No. _____

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

PETITION FOR A WRIT OF CERTIORARI

JEFF EDWARDS
THE EDWARDS LAW FIRM
The Haehnel Building
1101 East 11th Street
Austin, Texas 78702
(512) 623-7727
Jeff@Edwards-Law.com

KURT KUHN
Counsel of Record
LISA BOWLIN HOBBS
KUHN HOBBS PLLC
3307 Northland Drive
Suite 310
Austin, Texas 78731
(512) 476-6000
Kurt@KuhnHobbs.com
Lisa@KuhnHobbs.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Can a victim raped by a police officer acting under color of law bring a §1983 substantive due process claim against state and local law enforcement officers and officials who, in the course of their investigation of her attacker, made the deliberate decision to build their prosecution case by allowing the victim to be repeatedly assaulted?

2. Under the deliberate indifference standard, are law enforcement officers and officials excused for knowing and intentional violations of a victim's constitutional rights in the course of investigating a state actor if the violations were committed as part of a plan to secure a conviction?

3. Is knowingly allowing a sexual assault by a state actor justifiable by any governmental interest?

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In the summer of 2007, when Natasha Whitley was only fifteen, she was repeatedly raped by a Texas police officer. Texas law enforcement knew of her plight—a Texas Ranger, a Texas Department of Public Safety lieutenant, a district attorney, and a sheriff were involved in investigating the officer whom they knew was a sexual predator using his office to find victims. Instead of trying to protect Whitley, these law enforcement officers and officials made the calculated decision to allow her to be repeatedly raped in order to build their case against her attacker. This case asks whether their decision to do so was constitutionally permissible.

Whitley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals, App. A, 1a-50a, is reported at 726 F.3d 631. The order of the district court, App. C, 52a-65a, is unreported.

JURISDICTION

The judgment of the court of appeals, App. B, 51a, was entered on August 8, 2013. A timely-filed petition for rehearing en banc was denied by the court in an order, App. E, 67a-68a, issued on September 9, 2013. The Court has jurisdiction to review this case under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides that: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, §1.

Section §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

42 U.S.C. §1983.

STATEMENT

This lawsuit was brought, under 42 U.S.C. §1983, by a statutory-rape victim alleging substantive due process claims against four law enforcement officers based on their actions during the investigation of her attacker—a police officer and sexual predator. The essence of her claims is that, knowing a state actor was repeatedly sexually assaulting her, these officers made a deliberate choice as part of their investigation not to stop the abuse, but to allow it to continue in order to use the assaults in their prosecution.

A. Facts

The City of Brownwood, Texas created Explorer Post 1150, a program to teach young participants about law enforcement. Vincent Ariaz, a fifty-five-year-old sergeant with the City of Brownwood Police Department, served as the group's advisor. In early 2007, it came to light that Ariaz was a sexual predator who was using his role with the group to find and groom young female victims.[1]

In January 2007, Ranger John Hanna, an officer with the Texas Rangers (a Texas law enforcement agency with statewide jurisdiction), began investigating claims that Ariaz had sexually abused one of the program's participants (A.M.). Hanna found credible evidence that Ariaz used his position with the program to abuse A.M. Ariaz kept A.M. late

[1] Because this case was disposed on a motion to dismiss under Rule 12(B)(6), the facts asserted herein are taken from the complaint and amended complaint which are contained in the record at R.7-23, 131-54.

with no one else around, rubbed his body against hers to arouse himself, and asked about her sexual experiences. Ariaz sent A.M. numerous sexually suggestive text messages, including suggesting they have sex at a motel. A.M. told Hanna that Ariaz had gotten her alone in a storeroom one night, closed the door and turned off the lights, and despite her protests to stop, kissed A.M. and fondled her breasts before she escaped. Hanna found A.M. credible, believed Ariaz's abuse was more extensive, and expressed concern Ariaz would abuse again.

But Hanna essentially stopped investigating. He did not interview Ariaz or put him under surveillance. He notified his supervisor, Lieutenant Robert Bullock, that he had obtained "a written statement detailing a pattern of sexual harassment, text messages of [a] sexual nature, and one incident of sexual contact." Bullock approved the report, the investigation was listed as "active," but they took no further action, and Ariaz was left in charge of the Explorer program.

Ariaz soon picked his next victim, Natasha Whitley, who was fifteen years old and in the eighth grade. As with A.M., Ariaz used the program to "groom" Whitley to be a victim by using her as an example in class, promoting her to the highest position, taking her to meals, giving her gifts, and writing her love notes. In the summer, Ariaz had Whitley ride with him in his police car on shifts at night. Police dispatchers noticed a disturbing pattern where Ariaz was stopping with Whitley for lengthy periods in isolated areas. Around June 2007, Ariaz began sexually assaulting Whitley. From that time

until his eventual arrest, Ariaz continued to sexually assault Whitley when they were together at night.

On July 3, 2007, a Brownwood police officer grew suspicious when he saw Whitley driving Ariaz's truck and learned she was riding with Ariaz on his shifts. He contacted Hanna, who resumed the investigation. Hanna quickly confirmed that Ariaz allowed Whitley to drive his vehicle, rode with her almost every night, and spent hours at a time parked with her alone in known "make out areas." But Hanna did nothing to separate Ariaz from Whitley.

On July 9, 2007, a meeting was held at the Brown County District Attorney's office to decide how to proceed. Attending the meeting were Ranger Hanna, District Attorney Michael Murray, Brown County Sheriff Bobby Grubbs, and other law enforcement officers. During the meeting, the decision was made not to separate Whitley from Ariaz. Believing their prosecution of Ariaz would be easier if they could catch him in the act of raping Whitley, the group decided not to stop Ariaz from continuing to sexually assault her. Bullock was not at the meeting, but was subsequently made aware of and sanctioned the plan. After the meeting, Whitley was repeatedly raped as the investigation continued.

From July 9 until July 16, the investigators regularly saw evidence of multiple instances of Ariaz abusing Whitley, including kissing, hugging, and other inappropriate conduct indicating sexual contact. In the early morning of July 17, Hanna hid with another investigator in the courtroom closet of the Brownwood Annex where Ariaz was known to

take Whitley. Sometime after 2:30 a.m., Hanna witnessed Whitley sitting or lying on a table with Ariaz positioned over her in a sexual manner touching her genitalia. Hanna still did not intervene, hoping to catch Ariaz involved in a more prolonged act. Ariaz left with Whitley, and Hanna remained in the Annex. Around 6:00 a.m., Ariaz returned with Whitley. Hanna observed Ariaz kissing Whitley for several minutes while she was lying down. Hanna then witnessed Ariaz place his head in her "crotch area," at which point Hanna finally intervened.

Ariaz was arrested and indicted on more than twenty-five counts of sexual assault of a child (based on his assaults of Whitley) and two counts of indecency with a child (which included his assault of A.M.). Ariaz pleaded guilty to two counts of sexual assault of a child and no contest to indecency with a child, and is serving a twenty-year prison sentence.

B. Proceedings Below

Whitley brought this lawsuit under 42 U.S.C. §1983 against Ranger Hanna, Lieutenant Bullock, District Attorney Murray, and Sheriff Grubbs based on their decision to construct their case against Ariaz at the expense of her substantive due process rights.

All four defendants filed motions to dismiss under Rule 12(b)(6) for failure to state a claim. Ranger Hanna and Lieutenant Bullock also sought qualified immunity. Respondents argued (and the district court accepted) that Whitley's claims should be rejected as if she is seeking to hold them liable for not arresting her attacker. App. 60a-61a. But nowhere in the complaint does Whitley ever make that claim.

Whitley's claims are actually the exact opposite. Whitley alleges that, in their zeal to arrest and prosecute her attacker, these law enforcement officers knowingly subverted her constitutional rights. The district court indicated that it was "important" that Officer Ariaz was employed by the Brownwood Police Department and "Defendants named in this lawsuit had no supervisory capacity over Ariaz and did not even work in the same entity." App. 62a. Finally, the district court indicated that it believed Whitley was instead really alleging a state-created danger—a theory of liability that the Fifth Circuit has, to date, never recognized. App. 63a-64a.

A partially-divided panel of the Fifth Circuit affirmed. The majority held Whitley failed to state a claim for deliberate indifference because the law enforcement officers' actions reflected a permissible choice to gather more evidence to ensure a successful prosecution. App. 12a-27a. The court separately held Whitley could not state a claim that the law enforcement officers' and officials' actions rose to the level of shocking the conscience and violating the Due Process Clause because they did not themselves sexually abuse her. App. 11a n.2. While noting it believed the case raised serious questions as to whether, given this Court's opinion in *Town of Castle Rock v. Gonzalez*, law enforcement officers and officials could ever even have a duty to act in a case such as this, the majority left that question unanswered. App. 16a n.7. Finally, the court held that, even if such a duty existed, Respondents would be entitled to qualified immunity because there was no clearly-established law saying that law

enforcement officers and officials could not, as part of an investigation of another state actor, decide to not intervene to prevent constitutional violations because they wanted instead to solidify evidence for the prosecution. App. 31a n.12.

Joining only in the judgment, the concurrence would have held that, at least as to lead investigator Ranger Hanna, the complaint stated a plausible §1983 claim. The concurrence noted that there was "no reasonable debate that Ariaz violated Whitley's constitutional rights when he sexually assaulted her." App. 38a. The concurrence honed in on the fact that "[c]ritically, the existence of an underlying constitutional violation differentiates this case from *Gonzalez* and *DeShaney*, which examined the scope of a state official's duty to interfere with private violence." App. 40a. The concurrence viewed the considered choice to prioritize prosecution over the victim's safety as stating a plausible claim of deliberate indifference to a known risk of a constitutional violation. App. 47a. Recognizing there are all sorts of law enforcement tactics which could help secure a conviction but are barred because they would violate a paramount constitutional right, the concurrence indicated that "[t]he implicit message of the majority's opinion is that an officer can escape §1983 liability for a conscious endangerment of a victim's constitutional rights, provided that he acted with good intentions." App. 45a n.8. The concurrence would still affirm on qualified immunity, finding the law not clearly established. App. 49a-50a. Whitley filed a motion for rehearing en banc, which was denied. This petition followed.

REASONS FOR GRANTING THE PETITION

It is beyond dispute that law enforcement cannot violate the constitutional rights of the accused to obtain a conviction. The same should be true for the constitutional rights of the victim.

This case presents a unique opportunity for the Court to decide the proper boundaries (if any) that victims' constitutional rights place on investigations of wrongdoing by state actors. The Court has not previously addressed the issue, nor has the Court considered the proper scope of §1983 liability for sexual misconduct by a state actor.

The Court should use this case to reject the Fifth Circuit's approach to the "deliberate indifference" standard which abrogates victims' due process rights in criminal investigations of state actors, so long as done with the goal of a conviction—which would presumably always be true. The Fifth Circuit's approach renders the "deliberate indifference" standard ineffectual and invites law enforcement misconduct. Criminal investigations should adhere to the Constitution, and constitutional violations cannot be condoned for the sake of a conviction.

A victim should be able to state a claim under §1983 when the government decides, as part of a criminal investigation, to purposely allow the victim's constitutional rights to be violated. The Fifth Circuit's opinion conflicts with the Court's and other circuit's precedent as to an individual's substantive due process right to bodily integrity. No governmental interest is sufficient to justify allowing rape by a state actor.

A. The Court should decide whether, in investigating a state actor, law enforcement can choose to knowingly allow a violation of the victim's constitutional rights.

There can be "no reasonable debate that Ariaz violated Whitley's constitutional rights when he sexually assaulted her." App. 38a (Elrod, J., concurring). The issue is whether Whitley can state a §1983 claim against the law enforcement officers and officials who were investigating Ariaz for their decision to allow him to repeatedly do so. The court of appeals' majority held that no such claim could be made because the decision to allow Ariaz to continue abusing Whitley was part of a plan to secure his eventual conviction. But such a plan is the very definition of "deliberate indifference."

1. The deliberate indifference standard should be met when an official acts or fails to act despite knowing of a substantial risk of constitutional harm.

Whitley never volunteered to be used as the sexual bait Respondents decided they wanted to prove their case against Ariaz. Instead, in the zeal to prosecute, these law enforcement officers and officials chose a course of action that allowed—in fact, expected and depended on—Whitley to suffer sexual abuse at the hands of another state actor. Law enforcement should not be allowed to make their case at the expense of a victim's constitutional rights, and the Fifth Circuit's interpretation of the "deliberate indifference" standard is misguided and dangerous.

The court of appeals' majority confused the general constitutional framework for considering Whitley's substantive due process claim. For more than sixty years, the Court, when addressing substantive due process claims, has "spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Here, however, the Fifth Circuit separated the concept of a due process claim based on actions that shock the conscience from the idea that the deliberate indifference test applies to Whitley's §1983 claim. App. 11a n.2, 12a-27a. These should not be separate inquiries—which test applies to a substantive due process claim simply turns on the circumstances under which the defendants were required to act. *Lewis*, 523 U.S. at 850-51.

While taking different routes to get there, in the end both the majority and concurrence considered Whitley's claims under the deliberate indifference standard. As the term implies, the deliberate indifference standard is sensibly employed in those instances when actual deliberation is practical. *Id.* at 851. In this case, the officers chose to allow Whitley to continue being raped by Ariaz as part of an investigation that spanned six months and included the July 9 meeting in which they actively deliberated how to proceed. This is exactly the type of circumstances in which "deliberate indifference" analysis applies.

Under §1983, the analysis is whether the government's actions reflect "deliberate indifference to the risk that a violation of a particular

constitutional or statutory right will follow that decision." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 411 (1997). The actions of law enforcement in this case demonstrate a deliberate indifference to the risks posed to Whitley's substantive due process rights. The Fifth Circuit's deliberate indifference analysis in this case, which adds an escape valve for knowingly placing constitutional rights at risk for a presumed greater good, is contrary to existing precedent from the Court, as well as the decisions of other Circuits.

