No. _____

IN THE

Supreme Court of the United States

DERAY MCKESSON,

Petitioner,

—v.—

JOHN FORD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment foreclose a state law negligence action making a leader of a political protest liable in damages for injuries caused by an unidentified third party's violent act, absent evidence that the defendant directed, ratified, authorized, or intended the assault, or violence of any kind?

PARTIES TO THE PROCEEDING

Petitioner DeRay Mckesson was a defendant-appellee below. Respondent John Ford was plaintiff-appellant below. Black Lives Matter Network, Inc., was a defendant-appellee before the court of appeals but does not join this petition.

RELATED PROCEEDINGS

Supreme Court of the United States:

- *Mckesson v. Doe*, No. 19-1108 (November 2, 2020)

United States Court of Appeals for the Fifth Circuit:

- *Ford v. Mckesson*, No. 24-30494 (March 19, 2026)
- *Ford v. Mckesson*, No. 24-30494 (July 30, 2026)
- *Doe v. Mckesson*, No. 17-30864 (June 16, 2023)
- *Doe v. Mckesson*, No. 17-30864 (June 25, 2021)
- *Doe v. Mckesson*, No. 17-30864 (January 28, 2020)
- *Doe v. Mckesson*, No. 17-30864 (December 16, 2019)
- *Doe v. Mckesson*, No. 17-30864 (August 8, 2019)
- *Doe v. Mckesson*, No. 17-30864 (April 24, 2019)

United States District Court for the Middle District of Louisiana:

- *Doe v. Mckesson*, No. 3:16-CV-742 (September 28, 2017)
- *Doe v. Mckesson*, No. 3:16-CV-742 (July 10, 2024)

Louisiana Supreme Court:

- *Doe v. Mckesson*, No. 2021-CQ-00929 (March 25, 2022)

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INTRODUCTION

In July 2016, petitioner DeRay Mckesson joined with thousands of others in Baton Rouge, Louisiana to protest the notorious killing of Alton Sterling, a Black man, by the police. During the demonstration, an unidentified person threw a piece of concrete that struck and badly injured respondent John Ford, an on-duty police officer.

Ford brought suit—not against the assailant, but rather Mckesson. He does not contend that Mckesson engaged in, intended, directed, authorized, or ratified the rock-throwing—or violence of any kind. Instead, Ford seeks to hold Mckesson personally liable in damages, on the theory that his "negligence" in allegedly organizing the demonstration heightened the risk of the third-party's assault.

In a series of decisions, culminating in the one here, Fifth Circuit panels have held, over strenuous dissent, that the First Amendment permits imposing liability based on "negligent protesting." And that court has twice declined to consider the constitutional issue en banc.

This Court's intervention is critically needed. The Fifth Circuit's rule squarely and sharply conflicts with directly controlling precedent of this Court. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), held that the First Amendment prohibits States from making protest leaders liable for injuries caused by others absent proof that they "authorized, directed . . . ratified," or "incite[d]" the specific unlawful conduct. *Id.* at 927-28. The decision is also irreconcilable with *Counterman v. Colorado*, which held that negligence is a constitutionally

impermissible basis for liability, even in the context of privately communicated true threats of violence, much less when imposing liability for injuries caused by an unrelated person's violent act at a public protest on a matter of urgent public concern. 600 U.S. 66, 78-81 (2023).

The Fifth Circuit's decision raises an issue of large and "undeniabl[e]" practical importance that can and should be settled now. 592 U.S. at 4. As the Court recognized in granting certiorari and vacating a prior decision in this case, "[w]hen violence occurs during activity protected by the First Amendment," state tort rules allowing recovery based on loose and attenuated theories of derivative liability are impermissible. *Id.* The Constitution "mandates 'precision of regulation,'" *id.* (quoting *Claiborne*, 458 U.S. at 916-17)—in the form of the clear, certain, and stringent intent-based requirement the Fifth Circuit has jettisoned.

The Court declined to address the First Amendment question at that juncture, however, because it was still hypothetical.

No longer. Since this Court's remanded earlier in this case, the Louisiana Supreme Court has held that "negligent protest" is a tort, directly presenting the conflict between First Amendment protections and state law. And the court of appeals not only has doubled down on its insistence that negligence can be reconciled with *Claiborne*, it has done so in the face of *Counterman,* whose central teaching—that *mens rea* requirements are necessary to protect against regulation that will fatally chill the exercise of First Amendment rights—condemns the theory. Indeed, the Fifth Circuit's new decision has embraced liability

based on a defendant's prominence as a political activist—a rule of liability *for* association with a social movement—whether that is Black Lives Matter in Louisiana or a white nationalist group in Oregon. *See Cider Riot, LLC v. Patriot Prayer USA, LLC*, 544 P.3d 363 (Or. Ct. App. 2024).

Allowing the Fifth Circuit's decision to stand will expose those seeking to express "strong [objections] to the government and prevailing social order," *Counterman*, 600 U.S. at 81, to potentially ruinous personal damages liability—and the near certainty of costly, intrusive civil litigation—if someone at the scene of a policial protest is injured by someone else present there. The inevitable result will be silence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 171 F.4th 332 and is reproduced at Pet.App.1a-43a. The opinion of the district court can be found at 44a-59a. The order denying rehearing en banc, 184 F. 4th 448, is reproduced at Pet.App.60a-87a.

The court of appeals' order certifying state law questions to the Louisiana Supreme Court is reported at 2 F.4th 502 and is reproduced at Pet.App.211a-19a. The Louisiana Supreme Court's decision answering those questions is reported at 339 So.3d 524 and is reproduced at Pet.App.72a-125a. The court of appeals' post-certification decision vacating and remanding is reported at 71 F.4th 278 and is reproduced at Pet.App.88a-158a.

This Court's *per curiam* decision granting certiorari, vacating, and remanding is reported at 592 U.S. 1 (2020), and reproduced at Pet.App.220a-25a. The Fifth Circuit's (vacated) opinion on *sua sponte* panel rehearing is reported at 945 F.3d 818 and reproduced at Pet.App.238a-91a. Its order and opinions on denial of rehearing en banc (Pet.App.238a-91a) are reported at 947 F.3d 874. The court's (withdrawn) initial and rehearing opinions (Pet.App.313a-30a and 292a-312a, respectively) were reported at 922 F.3d 604 and 935 F.3d 253. The initial opinion of the district court (Pet.App.331a-55a) is reported at 272 F. Supp.3d 841.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254. On March 19, 2026, the court of appeals issued its decision, and on July 30, 2026, it issued an order denying rehearing en banc. On October 20, 2026, Justice Alito granted an extension of time, to and including November 27, 2026.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Louisiana Civil Code article 2315(A) provides:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Louisiana Rev. Statutes § 14:97 provides:

> Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.

STATEMENT

A. Initial District Court Proceedings

This lawsuit arose out of a protest sparked by the police killing of Alton Sterling. Respondent, a police officer at the protest, sustained injuries at the hands of the unidentified concrete-thrower. He sued for damages in federal court, naming as defendants Mckesson and "Black Lives Matter," described as an "unincorporated association" on whose "behalf" he alleged Mckesson "staged" the demonstration. *Doe v. Mckesson; Black Lives Matter*, No. 16-cv-742 (M.D. La. Nov. 7, 2016), Dkt. No. 1, ¶3 ("Compl.").

Ford did not allege that Mckesson engaged in or encouraged any violence. Rather, he alleged petitioner "organized," and "staged" the protest, such that he "knew or should have known . . . that violence would result." Compl. ¶¶ 12, 19, 28. Respondent sought damages based on negligence, civil conspiracy, and *respondeat superior*.

The district court dismissed, concluding that "Black Lives Matter" is a "social movement," not the sort of entity that may be sued in federal court, Pet.App.340a, and that, absent any plausible allegation that petitioner directed, authorized, ratified or otherwise intended violence, the claims against Mckesson were barred by *Claiborne*. Pet.App.338a-40a.

B. The Fifth Circuit's Rule

An initially unanimous Fifth Circuit panel, first in a 2019 opinion and again in a substantially similar opinion on rehearing, rejected Ford's conspiracy and vicarious liability claims. But it held that Mckesson

could be liable in negligence, concluding that he owed a duty to Ford (and others present at the scene) "to use reasonable care so as to avoid [their being] injur[ed]." Pet.App.300a, 321a.

The court attached special significance to allegations that petitioner and other protesters had marched in the street, noting that "[b]locking a public highway is a criminal act under Louisiana law." Pet.App.301a, 322a (citing La. Rev. Stat. Ann. § 14:97). It was "patently foreseeable," the court reasoned, that police would respond "by clearing the highway and, when necessary, making arrests," an action that, in turn, carried a "foreseeable risk" that someone would respond violently. *Id.*

The panel held that, "[e]ven if we assume that [respondent] seeks to hold Mckesson 'liable for the unlawful conduct of others' within the meaning of *Claiborne*," the First Amendment defense was "overcome" by "plausibl[e] alleg[ations] that [Ford's] injuries" were a "consequence," Pet.App.303a (quoting 458 U.S. at 927), of the protest petitioner (allegedly) "tortious[ly]" organized, *id.* In December 2019, after Mckesson filed a petition for a writ of certiorari, the same Fifth Circuit panel *sua sponte* issued a third opinion because one of its members, Judge Willett, had come to dissent on the negligence and First Amendment issues.

After raising doubts about the "exotic" negligent-protest theory and suggesting that the duty question should have been certified to the state supreme court, *see* Pet.App.268a-76a, 290a, Judge Willett addressed the First Amendment question. "Even assuming that Mckesson could be sued under Louisiana law for

'negligently' leading a protest at which someone became violent," Pet.App.276a, Judge Willett explained, that claim would be "foreclosed—squarely—by controlling Supreme Court precedent" and "constitutional fundamentals," Pet.App.281a, 290a. If *Claiborne* had permitted liability for another person's violence as a "consequence" of a protest leader's negligent management, Judge Willett observed, the Court would not have questioned the verdict against Charles Evers, the boycott leader and primary defendant, who could have foreseen, but did not direct, participants' acts of violence. Pet.App.277a-85a. Indeed, under the majority's theory, Judge Willett noted, Martin Luther King, Jr. and other leaders of nonviolent but civilly disobedient Civil Rights Movement street protests could have been subject to "ruinous financial liability" for injuries that arose, foreseeably, out of tense confrontations with hostile onlookers and police. Pet.App.290a.

The Fifth Circuit denied en banc rehearing by an 8-8 tie, with two written dissents. Judge Dennis objected that, by letting stand the panel's "freewheeling form of strict liability," the Fifth Circuit had "grievously" disregarded "longstanding [First Amendment] protections." Pet.App.235a. Judge Higginson, noting that "[p]rotestors of all types and causes have been blocking streets in Louisiana for decades," and the "vital First Amendment concerns at stake," doubted whether, as a matter of state law, the possibility of an officer's being struck by someone opposing another's arrest for highway obstruction was within the "particular risk" that Section 14:97 addresses. Pet.App.236a-37a.

C. The First Petition for Certiorari

This Court granted certiorari and vacated the Fifth Circuit's decision. The Court recognized the "undeniabl[e] importan[ce]" of the First Amendment question and the constitutional limits on "'the grounds that may give rise to damages liability' as well as 'the persons who may be held accountable for those damages'" when "violence occurs during activity protected by the First Amendment." 592 U.S. at 4 (quoting *Claiborne*, 458 U.S. at 916-17). Nevertheless, it concluded that because the tort theory was so "novel," "uncertain," "laden with value judgments," and "fraught with implications for First Amendment rights," the court of appeals should have first sought the Louisiana Supreme Court's input. *Id.* at 5-6.

D. Post-Remand Proceedings

The Fifth Circuit issued a certification order, asking the Louisiana Supreme Court "whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party." Pet.App.215a.[1]

The state high court ruled that a protest organizer could be sued in negligence "under the facts alleged in the complaint." Pet.App.175a-76a. Rather than providing any independent analysis, the court's

[1] The order also asked whether, under complaint's allegations, recovery was barred by Louisiana's Professional Rescuer's doctrine, which prevented police officers from suing on injuries arising "from the very emergency [they were] hired to remedy," Pet.App.229a (citation modified). The Louisiana Supreme Court pronounced that doctrine abrogated.

opinion reproduced verbatim the nine-paragraph portion of the vacated federal appellate decision discussing the negligent-protest theory and pronounced that excerpt "an accurate summary of the pertinent Louisiana law." *Id.*

In June 2023, the Fifth Circuit issued a new decision, again over Judge Willett's dissent, reinstating the negligent-protest claim. The court concluded that respondent stated the cause of action the Louisiana Supreme Court had approved, explaining that Ford's complaint plausibly alleged that Mckesson's role in "organiz[ing]," "arrang[ing]," "plan[ning]," "operat[ing]," and "direct[ing] the protest at all times" made him responsible for "creating circumstances" that enabled the injury-inflicting assault. Pet.App.89a-92a, 116a.

The court then held the First Amendment was no bar to such negligence liability. Declaring that its "lodestar" was *Claiborne*, Pet.App.106a, the majority maintained that Ford's allegations "fit[] quite comfortably," Pet.App.110a, within two theories *Claiborne* permitted: First, "because the conduct [Louisiana law] deems unlawful here—creating unreasonably dangerous conditions"—was "tortious activity," (citing *Claiborne*, 458 U.S. at 927), a protest organizer could be said to have "directed" his "*own* tortious conduct'" when creating such conditions. Pet.App.110a (emphasis in original). Second, the majority invoked *Claiborne*'s holding that a protest leader can be liable for third-party violence based on incitement, saying that was "precisely what [Ford] allege[d] Mckesson did here" by "organiz[ing] and direct[ing a] protest . . . such that it was likely that a violent confrontation . . . would result." Pet.App.114a.

Responding to the dissent's objection that *Claiborne* foreclosed negligence liability, the majority asserted that *Claiborne*'s "concept of liability for protest *leaders* did not include an intent condition." Pet.App.123a (emphasis added). On its account, this Court's decision drew a "contrast[]" between the "nature of culpability" the First Amendment requires for a protest *participant* to be liable for someone else's violent act and what "i[t] require[s]" to hold a protest leader liable. Pet.App.122a. For the former, *Claiborne* explicitly "held [that] a specific intent" is necessary. *Id.* (citing 458 U.S. at 920). But for the latter, the "plaintiff *need only* show that the [defendant] 'authorized, directed, or ratified specific tortious activity,'" *Id.* (citing 458 U.S. at 927) (emphasis added). *Claiborne*'s failure to even "mention" *mens rea* in this enumeration, the majority reasoned, meant that suing Mckesson, an alleged leader, in negligence was constitutionally unproblematic. *Id.*

The court pronounced its holding "fully consistent with *Claiborne*'s demand for 'precision of regulation' for State laws that impose liability in these circumstances," because the negligent-protest tort "targets wrongful conduct and not legitimate expressive conduct." *Id.* Moreover, plaintiffs' obligation to prove each tort element would shield "ordinary protest leaders" and allow recovery "only [in] . . . exceptional cases." Pet.App.112a. The majority described the causation element—requiring that the leader's "actions were a necessary antecedent to [the plaintiff's] injuries"—as an especially "tall task," since, [i]n most cases," the injury-inflicting "altercation would have occurred regardless of how the protest leader . . . acted." *Id.* & n.8.

Responding to Judge Willett's concerns about the rule's implications for protests throughout history and going forward, the majority stated that the case was "not about the Boston Tea Party or Dr. Martin Luther King Jr.," Pet.App.128a, and that it would "le[ave] for another day" the "constitutional limits [on] this cause of action." Pet.App.124a.

E. The Second Petition for Certiorari

Mckesson again sought this Court's review. In a statement accompanying the denial of certiorari, Justice Sotomayor observed that the Fifth Circuit's decision had predated this Court's in *Counterman* and noted an expectation that "arguments regarding *Counterman*'s impact" would receive "full and fair consideration . . . in [] future proceedings." *Mckesson v. Doe*, 144 S. Ct. 913 (2024) (mem.) (Sotomayor, J., respecting the denial of certiorari).

F. District Court Proceedings

On remand, and after "open and extensive discovery," Mckesson moved for summary judgment, which the district court granted, because Ford was "unable to substantiate . . . with competent evidence," the required negligence elements. Pet.App.53a.[2]

As to the duty (and breach-of-duty) elements, the district court observed that Mckesson "cannot be liable for [negligent] organization and leadership of a

[2] The district court observed that Ford's submission consisted largely of material that was "irrelevant" and not shown "to be present[able] in admissible form at trial" (citation omitted) and "evince[d] a flagrant unwillingness to abide by the Federal . . . and . . . Local [summary judgment] Rule[s]," but declined to limit its consideration on that basis. Pet.App.47a-48a.

protest he did not organize or lead," Pet.App.54a, and explained that Ford had adduced "no evidence" supporting the litany of allegations that Mckesson "planned" and was "in charge of" the protest. *Id.*[3] Permitting liability absent proof of leadership would work "a major expansion" "unsupported by" state law and "dramatically increase" the risk of tort suits against "protest participants." Pet.App.55a. The court also concluded that Ford failed to adduce any evidence that Mckesson's activity "cause[d] an unidentified person to hit [Ford] in the face." *Id.*

The district court then concluded that petitioner was, in any event, entitled to judgment under *Counterman,* which the court understood to foreclose negligence-based liability in the context of organizing or participating in a political protest and other core First Amendment activity. Pet.App.57a-59a.

G. Respondent's Second Appeal

A divided Fifth Circuit panel reversed. The majority opinion began with a recitation of the "well known" "facts" of the case, principally consisting of quotations from the 2023 opinion at the motion-to-

[3] The court noted that the sole "shred" of evidence proffered to support these allegations was itself problematic: Ford pointed to his own deposition testimony that he at some point "heard" petitioner directing others to walk in the road. Pet.App.51a, 55a. But that statement was elicited immediately after he testified that he "he did not personally hear Mckesson giving any orders," prompting his "alarm[ed] . . . counsel" to ask, "Are you having memory problems?"—at which point Ford "corrected" his account. Pet.App.29a-30a & n.1. *See also* Pet.App.30a n.2 (collecting decisions declining to credit on summary judgment similarly abrupt "change[s] in [a party's] deposition testimony . . . in response to [their] own lawyer's question[]").

dismiss stage. Pet.App.1a-6a. As to duty, the majority identified as evidence of Mckesson's "leadership," testimony that he came to Baton Rouge "because his 'team' was contacted by leaders in 'the organizing community'"; a court filing in a separate case that referenced "leadership" qualities in arguing Mckesson would be an "adequate representative of [a] class of protestors" settling a civil rights claim over their arrests; and the "admission" in his appellate brief that "the evidence shows that [he] is a well-known leader in a social movement, that he attended the July 9 protest, that he re-tweeted someone else's announcement of the Baton Rouge protest's time and location, and that some group of people followed him at various moments." Pet.App.9a, 11a, 16a, 24a, 28a, 29a. *See also* Pet.App.11a (observing that the "federal government" recognized Mckesson's "leadership," by "invit[ing him] to meet "President Obama and Attorney General Lynch to discuss Black Lives Matter").

As to causation, the court described its 2023 decision and the Louisiana Supreme Court's opinion on certification as having already held the "facts" and "evidence," were "sufficient for a jury to find that Mckesson's actions were the cause-in-fact of Officer Ford's injuries." Pet.App.14a (citing 339 So. 3d 524, 532 (quoting 945 F.3d at 828)).

The majority then concluded that the district court had transgressed the Fifth Circuit's "rule of orderliness" by considering whether *Counterman* justified "depart[ure] from th[e] court's prior holding" that the First Amendment allows "imposing negligence liability on Mckesson." Pet.App.16a. In any event, *Counterman*, a decision "about the elements of

an unrelated criminal offense[,]" the court concluded, "change[d] nothing about this case." Pet.App.18a.

Judge King dissented, lamenting that the majority's "eager[ness] to afford [Ford] . . . a remedy" had led it to a rule that "imperil[s] First Amendment liberties." Pet.App.19a. After faulting the majority for treating earlier motion-to-dismiss-stage decisions upholding the sufficiency of allegations as if they passed upon the evidence, Judge King observed that the evidence the majority identified as supporting leadership did "nothing of the sort," showing that Mckesson was *not* among the "hundreds of people who . . . plan[ned] . . . the protest," but rather their "guest." Pet.App.24a.

As for causation, Judge King observed that Ford's own account established Mckesson's acts were *not* a "necessary antecedent" of the assault. Pet.App.32a. That Ford maintained that "the crowd was already throwing objects . . . [before] Mc[k]esson [allegedly] le[d] them onto" the street, and testified that *numerous* "agitators" were urging protestors to leave the sidewalk meant that both the arrest-inducing behavior and the object-throwing "would have occurred regardless" of Mckesson. Pet.App.33a (quoting 71 F.4th at 292 n.8).

After observing that these evidentiary "failure[s]" were fatal even under the Fifth Circuit's 2023 decision, Judge King explained that *Counterman*'s insistence on a "culpable mental state" had rendered the Fifth Circuit's contrary rule untenable. Pet.App.40a (quoting 600 U.S. at 75).

The Fifth Circuit again denied rehearing en banc, this time with six judges dissenting.

Judge Willett, writing for the dissenters, agreed with Judge King that the panel cast aside requirements the court's 2023 decision held out as constitutionally essential—and, more fundamentally, that it vitiated the protections afforded by *Claiborne, Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Counterman*. Pet.App.64a-65a.

The decision, the dissent explained, had completed the Fifth Circuit's transformation of *Claiborne*. The court had "substitute[d] . . . mere foreseeability" for "authorization, direction, or ratification," Pet.App.46a, 70a; and, faced with the void of "evidence show[ing] that [Mckesson] asked anyone to throw objects, or approved the assault," it had "change[d] the subject," from the "'specific tortious activity' for which Ford seeks damages . . . the assault that shattered his jaw" to "the obstruction of traffic." Pet.App.70a-71a (quoting *Claiborne*, 458 U.S. at 927). In doing so, the dissent explained, it had violated the "foundational First Amendment principle [that] association may be collective, but culpability [must be] personal." *Id.* "[P]rominence in a national movement [cannot] become[] command of a particular crowd," and "[p]olitical speakers . . . may not be conscripted as insurers of a crowd—or as substitute defendants for an unknown assailant—simply because they were visible, prominent, and nearest the microphone." Pet.App.65a, 86a-87a.

Likewise, the six dissenters pointed to a direct conflict with *Brandenburg*. "Under the panel's foreseeability approach, nonviolent advocacy of a road obstruction receives *less* protection than explicit advocacy of violence: the former may support damages for a stranger's assault on negligence alone, while the

latter cannot be punished without specific intent." Pet.App.76a-77a (citing 395 U.S. at 447).

The dissent then faulted the court for declining to reckon with *Counterman*. It noted that the prior panel's holding, that "no 'intent condition'" is required to make protest leaders liable for harms others inflict, Pet.App.75a (quoting 71 F. 4th at 297), was contrary to *Counterman*'s requirement of a highly demanding mental state to protect "dissenting political speech at the First Amendment's core." *Id.* (quoting 600 U.S. at 81-82). The Fifth Circuit, the dissent continued, had adopted "the very objective-negligence standard *Counterman* rejected" and done so "in a setting" where this Court made clear that "the Constitution demands more protection." *Id.*

Finally, the dissent highlighted the lack of any limiting principle for the Fifth Circuit's rule. Based on its application in this case, liability may attach "where no evidence connects [the tortfeasor] to the defendant; where the alleged direction concerned a different unlawful act; and where leadership is inferred largely from prominence, association, and public advocacy." Pet.App.83a, And the negligent-protest theory creates a "heckler's veto on steroids": by hinging liability on others' foreseeable "respon[ses] to [a] demonstrat[ion]", it enables the government officials whose actions are being protested—the police—to raise their critics' liability exposure by announcing an intent to deploy aggressive tactics. Pet.App.83a n.58 (quoting 171 F.4th at 352 (King, J., dissenting)).

In sum, negligent-protest liability, the dissent emphasized, is impossible to square with "foundational First Amendment principle[s]"

protecting political expression and association: "*Claiborne*['s] demand[] [of] personal responsibility and direct, proximate causation; *Counterman*'s reject[ion] [of] . . . negligence" in favor of "a culpable mental state tied to the conduct for which liability is imposed; and *Brandenburg*'s require[ment of specific] intent . . . that the [criminal] act[] occur." Pet.App.65a. In view of this "direct [and] acknowledged" conflict; the fact that the "obstacle[s] that complicated [this Court's] review in 2020 [are] now gone"; the widespread, ongoing "constitutional injur[ies]" caused by leaving protest unprotected; the further damage inflicted by the panel's decision's emphasis on "prominence"; and the Fifth Circuit's refusal even to consider *Counterman*'s import, this Court's intervention, the dissent explained, would be both necessary "and unusually appropriate." Pet.App.85a-86a.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CONTROLLING PRECEDENTS AND THE FOUNDATIONAL FIRST AMENDMENT PRINCIPLES THEY ENFORCE

The Fifth Circuit's rule directly conflicts with *Claiborne* and *Counterman* and, in doing so, enacts the precise First Amendment harms they were designed to protect against.

A. *NAACP v. Claiborne Hardware Co.*

1. *Claiborne*'s rule restricting civil damages liability for another person's harmful acts in the First Amendment context forecloses negligent-protest liability.

The Fifth Circuit held that, as a prominent political activist at a protest, Mckesson may constitutionally be held personally liable for an act of violence, committed by someone else, that he did not direct, authorize, ratify, or intend. *See* Pet.App.10a-11a. But even were the negligence cause of action stringently confined to those who actually organize and lead protests, it would still run headlong into *Claiborne*, which reversed a state tort law verdict holding Charles Evers, the undisputed principal organizer of a civil rights boycott, liable in damages for foreseeable acts of violence committed by others "in the context of" that protest. 458 U.S. at 916. As the Court's prior opinion in this case recognized, *Claiborne* held then "[w]hen violence occurs during activity protected by the First Amendment," the Constitution imposes restraints "'on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages,'" 592 U.S. at 4 (quoting 458 U.S. at 916-17). Those who *commit* violence (including for political reasons) can of course be held liable, 458 U.S. at 926, but the First Amendment forbids making holding a protester, or a protest leader, personally "liable for the unlawful conduct of others" without proof that he "authorized, directed, or ratified [the] specific tortious activity," or "incite[d]," *id.* at 927, the "wrongful conduct" that "directly and proximately caused" a plaintiff's

injuries, *id.* at 918. That "federal rule of law," the Court explained, *id.* at 916, reconciled the State's interest in ensuring accountability for violence with its obligation to respect a protest's "majest[ic]"—and constitutionally protected—elements: there, citizens' joining together to express collective anger over a "social order that had consistently treated them as second-class citizens" and petition their government to redress these injustices. *Id.* at 888, 912.

In deriving its rule, the Court looked to landmark precedents establishing constitutional restraints on association- and incitement-based liability—settings that, like *Claiborne* and here, involve the co-occurrence of First Amendment activity and third-party misconduct. *See id.* at 908-09, 919, 927-28 (discussing *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Scales v. United States*, 367 U.S. 203 (1961); and *Brandenberg*). Those cases establish that the First Amendment forbids liability for others' criminality absent "clear proof" that a defendant himself "specifically inten[ded]" the associate's unlawful behavior. *Scales*, 367 U.S. 229-230 (quoting *Noto v. U.S.*, 367 U.S. 290, 299 (1961)); *accord Brandenburg*, 395 U.S. at 447 (defendant's speech must be "directed to" and "likely" to induce another's lawless action). These requirements reflect the demand for "precision" when regulation implicates the First Amendment. *Claiborne*, 458 U.S. at 916. Even a "substantial" governmental interest may not "be pursued by means" that unnecessarily deter or "broadly stifle" the exercise of rights of expression and political association. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Claiborne controls this case. Like the boycott of racially exclusionary businesses there, the Baton Rouge protest "clearly involved constitutionally protected activity": "speech, assembly, association, and petition" that aimed to "vindicate rights of equality and of freedom . . . at the heart of the Fourteenth Amendment." 458 U.S. at 911, 914. And no one maintains that petitioner directed, authorized, encouraged, or specifically intended the illegal injury-causing conduct. Yet the Fifth Circuit has upheld a negligence-based regime that occupies the opposite end of the personal culpability spectrum from the rule *Claiborne* announced. The resulting chilling of First Amendment rights is severe and precisely what the *Claiborne* rule was meant to protect against.

2. *Claiborne* cannot be read to authorize negligence-based liability.

The Fifth Circuit has advanced three "interpretations" of *Claiborne* that ostensibly allow negligent-protest liability. Even if it were appropriate to read opinions like statutes, *but see National Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023), none would be plausible.

a. Most prominently, the court posited that *Claiborne*'s intent requirement does not protect protest "leaders." Pet.App.123a. It pointed to a perceived "contrast[]" between *Claiborne*'s exposition of the First Amendment's protection for protest "associates"—a "specific intent" requirement, Pet.App.122a—and its articulation of the permissible grounds for derivative liability against Evers—three verbs, "authorized, directed, or ratified," unaccompanied by a "*mens rea*" element. *Id.*

(Tellingly, the Fifth Circuit did not assert that *Claiborne*'s reference to "incitement," rather than "*intentional* incitement," was similarly meaningful, *see* infra. 23-25)

But as Judge Willett explained, there was no need to include an express modifier in *Claiborne's* standard because the verbs themselves "connote intentionality." Pet.App.147a. *See United States v. Hansen*, 599 U.S. 762, 780 (2023) (noting "[t]here [was] no need for" "an express *mens rea* requirement" modifying prohibitions against "encourag[ing] or induc[ing]" criminal conduct because they carried traditional intent requirements with them).

Nor is there any support for the Fifth Circuit's suggestion that *Claiborne*'s comprehensive survey of specific-intent precedents like *De Jonge* and *Scales* was included to supply a "contrast[]" with the lesser protection the Court was announcing for leaders like Evers. Pet.App.122a. To the contrary, those cases self-evidently supplied *the foundation* for the stringent intent-based rule the Court applied to vacate the damages award against him. And that comports with precedent and common sense. The Constitution's prohibition on guilt by association applies "down" as well as "up," prohibiting holding organizations and leaders answerable for rank-and-file affiliates' criminality. *Compare* 458 U.S. at 919 (discussing *Healy v. James*, 408 U.S. 169 (1972), which held that a local affiliate may not be sanctioned for a national organization's violent activities), *with* 458 U.S. at 931-32 (endorsing the observation that political association could be "destroy[ed]" if a local branch's

misconduct could automatically be attributed to "the national organization") (quoting *NAACP v. Overstreet*, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from dismissal of certiorari)). If anything, concerns about sweeping liability rules' protest-inhibiting effects have greater force for leaders. (As briefing in *Claiborne* attested, lawsuits against organizations and prominent leaders werea preferred tactic of those aiming to silence civil rights protests. *See* Sandifer & Smith, *The Tort Suit For Damages: The New Threat To Civil Rights Organizations*, 41 Brooklyn L. Rev. 559, 561-64 (1975))

b. The Fifth Circuit's suggestion that its negligence tort "fits quite comfortably" into *Claiborne*'s "direct, authorize, or ratify" rule—because Mckesson "directed" his "*own*" "tortious activity" of "creating unreasonably dangerous conditions"—fares no better. *See* Pet.App.110a. As Judge Willett explained, "direct[ing] [one's] own negligence" cannot substitute for directing "the unlawful conduct of [an]other[]," Pet.App.149a (quoting *Claiborne*, 458 U.S. at 927), which "directly and proximately caused" respondent's injury. 458 U.S. at 918. Mckesson did not throw the concrete, so under *Claiborne*, the First Amendment permits liability against him *only* if he "directed" *that* "specific tortious activity," 458 U.S. at 927—not "his own" "negligence" in contributing to "conditions" that prevailed at the protest. *See* Pet.App.71a.

As Judge Willett noted, under the Fifth Circuit's rule, *Claiborne* itself would have come out the opposite way. Pet.App.141a. Indeed, the evidence here evinces a "far weaker" connection between petitioner and the

concrete-throwing than between Evers and the *Claiborne* assaults. Pet.App.72a. Charles Evers (1) was "unquestionably" the leader of the formally and hierarchically organized protest campaign, 458 U.S. at 926; (2) violence in the context of the boycott was foreseeable; indeed, Evers himself declared that defectors would have their "necks broken" and presided at meetings where violators' names were read aloud, *id.* at 900 n.28, 909; (3) and violence was in fact committed by members of his boycott organization, with the intent of advancing the protest's aims, *id.* at 904-05. Yet that was constitutionally insufficient. Nothing remotely comparable was even alleged here. The Fifth Circuit's conclusion inexplicably flipped when the names "Evers" and "Mckesson" were "swap[ped]." Pet.App.138a; *cf. Counterman*, 600 U.S. at 99 (Sotomayor, J., concurring) (asserting that "[u]nder a recklessness rule, *Claiborne* would have come out the other way").[4]

c. Finally, the court posited that Mckesson's "organiz[ing] and direct[ing a] protest . . . such that it was likely" that an assault "would result" is "precisely" what *Claiborne*'s incitement theory allows. Pet.App.114a. On the contrary, the incitement theory that *Claiborne* incorporated permits penalizing a speaker for an audience's ensuing illegal conduct only if his speech was *both* "likely" *and* "intended" to induce

[4] The majority below noted Ford's testimony that petitioner did not speak up when some demonstrators threw plastic water bottles at armor-clad police, Pet.App.3a, but *Claiborne* expressly rejected inaction as a constitutionally permissible basis for derivative liability—and Evers was far from silent about violence. *See* 458 U.S. at 926 n.69.

the criminality. *Hess v. Indiana*, 414 U. S. 105, 109 (1973) (per curiam); *Brandenburg*, 395 U.S. at 447.

The Fifth Circuit's formulation is precisely what this Court's modern incitement precedents *rejected*: punishing speech based on its tendency to "increase[] the chance an unlawful act will be committed," without proof of a defendant's culpable intent. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (citing *Brandenburg* and *Hess*). As Judge Willett explained, under the Fifth Circuit's rule, "nonviolent advocacy of [] road obstruction receives *less* protection than explicit advocacy of violence: the former may support damages for a stranger's assault on negligence alone, while the latter cannot be punished without specific intent." Pet.App.76a-77a.

The Fifth Circuit's effort to characterize this case as turning on "actions," not expression, "tending to incite unlawful behavior" is no more consistent with precedent. Pet.App.114a-15a. *Claiborne* itself was predicated on an economic boycott, an "action" that could be broadly regulated outside the First Amendment context. 458 U.S. at 913. And other decisions refute the supposition that, for First Amendment purposes, Mckesson was engaged *either* in political protest *or* unlawful "trespass[ing]." Pet.App.63a (Ho, J., concurring in denial). To take two, the parties whose First Amendment rights were vindicated in *Virginia v. Black*, 538 U.S. 343 (2003) and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), included trespassers who crossed property lines to burn crosses on their targets' land. That the First Amendment would allow Louisiana to punish protest leaders for impeding traffic (as Virginia could punish trespassing by cross-burners) does not establish that

the Constitution permits *also* subjecting them to boundless damages liability for other persons' "violent deeds," 458 U.S. at 933, under attenuated rules that *Claiborne* otherwise forbids, *because* they violated a traffic law.

The en banc dissent catalogued the many "shortcuts" and "substitutions" to which the court resorted in its attempt to evade the clear rule set out in *Claiborne*. Pet.App.65a. At the end of the day, none of those attempts succeeds. The decision below is directly contrary to *Claiborne*.

B. *Counterman v. Colorado*

The Fifth Circuit's decision also conflicts with *Counterman* in two ways. First, *Counterman* held that the First Amendment forbids an objective, negligence-based standard even for low-value, threatening speech because a subjective *mens rea* requirement is necessary to "provide[] breathing room for more valuable speech." 600 U.S. at 75, 78 (2023) (citation modified). In other words, where there is potential for chilling speech, negligence cannot suffice. Second, in holding that the specific mental state required for true threats is recklessness, *id.* at 79-80, *Counterman* simultaneously affirmed the First Amendment's requirement of a still more demanding standard of culpability, *specific intent,* where, as here, "strong protests against the government and prevailing social order" are involved, *id.* at 81. The Fifth Circuit defied this Court's decision, concluding that "*Counterman*'s holding about the elements of an unrelated criminal offense changes nothing about this case." Pet.App.18a.

1. The Fifth Circuit ignored *mens rea*'s critical role in protecting speech against chilling.

If, as *Counterman* squarely held, the First Amendment forbids negligence-based liability in the context of privately communicated "true threats"—expression that is unprotected and makes no discernable contribution to the "marketplace of ideas," *303 Creative LLC v. Elenis*, 600 U.S. 570, 584-85 (2023), it is *a fortiori* unconstitutional to permit negligence liability for organizing political protests in public streets on matters of public concern.

Indeed, *Counterman* explained that negligence could not suffice even for true threats because "prohibitions on speech have the potential to chill, or deter, speech outside their boundaries." 600 U.S. at 75. Deterrence, the Court continued, can come from many sources: an individual's own uncertainty about what is prohibited, his worries "that the legal system will err," and his "concern[s] about the expense[] of becoming entangled in the legal system." *Id.* Accordingly, "an important tool . . . to stop people from steering 'wide of the unlawful zone [] is to condition liability on the . . . showing of a culpable mental state.'" *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *Accord Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) (courts must scrutinize "the actual burden on First Amendment rights," including a measure's "inevitable" "deterrent effect[s]"); *Claiborne*, 458 U.S. at 931-32 ("The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit") (quoting *Overstreet,* 384 U.S. at 122 (Douglas, J., dissenting)).

Yet at no point did the Fifth Circuit allude to, let alone examine, the negligent-protest tort's potential to stifle important exercises of First Amendment rights by chilling.

That failure is remarkable because the protest-leader negligence regime the Fifth Circuit approved so manifestly threatens the suppressive effects *Counterman* catalogued. Where liability will turn on *ex post* jury determinations of "reasonableness," "conditions," and "sufficiently close connections" to "foreseeable" violent interactions and is imposed for acts committed for unknown reasons by unrelated parties, a protester will certainly "be unsure about the side of a line" on which his protest falls, *see Counterman*, 600 U.S. at 75. So, too, must "he . . . worry that the legal system will err." *Id.* And the costs of either mistake are catastrophic: the tort exposes a defendant to limitless, potentially ruinous, personal damages liability.

Moreover, concerns about "becoming entangled in the legal system" can "be markedly more inhibiting" in the civil context than is "the fear of prosecution under a criminal statute." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). Civil defendants lack a broad range of safeguards afforded the criminally accused—government-provided counsel, protections against burdensome discovery and double jeopardy, and the beyond-a-reasonable-doubt proof standard, to name a few. Civil *plaintiffs*, moreover, are free from the constitutional and institutional controls that restrain public prosecutors from initiating cases for speech-suppressive reasons. *See Wayte v. United States*, 470 U.S. 598, 608 (1985). And the only reliable way to avoid the burdens of *being sued* for negligent protest

is to refrain from protesting. "The predictable consequence is self-censorship." Pet.App.66a.

2. *Counterman* shows why specific intent is constitutionally required.

In addition to foreclosing negligence, *Counterman*'s reasoning makes clear why proof of specific intent, as *Claiborne* recognized, is necessary here. In explaining that a recklessness requirement was constitutionally sufficient for true threats, *Counterman* highlighted that "all the [decisions] in which the Court [has] demanded a showing of intent" arose—as does this one—from cases considering protests "against the government and prevailing social order." 600 U.S. at 81 (citing *Brandenburg*, 395 U.S. at 447). In these settings, the Court explained, the problems the government permissibly targets stand "a hair's-breadth away from political 'advocacy,'" and so the First Amendment "demand[s] more": the "potency of . . . protection" offered by "specific intent," which "ensure[s] that [government] efforts" to punish or deter criminality do "not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core." *Id.*

* * *

The rules announced by this Court and the Fifth Circuit are polar opposites. For the nearly forty million residents of States within the Fifth Circuit, "objective negligence" now suffices for liability in the context of protected political expression: Some combination of "leadership" (whatever that means), foreseeability, and "dangerous conditions" are enough to impose damages liability—with much less required

to hale and keep a prominent protester in court. And, unless this Court intervenes, plaintiffs in other jurisdictions may soon ask their courts to hold the same. Because the tort is based in common law, not legislation, all they'll need to do is sue. Plaintiffs elsewhere have tried. *See Cider Riot, LLC v. Patriot Prayer USA, LLC*, 544 P.3d 363 (Or. Ct. App. 2024); *Lam v. Ngo*, 111 Cal. Rptr. 2d 582 (Cal. Ct. App. 2001). If the Fifth Circuit opinion is left standing, they may soon succeed. As Judge Willett emphasized, that reality means that citizens otherwise inclined to "organize, publicize, attend, or lend their names to a demonstration" are instead deciding, after considering "the risk of financial ruin for an unknown stranger's violence," to remain silent. Pet.App.86a.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Deciding the First Amendment question presented here is necessary for the same reasons it was in *Claiborne*: Because the rights at issue are essential to our democracy, and because the threat posed to them is so potent. The tort's multiple vectors of uncertainty will induce political dissenters to desist. And that will also burden their fellow citizens' First Amendment entitlement to hear diverse views on matters of public concern. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776-77 (1978).

The right to protest is one people across the Nation recognize as fundamental. Scholars estimate that there were nearly 40,000 protests and

demonstrations in 2025,[5] and the percentage of Americans who report having participated has increased markedly over the past decade.[6] Between 15 and 25 million Americans have participated in Black Lives Matter demonstrations,[7] and millions of others have taken to the streets to advocate for and against the right to bear arms, abortion, and countless presidents and their policies.[8]

There is, as Judge Willett emphasized, no reason to assume that the Fifth Circuit's rule will burden only a narrow subset of protest-inducing viewpoints. Although this case and *Claiborne* involved civil rights protests, the claim the Oregon court held *Claiborne*-barred in *Cider Riot* was against the leader of a White Nationalist demonstration, *see* 544 P.3d at 356 n.2; the negligent-protest claim rejected on state law grounds in *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996), arose from a pro-life protest; and the one rejected in *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018), sought to hold a political candidate liable for an assault that occurred at a rally. The prospect that "advocacy across the spectrum" will be burdened is, of course, a "constitutional danger" and supports the Court's granting, not withholding, review here. Pet.App.84a.

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[5] Crowd Counting Consortium, *US Protest Events* (Sep. 30, 2026) https://perma.cc/BM2U-4WNW (noting 39,092 events from January 1, 2025 to December 31, 2025).

[6] Dana Fisher & Arman Azedi, *Online and in the Streets: Civic Participation and Protest in America*, Charles F. Kettering Found. (Oct. 26, 2026), https://perma.cc/6FG7-KPZ5.

[7] *See* Jenn Hatfield, *8 facts about Black Lives Matter*, Pew Rsch. Ctr. (July 12, 2023), https://perma.cc/53AL-NWGU.

[8] Crowd Counting Consortium, *US Protest Events*.

The contours of the cause of action make it a particularly potent tool for silencing dissent. Liability turns on "a highly malleable standard," *Snyder v. Phelps*, carrying an obvious "danger of becoming an instrument for [viewpoint-based] suppression." 562 U.S. 443, 458 (2011). It would be surprising if a jury evaluated the open-ended tort elements the same way in a case arising from a demonstration expressing a locally popular viewpoint and one where the defendant was perceived as an "outside activist" and the injured party, a local police officer. (The Fifth Circuit's assurances that liability would be "rare" and, specifically, would likely not extend to foreseeable violence arising at "sporting event[s]," Pet.App.112a n.8, would seem to reinforce, not dispel, this concern of biased selectivity.)[9]

Moreover, as Judge Willett first highlighted in his 2023 dissent, a rule imposing liability based on foreseeable risks of violence at protests necessarily

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[9] The opinion concurring in denial of rehearing en banc suggested that the First Amendment is unconcerned with "[facially] viewpoint neutral" laws. Pet.App.62a. *Claiborne* nowhere mentioned viewpoint; in theory, the Mississippi tort law would have authorized damages for a comparably violent (if less "majestic") boycott organized by civil rights *opponents* against businesses that served customers on a nondiscriminatory basis. *Cf. Harness v. Watson*, 47 F.4th 296, 329 (5th Cir. 2022) (Graves, J., dissenting). And it is not hard to imagine scenarios where open-ended liability rules would be an "instrument" for viewpoint-based decision-making from "both sides": Jurors might, for example, equally pronounce "outrageous" placards that (unlike the ones in *Snyder*) announced that a soldier's death was retribution for America's *discriminatory* treatment of gay people. But there is no First Amendment principle that tolerates suppression so long as one side cancels out the other. *Cf. Powers v. Ohio*, 499 U.S. 400, 410 (1991).

places greater burdens on the First Amendment rights of those espousing controversial views—and, in particular, views "unpopular with bottle throwers." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). *See* Pet.App.154a. This "heckler's veto"—where the freedom to publicly dissent contracts based on others' (likely) hostile reactions to the viewpoint expressed—contravenes the First Amendment's core commitments to neutrality and personal culpability.[10]

When pressed for answers to basic questions about the tort's application in important, non-hypothetical protest situations and for any "limiting principles," Fifth Circuit panel majorities have been reticent to the point of caginess, reserving elaboration "for another day." Pet.App.124a.

But, as Judge Willett emphasized, "[a] rule is not narrow merely because its limitless premises are recited one case at a time," Pet.App.83a, and there is reason to believe that responses to these vexing First Amendment questions have not been forthcoming because there are no satisfactory answers. These problems are of the Fifth Circuit's making—the direct

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[10] The panel majority offered that liability *might not* attach where the injury-causing act was committed by someone not on the leader's "side." *See* Pet.App.15a. But there is no evidence here that the concrete-thrower was on Mckesson's "side." And that potential limitation only serves to highlight another First Amendment problem: "guilt *for* association." *Claiborne*, 458 U.S. at 925. As the dissent explained, the sanitation workers' demonstration that drew Dr. King to Memphis in 1968—remembered for the eloquent "I am a man" placards marchers carried—witnessed a number of acts of vandalism and clashes between police and certain demonstrators, who (presumably) shared King's views, but not his belief in passive resistance. Pet.App.84a.

result of its decision to jettison *Claiborne* and pursue a law-making experiment that contravenes this Court's foundational First Amendment precedents.

The *Claiborne* rule encounters no comparable difficulties: If a leader intended violence, he, no less than an actual concrete-thrower, must answer. If not, the injured party's recourse is against the actor who, for whatever reason, hurt him.

III. INTERVENTION NOW IS NECESSARY AND APPROPRIATE

As the dissenting judges recognized, the Court's familiar criteria support certiorari, and there is no ground for withholding or postponing review. Pet.App.85a. There is no potential that a state law ruling will render academic the First Amendment question. After five opinions (three divided) and two close, but unsuccessful, en banc votes, the relevant legal questions have been thoroughly ventilated, and there is no reason to expect the Fifth Circuit will come into compliance on its own.

On the contrary, the recent panel decision further loosened, in constitutionally significantly ways, its predecessor's already minimal "restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable." *Claiborne*, 458 U.S. at 916-17. Indeed, as the dissenting judges underscored, imposing liability based on civic "prominence" approaches guilt-by-association in its purest and most plainly impermissible form. *See* Pet.App.81-82a. And the Fifth Circuit deemed this Court's intervening *Counterman* decision undeserving of its consideration. *Compare Cider Riot*, 544 P.3d at 370 ("In view of *Counterman*, we are persuaded

that . . . the First Amendment does not allow for the imposition of liability on a protest leader or an organizer under a negligence theory.").

Moreover, as the dissent explained, petitioner stands out among the many people whose rights of expression and association are burdened by the Fifth Circuit rule—in that he is a party to a live case and has a concrete stake in the Court's intervention. *See* Pet.App.86a. For this Court to leave resolution of the constitutional question "for another day," Pet.App.124a, would be to allow this far-reaching, but below-the-surface, suppression to continue.

Though the panel majority suggested that returning the case to district court might bring closure, that expectation is surely illusory. The Fifth Circuit has announced and adopted a plainly unconstitutional rule covering all protests. Even a district court resolution in petitioner's *favor*, if affirmed on the (inevitable) appeal, would be a defeat for the First Amendment, because the Fifth Circuit's speech-suppressive rule would remain in place. Were the Fifth Circuit to *reverse* a judgment in petitioner's favor—a not implausible scenario, given how things have gone—the risk would again arise of the constitutional question's being obscured behind factual matters or ones pertaining to the protean "state law" cause of action.

These considerations are reinforced by interests of justice and this Court's role. It has long been the Court's practice to take responsibility for seeing through to appropriate resolution cases in which it has exercised discretionary jurisdiction. *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

The Court's 2020 opinion explained that resolution of the constitutional question should be informed by a more certain understanding of state law and by the First Amendment's demand for "precision of regulation," *See* 592 U.S. at 4 (citing *Claiborne*, 458 U.S. at 916-17). Instead, the court of appeals has repeatedly adjusted the contours of the tort and its constitutional justification—with the consistent effect of keeping respondent's suit alive and the controlling *Claiborne* rule at bay. Providing recourse for an officer injured in the line of duty is doubtless a worthy objective. But the Fifth Circuit's proceedings—increasingly resembling "picking the man and then searching the law books [for a tort] to pin on him," *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting R. Jackson, *The Federal Prosecutor* (Apr. 1, 1940)), and approaching a rule of de facto strict liability well beyond the "objective negligence" rejected in *Counterman*—are far from "accepted and usual." Sup. Ct. R. 10(a).

The same principles of vertical *stare decisis* invoked by the panel below establish *this* Court as the authoritative expositor of its decisions in *Claiborne* and *Counterman* and of the foundational precedents and First Amendment principles on which they stand. The Court should grant review here—and reinstate those undeniably important constitutional restraints once and for all. *Cf. Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (recognizing that a decision "flatly contrary to this Court's controlling precedent" may be an appropriate candidate for summary reversal).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN FORD, *former Officer John Doe Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-742

No. 24-30494

OPINION

March 19, 2026

Before KING, JONES, and OLDHAM, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

After two decisions from this court, a Supreme

Court decision, certified questions addressed by the Louisiana Supreme Court, and a subsequent denial of certiorari by the Supreme Court, Officer John Ford has yet to present his case to a jury. Eight years of pretrial litigation are enough. It is time for Officer Ford to have a jury assess his claim that DeRay Mckesson's negligence in leading a violent protest caused him to suffer injuries at the hands of rioters. The district court's grant of summary judgment for Mckesson is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

I.

At this advanced stage of the litigation, "the background facts [remain] well known." *Doe v. Mckesson*, 71 F.4th 278, 282–83 (5th Cir. 2023). Mckesson is a leader in the "Black Lives Matter" movement, who has attended "hundreds of protests" and received financial support for his efforts. During 2016, he prominently participated in protests in Baltimore, McKinney, Ferguson, and Earth City. Some of these protests devolved into riots in which rioters injured police officers, looted businesses, destroyed property, and damaged communities. *Id.* at 283. Due to his personal experience attending and watching many protests, he admitted to knowing that protestors blocking public highways could lead to violent clashes with police. Mckesson not only participated in protests that turned violent—he also refused to condemn political violence in an interview on national television.

The day before July 9, 2016, Mckesson travelled to Baton Rouge and met with others who were plan-

ning a Black Lives Matter protest. On the appointed day, Mckesson led protestors in congregating in front of a Baton Rouge Police Department station. The initially peaceful protest became violent, as rioters looted a store, stole water bottles, and threw them at police officers. *Id.* Mckesson was present as protestors looted a Circle K gas station, and he was seen carrying a stolen water bottle outside the store. While the looting was happening, officers observed Mckesson leading protestors and witnessed "people moving with him." Given Mckesson's television interview refusing to condemn the use of violence, it is unsurprising that he did nothing to discourage protestors from assaulting police officers, looting a store, and engaging in other lawless acts.

Later, Officer Ford witnessed Mckesson "leading the crowd" and "talking to a lot of people." Later, he was seen "getting [protestors] ready to walk into the highway." Officer Ford and "other police officers" then witnessed Mckesson "giving orders" to protestors "to go out into that road and block traffic." Mckesson was then "in the front" of the crowd that followed him "out into the highway."

While obstructing the road, the protestors continued to throw water bottles at police. As their water bottle supply dwindled, one rioter threw either a piece of concrete or a rock that hit Officer Ford in the face. The resulting blow knocked Officer Ford to the ground and caused devastating harm, including the loss of teeth, a jaw injury, a concussion, and post-traumatic stress disorder. The injuries Officer Ford suffered to his teeth were so extensive that he was forced to spend 18 hours undergoing procedures in a dental chair. Officer Ford suffers ongoing problems

as a result of his injury. Years later, his vision is still clouded with "black marks" and "squiggly clear lines." Because of his injuries, Officer Ford quit being a law enforcement officer and was forced to begin a new career in construction.

Officer Ford filed a complaint in federal district court against Mckesson and Black Lives Matter. He asserted tort claims based on theories of negligence, *respondeat superior*, and civil conspiracy. Officer Ford sought leave to amend and join Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants. The district court dismissed Officer Ford's claims with prejudice and denied leave to amend. *Doe v. Mckesson*, 272 F. Supp. 3d 841, 850 (M.D. La. 2017).

On appeal, this court affirmed the dismissal of Black Lives Matter. *Doe v. Mckesson*, 945 F.3d 818, 834 (5th Cir. 2019). Additionally, this court affirmed the district court's dismissal of the *respondeat superior* and civil conspiracy claims against Mckesson. *Id.* at 834–35. However, this court reversed the dismissal of Officer Ford's negligence claim. This court held that Louisiana state law recognized a theory of negligence that would allow a jury to find that Mckesson had a duty to exercise reasonable care in organizing a Black Lives Matter protest. *Id.* at 826–28. We concluded that a jury could find that he breached this duty by leading the protest in a manner in which it was reasonably foreseeable that the protest would lead to a violent confrontation with police. *Id.* This court further rejected Mckesson's defense that the First Amendment protected him from liability for his actions while leading the protest. *Id.* at 832. Mckesson's request for a rehearing *en banc* was de-

nied. *Doe v. Mckesson*, 947 F.3d 874 (5th Cir. 2020).

Mckesson petitioned the Supreme Court for *certiorari* on his First Amendment defense. The Court granted *certiorari*, but it did not reach the merits of the First Amendment question. The Court found that this court's interpretation of Louisiana state law was "too uncertain a premise on which to address" the First Amendment issue. *Mckesson v. Doe*, 592 U.S. 1, 4, 141 S. Ct. 48, 50 (2020). Therefore, the Supreme Court vacated this court's panel opinion and remanded for certification to the Supreme Court of Louisiana the question whether Louisiana recognizes Officer Ford's negligence claim.

On remand, this court certified two questions to the Supreme Court of Louisiana:

1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

Doe v. Mckesson, 2 F.4th 502, 504 (5th Cir. 2021). The Supreme Court of Louisiana "answered the first question 'yes,' and the second question 'no.'" *Doe v. Mckesson*, 71 F.4th 278, 285 (5th Cir. 2023) (citing *Doe v. McKesson*, 339 So. 3d 524, 530–36 (La. 2022)).

The case returned to this court. Because the Supreme Court had vacated this court's original judg-

ment, it became necessary to reconsider each of the original issues on appeal. The panel reaffirmed its previous conclusions, remanded the case to the district court for trial, and again rejected Mckesson's First Amendment defense. *Id.* at 289.

The district court, however, granted summary judgment for Mckesson on the negligence claim. First, the district court found that there was no evidence that Mckesson led the protestors, and as a result, he owed Officer Ford no duty of care. *Ford v. Mckesson*, 739 F. Supp. 3d 344, 351 (M.D. La. 2024). Second, the district court found that Mckesson's conduct was not a cause-in-fact of Officer Ford's injuries. *Id.* at 351–52. Finally, the district court found that Mckesson's participation in the protest was protected by the First Amendment and the intervening Supreme Court case of *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106 (2023). 739 F. Supp. 3d at 352–53.

Officer Ford has appealed.

II.

"This court reviews a district court's grant of summary judgment . . . de novo." *Willis v. Barry Graham Oil Serv., L.L.C.*, 122 F.4th 149, 153 (5th Cir. 2024). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if a reasonable jury "could differ as to the import of the evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *see also Dupree v. Younger*, 598 U.S. 729, 731–32, 143 S. Ct. 1382, 1387

(2023) (explaining that the summary judgment and judgment as a matter of law standards are effectively the same). When assessing the record, this court "must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment." *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016) (quoting *Hightower v. Tex. Hosp. Ass'n*, 65 F.3d 443, 447 (5th Cir. 1995)). It must be borne in mind that "at the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511.

III.

The first issue on appeal is whether there is a genuine dispute as to any material facts that constitute the elements of Officer Ford's negligence claim. The second issue is whether the First Amendment immunizes Mckesson from facing trial for his negligence.

A.

Louisiana Civil Code article 2315 provides, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." In applying this code, Louisiana adopts a "duty-risk" theory of negligence. *Doe*, 339 So. 3d at 531. To prevail under a negligence theory, Officer Ford must prove five elements: "(1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was

within the scope of protection afforded by the duty breached." *Doe*, 71 F.4th at 288 (quoting *Doe*, 945 F.3d at 826).

i.

The facts establishing Officer Ford's injury are undisputed. He was hit in the head with a piece of concrete or similar substance. This blow caused him to lose teeth, injure his jaw, and suffer a concussion. In the aftermath of the concussion, he has suffered lasting vision damage. As a result of the injuries and post-traumatic stress disorder caused by the incident, Officer Ford had to leave the Baton Rouge Police Department and begin a new career.

ii.

Whether a duty of care exists is purely a question of state law. *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004). The Supreme Court of Louisiana unambiguously answered that question and held that Mckesson owed a duty of care to Officer Ford. *Doe*, 339 So. 3d at 530–33. In its decision, the Supreme Court of Louisiana held that a duty of care exists in the facts presented in this case, and it affirmed this court's holding that Louisiana law recognizes "a duty not to negligently precipitate the crime of a third party." *Id.* at 532 (quoting *Doe*, 945 F.3d at 827).

