LOUISIANA SUPREME COURT

NO. 2021-CQ-00929

JOHN DOE,
Plaintiff/Appellant

VERSUS

DERAY MCKESSON, et al.
Defendants/Appellees

On Certified Question
From the U.S. Court of Appeals for the Fifth Circuit
(Jolly, Elrod, and Willett, JJ), No. 17-30864

ORIGINAL BRIEF OF APPELLEE DERAY MCKESSON

A CIVIL PROCEEDING

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Facts and Prior Proceedings

On July 5, 2016, Alton Sterling, a Black resident of Baton Rouge, was shot and killed by police officers responding to an anonymous 911 call. In the days after, members of the city's Black community took to the streets—including, on the evening of July 9, the area in front of police headquarters—to express their anguish, celebrate Mr. Sterling's life, and press for accountability and change. As at protests prompted by police violence elsewhere, one way those assembled conveyed their dismay was by insisting, to the police before them, the community, and the watching world, that "Black Lives Matter."

The July 9 protest was, on Appellant's account, initially peaceful, but at some point certain demonstrators began to hurl plastic water bottles in the direction of police. Compl. ¶¶ 16, 18.[1] And when the bottles "ran out," an unidentified person threw a "rock like" object that struck and injured Appellant. *Id.* ¶ 20. Appellant did not seek recovery against the unidentified assailant. Instead, he filed this personal injury suit in federal court, naming as defendants DeRay Mckesson—Appellee here—and "Black Lives Matter," described as an "unincorporated association" on whose "behalf" Mckesson "staged" the demonstration. *Id.* ¶ 3. The complaint did not allege that Mckesson himself engaged in or directed violence of any kind. Rather, Appellant alleged that Mckesson "knew or should have known . . . that violence would [occur]" at the demonstration; "did nothing to calm the crowd"; and "directed" demonstrators to protest on the public road in front of police headquarters. *Id.* ¶¶ 12, 19, 28. If proven, Appellant maintained, these allegations would give rise to liability for negligence, civil conspiracy, and vicarious liability. *See* La. Civ. Code arts. 2315, 2324, 2320.

The federal district court dismissed the suit, first holding that "Black Lives Matter" is a "social movement," not a suable "juridical person," *Doe v. McKesson*, 272 F.Supp.3d 841, 850 (M.D. La. 2017) (quoting La. Civ. Code

[1] In light of the case's procedural posture, this brief accepts as true the well-pleaded factual allegations of Appellant's complaint and indeed does not dispute those in a proposed amended complaint the district court rejected. As explained below, however, no similar solicitude is owed allegations that the certifying court specifically concluded were impermissible or implausible, nor ones advanced in support of other causes of action, distinct from the negligence claim certified, which the federal courts dismissed, unanimously, as failing to state a claim.

Art. 24).[2] It then concluded that the claims against Mckesson were foreclosed by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 888 (1982), which held that the First Amendment prohibits States from imposing civil damages liability on a defendant for a violent act committed by other parties "in the context of constitutionally-protected activity," unless the defendant himself "authorized, directed, or ratified" or otherwise manifested "a specific intent to further" those wrongs. 272 F.Supp.3d at 847-48 (quoting 458 U.S. at 925-27). Because Appellant did not plausibly allege any such connection between Mckesson and the injury-causing assault, the court ruled, the state law personal injury claims could not go forward. *Id.*

An (initially) unanimous panel of the federal court of appeals affirmed the dismissal of Appellant's civil conspiracy and vicarious liability claims because, for the latter, Appellant failed to allege facts that could support an inference that the rock-thrower's "physical movements [were] subject to . . . [Mckesson's] right to control," *Doe v. McKesson*, No. 17-30864 (5th Cir. Apr. 24, 2019), slip op. 6, and, for the former, he failed to plausibly allege that Mckesson agreed to or ratified violence, *id.* at 6-7.[3]

The panel reached a different conclusion regarding Appellant's effort to hold negligence "for organizing and leading the … demonstration" claim, finding that the elements required under Article 2315 were sufficiently alleged. *Id.* at 7-9. With respect to duty, the court quoted this Court's instruction that such determinations take account of "moral, social, and economic factors," *id.* at 8 (quoting *Posecai v. Wal-Mart Stores, Inc.*, 99-1222, p. 4 (La. 11/30/99); 752 So.2d 762, 766), but held Mckesson owed a duty to Appellant and others on the scene, based on what it described as a "universal" obligation under Louisiana law "to use reasonable care so as to avoid injury to another," *id.* at 8 (quoting *Boykin v. La. Transit Co.*, 96-1932, p. 10 (La. 3/4/98); 707 So.2d 1225, 1231).

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[2] The court of appeals later identified a further, fatal defect. If Appellant's allegation that Black Lives Matter was an "unincorporated association," with members in Louisiana, were *true*, dismissal for lack of jurisdiction would have been mandatory. 945 F.3d at 824. Thus, the power of the Fifth Circuit to certify this case to this Court—and ultimately to enter judgment—depends on Appellant's *not* pressing claims that Mckesson "was acting . . . on behalf of Black Lives Matter," Br. 3, making such allegations irrelevant here, if not improper.

[3] This first opinion is available at https://www.aclu.org/legal-document/initial-opinion. As explained below, it was withdrawn on August 8, 2019, as, eventually, was the substitute opinion issued that day. *See* 935 F.3d 253. But the court's discussion of these two claims was unvarying across the opinions.

In assessing the other elements, the Fifth Circuit attached special significance to Appellant's allegation that Mckesson and other protesters had marched onto the road in front of police headquarters, noting that "[b]locking a public highway is a criminal act under Louisiana law." *Id.* at 8 (citing La. Rev. Stat. § 14:97). It was thus "patently foreseeable" that police would respond "by clearing the highway and, when necessary, making arrests," a development that, in turn, carried a "foreseeable risk of violence" to "officers, bystanders, and demonstrators." *Id.* Similarly, though "it may have been an unknown demonstrator who threw the hard object," the court concluded, "Mckesson's negligent actions were the 'but for' causes of [Appellant's] injury." *Id.* at 9.

Having held Mckesson could be sued under Article 2315, the court considered the federal Constitution. *Id.* The fact that Mckesson did not participate in or support violence raised no First Amendment bar, the Fifth Circuit reasoned, because the complaint alleged negligence *and* directing the "tortious and illegal" act of "occupying [a] public highway," *id.* at 10, and because *Claiborne* allowed liability for what the Fifth Circuit called "the *consequences*" of *that* "tortious activity"—*i.e.*, the arrests, the assailant's hurling the object, and Appellant's injuries, *id.* After Mckesson sought rehearing *en banc*, the panel issued a second opinion, which expanded on the initial opinion's First Amendment reasoning, but replicated its discussion of state law. *See* n.3, *supra.*

Four months later—and ten days after Mckesson filed a petition for certiorari—the Fifth Circuit panel, *sua sponte*, withdrew that opinion and issued a third one, *see Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019), now with a lengthy dissent from Judge Willett, who had come to disagree with both the negligence and First Amendment rulings. "[T]he starting-point," Judge Willett explained, should be "whether Mckesson's conduct was negligent at all. And step one of that inquiry is determining whether a duty exists—a pure question of law." *Id.* at 836. Noting this Court's affirmation that "under Louisiana law, a person generally has 'no duty to protect others from the criminal activities of third persons,'" *id.* (quoting *Posecai*, 99-1222, p.5; 752 So.2d at 766), Judge Willett noted he was "unaware of any Louisiana case imposing a duty to protect against the criminal acts of a third party absent a special relationship that entails an independent duty." *Id.* (His colleagues' suggested exception for "negligently *caus[ing]* a third party to commit a crime that is a foreseeable consequence of negligence," Willett submitted, rested on "a semantic distinction without an analytic difference," one "unsupported by Louisiana law." *Id.* at 837.)

Emphasizing that federal courts should be "chary of making policy decisions that create or expand Louisiana tort duties," Judge Willett concluded that his court should have certified to this one whether, under state law, "a protest's foreseeable risk of violence impose[s] a duty upon the protest organizer, such that he can be held personally liable for injuries inflicted by an unknown assailant." *Id.* at 838.

But even if Louisiana allowed suit "for 'negligently' leading a protest at which someone became violent," *id.* at 840, the dissent explained, that claim would be "foreclosed—squarely—by controlling Supreme Court precedent," *id.* at 842. Emphasizing that *Claiborne* set a very "high [personal culpability] bar" for derivative liability, Judge Willett concluded that Appellant's allegations "utterly fail[ed]" to supply the constitutionally mandated "link [between] Mckesson's role as leader of the protest . . . [and] the mystery attacker's violent act." *Id.* at 842, 845. (Appellant's contentions on critical points, he observed, depended on "[g]auzy allegations," "conclusory statement[s]," and "naked assertion[s]," *see id.* 840-42; thus, despite its casual references to "incite[ment]," the "lone" statement of Mckesson's the Complaint actually quoted was one "*to a . . . reporter—the day following the protest* [that] 'police want protesters to be too afraid to protest,'" *id.* (emphasis added).)

Judge Willett then explained why the majority's (seemingly) "alternative liability theory"—that Mckesson could be liable for Appellant's injuries because he "directed . . . [the] specific tortious activity" of impeding a public highway—fared no better. *Id.* at 842. Even if encouraging that misdemeanor were a civil wrong against a police officer, he reasoned, that would be a constitutionally impermissible basis for "expos[ing] Mckesson to liability" for the rock-thrower's act, because "[Mckesson] didn't instruct anyone to commit *violence*." *Id.* at 844. It could not be that "directing [that or] any tort would strip a protest organizer of First Amendment protection." *Id.* at 842.