Deliberate indifference is a stringent standard of fault, requiring proof that the state actor disregarded a known or obvious consequence of his action. *Connick v. Thompson*, 131 S.Ct. 1350, 1360 (2011). While deliberate indifference "entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). The standard for deliberate indifference is met without showing that the official acted or failed to act believing the harm actually would occur; "it is enough that the official acted or waited to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. The deliberate indifference standard is met when, despite a lack of an emergency situation, officials knowingly subject the plaintiff to a substantial risk of harm. *Hope v. Pelzer,* 536 U.S. 730, 738 (2002). Under a deliberate indifference standard, the subjective state of mind can be inferred when the risk of harm is obvious. *Id.* at 738. Here, the risk of harm to

Whitley's constitutional rights was obvious and deliberate—the intended plan was to allow Ariaz to abuse Whitley.

Correctly applied, the deliberate indifference standard is met by Whitley's claim that these law enforcement officers and officials knowingly decided to allow Whitley, then a minor, to continue to be repeatedly sexually assaulted by a 55-year-old police officer in order to aid in their prosecution against him. Whitley's allegations in this case are sufficient to state a claim under §1983 because Respondents' actions during their investigation were deliberately indifferent to the violation of her substantive due process right to bodily integrity. The Court has held that 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. *Brown*, 520 U.S. at 403–06. And, likewise, 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. The Court had "little difficulty" in determining that a §1983 case should not be dismissed when the allegation is that a prosecutor and police officers made decisions and carried out actions as part of a criminal investigation that violated constitutional rights. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484–85 (1986). The same should be true in this case—Respondents should not be able to take actions

in the course of their investigation of Ariaz knowing that the likely result will be the violation of Whitley's constitutional rights.

The allegation in this case is that these law enforcement officials decided to follow a course of conduct with deliberate indifference to the fact that a known and obvious consequence of that path was that Whitley would suffer a deprivation of her constitutional rights at the hands of another state actor. Law enforcement officers should not be able to, without subjecting themselves to §1983 liability, make such a choice.

2. The deliberate indifference standard should not excuse constitutional violations for the purpose of obtaining a conviction.

Despite the prevalence of the deliberative indifference standard, Petitioner has been unable to find any prior case—and neither the court of appeals nor Respondents cite to any—supporting an exception to deliberate indifference based on law enforcement officers' desire to prosecute. This is not a case about negligent acts or an inadvertent failure. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976). This is not a case about an ineffective effort to prevent the abuse. *See, e.g., Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 458 (5th Cir. 1994) (en banc). Here, the allegation is that these law enforcement officers and officials deliberately chose to allow the violation of Whitley's constitutional rights because they wanted the evidence to aid in their investigation and prosecution of a state actor. Despite no emergency situation and clear opportunity to easily intervene

and prevent Whitley from being further raped by Ariaz, Respondents deliberated and decided not to do so. Nor did they attempt less drastic means that did not rely on violating constitutional rights. In an effort to "get their man," these law enforcement officers and officials made the deliberate choice to sacrifice Whitley's constitutional rights. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853. The Court should use this case to make clear that intentionally choosing a course that inevitably leads to a violation of a victim's rights is not a constitutionally permissible investigatory path.

Every law enforcement investigation is subject to constitutional limitations. Law enforcement officers cannot condone constitutional violations for the sake of winning a conviction. Our government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S.,* 295 U.S. 78, 88 (1935). As such, in a criminal prosecution, the aim of the law is twofold: "that guilt shall not escape or innocence suffer." *Id*. Even if done in the name of a perceived greater good, the "ends justify the means" approach of law enforcement endorsed in this case is wholly contrary to that interest. *See U.S. v. Helmandollar*, 852 F.2d 498, 501–02 (9th Cir. 1988).

State and local law enforcement are not free to ignore constitutional rights simply because doing so would make obtaining a criminal conviction easier. By their very nature, due process rights granted by the Constitution are "restrictions upon the manner in

which the States may enforce their penal codes." *Rochin v. California*, 342 U.S. 165, 168 (1952). Such due process limitations on state actors are "only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct." *Id.* at 173.

When in the course of an investigation and not under haste, law enforcement makes a deliberate decision to violate an individual's constitutional rights, that action should raise the potential for §1983 liability. *See Pembaur*, 475 U.S. at 484–85. Neither prosecutors nor police are immune from §1983 liability for the actions they undertake in their investigatory capacity. *See Hartman v. Moore*, 547 U.S. 250, 262 n.8 (2006). And law enforcement cannot avoid liability simply by claiming there is no identical prior case holding the exact egregious decision to be actionable. *United States v. Lanier*, 520 U.S. 259, 268-71 (1997). In reality, the lack of an identical case is because the "'easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose the officials would be immune from damages.'" *Id.* (*quoting K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)). The law is clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. And here, the only potentially novel aspect of the case is the decision made by law enforcement itself.

Obviously, not every assault by a third party results in a claim for liability against the police. For

instance, as the Sixth Circuit has recognized, no claim of deliberate indifference can be asserted based on an assault that occurred as the result of negligent police actions. *Nobles v. Brown*, 985 F.2d 235, 236 (6th Cir. 1992) ("However derelict in their duties the defendant prison officials may have been here, it cannot be said that they deliberately decided to have plaintiff Nobles taken captive and raped, in the way that the defendant in *Rochin*, for example, deliberately decided to have the plaintiff prisoner's stomach pumped."). But this is not a case alleging that Whitley was raped because the police were negligent. Instead, the claim here is that because the law enforcement officers and officials "knew that Plaintiff was being assaulted, this may constitute a violation of her liberty interest under the due process clause of the Fourteenth Amendment." *Callis v. Sellars*, 931 F.Supp. 504, 517–19 (S.D. Tex. 1996) (holding that woman who agreed to participate in internal affairs sting to catch abusive police officer might be able to state a due process violation if the monitoring police failed to intervene knowing that she was being assaulted, but not based on isolated negligent failure). Here, the facts are exactly what the Sixth Circuit said that the *Nobles* case was not—here, the allegation is that law enforcement deliberately decided to allow Whitley to be raped.

The deliberate indifference standard has been applied by the Court in a variety of circumstances. For example, under §1983, the Court held that a municipality could be liable for inadequately training its police when the failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Also under §1983, the Court held that a municipality could be held liable for inadequate screening in the hiring of a law enforcement officer if they were deliberately indifferent to evidence that the officer was highly likely to inflict the particular injury suffered by the plaintiff. *Brown*, 520 U.S. at 406–13. Under the Eighth Amendment, the Court held that a prison official can be liable for being deliberately indifferent in disregarding a known risk that an inmate may be subject to rape at the hands of another. *Farmer*, 811 U.S. at 836-38. Under Title IX, the Court held that an appropriate official in an educational institution can be held liable if they acted with deliberate indifference in refusing to take action to remedy sexual harassment by a teacher of a student. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998). And also under Title IX, the Court held that a school board could be liable for deliberate indifference to known student-on-student harassment if their actions cause students to undergo harassment or make them more vulnerable to it. *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 642-45 (1999). Despite the fact that the Court has repeatedly applied the deliberate indifference test in numerous contexts, in none of those cases has the Court indicated, as the Fifth Circuit held here, that officials could be categorically excused for taking actions they knew would result in a violation of constitutional rights.

While it may be difficult in some cases to prosecute child sex offenders, and the work of law

enforcement officers in most cases may be laudable, those truisms do not support allowing law enforcement officers and officials to decide to violate the constitutional rights of child sex crime victims in order to make their job easier. As the concurrence recognized below:

> No matter how well-intended, investigatory and prosecutorial strategies must yield to the inviolable constitutional rights of those involved (typically the defendant, but here the victim). "While the difficulties of law enforcement are great, police investigations cannot be allowed to subordinate the rights of men and women under our Constitution. This principle runs deep in our jurisprudence, and we will stand by it until time has tolled its last bell."

App. 45a-46a (Elrod, J., concurring) (*quoting Melear v. Spears*, 862 F.2d 1177, 1186–87 (5th Cir. 1989)).

The fact that Respondents were seeking to prosecute and convict a state actor does not excuse their deliberate decision to do so by allowing the violation of Whitley's constitutional rights. The Court should use this case to say that there is no exception to the deliberate indifference standard based on a claim that the actions were taken in the course of a criminal investigation.

B. The Court should take this case to hold that allowing a sexual assault by a state actor is unjustifiable by any government interest.

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 participant in a law-enforcement-learning program." App. 36a (Elrod, J., concurring). But the Fifth Circuit 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 the child. App. 11a n.2, 12a–27a. The Fifth Circuit's understanding is that law enforcement is justified in deciding to stand by and allow a rape by a state actor if they believe doing so will help to ensure his eventual prosecution. As the concurrence reads the opinion, "[t]he implicit message in the majority opinion's deliberate-indifference analysis is that an officer can escape §1983 liability for a conscious endangerment of a victim's constitutional rights, provided that he acted with good intentions." App. 44a. The Court should grant review to say that, no matter what the intentions or the standard involved, allowing rape by a state actor is unjustifiable by any governmental interest.

The Court has recognized that the integrity of an individual's person is a cherished value in our society. *Schmerber v. California*, 384 U.S. 757, 772 (1966). The right to ultimate bodily security is the most fundamental aspect of personal privacy, and

numerous cases in a variety of contexts recognize "as a last line of defense against those literally outrageous abuses of official power." *Hall v. Tawney*, 621 F.2d 607, 613 (6th Cir. 1980). "However it is captioned, the essence of plaintiff's constitutional claim is that [s]he was denied [her] right not to have unwanted and dangerous things done to [her] body. We are satisfied that compensation is available under section 1983 for such a claim." *Clark v. Taylor*, 710 F.2d 4, 8 (1st Cir. 1983).

There can never be any legitimate government justification to allow a rape by a state actor. As both the Eighth and Ninth Circuits have recognized, rape by a state actor falls at the extreme end of egregious conduct and is "unjustifiable by any government interest." *Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (quoting *Lewis*, 523 U.S. at 849); *Fontana v. Haskin*, 262 F.3d 871, 882 (9th Cir. 2001) (holding that a police officer's sexual harassment of arrestee was "sexual predation" that was unjustifiable by any government interest and, if proved, would be "egregious and outrageous and shocks the conscience as a matter of law."). Sexual assault by a police officer acting under color of law is a violation of the right to bodily integrity that is conscious shocking. *Rogers*, 152 F.3d at 797. "No degree of sexual assault by a police officer acting under color of law could ever be proper." *Id.* at 796.

Allowing Whitley's constitutional right to bodily integrity to be violated cannot be justified based on the desire to obtain a conviction of her attacker. The Court has held that an intrusion into an individual's body for evidence violates the Constitution even if it

is likely to produce evidence of a crime. *Winston v. Lee*, 470 U.S. 756, 759 (1985). In fact, in the seminal bodily integrity case, the Court rejected, on due process grounds, evidence gathered in an investigation offered to support a criminal conviction. *Rochin*, 342 U.S. at 172. As the Court explained, the desire to obtain a criminal conviction does not excuse the due process requirement that "States in their prosecutions respect certain decencies of civilized conduct." *Id.* at 173. The same is true here.

In the case of sexual assault of a student by a teacher in the school context, the Fifth Circuit previously had "little trouble" concluding that allegations by a victim that she was sexually assaulted by a state actor are sufficient to state a constitutional claim under §1983 for violation of her right to bodily integrity. *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir. 1995). And the Fifth Circuit recognized that liability can attach to state actors other than just the perpetrator for their actions or failure to act, if state law placed on them a duty to act to prevent the harm. *Id.* at 1407–15. The rule should be no different here simply because the case involves police instead of teachers. Law enforcement officers and officials should be just as liable for deciding to allow the rape of a child by a state actor as any other responsible government actor.

Texas law places a duty on each of these law enforcement officers and officials to prevent the rape of a child. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 800 (Tex. 2006) (Brister, J., concurring) ("Texas law imposes certain duties on peace officers . . . .

Peace officers have a duty to prevent crime and arrest offenders . . . . peace officers exercise a nondelgable duty that is imposed by state law"); TEX. CODE CRIM. P. art. 2.13 (duties of "peace officers"); TEX. CODE CRIM. P. art. 2.12 (defining "peace officers"); Tex. Att'y Gen. Op. H–167 (Nov. 30, 1973) (county attorneys in investigatory capacity are "peace officers").

Moreover, a law enforcement official also violates an individual's federal rights when he has both knowledge of and an opportunity to prevent, but makes no attempt to prevent, another officer from violating the individual's rights. *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). While the court of appeals held to the contrary, App.27a-32a, actual presence at the scene of the rape should not be required for liability to attach. In the leading case on a law enforcement agent's duty to intervene, the Seventh Circuit found that police officers who ignored *known* assaults by other officers could be held liable under Section 1983:

> We believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence *or otherwise within his knowledge*.

Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) (emphasis added). In addition to having a state law statutory duty to attempt to prevent the rape of Whitley, these law enforcement officers, when they have both knowledge of the facts and ample

opportunity to prevent the harm, should also have an affirmative duty to try to prevent another police officer from violating Whitley's constitutional rights. But here, they did the exact opposite—deliberately choosing to stand by while anticipating and expecting Whitley to be raped by a state actor.

This case provides the Court with an important opportunity to decide the rights of a victim to be free from sexual assault by a state actor. Preserving the proper constitutional proportions of substantive due process depends on the courts providing exacting analysis of the circumstances. *Lewis*, 523 U.S. at 850. The Court has not yet addressed under what circumstances a sexual assault committed by a state actor may give rise to an actionable substantive due process claim under §1983. *Hawkins v. Holloway*, 316 F.3d 777, 784 (8th Cir. 2003). While the Court has not previously considered the question, a number of the circuit courts have found due process violations when state actors inflict sexual abuse on individuals. *Rogers*, 152 F.3d at 795-96 (listing cases). This case provides the Court the opportunity to decide the degree to which a sexual assault by a state actor may give rise to an actionable substantive due process claim under §1983. Knowingly allowing sexual assault by a state actor—as was done here—should not be justifiable in any context or for any reason, and the courts cannot defer to law enforcement to determine when a victim's constitutional rights should be protected and when they should not. The Court should use this case to decide the proper scope of a substantive due process claim based on knowingly allowing a rape by a state actor.

