# "THE RIGHT TO PROTEST FOR RIGHT": REAFFIRMING THE FIRST AMENDMENT PRINCIPLE THAT LIMITS THE TORT LIABILITY OF PROTEST ORGANIZERS*

**Abstract:** On December 16, 2019, the U.S. Court of Appeals for the Fifth Circuit held in *Doe v. Mckesson* that a court could hold DeRay Mckesson liable for damages to a police officer whom an unidentified assailant injured at a 2016 Black Lives Matter protest that Mckesson helped organize. Mckesson did not cause the officer's injuries, and he did not order, encourage, or incite the protestors at the demonstration to act violently. The Fifth Circuit held that Mckesson could be liable only because he played a role in organizing the demonstration. In 1982, the U.S. Supreme Court set forth an important principle in *NAACP v. Claiborne Hardware Co.* that limited the extent to which a court could hold protest organizers engaged in protected First Amendment activity liable for the violent acts of third parties. Many First Amendment scholars considered the Fifth Circuit's decision in *Doe v. Mckesson* a direct affront to the principle set out in *Claiborne Hardware*. Indeed, Mckesson engaged in core protected speech activity when he protested police misconduct and thus should have fallen under the protection of the stringent standard. In November of 2020, in *Doe v. Mckesson*, the Supreme Court reversed and remanded the Fifth Circuit's decision, but it did so in a *per curiam* opinion based only on issues concerning Louisiana tort law theories, leaving the First Amendment implications unanswered. This Note argues that the limited liability principle set forth in *Claiborne Hardware* is an essential protection for organizers and for democracy, such that the Supreme Court should look for opportunities to reaffirm it in the wake of the Fifth Circuit's latest attack.

## INTRODUCTION

On July 9, 2016, DeRay Mckesson, an activist associated with the Black Lives Matter movement, organized a demonstration in Baton Rouge, Louisiana to protest a familiar atrocity in American life: the police killing of a Black civilian.[1] A few days earlier, two police officers shot and killed Alton Sterling, a

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* Martin Luther King, Jr., I've Been to the Mountaintop (Apr. 3, 1968) ("But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of press. Somewhere I read that the greatness of America is the right to protest for right.").

[1] *See* Doe v. Mckesson (*Mckesson I*), 272 F. Supp. 3d 841, 844–45 (M.D. La. 2017) (stating that Mckesson helped organized the protest); Petition for Writ of Certiorari at 5–6, Mckesson v. Doe (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) (accepting as true the plaintiff's claims that Mckesson helped organize the protest); Phil Helsel, Elisha Fieldstadt & Matthew Grimson, *Hundreds Arrested in Protests Over Police Shootings in St. Paul, Baton Rouge*, NBC NEWS, https://www.nbcnews.com/news/us-news/black-lives-matter-protests-span-country-fourth-day-n606556 [https://perma.

thirty-seven-year-old Black man, in the parking lot outside a convenience store.[2] As hundreds gathered throughout the city to protest Sterling's death, Mckesson's group gathered peacefully on a public highway in front of the Baton Rouge Police Department headquarters to call for accountability.[3] The police department responded by deploying officers dressed in riot gear to meet the protesters and be ready to make arrests.[4] Eventually, the demonstrators grew invigorated, and some began throwing full plastic water bottles at the officers.[5] One unidentified individual threw a piece of concrete that struck an officer and caused serious injuries.[6]

Because the authorities could not identify the assailant, the injured officer brought a civil suit against Mckesson and alleged that, as a leader of the demonstration, Mckesson was liable for his injuries on theories of negligence.[7] The officer did not claim that Mckesson engaged in any violent behavior himself or directed the protestors to act violently.[8] Instead, he alleged only that Mckesson was liable because he should have known that the protest would grow violent and did not attempt to quell the unrest once it began.[9]

In 2017, when the U.S. District Court for the Middle District of Louisiana considered Mckesson's case in *Doe v. Mckesson* (*Mckesson I*), it dismissed the action as a straightforward application of the U.S. Supreme Court's 1982 deci-

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cc/6PLC-Q83K] (July 10, 2016) (describing Mckesson's involvement in the protest); *see also* Li Cohen, *It's Been Over Three Months Since George Floyd Was Killed by Police. Police Are Still Killing Black People at Disproportionate Rates*, CBS NEWS (Sept. 10, 2020), https://www.cbsnews.com/news/george-floyd-killing-police-black-people-killed-164/ [https://perma.cc/A5LR-WSXS] (highlighting the continued rampancy of Black deaths at the hands of American police officers).

[2] *See* Petition for Writ of Certiorari, *supra* note 1, at 12 (stating that the protest was a response to Sterling's death); Richard Fausset, Richard Pérez-Peña & Campbell Robertson, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html [https://perma.cc/4NDA-WSCR] (describing the circumstances surrounding Sterling's death).

[3] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 822–23 (5th Cir. 2019) (describing the way the protesters blocked the highway and noting Mckesson's involvement in this particular demonstration); *Mckesson I*, 272 F. Supp. 3d at 845 (noting that the protest on the highway started peacefully); Petition for Writ of Certiorari, *supra* note 1, at 5 (stating the protestors sought "to express their anguish, celebrate Mr. Sterling's life, and press for accountability and change"); *see also* Helsel et al., *supra* note 1 (describing the breadth of the protests).

[4] *Mckesson IV*, 945 F.3d at 822–23; *see also* Helsel et al., *supra* note 1 (noting that the police arrested Mckesson for "simple obstruction of highway commerce," but released him from jail the following day).

[5] *Mckesson IV*, 945 F.3d at 822–23.

[6] *Id.* at 823 (noting the officer suffered lost teeth and injuries to his jaw, brain, and head).

[7] *Mckesson I*, 272 F. Supp. 3d at 844–45 (describing the officer's claims against Mckesson). The officer also originally brought a suit against Black Lives Matter, but the district court held that Black Lives Matter was a social movement, much like the Civil Rights movement, and thus was not an entity that a party could sue. *Id.* at 845, 850; *see also Mckesson IV*, 945 F.3d at 834 (holding that the district court was correct in concluding that a party could not sue Black Lives Matter).

[8] *Mckesson I*, 272 F. Supp. 3d at 845 (describing the plaintiff's claims).

[9] *Id.*

sion in *NAACP v. Claiborne Hardware Co*.[10] As this Note discusses in detail, *Claiborne Hardware* set forth the crucial First Amendment principle that courts cannot hold protest organizers liable for the violent acts of third-party protest participants when the organizers themselves do not incite or participate in such violence.[11] Yet, in December 2019, in *Doe v. Mckesson* (*Mckesson IV*), the U.S. Court of Appeals for the Fifth Circuit reversed the district court.[12] The Fifth Circuit concluded that although Mckesson did not incite violence or act violently himself, a court could still hold him liable for the violent acts of protest attendees—and remain consistent with *Claiborne Hardware*—because, according to the Fifth Circuit, Mckesson negligently organized the demonstration and his negligence could be the basis for his liability.[13] At the time, many First Amendment scholars believed that the Fifth Circuit's decision directly contradicted the principle set out in *Claiborne Hardware* and expressed deep concern for its implications.[14] Ultimately, the Supreme Court granted certiorari and released a *per curiam* decision in November 2020 vacating the Fifth Circuit's judgment—but only so the Fifth Circuit could better consider certain opaque Louisiana tort law issues.[15] The Court briefly acknowledged that the case implicated the First Amendment, but did not opine on whether the First Amendment affords limited tort liability to protest organizers, thus leaving the debate unresolved.[16]

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[10] *Id.* at 847–48; *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916–18 (1982) (holding that courts may not hold protest organizers liable for the violent acts of third-party individuals whom the organizers did not incite to act violently).

[11] *See Claiborne Hardware*, 458 U.S. at 918 ("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."); *see also infra* notes 99–115 and accompanying text (providing a more nuanced discussion of the limited circumstances in which protest organizers may be held liable for participant violence.

[12] *Mckesson IV*, 945 F.3d at 828, 834; *see Mckesson I*, 272 F. Supp. 3d at 847–48 (holding that the First Amendment shielded Mckesson from liability).

[13] *Mckesson IV*, 945 F.3d at 828–29, 834 (reasoning that *NAACP v. Claiborne Hardware Co.* stands for the principle that courts can impose liability on protest organizers for the violent acts of third parties when the protest organizers themselves commit tortious acts); *see Claiborne Hardware*, 458 U.S. at 927 ("[A] finding that [the boycott organizer] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.").

[14] *See, e.g.*, Garrett Epps, *The Important First Amendment Principle Now at Risk*, THE ATLANTIC (Apr. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/04/important-first-amendment-principle-now-risk/610348 [https://perma.cc/E8KS-A37A] (arguing that the Fifth Circuit's decision was inconsistent with *Claiborne Hardware* and would expose protest organizers to incredible financial liability if in place).

[15] Mckesson v. Doe (*Mckesson VI*), 141 S. Ct. 48, 50–51 (2020) (per curiam) (remanding for reconsideration of whether the Fifth Circuit's novel "negligent protest" theory of liability is viable under Louisiana tort law); *see also infra* notes 149–161 and accompanying text (providing a more detailed discussion of the Fifth Circuit's "negligent protest" theory of liability).

[16] *See Mckesson VI*, 141 S. Ct. at 50–51 ("[W]e 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 im-

In addition to critically shielding organizers from potentially insurmountable damages,[17] the First Amendment limited liability principle set forth in *Claiborne Hardware* crucially enriches democracy itself, as protests have consistently been a vehicle through which social movements in the United States have generated the public pressure necessary to enact change.[18] The American colonists who participated in the Boston Tea Party in 1773 sparked the public outcry that led to the American Revolution in 1775.[19] The women's suffragists who picketed outside the White House in 1917 and 1918 generated the public pressure necessary to pass and ratify the Nineteenth Amendment in 1919.[20] The Civil Rights activists of the 1950s and 1960s who participated in the historic March on Washington in 1963, as well as other acts of protest and civil

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plications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.").

[17] *See* Epps, *supra* note 14 (noting that Mckesson, for example, faces severe damages if Officer Doe's tort claims against him are successful); *see also infra* notes 25, 34, 175–185 and accompanying text (discussing the magnitude of damages at large scale protests and the halting impact of imposing civil liability on their organizers). Indeed, prior to the Supreme Court's decision in 1982 in *Claiborne Hardware*, segregationists routinely brought tort lawsuits against Civil Rights activists to weaponize the threat of damages and accordingly, impede the movement by deterring demonstrations. Epps, *supra* note 14. By granting protest organizers limited liability, *Claiborne Hardware* effectively put an end to this segregationist strategy, thus signaling the principle's importance in First Amendment jurisprudence. *Id.*

[18] *See* Brief of Floyd Abrams, Erwin Chemerinsky, Walter Dellinger, Geoffrey R. Stone, Nadine Strossen & Kenneth P. White as *Amici Curiae* in Support of Petitioner at 4–6, Mckesson v. Doe (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) [hereinafter Brief of Floyd Abrams et al.] (highlighting various social movements that successfully used protest as a tool for change and recognizing the Black Lives Matter movement as a continuation of that tradition); Patrisse Cullors, *Without the Right to Protest, America Is Doomed to Fail*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/opinion/international-world/protest-black-america.html [https://perma.cc/H4BK-J482] (arguing every major turning point in American history is grounded in protest); Daniel Q. Gillion, *The Myth of the Silent Majority*, ATLANTIC MONTHLY, Sept. 2020, https://www.theatlantic.com/magazine/archive/2020/09/protest-works/614182/ [https://perma.cc/85WL-YGVN] (arguing that protests are an essential aspect of a working democracy because they provide aggrieved members of society with a release for their frustrations and alert the general public that societal change is necessary); Kori Schake, *This Upheaval Is How America Gets Better*, THE ATLANTIC (June 8, 2020), https://www.theatlantic.com/ideas/archive/2020/06/upheaval-how-america-gets-better/612799/ [https://perma.cc/B95P-RSXB] (arguing that the disruption that protests cause is the means by which societies improve and fix broken systems).

[19] NCC Staff, *On This Day, the Boston Tea Party Lights a Fuse*, NAT'L CONST. CTR. (Dec. 16, 2020), https://constitutioncenter.org/blog/on-this-day-the-boston-tea-party-lights-a-fuse/ [https://perma.cc/PBP5-YY7E] (describing the violent protests that were part of the Boston Tea Party and linking the events of the day to the beginning of the American Revolution).

[20] *See* Alli Hartley-Kong, *Radical Protests Propelled the Suffrage Movement. Here's How a New Museum Captures That History*, SMITHSONIAN MAG. (Oct. 20, 2020), https://www.smithsonianmag.com/history/radical-protests-propelled-suffrage-movement-heres-how-new-museum-captures-history-180976114/ [https://perma.cc/RP8B-MAHB] (reporting that the women's suffragettes picketing and arrests in 1917 captured public attention that ultimately shifted public opinion in favor of suffrage and led to Congress's ratification of the Nineteenth Amendment in 1919); *see also* U.S. CONST. amend. XIX (forbidding the denial of the right to vote based on of sex).

disobedience, compelled and shaped the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[21] The Stonewall Riots of 1969 galvanized the LGBTQ+ rights movement in a way that provided for legal and social LGBTQ+ anti-discrimination victories in the late twentieth and early twenty-first centuries.[22]

In the last decade, the Black Lives Matter movement built upon this longstanding tradition by using protests to amplify its grievances and calls for reform in national discourse, particularly regarding systemic racism and police violence against Black Americans.[23] Since the movement's inception, Black Lives Matter organizers, like DeRay Mckesson, have used a variety of civil disobedience strategies to attract public attention to their causes, including gathering in public spaces and blocking roadways.[24] Although early Black Lives Matter demonstrations were predominantly peaceful, some actors at the demonstrations did engage in violence, looting, and property destruction,[25] and

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[21] *See* Brief of National Association for the Advancement of Colored People in Support of Petitioner as *Amici Curiae* at 2, Mckesson v. Doe (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) [hereinafter Brief of NAACP] (arguing that Civil Rights activists' participation in sit ins, freedom rides, and marches increased public discussion of racial inequality and shifted public opinion in a way that led to civil rights legislation).

[22] Emily Priborkin, *The Legacy of the Stonewall Riots*, AM. UNIV. (June 18, 2019), https://www.american.edu/sis/news/20190618-the-legacy-of-the-stonewall-riots.cfm [https://perma.cc/T2ZH-FKJQ] (describing the significance of the Stonewall Riots in igniting the modern LGBT+ rights movement and subsequent legislative victories).

[23] *See* Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 68 (2020), https://www.stanfordlawreview.org/online/forseeable-violence-black-lives-matter/ [https://perma.cc/ZJ72-6W2Y] (describing police violence and systemic racism as key issues upon which the Black Lives Matter protests sought to shed light). The Black Lives Matter movement began in 2013 after the acquittal of George Zimmerman, the community watchman who shot and killed seventeen-year-old Trayvon Martin. Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1092 (2018). The first Black Lives Matter protests took place in the days that followed the announcement of the Zimmerman verdict, as thousands gathered in cities across America. *Id.* at 1096. (describing protests in Atlanta, New York, and Washington D.C.). The protests grew larger and more frequent after the death of Michael Brown in Ferguson, Missouri in 2014. Motala, *supra*, at 68 (reporting that by some accounts, in the year following the death of Michael Brown, more than 780 protests took place in 2014 in at least forty-four states).

