No. 21-1231

In The
Supreme Court of the United States

PRISCILLA LEFEBURE,

Petitioner,

v.

SAMUEL D'AQUILLA, 20th Judicial District,
Individually and in his Official Capacity
as District Attorney,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION FILED ON BEHALF OF RESPONDENT SAMUEL C. D'AQUILLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY, 20TH JUDICIAL DISTRICT, STATE OF LOUISIANA

C. FRANK HOLTHAUS
CRAIG FRANK HOLTHAUS, APLC
4607 Bluebonnet Blvd., Ste. B
Baton Rouge, LA 70809
(225) 295-8286
frank@holthauslaw.com

RALPH R. ALEXIS III
Counsel of Record
PORTEOUS, HAINKEL AND JOHNSON, L.L.P.
704 Carondelet Street
New Orleans, LA 70130
(504) 581-3838
ralexis@phjlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

Although the Petitioner attempts to frame the question differently, the true question presented for review is whether the Petitioner can bring an equal protection action against a Louisiana district attorney because a Grand Jury failed to return an indictment of her alleged assailant.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Samuel D'Aquilla individually and in his official capacity[1] as District Attorney for the 20th Judicial District (East and West Feliciana Parishes) of Louisiana (hereafter "D'Aquilla" or "Respondent") respectfully, for the reasons set forth hereinafter, opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, brought on behalf of Petitioner Priscilla Lefebure ("Lefebure").

STATEMENT OF THE CASE

A. Statement of Alleged Facts

Respondent is Samuel D'Aquilla individually and in his official capacity as District Attorney for the 20th Judicial District (East and West Feliciana Parishes) of Louisiana. As to D'Aquilla, this litigation arises out of the presentation of evidence to a West Feliciana Parish grand jury regarding charges of rape against Defendant Barrett Boeker ("Boeker"). After considering the evidence submitted (allegedly including the testimony of both Lefebure and Boeker), the grand

[1] As set forth hereinafter, the District Court failed to completely dismiss D'Aquilla in his individual capacity and failed to dismiss Petitioner's *Monell* claims against him. The denial of the said motions was properly appealed to the Fifth Circuit; however, since the Fifth Circuit dismissed Petitioner's claims based upon her lack of standing, the Court did not reach these issues.

jury declined to indict Boeker and returned a "no true bill." Resp. App. 1a.

In pertinent part, Lefebure's First Amended Complaint ("FAC") alleges the following timeline of underlying events:

(1) **November 16, 2016:** Lefebure visited Boeker's home. (Boeker was married to Lefebure's cousin.) Boeker grabbed her in a sexually inappropriate manner. FAC ¶ 52; App. to Pet. for Cert. 125a-126a.

(2) **November 30, 2016:** Lefebure returned to Boeker's home. Boeker's wife "was away from home for a few nights" but Lefebure agreed to stay to be "in charge of [Boeker's] two young children." FAC ¶ 53-54; App. to Pet. for Cert.126a.

(3) **December 1, 2016:** "On or about the late evening and early morning of December 1, Boeker raped her . . . " FAC ¶ 53; App. to Pet. for Cert. 126a**.** FAC ¶ 55-60; App. to Pet. for Cert. 126a-127a.

(4) **December 3-4, 2016:** Lefebure again returned to the Boeker home and spent the night—at which time she alleges Boeker again sexually assaulted her. FAC ¶ 61-68; App. to Pet. for Cert. 127a-129a.

(5) **December 4-5, 2016:** After the December 4th sexual assault, Lefebure "remained until the next day to complete the chores she promised her cousin she would do in exchange for staying at her

home." She then left the Boeker residence. FAC ¶ 69; App. to Pet. for Cert.129a.

(6) **December 7, 2016:** Lefebure again returned to Boeker's home "to get the remainder of her things . . . " She then advised her cousin that Boeker had "raped her." FAC 70-71; App. to Pet. for Cert. 129a.

(7) **December 8, 2016:** Lefebure went to Woman's Hospital "for an exam and treatment." (i.e., a sexual assault examination or "rape kit"). FAC ¶ 74-75; App. to Pet. for Cert. 130a.; Exhibit A; Resp. App. 2a-11a.

(8) **December 20, 2016:** Boeker was arrested.[2] FAC ¶ 119; App. to Pet. for Cert. 137a.;

The lawsuit further alleges:

(1) D'Aquilla and Sheriff "refused to examine or pick up Ms. Lefebure's rape kit . . . " FAC ¶ 9; App. to Pet. for Cert. 116a. (Lefebure alleges that the "rape kit" showed bruising consistent with trauma." FAC ¶ 9; App. to Pet. for Cert. 116a.

