No. 13-693

In the Supreme Court of the United States

NATASHA WHITLEY, PETITIONER

v.

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; ROBERT GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS HANNA AND BULLOCK IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's questions presented are premised on an inaccurate reading of her own complaint. Accepting Petitioner's well-pleaded factual allegations as true — and accepting only those factual allegations as true — the appropriate questions presented are:

1. Is there a substantive due process right to the timely arrest of a third party?

2. Even if there is such a right, may a law enforcement officer face personal liability under the deliberate-indifference standard because he should have known that a rape victim's constitutional rights were being violated, even though the officer did not have actual knowledge of the violation?

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INTRODUCTION

The petition presents a splitless plea for factbound error correction, with no error apparent. There is no substantive due process right to the timely arrest of another person. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005). But even if such a right existed, there still would be no error apparent because Petitioner's complaint alleges at most that Ranger Hanna *should have known* that a sexual assault was occurring, not that he had actual knowledge of the sexual assault. See Pet. App. 23a-24a. Actual knowledge is the touchstone of deliberate indifference; imputed knowledge is not enough. See *Farmer* v. *Brennan*, 511 U.S. 825, 838 (1994). The petition should be denied.

STATEMENT

A. Procedural Background

John Nick Hanna and Robert Bullock are Texas Rangers who investigate sex crimes. In 2007, they were asked by the Brownwood Police Department to investigate allegations that Sergeant Vince Ariaz, a local policeman, was sexually assaulting a 15-year-old girl who he had met through the Brownwood Police Department's Explorer program, an after school ride-along program sponsored by the Boy Scouts. After a months' long investigation, including video surveillance, Ranger Hanna arrested Ariaz, who pleaded guilty to two counts of sexual assault of a child and no contest to one count of indecency. Ariaz was sentenced to the statutory maximum: twenty years' imprisonment.

Soon afterward, in 2008, the victim's parents sued the City of Brownwood, its police department, its police chief, and the Boy Scouts of America. That lawsuit was dismissed by the plaintiffs upon settlement. *Whitley* v. *Ariaz, et al.*, No. 6:08-cv-085 (N.D. Tex.).

Three years later, in 2011, the victim herself brought this lawsuit against John Hanna, the Texas Ranger who conducted the investigation; Robert Bullock, his supervisor; Michael Murray, the district attorney who prosecuted Ariaz; and Robert Grubbs, the Sheriff of Brown County. USCA5 8. The complaint alleges that the defendants violated her substantive due process rights by waiting too long to arrest Ariaz. USCA5 15-16.

According to the complaint, the defendants continued to gather surveillance evidence "to better

their chance at a conviction" and thereby "knowingly allowed and provided substantial assistance to a fifty-five year old man to abuse a fifteen year old." USCA5 16. The trial court granted the defendants' motion to dismiss under Rule 12(b)(6), holding that Petitioner had failed to state a claim under section 1983. Pet. App. 52a. In the alternative, the trial court held that defendants were entitled to qualified immunity. Id. Petitioner timely filed a notice of appeal. USCA5 214.

The Fifth Circuit affirmed. Pet. App. 1a. Writing for herself and Judge Davis, Judge King observed that Petitioner's complaint never alleged facts indicating that Officer Hanna *knew* that Petitioner was being sexually abused. Pet. App. 23a-24a. And since knowledge, not suspicion, is the standard for deliberate indifference, the Fifth Circuit held that no constitutional violation occurred. *Id.* Judge Elrod concurred, stating her view that the complaint makes a plausible allegation of deliberate indifference, but that no clearly established law requires a police officer to arrest a suspect at a time certain.

B. Factual Background

The Texas Rangers is a state law-enforcement agency that assists local police with major investigations, including allegations of corruption or illegality within the police department itself. The Rangers function something like internal affairs for many local law enforcement entities, so they must be ever alert to the possibility that the charges they have been asked to investigate are a fabrication, and that the local official who requested the Rangers' assistance is the real criminal.

