No. 23-________

IN THE

# Supreme Court of the United States

DERAY MCKESSON,

*Petitioner*,

—v.—

JOHN DOE,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

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

## PARTIES TO THE PROCEEDING

In addition to the parties in the caption, Black Lives Matter Network, Inc., was a party to the proceedings before the court of appeals but does not join this petition.

## RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

*Doe v. Mckesson*, No. 17-30864 (decision issued June 16, 2023)

Louisiana Supreme Court (La.):

*Doe v. Mckesson*, No. 2021-CQ-00929 (decision on certified question issued Mar. 25, 2022)

United States Court of Appeals (5th Cir.):

*Doe v. Mckesson*, No. 17-30864 (order certifying question to Louisiana Supreme Court entered June 25, 2021)

Supreme Court of the United States:

*Mckesson v. Doe*, No. 19-1108 (decision granting certiorari, vacating the opinion of the court of appeals, and remanding the case issued November 2, 2020)

United States Court of Appeals (5th Cir.):

*Doe v. Mckesson*, No. 17-30864 (order denying rehearing en banc entered January 28, 2020)

*Doe v. Mckesson*, No. 17-30864 (decision issued December 16, 2019)

*Doe v. Mckesson*, No. 17-30864 (decision issued August 8, 2019, and subsequently withdrawn December 16, 2019)

*Doe v. Mckesson*, No. 17-30864 (decision issued April 24, 2019, and subsequently withdrawn August 8, 2019)

United States District Court (M.D. La.):

*Doe v. Mckesson*, No. 16-00742-BAJ-RLB (ruling and order granting defendant's motion to dismiss entered September 28, 2017)

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 71 F.4th 278 and can be found at App.1a-71a. Its decision certifying state law questions, 2 F.4th 502, is reproduced at App.126a-134a, and the Louisiana Supreme Court's decision answering those questions is reported at 339 So.3d 524 and reproduced at App.72a-125a. The opinion of the district court, App.194a-218a, is reported at 272 F.Supp.3d 841.

This Court's per curiam decision granting certiorari, vacating, and remanding is reported at 141 S. Ct. 48, and reproduced at App.135a-40a. The Fifth Circuit's (vacated) opinion on *sua sponte* panel rehearing is reported at 945 F.3d 818 and reproduced at App. 141a-93a. Its order and opinions on denial of rehearing en banc, App.219a-31a, are reported at 947 F.3d 874. The court's (withdrawn) rehearing and initial opinions, App.232a-51a and App.252a-69a, respectively, are reported at 935 F.3d 253 and 922 F.3d 604.

## JURISDICTION

On June 16, 2023, the court of appeals issued its decision. On September 6, 2023, Justice Alito granted an extension of time up to and including October 5, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## 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 Revised 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.

## INTRODUCTION

This Court has already granted certiorari once in this case asking whether a protest leader may be held liable for the independent acts of others that the leader did not authorize, direct, or ratify. Recognizing the issue's "undeniabl[e] importan[ce]," App.138a, the Court granted certiorari, vacated, and directed the court of appeals to certify to the Supreme Court of Louisiana the question whether state tort law even permits such attenuated damages liability. *Id.* at 139a-40a. If not, there would be no need to address the First Amendment. The state court has now confirmed that state law *does* permit such liability, squarely raising the question whether such liability is

consistent with the First Amendment. It is not. Because the decision below is directly at odds with this Court's precedent and will chill classic First-Amendment-protected activity nationwide, the Court should grant review and reverse.

Four decades ago, in *NAACP v. Claiborne Hardware Co.*, this Court established a constitutional rule limiting the imposition of liability on protest organizers for the "unlawful conduct of others" occurring "in the context of . . . activity" protected by the First Amendment. 458 U.S. 886, 916, 927 (1982). That case arose from a long-running civil rights boycott that included "elements of majesty," *id.* at 888, but also threats and acts of violence. The Mississippi Supreme Court had affirmed a judgment holding the boycott's primary leader, Charles Evers, personally liable for damages on the ground that, under state tort law, the violence rendered the boycott illegal.

In holding that judgment unconstitutional, *Claiborne* recognized both the significance of the State's interest in preventing harmful conduct and the dangers to First Amendment freedoms that Mississippi's damages remedy posed: Given the prospect that some individual protest participant might engage in law-breaking, only the most intrepid citizens would exercise their rights if doing so risked personal liability for third-parties' wrongdoing. *Claiborne*'s answer was a "federal rule of law" restricting state liability rules for wrongs arising in "the presence of [First Amendment] activity." *Id.* at 916. Under that rule, States may impose damages on protest participants and leaders who *themselves* inflict harm. But the Constitution forbids holding a protest organizer personally responsible for illegal acts committed *by others* unless the leader himself incited

or "authorized, directed, or ratified" the "specific" harm-inflicting acts. *Id.* at 927.

*Claiborne*'s stringent personal culpability requirement tracked principles this Court established in landmark decisions recognizing First Amendment limits on liability for incitement and association, which similarly arise at the nexus of protected activity and actual harm. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Scales v. United States*, 367 U.S. 203 (1961). In those cases, as in *Claiborne*, the Constitution forbids liability for third-party wrongs unless the speaker or associate specifically intended to bring them about.

The present case called for a straightforward application of *Claiborne*, but it has yielded something strikingly different. Respondent, a police officer, filed a state law tort suit seeking recovery for injuries he suffered when struck by a rock thrown by an unidentified person during a civil rights demonstration. He sued not the rock-thrower but petitioner, a prominent social justice advocate, for "conducting" the demonstration "negligently." In three 2019 decisions, and a new one—issued after an 8-8 en banc vote and this Court's summary vacatur—the Fifth Circuit has held that, under *Claiborne*, the absence of any plausible allegation that petitioner directed, authorized, or ratified the rock-throwing (or any violence whatsoever) *does not* prevent his being held personally liable for respondent's injuries.

The lower court's departure from this Court's controlling precedent could hardly be more stark. What the Fifth Circuit held the Constitution to permit is precisely what *Claiborne* ruled it forbids: holding a protest leader liable for wrongs committed by someone

else that he neither authorized nor intended. Indeed, only weeks after the court of appeals proclaimed that "[a] proper reading of *Claiborne* shows that the Court's concept of liability for protest leaders did not include an intent condition," App.35a, this Court reaffirmed that *Claiborne* "demanded a showing of intent." *Counterman v. Colorado*, 143 S. Ct. 2106, 2118 (2023). The decision is so "flatly contrary to this Court's controlling precedent" to be appropriate for summary reversal. *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2000).

## STATEMENT

1. On July 5, 2016, Alton Sterling, a Black resident of Baton Rouge, Louisiana, was shot and killed by police officers responding to an anonymous 911 call. In the days afterward, members of the city's Black community and others took to the streets—including, on the evening of July 9, the area in front of police headquarters—to express their anguish, celebrate Mr. Sterling's life, and press for accountability and change. As with protests prompted by police violence elsewhere, one way those assembled conveyed their dismay was by insisting, to the police before them, the community, and the watching world, that "Black Lives Matter."

The July 9 protest was, on respondent's account, initially peaceful, although some demonstrators began to throw plastic water bottles in the direction of police. Compl. ¶¶ 17, 18.[1] And when the bottles "ran

[1] Given the case's procedural posture, petitioner treats as true the well-pleaded factual allegations of the complaint. *See infra.*

out," an unidentified person threw a "rock-like" object that struck and injured respondent. *Id.* at ¶ 20.

2. Respondent sued in federal court, *see* 28 U.S.C. § 1332, naming as defendants DeRay Mckesson—petitioner here—and "Black Lives Matter," Compl. ¶ 3, described as an "unincorporated association" on whose "behalf" Mckesson "staged" the demonstration. *Id.*[2]

The complaint did not allege that Mckesson himself engaged in or encouraged any violence, much less rock-throwing. Rather, it alleged that he "knew or should have known . . . that violence would result" at the demonstration he "staged"; was "present during the protest" but "did nothing to calm the crowd"; and had "directed" demonstrators to protest in the street. Compl. ¶¶ 19, 28. If proven, respondent maintained, these allegations would give rise to state law liability for negligence, civil conspiracy, and *respondeat superior*.

