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 *AMICUS CURIAE* HOWARD UNIVERSITY HUMAN AND CIVL RIGHTS CLINIC IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae is the Howard University School of Law Human and Civil Rights Clinic. Howard University is one of the oldest historically Black institutions of higher learning in the United States, established in 1867 in the aftermath of the Civil War. Founded in 1869, the School of Law has "emerged as a 'clinic' on justice and injustice in America, as well as a clearing-house for information on the civil rights struggle."[2] Consistent with these principles and the mission of Howard University,[3] the clinic has an interest in

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[1] All parties received timely notice and consented to the filing of this brief. This brief was not written in whole or in part by any party, and no person or entity other than the Howard University School of Law Human and Civil Rights Clinic or its counsel made any monetary contribution towards the preparation or submission of this brief.

[2] Our History, http://law.howard.edu/content/our-history (last visited Apr. 6, 2020).

[3] The Howard University Mission Statement provides:

> Howard University, a culturally diverse, comprehensive, research intensive and historically Black private university, provides an educational experience of exceptional quality at the undergraduate, graduate, and professional levels to students of high academic standing and potential, with particular emphasis upon educational opportunities for Black students. Moreover, the University is dedicating to attracting and sustaining a cadre of faculty who are, through their teaching, research and service, committed to the development of distinguished, historically aware, and compassionate graduates and to the discovery of solutions to human problems in the United States and throughout the world. With an abiding interest in both domestic and international affairs, the University is committed to continuing to produce leaders for America and the global community.

protecting the rights of protesters, particularly those who advocate for civil rights and human rights reform. It also has an interest in ensuring that sanctions against protest organizers do not disproportionately harm Black protesters. The clinic works in tandem with the Thurgood Marshall Civil Rights Center at Howard University School of Law. The Thurgood Marshall Civil Rights Center is Howard University's flagship institutional setting for the study and practice of civil rights, human rights, and racial justice law and advocacy.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision furthers a campaign to restrict free speech rights that will disproportionately limit the rights of Black protesters. Historically, Black protests were more likely than White protests to draw heavy police presence. In addition, police have been more likely to make arrests, use force and violence, and use force and violence in combination with arrests, when the protesters were Black. By many accounts, this dynamic has endured. Research has demonstrated that while on the individual level, unconscious bias leads law enforcement officers to see Black protesters as more of a threat, on the systemic level, institutional actors freed from the restrictions of the First Amendment may seek to squelch political speech that criticizes their own behavior. A prime example of this phenomenon is law enforcement's response to Black Lives Matter protests.

This dynamic unfolds in the midst of a growing nationwide trend in local and state legislatures that

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Mission, Vision, Core Values, https://www2.howard.edu/howard-forward/mission-vision-values (last visited Apr. 6, 2020).

creates new avenues of civil and criminal liability against protesters. These statutes, which sanction acts of civil disobedience, such as blocking streets, are largely in response to Black Lives Matter protests. The Fifth Circuit's decision is part of this larger anti-protest policy campaign. It seeks to open the floodgates of litigation in order to deter the free speech of protesters who engage in civil disobedience or unknowingly break a local ordinance. Without Supreme Court intervention, citizens exercising their constitutional rights in the Fifth Circuit's jurisdiction who unwittingly become subject to these new anti-protest laws may find themselves liable for the unconnected acts of an unknown and unrelated third-party.

Moreover, the Fifth Circuit subjects protest leaders to a "foreseeability of violence" standard that will disproportionately chill speech in Black communities. Neither courts nor law enforcement authorities have demonstrated the capacity to measure "foreseeable violence" in the context of public assemblies with accuracy, fairness, or the absence of implicit bias. Authorities have disproportionately anticipated violence in responding to peaceful Black Lives Matter protests with harsh measures, arriving in riot gear as if they are entering warzones. However, they have failed to sufficiently foresee violence, when responding to armed Neo-Nazi protests, like that which took place in Charlottesville in 2017.

