APPENDIX

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APPENDIX A

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No. 21-2802

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD PINKNEY, Plaintiff-Appellee, v. BERRIEN COUNTY, MICHIGAN; BERRIEN COUNTY PROSECUTOR, in his official capacity as a local, non-state official with a legal existence separate and distinct from the county, jointly and severally, Defendant-Appellees /	**FILED** Aug 19, 2022 DEBORAH S. HUNT, Clerk ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: GUY, THAPAR, and READLER, Circuit Judges.

RALPH B. GUY, JR., Circuit Judge. Edward Pinkney's five felony convictions for election forgery were reversed when the Michigan Supreme Court held that the statute of conviction—Mich. Comp. Laws (MCL) § 168.937—is merely a leftover penalty provision that "does not create a substantive offense." *See People v. Pinkney*, 912 N.W.2d 535, 536, 550 (Mich. 2018), *reversing* 891 N.W.2d 891 (Mich. Ct. App. 2016).

Pinkney subsequently filed this civil action under 42 U.S.C. § 1983, alleging that he was deprived of his federal due process rights by the prosecutor's decision to charge and prosecute him for what would be declared "non-existent" offenses. The district court granted the defendants' motion to dismiss for failure to state a claim, after declining to stay the case pending resolution of Pinkney's appeal in his parallel state court action. Having had the benefit of oral argument, and in light of the intervening Michigan Court of Appeals' decision in the parallel state court action, we **DENY** Pinkney's latest request to stay this appeal and **AFFIRM** the district court's judgment.

I.

In January 2014, as part of an effort to recall the mayor of Benton Harbor, Michigan, Edward Pinkney presented 62 recall petitions to the Berrien County Clerk's Office. *See Pinkney II*, 912 N.W.2d at 536. Perceived irregularities with some of those petitions resulted in an investigation, which found that five petitions contained signatures with "dates [that] had been altered so as to fall within the 60-day window for valid signatures." *Id.* at 537. Berrien County Prosecutor Michael Sepic initiated a criminal prosecution on "five counts of election-law forgery under MCL [§] 168.937 and six counts of making a false statement in a certificate-of-recall petition under MCL [§] 168.957." *Id.* At the conclusion of trial, the jury found Pinkney guilty of the felony election-forgery charges and acquitted him of the other counts. Pinkney was sentenced to 30 to 120 months of imprisonment and served the minimum term before being released on parole in June 2017.

Pinkney argued from the start that § 168.937 does not create a chargeable substantive offense—in a motion to quash, at trial, and by a motion for directed verdict—and appealed on that basis. The Michigan Court of Appeals rejected that challenge, agreeing with an unpublished opinion it had issued in another case. *Id*. at 537 nn.5 & 9 (citing *People v. Hall*, No. 321045, 2014 WL 5409079 (Mich. Ct. App. Oct. 23, 2014) (per curiam), *rev'd on other grounds* 884 N.W.2d 561 (Mich. 2016)). Pinkney finally prevailed when the Michigan Supreme Court concluded from a review of the statutory language, context, and history that § 168.937 was an orphaned, inoperative penalty provision that did not create a substantive election-forgery offense. *Pinkney*, 912 N.W.2d at 539–40; *see id.* at 550 ("[W]e recognize that our conclusion that § 937 is an inoperative penalty provision is an unusual one, and it is not one that we reach lightly."). As a result, Pinkney's convictions were vacated and he was released from parole.[1]

Once Pinkney prevailed in his criminal appeal, he brought two civil actions to recover damages for having been charged, prosecuted, and convicted of "non-existent" offenses. His first suit, filed in the Michigan Court of Claims, asserted due process claims under the Michigan Constitution. When that complaint was dismissed on summary disposition, Pinkney appealed but also filed this § 1983 action in

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[1] The Michigan statute in question provides: "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, or by both such fine and imprisonment in the discretion of the court." MCL § 168.937.

federal court asserting similar due process claims under the U.S. Constitution.

Factually, both cases alleged that former Berrien County Prosecutor Michael Sepic personally secured the warrant, signed the information and amended information, and appeared in the criminal proceedings against Pinkney. Pinkney disavows any claim that Sepic intended to violate Pinkney's constitutional rights—asserting only that Sepic intended to "deprive Pinkney of his liberty through prosecution, conviction and incarceration." Also, Pinkney has not alleged any individual capacity claims against Sepic in recognition that absolute prosecutorial immunity would almost certainly bar such claims. *See Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

Here, Pinkney alleges violations of his procedural and substantive due process rights under only the U.S. Constitution and expressly eschews any claim under the Fourth Amendment. The complaint alleged that the Prosecutor's actions were taken in his official capacity as a final policymaker for Berrien County or the Prosecutor's Office—not on behalf of the State of Michigan as he had alleged in his state-court action—for purposes of establishing liability under a *Monell* theory. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483–84 (1986). Berrien County and the Prosecutor moved for dismissal of those claims, which Pinkney opposed. The district court granted defendants' motion, holding: (1) that the official capacity claims asserted against the Prosecutor are barred by sovereign immunity; (2) that the County

could not be liable because the Prosecutor was acting for the State when prosecuting Pinkney under state law; and (3) that, in any event, Pinkney failed to plausibly allege federal due process claims cognizable under § 1983. Judgment was entered accordingly, and this appeal followed.

II.

A district court's dismissal pursuant to Rule 12(b)(6) is reviewed de novo. *See Doe v. DeWine*, 910 F.3d 842, 848 (6th Cir. 2018); Fed. R. Civ. P. 12(b)(6). In doing so, this court construes the complaint in the light most favorable to plaintiff and determines whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)).

Pinkney argues that the outcome of his state-court appeal could be relevant to the question of whether the official capacity claims in this federal action are barred by sovereign immunity. *See Cady v. Arenac County*, 574 F.3d 334, 343 (6th Cir. 2009). The complaint in state court was brought against the Prosecutor, in his official capacity "as a sub-entity, arm and/or agency of the State of Michigan." An issue in the state-court appeal was whether the Prosecutor was a "state actor" whose actions could be attributed to the State. But the Michigan Court of Appeals affirmed the dismissal of his state-law claims on other grounds, explaining that it "need not resolve this question because even if the Court of Claims erred regarding the 'state actor' issue, dismissal was nevertheless warranted on the basis of plaintiff's

failure to allege or support any viable constitutional violation." *Pinkney v. Michigan*, No. 356363, 2022 WL 1701944, at *4 (Mich. Ct. App. May 26, 2022), *recon. denied* June 24, 2022, *application for leave to appeal filed* July 7, 2022). Likewise, although Pinkney argues that this court should revisit its decision in *Cady*, the appellees acknowledged at oral argument that it "doesn't matter" if we reach the sovereign immunity issue, instead directing us toward the merits of the appeal. (Tr. 13:25–14:28). Accordingly, we need not resolve the sovereign immunity issue and instead find Pinkney has not alleged a constitutional violation cognizable under 42 U.S.C. § 1983. *See Armstrong v. Mich. Bureau of Servs. for Blind Persons*, 969 F.3d 337, 340 (6th Cir. 2020) (affirming on the merits without deciding the state's alternative sovereign-immunity defense when the state does not raise sovereign immunity as a threshold defense).

"Section 1983 'is not itself a source of substantive rights' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). The first step is to identify the precise constitutional right allegedly infringed. *Id*. (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989), and *Baker*, 443 U.S. at 140). Taking the factual allegations as true, the gravamen of Pinkney's complaint is that he was charged, prosecuted, convicted, and subjected to incarceration and parole for what were non-existent state law offenses. As the master of his complaint, Pinkney alleges that the Prosecutor's decision to pursue these charges violated his procedural and substantive due process rights under the U.S. Constitution.

The Due Process Clause of the Fourteenth Amendment "provide[s] a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). This procedural due process right "does not protect against all deprivations of liberty," only those "deprivations of liberty accomplished without 'due process of law.'" *Baker*, 443 U.S. at 145. The district court found Pinkney did not "identify a protected interest of which he was deprived without adequate process." Pinkney cites to *Hurtado v. California*, 110 U.S. 516 (1884), which involved whether a state could charge a crime by information rather than grand jury indictment. But Pinkney's claim is not based on how the charges were brought—but on the fact that he was charged under what would later be held to be an inoperative penalty provision. Although his ultimate exoneration may be of little consolation, Pinkney has not alleged that he was deprived of his liberty without adequate process.

The Fourteenth Amendment's substantive due process component "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins*, 503 U.S. at 125 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). It "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up); *see also Guertin v. State*, 912 F.3d 907, 918 (6th Cir. 2019).

Pinkney contends that substantive due process protects against prosecution and incarceration for a non-existent crime. For example, the Supreme Court reiterated that a guilty plea cannot waive a claim that "the charge is one which the State may not constitutionally prosecute." *Class v. United States*, 138 S. Ct. 798, 803–04 (2018) (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam)). As a result, the defendant was able to pursue a constitutional challenge to the statute of conviction on direct appeal. *Id*. at 807; *see also 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). And, in a federal habeas case, one circuit explained that "punish[ing] a person criminally for an act that is not a crime would seem the quintessence of denying due process of law." *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986). These principles are consistent with the reversal of Pinkney's own convictions by the Michigan Supreme Court, but none recognize a § 1983 claim for damages.

Prior to *Albright v. Oliver*, this court "suggested that defendants had a substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'" *Lester v. Roberts*, 986 F.3d 599, 606 (6th Cir. 2021) (citing *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990) and *Cale v. Johnson*, 861 F.2d 943, 949–50 (6th Cir. 1988)). However, *Albright* rejected a claim based on a substantive due process right to be free from unreasonable prosecutions where, like here, no claim was asserted under the Fourth Amendment. *Albright*, 510 U.S. at 271 (plurality); *see also Manuel*

v. City of Joliet, 580 U.S. 357, _; 137 S. Ct. 911, 918 (2017). Pinkney's claim has the same fate.

Start with the essence of Albright's claim: "[a] warrant was issued for [his] arrest by Illinois authorities, and upon learning of it he surrendered and was released on bail"; he was charged by "criminal information with the sale of a substance which looked like an illegal drug"; at a preliminary hearing, "the court found probable cause to bind [him] over for trial"; and, "[a]t a later pretrial hearing, the court dismissed the criminal action against [him] *on the ground that the charge did not state an offense under Illinois law*." 510 U.S. at 268–69 (emphasis added). Pinkney argues that his claim is not a Fourth Amendment claim because he was not arrested or held in custody before trial—but neither was Albright. Pinkney also says his claim is that he was charged with a non-existent offense—so was Albright. Despite Albright's deliberate avoidance of the Fourth Amendment, his substantive due process claim under the Fourteenth Amendment was a liberty interest in the right "to be free from prosecution without probable cause." *Id.* at 271. Probable cause to prosecute may turn on fact *or* law. *Heien v. North Carolina*, 574 U.S. 54, 57 (2014) (explaining reasonable suspicion can be based on mistakes of fact or law); *see also Sinclair v. Lauderdale Cnty.*, 652 F. App'x 429, 438 (6th Cir. 2016) (finding probable cause for an arrest for which no law had been violated).