CONCLUSION

The constitutional rights of victims should be no less important than those of the accused. The diverging views expressed by the Fifth Circuit's panel involve important constitutional questions that affect the limits on legitimate police practices, victims' rights, and the separation of powers between the executive and the judiciary. The Court should use this case to decide these issues. The petition for a writ of certiorari should be granted.

Respectfully submitted,

KURT KUHN
Counsel of Record
LISA BOWLIN HOBBS
KUHN HOBBS PLLC
3307 Northland Drive
Suite 310
Austin, Texas 78731
(512) 476-6000
Kurt@KuhnHobbs.com
Lisa@KuhnHobbs.com

JEFF EDWARDS
THE EDWARDS LAW FIRM
The Haehnel Building
1101 East 11th Street
Austin, Texas 78702
(512) 623-7727
Jeff@Edwards-Law.com

December 5, 2013 COUNSEL FOR PETITIONER

APPENDIX A

August 8, 2013

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 12-10312

NATASHA WHITLEY, Plaintiff - Appellant,

v.

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; ROBERT GRUBBS, Defendants - Appellees.

Appeal from the United States District Court for the Northern District of Texas

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Before KING, DAVIS, and ELROD, Circuit Judges.

KING, Circuit Judge.

Plaintiff-Appellant Natasha Whitley appeals the dismissal of her 42 U.S.C. § 1983 action and the denial of her motion to amend her complaint. Whitley's claims arise out of former City of Brownwood police sergeant Vincent Ariaz's sexual abuse of her. Defendants–Appellees John Hanna, Robert Bullock, Michael Murray, and Robert Grubbs were state officers involved in the investigation and arrest of Ariaz. Whitley argues that Appellees failed

adequately to protect her from Ariaz, and used her as "sexual bait" to strengthen their prosecutorial case against him. The district court granted Appellees' motions to dismiss after finding that Whitley failed to state a § 1983 claim and that Appellees would be entitled to qualified immunity. It also denied Whitley's motion to amend her complaint. For the following reasons, we AFFIRM the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2000, the City of Brownwood created Explorer Post 1150 as part of the "Explorers" program—a school- and work-based program to introduce young people to various vocations. Explorer Post 1150 was established to teach participants about law enforcement, including police training and operations. Vincent Ariaz, a then-sergeant with the City of Brownwood Police Department, acted as Explorer Post 1150's advisor. In January 2007, Ariaz was investigated for alleged abuse of one of the program's female participants ("A.M."). A Brownwood police officer, together with appellee Texas Ranger John Hanna, conducted the investigation.

Hanna interviewed A.M., and learned that Ariaz would use her as an example for activities like handcuffing and have her stay late when no one else was around. Hanna also discovered from A.M. that Ariaz would rub his body against hers and ask her about her sexual experiences. A.M. further informed Hanna of an incident in which she and Ariaz were alone in a storeroom. Ariaz allegedly closed the door,

turned off the lights, and proceeded to kiss A.M. and fondle her breasts. Despite A.M. telling him to stop, Ariaz continued until she was able to make noise and escape. A.M.'s mother and her then-boyfriend also told Hanna that Ariaz had sent A.M. numerous sexually suggestive text messages, including proposing having sex in a motel room. The boyfriend also lodged a complaint against Ariaz, to no apparent effect. An affidavit by another police officer stated that Ariaz had expressed a desire to engage in different sexual acts with a young girl.

Whitley's allegations do not disclose what action, if any, the City of Brownwood or the Brownwood Police Department took in response to Hanna's investigation or Ariaz's conduct. We do know that Ariaz continued as a police officer for the City of Brownwood. Hanna, following his investigation, notified his lieutenant, appellee Robert Bullock, that he had obtained a "written statement detailing a pattern of sexual harassment, text messages of [a] sexual nature, and one incident of sexual contact." The report was approved by Bullock on February 19, 2007, and stated that the investigation "would remain active."

Sometime thereafter, Ariaz's attention shifted to another Explorers participant—fifteen-year-old appellant Natasha Whitley. Ariaz began "grooming" Whitley by giving her gifts, promoting her to the highest position in the Explorer post, repeatedly using her as his example in class, and writing her love notes that she kept in her Explorers locker.

Ariaz's advances grew progressively more intimate and eventually became sexual around June 2007.

Although various individuals were aware that Ariaz was engaging in suspicious conduct, it does not appear that Hanna learned of this until July 3, when another member of the Brownwood Police Department, Richard Williams, noticed Whitley driving Ariaz's truck and questioned her. In the course of speaking with her, Williams learned that Ariaz and Whitley drove together on a nightly basis. Williams thereupon contacted Hanna, who resumed his investigation and quickly confirmed that Ariaz allowed Whitley to drive his vehicle, rode with her almost every night, and spent hours with her parked in locations that were secluded or known "make out" areas.

On July 9, Hanna met with the Brown County District Attorney, appellee Michael Murray, and the Brown County Sheriff, appellee Bobby Grubbs. Also present were Brown County's Assistant District Attorney, a District Attorney investigator, the Brown County Chief Deputy, a sergeant with the Texas Department of Public Safety, a Brownwood police sergeant, and members of the West Central Interlocal Drug Task Force. The group discussed Hanna's investigation into Ariaz's conduct and agreed that Hanna would continue monitoring Ariaz to catch Ariaz in the act of abusing Whitley, and thus strengthen the prosecutorial case against him. Bullock endorsed the plan after Hanna informed him of the July 9 meeting.

Hanna proceeded to install video surveillance cameras in the hallways of the Brownwood Annex building—one of the locations Ariaz was known to take Whitley. Hanna also initiated GPS surveillance of Ariaz's car. On July 10 and 11, Ariaz was observed with Whitley in the Annex building. Ariaz repeatedly hugged and kissed Whitley. Ariaz also was observed entering an Annex building courtroom where Whitley was waiting, and later exiting without his belt, followed by Whitley, who emerged adjusting her shirt. Ariaz and Whitley were known to spend lengthy periods of time in the Annex building courtroom. Hanna informed Bullock, Murray, and Grubbs of these events.

On July 12, Hanna assembled three two-man teams to surveil Ariaz and Whitley. Over the following days, Ariaz and Whitley repeatedly were observed engaging in the previously documented conduct. On July 17, Hanna and another investigator hid themselves in the closet of the courtroom Ariaz and Whitley previously had entered. Sometime after 2:30 a.m., Hanna witnessed Whitley sitting or lying on a table with Ariaz positioned over her. Ariaz and Whitley then left, but returned at 6:13 a.m. Whitley lay down, and Ariaz proceeded to kiss her for several minutes. He then placed his head in Whitley's "crotch area," whereupon Hanna exited the closet and intervened. Ariaz was arrested and indicted on more than twenty-five counts of sexual assault of a child and two counts of indecency with a child.[1] He

[1] The indecency with a child counts appear related to Ariaz's conduct with A.M. in January 2007.

ultimately pleaded guilty to two counts of sexual assault of a child and no contest to indecency with a child. Ariaz currently is serving a twenty-year prison sentence.

On November 3, 2008, Whitley's parents filed suit in federal district court against, among others, the City of Brownwood, the Brownwood Police Department, the Brownwood Chief of Police, and the Boy Scouts of America, in an action styled *Whitley v. Ariaz, et al.,* No. 6:08–CV–85–C. That lawsuit was dismissed upon settlement.

On August 19, 2011, Whitley herself filed suit against Hanna and Bullock, in their individual capacities, and against Murray and Grubbs in their individual and official capacities (collectively, "Appellees"). Whitley also sought declaratory and injunctive relief against Appellees in their official capacities. Her complaint primarily contended that Appellees violated her constitutional rights by failing timely to intervene to stop Ariaz's abuse of her.

Murray and Grubbs filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) on September 13. On the same day, Hanna and Bullock filed a separate motion to dismiss for failure to state a claim under Rule 12(b)(6), in which they asserted qualified immunity. Subsequently, Murray and Grubbs filed an original answer in which they also raised a qualified immunity defense. Following the filing of Appellees' motions to dismiss, Whitley filed a motion to amend her complaint.

In an order entered on February 21, 2012, the district court granted both motions to dismiss and denied Whitley's motion to amend her complaint. The district court began by reviewing the proposed amended complaint and concluded that the amendments were "nothing more than reiterations of the original § 1983 claim premised upon substantive due process rights." The court viewed the proposed amendments only as alleging that Appellees engaged in a conspiracy to deprive Whitley of her constitutional rights, a claim that was not actionable under § 1983 without an underlying constitutional violation. Further, it found that "the proposed additional facts that [Whitley] wishes to add to her pleadings do nothing to change the claims brought by [her]." Accordingly, the district court held that granting Whitley's motion to amend her complaint would be futile and denied her motion.

Turning to Appellees' motions to dismiss, the district court found that dismissal was warranted. "At the heart of the allegations is [Whitley's] claim that the [Appellees] should have concluded their investigation sooner and arrested Ariaz sooner, thus preventing further sexual acts against her." The court determined that Whitley's § 1983 claims failed because there was no constitutional right to have criminal charges filed against someone or to have that person investigated.

The district court likewise was unpersuaded by what it construed as Whitley's attempts to establish supervisory liability over Appellees. First, to the extent Appellees were involved in Ariaz's misconduct,

the district court found that they actively were investigating him and thus their behavior did not fall within the purview of cases that permitted claims against state actors who failed to protect victims from harm. Second, the district court noted that Appellees did not supervise Ariaz and actually were employed by completely separate entities. Properly construed, the district court reasoned, Whitley's allegations really fell under a "state-created-danger theory," because Appellees—as state actors—allegedly acted with deliberate indifference in creating or increasing a danger to her. But such a theory also requires that the state actors create an opportunity that otherwise would not have existed, which the district court found was not the case. Further, it noted that this circuit has declined to adopt a state-created-danger theory to trigger affirmative duties under the Due Process Clause. The district court thus granted Appellees' motions to dismiss.

Whitley timely filed a notice of appeal on March 15, 2012, asserting that the district court erroneously granted Appellees' motions to dismiss her § 1983 claims and denied her motion to amend her complaint.

II. STANDARD OF REVIEW

This court reviews a district court's grant of a motion to dismiss de novo. *Bowlby v. City of Aberdeen*, Miss., 681 F.3d 215, 219 (5th Cir.2012). The grant of a motion to dismiss based on qualified immunity similarly is reviewed de novo. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir.2008). We accept all well-pleaded facts as true and view those facts in

the light most favorable to the plaintiff. *Bowlby*, 681 F.3d at 219 (citation omitted). The facts taken as true must, however, "state a claim that is plausible on its face." *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir.2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is insufficient if it offers only "labels and conclusions," or "a formulaic recitation of the elements of a cause of action." Id. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

We review a district court's denial of a motion for leave to file an amended complaint for abuse of discretion. *City of Clinton, Ark. v. Pilgrim's Pride Corp.,* 632 F.3d 148, 152 (5th Cir.2010). However, where a district court's denial solely was based on futility, this court applies a de novo standard identical, in practice, to the standard used for reviewing a motion to dismiss for failure to state a claim. *See Wilson v. Bruks–Klockner, Inc.,* 602 F.3d 363, 368 (5th Cir.2010).

III. APPLICABLE LAW

A. Section 1983

Section 1983 provides a claim against anyone who "under color of any statute, ordinance, regulation, custom, or usage, of any State" violates another's constitutional rights. 42 U.S.C. § 1983. "To state a section 1983 claim, 'a plaintiff must (1) allege a violation of a right secured by the Constitution or

laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.' " *James v. Tex. Collin Cnty.,* 535 F.3d 365, 373 (5th Cir.2008) (quoting *Moore v. Willis Indep. Sch. Dist.,* 233 F.3d 871, 874 (5th Cir.2000)).

B. Qualified Immunity

"The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson,* 659 F.3d 359, 370 (5th Cir.2011) (en banc). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs,* 475 U.S. 335, 341 (1986), and courts will not deny immunity unless "existing precedent ... placed the statutory or constitutional question beyond debate," *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2083 (2011). Therefore, a plaintiff seeking to overcome qualified immunity must show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Id.* at 2080 (citation omitted). A court has discretion to decide which prong to consider first. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009).

IV. DISCUSSION

On appeal, Whitley presents two theories of liability she asserts warrant reversal of the district court's decision. First, relying on our decision in *Doe v. Taylor Independent School District,* 15 F.3d 443 (5th Cir.1994) (en banc), Whitley argues that

Appellees are liable under § 1983 for acting with deliberate indifference to her constitutional rights by engaging in an investigation premised on catching Ariaz (the primary constitutional wrongdoer) in the act of abusing her. Second, citing to *Hale v. Townley,* 45 F.3d 914 (5th Cir.1995), Whitley asserts that Appellees are liable under § 1983 under a theory of bystander liability because they failed to stop Ariaz, a fellow officer, from violating Whitley's fundamental liberty interest in her bodily integrity.[2] Lastly, Whitley contends that the district court erred in denying her motion to amend her complaint.

We address each of her theories below, and conclude that Whitley fails to state a claim under

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[2] Whitley also asserts that she has sufficiently stated a constitutional violation under *Rochin v. California,* because Appellees' conduct shocked the conscience. *See* 342 U.S. 165, 166, 172–74 (1952) (conduct "shock[ed] the conscience" and violated the Due Process Clause where arresting police officers ordered doctors to pump suspect's stomach to induce him to vomit two morphine capsules). During oral argument, Whitley expressly limited the grounds on which she sought relief and it thus is unclear whether she is still pursuing a claim under *Rochin*'s shocks-the-conscience standard.