The dissent concluded by connecting this case to courageous, though not wholly violence-free, pro-democracy demonstrations taking place in other parts of the world and to milestones of this Nation's protest tradition, noting that the Sons of Liberty had *unlawfully* "dump[ed] tea into Boston Harbor" and that Martin Luther King's Selma-to-Montgomery March involved "occup[ying] public roadways." *Id.* at 846. Had the majority's understanding prevailed then, he observed, Dr. King and other leaders of "America's street-blocking civil rights

movement" could, constitutionally, have been subject to "ruinous [personal] liability" for any violent act that arose out of demonstrators' tense confrontations with hostile onlookers and police. *Id.*

Six weeks later, the Fifth Circuit issued an order announcing that a request for an *en banc* poll had yielded an 8-8 tie. *Doe v. McKesson*, 947 F.3d 874 (5th Cir. 2020). Several judges added their views. Judge Higginson (joined by Judge Dennis) explained that he "d[id] not believe the Louisiana Supreme Court would recognize a negligence claim in this situation," because "Louisiana courts allow [tort] recovery" based on statutory violations "only if the plaintiff's injury falls within 'the scope of protection intended by the legislature,'" *Id.* at 879 (quoting *Lazard v. Foti*, 2002-2888, p. 5 (La. 10/21/03); 859 So. 2d 656, 661), and that "an assault on a police officer by a third-party" "is not the 'particular risk' addressed by the highway obstruction statute.'" *Id.* Noting that "[p]rotestors of all types and causes have been blocking streets in Louisiana for decades" without being sued on claims like Appellant's, Judge Higginson faulted the panel opinion for "creat[ing] a new Louisiana tort duty" without considering the "moral, social, and economic factors" identified in the *Posecai* line of cases, and emphasized that "[t]he vital First Amendment concerns at stake" militated against any such duty. *Id.* In a brief dissent, Judge Dennis lamented that the court, by permitting the panel's "free-wheeling form of strict liability" to stand, had "grievously failed" to enforce "the longstanding protections of the First Amendment." *Id.* at 878.

Judge Ho, after acknowledging that "the panel majority's theory of liability" might be "wrong as a matter of Louisiana law" and agreeing "that this lawsuit . . . should not proceed," explained that he had voted *against* rehearing en banc nonetheless, because of the likelihood Mckesson would, on remand, obtain "immediate dismissal of this suit" by straightforward application of Louisiana's "professional rescuer doctrine." *Id.* at 875, 877-78 (citing *Gann v. Matthews*, 2003-0640, p. 5-6 (La. App. 1 Cir 2/23/04); 873 So.2d 701, 705).

On November 2, 2020, the United States Supreme Court granted Mckesson's petition for certiorari and, by a 7-1 vote, vacated the Fifth Circuit's decision. *McKesson v. Doe*, 141 S. Ct. 48 (2020) (per curiam).[4] The Court began by recognizing the "undeniabl[e] importan[ce]" of the question presented: "whether the theory of personal

[4] Justice Thomas dissented without opinion, and Justice Barrett did not participate in the Court's consideration.

liability adopted by the Fifth Circuit violates the First Amendment," but explained that it would refrain from answering that question in view of its "uncertain[ty]" about "the Fifth Circuit's interpretation of state law." *Id.* at 50. Given that "Louisiana law generally imposes no 'duty to protect others from the criminal activities of third persons,'" *id.* at 48 (quoting *Posecai*, 99-1222, p. 5), it was unclear under general tort principles, that alleging the rock-throwing "was a foreseeable effect of negligently directing a protest' onto the [street]" would state a claim against Mckesson for the injuries the rock-thrower inflicted. *Id.* at 49 (quoting 945 F.3d at 827).

The opinion next highlighted courts' responsibility "under Louisiana law [to] consider the [*Posecai*] factors" in deciding whether to impose a new tort duty, *id.* at 51, including "the moral value of protest," and held that "the Fifth Circuit [erred by] . . . ventur[ing] into … an area of tort law [so] … fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from [this Court]." *Id.* Because "the Court of Appeals should have certified to [this Court] the questions (1) whether Mckesson could have breached a duty of care in organizing and leading the protest" and (2) whether (if any such duty "exists"), Appellant "alleged a particular risk within the scope of protection [it] afford[s]," *id.*, the Supreme Court vacated the judgment and remanded "for further proceedings consistent with [its] opinion." *Id.*

On June 25, 2021, the Fifth Circuit panel issued an order certifying the case to this Court. *Doe v. McKesson*, 2 F.4th 502 (5th Cir. 2021). Noting the "Supreme Court's suggest[ion] that we should have pursued [this Court's] certification procedure . . . before engaging in the politically fraught balancing . . . that is required before imposing a duty under Louisiana law," and that the rescuer doctrine might also "be dispositive," the court "t[ook the] opportunity to elicit [this Court's] guidance," as to:

> 1) Whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party? [and]
>
> 2) [Whether, a]ssuming Mckesson could otherwise be held liable for a breach of duty owed [Appellant], Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint?

Id. at 503-04.

The order "disclaim[ed] any intention" on the federal court's part that this Court "confine its reply to the precise form or scope of the[se] questions," and pledged that the Fifth Circuit would "resolve [the] case in accordance with any opinion provided . . . by the Supreme Court of Louisiana." *Id.* at 504.

On July 8, 2021, this Court issued an order accepting the certification and directing the parties to file briefs. *Doe v. McKesson*, 2021-00929, p. 1 (La. 7/8/21); 320 So.3d 416, 417 (Mem.).

Summary of Argument

Although the "negligent protest" tort Appellant urges the Court to announce is unprecedented, uncertain, and "fraught with implications," 141 S. Ct. at 51, the grounds for rejecting it are clear and straightforward. As each of the Fifth Circuit's and Supreme Court opinions makes clear, Appellant may not hold Mckesson liable in negligence for injuries inflicted by the assailant's violent, criminal assault unless he establishes a legally enforceable duty of care. Duty is, as this Court has often recognized, a question of law and a threshold issue in every case where negligence recovery is sought under Article 2315. As Judge Willett put it, "if there's no duty, there's no negligence. And if there's no negligence, there's no case." 945 F.3d at 838.

I. There is no legal duty here. That conclusion follows from basic principles of state tort law that apply independently of the protest context from which this case arises. First, as *Posecai* emphasized, Louisiana law generally *does not* impose a duty to protect another person from a third person's criminal and violent acts. Rather, such an obligation arises only when there is a preexisting "special relationship" between the defendant and the person injured. Thus, store owners and bar owners may be liable to customers injured by third-party crimes on their premises. But businesses owe no duty to take reasonable measures that would protect those on *adjacent* property from third-party crimes. A contrary rule would be revolutionary: There are legion cases where failure of the duty element was the basis for denying recovery—though it was beyond dispute that the plaintiff's injuries would have been avoided had the defendant gone about his own activities more carefully.

Rather than assert that there is a "special relationship" between protest leaders and every person present, as a matter of right, in public places where demonstrations occur, Appellant principally submits that the absence of a preexisting relationship can be overcome when the risk of third-party harm is foreseeable. Indeed, Appellant's brief

overflows with assertions—some that appeared in his complaint, others new—that Mckesson should have foreseen or did foresee the prospect that one third party would assault another in the context of a tense and confrontational protest. Many of these allegations are self-refuting or implausible on their face, but they are legally beside the point: McKesson has not argued for dismissal because foreseeability was insufficiently alleged, but because foreseeability, if proved, is not a substitute for duty. This Court's precedents—many of which refuse recovery in cases where foreseeability was similarly undisputed—cannot be read otherwise.

Nor does a different rule apply when a defendant is asserted to have negligently "precipitated" a third party's crime—that is, when an alleged failure of care set in motion a chain of events that ended with the assailant's injury-inflicting act. It is unclear what, if anything, distinguishes "precipitation" from cases combining carelessness, foreseeability, and but-for causation, and neither the Fifth Circuit majority nor Appellant has identified a decision that supports, let alone relies on, such a distinction. On the contrary, case law is replete with examples of liability's being denied despite facts far more suggestive of "precipitation" than what is alleged here.

B. Settled Louisiana law is equally firm in closing the door to Appellant's alternative theory—that Mckesson is liable for the rock-thrower-inflicted injury because the criminality was a "consequence" of Mckesson's breach of duty to obey all laws, including Section 14:97, which makes impeding traffic a misdemeanor offense. Louisiana law has long rejected negligence per se, because not every duty is owed to every person to avoid every injury that could "result from" a statutory violation. As *State v. Winnon*, 28864 (La. App. 2 Cir. 9/25/96); 681 So.2d 463, squarely held, the duty imposed under Section 14:97 is for the benefit of *motorists*—to protect them from being impeded. For that reason, *Winnon* held that a sentence for traffic obstruction could not be based on a beating the defendant's obstruction precipitated. (Winnon blocked the road so he himself could brutally attack the victim). The same surely holds here for the rock-hurling by another person allegedly upset about arrests triggered by a protest leader's 14:97 violation. In *Winnon* and here, battery may be penalized and the assailant sued—but not the person whose traffic offense allegedly set the course of events in motion.

C. Appellant's claim thus fails under principles unrelated to the context in which this case arises. But, as this Court has held, and the U.S. Supreme Court highlighted, requests to impose novel duties require careful context-

specific consideration, particularly of the "consequences" of recognizing the duty. That analysis powerfully confirms the correctness of the result to which general tort principles already point. Injecting a duty of care into the protest setting would have grave and far-reaching consequences, effectively suppressing and deterring activities this Court has recognized as indispensable to self-government. The liability regime would be unfair, burdensome, and impossible for courts to administer in a principled and even-handed way. Nor would such a regime—which would have exposed Martin Luther King to ruinous personal liability for conducting the Selma March in a manner that foreseeably led to violence—be consistent with evolving social understandings or with Louisiana legal tradition. The State has a proud history of protecting rights of political participation and safeguarding them against destruction by lawsuit. There is, in contrast, remarkably little that could support imposing a duty: State tort law indisputably entitles Appellant to recover for his personal injuries against the culprit who intentionally—without any involvement, encouragement, or direction from Mckesson—inflicted them. And if present criminal and civil penalties for rock-throwing are insufficient deterrents, the obvious recourse is to beef up laws forbidding people from throwing rocks, not to fashion broad new damages causes of action against nonviolent protesters or organizers.

D. Because Louisiana tort law already does what the First Amendment requires, there is no need to address whether a counterfactual "negligent protest" regime could be upheld under *Claiborne*. But since Appellant's brief repeatedly argues constitutional issues, we explain briefly why it could not be. Among the many reasons is this: *Claiborne* squarely held that, under the First Amendment, a protest leader's civil liability for someone else's violence requires proof he personally intended it; Appellant's rule treats *negligence* as sufficient.

