NO. 19-_____

In the Supreme Court of the United States

DEJENAY BECKWITH AND BEVERLY FLORES,
INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CITY OF HOUSTON, TEXAS; PETER STOUT, CEO OF THE HOUSTON FORENSIC SCIENCE CENTER; ANNISE PARKER; LEE P. BROWN; CLARENCE BRADFORD; SAM NUCHIA, AND CHARLES MCCLELLAND,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred by affirming a statute of limitations defense on a motion to dismiss.

2. Whether this Court should clarify erratic application among the circuits of its precedent regarding government conspiracies to deny civil rights.

3. Whether the national rape kit backlog scandal, allowing serial rapists to proliferate, is a unique phenomenon that justifies this Court's reconsideration of existing statute of limits jurisprudence.

4. Whether this Court should address the merits of this case, which raises important and novel Fourth and Fifth Amendment questions.

PARTIES TO THE PROCEEDINGS

Petitioners

- DeJenay Beckwith
- Beverly Flores

Individually, and on Behalf of All Others Similarly Situated

Respondents

- Peter Stout
- Annise Parker
- Lee P. Brown
- Chief Charles McClelland
- Chief Clarence Bradford
- Chief Sam Nuchia
- The City of Houston

LIST OF PROCEEDINGS

United States Court of Appeals for the Fifth Circuit

Case Number: No. 18-20611

Dejenay Beckwith; Beverly Flores,
Plaintiffs-Appellants v.
City of Houston; Mayor Sylvester Turner; Police Chief Art Acevedo; Houston Forensic Science Center; Peter Stout; Annise Parker; Lee P. Brown; Kathy Whitmire; Chief Charles Mcclelland; Chief Clarence Bradford; Chief Sam Nuchia, Defendants-Appellees

Date of Final Opinion: October 16, 2019

United States District Court for the Southern District of Texas

Case Number: 4:17-CV-02859

Dejenay Beckwith and Beverly Flores, Individually and on Behalf of All Others Similarly Situated, Plaintiffs v. *City of Houston, Texas, Et Al.*, Defendants

Date of Final Order: July 31, 2018

Date of Order Granting Motion for a Stay: March 2, 2018

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The decision of the U.S. Court of Appeals for the Fifth Circuit is included at App.1a. The memorandum and order of the U.S. District Court for the Southern District of Texas is included at App.17a, and the order granting a stay is attached at App.44a.

JURISDICTION

The Fifth Circuit entered judgment on October 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254. The Petitioner has asserted below and is asserting here the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Gov't Code § 420.042(a)

> A law enforcement agency that receives sexual assault evidence . . . shall submit that evidence to a public accredited crime laboratory for analysis not later than the 30th day after the date on which that evidence was received.

INTRODUCTION

This Court should grant a writ of certiorari in this case because the United States Court of Appeals for the Fifth Circuit "has decided an important question of federal law that has not been, and should be, settled by this Court." Sup. Ct. Rule 10(c).

The case is significant because of the frequency with which this question arises and the number of persons it affects-tens to hundreds of thousands. *See U.S. v. Zacks*, 375 U.S. 59 (1963) (granting certiorari in part because of the "recurring importance" of the legal question at issue).

Beckwith and Flores are not asserting a right to have a third-party prosecuted for a crime; instead, they assert their rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution to be free from gender discrimination by state actors, their rights to be free from unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution, and their rights to be free from government actors improperly taking their property under the Fifth Amendment to the U.S. Constitution. All of these are recognized "constitutional rights," as discussed in greater detail in the sections below.

STATEMENT OF THE CASE

A. Factual Background

Dejenay Beckwith was told by Houston police officers following her April 2, 2011 sexual assault that her SAK was being transported for testing.

Beckwith was contacted by HPD and was told "these things happen to these types of women" and despite being offended by those comments assumed defendants were doing their job and would contact her if there was a DNA match.

Beverly Flores was told by HPD officers in the two weeks after her September 20, 2011 sexual assault that her SAK would be processed in three months' time.

Petitioners went to the hospital to which they were directed by law enforcement for the SAKS collection. The police told both victims that their SAKS would be tested relatively quickly when the police knew this not to be true due to their discriminatory intent.

Petitioners were thereafter subjected to an unreasonable body cavity search in violation of their privacy during the SAKS examination when law enforcement had no plans to have the SAKS tested despite falsely assuring both Appellants that it would be tested.

Petitioners had no reason to believe that their own genetic material was part of that continuing pattern of concealment until they were contacted by the Harris County District Attorneys' Office and/or the Houston Police Department regarding their kit results (late 2016 for both Ms. Beckwith and Ms. Flores).

Despite the district court's inference that Petitioners could have gone to the HPD property room at any time and taken back their samples, no evidence exists of any HPD Policy allowing crime victims to obtain or touch evidence. The Texas Rules of Criminal Procedure and Texas Rules of Evidence would certainly weigh against such access under chain of custody rules.

The Houston Police Department had more than 6,000 untested rape kits in storage in 2010. Respondents concealed the backlog for over thirty years. Respondents even had the backlog in a defective property room that had to be rebuilt, but that still did not prompt any testing.

A federally funded comprehensive review was conducted in 2015 by Professor William Wells and Professor Cortney Franklin of Sam Houston University, and Professor Bradley Campbell of the University of Louisville. That review resulted in a report entitled *Unsubmitted Sexual Assault Kits in Houston, TX: Case Characteristics, Forensic Testing Results, and the Investigation of CODIS Hits, Final Report*, which was completed on March 1, 2016 and was published online by the National Criminal Justice Reference Service. The results of that study indicate that the City did not thoroughly test all of the 6,633 SAKs, but only conducted a thorough investigation of 493 rape kits that had been linked to CODIS.

There were myriad reasons why SAKs were not tested in the first place, including negative inferences about the victims, which is consistent with plaintiffs' contention that rape and sexual assault investigations are biased against women.