As will be discussed, however, the alleged facts do not rise to the level of shocking the conscience: Whitley has not alleged that Appellees themselves sexually abused her; at best, she has shown that Appellees conducted a deficient investigation and failed to intervene earlier. Such circumstances do not conform to the extreme cases in which the shocks-the-conscience standard typically has been satisfied. *See, e.g., Morris v. Dearborne,* 181 F.3d 657, 668 (5th Cir.1999) (teacher fabricated sexual abuse charges against a student's father); *Rogers v. City of Little Rock, Ark.,* 152 F.3d 790, 797 (8th Cir.1998) (police officer raped woman in her house after stopping her for traffic violation).

either her deliberate indifference or bystander liability theory.[3] Our conclusion that Whitley fails to state a claim as to any of the Appellees also resolves the question of qualified immunity raised in Hanna and Bullock's motion to dismiss.[4] *See Lytle v. Bexar Cnty., Tex.,* 560 F.3d 404, 410 (5th Cir.2009) ("If we determine that the alleged conduct did not violate a constitutional right, our inquiry ceases because there is no constitutional violation for which the government official would need qualified immunity."); *Hampton v. Oktibbeha Cnty. Sheriff Dep't,* 480 F.3d 358, 363 (5th Cir.2007). Finally, we hold that the district court correctly denied Whitley's motion to amend her complaint.

A. Deliberate Indifference

Whitley's first basis for establishing liability under § 1983 is "the decision by [Appellees] as part of their investigation, to knowingly allow Whitley to be

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[3] To the extent Whitley asserts claims against Appellees in their official capacities, we find such claims also fail for lack of an underlying constitutional violation. *See Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir.2001) (municipal liability under § 1983 requires "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." (citation omitted)).

[4] The district court seemingly conflated Appellees' motions to dismiss as "Motions to Dismiss Based Upon Qualified Immunity," despite only Hanna and Bullock asserting qualified immunity in their motion. Importantly, however, the district found that Whitley "failed to state a claim under § 1983 against the [Appellees], and certainly not such that would overcome their assertion of qualified immunity." Accordingly, it appears that the district court sufficiently addressed both motions to dismiss.

repeatedly raped by another police officer." Put another way, Appellees purportedly acted with deliberate indifference by agreeing on a plan that would allow Ariaz to continue sexually abusing Whitley for the sake of gathering additional evidence to secure his conviction.[5] In support, Whitley primarily relies on our decision in *Taylor,* 15 F.3d 443.[6]

In *Taylor,* we considered whether a school's principal and the district's superintendent could be

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[5] Whitley's allegations resemble—and the district court actually understood her to assert—a claim under a state-created-danger theory of liability, by which state actors may be held liable when "the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon v. City of Columbia,* 305 F.3d 314, 324 (5th Cir.2002). Given Whitley's allegation that Appellees put her in harm's way in order to secure Ariaz's conviction, the district court's interpretation is understandable. However, this court has not adopted the state-created-danger theory, *Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys,* 675 F.3d 849, 865 (5th Cir.2012) (en banc), and Whitley wisely has disclaimed reliance on it.

[6] Whitley also relies on the Supreme Court's decision in *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986). Whitley first refers to this case in her reply brief and then only for the proposition that "a § 1983 case should not be dismissed when the allegation is that a prosecutor and police officers made decisions and carried out actions as part of a criminal investigation that violated constitutional rights." The problem with Whitley's argument is that it assumes the very thing she seeks to prove—that it was a constitutional violation for Appellees to delay removing Whitley from Ariaz's presence to collect additional evidence. By contrast, the county prosecutor in *Pembaur* ordered deputy sheriffs to forcibly enter a clinic in violation of a doctor's Fourth Amendment rights. *Id.* at 484.

held liable under § 1983 for failing to prevent a high school coach from manipulating a fifteen-year-old student over several months into repeatedly having sexual intercourse with him. *Id.* at 446–49. In affirming the district court's denial of qualified immunity to the principal, but reversing the denial of qualified immunity to the superintendent, we held that:

> A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that:
>
> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Taylor, 15 F.3d at 454.

Subsequently, in *Doe v. Rains County Independent School District,* 66 F.3d 1402 (5th Cir.1995), we expanded our holding in *Taylor* to include non-supervisory state officers. We determined that "once

... a constitutional violation has occurred, we are no longer barred from finding another person liable under § 1983 for committing a state-law breach that caused the constitutional injury, even if the breach itself does not independently satisfy the elements of a constitutional claim." *Id.* at 1409. We reached this conclusion by "ask[ing] what it is about a supervisor's duties and functions that renders a state supervisory official liable for a constitutional deprivation by a subordinate." *Id.* at 1410. We concluded that "it is state law's grant of a right of legal control over the immediate perpetrator of an injury that establishes that a state supervisor possessed and exercised state authority." *Id.* at 1413. The "critical question" in determining whether a non-supervisory state actor may be held liable thus is "whether state law has reposed in a defendant enough responsibility for the underlying conduct that she can be said to have caused the injury herself." *Id.* at 1408.

Accordingly, Whitley must show that (1) Appellees knew of a pattern of constitutional deprivations; (2) the abuse was caused by a state actor over whom they had supervisory authority or a state-law created right of legal control; (3) Appellees' failure to act demonstrated deliberate indifference to the victim's constitutional rights; and (4) their failure to act resulted in a constitutional injury. Because we conclude that Appellees were not deliberately indifferent, we limit our analysis to the third

element, and hold that Whitley's § 1983 claims fail under her deliberate indifference theory.[7]

"The deliberate indifference standard is a high one." *Doe v. Dall. Indep. Sch. Dist.,* 153 F.3d 211, 219 (5th Cir.1998). "To act with deliberate indifference, a state actor must 'know[ ] of and disregard[ ] an

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[7] Although disposing of this case on deliberate-indifference grounds, we note that Appellees seriously call into question whether law enforcement officers in cases like the one sub judice can be said to have what we term "the linchpin in all cases in which we have found § 1983 liability based on breach of a duty to act" namely, "the existence of a legal right of control," i.e., state-conferred control "over the persons or events giving rise to the injury complained of." *Rains*, 66 F.3d at 1414–15; see also *Taylor*, 15 F.3d at 452 n. 6 (the "mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability" (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n. 58 (1978))). Appellees forcefully argue that the Supreme Court's decision in *Town of Castle Rock v. Gonzales*, entirely forecloses Whitley's deliberate indifference theory of liability because, although *Gonzales* denied an individual's purported entitlement to police enforcement of a restraining order against a private party, the same principle should apply where the violative agent is a state actor. *See* 545 U.S. 748, 768 (2005) ("In light of today's decision ... 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."). To do otherwise, they assert, would deprive law enforcement officers of the very discretion the Supreme Court repeatedly has recognized them to possess. *See id.* at 760 ("A well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes."). Expressing no opinion, we leave for another day the extent to which *Gonzales* supplements or supplants our analysis under *Rains*.

excessive risk to [the victim's] health or safety.' " *McClendon,* 305 F.3d at 326 n. 8 (alterations in original) (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)). "The state actor's actual knowledge is critical to the inquiry"—a "failure to alleviate 'a significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Id.* (quoting *Farmer,* 511 U.S. at 837). While we previously have observed that the terms "gross negligence" and "deliberate indifference" are sometimes used interchangeably, understood properly, "the former is a 'heightened degree of negligence,' [while] the latter is a 'lesser form of intent.' " *Taylor,* 15 F.3d at 453 n. 7 (citation omitted).

In this case, the district court found that Appellees did not act with deliberate indifference because they were "acting on facts and investigating Ariaz." Whitley contends that the district court's finding was erroneous because Appellees' investigation clearly was flawed, and identifies multiple indicators Appellees had that Ariaz—even before meeting Whitley—was engaging in sexual misconduct. Whitley also highlights purported deficiencies in the investigation itself.

We agree with the district court that neither Hanna and Bullock, nor Grubbs and Murray, were deliberately indifferent.

1. Hanna and Bullock

a) Hanna

We begin our analysis by considering Hanna's investigation, which, while possibly subject to criticism and charges of deficiency, cannot be said to have been conducted with deliberate indifference. Hanna began investigating Ariaz in January 2007, and spoke with A.M., A.M.'s mother, and her boyfriend. Although the investigation did not, at that time, result in the arrest and prosecution of Ariaz, the investigation remained open.

Over the next several months, there were numerous incidents indicating that Ariaz's attention had shifted to a new victim—Whitley. Ariaz repeatedly used Whitley as his example in class, and made her his Explorers captain. He also ate with Whitley in view of other Brownwood Police Department officers. It apparently was well-known that Ariaz and Whitley would ride together during the night shift. But while the Brownwood Police Department may have been aware of Ariaz's conduct, Hanna was not. Hanna had no reason to think that the Brownwood Police Department, as Ariaz's supervisor, would fail to respond to evidence that Ariaz again was targeting a minor, including sharing such evidence with Hanna.[8]

Hanna's failure to discover Ariaz's new relationship earlier thus is no ground for finding him deliberately indifferent. In *Taylor,* we found a school superintendent not deliberately indifferent partly because he reacted promptly to new evidence of a

[8] We again note that the Brownwood Police Department would later be involved in a suit brought by Whitley's parents resulting in a settlement.

high school coach's sexual misconduct. 15 F.3d at 457–58. Similarly here, when Hanna received word that Ariaz again was seen with a minor, he immediately resumed his investigation. From that point on, Hanna undertook a series of measures that appropriately responded to the evidence available to him, including:

- learning that Ariaz was riding with Whitley almost every night, and allowing her to drive his vehicle;
- discovering that Ariaz, accompanied by Whitley, would park for two to three hours in remote areas such as the Brownwood airport, a wooded area by the Brownwood Hospital, and an old police department;
- meeting with Murray, the Brown County District Attorney, and Grubbs, the Brown County Sheriff, and others to discuss Ariaz's behavior;
- installing video surveillance cameras in the Brownwood Annex building, one of the isolated locations Ariaz was known to take Whiteley;
- placing GPS surveillance on Ariaz's vehicle, despite Ariaz previously having requested vehicles without GPS tracking;
- assembling three two-man teams to surveil Ariaz and Whitley;
- organizing a sting operation that resulted in the arrest and prosecution of Ariaz.

Whereas Hanna's previous investigation into Ariaz did not result in a prosecution, Hanna's actions upon learning that Ariaz was seen with Whitley demonstrate that, while the Brownwood Police Department apparently had been unable to stop Ariaz, Hanna was committed to putting an end to Ariaz's abuses once and for all.

Whitley criticizes various aspects of Hanna's investigation, but these do not amount to a showing of deliberate indifference. She accuses Hanna of improperly placing surveillance cameras in the Brownwood Annex building's hallways, instead of in its courtroom. But the mere "haphazard" or "negligent" deployment of security measures does not establish deliberate indifference. *Johnson v. Dall. Indep. Sch. Dist.,* 38 F.3d 198, 202 (5th Cir.1994). Whitley also criticizes Hanna for conducting an excessively long investigation. Yet, in light of Ariaz's persistent conduct, even in the face of other members of the Brownwood Police Department knowing of the suspicious activity, we cannot fault Hanna for wanting to ensure that this time the investigation would conclude with Ariaz's successful prosecution. At most, Whitley has shown that Hanna's actions were comparable to those of *Taylor*'s superintendent. After observing that the superintendent had directed the principal to talk with the coach suspected of sexual abuse, contacted parents, spoken with the victim, and verbally reprimanded the coach, we determined that although the superintendent's actions had been "ineffective," they were not "deliberately indifferent." 15 F.3d at 457–58. As in that case, although we do not deny the possibility

that Hanna could have conducted the investigation differently, perhaps even gathering enough evidence to make an arrest in less than the two weeks it took him, Hanna's failure to immediately end the abuse does not make him deliberately indifferent. *See Dall. Indep. Sch. Dist.,* 153 F.3d at 219 ("Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and thus do not divest the official of qualified immunity.").[9]

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[9] Instead of looking to whether Hanna's conduct was appropriate in light of the available evidence, *see Rains,* 66 F.3d at 1413 (school official "fail[ed] to take appropriate action to prevent or stop the abuse"); *Taylor,* 15 F.3d at 458 (superintendent "responded appropriately"), the concurrence instead would look to whether "the purpose of [the defendant's] actions was to *interfere with* the alleged abuse," and criticizes us for suggesting that Hanna faced a "binary choice: arrest Ariaz, or do nothing to intervene in the absence of conclusive evidence of abuse." We do not dispute that Appellees had other options available to them, but we refuse to find Appellees deliberately indifferent for choosing one permissible course of action—conducting an investigation intended to effectuate the arrest of Ariaz—over another. *Cf. Taylor,* 15 F.3d at 457–58 (describing superintendent's investigation into alleged abuse as sufficient based on the available evidence); *Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 256 (5th Cir.2005) (deliberate indifference sufficiently alleged where defendants allegedly knew that a dangerous drug was missing and patients were dying at an unusually high rate, but failed to investigate or change hospital policy). Even applying the concurrence's standard, and accepting that better policing might have led to a speedier conclusion to the investigation, we are hard-pressed to see how the arrest and prosecution of Ariaz cannot be said to have had the purpose of "interfer[ing] with" the alleged abuse.

Hanna had to decide what evidence would suffice to secure a conviction. His decision to wait two or three days longer to make a stronger case to permanently stop Ariaz's misconduct does not bring this case within *Taylor*'s fact pattern, where we denied qualified immunity to a school principal on the ground that he "fail[ed] to take action that was obviously necessary to prevent or stop" the sexual misconduct of a subordinate high school coach. 15 F.3d at 457. Far from failing to take action, Hanna led an ongoing effort to put Ariaz out of business. In this, Hanna was successful. His failure to be successful earlier does not make him deliberately indifferent to Whitley's plight.