When law enforcement treats Black protesters as combatants and uses military-grade weapons and equipment for crowd control, it creates an atmosphere of distrust and provocation. This response actually incites more violence by angering otherwise peaceful protesters. In the Fifth Circuit, when such violence does ensue, protest organizers can be held civilly

liable, even if the organizers did not perpetuate the violence. In some cases, the party who perpetuated, incited, directed, authorized, or ratified the violence was law enforcement.

Also, allowing government officers to label political speech as "foreseeably violent" raises the risk that, as in the case at bar, they will self-interestedly conceptualize political speech that criticizes their own behavior as hazardous to public safety. Since the "foreseeable violence" standard systematically allows for bias through both institutional and implicit bias mechanisms, the First Amendment should continue to protect protest organizers, regardless of the activities of unknown and unrelated third parties.

I. THE FIFTH CIRCUIT'S DECISION PROMOTES A CAMPAIGN TO RESTRICT FREE SPEECH RIGHTS THAT WILL DISPROPORTIONATELY LIMIT THE RIGHTS OF BLACK PROTESTERS.

The Fifth Circuit's holding allows protest organizers to be held liable for the actions of unknown and unrelated third parties that occur during a protest. *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019). This expansion of liability will disproportionately impact majority-Black protests, which are more likely to draw heavy police response. Additionally, the tactics favored by Black Lives Matter demonstrators have been targeted by a legislative campaign designed to criminalize these protests. Because the Fifth Circuit's holding extends liability for the actions of unknown and unrelated third parties to any citizen engaged in "unlawful" activity at a protest, it opens the floodgates for "strategic lawsuits against public participation," especially against Black Lives Matter protesters, who will be subject to the new statutes and

ordinances. The Fifth Circuit's holding also encourages surreptitious rogue third parties to attend Black Lives Matter protests and wreak havoc with the goal of creating liability for protest leaders.

A. Both historically and in the present case, legal repression of protest has disproportionately restricted the free speech rights of Black protesters.

In 2011, researchers examined more than 15,000 protest events that took place in the United States between 1960 and 1990 and found that historically, Black protest events were more likely than White protest events to draw police presence. Christian Davenport et al., *Protesting While Black? The Differential Policing of American Activism, 1960-1900*, 76(1) AM. SOC. REV. 152 (2011). Upon arrival, police were more likely to make arrests, use force and violence, and use force and violence in combination with arrests, when Black protesters were involved. *Id.* The researchers found that this trend held even when controlling for mitigating factors; non-Black protesters experienced less police violence, even controlling for various levels of threat (such as the size of protest and protesters' use of violence). The findings were remarkably consistent with other studies that examined the disproportionate policing of Black protests. Jennifer Earl et al., *Protest Under Fire? Explaining the Policing of Protest*, 68 AM. SOC. REV. 581 (2003) and Ronald A. Francisco, *Coercion and Protest: An Empirical Test in Two Democratic States*, 40 AM. J. POL. SCI. 1179 (1996).

By many accounts, these dynamics have endured, including during the Black Lives Matter protests at issue in this case. At the conclusion of his visit to the United States in 2016, the United Nations Special

Rapporteur on the Rights of Freedom of Peaceful Assembly noted that:

> It was disturbing to learn that assemblies organized by African-Americans are managed differently, with these protests often met with disproportionate force. Indeed, white and Muslim activists that I met acknowledged that black fellow protesters face harsher police encounters in the context of assemblies: police are more likely to be militarized and aggressive; black people are detained longer after arrests, they face more and heavier charges, more intimidation and more disrespect . . . similar practices were repeated in Baton Rouge in July this year to deal with protests after the police shooting of Alton Sterling.

UN OHCHR, *Statement by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association at the Conclusion of his Visit to the United States of America* (July 27, 2016).[4]

Explanations for why Black protesters are seen as more threatening have been thoroughly researched as well. Stanford social psychologist Jennifer Eberhardt received the prestigious MacArthur Fellowship for her research detailing the existence of implicit bias in the perception of individuals who administer the criminal justice apparatus. Her findings have implications for both the policing of protests and for the judicial determination of liability in the protest context. Due to implicit bias, at the scene of a protest, an individual police officer may be more likely to view a Black protester as a potential criminal actor that poses a

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[4] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20317&LangID=E (last visited Apr. 6, 2020).

threat. Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERS'Y SOC. PSYCH. 876 (2004).

