No. 22-___

IN THE

Supreme Court of the United States

EDWARD PINKNEY,

Petitioner,

v.

BERRIEN COUNTY, MICHIGAN;
BERRIEN COUNTY PROSECUTOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE D. ROSENBERG
Counsel of Record
STEPHEN J. KENNY
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

ANNE MARIE LOFASO
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Drive
Morgantown, WV 26506

TIMOTHY M. HOLLOWAY
P.O. Box 296
20257 Ecorse Rd, #5E
Taylor, MI 48180

Counsel for Petitioner

QUESTION PRESENTED

Petitioner was charged, subjected to pretrial proceedings, tried, convicted, and incarcerated for an act that the law does not make criminal. Petitioner brought this action under 42 U.S.C. § 1983, alleging that the prosecuting attorney who procured his unlawful conviction and incarceration violated his due process rights. Despite acknowledging that a conviction and incarceration for a non-criminal act implicates due process, the Sixth Circuit concluded that the Fourteenth Amendment did not apply and assessed the entirety of Petitioner's claim under the Fourth Amendment.

The Sixth Circuit's decision deepens a split among the circuits regarding whether the Fourth Amendment exclusively governs claims challenging the lawfulness of a prosecution and pretrial criminal proceedings outside of a defect in the probable-cause determination. Three circuits, including the Sixth Circuit below, have taken the position that the Fourth Amendment governs all such claims, while four circuits have recognized that the Due Process Clause governs at least some such claims. But the Sixth Circuit went even further. Contrary to the decisions of this Court and every circuit court, the court also applied the Fourth Amendment to Petitioner's challenge to the lawfulness of his conviction and incarceration, well after the point at which the protections of the Fourth Amendment give way to the protections of the Fourteenth Amendment. The question presented is:

Whether Petitioner's § 1983 claim based on his prosecution, pretrial criminal proceedings, trial,

conviction, and incarceration for an act the law does not make criminal should be assessed under the Due Process Clause of the Fourteenth Amendment or under the Fourth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were the Petitioner, Reverend Edward Pinkney, who was the Plaintiff-Appellant in the Sixth Circuit, and the Respondents, Berrien County, Michigan and the Berrien County Prosecutor, who were Defendants-Appellees in the Sixth Circuit.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

1. *Pinkney v. Berrien County*, No. 1:21-CV-310 (W.D. Mich.). Judgment entered July 20, 2021.

2. *Pinkney v. Berrien County*, No. 21-2802 (6th Cir.). Judgment entered August 19, 2022.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT....................... iii

RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES.....................................vi

INTRODUCTION..1

OPINIONS BELOW..4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 6

A. State Court Proceedings 6

B. Federal District Court Proceedings...........8

C. Sixth Circuit Proceedings 9

REASONS FOR GRANTING THE WRIT...............10

I. There Is Continuing Disagreement Among The Circuit Courts Regarding Whether The Fourth Amendment Governs Claims Challenging The Lawfulness Of Pretrial Proceedings Where Probable Cause Is Not At Issue 10

II. The Decision Below Is Wrong 17

III. The Question Presented Is Exceptionally Important And Likely To Recur 24

IV. This Case Is An Ideal Vehicle..........................26

CONCLUSION 28

APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit (Aug. 19, 2022) 1a

APPENDIX B: Opinion and Order of the United States District Court for the Western District of Michigan (July 20, 2021) 11a

APPENDIX C: Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing (Sept. 15, 2022) 30a

APPENDIX D: Constitutional and Statutory Provisions 32a

APPENDIX E: Opinion of the Michigan Supreme Court (May 1, 2018) 35a

TABLE OF AUTHORITIES

Page(s)

CASES

Albright v. Oliver,
510 U.S. 266 (1994) 3, 10–11, 17–18, 20, 25

Brady v. Maryland,
373 U.S. 83 (1963) 22, 24

Buggs v. United States,
153 F.3d 439 (7th Cir. 1998) 21, 23

Caldwell v. City & Cnty. of S.F.,
889 F.3d 1105 (9th Cir. 2018) 16

Castellano v. Fragozo,
352 F.3d 939 (5th Cir. 2003) 23

Class v. United States,
138 S. Ct. 798 (2018) 21

Cole v. Carson,
935 F.3d 444 (5th Cir. 2019) 15

Creech v. Frauenheim,
800 F.3d 1005 (9th Cir. 2015) 23

Daves v. Dallas Cnty.,
22 F.4th 522 (5th Cir. 2022) 16

DeLade v. Cargan,
972 F.3d 207 (3d Cir. 2020) 12–13

Devereaux v. Abbey,
263 F.3d 1070 (9th Cir. 2001) 16

Ernst v. Rising,
427 F.3d 351 (6th Cir. 2005) 9, 27

Everette-Oates v. Chapman,
No. 20-1093, 2021 WL 3089057
(4th Cir. July 22, 2021) 16

Fiore v. White,
531 U.S. 225 (2001) (per curiam) 21

Frost v. N.Y.C. Police Dep't,
980 F.3d 231 (2d Cir. 2020) 15

Green v. Nelson,
595 F.3d 1245 (11th Cir. 2010)............................23

Halsey v. Pfeiffer,
750 F.3d 273 (3d Cir. 2014) 23

Harden v. Norman,
919 F.3d 1097 (8th Cir. 2019)..............................23

Jackson v. Virginia,
443 U.S. 307 (1979).......................................22, 24

Jauch v. Choctaw Cnty.,
874 F.3d 425 (5th Cir. 2017)..........................15, 19

