

No. 13-693

IN THE
Supreme Court of the United States

NATASHA WHITLEY,

Petitioner,

v.

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

Respondents.

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

**BRIEF OF AMICI CURIAE THE TEXAS
ASSOCIATION AGAINST SEXUAL ASSAULT,
ET AL. IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
INTRODUCTION AND SUMMARY	4
ARGUMENT.....	6
I. THIS COURT’S REVIEW IS REQUIRED TO CLARIFY THAT STATE ACTORS VIOLATE A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT WHEN THEY DELIBERATELY DECIDE TO PERMIT A STATE OFFICER TO RAPE A CHILD.....	6
A. The Due Process Clause Of The Fourteenth Amendment Protects The Right To Be Free From Intrusions On Bodily Integrity.....	7
B. The Deliberate Indifference Standard Prohibits The Conscious And Deliber- ate Decision To Allow The Violation Of A Constitutional Right	11
II. RAPE BY A STATE ACTOR CONSTI- TUTES AN EXTREME VIOLATION OF THE CONSTITUTION WITH PROFOUND PSYCHOLOGICAL IMPACT	14
CONCLUSION	23

TABLE OF AUTHORITIES

CASES	Page
<i>Bd. of Cnty. Com'rs v. Brown</i> , 520 U.S. 397 (1997)	5, 11, 12
<i>Bennett v. Pippin</i> , 74 F.3d 578 (5th Cir. 1996)	10
<i>Bjerke v. Johnson</i> , 742 N.W.2d 660 (Minn. 2007)	20
<i>Brown v. Mississippi</i> , 297 U.S. 278 (1936)...	8
<i>Camilo-Robles v. Hoyos</i> , 151 F.3d 1 (1st Cir. 1998)	12
<i>Canedy v. Boardman</i> , 16 F.3d 183 (7th Cir. 1994)	10
<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989)	5, 11, 12
<i>Cnty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	12
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	9, 10, 14, 15
<i>Cruzan v. Director, Mo. Dep't of Health</i> , 497 U.S. 261 (1990)	8
<i>Dang Vang v. Vang Xiong X. Toyed</i> , 944 F.2d 476 (9th Cir. 1991)	10
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	11
<i>Doe v. Taylor Indep. Sch. Dist.</i> , 15 F.3d 443 (5th Cir. 1994)	9
<i>Elkington v. Foust</i> , 618 P.2d 37 (Utah 1980)	20
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	11, 12, 15
<i>ICC v. Brimson</i> , 154 U.S. 447 (1894), overruled on other grounds by <i>Bloom v. Illinois</i> , 391 U.S. 194 (1968)	7
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	8
<i>Johnson v. Phillips</i> , 664 F.3d 232 (8th Cir. 2011)	9, 10

TABLE OF AUTHORITIES—continued

	Page
<i>Jones v. Wellham</i> , 104 F.3d 620 (4th Cir. 1997)	9
<i>Maryland v. King</i> , 133 S. Ct. 1958 (2013)....	9
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961), overruled on other grounds by <i>Monell v.</i> <i>Dep't of Soc. Servs.</i> , 436 U.S. 658 (1978)...	13
<i>Oviatt ex rel. Waugh v. Pearce</i> , 954 F.2d 1470 (9th Cir. 1992)	11
<i>Planned Parenthood of Se. Pa. v. Casey</i> , 505 U.S. 833 (1992)	8
<i>Plumeau v. Sch. Dist. #40</i> , 130 F.3d 432 (9th Cir. 1997)	9, 15
<i>Riggins v. Nevada</i> , 504 U.S. 127 (1992)	8
<i>Rochin v. California</i> , 342 U.S. 165 (1952)....	8
<i>Rogers v. City of Little Rock, Ark.</i> , 152 F.3d 790 (8th Cir. 1998)	8, 9, 10, 11
<i>Stoneking v. Bradford Area Sch. Dist.</i> , 882 F.2d 720 (3d Cir. 1989)	10
<i>United Pac. Ry. v. Botsford</i> , 141 U.S. 250 (1891)	7
<i>United States v. Brummett</i> , 786 F.2d 720 (6th Cir. 1986)	10
<i>United States v. Davila</i> , 704 F.2d 749 (5th Cir. 1983)	10
<i>United States v. Shannon</i> , 110 F.3d 382 (7th Cir. 1997), <i>abrogated on other</i> <i>grounds by Begay v. United States</i> , 553 U.S. 137 (2008), <i>as recognized in United</i> <i>States v. McDonald</i> , 592 F.3d 808 (7th Cir. 2010)	15
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	8
<i>Washington v. Harper</i> , 494 U.S. 210 (1990)	8
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)....	8