On a systemic level, other research has suggested that freedom of assembly and First Amendment jurisprudence have historically responded to rising political movements by subordinated communities through limiting access to political speech. Laura Weinrib, *The Taming of Free Speech* (2016). Particularly in the context of race, in the immediate aftermath of the civil rights movement and in the midst of the emergence of protests that questioned the efficacy of police and law enforcement practices in Black communities, the jurisprudential turn appeared to narrow the field of protest in response to the broadened political assertiveness of the Black community. Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L. J. FOR. 685 (2018). Granting certiorari in this case is an opportunity to interrupt this historical pattern and repudiate its disturbing implications.

B. The Fifth Circuit's decision is part of a larger anti-protest policy campaign that now seeks to open the floodgates of litigation in order to deter free speech.

The Fifth Circuit's decision does not exist in a vacuum. Across the United States, state and local legislatures are taking measures to limit the rights of protesters, particularly those protesting against police brutality. The protests against police violence in Ferguson, Missouri in 2014 catalyzed a nationwide movement of political action against police brutality. In the year after Michael Brown's death in Ferguson, over 780 Black Lives Matter protests occurred in 44 states. Vanessa Williams et al., *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest*

Activity 16 PERSP. POL. 400 (June 2018). Simultaneously, since 2014, lawmakers in 38 states have proposed at least 120 anti-protest bills that create widespread criminal and civil liability for protesters. US Protest Law Tracker, International Center for Not-For-Profit Law (ICNL).[5] These bills have proposed penalizing protest bystanders N.D. H.B. 1426, 65th Leg. Assemb. (2017); criminalizing protests in streets and highways (a common Black Lives Matter protest tactic); TENN. S.B. 902, 110th Gen. Assemb. (2017); eliminating liability for police in cases where protesters or bystanders are killed during forced crowd dispersal; W. VA. H.B. 4618, 84th Leg. 2nd Sess. (2018); and charging bystanders that refuse to assist in dispersal requests as rioters. *Id*. In some states, proponents of the legislation have explicitly tied their support for these bills to the growing Black Lives Matter movement and protests against police brutality in Ferguson. *See, e.g.* Tafi Mukunyadzi, *Arkansas Governor Vetoes Anti-Mass Picketing Bill*, PHILA. TRIB. (Apr. 17, 2017) ("[Arkansas State Chamber of Commerce President Randy Zook] referenced a 2016 Black Lives Matter protest that blocked traffic for several hours in both directions on Interstate 40 in Memphis")[6] and Alexis Zotos, *Mo. Lawmaker Wants To Ban Masks at Protests*, KMOV4 (Feb. 1, 2017) ("Rep. Don Phillips-R,

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[5] https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative (last visited Mar. 2, 2020). Connecticut, Delaware, Maine, Maryland, Montana, Nebraska, Nevada, New Hampshire, New York, and Vermont are the only States that have not introduced such Anti-Protest Legislation since 2014. *Id.*

[6] https://www.phillytrib.com/news/arkansas-governor-vetoes-anti-mass-picketing-bill/article_b0e084d1-b0cf-51eb-930f-72a9cf17cb02.html (last visited Apr. 2, 2020).

from the Branson area, was inspired by the protests in Ferguson").[7]

In South Dakota, the Riot-Boosting Act threatened criminal penalties of up to 25 years and significant fines for protesters that encouraged or organized protests. S.D. S.B. 189, 94th Leg. Assemb. (2019). The legislation criminally sanctioned anyone who "does not personally participate in any riot, but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence." *Id.* Under this legislation, simply encouraging a protest could result in criminal penalties. Last year, a district court struck the legislation down, finding that, "if these riot boosting statutes were applied to the protests that took place in Birmingham, Alabama . . . Dr. King and the Southern Christian Leadership Conference could have been liable . . ." *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874, 889-90 (D.S.D. 2019). The Fifth Circuit's ruling, if maintained, would put demonstrators nationwide at risk of a similarly expansive liability regime that would threaten racial equality movements and free speech generally.