---

[2] In Petitioner's Statement of the Case, she states that Boeker "hired the local District Attorney's cousin for a lawyer and managed to avoid spending a single night in jail." See Pet. for Cert. 3. In fact, the attorney in question, Jerome D'Aquila, is a rather distant counsel of Respondent, who spells his name differently from Respondent, i.e. D'Aquila with one "l."

(It is noted that the Sexual Assault Examination Form, Exhibit A, to the Complaint and FAC; Resp. App. 2a-11a contains information which might be considered inconsistent with Lefebure's rape allegations.)

(2) " . . . D'Aquilla's markup of the police report highlighted only possible discrepancies" in Ms. Lefebure's description of events. FAC ¶ 10; App. to Pet. for Cert. 116a.

(3) Prior to the grand jury hearing, neither D'Aquilla nor his office met with her. FAC ¶ 11; App. to Pet. for Cert. 116a.

(4) Various alleged fact and expert witnesses were not called to testify to the grand jury. FAC ¶ 12; App. to Pet. for Cert. 117a.

(5) Lefebure speculates: "With the rape kit and physical evidence sitting in the East Baton Rouge coroner's office, without corroborating witness testimony, and having watched . . . D'Aquilla impugn Ms. Lefebure's credibility on the stand while bolstering . . . Boeker's, ***the grand jury failed to return an indictment*** . . . " FAC ¶ 16; App. to Pet. for Cert. 117a-118a. (***Emphasis added.***)

The lawsuit made various claims against D'Aquilla under (1) Equal Protection Clause of the Fourteenth Amendment and Louisiana Constitution; (2) Due Process Clause of the Fourteenth Amendment and Louisiana Constitution; (3) 42 U.S.C. § 1983 and for civil

conspiracy to violate civil rights; and (4) 42 U.S.C. § 1983 for abuse of process. She alleges that " . . . D'Aquilla and [Sheriff] Austin [Daniel] had a duty to diligently investigate the allegations [of rape] and to collect the rape kit, submit it to the crime lab for examination, and review it as part of their own investigation." FAC ¶ 107; App. to Pet. for Cert. 135a; that Austin and D'Aquilla "failed to implement procedures . . . to provide for proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations." FAC ¶ 108; App. to Pet. for Cert. 135a; that the defendants acted intentionally and were "motivated by Plaintiff's gender." FAC ¶ 97; App. to Pet. for Cert. 134a.

B. Course of Relevant Proceedings and Disposition

Petitioner's lawsuit was filed on December 21, 2017. Resp. App. 12a-42a. Named as defendants were (1) Boeker individually and in an alleged official capacity (Assistant Warden, State Penitentiary);[3] (2) D'Aquilla, individually and in his official capacity as DA; and (3) Daniel (West Feliciana Sheriff). Petitioner filed a First Amended Complaint on May 10, 2018. App. to Pet. for Cert. 114a-144a.

---

[3] In Petitioner's Statement of the Case, she refers to Boeker as a "high-ranking warden at the Louisiana State Penitentiary at Angola." See Pet. for Cert. 2. Upon information and belief, Boeker was one of a number of assistant wardens, and was rather low in rank.

In response, D'Aquilla filed Motions to Dismiss (in both his individual and official capacities) asserting that Lefebure, as an alleged crime victim, lacked standing to bring an action arising out of D'Aquilla's handling of the grand jury and its issuance of a "no true bill" as to Boeker; that D'Aquilla was immune from suit; and that the FAC failed to state a claim. *See* App. to Pet. for Cert. 4a-5a; *Lefebure v. Boeker*, 390 F. Supp. 3d 729 (M.D.La. 2019).

On June 25, 2019, the District Court granted D'Aquilla's motion, in part, on grounds of absolute immunity – insofar as the motion was filed on behalf of D'Aquilla in his individual capacity**—but denied as to alleged actions** the Court deemed "investigative functions":[4]

a. failing to request, obtain, and examine rape kit;

b. making notes on the police report; and

c. not interviewing Plaintiff prior to grand jury hearing.

Id. at 753.

---

[4] These alleged acts are not investigative. Rather, they are part of a DA's prosecutorial role. *Cook v. Houston Post*, 616 F.2d 791 793 (5th Cir. 1980) ("Not all of an advocate's work is done in the courtroom."); *Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996); *Rose v. Bartle*, 871 F.2d 331, 343 (3d Cir. 1989); *Stingley v. Chisolm*, 805 Fed.Appx. 436, 437-438 (7th Cir. 2020) (" . . . because absolute immunity covers the decision not to prosecute, it necessarily covers a prosecutor's decisions in the course of a charging decision as to the need to investigate or document an investigation . . . ").

