No. _____

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

PETITION FOR WRIT OF CERTIORARI

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March 4, 2022

QUESTION PRESENTED

Whether a rape victim has Article III standing to sue for damages when the invidiously discriminatory policies of a district attorney's office are causally connected to the sexual assault she suffered.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing before the Court of Appeals:

Petitioner Priscilla Lefebure was the plaintiff in the District Court and the appellee in the Court of Appeals.

Respondent Samuel D'Aquilla, Individually and in his Official Capacity as District Attorney for the 20th Judicial District, was the defendant in the District Court and the appellant in the Court of Appeals.

LIST OF PROCEEDINGS

U.S. Fifth Circuit Court of Appeals

No. 19-30702, Consolidated with No. 19-30989

Priscilla Lefebure, *Plaintiff-Appellee* v. Samuel D'Aquilla, 20th Judicial District, individually and in his official capacity as District Attorney, *Defendant-Appellant*

Published: 15 F.4th 650

Date of Final Opinion: October 5, 2021

U.S. Fifth Circuit Court of Appeals

No. 19-30702, Consolidated with No. 19-30989

Priscilla Lefebure, *Plaintiff-Appellee* v. Samuel D'Aquilla, 20th Judicial District, individually and in his official capacity as District Attorney, *Defendant-Appellant*

Published: 987 F.3d 446

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Withdrawn: October 5, 2021

U.S. District Court, Middle District of Louisiana

Priscilla Lefebure v. Barrett Boeker et al.

No. 3:17-CV-01791

Published: 390 F.Supp.3d 729

Date of Interlocutory Order Granting in Part and Denying in Part Motion to Dismiss: June 25, 2019

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PETITION FOR WRIT OF CERTIORARI

Priscilla Lefebure respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The ruling and order of the District Court in petitioner's favor is published and appears at *Lefebure v. Boeker*, 390 F. Supp. 3d 729 (M.D. La. 2019). Pet. App. 43a. The original opinion of the Court of Appeals reversing the District Court's denial of respondent's motion to dismiss was published and appears at *Lefebure v. D'Aquilla*, 987 F.3d 446 (5th Cir. 2021). On petition for rehearing en banc, that unanimous opinion was withdrawn, and a divided panel again reversed in a published opinion, *Lefebure v. D'Aquilla*, 15 F.4th 650 (5th Cir. 2021), Pet. App. 1a, with dissent, Pet. App. 28a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals issued on October 5, 2021. Pet. App. 41a. After being granted a sixty-day extension, petitioner timely filed this petition on March 4, 2022, Sup. Ct. No. 21A291. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2 of the United States Constitution provides:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . .

STATEMENT OF THE CASE

This case embodies a tragic breakdown of our justice system. As the majority below observed, "it is difficult to imagine anyone who deserves justice more than Priscilla Lefebure." Pet. App. 2a. Petitioner alleges that respondent's invidiously discriminatory policies fostered an environment in which petitioner's rapist knew he would be able to assault her, or any woman, with impunity. Because these allegations do not involve a claim for failure to prosecute, the District Court and dissent below agreed that no case law forecloses petitioner's standing to pursue redress.

The majority below described the conduct alleged by petitioner as "sickening." Pet. App. 2a. Barrett Boeker, who was then a high-ranking warden at the Louisiana State Penitentiary at Angola, violently raped his wife's cousin, petitioner Priscilla Lefebure, while she sheltered in his home on prison grounds during a flood evacuation. *Id.* at 2a-4a. He raped her in front of a mirror, making her watch and telling her no one would hear her scream as she kicked and tried to alert help. *Id.* at 3a, 126a. Then he raped her again two days later, this time with a foreign object. *Id.* at 3a.

A rape kit, administered seven days after the initial assault and five days after the second, revealed "bruising in the pattern of fingers and hand prints and a red, irritated cervix." Pet. App. 45a. The bruising appeared all over Ms. Lefebure's body—on her inner and upper thigh, her right arm, and her left shin. *Id.* at 115a. In addition to the pictures of bruises, the rape kit included a depiction of the pattern of bruising, consistent with a hand forcing legs open and holding down an arm. *Id.* at 121a.

These were not consensual encounters.