3. 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, App.207a, 211a, and that the claims against Mckesson were defeated by *Claiborne*'s rule governing civil liability for other persons' wrongful acts committed "in the context of constitutionally protected activity," 458 U.S. at 916. Because there was no plausible allegation that petitioner personally "authorized, directed, or ratified" or otherwise evinced "a specific intent to further" the injury-causing assault, *id.* at 925-27, the

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[2] Respondent sought to proceed anonymously, but both the district court and the court of appeals ruled that he failed to state a lawful basis for doing so. App.168a n.12.

district court held, the First Amendment precluded state law damages liability. App.198a-199a.

4. A unanimous panel of the Fifth Circuit, in an initial 2019 opinion and a second one on rehearing, rejected respondent's conspiracy and vicarious liability claims, but held Mckesson could be liable in negligence, concluding that he owed a duty to respondent (and others present at the scene) "to use reasonable care so as to avoid injury." *Id.* at 240a, 260a.

The court attached special significance to allegations that petitioner and other protesters had marched onto the street and that "[b]locking a public highway is a criminal act under Louisiana law." *Id* at 241a, 261a (citing La. Rev. Stat. § 14:97). It was "patently foreseeable," the court reasoned, that police would respond "by clearing the highway and, when necessary, making arrests," a development 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 could be overcome by "plausibly alleg[ing] that his injuries" were a "consequence[]" of any "tortious activity" that petitioner "authorized, directed, or ratified" "in violation of his duty of care," including encouraging misdemeanor traffic-obstruction. *Id.* at 243a. Just as *Claiborne* would not "insulate [petitioner] from liability" for using "weapons" and "gunpowder" "simply because he, and those he associated with . . . intended to communicate a message," *id.* at 244a (quoting *Claiborne*, 458 U.S. at 916) (cleaned up), "the

criminal conduct" Mckesson allegedly "ordered" was not "protected by the First Amendment."

6. In December 2019, months after the panel's second opinion and ten days after Mckesson filed a petition for certiorari, the court of appeals, *sua sponte*, issued a third opinion, reflecting that the panel had become sharply divided on the negligence and First Amendment issues. Judge Willett's dissent raised doubts about the "exotic" negligent-protest theory's compatibility with Louisiana's general rule against tort liability for someone else's criminal act, suggesting that the duty question should have been certified to the state supreme court. *Id.* at 178a, 192a.

But "[e]ven assuming that Mckesson could be sued under Louisiana law for 'negligently' leading a protest at which someone became violent," *id.* at 178a, Judge Willett explained, that claim would be "foreclosed—squarely—by controlling Supreme Court precedent" and "constitutional fundamentals," *id.* at 183a, 192a, which set a "much higher [bar]" than negligence for holding a leader of a demonstration liable for a "mystery attacker's violent act." *Id.* at 182a, 188a. If liability for an independent actor's violence could constitutionally be imposed as a "consequence" of a leader's "own" negligent oversight of a protest, Judge Willett noted, *Claiborne* would have upheld the verdict against Charles Evers. *Id.* at 183a nn.41-42.

Judge Willett concluded by connecting this case to milestones in this Nation's protest tradition, noting that the Sons of Liberty are venerated for "[unlawfully] dumping tea into Boston Harbor" and that the Selma-to-Montgomery March involved "occup[ying] public roadways." *Id.* at 190a. Had the majority's views prevailed, he continued, Dr. King and

other leaders of "America's street-blocking civil rights movement" could, constitutionally, have been subject to "ruinous [personal] liability" for any instance of violence that arose from demonstrators' confrontations with hostile onlookers and police. *Id.* at 192a.

7. The court denied rehearing en banc by an 8-8 tie. Dissenting, Judge Dennis charged that, by permitting the panel's "freewheeling form of strict liability" to stand, the court had "grievously failed to . . . apply the longstanding protections of the First Amendment." *Id.* at 228a. Noting that "[p]rotestors of all types and causes have been blocking streets in Louisiana for decades," without having to defend suits like this one, Judge Higginson maintained that the claim failed as a matter of state tort law, because the possibility of a police officer's being struck by a person opposing an arrest for highway obstruction was far outside the "particular risk" Louisiana's Section 14:97 addresses. App.230a. Judge Ho concurred in denying rehearing, explaining, among other things, that he thought it so likely petitioner would prevail under Louisiana's "professional rescuer" rule—which precludes officers from suing on injuries resulting "from the very emergency [they were] hired to remedy," *id.* at 221a-22a (citation omitted)—that en banc consideration was unnecessary.

8. This Court granted certiorari and vacated the Fifth Circuit's decision. The Court recognized the "undeniabl[e] importan[ce]" of the constitutional question, *id.* at 138a, but concluded that the Fifth Circuit had committed a threshold error: Because *Claiborne*'s limitations would be "implicated only if Louisiana law permits recovery . . . in the first place," and because the tort theory was so "novel,"

"uncertain," and "fraught with [First Amendment] implications," the court of appeals should not have decided the constitutional question without seeking Louisiana Supreme Court's assurance that the majority's understanding of state law was correct. *Id.* at 138a-39a.

That course was warranted, the Court explained, (1) because the state tribunal appeared "willing" to accept certifications and could consider the import of Louisiana's rule limiting liability for "the criminal activities of third persons" and dissenters' "doubt[s] that an intentional assault is the 'particular risk' for which [respondent] could recover for a breach of 'Louisiana's prohibitions on highway-blocking,'" *id.* at 136a, 139a; (2) because imposing "a duty under Louisiana law" requires courts to "consider 'various moral, social, and economic factors'" and make "value-[laden]" determinations about "the moral value of protest [and] the economic consequences of withholding liability" that are unsuited to federal court "[s]peculation," *id.* at 139a-40a; and (3) because certification could potentially have avoided a "hypothetical" constitutional decision, *id.* at 139a.

Having held that the Fifth Circuit should have certified at least these questions: "(1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) whether respondent has alleged a particular risk within the scope of protection afforded by the duty, provided one exists," *id.*, the Court remanded "for further proceedings consistent with [its] opinion." *Id.* at 139a-40a.

9. On remand, the Fifth Circuit certified two questions: "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?" and "whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?" *Id.* at 130a.

10. The Supreme Court of Louisiana accepted certification and issued an opinion answering that a protest leader could be sued for negligence "under the facts alleged in the complaint," *id.* at 88a, and that the professional rescue doctrine would not bar liability, *id.* at 96a.

The court did not independently address its prior precedents rejecting liability based on foreseeable third-party criminality, nor did it examine whether its liability rule might chill societally important activity. Rather, the court reproduced verbatim the nine-paragraph portion of the vacated Fifth Circuit opinion discussing the negligent-protest theory and "f[ou]nd this recitation of the law . . . an accurate summary of the pertinent Louisiana law on this issue." *Id.* at 88a; *but see id.* at 124a (Griffin, J., dissenting) (describing "existing laws hold[ing] perpetrators of [violence at protests] criminally and civilly accountable" and noting "the high moral value [attached to protest] in our society" and the cause of action's potential "chilling effect on political protests").

11. In June 2023, the same Fifth Circuit panel—again without hearing argument—issued a new 2-1 decision permitting the negligent-protest claims to proceed. The court held that respondent had plausibly alleged the cause of action the Louisiana Supreme Court approved. It highlighted "three significant respects" in which respondent alleged "Mckesson created unreasonably unsafe conditions": "[1] he

organized the protest to begin in front of the police station . . . . [2] he personally assumed control of the protest's movements, but failed to take any action . . . to . . . dissuade his fellow demonstrators once they began to loot a grocery store and throw items," and "[3, he] deliberately led the assembled protest onto a public highway, in violation of Louisiana criminal law." *Id* at 24a.

