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VIA CM/ECF
Lyle W. Cayce
Clerk of the Court
United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: John Doe v. DeRay Mckesson, No. 17-30864

Dear Mr. Cayce:

This letter responds to the Court's December 8 request for letter briefs addressing three questions concerning the application to this case of Louisiana's Professional Rescuer Rule—which generally bars police officers from recovering tort damages for personal injuries arising from the performance of their job duties.

As explained below, the Rescuer Rule squarely applies to this case, and nothing about the course of proceedings prevents this Court's dismissing plaintiff's suit on that basis. If the Court is disinclined to do that, certification of the Rescuer issue to the Louisiana Supreme Court, alongside the two questions expressly identified in the U.S. Supreme Court's November 2 opinion would be appropriate. As further explained, however, the Supreme Court's decision *does not* permit two courses of proceeding that the December 8 request might be read as contemplating: (1) certifying *only* the Rescuer question or (2) holding certification in abeyance and remanding the issue for the district court to resolve.

**A. The Professional Rescuer Rule supports dismissal here.** Louisiana courts have long held that police officers and firefighters may not recover in tort for injuries resulting from "dependent" (*i.e.*, "it comes with the job") risks, save for in a narrow subset of cases where the defendant's actions are so highly "blameworthy" that considerations of "punishment [and] deterrence" require that the rule yield. *Gann v. Matthews*, 873 So.2d 701, 704 (1st Cir. 2004). The rule is grounded on assumption-of-risk principles: Rescuers are compensated for activities that carry dependent risks. And in cases like this one, where the Rule clearly applies, Louisiana courts dismiss on the pleadings. *See, e.g.*, *Holloway v. Midland Ins.*, 759 So.2d 309, 315 (2d Cir. 2000); *Solis v. Civic Center Site Dev. Co., Inc.*, 385 So.2d 1229 (4th Cir. 1980).

1. Here, the risk that caused plaintiff's injury is "dependent," *i.e.*, it "ar[ose] from the very emergency that [Officer Doe] was hired to remedy." *Holloway*, 759 So.2d at 313. Plaintiff's complaint alleges that he and other officers—many in "riot gear"—were on the scene to make arrests, Appellant's Rec. Excerpts 50, and indeed that objects were being thrown before Mckesson allegedly led protesters to march on a public road, *id. See also id.* (alleging that rock-like object was thrown after supply of plastic water bottles was exhausted). Far from something extraordinary, plaintiff can claim no surprise that protestors would attempt to walk onto the

street, that police would undertake to stop them, or that these interactions carried a risk that some individual—on one side or the other or a bystander or a provocateur—would act violently.

2. Nor could plaintiff plausibly allege that Mckesson acted with the kind of elevated culpability that would qualify for an exception. The Rule does not shelter the rock-hurler from liability. *See Bell v. Whitten* 722 So.2d 1057 (1st Cir. 1998) (affirming damages recovery against defendant who violently resisted arrest); *Worley v. Winston*, 550 So.2d 694 (2d Cir. 1989) (similar). But as this Court recognized, plaintiff does not allege that *Mckesson* intended, encouraged, or endorsed violence, even in the abstract, and there is no basis for concluding that the assailant was under his direction or control. *See* 945 F.3d at 826. Indeed, the case for "punishment and deterrence" here is much weaker than what *Bell* held insufficient as a matter of law to overcome the general bar. The court there held liable the intoxicated teenager who injured a police officer summoned to the scene of a disorderly party, but it held that the Rescuer Rule barred suit against the host, even though he had invited the attacker into his home and served him alcohol, despite a Louisiana statute criminalizing alcohol consumption by minors. Mckesson, in contrast, had no relationship with the unknown assailant who caused plaintiff's injuries, and the criminal statute he is alleged to have violated, a misdemeanor whose "focus" is to prevent impeding "other motorists," *State v. Winnon*, 681 So.2d 463, 466 (2d Cir. 1996), has less to do with violence (let alone third-party violence against police) than did the alcohol offense in *Bell*.[1]

The policies underlying distinctive treatment of tort suits brought by public safety officers for on-duty injuries apply with full force here. Not only do officers receive *compensation* for policing potentially tumultuous demonstrations in public streets, but they have a vast array of powers and protections ordinary citizens do not: They are armed, often clad in protective gear and have legal authority to order dispersal, to use force to arrest and detain citizens, and are protected by special immunities and indemnification when they exceed those lawful powers.

**B. Nothing about the course of the proceedings impedes the Court's dismissing on Rescuer grounds.** To the extent the Court's third question asks whether the Rescuer issue somehow has been forfeited by not having been raised "throughout the proceedings" to date, the answer is no. (Equally, nothing about the case's early posture precludes such dismissal.)

