No. 21-1231

In the Supreme Court of the United States

PRISCILLA LEFEBURE, *Petitioner,*

v.

SAMUEL D'AQUILLA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN CONSERVATIVE UNION AS *AMICUS CURIAE* SUPPORTING PETITIONER

DAVID H. SAFAVIAN
General Counsel
AMERICAN CONSERVATIVE UNION FOUNDATION
1199 North Fairfax Street
Suite 500
Alexandria, VA 22314
(202) 347-9388
dsafavian@conservative.org

GENE C. SCHAERR
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
HANNAH C. SMITH
KATHRYN E. TARBERT
JORDAN E. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

April 11, 2022

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Amicus curiae American Conservative Union respectfully moves for leave to file the attached brief supporting petitioner. Every party has consented to the filing of this brief except the respondents. After *Amicus* sought respondents' consent on March 28, 2022, counsel for respondents responded that they did not consent to the filing.

Amicus American Conservative Union is a nonprofit educational organization that advocates for conservative policy solutions to problems facing America. *Amicus* is interested in this case because it presents an opportunity to defend constitutional guarantees of liberty and equal protection by holding law enforcement accountable for discriminatory enforcement policies that harm protected classes. *Amicus* will explain avenues of accountability for such policies that are consistent with this Court's precedent.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
HANNAH C. SMITH
KATHRYN E. TARBERT
JORDAN E. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

DAVID H. SAFAVIAN
General Counsel
AMERICAN CONSERVATIVE
UNION FOUNDATION
1199 North Fairfax Street
Suite 500
Alexandria, VA 22314
(202) 347-9388
dsafavian@conservative.org

Counsel for Amicus Curiae

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INTRODUCTION AND INTEREST OF *AMICUS*[1]

Although policing excesses have monopolized headlines recently, systematic *underenforcement* of certain laws is at least as urgent and hazardous to Americans' safety, especially the safety of vulnerable communities. Widespread underenforcement of various statutes, moreover, stems from the immense powers given to prosecutors and the lack of public accountability for such underenforcement.

Sadly, victims of sexual crimes, like the petitioner, Ms. Lefebure, are least likely to have their crimes investigated and prosecuted. When, as here, a prosecutor systematically chooses not to prosecute a crime like sexual assault and thereby refuses to provide the protections offered by the criminal justice system to a specific class of victims, he violates the core of our Constitution's Equal Protection Clause.

This problem is of particular concern to *Amicus* American Conservative Union Foundation ("ACUF"), a tax-exempt organization whose mission is to develop conservative solutions to address some of the nation's most pressing problems. ACUF's Nolan Center for Justice ("NCJ") has been at the forefront of criminal justice policy at the national and state levels since its inception nine years ago. ACUF-NCJ actively pursues reforms that improve public safety, strengthen government accountability, advance human dignity, and

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[1] Counsel for *amicus* provided the requisite 10-days' notice to all sides. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has not. No counsel for any party or any other person or entity aside from *amicus curiae*, its members, and its counsel authored it or made any monetary contribution toward the preparation of this brief.

redress unequal access to justice. *Amicus* writes separately to highlight the growing trend of underenforcement in America and how underenforcement policies that harm protected groups violate the original understanding of the Fourteenth Amendment's Equal Protection Clause as a guarantee of protection under the law.

To be sure, that Clause is now invoked most often when people are unfairly classified by their immutable characteristics. But its original purpose was to ensure the fundamental protection of the laws to freed slaves, and all Americans.

And today, unfortunately, widespread denial of these protections to vulnerable groups is made possible by a misguided reading of this Court's dicta in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Since that case was decided, the Court's standing doctrine has evolved to such an extent that a clarification of subsequent cases' impact on *Linda R.S.* is critical.

This Court should grant review to clarify the Equal Protection Clause's role in holding prosecutors accountable for discriminatory inaction and to clarify the holding of *Linda R.S.*, in light of subsequent caselaw.

ARGUMENT

I. Granting review would enable the Court to address the widespread problem of categorical underenforcement of criminal laws and, in particular, laws against sexual assault.

To "secure the blessings of liberty to ourselves and our posterity," our nation requires a robust criminal justice system that holds accountable those who violate others' liberties. U.S. Const. pmbl. Prosecutors play a critical role in that system. Unfortunately, there is a trend among certain prosecutors to set categorical *non*-prosecution policies that reflect ideology at the expense of the 'faithful execution of the laws' as intended by their respective legislatures. Such decisions not only signal to the public what conduct is deemed acceptable, they also deprive victims—like Ms. Lefebure—of the law's protection.