The majority explained that its First Amendment "lodestar" was *Claiborne* and its principle that "'precision of regulation' is demanded" when a State imposes liability for another person's wrongful act in the presence of First Amendment activity. *Id.* at 19a (quoting *Claiborne*, 458 U.S. at 916). That "tailoring requirement," the court explained, forbids "the government [from] hold[ing] a protest leader liable anytime a protestor does something unlawful." *Id.* at 21a. But, it concluded, respondent's allegations "fit[] quite comfortably" within the two specific grounds *Claiborne* held could justify liability for harms the protester did not personally inflict. *Id.* at 23a. First, because "the conduct Louisiana law deems unlawful here—creating unreasonably dangerous conditions—is 'tortious activity' contemplated by the *Claiborne* Court," a protest leader whose "creation of those conditions causes a plaintiff to sustain injuries" can be said to have "'directed' his own 'tortious activity' for purposes of *Claiborne*." *Id.* at 25a.

Second, the majority invoked *Claiborne*'s holding that the First Amendment permits protest-leader liability for third-party violence based on "incit[ing]] lawless action," saying this was "precisely what [respondent] alleges Mckesson did here." *Id.* at 27a. The court reasoned that incitement, while usually in the form of speech, "logically includes . . . actions

tending to incite unlawful behavior," including "organiz[ing] and direct[ing a] protest . . . such that it was likely that a violent confrontation with the police would result." *Id.*

The majority next explained that this negligence-based liability, without any requirement that petitioner intended any violence whatsoever, was permissible because, in its view, *Claiborne*'s "concept of liability for protest leaders did not include an intent condition." *Id.* at 35a. In particular, the majority asserted that *Claiborne* drew a "contrast[]" between the "culpability required to hold an *associate* liable for unlawful conduct taken in the midst of legitimate expressive behavior" and "that required to hold a protest *leader* liable." *Id.* (emphases added). For a protest participant, *Claiborne* explicitly "held [that] a specific intent" was required. *Id.* (quoting *Claiborne*, 458 U.S. at 920). But to hold a leader liable for someone else's "unlawful conduct," the "plaintiff *need only* show that the leader 'authorized, directed, or ratified specific tortious activity,'" or that his "public speeches were likely to incite lawless action." *Id.* (quoting *Claiborne*, 458 U.S. at 927). This failure to "mention [*mens rea*] when discussing protest-leader liability" even as the Court affirmed a "[h]eightened culpability requirement" for participant liability, the Fifth Circuit reasoned, was conclusive. *Id.* at 35a-36a.

The court pronounced its holding "fully consistent with the [] instruction that 'precision of regulation' is required for State laws that impose liability in these circumstances," *id.* at 35a, because the negligent protest tort was "designed to *allow* lawful expressive behavior" and to "target wrongful conduct, not stifle legitimate expressive activity," *id.* at 19a. The court explained that plaintiff's obligation to prove each tort

element would protect "ordinary protest leaders," *id.* at 24a, by ensuring, for example, that "protesters who organize and lead demonstrations with minimally acceptable standards of care" are not liable if an "errant protestor injures someone." *Id.* at 39a-40a.

Because respondent's allegations placed Mckesson so "well below any reasonable standard," the court continued, it would "le[ave] for another day" the "exact constitutional limits [on] this cause of action." *Id.* at 37a. The opinion ended saying that "the dispute [was] not about the Boston Tea Party or Dr. Martin Luther King Jr.," but rather "whether sovereign States may impose tort liability for unreasonably dangerous conduct. They may." *Id.* at 41a.

Judge Willett again dissented, maintaining that "[t]he novel 'negligent protest' theory" is foreclosed—squarely—by the Constitution and precedent." *Id.* at 47a. In his view, the presence of protected activity provides no protection from personal injury liability for someone who himself commits an act of violence, nor does it prohibit punishment if he violates a traffic obstruction law. But the First Amendment rule announced in *Claiborne* and its underlying principles, he reasoned, do not permit Louisiana to hold Mckesson liable for the rock-hurler's violent act absent proof he encouraged rock-throwing. *Id.* at 69a-70a.

After expressing puzzlement that *Claiborne*'s protest-leader standards could be read as omitting an intent condition, Judge Willett answered the majority's "precision of regulation" claim and its assurances that the tort was "designed" to protect "legitimate [First Amendment] activities." *See id.* at 36a, 40a. By equating "legitimate expressive conduct"

with whatever state tort law permits, he explained, the majority had rendered the "precision" requirement meaningless. *Id.* at 56a-57a. After observing that the majority's theory would support liability for "foreseeable damages . . . caused by . . . counter-protesters and agitators," and "rogue officers," Judge Willet joined issue as to whether the case was "about" Dr. King and other iconic champions of nonviolent protest. *Id.* at 70a-71a. That the Constitution could be read, as the majority seemed to, to "countenance" imposing "ruinous [personal] liability" for criminal acts those leaders in no way encouraged, Judge Willett concluded, was something he could "not fathom." *Id.* at 69a, 71a.

## REASONS FOR GRANTING THE PETITION

Judge Willett was right. It *is* unfathomable under this Court's First Amendment jurisprudence that a State would hold a protest leader liable in damages for a third party's independent conduct that the leader himself neither incited, directed, authorized, nor ratified. When the Court earlier granted review, it believed that state law might preclude respondent's suit. Having learned it does not, this Court now should grant certiorari and confirm that *Claiborne* forecloses negligent-protest liability.

### I. The Fifth Circuit's Decision Starkly Conflicts with This Court's Squarely Controlling Precedent

The Fifth Circuit's decision upholding the negligent-protest tort, under which protest leaders may be held liable for independent wrongdoing of unidentified others without any proof that they incited, directed, authorized, or ratified those acts, cannot be reconciled with *Claiborne* or the

foundational First Amendment precedents upon which it rests. And the alternative "protections" the Fifth Circuit rule offers are manifestly inadequate to safeguard the fundamental right to protest.

### A. Protest-Leader Liability in Negligence for Another Person's Wrongdoing Is Precisely What *Claiborne* Forbids

The Fifth Circuit was correct to recognize that the constitutionality of respondent's claim is controlled by *Claiborne*. But it grievously erred in interpreting *Claiborne* to permit precisely what the decision forbade: holding a protest leader liable for injuries inflicted by an independent third party without evidence that the leader directed, authorized, or ratified the third party's conduct.

*Claiborne* was a state law damages suit brought by businesses targeted in a six-year civil rights boycott in Port Gibson, Mississippi. The suit named as defendants Charles Evers, the State NAACP Field Secretary, who played "the primary leadership role" in the boycott's operation, 458 U.S. at 926, along with other individual participants and the state and national NAACP organizations. The Mississippi Supreme Court held that the acts and threats of violence directed at Black citizens who patronized white-owned stores rendered the boycott illegal, and it sustained a large damages judgment against Evers personally, citing his extensive management role in the highly organized effort, his failure to act against boycott participants known to have perpetrated violence, and his public speeches declaring that would-be defectors would have "their necks broken" and not be safe in their homes at night. *Id.* at 894-95, 900 n.28. Because the protest was unlawful, the state

court held, it was unprotected by the First Amendment. App.87a.

This Court held that the damages judgments against Evers and the organizations were unconstitutional. The Court noted that the protest, while marred by acts of violence, also had elements of "majesty," *Claiborne*, 458 U.S. at 888, emphasizing that most of its success was attributable to Black citizens' collective exercise of their rights to speak, petition, and assemble. While the First Amendment affords no protection to violence, whatever its motivation, and therefore permits civil liability against persons who themselves perpetrate such acts, the Court explained, "the presence of activity protected by the First Amendment," *id* at 916—and the danger that imposing damages based on *others'* wrongful acts would punish and deter core speech and association—demanded "extreme care," before derivative liability may be sustained. *Id.* at 927.