Johnson v. McCarver,
942 F.3d 405 (8th Cir. 2019)...............................13

Johnson v. United States,
805 F.2d 1284 (7th Cir. 1986)..............................21

Lewis v. City of Chicago,
914 F.3d 472 (7th Cir. 2019)...............................23

Manuel v. City of Joliet,
580 U.S. 357 (2017)........... 3, 11–15, 17–19, 22, 26

Mayberry v. Pennsylvania,
400 U.S. 455 (1971)...24

Miller v. Pate,
386 U.S. 1 (1967)...24

Mitchell v. Doherty,
37 F.4th 1277 (7th Cir. 2022) 3, 12, 17–18, 22, 25–26

Monell v. Dep't of Soc. Servs. of City of N.Y.,
436 U.S. 658 (1978)..8

ODonnell v. Harris Cnty.,
892 F.3d 147 (5th Cir. 2018)...............................15

Pavatt v. Carpenter,
928 F.3d 906 (10th Cir. 2019).............................23

Pinkney v. Dep't of Corr.,
No. 356363, 2022 WL 1701944 (Mich. Ct. App. May 26, 2022) (per curiam).....................8

Pope v. Netherland,
113 F.3d 1364 (4th Cir. 1997).............................23

Regents of the Univ. of Cal. v. Doe,
519 U.S. 425 (1997)...27

Roman v. Mitchell,
924 F.3d 3 (1st Cir. 2019) 22

Smalls v. Collins,
10 F.4th 117 (2d Cir. 2021).....................14–15, 19

Smith v. Cain,
565 U.S. 73 (2012)..22

Spencer v. Peters,
857 F.3d 789 (9th Cir. 2017)...............................16

Thompson v. Clark,
142 S. Ct. 1332 (2022)..18

Thompson v. Louisville,
362 U.S. 199 (1960)..22

Travillion v. Superintendent Rockview SCI,
982 F.3d 896 (3d Cir. 2020) 22

United States v. Clark,
740 F.3d 808 (2d Cir. 2014) 22

United States v. Delgado,
672 F.3d 320 (5th Cir. 2012)................................23

United States v. Salerno,
481 U.S. 739 (1987).......................................18, 24

United States v. Torres,
894 F.3d 305 (D.C. Cir. 2018) 23

Walker v. City of Calhoun,
901 F.3d 1245 (11th Cir. 2018)......................16, 19

Wayte v. United States,
470 U.S. 598 (1985)..18

Weiland v. Palm Beach Cnty. Sheriff's Off.,
792 F.3d 1313 (11th Cir. 2015)............................16

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const. amend. IV...5

U.S. Const. amend. XIV 5

28 U.S.C. § 1254 4

42 U.S.C. § 1983 .... 1, 5, 8, 10, 14, 16, 18, 25

Mich. Comp. Laws § 168.937 ....1, 6–7, 10

Mich. Comp. Laws § 168.957 6

Mich. Comp. Laws § 600.6093 27

OTHER AUTHORITIES

Jenny E. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. 757 (2020) 25–26

Teressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C. L. Rev. 379 (2021)...................................25

Josh Stanton, *Substantive Due Process and Pretrial Detention: Implications of Strict Scrutiny for the Law of Bail*, 41 Rev. Litig. 365 (2022)..........................18, 24, 26

INTRODUCTION

Petitioner, Reverend Edward Pinkney, was charged, subjected to pretrial criminal proceedings, tried, convicted, and incarcerated for more than two years for an act that the law does not make criminal. After submitting recall petitions with some allegedly altered dates, Petitioner was charged by the Berrien County Prosecuting Attorney with "election forgery" under Mich. Comp. Laws § 168.937. On direct appeal, the Michigan Supreme Court ordered Petitioner's conviction vacated after concluding that § 937 "unambiguously sets forth a penalty provision and not a substantive offense." Pet.App.72a–73a n.71.

Petitioner filed this action under 42 U.S.C. § 1983, alleging that the Berrien County Prosecuting Attorney violated his Fourteenth Amendment due process rights by prosecuting him and procuring a conviction and incarceration for a non-criminal act. The district court dismissed Petitioner's complaint, and the Sixth Circuit affirmed. Pet.App.10a. Although the Sixth Circuit acknowledged that a conviction and incarceration for a non-criminal act implicates a defendant's due process rights, the court nevertheless held that the entirety of Petitioner's claim must be assessed under the Fourth Amendment. Pet.App.8a–10a. And because Petitioner did not bring a Fourth Amendment claim, the Sixth Circuit affirmed dismissal of the complaint. Pet.App.10a.

Petitioner's claim—that the Due Process Clause prohibits charging, detaining, trying, convicting, and incarcerating an individual for an act that the law does not make criminal—relates to the entire continuum of the criminal process. The Sixth Circuit

was wrong to hold that the Fourth Amendment applies to any aspect of Petitioner's claim for the simple reason that Petitioner's claim implicates his due process rights and does not challenge the reasonableness of any search or seizure. And while there is a circuit split regarding whether the Fourth Amendment governs claims arising from the pretrial phases of the criminal process when probable cause is not at issue, this Court's precedent clearly holds that the Due Process Clause governs the lawfulness of post-trial conviction and incarceration.