The grand jury heard none of that, however. Though Boeker was arrested some twelve days after completion of Ms. Lefebure's rape exam, he hired the local District Attorney's cousin for a lawyer and managed to avoid spending a single night in jail. Pet. App. 4a, 105a. Consistent with an apparent longstanding local policy, the rape kit was not picked up or processed for months and was never presented to the grand jury. *Id.* at 35a, 46a. Neither the District Attorney nor members of his staff met with Ms. Lefebure. *Id.* at 46a. Indeed, neither his office nor the Sheriff's office conducted any investigation at all. *Id.* at 116a, 118a-120a.

After media pressure forced the District Attorney and Sheriff to take *some* action, the District Attorney convened a grand jury. Pet. App. 116a-117a. Or at least the appearance of a grand jury. The rape kit, with its pictures of the trauma and clinical notes of the sexual assault nurse examiner, was not presented.[1] Neither the responsible Sheriff's deputies, nor the rape examiner, nor an expert was called. *Id.* at 117a. Witnesses to the immediate aftermath who could corroborate Ms. Lefebure's story were not called. *Id.* On the morning of the grand jury session, the District Attorney reneged on his agreement to delay Ms. Lefebure's testimony for a day or two in light of illness and to enable her to prepare with her newly retained counsel. *Id.*

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[1] The rape kit remained with the coroner's office (the collecting state agency) until one week after the District Attorney's presentation to the grand jury. Pet. App. 120a. It would not be processed until two months later. *Id.*

But Boeker was allowed to tell his story that "[w]e had sex and it was consensual, we got kind of rough." Pet. App. 119a.

Unsurprisingly, the grand jury returned no true bill. *Id.* at 117a. Boeker, who the District Attorney said "needed to return to his family and his job" when explaining why he would not postpone the grand jury even a day, would go on with his career. *Id.* Go on, that is, until he assaulted an inmate with a fire extinguisher and was finally charged with a felony. Jacqueline DeRobertis, *Angola Officer Fired for Allegedly Spraying Inmate with Fire Extinguisher Charged with Felony*, THE ADVOCATE (July 19, 2020, 5:01 PM), https://tinyurl.com/x5fzye1y.

Petitioner's rape was made possible because Boeker believed that he, like other sexual assailants before him, would not face prosecution. These events left Ms. Lefebure traumatized, ostracized by her family and the community at large in the close-knit fraternity of corrections officers who populate and dominate the parishes around Angola. Pet. App. 121a-122a. As a result, she has experienced periods of homelessness. *Id.* at 121a. She turned to the federal courts for help.

In her First Amended Complaint, Ms. Lefebure asserted six substantive claims. In the first, claiming a denial of equal protection, she alleged respondent has a custom and practice of refusing to properly investigate sexual assault crimes against women because of gender-based stereotypes and animus. Pet. App. 132a-134a. She alleged Boeker was aware of this—as one might expect of a fellow high-ranking law enforcement official in the same parish—and that it was a cause, by emboldening her attacker, of her rape.

Id.

The first claim, like the rest, is based on respondent's policies and his actions of "failing to investigate the accused and failing to pick up, analyze, examine, or submit [the] rape kit and/or sexual assault examination evidence" and "fail[ing] to draft or implement procedures . . . to ensure proper investigation of rape cases and proper review, examination, collection, and handling of rape kits and sexual assault examinations." Pet. App. 133a. The words "prosecute," "charge," "indict," and any of their cognates do not appear under the first claim—or any of the succeeding claims.

In her due process claim, petitioner alleged that respondent has a custom and practice of refusing "to properly investigate sexual assault crimes committed against women," of which Boeker was aware and which contributed to his fearlessness in raping her. Pet. App. 36a, 133a-134a. Both this and the equal protection claim included failure-to-train and deliberate-indifference theories based on the absence of policies designed to prevent the harm petitioner suffered. *Id.* at 132a-137a.

Allegations concerning discrimination, failure to protect, and failure to investigate were likewise made against the Sheriff, whom Ms. Lefebure also sued for conspiring with the District Attorney. Pet. App. 132a-138a. The remaining claims alleged abuse of process and various state-law theories of liability. *Id.* at 139a-140a. *Petitioner nowhere requested that Boeker be prosecuted*, nor did she seek damages for respondent's failure to prosecute Boeker. *Id.* at 142a.

