

EXHIBIT A

United States District Court
Eastern District of Michigan
Southern Division

Detroit Will Breathe, Tristan Taylor, Nakia Wallace, Jazten Bass, Lauren Rosen, Lauryn Brennan, Amy Nahabedian, Zachary Kolodziej, Lauren Branch, Lillian Ellis, Olivia Puente, Iman Saleh, Margaret Henige, Caylee Arnold, and Alexander Anest,

Plaintiffs,

v.

City of Detroit, a municipal corporation, **Mayor Michael Duggan**, acting in his official and individual capacities, **Chief James Craig**, acting in his official and individual capacities, **Officer Stephen Anouti, Sergeant Timothy Barr, Officer David Hornshaw, Officer Mariah Erard, and Officer Does 1-100 inclusive**, acting in their respective individual capacities, all jointly and severally,

Defendants.

Civ. No. 2:20-cv-12363
Hon: Laurie J. Michelson

Brief of Amicus Curiae National Police Association in Support of Defendants/Counter-Plaintiffs' Response in Opposition to Motion to Dismiss Counterclaim

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Interest of Amicus Curiae

The National Police Association (“NPA”) is a Delaware nonprofit corporation founded to provide (i) educational assistance to supporters of law enforcement and (ii) support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring issues of importance to the forefront to facilitate remedies and broaden public awareness.

Issues Presented

Does the First Amendment protect against one’s own unlawful activities?

Amicus curiae states: No.

Controlling Authority

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Introduction

While the First Amendment offers robust protection for protesting activities, it offers no protection for a one's own unlawful activities.

Amicus curiae the NPA argues that (i) the First Amendment does not protect against unlawful activity, (ii) the conduct at issue was unlawful, and (iii) police officers need protection from such unlawful activity and serious harm.

Argument

I. The First Amendment does not protect against unlawful activity.

The First Amendment protects a persons right to protest. *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981) (“the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.”), *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“There is a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, and wide-open.’”).

However, it is equally important to note that the “[t]he First Amendment does not protect violence.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). “Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under

the guise of ‘advocacy.’” *Id.* (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring)). This lack of protection extends to unlawful conduct. *Id.* at 918 (“losses proximately caused by unlawful conduct” may be recovered); *see also* Part I.C.

Plaintiffs/Counter-Defendants¹ and amici Protect the Protest Task Force and the American Civil Liberties Union, each argue that the conduct at issue is protected by the First Amendment. ECF 46, PageID.669-671;² ECF 48, PageID.724, 729-731, 736-737; ECF 49, PageID.760-765. In doing so, each argue that such claim is impermissible under *Claiborne. Id.*

For the reasons below, *Claiborne* does not act as a bar to Defendant’s counter-claim.³

¹ For clarity, Amicus will follow the parties lead and will refer to Plaintiffs/Counter-Defendants as “Plaintiffs” and Defendants/Counter-Plaintiffs as “Defendants” throughout this brief.

² Plaintiffs and amici also argue that their statements are protected by the First Amendment. *See, e.g.* ECF 46, PageID.664, 667, ECF 48, PageID.726-727. But Defendants’ counter-claim does not seek liability for Plaintiffs’ speech or expression, but rather for their illegal actions conspiring to engage in unlawful activities and for the injuries/damages resulting from those unlawful activities. And Defendants agree that the First Amendment does not protect against criticism of the government or the police. So this argument is irrelevant.

³ *Bradenburg v. Ohio*, 395 U.S. 444 (1969) also does not bar Defendants’ counter-claim as Defendants are not seeking liability for Plaintiffs’ speech or expression, but for their own unlawful conduct.

A. *Claiborne* involved limiting the liability on those engaged in lawful activity for the unlawful acts of others, not one’s own illegal acts at issue here.

Claiborne involved a unique problem and solution not at issue here. The problem was that a state court had “concluded that [an] entire boycott was unlawful,” due to the presence of ““force, violence, or threats”” by ““certain of the defendants,”” but not all, and so imposed liability on lawful and unlawful defendants alike among those involved in certain roles and activities in the boycott. 458 U.S. at 895 (citation omitted). This was an overbroad remedy given the presence of some activity protected by the First Amendment.