TABLE OF AUTHORITIES—continued

LEGAL SCHOLARLY AUTHORITIES	Page
1 William Blackstone, <i>Commentaries</i>	7
Karla Fischer, <i>Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome</i> , 1989 U. Ill. L. Rev. 691	16
Roger L. Goldman & Steven Puro, <i>Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?</i> , 45 St. Louis U. L.J. 541 (2001)	21
Gary Harper, <i>Contextual Factors that Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization and Sociocultural Factors</i> , 50 DePaul L. Rev. 897 (2001)	19
Timothy M. Maher, <i>Police Sexual Misconduct: Officers' Perceptions of Its Extent and Causality</i> , 28 Crim. Just. Rev. 355 (2003)	21
Michelle Oberman, <i>Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape</i> , 48 Buff. L. Rev. 703 (2000)	20, 21, 22
Lyn Hecht Schafran, <i>Writing and Reading About Rape: A Primer</i> , 66 St. John's L. Rev. 979 (1993)	15
Lynn Hecht Schafran, <i>Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist</i> , 20 Fordham Urb. L.J. 439 (1993)	15

TABLE OF AUTHORITIES—continued	
OTHER SCHOLARLY AUTHORITIES	Page
Sally I. Bowie et al., <i>Blitz Rape and Confidence Rape: Implications for Clinical Intervention</i> , 44 Am. J. Psychotherapy 180 (1990)	17
Ann Burgess & Lynda Holmstrom, <i>Rape Trauma Syndrome</i> , 131 Am. J. Psychiatry 981 (1974)	16
Sharon G. Elstein & Noy Davis, <i>Sexual Relationships Between Adult Males and Young Girls: Exploring the Legal and Social Responses</i> (Oct. 1997)	18
Carlo Faravelli et al., <i>Psychopathology After Rape</i> , 161 Am. J. Psychiatry 1483 (2004)	15
Edna Foa & David Riggs, <i>Posttraumatic Stress Disorder Following Assault: Theoretical Considerations of Empirical Findings</i> , 4 Current Directions in Psychol. Sci. 61 (1995)	15
Judith L. Herman, <i>Trauma and Recovery</i> (1992)	15
Denise A. Hines & David Finkelhor, <i>Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research</i> , 12 Aggression & Violent Behavior 300 (2007)	18, 19
Christine E. Kaestle et al., <i>Sexual Intercourse and the Age Difference Between Adolescent Females and Their Romantic Partners</i> , 34 Perspectives on Sexual & Reproductive Health 304 (2002)	18, 19
Sedelle Katz & Mary Ann Mazur, <i>Understanding the Rape Victim: A Synthesis of Research Findings</i> (1979)	17

TABLE OF AUTHORITIES—continued

	Page
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TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES	Page
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U.S. Dep't of Educ., <i>Educator Sexual Misconduct: A Synthesis of Existing Literature</i> (2d ed. 2004), available at https://www2.ed.gov/rschstat/research/ pubs/misconductreview/report.pdf	22
U.S. Dep't of Health & Human Servs., <i>Statutory Rape: A Guide to State Laws and Reporting Requirements</i> , http://www. aspe.hhs.gov/hsp/08/sr/statelaws/state laws.shtml (viewed Mar. 4, 2014).....	20
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INTEREST OF AMICI¹

The Texas Association Against Sexual Assault (“TAASA”) is a 32-year-old non-profit organization committed to ending sexual violence in Texas. TAASA supports and advocates for survivors of sexual violence, their families, and concerned others. TAASA’s membership extends throughout Texas. Eighty rape crisis centers operate 24-hour crisis and support hotlines, provide support groups and victim advocates for hospital and courtroom accompaniment, practice crisis intervention, and refer victims and their loved ones for mental health and other community resources. As part of its mission to serve sexual assault victims, TAASA emphasizes the need for compassionate, evidence-based practices by first responders, including law enforcement professionals.

Sexual assault is one of the least reported crimes in the country, and perceptions of mistrust and maltreatment by law enforcement are among the most common reasons victims choose not to come forward. These concerns are compounded, and the consequences especially dire, for child victims. Because child victims experience sexual assault during psychologically formative years, the harm they suffer can be particularly tragic. As child victims grow older, that harm often becomes manifest in the form of depression, suicidal thoughts, and drug dependency. Child sexual abuse is particularly difficult to address because children often are reluctant to report abuse. To that end, TAASA counsels

¹ Counsel for amici certify that no party or counsel for a party authored this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Amici sought and received consent from the counsel of record for all parties, pursuant to Rule 37.3(a).

victims and provides them with the legal means to defend themselves and hold responsible purveyors of sexual assault.

This case involves issues of critical importance and longstanding interest to TAASA. Natasha Whitley was repeatedly raped by a police officer and leader of a youth engagement program. The defendants in this case made a deliberate decision to allow the police officer to continue his sexual abuse. TAASA urges the Court to grant certiorari and adopt a clear standard recognizing the constitutional right to bodily integrity and prohibiting investigating state actors from deliberately and consciously deciding to allow the violation of this right by a public official's rape of a minor child.