In this context, the Court held, a protester may not be held personally responsible for someone else's violent act absent proof that he "directed, authorized, or ratified" those specific acts. *Id.* at 927. That rule, the Court explained, derived from decisions similarly holding that freedom of association forbids holding a member of an organization liable for its unlawful purposes absent proof that he "specifically intend[ed]" the group's illegal ends, *id.* at 919 (citing *Scales*, 367 U.S. 203, 229 (1961)), and that the Free Speech Clause requires proof of intent before a speaker may be punished for inciting others' criminal acts, *id.* at 927-28 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

These principles foreclosed liability against Evers and the NAACP. There was no contention that Evers personally authorized, directed, or ratified any of the violent acts, and while his inflammatory rhetoric pushed the limits of protected advocacy, it did not exceed "the bounds . . . set forth in *Brandenburg*." *Id.* at 928. The same free-association principles foreclosed NAACP liability: It was not enough that the violent actors were organization members; the absence of proof that the organization "authorized" or "specifically ratified" those acts was conclusive. *Id.* at 930-31.

The Fifth Circuit's decision is directly contrary to *Claiborne*. Unlike Evers, Mckesson is not alleged to have advocated any violence whatsoever. And it is beyond dispute that he did not direct, authorize, ratify, or otherwise intend the rock-throwing that caused respondent's injury. Yet the court held that the First Amendment—indeed *Claiborne*—permitted him to be sued.

The keystone of the Fifth Circuit's decision—its claim that *Claiborne* is "proper[ly] read[]" to establish two First Amendment tiers, and requires "specific intent" to hold protest *participants*, but not *leaders*, liable for injuries another person inflicted, App.35a—is wholly unfounded.

There is no basis for understanding *Claiborne*'s reference to "specific intent" in its initial canvas of freedom-of-association principles as somehow restricted to participants. To be sure, the language *Claiborne* quoted from *Scales*, 367 U.S. at 229, and *Healy v. James*, 408 U.S. 169, 185-86 (1972), condemns imputing an organization's purposes to a member. But this Court's precedents and *Claiborne*

itself leave no doubt that the associational rights of members and leaders (and organizations) are different sides of the same coin. The Court relied on those same principles—and the same precedents—to hold that Evers, the protest's "manager," and the NAACP itself, could not be liable for boycott participants' violence. 458 U.S. at 925 n.69 (citing *Scales* and *Healy* as barring liability against Evers); *id.* at 930 (applying same principles to bar liability against NAACP). This Court's opinion never hinted at the double standard the Fifth Circuit ostensibly uncovered.

As *Claiborne* explained, political movements and protests could never materialize if leaders or organizations could be personally responsible for the independent wrongs of participants who "shar[e] their goals." *Id.* at 925 n.69; *see id.* at 931-32 ("[Imposing] liability [on] . . . national organization . . . in the absence of any proof that [it] authorized or ratified [local-level] misconduct . . . could ultimately destroy it.") (quoting *NAACP v. Overstreet*, 384 U.S. 118 (1966) (Mem.) (Douglas, J., dissenting from dismissal of certiorari as improvidently granted)).

Nor does the rationale the Fifth Circuit supplied for its two-tiered First Amendment right make sense. Far from a "closer connection," App.35a, leaders of street demonstrations typically have *no means* of excluding anyone from participating—including "people looking for trouble," *id.* at 68a, with every right to be present. Indeed, the court itself held the absence of such control precluded respondent's vicarious liability claim, *id.* at 13a-14a—only to introduce an ill-defined "*respondeat superior*–lite" concept through its First Amendment analysis.

The other side of the "contrast," the court's suggestion that *Claiborne* was silent—and meaningfully silent—about whether intent is required to hold leaders derivatively liable, is even more far-fetched. As Judge Willett emphasized, when the Court's opinion said "authorized," "directed" and "incited"—and not, *e.g.*, "intentionally authorized" or "intentionally incited"—it did so not to leave open negligence liability, but because those modifiers would have been redundant. "Direct" and "authorize" themselves "connote intentionality," not negligence. *Id.* at 60a. And "incitement" describes words "*directed to*" inducing another person's criminal behavior. *Id.* at 60a-61a & n.84 (quoting *Brandenburg*, 395 U.S. at 447) (emphasis added).

In *United States v. Hansen*, this Court, rejecting a contention that a statute's "silence" as to *mens rea* should be treated as significant—offered essentially Judge Willett's answer: "[The statutory terms] 'encourages' [and] 'induces' were not modified by an express *mens rea* requirement [because t]here [wa]s no need." 143 S. Ct. 1932, 1945 (2023). That "simple explanation" is, if anything, more compelling here: As a matter of ordinary understanding, unintentionally "encouraging" behavior is not hard to imagine; but "negligently authorizing" and "negligently directing"' were not linguistic possibilities the *Claiborne* Court needed to negate.

*Counterman v. Colorado* similarly disposes of the Fifth Circuit's *mens rea*–free reading of *Claiborne*'s incitement theory. As this Court explained, the Free Speech Clause's incitement limitation is triggered when a speaker's "words were 'intended' (not just likely) to produce imminent [lawlessness]." 143 S. Ct. at 2115; *see also id.* at 2118 ("When incitement is at

issue, we have spoken in terms of specific intent."); *id.* at 2137 (Barrett, J., dissenting) (observing that the "specific intent requirement helps draw the line between incitement and . . . [speech] at the 'core of the First Amendment'" (quoting *Claiborne*, 458 U.S. at 926-27)).

The Fifth Circuit's labored efforts to show that negligent-protest liability could be upheld as an *application* of *Claiborne*'s "incitement" and "direction" theories fail for the same fundamental reason. This Court's clear language, describing the strong restraints on derivative liability when First Amendment activity is present, is not easily "[r]ephrased," App.19a, and repurposed as a permission slip for loose and attenuated state rules.

Whatever may be the "logic[]," *id.* at 27a, of extending incitement from *communication* that is likely and intended to induce unlawful third-party behavior, to "conduct" of that same character, that is not "precisely"—or even remotely—this case. *Id.* No incitement case of this Court involves anything like what is alleged here: unlawful action that was a *response* to a *response* to petitioner's (allegedly) encouraging a demonstration that took place in the street. Nor could the actions alleged here possibly be described as "directed to" attacking police: a protest leader intent on making that happen presumably would not *refrain* from urging violence while "giving orders throughout the day," *id.* at 201a—and instead encourage demonstrators to walk on the street.

The same goes for the claimed "comfortabl[e]" "fit[]" with *Claiborne*'s "directing" theory, App.23a, because Mckesson "'directed' his own 'tortious activity.'" *Id.* at 25a. (quoting *Claiborne*, 458 U.S. at

927). An ordinary English speaker would struggle to explain what "directing" or "authorizing" one's own violence—or negligence—even means. And while *Claiborne* recognizes that a protest leader may be held liable for injuries he himself wrongfully inflicts, that is not because he "directed" or "authorized" his own acts—but because he committed them.

The majority further posited that, because "negligently creating the conditions" for a third-party crime is *itself* "conduct" Louisiana deems "tortious," *see* App.37a, *Claiborne* allows damages liability—no less than if Mckesson tortiously threw the rock himself. But respondent was not injured by "conditions"; he was injured by another person's specific unlawful act, which is exactly what triggers *Claiborne*'s special rule against expansive attributions of derivative liability.

As Judge Willett forcefully objected, *see* App.57a-58a, if a State's "deem[ing]" condition-creating to be "tortious conduct" were "all that [*Claiborne*] require[s]," *see* App. 34a., nothing would be left of this Court's rule. What *Claiborne* presented as a stringent, substantive restraint on States' power to enforce liability rules that would be unobjectionable outside the "presen[ce] of [First Amendment] activity," 458 U.S. at 916-17, would be nothing more than a technical pleading requirement. *See* App.58a.

It would have been a trivial thing for the *Claiborne* plaintiffs, for example, to have re-cast their suit as sounding in negligence, alleging that Evers failed to show reasonable care by "creating the conditions" in which the numerous threats and acts of violence occurred, by "managing" a boycott organization that stationed a "paramilitary" unit, 458 U.S. at 903 n.34,

outside white-owned stores to identify boycott violators, some of whom became victims of the violent acts (committed, in a number of cases, by members of that subunit, *id*. at 926). A Mississippi jury that heard that these acts and threats of violence "contributed to [the protest's] . . . success," *id.* at 921—and that Evers told boycott violators they would have their "necks broken," *id.* at 900 n.28—would unlikely have deliberated long before finding for the businesses on the "breach" element. *Cf. Counterman*, 143 S. Ct. at 2129 (Sotomayor, J., concurring) ("Under a recklessness rule, *Claiborne* would have come out the other way.").