This duty attaches if a fact-finder determines that Mckesson negligently led the protest. Here, the record contains ample evidence to allow such a finding. Mckesson's own testimony is that he was "part of" a group of "incredible leaders who were planning things . . . associated . . . with the protest." Further, Mckesson admitted that he came to Baton Rouge be-

cause his "team" was in contact with leaders in "the organizing community" who had "asked [his team] to come." Additionally, he "amplified" posts about the protest to his over quarter million Twitter followers so that they would know "that there would be protests in Baton Rouge." Once the protest—that he helped plan—was underway, Officer Ford observed Mckesson as the crowd followed him around; as he directed them with his body language and got protestors ready to walk on the highway; and as they followed him and members of the New Black Panther Party out onto the highway. Mckesson's leadership was recognized not only by police, but also by other protestors who submitted to his authority and "were following him all over the area." Indeed, a video that Mckesson filmed on his cell phone would allow a reasonable fact-finder to conclude that the video of Mckesson's arrest demonstrates that he was leading the group toward I-12 for the purpose of blocking the interstate highway. After police officers cut off the protestors and thwarted them from carrying out the criminal act of interrupting traffic on I-12, the group turned around and started marching away from I-12. As the group was turned around by police, Mckesson is one of the people closest to the police officers who intervened to cut off the march. A reasonable jury could infer that Mckesson's position at the front of the protest as it was cut off by police evidences his leadership over the unlawful movements of the protestors.[1]

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[1] The dissent argues that the video does not show the protestors turning around after police cut them off. However, the record as a whole supports that this is exactly what happened. When asked if he was "marching towards I-12," Mckesson said

Mckesson's brief admits his leadership role in the protest. At minimum, Mckesson admits that "the evidence shows that [he] is a well-known leader in a social movement, that he attended the July 9 protest, that he re-tweeted someone else's announcement of the Baton Rouge protest's time and location, and that some group of people followed him at various moments of the day." Further, Mckesson's brief admits that there is "no question" that "a protest leader may be held liable for" this tort. As Mckesson admits, to hold him liable it is not required for a jury to find that Mckesson was *the* only leader of the protest. Rather, it is sufficient for a jury to find that Mckesson was *a* leader of the protest.

So far, the evidence would permit a jury to find that Mckesson was involved in planning the protest and leading the protest on the day it occurred. But his leadership did not end there. After the protest was over, Mckesson sued the City of Baton Rouge in a class action lawsuit. His own court filings admit that he was a leader of the protest and argued that he was an adequate representative of the class of protestors who were arrested by police due to the "leadership" he exercised over them. Memorandum in Support of Motion for Final Approval of Class Action Settlement at 15, *McKesson v. City of Baton Rouge*,

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"yes." Mckesson also admitted that police intervened to turn the protestors around and that he only started filming the video after he complied with police orders to turn around. The video itself corroborates the fact that police turned the protestors around, with Mckesson informing viewers of the video, "We're walking back." The video also corroborates the fact that Mckesson was near the back of the crowd after the protest had been turned around by police, with Mckesson stating that the police "are like literally right behind us."

Civ. No. 16-520-JWD-RLB, 2017 WL 11675692 (M.D. La. Nov. 16, 2017). By claiming to be a leader of the protest, Mckesson ultimately received a settlement from the City of Baton Rouge. A jury could choose to take Mckesson at his word and find that he led the protest.[2]

That Mckesson assumed a leadership role in the Baton Rouge protest is not surprising, given that, as he admits, he is routinely identified as one of the "leaders in the Black Lives Matter Pride Movement." Furthermore, during an interview on national television, he was identified as a prominent "community organizer." His leadership was even recognized by the highest levels of the federal government, and he met with President Obama and Attorney General Lynch to discuss Black Lives Matter. Mckesson argues the evidence of his leadership in Black Lives Matter is inadmissible. Although prior act evidence "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," it is "admissible for . . . proving . . . motive, . . . intent, preparation, plan[ning], knowledge, . . . absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Officer Ford's evidence could be admitted under these exceptions.

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[2] The dissent unsuccessfully argues that Mckesson's role as a leader in a class action regarding the protest "does not refer to his leadership of the *protest*." (emphasis in original). This argument fails on its own terms, as Mckesson's own court filing indicates that his "leadership" is directly related to the "broad spectrum of persons who were involved in the protests." Memorandum in Support of Motion for Final Approval of Class Action Settlement at 15, *McKesson v. City of Baton Rouge*, Civ. No. 16-520-JWD-RLB, 2017 WL 11675692 (M.D. La. Nov. 16, 2017).

There is ample admissible evidence to create a genuine, material fact dispute about whether Mckesson was a leader in the protest. The district court erred in discounting the evidence as "self-serving, uncorroborated, and inconsistent." *Ford*, 739 F. Supp. 3d at 351. This holding is erroneous for at least two reasons. First, the mere fact that evidence is "self-serving" does not permit a judge to grant summary judgment. To the contrary, "self-serving affidavits and depositions may create fact issues even if not supported by the rest of the record." *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (internal quotation marks omitted). Further, assessing "[h]ow much weight to credit self-interested evidence is a question of credibility, which judges may not evaluate at the summary judgment stage." *Id.* at 161. All that is required is that "self-serving evidence . . . comport with the standard requirements of Federal Rule of Civil Procedure 56" and "'be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.'" *Id.* (quoting Fed. R. Civ. P. 56(c)(4)). Here, Officer Ford testified from personal knowledge based on what he saw as an eyewitness. His testimony plainly complies with Fed. R. Civ. P. 56(c)(4).

Second, the district court erred because the evidence in the record corroborates Officer Ford's testimony. As recounted above, the evidence demonstrates that Mckesson helped plan the protest, was a leader in many protests that have turned violent, amplified messages about the protest on social media, and gave orders to the crowd during the protest. Additionally, a video of Mckesson's position near the

police as they cut off the protestors from accessing the interstate substantiates the other evidence. This evidence all tends to support that Mckesson was a leader of the protest, if the jury so determines.

iii.

A reasonable jury could also find that Mckesson breached his duty of care by "organizing the protest in such a manner where it was reasonably foreseeable that a violent confrontation with the police would result." *Doe*, 71 F.4th at 284. As this court held, and the Supreme Court of Louisiana confirmed, "It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests." *Doe*, 339 So. 3d at 531 (quoting *Doe*, 945 F.3d at 827). A jury could find that Mckesson was undeterred by the foreseeable risk of violence and engaged in "intentional lawlessness" by leading "the demonstrators onto a busy highway . . . to provoke a confrontation between police and the mass of demonstrators." *Id.* Mckesson "direct[ed]" protestors "to go out into that road and block traffic." Such an action is patently illegal under Louisiana law. La. Stat. Ann. § 14:97. Additionally, Mckesson was in charge while protestors looted a store and threw water bottles at police. A jury could find that by engaging in this conduct, he put the lives of "officers, bystanders, and demonstrators" at risk and "failed to exercise reasonable care in conducting his demonstration." *Doe*, 339 So. 3d at 531 (quoting *Doe*, 945 F.3d at 827).

The record contains ample evidence that Mckesson led the protest in a way that violated his duty of care. For instance, Mckesson had previously

"participated in other Black Lives Matter protests in which demonstrators blocked public highways, and in which police officers were injured." *Doe*, 71 F.4th at 288. Mckesson supported these violent protests, and he refused to condemn the use of violence in a televised interview on CNN. Consequently, whether Mckesson breached his duty to Officer Ford and others raises a triable jury question.

iv.

Next, a reasonable jury could determine that Mckesson's conduct was the cause-in-fact of Officer Ford's injuries. A jury must determine if "but for the defendant's conduct, the incident probably would not have occurred." *Doe*, 339 So.3d at 532. (approving of this court's quoting of *Roberts v. Benoit*, 605 So.2d 1032, 1052 (La. 1992) in *Doe*, 945 F.3d at 828). So long as "the defendant's actions had something to do with the injury the plaintiff sustained, the test of a factual, causal relationship is met." *Faucheaux v. Terrebonne Consol. Gov't*, 615 So. 2d 289, 292 (La. 1993).

This court and Louisiana's Supreme Court have both already held that the facts of this case are sufficient for a jury to find that Mckesson's actions were the cause-in-fact of Officer Ford's injuries. According to the state supreme court, the evidence could allow a jury to find that "by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the 'but for' causes of Officer Doe's injuries." 339 So. 3d at 532 (quoting *Doe*, 945 F.3d at 828). Further, the Louisiana Supreme Court recognized, "It is an uncontroversial proposition of tort law that

intentionally breaking, and encouraging others to break, the law is relevant to the reasonableness of one's actions." *Id.* (quoting *Doe*, 945 F.3d at 828). Officer Ford testified that he and other officers observed Mckesson ordering other protestors to go out into the roadway and leading them in their incursions into lanes of traffic. Additionally, Mckesson's negligence in organizing the protest would permit the jury to find that he is the cause-in-fact of Officer Ford's injuries. Indeed, the fact that lawlessness, looting, and assaulting police officers occurred under Mckesson's leadership "support[s] the assertion that he organized and directed the protest in such a manner as to create an unreasonable risk that one protestor would assault or batter [Officer Ford]." *Doe*, 71 F.4th at 289.

The dissent argues that holding that a jury could find that Mckesson is the cause-in-fact of Officer Ford's injuries could open the door to protest leaders being held liable for the actions of people participating in a counter-protest. This court has no occasion to reach that question in this case; however, the dissent's concern seems unfounded. To be liable, a protest leader must have "organized and directed" the protestor's actions. *Id.* Further, the Louisiana Supreme Court has held that liability for protest leaders attaches only when they "encourage[e] others to break . . . the law." 339 So. 3d at 532 (quoting *Doe*, 945 F.3d at 828). It is highly unlikely that a protest leader's actions would make them accountable for the torts committed by counter-protestors.

v.

Finally, Officer Ford satisfies the scope of duty

requirement. Under Louisiana law, determining "scope of the duty involves a purely legal question." *Malta v. Herbert S. Hiller Corp.*, 333 So. 3d 384, 399 (La. 2021). This court previously held that "a central purpose of imposing a duty in these circumstance[s] is to protect those who are injured as a result of a negligently organized and led protest. As such, the risk of harm to [Officer Ford] is plainly within the scope of protection afforded by the duty owed by Mckesson here." *Doe*, 71 F.4th at 289.

Under Louisiana law, the scope of duty inquiry asks whether the duty imposed is intended to protect "this plaintiff from this type of harm arising in this manner." *Faucheaux*, 615 So. 2d at 294. Officer Ford satisfies this test. The duty to exercise due care in leading a protest protects the physical safety of police officers who must be on hand to prevent potential outbursts of violence. Officer Ford suffered the exact type of harm, starting with his being hit in the head, that the duty aims to prevent.

*

It is not certain whether Officer Ford will prevail in front of a jury. Indeed, "reasonable minds could differ as to the import of the evidence," but that is precisely why this case must now be brought before a jury. *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511.

B.

The district court additionally erred in departing from this court's earlier holding that "imposing negligence liability on Mckesson does not offend the First Amendment." *Doe*, 71 F.4th at 291. Under the Fifth Circuit's rule of orderliness, only the en banc Fifth Circuit or the Supreme Court may overrule

Fifth Circuit precedent. *Texas v. United States*, 126 F.4th 392, 406 (5th Cir. 2025). The district court erred in assuming that *Counterman*, 600 U.S. 66, 143 S. Ct. 2106, nullified this court's prior decision.

This court, like the district court, is bound by our earlier precedent in this case. While "an intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent . . . [s]uch an intervening change in the law must be unequivocal, not a mere 'hint' of how the Court might rule in the future." *U.S. v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); *see also In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 331 (5th Cir. 2013) (to overturn a prior precedent of this court, a "Supreme Court decision must be more than merely illuminating with respect to the case before us" and must be "unequivocally directed by controlling Supreme Court precedent." (quoting *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 647–48 (5th Cir. 2012) (DENNIS, J., concurring))). And importantly, a "district court [is] not free to overturn" Fifth Circuit precedent even if it thinks that the Supreme Court has "implicitly overruled" that precedent. *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 789, 792 (5th Cir. 2021).

In any event, the Supreme Court did not overturn our prior rulings in this case, explicitly or implicitly. *Counterman* held only that in a criminal conviction for a true threat of violence, the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements." 600 U.S. at 69, 143 S. Ct. at 2111. *Counterman* held that a speaker can be held civilly accountable for his speech if his "words were

'intended' (not just likely) to produce imminent disorder." *Id.* at 76, 143 S. Ct. at 2115. A jury can find that a protest leader who directs protestors to "interfere[] with traffic upon the public streets" intends to produce disorder because blocking a road represents an "immediate threat to public safety, peace, or order." *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905 (1940); *see also Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) (SOTOMAYOR, J.) (citing *Cantwell* for the "axiomatic" proposition that blocking a street represents disorder). *Counterman*'s holding about the elements of an unrelated criminal offense changes nothing about this case. Therefore, the thorough First Amendment analysis in *Doe v. Mckesson* remains binding on the district court and should govern this case at trial. 71 F.4th at 289–300.

For these reasons, the judgment of the district court is REVERSED AND REMANDED to the district court for further proceedings consistent with this opinion.

KING, *Circuit Judge*, dissenting:

Officer John Ford was tragically injured in his line of duty. Someone should be held accountable. But Officer Ford has not come close to demonstrating that Mckesson is that someone. Perhaps eager to afford Officer Ford a remedy for his injuries, the majority nevertheless holds that he has done just that. In so doing, it imperils First Amendment liberties. So I dissent.

I

"The standard of review on summary judgment is *de novo*." *Favela v. Collier*, 91 F.4th 1210, 1212 (5th Cir. 2024). "Summary judgment is appropriate where the submissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010) (citing Fed. R. Civ. P. 56(c)). "To make a showing of a genuine dispute of material fact, 'the party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim.'" *Clark v. City of Alexandria*, 116 F.4th 472, 478 (5th Cir. 2024) (quoting *Diaz v. Kaplan Higher Educ., L.L.C.*, 820 F.3d 171, 176 (5th Cir. 2016)). Then "we consider evidence bearing on the issues, viewing the facts and the inferences to be drawn therefrom in the light most favorable to the nonmovant." *Chaney*, 595 F.3d at 229 (quoting *Olabisiomotosho v. City of Hou.*, 185 F.3d 521, 525 (5th Cir. 1999)).

"However, we are not required to accept the nonmovant's conclusory allegations, speculation, and

unsubstantiated assertions [that] are either entirely unsupported[] or supported by a mere scintilla of evidence." *Id.* (citing *Reaves Brokerage Co., Inc. v. Sunbelt Fruit & Vegetable Co., Inc.*, 336 F.3d 410, 413 (5th Cir. 2003)). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). And it must do so by providing evidence capable of being "presented in admissible form at trial," *Patel v. Tex. Tech Univ.*, 941 F.3d 743, 746 (5th Cir. 2019), rather than merely offering "improbable inferences," *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) (quoting *Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 673 (5th Cir. 2015)). Further, "'[s]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment,' and 'a vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence.'" *Koerner v. CMR Constr. & Roofing L.L.C.*, 910 F.3d 221, 227 (5th Cir. 2018) (quoting *Kariuki v. Tarango*, 709 F.3d 495, 505 (5th Cir. 2013)). "Therefore, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of . . . summary judgment.'" *Id.* at 227–28 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

II

Relying heavily on a prior panel's decision rendered at the motion-to-dismiss stage, the majority concludes that Officer Ford has presented sufficient

evidence on each element of his negligence claim and that the First Amendment does not pose a barrier to that claim. But the case before us bears little resemblance to the case before the prior panel. In *this* case and on *this* record, I find it difficult to conclude that Officer Ford has raised fact issues on every element of his claim. And I find it even more difficult to conclude that the First Amendment lies dormant while its protections are chilled to the marrow.

A

Under Louisiana negligence law, Officer Ford must prove or raise genuine issues of material fact on five elements: "(1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached." *Doe v. Mckesson*, 71 F.4th 278, 288 (5th Cir. 2023) (internal quotes omitted). Officer Ford, however, has failed to present sufficient competent summary-judgment evidence on at least three of them: duty, breach, and cause-in-fact.

1

The Louisiana Supreme Court has identified a duty to "not negligently precipitate the crime of a third party." *Doe v. McKesson*, 339 So. 3d 524, 531 (La. 2022). This duty attaches if Mckesson was "organizing and leading the Baton Rouge demonstration." *Id.* Similarly, Officer Ford's theory of breach centers around Mckesson's organization and leadership of the Baton Rouge protest. *See Mckesson*, 71 F.4th at 288 ("[Officer Ford] has also plausibly al-

leged that Mckesson breached his duty in the course of the latter's organizing and leading the Black Lives Matter protest at issue here."). Accordingly, both the duty and breach elements rise and fall on the same proof of Mckesson's organization and leadership of the protest.

Before the prior panel, Officer Ford had an easier time establishing Mckesson's purported organization and leadership of the protest; the case was at the motion-to-dismiss stage, so his allegations were simply taken as true. It took as true Officer Ford's allegations "that Mckesson *planned* to lead the demonstrators onto Interstate 12," "that Mckesson *regularly gave orders* to the protestors and *directed* their activity," and that other unlawful acts "occurred under Mckesson's *leadership*." *Id.* at 288–89 (emphasis added). And based on these allegations, that panel held that Officer Ford had "plausibly alleged that Mckesson breached his duty in the course of the latter's *organizing* and *leading* the Black Lives Matter protest at issue here." *Id.* (emphasis added).

The prior panel also concluded that Officer Ford "has alleged that Mckesson created unreasonably unsafe conditions in at least three significant aspects." *Id.* at 292. "First, he *organized* the protest to begin in front of the police station, obstructing access to the building." *Id.* (emphasis added). "Second, he *personally assumed control* of the protest's movements . . ." *Id.* (emphasis added). "And third, Mckesson *deliberately led* the assembled protest onto a public highway, in violation of Louisiana criminal law." *Id.* (emphasis added).

Answering certified questions from this court,

the Louisiana Supreme Court, too, relied on such allegations of protest organization and leadership. That court found that "Officer [Ford] has plausibly alleged that Mckesson breached his duty of reasonable care in the course of *organizing* and *leading* the Baton Rouge demonstration." *McKesson*, 339 So. 3d at 531 (emphasis added). "The complaint alleges that Mckesson *planned* to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson *was in charge of the protests* and was *seen and heard giving orders throughout the day and night* of the protests." *Id.* (emphasis added).

Today, however, Officer Ford finds himself at the summary-judgment stage. So he must do more than simply allege; he must produce evidence. And reading the majority's opinion, one would be forgiven for believing that competent summary-judgment evidence bore out these allegations of organization and leadership. But what the majority describes as "ample evidence," *ante*, at 7, is simply not so.

Start with Mckesson's purported role in *organizing* the protest. The majority points to Mckesson's testimony that he was a "part of" a group of "incredible leaders who were planning things . . . associated . . . with the protest." *Ante*, at 7 (ellipses in original). But hidden in the ellipses between "planning things" and "associated" is Mckesson's clarification that there is no formal, centralized group of organizers—only community leaders. In fact, when asked "who [is] this planning group you're referencing," Mckesson stated, "when I say planning it's beautifully community lead [sic] so it's hundreds of people at any given point across the protests that I participated in or protesters that I knew

whether I was there or not." And when asked "who is a person in the planning group," he further clarified that "[t]he planning group is not a proper noun remember, *so there's no group*. I use planning broadly. There were hundreds of people who were helping to plan associated things with the protest."

Moreover, contrary to the majority's characterization of the record, it is clear Mckesson was not one of these community leaders for the Baton Rouge protest. The majority thinks that Mckesson's admission that he came to Baton Rouge because his team was in contact "with leaders in 'the organizing community' who had 'asked [his team] to come,'" *ante*, at 7, somehow means Mckesson *was* a leader in the organizing community. But that defies logic. If the leaders of the Baton Rouge organizing community invited Mckesson to join their protest, Mckesson was a guest, not a host or an organizer.

Similarly, that Mckesson "'amplified' posts about the protest to his over quarter million Twitter followers so that they would know 'that there would be protests in Baton Rouge," *ante*, at 7, says nothing about his status as an organizer of the protest. Retweeting—something virtually anyone could do—evinces merely that Mckesson promoted, not organized, the protest. As Mckesson argues, "[r]e-tweeting the details of an already-planned protest no more makes one its organizer than would re-tweeting the time or location of an outdoor movie screening or church rummage sale."

In short, far from creating fact issues on whether Mckesson was an organizer of the Baton Rouge protest, the evidence shows that Black Lives Matter pro-

test-planning is decentralized and community-led; Baton Rouge's community leaders invited Mckesson to join their planned protest; and Mckesson retweeted the details of an already-planned protest. That is insufficient for a reasonable jury to conclude that he *organized* the protest at issue.

As for Mckesson's *leadership* of the protest, the majority draws unfounded inferences and improperly credits speculation. While, as the majority points out, Officer Ford testified that he thought Mckesson "was getting [people] ready to walk onto the highway," the basis for that thought was that Mckesson was "directing them with his body language moving around"—not anything Officer Ford heard personally. In fact, Officer Ford conceded that he "do[es]n't know what [Mckesson] said" to the crowd because "it was too loud." Sure, body language, such as pointing, can be a powerful tool of tacit communication. But what Officer Ford observed is far more speculative. When asked, "Did you see him making any hand gestures, signaling people, or anything like that," he responded, "I don't remember any signaling." So what did he mean by "body language"? Merely that "a crowd" was "following [Mckesson] all over the area" before they walked onto the highway. The majority makes no effort to reconcile this speculative leap from a crowd's following Mckesson—without any evidence of Mckesson's *causing* them to follow him—to Mckesson's actively "getting them ready to walk into the highway." Instead, the majority indulges in the speculation, which we may not. *See Moon v. Olivarez*, 26 F.4th 220, 226 (5th Cir. 2022) ("[Nonmovant] cannot defeat summary judgment with speculation . . .").

The majority also points to the video depicting

Mckesson's arrest. To reach its conclusion—that the video demonstrates, at a point in time that the video does *not* show, Mckesson was leading the crowd onto the highway—the majority purports to make observations and draw inferences therefrom: (1) "police officers cut off the protesters" and "the group turned around"; (2) "Mckesson is one of the people closest to the police officers who intervened to cut off the march"; (3) it thus could be inferred that Mckesson was "at the front of the protest as it was cut off by police"; and (4) that means he was leading the crowd before it was cut off. *Ante*, at 8. And, at this juncture, we are generally obligated to draw inferences in the light most favorable to Office Ford.

But the video does not show either (1) or (2), so the majority cannot infer (3) and (4). At no point in the video do "police officers cut off the protesters"; from the beginning to the end of the video, the police are behind the crowd. Nor does "the group turn[] around." The video *begins* with Mckesson and the crowd walking in one direction—and they never change direction.

More fundamentally, the video does *not* show that "Mckesson is one of the people closest to the police officers." *Ante*, at 8. What the video does show is Mckesson in the *middle* of the crowd. *See, e.g.,* Video at 00:12 (people walking in front of Mckesson); *id.* at 3:34 (various people behind Mckesson); *id.* at 4:18 (same); *id.* at 4:53 (same). This is so even though Mckesson stops a few times to record his video, as other protesters pass him, *id.* at 0:37, 2:32, and he even walks toward the back of the crowd to record another protester get arrested, *id.* at 3:36. This discrepancy between Officer Ford's version of events

and the video means we no longer draw inferences in Officer Ford's favor; instead, we "view[] the facts in the light depicted by the videotape." *Scott*, 550 U.S. at 381.

Tellingly, the video also fails to depict Mckesson shouting any orders, leading any chants, or directing anyone to do anything. In fact, the crowd continues to shout chants without any direction from Mckesson, and Mckesson does not join the chant. So contrary to the idea that this was a protest "that Mckesson personally directed *at all times*," *see Mckesson*, 71 F.4th at 289 (emphasis added), the only video evidence of the protest *never* shows him directing the protest.

The majority also cites to Mckesson's brief, which the majority reads as "admit[ting] his leadership role in the protest." *Ante*, at 8. The brief states that, "[a]t most, the evidence shows that Mckesson is a well-known leader in a social movement, that he attended the July 9 protest, and that he re-tweeted someone else's announcement of the Baton Rouge protest's time and location, and that some group of people followed him at various moments of the day." But each of these "admissions" do not admit his leadership role in *the protest*. First, being a leader in a *movement* is different from being a leader in a *protest*, especially given Mckesson's uncontroverted testimony that Black Lives Matter protest-planning is decentralized and community-led. Second, merely attending a protest does not make him liable for the conduct of other protesters. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of

violence."). Third, retweeting the details of a preplanned event does not make one an organizer or leader. And fourth, being followed, without additional nonspeculative evidence of Mckesson's conduct that *caused* the following, does not make him a leader.

The next two pieces of evidence the majority relies on suggest that the majority sees unwarranted talismanic powers in the word "leadership"—regardless of the context. First, the majority cites to Mckesson's participation in a class action lawsuit arising out of the protest. Per the majority, "[h]is own court filings admit that he was a leader of the protest and argued that he was an adequate representative of the class of protesters who were arrested by the police due to the 'leadership' he exercised over them." *Ante*, at 9. But they do no such thing.

To be sure, he wrote there that he is an adequate class representative "due to [his] interest in this litigation, accessibility, involvement, leadership and commitment." Memorandum in Support of Motion for Final Approval of Class Action Settlement at 15, *McKesson v. City of Baton Rouge*, Civ. No. 16-520-JWD-RLB, 2017 WL 11675692 (M.D. La. Nov. 16, 2017).

The next paragraph, however, makes clear that the word "leadership" does not refer to his leadership of the *protest*. That paragraph begins with "[a]ll those terms apply to DeRay Mc[k]esson." *Id.* It continues, "[h]e has been a fearless young African-American man who has stood against racism, brutality and the right to exercise free speech throughout America." *Id.* And he has "committed to devoting

time to this litigation and keeping the entire class informed." *Id.* Nowhere is there a discussion of Mckesson's leadership of the *Baton Rouge protest*. Instead, the filing discusses Mckesson's leadership within the Black Lives Matter *movement* and commitment to keeping the entire class informed—*i.e.*, his leadership of the *class action*. A generalized reference to leadership or possession of leadership qualities does not transform Mckesson into a leader of *this* protest.

The majority makes the same misstep when it cites to Mckesson's recognized leadership in the Black Lives Matter movement. *See ante*, at 9. True, he admitted that he was one of "many leaders in the Black Lives Matter Pride Movement." And he admitted that he met with President Obama and Attorney General Lynch, though he denied that he did so as a representative of the Black Lives Matter movement. But even if he met with the White House as a representative of the movement, that suffices to establish only that he led the *movement*, not this particular *protest*. Again, Officer Ford has failed to controvert Mckesson's testimony that protests were planned throughout the country by communities, not by a centralized group of leaders.

Perhaps Officer Ford's strongest argument is that he "saw and heard Mc[k]esson giving orders to the crowd." Yet in his own deposition, Ford admitted that he did not personally hear Mckesson "giving *any* orders."[1] This admission seemed to alarm Ford's

[1] *See also, e.g.*, Ford Dep. 38:7–20 ("Q: [D]id you hear anything in particular that he said? A: Well, the casual conversations, no. There was too much traffic[,] and it was loud out there. But I could hear his chants and stuff like that . . . The

counsel, who followed up: "When we gave you your admissions, we asked you, did you hear him giving orders, and you said you did. So is your — what's with your memory? Are you having memory problems? Are you confused?" To that, Officer Ford revised his testimony, stating "I did say that he told them to come out into the road, didn't I? . . . Well, that's — that's the only time then."

But say we credit this latter testimony.[2] It stands as the only evidence of Mckesson's purported

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main thing they started off with was no justice, no peace, no racist police. . . . Q: Besides that, did you hear him say anything else? A: Nothing personal, no."); 41:1–11 ("Q: [W]hat did you hear DeRay Mc[k]esson say? . . . A: That, like, the police were the new KKK . . . I can't recall anything else."); 96:10–14 ("Q: You personally did not hear him giving any orders, did you? A: Not personal orders, no, I didn't — I didn't hear him.").

[2] Of course, this is not a given because "[s]elf-serving assertions contradicting previous testimony are insufficient evidence to overcome a summary-judgment motion." *Barlow v. Allstate Tex. Lloyds*, 214 F. App'x 435, 437 (5th Cir. 2007) (citing *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 496 (5th Cir. 1996)); *see also Flaherty v. Entergy Nuclear Operations, Inc.*, 946 F.3d 41, 51 (1st Cir. 2019) (holding that, where witness "provided a clear answer to an unambiguous question during his deposition, which he then directly contradicted without satisfactory explanation," it was not error to reject witness' "claim of confusion" and to disregard the subsequent contradictory testimony); *Marathon Ashland Petrol, LLC v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, Helpers of Am., Gen. Drivers, Helpers & Truck Terminal Emp. Union, Lc. No. 120*, 300 F.3d 945, 951 (8th Cir. 2002) (holding change in witness' deposition testimony after break and in response to own lawyer's questioning "was not a mere clarification of his earlier testimony, but was a 'sudden and unexplained revision' to create an issue where none existed before" and therefore did "not create an issue of disputed fact" (quoting *Am. Airlines, Inc. v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 111 (8th Cir. 1997))).

leadership of the protest and precipitating the crime of others. And such a one-time "order"—an unadorned characterization unsubstantiated by the record—cannot be enough to defeat a summary-judgment motion in a protest *leader* liability case. Otherwise, any protester could be haled into court and dragged through lengthy, costly litigation as a purported "leader" for simply shouting something as innocuous as "Let's go!" in the heat of the moment. This would, in effect, transform this narrow duty imposed on a protest organizer and leader into a "duty to protect others from the criminal activities of third persons"—which both this court and the Louisiana Supreme Court expressly rejected. *See McKesson*, 339 So. 3d at 532 (quoting *Doe v. Mckesson*, 945 F.3d at 818, 827 (5th Cir. 2019)). More concerningly, such loosening of the duty and breach standard poses grave First Amendment concerns, as explained below. *See infra*, Part II.B.

2

Officer Ford's evidentiary deficiency also plagues the cause-in-fact element. Under that element, he must prove, or at least raise genuine issues of material fact, that "he would not have been injured but for the manner in which Mckesson organized and led the protest." *Mckesson*, 71 F.4th at 292. That is, he must demonstrate "that Mckesson's actions were a necessary antecedent" to his injuries. *Id.* "That is a tall task, and the standard will only be met in the exceptional cases where" the evidence "support[s] the inference that the leader's specific actions caused the plaintiff's injuries." *Id.* The prior panel emphasized that "[i]n most cases, the altercation would have occurred regardless of how the protest lead-

er . . . acted." *Id.* at 292 n.8. Indeed, "[o]nly seldomly will a plaintiff be able to prove that the specific actions taken by the defendant caused the alleged injury." *Id.*

The majority asserts that, "[a]ccording to the state supreme court, the evidence could allow a jury to find that 'by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Officer [Ford's] injuries.'" *Ante*, at 12 (quoting *McKesson*, 339 So. 3d at 532). This assertion is flawed for two reasons.

First, the state supreme court never once said the *evidence* here could allow a jury to find anything at all, because it handed down *McKesson* at the motion-to-dismiss stage. *See McKesson*, 339 So. 3d at 521 ("We first note that this case comes before us from a dismissal on the pleadings alone."). Our task today is to decide whether Officer Ford has offered sufficient evidence to substantiate his allegations, not parrot a decision that took them as given.

Second, Officer Ford admits that Mckesson's purported shepherding of a crowd onto the highway did *not* cause a violent confrontation—*i.e.*, *cause* the crowd to hurl objects at the officers. Instead, he writes that "the crowd was already throwing objects at police and *had been doing so all day*, when Mc[k]esson lead [sic] them onto the highway." If the protesters were throwing objects at the police "all day," it seems clear that Mckesson's leading of the crowd onto the highway was not the "necessary antecedent" of Officer Ford's injury. *See Mckesson*, 71 F.4th at 292. In fact, this case would fall alongside

"most cases" where "the altercation would have occurred [and did occur] regardless of how the protest leader . . . acted." *See id.* at 292 n.8.

And just as the crowd was throwing objects at the police without any action on Mckesson's part, the record shows they likely would have occupied the highway without him too. Officer Ford testified that there were "agitators" in the crowd who were "trying to get the crowd to come back into the roadway." In fact, it was when Officer Ford was arresting one of these agitators—not Mckesson—that he was struck with a rock. So again, it seems the highway occupation "would have occurred regardless of how the protest leader . . . acted." *Id.*

The majority also concludes that a jury can find Mckesson as the cause-in-fact of Officer Ford's injuries because Mckesson "organized and directed the protest in such a manner as to create an unreasonable risk that *one protester* would assault or batter [Officer Ford]." *Ante*, at 13 (emphasis added) (quoting *id.* at 829). Indeed, the crux of Officer Ford's claim against Mckesson is that "Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between the police *and the mass of demonstrators*, yet he ignored the foreseeable danger. . . ." *Mckesson*, 71 F.4th at 288.

But here is the catch—Officer Ford has produced *zero* evidence that the unidentified rock-thrower was a protester at all. Zero evidence is, of course, even less than a mere scintilla of evidence, which is insufficient to overcome a summary judgment motion. *See Chaney*, 595 F.3d at 229. And without that evidence

of a protester-rock-thrower, we have no basis to conclude that Mckesson in fact caused "one protester" or someone in the "mass of demonstrators" to assault or batter Officer Ford.

3

In sum, when unsupported, unsubstantiated allegations are stripped away, the sole remaining evidence in support of Officer Ford's claim is a self-contradicted testimony that Mckesson told people, just once, that they should go onto the highway. Officer Ford has failed to present any other evidence of Mckesson's organization and leadership of the protest or evidence of sufficient causal relationship between Mckesson's actions and his injuries. He therefore cannot survive summary judgment.

B

Officer Ford's failure to establish the state-law elements also means his claim is barred by the First Amendment. The majority treats the First Amendment issue as foreclosed by the previous panel's decision in *Mckesson* and our adherence to the rule of orderliness. *Ante*, at 14–15. But not only do Officer Ford's evidentiary shortcomings render the rule of orderliness inapplicable, the majority's holding is flawed on its own terms.

1

At the motion-to-dismiss stage, when Officer Ford's allegations were taken as true, a divided panel of this court held that "imposing negligence liability on Mckesson does not offend the First Amendment." *Mckesson*, 71 F.4th at 291. Specifically, it held so because, in its view, "the negligence theory [Officer

Ford] pursues fits quite comfortably into two of the theories for protest-leader liability identified in" *Claiborne*.[3] *Id.*

Those theories are as follows. "First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity." *Claiborne*, 458 U.S. at 927. "Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period." *Id.*

The majority in *Mckesson* held that the first theory of liability was met because Mckesson "'di-

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[3] In *Claiborne*, African American citizens of Claiborne County instituted a boycott on white merchants in the area when their demands to elected officials for racial equality and integration were unmet. *Claiborne*, 458 U.S. at 889. An undisputed leader of the boycott was Charles Evers, the Field Secretary of the N.A.A.C.P., who helped organize the Claiborne County Branch of the N.A.A.C.P. *Id.* at 898. On one occasion, he gave a speech to a crowd and led them on a march to the courthouse, demanding the discharge of the entire city police force, after some officers shot and killed a young African American male. *Id.* at 902. In that speech, he warned that "boycott violators would be 'disciplined' by their own people." *Id.* On another occasion, he gave a speech to "several hundred people," during which he stated that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* And indeed, boycott violators faced some "discipline," including being physically battered, shots being fired at their house, a brick thrown at their windshield, or personal property damaged or stolen. *Id.* at 904–05.

Despite his undisputed leadership and explicit call for violence, the Supreme Court refused to pierce the First Amendment and impose liability on Evers for the wrongful conduct of others. *Id.* at 929.

rected . . . specific tortious activity' insofar as [Officer Ford] contends 'that his injuries were the result of Mckesson's *own* tortious conduct in *directing* an illegal and foreseeably violent protest." *Mckesson*, 71 F.4th at 291 (first emphasis in original; second emphasis added). It then held that the second theory was met because Officer Ford "contend[ed] that Mckesson *organized* and *directed* the protest in an unsafe manner such that it was likely that a violent confrontation would result, and in fact did result." *Id.* at 293 (emphasis added).

But as shown above, Mckesson did not organize or direct the protest. At best, Officer Ford's self-contradicted testimony shows that Mckesson directed *one* movement of the protest at a specific moment in time. This is far afield of the allegations underlying *Mckesson*, which were that Mckesson "*planned* to lead the demonstrators onto Interstate 12," "*regularly gave orders* to the protesters," "*personally assumed control* of the protest" and "personally directed [it] at all times." *Id.* at 288–89, 92 (emphasis added). This factual discrepancy between the allegations assumed as true in *Mckesson* and what the evidence actually bears out means we no longer can rely on *Mckesson* or hide behind the rule of orderliness.

2

More troublesome than applying non-analogous caselaw, the majority's holding today greenlights a form of "heckler's veto." We have said that "it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others." *Beckerman v. City of Tupelo*, 664 F.2d 502, 509 (5th Cir. Unit A Dec. 1981). But by

not insisting that Officer Ford show proof that the rock-thrower is a *protester*, rather than a bystander or even a counterprotester, the majority makes every protest a hostage to "the reaction . . . by others." *Id.*

Indeed, under today's decision, the violence "even of those *opposed* to the protest" may lead to civil liability for a protest leader "on the theory that such violence was 'foreseeable.'" Timothy Zick, *The Cost of Dissent: Protest and Civil Liabilities*, 89 Geo. Wash. L. Rev. 233, 273 (2021) (emphasis in original). Even worse, someone opposed to a planned protest can simply *threaten* violence. In that case, the protest leader cannot deny foreseeability and must now choose between exercising his First Amendment rights or facing potentially ruinous liability.[4] *Cf. N.Y.*

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[4] Perhaps the majority would respond that, in such a case, "the altercation would have occurred regardless of how the protest leader . . . acted," *Mckesson*, 71 F.4th at 292 n.8, undercutting the causation element. And I would tend to agree. But by ignoring Officer Ford's own testimony that the protesters were throwing objects at officers and that agitators were encouraging the crowd to walk onto the highway regardless of Mckesson's conduct, the majority has ditched that guardrail.

Nor is the response the majority actually gives any more reassuring. It writes that a protest leader cannot be held liable for the conduct of counterprotesters because "a protest leader must have 'organized and directed' the *protestor's* actions" to incur liability. *Ante*, at 13 (quoting *Mckesson*, 71 F.4th at 289). That fundamentally misunderstands *Mckesson*, the very case the majority contends governs this one.

That case held that, under the alleged facts, Mckesson can be held liable because he "organized and directed *the protest* in such a manner as to create an unreasonable risk that one protester would assault or batter [Officer Ford]." *Mckesson*, 71 F.4th at 289. It is the manner in which a protest leader organizes and directs the *protest* that may trigger liability, not the way he organizes and directs the *people*. Indeed, JUDGE

Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."). That would, of course, impermissibly chill speech and violate the tenet that, "in the context of constitutionally protected activity . . . 'precision of regulation is demanded.'" *Claiborne*, 458 U.S. at 916.

Moreover, by hinging Mckesson's liability on the "foreseeab[ility] that the Baton Rouge police would be required to respond to the demonstration," *ante*, at 11, the majority "allows law enforcement to dictate the extent of protesters' liability exposure," Zick*, supra*, at 273. This is "heckler's veto" on steroids because now the heckler is the government. Instead of exercising its lawmaking powers to suppress speech it dislikes—and face strict scrutiny—the government can unleash its law enforcement officers, armed with riot gear and today's decision, upon its citizens, including, as in this case, its dissidents. This obvious danger of handing the protester-liability trigger to the government is made worse because "almost anyone can be arrested for something." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (GORSUCH, J., concurring

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WILLETT's dissent there argued for what the majority today asserts—to hold a protest leader liable, two things must be identified: "a 'specific' tort committed by someone other than [the leader], and an action by [the leader] that 'authorized, directed, or ratified' that tort." *Id.* at 310 (WILLETT, J., concurring in part, dissenting in part). But, as he observed, "the [*Mckesson*] majority's analysis blend[ed] those two steps by [holding] that Mckesson 'directed' *his own* tort." *Id.*; *see also id.* at 292.

Today's majority seeks to both rest on *Mckesson*'s holding and retroactively un-blend its analysis. But precisely because it cannot rewrite that case, the majority's holding poses a threat to the First Amendment.

in part and dissenting in part). And this danger is more likely to manifest when the government is itself the object of the protest, as it was here. Dangerously, that threatens First Amendment rights when they are needed the most—when the speech concerns public affairs. *See 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."); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values . . . ."); *N.Y. Times Co.*, 376 U.S. at 270 (articulating "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .").

3

The prior panel's decision in *Mckesson* is inapplicable, and the majority's approach imperils First Amendment liberties. But there is an alternative, well-trodden path for us to take: simply hew closely to the "historic," "traditional," "well-defined[,] and narrowly limited classes of speech" that the Supreme Court has identified as unprotected by the First Amendment and see whether they apply here. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010). These are defamation, obscenity, true threats, and incitement. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (collecting cases). Of these categories, the closest one to the facts at hand would be incitement. But it is not close enough still.

I start with well-established principles. "First Amendment freedoms need breathing space to survive." *FEC v. Wis. Right to Life, Inc.*, 552 U.S. 449,

468–69 (2007) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Accordingly, we are cognizant that "[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries." *Counterman*, 143 S. Ct. at 2114. "A speaker may be unsure about the side of a line on which his speech falls." *Id.* at 2114–15. "Or he may simply be concerned about the expense of becoming entangled in the legal system." *Id.* at 2115. "The result is 'self-censorship' of speech that could not be proscribed—a 'cautious and restrictive exercise' of First Amendment freedoms." *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). So "an important tool to prevent that outcome—to stop people from steering 'wide[] of the unlawful zone'—is to condition liability on the [plaintiff's] showing of a culpable mental state." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The same tool is necessary in the incitement context. Incitement is when an "advocacy of the use of force or law violation . . . is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). But "incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature or consequence." *Counterman*, 143 S. Ct. at 2115. So, the Supreme Court instructs, "the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder." *Id.* (citing *Hess*, 414 U.S. at 109).

The need for a *mens rea* requirement for incite-

ment is particularly strong. That is because the Court "recognized that incitement to disorder is commonly a hair's-breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order." *Id.* at 2118 (citing *Brandenburg*, 395 U.S. at 447). But the Court "fail[ed], in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction." *Id.* So a "strong intent requirement" is "a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core." *Id.* Even the *Mckesson* panel acknowledged this, writing, "imposing liability on associates without an intent requirement would risk discouraging a whole range of legitimate expressive activities." *Mckesson*, 71 F.4th at 297. And, as explained above, the evidence shows that Mckesson was merely an associate—not a protest leader.

Here, of course, Officer Ford has testified—albeit inconsistently—that Mckesson told some people to go on the highway. And if he told people to go on the highway, Mckesson very likely intended people to go on the highway and to do so imminently. At first glance, it may appear Mckesson's speech was unprotected incitement.

But that focuses on the wrong lawless action. Mckesson is not being prosecuted or sued for illegally occupying the highway. *See Mckesson*, 71 F.4th at 298 ("[Officer Ford] does not assert highway obstruction as a tort *per se*."). He is being sued because an unidentified, perhaps-unassociated person threw a rock at Officer Ford without Mckesson's direction, ratification, or authorization. The relevant question

thus is not whether he intended the illegal highway occupation, but whether he "intended (not just likely) to produce" that lawless action of throwing a rock at Officer Ford. *See Counterman*, 143 S. Ct. at 2115. And Officer Ford does not allege, contend, or present evidence that Mckesson intended to produce the rock throwing.

The majority's approach of using the highway occupation to impose liability on the downstream occurrence of rock-throwing contravenes the above-outlined principles. It imposes a civil punishment via a mere negligence standard. So now, under the majority's regime, "a clueless speaker [who] fails to grasp his expression's nature and consequences" could be civilly punished, *id.*, even if he does not intend the consequences. This is an end-run around the "strong intent requirement"—a necessary safeguard to preserve the First Amendment's "breathing space"—where an intent to commit any minor crime opens the floodgates for indefinite liability.

"[T]he 'tendency to lead to violence' is not enough. Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under the libel doctrine." *Bailey v. Iles*, 87 F.4th 275, 285 (5th Cir. 2023) (quoting *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987)). The First Amendment demands more.

III

"[I]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *Claiborne*, 458 U.S. at 924. But today, the majority couples insubstantial findings of

fact with imprecision of regulation to strike at the heart of the First Amendment. Because "First Amendment freedoms need breathing space to survive," *Wis. Right to Life, Inc.*, 551 U.S. at 468–69, and the majority suffocates them, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN FORD,

v.

DERAY MCKESSON, ET AL,

No. 16-00742-BAJ-RLB

RULING AND ORDER

July 10, 2024

Plaintiff John Ford, a Baton Rouge Police Department officer, was on duty at a demonstration in Baton Rouge on July 9, 2016, when he was struck by a heavy object thrown by an unidentified demonstrator. Ford sued Defendant DeRay Mckesson, now the sole remaining Defendant, alleging that Mckesson negligently organized and led the protest and was therefore liable under Louisiana tort law for Ford's injuries. (Doc. 101, Amended Complaint). Now before the Court is Defendant's Motion for Summary Judgment (Doc. 109, the "Motion"), which argues that Plaintiffs action must be dismissed because the summary judgment evidence shows that Defendant

did not organize the protest, breached no duty to Plaintiff, and was not the cause-in-fact of Plaintiffs injuries. Plaintiff opposes the Motion. (Doc. 117). For the reasons that follow, Defendant's Motion will be granted, and Plaintiffs action will be dismissed with prejudice.

I. BACKGROUND

A. Procedural History

Plaintiff initiated this suit on November 7, 2016, naming as Defendants DeRay Mckesson and "Black Lives Mater," described as an "unincorporated association." (Doc. 1). In September 2017, the Court dismissed the suit, concluding that "Black Lives Matter" is a "social movement," not the sort of entity that may be sued in federal court, and that the claims against Mckesson were defeated by the rule set forth in *NAACP v. Claiborne Hardware* Co., 458 U.S. 886, 908 (1982), governing civil liability for the wrongful acts of others committed "in the context of constitutionally protected activity." (Doc. 71 at 2, 10). Because Plaintiff alleged no facts demonstrating that Mckesson "authorized, directed, or ratified specific tortious activity," the Court held that the First Amendment precluded state law damages liability. *(Id.* at 8 (quoting *Claiborne,* 458 U.S. at 927 (quotations omitted)).

In an initial 2019 opinion, *Doe v. Mckesson,* 922 F.3d 604 (5th Cir. 2019), a second one on rehearing, *Doe v. Mckesson,* 935 F.3d 253 (5th Cir. 2019), and a final one issued with a dissenting opinion, the U.S. Court of Appeals for the Fifth Circuit reversed only the dismissal of Mckesson, holding that he could be liable in negligence because when he allegedly led

protesters into the street, a criminal act in Louisiana, it was "patently foreseeable" that police would respond "by clearing the highway and making arrests," a development that in turn carried a "foreseeable risk" that someone would respond violently, *Doe v. Mckesson,* 945 F.3d 818, 827 (5th Cir. 2019). For this reason, the Fifth Circuit opined that Plaintiff had plausibly alleged that Mckesson "failed to exercise reasonable care in conducting his demonstration" and that this breach was a "cause-in-fact of Plaintiffs injury." *Id.* Notably, Mckesson has repeatedly denied that he organized the Baton Rouge protest or led any protesters there. *(E.g.,* Doc. 109-1 ¶ 1).

The U.S. Supreme Court vacated the Fifth Circuit's decision and remanded so that the Fifth Circuit could certify questions of law to the Louisiana Supreme Court including, among others, "whether Mckesson could have breached a duty of care in organizing and leading the protest and ... whether [Plaintiff] has alleged a particular risk within the scope of protection afforded by the duty, provided one exists." *Mckesson v. Doe,* 592 U.S. 1, 5 (2020). The Louisiana Supreme Court accepted certification and issued an opinion answering that a protest leader could be sued for negligence "under the facts alleged in the complaint." *Doe v. Mckesson,* 2021-00929 (La. 3/25/22), 339 So. 3d 524, 526.

Following this, the Fifth Circuit issued a new decision permitting Plaintiffs negligent protest claims against Defendant. *See Doe v. Mckesson,* 71 F.4th 278, 286 (5th Cir. 2023), *cert. denied, Mckesson v. Doe,* 601 U.S.__, 3 (2024). On remand, Plaintiff filed an amended complaint naming only Mckesson as Defendant, (Doc. 101), and in February 2024, Defendant

filed a Motion for Summary Judgment, (Doc. 109). Plaintiff opposed the Motion. (Doc. 117). Before the Court could rule, Defendant sought and was granted a stay pending the resolution of his petition for certiorari to the Supreme Court appealing the Fifth Circuit's 2023 decision. (Doc. 123). The petition was denied on April 17, with Justice Sotomayor dissenting. *Mckesson,* 601

U.S. at 1. (Doc. 125). For the reasons that follow, the stay will be lifted, and Defendant's Motion for Summary Judgment will be granted.

B. Summary Judgment Evidence

The facts set forth below are drawn from the parties' competing statements of material fact, and the competent, relevant, summary judgment evidence submitted in support of these pleadings.[1]

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[1] Plaintiff submitted 38 exhibits in support of his opposition to Defendant's Motion and did not disclose a single one to Defendant in discovery. In addition to this apparent and unexcused violation of numerous discovery rules in the Federal Rules of Civil Procedure, each possibly subject to sanctions, see Rule 37, Plaintiffs submission suffers from significant admissibility issues.

A party can only dispute summary judgment with evidence that "can be presented in admissible form at trial." *Patel v. Tex. Tech Univ.,* 941 F.3d 743, 746 (5th Cir. 2019). Plaintiffs problematic exhibits include, among others, dozens of photographs taken by unidentified individuals with no suggestion that Plaintiff would be able to successfully authenticate the photos at trial; newspaper articles, internet posts, and a Wikipedia article, all of which constitute inadmissible hearsay, *see Roberts v. City of Shreveport,* 397 F.3d 287, 295 (5th Cir. 2005); a declaration by a retired Baton Rouge Police Department Officer that does not mention Defendant; and four videos, including a video filmed by an unidentified individual that does not depict Mckesson, an

On July 9, 2016, Defendant and hundreds of other individuals attended a protest in Baton Rouge, Louisiana, in the aftermath of the death of Alton Sterling.[2] Officer John Ford claims that he was injured during that protest by an unknown assailant who hit him in the face with a piece of concrete. (Doc. 101 ¶ 42; Doc. 117-2 at 54:1-4).

According to Defendant, there is "no evidence that [Defendant] organized the protest held in Baton Rouge, Louisiana on July 9, 2016." (Doc. 109-1 ¶ 1). Plaintiff denies this, citing to a section of his brief in opposition to summary judgment. (Doc. 117-1 ¶ 1 (citing to Doc. 117 at 7-9)). That section, entitled "Mckesson organized and led the protest," references a "tweet of the location and time of the protest" that Defendant acknowledged "re-tweet[ing]." *(Id.* at 7,

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interview of Mckesson on CNN that does not specifically mention the Baton Rouge protest, and a video of a completely different protest in Dallas, Texas.

Plaintiffs submission evinces a flagrant unwillingness to abide by the Federal Rules and the Court's Local Rule 56. Most of Plaintiffs exhibits, even if ultimately deemed admissible, are irrelevant to the issues raised in Defendant's Motion. Despite these errors, the Court will not allow counsel's shortcomings to short-circuit its adjudicatory role, and this case, now seven years old, demands resolution. Accordingly, the Court has conducted an independent review of the summary judgment evidence and sets forth the *relevant* evidence in this Order. *E.g., Berry v. Williams,* No. CV 20-599-SDD-RLB, 2022 WL 2073079, at *5 (M.D. La. May 23, 2022) (Bourgeois, M.J.) (exercising discretion to review plaintiffs evidence despite plaintiffs failure to conform his summary judgment opposition to Local Rule 56), *adopted,* 2022 WL 2070884 (M.D. La. June 8, 2022) (Dick, C.J.).

[2] Sterling, an African American man, was shot and killed during an encounter with Baton Rouge police officers on July 5, 2016.

9).[3] The section also cites deposition testimony about the organizing of the protest, in which Defendant said that he did not know the organizers personally, and only met them on the night of the protest. *(Id.* at 9 (citing Doc. 117-3 at 16)).

As for Plaintiffs own recollection of the protest, he testified that he did not "hear" Defendant giving any orders during the protest, although he heard Defendant "[tell protesters] to come out into the road." (Doc. 117-2 at 96:10-14, 97:13-14). Finally, Plaintiff submitted a video filmed in part by Defendant during the protest. (Doc. 117 (Manual Attachment X), *hereinafter* "Livestream Video"). In the five minutes of the video before Defendant's arrest, Defendant in no way blocks traffic, engages in violence, or gives orders to anyone. *(Id.).* Indeed, Defendant appears to be walking in the middle of the protest rather than at the head of it. *(Id.).* Based on the competent summary judgment evidence, and in spite of Plaintiffs claims to the contrary, it is apparent that Defendant did not organize or lead the protest. Nor will a single retweet-the only connection between Defendant and the organization and leadership of the protest-give rise to the type of liability contemplated by Plaintiff here.

Next, according to Defendant, he "did not engage in any acts of violence at the protest." (Doc. 109-1 ¶ 2). Plaintiff attempts to rebut this, responding that Defendant "likely threw his water bottle at police,"

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[3] The "Retweet" feature of X, formerly known as Twitter, allows a user to quickly share another user's post. The content looks the same as the initial tweet but will be distinguished by the Retweet icon and the phrase "[Username] Retweeted" at the top of the post to indicate that the post is a Retweet.

(Doc. 117-1 ¶ 2), and citing to briefing in which Plaintiff argues that because police officers and Plaintiff saw Defendant retrieve a bottle of water, "[o]ne may infer that [Defendant] likely threw his bottle of water at police," (Doc. 117 at 18). Plaintiff urges this absurdly speculative inferential leap despite Plaintiffs own testimony that "[he] never saw [Defendant] throw a water bottle" and nobody "told [him]" Defendant had done so. (Doc. 111-1 at 11:3-9). Numerous run-of-the-mill scenarios come to mind well before a conclusion that Defendant threw his water: Defendant could have given the bottle to another person, or put it in a pocket, or thrown it away in a trash can after drinking it. Put simply, Plaintiffs "evidence" on this issue is not evidence at all, but idle speculation, and the Court has repeatedly warned that "summary judgment is about evidence, and that a party that fails to direct the Court's attention to any evidence supporting his claims cannot carry his burden of showing a genuine, material dispute." *Johnson v. Cooper T. Smith Stevedoring* Co., *Inc.,* 610 F. Supp. 3d 867, 877 (M.D. La. 2022), *aff'd,* 74 F.4th 268 (5th Cir. 2023). Lacking any evidence whatsoever for his claim, Plaintiff asks the Court to make an outlandish inference regarding Defendant's behavior and accept this inference as fact for purposes of summary judgment. The Court will do no such thing. *See Houston v. Texas Dep't of Agric.,* 17 F.4th 576, 582 (5th Cir. 2021) ("Summary judgment cannot be defeated through conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation." (quotations and alterations omitted)). Nothing produced by Plaintiff shows that Defendant engaged in any acts of violence at the protest.

Finally, Defendant states that he "did not direct anyone to commit acts of violence at the protest." (Doc. 109-1 ¶ 3). Plaintiff attempts to rebut this as well, testifying that Defendant "led the protestors to block the public highway." (Doc. 117-1 ¶ 3). Notwithstanding the failure of Plaintiff to respond to Defendant's undisputed assertion, Plaintiffs response does raise a dispute of sorts: Plaintiff testified that Defendant "led [protesters] a couple of times out into the road." (Doc. 117-2 at 88:15-16). Additionally, after first admitting that he "didn't hear" Defendant give any orders personally, *(id.* at 96:6-14), Plaintiff later claimed that he "personally heard" Defendant tell people to come into the road. *(Id.* at 98:2). As the Court explains below, however, while this may be a disputed issue of fact, it is not material for summary judgment purposes. In other words, that Defendant may have encouraged some protesters into the road at some point during the protest is not sufficient to hold him liable in negligence for Plaintiffs injuries.

II. LAW AND ANALYSIS

a. Standard

The summary judgment standard is well-set: to prevail, Defendant must show that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In making this assessment, the Court must view all evidence and make all reasonable inferences in the light most favorable to Plaintiff-the non-moving party. *Owens v. Circassia Pharms.,* Inc., 33 F.4th 814, 824 (5th Cir. 2022). Even so, under the Federal and Local Civil Rules, Plaintiff must counter with evidence to support his claims: "A non-movant

will not avoid summary judgment by presenting speculation, improbable inferences, or unsubstantiated assertions." *Jones v. United States,* 936 F.3d 318, 321 (5th Cir. 2019) (quotation marks omitted); *see also* M.D. La. Local Rule 56. To the point, summary judgment is required if Plaintiff fails to "produce any summary judgment evidence on an essential element of [his] claim." *Geisennan v. MacDonald,* 893 F.2d 787, 793 (5th Cir. 1990).

b. Discussion

i. Plaintiffs claim fails under Louisiana law

The origin of Plaintiffs negligence claim is Louisiana Civil Code article 2315.[4] That article provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana has adopted a "duty-risk" approach to negligence. Under that approach, a plaintiff must prove five elements: "(1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached." *Doe v. Mckesson,* 945 F.3d 818, 826 (5th Cir. 2019) (collecting Louisiana authority).

Here, there is no dispute that Plaintiff suffered an injury. As for the second element, the Fifth Cir-

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[4] When a federal court is sitting in diversity, as the Court is here, it is "obligated to apply the substantive law of the forum state." *Chevron Granite Co., L.L.C. v. Jacobs Field Servs. N. Am., Inc.,* 951 F.3d 219, 225 (5th Cir. 2020) (quotations omitted).

cuit has described the duty at issue as "a duty not to negligently precipitate the crime of a third party." *Mckesson,* 945 F.3d at 827. The Fifth Circuit held that Defendant breached that duty by allegedly leading and organizing the protest in a negligent way. *Mckesson,* 71 F.4th at 286. As for the cause-in-fact requirement, the Fifth Circuit explained that "[it]t is not enough that [Plaintiff] show that Mckesson breached his duty of care-he must also prove that Mckesson's actions were a necessary antecedent to [Plaintiffs] injuries." *Id.* at 292. This "tall task ... will only be met in the exceptional cases where ...the allegations support the inference that the leader's specific actions caused the plaintiffs injuries." *Id.* Nevertheless, the Fifth Circuit opined that Plaintiffs complaint plausibly alleged that "by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the 'but for' causes of Officer Doe's injuries." *Id.* at 289 (quotations omitted). As for the fifth element, according to the Fifth Circuit, "the risk of harm to [Plaintiff was] plainly within the scope of protection afforded by the duty owed by [Defendant] here." *Id.* Again, however, the Fifth Circuit's numerous decisions in this case were issued at the motion-to-dismiss stage, when Plaintiffs well-pleaded allegations were accepted as true.

Now, at summary judgment, and despite the benefits of open and extensive discovery, Plaintiff has been unable to substantiate his claims with competent evidence.

With respect to duty-the second element of a Louisiana negligence claim-there is no evidence that Defendant "arranged for the protesters to meet in

front of the ... police station, [and] block entry to the station and access to the adjacent streets." (Doc. 101 ¶ 23). There is no evidence that Defendant was "directing the protesters" "at all times." (Id.). There is no evidence that Defendant "planned" the protest. *(Id.* ¶ 28). There is no evidence that Defendant "organized" or "staged" the protest. *(Id.* ¶¶ 29, 30). There is no evidence that Defendant "was in charge of the protests" or that "he was seen and heard giving orders throughout the day and night of the protests." *(Id.* ¶ 33). There is no evidence that Defendant "incited" violence or "criminal conduct" during the protests. *(Id.* ¶¶ 37, 48). There is no evidence that Defendant "ratified all action taken during" the protest. *(Id.* ¶ 43). In practically every way, Plaintiffs evidence has fallen short of his allegations. Because of this, and because Defendant cannot be liable for the organization and leadership of a protest he did not organize or lead, the Court finds that Defendant owed no duty to Plaintiff.