The District Court denied D'Aquilla's Motion to Dismiss as to: 1) Lefebure lacking standing to sue; 2) absolute and Eleventh Amendment Immunity, with respect to alleged official capacity claims; 3) D'Aquilla's absolute immunity under state law relating to the abuse of process claim; 4) the FAC failed to sufficiently allege facts which would establish (a) that D'Aquilla violated Plaintiff's constitutional rights; (b) a *Monell* claim; and (c) a claim of conspiracy.[5] *Lefebure v. Boeker*, 390 F. Supp. 3d at 747-50, 758, 767-68 (M.D. La. 2019).

The District Court certified its Ruling and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). D'Aquilla thereafter filed a Motion for Permission to Appeal in the Fifth Circuit; it was granted. *Lefebure v. D'Aquilla*, 15 F.4th 650, 653 (5th Cir. 2021).

On February 16, 2021, a Fifth Circuit panel issued a decision reversing the District Court. It (correctly) held:

> We see no reason why the logic of *Linda R.S.* would not readily apply here. *Linda R.S.*[6] . . . makes clear that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."

Lefebure v. D'Aquilla, 987 F.3d 446 (5th Cir. 2021).

---

[5] The Court granted the Motion as to certain other claims.

[6] A reference to *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973).

On October 5, 2021, the panel withdrew its ruling and issued a new opinion, again reversing the District Court, with legal reasoning identical to its prior decision but with Judge Graves dissenting. *Lefebure v. D'Aquilla*, *supra*.

REASONS FOR DENYING THE PETITION

In spite of the Petitioner's attempts to shift the focus of the inquiry, the sole, dispositive question in this case is whether the Petitioner has standing to assert an equal protection claim against the Respondent, a Louisiana district attorney, where he convened a grand jury and presented evidence, but where the grand jury failed to indict Petitioner's alleged assailant for rape. Ultimately, for a number of reasons, this question has always been and must always be answered in the negative. Because no other court, including this Court, has ever ruled differently, certiorari is not warranted; accordingly, it is respectfully submitted that the Petition should be denied.

I. The Decision Below is Consistent with *Linda R.S. v. Richard D.*

The Fifth Circuit correctly followed this Court's oft-cited decision in *Linda R.S.* that " . . . a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149, 35 L. Ed. 2d 536

(1973). The Fifth Circuit correctly noted below that Lefebure did not dispute that a victim has no standing under Article III of the Constitution to bring suit to demand the prosecution of her alleged assailant. *Lefebure v. D'Aquilla*, 15 F. 4th at 655-56. Indeed, Petitioner asserts herein that she

> . . . has no quarrel with *Linda R.S.* as written; it embodies a common-sense limitation on judicial authority. If citizens were able to force prosecutors to bring charges against a particular person, an important bulwark against governmental overreach would be lost—particularly in an era of policy and fairness concerns resulting from the overcriminalization of American law. It would also usurp a historical prerogative—the exercise of prosecutorial discretion—and thereby undermine separation-of-powers values.

See Pet. for Cert. 21.

And yet that is exactly what Lefebure is attempting here. See FAC ¶ 87, App. to Pet. for Cert. 132a: " . . . In short, Ms. Lefebure's life has been completely altered since . . . Boeker, violently assaulted her **and the grand jury failed to return an indictment**." See also FAC ¶ 16 App. to Pet. for Cert. 117a-118a: " . . . **the grand jury failed to return an indictment**." Lefebure seeks to skirt *Linda R.S.'s* well-settled principle of standing by arguing she is not complaining that Boeker was not indicted and prosecuted; rather she claims that she is asserting a claim of failure to investigate and protect. It is obvious that

Plaintiff's real claim is that if the district attorney had handled the grand jury in a manner to her liking, then—according to plaintiff's logic—the grand jury would have indicted Boeker and thereafter Boeker would have been prosecuted and convicted. The Fifth Circuit saw through Plaintiff's argument and opined thusly in its original panel decision; to wit:

> Lefebure contends that this body of precedent should not bar her suit, because her asserted injury is not D'Aquilla's failure to prosecute but rather his failure to investigate Boeker. *See*, *e.g.*, *Lefebure*, 390 F. Supp. 3d at 745 ("[Lefebure] seeks relief for the failure to investigate her claims, for the alleged conspiracy with the Sheriff not to investigate her claims, and for the alleged long-standing practice, policies and procedures that fostered the failure to investigate").
>
> ***We disagree. Her theory of the injury is the same: As in Linda R.S., D'Aquilla deprived her of the opportunity to hold Boeker accountable through the criminal justice system. . . .***

Lefebure v. D'Aquilla, 987 F.3d at 449. (***Emphasis*** added).