"[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." *United*

States v. Lanier, 520 U.S. 259, 272 n.7 (1997); *see also Albright*, 510 U.S. at 273. Pinkney's § 1983 claim based on the Prosecutor's decision to pursue charges under MCL § 168.937 arises under the Fourth Amendment (if at all) and not the substantive component of the Due Process Clause of the Fourteenth Amendment. *See Davis v. Gallagher*, 951 F.3d 743, 752 (6th Cir. 2020) (affirming dismissal of substantive due process claim); *Howse v. Hodous*, 953 F.3d 402, 408 n.2 (6th Cir. 2020) ("[B]ecause our circuit has held that a federal malicious-prosecution claim does arise under the Fourth Amendment (and not the Due Process Clause) we are bound by that decision and must consider Fourth Amendment principles when defining the scope of the claim"). But Pinkney neither asserts a claim under the Fourth Amendment nor challenges the district court's finding that he could not state a Fourth Amendment claim because "there is no question but that there was probable cause for Pinkney's prosecution." *See Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010).

III.

The motion for stay of this appeal is **DENIED**, and the judgment of the district court is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD PINKNEY,

Plaintiff,

v. CASE No. 1:21-CV-310

BERRIEN COUNTY, et al., HON. ROBERT J. JONKER

Defendants. /

OPINION AND ORDER

INTRODUCTION

Plaintiff Edward Pinkney was convicted of five counts of election-law forgery in violation of MICH. COMP. LAWS § 168.937 in Michigan State Court. His convictions were vacated and the charges dismissed, however, after the Michigan Supreme Court determined that the statute was only a penalty provision, and that it did not set out any substantive offense. Following that decision, Pinkney brought this civil action based on the events relating to his prosecution, conviction, and subsequent incarceration. In particular, Pinkney alleges the county and county prosecutor that charged him in the case violated his substantive and procedural due process rights as well as other certain described fundamental rights in violation of 42 U.S.C. § 1983.

The matter is before the Court on Defendants' Motion to Dismiss under Rule 12(b)(6) (ECF No. 7) and Pinkney's motion to stay pending the resolution of a State Court claim. (ECF No. 12). The motions were not fully briefed by the Rule 16 scheduling conference, but the Court heard the parties on their basic positions during the conference. Thereafter the Court ordered supplemental briefing that has since been filed. The Court has also determined that additional argument on the motions is unnecessary. (ECF No. 21). The matter is now ready for decision. After considering all matters of record, the Court **DENIES** Pinkney's motion to stay and **GRANTS** the defense motion to dismiss. Under controlling Sixth Circuit precedent, the Berrien County prosecutor is entitled to Eleventh Amendment immunity, and the County cannot be liable for the decision of the prosecutor to enforce State law. Pinkney's claims, furthermore, fail on the merits under Rule 12(b)(6) review.

BACKGROUND

The facts of this case are not in dispute. Between November 2013 and January 2014, Pinkney participated in a recall campaign against the mayor of Benton Harbor, Michigan. To bring the matter to an election day vote, the campaign needed to submit to the county clerk a minimum of approximately four-hundred signatures on petitions that supported the recall. Under state law, the campaign had a sixty-day window within which to collect the signatures. The campaign submitted more than the requisite number of signatures and the clerk initially found enough of those signatures qualified to move the matter to the ballot. But further inspection of the petitions raised

questions about some of the signatures, and the county clerk forwarded the petitions to the Berrien County Sheriff's Department. After performing an examination, law enforcement determined that some of the petitions contained altered dates to move stale signatures into the sixty-day window. *See generally People v. Pinkney*, 501 Mich. 259, 912 N.W.2d 535 (2018). Without those signatures, the petitions did not qualify for the ballot.

Pinkney was charged, in relevant part, with five counts of election-law forgery under MICH. COMP. LAWS § 168.937 for his alleged role in the scheme. Before trial, Pinkney sought to quash the charges on the basis that the charging statute was a penalty provision and not a substantive, chargeable offense. *Pinkney*, 501 Mich. at 264. The trial court denied the motion, and the matter proceeded to trial. On the day Pinkney's trial began, the Michigan Court of Appeals reached the same conclusion the trial judge did: namely, that MICH. COMP. LAWS § 168.937 created a substantive criminal offense. *People v. Hall*, Case No. 321045, 2014 WL 5409079, at *6 (Mich. Ct. App. Oct. 23, 2014). Following an eight-day jury trial, Pinkney was convicted on the five counts.[1] He was sentenced on December 15, 2014, to 30 to 120 months imprisonment.

Pinkney appealed his convictions. He argued, as he did in the trial court, that the Michigan statute was not a substantive, chargeable offense. The Michigan

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[1] Pinkney was also charged with six counts of making a false statement in a certificate-of-recall petition in violation of MICH. COMP. LAWS § 168.957. The jury acquitted Pinkney on those charges.

Court of Appeals disagreed with Pinkney and affirmed his conviction and sentence. In so doing, the Court of Appeals relied on *People v. Hall* for the proposition that MICH. COMP LAWS § 168.937 "is not merely a penalty provision, but rather creates a substantive offense of forgery." [2] *See People v. Pinkney*, 316 Mich. App. 450 (Mich. Ct. App. July 26, 2016). Pinkney sought further review from the Michigan Supreme Court and in a decision dated May 1, 2018, the Michigan Supreme Court held that the State statute did not create a substantive offense of election law forgery. *People v. Pinkney*, 501 Mich. 259 (2018). Pinkney's convictions were vacated, and he was released from custody. Since then, Pinkney has pursued civil remedies, first in the Michigan courts and now, here, in federal court.

Pinkney first sought monetary relief in State Court via a lawsuit filed on June 12, 2018. The lawsuit in the Michigan Court of Claims named as defendants the State of Michigan, the Michigan Department of Corrections, and the Berrien County Prosecutor. (ECF No. 9-1). In his factual recitals, Pinkney alleged that the Berrien County Prosecutor "signed an Amended Information on or about October 17, 2014, and filed it on or about October 20, 2014, on behalf of the State of Michigan." (ECF No. 9-1, PageID.104). Plaintiff brought a single count for relief, alleging a violation of his constitutional rights. The Court of Claims dismissed Pinkney's Complaint, but Pinkney

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[2] The Michigan Supreme Court reversed *People v. Hall*, 499 Mich. 466 (2016), but the basis for reversal did not dispute the conclusion that Mich. Comp. Laws § 168.937 created a substantive felony offense. *See also Pinkney*, 501 Mich. at 537 n.9 (explaining rationale of Supreme Court decision in *Hall*).

says the court's reasoning undermines the rationale of a Sixth Circuit decision in *Cady v. Aremac County*, 574 F.3d 334 (6th Cir. 2009), a case Defendants cite here for the proposition that the Berrien County Prosecuting Attorney is entitled to Eleventh Amendment immunity.[3]

Hence this federal lawsuit. Pinkney initiated his federal case in this court on April 12, 2021. (ECF No. 1). He raises four counts under 42 U.S.C. § 1983. Counts I and II assert violations of Pinkney's substantive and procedural due process rights, respectively, in violation of the 14th Amendment. Count III asserts a violation of Pinkney's "fundamental and basic constitutional rights to bodily liberty" and listed rights "involved in the penumbra of specific guarantees in the Bill of Rights." (ECF No. 1, PageID.21). Finally, Count IV asserts a constitutional violation "to the extent not already alleged" based on *Class v. United States*, 583 U.S. ___, 138 S. Ct. 798, 804 (2018). That case, Pinkney contends, stands for the proposition that "it is unconstitutional for the government to charge and convict a person in a criminal proceeding based on a charging document that does not set forth a crime[.]" (ECF No. 1, PageID.4).

On April 30, 2021, Defendants filed a motion to dismiss Pinkney's Complaint under FED. R. CIV. P. 12(b)(6). In the main, Defendants argue that the Defendant Prosecutor, sued only in his official

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[3] The Court of Claims case is currently before the Michigan Court of Appeals. Both sides indicate that one issue will be whether the Berrien County prosecutor—a defendant in this case—acted as an agent of the State.

capacity, acted as an official of the State when pursuing charges based on Michigan state law as set out in *Cady v. Arenac County*, 574 F.3d 334 (6th Cir. 2009) and thus is protected by Eleventh Amendment immunity. Along the same lines, the defense says the County cannot be held liable under *Monell* for the decision of the prosecutor to enforce Michigan state law. As a further basis for dismissal, Defendants assert that Pinkney's claims are without merit, and thus he fails to state a claim. Pinkney has responded in opposition to the motion, and further seeks a stay of the matter while the State Court litigation proceeds. Pinkney says the resolution of the State matter has bearing on *Cady's* continued validity.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not necessary. To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Put differently, the complaint must contain more than "naked assertions devoid of further factual enhancement." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether a claim has facial plausibility, a court must construe the complaint in the light most favorable to the plaintiff, accept the factual allegations as true,

and draw all reasonable inferences in favor of the plaintiff. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion so long as they are referred to in the Complaint and are central to the claims contained therein." *Id.* Applying these standards, Pinkney's Complaint is subject to dismissal.

DISCUSSION

1. Plaintiff's Claim Against the Berrien County Prosecuting Attorney in His Official Capacity is Barred by Eleventh Amendment Immunity.

In his Complaint, Pinkney sues the Berrien County Prosecutor, Michael Sepic, who Pinkney says authorized Pinkney's wrongful prosecution, conviction, incarceration, and deprivation of liberty. Recognizing that a suit against the prosecutor in his individual capacity would be barred by absolute immunity, Pinkney brings this claim against the prosecutor only "in his official capacity as a local, non-state official[.]" Official-capacity lawsuits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978)). An official-capacity suit is to be treated as a suit against the entity itself. *Id.* at 166 (citing *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985)); *see also Matthew v. Jones*, 35 F.3d 1046, 1049

(6th Cir. 1994). "Individuals sued in their official capacities stand in the shoes of the entity they represent," and the suit is not against the official personally. *Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003); *Graham*, 473 U.S. at 165–66. In their motion, Defendants argue that Pinkney's official-capacity claim against the prosecutor is barred by Eleventh Amendment immunity as set out in *Cady v. Arenac Cnty*, 574 F.3d 334 (6th Cir. 2009). The Court agrees.

The Eleventh Amendment bars claims for damages brought against a state, its agencies, and its officials sued in their official capacities. *Id.* at 342. "Whether a county prosecutor is deemed a 'state official' depends, at least in part, on state law." *Cady*, 573 F.3d at 342 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *see also Grainger v. Ottawa County*, Case No. 19-cv-501, ECF No. 127, PageID.3096 (W.D. Mich. Mar. 2, 2021) (Maloney, J) (citing *Cady*, 574 F.3d at 342). Local government units, like counties, are generally not considered part of the of the State for the purpose of the Eleventh Amendment. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 n.54 (1978). A claimant can use § 1983 to sue a local government unit, including counties, for violations of federal civil rights. *Monell*, 436 U.S. at 690. The Berrien County Prosecutor, however, is not simply a local government office. *Hughson v. County of Antrim*, 707 F. Supp. 304, 306 (W.D. Mich. 1988) (noting "there does not exist . . . a prosecutor's office" under Mich. Const. Art. 7, § 4). Under *Cady*, the Berrien County Prosecutor acted as an agent of the State of Michigan when enforcing

State law and Pinkney's claim is barred by Eleventh Amendment immunity.

