No. 19-1108

In The
Supreme Court of the United States

DERAY MCKESSON,

Petitioner,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus The Rutherford Institute, a nonprofit civil-liberties organization, is committed to protecting the constitutional freedoms of every American and the fundamental human rights of all people. The Rutherford Institute advocates for protection of civil liberties and human rights through *pro bono* legal representation and public education on a wide spectrum of issues affecting individual freedom in the United States and around the world. In particular, The Rutherford Institute advocates against government infringement of citizens' rights to freely express themselves, seeking redress in cases where citizens have been punished for exercising their First Amendment right to free speech.

To ensure the vitality of the First Amendment, The Rutherford Institute urges the Court to grant the petition and reverse the Fifth Circuit, reaffirming that protest organizers cannot be sued for third-party actions that cause injuries during a protest unless allegations satisfy the stringent limitations on liability this Court requires for crimes like incitement and speech-based torts.

[1] Pursuant to Rule 37.2(a), counsel for *amicus* provided notice to all parties of its intention to file this brief and did so at least ten days before its due date. All parties gave their consent. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Protest speech has shaped American democracy throughout the Nation's history. And to preserve the "breathing space" required to ensure freedom of speech, this Court has placed stringent limitations on criminal and civil laws that directly restrict—or indirectly chill—speech on matters of public concern. Those limitations are most needed, and most strictly imposed, when speech criticizes the government.

The Fifth Circuit's negligent-protest tort strikes at the core of protected speech, yet it includes none of the special protections this Court's First Amendment jurisprudence requires. Instead, it creates vast exposure to civil liability in circumstances that will be present whenever protesters collectively occupy public spaces.

The trigger for the negligent-protest tort is a predicate criminal act by the organizer; and protests, by nature, often involve unlawful conduct. Civil disobedience, a hallmark of historical and contemporary protests, involves violating a law to call attention to the law's injustice. Or, as happened below, a protest may unlawfully block a highway. Pet. App. 11a-12a. In either scenario, once the predicate unlawful act occurs, protest organizers face liability not only for their own unlawful conduct, but for any foreseeable damages occurring during the protest—regardless of who is injured or who causes the injury. That sweeping exposure will inhere in almost any group protest, and it will affect speakers across the

political spectrum, from civil-rights to pro-life activists. The negligent-protest tort thus cannot be reconciled with the special protections the First Amendment demands and this Court's jurisprudence requires when a law threatens to chill core protected speech.

ARGUMENT

I. PROTEST SPEECH FURTHERS PUBLIC DISCOURSE AND PROTECTS DEMOCRACY.

Speech protesting or criticizing the government has played a vital role throughout the Nation's history. The Founders believed that advocacy for political and social change was essential to a free and fair democracy in which power flows from the people to the government. And this Court has emphasized that the protection of speech—even speech that is unpleasant or offensive or advocates lawbreaking—is essential to democratic government.

Speech on matters of public concern is so important that this Court has created special rules to ensure that such speech is given breathing space. Those rules cabin the reach of both civil and criminal laws so that the exercise of free speech is not chilled by the threat of excessive liability. From the definition of incitement, to the application of defamation law, to the permissible grounds for finding malicious interference with business, this Court's precedent clearly limits laws that punish speech in order to protect speech on matters of public concern. The same limiting principle

should be applied to any tort that threatens public discourse—particularly one with the far-reaching potential of the Fifth Circuit's negligent-protest tort.

A. The Founders Believed Speech Criticizing The Government Was Essential To Democracy, And This Court's First Amendment Jurisprudence Reaffirms That Vital Role.

Protest speech—and particularly speech critical of the government—lies at the core of First Amendment protection. Recognizing that freedom of speech is essential to democracy, this Court has determined that "[t]he First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Freedom of speech is "essential to free government" because its abridgment would "impair[] those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). And this Court has "frequently reaffirmed that speech on public issues occupies the 'highest rung of the heirarchy [sic] of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

The Founders created a government whose power was derived solely from the people. As James Madison wrote, that popular sovereignty means the validity of government actions ultimately depends on the "temperate consideration and candid judgment of the American public." James Madison, *Virginia Report of 1799*, *reprinted in* THE VIRGINIA REPORT OF 1799-1800, TOUCHING THE ALIEN AND SEDITION LAWS, at 196 (Leonard W. Levy ed., Da Capo Press reprinted 1970) (1850). The principle of popular sovereignty on which America was founded thus requires—and the First Amendment at its core protects—the right of the people to speak openly against the government.