The judgment in *Claiborne* was reversed not because the Mississippi Supreme Court cited the wrong state law tort, but because, by making Evers personally responsible—under *any* tort theory—for specific acts committed by others that he did not intend or direct, the State had imposed a *constitutionally impermissible* burden on his right to speak, petition, and associate. That's precisely what the complaint seeks here, and precisely what the Fifth Circuit held *Claiborne* endorsed.

### B. The Fifth Circuit's Rule Defies Longstanding First Amendment Precedents Requiring Specific Intent Before Holding a Speaker or Leader Responsible for Actions of Third Parties

The decision below conflicts not just with *Claiborne*, but with some of this Court's most important First Amendment decisions. The intent requirement *Claiborne* announced was no slip of the judicial pen. It was expressly grounded on First Amendment restraints established in prior landmark

cases involving association and advocacy, which confronted substantially the same question presented in *Claiborne*—and here: whether and how States may regulate First Amendment activity based on its connection to the unlawful acts of others.

Those precedents' answer, arrived at through generations of struggle, *is Claiborne*'s: Specific intent is constitutionally indispensable. Thus, *Brandenburg* held that the First Amendment forbids punishment even for directly advocating criminal conduct unless the speech was both likely *and* intended to produce imminent lawless action. 395 U.S. at 447. And even where Congress had found that an organization's goals included the violent overthrow of the United States Government, the Court held that a member may not be penalized for his association absent proof he "specifically intend[ed]" to further the group's illegal ends. *See Scales*, 367 U.S. at 229; *Healy*, 408 U.S. at 185-86 (same for civil sanctions).

While the majority below professed incredulity that the First Amendment might restrain liability for "creat[ing] the conditions" for a third party's criminal behavior, App.37a-39a, that is exactly what these and other decisions have long done. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253-57 (2002) (striking down ban on "virtual child pornography," notwithstanding congressional findings that such materials enable sexual abuse of children); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 798-99 (2011) (invalidating law restricting sales of video games found to cause aggressive behavior by young players). And courts across the nation continue to reject claims that the First Amendment permits some combination of foreseeability, failure of "reasonable care," and but-for causation to make up for the absence of intent. *Cf.*

*Herndon v. Lowry*, 301 U.S. 242, 262 (1937) (invalidating law construed to authorize punishment if a defendant could have "forecast that, as a result of a chain of causation," his speech would lead a "group" to "resort to force").

As this Court explained in *Counterman*, intent is required in all these circumstances because the First Amendment activity on the lawful advocacy "side of the . . . line" is so important, because such speech is so easily deterred, and because less rigorous standards open the door to content-based suppression. 143 S. Ct. at 2118.

In adopting its intent requirement, *Claiborne* concluded that these same rationales apply with at least equal force to tort suits against protest organizers. The rights exercised in protests are both integral to "self-government," and highly "fragile," 458 U.S. at 913, 931 (first quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); then quoting *Overstreet*, 384 U.S. at 86 (Douglas, J., dissenting from dismissal of certiorari as improvidently granted)). And "[t]he fear of [civil] damage awards," whose magnitude cannot be ascertained in advance and result from proceedings initiated by protestors' adversaries, "may be markedly more inhibiting than the fear of prosecution under a criminal statute." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

As both *Claiborne* and *Counterman* highlight, intent requirements reflect a more general First Amendment principle: Even where pursuing unquestionably important interests, government must regulate carefully, to avoid needlessly burdening or chilling citizens' exercise of their speech, association, petitioning, and assembly rights.

*Claiborne*, 458 U.S. at 920 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)); *accord Counterman*, 143 S. Ct. at 2118 ("[A] strong intent requirement [is one] way to ensure that efforts to prosecute incitement [do] not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core"). As explained below, the Fifth Circuit's novel standard, which abandons *Claiborne's* well-established requirement of specific intent, dramatically fails that test.

### C. The Fifth Circuit's Substitute Test Provides No Protection for First Amendment Freedoms

In addition to defying *Claiborne* and other foundational First Amendment precedents, the Fifth Circuit created an alternative test that is patently inadequate to protect free speech and association in the context of protests.

The majority acknowledged that upholding negligent-protest liability would require finding that it exhibited "precision of regulation." App.35a (quoting *Claiborne*, 458 U.S. at 916). Pronouncements that the Louisiana cause of action is "narrowly tailored," "targets wrongful . . . not legitimate expressive conduct," *id.*, and affords protections "designed to *allow* lawful expressive behavior" appear throughout its opinion, *id.* at 40a. But those assurances reflect an understanding of that First Amendment requirement radically different from this Court's.

At the heart of these "tailoring" claims is the same tautology the dissent identified in the court's anything-goes "reading" of *Claiborne*. *See* p. 14-15 *supra*. If the First Amendment really gives States carte blanche to impose damages liability for

whatever they deem "tortious"—including leading a protest that creates conditions for some unrelated person's criminal act—then this and every cause of action will *ipso facto* be "precis[ely]" tailored. It will, by definition, "target" that "unlawful behavior," and will not prohibit anything lawful—*i.e.*, activity the State chose not to deem "tortious."

Only in that empty sense could the cause of action here—which singles out protests and subjects them to distinctly *un*favorable treatment compared to torts arising from other contexts—be said to protect "legitimate [protest] activity,"App.19a, let alone be "designed to *allow* lawful expressive behavior," *id.* at 40a.[3]

The Fifth Circuit's opinion shows no sign that it engaged in what is expected before a court finds sufficient "precision of regulation." Courts are instructed to:

> [c]onsider the prospect of chilling . . . given the ordinary citizen's predictable

[3] Quite remarkably, given this case's procedural course, the Fifth Circuit did not even note that the state court's opinion omitted to do what this Court understood Louisiana law to require in every negligence case: canvas the relevant "moral, social, and economic factors" before imposing a duty, *see* App.139a (quoting *Posecai v. Wal-Mart Stores*, 752 So.2d 762, 766 (La. 1999)), or "weigh . . . the moral value of protest," *id.* at 138a, against countervailing state policies. Numerous cases applying that framework have rejected duties based on chilling concerns. *See, e.g.*, *Cardella v. Robinson*, 903 So.2d 613, 618 (La. Ct. App. 2005) (rejecting duty to carefully transport intoxicated people, because, rather than promoting safety, liability rule might, deter "designated driving" altogether). Nor did the Fifth Circuit note the state court's unexplained departure from the "general rule" forbidding liability for third-party crimes without a special relationship. *See* App.136a.

> tendency to steer "wide[] of the unlawful zone"; [the leader's] fear of mistaking whether a [protest is unlawful]; his fear of the legal system getting that judgment wrong; [and] his fear, in any event, of incurring legal costs.

*Counterman*, 143 S. Ct. at 2115 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957)).

The one principal "protection" for protesters to which the court below pointed—the "reasonable standard of care" the plaintiff must prove breached—is no protection at all. In fact, it closely tracks the archetype of an impermissibly vague law, one that punishes "all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Herndon*, 301 U.S. at 263 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)).

Vague rules chill speech, and a rule that holds protest leaders personally liable for foreseeable but unintended third-party misconduct has predictably unequal chilling effects, disadvantaging would-be protesters who address subjects that arouse virulent opposition or impassioned support or both (or are particularly unpopular with police, *see infra*). Under the negligent-protest regime, as under the one held unconstitutional in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), leaders "wishing to express views" that stir strong feelings among "bottle throwers . . . [must expect] to pay more." *Id.* at 134.

