No. 19-1108

In the Supreme Court of the United States

DERAY MCKESSON,

Petitioner,

v.

JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition is remarkable for what it does not say. Respondent could hardly dispute the importance of the question presented; it is not every day that a circuit judge forcefully repudiates a published decision he twice joined; or that eight judges call *sua sponte* for en banc rehearing—or that so eminent and diverse an array of First Amendment scholars and advocates file petition-stage briefs imploring the Court to reverse a lower court decision.

Neither does respondent deny the logical import of the Fifth Circuit's rule: The Selma-to-Montgomery March—hailed by President Johnson as a turning point in the Nation's history on par with Lexington and Concord—should be considered "unpeaceful, illegal, dangerous activity," undeserving of First Amendment consideration. And he nowhere disputes what the petition and amici demonstrate: that the negligent-protesting tort the Fifth Circuit blessed—subjecting protest organizers to limitless personal damages liability based on determinations that another person's independent, unprompted wrongdoing was a "consequence" of a breach of the organizer's "duty of care"—will dramatically inhibit the exercise of rights to speak, petition, and assemble.

Respondent's argument against review is confined principally to reprising the assertions of the majority opinion below: that *Claiborne* did not foreclose negligence-based liability for someone else's wrongdoing and that First Amendment protections are limited to protests that indisputably comply with every law and regulation. (The only new ground the opposition breaks are baseless contentions that the

petition "ignored" allegations that played no role in the Fifth Circuit decision and an ill-considered argument that negligent-protest liability is wise policy.)

But permitting personal liability for an unidentified person's criminal acts that a protest leader neither directed, authorized, nor ratified merely because the acts occurred during the same protest, is nothing less than guilt by association. It contravenes not only *Claiborne*, but other landmark decisions that forbid foreseeability-based liability and demand precision of regulation when First Amendment activity is burdened. A departure so stark, indefensible, and immediately consequential for First Amendment rights warrants this Court's correction.

I. The petition properly states the First Amendment question this case raises.

Respondent's scattershot suggestions that the petition took a "non-factual, overbroad" view of the Fifth Circuit's decision, Opp. 18—or "ignore[d]" *id.* at 17, allegations that support finding petitioner incited violence or "ratif[ied]… the perpetrator's act," *id.* at (i), (ii)—should not detain the Court.

Had the courts below viewed respondent's "ratification" allegation as plausible, they would have denied Mckesson's motion under *Claiborne*'s core rule that a protest leader could be held liable only for acts he ratified or authorized, *see* 458 U.S. at 927. They would have had no need to debate, at length, in multiple opinions, the actual question here: whether derivative liability is permissible when authorization and ratification of third-party wrongdoing are *absent*.

The Fifth Circuit, however, reached that question, because it held respondent's bare-bones allegation of ratification was implausible. The majority, after citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), found that respondent had not "pled facts that would allow a jury to conclude that Mckesson … knew of the attack and specifically ratified it." Pet. App. 10a. That ruling was surely correct: The sole basis respondent identified for finding "ratification" was an allegation that Mckesson told a journalist "'[t]he police want protesters to be too afraid to protest,'" and "that he intended to plan more protests." *See* Opp. (ii) (quoting Compl. ¶24).

The same goes for respondent's assertions that petitioner was "in Baton Rouge for the purpose of demonstrating, protesting, and rioting" and "did nothing to calm the crowd and, instead, … incited the violence[.]" *Id.* (quoting Compl. ¶¶11, 19). The first allegation obscures critical constitutional distinctions between demonstration and protest on the one hand, and riot on the other. And *Claiborne* squarely held that a leader's mere inaction in the face of third-party violence is a constitutionally insufficient basis for liability. *See* 458 U.S. at 929 n.73. In any event, bald assertions of "incitement" and "riot" are exactly the kind of legal conclusions federal courts do not accept as "true" just because they are typed in a complaint. *See Twombly*, 550 U.S. at 555. As Judge Willett highlighted, respondent's complaint is bereft of any allegation that petitioner uttered "a single word encouraging violence," *Nwanguma v. Trump*, 903 F.3d 604, 610 (6th Cir. 2018). *See* Pet. App. 44a. And not even the officers who arrested him on the scene accused petitioner of inciting or rioting. They claimed only to have found probable cause that he committed

a non-violent traffic-safety misdemeanor—and even that charge was dropped in short order and the record of the arrest expunged. *See* Pet. 25 n.7.