II. In view of the clarity of these principles—which foreclose protest-leader liability to *anyone* harmed by an independent actor at the scene of the protest—it is not strictly necessary that this Court answer the second certified question, which asks whether a professional rescuer could recover *if* McKesson owed a duty to others. And this Court should not, we respectfully submit, answer *only* that question: The reason the U.S. Supreme Court gave for vacating—that belated certification, despite its cost, could potentially moot the entire constitutional issue—would best be served by a decision that did not hold open the possibility of liability where a projectile struck a bystander or protest opponent, rather than an on-duty officer.

The answer to the second question is, in any event, equally straightforward and affirmative. As Judge Ho explained, accepting Appellant's allegations as true, the professional rescuer rule controls—and no exception applies. Appellant does not actually argue otherwise. Instead, he invites the Court to abolish the rescuer doctrine—or, more precisely, recognize that it was abolished by the 1988 decision in *Murray v. Ramada Inns*, a development that eluded the notice of the many courts to have applied the doctrine in the intervening 33 years. That argument misreads *Murray*, which held that Louisiana tort law developments supported discarding the "assumption of risk" *label*, but affirmed that *the outcomes* of important lines of "assumption of risk" precedent were correct, and consistent with the modern framework. More fundamentally, although the rescuer doctrine has often been described as analogous to assumption of risk, decisions both before and after *Murray* show that nothing depends on that analogy. The rescuer doctrine, these cases recognize, is an application of the duty-risk framework, an acknowledgment that duties of care businesses owe customers do not extend to rescuers on the scene in their official capacity, because the purposes underlying those protective duties do not apply to rescuers. That is especially true here, where Mckesson *does not* owe members of the public any protective duty denied rescuers—and where the doctrine does not prevent a rescuer's recovering against a rock-thrower the same way an injured member of the public could.

Law and Argument

I. Under Louisiana law, Mckesson did not owe Appellant (or others present at the demonstration) a duty to prevent harms from an unrelated third-party's violent act

A. Absent a special relationship, Louisiana law imposes no duty to avoid third-party criminality

A single, settled principle of Louisiana tort law requires dismissal of Appellant's negligence claim. Although a person may be civilly liable for violent acts that he perpetrates or personally directs, he may not be held liable under Article 2315 for injuries a plaintiff suffers through another person's criminal or violent act in the absence of a preexisting duty to, or special relationship with, the injured party. There is no dispute that the injuries on which Appellant seeks to recover were inflicted through the object-hurling by the unidentified assailant; and it is equally clear that there is no special relationship between Mckesson and Appellant—or members of the public

present at the protest. Appellant does not seriously argue otherwise. Rather, largely following the reasoning of the Fifth Circuit majority, he suggests: first, that the requisite duty of care is "universal," not special; then, that the duty element can be excused—or established—if the third-party's harm-inflicting act was *foreseeable*; and finally, that an independent duty is not required when the defendant's carelessness "precipitates" a third-party assault. But Louisiana law squarely forecloses each alternative.[5]

1. There is no "universal" duty to exercise reasonable care to avoid third-party-inflicted injury

Appellant's suggestion that Mckesson's duty follows from a "universal duty on the part of the defendant . . . to use reasonable care so as to avoid injury to another" is a non-starter. Br. 22 (quoting 945 F.3d at 827 quoting *Boykin*, 96-1932, p.10). Indeed, the Fifth Circuit majority, after being pressed by the dissent on the point, acknowledged that this Court has announced essentially the opposite of a "universal" obligation: Under Louisiana law, there is generally "*no* duty to protect others from the criminal activities of third persons." 945 F.3d at 827 (quoting *Posecai*, 99-1222, p.5; 752 So.2d at 766) (emphasis added).

Were duty "universal," Article 2315 liability would be established whenever there was proof of damage, substandard conduct, and but-for causation. That is not the law. Rather, this Court has emphasized that legal duty is a distinct element that must, on pain of dismissal, be alleged and ultimately proven in every case. *Posecai*, 99-1222, p.5. Scores of decisions upholding dismissal of claims for third-party-inflicted injury, notwithstanding plausible or proven allegations of insufficient care and but-for causation, bear that out. Had the defendant motorist in *Holloway v. Midland Risk Ins. Co.*, 33026 (La. App. 2 Cir. 5/15/00); 759 So.2d 309, not fallen asleep at the wheel, the plaintiff would not have been injured by defectively manufactured rescue equipment. Yet she was held entitled to judgment. Had the defendant in *Blanchard v. Hicks*, 2017-1045 (La. App. 3 Cir. 5/2/18); 244 So.3d 875,

[5] In various places, Appellant's brief resists the premise of the Fifth Circuit's and Supreme Court's opinions and the certification order—that the assailant was a "third party"—suggesting that liability could be imposed based on Mckesson's alleged "control and custody" over the rock-thrower. Br. 2, 8. These efforts need not divert the Court. While the language quoted did appear in Appellant's complaint, it was advanced in support of the vicarious liability claim dismissed in 2017—a ruling affirmed, unanimously, in each of the three Fifth Circuit opinions, based on an express conclusion that Appellant could not plausibly allege "that the assailant's 'physical movements [were] subject to the control or right to control' of, Mckesson" 945 F.3d at 826.

not carelessly left his keys in the ignition of the truck he parked, unlocked, on a public street, the plaintiff would not have suffered injury by a car-thief's reckless driving; yet the court denied liability, because Hicks "owe[d] no duty to the public at large against the risk of a thief's [dangerous driving]." *Id.* p.6. And had the defendant in *Gresham v. Davenport*, 537 So.2d 1144 (1989), not given an under-age car passenger beer, the plaintiff would not have been injured in a crash; yet, this Court held, his suit failed. Indeed, *Boykin*, the ostensible source of the "universal duty" language, suggested that *no duty* was owed the plaintiff in that case.[6]

To be sure, Louisiana law does not hold that a defendant may *never* be held liable for injuries inflicted through third-party criminality. But, as Judge Willett explained, such liability is authorized only in the subset of cases where there is *already* a protective duty or other special relationship between the parties. 945 F.3d at 836-37 & n.9, 11. *See Clomon v. Monroe City School Bd.*, 572 So.2d 571, 577 (1990) (school bus driver's liability for trauma suffered by motorist who killed child the defendant carelessly permitted to disembark depended on finding driver owed "a delictual duty . . . *specially and directly* to [motorist]") (emphasis added).

Thus, *Posecai*—a leading case concerning liability for third-party criminal conduct—did not hold that Louisiana *defendants* generally "have a duty to implement reasonable measures to protect [*people*] from criminal acts when those acts are foreseeable." 99-1222, p.5. It held that "*business owners* [may] owe [that duty to their] . . . *patrons* . . . when the criminal act in question was reasonably foreseeable *to the owner of the business*." *Id.*, pp. 5-6 (emphasis added). The specific duty flowed from the long-established obligation of commercial enterprises to provide safe *premises* for customer invitees, a duty that reflects recognition that proprietors "are in the best position to appreciate the crime risks that are posed on their premises," *id.*, p. 8, and that the bundle of rights associated with store ownership—to exclude customers and would-be wrongdoers, to manage activities on-site, and to hire, fire, train, and assign employees—enable them to provide effective protection. *Compare Wellons v. Grayson*, 583 So.2d

[6] The *Boykin* opinion actually referenced an "*almost* universal duty," 96-1932, p.10, and the parties had not disputed the *general duty* of the defendant highway operator to safeguard crossing pedestrians. The ruling's primary basis was that the crossing interval was not culpably short, because cars would still be required to yield to a slow-crossing pedestrian, but the court further indicated that the risk that caused plaintiff's injury, a car's running a stop light, was outside the scope of defendant's protective duty. *Id.*, p.13 n.12.

1166, 1169 (La. App. 1 Cir. 1991) (defendant whose former client fired a gun from his office porch owed occupant of *adjacent* property no duty of care); *accord Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 103 (5th Cir. 1990). Similar duties have long been imposed on innkeepers and restaurant- and bar-owners for similar reasons. And these duties closely track responsibilities specified in the Civil Code for "damage occasioned by [the] ruin [of a building the defendant owns] . . . or a defect in its design [or upkeep]," Art. 2322, and "damage occasioned by [ ] servants . . . in the exercise of the functions in which the [defendant] employ[s] [them]," *id.* Art. 2320.

Appellant's brief offers no basis for denying that a special relationship is a necessary prerequisite. Nor does the lone decision the Fifth Circuit panel majority proffered to rebut Judge Willett's assertion, *Brown v. Tesack*, 566 So.2d 955 (1990). In *Brown*, the defendant school board was held liable for injuries caused to one minor when another minor ignited a highly flammable chemical the school had improperly stored on property "used as a throughway" by local children. *Id.* at 956. As the Court noted, the defendant had acknowledged and "voluntarily accepted" its duty to "properly dispose of [the chemical]" and thereby protect children from "physical injury resulting from its flammability," *id.* at 957, duties supported by longstanding rules providing for liability based on a property owner's improperly "maintaining a thing which presents an unreasonable risk of harm," *Kent v. Gulf States Utilities Co.*, 418 So.2d 493, 498 (1982), and by special duties to prevent *minors* from misusing objects that adults would recognize to be highly dangerous, *see Commercial Union Fire Ins. Co. v. Blocker*, 86 So.2d 760, 762 (Ct. App. 1956). *Brown*, like *Posecai*, involved the defendant's own property, though the minor who inflicted the harm was, at least technically, a trespasser rather than an invitee. But Louisiana law has long recognized that a property owner owes a special duty to protect children from "attractive nuisances" readily accessible to them. *Id.* at 762 (inherent "attractiveness amounts to an implied invitation to [neighborhood] children").[7]