The solution required the *Claiborne* Court to make two sets of distinctions. First, it had to separate activities protected by the First Amendment from activities not so protected. As discussed in Part I(B), it found that peaceful, lawful activity that falls within First Amendment categories (expression, association, peaceful assembly, petition) is protected, but unpeaceful, unlawful activity is not protected—even if it includes some speech, association, assembly, or petition.

Second, the *Claiborne* Court had to separate those engaging in peaceful, lawful (and so constitutionally protected) activities from those doing unpeaceful, unlawful (and so constitutionally unprotected) activities.

In separating the lawful from the unlawful, the *Claiborne* Court provided

precise guidelines to protect the lawful from liability for the acts of lawbreakers. In that context, *Claiborne* held that the lawful are not liable for the illegal actions of others unless they “authorized, directed, or ratified specific tortious activity,” and even then liability would be limited to the consequences of that specific activity. *Id.* at 927. However, those engaging in illegal activity that causes harm may be held liable: “Unquestionably those individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.” *Id.* at 926 (emphasis added).

This case involves the consequences of Plaintiffs’ own unlawful activities. As a result, the consequences of Plaintiffs’ unlawful activity is not shielded by the First Amendment and is not protected by *Claiborne*. Here, as shown in Part II, the conduct in question was not a peaceful, lawful protest. Instead, the conduct at issue involves a civil conspiracy, whereby Plaintiffs conspired to engage in unlawful acts and actually engaged in those acts. Consequently, it does not involve the *Claiborne* situation where a person was engaged in peaceful, lawful, and constitutionally protected First Amendment activity and the government sought to make that innocent person liable for the illegal acts of others. *Claiborne* does not control on this fundamental difference alone.

B. *Claiborne* does not preclude liability for the foreseeable consequences of one’s own illegal acts.

Claiborne made clear that one may be liable for the reasonably foreseeable consequences of one’s own unlawful acts by holding that (i) unpeaceful, unlawful acts are not protected by the First Amendment and (ii) those engaged in unlawful acts are liable for the consequences of their own unlawful actions.

Regarding the scope of First Amendment protection, *Claiborne* made clear that, even if activity involves expression, association, assembly, and petition, it is only protected if it is peaceful and lawful. Unpeaceful, unlawful activity is unprotected even if it is accompanied by, or associated with, expressive activity, e.g., chanting slogans while breaking the law. The First Amendment provides no protection for unlawful activity. So if, as alleged here, persons conspired to engage in unlawful activity, those involved lose all First Amendment protection. And that is the end of any *Claiborne* and First Amendment constitutional analysis: Absent First Amendment protection, there is no basis to interrupt the ordinary workings of state law imposing liability.

Of course, *Claiborne* repeatedly emphasized that protests there were peaceful and lawful, e.g, it began by “not[ing] that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly.” 458

U.S. at 903 (emphasis added). “The few marches associated with the boycott were carefully controlled by black leaders.” *Id.* (emphasis added). “The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott.” *Id.* This Court repeatedly emphasized that “peaceful” activity had First Amendment protection. *Id.* at 908 n.43 (right “peaceably to assemble”), 909 (“assemble peacefully” and “peaceful march and demonstration”), 910 (“peaceful pamphleteering”), 912 (not “through riot or revolution”). And state “power to regulate economic activity” does not include “a comparable right to prohibit peaceful political activity.” *Id.* at 913 (emphasis added). So that is the sort of activity protected by the First Amendment. But that “peaceful” and “carefully controlled” activity is a far cry from the activity at issue here, whereby Plaintiffs conspired to engage in unlawful activity, which *Claiborne* excluded from constitutional protection. The activity here was neither peaceful nor lawful, so it lacks First Amendment protection.

Of course, states may impose reasonable time, place, and manner restrictions on speech, and speech outside those lawful restrictions lacks constitutional protection. Michigan permissibly barred inter alia, obstructing traffic (MCL § 257.676b), which meant that even lawful speech would be unprotected where protesters blocked an intersection and obstructed traffic, so the unlawful activity

solicited and engaged in by Plaintiffs was constitutionally illegal and lacked First Amendment protection.