[24] Motala, *supra* note 23, at 68 (describing the various civil disobedience strategies that Black Lives Matter organizers have employed, including occupying public roadways, police headquarters, and public spaces); Garrett Epps, *Don't Let the First Amendment Forget DeRay Mckesson*, THE ATLANTIC (Dec. 14, 2019), https://www.theatlantic.com/ideas/archive/2019/12/dont-let-the-first-amendment-forget-deray-mckesson/603580 [https://perma.cc/M8GH-GJ89] (noting that Mckesson helped organize the Black Lives Matter protest in Baton Rouge in 2016 where protesters blocked a highway beside the police department headquarters). *See generally* Brief of NAACP, *supra* note 21 (discussing the ways in which Civil Rights Movement activists also used civil disobedience as an effective protest tactic).

[25] *See, e.g.*, Yamiche Alcindor, Aamer Madhani & Doug Stanglin, *Hundreds of Peaceful Protesters March in Ferguson*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/08/14/ferguson-missouri-police-clashes-shooting-anonymous/14046707/ [https://perma.cc/6VN8-C88D] (Aug. 19, 2014) (noting that the initial protests in Ferguson after the death of Michael Brown were peaceful); *The Damage in Ferguson*, N.Y. TIMES (Nov. 25, 2014), https://www.nytimes.com/interactive/2014/

police departments often responded to such protests with force.[26] In the early years of the movement, Black Lives Matter activists succeeded in shifting public opinion on issues of systemic racism and police brutality, leading police departments and political candidates alike to embrace police and criminal justice reform.[27] Yet, empirical research demonstrated that Black Americans remained disproportionately more likely to be killed during police encounters than white Americans during the period that the Black Lives Matter movement gained its early momentum.[28]

In 2020, the Black Lives Matter Movement entered a revitalized and historic phase with the protests that followed the brutal murder of George Floyd.[29] On May 25, 2020, Derek Chauvin, a white Minneapolis police officer, killed Floyd, a forty-six-year-old Black man, when he pinned Floyd to the pavement during an arrest and kneeled on Floyd's neck, while Floyd repeatedly exclaimed, "I can't breathe."[30] Witnesses recorded the incident and shared the video on social media channels, where it proceeded to go viral.[31] Ultimately, the video of Floyd's death ignited a wave of Black Lives Matter protests that took place in over 140 cities across the United States throughout the summer of 2020.[32] Mobilized by local Black Lives Matter chapters, millions of protest-

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11/25/us/ferguson-photos.html [https://perma.cc/BV7V-Y8EP] (reporting that looting, vandalism, fires, and other related violence took place at the Ferguson protests). For further discussion about who the violent actors were, see *infra* note 34 and accompanying text.

[26] *See* Motala, *supra* note 23, at 71 (noting that the Ferguson police used armored tanks, assault rifles, flash grenades, rubber bullets, and tear gas as part of its efforts to break up the protests following the 2014 death of Michael Brown).

[27] *See* Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, N.Y. TIMES, https://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html [https://perma.cc/2VMA-DEJS] (Aug. 21, 2019) (describing the police reforms that municipalities embraced as a result of the Black Lives Matter protests and noting in particular the movement's impact on the 2020 Democratic presidential primary).

[28] *See* Gabriel L. Schwartz & Jacquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013–2017*, PLOSONE (June 24, 2020), https://doi.org/10.1371/journal.pone.0229686 [https://perma.cc/5FVT-G6UN] (reporting that from 2013 to 2017, Black Americans were 3.23 times more likely to be killed in a police encounter than white Americans).

[29] *See* Motala, *supra* note 23, at 61, 64 (describing how the George Floyd protests transformed Black Lives Matter into a ubiquitous movement with broad public support).

[30] Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Oct. 2, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/52RM-WGNJ].

[31] *Id.* (reporting that internet users shared the video extensively to reach broad audiences the day after the incident).

[32] *Id.* The protests began in Minneapolis on May 26, 2020, and lasted for several days. *Id.* On May 27, protestors gathered in Memphis, Los Angeles, Louisville, St. Louis, and Chicago. *Id.* In the days that followed, additional protests erupted in dozens of other cities across the country including Atlanta, New York, Washington D.C., Detroit, Buffalo, and Philadelphia. *Id.* In October 2020, research suggested over seven-thousand demonstrations took place in May and June in cities and municipalities spanning all 50 states and the District of Columbia. Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH.

ers demanded a variety of police and criminal justice reforms and made broader calls for racial equity.[33] Early research from the fall of 2020 indicated that these protests were almost entirely peaceful; although violence and property destruction did mar a small percentage of the demonstrations and generated substantial financial losses.[34]

The George Floyd protests reinvigorated the Black Lives Matter movement and brought issues of race and police misconduct to the forefront of the national conversation.[35] The protests significantly shifted public opinion on issues of race to an extent arguably not seen since the Civil Rights Movement.[36] Furthermore, they generated the pressure necessary to effectuate tangi-

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POST (Oct. 16, 2020), https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/ [https://perma.cc/3A8A-XP4F].

[33] *See, e.g.*, Martin Austermuhle, *Here's What Black Lives Matter D.C. Is Calling For, and Where the City Stands*, NPR (June 9, 2020), https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands [https://perma.cc/B8XE-CBF6] (reporting that the Washington D.C. Black Lives Matter chapter released a series of demands before the protests that took place on June 6, 2020 that included defunding the police, decriminalizing sex work, removing police from schools, dropping charges against protesters, ending cash bail, banning stop-and-frisk, and providing for education, healthcare, and housing equity); *see also* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/CC8R-9F4C] (reporting that polls indicated somewhere been fifteen to twenty-six million people joined in a George Floyd protest in the early weeks of June 2020).

[34] *See* Chenoweth & Pressman, *supra* note 32 (reporting the data indicated 96.3% of the protests had no reported damage to property or law enforcement injuries, 97.7% had no reported participant, law enforcement, or bystander injuries, and just 3.7% had reported property damage or vandalism). *But see* Taylor, *supra* note 30 (noting that some protesters engaged in vandalism, looting, and general property destruction, and that twenty-one states called in the National Guard at various points); Jennifer A. Kingson, *$1 Billion-Plus Riot Damage Is Most Expensive in Insurance Industry*, AXIOS (Sept. 16, 2020), https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html [https://perma.cc/UHQ6-26RN] (reporting that the property damage resulting from the George Floyd protests amounted to an estimated one to two billion dollars in net insured losses). The data indicated that law enforcement and counter-protesters carried out the majority of the violent acts that occurred at the protests and directed violence *at* the Black Lives Matter protesters. Chenoweth & Pressman, *supra* note 32. Scholars have argued that police officers are generally more likely to respond to Black protests with force, and that such use of force increases the likelihood of a violent conflict between the police and the protesters. *See* Motala, *supra* note 23, at 71–72 (noting the police's use of tear gas, grenades, military-grade assault rifles, rubber bullets, and riot gear at a 2014 Black Lives Matter protest in Ferguson, Missouri following the death of Michael Brown). Law enforcement used similar militarized tactics at the George Floyd protests, and some police officers carried out acts of violence against individual protesters. *See* Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1, 12–15 (2020) (detailing law enforcement's use of force in responding to the summer 2020 protests in various cities).

[35] *See* Motala, *supra* note 23, at 64 (arguing that due to the protests following Floyd's death, "[t]he phrase 'Black Lives Matter' has gone from a polarizing rhetorical boogeyman to a relatively uncontroversial rallying cry, taken up by politicians, celebrities, and corporations regardless of their political affiliation").

[36] *See* Adam Serwer, *The New Reconstruction*, ATLANTIC MONTHLY, Oct. 2020, https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/ [https://perma.cc/ML5G-

ble measures of change, as institutional actors responded to protestors' calls for police reform and racial equity.[37] In the weeks and months following the protests, federal, state, and local governments across the country crafted and adopted new police reform policies and legislation.[38] Voters embraced race as a priority issue, thus driving elected officials and candidates to adopt positions

QHF5] (reporting that 76% of polled Americans in June 2020 indicated that they believed racism was a "big problem," compared with 51% in 2015, and comparing such a shift to similar polls from the Civil Rights Movement); Michael Tesler, *The Floyd Protests Have Changed Public Opinion About Race and Policing. Here's the Data.*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/politics/2020/06/09/floyd-protests-have-changed-public-opinion-about-race-policing-heres-data/ [https://perma.cc/4HMU-YFZ2] (reporting an increase in public support for Black Lives Matter immediately following the George Floyd protests); *see also* Bryan Schonfeld & Sam Winter-Levy, *After This Summer's Protests, Americans Think Differently About Race. That Could Last for Generations.*, WASH. POST (Oct. 12, 2020), https://www.washingtonpost.com/politics/2020/10/12/after-this-summers-protests-americans-think-differently-about-race-that-could-last-generations/ [https://perma.cc/P6WQ-XM8J] (noting that in December 2014, 33% of polled Americans indicated they believed "police officers were more likely to use excessive force against Black people than against White people," but that the number jumped to 57% in May 2020).

[37] *See* Motala, *supra* note 23, at 64 (noting the broad embrace of Black Lives Matter amidst the George Floyd protests). *But see* Michele L. Norris, *Don't Call It a Racial Reckoning. The Race Toward Equality Has Barely Begun.*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/opinions/dont-call-it-a-racial-reckoning-the-race-toward-equality-has-barely-begun/2020/12/18/90b65eba-414e-11eb-8bc0-ae155bee4aff_story.html [https://perma.cc/LPQ4-53F4] (arguing that major change still needs to happen in terms of racial justice).

[38] *See How George Floyd Protests Have Already Sparked Change*, N.Y. TIMES (June 9, 2020), https://www.nytimes.com/interactive/2020/06/09/burst/george-floyd-protests-police-laws.html [https://perma.cc/7MV5-C2Q2] (recounting federal, state, and city legislative proposals that lawmakers crafted in the weeks immediately following Floyd's killing and the related protests); *see also* Russel Berman, *The Nation's Most Ambitious Police Reform Launches Today*, THE ATLANTIC (Dec. 21, 2020), https://www.theatlantic.com/politics/archive/2020/12/new-jersey-police-reform/617436/ [https://perma.cc/5RKZ-VSTJ] (depicting new police reform measures adopted in New Jersey in December 2020 in response to the George Floyd protests); Russell Berman, *The State Where Protests Have Already Forced Major Police Reform*, THE ATLANTIC (July 17, 2020), https://www.theatlantic.com/politics/archive/2020/07/police-reform-law-colorado/614269/ [https://perma.cc/STS9-MD8K] (describing the police accountability reforms that Colorado adopted in July 2020 in response to protests in Denver); Sean Collins, *The House Has Passed the George Floyd Justice in Policing Act*, VOX (Mar. 3, 2021), https://www.vox.com/2021/3/3/22295856/george-floyd-justice-in-policing-act-2021-passed-house [https://perma.cc/A49T-BFBE] (citing George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021)) (reporting that on March 3, 2021, the House of Representatives voted in favor of the George Floyd Justice in Policing Act of 2021 that set forth various police reform measures); Jill Cowan, Shawn Hubler & Kate Taylor, *Protesters Urged Defunding the Police. Schools in Big Cities Are Doing It.*, N.Y. TIMES, https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html [https://perma.cc/Y3CV-RV23] (Mar. 8, 2021) (noting that school officials in Denver, Los Angeles, Minneapolis, Oakland, Portland, Oregon, and Seattle cut funding for or removed police departments from school districts in response to the calls of George Floyd protesters); Ian Prasad Philbrick & Sanam Yar, *What Has Changed Since George Floyd*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/briefing/coronavirus-vaccine-tropical-storm-isaias-tiktok-your-monday-briefing.html [https://perma.cc/3UAY-DDVL] (Aug. 11, 2020) (reporting that in the months following Floyd's killing, thirty-one of the largest one hundred cities in the United States adopted policies that limited law enforcement use of chokeholds).

that reflected a commitment to racial justice.[39] Governments and institutions evaluated the racist underpinnings of their histories and committed to symbolic remedial measures, such as taking down statutes of Confederate generals that had stood for over a century.[40] Major brands, sports franchises, publishers, and celebrities all made new commitments to racial justice and took measures to correct past racist practices.[41] In short, the protests that thrust issues of racism

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[39] *See* Tim Arango, *'A Tsunami of Change': How Protests Fueled a New Crop of Prosecutors*, N.Y. TIMES, https://www.nytimes.com/2020/12/08/us/george-gascon-la-county-district-attorney.html [https://perma.cc/9P7U-LTWQ] (Feb. 11, 2021) (reporting that progressive prosecutors running on criminal justice reforms were successful in their respective 2020 district attorney races across the country); John Eligon & Audra D. S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html [https://perma.cc/6MXN-9CJM] (reporting that local candidates for sheriffs' offices, prosecutors, and council representatives ran on criminal justice reform platforms after voter registration increased drastically after the George Floyd protests); Sabrina Tavernise & John Eligon, *Voters Say Black Lives Matter Protests Were Important. They Disagree on Why.*, N.Y. TIMES, https://www.nytimes.com/2020/11/07/us/black-lives-matter-protests.html [https://perma.cc/7PCW-TUBD] (June 10, 2021) (reporting that voters in national elections also considered the Black Lives Matter protests as influential, although they were divided about whether the protests were positive or negative).

[40] *See, e.g.*, Marie Fazio, *Boston Removes Statue of Formerly Enslaved Man Kneeling Before Lincoln*, N.Y. TIMES, https://www.nytimes.com/2020/12/29/us/boston-abraham-lincoln-statue.html [https://perma.cc/6X8X-D256] (Feb. 28, 2021) (reporting that, in December 2020, in response to calls from protesters, Boston took down the "Emancipation Group" statue that portrayed President Lincoln with a freed Black man at his feet and had stood in Park Square since 1879); Bryan Pietsch, *Princeton Will Remove Woodrow Wilson's Name From School*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/2020/06/27/nyregion/princeton-university-woodrow-wilson.html [https://perma.cc/6H8Q-YWEJ] (reporting that Princeton University voted to change the name of the Woodrow Wilson School of Public and International Affairs in June 2020 in response to the George Floyd protests and in recognition of Wilson's racist ideas and actions); Bryan Pietsch, *Robert E. Lee Statue Is Removed from U.S. Capitol*, N.Y. TIMES, https://www.nytimes.com/2020/12/21/us/robert-e-lee-statue-us-capitol.html [https://perma.cc/4N5V-22UN] (Sept. 2, 2021) (noting that the United States House of Representatives voted to remove all Confederate statues in July 2020 in response to the protests, and reporting that Virginia accordingly removed a statue of Robert E. Lee in December 2020).