In *Cady*, the Court of Appeals concluded in a published decision that under Michigan law, county prosecuting attorneys "are responsible for enforcing criminal laws on behalf of the state" and are therefore entitled to Eleventh Amendment immunity when suits are brought against them in their official capacity. *Id.* at 343. Accordingly, although prosecutors may be elected county officials or employed by the county, prosecutors in Michigan are deemed to be state agents when prosecting state criminal charges. *Id.* (quoting MICH. COMP. LAWS § 49.153 (2008) for the proposition that "county prosecuting attorneys are charged with the duty of 'appear[ing] for the state or county, and prosecute or defend . . . all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interest.'"). Here, Pinkney was charged with, prosecuted, and convicted for violating a Michigan statute passed by the State of Michigan legislature. "[S]tate criminal law represents the policy of the state." *Id.* Accordingly, the Defendant Berrien County prosecutor "was acting 'as a state agent when prosecuting state criminal charges'" and "should therefore be treated as a suit against the state." *Id.* (quoting *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993)).

Regardless of the form of relief requested, the States are immune under the Eleventh Amendment from suit in the federal counts, unless the State has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute, *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The State

of Michigan has not consented to civil suits in federal court, and Congress has not abrogated the immunity for this type of claim. *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). Accordingly, Pinkney has failed to state a claim against the Defendant Berrien County Prosecuting Attorney.[4]

Pinkney's arguments to the contrary are unavailing. Pinkney recognizes the *Cady* decision, but argues that it does not compel dismissal in this case because 1) pending State court litigation may demonstrate that *Cady* was wrongly decided; and 2) this case is distinguishable. Neither argument is persuasive.

Pinkney's claim in State Court is currently pending in the State Court of Appeals. He does not quibble with the defense argument here that the Court of Claims in the State Court case misconstrued the prosecutor's argument with respect to agency. Moreover, so far Michigan State courts (albeit in an unpublished decision) have followed *Cady*'s reasoning. *See Crawford v. Lapeer County Prosecutor*, Case No. 302836, 2012 WL 1060631, at *1 (Mich. Ct. App. Mar. 29, 2012) ("County prosecuting attorneys, when prosecuting individuals for violations of state law, are considered state officials[.]"). Also, unless the Sixth

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[4] Ordinarily, a suit against an individual in his official capacity is equivalent to a suit brought against the governmental entity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Nevertheless, an official-capacity action seeking injunctive relief constitutes an exception to sovereign immunity. *See Ex Parte Young*, 209 U.S. 123, 159–60 (1908) (Eleventh Amendment immunity does not bar prospective injunctive relief against a state official). Pinkney seeks only damages, so the *Ex Parte Young* exception does not apply.

Circuit overrules *Cady*, this Court is bound to follow it. At bottom, "the district courts in a circuit owe obedience to a decision of the court of appeals in that circuit and ordinarily must follow it until the court of appeals overrules it." *Fernanders v. Daughtrey*, No. 16-10262, 2016 WL 612758, at *4 (E.D. Mich. Feb. 16, 2016) (quoting *Moore's Federal Practice* and collecting cases).

Pinkney also contends that *Cady* is distinguishable because that case decided only whether the prosecuting attorney's actions were attributable to the state of Michigan. It did not, he says, involve whether the prosecuting attorney is a separate suable entity regardless of whether the prosecutor may also act as an agent for the county or the State of Michigan. (*See* ECF No. 11, PageID.301). But Pinkney sees daylight where there is none, and the argument is beside the point in any event. As *Cady* set out, when a county prosecutor in Michigan makes the decision related to the issuance of State criminal charges, the prosecutor acts as an agent of the State. *Cady*, 574 F.3d at 345. This is precisely what happened here.

Accordingly, the Court concludes that the Defendant Berrien County Prosecuting Attorney is entitled to Eleventh Amendment immunity.

2. Pinkney's Claims Against the County Focus on the Conduct of the Prosecutor in Enforcing State Law and Cannot State a* Monell *are Also Barred.

Even apart from *Cady*, the prosecutor's conduct in seeking to enforce State law "cannot have established a county policy, unconstitutional or otherwise" such as

to establish municipal liability for *Monell* purposes.[5] *See D'Ambrosio v. Marino*, 747 F.3d 378, 386 (6th Cir. 2014) (citing *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013). A municipality or other local governmental entity may be considered a "person" under § 1983 and may therefore be held liable for its actions depriving a plaintiff of his federal rights—commonly referred to as *Monell* liability. *Board of Cty. Comm'rs of Bryan Cty, Okl. v. Brown*, 520 U.S, 397, 403 (1997) (citing *Monell v. N.Y.C. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978)). But to establish municipality under § 1983, a plaintiff must establish that a constitutional violation caused his or her harm, *and that the municipality was responsible for the violation*. *Spears v. Ruth*, 589 F.3d 249, 256 (6th Cir. 2009). Municipal liability for such harms exists only if the implementation of official policies or established customs caused the harm. *Id.* (Citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 708 (Powell, J., concurring)). To prove an illegal policy or custom, a plaintiff may look to "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance of acquiescence of federal rights violations." *Id.* It is possible to show that a municipality has "a 'custom' causing constitutional violations, even if that custom was not formally sanctioned, provided that the plaintiff offers proof of policymaking officials'

[5] Pinkney himself seems recognize this. *See* ECF No. 11, PageID.310 (noting that the county's liability "is dependent on whether, for purposes of *Monell*, [the prosecutor] was an agent of the State of Michigan or Berrien County.").

knowledge and acquiescence to the established practice." *Id.* (quotations omitted). Here, Pinkney alleges that Berrien County is liable for the actions of the prosecutor as a policymaker for the county. This allegation fails to state a *Monell* claim under Rule 12(b)(6).

In *D'Ambrosio*, a former death row inmate brought a Section 1983 claim against the county and county prosecutors that had failed to provide material exculpatory evidence to the inmates defense. He alleged that the county was liable for the constitutional violations of the prosecutors who, he said, "created and maintained an official policy, practice, and/or custom" of violating criminal defendants' constitutional rights. *D'Ambrosio*, 747 F.3d 378. In reviewing the *Monell* claim against the county, the Sixth Circuit applied a case parallel to *Cady* to hold that the county prosecutors "act as arms of the state—not of a municipality—when prosecuting state criminal charges." *Id.* at 386 (*citing Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). The court thus rejected the plaintiff's claim that the defendant prosecutor was a policymaking official for the county, rather than the state, at least while prosecuting a State crime. Courts in Michigan have reached the same conclusion in rejecting claims brought against local governments for the actions of county prosecutors who enforce state law. *See Gavitt v. Ionia County*, 67 F. Supp. 3d 838, 860–61 (E.D. Mich. 2014), *aff'd* 835 F.3d 623 (6th Cir. 2016); *Gerics v. Trevino*, Case No. 15-cv-12922, 2018 WL 5719843, at *3 (E.D. Mich. Nov. 1, 2018).

To the extent Pinkney claims that the Berrien county prosecutor acted in accordance with a county

practice, that is, that the prosecutor as a policymaker designed policies or customs resulting in constitutional violations, the allegations in the Complaint are insufficient to create a *Twombly* plausible claim. *See Gavitt*, 67 F. Supp. 3d at 860. As the court in *D'Ambrosio* observed in rejecting a similar contention:

> The thrust of the complaint is that [the defendant prosecutor]—and perhaps one or two other members of the Prosecutor's Office—instigated and implemented habitually unconstitutional practices, not that they were following municipal policy in doing so. Municipal liability attaches only where the policy or practice in question is "attributable to the municipality," but D'Ambrosio's complaint contains no allegations that the practice at issue here was acquiesced to or informed by municipal actors rather than by prosecutors who had adopted the strategy in order to win criminal convictions. Again, state prosecutors' actions in prosecuting state crimes cannot themselves establish municipal policy.

D'Ambrosio, 747 F.3d at 387. The same holds true here. Pinkney has not alleged there is any separate policy or practice attributable to Berrien County that resulted in the deprivation of his constitutional rights. Accordingly, the Court concludes that Pinkney has failed to establish a basis for *Monell* liability against the Defendant county.

3. Plaintiff Fails to State a Claim on the Merits in Any Event

Pinkney has also failed to state a *Twombly* plausible claim with respect to the Counts raised in his Complaint.

1. Procedural Due Process

Pinkney's procedural due process claim is grounded in his contention that he was prosecuted, convicted, and incarcerated for a crime that did not exist, which deprived him of his liberty interests. This claim does not fit neatly in the procedural due process framework because Pinkney used the process and prevailed—he successfully obtained an Order dismissing the charges. The elements of a procedural due process claim are: (1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process. *Women's Med. Prof' Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). Pinkney's Complaint fails to identify a protected interest of which he was deprived without adequate process. *See Duncan v. Newby*, No. 5:15-cv-137-TBR, 2018 WL 627573, at *3 (W.D. Ky. Jan. 29, 2019) ("[D]ue to the fact that the underlying criminal proceedings against Plaintiff were terminated in his favor, he has failed to state an independent claim for violation of procedural due process[.]"); *see also Sadowski v. City of Ishpeming*, Case No. 2:19-cv-13, ECF No. 32 (W.D. Mich. Jan. 3, 2020) (granting defense motion to dismiss procedural due process claim where the plaintiff was acquitted at retrial). To the contrary, his exercise of his procedural rights ultimately led to his exoneration.

2. Remaining Claims

In his remaining counts, Pinkney contends that his prosecution, conviction, and subsequent incarceration for an illusory crime violated substantive due process, as well as various constitutional penumbras, and those rights recognized in *Class v. United States*, 583 U.S. ___, 138 S. Ct. 798, 804 (2018). Pinkney emphasizes that he is raising these claims apart from a Fourth Amendment malicious prosecution claim and that he is not bringing a claim under the Fourth Amendment.