The Oregon Coalition Against Domestic and Sexual Violence ("OCADSV") was founded in 1978 and is a non-profit organization located in Portland, Oregon. Member programs that serve survivors of domestic and sexual violence in communities across the state comprise the core of OCADSV. As an organization, OCADSV provides technical assistance, training, and public education to local crisis centers and communities; engages in systems advocacy; and supports multi-disciplinary efforts to develop effective agency protocols. These activities promote awareness of sexual assault and domestic violence, enhance systemic responses to victims and their families, and support innovative approaches to ending domestic and sexual violence.

The Victim Rights Law Center ("VRLC") is a nonprofit organization based in Boston, Massachusetts, with a satellite office in Portland, Oregon. Founded in 2003, VRLC's mission is to provide legal representation to victims of rape and sexual assault, and to promote a national movement committed to

seeking justice for every rape and sexual assault victim. VRLC meets its mission through direct representation of victims in Massachusetts and Oregon and through national legal advocacy, training, and education regarding civil remedies for victims of sexual assault. VRLC provides direct representation on privacy, safety, education, housing, employment, immigration, and financial matters. Because nearly 25% of the rape and sexual assault survivors it serves are under eighteen years of age, VRLC is acutely aware of the devastating and lifelong consequences of the sexual victimization of minors. The issues discussed in this amicus brief, including the constitutional right to bodily integrity, are critical to all sexual assault survivors.

The Texas Advocacy Project (“TAP”) is a nonprofit public interest law firm founded in 1982 that specializes in advocating for and advising Texans who have survived domestic violence and sexual assault. Thus, TAP champions victims who face systemic barriers in accessing the justice system—victims such as the sexual assault survivor in this case. TAP provides statewide leadership on public policy issues related to the protection of victims of sexual assault and domestic violence, and works toward the reduction of sexual assault and domestic violence in Texas.

The Texas Civil Rights Project (“TCRP”) is a nonprofit public interest law organization founded in 1990 that promotes racial, economic, and social justice, as well as civil liberty under the Texas and United States Constitutions. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations. TCRP has always had a strong interest in

ensuring that individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, inadequate or improper enforcement, or judicial action. TCRP has participated as *amicus curiae* in other cases before this Court.

INTRODUCTION AND SUMMARY

State actors cannot build a stronger case by allowing the violation of individual constitutional protections. In particular, clearly established law prohibits, without exception, the conscious and deliberate decision to violate a child's constitutional right to bodily integrity, or to allow such a violation to occur.

That is, however, precisely what occurred here. Four law enforcement officers made a deliberate decision as part of their investigation to allow a 55-year-old police officer and known sexual predator to rape Natasha Whitley when she was 15 years old. That decision undeniably constituted a gross violation of her constitutional rights, entitling her to seek relief under 42 U.S.C. § 1983. Nevertheless, a divided panel below held to the contrary, reasoning that law enforcement may make the calculated decision to gather more evidence to ensure a successful prosecution even if that deliberate decision allows the knowing violation of a child's constitutional right to bodily integrity. Pet. App. 12a-27a.

The Fifth Circuit's decision diminishes the right to bodily integrity that this Court has long recognized to be protected by the Due Process Clause of the Fourteenth Amendment. In a series of decisions, this Court has held that individuals cannot be deprived of their right to bodily integrity without due process. Though this court has yet to address it, the circuit

courts are unanimous in holding that sexual assault by a public official violates the victim's right to bodily integrity. This case provides an opportunity for this Court to once and for all establish that the Constitution does not permit rape by a state officer.

Perhaps more troubling, the Fifth Circuit contravened this Court's precedent establishing that public officials cannot, without exception, make the deliberate and conscious decision to allow the violation of a constitutional right. See, *e.g.*, *Bd. of Cnty. Com'rs v. Brown*, 520 U.S. 397, 411 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989). Without any support from this Court or other courts of appeals, the Fifth Circuit unilaterally carved out an exception to the deliberate indifference standard that would allow law enforcement to prioritize the interest of conviction over the protection of constitutional rights. Under this standard, law enforcement officers may make a deliberate and conscious decision to allow the violation of a victim's right to bodily integrity so long as they engage in a good faith effort to secure more evidence. But there is no such exception to the deliberate indifference standard. This Court's review is required to clarify that such a conscious decision is the essence of deliberate indifference.

The need for this Court's review is compounded by the exceptional importance of this case to victims of rape, sexual assault, and sexual abuse. Victims of rape suffer lifelong consequences from the assault, including increased risk of physical and sexual revictimization, depression, and post-traumatic stress. Rape of a child, in particular, increases the risk of drug addiction, disease, suicide, and post-traumatic stress disorder, especially where the perpetrator is much older and occupies a position of

authority. This Court should grant certiorari to preserve the constitutional right to bodily integrity and combat any tolerance of rape by public officials.