[41] *See, e.g.*, Vanessa Friedman et al., *The Fashion World Promised More Diversity. Here's What We Found.*, N.Y. TIMES (Mar. 4, 2021), https://www.nytimes.com/2021/03/04/style/Black-representation-fashion.html [https://perma.cc/7W9M-68YM] (noting that major fashion brands vowed to increase diversity in the industry in the wake of the George Floyd protests); Emily Heil, *Aunt Jemima Drops the Racial Stereotype and Rebrands as Pearl Milling Company*, WASH. POST (Feb. 10, 2021), https://www.washingtonpost.com/food/2021/02/10/aunt-jemima-pearl-milling-company/ [https://perma.cc/8NVS-HY3H] (reporting that in February 2021, Pearl Milling Company announced it would rebrand its Aunt Jemima pancake mix after 131 years in response to the George Floyd protests and in recognition of the name's racist history); Tiffany Hsu, *Corporate Voices Get Behind 'Black Lives Matter' Cause*, N.Y. TIMES, https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html [https://perma.cc/8SVB-NFWE] (June 10, 2020) (reporting that major corporations embraced Black Lives Matter after the George Floyd protests including Nike, Twitter, Citigroup, Netflix, HBO, Nordstrom, Ben & Jerry's, TikTok, YouTube, and Starbucks); Sonia Rao, *Celebrities Are Rushing to Support the Black Lives Matter Movement. Some Might Actually Make an Impact.*, WASH. POST (June 11, 2020), https://www.washingtonpost.com/arts-entertainment/2020/06/11/celebrities-black-lives-matter-movement/ [https://perma.cc/2EG7-8GH6] (highlighting the numerous celebrities that supported or participated in Black Lives Matter protests in the summer of 2020 and suggesting their support may have a tangible impact on public opinion); Barry Svrluga, *Baseball Is Finally Addressing Its Racist Past, but Its*

and violence against Black Americans into the national consciousness swiftly generated multidimensional progress.[42] Nevertheless, even in the months after the initiation of these reforms, police continued to kill Black Americans at a disproportionate rate, thus signaling that America as a nation still has much progress to achieve.[43]

To synthesize, the George Floyd protests are important to the focus of this Note because they demonstrate, in two crucial ways, the contemporary importance of *Claiborne Hardware* and the limited liability that it affords organizers.[44] First, the protests exemplify the insurmountable financial risk that protest organizers would face without the First Amendment's protection from liability exposure.[45] Although violence and property destruction rarely occurred at the George Floyd protests, the limited instances of violence and property destruction that did transpire generated tremendous financial loss.[46] It would be a financial catastrophe for the protest organizers if injured parties could collect damages from them.[47] Second, the swift and pivotal impact of the George

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*Work Can't End There*, WASH. POST (Dec. 16, 2020), https://www.washingtonpost.com/sports/2020/12/16/mlb-josh-gibson-satchel-paige-negro-leagues [https://perma.cc/5V4J-5DQ4] (reporting that, in December 2020, Major League Baseball officially recognized former Negro League players as members of the Big League); Derrick Bryson Taylor, *Maker of Dove Soap Will Drop the Word 'Normal' from Beauty Products*, N.Y. TIMES (Mar. 9, 2021), https://www.nytimes.com/2021/03/09/business/unilever-normal-positive-beauty.html [https://perma.cc/CQP8-BVFZ] (noting that in response to the national conversation that the George Floyd protests sparked, several beauty companies, such as Unilever, Johnson & Johnson, and L'Oréal announced they would correct racist marketing practices such as referring to lighter skin tones as "normal"); Taylor Telford, *Some Dr. Seuss Books with Racist Imagery Will Go Out of Print*, WASH. POST (Mar. 2, 2021), https://www.washingtonpost.com/business/2021/03/02/dr-seuss-racist-imagery/ [https://perma.cc/JZJ9-JPSU] (reporting that in March 2021, the publisher of Dr. Seuss books announced it would no longer print several books that contained racist depictions).

[42] *See* Motala, *supra* note 23, at 64 (linking the changes on racial justice in 2020 to the protests).

[43] *See* Collins, *supra* note 38 (noting that in the early months of 2021, police had already killed at least twenty-three Black Americans).

[44] *See* Motala, *supra* note 23, at 61–62 (offering the George Floyd protests as evidence that the Mckesson litigation and the First Amendment principle set forth in *Claiborne Hardware* are timely issues deserving of the Supreme Court's attention); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) (holding that courts may not hold individuals who are engaged in nonviolent, protected First Amendment activity liable for the violent acts of third parties).

[45] *See* Epps, *supra* note 14 (highlighting that without *Claiborne Hardware*'s promise of limited liability, protest organizers are vulnerable to private tort suits with potential for extensive damages deriving from the violence that occurs on the fringes of the demonstrations that they organize); *see also Claiborne Hardware*, 458 U.S. at 916–18 (holding that courts cannot hold protest organizers engaged in nonviolent, protected speech activity liable for the violent acts of others when they did not incite such violence).

[46] *See supra* note 34 and accompanying text (discussing the violence and property destruction that occurred during the George Floyd protests, and the significant financial cost of such violence and property destruction).

[47] *See* Motala, *supra* note 23, at 76 (suggesting that although Black Lives Matter organizers may be willing to endure arrest for protest activities, they are likely less willing to persevere in the face of an unchecked civil liability system whereby the cost associated with private tort suits could drive

Floyd protests manifests the indispensable nature of protests to American democracy, which is why the Court held in *Claiborne Hardware* that the First Amendment affords organizers limited liability protection in the first place.[48]

Thus, this Note seeks to contextualize the importance of the limited organizer liability principle first set out in *Claiborne Hardware* as an invaluable, present-day First Amendment protection.[49] Moreover, it argues that, in light of the Fifth Circuit's latest attack in *Mckesson IV*, the Supreme Court should look for an opportunity to reaffirm the breadth of this crucial protection for organizers.[50] Part I of this Note provides an overview of the broad landscape of First Amendment doctrine necessary to understand the issues at stake, as well as a detailed analysis of *Claiborne Hardware*.[51] Part II describes the Fifth Circuit's interpretation of *Claiborne Hardware* in *Mckesson IV* and the critiques and alternative interpretations that First Amendment scholars articulated in response to the Fifth Circuit's decision.[52] Part III argues that as a matter of both law and policy, the interpretation of *Claiborne Hardware* set forth by First Amendment scholars is correct.[53]

## I. THE FIRST AMENDMENT FOUNDATION

The First Amendment to the United States Constitution affords rigorous protection to those who exercise their right to protest the government.[54] This specific protection fits squarely within a central theme in the U.S. Supreme Court's broader First Amendment jurisprudence—that the First Amendment fiercely guards speech about public issues because such speech constitutes

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organizers bankrupt); *see also infra* notes 175–185 and accompanying text (discussing how the threat of civil liability can deter political organization).

[48] *See Claiborne Hardware*, 458 U.S. at 907, 931–32 (citing NAACP v. Overstreet, 384 U.S. 118, 86 (1966)) (recognizing that political association is invaluable to democracy and that its inherent fragility requires a First Amendment standard that protects such activity from state suppression); *see also infra* notes 112–115 and accompanying text (providing a nuanced coverage of the Court's underlying reasoning in *Claiborne Hardware*).

[49] *See infra* notes 54–219 and accompanying text.

[50] *See infra* notes 186–207 and accompanying text.

[51] *See infra* notes 54–134 and accompanying text.

[52] *See infra* notes 135–185 and accompanying text.

[53] *See infra* notes 186–207 and accompanying text.

[54] *See* U.S. CONST. amend. I ("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."); *see also* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH, § 16:2 (2020) (noting that the Supreme Court has repeatedly recognized that political speech and speech concerning governmental affairs are essential protected speech under the First Amendment (quoting Herbert v. Lando, 441 U.S. 153, 184–85 (1979) (Powell, J., concurring) ("[T]he [First] Amendment shields those who would censure the state or expose its abuses."))); *id.* § 16:3 (noting that the Court evaluates assembly, petition, and association cases as part of general free speech jurisprudence). The due process clause of the Fourteenth Amendment requires states to abide by the First Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

"core" activity that is essential to democracy.[55] Principally, this first Part casts the U.S. Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.* and its promise of limited tort liability for protest organizers against the larger backdrop of First Amendment law in which the Court has robustly protected speech activity in other comparable, but distinct, contexts.[56] Section A of this Part discusses the extent to which the Court has long recognized public speech activity—including protest activity—as core First Amendment activity.[57] Section B explores the Court's incitement doctrine as an example of another facet of First Amendment law—separate from the protest organizer liability doctrine—where the First Amendment restricts courts from imposing civil or criminal liability on speech.[58] Section C discusses the First Amendment doctrine that requires limited tort liability for protest organizers, as the Court established in *Claiborne Hardware*, which is the primary focus of this Note.[59] Finally, Section D discusses how the Court has held that the First Amendment supersedes ordinary tort liability principles in the context of other speech-related torts.[60]

### *A. Protesting the Government Is Core First Amendment Activity*

The Supreme Court has repeatedly stated that speech regarding "matters of public concern" is "core" speech deserving of the utmost protection under the First Amendment.[61] This is because the inherent utility of such speech—the

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[55] *See infra* notes 61–72 and accompanying text (discussing the Court's First Amendment jurisprudence and the broad protection it affords "core" speech).

[56] *See infra* notes 61–134 and accompanying text (laying out various facets of First Amendment law to demonstrate the breadth of the First Amendment's protection of speech). Namely, this Part discusses the First Amendment doctrine governing inciting speech and the theory that underlies it. *Infra* notes 73–98 and accompanying text. It also discusses the doctrine governing other speech-related torts, such as libel and intentional infliction of emotional distress. *Infra* notes 116–124 and accompanying text. To avoid distraction, the reader should note that the discussion of these other facets of First Amendment law are not essential for comprehending the protection that the First Amendment affords to protest organizers. *See* SMOLLA, *supra* note 54, § 10:44 (noting that *NAACP v. Claiborne Hardware Co.* governs organizer-based protest liability and *Brandenburg v. Ohio* governs incitement liability); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) (holding that the First Amendment limits the tort liability of protest organizers); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (setting out the test for what constitutes inciting speech). The author includes them because they exemplify the awesome breadth of speech protection in the United States and provide helpful context for understanding why the First Amendment affords organizers such rigorous protection. *See* Brief of Floyd Abrams et al., *supra* note 18, at 7 (noting that limited tort liability for protest organizers aligns with the Supreme Court's broader tendency to robustly protect public speech).

[57] *See infra* notes 61–72 and accompanying text.

[58] *See infra* notes 73–98 and accompanying text.

[59] *See infra* notes 99–115 and accompanying text.

[60] *See infra* notes 116–134 and accompanying text.

[61] *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (starting that speech concerning public issues represents "the highest rung of the hierarchy of First Amendment values," and deserves the most safeguarding (quoting Connick v. Meyers, 461 U.S. 138, 145 (1983))); Virginia v. Black, 538

exchange of ideas pertaining to public issues—is essential to an effective and successful democratic system.[62] Indeed, the "self-governance" theory is one of the philosophies that courts and scholars most frequently articulate in free speech jurisprudence to justify the United States' robust speech protection regime.[63] The theory postulates that freedom of speech is an essential liberty deserving of vigorous protection mainly—if not exclusively—because democracy requires it.[64] Without free speech, it would be impossible for citizens to engage in the conversations necessary to evaluate effectively the policies and

U.S. 343, 365 (2003) (noting that political speech, for example is "core" speech, because it lies at the "core of what the First Amendment is designed to protect"). The Court has defined "matters of public concern" quite broadly to include speech that regards political or social issues or "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453 (quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004)). In 2011, in *Snyder v. Phelps*, the U.S. Supreme Court distinguished speech concerning public issues from speech concerning private issues and held that speech concerning private issues receives less First Amendment protection because the policy interest in protecting private speech is not as significant. *Id.* at 452.

[62] *See Snyder*, 562 U.S. at 452–53 (stating that the First Amendment is grounded in the notion that deliberation over public matters is essential to self-governance, such that "debate on public issues should be uninhibited, robust, and wide-open" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (noting that the First Amendment not only enables individual expression, but it also plays "a *structural* role" in our democratic system); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating that a major force behind the First Amendment was the need to guard and enable dialogue about political candidates, government structure, government operations, and all other topics that pertained to politics). *See generally* SMOLLA, *supra* note 54, §§ 16:1–:2 (discussing the way the Court has recognized political speech as core First Amendment speech).

[63] *See* SMOLLA, *supra* note 54, § 2:3 (explaining that the self-governance theory is one of three major theories that scholars and judges offer to elucidate why speech should be so protected). Theory plays an important role in First Amendment jurisprudence because one's understanding of *why* courts should protect speech informs the analysis as to *when* speech rights should prevail, particularly in instances where the exercise of one's speech rights implicates the rights of others or brings forth other undesirable consequences. *See id.*; *see also* Victor Brudney, 53 B.C. L. REV. 1153, 1161 (2012) (noting that to determine whether the First Amendment lends protection to particular speech, one must first identify the relevant values that ground the First Amendment). The three dominant theories are the "marketplace of ideas" theory, the "human dignity and self-fulfillment" theory, also known as the "autonomy" theory, and the "democratic self-governance" theory. SMOLLA, *supra* note 54, § 2:3. Subscribers to the "marketplace of ideas" theory believe courts should robustly protect speech to allow ideas to freely compete with each other in the "marketplace," as a means for finding truth. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (famously articulating the theory); *see also* SMOLLA, *supra* note 54, § 2:4 (discussing the theory generally). Subscribers to the "autonomy" or "human dignity and self-fulfillment" theory believe courts should protect speech because speech itself is essential to liberty and self-expression. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that the founders "valued liberty both as an end and a means"); SMOLLA, *supra* note 54, § 2:5 (describing the theory). For a discussion of the "self-governance" theory, see *infra* notes 64–66 and accompanying text.

[64] *See* SMOLLA, *supra* note 54, § 2.6 (noting that the tenets of the "self-governance" theory are undisputedly some of the most important grounds for protecting speech and the only debate surrounding the theory concerns whether political speech should be the *only* type of speech that courts protect).

practices of government and to hold officials accountable.[65] Thus, the Supreme Court has considered infringements on speech pertaining to such issues as especially problematic, and has accordingly applied heightened scrutiny.[66]

Furthermore, the Supreme Court has recognized that peaceful protest is an essential mechanism by which these democratic objectives are often realized—particularly when directed at government institutions, actors, and policies.[67] Certainly, protests have long played a significant role in the American political tradition and have historically served as an important means of bringing about social, political, and economic progress.[68] As such, punishing protestors for expressing dissenting opinions is wholly inconsistent with the First

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[65] *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 73 (1989) (explaining first, that if citizens do not have access to information and competing opinions, they cannot make informed political decisions, and second, that if citizens cannot voice their opinions to their elected representatives, such representatives will govern poorly); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 527, 542 (1977) (arguing that the freedoms of speech, assembly, and the press crucially enable citizens to check power abuses by public officials, and effectively "veto" their actions when they misstep).

[66] *See, e.g.*, *Snyder*, 562 U.S. at 457–58 (applying a heightened standard of review to tort damages imposed on speech because the speech at issue pertained to "matters of public concern"). Generally, government restrictions of speech that are "content-based," meaning they "appl[y] to particular speech because of the topic discussed or the idea or message expressed," are "presumptively unconstitutional" and subject to strict scrutiny. Reed v. Town of Gilbert, 576 U.S. 155, 155, 171 (2015). As such, "content-based" restrictions only survive constitutional muster if the government demonstrates they satisfy strict scrutiny, meaning they are "narrowly tailored to serve compelling state interests." *Id.* at 163. A government may, however, regulate the "time, place, or manner" in which speech is communicated. Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (1988). Such restrictions are subject to less exacting scrutiny, in that they must be "narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so." *Id.* at 798. The application of this framework is relatively straightforward when the speech restriction at issue is a statute that makes message-based or "time, place, or manner"-based distinctions. *See, e.g.*, *Reed*, 576 U.S. at 160, 164 (determining that a sign ordinance that set different restrictions for political signs than for directional signs was content-based). Yet, in tort cases, the speech restriction at issue is less obvious—the government restricts speech by imposing damages for the defendant's harm to the plaintiff. *E.g.*, *Snyder*, 562 U.S. at 447, 451. In such cases, restrictions are content-based if what the speaker specifically said caused the harm for which the listener sought to be compensated. *See, e.g.*, *id.* at 457 (determining that the "content and viewpoint" of the picketer's message is what caused the plaintiff's harm). Although, in this context, the Court has not explicitly required content-based tort liability exposure to survive strict scrutiny, it has instead identified whether the speech at issue deserves "special protection," as determined by its public or private nature. *See, e.g.*, *id.* at 458 (applying this method).