Despite these arguments, however, the Court is satisfied that Pinkney's claims must rise or fall under the Fourth Amendment.[6] Indeed, in a recent decision

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[6] Even analyzing Pinkney's claims on his own terms, he fails to state a claim. The substantive component of the Due Process Clause, for example, protects 'fundamental rights' that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Michigan Dept of State Police*, 490 F.3d 491, 499 (6th Cir. 2007) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937). "Such rights include 'the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). "The Supreme Court has cautioned, however, that it has 'always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scare and open-ended.'" *Id.* (quoting *Glucksberg*, 521 U.S. at 720). The legal test applied to determine whether conduct violates substantive due process under the Fourteenth Amendment is whether the conduct "shocks the conscience." *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001). Pinkney was charged and convicted under a statute that the trial court, and two panels of the State Court of Appeals had concluded amounted to a substantive offense. He pursued his claims and ultimately prevailed in the Michigan Supreme

the Sixth Circuit Court of Appeals noted that it once examined such claims as a "substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'" *Lester v. Roberts*, 986 F.3d 599, 606 (6th Cir. 2021) (citing *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990)). But the court in *Lester* noted that the Supreme Court "rejected [this] view." *Id.* (citing *Albright v. Oliver*, 510 U.S. 266)). Today, the Sixth Circuit applies a Fourth Amendment framework to these claims. *See id.*; *see also Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). To make out a claim under the Fourth Amendment, a plaintiff must show "(1) the defendant 'made, influenced, or participated in the decision to prosecute'; (2) the government lacked probable cause; (3) the proceeding caused the plaintiff to suffer a deprivation of liberty; and (4) the prosecution ended in the plaintiff's favor." *Lester*, 986 F.3d at 606 (quoting *Jones v, Clark County*, 959 F.3d 748, 756 (6th Cir. 2020)). Accepting as true the well-pleaded allegations in Pinkney's Complaint, there is no question but that there was probable cause for Pinkney's prosecution.[7] He does not dispute the

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Court. This is hardly conscience shocking; to the contrary, it is how the normal process of direct review works. Pinkney's remaining "penumbra" claims merely reassert the same claims with new labels. They fail for the same reason.

[7] To the extent Pinkney contends his detention along the way amounted to a false arrest, this claim is also governed by the Fourth Amendment requiring a lack of probable cause. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017) ("[T]he Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process[.]"); *Robertson v. Lucas*, 753 F.3d 606, 618 (6th Cir. 2014) ("To state a Fourth Amendment false arrest claim, a plaintiff must 'prove that the

underlying events that led to his prosecution. These events readily provide a prudent prosecutor with probable cause to believe that an offense had been committed. The decisions of the Court of Appeals in *Hall*, of the trial court in Pinkney's own case—and of the Court of Appeals during Pinkney's direct appeal—all confirm that this belief was eminently reasonable. Thus there is no valid Fourth Amendment claim here on the decision to charge and prosecute Pinkney.

Of course, Pinkney is entitled to the benefit of the Michigan Supreme Court decision on the direct review of his case. But that benefit was fully realized when the underlying conviction was vacated on direct appeal. This exonerated Pinkney. True, Pinkney spent time in custody that he would not have spent if the State Supreme Court had reached that conclusion earlier. But that is true whenever an appellate court changes the law or vacates a conviction on direct review. For that matter, it is also true when a jury ultimately acquits a defendant detained pending trial. These circumstances do not translate to a basis for liability for the prosecutor and county in following the law in effect at the time of the prosecution. *C.f. Heyerman v. County of Calhoun*, 680 F.3d 642 (6th Cir. 2012) (no county liability where the need for action (to avoid constitutional violation) was not 'plainly obvious" or a 'highly predictable consequence' of the county's existing policy). The constitutional liberty interest of defendants in those situations is fully vindicated by the requirement of probable cause.

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arresting officer lacked probable cause to arrest the plaintiff.'") (quoting *Voyticky v. Vill. of Timberlake*, 412 F.3d 669, 677 (6th Cir. 2005)).

Based on all the above, the Court discerns no reason for a stay of this case while Pinkney's State Court case proceeds. Even if the proceedings result in a ruling that is favorable towards Pinkney's position, and even if that undermines *Cady*'s validity, the claims in Plaintiff's complaint fail on the merits.

CONCLUSION

ACCORDINGLY, IT IS ORDERED:

1. Pinkney's Motion to Stay (ECF No. 12) is **DENIED.**

2. Defendant's Motion to Dismiss (ECF No. 7) is **GRANTED.**

Judgment will enter against Pinkney and in favor of Defendants dismissing this action with prejudice.

Dated: July 20, 2021

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C

No. 21-2802

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD PINKNEY,
Plaintiff-Appellant,
v.
BERRIEN COUNTY, MICHIGAN; BERRIEN COUNTY PROSECUTOR, IN HIS OFFICIAL CAPACITY AS A LOCAL, NON-STATE OFFICIAL WITH A LEGAL EXISTENCE SEPARATE AND DISTINCT FROM THE COUNTY, JOINTLY AND SEVERALLY,
Defendants-Appellees.

FILED
Sep 15, 2022
DEBORAH S. HUNT, Clerk

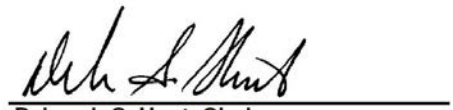
O R D E R

BEFORE: GUY, THAPAR, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX D

United States Constitution
Amendment IV

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.

United States Constitution
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive

and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983
Civil action for deprivation of rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX E

Michigan Supreme Court
Lansing, Michigan

Syllabus	Chief Justice: Stephen J. Markman	Justices: Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement
This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.		Reporter of Decisions: Kathryn L. Loomis

PEOPLE v PINKNEY

Docket No. 154374. Argued on application for leave to appeal November 7, 2017. Decided May 1, 2018.

Edward Pinkney was charged in Berrien County with five felony counts of election forgery under MCL 168.937 and six misdemeanor counts of making a false statement in a certificate-of-recall petition under MCL 168.957 for having submitted petitions with falsified dates in connection with an effort to recall the mayor of Benton Harbor. After defendant was bound over to the Berrien Circuit Court for trial, he moved to quash the charges, arguing that MCL 168.937 was

a penalty provision and not a substantive, chargeable offense. The court, Sterling R. Schrock, J., denied the motion. Defendant was convicted following a jury trial in the Berrien Circuit Court of all five counts of election forgery but acquitted of all six counts of making a false statement in a certificate-of-recall petition. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 to 120 months. The Court of Appeals, O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ., upheld defendant's convictions, holding that MCL 168.937 created the substantive offense of election-law forgery. 316 Mich App 450 (2016). Defendant applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other peremptory action. 500 Mich 990 (2017).

In a unanimous opinion by Justice VIVIANO, the Supreme Court, in lieu of granting leave to appeal, *held*:

MCL 168.937, by its plain language, is only a penalty provision; it does not set forth a substantive offense. As a result, defendant was not properly charged under that provision with the substantive offense of election-law forgery. Therefore, his convictions must be vacated and the charges dismissed.

1. MCL 168.937 provides that any person found guilty of forgery under the provisions of the Election Law, MCL 168.1 *et seq*., shall, unless otherwise provided, be punished by a fine not exceeding $1,000, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and

imprisonment in the discretion of the court. Nothing in the plain language of § 937 suggests that the Legislature intended it to be a chargeable offense; instead, the language indicates that it provides the penalty for the crime of forgery enumerated elsewhere in the Election Law. Section 937 does not set forth or describe any conduct that is prohibited, and the Legislature's use of the past tense verb "found" presupposes that an individual has already been convicted of the crime of forgery under the Election Law. Consequently, by its clear terms, the provision does nothing more than provide the punishment for that already-committed offense. A review of the surrounding provisions further indicates that § 937 does not create a chargeable offense, but is instead one of a series of penalty provisions for offenses delineated elsewhere in the Election Law.

2. The statutory text of MCL 168.937 contains no evidence that the Legislature intended to incorporate the common-law definition of forgery when the previous version of § 937 was first enacted or when it was recodified. The term "forgery" is not used to describe a type of conduct that is prohibited. Instead, it describes the punishment for someone who has already committed the crime of forgery. In other statutes that have been found to codify a common-law crime, the commission of the common-law crime itself is the subject of the statute, which generally expressly criminalizes the crime; the common-law term is simply a shorthand for how the crime is committed. By contrast, the subject of MCL 168.937 is an individual found guilty of a crime, and § 937 itself merely prescribes the punishment for such an individual; it does not mention the commission of

forgery or state that a person who forges is guilty of a crime. Simply plugging the common-law definition of "forgery" into § 937 does not transform the provision into a substantive offense. While the common law can provide the definition of "forgery," the common law cannot supply the elements of "forgery under the provisions of this act"; rather, a reasonable person would believe that "forgery under the provisions of this act" suggests that one could only be found guilty of a forgery crime defined elsewhere under the Election Law.

3. The statutory history of the Election Law provides further support for the conclusion that MCL 168.937 is a penalty provision. For more than 80 years, the only statute in Michigan criminalizing election-related forgery was narrowly drawn to prohibit falsification of a "register of electors" (later called a "registration book"). In this statute, the Legislature confusingly combined two offenses in one statute: the first was labeled "larceny," and the second was labeled "forgery." The penalty for these crimes was included at the end of the section, making both crimes felonies. Notably, the statute was designed to protect a document that was in the custody of election officials. In 1917, the Legislature made two changes to this statute that are of note: it dropped the "larceny" label from the first grouping of prohibited conduct and instead provided that a person who violated that clause "shall be deemed guilty of a felony," and it deleted the penalty provision from the statute defining these substantive offenses and created a separate penalty provision for the crime of election-related forgery. The latter provision was nearly identical to § 937, the present-day penalty

provision at issue in this case. In 1948, these provisions were recodified as 1948 CL 195.8 and 1948 CL 198.3, respectively. During a rewrite of the Election Law in 1954, the Legislature enacted MCL 168.932(c), which essentially combined the two offenses from 1948 CL 195.8 into one. But MCL 168.932(c) explicitly focused on the actions of election officials and those who have custody of election records. In addition, instead of applying only to a registration book or copy thereof filed for preservation like its predecessor, the new offense was expanded to cover any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved. Finally, the new statute dropped the reference to "forgery," presumably because the newly combined statute also included some of the former so-called "larceny" activities. The statute also made it clear that a person who violates § 932(c) is guilty of a felony. This obviated the need for § 937, given that the general felony penalty provision, § 935, applies as the penalty provision. Despite these changes, however, the 1954 amendments recodified 1948 CL 198.3 as MCL 168.937. Thus, in 1954 the Legislature retained the forgery penalty as the new § 937, but the Legislature omitted the only provision in the Election Law to which that penalty pertained. At the same time, the Legislature enacted yet another statute, MCL 168.957, with potential applicability to the conduct at issue in this case. The Legislature also recodified a provision making it unlawful to affix a forged name to an initiative or referendum petition, MCL 168.484. Finally, in 1995, the Legislature added

another narrow forgery offense to the Election Law, MCL 168.759(8), which provides that a person who forges a signature on an absent voter ballot application is guilty of a felony. It would be unreasonable to conclude that the Legislature would have made these changes if it considered § 937 an omnibus forgery offense covering all election-related documents, and it would also be unreasonable to conclude that the Legislature would have chosen to create such a vast and far-reaching offense out of an existing penalty provision by making no substantive changes to its language.

