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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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April 22, 2022

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INTRODUCTION

At the time of petitioner's rape, respondent had a policy, coordinated with the local Sheriff's office, of not collecting, not processing, and not investigating evidence from rape kits. This policy, sex-discriminatory on its face, led a repeat rapist to believe he could violently rape petitioner with impunity.

The rapist was right. Because of respondent's policies, he did get away with it—petitioner will not see her attacker convicted of a crime. And petitioner accepts that she lacks the power to change that tragic result through litigation in federal court. *See Linda R.S. v. Richard D.*, 410 U.S. 614 (1977). No federal court can, or should, exercise jurisdiction to enjoin a prosecutor to undertake a particular prosecution.

What is not—as a constitutional matter—beyond the power of the federal courts is the ability to award damages to a victim for harm caused by a prosecutor's sex-based *refusal to investigate* a claim of rape or a prosecutor's policy-based, discriminatory *failure to protect*. Whatever other doctrines may be involved, the Fifth Circuit's decision on Article III standing is just plain wrong. This important Article III and victims' rights case cries out for review.

I. The Brief in Opposition Raises No Vehicle Concerns.

Stripped of its mischaracterization of the nature of this case, the brief in opposition ("BIO") is devoid of argument that this case is unsuitable for resolving the issue presented. Quite the opposite. As the BIO highlights, the District Court expressly found reason to believe that the challenged policy existed and

caused harm. The standing issue is thus cleanly and concretely presented.

Instead of focusing primarily on the absence of offensive *policies*—the issue for appellate review—respondent's brief devotes inordinate space seeking to cast doubt on whether petitioner was actually raped. This is not, however, a vehicle problem; the BIO never claims petitioner was not raped.

As explained in the amicus brief filed by the Louisiana Foundation Against Sexual Assault ("LaFASA"), victims often face pervasive discrimination from law enforcement. This discrimination is, in its experience, worse in rural Louisiana parishes. LaFASA Br. at 13. Respondent's office engages in troubling practices—such as "doubt[ing] evidence in the kit" of "bruising . . . all over [petitioner's] body" because "*[e]ven if you have a ton of bruises, that doesn't say it's not consensual*." *Id.* at 17-18. Those appalling practices, finding their culmination in the BIO's insinuation that petitioner was not raped, are relevant prudential concerns for this Court to consider.

A. The sole basis of the Court of Appeals decision is cleanly presented.

As the BIO helpfully highlights, the District Court denied much of respondent's motion to dismiss based on claims of absolute immunity. Petitioner plausibly alleged claims related to investigatory functions, not just prosecutorial decisions. BIO at 1 n.1, 6. The District Court also denied much of respondent's motion to dismiss based on failure to state a claim. Petitioner plausibly pleaded claims for official, policy-based decisions under *Monell v. Department of Social*

Services of the City of New York, 436 U.S. 658 (1978). *Id.* at 1 n.1, 7.

The Court thus has before it a case where the local federal court concluded that a district attorney's office is plausibly alleged to have engaged in sex-based discrimination against female rape victims *as a matter of office policy* during the *investigation* phase of cases, separate and apart from the office's final prosecutorial decisions.[1] That discriminatory policy, according to the federal court with front-line experience, is plausibly alleged to have a causal connection to petitioner's rape.

B. The aspersions cast on petitioner's claim of rape counsel in favor of review.

A serial rapist, one whose wife told petitioner that she "knew [petitioner's rape] was going to happen" because he had previously raped others, Pet. App. 129a, left petitioner with bruises in the shape of fingers and hands and "a red, irritated cervix" that medical experts were still able to see seven days after the first assault. Pet. App. 45a. The District Attorney's office has nevertheless decided it appropriate to file a BIO using the rhetorical device of anaphoric repetition—repeatedly stating that petitioner "returned" and "again returned" to her

