**No. 22A-_____**

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., a party to the proceedings before the Court of Appeals, does not join in this application (nor does "Black Lives Matter," which the court held was not an entity amenable to suit).

**APPLICATION FOR EXTENSION OF TIME**
**TO FILE A PETITION FOR 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 twenty-one (21) days to file a petition for a writ of certiorari, seeking review of the decision of the U.S. Court of Appeals for the Fifth Circuit in *Doe v. Mcksesson*, No. 17-30864, 71 F. 4th 278, a copy of which is attached. *See also* 141 S. Ct. 48 (2020) (per curiam) (opinion of this Court granting certiorari, vacating prior decision, and remanding); 339 So. 3d 524 (La. 2022) (opinion on certified question); 947 F.3d 874 (declining, by an 8-8 vote, to rehear case en banc).

1. A panel of the Fifth Circuit issued its decision on June 16, 2023. Without an extension, the petition for writ of certiorari would be due on September 14, 2023. With the requested extension, the petition would be due on October 5, 2023. This Court's jurisdiction will be based on 28 U.S.C. § 1254.

2. This case, which has been the subject of four panel opinions (the first two, unanimous; the latter two, 2-1), an 8-8 en banc vote, and a prior grant of certiorari—is a serious candidate for further review.

3. Respondent brought this civil action, alleging that, while on-duty as a police officer at an emotionally charged 2016 protest in Baton Rouge, Louisiana, he was struck by a rock-like-object thrown by an unknown person. He sought recovery not from the rock-hurler, but from applicant, DeRay Mckesson, a prominent justice activist whom he identified as the protest's leader. The complaint did not allege

Mckeson himself perpetrated violence or directed, authorized, ratified, or encouraged the attack (or violence of any kind), but rather that he had been negligent— breaching a duty of care, owed those present, to "organize" and "conduct" the protest "reasonably," *i.e.* to avoid eliciting a police response and the attendant, foreseeable risk someone might then violently act out.

a. After the district court dismissed the negligence claim as barred by the First Amendment, 272 F. Supp. 3d 841 (M.D. La. 2017), the Fifth Circuit reversed. The court held, over Judge Willett's dissent, that the negligent-protest theory was authorized under Louisiana law and did not exceed the limits the Constitution imposes on "the grounds that may give rise to damages liability [and]…the persons who may be held accountable," for another person's unlawful act in "the presence of" First Amendment activity. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). The majority's principal rationale was that *Claiborne's* protections were not triggered because the culprit's attack was a "consequence" of Mckesson's directing the demonstration onto a public street, noting that Louisiana law makes traffic-obstruction "unlawful." 945 F.3d at 829 (quoting *Claiborne*).

b. After the Fifth Circuit declined to reconsider the constitutional ruling en banc, applicant sought review in this Court, which granted certiorari and vacated the decision, without deciding the constitutional question. The Court recognized the "undeniabl[e] important[ce]" of the First Amendment question, 141 S. Ct. at 50, but, echoing Judge Willett, held that the Fifth Circuit should not have reached it without

first obtaining assurance from "the Louisiana Supreme Court [that the majority's understanding of] potentially controlling Louisiana law" was sound. *Id.* at 51.

Certification was the proper course, the Court explained, both because the theory was "novel" and "uncertain," *id.*, *see id.* at 49, and because the unsettled state law issues were "laden with value judgments" that "peculiarly call[ed] for the exercise of judgment by the state court[]." *Id.* at 51 (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974))

Having identified two questions the Fifth Circuit should have certified—"(1) whether Mckesson could have breached a duty of care in organizing and leading the protest and (2) [if so,] whether Officer Doe has alleged a particular risk within the scope of protection afforded by the duty"—the Court remanded for "proceedings consistent with [its] opinion." *Id.*

d. On remand, the Fifth Circuit, noting this Court's uncertainty as to whether Mckesson could be held liable for leading a protest and its conclusion that a state court was better equipped to "engag[e] in the politically fraught balancing … required before imposing a duty under Louisiana law," issued a certification order, asking "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?" 2 F. 4th 502, 504 (Mem.).[1]

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[1] The court certified a second question, not relevant here: whether respondent's claim would in any event be barred by his status as a "professional rescuer" *Id.*

e. The Supreme Court of Louisiana accepted certification and issued an opinion answering the duty question affirmatively, "under the facts alleged in the complaint," holding that "provoking a confrontation with … police officers through the commission of a crime … with full knowledge that the result of similar actions …in other parts of the country [had been] violence … would render Mr. Mckesson liable for damages for injuries to a police officer [hit] …while… clear[ing] the highway." 339 So. 3d at 533.