A. Prosecutors play a central role in establishing policies and priorities for law enforcement agencies.

In 1940, United States Attorney General, Robert Jackson, later a Supreme Court Justice, observed that "[t]he Prosecutor has more control over life, liberty and reputation than any other person in America."[2] The United Nations Office of Drug and Crime correctly echoes this view, calling prosecutors the "gatekeepers of criminal justice."[3]

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[2] Robert H. Jackson, *Address at the Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940)*, *in* 24 J. Am. Judicature Soc'y 18 (1940).

[3] United Nations Off. on Drugs & Crime, *General issues. Public prosecutors as the 'gate keepers' of criminal justice* (last

Prosecutors at the state and federal levels wield this gatekeeping power in diverse ways, including their ability to choose the types of crimes for which to bring charges and what charges to bring.[4] Each of these areas of discretion influences the types of crimes on which law enforcement will spend time and effort. Unless a prosecutor signals through these choices that an arrest will likely lead to a charged crime and an appropriate sentence, a law enforcement officer lacks incentive to seek out the offender.

Prosecutors have remarkable discretion to pursue certain crimes or not, and to decide what violations to charge. As this Court noted in *Bordenkircher* v. *Hayes*, "so long as the prosecutor has probable cause to believe that the accused committed an offense * * *, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." 434 U.S. 357, 364 (1978).

A prosecutor's pattern of charging decisions logically has a profound impact on law enforcement's incentive to enforce certain laws. Indeed, that discretion has been cited as an important reason to train police departments to make more careful arrests based on solid evidence.[5]

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accessed Apr. 10, 2022), https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/2--general-issues--public-prosecutors-as-the-gate-keepers-of-criminal-justice.html.

[4] See, *e.g.*, U.S. Dep't of Justice, Justice Manual § 9-27.000 *et seq*.; see generally Nat'l District Att'ys Ass'n, National Prosecution Standards (3d ed. 2009).

[5] See, *e.g.*, Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, Time (July 7, 2020)

The prosecutor's choices on charging telegraph to front-line law enforcement the types of cases to prioritize and deprioritize. Just as a prosecutor's decision not to bring charges for unfounded arrests can encourage better policing practices, an irresponsible decision *not* to bring charges against a certain class of offenders or for violations of certain laws discourages police from enforcing those laws. Such a decision can substantially affect the interests of particular groups—especially vulnerable communities—that those laws are designed to protect.

In short, although prosecutorial discretion serves an important role in safeguarding the separation of powers among branches of government, the use of this discretion can set priorities for many other actors in our criminal justice system. And there must be some recourse, at least for discriminatory prosecutorial policies that harm society's most vulnerable members.

B. A widespread movement exists among some prosecutors to deliberately under-prosecute categories of crimes.

To make matters worse, there now exists a widespread movement among some prosecutors to deliberately under-prosecute (or even not prosecute) categories of crimes. Unfortunately, as Justice Stewart once remarked, "[w]hen people begin to believe that organized society is unwilling or unable to impose on criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

(remarking that, through charging discretion, prosecutors can "set standards for future conduct of investigations by the police").

Prosecutorial policies to refrain from pursuing certain types of crimes can particularly harm disadvantaged communities, and these communities are often composed of racial, sexual or other classes protected by the Constitution.

1. Before "Defund the Police" was coined in 2020, evidence of underenforcement policies was already mounting. In 2018, a Washington Post investigation found that, despite high murder rates in many cities, "68 percent of cities have a lower homicide arrest rate now than a decade ago." Wash. Post Investigative Team, *Murder With Impunity*, Wash. Post (Jan. 7, 2019). The *Post* also found that African-American victims, who accounted for most homicides, were the least likely to have their killings result in an arrest. *Id.*

This already declining rate of prosecutions in some jurisdictions has plummeted since the Covid-19 pandemic. The Transactional Records Access Clearinghouse ("TRAC") run by Syracuse University found that, during February 2020, prosecutions had been close to 80 percent of referrals. But in April 2020, prosecutions fell to 37.5 percent—with 8,000 referrals but fewer than 3,000 actual prosecutions.[6]

This Covid-spurred decline has not been reversed. For example, in March 2021, Baltimore's chief prosecutor announced that a pause the City had put on prosecuting low-level crime during the pandemic would become a permanent policy.[7]

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[6] TRAC Reports, *Federal Criminal Prosecutions Plummet in Wake of COVID-19*, TRAC (May 28, 2020), https://trac.syr.edu/tracreports/crim/609/.