Respondent devotes whole pages to rehearsing complaint allegations describing violent acts committed at demonstrations elsewhere prompted by police killings of Black citizens—including at protests petitioner indisputably did not attend. Opp. 11-13. (Respondent nowhere alleged Mckesson participated in, directed, or encouraged violent acts at *any* protest.) The petition did not dwell on *those* allegations because it argued that, even *accepting* that it was foreseeable that someone on the scene in Baton Rouge might commit a violent act, such foreseeability is constitutionally insufficient for liability.

That said, such allegations do not distinguish this case from storied civil rights protests: The Selma March was preceded by "Bloody Sunday." Nor, for that matter, do they distinguish the case from *Nwanguma*, *see* 903 F.3d at 608 n.2 (noting plausible "allegations of similar [violent] occurrences at other Trump for President rallies"), and certainly not from *Claiborne*. As respondents there stressed, Charles Evers, the leader of the Port Gibson boycott, had published a memoir in which he admitted to keeping a cache of hand grenades and explained that Black citizens "have to" abide by boycotts because, otherwise, "somebody would send a brickbat through a window around midnight with a telegram saying, 'You shopped at such and such a place,'" Resp. Supp. Br. at 4, No. 81-202. Evers countered—successfully—that such evidence was irrelevant in *Claiborne*, because the quoted passages described a prior boycott, not the Port Gibson one. Pet. Rep. Br. 10 n.9.

II. The conflict between the Fifth Circuit's decision and this Court's foundational precedents is indisputable.

Respondent spends most of the opposition repackaging arguments made by the majority below: (1) that his tort suit satisfies *Claiborne*'s standards for direct and derivative liability; (2) that the "situations" in the two cases are so different as to render the *Claiborne* rule irrelevant; and (3) that political protesting on a public road, in violation of a traffic-safety law, is "constitutionally illegal," Opp. 7—and that the alternative to the Fifth Circuit's rule would place politically-motivated wrongdoing beyond the government's regulatory power. Opp. 16. None of these arguments has merit.

1. As the petition explained, it is simply impossible to read *Claiborne*'s specific holding that imposing liability on a protest leader for someone else's harm-causing behavior requires proof of "directing, authorizing, or ratifying [the conduct]," as *also* permitting such derivative liability based on mere negligence. *Claiborne*, 458 U.S. at 927. The premise of the Court's opinion was that the same First Amendment principles that demand personal, culpable intent for incitement or associational liability limit States' power to impose civil liability for a criminal act someone else commits at a political protest. *See id.* at 458 U.S. at 919, 927 (citing *Scales v. United* States, 367 U.S. 203 (1961), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). *Claiborne*'s exposition of its derivative-liability rule uses variants of the term "specific intent" nine times, *see id.* at 920, 925, 932; *see also id.* at 930 (liability

permissible only for "conduct of which [organizer] had knowledge and specifically ratified").

If these restrictions could be evaded simply by characterizing another person's criminal act as a "consequence[]" of the organizer's "*own*," Opp. 4, "unlawful" breach of a universal duty of reasonable care, Pet. App. 22a, *Claiborne*'s result would be inexplicable. The facts there surely supported "negligent protesting" liability—the harms sued upon could readily be described as consequences of a breach of a duty Evers owed to "conduct his [protest]" with reasonable care for targets' safety. *See* Pet. App. 17a. In fact, such arguments *were* made—and rejected by this Court. Respondents urged that Evers's liability be sustained based on his role as the boycott's "manager[]" and the principle that someone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics...." 458 U.S. at 897 n.20 (citation omitted). *Accord id.* at 925 n.69 (rejecting failure-to-repudiate liability, citing the absence of an existing duty to victims). Indeed, the Court rejected these arguments in the face of evidence that "violence contributed to the success of the boycott," *id.* at 933, that Evers himself advocated that defectors' necks be broken, *id.* at 902, and that NAACP leaders "certainly foresaw—and directly intended—… [the] economic injur[ies]" on which respondents sued, *id.* at 914.