In its final panel decision, the Fifth Circuit reiterated this point; to wit:

> . . . that is precisely what this suit is—a complaint that a prosecutor has failed to investigate and prosecute another person. . . .

Lefebure v. D'Aquilla, 15 F.4th at 655.

II. There is no Conflict in the Circuits

Petitioner contends that there exists an 8-1 conflict in the circuits on the Article III standing issue presented here. That argument is baseless. Petitioner, based on Judge Graves' dissent below, asserts that the Fifth Circuit's decision conflicts with the Fifth Circuit's "prior recognition, shared by all other Courts of Appeals, that failure-to-protect and discriminatory non-protection claims are cognizable in the federal courts." See Pet. for Cert. 7-12; See Pet. for Cert. at FN 6. **There is no such conflict within the Fifth Circuit or among the circuits.**

Petitioner's fallacious argument conflates[7] cases involving Equal Protection claims **against police defendants** which have recognized a potential failure-to-protect claim and cases against prosecutors which do not recognize such. The Petitioner raised this issue in the Court below. The Fifth Circuit recognized the "false analogy" and opined thusly:

> Specifically, [Lefebure] claims that our decision conflicts with both *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000), and *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000).
>
> But neither of these cases even mention, let alone analyze, standing—presumably because no one challenged standing in these

[7] In order to support her Procrustean argument conflating failure-to-protect claims involving police with claims against prosecutors, Petitioner collectively refers to district attorneys and police as "law enforcement." See for example, Pet. for Cert. 10.

> cases. And the same is true with the case identified by amici, *Elliot-Park v. Manglona*, 592 F.3d 1003 (9th Cir. 2010). We cannot rely on these decisions to justify standing when they do not even mention standing—let alone offer a theory for distinguishing *Linda R.S.*—let alone a theory that applies to the specific facts presented here. . . .

Lefebure v. D'Aquilla, 15 F.4th at 657.

The Fifth Circuit's decision below is consistent with decisions in all circuits—including its own—in cases involving Equal Protection claims against prosecutors. In fact, in its decision below, that Court correctly observed, " . . . courts across the county have dutifully enforced this rule in case after case—refusing to hear claims challenging the decision not to investigate or prosecute another person." *Id* at 655. See for example, *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990); *Amir-Sharif v. District Attorney's Office of Dallas County*, 281 Fed.Appx. 413 (5th Cir. 2008) (dismissal of claim by prisoner, whose assailant was not charged, against prosecutor, holding: " . . . [d]ecisions whether to prosecute or file criminal charges against an individual lie within the prosecutor's discretion, and private citizens do not have a constitutional right to have an individual criminally prosecuted."); *Doe v. Pocomoke City*, 745 F. Supp. 1137 (D.Md. 1990)[8]; *Happe v. Lloyd*,

[8] The District Court misread *Doe*, stating that "the plaintiffs in *Doe* did not complain about any specific sexual assault on themselves of the alleged failure of the criminal process as to themselves. Rather, *Doe* involved plaintiffs as interested citizens, albeit prior victims, coming forward to urge the investigation of a

2 Fed.Appx. 519 (7th Cir. 2001) (dismissal of claim by alleged victim that prosecutor "mishandled" the prosecution of her alleged assailant, by among other alleged reasons, failing to call appropriate witnesses); *Stingley v. Chisolm*, *supra* (dismissal of complaint against prosecutors for alleged failure to investigate a murder because of alleged racial bias); *Parkhurst v. Tabor*, 569 F.3d 861, 865 (8th Cir. 2009, *writ denied*, 558 U.S. 1148, 130 S. Ct. 1143 (Mem), 175 L. Ed. 2d 973 (2010).

The *Parkhurst* case, *supra*, is perhaps the case most *apropos* to this case. In *Parkhurst*, the facts were as follows: Amy Parkhurst ("Amy") and Chad Belt ("Belt") had been married in Arkansas in 1993. In 1994 they had a daughter. In 2000 the couple divorced. Amy was awarded sole custody of their child; Belt was granted visitation rights. Amy subsequently relocated to Arizona and remarried to Mr. Parkhurst. In 2001, the daughter, now age seven, visited her father [Belt] in Arkansas for an extended period of time. After returning to Arizona the child begged her mother not to require her to visit her father again. Nevertheless in 2003 her father insisted that she come back to Arkansas to visit him. The child thereafter spent seven weeks with her father. There came a time during that visit when the daughter telephoned her mother to inform her that she had injured her genitals in a diving board

---

sexual assault matter that was completely unrelated to them." App. to Pet. for Cert. 60a. As shown by the Amended Petition filed by *Doe* and made a part of the record in this case [Resp. App. 82a-97a] that statement was incorrect. Doe's allegations are virtually identical to those here.

accident. Amy then traveled to Arkansas to investigate. All medical personnel who examined the daughter diagnosed her as being the potential victim of sexual abuse. The matter was referred to the Crimes Against Children Division of the Arkansas State Police which determined that the girl had been sexually abused but that she was afraid to name her assailant.

