No. _____

In The
Supreme Court of the United States

CHOCTAW COUNTY AND CLOYD HALFORD,

Petitioners,

v.

JESSICA JAUCH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sheriff's Department detained Respondent for ninety-six days pursuant to a capias issued by the state circuit court following a grand jury's indictment for the sale of a controlled substance. The capias commanded the Sheriff to "take" and "safely keep" Respondent "so that you have his/her body before the Circuit Court of Choctaw County" at the next immediate term of court. Respondent was arrested on unrelated charges after an intervening term of court. The questions presented are:

1. Whether a pretrial detainee's procedural due process rights under the Fourteenth Amendment have been violated when she was held for ninety-six days pursuant to a capias issued by a state circuit court following a grand jury indictment and when she was otherwise afforded all procedural due process safeguards to which she was entitled under state law.

2. Whether a county and local county sheriff can be held liable under 42 U.S.C. § 1983 for a pretrial detainee's ninety-six-day detention where the moving force behind the deprivation of her protected liberty interest are state court rules, a capias issued by a state circuit court following a grand jury indictment, and statutory law.

3. Whether a pretrial detainee's Fourteenth Amendment liberty interest to be free from detention following a grand jury indictment was clearly established at the time of Respondent's detention so as to deny qualified immunity to the local county sheriff.

PARTIES TO THE PROCEEDING

Petitioners, who were the Appellees below, are Choctaw County, Mississippi, and its elected Sheriff, Cloyd Halford.

Respondent, who was the Appellant below, is Jessica Jauch.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 874 F.3d 425. The order denying rehearing *en banc* with dissenting opinion is reported at 886 F.3d 534. The memorandum opinion of the District Court denying Respondent's Cross-Motion for Partial Summary Judgment as to liability and dismissing the case with prejudice is reported at *Jauch v. Choctaw Cty*., No. 1:15-CV-75-SA-SAA, 2016 WL 5720649, at *1 (N.D. Miss. Sept. 30, 2016).

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 2017. The Court of Appeals denied a timely Petition for Rehearing *En Banc* on March 29, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant Constitutional and Statutory Provisions are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

Ultimately, this case is about procedural due process afforded under state law and the interplay between the

Fourth Amendment and Fourteenth Amendment. This case also raises the critical issue of whether a county executive officer may exercise control over responsibilities of a state judicial officer. Finally, this case calls upon the Court to address proper application of qualified immunity afforded to law enforcement officers. Respondent claims her Fourteenth Amendment procedural due process rights were violated by prolonged detention following her arrest after a grand jury indictment. She lays blame for this detention at the foot of the Sheriff and the County, despite the fact that no court order was violated, and she was afforded all procedural due process it was the responsibility of the Sheriff to give her.

FACTUAL BACKGROUND

The facts in this case were stipulated. On February 17, 2011, a confidential informant notified Choctaw County narcotics officers she purchased narcotics (eight dosage units of an Alprazolam mixture) from Jauch.

On January 24, 2012, a Grand Jury issued a true bill indictment indicting Jauch for the sale of a controlled substance arising from the February 17, 2011 drug transaction. That same day, the Choctaw County Circuit Clerk issued a capias mandating the Sheriff's department take Jauch into custody.

On April 26, 2012, Starkville Police Department officers stopped Jauch and issued her several traffic

citations. The Starkville officers also informed Jauch of an outstanding misdemeanor warrant in Choctaw County. The officers briefly detained Jauch, and Choctaw County deputies then transported her from Starkville Police custody to the Choctaw County Jail.

The following morning, Choctaw County deputies served Jauch with the misdemeanor warrant and the January 2012 capias. The capias return was promptly filed with the Circuit Court. Several days later, Jauch cleared the misdemeanor warrant.

While detained on the capias, Jauch asserted her innocence and asked jail personnel to take her before a judge so that she could post bail. Jail personnel instructed Jauch they had spoken with Sheriff Halford and that she could not go before the Circuit Court judge until the next term of court in August 2012.

On July 16, 2012, the Choctaw County Circuit Clerk notified the Choctaw County Public Defender that Jauch's case was set for docket call on July 31, 2012 at 10:00 a.m. On July 24, 2012, Jauch consented to name her mother as guardian over Jauch's minor child. On July 25, 2012, Jauch was transported to Oktibbeha County and arraigned on an unrelated drug charge. Plaintiff was appointed counsel in Oktibbeha County and her bail was set at $10,000. Plaintiff was immediately returned to Choctaw County Jail from Oktibbeha County. The following day, the Oktibbeha County Sheriff's Department placed a detainer on Jauch.