Plaintiffs claim also fails to establish cause-in-fact and breach. As described above, there is simply no evidence to support Plaintiffs core claims. Instead, all that is offered is Plaintiffs own self-serving, uncorroborated, and inconsistent testimony that Defendant led individuals onto Airline Highway. *(See* Doc. 117-2 at 88:15-16). This will not suffice for two reasons.

First, the Court is not required to accept as true a nonmovant's conclusory allegations, speculation, or unsubstantiated assertions of fact that are either entirely unsupported by the summary judgment record, or are supported by a mere scintilla of evidence. *Chaney v. Dreyfus Serv. Corp.,* 595 F.3d 219, 229 (5th

Cir. 2010) (citing *Reaves Broherage Co. v. Sunbelt Fruit & Vegetable Co.,* 336 F.3d 410, 413 (5th Cir. 2003); *see Germain v. US Banh Nat'lAss'n as Tr. for Morgan Stanley Mortg. Loan Tr. 2006-7,* 920 F.3d 269, 272 (5th Cir. 2019) ("Conclusional allegations, unsubstantiated assertions, and a mere 'scintilla' of evidence are insufficient to defeat summary judgment."); *Koerner v. CMR Constr. & Roofing, L.L.C.,* 910 F.3d 221, 227 (5th Cir. 2018) ("[S]elf-serving allegations are not the type of significant probative evidence required to defeat summary judgment ...."(quotation omitted)); *c.f Scott v. Harris,* 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Second, and more importantly, Plaintiff cannot establish that merely leading some individuals onto the road at some point during a protest could cause an unidentified person to hit Plaintiff in the face with concrete at some other time. The Fifth Circuit's theory of liability was premised on Mckesson's alleged leadership of the protest: if Mckesson had not negligently led the protest, Plaintiff would never have been injured. Now, with Plaintiffs original allegations regarding Mckesson's "leadership" reduced to a shred by discovery, the Court simply will not extend liability to Mckesson for the minor, disputed role that he played. Doing so would represent a major expansion of tort liability unsupported by precedent and would dramatically increase the liability faced by all protest participants-not just protest

leaders-in protests across the Circuit. This in turn would impermissibly chill speech and restrict the right to protest. *See New Yori?, Tim.es Co. v. Sullivan,* 376 U.S. 254, 278 (1964) (limiting defamation liability for critics of public figures because under standard defamation, "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive"); *Countennan v. Colorado,* 600 U.S. 66, 76, 143 S. Ct. 2106, 2115-16 (2023) (explaining that potential civil liability is frequently restricted when broader liability could have a chilling effect on speech; listing cases).

The Fifth Circuit itself acknowledged that the act of blocking a road on its own would not suffice to establish liability here. Rather, directing protesters to obstruct the road would be *"evidence* that [Defendant] breached his duty," *Mckesson,* 71 F.4th at 298, but it would not be "[Plaintiff]'s only evidence that [Defendant] breached his duty." *Id.* at n.10. According to the Fifth Circuit, additional evidence that would be necessary to establish breach included evidence that:

> [Defendant] organized the protest to begin in front of the Baton Rouge police station; that [Defendant] did nothing to prevent the demonstrators from looting the grocery store and throwing water bottles at the police, despite [Defendant] exercising some amount of direction and control over the protest; and that [Defendant] had participated in similar protests across the country, which had also resulted in violence to others and damage to property.

Id. Although Defendant may have participated in similar protests in other places, none of the specific allegations regarding his role in *this* protest are supported by the evidence. In other words, Plaintiffs case for causation rests solely on Defendant's *possible* presence at other protests and his *possible* direction of some protestors into the road. The Court will not impose liability on a protest participant for the actions of an unidentified individual under these circumstances. *See Claiborne,* 458 U.S. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."). Again, the "tall task [of establishing causation] ... will only be met in the exceptional cases where ... the allegations support the inference that the leader's specific actions caused the plaintiffs injuries." *Mckesson,* 71 F.4th at 292. Nothing could be further from the evidence here. For these reasons, Plaintiffs claim fails on causation.

ii. Plaintiffs claim fails under the First Amendment

Less than two weeks after the Fifth Circuit issued its 2023 opinion in this case, the Supreme Court decided *Countennan v. Colorado,* 600 U.S. 66 (2023). **In** *Counterman,* a criminal case in which the Court decided the *,nens rea* necessary for the criminal charge of making true threats of violence, the Court made clear that the First Amendment bars the use of "an objective standard" like negligence for punishing speech. *Id.* at 78, 79 n.5. The Court explained that "the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were intended (not just likely) to produce imminent disorder." *Id.* at 77 (citing *Claiborne,* 458 U.S. at 927-

929) (quotations omitted)). Indeed, the Court has held that a subjective standard is required by the First Amendment in cases involving defamation, *see New Yorh Tinies Co.,* 376 U.S. at 280, incitement, *see Hess v. Indiana,* 414 U.S. 105, 109 (1973) *(per curiam),* and obscenity, *see Hamling v. United States,* 418 U.S. 87, 122-123 (1974). Such careful treading "relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries." *Counterman,* 600 U.S. at 75. "And an important tool to prevent that outcome" is to condition liability for speech on a showing of a culpable mental state. *Id.* (quoting *Speiser v. Randall,* 357 U.S. 513, 526 (1958)).

"Although the Fifth Circuit did not have the benefit of [the Supreme] Court's… decision in *Counterman* when it issued its opinion," this Court does. *Mckesson,* 601 U.S. at 3 (Sotomayor, J., dissenting from denial of cert.). As is clear from *Counterman,* the "negligent protest theory of a leader's liability for the violent act of a rogue assailant ... clashes head-on with constitutional fundamentals." *Mckesson,* 71 F.4th at 286, 313 (quotations omitted) (Willett, J., concurring in part and dissenting in part). Under *Counterman,* Defendant cannot be held liable in negligence for actions taken while exercising his First Amendment freedoms. *Counterman,* 600 U.S. at 78, 79 n.5; *c.f United States v. Ehmer,* 87 F.4th 1073, 1121 (9th Cir. 2023) (describing subjective *mens rea* as constitutional mm1mum under *Counterman). But see Mckesson,* 71 F.4th at 297 (holding, *pre-Counterman,* that objective liability is sufficient under the First Amendment). For this reason, independently, Plaintiffs claim fails.

II. CONCLUSION

Accordingly,

IT IS ORDERED that the Order (Doc. 124) staying and administratively closing this case, originally entered on March 28, 2024, be and is hereby **VACATED.**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. 120) be and is hereby **GRANTED.** Plaintiffs claim be and is hereby **DISMISSED WITH PREJUDICE.** Judgment will issue separately.

Baton Rouge, Louisiana, this 10th day of July, 2024.

/s/ Judge Brian A. Jackson
United States District Court
Middle District of Louisiana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN FORD, *former Officer John Doe Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-742

No. 24-30494

ON PETITION FOR REHEARING EN BANC

July 30, 2026

Before KING, JONES, and OLDHAM, *Circuit Judges*.

Per Curiam:

Treating the petition for rehearing en banc as a

petition for panel rehearing (5th Cir. R.40 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (Fed. R. App. P.40 and 5th Cir. R.40).

In the en banc poll, six judges voted in favor of rehearing, STEWART, GRAVES, HIGGINSON, WILLETT, DOUGLAS, AND RAMIREZ, *Circuit Judges*, and ten voted against rehearing ELROD, *CHIEF JUDGE*; JONES, SMITH, RICHMAN, SOUTHWICK, HAYNES, HO, DUNCAN, OLDHAM, AND WILSON, *Circuit Judges*.*

* Judge Kurt D. Engelhardt, did not participate in the consideration of the rehearing en banc.

JAMES C. HO, *Circuit Judge*, concurring in the denial of rehearing en banc:

The dissent calls for principled enforcement of the First Amendment: "Constitutional rules cannot turn on the cause, the crowd, or the speaker." *Post*, at _ (Willett, J., dissenting from the denial of rehearing en banc). "The First Amendment must protect advocacy without regard to whether the cause is popular or unpopular, favored or disfavored." *Id.*

I certainly agree: "Popular speech doesn't need protection. It's only when speech is unpopular that you need the First Amendment." *Hershey v. Bossier City*, 165 F.4th 292, 292 (5th Cir. 2025) (Ho, J., concurring in the denial of rehearing en banc). "The First Amendment doesn't mean much if you're only allowed to express views favored by the government." *Mayfield v. Butler Snow*, 78 F.4th 796, 798 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc). *See also Villarreal v. City of Laredo*, 94 F.4th 374, 409 (5th Cir. 2024) (Ho, J., dissenting) (same).

So our rulings must be scrupulously viewpoint neutral. We must apply the same standards, regardless of whether the views at issue are favored or disfavored by judges, cultural elites, or society at large. *See*, *e.g.*, *Oliver v. Arnold*, 19 F.4th 843, 844–45 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc) (urging consistent enforcement of the First Amendment regardless of viewpoint); *Gonzalez v. Trevino*, 60 F.4th 906, 911–12 (5th Cir. 2023) (Ho, J., dissenting from the denial of rehearing en banc) (expressing concerns about inconsistent enforcement of the First Amendment); *Perez v. City of San Anto-*

nio, 168 F.4th 345, 346 (5th Cir. 2026) (Ho, J., dissenting from the denial of rehearing en banc) (noting that physical location can play a critical role in the exercise of religion, whether it's the Lipan-Apache or evangelical Christianity) (citing *Siders v. City of Brandon*, 130 F.4th 188 (5th Cir. 2025)); *Hershey*, 165 F.4th at 301 (Ho, J., concurring in the denial of rehearing en banc) (same).

Where I ultimately part company with my distinguished dissenting colleague is that, unlike him, I see no violation of viewpoint neutrality in this case—only the dutiful application of a simple principle: "The First Amendment protects protest, not trespass." *Doe v. Mckesson*, 947 F.3d 874, 878 (5th Cir. 2020) (Ho, J., concurring in the denial of rehearing en banc). This principle "applies with equal force to pro-police protestors" (or to, say, "pro-life and pro-choice protestors alike") "who unlawfully obstruct a public highway." *Id.* at 877. And Plaintiff has presented ample evidence for a jury to put this case in the category of trespass, not protest—as our court has already detailed on more than one occasion. *See*, *e.g.*, *Doe v. Mckesson*, 71 F.4th 278, 281–82, 283, 288–89 (5th Cir. 2023); *Ford v. Mckesson*, 171 F.4th 332, 336, 339–41 (5th Cir. 2026).

I concur in the denial of rehearing en banc.

DON R. WILLETT, *Circuit Judge*, joined by STEWART, GRAVES*, HIGGINSON, DOUGLAS, AND RAMIREZ, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The Supreme Court has already called the constitutional issue presented here "undeniably important":[1] whether the First Amendment tolerates a negligent-protest theory that substitutes the mere foreseeability of a stranger's violence for intent. After a decade of litigation, full discovery, and another appeal, every threshold obstacle is gone. At last, the question is cleanly presented.

Baton Rouge Police Officer John Ford was grievously injured when someone hurled a rock or piece of concrete into his face during a political protest. The assailant has never been identified. Neither has the assailant's affiliation, motive, or connection—if any—to DeRay Mckesson. Yet today the court sends Mckesson to trial—not because evidence connects him to the assault, but because he was a prominent activist, allegedly helped lead demonstrators into a roadway, and could have foreseen that disorder might follow.

The First Amendment does not permit prominence to substitute for proof. Under *NAACP v. Claiborne Hardware Co.*, liability for another person's violence demands proof that the defendant authorized, directed, or ratified the specific tortious activity[2]—or that his speech was directed to inciting or

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* Judge Graves joins all but Part V.C.

[1] *Mckesson v. Doe*, 592 U.S. 1, 4 (2020) (per curiam).

[2] 458 U.S. 886, 927–29 (1982).

producing imminent lawless action and likely to do so under the demanding rule of *Brandenburg v. Ohio*.[3] And *Counterman v. Colorado* confirms why ordinary negligence cannot do that work when legal sanctions burden political advocacy at the First Amendment's core.[4] Negligence supplies neither personal responsibility nor the culpable mental state the Constitution demands.

The panel reaches the opposite result through four substitutions. An alleged direction to obstruct traffic becomes a direction to assault an officer; prominence in a national movement becomes command of a particular crowd; proximity becomes causation; and foreseeability becomes intent. Those substitutions evade three constitutional requirements: *Claiborne* demands personal responsibility and direct, proximate causation; *Counterman* rejects objective negligence and requires a culpable mental state tied to the conduct for which liability is imposed; and *Brandenburg* requires intent to produce imminent lawless action and a likelihood that the action will occur. The panel supplies none. Together, its substitutions erase the constitutional boundary between advocacy and violence.

Strip away the euphemisms, and the rule is stark: a freestanding tort of negligent protest—liability imposed on Mckesson not for causing Ford's injury, but for failing to foresee that someone else might cause it.

Nor will the rule remain confined to Mckesson,

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[3] 395 U.S. 444, 447 (1969) (per curiam).

[4] 600 U.S. 66, 81–82 (2023).

Black Lives Matter, or protests against police conduct. It will govern every cause and every viewpoint. The most visible speaker may become the ready-made defendant whenever an unidentified person in the crowd—even an interloper or provocateur—turns violent. The predictable consequence is self-censorship. Citizens will think twice before organizing, promoting, attending, or lending their names to public causes. Civil damages can chill political expression as surely as criminal punishment—and often more effectively.[5]

Ford's injuries are abhorrent. He deserves a remedy from whoever is legally responsible for them. But grievous injury does not relax the First Amendment's demand for proof. The Constitution does not let courts solve the mystery of an unknown assailant by turning the most recognizable speaker into a substitute defendant.

Those inclined to applaud today's result should consider how the same rule will operate in tomorrow's case. Today's defendant is associated with Black Lives Matter. Tomorrow's may be a gun-rights advocate, a pro-life leader, a pastor protesting a government mandate, or parents addressing a school-board meeting. Constitutional rules cannot turn on the cause, the crowd, or the speaker. The First Amendment must protect advocacy without regard to whether the cause is popular or unpopular, favored or disfavored. Otherwise, constitutional guarantees become fair-weather guarantees.

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[5] *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

The en banc court should have stopped this doctrinal erasure. It did not. Now the Supreme Court should. I respectfully dissent.

I. Discovery Disproved the Pleading-Stage Theory

The case first reached our court at the pleading stage. We then accepted the complaint's allegations that Mckesson had organized the Baton Rouge demonstration, "regularly gave orders" to protesters, "personally assumed control" of their movements, and deliberately led them onto a highway.[6] The Supreme Court vacated that decision because our interpretation of Louisiana tort law was "too uncertain a premise" for deciding the First Amendment question.[7] After the Louisiana Supreme Court answered certified questions based on Ford's allegations, a divided panel reinstated the negligence claim and again rejected Mckesson's constitutional defense. [8]

The case is different now in the way that matters most: discovery tested the allegations, and the resulting record does not show that Mckesson planned the protest, controlled its participants, or had any relationship with the person who struck Ford, much less that he directed the assault on Ford.

Local community members organized the July 2016 demonstration and invited Mckesson to attend. He arrived the day before and retweeted details of an

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[6] *Doe v. Mckesson*, 71 F.4th 278, 288–92 (5th Cir. 2023) (*Mckesson I*).

[7] *Mckesson*, 592 U.S. at 4–5.

[8] *Doe v. McKesson*, 339 So. 3d 524, 530–36 (La. 2022); *Mckesson* I, 71 F.4th at 286–300.

event already circulating online. On the day of the protest, he walked with the crowd and recorded events on his phone. The demonstration began peacefully. Later, some participants looted a convenience store and threw water bottles at police. There is no evidence that Mckesson participated in or encouraged those acts.

As evening approached, word spread that demonstrators should move toward the highway. Some entered the roadway, and officers began clearing the street and making arrests. Mckesson continued filming until his own arrest. While Ford was arresting another person, someone in the crowd threw the object that struck him. The assailant was never identified, and the record never established whether that person was a protester, a bystander, an interloper, a provocateur, or someone else entirely.

The district court granted summary judgment. It found no competent evidence that Mckesson organized or led the protest in the manner previously alleged, no evidence that his conduct caused Ford's injury, and an independent First Amendment bar under *Counterman*.[9]

The panel reversed over Judge King's searing dissent. It opened by declaring that "[e]ight years of pretrial litigation are enough" and that it was "time for Officer Ford to have a jury assess his claim."[10] But Rule 56 contains no litigation-fatigue exception.

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[9] *Ford v. Mckesson*, 739 F. Supp. 3d 344, 350–53 (M.D. La. 2024).

[10] *Ford v. Mckesson*, 171 F.4th 332, 335–36 (5th Cir. 2026) (*Mckesson II*).

The age of a case cannot manufacture a genuine dispute of material fact.

More fundamentally, the panel carried pleading-stage assumptions into the evidentiary record. It declared that our court and the Louisiana Supreme Court had "already held" the facts sufficient for a jury to find causation.[11] Neither court had done so. The Louisiana Supreme Court repeatedly emphasized that it was answering the certified question on "the pleadings alone," and the prior Fifth Circuit panel likewise relied on "well-pleaded allegations" that Ford still had to prove.[12] The complaint supplied a theory; discovery had to supply proof. It did not.[13]

A second development matters too. Eleven days after our 2023 decision, the Supreme Court decided *Counterman*. When the Court later denied certiorari, Justice Sotomayor specifically observed that our court had lacked the benefit of *Counterman* and expected the lower courts to give that decision "full and fair consideration" in later proceedings.[14] The district court did so. The panel answered that *Counterman*

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[11] *Id.* at 341.

[12] *McKesson*, 339 So. 3d at 531, 544 n.8 (Crain, J., concurring in part); *Mckesson I*, 71 F.4th at 292.

[13] Ford invokes law of the case, but the earlier decisions did not decide whether the record developed in discovery would establish leadership and causation. The doctrine applies only to issues actually decided, not to questions that had not—and could not yet have—been resolved. *See Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir.1978), *overruled on other grounds by Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983).

[14] *Mckesson v. Doe*, 144 S. Ct. 913, 914 (2024) (Sotomayor, J., statement respecting the denial of certiorari).

"changes nothing."[15]

Respectfully, that answer cannot be squared with *Claiborne*, *Counterman*, or *Brandenburg*. The case therefore arrives in a materially different posture from the one before us in 2023: the allegations have been tested, the evidentiary record is closed, and *Counterman* is now on the books. Two independent constitutional defects bar trial.

II. *Claiborne* Requires Personal Responsibility for the Specific Violence

Foreseeability Is Not Authorization, Direction, or Ratification

Claiborne arose from a civil-damages judgment imposed after a political boycott that included both protected advocacy and violence. The Supreme Court reversed and identified three possible bases for liability: (1) unlawful conduct the defendant personally committed; (2) another person's unlawful conduct, but only upon proof that the defendant "authorized, directed, or ratified specific tortious activity"; or (3) speech satisfying the constitutional test for incitement.[16]

Those categories enforce a foundational First Amendment principle: association may be collective, but culpability is personal. Membership in a movement, participation in a demonstration, even leadership of a political campaign or rally does not make a person answerable for every unlawful act committed by someone associated with the cause. "Civil liability

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[15] *Mckesson II*, 171 F.4th at 343.

[16] 458 U.S. at 916–18, 927–29.

may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."[17]

Ford does not contend that Mckesson threw the rock. No evidence shows that he asked anyone to throw objects, approved the assault, ratified it afterward, or even knew the assailant. The negligence theory instead treats Mckesson's alleged direction of demonstrators into a roadway as creating a foreseeable risk of violence.

That theory changes the subject—and with it, the constitutional inquiry. The "specific tortious activity" for which Ford seeks damages is the assault that shattered his jaw—not the obstruction of traffic. *Claiborne*'s three verbs—authorized, directed, ratified—require a personal nexus between the defendant and the violence of others.[18] They are not satisfied merely because Mckesson allegedly directed demonstrators into the road. Intent to commit one unlawful act does not establish authorization of another person's violent felony. I previously called this maneuver by its true name: a "negligent protest" theory that lets a stranger's foreseeable violence stand in for Mckesson's own wrongdoing.[19]

Our 2023 decision purported to require a "sufficiently close relationship" between the leader's conduct and the third party's tort, yet deemed that requirement satisfied whenever a leader negligently

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[17] *Id.* at 918–20.

[18] *Mckesson I*, 71 F.4th at 308–10 (Willett, J., concurring in part and dissenting in part).

[19] *See id.* at 302, 313.

created conditions in which injury was likely.[20] That formulation supplies no meaningful boundary. Large demonstrations, marches, labor actions, sporting celebrations, and political rallies all carry some foreseeable risk that an attendee will act unlawfully. If furnishing the occasion for possible violence is enough, *Claiborne*'s personal-responsibility rule disappears precisely when it is needed most.

Claiborne itself exposes the gulf. Charles Evers unquestionably led the boycott. His speeches included threatening language, and violence did occur. Even so, the Court refused to hold him liable without proof that he had authorized, directed, or ratified the particular violence at issue.[21] Mckesson's connection to the Baton Rouge assault is far weaker: the assailant is unknown, and no evidence ties that person's act to anything Mckesson said or did.

Proximity Is Not Causation

Claiborne also requires "precision of regulation" when liability burdens protected political activity.[22] Damages must be confined to injuries "directly and proximately caused by wrongful conduct chargeable to the defendants."[23] That requirement is constitutional, not ornamental. Without it, liability migrates from unlawful conduct to protected association and advocacy.

The panel's causation analysis leans heavily on

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[20] *Id.* at 290, 298 (majority opinion).

[21] *Claiborne*, 458 U.S. at 902, 926–29.

[22] *Id.* at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[23] *Id.* at 916, 918.

decisions made before discovery. The Louisiana Supreme Court could not have found the evidence sufficient for a jury; it had no evidentiary record before it. Our 2023 panel likewise warned that Ford still had to prove causation and described that showing as a "tall task" likely to succeed only in exceptional cases.[24] This appeal is where that proof came due.

It never arrived. No one knows who threw the rock. The record does not show that the assailant attended the demonstration for its political purpose, heard Mckesson, followed him into the roadway, or acted in response to any instruction. Identity, affiliation, and motive all remain unknown.

The timing further weakens the asserted chain. Ford testified that objects had been thrown at police before Mckesson allegedly directed anyone into the road. He also described independent agitators urging people toward the roadway and testified that he was struck while arresting one of them—someone other than Mckesson.[25] On this record, the crowd's movement and violence had causes independent of Mckesson.

The asserted chain runs from an alleged direction to enter the street, through an already unruly crowd, a police response, the arrest of someone else, and finally an unknown assailant's independent decision to throw a rock. That is chronology, not causation—a series of increasingly remote contingencies. *Claiborne* requires direct and proximate causation.[26]

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[24] *Mckesson I*, 71 F.4th at 292, 299.

[25] *See id.* at 292 n.8; *Mckesson II*, 171 F.4th at 350–52 (King, J., dissenting).

[26] 458 U.S. at 916, 918.

The sequence supplies temporal and physical proximity, not the indispensable link between Mckesson and the assault.

The missing assailant is not an evidentiary gap at the margin. It is the void at the center of the case. The panel's assurance that its rule will rarely reach interlopers and counterprotesters assumes the very fact the record does not establish—that the person who injured Ford was a protester whose conduct Mckesson incited, organized, or directed.[27] The record supplies no basis for that assumption. That failure of proof is independently dispositive.

III. *Counterman* Forecloses Liability Based on Objective Negligence

Counterman Requires a Culpable Mental State Tied to the Assault

Counterman identifies a second constitutional defect: Ford's theory rests on objective negligence untethered to the assault. The panel dismisses *Counterman* as an inapposite criminal true-threat case. The Supreme Court's holding concerned true threats, but its reasoning speaks directly to the constitutional problem here.

Counterman rejected objective negligence for threatening speech and required at least subjective recklessness.[28] More important here, the Court distinguished incitement. Incitement decisions "demand more," the Court explained, because political advocacy lies "a hair's-breadth away" from punishable in-

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[27] *Mckesson II*, 171 F.4th at 341–42.

[28] 600 U.S. at 72, 79 & n.5.

citement.[29] Those cases require specific intent—purpose or knowledge—to prevent legal sanctions from bleeding into "dissenting political speech at the First Amendment's core."[30] The Court cited *Claiborne* as part of that line.

A negligence action arising from a protest against government conduct sits squarely within that concern. The panel's rule imposes liability without proof that Mckesson intended violence, knew that his own words or conduct would cause it, or consciously disregarded a substantial risk that they would do so. It asks only whether a reasonable person should have foreseen some confrontation at some point.

That is the very objective-negligence standard *Counterman* rejected, applied in a setting where the Court said the Constitution demands more protection, not less.[31] *Counterman* does not mechanically convert every First Amendment case into a true-threat prosecution. It does, however, foreclose the premise underlying our 2023 decision—that protest-related speech may support liability for another person's violence with no "intent condition."[32]

The panel's rule-of-orderliness analysis underscores why rehearing en banc was necessary.[33] A later panel may have considered itself bound. The en banc court was not. We had both the authority and the responsibility to reconcile circuit law with the

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[29] *Id.* at 81.

[30] *Id.* at 81–82 (discussing *Brandenburg*, *Hess*, and *Claiborne*).

[31] *Id.* at 81.

[32] *Mckesson I*, 71 F.4th at 297.

[33] *See Mckesson II*, 171 F.4th at 342–43.

Supreme Court's treatment of *Counterman* and incitement as intent-based doctrines.

Intent to Obstruct Traffic Is Not Intent to Cause the Assault

The panel says *Counterman* is satisfied because a jury could find that Mckesson intended "disorder" when he allegedly directed people into a public street.[34] The panel invokes the right *mens rea* but attaches it to the wrong act.

The required mental state must attach to the violence for which Ford seeks damages—a rock thrown into his face, not delayed traffic. Intent to obstruct traffic is not intent to shatter an officer's jaw. Proof that Mckesson intended civil disobedience does not show that he intended, knew of, or consciously disregarded a substantial risk of this particular assault by an unknown person. Otherwise, any intent to violate a minor law during a protest would expose the speaker to liability for every foreseeable crime that followed.

That inversion is impossible to reconcile with the Court's decisions in *Brandenburg* and *Hess v. Indiana*. Even express advocacy of force or lawbreaking remains protected unless it is directed to producing imminent lawless action and likely to do so.[35] Under the panel's foreseeability approach, nonviolent advocacy of a road obstruction receives *less* protection than explicit advocacy of violence: the former may

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[34] *Id.* at 343 (first quoting *Counterman*, 600 U.S. at 76; then quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

[35] *Brandenburg*, 395 U.S. at 447; *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam).

support damages for a stranger's assault on negligence alone, while the latter cannot be punished without specific intent, imminence, and likelihood. *Brandenburg* buried that bad-tendency rationale.[36] The panel exhumes it, rechristens it "foreseeable violence," and turns every speaker into the insurer of every stranger's crime. Tort law cannot accomplish what *Brandenburg* forbids.

Civil Damages Do Not Evade the First Amendment

The panel also emphasizes that *Counterman* involved a criminal conviction. But the First Amendment does not disappear when punishment arrives through a verdict form rather than an indictment. The constitutional *mens rea* principles on which *Counterman* relied cross the civil-criminal line. The Court drew from defamation, incitement, and obscenity—not to mention *Claiborne* itself, a civil-damages case.[37] *Garrison v. Louisiana* likewise explained that freedom of expression requires the same constitutional standard for civil and criminal remedies.[38]

The distinction is especially hollow when the constitutional concern is chilling protected speech. Civil liability can impose crushing financial consequences without the criminal law's heightened burden of proof and related safeguards. The Supreme

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[36] 395 U.S. at 447 (overruling *Whitney v. California*, which permitted punishment of advocacy based on its perceived tendency to produce violence); *id.* at 447 n.2 (explaining that *Yates v. United States* overturned convictions resting on "mere advocacy, unrelated to its tendency to produce forcible action").

[37] *Counterman*, 600 U.S. at 73, 76, 80–82.

[38] 379 U.S. 64, 74 (1964).

Court has long recognized that "[t]he fear of damage awards" may inhibit speech even more than criminal prosecution.[39]

Justice Barrett's *Counterman* dissent made the civil reach explicit: because the case concerned the scope of the First Amendment, not merely the construction of a criminal statute, its reasoning affects "the *civil* consequences" as well.[40] And when Justice Sotomayor addressed this very litigation after *Counterman*, she explained that the Court's decision bars objective negligence as a basis for punishing speech and treats *Claiborne* and the incitement cases as demanding intent.[41]

The panel devoted one paragraph to that intervening guidance—and gave it no effect. It then returned to a negligence regime that allows a jury to impose damages without finding any culpable mental state tied to the assault.

That is not "full and fair consideration" of *Counterman*.[42] It is acknowledgment without application.

IV. Prominence Is Not Proof of Control

The panel compounds the constitutional error with the evidence it uses to send the case to trial. The record may show that Mckesson was a nationally prominent activist. It does not show that he organized this protest, commanded this crowd, or caused

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[39] *N.Y. Times*, 376 U.S. at 277.

[40] *Counterman*, 600 U.S. at 119 (Barrett, J., dissenting).

[41] *Mckesson*, 144 S. Ct. at 914 (Sotomayor, J., statement respecting the denial of certiorari).

[42] *See id.*

this injury. The assailant is unknown. The activist is famous. The panel lets fame fill the evidentiary void.

Promotion Is Not Organization

The panel quotes Mckesson as saying he was "part of" a group of "incredible leaders who were planning things . . . associated . . . with the protest."[43] But the omitted testimony is the point. Mckesson explained that there was no formal "planning group"; he was describing a decentralized, community-led effort involving hundreds of people. The ellipses do not merely shorten the answer. They excise the qualification that defeats the inference of centralized command.

The rest of the record points in the same direction. Baton Rouge community leaders invited Mckesson to attend. Being invited suggests attendance, not control. Mckesson was a guest, not a host. His retweet merely amplified an event already announced; it did not organize the event or give him authority over it. Social media enables speakers to publicize events without planning or directing them. Treating that amplification as operational command converts ordinary participation in "the modern public square" into proof of control.[44]

The panel then reaches further afield—to Mckesson's national profile, his involvement in other protests, and his meetings with federal officials.[45] Those facts may show influence within a movement. They do not establish who planned this demonstra-

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[43] *Mckesson II*, 171 F.4th at 339.

[44] *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

[45] *Mckesson II*, 171 F.4th at 340.

tion, commanded this crowd, or caused this injury. The panel converts a political résumé into a chain of command—the very associative shortcut *Claiborne* forbids.[46]

Presence Is Not Command

Ford testified that the crowd followed Mckesson and that Mckesson appeared to be getting people ready to enter the highway. But Ford repeatedly acknowledged that the crowd was too loud for him to hear what Mckesson said and that he did not recall hand signals or gestures. Only later, while being questioned by his own counsel, did he recall an instruction to enter the road.

Even crediting that recollection, it proves at most a single instruction to enter the roadway during a moving demonstration. It does not establish the sweeping allegations that carried the case past dismissal: that Mckesson organized the event, regularly gave orders, personally controlled the protest's movements, and directed it at all times.[47]

The contemporaneous video is more telling. The panel reads it to show police cutting off the march, the crowd turning, and Mckesson at the front.[48] Judge King reviewed the same footage and explained that it shows no such sequence.[49] The crowd does not change direction on camera; police remain behind it; and Mckesson appears within the crowd, sometimes stopping or moving backward to film arrests. The

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[46] 458 U.S. at 918–19.

[47] *Mckesson I*, 71 F.4th at 288–92.

[48] *Mckesson II*, 171 F.4th at 341.

[49] *Id.* at 346–47 (King, J., dissenting).

video shows no order, no signal, no command.

When video evidence blatantly contradicts a witness's account, courts must view the facts as the recording depicts them.[50] The panel sees a commander. The video shows a man documenting arrests. Visibility in a crowd is not command of it.

Movement Leadership Is Not Control of This Crowd

The panel cites a television interview from more than a year before the Baton Rouge protest, characterizing Mckesson as supporting violent protests and refusing to condemn violence.[51] But as the record shows, the interview also contains statements favoring peaceful protest, and it concerned neither this demonstration nor the assault on Ford. Even general advocacy of violence would not support liability for specific violence that is remote in time and unconnected to the speech.[52] A year-old interview about other events does still less to prove that Mckesson commanded this crowd or caused this injury.

The panel next assigns similar weight to the word "leadership" in a class-action settlement filing.[53] The term appeared among qualities offered to show that several named plaintiffs would adequately represent a class under Rule 23. In context, it referred to Mckesson's national advocacy and commitment to the litigation—not operational control of the

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[50] *Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

[51] *Mckesson II*, 171 F.4th at 336, 340.

[52] *See Claiborne*, 458 U.S. at 928; *see also Mckesson I*, 71 F.4th at 291.

[53] *Mckesson II*, 171 F.4th at 340.

Baton Rouge march.[54] Leadership of a movement, adequacy as a class representative, and command of a particular crowd are distinct propositions. The panel treats them as interchangeable.

Most troubling, the panel treats Mckesson's political activity—his public profile, associations, prior protests, media appearances, and meetings with government officials—as evidence that he led this event and negligently caused a stranger's violence.[55] That method turns civic effectiveness into evidentiary exposure: the more prominent the advocate, the more readily prominence can be recast as control when disorder erupts nearby. Visibility becomes liability.

The First Amendment does not convert visibility into vicarious liability. *Claiborne* protected even the acknowledged leader of a campaign because the Constitution required evidence connecting him personally to the specific violence at issue. The panel sends Mckesson to trial on far less.

Once prominence may substitute for control, and foreseeability for intent, the rule cannot be confined to this case.

V. The Panel's Rule Has No Limiting Principle

The panel's rule is anything but narrow. The record confirms it. Liability may attach where the tortfeasor is unidentified; where no evidence connects

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[54] Memorandum in Support of Motion for Final Approval of Class Action Settlement at 15, *McKesson v. City of Baton Rouge*, No. 16-520-JWD-RLB, 2017 WL 11675692 (M.D. La. Nov. 16, 2017); *Mckesson II*, 171 F.4th at 351 (King, J., dissenting).

[55] *Mckesson II*, 171 F.4th at 340.

that person to the defendant; where the alleged direction concerned a different unlawful act; and where leadership is inferred largely from prominence, association, and public advocacy. A rule is not narrow merely because its limitless premises are recited one case at a time.

A. The Rule Creates a Civil Heckler's Veto

That rule creates a civil heckler's veto. If the assailant may have been a counterprotester, outsider, or unaffiliated agitator, then violence by an opponent can increase the organizer's exposure. The panel calls that concern unlikely because liability supposedly requires direction of the protester's actions.[56] But without proof that the assailant was a protester, the asserted safeguard is no safeguard at all. A provocateur need not silence the speaker; he need only make speaking ruinously expensive.

B. Police Reaction Becomes Evidence Against Police Critics

The panel also ties foreseeability to the prospect that police would respond to demonstrators in the roadway.[57] That creates a constitutional inversion: the more aggressively police respond to a protest against police, the greater the potential liability of the protest's most visible participant. Official reaction thus becomes evidence against official critics.[58]

History supplies a familiar illustration. In 1968,

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[56] *Id.* at 342.

[57] *Id.* at 341.

[58] *Id.* at 352 (King, J., dissenting) (calling the rule a "'heckler's veto' on steroids" because law enforcement's response determines liability exposure).

exactly one week before his assassination, Dr. Martin Luther King Jr. led a Memphis march supporting striking sanitation workers. Some participants broke windows; police intervened; and violence followed. Dr. King unquestionably led that march, and disorder at a large demonstration was foreseeable. Yet *Claiborne* would not have allowed an injured officer or shopkeeper to hold him personally liable without proof connecting him to the specific wrongful act.[59] The panel's negligence theory offers no principled reason why Dr. King would have fared differently—and thus no principled stopping point.

C. Constitutional Rules Do Not Keep Partisan Company

The next defendant may be a gun-rights advocate whose rally is disrupted by an armed provocateur, a pro-life leader whose march attracts a vandal, a pastor whose protest against a government mandate is infiltrated by an agitator, or parents whose school-board testimony is thrown into disorder by someone else. Today's result may seem compelling because the plaintiff is an injured officer. But constitutional protections cannot turn on the speaker, the cause, or the sympathies a particular case evokes. The First Amendment protects advocacy across the spectrum—popular and despised, orderly and unruly, left and right. The breadth of the panel's rule makes the constitutional danger substantial—and Supreme Court review unusually appropriate.

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[59] *Mckesson I*, 71 F.4th at 313 (Willett, J., concurring in part and dissenting in part).

VI. This Case Is Now a Clean Vehicle for Review

Every obstacle that complicated Supreme Court review in 2020 is now gone. The state-law uncertainty that prompted the Court's vacatur has been resolved. Discovery is complete. The pleading-stage assumptions have been tested. The district court entered final summary judgment. *Counterman* intervened, and the panel expressly held that it changes nothing. The en banc court has now declined to intervene.

The constitutional question is therefore squarely presented and unavoidable: may a political speaker be held liable under a negligence theory for an unidentified stranger's violence without proof that the speaker authorized, directed, ratified, or intentionally incited that violence? *Claiborne*, *Counterman*, and *Brandenburg* answer no. Our court now answers yes.

VII. The Supreme Court Should Restore the Line Between Advocacy and Violence

Officer Ford suffered a devastating injury in the line of duty. The person who struck him should answer. So should anyone who authorized, directed, ratified, or intentionally incited the attack. But the First Amendment does not permit liability to migrate to the most visible activist simply because the actual assailant cannot be found.

The panel replaces every constitutional safeguard with an evidentiary shortcut: negligence for personal culpability, generalized disorder for intent to produce imminent violence, proximity for causation, and political prominence for event-specific proof. *Claiborne* demands personal responsibility. *Coun-*

terman demands a culpable mental state. *Brandenburg* demands intent, imminence, and likelihood. The panel supplies none. Political advocacy may not be punished merely because a reasonable person should have foreseen someone else's crime.

The constitutional damage begins long before any jury deliberates. Citizens deciding whether to organize, publicize, attend, or lend their names to a demonstration must now weigh the risk of financial ruin for an unknown stranger's violence before exercising a First Amendment right. Mckesson has lived under that threat for more than a decade. When the price of advocacy may be financial ruin for a stranger's violence, silence is the predictable result—and the constitutional injury.

The Supreme Court called this issue "undeniably important" more than half a decade ago, when unsettled state law stood in the way.[60] That obstacle is gone. Discovery is complete. The record is closed. *Counterman* has intervened. And the panel has squarely held that it changes nothing. The conflict is direct, acknowledged, and outcome-determinative—not latent or academic. The panel has also resurrected the bad-tendency rationale that *Brandenburg* buried.

The Court should grant review and restore the constitutional line between advocacy and violence. Political speakers may be held to account for violence they commit, authorize, direct, ratify, or intentionally incite. But they may not be conscripted as insurers of a crowd—or as substitute defendants for an unknown assailant—simply because they were visible,

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[60] *Mckesson*, 592 U.S. at 4.

prominent, and nearest the microphone.

I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICER JOHN DOE, *Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-742

No. 17-30864

OPINION

June 16, 2023

Before JOLLY, ELROD, AND WILLETT, *Circuit Judges*.
JENNIFER WALKER ELROD, *Circuit Judge*:

This case returns to us after remand from the Supreme Court and certification to the Supreme

Court of Louisiana. The controversy concerns a Black Lives Matter protest organized and led by Appellee DeRay Mckesson. During that protest, an unidentified demonstrator struck Appellant John Doe, a police officer in the Baton Rouge Police Department, with a heavy object, causing him to sustain severe injuries.

According to Doe's complaint, Mckesson organized the protest such that he knew, or should have known, that violence would likely ensue. Doe says that Mckesson arranged for the protesters to meet in front of the Baton Rouge police station, blocking entry to the station and access to the adjacent streets. Mckesson directed the protest at all times, and when demonstrators looted a grocery store for water bottles to throw at the assembled police officers, he did nothing to try to discourage this, even though he remained in charge. After that, Mckesson personally attempted to lead protesters onto a local interstate to obstruct traffic, a crime under Louisiana law. To prevent the commission of that crime, the police responded and began making arrests. In that confrontation, the unidentified protester struck and injured Doe. All of this occurred, according to Doe, shortly after Mckesson had participated in protests across the country involving violence and property damage.

The district court dismissed Doe's claims, and for the most part, we affirmed. *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019). Specifically, we explained that Doe could not state a claim against Mckesson for respondeat superior because he could not show that Mckesson had the right to direct the unidentified protester's actions. We also explained that Doe could not state a claim against Mckesson for conspiracy be-

cause he could not show that Mckesson agreed with the unidentified protester to commit the underlying tort of battery. Finally, we explained that Doe could not state claims against Black Lives Matter because he could not show that it was an unincorporated association, and thus possessing jural capacity to be sued in its own name.

But a panel majority reversed the district court's dismissal of the negligence claim Doe asserted against Mckesson. On the allegations present in Doe's complaint, and based on our understanding of Louisiana tort law, we held that Doe had plausibly alleged that Mckesson organized and led the protest in an unreasonably dangerous manner, in breach of his duty to avoid creating circumstances in which it is foreseeable that another will be injured. In other words, arranging the protest as he did, it is plausible that Mckesson knew or should have known that the police would be forced to respond to the demonstration, that the protest would turn violent, and that someone might be injured as a result. We also rejected Mckesson's argument that the First Amendment forbids a State from imposing liability in these circumstances. Here, the negligence theory of which Doe seeks to avail himself is tailored to prohibiting unlawful conduct and does not restrict otherwise legitimate expressive activity. One of our colleagues dissented from this holding.

The Supreme Court vacated the previous judgment, explaining that we should have certified the state-law question before considering the constitutional issue. *Mckesson v. Doe*, 141 S. Ct. 48 (2020). On remand, we certified to the Supreme Court of Louisiana the question of whether Louisiana tort law

recognizes a negligence cause of action in the circumstances alleged in Doe's complaint. The court answered that question in the affirmative. *Doe v. Mckesson*, 339 So. 3d 524 (La. 2022). With that essential confirmation, the case returns to us. We now renew our prior holdings. The judgment of the district court is REVERSED as to Doe's negligence claim. In addition, because Doe's proposed amended complaint alleges sufficient facts to state a negligence claim, the district court erred in denying Doe's motion for leave to amend. That aspect of the district court's order is likewise REVERSED, but only insofar as Doe may replead his negligence claim against Mckesson. In all other respects, the judgment is AFFIRMED, and the case is REMANDED for further proceedings consistent with this opinion.

I

At this stage, the background facts are well known.[1] Appellee DeRay Mckesson is a leader in the national social movement known as "Black Lives Matter." Throughout 2015 and 2016, and prior to the events at issue here, Mckesson participated in Black Lives Matter protests in Baltimore, McKinney, Ferguson, and Earth City, in which protesters injured dozens of police officers, looted businesses, and damaged private and public property.[1] Continuing the

[1] We take these facts from the well-pleaded allegations contained in Doe's original and first-amended complaints. The district court denied Doe's motion for leave to amend, reasoning that Doe's claims would be futile even under the amended complaint. *See Doe v. Mckesson*, 272 F. Supp. 3d 841, 853 (M.D. La. 2017). As explained *infra*, we conclude that Doe has plausibly stated a claim for negligence on the allegations identified here. Insofar as the allegations in the proposed amended complaint

string of protests, Mckesson planned a Black Lives Matter demonstration for July 9, 2016, in Baton Rouge. On that day, under Mckesson's leadership, protesters congregated in front of the police station for the Baton Rouge Police Department. The congregation blocked access to the police station and the adjacent streets, Airline Highway and Goodwood Boulevard. As a precaution, the police leadership directed officers to monitor the protest and make arrests, if any were necessary. The police organized a front line of officers in riot gear, arranged in front of officers in ordinary uniforms, designated to make arrests. Officer John Doe was one of the latter.

According to the complaint, Mckesson was "in charge" of the protest at all times, and regularly "gave orders" to the demonstrators. The protest began peacefully, but soon escalated and "turned into a riot." According to the complaint, Mckesson "did nothing to stop, quell, or dissuade these actions." The protestors then looted a grocery store, taking water bottles among other things. They began to throw the water bottles at the police. Doe alleges that, rather than attempt to "calm the crowd," Mckesson "incited the violence" and "direct[ed] the activity of the protesters."

Mckesson then led the protestors into the street on Airline Highway, with the purpose of proceeding to and obstructing Interstate 12. The police blocked the protestors' advance, but the protestors continued

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are necessary to support that conclusion, the district court erred in denying the motion for leave to amend as futile. *E.g., In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125–28, 127 n.13 (5th Cir. 2019) (evaluating allegations in amended complaint to determine if amendment would be futile).

to throw water bottles. When they ran out of those, one demonstrator "picked up a piece of concrete or similar rock like substance" and threw it into the assembled officers. The projectile struck Doe "fully in the face," immediately knocking him down, incapacitated. According to the complaint, Doe's injuries include "loss of teeth, injury to jaw, [and] injury to brain and head." The protestor who threw the projectile was never identified.

Later in 2016, Doe filed a complaint in federal court, naming as defendants Mckesson and Black Lives Matter. He asserted claims based on negligence, *respondeat superior*, and civil conspiracy, and later sought leave to amend to include additional factual allegations and join Black Lives Matter Network, Inc. and #BlackLivesMatter. The district court subsequently dismissed Doe's claims with prejudice and denied his motion for leave to amend. *Doe v. Mckesson*, 272 F. Supp. 3d 841 (M.D. La. 2017).

We affirmed in part and reversed in part. *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019).[2] To begin, we held that Doe failed to prove that Black Lives Matter is an unincorporated association with jural capacity to be sued, and affirmed the district court's dismissal

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[2] This panel's first opinion, *Doe v. Mckesson*, 922 F.3d 604 (5th Cir. 2019), was withdrawn following rehearing and replaced with an opinion that clarified the prior holding with respect to Doe's negligence claim. *Doe v. McKesson*, 935 F.3d 253 (5th Cir. 2019). The first two opinions were unanimous. However, one of our distinguished colleagues subsequently changed his view as to the negligence claim. On our own motion, we withdrew the second opinion, and replaced it with a third, in which our colleague dissented in part. *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019); *id.* at 835–47 (Willett, J., concurring in part and dissenting in part).

of Doe's claims against that defendant. We further held that Doe failed to plausibly allege his *respondeat-superior* and civil-conspiracy claims and affirmed those claims' dismissal.

As to Doe's negligence claim, however, we reversed. Doe argued that Mckesson had a duty to exercise reasonable care in organizing the Black Lives Matter protest, and that Mckesson breached that duty in organizing the protest in such a manner where it was reasonably foreseeable that a violent confrontation with the police would result. We understood Louisiana state law to recognize such a theory of negligence liability.

We also rejected Mckesson's argument that imposing liability in these circumstances would violate the First Amendment, as informed by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). That case gave important guidance on the extent to which state law can impose liability for conduct in "the presence of activity protected by the First Amendment." *Id.* at 916. Under *Claiborne*, where a defendant "authorized, directed, or ratified specific tortious activity," the First Amendment allows state law to impose liability for "the consequences of that activity." *Id.* at 927. That principle, we explained, is consistent with allowing civil liability here. Doe seeks to hold Mckesson liable for the latter's personally conducted tortious actions: negligently organizing and directing a protest in an unsafe manner, such that it was reasonably foreseeable for the police to respond, and violence to ensue. Nothing in the First Amendment prohibits such liability.

After the final panel opinion was published,

Mckesson sought rehearing *en banc*, which was denied. *Doe v. Mckesson*, 947 F.3d 874 (5th Cir. 2020). He then sought *certiorari* from the Supreme Court, focusing his petition on the First Amendment question. The Court granted the petition, but did not reach the question on the merits. *Mckesson v. Doe*, 141 S. Ct. 48 (2020). Instead, the Court centered its attention on the fact that Louisiana state law had not expressly recognized a negligence theory like that put forward by Doe. The Court explained that the interpretation of Louisiana law was "too uncertain a premise on which to address" the First Amendment question. *Id.* at 50. For that reason, the Court vacated the panel opinion and remanded the case to this court to certify to the Supreme Court of Louisiana the question of whether Louisiana law recognizes a negligence action akin to that asserted by Doe. *Id.* at 51; *see* Supreme Court of Louisiana Rule XII, §§ 1–2 (allowing for certification).

Upon remand, this court promptly certified that question, as well as one other. *Doe v. Mckesson*, 2 F.4th 502 (5th Cir. 2021). It came to the court's attention that even if Louisiana law recognized such a cause of action, Doe's recovery might nonetheless be barred by that State's professional rescuer's doctrine. *See id.* at 503–04. That 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." *Gann v. Matthews*, 873 So. 2d 701, 705 (La. Ct. App. 2004) (internal quotation marks and citation omitted). We thus certified the following two questions to the Supreme Court of Louisiana:

> 1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?
>
> 2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

Mckesson, 2 F.4th at 504.

The state Supreme Court accepted the certification. *Doe v. Mckesson*, 320 So. 3d 416 (La. 2021) (mem.). It answered the first question "yes," and the second question "no." *Doe v. Mckesson*, 339 So. 3d 524 (La. 2022).

As to the first question, the court understood the panel opinion as "an accurate summary of the pertinent Louisiana law on this issue." *Mckesson*, 339 So. 3d at 533. It further explained that the complaint had plausibly alleged a claim based on the negligence theory:

> Under the allegations of fact set forth in the plaintiff's federal district court petition, it could be found that Mr. Mckesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway, thereby posing a hazard to public safety), directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM in other parts of the country resulted in violence and injury not only to citizens but to police, would ren-

> der Mr. Mckesson liable for damages for injuries, resulting from these activities, to a police officer compelled to attempt to clear the highway of the obstruction.

Id. As to the second question, the court determined that the professional rescuer's doctrine had been abrogated by subsequent caselaw:

> Accordingly, we answer the Fifth Circuit Court of Appeals' second certified question: In view of the current directive of La. C.C. art. 2323 that "[i]n ***any*** action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of ***all*** persons ***causing or contributing*** to the injury, death, or loss ***shall*** be determined ..." (emphasis added) and this court's holding in *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988), abrogating assumption of risk, we conclude that the Professional Rescuer's Doctrine has likewise been abrogated in Louisiana both legislatively and jurisprudentially.

Id. at 536.[3] The case now returns to this court for consideration of the merits of the appeal with the benefit of the Supreme Court of Louisiana's guidance.

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[3] Several Justices of the seven-member court wrote separately. Specifically, three Members wrote concurring opinions, offering separate approaches to the certified questions, but reaching the same result. *See Mckesson*, 339 So. 3d at 537–39 (Weimer, C.J., concurring); *id.* at 539 (Genovese, J., concurring in the judgment); *id.* at 540–47 (Crain, J., concurring in part). And one Member dissented. *Id.* at 547–48 (Griffin, J., dissenting).

II

Turning to the analysis, we emphasize as an initial matter that the majority of our prior holdings were not appealed.[4] Specifically, neither party objected to our affirming the district court's dismissal of all claims as to Black Lives Matter and the *respondeat superior* and civil conspiracy claims as to Mckesson. Even so, when the Supreme Court vacated the prior judgment, it voided each of the judgment's holdings; that is the nature of vacatur. As such, we must address each of the original issues on appeal, beginning here with the dismissal of the defendant Black Lives Matter.

The district court took judicial notice that Black Lives Matter is a "*social movement*, rather than an organization or entity of any sort," *Mckesson*, 272 F. Supp. 3d at 850, and dismissed the defendant as lacking capacity to be sued. Although judicial notice was not warranted here, we ultimately affirm.

As explained in the prior panel opinion, *Mckesson*, 945 F.3d at 832–33, judicial notice is inappropriate for a mixed question of fact and law. That is the type of question presented here; the legal status of "Black Lives Matter" turns both on the factual background giving rise to the entity's existence and on the legal significance of those facts as a matter of Louisiana law. It was incorrect to use judicial notice to answer that particular question.

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[4] In the previous panel opinion, we *sua sponte* considered our jurisdiction, noting that it might conceivably be absent. We hereby incorporate by reference the related analysis and holding, and conclude that we have jurisdiction over this appeal. *See Mckesson*, 945 F.3d at 824–25 (Part IV).

On the merits of the question, Doe asserts that Black Lives Matter is an unincorporated association, which Louisiana law recognizes as an entity with jural capacity. La. Code Civ. Proc. Ann. art. 738; *see also* Fed. R. Civ. P. 17(b) (providing that, for this type of entity, "[c]apacity to sue or be sued is determined ... by the law of the state where the court is located"). As previously noted, "Louisiana courts have looked to various factors as indicative of an intent to create an unincorporated association, including requiring dues, having insurance, ownership of property, governing agreements, or the presence of a formal membership structure." *Mckesson*, 945 F.3d at 834 (collecting cases). Possession of at least some of these characteristics is a necessary condition of establishing intent to create an unincorporated association. *Id.*

Doe fails to allege facts that demonstrate any of those characteristics. Instead, he alleges only that Black Lives Matter has founders and several informal leaders, has several chapters nationwide, and participates in protests and demonstrations across the country. Perhaps these allegations show "a community of interest," or that individuals have "acted together." *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 474 (La. 1990). But, without at least some of the characteristics listed above, concerted action is insufficient to establish intent to create an unincorporated association. *Mckesson*, 945 F.3d at 834. We thus affirm the district court's denial of Black Lives Matter as a defendant because Doe has not shown that it has the jural capacity to be sued. As before, we do not address whether Doe could state a claim against Black Lives Matter, if that entity could be sued. *See*

id. at 834 n.10.[5]

III

Next, we address the claims Doe asserts against Mckesson. We begin with the *respondeat-superior* and civil-conspiracy claims, whose disposal was not contested after our previous panel opinion. We then consider Doe's negligence claim, which of course was the subject of the Supreme Court's order and the Supreme Court of Louisiana's opinion on certification.

A

As to Doe's vicarious-liability claim, Louisiana law defines the scope of liability as follows: "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." La. Civ. Code Ann. art. 2320; *see also Mckesson*, 945 F.3d at 825–26. And a "servant," in turn, "includes anyone who performs continuous service for another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." *Ermert*, 559 So. 2d at 476.

Here, Doe's complaint fails to meet that standard. *Mckesson*, 945 F.3d at 826. To be sure, Doe al-

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[5] The district court denied Doe's motion for leave to add Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants, holding that amendment would be futile. Specifically, the district court held that Doe failed to state plausible claims for relief as to Black Lives Matter Network, and that #BlackLivesMatter is an expression that lacks jural capacity. *Mckesson*, 272 F. Supp. 3d at 851, 853–54. Doe fails to brief these issues on appeal. They are therefore forfeited. *See, e.g., Garcia v. Orta*, 47 F.4th 343, 349 n.1 (5th Cir. 2022).

leges that Mckesson organized the protest, was its leader, and often directed the protesters' movements. But those actions are insufficient by themselves to establish agency. Specifically, Doe fails to allege that the protesters "perform[ed] continuous service" for Mckesson, or that their "physical movements" were subject to his "right to control." *Ermert*, 559 So. 2d at 476. We therefore affirm the district court's dismissal of Doe's *respondeat superior* claim asserted against Mckesson.

B

As to Doe's civil-conspiracy claim, we are mindful that such a cause of action "is not itself an actionable tort." *Mckesson*, 945 F.3d at 826 (citing *Ross v. Conoco, Inc.*, 828 So. 2d 546, 552 (La. 2002)). Operationally, civil conspiracy assigns liability for an underlying unlawful act to a person who acted in concert with the direct tortfeasor. To impose such liability, a plaintiff must prove the following elements: "(1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result." *Id.* (first citing *Crutcher-Tufts Resources, Inc. v. Tufts*, 992 So. 2d 1091, 1094 (La. Ct. App. 2008), and then La. Civ. Code Ann. art. 2324).

The district court was correct to dismiss this claim because Doe fails to allege facts tending to show that Mckesson agreed with the protester who threw the rock or concrete-like object. *See Mckesson*, 945 F.3d at 826. True, Doe alleges that, among other things, Mckesson agreed with the demonstrators to protest in front of the Baton Rouge police station and

attempt to block a public highway. But this particular cause of action is derived from the unknown assailant's battery. The facts alleged in Doe's complaint do not show that Mckesson agreed with the assailant to commit this tort.

C

As to Doe's negligence claim, we first address whether Louisiana tort law allows Doe to pursue such a claim, and if so, whether Doe has plausibly stated such a claim. Obviously, we are bound by the Supreme Court of Louisiana's interpretation of its own state law. We then address if the First Amendment allows a State to impose civil liability on this basis.

1

In the prior panel opinion, we set forth our understanding of Louisiana state law as applied to this case. *Mckesson*, 945 F.3d at 826–28. The Supreme Court of Louisiana expressly incorporated that portion of our decision in its opinion on certification. *Mckesson*, 339 So. 3d at 530–33. We hereby reiterate our prior holding.

The origin of Doe's negligence claim is Louisiana Civil Code article 2315. That article provides, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Within that body of tort liability, Louisiana has adopted a "duty-risk" approach to negligence. Under that approach, a plaintiff must prove five elements: "(1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and

(5) the risk of harm was within the scope of protection afforded by the duty breached." *Mckesson*, 945 F.3d at 826 (collecting Louisiana authority).

The parties disputed whether Louisiana law recognizes a duty in these circumstances. In the course of that dispute, we understood the duty at issue as follows: "a duty not to negligently precipitate the crime of a third party." *Mckesson*, 945 F.3d at 827. The existence of a legal duty is a question of state law, and the Supreme Court of Louisiana expressly concluded that such a duty exists in the circumstances presented here. *Mckesson*, 339 So. 3d at 533.

The threshold question having been answered, the only remaining issue is whether Doe has plausibly stated this form of a negligence claim. As before, we conclude that he has. Doe has plainly alleged that he suffered an injury. He has also plausibly alleged that Mckesson breached his duty in the course of the latter's organizing and leading the Black Lives Matter protest at issue here. First and foremost, Doe alleged that Mckesson planned to lead the demonstrators onto Interstate 12, despite the fact that blocking a public highway is a crime under Louisiana law. La. Stat. Ann. § 14:97. As we explained before, that act supports the contention that Mckesson breached his duty of care as to Doe:

> It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have

> known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.

Mckesson, 945 F.3d at 827. Other allegations support Doe's contention that Mckesson breached his duty of care. For instance, Doe says that Mckesson had recently participated in other Black Lives Matter protests in which demonstrators blocked public highways, and in which police officers were injured. That allegation would tend to support the argument that Mckesson knew or should have known that the protest at issue here—a protest that Mckesson personally directed at all times—would end in a violent confrontation. Doe also alleges that Mckesson regularly gave orders to the protestors and directed their activity. To be sure, Doe does not allege that Mckesson directed the unidentified assailant to throw the heavy object, or that he directed the protesters to loot the grocery store and throw water bottles at the assembled police officers. But the fact that those events occurred under Mckesson's leadership support the assertion that he organized and directed the protest in such a manner as to create an unreasonable risk that one protester would assault or batter Doe.