[7] Mikenzie Frost, *Marilyn Mosby Announces Baltimore City Will No Longer Prosecute Drug Possession, Sex Work*, Fox 5 News

In addition, prosecutors from North Carolina to California have adopted policies of dismissing or pleading out cases because of the pandemic backlog and an uptick in more violent crime.[8] For example, the District Attorney in Mecklenburg County, North Carolina stopped prosecuting low-level offenses in February 2021 to handle an increasing number of homicides.[9]

Since adopting such non-prosecution policies, many of these cities have seen spikes in crime and a correlated decrease in quality of life. In late 2021, for example, Los Angeles, San Francisco, and Chicago were hit by a slew of robberies of retail chains.[10] Choosing to categorically decline prosecuting retail theft not only flies in the face of the duty to faithfully execute the laws, but that policy has created "retail

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(Mar. 26, 2021), https://foxbaltimore.com/news/local/marilyn-mosby-announces-baltimore-city-will-no-longer-prosecute-drug-possession-sex-work.

[8] Russell Contreras, *Covid-Era Criminals Go Free: Prosecutors Dismiss Cases as Backlog Mounts*, Axios (Sept. 28, 2021), https://www.axios.com/courts-pandemic-violent-crime-prosecutions-d43c1e77-9dd4-46e5-bdfa-10a5f7104dc7.html.

[9] *Id.*

[10] See, *e.g.*, Robert J. Lopez & Emily Alpert Reyes, *Black Friday smash-and-grab robberies put LAPD on tactical alert*, L.A. Times (Nov. 26, 2021); Keith Allen, et al., *14 people rushed into a Louis Vuitton store outside Chicago and ran out with at least $100,000 in merchandise, police say*, CNN (Nov. 22, 2021), https://www.cnn.com/2021/11/21/us/louis-vuitton-ransacked-illinois-oak-brook/index.html; The Real Deal Staff, *Thieves target Nordstrom, other stores in four Bay Area cities in weekend spree*, The Real Deal (Nov. 22, 2021), https://therealdeal.com/sanfrancisco/2021/11/22/thieves-target-nordstrom-other-stores-in-four-bay-area-cities-in-weekend-spree/.

deserts" in predominantly poor neighborhoods as retailers made the logical decision to close stores.[11]

2. Although robbing a Louis Vuitton store in Chicago might seem to harm only the colloquial "one percent," underenforcement policies especially harm more vulnerable communities. Socio-economically disadvantaged groups are more likely to fall victim to crimes.[12] And studies suggest that "policing aimed at hot spots—particularly problem-oriented policing that focuses on specific problems such as illegal firearms and engages the community as a partner" can be effective at changing the character of these neighborhoods.[13]

In fact, residents in these disadvantaged neighborhoods often report that they would welcome a larger law enforcement presence. This is confirmed by a 2019 study finding that African-American and Hispanic members of vulnerable communities are more likely than non-minorities to say that they would like police

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[11] See, *e.g.*, Jesse O'Neill, *Walgreens closes five more San Francisco locations, citing 'organized retail crime'*, N.Y. Post (Oct. 12, 2021), https://nypost.com/2021/10/12/walgreens-closes-five-more-san-francisco-locations-due-to-theft/.

[12] See, *e.g.*, Michael L. Benson & Greer L. Fox, *Economic Distress, Community Context, and Intimate Violence: An Application and Extension of Social Disintegration Theory*, Nat'l Crim. Just. Reference Serv. (2001), https://www.ojp.gov/ncjrs/virtual-library/abstracts/economic-distress-community-context-and-intimate-violence-0; Melissa S. Kearney, et al., *Ten Economic Facts about Crime and Incarceration in the United States*, Brookings Inst. (May 2014).

[13] Off. Pol'y Dev. & Rsch., U.S. Dep't Hous. Urb. Dev., *Neighborhoods and Violent Crime* (Summer 2016), https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html.

to spend more time in their areas.[14] Yet prosecutorial policies that de-emphasize crimes like sexual assault discourage police from responding to such desires.

C. Laws against sexual assault are often unenforced or underenforced.

A subset of these vulnerable communities that is deeply harmed by underenforcement is sexual assault victims. Victims of sexual assault—generally women—suffer a psychologically damaging type of crime. Yet their victimization is often ignored by the criminal justice system.[15]

For example, out of every 310 sexual assaults reported in one study, only 50 led to an arrest, and only 25 to incarceration.[16] Similarly, in a U.S. Department of Justice study, of "all women who were raped since age eighteen, only 7.8 percent said their rapist was criminally prosecuted [and] 3.3 percent said their rapist was convicted of a crime."[17]

Moreover, even after the public attention to sexual assault sparked by the Me Too movement, police and prosecutors are slow to pursue sexual assault allegations. For example, the New York Times noted that

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[14] See Ctr. for Advancing Opportunity, *The State of Opportunity in America* 4 (2019), https://www.centerforjusticeresearch.org/reports/the-state-of-opportunity-in-america-report.