Texas Ranger John Hanna is an experienced and decorated sex-crimes investigator. He was recently awarded the Medal of Merit for his investigation, along with Child Protective Services and local law enforcement, of FLDS leader Warren Jeffs, who received a life sentence for his crimes. Texas Dep't of Public Safety, *DPS Honors Those Committed to Protecting Children*, July 19, 2012.

In January 2007, Ranger Hanna was asked to investigate allegations of an illegal sexual relationship between a Brownwood policeman and a 15-year-old girl who the policeman met through the Boy Scouts' Explorer program. A month later, the investigation stalled, though it remained open and active. USCA5 10-11.

A few months later, on July 3, 2007, there was a break in the case. A Brownwood police officer witnessed the 15-year old victim driving Ariaz's squad car and contacted Ranger Hanna directly. USCA5 12-13. Two days later, Ranger Hanna determined where Ariaz would park his car, and began surveillance of him. *Id.*

One week later, according to Petitioner's complaint, Ranger Hanna captured video surveillance evidence of Ariaz "hugging" and "kissing" his victim. This behavior is not a felony under Texas law. Tex. Penal Code § 21.11 (indecency with a child) (defining "sexual contact" as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child"); Tex. Penal Code § 22.021(a)(1)(B) (aggravated sexual assault) (same). The video showed further evidence suggestive of illegal sexual contact, such as Araiz leaving a

courtroom "without his belt on," and the victim leaving the same courtroom while "adjusting her shirt." USCA5 15 (complaint). Over the next five days, the surveillance continued, but only produced evidence of hugging and kissing. Id. The complaint alleges that this video footage amounted to "video proof that Plaintiff was likely being abused." USCA5 15.

On the fifth day, Ranger Hanna hid in the courtroom closet with another investigator. He witnessed Ariaz "kissing Plaintiff in the courtroom for several minutes while Plaintiff was lying down." The moment that Ariaz "place[d] his head in Plaintiff's crotch area," Ranger Hanna intervened and arrested him. USCA5 17 (complaint).

REASONS FOR DENYING THE PETITION

The Fifth Circuit's holding creates no division of authority and is correct. Petitioner makes little effort to identify even a single circuit where this case would have come out differently.

There is no division of authority because this Court's precedents are clear: There is no substantive due process right to the timely arrest of another person. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768 (2005) ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."). If the law were otherwise, courts would be put in the unenviable position of second-guessing the timing of every arrest that results in harm to an innocent third party or bystander. From federal terrorism investigations to

municipal traffic stops, such second-guessing would unacceptably intrude on the executive branch's deeply rooted discretion on matters of arrest and prosecution. The petition is a splitless and factbound plea for error correction, where no error has occurred, and it should be denied.

I. THE FIFTH CIRCUIT'S HOLDING IS CORRECT AND CREATES NO DIVISION OF AUTHORITY

A. A Constitutional Right To The Timely Arrest Of A Third Party Has Never Been Established — Let Alone Clearly Established.

The courts below correctly refused to recognize a substantive due process right to the timely arrest of another person. Indeed, we have been unable to find a single case from any jurisdiction interpreting the Fourteenth Amendment in such a manner. Nor have we found any court willing to use section 1983 (or *Bivens*) to insert itself into executive decisionmaking on facts like these. And for good reason: constitutional liability is foreclosed by a leading Supreme Court decision on the subject of executive power. *Castle Rock*, 545 U.S. at 768 (2005).

1. The policeman's decision to end her investigation and arrest a suspect is a core executive function beyond the reach of constitutional tort. Petitioner's interpretation of the Fourteenth Amendment is foreclosed by a decision of this Court that she does not cite. There is no constitutional right to have someone else arrested:

> In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger

> protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations.

Castle Rock, 545 U.S. at 768. This result stems naturally from the "deep rooted nature of law enforcement discretion." *Id.* at 761. A benefit cannot be a constitutional entitlement if executive officials may grant or deny it at their discretion. *Id.* at 756.

