No. 19-1108

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

Brief of Officer John Doe, Respondent

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Question Presented

Petitioner presents the following question:

> 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 there, when it is undisputed that the leader neither authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind? Cert. Ptn. (i).

Respondent, John Doe Police Officer, argues that (i) the First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's own negligent, illegal, and dangerous activity that poses a risk of serious harm to others and (ii) police officers need tort protection from such illegal activity and serious harm.

Rule 15 Statement

Petitioner through the "Question Presented" avers that "it is undisputed that the leader neither authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind." The Complaint/Amended Complaint do not allege that McKesson authorized or directed the specific act (this specific person to throw this specific object). They do allege that prior violent conduct created a well known pattern of violence at Black Lives Matter protests and that McKesson ratified the violence at the prior protests and at the Baton Rouge protest by taking no action to stop the BLM protestors from throwing objects at police. "By July 9, 2016, Defendants were in Baton Rouge for the purpose of staging a protest. Protests in other cities staged by Defendants resulted in violence and property loss. DEFENDANTS conspired to violate the law by planning to block a public highway." Plt. Comp. ¶ 10. "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." Plt. Comp. ¶11. ". . . . DeRay McKesson was in charge of the protests and he was seen and heard giving orders throughout the day and night of the protests." Plt. Comp. ¶17. The Complaint references the looting and throwing objects at police and, "Defendant DeRay McKesson was present during the protest and he did nothing to calm the crowd and, instead, he cited the violence on behalf of the Defendant BLACK LIVES MATTER." Plt. Comp. ¶19. "Following the violence, DEFENDANTS took credit/blame for the protest and riot."Plt. Comp. ¶23. "On Sunday, DeRay McKesson told the New York Times, `The police want protesters to be too afraid to protest.' He suggested that he intended to plan more protests." Plt Comp. ¶24. The Amended Complaint provides greater detail regarding the history of BLM violence against police in multiple protests led by McKesson, who refused to disavow the violence. See e.g., ". . . .When confronted with the inexcusable violence, DeRay McKesson justified the violence as looking for justice. He was prompted several times to say that he did not condone the violence, but he would not." Am.Comp.¶9.

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Summary of the Argument

The First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's *own* negligent, illegal, and dangerous *activity*. This Court did not hold otherwise in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1964). *Claiborne* involved a lawful boycott (and various accompanying activities), in which certain persons (but not all) engaged in violent activity, and a state court held the whole boycott illegal, based on the violent acts of some, and imposed liability on all involved.

Given First Amendment protections, this Court in *Claiborne* had to separate constitutionally protected activities and persons from those not protected. In that context, this Court held that those *not* engaged in illegal acts could not be held liable for *others*' illegal acts, based on their speech, unless the person authorized, directed, or ratified the perpetrator's act, or engaged in or incited violence itself. But here the issue is whether the First Amendment protects one from ordinary tort liability for the reasonably foreseeable consequences of one's *own* negligent, and illegal *activity*, and *Claiborne* did not find First Amendment protection for that. In fact, *Claiborne* recognized protection for *peaceful, lawful* activity, *not* for unpeaceful, unlawful activity of the sort at issue here. (Part I.)

A contrary rule would encourage negligent, unpeaceful, and illegal behavior at the expense of others and, in particular, would expose law enforcement officers to serious harm that tort liability is intended to discourage. (Part II.)

Argument

I.

The First Amendment does not protect against tort liability for the foreseeable consequences of one's own negligent, illegal, and dangerous activity posing a risk of serious harm to others.

When a demonstration that is lawful and peaceful, and thus constitutionally protected (as expression, association, assembly, or petition), transforms into an unlawful, unpeaceful, and dangerous activity—with participants unlawfully moving onto a highway, blocking traffic, confronting police trying to clear the highway, looting a store for objects to throw at police, and throwing objects at police[1]—does the First Amendment protect the leader of that illegal activity from the reasonably foreseeable consequences of his *own* negligent, illegal, and dangerous *activity* under ordinary tort law?