After oral argument on the District Attorney's motion to dismiss, Chief Judge Shelly Dick held that

Ms. Lefebure had Article III standing to bring constitutionally based claims against respondent. Pet. App. 43a-63a. The District Court wrote:

> In the Court's view, *the Plaintiff's claims in the instant matter against the DA are not for his failure to prosecute Boeker*. Plaintiff may claim that the alleged failure to fully investigate was motivated by a preference in the prosecutorial outcome, *but the Plaintiff does not assert the prosecutorial outcome as her injury*. Rather, Plaintiff seeks relief for the failure to investigate her claims, for the alleged conspiracy with the Sheriff not to investigate her claims, and for the alleged long-standing practice, policies and procedures that fostered the failure to investigate resulting in a discriminatory impact upon sexual assault victims and women in violation of the Equal Protection and Due Process Clauses.

Id. at 59a (emphases added).

On interlocutory appeal, a unanimous panel reversed in a published opinion. *Lefebure v. D'Aquilla*, 987 F.3d 446 (5th Cir. 2021). After Ms. Lefebure petitioned for rehearing en banc, the panel withdrew its opinion and again reversed, this time over the dissent of one of the panel members. *Lefebure*, 15 F.4th 650 (5th Cir. 2021).

Writing for the majority, Judge Ho opened with an acknowledgement that "[i]f anyone deserves to have her day in court, it is Priscilla Lefebure." Pet. App. 2a. Yet, the majority held that the outcome of this case is

controlled by this Court's decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). In its view, *Linda R.S.* "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." Pet. App. 2a. The majority concluded that this reading of *Linda R.S.* forecloses a lawsuit by a crime victim against a district attorney—even if the prosecutor's policy is openly discriminatory.

In dissent, Judge Graves (like Chief Judge Dick) distinguished failure-to-prosecute claims (no standing) from claims of failure to protect, a distinct equal protection violation. In his view, petitioner "articulate[d] a failure-to-protect injury that we have recognized for at least twenty years—and one that invokes the original concerns of the Equal Protection Clause." Pet. App. 37a.

After reviewing the text and history of the Equal Protection Clause, Judge Graves concluded that petitioner's case represents "a prototypical equal protection claim, centered on the injuries she alleges resulted from a discriminatory failure to enforce the law when it comes to rape cases." Pet. App. 40a.

REASONS FOR GRANTING THE PETITION

I. The panel majority has created an 8-1 circuit split that merits summary reversal.

Whether *Linda R.S.* forbids the kind of failure-to-protect and failure-to-investigate claims pleaded by Ms. Lefebure is neither a new nor controversial question. As pointed out by Judge Graves, every circuit to consider the issue has recognized the viability of such claims against law enforcement. Pet.

App. 29a (citing *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, 1030–31 (3d Cir. 1988); *Jones v. Union County*, 296 F.3d 417, 426–27 (6th Cir. 2002); *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); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000); *Watson v. City of Kansas City*, 857 F.2d 690, 695–96 (10th Cir. 1988)).

The specific context of those cases involved the practices and policies of police and other law enforcement officials.[2] But it is common ground that, in the American criminal justice system, prosecutors are an integral part of the law enforcement process; indeed, in practice, law enforcement activity flows in large part from prosecutorial priorities. In any event, the complaint's allegations make clear that the discriminatory policies in place in West Feliciana Parish reflected a collaborative relationship between the District Attorney and the Sheriff. That salient fact removes this case from the ambit of *Linda R.S.*'s teaching.

As Judge Graves' analysis persuasively demonstrates, the previously unanimous voice of the federal circuits represents the most sensible approach, focusing, as did *Linda R.S.*, on the *nature of the claim* rather than the *identity of the defendant*.

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[2] Whether such constitutionally based claims ultimately prove successful or not is, of course, a merits question. In the cases listed in the preceding paragraph, there was no doubt, however, that the plaintiffs had standing to assert constitutional violations.

While certain claims may be beyond the reach of the federal courts, no class of persons is above the law by virtue of their identity.[3]

Thus, prior to this case, the Fifth Circuit, like all circuits to consider the issue, applied the test developed in *Watson, supra*, 857 F.2d 690:

> [T]o sustain a gender-based Equal Protection claim based on law enforcement policies, practices, and customs toward domestic assault and abuse cases, a plaintiff must show: (1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice.

Shipp v. McMahon, 234 F.3d 907, 914 (5th Cir. 2000), *overruled in part on other grounds by McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc).