4. Generally, courts must give effect to every word, phrase, and clause of a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory. However, the canon against surplusage is not an absolute rule. Rather, it assists only when a competing interpretation gives effect to every clause and word of a statute. In this case, construing MCL 168.937 as creating the separate offense of forgery would appear to render all or part of two other statutory provisions surplusage. Both MCL 168.932(c) and MCL 168.759(8) prohibit forgery of certain Election Law documents. Section 932(c), in particular, prohibits forgery of an expansive list of documents by certain election officials or other persons having custody of such documents. Had the Legislature intended § 937 to be a general forgery provision prohibiting forgery of any document in the Election Law, there would have been no need to include two other forgery provisions describing how forgery is committed. Therefore, reading § 937 as creating a substantive offense of forgery renders all or part of §§ 932(c) and 759(8) surplusage. Furthermore,

using the surplusage canon—or any rule of construction—to create a criminal offense is impermissible.

Court of Appeals' judgment reversed; case remanded to the trial court for further proceedings.

Justice CLEMENT took no part in the decision of this case.

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice: Stephen J. Markman	Justices: Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement

FILED May 1, 2018

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD PINKNEY,

Defendant-Appellant.

No. 154374

BEFORE THE ENTIRE BENCH (except CLEMENT, J.)

VIVIANO, J.

The issue in this case is whether defendant can be convicted of election-law forgery under MCL 168.937. The Court of Appeals upheld defendant's convictions under that provision, holding that MCL 168.937 creates the substantive offense of election-law forgery. We disagree and hold that MCL 168.937 is nothing more than a penalty provision—it does not create a substantive offense. Because defendant cannot be convicted under a statute that does not set forth a

crime, we reverse and remand for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Between November 2013 and January 2014, Edward Pinkney participated in a recall effort against the mayor of Benton Harbor, James Hightower. In order to force a recall election, defendant Pinkney needed to obtain 393 signatures on petitions supporting the recall. Defendant had a 60-day window within which to collect the required number of signatures.[1] On January 8, 2014, defendant presented the Berrien County Clerk's office with 62 petitions containing 728 signatures supporting the recall election. The clerk's office certified 402 of these signatures and scheduled the recall election.

Prior to the election, the clerk's office transferred the petitions to the Berrien County Sheriff's Department for examination of perceived irregularities in the signatures on the petitions. After reviewing the petitions, the sheriff's department identified several signatures for which the dates appeared to have been altered. The Michigan State Police Crime Laboratory also examined the petitions and confirmed that five of the petitions contained signatures with altered dates. In each case, the dates had been altered so as to fall within the 60-day window for valid signatures.

Defendant was charged with five counts of election-law forgery under MCL 168.937 and six counts of

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[1] Under MCL 168.961(2)(d), signatures on a recall petition are not valid if obtained "more than 60 days before the filing of the recall petition."

making a false statement in a certificate-of-recall petition under MCL 168.957. After being bound over to the Berrien Circuit Court on these charges, defendant filed a motion to quash arguing, *inter alia*, that § 937 is a penalty provision, not a substantive, chargeable offense. The circuit court denied the motion to quash, and the case proceeded to trial. After an eight-day trial, the jury returned verdicts of guilty on the five felony counts and not guilty on the six misdemeanor counts. In a motion for a directed verdict, defendant again argued that § 937 is a penalty provision and not a substantive offense. The circuit court denied the motion and sentenced defendant to concurrent prison terms of 30 to 120 months.

On appeal, defendant argued, among other things, that § 937 does not create a substantive offense and that the admission of certain evidence under MRE 404(b) was improper and requires reversal.[2] The Court of Appeals unanimously upheld defendant's convictions.[3] Regarding § 937, the Court of Appeals held that the statute does create the substantive offense of election-law forgery.[4] In reaching this conclusion, the panel relied heavily on the reasoning of *People v Hall*,[5] which considered the same issue.

The Court of Appeals in *Hall* concluded that § 937 created a substantive offense for two reasons. First,

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[2] *People v Pinkney*, 316 Mich App 450, 461; 891 NW2d 891 (2016).

[3] *Id.* at 462.

[4] *Id.* at 462–465.

[5] *People v Hall*, unpublished per curiam opinion of the Court of Appeals, issued October 23, 2014 (Docket No. 321045).

the Court explained that interpreting § 937 as a penalty provision would render it surplusage because another provision, MCL 168.935,[6] already sets forth an identical penalty for felonies under the Michigan Election Law, MCL 168.1 *et seq*.[7] Second, the Court reasoned that interpreting § 937 as a penalty provision would contravene the Legislature's intent in enacting the Election Law, which the Court described as "ensur[ing] the fairness and purity of the election process in part by proscribing misconduct that would foster such unfairness and impurity."[8] Based on this reasoning, the *Hall* Court determined that § 937 creates a substantive offense and is not merely a penalty provision.[9]

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[6] "Any person found guilty of a felony 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, or by both such fine and imprisonment in the discretion of the court." MCL 168.935.

[7] *Hall*, unpub op at 6. The Legislature has directed that the act containing our election laws "shall be known and may be cited as the 'Michigan election law.' " MCL 168.1.

[8] *Id.* at 7.

[9] Following this decision, the *Hall* prosecutor appealed a separate, unfavorable ruling in our Court. In response, the defendant did not challenge the Court of Appeals' holding that § 937 created a substantive offense, but instead argued that the Court of Appeals correctly held that the prosecution could only charge him with violating MCL 168.544c (falsifying electoral nominating petitions) and not MCL 168.937. Accordingly, in deciding the case, we declined to reach this question and instead presumed, for purposes of the appeal, that § 937 did create a substantive offense. See *People v Hall*, 499 Mich 446, 449 n 2, 453, 456, 461; 884 NW2d 561 (2016). Then, we reversed the Court of Appeals, holding that the prosecutor had discretion to charge the defendant under both § 937 and § 544c. *Id.* at 449.

The Court of Appeals in the present case adopted the *Hall* panel's reasoning and again held that § 937 constitutes a substantive offense.[10] The Court further noted that interpreting § 937 solely as a penalty provision would create an absurd result.[11] The Court explained:

> [U]nder defendant's interpretation of MCL 168.937, only "[a]n inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description," MCL 168.932(c), or "[a] person who is not involved in the counting of ballots as provided by law and who has possession of an absent voter ballot mailed or delivered to another person," MCL 168.932(e), could be guilty of election forgery. There is simply nothing—express, implied, or otherwise—in the Michigan Election Law to support the idea that the Legislature intended such a peculiar result. *People v Stephan*, 241 Mich App 482, 503; 616 NW2d 188 (2000) (explaining that this Court will not read anything into a statute that is "not plainly expressed" by the Legislature). Furthermore, interpreting MCL 168.937 in that manner, that is, as only a penalty provision, would create an absurd result by permitting individuals who do not meet the definitions set forth in MCL 168.932 to commit common-law forgery in the election process without recourse under the Michigan

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[10] *Pinkney*, 316 Mich App at 463–465.

[11] *Id.* at 464.

> Election Law. *People v Lewis*, 302 Mich App 338, 341–342; 839 NW2d 37 (2013), quoting *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010) (" 'Statutes must be construed to prevent absurd results.' ").[12]

The Court concluded that it could not interpret § 937 in a way that would render the provision surplusage and create such an absurd result.[13]

The panel went on to reject defendant's arguments that § 937 violates the vagueness doctrine and the rule of lenity.[14] The statute is not unconstitutionally vague, the panel explained, because it can be clearly understood by reference to the common-law definition of forgery. Similarly, the panel concluded that the statute does not implicate the rule of lenity because it is not ambiguous.[15]

Defendant has now sought leave to appeal in this Court. We scheduled oral argument on the application, directing the parties to address:

> (1) whether the trial court abused its discretion when it admitted evidence under MRE 404(b) that related to the defendant's political and community activities other than the mayoral recall effort for the purpose of showing the

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[12] *Id.*

[13] *Id.* at 465.

[14] *Id.* at 466.

[15] *Id.* We need not address defendant's vagueness and rule-of-lenity arguments in light of our holding that MCL 168.937 does not create a substantive offense; however, we will discuss whether the statute may be understood as incorporating the common-law definition of forgery because we believe that is important to determine its meaning.

> defendant's motive to commit the instant crimes, and (2) whether the Court of Appeals erred in determining that MCL 168.937 creates the substantive offense of election forgery and is not merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law.[16]

II. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation de novo.[17]

III. ANALYSIS

It has long been our rule that "[a] criminal statute ought to be so plain and unambiguous that 'he who runs' may read, and understand whether his conduct is in violation of its provisions."[18] In this case, after reviewing the plain language of § 937, together with its context and history, we are convinced that § 937 does not create a substantive crime. Instead, it is an inoperative penalty provision. We reach this unusual conclusion for the reasons that follow.

A. ANALYSIS OF MCL 168.937

When interpreting a statute, "our goal is to give effect to the Legislature's intent, focusing first on the

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[16] *People v Pinkney*, 500 Mich 990, 990–991 (2017).

[17] *People v Miller*, 498 Mich 13, 16–17; 869 NW2d 204 (2015).

[18] *People v Ellis*, 204 Mich 157, 161; 169 NW 930 (1918). The phrase "he who runs may read" is derived from the Bible, *Habakkuk* 2:2, and has been interpreted by a leading scholar of the early 20th century to mean "[w]rite plainly . . . that it may be read runningly, *i.e.* without pause and hesitation." Brief Communications, *He Who Runs May Read*, 40 J Biblical Lit 166, 181 (1921).

statute's plain language."[19] "In so doing, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[20] "When a statute's language is unambiguous, . . . the statute must be enforced as written. No further judicial construction is required or permitted."[21]

The prosecution charged defendant with six counts of violating § 937, which reads:

> 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, or by both such fine and imprisonment in the discretion of the court.

Contrary to the Court of Appeals' conclusion that § 937 clearly sets forth the offense of forgery under the Election Law, nothing in the plain language of § 937 suggests that the Legislature intended it to be a chargeable offense. Instead, as defendant argued below, it reads like a penalty provision—i.e., a provision providing the penalty for the crime of forgery enumerated elsewhere in the Election Law. Section 937 does not set forth or describe any conduct that is prohibited. Instead, the Legislature's use of the past tense verb "found" (in the phrase "found guilty of forgery under the provisions of this act")

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[19] *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citations omitted).