[15] *The Criminal Justice System: Statistics*, RAINN (last accessed Apr. 10, 2022), https://www.rainn.org/statistics/criminal-justice-system.

[16] *Id.*

[17] Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College Age Females, 1995-2013*, U.S. Dep't of Just. 1, 33 (2014).

"[m]ost New York City prosecutors' offices rejected a greater percentage of sex crime cases in 2019 * * * than they did roughly a decade earlier, before the case against Harvey Weinstein" spurred a "national reckoning."[18]

This nationwide failure to diligently prosecute and arrest sex assault offenders has recently resulted in lawsuits. For example, in 2018, a class action was filed in the Western District of Texas by sexual assault victims, alleging that the City of Austin had denied them equal access to justice and protection.[19] As part of this suit, several Texas women described the brutal sexual assaults they endured and the years they waited for justice. One victim alleged that her DNA samples had been carelessly contaminated by officials, that she had been subjected to adversarial interrogation about her other sexual partners, and that her assailant had raped again—at least twice—after his release on bail.[20] She described having to call repeatedly and meet with police and prosecutors to push the case forward, but ultimately, learning by phone that her case was dismissed by the district attorney.[21]

Examples like these align with the findings of recent investigations into the handling of reported sexual assaults. For example, studies have found that

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[18] Jan Ransom, *'Nobody Believed Me': How Rape Cases Get Dropped*, N.Y. Times (Sept. 28, 2019).

[19] See Compl. at 1, *Smith, et al.* v. *City of Austin*, No. 1:18-cv-505 (W.D. Tex. Jun. 30, 2022), ECF No. 1.

[20] *Id.* at 11.

[21] *Id.*

rape kits largely go untested.[22] In one such study in 2015, USA Today conducted an extensive inventory of untested rape kits and found at least 70,000 neglected kits across 1,000-plus police agencies.[23]

This same trend was evident in a U.S Department of Justice investigation into the New Orleans Police Department.[24] The Justice Department found that, in the "vast majority" of cases, even when detectives completed a Major Offense Report for a sex crime, they would "take no further action" after drafting the Report.[25] Moreover, the reports "'often expressed skepticism about victims' credibility' and 'opined on victim possible motivations for lying.'"[26]

Studies further suggest that police and prosecutors more vigorously punish rape committed by strangers than by acquaintances of the victim.[27] And that in turn indicates that law enforcement may not take sexual assault as seriously when committed by someone with

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[22] Steve Reilly, *Tens of Thousands of Rape Kits Go Untested Across USA*, USA Today (July 16, 2015), http://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/ [https://perma.cc/24CR-WUUG].

[23] *Id.*

[24] Civ. Rts. Div., U.S. Dep't of Just., *Investigation of the New Orleans Police Dep't* (Mar. 16, 2011).

[25] *Id.*

[26] *Id.* at 46.

[27] See Vera Inst. of Just., *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (1977) (finding that victim-offender relationships "were often mentioned by prosecutors * * * as their reason for offering reduced charges and light sentences in return for a plea of guilty").

a pre-existing relationship to the victim.[28] But eight of ten rapes are committed by someone known to the victim.[29] And, in most sexual assault cases, victims claim they were raped by an acquaintance. Therefore, the chances that the offender will receive a serious punishment in these situations are unfortunately low.

In short, laws against sexual assault are vastly underenforced. And this case gives the Court an opportunity to address this issue when lack of enforcement is systematic and harms a protected class of victims.

II. As the history outlined in Judge Graves' dissent shows, equal-protection violations like the one alleged here are particularly deserving of the Court's attention.

Ms. Lefebure's experience represents a chilling failure of the criminal justice system to safeguard the human dignity of sexual assault victims. Any government that systematically declines to prosecute violent crimes against women necessarily robs them of their basic human dignity—in a way that deprives them of their right to equal protection of the laws.

1. Our nation was founded on the self-evident truth that "all men are created equal," implying that all mankind has inherent human dignity. The Declaration of Independence para. 2 (U.S. 1776). Dignity is

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[28] See Lenore M. J. Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, J. Interpersonal Violence (Mar. 1, 1996) (finding that nonstranger offenders are convicted of more serious crimes, but stranger offenders receive significantly longer sentences).