With respect to the pretrial phases of the criminal process, the Sixth Circuit's decision deepens a split among lower courts regarding whether the Fourth Amendment exclusively governs claims challenging the lawfulness of a prosecution and pretrial criminal proceedings outside of a defect in the probable-cause determination. Three circuits—the Third, Eighth, and now the Sixth—have taken the maximalist position that all such claims must be brought under the Fourth Amendment. Four other circuits—the Second, Fifth, Ninth, and Eleventh—have recognized that the Due Process Clause may in some circumstances apply to such claims. But the Sixth Circuit's position is wrong, because it ignores that a prosecution or pretrial detention may be unlawful for reasons other than lack of probable cause—including where, as here, Petitioner's complaint is that he was charged with a non-existent offense—and therefore does not implicate the Fourth Amendment.

And the Sixth Circuit went even further. While there is uncertainty in the lower courts regarding the boundary between the Fourth and Fourteenth Amendments during pretrial proceedings, there is no

serious dispute that the Fourteenth Amendment, and not the Fourth Amendment, governs challenges to the lawfulness of convictions and incarcerations. Indeed, this Court has expressly held that "once a trial has occurred, the Fourth Amendment drops out," and a plaintiff may challenge "a conviction and any ensuing incarceration … under the Due Process Clause of the Fourteenth Amendment." *Manuel v. City of Joliet*, 580 U.S. 357, 369 n.8 (2017). Yet the Sixth Circuit assessed Petitioner's claim entirely under the Fourth Amendment, notwithstanding that his claim involves a challenge to the lawfulness of his conviction and incarceration for a non-existent offense. This decision is egregiously wrong.

The question presented involves an important and recurring issue. The Sixth Circuit's overly expansive view of the Fourth Amendment's application threatens to undermine the fundamental rights of criminal defendants by funneling their due process claims through the inadequate and inapplicable framework of the Fourth Amendment. Moreover, the boundary between the Fourth and Fourteenth Amendments during pretrial criminal proceedings, and thus the scope of protections afforded to pretrial detainees, has been unsettled since this Court decided *Albright v. Oliver*, 510 U.S. 266 (1994). While this Court provided some additional clarity in *Manuel*, "that the Fourth Amendment extends beyond the start of legal process," the Court "left open whether it applies outside some defect in the probable-cause determination." *Mitchell v. Doherty*, 37 F.4th 1277, 1283 (7th Cir. 2022). Thus, this issue that has vexed lower courts since *Albright* has not been fully resolved,

and this Court should step in to resolve this important and recurring issue.

Finally, this case presents an ideal vehicle for review. The question presented was preserved below and is squarely posed. This case also involves the entire continuum of the criminal process and offers the Court an optimal opportunity to clarify when and under what circumstances during the criminal process the protections of the Fourth Amendment give way to the protections of the Due Process Clause.

Because the opinion below conflicts with this Court's decisions as well as decisions from other courts over an important and recurring issue, this Court should grant review and answer the question presented.

OPINIONS BELOW

The court of appeals' opinion is unpublished but available at 2022 WL 3572978 and reproduced at Pet.App.1a–10a. The district court's opinion is unpublished but available at 2021 WL 9316105 and reproduced at Pet.App.11a–29a.

JURISDICTION

The court of appeals affirmed the district court's judgment on August 19, 2022. Pet.App.1a–2a, 10a. Justice Kavanaugh extended the time to file this petition until February 10, 2023. No. 22A501 (U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution states, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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[.]

STATEMENT OF THE CASE

A. State Court Proceedings

Petitioner is a community activist who participated in an effort to recall the mayor of Benton Harbor, Michigan. In order to force a recall election, Petitioner needed to obtain 393 signatures on petitions supporting the recall within a 60-day window. Pet.App.43a. On January 8, 2014, Petitioner submitted 62 recall petitions containing 728 supporting signatures to the Berrien County Clerk's office. *Id.* The clerk's office certified 402 of these signatures and scheduled the recall election. *Id.*

Suspected irregularities in some of the signatures on the petitions resulted in an investigation, which found that five petitions contained some signatures with dates altered so as to fall within the 60-day window. *Id.* Berrien County Prosecuting Attorney Michael Sepic initiated a criminal prosecution, charging Petitioner with five counts of election-law forgery under Mich. Comp. Laws § 168.937 and six counts of making a false statement in a certificate-of-recall petition under Mich. Comp. Laws § 168.957. Pet.App.43a–44a.

After posting bond and being bound over to the Berrien Circuit Court on these charges, Petitioner filed a motion to quash, arguing that § 937 is a penalty provision, not a substantive, chargeable offense. Pet.App.44a. The text of the statute states: "Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years[.]" Mich. Comp. Laws § 168.937.

The court denied the motion. Pet.App.44a. After an eight-day trial, the jury found Petitioner guilty of the five election-forgery counts and acquitted him of all other counts. *Id.* Petitioner then filed a motion for a directed verdict, again arguing that § 937 is a penalty provision and not a substantive offense. *Id.* The court denied the motion and sentenced Petitioner to concurrent prison terms of 30 to 120 months. *Id.* Petitioner served the minimum term and was released on parole in June 2017. Pet.App.2a.

The Michigan Court of Appeals upheld Petitioner's convictions. Pet.App.44a. Petitioner then sought review by the Michigan Supreme Court. Pet.App.47a. The Michigan Supreme Court granted review and reversed, holding that "§ 937 unambiguously sets forth a penalty provision and not a substantive offense." Pet.App.72a–73a n.71. The court explained that "nothing in the plain language of § 937 suggests that the Legislature intended it to be a chargeable offense," nor does the statute "set forth or describe any conduct that is prohibited." Pet.App.49a. Instead, "it reads like a penalty provision—*i.e.*, a provision providing the penalty for the crime of forgery enumerated elsewhere in the Election Law." *Id.* Because Petitioner "was not properly charged under § 937 with the substantive offense of election-law forgery," the Michigan Supreme Court ordered that "his convictions must be vacated and the charges dismissed." Pet.App.72a.