[1] Although a footnote in the BIO's Statement of the Case questions whether the handling of a rape kit is investigatory, BIO at 6 n.4, petitioner notes such processing is not "an effort to control the presentation of . . . witness testimony" or another "task fairly within [the District Attorney's] function as an advocate." *Imbler v. Pachtman*, 424 U.S. 409, 430 n.32 (1976). Instead, it is "a direction to police officers"—in this case, the Sheriff and state police laboratory—"engaged in the investigation of crime." *Id.*

assailant's home—the only point of which is to suggest that petitioner was not raped because she kept returning. BIO at 2-3. These insinuations of insouciant return leave unmentioned the fact that petitioner had little choice but to remain in her cousin's home because of the widespread August 2016 flooding in Baton Rouge that destroyed her own home. Then, petitioner's rape is put in scare quotes. BIO at 3.

If there were any doubt about the motivation behind such curious phrasings, the BIO goes on to assert: "It is noted that the Sexual Assault Examination Form, Exhibit A, to the Complaint . . . contains information which might be considered inconsistent with Lefebure's rape allegations." BIO at 4. As support, the BIO cites the entirety of the Sexual Assault Examination Form. ***Yet nothing in the Form is in any way inconsistent with rape***. But this is a jury issue; it has no bearing on the standing question presented in the petition. Its only relevance is to reveal respondent's dismissive attitude toward rape victims—the very attitude enshrined in the policies petitioner seeks to challenge in this litigation.

II. The BIO's Merits-Based Arguments Are Unpersuasive.[2]

Relying heavily on *Imbler v. Pachtman*, 424 U.S. 409 (1976), BIO at 25-27, respondent invokes principles of absolute immunity in a bid to shield his office's policy determinations. But this line of

[2] Respondent's unusual argument resting on Louisiana law that largely duplicates his absolute immunity arguments, BIO at 19-20, requires no response beyond citation to the Supremacy Clause. U.S. CONST. art. VI, § 2.

argument conflates prosecutorial decisions about whom and whether to prosecute with the broader question of unconstitutional policies adversely affecting a protected class. This case involves the latter, not the former.

Brushing aside numerous cases, BIO at 11-13, 25-27, respondent echoes the argument that civil rights cases involving police are different from actions against prosecutors. Yes and no. While, unlike police, prosecutors enjoy absolute immunity with respect to specific *prosecutorial* decisions, both police and prosecutors are bound by the Constitution, including the Equal Protection Clause, in adopting policies that adversely affect a protected class.

Imbler expressly declined to extend absolute immunity to a prosecutor's role as an administrator or investigator. 424 U.S. at 430-31. Those are the roles implicated in this case. As an administrator, respondent put in place discriminatory policies; as an investigator, he carried out those invidious policies, such as systematically failing to pick up rape kits.

The BIO engages with neither the developments in the Court's standing jurisprudence since *Linda R.S.* nor the critical distinction between claims based on a denial of equal protection versus claims based merely on disagreement with prosecutorial priorities or individual decisions. Further, the BIO's attempt to reframe the question presented should be rejected. BIO at i. The Court should not permit respondent's unwillingness to engage the actual issue presented distract from resolution of this pressing problem.

A. The BIO fails to engage with the narrowness of *Linda R.S.* or the Court's subsequent decisions.

Leaning on the crutch of asserted distinctions between police and prosecutors, the BIO thrice fails to engage with the cases and arguments petitioner advances. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), are not cited at all, while *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is cited once, and then only to state that the Fifth Circuit applied its three-part test. Combined with a persistent overreading of *Linda R.S.*, the BIO advances no argument against review save that respondent prevailed below.