As Benjamin Franklin noted, it is necessary to vest the right to free speech with the people because "[r]epublics and limited monarchies derive their strength and vigour from a popular examination into the actions of the magistrates." Benjamin Franklin, *On Freedom of Speech and the Press*, Pa. Gazette (Nov. 1737), *reprinted in* 2 BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 431 (1840). Franklin worried that "[a]n evil magistrate intrusted with power to *punish for words*, would be armed with a weapon the most destructive and terrible." *Id.* In short, "[f]reedom of speech is a principal pillar of a free government: when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." *Id.*

Because examination of governmental actions is central to democracy, it is essential that speech related

to public discourse "be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 270. By its very nature, speech critical of the government "invite[s] dispute" and "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). As this Court noted in *City of Houston v. Hill*, "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." 482 U.S. 451, 472 (1987). That recognition of the importance of critical or unpopular speech undergirds this Court's strict protection of speech on public matters.

B. To Preserve Breathing Space For Protected Speech, This Court Has Enforced Strict Limits On Both Civil And Criminal Liability For Speech On Public Issues.

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). It is of such importance that freedom to speak on matters of public concern must be given "breathing space" from regulation and government-enforced consequences, even when the speech is unpleasant or unpopular.

Boos v. Barry, 485 U.S. 312, 322 (1988). This Court has ensured that breathing space by strictly limiting laws, civil and criminal, that may restrict or burden speech. Those limits keep speech on matters of public concern from being crushed under the weight of potential liability, either criminal or civil.

The First Amendment requires restrictions on civil laws as surely as it does on criminal laws. As this Court noted in *New York Times v. Sullivan*, "[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"; state power is used not only in enforcing criminal laws, but also in enforcing any civil judgment. 376 U.S. at 265. And civil damages not only involve the use of state power, but also may be an even greater deterrent than criminal punishment. In *Sullivan*, the possible fine for criminal libel was $500, but the jury awarded $500,000 for civil defamation. *Id.* at 277. In *NAACP v. Claiborne Hardware Co.*, the defendants were held jointly and severally liable for a judgment exceeding a million dollars for tortious interference with business. 458 U.S. at 893. Such crushing potential liability would certainly dissuade a speaker from undertaking controversial but important speech.

Civil and criminal laws directly restricting speech are the most obvious danger to the freedom of speech protected by the First Amendment. Accordingly, even state restrictions on unprotected speech must be strictly cabined. For example, laws that forbid incitement of violence or other unlawful action—a

legitimate exercise of police power—must be limited to apply only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). Intent to cause unlawful action at an "indefinite future time" is not sufficient to impose liability. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam). Limiting states' power to restrict speech considered dangerous or wrong protects speech that may be unpopular but addresses issues of public concern.

Similarly, despite the long history of criminal and civil defamation laws in America, their permissible scope narrows when the alleged defamation implicates matters of public concern. *See Sullivan*, 376 U.S. at 280-82; Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, 74 AM. HIST. REV. 429, 429-30 (1968). Because a strict-liability speech tort would "dampen[] the vigor and limit[] the variety of public debate" on matters of public concern, a scienter standard applies: Plaintiffs must prove "actual malice"—the speaker's knowledge or reckless disregard of a statement's falsity. *Sullivan*, 376 U.S. at 279-80. That standard allows some false statements to go unpunished but is necessary to avoid chilling vigorous debate on important issues. *See id.* at 270.

In addition to laws that directly regulate speech, other torts may sweep speech into actionable conduct. When that occurs, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on

the persons who may be held accountable for those damages." *Claiborne*, 458 U.S. at 916-17. Those restraints apply to the tort of intentional infliction of emotional distress, which generally requires a plaintiff to show that injurious conduct was "sufficiently 'outrageous.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988). But if a public figure brings suit based on a defendant's speech, the public figure must show actual malice. *Id.* at 56. As with defamation, "such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.*

The limits on imposing liability for intentional infliction of emotional distress are even tighter if the action causing harm was a protest on matters of "public concern at a public place adjacent to a public street." *Snyder*, 562 U.S. at 456. Because "[t]ime out of mind public streets and sidewalks have been used for public assembly and debate," a tort cannot be allowed to effectively prohibit such protest. *Id.* (internal quotation marks omitted). While speech on matters of public concern can be subject to reasonable time, place, and manner restrictions, it cannot give rise to liability for being "outrageous" or causing emotional distress, even though that standard applies to non-speech infliction of emotional distress. *Id*. Extra limitations on tort liability are necessary to prevent such laws from chilling public debate.