1. Although the litigation has entered its fifth year, Mckesson has yet to answer the complaint, and the Federal Rules establish that his omission of the Rescuer issue from his pre-answer motion to dismiss under Fed. R. Civ. P. 12(b)(6) is no forfeiture. Although Rule 12(g)(2) identifies certain defenses that *are* waived if not raised in a pre-answer Rule 12(b) motion, Rule 12(h)(2) expressly affirms that defenses like the one at issue here—that a safety officer's personal injury suit does not state a claim on which relief may be granted—*are not* forfeited and in fact may be raised in motions to dismiss under Rule 12(c), which are also resolved pre-trial, under the

[1] Viewed through a wider lens, as Judge Willett emphasized, plaintiff's allegations do not distinguish McKesson's culpability from that of leaders of historic protests, who encouraged civil disobedience, knowing that "provocative" tactics can raise the risk of violent acts, but not intending that violence occur. *See* 945 F.3d at 846-47.

same standards that govern Rule 12(b)(6) motions. *See* 5C Fed. Prac. & Proc. Civ. § 1367 (3d ed.).

Apart from when they explicitly provide for waiver, the Federal Rules do not express a preference, let alone impose a requirement, that litigants raise particular issues in particular ways, *e.g.*, the narrowest grounds for prevailing at the earliest possible opportunity. Rather they permit parties, who best know their own cases, resource constraints, and strategic interests, to make their own litigation decisions. (Such freedom is especially important to litigants like Mckesson, who was hailed into a distant court, in plaintiff's home state, facing state law damages claims the Constitution prohibits.). These principles do not vary when the argument that "could have been made" is a nonconstitutional alternative to deciding a constitutional question. Federal *courts* seek generally to decide cases on nonconstitutional grounds—a rule of practice that would *support* this Court's dismissing here. But *litigants* are not obliged to seek relief or dismissal on the narrowest possible grounds.[2]

2. Nor does a forfeiture result from the fact that Mckesson's brief in this Court did not raise the Rescuer issue as an alternative ground for affirming the judgment of dismissal. As a general matter, forfeiture rules apply to appell*ants*, encouraging them to bring up grounds for overturning a lower court's judgment all together, rather than piecemeal. But appell*ees*, as prevailing parties below, *do not* forfeit winning arguments based on "failure" to urge them as alternate grounds for affirmance. *See United States v. Smith*, 814 F.3d 268, 272 (5th Cir. 2016). Any such rule would greatly complicate appellate litigation. Given rules requiring that briefs meaningfully argue, and not merely mention, points, *see, e.g.*, *United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010), appellees would be required to engage in extensive protective briefing, thereby forcing appellants to devote reply briefs to answering ancillary arguments raised for the first time in appellees' briefs; and courts would then be required to sift through these. Indeed, a compulsory argument-or-forfeiture regime would be maximally unfair and inefficient where, as here, the defendant has won a complete victory on a single issue out of the gate, by obliging him to brief up arguments he had not yet raised, because there was no need or opportunity to do so.[3]

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[2] The First Amendment dismissal that Mckesson won in the court below was especially valuable because it did not turn on vagaries of state law and protected against similar claims brought by plaintiffs who are not professional rescuers. Indeed, as the Supreme Court has recognized, narrow decisions are not an unalloyed good in this setting. When an important First Amendment question is left unresolved and a case is decided on idiosyncratic state law grounds, there is a significant potential that Free Speech will be unconstitutionally chilled. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989).

[3] There is thus no need to justify Mckesson's not litigating an issue when neither the Federal Rules nor governing precedent required him to. But if explanation were needed, it bears emphasis that *plaintiff* said almost nothing in either court about the negligence claim that the Rescuer Rule would block. In no submission did Doe even set out *the elements* of a negligence claim under Louisiana law, let alone offer argument as to how each, or even the duty element, was satisfied. His opening brief in this Court devoted this *one sentence* to the negligent-protest theory: "Officer John Doe has stated a claim of negligence against Defendants." Br. 32. In most

3. Finally, nothing about the case's *early* posture—the fact that judgment was granted on First Amendment grounds before Mckesson could file an answer or a Rule 12(c) motion—precludes dismissal on Rescuer grounds either. Federal courts have authority to decide cases on grounds that are "antecedent... and ultimately dispositive, [including ones] ... parties fail to identify and brief," *United States Nat'l Bank v. Independent Ins. Agents,* 508 U.S. 439,447 (1993) (cleaned up), and may decide questions not passed upon where "injustice might otherwise result," *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Whether a Rescuer-Doctrine dismissal would have been proper on the original briefs, that disposition would work no unfairness to plaintiff now, since the Court has afforded the parties an opportunity to address the issue. Nor could the absence of a Rule 12(c) motion conceivably prejudice plaintiff, and appellate courts have broad discretion to dispense with such technicalities. (Indeed, the panel here did that with respect to the lack-of-capacity dismissal, *see* 945 F.3d at 824 n.2.)