Whitley also appears, however, to allege that Hanna was deliberately indifferent because he failed to intervene when Ariaz sexually abused her in Hanna's presence. This argument refers to Hanna's failure immediately to emerge from his courtroom hiding place upon witnessing Ariaz positioned atop her the morning of July 17, 2007. We find it worthwhile to quote this part of Whitley's complaint in its entirety:

- At approximately 2:30 a.m. on July 17, 2007, Hanna hid in the courtroom's closet with another investigator.
- He observed [Whitley] sitting or lying on a table with Ariaz positioned over her in a clearly inappropriate and sexual manner.
- Yet Hanna still did not intervene.

- Instead, he let Ariaz continue and then let them leave.
- According to Hanna, he remained at the Annex so that he would be more ready the next time to catch Ariaz in the midst of a more prolonged act.
- Then, according to Hanna, Ariaz and [Whitley] arrived back at the Annex at 6:13 a.m. Ariaz began kissing [Whitley] in the courtroom for several minutes while [Whitley] was lying down. Then, Hanna observed him place his head in [Whitley's] "crotch area."

Whitley's proposed amended complaint, which we separately address *infra,* elaborates only slightly on these facts: "[Hanna] observed Plaintiff sitting or lying on a table with Ariaz positioned over her in a clearly inappropriate and sexual manner. Ariaz was touching Plaintiff's genitalia." Hanna ultimately emerged and arrested Ariaz when he observed Ariaz placing his head in Whitley's genital area after the two returned at 6:13 a.m.

Several aspects of Whitley's complaint, as well as the relevant parts of her proposed amended complaint, draw our attention. Although Whitley's brief repeatedly describes Appellees as exposing Whitley to statutory rape (even going so far as accusing them of effectively raping Whitley herself by failing to act), the closest Hanna came to actually seeing Ariaz sexually abuse Whitley was to observe her sitting or lying while Ariaz was positioned over her. Whitley does not describe what Ariaz was doing other than to say it was "clearly inappropriate" and

done in a "sexual manner." Additionally, while specifically describing what Hanna observed in every part of her complaint, Whitley noticeably omits in her proposed amended complaint whether or not Hanna observed Ariaz touching her genitals.[10] Hanna apparently could not even see whether Whitley was sitting or lying down.

While we must view the facts in the light most favorable to Whitley, we also cannot ignore what she has, and has not, pled. Nor can we ignore that Hanna, after tracking Ariaz by camera, GPS, and officer surveillance, emerged from cover to arrest Ariaz after observing him engage in a clearly sexual act. Whitley may have alleged facts sufficient to show that Hanna made an error of judgment, but we refuse to find that Hanna's failure to act, after viewing some unspecified conduct that was "clearly inappropriate," transformed his otherwise proper investigation into one that was deliberately indifferent. *See Callis v. Sellars,* 931 F.Supp. 504, 519 (S.D.Tex.1996) (officers' failure to timely intervene in sting operation amounted to isolated instance of negligence or error of judgment that did not amount to deliberate indifference).

Whitley thus has failed to allege facts sufficient to show that Hanna was deliberately indifferent.

b) Bullock

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[10] The proposed amended complaint also states that Ariaz "had his hand in [Whitley's] crotch area for several minutes while [she] was lying down," but again does not state that Hanna could observe this conduct.

Having found that Hanna did not act deliberately indifferent, we similarly conclude that Whitley has not demonstrated that Bullock was deliberately indifferent in entrusting the investigation to Hanna. As with Hanna, the Brownwood Police Department's failure to notify the Texas Rangers of Ariaz's renewed involvement with a minor cannot be imputed to Bullock. Indeed, Bullock's involvement in the investigation was limited to receiving updates from Hanna on how the investigation was progressing, and approving Hanna's continuation of that investigation. Bullock was not even involved in the meeting in which Hanna, Murray, and Grubbs discussed Ariaz, and which resulted in the decision to continue surveilling Ariaz until there was actual evidence of sexual abuse. Whitley has alleged no facts suggesting that Bullock knew Hanna was acting improperly in seeking to collect additional evidence, especially as the prior investigation into Ariaz's conduct towards A.M. had not resulted in a prosecution. Whitley thus also has failed to show that Bullock was deliberately indifferent.

2. Grubbs and Murray

Whitley's primary reason for claiming Grubbs and Murray acted with deliberate indifference is that they participated in formulating, and endorsed, a plan dependent on catching Ariaz in the act of committing an act of sexual abuse. However, far from being the product of deliberate indifference, this plan was responsive to the requirements of the Texas penal code. Ariaz eventually was charged with sexual assault of a child and indecency with a child. Under

Texas law, the crime of sexual assault requires sexual contact or penetration. Tex. Penal Code Ann. § 22.011(a)(1)-(2). Similarly, the offense of indecency with a child requires exposure or "sexual contact," defined as "(1) any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child; or (2) any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person." *Id.* § 21.11. Video evidence only showed Ariaz hugging and kissing Whitley, actions which Appellees could not be certain a jury would find sufficient to violate the applicable criminal statutes. As Whitley acknowledges, Appellees only "had video proof that [Whitley] was likely being abused."

Grubbs and Murray also did not ignore Whitley's plight—to the contrary, they agreed that Hanna would investigate allegations of Ariaz's sexual misconduct in order to prosecute Ariaz. They were aware that Hanna was pursuing the investigation by setting up surveillance cameras, tracking Ariaz's movements, and devoting three two-man teams to surveilling him. Moreover, Grubbs and Murray were not telling Hanna to allow Ariaz to abuse Whitley, but rather to gather evidence and stop Ariaz from doing so. Although Whitley alleges that, based on the evidence available to them, Grubbs and Murray must have known that Ariaz was sexually abusing her, there is no allegation that they actively facilitated Ariaz's behavior in order to gather more evidence.

Accordingly, although the decision to gather additional evidence may have been imprudent in light of that already available, we cannot say that Grubbs and Murray were deliberately indifferent to Whitley's peril. It is unclear, for example, what they should have done that was any more certain to safeguard Whitley's well-being or result in a favorable outcome to the investigation. They did not supervise Ariaz. They also did not have the authority to order the Brownwood Police Department to remove Ariaz from duty. At oral argument, Whitley's counsel admitted that Appellees, including Grubbs and Murray, also lacked the power to end the Explorers program. Further, while Grubbs and Murray arguably had the power to effectuate the arrest of Ariaz earlier in the investigation, Whitley has made clear that she is not premising her claim on Appellees' arresting Ariaz. Thus, although we easily can imagine some alternatives to the choice that Appellees made—including confronting Whitley or contacting her parents—the fact remains that Appellees successfully brought about Ariaz's arrest approximately two weeks after Hanna first learned of a potential relationship between Ariaz and Whitley.

We conclude that Whitley has not alleged facts sufficient to establish that Grubbs and Murray acted with deliberate indifference.

A. Bystander Liability

Whitley's second basis for establishing liability under § 1983 is Appellees' "failure ... to attempt to intercede to protect [her] from further abuse at the hands of another officer." Whitley cites this court's

decision in *Hale,* 45 F.3d 914, for the proposition that Appellees were required to intervene and stop Ariaz from further sexually abusing her.

In *Hale,* a plaintiff brought a § 1983 action for, *inter alia,* the use of excessive force during a search and arrest. *Id.* at 916. One of the police officer defendants allegedly stood by, laughed, and shouted encouragement while another officer assaulted the plaintiff. *Id.* at 919. Characterizing the plaintiff's claim as one of bystander liability, this court agreed that "an officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983." *Id.* We further observed that the fact that the police officers "were from different law enforcement agencies does not as a matter of law relieve [an officer] from liability for a failure to intervene." *Id.* In light of the allegations and evidence in that case, we concluded that there was sufficient evidence to create a genuine issue of material fact concerning the bystanding officer's "acquiescence in the alleged use of excessive force." *Id.*

Our holding in *Hale* is consistent with other circuits' determination that an officer may be liable under § 1983 under a theory of bystander liability where the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act."[11] *Randall v. Prince George's Cnty.,*

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[11] Although *Hale* most often applies in the context of excessive force claims, other constitutional violations also may support a

Md., 302 F.3d 188, 204 (4th Cir.2002) (footnote omitted); *see, e.g., Lewis v. Downey,* 581 F.3d 467, 472 (7th Cir.2009); *Smith v. Mensinger,* 293 F.3d 641, 650–51 (3d Cir.2002); *see also Nowell v. Acadian Ambulance Serv.,* 147 F.Supp.2d 495, 507 (W.D.La.2001). However, liability will not attach where an officer is not present at the scene of the constitutional violation.[12] *See Snyder v. Trepagnier,* 142 F.3d 791, 801 n. 11 (5th Cir.1998) (citing *Hale,* 45

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theory of bystander liability. *See Richie v. Wharton Cnty. Sheriff Dep't Star Team,* No. 12–20014, 2013 WL 616962, at *2 (5th Cir. Feb. 19, 2013) (per curiam) (unpublished) (noting that plaintiff failed to allege facts suggesting that officers "were liable under a theory of bystander liability for failing to prevent ... other member[s] from committing constitutional violations"); *accord Anderson v. Branen,* 17 F.3d 552, 557 (2d Cir.1994) ("[A]ll law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence.").

[12] Whitley disputes that this is a requirement for bystander liability. In support, Whitley's counsel referred us during oral argument to a case not cited in Whitley's briefs—*United States v. McKenzie,* 768 F.2d 602 (5th Cir.1985). In that case, defendant police officers appealed their convictions for conspiring to deprive citizens of their civil rights and for illegally depriving one victim of his liberty, as well as failing to keep him free from harm while in official custody. *Id.* at 604. In addressing whether the evidence was sufficient to support a jury's guilty verdict as to one defendant, we observed that the defendant "admitted that he was in and out of the room while [the victim] was being interrogated," and found that this was "sufficient to support the conclusion that he was aware of what was transpiring and did not stop it." *Id.* at 605. *McKenzie*, however, was a criminal case and did not address bystander liability. Moreover, the detective in that case was in and out of the room, and thus arguably could be said to have been present while the alleged constitutional violation took place. *See id.*

F.3d at 919); *see also Gilbert v. French,* 364 Fed.Appx. 76, 83 (5th Cir.2010) (per curiam) (unpublished); *Ibarra v. Harris Cnty. Tex.,* 243 Fed.Appx. 830, 835 & n. 8 (5th Cir.2007) (per curiam) (unpublished) ("A bystander liability claim requires the plaintiffs to show that the officer was present at the scene and did not take reasonable measures to protect a suspect from excessive force."). In resolving whether a plaintiff has sufficiently alleged a bystander liability claim we also consider whether an officer "acquiesce[d] in" the alleged constitutional violation. *Hale,* 45 F.3d at 919; *see Baker v. Monroe Twp.,* 50 F.3d 1186, 1193–94 (3d Cir.1995) (premising liability on senior officer's knowledge of, and acquiescence in, treatment of victim); *see also Peavy v. Dall. Indep. Sch. Dist.,* 57 F.Supp.2d 382, 390 n. 4 (N.D.Tex.1999) (*Hale* inapplicable where defendant did not acquiesce in any conduct violating plaintiff's constitutional rights).

Applying this analysis to each of the Appellees, Whitley has failed to state a claim of bystander liability.

1. Hanna and Bullock

We observe at the outset that Whitley has failed to state a claim against Bullock because she has not alleged that he was in Ariaz's presence when Ariaz was sexually abusing Whitley. As a result, Bullock is not within the scope of a bystander liability claim. *See Hale,* 45 F.3d at 919; *Ibarra,* 243 Fed.App'x. at 835 & n. 8. Even were we merely to require knowledge, Bullock still would not be liable because

he acted reasonably in entrusting Hanna with investigating and arresting Ariaz.

Turning to Hanna, although Whitley has alleged that Hanna was in Ariaz's presence (unbeknownst to Ariaz) the morning of July 17, she nevertheless has failed to state a claim because she has not alleged that Hanna acquiesced in Ariaz's conduct. Hanna was investigating Ariaz with the intent of gathering evidence to secure Ariaz's conviction for sexual abuse of a minor. Far from being a bystander to Ariaz's conduct, Hanna was accumulating evidence for Ariaz's prosecution. This is in no way comparable to the factual scenario in *Hale,* where there was a genuine dispute over whether an officer's laughing and shouting encouragement to another officer who was committing a constitutional violation constituted acquiescence in the latter's conduct. Hanna's subsequent arrest of Ariaz after Ariaz began to engage in a clearly sexual act dispels all doubt as to whether Hanna acquiesced in Ariaz's misconduct. *Cf. Randall,* 302 F.3d at 204 n. 24 ("The rationale underlying the bystander liability theory is that a bystanding officer, by choosing not to intervene, functionally participates in the unconstitutional act of his fellow officer.").

Accordingly, we reject Whitley's bystander liability claims against Hanna and Bullock.[13]

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[13] Even if bystander liability did apply, we nevertheless would be compelled to affirm the district court's judgment as to Hanna and Bullock on the second prong of the qualified immunity analysis because Whitley has failed to identify clearly established law requiring an officer immediately to intervene

2. Grubbs and Murray

Like Bullock, neither Grubbs nor Murray was in Ariaz's presence during Ariaz's abusive conduct. They thus also are not bystanders for purposes of a bystander liability claim. *See Hale,* 45 F.3d at 919; *Ibarra,* 243 Fed.App'x. at 835 & n. 8. Further, they acted reasonably in attempting to stop Ariaz from further abusing Whitley and other minors by endorsing a plan that would lead to the arrest of Ariaz. As discussed *supra,* it is unclear exactly what other actions Whitley would have required from Grubbs and Murray that were more certain to permanently remove her and others from Ariaz's reach.