ARGUMENT

The petition presents important issues of constitutional magnitude that require clarification from this Court. The Court should grant certiorari to declare unequivocally that sexual assault by a public official violates the victim's due process rights. See *infra* Part I.A. The Court also should clarify that law enforcement officers investigating suspected rape by a public official are deliberately indifferent to the constitutional rights of the victim if, for the perceived greater good of obtaining more evidence, they consciously sacrifice the victim's right to be free from sexual assault. See *infra* Part I.B. Clarification on these issues is critical in light of the immense harms of rape, especially rape of a minor by someone in a position of authority. See *infra* Part II.

I. THIS COURT'S REVIEW IS REQUIRED TO CLARIFY THAT STATE ACTORS VIOLATE A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT WHEN THEY DELIBERATELY DECIDE TO PERMIT A STATE OFFICER TO RAPE A CHILD.

State actors who deliberately choose to allow the continued rape of a minor child by a public official to obtain more evidence against the perpetrator—as the defendants did in this case—undoubtedly act with deliberate indifference to the victim's constitutional right to bodily integrity. The Fifth Circuit's opinion conflicts with this Court's precedent regarding the deliberate indifference standard and with the views of the courts of appeals. Under a correct understanding of the deliberate indifference test, the

defendants in this case should be subject to § 1983 liability for their conscious choice to allow the petitioner to be repeatedly raped.

A. The Due Process Clause Of The Fourteenth Amendment Protects The Right To Be Free From Intrusions On Bodily Integrity.

The right to personal security and bodily integrity is rooted in the common law and recognized by a series of this Court's decisions as protected by the Due Process Clause of the Fourteenth Amendment. This Court should affirm that this right protects against rape by a public official.

This Court declared over a century ago that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person.” *United Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (upholding trial court's refusal to order surgical examination of woman injured in railway car accident); see also *ICC v. Brimson*, 154 U.S. 447, 479 (1894) (“the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of ... the privacies of [a person's] life”), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194 (1968). Blackstone likewise recognized that arbitrary deprivations of personal security violated the Magna Carta's requirement that the sovereign act in accordance with “the law of the land,” reasoning that “the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.” 1 William Blackstone, *Commentaries* *133.

This Court has enforced this right to bodily integrity through the Due Process Clause of the Fourteenth Amendment and has applied it in a variety of contexts.² It is therefore beyond doubt that “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.” *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).³

This right to bodily integrity, if it means anything, must unequivocally forbid rape by government officials. *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 796 (8th Cir. 1998) (“No degree of sexual assault by a police officer acting under color of law could ever be proper.”). Indeed, as Judge Elrod stated in concurrence below, there can be “no reasonable

² See, e.g., *Riggins v. Nevada*, 504 U.S. 127, 133-34 (1992) (due process prevents forced administration of antipsychotic medication to a pretrial detainee); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 282 (1990) (due process generally requires informed consent for medical treatment); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (due process protects against “unwanted administration” of medical procedures); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (due process protects against corporal punishment in public schools); *Rochin v. California*, 342 U.S. 165, 172 (1952) (police officers’ forcible administration of “stomach pumping” solution to recover evidence from crime suspect “shocks the conscience” and violated the suspect’s right to bodily integrity); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (due process forbids forced confessions by means of torture).

³ See also *Washington v. Glucksberg*, 521 U.S. 702, 777 (1997) (Souter, J., concurring) (“[I]t is settled now that the constitution places limits on the State’s right to interfere with a person’s most basic decisions about bodily integrity.”) (omissions omitted); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”).

debate that [the police officer] violated Whitley’s constitutional rights when he sexually assaulted her.” Pet. App. 38a (Elrod, J., concurring).

Yet this Court has not had the occasion to hold that sexual assault by a public official violates the Due Process Clause. See *Rogers*, 152 F.3d at 795. The Court should eliminate any doubt and declare once and for all that rape by a public official represents an egregious violation of the victim’s constitutional rights.

Such a holding would comport with this Court’s statements regarding the severity of rape. Unlike acts that are minimally invasive of one’s right to bodily integrity, like that of a cheek swab, see *Maryland v. King*, 133 S. Ct. 1958, 1977-78 (2013), rape, “[s]hort of homicide, ... is the ultimate violation of self.” *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality). More than “a mere physical attack,” it “is destructive of the human personality.” *Id.* at 612 (Burger, C.J., dissenting); see also *infra* Part II. A holding that rape by a public official violates due process also would align with the courts of appeals, which have uniformly declared that “bodily integrity is necessarily violated when a state actor” commits sexual abuse, and have held that “such misconduct deprives the [victim] of rights vouchsafed by the Fourteenth Amendment.” *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451-52 (5th Cir. 1994) (en banc).⁴

⁴ See also *Johnson v. Phillips*, 664 F.3d 232, 239 (8th Cir. 2011) (“the commission of a sexual assault by a government official acting under color of law constitutes a violation of due process that shocks the conscience”); *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir. 1997) (describing a “right ... not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm”); *Plumeau v. Sch. Dist. #40*, 130 F.3d 432, 438 (9th Cir. 1997) (public school students have a

Indeed, given the egregious nature of rape, no other conclusion is possible. Rape by a public official under color of state authority is outrageous conduct, stealing from the victim her “right to intimate bodily integrity” in a way that is undoubtedly “conscience shocking.” *Rogers*, 152 F.3d at 797. Such conduct represents an “arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.” *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998)). It falls “at the extreme end of the scale of egregious conduct by a state actor and [is] ‘unjustifiable by any government interest.’” *Id.* (quoting *Lewis*, 523 U.S. at 849).

