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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. The rule adopted by the Fifth Circuit in this case would inevitably expose advocacy organizations and their employees, allies, and affiliates to the hazards and burdens of litigation, often brought or funded by their ideological opponents. Such litigation threatens to chill core political speech and association protected by the First Amendment. Accordingly, the Institute writes to suggest that this Court use this case as a vehicle to announce pleading standards sufficient to protect lawful advocacy, including the venerable American tradition of public protest, from litigation designed to stifle it.

SUMMARY OF THE ARGUMENT

This case raises a significant First Amendment issue: When should the federal courts be used to impose vicarious liability on public advocates or advocacy organizations based upon acts that occur during public protests?

Here, a government official, a police officer, is not suing the unknown assailant that injured him at a civil rights protest, but rather a different person: the citizen activist that organized the protest. Respondent concedes that Petitioner DeRay

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All Parties have consented to the filing of this brief.

Mckesson did not assault him, but nonetheless argues that Mr. Mckesson's acts of speech, association, and civil disobedience make him responsible for the true tortfeasor's actions.

Allowing this case to survive a motion to dismiss will open Mr. Mckesson and the Black Lives Matter movement to substantial discovery and the other assorted burdens of federal civil litigation. This process will serve as a punishment of its own for Mr. Mckesson, regardless of the eventual outcome of the case. But, more fundamentally, it will serve as a weapon against a particular type of group: those who organize protests during which unsolicited acts of illegality and violence occur.

Such a precedent would inevitably chill future civil rights protests and encourage organizers to remain silent. *NAACP v. Ala.*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action"). But it would also do so indirectly by permitting discovery into the membership, leadership, and financial supporters of advocacy groups, threatening the "privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*).

Certiorari should be granted so this Court may clarify the federal pleading standards and address these concerns. If this complaint, which never alleges that Mr. Mckesson personally caused the injury to Respondent, nor specifies how he exercised control over or had responsibility for the unknown assailant,

sufficiently states a claim, then nearly any complaint does.

To the contrary, in such cases, the First Amendment requires a heightened pleading standard under Federal Rule of Civil Procedure 8. Such a rule would prevent the federal courts from being accomplices to lawsuits that would necessarily chill fundamental First Amendment activity and impose vastly disproportionate costs upon acts of civil disobedience.

This Court and the lower courts have previously imposed judicially-created rules intended to safeguard First Amendment liberties in the litigation context. Most famously, in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), this Court ruled that the First Amendment requires certain plaintiffs to allege actual malice before bringing a libel suit. Other courts have acted similarly in contexts as varied as antitrust law, the qualified immunity doctrine, and the enforcement of standing requirements.

Here, at a minimum, our system should require plaintiffs to allege a more particularized and direct connection between a protest organizer and an alleged tort in cases concerning vicarious liability arising from constitutionally-protected activity.

ARGUMENT

I. The Court Should Adopt A Heightened Pleading Requirement In Civil Tort Cases In Order To Defend Citizen Activists From Burdensome Litigation.

Civil procedure reflects important policy choices about the roles of plaintiffs, defendants, and judges in the judicial system. The Federal Rules of Civil Procedure govern not merely how trials and discovery must be conducted, but whether an Article III courthouse is the proper forum to handle a dispute. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 407 (2006) (Stevens, J., dissenting) ("The spirit of the Federal Rules of Civil Procedure favors preservation of a court's power to avoid manifestly unjust results in exceptional cases"). The power to bar or open the courthouse door is one of the most consequential in our federal judicial system. This case concerns the proper scope of that power.

a. Mr. Doe's complaint alleges that Mr. Mckesson is vicariously liable for Respondent's injuries, and specifically blames Mr. Mckesson's speech and associations.

Here, an unnamed agent of the state seeks a jury trial and damages from Petitioner DeRay Mckesson on a vicarious liability theory that would hold Mr. Mckesson responsible for injuries committed against Mr. Doe by an unknown—and likely unknowable—third party.