The report completed on March 1, 2016 and published in April 2016, when viewed with the most recent news reports of still untested rape kits would indicate that many rape kits from the January 1, 2014 through February 24, 2018 era remain untested. The report is not clear on whether there are other rape kits which were tested, but the DNA data was not entered into CODIS.

"The [criminal] statute of limitations had expired in approximately 44 percent of the CODIS-hit cases, prohibiting arrests and prosecution," due to the delays in testing the rape kits. The 2016 report confirms that there remain genuinely disputed issues of material fact as to whether Respondents' failure to test SAKs continues to the detriment of women who continue to be victimized and raped by perpetrators, particularly serial rapists, whose DNA should have been known to law enforcement.

As recently as March of 2018, multiple SAKs were located and had not been sent to the Houston Forensic Science Center despite a statutory duty of the Houston Police Department to do so under Tex. Gov't Code § 420.003(1)(1-d); § 420.042. This occurred despite pronouncements that the backlog issue has ended and a law in effect since 2011 requiring that the law enforcement agency, not the hospital, deliver the kit to the appropriate laboratory within thirty (30) days of the administration of the SAKs. Tex. Gov't Code § 420.003(1)(1-d) and § 420.042.

Respondents concealed the backlog of sexual assault kits. Petitioners had no reason to suspect that law enforcement had not done their job, but instead could and should be able to assume that law enforcement had their SAKs tested and the results run

through CODIS for a DNA match. Respondents put forth as alleged evidence a small press release from the City of Houston Mayor, an article from an obscure publication, the Texas Observer, a bimonthly magazine in Austin, and the creation of an alleged hotline as evidence of huge efforts to reach the victims of the SAKs mishandling.[1] The one-page press release by the mayor cited by Respondents does not provide detail as to what publications picked up the press release, whether it reached the victims of crime and certainly does not tell the sexual assault victims that their SAKs might be in jeopardy, so they should call.

While the City had the all rape victims' telephone numbers, addresses, Texas driver's license numbers and other identifying information they made no such effort to directly any victim unless they were involved in a rapist's prosecution.

Neither Petitioner received any telephone call from anyone informing them that their SAKs had been one that sat untested, neither saw any alleged billboard advertisement (proof of which by Respondents is lacking), neither received any alleged pamphlet (proof of which by Respondents is also lacking). In fact, the article from The Texas Tribune cited by Respondents stated: "Pearl did not know until the reporter told her in October of 2014 that her 2003 SAKs was among those not tested, she just assumed he eluded them (HPD) for that long.

This despite the alleged (unsupported by any evidence) press releases, national publicity, billboards, pamphlets and telephone calls to the victims of

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[1] Consideration of this type of proof is improper on a motion to dismiss.

sexual assault. Per the district court's ruling Pearl, who was 77 at the time of her sexual assault and legally blind, would have been barred from bringing any claim against Respondents because her statute of limitation on her claim would have run in 2005.

Yet not a scintilla of evidence exists to show how extensive the alleged notices/advertisements were by the City of Houston regarding the rape kit backlog nor that it reached its targeted audience. Petitioners were not able to conduct discovery on Respondents alleged advertising of their errors. The Trial Court issued a stay of discovery and refused plaintiff class request for even limited discovery. Thus, no evidence exists of (i) where in the city the alleged billboards were placed, (ii) how long the alleged billboards were in place, (iii) when were they placed, (iv) what was on the billboards, (v) what marketing decisions were made and how they were made as to the placement of the alleged billboards, (vi) on what television stations did the alleged advertisements appear, (vii) how long did the alleged television advertisements run, (viii) when did the alleged television advertisements run, (ix) what marketing decisions were made and how they were made as to the placement of the alleged television advertisements, (x) what did the alleged bilingual pamphlet state, (xi) where was the alleged bilingual pamphlet delivered, (xii) how was the alleged bilingual pamphlet delivered, (xiii) when was the alleged bilingual pamphlet delivered. Appellants never received or saw any of this alleged advertising. Moreover, Respondents always possessed the information to contact all victims whose SAKs were part of the backlog yet chose not to do so.

B. Procedural Background

Beckwith filed her Original Class Action Complaint on September 24, 2017, against the City. On December 20, 2017 Flores was added.

Petitioners filed their Second Amended Class Action Complaint on March 7, 2018, removing Defendants Sylvester Turner, Art Acevedo, Kathy Whitmire, and Elizabeth Watson. They also removed the HFSC, although its CEO, Peter Stout, remains a named defendant.

Petitioners sued all Defendants/Respondents in their individual and official capacities under 42 U.S.C. § 1983 for alleged violations of the Equal Protection and Due Process Clauses. They further assert alleged violations of their substantive Due Process rights, the Fourth Amendment, Fifth Amendment "Takings" Clause, and negligence under state law. They also bring claims for conspiracy to interfere with their civil rights under 42 U.S.C. § 1985, and for negligently failing to prevent their alleged civil rights violations under 42 U.S.C. § 1986. They seek monetary damages and injunctive relief.

On March 21, 2018, the City filed an Amended Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules 12(b)(1) and 12(b)(6), or, in the Alternative, Motion for Summary Judgment. Beckwith/Flores filed their Response on April 11, 2018. On April 13, 2018, Defendants filed their Amended Reply. On July 31, 2018, the district court granted the City's Rule 12(b)(1) motion to dismiss Beckwith/Flores' § 1983 and state law negligence claims and the City's Rule 12(b)(6) motion to dismiss plaintiffs' remaining claims.

On August 29, 2018, Beckwith and Flores filed their notice of appeal. The Fifth Circuit affirmed the district court's dismissal on October 16, 2019. The appellate court ruled only on statute of limitations grounds, without reaching the merits of Petitioners' constitutional claims.

REASONS FOR GRANTING THE PETITION

I. THE APPELLATE COURT ERRED BY AFFIRMING A STATUTE OF LIMITATIONS DEFENSE ON MOTION TO DISMISS.

Dismissal at the pleading stage on statute of limitations grounds ordinarily is improper unless it is apparent from the face of the complaint that the claim is time-barred. *ABB Turbo Systems AG v. Turbousa, Inc.*, 774 F.3d 979 (Fed. Cir. 2014); *see also*, Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A.