The Fifth Circuit's view is that breaking an anti-protest criminal statute or ordinance, such as legislation that criminalizes protesting on public streets, can form the basis for liability for the actions of an unknown and unrelated third-party. *Mckesson*, 945 F.3d 818 at 828-29. Without the Supreme Court's intervention, protesters who engage in civil disobedience or unwittingly break an anti-protest ordinance can now be held civilly liable for the acts of an unrelated or unknown third

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[7] https://www.kmov.com/news/mo-lawmaker-wants-to-ban-masks-at-protests/article_c1fa0021-fde9-515a-afb0-6a649f667536.html (last visited Apr. 2, 2020).

party. Given the proliferation of anti-protest legislation nationwide, one of the unforeseen consequences of the Fifth Circuit's opinion could be the unpredictable and drastic explosion of civil liability litigation targeting citizens seeking to exercise their First Amendment rights.

Opening the floodgates of litigation in this area will have disastrous consequences for our democracy. Protest organizers must already consider the costs of medics, permits, amenities, security, and clean up. If certiorari is not granted, in the jurisdictions governed by the Fifth Circuit, protest organizers must now factor in the costs and risks of litigation due to potential tortious activity by outside actors that will be ascribed to them. Already, there is a growing trend of protesters being sued for common law torts such as conspiracy, nuisance, and trespass. Timothy Zick, *The Rising Cost of Dissent: Public Protest and Civil Liabilities* (Dec. 29, 2019) at 3.[8] The imposition of additional damage awards, penalties, and other administrative costs "add an additional deterrence layer to engaging in public contention, criticism of the government, or petitioning officials for redress of grievances." *Id.* at 25.

A ten-year study on "strategic lawsuits against public participation," or SLAPPs, found that the mere threat of significant fines or damages following civil litigation discourages organizing and participation in protests, engagement in civil disobedience, and communication with public officials. George W. Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 PACE ENVTL. L. REV. 3 (1989). While those who engage in civil disobedience might be prepared to risk some level

[8] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3511233 (last visited Apr. 3, 2020).

of inconvenience for their cause, few are able or willing to pay a multi-million dollar judgment against them. Such an expansive liability regime will essentially suffocate political participation in the most under resourced communities.

Because protests are often the last bastion of political speech for groups that otherwise do not have the resources to meaningfully participate in other venues, civil liability, anti-protest criminal legislation, and SLAPP litigation hurt our democracy and are part of a "dangerous trend that threatens to chill a valuable means of effectuating social change." Timothy Zick, *Managing Dissent* 95 WASH. L. REV. 1423, 1454 (2018). For example, many protesters in Ferguson were ultimately deterred by police intervention, stating that protesting "is not safe because I don't know what kind of attitude the cop might have that may stop me . . . If they give me one of them charges, I'm gonna be done for." Jennifer E. Cobbina, *Hands Up, Don't Shoot: Why the Protests in Ferguson and Baltimore Matter, and How They Changed America* 112 (2019). Other protesters may become demoralized by the increasing economic and even psychological costs of protests and disengage. One protester in Ferguson lamented, "I thought this was a democracy. So, we don't have a right to walk down the streets and protest peacefully?" *Id.* at 115.

While protesters must already factor in the risks of criminal sanction, the Fifth Circuit's ruling now creates an opening for third parties to surreptitiously commit tortious acts during a protest with the aim of holding the protest leader responsible. Even the most diligent and law-abiding of protest leaders have no way of anticipating or preventing a rogue third party - over whom they have no control - from committing violence during a protest. Such a "heckler's veto" would allow

one individual to stymie the goals of an entire movement by committing a violent act that would then be imputed to the protest leader. This Court has warned against third parties, in bad faith, chilling the speech of protesters, cautioning that those that are "hostile to the aims of an organization in the educational or political field . . . can deliver crushing verdicts that may stifle organized dissent from the views and policies accepted by the majority" *Nat'l Ass'n for Advancement of Colored People v. Overstreet*, 384 U.S. 118, 123 (1966).[9] Unpopular causes, such as protests against police violence, are particularly vulnerable to this sort of subversion.