[7] Appellant cannot and does not claim any support in Louisiana law for concluding that Mckesson, as a "leader" of a political protest on public streets, had a "special relationship" with every other member of the public in attendance. On the contrary, the characteristics that support imposing protective duties running from business proprietors to their invitees are absent: Mckesson had no power to exclude anyone—protest opponents, journalists, passersby, onlookers—from public streets, least of all on-duty police officers, whose presence even on private property does not require permission and who have powers—to use force, give orders, and call for reinforcements—that shoppers and hotel guests do not bring to business premises. *See Clomon*, 572 So.2d at 577-78 (statute "vesting

2. A duty does not arise merely because the third party's harmful conduct is foreseeable

Nor, despite the argumentation and allegations that consume much of Appellant's brief, does Louisiana law impose a duty based on a showing that the harm-inflicting third-party's behavior was "foreseeable."[8] In *Cardella v. Robinson*, where the defendant stopped the car and discharged a highly intoxicated passenger in the middle of an interstate highway, it was surely "foreseeable" that what did happen would happen—the impaired passenger wandered into the roadway, in violation of La. R.S. 32:263(C), and was killed by a fast-driving motorist who did not expect to encounter a pedestrian there. 39663, p. 5 (La. App. 2 Cir. 5/13/05); 903 So.2d 613, 616 (summarizing defendant's argument regarding passenger's "*criminal and foreseeable*" actions) (emphasis added). Likewise, in *Solis v. Civic Center Site Dev. Co., Inc.*, 385 So.2d 1229 (La. App. 4 Cir. 1980), it was surely *foreseeable* that the gunman who gained access to the defendant's hotel through serious security failures would fire on the police officers the hotel operator summoned; but the defendant was held entitled to judgment based on the absence of a duty. Equally, in *Carver, Inc. v. Dixon*, 33241, p. 5 (La. App. 2 Cir. 5/15/00); 759 So.2d 316, 320, the defendants, who sat a young child on their laps in a gaming area that state law placed off-limits to minors, could readily have foreseen what would happen—revocation of the plaintiff's operating license based on that violation. *But see id.* (affirming dismissal based on absence of duty).

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the bus driver with authority similar to that of a policeman required and entitled [motorist] to rely for his safety . . . upon the bus driver's performance of his duty").

[8] Appellant's brief brims with allegations—some from the operative complaint, others from a proposed amended one, and others advanced for the first time here—seemingly included to establish foreseeability of violence. Those related to events where Mckesson was admittedly not present have no other *possible* relevance. And many fail even on those terms, including allegations about events that occurred *after* July 9, 2016. (President Obama expressed concern, Br.19, not about protests, but about the "recent [police] shootings.") But all such argumentation is beside the point: Neither Mckesson nor the dissenting Fifth Circuit judges disputed the sufficiency of the foreseeability allegation.

That said, Appellant's new assertion that injury at the hands of the rock-hurler was "not merely foreseeable, [but] inevitable," Br. 18, is not plausible. The complaint alleged a *single* injury. (And if it were truly "inevitable," it is unlikely that Mckesson's encouraging marchers to protest on the public street made any real difference, *see infra* p. 16). In fact, this Court has cited the certainty that some quantum of harm will eventuate as reason to *not impose* a duty on a subset of actors. *See Hudspeth v. Allstate Ins. Co.*, 2009-0119 (La. App. 1 Cir. 7/17/09) ("[Because] [i]ncreased traffic congestion has become an expected circumstance of urban life, . . . we are unwilling to impose upon an individual school such a duty."); *Posecai*, 99-1222, p. 8 (individual "businesses are generally not responsible for the endemic crime that plagues our communities").

And in the many cases involving injuries inflicted by intoxicated tortfeasors, there is no serious dispute that the tavern owners who served drinks to an already inebriated patron—in violation of law—could foresee the lethal consequences to others. But foreseeability notwithstanding, both the Legislature and the State's courts have refused to hold liquor purveyors responsible to the injured. *See, e.g. LeBlanc v. Adams*, 510 So.2d 678 (La. App. 4 Cir. 1987). Although often stated in terms of "proximate cause," the rule is readily described as holding the bar owner is "not responsible to [protect] anyone," *id.* at 683, from their customers' foreseeable alcohol-induced criminality.

Of course, foreseeability does play a role in determining the *nature* of a duty. But when *Posecai* observed that "[d]determining when a crime is foreseeable is . . . a critical inquiry," 99-1222, p. 6, it *was not* holding that foreseeability could be the basis for imposing a duty between unrelated parties—or a substitute for the requisite special relationship. Rather, the Court was underscoring that "the degree of foreseeability" could determine the *extent* of a particular proprietor's duty, *i.e.*, the standard of care: a "high[er] degree . . . give[s] rise to a duty to post security guards, but a lower [one] may support a duty to implement lesser security measures," *id.*, p. 9. And, even where a special relationship exists, *un*foreseeability can mean that a proprietor does not owe a *particular* protection. Thus, in *Lienhard v. Laxmi of New Llano*, it was undisputed that, under Louisiana law, an innkeeper "owes [guests] a duty to . . . protect them from harm at the hands of a fellow guest or . . . his employees" and that guests may rely on the proprietor's "exercise of reasonable care for their safety." No. 2:13-CV-00676-PM-KK, 2013 WL 3465533, at*3 (W.D. La. July 8, 2013). But the court held that the risks of crimes being perpetrated in unlocked, unoccupied rooms (and of what *actually* befell the plaintiff, a guest who became disoriented, wandered into an unoccupied room, and passed out) were so *un*likely—and requiring innkeepers to keep rooms locked, so burdensome—that no such duty should be recognized. *Id.* at *4, *5.

3. There is no duty not to "precipitate" third-party wrongdoing

What applies to the ostensible "foreseeability" exception also holds true for "precipitation"—the label the Fifth Circuit majority affixed to the claimed category of cases where, it suggested, liability for third-party wrongdoing may be imposed without a special relationship. As explained above, *Brown*, the lone case so identified, in fact involved a pre-existing duty—and it would have been an odd "precipitation" case in any event. (The Court

did not use the term.). The culpable "action" was the defendant's neglecting to properly store, on its own property, the chemical that the (minor) harm-doer, a trespasser, unlawfully removed and intentionally ignited, thereby injuring the plaintiff. 566 So.2d at 957. Had minors and dangerous substances not been involved, that fact-pattern would sound like a weak instance of inadvertently "furnishing the means" by which one stranger harms another.

If the "precipitation" label had actual, not just "semantic," significance, 945 F.3d at 837 (Willett, J., dissenting), one would expect cases with stronger "precipitation" facts to uphold liability. But many of the cases discussed above refute that hypothesis. The defendant in *Blanchard*, for example, surely "precipitated" the unknown thief's reckless driving, which caused the plaintiff's injury: He left a truck unlocked, with the key in the ignition, on a public street. The defendant in *Cardella*, who drove his intoxicated friend onto a public highway, stopped his car, and enabled him to exit, surely "precipitated" the passenger's violation of criminal laws forbidding walking on or crossing an interstate highway, not to mention the fatal collision and ensuing trauma that those laws were meant to protect against. It is hard to see how the bar-owner in *LeBlanc*, who knowingly served alcohol to an inebriated customer, in violation of a law prohibiting such sales, would not be liable for its customer's fatal DWI were "precipitation" the touchstone. And the *Carver* defendants all but committed the offense themselves—they had a four-year-old gamble on plaintiff's machines, and the plaintiff was punished for not having stopped them.

The basis for "precipitation" that the Fifth Circuit majority advanced here is far more tenuous than in any of those cases. The court suggested that Mckesson was alleged to have led a protest in a "provocative" way, meaning (1) it was more likely there would be a citizen-police confrontation; and thus (2) more likely someone would be arrested; which (3) made it more likely that *someone* present would lash out at police criminally; and (4) cause injury. This multi-link causal chain would seem to strain the limits of but-for, let alone legal, causation. (Tellingly, Appellant's complaint omitted the arrests and marching from its causal narrative, alleging instead that certain people were lobbing water bottles; that Mckesson "failed to calm them"; and that someone threw the rock-like object "when the water bottles ran out.")

B. Mckesson's alleged breach of a "duty" to not impede traffic does not make him answerable for injury inflicted by a third party's violence

Unable to overcome blackletter rules denying a duty to avoid injuries inflicted by a third-party's criminal assault, Appellant shifts gears, positing that allegations that *Mckesson* violated a criminal law, La. R.S. §14:97 (or encouraged others to) change everything. "It is *self-evident*," he asserts, "that McKesson had a duty to refrain from violating the law, including traffic laws," and also clear that "laws in place governing the conduct of the persons using public highways [apply] . . . when the person is engaged in protest[]." *Id.* at 23, 26. And this Court, he notes, has recognized that "[c]riminal laws [and] traffic regulations . . . may and often do set the standard for lawful conduct in personal relationships," *id.* at 28 (quoting *Pierre v. Allstate Ins. Co.*, 242 So.2d 821 (La. 1971)). From this, he concludes, "[t]he standard of care *and duty* that was breached is found in La. R.S. 14:97," *id.* (emphasis added), and the injuries suffered at the assailant's hand are recoverable "consequences" of Mckesson's "breach." *Id.* at 23.

The unsoundness of this argument is hard to miss. First, if the theory that Mckesson's negligence led to confrontation, which led to arrest, which led to rock-throwing, which led to Appellant's injury fails as a matter of law—as it plainly does, *see* pp. 11-16, *supra*—it is far from "self-evident" why substituting negligence-by-traffic-misdemeanor should make a difference. At a basic level, *the* "culprit," 141 S. Ct. at 49, who violently inflicted Appellant's personal injuries was the rock-hurler; and, as just noted, the second and third links—the ostensibly critical ones—*were not part of* the negligence theory advanced in *Appellant's* complaint. Unsurprisingly, blackletter Louisiana tort principles reflect these common-sense intuitions and foreclose raising this same meritless duty claim via the side door of a Section 14:97 "breach."