It is likewise plausible that Mckesson's conduct was the but-for cause of Doe's injuries, and that the pertinent risk was within the protection designed to be afforded by the duty Mckesson breached. As to the former, "by leading the demonstrators onto the public highway and provoking a violent confrontation with

the police, Mckesson's negligent actions were the 'but for' causes of Officer Doe's injuries." *Mckesson*, 945 F.3d at 828 (citing *Roberts v. Benoit*, 605 So. 2d 1032, 1052 (La. 1992)). And as to the latter, a central purpose of imposing a duty in these circumstance is to protect those who are injured as a result of a negligently organized and led protest. As such, the risk of harm to Doe is plainly within the scope of protection afforded by the duty owed by Mckesson here. *See id.*[6]

Following the guidance of the Supreme Court of Louisiana, we therefore must conclude that Louisiana tort law recognizes a negligence claim in these circumstances and that Doe has plausibly alleged such a claim. However, we reiterate that Doe's pleading a negligence claim in no way guarantees that he will *prove* that claim. Doe will be required to present specific evidence satisfying each of the five elements listed above, and Mckesson will of course be entitled to introduce evidence supporting his contention that he did not breach his duty to organize and lead the protest with reasonable care. The only question before us is whether Doe is entitled to proceed to discovery on his negligence claim. We are compelled to conclude that he is.

2

Having confirmed that Louisiana state law recognizes the negligence theory Doe pursues here, and

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[6] As noted above, we previously apprehended that Louisiana's professional rescuer's doctrine might apply here and bar Doe's negligence claim. *Mckesson*, 2 F.4th at 503–04. But on certification, the Supreme Court of Louisiana held that the doctrine has been "abrogated in Louisiana both legislatively and jurisprudentially." *Mckesson*, 339 So. 3d at 536. As such, the doctrine poses no bar to Doe's recovery here.

that Doe plausibly alleges such a claim, we now consider Mckesson's argument that imposing liability in these circumstances is prohibited by the First Amendment. We conclude that the First Amendment allows such liability, for largely the same reasons expressed in the prior panel opinion. *Mckesson*, 945 F.3d at 828–32.

a

As before, our lodestar is the Supreme Court's decision in *Claiborne Hardware*, 458 U.S. 886 (1982). There, the Court reiterated that the "First Amendment does not protect violence." *Id.* at 916. And as a general matter, "[n]o federal rule of law restricts a State from imposing tort liability" for damages "that are caused by violence and by threats of violence." *Id.* But where otherwise tortious conduct "occurs in the context of constitutionally protected activity ... 'precision of regulation' is demanded." *Id.* at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Such protected activity "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916–17. Although the specific contours of these limitations are not enumerated, the guiding principle is to ensure that any liability is molded to prevent wrongful conduct, not stifle legitimate expressive activity. Rephrased, "A judgment tailored to the consequences of [a defendant's] unlawful conduct may be sustained." *Id.* at 926; *see also id.* at 918 ("Only those losses proximately caused by unlawful conduct may be recovered.").

It is clear that a protestor may be held liable for his or her own wrongful conduct, even if otherwise

participating in expressive activity. *Id.* at 918, 926; *accord United States v. Daly*, 756 F.2d 1076, 1081–82 (5th Cir. 1985); *United States v. Wilson*, 154 F.3d 658, 666 (7th Cir. 1998); *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286, 295–98 (2d Cir. 1992). The Court of Appeals of Minnesota recently applied this principle in a case concerning the state's highway interference law, which is similar to the Louisiana statute at issue here. *Compare* La. Stat. Ann. § 14:97, *with* Minn. Stat. Ann. § 169.305; *see generally State v. Dornfeld*, No. A22-0816, 2023 WL 1956532 (Minn. Ct. App. Feb. 13, 2023). In *Dornfeld*, 600 protesters marched onto Interstate 94 in Minneapolis to participate in a demonstration. The defendant was charged and convicted of being a pedestrian on a controlled-access highway. In response to the charge, she defended herself by arguing, among other things, that her conviction violated the First Amendment. The court summarily rejected this argument, explaining that unlawful conduct does not become lawful merely by including an expressive component. *See id.* at *3 ("[A]ppellant does not explain her implicit view that her right to free speech supersedes the rights of those travelling on a controlled-access highway to travel in safety, nor does she explain why her arrest deprived her of alternative channels of communication."). In cases like *Dornfeld*, the First Amendment's applicability, or lack thereof, is clear. But after that, the circumstances in which the government may impose liability differ based on the defendant's relationship with the person or persons who directedly committed the unlawful act and the nature of the defendant's involvement in the protected activity.

In certain circumstances, an associate of a tortfeasor-protestor may be liable for the consequences of that tort. But to maintain fundamental associative rights, those circumstances are narrow. It is clear that "mere association" with a group whose member commits some unlawful act "is an insufficient predicate on which to impose liability." *Claiborne*, 458 U.S. at 924–25. "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 a specific intent to further those illegal aims." *Id.* at 920.

In other cases, a protest leader may be liable for the consequences of a demonstrator's unlawful act. But in keeping with the tailoring requirement, the First Amendment does not allow the government to hold a protest leader liable anytime a protestor does something unlawful. Rather, liability must be tailored such that there is a sufficiently close relationship between the leader's actions and the protestor's unlawful conduct. In *Claiborne*, the Supreme Court identified three "theories" that would support such liability:

> First, a finding that [the leader] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that [the leader's] public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that [the leader] gave other specific instructions to carry out violent acts or threats.

Id. at 927. As discussed in some detail below, the "specific tortious activity" authorized or otherwise caused by the protest leader does not have to be violent to lawfully impose liability. It need only be "unlawful."

Nothing in *Claiborne* suggests that the three theories identified above are the only proper bases for imposing tort liability on a protest leader. Instead, they are three examples of liability that is sufficiently narrow such that it targets improper conduct without prohibiting legitimate expressive activity. In identifying the bounds of allowable liability, the temporal relationship between the leader's actions and unlawful acts committed by the protesters is particularly important.

To illustrate, liability was improper in *Claiborne* where the protest leader advocated for violence in general terms, but acts of violence did not follow until weeks or months after the speech at issue there. But, the Supreme Court stressed, the case might have been different if violence had occurred sooner after the leader's actions. *See id.* at 928 ("The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.").

b

Applying those principles to the facts alleged, we hold that imposing negligence liability on Mckesson

does not offend the First Amendment. *See Mckesson*, 945 F.3d at 828–32. At the outset, we highlight what we *do not* hold. First, it is clear that Mckesson did not throw the heavy object that injured Doe. That protestor could of course be held liable for his unlawful conduct notwithstanding his participation in the demonstration. *See Claiborne*, 458 U.S. at 918, 926; *accord Daly*, 756 F.2d at 1081–82. But Mckesson is not indirectly liable for that wrongful act because, as explained above, Doe fails to satisfy the conditions required for vicarious liability or civil conspiracy. *Supra* Sections III.A, III.B. Likewise, Mckesson is not liable for the unidentified protestor's tort merely because the two associated together for purposes of the Black Lives Matter protest. *Claiborne*, 458 U.S. at 925–26.

i

Setting those two forms of liability to the side, the negligence theory Doe pursues fits quite comfortably into two of the theories for protest-leader liability identified in *Claiborne*. First, Doe plausibly alleges that Mckesson "directed ... specific tortious activity" insofar as Doe contends "that his injuries were the result of Mckesson's *own* tortious conduct in directing an illegal and foreseeably violent protest." *Mckesson*, 945 F.3d at 829. *Claiborne* reaffirmed that the First Amendment does not prohibit States from imposing tort liability even if the tort occurs in the context of expressive activity. The conduct the State deems unlawful here—creating unreasonably dangerous conditions—is a quintessential tort. Plainly that is within the scope of "tortious activity" contemplated by the *Claiborne* Court.

The only other thing required for this cause of action to accord with the First Amendment is that it be sufficiently tailored to target the tortious activity without sweeping up legitimate expressive conduct. In this regard, we do not disagree with the dissenting opinion[7] that the question of whether a particular form of liability is consistent with the First Amendment must be assessed "action-by-action" and "defendant-by-defendant." *Post* at 47. But we are confident that Doe's negligence theory satisfies that requirement.

Start with the "breach" element. The State of Louisiana does not put ordinary protest leaders at risk by recognizing that Mckesson's actions fell below a reasonable standard of care. On the contrary, Doe has alleged that Mckesson created unreasonably unsafe conditions in at least three significant respects. First, he organized the protest to begin in front of the police station, obstructing access to the building. Second, he personally assumed control of the protest's movements, but failed to take any action whatsoever to prevent or dissuade his fellow demonstrators once they began to loot a grocery store and throw items at the assembled police. And third, Mckesson deliberately led the assembled protest onto a public highway, in violation of Louisiana criminal law. Plainly the State has a strong interest in preventing unreasonably dangerous conduct such as this. But

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[7] The separate opinion concurs with the majority of our conclusions, but dissents from our holding that the proceeding of Doe's negligence claim against Mckesson does not violate the First Amendment. *Post* at 59 n.117. We therefore refer to that writing as "the dissenting opinion" only when addressing that specific subject.

neither does that standard unnecessarily sweep in expressive conduct. Protest leaders who organize their demonstrations with at least a minimal level of care will not be responsible for any actions taken by rogue participants.

And then there is the cause-in-fact requirement. It is not enough that Doe show that Mckesson breached his duty of care—he must also prove that Mckesson's actions were a necessary antecedent to Doe's injuries. *See, e.g., Rando v. Anco Insulations Inc.*, 16 So. 3d 1065, 1089 (La. 2009). Restated, Doe must prove that he would not have been injured but for the manner in which Mckesson organized and led the protest. That is a tall task, and the standard will only be met in the exceptional cases where, as here, the well-pleaded allegations support the inference that the leader's specific actions caused the plaintiff's injuries.[8]

To recap, where a defendant creates unreasonably dangerous conditions, and where his creation of those conditions causes a plaintiff to sustain injuries, that defendant has "directed" his own "tortious activity" for purposes of *Claiborne*. 458 U.S. at 927. In these circumstances, imposing liability goes far more

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[8] The dissenting opinion worries that this cause of action will expose protest leaders to liability whenever a fight breaks out at a high-intensity event, like a protest or a sporting event between two rival teams. The opinion is certainly correct that altercations arise in many such occasions, but that fact actually cuts *against* the opinion's stated concern. In most cases, the altercation would have occurred regardless of how the protest leader or sports club owner acted. Only seldomly will a plaintiff be able to prove that the specific actions taken by the defendant caused the alleged injury.

to preventing tortious conduct than it does to suppressing any legitimate expressive activity. The cause of action therefore satisfies *Claiborne*'s demand for "precision of regulation." *Id.* at 916.

The dissenting opinion reads *Claiborne* as limiting the authorize/direct/ratify theory of liability to torts committed by someone other than the defendant, *post* at ——, but that reading conflicts with settled First Amendment law. It is well-established that expressive activity is not a defense to an individual's own unlawful conduct. *Claiborne*, 458 U.S. at 918, 926; *Daly*, 756 F.2d at 1081–82; *Wilson*, 154 F.3d at 666; *Jews for Jesus, Inc.*, 968 F.2d at 295–98; *Dornfield*, 2023 WL 1956532 at *3. It follows that a protest leader who commits a tort cannot avoid liability for that tort merely by pointing to his participation in a protest. Doe may pursue claims against Mckesson even though the latter did not throw the projectile because, according to the complaint, Mckesson committed an intendent tort that caused Doe's injuries.

In addition, the dissenting opinion contends that Mckesson cannot be held liable for his unviolent conduct because the Supreme Court declined to impose liability on Evers in *Claiborne*. *Post* at 42–43. But that fails to account for the significant differences between *Claiborne* and this case. First, according to the allegations, Mckesson had a closer connection to the unlawful components of the protest than Evers did. Mckesson personally led the protest in the field and directed its movements. To be sure, Evers was a protest leader and gave various speeches relating to the boycott. But it was never alleged that Evers actually participated in the particular activities that became unlawful. *See Claiborne*, 458 U.S. at 902 (describing

Evers giving speeches); *id.* at 903–06 (making no mention of Evers in reciting the subsequent unlawful incidents). And so although Evers "led the protest," *post* at 42, he did so in a manner that is legally distinguishable from how Mckesson led the protest at issue here.

Second, and relatedly, Mckesson is alleged to have caused the protest to become unlawful more directly than did Evers. Perhaps, as the dissenting opinion says, the protest in *Claiborne* was "foreseeably violent," *post* at 42, but the evidence failed to attribute the foreseeability to Evers. Here, by contrast, Mckesson's organization and operation of the protest in an unsafe manner directly created foreseeable violent conduct. Contrary to the dissenting opinion, there is no tension between the result here and the one in *Claiborne*.

ii

The negligence cause of action at issue is also consistent with the second theory of protest-leader liability identified in *Claiborne*. The Court explained that a protest leader could be liable for his actions where it was shown that he or she "were likely to incite lawless action," and that "unlawful conduct ... in fact followed within a reasonable period." 458 U.S. at 927. That is precisely what Doe alleges Mckesson did here. That is, Doe contends that Mckesson organized and directed the protest in an unsafe manner such that it was likely that a violent confrontation with the police would result, and in fact did result. To be sure, this liability theory is seen more commonly in the context of allegedly inciteful speech. But it logically includes other actions tending to incite unlaw-

ful behavior.

A close example is *National Organization for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994). That case involved a series of protests of clinics that perform abortions. Pro-life demonstrators obstructed access to and physically blockaded several clinics, sometimes involving trespass on and damage to private property. Based on a combination of Virginia state law and federal law, the district court enjoined the protesters from engaging in such behavior, as well as from taking any actions that would incite such behavior. *Id.* at 649–50. In an order clarifying its injunction, the district court explained that the protesters were prohibited from "specifically planning and organizing unlawful blockades." *National Organization for Women v. Operation Rescue*, No. 1:89-CV-2968, 1993 WL 836931, at *2 (D.D.C. July 29, 1993). The protesters initially declined to comply with the injunction, and so the district court held them in contempt and imposed monetary sanctions.

Pertinent here, the D.C. Circuit upheld the injunction and sanctions over the protesters' objection that the orders violated the First Amendment as understood in *Claiborne*. In doing so, the court carefully distinguished between actions that encourage legitimate expressive activity, which are protected by the First Amendment, and actions that provide for unlawful behavior, which are not. State law may not prohibit "the organizing of lawful demonstrations which may ultimately include unauthorized unlawful acts." *National Organization for Women*, 37 F.3d at 657. But "[i]t is well settled that incitement to specific unlawful acts may be prohibited without running afoul of First Amendment guarantees." *Id.*

This case would be different if all Mckesson had done was organize a lawful protest, and if an unidentified protester had nonetheless assaulted Doe. But that is not what Doe alleges happened. Rather, Doe alleges that Mckesson organized and led the protest in such a manner that his actions "were likely to incite lawless action." *Claiborne*, 458 U.S. at 927. As described above, these alleged actions include directing the protesters to obstruct a public highway, organizing the protest to begin in front of the Baton Rouge police station, and doing nothing to discourage the demonstrators from looting a grocery store and throwing water bottles at the police, despite Mckesson's allegedly exercising some degree of direction and control of the protest. And as is clear from Doe's injuries, "unlawful conduct ... in fact followed within a reasonable period." *Id.* As explained above, Doe's allegations fit within the "directed, authorized, or ratified" theory set forth by the Supreme Court in *Claiborne*. In addition, for the reasons discussed here, the allegations also fit within the "likely to incite lawless action" theory.

The dissenting opinion disputes this conclusion, reasoning that the complaint does not plausibly allege that any statements Mckesson made were likely to incite violence. *Post* at 54–55. But the opinion focuses on the wrong facts—it is the manner in which Mckesson led the protest that made a violent encounter likely, not anything he said in an interview after the fact. Doe's allegations support the inference that Mckesson created unreasonably dangerous conditions—and it is undisputed that violence followed during his operation of the protest. That is all that *Claiborne* requires.

iii

Mckesson and the dissenting opinion raise a number of objections to this conclusion, but none demonstrate why the First Amendment prohibits the State from imposing liability for the injuries Doe contends are caused by Mckesson's negligence. Most prominently, the dissenting opinion contends that "the First Amendment permits civil liability for the activity only if the activity itself involves violence." *Post* at 40 (emphasis omitted).

As an initial matter, we must note that, according to the complaint, Mckesson's actions caused violence—even if he did not personally attack Doe. As explained above, Doe alleges that the actions Mckesson took to organize and direct the protest in an unreasonably dangerous manner caused the violent encounter that led to his injuries. Even if Mckesson's underlying actions are not violent in nature, they still plainly involve violence as a matter of causation. We struggle to see how a non-violent action that unreasonably causes violence could be categorically disallowed for purposes of *Claiborne*. In short, assuming *arguendo* that violence is required to make liability accord with the First Amendment—which it is not—the facts alleged here sufficiently satisfy that condition.[9]

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[9] In concluding that Mckesson's actions are purely non-violent, the dissenting opinion fails to accept Doe's theory of the case. That is, it does not recognize the allegation that Mckesson *caused* the confrontation that resulted in Doe's injury. *See post* at 37 ("It is not enough that [Mckesson] encouraged or committed unlawful-but-nonviolent actions that *preceded* violence.") (emphasis added). But Doe argues that a causal connection exists between Mckesson's actions and the violence that fol-

But contrary to Mckesson's argument, *Claiborne* required only that the tortfeasor's conduct be unlawful—that is, that is be conduct traditionally prohibited by tort law. That the unlawful conduct need not be violent is evident from the Supreme Court's repeated use of the latter term, when it might have otherwise said "violent." *See Claiborne*, 458 U.S. at 918 ("Only those losses proximately caused by unlawful conduct may be recovered."); *id.* at 920 (explaining that "it is necessary to establish that the group itself possessed unlawful goals"); *id.* at 925 (observing that "there is no evidence that the association possessed unlawful aims"); *id.* ("There is nothing unlawful in standing outside a store and recording names."); *id.* at 926 (holding that "a judgment tailored to the consequences of [defendants'] unlawful conduct may be sustained"); *id.* at 927 ("There are three separate theories that might justify holding [a leader] liable for the unlawful conduct of others."); *see also Mckesson*, 945 F.3d at 830. To be sure, the Court at times spoke in terms of "the consequences of violent conduct." *Claiborne*, 458 U.S. at 918. But that was so because the *only* tortious conduct at issue there was violent conduct.

The previous panel opinion explains this posture in some detail. *See Mckesson*, 945 F.3d at 829–30. The critical fact is that the Supreme Court of Mississippi, from which the *Claiborne* judgment was appealed, held that the defendants had committed the

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lowed—and his allegations support that inference. Perhaps the First Amendment allows such a cause of action and perhaps it does not. (We think it does.) But we must confront the complete version of Doe's claim, and that version unquestionably involves violence.

tort of malicious interference with business only if "force, violence, or threats" were present. *Claiborne*, 458 U.S. at 895, 102 S.Ct. 3409 (citing *NAACP v. Claiborne Co.*, 393 So. 2d 1290, 1301 (Miss. 1980)). Indeed, the Supreme Court specified that "the Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a non-violent, politically motivated boycott." *Id.* at 915, 102 S.Ct. 3409. As the prior opinion explained, if the force, violence, and threats "had been removed from the boycott, the remaining conduct would not have been tortious at all." *Mckesson*, 945 F.3d at 829. Thus, "violent conduct" in *Claiborne* is simply a shorthand for the unlawful conduct that is required to impose liability, not an independent condition for doing so.

The dissenting opinion would require violence as a condition of constitutionally permissible liability, but it misreads *Claiborne*. It quotes several passages of that case for the proposition that the First Amendment does not protect violent conduct. *Post* at 41 ("[V]iolent conduct is beyond the pale of constitutional protection.") (quoting *Claiborne*, 458 U.S. at 933); *id.* at 42 ("The First Amendment does not protect violence.") (quoting *Claiborne*, 458 U.S. at 916). But the fact that violent conduct *is not* protected does not mean that unlawful, non-violent conduct *is* protected.

Supreme Court and circuit caselaw offer examples of defendants being found liable for non-violent, unlawful acts—despite participating in otherwise legitimate expressive activity. Our prior opinion discussed two such examples at length:

Take *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That case held that a public officer cannot "recover[ ] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. But defamation is a non-violent tort, and statements made about public officers are often shouted during political protests. If [violence were required], then it would seem that even the narrow "actual malice" exception to immunity was eliminated by *Claiborne* ... at least for statements made during a protest.

Neither do recent cases vindicate this understanding. The Seventh Circuit examined a boycott similar to the one in *Claiborne Hardware*, this time a boycott by a union of a hotel and those doing business with the hotel. *See 520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Local 1*, 760 F.3d 708 (7th Cir. 2014). The court found that it was "undisputed that the Union delegations all attempted to communicate a message on a topic of public concern." *Id* at 723. But the court nonetheless held that the boycotters could be found liable if they had crossed the line into illegal coercion, because "prohibiting some of the Union's conduct under the federal labor laws would pose no greater obstacle to free speech than that posed by ordinary trespass and harassment laws." *Id.* The court's

> benchmark for liability was illegality, not violence. The court concluded that if "the Union's conduct in this case is equivalent to secondary picketing, and inflicts the same type of economic harm, it too may be prohibited without doing any harm to First Amendment liberties." *Id.* The [purported violence requirement] cannot be squared with this outcome.

Mckesson, 945 F.3d at 831.

And there are others. In *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), the plaintiffs' son was murdered by Hamas terrorists. Unable to sue the men who carried out the attack, plaintiffs brought claims against two organizations that allegedly provided funds to Hamas. The defendants protested, arguing that "all they intended was to supply money to fund the legitimate, humanitarian mission of Hamas," and citing *Claiborne* for the proposition that they could not be held liable for attacks carried out by someone else. *Id.* at 1022. The court rejected that argument, explaining that the plaintiffs were not seeking to hold the defendants "liable for their mere association with Hamas, nor are they seeking to hold the defendants liable for contributing money for humanitarian efforts. Rather, they are seeking to hold them liable for aiding and abetting murder by supplying the money to buy the weapons, train the shooters, and compensate the families of the murderers." *Id.* at 1024. And so the finding of liability was upheld, despite the non-violent nature of financial contributions.

The upshot is that violence is not a necessary

condition to impose liability that accords with the First Amendment. Rather, all that is required is that the defendant violate independent state law, whose enforcement is itself consistent with *Claiborne* insofar as it targets wrongful conduct and not legitimate expressive conduct. It would be consistent with those principles to hold Mckesson liable for his allegedly negligent actions.

iv

The dissenting opinion contends that "nonviolent torts" must be "intentional" to not offend the First Amendment, *post* at 45, but that distinction appears nowhere in *Claiborne* or the dozens of circuit decisions applying it. On the contrary, the First Amendment framework set forth in *Claiborne* rejects the dissenting opinion's theory. Recall that the Supreme Court contrasted the nature of culpability required to hold an associate liable for unlawful conduct taken in the midst of legitimate expressive behavior with that required to hold a protest leader liable. For an associate, the plaintiff must show that the defendant "held a specific intent to further" the organization's "illegal aims." 458 U.S. at 920. But for a protest leader, the plaintiff need only show that the leader "authorized, directed, or ratified specific tortious activity [to] justify holding him responsible for the consequences of that activity" or that the leader's "public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period." *Id.* at 927. The Court certainly understood the First Amendment as placing a *mens rea* requirement on some forms of civil liability, but it did not mention the subject at all when discussing protest-leader lia-

bility. A proper reading of *Claiborne* shows that the Court's concept of liability for protest leaders did not include an intent condition.

That conclusion is also fully consistent with the Court's instruction that "precision of regulation" is required for State laws that impose liability in these circumstances. *Id.* at 916. As understood by the *Claiborne* court, the object of the First Amendment inquiry is to ensure that civil liability is "tailored" to reach only "losses proximately caused by unlawful conduct." *Id.* at 918, 926. This goal in mind, it makes sense to place a heightened culpability requirement on a mere associate because his relationship with the unlawful conduct is more attenuated than that of a protest leader. Restated, imposing liability on associates without an intent requirement would risk discouraging a whole range of legitimate expressive activities. But the same is not true for protest leaders—as the Supreme Court clarified in *Claiborne*. Leaders are far more responsible for the organization's operations and therefore have a closer connection to unlawful activities committed by its members. To be sure, leaders are not liable on a *respondeat superior* basis. But holding a leader liable under one of the theories set forth in *Claiborne* is fully consistent with the First Amendment—*mens rea* aside.

The dissenting opinion also worries that the theory of liability recognized by the Supreme Court of Louisiana might encourage police violence against protestors or open the floodgates for rabble rousers to sue concert organizers or sports club owners. *Post* at 56–57. With great respect, those concerns are both speculative and inconsistent with the theory at issue here. As to the former, if a police officer responding

to a protest initiates a violent confrontation, is injured during the conflict, and sues the protest leader to recover for his injuries, he will be unable to show causation. That is, it will be the police officer's actions, not the protest leader's negligence (if any) that caused the officer's injuries. And the use of excessive force against protestors would also expose the police officer to liability under § 1983.

As to the latter, there is no reason to suppose that the State would set the standard of care so low as to subject the owner of a football team to liability every time two disgruntled fans get into a fight—or so low as to offend the First Amendment. To be sure, an overly strict standard of care for protest leaders may well run afoul of *Claiborne*. But here, accepting Doe's allegations as true, Mckesson's actions fall well below any reasonable standard. The exact constitutional limits of this cause of action are better left for another day and a different case. But for this appeal, it suffices for us to conclude that it does not violate the First Amendment for Louisiana tort law to provide that Mckesson breached his duty of care in these circumstances.

V

Several other objections warrant brief attention. First, Mckesson contends that to impose liability on this basis is to hold him liable for the conduct of others. But that confuses vicarious liability with negligently creating the conditions under which a plaintiff is likely to be injured. As we recognized before, the latter is "a standard aspect of state law." *Id.* (citing Restatement (Third) of Torts: Liability for Physical

and Emotional Harm § 19 (2010)) ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."). It is consistent with the First Amendment to impose tort liability where, as here, the defendant personally directs the activities of others such that he creates a foreseeable risk of injury to others.

Next, Mckesson protests that the "specific tortious activity" he directed is, at most, obstructing a public highway, that the unidentified demonstrator's assault on Doe is not a natural consequence of that tortious activity, and that the First Amendment therefore does not allow State law to hold him liable for that unrelated result. According to Mckesson, the prohibition on highway obstruction is principally concerned with traffic safety, not police safety. This objection misunderstands the precise tortious activity for which Doe seeks to hold Mckesson liable. Doe does not assert highway obstruction as a tort *per se*. Rather, he asserts that Mckesson's direction of the protesters to obstruct Interstate 12 is *evidence* that Mckesson breached his duty to refrain from creating the conditions in which it is likely that a third party will injure someone by an unlawful act.[10]

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[10] Of course, this is not Doe's only evidence that Mckesson breached his duty of care. As explained above, Doe also alleges, among other things, that Mckesson organized the protest to begin in front of the Baton Rouge police station; that Doe did nothing to prevent the demonstrators from looting the grocery store and throwing water bottles at the police, despite Mckesson's exercising some amount of direction and control over the protest; and that Mckesson had participated in similar protests across the country, which had also resulted in violence to others and damage to property.

Finally, Mckesson objects that our holding would remove all First Amendment protection whenever protest activity violates state civil or criminal law. The dissenting opinion adopts this objection, contending that imposing liability in these circumstances renders the First Amendment useless as it relates to *Claiborne*. *Post* at ——. That assertion lacks merit for the simple reason that it ignores the causal relationship between Mckesson's negligence and Doe's injuries. We *do not* hold that, where a protestor defendant directs some unlawful activity, he may be held liable for whatever consequences follow. We hold only that the First Amendment allows Mckesson to be held liable for negligence if Doe proves that Mckesson's breach of duty caused Doe's injury, insofar as the breach foreseeably precipitated the crime of a third party.[11]

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[11] As we did before, we reiterate that nothing in our holding should be understood to suggest that "the First Amendment allows a person to be punished, or held civilly liable, simply because of his associations with others, unless it is established that the group that the person associated with 'itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.' " *Mckesson*, 945 F.3d at 823 n.9 (quoting *Claiborne*, 458 U.S. at 920). With that being said, Doe's allegations sufficiently allege that Black Lives Matter possessed an unlawful goal (to block a public highway) and that Mckesson possessed a specific intent to further that goal. Doe alleges that Black Lives Matter "plann[ed] to block a public highway," and that Mckesson travelled to Baton Rouge "for the purpose of ... rioting," including blocking the highway. This distinction does not affect the judgment here, given our conclusion that Doe's negligence action accords with the First Amendment for at least one of the two reasons we explain. But it underscores the causal relationship that Doe has alleged exists between Black Lives Matter, Mckesson, and the events giving rise to the assault on Doe.

In particular, liability cannot be imposed on protesters who organize and lead demonstrations with minimally acceptable standards of care. And even if a protest leader breaches that duty of care, the plaintiff must still prove that the breach caused his or her particular injuries. Those are demanding standards, and they will only be met in the most unusual of cases. The dissenting opinion is of course entitled to disagree that Doe's liability theory is sufficiently tailored for purposes of *Claiborne*. But its concerns regarding broader application of First Amendment protection are overstated.

* * *

Our limited holding guarantees only that Doe may proceed to discovery on his negligence claim. It does not guarantee that he will *prevail* on that claim. Mckesson will have every opportunity to discover and offer evidence disproving Doe's allegations that Mckesson breached his duty of care, and that the breach was a but-for cause of Doe's injuries. Likewise, and in light of the fact that Doe seeks to avail himself of Louisiana tort law, Mckesson is entitled to seek to avail himself of traditional tort defenses. These defenses would of course be available to future defendants in future cases. For example, if a defendant could show that a police officer improperly provoked a confrontation with a protestor, the defendant might assert the defense of comparative negligence, which remains available to assign proportional fault, as the Supreme Court of Louisiana explained on certification. *See Mckesson*, 339 So. 3d at 535.

These legal defenses and procedural safeguards confirm that allowing Doe's claim to proceed will not

create strict liability for protest leaders every time an errant protestor injures someone. Rather, Mckesson can be held liable only if Doe proves the specific elements of his negligence claim. Those elements are designed to target behavior that creates a foreseeable risk that others will be injured—and likewise designed to *allow* lawful expressive behavior. We conclude that imposing liability on the facts alleged here comports with *Claiborne*'s demand for "precision of regulation," 458 U.S. at 916, and therefore comports with the First Amendment.

IV

Despite the dissenting opinion's insistence, this controversy is not about the Boston Tea Party or Dr. Martin Luther King Jr. *Post* at ——. It is about whether sovereign States may impose tort liability for unreasonably dangerous conduct. They may. And where the unreasonably dangerous conduct occurs in proximity to behavior traditionally associated with the First Amendment, the State must tailor the cause of action to target the tortious activity, rather than to suppress the expressive conduct. The cause of action at issue here satisfies that requirement.

When we first considered this appeal, we affirmed the district court's dismissal of Doe's claims asserted against Black Lives Matter. We likewise affirmed the dismissal of Doe's vicarious-liability and civil-conspiracy claims asserted against DeRay Mckesson. But we reversed as to Doe's negligence claim, holding that it was sufficiently pleaded for purposes of Rule 12(b)(6), and that the First Amendment does not prohibit the imposition of liability on that basis. Each of those holdings was based

on our best understanding of Louisiana state law. After guidance from both the Supreme Court and the Supreme Court of Louisiana, the appeal now returns to us. With the benefit of that guidance, and with the Supreme Court of Louisiana having largely confirmed our understanding of state law, we renew our prior holdings here.

Accordingly, the judgement of the district court is AFFIRMED in part and REVERSED in part. The dismissal of Doe's negligence claim against Mckesson and the denial of Doe's motion for leave to amend to replead that negligence claim (and only that claim) are REVERSED. In all other respects, the judgment of the district court is AFFIRMED. The case is REMANDED to the district court for further proceedings consistent with this opinion.[12]

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[12] We hereby incorporate our prior holding that Doe failed to offer sufficient evidence to justify his proceeding anonymously. *Mckesson*, 945 F.3d at 835 n.12.

DON R. WILLETT, *Circuit Judge*, concurring in part, dissenting in part:

Officer John Doe was honoring his oath to serve and protect the people of Baton Rouge when an unidentified violent protestor hurled a rock or something like it, striking Doe in the face and inflicting devastating injuries. Officer Doe risked his life to keep his city safe that day—same as every other day he put on the uniform. He deserves justice. Unquestionably, Officer Doe can sue the rock-thrower. But I disagree that he can sue Mckesson as the protest leader. The Constitution that Officer Doe swore to protect itself protects Mckesson's rights to speak, assemble, associate, and petition. First Amendment freedoms are not absolute—but there's the rub: Did Mckesson stray from lawfully exercising his own rights to unlawfully exorcising Doe's? I don't believe he did.

I

The First Amendment "imposes restraints" on what (and whom) state tort law may punish. "No federal rule of law restricts a State from imposing tort liability for ... violence [or] threats of violence.[1] But "[w]hen such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded."[2]These guardrails prevent tort law from reaching "activity protected by the First Amendment."[3]

Start with "what." The First Amendment does

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[1] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[2] *Id.*

[3] *Id.* at 916.

not protect words "that provoke immediate violence"[4] or "that create an immediate panic."[5] That rule drives the analysis in the majority's leading case, *Claiborne*, which involved a years-long and sometimes violent boycott that tortiously interfered with white-owned businesses. Charles Evers "unquestionably played the primary leadership role in the organization of the boycott."[6] Yet the Supreme Court unanimously held that the Constitution protected his "highly charged political rhetoric," and it refused to hold him "liable for the unlawful conduct of others."[7] This even though Evers vilified and urged violence against boycott breakers, warning: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[8]

Claiborne shows that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."[9] Because Evers only *advocated* for violence, but did not provoke or incite imminent acts of violence, the Court said his fiery words "did not exceed the bounds of protected speech."[10] And under a wealth of precedent before and since, raucous public protests—even "impassioned" and "emotionally charged" appeals for the use of force—are protected unless intended to, and

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[4] *Id.* at 927.

[5] *Id.*

[6] *Id.* at 926.

[7] *Id.* at 926–27.

[8] *Id.* at 902.

[9] *Id.* at 927 (emphasis in original) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

[10] *Id.* at 929.

likely to, spark immediate violence.[11] So, 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."[12]

As for "whom," "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence."[13] Still, *Claiborne* gave three "theories that might justify holding [a leader] liable for the unlawful conduct of others."[14] First, "a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."[15] Second, "a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period."[16] Third, a leader's speeches might be "evidence that [he] gave other specific instructions to carry out violent acts or threats."[17]

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[11] *Id.* at 928, 102 S.Ct. 3409 (citing *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827); *see Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) ("[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct." (internal citation omitted)); *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991).

[12] *Claiborne*, 458 U.S. at 918, 102 S.Ct. 3409.

[13] *Id.* at 920.

[14] *Id.* at 927.

[15] *Id.*

[16] *Id.*

[17] *Id.*

The majority concludes that the first two theories allow Louisiana to punish Mckesson for "negligently organizing and directing a protest in an unsafe manner."[18] I disagree. Under *Claiborne*, Mckesson cannot be liable for violence unless he encouraged violence. It is not enough that he encouraged or committed unlawful-but-nonviolent actions that preceded violence. Next, even if *Claiborne* allows a state to pin liability for violence on a protest leader who committed only a nonviolent tort, that tort must at least be intentional. The majority argues that a "negligent protest" is unlawful, and thus unprotected. But that theory defies *Claiborne*, which carefully explains that the First Amendment protects large swaths of protest-leader conduct from liability under state law. After all, Mckesson calls for the First Amendment's aid precisely *because* he has been sued for conduct that a state deems unlawful. And separately, even if *Claiborne* allows liability for nonviolent, nonintentional conduct in some instances, the "negligent protest" idea does not match either theory of liability that the majority cites. Passive negligence is the opposite of "authorization," under *Claiborne*'s first theory, just as "d[oing] nothing" is the opposite of "incite[ment]" under the second.[19]

All told, the majority's expansive approach does not "impose[ ] restraints" but rather disposes them.[20] And it replaces "precision of regulation" with a sweeping proscription-by-regulation that would swal-

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[18] *Ante*, at 6.

[19] *See Claiborne*, 458 U.S. at 927.

[20] *See id.* at 916.

low the very theories that the majority points to.[21] For all these reasons, the novel "negligent protest" theory of liability is incompatible with the First Amendment and is foreclosed—squarely—by Supreme Court precedent.

A

The leader-liability framework that the majority relies on applies only when a protest organizer specifically directs *violence*. I disagree that *Claiborne* used the words "violent conduct" simply as a "shorthand for the unlawful conduct that is required to impose liability."[22] Just the opposite. Violence of some kind—whether direct or via incitement—*is* an independent condition of liability for violence under *Claiborne*. Like Evers, Mckesson did not commit or direct violence, so he cannot be liable for violence.

Evers threatened that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[23] And "several significant incidents of boycott-related violence" had already occurred.[24] As such, the economic harm at issue in *Claiborne* flowed from Evers's own (very likely) tortious conduct in organizing and leading a foreseeably and actually violent protest that "malicious[ly] interfere[d] with the plaintiffs' businesses."[25] Despite all that, the Supreme Court held that Evers's protest-leadership fell within the category of conduct that

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[21] *See id.* (quoting *Button*, 371 U.S. at 438.)

[22] *Ante*, at 26.

[23] *Claiborne*, 458 U.S. at 900 n.28.

[24] *Id.* at 903.

[25] *Id.* at 891.

the First Amendment protects.[26] Because Evers did not specifically direct *violence*, the Supreme Court was unwilling to find him liable for *violence.*[27] Unlike preventing violence, preventing tortious interference is not a good reason to limit speech.[28] Thus the Court refused to hold Evers liable for the economic harms that the boycott caused—even though Evers *led* the sometimes-violent boycott.[29]

When the Supreme Court observed that Evers could be held liable if he "authorized, directed, or ratified specific tortious activity," it was clarifying that Evers could be held liable for *violence* he directly incited.[30] That's because violence is a tort that falls outside First Amendment protection.[31] I see further evidence for *violent conduct* as a key element of *violence liability* in the Court's reliance on that same three-verb standard to explain why Evers was not liable despite his intentionally tortious activity, including words that urged violence.[32] "[A]ny such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened *acts* of violence."[33]

The takeaway is clear: when violent conduct "occurs in the context of constitutionally protected activ-

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[26] *Id.* at 929.

[27] *Id.* at 927–28.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 927.

[31] *Brandenburg*, 395 U.S. at 447.

[32] *Claiborne*, 458 U.S. at 929.

[33] *Id.* (emphasis added).

ity," the First Amendment permits civil liability for *the activity* only if the activity itself involves *violence.*[34] On the other hand, liability cannot attach to "nonviolent, protected activity."[35]

The majority argues that *Claiborne* uses "violent" and its variants only to refer to the particular category of "unlawful conduct" at issue in that case. So, the majority says, "[t]hat the unlawful conduct need not be violent is evident from the Supreme Court's repeated use of the latter term, when it might have otherwise said 'violent.' "[36] But the opposite inference is equally valid. That the unlawful conduct *must* be violent is evident from the Supreme Court's repeated use of the former term when it might have otherwise said "unlawful." My inference has a firmer foundation.

The Supreme Court used "violent" in prominent parts of the opinion.

• Concluding a section: "We *hold* that the *nonviolent* elements of petitioners' activities are entitled to the protection of the First Amendment."[37]

• Concluding a summary: "*violent* conduct is beyond the pale of constitutional protection."[38]

• Opening the opinion's final paragraph: "[t]he taint of *violence* colored the conduct of some of the petitioners[, who] of course, may be held liable for the

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[34] *Id.* at 916.

[35] *Id.* at 918.

[36] *Ante*, at 25.

[37] *Claiborne*, 458 U.S. at 915 (emphases added).

[38] *Id.* at 933 (emphasis added).

consequences of their *violent* deeds."[39]

But while the dueling usages may inspire good-faith debate about which term is a stand-in for the other, no amount of string-citing, word-counting, or prominence-hunting can provide a firm answer. As such, I would defer to the Court's exhortation toward "precision of regulation" and would hold that *Claiborne* authorizes leader-liability only for a leader who himself engages in violence. I would not extend *Claiborne* to those leaders who, like Evers and Mckesson, engaged only in the broader category of unlawful activity that the majority invokes.[40]

The majority opinion dismisses violence as a dividing line between liability and protection, pointing instead to proceedings that occurred in the state chancery and supreme courts to argue that the unlawful-but-nonviolent conduct that Evers led was actually not at issue in *Claiborne*. Under this view, *Claiborne* addressed leader-liability *only* for torts involving violent conduct. Thus, that case did not distinguish between unlawful-violent and unlawful-nonviolent conduct, and it therefore offers no constitutional protection to Mckesson's unlawful-nonviolent conduct. So the theory goes.

I am unpersuaded. For one thing, *Claiborne* held that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."[41] Evers was a petitioner. But even if that decision's procedural posture makes that hold-

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[39] *Id.* (emphases added).

[40] *Id.* at 916 (quoting *Button*, 371 U.S. at 438).

[41] *Claiborne*, 458 U.S. at 915.

ing dicta, as the majority opinion suggests, *Claiborne* does not thereby fail to distinguish between violence and nonviolence. On the contrary, *Claiborne*'s entire line of reasoning rests on the idea that "[t]he First Amendment does not protect violence."[42] Even if violence had been the "*only* tortious conduct at issue,"[43] then, violence *qua* violence was also the only possible path to liability for Evers.[44]

Also, and I hesitate to add complexity, but if violence really was the *only* tortious conduct at issue in *Claiborne* (a point I reject), wouldn't that, too, help Mckesson here? Consider this argument:

(a) Evers led the protest.[45]

(b) The protest was foreseeably violent.[46]

(c) Yet because the plaintiffs sought to hold Evers liable only for tortious "violent conduct" that he did not himself commit,[47]

(d) Evers was not liable.[48]

I understand the majority to agree with each of these points. But I also understand the majority to conclude that this argument fails when I swap "Evers" for "Mckesson." Why? I cannot tell. The ma-

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[42] *Id.* at 916.

[43] *Ante*, at 26.

[44] *Claiborne*, 458 U.S. at 914–15.

[45] *Claiborne*, 458 U.S. at 926, ("Evers ... unquestionably played the primary leadership role in the organization of the boycott.")

[46] *Id.* at 903 ("[S]everal significant incidents of boycott-related violence [had] occurred some years earlier.").

[47] *Ante*, at 26.

[48] *Claiborne*, 458 U.S. at 929.

jority says that "liability was improper" for Evers because he only "advocated for violence in general terms," and because "violence did not follow until weeks or months after the speech at issue there."[49] But I think those are distinctions without differences. Mckesson did not advocate for violence, so I fail to see why it would matter that the violent rock-thrower acted in close proximity to Mckesson's mere leadership of the protest. Indeed, it appears that Evers was still *leading* the protest when the "violent" torts happened in *Claiborne*. The issue here is not whether Mckesson urged violence, but whether he can be liable for failing to prevent foreseeable violence. *Claiborne* says no.

I agree with the majority that protest leaders can sometimes be "found liable for nonviolent, unlawful acts—despite participating in otherwise legitimate expressive activity."[50] Certainly, a libeler can be held liable for the *reputational harms* caused by his libelous speech.[51] But a libeler cannot be liable for the violent acts of others that the libeler did not intend to incite with his libelous speech.[52] Evers used defamatory language in *Claiborne*, denouncing his targets as "racists" and "bigots" and implying that they were murderers, rapists, and liars.[53] Yet the Court held that this language was "constitutionally inadequate to support the damages judgment against him."[54]

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[49] *Ante*, at 18

[50] *Ante*, at 27.

[51] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974).

[52] *See Brandenburg*, 395 U.S. at 447–48.

[53] *Claiborne*, 458 U.S. at 936–37.

[54] *Id.* at 929.

Defamation is a nonviolent tort, so it cannot support liability for violent conduct. That remains true even if the defamation's author writes words that, "as a matter of causation,"[55] inspire a third-party to commit violence. If the majority believes that this rule conflicts with *New York Times v. Sullivan*,[56] that belief misunderstands my position, *Sullivan*, or both.

I disagree with the majority because I read *Claiborne* to hold that a protest leader cannot be liable for *violent conduct* unless he himself committed or directed some form of violence.[57] The majority's Seventh Circuit citations show nothing to the contrary. The first case holds that a union can be liable for coercion if it engages in coercion.[58] That holding hews to the 1:1 correspondence I urge between activity and liability. The second case holds that "[t]here is no constitutional right to ... provide the resources with which the terrorists can purchase weapons and explosives."[59] I do not agree with the majority's seeming view that donations to terrorists have a nonviolent nature. Rather, because "donations are not always equivalent to advocacy," the Constitution allows the government to prohibit "the provision of material support" for terrorism.[60] At the same time, though, individuals "may, with impunity, become

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[55] *Ante*, at 25.

[56] 376 U.S. 254 (1964).

[57] *Claiborne*, 458 U.S. at 927–28.

[58] *520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Loc. 1*, 760 F.3d 708, 733 (7th Cir. 2014).

[59] *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026 (7th Cir. 2002).

[60] *Boim*, 291 F.3d at 1026.

members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas."[61] Individuals can face liability for funding violence, just as leaders can face liability for inciting violence. But those rules are inapt here, where Mckesson did not "material[ly] support" or incite violence.[62]

Finally, the majority argues that Mckesson's actions "plainly involve violence as a matter of causation."[63] I think the idea of violent negligence is something of an oxymoron in these circumstances, but I also disagree that Mckesson's actions were violent. To be sure, I accept the causal link between Mckesson's leadership and the rock-thrower's violence. If the protest hadn't happened, neither would Officer Doe's injuries. But just as in the context of defamation, I don't believe that a mere causal link is sufficient to establish liability. The majority also says that Mckesson participated in previous "similar protests," that he "organiz[ed]" the protest here, and that he "did nothing to prevent" violence.[64] But under this view, even Evers of *Claiborne* would be liable, for he too participated in and organized a boycott that was often violent.[65] Further, Evers did more than fail to discourage violence—he *encouraged* it.[66] Yet he wasn't liable.[67] Mckesson isn't either.

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[61] *Id.*

[62] *Id.*

[63] *Ante*, at 25.

[64] *Ante*, at 31 n.10.

[65] *Claiborne*, 458 U.S. at 903.

[66] *Id.* at 902.

[67] *Id.* at 929.

B

Even if *Claiborne* allows assigning liability for violence to a protest leader who committed only a nonviolent tort, I believe that tort must at least be intentional. The First Amendment "imposes restraints on the grounds that may give rise to damages liability," and it demands both "extreme care" and "precision of regulation."[68] As such, a protest leader's simple negligence is far too low a threshold for imposing liability for a third party's violence.[69]

To see why, step back to consider how this case arose. Officer Doe asserts a negligence claim. Mckesson asserts a First Amendment defense. The majority uses *Claiborne* to rebut Mckesson's defense. Importantly, then, *Claiborne* provides a basis of liability only in the sense that it gives "theories" that can rebut a First Amendment defense.[70] In turn, those theories unlock a possible path to tort liability under state law. But *Claiborne* does not create liability any more than it creates a cause of action.[71] Instead, for present purposes, *Claiborne* is relevant only when a protest leader uses the First Amendment to defend against a cause of action.

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The majority's theory of negligence liability would reduce First Amendment protections for pro-

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[68] *Id.* at 916–17, 927.

[69] *Id.*

[70] *Claiborne*, 458 U.S. at 927.

[71] *See, e.g., id.* at 926 ("[L]iability may not be *imposed on* Evers for his presence at NAACP meetings or his active participation in the boycott itself."(emphasis added)).

test leaders to a phantasm, almost incapable of real-world effect. In my view, that state of affairs would run counter to *Claiborne*, which explained at length exactly the opposite idea—that the First Amendment *does* protect protest leaders from liability for other's actions.[72]

The question *Claiborne* asks is, "in what circumstances is a protest leader's First Amendment defense inadequate?"[73] The majority answers that such a defense fails—and thus that the leader can be liable for a third-party's violence—anytime the protest-leader's conduct is "unlawful" or "wrongful." In other words, the First Amendment protects you until you get sued. Hmmm. The majority opinion's answer is circular, because *Claiborne* is relevant only when there is *already* a protest leader who is *already* facing an allegation of unlawful or wrongful conduct. Such a view leaves no room for the First Amendment to work. And that may be fine in certain circumstances—the First Amendment is not relevant to the vast majority of unlawful conduct, whether civil or criminal. But here, such a lax approach defies the "extreme care" that the Court charged us with in *Claiborne*.[74]

Interrupting the circularity requires giving the First Amendment force, not mere fanfare. That means identifying some protest-leader conduct that the Constitution shields *even though* state law deems it an unlawful cause of third-party violence. If negligence is not constitutionally protected, then I don't

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[72] *Id.* at 925–29.

[73] *See id.* at 927.

[74] *Claiborne*, 458 U.S. at 927.

know what conduct would be. Negligence sits at or near the far end of the "unlawfulness" spectrum that begins with violent crimes before running through property crimes, civil torts like battery, intentional-but-nonviolent civil torts such as trespass, and torts that require recklessness. A belt-and-suspenders view under which the First Amendment protects only that conduct which is already "lawful" under state law stands at odds with *Claiborne*'s painstaking action-by-action, defendant-by-defendant analysis.[75]

The majority opinion argues that its analysis *does* give the First Amendment force, because "liability must be tailored such that there is a sufficiently close relationship between the leader's actions and the protestor's unlawful conduct."[76] I agree that *Claiborne* requires a close relationship. The majority says that *Claiborne*'s three separate theories of liability define this close relationship. I agree with that too. But the majority later tells us that, under *Claiborne*'s first theory, this close relationship is present anytime a protest-leader "negligently creat[es] the conditions under which a plaintiff is likely to be injured."[77] That relationship doesn't look very "close" to me. Instead, it just looks like a restatement of the idea that the First Amendment protections apply only to conduct that a state deems lawful. The majority opinion also argues that its analysis gives the First Amendment force in this context because the majority's test still prohibits liability for legitimate expressive conduct. But if conduct is "legitimate" only if it

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[75] *See id.* at 906–34.

[76] *Ante*, at 17.

[77] *Ante*, at 31.

isn't "unlawful," then this response begs the question. I don't think *Claiborne* is that shallow (even if it *does* allow leader-liability for violence even when the leader did not commit violence).

Instead, *Claiborne* assumes that there are categories of conduct in which a protest leader can engage that are "unlawful" under state law but that are still protected under the First Amendment.[78] That decision then delineates those categories.[79] The majority opinion rejects the assumption—if not expressly, then by implication, and by a question-begging retreat to legitimate expressive conduct as the dividing line between categories. But that phrase is useful only as a tautology; it is like saying that the First Amendment protects protected conduct. The majority's actual analytical lever—"unlawful conduct"—sweeps far too broadly and would leave the First Amendment as a mere backstop that shields a protest leader from liability only for conduct that state law already deems lawful.

I agree that there are some circumstances in which a protest leader might be liable for negligently causing a third-party's foreseeable negligence. Or for intentionally causing a third-party's intentional tort. Or for expressly calling for violence that leads to third-party violence. I also agree that Louisiana could, in theory, hold Mckesson liable for violating any state laws that protect highways and police-station entrances from obstruction. But none of that describes Officer Doe's theory. Instead, he seeks to hold Mckesson liable for an unknown third-party's

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[78] *See Claiborne*, 458 U.S. at 926–27.

[79] *Id.* at 927.

violence. The third party's motivations and affiliations are also unknown. If a protest leader's *unintentional negligence* creates liability for a third-party's *intentional violence*, then the First Amendment is doing hardly any work in this area of the law, and the Supreme Court's opinion in *Claiborne* could have been much shorter.

2

Furthermore, and separately, I disagree that *Claiborne*'s actual language reaches a protest-leader's simple negligence. Consider it:

> There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.[80]

None of these theories looks like open-ended negligence to me.

The first theory's verbs are hardly passive, and anyway, I am unsure as to even the analytical possibility of holding a protest leader (or anyone else) liable for negligently "authoriz[ing], direct[ing], or ratif[ying]" a "specific" tort.[81] One can negligently *com-*

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[80] *Claiborne*, 458 U.S. at 927.

[81] *Id.*

mit a tort, of course—but only if the tort is one's own. By contrast, *Claiborne*'s three-verb formulation describes a leader's relationship not to his own conduct, but to the "unlawful conduct of others."[82] In my view, "authorize[ ]," "direct[ ]," and "ratif[y]" all connote intentionality. Thus, I see *Claiborne*'s first theory as encompassing only intentional conduct. So too for the third theory, which again applies to "specific" actions—this time instructions toward threats or violence. Both theories refer to intentional acts that are culpable far beyond mere negligence.

The second theory refers to speeches that are "likely to incite lawless action."[83] I think it is fair to say that this theory is a direct reference to that doctrine which appears most often in cases approving state-law criminal prohibitions against words or actions that are both "directed to ... producing imminent lawless action" and "likely to ... produce such action."[84] As such, incitement is among a relatively small number of familiar exceptions to the First Amendment, some others being libel, fighting words, true threats, and obscenity.[85] I can see how a bystander injured in the stampede from a lecture hall in which no "Fire!" was burning might have a cause of action for negligence against the yeller—but not against the lecture-planner. I would not use the incitement exception as a shovel to bury the rule. If the First Amendment allows *civil negligence* liability for

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[82] *Id.*

[83] *Id.*

[84] *Brandenburg*, 395 U.S. at 447.

[85] *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504–05 (1984).

words or actions whose unintentional-yet-foreseeable consequences include non-imminent injuries to third parties, then I do not understand why that Amendment would forbid criminal liability for those same deeds. Yet forbid it does.[86]

To sum up, state law already protects protest leaders from liability for *lawful* conduct. For protest leaders, *Claiborne* and the First Amendment are nugatory unless they protect something that state law doesn't—namely, conduct that is *unlawful* under state law. As to the specific question whether a protest leader can be liable for someone else's violence, I view the protest leader's own violence as the dividing line between what the First Amendment does and does not protect. But even if that line fails, I believe that the protest leader's unlawful actions must at least be intentional. The majority's dividing line—lawful versus unlawful—yields the same result whether a defendant looks to state law or to the Constitution. It says that the First Amendment protects protest leaders only until they need its help.

C

Even if everything I have said so far is dead wrong, I still could not join the majority opinion. That's because Officer Doe's allegations fall outside both theories of liability that the majority draws from *Claiborne*.

1

The first theory says that Mckesson can face liability if "he authorized, directed, or ratified specific

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[86] *Brandenburg*, 395 U.S. at 447.

tortious activity."[87] The majority focuses on the second verb, arguing that Mckesson directed specific tortious activity. But then it gets muddy. What "specific tortious activity" does the majority opinion believe that Mckesson is liable for? Not throwing the rock, of course. And not obstructing a public highway. Rather, the majority opinion tells us that the "precise tortious activity" at issue is that "Mckesson breached his duty to refrain from creating the conditions in which it is likely that a third party will injure someone by an unlawful act."[88] In other words, Mckesson "directed" his own negligence.

I am not persuaded. *Claiborne* explains the contexts in which a protest leader can be liable for "the unlawful conduct of others."[89] To hold Mckesson liable under *Claiborne*'s first theory, I think that the majority must identify two things: a "specific" tort committed by someone other than Mckesson, and an action by Mckesson that "authorized, directed, or ratified" that tort.[90] If those two steps are satisfied, *then* the First Amendment allows Mckesson to face state-law liability for directing the third-party's tort. But here, the majority's analysis blends those two steps by arguing that Mckesson "directed" *his own* tort.[91]

The correct mode of analysis under the first theory would proceed (and fail) as follows. The rock-throwing and its "consequences" are the "tortious ac-

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[87] *Claiborne*, 458 U.S. at 927.

[88] *Ante*, at 31.

[89] *Claiborne*, 458 U.S. at 927.

[90] *Id.*

[91] *Id.*

tivity" for which Doe seeks to hold Mckesson liable.[92] Thus the second-step question is whether Mckesson "directed" that "specific" activity.[93] He didn't. At worst, Mckesson "did nothing to try to discourage" violent behavior.[94] Doing nothing is passive, while "direct[ing]" is active, and I think *Claiborne* demands that we observe that distinction.[95] And even if Mckesson directed protestors to block a highway, traffic obstruction is not the "specific" activity that Doe complains of. Therefore, *Claiborne*'s first theory of leader-liability does not apply here.

None of this means that Mckesson can "avoid liability for [a] tort merely by pointing to his participation in a protest."[96] And he isn't trying to do that. Instead, he's arguing that Doe's theory is constitutionally invalid. That argument strikes me as utterly sensible, because Doe's theory is that Mckesson *negligently organized a protest*—not that Mckesson committed some separate, non-protest tort while a protest was otherwise occurring.

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The second theory says that a protest leader can be liable if his "speeches were likely to incite lawless action" and if "unlawful conduct ... in fact followed within a reasonable period."[97] As discussed above, I view this as a straightforward reference to the in-

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[92] *Id.*

[93] *Id.*

[94] *Ante*, at 2.

[95] *Claiborne*, 458 U.S. at 927.

[96] *Ante*, at 21.

[97] *Claiborne*, 458 U.S. at 927.

citement doctrine.[98] Under that doctrine, the Constitution does not protect speech that is intended to and likely to "produc[e] imminent lawless action."[99] The majority argues that incitement "is precisely what Doe alleges Mckesson did here."[100] I disagree.

For one thing—and here I agree with the majority—"this liability theory is seen more commonly in the context of allegedly inciteful speech."[101] The majority then says that the doctrine also extends to "*actions* tending to incite unlawful behavior."[102] Whether I agree with that or not, I do not see why it is relevant here, where the only "actions" that the majority identifies are: (1) "directing the protesters to obstruct a public highway," (2) "organizing the protest to begin in front of the Baton Rouge police station," and (3) "doing nothing to discourage the demonstrators from looting a grocery store and throwing water bottles at the police."[103] By my count, those "actions" are actually two instances of speech and one instance of *in*action.

But regardless, Mckesson's words (or actions) are not incitement—and thus do not fall within the second theory—unless they (1) were "directed to inciting or producing imminent lawless action" and (2) were "likely to incite or produce such action."[104] While I

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[98] *See supra* Part I.B.2.

[99] *Brandenburg*, 395 U.S. at 447.

[100] *Ante*, at 22.

[101] *Ante*, at 23.

[102] *Ante*, at 23 (emphasis added).

[103] *Ante*, at 24.