[67] *See* Cox v. Louisiana (*Cox II*), 379 U.S. 559, 574 (1965) (recognizing that the exercise of free speech and assembly rights through peacefully protest as "so important to the preservation of the freedoms treasured in a democratic society"); *see also* Brief of Floyd Abrams et al., *supra* note 18, at 7–9 (arguing that the Court has explicitly tied civil protest to the preservation of democracy).

[68] *See* Brief of Floyd Abrams et al., *supra* note 18, at 4–6 (recognizing the advocates of various social movements in American history that brought about change through protest, including the American colonists who participated in the Boston Tea Party, abolitionists, women's suffragists, labor organizers, civil rights activists, and anti-war protestors); *see also supra* notes 18–22 and accompanying text (discussing the specific tactics these movements used and their effects).

Amendment and its underlying policies.[69] Importantly, the Court has emphatically stated that the First Amendment does not lend protection to violent activity.[70] Yet, it has also recognized that protest speech and related expressive activity are often necessarily provocative and might even be most effective when they cause unrest.[71] Thus, the First Amendment requires that the government strike a delicate balance: it must establish regulations that provide for societal order, but do so in a manner that does not overly inhibit such core protected activity.[72]

### *B. The Confines of First Amendment Protections and Modern Incitement Doctrine*

Although the First Amendment's guarantees of speech, assembly, and petition are certainly robust, they are not absolute.[73] The Supreme Court categorically gives less First Amendment protection to some types of speech because the speech itself is of lesser societal value or because it poses a danger against

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[69] *See* Cox v. Louisiana (*Cox I*), 379 U.S. 536, 551–52 (1965) (holding that a statute that prohibited "congregating with others with intent to provoke a breach of the peace," such as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet," was overly broad and unconstitutionally punished protestors for lawful exercise of their free speech and assembly rights); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[The Court] should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten intermediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."); Brief of Floyd Abrams et al., *supra* note 18, at 7 (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)) (noting that the Supreme Court has since embraced Justice Holmes' philosophy, as articulated in his dissent in *Abrams*).

[70] *Cox II*, 379 U.S. at 574 (noting the Court's decisions have repeatedly stated that violence is antithetical to democracy such that the right to peacefully protest is subject to time and location limitations).

[71] *See Cox I*, 379 U.S. at 551–52 ("[Speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (quoting Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949))).

[72] *See Cox II*, 379 U.S. at 574 (stating that citizens have a duty to abide by laws and regulations that validly limit the time and place for protests, but that such laws and regulations must adequately provide citizens with notice of what conduct is unlawful and must not be overly broad so as to suppress First Amendment expression).

[73] *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (noting that because the First Amendment does not protect speech absolutely, the Court has held that the First Amendment does not shield particular categories of speech and expression from regulation); *see also* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 482 (2007) (Alito, J., concurring) ("[The Court's] jurisprudence over the past 216 years has rejected an absolutist interpretation [of the First Amendment] . . . ."); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (noting that a state may restrict the exercise of free speech and assembly to prevent the destruction of the state or consequential political, economic, or moral harm to the state); SMOLLA, *supra* note 54, § 2:10 (noting that First Amendment speech guarantees are not without limit, despite the language of the Amendment itself seeming absolute); *cf.* U.S. CONST. amend. I ("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 redress of grievances.") (emphasis added).

which the state has an interest in defending society.[74] Among the types of speech that fall outside the protection of the First Amendment is speech that incites violence.[75] When speech loses its protection because it qualifies as inciting speech, courts can impose criminal and civil liability on the speaker without running afoul of the First Amendment.[76] Yet, as discussed herein, the incitement test is so stringent that even speech that explicitly condones violence rarely satisfies its requirements, thus exemplifying the robust protection that the First Amendment affords speech.[77]

In 1969, in *Brandenburg v. Ohio*, the Supreme Court set forth the modern doctrine for incitement and fashioned the test it now uses to determine whether the restriction of such speech is consistent with the vigorous protections of the First Amendment.[78] In *Brandenburg*, the Court considered the conviction of a Ku Klux Klan (Klan) leader under a criminal syndicalism statute for his involvement in organizing, speaking at, and publicizing a Klan rally.[79] At the

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[74] *See Black*, 538 U.S. at 358–59, 363 (first citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992); then citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); then citing Cohen v. California, 403 U.S. 15, 20 (1971); then citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); and then citing Watts v. United States, 394 U.S. 705, 708 (1969)) (noting that the various categories of less protected speech include "fighting words"—words that are likely to provoke the average listener to react violently, "true threats" of violence, incitements, and obscenity). In *Chaplinsky v. New Hampshire*, the Court noted that it had recognized particular "well-defined and narrowly limited" categories of speech that governments may seek to prevent and punish without running afoul of the First Amendment. 315 U.S. at 571–72. Namely, this is because such speech does not contribute to the sharing of ideas or provide value to a truth-seeking society, and therefore, the state interest in maintaining order outweighs the protection of such speech. *Id.* at 572–73. *But see* SMOLLA, *supra* note 54, § 2:70 (noting that the specific categories set out in *Chaplinsky* are no longer representative of modern doctrine and that the Court is reluctant to recognize additional categories of less protected speech).

[75] *See infra* notes 78–90 and accompanying text (describing the Court's doctrinal analysis for inciting speech).

[76] *See Black*, 538 U.S. at 358–59 (noting that states may regulate or proscribe speech that categorically falls outside the protection of the First Amendment).

[77] *See Brandenberg*, 395 U.S. at 447 (holding that to qualify as inciting speech for purposes of First Amendment doctrine, the speech must be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928–29 (1982) (holding that speech loosely threatening violent repercussions for breaking a boycott did not constitute incitement because although violence did transpire, it occurred weeks after the speaker's comments, and therefore, the violence was not imminent); Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (holding that speech insinuating violence did not qualify as inciting speech because the threat of violence was also not imminent).

[78] *Brandenburg*, 395 U.S. at 447; *see Black*, 538 U.S. at 359 (referencing *Brandenburg* as the source of law governing modern incitement doctrine); *see also* SMOLLA, *supra* note 54, § 10:24 (noting that the Court currently uses the *Brandenburg* test to evaluate restrictions targeted at speech that may inspire illegal and dangerous actions).

[79] *Brandenburg*, 395 U.S. at 444–46. The Ohio Criminal Syndicalism Act prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444–45. The convicted individual had invited a television reporter to attend the rally. *Id.* at 444–46.

rally, parts of which television networks eventually broadcasted on local and national channels, twelve participants gathered alone at a farm and burned a wooden cross while uttering various racist and anti-Semitic epithets.[80] The leader of the rally also delivered a speech in which he spoke of the government's continued efforts to "suppress the white, Caucasian race," and the possible need for the Klan to take "revengeance."[81]

The Court noted that the Ohio Criminal Syndicalism Act at issue was similar to those of several other states that had allowed for the punishment of speakers who simply advocated for violence as a means to force political or economic change.[82] Although acknowledging that it had originally upheld such statutes that punished mere advocacy, the Court noted that its more recent decisions effectively refuted that principle.[83] Thus, the Court held that the First Amendment prohibited the government from punishing individuals for advocating for others to act violently "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[84] As such, it reversed the conviction of the Klan leader because the Ohio Criminal Syndicalism Act, both textually and as applied to the facts, impermissibly punished advocacy without meeting the imminence requirement.[85]

The *Brandenburg* test for incitement has proved difficult to satisfy—particularly with regard to the imminence and likelihood requirements.[86] For example, in 1973, in *Hess v. Indiana*, the Supreme Court overturned the disorderly conduct conviction of an anti-war protestor because his speech was not connected to "imminent lawless action."[87] A large group of antiwar demonstrators had originally blocked a public street before police officers forcibly moved them to the curb.[88] Hess, the convicted organizer, said in the presence

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[80] *Id.* at 444–46(noting that several of the participants carried weapons and generally providing a more detailed account of the facts).

[81] *Id.* at 446 (providing the text of the leader's speech in full).

[82] *See id.* at 447 (citing Whitney v. California, 274 U.S. 357 (1927)) (comparing the Ohio statute to that of California that the Court analyzed in *Whitney v. California*).

[83] *See id.* (first citing Dennis v. United States, 341 U.S. 494, 507 (1951); and then citing *Whitney*, 274 U.S. 357) (noting *Dennis v. United States* as an example of a later decision that "thoroughly discredited" *Whitney*, which upheld a similar statute).

[84] *Brandenburg*, 395 U.S. at 447. Thus, for speech to constitute incitement it must be (1) "directed to inciting or producing"; (2) "*imminent* lawless action"; and (3) "*likely*" to result in "lawless action." *Id.* (emphasis added).

[85] *Id.* at 447–49.

[86] *See* SMOLLA, *supra* note 54, §§ 10:27–:30 (noting that the imminence and likelihood requirements lie at the heart of the test and that the Court's subsequent application of the test has resulted in the overturning of convictions that inadequately satisfy either prong).

[87] Hess v. Indiana, 414 U.S. 105, 107, 108–09 (1973).

[88] *Id.* at 106.

of the sheriff, "We'll take the f[***]ing street later."[89] Applying the *Brandenburg* test, the Court held that the use of the word "later" indicated that Hess' speech posed an insufficient risk of imminent harm, such that the First Amendment foreclosed the state from punishing him for such speech.[90]

In 1982, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court further demonstrated the stringency of the *Brandenburg* test.[91] There, leaders of the National Association for the Advancement of Colored People (NAACP) organized a boycott of stores owned by white individuals as part of an effort to protest segregation and advocate for racial equality.[92] One of the leaders, Charles Evers, gave several speeches in which he called for the boycott and insinuated violence against those who did not follow along.[93] Indeed, several boycott supporters—none of whom were Evers—carried out acts of violence against individuals who violated the boycott.[94] Yet, such acts did not occur until weeks and months after Evers' speeches.[95] As such, the Court held that his speeches did not qualify as incitement under *Brandenburg* and therefore retained First Amendment protection.[96] The Court noted that activists must be able to use poignant and stirring rhetoric in order to effectively call for listeners to collectively embrace a shared cause.[97] Further, it reasoned that the failure to protect such speech would be at odds with the First Amendment's commitments to the unbridled discussion of public issues.[98]

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[89] *Id.* at 107 (noting that Hess's statement prompted the sheriff to arrest him for disorderly conduct).

[90] *See id.* at 108–09 (noting that listeners could have interpreted Hess's statement to mean he was advocating for the exercise of restraint or, at least, was only encouraging unlawful action at some unknown point in the future); *see also* SMOLLA, *supra* note 54, § 10:27 (emphasizing the Court's reliance on the word "later" as dispositive to the Court's determination that the threat of unlawful action was not imminent).

[91] *See* 458 U.S. 886, 927–28 (1982) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)) (applying the *Brandenburg* test to the facts of this case); *see also* SMOLLA, *supra* note 54, § 10:28 (noting that *Claiborne Hardware* clarified the application of the *Brandenburg* test).

[92] *Claiborne Hardware*, 458 U.S. at 898–900. In the weeks before the boycott, the Claiborne County, Mississippi NAACP chapter presented a petition with nineteen racial equality demands to local public officials but was unsatisfied with the officials' response. *Id.* As a result, the group held a meeting at which those in attendance unanimously voted to boycott local white-owned businesses. *Id.* at 900.

[93] *See id.* at 902 (noting that Evers said "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck").

[94] *See id.* at 904–05 (recounting the violent acts). In two instances, individuals fired shots at the houses of boycott violators. *Id.* at 904. In one instance, an individual threw a brick at a violator's windshield. *Id.* In another instance, individuals damaged a violator's flower garden. *Id.*

[95] *Id.* at 928 (highlighting the time lapse between the Evers speeches and the acts of violence).

[96] *Id.* at 928–29.

[97] *Id.* at 928 (noting the effectiveness and importance of colorful and emotional language).

[98] *Id.* (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

### *C.* NAACP v. Claiborne Hardware Co. *Sets Forth a First Amendment Principle Limiting the Tort Liability of Protest Organizers*

In addition to clarifying the operative nature of the incitement test, the Court set forth the separate, but crucial, principle in *Claiborne Hardware* that explicitly limited the extent to which courts could hold protest organizers liable for tort damages.[99] The business-owner plaintiffs alleged that the NAACP and Evers were liable for the tort of malicious interference with their businesses due to their roles in organizing the boycott and insinuating violence as a means of enforcement.[100] When it evaluated such theories of tort liability, the Court reiterated the longstanding principle that violence falls outside the protection of the First Amendment.[101] It also affirmed that states may impose tort liability for business losses that violence or threats of violence cause.[102] Yet, the Court unanimously held that when the harm that the plaintiff alleges occurs in connection with protected speech and expression, the First Amendment constrains the state's ability to impose liability for resulting tort damages.[103] The Court noted that the state may not hold an individual liable for the harm caused by the tortious conduct of others unless the individual "authorized, directed, or

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[99] *Id.* at 916–18; SMOLLA, *supra* note 54, § 10:44 (highlighting that *Claiborne Hardware* established the principle that the First Amendment limits the reach of state tort law). Notably, in *Claiborne Hardware*, the parties disputed whether Evers had incited violence *as well as* whether Evers could be liable for damages because he organized a boycott in which some participants used violence as an enforcement mechanism. *See* 458 U.S. at 897–98, 927–28 (considering whether Evers' speech qualified as inciting speech). In contrast, in *Doe v. Mckesson* (*Mckesson I*), the facts did not support a claim that Mckesson incited violence. *See* Petition for Writ of Certiorari, *supra* note 1, at i, 5–7 (framing the question presented with the context that it was "undisputed" that Mckesson did not incite violence). As such, the only theory of liability before the court in *Mckesson IV* was protest organizer liability, not incitement liability. *Id.*; *see* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 830–32 (5th Cir. 2019) (reasoning Mckesson could be liable for the unidentified assailant's violence for reasons *other* than incitement). Thus, although a violent protest may give rise to both incitement and organizer-liability claims, such claims are distinct from each other. *See* SMOLLA, *supra* note 54, § 10:44 (noting that incitement and organizer-liability claims are analyzed through distinct frameworks).

[100] *See Claiborne Hardware*, 458 U.S. at 891, 897–98 (describing the plaintiffs' theories of tort liability). First, the business owners claimed that the defendants were liable for their damages for managing the boycott. *Id.* at 897. Second, they claimed the defendants were liable because individuals associated with the NAACP actively enforced the boycott, in part by engaging in "store-watching." *Id.* at 897–98 & n.22. Third, they claimed the defendants were liable because individuals threatened and carried out acts of violence to effectuate the boycott. *Id.* Finally, they claimed the defendants were liable because Evers threatened violence while acting in his role as a leader of the NAACP. *Id.* at 898.