Most fundamentally, Louisiana law does not accept the notion that (1) every violation of a criminal law gives rise to a *civil* duty owed every other person and/or (2) makes the alleged violator liable to everyone injured "as a result" of the violation. "[N]egligence per se has been rejected in Louisiana," *Galloway v. Dep't of Transp. & Dev.*, 97-2747, p. 5 (La. 5/22/95); 654 So.2d 1345, 1347, precisely "because [criminal] statute[s] may have been designed to protect someone other than the plaintiff, or to protect the plaintiff from some evil other than the injury for which recovery is sought," *Boyer v. Johnson*, 360 So.2d 1164, 1169 (La. 1978)—or, as here, both. Instead,

"[w]hen a negligence claim is based on the violation of a statute, Louisiana courts allow recovery *only* if the plaintiff's injury falls within 'the scope of protection intended by the legislature,'" 947 F.3d at 879 (Higginson, J.) (quoting *Lazard*, 2002-2888 p 6; 859 So.2d at 661), requiring proof both that "(1) [plaintiff] falls within the class of persons [the legislatively-enacted] duty was intended to protect and (2) the harm complained of was of the kind which the statute was intended . . . to prevent." *Clomon*, 572 So.2d at 577.

Just as with foreseeability of third-party crime, *see* p. 15, *supra*, Appellant is right that "[c]riminal laws [and] traffic regulations" play some role in Louisiana negligence law, but wrong about what that role is. Such laws and regulations may and often do "*set the standard* [governing] personal relationships" *where a duty has already been established*—but they do not establish the duty themselves. A driver arrested for drunkenly hitting a pedestrian or for rear-ending another motorist while driving 60 mph in a 30-mph zone is likely liable on that basis to those plaintiffs—but a defendant whose speeding violation prompts someone else angry about aggressive traffic enforcement to assault the officer writing a ticket will not be responsible for that.

Here, both case law and common sense establish that "[a]n assault on a police officer by a third-party *is not* the 'particular risk' addressed by the highway obstruction statute." 947 F.3d at 879 (Higginson, J.) (quoting *Lazard*, 2002-2888, p.6). The *Winnon* decision addressed in detail the purposes of the "misdemeanor [14:97] offense of 'simple obstruction'"—applicable to "obstructions [that] render movement on the highway more difficult," *without* "foreseeable danger to human life"—along with the "aggravated" 14:96 felony at issue there. 28654, p. 4; 681 So.2d at 466. The purpose of both provisions is "*the protection of other motorists"*— those "who may be . . . harmed . . . or [in the case of 14:97] impeded." *Id.* (emphasis added). That does not describe Appellant's situation. In view of that purpose, *Winnon* held, it was impermissible to impose 14:96 punishment based on injuries the complainant suffered in a "brutal beating" accomplished through "intentional[] obstruct[ion of a] highway." *Id.*, p. 9. (Her injuries were not some merely "foreseeable" downstream consequence of impeding traffic; inflicting them was the sole aim of the premeditated obstruction—and of the defendant who did both things).

Even on these facts, *Winnon* affirmed that "the enunciated [traffic impediment] rule" in Section 14:97 does not "protect every victim against every risk that may befall him, merely because it is shown that the violation of the

[law] played a part in producing the injury." *Hill v. Lundin & Assocs., Inc*., 256 So.2d 620, 623 (La. 1972). But *Winnon also* emphasized that Louisiana law did not leave the injury-inflicting behavior unpenalized. *See* 28654, p. 8; 681 So.2d at 468 (noting that perpetrator was convicted and separately sentenced for battery). So too here. Louisiana law provides a plethora of rules addressing the harmful conduct—including, but not limited to, laws criminalizing battery and resisting arrest, *see* La. R.S. §§ 14:34.1, 14:108, and imposing enhanced punishment for assaulting on-duty officers, *id.* §14:34.2. *These* duties are enforceable in civil actions brought by injured parties against the individuals who violate them. *See Bell v. Whitten*, 97-2359 (La. App. 1 Cir. 11/6/98); 722 So.2d 1057 (holding that rescuer doctrine does not bar recovery against arrestee who violently attacked an officer but denying liability for negligently precipitating the arrest); *Worley v. Winston*, 550 So.2d 694 (La. App. 2 Cir. 1989) (duty to not unreasonably resist arrest *is* one that runs to police officers). But no prosecutor would imagine charging *Mckesson* with battery, nor could he be so charged, *see* 945 F.3d at 826 (dismissing civil conspiracy claim), and courts have consistently rejected the argument that criminal statutes impose corollary duties to refrain from all conduct that makes someone else's unlawful activity more likely. *See, e.g., Cardella*, 39663 p. 9; 903 So.2d at 618.

Appellant's bald assertion that "[t]he Legislature created legal duties [under Section 14:97] . . . *for the protection of the police* and those traveling the public highways in this State," Br. 23 (emphasis added), is not entirely mistaken. The provision presumably would protect an officer-motorist impeded on his way home from work—or one returning to a station after making an arrest. (The rescuer doctrine's limits apply only to liability for harms inherent in the emergency the officer is responding to, *see infra*; that the *Blanchard* plaintiff was a police officer was not an independent basis for dismissal; the court's "no duty" ruling would defeat an Article 2315 claim by any motorist struck by a stolen car.) But the Section 14:97 "duty" does not extend to *this* "particular risk"—that an officer enforcing this statute would be violently attacked by an unknown, unrelated party. Appellant's proposal would enact an upside-down version of the professional rescuer doctrine: Rather than *limiting* civilians' legal responsibilities to on-duty responders, as Louisiana courts long have, *see infra*, Appellant would impose a duty, owed *by* everyone *to* police officers, to obey *every* law, on the theory that every violation increases the risk an officer might make an arrest—and thereby be exposed to someone's violent interference.

Nor, finally, does anything turn, as Appellant posits, on whether—or not—a prohibition on protesting in a public street is valid under the First Amendment, as a "time, place, and manner regulation." Br. 17. The legal rules that foreclose civil liability here do not depend on the presence of First Amendment activity. *See* 141 S. Ct. at 50 (recognizing Mckesson's contention "that his role in leading the protest onto the highway, *even if negligent and punishable as a misdemeanor*, cannot make him personally liable for the violent act of an individual whose only association with him was attendance at the protest") (emphasis added).[9] No one doubted that the "lock law" could be constitutionally enforced against the defendant in *Blanchard*, and the defendant in *LeBlanc* did not prevail based on a First Amendment right to sell alcohol to an already inebriated patron. Thus, if Mckesson had encouraged others to go onto a public roadway for *non*-protest reasons—say, to retrieve an item they had lost there—and those individuals were arrested, and some other unknown person then hurled an object at the arresting officers, *Mckesson* would not have been civilly (or criminally) responsible for the assault.

C. Context-specific considerations compel rejection of the "negligent protest" tort

Bedrock principles of Louisiana tort law, which apply independently of the protest setting in which this case arises, foreclose holding Mckesson liable in negligence for personal injuries someone else's crime inflicted. But, even were those rules less definitive, this Court's decisions make clear that imposing the novel and ill-defined duty of care sought here would be improper.

Before imposing a duty of care under Louisiana law, courts must consider "various moral, social, and economic factors," among them "the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; [and] the potential for an unmanageable flow of litigation." *Posecai*, 99-1222, pp. 4-5; 752 So.2d at 766. Numerous

[9] As explained *infra*, p.28, the constitutional issue is not whether *Section 14:97* was or may be enforced consistently with the First Amendment, but whether a vast regime of civil damages liability for third-party-inflicted harms that otherwise would not be recoverable could be imposed based on a defendant's (alleged) violation of the limited-purpose traffic law. *That* regime, the one Appellant invites the Court to impose, *would not be* a valid, "content-neutral time, place, or manner" regulation. As to whether 14:97 was lawfully applied to Mckesson, it is a matter of public record that the lawsuit Appellant repeatedly references, *see* Br. 20 n.8, was resolved by *Appellant's employer*'s *agreement* to expunge, at its expense, the record of Mckesson's arrest and to compensate him for the time he was detained. *See* Judgment, *Mckesson v. Baton Rouge*, No. 3:16-cv-00520 (M.D. La. Oct. 27, 2017).

decisions have invoked these considerations to reject novel duties of care. *See, e.g.*, *Carver*, 33241, pp. 2-5; 759 So.2d at 318-20 (refusing to recognize duty owed by adults to "refrain from bringing a child into a gaming area"); *Cardella*, 39663 at 7–9; 903 So.2d at 617-18 (refusing to recognize duty owed by driver to control inebriated adult passengers); *Hudspeth v. Allstate Ins. Co.*, 2009-0119, p. 6 (La. App. 1 Cir. 7/17/09) (refusing to recognize duty owed by school to manage adjacent traffic flows); *cf. Lienhard*, 2013 WL 3465533, at *4, *5 (applying Louisiana law and refusing duties to lock unrented hotel rooms and investigate guests' whereabouts); *compare Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1161 (La. 1988) (holding, in alignment with vast majority of other States, that doctors' duties to patients include duty to competently perform tubal ligation procedure); *Posecai*, 99-1222, p.5 (agreeing with "[m]ost state supreme courts . . . that business owners do have a duty to take reasonable precautions to protect invitees from foreseeable criminal attacks," but limiting such duty, in light of economic burdens). These policy and context considerations powerfully reinforce the conclusion that the duty sought here may not be imposed.

1. The nature of the activity involved—conducting a political protest—requires rejecting a new duty

First, consider the "activity" that Appellant asks this Court to regulate, by injecting a novel "duty of care" and civil damages action: political protest. When deciding whether to recognize or reject duties, Louisiana courts take seriously the "importance that society places" on the activity targeted. *Hudspeth*, 2009-0119, p. 6 (refusing to impose new duty on schools, in part because of "tremendous [societal] importance" of education). It would be idle to say the protest activities targeted here are less socially important than the benefits of designated drivers' providing rides to inebriated people, *see Cardella*, 39663, p. 8-9; doing business in high-crime areas, *Posecai*, 99-1222, p. 8; or even educating children, *Hudspeth*. Political demonstrations are "a use of [public] streets that has 'from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.'" *Hurley v. IGLBG.*, 515 U.S. 557, 579 (1995) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J.)). Their societal importance is at its zenith where, as here, protesters are both speaking about matters of broad public concern—already assigned "the highest rung [in] the hierarchy of First Amendment [protection]," *Carey v. Brown*, 447 U.S. 455, 467 (1980)—and

"petition[ing] the Government for a redress of grievances," U.S. Const. amend. I; La. Const. Art.1, § 9, by calling fellow citizens' attention to governmental failures. That activity "is, and always has been, one of the attributes of citizenship under a free government, and is expressly made one of the constitutional guarantees in this state." *Blanchard v. Forgey*, 112 So. 395 (La. 1927).