Such an open-ended standard invites "discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Prosecutors enforcing criminal law are under a constitutional obligation not

to initiate cases based on political disagreement. *See Wayte v. United States*, 470 U.S. 598, 608 (1985). But private parties face no such constraint. They may bring suit with the aim of inflicting hardship—including defense costs and intrusive discovery—on speakers and movements whose views they oppose. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983). Indeed, *Claiborne* was decided against a "resonant . . . background" of civil rights leaders and organizations being sued in civil proceedings, under all manner of novel theories, with the aim of silencing their movement. *See* Aimee Edmondson, *In* Sullivan*'s Shadow* 8 (2019).

And as *Snyder v. Phelps* explained, when liability turns on "[a] highly malleable standard," there is also "a real danger of [the jury's] becoming an instrument for the suppression of [First Amendment activity].'" 562 U.S. 443, 458 (2011) (quoting *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510 (1984)). It would be surprising if a jury adjudicated the open-ended tort elements the same way in a case where an injury arose at a demonstration expressing a locally popular viewpoint and one where the defendant is perceived as an "outside activist" and the injured party is a local police officer.

The Fifth Circuit's confident prediction that "owner[s] of football team[s]" should not fear liability based on "creating the conditions" for altercations at games, App.36a-37a, may be right. But if so, it is not because of any First Amendment bar, but instead because jurors will likely value *that* activity so highly they would not render a ruinous verdict.

Having cast aside the specific intent requirement and ostensibly announced an alternative "sufficiently

close relationship" test, the Fifth Circuit was remarkably unforthcoming about what kind of protest its test would protect—and remarkably incurious about the First Amendment implications of the cause of action its test approved. Beyond saying that "legitimate" protest leaders (and Charles Evers and sports team owners) were on the safe side of the line, the Fifth Circuit "left for another day" further guidance as to what protections the Constitution affords to protest leaders sued for unlawful acts committed by others. App.37a. This case-by-case approach—where the contours of federal constitutional protection are revealed gradually and after the fact, *e.g.*, on appeal from damages verdicts against protest leaders—stands in stark contrast to the bright line that *Claiborne* announced.

The majority's assertion that "significant differences," *id.* at 26a, make Evers, who predicted "neck-breaking" and "discipline" awaited boycott violators and whose protest benefitted from the specific acts and threats, *less* culpably connected to violence than petitioner is to the assault that injured respondent, is not easily credited. But even if the proffered distinctions somehow could rationalize the different outcomes, they are manifestly inadequate protection against chilling. It is unfathomable that a present-day Evers, deciding whether to assume a "primary leadership role," 458 U.S. at 926, in a comparable protest would, upon reviewing the Fifth Circuit's opinion, conclude that his adversaries' burden of showing "unreasonableness" (plus a judicial check for "sufficient[] close[ness]") was enough protection against ruinous personal liability. *Cf. Counterman*, 143 S. Ct. at 2116 (noting deterrent effects that stem from fears of "mistaking [the legal

rule]" and "of the legal system getting that judgment wrong").

Those who lost business through the boycott could not be expected to hesitate before suing Evers in negligence for millions (preferably in a district court within the Fifth Circuit). And, to round out the picture, a judge assigned to preside over a suit with novel facts—but one, like these, seeking recovery for injuries inflicted through a violent act a protest leader did not encourage or approve—would find herself at sea in applying the new "test."

What little guidance the opinion did offer in pronouncing the negligent-protest allegations here below the "standard of care" is itself "fraught with implications for First Amendment rights." App.140a. Liability for failing to "dissuade" wrongdoers, App.24a, was effectively rejected in *Claiborne*. *See* 458 U.S. at 925 n.69. And for good reason. Requiring a leader, on pain of massive civil liability, to cease talking about governmental abuses and instead talk unidentified troublemakers out of disorderly behavior would be a particularly troubling instance of compelled speech. Likewise, protesting in places that may heighten tension, while not immune from all regulation, is central to the exercise of First Amendment rights: Abortion opponents need not locate themselves hundreds of feet from those with whom they seek to communicate. *See McCullen v. Coakley*, 573 U.S. 464 (2014). And Dr. King's decision to protest in Birmingham streets teeming with police dogs; the Westboro Baptist Church's choice of the sidewalk outside Matthew Snyder's funeral in *Phelps*; and the Nazi Party's decision to march in Skokie, Illinois, were made because of, not despite, their

likelihood to increase tension. They were no less protected for doing so.

That leaves allegedly encouraging the nonviolent misdemeanor as the Fifth Circuit's remaining basis for declaring petitioner's protest "unreasonable." But that would seem to place non-violent civil disobedience like that championed by Dr. King—where protesters willingly accept jail confinement and risk brutal suppression to call attention to injustice—squarely on the "[il]legitimate," App.19a, 22a, 23a, 25a, *i.e.*, ruinous personal liability, side of the First Amendment line.

And making a protest's "legitimacy" depend on how police respond to it is an especially troubling version of the heckler's veto. If police officials make clear that *they* will meet a protest with a provocative, maximal response, one *they* foresee will raise the risk of rock-throwing, they can thereby subject the leader to strict liability. *See* Police Exec. Res. Forum, *Rethinking the Police Response to Mass Demonstrations* 41 (Feb. 2022) (noting that organization "has been strongly cautioning police agencies against making mass arrests at demonstrations" since 2006). Officials have discretion to select *which* protests to pressure this way, and there is every reason to expect demonstrations against departmental abuses would be their first choice.[4]

[4] These are hardly abstract concerns. Although the opinion recited that "police leadership directed officers to monitor the protest and make arrests, if any were necessary," App.5a, respondent's complaint makes no mention of departmental directives, but *does* advert to a civil rights suit petitioner filed, which resulted in a settlement whereby that department, in exchange for Mckesson's dismissing his unconstitutional arrest claims, paid to expunge the record of the arrest and compensate

In short, the Fifth Circuit's decision squarely conflicts with *Claiborne*, is at odds with many of the Court's most fundamental decisions protecting dissent and protest, and offers in their stead a novel constitutional rule that is less a bulwark against incursions on fundamental freedoms than a Maginot Line.

## II. The Need for This Court's Intervention Is Compelling

The Court's intervention is needed for the same reasons it was in *Claiborne* (and when this case was last here): because the protest rights at issue are "undeniably important," App.138a; because the tort the Fifth Circuit approved is "fraught with implications for First Amendment rights," *id.* at 140a; and because the Fifth Circuit's wait-and-see replacement for *Claiborne* is patently inadequate.

As Judge Willett highlighted, street protests have enabled Americans to secure basic rights and persuade government officials to change unwise, unjust, and unconstitutional policies throughout the Nation's history. App. 69a-70a. Such protests often heighten discomfort, but that is a reason to protect them, not to deny them protection. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[U]nder our system of government," free speech may "serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."). And while those who throw rocks in a protest may be punished, the mere fact that

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Mckesson for the time it detained him. *See* Judgment, *Mckesson v. City of Baton Rouge*, No. 3:16-cv-00520 (M.D. La. Oct. 27, 2017), ECF No. 103.

a rock was thrown is no indicator of a leader's culpability or of the "[il]legitimacy" of the protest itself.[5]

And, as decided cases attest, the *Claiborne* rule, like the First Amendment, is viewpoint-neutral, protecting protesters across the political spectrum. *See Juhl v. Airington*, 936 S.W.2d 640, 642-43 (Tex. 1996) (citing *Claiborne* in dismissing negligence claims against anti-abortion protesters); *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018) (noting that "negligent-speech claim" brought by a political activist attacked at candidate's political rally had been dismissed as "incompatible with the First Amendment). Indeed, it is of particular value to dissenting protesters—be they same-sex marriage opponents in Berkeley or gun control proponents in Cheyenne—who take to the streets to persuade their fellow citizens to reconsider locally orthodox opinions.

This Court has already recognized the "undeniabl[e] important[ce]," App.138a, of the question presented, and the Louisiana Supreme Court's having spoken, there is nothing "hypothetical," *id.* 139a, about the conflict. Until the *Claiborne* rule is reinstated there, the 38 million residents of Fifth Circuit States must exercise their

[5] Although some present-day Americans might have difficulty seeing Martin Luther King as anything *other than* a noncontroversial, nonthreatening figure, only 27% of white Americans had a favorable opinion of Dr. King in 1966, and 50% believed his protests had set back the cause of Black civil rights. *See* Harry Enten, *Americans See Martin Luther King Jr. As a Hero Now, But that Wasn't the Case During His Time*, CNN (Jan. 16, 2023), https://www.cnn.com/2023/01/16/politics/martin-luther-king-jr-polling-analysis/index.html. It would be surprising if Charles Evers was even that well regarded among Claiborne County's white citizens.