No. This is so because (inter alia) (**A**) *Claiborne* involved liability on those engaged in lawful activity for the unlawful acts of *others*, not the consequences of one's *own* illegal acts at issue here, (**B**) *Claiborne* does not preclude liability for the foreseeable consequences of one's *own* illegal acts, which are beyond First Amendment protection, and (**C**) a contrary rule would harm police officers, the public, and the rule of law.

[1] *Doe v. Mckesson*, 945 F.3d 818, 823 (5th Cir. 2019). The Fifth Circuit's use of Amended Complaint allegations is appropriate because amendment was deemed futile under *Claiborne*, which doesn't control, so leave to amend should be granted. *Id*. at 824.

A. *Claiborne* involved limiting the liability on those engaged in lawful activity for the unlawful acts of *others*, not the foreseeable consequences of one's *own* illegal acts at issue here.

Claiborne involved a unique problem and solution not at issue here. The problem was that a state court had "concluded that [an] entire boycott was unlawful," due to the presence of "'force, violence, or threats'" by "'certain of the defendants,'" but not all, and so imposed liability on lawful and unlawful defendants alike among those involved in certain roles and activities in the boycott. 458 U.S. at 895 (citation omitted). This was an overbroad remedy given the presence of some activity protected by the First Amendment.

The solution required the *Claiborne* Court to make two sets of distinctions. First, it had to separate activities protected by the First Amendment from activities not so protected. As discussed in Part I(B), it found that peaceful, lawful activity that falls within First Amendment categories (expression, association, peaceful assembly, petition) is protected, but unpeaceful, illegal activity is *not* protected—*even if* it includes some speech, association, assembly, or petition.

Second, the *Claiborne* Court had to separate those engaging in peaceful, lawful (and so constitutionally protected) activities from those doing unpeaceful, unlawful (and so constitutionally unprotected) activities.

In separating the lawful from the unlawful, the *Claiborne* Court provided precise guidelines to protect the lawful from liability for the acts of lawbreakers. In that con-

text, *Claiborne* held that the lawful are not liable for the illegal actions of *others* unless they "authorized, directed, or ratified specific tortious activity," and even then liability would be limited to the consequences of that specific activity. *Id.* at 927. However, those engaging in illegal activity that causes harm may be held liable: "Unquestionably those 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 926 (emphasis added).

This case involves the foreseeable consequences of Petitioner DeRay Mckesson's *own* illegal actions, not his speech or advocacy. As a result, the legal consequences of his illegal activity is not shielded by the First Amendment and is not protected by *Claiborne*. Here, against the backdrop of previous violent protests turned riots, Mckesson planned and led an unlawful protest situated in front of police headquarter on a public highway for the purpose of "rioting,"[2] and engaging police and this is when the serious harm to Respondent Officer John Doe occurred for which Mckesson would be held liable. Consequently, it does not involve the *Claiborne* situation where a person was engaged in peaceful, lawful, and constitutionally protected First Amendment

[2] For example, as the Fifth Circuit described some of the facts alleged in the Amended Complaint (which at this stage must be accepted as true with all favorable inferences to Officer Doe), Mckesson "was the prime leader and an organizer of the protest," he "led the protestors to block the public highway," *Mckesson*, at 823, he then "led protestors down a public highway in an attempt to block the interstate," "the protestors followed," *id.* at 828, and "he knew he was in violation of the law and livestreamed his arrest," *id.*. In his presence, "some protestors began to throw full water bottles, which had been stolen from a nearby convenience store," and he "did nothing to prevent the violence or calm the crowd, and ... 'incited the violence.'" *Id.* at 823 (citation omitted). Moreover, he "traveled to Baton Rouge 'for the *purpose* of ... rioting.'" *Id.* at 832 n.9(emphasis added by Fifth Circuit) (citing Amended Complaint). Of course, *Claiborne* made clear that "riot[ing]" lacks First Amendment protection. 458 U.S. at 912.

activity and the government (by law) sought to make that innocent person liable for the illegal acts of others. *Claiborne* does not control on this fundamental difference alone.

B. *Claiborne* does not preclude liability for the foreseeable consequences of one's *own* illegal acts.

Claiborne made clear that one may be liable in tort for the reasonably foreseeable consequences of one's *own* illegal acts by holding that (i) unpeaceful, illegal acts are not protected by the First Amendment and (ii) those engaged in unlawful acts are liable for the consequences of their own illegal actions.