[29] *Perpetrators of Sexual Violence: Statistics*, RAINN (last accessed Apr. 9, 2022), https://rainn.org/statistics/perpetrators-sexual-violence.

not the right to happiness itself, but rather something made possible by having the autonomy to pursue one's preferred life path. Thus, "autonomy is the ground of the dignity of human nature and of every rational nature," and it is the law that protects autonomy. See, *e.g.,* Immanuel Kant, *Grounding for the Metaphysics of Morals* 39-42 (James Ellington trans., 1981).

Of course, one cannot have autonomy to shape one's life if she is physically dominated and overpowered by others. And perhaps the most degrading violation of one's body short of murder is sexual assault. The connection between protection from sexual assault and human dignity has thus been aptly described by commenters on the International Criminal Court sex-crimes statute: "the prohibitions of sexual crimes derive their fundamental justification from the notion of human dignity because they link gross infringements of dignity to violations of bodily security and privacy."[30] Similarly, American laws against sexual crimes derive their fundamental justification from this notion of the basic right of each person to bodily security.

This is not to say that the Court should grant review or, ultimately, rule in favor of Ms. Lefebure because she is deprived of dignity as an extra-constitutional value. As Judge Rao has pointed out, adopting loss of dignity as a legal criterion is problematic because "infringements of dignity have the quality of

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[30] Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum. Hum. Rts. L. Rev. 625, 633-634 (2001).

pornography, in that we are supposed to know them when we see them."[31]

Instead, the right to be free from sexual assault is a statutory right enshrined in the laws of every State.[32] And, as shown below, the right to have those laws enforced in favor of women who are victimized by such assault is guaranteed by the original public meaning of the Fourteenth Amendment—that all men and women of all races are entitled to equal protection of the law.

2. As Judge Graves highlights in his dissent below, the Fourteenth Amendment was originally understood to have a "protection-centered" meaning. See Pet. App. 39a.[33] To be sure, modern interpretation has obscured the Amendment's original meaning to focus primarily on *equality*.[34] But the 39th Congress, which wrote the Amendment, was primarily concerned about the vulnerable condition of recently freed slaves who faced rampant violence and scant protection by state governments.[35] De facto servitude would surely result if laws prohibiting private violence did not apply to all perpetrators, regardless of the victims' race.

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[31] Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, Colum. J. Eur. L. 201, 208 (2008).

[32] See, *e.g.,* Nat'l Crime Victim L. Inst. & Nat'l Women's L. Ctr., *Sexual Assault Statutes in the United States Chart* (updated by Nat'l Dist. Att'ys Ass'n (2016)), https://ndaa.org/wp-content/uploads/sexual-assault-chart.pdf.

[33] *Accord* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. Rev. 1287, 1300-1301 (2016).

[34] See *id.* at 1301.

[35] *Id.* at 1299.

Scholars across the spectrum of constitutional interpretation agree that the Fourteenth Amendment was passed with this central idea in mind: freed slaves needed protection from violence to be free. *Id.* at 1301. For example, Professor Randy Barnett has stated that the Equal Protection Clause "mandates that *protection* of proper laws be provided equally to all persons."[36] And Professor Akhil Amar has similarly stated that equal protection "at its core affirms the rights of victims to be equally protected by government from criminals."[37]

Yet modern interpretation modified the original meaning of the Fourteenth Amendment's fundamental duty to protect. This Court first shifted its emphasis to an anti-classification model, preventing legal distinctions that rest on an improper basis. See *Gulf, Colo. & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 165 (1897) (explaining the new anti-classification approach to the Fourteenth Amendment).[38] After this interpretive shift, to bring a claim, improper state *action* was required, removing the importance of state *in*action. As Professor Deborah Tuerkheimer has explained, "[b]y requiring proof of intentional discrimination, the Court has largely immunized the underenforcement of laws against private violence—a problem that the

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[36] *Id.* (quoting Randy E. Barnett, *Foreword: What's So Wicked About Lochner?*, 1 N.Y.U. J.L. & Liberty 325, 331 (2005)).

[37] Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 102 (2000).

[38] See also Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason U. Civ. Rts. L. J. 1, 10-11 (2008).

Equal Protection Clause was specifically designed to redress."[39]

Ms. Lefebure is experiencing the painful effects of this shift away from the original meaning of the Equal Protection Clause. As originally written, the Fourteenth Amendment prohibits discriminatory underenforcement of the law, especially the underenforcement of laws prohibiting violence. The categorical underenforcement of laws against rape is akin to the categorical underenforcement of violent crimes against Black Americans that were prevalent when the Fourteenth Amendment was drafted. The result is the same: a group of individuals is left without the basic protection of the law, systematically leaving members of that group in a sort of de facto captivity and deprived of basic dignity.