[104] *Claiborne*, 458 U.S. at 927–28 (citing *Brandenburg*, 395 U.S. at 447).

accept the Supreme Court of Louisiana's determination that Doe has stated a cause of action under that state's law, it remains for us to decide whether the allegations underpinning that cause of action, so stated, are consistent with the First Amendment.

To support his assertion of "incitement," Doe strings together various unadorned contentions—that Mckesson was "present during the protest," "did nothing to calm the crowd," "directed" protestors to gather on the public street in front of police headquarters, and "knew or should have known ... that violence would result" from the protest that Mckesson "staged." But Officer Doe does not allege:

- What orders Mckesson allegedly gave, how he led the protest, or what he said or did to incite violence.
- How Mckesson "controlled" or "directed" the unidentified assailant who injured Doe.
- How statements that Mckesson made to the media after the protest amount to a ratification of violence.

Without these and other fleshed-out facts, the complaint utterly fails to link Mckesson's role as leader of the protest demonstration to the mystery attacker's violent act. In short, Doe's skimpy complaint is heavy on well-worn conclusions but light on well-pleaded facts. Indeed, the lone "inciteful" speech quoted in Doe's complaint is something Mckesson said not to a fired-up protestor but to a mic'ed-up reporter—the day *after* the protest: "The police want protestors to be too afraid to protest." Tellingly, not a single word even obliquely references violence, much

less advocates it. Temporally, words spoken after the protest cannot possibly have incited violence during the protest. Tacitly, the majority opinion seems to discard the suggestion that Mckesson uttered anything to incite violence against Officer Doe. Thus constitutionally, these allegations are inadequate.

3

The majority argues that these two theories may not be "the only proper bases for imposing tort liability on a protest leader" under *Claiborne*.[105] But that case suggests, if anything, just the reverse. Approaching the question with "extreme care," the Court said that there were "three" theories that "might" do the trick.[106] It also said that Evers "did not exceed the bounds of protected speech."[107] I do not read this language as an invitation for us to identify new proper bases of protest-leader liability.

And even if we had an invitation to invent new exceptions, there are good reasons to conclude that a protest-leader's liability for a third-party's actions cannot encompass mere negligence. For one thing, it is impossible to reconcile the majority opinion's view (negligently disregarding potential violence *is not* protected) with *Claiborne*'s holding (intentionally advocating violence *is* protected)—at least not without also accepting that one who expressly and purposely calls for violence is somehow not behaving negligently to the risk that violence may result. But "[m]ere negligence ... cannot form the basis of liability under

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[105] *Ante*, at 18.

[106] *Claiborne*, 458 U.S. at 927.

[107] *Id.* at 929.

the incitement doctrine[.]"[108] To hold otherwise seems fanciful, as does allowing common-law tort principles to upstage constitutional free-speech principles.[109]

I also worry that the majority's approach will be a boon to anyone who might wish to quash protest using a heckler's (or rock-thrower's) veto. After all, the majority's "tortious conduct + foreseeable violence = liability for violence" formula leaves no accounting for *who* caused the violence. Here we don't know. Maybe the majority is correct in suggesting that the rock-thrower was a "member[ ]" of the group that Mckesson led, but maybe not.[110] Either way, under the majority's view, "protest organizers would be liable for all foreseeable damages that occurred during mass demonstrations—including those caused by the unlawful acts of counter-protesters and agitators not associated with a group or movement."[111] Nor can we be blind to the fact that individual rogue officers have caused violence on occasion.[112] To spell

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[108] *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987); *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 798 (2011) (holding that even if violent video games cause aggression, a state could not prohibit their sale to children).

[109] *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

[110] *See ante*, at 30.

[111] Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 Geo. Wash. L. Rev. 233, 238 (2021).

[112] *See, e.g.*, Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. Davis L. Rev. 347, 349–50 (2021) (cataloguing several such instances). It would be perverse indeed if

it out, I am concerned that those who oppose a social or political movement might view instigating violence (or feigning injury) during that movement's protests as a path toward suppressing the protest leader's speech—and thus the movement itself. And even putting that risk aside, large protests—just like large concerts and large sporting events—tend to attract people looking for trouble. You might even say that violence is nearly *always* foreseeable when an organizer takes specific action by putting together a large-enough event. But if you do, it is hard to accept the majority's theory.

II

The Supreme Court requires "extreme care" when attaching liability to protest-related activity.[113] The majority's theory—with no parsing between *intentional violent* tortious conduct (actionable) and *unintentional nonviolent* tortious conduct (nonactionable)—is at odds with the "precision of regulation" required to overcome the First Amendment.[114] Indeed, if it were that easy to plead around *Claiborne* and hold protest leaders personally liable for an individual protestor's violence, there would be cases galore holding as much. The majority opinion cites none. That's because the "negligent protest" theory of a leader's liability for the violent act of a rogue assailant dodges *Claiborne* and clashes head-on with constitutional fundamentals. Such an exotic theory

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injured protestors—forbidden by qualified immunity from suing any rogue officers who committed violence—could sue the protest organizer.

[113] *Id.* at 927.

[114] *Id.* at 916, 921.

would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms.

Holding Mckesson responsible for the violent acts of others because he "negligently" led a protest that carried the *risk* of *potential* violence is impossible to square with Supreme Court precedent holding that only tortious activity meant to incite imminent violence, and likely to do so, forfeits constitutional protection against liability for violent acts committed by others. With greatest respect, I disagree with the majority opinion's First Amendment analysis. Political uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning—indeed, from *before* the beginning. The Sons of Liberty were dumping tea into Boston Harbor almost two centuries before Dr. King's Selma-to-Montgomery march occupied the full width of the bloodied Edmund Pettus Bridge.

Officer Doe put himself in harm's way to protect his community—including the violent protestor who injured him. And states have undeniable authority to punish protest leaders and participants who *themselves* commit violence. The rock-hurler's personal liability is obvious, but I do not believe that Mckesson's is. Our Constitution explicitly protects nonviolent political protest. *Claiborne* is among "our most significant First Amendment" cases.[115] It insulates nonviolent protestors from liability for others' conduct when engaging in political expression, even

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[115] *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (Scalia, J., dissenting from denial of petition for a writ of certiorari).

negligently planning a protest, that aims to spur anything less than immediate violence. The Constitution does not insulate violence, but it does insulate citizens—including protest leaders—from responsibility for *others'* violence.

* * *

Dr. King's last protest march was in March 1968, in support of striking Memphis sanitation workers. It was a prelude to his assassination a week later, the day after his "I've Been to the Mountaintop" speech. Dr. King's hallmark was nonviolent protest, but as he led marchers down Beale Street, some young men began breaking storefront windows. The police moved in, and violence erupted, harming peaceful demonstrators and youthful looters alike. Had Dr. King been sued, either by injured police or injured protestors, I cannot fathom that the Constitution he praised as "magnificent"—"a promissory note to which every American was to fall heir"[116]—would countenance his personal liability.

Summing up: Mckesson is not liable for intentional violence, foremost because he did not commit any violence, but at minimum because he did not commit any intentional tort. Separately, *Claiborne*'s theories cannot support liability here, where Mckesson did not actively "direct" the tort that Officer Doe complains of, and where Doe's complaint is too flimsy to state an incitement rebuttal to Mckesson's First Amendment defense.

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[116] Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* I Have A Dream: Writings And Speeches That Changed The World 102 (James M. Washington ed., 1992).

In all other respects, I concur.[117]

[117] I dissent on the First Amendment issue, but I agree with the majority opinion that: (1) we have jurisdiction over this appeal; (2) Mckesson cannot be held vicariously liable for the assailant's actions; (3) Officer Doe failed to state a civil conspiracy claim; (4) Officer Doe failed to adequately allege that Black Lives Matter is an unincorporated association capable of being sued under Louisiana law; (5) Officer Doe has no right to proceed anonymously; (6) Louisiana law recognizes the negligence claim that Doe asserts and; (7) under Louisiana law, Doe has plausibly alleged such a claim.

APPENDIX E

SUPREME COURT OF LOUISIANA

OFFICER JOHN DOE, *Police Officer*,

v.

DERAY MCKESSON, ET AL.,

No. 2021-CQ-00929

OPINION

March 25, 2022

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

HUGHES, J.

We accepted the certified questions presented to this court by the United States Court of Appeals, Fifth Circuit, in *Doe v. Mckesson*, 2 F.4th 502 (5th Cir. 2021) (per curiam). The questions posed by the Fifth Circuit are: (1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party? (2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescu-

er's Doctrine bars recovery under the facts alleged in the complaint? *Id.*, 2 F.4th at 504. We answer the former, under the facts alleged in the complaint, in the affirmative and the latter in the negative, for the following reasons.

FACTS AND PROCEDURAL HISTORY

The plaintiff in this personal injury case named as defendants the Black Lives Matter ("BLM") organization[1] and DeRay Mckesson (alleged to be a leader and co-founder of BLM). The plaintiff alleges that he was a duly commissioned police officer for the City of Baton Rouge on July 9, 2016, when he was ordered to respond to a protest "staged and organized by" BLM and DeRay Mckesson, which was in response to the July 5, 2016 death of Alton Sterling, who was shot by a Baton Rouge police officer when Mr. Sterling resisted arrest.

The plaintiff alleged that Mr. Mckesson, at all material times during the July 9th protest, led "the protest and violence that accompanied the protest," which took place outside the Baton Rouge Police Department located on Airline Highway, a heavily traveled public highway. The plaintiff further alleged that BLM and Mr. Mckesson "staged" the July 9th protest and, during the protest, their followers engaged in the "blocking of a public highway, looting of a Circle K, throwing of items stolen and violence towards police." It was further claimed that the defendants were in Baton Rouge "for the purpose of demon-

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[1] BLM was dismissed in the federal district court proceedings, and that dismissal is not at issue in the questions certified to this court by the Fifth Circuit Court of Appeals and will not be discussed herein.

strating, protesting and rioting to incite others to violence against police and other law enforcement officers," that the defendants "conspired to violate the law by planning to block a public highway," and that they "knew police would be called to clear the public highway of protestors."

As stated in the petition, when the highway in front of the police department was blocked, the Baton Rouge police department "arranged for a front line of officers in riot gear that formed a shield around officers who were to effectuate arrests and removal of Defendants from the public highway," and the plaintiff was one of the officers designated to make arrests. The plaintiff also asserted that "the protest was peaceful until activist[s] began pumping up the crowd," that Mr. Mckesson was "in charge of the protests," and that he was "seen and heard giving orders throughout the day and night of the protests." The plaintiff claimed in his petition that the protest turned into a riot, with protestors hurling full plastic water bottles at the police officers. The plaintiff further alleged that Mr. Mckesson was present during the protest, and "he did nothing to calm the crowd and, instead, he incited the violence on behalf of [BLM]." When the defendants ran out of water bottles to throw, the plaintiff claimed that a BLM protestor "picked up a piece of concrete or similar rock like substance and hurled [it] into the police that were making arrests," striking the plaintiff in the face and causing him injuries to his teeth, jaw, brain, and head, along with other compensable losses.

In addition, the plaintiff sets forth in his petition that Alton Sterling's July 5, 2016 death "started a flurry of activity" by the defendants, who had staged

protests in other cities that "resulted in violence and property damage." The plaintiff cited as examples of these other activities, that: on July 7, 2016, Lakeem Keon Scott "shot at passing car[s] along a Tennessee highway, killing one woman and wounding three others, including a police officer, while yelling, '[P]olice suck! Black lives matter!'"; and, on July 7, 2016, at a BLM protest in Dallas, Texas, at least one sniper shot twelve police officers (killing five), who had been on duty to keep the peace during the protest. The plaintiff alleged other similar attacks occurred during protests and rioting in other locations across the country, and the defendants had taken credit for the protests and riots, citing Mr. Mckesson's statement to the New York Times, following the attack on the plaintiff, that "[t]he police want protesters to be too afraid to protest," in addition to indicating that he intended to plan more protests.

In an amended petition, which the plaintiff later sought to file in the federal district court,[2] he detailed further incidents of violent protests by BLM leading

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[2] We note that, although the federal district court denied the plaintiff's motion to amend, it did so in conjunction with its judgment granting motions to dismiss filed by the defendants, for the failure to state plausible claims for relief, therefore, the court in essence deemed the amended petition futile. We summarize the additional allegations presented in the plaintiff's amended petition since they were implicitly considered by the certifying court herein, in *Doe v. Mckesson*, 945 F.3d 818, 828 (5th Cir. 2019), cert. granted, judgment vacated, U.S. , 141 S.Ct. 48, 208 L.Ed.2d 158 (2020), discussed hereinafter (wherein the Fifth Circuit reversed the dismissal of Mr. Mckesson and further concluded that the district court erred in refusing to allow the amendment of the plaintiff's petition; in discussing the plaintiff's amended complaint, the court began with, "The amended complaint only bolsters these conclusions….").

up to the July 2016 incident in Baton Rouge, including: the April 2015 "Baltimore unrest and rioting"; the June 2015 "McKinney, Texas unrest"; the August 2015 "Earth City, Missouri, blocking rush-hour traffic" incident; the August 2015 "Ferguson unrest"; the July 7-8, 2016 BLM marches "through midtown Manhattan and up into Harlem blocking public highways"; the July 8, 2016 "protest in Nashville, Memphis, Knoxville and Chattanooga, Tennessee, blocking traffic on a public highway"; the July 9, 2016 protests on the "1-94 freeway in St. Paul, Minnesota" (during which police were attacked by protestors with "chunks of concrete, rebar, rocks, bottles, fireworks and Molotov Cocktails"); and a July 9, 2016 Phoenix, Arizona rally (during which "rocks and other objects" were thrown at police, and protestors shouted to police officers: "We should shoot you!"). It was also alleged that during the July 9, 2016 Baton Rouge BLM protest, Mr. Mckesson "lead [sic] protestors down Airline Hwy in an attempt to reach 1-12 to block the interstate" but "OFFICER JOHN DOE's squad managed to block the effort of DeRay Mckesson to lead the protestors to I-12. DeRay Mckesson knew he was in violation of the law and actually live streamed his arrest."

Plaintiff also gave further details, in his amended petition, about public statements made by Mr. Mckesson, in which he represented himself as a BLM leader and protest organizer, including: with CNN's Wolfe Blitzer; with FOX's Sean Hannity; on Stephen Colbert's The Late Show; in a Forbes Magazine article titled "Black Lives Matter Activist DeRay Mckesson Talks Colin Kaepernick, Progress and the Future"; at the Voice of San Diego Politifest; on

UPROXX.com; and at the White House with President Obama; along with the hacking of Mr. Mckesson's Twitter account and the public disclosure of Twitter statements between Mr. Mckesson and other BLM leaders that "specifically showed an intent to use protests to have 'martial law' declared nationwide."

Based on these allegations in the federal district court, the plaintiff sought damages for the injuries he sustained at the hands of the BLM protestors, citing La. C.C. art. 2315 and claiming that the defendants knew or should have known that the demonstration and riot they staged would become violent and result in serious personal injuries, as other similar protests had become violent and police officers were assaulted. Also, the plaintiff cited La. C.C. art. 2317, claiming the defendants are liable for the actions of the BLM protestor who directly caused the injuries at issue; he also cited La. C.C. art. 2324 in claiming the defendants are liable in solido for the plaintiff's injuries, for their intentional actions, and for conspiring to incite a protest/riot.

In response to the action, motions to dismiss were filed under Federal Rules of Civil Procedure, Rule 9(a) (asserting there is no authority for Mckesson to be sued as an agent of BLM) and Rule 12(b)(6) (asserting a failure to state a claim upon which relief can be granted), both of which the federal district court granted. *See Doe v. Mckesson*, 272 F.Supp.3d 841 (M.D. La. 2017). The federal appellate court ultimately reversed the district court in *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), cert. granted, judgment vacated,_____U.S._____, 141 S.Ct. 48, 208 L.Ed.2d 158 (2020). Thereafter, the Supreme Court

granted a petition for writ of certiorari, vacated the Fifth Circuit decision, and remanded to that court for further proceedings consistent with its opinion, reasoning:

> The question presented for our review is whether the theory of personal liability adopted by the Fifth Circuit violates the First Amendment. When violence occurs during activity protected by the First Amendment, that provision mandates "precision of regulation" with respect to "the grounds that may give rise to damages liability" as well as "the persons who may be held accountable for those damages." *[NAACP v.] Claiborne Hardware [Co.]*, 458 U.S. [886,] at 916-917, 102 S.Ct. 3409[, 73 L.Ed.2d 1215 (1982)] (internal quotation marks omitted). Mckesson contends that his role in leading the protest onto the highway, even if negligent and punishable as a misdemeanor, cannot make him personally liable for the violent act of an individual whose only association with him was attendance at the protest.
>
> We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place. The dispute thus could be "greatly simplifie[d]" by guidance from the Louisiana Supreme Court on the meaning of Louisiana law. *Bellotti v. Baird*, 428 U.S. 132, 151, 96 S.Ct. 2857, 49 L.Ed.2d 844

(1976).

* * *

In exceptional instances … certification is advisable before addressing a constitutional issue. *See Bellotti*, 428 U.S. at 151, 96 S.Ct. 2857; *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960). Two aspects of this case, taken together, persuade us that the Court of Appeals should have certified to the Louisiana Supreme Court the questions (1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists. *See* 945 F.3d at 839 (opinion of Willett, J.).

First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. *See Lehman Brothers [v. Schein]*, 416 U.S. [386,] at 391, 94 S.Ct. 1741[, 40 L.Ed.2d 215 (1974).] To impose a duty under Louisiana law, courts must consider "various moral, social, and economic factors," among them "the fairness of imposing liability," "the historical development of precedent," and "the direction in which society and its institutions are evolving." *Posecai [v. Wal-Mart Stores, Inc.]*, 752 So.2d [762,] at 766 [(La. 1999)]. "Speculation by a federal court about" how a state court would weigh, for instance, the moral value of protest against the economic consequences of

> withholding liability "is particularly gratuitous when the state courts stand willing to address questions of state law on certification." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (internal quotation marks and alteration omitted).
>
> Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical. The novelty of the claim at issue here only underscores that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Ibid.* The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court. We express no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand.

McKesson v. Doe, ____U.S.____, 141 S.Ct. 48, 50-51, 208 L.Ed.2d 158 (2020).

On remand, the Fifth Circuit Court of Appeals certified two questions to this court, stating in perti-

nent part as follows:

> [W]e hereby certify the following determinative questions of law to the Supreme Court of Louisiana, by which responses we will be bound for the purposes of this case:
>
> 1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?
>
> 2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?
>
> * * *
>
> Should the Supreme Court of Louisiana accept our request for answers to these questions, we disclaim any intention or desire that it confine its reply to the precise form or scope of the questions certified. Along with our certification, we transfer this case's record, our previous opinion, and the briefs submitted by the parties. We will resolve this case in accordance with any opinion provided on these questions by the Supreme Court of Louisiana. Accordingly, the Clerk of this Court is directed to transmit this certification and request to the Supreme Court of Louisiana in conformity with the usual practice of this court.

Doe v. Mckesson, 2 F.4th 502, 504 (5th Cir. 2021).

This court accepted the Fifth Circuit's certi-

fication request. *Doe v. McKesson*, 21-00929, p. 1 (La. 7/8/21), 320 So.3d 416, 417.

CERTIFIED QUESTION NO. 1: Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

Though later vacated by the Supreme Court, directing certification of the questions to this court, in *Doe v. Mckesson*, 945 F.3d at 826-32, the Fifth Circuit previously answered the first certified question it now poses to this court, stating in pertinent part:

> [W]e turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree as follows.
>
> Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached. *Lazard v. Foti*, 859 So.2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762, 766

(La. 1999); see *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.'" (quoting *Dupre v. Chevron U.S.A., Inc.*, 20 F.3d 154, 157 (5th Cir. 1994))). There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another." Boykin v. La. Transit Co., 707 So.2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of

> various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.

Posecai, 752 So.2d at 766.

We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organ-

izing and leading the Baton Rouge demonstration. The complaint alleges that Mckesson planned to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson was in charge of the protests and was seen and heard giving orders throughout the day and night of the protests. Blocking a public highway is a criminal act under Louisiana law. *See* La. Rev. Stat. Ann. § 14:97. Indeed, the complaint alleges that Mckesson himself was arrested during the demonstration. It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.

By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration. This is not, as the dissenting opinion contends, a "duty to protect others from the criminal activities of third persons." *See Posecai*, 752 So.2d at 766. Louisiana does not recognize such a duty. It does, however, recognize a duty not to negligently cause

a third party to commit a crime that is a foreseeable consequence of negligence. *See Brown v. Tesack*, 566 So.2d 955 (La. 1990). The former means a business owner has no duty to provide security guards in its parking lot if there is a very low risk of crime. *See Posecai*, 752 So.2d at 770. The latter means a school can be liable when it negligently disposes of flammable material in an unsecured dumpster and local children use the liquid to burn another child. *See Brown*, 566 So.2d at 957. That latter rule applies here too: Mckesson owed Doe a duty not to negligently precipitate the crime of a third party. And a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest.

Officer Doe has also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of Officer Doe's injury and that the injury was within the scope of the duty breached by Mckesson. It may have been an unknown demonstrator who threw the hard object at Officer Doe, but by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Officer Doe's injuries. *See Roberts v. Benoit*, 605 So.2d 1032, 1052 (La. 1992) ("To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred."). Fur-

thermore, as the purpose of imposing a duty on Mckesson in this situation is to prevent foreseeable violence to the police and bystanders, Officer Doe's injury, as alleged in the pleadings, was within the scope of the duty of care allegedly breached by Mckesson.

The amended complaint only bolsters these conclusions. It specifically alleges that Mckesson led protestors down a public highway in an attempt to block the interstate. The protestors followed. During this unlawful act, Mckesson knew he was in violation of law and livestreamed his arrest. Finally, the plaintiff's injury was suffered during this unlawful action. The amended complaint alleges that it was during this struggle of the protestors to reach the interstate that Officer Doe was struck by a piece of concrete or rock-like object. It is an uncontroversial proposition of tort law that intentionally breaking, and encouraging others to break, the law is relevant to the reasonableness of one's actions.

We iterate what we have previously noted: Our ruling at this point is not to say that a finding of liability will ultimately be appropriate. At the motion to dismiss stage, however, we are simply required to decide whether Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery. We find that it is.

* * *

…The district court erred by dismissing Of-

> ficer Doe's complaint—at the pleading stage—as barred by the First Amendment. We emphasize that this means only that, given the facts that Doe alleges, he could plausibly succeed on this claim. We make no statement (and we cannot know) whether he will.

(Footnotes omitted.)

We find this recitation of the law by the Fifth Circuit both relevant to the first certified question posed to this court and an accurate summary of the pertinent Louisiana law on this issue. Under the allegations of fact set forth in the plaintiff's federal district court petition, it could be found that Mr. Mckesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway, thereby posing a hazard to public safety), directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM in other parts of the country resulted in violence and injury not only to citizens but to police, would render Mr. Mckessonliable for damages for injuries, resulting from these activities, to a police officer compelled to attempt to clear the highway of the obstruction. Louisiana's Civil Code Article 2315 requires that "[***e***]***very act whatever*** of man that causes damage to another obliges him by whose fault it happened to repair it." (Emphasis added.) Louisiana law would give the plaintiff an opportunity to prove the allegations made at trial, since "[i]n ruling on an exception raising the objection of no cause of action, the court must determine whether the law affords any relief to the claimant if he proves the factual allegations in the petition

at trial" and "[a]ny reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated." *See United Teachers of New Orleans v. State Board of Elementary & Secondary Education*, 07-0031, p. 9 (La. App. 1 Cir. 3/26/08), 985 So.2d 184, 193.

CERTIFIED QUESTION NO. 2: Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

"The professional rescuers rule … 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." Worley v. Winston, 550 So.2d 694, 696 (La. App. 2 Cir.), *writ denied*, 551 So.2d 1342 (La. 1989). Prior to the enactment of pure comparative fault in Louisiana,[3] via the amendments to La. C.C. art. 2323 by 1996 La. Acts, 1st Ex. Sess, No. 3, a rudimentary form of the common-law Profes-

[3] By means of 1996 La. Acts, 1st Ex. Sess., No. 3, "the legislature … amended La. C.C. arts. 2323 and 2324(B) … to abolish solidary liability among non-intentional tortfeasors and to place Louisiana in a pure comparative fault system." *Dumas v. State ex rel. Department of Culture, Recreation & Tourism*, 02-0563, p. 9 (La. 10/15/02), 828 So.2d 530, 535. *See also Hall v. Brookshire Brothers*, 02-2404, p. 16 (La. 6/27/03), 848 So.2d 559, 569 ("In 1996 … the legislature enacted a system of pure comparative fault in Louisiana."). "[T]he 1996 legislation … extended the comparative fault principles to virtually all at-fault actors." Frank L. Maraist et al., *Answering A Fool According to His Folly: Ruminations on Comparative Fault Thirty Years on*, 70 La. L. Rev. 1105, 1132 (2010).

sional Rescuer's Doctrine[4] (though not so-called) was considered by this court in *Briley v. Mitchell*, 238 La. 551, 115 So.2d 851 (1959), and *Langlois v. Allied Chemical Corporation*, 258 La. 1067, 1070, 249 So.2d 133 (1971). Similar results were reached in the plaintiff's favor in both the *Briley* and the *Langlois* cases, which held that the plaintiff/professional rescuers were not precluded from recovering damages for injuries against a tortfeasor, who was strictly liable, under the law existing at the time of the tort, for a hazard in his custody (in the former, a wild animal and, in the latter, a hazardous chemical).

In *Langlois*, this court recognized that "[u]sually, the ***assumption of risk*** doctrine will apply where the nature of the relationship of the parties appears to exact consent from the one injured to be exposed to possible harm. In such situations the plaintiff understands the risk involved and accepts the risk as well as the inherent possibility of damage because of the risk. … A plaintiff who with full knowledge and appreciation of the danger voluntarily exposes himself to the risks and embraces the danger cannot recover damages for injury which may occur." *Langlois*, 258 La. at 1086, 249 So.2d at 140 (emphasis added). This court further held: "We must examine the plaintiff's appreciation and knowledge of the risks, his ability to avoid or minimize the risks, and ***whether he has consented to encounter the risk***. The interests of

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[4] "Louisiana courts appear simply to have borrowed the assumption of risk doctrine from the common law." *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1130 (La. 1988). The Professional Rescue's Doctrine is a type of assumption of the risk. *Beaupre v. Pierce County*, 161 Wash.2d 568, 576, 166 P.3d 712, 717 (2007).

the parties must be balanced. Plaintiff is not required to surrender valuable rights and privileges because defendant's conduct threatens him. Yet if the plaintiff could readily avoid or mitigate the damage caused by defendant's conduct and he knows how to do so, he cannot act in such a manner as to invite injury." *Id.*, 258 La. at 1086-87, 249 So.2d at 141 (emphasis added). In *Langlois*, this court specifically pointed out that the defendant/tortfeasor was not the party being rescued. The *Langlois* court recognized that "[a]ny voluntariness on the part of [the plaintiff/firefighter] could only be found if we ***assume a waiver*** because he became a fireman," it also recognized that "[f]iremen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety ***do not assume the risk of all injury without recourse against others***." *Langlois*, 258 La. at 1087-88, 249 So.2d at 141 (citing *Briley v. Mitchell*, 238 La. 551, 115 So.2d 851 (1959)) (emphasis added). The court found that the plaintiff had "acted in response to duty, and his exposure to the risk in line with that duty was minimal," however, he "did not embrace a known danger with that consent required by law to bar his recovery for defendant's fault."[5] *Id.*, 258 La. at 1088-89, 249 So.2d at 141.

Notwithstanding, it has been posited that the Professional Rescuer's Doctrine is no longer viable in Louisiana in light of this court's decision in *Murray v. Ramada Inns, Inc.*, and the amendments to La. C.C. art. 2323(A) by 1996 La. Acts, 1st Ex. Sess, No. 3,

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[5] Prior to this court's decision in *Murray v. Ramada Inns, Inc.*, 521 So.2d at 1133, assumption of risk was a defense that, if proven, totally barred a plaintiff's recovery of damages.

enacting pure comparative fault in Louisiana and resulting in its current provisions, directing:

> In ***any*** action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of ***all*** persons ***causing or contributing*** to the injury, death, or loss ***shall*** be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

(Emphasis added.) In addition, as amended by Act No. 3, Paragraph (B) of 2323 now states: "The provisions of Paragraph A shall apply to ***any*** claim for recovery of damages for injury, death, or loss asserted under ***any*** law or legal doctrine or theory of liability, regardless of the basis of liability." (Emphasis added.)

Even prior to the enactment of 1996 La. Act (1st Ex. Sess.) No. 3, this court in *Murray v. Ramada Inns, Inc.*, interpreting the previous version of Article 2323, held that in view of the legislative adoption of comparative fault the jurisprudentially-borrowed

common law doctrine of assumption of risk no longer had a place in Louisiana tort law. *Murray v. Ramada Inns, Inc.*, 521 So.2d at 1132. In so holding, this court reasoned that if the Legislature had intended to preserve the defense as a total bar to recovery, it could have easily and expressly stated that intention in Article 2323; however, there is no doubt that the Legislature intended by its amendment of Article 2323 to eliminate contributory negligence as a complete bar to recovery and to make comparative fault applicable to those cases in which the plaintiff's conduct may result in a reduction of recovery. *Murray*, 521 So.2d at 1133. Beyond that clearly expressed intention, this court further observed that the Legislature left the "tough details," regarding the scope and application of Article 2323, "for the courts to decide." *Id.* The *Murray* court concluded that "the survival of assumption of risk as a total bar to recovery would be inconsistent with [A]rticle 2323's mandate that contributory negligence should no longer operate as such a bar to recovery." *Id.*

Despite *Murray's* general abrogation of the application of assumption of risk in Louisiana tort cases, this court therein excepted from its ruling those cases "where the plaintiff, by oral or written agreement, expressly waives or releases a future right to recover damages from the defendant," if "no public policy concerns would invalidate such a waiver (see also La. Civil Code art. 2004), the plaintiff's right to recover damages may be barred on a release theory," and "in the sports spectator or amusement park cases (common law's "implied primary" assumption of risk cases)." *Murray*, 521 So.2d at 1134. However, *Murray* expressed the view that in each of these two excep-

tions, the better analysis would, in the former, to have been by "[a]pplying duty/risk analysis to this situation, it can be concluded that the defendant has been relieved by contract of the duty that he otherwise may have owed to the plaintiff," and in the latter to "rather than relying on the fiction that the plaintiffs in such cases implicitly consented to their injuries, the sounder reasoning is that the defendants were not liable because they did not breach any duty owed to the plaintiffs."[6] *Id.* Even in stating the exceptions to its abrogation of assumption of risk,

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[6] *Murray*, 521 So.2d at 1134-35, further explained:

> For example, in the classical baseball spectator setting, the case for negligence may often fall short on the question of whether the defendant breached a duty owed to the plaintiff. While a stadium operator may owe a duty to spectators to provide them with a reasonably safe area from which they can watch the game, it is generally not considered reasonable to require the stadium operator to screen all spectator areas from flying baseballs. Even while applying assumption of risk terminology to these types of cases, courts have simultaneously recognized that the defendant was not negligent because his conduct vis-a-vis the plaintiff was not unreasonable. *See Lorino v. New Orleans Baseball & Amusement Co.*, 16 La. App. [95,] at 96, 133 So. [408,] at 408 [(La. App. Orl. 1931)] ("It is well known ... that it is not possible ... for the ball to be kept at all times within the confines of the playing field.") On the other hand, the failure to protect spectator areas into which balls are frequently hit, such as the area behind home plate, might well constitute a breach of duty. These types of cases will turn on their particular facts and may be analyzed in terms of duty/risk. The same analysis applies in other cases where it may not be reasonable to require the defendant to protect the plaintiff from all of the risks associated with a particular activity….

Murray instructs that the better analysis is under the duty/risk analysis of comparative fault.

We note that *Murray* made no express exception relative to the Professional Rescuer's Doctrine, which is based on an implied (not express) assumption of risk. Also, though the Louisiana Legislature has enacted statutes to bar some plaintiffs' recovery, which may be said to modify the pure comparative fault now set forth in La. C.C. 2323 and to statutorily deny recovery to such plaintiffs based on their own "specified risky or blameworthy conduct or activities" (see Frank L. Maraist et al., supra at 1132-35), no such statute has been cited to this court codifying the Professional Rescuer's Doctrine.[7] Thus, neither this court, nor this state's legislature, has deemed

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[7] *See, e.g.,* La. R.S. 9:2798.4 (denying tort recovery to one injured while "operating a motor vehicle, aircraft, watercraft, or vessel" with a "blood alcohol concentration of 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood" or "while he was under the influence of any controlled dangerous substance described in R.S. 14:98(A)(1)(c) or R.S. 40:964"); La. R.S. 9:2800.10 (denying tort recovery to one injured while perpetrating "a felony offense during the commission of the offense or while fleeing the scene of the offense"); La. R.S. 14:19 (denying tort recovery against a person to one injured while committing "a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense"); La. R.S. 14:63(H) (denying tort recovery to one injured while entering a "structure, watercraft, movable or immovable property without express, legal or implied authorization, or who without legal authorization, remains upon the structure, watercraft, movable or immovable property after being forbidden by the owner, or other person with authority to do so" unless resulting from "the intentional acts or gross negligence of the owner, lessee or custodian").

it appropriate to recognize an express exception for the Professional Rescuer's Doctrine to *Murray's* abrogation of assumption of risk or La. C.C. 2323's mandate of pure comparative fault in this state.

Accordingly, we answer the Fifth Circuit Court of Appeals' second certified question: In view of the current directive of La. C.C. art. 2323 that "[i]n ***any*** action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of ***all*** persons ***causing or contributing*** to the injury, death, or loss ***shall*** be determined…" (emphasis added) and this court's holding in *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1132 (La. 1988), abrogating assumption of risk, we conclude that the Professional Rescuer's Doctrine has likewise been abrogated in Louisiana both legislatively and jurisprudentially.

DECREE

We have answered the certified questions as set forth in this opinion. Pursuant to Rule XII, Supreme Court of Louisiana, the judgment rendered by this court upon the questions certified shall be sent by the clerk of this court under its seal to the United States Court of Appeals for the Fifth Circuit and to the parties.

WEIMER, C.J., concurring.

I respectfully concur, adopting a slightly different analytical approach to the questions posed. In doing so, I recognize and emphasize that this court's role in addressing a certified question is to respond to the question posed by the federal court and not to decide the underlying case. The fact-intensive analysis to ultimately decide this case is left for the federal court where this matter is pending. That being said, with respect to the certified questions presented, I offer the following.

Certified Question No. 1: Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?

In Louisiana, the foundation of any delictual action lies in Louisiana Civil Code article 2315, which provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana Civil Code article 2316 similarly provides: "Every person is responsible for the damage he occasions not merely by his action, but by his negligence, his imprudence, or his want of skill." This foundational basis for tort liability in Louisiana creates a broad obligation on everyone to act with reasonable care to avoid injury to another. *Boykin v. La. Transit Co., Inc.*, 96-1932, p. 10 (La. 3/4/98), 707 So.2d 1225, 1231.

In applying La. C.C. art. 2315 to a specific factual situation, Louisiana courts utilize the duty-risk analysis which requires a plaintiff to prove five elements: (1) defendant had a duty to conform his conduct to a specific standard (the duty element); (2) defendant's

conduct failed to conform to the applicable standard (the breach element); (3) defendant's substandard conduct was a cause-in-fact of plaintiff's injuries (the cause-in-fact element); (4) defendant's substandard conduct was a legal cause of plaintiff's injuries (the scope of the duty element); and (5) actual damages. *Boykin*, 96-1932 at 8, 707 So.2d at 1230. If a plaintiff fails to prove any one of the five elements, a defendant is not liable. *Id.*

While Article 2315 creates broad accountability for fault, the "duty" inquiry can narrow the scope of potential liability and financial responsibility. Thus, the threshold inquiry in a negligence action is whether the defendant owed the plaintiff a duty. *Posecai v. Wal-Mart Stores, Inc.*, 99-1222, p. 4 (La. 11/30/99), 752 So.2d 762, 766.[1] This is a policy-driven decision that considers various moral, social, and economic factors. *Id.* Relevant factors in determining the existence of a duty include "the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for a unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving." *Id.*

The factors outlined by this court in *Posecai* and

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[1] Specific duties can arise from codal, statutory, administrative and local laws, as well as private contracts and custom. *See Ardoin v. Hartford Acc. & Indem. Co.*, 360 So.2d 1331, 1334 (La. 1978); *see also Reynolds v. Bordelon*, 14-2362, pp. 7-8 (La. 6/30/15), 172 So.3d 589, 595-596. The parties have not cited, nor have we found, any specific codal, statutory, administrative or local law that addresses the duty at issue here.

other cases weigh in favor of finding a general duty exists "not to negligently precipitate the crime of a third party." An analysis of these factors leads to the conclusion: (1) the imposition of a duty is a matter of fundamental fairness, as the potential for civil liability for a "negligent precipitator" may deter future negligent conduct; (2) the imposition of a duty places the economic loss on the "negligent precipitator" rather than on the injured victim; (3) the imposition of a duty on a "negligent precipitator" of the crime of a third party may prevent future harm; and (4) the "negligent precipitator" is better positioned to analyze the risks involved in the conduct at issue and, thus, take precautions to avoid them or to insure against them. These policy considerations, independently and collectively, support recognition of a broad duty not to "negligently precipitate the crime of a third party."

Certified Question No. 2: Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint.

The Professional Rescuer's Doctrine is a jurisprudential rule which provides 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." *Gann v. Matthews*, 03-640, pp. 5-6 (La.App. 1 Cir. 2/23/04), 873 So.2d 701, 705. However, there are exceptions to this rule, as explained in *Gann*:

> A professional rescuer may recover for an injury caused by a risk that is independent of

> the emergency or problem he has assumed the risk to remedy. A risk is independent of the task, and the assumption of the risk rationale does not bar recovery, if the risk-generating object could pose the risk to the rescuer in the absence of the emergency or specific problem undertaken. On the other hand, "dependent" risks arise from the very emergency that the professional rescuer was hired to remedy. The assumption rationale bars recovery from most dependent risks except when (1) the dependent risks encountered by the professional rescuer are so extraordinary that it cannot be said that the parties intended rescuers to assume them, or (2) the conduct of the defendant may be so blameworthy that tort recovery should be imposed for the purposes of punishment or deterrence.

Gann, 03-640 at 6, 873 So.2d at 705.

While historically discussed in terms of assumption of the risk, the Professional Rescuer's Doctrine is more appropriately understood in terms of comparative fault and duty-risk. See La. C.C. art. 2323.[2] See

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[2] La. C.C. art. 2323(A) provides:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the re-

also *Worley v. Winston*, 550 So.2d 694, 697 (La.App. 2 Cir. 1989) (citing *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123 (La. 1988)).

> More precisely, the rule comes in to play in determining the risks included within the scope of the defendant's duty and to whom the duty is owed. It might be said that a defendant's ordinary negligence or breach of duty does not encompass the risk of injury to a police officer or fireman responding in the line of duty to a situation created by such negligence or breach of duty. A defendant's particularly blameworthy conduct, especially intentional criminal conduct, does encompass the risk of injury to a policeman or fireman responding in the line of duty.

Worley, 550 So.2d at 697.

The Professional Rescuer's Doctrine has not been abrogated. Its parameters, and the considerations inherent in the doctrine as outlined above, may be applied by the federal court to the specific facts of this case to determine Mckesson's liability, or lack thereof, under those facts.

Finally, I wish to point out that this court is deferring to the federal court the determination of whether Mckesson benefits from protections afforded by the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 888 (1982). I would note,

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> sult partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

incidentally, that Louisiana's protection of First Amendment rights is at least co-extensive with federal rights. *See* La. Const. art. 1, § 7; *State v. Franzone*, 384 So.2d 409, 411 (La. 1980).

GENOVESE, J., additionally concurs in the result and assigns reasons:

While I agree with the result in this Court's decision, I write separately to express my response to these two certified questions.

Answer to Question No. 1:

Louisiana tort law is governed by La. C.C. art. 2315[1] and a duty/risk analysis.[2] If the facts alleged in the complaint are proven at trial and the requirements of the duty/risk analysis are met, then yes, there can be a duty owed.

Answer to Question No. 2:

No. The Professional Rescuer Doctrine does not bar recovery under Louisiana law.[3]

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[1] La. C.C. art. 2315(A) provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

[2] The standard negligence analysis Louisiana courts employ in determining whether to impose liability under La. C.C. art. 2315 is the duty/risk analysis, which consists of the following four-prong inquiry: (1) was the conduct in question a substantial factor in bringing about the harm to the plaintiff, i.e., was it a cause-in-fact of the harm which occurred? (2) did the defendant(s) owe a duty to the plaintiff? (3) was the duty breached? and, (4) was the risk, and harm caused, within the scope of protection afforded by the duty breached? *Rando v. Anco Insulations Inc.*, 08-1163, p. 26 (La. 5/22/09), 16 So.3d 1065, 1085-86 (citing *Mathieu v. Imperial Toy Corp.,* 94-0952 (La. 11/30/94), 646 So.2d 318, 321-22). All four inquiries must be affirmatively answered for a plaintiff to recover. *Id.*, 08-1163, p. 26, 16 So.3d at 1086.

[3] Notably, in *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1124 (La. 1988), discussed extensively in the majority opinion, the United States Court of Appeals for the Fifth Circuit certified a

question to this Court: "Does assumption of risk serve as a total bar to recovery by a plaintiff in a negligence case, or does it only result in a reduction of recovery under the Louisiana comparative negligence statute [La. C.C. art. 2323]?" This Court responded that "the common law doctrine of assumption of risk no longer has a place in Louisiana tort law." *Id*. at 1132; *see also*, *Worley v. Winston*, 550 So.2d 694, 697 (La. App. 2nd Cir. 1989)(citing *Murray,* 521 So.2d 1123)("While the professional rescuers rule… has traditionally been discussed in terms of assumption of risk, under current Louisiana tort theory the rule should, perhaps, be couched in terms of comparative fault or duty/risk.").

CRAIN, J. concurs in part and assigns reasons.

I agree with the result reached by the majority regarding "duty." I write separately to clarify why I believe Louisiana law recognizes potential liability for the negligent precipitation of a crime of a third party. This certified question requires scrutiny of two elements of a tort claim: 1) duty, a purely legal question based on broad policy considerations; and 2) scope of the duty, a mixed question of law and fact that depends on the circumstances of each case.[1] The line between these distinct elements is often blurred.

Applicable Law

Under the traditional duty-risk analysis applicable to negligence claims, a plaintiff must prove five elements: (1) the defendant had a duty to conform his conduct to a specific standard (**the duty element**); (2) the defendant's conduct failed to conform to the applicable standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (**the scope of the duty element)**; and (5) actual damages (the damages element). *See Lemann v. Essen Lane Daiquiris, Inc.,* 05–1095, p. 7 (La. 3/10/06), 923 So.2d 627, 633. If a plaintiff fails to prove any one of the five elements, a defendant is not liable. *Id.* Answering the certified question before us requires that we analyze the first and fourth elements.

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[1] The scope of the duty element has also been referred to in terms of "scope of liability," "scope of the risk," "breach of the legal cause," "legal cause," and "proximate cause."

The starting point for determining whether a duty exists is Louisiana Civil Code article 2315, which provides, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Similarly, Louisiana Civil Code article 2316 provides, "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." This foundational basis for tort liability in Louisiana creates a broad obligation on everyone to act with reasonable care to avoid injury to another. *Boykin v. Louisiana Transit Co., Inc.*, 96-1932 (La. 3/4/98), 707 So.2d1225, 1231.

More specific duties can also arise from other codal, statutory, administrative and local laws, as well as private contracts. *See Ardoin v. Hartford Acc. & Indem. Co.*, 360 So. 2d 1331, 1334 (La. 1978). When a duty arises from a public source of law, the enacting body has recognized, as a matter of public policy, a duty to act or not act in a certain manner. See *Boyer v. Johnson*, 360 So. 2d 1164, 1169 (La. 1978) (because statute satisfied the duty element, analysis of the statutory violation was at the scope of the duty stage to determine whether the statute was designed to protect particular plaintiff from particular type of harm); *See Lazard v. Foti,* 02-2888 (La. 10/21/03), 859 So. 2d 656, 660-61, quoting *Hill v. Lundin & Assoc.,* 260 La. 542, 256 So. 2d 620, 622 (1972) ("Where the rule of law upon which a plaintiff relies for imposing a duty is based on a statute, the court attempts to interpret legislative intent as to the risk contemplated by the legal duty, which is often a resort to the court's own judgment of the scope of protection intended by the legislature.")

Absent a duty from a public source of law, there are limits to liability where the courts will not recognize certain torts. *Reynolds v. Bordelon*, 14-2362 (La. 6/30/15), 172 So. 3d 589, 595. While Article 2315 creates broad accountability for fault, the "duty" inquiry can narrow the scope of potential liability and financial responsibility. It contemplates whether an entire category of defendants should be excluded from liability. *Reynolds*, 172 So.3d 589. This is a policy-driven decision that considers various moral, social, and economic factors. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999). These policy considerations can compel a court to make a categorical "no duty" rule regarding certain acts or actors. *Id.* Structuring the duty inquiry broadly allows a court to determine whether Louisiana will exclude liability as to "whole categories of claimants" or "of claims under any circumstances."[2] Frank L. Maraist & Thomas C. Galligan, Jr., 1 Louisiana Tort Law § 5.02[5] (2020), citing *Pitre v. La. Tech Univ.,* 673 So. 2d 585, 596 (La. 1996) (Lemmon, J., concurring). Examples where Louisiana courts have found no duty at this broad categorical level are: *Reynolds*, 172 So.3d 589 (no duty to prevent negligent spoliation of evidence); and *Carrier v. City of Amite*, 10-0007 (La. 10/19/10), 50 So. 3d 1247, 1249 (no duty for retailer to fit a helmet to customer at point of sale). Categorical rejection of civil tort liability for classes of acts or actors by finding no duty is rare.

In contrast, when the question presented is whether a stated duty will be extended to support

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[2] The context for the use of "claimants" in this quote is to claimants of the no-duty defense; *i.e.,* defendants argued no duty existed in defense against a plaintiff's claim.

liability for a particular circumstance, analysis of the defendant's conduct should be in terms of the scope of the duty. *See* Louisiana Tort Law at § 5.02[7]. The question is, "should this plaintiff recover from this defendant for these particular damages that arose in this particular manner?" *Id.* at § 3.05. This inquiry is fact-specific. *Id.* The scope of the duty is generally not a policy question; it is a matter of common sense, justice and fairness. *Id.* at 5.02[7]. At this stage of the analysis, foreseeability and ease of association of the injury are relevant considerations. *Hill*, 256 So. 2d at 622, citing Prosser, Law of Torts (3rd ed. 1964), 282. The concept of "ease of association" asks how easily the risk of injury to the plaintiff can be associated with the duty sought to be enforced. *Hill, supra.* "Restated, the ease of association inquiry is simply: 'How easily does one associate the plaintiff's complained-of harm with the defendant's conduct? ... Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone.'" *Roberts v. Benoit*, 605 So. 2d 1032, 1045 (La. 1991), *on reh'g* (May 28, 1992).

It is important to separate the duty and scope of the duty questions because each has considerations unique to itself.[3,4] Whether a duty exists is a ques-

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[3] Notably, in *Mckesson v. Doe*, 141 S. Ct. 48, 51, 208 L. Ed. 2d 158 (2020), the United States Supreme Court framed the question as a two-part inquiry, with the broader duty distinct from the narrower scope of that duty. In remanding to the Fifth Circuit, the Supreme Court stated the following questions should be certified, "(1) Whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists."

[4] *See Lazard,* 859 So. 2d at 660, where elements were well de-

tion of law. *Faucheaux v. Terrebonne Consolidated Government,* 92-0930 (La.3/25/93), 615 So.2d 289, 292. The scope of the duty presents a mixed question of fact and law. *Parents of Minor Child v. Charlet,* 13-2879, p. 6 (La. 4/4/14), 135 So.3d 1177, 1181.

The Certified Question

We accepted the following certified question from the Fifth Circuit: "1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?" Because the threshold element of "duty" is analyzed at the categorical level, I believe the certified question should be framed more broadly to both respond to the federal court and to be consistent with Louisiana law.[5] The more pertinent question is: "Does a protest organizer have a duty to use reasonable care so that the protest is conducted in a lawful manner?"[6]

Duty

The parties have not cited, nor have we found, any specific codal, statutory, administrative or local law that addresses the duty applicable to this case. Consequently, starting with the foundational basis

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fined and analyzed separately. *See also Morris v. Orleans Par. Sch. Bd.*, 553 So. 2d 427, 429 (La. 1989).

[5] The certified question expressly contemplates reframing, stating, "Should the Supreme Court of Louisiana accept our request for answers to these questions, we disclaim any intention or desire that it confine its reply to the precise form or scope of the questions certified."

[6] The use of "organizer" throughout this opinion includes a "leader" who may or may not have been involved in organizing the protest, but actively led the protest.

for tort liability in Louisiana, Article 2315, we must determine whether moral, social and economic considerations support our recognition of such a duty or the categorical exclusion of it. *Posecai*, 752 So.2d 762. To answer this question, relevant policy factors must be considered: (1) deterrence of unreasonable conduct, or encouraging reasonable conduct; (2) economic considerations; (3) justice and fairness of potentially imposing liability; (4) allocation of judicial resources; and (5) predictability.[7]

Deterrence

Finding the existence of a duty will make an actor potentially civilly liable. The potential for civil liability may deter future conduct. So, exposing a protest organizer to civil liability for failing to exercise reasonable care so that the protest is carried out in a lawful manner should deter undesirable conduct (*i.e.* unlawful protests) and encourage desirable conduct (*i.e.* lawful protests). This factor weighs in favor of recognizing a duty.

Economic Considerations

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[7] This court in *Reynolds* listed the following policy considerations: deterrence of undesirable conduct, avoiding the deterrence of desirable conduct, compensation of victims, satisfaction of the community's sense of justice, proper allocation of resources (including judicial resources), predictability, and deference to the legislative will. *Reynolds*, 172 So. 3d at 596-597.

In *Posecai*, this court listed the elements with a slight variation: "fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and institutions are evolving." *Posecai*, 752 So.2d at 766.

This factor considers who will bear the financial loss for the alleged injury. Finding a duty potentially places that loss on the defendant. Finding no duty will result in the victim bearing the financial loss associated with his injury. Thus, this factor balances the need for compensating victims against a protest organizer's responsibility to pay. The purpose of tort damages is to make the victim whole. *Bellard v. Am. Cent. Ins. Co.*, 2007-1335 (La. 4/18/08), 980 So. 2d 654, 668. Recognizing a duty that results in compensating victims injured when a protest is conducted unlawfully furthers the purpose of making the victim whole. An innocent victim in these circumstances should not be categorically denied recovery.

Further, while a protest organizer cannot be deemed to know of or condone every action that may cause an injury during the protest, the critical part of the proposed duty is whether the organizer used reasonable care so that the protest was conducted *in a lawful manner*. If the protest is organized, led, and effectuated in a lawful manner, a plaintiff generally will be unable to show a breach of the stated duty and the defendant will not bear the cost of injury. If, however, the organizer does not use reasonable care so that the protest occurs in a lawful manner, the expectation that he will absorb the financial loss instead of a victim is reasonable. This factor is bolstered by Louisiana's recognition of comparative fault, which results in the fault of a victim who contributes to his own injury, or of a third party who acts particularly egregiously, proportionately reducing any fault allocated to the organizer. The proposed duty requires lawful actions by the organizer. The financial burden associated with the

failure to conform to that duty should be borne by him.

This factor weighs in favor of finding a duty.

Justice

This factor addresses society's sense of fairness in determining whether a reasonable person should act or not act in a certain manner. *Reynolds*, 172 So.3d at. 598. The reasonable person standard asks "whether reasonable persons would expect certain behavior in certain situations and, conversely, whether reasonable persons can be expected to be exposed to liability in certain situations." *Id.* It is reasonable for citizens to expect that a protest be conducted in a lawful manner. Doing so protects everyone's right to assemble, speak, and protest, while also protecting their safety. While protests, both lawful and unlawful, are part of our nation's history and identity, we are also a country of laws. Attaching civil liability to unlawful protests furthers the rule of law. Thus, imposing a duty to use reasonable care when organizing and conducting a protest is supported by a societal sense of fairness, justice, and order.

Allocation of Judicial Resources

This factor addresses judicial economy and the potential for an unmanageable flow of litigation if a duty is recognized. Anecdotally, it is reasonable to expect relatively low occurrences of planned, unlawful protests, making the likelihood of injury from one improbable. The infrequency of such events supports the conclusion that judicial resources will not be unduly burdened by imposing the proposed duty. Further, the First Amendment protects lawful protests. Placing lawful protests beyond the reach of civil lia-

bility, while recognizing potential civil liability for unlawful protests, will make overloaded dockets unlikely. This factor weighs in favor of finding a duty.

Predictability

This factor looks at whether the alleged tortfeasor or the victim is better positioned to analyze the risks involved in an unlawful protest and, thus, take precautions to avoid them or to insure against them. A protest organizer who plans or leads an unlawful protest is best positioned to predict and, therefore protect against, the risks of that conduct. The act of organizing and leading a protest in a reasonable and lawful fashion should require precautions to counter the risks associated with unlawful protests. Those risks are best calculated and avoided by the organizer. The predictability factor favors the recognition of a duty.

These policy considerations, independently and collectively, support our recognition of a protest organizer's duty to use reasonable care so that a protest is conducted in a lawful manner. Recognizing such a duty negates any contention that a protest organizer, as a matter of law, is categorically excluded in all instances from liability for harm occurring during a protest.

Scope of the Duty

To fully respond to the certified question, the analysis also requires a determination of whether that duty extends to cover the injury in this case, which is the "scope of the duty" element. The extent of protection owed a particular plaintiff depends on the particular facts and circumstances of the case and is determined on a case-by-case basis to avoid making

a defendant the insurer of all persons against all harms. *Todd v. State Through Dep't of Soc. Servs., Off. of Cmty. Servs.*, 96-3090 (La. 9/9/97), 699 So. 2d 35, 39. Here, the specific facts must be scrutinized to determine whether the risk of a third party criminal act harming a responding police officer is within the scope of the organizer's duty to exercise reasonable care so that the protest is conducted lawfully.[8]That is, will a reasonable person associate the injury suffered by Officer Doe with the risks posed by Mckesson's conduct?

Foreseeability and ease of association are factors in deciding whether a duty extends to cover a particular risk of harm. *Id.* Therefore, it is necessary to address whether the defendant's alleged conduct foreseeably resulted in the plaintiff being injured by the criminal act of a third party and whether such injury is easily associated with the articulated duty, namely, a protest organizer's duty to use reasonable care so that a protest is conducted in a lawful manner.[9]

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[8] At this point, it bears emphasizing that this issue is before us at a preliminary stage where we must accept all allegations in the petition or complaint as true. *Indus. Companies, Inc. v. Durbin,* 02-0665 (La. 1/28/03), 837 So. 2d 1207, 1212. These allegations may ultimately not be proven at trial. Thus, while the scope of the duty question requires us to make certain determinations based on the facts as alleged, these facts must still be established before the trier of fact. We offer no opinion on the merits. Instead, we only resolve whether Louisiana law allows for tort recovery under these alleged facts.

[9] The primary allegations set forth in the plaintiff's petition are more particularly summarized as: (1) Mckesson "staged and organized" a protest on behalf of Black Lives Matter; (2) Mckesson knew of the violence that resulted in other previous Black Lives

The plaintiff alleges Mckesson knew of previous protests sponsored by or identified with Black Lives Matter turning violent. The petition cites prior protests across the country associated with this movement where police officers were injured or killed. Because previous protests provoked a police response, a police response to the subject protest was certainly foreseeable, if not desired. Given the alleged prior incidents and the alleged intent to incite violence against police, the violence committed against a responding police officer at this protest was foreseeable.

It is also alleged that Mckesson organized the protest on a main, highly trafficked highway in front of the Baton Rouge Police headquarters and in violation of traffic laws. (*See* La. R.S. 14:97, penalizing intentional or criminally negligent obstruction of highways.) Again, a police response to confront potentially riotous protestors and to manage a likely dangerous traffic situation was foreseeable. In fact, while the traffic law that prevents obstructing a highway does not provide the basis for the duty recognized here, organizing the protest to violate that statute is alleged to have been either calculated, or at

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Matter protests; (3) Mckesson was in "Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers;" (4) Mckesson staged "a protest/demonstration at the intersections of Airline and Goodwood Boulevard, which is the location of the Baton Rouge Police Department and which is a known public highway;" (5) Mckesson "knew police would be called to clear the public highway of protestors;" (6) Mckesson "was in charge of the protest and he was seen and heard giving orders throughout the day and night of the protests;" and (7) Mckesson "did nothing to calm the crowd and, instead, he incited the violence."

least expected, to provoke a police response and, thus, a confrontation with the protestors.[10] Having allegedly organized the protest to provoke that confrontation, it was easily foreseeable that the resulting injury could occur.

The facts alleged require the conclusion that the protest was organized to provoke a police response. It is alleged that Mckesson "incited" the protesters and did nothing to stop them when the protest turned violent. It was foreseeable that a police officer would suffer injury when responding to a situation that occurred, at least in part, because Mckesson did not use care to conduct the protest in a lawful manner. Based on the facts alleged in the petition, it was foreseeable that a police officer may get hurt by the criminal actions of a third party during this protest. The facts alleged are sufficient to establish an ease of association between Mckesson's duty and the plaintiff's injury. Because it is alleged that Mckesson, with knowledge that such protests could turn violent, staged a protest in direct contravention of law, thereby provoking the police to respond, a person can easily associate the injury to the police officer with the alleged conduct. Once a confrontation is provoked, it is reasonable that the provocateur be potentially responsible for the foreseeable consequences which result from the confrontation.

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[10] For statutory violations, Louisiana has rejected a negligence per se theory, favoring, instead, analysis at the scope of the duty stage. The court in *Weber v. Phoenix Assur. Co. of New York*, 273 So. 2d 30, 33 (La. 1973) stated, "Moreover, violation of a criminal statute in combination with some resultant harm does not, in and of itself, impose civil liability. We must determine whether the prohibition in the statute is designed to protect from the harm or damage which ensues from its violation."