[101] *See id.* at 916 ("Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" (quoting Samuels v. Mackell, 401 U.S. 66, 75 (1971) (Douglas, J., concurring))).

[102] *Id.*

[103] *See id.* at 916–17 ("[T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and the persons who may be held accountable for those damages.").

ratified [the] specific tortious activity."[104] In short, the Court held that the state could only impose damages liability on those whose violent conduct "proximately caused" the alleged harm and could not impose liability on those engaged in "nonviolent, protected activity"—regardless of its consequences.[105]

The Court further recognized that the efforts of the NAACP and Evers constituted fundamental political speech and association that deserved First Amendment protection.[106] The group had come together with the express purpose of demanding racial equality, and had organized the boycott and related speeches to achieve that end.[107] Furthermore, the Court noted that the NAACP and Evers neither engaged in nor condoned unlawful conduct in a manner that would have stripped their activities of such First Amendment protection.[108] Nothing in the record indicated that the NAACP in any way "authorized" or "ratified" the use of violent activity to effectuate the boycott.[109] Similarly, Evers himself did not perpetuate violence, and although his speeches abstractly warned of violent repercussions, they did not qualify as inciting speech.[110] Thus, the Court held that although the state could impose tort damages on those whose violent activity caused harm to the businesses, the First Amendment precluded it from imposing damages on the NAACP and Evers—notwithstanding the extent to which their nonviolent speeches and boycott organizing may have also caused the businesses harm.[111]

The Court also held that the First Amendment's protection of association generally forbids the government from holding individuals liable for civil damages simply because they belong to same group as perpetrators of vio-

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[104] *See id.* at 927 ("[A] finding that [Evers] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.").

[105] *Id.* at 918.

[106] *See id.* (noting that the boycott qualified as First Amendment protected speech or conduct).

[107] *Id.* at 907–08.

[108] *See id.* at 926–29, 930–31 (noting that Evers' actions and speeches were all within the scope of the First Amendment's protection, and that the NAACP's right of political association precluded the state from imposing tort damages upon it absent the organization's authorization or ratification of illegal activity).

[109] *See id.* at 924, 930–31 (noting that the use of illegal activity was not even mentioned at the Claiborne County NAACP meetings). The Court noted that the state could have held the NAACP liable under agency principles if those who acted violently did so with the "actual or apparent authority" of the NAACP. *Id.* at 930. Yet, the record reflected that the NAACP did not even have knowledge of the violence or threats thereof connected to the boycott, let alone authorized or ratified such violence. *Id.* at 930–31.

[110] *Id.* at 928–29. *See supra* notes 91–98 and accompanying text for further discussion of the Court's analysis that led to its conclusion that the First Amendment protected Evers' speeches insinuating violence.

[111] *See id.* at 918 ("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.").

lence.[112] Rather, the state may only impose individual liability on the sole basis of association when the group as a whole had unlawful objectives and the individual "held a specific intent" to further such objectives.[113] In reaching that conclusion, the Court noted that political association is both incredibly valuable to a democratic society, and yet, inherently fragile.[114] As such, the First Amendment acts as a defense against attempts to impede or dismantle associations by way of imposing damages liability.[115]

### *D. The First Amendment Supersedes Tort Law in the Context of Other Speech-Related Torts*

The Supreme Court has reconciled the conflict between the First Amendment and tort law in the context of other speech-related torts as well, demonstrating that *Claiborne Hardware*'s concept of limited liability for protest organizers is not unique in First Amendment jurisprudence.[116] The common thread in the other tort cases is that when the tortious speech at issue implicates core First Amendment principles, the First Amendment supersedes the relevant tort law principles and modifies or limits the extent to which courts may impose civil liability.[117]

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[112] *Id.* at 919–20 (first citing Noto v. United States, 367 U.S. 290, 299 (1961); then citing Scales v. United States, 367 U.S. 203, 229 (1961); and then citing Healy v. James, 408 U.S. 169, 185–86 (1972)).

[113] *Id.* at 920. The Court reasoned that when personal liberties are at stake, the state must avoid unnecessarily imposing broad and sweeping liability when accountability can be sufficiently achieved by way of a more tailored approach. *Id.*

[114] *See id.* at 907, 931–32 ("The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit.") (quoting NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting)). The Court noted that association is so important to American politics, because forming a group augments the ability of individual advocates to successfully assert and promote their views on public issues. *See id.* at 907–08 (citing Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal., 454 U.S. 290, 294 (1981)) (reasoning that without the ability of individuals to voice their opinions in a group, the public might not hear the views of individuals).

[115] *See id.* at 931–32 (noting that the First Amendment forbids both overt mechanisms for suppressing political association, such as a state prosecuting speech, as well as covert mechanisms, such as courts allowing the threat of civil liability for protest organizers to go unchecked).

[116] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 450, 458–59 (2011) (holding that the First Amendment precluded the government from imposing tort liability for intentional infliction of emotional distress); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56–57 (1988) (holding similarly in a case involving the tort of intentional infliction of emotional distress); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that the First Amendment required a more stringent standard for public officials alleging the tort of defamation); *see also Claiborne Hardware*, 458 U.S. at 918 (holding that the First Amendment affords limited tort liability to protest organizers engaged in nonviolent, expressive activity).

[117] *See Snyder*, 562 U.S. at 451 (noting that the First Amendment may operate as a defense in tort actions); *see also* SMOLLA, *supra* note 54, § 10:44 ("The rule is that state tort law must bend to the First Amendment—not the other way around.").

For example, in 1964, in *New York Times Co. v. Sullivan*, the Supreme Court held in a libel action that public officials seeking damages for allegedly false speech concerning their official activities must meet a higher standard of liability than would typically apply.[118] Specifically, the Court held that public officials could not recover damages unless they proved that the speaker acted with "actual malice."[119] The Court famously reasoned that its First Amendment jurisprudence reflected, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[120] Because the speech at issue concerned public officials and their actions—an essential component of this debate—it was crucial that such speech receive extra protection from tort liability.[121] The Court reasoned that critics inevitably make some minor factual errors when criticizing public officials, so a tort standard requiring critics to prove that their statements were true to avoid liability would have the effect of chilling speech.[122] In other words, even critics who believed their criticism to be true would refrain from publishing such speech out of fear of tort liability.[123] Thus, the First Amendment required the modified tort standard.[124]

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[118] *See Sullivan*, 376 U.S. at 279–80. The *New York Times* had published an advertisement that criticized the City of Montgomery, Alabama's Police Department's response to nonviolent civil rights demonstrations. *Id.* at 256–58. Because the advertisement contained some factual inaccuracies, the Commissioner of Public Affairs, who supervised the police department, brought a libel action against *The New York Times*. *Id.*

[119] *Id.* at 279–80 (defining "actual malice" to mean "with knowledge that it was false or with reckless disregard of whether it was false or not"). Typically, under Alabama tort law, the publication of a falsehood was "libelous per se" if it was about the plaintiff and was likely to cause harm to the plaintiff's reputation or bring the plaintiff into "public contempt." *Id.* at 267 (describing the libel standard). Once the jury found a publication was "libelous per se," the defendant's only defense was the truth. *Id.*

[120] *Id.* at 270; *see Snyder*, 562 U.S. at 452 ("The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting *Sullivan*, 376 U.S. at 270)).

[121] *See Sullivan*, 376 U.S. at 270 (noting that such debate may include forceful, sharp, and vexing critiques of public officials).

[122] *See id.* at 279 (reasoning that if the law required those criticizing official behavior to ensure that all their factual assertions were true with the risk of substantial tort damages, it would lead to "self-censorship").

[123] *Id.* (reasoning that speakers' concerns over whether they could prove veracity in court or the cost of going to court would deter speech—even when the statements were truthful).

[124] *See id.* at 279–80 (reaching the "actual malice" standard after setting out this reasoning). Notably, in *Gertz v. Welch*, the Court clarified the scope of the *New York Times Co. v. Sullivan* rule and held that when false speech concerned a *private* citizen, the plaintiff could recover under standard state libel principles. Gertz v. Welch, 418 U.S. 323, 345–46 (1974); *see also Sullivan*, 376 U.S. at 279–80 (holding that when speech concerns a public citizen, a plaintiff must demonstrate "actual malice" to recover libel damages from the speaker). Private citizens, the Court reasoned, do not influence public controversies in the same way that public actors do, and they also do not have the same capacity as public figures to use their platforms to correct public falsities about themselves. *Gertz*, 418 U.S. at 345–46.

Similarly, in 1988, in *Hustler Magazine, Inc. v. Falwell*, the Court held in an intentional infliction of emotional distress action that the First Amendment precluded courts from imposing liability on individuals who published parodic materials about public figures, absent a showing that the materials contained falsehoods created with "actual malice."[125] The Court echoed its reasoning in *Sullivan* and noted that the First Amendment affords "breathing space" to speech and expression concerning public figures.[126] It reasoned that intentionally-ridiculing satire about public figures is often an effective medium in public debate.[127] As such, a tort standard that allowed public figures to recover for emotional distress merely by demonstrating that the speaker intended to cause harm would be inconsistent with the First Amendment—even if that standard might be appropriate in other contexts not involving public subjects.[128] In short, because parodic speech about public officials is core First Amendment

[125] 485 U.S. 46, 56–57 (1988) (citing *Sullivan*, 376 U.S. at 279–80) (applying the *Sullivan* standard). The plaintiff in the case was Jerry Falwell, a prominent minister and national political commentator. *Id.* at 47. The Court held that Falwell was a "public figure" under the First Amendment. *Id.* at 57. Falwell brought an intentional infliction of emotional distress claim against *Hustler Magazine* after it published a parody piece that mocked certain advertisements for Campari Liqueur. *Id.* at 48. The real Campari Liqueur advertisements, on which the *Hustler Magazine* parody was based, contained interviews with celebrities discussing their "first times" trying Campari, while clearly emphasizing the double entendre. *Id.* The *Hustler Magazine* parody was called "Jerry Falwell talks about his first time," and included a fake interview with Falwell that portrayed him to state "that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse." *Id. Hustler Magazine* included multiple disclaimers that indicated the piece was fictional and parodic. *Id.*

[126] *Id.* at 52; *see Sullivan*, 376 U.S. at 271–72 (noting that expressive activity requires "breathing space"). The Court later emphasized that its extension of the *Sullivan* standard from defamation to intentional infliction of emotional distress was not a "blind application," but a recognition that the same underlying reasoning applied. *See Hustler Mag.*, 485 U.S. at 56–57 (stating the modified standard was "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment"); *see also Sullivan*, 376 U.S. at 272, 279–80 (reasoning that speech about public officials requires "breathing space," and accordingly holding that a heightened libel standard must apply to speech about public officials).

[127] *See Hustler Mag.*, 485 U.S. at 53–54 (noting that political cartoonists often deliberately design their work to offend the subjects they portray and convey a message through exaggeration or mockery). The Court noted that, although the *Hustler Magazine* parody was not a political cartoon, it would be impossible to come up with a standard to practically distinguish this type of parody from political cartoons. *Id.* at 55. As such, the Court indicated that, for purposes of the First Amendment analysis, there is value to public debate deriving specifically from political cartoons *as well as* from parody about public figures more generally. *See id.* (suggesting there was no reliable way to distinguish political cartoons from the *Hustler Magazine* parody and that the value at stake was the health of public discourse).

[128] *Id.* at 53. Falwell contended that he could recover for intentional infliction of emotional distress because the parody piece was (1) "intended to inflict emotional distress"; (2) "outrageous"; and (3) did cause Falwell emotional distress. *Id.* at 52–53.

speech, the Court held that the First Amendment requires a more speech-protective tort standard than would ordinarily apply.[129]

Continuing the trend, in 2011, in *Snyder v. Phelps*, the Court held in another intentional infliction of emotional distress action that the First Amendment prohibited courts from imposing liability on individuals for speech that regarded "matters of public concern."[130] The Court noted that the harm-inflicting speech at issue was related to the speakers' views on American politics, morality, the military, and the Catholic Church—all of which were topics relevant to the general public.[131] The speech was, therefore, core speech, such that the First Amendment precluded the Court from punishing the speakers by imposing liability, even though the plaintiffs did indeed suffer emotional harm.[132] The Court recognized that speech often has undesirable consequences, but reasoned that its First Amendment jurisprudence reflected a commitment to prioritize the preservation of public debate over the alleviation of collateral harm.[133] In short, this First Amendment commitment ultimately commanded that the Court to reprieve the speakers from tort liability.[134]

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[129] *See id.* at 56–57 (holding that the First Amendment precluded Falwell from recovering without a showing of falsity and "actual malice" because of his status as a public figure and the importance of protecting expression related to public figures).

[130] 562 U.S. 443, 458–59 (2011); *see supra* note 61 and accompanying text (providing further discussion on how to define a "matter of public concern"). The aggrieved plaintiff was the father of a soldier who died in Iraq. *Snyder*, 562 U.S. at 448. He brought an intentional infliction of emotional distress action against certain members of the Westboro Baptist Church who picketed on public land next to his son's funeral. *Id.* at 448, 450. The picketers held signs that read various messages including "God Hates the USA/Thank God for 911," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* at 458.

[131] *Snyder*, 562 U.S. at 454. The Court acknowledged that the signs were not "refined social or political commentary," but stated that they still expressed the picketers' opinions on issues that were generally "matters of public import." *Id.* Furthermore, the picketers intended to broadcast their viewpoints to a large audience. *Id.* at 449, 454 (noting that television networks featured the picketers).

[132] *Id.* at 458–59 (holding speech regarding "matters of public concern" receives "special protection," such that the Court could not impose tort liability).

[133] *Id.* at 460–61. The Court stated:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure we do not stifle public debate.

*Id.*

[134] *Id.* at 461.

## II. *DOE V. MCKESSON* AND THE ENSUING DEBATE OVER THE LIABILITY PROTECTIONS THAT *NAACP V. CLAIBORNE HARDWARE CO.* AFFORDS TO PROTEST ORGANIZERS

In 2019, in *Doe v. Mckesson* (*Mckesson IV*), the U.S. Court of Appeals for the Fifth Circuit held that a court could hold DeRay Mckesson liable for negligently organizing a protest at which violence occurred—even though Mckesson did not direct, encourage, or partake in such violence.[135] Many First Amendment scholars vehemently disagreed with the Fifth Circuit's holding and argued that it conflicted with the principle set out by the U.S. Supreme Court's decision in 1982 in *NAACP v. Claiborne Hardware Co*.[136] Section A of this Part establishes the consensus among courts and scholars that Mckesson was engaged in core First Amendment activity, such that *Claiborne Hardware* is relevant.[137] Section B of this Part recounts the Fifth Circuit's interpretation of *Claiborne Hardware* and its resultant holding in *Mckesson IV*.[138] Section C presents First Amendment scholars' opposition to and their interpretations of *Claiborne Hardware*.[139] Section D presents the chilling effect problem that arises from a "negligent protest" tort.[140]

### *A. Courts and Scholars Agreed That Mckesson Was Engaged in Core First Amendment Activity*

As a threshold matter, courts and scholars on both sides of the debate agree that Mckesson's organization of the Black Lives Matter protest was core First Amendment activity.[141] The Fifth Circuit and supporting scholars who

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[135] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828, 834 (5th Cir. 2019) (remanding to the District Court for consideration consistent with the notion that it could hold Mckesson liable for the officer's injuries without running afoul of the First Amendment); *see also* Petition for Writ of Certiorari, *supra* note 1, at i, 5–6 (noting that it was uncontested that Mckesson "neither intended, authorized, directed, nor ratified the perpetrator's act, nor engaged in or incited violence of any kind"). For further discussion of the facts of the case, see *supra* notes 1–9 and accompanying text.