Expansive liability regimes that seek to punish protesters and deter individuals from expressing their political views in public fora impermissibly infringe on First Amendment rights. As the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association warned the United States, "One person's decision to resort to violence does not strip other protesters of their right to freedom of peaceful assembly. This right is not a collective right; it is held by each person individually." UN OHCHR, Mandates of the Special Rapporteur on The Promotion and Protection of The Right to Freedom of Opinion and Expression, and The Special Rapporteur on The Rights to Freedom of Peaceful Assembly and of Association OL USA 3/2017 (Mar. 27, 2017). Without the Supreme Court's intervention, the United States will continue down a troubling path of widespread repression of protesters' constitutional rights.

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[9] Although the precise quote referred to jury verdicts, the same sentiment applies.

II. THE FIFTH CIRCUIT'S APPLICATION OF THE "FORESEEABLE VIOLENCE" STANDARD WILL DISPROPORTIONATELY CHILL SPEECH IN BLACK COMMUNITIES.

The Fifth Circuit's holding allows protest organizers to be held liable for "foreseeable violence" that occurs during a protest. *Mckesson*, 945 F.3d 818 at 828-32. This foreseeability of violence standard will disproportionately impact Black communities and majority-Black protests. Because of both unconscious bias and structural inequality, Black communities are over-policed and more likely to be seen as dangerous and threatening. As a result, majority-Black protests are disproportionately met with highly militarized police forces, an indicator of increased amounts of violence being foreseen by decision makers. Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335 (2019). In addition, in contexts like Black Lives Matter protests, where policing and the criminal justice system are under critique, police officers and courts have self-interested incentives to more often conclude that violence will be foreseeable. When examining whether to create a standard where courts can determine liability based on a determination of whether the protest is "foreseeably violent," this data suggests that *who* is participating in the protest and *what* is being advocated therein will play unfair roles in the calculation.

A. Public officials have not demonstrated the capacity to measure the "foreseeable violence" in the context of public assemblies with accuracy, fairness, or the absence of bias.

Because decisions to deploy military equipment are made in advance by police, they provide a more effective indicator as to whether violence was foreseen in the moments before a political assembly occurred than arrests or other in the moment responses. One of the most unnerving examples of police militarization in recent memory was the police response to protests in Ferguson, Missouri in 2014. In the days immediately following the killing of Mike Brown, law enforcement policed protests armed with military grade assault rifles and grenade launchers and dressed in army fatigues and riot gear. They sat on armored tanks with sniper rifles loaded and aimed at unarmed grandparents and children who came out to protest. They ultimately deployed tear gas and rubber bullets into the crowds. German Lopez, *What Happened in Ferguson, Missouri, Following the Shooting and Grand Jury Decision?*, VOX (Jan. 27, 2016)[10] and Dana Farrington, *Ferguson Police Use Tear Gas, Flash Grenades To Disperse Protesters*, NPR (Aug. 18, 2014).[11] Similarly, following the police killing of Alton Sterling in Baton Rouge, Louisiana, Black protesters were also met by hyper-militarized police – wearing military grade uniforms, carrying ballistic shields, vaulting tear gas into crowds, and pepper spraying

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[10] https://www.vox.com/2015/5/31/17937880/ferguson-missouri-2014-protests-riots-police (last visited Mar. 5, 2020).

[11] https://www.npr.org/sections/thetwo-way/2014/08/18/341427039/holder-to-visit-ferguson-obama-says-why-he-wont-go-too (last visited Mar. 2, 2020).

people as they made arrests – despite the overwhelmingly peaceful nature of the protests. Robert Mackey, *Images of Militarized Police in Baton Rouge Draw Global Attention*, THE INTERCEPT (July 11, 2016).[12]

While Ferguson and Baton Rouge may highlight particular instances of the militarized approach that police disproportionately employ against Black communities, studies show that this trend is common nationwide. A 2018 study concluded that, "militarized police units are more often deployed in communities with high concentrations of African Americans, a relationship that holds at multiple levels of geography and even after controlling for social indicators including crime rates." Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, Proceedings of the National Academy of Sciences of the United States of America (Sept. 20, 2018).[13] A 2014 report from the American Civil Liberties Union found that 42 percent of those visited by special weapons and tactics teams to execute a search warrant were Black, and another 12 percent were Latino. Am. Civ. Liberties Union, *War Comes Home: The Excessive Militarization of American Policing* 36 (2014).