On July 31, 2012, the Choctaw County Public Defender was appointed counsel for Jauch. Jauch waived arraignment, had bail set at $15,000, and had her trial scheduled for August 20, 2012. On August 6, 2012, Jauch posted bond and was released from custody in Choctaw County.

On August 20, 2012, Jauch was appointed new counsel who viewed the State's evidence implicating Jauch in the sale of a controlled substance. After viewing the evidence, Jauch and her appointed counsel met with the District Attorney's office to review the evidence. Thereafter, the Assistant District Attorney moved to dismiss the case against Jauch. On January 29, 2013, the Circuit Court of Choctaw County dismissed the felony charges against Jauch.

DISTRICT COURT PROCEEDINGS

Respondent brought suit in the United States District Court for the Northern District of Mississippi invoking jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) based on her post-indictment, pretrial detention. Choctaw County and Sheriff Halford moved for Summary Judgment and Respondent moved for Partial Summary Judgment on the above stipulated facts.

The District Court denied Respondent's motion for partial summary judgment holding as a matter of law Respondent failed to allege a constitutional violation of her procedural due process rights because she did

not possess a state-created liberty interest under state procedural rules that was infringed when she was denied a reexamination of the grand jury's probable cause determination. The District Court also held Respondent failed to establish a claim against the County under 42 U.S.C. § 1983 and *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-91 (1978), finding Respondent failed to establish a violation of her constitutional rights, failed to allege a particular custom or policy resulted in the alleged violation, failed to establish Sheriff Halford was the relevant policy maker, and failed to establish the required causation between the specific policy and resulting constitutional injury. Finally, the District Court held Sheriff Halford was entitled to qualified immunity as Respondent had failed to establish Sheriff Halford had violated a clearly established constitutional right.

THE COURT OF APPEALS' OPINION

The three judge panel for the Fifth Circuit Court of Appeals reversed. Addressing only the Fourteenth Amendment procedural due process claim the Panel held that "this excessive detention, depriving Jauch of liberty without legal or due process violated that Amendment; for that reason her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim."

The Panel rejected the District Court's reasoning that the "more particularized Fourth Amendment

analysis [is] appropriate," stating "[t]his analysis dooms Jauch's claim and seemingly means the Constitution is not violated by prolonged detention so long as the arrest is supported by probable cause." The Panel held, like a pretrial detainee subjected to excessive force, "a legally seized pre-trial detainee held for an extended period without further process," may resort to Fourteenth Amendment protections. The Panel distinguished this Court's holding in *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017), holding "*Manuel* does not address the availability of due process challenges after a legal seizure and cannot be read to mean . . . that *only* the Fourth Amendment is available to pre-trial detainees."

Next, the Panel held "prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated." Ultimately, the Panel held the procedure at issue here, a legislative mandate that a capias issued by a state trial court and returned to the next term of state circuit court, was attributable to the Sheriff and County who merely held her in custody pursuant to court order.

The Panel also held Choctaw County was liable for Respondent's detention, finding Choctaw County policy, and not state statutes, rules of procedure, and the Circuit Court's capias process, was the moving force behind the Respondent's detention. The Panel further held Sheriff Halford was the relevant policy maker for implementing such policy.

Finally, the Panel denied qualified immunity to Sheriff Halford. Having found a constitutional violation, the Panel analyzed whether Respondent's right to be free from prolonged detention without the benefit of a court appearance after a finding of probable cause was clearly established at the time of Respondent's detention. Based on the Fifth Circuit's admittedly limited analysis in the factually distinct case of *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000), the Panel found the contours of Respondent's liberty interest were clearly established.

DISSENT FROM *EN BANC* REHEARING

Petitioner's Petition for Rehearing *En Banc* was denied by a vote of nine to six, with each of the circuit judges voting to grant rehearing *en banc* joining into a dissent penned by Judge Southwick. Concerned primarily with the Panel's assessment of liability to the County and Sheriff, and the Panel's disregard of state law and rules of procedure, the dissent concluded the "clear responsibilities relevant to this case are those of the county's circuit court judges." "[T]he court-issued capias was to hold Jauch until the next circuit court term, which is just what the sheriff did." The dissent found "under state law the sheriff had no clear obligation to take Jauch before a judicial officer for an initial appearance or for a preliminary hearing because she had been indicted. There was no obligation on the sheriff to have Respondent arraigned because that is a duty that falls elsewhere."