Mr. Doe's allegations are that "DeRay McKesson, is a major [2] …a managing member of BLACK LIVES MATTER," who was "in Baton Rouge for the purpose of staging a protest" and "planning to block a public highway." ECF No. 1 ("Complaint") at 2-3, *Doe v. Mckesson*, No. 16-742 (M.D. La. Nov. 7, 2016). It further alleges that "a member of Defendant Black Lives Matter, under the control and custody" of Mr. Mckesson, "then picked up a piece of concrete or similar rock like substance and hurled into [*sic*] the police," striking Mr. Doe, who was a police officer performing his official duties. Complaint at 4-5 (capitalization altered). It alleges that Mr. Mckesson "took credit/blame" for the highway protest turning violent by speaking to the *New York Times* after the protest concluded. *Id.* at 5. Furthermore, it alleges that because "12 police officers in Dallas[,] Texas were shot" by a person that Mr. Mckesson is never alleged to have known, [3] Petitioner "knew or should have known that" the protest in Baton Rouge, Louisiana would result in police injuries. *Id.* at 3, 5-6. The complaint, however, never identifies any action that Mr. Mckesson *himself* undertook to harm Mr. Doe, nor does it allege that Mr. Mckesson engaged in anything other than nonviolent protest and peaceful civil disobedience. [4]

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[2] That is, Mr. Mckesson is an adult, or "not a minor."

[3] The complaint avers that "[a]ctivities of BLACK LIVES MATTER was associate [*sic*] with the shooting." Complaint at 3.

[4] "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence." *Matal v. Tam*, 582 U.S. __; 137 S. Ct. 1744, 1769 (2017)

Accordingly, *Amicus* contends that this complaint, consisting of conclusory statements and no "more than an unadorned, the-defendant-unlawfully-harmed me accusation," should have been rejected under the current pleading standards of Rule 8. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (for a complaint to succeed under Rule 8, it "requires more than labels and conclusions" and its "[f]actual allegations must be enough to raise a right to relief above the speculative level"). But the court of appeals disagreed, and declined, by an evenly-divided vote, to reconsider the matter *en banc*. Pet. App. 79a.

b. The First Amendment sometimes requires heightened pleading standards.

To the extent that this complaint "raise[s] a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, the Court should grant the writ and announce a heightened pleading standard that governs this complaint and others like it. Mr. Mckesson's acts of speech and assembly, including an act of civil disobedience that was handled by the local authorities,[5] should not serve as a license to allege his responsibility for a violent tort.

The complaint expressly concedes that Mr. Mckesson did not hurl the missile that injured Mr.

(Kennedy, J., concurring op.); *see also* Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, The Atlantic, Sept. 2015 ("When speech comes to be seen as a form of violence, vindictive protectiveness can justify a hostile, and perhaps even violent, response").

[5] The complaint notes that Mr. Mckesson was arrested for blocking the public highway. He was subsequently released.

Doe. Complaint at 5. Indeed, if it did, there would be no question of Mr. Doe's right to bring his suit against Petitioner. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982) ("[V]iolent conduct is beyond the pale of constitutional protection"). Instead, Mr. Doe's complaint gestures at a daisy-chain theory that Mr. Mckesson "should have known" that a civil rights protest that extended into and temporarily blocked a public highway would lead to the pitching of a rock-like object at a police officer.[6] *Claiborne Hardware Co.* at 915 ("'[S]peech to protest racial discrimination is essential political speech lying at the core of the First Amendment'") (quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)); *also id.* at 888 (Mississippi economic boycott against white merchants by black protestors "included elements of criminality and elements of majesty"); *cf. N.Y. Times Co.*, 376 U.S. at 269 ("Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of

[6] As Judge Willet noted in dissenting below, blocking highways is a classic form of civil disobedience with longstanding roots in the ongoing struggle to make real the guarantees of the Fourteenth Amendment for Black Americans. Pet. App. 52a ("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)"); National Park Service, "Selma-to-Montgomery March," We Shall Overcome – Historic Places of the Civil Rights Movement, https://www.nps.gov/nr/travel/civilrights/al4.htm; Jeanne Theoharis, "MLK Would Never Shut Down A Freeway, and 6 Other Myths…", The Root, July 15, 2016, https://www.theroot.com/mlk-would-never-shut-down-a-freeway-and-6-other-myths-1790856033.

expression that have been challenged in this Court…It must be measured by standards that satisfy the First Amendment").

The use of the court system to seek financial recompense triggers the protections of the federal Constitution. *N.Y. Times Co.*, 376 U.S. at 265 ("It matters not that that law has been applied in a civil action…The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"). As a result, this Court has required a stronger showing of malice and control when a complaint implicates First Amendment freedoms. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us…").[7]

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[7] Alarmingly, Mr. Doe's complaint even goes so far as to base its theory of liability, in part, upon Mr. Mckesson's statements to a journalist after he was released from jail, suggesting they are a sort of *post hoc* evidence that Mr. Mckesson came to Baton Rouge to negligently harm Mr. Doe. Worse, the complaint misleadingly truncated Mr. Mckesson's statement. *Compare* Complaint at 5 ("On Sunday, DeRay McKesson [*sic*] told the New York Times, 'The police want protesters to be too afraid to protest.' He suggested that he intended to plan more protests"); *with* Yamiche Alcindor, "DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released," N.Y. Times, July 10, 2016, ("'The police want protesters to be too afraid to protest, which is why they intentionally created a context of conflict, and I'll never be afraid to tell the truth,' he said"); *available at*: https://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html.