Belt thereafter, on his on his own initiative, contacted Amy and offered to relinquish his parental rights if the Parkhursts would sign a statement that they were not accusing him of molestation. The Parkhursts executed the requested document and Belt consented to the termination of his parental rights. Mr. Parkhurst thereafter adopted the child. After the adoption, the child disclosed that Belt had raped her during the summers of 2001 and 2003. Thereafter Belt was arrested by Sebastian County, Arkansas police and charged with felony sexual assault. Deputy Prosecuting Attorney Tabor and Prosecuting Attorney Shue were assigned to the case.

According to the lawsuit later filed by the Parkhursts, the prosecutors initially expressed confidence in the overwhelming evidence against Belt; however, the Parkhursts alleged that Shue told them that as a matter of policy his office was reluctant to prosecute sexual abuse perpetrated by a close relative, explaining that "no one wants these [incest] cases." *Id.* at 864. According to the suit, Shue also stated that his office "would prefer not to prosecute such a case if it could find a reason not to." *Id.* It was further alleged that prosecutors entered into an agreement with Belt to

allow administration of a polygraph test—which Belt agreed and stipulated would be admissible in court. The polygraph examiner asked three questions directed to Belt, one of which was "Have you ever had sex with [your daughter]?" Belt passed the polygraph test. *Id.* at 864.

Several months afterwards Tabor and Shue informed the Parkhursts by letter that they intended to issue a *nolle prosequi* based upon the outcome of the polygraph. *Id.* at 864.

The Parkhursts thereafter filed a Section 1983 action on behalf of their minor daughter against Tabor, Shue, and Belt. They asserted that Tabor and Shue had violated their daughter's right to Equal Protection by discriminating against victims of incest by failing to provide victims of incest the same protection offered to other victims of sexual assault. The Parkhursts alleged that Tabor and Shue's authorization of the polygraph was done as a pretext for abandoning the prosecution. Under Arkansas law a polygraph was inadmissible unless the parties stipulated to its admissibility. The Parkhursts alleged that Tabor and Shue knew that their action in administering the polygraph pursuant to that stipulation was against sound prosecutorial policy because perpetrators of sex crimes are often able to pass a polygraph. *Id.* at 864-65.

In response to the suit, Shue and Tabor filed a 12(b)(6) motion to dismiss. The district judge dismissed the action, relying on this Court's decision in *Linda R.S.* The Parkhursts appealed the dismissal to the U.S.

Court of Appeals for the Eighth Circuit. That Court affirmed. Like Lefebure, the Parkhursts sought to avoid the holding of *Linda R.S.* by artful pleading. They argued that, through their policies, prosecutors provided less protection to victims of incest than to other sexual assault victims. They pointed to cases, such as *Estate of Macias v. Ihde*, 219 F.3d 1018 (9th Cir. 2000), where victims were held to have standing to challenge the allegedly discriminatory provision of police protection.

The *Parkhurst* Court—in reasoning that is instructive here—explained why a prosecutor has the absolute discretion to prosecute or not, even in the face of an alleged Equal Protection claim—and why a claim against a prosecutor is—and must be—treated differently than a claim against the police; to wit:

> While it is well-settled that defendants subjected to or threatened with discriminatory prosecution have standing to bring an equal protection claim *this right has not been extended to crime victims* . . .
>
> * * * * *
>
> The Parkhursts claim to have been injured by a failure to prosecute Belt rather than by a failure to provide police protection to [the child], and they point to no cases which have recognized a right to compel prosecution of a wrongdoer. *That the standing analysis differs depending on whether the alleged injury arises from a failure to prosecute or a failure to protect is not without rationale*. While police officers are under a 'statutorily imposed duty

> to enforce the laws equally and fairly,' . . . '*[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.*' (*Emphasis* added).

Parkhurst, 569 F.3d at 865-67.