A court may grant the motion only if no reasonable person could disagree on the date on which the cause of action accrued and the complaint on its face is conclusively time-barred. *Davis v. Vilsack*, 880 F.Supp. 2d 156 (D.D.C. 2012) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); *Accord*, *Beach Cmty. Bank v. CBG Real Estate LLC*, 674 F. App'x 932, 934 (11th Cir. 2017); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014); *Stuart v. Local 727, Int'l Bhd. of Teamsters*, 771 F.3d 1014, 1018 (7th Cir. 2014). Because statute of limitations defenses often are based on contested facts, courts should be cautious in granting a motion to dismiss on such grounds; *Rudder v. Williams*, 47 F. Supp. 3d 47 (D.D.C. 2014). *Accord*, *Mack v. Great*

Atlantic and Pacific Tea Co., 871 F.2d 179, 181 (1st Cir. 1989).

The appellate court's analysis of the statute of limitations defense was both premature and overly rigid because the claims were not conclusively time barred on their face. The appellate court's affirmation of dismissal was particularly unreasonable here, where the district court granted Respondent-Defendants' motion to stay discovery, then uncritically and improperly construed the movants' disputed factual claims as true. The appellate court repeated those errors and compounded them by ignoring the facts Beckwith and Flores alleged in arguing their claims were timely filed. The appellate court reasoned, without analysis, that Beckwith and Flores "had facts by the end of 2011 to support a § 1983 claim that Defendants had delayed testing of their SAKs" but never enumerated what those facts were. *Beckwith v. City of Houston*, No. 18-20611, 2019 WL 5260361, at *5 (5th Cir. Oct. 16, 2019) All Beckwith and Flores knew in 2011, was that DNA evidence collected from their bodies had not yielded a match to that of any suspect. The court improperly accepted the movants' disputed assertion wholesale, without construing as true facts that supported Beckwith's and Flores' claims, that they were only exposed to those facts during the course of their long-delayed rape trials in 2017.

Furthermore, a motion to dismiss on a statute of limitations defense should only be granted where the pleadings state no basis for tolling. *Bernegger v. Dep't of Revenue*, 785 F. App'x 209, 212 (5th Cir. 2019); *Heilman v. City of Beaumont*, 638 F. App'x 363, 366 (5th Cir. 2016); *Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014); *Accord*, *Supermail Cargo,*

Inc. v. United States, 68 F.3d 1204, 1206–07 (9th Cir. 1995) (holding "A motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove the statute was tolled.'").

However here, Beckwith and Flores offered several tolling theories, the bases of which were supported by independently corroborated facts that the lower courts ignored. Against the great weight of settled law both, within and without the Fifth Circuit, the appellate court affirmed an unjustified heightened pleading standard, requiring Beckwith and Flores to prove their tolling theories in response to a motion to dismiss without even the benefit of discovery.

This Court should reverse and remand the statute of limitations issue and require the lower courts to properly ventilate these issues for the following reasons.

A. The Appellate Court Erroneously Determined the Accrual Date to Hold That Petitioners' Claims Were Time Barred.

Respondents also contest the accrual date of their § 1983 and negligence claims. Accrual of a § 1983 claim is governed by federal law. "'Under federal law, the [limitations] period begins to run the moment the plaintiff becomes aware that [s]he has suffered an injury or has sufficient information to know that [s]he has been injured.'" *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008) (quoting *Russell v. Bd. of Trs. of the Firemen*, 968 F.2d 489, 493 (5th Cir. 1992)). Awareness is found via two elements: "(1) The existence of the injury; and (2) causation, that is,

the connection between the injury and the defendant's actions." *Piotrowski v. City of Hous.*, 51 F.3d 512, 516 (5th Cir. 1995).

"A plaintiff who has learned of facts, [sic] and is charged with the knowledge of all facts such an investigation would have disclosed." *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

The appellate court unreasonably held that Beckwith and Flores learned facts in 2011 that "'would cause a reasonable person to inquire further'" and "'proceed with a reasonable and diligent investigation'" and charged both "'with the knowledge of all facts such an investigation would have disclosed.'" There are numerous reasons law enforcement might not follow up with a victim, unrelated to a failure to test their SAK.

For example, a reasonable person would most likely assume, upon officers' extended silence, that DNA test results yielded no match—a far more obvious assumption than jumping to the conclusion that the SAK was forgotten despite officers' representations, not to mention medical professionals' it would be tested. See, *e.g.* "[Rape victims] seem to assume that if they have not heard back from the police, it is not because testing was not done; it was because testing was done but there was no DNA in the kit." Human Rights Watch, Testing Justice: The Rape Kit Backlog in Los Angeles City and County, March 31, 2009), available at http://www.hrw.org/node/81826 (quoting Gail Abarbanel, director of the Rape Treatment Center at Santa Monica-UCLA Medical Center, and an unidentified sexual assault nurse examiner).

To require victims of traumatic sexual assault to contact law enforcement repeatedly on the assumption that law enforcement is not doing their job when most assume law enforcement is doing their job, is an onerous and unfair application of the statute of limitations. The appellate court also erred by ignoring disputed factual assertions that evidence that Flores relied upon investigators' assurances the kits would be timely tested. The Fifth Circuit cannot ignore the facts set forward by a responding party to dispositive motion. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (a summary judgment case). Meanwhile, Respondent-Appellee's offered no facts to support the argument that Beckwith and Flores should reasonably have known their SAKs had been neglected immediately following the 30 days prior to collection stipulated by Texas law. See, Tex. Gov't Code § 420.003(1) (1-d); § 420.042.

The appellate court also based its determination that Beckwith and Flores did not act with reasonable diligence by improperly drawing inferences in favor of the movants on a motion to dismiss, that a press release and billboards announcing the backlog scandal was sufficient to satisfy the injury and causation elements that were their burden (not the victims') to establish awareness. Surely this court must not abide the outcome that the reasonable diligence scale would have tipped in Petitioners' favor, had they only happened to read the right newspapers, or drive down the right highway.