First Amendment rights under the threat of lawsuits and damages awards that this Court has squarely held unconstitutional. This Court's intervention should not be "le[ft] for another day." App.37a.

Even outside that circuit, this decision works harm, by providing protest opponents with a roadmap for burdening activists with costly, time-consuming, intrusive litigation, driving up the price of joining with others to express themselves and challenge the status quo.

And the regime's most potent effects will involve "cases" that never make their way to court, let alone this Court. Persons who, as a result of the Fifth Circuit's rule, "refrain from exercising their right[]" to demonstrate, *Gooding v. Wilson*, 405 U.S. 518, 521 (1972), will not be sued for negligent protesting. And while vague *statutes* may be challenged and restrained before speech is chilled, there is no plausible mechanism, other than a decision of this Court, for would-be protesters to obtain judicial assurance that, in the context of a protest, the Constitution protects them against liability for third-party misbehavior they did not intend.

This is not a situation where lower courts are working through tensions in dueling lines of this Court's precedent: Indeed, were the Fifth Circuit majority opinion a brief supporting negligent-protest liability, *Claiborne* would be virtually the only case in its table of authorities. No other court has adopted a rule that even approaches the Fifth Circuit's.

Nor is the prospect that petitioner may defeat liability on the facts or on state law grounds reason for withholding review. The First Amendment issue has been conclusively decided, and there is nothing fact-

specific about the Fifth Circuit's resolution. Even assuming petitioner eventually will prevail on *some* ground, the First Amendment question here is whether the case may proceed "at all." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). It may not.

## CONCLUSION

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

Respectfully submitted,


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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 17-30864

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OFFICER JOHN DOE, *Police Officer*,

*Plaintiff–Appellant*,

*versus*

DERAY MCKESSON; BLACK LIVES MATTER,

*Defendants–Appellees*

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

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June 16, 2023

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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 because 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.

Continuing the string of protests, Mckesson planned a Black Lives Matter demonstration for July

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[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 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).

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 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 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

[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).

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 render 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.

## II

Turning to the analysis, we emphasize as an initial matter that the majority of our prior holdings were not

[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).

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.

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

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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).

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]

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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

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 alleges 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

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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).

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 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

[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.

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 demonstra tion. 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. 458 U.S. at 927.

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 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.

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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.

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 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*

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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.

at 53, 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 unlawful 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]

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

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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 followed—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.

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 tort of malicious interference with business only if "force, violence, or threats" were present. *Claiborne*, 458 U.S. at 895 (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. 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 liability. 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]

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 46. 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

[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.

as the breach foreseeably precipitated the crime of a third party.[11]

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.

* * *

[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.

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 58. 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]

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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.

Start with "what." The First Amendment does 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

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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.

force—are protected unless intended to, and 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

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[11] *Id.* at 928 (citing *Brandenburg*, 395 U.S. at 447); *see Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (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.

[13] *Id.* at 920.

[14] *Id.* at 927.

[15] *Id.*

[16] *Id.*

other specific instructions to carry out violent acts or threats."[17]

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, non-intentional 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

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[17] *Id.*

[18] *Ante*, at 6.

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

not "impose[] restraints" but rather disposes them.[20] And it replaces "precision of regulation" with a sweeping proscription-by-regulation that would swallow 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

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[20] *See id.* at 916.

[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.

the plaintiffs' businesses."[25] Despite all that, the Supreme Court held that Evers's protest-leadership fell within the category of conduct that 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

[25] *Id.* at 891.

[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.

Evers authorized, ratified, or directly threatened *acts* of violence."[33]

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

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

[34] *Id.* at 916.

[35] *Id.* at 918.

[36] *Ante*, at 25.

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

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 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

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

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

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

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 holding 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

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

[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.").

"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 majority 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

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[47] *Ante*, at 26.

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

[49] *Ante*, at 18.

[50] *Ante*, at 27.

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

violent acts of others that the libeler did not intend to incite with his libelous speech.[52] Evers used inflammatory 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] 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

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[52] *See Bradenburg*, 385 U.S. at 447–48.

[53] *Claiborne*, 458 U.S. at 936–37.

[54] *Id.* at 929.

[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).

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 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

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

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

[61] *Id.*

[62] *Id.*

[63] *Ante*, at 25.

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.

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

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

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

[66] *Id.* at 902.

[67] *Id.* at 929.

[68] *Id.* at 916–17, 927.

[69] *Id.*

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

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.

1

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

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[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)).

[72] *Id.* at 925–29.

[73] *See id.* at 927.

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 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

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

[75] *See id.* at 906–34.

[76] *Ante*, at 17.

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 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.

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[77] *Ante*, at 31.

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

[79] *Id.* at 927.

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 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 *commit* 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

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

[81] *Id.*

[82] *Id.*

[83] *Id.*

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 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

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[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).

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

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 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

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

[88] *Ante*, at 31.

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

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 activity" 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

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Ante*, at 2.

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

[96] *Ante*, at 21.

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.

2

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 incitement 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)

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

[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).

"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 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, howe he led the protest, or what he said or did to incite violence.

[103] *Ante*, at 24.

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

- 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

[105] *Ante*, at 18.

trick.[106] It also said that Evers "did not exceed the bounds of protected speech."[107] I do not read this langauge 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 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 =

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

[107] *Id.* at 929.

[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.").

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 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.

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

## 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 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—

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[113] *Id.* at 927.

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

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 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.

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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).

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.

In all other respects, I concur.[117]

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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).

[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 B

## SUPREME COURT OF LOUISIANA

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No. 2021-CQ-00929

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OFFICER JOHN DOE, *Police Officer*,

*versus*

DERAY MCKESSON, ET AL.

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

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March 25, 2022

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**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 Rescuer'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 demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers," that the defendants "conspired to violate the

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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.

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 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-

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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), <u>cert. granted, judgment vacated</u>, ___ 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….").

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 Phoeniz, 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 pertinent 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 certification 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 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 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."). 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.

* * *

. . . The district court erred by dismissing Officer 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. Mckesson liable 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 Professional Rescuer's Doctrine[4] (though not so-

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[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).

[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.

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 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

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**Beaupre v. Pierce County**, 161 Wash.2d 568, 576, 166 P.3d 712, 717 (2007).

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, 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

[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.

> 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 exceptions, 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, **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

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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. . . .

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 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.

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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").

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.

**SUPREME COURT OF LOUISIANA**

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No. 2021-CQ-00929

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OFFICER JOHN DOE, *Police Officer*,

*vs.*

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

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

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March 25, 2022

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**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 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

[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.

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 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

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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 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.

> 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, 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).

**SUPREME COURT OF LOUISIANA**

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No. 2021-CQ-00929

---

OFFICER JOHN DOE, *Police Officer*,

*versus*

DERAY MCKESSON, ET AL.

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

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March 25, 2022

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On Certified Question from the United States Court of Appeals for the Fifth Circuit **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

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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.

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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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.").

**SUPREME COURT OF LOUISIANA**

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No. 2021-CQ-00929

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OFFICER JOHN DOE, *Police Officer*,

*vs.*

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

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

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March 25, 2022

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**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.

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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

## 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.

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.

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legal cause," "legal cause," and "proximate cause."

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 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

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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.

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 question 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

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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 defined and analyzed separately. *See also Morris v. Orleans Par. Sch. Bd.*, 553 So. 2d 427, 429 (La. 1989).

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 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]

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[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.

[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

*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*

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

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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.

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 liability, 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,

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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

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]

The plaintiff alleges Mckesson knew of previous protests sponsored by or identified with Black Lives Matter turning violent. The petition cites prior

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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 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."

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 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.