Ms. Lefebure, then, simply asserts her right to protection of law against the commission of violent crimes directed against women. And she is not alone. As Professor Tuerkheimer has noted, "[u]nremedied injuries suffered by women, in particular, have historically been the norm."[40]

This case presents an ideal opportunity to clarify that the Equal Protection Clause operates to *protect* classes of victims like Ms. Lefebure from the violent and otherwise illegal, harmful behavior that any system of laws is designed to prevent and punish.

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[39] Tuerkheimer, *supra* note 38, at 1306.

[40] *Id.* at 1290.

III. The Fifth Circuit's approach impedes the public's ability to hold public officials accountable for such deliberate underenforcement and contravenes this Court's post-*Linda R.S.* decisions.

Underenforcement of criminal laws, especially sexual crimes, is exacerbated by a lack of public accountability. To be sure, prosecutorial immunity is a time-honored feature of the criminal justice system. But some accountability for discriminatory policies remains essential.

1. Under the Fifth Circuit's ruling, however, the public seems to have only one recourse for pushing back against discriminatory prosecutorial policies—the ballot box. But this is impractical given the general community's lack of awareness of these issues, lack of meaningful competition in most relevant races, and a diffusion of responsibility for protection from violence across usually unelected (police chief) and elected (prosecutor) positions. According to one study, between 1996 and 2006, about 95 percent of incumbent prosecutors won reelection, and 85 percent ran unopposed in general elections.[41]

Historically, it has taken significant increases in crime or high-profile scandals for the public to vote district attorneys out of office. For example, district attorneys in Los Angeles and San Francisco are facing credible recall elections—but only after significant spikes

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[41] German Lopez, *Want to End Mass Incarceration? Stop Blindly Reelecting Your Local Prosecutor*, Vox (Sept. 1, 2016), https://www.vox.com/2015/5/27/8661045/prosecutors-mass-incarceration.

in crime generally.[42] In Georgia, a D.A. was voted out for failure to report a conflict of interest in the highly publicized Ahmaud Arbery case, one that led to her own prosecution.[43] But even in such cases, vulnerable communities harmed by categorical decisions to decline prosecution of certain crimes are denied any effective remedy.

In short, as explained earlier, under-prosecution for sexual assault runs rampant in this country, even though it does not garner the same headlines as the Ahmaud Arbery case. Discriminatory practices barring access to justice should be open to legal recourse. Yet the Fifth Circuit's ruling improperly forces entire classes of victims to sit and wait for scandal to hit the news to effect electoral change, while denying those same victims any mechanism for recompense.

2. In rejecting Ms. Lefebure's claim, the Fifth Circuit relied on *Linda R.S.*, in which this Court held that the plaintiff lacked standing to challenge a prosecutor's decision not to prosecute her child's father for lack of child support. *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973). Because a prosecution would have

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[42] See, *e.g.,* Miriam Pawel, *How Chesa Boudin's life made him a lightning rod for the progressive prosecutor movement*, L.A. Times (Mar. 30, 2022), https://www.latimes.com/politics/story/2022-03-30/chesa-boudin-san-francisco-recall-profile; see also, Louis Casiano, *LA County DA Gascon recall effort raises $3.5 million, on track to gather needed signatures, organizers say*, Fox News (Mar. 16, 2022), https://www.foxnews.com/us/la-gascon-recall.

[43] See Cherranda Smith, *Original District Attorney On Arbery Murder Case Voted Out Of Office*, Black Info. Network (Nov. 5, 2020), https://www.binnews.com/content/2020-11-05-original-district-attorney-on-arbery-murder-case-voted-out-of-office/.

resulted in jail time for the father, rather than child support payments, the Court held that Linda's injury could not be remedied by the relief she requested. But, unlike in *Linda R.S.*, Ms. Lefebure alleges that the district attorney's discriminatory policy caused her to be raped—and this is an injury that a favorable court outcome *can* redress. See *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021) (holding an award of nominal damages "by itself can redress a past injury").