More importantly, perhaps, is what the City, its Mayors, and its police chiefs did not do and that is they did not contact the victims when they had their address, telephone numbers, names, driver's license numbers and other identifying information.

In the interest of justice, this Court should find that Beckwith and Flores raised sufficient factual disputes to overcome an affirmative defense at the FRCP 12(b)(6) stage.

B. The Date of Petitioners' Individual Injuries Is Irrelevant to Resolving Statute of Limitations Issues on *Monell* Claims.

The focus of the inquiry in determining accrual of a *Monell* claim is not the harmful act itself, rather, the point in time at which a plaintiff should reasonably understand that the harmful act was the consequence of a municipal policy or custom. The appellate court erred by relying on the date of Beckwith's and Flores' individual injuries, rather than the date they became aware of the city's custom of deprioritizing rape investigations. That miscalculation led to two reversible errors: 1) the appellate court wrongly determined the claims' accrual date; and 2) it botched its analysis of a key tolling issue Beckwith and Flores raised, based on continuing violations.

1. This Court Should Clarify When the Statute of Limitations for a *Monell* Claim Begins to Run.

Although this Court has not squarely addressed when the statute of limitations for a *Monell* claim accrues, a recent holding directly conflicts with the Fifth Circuit's ruling in Beckwith. *See*, *McDonough v. Smith*, 139 S. Ct. 2149, 2155 204 L.Ed.2d 506 (June 20, 2019) (explaining the rule that the time to bring a claim under § 1983 is "presumptively 'when the plaintiff has "a complete and present cause of action."'" (quoting *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct.

1091, 1095, 166 L. Ed. 2d 973 (2007)). Applying that rule here, Beckwith's and Flores' pattern and practice claims did not accrue until they became aware of, not just of an injury to themselves, but of the city's discriminatory policy or custom of allowing rape kits to languish.

In *McDonough*, this Court's statute of limitations analysis turned on application of the majority opinion in *Heck v. Humphrey*, 512 U.S. 477, 480, n.2 (1994) (holding claims that challenge the integrity of a criminal prosecution cannot be brought until the plaintiff has obtained a favorable termination of that prosecution). The *McDonough* Court "follow[ed] . . . [Heck] . . . where it leads: McDonough could not bring [a] fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution." *McDonough* at 2156.

Other circuits have indeed applied this rule to determine that, in pattern and practice cases under § 1983, a cause of action against the municipality does not accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a policy or custom. *See, e.g. Pinaud v. County of Suffolk*, 52 F.3d 1139, 1157 (2d Cir. 1995).

Similarly, here, even if Beckwith and Flores were aware their SAKS were yet untested in 2011, or even 2014 (a claim that is disputed SUPRA at), that injury would not suffice as the basis for a cause of action under *Monell.* That claim did not accrue until after 2016, when Beckwith and Flores became aware that their constitutional harms were the result of a city custom or policy. Follow-up phone calls to the police by Beckwith and Flores—the lack of which the appellate

court found fatal to their claims—would not have alerted Petitioners' to the fact that thousands of other Houston womens' rape kits were similarly neglected.

This Court should apply the same rationale it did in *Heck* and *McDonough* here to hold that Petitioners' pattern and practice claims could not have accrued until they had the requisite knowledge of a discriminatory policy or custom by the city of Houston.

2. This Court Should Clarify That the Continuing Violation Doctrine Applies to Section 1983 Claims Such as Petitioners'.

Multiple circuits, including the Fifth, have consistently held that the continuing violation doctrine is available for claims arising under 42 U.S.C. § 1983. *See e.g.*, *Gutowsky v. Cnty of Placer*, 108 F.3d 256, 259 (9th Cir. 1997); *see also DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018). In fact, the appellate court acknowledged, even when applying state tort law "[i]n a continuing-tort case, the wrongful conduct continues to effect additional injury to the plaintiff until that conduct stops." *Beckwith* at *4 (5th Cir. Oct. 16, 2019) (quoting *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007).

Analyzing claims of an unconstitutional custom or policy, *Gutowsky* is particularly instructive: "If the continuing violations doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the [statutory period] immediately prior to the filing of the lawsuit." 108 F.3d at 259. To constitute a continuing violation, that policy or practice must be maintained

"both before and during" the statutory period. *Green v. Los Angeles Cnty. Superintendent of Schs.*, 883 F.2d 1427, 1480 (9th Cir. 1989).

Here, Beckwith and Flores alleged precisely that. Respondents engaged in a pattern, policy or practice of deprioritizing investigations into sexual assault dating from no later than 2011. In fact academic studies and media reports cited in the original complaint date untested rape kits as far back as the mid-1980s, prior to the statutory period, and continuing until no earlier than February 2018, during the statutory period. Petitioners-Appellants alleged specific facts in support of this allegation as well. Appellants' brief at p. 14-15. Each day that policy is in place constitutes a new violation of Beckwith's, Flores', and putative class members' civil rights.

Respondents-Appellees' denial of Beckwith's and Flores' factual allegations were immaterial on a motion to dismiss and it was reversible error for the appellate court to credit to the movants' legal inferences based on disputed facts.

Nevertheless, the appellate court erroneously held that tolling for continuing violations was foreclosed the moment Beckwith's and Flores' SAKS were tested in 2014, years after their genetic material was collected. The court reached this erroneous holding by reasoning that Beckwith and Flores could not extend the duration of their injuries, merely by tacking the violations of other women's constitutional rights—even thousands of them—onto their own claims. This reasoning badly misconstrued Petitioners-Appellant's theory which rests not on others' injuries, but on the fact that the policy of neglecting rape kits, the conduct that formed the basis of their *Monell* claims, continued until at least

2018. That claim was supported facts, reported by the National Criminal Justice Reference Service, which the appellate court ignored. Because on a motion to dismiss, a court must assume the facts pleaded in the complaint are true, the appellate court should have found that this action, initiated on December 20, 2017, was timely filed.