Such conduct is unquestionably “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim.” *Coker*, 433 U.S. at 597 (plurality). “Any reasonable officer”—including the defendants here—“would have known” that rape by a police officer acting under color of state law “violate[s] clearly established law.” *Johnson v. Phillips*, 664

substantive due process right not to be sexually abused by school employees at school); *Bennett v. Pippin*, 74 F.3d 578, 584 (5th Cir. 1996) (rape of criminal suspect violated suspect’s “substantive due process right to bodily integrity”); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (strip search by female guards violated privacy and right to bodily integrity); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (sexual coercion by state official violated “constitutional right to be free from sexual assault”); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir. 1989) (“sexual molestation of a student is an intrusion of the schoolchild’s bodily integrity”); *United States v. Brummett*, 786 F.2d 720, 721 (6th Cir. 1986) (conspiracy to commit sexual assault); *United States v. Davila*, 704 F.2d 749, 750 (5th Cir. 1983) (immigrants’ “liberty” deprived through sexual coercion by Border Patrol agents).

F.3d 232, 239 (8th Cir. 2011); see also *Rogers*, 152 F.3d at 797. This Court should declare now that rape by a public official can never be justified or condoned under our Constitution.

B. The Deliberate Indifference Standard Prohibits The Conscious And Deliberate Decision To Allow The Violation Of A Constitutional Right.

The deliberate indifference standard, without exception, prohibits law enforcement officials from making the conscious decision to allow the violation of a rape victim's constitutional right to bodily integrity. Precedent from this Court and the courts of appeals clearly establishes that a state official cannot deliberately decide to allow the violation of a constitutional right. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."); see also, e.g., *Brown*, 520 U.S. at 411; *Harris*, 489 U.S. at 388-89; *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). In direct conflict with these decisions, the Fifth Circuit permits law enforcement officials to, in the interest of collecting evidence, expressly anticipate and premise their investigation upon the violation of an individual's constitutional right to bodily integrity. Pet. App. 12a-27a. This Court should grant review to declare that there is no exception to the deliberate indifference standard that permits a constitutional violation in the interest of securing more evidence.

To be sure, deliberate indifference sets a high standard. It requires "more than mere negligence" or incompetence but, instead, requires that "a person ... 'consciously disregar[d]' a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 835, 839

(1994) (alteration in original); see also *Brown*, 520 U.S. at 411. For the standard to apply, the decision to endanger a person’s constitutional rights must be made “when actual deliberation is practical,” *Lewis*, 523 U.S. at 851, and is clearly met where a defendant makes a “deliberate or conscious choice” to permit the violation of a plaintiff’s constitutional rights. *Harris*, 489 U.S. at 388-89.

There can be no serious doubt that defendants here met the deliberate indifference standard. See Pet. App. 42a-47a (Elrod, J., concurring) (“[I]n his zeal to put Ariaz behind bars for good, Hanna allowed—in fact, expected—Whitley to suffer additional instances of sexual abuse at the hands of a fifty-five year old police officer.”) (footnote omitted). Instead of recognizing this fact, the two-judge majority unilaterally carved out an exception to the deliberate indifference standard. Without support from this Court or the courts of appeals, the Fifth Circuit held that a state actor may deliberately and consciously choose to allow the violation of a child’s right to bodily integrity so long as the decision is made with the good faith belief that the violation will help secure more evidence for conviction. *Id.* at 17a-27a; *id.* at 44a (Elrod, J., concurring) (“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.”).

This result is completely contrary to this Court’s precedent. *Farmer*, 511 U.S. at 835, 839; *Brown*, 520 U.S. at 411. Further, no court of appeals has recognized any exception to the deliberate indifference standard. These courts have unequivocally held that state actors cannot act with “complete indifference to the constitutional rights of others.” *Camilo-Robles v.*

Hoyos, 151 F.3d 1, 9 (1st Cir. 1998). An official’s conscious and deliberate decision to allow a constitutional violation with the aim of collecting more evidence is the essence of deliberate indifference. Such indifference is especially egregious given the magnitude of the harms associated with the rape of a child. See *infra* Part II.

Section 1983 has long prohibited state actors from deliberately deciding not to enforce and protect an individual’s clearly established rights. Indeed, this Court recognized that § 1983 provides a remedy “against those who representing a State in some capacity were *unable* or *unwilling* to enforce” a protected right. *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (emphases in original), *overruled on other grounds by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). Those state actors who by “deliberate or conscious choice” fail to consider the substantial risk of constitutional harms—or, as in this case, specifically anticipate and premise their investigation upon the violation of a constitutional right—work a special harm that § 1983 prohibits.