In many ways, this is an easier case than *Castle Rock*. There the Court was confronted with "horrible facts" that resulted from a policeman's failure to arrest a husband who violated a restraining order. The officer's failure was inexplicable in light of a Colorado statute that seemingly provided for the mandatory arrest of such violators. *Id.* at 759-60. Yet even the Colorado Legislature's command was insufficient to overcome the arrest discretion that the government vests in its police. *Id.* at 761. The Court refused to intrude on this discretion, even though the Colorado Legislature had apparently invited it to do so, but instead held that the victim had no constitutional right to have her husband arrested. *Id.* at 761-68.

A contrary rule would paralyze law enforcement and swamp the courts. Examples abound where the police, during the course of an investigation, must choose to risk an individual's safety for the greater good. Whether surveilling drug gangs or investigating child prostitution rings, federal and state officers often resist intervening in a dangerous situation, despite the escalating risk to participants and bystanders, in order to secure more evidence, or get additional criminals off the streets. See *id.* at 765 ("The serving of public rather than private ends is

the normal course of the criminal law."). This Court should have no interest in second guessing a policeman's calculated judgment to delay arrest. Here Petitioner complains that Ranger Hanna unreasonably delayed several days, but we can easily imagine a lawsuit complaining about a delay of hours, or even minutes. See *Garcetti* v. *Ceballos*, 547 U.S. 410, 422-23 (2006) (federal courts should be mindful in section 1983 lawsuits of the need to promote "the vigorous exercise of government authority").

B. Even If There Were A Constitutional Right To The Timely Arrest Of A Third Party, Officer Hanna Was Not Deliberately Indifferent Because He Had No Actual Knowledge Of The Sexual Assaults.

Petitioner's complaint alleges, at most, that Officer Hanna should have known or suspected that Arias was sexually assaulting Petitioner, it does not allege that Officer Hanna actually knew about the sexual assaults. Pet. App. 23a-24a. And actual knowledge is the standard for deliberate indifference. *Farmer* v. *Brennan*, 511 U.S. 825, 838 (1994).

Even in retrospect, Ranger Hanna's heart-wrenching decisions were reasonable. Prosecutors of sex crimes face extraordinary pressure to secure convictions without going to trial. With little hard evidence, criminal trials can devolve into swearing matches, where victims must face their abusers in court and survive the ordeal of a cross examination into their history and character. As a police officer himself, Ariaz would have known this. He also might have tried to manipulate his 15-year-old victim into lying about their "relationship." Indeed, the complaint includes disturbing detail about Ariaz

manipulating his victim with gifts and love notes. USCA5 11.

The Department of Justice takes an identical approach when investigating sex crimes involving adults and teenage victims:

> From the start of the investigation, assume that the victim and the adult may change their stories to minimize what happened to avoid prosecution. To increase the chances of successfully prosecuting the case without the victim's cooperation, investigators must rely on collecting solid evidence rather than the victim's word.

U.S Dept. of Justice, Office for Victims of Crime, Victim-Oriented Responses To Statutory Rape, Training Guide (Feb. 2000).

Even putting these challenges aside, Ranger Hanna still needed every scrap of available evidence to obtain a conviction and to assure himself that a crime was being committed. Until the moment he intervened, Ranger Hanna did not have enough evidence to convict Ariaz of the serious crime of which he appeared to be guilty. As the complaint explains, Ranger Hanna only had video evidence of "hugging," "kissing" and other suggestive behavior. See USCA5 15 ("[T]he video they had installed in the Annex hallway showed Ariaz kissing and hugging Plaintiff."); *id.* ("When Plaintiff exited she was adjusting her shirt."); *id.* ("Ariaz kissed Plaintiff eight times and hugged her on the video. One minute later, Ariaz kisses Plaintiff again two more times. One minute after that, Ariaz kissed Plaintiff again

two more times."); *id.* at 15-16 ("Ariaz kissed Plaintiff twice and placed a necklace on her neck.").