Not all protesters face military-grade tanks and SWAT teams while protesting. In the weeks preceding the Unite the Right protest in Charlottesville, Virginia on August 12, 2017 that resulted in the killing of Heather Heyer and dozens of other injuries, "[b]usiness leaders,

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[12] https://theintercept.com/2016/07/11/images-militarized-police-baton-rouge-draw-global-attention/ (last visited Mar. 2, 2020).

[13] https://www.pnas.org/content/115/37/918 (last visited Mar 2, 2020).

faith groups, neighborhood associations, and other interested members of the community expressed concern about the prospect of a large-scale disorder. They correctly predicted . . . the potential for violence, disorder, and a substantial threat to public safety." Hunton & Williams, *Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia* 155 (2017).[14] As detailed in an independent review commissioned by the city of Charlottesville, despite these warnings, the local Charlottesville police chief and the State Police superintendent failed to adequately prepare for the threats of violence, even asking officers to stand down and not interfere while violent interactions were taking place between protesters and counter protesters. *Id.* The lack of militarized response in Charlottesville stands in stark contrast to law enforcement's responses to protests in Ferguson, Baton Rouge, and elsewhere throughout the country, demonstrating a gap in the foreseeability of violence, which could have been influenced by the identity of the protesters. Seth Millstein, *This Difference Between Charlottesville & Ferguson Could Be Part of a Sickening Double Standard*, BUSTLE (Aug. 13, 2017).[15]

In addition to evidence that law enforcement can be biased in its determination of the foreseeability of violence, evidence suggests that bias also exists in judicial determinations. In the Charlottesville case, a federal judge granted the Neo-Nazi Unite the Right

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[14] https://bloximages.newyork1.vip.townnews.com/dailyprogress.com/content/tncms/assets/v3/editorial/a/7f/a7f6fbf8-d6a2-11e7-b274-ff0516d3675c/5a21654433f0d.pdf.pdf (last visited Apr. 5th, 2020).

[15] https://www.bustle.com/p/this-difference-between-charlottesville-ferguson-could-be-part-of-a-sickening-double-standard-76288 (last visited Apr. 5th, 2020).

protesters an injunction guaranteeing their access to Emancipation Park (formerly known as Market Street Park) on the night before the rally *Kessler v. City of Charlottesville*, No. 3:17-CV-00056, slip op. at 1 (W.D.Va Aug. 11, 2017), a ruling that made it more difficult to contain the violent activities that transpired the next day. Indeed, research has suggested that in addition to burdensome dockets that fail to leave sufficient time to moderate unconscious tendencies towards bias, judges may also tend towards overconfidence in their abilities to control their own biases. Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195 (2009). The Fifth Circuit's decision allows a judge to make a post-hoc determination of the "foreseeability of violence," after violence has already occurred. But such a rule does not take into account the implicit bias demonstrated to exist in many trial determinations, biases that tend to underestimate the foreseeability of violence in predominantly White-led protests and overestimate the foreseeability of violence in predominantly Black protests.

Nor does this foreseeability of violence rule recognize that the demonstrable inequalities in law enforcement's response to protests often catalyze violent encounters between police and protesters. When police officers attend Black Lives Matter protests in riot gear and use military-grade weapons, they create an environment of intimidation and provocation that is more likely to lead to violence. One Ferguson protester lamented, "The tear gas hurt and they were just, you know, throwing the tear gas for no reason. That was the only time where I felt like, 'Okay, they don't care, they don't care who they are hurting, they don't care if it's kids or they don't care if you are out here to protest in a positive way' . . . That day, that was the worst I

ever felt about the police. It was like, 'Okay, this is what you get.' They was treating us like we're animals." Cobbina, *supra* at 114.