C. The Appellate Court Erred When It Failed to Toll the Statute of Limitations Under Texas' Discovery Rule or for Fraudulent Concealment.

The appellate court adopted wholesale Respondents-Appellees' factually disputed legal theories by refusing to toll the statute of limitations, in spite of Beckwith's and Flores' arguments in support of the discovery rule and fraudulent concealment doctrines.

The discovery rule applies if the "nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754 (5th Cir. 2015) (quoting *Childs v. Haussecker*, 974 S.W.2d 31, 36–37 (Tex. 1998)). Texas, and the federal courts applying state tort law, recognize an exception to the discovery rule that bars its application where a plaintiff fails to use reasonable diligence to investigate the facts establishing the elements of her cause of action. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

Rather than analyzing the two *King-White* elements as applied to Beckwith's and Flores' constitutional injuries, the appellate court rejected the discovery rule as a basis for tolling solely on the grounds of the diligence exception. Without analysis, the opinion casts a terse reference back to its accusations underpinning the decision to reject Petitioners-Appellants' accrual

arguments: specifically, that the rape victims were themselves to blame for trusting law enforcement to do their jobs.

Based on the same perverse reasoning, the appellate court also rejected tolling on the basis of fraudulent concealment of HPD's discriminatory policy of deprioritizing rape investigations.

The appellate court's callous and judgmental statements that Beckwith and Flores "did nothing", in addition to mirroring the rape victims' shoddy treatment by HPD, is fraught with legal error.

First, the reasonable diligence of Beckwith's and Flores' actions is a fact issue that was inappropriate for resolution on a motion to dismiss. Disputed facts that would have figured into that calculus, including, inter alia, that they were told by medical professionals and law enforcement that collection of their genetic material would be tested and used to identify and prosecute their rapists, should have been credited to the non-movants. At the very least those facts should have been considered.

Second, on a motion to dismiss, the burden was on the movants to show that the nature of the injury was discoverable and the evidence verifiable. The appellate court's improperly drawn inference, that repeated calls to HPD would have allowed the discovery of any constitutional injuries, is nothing more than an assumptive leap of reasoning. Such phone calls even if successful, could not have alerted Beckwith and Flores to the fact that their SAKs had not been tested, let alone to the fact that thousands of other rape kits languished alongside their own establishing a pattern or practice. Unless a rape victim were

aware of the backlog, it is unlikely that it would have occurred to her to ask whether her SAK had ever been tested. Even if they had the premonition to ask, the evidence would not have been verifiable, as the movants pointed to no policy that would have allowed rape victims access to the HPD property room or crime lab records.

Third, the appellate court refused to find fraudulent concealment based on the 2013 press release and billboards but ignored the fact that the most recently untested rape kit was reported in 2018. Far from negating fraudulent concealment, these acts actually prove the conduct: Respondents engaged in a public relations campaign representing the backlog problem as being resolved, all the while continuing to engage in the same unconstitutional conduct for at least another five years, as reported.

Finally, the appellate court's obliviousness to the fact that officers affirmatively discouraged Beckwith and Flores from pursuing rape charges, is relevant to analysis of both tolling theories. Why would "these types of women," to quote Beckwith's initial investigator, have reasonably expected uninterested officers to return their phone calls?

Beckwith and Flores were reasonably diligent when they cooperated with and assisted police in the identification and prosecution of their rapists by allowing themselves to be interviewed, by consenting to intimate and humiliating physical examinations, by providing sensitive testimony even appearing in open court. These brave and compromising actions should be more than sufficient to overcome the reasonable diligence exception. This Court should announce that, as a rule, any 42 U.S.C. § 1983 claimant who simil-

arly cooperates in a rape investigation be accorded this mercy and, consequently, remand to the Fifth Circuit to apply the discovery rule here.

II. THIS COURT SHOULD CLARIFY ERRATIC APPLICATION AMONG THE CIRCUITS OF ITS PRECEDENT REGARDING GOVERNMENT CONSPIRACIES TO DENY CIVIL RIGHTS.

A cause of action under 42 U.S.C. § 1985(3) is directed at those who conspire to deprive protected classes of people of their rights. *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985). The federal remedy, construed broadly, is for "conspiracies involving invidious animus toward a class of persons" who are not adequately protected by the state. *Id.* at 1258 (internal quotation marks omitted). The elements of proof for a § 1985(3) cause of action are: "(1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995) (*citing Buschi*, 775 F.2d at 1257).

The appellate court mooted Petitioners' § 1986 claims, by dismissing their § 1985 claims, on which the former claims depend, as time barred. However, in the Fifth Circuit and elsewhere, a cause of action under § 1985 "accrue[s] as soon as the plaintiffs knew or should have known of the overt acts involved in the alleged conspiracy." *Beckwith* citing *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1988). For the

reasons addressed above, the earliest the conspiracy claims could have accrued is 2017. The appellate court's reasoning that the mere continuance of the conspiracy does not forestall accrual under 1985 ignored the assertion that the systemic and ongoing nature of Respondents-Appellees "overt acts" is the source of Petitioners-Appellants' civil rights violations. Moreover, the appellate court's scant analysis erroneously avoided reaching the merits of either set of conspiracy claims.

A. Petitioners Pleaded Facts Sufficient Facts to Sustain a § 1985 Claim on Motion to Dismiss.

To state a claim under § 1985(3), a plaintiff must first show that the defendants conspired—that is, reached an agreement—with one another. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868, 198 L. Ed. 2d 290 (2017). Fifth Circuit has specifically recognized that direct evidence of a conspiracy is both rare and unnecessary, holding: "[A] conspiracy may be proved by circumstantial evidence. Since conspiracies, whether among businessmen or others, are rarely evidenced by explicit agreements, the determination of whether a conspiracy existed almost inevitably rests on the inferences that may fairly be drawn from the behavior of the alleged conspirators. At a minimum, their actions, to support a finding of a conspiracy, must suggest a commitment to a common end. The circumstances must be such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Mack v. Newton*, 737 F.2d 1343, 1350-51 (5th Cir. 1984).