Finally, the dissent concluded the Panel's reliance on *Jones* to find the law regarding Respondent's detention was clearly established was misplaced. This is so because *Jones* had very limited analysis and was based on two very general due process civil cases irrelevant to the instant matter. Further, *Jones* does not meet the clearly established standard this Court recently announced in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), because *Jones* is not closely analogous to the instant matter.

REASONS FOR GRANTING THE PETITION

In order to prevail on a claim against a municipality under § 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, (1978). Here, the Panel decided an important question of constitutional law seemingly left open in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), *Baker v. McCollan*, 443 U.S. 137 (1979), and *Gerstein v. Pugh*, 420 U.S. 103, 108 (1975): whether a ninety-six-day detention following a grand jury's indictment and in accordance with state rules of criminal procedure gives rise to a deprivation of procedural due process under the Fourteenth Amendment despite compliance with the Fourth Amendment and state law. The Panel held it does. Although a grand jury found probable

cause and indicted Respondent, the Panel found the District Court's analysis under the Fourth Amendment "dooms Jauch's claim and seemingly means the Constitution is not violated by prolonged pretrial detention so long as the arrest is supported by probable cause." The Panel held Respondent was entitled to an appearance before a judge under state criminal procedure rules, and found a ninety-six-day detention based upon a grand jury's finding of probable cause "offends fundamental principles of justice deeply rooted in the traditions and conscience of our people."

The Panel also held Sheriff Halford, a local executive official, was the relevant policy maker for Choctaw County with respect to Respondent's detention, and that the policy of the County and Sheriff Halford was the moving force behind Respondent's detention. The Panel ignored that Respondent's detention was pursuant to state law and the Circuit Court's capias process requiring Sheriff Halford to "take" and "safely keep" Respondent until the next term of the Circuit Court. Under state law, the relevant policy maker, the only person who could order respondent's detention or release following the grand jury's indictment, was a state court, not the local sheriff. Therefore, the Panel's finding that the County's official policy was the moving force behind Respondent's detention warrants granting of this Petition.

Finally, based upon the Fifth Circuit's holding in *Jones*, the Panel found Sheriff Halford was not entitled to qualified immunity because it was clearly established at the time of Respondent's detention that

prolonged detention without the benefit of court appearance violates the detainee's Fourteenth Amendment procedural due process rights. However, *Jones* was not held pursuant to an active indictment. Thus, with respect to the Fifth Circuit Panel's application of qualified immunity here, review of the Panel's opinion is warranted.

A. DEPRIVATION OF CONSTITUTIONAL RIGHT

1. By Holding Respondent's Ninety-Six-Day Detention Following a Grand Jury's Indictment Gave Rise to a Procedural Due Process Claim Under the Fourteenth Amendment, the Fifth Circuit Has Decided an Important Question of Constitutional Law Left Open in *Manuel*, *Baker* and *Gerstein* in Such a Way That it Conflicts With Settled Precedent of This Court's Holding That the Fourth Amendment Governs Claim for Pretrial Detention Following the Start of the Legal Process.

The question presented here is whether the Fourteenth Amendment, independent of any other Constitutional ground or state law, gives rise to a procedural due process violation. More specifically, whether a prolonged, but determinant, pretrial detention after a grand jury's indictment and finding of probable cause gives rise to a procedural due process violation under the Fourteenth Amendment when the pretrial detainee has been afforded all pretrial procedures to which she was entitled under the Constitution and

state law. Under the Panel's analysis, a pretrial detainee held pursuant to a grand jury's indictment has a fundamental and constitutional right to be free from prolonged detention separate and apart from those fundamental rights guaranteed in the Constitution and under state law. This issue has far reaching and important ramifications for state court systems, law enforcement officers, and the general public. This Court has not addressed this specific question.

In *Gerstein,* this Court observed "[b]oth the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents." 420 U.S. at 111. "The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interest always has been thought to define the 'process that is due' for seizures of persons or property in criminal cases, including the detention of suspects pending trial." *Id.* at 125 n.27.