This Court has applied the same reasoning to the tort of malicious interference with business. In *Claiborne*, Charles Evers, Field Secretary of the

NAACP, helped to organize and carry out a boycott of white merchants in Claiborne County, Mississippi, to protest racial segregation and inequality. 458 U.S. at 898-900. Throughout the protest, Evers addressed large crowds and made a number of provocative statements, including a warning that, if the protestors caught black people "going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902. Although the boycott and protests were generally peaceful, there were some incidents of violence perpetrated by protestors against black residents who did not observe the boycott. *Id.* at 905-06. Business owners who suffered losses from the boycott sued Evers, the NAACP, and multiple other defendants on a number of theories, obtaining a large judgment for malicious interference with business. *Id.* at 894.

Evers's speech was not incitement because it resulted in no imminent violence—any violence occurred months later. *Id.* at 928. Absent direct incitement, then, this Court held that he could not be held liable for damages from the boycott because "there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.* at 929. "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause," this Court explained. *Id.* at 928. "When such appeals do not incite lawless action, they must be regarded as protected speech." *Id*. And protected speech is shielded from tort liability as well as from criminal punishment. *Id.* at 916-17 & n.51. Therefore,

the malicious-interference-with-business award based on Evers's speeches could not stand. *Id.* at 921.

The constraints on liability resulting from speech vary according to the tort and surrounding circumstances—in some cases requiring malice, in others incitement or authorization or ratification of violence. *See Sullivan*, 376 U.S. at 279-80; *Claiborne*, 458 U.S. at 928-29. All restrictions, however, share a common purpose: to give breathing space to speech crucial to self-governance, even when that speech is unpleasant or unpopular.

II. THE FIFTH CIRCUIT'S NEGLIGENT-PROTEST TORT ERODES THE BREATHING SPACE REQUIRED FOR PROTEST SPEECH AND THREATENS TO CHILL SPEAKERS BY EXPOSING THEM TO INCREASED CIVIL LIABILITY.

Free speech "is essential to our democratic form of government, and it furthers the search for truth." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018) (citations omitted). Yet the Fifth Circuit's negligent-protest tort threatens to disrupt that search for truth and chill the public discourse that fuels democracy, dramatically increasing the risks faced by leaders whose speech mobilizes protesters into groups. When encouraging protestors to visibly and audibly occupy public spaces, organizers must now balance their First Amendment right to protest against potential liability for third parties'

torts the organizers did not encourage, much less commit.

The threat of this new form of civil liability is certainly grave for the protest leader. But for democracy, even graver is the threat that such leaders will cease to speak in furtherance of organized protest. That chilling effect would defeat the ability of movements to amplify protest messages through collective action. And that silence, in turn, would imperil the type of vital protests that drove the historic movements that shaped America into the democracy it is today and that continue to fuel contemporary movements. As such, the negligent-protest tort inflicts unjustifiable costs not only on protest organizers, but also on democracy itself. Those costs cannot be squared with core First Amendment values and the breathing space for protected speech that this Court's First Amendment jurisprudence demands.

A. The Negligent-Protest Tort Opens the Floodgates To Civil Liability When Movements Seek To Amplify Messages Through Group Protests.

The trigger for the Fifth Circuit's negligent-protest tort is a predicate criminal act by the organizer;[2] and protests, by nature, often involve unlawful conduct. Acts of civil disobedience—a

[2] *See* Pet. App. 12a; *id.* 45a (Willett, J., concurring in part and dissenting in part).

hallmark of many protest movements—may include organized resistance to the very laws the protesters challenge. As explained by Dr. Martin Luther King, Jr., "[t]here are just and there are unjust laws. I would agree with Saint Augustine that 'An unjust law is no law at all.'" Martin Luther King, Jr., Letter From a Birmingham Jail (Apr. 16, 1963), https://kinginstitute.stanford.edu/king-papers/documents/letter-birmingham-jail/. And even when protesters are not directly breaking the laws they protest, they may gather, march, or otherwise occupy public spaces in ways that not only garner attention for the protest, but also violate state or local laws.