"Special Relationship"

This court has generally refrained from finding a duty to protect persons from the criminal acts of third parties. *See Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La. 1984). Generally, there is no duty to protect against or control the criminal acts of third parties unless a "special relationship exists [between the victim and the non-criminal defendant] to give rise to such a duty." *Beck v. Schrum*, 41,647 (La. App. 2 Cir. 11/1/06), 942 So. 2d 669, 672. While there is no jurisprudential definition of a "special relationship," cases finding such a relationship impose some higher degree of care solely because the relationship affords the victim a reasonable expectation of protection or safety. Restatement (Second) of Torts, § 315.[11]

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[11] Courts have found "special relationships" between: (1) **parent and child**, *see Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (where actions of child are tortious by normal standards, the child's parents are liable whether or not they could have prevented the act of the child; *see also* La. Civ. Code art. 2318; (2) **employer and employee** (*see LeBrane v. Lewis*, 292 So.2d 216 (La. 1974) (employer was liable for employee supervisor stabbing discharged employee in an employment related suit; *see also* La. Civ. Code art. 2320; (3) **carrier and passenger** (*see generally Gross v. Teche Lines*, 21 So. 378 (La. 1945) (carrier of passengers are required to exercise the highest degree of care, vigilance, and precaution for the safety of those it transports and is liable for the slightest negligence. *See also Luckette v. Bart's on the Lake, Ltd.* 602 So.2d 108, 112, (La. App. 4 Cir. 1992) (private transport company assumed a duty to protect third parties from the deviant behavior of those in its custody, particularly, "predictable risks of assaults;") (4) **innkeeper and guest** (*see Kraaz v. La Quinta Motor Inns, Inc.*, 410 So.2d 1048, 1053 (La.1982) (hotel liable for damages suffered by guests who were robbed and assaulted inside their hotel room

Here, the defendants assert, and the plaintiff does not refute, that no special relationship existed between Mckesson and the injured police officer. Generally, that would end the inquiry and no liability or financial responsibility would attach to Mckesson for the criminal acts of the unknown criminal. However, close review of the "special relationship" cases reveal that these cases involve defendants held liable not for their own involvement in the criminal acts, but because their failure to act allowed for the criminal act. That rule of law does not apply when the defendant is alleged to have affirmatively acted to create the circumstance that facilitated the violent act. As noted by Dean Prosser, circumstances beyond those arising from a special relationship may give rise to responsibility for intentional torts of third parties. In his treatise, he writes, "There are other

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when the desk clerk gave the robber the master key); *see also Banks v. Hyatt Corp.,* 722 F.2d 214 (5th Cir. 1984) (applying Louisiana law, a negligent innkeeper was liable for a third-party assault on the premises*;* (5) **shopkeeper and business visitor**, *see generally Posecai, supra*; *see also Green v. Infinity Intern., Inc.,* 95-2356 (La. App. 1 Cir. 6/28/96), 676 So.2d 234) (liability can be owed when the proprietor knows, or should know of the potential danger caused by criminal activity; (6) **restaurateur and patron**, (*see Harris v. Pizza Hut*, 455 So.2d 1364 (La. 1984) (any business which invites the public must take "reasonably necessary acts to guard against the predictable risk of assaults"; (7) **jailer and prisoner** (*see Wilson v. State*, 576, So.2d 490 (La. 1991) (victims of robbery committed by an escaped prisoner two weeks after his escape were entitled to recover from the State corrections department; and (8) **teacher and pupil** (*see D.C. v. St. Landry Par. Sch. Bd.,* 00-01304 (La. App. 3 Cir. 3/7/01), 802 So. 2d 19, 23, *writ denied,* 01-0981 (La. 5/25/01), 793 So. 2d 169) (school had a duty to supervise, which encompassed the foreseeable risk that a twelve-year-old female who leaves campus might be raped on her walk home.)

situations in which the defendant will be held liable because his *affirmative conduct* has greatly increased the risk or harm to the plaintiff through the criminal acts of others." (Emphasis added). *Prosser and Keeton on Torts,* Sec. 33, p. 201-203 (West 1984) (Footnotes omitted).

The allegations in this case put Mckesson outside the limiting scope of the "special relationship" line of cases. Here, it is not alleged that Mckesson, merely because he organized a protest, must act with a higher degree of care and afford all those who encounter the protest a certain degree of protection. Rather, it is alleged that his conduct was designed to *provoke* a violent encounter with the police; *i.e.,* "his affirmative conduct has greatly increased the risk or [sic] harm to the plaintiff through the criminal acts of others." *Id.* No special relationship is needed. If proven, Mckesson's actions provide the link between the criminal actor and the victim sufficient to attach financial responsibility to him.

Thus, while a "special relationship" typically is required to impose liability for third party conduct, here, the absence of a "special relationship" does not exclude liability. I find no merit to the proposition that a lack of a special relationship acts to bar this claim.

Conclusion

I find that Louisiana law recognizes a duty to use reasonable care so that a protest is conducted in a lawful manner. Further, based on the facts alleged in the petition, the risk of an officer being harmed by third party criminal activity is within the scope of that duty, thereby satisfying the "scope of the duty"

element. To succeed on his claim, the plaintiff must also prove a breach of duty, causation-in-fact, and damages. This court was not tasked with completing that analysis, nor would it be appropriate to do so at this stage of the litigation, which asks simply whether the plaintiff has stated a cause of action. Additionally, I am also cognizant that under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 888, 925-27 (1982), the imposition of civil liability on a defendant for a violent act committed by a third party is prohibited if it arises "in the context of constitutionally-protected activity" and is appropriate only if the defendant himself "authorized, directed, or ratified" or otherwise manifested "a specific intent to further" those wrongs." I would expressly defer to the federal court to make any determinations about any protection afforded by the First Amendment in this case and whether Mckesson falls with the scope of liability authorized by *Claiborne*.

I respectfully concur.

GRIFFIN, J., dissents and assigns reasons.

The primary issue presented is whether, under the facts as alleged, Mr. Mckesson owes a duty to Officer Doe and whether the risk of the resulting harm was within the scope of that duty.[1] Justice Crain, in his well-written concurrence, correctly observes these are two distinct inquiries with unique considerations. The Fifth Circuit conflates these two inquiries without conducting the requisite policy analysis to determine whether a duty should exist.[2] *See Posecai v.*

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[1] In certifying the questions to this Court, it was observed that we are "not limited to the text of the certified questions but may consider the complaint in its totality." *Doe v. Mckesson*, 2 F.4th 502, 505 (5th Cir. 2021) (Elrod, J., concurring). Prior to remanding the matter, the United States Supreme Court posed the relevant questions as "(1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty, provided one exists." *Mckesson v. Doe*, --- U.S. ---, 141 S.Ct. 48, 51, 208 L.Ed.2d 158.

[2] The Fifth Circuit relied heavily on La. R.S. 14:97 in that Mr. Mckesson's leading a protest down a public highway would foreseeably result in a confrontation with police. However, "a criminal statute does not automatically create liability in a particular civil case, because the statute may have been designed to protect someone other than the plaintiff, or to protect the plaintiff from some evil other than the injury for which recovery is sought." *Boyer v. Johnson*, 360 So.2d 1164, 1169 (La. 1978).

An assault on a police officer by a third party is not the risk addressed by the statute. *Doe v. Mckesson*, 947 F.3d 874, 879 (5th Cir. 2020) (Higginson, J., dissenting from denial of rehearing en banc); *State v. Winnon*, 28,654, p. 4 (La.App. 2 Cir. 9/25/96), 681 So.2d 463, 466 (observing La. R.S. 14:97 contemplates the "absence of foreseeable danger to human life" and is focused on "the protection of other motorists" from being impeded by obstructions). Under the section titled "Scope," the comment to La. R.S. 14:97 states:

Wal-Mart Stores, Inc., 99-1222, p. 4 (La. 11/30/99), 707 So.2d 762, 766; *Mckesson*, --- U.S. ---, 141 S.Ct. at 51, 208 L.Ed.2d 158 (offering the example of "the moral value of protest [weighed] against the economic consequences of withholding liability"). Although Justice Crain's concurrence presents an excellent analytical framework, I respectfully disagree with the result reached in both his analysis and the opinion of this Court.

It is beyond citation that political protest carries a high moral value in our society. It is also true that protests which turn violent may not only result in injuries to police and bystanders but also damage to businesses and property – deterring such outcomes is sound policy. However, the finding of a duty in this case will have a chilling effect on political protests in general as nothing prevents a bad actor from attending an otherwise peaceful protest and committing acts of violence. While in such instances the organizers of a protest may ultimately be cleared of liability

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> The division into two sections, one known as "aggravated obstruction of a highway of commerce" and the other, "simple obstruction of a highway of commerce," is to maintain consistency of form and to make the penalty fit the seriousness of the crime. The first [La. R.S. 14:96] is based on the danger to human life, and the second [La. R.S. 14:97] on traffic obstruction.

Reliance on this statute is arguably questionable as Officer Doe's injuries do not appear to fall within "the scope of protection intended by the legislature." *Lazard v. Foti*, 02-2888, p. 6, (La. 10/21/03), 859 So.2d 656, 660-61. Nevertheless, I acknowledge the allegations as to Mr. Mckesson's past participation in protests accompanied by violence aid in bridging the foreseeability gap apparent from reliance on the statute alone.

by the trier of fact, the costs of defending a lawsuit at the pre-trial phase are significant. Courts would see increased litigation from all sides of the political spectrum and the flow of political speech could hinge on which viewpoints had patrons with deeper pockets. Further, presenting such factual determinations to a jury risks the imposition of liability based on a juror's political views. *See Snyder v. Phelps*, 562 U.S. 443, 458, 131 S.Ct. 1207, 1219, 179 L.Ed.2d 172 (2011). Existing laws hold the perpetrators of wrongful acts criminally and civilly accountable. *See*, *e.g.*, La. R.S. 14:34.2 (criminal penalties for battery of a police officer); *Bell v. Whitten*, 97-2359, p. 12 (La.App. 1 Cir. 11/6/98), 722 So.2d 1057, 1064 ("a defendant's particularly blameworthy conduct, such as intentional conduct or gross negligence, could be said to encompass the risk of injury to a policeman responding in the line of duty").

The assault on Officer Doe is unacceptable. Violence denigrates our political process and must be unequivocally repudiated. A balance must be struck between the freedom to express a political opinion in a peaceful manner and a respect for the rule of law. *See Doe*, 2 F.4th at 505 (Elrod, J., concurring) (citing *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965)). Reasonable jurists can disagree on the weighing of the moral, economic, and social factors articulated in Louisiana jurisprudence. However, for the concerns outlined above, I respectfully dissent and would refrain from imposing a duty in this matter.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN FORD, *former Officer John Doe Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:16-CV-742

No. 17-30864

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

June 25, 2021

Before JOLLY, ELROD, and WILLETT, *Circuit Judges*.

Per Curiam:

This case arose out of a protest alleged to have been organized and led by defendant DeRay Mckesson in Baton Rouge, Louisiana, in response to the police shooting of Alton Sterling. According to the complaint, the defendant directed the protest to a public highway in front of a police station.[1] The police began making arrests and attempting to clear the highway. Some protesters began throwing various objects at the police. Officer John Doe was struck in the face by a piece of concrete or similar rock-like object. As a result, he lost teeth and suffered injury to his jaw and brain. The individual who threw the object has not been identified.

Officer Doe brought suit against Mckesson in the Baton Rouge, Louisiana, federal district court, alleging that his injuries resulted from Mckesson's negligence in organizing and leading the protest. The district court dismissed Officer Doe's claim under Federal Rule of Civil Procedure 12(b)(6). It found that the facts alleged did not fall into one of the specific categories of conduct for which an individual can be held liable for the tortious activity of an associate. *Doe v. Mckesson*, 272 F. Supp. 3d 841, 847–48 (M.D. La. 2017). Officer Doe appealed to this court.

I.

In *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), *vacated*, 141 S. Ct. 48 (2020), a divided panel of this court found that Officer Doe's complaint had stated a cause of action under Louisiana law against

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[1] The case was dismissed by the district court under Federal Rule of Civil Procedure 12(b)(6). Consequently, the alleged facts are taken directly from the plaintiff's complaint.

Mckesson. The theory of liability accepted by this court was that Officer Doe had plausibly alleged that Mckesson knew or should have known that the protest he led onto a public highway would turn confrontational and violent, and thus that, in the course of organizing and leading that protest, he breached a duty of reasonable care owed to Officer Doe and persons similarly situated. Stated more generally, we found that Louisiana law recognized "a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence," and that Officer Doe had plausibly alleged a violation of that duty in illegally blocking a public highway. *Doe*, 945 F.3d at 826–27. We denied Mckesson's petition for rehearing en banc. *Doe v. Mckesson*, 947 F.3d 874 (2020). He petitioned the Supreme Court of the United States for a writ of certiorari.

Although Mckesson's petition to the Supreme Court focused on whether holding him liable for Officer Doe's injuries was consistent with the First Amendment, the Supreme Court declined to address that issue. *See Mckesson v. Doe*, 141 S. Ct. 48, 49–51 (2020) (per curiam). It found our interpretation of Louisiana law "too uncertain a premise on which to address . . . [t]he constitutional issue . . . ." *Id.* at 50. It found that this "dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *Id.* at 51. Although federal courts are generally presumed competent to apply state law, the Supreme Court suggested that we should have pursued the certification procedure made available by the Supreme Court of Louisiana[2]

[2] Supreme Court of Louisiana Rule XII, §§ 1–2 provides that a federal court of appeals may, upon its own motion, certify de-

before engaging in the politically fraught balancing of "various moral, social, and economic factors" that is required before imposing a duty under Louisiana law. *Id.* at 50–51 (citations omitted). Today, in following the direction of the Supreme Court, we respectfully certify the relevant questions of law, set out below, to the Supreme Court of Louisiana.[3]

II.

In the meantime our attention has been drawn to a separate aspect of Louisiana law, the Professional Rescuer's Doctrine,[4] that could be dispositive.[5] That doctrine, put succinctly, is a judge-made rule that "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." *Gann v. Matthews*, 873 So. 2d 701, 705 (La. App. 1st Cir. 2004) (citation and internal quotation marks omitted). The parties disagree as to whether this doctrine bars Officer Doe from recovering. *See* Mckesson

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terminative questions of Louisiana law when it appears as though there is no clear controlling precedent from the Supreme Court of Louisiana.

[3] A resolution by the Supreme Court of Louisiana of the certified questions will bind this court to apply that determination in deciding this case.

[4] Sometimes referred to as the "fireman's rule" or "firefighter's rule."

[5] We acknowledge credit to Professor Eugene Volokh for noting this issue. *The Weird Litigation Posture of the Doe v. Mckesson/Baton Rouge Black Lives Matter Protest Case*, Volokh Conspiracy (Dec. 19, 2019, 8:01 AM), https://reason.com/volokh/2019/12/19/the-weird-litigation-posture- of-the-doe-v-mckesson-baton-rouge-black-lives-matter-protest-case.

Suppl. Br., Dec. 18, 2020, Doc. No. 00515679716; Doe Suppl. Br., Dec. 18, 2020, Doc. No. 00515678655. We have found limited guidance from the opinions of the Supreme Court of Louisiana on how this doctrine might apply to the particular facts of this case. Because we find this to be a close question of law, which also raises a significant issue of state policy, we further take this opportunity to respectfully elicit guidance on this issue from the Supreme Court of Louisiana.

III.

Accordingly, we hereby certify the following determinative questions of law to the Supreme Court of Louisiana, by which responses we will be bound for the purposes of this case:

1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party?
2) Assuming Mckesson could otherwise be held liable for a breach of duty owed to Officer Doe, whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

IV.

Should the Supreme Court of Louisiana accept our request for answers to these questions, we disclaim any intention or desire that it confine its reply to the precise form or scope of the questions certified. Along with our certification, we transfer this case's record, our previous opinion, and the briefs submitted by the parties. We will resolve this case in accordance with any opinion provided on these ques-

tions by the Supreme Court of Louisiana. Accordingly, the Clerk of this Court is directed to transmit this certification and request to the Supreme Court of Louisiana in conformity with the usual practice of this court.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring:

During a protest-turned-riot that was alleged to have been organized and led by defendant DeRay Mckesson in Baton Rouge, Louisiana, a police officer was seriously injured.[1] The injured officer's complaint specifically alleges that Mckesson directed the protest to illegally block the public highway in front of the Baton Rouge Police Department headquarters. Police officers began making arrests and attempting to clear the highway. Mckesson was "in charge of the protests" and was "seen and heard giving orders throughout the day and night of the protests."

The protest devolved into a violent riot. Mckesson observed as the rioters began throwing various objects at the police, including full water bottles that they had stolen from a nearby convenience store. Mckesson was present and part of the riot but did nothing to calm the crowd and allegedly "incited the violence" on behalf of the group. After the rioters ran out of water bottles to throw, an unidentified rioter in the group under Mckesson's control picked up a piece of concrete or a similar heavy, rock-like object and hurled it at Officer Doe. Officer Doe was struck in the face and immediately knocked unconscious. His injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, "and other

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[1] The alleged facts are taken directly from the plaintiff's complaint and are accepted as true at this stage of the case, as we must do. *See Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Georgia, Inc.*, 892 F.3d 719, 726 (5th Cir. 2018) ("On a motion to dismiss, we must 'accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff.'" (quoting *Richardson v. Axion Logistics, L.L.C.*, 780 F.3d 304, 406 (5th Cir. 2015))).

compensable losses."

Officer Doe filed suit against Mckesson alleging that his injuries were "occasioned by the intentional and/or negligent acts and/or omissions" of Mckesson. The complaint alleges not just unlawful actions by the unidentified protestor-turned-rioter but also Mckesson's own actions in the ensuing riot. Moreover, the complaint alleges that Mckesson not only committed negligent actions but that he also committed intentional actions. The complaint alleges that he is liable *in solido* for his "intentional actions and for conspiring to incite a riot/protest."

I agree that this case presents a close question of constitutional law and a significant issue of state law, and I also agree that we should take this opportunity to respectfully elicit guidance from the Louisiana Supreme Court. *See Barnes v. Atl. & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 706 (5th Cir. 1975) ("When the state law is in doubt especially on the underlying public policy aims, it is in the best administration of justice to afford the litigants a consistent final judicial resolution by utilizing the certification procedure.").

While the text of the certified questions appears somewhat narrow to these eyes, the Louisiana Supreme Court is not limited to the text of the certified questions but may consider the complaint in its totality. *See, e.g.*, *Boardman v. United Servs. Auto. Ass'n*, 742 F.2d 847, 851 n.10 (5th Cir. 1984) ("[T]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the rec-

ord certified in this case." (quoting *Martinez v. Rodriquez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968))).

We stand to benefit from the Louisiana Supreme Court's guidance on the intersection of state tort law and constitutional law, as Americans should be free to exercise their constitutional rights to free speech and assembly. While these rights are "fundamental in our democratic society," the "constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Moreover, "[t]he control of travel on the streets is a clear example of governmental responsibility to [e]nsure this necessary order." *Id.*

APPENDIX G

SUPREME COURT OF THE UNITED STATES

DERAY MCKESSON,

v.

JOHN DOE.

No. 19-1108

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

November 2, 2020

PER CURIAM.

Petitioner DeRay Mckesson organized a demonstration in Baton Rouge, Louisiana, to protest a shooting by a local police officer. The protesters, allegedly at Mckesson's direction, occupied the highway in front of the police headquarters. As officers began making arrests to clear the highway, an unknown individual threw a "piece of concrete or a similar rock-like object," striking respondent Officer Doe in the face. 945 F. 3d 818, 823 (CA5 2019). Officer Doe suffered devastating injuries in the line of duty, including loss of teeth and brain trauma.

Though the culprit remains unidentified, Officer Doe sought to recover damages from Mckesson on the theory that he negligently staged the protest in a manner that caused the assault. The District Court dismissed the negligence claim as barred by the First Amendment. 272 F. Supp. 3d 841, 847–848 (MD La. 2017).

A divided panel of the Court of Appeals for the Fifth Circuit reversed. As the Fifth Circuit recognized at the outset, Louisiana law generally imposes no "'duty to protect others from the criminal activities of third persons.'" 945 F. 3d, at 827 (quoting *Posecai* v. *Wal-Mart Stores, Inc.*, 1999–1222, p. 5 (La. 11/30/99), 752 So. 2d 762, 766). But the panel majority held that a jury could plausibly find that Mckesson breached his "duty not to negligently precipitate the crime of a third party" because "a violent confrontation with a po-lice officer was a foreseeable effect of negligently directing a protest" onto the highway. 945 F. 3d, at 827. The dissent would have demanded something more—a "special relationship" between Mckesson and Officer Doe—before recognizing such a duty under Louisiana law. *Id.,* at 836–838, and n. 11 (Willett, J., concurring in part and dissenting in part). The dissent likewise doubted that an intentional as-sault is the "particular risk" for which Officer Doe could re-cover for a breach of "Louisiana's prohibitions on highway-blocking," which "have as their focus the protection of other motorists." *Id.,* at 844, n. 56 (internal quotation marks omitted).

The panel majority also rejected Mckesson's argument that *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982), forbids liability for speech-related activity that negligently causes a violent act unless

the defendant specifically intended that the violent act would result. According to the Fifth Circuit, the First Amendment imposes no barrier to tort liability so long as the rock-throwing incident was "one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of care." 945 F. 3d, at 829 (quoting *Claiborne Hardware*, 458 U. S., at 927). Because Mckesson allegedly directed an unlawful obstruction of a highway, see La. Rev. Stat. Ann. §14:97 (West 2018), the Fifth Circuit held that the First Amendment did not shield him from li-ability for the downstream consequences. 945 F. 3d, at 829. Again, the dissent disagreed, deeming the "novel 'negligent protest' theory of liability" to be "incompatible with the First Amendment and foreclosed—squarely—by" *Claiborne Hardware*. 945 F. 3d, at 842 (opinion of Willett, J.).

The Fifth Circuit subsequently deadlocked 8 to 8 on Mckesson's petition for rehearing en banc. 947 F. 3d 874, 875 (2020) (*per curiam*). Members of the Court of Appeals wrote separately to express further disagreement with both the panel decision's interpretation of state law, *id.,* at 879 (Higginson, J., dissenting from denial of rehearing en banc), and its application of *Claiborne Hardware*, 947 F. 3d, at 878 (Dennis, J., dissenting from denial of rehearing en banc).

The question presented for our review is whether the theory of personal liability adopted by the Fifth Circuit violates the First Amendment. When violence occurs during activity protected by the First Amendment, that provision man-dates "precision of regulation" with respect to "the grounds that may give rise to damages liability" as well as "the per-sons who

may be held accountable for those damages." *Claiborne Hardware*, 458 U. S., at 916–917 (internal quota-tion marks omitted). Mckesson contends that his role in leading the protest onto the highway, even if negligent and punishable as a misdemeanor, cannot make him personally liable for the violent act of an individual whose only association with him was attendance at the protest.

We think that the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place. The dispute thus could be "greatly simplifie[d]" by guidance from the Louisiana Supreme Court on the meaning of Louisiana law. *Bellotti* v. *Baird*, 428 U. S. 132, 151 (1976).

Fortunately, the Rules of the Louisiana Supreme Court, like the rules of 47 other States, provide an opportunity to obtain such guidance. In the absence of "clear controlling precedents in the decisions of the" Louisiana Supreme Court, those Rules specify that the federal courts of appeals may certify dispositive questions of Louisiana law on their own accord or on motion of a party. La. Sup. Ct. Rule 12, §§1–2 (2019). Certification is by no means "obligatory" merely because state law is unsettled; the choice instead rests "in the sound discretion of the federal court." *Lehman Brothers* v. *Schein*, 416 U. S. 386, 391 (1974). Federal courts have only rarely resorted to state certification procedures, which can prolong the dispute and increase the expenses incurred by the parties. See *id.,* at 394–395 (Rehnquist, J., concurring). Our system of "cooperative judicial fed-

eralism" presumes federal and state courts alike are competent to apply federal and state law. *Id.,* at 391 (opinion of the Court); cf. *Tafflin* v. *Levitt*, 493 U. S. 455, 465 (1990).

In exceptional instances, however, certification is advisable before addressing a constitutional issue. See *Bellotti*, 428 U. S., at 151; *Clay* v. *Sun Ins. Office Ltd.*, 363 U. S. 207, 212 (1960). Two aspects of this case, taken together, persuade us that the Court of Appeals should have certified to the Louisiana Supreme Court the questions (1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether Officer Doe has alleged a particular risk within the scope of protection af-forded by the duty, provided one exists. See 945 F. 3d, at 839 (opinion of Willett, J.).

First, the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts. See *Lehman Brothers*, 416 U. S., at 391. To impose a duty under Louisiana law, courts must consider "various moral, social, and economic factors," among them "the fair-ness of imposing liability," "the historical development of precedent," and "the direction in which society and its institutions are evolving." *Posecai*, 752 So. 2d, at 766. "Speculation by a federal court about" how a state court would weigh, for instance, the moral value of protest against the economic consequences of withholding liability "is particularly gratuitous when the state courts stand willing to ad-dress questions of state law on certification." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 79 (1997) (internal quotation marks and alteration omitted).

Second, certification would ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical. The novelty of the claim at issue here only underscores that "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Ibid.* The Louisiana Supreme Court, to be sure, may announce the same duty as the Fifth Circuit. But under the unusual circumstances we confront here, we conclude that the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court. We ex-press no opinion on the propriety of the Fifth Circuit certifying or resolving on its own any other issues of state law that the parties may raise on remand.

We therefore grant the petition for writ of certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and remand the case to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICER JOHN DOE, *Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana

No. 17-30864

ON REQUEST FOR A POLL
Opinion 945 F.3d 818 (5th Cir. Dec. 16, 2019)

January 28, 2020

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

PER CURIAM:

The court having been polled at the request of

one of its members, and a majority of the judges who are in regular service and not disqualified not having voted in favor (Fed. R. Ap. P. 35 and 5th Cir. R. 35), rehearing en banc is DENIED. In the en banc poll, eight judges in favor of rehearing (Judge Stewart, Judge Dennis, Judge Southwick, Judge Graves, Judge Higginson, Judge Costa, Judge Willett, and Judge Duncan), and eight judges voted against rehearing (Chief Judge Owen, Judge Jones, Judge Smith, Judge Elrod, Judge Haynes, Judge Ho, Judge Engelhardt, and Judge Oldham).

Judge Ho concurred with the Court's denial of rehearing en banc, his Concurrence is attached. Judge Dennis, joined by Judge Graves, and Judge Higginson, joined by Judge Dennis, dissent from the Court's denial of rehearing en banc, their Dissents are attached.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

JAMES C. HO, Circuit Judge, concurring in denial of rehearing en banc:

I agree with my colleagues who voted to grant rehearing en banc that this lawsuit by a police officer against DeRay Mckesson, a leader of the Black Lives Matter movement, should not proceed. I nevertheless voted to deny rehearing en banc. I write to briefly explain why, in the hope that this explanation might help finally bring this suit to an end.

I.

Police officers and firefighters dedicate their lives to protecting others, often putting themselves in harm's way. These are difficult and dangerous jobs, and citizens owe a debt of gratitude to those who are willing and able to perform them. What's more, police officers and firefighters assume the risk that they may be injured in the line of duty. So they are not allowed to recover damages from those responsible for their injuries, under a common law rule known as the professional rescuer doctrine.

"The professional rescuer doctrine, the fireman's rule, is a common law rule that either bars recovery by a professional rescuer injured in responding to an emergency or requires the rescuer to prove a higher degree of culpability in order to recover." *Gallup v. Exxon Corp.*, 70 F. App'x 737, 738 (5th Cir. 2003) (collecting Louisiana cases). "The Professional Rescuer's Doctrine is a jurisprudential rule that 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"— particularly when the "risks arise from the very emergency that

the professional rescuer was hired to remedy." *Gann v. Matthews*, 873 So.2d 701, 705–6 (La. Ct. App. 2004).

This doctrine would seem to require immediate dismissal of this suit. After all, there is no dispute that the officer was seriously injured in the line of duty—specifically, while policing a Black Lives Matter protest that unlawfully obstructed a public highway and then turned violent. The officer deserves our profound thanks, sympathy, and respect. But his case would appear to fall squarely within the scope of the doctrine.

None of the panel opinions in this case addressed the professional rescuer doctrine, however—presumably because Mckesson never raised it. I imagine that, if given the chance on remand, he will invoke the doctrine at last, and that the district court will terminate this suit (again) accordingly.

Had Mckesson raised this doctrine at an earlier stage in the suit, there would have been no need to answer the more challenging First Amendment questions that now animate his petition for rehearing en banc. But he did not. So, like the panel, I turn to those questions now.

II.

Because Mckesson has thus far neglected to invoke the professional rescuer doctrine, the panel confronted novel and interesting First Amendment issues that are arguably worthy of rehearing en banc. But I take some comfort in the fact that, upon closer review of the panel opinions, the constitutional concerns that have generated the most alarm may not be as serious as feared.

The First Amendment indisputably protects the right of every American to condemn police misconduct.[1] And that protection secures the citizen protestor against not only criminal penalty, but civil liability as well. *See*, *e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).

But there are important differences between the theory of liability held invalid in *Claiborne Hardware* and the tort liability permitted by the panel majority here. In *Claiborne Hardware*, the defendants were sued for leading a boycott of white merchants. State courts subsequently held the defendants liable for all of the economic damages caused by their boycott. Notably, the theory of liability rejected in *Claiborne Hardware* was inherently premised on the *content* of expressive activity. If the defendants had advocated in *favor* of the white merchants, no court would have held them liable for such speech. So the tort liability theory adopted by the state courts necessarily turned on the content of the defendants' expressive activities. And the Supreme Court rejected this content-based theory of liability as a violation of the First Amendment. *See*, *e.g.*, *id.* at 914 ("[T]he petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign …. [But 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

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[1] Indeed, it is important to condemn such misconduct when it occurs. *See*, *e.g.*, *United States v. Taffaro*, 919 F.3d 947, 949-51 (5th Cir. 2019) (Ho, J., concurring in the judgment); *Wilson v. City of Southlake*, 936 F.3d 326, 333-34 (5th Cir. 2019) (Ho, J., concurring in the judgment).

economic change and to effectuate rights guaranteed by the Constitution itself.").

By contrast, the theory of liability adopted in this case appears to be neutral as to the content of the Black Lives Matter protest. Unlike *Claiborne Hardware*, liability here turns not on the content of the expressive activity, but on the unlawful obstruction of the public highway and the injuries that foreseeably resulted. This is an important distinction. As *Claiborne Hardware* itself observed: "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." *Id.* at 918. "Only those losses proximately caused by unlawful conduct may be recovered." *Id.*

So in sum: Content-based damages are generally impermissible, as *Claiborne Hardware* illustrates. But content-neutral rules typically survive First Amendment challenge. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make clear … that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'") (collecting cases).

Applying that framework here, I do not understand the panel majority to suggest that Mckesson may be held liable for lawfully protesting police—

that would be a textbook violation of established First Amendment doctrine, including *Claiborne Hardware*—but rather for injuries following the unlawful obstruction of a public highway. As the panel explained, "the criminal conduct allegedly ordered by Mckesson was not itself protected by the First Amendment, as Mckesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway. As such, no First Amendment protected activity is suppressed by allowing the consequences of Mckesson's conduct to be addressed by state tort law." *Doe v. Mckesson*, 945 F.3d 818, 832 (5th Cir. 2019) (citation omitted). In the face of such limiting language, any First Amendment concern about the potential reach of the panel majority opinion strikes me as uncertain and speculative.[2]

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[2] By contrast, there was no such ambiguity in a recent decision of our court—one that presented even starker First Amendment concerns—yet we nevertheless denied rehearing en banc. *See Zimmerman v. City of Austin*, 888 F.3d 163 (5th Cir. 2018). I say starker because the First Amendment surely protects political speech at least as much as it protects protests—and because a state surely has a greater interest in protecting police officers from assault than in preventing citizens from donating over $350 to a city council race. As the ACLU once noted, "[c]ontributions are crucially important in determining the level of political debate and in implementing the freedom of association guaranteed by the First Amendment …. If anything, Americans spend too little to finance the process by which their government is chosen." Brief of the Appellants, at 27-28, *Buckley v. Valeo*, 424 U.S. 1 (1976). *See also Buckley*, 424 U.S. at 288 (Marshall, J., concurring in part and dissenting in part) ("[A]ll Members of the Court agree … money is essential for effective communication in a political campaign."); *Thompson v. Hebdon*, 140 S. Ct. 348, 350 (2019) (per curiam) ("JUSTICE BREYER's opinion for the plurality observed that 'contribution limits that

So if I understand the panel majority's theory of liability correctly, it may be expansive—and it may be wrong as a matter of Louisiana law, as Judge Higginson's typically thoughtful dissent suggests. But it applies with equal force to pro-police protestors (just as it would, say, to pro-life and pro-choice protestors alike) who unlawfully obstruct a public highway and then break out into violence. It is far from obvious, then, that the First Amendment principles articulated in *Claiborne Hardware* would have any bearing here (and we do not ordinarily grant en banc rehearing to resolve questions of state law).

* * *

Civil disobedience enjoys a rich tradition in our nation's history. But there is a difference between civil disobedience—and civil disobedience without consequenc.[3] Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to vio-

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are too low can … harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.") (quoting *Randall v. Sorrell*, 548 U.S. 230, 249 (2006)).

[3] Indeed, for the civil disobedient, the consequence is the point. *See*, *e.g.*, Henry David Thoreau, *Civil Disobedience* (1849) ("Under a government which imprisons any unjustly, the true place for a just man is also a prison."); Martin Luther King Jr., *Letter from a Birmingham Jail* (1963) ("Of course, there is nothing new about this kind of civil disobedience. It was seen sublimely in the refusal of Shadrach, Meshach, and Abednego to obey the laws of Nebuchadnezzar because a higher moral law was involved. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks before submitting to certain unjust laws of the Roman Empire. To a degree, academic freedom is a reality today because Socrates practiced civil disobedience.").

late traffic rules or other laws that the rest of us are required to follow. The First Amendment protects protest, not trespass.

That said, this lawsuit should not proceed for an entirely different reason—the professional rescuer doctrine. I trust the district court will faithfully apply that doctrine if and when Mckesson invokes it, and dismiss the suit on remand, just as it did before. It is for that reason that I am comfortable concurring in the denial of rehearing en banc.

JAMES L. DENNIS, Circuit Judge, joined by JAMES E. GRAVES, Circuit Judge, dissenting:

I respectfully dissent from the court's refusal to rehear en banc a 2-1 panel opinion that not only misapplies Louisiana's duty-risk analysis, as Judge Higginson's dissent, *infra*, points out, but also fails to uphold the clearly established First Amendment principles enshrined in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). *Claiborne Hardware* reaffirmed this country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Claiborne*, 458 U.S. at 913 (cleaned up). Thus, when violence or threats of violence "occur[] in the context of constitutionally protected activity, … precision of regulation is demanded," including an inquiry into whether the defendant "authorized, ratified, or directly threatened acts of violence." *Id.* at 916, 929. The panel majority demands no such precision. Instead, it appears to apply a freewheeling form of strict liability having no resemblance to Louisiana law's careful duty-risk analysis, concluding that, because of his association with the demonstrators or his failure to anticipate and prevent the rock throwing incident, Mckesson can be held liable—despite the First Amendment protection historically afforded protest activity—for the acts of a "mystery attacker." *Doe v. Mckesson*, 945 F.3d 818, 842 (5th Cir. 2019) (Willett, J., dissenting). The majority of our colleagues have thus grievously failed to do what should have been done: Take up this case, apply the longstanding protections of the First Amendment, and conclude, as the district court did, that Doe's lawsuit against DeRay Mckesson should be dis-

missed. *See Doe v. Mckesson*, 272 F. Supp. 3d 841, 852-53 (M.D. La. 2017).

STEPHEN A. HIGGINSON, Circuit Judge, joined by JAMES L. DENNIS, Circuit Judge, dissenting:

The panel opinion holds that the First Amendment affords no protection to McKesson because he was negligent under Louisiana law. I do not believe the Louisiana Supreme Court would recognize a negligence claim in this situation. When a negligence claim is based on the violation of a statute, Louisiana courts allow recovery only if the plaintiff's injury falls within "the scope of protection intended by the legislature." *Lazard v. Foti*, 859 So. 2d 656, 661 (La. 2003). An assault on a police officer by a third-party is not the "particular risk" addressed by the highway obstruction statute. *Id*. Absent the breach of this statutory duty, it is unclear on what basis the panel opinion finds that the protest was foreseeably violent.

To the extent that the panel opinion creates a new Louisiana tort duty, this is "a policy decision" for Louisiana courts—not this court—to make. *See Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999); *see also Meador v. Apple*, 911 F.3d 260, 267 (5th Cir. 2018). Even if we could make this policy decision ourselves, the panel opinion does not weigh the "moral, social, and economic factors" the Louisiana Supreme Court has identified as relevant, including "the nature of defendant's activity" and "the historical development of precedent." *Posecai*, 752 So. 2d at 766. In light of the vital First Amendment concerns at stake, I respectfully suggest that these considerations counsel against our court recognizing a

new Louisiana state law negligence duty here, at least in a case where argument from counsel has not been received. Protestors of all types and causes have been blocking streets in Louisiana for decades without Louisiana courts recognizing any similar claim.

For these reasons, I dissent.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICER JOHN DOE, *Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana

No. 17-30864

OPINION

December 16, 2019

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

We WITHDRAW the court's prior opinion of August 8, 2019, and substitute the following opinion.

During a public protest against police misconduct in Baton Rouge, Louisiana, an unidentified individual hit Officer John Doe with a heavy object, causing him serious physical injuries. Following this incident, Officer Doe brought suit against "Black Lives Matter," the group associated with the protest, and DeRay Mckesson, one of the leaders of Black Lives Matter and the organizer of the protest. Officer Doe later sought to amend his complaint to add Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants. The district court dismissed Officer Doe's claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6), and denied his motion to amend his complaint as futile. Because we conclude that the district court erred in dismissing the case against Mckesson on the basis of the pleadings, we REMAND for further proceedings relative to Mckesson. We further hold that the district court properly dismissed the claims against Black Lives Matter. We thus REVERSE in part, AFFIRM in part, and REMAND for further proceedings consistent with this opinion.

I.

On July 9, 2016, a protest illegally blocked a public highway in front of the Baton Rouge Police Department headquarters.[1] This demonstration was one in a string of protests across the country, often associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear. These officers were ordered to stand in front of

[1] This case comes to us on a motion to dismiss, so we treat all well-pleaded facts as true.

other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay Mckesson, associated with Black Lives Matter, was the prime leader and an organizer of the protest.

In the presence of Mckesson, some protesters began throwing objects at the police officers. Specifically, protestors began to throw full water bottles, which had been stolen from a nearby convenience store. The dismissed complaint further alleges that Mckesson did nothing to prevent the violence or to calm the crowd, and, indeed, alleges that Mckesson "incited the violence on behalf of [Black Lives Matter]." The complaint specifically alleges that Mckesson led the protestors to block the public highway. The police officers began making arrests of those blocking the highway and participating in the violence.

At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests. The object struck Officer Doe's face. Officer Doe was knocked to the ground and incapacitated. Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, "and other compensable losses."

Following the Baton Rouge protest, Officer Doe brought suit, naming Mckesson and Black Lives Matter as defendants. According to his complaint, the defendants are liable on theories of negligence, respondeat superior, and civil conspiracy. Mckesson subsequently filed two motions: (1) a Rule 12(b)(6) motion, asserting that Officer Doe failed to state a plausible claim for relief against Mckesson; and (2) a

Rule 9(a)(2) motion, asserting that Black Lives Matter is not an entity with the capacity to be sued.

Officer Doe responded by filing a motion to amend. He sought leave to amend his complaint to add factual allegations to his complaint and Black Lives Matter Network, Inc. and #BlackLivesMatter as defendants.

II.

The district court granted both of Mckesson's motions, treating the Rule 9(a)(2) motion as a Rule 12(b)(6) motion, and denied Officer Doe's motion for leave to amend, concluding that his proposed amendment would be futile. With respect to Officer Doe's claims against #BlackLivesMatter, the district court took judicial notice that it is a "hashtag" and therefore an "expression" that lacks the capacity to be sued. With respect to Officer Doe's claims against Black Lives Matter Network, Inc., the district court held that Officer Doe's allegations were insufficient to state a plausible claim for relief against this entity. Emphasizing the fact that Officer Doe attempted to add a social movement and a "hashtag" as defendants, the district court dismissed his case with prejudice. Officer Doe timely appealed.

III.

When considering a motion to dismiss under Rule 12(b)(6), we will not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). "We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* (citing *Kelly v. Ni-*

chamoff, 868 F.3d 371, 374 (5th Cir. 2017)). To survive, a complaint must consist of more than "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotation marks and brackets omitted)). Instead, "the plaintiff must plead enough facts to nudge the claims across the line from conceivable to plausible." *Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) (internal quotation marks, brackets, and ellipses omitted) (quoting *Iqbal*, 556 U.S. at 680).[2]

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[2] Federal Rule of Civil Procedure Rule 9(a)(2) states that, if a party wishes to raise an issue regarding lack of capacity to be sued, "a party must do so by a specific denial." Rule 12(b) does not specifically authorize a motion to dismiss based on a lack of capacity. Nonetheless, we have permitted Rule 12(b) motions arguing lack of capacity. *See, e.g.*, *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1992). Where the issue appears on the face of the complaint, other courts have done the same and treated it as a Rule 12(b)(6) motion. *See, e.g.*, *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) ("Although the defense of lack of capacity is not expressly mentioned in [R]ule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint."); *Coates v. Brazoria Cty. Tex.*, 894 F. Supp. 2d 966, 968 (S.D. Tex. 2012) ("Whether a party has the capacity to sue or be sued is a legal question that may be decided at the Rule 12 stage."); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1294 (3d ed. 2018) ("An effective denial of capacity ... creates an issue of fact. Such a denial may be made in the responsive pleading or, if the lack of capacity ... appears on the face of the pleadings or is discernible there from, the issue can be raised by a motion to dismiss for failure to state a claim for relief." (footnotes omitted)). Thus, we review the district court's dismissal for lack of capacity de novo and apply the Rule 12(b)(6) standard.

A district court's denial of a motion to amend is generally reviewed for abuse of discretion. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). However, where the district court's denial of leave to amend was based solely on futility, we instead apply a de novo standard of review identical in practice to the Rule 12(b)(6) standard. *Id.* When a party seeks leave from the court to amend and justice requires it, the district court should freely give it. Fed. R. Civ. P. 15(a)(2).

IV.

We start with whether we have jurisdiction to hear this case, raising sua sponte its potential absence. Neither the district court nor any party addressed this issue in prior proceedings or on appeal. Officer Doe sued Mckesson and Black Lives Matter.[3] The complaint alleges that Black Lives Matter is a national unincorporated association, *Doe v. Mckesson*, 272 F. Supp. 3d 841, 849 (M.D. La. 2017), which, for diversity purposes, is a citizen of every state where a member is a citizen, *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1258 (5th Cir. 1988). Officer Doe, as the party invoking federal jurisdiction, bore the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). But the complaint fails to allege with sufficiency the membership of Black Lives Matter.[4] Such failure to establish diversity jurisdiction

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[3] We are addressing here Officer Doe's claims against Black Lives Matter Network, Inc., the potential unincorporated association, not against #BlackLivesMatter, the hashtag.

[4] In his Proposed Amended Complaint, Officer Doe did allege that Black Lives Matter is a "chapter-based national unincorporated association that is organized under the laws of the State

normally warrants remand—if there was some reason to believe that jurisdiction exists, i.e., some reason to believe both that Black Lives Matter's citizenship could be demonstrated with a supplemented record *and* that it is diverse from the plaintiff—or dismissal of the case. *See MidCap Media Fin., LLC v. Pathway Data, Inc.*, 929 F.3d 310, 316 (5th Cir. 2019).

Yet we need not resort to either here. Even assuming arguendo that Black Lives Matter were nondiverse and thus that the parties were nondiverse at the time of filing this lawsuit, such "lack of [diversity] jurisdiction can be cured when the non-diverse party is dismissed in federal court." *16 Front Street, L.L.C. v. Miss. Silicon, L.L.C.*, 886 F.3d 549, 556 (5th Cir. 2018). This "method of curing a jurisdictional defect ha[s] long been an exception to the time-of-filing rule." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 572 (2004); *see, e.g.*, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 73 (1996) (holding that "diversity became complete" when a nondiverse party settled and was dismissed from the case and that therefore "[t]he jurisdictional defect was cured") (emphasis removed); *McGlothin v. State Farm Mut. Ins. Co.*, 925 F.3d 741, 744 (5th Cir. 2019) (holding that the dismissal of nondiverse defendants for failure of service of process "created complete diversity; and, therefore,

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of California, though it allegedly is also a partnership that is a citizen of California and Delaware." *Doe*, 272 F. Supp. 3d at 851 (internal quotations omitted). But since an association, or a partnership for that matter, is considered a citizen of every state in which its constituent members/partners are citizens, Officer Doe still failed to allege Black Lives Matter's citizenship by omitting the citizenship of its constituent members.

the district court had jurisdiction") (citations omitted).

Here, the district court took judicial notice that Black Lives Matter was a social movement and therefore a non-juridical entity lacking the capacity to be sued. *Doe*, 272 F. Supp. 3d at 850; *see infra* Part V.C. The court subsequently dismissed Black Lives Matter as a defendant. *Doe*, 272 F. Supp. 3d at 850. If complete diversity did not exist before, this dismissal created the complete diversity (since Officer Doe and Mckesson are citizens of different states) necessary for jurisdiction in this case. For that reason, we have jurisdiction to hear this case.[5]

V.

A.

We next address Officer Doe's claims against DeRay Mckesson. The district court did not reach the merits of Officer Doe's underlying state tort claims, but instead found that Officer Doe failed to plead facts that took Mckesson's conduct outside of the bounds of First Amendment protected speech and association. Because we ultimately find that Mckesson's conduct at this pleading stage was not necessarily protected by the First Amendment, we will begin by addressing the plausibility of Officer Doe's state tort claims. We will address each of Officer Doe's specific theories of liability in turn—vicarious liability, negligence, and civil conspiracy, beginning with vicarious liability.

1.

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[5] All three judges on this panel agree with this conclusion.

Louisiana Civil Code article 2320 provides that "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." A "servant," as used in the Civil Code, "includes anyone who performs continuous service for another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 476 (La. 1990). Officer Doe's vicarious liability theory fails at the point of our beginning because he does not allege facts that support an inference that the unknown assailant "perform[ed] a continuous service" for, or that the assailant's "physical movements [were] subject to the control or right to control" of, Mckesson. Therefore, under the pleadings, Mckesson cannot be held liable under a vicarious liability theory.

2.

We now move on to address Officer Doe's civil conspiracy theory. Civil conspiracy is not itself an actionable tort. *Ross v. Conoco, Inc.*, 828 So. 2d 546, 552 (La. 2002). Instead, it assigns liability arising from the existence of an underlying unlawful act. *Id.* In order to impose liability for civil conspiracy in Louisiana, a plaintiff must prove that (1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result. *Crutcher-Tufts Res., Inc. v. Tufts*, 992 So. 2d 1091, 1094 (La. Ct. App. 2008); *see also* La. Civ. Code art. 2324. "Evidence of ... a conspiracy can be actual knowledge, overt actions with another,

such as arming oneself in anticipation of apprehension, or inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator." *Stephens v. Bail Enf't*, 690 So. 2d 124, 131 (La. Ct. App. 1997).

Officer Doe's complaint is vague about the underlying conspiracy to which Mckesson agreed, or with whom such an agreement was made. In his complaint, Officer Doe refers to a conspiracy "to incite a riot/protest." Disregarding Officer Doe's conclusory allegations, we find that Officer Doe has not alleged facts that would support a plausible claim that Mckesson can be held liable for his injuries on a theory of civil conspiracy. Although Officer Doe has alleged facts that support an inference that Mckesson agreed with unnamed others to demonstrate illegally on a public highway, he has not pled facts that would allow a jury to conclude that Mckesson colluded with the unknown assailant to attack Officer Doe or knew of the attack and specifically ratified it. The closest that Officer Doe comes to such an allegation is when he states that Mckesson was "giving orders" throughout the demonstration. But we cannot infer from this quite unspecific allegation that Mckesson ordered the unknown assailant to attack Officer Doe. Lacking an allegation of this pleading quality, Officer Doe's conspiracy claim must and does fail.

3.

Finally, we turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree

as follows.

Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached. *Lazard v. Foti*, 859 So. 2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999); *see Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.' " (quoting *Dupre v. Chevron U.S.A., Inc.*, 20 F.3d 154, 157 (5th Cir. 1994))). There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another." *Boykin v. La. Transit Co.*, 707 So. 2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of

> various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of

> defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.

Posecai, 752 So. 2d at 766.

We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint alleges that Mckesson planned to block a public highway as part of the protest. And the complaint specifically alleges that Mckesson was in charge of the protests and was seen and heard giving orders throughout the day and night of the protests. Blocking a public highway is a criminal act under Louisiana law. *See* La. Rev. Stat. Ann. § 14:97. Indeed, the complaint alleges that Mckesson himself was arrested during the demonstration. It was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway.

By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise rea-

sonable care in conducting his demonstration. This is not, as the dissenting opinion contends, a "duty to protect others from the criminal activities of third persons." *See Posecai*, 752 So. 2d at 766. Louisiana does not recognize such a duty. It does, however, recognize a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence. *See Brown v. Tesack*, 566 So. 2d 955 (La. 1990). The former means a business owner has no duty to provide security guards in its parking lot if there is a very low risk of crime. *See Posecai*, 752 So. 2d at 770. The latter means a school can be liable when it negligently disposes of flammable material in an unsecured dumpster and local children use the liquid to burn another child. *See Brown*, 566 So. 2d at 957. That latter rule applies here too: Mckesson owed Doe a duty not to negligently precipitate the crime of a third party. And a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest.[6]

Officer Doe has also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of Officer Doe's injury and that the injury was within the scope of the duty breached by Mckesson. It may have been an unknown demonstrator who threw the hard object at Officer Doe, but by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negli-

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[6] The dissenting opinion attempts to distinguish *Brown* by pointing out that "we are dealing with the criminal acts of an adult, not a child." But the dissenting opinion does not explain why the child/adult distinction should matter. The potential for future violent actions by adults can be just as foreseeable as the potential for future violent actions by children.

gent actions were the "but for" causes of Officer Doe's injuries. *See Roberts v. Benoit*, 605 So. 2d 1032, 1052 (La. 1992) ("To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred."). Furthermore, as the purpose of imposing a duty on Mckesson in this situation is to prevent foreseeable violence to the police and bystanders, Officer Doe's injury, as alleged in the pleadings, was within the scope of the duty of care allegedly breached by Mckesson.

The amended complaint only bolsters these conclusions. It specifically alleges that Mckesson led protestors down a public highway in an attempt to block the interstate. The protestors followed. During this unlawful act, Mckesson knew he was in violation of law and livestreamed his arrest. Finally, the plaintiff's injury was suffered during this unlawful action. The amended complaint alleges that it was during this struggle of the protestors to reach the interstate that Officer Doe was struck by a piece of concrete or rock-like object. It is an uncontroversial proposition of tort law that intentionally breaking, and encouraging others to break, the law is relevant to the reasonableness of one's actions.

We iterate what we have previously noted: Our ruling at this point is not to say that a finding of liability will ultimately be appropriate. At the motion to dismiss stage, however, we are simply required to decide whether Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery. We find that it is.

B.

Having concluded that Officer Doe has stated a plausible claim for relief against Mckesson under state tort law, we will now take a step back and address the district court's determination that Officer Doe's complaint should be dismissed based on the First Amendment. The Supreme Court has made clear that "[t]he First Amendment does not protect violence." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Nonetheless, the district court dismissed the complaint on First Amendment grounds, reasoning that "[i]n order to state a claim against Mckesson to hold him liable for the tortious act of another with whom he was associating during the demonstration, Plaintiff would have to allege facts that tend to demonstrate that Mckesson 'authorized, directed, or ratified specific tortious activity.'" *Doe*, 272 F. Supp. 3d at 847 (quoting *Claiborne Hardware*, 458 U.S. at 927). The district court then went on to find that there were no plausible allegations that Mckesson had done so in his complaint.

The district court appears to have assumed that in order to state a claim that Mckesson was liable for his injuries, Officer Doe was required to allege facts that created an inference that Mckesson directed, authorized, or ratified the unknown assailant's specific conduct in attacking Officer Doe. This assumption, however, does not fit the situation we address today. Even if we assume that Officer Doe seeks to hold Mckesson "liable for the unlawful conduct of others" within the meaning of *Claiborne Hardware*, the First Amendment would not require dismissal of Officer Doe's complaint. 458 U.S. at 927. In order 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. *See id.* ("[A] finding that [the defendant] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."). Our discussion above makes clear that Officer Doe's complaint does allege that Mckesson directed the demonstrators to engage in the criminal act of occupying the public highway, which quite consequentially provoked a confrontation between the Baton Rouge police and the protesters, and that Officer Doe's injuries were the foreseeable result of the tortious and illegal conduct of blocking a busy highway.

We focus here on the fact that Mckesson "directed ... specific tortious activity" because we hold that Officer Doe has adequately alleged that his injuries were the result of Mckesson's *own* tortious conduct in directing an illegal and foreseeably violent protest. In Mckesson's petition for rehearing, he expresses concern that the panel opinion permits Officer Doe to hold him liable for the tortious conduct of *others* even though Officer Doe merely alleged that he was negligent, and not that he specifically intended that violence would result. We think that Mckesson's criticisms are misplaced. We perceive 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. The permissibility of such liability is a standard aspect of state law. *See* Restatement (Third) of Torts:

Liability for Physical and Emotional Harm § 19 (2010) ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."). There is no indication in *Claiborne Hardware* or subsequent decisions that the Supreme Court intended to restructure state tort law by eliminating this principle of negligence liability.

A close reading of *Claiborne Hardware* makes this clear. In that case, the Mississippi Supreme Court had found defendants liable for malicious interference with plaintiff's business when they executed a sustained boycott against white-owned businesses for the purpose of securing "equal rights and opportunities for Negro citizens." *See Claiborne Hardware*, 458 U.S. at 899 (internal quotations omitted). That holding depended on the conclusion that "force, violence, or threats" were present. *See id.* at 895 (citing 393 So. 2d 1290, 1301 (Miss. 1980)). This was a departure from the holding of the state chancery court. As the United States Supreme Court clarified, "[t]he Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott." *Id.* at 915. This distinction is key: Before the United States Supreme Court, the only unlawful activities at issue involved "force, violence, or threats." If the "force, violence, [and] threats" had been removed from the boycott, the remaining conduct would not have been tortious at all.

This posture is central to understanding what *Claiborne Hardware* did, and more importantly, did not, hold. When *Claiborne Hardware* speaks of violence, it speaks of the only unlawful activity at issue

in the case. Consider its observation that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." *Id.* at 918. It could not award compensation for the consequences of nonviolent activity because the only potentially tortious conduct at issue was violent. Indeed, the court expressly declined to reach the question of how it would have ruled if the nonviolent aspects of the boycott had been found to be tortious violations of an appropriately tailored state law. *See id.* at 915 n.49.

Yet the dissenting opinion reads *Claiborne Hardware* as creating a broad categorical rule: "*Claiborne Hardware* ... insulates nonviolent protestors from liability for others' conduct when engaging in political expression, even intentionally tortious conduct, not intended to incite immediate violence." How does it reach this conclusion? It relies on the *Claiborne Hardware* chancery court opinion that grounded liability in nonviolent protest. But the Mississippi Supreme Court and the United States Supreme Court grounded liability solely in the presence of "force, violence or threats." *Id.* at 895. The United States Supreme Court did not invent a "violence/nonviolence distinction" when it explained that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." *Id.* at 918. 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. *See id.* ("Only those losses proxi-

mately caused by unlawful conduct may be recovered.").

For the same reason, the *Claiborne Hardware* opinion makes frequent reference to unlawful conduct when, under the dissenting opinion's view, it should have spoken of violence. *See, e.g., id.* at 920 ("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 a specific intent to further those illegal aims."); *id.* at 925 ("There is nothing unlawful in standing outside a store and recording names."); *id.* at 926 ("Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained."); *id.* at 927 ("There are three separate theories that might justify holding Evers liable for the unlawful conduct of others."); *id.* at 933 ("At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose."). In every instance, if the Court were creating a violence/nonviolence distinction it would have replaced "unlawful" with "violent." It did not, because it created no such demarcation. Rather, it addressed the case before it, where the only tortious conduct was violent.[7]

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[7] The dissenting opinion concedes that the First Amendment does not "protect[] individuals from all liability as long as their speech was nonviolent." Rather, the dissenting opinion contends, "*Claiborne Hardware* supports the proposition that an individual cannot be held liable for *violence* if his speech did not 'authorize[], direct[], or ratif[y]' *violence*." But the basis of potential liability in this case is Mckesson's *actions and conduct* in directing the illegal demonstration, not his speech and advoca-

This supposed violence/nonviolence distinction also does not square with the case law. Take *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That case held that a public officer cannot "recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. But defamation is a nonviolent tort, and statements made about public officers are often shouted during political protests. If the dissenting opinion's interpretation is correct, then it would seem that even the narrow "actual malice" exception to immunity was eliminated by *Claiborne Hardware*, at least for statements made during a protest.

Neither do recent cases vindicate this understanding. The Seventh Circuit examined a boycott similar to the one in *Claiborne Hardware*, this time a boycott by a union of a hotel and those doing business with the hotel. *See 520 S. Mich. Ave. Assocs., Ltd. v. Unite Here Local 1*, 760 F.3d 708 (7th Cir. 2014). The court found that it was "undisputed that the Union delegations all attempted to communicate a message on a topic of public concern." *Id.* at 723. But the court nonetheless held that the boycotters could be found liable if they had crossed the line into

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cy. Elsewhere, the dissenting opinion describes its thesis this way: "encouraging [] unlawful activity cannot expose Mckesson to liability for *violence* because he didn't instruct anyone to commit *violence*." But that still overreads *Claiborne Hardware*; if this were the rule, then a protest leader who directs protesters to occupy an empty business could not be held liable for a violent confrontation that foreseeably follows between a protester and a business owner or police officer.

illegal coercion, because "prohibiting some of the Union's conduct under the federal labor laws would pose no greater obstacle to free speech than that posed by ordinary trespass and harassment laws." *Id.* The court's benchmark for liability was illegality, not violence. The court concluded that if "the Union's conduct in this case is equivalent to secondary picketing, and inflicts the same type of economic harm, it too may be prohibited without doing any harm to First Amendment liberties." *Id.* The dissenting opinion cannot be squared with this outcome.

Finally, the violence/nonviolence distinction does not make sense. Imagine protesters speaking out on a heated political issue are marching in a downtown district. As they march through the city, a protester jaywalks. To avoid the jaywalker, a car swerves off the street, and the driver is seriously injured. If the dissenting opinion's interpretation of *Claiborne Hardware* is correct, the First Amendment provides an absolute defense to liability for the jaywalker in a suit by the driver. The dissenting opinion says that "preventing tortious interference is not a proper justification for restricting free speech (unlike preventing violence)" because *Claiborne Hardware* cemented a "violence/nonviolence distinction." The theory seems to be that because tortious interference is nonviolent, it cannot be tortious if done for a political reason. So too with every nonviolent tort? What about nonviolent *criminal* offenses done for a political reason? The dissenting opinion does not seem to believe that engaging in a protest provides a protestor immunity for violating La. Rev. Stat. Ann. § 14:97. What is the logic behind immunizing protestors from nonviolent civil liability while retaining

their nonviolent criminal liability?[8]

We of course acknowledge that Mckesson's negligent conduct took place in the context of a political protest. It is certainly true that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Claiborne Hardware*, 458 U.S. at 916-17. But *Claiborne Hardware* does not insulate the petitioner from liability *for his own negligent conduct* simply because he, and those he associated with, also intended to communicate a message. *See id.* at 916 ("[T]he use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy." (internal quotation marks and citations omitted)). Furthermore, although we do not understand the petitioner to be arguing that the Baton Rouge police violated the demonstrators' First Amendment rights by attempting to remove them from the highway, we note that the criminal conduct allegedly ordered by Mckesson was not itself protected by the First Amendment, as Mckesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (reasonable time, place, and manner restrictions do not violate the First Amendment). As such, no First Amendment protected activity is suppressed by allowing the consequences of Mckesson's conduct to be addressed by state tort law.