This Court should grant review to declare that state actors cannot build a stronger case by violating constitutional protections, especially where that violation is an extreme act of rape involving a minor. This Court’s review is required to guarantee the uniform application of the deliberate indifference standard across the courts of appeals, and to affirm that there is no exception authorizing the deliberate decision to allow the violation of a constitutional right.

II. RAPE BY A STATE ACTOR CONSTITUTES AN EXTREME VIOLATION OF THE CONSTITUTION WITH PROFOUND PSYCHOLOGICAL IMPACT.

Rape is a heinous crime that, all too often, results in life-destroying harm to victims. Guidance from this Court is particularly important given the immense harms of rape, especially where—as here—the rapist is a public official and the victim is a minor subject to his authority. This Court’s findings regarding the traumatic impact of rape, see, *e.g.*, *Coker*, 433 U.S. at 597 (plurality); *id.* at 612 (Burger, C.J., dissenting), are reinforced by medical and social science literature describing the deep and long-term effects of rape. Such findings only serve to underscore that the victim’s right to bodily integrity cannot be sacrificed for any reason, not even tactical ones that serve to strengthen the case against the perpetrator.

1. As indicated, this Court has recognized that rape results in pernicious psychological harm to victims. It is “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim.” *Id.* at 597 (plurality). Indeed, “[t]he deliberate viciousness of the rapist may be greater than that of the murderer.... Some victims are so grievously injured physically or psychologically that life is beyond repair.” *Id.* at 603 (Powell, J., concurring in the judgment in part and dissenting in part) (emphasis omitted). Rape is more than “a mere physical attack”; “it is destructive of the human personality,” “gravely affect[ing]” the “remainder of the victim’s life” and having “a serious detrimental

effect upon her husband and any children she may have.” *Id.* at 612 (Burger, C.J., dissenting).⁵

Rape is a brutal experience with lifetime repercussions.⁶ Researchers have documented the emotional, physical, and behavioral symptoms endured by rape victims.⁷ Victims suffer nightmares, flashbacks,

⁵ See *Farmer*, 511 U.S. at 853 (Blackmun, J., concurring) (“Prison rape ... is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.”); see also *Plumeau*, 130 F.3d at 438 (“The extent of harm inflicted by sexual abuse is immeasurable.”); *United States v. Shannon*, 110 F.3d 382, 413 (7th Cir. 1997) (en banc) (Coffey, J., concurring in part, concurring in the judgment, and dissenting in part) (“At the very root of any sex crime, whether it be committed against a child or adult, lies *an utter indifference towards respect for another human’s life*. The perpetrator knows full well, but nevertheless does not care, whether his or her helpless victim shall be forever physically and psychologically scarred, often being left to face a life riddled with depression as well as societal mistrust.”).

⁶ See generally Crime Victims Research & Treatment Ctr., *Rape in America: A Report to the Nation* 7-8 (1992) (hereinafter *Rape in America*); Judith L. Herman, *Trauma and Recovery* 57-58 (1992); Lenore E.A. Walker, *Abused Women and Survivor Therapy* 23-53 (1994); Lyn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 St. John’s L. Rev. 979, 1017-26 (1993); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 Fordham Urb. L.J. 439, 443-47 (1993).

⁷ See, e.g., Carlo Faravelli et al., *Psychopathology After Rape*, 161 Am. J. Psychiatry 1483 (2004); Edna Foa & David Riggs, *Posttraumatic Stress Disorder Following Assault: Theoretical Considerations of Empirical Findings*, 4 Current Directions in Psychol. Sci. 61, 63 (1995); Barbara O. Rothbaum & Edna B. Foa, *Subtypes of Posttraumatic Stress Disorder and Duration of Symptoms*, in *Posttraumatic Stress Disorder: DSM-IV and Beyond* 23, 26, 29 (Jonathan R.T. Davidson & Edna B. Foa eds.,

disorientation, dissociation, sleep and appetite disturbances, constant reliving of the rape, shock, disbelief, helplessness, powerlessness, guilt, self-blame, loss of self-esteem, uncontrollable crying, extreme fear, hypervigilance, anxiety attacks, psychic numbing, fatigue, shame, internalized sense of damage, sexual dysfunction, depression, and suicidal thoughts and actions.⁸ And many turn to alcohol and drugs.⁹

The trauma of rape persists. Six months after being raped, the majority of victims experience what one researcher called a distinct “core of distress.”¹⁰ Fifteen to 30 months after being raped, more than 40% of victims suffer depression, restricted social interaction, sexual dysfunction, suspicion, and fears.¹¹ Three years after the rape, a variety of psychological symptoms persist, and many victims never recover completely. Even after 15 years, 16.5% of victims experience pervasive symptoms of rape trauma syndrome.¹² Most troublingly, “13% of all rape victims have actually attempted suicide,” which

1993); Ann Burgess & Lynda Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981, 982 (1974).