Regardless of form, protests historically have relied on organizers' advocacy to mobilize collective action and amplify movements' messages. "In America, political uprisings, from peaceful picketing to lawless riots, have marked our history from the beginning—indeed, from before the beginning," Judge Willett observed below. Pet. App. 52a (Willett, J., concurring in part and dissenting in part). "The Sons of Liberty were dumping tea into Boston Harbor almost two centuries before Dr. King's Selma-to-Montgomery march (which, of course, occupied public roadways, including the full width of the bloodied Edmund Pettus Bridge)." *Id.*

When group protests result in participants' arrests for their own violations of law in the course of the protest, that is to be expected. Indeed, arrests can help expose the injustice that compels the protest and

promote real social change. The 1960s sit-ins organized by groups such as the Student Nonviolent Coordinating Committee (SNCC), for example, were the driving catalyst for desegregating lunch counters throughout the South. *See* Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 97-102 (2015).

But what if protest organizers throughout history faced not only punishment for their own civil disobedience, but also civil liability for third parties' torts that the organizers never encouraged or committed? With the increased threat of civil liability, perhaps some of the most iconic protest movements in American history—including the Women's Suffrage and modern Civil Rights Movements—might have unfolded very differently.

The July 2016 Baton Rouge Black Lives Matter protest mirrored the form of protests throughout American history. *See* Pet. App. 52a (Willett, J., concurring in part and dissenting in part). Petitioner organized and led the event to protest police practices, blocking a public highway in front of the Baton Rouge Police Department Headquarters, in violation of state law. Pet. App. 2a-3a; LA. STAT. ANN. § 14:97. During the protest, an unidentified individual threw a rock-like object at Officer Doe, the plaintiff below. Pet. App. 3a.

The unidentified rock-thrower could face liability under Louisiana criminal and civil law. *See* LA. STAT.

ANN. § 14:34 (aggravated battery); LA. CIV. CODE ANN. art. 2315 (tort liability). And petitioner, like any protester, could (and did, Pet. App. 24a-25a n.7) face liability for any unlawful acts he committed. But the negligent-protest tort created by the Fifth Circuit threatens a new and very different form of liability stemming from petitioner's organizing and participating *in the protest*. And in that advocacy context, as Judge Willett explained, "the First Amendment 'imposes restraints' on what (and whom) state tort law may punish." Pet. App. 39a (Willet, J., concurring in part and dissenting in part) (quoting *Claiborne*, 458 U.S. at 916-17). The negligent-protest tort ignores those restraints and threatens the core of the First Amendment, where "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy" except in narrow circumstances that the negligent-protest tort does not require. *Brandenburg*, 395 U.S. at 447; *see infra* at 24-26.

The negligent-protest tort is particularly dangerous to free speech because it takes very little to trigger a protest leader's exposure. And the ease with which the tort may be invoked increases the likelihood that the threat of liability will chill efforts to amplify protest messages through advocacy of collective action. Once a violation of criminal law occurs at the direction of the organizer—such as the crime of blocking a public highway, Pet. App. 2a, or perhaps even jaywalking, a

misdemeanor in some states[3]—the floodgates open to liability for third parties' actions, subject only to the routine tort constraints of foreseeability and but-for causation. *See infra* at 24-26.

The tort's predicate criminal act is insufficient to preserve the "breathing space" the First Amendment requires when a state law implicates protected advocacy. *See Hustler*, 485 U.S. at 46. As Judge Willett noted, Fifth Circuit law now suggests that "directing *any* tort would strip a protest organizer of First Amendment protection." Pet. App. 45a (Willett, J., concurring in part and dissenting in part). And this would apply even when the organizer had no awareness of, much less control over, the act that injured the plaintiff.

That bar is far too low, as "criminal laws have grown so exuberantly . . . that almost anyone can be arrested for something." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314-15 (2012) (estimating ten-million misdemeanor cases filed annually). "If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant

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[3] *E.g.*, GA. CODE ANN. §§ 40-6-1, 40-6-92; MONT. CODE ANN. §§ 61-8-104, 61-8-503; OKLA. STAT. tit. 47, §§ 11-102, 11-503.

fiefdoms of our own age." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part).