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[8] The dissenting opinion does not engage with our reading of *Claiborne Hardware*, nor does it grapple with the staggering consequences of its approach.

Thus, on the pleadings, which must be read in a light most favorable to Officer Doe, the First Amendment is not a bar to Officer Doe's negligence theory. The district court erred by dismissing Officer Doe's complaint—at the pleading stage—as barred by the First Amendment.[9] We emphasize that this means only that, given the facts that Doe alleges, he *could* plausibly succeed on this claim. We make no statement (and we cannot know) whether he will.

C.

Now we turn our attention to whether Officer Doe has stated a claim against Black Lives Matter. The district court took judicial notice that "'Black Lives Matter,' as that term is used in the Complaint, is a *social movement* that was catalyzed on social media by the persons listed in the Complaint in response to the perceived mistreatment of African-American citizens by law enforcement officers." Based on this conclusion, the district court held that Black Lives Matter is not a "juridical person" capable of being sued. *See Ermert*, 559 So. 2d at 474. We first

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[9] We emphasize, however, that our opinion does not suggest that the First Amendment allows a person to be punished, or held civilly liable, simply because of his associations with others, unless it is established that the group that the person associated with "itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne Hardware*, 458 U.S. at 920. But we also observe that, in any event, Officer Doe's allegations are sufficient to state a claim that Black Lives Matter "possessed unlawful goals" and that Mckesson "held a specific intent to further those illegal aims." *See id.* Officer Doe alleges that Black Lives Matter "*plann[ed]* to block a public highway," and, in his amended complaint, that Mckesson and Black Lives Matter traveled to Baton Rouge "for the *purpose* of ... rioting." (emphasis added).

address the district court's taking of judicial notice, then Black Lives Matter's alleged capacity to be sued.

Federal Rule of Evidence 201 provides that a court may take judicial notice of an "adjudicative fact" if the fact is "not subject to reasonable dispute" in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Fed. R. Evid. 201(b). "Rule 201 authorizes the court to take notice only of 'adjudicative *facts*,' not legal determinations." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998). In *Taylor*, we held that another court's state-actor determination was not an "adjudicative fact" within the meaning of Rule 201 because "[w]hether a private party is a state actor for the purposes of § 1983 is a mixed question of fact and law and is thus subject to our *de novo* review." *Id.* at 830-31. We further held that the state-actor determination was not beyond reasonable dispute where it "was, in fact, disputed by the parties" in the related case. *Id.* at 830.

We think that the district court was incorrect to take judicial notice of a mixed question of fact and law when it concluded that Black Lives Matter is a "*social movement*, rather than an organization or entity of any sort." The legal status of Black Lives Matter is not immune from reasonable dispute; and, indeed, it is disputed by the parties—Doe claiming that Black Lives Matter is a national unincorporated association, and Mckesson claiming that it is a movement or at best a community of interest. This difference is sufficient under our case law to preclude judi-

cial notice.

We should further say that we see the cases relied on by the district court as distinguishable. Each deals with judicial notice of an aspect of an entity, not its legal form. *See United States v. Parise*, 159 F.3d 790, 801 (3d Cir. 1998) (holding that the court could take judicial notice of the *aims* and *goals* of a movement); *Atty. Gen. of U.S. v. Irish N. Aid. Comm.*, 530 F. Supp. 241, 259-60 (S.D.N.Y. 1981) (stating the court could take "notice that the IRA is a 'Republican movement,' *at least insofar as it advocates a united Ireland*" (emphasis added)); *see also Baggett v. Bullitt*, 377 U.S. 360, 376 n.13 (1964) (noting that "[t]he lower court took judicial notice of the fact that the Communist Party of the United States ... was *a part of* the world Communist movement" (emphasis added)).

Now, we move on to discuss the merits of Officer Doe's contention that Black Lives Matter is a suable entity. He alleges that Black Lives Matter "is a national unincorporated association with chapter [sic] in many states." Under Federal Rule of Civil Procedure 17(b), the capacity of an entity "to sue or be sued is determined ... by the law of the state where the court is located." Under Article 738 of the Louisiana Code of Civil Procedure, "an unincorporated association has the procedural capacity to be sued in its own name." The Louisiana Supreme Court has held that "an unincorporated association is created in the same manner as a partnership, by a contract between two or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit." *Ermert*, 559 So. 2d at 473. "Interpretation of a contract is the deter-

mination of the common intent of the parties." La. Civ. Code Ann. art. 2045. To show intent, "the object of the contract of association must necessarily be the creation of an entity whose personality 'is distinct from that of its members.'" *Ermert*, 559 So. 2d at 474 (quoting La. Civ. Code Ann. art. 24). Louisiana law does not provide for a public display of the parties' intent. *Id*.

Louisiana courts have looked to various factors as indicative of an intent to create an unincorporated association, including requiring dues, having insurance, ownership of property, governing agreements, or the presence of a formal membership structure. *See Bogue Lusa Waterworks Dist. v. La. Dep't of Envtl. Quality*, 897 So. 2d 726, 728-29 (La. Ct. App. 2004) (relying on organization's unfiled articles of incorporation); *Friendship Hunting Club v. Lejeune*, 999 So. 2d 216, 223 (La. Ct. App. 2008) (relying on organization's required dues and possession of an insurance policy); *see also Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 675 (E.D. La. 2010) (relying on organization's formal and determinate membership structure). Lacking at least some of these indicators, Louisiana courts have been unwilling to find an intent to create an unincorporated association. *See, e.g.*, *Ermert*, 559 So. 2d at 474-75 (finding that hunting group was not an unincorporated association because it did not own or lease the property that it was based on, required the permission of one of its alleged members to use the property, and lacked formal rules or bylaws).

Officer Doe has not shown in his complaint a plausible inference that Black Lives Matter is an unincorporated association. His only allegations are

that Black Lives Matter: (1) was created by three women; (2) has several leaders, including Mckesson; (3) has chapters in many states; and (4) was involved in numerous protests in response to police practices. He does not allege that it possesses property, has a formal membership, requires dues, or possesses a governing agreement. As such, the complaint lacks any indication that Black Lives Matter possesses the traits that Louisiana courts have regarded as indicative of an intent to establish a juridical entity. We have no doubt that Black Lives Matter involves a number of people working in concert, but "an unincorporated association .... does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a number of individuals have simply acted together." *Id*. at 474. Therefore, we find that the district court did not err in concluding that Officer Doe's complaint has failed plausibly to allege that Black Lives Matter is an entity capable of being sued.[10]

VI.

In sum, we hold that Officer Doe has not adequately alleged that Mckesson was vicariously liable for the conduct of the unknown assailant or that Mckesson entered into a civil conspiracy with the purpose of injuring Officer Doe. We do find, however, that Officer Doe adequately alleged that Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a

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[10] We do not address whether Officer Doe could state a claim against an entity whose capacity to be sued was plausibly alleged, nor do we address whether Mckesson could be held liable for the actions of that entity under state law.

highway. We further find that in this context the district court erred in dismissing the suit on First Amendment grounds. As such, Officer Doe has pleaded a claim for relief against DeRay Mckesson in his active complaint.[11] The district court therefore erred by concluding that it would be futile for Doe to amend his complaint. We also hold that the district court erred by taking judicial notice of the legal status of "Black Lives Matter," but nonetheless find that Officer Doe did not plead facts that would allow us to conclude that Black Lives Matter is an entity capable of being sued. Therefore, the judgment of the district court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings consistent with this opinion.[12]

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[11] Officer Doe has complained of the lack of discovery in this case, particularly related to his claims against the corporate defendants. Officer Doe is free to argue before the district court that he is entitled to discovery. The district court may then decide whether, in the light of our remand, discovery would be appropriate.

[12] On appeal, Officer Doe also argues that the district court erred in denying his request to proceed anonymously as John Doe. He argues that the public nature of his job puts him and his family in danger of additional violence. At the district court, he listed a number of examples of acts of violence against police officers by individuals who may have some connection with Black Lives Matter. In its order, the district court walked through three factors common to anonymous-party suits that we have said "deserve considerable weight." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). These are: (1) whether the plaintiff is "challeng[ing] governmental activity"; (2) whether the plaintiff will be required to disclose information "of the utmost intimacy"; and (3) whether the plaintiff will be "compelled to admit [his] intention to engage in illegal conduct, thereby risking criminal prosecution." *Id.* at 185. The district court concluded that none of these factors applied to the facts of this case. In

AFFIRMED in part, REVERSED in part, and REMANDED.

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response to Officer Doe's argument regarding potential future violence, the district court noted that the incidents Officer Doe listed did not involve Officer Doe and were not related to this lawsuit. In fact, at oral argument before the district court regarding his motion, Officer Doe conceded that he had received no particularized threats of violence since filing his lawsuit. The district court instead saw the incidents Officer Doe listed as evidence of "the generalized threat of violence that all police officers face." As a result, the district found that Doe had not demonstrated a privacy interest that outweighs the "customary and constitutionally embedded presumption of openness in judicial proceedings." *Id*. at 186. We agree with the district court and affirm the denial of Doe's motion to proceed anonymously. In so holding, we emphasize what the Supreme Court said decades ago: "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

DON R. WILLETT, Circuit Judge, concurring in part, dissenting in part:

I originally agreed with denying Mckesson's First Amendment defense.[1] But I have had a judicial change of heart. Further reflection has led me to see this case differently, as explained below. Admittedly, judges aren't naturals at backtracking or about-facing. But I do so forthrightly. Consistency is a cardinal judicial virtue, but not the only virtue. In my judgment, earnest rethinking should underscore, rather than undermine, faith in the judicial process. As Justice Frankfurter elegantly put it 70 years ago, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[2]

* * *

Officer John Doe was honoring his oath to serve and protect the people of Baton Rouge when an unidentified violent protestor hurled a rock-like object at his face. Officer Doe risked his life to keep his community safe that day—same as every other day he put on the uniform. He deserves justice.

Unquestionably, Officer Doe can sue the rock thrower. But I am unconvinced he can sue the protest leader. First, it is unclear whether DeRay Mckesson owed Officer Doe a duty under Louisiana law to protect him from the criminal acts of others. I would certify that threshold—and potentially dispositive—issue to the Supreme Court of Louisiana. Sec-

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[1] *Doe v. Mckesson*, 922 F.3d 604 (5th Cir.), *superseded on panel rehearing*, 935 F.3d 253 (5th Cir. 2019) (*Mckesson II*).

[2] *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

ond, the Constitution that Officer Doe swore to protect itself protects Mckesson's rights to speak, assemble, associate, and petition. First Amendment freedoms, of course, are not absolute—and there's the rub: Did Mckesson stray from lawfully exercising his own rights to unlawfully exorcising Doe's. I don't believe he did.[3]

I.

Respectfully, the majority opinion is too quick to conclude that Mckesson's organization and leadership of the Black Lives Matter protest amounted to negligence. Under Louisiana law, a person generally has "no duty to protect others from the criminal activities of third persons."[4] And to determine whether to impose such a duty, "the court must make a policy decision in light of the unique facts and circumstances presented."[5] This case raises consequential questions of Federal constitutional law—but only *potential* questions. If Louisiana law does not impose a duty on protest organizers to protect officers from the criminal violence of individual protestors, then the First Amendment issues, however important, are moot.

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[3] Although I now dissent on the First Amendment issue, I still agree with the majority opinion that: (1) we have jurisdiction over this appeal; (2) Mckesson cannot be held vicariously liable for the assailant's actions; (3) Officer Doe failed to state a civil conspiracy claim; (4) Officer Doe failed to adequately allege that Black Lives Matter is an unincorporated association capable of being sued under Louisiana law; and (5) Officer Doe is not entitled to proceed anonymously.

[4] *Posecai v. Wal-Mart Stores, Inc.,* 752 So. 2d 762, 766 (La. 1999).

[5] *Id.*

The majority opinion concludes that Mckesson, as protest organizer, can be held liable for Officer Doe's injuries because the Constitution "does not insulate [Mckesson] from liability *for his own negligent conduct* simply because he, and those he associated with, also intended to communicate a message."[6] Putting aside whether the Constitution, in fact, supports precisely that,[7] the starting-point question is whether Mckesson's conduct was negligent at all. And step one of that inquiry is determining whether a duty exists—a pure question of law.[8]

The majority concludes that the foreseeable risk of violence alone imposed a duty on Mckesson to exercise reasonable care to avoid that violence. But I am unaware of any Louisiana case imposing a duty to protect against the criminal acts of a third party absent a special relationship that entails an independent duty.[9] The majority, as it must, accepts that

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[6] Maj. Op. at 21a–22a.

[7] *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."). *Claiborne Hardware*, in part, addresses what protest conduct can give rise to tort liability consistent with the First Amendment, something that requires "precision of regulation" even when holding someone liable for his own actions in connection with protected speech. *Id*. at 916.

[8] *Lazard v. Foti*, 859 So. 2d 656, 659 (La. 2003).

[9] *See Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98, 101 (5th Cir. 1990) ("Ordinarily, Louisiana law imposes no duty to protect against the criminal acts of third persons. However, a duty to protect against foreseeable criminal misconduct may arise from a special relationship." (internal citations omitted)); *Wellons v. Grayson*, 583 So. 2d 1166, 1168-69 (La. App. 1 Cir. 1991) (explaining that, for a party to have an obligation to pro-

tect against the criminal acts of others, "some special relationship must exist in order for that duty to arise"). For instance, in *Posecai*, the Supreme Court of Louisiana examined whether a business owed a duty to its customers to protect against criminal acts that were reasonably foreseeable to occur in the business's parking lot. 752 So. 2d at 766. Importantly, the business unquestionably owed some duty to the customer because the customer was an invitee on the property; the question was how far that duty extended. And because, on balance, the risk of criminal activity was reasonably foreseeable and the burden of imposing a duty to protect against that risk was minimal, the court chose to impose a duty on the business. *Id.* at 768.

Consider also *Brown v. Tesack*, relied upon by the majority. 566 So. 2d 955 (La. 1990). In *Brown*, there was no question that the school had a duty to properly dispose of hazardous materials. Id. at 957. The school "specifically recognized" that certain flammable liquids created an unreasonable risk to the children who played on the school's property. *Id.* As in *Posecai*, the question before the Supreme Court of Louisiana was whether this pre-existing duty extended to protecting against the acts of third parties (*i.e.*, one child abusing the flammable liquids and burning another child). *Id.* The court concluded that because the harm that occurred was not only a foreseeable consequence of a breach of the school's already existing duty, but was a "*foreseen*" harm, protecting against the risk of children taking and misusing the hazardous liquids was within the scope of the school's underlying duty to properly dispose of the liquids. *Id.* at 957-58. Further, the underlying duty in *Brown* was tied to the heightened standard of care involving children, which is not an issue in our case. *See id.* at 957 ("A duty was owed both to these children and to their potential victims …. We agree ... that 'children who possess a flammable substance can be expected to light it, to attract other children to join in the play and to commit criminal acts or engage in other misadventures.'" (quoting *Brown*, 556 So.2d at 89 (Plotkin, J., dissenting) ("[T]here is no difference between the recognizable risk of a minor's misuse of an inherently dangerous object and the likelihood that the minor will cause personal or property damages to others[.]"))).

Here, the harm to Officer Doe was not within the scope of the highway-obstruction statute that the majority alleges Doe vio-

Louisiana does not recognize such a duty. Instead, it argues, Louisiana law imposes a "duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence."[10] Respectfully, this is a semantic distinction without an analytic difference. And it is a distinction unsupported by Louisiana law.[11] Doe asserts that Mckesson "did

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lated, and Mckesson owed no pre-existing duty to Doe because of a special relationship between them. Finally, the majority opinion, while *quoting* the multi-factor balancing analysis required by the Louisiana Supreme Court in *Posecai*, never gets around to actually *applying* it. Rather, the majority simply assumes that because the harm was foreseeable, a duty necessarily exists. Louisiana law requires more.

[10] Maj. Op. at 12a.

[11] The majority opinion attempts to distinguish between a duty to *protect* against a crime and a duty not to *precipitate* one. But I have certainly not found any case that describes such a difference or recognizes the majority's proposed duty. *See, e.g.*, *Harris v. Pizza Hut of La., Inc.*, 45 So.2d 1364, 1369-70 (La. 1984) ("Louisiana has for some time employed the duty-risk analysis to determine legal responsibility in tort claims. The pertinent inquiries are: ... II. Whether there was a duty on the part of the defendant which was imposed to *protect* against the risk involved .... (emphasis added)). And, despite the majority's contention otherwise, both *Posecai* and *Brown* concern a duty to protect against the criminal acts of others, which exists only where there is a pre-existing special relationship that itself imposes a duty. *See Poseca*i, 752 So. 2d at 766; *Brown*, 566 So.2d at 957 ("[A]ll rules of conduct ... exist for purposes. They are designed to protect *some* persons under *some* circumstances against *some* risks ... (quoting Wex Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60, 73 (1956)) (emphasis and ellipses in original)). The majority opinion never grapples with Louisiana's unequivocal expression that for a person to be held liable for the consequences of others' actions, there must be a pre-existing duty between the acting and the liable parties. This necessity does not go away simply because the majority has rephrased the duty at issue.

nothing to calm the crowd," but under *Claiborne Hardware*, a duty to repudiate "cannot arise unless, absent repudiation, an individual could be found liable for those acts."[12] Duty is the first inquiry. And possibly the last.

Recently, in another Louisiana tort case, we stressed, "If guidance from state cases is lacking, 'it is not for us to adopt innovative theories of recovery under state law.'"[13] Wise words. I would be chary of making policy decisions that create or expand Louisiana tort duties. Given the fateful First Amendment issues, and the dearth of on-point guidance from Louisiana courts, I would certify this *res nova* negligence question to the Supreme Court of Louisiana: Does a protest's foreseeable risk of violence impose a duty upon the protest organizer, such that he can be held personally liable for injuries inflicted by an unknown assailant? Because if there's no duty, there's no negligence. And if there's no negligence, there's no case. And if there's no case, there's no need to fret about the First Amendment.

This is not a federal constitutional case unless it is first a state tort case. As such, certification is counseled, if not compelled, by the twin doctrines of constitutional avoidance and abstention. We recently remarked that "the doctrine of constitutional avoidance is rooted in basic considerations of federalism,"[14] adding that where a ruling on constitutionali-

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[12] 458 U.S. at 925 n.69.

[13] *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) (quoting *Mayo v. Hyatt Corp.*, 898 F.2d 47, 49 (5th Cir. 1990)).

[14] *St. Joseph Abbey v. Castille*, 700 F.3d 154, 168 (5th Cir. 2012).

ty "could be avoided by interpretation of Louisiana law, we must give due consideration to this non-constitutional ground for decision."[15] This caution is less prudish than prudent, and has a venerable, generations-long pedigree. The Supreme Court, almost 80 years ago, held that "where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions." [16]

After all, state judiciaries are equal partners in our shared duty "to say what the law is."[17] Bombshell federal cases dominate most headlines. But as this same panel recently emphasized, "American justice is dispensed—overwhelmingly—in state, not federal, judiciaries."[18] How much? "[A] whopping 96 percent of all cases."[19] As Justice Scalia self-deprecatingly observed, state law (and state courts) matter far more to citizens' everyday lives: "If you ask which court is of the greatest importance to an American

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[15] *Id*. at 167.

[16] *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 667 (2006) (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941)).

[17] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[18] *Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 470-71 (5th Cir. 2019) (citing Jennifer W. Elrod, *Don't Mess with Texas Judges: In Praise of the State Judiciary,* 37 HARV. J.L. & PUB. POL'Y 629 (2013)).

[19] *New NCSC Video Explains That State Courts Are Where the Action Is*, NAT. CTR. FOR STATE COURTS (Nov. 28, 2018), https://www.ncsc.org/Newsroom/at-the-Center/2018/Nov-28.aspx.

citizen, it is not my court."[20]

State judiciaries are fundamental, not ornamental, and have been since the Founding, when Hamilton lauded them as "the immediate and visible guardian of life and property."[21] (Indeed, the federal judiciary didn't even *exist* for the first several years after independence.) Hamilton's reassurance has endured for 232 years. Earlier this year, we again extolled the front-and-center role of state judiciaries: "For most Americans, Lady Justice lives in the halls of state courts."[22]

In this case, Louisiana law poses a threshold, potentially decisive question. Only the Supreme Court of Louisiana can adjudicate it authoritatively. Certification—inviting the state high court's definitive word—serves the dual goals of abstention and avoidance by obviating (perhaps) the need to confront the First Amendment at all. Avoiding unnecessary federal constitutional rulings honors our bedrock commitment to federalism. On this point, we have not minced words: "[T]he Supreme Court has long recognized that concerns for comity and federalism may require federal courts to either abstain from deciding federal constitutional issues that are entwined with the interpretation of state law or certify the questions of state law to the state's highest court for an

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[20] *Thompson*, 913 F.3d at 471 (quoting *Justice Scalia Honors U.S. Constitution,* GEO. WASH. TODAY (Sept. 18, 2013), https://gwtoday.gwu.edu/justice-scalia-honors-us-constitution).

[21] The Federalist No. 17 (Alexander Hamilton).

[22] *Thompson*, 913 F.3d at 470 (citing John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18 (quoting a former justice of the Colorado Supreme Court)).

authoritative interpretation of them before reaching the merits of the cases."[23] Indeed, as the Supreme Court has itself stressed, our carefully wrought system of federalism is best served by avoiding "the friction of a premature constitutional adjudication."[24] And certification of state-law questions may be particularly important in First Amendment cases.[25]

To my mind, there is no need for *Erie* guesses or crystal balls. Federal-to-state certification is a remarkable device: workable, efficient, and guaranteed to yield a doubt-free answer. Zero guesswork, *Erie* or otherwise. And this case, by any traditional measure, hits the certification bull's-eye: The state-law answer is uncertain, and the federal-law question is (maybe) unnecessary. The first adjudication of this unresolved issue, one that portends far-reaching impact given the ubiquity of "negligent protests," should be decisive and authoritative, one on which the people of Louisiana can rely.

True, certification is entirely discretionary, not obligatory. And the tipping point for certification-worthiness eludes mathematical precision; it's wholly subjective, with a patent, eye-of-the-beholder flavor.[26] But this case seems a Certification 101 exem-

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[23] *Carmouche*, 449 F.3d at 667.

[24] *Pullman*, 312 U.S. at 500.

[25] *See* Clay Calvert, *Certifying Questions in First Amendment Cases: Free Speech, Statutory Ambiguity, and Definitive Interpretations*, 60 B.C.L. REV. 1349, 1352 (2019).

[26] Disclosure: My dozen years as a state high court jurist likely make me more inclined to certify (as does my judgment that the majority reaches the wrong constitutional result). As this is a federal constitutional case only if it is first a viable state negligence case, a state supreme court justice would reasonably

plar that calls for cooperative judicial federalism. If consequential state-law ground is to be plowed, I believe the Supreme Court of Louisiana should do the plowing.

It is principally the role of state judges to define and delimit state causes of action. And state supreme courts have an irreplaceable duty: to be supreme and to speak supremely. We should let them do so, particularly when doing so may obviate a knotty federal question. I would leave this ruling on Louisiana negligence law to those elected to rule on Louisiana negligence law. I would seek conclusive word from the conclusive court as to what state law prescribes and proscribes. I would not guess, predict, or speculate. I would certify.

II.

Even assuming that Mckesson could be sued under Louisiana law for "negligently" leading a protest at which someone became violent, the First Amendment "imposes restraints" on what (and whom) state tort law may punish.[27] Just as there is no "hate

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think it *her* job to decide an unsettled state-law issue of far-reaching significance.

[27] *Claiborne Hardware*, 458 U.S. at 916-17 ("Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the person who may be held accountable for those damages."). As to what activity may be subject to liability, the Court held: "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. As to who can be held liable for that violent conduct, the Court held: "Civil liability may not be imposed merely because an individual belonged to a group, some

speech" exception to the First Amendment,[28] "negligent" speech is also constitutionally protected.[29] And under *Claiborne Hardware* (and a wealth of precedent since), raucous public protest—even "impassioned" and "emotionally charged" appeals for the use of force—is protected unless clearly intended to, and likely to, spark immediate violence.[30]

In *Claiborne Hardware*, involving a years-long and sometimes violent boycott that tortiously interfered with white-owned businesses, the Court unanimously held that the "highly charged political rhetoric" of Charles Evers—who "unquestionably played the primary leadership role in the organization of the boycott"—was constitutionally protected even though Evers vilified and urged violence against boycott

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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 a specific intent to further those illegal aims." *Id*. at 920.

[28] *Matal v. Tam*, 137 1744 (2017) (making clear that viewpoint discrimination—including against hateful speech that demeans—is unconstitutional).

[29] *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-80 (1964) (prohibiting public officials from recovering damages for negligently made "defamatory falsehoods" because permitting liability for such negligence would impose a "pall of fear and timidity ... upon those who would give voice to public criticism," creating "an atmosphere in which the First Amendment freedoms cannot survive").

[30] 458 U.S. at 927-28 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (protecting speech of Ku Klux Klan leader who threatened "revengeance" if "suppression" of the white race continued, and defining "incitement" to mean speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action")).

breakers, warning, "if we catch any of you going in any of them racist stores, we're gonna break your damn neck."[31] The Court made clear that the First Amendment does not protect words "that provoke immediate violence"[32] or "that create an immediate panic."[33] But "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."[34] Because Evers only *advocated* for violence, but did not provoke or incite imminent acts of violence, the Court said his fiery words "did not exceed the bounds of protected speech."[35] The Court noted there was "no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence."[36] In this case, there is not even a competent *allegation* of such behavior.

Officer Doe does not assert that Mckesson perpetrated violence himself. Rather, he asserts that Mckesson "incited the violence." But Doe's barebones complaint specifies no words or actions by Mckesson that may have done so. For Rule 12(b)(6) purposes, we accept well-pleaded facts as true and view them in the light most favorable to the plaintiff.[37] But "a

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[31] *Id.* at 926-28.

[32] *Id.* at 927.

[33] *Id.*

[34] *Id.* (emphasis in original).

[35] *Id.* at 929.

[36] *Id.*

[37] *SGK Props., L.L.C. v. U.S. Bank Nat'l Ass'n*, 881 F.3d 933, 943 (5th Cir. 2018). Confusingly, the majority opinion relies on Officer Doe's proposed amended complaint even though the district court denied Doe's request to file an amended complaint. The controlling complaint for the purposes of our analysis

legal conclusion couched as a factual allegation" need not be accepted as true.[38] Gauzy allegations that offer only "labels and conclusions" or "naked assertion[s] devoid of further factual enhancement" do not suffice.[39] Doe's allegations—"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements"—fail the 12(b)(6) plausibility standard.[40]

Doe strings together various unadorned contentions—that Mckesson was "present during the protest," "did nothing to calm the crowd," "directed" protestors to gather on the public street in front of police headquarters, and "knew or should have known ... that violence would result" from the protest that Mckesson "staged." Even taking these impermissibly

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should be Doe's original complaint. *See Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 112 n.2 (5th Cir. 2019) (accepting facts as alleged in Third Amended Complaint, even where district court improperly denied plaintiff's request to file its Proposed Fourth Amended Complaint, because the Third Amended Complaint was "the live pleading at the time of dismissal"); *Stem v. Gomez*, 813 F.3d 205, 209, 215-17 (5th Cir. 2016) (relying on facts as alleged in original complaint where district court denied leave to amend); *Leal v. McHugh*, 731 F.3d 405, 407 & n.1 (5th Cir. 2013) (same). But even if I accepted the facts alleged in Doe's Amended Complaint as true, the First Amendment would still prohibit imposing liability against Mckesson for the violent acts of others because, as the majority agrees, Mckesson did not authorize, direct, or ratify any violent conduct.

[38] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[39] *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The majority opinion rightly disregards Doe's "conclusory allegations" against Black Lives Matter. *See* Maj. Op. at 8.

[40] *Iqbal*, 556 U.S. at 678.

conclusory allegations as true, the complaint lacks sufficient factual detail to state a claim for negligence, much less to overcome Mckesson's First Amendment defense. For example, Doe does *not* allege:

- What orders Mckesson allegedly gave, how he led the protest, or what he said or did to incite violence.
- How Mckesson "controlled" or "directed" the unidentified assailant who injured Officer Doe.
- How statements that Mckesson made to the media after the protest amount to a ratification of violence.

Without these and other fleshed-out facts, the complaint utterly fails to link Mckesson's role as leader of the protest demonstration to the mystery attacker's violent act. In short, Doe's skimpy complaint is heavy on well-worn conclusions but light on well-pleaded facts.

Indeed, the lone "inciteful" speech quoted in Doe's complaint is something Mckesson said not to a fired-up protestor but to a mic'ed-up reporter—the day *following* the protest: "The police want protestors to be too afraid to protest." Tellingly, not a single word even obliquely references violence, much less advocates it. Temporally, words spoken *after* the protest cannot possibly have incited violence *during* the protest. And tacitly, the majority opinion seems to discard the suggestion that Mckesson uttered anything to incite violence against Officer Doe.

With "speech" off the table, the majority seems to

endorse an alternative liability theory—that Mckesson "authorized, directed, or ratified specific tortious activity"[41] by leading others to block a public highway. The majority credits Doe's abstract, one-sentence contention that Mckesson "knew or should have known that violence would result."[42] Mind you, Doe's complaint contains no specific allegations that Mckesson advocated imminent violence, just this bald, conclusory assertion that he negligently allowed violence to occur.

This novel "negligent protest" theory of liability seems incompatible with the First Amendment and foreclosed—squarely—by controlling Supreme Court precedent. Even assuming, for argument's sake, that Mckesson directed others to stand in the highway[43] and that violating this criminal law constitutes a

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[41] *Claiborne Hardware*, 458 U.S. at 927 ("[A] finding that [Evers] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.").

[42] *See* Maj. Op. at 21a–22a ("But *Claiborne Hardware* does not insulate the petitioner from liability *for his own negligent conduct* simply because he, and those he associated with, also intended to communicate a message." (emphasis in original)).

[43] The majority opinion states that "Officer Doe's complaint does allege that Mckesson directed the demonstrators to engage in the criminal act of occupying the public highway," adding that Doe "specifically alleges that Mckesson led protestors down a public highway in an attempt to block the interstate." But the lone assertion of purposeful highway-blocking in Doe's scanty complaint is this sentence: "DEFENDANTS conspired to violate the law by planning to block a public highway." Even if "planning" equates to directing, the majority properly holds that Doe failed to state a claim that Mckesson engaged in any conspiracy. *Id.* at 260.

tort,[44] I disagree with the suggestion that directing *any* tort would strip a protest organizer of First Amendment protection. Even Evers of *Claiborne Hardware* would be liable under the majority's analysis. After all, the economic harm inflicted in *Claiborne Hardware* was "the result of [Evers's] *own* tortious conduct in organizing a foreseeably violent protest."[45] Evers engaged in the tort of "malicious interference with the plaintiff's business."[46] He even threatened during a meeting that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[47] And violence was not just foreseeable; "several" clashes had already occurred.[48] Despite all that, the Supreme Court ruled Evers to be constitutionally protected. Because Evers did not specifically direct *violence*, the Supreme Court was unwilling to find him liable for *violence*.[49] And because preventing tortious interference is not a proper justification for restricting free speech (unlike preventing violence), it refused to hold Evers liable for the economic harms resulting from the boycott he

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[44] La. Rev. Stat. Ann. § 14:97.

[45] Maj. Op. at 16a (emphasis in original). Similarly, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, the Supreme Court held that a campaign with an anticompetitive purpose and effect was permissible under the First Amendment, even though the Sherman Act prohibits individuals from restraining trade or creating monopolies, because "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." 365 U.S. 127, 138 (1961).

[46] *Claiborne Hardware*, 458 U.S. at 891.

[47] *Id.* at 900 n.28.

[48] *Id.* at 903.

[49] *Id.* at 927.

led.[50]

In other words, when the Supreme Court observed that Evers could be held liable if he "authorized, directed, or ratified specific tortious activity," it

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[50] *Id.* at 914-15 ("[T]he petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign[;] ... however ... [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 …. We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."). The majority opinion overlooks these statements by the Supreme Court and instead points to proceedings that occurred in the state chancery and supreme courts to argue that the tortious conduct that Evers unequivocally led was not at issue before the *Claiborne Hardware* Court. But the Court never made such an assertion. To the contrary, the Supreme Court observed that it was not deciding "the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law." *Id.* at 915 n.49. The Supreme Court did not here say that no one committed tortious conduct; the Court affirmed that a generic statute against tortious interference is not the type of narrowly tailored law that can restrict protected First Amendment speech. And because it is not such a narrowly tailored law, directing others to violate it could not impose liability on Evers generally, and it certainly could not impose liability on him for the *violence* of others. *Id.* at 914-15; *see also Brandenburg*, 395 U.S. at 448 ("A statute which fails to draw [a] distinction [between teaching about the need for violence and "steeling" a group to commit violence] impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.").

was clarifying that Evers could be held liable for *violence* he directly incited because violence is a tortious activity that unequivocally falls outside First Amendment protection.[51] This violence/nonviolence distinction[52] is cemented later in *Claiborne Hard-*

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[51] *Claiborne Hardware*, 458 U.S. at 927. This is not to say the First Amendment protects individuals from all liability as long as their speech was nonviolent. Instead, *Claiborne Hardware* supports the proposition that an individual cannot be held liable for *violence* if his speech did not "authorize[], direct[], or ratif[y]" *violence*. *Id.* ("[A] finding that [Evers] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of *that* activity." (emphasis added)).

[52]The majority opinion latches onto the phrase "violence/nonviolence distinction" and appears to oversimplify it. As reiterated throughout this dissent, *see, e.g.*, *supra* note 51, I do not contend that the First Amendment protects individuals from all tortious activity as long as it is nonviolent. Instead, I affirm the Supreme Court's holding that a person cannot be held liable for *violent conduct* that he did not intentionally incite or commit. And it is *violent conduct* that is at issue here. Certainly, a libeler can be held liable for the *reputational harms* caused by his libelous speech, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974), because defamation statutes are proper, narrowly tailored restrictions on the First Amendment. But a libeler may not be held liable for the violent acts of others that the libeler did not intend to incite with his libelous speech. *See Brandenburg*, 395 U.S. at 447-48; *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (refusing to impose civil liability against Hustler for "inciting" accidental asphyxiation, observing that "[m]ere negligence ... cannot form the basis of liability under the incitement doctrine"); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 798 (2011) (holding that even if violent video games make people more aggressive, California could not prohibit their sale to children). And even if the libeler could be held so responsible, generic negligence statutes do not meet the first necessary condition of being narrowly tailored restrictions on free speech. *See infra*, note 56. Without

ware when the Court restates the same three-verb standard to explain why Evers could not be liable despite his intentionally tortious activity, including speech that advocated violence: "[A]ny such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence."[53] The takeaway seems clear: The First Amendment only allows civil liability for violent conduct that "occurs in the context of constitutionally protected activity" when that activity involves violence or threats of violence.[54]

The majority opinion avers (though, notably, the complaint does not) that Mckesson directed protestors to block a public highway.[55] But encouraging that unlawful activity cannot expose Mckesson to liability for *violence* because he didn't instruct anyone to commit *violence*.[56] The Supreme Court requires

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a doubt, Evers defamed certain targets of his speech, yet the Court still refused to hold him liable for violence. *See, e.g.*, *Claiborne Hardware*, 458 U.S. at 935-36 (describing specific local store owners as "racists" and "bigots" and implying they were murderers, rapists, and liars).

[53] *Id.* at 929.

[54] *Id.* at 916.

[55] *See supra* note 43.

[56] *Claiborne Hardware*, 458 U.S. at 916, 921, 927. The majority opinion summarily concludes that Louisiana's road-blocking statute is a proper time, place, manner restriction, Maj. Op. at 18. But absent briefing from the parties, I am uncomfortable reaching such a consequential constitutional conclusion. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 553-58 (1965) (invalidating a Baton Rouge ordinance that criminalized blocking public streets and only allowed parades or meetings with prior permission of an official who had unfettered discretion).

"extreme care" when attaching liability to protest-related activity.[57] The majority's "tortious conduct + foreseeable violence = liability for violence" formula—with no parsing between *violent* tortious conduct (actionable) and *nonviolent* tortious conduct (nonactionable)—is at odds with the "precision of regulation" required to overcome the First Amendment.[58] Indeed, if it were that easy to plead around *Claiborne Hardware* and hold protest leaders personally liable for the violence of an individual protestor, there would be cases galore holding as much. The majority opinion cites none.

The bar set by *Claiborne Hardware* is much higher than the majority opinion gives it credit for. For example, plaintiffs may only recover "losses proximately caused by unlawful conduct."[59] This requires naming "specific parties who agreed to use unlawful

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Also, to the extent that a tort duty can arise from the violation of statutes against obstructing highways, "recovery will be allowed only if a rule of law on which plaintiff relied included within its limits protections against the particular risk that plaintiff's interests encountered." *Lazard*, 859 So. 2d at 661. And Louisiana's prohibitions on highway-blocking "have as their focus the protection of other motorists." *State v. Winnon*, 681 So. 2d 463, 466 (La. App. 2 Cir. 1996). More attenuated harm is likely outside the scope of a defendant's duty under La. Rev. Stat. Ann. § 14:97. *See, e.g.*, *Thomas v. Ballard*, 577 So. 2d 149, 151 (La. App. 1 Cir. 1991). I could find no Louisiana case extending the scope of the negligence duty created by La. Rev. Stat. Ann. § 14:97 beyond the traffic-accident context. And I thus doubt that an intentional assault on a police officer is the "particular risk" addressed by the statute. *Lazard*, 859 So. 2d at 661.

[57] *Claiborne Hardware*, 458 U.S. at 927.

[58] *Id.* at 916, 921

[59] *Id.* at 918.

means" and "identifying the impact of such unlawful conduct."[60] Doe's complaint does not allege specific facts indicating an agreement or any kind of agency relationship between Mckesson and the unidentified protestor, or that Mckesson encouraged or incited violent acts. Officer Doe does not allege facts supporting that Mckesson had an affirmative duty to intervene, and under *Claiborne Hardware*, protest organizers cannot be held strictly liable for the violent actions of rogue individuals.[61]

To reconcile the majority opinion (negligently disregarding potential violence is *not* protected) with *Claiborne Hardware* (intentionally advocating violence *is* protected), we must accept that one who expressly and purposely calls for violence is somehow not behaving negligently to the risk that violence may result. But "[m]ere negligence ... cannot form the basis of liability under the incitement doctrine[.]"[62] To hold otherwise seems fanciful, as does allowing common-law tort principles to trump constitutional free-speech principles.[63] *Claiborne Hardware* held that Evers's leadership of an intentionally tortious and foreseeably violent boycott did not forfeit his First Amendment defense. Reading *Claiborne*

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[60] *Id.* at 933-34.

[61] *Id.* at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.")..

[62] *Hustler Magazine, Inc.*, 814 F.2d at 1024.

[63] *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, (1983) ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end …. ").

Hardware as authorizing liability for violence on the basis of urging *any* unlawful activity—no matter how attenuated from the violence that ultimately occurred—paints with startlingly broad strokes.

Holding Mckesson responsible for the violent acts of others because he "negligently" led a protest that carried the *risk* of *potential* violence or urged the blocking of a road is impossible to square with Supreme Court precedent holding that only tortious activity meant to incite imminent violence, and likely to do so, forfeits constitutional protection against liability for violent acts committed by others.[64] With greatest respect, I disagree with the majority opinion's First Amendment analysis—both its substance and its necessity.

III

In Hong Kong, millions of defiant pro-democracy protesters have taken to the streets, with demonstrations growing increasingly violent. In America, political uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning—indeed, from *before* the beginning. The Sons of Liberty were dumping tea into Boston Harbor almost two centuries before Dr. King's Selma-to-Montgomery march (which, of course, occupied public roadways, including the full width of the bloodied Edmund Pettus Bridge).

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Officer Doe put himself in harm's way to protect his community (including the violent protestor who injured him). And states have undeniable authority

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[64] *See, supra,* note 52.

to punish protest leaders and participants who *themselves* commit violence. The rock-hurler's personal liability is obvious, but I do not believe that Mckesson's is—for at least two reasons.

First, this is a negligence case, and I would not take it as a given that Mckesson owed an identifiable legal duty under Louisiana law. If no duty was owed, then no First Amendment analysis is necessary. Before weighing United States Supreme Court precedent on a fateful Federal question, I would invite the Louisiana Supreme Court to issue precedent on a fundamental State question. The tort analysis may well obviate the constitutional analysis.

Second, even assuming that Mckesson owed a duty, Doe's skeletal complaint does not plausibly assert that Mckesson forfeited First Amendment protection by inciting violence. Not one of the three elements of "incitement"—intent, imminence, likelihood—is competently pleaded here.[65] Nor does the complaint competently assert that Mckesson directed, intended, or authorized this attack. Our Constitution explicitly protects nonviolent political protest. And *Claiborne Hardware*, among "our most significant First Amendment" cases,[66] insulates nonviolent protestors from liability for others' conduct when engaging in political expression, even intentionally

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[65] *See Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech ... do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[66] *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000) (Scalia, J., dissenting from denial of petition for a writ of certiorari).

tortious conduct, not intended to incite immediate violence. The Constitution does not insulate violence, but it does insulate citizens from responsibility for *others'* violence.

"Negligent protest" liability against a protest leader for the violent act of a rogue assailant is a dodge of *Claiborne Hardware* and clashes head-on with constitutional fundamentals. Such an exotic theory would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms.[67]

Dr. King's last protest march was in March 1968, in support of striking Memphis sanitation workers. It was prelude to his assassination a week later, the day after his "I've Been to the Mountaintop" speech. Dr. King's hallmark was nonviolent protest, but as he led marchers down Beale Street, some young men began breaking storefront windows. The police moved in, and violence erupted, harming peaceful demonstrators and youthful looters alike. Had Dr. King been sued, either by injured police or injured protestors, I cannot fathom that the Constitution he praised as "magnificent"—"a promissory note to which every American was to fall heir"[68]—would countenance his personal liability.

Summing up: I would certify the threshold negligence question to the Supreme Court of Louisiana.

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[67] The march from Selma to Montgomery—54 miles, 54 years ago—was no sidewalk stroll.

[68] Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in I Have A Dream: Writings And Speeches That Changed The World 101* (James M. Washington ed., 1992).

Failing that, and given the flimsiness of Doe's complaint, I would hold that the First Amendment shields Mckesson from tort liability for the rock thrower's criminal act. In all other respects, I concur.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICER JOHN DOE, *Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana

No. 17-30864

ON PETITION FOR PANEL REHEARING

August 8, 2019

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The petition for panel rehearing is hereby GRANTED. We WITHDRAW the court's prior opin-

ion of April 24, 2019, and substitute the following opinion.

During a public protest against police misconduct in Baton Rouge, Louisiana, an unidentified individual hit Officer John Doe with a heavy object, causing him serious physical injuries. Following this incident, Officer Doe brought suit against "Black Lives Matter," the group associated with the protest, and DeRay Mckesson, one of the leaders of Black Lives Matter and the organizer of the protest. Officer Doe later sought to amend his complaint to add Black Lives Matter Network, Inc. and # BlackLivesMatter as defendants. The district court dismissed Officer Doe's claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6), and denied his motion to amend his complaint as futile. Because we conclude that the district court erred in dismissing the case against Mckesson on the basis of the pleadings, we REMAND for further proceedings relative to Mckesson. We further hold that the district court properly dismissed the claims against Black Lives Matter.[1] We thus REVERSE in part, AFFIRM in part, and REMAND for further proceedings not inconsistent with this opinion.

I.

On July 9, 2016, a protest took place by blocking a public highway in front of the Baton Rouge Police Department headquarters.[2] This demonstration was one in a string of protests across the country, often

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[1] We do not address any of the allegations raised by the Proposed Amended Complaint. *See* note 5, *infra*.

[2] This case comes to us on a motion to dismiss, so we treat all well-pleaded facts as true.

associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear. These officers were ordered to stand in front of other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay Mckesson, associated with Black Lives Matter, was the prime leader and an organizer of the protest.

In the presence of Mckesson, some protesters began throwing objects at the police officers. Specifically, protestors began to throw full water bottles, which had been stolen from a nearby convenience store. The dismissed complaint further alleges that Mckesson did nothing to prevent the violence or to calm the crowd, and, indeed, alleges that Mckesson "incited the violence on behalf of [Black Lives Matter]." The complaint specifically alleges that Mckesson led the protestors to block the public highway. The police officers began making arrests of those blocking the highway and participating in the violence.

At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests. The object struck Officer Doe's face. Officer Doe was knocked to the ground and incapacitated. Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, "and other compensable losses."

Following the Baton Rouge protest, Officer Doe brought suit, naming Mckesson and Black Lives Matter as defendants. According to his complaint, the defendants are liable on theories of negligence,

respondeat superior, and civil conspiracy. Mckesson subsequently filed two motions: (1) a Rule 12(b)(6) motion, asserting that Officer Doe failed to state a plausible claim for relief against Mckesson and (2) a Rule 9(a)(2) motion, asserting that Black Lives Matter is not an entity with the capacity to be sued.

Officer Doe responded by filing a motion to amend. He sought leave to amend his complaint to add factual allegations to his complaint and Black Lives Matter Network, Inc. and # BlackLivesMatter as defendants.

II.

The district court granted both of Mckesson's motions, treating the Rule 9(a)(2) motion as a Rule 12(b)(6) motion, and denied Officer Doe's motion for leave to amend, concluding that his proposed amendment would be futile. With respect to Officer Doe's claims against # BlackLivesMatter, the district court took judicial notice that it is a "hashtag" and therefore an "expression" that lacks the capacity to be sued. With respect to Officer Doe's claims against Black Lives Matter Network, Inc. the district court held that Officer Doe's allegations were insufficient to state a plausible claim for relief against this entity. Emphasizing the fact that Officer Doe attempted to add a social movement and a "hashtag" as defendants, the district court dismissed his case with prejudice. Officer Doe timely appealed.

III.

When considering a motion to dismiss under Rule 12(b)(6), we will not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Al-*

exander v. Verizon Wireless Servs., L.L.C., 875 F.3d 243, 249 (5th Cir. 2017). "We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* (citing *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017)). To survive, a complaint must consist of more than "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotation marks and brackets omitted)). Instead, "the plaintiff must plead enough facts to nudge the claims across the line from conceivable to plausible." *Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) (internal quotation marks, brackets, and ellipses omitted) (quoting *Iqbal*, 556 U.S. at 680).[3]

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[3] Federal Rule of Civil Procedure Rule 9(a)(2) states that, if a party wishes to raise an issue regarding lack of capacity to be sued, "a party must do so by a specific denial." Rule 12(b) does not specifically authorize a motion to dismiss based on a lack of capacity. Nonetheless, we have permitted Rule 12(b) motions arguing lack of capacity. *See, e.g.*, *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1992). Where the issue appears on the face of the complaint, other courts have done the same and treated it as a Rule 12(b)(6) motion. *See, e.g.*, *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) ("Although the defense of lack of capacity is not expressly mentioned in [R]ule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint."); *Coates v. Brazoria Cty. Tex.*, 894 F.Supp.2d 966, 968 (S.D. Tex. 2012) ("Whether a party has the capacity to sue or be sued is a legal question that may be decided at the Rule 12 stage."); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1294 (3d ed. 2018) ("An effective denial of capacity … creates an issue of fact. Such a denial may be made in the responsive pleading or, if the lack of capacity … appears on the face of the pleadings or is discernible there

A district court's denial of a motion to amend is generally reviewed for abuse of discretion. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). However, where the district court's denial of leave to amend was based solely on futility, we instead apply a de novo standard of review identical in practice to the Rule 12(b)(6) standard. *Id.* When a party seeks leave from the court to amend and justice requires it, the district court should freely give it. Fed. R. Civ. P. 15(a)(2).

IV.

A.

We begin by addressing Officer Doe's claims against DeRay Mckesson. The district court did not reach the merits of Officer Doe's underlying state tort claims, but instead found that Officer Doe failed to plead facts that took Mckesson's conduct outside of the bounds of First Amendment protected speech and association. Because we ultimately find that Mckesson's conduct at this pleading stage was not necessarily protected by the First Amendment, we will begin by addressing the plausibility of Officer Doe's state tort claims. We will address each of Officer Doe's specific theories of liability in turn—vicarious liability, negligence, and civil conspiracy, beginning with vicarious liability.

1.

Louisiana Civil Code article 2320 provides that

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from, the issue can be raised by a motion to dismiss for failure to state a claim for relief." (footnotes omitted)). Thus, we review the district court's dismissal for lack of capacity de novo and apply the Rule 12(b)(6) standard.

"[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions which they are employed." A "servant," as used in the Civil Code, "includes anyone who performs continuous service for another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 476 (La. 1990). Officer Doe's vicarious liability theory fails at the point of our beginning because he does not allege facts that support an inference that the unknown assailant "perform[ed] a continuous service" for or that the assailant's "physical movements [were] subject to the control or right to control" of Mckesson. Therefore, under the pleadings, Mckesson cannot be held liable under a vicarious liability theory.

2.

We now move on to address Officer Doe's civil conspiracy theory. Civil conspiracy is not itself an actionable tort. *Ross v. Conoco, Inc.*, 828 So. 2d 546, 552 (La. 2002). Instead, it assigns liability arising from the existence of an underlying unlawful act. *Id.* In order to impose liability for civil conspiracy in Louisiana, a plaintiff must prove that (1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result. *Crutcher-Tufts Res., Inc. v. Tufts*, 992 So. 2d 1091, 1094 (La. Ct. App. 2008); *see also* La. Civ. Code art. 2324. "Evidence of … a conspiracy can be actual knowledge, overt actions with another, such as arming oneself in anticipation of apprehen-

sion, or inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator." *Stephens v. Bail Enf't*, 690 So. 2d 124, 131 (La. Ct. App. 1997).

Officer Doe's complaint is vague about the underlying conspiracy to which Mckesson agreed, or with whom such an agreement was made. In his complaint, Officer Doe refers to a conspiracy "to incite a riot/protest." Disregarding Officer Doe's conclusory allegations, we find that Officer Doe has not alleged facts that would support a plausible claim that Mckesson can be held liable for his injuries on a theory of civil conspiracy. Although Officer Doe has alleged facts that support an inference that Mckesson agreed with unnamed others to demonstrate illegally on a public highway, he has not pled facts that would allow a jury to conclude that Mckesson colluded with the unknown assailant to attack Officer Doe or knew of the attack and specifically ratified it. The closest that Officer Doe comes to such an allegation is when he states that Mckesson was "giving orders" throughout the demonstration. But we cannot infer from this quite unspecific allegation that Mckesson ordered the unknown assailant to attack Officer Doe. Lacking an allegation of this pleading quality, Officer Doe's conspiracy claim must and does fail.

3.

Finally, we turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree as follows.

Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached. *Lazard v. Foti*, 859 So. 2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. *See Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999); *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.'" (quoting *Dupre v. Chevron U.S.A., Inc.*, 20 F.3d 154, 157 (5th Cir. 1994))). There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another." *Boykin v. La. Transit Co.*, 707 So. 2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of "various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its

institutions are evolving." *Posecai*, 752 So. 2d at 766.

We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint specifically alleges that it was Mckesson himself who intentionally led the demonstrators to block the highway. Blocking a public highway is a criminal act under Louisiana law. *See* La. Rev. Stat. Ann. § 14:97. As such, it was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was most nearly certain to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway. By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration.

Officer Doe has also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of Officer Doe's injury and that the injury was within the scope of the duty breached by Mckesson. It may have been an unknown demonstrator who threw the hard object at Officer Doe, but by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Officer Doe's

injuries. *See Roberts v. Benoit*, 605 So. 2d 1032, 1052 (La. 1992) ("To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred."). Furthermore, as the purpose of imposing a duty on Mckesson in this situation is to prevent foreseeable violence to the police and bystanders, Officer Doe's injury, as alleged in the pleadings, was within the scope of the duty of care allegedly breached by Mckesson.

We iterate what we have previously noted: Our ruling at this point is not to say that a finding of liability will ultimately be appropriate. At the motion to dismiss stage, however, we are simply required to decide whether Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery. We find that it is.

B.

Having concluded that Officer Doe has stated a plausible claim for relief against Mckesson under state tort law, we will now take a step back and address the district court's determination that Officer Doe's complaint should be dismissed based on the First Amendment. The Supreme Court has made clear that "[t]he First Amendment does not protect violence." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Nonetheless, the district court dismissed the complaint on First Amendment grounds, reasoning that "[i]n order to state a claim against Mckesson to hold him liable for the tortious act of another with whom he was associating during the demonstration, Plaintiff would have to allege

facts that tend to demonstrate that Mckesson 'authorized, directed, or ratified specific tortious activity.'" *See id.* at 927. The district court then went on to find that there were no plausible allegations that Mckesson had done so in his complaint.

The district court appears to have assumed that in order to state a claim that Mckesson was liable for his injuries, Officer Doe was required to allege facts that created an inference that Mckesson directed, authorized, or ratified the unknown assailant's specific conduct in attacking Officer Doe. This assumption, however, does not fit the situation we address today. Even if we assume that Officer Doe seeks to hold Mckesson "liable for the unlawful conduct of others" within the meaning of *Claiborne Hardware*, the First Amendment would not require dismissal of Officer Doe's complaint. *Id.* In order 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. *See id.* ("[A] finding that [the defendant] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."). Our discussion above makes clear that Officer Doe's complaint does allege that Mckesson directed the demonstrators to engage in the criminal act of occupying the public highway, which quite consequentially provoked a confrontation between the Baton Rouge police and the protesters, and that Officer Doe's injuries were the foreseeable result of the tortious and illegal conduct of blocking a busy highway.

We focus here on the fact that Mckesson "directed … specific tortious activity" because we hold that Officer Doe has adequately alleged that his injuries were the result of Mckesson's *own* tortious conduct in organizing a foreseeably violent protest. In Mckesson's petition for rehearing, he expresses concern that the panel opinion permits Officer Doe to hold him liable for the tortious conduct of *others* even though Officer Doe merely alleged that he was negligent, and not that he specifically intended that violence would result. We think that Mckesson's criticisms are misplaced. We perceive no Constitutional issue with Mckesson being held liable for injuries caused by a combination of his own negligent conduct and the violent actions of a another that were foreseeable as a result of that negligent conduct. The permissibility of such liability is a standard aspect of state law. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 19 (2010) ("The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."). There is no indication in *Claiborne Hardware* or subsequent decisions that the Supreme Court intended to restructure state tort law by eliminating this principle of negligence liability.

We of course acknowledge that Mckesson's negligent conduct took place in the context of a political protest. It is certainly true that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Claiborne Hardware*, 468 U.S. at 916–17. But *Claiborne Hardware* does

not insulate the petitioner from liability *for his own negligent conduct* simply because he, and those he associated with, also intended to communicate a message. *See id.* at 916 ("[T]he use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.") (internal quotation marks and citations omitted). Furthermore, although we do not understand the petitioner to be arguing that the Baton Rouge police violated the demonstrators' First Amendment rights by attempting to remove them from the highway, we note that the criminal conduct allegedly ordered by Mckesson was not itself protected by the First Amendment, as Mckesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (reasonable time, place, and manner restrictions do not violate the First Amendment). As such, no First Amendment protected activity is suppressed by allowing the consequences of Mckesson's conduct to be addressed by state tort law.

Thus, on the pleadings, which must be read in a light most favorable to Officer Doe, the First Amendment is not a bar to Officer Doe's negligence theory. The district court erred by dismissing Officer Doe's complaint—at the pleading stage—as barred by the First Amendment.[4]

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[4] We emphasize, however, that our opinion does not suggest that the First Amendment allows a person to be punished, or held civilly liable, simply because of his associations with others, unless it is established that the group that the person associated with "itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."

C.

Now we turn our attention to whether Officer Doe has stated a claim against Black Lives Matter. The district court took judicial notice that "'Black Lives Matter,' as that term is used in the Complaint, is a *social movement* that was catalyzed on social media by the persons listed in the Complaint in response to the perceived mistreatment of African-American citizens by law enforcement officers." Based on this conclusion, the district court held that Black Lives Matter is not a "juridical person" capable of being sued. *See Ermert*, 559 So. 2d at 474. We first address the district court's taking of judicial notice, then Black Lives Matter's alleged capacity to be sued.

Federal Rule of Evidence 201 provides that a court may take judicial notice of an "adjudicative fact" if the fact is "not subject to reasonable dispute" in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Fed. R. Evid. 201(b). "Rule 201 authorizes the court to take notice only of 'adjudicative *facts*,' not legal determinations." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998). In *Taylor*, we held that another

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Claiborne Hardware, 458 U.S. at 920. But we also observe that, in any event, Officer Doe's allegations are sufficient to state a claim that Black Lives Matter "possessed unlawful goals" and that Mckesson "held a specific intent to further those illegal aims." *See id.* Officer Doe alleges that Black Lives Matter "*plann[ed]* to block a public highway," and, in his amended complaint, that Mckesson and Black Lives Matter traveled to Baton Rouge "for the *purpose* of … rioting." (emphasis added).

court's state actor determination was not an "adjudicative fact" within the meaning of Rule 201 because "[w]hether a private party is a state actor for the purposes of § 1983 is a mixed question of fact and law and is thus subject to our *de novo* review." *Id.* at 830–31. We further held that the state-actor determination was not beyond reasonable dispute where it "was, in fact, disputed by the parties" in the related case. *Id.* at 830.

We think that the district court was incorrect to take judicial notice of a mixed question of fact and law when it concluded that Black Lives Matter is a "*social movement*, rather than an organization or entity of any sort." The legal status of Black Lives Matter is not immune from reasonable dispute; and, indeed, it is disputed by the parties—Doe claiming that Black Lives Matter is a national unincorporated association, and Mckesson claiming that it is a movement or at best a community of interest. This difference is sufficient under our case law to preclude judicial notice.