Petitioner then filed a suit for monetary damages in the Michigan Court of Claims against the State of Michigan, the Michigan Department of Corrections, and the Berrien County Prosecuting Attorney alleging violations of his rights under the Michigan

Constitution. Pet.App.14a. The Court of Claims granted defendants summary disposition, holding that the Berrien County Prosecuting Attorney was a local government actor and not an agent of the State of Michigan. *See* Dkt. No. 9-11 at 3. The Michigan Court of Appeals affirmed, on the grounds that Petitioner failed to state a constitutional claim. *Pinkney v. Dep't of Corr.*, No. 356363, 2022 WL 1701944 (Mich. Ct. App. May 26, 2022) (per curiam). Petitioner has sought review by the Michigan Supreme Court.

B. Federal District Court Proceedings

Petitioner filed this § 1983 action for damages in federal district court against Berrien County and the Berrien County Prosecuting Attorney in his official capacity as a local official. Petitioner claimed that the defendants wrongfully procured his convictions under a statute that did not create a criminal offense and thereby caused Petitioner to be wrongfully incarcerated in violation of his rights under the Due Process Clause of the Fourteenth Amendment.

The district court dismissed the complaint. Pet.App.29a. First, the district court held that the defendants were immune from suit, because the Berrien County Prosecuting Attorney was acting as an agent of the State of Michigan when prosecuting Petitioner for violations of state law. Pet.App.21a. The district court thus concluded that the prosecuting attorney was protected from suit by Michigan's sovereign immunity and that he could not serve as a policymaker for Berrien County for purposes of establishing § 1983 municipal liability under *Monell v. Department of Social Services of City of New York*, 436

U.S. 658 (1978). Pet.App.21a, 24a. But, in reaching this conclusion, the district court failed to apply the Sixth Circuit's test for determining whether the prosecuting attorney is an "arm of the State" for sovereign immunity purposes, including ignoring that Berrien County, not the State, would be liable for any judgment. *See Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (describing four-factor test and stating that liability for judgment is the "foremost factor"). Moreover, the Michigan Court of Claims concluded that the prosecuting attorney was *not* acting as an agent for the State of Michigan when it prosecuted Petitioner. *See* Dkt. No. 9-11 at 3.

Second, the district court held that Petitioner failed to state a claim upon which relief could be granted. The court concluded that Petitioner could not bring a claim based on his "prosecution, conviction, and subsequent incarceration for an illusory crime" under the Fourteenth Amendment. Pet.App.26a. Rather, the court held, Petitioner's claim "must rise or fall under the Fourth Amendment." *Id.* Because the Petitioner did not allege that probable cause was lacking, the district court held that the Petitioner could not state a claim for violation of the Fourth Amendment. Pet.App.27a–28a.

C. Sixth Circuit Proceedings

Petitioner appealed to the Sixth Circuit, which affirmed the district court's merits holding but did not address its immunity holding.

The Sixth Circuit held that Petitioner's claim must be assessed under the Fourth Amendment, not the Due Process Clause. Pet.App.9a–10a. In reaching this conclusion, the court acknowledged the numerous

authorities holding that "substantive due process protects against prosecution and incarceration for a non-existent crime." Pet.App.8a. But the court eschewed reliance on these authorities because "none recognize a § 1983 claim for damages." *Id.*

The court explained that "[i]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." Pet.App.9a. The court concluded that Petitioner's "§ 1983 claim based on the Prosecutor's decision to pursue charges under [Mich. Comp. Laws] § 168.937 arises under the Fourth Amendment (if at all) and not the substantive component of the Due Process Clause of the Fourteenth Amendment." Pet.App.10a. Because Petitioner "neither asserts a claim under the Fourth Amendment nor challenges the district court's finding that he could not state a Fourth Amendment claim" due to the existence of probable cause, the Sixth Circuit affirmed dismissal of Petitioner's complaint. *Id.*

REASONS FOR GRANTING THE WRIT

I. There Is Continuing Disagreement Among The Circuit Courts Regarding Whether The Fourth Amendment Governs Claims Challenging The Lawfulness Of Pretrial Proceedings Where Probable Cause Is Not At Issue.

A. Since this Court decided *Albright* in 1994, there has been considerable uncertainty in the circuit courts as to the precise boundaries between the Fourth and Fourteenth Amendments with respect to constitutional claims arising from the criminal

process. In *Albright*, this Court held that a plaintiff seeking to challenge the constitutionality of a prosecution lacking probable cause must do so under the Fourth Amendment and may not do so under the Due Process Clause, at least where the indictment was dismissed before trial. 510 U.S. at 274. In a plurality opinion, the Court explained, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* at 273 (quotation marks omitted). Because the Fourth Amendment addressed "the matter of pretrial deprivations of liberty," the petitioner's claim in that case had to be brought under that Amendment and not the Due Process Clause. *Id.* at 274.

Left unresolved by the plurality opinion, however, was at what point during the criminal process the Fourth Amendment gives way to the Due Process Clause. *See, e.g.*, *id.* at 275 (Scalia, J., concurring) (noting that "abuses of the trial process" can "cause a criminal sentence" to violate due process). Nor did the Court address whether a plaintiff may challenge, under the Due Process Clause, a prosecution or pretrial detention for reasons other than lack of probable cause.