The use of military equipment signals that police officers do not view themselves to be responding to citizens practicing their First Amendment rights, but rather a hostile enemy force. Moreover, the use of military weapons tends to embolden police to use violence and provoke protesters to respond with violence. Psychological studies show that the mere presence of weapons increases aggression in both police and protesters. Brad J. Bushman, *The "Weapons Effect"* PSYCH. TODAY (2013).[16] Psychologist Leonard Berkowitz explains, "Guns not only permit violence, they can stimulate it as well. The finger pulls the trigger, but the trigger may also be pulling the finger." *Id*. While all guns can stimulate violence, psychologists have found that military-grade weapons have a more potent effect. Jesse Singal, *How Militarizing Police Can Increase Violence*, N.Y. MAG. (Aug. 14, 2014).[17] The use of military-grade masks also creates what psychologists call deindividualization, or an "immersion in a group to the point that one loses a sense of self-awareness and feels lessened responsibility for one's actions." Renée Grinnell, Deindividualization, PSYCH. CENT.[18] Deindividuation results in police officers taking part in actions that they would not have done otherwise, if their identity was not obscured. *Id*.

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[16] https://www.psychologytoday.com/us/blog/get-psyched/201301/the-weapons-effect (last visited Mar. 11, 2020).

[17] http://nymag.com/scienceofus/2014/08/how-militarizing-police-can-increase-violence.html (last visited Apr. 3, 2020).

[18] http://psychcentral.com/encyclopedia/2008/deindividuation (last visited Apr. 3, 2020).

In addition to the immediate response that protesters likely have at the sight of military weapons, police in riot gear also arrive in military formation, which further elicits aggression by the police. UCLA researchers theorize that humans have evolved to view the act of moving in unison, likely in a military or police formation, as a marker of a group's strength. *See* Daniel M. T. Fessler & Colin Holbrook, *Marching into Battle: Synchronized Walking Diminishes the Conceptualized Formidability of an Antagonist in Men*, 10 BIOLOGY LETTERS 20140592 (2014). The study found that synchronized police feel a greater sense of collective power that encourages them to be more aggressive. *Id.*

These psychological studies on the effects of militarized policing on violence are supported by the numbers. Social scientists who examined the relationship between militarized police forces and violence against civilians found that an increase in military equipment to police departments results in an increase (in some instances more than two-fold) in civilian fatalities from officer involved shootings. Casey Delehantey et al., *Militarization and Police Violence: The Case of the 1033 Program*, RES. & POL. (June 2017).

To see how courts fail to grapple with the realities of how police respond to Black protest, one need look no further than the Fifth Circuit's opinion, which holds that a protest organizer can be liable if he "knew or should have known" a protest will turn violent. *Mckesson*, 945 F.3d 818 at 826. Black protesters, who are subject to highly militarized and aggressive police forces, certainly know that violence—through no fault of their own—is foreseeable at their protests. In the face of unequal treatment by law enforcement, a foreseeable violence rule will lead to Black protest

organizers being held to an insurmountable standard, one in which any violent acts that occur during their protests would be seen as foreseeable and therefore leading to their liability.

B. The use of the foreseeable violence standard undermines the First Amendment's purpose of protecting political speech from undue interference.

As we parse through the morass of First Amendment jurisprudence, it is easy to forget how this case arose. On July 5, 2016, Baton Rouge Police officers shot at point-blank range Alton Sterling, a 37 year old Black man accused of no crime. Thousands of protesters marched through Baton Rouge's streets to give action to their grief and righteous anger over Alton Sterling's death, and also, in an environment where their political voices had not been heard, to petition for justice. These protests were an assertion of dignity in the face of a justice system that too-often perpetuates and immunizes police violence against Black lives. Moreover, these protests were an instance of political speech.