[20] *Id.*

[21] *Id.* (quotation marks and citations omitted).

presupposes that an individual has already been convicted of the crime of forgery under the Election Law. Consequently, by its clear terms, the provision does nothing more than provide the punishment for that already-committed offense.[22]

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[22] This accords both with logic and the Legislature's usual practice—when the Legislature uses the phrase "found guilty" in a statute that does not describe the prohibited conduct, the statute typically prescribes penalties or consequences for conduct that is criminalized or made punishable elsewhere. For example, MCL 600.3830(2) states, "Any person found guilty of maintaining a nuisance under the provisions of this chapter shall forfeit the benefit of all property exemptions . . . ." Nothing in that provision could reasonably be construed as suggesting that it creates a general crime of nuisance. Instead, an individual trying to determine how to commit a nuisance "under the provisions of this chapter" would have to look elsewhere in the chapter. Unsurprisingly, MCL 600.3801 specifically provides what conduct constitutes a nuisance, and further explains that "[a] person . . . who owns, leases, conducts, or maintains a building, vehicle, or place described in subsection (1) is guilty of a nuisance." Thus, based on its plain language, MCL 600.3830(2) is exactly what § 937 appears to be—a penalty provision. See also, e.g., MCL 28.468 (criminalizing conduct in Subsection 1 and providing, in Subsection 2, that "a person that is found guilty of a violation of this act shall be required to reimburse the appropriate governmental agency"); MCL 28.723a(1) ("If an individual pleads guilty to or is found guilty of a listed offense . . . ."); MCL 32.1085 (describing the offense of "desertion" and then providing, in a separate subsection, that "[a] person found guilty of desertion shall be punished as a court-martial directs"); MCL 752.102 ("Any person . . . who shall be found guilty of a violation of the provisions of section 1 of this act, shall be deemed guilty of a misdemeanor . . . ."). According to at least one commentator, this is a preferred practice. See 1A Singer & Singer, Sutherland Statutory Construction (7th ed), § 20:18, p 147 ("The better practice [when drafting criminal penalties] is to place a general penalty section at the end or near the end of

A review of its surrounding provisions further indicates that § 937 does not create a chargeable offense, but is instead one of a series of penalty provisions for offenses delineated elsewhere in the Election Law. The three sections of the Election Law immediately preceding § 937 provide as follows:

> Any person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not exceeding $500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court.[23]
>
> Any person found guilty of a felony 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, or by both such fine and imprisonment in the discretion of the court.[24]
>
> Any person found guilty of perjury 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, or by both such fine and imprisonment in the discretion of the court.[25]

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the act and provide that any violation of the provisions of the act is punishable according to the terms of the penalty section.").

[23] MCL 168.934.

[24] MCL 168.935.

[25] MCL 168.936.

One treatise describes these provisions, along with § 937, as "penalties for offenses where no other penalty is provided by the Act[.]"[26]

Certainly, no one would suggest that § 934 and § 935 create chargeable offenses for misdemeanors and felonies under the Election Law. Instead, they merely define the punishment for misdemeanor and felony offenses under the Election Law, where no penalty is "otherwise provided." Section 937 is nearly identical to §§ 934 and 935, except for the use of the word "forgery" in place of "misdemeanor" and "felony," respectively, thereby leaving no room to distinguish the provisions.

Section 936 is most akin to § 937, in that it specifies a penalty for a recognized type of crime—"perjury" rather than "forgery." Yet the Legislature described how an individual commits "perjury" in MCL 168.933, which reads:

> A person who makes a false affidavit or swears falsely while under oath under section 848 or for the purpose of securing registration, for the purpose of voting at an election, or for the purpose of qualifying as a candidate for elective office under section 558 is guilty of perjury.

The only reasonable reading of these two provisions is that the Legislature intended § 933 to be the substantive offense of perjury and § 936 to set forth the punishment for a conviction of perjury under the Election Law. And, since it contains language nearly identical to § 936, it would be exceedingly odd to

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[26] 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 71:18, p 555.

assume that the Legislature intended § 937 to operate not as a penalty provision like § 936, but as a provision creating the substantive offense of forgery under the Election Law. In short, the plain language of § 937, in context with its surrounding provisions in the Election Law, strongly indicates that it is only a penalty provision.

In reaching the contrary conclusion, the Court of Appeals erred by first looking to the purpose of the Election Law instead of focusing on its plain language.[27] After noting that the purpose of the Election Law is "to regulate primaries and elections, provide for the 'purity' of the election process, and guard against abuse," the Court summarily concluded that interpreting § 937 as a substantive offense would further that purpose.[28] The Court then made the rather remarkable assertion that it would be "peculiar" or "absurd" if someone could only be found guilty of election-related forgery if they engaged in conduct specifically prohibited by two other statutory subsections, MCL 168.932(c) and (e).[29] However, "[t]he Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."[30]

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[27] See *Madugula*, 496 Mich at 696 ("As with any statutory interpretation, our goal 'is to give effect to the Legislature's intent, focusing first on the statute's plain language.' ") (quotation marks and citation omitted).

[28] *Pinkney*, 316 Mich App at 463–464.

[29] *Id.* at 464.

[30] *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017).

We determine the scope of a statute based on its plain language—here, the words of § 937 give no indication that it was intended to cover all possible election-related forgery crimes.[31]

B. INCORPORATING THE COMMON-LAW DEFINITION OF FORGERY

Our statutory interpretation would not be complete without consideration of whether it is possible to interpret the plain language of § 937 as creating a substantive crime by reference to the common law.[32] The rule is well established that "[w]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject matter as that with which they were associated at the common law."[33] Therefore, "[w]here the statutory

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[31] Cf. *People v Boscgalia*, 419 Mich 556, 563–564; 357 NW2d 658 (1984) ("There is no indication that the present statute was intended to cover all the possible crimes dealing with transfer of title or theft of automobile parts. To the contrary, this statute is only one part of an overall statutory scheme dealing with automobiles and stolen goods in general.").

[32] In its opinion, the Court of Appeals did state that "the meaning of [§ 937] can be fairly ascertained by reference to the common law." *Pinkney*, 316 Mich App at 466. See generally 2B Singer & Singer, Sutherland Statutory Construction (7th ed), § 50:1, p 143 ("All legislation is interpreted in the light of the common law . . . ."). However, as noted above, the Court of Appeals made this observation only after concluding that § 937 created a substantive offense. See note 15 of this opinion.

[33] *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995), superseded by statute on other grounds by 1996 PA 20. See also MCL 8.3a (instructing that while statutory terms generally are accorded their ordinary meaning, "technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according

provision describes by name, but does not clearly and explicitly state the definition of a criminal offense, courts will construe the statutory crime by resorting to the common-law definition."[34]

In this case, however, the statutory text contains no evidence that the Legislature intended to incorporate the common-law definition of forgery when the previous version of § 937 was first enacted or when it was recodified.[35] As noted above, the statutory text does not use the term "forgery" to describe a type of conduct that is prohibited. Instead, it describes the punishment for someone who has already committed the crime of forgery.[36] In other statutes that we have

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to such peculiar and appropriate meaning."); and *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921) ("A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown."), superseded by statute on other grounds as recognized by *People v Williams*, 491 Mich 164, 171–173; 814 NW2d 270 (2013).

[34] *Reeves*, 448 Mich at 8.

[35] The statutory history of this provision is discussed in detail below.

[36] By comparison, the general forgery statute, MCL 750.248(1), clearly sets forth the conduct (i.e., "a person who . . . forges") and enumerates documents that, if forged, can result in a conviction under MCL 750.248(1). Likewise, every other forgery statute contains a description of what is necessary to commit forgery under those acts—and what documents are covered. For example, MCL 432.30(1) of Michigan's Lottery Act, MCL 432.1 *et seq*., provides, "A person, with the intent to defraud, shall not falsely make, alter, forge, utter, pass, or counterfeit a state lottery ticket or share." And, not surprisingly, the provision is followed by a penalty provision akin to § 937—"A person

convicted of violating this section is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $1,000.00, or both." MCL 432.30(3). See also MCL 205.428(7) ("A person who falsely makes, counterfeits, or alters a license, vending machine disc, or marker . . . is guilty of a felony punishable by a fine of not more than $5,000.00 or imprisonment for not more than 5 years, or both."); MCL 257.310(7) (subjecting to punishment "a person who intentionally reproduces, alters, counterfeits, forges, or duplicates a license photograph, the negative of the photograph, image, license, or electronic data contained on a license . . . ."); MCL 257.905 ("Any person who shall forge, or without authority, sign any evidence of ability to respond in damages as required by the secretary of state . . . shall be guilty of a misdemeanor . . . ."); MCL 257.222(6) ("A person who intentionally reproduces, alters, counterfeits, forges, or duplicates a certificate of title . . . shall be punished as follows . . . ."); MCL 259.176a(a) (allowing the punishment of an individual under the act who "[k]nowingly forges, counterfeits, alters, or falsely makes a certificate authorized to be issued under this act or the rules promulgated under this act"); MCL 324.52908(5) ("A person who forges a bill of sale or other evidence of title prescribed by the department or the federal agency that has jurisdiction is guilty of a misdemeanor, punishable by imprisonment for not more than 90 days, or a fine of not more than $100.00, or both."); MCL 324.80319(1)(a) ("A person shall not . . . [a]lter or forge a certificate of title . . . ."); MCL 324.81112(4) (subjecting to punishment "[a] person who intentionally reproduces, alters, counterfeits, forges, or duplicates an [off-road vehicle] certificate of title"); MCL 333.7407(1)(c) ("A person shall not knowingly or intentionally . . . [a]cquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."); MCL 333.17766(c) (stating that a person is guilty of a misdemeanor if he or she "[f]alsely makes, utters, publishes, passes, alters, or forges a prescription"); MCL 436.1919 ("A person who falsely or fraudulently makes, simulates, forges, alters, or counterfeits a document, label, or stamp prescribed by the commission under this act . . . is guilty of a felony . . . ."); MCL 168.759(8) ("A person who forges a signature on an absent voter ballot application is guilty of a felony."); MCL 28.422(14)

found to codify a common-law crime, the commission of the common-law crime itself is the subject of the statute, which generally expressly criminalizes the crime; the common-law term is simply a shorthand for how the crime is committed.[37] Here, by contrast, the statute's subject is an individual "found guilty" of a crime, and the statute itself merely prescribes the punishment for such an individual; it does not mention the commission of forgery or state that a person who forges "is guilty" of a crime.

("A person who forges any matter on an application for a license under this section is guilty of a felony . . . ."); MCL 28.295(1) (subjecting to punishment "[a] person who intentionally reproduces, alters, counterfeits, forges, or duplicates an official state personal identification card photograph"); MCL 324.43558(1)(f) ("A person is guilty of a misdemeanor if the person . . . [f]alsely makes, alters, forges, or counterfeits a sportcard or a hunting, fishing or fur harvester's license . . . .").

[37] An example is the manslaughter statute, MCL 750.321, which provides, "Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court." Because the term "manslaughter" is not statutorily defined, this Court found it appropriate to incorporate its common-law meaning into the statute. See *People v Couch*, 436 Mich 414, 419–420; 461 NW2d 683 (1990). The focus of that statute is criminalizing the commission of certain conduct. Another example is MCL 750.356(1), which states that "[a] person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section . . . ." The statute makes the commission of larceny a crime, i.e., an individual who commits larceny "is guilty of a crime." Because there is no full statutory definition, the common-law definition is used to help describe how an individual commits larceny. See *People v March*, 499 Mich 389, 399–400; 886 NW2d 396 (2016).

Simply plugging the common-law definition of "forgery" into § 937 does not transform the provision into a substantive offense.[38] While the common law can provide the definition of "forgery," the common law cannot supply the elements of "forgery *under the provisions of this act*."[39] In other words, a reader of the statute who sees "forgery under the provisions of this act" would not assume that "forgery" means common-law forgery. Instead, a reasonable person would believe that "forgery *under the provisions of this act*" suggests that he or she could only be found guilty of a forgery crime defined elsewhere in the Election Law.[40]

A review of the statutory history of the Election Law provides further support for our conclusion that § 937 is a penalty provision.[41] For more than 80 years,

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[38] As we noted in Hall, " '[t]he common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud.' " *Hall*, 499 Mich at 456, quoting *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895).

