No. 13-693

In the Supreme Court of the United States

NATASHA WHITLEY,
Petitioner,
v.

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; ROBERT GRUBBS,
Respondents.

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

REPLY BRIEF OF PETITIONER NATASHA WHITLEY

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Respondents deliberately put at risk and knowingly sacrificed Whitley's constitutional rights. As the Fifth Circuit recognized, Respondents made a conscious decision "agreeing on a plan that would allow [a police officer] to continue sexually abusing Whitley for the sake of gathering additional evidence to secure his conviction." App. 13a. Their plan worked, and Whitley was repeatedly sexually assaulted during their investigation.

The Court should review the Fifth Circuit's split decision which condones these law enforcement tactics, conflicts with prior due process jurisprudence, renders the "deliberate indifference" standard ineffectual, and undermines the right to bodily integrity. The Court should decide if a victim has rights during an investigation of a state actor.

ARGUMENT

A. This case is the perfect vehicle for the Court to decide important questions on the deliberate indifference standard, limits on police practices, and victims' rights.

Whitley brought this lawsuit, under 42 U.S.C. §1983, against four law enforcement officers based on their own actions and decisions during their investigation of another police officer. Specifically, she claims that, knowing a state actor was repeatedly sexually assaulting her, Respondents made the choice not to stop the abuse, but to allow it to continue in order to use those assaults to prosecute their suspect.

While admitting Whitley was sexually assaulted, Respondents try to avoid review by wrongly claiming that the petition asks the Court to resolve factual disputes. Murray & Grubbs Br. 2, 8–13. But as this case arises from a motion to dismiss, the facts of the complaint must be accepted as true, and the issue is whether those facts state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, the relevant facts are clear: knowing a police officer was sexually abusing Whitley, Respondents decided on a plan to allow him to continue doing so in order to prosecute him for those assaults.[1]

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[1] Hanna and Bullock's argument that Hanna had no knowledge of Ariaz assaulting Whitley is not a fair reading of the complaint. Among other facts, Whitley pleaded that: (1) "Hanna knowingly subjected a minor to ongoing sexual abuse in order to catch a sexual predator and corrupt police officer in the act;" (2) "after confirming their suspicions of abuse, Hanna and Bullock

The Fifth Circuit's opinion makes clear that this case presents the perfect opportunity to decide the issues presented. The majority recognized that: (1) Respondents "participated in formulating, and endorsed, a plan dependent on catching Ariaz in the act of committing an act of sexual abuse" of Whitley; (2) their decision was to "continue surveilling Ariaz until there was actual evidence of sexual abuse" of Whitley; and (3) Whitley was sexually assaulted during the investigation. App. 17a–27a. The majority acknowledged Respondents discussed and agreed on a plan to "continue monitoring Ariaz to catch Ariaz in the act of abusing Whitley, and thus strengthen the prosecutorial case against him." App. 4a.

As the concurrence explained, this case involves the "conscious decision to allow a fifty-five-year-old law enforcement official to engage in predictable, preventable, and yet repeated sexual assaults on a fifteen-year-old." App. 36a (Elrod, J., concurring). But the majority held that such a decision does not amount to deliberate indifference because it was made in the course of a criminal investigation for the purposes of ensuring a conviction and Respondents did not themselves sexually assault Whitley. App. 11a n.2, 12a–27a.

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allowed [Whitley] to be used as bait to catch Ariaz in the act;" (3) Hanna "concluded in his mind that Ariaz was actively abusing another Explorer;" (4) "Hanna believed that Ariaz was abusing and molesting Plaintiff;" and (5) "Defendants knowingly left Plaintiff in danger of being sexually abused and assaulted by Ariaz." Moreover, knowledge of prior assaults aside, no one disputes that Respondents affirmatively planned to allow Ariaz to sexually assault Whitley in order to prosecute him.