Some court opinions since *Linda R.S.*, including the opinion below, have fashioned a categorical rule barring suits brought "to challenge the policies of the prosecuting authority." See Pet. App. 2a. But such an extreme rule extends beyond the holding of *Linda R.S.* and fails to account for this Court's subsequent standing caselaw, which has limited—not expanded—*Linda R.S.* This Court should grant certiorari to dispel the misunderstanding caused by dicta in *Linda R.S.*, as well as to clarify the impact of subsequent Court decisions, such as *Duke Power* v. *Carolina Env't Study Grp., Inc.*, 438 U.S. 59 (1978), *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Friends of the Earth, Inc.* v. *Laidlaw Environ. Servs. (TOC), Inc.,* 528 U.S. 167 (2000), and *Uzuegbunam, 141 S. Ct. 792*, on the standing analysis articulated in *Linda R.S.*

First, the Fifth Circuit improperly relied on dicta in *Linda R.S.* that suggested a broader rule than a simple bar on claims for failure to prosecute. This dicta suggested not only that failure-to-prosecute claims are not cognizable, but that failure-to-protect claims, stemming from a prosecutor's harmful policies, are also barred. See *Linda R.S.*, 410 at 619. After explaining its holding, the *Linda R.S.* Court stated that "a citizen lacks standing to contest the policies of the

prosecuting authority when he is neither prosecuted nor threatened with prosecution." *Id.* The Fifth Circuit treated this language as controlling the outcome of Ms. Lefebure's case. See Pet. App. 2a (citing *Linda R.S.*, 410 U.S. at 617-619) ("Supreme Court precedent makes clear that a citizen does not have standing to challenge the policies of the prosecuting authority unless she herself is prosecuted or threatened with prosecution.").

As dicta, this statement in *Linda R.S.* should not have been treated as a broad, controlling rule—especially since the dicta is in tension with the *Linda R.S.* Court's holding, which focused on the unredressability of Linda R.S.'s injury.[44] See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.) ("If [general expressions] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.").[45]

Second, this Court's subsequent standing caselaw calls the *Linda R.S.* dicta into question, and the Fifth Circuit failed to take these cases into account. Through the 1980s, the Court applied the redressability requirement strictly, see*, e.g.*, *Simon* v. *E. Ky. Welf. Rts. Org.*, 426 U.S. 26, 37 (1976); *Allen* v. *Wright*, 468

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[44] One wonders why the *Linda R.S.* Court rested its analysis on the mother's failure to provide sufficient evidence of causation/redressability if the Court really thought that non-prosecuted plaintiffs never have standing to challenge unconstitutional prosecutorial policies.

[45] See also Ryan S. Killian, *Dicta and the Rule of Law*, 2013 Pepp. L. Rev. 1, 19 (2013) (concluding the "judges should be mindful of the vital but often overlooked distinction between holding and dicta and refrain from treating the latter as the former").

U.S. 737, 751 (1984), though it did expressly leave open the applicability of the *Linda R.S.* dicta to similar cases. See *Simon*, 426 U.S. at 37 (declining to reach the question, after citing the *Linda R.S.* dicta, of "whether a third party ever may challenge IRS treatment of another").

But the Court's approach "softened" over time.[46] For example, when plaintiffs sued to require the Federal Election Commission to enforce its reporting requirements against a nonparty, the Court found redressability satisfied because enforcing the requirements would give plaintiffs access to the information desired. See *FEC* v. *Akins*, 524 U.S. 11, 25 (1998); see also *id.* at 25-26 (noting "those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground").

As Professor Doug Laycock has explained, these administrative enforcement cases implicate the same standing issues present in *Linda R.S.* See Douglas Laycock, Modern American Remedies 556 (4th ed. 2010) ("If one citizen has no cognizable interest in the criminal prosecution of another, how can he have an interest in administrative enforcement?") Yet, "[d]espite the tension with *Linda R.S.*, a steady flow of suits demanded more vigorous administrative enforcement of various laws." *Id.*

Accordingly, during this time, the Court reformulated the rationale of *Linda R.S.* Whereas that decision had expressly rested on the logical nexus

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[46] See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 671 (2006).

requirement derived from the taxpayer standing doctrine, 410 U.S. at 618 (quoting *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968)), the Court later repudiated that requirement and recharacterized *Linda R.S.* as a case about redressability. See *Duke Power*, 438 U.S. at 79 & 79 n.24. Combined with the flow of administrative cases in tension with the *Linda R.S.* dicta, the Court's recharacterization of the case called into question the continued validity of that dicta.