[39] Emphasis added.

[40] The Court of Appeals in *Hall*, unpub op at 9, interpreted "forgery under the provisions of this act" to mean forgery of documents "required to be submitted under the Michigan election law." Even assuming the statutory text could bear this meaning, it would not be a reasonable interpretation, for the reader would first need to incorporate the common-law definition of "forgery" and then canvass the entire Election Law to determine what conduct could potentially result in a felony conviction. This construction is far from the clear and concise delineation of the elements of a crime that the Legislature is required to provide. *People v Goulding*, 275 Mich 353, 359; 266 NW 378 (1936).

[41] Unlike legislative history, statutory history—the narrative of the "statutes repealed or amended by the statute under consideration"—properly "form[s] part of the context of the

the only statute in Michigan criminalizing election-related forgery was narrowly drawn to prohibit falsification of a "register of electors" (later called a "registration book").[42] In this statute, the Legislature confusingly combined two offenses in one statute: the first was labeled "larceny," and the second was labeled "forgery." The penalty for these crimes was included at the end of the section, making both crimes felonies. Notably, the statute was designed to protect a document that was in the custody of election officials.[43]

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statute . . . ." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 256.

[42] That statute, 1859 PA 177, § 20, provided as follows:

> Whoever shall willfully cut, burn, mutilate or destroy any such register of electors, or copy thereof filed for preservation, or shall unlawfully take and carry away the same, or unlawfully conceal or refuse or neglect to surrender the same, with intent to prevent its being used as authorized by law, shall be deemed guilty of larceny; and whoever shall falsify any such register or copy, by unlawfully erasing or obliterating any name or entry lawfully made therein, or by unlawfully inserting therein any name, note or memorandum, with intent thereby to influence or affect the result of any election or to defraud any person of an election to office, shall be deemed guilty of forgery; and the person so offending shall, for every such offence, be punished by imprisonment in the State Prison not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, nor less than ninety days.

[43] See 1859 PA 177, § 1 (imposing a duty on city and township officials to provide one register or book of electors for each township or ward); 1917 PA 126, ch 2, § 5 ("The registration book or books of any township or city shall remain in the custody of the township or city clerk, as the case may be, at all times except when they are in use by boards of registration or boards of

In 1917, the Legislature made two changes to this statute that are of note.[44] It dropped the "larceny" label from the first grouping of prohibited conduct, and instead provided that a person who violated that clause "shall be deemed guilty of a felony." And it deleted the penalty provision from the statute defining these substantive offenses and created a separate penalty provision for the crime of election-related forgery.[45] The latter provision was nearly identical to § 937, the present-day penalty provision at issue in this case.[46] In 1948, these provisions were

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inspectors of an election or an official primary election, as provided by this act.").

[44] That statute, 1917 PA 126, ch 2, § 8, provided as follows:

> Whoever shall wilfully cut, burn, mutilate or destroy any registration book, or copy thereof filed for preservation, or shall unlawfully take and carry away any such registration book or copy, or shall unlawfully conceal or refuse or neglect to surrender the same with intent to prevent its being used, as authorized by law, shall be deemed guilty of a felony. Whoever shall falsify such registration book, or copy thereof, by unlawfully erasing or obliterating any name or entry lawfully made therein, or by unlawfully inserting therein any name, note or memorandum, shall be deemed guilty of forgery.

[45] See 1917 PA 126, ch 2, § 8 (substantive offense); 1917 PA 126, ch 11, § 7 ("Any person found guilty of forgery under the provisions of this act shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the State Prison for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.").

[46] In another public act passed the same year, Public Act 203, the Legislature enacted a penalty provision identical to the one in 1917 PA 126 except for the amount of the fine. 1917 PA 203, ch 25, § 16. It appears that this penalty provision was unaccompanied by any substantive offense, as PA 203 nowhere defined forgery. The Legislature corrected this oversight by

recodified as 1948 CL 195.8 and 1948 CL 198.3, respectively.[47]

During a rewrite of the Election Law in 1954, the Legislature expanded the scope of this election-related forgery prohibition when it enacted MCL 168.932(c), which essentially combined the two offenses from 1948 CL 195.8 into one.[48] But § 932(c)

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combining multiple election provisions into a more comprehensive scheme a few years later in 1925 PA 351. That act defined the substantive offense of forgery, 1925 PA 351, part 5, ch 1, § 8, just as it had in 1917 PA 126. The act also provided the penalty for forgery—in the chapter called "Penalties"—using the same structure as the penalty provisions in 1917 PA 126 and 203. 1925 PA 351, part 5, ch 4, § 3.

[47] Another election-related forgery statute, 1941 PA 246, § 14 (later codified at 1948 CL 200.14), made it unlawful to affix a forged name to an initiative or referendum petition. *Id.* (retained as MCL 168.484 after 1954 PA 116 and repealed by 1965 PA 312, § 2). While 1948 CL 200.14 did mention forgery, it has no relationship to § 937 because it provided its own punishment. See *id.* ("Any person found guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor.").

[48] See 1954 PA 116. As enacted, MCL 168.932(c) provided:

> No inspector of election, clerk or other officer or person having custody of any record, election list of voters, affidavit, return or statement of votes, certificates, poll book, or of any paper, document or vote of any description, in this act directed to be made, filed or preserved, shall wilfully destroy, mutilate, deface, falsify or fraudulently remove or secrete the whole or part thereof, or fraudulently make any entry, erasure or alteration therein, or permit any other person to do so.

This statute, which has since been amended in style but not substance, does not list all of the same items as its predecessor. Thus, for example, it does expressly prohibit cutting, burning, or unlawfully taking and carrying away a registration book. And it adds some items to the list that were not included previously,

continued to focus (now explicitly) on the actions of election officials and those who have custody of election records—it applies to "[a]n inspector of election, clerk, or other officer or person having custody" of the enumerated documents.[49] In addition, instead of applying only to "a registration book or copy thereof filed for preservation" like its predecessor, the new offense was expanded to cover "any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or . . . any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved . . . ."[50]

Finally, the new statute dropped the reference to "forgery," presumably because the newly combined

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such as "deface" and "alter[]." But, especially as it relates to the forgery-type conduct, the new statute appears to encompass most, if not all, of the same conduct.

Our conclusion that § 932 is a direct descendant of the original, independent substantive forgery offense is further confirmed by the official compiler's notes to its predecessor, 1948 CL 195.8. Those notes indicate that 1948 CL 195.8 originated in 1917 PA 126, ch 2, § 8, the first statute in which the substantive forgery crime was independent of the penalty provision. In other words, § 932(c) hails from the original substantive forgery offense. While the compiler's notes are not necessary to our conclusion, which follows from the plain text, the notes offer a form of support contemplated by the Legislature, which instructs that official compilations shall include "notes, references, and other materials" the compiler "considers necessary." MCL 8.41(3); cf. *Camaj v S S Kresge Co*, 426 Mich 281, 289; 393 NW2d 875 (1986) (noting that marginal notations in a statute can provide persuasive, but not conclusive, proof of meaning).

[49] MCL 168.932(c).

[50] *Id.*

statute also includes some of the former so-called "larceny" activities, so it no longer made sense to use the term "forgery." Perhaps because of this change, the statute also now makes it clear (in its introductory clause) that a person who violates § 932(c) "is guilty of a felony." This, of course, obviated the need for § 937, since the general felony penalty provision (§ 935) applies as the penalty provision. Despite these changes, the 1954 amendments recodified 1948 CL 198.3 as § 937.[51] Thus, the Legislature retained § 937, but omitted the only provision in the Election Law to which it pertained.

To summarize, the previous statute defining "forgery"—1948 CL 195.8—was extremely limited, applying only when an individual falsified a registration book. In 1954, the Legislature combined two offenses into one, dramatically expanded the scope of documents covered, dropped the label "forgery," and made the combined offense a felony (thus obviating the need for a separate forgery penalty provision).

At the same time, the Legislature enacted another statute, MCL 168.957, with potential applicability to the conduct at issue in this case.[52] And, as noted

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[51] See 1954 PA 116.

[52] See 1954 PA 116. MCL 168.957, which governs the conduct of petition circulators, was amended by 1976 PA 66 and currently provides:

> A person circulating a petition shall be a qualified and registered elector in the electoral district of the official sought to be recalled and shall attach thereto his certificate stating that he is a qualified and registered elector in the electoral district of the official sought to be recalled and shall state the city or the township wherein he resides and

above, the Legislature also recodified a provision making it unlawful to affix a forged name to an initiative or referendum petition. See MCL 168.484.[53] Finally, in 1995, the Legislature added another narrow forgery offense to the Election Law. In that provision, MCL 168.759(8), the Legislature provided that "[a] person who forges a signature on an absent voter ballot application is guilty of a felony."[54]

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his post-office address; further, that signatures appearing upon the petition were not obtained through fraud, deceit, or misrepresentation and that he has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once; that all signatures to the petition were affixed in his presence; and that to the best of his knowledge, information, and belief, the signers of the petition are qualified and registered electors and the signatures appearing thereon are the genuine signatures of the persons of whom they purport to be. A person who knowingly makes a false statement in the certificate hereby required is guilty of a misdemeanor.

Defendant was acquitted of six misdemeanor counts under this statute for allegedly permitting six individuals to sign the recall petition twice. He was convicted of five felony counts under MCL 168.937 for altering the dates of some petition signatures so they would count for the recall. Amicus curiae the American Civil Liberties Union of Michigan makes the interesting point that § 957 may also be a potential avenue of prosecution for altering dates. We, of course, offer no opinion on the validity of this argument because the issue is not before us and involves a matter of prosecutorial discretion.

[53] See note 47 of this opinion.

[54] See 1995 PA 261. MCL 168.759(8), like § 932(c), does not rely on § 937 to define the scope of the punishment for a violation of its provisions. Instead, it also designates the forgery offense it creates as a felony, making it punishable under the general felony penalty provision (§ 935), not under § 937.

Why, one might ask, would the Legislature go to all this trouble if it intended to transform § 937, the prior penalty provision, into an omnibus forgery offense covering all election-related documents? And would the Legislature really choose to create such a vast and far-reaching offense in an existing penalty provision by (drumroll please) . . . making *no* substantive changes to its language?

We think it unreasonable to conclude that the Legislature signaled its intention to convert § 937 from a penalty provision to a stand-alone crime by making no meaningful changes to its language.[55] Instead, our review of the statutory history of § 937 confirms that it was previously, and remains now, a penalty provision.

C. THE CANON AGAINST SURPLUSAGE

The Court of Appeals also declined to read § 937 as a penalty provision because of its fear that doing so would render it "mere surplusage."[56] That is, § 937 would be a penalty provision without a crime. This is a serious concern because, as a general rule, "we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the

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[55] If it is true (and we think it is) that "a change in the language of a prior statute presumably connotes a change in meaning," *Reading Law*, p 256, the converse seems even more obviously true: namely, that no change in the text connotes no change in its meaning.