As shown in Part II, the alleged liability here flowed from this illegal activity. It was reasonable to assume that police would respond to the unlawful activity, seeking to protect the public and restore the police. And with the history of violence and unlawful activity at Detroit Will Breathe (“DWB”) and like protests, it was a natural consequence for the alleged injuries and damages to follow such interaction.

In sum, because Plaintiffs’ own activities at issue here was not their speech or advocacy, but rather their unlawful activity, they lack First Amendment protection, which ends the analysis. And *Claiborne* also indicated that liability for the reasonably foreseeable consequences of one’s own unlawful activity is not precluded by the First Amendment.

C. *Claiborne* did not limit its holding to “violent” activities.

It is important to note that *Claiborne* did not limit this lack of protection to “violent” activity but also to “unlawful” activity. *See* 458 U.S. at 918 (“Only those losses proximately caused by unlawful conduct may be recovered.”). Indeed, the Supreme Court used both terms when describing activities that lost First Amendment protection. *See Officer John Doe v. McKesson*, 945 F.3d 818, 830 (2019)

(“the Supreme Court did not invent a violence/nonviolence distinction”) (vacated on other grounds). Indeed, the Supreme Court made clear that a person could be held liable for their unlawful activities:

the *Claiborne Hardware* opinion makes frequent reference to unlawful conduct See, e.g., *id.* at 920, 102 S.Ct. 3409 (“For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”); *id.* at 925, 102 S.Ct. 3409 (“There is nothing unlawful in standing outside a store and recording names.”); *id.* at 926, 102 S.Ct. 3409 (“Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.”); *id.* at 927, 102 S.Ct. 3409 (“There are three separate theories that might justify holding Evers liable for the unlawful conduct of others.”); *id.* at 933, 102 S.Ct. 3409 (“At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose.”). In every instance, if the Court were creating a violence/nonviolence distinction it would have replaced “unlawful” with “violent.” It did not, because it created no such demarcation.

Id. at 830 (citing *Claiborne*, 458 U.S. 886).

Moreover, that *Claiborne* was not creating the purported violence/nonviolence distinction is clear because (i) “[t]his ... distinction ... does not square with the case law,” (ii) “recent cases [do not] vindicate this understanding,” and (iii) “the ... distinction does not make sense.” *Id.* at 831 (citations omitted). So *Claiborne* eliminates First Amendment protection for both violent and unlawful activities.

II. The conduct involved was unlawful.

The conduct in question was not a peaceful, lawful protest. Instead, the conduct at issue involves a civil conspiracy, whereby Plaintiffs conspired to engage in unlawful acts including: “disobeying lawful police directives, obstruction of traffic, assault and battery against officers, and other such disorderly conduct.” ECF 54, PageID 808, *see also* ECF 43, PageID.625, ¶¶ 132-134. These unlawful activities violate a number of State and local laws. *See, e.g.*, MCL § 257.676b (which prohibits obstructing traffic, which Plaintiffs directly solicited and participated in).

Moreover, the injuries and damages resulting from this civil conspiracy were reasonably foreseeable. It is expected that such unlawful activities would lead to a police response—seeking to stop the unlawful activities and restore the peace. These reasonably foreseeable injuries and damages include, *inter alia*: “physical injuries; pain, suffering, and emotional distress; property damage; loss of business opportunities;” etc. ECF 43, PageID.626, ¶ 135.

Additionally, Defendants are not bringing a claim based on the acts of third parties, but for the actions of Plaintiffs themselves. Plaintiffs include DWB, which solicited participation in the unlawful activity and which hosted the unlawful “protest”, and Plaintiffs T. Taylor, N. Wallace, L. Brennan, Z. Kolodziej, O.

