

Jeopardizing the right to protest, Supreme Court refuses to block lawsuit by police officer against demonstration organizer

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Effectively jeopardizing the right to organize any large protest in the US, the Supreme Court refused to intervene Monday to stop a lawsuit by a police officer seeking to hold a protest organizer liable for the act of one of the protesters.

The case, *Mckesson v Doe*, was filed by an unnamed police officer against DeRay Mckesson, a Black Lives Matter activist, organizer, and podcaster. The officer claimed to have been injured when someone threw a rock or piece of concrete in the direction of police during the intense police crackdown on protests over the 2016 police murder of Alton Sterling in Baton Rouge, Louisiana. Over several nights, formations of heavily armed police officers assaulted protesters and arrested nearly 200 people.

There was no allegation that Mckesson personally authorized, intended or encouraged anyone to throw anything at the police during the protests. But the police officer sued Mckesson claiming that he was responsible anyway simply for having organized and directed the protest in the first place.

Petitioning the Supreme Court based on his First Amendment rights to freedom of speech and assembly, attorneys for Mckesson had argued that he could not be required to pay money damages for actions by protesters he had no control over, whose actions he did not authorize or intend.

In declining to hear the case, the Supreme Court formally expressed no view on the merits of the case, but the practical outcome of Monday's decision is that it leaves in place a series of extraordinary decisions by the Fifth Circuit Court of Appeals, which will allow the case against Mckesson to proceed.

The Fifth Circuit, which hears appeals from federal district courts in Texas, Louisiana and Mississippi, has developed a reputation as the most far-right of the circuit courts of appeals, all of which are increasingly stacked with hard-right political operatives. The Fifth Circuit's rulings in Mckesson's case in particular constitute an outrageous provocation in defiance of clear law and precedent.

In June 2023, the Fifth Circuit held that Mckesson had "incited" violence by "organiz[ing] and direct[ing] a protest . . . such that it was likely that a violent confrontation with the police would result." In other words, Mckesson could be held liable even if he did not specifically encourage or authorize anyone to do anything violent. This formulation is especially cynical given that it is usually the police, not the protesters, who are responsible for

confrontations becoming violent.

According to the Fifth Circuit, Mckesson "directed the protest at all times, and when demonstrators looted a grocery store for water bottles to throw at the assembled police officers, he did nothing to try to discourage this, even though he remained in charge." The Fifth Circuit also argued that "Mckesson personally attempted to lead protesters onto a local interstate to obstruct traffic, a crime under Louisiana law."

In deciding in favor of the officer, the Fifth Circuit overturned a 2017 decision by the district court that had originally dismissed the case against Mckesson on the well-settled grounds that protest leaders cannot be held liable for acts that they had not specifically "authorized, directed, or ratified."

Fifth Circuit Judge Don J. Willett dissented from a majority opinion in Mckesson's case, arguing that Mckesson "cannot be liable for violence unless he encouraged violence. It is not enough that he encouraged or committed unlawful-but-nonviolent actions that preceded violence."

"To spell it out," Willett continued, "I am concerned that those who oppose a social or political movement might view instigating violence (or feigning injury) during that movement's protests as a path toward suppressing the protest leader's speech—and thus the movement itself. And even putting that risk aside, large protests—just like large concerts and large sporting events—tend to attract people looking for trouble. You might even say that violence is nearly always foreseeable when an organizer takes specific action by putting together a large-enough event. But if you do, it is hard to accept the majority's theory."

The American Civil Liberties Union (ACLU) described the Fifth Circuit as endorsing "a theory under which all protest leaders can find themselves on the hook for an unlawful act they did not intend, committed by an unidentified person they neither knew nor controlled, all because they were at the same protest."

As for the allegation by the Fifth Circuit that Mckesson led a protest into a roadway in technical violation of traffic safety laws, the same could be said of Martin Luther King, Jr. numerous times during the Civil Rights period, together with countless protest leaders throughout US history. On this point, the Fifth Circuit's decision echoes authoritarian policies in the process of being imposed at institutions like the University of Michigan, which vaguely ban anything that can be described as "disruptive" to

“normal university operations.”