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while engaged in covert surveillance of a perpetrator. *See Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir.2004) (en banc) (central concept of second prong of qualified immunity analysis is whether law provided "fair warning" that the conduct at issue violated constitutional rights). Whitley cites no case that would put Appellees on notice that they were required to intervene in some unspecified way before arresting Ariaz. *Cf. Callis,* 953 F.Supp. at 799 (S.D. Tex. 1996) ("Even today, the application of the doctrine of bodily integrity to voluntary civilian participants in a 'sting' is an untrodden area of the law."). The only case she cites is *Hale,* but, as discussed, that case is factually inapposite. *See* 45 F.3d at 919; *see also Deshotels v. Marshall,* 454 Fed.App'x. 262, 264, 269 (5th Cir.2011) (per curiam) (unpublished) (distinguishing facts in *Hale* from case in which law enforcement officers failed to stop another officer from using a stun weapon to subdue an arrestee the officers were attempting to restrain). We do not find that Hale put Hanna and the other Appellees on notice that they could not solidify their evidence against Ariaz to secure a conviction by surveilling him and arresting him upon commission of a felony.

For these reasons, we reject Whitley's bystander liability claims as to Grubbs and Murray.

C. Motion to Amend the Complaint

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend should be freely given "when justice so requires." Fed.R.Civ.P. 15(a)(2). A motion to amend ordinarily should be granted absent some justification for refusal. *Foman v. Davis,* 371 U.S. 178, 182 (1962).

> The liberal amendment policy underlying Rule 15(a) affords the court broad discretion in granting leave to amend and, consequently, a motion for leave to amend should not be denied unless there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed [or] undue prejudice to the opposing party by virtue of allowance of the amendment, ..."

United States ex rel. Willard v. Humana Health Plan of Tex. Inc., 336 F.3d 375, 386 (5th Cir.2003) (alteration in original) (citation omitted). Leave to amend also may be denied when amendment would be futile. *Id.* at 387.

We find that, even under Rule 15's liberal standard, the district court appropriately denied as futile Whitley's motion to amend her complaint. First, the amended complaint adds no new substantive factual allegations. As already discussed, even if we read her complaint to allege that Hanna witnessed Ariaz sexually abusing Whitley, liability would not extend to Hanna—nor the other Appellees because

Hanna was not deliberately indifferent and did not acquiesce in Ariaz's conduct.

Second, the amended complaint's new causes of action are meritless. Whitley adds supervisory liability claims, including for inadequate supervision and failure to train. She also adds policy, custom, and practice claims, alleging, *inter alia,* that it was "the practice of the Texas Rangers to permit minor sexual assault victims to be used as bait to catch their assailants." Finally, the amended complaint adds a series of "Secondary Liability Claims" including "Assisting and Encouraging / Aiding and Abetting sexual abuse and invasions of bodily integrity," "Assisting and Participating in violations of bodily integrity and sexual abuse," and "Conspiracy to violate Plaintiff's right to be free from violations of her bodily integrity and ... sexual abuse," all in violation of § 1983.

All of Whitley's inadequate supervision, failure to train, and policy, practice, or custom claims fail without an underlying constitutional violation. *See Bustos v. Martini Club, Inc.,* 599 F.3d 458, 467 (5th Cir.2010) ("Because [plaintiff] has alleged no constitutional injury attributable to the Officers, [plaintiff] has failed to state a claim that a City policy was the moving force behind a violation of his constitutional rights."). Even if we assume that Whitley has sufficiently alleged a § 1983 claim, her municipal liability claims still would fail. "To establish municipal liability under § 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving

force behind the violation of a constitutional right." *Peterson v. City of Fort Worth, Tex.,* 588 F.3d 838, 847 (5th Cir.2009). The proposed amended complaint makes no specific factual allegations of the county's policies and simply adds the words "policies, practices, and/or customs" to Whitley's perceived wrongs. Such allegations are insufficient to survive dismissal. *See Spiller v. City of Tex. City, Police Dep't,* 130 F.3d 162, 167 (5th Cir.1997) (conclusory description of policy or custom insufficient).

Her secondary liability claims similarly fail for lack of a § 1983 violation by Appellees. *See Hale,* 45 F.3d at 920 ("[A] conspiracy claim is not actionable without an actual violation of section 1983." (internal quotation marks and citation omitted)). Additionally, her aiding and abetting, assisting and participating, and conspiracy claims merely restate her § 1983 allegations. For the same reasons we are unpersuaded by her § 1983 claims, we also reject her secondary liability claims.

We agree with the district court that amendment of her complaint would be futile and that Whitley's motion to amend correctly was denied.

V. CONCLUSION

For the aforementioned reasons, the district court's judgment is AFFIRMED.

JENNIFER WALKER ELROD, Circuit Judge, concurring only in the judgment:

I write separately to address Whitley's § 1983 deliberate-indifference claim against Ranger Hanna.

Taking Whitley's allegations as true, Hanna made a 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 participant in a law-enforcement-learning program. Thus, at this early stage of the case, I would hold that Whitley states a plausible § 1983 claim. I concur in the judgment, however, because Whitley cannot overcome Hanna's assertion of qualified immunity.

I.

We must take Whitley's allegations as true at this 12(b)(6) stage of the case. *Bowlby v. City of Aberdeen,* 681 F.3d 215, 219 (5th Cir.2012). Although the majority opinion offers a careful and thorough description of the complaint, some critical points bear repeating and, in some respects, reframing in the light most favorable to Whitley.

By January 2007, Hanna knew that Ariaz was a threat to the young female participants in the Explorer program. Although Hanna obtained credible evidence that Ariaz had kissed, fondled, sent numerous sexually suggestive text messages to, and expressed an intent to engage in "several different sexual acts" with his first victim (A.M.), Whitley alleges that Hanna "essentially stopped investigating." Over the next several months, Whitley asserts that Hanna did nothing "to protect any of the young girls Ariaz was supervising."

Shortly after A.M.'s complaint, Ariaz began "grooming" Whitley, a fifteen-year old Explorer student, to be his next victim. The relationship turned sexual in June 2007. Whitley alleges that, had Hanna "actually investigated Ariaz ... [he] would have learned what Ariaz was up to and would have prevented him from abusing" her. But Hanna did not, in fact, learn of Ariaz's conduct until July 3, 2007, when an officer with the Brownwood Police Department reported suspicious activity. Hanna quickly confirmed that Ariaz was "spending hours at a time alone with [Whitley] in the middle of the night," often parked in known "make out" areas. Yet, says Whitley, Hanna did not seek "to separate the predator from his prey."

To the contrary, Hanna decided to continue monitoring Ariaz to "catch him in the act of abuse." To accumulate evidence for an eventual prosecution, Hanna and a Brownwood officer placed a GPS-tracking device on Ariaz's car and installed surveillance cameras in the hallways of the Brownwood Annex, a common meeting place for Whitley and Ariaz. By July 12, 2007, Hanna had "video proof that [Whitley] was likely being abused." Specifically, Hanna observed Ariaz kissing and hugging Whitley several times in the Annex hallway, entering a courtroom where Whitley was waiting, and exiting the same courtroom without his duty belt thirteen minutes later. Despite this knowledge, Hanna allegedly made no effort to "put a stop to the abuse." Rather, says Whitley's complaint, Hanna "continued to use [her] as bait to catch Ariaz in the act of sexual offense," and thereby "knowingly

allowed and provided substantial assistance to a fifty-five year old man to abuse a fifteen year old to better [his] chance at a conviction and make [his] investigation easier."

Ariaz continued to abuse Whitley for days, with bits and pieces of his inappropriate conduct captured on Brownwood Annex video cameras. In the early morning of July 17, 2007, Hanna hid in the courtroom closet with another investigator, where he observed Ariaz positioned over Whitley in a "clearly inappropriate and sexual manner." Hanna did not intervene to stop Ariaz's conduct, but "remained at the Annex so that he would be more ready the next time to catch Ariaz in the midst of a more prolonged act." Ariaz left the Annex with Whitley at around 2:30 in the morning. Hours later, at 6:13 a.m., Ariaz returned with Whitley; Hanna observed Ariaz kiss her for several minutes while she was lying down, and ultimately place his head in Whitley's "crotch area." Only then did Hanna emerge from the closet and place Ariaz under arrest.

Taking these allegations as true, I would conclude that Hanna plausibly acted with deliberate indifference to Whitley's constitutional right to bodily integrity.

II.

As a threshold matter, there is no reasonable debate that Ariaz violated Whitley's constitutional rights when he sexually assaulted her. We have long held that the Fourteenth Amendment affords a person "[t]he right to be free of state-occasioned

damage to ... bodily integrity." *Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 450–51 (5th Cir.1994) (en banc) (quoting *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir.1981)).[1] Sexual abuse by a state official is an undeniable violation of this liberty interest. *See Taylor,* 15 F.3d at 451 ("[S]urely the Constitution protects a schoolchild from physical sexual abuse—here, sexually fondling a 15–year old school girl and statutory rape—by a public schoolteacher.... Thus, Jane Doe clearly was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment." (footnote omitted)). We have called it "incontrovertible" that a state actor violates bodily integrity when s/he sexually abuses a child; "such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment." *Id.* (footnotes omitted).

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[1] As the Fourth Circuit explained, "[t]he existence of this right to ultimate bodily security ... is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power...." *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir.1980). For example, in a case involving rape by a police officer after a traffic stop, the Eighth Circuit emphasized that the officer's sexual assault "was a violation of the most intimate kind of bodily integrity," and concluded that the district court did not err in concluding that the officer's "egregious sexual violation" deprived the victim of a due process right. *Rogers v. City of Little Rock,* 152 F.3d 790, 796 (8th Cir.1998). In a case with nearly identical facts, the Fourth Circuit described the due process right at issue as a "right ... not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm." *Jones v. Wellham,* 104 F.3d 620, 628 (4th Cir.1997).

Critically, the existence of an underlying constitutional violation differentiates this case from *Gonzales* and *DeShaney,* which examined the scope of a state official's duty to interfere with private violence. *See Town of Castle Rock v. Gonzales,* 545 U.S. 748, 750–51 (2005) (analyzing whether an individual had a constitutionally protected property interest in the enforcement of a state-law restraining order against a private party); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.,* 489 U.S. 189, 195–96 (1989) (analyzing whether a child had a substantive due process right to protection from violent physical abuse by his father). As the Supreme Court explained in *DeShaney,* the Fourteenth Amendment was enacted to "protect the people from the State, not to ensure that the State protected them from each other." 489 U.S. at 196. Thus, although the substantive component of the Due Process Clause does not "requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors," it does protect against "*state-occasioned* damage to a person's bodily integrity." *Id.* at 195; *Taylor,* 15 F.3d at 450–51 (citing *Shillingford,* 634 F.2d at 265) (emphasis added).[2]

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[2] The Supreme Court has cautioned that the Due Process Clause "does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 848 (1998). Instead, for the conduct of a state actor to give rise to liability under the Due Process Clause, "the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n. 8 (citing *Washington v. Glucksberg,* 521 U.S. 702 (1997)). In many contexts, what shocks the

Where, as here, a case involves an underlying constitutional violation like state-occasioned violence, the court must ask whether the state actor treated the violation with deliberate indifference. *See Doe v. Rains Cnty. Indep. Sch. Dist.,* 66 F.3d 1402, 1413 (5th Cir.1995) (noting that, in *Taylor,* "the supervisor's failure to act, coupled with his deliberate indifference, was tantamount to a conscious decision to allow the alleged constitutional injury to occur or persist"); *see also Taylor,* 15 F.3d at 463 (Higginbotham, J., concurring) ("An omission that evinces deliberate indifference toward the violation of an individual's constitutional rights may amount to an act that causes the violation.").[3] My primary

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conscience is "deliberate indifference." *Id.* at 851; *see Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.,* 380 F.3d 872, 880 (5th Cir.2004) ("Consistent with those principles [in *Lewis*], we have generally required plaintiffs to demonstrate that 'the defendant state official at a minimum acted with deliberate indifference toward the plaintiff.' " (citation and internal quotation marks omitted) (collecting cases)). "As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical." *Lewis,* 523 U.S. at 851 (citing *Whitley v. Albers,* 475 U.S. 312, 320 (1986)); *see Brown v. Nationsbank Corp.,* 188 F.3d 579, 592 (5th Cir.1999) (applying a deliberate-indifference standard where "the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection").

[3] For example, in the context of alleged abuse to foster children, we have held that "an obvious showing that state social workers exhibited a conscious disregard for known severe physical abuses in a state-licensed foster home by itself sufficiently demonstrates deliberate indifference to a child's right to personal security." *Hernandez,* 380 F.3d at 881 (concluding that two social workers did not act with deliberate indifference where, after an investigation, both concluded that there was no

concern here is with the majority opinion's approach to the deliberate indifference inquiry.

III.

The deliberate indifference standard is a high bar, but it is not insurmountable. At this stage, Whitley must plausibly allege that Hanna made a " 'conscious' choice to endanger [her] constitutional rights." *Mesa v. Prejean,* 543 F.3d 264, 274 (5th Cir.2008) (quoting *Snyder v. Trepagnier,* 142 F.3d 791, 799 (5th Cir.1998)). Taking Whitley's allegations as true, that is precisely what happened here: Hanna decided to allow Ariaz, a state official, to continue sexually assaulting Whitley in the hopes of obtaining stronger evidence against Ariaz. Whitley contends that Hanna was well-aware of the risk to her at the time; the plan was predicated on the fact that Ariaz had abused, and would continue to abuse, his young Explorer student.[4] In other words, Hanna allegedly knew that

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substantial risk to the children at issue). We have allowed a deliberate-indifference claim against hospital officials who turned a blind eye to a subordinate's alleged intentional poisoning of patients. *Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 256 (5th Cir.2005) (holding that plaintiffs sufficiently pled deliberate indifference against two supervisors who allegedly "knew both that a dangerous drug was missing and that patients were dying at an unusually high rate," and noting that although they "could have investigated the deaths and missing drugs or changed hospital policy, they did nothing for a considerable period of time").

[4] This is especially true in light of A.M.'s prior complaints about Ariaz's conduct and the information Hanna obtained in the very early stages of his investigation regarding Whitley. Moreover, Hanna himself observed Whitley and Ariaz engaging in sexually suggestive behavior at the Brownwood Annex. Thus, there is no

Ariaz was "highly likely to inflict the particular injury" that Whitley suffered, and Hanna chose not to act. *Cf. Brown v. Bryan Cnty., Okla.,* 219 F.3d 450, 461 (5th Cir.2000) (citation omitted).