Called on to defend that decision here, Respondents spend most of their effort trying to avoid it. Respondents instead mischaracterize Whitley's claims as alleging that Respondents should have arrested her attacker sooner, as seeking to create strict liability, or as being based on vicarious or supervisory liability. Hanna & Bullock Br. at 1, 5–10, 12; Murray & Grubbs Br. at 8–13, 16–17, 20–21. But these assertions are untrue.

Hanna and Bullock continue to argue that Whitley's claims are based on their failure to arrest Ariaz sooner. Hanna & Bullock Br. at 1–2, 5–10. But Whitley does not now and never has made that claim. As the Fifth Circuit's majority states, "Whitley has made clear that she is not premising her claim on Appellees' arresting Ariaz." App. 27a.

Whitley's claims are exactly the opposite of how Respondents characterize them. Whitley's claims are that, in their zeal to arrest Ariaz, Respondents made the decision to allow Ariaz to repeatedly sexually assault her so they could prosecute him for those crimes. Whitley claims Respondents knowingly planned for and allowed the violation of her constitutional rights.

The Fifth Circuit's majority acknowledged Respondents "had other options available to them" and that it "easily can imagine some alternatives to the choice that [Respondents] made." App. 21a n.9, 27a. Whitley is not alleging Respondents should have arrested Ariaz sooner; her lawsuit challenges Respondents' decision to knowingly sacrifice her

rights in the process, regardless of when or whether an arrest would have otherwise occurred.

Respondents' arguments that Whitley's claims would create a strict liability rule, are based on vicarious or supervisory liability, or would somehow paralyze law enforcement, are all equally misguided. Respondents point to *Castle Rock*, *Iqbal* and *DeShaney*, but none of those cases are relevant nor support their arguments. Hanna & Bullock Br. at 6–8, 12; Murray & Grubbs Br. at 20–21. Unlike *Castle Rock* and *DeShaney*, which both involved claims for protection from private violence, there is no dispute that Whitley's constitutional rights were violated when she was sexually assaulted by a state actor. And while *Castle Rock* and *DeShaney* involved claims the government failed to act, Whitley's claims are that Respondents' affirmative actions and decisions were unconstitutional. As the concurrence recognized, *DeShaney* and *Castle Rock* do not apply. App. 40a.

Likewise, Whitley's claims are not based on strict or vicarious liability. Respondents' arguments would turn *Iqbal* on its head. In *Iqbal*, the Court held that, whether in a supervisory capacity or not, liability under §1983 turns on whether a defendant's own actions violated the Constitution. *Iqbal*, 556 U.S. at 676. Under §1983, every government official is liable for his or her own misconduct. *Id.* at 677. Whitley's claims are that Respondents should be responsible for their own actions and decisions during the course of their investigation.

Section 1983 provides a remedy when police and prosecutors make decisions and take actions as part of a criminal investigation that violate constitutional rights. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484–85 (1986). A claim can be brought under §1983 when a government official, clothed with decision making authority, deliberately decides on a course of action that itself violates an individual's federal rights. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403–06 (1997). And a claim can be brought under §1983 when an official with decision-making authority decides on a course of conduct with deliberate indifference to the fact that a known and obvious consequence of that path is that an individual will suffer a deprivation of federal rights at the hands of another state actor. *Id.* at 406–07. Whitley's complaint sufficiently states a §1983 claim against Respondents for violations of her right to bodily integrity.

This case squarely presents the issues raised in the petition, and Respondents' attempts at misdirection should fail. These issues merit the Court's review, and the petition should be granted.

B. The Fifth Circuit's opinion conflicts with prior deliberate indifference jurisprudence by excusing constitutional violations for the purpose of obtaining a conviction.