Perhaps most relevant here, this Court has held that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Claiborne Hardware Co.*, 458 U.S. at 925, n.69. "[A]bsent a *specific* intent to further" criminal behavior, *id.* at 925 (emphasis supplied), "[t]he First Amendment [] restricts the ability of the State to impose liability on an individual solely because of his association[s]." *Id.* at 918-919. Constitutionally speaking, this is "an insufficient predicate for liability." *Id.* at 926.

Accordingly, this "Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees." *Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976) (collecting cases); *see also Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003) ("First Amendment concerns" mean that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day…A State's Attorney General surely cannot gain case-by-case ground this Court has declared off limits to legislators"). And in *New York Times Company v. Sullivan,* this Court "interpose[d] the First Amendment as a defense to the tort of defamation." James M. Beck, Constitutional Protection of Scientific and Educational Activities from Tort Liability: The First Amendment as a Defense to Personal Injury Litigation, 37 Tort & Ins. L.J. 981 (Spring 2002) ("Application of the First Amendment to state tort litigation was one of the unanticipated consequences of the civil rights struggle in the South").

In a similar vein, this Court has also instructed the federal judiciary to relax traditional standing rules in facial overbreadth challenges so as "to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); *see also Burke v. City of Charleston*, 139 F.3d 401, 405 n.2 (4th Cir. 1998) ("In some instances, courts will relax the prudential limitations because they are outweighed by competing considerations. Among those weightier considerations within the context of the First Amendment is the danger of chilling free speech"). It has even held the door open for "the First Amendment [to] limit the relief that can be granted against an organization otherwise engaging in protected expression," "even in a case where a RICO violation has been validly established…" *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., concurring) (citing *NAACP v. Alabama*; *NAACP v. Claiborne Hardware Co.*, and *Or. Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991)).

Following this lead, the Ninth Circuit adopted a "heightened pleading standard" in *Noerr-Pennington* cases, precisely "to avoid a chilling effect on the exercise of [a] fundamental First Amendment [r]ight." *Or. Natural Resources Council*, 944 F.2d at 533 (citation and quotation marks omitted).[8] Other

[8] The Ninth Circuit has also read the First Amendment into the doctrine of qualified immunity. *Ryan v. Putnam*, 777 Fed. App'x. 245, 246 (9th Cir. 2019) ("Since 2002, we have recognized that an employer's decision to initiate disciplinary proceedings against a doctor that threaten to revoke staff privileges, when combined with a negative effect on employment prospects" is

courts have made similar arrangements in civil cases. *See Pfizer Inc. v. Giles (In re Asbestos Sch. Litig.)*, 46 F.3d 1284, 1294 (3d Cir. 1994) ("[I]t has implications that broadly threaten First Amendment rights. The district court's holding suggests that Pfizer – based solely on its limited and (as far as the record reflects) innocent association with the SBA ["Safe Buildings Alliance"] – could be held liable" for "tortious acts committed by all of the defendants"); *Caplan v. Am. Baby, Inc.*, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) ("[I]n cases alleging antitrust activity as to conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the claim will have a chilling effect…requires a greater degree of specificity in the complaint than would otherwise be the case").

This is for good reason: it is hardly costless to be haled into court to defend a lawsuit. Beyond the cost of hiring counsel, lawsuits also allow for party-opponents to obtain discovery of sensitive information and subject defendants to rigorous and invasive examination.[9] Indeed, it comes as no surprise that the

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"'reasonably likely to deter the plaintiff from engaging in protected activity under the First Amendment'" for purposes of a qualified immunity analysis) (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003) (brackets removed)).

[9] Some States have responded to this threat by enacting what are colloquially known as anti-SLAPP ("anti-Strategic Lawsuits Against Public Participation") statutes. These are designed to deter litigation intended to harm First Amendment rights by allowing for early dismissal of cases implicating free speech and, in some cases, providing for attorney's fees. While those statutes undoubtedly apply in state courts and, when properly crafted, can be powerful tools for vindicating First Amendment rights, their applicability in federal court varies. *E.g. Abbas v. Foreign*

federal courts have often required heightened standards in the civil context. After all, such cases are shorn of the "ordinary criminal-law safeguards such as the requirements of an indictment and proof beyond a reasonable doubt." *N.Y. Times Co.*, 376 U.S. at 277.[10] The risk of absorbing these various litigation costs can itself chill constitutionally-protected activities.

