No. 22-766

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' opposition brief is notable for what it does not dispute. Indeed, it essentially ignores the Petition. Respondents do not dispute that there exists a circuit split regarding whether the Fourth Amendment or the Due Process Clause governs claims challenging the lawfulness of pretrial proceedings where probable cause is not at issue. Respondents do not dispute that every other circuit court has held that the Due Process Clause, and not the Fourth Amendment, applies to post-trial phases of the criminal process. They do not dispute that the Sixth Circuit was wrong to assess Petitioner's entire claim under the Fourth Amendment. Nor do Respondents dispute that the question presented is exceptionally important and likely to recur. Finally, Respondents do not dispute the reasons described in the Petition why the case presents an ideal vehicle for this Court's review.

Instead, Respondents devote their opposition brief to litigating a tangential legal issue regarding the merits of the case and asserting that the case is somehow moot because the district court decided the case on an alternate ground not reached by the Sixth Circuit below.

On the merits, Respondents argue there was no constitutional violation in prosecuting, convicting, and incarcerating Petitioner for a non-existent crime. This is plainly wrong as a matter of law; Respondents offer no response to the authorities cited by Petitioner that conviction and incarceration for a non-existent crime violate due process. In any event, Respondents' erroneous merits argument is tangential to the

question presented, premature, and no reason to deny certiorari.

Respondents' assertion that the case is moot because the district court also decided the case on immunity grounds is likewise baseless. Respondents offer no authority that a district court's alternate holding somehow renders Petitioner's appeal moot, because there is no such authority. Moreover, the Sixth Circuit conspicuously avoided the immunity issue, as there is serious reason to doubt the correctness of the district court's decision on that issue, another point that Respondents do not dispute in their opposition. Because the immunity issue is fit to be addressed on remand, it does not moot this lawsuit or otherwise pose a vehicle problem. This Court should grant review.

ARGUMENT

I. Respondents Fail To Dispute Numerous Arguments In The Petition In Favor Of Certiorari.

Petitioner offered numerous "compelling reasons" for the Court to grant review of this case. S. Ct. R. 10. But Respondents do not even attempt to dispute any of them.

First, there is a deep circuit split regarding whether the Fourth Amendment or the Due Process Clause governs claims challenging the lawfulness of pretrial proceedings where probable cause is not at issue. Pet.10–17. Three circuits, including the Sixth Circuit below, have taken a maximalist position and have assessed claims challenging the lawfulness of prosecutions and pretrial proceedings exclusively under the Fourth Amendment. Pet.12–14. Four

circuits, in contrast, 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. Pet.14–16.

Second, the Sixth Circuit's decision is out-of-step with every other circuit court, each of which has held that the Due Process Clause, and not the Fourth Amendment, applies to a defendant's trial, conviction, and incarceration. Pet.22–24.

Third, the Sixth Circuit was wrong to assess the entirety of Petitioner's claim—which encompassed not just the pretrial phase of his criminal proceedings, but also his trial, conviction, and incarceration—under the Fourth Amendment. Pet.21–24. This Court could not have been clearer when it stated in *Manuel v. City of Joliet* that, "once 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." 580 U.S. 357, 369 n.8 (2017).

Fourth, the question presented is exceptionally important and likely to recur. Pet.24–26. 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. Moreover, 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 v. Oliver*, 510 U.S. 266 (1994).

Fifth, this case presents an ideal vehicle for review. Pet.26–27. 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. Additionally, the district court's immunity holding should not bar this Court's review, because the Sixth Circuit had good reason not to address it and because it is, at best, an issue for remand. Pet.27.

Respondents do not attempt to dispute any of this.

II. Petitioner Has Stated A Due Process Claim.

Respondents focus almost exclusively on the merits of Petitioner's Due Process claim. Of course, these arguments are only tangentially related to the question presented by the petition and are premature, as the Court has not yet accepted the case for review. In any event, Respondents' arguments are meritless.

As an initial matter, Respondents do not dispute the fundamental point that that a conviction for a non-existent offense violates due process. Pet.21–22. They also have nothing to say about the numerous authorities Petitioner cited in support of this claim. *See id.* Indeed, even the Sixth Circuit acknowledged in its opinion that conviction and incarceration for a non-existent offense implicates the Due Process Clause. *See* Pet.App.8a.

Instead, Respondents first argue that "there can be no constitutional violation by a government official

acting in accordance with the law as declared by the courts at the time of the official's actions." Opp.6. Respondents offer no authority for this remarkable proposition, because there is none. Unconstitutional official conduct is not rendered constitutional simply because it comports with then-existing state law. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (city's actions pursuant to ordinance upheld as constitutional by state courts were in violation of due process); *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (failure to vacate sentence imposed pursuant to statute later declared unconstitutional violated due process).