After a careful analysis of petitioner's complaint,

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[3] Even doctrines such as absolute immunity do not operate in this manner. Judges, like legislators and prosecutors, do not enjoy absolute immunity for every decision they make simply because they are judges, legislators, or prosecutors. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 224, 230 (1988) (describing "functional" approach to absolute immunity in denying such to judges and district attorneys for personnel decisions). It is thus the *nature of the claim* (here, a failure to protect or investigate) instead of the *identity of the defendant* that controls.

this type of constitutional challenge is precisely what the District Court allowed. Chief Judge Dick specifically considered *Linda R.S.* and was sensitive to standing issues. She separated any impermissible challenge to a particular prosecutorial charging decision, on the one hand, and a permissible challenge to the discrimination-infected law enforcement policy, on the other. Pet. App. 65a. So too did Judge Graves. *Id.* at 34a-37a.

This long-established standard, applied as settled law for more than three decades, has struck a workable balance between the federal courts' limited role under Article III and vindication of the constitutional rights of crime victims. This approach does not intrude into the sensitive prosecutorial domain of whether to charge a particular individual. Rather, the standard applied by Chief Judge Dick, and championed by Judge Graves, permits a challenge by an aggrieved crime victim to an invidiously discriminatory law enforcement policy that fostered an unchecked culture of violent sexual assault. Leaving no doubt whatever in this respect, Judge Graves specifically emphasized that petitioner is not seeking to have her assailant indicted or prosecuted. Pet. App. 34a. *See infra* p. 12 n.6.

Summary reversal would appropriately cabin *Linda R.S.* within its context of challenges to prosecutorial charging decisions. Doing so would return the Fifth Circuit to this long-standing rule for Section 1983 claims based on discriminatory policies that result in the victimization of certain disfavored groups by crimes to which law enforcement turns a blind eye. This is at the core of what the Equal Protection Clause means and what 42 U.S.C. § 1983

seeks to prohibit.[4]

II. In the alternative, guidance is necessary on this important Article III issue, which the Court has not addressed for nearly 50 years.

Consistent with Judge Graves' dissent, Pet. App. 38a-40a, imagine the unimaginable: A district attorney walks to a lectern and intones, "I won't investigate or prosecute anyone who assaults a Black person. If made to convene a grand jury, I'll tell them there's no evidence and they can't indict."[5] Further assume that these inflammatory comments have the predictable effect of causing an uptick in violence against Black people. According to the Fifth Circuit majority's expansive interpretation of *Linda R.S.*,

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[4] See page 22, below, for a discussion of the relevant history of the Equal Protection Clause. Similarly, § 1983 created a remedy "against those who representing a State in some capacity were unable or unwilling to enforce a state law." *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). *See also D.C. v. Carter*, 409 U.S. 418, 427-429 (1972) ("[I]t is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection.") (quoting Cong. Globe, 42d Cong., 1st Sess., 334 (1871)).

[5] Six states permit citizens to empanel a grand jury by collecting signatures. KAN. STAT. ANN. § 22-3001 (West 2017); NEB. REV. STAT. ANN. § 29-1401.02 (West 2002); NEV. REV. STAT. ANN. § 6.132 (West 2001); N.M. CONST. art. II, § 14; N.D. CENT. CODE § 29-10.1-02 (West 2013); OKLA. CONST. art. II, § 18.

none of those victims could sue that district attorney in his official capacity. Nor could Congress or the state legislature give them that right. The panel's Article III holding means that the political branches are, as a constitutional matter, forbidden from creating a cause of action for lynch-mob victims cognizable in federal court. *See Lefebure*, 15 F.4th at 659.[6]

Nothing in the text of *Linda R.S.* supports that interpretation. As we more fully discuss below, *Linda R.S.* operates in the "unique context of a challenge to a criminal statute." 410 U.S. at 617. The Court emphasized that granting the mother's requested relief "would result only in the jailing of the child's father," *id.* at 618, rather than the requested relief of child support payments. This rendered the sought-after relief entirely "speculative." *Id.* Only after