More recently, this Court provided additional clarification in *Manuel v. City of Joliet*, 580 U.S. 357 (2017). In *Manuel*, this Court held that the Fourth Amendment governs a claim for unlawful pretrial detention "unsupported by probable cause" after "the start of legal process" and rejected the view that the

Due Process Clause should govern such claims. *Id.* at 367, 369. At the same time, the Court explicitly recognized that the protections of the Fourth Amendment do not extend beyond the pretrial detention phase. "[O]nce a trial has occurred, the Fourth Amendment drops out," and a plaintiff may challenge "a conviction and any ensuing incarceration … under the Due Process Clause of the Fourteenth Amendment." *Id.* at 369 n.8. Despite *Manuel*'s additional clarification, there remains uncertainty among the circuit courts regarding when and under what circumstances during the criminal process the protections of the Fourth Amendment give way to the protections of the Due Process Clause. As relevant here, the Court "left open whether [the Fourth Amendment] applies outside some defect in the probable-cause determination." *Mitchell*, 37 F.4th at 1283.

B. Three circuits have taken a maximalist position post-*Manuel*, assessing claims challenging the lawfulness of prosecutions and pretrial proceedings exclusively under the Fourth Amendment. The Third, Eighth, and now the Sixth Circuits have held that all such claims must be brought under the Fourth Amendment and are not cognizable under the Fourteenth Amendment, even where the claim is not based on lack of probable cause.

In *DeLade v. Cargan*, 972 F.3d 207 (3d Cir. 2020), the Third Circuit reversed the district court's holding that, although probable cause existed to arrest the plaintiff, the plaintiff could bring a Fourteenth Amendment Due Process claim based on the defendants' alleged use of fabricated evidence to procure his arrest. The Third Circuit held that "the

Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs before the detainee's first appearance before a court." *Id.* at 212. The plaintiff's "claim of unlawful arrest and pretrial detention," the court concluded, was "not cognizable under the Due Process Clause of the Fourteenth Amendment." *Id.* at 213. The court stated that its "conclusion is compelled by *Manuel*." *Id.* at 212.

Likewise, in *Johnson v. McCarver*, 942 F.3d 405 (8th Cir. 2019), the Eighth Circuit held that allegations that the defendants violated the plaintiff's due process rights by falsifying a report of his arrest did not state a due process violation. The court stated that "[a]ny deprivation of [the plaintiff's] liberty before his criminal trial … is governed by the Fourth Amendment and its prohibition on unreasonable seizures." *Id.* at 410–11. The court further noted that "[a]ny *post-trial* claim based on the alleged false report requires a showing that the report was used to deprive [the plaintiff] of liberty in some way," which did not happen because the plaintiff was acquitted at trial. *Id.* at 411.

As the decision below demonstrates, the Sixth Circuit has taken the position that the Fourth Amendment applies even to claims arising from pretrial proceedings where probable cause is not at issue. Petitioner conceded the existence of probable cause and challenged his prosecution on due process grounds, but the Sixth Circuit held that the Fourth Amendment nevertheless governs the claim. *See* Pet.App.9a–10a. Indeed, the Sixth Circuit took an even more extreme position, holding that the Fourth Amendment applies not only to the aspects of

Petitioner's claim involving the pretrial process, but to Petitioner's entire claim, including those aspects involving the lawfulness of his conviction and subsequent incarceration. *See* Pet.App.8a–10a. The Sixth Circuit thus extended the Fourth Amendment maximalist position beyond the pretrial phase and into phases of the criminal process where no Fourth Amendment claims have heretofore been recognized.

C. In contrast, four circuits have held that the Fourth Amendment does not govern every claim challenging the lawfulness of prosecutions and pretrial criminal proceedings, particularly where probable cause is not at issue. The Second, Fifth, Ninth, and Eleventh Circuits have recognized the viability of due process claims in connection with a plaintiff's prosecution or pretrial detention.

In *Smalls v. Collins*, 10 F.4th 117 (2d Cir. 2021), the Second Circuit held that the plaintiffs could bring § 1983 claims against police officers for depriving them of their right to a fair trial by introducing fabricated evidence. The court explained that a fair-trial claim "will not be defeated by evidence of probable cause because it covers kinds of police misconduct not addressed by malicious prosecution claims and vindicates a different constitutional right—the right to due process protected by the Fifth and Fourteenth Amendments." *Id.* at 133 (cleaned up). The court rejected the argument made by the defendants that, under *Manuel*, one of the plaintiffs' claims—which involved only a pretrial deprivation of liberty—was governed exclusively by the Fourth Amendment. The court stated that "*Manuel* did not rule out the possibility that, in such circumstances, the Constitution also permits a due process claim that

the plaintiff was deprived of life, liberty, or property as a result of the use of fabricated evidence." *Id.* at 141. The "fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision … even when no trial occurs at all." *Id.* Distinguishing *Manuel*, the court quoted an earlier Second Circuit opinion explaining that, "just as a Fourth Amendment claim survives the initiation of 'legal process,' our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself." *Id.* (quoting *Frost v. N.Y.C. Police Dep't*, 980 F.3d 231, 251 n.14 (2d Cir. 2020)).

In *Jauch v. Choctaw County*, 874 F.3d 425 (5th Cir. 2017), the Fifth Circuit held that the plaintiff could challenge her prolonged pretrial detention under the Due Process Clause. The court stated: "*Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that only the Fourth Amendment is available to pre-trial detainees." *Id.* at 429. The court noted that, for example, "even when [a] detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment." *Id.* Likewise, "a legally seized pre-trial detainee held for an extended period without further process" is not confined to the Fourth Amendment and may raise a due process claim. *Id.*; *see also Cole v. Carson*, 935 F.3d 444, 451 n.25 (5th Cir. 2019) (*Manuel* "does not hold that the Fourth Amendment provides the exclusive basis for a claim asserting pre-trial deprivations based on fabricated evidence."); *ODonnell v. Harris Cnty.*, 892 F.3d 147, 159 (5th Cir.