⁸ See, e.g., Walker, *supra*, at 30-40; Burgess & Holstrom, *supra*, at 982-85.

⁹ See *Rape in America*, *supra*, at 7-8.

¹⁰ Dean G. Kilpatrick et al., *The Aftermath of Rape: Recent Empirical Findings*, 49 Am. J. Orthopsychiatry 658, 668 (1979).

¹¹ See Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. Ill. L. Rev. 691, 706 (citing Nadelson et al., *A Follow-Up Study of Rape Victims*, 139 Am. J. Psychiatry 1266, 1268 tbl.2 (1982)).

¹² Dean G. Kilpatrick et al., *Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact*, 33 Crime & Delinq. 479 (1987).

“confirms the devastating and potentially life-threatening health impact of rape.”¹³

Rape by someone known to the victim or standing in a position of authority and trust is uniquely destructive.¹⁴ Victims of so-called “confidence rape”—*i.e.*, rape occurring where the assailant is known to the victim and gains control over her by winning her trust—frequently experience feelings of guilt and self-blame. And because they blame themselves, they often do not report the rape for years, delaying access to necessary physical and psychological treatment.¹⁵

2. The harmful impact of rape is pronounced for children. Child rape victims suffer long-term cognitive defects and biological weaknesses. One 23-year study of victims of child sexual abuse found that the victims were “biologically changed.”¹⁶ They suffered increased rates of obesity and experienced puberty earlier.¹⁷ They also suffered immune system dysfunctions that resulted in more major illnesses and hospitalizations than comparable females. The study concluded that “[c]ollectively these sexually abused females are by and large tracking life

¹³ *Rape in America, supra*, at 7.

¹⁴ See Sedelle Katz & Mary Ann Mazur, *Understanding the Rape Victim: A Synthesis of Research Findings* 108 (1979); Sally I. Bowie et al., *Blitz Rape and Confidence Rape: Implications for Clinical Intervention*, 44 *Am. J. Psychotherapy* 180 (1990).

¹⁵ See Bowie et al., *supra*.

¹⁶ Penelope K. Trickett et al., *The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study*, 23 *Dev. & Psychopathology*, 453, 468 (2011).

¹⁷ *Id.*

trajectories associated with chronic illness and the leading causes of death.”¹⁸

The study found that child rape victims also suffer socially. They are more likely to have abusive partners, become teen mothers, and have premature babies.¹⁹ They are more likely to practice self-mutilation, engage in risky sexual activity, abuse drugs and alcohol, fail to complete high school, and qualify for at least one mental disorder diagnosis.²⁰ “As parents,” the study found, “they place their children at increased risk for abuse and neglect and overall maldevelopment as they repeat generational patterns of abuse, neglect, and family dysfunction.”²¹

The serious harms of child rape are present even where the rapist gained control over the victim without resorting to traditional violent force. These so-called statutory rape relationships carry high risks of pregnancy, sexually transmitted diseases, single-parenthood, suicide, and other psychosocial problems,²² and often involve children from disadvantaged and vulnerable backgrounds.²³

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Denise A. Hines & David Finkelhor, *Statutory Sex Crime Relationships Between Juveniles and Adults: A Review of Social Scientific Research*, 12 *Aggression & Violent Behavior* 300, 303 (2007); Christine E. Kaestle et al., *Sexual Intercourse and the Age Difference Between Adolescent Females and Their Romantic Partners*, 34 *Perspectives on Sexual & Reproductive Health* 304, 307 (2002).

²³ Sharon G. Elstein & Noy Davis, *Sexual Relationships Between Adult Males and Young Girls: Exploring the Legal and Social Responses* 11 (Oct. 1997).

Such relationships with older partners that lead to sexual intercourse have an increasingly negative impact on adolescent girls the younger they are. Younger girls with older partners are more likely to attempt suicide, use alcohol or drugs, or get pregnant.²⁴ Adolescent girls in a statutory rape relationship are less likely to use a condom, are more likely to contract HIV or other sexually transmitted diseases, and are more likely to get pregnant.²⁵ Due in part to the great disparity in power and communication dynamics between adolescent females and much older males in positions of authority, girls who characterize their relationships as consensual are not necessarily less at risk of these harms.²⁶ Accordingly, the toxic stereotype that the minor participant in a statutory rape relationship acted or appeared older than her age must be forcefully opposed.

Society has expressed a particularly strong interest in protecting children from the malignant effects of sexual abuse, as reflected in state criminal laws that render consent irrelevant in criminal prosecutions for

²⁴ Harold Leitenberg & Heidi Saltzman, *A Statewide Survey of Age at First Intercourse for Adolescent Females and Age of Their Male Partners: Relation to Other Risk Behaviors and Statutory Rape Implications*, 29 *Archives of Sexual Behavior* 203 (2000).