While Respondents avoid defending the issues raised in the petition, the Fifth Circuit addressed them head-on. The majority acknowledged that, despite having other options available to them, Respondents decided to allow Ariaz to sexually

assault Whitley so they could prosecute him for those crimes. But the majority held that Respondents could not be found deliberately indifferent to the violation of Whitley's rights because their actions were aimed at ultimately securing Ariaz's arrest and conviction. App. 21a n.9, 22a, 24a–25a, 27a. According to the majority, Respondents could not be held to be deliberately indifferent because:

- Hanna was committed to putting an end to Ariaz's abuses once and for all, App. 20a;
- In "an ongoing effort to put Ariaz out of business" it was up to Hanna to "decide what evidence would suffice to secure a conviction," App. 22a;
- Respondents' plan depended on catching Ariaz in the act of sexually abusing Whitley because that conduct tracked the requirements of sexual assault of a child under the Texas penal code, App. 25a; and
- While other options were available—like approaching Whitley or contacting her parents—Respondents' choice to "conduct[] an investigation intended to effectuate the arrest of Ariaz" was a "permissible course of action." App. 21a n.9, 27a,

The "seeking evidence" exception to deliberate indifference created by the Fifth Circuit's opinion conflicts with the prior due process jurisprudence of this Court and the other circuits. Without citation to any authority, Respondents argue that, under the deliberate indifference standard, courts are required to weigh the violation of constitutional rights against the stated governmental interest to determine if they

are "unjustifiable by any governmental interest" or "legitimately trying to investigate a suspected crime." Murray & Grubbs Br. at 15. But the law does not allow state actors to knowingly violate due process rights in order to advance some other government interest. By improperly applying a balancing test, Respondents' approach—adopted by the Fifth Circuit—instead incorporates the very definition of "deliberate indifference."

The Court has recognized the "deliberate indifference" test is met by showing that a state actor, through his actions or failure to act, knowingly places an individual's rights at substantial risk of serious harm. *Brown*, 520 U.S. at 411; *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). While acknowledging that this case should be analyzed under the "deliberate indifference" standard, Respondents cite to the Court's *Lewis* opinion as supporting application of a balancing approach to deliberate indifference. Murray & Grubbs Br. at 9, 15. But in *Lewis* the Court rejected the application of the deliberate indifference standard, specifically pointing out that "a deliberate indifference standard does not adequately capture the importance of such competing obligations." *County of Sacramento v. Lewis*, 523 U.S. 833, 852 (1998); *see also Whitley v. Albers*, 475 U.S. 312, 320 (1986) (holding that deliberate indifference standard does not capture the importance of competing interests). In *Lewis*, the Court explained that, in situations when the deliberate standard is appropriately applied, "substantial countervailing interests" do not excuse the State from violating individual rights. *Lewis*, 523

U.S. at 851–52 ("Nor does any substantial countervailing interest excuse the State from making provision for the decent care and protection of those it locks up").

Even if the "deliberate indifference" standard did incorporate a balancing of constitutional rights versus other interests, the Fifth Circuit's approach still weighs these interests incorrectly and conflicts with this Court's and other circuits' prior due process jurisprudence. As set out more fully in Section C below, the Court has rejected the notion that law enforcement can significantly violate an individual's right to bodily integrity to gather evidence to prosecute a crime. *See, e.g., Winston v. Lee*, 470 U.S. 753, 759 (1985); *Rochin v. California*, 342 U.S. 165, 172–74 (1952).

Respondents argue that granting review would amount to "second-guessing" and "unacceptably intrude on the executive branch's deeply rooted discretion on matters of arrest and prosecution." Hanna & Bullock Br. at 5–6. But this Court has long rejected the notion that it can or should demur in deciding what restrictions the Due Process Clause places on the government's investigation and prosecution of crimes. As the Court explained in *Rochin*:

> [T]his Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those

> canons of decency and fairness which express the notions of justice . . . .'

Rochin, 342 U.S. at 169.

The Court has previously granted certiorari to address inconsistent applications of "deliberate indifference," *Farmer*, 511 U.S. at 832, and the Court should do so again here. The rules of due process are not subject to mechanical application. *Lewis*, 523 U.S. at 850. The "deliberate indifference" test is a judicial gloss and its application can vary under different circumstance. *Farmer*, 511 U.S. at 840–41. The Court has never considered whether law enforcement can deliberately plan and allow for the violation of a victim's constitutional rights in order to gather evidence. The petition should be granted for the Court to decide this important question.