Regarding the scope of First Amendment protection, *Claiborne* made clear that, even if activity involves expression, association, assembly, and petition, it is only protected if it is peaceful and lawful. Unpeaceful, unlawful activity is unprotected even if it is accompanied by, or associated with, expressive activity, e.g., chanting slogans while breaking the law. The First Amendment provides no protection for illegal activity. So if, as alleged here, a "demonstration" illegally starts on a public highway and becomes a "riot," those involved lose all First Amendment protection. And that is the end of any *Claiborne* and First Amendment constitutional analysis: Absent First Amendment protection, there is no basis to interrupt the ordinary workings of state tort law imposing liability for negligence.[3]

[3] The Fifth Circuit found that Officer Doe "plausibly alleged" the elements of tort neglgence, *Mckesson*, 945 F.3d at 827, so under ordinary rules his "claim for relief is sufficiently plausible to allow him to proceed to discovery," *id.* at 828. And if the allegations are proven, Mckesson would be liable for Officer Doe's serious physical, economic, and other injuries resulting from being struck in the face by a rock or piece of concrete hurled by a participant in the demonstration that turned into an alleged riot with objects being hurled at police and in which Mckesson was seen and heard to be giving orders that others fol-

Of course, *Claiborne* repeatedly emphasized that protests there were peaceful and lawful, e.g, it began by "not[ing] that certain practices generally used to encourage support for the boycott were uniformly *peaceful* and *orderly*." 458 U.S. at 903 (emphasis added). "The few marches associated with the boycott *were carefully controlled by black leaders*." *Id.* (emphasis added). "The police made *no arrests*—and *no complaints* are recorded—in connection with the picketing and occasional demonstrations supporting the boycott." *Id.* This Court repeatedly emphasized that "peaceful" activity had First Amendment protection. *Id.* at 908 n.43 (right "'peaceably to assemble'"), 909 ("assemble peacefully" and "peaceful march and demonstration"), 910 ("peaceful pamphleteering"), 912 (not "through riot or revolution"). And state "power to regulate economic activity" does not include "a comparable right to prohibit *peaceful* political activity." *Id.* at 913 (emphasis added). So that is the sort of activity protected by the First Amendment. But that "peaceful" and "carefully controlled" activity is a far cry from the activity at issue here, alleged to be a "riot," which *Claiborne* excluded from constitutional protection. The activity here was neither peaceful nor lawful, so it lacks First Amendment protection.

Furthermore, even in the context of peaceful, lawful protests protected by the First Amendment, *Claiborne* made clear that violence and threats of violence associated with those protests lack First Amendment protection. *Id.* 458 U.S. at 916. So states may "impos[e] tort liability for ... losses ... caused by violence and ... threats of violence." *Id.*

Of course, states may impose reasonable time, place, and manner restrictions on

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lowed. *Id.*

speech, and speech outside those lawful restrictions lacks constitutional protection. Baton Rouge permissibly barred occupying highways, which meant that even lawful speech would be unprotected there, so the activity in the street was constitutionally illegal and lacked First Amendment protection.

The alleged negligence here flowed from this illegal activity: "Officer Doe adequately alleged that Mckesson is liable in negligence for organizing and leading the Baton Rouge demonstration to illegally occupy a highway." *Mckesson*, 945 F.3d at 826. "[T]he basis of potential liability in this case is Mckesson's *actions and conduct* in directing the illegal demonstration, not his speech and advocacy." *Id*. at 830, nt. 7.