Here, Beckwith and Flores have alleged precisely such a "unity of purpose" and "common design and

understanding" among Respondents. The factual allegations in support of this claim give rise to plausible inferences of a conspiracy to deprive women of equal protection under law, which is all that § 1985(3) requires at the pleading stage.

B. The Intracorporate-Conspiracy Doctrine Is Not Applicable; Even If It Were, Exceptions Apply and the Circuits Are Divided Its Application to Civil Rights Claims.

The Fifth Circuit did not rule on this issue. However, any reliance on *Ziglar v. Abbasi* in this context is specious for several reasons. Far from the absolute terms Respondents-Appellees used in reliance on it, that opinion acknowledged the law surrounding the intracorporate-conspriracy doctrine is unsettled, that this Court has not endorsed the doctrine's application in the specific context of § 1985(3). 137 S. Ct. 1843, 1868 (stating [n]othing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation).

Likewise, nearly every circuit, including the Fifth, recognizes exceptions that limit the doctrine's applicability. Relevant here is the exception regarding acts of members of a single entity when they are part of a broad pattern of activity that includes a number of acts by several agents over an extended period. *Volk v. Coler*, 845 F.2d 1422, 1435 (7th Cir. 1988); *Doe v. Taylor*, 975 F.2d 137 (5th Cir. 1992) (sexual harassment case). In the present case, Appellants' supported allegations that evidence went untested based upon gender, income, race/color and national origin for more

than thirty years and that it is still ongoing gives rise to this conspiracy.

Furthermore, this case is distinguishable from *Abbasi*, where defendants were agents of several different agencies, all of which fell under the purview of the Department of Justice. 137 S.Ct. at 1868,. Here, however, Respondents are agents of several different municipal entities. When, as here, a municipal entity the size of Houston may conspire with itself, when its overt acts implicate separate agencies. While the appellate court has held that *Hill* is the outlier in this Circuit, the case is still good law, and this Court could use the opportunity to clarify the intracorporate-conspiracy doctrine without disturbing *Abbasi.* This case is also distinguishable, in that it does not implicate the extraordinary judicial deference regarding national security issues, which weigh heavily on the majority's reasoning.

Ultimately, by preventing discovery, the district court shielded the Respondent-Defendants from the exposure of facts that would have led to the inclusion of outside entities in the suit—most likely, the Harris County District Attorney, who would have been responsible for failing to prosecute rape cases implicated in the backlog scandal. Beckwith and Flores urge this Court to remedy the procedural injustice below, and let the sunlight in, by remanding with instruction to allow discovery to resolve the conspiracy claims.

III. THE RAPE KIT BACKLOG SCANDAL IS A UNIQUE PHENOMENON THAT JUSTIFIES THIS COURT'S RECONSIDERATION OF EXISTING STATUTE OF LIMITS JURISPRUDENCE.

Even if this Court finds the appellate court correctly analyzed the statute of limitations issues here, the unique and constitutionally weighty circumstances warrant closer scrutiny. In § 1983 claims alleging discriminatory under-investigation, this Court should employ a less rigid approach to statute of limitations defenses where the underlying crime is rape. Beckwith and Flores urged the lower courts to do just that, by applying the Texas statute which stipulates a five-year limitations period on injuries arising from sexual assault. (*citing* Tex. Civ. Prac. & Rem. Code § 16.0045 (b)). The appellate court rejected that argument, explaining the rule that federal courts use the forum state's general personal injury limitations period to govern claims under § 1983. *Beckwith* at *3 (citing *Owens v. Okure*, 488 U.S. 235, 240–41, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989)). This Court should consider whether *Owens'* application is appropriate in rape kit backlog cases as this is the trend in the most states.

Civil law's burden on the plaintiff to investigate facts giving rise to a constitutional claim makes no sense in the context of a criminal investigation where officers have a legal and moral duty to investigate and inform cooperating victims of progress on their cases. Likewise, law enforcement is in a better position to access (and, more nefariously conceal) such facts, especially where, as here, evidence that would verify the injury is protected by evidentiary rules and chain of custody protocols.

Reasonableness calculations are also uniquely altered where the § 1983 claimant is a rape victim for reasons that should be obvious to this Court, including trauma, vulnerability, perceived powerlessness, shame, and fear of lacking credibility. Not hearing from the police can also contribute to the self-blame and doubt that victims are feeling about the rape.

Rape victims' awareness of the backlog scandal, which even Beckwith and Flores concede would alert them to their potential constitutional injuries, has the paradoxical effect of discouraging reasonable diligence to investigate a cause of action under § 1983. Untested rape kits reinforce perceptions that the criminal justice system is hostile to rape complainants.[2] "When [rape kit] evidence is not delivered—when it is abandoned in evidence lockers or left at a police station—the victim is further traumatized and the public trust is betrayed."[3]

This phenomenon has far-reaching policy reverberations, considering the fact that victims' non-cooperation is the paramount factor causing identified rapists to go free to attack again.[4] The message that untested rape kits sends to victims about both the

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[2] Milli Kanani Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 Colum. Hum. Rts. L. Rev. 943, 960 (2011).

[3] Press Release, *Illinois Attorney General's Office, Madigan Proposes Bill to Require Law Enforcement to Submit Evidence in Sexual Assault Cases* (Feb. 9, 2010), http://www.illinoisattorneygeneral.gov/pressroom/2010_02/20100209.html.

[4] Human Rights Watch, *Testing Justice: The Rape Kit Backlog in Los Angeles City and County* (2009), *available at* http://www.hrw.org/node/81826.

seriousness and legitimacy of their complaint hampers the effectiveness of the criminal justice system in protecting us all from sexual assault. Ultimately, *Owens*' express goal—to eliminate the "confusion and inconsistency" caused by the "practice of seeking state-law analogies for particular § 1983 claims, "would not be disturbed by a narrow carve out for the finite, though large, number of women affected by the backlog scandal. The following sections addressing Beckwith's and Flores' constitutional theories establish the gravity and magnitude of the backlog scandal to justify such a carveout.