In support of that conclusion, the opinion reproduced, verbatim, the relevant nine-paragraph portion of the vacated Fifth Circuit opinion, followed by the state court's pronouncement that it "f[ound] this recitation of the law …. both relevant ….and an accurate summary of the pertinent Louisiana law on this issue." *Id.* at 532-33. The court did not otherwise address its prior precedents rejecting a duty to protect against foreseeable third-party criminality, *see* 141 S. Ct. 49, nor did it explore the "moral, social, and economic" implications of the duty it recognized or "weigh…the moral value of protest against the economic consequences of withholding liability." *Id.* at 49, 51.

f. On June 16, 2023, the Fifth Circuit, again by a 2-1 vote, reaffirmed its conclusion that respondent's claim was First-Amendment-compliant. The majority stressed that *Claiborne* was its "lodestar," Slip Op. 16, stating that negligent-protesting liability "fit[] quite comfortably," *id.* 19, within two theories this Court identified as constitutionally permissible: the allegations could support finding Mckesson "directed" his own, "unlawful" breach of an obligation to not "create

unreasonably dangerous conditions," *id.,* or that his actions, in starting a chain of events that culminated in respondent's being struck, were tantamount to "incitement," *id.* 22. But were that not so, the majority reasoned, *Claiborne* did not hold "that the identified theories were the only proper [ones]," *id.* 18, only that the First Amendment requires some "sufficiently close connection" between the leader and the third-party violence. Nor was it fatal that Mckesson did not intend violence, because *Claiborne*'s statement of permissible bases for leader liability "did mention the subject" of *mens rea*. *Id.* 29.

Responding to the dissent's concern that its rule would have subjected civil rights movement heroes to ruinous personal liability for violent acts that occurred—foreseeably—at landmark protests they organized, the majority observed that "this dispute is not about … Dr. Martin Luther King, Jr.… [but rather] about when sovereign States may impose tort liability…" and that any "constitutional limits [on] this cause of action" could be "left for another day." *Id.* 33, 30.

4. As Applicant's petition for certiorari will explain, the Fifth Circuit's understanding of *Claiborne* is untenable and conflicts squarely with First Amendment fundamentals. *Claiborne* makes clear that, whatever state law allows, when a plaintiff seeks damages from a protest leader for injuries caused by someone else's violent acts, negligence is not a proper basis. Rather, the First Amendment conditions recovery upon proof either (1) that the leader—*intentionally*—"directed, authorized, or ratified" the "specific" harm-causing third-party acts, *see* Slip. Op. 50 (dissent) (questioning what "negligently …directing" could mean) or (2) that his First

Amendment activity was "*directed [at]*" encouraging those acts. *Counterman v. Colorado*, 143 S. Ct. 2106, 2117 (2023) (quoting *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam)) (emphasis added); *see id.* at 2118 (discussing *Claiborne* and noting that "[w]hen incitement is at issue, we have spoken in terms of specific intent"); *United States v. Hansen*, 143 S. Ct. 1932, 1945 (2023) (explaining that similar verbs "[we]re not modified by an express *mens rea* requirement" because "[t]here [wa]s no need."). Indeed, *Claiborne* derived its rule from landmark decisions prohibiting liability based on First Amendment activity's foreseeable, but not intended, contribution to third-party criminality. *See, e.g.*, *Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Scales v. United States*, 367 U.S. 203, 229 (1961); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002).

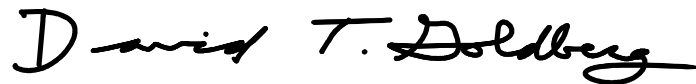
And there are compelling reasons, beyond fidelity to precedent, for this Court's intervention. The regime the Fifth Circuit allowed—subjecting non-violent protest leaders to vast personal liability for criminal acts committed by unknown persons whom they have no right to exclude from public streets, based on open-ended post-hoc determinations of "unreasonableness" or "precipitation"—carries grave and immediate practical implications for the exercise of core First Amendment rights.

5. The requested 21-day extension would enable undersigned counsel to better present this important and procedurally intricate case to the Court. The current due date falls within the same week that counsel is required to submit comprehensive pre-trial briefing in an 8,000-plaintiff civil rights case and is also due to support co-

counsel's presentation of oral argument in a large, complex D.C. Circuit case for which he had substantial briefing responsibility.

6. 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 October 5, 2023.

Respectfully submitted,
By:



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