Finally, *Claiborne* expressly *said* that states may impose tort liability for one's *own* tortious acts and the reasonably foreseeable consequences thereof. For example: "No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." 458 U.S. at 916. That was in the context of paragraph discussing the lack of First Amendment for violence and threats of violence, so those actions were the focus of this statement (as was much of *Claiborne*'s discussion since violence was particularly at issue there). But the doctrine that one is not protected from tort liability by the First Amendment for one's *own* illegal acts (which may include violence and threats of violence) emerges clearly in this statement, and that doctrine is not restricted to violence and threats of violence.[4] This is clear from this Court's often use of "unlawful" where the "precision" that this Court

[4] The Fifth Circuit establishes why this "Court did not invent a 'violence/nonviolence' distinction." *Mckesson*, 945 F.3d at 830 (citing the dissent's view).

required, *id*. at 916, would require the use of "violence" to establish a rule that only extended to unlawful action that is violent or threatens violence. For example, *Claiborne* said that "[o]nly those losses proximately caused by *unlawful* conduct may recovered." *Id*. at 918 (emphasis added). And it distinguished situations where it said no liability could be imposed from "whether an individual may be held liable for *unlawful* conduct that he himself authorized or incited," with the understanding that liability can arise for "unlawful," not just violent, acts. *Id.* at 920 n.56 (emphasis added).

In sum, because Mckesson's *own* activity at issue here was not his speech or advocacy, but rather his unpeaceful, illegal, and dangerous activity, it lacks First Amendment protection, which ends the analysis. And *Claiborne* also indicated that liability for the reasonably foreseeable consequences of one's *own unlawful* activity is not precluded by the First Amendment.

From the foregoing, it is clear that the relevant[5] analysis of Judge Willett's dissent, *Mckesson* 945 F.3d at 835 - 847 (concurring in part, dissenting in part), is erroneous—as the Fifth Circuit majority establishes, on *Mckesson*, at 830-831. Essentially, the dissent believes *Claiborne* "creat[ed] a broad categorical rule" that shields persons engaged in unpeaceful, illegal, and dangerous activity that poses a

[5] Judge Willett makes some arguments that are not relevant here, such as questioning tort liability under state law, *Mckesson*, 945 F.3d at 836-840, though the issue here is whether the First Amendment under *Claiborne* bars this challenge given the majority's conclusion that Officer Doe does state a claim under state tort law. Amicus focus only on the *Claiborne* argument. And Judge Willett disputes reliance on facts from the proposed Amended Complaint, *id.* at 841 n.37, though the majority found such reliance proper because the "futility" basis for denying leave to amend was based on an erroneous reading of *Claiborne*.

reasonably foreseeable risk of serious harm from tort liability for their *own* actions *if* they are in a context that also involves First Amendment protected activity —unless they actually authorized, directed, or ratified a perpetrator's particular violent act. But as the majority notes, this analysis relies on a purported "violence/nonviolence distinction" that is based on a misreading of *Claiborne*. *Mckesson*, at 830, nt. 7. ("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.").

The legal/illegal (majority) vs. violent/nonviolent (dissent) distinction is actually based on the dissent's reliance on "chancery court opinion that grounded liability in nonviolent protest," while the Mississippi and U.S. Supreme Courts "grounded liability solely in the presence of 'force, violence or threats,'" Mckesson, 945 F.3d at 830 (citation omitted), which is *why Claiborne* talked about violence and threats thereof, *id*. That *Claiborne* was not creating the purported violence/nonviolence distinction adopted by Judge Willet in his dissent is clear because (i) *Claiborne* "makes frequent reference to unlawful conduct when, under the dissent's view, it should have spoken of violence," *id.* (citations omitted), (ii) "[t]his supposed violence/nonviolence distinction ... does not square with the case law," *id.* at 831 (citation omitted), (iii) "recent cases [do not] vindicate this understanding," *id.* (citation omitted), and (iv) "the ... distinction does not make sense," *id.*[6]

[6] "Finally, the violence/nonviolence distinction does not make sense. Imagine protesters

II.

Police officers need tort protection from negligent, illegal, and dangerous activity posing foreseeable serious harm to them.

Police officers need the tort protection at issue because (inter alia) (**A**) harm to police officers from such activity is reasonably foreseeable, (**B**) the First Amendment does not protect one's own unlawful or violent conduct, and (**C**) a contrary rule would harm police officers, the public, and the rule of law.

A. The violent and illegal activity associated with the Baton Rouge protest, in the broader context of the violent and illegal activity associated with other similar protests organized and led by Black Lives Matter and DeRay Mckesson, created a reasonably foreseeable risk of harm to Officer Doe.