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[6] As Judge Graves recognized, petitioner clearly and repeatedly raised this claim in the courts below: "Plaintiff is not claiming a right to have Boeker prosecuted or convicted, she claims no more than what the Fifth Circuit has recognized for more than a decade, that where a law enforcement policy, practice, or custom provides less protection to victims of domestic violence, including rape and sexual assault, such a custom unconstitutionally violates the right to equal protection where discrimination against a specific class was a motivating factor and the plaintiff was injured by the policy, custom, or practice." Pet. App. 34a-35a. *See also* Pet. for Reh'g En Banc at iii, *Lefebure v. D'Aquilla*, No. 19-30702, 15 F.4th 650 (5th Cir. 2021) ("The panel's holding conflicts with the Court's prior recognition, shared by all other Courts of Appeals, that failure-to-protect and discriminatory non-protection claims are cognizable in the federal courts."); *id.* at 13-14 ("And as the District Court cogently explained, the Eighth Circuit case relied on by the panel draws an explicit distinction that supports Ms. Lefebure's claim." (citing *Parkhurst v. Tabor*, 569 F.3d 861 (8th Cir. 2009))).

concluding that the requisite element of standing was not satisfied did the Court go on to restate the familiar proposition that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* at 619.

An expansive reading of *Linda R.S.*, as embraced by the Fifth Circuit majority, is at loggerheads with the Court's subsequent decisions in both standing and substantive constitutional law. And it would rend an ill-advised hole in the fabric of rights Americans enjoy. But even if none of those things were true, clarity with respect to this vital issue—which the Court has not addressed in half a century—would benefit the lower courts and the public in an era of renewed national focus on criminal justice issues.

A. The majority's reading of *Linda R.S.* is inconsistent with the text of the decision.

While holding that a plaintiff lacks standing to force a district attorney to prosecute a particular case, *Linda R.S.* says nothing about suits against district attorneys who adopt a policy of giving a pass to criminals who victimize individuals of a certain race or sex, thereby systematically denying those victims equal protection of the law.

Linda R.S. involved a Texas district attorney's decision not to bring criminal child support enforcement proceedings against deadbeat dads of "illegitimate children." 410 U.S. at 614-15. The plaintiff, a single mother whose child the father would not support, sought "an injunction running against the district attorney forbidding him from declining prosecution on the ground that the unsupported child is illegitimate." *Id.* at 616.

This Court held that the plaintiff lacked standing because "appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention." *Id.* at 617-18. That was because "appellant has made no showing that her failure to secure support payments"—the injury-in-fact she claimed—"results from the nonenforcement, as to her child's father." *Id.* at 618. And that was because "[a]lthough the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant 'keeps the keys to the jail in his own pocket' and may be released whenever he complies with his legal obligations." *Id.* "On the contrary, the statute creates a completed offense with a fixed penalty," so "if appellant were granted the requested relief, it would result only in the jailing of the child's father." *Id.* "The prospect that the prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.*

After announcing this holding, the Court added that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.[7] But nobody in this case suggests

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[7] *Linda R.S.* relied on three cases to support this broad proposition: *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). 410 U.S. at 619. But plaintiffs in each of those cases lacked an underlying injury. *See Poe*, 367 U.S. at 505-08 (finding no "direct injury" and only the "threat of prosecution"); *Younger*, 401 U.S. at 41-42 (holding that, because plaintiff had not been indicted, arrested, or threatened with prosecution, the normal course of a state criminal prosecution cannot be blocked on the basis of fears of prosecution that are merely speculative); *Bailey*,

(footnote continues)

that petitioner has standing to sue based on respondent's failure to prosecute Boeker. Certainly she has never sought an injunction to compel his prosecution, as did the plaintiff in *Linda R.S.* Accordingly, that case does not decide the question presented here.

Nor does *Linda R.S.*'s reasoning support the Fifth Circuit majority's conclusion. The plaintiff there did not allege that jailing the deadbeat dad would, with any reasonable probability, cause him to make future child support payments. It was this failure even to "allege"—or as this Court put it, that plaintiff made "no showing" of—a connection between what she wanted in the real world (money from the father) and what she was asking the court to do (force a district attorney to prosecute) that doomed her case. 410 U.S. at 618. Whether viewed as a nexus problem or a redressability problem, *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 n.24 (1978), *Linda R.S.* is a case about a mismatch, perhaps even just a failure to plead a match, between harm and remedy.

There is no mismatch here. Petitioner does not seek to compel some governmental act that she hopes will catalyze some other act by a private individual.[8]

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369 U.S. at 32 (holding that plaintiffs lacked standing to enjoin a Mississippi law "since they do not allege that they have been prosecuted or threatened with prosecution").