Puente, M. Henige, I. Saleh, L. Rosen, L. Ellis, A. Nahabedian, C. Arnold, and A. Anest, each of whom actively engaged in the unlawful activity solicited. Many of the Plaintiffs were arrested for the very conduct that Defendants allege as part of the conspiracy. ECF 54, PageID 805-806, ECF 43, PageID.617, ¶¶ 84-86, PageID.622, ¶¶ 115-120. The conspiracy engaged in by these Plaintiffs resulted in the alleged injuries and damages.

This is not the conduct of unidentified third parties, or an effort to subject peaceful protestors to liability for the actions of others. Instead, the counter claim is seeking to hold those who engaged in the conspiracy and the unlawful actions liable for their own actions. As shown above, such unlawful conduct is not protected by the First Amendment.

III. Police officers need protection from unlawful activity.

Police officers need protection from unlawful activity (inter alia) (A) harm to police officers from such activity is reasonably foreseeable, (B) the First Amendment does not protect one's own unlawful or violent conduct, and (c) a contrary rule would harm police officers, the public, and the rule of law.

A. The unlawful activity associated with the Detroit protests, in the broader context of the violent and unlawful activity associated with other similar protests, created a reasonably foreseeable risk of harm.

Allowing liability for a person's own unlawful activities and for illegal

conspiracies to engage in unlawful activities are necessary to ensure police officers remain safe in performing their duties, and acts as a necessary deterrent from similar future harm. This is even more necessary where such unlawful activities have become commonplace.

Similar violent and unlawful activity has been associated with illegal protests that have routinely followed many police-involved shootings of minorities across the country, and have, with repetition, resulted in serious and severe physical and pecuniary losses to police officers doing little else but protecting and serving the public. These catastrophic consequences have been visited upon police officers across the United States who are fulfilling a vital service to their communities.

In Detroit, prior to the events in question, other DWB events resulted in significant violent and unlawful activities. *See* ECF 54, PageID.805; ECF 43 PageID.610-614, ¶¶ 27-58. Indeed, there is evidence from prior protests of individuals “hurling dangerous projectiles at police officers, blocking busy streets and school buses, encouraging violent behavior, screaming loudly in the faces of DPD officers, refusing to follow clear and lawful DPD directives and destroying and defacing public property.” ECF 43, PageID.608.

But other examples from across the United States abound. The riots follow-

ing the death of George Floyd led to more than 9,000 arrests, millions in damage, injuries to more than 400 law enforcement officers, and the death of at least two officers. The Cullman Tribune, *More than 400 law enforcement officers injured in riots across U.S., 2 dead*, June 6, 2020, <https://www.cullmantribune.com/2020/06/06/more-than-400-law-enforcement-officers-injured-in-riots-across-u-s-2-dead/>.

Following the death of Michael Brown, protests quickly turned into riots during which local businesses were both looted and set ablaze, resulting in millions of dollars in damage. St. Louis Business Journal, *Buildings destroyed in Ferguson riots worth million*, Dec. 4, 2014, <https://www.bizjournals.com/stlouis/news/2014/12/04/buildings-destroyed-in-ferguson-riots-worth.html>. Police officers tasked with protecting the public had bottles and rocks thrown at them, and hundreds protestors were arrested. These riots continued for more than a year, eventually leading to the shooting of two police officers. Associated Press, *Man convicted of shooting two officers during Ferguson protest*, Los Angeles Times, Dec. 9, 2016, <https://www.latimes.com/nation/nationnow/la-na-ferguson-shooting-20161209-story.html>. And following the police-involved death of Freddie Gray in Baltimore, protests devolved into rioting, leading to the injury of twenty police officers in the course of their official duties. The Baltimore Sun, *Baltimore riots lead to 235 arrests, 20 injured officers*, Apr. 28, 2015, <https://www.baltimoresun.com>.

com/news/crime/bs-md-ci-baltimore-riots-what-we-know-20150428-story.html.

During the chaos, approximately 300 businesses were damaged; hundreds of vehicles, buildings, and structures were set ablaze; and over 200 rioters were arrested for their conduct. *Id.*; The New York Times, Maryland: Rioting Damaged 300 Businesses, May 7, 2015, <https://www.nytimes.com/2015/05/08/us/freddie-gray-rioting-damaged-300-businesses.html>. In St Paul, Minnesota, twenty-one officers were injured when rioters hurled chunks of concrete and other dangerous projectiles at police, and in one instance, a protestor dropped a concrete block on an officer's head, breaking his neck. KARE 11 staff, Officer suffers spinal fracture during I-94 shutdown, KARE 11 News, July 10, 2016, <https://www.kare11.com/article/news/officer-suffers-spinal-fracture-during-i-94-shutdown/89-268434384>.

As shown by prior similar protests across the United States and from DWB protests in Detroit, the injuries and damages were eminently foreseeable. It was expected that such unlawful activities by Plaintiffs would lead to a police response—seeking to stop the unlawful activities and restore the peace. It was also reasonably foreseeable that the unlawful activities would lead to significant injuries and damages.

But despite this obvious and known risk, DWB nonetheless conspired to engage in unlawful activity, solicited others to engage in the unlawful activity, and

Plaintiffs participated in that activity. The results and damages from those actions were not merely foreseeable; they were inevitable.

B. The First Amendment does not protect unlawful or violent conduct.

As discussed above, the First Amendment offers no such refuge to unlawful conduct merely because it occurs in association with speech. *Supra* Part I.

Defendants do not seek to hold Plaintiffs liable for their speech or expression, but rather for their illegal actions conspiring to engage in unlawful activities and for the injuries/damages resulting from those unlawful activities.

Lawful exercise of speech and assembly is protected by the First Amendment. Unlawful conduct is not. This clarification is necessary and proper given the misconception of the extent to which the First Amendment affords protection to individuals in the area of political protest.

C. A contrary rule would harm police officers, the public, and the rule of law.

Given that Plaintiffs' activity was unlawful, a finding that such activity is protected by the First Amendment would harm police officers, the public, and the rule of law because it would (i) eliminate valuable protection and (ii) impose a rule that would lead to broad societal harm in this and similar situations.

First, prohibiting liability would be very harmful. Such liability plays a vital

rule-of-law role that should be preserved here and in similar situations. It discourages unlawful activity because of the risk of liability. And one who encourages others to break the law—for example: by blocking a public highway and forcing a confrontation with police—should think twice before engaging in such illegal and dangerous activity because of the risk of liability. The prudent choice would be to lead those a lawful protest on a sidewalk or other legal, safe, non-obstructing place.

Second, liability also assigns losses where they belong—on the wrongdoer, not the victim or the public. That is simple justice. Neither the police officers or the government should absorb the damages for Plaintiffs’ unlawful actions if a finder of fact determines that the damages were a result of their unlawful actions.

Plaintiffs and amici erroneously read *Claiborne* as imposing a broad rule, that immunizes persons engaged in unlawful activity from liability for the consequences of such illegal activity if this activity also involves expressive activity. So they would radically expand *Claiborne*’s protection of speech, while engaged in peaceful and lawful protest, from the unlawful acts of other, to the foreseeable consequences one’s own illegal actions. Such a rule, if recognized, would harm police officers, the public, and the rule of law.

As established above, *Claiborne* did not preclude liability for consequences

of one's own illegal activity that lacks First Amendment protection. Here, Defendants do not seek to hold Plaintiffs liable for their speech or expression, but for their own unlawful activity which lacks First Amendment protection.

Allowing liability for one's own unlawful actions deters similar future unlawful conduct. To hold otherwise would allow protestors to engage in unpeaceful, unlawful actions themselves, without the normal concern a citizen should have for the possible harm to other citizens from the foreseeable consequences of their own unpeaceful, unlawful acts. This is extremely dangerous to police officers, who typically bear the brunt of such illegal actions and its consequences, but also to members of the public who may be similarly harmed, and to the rule of law because purported speech protections are asserted to inoculate wrongdoing.

Conclusion

This Court should deny Plaintiffs' Motion to Dismiss.

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Certificate of Service

I hereby certify that the foregoing document was served electronically on December 11, 2020, upon all counsel of record via the United States District Court for the Eastern District of Michigan, electronic filing system.

/s/ Courtney Turner Milbank

Courtney Turner Milbank