Moreover, Hanna's alleged conduct goes beyond mere haphazard or negligent investigation. The majority opinion analogizes Hanna's behavior to that of the superintendent in *Taylor,* highlighting that Hanna immediately resumed his investigation (after months of stagnation) when he learned that Ariaz was cavorting with another minor in the Explorers program.[5] But Hanna's conduct here is fundamentally different from that of the *Taylor* superintendent. In *Taylor,* the superintendent took affirmative, albeit ineffective, steps to end the abuse. 15 F.3d at 457–58. He directed the principal to talk with the coach suspected of sexual abuse, contacted the victim's parents, spoke with the victim, and verbally reprimanded the coach. *Id.* The purpose of these actions was to *interfere with* the alleged abuse, thereby mitigating the risk of continued

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question that Hanna was aware of the risk to Whitley's constitutional rights.

[5] The majority opinion emphasizes that Hanna could have conducted the investigation differently by, for example, moving at a faster pace, or placing video cameras in the courtroom (rather than the public hallway) of the Brownwood Annex. But it concludes that such mistakes are not enough to plausibly support § 1983 liability. If Whitley's claim turned on arguably minor investigatory failures in a typical criminal investigation, I would agree wholeheartedly. But it does not. Rather, Whitley's allegations center on Hanna's deliberate choice to prolong the risk of constitutional injury for the perceived greater good of Ariaz's conviction.

constitutional injury. *Id.* Indeed, we distinguished the *Taylor* superintendent's actions from those of the deliberately-indifferent school principal, who "failed to take action that was obviously necessary to prevent or stop" the abuse.[6] *Id.* at 457. We focused on the principal's failure to take actions that may have "derailed the relationship." Put another way, the constitutional violations would not have been as "severe or prolonged" absent his deliberate choice not to act. *Id.* If the *Taylor* principal's nonfeasance is sufficient to show deliberate indifference, then Hanna's allegedly purposeful subrogation of Whitley's constitutional rights must be enough to survive 12(b)(6) dismissal.

The implicit message in the majority opinion's deliberate-indifference analysis is that an officer can escape § 1983 liability for a conscious endangerment of a victim's constitutional rights, provided that he acted with good intentions. For example, the majority opinion emphasizes that Hanna "had to decide what evidence would suffice to secure a conviction," and notes Hanna's commitment "to putting an end to Ariaz's abuses once and for all." But this ignores the fact that, in his zeal to put Ariaz behind bars for good, Hanna allowed—in fact, expected[7]—Whitley to

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[6] Moreover, the *Taylor* superintendent was new to the school, and had no prior knowledge of the teacher's behavior. Still, he acted immediately when he learned of the abuse. Here, on the other hand, Hanna declined to complete his investigation of A.M.'s complaint and then, after learning that Ariaz was likely abusing Whitley, decided to allow the abuse to continue.

[7] Indeed, Hanna's plan did more than just allow Ariaz to continue to abuse Whitley; rather, it required further acts of

suffer additional instances of sexual abuse at the hands of a fifty-five year old police officer. No matter how well-intended, investigatory and prosecutorial strategies must yield to the inviolable constitutional rights of those involved (typically the defendant, but here the victim).[8] "While the difficulties of law

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sexual abuse before Hanna would arrest Ariaz or directly intervene. For example, Whitley alleges that "[Hanna] observed Plaintiff sitting or lying on a table with Ariaz positioned over her in a clearly inappropriate and sexual manner" at or near 2:30 a.m. on July 17, 2013. The majority opinion's fine parsing of this allegation extends beyond the requirements of *Twombly* and *Iqbal*. Certainly, Hanna was aware of a substantial risk to Whitley's constitutional rights when he saw Ariaz positioned over Hanna in a "clearly inappropriate and sexual manner." Whitley alleges that, despite this known risk, Hanna allowed the contact to continue.

[8] As Whitley's counsel rightly noted at oral argument, there are many tactics that an officer could employ to secure stronger evidence in the course of an investigation: a coerced confession, an illegal search, an improper wiretap, and so on. *See, e.g., Crawford v. Washington,* 541 U.S. 36, 69 (2004) (reversing the judgment of the Washington Supreme Court based on the unconstitutional denial of a defendant's Sixth Amendment right to confront a witness against him); *Kyles v. Whitley,* 514 U.S. 419, 454 (1995) (reversing a defendant's conviction and remanding for a new trial based on the state's unconstitutional failure to turn over exculpatory evidence); *Blackburn v. Alabama,* 361 U.S. 199 (1960) (reversing a robbery conviction of a mentally incompetent defendant after his confession was found to be involuntary and in violation of the Fourteenth Amendment); *Giordenello v. United States,* 357 U.S. 480, 488 (1958) (reversing a conviction for the possession of narcotics when the arrest warrant lacked probable cause in violation of the Federal Rules of Criminal Procedure); *see also Wilson v. Lawrence Cnty.,* 260 F.3d 946 (8th Cir.2001) (holding that a defendant could state a § 1983 claim where "a reasonable factfinder could determine that Defendants recklessly or

enforcement are great, police investigations cannot be allowed to subordinate the rights of men and women under our Constitution. This principle runs deep in our jurisprudence, and we will stand by it until time has tolled its last bell." *Melear v. Spears,* 862 F.2d 1177, 1186–87 (5th Cir.1989).

Moreover, the majority opinion's deliberate-indifference analysis suggests that Hanna faced a binary choice: arrest Ariaz, or do nothing to intervene in the absence of conclusive evidence of abuse. *See, e.g.,* Op. at 651 ("Hanna had to decide what evidence would suffice to secure a conviction.").[9] It focuses on the fact that Hanna had only "[v]ideo proof that [Whitley] was likely being abused," which may not have been sufficient to obtain a conviction under the Texas Penal Code. But whether Hanna could or should have arrested Ariaz is an entirely different

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intentionally chose to force Wilson to confess instead of attempting to solve the murder through reliable but time consuming investigatory techniques designed to confirm their suspicions," and noting that there is "no counterveiling equally important governmental interest that would excuse the appellants from fulfilling their responsibility"). We bar law enforcement from this conduct because, no matter how valuable the conviction, the constitutional rights at issue are paramount. *See Blackburn,* 361 U.S. at 206 ("As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence.").

[9] *See also* Op. at 645 ("Thus, although we easily can imagine some alternatives to the choice that Appellees made—including confronting Whitley or contacting her parents—the fact remains that Appellees successfully brought about Ariaz's arrest approximately two weeks after Hanna first learned of a potential relationship between Ariaz and Whitley.").

question from whether Hanna's failure to intervene in state-occasioned violence constitutes deliberate indifference. The deliberate-indifference standard requires only conscious disregard to a "*risk* that a violation of a particular constitutional right ... will follow the decision." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown,* 520 U.S. 397, 411 (1997) (emphasis added) (analyzing the deliberate-indifference standard in the context of municipal liability, and evaluating whether a police officer's use of excessive force would have been a plainly obvious consequence of the sheriff's hiring decision). In other words, as soon as Hanna knew that Whitley was in danger of further sexual abuse, he could not choose to ignore the risk, regardless of whether he had direct evidence for a conviction.

In short, while Hanna may have preferred perfect proof of Ariaz's sexual abuse, video or eyewitness evidence was by no means a mandatory prerequisite to Whitley's rescue. I would hold at this preliminary stage that Hanna's alleged deliberate choice to prioritize Ariaz's eventual prosecution over Whitley's immediate safety plausibly constitutes deliberate indifference to a known risk of constitutional violations.

IV.

Of course, the inquiry does not end with the plausibility of Whitley's § 1983 claim, as Hanna asserted a qualified-immunity defense. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or

constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al–Kidd,* 131 S.Ct. 2074, 2080 (2011).

Relevant here is the second prong of the inquiry: whether the constitutional right at issue was "clearly established" at the time of the challenged conduct. *Id.* In considering this prong, the court asks whether the law so clearly and unambiguously prohibited his conduct that "every 'reasonable official would understand that what he is doing violates [the law].' " *Id.* at 2083 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). The court will not deny immunity unless "existing precedent ... placed the statutory or constitutional question beyond debate." *Id.* at 2083. This doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

The "clearly established" requirement does not depend on the existence of a case directly on point, however. *See al–Kidd,* 131 S.Ct. at 2083; *see also Safford Unified Sch. Dist. No. 1 v. Redding,* 557 U.S. 364, 377 (2009) ("To be established clearly, however, there is no need that the 'very action in question [have] previously been held unlawful.' " (quoting *Wilson v. Layne,* 526 U.S. 603, 615 (1999))). "Rather, '[t]he central concept is that of fair warning: The law can be clearly established despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.' " *Morgan*

v. Swanson, 659 F.3d 359, 412–13 (5th Cir.2011) (en banc) (Elrod, J., dissenting) (quoting *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir.2004) (en banc)) (internal quotation marks omitted). The fair notice requirement is satisfied if controlling authority—or a "robust 'consensus of persuasive authority' "—defines the contours of the right in question with a high degree of particularity. *See al–Kidd,* 131 S.Ct. at 2083 (quoting *Wilson,* 526 U.S. at 617).

Here, I would hold that Hanna lacked fair notice that his conduct would amount to a constitutional violation.[10] Although there is no debate that a child has an inviolable right to bodily integrity, *see supra* Part II, our case law regarding an individual's obligation to intervene in incidents of child sexual abuse arises almost exclusively in the context of school officials. *See Taylor,* 15 F.3d at 450–51; *Rains,* 66 F.3d at 1413. The other analogous body of law arises in bystander-liability cases, in which we require both actual presence at and acquiescence in the underlying constitutional violation. *See Hale v. Townley,* 45 F.3d 914 (5th Cir.1995). There simply is not enough controlling or persuasive authority to conclude that every reasonable official in Hanna's

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[10] The court looks not to whether the underlying constitutional violation is clearly established, but rather to whether an officer would have known that his conduct in addressing—or failing to address—the underlying violation, in and of itself, creates a constitutional injury. *See, e.g., al–Kidd,* 131 S.Ct. at 2084 (explaining that "[t]he general proposition ... that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established" (citing *Saucier v. Katz,* 533 U.S. 194, 201–02 (2001); *Wilson,* 526 U.S. at 615).

position would understand that what he was doing violated the law. For that reason, Hanna is entitled to qualified immunity.

V.

This case is about a state actor's knowing, deliberate choice not to intervene despite a substantial risk of continued statutory rape by a public official, in hopes of obtaining direct evidence for a conviction. While the underlying law-enforcement goal may be laudable, it must bend where a constitutional right is in play. Therefore, I would hold that Whitley states a plausible deliberate-indifference claim under § 1983. Nevertheless, I concur in the judgment because Hanna is entitled to qualified immunity.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 12-10312

Aug. 8, 2013

NATASHA WHITLEY, Plaintiff - Appellant,

v.

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; ROBERT GRUBBS, Defendants - Appellees.

Appeal from the United States District Court for the Northern District of Texas, San Angelo

Before KING, DAVIS, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

JENNIFER WALKER ELROD, Circuit Judge, concurring only in the judgment.

ISSUED AS MANDATE:

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

NATASHA WHITLEY, Plaintiff,	)	
v.	)	No. 6:11-cv-074-C
JOHN NICK HANNA, et al., Defendants.	)	

ORDER

On this day, the Court considered:

(1) Defendants Michael Murray and Robert "Bobby" Grubbs' Motion to Dismiss, filed September 13, 2011;

(2) Defendants Hanna and Bullock's Motion to Dismiss, filed September 13, 2011;

(3) Plaintiff's Response to Defendants Michael Murray and Robert "Bobby" Grubbs' Motion to Dismiss and Alternative Request for Discovery, filed October 14, 2011;

(4) Plaintiff's Response to Defendants Hanna and Bullock's Motion to Dismiss and Alternative Request for Discovery, filed October 14, 2011;

(5) Defendants Michael Murray and Robert "Bobby" Grubbs' Unopposed Motion for Leave to File Reply, filed October 26, 2011;

(6) Defendants Hanna and Bullock's Motion for Protective Order, filed December 1, 2011;

(7) Plaintiff's Motion for Leave to File First Amended Complaint, filed January 16, 2012; and

(8) Defendants Hanna and Bullock's Response in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint, filed January 24, 2012.

I.
PROCEDURAL HISTORY

Plaintiff, Natasha Whitley, filed her Complaint on August 19, 2011, against Defendants, John Nick Hanna, Robert Bullock, Michael Murray, and Robert "Bobby" Grubbs, alleging causes of action under 42 U.S.C. § 1983 and for declaratory and injunctive relief. Specifically, Plaintiff asserted the § 1983 cause of action against Defendants Hanna and Bullock in only their individual capacities for damages and against Defendants Murray and Grubbs in both their individual and official capacities for damages. Plaintiff seeks declaratory and injunctive relief against Defendants Hanna and Bullock in only their official capacities. As stated above, all Defendants have filed Motions to Dismiss based upon qualified immunity, and Plaintiff has sought leave to amend her Complaint.

II.
BACKGROUND

This case arises from the fact that former Sergeant Vincent Ariaz, who was employed by the Brownwood Police Department, was a sexual predator who was charged with multiple counts of sexual assault of a child and indecency with a child. He is currently serving a 20-year prison sentence as a result of these crimes.[1]

Plaintiff participated in a school and work-based program to introduce young boys and girls to various vocations. This program was referred to as the Explorers program. The Explorers program maintains "posts" in which adult post advisors oversee the teenagers involved in the program. In this instance, the Explorers program allowed young boys and girls to participate in police training and operations and is designed to interest them in possible future careers in law enforcement while enhancing their character and sense of responsibility. While employed by the Brownwood Police Department, Ariaz was an advisor for the Explorers Post 1150 from approximately 2000 to 2007.

