In The
Supreme Court of the United States

DERAY MCKESSON,
Petitioner,
v.
JOHN DOE,
Respondent.

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This case is now back before the Court because the Fifth Circuit refused to take a hint. It first appeared on this Court's docket three years ago, asking to address whether a "negligent protest" theory of liability violates the First Amendment. *Mckesson v. Doe*, 141 S. Ct. 48, 50 (2020). At that time, the Court granted the petition, vacated the judgment below, and remanded the case so that Louisiana courts could weigh in on whether such a "novel" claim was even possible under state law. *Id.* at 51. It warned that venturing into "so uncertain an area of tort law" was "laden with value judgments and fraught with implications for First Amendment rights[.]" *Id*.

Undaunted by this warning, the Louisiana Supreme Court held that the Fifth Circuit had accurately summarized state tort law. *Doe v. Mckesson*, 339 So. 3d 524, 533 (La. 2022). Equally undeterred, the same circuit court panel then reaffirmed that a protest leader could be liable for others' independent actions based on nothing more than a showing of negligence. *Doe v. Mckesson*, 71 F.4th 278, 289–99 (5th Cir. 2023). To reach this startling conclusion, it said "a proper reading" of this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) shows that "the Court's concept of liability for protest leaders did not include an intent condition." *Mckesson*, 71 F.4th at 297.

Counterman, 600 U.S. at 76. The Court reserved the highest level of *mens rea*—specific intent—for allegations of incitement because "incitement to disorder is commonly a hair's breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order," *id*. at 81, exactly the type of speech at issue here. And it added that "[s]uch protests gave rise to all the cases in which the Court demanded a showing of intent." *Id*. (again citing *Claiborne Hardware*).

Based on this reasoning, the First Amendment