This video evidence is repulsive, but the Texas Penal Code demands more to convict. Tex. Penal Code § 21.11 (indecency with a child) (defining "sexual contact" as "any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child"); Tex. Penal Code § 22.021(a)(1)(B) (aggravated sexual assault) (same). Indeed, the complaint acknowledges that Ranger Hanna did not have actual knowledge that the victim was being sexually abused, and that there was not yet enough evidence to convict. See USCA5 15 ("In other words, as of July 12, 2007, Hanna had video proof that Plaintiff was *likely* being abused.") (emphasis added).

To secure the needed evidence, Ranger Hanna moved his video cameras to a better location and hid in a nearby closet. USCA5 15-16. He jumped out and arrested Arias the moment that he witnessed a felony. See USCA5 16-17 ("Ariaz began kissing Plaintiff in the courtroom for several minutes while Plaintiff was lying down. Then, Hanna observed him place his head in Plaintiff's 'crotch area.' Finally, Hanna intervened and exited the closet."). Because of Ranger Hanna's competent investigation, Arias pleaded guilty, before trial, to the maximum sentence. Petitioner's complaint does not deny that Ranger Hanna's delay in arresting Ariaz was motivated by a desire to achieve this public-serving result. USCA5 14, 16 (alleging that the delay was "to better their chance at conviction").

C. There Is No Division Of Authority On These Legal Principles.

Petitioner cannot identify a circuit where this case would have come out differently. Petitioner cites "bystander liability' cases from the Second and Seventh Circuit, but those cases impose liability on police officers who watch their partners abuse an arrestee. See Pet. 23 (citing *Anderson* v. *Branen*, 17 F.3d 552, 557 (2d Cir. 1994) and *Byrd* v. *Brishke*, 466 F.2d 6, 11 (7th Cir. 1972)). As *Byrd* explains, "a police officer may not ignore the duty imposed by his office and fail to stop other officers who *summarily punish* a third person . . . ."). *Byrd*, 466 F.2d at 11 (emphasis added). These bystander liability cases do not apply to a police officer, like Ranger Hanna, who is investigating another officer for a crime.

Petitioner briefed these bystander liability cases in the Fifth Circuit, arguing that Ranger Hanna "may be liable under section 1983 if he does not take reasonable measures to protect a suspect from another officer's use of excessive force." See AA Br. at 36 n.81 (citing *Hale* v. *Townley*, 45 F.3d 914, 919 (5th Cir. 1995)); *see also* Appellant's CA5 Br. at 43 ("Imagine if a Brown County Sheriff's deputy were smashing a suspect's head into the pavement as a City police officer looked on."). In *Hale*, for example, a police officer was held liable for his partner's use of excessive force because he "stood by and laughed, making no effort to stop the illegal use of force." *Hale*, 45 F.3d at 919

But the "bystander liability" doctrine has no force here. Petitioner's argument contrariwise confuses a partner with a perp. Ranger Hanna was not working with Ariaz; he was investigating him. And this

dispute is not about whether Ranger Hanna should have intervened; it is about when. No one disputes that Ranger Hanna was performing his lawful duty in witnessing Ariaz commit a crime. Ordinary police officers, by contrast, are forbidden to watch their partners break the law. Nor does plaintiff allege that Ranger Hanna was motivated by anything illegal or that he "stood by and laughed," *Hale*, 45 F.3d at 919. Indeed, the complaint acknowledges that, by delaying the arrest, Ranger Hanna was ensuring that any charges would stick — in other words, he was doing his job. See USCA5 14, 16. Petitioner urges the Court to adopt a rule that would make it nearly impossible for police officers to investigate and punish their own.

In all events, the judgment below should stand because the bystander liability doctrine, like all forms of supervisory liability, did not survive *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). *Iqbal* poses two hurdles for Petitioner's claim against Robert Bullock, which relies on a double layer of supervisory liability: First, a court must hold Ranger Hanna liable for the misdeeds of Ariaz, and then it must hold Bullock liable, in his supervisory capacity, for the bystander liability that was imputed to Ranger Hanna.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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