The First Amendment requires further scrutiny of a federal complaint when a case, such as this, concerns political speech and association. This Court has been mindful that it must fashion rules that protect against chill, as "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010). Political speech that is never uttered denies other speakers, associates, audiences, and society-at-large of the independent right to hear about issues of public importance. *See Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 497

Policy Grp., LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (Kavanaugh, J.) (denying application of D.C. anti-SLAPP law in federal court); *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) (applying Maine's anti-SLAPP law). Louisiana has an anti-SLAPP statute, La. Code Civ. Proc. Ann. art. 971, but its applicability is unclear given the Fifth Circuit's recent ruling that Texas's anti-SLAPP "state law cannot apply in federal court." *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019); *but see Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir. 2009) (giving effect to Louisiana anti-SLAPP law). In any event, the existence and application of such a statute is a completely separate issue from robust application of Federal Rule of Civil Procedure 8, which would appropriately restrain federal courts but would not impose cost shifting on plaintiffs.

[10] Mr. Doe's fellow officers arrested Mr. Mckesson for the local ordinance he allegedly violated and subsequently released him.

n.5 (2007) (Scalia, J., concurring) ("Our normal practice is to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech").

And, of course, allowing suits such as this one to go forward risks encouraging ideological opponents to use the federal courts as a mechanism to stifle and suppress highly-prized constitutional activity. In particular, judicial proceedings, including the liberal discovery standards of Federal Rule of Civil Procedure 26, offer a tempting target for groups seeking to pressure their foes by threatening the release of internal documents, donor lists, or other sensitive information. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1142 (9th Cir. 2009) ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private"); *see also Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 177-178 (D.C. Cir. 2003) ("[H]ere, the Commission compels public disclosure of an association's confidential internal materials, it intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interferes with internal group operations and effectiveness") (quoting *Buckley*, 424 U.S. at 64).

Yet, proving that a suit's discovery requests are wholly immaterial or vexatious is a tall order, reviewable only for abuse of discretion. And many defendants and their supporters may well be unpopular dissidents, vulnerable to exposure. This Court, after all, was the first to refuse to uphold the infamous production order of the Montgomery County circuit court that formed the basis of *NAACP v.*

Alabama. 357 U.S. at 462 ("We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association").

It would be best to close the door to such suits and such discovery requests at the outset, not at some later date, when concrete harm has already been done to specific groups and, by extension, our civil society.

c. The Court should explain that cases such as this cannot satisfy appropriate pleading standards.

Unquestionably, the throwing of concrete at a police officer, if proven, is not an act protected under our charter of liberties. But that projectile was not hurled by Mr. Mckesson, and the complaint in this case fails to specify how, precisely, Petitioner was responsible for the actions of the person who actually committed the battery.

Instead, it lists a number of muddled or conclusory accusations. It appears to allege that Mr. Mckesson is somehow associated with murders "along a Tennessee highway" and in Texas. Complaint at 2-3. It even appears to allege that Mr. Mckesson himself "began to loot a Circle K" during his time in Baton Rouge. *Id*. at 4. But when it comes to the violent tort in question here, it rotely claims that Mr. Mckesson "incited the violence on behalf of the Defendant BLACK LIVES MATTER," and that "a member of Defendant BLACK LIVES MATTER, under the control and custody of the DEFENDANTS, then picked up a piece of concrete or similar rock like

substance and hurled [it] into the police that were making arrests." *Id.* at 4-5.

The writ should issue so this Court may impose a First Amendment gloss, in this case and others like it, on Rule 8's requirement that a complaint "show[] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Such a construction ought to bar federal complaints where a defendant is held responsible for an unknown third party's violent torts simply because she spoke or assembled, or had some political association with that person.

At a minimum, such complaints should be required to do more than blindly assert that a speaker or event organizer had "control and custody" over a person. Complaint at 4-5. They ought to explain, with precision, either how that control existed and was wielded or how, with particularity, the defendant's non-violent actions were manifestly likely to trigger violence. *See Va. v. Black*, 538 U.S. 343, 359 (2003) ("We have consequently held that fighting words – 'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction' are generally proscribable under the First Amendment") (quoting *Cohen v. Calif.*, 403 U.S. 15, 20 (1971)).

* * *

Mr. Doe's desire to be made whole is, of course, understandable and just. He was hit in the face with a rock and sustained serious injuries. Those injuries do and should compel sympathy. But the federal courts should not exercise their Article III powers, on

this record, to chill Mr. Mckesson, a "citizen-critic" of the Baton Rouge police.

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Such guardianship is necessary here.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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