[56] In particular, the Court of Appeals opined that interpreting § 937 as a penalty provision would render it surplusage because § 935 already "sets forth the penalties for a felony conviction under the provisions of the Michigan Election Law . . . ." *Pinkney*, 316 Mich App at 464.

statute surplusage or nugatory."[57] Thus, the Court of Appeals was justifiably reluctant to declare an entire statutory section meaningless. But we are even more reluctant to use the surplusage canon to create a crime when a plain-language reading of the statute and consideration of its history provide no evidence that the Legislature intended to do so.

The canon against surplusage is not an absolute rule. As Justice THOMAS COOLEY explained 150 years ago:

> The rule applicable here is, that *effect is to be given, if possible, to the whole instrument, and to every section and clause*. If different portions seem to conflict, the courts must harmonize them, if practicable, and lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory.[58]

More recently, our Court has stated that "[*w*]*hen possible*, we strive to avoid constructions that would render any part of the Legislature's work nugatory."[59]

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[57] *Miller*, 498 Mich at 25 (quotation marks and citation omitted).

[58] Cooley, Constitutional Limitations (1868), p 58 (some emphasis added). The roots of the surplusage canon may be traced even further. See 2 Blackstone, Commentaries on the Laws of England, pp *379–380 ("That the construction be made upon the entire deed, and not merely upon disjointed parts of it. '*Nam ex antecedentibus et consequentibus fit optima interpretatio*.' And therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.").

[59] *People v Seewald*, 499 Mich 111, 123; 879 NW2d 237 (2016) (emphasis added). Although we have sometimes stated the canon in absolute terms, see, e.g., *Miller*, 498 Mich at 25, we have also articulated the canon in nonabsolute terms, see, e.g.,

Logically, "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute."[60] However, in this case, construing § 937 as creating the separate offense of forgery appears to render all or part of two other statutory provisions surplusage. Both § 932(c) (prohibiting most of the forgery-type conduct contained in 1948 CL 195.8, the previous election-law forgery offense)[61] and § 759(8) (prohibiting forgery of a signature on an absentee voter ballot application) prohibit forgery of certain Election Law documents. Section 932(c), in particular, prohibits forgery of an expansive list of documents by certain election

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Seewald, 499 Mich at 123; *State Bd of Ed v Houghton Lake Community Sch*, 430 Mich 658, 671; 425 NW2d 80 (1988) ("[E]very word of a statute should be given meaning, and no word should be treated as surplusage or rendered nugatory *if at all possible*.") (emphasis added); *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."). The latter formulation comports with the canon's historical roots, the jurisprudence of the United States Supreme Court, and outside authorities. *Marx v Gen Revenue Corp*, 568 US 371, 385; 133 S Ct 1166; 185 L Ed 2d 242 (2013) ("The canon against surplusage is not an absolute rule . . . ."); *Lamie v United States Trustee*, 540 US 526, 536; 124 S Ct 1023; 157 L Ed 2d 1024 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."); *Reading Law*, p 174 ("*If possible*, every word and every provision is to be given effect[.]") (emphasis added; formatting altered).

[60] *Microsoft Corp v i4i Ltd Partnership*, 564 US 91, 106; 131 S Ct 2238; 180 L Ed 2d 131 (2011) (quotation marks and citations omitted).

[61] Section 932(c) is discussed in detail in Part III(B) of this opinion.

officials or other persons having custody of such documents. But if the Legislature intended § 937 to be a general forgery provision prohibiting forgery of any document in the Election Law, why would it have included two other forgery provisions describing how forgery is committed? There would, of course, be no need to do so because § 937 would cover all such conduct. Therefore, reading § 937 as creating a substantive offense of forgery renders all or part of §§ 932(c) and 759(8) surplusage. As a result, the canon against surplusage cannot help us, because both proffered interpretations of the text leave some sections of the Election Law without meaning.[62]

As noted above, the Court of Appeals' interpretation is not based on the plain language of § 937—instead, it is an attempt to salvage that provision and give it some current legal effect. But this goes beyond the work of the surplusage canon.[63] Using the surplusage canon—or any rule of construction—*to create a criminal offense* is impermissible.[64]

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[62] See *Microsoft Corp*, 564 US at 106.

[63] See *Connecticut Nat'l Bank v Germain*, 503 US 249, 253–254; 112 S Ct 1146; 117 L Ed 2d 391 (1992) (stating in relation to the surplusage canon that "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (quotation marks and citations omitted).

[64] *Goulding*, 275 Mich at 359–360 ("The statute may not be extended beyond its plain terms by judicial construction, and defendant convicted, by showing acts which ought to have been

Even though interpreting § 937 as a penalty provision means that it lacks effect because it has no corresponding substantive offense, we cannot disregard the historical textual clues and supplement the otherwise plain text of § 937 to reach a different result.[65] This is true even when enforcing the plain language of the statute may frustrate its purpose.[66] Even if we believed—contrary to the analysis above—

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within the terms of the statute but are not. *There are no constructive criminal offenses*.") (emphasis added).

[65] Another lens through which to view this case is the unintelligibility canon. That canon applies when statutory language makes no sense because it is intractably ambiguous or because two provisions are irreconcilable. *Reading Law*, pp 134–135. In such cases, the unintelligible text is inoperative and cannot be given effect because it is meaningless. In this case, § 937 has a clear semantic meaning—it is a penalty provision. When viewed in its larger statutory context, however, it could be considered meaningless because, as a penalty with no corresponding substantive offense, it has no effect. Considered thusly, we agree with Justice Scalia and Professor Garner that "[t]o give meaning to what is meaningless is to create a text rather than to interpret one." *Id.* at 134. Although the unintelligibility canon contains parallels to this case, we take no position on whether it applies here because no party has raised the issue.

[66] See *People v Oakland Co Bank*, 1 Doug 282, 287 (1844) ("We cannot, in order to give effect to what we may *suppose* to be the intention of the legislature, put upon the provisions of a statute a construction not supported by the words, though the consequence be to defeat the object of the act[.]"). See also *King v Barham*, 108 Eng Rep 980, 982; 8 B & C 100 (1828) ("Our decision may, perhaps, in this particular case, operate to defeat the object of the [statute]; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act, in order to give effect to what we may suppose to have been the intention of the Legislature.").

that the Legislature mistakenly omitted a forgery offense from the Election Law, it is not the job of a court to supply the omitted provision.[67] And this is true even if interpreting the statute according to its plain language, context, and history leads us to the conclusion that it is inoperative.[68]

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[67] See *Malpass v Dep't of Treasury*, 494 Mich 237, 251; 833 NW2d 272 (2013) (" '[T]o supply omissions transcends the judicial function.' "), quoting *Iselin v United States*, 270 US 245, 251; 46 S Ct 248; 70 L Ed 566 (1926). See also *Hobbs v McLean*, 117 US 567, 579; 6 S Ct 870; 29 L Ed 940 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."); *Jones v Smart*, 1 Term Rep 44, 52 (1785) ("[W]e are bound to take the act of parliament, as they have made it: a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider, whether such a law that has been passed be tyrannical or not."); *Crawford v Spooner*, 18 Eng Rep 179, 6 Moore, PC 1 (1846) ("The construction of the Act must be taken from the bare words of the Act. We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there."); *Reading Law*, p 93 ("Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.") (formatting altered); Crawford, Construction of Statutes (1940), § 169, p 269 ("Omissions in a statute cannot, as a general rule, be supplied by construction. . . . As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature.").

[68] See Endlich, Commentary on the Interpretation of Statutes (1888), § 22, p 29 ("It has been seen that the plain meaning of the language used in a statute will not be departed from in its construction, though the purpose of the enactment be defeated by following it. Upon the same principle, courts cannot supply

But alas, it does not appear to us that the Legislature left something out when it overhauled the Election Law in 1954; instead, it appears that it left something in—a penalty provision that was no longer needed. Regardless, courts do not have the power to rewrite statutes to ensure they have some substantive effect. After focusing on the plain language, context, and history of § 937, we conclude that it is nothing more than an inoperative penalty provision.

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legislative defects and omissions, although, by reason of such, the statute becomes, in whole or in part, practically unenforceable or inoperative."), citing *In re Willis Ave*, 56 Mich 244, 250; 22 NW 871 (1885) (holding that a statute, through the oversight of the Legislature, failed to provide a procedure to effectuate the expressed intent of the statute, rendering that portion of the statute inoperative). See also *CN Ray Corp v Secretary of State*, 241 Mich 457, 461; 217 NW 334 (1928) (holding that an act that expressly purported to repeal prior statutes failed to repeal anything because it lacked a necessary repealing clause); *People v Boothe*, 16 NY3d 195; 944 NE2d 1137 (2011) (holding that where the legislature added a new definition of criminal conduct without amending the substantive provision to make that conduct unlawful, no crime was created and the charges were properly dismissed); *Farmers' Bank of Fayetteville v Hale*, 59 NY 53, 57–58 (1874), overruled on other grounds by *Hintermister v First Nat'l Bank of Chittenango*, 64 NY 212 (1876) ("It is said that this [interpretation] renders the statute inoperative, and that this result must be avoided. This is a plausible but not a valid or sound position. There is nothing in the Constitution nor in any legal principle to prevent the legislature from passing an act with provisions which render it inoperative. When different constructions may be put upon an act, one of which will accomplish the purpose of the legislature and the other render the act nugatory, the former should be adopted; but when the provisions of an act are such that to make it operative would violate the declared meaning of the legislature, courts should be astute in construing it inoperative.").

As noted at the outset, we recognize that our conclusion that § 937 is an inoperative penalty provision is an unusual one, and it is not one that we reach lightly. To be clear, a statute should only be deemed inoperative after the most careful consideration of alternative interpretations and rigorous application of the interpretative tools at our disposal, including the necessity of "reading individual words and phrases in the context of the entire legislative scheme."[69] This finding has historically been—and will continue to be—exceedingly rare. Indeed, as we have already stated, "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory *if at all possible*."[70] Ultimately, however, we must here, as in every case, give effect to the will of the Legislature by scrupulously examining the statutory text to determine its plain meaning.

IV. CONCLUSION

We hold that § 937, by its plain language, does not set forth a substantive offense. As a result, defendant was not properly charged under § 937 with the substantive offense of election-law forgery. Therefore, his convictions must be vacated and the charges dismissed. We reverse the Court of Appeals' holding to the contrary and remand to the trial court for further proceedings not inconsistent with this opinion.[71]

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[69] *Madugula*, 496 Mich at 696.

[70] *Baker*, 409 Mich at 665 (emphasis added).

[71] Because we hold that § 937 does not create a substantive offense, we do not reach defendant's argument that the trial court improperly admitted other-acts evidence under MRE

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CLEMENT, J., took no part in the decision of this case.

404(b). Additionally, because we hold that § 937 unambiguously sets forth a penalty provision and not a substantive offense, we do not reach defendant's additional arguments that the rule of lenity precludes enforcement of § 937 against defendant or that § 937 is void for vagueness.