1. Only an unwarranted extension of *Linda R.S.* could result in affirmance.

Linda R.S. does not resolve petitioner's claim for damages based on a prosecutor's failure to investigate and failure to protect. As explained in the petition, *Linda R.S.* concerned a suit for (i) an injunction; (ii) seeking to compel a district attorney to bring charges against another individual; (iii) with the hope those charges would result in the third party paying the plaintiff child support. *Linda R.S.* does not and cannot authoritatively resolve petitioner's procedurally and substantively distinct claim. While some lower courts may have read *Linda R.S.* to preclude suits like petitioner's, that interpretation represents an unwarranted extension of that decision. Nor is it an extension that all Courts of Appeals have indulged. *See, e.g., Nader v. Saxbe*, 497 F.2d 676, 681 (D.C. Cir. 1974) ("Since the District Court's opinion, the Supreme Court has emphasized that the nexus

issue must receive close scrutiny where, as here, victims or potential victims of criminal acts sue to correct allegedly unlawful prosecutorial conduct. *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973). We do not read *Linda R. S.* to preclude standing in all such suits . . . ."). The BIO's suggestion that there is no circuit split on the question presented in the petition thus fails on its own terms.

Whether extension of *Linda R.S.* is wise or unwise, it should be beyond dispute that *Linda R.S.* failed to address the precise issue now before the Court. It is for this Court—and this Court alone—to determine the scope of its precedents. *Linda R.S.* is a precedent whose scope stands in need of definition. Certiorari is therefore appropriate.

In light of the BIO's unifying theme, this point bears repeating: Petitioner does not seek an injunction compelling the prosecution of her attacker. Petitioner is willing to concede an extension of *Linda R.S.* to suits against prosecutors seeking to compel the prosecution of an individual, even when the specific redressability issues present in *Linda R.S.* are absent. Petitioner is even willing to concede the extension of *Linda R.S.* to cases where damages are sought solely because of harm caused by a failure to prosecute a victim's attacker. Neither of those extensions, however, would resolve this case against petitioner. Only insulating prosecutors from *any* liability based on discriminatory underenforcement of law would do so.

2. Immunizing discriminatory under-enforcement of law is irreconcilable with the Equal Protection Clause.

Are prosecutors who discriminate against victims in a suspect class now and forever, as a matter of Article III, above the law? *DeShaney*, which respondent entirely ignores, says no. *See* 489 U.S. at 197 n.3. As persuasively demonstrated by Judge Graves below and by the American Conservative Union as amicus, it would be contrary to the original public meaning of the Equal Protection Clause to allow state officials to provide a suspect class with less protection from violence or other lawlessness based on discriminatory animus.

Rather than engage with this problem inherent in his position, respondent denounces a hypothetical in the petition as an *ad hominem* attack and then extensively analyzes a case that did *not* involve a suspect class. BIO at 27-29. This implicitly concedes that respondent *has* no response—or any persuasive way to distinguish the current case from the hypothetical. Which leads to the inexorable conclusion that, if a case like the one hypothesized were to arise in the Fifth Circuit, that victim would likewise lack standing to challenge the policy.

The BIO's prolonged discussion of a non-suspect-class case can readily be dismissed. BIO at 13-18 (relying on *Parkhurst v. Tabor*, 569 F.3d 861 (8th Cir. 2009), where the claim was for discriminatory underenforcement of laws against incest). Familial relation is not a protected class. It therefore does no violence to the history or original public meaning of the Equal Protection Clause to withhold heightened protections against discrimination based on familial

status. *Parkhurst* is entirely consistent with petitioner's position that only the *invidiously discriminatory* underenforcement of law, *e.g.*, the refusal to protect a suspect class from violence, should be actionable. It is the harm caused by the discrimination—which is experienced by the victim herself—that distinguishes a generalized interest in seeing justice done from a protected legal interest.