[136] *See generally* Brief of First Amendment Scholars as *Amici Curiae* in Support of Petitioner, Doe v. Mckesson (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) [hereinafter Brief of First Amendment Scholars] (criticizing the Fifth Circuit's holding on the grounds that it conflicted with First Amendment jurisprudence); Brief of Floyd Abrams et al., *supra* note 18 (same); *Amici Curiae* Brief of the Institute for Free Speech in Support of Petitioner, Doe v. Mckesson (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) (same); Brief of The Rutherford Institute as *Amici Curiae* Supporting Petitioner, Doe v. Mckesson (*Mckesson VI*), 141 S. Ct. 48 (2020) (No. 19-1108) [hereinafter Brief of The Rutherford Institute] (same).

[137] *See infra* notes 141–145 and accompanying text.

[138] *See infra* notes 146–161 and accompanying text.

[139] *See infra* notes 162–174 and accompanying text.

[140] *See infra* notes 175–185 and accompanying text.

[141] *See, e.g.*, Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 832 (5th Cir. 2019) (acknowledging that Mckesson's actions occurred amidst First Amendment-protected political protest, but also holding that the First Amendment did not bar Mckesson's liability); Brief of Floyd Abrams et al., *supra* note

believe that the First Amendment did not preclude Mckesson from liability still recognize that that the First Amendment guaranteed his right to protest the police.[142] Further, in a wealth of amicus briefs submitted to the Supreme Court, First Amendment scholars placed Mckesson's protest activity squarely within the context of the rich history of political protests and social movements—all of which were only possible because of the stringent protections of the First Amendment.[143] As such, *Claiborne Hardware* was undisputedly applicable.[144] The ensuing debate concerned only the breadth of the First Amendment's limitations on protestor liability and whether Mckesson could still be liable under negligence principles, notwithstanding the core political nature of his activity.[145]

### *B. The Fifth Circuit's Interpretation of* NAACP v. Claiborne Hardware *as a Standard Application of Tort Law, Not a Categorical First Amendment Rule*

In *Claiborne Hardware*, the Supreme Court clarified that finding that the defendant boycott leader had "authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."[146] The U.S. District Court for the Middle District of Louisiana focused on this language in particular when it determined in 2017, in *Doe v. Mckesson* (*Mckesson I*), that Officer Doe failed to allege sufficient facts to

18, at 3–4 (arguing that Mckesson was exercising his core First Amendment rights when protesting the Baton Rouge police, such that the First Amendment precluded his liability).

[142] *See* Doe v. Mckesson (*Mckesson V*), 947 F.3d 874, 876–77 (5th Cir. 2020) (Ho, J., concurring) ("The First Amendment indisputably protects the right of every American to condemn police misconduct. And that protection secures the citizen protestor against not only criminal penalty, but civil liability as well."); *see also Mckesson IV*, 945 F.3d at 832 (recognizing that the First Amendment limited the extent to which a court may impose damages liability on those engaged in political protest (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916–917 (1982) (holding that courts may only impose liability for violent activity on violent actors and not on those engaged in contemporaneous nonviolent, protected activity))); Eugene Volokh, *When Does the First Amendment Preempt Negligence Liability?*, REASON: VOLOKH CONSPIRACY (Dec. 20, 2019), https://reason.com/volokh/2019/12/20/when-does-first-amendment-preempt-negligence-liability/ [https://perma.cc/YZA6-P6EK] (suggesting that the First Amendment affords protestors like Mckesson at least some protection from negligence liability).

[143] *See* Brief of First Amendment Scholars, *supra* note 136, at 2–3 (recognizing Mckesson's protest activity as a historically protected right); Brief of Floyd Abrams et al., *supra* note 18, at 4–6 ("The Black Lives Matter Movement is a twenty-first-century embodiment of this American tradition of publicly petitioning the government for redress."); *see also* Brief of The Rutherford Institute, *supra* note 136, at 14 (suggesting that the Women's Suffrage movement and the Civil Rights movement might not have been as successful if organizers could have been liable for the torts of third parties).

[144] *See* 458 U.S. at 916–18 (holding that the First Amendment limits the extent to which courts may hold individuals engaged in First Amendment protected activity civilly liable for the unlawful activity of others).

[145] *See, e.g.*, *Mckesson IV*, 945 F.3d at 832 (holding that Mckesson could be liable for the officer's injuries that the anonymous third party inflicted); Brief of Floyd Abrams et al., *supra* note 18, at 13 (arguing that normatively, the First Amendment standard should shield protest organizers from liability for damages that the violent acts of third parties generate).

[146] 458 U.S. at 927 (noting that the record did not support such a finding).

support his claim that Mckesson was liable for the unidentified attacker's assault on the officer.[147] In short, the district court interpreted the language in *Claiborne Hardware* to mean that, under the First Amendment, it could not hold Mckesson liable unless the facts demonstrated that he incited the specific violent actions of the assailant.[148]

The Fifth Circuit, however, disagreed with the district court's interpretation.[149] In 2019, in *Mckesson IV*, the Fifth Circuit held that for Officer Doe to recover damages from Mckesson for the violent act of the unidentified attacker, he needed only to prove that Mckesson condoned tortious and unlawful conduct, the "foreseeable result" of which was violence.[150] In other words, the Fifth Circuit interpreted *Claiborne Hardware*'s language to mean that an individual may be liable for the consequences of the violent actions of others if the individual condoned or partook in *any* other tortious activity that foreseeably would have led to violence.[151] According to the Fifth Circuit, Mckesson negli-

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[147] 272 F. Supp. 3d 841, 846–47 (M.D. La. 2017); *see also Claiborne Hardware*, 458 U.S. at 927 ("[A] finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.")

[148] *See Mckesson I*, 272 F. Supp. 3d at 847 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (holding that Officer Doe's allegations did not "give rise to a plausible claim for relief against Mckesson" because they were "conclusory in nature," in that the officer did not provide specific facts as to how Mckesson incited the violence or what specific violent orders he gave); *see also Claiborne Hardware*, 458 U.S. at 927 ("[A] finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."); Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828–29 (5th Cir. 2019) (noting that the district court required Officer Doe to plead facts that suggested Mckesson incited the particular unlawful conduct of the officer's attacker).

[149] *See Mckesson IV*, 945 F.3d at 828–29 (citing *Mckesson I*, 272 F. Supp. 3d at 847) (contesting the district court's interpretation). The Fifth Circuit issued four opinions in this case. *See generally* Doe v. Mckesson (*Mckesson V*), 947 F.3d 874 (5th Cir. 2020) (per curiam); *Mckesson IV*, 945 F.3d 818; Doe v. Mckesson (*Mckesson III*), 935 F.3d 253 (5th Cir. 2019), *withdrawn*, Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818 (5th Cir. 2019); Doe v. Mckesson (*Mckesson II*), 922 F.3d 604 (5th Cir. 2019), *withdrawn*, Doe v. Mckesson (*Mckesson III*), 935 F.3d 253 (5th Cir. 2019). First, in April of 2019, a three-judge panel reversed the district court's decision and held for the police officer. *Mckesson II*, 922 F.3d at 612–13; *see Mckesson I*, 272 F. Supp. 3d at 847. Mckesson then petitioned for a panel rehearing, at which all the circuit judges would typically hear the case, but instead, in August of 2019, the same three-judge panel granted the rehearing and issued an opinion substituting but affirming *Mckesson II* without hearing oral argument. *Mckesson III*, 935 F.3d at 257; *see Mckesson II*, 922 F.3d at 612–13; *see also* Epps, *supra* note 14 (explaining the complex procedural history). Then, in December of 2019, the Fifth Circuit issued a third opinion, *Mckesson IV*, in which the same three-judge panel withdrew *Mckesson III* but delivered the same result. *Mckesson IV*, 945 F.3d at 822; *see Mckesson III*, 935 F.3d at 257. Finally, in January of 2020, the Fifth Circuit considered vacating the December 2019 opinion in *Mckesson IV*, but split eight votes for, eight votes against, leaving *Mckesson IV* intact. *Mckesson V*, 947 F.3d at 874, 875; *see Mckesson IV*, 945 F.3d at 822.

[150] *Mckesson V*, 947 F.3d at 829.

[151] *Id.*; *see Claiborne Hardware*, 458 U.S. at 927 (holding that to hold a protest organizer liable for the tortious activity of a third party, only a finding that the organizer "authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity"). In his dissenting opinion, Judge Willett described the majority's interpretation of the language as a "'tortious conduct + foreseeable violence = liability for violence' formula—with no pars-

gently instructed the protestors to overrun the highway outside the police station.[152] The court reasoned that he was negligent because the demonstration was contentious in nature, and it was foreseeable that violence would break out.[153] Thus, the court stated, the violence that caused Officer Doe's injuries was a consequence, at least in part, of Mckesson's tortious activity, namely his negligent organization of the protest.[154] Therefore, under its interpretation of *Claiborne Hardware*, the First Amendment did not preclude the court from holding Mckesson liable for the officer's injuries, notwithstanding the extent to which Mckesson was engaged in core protected activity.[155]

To reconcile the different outcomes in *Mckesson IV* and *Claiborne Hardware*, the Fifth Circuit emphasized that in *Claiborne Hardware*, the *defendants*' *own* tortious conduct was not before the Supreme Court.[156] Rather, the only tortious conduct at issue in *Claiborne Hardware* was the violence of the third-party boycott enforcers who were not parties in the case.[157] In contrast, *Mckesson's own* tortious conduct was indeed before the Fifth Circuit—according to the Fifth Circuit, he himself acted negligently when he instructed the protestors to occupy the highway.[158] The Fifth Circuit insisted that the Supreme Court did not create a general rule in *Claiborne Hardware* that those engaged in nonviolent safeguarded speech activity could never be liable for the

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ing between *violent* tortious conduct (actionable) and *nonviolent* tortious conduct (nonactionable)." *Mckesson IV*, 945 F.3d at 845 (Willett, J., concurring in part and dissenting in part).

[152] *Id.* at 829 (majority opinion).

[153] *See id.* (noting that when Mckesson instructed the protestors to occupy the highway, it instigated a clash with the Baton Rouge police officers, such that the officer's injuries were a predictable consequence).

[154] *Id.*

[155] *Id.* ("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 court noted that this standard of combined liability that it applied was a settled principle in state tort law and argued that *NAACP v. Claiborne Hardware* did not do away with this principle. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 19 (AM. L. INST. 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.").

[156] *See id.* (noting that before *Claiborne Hardware* reached the Supreme Court, the Mississippi Supreme Court rejected the plaintiff's argument that the defendants were liable for the tort of malicious interference for damages to the businesses for organizing a political boycott); *see also Claiborne Hardware*, 458 U.S. at 918 (holding that the First Amendment precluded the state from imposing liability on the defendants for the damages that the violent acts of third parties generated). *But see* Epps, *supra* note 14 (suggesting the Fifth Circuit's opinion and *Claiborne Hardware* are indistinguishable and characterizing the Fifth Circuit's reasoning as bizarre and confusing).

[157] *See Mckesson IV*, 945 F.3d at 829 (citing *Claiborne Hardware*, 458 U.S. at 915) (noting, in other words, that if the violent acts of the third parties "had been removed from the boycott, the remaining conduct would not have been tortious at all").

[158] *Id.* (reasoning that Mckesson's actions were negligent because the demonstration was contentious, such that it was foreseeable that violence would break out when he instructed protesters to occupy the highway).

violent activities of others absent incitement.[159] Rather, the Supreme Court had simply concluded, by applying basic tort principles, that it could not hold the *Claiborne Hardware* defendants liable because lawful, nonviolent conduct could not be the proximate cause of violence-inflicted injuries.[160] Because Mckesson's negligent conduct, however, *could* be the proximate cause of the officer's injuries, the Fifth Circuit determined its ruling was consistent with *Claiborne Hardware*.[161]

### *C. First Amendment Scholars See Fifth Circuit's "Negligent Protest" Tort as an Affront to* NAACP v. Claiborne Hardware

Many leading First Amendment scholars found the Fifth Circuit's interpretation of *Claiborne Hardware* and resultant holding in *Mckesson IV* erroneous and fundamentally inconsistent with the long-recognized principles underlying the Supreme Court's First Amendment jurisprudence.[162] Specifically, they criticized the Fifth Circuit's theory that when a protest organizer engages in *any* unlawful activity—violent or nonviolent—that activity may expose a protest organizer to liability for the violence of others.[163]

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[159] *Id.* at 830. The Fifth Circuit was primarily responding to an argument that Judge Willett articulated in his partial dissent that *Claiborne Hardware* shields protestors from liability for the acts of others when they are participating in political speech and expression that does not constitute incitement—even when they engage in intentionally tortious activity. *Id.*; *id.* at 846 (Willett, J., concurring in part and dissenting in part).

[160] *Id.* at 830 (majority opinion); *see also Claiborne Hardware*, 458 U.S. at 918 ("Only those losses proximately caused by unlawful conduct may be recovered."). The Fifth Circuit did not clarify the black-letter tort law to which it referred. *Mckesson IV*, 945 F.3d at 830.

[161] *Mckesson IV*, 945 F.3d at 832 (noting that in this stage, the Fifth Circuit only held that the officer could "plausibly" prove Mckesson's negligence was the proximate cause of his injuries, such that the district court should not have dismissed his complaint on First Amendment grounds).

[162] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9–12 (criticizing the Fifth Circuit's ruling on these grounds); *see also* Epps, *supra* note 14 (referring to Floyd Abrams, Erwin Chemerinsky, Walter Dellinger, Geoffrey R. Stone, Nadine Strossen, and Kenneth P. White, authors of the Brief of Floyd Abrams et al., *supra* note 18, as a "dream team of First Amendment scholars").

[163] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9–10 (emphasizing the portion of the Fifth Circuit's opinion in *Mckesson IV* where it rejected the importance of the differentiation between violence and nonviolence in *Claiborne Hardware* (citing *Mckesson IV*, 945 F.3d at 830 ("[T]he United States Supreme Court did not invent a 'violence/nonviolence distinction' . . . [i]t 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.")*)*). As an aside, if an organizer incites violence, the organizer loses the protection of the First Amendment. *See* Virginia v. Black, 538 U.S. 343, 358–59, 363 (2003) (noting that inciting speech does not receive First Amendment protection); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding speech only constitutes incitement if it is both designed to inspire "imminent lawless action," and it is likely that such "imminent lawless action" will occur); *see also supra* notes 73–98 and accompanying text (discussing the stringency of the incitement test). In the original district court litigation, however, the officer failed to allege facts that indicated Mckesson incited violence, such that neither the Fifth Circuit nor the responding First Amendment scholars focused their attention on the significance of incitement. *See* Doe v. Mckesson (*Mckesson I*), 272 F. Supp. 3d 841, 846–47 (M.D. La. 2017) (holding the officer failed to plead suffi-

First, they argued that this notion distorted one of the Supreme Court's express holdings in *Claiborne Hardware*—that the violent or nonviolent nature of an organizer's activity *is* significant because it determines whether or what portion of the organizer's actions receive full First Amendment protection.[164] In other words, when protests have both violent and nonviolent aspects, the First Amendment *only* allows courts to impose liability on protest organizers for the *violent* aspects and bars courts from imposing liability on nonviolent speech activity.[165] Thus, the First Amendment requires courts to meticulously separate violent activity from nonviolent speech-related activity.[166] Furthermore, as *Claiborne Hardware* demonstrated, even those who organize protests that turn violent retain their protections under the First Amendment, so long as they do not participate in or incite such violence.[167] In short, the Fifth Circuit's holding allowing protest organizers to be liable for mere negligent conduct directly contradicted this rule.[168]

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cient facts to bring an incitement claim); *see also supra* note 148 and accompanying text (providing a further explanation as to why the officer failed to allege incitement).