This rift between this Court's standing jurisprudence and the *Linda R.S.* dicta continued to deepen in subsequent cases. A decade after *Duke Power*, this Court noted that a "State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n.3 (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). This statement, which the Court made as a "but see" to the rule that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," *id.* at 196-197, suggested that, contrary to the *Linda R.S.* dicta, individuals *could* have a judicially cognizable interest in "the *policies* of the prosecuting authority," even when they are "neither prosecuted nor threatened with prosecution." *Cf. Linda R.S.*, 410 U.S. at 619. In fact, almost every lower court in the country has allowed suits based on discriminatory underenforcement of the law, and thereby exercised jurisdiction over cases that the *Linda R.S.* dicta would foreclose.[47]

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[47] *E.g., Soto* v. *Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Eagleston* v. *Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson* v. *City of Chester Legal Dep't*, 864 F.2d 1026, 1030-1031 (3d Cir. 1988); *Jones* v. *Union Cnty.*, 296 F.3d 417, 426-427 (6th Cir. 2002);

Building on this holding a decade later, the Court's *Laidlaw* opinion found standing on a theory that *Linda R.S.* seemed to foreclose, providing "another example of the diminished stringency of the redressability requirement." Fallon, *supra*, at 672 n.140 (citing *Laidlaw*, 528 U.S. 167). Whereas *Linda R.S.* had rejected as "speculative" a theory that prosecuting the father would deter him from failing to make future child support payments, *Laidlaw* stated that civil penalties placed on a nonparty "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [the plaintiffs'] injuries." 528 U.S. at 187.

The dissent in *Laidlaw* further noted that the standing arguments in *Linda R.S.* and *Laidlaw* were "precisely the same." *Id.* at 203-204 (Scalia, J., dissenting). Specifically, the dicta statement that a plaintiff could not sue for the prosecution of another clearly applies "to prosecution for civil penalties payable to the State." *Id.* at 204 (Scalia, J., dissenting). In response, the majority distinguished *Linda R.S.*, relegating it to criminal prosecutions in which the criminal relief "would scarcely remedy" the plaintiff's injury. *Id.* at 188 n.4. Notably, as limited by *Laidlaw*, the *Linda R.S.* dicta became almost coextensive with that case's failure-to-prove holding: If an individual could show that criminal relief would deter future injury to the plaintiff, *Laidlaw* suggested there could be standing. Certainly, after *Laidlaw*, the *Linda R.S.* dicta could

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Hilton v. *City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000); *Ricketts* v. *City of Columbia*, 36 F.3d 775, 780 (8th Cir. 1994); *Est. of Macias* v. *Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Watson* v. *City of Kan. City*, 857 F.2d 690, 695-696 (10th Cir. 1988).

not be taken as a categorical rule, as it was by the Fifth Circuit below.

As the final nail in the coffin of the *Linda R.S.* dicta, this Court's recent opinion in *Uzuegbunam* v. *Preczewski* stated that an award of nominal damages "by itself can redress a past injury" for the purposes of standing. 141 S. Ct. 792, 796 (2021). If nominal damages are sufficient to redress past injuries, redressability is established when a plaintiff can show that a defendant's failure to prosecute a nonparty caused her injury. As long as she seeks nominal damages, a federal court's judgment in her favor *can* redress her injury. *Id.*

In summary, the dicta in *Linda R.S.* on which the Fifth Circuit relied is in tension with this Court's more recent standing doctrine: After *DeShaney*, plaintiffs have an equal-protection interest in fair prosecution policies. After *Laidlaw*, the deterrence effect of enforcing a law against a nonparty can count as redress. And, after *Uzuegbunam*, even nominal damages for a past wrong can satisfy the redressability requirement. Thus, if a plaintiff asserts that a prosecutorial policy violates the Equal Protection Clause and alleges either (1) that the unconstitutional policy caused her injury and that she is entitled to nominal damages or (2) that prosecuting a class of individuals will deter future injuries that are likely, this Court's current jurisprudence requires that standing be recognized, notwithstanding the *Linda R.S.* dicta.

Because this case squarely raises the issue, it provides the Court an ideal opportunity to clarify the proper understanding of *Linda R.S.* in light of these subsequent decisions.

CONCLUSION

As James Madison explained, "If angels were to govern men, neither external nor internal controls on government would be necessary." The Federalist No. 51 (James Madison). But humans are not angels, and this includes prosecutors. Therefore, there must be some accountability for and recourse against prosecutors who establish discriminatory policies that fail to protect protected classes of victims. Current precedent does not preclude this, and large numbers of victims of unprosecuted crimes deserve it. For these reasons, the Court should summarily reverse or grant certiorari.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
H. CHRISTOPHER BARTOLOMUCCI
HANNAH C. SMITH
KATHRYN E. TARBERT
JORDAN E. SMITH
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

DAVID H. SAFAVIAN
General Counsel
AMERICAN CONSERVATIVE
UNION FOUNDATION
1199 North Fairfax Street
Suite 500
Alexandria, VA 22314
(202) 347-9388
dsafavian@conservative.org

Counsel for Amicus Curiae

April 11, 2022