Like the plaintiffs in *Parkhurst*, Lefebure cites to police failure-to-protect cases such as *Estate of Macias*. Like the plaintiffs in *Parkhurst*, Lefebure argues that a claim can be brought against a prosecutor (and *Linda R.S.*'s standing bar overcome) by simply alleging "failure to investigate" or "failure to protect" by the prosecutor. See Pet. for Cert. 7-10. The plaintiffs in *Parkhurst*, also citing *Macias*, made a similar argument. That argument is based on fallacious reasoning and a lack of understanding of the difference between prosecutors and police. In *Parkhurst*, the Eighth Circuit drew a distinction between the statutory duty of police to protect equally and the statutory prerogative of a prosecutor to prosecute or not. In the *Parkhurst* Court's calculation, the difference in the standing analysis between a claim against police and one against a prosecutor **did not rest on how the plaintiff's allegations were worded**; rather the difference in standing was based on the difference in functions between police and prosecutors. *Parkhurst*, 569 F.3d 865-67.

Macias involved a suit against a sheriff—not a prosecutor. Mrs. Macias was killed by her estranged husband after she had made numerous calls to the sheriff complaining about her estranged husband's

threatening behavior. *Macias*, *supra*, at 1024. Her estate sued the sheriff alleging that she had been denied equal police protection. *Id.* The Ninth Circuit reversed summary judgment in favor of the defendants, and remanded the case to the district court to determine if Macias's right to equal police protection had been violated. *Id.* Critical to this legal analysis, *Macias* involved a claim against the police—**not a claim against a prosecutor**. The Ninth Circuit concluded, without reaching the merits, that there is a constitutional right for *police services* to be administered in a non-discriminatory manner and that that right is violated where the police deny equal protection to disfavored persons. *Macias*, 219 F.3d at 1028.

There is no distinction between the claim against D'Aquilla and that against the *Parkhurst* prosecutors. Identical to Arkansas prosecutors, Louisiana prosecutors have " . . . entire charge and control of every criminal prosecution instituted . . . in his district, and determines who, when, and how he shall prosecute." See discussion *infra.* The Fifth Circuit correctly followed the analysis of the *Parkhurst* Court.

The Fifth Circuit pointed out another difference with the failure-to-protect cases involving the police. The Court explained thusly:

> There's an additional problem with the two cases cited by Lefebure. As noted, under *Linda R.S.*, victims of crime do not have a cognizable interest in the investigation or prosecution of others. But they of course have a compelling interest in their own physical

> safety and protection. As a result, crime victims have standing to sue when the police refuse to provide them with physical protection. That is because their complaint concerns their own treatment, not the treatment of others.
>
> * * * * *
>
> Here, by contrast, Lefebure does not contend that the police refused to protect her before some future assault by her assailant. Instead, she contends that prosecutors refused to investigate or prosecute him after the assault took place. Here, the appeal concerns only the prosecutor—it does not involve any police officer or other law enforcement official who could have provided her physical protection from an assailant yet failed to do so.

Lefebure v. D'Aquilla, 15 F.4th at 657-58.

III. The Fifth Circuit Decision is Consistent with Well-Established Louisiana Legal Principles Pertaining to Prosecutors

If prosecutors could be sued for alleged failure to investigate and prosecute, the entire structure of Louisiana constitutional law and statutes giving Louisiana prosecutors absolute discretion to prosecute—or not—would be upended. Lefebure's position goes even further—that an alleged victim can sue a prosecutor where the prosecution was not conducted to their satisfaction.

The Fifth Circuit correctly decided that Lefebure's true complaint was that Boeker was not prosecuted and that D'Aquilla deprived her of the opportunity to hold Boeker accountable through the criminal justice system. It should further be noted that Lefebure alleges that D'Aquilla presented her rape allegations to a grand jury and that she and Boeker testified before the grand jury. The grand jury did not indict Boeker. Resp. App. 1a. Plaintiff now, in effect, complains about D'Aquilla's alleged mishandling of the grand jury. FAC ¶¶ 12-16; App. to Pet. for Cert. 117a-118a.

An alleged victim does not control the prosecutorial process, and thus should not be able to sue a prosecutor because a grand jury failed to indict her alleged assailant. Under Louisiana law, a District Attorney:

> . . . has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.

LSA-C.Cr.P. art. 61; Louisiana Const. of 1974, Art. V, § 26(B).

Under Louisiana law—and federal law—a district attorney cannot be liable for a decision not to prosecute "because the decision to take any action to prosecute or not prosecute is within the district attorney's constitutionally granted powers." *Briede v. Orleans Parish District Attorney's Office, et al.*, 2004-1773 (La. App. 4 Cir. 06/22/05); 907 So.2d 790, *writ denied*, 2005-1924 (La. 2005), 922 So.2d 1182.