When a protestor threw the rock-like object at Officer Doe's face, Doe was "knocked to the ground incapacitated." *Mckesson* at 823. Officer Doe suffered a host of serious physical and financial injuries, including "loss of teeth, jaw injury, a brain injury, a head injury, lost wages, 'and other compensable losses.'" *Id*. While this incident may seem isolated, similar violent activity has been associated with illegal protests that have routinely followed many police-involved shootings of minorities across the country, and have, with repetition, resulted in serious and severe physical and pecuni-

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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." *Mckesson* at 83.

ary losses to police officers doing little else but protecting and serving the public. These catastrophic consequences have not been limited to Officer Doe alone, but rather have been visited upon police officers across the United States who are fulfilling a vital service to their communities.

On August 9, 2014, Michael Brown was shot and killed by a Ferguson, Missouri police officer. Over the next two weeks, protests quickly turned into riots during which local businesses were both looted and set ablaze, resulting in millions of dollars in damage. Police officers tasked with protecting the public had bottles and rocks thrown at them, and more than 200 protestors were arrested in the first two weeks of unrest. These riots continued for more than a year, eventually leading to the shooting of two police officers. Associated Press, *Man convicted of shooting two officers during Ferguson protest*, Los Angeles Times, Dec. 9, 2016, https://www.latimes.com/nation/nationnow/la-na-ferguson-shooting-20161209-story.html.

Following the police-involved death of Freddie Gray in Baltimore, protests devolved into rioting, leading to the injury of twenty police officers in the course of their official duties. Am. Compl. ¶ 5.[7] During the chaos in early April of 2015, approximately 300 businesses were damaged, over 200 vehicles and structures were set ablaze, almost thirty stores were looted, and 250 rioters were arrested for their conduct. Just days before Officer Doe was attacked, alongside the continued riots in Ferguson, similar violent protests sprang up around the country through the concerted efforts of

[7] Amended Complaint citations herein are to the proposed Amended Complaint for Damages: Police Officer Hit in Face with Rock, which is in the Fifth Circuit record document titled Appellant Officer John Doe's Record Excerpt at 55-72 (No. 17-30864).

Mckesson and his Black Lives Matter organization: in St Paul, Minnesota, twenty-one officers were injured when rioters hurled chunks of concrete and other dangerous projectiles at police, and in one instance, a protestor dropped a concrete block on an officer's head, breaking his neck; in Dallas, five officers were killed and nine were injured when a lone gunman opened fire on the police during a Black Lives Matter protest; and four Tennessee highways were blocked by Black Lives Matter protesters, leading to six arrests. Am. Compl. ¶¶ 18, 20, 22; KARE 11 staff, *Officer suffers spinal fracture during I-94 shutdown*, KARE 11 News, July 10, 2016, https://www.kare11.com/article/news/officer-suffers-spinal-fracture-during-i-94-shut-down/89-268434384.

Given the context and events surrounding the Baton Rouge protests, the attack on Officer Doe was eminently foreseeable. The Baton Rouge Police on the front line, were in full riot gear to protect the officers making arrests. Plt. Comp. ¶15. The roiling tensions between activists and police had become a national focus, and media coverage of these conflicts dominated the headlines. Even then-President Barack Obama emphasized the fact that "Americans should be troubled by the recent shootings" stating "'[t]hese are not isolated incidents. They're symptomatic of racial disparities that exist in our criminal justice system.'" Christine Wang, *Obama: All Americans Should Be Troubled By Recent Police Shootings*, CNBC, July 7, 2016, https://www.cnbc.com/2016/07/07/president-barack-obama-on-deaths-of-philando-castile-and-alton-sterling.html. The risk was so great to police officers nationwide that the FBI New Orleans office issued a warning emphasizing potential "threats to law enforcement and

potential threats to the safety of the general public," stemming from the violent protests. Trey Schmaltz, WBRZ, *FBI Warns of Safety Concerns for Public, Law Enforcement This Weekend*, July 8, 2016, https://www.wbrz.com/news/fbi-warns-of-safety-concerns-for-public-law-enforcement-this-weekend/. And on the same day Officer Doe was injured, three foreign governments urged caution when traveling to the United States amid the protests. Jason Lange & Lauren Hirsch, Reuters, *Three Countries Urge Caution Traveling to U.S. Amid Protests, Violence*, July 10, 2016, https://www.reuters.com/article/us-usa-police-travel-idUSKCN0ZQ0RM.