[164] *See* Brief of Floyd Abrams et al., *supra* note 18, at 11 (noting that the Supreme Court explicitly ruled that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment" (quoting *Claiborne Hardware*, 458 U.S. at 915).

[165] *See Mckesson IV*, 945 F.3d at 844 (Willett, J., concurring in part and dissenting in part) ("The takeaway [from *Claiborne Hardware*] seems clear: The First Amendment only allows for civil liability for conduct that 'occurs in the context of constitutionally protected activity' when that activity involves violence or threats of violence." (quoting *Claiborne Hardware*, 458 U.S. at 916)); *see also* Brief of Floyd Abrams et al., *supra* note 18, at 11 (acknowledging Judge Willett's dissent as persuasive).

[166] *See* Brief of Floyd Abrams et al., *supra* note 18, at 11 ("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." (quoting *Claiborne Hardware*, 458 U.S. at 918)); *see also Claiborne Hardware*, 458 U.S. at 916 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)) (stating that when violent activity occurs amidst First Amendment protected activity, the Constitution requires exacting regulation).

[167] *See Claiborne Hardware*, 458 U.S. at 933 (holding the defendant boycott organizers were not liable even though some boycott participants acted violently); Brief of Floyd Abrams et al., *supra* note 18, at 11 (arguing that protests at which violence occurs are not automatically devoid of First Amendment protection); *see also Mckesson IV*, 945 F.3d at 840 (stating that the First Amendment protects protests, even when organizers passionately advocate for the use of force, so long as they do not intend to incite violence and such violence is not likely to result). Incitement refers to the specific test set out in *Brandenburg v. Ohio*. 395 U.S. 444, 447 (1969) (holding that speech qualifies as incitement if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also supra* notes 73–98 (providing further discussion of the incitement test). As discussed *supra*, in *Claiborne Hardware*, the defendant boycott organizers retained their First Amendment protections, even though some nonparties had acted violently in enforcing the boycott, because the First Amendment requires meticulous protection of nonviolent speech activity. 458 U.S. at 918; *see also supra* notes 91–115 and accompanying text (discussing *Claiborne Hardware* in further detail).

[168] *See* Brief of Floyd Abrams et al., *supra* note 18, at 10 (arguing that allegations of basic negligence are not enough to impose liability on individuals engaged in protected First Amendment activity); *see also Mckesson IV*, 945 F.3d at 846 (stating that holding a protest organizer liable on theories

Second, these scholars argued that when the Fifth Circuit construed *Claiborne Hardware* to provide for sweeping organizer liability, it completely disregarded the First Amendment policies in which the Supreme Court grounded its holding in *Claiborne Hardware*.[169] Namely, the Supreme Court repeatedly echoed throughout the opinion that the rights to political protest and association are so important to democracy and so central to the First Amendment that the state may not suppress their exercise by "heavy-handed frontal attack" or "more subtle government interference."[170] When courts hold protest leaders liable for civil damages, that constitutes "subtle government interference."[171] The scholars argued that these principles led the Court in *Claiborne Hardware* to first conclude that courts must separate the violent, unprotected conduct of organizers from their nonviolent safeguarded conduct.[172] Furthermore, these principles led the Court to explicitly hold that courts may only impose sheer association-based liability on individual members of a group for violence by other members if particular intent elements are met: the group itself must have had violent objectives, and the individual must have had "specific intent" to effectuate such objectives.[173] In short, the scholars argued that by transforming *Claiborne Hardware* into a decision that expanded the liability of protest organizers, the Fifth Circuit's opinion in *Mckesson IV* ran directly afoul to the Supreme Court's underlying reasoning in *Claiborne Hardware*.[174]

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of negligence for the violent acts of another is inconsistent with *Claiborne Hardware* and First Amendment jurisprudence).

[169] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9 (arguing that the Fifth Circuit's opinion also contradicted the Supreme Court's other First Amendment jurisprudence); *see also Claiborne Hardware*, 458 U.S. at 918 (holding that the First Amendment precluded the court from holding the organizers of a boycott liable for the violent acts of third parties).

[170] Brief of Floyd Abrams et al., *supra* note 18, at 9 (quoting Bates v. Little Rock, 361 U.S. 516, 523 (1960)); *see also Claiborne Hardware*, 458 U.S. at 932 (citing *Bates*, 361 U.S. at 523) ("[T]he protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled.").

[171] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9 (citing *Claiborne Hardware*, 458 U.S. at 915–17) (noting the Court in *Claiborne Hardware* explicitly identified civil liability as such an interference).

[172] *See* Brief of Floyd Abrams et al., *supra* note 18, at 10–11 (tying the Court's violence/nonviolence distinction to the longstanding principle that political speech activity "has always rested on the highest rung of the hierarchy of First Amendment values" (quoting *Claiborne Hardware*, 458 U.S. at 913)); *see also Claiborne Hardware*, 458 U.S. at 927 ("[A] finding that [the boycott organizer] authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.").

[173] *See* Brief of Floyd Abrams et al., *supra* note 18, at 12–13 (emphasizing this express holding in *Claiborne Hardware*); *see also Claiborne Hardware*, 458 U.S. 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 specific intent to further those illegal aims.").

[174] *See* Brief of Floyd Abrams et al., *supra* note 18, at 12–13 (noting that by disregarding the rationale behind *Claiborne Hardware*, the Fifth Circuit's opinion "trivialize[d]" the Supreme Court's crucial First Amendment holding); *see also* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 830 (5th Cir. 2019) (providing the holding with which amici disagreed).

### *D. First Amendment Scholars Warn That Fifth Circuit's "Negligent Protest" Tort Will Chill Speech*

Many First Amendment scholars also cautioned that exposing protest organizers to broad negligence liability for the violent actions of third parties would certainly have the effect of chilling core First Amendment speech.[175] First, it would generate countless opportunities for plaintiffs to bring civil actions against organizers and recover damages for injuries suffered at the hands of other violent actors—actors whom the organizers were unable to control, or of whom the organizers were not even aware.[176] This ultimately would transfer both the cost of preventing violence and the cost of compensating for inevitable harm from the individual violent actor to the protest organizer.[177] Such liability exposure would force protest organizers to weigh the importance of their social or political causes against the potential cost of compensating injured parties for third-party-inflicted harm.[178] Some organizers would likely forgo protesting for reasonable fear of such liability.[179] Furthermore, opponents of certain movements would have an incentive to take advantage of negligence theories and effectively use civil suits to extinguish the messages of those who would continue to protest even when faced with such liability.[180] Ultimately, the chilling effect would reach all organizers on all sides of any given debate.[181]

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[175] *See* Brief of First Amendment Scholars, *supra* note 136, at 22–23 (cautioning against the chilling effect); Brief of Floyd Abrams et al., *supra* note 18, at 17 (same); Brief of The Rutherford Institute, *supra* note 136, at 11–12 (same); *see also* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (describing the deterrence of speech due to the threat of liability as the chilling effect). Some scholars in support of the Fifth Circuit's interpretation of *Claiborne Hardware* even acknowledged the problem of a chilling effect on speech. *See, e.g.*, Volokh, *supra* note 142 (acknowledging that "categorical immunity from negligence liability" is an understandably appealing way to minimize the "chilling effect" on protest organizers, even when such organizers are carrying out minor crimes like trespassing).

[176] *See* Brief of First Amendment Scholars, *supra* note 136, at 22 (noting that counter-protestors could also use civil suits as a tactic to silence their opponents' message).

[177] *See id.* (describing the undesirable cost-shifting effects of the Fifth Circuit's liability standard and noting these are harms and costs over which the protest organizer has little control). Violence, property damage, and resultant harm are often inevitable at protests, because they are often disruptive and attract impassioned participants. *See* Brief of Floyd Abrams et al., *supra* note 18, at 14 (noting that the Supreme Court has long held that the First Amendment protects protests even though they are likely to lead to unrest (first citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); and then citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949))). Furthermore, the liability exposure at a big protest could be immense, depending on the extent of destruction at a given protest. *Id.* at 17.

[178] *See* Brief of The Rutherford Institute, *supra* note 136, at 11–12 (suggesting such liability would cause organizers to think twice before coaxing protestors to take over public areas).

[179] *See* Brief of First Amendment Scholars, *supra* note 136, at 22–23 (stating the longstanding principle that "tort liability can significantly chill constitutionally protected speech").

[180] *See id.* at 23 (noting the effectiveness of negligence suits directed at suppressing speech).

[181] *See id.* (arguing that this standard would affect organizers from a full-spectrum of perspectives—pro-life organizers, pro-choice organizers, pro-gun organizers, gun-control organizers, environmental organizers, social justice organizers, and the Women's March organizers). *But see* Motala,

These scholars further argued that the chilling effect would not only be bad for the organizers and the causes they represent, but it would be also be catastrophic for democracy.[182] Protests are—and long have been—an integral vehicle through which citizens vocalize the calls for social, political, and economic change that continuously sculpt the character of American democracy.[183] This is why the Supreme Court has long recognized the importance of protecting protest speech, notwithstanding the potential consequences of doing so.[184] Thus, the scholars argued that subjecting protest organizers to broader liability would ultimately undermine the policies that lie at the heart of the First Amendment.[185]

## III. THE NEED TO REAFFIRM THE FIRST AMENDMENT'S TORT LIABILITY LIMITATIONS FOR PROTEST ORGANIZERS

The U.S. Court of Appeals for Fifth Circuit's 2019 holding in *Doe v. Mckesson* (*Mckesson IV*) sparked a debate over the meaning of the Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.* and whether the First Amendment restricts the extent to which courts may hold organizers liable for violence that occurs at protests.[186] As discussed in Part II, many First Amendment scholars criticized the Fifth Circuit's holding in *Mckesson IV* and interpreted *Claiborne Hardware* to stand for the principle that the First

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*supra* note 23, at 71 (arguing the standard would disproportionately impact Black organizers, because police officers are more likely to respond to Black protests with militarized force that creates more opportunities for violence at Black protests).

[182] *See* Brief of The Rutherford Institute, *supra* note 136, at 12 (suggesting the chilling effect would be "even graver" for democracy, because it would lead to the broader decline of protests).

[183] *Id.* (recognizing the macro-importance of protests to American democracy); *see also supra* notes 18–22 and accompanying text (providing an extended discussion of various historical protests that have been integral to democracy).

[184] Brief of Floyd Abrams et al., *supra* note 18, at 17 (noting the Court has recognized that the risk of suppressing protected speech outweighs the risk of allowing some unprotected speech to evade punishment (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973))).

[185] *See* Brief of The Rutherford Institute, *supra* note 136, at 12 (arguing that the chilling effect associated with broad protest organizer liability is inconsistent with the Court's deep commitment to protecting speech).

[186] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828, 834 (5th Cir. 2019) (holding that a court could hold a protest organizer liable for the violent actions of another person, despite not condoning or partaking in such violence); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) ("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."). For a discussion of the Fifth Circuit's holding and the ensuing debate, see *supra* notes 135–185 and accompanying text. Although the Supreme Court reversed and remanded the Fifth Circuit's decision in *Mckesson IV*, the opinion did not provide guidance on the First Amendment issues, thus leaving the debate unresolved. *See* Mckesson v. Doe (*Mckesson VI*), 141 S. Ct. 48, 50–51 (2020) (remanding for reconsideration of the tort issues); *Mckesson IV*, 945 F.3d at 828, 834 (holding that a court could hold Mckesson liable on negligence principles).

Amendment shields protest organizers from tort liability.[187] This Part argues that the interpretation of *Claiborne Hardware* set forth by these scholars is correct as a matter of law and policy.[188] Section A of this Part argues that reading *Claiborne Hardware* to limit the liability of protest organizers is more consistent with the Supreme Court's First Amendment jurisprudence and a more honest reading of *Claiborne Hardware* itself.[189] Section B of this Part suggests that limiting organizer tort liability is good for democracy and necessary in this particular moment in history, as the Black Lives Matter protests that have occurred since the death of George Floyd in 2020 well demonstrate.[190]

### *A. Interpreting* Claiborne Hardware *to Limit Protest Organizer Liability Is Consistent with First Amendment Jurisprudence and the Underlying Rationale in* Claiborne Hardware

Between the Fifth Circuit's and the opposing First Amendment scholars' interpretations of *Claiborne Hardware*, the latter is correct as a matter of law, because it is both consistent with First Amendment jurisprudence as well as the Supreme Court's underlying reasoning in *Claiborne Hardware*.[191]

To align with First Amendment jurisprudence, *Claiborne Hardware* must stand for the principle that the First Amendment precludes courts from holding protest organizers engaged in nonviolent expressive activity liable for the violent actions of others.[192] Protest organizers, such as those affiliated with the Black Lives Matter movement, are undisputedly engaged in core First

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[187] *See supra* notes 162–185 and accompanying text (providing a discussion of the First Amendment scholars' critiques).

[188] *See infra* notes 191–219 and accompanying text.

[189] *See infra* notes 191–207 and accompanying text.

[190] *See infra* notes 208–219 and accompanying text.

[191] *See Mckesson IV*, 945 F.3d at 829 (interpreting *NAACP v. Claiborne Hardware* to suggest that a court may hold an individual liable for the violent actions of another, so long as the individual condoned or took part in any other tortious activity "the foreseeable result" of which was violence); Brief of Floyd Abrams et al., *supra* note 18, at 11 (interpreting *Claiborne Hardware* to mean that a court may only impose civil liability on those who engage in violent activity, and may not impose liability on those engaged in nonviolent speech activity); *see also Claiborne Hardware*, 458 U.S. at 927 (noting that the defendant could be liable for the violent actions of others if he "authorized, directed, or ratified specific tortious activity [that] would justify holding him responsible for the consequences of that activity"); *id.* at 918 (holding that a court may only impose damages on those whose violent conduct "proximately caused" the alleged harm and not on those engaged in "nonviolent, protected activity"). For further discussion of the conflicting interpretations of *Claiborne Hardware*, see *supra* notes 135–185 and accompanying text.

[192] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9–13 (describing generally the First Amendment principles that protect speech and suggesting that interpreting *Claiborne Hardware* to limit organizer liability is consistent with those principle); *Claiborne Hardware*, 458 U.S. at 918 (holding that the First Amendment precludes courts from holding nonviolent actors liable for the harms of violent actors).