In a statement accompanying the Supreme Court’s decision not to hear the appeal, Justice Sonia Sotomayor wrote that the “denial today expresses no view about the merits of Mckesson’s claim.” This is true only in a technical legal sense, and is cold comfort in every practical and political sense. The deliberate refusal to halt the case, as the far-right majority on the Court certainly knows, gives a green light for similar lawsuits to be filed against protest organizers throughout the country, and especially in Texas, Louisiana, and Mississippi.

The American legal system is notoriously costly, with hundreds of thousands of dollars of legal fees potentially accumulating over a period of years even for litigants who ultimately prevail. The case against Mckesson, for example, relates to events that took place as far back as 2016, but the case is still ongoing.

The Supreme Court’s refusal to halt the case gives state and local authorities, individual police officers, and well-funded far-right provocateurs a new tool for their arsenal: they can seek to bankrupt protest organizers with protracted litigation even if those lawsuits are not ultimately successful. These lawsuits can be brought even if the protest organizers who are being sued had nothing whatsoever to do with any violent activity by individual protesters (or for that matter, with provocateurs posing as protesters).

Significantly, the legal issue in the case against Mckesson echoes the legal issue in one of the most famous episodes in the history of the workers’ movement in the US, namely the Haymarket Affair, a series of events that contributed to May Day becoming an international workers’ holiday.

On May 4, 1886, there was a rally of thousands of workers in Chicago’s Haymarket Square, demonstrating against the police killing of six striking workers the day before. As a formation of police officers attempted to disperse the crowd, a bomb exploded, leading to a bloody clash in which seven policemen and an unknown number of others died.

In the wake of the incident, Chicago’s most prominent working class leaders were rounded up and arrested, including a number who had spoken at the Haymarket rally itself. These leaders were charged and convicted for their role in the “riot,” even though the evidence never demonstrated any credible connection whatsoever between them and the bomb. Four of the eight leaders were executed on “Black Friday,” November 11, 1887.

Mckesson, a one-time candidate for the Democratic nomination for Baltimore mayor, may have little in common politically with the socialist, anarchist, and labor militant Haymarket leaders, and unlike the “Chicago Martyrs,” he does not face the death penalty. But just as the victims of the Haymarket frame-ups had no demonstrable connection to the bomb that was thrown at the police in 1886, Mckesson has no demonstrable connection to a rock being thrown at the police in 2016. Allowing the case against him to proceed in the absence of any such evidence, simply because he organized the demonstration, has profoundly reactionary implications.

The revival of the pseudo-legal framework of one of the most infamous travesties of justice in American history occurs amid mass disaffection from official politics and both capitalist political

parties in the US, mounting labor unrest, and substantial and ongoing protests directed against the Biden administration’s support for the Gaza genocide.

On the same week that the Supreme Court handed down its ruling, the New York Police Department, acting on an invitation from Columbia University authorities, carried out mass arrests of students and young people staging a protest against the Israeli genocide in Gaza. Similar protests, accompanied by police efforts to suppress them, continue to break out around the country on an almost daily basis, with hundreds demonstrating yesterday at the University of Southern California against the cancellation of the speech of valedictorian Asna Tabassum on account of her prior statements critical of Israel.

The Supreme Court, for its part, is increasingly seen as a discredited institution stacked with unelected political operatives. Having abolished the federal right to abortion in the summer of 2022 and currently embroiled in a historic corruption scandal, it is in the midst of carrying out a rampage against democratic rights across the board. In this context, the Supreme Court has signaled that it stands ready to ratify ever more anti-democratic methods to suppress popular opposition from the left.

This was made especially clear by associate justice Samuel Alito during oral arguments in the case of an individual far-right insurrectionist on Tuesday. Pointing to a law against obstructing official proceedings that had been invoked against many participants in Trump’s January 6, 2021 coup attempt, Alito provocatively asked whether pro-Palestinian protesters who “blocked the Golden Gate Bridge in San Francisco and disrupted traffic” could be arrested and jailed under the same provision. The criminal provision in question carries with it a jail term of up to 20 years.

As a consequence of the Supreme Court’s refusal to act on Monday, Mckesson’s case will be returned to lower courts for further proceedings.

While Mckesson continues to face protracted litigation over his role in organizing a protest in 2016, the police officers who triggered that protest in the first place—one held the 37-year-old Alton Sterling down while two others shot him—were never prosecuted. The Trump Justice Department announced that no federal charges would be filed in May 2017, while Louisiana state authorities reached a similar decision in March 2018.



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