But despite this obvious and known risk, Mckesson nonetheless organized a protest in the heart of an angry Baton Rouge, and lawlessly lead a group of protesters onto a highway in front of police headquarters while broadcasting himself live on the Internet. In the midst of this maelstrom of protestors clashing with police, protesters were throwing objects including water bottles at the police. One protestor threw a heavy projectile over the front line and hit Officer Doe in the face, severely injuring him. That injury was not merely foreseeable; it was inevitable.

B. The Fifth Circuit's decision makes clear that the First Amendment does not protect unlawful or violent conduct.

Just as this incident is but one in a string of protests organized by Black Lives Matter and Mr. Mckesson that turned violent, this case is not the first attempt to entice a court to find that the First Amendment protects unlawful, and even violent activity, undertaken during a political protest. But the First Amendment offers no such

refuge to illegal conduct merely because it occurs in association with speech.

Several legal actions have been brought by those protesting purported police misconduct that claim immunity from arrest for unlawful acts because these were in association with protests. *See, e.g., Black Lives Matter-Stockton Chapter v. San Joaquin Cty. Sheriff's Office,* No. 2:18-cv-00591-KJM-AC, 2018 U.S. Dist. LEXIS 130115, at *5 (E.D. Cal. Aug. 2, 2018); *Ahmad v. City of St. Louis*, No. 4:17 CV 2455 CDP, 2017 U.S. Dist. LEXIS 188478, at *2 (E.D. Mo. Nov. 15, 2017); *San Diego Branch of NAACP v. Cty. of San Diego,* No. 16-CV-2575 JLS (MSB), 2019 U.S. Dist. LEXIS 13375, at *21 (S.D. Cal. Jan. 25, 2019); *Abdullah v. Cty. of St. Louis,* 52 F. Supp.3d 936, 943 (E.D. Mo. 2014). McKesson, himself, filed a class action in United States District Court for the Middle District of Louisiana as the representative of a class of persons whose civil rights were violated when he and other protesters were arrested and jailed for blocking a public highway during the protest. Plt. Am. Comp. ¶39. *DeRay McKesson, et al v. City of Baton Rouge, et al*, 16-520-JWD-EWD (M.D. La. 08/04/16). But as *Claiborne* made plain, the First Amendment does not shield a protester from liability for illegal conduct separate and apart from any speech and expression.

Officer Doe does not seek to hold DeRay Mckesson accountable for his speech or expression, but rather for his illegal actions leading a protest unlawfully onto a public highway and the reasonably foreseeable risk of harm to police officers that illegal activity occasioned. The Fifth Circuit's decision correctly construed this Court's prior precedent and did nothing more that emphasize that the lawful exercise of speech and assembly is protected by the First Amendment and that unlawful, unpeaceful and

violent conduct is not. That clarification was necessary and proper given the misconception of many litigants of the extent to which the First Amendment affords protection to individuals in the area of political protest.

C. A contrary rule would harm police officers, the public, and the rule of law.

Given that Mckesson's activity was illegal, unpeaceful, and dangerous, a finding that such activity is protected from tort liability by the First Amendment would harm police officers, the public, and the rule of law because it would (i) eliminate valuable tort protection and (ii) impose a rule that would lead to broad societal harm in this and similar situations.

First, the loss of tort liability for negligence in this and similar cases would be very harmful. Such liability plays a vital rule-of-law role that should be preserved here and in similar situations. It discourages negligent activity, making even those unconcerned for others think twice about, e.g., leaving snow on walkways, because of the risk of liability. And one who leads angry people onto a public highway, closing the highway and forcing a confrontation with police, should think twice before engaging in such illegal and dangerous activity because of the risk of liability. The prudent choice would be to lead those protestors onto the parking lot,[8] Independence Park, the sidewalk or other legal, safe, non-obstructing place.