Respondent also repeats the Fifth Circuit's specious theory that his complaint's allegations actually met *Claiborne*'s test for derivative liability, because they accused petitioner of "directing" *something* unlawful, *i.e.*, protesting on a public road.

But *Claiborne*'s rule requires not merely wrongful intent, but *specific* intent: "A finding that [a leader] authorized, directed, or ratified *specific* tortious activity would justify holding him responsible for the consequences of *that activity*." 458 U.S. at 927 (emphasis added). Third party rock-throwing is not a "consequence" of impeding traffic. *See* Pet. 23.

2. The opposition, like the Fifth Circuit's third opinion, posits that *Claiborne* and this case involve entirely different "situation[s]," Opp. 4, 8, 16, insisting repeatedly that the derivative-liability claim here involves "unpeaceful, illegal, and dangerous activity," *see id.* at 8, 9, 14, 15. But this claim rests not on "[]factual" distinctions, *id.* at 17, but rather on the kind of *ipse dixit* labeling that *Claiborne* rejected.

Although the opposition uses "unpeaceful, illegal, and dangerous activity" as its mantra, it nowhere explains what the first and third adjectives mean—beyond that the political demonstration Mckesson led, like many demonstrations, carried a risk that unsolicited third-party violence might occur. Respondent makes no suggestion that petitioner himself did or directed others to do something "unpeaceful." And while marching on a public street is potentially "dangerous," in the same way that driving below the minimum speed is, to the extent that label refers to a prospect that tensions might escalate and some person might act violently, it would apply equally to the *Claiborne* boycott, whose leader was well acquainted with the harms that are sometimes inflicted on boycott defectors, s*ee* p.4, *supra*. The 1968 Memphis March, where violent interlopers appeared at Dr. King's side, would also qualify as "dangerous," as would the event in

Terminiello v. City of Chicago, 337 U.S. 1 (1949), whose organizer surely had an inkling that windows would be broken, s*ee id.* at 16 (Jackson, J., dissenting). The organizer of the political rally in *Nwanguma* could expect that hecklers would be violently attacked, *see* 903 F.3d at 608. And so could organizers of the countless rallies protesting police abuse since George Floyd's killing.

3. That leaves "illegal" as the lone (alleged) basis for distinguishing between the two cases. Respondent argues that "unlawful protest[ing]" is "constitutionally illegal" and that *Claiborne* "made clear" that *only* "lawful" "expression, association, assembly, and petition[ing]" is constitutionally protected. Opp. 4, 7, 5.

These arguments fail to confront the actual constitutional holding of *Claiborne* and the First Amendment principles it enforces. This Court did not "ma[k]e clear" in *Claiborne* that all "unlawful activity" is "unprotected." Opp. 5, 13. It said nearly the opposite: that otherwise permissible prohibitions and civil liability rules can be unenforceable "in the context of [First Amendment] activity," because of the burdens that loose and attenuated attributions of responsibility impose on free expression. *See* 458 U.S. at 916 & n.48.

No one argues that the Constitution "immunizes," Opp. 16, politically-motivated violence—or politically-motivated road-blocking, *See* Pet. 26-27. But, as *Claiborne* affirms, the First Amendment *does* deny States carte blanche to deal with protest leaders' impeding traffic by subjecting them to standardless and limitless personal liability for damages caused by others' unsolicited acts simply because they occurred

in the same protest. *Compare* Opp. 7 ("[Because] Baton Rouge permissibly barred occupying highway … even lawful speech would be unprotected there") *with NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) ("a governmental purpose to control … activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.").[1]

The reasons why the all-or-nothing First Amendment theory is so wrong are laid out comprehensively in the *Claiborne* opinion. This Court explained that the stringent liability limitation follows from the requirement of "precision of regulation" when First Amendment activity is at issue. 458 U.S. at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963). Precision is required to avoid indirect suppression of First Amendment activity. To say, as do both the Fifth Circuit and the opposition, that "no protected First Amendment activity [is] suppressed" by the negligent protest regime, Pet. App. 22a, is to ignore courts' responsibility "to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech." *FEC v. WRTL, Inc.*, 551 U.S. 449, 497 n.5 (2007) (Scalia, J., concurring). *Cf.* Opp. 17 (faulting petition for addressing Fifth Circuit rule's implications for "other situations").