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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 he prohibition in the statute is designed to protect from the harm or damage which ensues from its violation."

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.

**"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 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,

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 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

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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.)

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.

**SUPREME COURT OF LOUISIANA**

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No. 2021-CQ-00929

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OFFICER JOHN DOE, *Police Officer*,

*vs.*

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

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

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March 25, 2022

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**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

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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.

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. Wal-Mart Stores, Inc.*, 99-1222, p. 4 (La. 11/30/99), 707 So.2d

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[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:

> 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.

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 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 C**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-30864

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OFFICER JOHN DOE, *Police Officer*,

*Plaintiff–Appellant*,

*versus*

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

*Defendants–Appellants*

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

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ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

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June 25, 2021

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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 Mckesson. The theory of liability accepted by this

[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.

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] before engaging in

[2] Supreme Court of Louisiana Rule XII, §§ 1–2 provides that a federal court of appeals may, upon its own motion, certify determinative questions of Louisiana law when it appears as though there is no clear controlling precedent from the Supreme

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 Suppl. Br., Dec. 18, 2020, Doc. No. 00515679716; Doe Suppl. Br.,

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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.

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 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.

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

[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))).

head injury, lost wages, "and other 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 record

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 D**

**SUPREME COURT OF THE UNITED STATES**

No. 19–1108

DERAY MCKESSON

*v.*

JOHN DOE

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 police 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 assault is the "particular risk" for which Officer Doe could recover 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 liability 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 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." *Claiborne Hardware*, 458 U. S., at 916–917 (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 (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 federalism" 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 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*, 416 U. S., at 391. 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*, 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 address 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 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.

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 E**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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No. 17-30864

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OFFICER JOHN DOE, *Police Officer*,

*Plaintiff-Appellant*,

v.

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

*Defendants-Appellees*

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Appeal from the United States District Court for the Middle District of Louisiana

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December 16, 2019

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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 other officers prepared to make arrests. Officer Doe was one of the officers ordered to make arrests. DeRay

[1] This case comes to us on a motion to dismiss, so we treat all well-pleaded facts as true.

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. 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).[2]

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

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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.

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]

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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 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

Such failure to establish diversity jurisdiction 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, 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; s*ee infra* Part

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by omitting the citizenship of its constituent members.

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.

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

[5] All three judges on this panel agree with this conclusion.

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 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.[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 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

[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.

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 proximately 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]

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

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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 advocacy. 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.

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 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

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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.

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.[9] We emphasize that this means

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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

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 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

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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).

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 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 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.[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 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

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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.

[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.

court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings consistent with this opinion.[12]

AFFIRMED in part, REVERSED in part, and REMANDED.

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[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 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. Second, the Constitution that Officer Doe swore to protect itself

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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).

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

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[6] Maj. Op. at 18.

[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 protect

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 violated, and Mckesson owed no pre-existing duty to Doe because

that 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 nothing to calm the crowd," but under *Claiborne*

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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 10.

[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 Posecai*, 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.

*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 constitutionality "could be avoided by interpretation

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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).

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 citizen, it is not my court."[20]

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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. 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.

[20] *Thompson*, 913 F.3d at 471 (quoting *Justice Scalia Honors*

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 authoritative interpretation of

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*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)).

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]

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[23] *Carmouche*, 449 F.3 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

But this case seems a Certification 101 exemplar 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 speech"

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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

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

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not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Id*. at 920.

[28] *Matal v. Tam*, 137 S. Ct. 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")).

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."[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 legal

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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

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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district court denied Doe's request to file an amended complaint. The controlling complaint for the purposes of our analysis 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
- 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 tort,[44] I disagree with the suggestion that directing *any* tort would strip a protest organizer of First

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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 18 ("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.

[44] La. Rev. Stat. Ann. § 14:97.

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 led.[50]

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[45] Maj. Op. at 13 (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.

[50] *Id.* at 914–15 ("[T]he petitioners certainly foresaw—and directly intended—that the merchants would sustain economic

In other words, 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 because violence is a tortious activity that unequivocally falls outside First

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 Bradenburg*, 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.").

Amendment protection.[51] This violence/nonviolence distinction[52] is cemented later in *Claiborne Hardware*

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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 Bradenburg*, 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 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).

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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[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).

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

"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 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

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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.

[60] *Id.* at 933–34.

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 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.

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[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. . . .").

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).

* * *

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—for at least two reasons.

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[64] *See*, *supra*, note 52.

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 tortious conduct, not intended to incite immediate violence. The Constitution does not insulate violence, but it does insulate citizens from responsibility for *others'* violence.

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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).

"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. Failing that, and given the flimsiness of Doe's complaint, I would hold that the First Amendment shields Mckesson from tort liability for

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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).

the rock thrower's criminal act. In all other respects, I concur.

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

———

CIVIL ACTION NO. 16-00742–BAJ-RLB

———

OFFICER JOHN DOE

VERSUS

DERAY MCKESSON ET AL.

———

September 28, 2017

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**RULING AND ORDER**

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, 102 S.Ct. 434, 70 L.Ed.2d 492 (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, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (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, 102 S.Ct. 3409 (quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (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 Dismiss (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 demonstrator "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 Matter" 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 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 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, 91 (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, 102 S.Ct. 3409. 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, 129 S.Ct. 1937. 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, 84 S.Ct. 1316, 12 L.Ed.2d 377 (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, 84 S.Ct. 1316 (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 Proposed 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 association [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 “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

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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, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

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

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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, 102 S.Ct. 3409 (holding that liability may only be imposed on a person for the tortious acts of others with whom the

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, 129 S.Ct. 1937. 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 association 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

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person associated if his "*public* speech" meets certain criteria (emphasis added)).

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, 129 S.Ct. 1937. 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, 129 S.Ct. 1937. 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

[3] Black Lives Matter Network, Inc., indeed has filed a motion to dismiss in the event that the Court permitted Plaintiff to

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 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

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amend his Complaint to add it as a Defendant. *See* Doc. 68.

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, 83 S.Ct. 227, 9 L.Ed.2d 222 (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 September, 2017

*/s/ Brian A. Jackson*
**BRIAN A. JACKSON, CHIEF JUDGE**
**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

## APPENDIX G

**IN THE UNITED STATES**
**COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-30864

———

OFFICER JOHN DOE, *Police Officer*,

*Plaintiff–Appellant*,

v.

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

*Defendants–Appellees*

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Appeal from the United States District Court for the Middle District of Louisiana

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January 28, 2020

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ON REQUEST FOR A POLL
Opinion 945 F.3d 818 (5th Cir. Dec. 16, 2019)

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

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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).

force governmental and 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 are too low can . . . harm the electoral process by

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 consequence[3] Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to violate traffic rules or other laws that the rest of us are

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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.").

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

dismissed. *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 H

**IN THE UNITED STATES**
**COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 17-30864

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OFFICER JOHN DOE, *Police Officer*,

*Plaintiff-Appellant*,

v.

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

*Defendants-Appellees*

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Appeal from the United States District Court
for the Middle District of Louisiana

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August 8, 2019 On Petition for Panel Rehearing

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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 opinion 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 associated with Black Lives Matter, concerning police practices. The Baton Rouge Police Department

[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.

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. *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. 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 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 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." *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).

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 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]

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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.

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 of being sued.[7] Therefore, the judgment of the district

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[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.

[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

court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings not inconsistent with this opinion.[8]

AFFIRMED in part, REVERSED in part, and REMANDED.

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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 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 I

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 17-30864

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OFFICER JOHN DOE, *Police Officer*,

*Plaintiff-Appellant*,

v.

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

*Defendants-Appellees*

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Appeal from the United States District Court for the Middle District of Louisiana

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April 24, 2019

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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 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 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

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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.

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. 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]

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

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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.

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 '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.

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 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.

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

[4] Officer Doe has complained of the lack of discovery in this

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 court is AFFIRMED in part, REVERSED in part, and the case is REMANDED for further proceedings not inconsistent with this opinion.[6]

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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 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

AFFIRMED in part, REVERSED in part, and REMANDED.

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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).