In *Briede*, Plaintiff was injured and her husband murdered. Plaintiff sued the Orleans Parish District Attorney asserting that the DA was negligent in failing to charge the perpetrators for prior crimes; that is, the perpetrators should have been in jail and not on New Orleans streets. The Orleans Parish Civil District summarily dismissed the suit against the DA. The Louisiana Court of Appeal for the Fourth Circuit affirmed the dismissal stating:

> Mrs. Briede's allegations do not state a cause of action against . . . the District Attorney . . . because the decision to . . . prosecute or not prosecute is within the district attorney's constitutionally granted powers. . . .

Briede, 907 So.2d at 793.

To overturn the Fifth Circuit and allow Lefebure to proceed in this case would not only contradict this Court's and Fifth Circuit precedent; it would overturn longstanding Louisiana statutory and constitutional authority giving Louisiana District Attorneys wide discretion in handling the process of initiating a prosecution (or not).

IV. *Linda R.S.* Established Good Public Policy

Petitioner argues that the Fifth Circuit has given *Linda R.S.* an "expansive reading" which "is at loggerheads with the Court's subsequent decisions in both standing and substantive and constitutional law." See Pet. for Cert. 13. Petitioner further argues that "The majority's reading of *Linda R.S*. is inconsistent with

the text of the decision." See Pet. for Cert. 13. Petitioner also argues that "The majority's extension of *Linda R.S.*, is unwise, particularly at this moment in history." See Pet. for Cert. 21.

None of this is accurate. Petitioner asserts that "*Linda R. S.* cast its decision in terms of the standing doctrine's nexus requirement . . . citing *Flast v. Cohen* . . . " See Pet. for Cert. 18. Petitioner then argues that " . . . [i]n *Duke Power* . . . the Court held that the nexus requirement is applicable only in cases of taxpayer standing." Petitioners then quote from Chief Justice Burger's opinion that:

> In *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973), a non-taxpayer suit, reference was made to *Flast's* nexus requirement in the course of denying appellant's standing to challenge the nonenforcement of Texas' desertion and nonsupport statute. Upon careful reading, however, *it is clear that standing was denied not because of the absence of a subject-matter nexus between the injury asserted and the constitutional claim, but instead because of the unlikelihood that the relief requested would redress appellant's claimed injury*. *Id.*, at 618, 93 S. Ct., at 1149. This case thus provides no qualitative support for the broader application of *Flast*'s principles which appellants appear to advocate. . . .

Duke Power Co. v. Carolina Environmental Study Group, Inc., et al, 438 U.S. 59, 79 n.24, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (*emphasis* added).

Petitioner then concludes that "*Linda R.S.* is a fact specific case about redressability." See Pet. for Cert. 19. Petitioner suggests by all of the above that *Linda R.S.* does not support Respondent's standing argument in this case. To the contrary, Chief Justice Burger's above-quoted analysis supports that *Linda R.S*. still controls the standing issue arising out of the alleged facts of this case—and further supports that Petitioner does not have standing. The Fifth Circuit analyzed Petitioner's claims under three-part test enunciated in *Lujan v. Defenders of Wildlife* (and its progeny), 504 U.S. 555, 560 112 S. Ct. 2130, 119 L. Ed 2d 351 (1992). The Court opined thusly:

> . . . longstanding Supreme Court precedent confirms that a crime victim lacks standing to sue a prosecutor for failing to investigate or indict her perpetrator, *due to lack of causation and redressability*.
>
> * * * * *
>
> . . . It is a bedrock principle of our system of government that the decision to prosecute is made, not by judges or crime victims, but by officials in the executive branch. And so it is not the province of the judiciary to dictate to executive branch officials who shall be subject to investigation or prosecution. . . .
>
> * * * * *
>
> In short, it is not the province of the judiciary to dictate prosecutorial or investigative decisions to the executive branch. And if that is so, then it is understandable why plaintiffs

> would lack standing to seek judicial review of such executive decisions, as the Court held in *Linda R.S.* . . .

Lefebure v. D'Aquila, 15 F.4th at 654 (*emphasis* added).

Moreover, the Fifth Circuit has not "extended" *Linda R.S.* As set forth above, its decision followed *Linda R.S.* and is consistent with similar cases decided by all other federal jurisdictions.

Petitioner assures that if the Court adopts her radical interpretation of *Linda R.S.* no ill effects will occur:

> If one fears that this approach would lead to a profusion of baseless lawsuits, one need only look to the policing context to see that has not happened, even though nine circuits have, for decades, expressly countenanced such claims. ***No slippery slope looms ahead.***

Emphasis added at See Pet. for Cert. 21-22.