²⁵ Hines & Finkelhor, *supra*, at 307.

²⁶ Kaestle et al., *supra*, at 307. Indeed, “as the age difference between the young woman and her partner increased, the ... degree to which she ‘wanted’ to participate in the sexual act decreased. This finding indicates the likelihood of a greater power differential ... and that the episode may not have been voluntary.” Gary Harper, *Contextual Factors that Perpetuate Statutory Rape: The Influence of Gender Roles, Sexual Socialization and Sociocultural Factors*, 50 *DePaul L. Rev.* 897, 912-13 (2001) (footnote omitted).

the sexual abuse of a child.²⁷ One state supreme court has characterized its statutory rape law as reflecting “the feeling of society in general that sexual contact by adults with children ... is reprehensible whether or not the child consents, because at that age, the child should be deemed incapable of giving consent.” *Bjerke v. Johnson*, 742 N.W.2d 660, 670 (Minn. 2007) (omission in original); see also *Elkington v. Foust*, 618 P.2d 37, 40 (Utah 1980) (child sexual abuse is “so contrary to commonly accepted standards of decency and morality that any consensual agreement to engage in such conduct would be rejected by the law as against public policy and void”). In addition, all 50 states and the U.S. territories have laws and policies that specify procedures for making and responding to reports of suspected child abuse.²⁸

The strong public interest in protecting children from sexual abuse aligns with the social science literature on the effects of statutory rape. Children cannot be expected to foresee the multitude of long-term effects of sexual abuse by an adult, which include “depression and other psychosocial disorders, promiscuity, and revictimization,” as well as “guilt, shame, phobias, and eating disorders.”²⁹ Such abuse will often also lead to “lower self-esteem, higher rates

²⁷ See U.S. Dep’t of Health & Human Servs., *Statutory Rape: A Guide to State Laws and Reporting Requirements*, http://www.aspe.hhs.gov/hsp/08/sr/state_laws/statelaws.shtml (viewed Mar. 4, 2014).

²⁸ See Nat’l Conf. of State Legislatures, *Child Abuse and Neglect Reporting State Statute Overview*, <http://www.ncsl.org/research/human-services/child-abuse-and-neglect-reporting-statutes.aspx> (viewed Mar. 4, 2014).

²⁹ Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 Buff. L. Rev. 703, 728-29 (2000).

of emotional distress, and considerably elevated rates of suicide and self-harm.”³⁰

These studies lead ineluctably to the conclusion that allowing an adult public official (here, a 55-year-old police officer) to sexually assault a child (here, a 15-year-old girl) for any period of time only increases the likelihood that the victim will suffer one or more of these harms in derogation of her constitutional right to bodily integrity.

3. Rape by public officials abusing their authority occurs with alarming frequency,³¹ contributing to victims’ widespread mistrust of law enforcement. Indeed, the fear of maltreatment by law enforcement officials is one of the most common reasons victims choose not to report being raped.³² In part for this reason, rape is widely underreported; only about 20% of rapes are reported to law enforcement.³³ In fact, given that young people are especially fearful of

³⁰ *Id.* at 729.

³¹ See, e.g., Timothy M. Maher, *Police Sexual Misconduct: Officers’ Perceptions of Its Extent and Causality*, 28 *Crim. Just. Rev.* 355 (2003) (surveying law enforcement officials in St. Louis and finding that they perceived sexual misconduct by police officers to be common); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 *St. Louis U. L.J.* 541 (2001) (reviewing police license revocations in Florida and Missouri and finding that sexual misconduct was the basis for 25% of revocations).

³² Cf. U.S. Dep’t of Justice, Office of Justice Programs, *Victimizations Not Reported to the Police, 2006-2010*, at 2 (Aug. 2012) (reporting dramatic upward trend between 1994 and 2010 in victims who said the reason they did not report violent crime was because they believed the police “would not or could not help”).

³³ See Nat’l Research Council, *Estimating the Incidence of Rape and Sexual Assault* 34 (2013).

reporting traumatic experiences to law enforcement,³⁴ the statistics for child rape victims are even worse: “[o]nly 5 to 6 percent of child sexual abuse cases become known to social services or the police.”³⁵ It is therefore even more incumbent on law enforcement to act swiftly and decisively to end sexual abuse of children by public officials.

Under the Fifth Circuit’s reasoning, an investigating officer may deliberately sacrifice the immediate safety and constitutional rights of a victim. See, e.g., Pet. App. 21a n.9 (stating that defendants were not deliberately indifferent to Whitley’s constitutional rights for “choosing one permissible course of action ... over another”). Guidance from this Court is needed to define the role of law enforcement when investigating the suspected rape of a minor child by a public official.

³⁴ See Oberman, *supra*, at 782-84.

³⁵ U.S. Dep’t of Educ., *Educator Sexual Misconduct: A Synthesis of Existing Literature* 16 (2004), available at <https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

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