Nor can concerns about protest rights be brushed aside by asserting that the proposed duty would not impose liability for "protected speech" or for leading a "reasonably careful," "legal" protest. A central theme of cases in the *Posecai* line is that *potential* liability (and litigation) can have an unacceptable "chilling effect" on beneficial conduct. *Cardella*, 39663, p. 9; 903 So.2d at 618. Thus, *Cardella* rejected a novel duty arising from transporting intoxicated people in part because, rather than making designated drivers, friends, and common carriers *more careful*, the prospect of damages suits for passenger-inflicted injuries would instead make them stop providing rides altogether. *Id.*

The consequences of recognizing a duty here are even more grave and "far-reaching." *Id.* Chilling effects are a central concern for protest: Because rights to speak and associate are so "fragile" and readily inhibited, *Claiborne*, 458 U.S. at 931-32, legal rules "that may have the *effect* of curtailing th[os]e freedom[s are]," are carefully scrutinized, *Shane v. Parish of Jefferson*, 2014-2225, p. 19 (La. 12/8/15); 209 So.3d 726, 741, and must avoid "unnecessarily restrict[ing]" protected activities "even when pursuing a legitimate interest," *id*, p.20. The chilling effects of Appellant's "negligent protest" tort would be vast because the scope and magnitude of personal damages liability facing any would-be protest leader—determined by the severity of injuries to unknown "officers [and] bystanders," 945 F.3d at 827, and inflicted through violent acts by others whom the leader neither knows nor controls—are limitless and unknowable. Liability would be imposed *post hoc* based on jury determinations as to whether the protest leader took "reasonable care" of those present and whether the injury-inflicting third-party act was "precipitated" by the leader's "breach." For courts and would-be protesters alike, such a radically open-ended regime would be disastrous—the "equivalent of . . . a statute which in terms . . . punishe[s] all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

Moreover, it is not at all clear that the duty Appellant seeks here, or that the Fifth Circuit contemplated, is, or logically could be, limited to cases where the defendant violated a criminal law. *See* 945 F.3d at 842 (Willett, J., dissenting) (reading majority opinion as recognizing "seem[ing] alternative" theories). As explained above, it is settled law that criminal-law violations are neither necessary nor sufficient for tort duties, and thus uncertain that a defendant whose allegedly careless protesting "precipitates" a sequence of events like what supposedly occurred here—but *does not* himself commit an offense—would escape liability. In reality though, as Justice Gorsuch recently observed, "criminal laws have grown so exuberantly [that] . . . almost anyone can be arrested *for something,*" *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (emphasis added). And an even larger proportion could be *alleged* in a well-researched, later drafted civil complaint to have violated some law.

But even if liability were limited to those who intentionally violate laws, the chilling would be intolerable. As Judge Willett highlighted, the very conduct that Appellant is most eager to deter, "lead[ing] angry people [onto public streets] . . . and forcing a confrontation with police" in moments of civic tension, Br. 20, describes what Martin Luther King, Jr. did in Birmingham and Selma—civilly disobedient acts widely viewed as highpoints in our Nation's history. Citizens who feel passionately enough about an injustice to collectively risk arrest or misdemeanor fines for protest activity—whether by walking into a street, as alleged here, or lying down in front of the entrance to an abortion clinic, *see Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996)—will balk at damages liability orders of magnitude larger. *See id.* at 642 (refusing to impose civil liability on protest organizers for injuries police officer incurred responding to civil disobedience).

Nor is the duty that Appellant asks the Court to create logically limited to "foreseeable" wrongs committed by parties on the protest leader's "side." The violence in Birmingham—committed by police *against* protesters, onlookers, and journalists—was "not merely [a] foreseeable but [an] inevitable" consequence, Br. 20, of Dr. King's confrontational protesting. Nor was there any doubt that the white nationalist march in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), would precipitate the hurling of glass bottles by anti-racists on the scene. Protest "leaders" often have no more control over people present *who agree with* their views about racial justice (but not about nonviolence) than they do over avowed opponents or police. A rule limiting a

leader's personal liability to harms inflicted by "sympathizers" would be modestly narrower, but it would flout the constitutional principle that shared belief in an ultimate goal is an impermissible basis for imposing responsibility for another person's criminal acts. *See, e.g.*, *Noto v. United States*, 367 U.S. 290 (1961).

In fact, there is no principled basis for limiting Appellant's proposed duty to protest "leaders"—whatever that term might mean in the context of demonstrations catalyzed by some unanticipated, widely upsetting occurrence. Any protest *participant* who violates a law, foreseeing that the police will effect arrests that foreseeably might anger someone else present, would have reason to fear "precipitation" liability too.

2. Imposing this duty would be unfair, economically harmful, and would open litigation floodgates

A duty that seeks to combat violence by making "leaders" (or protesters) personally liable for something someone else "foreseeably" does at a demonstration would not only be chilling, but also unfair, as it would have *unequal* suppressive effects, disadvantaging would-be protesters with the fewest means and those who seek to address subjects that arouse virulent opposition or impassioned support, or both, whether in the general public or particularly with police. Not unlike the regime the U.S. Supreme Court held to be an unconstitutional "heckler's veto" in *Forsyth County*, Appellant's regime would mean that "[t]hose wishing to express views" that stir strong feelings among "bottle throwers … [would expect] to pay more." 505 U.S. at 134.

And that differential effect would also likely come about through unbounded litigation. As cases seeking damages from protest leaders increasingly arose, it would be surprising if juries determined the various negligence elements the same way in cases arising from demonstrations supporting a locally popular cause and ones where the defendant is perceived to be "outside activist." As the U.S. Supreme Court explained, holding unconstitutional the damages remedy in *Snyder v. Phelps*, when liability turns on a "highly malleable standard," there is "a real danger of [the jury's] becoming an instrument [of] suppression." 562 U.S. 443, 458 (2011).

Even when imposition of an adverse judgment is unlikely, litigation itself is very costly for a protester made a civil defendant, who, unlike defendants in criminal cases, is not provided court-appointed counsel. Worse yet, civil litigation burdens may be—often are—imposed intentionally, for the *purpose* of muting the protester's voice. While prosecutors are obliged not to initiate cases based on political disagreement*, see Wayte v. United States,* 470

U.S. 598, 608 (1985), private parties may file suits, select defendants, and conduct litigation with an eye toward burdening political opponents. That too is why fear of civil liability can be "markedly more inhibiting than the fear of prosecution under a criminal statute.'" *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

Such dangers are especially concerning where the would-be plaintiff is a police officer seeking to recover damages incurred while present at a protest as a government agent, performing law-enforcement duties. As two Justices of the Texas Supreme Court explained, recognizing such a duty would enable "arresting officers [to sue protesters for] negligence" in cases where arrests were held unconstitutional—a "back-door attack [on First Amendment rights] by state actors," *Juhl*, at 936 S.W.2d at 648 (Gonzalez, J., concurring).[10] And those concerns are heightened in cases like this, where the allegedly negligent protest's purpose is to criticize law enforcement agents' behavior. *Cf. Sullivan*, 376 U.S. at 270 (highlighting danger that civil liability can be used to silence "unpleasantly sharp attacks on . . . public officials").[11]

3. Precedent, and the direction in which society is evolving, also weigh against imposing a duty

To say the least, there is no support in precedent for the duty Appellant seeks. Such a regime is out of step with the development of tort law in this State: This Court and the Legislature have been careful to cabin secondary and derivative liability and especially skeptical of "negligence per se" theories. *See* pp. 11-20, *supra*. And *Posecai* underscored that even business operators, who have powerful means of controlling what happens on their premises and longstanding duties to protect customers, are not "insurers of their patrons' safety." 99-1222, p. 5. It would be

[10]Appellant's brief gathers an array of federal court decisions concluding that law enforcement treatment of "those protesting purported police misconduct" violated their constitutional rights, Br. 20, apparently arguing that conferring a right to bring suit *against* demonstrators for third-party harms might "even things up." To the extent that is Appellant's proposal, it supplies stark confirmation of Justice Gonzalez's concerns.

[11] Even that does not exhaust the adverse implications of the regime. If Louisiana law permitted suits like Appellant's, protester-defendants would be entitled to show that the *arrests*—by hypothesis, the more proximate cause of injury—were carried out in an unprofessionally provocative manner. Such allegations would require examination not of the plaintiff's behavior, but of the policies and practices of his departmental employer. Few local governments would welcome a regime where suits by officers in their *personal capacity*, for injuries incurred in their *official capacity*, opened departmental operations to such scrutiny.

extraordinary if protesters, who have no comparable control over public streets and sidewalks or over other people present (and less power still vis-a-vis police officers), were held to bear remotely comparable responsibilities.

It would also be out of step with Louisiana law's strong protection for rights of speech and political association. In *Byers v. Edmondson*, the court rejected a wrongful death suit brought against the makers of a film that "inspired" two viewers to commit violent crimes like the ones the film depicted. 2001-1184, p. 6–8 (La. App. 1 Cir. 6/5/02); 826 So.2d 551, 556–57. Without doubting that the filmmaker-defendants foreseeably contributed to the perpetrators' criminal—homicidal—acts, the court of appeal held, "as a matter of [First Amendment] law," that this "tendency to lead to violence" was an impermissible basis for imposing civil liability absent evidence they "direct[ed] or encourage[d viewers] to take such actions." *Id.* And this Court has emphasized that the Louisiana Constitution's protections are "at least equal [to]—if not greater [than]—[those] of the First Amendment." *City of New Orleans v. Clark*, 2017-1453, p. 13 (La. 9/7/18), 251 So.3d 1047, 1057. Indeed, the State's "anti-SLAPP" law, La. Code Civ. Pro. Art. 971(A)(1), which entitles defendants in cases "arising from any act of [theirs] in furtherance of [their] right of petition or free speech . . . in connection with a public issue" not only to dismissal but also to attorneys' fees and costs, attests to an "evol[ution]" *away* from the regime Appellant seeks. *Posecai*, 99-1222, p. 5. That provision expresses the Legislature's intent to encourage participation in matters of public significance and its concern that participation not "be chilled through abuse of judicial process." *Shelton v. Pavon*, 2017-0482, p. 12 (La. 10/18/17), 236 So.3d 1233, 1240.