**C. If the Court is not prepared to dismiss on Rescuer grounds, certifying the question—along with the duty questions identified by the Supreme Court—would be proper. But neither certifying that issue *alone* nor remanding it to the district court would be appropriate.** It is not entirely clear whether the Court's second question contemplates: (1) *including* the Rescuer issue in a multi-question certification; or (2) certifying *only* that question; or (3) withholding certification until that issue is decided in federal court. If, for whatever reason, the Court is disinclined to hold that Mckesson is entitled to dismissal on Rescuer grounds, only the first of these would be proper.

1. Certification of the Rescuer issue alone would not be "consistent with" the Supreme Court's mandate. Slip Op. 5. The Supreme Court, which was aware of the Rescuer issue, *see* Cert. Pet. 37 n.9. expressly held open certifying "other" state-law issues, *id.*, but its decision to vacate—on the ground that, under the "exceptional circumstances" presented, this Court "should have" certified two specific issues to the state court, *id.* 4, both going to the validity of the "negligent protest" tort writ large, rather than to which classes of people may recover on it. The *reasons* the Court gave for its highly unusual exercise of its certiorari jurisdiction—vacating an interlocutory decision in the absence of a confession of error or other intervening development—require including those questions in a certification. The opinion began by acknowledging the significant costs of the certification mechanism—the potential to add expense and delay resolution of federal cases—but concluded that these were outweighed here by (1) the serious "implications for First Amendment rights," Slip Op. 5, including those inherent in leaving this Court's rule in place *until* a final damages judgment was entered and upheld, in this case or some future one; (2) the "novelty" of the state law theory the panel embraced; (3) the extent to which the duty questions are peculiarly within the ken of the state judiciary; and (4) the reality that a favorable resolution of those questions would afford protection coextensive with what the petition sought under the First Amendment. *Id.* 4-5.

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cases, that would be treated as waiver on *appellant*'s part. The fact that the panel majority laid out *sua sponte* a theory that appellant barely hinted at cannot retrospectively make Mckesson's "omission" a culpable forfeiture.

2. A certification on the Rescuer issue alone would, for no sound reason, compromise these benefits and drastically increase the costs. First, confining the Louisiana court to that issue would require it to take as given the "novel[]" negligence rule the Supreme Court vacated (on the ground that it was for the state judiciary to decide, *id.* 4) and to render a decision addressing whether a particular class of injured parties may sue under a hypothetical cause of action. Such a mode of proceeding would deprive that tribunal of its usual discretion to rule on grounds that are more straightforward or less fact-dependent than others. And a Louisiana Supreme Court decision answering that limited question *adversely* to Mckesson would essentially be a "Groundhog Day" result, winding the clock back to April 2019—and necessitating a *second* certification, because, under the Supreme Court's holding, a decision overturning the district court's constitution-based dismissal *requires* the Louisiana court's resolution of the duty questions. (Notably, an adverse resolution almost certainly would not hold the Rescuer Rule *inapplicable*, only that the court could not say, as a matter of law, that it controlled).

Under a limited certification, even a Louisiana Supreme Court decision resolving the Rescuer issue *favorably* to Mckesson, while disposing of this case, would lack the important benefits that led the Supreme Court to hold certification justified. The Louisiana Supreme Court would be *prevented* from resolving the duty question in a way that not merely avoided the need *to* decide a First Amendment *issue* but that eliminated the actual threat to First Amendment rights. Indeed, as a practical matter, protesters would continue to be deterred by the threat of liability under the state tort rule this Court's *vacated* decision established—because leaders have no way of controlling who will be injured when a third party hurls an object—an officer or a civilian bystander (or a victim's whose citizenship would support federal diversity jurisdiction).

3. Much the same can be said of withholding certification entirely and instead directing that the Rescuer defense be litigated to resolution in federal court. That course too would require Mckesson to litigate (almost certainly at two federal court levels) a state law issue whose significance is predicated on an "uncertain" "novel[]" tort theory "peculiarly calling for the exercise of judgment by the state courts," Slip. Op. 4-5, and even a remand ostensibly limited to that issue could spawn litigation (and appeals) about matters like amendment and discovery, multiplying expense and delay. And as with a limited certification, an *adverse* disposition would put Mckesson in a worse position than when he successfully sought certiorari—having expended additional time and resources, but still needing to obtain from the Louisiana Supreme Court a state law ruling, without which this Court's answer to his First Amendment defense would remain "purely hypothetical." *Id*.

Respectfully submitted,

/s/

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