Predictably, state actors, from law enforcement to the Fifth Circuit, resisted such attempts to hold the Baton Rouge Police Department to account. During one of these protests, police arrived on the scene in an armored vehicle and yielded assault rifles and a "long range acoustic device," that creates painfully loud sounds designed to drive people away. Motion for Temporary Restraining Order, *North Baton Rouge Matters et al., v. City of Baton Rouge et al.*, ¶ 32 No. 3 Civ. 00463 (M.D.La 2016) Police arrested over 200 protesters, oftentimes without cause and through excessive force (the city of Baton Rouge later paid a cash settlement to 92 protesters who were subject to these unconstitutional and abusive arrests). Andrea Gallo,

DeRay Mckesson, Arrested Alton Sterling Protestors to Get Payout from Baton Rouge in Lawsuit Settlement, THE ADVOCATE (Nov. 22, 2016).[19] In the context of these protests and aggressive police responses, an officer was injured by a projectile. He filed suit in this case and attempted to sue a protest organizer, as well as the entire movement that calls itself "Black Lives Matter," for the injury that he received. In suing a protest organizer, who took no part in the violence against the officer, and a movement that seeks to affirm the inherent dignity in Black lives, this litigation is an attempt to stifle those who dare to challenge the power structures that enforce and uphold societal inequalities.

The Fifth Circuit allowed the case against non-violent civil rights protesters to go forward by creating a new standard, one in which protest organizers can be held liable for any foreseeable violence that occurs during the course of their protests. The foreseeable violence standard is capacious and gives courts ample space to make risk assessments that would prevent criticism of the institutions of which they are part. As Harvard Law Professor Cass Sunstein highlighted, giving decision makers, be it courts or law enforcement, such broad power to regulate or sanction political speech is a serious barrier to free speech, as, "Public officials might complain about a risk of violence, but their actual goal (whether conscious or not) might be to insulate themselves from criticism." Cass Sunstein, *Does the Clear and Present Danger Test Survive Cost-Benefit Analysis?*, in Lee C. Bollinger & Geoffrey R. Stone, *The Free Speech Century* 162

[19] https://www.theadvocate.com/baton_rouge/news/article_0bd9cc7c-b110-11e6-8137-5336510f1f03.html?sr_source=lift_amplify (last visited Apr. 7, 2020).

(2019). For watchers of history, it is unsurprising that the government's assessments of political speech tend towards a finding of foreseeable risk of harm, in particular when the speech critiques the behavior of public officials.

Historically, although ostensibly content neutral, the Court's jurisprudence has reflected this tendency to view protests against law enforcement and the criminal justice system through a less generous doctrinal lens. Core cases in the freedom of assembly canon like *Boynton v. Virginia*, 364 U.S. 454 (1960), *Peterson v. City of Greenville*, 373 U.S. 244 (1963), and *Gober v. City of Birmingham*, 373 U.S. 374 (1963) overturned trespass and unlawful assembly convictions of those arrested during the civil rights sit-ins. In these cases, the Warren Court "protected the civil liberties of free speech and association to promote the civil rights of racial equality." Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment,* 59 WASH. & LEE L. REV. 1075 (2002); *see also* Harry Kalven, Jr., *The Negro and the First Amendment* (1966). However, towards the end of the decade, cases like *Adderley v. Florida*, 385 U.S. 39 (1966) and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) came before the Court. In these later cases, protesters agitated for more than integration: they criticized policing and the justice system itself. Instead of protesting against segregation in public accommodations, civil rights protesters shifted to protesting against court decisions and engaged in demonstrations against police action outside jails. They also moved away from the prayer-oriented protests of the early 1960's in favor of a more radical tone and rhetoric. Derrick Bell, *Race, Racism,*

and American Law 549 (5th ed. 2004). Coextensive with this change in the target of civil rights protesters' political speech and method of rhetoric, the Supreme Court upheld convictions against protesters, notwithstanding the warnings of dissenting justices not to "permit fears of 'riots' and 'civil disobedience' generated by slogans like 'Black Power' to divert our attention from what is here at stake . . . patently impermissible prior restraints on the exercise of First Amendment rights." *Walker*, 388 U.S. at 349 (Brennan, J. dissenting). By summarily reversing or granting certiorari, the Court has an opportunity to repudiate this historical trend and reaffirm its commitment to content neutral First Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, the Howard Human and Civil Rights Clinic respectfully urges this Court to summarily reverse the Fifth Circuit opinion, or, in the alternative, to grant certiorari.

Respectfully submitted,

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