In the context of the Baton Rouge Black Lives Matter protest, for example, the negligent-protest tort could be triggered not only by allegations that petitioner committed a crime by directing protesters to block the highway (LA. STAT. ANN. § 14:97), but arguably also by a claim that petitioner condoned protesters' littering (*see id.* § 30:2531(A)), or urged walking in the street where a sidewalk was available (*id.* § 32:216).

The burden of organizers' having to cover potentially staggering adverse judgments, not to mention increased insurance and litigation costs, could put an end to the type of grassroots organizing and advocacy that has defined America since its founding. And the Fifth Circuit's "exotic theory" of negligent-protest liability, had it existed historically, "would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms." Pet. App. 53a (Willett, J., concurring in part and dissenting in part).

Due to the dynamics of large groups converging to protest politically and emotionally charged topics, violence looms as a possibility even within peaceful movements. Student activists organized SNCC's Freedom Ride of 1961 as an act of nonviolent civil disobedience, traveling through the South on integrated buses to protest state statutes prohibiting

integration in interstate travel facilities. *See* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE (2006), *excerpted in* Terry Gross, *Raymond Arsenault Traces Freedom Riders' Road*, NPR (May 4, 2007), https://www.npr.org/templates/story/story.php?storyId=10004609. Violence erupted, however, when segregationists viciously attacked the Freedom Riders in Alabama, resulting in injuries not only to protesters, but also to bystanders, journalists, and Klansmen. *See id*. Every person on those integrated buses had violated state criminal law at the direction of SNCC organizers, supplying the predicate criminal act that, under the Fifth Circuit's theory, would have rendered those organizers liable for the injurious actions of others—including assaults by and against the segregationist vigilantes.

Similarly, although Dr. King was a committed proponent of nonviolent protest, his 1968 Memphis march to support striking sanitation workers turned violent when some young men began breaking storefront windows. *See* Pet. App. 54a. (Willett, J., concurring in part and dissenting in part). "Had Dr. King been sued, either by injured police or injured protestors," Judge Willett explained, "I cannot fathom that the Constitution he praised as 'magnificent'—'a promissory note to which every American was to fall heir'—would countenance his personal liability." *Id.* at 54a (footnote omitted) (quoting Dr. King's 1963 "I Have a Dream" speech). Yet that is precisely the result the Fifth Circuit's "exotic theory," *id.* at 53a, would yield.

Violence incident to protests erupted in other historic contexts as well, including the 1913 march on Washington organized by leaders of the Women's Suffrage Movement. *See* Lorraine Boissoneault, *This Original Women's March on Washington and the Suffragists Who Paved the Way*, SMITHSONIAN MAGAZINE (Jan. 21, 2017), https://www.smithsonianmag.com/history/original-womens-march-washington-and-suffragists-who-paved-way-180961869/. As thousands of women, including Helen Keller, journalist Nellie Bly, and activist Ida B. Wells, gathered in the Nation's Capital to advocate for a constitutional amendment guaranteeing women the right to vote, they were often "heckled and harassed by the crowd" of onlookers. *Id*. Pennsylvania Avenue was "completely choked with spectators" who "converge[d]" on protesters and blocked their route. Alan Taylor, *The 1913 Women's Suffrage Parade*, THE ATLANTIC (Mar. 1, 2013), https://www.theatlantic.com/photo/2013/03/100-years-ago-the-1913-womens-suffrage-parade/100465/. Dozens of marchers were injured, "shoved and tripped by spectators." *Id.* Had the negligent-protest tort been available, anyone injured—whether protesters, medical caregivers, or perhaps even some of the heckling and violent onlookers—could have sued the march's organizers, pointing to street-blocking tactics as the trigger for negligent-protest liability.[4]

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[4] Although organizers had obtained a permit for the march, it is not difficult to imagine the possibility, given the conflict that ensued, that an organizer nonetheless could have been charged criminally for directing protesters "to occupy the roads" on Capitol