2018) (holding that county's bail system violated due process and equal protection), *overruled on other grounds by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

In *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001), the Ninth Circuit held that "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Id.* at 1074–75; *see also Spencer v. Peters*, 857 F.3d 789, 798–800 (9th Cir. 2017); *Caldwell v. City & Cnty. of S.F.*, 889 F.3d 1105, 1115 (9th Cir. 2018) ("[A] § 1983 plaintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is enough.").

And in *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), the Eleventh Circuit assessed the lawfulness of the city's process for setting bail for indigent arrestees under the Due Process Clause. The court held that the city's process of making indigency determinations for purposes of setting bail within 48 hours of arrest and the use of judicial bail hearings rather than affidavits were consistent with due process. *See also Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1328 (11th Cir. 2015) (holding that plaintiff may challenge pretrial detention based on fabricated evidence under the Due Process Clause).

D. Other circuits have acknowledged the lack of clarity regarding whether the Due Process Clause applies to any claims arising from pretrial prosecution and detention. *See Everette-Oates v. Chapman*, No.

20-1093, 2021 WL 3089057, at *6 n.5 (4th Cir. July 22, 2021) ("In discussing her conspiracy claim on appeal, Everette-Oates refers not only to a deprivation of her Fourth Amendment rights but also to a violation of her rights under the Fourteenth Amendment's Due Process Clause. We need not consider in this case whether the Due Process Clause may be violated by the involvement of state or municipal defendants in the pre-trial concealment or fabrication of evidence."); *Mitchell*, 37 F.4th at 1285 ("Prior to *Manuel*, we charted the middle course: the Fourth Amendment applies until the probable-cause determination, at which point the Fourteenth Amendment governs. After *Manuel*, our cases are not as clear." (citations omitted)).

II. The Decision Below Is Wrong

The decision below is wrong for two main reasons: First, the Sixth Circuit (and the Third and Eighth Circuits) are wrong to hold that all claims challenging the lawfulness of prosecutions and pretrial criminal proceedings are governed exclusively by the Fourth Amendment. Second, the Sixth Circuit is egregiously wrong to hold that the Fourth Amendment, rather than the Due Process Clause, governs challenges to the lawfulness of convictions and incarceration.

A. With respect to the pretrial phases of the criminal process, the Second, Fifth, Ninth, and Eleventh Circuits are correct to hold that the Fourth Amendment does not govern all claims arising from a prosecution and pretrial criminal proceedings. The Circuits that hold to the contrary have done so based on an overly expansive reading of *Albright* and *Manuel*. In *Albright*, the Court declined to recognize

a substantive due process right "to be free from criminal prosecution except upon probable cause." 510 U.S. at 268. The Court held that such claims must instead be brought under the Fourth Amendment. Likewise, in *Manuel*, this Court held that, "[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment." *Manuel*, 580 U.S. at 367.

But neither *Albright* nor *Manuel* addressed claims not based on a lack of probable cause. *See Mitchell*, 37 F.4th at 1283 (stating that *Manuel* left open whether the Fourth Amendment "applies outside some defect in the probable-cause determination"); Josh Stanton, *Substantive Due Process and Pretrial Detention: Implications of Strict Scrutiny for the Law of Bail*, 41 Rev. Litig. 365, 393 (2022) ("[O]nly a certain class of pretrial detention claims are brought under the Fourth Amendment, namely, those challenging the existence of probable cause to support the prosecution of their cases in the first instance."). Indeed, this Court has recognized that a charging decision or pretrial detention can be unlawful for reasons besides lack of probable cause and has assessed challenges to such actions under the Fourteenth Amendment. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739 (1987) (assessing the lawfulness of pretrial detention procedures under the Due Process Clause); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (charging decisions may be challenged on equal protection grounds). Just recently, the Court left the door open to a malicious prosecution claim under § 1983 rooted in the Due Process Clause. *See Thompson v. Clark*, 142 S. Ct. 1332, 1337 n.2 (2022). The importance of

these decisions is that the Fourth Amendment governs claims of unlawful arrest and pretrial detention for lack of probable cause, but other constitutional provisions may apply where the unlawfulness of the government's action is based on something besides lack of probable cause.

The Second, Fifth, Ninth, and Eleventh Circuits are thus correct to hold that the Fourth Amendment does not occupy the field with respect to constitutional claims arising from the pretrial criminal process. As the Second Circuit has explained, the Due Process Clause "prohibit[s] the government from 'depriv[ing] any person of life, liberty, or property, without due process of law,' and thus, unlike a plaintiff asserting a Fourth Amendment violation, a plaintiff may assert a violation of her due process rights even where the relevant deprivation was otherwise '[ ]reasonable.'" *Smalls*, 10 F.4th at 133 (citations omitted). Accordingly, the Second Circuit and others have correctly held that challenges to the lawfulness of pretrial detention can be brought under the Due Process Clause. *See id.* at 141 ("We have held that *Manuel* did not rule out the possibility that, in such circumstances, the Constitution also permits a due process claim that the plaintiff was deprived of life, liberty, or property as a result of the use of fabricated evidence."); *Jauch*, 874 F.3d at 429 (*Manuel* "cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees"); *Walker*, 901 F.3d 1245 (assessing bail procedures under Due Process Clause).