IV. THE APPELLATE COURT NEVER ADDRESSED THE MERITS OF THIS CASE, WHICH RAISES IMPORTANT AND NOVEL CONSTITUTIONAL QUESTIONS.

A. This Court Should Clarify That a Rape-Victim Plaintiff Who Pleads Deliberate Discrimination Under-Investigation of Crimes of Sexual Violence May State a Prima Facie Claim for an Equal Protection Violation.

The appellate court never addressed Beckwith's and Flores' challenge to the district court's dismissal for failure to state an equal protection claim.

The Equal Protection Clause of the Fourteenth Amendment prevents the state from investigating some crimes, but not others, on the basis of the sex of the perpetrator or of the victim. "There is a constitutional right . . . to have police services administered in a nondiscriminatory manner-a right that is violated when a state actor denies such protection to disfavored persons." *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *see also DeShaney v. Winnebago*

Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 n.3 (1989) ("The State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 418 (5th Cir. 1989). "Although there is no general constitutional right to police protection, the state may not discriminate in providing such protection." *Watson v. City of Kansas City, Kansas*, 857 F.2d 690, 694 (10th Cir. 1988).

This right to equal protection—literal protection—extends with the same force to "diminished police services," such as the refusal to fully investigate reported crimes. *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) ("[D]iminished police services, like the seat at the back of the bus, don't satisfy the government's obligation to provide services on a nondiscriminatory basis."). The right to be free from gender discrimination in the provision of law enforcement services has been a clearly established right in the Fifth Circuit since at least 2000. *Shipp v. McMahon*, 234 F.3d 907, 916 (5th Cir. 2000). The Fifth Circuit is not alone in recognizing a gender-based Equal Protection claim based on law enforcement policies and practices. The elements of such a claim have been well-established across most of the country for two decades. *See, e.g.*, *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Soto v. Flores*, 103 F.3d 1056, 1066 (1st Cir. 1997); *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994); *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994); *Hynson v. City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988); *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990).

Beckwith and Flores claim Respondents refused not only to process rape kits in a timely manner (or at all) but also refused to conduct meaningful investigations into reported rapes and sexual assaults. Respondents' conduct at constitutes the sort of "diminished police services" discussed in *Elliot-Park,* and at worst it is the sort of complete denial of services at issue in *Ihde.* In either case, Beckwith and Flores raised factual disputes sufficient to state an equal discrimination claim on the basis of sex. Because rape and sexual assault are both inherently "because of sex", withdrawal of police protection against those crimes must necessarily be a sex-based distinction. When a woman is raped, a crime has been committed against her as a woman; when the police engage in a policy, pattern, and practice of refusing to investigate rapes, they have wronged rape victims as women. *Marlowe v. City and County of San Francisco*, 2019 WL 4076357 (U.S.), Brief Amicus Curiae of Civil Rights Organizations in Support of Petitioner at 9 (analogizing to Supreme Court decisions involving other forms on non-consensual sexual contact against women).

Furthermore, an equal protection inquiry necessarily turns on a nuanced consideration of the facts and circumstances at issue. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2241-43 (2019). As such, these claims are inappropriate for dismissal at the pleading stage. Beckwith and Flores plead sufficient facts to make out an equal protection claim, which requires at the pleading stage, that claimants need only show that she is a member of a protected class-here, women-and the defendants' conduct was motivated by gender-based discriminatory animus. *See, e.g.*, *Village of Arlington*

Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 255-56 (1977).

Existing case law on discriminatory under-investigation of domestic violence logically supports Petitioners' equal protection theories. *See Villanueva v. City of Scottsbluff*, 779 F.3d 507, 511 (8th Cir. 2015) ("A police department's failure to protect victims of domestic violence can amount to an equal protection violation actionable under 42 U.S.C. § 1983"); *Hynson,* 864 F.2d at 1031; *Watson*, 857 F.2d at 696 (plaintiff had adduced sufficient evidence of gender discrimination behind police department's policy of ignoring or minimizing domestic violence complaints to survive summary judgment). On behalf of the other 10,000+ Houston women's whose SAKs were forgotten, Beckwith and Flores urge this Court to extend existing domestic-violence case law to deliberate under-investigation of rape.

Upholding the lower courts' dismissal on failure to state a claim would amount to judicial ratification of a culture of minimizing, deprioritizing, and sexual crimes against women. Indeed, public policy militates toward a finding that a plaintiff who pleads that law enforcement made a deliberate policy choice to deprioritize rape investigations states a *prima facie* claim for denial of her right to equal protection.

B. This Court Should Clarify That a Rape-Victim Plaintiff Who Pleads Deliberate Failure to Timely Test Her Rape Kit May State a Prima Facie Case for a Due Process Violations.

1. This Court Should Recognize Beckwith's Claim Respondents Violated Her Bodily Integrity.

Even if non-discriminatory, a government's broad refusal to meaningfully protect persons from rape constitutes a violation of the right to bodily integrity. "Among the historic liberties . . . protected [by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 at n. 41 (1977); *see also Black v. Stephens,* 662 F.2d 181, 188 (3d Cir.1981), *cert. denied*, 455 U.S. 1008, (1982) ("[a] law enforcement officer's infliction of personal injury on a person . . . may deprive a victim of a fourteenth amendment 'liberty'"). The right to bodily integrity is "clearly established . . . under the substantive component of the Due Process Clause" and "fundamental where the magnitude of the liberty deprivation that [the] abuse inflicts upon the victim . . . strips the very essence of personhood." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998).

Respondent's pattern, policy, or practice of declining to seriously investigate and prosecute reports of rape constitutes a violation of this fundamental right because it represents an affirmative and targeted withdrawal of state protection of that right.