This is decidedly not the case. It is clear that following the logic of Petitioner to create for the first time a "failure to protect" claim against prosecutors would indeed land all courts and prosecutors on a "slippery slope." One of the most important practical problems that would be created if the Petitioner's arguments were accepted (i.e., if alleged crime victims were allowed to sue prosecutors under the Equal Protection clause for the prosecution or non-prosecution of a third party) would be the torrent of litigation that would inevitably follow. Common sense dictates that someone

would object (just as someone else would applaud) virtually every time the decision was made not to prosecute a purported offender; or every time a grand jury failed to indict. Moreover, here Petitioner's argument is even more ominous: Petitioner attacks the alleged manner in which the prosecution of her alleged assailant was handled by the District Attorney.

This Court has long recognized the difference between the functions of prosecutors and that of the police. Almost a half century ago in *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976), this Court held that "in initiating a prosecution and in presenting the State's case," prosecutors are absolutely immune from civil suits for damages under section 1983. This Court explained thusly:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to

answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and-ultimately in every case-the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in an action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would fact greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, **often years after they were made**, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

The affording of only a qualified immunity to the prosecutor also could have an adverse

> effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.
>
> The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability . . .

Imbler, 96 S. Ct. at 991-93 (emphasis added).

Thus in *Imbler*, this Court decided to treat prosecutors differently from police in civil rights lawsuits. The same considerations underlying this Court's decision in *Imbler* are no less applicable to Petitioner's attempt to create a new cause of action against prosecutors.

V. Response to Petitioner's *Ad Hominem* Attacks

Lefebure's *ad hominem* attacks on D'Aquilla require a short response. For example, Lefebure compares D'Aquilla to a hypothetical racist district attorney who announces:

> I won't investigate or prosecute anyone who assaults a Black person. If made to convene a grand jury, I'll tell them there's no evidence and they can't indict.

See Pet. for Cert. 11.

That kind of personal attack is inappropriate. Lefebure's assertions with regard to D'Aquilla's alleged policies are conclusory, without citing a single other alleged instance where D'Aquilla did not (but should have) prosecuted a rape. Moreover, Lefebure's claim is not true–it is a matter of public record that D'Aquilla has prosecuted rape cases throughout his tenure as DA. (In fact, Lefebure alleges that D'Aquilla presented her own claims to a grand jury.) Indeed, the pleading filed into the court record below establishing that the grand jury returned a "no true bill" as to Boeker also shows that the same grand jury indicted another individual for rape. Resp. App. 1a.

Lefebure clearly transfers her disappointment in the grand jury returning a "no true bill" into blaming D'Aquilla for his handling of the grand jury—as if to suggest that there could have been no other outcome than that Boeker would be indicted. For example, Lefebure alleges:

> . . . In short, . . . Lefebure's life has been completely altered since . . . ***the grand jury failed to return an indictment***.

FAC, at ¶ 87, App. to Pet. for Cert. 132a.

It is not for anyone to second-guess what motivates a grand jury—whose proceedings are, by law, secret. Nevertheless, in response to these unwarranted personal attacks on D'Aquilla, it is noted that embedded within Lefebure's own description of the underlying events are potential reasons which may explain the grand jury's action. See for example. Statement of Facts, *infra*. Boeker has admitted that he had sex with Lefebure, but avers that it was consensual.[9] It should also be noted that Lefebure alleges that both she and Boeker testified before the grand jury. FAC ¶ 16; App. to Pet. for Cert. 117a-118a. Thus, it is alleged that the grand jury had the benefit of the testimony of the only two actual participants.

None of the above bears on the legal issue presented to the Court—which was correctly ruled upon by the Fifth Circuit. This brief mention is solely to assure the Court that these are mere accusations and to partially respond to Lefebure's unfair attacks.

[9] See Boeker's Answer and Defenses at ¶ 21. Resp. App. 50a-51a.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Writ. Respondents respectfully request that Lefebure's *Petition for Writ of Certiorari* be denied.

Respectfully submitted,

C. FRANK HOLTHAUS
CRAIG FRANK HOLTHAUS, APLC
4607 Bluebonnet Blvd., Ste. B
Baton Rouge, LA 70809
(225) 295-8286
frank@holthauslaw.com

RALPH R. ALEXIS III
Counsel of Record
PORTEOUS, HAINKEL AND JOHNSON, L.L.P.
704 Carondelet Street
New Orleans, LA 70130
(504) 581-3838
ralexis@phjlaw.com

April 8, 2022