[1] The petition cited multiple decisions of this Court enforcing First Amendment restraints in cases where the unlawfulness of the citizen's action was undisputed. *See* Pet. 26-27; *see also Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018). Respondent recognizes, albeit obliquely, that these conflict with the Fifth Circuit rule. Opp. 14.

The negligence-*plus*-misdemeanor hybrid on which the Fifth Circuit appeared to settle is no less an affront to the First Amendment than is liability based purely on foreseeability. As *amici* highlight, the rule does not merely relegate nonviolent, civilly disobedient protest to a low "rung" of First Amendment protection, it pushes it off the ladder altogether. And, in real-world conditions, the rule will make the *Claiborne* protection a virtual dead letter, applicable only to the trivial subset of demonstrations that could not be *alleged* to have violated *any* law.

Indeed, the Fifth Circuit's new regime lacks both clarity and coherence. It cannot be constitutional to hinge liability for another person's act of violence on an individual who steps in the street, merely because the two acts occurred in a protest led by the street marcher. *See Claiborne*, 458 U.S. at 925 (First Amendment forbids "guilt *for* association"). And the Fifth Circuit gave no indication whether First Amendment protection is overcome by every (alleged) statutory violation or some subset or whether allegations of negligence, without any "plus," can suffice. Such radical uncertainty is the opposite of this Court's longstanding regime, which makes clear to all that a derivative-liability claim against a protest leader is dead on arrival, absent a plausible basis for asserting that the leader himself shared the harm-doer's specific culpable intent.

III. Respondent's policy arguments do not justify jettisoning First Amendment protections or withholding review.

Respondent's various policy arguments fail of their own accord and offer no possible reason for this Court to leave the Fifth Circuit decision uncorrected.

Claiborne itself held that ordinary tort policies that support attenuated liability in other contexts do not control when First Amendment activity is present, because of the danger that damages lawsuits will "discourage[]," Opp. 15, not rock-hurling but *protesting*. A would-be leader will "think twice," *id.*, before taking to the streets, when doing so hazards costly litigation and personal liability for acts he did not encourage, committed by unknown persons he had no power to exclude from public streets. "Destruction by lawsuit," 458 U.S. at 932—filing cases in order to suppress disfavored viewpoints—is not a problem in ordinary litigation over walkway-shoveling. *See id.* And "simple justice," *id.*, better describes a regime that deters rock-throwing at street demonstrations by holding *rock-throwers* liable. *See Bartnicki v. Vopper,* 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

That many Americans might join respondent in welcoming a regime that effectively deters "provocative" demonstrations on sensitive subjects at sensitive junctures, such as in the "angry" aftermath of "police-involved shootings of minorities," Opp. 13, 10, is evidence in favor, not against, this Court's intervention. The First Amendment rejects that view, protecting protest so those who espouse dissenting

opinions—including ones popular or unpopular "with bottle throwers," *Forsyth v. Nationalist Movement*, 505 U.S. 123, 134 (1992)—may express themselves and so their fellow citizens may hear *from* them, especially when grievances concern abuses of office by government agents or a "system that ha[s] denied them the basic rights of dignity and equality," *Claiborne*, 458 U.S. at 918. *Cf. City of Houston v. Hill*, 482 U.S. 451, 463 (1987) (freedom "to oppose or challenge police action … is one of the principal characteristics … [of] a free nation"). This Court has implemented these protections in precedents establishing—through stringent, bright-line rules—that an individual's rights to speak, assemble, and petition may not be abridged based on *someone else*'s violent acts or intentions. The Fifth Circuit's decision—and its insistence that no First Amendment protection is implicated—flout that fundamental principle.

Conclusion

The petition for a writ of certiorari should be granted and the Fifth Circuit's decision reversed.

Respectfully submitted,

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