[8] Separate and apart from her claims for damages, Ms. Lefebure did seek a declaration that the District Attorney's custom and practice of not collecting, processing, or reviewing rape kits and otherwise not investigating rapes is

(footnote continues)

She has specifically alleged, and at the motion to dismiss stage it must be taken as true, that the District Attorney's official customs and practices (amounting to a policy) of not investigating rapes caused her to be raped. If a jury agrees, there can be no doubt damages would redress (at least somewhat) such past harm. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797-98, 801-02 (2021) (recognizing even nominal damages satisfy redressability requirement).

Petitioner repeatedly alleged this nexus in her equal protection claim. *See, e.g.*, Pet. App. 133a ("Defendants D'Aquilla and Austin's deliberate, and willful and wanton conduct created a danger of an increased risk of harm to Plaintiff and other victims of sexual assault, which are disproportionately women, 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 by the West Feliciana Sheriff's Department or District Attorney."); *id.* at 134a ("As a direct and proximate result of Defendants D'Aquilla and Austin's actions, omissions, policies, practices and customs, Plaintiff was denied the rights afforded to her by the state and federal constitutions.").[9]

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unconstitutional. Pet. App. 142a-143a. She also requested, as specific implementation of a duty not to violate the Constitution, injunctive relief requiring a written policy on rape kit processing and a training program. *Id.* Whether petitioner enjoys standing with respect to such *additional* claims does not affect her right to bring separate claims for damages.

[9] Perhaps most powerfully, Boeker's wife told Ms. Lefebure that "I knew this was going to happen" and she "was not

(footnote continues)

Thus, even if *Linda R.S.* extends from the forward-looking injunction context to the backward-looking damages context, the point remains: Petitioner does not claim that she may proceed under a failure-to-prosecute theory.[10] A failure-to-protect claim and a failure-to-investigate claim, by contrast, are still viable, as every court to address the issue (except this Fifth Circuit panel) has concluded. *See, e.g.*, *Nader v. Saxbe*, 497 F.2d 676, 681, 681 n.27 (D.C. Cir. 1974) (explaining that, while *Linda R.S.* precludes standing for a plaintiff to seek the "prosecution of a particular individual," it does not prevent standing where "victims or potential victims of criminal acts sue to correct allegedly unlawful prosecutorial conduct"). Ms. Lefebure plainly pleaded failure-to-protect and failure-to-investigate theories. The complaint, Chief Judge Dick's opinion, and Judge Graves' dissent confirm that understanding. *Linda R.S.* will not bear the weight the majority placed on it.

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surprised it happened" because Boeker "had also raped her sister six years ago and another girl at a party a few years back" without consequence. Pet. App. 129a, 130a.

[10] The Fifth Circuit majority suggested petitioner sought to skirt *Linda R.S.*'s strictures by recharacterizing a failure-to-prosecute claim. Pet. App. 10a-12a. But this fails to credit Chief Judge Dick's careful parsing of the complaint or Judge Graves' similar reading of that filing. This distinction, between a claim of failure to prosecute and failure to investigate or protect, was extensively discussed during oral argument before Chief Judge Dick, where petitioner explained her position this way: "Once the state affords protection such as to victims of any kind of violence, they cannot then mete out that protection in . . . a way that violates the confines of equal protection." C.A. App. 19-30989.802. By challenging an invidiously discriminatory policy not to pick up or process rape kits, as opposed to a specific charging decision, petitioner has not sought to intrude into a traditional prosecutorial domain.

B. Subsequent developments in standing and equal protection law foreclose the majority's attempt to extend *Linda R.S.*

Linda R.S. cast its decision in terms of the standing doctrine's nexus requirement. 410 U.S. at 618 (citing *Flast v. Cohen*, 392 U.S. 83, 102 (1968)). Five years later, the Court expressly removed that broad basis for barring suits against prosecutors. In *Duke Power*, 438 U.S. at 79 n.24, the Court held that the nexus requirement is applicable only in cases of taxpayer standing. Writing for a Court unanimous as to the result and a majority as to the reasoning, Chief Justice Burger noted:

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

Id. (emphasis added).