The Sixth Circuit was wrong to hold that Petitioner could challenge the constitutionality of his pretrial criminal proceedings only under the Fourth

Amendment. The court wrongly concluded that Petitioner was in the same position that the petitioner in *Albright* was, and therefore his claim had to arise under the Fourth Amendment and not the Due Process Clause. Pet.App.9a. But the petitioner in *Albright* challenged the lawfulness of his arrest and prosecution on the grounds that probable cause was lacking, which directly implicated the rights protected by the Fourth Amendment. 510 U.S. at 271, 274. Here, by contrast, Petitioner has conceded the existence of probable cause and instead challenges the lawfulness of his prosecution based on the fact he was charged with an offense that the law does not make criminal in violation of due process.

The Fourth Amendment simply does not reach such a claim. As Justice Souter explained in his concurring opinion in *Albright*, the Court eschewed reliance on the Due Process Clause, because recognizing a substantive due process right "to be free from criminal prosecution except upon probable cause" would have "duplicated" the protections offered by the Fourth Amendment. *Id.* at 269; *id.* at 288 (Souter, J., concurring in the judgment). But Justice Souter also emphasized that the Court has "rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one." *Id.* at 286 (Souter, J., concurring in the judgment). In other words, the application of the Fourth Amendment in *Albright* to a claim premised on the lack of probable

cause does not suggest that the Fourth Amendment preempts a claim based on violations of due process that do not involve the probable cause determination.

The Sixth Circuit was thus wrong to hold that Petitioner had to bring his claim under the Fourth Amendment; the court should have instead assessed his claim under the Due Process Clause.

B. With respect to the post-trial phases of the criminal process, the Sixth Circuit committed an even more egregious error when it held that the entirety of Petitioner's claim, including his challenge to the lawfulness of his conviction and incarceration, must be assessed under the Fourth Amendment.

As an initial matter, the Sixth Circuit acknowledged that conviction and incarceration for a non-existent offense implicates the Due Process Clause. *See* Pet.App.8a; *see also Class v. United States*, 138 S. Ct. 798, 803–04 (2018) (a guilty plea cannot waive a claim that "the charge is one which the State may not constitutionally prosecute"); *Fiore v. White*, 531 U.S. 225, 227–28 (2001) (per curiam) (reversing conviction because a clarification of state law meant there was no proof of an element of the offense). Indeed, it cannot be reasonably disputed that "punish[ing] a person criminally for an act that is not a crime" is "the quintessence of denying due process of law." *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986); *see also Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998) ("This court has stated numerous times that a conviction for engaging in conduct that the law does not make criminal is a denial of due process.").

Despite acknowledging that conviction and incarceration for an act the law does not make criminal implicates due process rights, the Sixth Circuit assessed the entirety of Petitioner's claim under the rubric of the Fourth Amendment. *See* Pet.App.8a–10a. This approach is flatly inconsistent with *Manuel* and this Court's numerous other decisions holding that the Due Process Clause, not the Fourth Amendment, applies to a defendant's trial, conviction, and incarceration. *See Manuel*, 580 U.S. at 369 n.8 ("[O]nce a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment."); *see also Thompson v. Louisville*, 362 U.S. 199, 206 (1960) (it is "a violation of due process to convict and punish a man without evidence of his guilt"); *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (the Due Process Clause guarantees "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense"); *Smith v. Cain*, 565 U.S. 73, 75 (2012) ("Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.").

Every other circuit has likewise applied the Due Process Clause when determining the lawfulness of a conviction and incarceration. *See, e.g.*, *Roman v. Mitchell*, 924 F.3d 3, 6 (1st Cir. 2019); *United States v. Clark*, 740 F.3d 808, 811 n.2 (2d Cir. 2014); *Travillion v. Superintendent Rockview SCI*, 982 F.3d 896, 902 (3d

Cir. 2020); *Pope v. Netherland*, 113 F.3d 1364, 1368 (4th Cir. 1997); *United States v. Delgado*, 672 F.3d 320, 331 (5th Cir. 2012); *Buggs*, 153 F.3d at 444; *Harden v. Norman*, 919 F.3d 1097, 1101 (8th Cir. 2019); *Creech v. Frauenheim*, 800 F.3d 1005, 1012 (9th Cir. 2015); *Pavatt v. Carpenter*, 928 F.3d 906, 917 (10th Cir. 2019); *Green v. Nelson*, 595 F.3d 1245, 1252 (11th Cir. 2010); *United States v. Torres*, 894 F.3d 305, 311 (D.C. Cir. 2018).

Moreover, some circuits have specifically noted that the Fourth Amendment has no application to trial events and any subsequent conviction and incarceration. *See, e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) ("Given that the district court dismissed the Fourteenth Amendment claims, albeit erroneously, the verdict cannot be sustained on the Fourth Amendment alone since it rests in part on events at trial—events not protected by the Fourth Amendment."); *Lewis v. City of Chicago*, 914 F.3d 472, 479 (7th Cir. 2019) ("We close by noting the important point that a claim for wrongful pretrial detention based on fabricated evidence is distinct from a claim for wrongful conviction based on fabricated evidence: Convictions premised on deliberately fabricated evidence will always violate the defendant's right to due process." (cleaned up)); *Halsey v. Pfeiffer*, 750 F.3d 273, 291 (3d Cir. 2014) ("In the future we may be called on to chisel more finely the lines between the two claims—thus we might be required to decide precisely when an unlawful seizure ends and a due process violation begins. But we are spared the burden of doing so now because the fabricated confession obviously injured Halsey long after he

suffered an injury attributable to his pre-trial detention." (cleaned up)).