Respondents' argument wrongly conflates the principles of qualified immunity with the merits of Petitioner's constitutional claim. *See* Opp.8 (asserting that officials cannot "be held liable for not speculatively anticipating a subsequent reversal of existing law by the courts" (citing *Wilson v. Layne*, 526 U.S. 603, 617–18 (1999))). This argument is off the mark for two reasons. First, while an official may be held *individually* liable under § 1983 only for violating "clearly established law," that qualification does not apply to this *official* liability suit. *See Owen v. City of Indep.*, 445 U.S. 622, 657–58 (1980). When it comes to official misconduct, "the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." *Id.* at 657. Second, the immunity issue has no bearing on the antecedent question of whether Respondents' conduct violated the Constitution in the first place.

Next, Respondents describe as "dubious" Petitioner's argument that his claim falls outside the scope of the Fourth Amendment. Opp.7. But there is

nothing "dubious" about it. First, Respondents cannot seriously argue that the Fourth Amendment applies to the aspects of Petitioner's claim arising out of his trial, conviction, and incarceration, and they make no attempt to do so. Second, with respect to the pretrial phase of the criminal process, Respondents ignore the critical issue in this case, which is whether the Fourth Amendment applies when probable cause is not at issue. *See* Pet.11. Respondents cite to *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975), but the issue in that case was whether the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to detention. Opp.7. Here, in contrast, probable cause is not at issue, and the Fourth Amendment therefore has no application.

Finally, Respondents argue that, because this case concerns a challenge to the actions of an executive official and not to legislation, Petitioner must establish that the official's "actions shock the conscience and violate the decencies of civilized conduct." *Id.* (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998)). This is incorrect. The Supreme Court's decision in *Lewis* did not establish such an "inflexible dichotomy" between executive action and legislation. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768 (10th Cir. 2008). In a subsequent decision, a majority of Justices agreed that an executive official could violate substantive due process either by action that shocks the conscience *or* by infringing a fundamental right. *See Chavez v. Martinez*, 538 U.S. 760, 775–76 (2003) (plurality opinion); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part). Thus, six Justices "agreed the fundamental rights strand of substantive due process applied to a

claim involving executive action. Clearly, there is no hard-and-fast rule requiring lower courts to analyze substantive due process cases under only the fundamental rights or shocks the conscience standards." *Seegmiller*, 528 F.3d at 768. Here, Petitioner's prosecution, trial, conviction, and incarceration for an act the law did not make criminal infringed his fundamental right to be "free[] from a wholly arbitrary deprivation of liberty." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Accordingly, Petitioner has indeed stated a due process claim.

III. The Case Is Not Moot.

Respondents assert that the case is moot because the district court's "primary dispositive holdings" were that Respondents are protected from suit by sovereign immunity and pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Opp.8–9. In their view, because the Sixth Circuit affirmed on the merits without addressing the immunity issue, the district court's holdings "still stand" and prevent Petitioner from obtaining "any effectual relief." Opp.9.

Respondents do not offer any authority for their puzzling view of mootness. Courts of appeals frequently affirm district court decisions on different or narrower grounds than the district court. A further appeal to this Court does not render the alternative decisions of the district court "dispositive" or not subject to review. Opp.8; *see Bailey v. United States*, 568 U.S. 186, 202 (2013) (stating that court of appeals could address district court's alternative holding on remand). Were this Court to grant review and reverse the Sixth Circuit's decision, the Sixth Circuit would have jurisdiction to review the district court's

immunity holdings on remand, because Petitioner had appealed the entirety of the district court's judgment to the Sixth Circuit. *See* Dist. Ct. Dkt. No. 24 (notice of appeal). Thus, the district court's immunity holdings do not prevent this Court from granting "any effectual relief." Opp.9.

Further, Respondents do not dispute that the Sixth Circuit had good reason to avoid the immunity issue because it turns on complex questions of state law. Pet.27. Nor do Respondents dispute that 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. *Id.* Respondents also do not dispute that the decision of the Michigan Court of Claims holding 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. *Id.* Because the Sixth Circuit will be able to address these issues on remand from this Court, the district court's immunity holdings do not pose any genuine impediment to this Court's review on the exceptionally important issue as to which Respondents concede there is a deep circuit split.

CONCLUSION

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

March 28, 2023

Respectfully submitted,

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