In the context of the marital rape exemption, courts have recognized that the state cannot constitutionally withdraw protection of the right to bodily

integrity. For example, in *People v. De Stefano*, 467 N.Y.S.2d 506 (Co. Ct. 1983), a New York court found the state's martial rape exemption unconstitutional on the basis that the state's decision not to protect married persons from sexual assault violated the right to bodily integrity. *Id.* at 514.

Respondents' policy of not testing rape kits deprived Beckwith of her right to bodily integrity by exposing her (and countless others) to a serial rapist whose DNA was in Respondent's posession for two decades. *Cf. Am. Express Travel Related Servs. Co. v. Kentucky,* 641 F.3d 685, 688 (6th Cir. 2011). Regardless of whether it intended to harm Beckwith, Respondents "chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury" and "did not act in furtherance of a countervailing government purpose that justified taking that risk." *Hunt v. Community Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 541 (6th Cir. 2008); *see also Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

2. This Court Should Recognize Petitioners' Fourth Amendment Claim for Unreasonable Search and Seizure.

"A consent search is unreasonable under the Fourth Amendment if the consent was induced by deceit, trickery, or misrepresentation." *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977). "The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be determined by all the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996). "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced,

account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

It is difficult to imagine a person in a more vulnerable state than a rape victim who has just been violated sexually and subjected to a violent, unwanted intrusion upon her body. It is equally difficult to imagine a more invasive search process than the hours-long ordeal involved in collecting a rape kit, which includes another set of unwanted intrusions upon and into the same parts of her body that were just violated. Similar but far less invasive types of searches have been found to be deeply personal and upsetting. *See, e.g.*, *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The scope of the intrusion here [a strip search] is indisputably a 'frightening and humiliating' invasion, even when conducted 'with all due courtesy.' Its intrusiveness 'cannot be overstated.'"). Finally, it is virtually impossible to imagine anything more coercive than being told, in a vulnerable moment by persons in authority that if a rape kit is not conducted, evidence of the crime may be lost. Nevertheless, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228, 93 S.Ct. 2041.

Beckwith and Flores reasonably believed, based on information provided by Respondents and their agents that their SAKs would be appropriately handled and stored, timely and properly tested, and ultimately used to assist in the investigation, potential identifica-

tion, and potential prosecution of suspects.[5] Beckwith and Flores alleged sufficient facts to show that, based on overwhelming majority of Houston rape cases, Respondents knew those representations were false. Given the invasiveness of the search required to conduct a rape kit, Respondents unreasonably failed to inform Beckwith and Flores of their *de facto* policies, practices and intent to forego prosecution. These misrepresentations make the searches unreasonable under the law.

3. This Court Should Recognize Petitioners' Claims Under the Fifth Amendment's Takings Clause.

Architect and drafter of the Fifth Amendment Takings Clause James Madison opined:

> A Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.

—James Madison, *Essay on Property*, March 29, 1792

That genetic material constitutes property implicating Fifth Amendment protections is uncontroversial, even in the Fifth Circuit, and federal courts have frequently recognized property rights inhering to bodily

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[5] *See U.S. v. Paige*, 136 F.3d 1012, 1017-18 (5th Cir. 1998) (describing the two-part test used "to determine if a private party activates the Fourth Amendment by acting as an instrument or agent of the government in conducting the search" as "(1) whether the government knew or acquiesced in the intrusive conduct; and (2) whether the private party intended to assist law enforcement efforts or to further his own ends.").

tissue, blood, plasma and sperm. *See generally, Washington University v. Catalona*, 490 F.3d 667, 674 (8th Cir. 2007) (examining donations of biological materials as inter vivos gifts, which are defined under Missouri law as "a voluntary transfer of property by the owner to another, without consideration or compensation as an incentive or motive for the transaction"); *York v. Jones*, 717 F. Supp. 421, 425, 427 (E.D. Va. 1989) (denying defendants' motion to dismiss quasi-contract and detinue claims related to defendants' refusal to release or transfer pre-zygotes as requested by donor couple); *U.S. v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (finding plasma is tangible property).

While what Beckwith and Flores would have done with the genetic materials they possessed is of little, if any relevance, had not the Houston police assured and reassured Beckwith and Flores that they were investigating their brutal rape cases Beckwith and Flores could have and likely, eventually, would have submitted the serial rapists' genetic material, from their person and clothes, to a lab, to a retained lawyer, or other law enforcement agency such as the Harris County Sheriff's Office, Texas Rangers, or FBI, and obtained results. Companies exist that can even find the likely suspect—AncestryDNA, 23andMe, Family Finder, and MyHeritage—even without the serial rapists' DNA on file anywhere by scientific analysis and comparison of relatives' DNA. Clearly, based on the allegations in the dismissed complaint the involved Houston police officers, police property room employees, lab personnel, and City officials knew or should have known the likelihood was high that DNA testing would be delayed, never accomplished, or DNA degraded though lapse of time until unusable.

Beckwith and Flores allege their genetic material was taken for the public use of identifying and prosecuting rapists, thereby triggering the Fifth Amendment takings clause. "Public use" under the Fifth Amendment encompasses a "broad [ ] and more natural interpretation of public use as 'public purpose.'" *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005). "Without exception, [the United States Supreme Court's] cases have defined that concept broadly." *Id.* at 480. This is true whether or not, "the government's pursuit of a public purpose will . . . benefit private parties." *Id.* at 486; *see also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244, 104 S. Ct. 2321 (1984) ("It is not essential that the entire community, nor even any considerable portion directly enjoy or participate in any improvement in order for it to constitute a public use."). What matters for the analysis is "the taking's purpose, and not its mechanics," and whether the taking of private property "is rationally related to a conceivable public purpose." *Midkiff*, 467 U.S. at 244, 241.

The bodily and genetic material taken from Beckwith, Flores and other members of the Subclass II was not removed pursuant to valid and un-coerced consent. It was taken, at least in part, to purportedly promote public safety and class members received no compensation from the government for the taking of their property. Beckwith and Flores have adequately alleged these facts, and thus stated a viable Fifth Amendment claim.

CONCLUSION

For the foregoing reasons, Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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