Contemporary movements also would be severely threatened by the specter of negligent-protest liability, as the same possibility of incidental violence looms whenever groups gather to challenge governmental action and clash with others on hot-button issues. Student walkouts have become a powerful tool for today's youth to voice concerns over widely debated topics, including immigration policy, gun control, and climate change. *See*, *e.g.*, Somini Sengupta, *Protesting Climate Change, Young People Take to Streets in a Global Strike*, N.Y. TIMES (Sept. 21. 2019), https://www.nytimes.com/2019/09/20/climate/global-climate-strike-html; Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Gun Violence Across the U.S.*, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/us/school-walkout.html; Jason Scronic, *Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws*, 2 FLA. A&M U. L. REV. 185, 186-87 (2007). And such walkouts could include the same type of street-blocking features as the Baton Rouge Black Lives Matter protest or the landmark marches of the Women's Suffrage and Civil Rights Movements—misdemeanors that would trigger a student organizer's negligent-protest liability should a third party injure anyone during the walkout. If the risks of a walkout no longer peak at truancy, but also include financially crippling civil damages, student activists may choose

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grounds "in such a manner as to obstruct or hinder their proper use." D.C. CODE § 882 (1911).

not to organize protests. And that would be a costly loss to democracy. Like the student Freedom Riders and SNCC organizers of lunch-counter sit-ins, the leaders of today's student protests have a vital role to play in furthering public discourse and effecting meaningful change. The negligent-protest tort imperils those contributions, threatening to eradicate the breathing space that enables this type of core protected speech to flourish.

The tort's stifling effects, moreover, will span the political spectrum. In the abortion context, for example, this Court has struck down attempts to limit pro-life protests outside of clinics to preserve the breathing space needed for free speech. *See*, *e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773-75 (2014) (invalidating aspects of an injunction prohibiting pro-life protesters from coming within 300 feet of a Florida clinic or its staff members' private residences); *McCullen v. Coakley*, 573 U.S. 464, 469-70, 485, 497 (2014) (striking down, as not narrowly tailored, a Massachusetts statute "designed to address clashes between abortion opponents and advocates of abortion rights" by prohibiting standing on a "public way or sidewalk" within 35 feet of the entrance or driveway of non-hospital abortion providers). The Fifth Circuit's negligent-protest tort, however, would threaten to chill the same pro-life speech this Court's precedent protects.

Those protests involve confrontations on public streets and occupy public spaces. That aspect heightens the scope of First Amendment protection of

the speech, as "there is no question that this public sidewalk area is a 'public forum' where citizens generally have the right to speak." *Madsen*, 512 U.S. at 790 (Scalia, J., concurring in the judgment in part and dissenting in part). At the same time, however, the location of those clinic protests may trigger some of the street-blocking violations of law that occurred during the Baton Rouge Black Lives Matter protest and inhered in many landmark, civil-rights protests—supplying the Fifth Circuit's criminal predicate for negligent-protest liability. Given the close proximity between protesters and patients attempting to enter the clinic, the emotionally charged content of protesters'—and counter-protesters'—speech,[5] and a history of violence between those groups,[6] the odds of an organizer's liability for third-party actions may be

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[5] In *Madsen*, Justice Scalia described exchanges that occurred between pro-life and pro-choice proponents in front of the Florida clinic, listing a wide range of expressive activity that was documented on film without violent encounters. 512 U.S. at 787-90 (Scalia, J., concurring in the judgment in part and dissenting in part). The absence of violence in those scenes was fortunate indeed. But with one protester yelling, "[y]ou are responsible for the deaths of children. . . . You are a murderer," *id.* at 789, and another shouting, "[r]ight to life is a lie, you don't care if women die," *id.* at 787, things might have gone another way. If violence ensued, and the protest organizer faced civil liability for *any* resulting injuries—even if the organizer were peacefully on the sidelines oblivious to the exchange—the risks of mobilizing collective action to amplify the protest's message might be too great.

[6] *See*, *e.g.*, Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html.

greatest in a protest like that. The breathing space the First Amendment requires leaves no room for the negligent-protest tort and the chilling effect it threatens across the political spectrum.

B. Expansive Liability Threatens The Breathing Space That Protects Protest Speech.

By imposing liability on protest leaders for negligently directing a protest, the negligent-protest tort negates the careful First Amendment protections this Court has set in place. *See supra* at 7-11. As discussed above, the threat of civil liability restricts freedom of speech just as much, if not more, than criminal prosecution. *See*, *e.g.*, *Sullivan*, 376 U.S. at 277. And the negligent-protest tort exposes protest leaders to the possibility of almost limitless liability, which contravenes a robust First Amendment. *See* Pet. App. 10a; *see also Sullivan*, 376 U.S. at 277-78.