Linda R.S. is a fact-specific case about

redressability. Suing a district attorney to compel him to prosecute a father, to get a conviction, to jail the man, to hope he emerges changed, and at the end of the day to get money is the legal equivalent of a Rube Goldberg contraption. Suing a person whose discrimination-infected past decisions were a cause of profound harm is not just direct, but classic.[11] *Carter*, 409 U.S. at 428-29 (Section 1983 "may be viewed as an effort to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the

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[11] Petitioner's complaint passes the "irreducible constitutional minimum of standing" that this Court articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and its progeny. Simply stated, *Lujan*'s familiar three-part test requires injury, causation, and redressability. *Id.* at 560-61.

First, injury: Nobody contests that petitioner suffered an injury in fact. Petitioner not only suffered horrific physical and emotional trauma as the victim of a vicious criminal assault; she suffered directly from the denial of equal protection. Specifically, petitioner expressly alleged that respondent's discriminatory "actions, omissions, practices and customs . . . violated the Fourteenth Amendment's promise of equal protection of the laws." Pet. App. 86a. *See also*, *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) (noting that the "'injury in fact' in an equal protection case of this variety is the denial of equal treatment").

Second, causation: Petitioner alleged that her attacker "knew of Defendant D'Aquilla's long-standing refusal to properly investigate sexual assault crimes against women," which emboldened him by removing any realistic fear of legal consequences. Pet. App. 133a-134a. In short, respondent's "acts led to the . . . violation of Ms. Lefebure's rights." *Id.* at 134a.

Third, and finally, redressability: The damages sought by petitioner are a classic form of redress for past harm. *Id.* at 143a. *See Uzuegbunam*, *supra*, 141 S. Ct. at 797-802.

Fourteenth Amendment might be denied by the state agencies" (quoting *Monroe*, 365 U.S. at 180)).

Developments in equal protection law have similarly foreclosed the majority's expansive reading of *Linda R.S.* The vast majority of circuit cases approving a claim for failure to investigate or failure to protect have cited Chief Justice Rehnquist's famous footnote in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 n.3 (1989): "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). Over time, this footnote became the source for expanding equal protection rights to circumstances not imagined in 1973. *See, e.g.*, *Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004) ("More recently, this court acknowledged that certain intentionally discriminatory policies, practices, and customs of law enforcement with regard to domestic assault and abuse cases may violate the Equal Protection Clause under the *DeShaney* footnote."). This change in substantive law means that, while petitioner had "no constitutional right to be protected by the state against being murdered by criminals or madmen," nevertheless "the state may not discriminate in providing such protection." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.); *Watson, supra*, 857 F.2d at 694, 695–96. This substantive right is meaningless without standing to assert it. It would be passing strange if, as among all the different kinds of government officials, prosecutors alone were

exempt from this duty.[12]

C. The majority's extension of *Linda R.S.* is unwise, particularly at this moment in history.

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

But these concerns have no application here. While the ultimate decision whether or not to prosecute a particular case rightly remains with

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[12] *See Mitchum v. Foster*, 407 U.S. 225, 239 (1972) ("It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment, against State action, . . . whether that action be executive, legislative, or judicial." (ellipsis in original)); *id.* at 241 ("'We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves i.e., the full and complete administration of justice in the courts' . . . . 'Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . (A)ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.'" (alteration in original) (quoting Cong. Globe, 42d Cong., 1st Sess., 653 (1871))).

prosecutors, that duty—like other Executive Branch functions—must be exercised consistent with constitutional norms. And a failure to protect citizens from crime based on discriminatory animus is subject to redress through damages, rather than injunctions that could effectively shift prosecutorial discretion to the judiciary.

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

Confining *Linda R.S.* to cases seeking to enjoin a district attorney to prosecute a particular person meets not only the moment, but also the history of the Equal Protection Clause and Section 1983. As Judge Graves observed in his dissent, the "selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection to their black citizens, is the prototypical denial of equal protection." Pet. App. 39a-40a (quoting *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000)) (citing *Slaughter–House Cases*, 83 U.S. 36, 70 (1872); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 349 (1985)). As Judge Graves aptly noted, "law enforcers who systematically withdraw protection from a group against which they are prejudiced" are "the original target of the equal protection clause." Pet. App. 40a (quoting *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887, 889 (7th Cir. 2012) (Posner, J., concurring)).

There is no reason to stretch *Linda R.S.*, as did the Fifth Circuit, beyond its original ambit. Discriminatory policies—like never even collecting, far less processing, rape kits—have no more place in a twenty-first century district attorney's office than in a police precinct. This Court can and should take this opportunity to make that clear.

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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