No. 23-373

In The
Supreme Court of the United States

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and amicus curiae filings in cases that implicate expressive rights. *See, e.g.*, Brief of Foundation for Individual Rights and Expression as Amicus Curiae in Support of Petitioner and Reversal, *Counterman v. Colorado*, No. 22-138, 600 U.S. 66 (2023).

FIRE represents plaintiffs in lawsuits across the United States seeking to vindicate First Amendment rights without regard to the speakers' political views. Because of its experience defending freedom of expression, FIRE is keenly aware that public officials can and do misuse the legal system and tort law to stifle protected speech.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, *amicus* affirms that all parties received timely notice to the intent to file this brief.

SUMMARY OF ARGUMENT

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.

Petitioner has now returned, asking the Court to address what it already determined is an "undeniably important" question of First Amendment law. *Mckesson*, 141 S. Ct. at 50. The Court should grant review based on its earlier assessment now that Doe and the Fifth Circuit have confirmed their novel approach to tort liability and the constitutional claim is unavoidable. In this regard, Petitioner has ably demonstrated why the lower court's reading of *Claiborne Hardware* and related precedent is dead wrong. Pet. 16-23.

But there is an even more pressing reason to grant review. Less than two weeks after the Fifth Circuit's decision, this Court confirmed that negligence is an insufficient basis for imposing liability on speech and that the lower court's reading of *Claiborne Hardware* is incorrect. *Counterman v. Colorado*, 600 U.S. 66 (2023). This Court not only should grant review, but also summarily reverse the Fifth Circuit and remand the case for resolution under the correct legal standard. Just like last time.

ARGUMENT

I. This is the Perfect Case for a GVR.

This Court has the authority to "vacate, set aside or reverse any judgment, decree, or order" and to "remand the cause" or "require such further

proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. This power to grant, vacate, and remand—GVR—"has . . . become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). "In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration [and] assists the court below by flagging a particular issue that it does not appear to have fully considered[.]" *Id.* at 167.

This is such a case. The linchpin of the decision below is its holding that the First Amendment permits the organizer of a political protest to be held civilly liable for injuries caused by independent third parties based on nothing more than a showing of negligence. As the Fifth Circuit put it, there is no "intent condition" where a protest leader "authorized, directed, or ratified specific tortious activity." *Mckesson*, 71 F.4th at 297. It characterized *Claiborne Hardware* as holding the First Amendment "plac[es] a *mens rea* requirement on some forms of civil liability," but that the Court "did not mention the subject at all when discussing protest-leader liability." *Id.* It therefore allowed the negligence claims against Mckesson to proceed.

This misreads *Claiborne Hardware*, as the Petitioner has shown and as this Court foreshadowed

last time around. There is no need here to elaborate on those arguments. But to whatever extent Doe's negligence claim seems uncertain, this Court removed all doubt in *Counterman v. Colorado*: The First Amendment bars Doe's claims.

Had the Fifth Circuit put off its *Mckesson* decision for eleven days, it would have learned that the First Amendment bars the use of "objective standards" like negligence for punishing speech. *Counterman*, 600 U.S. at 77–79 & n.5. True enough, *Counterman* was not about "protest leaders" *per se*, instead addressing what level of *mens rea* is needed to punish speech as a "true threat." But this Court framed its opinion more generally and held that the First Amendment requires "strategic protection" in the form of intent requirements for all "the most prominent categories of constitutionally unprotected speech." *Id.* at 75. And as the Court explained, the stringent *mens rea* standard needed to give speech "breathing room" is rooted not only in "strategic protection" against criminal liability, but also against tort liability. *Id.* at 75–76 (discussing the actual malice standard for civil and criminal defamation).

Tellingly, the Court cited *Claiborne Hardware*, among other cases, for the proposition that "the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder."

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 might well require specific intent to support a tort claim against a protest organizer. But one needn't decide the *mens rea* required here to know that the Fifth Circuit got it wrong. Under *Counterman*, the negligence standard isn't even on the menu. *Id.* at 79 n.5 (describing "negligence" as "an objective standard, of the kind we have just rejected").

A GVR is warranted where, as here, an intervening decision of this Court alters (or clarifies) the law and the court below did not have an opportunity to consider or apply it. *Lawrence*, 516 U.S. at 169. This has been a "customary procedure" in such circumstances for decades, *e.g.*, *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945), and numerous examples support this approach. *See*, *e.g.*, *FCC v. CBS Corp.*, 556 U.S. 1218 (2009) (GVR for further consideration in light of *FCC v. Fox Television*

Stations, Inc., 566 U.S. 502 (2009)); *Limon v. Kansas*, 539 U.S. 955 (2003) (GVR for further consideration in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)). This case belongs on that list.

CONCLUSION

Based on the foregoing, *amicus* FIRE asks this Court to grant the petition for certiorari, vacate the decision below, and remand for further proceedings consistent with the rule in *Counterman v. Colorado*.

November 9, 2023

Respectfully Submitted,

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