[8] The police headquarters is in the old Woman's Hospital complex, which has a huge parking area. McKesson could have confronted police in a legal place, but he instead chose to force confrontation and arrests. Had the protest started out legal, likely, there would have been no necessity for arrests and McKesson would not have had police responding in riot gear forming a wall of shields to protect those making the arrests. Instead of the parking lot, McKesson choose the busy four lane highway. What is more is that Independence Park is little more than a block away, McKesson could have staged the protest there.

Second, tort liability also assigns losses where they belong—on the wrongdoer, not the victim or the public. That is simple justice. Neither Officer Doe nor the government should absorb the damages for Officer Doe's injuries if a finder of fact determines that the injuries were a reasonably foreseeable consequence of Mckesson's own negligent act in planning and leading the protest onto the highway to engage police.

The Petitioner erroneously reads *Claiborne* as imposing a broad rule, applicable here, that immunizes persons engaged in unlawful activity from liability for the consequences of such illegal activity if this activity also involves expressive activity. So it would radically expand *Claiborne*'s protection of speech, while engaged in peaceful and lawful protest, from the unlawful acts of other, to the foreseeable consequence of one's *own illegal actions*. Such a rule, if recognized, would harm police officers, the public, and the rule of law.

As established above, *Claiborne* did not preclude liability for consequences of one's own illegal activity that lacks First Amendment protection. The Petition *downplays* McKesson's own lawless activity in this case. *See, e.g.*, Cert. Ptn. i (Question Presented makes no mention of allegations of Mckesson's own illegal acts), (Question erroneously asserts that Officer Doe failed to claim that Mckesson generally authorized, directed , nor ratified the perpetrator's act),[9] (Statement ignores many of Mckesson's illegal actions). And, instead of focusing on Mckesson's own illegal and dangerous activities

[9] The Complaint/Amended Complaint do not allege that McKesson authorized or directed the specific act (this specific person throw this specific object). They do allege that by the time the protests reached Baton Rouge a well known pattern of violence against police and property was the hallmark of BLM protests. McKesson ratified the violence.

at issue here, the Petition discusses claimed results in other situations. For example, though the alleged fact is that "Mckesson led the protestors to block the public highway," *Mckesson* at 823, which would be his *own* negligent, illegal *action* (not speech or advocacy), the Petition posits concerns about those engaged in a lawful demonstration "straying onto a public road" or "veer[ing] onto a highway," Cert. Ptn. 24. Inadvertent straying or veering simply are not at issue here, just as the situation in *Claiborne* is not at issue. Here, the Fifth Circuit held that where a demonstration leader *himself* violates the law in a negligent manner by leading protestors onto a highway, he may be held liable under the ordinary tort law for negligence.

Based on such a non-factual, overbroad focus, the Petition advocates for a broad rule based on the purported need to protect First Amendment activity. But protected First Amendment activity requires no special protection here because it is not at issue. The rule, as the Petitioner would have it, is this: A person who *himself* commits an unpeaceful, illegal, and dangerous *act* (which is not protected by the First Amendment) may not be held liable for a violent act by a third party that is a reasonably foreseeable consequence of the original person's own illegal act because in *Claiborne* this Court held that a person engaging in peaceful, lawful, First Amendment protected activity could not be liable for violent acts of third parties unless he authorized, directed, or ratified that specific tortious activity. That is nonsensical. Under this rule, individuals are free to engage in unpeaceful, unlawful activities themselves in connection with demonstrations, with no concern for ordinary tort liability for the actions of third parties that are a foreseeable consequence of the original person's own unpeaceful,

unlawful action.

That rule removes the vital function of negligence-tort law—discouraging negligence and assigning responsibility for losses to the guilty instead of the innocent—when people engage in demonstrations. Under this purported rule, protest leaders are free to engage in unpeaceful, illegal, negligent actions themselves, without the normal concern a citizens should have for the possible harm to other citizens from the foreseeable consequences of their own unpeaceful, unlawful, negligent act. This is extremely dangerous to police officers, who typically bear the brunt of such illegal actions and its consequences, but also to members of the public who may be similarly harmed, and to the rule of law because purported speech protections are asserted to innoculate wrongdoing.

Conclusion

This Court should deny the petition.

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