C. Under the Due Process Clause, there should be no government interest sufficient to allow a state actor to rape a child.

The Fifth Circuit held that allowing Whitley to be sexually assaulted by a state actor was a permissible choice law enforcement could make in deciding what evidence would suffice to convict their suspect of a particular crime. App. 21a n.9, 22a, 25a–26a. Respondents argue their interest in investigating crime and obtaining additional evidence overrides Whitley's right to be free from sexual assault. Murray & Grubbs Br. at 1, 14–15. Respondents also argue they needed to wait until Whitley was raped in order to have enough evidence to ensure a conviction, and that they were motivated "by a desire to achieve this public-serving result." Hanna & Bullock Br. at

9–10. But the Fifth Circuit and Respondents' reasoning conflicts with this Court's substantive due process jurisprudence. Under proper due process analysis, there should be no governmental interest that justifies allowing a state actor to rape a child.

Regardless of their ultimate goal, Respondents had no justification to decide to allow Whitley to be raped. "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992). This Court has recognized that "[v]irtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny." *Maryland v. King*, 133 S.Ct. 1958, 1969 (2013) (internal citations and quotations omitted). Deliberate violations of an individual's bodily integrity by law enforcement in conducting criminal investigations raise serious due process questions. *See Rochin*, 342 U.S. at 168.

Neither the Fifth Circuit nor Respondents point to any case that sanctions government intrusion on an individual's bodily integrity even remotely close to what occurred here. The due process protections afforded under the Constitution limit how even otherwise admissible and relevant evidence can be obtained. *Rochin*, 342 U.S. at 172. "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." *Id.*

This Court has never allowed more than those government actions which "do not constitute an

unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston*, 470 U.S. at 762. "The integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. 757, 772 (1966). While the Constitution may permit "minor intrusions into an individual's body under stringently limited conditions" that "in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*

The government intrusion in this case is more than substantial. The Court has recognized that rape is a serious and highly-reprehensible crime, "both in the moral sense and in its almost total contempt for the personal integrity and autonomy of the [] victim." *Coker v. Georgia*, 433 U.S. 584, 597 (1977). The rape of any victim inflicts great injury. *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Alito, J. dissenting). As explained by Amici, rape by a state actor is an extreme violation of the victim's constitutional rights with profound impacts. Amici Br. at 14–22.

Under Fourth Amendment analysis, this Court has only found reasonable the most negligible intrusions, and the degree of intrusiveness was central to that holding. *Maryland*, 133 S.Ct. at 1969. And even then, the Court was clear that a significant governmental interest alone would not justify the intrusion unless it also outweighed the degree to which it invaded an individual's legitimate expectations of privacy. *Id*. at 1977. And, even under reasonableness analysis, a significant intrusion into an individual's body for evidence, "implicates expectations of privacy and security of such

magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston*, 470 U.S. at 759. The violation of Whitley and her constitutional right to bodily integrity—agreed to by Respondents—could not be any more intrusive or severe, and should be considered "too close to the rack and the screw to permit of constitutional differentiation." *Rochin*, 342 U.S. at 172.

As the Eighth Circuit has recognized, "No degree of sexual assault by a police officer acting under color of law could ever be proper." *Rogers v. City of Little Rock*, 152 F.3d 790, 796 (8th Cir. 1998). And as the Ninth Circuit recognized, "sexual predation" by a police officer is "unjustifiable by any government interest." *Fontana v. Haskin*, 262 F.3d 871, 882 (9th Cir. 2001). Unfortunately, as pointed out by Amici, rape by public officials abusing their authority occurs with alarming frequency. Amici's Br. at 21. But this Court has not spoken on the rights of victims during investigations of such wrongdoing. The petition should be granted for the Court to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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