For these reasons, it is unsurprising that "protesters of all types . . . have been blocking streets in Louisiana for decades without Louisiana courts recognizing any similar claim." 947 F.3d at 874 (Higginson, J., dissenting). Nor, to Mckesson's knowledge, has any other State allowed such liability in the past forty years. *Compare Posecai* and *Pitre*. To the contrary, the one high court to have considered it, the Texas Supreme Court in *Juhl*, refused.[12]

[12] The dearth of such suits further confirms the conflict between Appellant's theory and the U.S. Supreme Court's *Claiborne* rule. *See*, *e.g.*, *Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 592 (Cal. App. 4th Dist. 2001) (*Claiborne* is "quite clear" in requiring proof of a protest organizer's "authorization, direction, or ratification of [fellow protester's] 'specific' [criminal acts]. before [he] can be held responsible for" them (quoting 458 U.S. at 927)).

4. Imposing this duty is not necessary to prevent future harm

That leaves Appellant to argue that the novel duty—and attendant liability regime—is "necessary" to prevent similar injuries from being inflicted in the future. That consideration has remarkably little traction where, as here, the injuries were inflicted through the intentional, violent conduct of an unrelated culprit. *Unlike* cases where injured professional rescuers are denied any recovery because the primary wrongdoer owed them no duty, *see, e.g., Thompson v. Warehouse Corp. of America, Inc.*, 337 So.2d 572, 573 (La. App. 4 Cir. 1976), an officer injured under the circumstances alleged here has a clear right of recovery against the individual who threw the object at him. *Bell*, 97-2359, p. 4 (adjudging arrestee who assaulted officer 100% responsible for injury). "The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Bartnicki v. Vopper,* 532 U.S. 514, 529 (2001). That method is available here.

D. Negligent protest liability would be constitutionally impermissible

While Appellant's brief is notably inattentive to the state tort law questions the U.S. Supreme Court held "should have [been] certified" to this Court, 141 S. Ct. at 51, it devotes considerable argument to whether a "negligent protesting" tort that made leaders liable for unrelated third parties' violent acts would be constitutional. *See* Br. 14 (argument summary beginning, "The First Amendment does not protect. . ."). There is no need to answer that hypothetical federal question because, as shown above, this State's tort law itself keeps within constitutional bounds "the grounds that may give rise to damages liability" and "the persons who may be held accountable for those damages," s*ee* 141 S. Ct. at 50 (quoting *Claiborne*, 458 U.S. at 916-17).

But to the extent the First Amendment is relevant here—and Louisiana courts *do* interpret and develop the State's law to avoid conflict with the federal Constitution, *see Ring v. State Dept. of Transp. & Dev.*, 2002-1367, p. 6 (La. 1/14/03); 835 So.2d 423, 427—Appellant's arguments, which largely track those of the Fifth Circuit majority—that "no First Amendment protected activity [would be] suppressed" by imposing a duty, Br. 17 (quoting 945 F.3d at 832), because this case involves "conduct" rather than speech, Br. 20, and because marching on a public road is "illegal" and therefore "unprotected"—fail. First, as explained above, the Constitution's concern with "suppression" goes beyond measures that target speech or petitioning as such, *see* pp. 22-23, *supra*; *Shane*, 2014-

2225, p. 20. Second, protesting in the street *is* First Amendment activity, not mere "conduct." *See Hurley*, 515 U.S. at 567. And while political demonstrations are not "immune" from regulation, Br. 20, laws that regulate them are subject to heightened First Amendment scrutiny, *McCullen v. Coakley*, 573 U.S. 464 (2014), and invalidated if they "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 486.

In concrete terms, the fact that the First Amendment would permit Louisiana to impose misdemeanor punishment for protesters convicted of violating a neutral traffic statute *does not* mean that the State would have *carte blanche* to subject protesters to the sort of open-ended, speech-suppressive damages liability regime sought here, whenever they are alleged to violate that (or any other) statute. *See NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 308 (1964) (order banishing civil rights group was impermissibly burdensome, even accepting illegality of conduct alleged); c*f. Forsyth*, 505 U.S. at 130 (a regime with the "potential for becoming a means of suppressing a particular point of view" is "inherently inconsistent with a valid time, place, and manner regulation").

Appellant's repeated claims that the Supreme Court's landmark *Claiborne Hardware* decision does not control here are baffling. Like this case, that one involved a civil suit seeking personal damages from the leader of a political protest—a protracted civil rights boycott in Mississippi—based on harms inflicted through third-party violence that the leader, Charles Evers, did not participate in or direct. The U.S. Supreme Court, after recognizing the deterrent potential of civil damages liability, the dangers of "guilt by association," and the need for "precision of regulation," announced a constitutional limitation on "the grounds that may give rise to damages liability" and "the persons who may be held accountable for those damages," s*ee Claiborne*, 458 U.S. at 887, 916-17, when recovery is sought for harms inflicted in the "context of constitutionally protected activity": A protest leader may only be liable for third-party acts he authorized, directed, ratified or otherwise specifically intended. *Id.* at 923. That rule, *Claiborne* explained, derived from landmark decisions involving incitement and associational liability. *See id.* at 918-20, 927-28; *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (First Amendment forbids liability for advocacy that directly and foreseeably leads others to commit violent acts, absent proof the advocate intended the violence to occur); *Scales v. United States*, 367 U.S. 203, 229 (1961)).

The conflict between Appellant's proposed tort regime and *Claiborne's* constitutional rule is not subtle. *Claiborne* held that the First Amendment limits a protest leader's liability to those acts of third-party violence he specifically intends to occur; Appellant maintains that "negligence" is enough. Indeed, as Judge Willett explained, Evers could clearly have been liable under Appellant's theory: the *Claiborne* plaintiffs sought to recover for injuries that were "the result of [Evers's] *own* tortious conduct in organizing a foreseeably violent protest." *See* 945 F.3d at 842 (alteration in original). Evers was, in almost every constitutionally relevant sense, more personally and culpably connected to the *Claiborne* plaintiffs' injuries than Mckesson was even alleged to have been to Appellant's: Evers publicly embraced "breaking [the] necks" of boycott defectors, 458 U.S. at 902; the acts of violence were perpetrated by identifiable individuals who occupied official roles in the boycott's hierarchical organization, *id.* at 925; those acts contributed to the boycott's success, *id.* at 933; and the injuries on which the plaintiffs sought to recover—business losses—were ones that Evers *did* intend they suffer. *Id.*at 912. Nothing remotely like that is claimed here.

Appellant nonetheless insists that *Claiborne* does not apply because *this* protest was "unpeaceful and illegal," in contrast to the one Evers led. Br. 15. But Appellant's complaint alleged a single injury resulting from a single rock-like object thrown by one assailant; *Claiborne* involved numerous proven acts and threats of violence made by persons within the boycott organization.[13] And this protest was "illegal" because Mckesson allegedly encouraged a misdemeanor traffic offense; the *Claiborne* boycott *would have been* "illegal" under Mississippi law had that State's supreme court not construed a statute enacted after the protest began to apply only prospectively. *See* 458 U.S. at 894 (citing 393 So.2d 1290, 1300 (Miss. 1980)). But it is impossible to read *Claiborne* as making First Amendment protections dependent on the state court's particular retroactivity analysis—and holding that the anything-goes personal damages regime the U.S. Supreme Court devoted 50 pages to condemning *could* constitutionally be imposed on leaders of protests commenced *after* the measure took effect.

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[13] Indeed, the event Appellant strains to describe in epic detail resembles an episode that warranted a single paragraph in *Claiborne*: "a young black man named Roosevelt Jackson was shot and killed [by] two Port Gibson police officers. Large crowds immediately gathered . . . [and] tension in the community neared a breaking point. The local police requested reinforcements . . . and sporadic acts of violence ensued." 458 U.S. at 902.

II. Appellant's status as an on-duty rescuer would preclude negligence liability in any event

For more than 40 years, Louisiana courts have held that firefighters and police officers generally do not have a personal right to sue private parties in negligence for injuries incurred in performing their emergency response job responsibilities. This line of cases does not establish a categorical bar, let alone "immunity," Br. 24, but it does limit their recovery to cases where the risk that causes injury is independent of the "emergency that the professional rescuer was hired to remedy," *Gann v. Matthews*, 2003-0640. p.6 (La. App. 1 Cir 2/23/04); 873 So.2d 701, 705, and those where the risk, though "dependent," was "extraordinary" and the harm-doer's personal culpability unusually high. Accordingly, what is true for the general tort principles discussed above holds for the rescuer doctrine: It requires dismissal of suits like this one, but it is no bar to a suit by Appellant against the person whose violent act caused his injury. *See, e.g.*, *Bell*, 97-2359, p. 4; 722 So.2d at 1060 (dismissing claims against defendant who provided liquor to youth who assaulted officer but awarding full damage recovery against assailant).

There is no serious dispute that the facts alleged here put the case "squarely within the scope of the [rescuer] doctrine"—and outside the recognized exceptions. 947 F.3d at 875-76 (Ho, J., concurring).[14] The risks that caused Appellant's injury were "dependent"—Appellant was, on his own account, ordered to be present and prepared to "make arrests," *see Gann*, 2003-0640, p. 6 (concluding that "the risk of being injured while carrying out an arrest is a dependent [one]"). Nor does the level of culpability that Appellant claims Mckesson exhibited—"negligence" in urging others to a commit a nonviolent, misdemeanor traffic offense that (ostensibly) was part of a chain of events that culminated in the unknown individual's rock-throwing—warrant an exception. *See Thompson*, 337 So. 2d at

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[14] Although Judge Ho did not doubt that the defense would entitle Mckesson "to terminate this suit" on remand to the district court, *id.*, he seemed to fault Mckesson for "neglect[ing]" to raise it earlier. On remand from the U.S. Supreme Court, the Fifth Circuit appeared to pick up that thread, directing the parties to brief whether the case's "procedural posture" precluded disposition on rescuer-doctrine grounds. Mckesson explained that, notwithstanding the amount of *time* the multi-opinion, multi-level litigation has consumed, the case's "posture" remains near the starting line—no answer has been filed—and further, that the Federal Rules of Civil Procedure *do not* oblige defendants to include such defenses in a pre-answer motion, and *preserve* their right to raise it by motion for judgment on the pleadings, on summary judgment, or at trial. Appellant did not disagree, and the Fifth Circuit, evidently persuaded, included the rescuer-doctrine question in its certification request to this Court.