We should further say that we see the cases relied on by the district court as distinguishable. Each deals with judicial notice of an aspect of an entity, not its legal form. *See United States v. Parise*, 159 F.3d 790, 801 (3d Cir. 1998) (holding that the court could take judicial notice of the *aims* and *goals* of a movement); *Atty. Gen. of U.S. v. Irish N. Aid. Comm.*, 530 F. Supp. 241, 259–60 (S.D.N.Y. 1981) (stating the court could take "notice that the IRA is a 'Republican movement,' *at least insofar as it advocates a united Ireland*" (emphasis added)); *see also Baggett v. Bullitt*, 377 U.S. 360, 376 n.13 (1964) (noting that "[t]he lower court took judicial notice of the fact that

the Communist Party of the United States . . . was *a part of* the world Communist movement" (emphasis added)).

Now, we move on to discuss the merits of Officer Doe's contention that Black Lives Matter is a suable entity. He alleges that Black Lives Matter "is a national incorporated association with chapter [sic] in many states." Under Federal Rule of Civil Procedure 17(b), the capacity of an entity "to sue or be sued is determined . . . by the law of the state where the court is located." Under Article 738 of the Louisiana Code of Civil Procedure, "an unincorporated association has the procedural capacity to be sued in its own name." The Louisiana Supreme Court has held that "an unincorporated association is created in the same manner as a partnership, by a contract between two or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit." *Ermert*, 559 So. 2d at 473. "Interpretation of a contract is the determination of the common intent of the parties." La. Civ. Code Ann. art. 2045. To show intent, "the object of the contract of association must necessarily be the creation of an entity whose personality 'is distinct from that of its members.'" *Ermert*, 559 So. 2d at 474 (quoting La. Civ. Code Ann. art. 24). Louisiana law does not provide for a public display of the parties' intent. *Id.*

Louisiana courts have looked to various factors as indicative of an intent to create an unincorporated association, including requiring dues, having insurance, ownership of property, governing agreements, or the presence of a formal membership structure. *See Bogue Lusa Waterworks Dist. v. La. Dep't of Envtl. Quality*, 897 So. 2d 726, 728-729 (La. Ct. App.

2004) (relying on organization's unfiled articles of incorporation); *Friendship Hunting Club v. Lejeune*, 999 So. 2d 216, 223 (La. Ct. App. 2008) (relying on organization's required dues and possession of an insurance policy); *see also Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F.Supp.2d 663, 675 (E.D. La. 2010) (relying on organization's formal and determinate membership structure). Lacking at least some of these indicators, Louisiana courts have been unwilling to find an intent to create an unincorporated association. *See, e.g.*, *Ermert*, 559 So. 2d at 474–475 (finding that hunting group was not an unincorporated association because it did not own or lease the property that it was based on, required the permission of one of its alleged members to use the property, and lacked formal rules or bylaws).

Officer Doe has not shown in his complaint a plausible inference that Black Lives Matter is an unincorporated association. His only allegations are that Black Lives Matter: (1) was created by three women; (2) has several leaders, including Mckesson; (3) has chapters in many states; and (4) was involved in numerous protests in response to police practices. He does not allege that it possesses property, has a formal membership, requires dues, or possesses a governing agreement. As such, the complaint lacks any indication that Black Lives Matter possesses the traits that Louisiana courts have regarded as indicative of an intent to establish a juridical entity. We have no doubt that Black Lives Matter involves a number of people working in concert, but "an unincorporated association . . . . does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a

number of individuals have simply acted together." *Id*. at 474. Therefore, we find that the district court did not err in concluding that Officer Doe's complaint has failed plausibly to allege that Black Lives Matter is an entity capable of being sued.[5]

V.

In sum, we hold that Officer Doe has not adequately alleged that Mckesson was vicariously liable for the conduct of the unknown assailant or that Mckesson entered into a civil conspiracy with the purpose of injuring Officer Doe. We do find, however, that Officer Doe adequately alleged that Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway. We further find that in this context the district court erred in dismissing the suit on First Amendment grounds. As such, Officer Doe has pleaded a claim for relief against DeRay Mckesson in his active complaint.[6] We also hold that the district court erred by taking judicial notice of the legal status of "Black Lives Matter," but nonetheless find that Officer Doe did not plead facts that would allow us to conclude that Black Lives Matter is an entity capable

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[5] We do not address as to whether Officer Doe could state a claim against an entity whose capacity to be sued was plausibly alleged, nor do we address whether Mckesson could be held liable for the actions of that entity under state law.

[6] Officer Doe has complained of the lack of discovery in this case, particularly related to his claims against the corporate defendants. Officer Doe is free to argue before the district court that he is entitled to discovery. The district court may then decide whether, in the light of our remand, discovery would be appropriate.

of being sued.[7] Therefore, the judgment of the district court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings not inconsistent with this opinion.[8]

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[7] Because we find that Officer Doe has successfully pled a claim, we do not reach the district court's denial of Officer Doe's motion for leave to amend. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 268 n.36 (5th Cir. 2009) (citing *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 358 n.70 (5th Cir. 1989)). It follows that we do not address any of the allegations in the Proposed Amended Complaint or the parties it seeks to add. On remand, Officer Doe may seek leave to amend his complaint to add new parties and plead additional facts to support his negligence claim. The district court should determine whether to grant this motion, and any new motions for leave to amend, in the light of our opinion.

[8] On appeal, Officer Doe also argues that the district court erred in denying his request to proceed anonymously as John Doe. He argues that the public nature of his job puts him and his family in danger of additional violence. At the district court, he listed a number of examples of acts of violence against police officers by individuals who may have some connection with Black Lives Matter. In its order, the district court walked through three factors common to anonymous-party suits that we have said "deserve considerable weight." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). These are: (1) whether the plaintiff is "challeng[ing] governmental activity"; (2) whether the plaintiff will be required to disclose information "of the utmost intimacy"; and (3) whether the plaintiff will be "compelled to admit [his] intention to engage in illegal conduct, thereby risking criminal prosecution." *Id.* at 185. The district court concluded that none of these factors applied to the facts of this case. In response to Officer Doe's argument regarding potential future violence, the district court noted that the incidents Officer Doe listed did not involve Officer Doe and were not related to this lawsuit. In fact, at oral argument before the district court regarding his motion, Officer Doe conceded that he had received no particularized threats of violence since filing his lawsuit. The district court instead saw the incidents Officer Doe listed as evidence of "the

AFFIRMED in part, REVERSED in part, and REMANDED.

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generalized threat of violence that all police officers face." As a result, the district found that Doe had not demonstrated a privacy interest that outweighs the "customary and constitutionally embedded presumption of openness in judicial proceedings." *Id*. at 186. We agree with the district court and affirm the denial of Doe's motion to proceed anonymously. In so holding, we emphasize what the Supreme Court said decades ago: "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICER JOHN DOE, *Police Officer*,

PLAINTIFF—APPELLANT,

v.

DERAY MCKESSON; BLACK LIVES MATTER; BLACK LIVES MATTER NETWORK, INCORPORATED,

DEFENDANTS—APPELLEES.

Appeal from the United States District Court
for the Middle District of Louisiana

No. 17-30864

ON PETITION FOR PANEL REHEARING

April 24, 2019

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

During a public protest against police misconduct in Baton Rouge, Louisiana, an unidentified individu-

al hit Officer John Doe with a heavy object, causing him serious physical injuries. Following this incident, Officer Doe brought suit against "Black Lives Matter," the group associated with the protest, and DeRay Mckesson, one of the leaders of Black Lives Matter and the organizer of the protest. Officer Doe later sought to amend his complaint to add Black Lives Matter Network, Inc. and # BlackLivesMatter as defendants. The district court dismissed Officer Doe's claims on the pleadings under Federal Rule of Civil Procedure 12(b)(6), and denied his motion to amend his complaint as futile. Because we conclude that the district court erred in dismissing the case against Mckesson on the basis of the pleadings, we REMAND for further proceedings relative to Mckesson. We further hold that the district court properly dismissed the claims against Black Lives Matter.[1] We thus REVERSE in part, AFFIRM in part, and REMAND for further proceedings not inconsistent with this opinion.

I.

On July 9, 2016, a protest took place by blocking a public highway in front of the Baton Rouge Police Department headquarters.[2] This demonstration was one in a string of protests across the country, often associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear. These officers were ordered to stand in front of

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[1] We do not address any of the allegations raised by the Proposed Amended Complaint. *See* note 5, *infra*.

[2] This case comes to us on a motion to dismiss, so we treat all well-pleaded facts as true.

other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay Mckesson, associated with Black Lives Matter, was the prime leader and an organizer of the protest.

In the presence of Mckesson, some protesters began throwing objects at the police officers. Specifically, protestors began to throw full water bottles, which had been stolen from a nearby convenience store. The dismissed complaint further alleges that Mckesson did nothing to prevent the violence or to calm the crowd, and, indeed, alleges that Mckesson "incited the violence on behalf of [Black Lives Matter]." The complaint specifically alleges that Mckesson led the protestors to block the public highway. The police officers began making arrests of those blocking the highway and participating in the violence.

At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests. The object struck Officer Doe's face. Officer Doe was knocked to the ground and incapacitated. Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, "and other compensable losses."

Following the Baton Rouge protest, Officer Doe brought suit, naming Mckesson and Black Lives Matter as defendants. According to his complaint, the defendants are liable on theories of negligence, respondeat superior, and civil conspiracy. Mckesson subsequently filed two motions: (1) a Rule 12(b)(6) motion, asserting that Officer Doe failed to state a plausible claim for relief against Mckesson and (2) a

Rule 9(a)(2) motion, asserting that Black Lives Matter is not an entity with the capacity to be sued.

Officer Doe responded by filing a motion to amend. He sought leave to amend his complaint to add factual allegations to his complaint and Black Lives Matter Network, Inc. and # BlackLivesMatter as defendants.

II.

The district court granted both of Mckesson's motions, treating the Rule 9(a)(2) motion as a Rule 12(b)(6) motion, and denied Officer Doe's motion for leave to amend, concluding that his proposed amendment would be futile. With respect to Officer Doe's claims against # BlackLivesMatter, the district court took judicial notice that it is a "hashtag" and therefore an "expression" that lacks the capacity to be sued. With respect to Officer Doe's claims against Black Lives Matter Network, Inc. the district court held that Officer Doe's allegations were insufficient to state a plausible claim for relief against this entity. Emphasizing the fact that Officer Doe attempted to add a social movement and a "hashtag" as defendants, the district court dismissed his case with prejudice. Officer Doe timely appealed.

III.

When considering a motion to dismiss under Rule 12(b)(6), we will not affirm dismissal of a claim unless the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). "We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* (citing *Kelly v. Ni-*

chamoff, 868 F.3d 371, 374 (5th Cir. 2017)). To survive, a complaint must consist of more than "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (internal quotation marks and brackets omitted)). Instead, "the plaintiff must plead enough facts to nudge the claims across the line from conceivable to plausible." *Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) (internal quotation marks, brackets, and ellipses omitted) (quoting *Iqbal*, 556 U.S. at 680).[3]

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[3] Federal Rule of Civil Procedure Rule 9(a)(2) states that, if a party wishes to raise an issue regarding lack of capacity to be sued, "a party must do so by a specific denial." Rule 12(b) does not specifically authorize a motion to dismiss based on a lack of capacity. Nonetheless, we have permitted Rule 12(b) motions arguing lack of capacity. *See, e.g.*, *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1992). Where the issue appears on the face of the complaint, other courts have done the same and treated it as a Rule 12(b)(6) motion. *See, e.g.*, *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) ("Although the defense of lack of capacity is not expressly mentioned in [R]ule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint."); *Coates v. Brazoria Cty. Tex.*, 894 F.Supp.2d 966, 968 (S.D. Tex. 2012) ("Whether a party has the capacity to sue or be sued is a legal question that may be decided at the Rule 12 stage."); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1294 (3d ed. 2018) ("An effective denial of capacity … creates an issue of fact. Such a denial may be made in the responsive pleading or, if the lack of capacity . . . appears on the face of the pleadings or is discernible there from, the issue can be raised by a motion to dismiss for failure to state a claim for relief." (footnotes omitted)). Thus, we review the district court's dismissal for lack of capacity de novo and apply the Rule 12(b)(6) standard.

A district court's denial of a motion to amend is generally reviewed for abuse of discretion. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). However, where the district court's denial of leave to amend was based solely on futility, we instead apply a de novo standard of review identical in practice to the Rule 12(b)(6) standard. *Id*. When a party seeks leave from the court to amend and justice requires it, the district court should freely give it. Fed. R. Civ. P. 15(a)(2).

IV.

A.

We begin by addressing Officer Doe's claims against DeRay Mckesson. The district court did not reach the merits of Officer Doe's underlying state tort claims, but instead found that Officer Doe failed to plead facts that took Mckesson's conduct outside of the bounds of First Amendment protected speech and association. Because we ultimately find that Mckesson's conduct at this pleading stage was not necessarily protected by the First Amendment, we will begin by addressing the plausibility of Officer Doe's state tort claims. We will address each of Officer Doe's specific theories of liability in turn—vicarious liability, negligence, and civil conspiracy, beginning with vicarious liability.

1.

Louisiana Civil Code article 2320 provides that "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions which they are employed." A "servant," as used in the Civil Code, "includes anyone who performs continuous service for

another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." *Ermert v. Hartford Ins. Co.*, 559 So. 2d 467, 476 (La. 1990). Officer Doe's vicarious liability theory fails at the point of our beginning because he does not allege facts that support an inference that the unknown assailant "perform[ed] a continuous service" for or that the assailant's "physical movements [were] subject to the control or right to control" of Mckesson. Therefore, under the pleadings, Mckesson cannot be held liable under a vicarious liability theory.

2.

We now move on to address Officer Doe's civil conspiracy theory. Civil conspiracy is not itself an actionable tort. *Ross v. Conoco, Inc.*, 828 So. 2d 546, 552 (La. 2002). Instead, it assigns liability arising from the existence of an underlying unlawful act. *Id.* In order to impose liability for civil conspiracy in Louisiana, a plaintiff must prove that (1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result. *Crutcher-Tufts Res., Inc. v. Tufts*, 992 So. 2d 1091, 1094 (La. Ct. App. 2008); *see also* La. Civ. Code art. 2324. "Evidence of . . . a conspiracy can be actual knowledge, overt actions with another, such as arming oneself in anticipation of apprehension, or inferred from the knowledge of the alleged co-conspirator of the impropriety of the actions taken by the other co-conspirator." *Stephens v. Bail Enf't*, 690 So. 2d 124, 131 (La. Ct. App. 1997).

Officer Doe's complaint is vague about the underlying conspiracy to which Mckesson agreed, or with whom such an agreement was made. In his complaint, Officer Doe refers to a conspiracy "to incite a riot/protest." Disregarding Officer Doe's conclusory allegations, we find that Officer Doe has not alleged facts that would support a plausible claim that Mckesson can be held liable for his injuries on a theory of civil conspiracy. Although Officer Doe has alleged facts that support an inference that Mckesson agreed with unnamed others to demonstrate illegally on a public highway, he has not pled facts that would allow a jury to conclude that Mckesson colluded with the unknown assailant to attack Officer Doe, knew of the attack and ratified it, or agreed with other named persons that attacking the police was one of the goals of the demonstration. The closest that Officer Doe comes to such an allegation is when he states that Mckesson was "giving orders" throughout the demonstration. But we cannot infer from this quite unspecific allegation that Mckesson ordered the unknown assailant to attack Officer Doe. Lacking an allegation of this pleading quality, Officer Doe's conspiracy claim must and does fail.

3.

Finally, we turn to Officer Doe's negligence theory. Officer Doe alleges that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. We agree as follows.

Louisiana Civil Code article 2315 provides that "[e]very act whatever of man that causes damage to

another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory. This theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached. *Lazard v. Foti*, 859 So. 2d 656, 659 (La. 2003). Whether a defendant owes a plaintiff a duty is a question of law. *See Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999); *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004) ("Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.'" (quoting *Dupre v. Chevron U.S.A., Inc.*, 20 F.3d 154, 157 (5th Cir. 1994))). There is a "universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another." *Boykin v. La. Transit Co.*, 707 So. 2d 1225, 1231 (La. 1998). Louisiana courts elucidate specific duties of care based on consideration of "various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving." *Posecai*, 752 So. 2d at 766.

We first note that this case comes before us from a dismissal on the pleadings alone. In this context, we find that Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration. The complaint specifically alleges that it was Mckesson himself who intentionally led the demonstrators to block the highway. Blocking a public highway is a criminal act under Louisiana law. *See* La. Rev. Stat. Ann. § 14:97. As such, it was patently foreseeable that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and, when necessary, making arrests. Given the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was most nearly certain to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway. By ignoring the foreseeable risk of violence that his actions created, Mckesson failed to exercise reasonable care in conducting his demonstration.

Officer Doe has also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of Officer Doe's injury and that the injury was within the scope of the duty breached by Mckesson. It may have been an unknown demonstrator who threw the hard object at Officer Doe, but by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Officer Doe's injuries. *See Roberts v. Benoit*, 605 So. 2d 1032, 1052

(La. 1992) ("To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident, that is, but for the defendant's conduct, the incident probably would not have occurred."). Furthermore, as the purpose of imposing a duty on Mckesson in this situation is to prevent foreseeable violence to the police and bystanders, Officer Doe's injury, as alleged in the pleadings, was within the scope of the duty of care allegedly breached by Mckesson.

We iterate what we have previously noted: Our ruling at this point is not to say that a finding of liability will ultimately be appropriate. At the motion to dismiss stage, however, we are simply required to decide whether Officer Doe's claim for relief is sufficiently plausible to allow him to proceed to discovery. We find that it is.

B.

Having concluded that Officer Doe has stated a plausible claim for relief against Mckesson under state tort law, we will now take a step back and address the district court's determination that Officer Doe's complaint should be dismissed based on the First Amendment. The Supreme Court has made clear that "[t]he First Amendment does not protect violence." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Nonetheless, the district court dismissed the complaint on First Amendment grounds, reasoning that "[i]n order to state a claim against Mckesson to hold him liable for the tortious act of another with whom he was associating during the demonstration, Plaintiff would have to allege facts that tend to demonstrate that Mckesson 'au-

thorized, directed, or ratified specific tortious activity.'" *See id.* at 927. The district court then went on to find that there were no plausible allegations that Mckesson had done so in his complaint.

We respectfully disagree. The district court appears to have assumed that in order to state a claim that Mckesson was liable for his injuries, Officer Doe was required to allege facts that created an inference that Mckesson directed, authorized, or ratified the unknown assailant's specific conduct in attacking Officer Doe. This assumption, however, does not fit the situation we address today. Assuming that the First Amendment is applicable to Mckesson's conduct, in order to counter its applicability 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. *See id.* ("[A] finding that [the defendant] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."). Our discussion above makes clear that Officer Doe's complaint does allege that Mckesson directed the demonstrators to engage in the criminal act of occupying the public highway, which quite consequentially provoked a confrontation between the Baton Rouge police and the protesters, and that Officer Doe's injuries were the foreseeable result of the tortious and illegal conduct of blocking a busy highway. Thus, on the pleadings, which must be read in a light most favorable to Officer Doe, the First Amendment is not a bar to Officer Doe's negligence theory. The district court erred by dismissing Officer Doe's complaint—at the pleading stage—as

barred by the First Amendment.

C.

Now we turn our attention to whether Officer Doe has stated a claim against Black Lives Matter. The district court took judicial notice that "'Black Lives Matter,' as that term is used in the Complaint, is a *social movement* that was catalyzed on social media by the persons listed in the Complaint in response to the perceived mistreatment of African-American citizens by law enforcement officers." Based on this conclusion, the district court held that Black Lives Matter is not a "juridical person" capable of being sued. *See Ermert*, 559 So. 2d at 474. We first address the district court's taking of judicial notice, then Black Lives Matter's alleged capacity to be sued.

Federal Rule of Evidence 201 provides that a court may take judicial notice of an "adjudicative fact" if the fact is "not subject to reasonable dispute" in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. Fed. R. Evid. 201(b). "Rule 201 authorizes the court to take notice only of 'adjudicative *facts*,' not legal determinations." *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998). In *Taylor*, we held that another court's state actor determination was not an "adjudicative fact" within the meaning of Rule 201 because "[w]hether a private party is a state actor for the purposes of § 1983 is a mixed question of fact and law and is thus subject to our *de novo* review." *Id.* at 830–31. We further held that the state-actor deter-

mination was not beyond reasonable dispute where it "was, in fact, disputed by the parties" in the related case. *Id.* at 830.

We think that the district court was incorrect to take judicial notice of a mixed question of fact and law when it concluded that Black Lives Matter is a "*social movement*, rather than an organization or entity of any sort." The legal status of Black Lives Matter is not immune from reasonable dispute; and, indeed, it is disputed by the parties—Doe claiming that Black Lives Matter is a national unincorporated association, and Mckesson claiming that it is a movement or at best a community of interest. This difference is sufficient under our case law to preclude judicial notice.

We should further say that we see the cases relied on by the district court as distinguishable. Each deals with judicial notice of an aspect of an entity, not its legal form. *See United States v. Parise*, 159 F.3d 790, 801 (3d Cir. 1998) (holding that the court could take judicial notice of the *aims* and *goals* of a movement); *Atty. Gen. of U.S. v. Irish N. Aid. Comm.*, 530 F. Supp. 241, 259–60 (S.D.N.Y. 1981) (stating the court could take "notice that the IRA is a 'Republican movement,' *at least insofar as it advocates a united Ireland*" (emphasis added)); *see also Baggett v. Bullitt*, 377 U.S. 360, 376 n.13 (1964) (noting that "[t]he lower court took judicial notice of the fact that the Communist Party of the United States … was *a part of* the world Communist movement" (emphasis added)).

Now, we move on to discuss the merits of Officer Doe's contention that Black Lives Matter is a suable

entity. He alleges that Black Lives Matter "is a national incorporated association with chapter [sic] in many states." Under Federal Rule of Civil Procedure 17(b), the capacity of an entity "to sue or be sued is determined … by the law of the state where the court is located." Under Article 738 of the Louisiana Code of Civil Procedure, "an unincorporated association has the procedural capacity to be sued in its own name." The Louisiana Supreme Court has held that "an unincorporated association is created in the same manner as a partnership, by a contract between two or more persons to combine their efforts, resources, knowledge or activities for a purpose other than profit or commercial benefit." *Ermert*, 559 So. 2d at 473. "Interpretation of a contract is the determination of the common intent of the parties." La. Civ. Code Ann. art. 2045. To show intent, "the object of the contract of association must necessarily be the creation of an entity whose personality 'is distinct from that of its members.'" *Ermert*, 559 So. 2d at 474 (quoting La. Civ. Code Ann. art. 24). Louisiana law does not provide for a public display of the parties' intent. *Id.*

Louisiana courts have looked to various factors as indicative of an intent to create an unincorporated association, including requiring dues, having insurance, ownership of property, governing agreements, or the presence of a formal membership structure. *See Bogue Lusa Waterworks Dist. v. La. Dep't of Envtl. Quality*, 897 So. 2d 726, 728-729 (La. Ct. App. 2004) (relying on organization's unfiled articles of incorporation); *Friendship Hunting Club v. Lejeune*, 999 So. 2d 216, 223 (La. Ct. App. 2008) (relying on organization's required dues and possession of an insurance policy); *see also Concerned Citizens Around*

Murphy v. Murphy Oil USA, Inc., 686 F.Supp.2d 663, 675 (E.D. La. 2010) (relying on organization's formal and determinate membership structure). Lacking at least some of these indicators, Louisiana courts have been unwilling to find an intent to create an unincorporated association. *See, e.g.*, *Ermert*, 559 So. 2d at 474–475 (finding that hunting group was not an unincorporated association because it did not own or lease the property that it was based on, required the permission of one of its alleged members to use the property, and lacked formal rules or bylaws).

Officer Doe has not shown in his complaint a plausible inference that Black Lives Matter is an unincorporated association. His only allegations are that Black Lives Matter: (1) was created by three women; (2) has several leaders, including Mckesson; (3) has chapters in many states; and (4) was involved in numerous protests in response to police practices. He does not allege that it possesses property, has a formal membership, requires dues, or possesses a governing agreement. As such, the complaint lacks any indication that Black Lives Matter possesses the traits that Louisiana courts have regarded as indicative of an intent to establish a juridical entity. We have no doubt that Black Lives Matter involves a number of people working in concert, but "an unincorporated association …. does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a number of individuals have simply acted together." *Id*. at 474. Therefore, we find that the district court did not err in concluding that Officer Doe's complaint has failed plausibly to allege that Black Lives Matter is an entity capable of being sued.

V.

In sum, we hold that Officer Doe has not adequately alleged that Mckesson was vicariously liable for the conduct of the unknown assailant or that Mckesson entered into a civil conspiracy with the purpose of injuring Officer Doe. We do find, however, that Officer Doe adequately alleged that Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway. We further find that in this context the district court erred in dismissing the suit on First Amendment grounds. As such, Officer Doe has pleaded a claim for relief against DeRay Mckesson in his active complaint.[4] We also hold that the district court erred by taking judicial notice of the legal status of "Black Lives Matter," but nonetheless find that Officer Doe did not plead facts that would allow us to conclude that Black Lives Matter is an entity capable of being sued.[5] Therefore, the judgment of the district

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[4] Officer Doe has complained of the lack of discovery in this case, particularly related to his claims against the corporate defendants. Officer Doe is free to argue before the district court that he is entitled to discovery. The district court may then decide whether, in the light of our remand, discovery would be appropriate.

[5] Because we find that Officer Doe has successfully pled a claim, we do not reach the district court's denial of Officer Doe's motion for leave to amend. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 268 n.36 (5th Cir. 2009) (citing *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 358 n.70 (5th Cir. 1989)). It follows that we do not address any of the allegations in the Proposed Amended Complaint or the parties it seeks to add. On remand, Officer Doe may seek leave to amend his complaint to add new parties and plead additional facts to support his negligence claim. The district court should determine whether to grant this motion, and any new motions for leave to amend, in

court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings not inconsistent with this opinion.[6]

AFFIRMED in part, REVERSED in part, and REMANDED.

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the light of our opinion.

[6] On appeal, Officer Doe also argues that the district court erred in denying his request to proceed anonymously as John Doe. He argues that the public nature of his job puts him and his family in danger of additional violence. At the district court, he listed a number of examples of acts of violence against police officers by individuals who may have some connection with Black Lives Matter. In its order, the district court walked through three factors common to anonymous-party suits that we have said "deserve considerable weight." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). These are: (1) whether the plaintiff is "challeng[ing] governmental activity"; (2) whether the plaintiff will be required to disclose information "of the utmost intimacy"; and (3) whether the plaintiff will be "compelled to admit [his] intention to engage in illegal conduct, thereby risking criminal prosecution." *Id.* at 185. The district court concluded that none of these factors applied to the facts of this case. In response to Officer Doe's argument regarding potential future violence, the district court noted that the incidents Officer Doe listed did not involve Officer Doe and were not related to this lawsuit. In fact, at oral argument before the district court regarding his motion, Officer Doe conceded that he had received no particularized threats of violence since filing his lawsuit. The district court instead saw the incidents Officer Doe listed as evidence of "the generalized threat of violence that all police officers face." As a result, the district found that Doe had not demonstrated a privacy interest that outweighs the "customary and constitutionally embedded presumption of openness in judicial proceedings." *Id.* at 186. We agree with the district court and affirm the denial of Doe's motion to proceed anonymously. In so holding, we emphasize what the Supreme Court said decades ago: "What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

APPENDIX L

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JOHN FORD,

v.

DERAY MCKESSON, ET AL,

No. 16-00742-BAJ-RLB

RULING AND ORDER

September 28, 2017

BRIAN A. JACKSON, Chief Judge.

Before the Court are Defendant DeRay Mckesson's Motion to Dismiss (Doc. 15) ("Defendant's Rule 12 Motion"), Defendant DeRay Mckesson's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(a) (Doc. 43) ("Defendant's Rule 9 Motion"), and Plaintiff's Motion to File Amended Complaint for Damages (Doc. 52) ("Plaintiff's Motion to Amend"). Plaintiff filed a memorandum in opposition to Defendant's Rule 12 Motion, (see Doc. 21), Defendant DeRay Mckesson filed a reply memorandum in support of the Motion, (see Doc. 29), and Plaintiff filed a surreply in opposition to the Motion, (see Doc.

38). Plaintiff also filed a memorandum in opposition to Defendant's Rule 9 Motion. (See Doc. 44). The Court held oral argument on Defendant's Rule 12 and Rule 9 Motions.

"[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*, 454 U.S. 290, 294 (1981). Because of its nature as a fundamental guarantee under the First Amendment to the United States Constitution, "[t]he right to associate does not lose all constitutional protection merely because some members of [a] group may have participated in conduct," such as violence, "that itself is not protected." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). Thus, when a tort is committed in the context of activity that is otherwise protected by the First Amendment, courts must use "precision" in determining who may be held liable for the tortious conduct so that the guarantees of the First Amendment are not undermined. *Id.* at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Plaintiff's alleged injuries in this case—which he claims to have suffered in the line of duty as a police officer while responding to a demonstration—are not to be minimized. Plaintiff has failed, however, to state a plausible claim for relief against an individual or entity that both has the capacity to be sued and falls within the precisely tailored category of persons that may be held liable for his injuries, which he allegedly suffered during activity that was otherwise constitutionally protected. For the reasons explained herein, Defendant DeRay Mckesson's Motion to Dis-

miss (Doc. 15) and Defendant DeRay Mckesson's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(a) (Doc. 43) are GRANTED, Plaintiff's Motion to File Amended Complaint for Damages (Doc. 52) is DENIED, and this matter is DISMISSED WITH PREJUDICE.

I. BACKGROUND

In his Complaint, Plaintiff—a Baton Rouge Police Department officer—alleges that he responded to a demonstration that took place on July 9, 2016, at the intersection of Airline Highway and Goodwood Boulevard. (See Doc. 1 at ¶¶ 12, 15–16). Plaintiff avers that Defendant DeRay Mckesson ("Mckesson") "le[]d the protest," "acting on behalf of" Defendant "Black Lives Matter." (*Id.* at ¶ 3). Plaintiff asserts that "Black Lives Matter" is a "national unincorporated association," of which Mckesson is a "leader and co-founder." (*Id.*).

Although Plaintiff alleges that Mckesson and "Black Lives Matter" "were in Baton Rouge for the purpose of demonstrating, protesting[,] and rioting to incite others to violence against police and other law enforcement officers," (*id.* at ¶ 11), Plaintiff concedes that the demonstration "was peaceful" when it commenced, (*id.* at ¶ 17). Plaintiff avers that "the protest turned into a riot," (*id.* at ¶ 18), however, when "activist[s] began pumping up the crowd," (*id.* at ¶ 17). Thereafter, demonstrators allegedly "began to loot a Circle K," taking "water bottles" from the business and "hurl[ing]" them at the police officers who were positioned at the demonstration. (*Id.* at ¶ 18). Once the demonstrators had exhausted their supply of water bottles, Plaintiff asserts that an unidentified de-

monstrator "picked up a piece of concrete or [a] similar rock[-]like substance and hurled [it] into the police." (*Id.* at ¶ 20). Plaintiff allegedly was struck by this object, causing several serious injuries. (*Id.* at ¶ 21).

Plaintiff alleges that Mckesson "was in charge of the protests" and "was seen and heard giving orders throughout the day and night of the protests." (*Id.* at ¶ 17). Mckesson, according to Plaintiff, "was present during the protest and ... did nothing to calm the crowd"; instead, Mckesson allegedly "incited the violence on behalf of ... Black Lives Matter." (*Id.* at ¶ 19).

Plaintiff brought suit, naming Mckesson and "Black Lives Matter" as Defendants. In his Complaint, Plaintiff states claims in negligence and respondeat superior, asserting that Mckesson and "Black Lives Matter" "knew or should have known that the physical contact[,] riot[,] and demonstration that they staged would become violent ... and ... that violence would result." (*Id.* at ¶ 28). The unidentified demonstrator who threw the object that allegedly struck Plaintiff, he avers, was "a member of ... Black Lives Matter" and was "under the control and custody" of Mckesson and "Black Lives Matter." (*Id.* at ¶ 20). Therefore, according to Plaintiff, Mckesson and "Black Lives Matter" "are liable in solido for the injuries caused to" Plaintiff by the unidentified demonstrator. (*Id.* at ¶ 31).

Mckesson thereafter filed Defendant's Rule 12 Motion, asserting that Plaintiff failed to state a plausible claim for relief against him, as well as Defendant's Rule 9 Motion, asserting that "Black Lives Mat-

ter" is not an entity that has the capacity to be sued. Plaintiff responded by filing Plaintiff's Motion to Amend, seeking leave of court to amend his complaint to add "# BlackLivesMatter" and Black Lives Matter Network, Inc., as Defendants and to supplement his Complaint with additional factual allegations.

II. DISCUSSION

The Court finds that Plaintiff's Complaint suffers from numerous deficiencies; namely, the Complaint fails to state a plausible claim for relief against Mckesson and it names as a Defendant a social movement that lacks the capacity to be sued. In an attempt to ameliorate these deficiencies, Plaintiff has sought leave of court to amend his Complaint to name two additional Defendants—"# BlackLivesMatter" and Black Lives Matter Network, Inc.—and to plead additional factual allegations. Plaintiff's proposed amendment, however, would be futile: Plaintiff fails to remedy the deficiencies contained in his initial Complaint with respect to his claims against Mckesson and "Black Lives Matter," "# BlackLivesMatter"—a *hashtag*—lacks the capacity to be sued, and Plaintiff fails to state a plausible claim for relief against Black Lives Matter Network, Inc. Plaintiff's claims, therefore, must be dismissed, and Plaintiff must be denied the opportunity to amend his Complaint.

A. Defendant's Rule 12 Motion

Setting aside his conclusory allegations, Plaintiff has pleaded facts that merely demonstrate that Mckesson exercised his constitutional right to association and that he solely engaged in protected speech

at the demonstration that took place in Baton Rouge on July 9, 2016. Because Plaintiff has failed to plead sufficient, nonconclusory factual allegations that would tend to demonstrate that Mckesson exceeded the bounds of protected speech, Mckesson cannot be held liable for the conduct of others with whom he associated, and Plaintiff thus has failed to state a plausible claim for relief against Mckesson.

1. Legal Standard

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint against the legal standard set forth in Rule 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

Thus, a complaint need not set out "detailed factual allegations," but a complaint must contain something more than "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). When con-

ducting its inquiry, the Court must "accept[] all well-pleaded facts as true and view[] those facts in the light most favorable to the plaintiff." *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010) (quoting *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and therefore "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 678.

2. Analysis

"The First Amendment does not protect violence." *Claiborne Hardware*, 458 U.S. at 916, ("Certainly violence has no sanctuary in the First Amendment, and the use of weapons ... may not constitutionally masquerade under the guise of 'advocacy.'" (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring))). "[T]he presence of activity protected by the First Amendment," however, "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-–17. Thus, while a person may be held liable in tort "for the consequences of [his] violent conduct," a person cannot be held liable in tort "for the consequences of nonviolent, protected activity." *Id.* at 918. "Only those losses proximately caused by unlawful conduct may be recovered." *Id.*

"The First Amendment similarly restricts the ability" of a tort plaintiff to recover damages from "an individual solely because of his association with

another." *Id.* at 918–19. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920. "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 a specific intent to further those illegal aims." *Id.* To impose tort liability on an individual for the torts of others with whom he associated, a plaintiff must prove that (1) the individual "authorized, directed, or ratified specific tortious activity"; (2) his public speech was "likely to incite lawless action" and the tort "followed within a reasonable period"; or (3) his public speech was of such a character that it could serve as "evidence that [he] gave other specific instructions to carry out violent acts or threats." *Id.* at 927.

In his Complaint, Plaintiff alleges that Mckesson "le[]d the protest and violence that accompanied the protest." (*Id.* at ¶ 3). As support for this contention, Plaintiff pleaded that Mckesson "was in charge of the protests[,] and he was seen and heard giving orders throughout the day and night of the protests." (*Id.* at ¶ 17). Further, Plaintiff avers that Mckesson "did nothing to calm the crowd" during the demonstration; rather, Mckesson "incited the violence." (*Id.* at ¶ 19).

All of these allegations are conclusory in nature, however, and they do not give rise to a plausible claim for relief against Mckesson. In order to state a claim against Mckesson to hold him liable for the tortious act of another with whom he was associating during the demonstration, Plaintiff would have to allege facts that tend to demonstrate that Mckesson

"authorized, directed, or ratified specific tortious activity." *Id.* Plaintiff, however, merely states—in a conclusory fashion—that Mckesson "incited the violence" and "g[ave] orders," (*id.* at ¶¶ 17, 19), but Plaintiff does not state in his Complaint how Mckesson allegedly incited violence or what orders he allegedly was giving. Therefore, the Complaint contains a "[t]hreadbare recital[] of the elements" of a cause of action against Mckesson, which Plaintiff only has "supported [with] mere conclusory statements," and therefore Plaintiff's Complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

Further, Plaintiff has not pleaded sufficient factual allegations regarding Mckesson's public speech to state a cause of action against Mckesson based on that speech. The only public speech to which Plaintiff cites in his Complaint is a one-sentence statement that Mckesson allegedly made to The New York Times: "The police want protestors to be too afraid to protest." (*Id.* at ¶ 24). Mckesson's statement does not advocate—or make any reference to—violence of any kind, and even if the statement did, "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927. This statement falls far short of being "likely to incite lawless action," which Plaintiff would have to prove to hold Mckesson liable based on his public speech. *Id.*

Nor can Plaintiff premise Mckesson's liability on the theory that he allegedly "did nothing to calm the crowd." *Id.* at ¶ 19). As the United States Supreme

Court stated in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence," *id.* at 920.

Plaintiff therefore has failed to plead in his Complaint "factual content that allows the court to draw the reasonable inference that [Mckesson] is liable for the misconduct alleged," and thus Plaintiff's claims against Mckesson must be dismissed. *Iqbal*, 556 U.S. at 678.

B. Defendant's Rule 9 Motion

The Court finds that "Black Lives Matter," as Plaintiff uses that term in his Complaint, refers to a social movement. Although many entities have utilized the phrase "black lives matter" in their titles or business designations, "Black Lives Matter" itself is not an entity of any sort. Therefore, all claims against "Black Lives Matter" must be dismissed because social movements lack the capacity to be sued.

1. Legal Standard

Although a motion to dismiss for lack of capacity is not contemplated by the express provisions of Rule 12, such a motion is treated by courts as a motion to dismiss pursuant to Rule 12(b)(6) when the issue can be resolved by analyzing the face of the complaint. *See Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 n.1 (2d Cir. 1965) ("Although the defense of lack of capacity is not expressly mentioned in [R]ule 12(b), the practice has grown up of examining it by a 12(b)(6) motion when the defect appears upon the face of the complaint."); *Oden Metro Turfing, Inc. v. Cont'l Cas. Co.*, No. 12-cv-01547, 2012 WL 5423704,

at *2 (W.D. La. Oct. 10, 2012) (citing *Klebanow*, 344 F.2d 294); *see also* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1294 (2017 Supp. 2017) ("[I]f the lack of capacity ... appears on the face of the pleadings or is discernible there from, the issue can be raised by a motion for failure to state a claim for relief."). The Court may treat a motion to dismiss for lack of capacity as a motion to dismiss pursuant to Rule 12(b)(6) even if the motion is labelled incorrectly. *See Oden Metro*, 2012 WL 5423704, at *2.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. When conducting its inquiry, the Court must "accept[] all well-pleaded facts as true and view[] those facts in the light most favorable to the plaintiff." *Bustos*, 599 F.3d at 461 (quoting *True*, 571 F.3d at 417). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint," however, "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. When analyzing a motion to dismiss for failure to state a claim, "courts may also consider matters of which they may take judicial notice." *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996).

If a party is not an individual or a corporation, the capacity of that party to be sued "is determined ... by the law of the state where the court is located."

Fed. R. Civ. P. 17(b)(3). "Under Louisiana law, an entity must qualify as a 'juridical person' to possess the capacity to be sued." *Hall v. Louisiana*, 974 F.Supp.2d 957, 962 (M.D. La. 2013). "A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership." La. Civ. Code art. 24. "[F]or an unincorporated association to possess juridical personality, the object of the contract of association must necessarily be the creation of an entity whose personality 'is distinct from that of its members.'" *Ermert v. Hartford Ins.*, 559 So.2d 467, 474 (La. 1990) (quoting La. Civ. Code art. 24). "Unless such an intent exists, the parties do not create a fictitious person[,] but instead simply incur obligations among themselves." *Id.* "Consequently, an unincorporated association, as a juridical person distinct from its members, does not come into existence or commence merely by virtue of the fortuitous creation of a community of interest or the fact that a number of individuals have simply acted together"; rather, "there must also be an agreement whereby two or more persons combine certain attributes to create a separate entity for a legitimate purpose." *Id.*

2. Analysis

Mckesson, in his Rule 9 Motion, argues that the Court should dismiss "Black Lives Matter" as a Defendant in this case because it lacks the capacity to be sued. According to Defendant, "Black Lives Matter" "is a movement and not a juridical entity capable of being sued." (Doc. 43–1 at p. 2). The Court finds that the capacity of "Black Lives Matter" to be sued can be discerned from the face of the pleadings, and therefore it will treat Defendant's Rule 9 Motion as a motion to dismiss for failure to state a claim under

Rule 12(b)(6). *See Klebanow*, 344 F.2d at 296 n.1.

Federal Rule of Evidence 201 permits a court to "judicially notice a fact that is not subject to reasonable dispute because it ... is generally known within the trial court's territorial jurisdiction." Fed. R. Evid. 201(b)(1). Courts previously have taken judicial notice of the character, nature, or composition of various social movements. *See, e.g.*, *United States v. Parise*, 159 F.3d 790, 801 (3d Cir. 1998) (holding that the court could "easily take judicial notice" of the aims and goals of the "union movement"); *Attorney Gen. of U.S. v. Irish N. Aid. Comm.*, 530 F. Supp. 241, 259 (S.D.N.Y. 1981) ("Under the doctrine of judicial notice, the Court can observe that the 'Republican movement' consists of groups other than, and in addition to, the IRA; but the Court can also notice that the IRA is a 'Republican movement'...."); *see also Baggett v. Bullitt*, 377 U.S. 360, 376 n.13 (1964) (noting that "[t]he lower court took judicial notice of the fact that the Communist Party of the United States ... was a part of the world Communist movement dominated by the Soviet Union").

In his Complaint, Plaintiff names "Black Lives Matter" as a Defendant, describing "Black Lives Matter" as a "national incorporated association with chapter[s] in many states[,] which is amenable to service of process through a managing member." (Doc. 1 at ¶ 3). Plaintiff alleges that "Black Lives Matter" was "created by Alicia Garza, Patrisse Cullors, and Opal Tometi" and that the "leaders" of "Black Lives Matter" are "Rashad Turner, Johnetta Elzie[,] and DeRay Mckesson." (*Id.* at ¶ 4).

The Court judicially notices that "Black Lives

Matter," as that term is used in the Complaint, is a social movement that was catalyzed on social media by the persons listed in the Complaint in response to the perceived mistreatment of African-American citizens by law enforcement officers. Fed. R. Evid. 201; *cf. Parise*, 159 F.3d at 801 (holding that the court could "easily take judicial notice" of the aims and goals of the "union movement"); *Irish N. Aid. Comm.*, 530 F. Supp. at 259 ("Under the doctrine of judicial notice, the Court can observe that the 'Republican movement' consists of groups other than, and in addition to, the IRA; but the Court can also notice that the IRA is a 'Republican movement' ...."); *see also Baggett*, 377 U.S. at 376 n.13 (noting that "[t]he lower court took judicial notice of the fact that the Communist Party of the United States ... was a part of the world Communist movement dominated by the Soviet Union"). Because "Black Lives Matter," as that term is used in the Complaint, is a social movement, rather than an organization or entity of any sort, its advent on social media merely was a "fortuitous creation of a community of interest"; "Black Lives Matter" was not created through a "contract of association" and is not an "entity whose personality 'is distinct from that of its members,'" and therefore it is not a "juridical person" that is capable of being sued. *Ermert*, 559 So.2d at 474 (quoting La. Civ. Code art. 24).

The Court notes that the phrase "black lives matter" has been utilized by various entities wishing to identify themselves with the "Black Lives Matter" movement. Plaintiff himself has identified one such entity and seeks leave of court to add that entity as a Defendant: Black Lives Matter Network, Inc. (See

Doc. 52–4 at ¶ 3). These entities undoubtedly are "juridical persons" capable of being sued, and therefore the issue of such an entity's capacity would not impede Plaintiff from filing suit against it. "Black Lives Matter," as a social movement, cannot be sued, however, in a similar way that a person cannot plausibly sue other social movements such as the Civil Rights movement, the LGBT rights movement, or the Tea Party movement. If he could state a plausible claim for relief, a plaintiff could bring suit against entities associated with those movements, though, such as the National Association for the Advancement of Colored People, the Human Rights Campaign, or Tea Party Patriots, because those entities are "juridical persons" within the meaning of Louisiana law. *See* La. Civ. Code art 24.

Nevertheless, Plaintiff merely has identified "Black Lives Matter" as a Defendant in his Complaint, and that term connotes a social movement that is not a "juridical person" and that lacks the capacity to be sued. *See Ermert*, 559 So.2d at 474. Therefore, "Black Lives Matter" shall be dismissed as a Defendant in this case because it lacks the capacity to be sued. *See id.*

C. Plaintiff's Motion to Amend

Following the filing of Defendant's Rule 12 Motion and Defendant's Rule 9 Motion, as well as the oral argument on those Motions, Plaintiff sought leave of court to amend his Complaint. Plaintiff identifies two additional Defendants in his Proposed Amended Complaint—"# BlackLivesMatter" and Black Lives Matter Network, Inc.—and pleads additional factual allegations. (*See* Doc. 52–4). In his Pro-

posed Amended Complaint, however, Plaintiff nonetheless fails to state a plausible claim for relief against any of the four named Defendants: "Black Lives Matter"—a social movement—and "# BlackLivesMatter"—a hashtag—both lack the capacity to be sued, and Plaintiff has failed to state plausible claims for relief against either Mckesson or Black Lives Matter Network, Inc., that are supported by anything more than conclusory allegations. Therefore, because Plaintiff's Proposed Amended Complaint would be subject to dismissal in its entirety, the Court shall deny Plaintiff leave of court to amend his Complaint.

1. Legal Standard

If a party is not entitled to amend a pleading as a matter of course pursuant to Rule 15(a)(1), "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "The court should freely give leave when justice so requires." *Id.* "[A] district court may refuse leave to amend," however, "if the filing of the amended complaint would be futile." *Varela v. Gonzales*, 773 F.3d 704, 707 (5th Cir. 2014). In other words, the Court may deny Plaintiff's Motion to Amend "if the complaint as amended would be subject to dismissal." *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 208 (5th Cir. 2009).

2. Analysis

a. "# BlackLivesMatter"

Plaintiff, in his Proposed Amended Complaint, seeks to add as a Defendant "# BlackLivesMatter." (*See id.* at ¶ 3). Plaintiff alleges that "# BlackLivesMatter" is a "national unincorporated associa-

tion [that] is domiciled in California." (*Id.*).

The Court judicially notices that the combination of a "pound" or "number" sign (#) and a word or phrase is referred to as a "hashtag" and that hashtags are utilized on the social media website Twitter in order to classify or categorize a user's particular "tweet," although the use of hashtags has spread to other social media websites and throughout popular culture. *See* Fed. R. Evid. 201; *see also TWTB, Inc. v. Rampick*, 152 F. Supp. 3d 549, 563 n.97 (E.D. La. 2016) ("A hashtag is 'a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet).'" (quoting *Hashtag*, Merriam-Webster Dictionary (2017), https://www.merriam-webster.com/dictionary/hashtag)). The Court also judicially notices that "# BlackLivesMatter" is a popular hashtag that is frequently used on social media websites. *See* Fed. R. Evid. 201.

Plaintiff therefore is attempting to sue a hashtag for damages in tort. For reasons that should be obvious,[1] a hashtag—which is an *expression* that categorizes or classifies a person's thought—is not a "juridical person" and therefore lacks the capacity to be sued. *See* La. Civ. Code art. 24. Amending the Complaint to add "# BlackLivesMatter" as a Defendant in this matter would be futile because such claims

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[1] The Court notes that if Plaintiff were not bearing his own costs, which otherwise would be borne by the taxpayers, 28 U.S.C. § 1915(e)(2)(B)(i) would permit the Court to dismiss this claim as "frivolous": a lawsuit that alleges that a hashtag—which is, in essence, an idea—is liable in tort for damages can be properly categorized as "fantastic or delusional." *Neitzke v. Williams*, 490 U.S. 319, 328 (1989).

"would be subject to dismissal"; a hashtag is patently incapable of being sued. *Ackerson*, 589 F.3d at 208.

b. "Black Lives Matter"

Plaintiff also seeks to supplement his allegations regarding Defendant "Black Lives Matter." In his Proposed Amended Complaint, Plaintiff avers that "Black Lives Matter" is a "chapter-based national unincorporated association" that is "organized" under the laws of the State of California, though it allegedly is also a "partnership" that is a "citizen" of "California and Delaware." (*Id.*).

For the reasons stated previously in reference to the Court's analysis of Defendant's Rule 9 Motion, "Black Lives Matter" is a social movement that lacks the capacity to be sued. *See* discussion *supra* Section II.B.2. In fact, in his Proposed Amended Complaint, Plaintiff himself refers to "Black Lives Matter" as a "movement" on multiple occasions. (*See, e.g.*, *id.* at ¶ 11 (describing the "Black Lives Matter movement"); *id.* at ¶ 45 (describing the "Black Lives Matter movement"); *id.* at ¶ 48 (describing the "movement's rioters")). Amending the Complaint to permit Plaintiff to continue to pursue claims against "Black Lives Matter" would be futile because such claims "would be subject to dismissal." *Ackerson*, 589 F.3d at 208. For the reasons stated previously, "Black Lives Matter" is a social movement that is not a "juridical person" and that lacks the capacity to be sued.

c. Mckesson

Plaintiff seeks to amend his complaint to include additional factual allegations in relation to Mckesson's activities and public statements. Plaintiff seeks to supplement his Complaint with allegations

that Mckesson (1) made a statement on a television news program, in which he allegedly "justified the violence" that occurred at a demonstration in Baltimore, Maryland, (*id.* at ¶ 9); (2) engaged in a private conversation that allegedly "shows an intent to use protests to have 'martial law' declared nationwide through protests," (*id.* at ¶ 19); (3) allegedly made a statement to a news website that "people take to the streets as a last resort," which—according to Plaintiff—was a "ratification and justification of ... violence," (*id.* at ¶ 48); (4) participated in various interviews or speeches during which he allegedly described himself or was described as a "leader" of the "Black Lives Matter" movement or a "participant" in various demonstrations, (*see, e.g.*, *id.* at ¶¶ 10, 11, 13, 45, 55, 58); (5) "ratified all action taken during the Baton Rouge protest," (*id.* at ¶ 39); and (6) "incited criminal conduct that cause[d] injury," (*id.* at ¶ 44).

These supplemental factual allegations do not remedy Plaintiff's failure to state a plausible claim for relief against Mckesson. *See* discussion *supra* Section II.A.2. Plaintiff's allegations that Mckesson "ratified all action," (*id.* at ¶ 39), and "incited criminal conduct," (*id.* at ¶ 44), are nothing but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," which "do not suffice" to survive a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 678. Plaintiff's Proposed Amended Complaint is devoid of any facts, aside from these broad conclusory allegations, that tend to suggest that Mckesson made any statements or engaged in any conduct that "authorized, directed, or ratified" the unidentified demonstrator's act of throwing a rock at Plaintiff. *Claiborne Hardware*, 458 U.S. at

927.

Further, the additional public statements[2] that Plaintiff has pleaded do not support a plausible claim for relief against Mckesson. Rather than including the actual statement that Mckesson allegedly made on a television news program, Plaintiff merely pleads that Mckesson "justified the violence," (*id.* at ¶ 9); this is a "[t]hreadbare recital[] of the elements of a cause of action," which is "supported by mere conclusory statements." Iqbal, 556 U.S. at 678. Mckesson's alleged statement that "people take to the streets as a last resort," (*id.* at ¶ 48), similarly cannot give rise to a cause of action: it is not plausible that this statement could be "likely to incite lawless action" or be of such a character that it could serve as "evidence that [he] gave other specific instructions" to the unidentified demonstrator to throw a rock at Plaintiff. *Claiborne Hardware*, 458 U.S. at 927. Moreover, to premise Mckesson's liability on the sole basis of his public statements in which he identified himself as a "leader" of the "Black Lives Matter" movement or a "participant" in various demonstrations, (*see, e.g.*, *id.* at ¶¶ 10, 11, 13, 45, 55, 58), would impermissibly impose liability on Mckesson for merely exercising his right of association. See *id.* at 925-26 ("[M]ere associ-

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[2] Setting aside Plaintiff's description of it in mere conclusory terms, the conversation in which Plaintiff alleges that Mckesson "show[ed] an intent to use protests to have `martial law' declared nationwide through protests," Doc. 52-4 at ¶ 19, is a *private* conversation that cannot give rise to liability in tort for the actions of other demonstrators. *See Claiborne Hardware,* 458 U.S. at 927 (holding that liability may only be imposed on a person for the tortious acts of others with whom the person associated if his "*public* speech" meets certain criteria (emphasis added)).

ation with [a] group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability.").

Plaintiff therefore has failed to remedy the deficiencies that the Court identified in his Complaint, *see* discussion *supra* Section II.A.2, and thus permitting Plaintiff to amend his Complaint to add various factual allegations against Mckesson would be futile because such claims nonetheless "would be subject to dismissal." *Ackerson*, 589 F.3d at 208.

d. Black Lives Matter Network, Inc.

Plaintiff, in his Proposed Amended Complaint, seeks to add Black Lives Matter Network, Inc., as a Defendant in this case. Plaintiff discovered the existence of Black Lives Matter Network, Inc., after making a donation through a website that is allegedly identified with the "Black Lives Matter" movement; the receipt from the donation indicated that Black Lives Matter Network, Inc., was the entity that received the donation.

While Black Lives Matter Network, Inc., certainly is an entity that has the capacity to be sued, *see* La. Civ. Code art. 24, Plaintiff has failed to state a plausible claim for relief against that entity in his Proposed Amended Complaint. For an entity such as Black Lives Matter Network, Inc., to be held liable in tort for damages caused during a demonstration, a plaintiff must demonstrate that the tortious act was committed by one of the entity's "agents ... within the scope of their actual or apparent authority." *Claiborne Hardware*, 458 U.S. at 930. Such an entity also may "be found liable for other conduct of which it had knowledge and specifically ratified." *Id.*

Plaintiff's only attempt at characterizing the unidentified tortfeasor as an agent of Black Lives Matter Network, Inc., is located in paragraph 37 of the Proposed Amended Complaint, in which Plaintiff alleges that the tortfeasor was a "member of Defendant Black Lives Matter, under the control and custody of Defendants." (*Id.* at ¶ 37). Not only does Plaintiff specifically fail to mention Black Lives Matter Network, Inc., whatsoever, but Plaintiff also fails to allege that such an agency relationship existed between the tortfeasor and "Defendants" with anything more than a "[t]hreadbare recital[] of the elements" of agency, "supported by [a] mere conclusory statement[]." *Iqbal*, 556 U.S. at 678. Further, Plaintiff has failed to plead that Black Lives Matter Network, Inc., in particular, "had knowledge and specifically ratified" the unidentified tortfeasor's act of throwing a rock at Plaintiff, *Claiborne Hardware*, 458 U.S. at 930; Plaintiff merely alleges, in a conclusory fashion, that "Black Lives Matter leadership ratified all action taken during the protest," *(id.* at ¶ 39), and that "Black Lives Matter promoted and ratified" the tortious conduct that gave rise to this suit, (*id.* at ¶ 44).

These allegations are insufficient to state a plausible claim for relief against Black Lives Matter Network, Inc. Not only are these allegations "conclusory statements," but they also do not identify any connection between this particular entity—Black Lives Matter Network, Inc.—and the particular tortious activity. *Iqbal*, 556 U.S. at 678. As the Supreme Court noted in *Claiborne Hardware*, allowing Plaintiff to proceed against Black Lives Matter Network, Inc., in this case—based solely on these conclusory allegations—"would impermissibly burden the rights

of political association that are protected by the First Amendment." 458 U.S. at 931. Therefore, allowing Plaintiff to amend his Complaint to add Black Lives Matter Network, Inc., as a Defendant in this matter would be futile because such claims "would be subject to dismissal";[3] Plaintiff has failed to state a plausible claim for relief against Black Lives Matter Network, Inc., in his Proposed Amended Complaint. *Ackerson*, 589 F.3d at 208.

3. Conclusion

Therefore, the Court finds that Plaintiff has failed to plead a plausible claim for relief against any of the Defendants that he identified in his Proposed Amended Complaint. The Court thus denies Plaintiff leave to amend his Complaint because the "filing of the amended complaint would be futile." *Varela*, 773 F.3d at 707.

D. Dismissal with Prejudice

For the reasons stated above, the Court finds that Plaintiff has failed to state a plausible claim for relief against either Mckesson or "Black Lives Matter," the only Defendants named in Plaintiff's initial Complaint. *See* discussion supra Section II.A-.B. Under normal circumstances, the Court would dismiss this matter without prejudice to provide Plaintiff with an opportunity to ameliorate the deficiencies that the Court has identified in his Complaint.

Plaintiff has had ample opportunity, however, following the briefing and argument on Defendant's

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[3] Black Lives Matter Network, Inc., indeed has filed a motion to dismiss in the event that the Court permitted Plaintiff to amend his Complaint to add it as a Defendant. *See* Doc. 68.

Rule 12 and Rule 9 Motions to demonstrate to the Court that he can state a plausible claim for relief against an individual or entity. In response to the arguments raised by Mckesson in his Motions and by the Court during oral argument on the Motions, Plaintiff nonetheless produced a Proposed Amended Complaint that not only fails to state a plausible claim for relief against any of the named Defendants, but that also attempts to hold a hashtag liable for damages in tort. The Court therefore finds that granting leave to Plaintiff to attempt to file a Second Proposed Amended Complaint would be futile. The Court also notes that Plaintiff's attempt to bring suit against a social movement and a hashtag evinces either a gross lack of understanding of the concept of capacity or bad faith, which would be an independent ground to deny Plaintiff leave to file a Second Proposed Amended Complaint. The Court therefore shall dismiss this matter with prejudice. See *Cent. Laborers' Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 556 (5th Cir. 2007) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

III. CONCLUSION

Accordingly,

IT IS ORDERED that Defendant DeRay Mckesson's Motion to Dismiss (Doc. 15) is **GRANTED.**

IT IS FURTHER ORDERED that Defendant DeRay Mckesson's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 9(a) (Doc. 43) is **GRANTED**.

IT IS FURTHER ORDERED that the Motion to File Amended Complaint for Damages (Doc. 52)

filed by Plaintiff is **DENIED**.

IT IS FURTHER ORDERED that the above-captioned matter is **DISMISSED WITH PREJUDICE.**

Baton Rouge, Louisiana, this 28th day of July, 2017.

/s/ Judge Brian A. Jackson
Chief Judge,
United States District Court
Middle District of Louisiana