Amendment activity when they coordinate and effectuate demonstrations.[193] As such, their activities are entitled to the highest levels of protection under the First Amendment.[194] Of course, if organizers engage in violent activity themselves or incite violence, the First Amendment does not offer protection.[195] Yet, the Supreme Court's First Amendment jurisprudence reflects a robust commitment to protecting the unbridled discussion of public issues—particularly on topics that relate to government accountability.[196] In multiple other contexts, that commitment has manifested in the form of the Court prioritizing the protection of speech over remedying the harm such speech inflicted.[197] The rules for protest organizer liability should be no different.[198] If courts could

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[193] *See Mckesson IV*, 945 F.3d at 832 (noting that Mckesson's political protest actions constituted core First Amendment activity); Brief of Floyd Abrams et al., *supra* note 18, at 3–4 (arguing that Mckesson was exercising his core First Amendment rights by organizing the Black Lives Matter protest); *see also* Cox v. Louisiana (*Cox II*), 379 U.S. 559, 574 (1965) (noting that the First Amendment protects peaceful protest and assembly because they are essential for successful democracy).

[194] *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (noting that speech pertaining to "matters of public concern" gets the most protection under the First Amendment). For further discussion of what qualifies as "matters of public concern," see *supra* note 61 and accompanying text.

[195] *See Claiborne Hardware*, 458 U.S. at 916, 928–29 (stating that the First Amendment does not protect violent activity and accepting that the defendant could be liable if he had incited violent activity). As mentioned, the doctrinal test for whether speech qualifies as inciting speech is incredibly difficult to meet. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech is inciting if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also* Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (demonstrating the stringency of the *Brandenburg* incitement test); *supra* notes 73–98 and accompanying text (discussing the incitement test). In *Claiborne Hardware*, the Court also indicated that individuals could be liable for the violent actions of others on association grounds—but only if the group itself had illegal objectives and the individual intended to help further those objectives. 458 U.S. at 920.

[196] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that the Court's First Amendment cases reflected "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[197] *See Snyder*, 562 U.S. at 460–61 (noting that the First Amendment requires the Court to protect speakers, even when their speech causes real harm). For example, in *Brandenburg v. Ohio* and the incitement cases that followed, the Court held that the protected speech could have led to violence, but it did not pose a likely risk of immediate violence. 395 U.S. at 447; *see also Claiborne Hardware*, 458 U.S. at 928–29 (holding that the speaker did not incite violence because his speech did not immediately lead to violence); *Hess*, 414 U.S. at 108–09 (same). Furthermore, the Court has also held in other speech-related tort actions that the First Amendment either requires a heightened liability standard or precludes liability altogether when the harm-causing speech is core First Amendment speech. *See, e.g.*, *Snyder*, 562 U.S. at 458–59 (holding that the First Amendment precluded the Court from imposing intentional infliction of emotional distress liability on military funeral picketers expressing their views on public issues); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988) (holding that the First Amendment requires a more stringent intentional infliction of emotional distress liability standard when the speech at issue is parodic speech about a public figure); *Sullivan*, 376 U.S. at 279–80 (holding that the First Amendment requires more stringent defamation and libel liability standards when the subject of a statement is a public official). For further discussion of the Court's incitement doctrine see *supra* notes 78–98 and accompanying text. For further discussion of the Court's reasoning in these speech-related tort actions, see *supra* notes 116–134 and accompanying text.

[198] *See* Brief of The Rutherford Institute, *supra* note 136, at 6–7 (arguing that the reason the Court has limited criminal and civil liability for speech is consistently to protect the debate of public issues).

impose liability on organizers for violence that they neither carried out nor condoned, as the Fifth Circuit suggested, it would certainly have the effect of chilling public debate.[199] This would run afoul to the principle that underlies a century of First Amendment decisions—that the First Amendment precludes courts from punishing speakers unless their speech falls under one of the very few and well-defined exceptions, none of which apply in Mckesson's case.[200] Thus, to the extent that organizers are engaged in nonviolent, expressive activity, the First Amendment requires a standard that shields them from liability for the violence of others.[201]

Furthermore, interpreting *Claiborne Hardware* to limit protest organizer liability is a more honest reading of the opinion itself, which is riddled with references to the same First Amendment commitments to robust speech protection.[202] In particular, the Court explicitly reasoned in *Claiborne Hardware* that protest speech and political association are both instrumentally valuable to a democratic society and incredibly vulnerable to overt and covert suppres-

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The common thread between the limited liability speech-related tort cases and the limited liability incitement cases is the reasoning that the First Amendment protects speech, even when the consequences are undesirable, because the broader need to preserve conversations about public issues is more important to American democracy. *See, e.g.*, *Snyder*, 562 U.S. at 460–61 (reasoning that society's prioritization of preserving public debate is what precluded the Court from holding the speaker liable for tort damages, regardless of the plaintiff's harm); *Claiborne Hardware*, 458 U.S. at 928 (stating that when a speaker stimulates an audience with a powerful call for action, but does not incite unlawful conduct, his speech must receive First Amendment protection to adequately preserve debate on public issues). This reasoning surely applies as well in the context of protests, such that the same result should follow. *See Cox II*, 379 U.S. at 574 (linking the importance of protests to the preservation of democracy).

[199] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828, 834 (5th Cir. 2019) (holding that the organizer of a protest could be liable for a third party's violent act when the organizer carried out tortious activity that foreseeably could have led to violence). *But see* Brief of Floyd Abrams et al., *supra* note 18, at 17 (arguing that the Fifth Circuit's liability rule would chill speech); Brief of First Amendment Scholars, *supra* note 136, at 22–23 (same); Brief of The Rutherford Institute, *supra* note 136, at 11–12 (same). For further discussion of the mechanics of the chilling effect, see *supra* notes 175–183 and accompanying text.

[200] *See Snyder*, 562 U.S. at 460–61 (noting that the First Amendment prohibits courts from punishing speakers for the harmful effects of their protected speech); Virginia v. Black, 538 U.S. 343, 358–59, 363 (2003) (identifying the "well-defined and narrowly limited" exceptions as "fighting words," "true threats," violence, incitement, and obscenity); Doe v. Mckesson (*Mckesson I*), 272 F. Supp. 3d 841, 846–47 (M.D. La. 2017) (holding the officer failed to allege facts that Mckesson incited violence); *see also* Brief of Floyd Abrams et al., *supra* note 18, at 9 (making a similar argument that the First Amendment requires protection for organizers). For further discussion of the exceptions to First Amendment protection, see *supra* notes 73–75 and accompanying text.

[201] *See Claiborne Hardware*, 458 U.S. at 918 ("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.").

[202] *See Claiborne Hardware*, 458 U.S. at 907–08 (emphasizing the importance of collective political organization and demonstration to democracy); *id.* at 913 (recognizing that speech about public issues receives the most First Amendment protection); *see also* Brief of Floyd Abrams et al., *supra* note 18, at 9–10 (noting that the Fifth Circuit ignored the Court's explicit reasoning in *Claiborne Hardware*).

sion.[203] To reconcile that vulnerability, the Court noted that the First Amendment staunchly guards against modes of suppression, such as the imposition of civil liability for nonviolent speech activity.[204] Because in the context of protests, violent, unprotected activity often occurs amidst safeguarded nonviolent expressive activity, the Court held that courts must be careful to only impose liability on those engaged in unprotected, violent activity—and not on those engaged in safeguarded, nonviolent expressive activity.[205] The Fifth Circuit, relying on a few lines of the opinion and ignoring pages of reasoning, construed *Claiborne Hardware* to allow for the complete opposite: a regime where organizers engaged in protected, nonviolent activity can be liable for the unprotected, violent acts of others.[206] As such, the Fifth Circuit's theory of liability is intellectually dishonest and completely inconsistent with the Court's reasoning in *Claiborne Hardware*.[207]

### *B. A First Amendment Principle Limiting Organizer Liability Is Good for Democracy*

The First Amendment scholars' interpretation of *Claiborne Hardware* is also correct a matter of policy because limiting the liability of organizers is good for democracy.[208] Protests have been—and continue to be—an invaluable impetus for groundbreaking and necessary change in the United States.[209] Or-

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[203] *Claiborne Hardware*, 458 U.S. 931–32. For further discussion of this point, see *supra* notes 112–115 and accompanying text.

[204] *Claiborne Hardware*, 458 U.S. 931–32.

[205] *Id.* at 918; *see also* Brief of Floyd Abrams et al., *supra* note 18, at 13–14 (arguing that violence is always a possibility at protests).

[206] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828, 834 (5th Cir. 2019) (holding that a court could hold Mckesson liable for the violent acts of an unidentified perpetrator); *see also id.* at 828 (emphasizing the Supreme Court's reasoning in *Claiborne Hardware* that violence receives no First Amendment protection (citing *Claiborne Hardware*, 458 U.S. at 916)); *id.* at 829 (focusing on the Supreme Court's statement in *Claiborne Hardware* that if the record demonstrated that the defendant "authorized, directed, or ratified specific tortious activity" it would "justify holding him responsible for the consequences of that activity" (quoting *Claiborne Hardware*, 458 U.S. at 927)).

[207] *See* Brief of Floyd Abrams et al., *supra* note 18, at 9–13 (critiquing the Fifth Circuit's opinion on these grounds); *see also Mckesson IV*, 945 F.3d at 828–34 (providing the criticized reasoning and resultant holding). *See generally Claiborne Hardware*, 458 U.S. at 907–08 (reasoning that political association is critical to the American democratic system).

[208] *See* Brief of The Rutherford Institute, *supra* note 136, at 12 (arguing that the Fifth Circuit's liability standard would be bad for democracy because it would deter protests that force change in America); *see also Claiborne Hardware*, 458 U.S. at 918 (holding that the state may not hold nonviolent actors liable for the actions of violent actors that the nonviolent actors did not proximately cause); Gillion, *supra* note 18 (arguing that protests are essential for democracy because they allow citizens to identify and correct societal ills).

[209] *See* Brief of Floyd Abrams et al., *supra* note 18, at 4–6 (describing the protests that have historically led to change in American history, including the Black Lives Matter movement); *see also supra* notes 18–28 and accompanying text (discussing the progress that the protests of various social movements accomplished).

ganizers need assurance that they will not suffer financial ruin simply by organizing a demonstration at which violence or property damage occurs.[210] Otherwise, they might refrain from coordinating such demonstrations, or at least be inclined to limit their size.[211] It is untold whether groundbreaking progress would occur absent the pressure that large demonstrations generate.[212]

Indeed, reflecting on the indispensable progress that historical social movements achieved through protest well demonstrates the importance of protecting individuals who organize such demonstrations.[213] Had the March on Washington of 1963 not occurred, Congress might not have passed the Civil Rights Act of 1964.[214] The killing of George Floyd and the importance of the ensuing Black Lives Matter protests of the summer of 2020 indicate that protecting organizers is still critical to social progress.[215] Although the majority of the George Floyd protests were peaceful, property destruction and violence did occur.[216] Holding the organizers of these demonstrations liable would seriously undermine a movement that has already forced positive change, but certainly has more to accomplish in terms of police reform and racial equity.[217]

In short, the Fifth Circuit's interpretation of *Claiborne Hardware* exposes organizers to liability in such a way that could impede vital and lasting pro-

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[210] *See* Brief of The Rutherford Institute, *supra* note 136, at 11–12 (arguing that exposing organizers to liability for violence and damage at the protest they organize would deter them from organizing such protests).

[211] *Id.*; *see* Brief of First Amendment Scholars, *supra* note 136, at 21 (arguing that the threat of violence is more pressing at bigger protests); *see also supra* notes 175–185 and accompanying text (discussing the way that the Fifth Circuit's liability standard would have a chilling effect on protests).

[212] *See* Brief of The Rutherford Institute, *supra* note 136, at 14 (hypothesizing that if the Civil Rights Movement organizers or women's suffragists were exposed to such liability for the protests that they organized, that liability may have deterred them from organizing, and consequently, the progress they achieved might not have occurred).

[213] *See* Brief of Floyd Abrams et al., *supra* note 18, at 4–6 (drawing on historical protests to demonstrate their macro importance to society); *see also supra notes* 18–28 and accompanying text (discussing specific social movements that used protest to induce significant progress).

[214] *See* Brief of NAACP, *supra* note 21, at 4 (suggesting the March on Washington contributed to the passing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965); *see also* Brief of The Rutherford Institute, *supra* note 136, at 14 (mentioning the possibility that imposing liability on protests organizers in history could have prevented the progress that they achieved).

[215] *See* Brief of First Amendment Scholars, *supra* note 136, at 21 (suggesting that the threat of liability for protest organizer is at its peak at the largest and most important political protests); Buchannan, *supra* note 33 (arguing that the protests that occurred after George Floyd's death may have made the Black Lives Matter movement the "largest" in American history); *see also supra* notes 30–42 and accompanying text for discussion of the significance and impact of the George Floyd protests.

[216] *See* Chenoweth & Pressman, *supra* note 32 (reporting that the majority of the George Floyd protests were peaceful); Taylor, *supra* note 30 (indicating that violence and property destruction did occur at some protests). See *supra* note 34 and accompanying for a detailed discussion of the data on the peacefulness of the protests, as well as the accompanying violence.

[217] *See supra* notes 35–43 and accompanying text (discussing the legislative, cultural, and policy changes that have already ensued as a result of the George Floyd protests, for instance the police reforms that federal, state, and local legislatures have adopted). *But see* Norris, *supra* note 37 (arguing that the Black Lives Matter movement still has more to accomplish in terms of racial justice).

gress for our democracy.[218] Thus, the Supreme Court should recognize that this moment in our history requires a reaffirmation that the First Amendment offers robust protection to organizers and limits the extent to which courts can hold them liable for the violent and destructive acts of others.[219]

## CONCLUSION

In 1982, in *NAACP v. Claiborne Hardware Co.*, the U.S. Supreme Court set forth the crucial First Amendment principle that restrains courts from holding protest organizers engaged in nonviolent activity liable for the violent acts of others. Yet, in 2019, in *Doe v. Mckesson* (*Mckesson IV*), the U.S. Court of Appeals for the Fifth Circuit held that Black Lives Matter activist DeRay Mckesson could be liable for the violent actions of an unidentified protestor solely because he negligently organized a protest of which violence was a foreseeable result. As many First Amendment scholars articulated, the Fifth Circuit's holding was nothing short of a full-fledged attack on the *Claiborne Hardware* principle and the wealth of First Amendment precedent that the Court used to ground its reasoning. In practice, the Fifth Circuit's negligent protest theory would expose organizers to incredible liability and consequently stifle the movements that they lead. Although the Supreme Court remanded the Fifth Circuit's decision in 2020 in *Doe v. Mckesson* (*Mckesson VI*), the First Amendment debate remains unresolved. As the momentous Black Lives Matter protests that ensued in response to the death of George Floyd in May 2020 demonstrate, protests remain an incredibly effective vehicle for progress in the United States. Thus, this moment in history demands that the Supreme Court look for an opportunity to reaffirm *Claiborne Hardware* and the liability limitations the First Amendment affords to protest organizers.

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[218] *See* Doe v. Mckesson (*Mckesson IV*), 945 F.3d 818, 828, 834 (5th Cir. 2019) (holding that a court could hold Mckesson liable for an unidentified assailant's violent act simply because he negligently coordinated the demonstration where violence was foreseeable); Brief of The Rutherford Institute, *supra* note 136, at 11–12 (arguing the Fifth Circuit's standard would chill protest speech and thus have negative consequences for democracy).

[219] *See* Brief of Floyd Abrams et al., *supra* note 18, at 11 (interpreting *Claiborne Hardware* to mean that a court may only impose civil liability on those who engage in violent activity and may not impose liability on those engaged in nonviolent speech activity); *see also Claiborne Hardware* 458 U.S. at 918 (holding that a court may only impose damages on those whose violent conduct "proximately caused" the alleged harm and not on those engaged in "nonviolent, protected activity").