At the time of the alleged conduct, Plaintiff was 15 years of age and Sergeant Ariaz was 53 years of age. It is undisputed that Ariaz seduced and sexually assaulted Plaintiff over a period of several months.

After suspicions arose, an investigation was started into the conduct and relationship between

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[1] The charges against Ariaz also included counts involving another minor female.

Ariaz and Plaintiff. Defendant Hanna is a Texas Ranger who conducted the majority of the investigation. Defendant Bullock is a Texas Department of Public Safety lieutenant and Hanna's supervisor. Defendant Murray is the Brown County District Attorney, and Defendant Grubbs is the Sheriff of Brown County, Texas.

A prior lawsuit was filed by Plaintiff's parents against the City of Brownwood, its police department, its police chief, and the Boy Scouts of America (along with other organizations involved with the Explorers program) based upon these facts. That case was styled *Whitley v. Ariaz, et al.*, Ca. No. 6:08-CV-085-C.[2] Ultimately, that prior lawsuit was dismissed upon motion by the plaintiffs following mediation.

The lawsuit at hand alleges that the Defendants should have done more to prevent the sexual contact by Ariaz and that the investigation allowed Plaintiff to continue to be placed in a position which furthered Ariaz's conduct against Plaintiff. Plaintiff alleges that the investigation by the four named Defendants allowed Ariaz to continue to violate Plaintiff's substantive due process rights. Though not precisely clear from the pleadings, it appears that Plaintiff alleges that the four Defendants should have intervened sooner to protect Plaintiff. Plaintiff also alleges that injunctive relief should be entered

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[2] An order related to the issue of qualified immunity was entered by the Court in the prior lawsuit and recites the background facts in more detail. *See Whitley v. Ariaz, et al.*, Ca. No. 6:08-CV-085-C (N.D. Tex. March 25, 2009) (Docket entry # 30).

against Defendants Hanna and Bullock in their official capacities as officers of the DPS to prevent future similar investigations in which a minor is allowed to continue contact with a suspected predator during the term of the investigation while attempts are made to gather evidence.

III.
STANDARD

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The United States Supreme Court has set out the test for determining the sufficiency of a complaint under Rule 12(b)(6) as follows: "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007). The complaint must contain sufficient factual matter that, accepted as true, states a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). The complaint only has facial plausibility when the pleadings contain factual content (and not legal conclusions) that allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged. *Id.*

A motion to dismiss under Rule 12(b)(6) "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). The plaintiff's complaint must be stated with enough clarity to enable a court or an

opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). In addition, "[t]he complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (internal quotation marks omitted). In the complaint, the plaintiff must assert more than "conclusory allegations or legal conclusions masquerading as factual conclusions" to avoid dismissal. *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1250 (5th Cir. 1997).

Qualified Immunity

The qualified immunity analysis is a two-step inquiry. *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001). First, the court must determine whether the plaintiff has alleged a violation of a constitutional right. *Id.* (citing *Hale v. Townley*, 45 F.3d 914, 917 (5th Cir. 1995)). Second, if the plaintiff has alleged a constitutional violation, the court must decide whether the conduct was objectively reasonable in the light of clearly established law. *Id.* (citing *Hale*, 45 F.3d at 917). An official's actions must be judged in light of the circumstances that confronted him and without the benefit of 20/20 hindsight when making a determination of whether the conduct was reasonable. *See Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010) (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

IV.
DISCUSSION

Preliminary Matter—Motion for Leave to Amend

Following the filing of the Defendants' Motions to Dismiss, Plaintiff filed a Motion for Leave to File First Amended Complaint. Plaintiff specifically argues that "Plaintiff's First Amended Complaint adds factual detail pertinent to Plaintiff's § 1983 claims and also adds supplemental state law claims that overlap factually with the federal claims in this case and relate back to the initial complaint." (Pl.'s Mot. Leave at 1.) A motion to amend is reviewed under Federal Rule of Civil Procedure 15(a) and leave to amend is generally freely given. However, a court is granted the discretion to deny leave to amend. *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 608 (5th Cir. 1998); Fed. R. Civ. P. 15(a) (given when justice so requires). Although Plaintiff attempts to classify the proposed additional claims as "supplemental state law claims," upon review of the proposed pleading, they are nothing more than reiterations of the original § 1983 claim premised upon substantive due process rights. Moreover, as argued by Defendants Hanna and Bullock in their Response to Plaintiff's Motion for Leave, the proposed additional facts that Plaintiff wishes to add to her pleadings do nothing to change the claims brought by the Plaintiff. (Defs.' Response to Mot. Leave at 3.) Furthermore, as argued by these Defendants, the proposed amendments would be futile because they, in essence, allege a conspiracy to violate Plaintiff's constitutional rights. But, as argued by Defendants Hanna and

Bullock, "[a] conspiracy by itself, however, is not actionable under section 1983 . . . . Thus, a conspiracy claim is not actionable without an actual violation of section 1983." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). Finally, regardless of which complaint is analyzed, as discussed below, the Defendants in this case are entitled to qualified immunity; and the proposed amended facts and "Secondary Liability Claims Under 42 U.S.C. § 1983" do not change this conclusion. Thus, for these reasons and those argued by Defendants Hanna and Bullock in their Response, Plaintiff's Motion for Leave to File First Amended Complaint is **DENIED**.[3]

Motions to Dismiss Based Upon Qualified Immunity

As to Plaintiff's allegations against the Defendants premised upon a violation of her constitutional rights because the Defendants failed to stop Ariaz before certain sexual conduct occurred, these allegations fail to state a claim for relief that is plausible on its face. This is so whether the allegations in Plaintiff's Complaint are analyzed or the allegations in her proffered First Amended

[3] It is also worth noting that, although Fifth Circuit precedence allows a plaintiff, when faced with a qualified immunity defense, to re-plead sufficient facts in the form of a Rule 7(a) reply so as to attempt to state a constitutional claim, here Plaintiff had the benefit of Defendants' Motions to Dismiss pointing out the weaknesses of Plaintiff's pleadings on file for approximately five months but still failed to state a constitutional violation in the proposed First Amended Complaint attached to the Motion for Leave.

Complaint are analyzed. Neither complaint differs substantially in the underlying alleged constitutional violations, and both are premised upon the same set of alleged facts. However, as argued by the Defendants, the conclusory and editorial statements in either complaint cannot form the basis for supporting a plausible claim. At the heart of the allegations is Plaintiff's claim that the Defendants should have concluded their investigation sooner and arrested Ariaz sooner, thus preventing further sexual acts against her. Beyond the state-created- danger theory problem, as discussed in further detail below, Plaintiff's claims relating to arresting Ariaz or concluding the investigation sooner do not amount to a constitutional violation.

There is no constitutional right to have criminal charges filed. *Oliver v. Collins*, 904 F.2d 278, 281 (5th Cir. 1990) ("The decision to file or not file criminal charges falls within this category of acts that will not give rise to section 1983 liability."). Thus, there can be no constitutional right to have charges filed against someone *sooner*. *See id*. Plaintiff's allegations against Defendant Murray, a prosecutor and the only defendant capable of actually filing charges, must therefore fail. Likewise, there is no constitutional right to have someone investigated. *See Vinyard v. Wilson*, 311 F.3d 1340, 1356 (11th Cir. 2002); *Mitchell v. McNeil*, 487 F.3d 374, 378-79 (6th Cir. 2007) (granting motion to dismiss was proper even before any discovery occurred in the case because the allegations failed to state a claim). Thus, Plaintiff's claims against the Defendants who were investigating Ariaz must fail because Plaintiff does

not have a cognizable constitutional right to any type of investigation against Ariaz—regardless of how prudently it was conducted.[4]

Although Plaintiff attempts to argue that Defendants' acts in conducting the investigation of Ariaz and the resulting prosecution fall within the purview of the conduct for which qualified immunity was denied in *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994), the Court disagrees. As argued by the Defendants in their Motions to Dismiss, the Fifth Circuit determined in *Doe v. Taylor* that the principal's conduct of knowing sufficient facts warranting further inquiry and failing to do anything was not reasonable and precluded granting his motion on qualified immunity. *See id.* at 456-57. Yet, the Fifth Circuit also determined that the superintendent was entitled to qualified immunity because, when he became aware of facts warranting further inquiry, he acted on those facts and investigated. *Id.* at 457-58. That is precisely what the Defendants in this instance were doing—acting on facts and investigating Ariaz. Moreover, as argued by the Defendants in their Motions, the plaintiff in *Doe v. Taylor* was in a school setting, and the constitutional right to be free from sexual conduct by someone employed by the school district was greater than the right might be to someone not in

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[4] To the extent that Plaintiff's allegations in Plaintiff's Complaint or the proffered First Amended Complaint attempt to assert some type of conspiracy claim, bald conclusory allegations that a conspiracy exists are insufficient to state a conspiracy claim. *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987).

that situation. *Doe v. Covington Cnty. Sch. Dist.*, 649 F.3d 335, 339 (5th Cir. 2011) (discussing the special relationship a school setting creates and the duty that arises therein to protect the students); *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (holding that a special relationship arises only when a person is involuntarily confined against his or her will; and without such a special relationship, no duty to protect arises under the due process clause of the Fourteenth Amendment).

Importantly, as argued by the Defendants, Ariaz was employed by the Brownwood Police Department—an entity separate from that which employed any of the Defendants named in this lawsuit. As such, none of the Defendants herein had any supervisory capacity over Ariaz or any control over his conduct. Plaintiff attempts to argue that this Court's determination in *Whitley v. Ariaz, et al.*—denying summary judgment to the Police Chief on the issue of qualified immunity—should cause the same result in this instance with the Defendants. However, as this Court reasoned in the prior lawsuit when denying the Brownwood Police Chief's motion for summary judgment, he was in a situation more comparable to that of the principal in *Doe v. Taylor* and genuine issues of material fact existed, thus precluding summary judgment. Here, that is not the case. The Defendants named in this lawsuit had no supervisory capacity over Ariaz and did not even work in the same entity. Furthermore, when presented with facts that might cause a reasonable official to investigate further, the Defendants did exactly that and launched a full investigation into the

concerns raised about Ariaz that eventually led to his arrest, indictment, and incarceration. This is completely different from the facts alleged against the Brownwood Police Chief in the prior lawsuit involving Plaintiff and Ariaz.

Plaintiff's claims are really allegations of the "state-created-danger theory." In order to satisfy the state-created-danger theory, a plaintiff must show that state actors created or increased the danger to the plaintiff and the state actors acted with deliberate indifference. *Morin v. Moore*, 309 F.3d 316, 322 (5th Cir. 2002). A "key to the state-created danger cases . . . [is] the state actors' culpable knowledge and conduct affirmatively placing [the] individual in a position of danger, effectively stripping the person of [his] ability to defend himself, or cutting off potential sources of private aid." *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994). Yet, the state actors "must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Id.* This last point is where Plaintiff's claims truly buckle. Here, the physical and sexual contact with Ariaz was not a situation created by the Defendants but was instead acts that were occurring and occurred between Ariaz and Plaintiff with or without the investigation being conducted by the Defendants. Plaintiff has come forward with no plausible facts supporting any allegations that the conduct by Ariaz happened because Defendants "used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *See id.* There are no facts alleged even

implying that Ariaz or Plaintiff was aware of the investigation and surveillance proceeding against Ariaz. At any rate, the Fifth Circuit has declined to adopt a state-created-danger theory to trigger affirmative duties under the due process clause. *See McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc). Because of this, Plaintiff cannot meet the burden of overcoming a qualified immunity defense when the unlawfulness of the defendant's actions must have been readily apparent from sufficiently similar situations. *Brown v. Miller*, 519 F.3d 231, 236-37 (5th Cir. 2008) (requiring the unlawfulness of the action to have been established by sufficiently similar situations and be readily apparent from relevant precedent). "[A]n official does not lose qualified immunity merely because a certain right is clearly established in the abstract." *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004). Qualified immunity should be granted "whenever the law in this circuit has remained in flux before and after the events that give rise to a particular claim." *McClendon*, 305 F.3d at 333 (E. Jones, J., concurring).

Therefore, based upon the arguments by the Defendants in their respective Motions and Reply, and upon a thorough review of Plaintiff's Complaint and proffered First Amended Complaint attached to her Motion for Leave to Amend, the Court finds that Plaintiff has failed to state a claim under § 1983 against the Defendants, and certainly not such that would overcome their assertion of qualified immunity. Thus, the Defendants' Motions to Dismiss are **GRANTED**.

"Finally, in the absence of a constitutional violation, there can be no municipal liability for the [governmental entity]." *Elizondo v. Green*, 2012 WL 447269, — F.3d — (5th Cir. Feb. 13, 2012) (citing *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009). For this reason, and because a suit against an individual in his official capacity is the same as a suit against the governmental entity, Plaintiff's claims against Defendants Murray and Grubbs in their official capacities (i.e., against Brown County) must fail. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, Plaintiff's claims for declaratory relief must also fail.

V.
CONCLUSION

For the reasons stated herein and as argued by the Defendants in their Motions to Dismiss, Plaintiff's claims against all Defendants are **DISMISSED** WITH PREJUDICE.

SO ORDERED.

Dated February 21, 2012.

/s/_____
Sam R. Cummings
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

NATASHA WHITLEY, Plaintiff,	)	
v.	)	No. 6:11-cv-074-C
JOHN NICK HANNA, et al., Defendants.	)	

JUDGMENT

For the reasons stated in the Court's order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered cause is DISMISSED with prejudice.

Dated February 21, 2012.

/s/
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

APPENDIX E

September 9, 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-10312

NATASHA WHITLEY,
Plaintiff-Appellant

JOHN NICK HANNA; ROBERT BULLOCK; MICHAEL MURRAY; ROBERT GRUBBS,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, San Angelo

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ON PETITION FOR REHEARING EN BANC

(Opinion 08/08/13, 5 Cir. _____, _____ F.3d_____)

Before KING, DAVIS, and ELROD, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge