No. 19A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DERAY MCKESSON,

Applicant,

v.

JOHN DOE,

Respondent.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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PARTIES

In addition to the parties on the caption, Black Lives Matter Network, Inc., was a party to the proceedings before the Court of Appeals but does not join this petition.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To: Hon. Samuel A. Alito, Jr., Circuit Justice for the Fifth Circuit:

Under this Court's Rules 13.5 and 22, Applicant DeRay Mckesson requests an extension of thirty (30) days to file a petition for a writ of certiorari, seeking the Court's review of the decision of the U.S. Court of Appeals for the Fifth Circuit, in *Doe v. Mcksesson*, No. 17-30864, 935 F.3d 253 (on rehearing) (Aug. 8, 2019), a copy of which is attached. *See also* 922 F.3d 604 (5th Cir. 2019) (prior, withdrawn panel opinion). In support of this application, Applicant states:

1. A panel of the Fifth Circuit issued its decision on rehearing on August 8, 2019. Without an extension, the petition for writ of certiorari would be due on November 6, 2019. With the requested extension, the petition would be due on December 6, 2019. This Court's jurisdiction will be based on 28 U.S.C. § 1254.

2. This case is a serious candidate for review because the Fifth Circuit decision resolved a vitally important question of federal constitutional law in a manner that contravenes *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), and cannot be squared with other landmark First Amendment precedents of this Court.

a. This is a state law tort suit seeking monetary damages for personal injuries suffered at a protest march prompted by the killing of Alton Sterling, an African-American resident of Baton Rouge, Louisiana, by local police. The plaintiff (Respondent here), is a law enforcement officer who was struck by a "rock-like object" while policing the demonstration; the principal defendant, Applicant DeRay

Mckesson, is a prominent advocate for racial justice and policing reform, who participated in the July 9, 2016 demonstration.[1]

Respondent has not claimed that Mckesson himself hurled the projectile or perpetrated violence of any kind. And his complaint, each court below concluded, made no plausible allegation that Mckesson had incited, directed, or ratified violent activity by any other person. Rather, Respondent maintained that three Louisiana tort theories—civil conspiracy, vicarious liability, and negligence—entitled him to recover from Mckesson for the injuries the unnamed assailant inflicted. In particular, Doe alleged that Mckesson had encouraged other protesters to march on a public highway, neglecting the prospect that arrests—and then aggressive resistance—might ensue.

b. After concluding that the first two causes of action failed on state law grounds, *see* 272 F.Supp.3d 841 (M.D. La. 2017), the district court held the negligence claim foreclosed by *Claiborne Hardware*. That case, like this one, involved a state law claim for damages resulting from violence that occurred "in the context of constitutionally protected activity," 458 U.S. at 916—an economic boycott of white-

[1] Respondent invoked the district court's diversity jurisdiction. 28 U.S.C. § 1332. In addition to naming Mckesson, he named "Black Lives Matter," alleged to be an unincorporated association. Both courts below rejected that claim. *But see* Slip Op. 16 n.7 (directing district court to reconsider, in light of panel's opinion, its denial of leave to add parties). The courts also held that Respondent is not entitled to proceed pseudonymously. *Id.* at 17 n.8. Because, the court of appeals did not alter its caption and because Respondent has yet to formally identify himself and potentially could cross-petition on that issue, this Application refers to him as "Doe."

owned businesses in Port Gibson, Mississippi, aimed at securing fairer treatment of the area's African-American residents. *Id.* at 907-12.

The *Claiborne* opinion affirmed that since "the First Amendment does not protect violence," *id.* at 916, "no federal rule of law restricts a State from imposing tort liability for … losses that are caused by violence and by threats of violence." *Id.* But, the Court held, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages," *id.* at 916-17. This Courtt's opinion, after extensively canvasing relevant lines of First Amendment authority, then identified the principal such restraint: States may not hold a nonviolent defendant liable in civil damages for his associates' violence absent clear proof he harbored "specific[] inten[t]" that the violence occur. 458 U.S. at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)). Because there was no plausible allegation that Mckesson perpetrated violence or shared the rock-thrower's violent aims, the district court concluded, *Claiborne*'s rule controlled. *See* 272 F. Supp. 3d at 847-48.

c. A panel of the Fifth Circuit, in both an initial opinion and the substitute, issued after Mckesson timely sought *en banc* review, reinstated Respondent's negligence claim.

The court first held Doe had plausibly alleged the requisite elements of that cause of action, including a breach of what the court described as a "universal obligation" imposed under Louisiana law "to use reasonable care so as to avoid injury to another." Slip. Op. 8 (quoting *Boykin v. La. Transit Co.*, 707 So.2d 1225, 1231 (La.

1998)). In addressing that element, the court attached special significance to allegations Mckesson had "led the demonstrators" onto a public thoroughfare, observing that hindering the flow of traffic is "a criminal act under Louisiana law," *id.* (citing La. Rev. Stat. § 14:97), which made it "patently foreseeable" police would respond "by clearing the highway and, when necessary, making arrests," a development that, in turn, carried a "foreseeable risk" that a protestor would respond violently. *Id.* 8.

The opinion then "t[ook] a step back" to consider the Constitution, *id.* at 9, holding that the *Claiborne* bar was inoperative. *Claiborne*, the panel reasoned, did not rule out imposing civil damages for "the consequences of tortious activity," *id.* at 10 (quoting 458 U.S. at 927), and, the court continued, Doe's injuries were readily described as "consequences" of Mckesson's "*own*" negligent and "illegal conduct." In view of the criminal statute, the court concluded, the civil liability regime it announced could be understood as the sort of "reasonable time, place, and manner regulation" the First Amendment allows governments to enforce. Slip. Op. 12 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

3. As Applicant's petition for certiorari will explain, the Fifth Circuit's understandings of the First Amendment and of the *Claiborne* rule are at odds with bedrock principles established in some of this Court's most important Free Speech decisions, which prohibit liability for third-party violence that was a foreseeable, but not intended, "consequence" of nonviolent First Amendment activity. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (overturning conviction of speaker

whose address caused "surging, howling mob" to break 28 windows); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that the First Amendment restricts punishment for incitement to defendants who personally intend criminal activity); *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (en banc) (applying that rule in rejecting tort liability for speech that led to crowd violence); *cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002) (rejecting punishment for possessing "virtual child pornography," notwithstanding congressional finding that such materials enable pedophiles to overcome child victims' resistance).

Likewise, the Fifth Circuit's primary rationale for casting aside the *Claiborne* rule—that First Amendment activity becomes "[un]protected" if it allegedly violates *any* law—has been rejected time and again. *See, e.g., Marsh v. Alabama.,* 326 U.S. 501, 509 (U.S. 1946) (overturning religious speaker's conviction for violating state trespassing law); *United States v. Stevens*, 559 U.S. 460 (2010) (holding unconstitutional statute that punished only depictions of independently "illegal" behavior); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (invalidating civil damages remedy for publishing unlawfully obtained information). Indeed, the Fifth Circuit's revision would likely not even spare the petitioner in *Claiborne* itself. And even if a civil damages regime could be analogized to a "time, place, and manner regulation," such laws are not exempt from First Amendment scrutiny. *See McCullen v. Coakley,* 573 U.S. 464, 490 (2014) (invalidating measure, as "burdening substantially more speech than necessary").

As the petition will also explain, there are compelling reasons—beyond the interests in decisional uniformity, doctrinal coherence, and compliance with precedent—why this Court's intervention is needed. The highly unusual tort law regime the Fifth Circuit's opinion blessed poses a serious practical threat to the exercise core First Amendment freedoms. Unlike the *Claiborne* rule, which sets clear bounds on demonstrators' liability for others' violent behavior, the "negligent-protesting" cause of action approved here: (1) exposes non-violent protesters to limitless, potentially vast monetary liability (2) for criminal acts, committed in public streets by unrelated third parties, and (3) does so based on post-hoc—and ad-hoc—balancing of "various moral, social, and economic factors," Slip Op. 8 (quoting *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999)), and (4) other determinations that cannot reasonably be expected to be made independently of jurors' attitudes toward the message a protestor-defendant sought to express, *see Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

The speakers whom the Fifth Circuit regime will most severely deter are those with the fewest resources and who seek engage fellow citizens on controversial subjects. Without the *Claiborne* shield, the risk and magnitude of damages liability will depend principally on the virulence of *others* who show up at a demonstration on a public street—including not just persons who subscribe to the protest's message, but also bitter opponents, police, and provocateurs (and various combination of these). As the *Claiborne* Court well understood, when Martin Luther King, Jr. and teenagers

took

to the streets of Birmingham (illegally), it was "foreseeable" that *someone* present would engage in violence.

The private damages cause of action the Fifth Circuit decision unleashed is, from a First Amendment perspective, worlds away from a prosecution for the misdemeanor offense of hindering traffic on a public highway. Unlike public prosecutors, whose decisionmaking is constrained by the First Amendment's neutrality command, *Wayte v. United States*, 470 U.S. 598, 608 (1985)—and further checked by stringent proof standards, jury trial rights, and government-provided defense counsel—private plaintiffs have free rein to initiate civil litigation *for the purpose* of hobbling the speech activities of persons whose views they want to silence. *See NLRB v. Bill Johnson's Restaurants*, 461. US. 731 (1983).

4. The requested 30-day extension would enable undersigned counsel to better present this complex and important case to the Court. The undersigned has substantial responsibility, between now and the present due date, for briefing several other matters in this Court and in the D.C. Circuit (on an accelerated schedule) and for a series of court-mandated mediation sessions before a federal district court.

5. For the foregoing reasons, Applicant DeRay Mckesson requests that the due date for his petition for a writ of certiorari be extended to and including December 6, 2019.

Respectfully submitted,

By:

__________/s/_______________

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