This Court's constraints on outlawing incitement arose from the principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy" except in the narrowest circumstances. *Brandenburg*, 395 U.S. at 447. And that same principle animated this Court's protection of speakers from tort liability in *Hustler*, 485 U.S. at 56, and protest leaders from tort liability in *Snyder*, 562 U.S. at 458-59, and *Claiborne*, 458 U.S. at 912-13. In each case, general rules of causation and

liability had to be adjusted to serve an overarching purpose: the protection of free speech on matters of public concern.

The Fifth Circuit's negligent-protest tort cannot be reconciled with either this Court's tests or the reasoning behind them. It does not cabin liability only to incitement because it restricts speech irrespective of the organizer's intent and absent a showing of the imminence or likelihood of resulting harms. Pet. App. 10a; *Brandenburg*, 395 U.S. at 447. Contrary to the rule in *Claiborne*, the tort exposes any protest organizer to liability based on harms caused by other protestors, with no requirement that the organizer "authorized, ratified, or even discussed" the injurious act. Pet. App. 10a; *Claiborne*, 458 U.S. at 924.

And, if damages under the Fifth Circuit's negligent-protest tort are limited only by the common-law rules of foreseeability and but-for causation, it presents the same dangers as the civil liability this Court rejected in *Sullivan*, 376 U.S. at 277, and *Claiborne*, 458 U.S. at 918-20. Civil damages for a "negligent protest" would likely exceed any available criminal punishment for the type of violations the court below pointed to as justifying petitioner's liability. For example, in this case, the Louisiana law that prohibited blocking highways allowed a fine of "not more than two hundred dollars" or "imprison[ment] for six months or both." LA. STAT. ANN. § 14:97; Pet. App. 12a. By contrast, Officer Doe seeks damages for pain and suffering, physical injuries, emotional and mental distress, loss of

employment, medical bills, inconvenience, future lost wages, and all litigation expenses. Complaint for Damages at 7, *Doe v. Mckesson*, 272 F. Supp. 3d 841 (M.D. La. 2017) (No. 16-00742-BAJ-RLB).

Moreover, a cause of action brought by one party does not preclude causes of action by others possibly injured in connection with the protest, exposing the protest organizer to almost limitless liability. *See Sullivan*, 376 U.S. at 278. And plaintiffs in such cases will not always be law-enforcement officers;[7] nothing in the Fifth Circuit's test would bar suits by fellow protesters who might suffer injuries during a protest. Nor would it bar suits by counter-protesters who allege that they were injured—a group likely to have great incentive to burden the speech of a protest organizer.

The fundamental flaw in the Fifth Circuit's negligent-protest tort is that it collapses the breathing space essential to robust speech and debate on issues of public concern. *Snyder*, 562 U.S. at 458; *Hustler*, 485 U.S. at 52; *Sullivan*, 376 U.S. at 271-72. Tort regimes that impose liability on protest leaders for

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[7] Suits by law-enforcement officers may be particularly problematic. Officers have immense discretion to decide when a crime has been committed. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). And if that criminal decision-making power in turn creates the trigger for negligent-protest liability, officers then also wield great power over the cost of protesting. *See Juhl v. Airington*, 936 S.W.2d 640, 648 (Tex. 1996) (Gonzalez, J., concurring) (An officer's suit for damages for a back injury sustained while removing abortion protesters would be a "back-door attack by state actors on a constitutional right—the right to political speech.").

mere negligence "would have an undoubted 'chilling' effect on" the protests themselves. *Hustler*, 485 U.S. at 52. Avoiding this chilling effect is the underlying purpose of this Court's precedent restricting liability for speech, from direct regulation of speech (as in *Brandenburg*) to speech-based torts (such as defamation) and more general torts (such as intentional infliction of emotional distress and malicious interference with business). *See supra* at 7-11. Allowing the negligent-protest tort to persist with no such restrictions on liability would seriously undermine that purpose and, in the process, gut the First Amendment guarantees on which a thriving democracy depends.

CONCLUSION

The Court should grant the petition and reverse the judgment of the Fifth Circuit.

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