3. Modern standing doctrine is irreconcilable with the Court of Appeals' extension of *Linda R.S.*

Do victims who are members of a suspect class suffer an injury-in-fact, remediable by damages, when a prosecutor discriminates against them—and actually enables their assault? *Uzuegbunam*, 141 S. Ct. at 797-98, and *Lujan*, 504 U.S. at 560, say yes. Respondent does not cite *Uzuegbunam*, and his only citation to *Lujan* is to say the Fifth Circuit employed its test. BIO at 23. In equal protection cases, it is the denial of equal treatment, standing alone, that constitutes an injury-in-fact. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing."). That a grand jury might not have indicted petitioner's rapist if presented with a full and fair recitation of the evidence of his guilt is irrelevant. It is the *policy* of not investigating or obtaining such evidence in countless cases—a policy well known to Boeker—that emboldened him to commit his crime, secure in the

knowledge he would get away with it. Because of her sex, petitioner was denied the most fundamental of government services provided to others: protection from violent physical assault. Such denial can be—however incompletely—remedied by money damages. That should be the beginning and end of the standing analysis.

B. The BIO's effort to change the question presented should be rejected.

The BIO claims petitioner is suing because she is unhappy that her attacker has not been indicted. It cherry-picks two uses of the word "indictment" from the First Amended Complaint ("FAC"), ignoring that neither instance appears in a cause of action or the prayer for relief. BIO at 9 (citing FAC ¶¶ 16, 87). The word "indictment" is used only descriptively; it would be misleading for petitioner to tell her story without mentioning that, further down the line from the acts she challenges, a hamstrung grand jury was convened.

Respondent's differential treatment of persons like petitioner is a product of the gender-based myth that so-called "he said, she said" cases are not deserving of serious investigation. One manifestation of this discriminatory attitude is respondent's flat-out refusal to collect, process, or present to the grand jury rape kits when women are raped by men who claim consent. Or as alleged in the FAC:

> When asked by reporters why he did not pick up or examine the rape kit, Defendant D'Aquilla said it was not necessary to review the kit or exam because, although the victim reported she did not consent and was physically

> forced to have sex with Defendant Boeker, the issue in the case was consent. According to Defendant D'Aquilla, nothing in the kit or exam could shed light on whether Ms. Lefebure consented to sex with Defendant Boeker.

Pet. App. 118a.

This is nonsense. This discriminatory attitude towards women has other manifestations as well, such as respondent's refusal to meet with such victims; refusal to interview or present corroborating witnesses; and to cast doubt on the allegations of women who find themselves in such a situation. These other policies, in some sense matters of degree and not already admitted by respondent (as with the no-rape-kits admission), do not provide the kind of bright-line, clear-cut distinction as does respondent's no-rape-kits policy. That is the reason for petitioner's focus on respondent's no-rape-kits policy. But that policy is far from petitioner's only evidence of discriminatory policies that she would present to the jury.

Thus, as the District Court found, petitioner's FAC plausibly alleged highly specific allegations sounding in equal protection:

> 94. With deliberate indifference Defendants . . . failed to draft or implement procedures in either the Sheriff's Department or the District Attorney's Office to ensure proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations.

> 95. Defendants . . . created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault . . . by failing to investigate sexual assault crimes, by fostering an environment whereby perpetrators of sexual assault are allowed to prey on victims without fear of investigation . . . .
>
> 96. On information and belief, Defendant Boeker knew of Defendant D'Aquilla's long-standing refusal to properly investigate sexual assault crimes against women . . . .
>
> 97. At all relevant times, Defendants D'Aquilla and Austin's conduct was intentional, under color of law, and motivated by Plaintiff's gender.

Pet. App. 133a-134a.

This, then, is the case presented for decision: A local law enforcement empire run amok. As evocatively, and tragically, described by LaFASA and the other amici which joined it, local law enforcement policies like those involved here are stubbornly resistant, standing in the way of fulfilling the promise of the Equal Protection Clause. Certiorari is warranted in this case to address this persistent, pernicious problem.

CONCLUSION

Petitioner respectfully requests that the Court summarily reverse the judgment below or, in the alternative, grant the petition and set the case for plenary consideration.

Respectfully submitted,

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