573 (absent culpability "tantamount to arson or to trap-setting . . . we cannot hold a building owner liable to firefighters for negligence causing or worsening fire [that injured them]"); *Bell*, 97-2359, p. 12 (if providing liquor to defendant who violently assaulted officer were "a breach [of a legal] duty . . . such ordinary negligence" still "could not . . . rise to the [high] level of [culpability]" required for an exception).

Appellant's brief does not dispute this analysis. Rather, faced with the reality that the rescuer doctrine would require "immediate dismissal," 947 F.3d at 875 (Ho, J), Appellant invites this Court to jettison the doctrine. Because it has been described as rooted in "assumption of risk," and because this Court's 1988 decision in *Murray v. Ramada Inns, Inc*., 521 So.2d 1123 (La. 1988), held *that* defense abolished in Louisiana, he argues, it follows that police officers should be free to bring negligence claims, in their personal capacity, for injuries incurred as a result of the dangerous emergencies their government employment requires them to respond to.

For reasons already explained, dismissal of this case *does not* depend on whether Appellant's proposal is correct. If the rock-hurler struck a protest opponent or bystander on a public sidewalk (intentionally or because an officer dodged a projectile meant for him), *Mckesson* wouldn't be liable to *that person*. If the Court agrees, Mckesson would urge that it *not* decide the case (exclusively) on the rescuer-doctrine grounds, because a decision that left open the threat of "negligent protesting" liability—if someone other than officer is injured—would do little to dissipate the grave suppressive effects described above. *See supra*, Part I.C. One of the principal reasons the U.S. Supreme Court cited for its unusual disposition was this Court's power to settle, as a matter of "controlling Louisiana law," that there is no "conflict . . . between state law and the First Amendment," 141 S. Ct. at 51; there is, we submit, a strong public interest in providing that "guidance," and avoiding the "implications for First Amendment rights" that lingering uncertainty about negligent protest liability threatens.

That said, Appellant's argument fails on the merits. Indeed, it is gravely wrong—about the rescuer doctrine, the *Murray* decision, and the relationship between the two. For starters, the audacity of Appellant's claim—that *Murray*'s holding has somehow eluded Louisiana courts over the past 33 years—is itself ground for skepticism. The doctrine was, as Appellant notes, *applied* in the 2004 *Gann* decision, but it was not "announced" there. Br. 24. On the contrary, there have been a welter of appellate decisions explaining and applying the doctrine between 1988

and 2021, not to mention ones that pre-dated *Gann* by decades.[15] Notably, many of the post-*Murray* decisions *dismissed* claims on rescuer-doctrine grounds, the very result Appellant maintains the 1988 decision forbade. And at least one, *Meunier* v. *Pizzo*, rejected a *constitutional* challenge, holding that the State's decision to provide different remedial rights for rescuers and others claiming injuries from the same failure of care was entirely justifiable—an unnecessary and erroneous conclusion, had differential treatment been "abolished" nine years earlier. 97-0047 (La. App. 4 Cir. 6/18/97); 696 So.2d 610. (This Court denied review. 703 So. 2d 27).

And numerous appellate decisions have applied the doctrine after expressly considering *Murray*, concluding that the *substance* of the rescuer rule remains entirely sound, though the *description* of its operation might warrant updating. Thus, *Worley v. Winston*, citing *Murray*, observed that "the professional rescuer[] rule . . . has traditionally been *discussed* in terms of assumption of risk," 550 So.2d at 697 (emphasis added), but then explained that "the rule comes into play in determining the risks included within the scope of the defendant's duty and to whom the duty is owed." *Id.* In those terms, "[i]t might be said that a defendant's ordinary negligence or breach of duty does not encompass the risk of injury to a police officer or fireman responding in the line of duty to a situation created by such negligence or breach of duty." *Id. Accord Bell*, 97-2359, p. 12.

The opinion in *Murray* makes plain why these courts are right—and Appellant's syllogism is not. *Murray* held, in deciding whether, under Louisiana law, "assumption of risk" barred recovery by a plaintiff injured while diving into a pool he knew to be unsafe, that the defense had not survived the Legislature's enactment of a comparative negligence regime. 521 So.2d at 1134. But the Court's reasoning struck a less radical note than Appellant suggests. The problem with the "assumption of risk" label, *Murray* explained, was that three distinct categories of cases lurked beneath it: (1) cases where the plaintiff explicitly agreed to bear a risk for which a defendant might otherwise be liable; (2) ones where the dangers are inherent in the nature of the activity that a plaintiff chose to engage in (known as "implied *primary* assumption of risk"), and (3) ones, like *Murray* itself,

[15] *E.g.*, *Worley*, 550 So.2d 694; *Meunier*, 97-0047; 696 So.2d 610; *Holdsworth v. Renegades of Louisiana, Inc.*, 516 So.2d 1299 (La. App. 2 Cir 1987); *Bell*, 97-2359; 722 So.2d 1057; *Mullins v. State Farm*, 96-0629 (La. App. 1 6/27/97); 697 So.2d 750. *See also, e.g.*, *Solis*, 385 So.2d 122; *Thompson*, 337 So.2d 572; *Weaver v. O'Banion*, 359 So.2d 706.

described as "implied secondary assumption of risk," where the defendant acknowledges that the condition was unreasonably hazardous, but seeks to be relieved of fault because the injured plaintiff was aware of the substandard condition. *See id.* at 1129. *Murray* court held that this *third* category could no longer be asserted, lest a case's outcome depend on whether the plaintiff's persistence despite actual knowledge of a defect is analyzed as *contributing* to an accident or "assum[ing the] risk" of one. Importantly, the Court, recognizing that the case before it involved only the "secondary implied" theory, emphasized that the "results" of prior cases involving the other two categories remained sound, even though the *label* should be "banished" from Louisiana law. *Id.* at 1134.

As this reasoning makes clear—and decisions before and after *Murray* illustrate—there is simply no incompatibility between post-1980 (or post-1988) Louisiana tort law, *i.e.*, without "assumption of risk," and the rescuer doctrine. First, while the doctrine has been described as "analogous to" assumption of risk, such cases bear no resemblance to the subcategory of cases whose *outcomes Murray* held were altered. "Assumption of risk" enters the discussion not because (as in *Murray*) "the subjective awareness" of the individual officer-plaintiff matters, *id.* at 1136, but rather because the rescuer's agreed-to employment entails his accepting the ordinary risks of performing the job, when on-duty and directed to do so by the public employer, *cf. Meunier*, 97-0047, p. 5 (noting that officer "[p]laintiff admits that all her medical bills resulting from the accident were paid by her employer, and that she received workmen's compensation benefits while out of work recovering").

More important, the analogy is not a complete or necessary explanation for the doctrine. As pre-*Murray* decisions illustrate, the status- and policy-based distinctions that animate the doctrine operate across tort law, including at the heartland of Article 2315's legal duty and risk-duty analysis. Thus, the court in *Weaver v. O'Banion*, after noting a bar-keeper's duty to "keep the house orderly" for customers, considered whether he owed that same duty to a police officer summoned "to quell a disturbance," concluding that the "protection owed by the bartender does not extend to the policeman *acting as such*," 359 So.2d 706, 707-08 (La. App. 1 Cir. 1978) (emphasis added)—and then recognized it need "*not reach* the [distinct] issue[] of assumption of the risk." *Weaver*, 359 So.2d at. 708. And *Meunier* explained that "[t]he courts of this state *in employing a duty-risk analysis* have continued to hold that a proprietor is not liable for injuries sustained by professional rescuers because they do not fall within the ambit of

risk of the proprietor's original negligence." 97-0047, p. 7 (emphasis added). *See Richter v. Provence Royal Street Co., LLC*, 97-0297, p. 4 (La. App. 4 Cir. 10/8/97); 700 So.2d 1180, 1182 (affirming "finding that defendant *did not owe a duty* to protect plaintiff from [injury while] . . . chasing a criminal suspect") (emphasis added).

Police officers and firefighters on a proprietor's premises, these cases recognize, *are not* similarly situated to the business's customer-invitees. They do not arrive with a "belief'" that the owner will "protect[] them from injury by the exercise of reasonable care for their safety." *Anderson v. Clements*, 284 So.2d 341, 344 (La. App. 4 Cir. 1973). Nor are they subject, as employees and customers are, to the property owner's exclusion, control, or direction—responders at the scene of an active emergency *give* orders and wield an array of powers, privileges, and immunities that others present lack. In sum, the dispositive question is whether *the relationship* between a business owner and responder is or should be the same "special" one it has with customers. But here, of course, Mckesson was not *the proprietor* of the public places in which the demonstration took place, and the many people present there—opponents, onlookers, journalists, and other demonstrators—were not his invitees.

Conclusion

For the foregoing reasons, this Court should reject Appellant's proposal to impose a careful-protest duty on Mckesson and should hold that the professional rescuer doctrine precludes liability here, in any event.

Respectfully submitted,

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**Pro hac vice application forthcoming*

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CERTIFICATE OF CORRECTNESS AND SERVICE

I hereby certify that the foregoing is true and correct to the best of my knowledge and belief. I further certify that on September 20, 2021, I filed the foregoing Brief via the court's E-Filing system and caused the same to be served by email on all below-listed counsel. I additionally certify that the below-listed parties were mailed hard copies of the foregoing Brief via appellate printer, Record Press, Inc., on September 20, 2021.

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