The Sixth Circuit's decision thus directly conflicts with this Court's precedent and decisions of the other circuits with respect to the post-trial phases of the criminal process.

III. The Question Presented Is Exceptionally Important And Likely To Recur.

This case concerns the viability of claims under the Due Process Clause at all stages of the criminal process and to what extent it has been supplanted by the Fourth Amendment. The Sixth Circuit's holding—that the Fourth Amendment applies to the entirety of the criminal process—severely curtails the scope of the Due Process Clause and applies the Fourth Amendment to aspects of the criminal process for which it is not suited and to which it has never been applied.

This Court has recognized on multiple occasions that the Due Process Clause protects the fundamental rights of criminal defendants at various stages of the criminal process. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963) (the suppression of exculpatory evidence violates due process); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (Fourteenth Amendment prohibits criminal convictions "obtained by the knowing use of false evidence"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (Due Process Clause prohibits the use of a patently biased judge in criminal trial); *Jackson*, 443 U.S. at 316 (a conviction must be supported by sufficient evidence); *Salerno*, 481 U.S. 739 (pretrial detention measures are governed by Due Process Clause); *see also Stanton*, *supra*, at 378–80 (describing

the fundamental nature of the right to be free from bodily restraint); Jenny E. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. 757, 759 (2020) (noting that this Court has "recognized pretrial detention as a source of government action that deprives a person of liberty, as well as the corresponding need for procedural safeguards to ensure that such deprivations are not arbitrary"). If allowed to stand, the Sixth Circuit's decision threatens to undermine the fundamental rights of criminal defendants by funneling their due process claims through the inadequate and inapplicable framework of the Fourth Amendment.

The issue is also one that is likely to recur. Whether a claim challenging the lawfulness of criminal process is governed by the Fourth Amendment or by the Due Process Clause has been a source of considerable uncertainty in the lower courts since this Court decided *Albright*. *See Mitchell*, 37 F.4th at 1284–86 (describing circuit split); Teressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C. L. Rev. 379, 390 (2021) (noting that courts "have vacillated between applying the Fourth and Fourteenth Amendments to § 1983 claims regarding detention following an arrest"). As the cases cited in this petition demonstrate, claims involving the applicability of the Due Process Clause to pretrial proceedings are frequently recurring and will continue to arise in the future.

With respect to pretrial detention specifically, the issue of the applicable constitutional provision is certain to recur as the population of pretrial detainees in the United States continues its rapid growth and as courts grapple with associated claims, such as

constitutional challenges to bail procedures. *See* Stanton, *supra*, at 371–72 (describing substantial increases in the number of pretrial detainees); Carroll, *supra*, at 791 ("[T]he Court's failure to articulate a definitive process due to pretrial detainees under the Fifth and Fourteenth Amendments has left lower courts, legislatures, and litigants to cobble together procedures that often appear inconsistent with the nature of the detention contemplated."). Although this Court provided some additional clarification in *Manuel*, that decision did not answer whether the Fourth Amendment "applies outside some defect in the probable-cause determination." *Mitchell*, 37 F.4th at 1283. As the circuit split described above exemplifies, the issue of the boundary between the Fourth and Fourteenth Amendments continues to bedevil lower courts even after *Manuel*. *See supra* Part I. Without this Court's intervention, the issue will continue to cause uncertainty in the lower courts addressing claims arising from all phases of the criminal process.

IV. This Case Is An Ideal Vehicle.

The question presented was properly preserved and is squarely posed. The sole basis for the Sixth Circuit's holding in this case was that Petitioner's complaint must be assessed in its entirety under the Fourth Amendment. Because Petitioner's claim implicates the entirety of the criminal process and the applicable constitutional provision at each stage, this case presents an optimal opportunity to clarify when and under what circumstances during the criminal process the protections of the Fourth Amendment give way to the protections of the Due Process Clause.

Although the district court also held that the defendants were protected by sovereign immunity, the Sixth Circuit confined itself to the merits and did not address that issue. For good reason: whether the Berrien County Prosecuting Attorney should be treated as an "arm of the State" for purposes of sovereign immunity largely turns on complex questions of state law. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997) (courts must "consider[] the provisions of state law that define the agency's character"). Indeed, the district court failed to apply the Sixth Circuit's test for determining whether the prosecuting attorney is an "arm of the State" for sovereign immunity purposes, including ignoring that Berrien County, not the State, would be liable for any judgment. *See Ernst*, 427 F.3d at 359 (describing the four-factor test and stating that liability for judgment is the "foremost factor"); Mich. Comp. Laws § 600.6093(3) (judgment against county officer "in his name of office … shall be levied and collected as other county charges, and when collected shall be paid by the county treasurer"). Indeed, the decision of the Michigan Court of Claims that the prosecuting attorney was *not* acting as an agent for the State of Michigan casts serious doubt on the correctness of the district court's decision and the authority on which it relied. *See* Dkt. No. 9-11 at 3.

In any event, the issue of sovereign immunity is, at best, one appropriate for remand and should not impede this Court's review of the important and recurring issue on which the Sixth Circuit below exclusively rested its ruling.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

February 10, 2023

Respectfully submitted,

LAWRENCE D. ROSENBERG
Counsel of Record
STEPHEN J. KENNY
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

ANNE MARIE LOFASO
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Drive
Morgantown, WV 26506

TIMOTHY M. HOLLOWAY
P.O. Box 296
20257 Ecorse Rd, #5E
Taylor, MI 48180

Counsel for Petitioner