In *Baker*, this Court held an individual does have a liberty interest in being free from incarceration absent a criminal conviction, but they may be deprived of this interest if the deprivation comports with the requirements of due process. 443 U.S. at 144. McCollan "was indeed deprived of his liberty interest for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment." *Id.* at 144. "The Fourteenth Amendment does not protect against all deprivations of liberty. It only protects against deprivations of liberty accompanied 'without due process of law.'" *Id.* at

145. Furthermore, the fact a Plaintiff is innocent of the charges "is largely irrelevant to his claim of deprivation of liberty without due process of law." *Id.*

In *Bell v. Wolfish*, this Court evaluated the constitutionality of conditions or restriction of pretrial detention that implicate only the protection against deprivation of liberty without due process of law. 441 U.S. 520, 535 (1979). It was unquestioned the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt, as held in *Gerstein*, or that the Government has a substantial interest in ensuring persons accused of crimes are available for trials or that confinement of such persons pending trial is a legitimate means to furthering that interest, as held in *Stack v. Boyle*, 342 U.S. 1, 4 (1951). *Bell*, 441 U.S. at 534. The proper inquiry is whether the conditions of confinement amount to punishment. *Id.* at 535. "[T]he fact that detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Id.* at 537.

In *Kaley v. United States*, 571 U.S. 320 (2014), this Court stated, "that inviolable grand jury finding, we have decided, may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom." The Court explained the "grand jury, all on its own, may effect a pretrial restraint on a

person's liberty by finding probable cause to support a criminal charge." *Id.*

Recently, this Court held in *Manuel* that "the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process." 137 S. Ct. at 918. The Fourth Amendment prohibits detaining a person in the absence of probable cause. *Id.* This can occur when the police hold someone without reason, or when probable cause is predicated on false evidence. *Id.* In both cases, a person is confined without adequate justification. *Id.*

After the Panel's decision here, the Tenth Circuit decided *Moya v. Garcia,* 887 F.3d 1161 (10th Cir. 2018), on similar facts reaching a different result. There, Plaintiffs were arrested on outstanding warrants and detained for over thirty days prior to arraignment. *Id.* at 1162. Plaintiffs argued the delays in arraignment constituted deprivations of due process. *Id.* The Tenth Circuit, like the Fifth Circuit should have done here, held the state court, not jail officials, were the cause of Plaintiff's deprivation. In speaking to Plaintiff's' due process claims, the majority observed a delay in arraignment, by itself, would not give rise to a due process violation. *Id.* at 1168. The dissent agreed. *Id.* at 1170 (McHugh, J., dissenting) ("[A]lthough New Mexico is free to create procedural rights protecting [state law procedural rights], the failure of its state officials to protect state law procedural rights is not a Fourteenth Amendment violation, so long as federal due process requirements (which may well be lower) are satisfied.").

The pronouncements from this Court indicate a detainee's pretrial deprivation of liberty must be accomplished with procedural due process under the Fourth Amendment. What is seemingly left open in these cases is whether a pretrial restraint of determinant length implicates a Fourteenth Amendment right to a constitutional right to an arraignment or other pretrial proceeding when the detainee has been afforded all procedural due process called for under the Constitution and state rules of criminal procedure. Here, the Fifth Circuit has now endorsed a view that state procedural rules, which are stricter than required by federal due process, imposes upon the states higher constitutional standards than required under federal due process. *But see Hewitt v. Helms*, 459 U.S. 460, 471 (1983) ("It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause."); *Fields v. Henry Cty.,* 701 F.3d 180, 186 (6th Cir. 2012) (observing *Hewitt*'s irony). The Court should grant the instant Petition to answer this important question.

2. The Fifth Circuit's Holding That State Law Created a Liberty Interest in an Arraignment or Other Pretrial Court Proceeding Protected by the Fourteenth Amendment is in Conflict With Precedent of This Court, Other Circuits, and Mississippi Law Holding That Respondent Was Not Entitled to an Initial Appearance, Preliminary Hearing, or Arraignment Following Her Arrest on a Grand Jury Indictment and Subsequent Detention Pursuant to the State Court's Capias Process.

The Fifth Circuit found state law created a protected procedural liberty interest in an arraignment or other pretrial court proceeding protected by the Fourteenth Amendment even after Respondent had been indicted by a grand jury, received notice of the charges against her, and was told when she would appear in state court to address her charges. The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against her and opportunity to meet it. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). Due process does not require a state to adopt any particular form of procedure, so long as it appears the accused has had sufficient notice of the accusation and an adequate opportunity to defend herself in the prosecution. *Garland v. Washington*, 232 U.S. 642, 645 (1914). All that is necessary is that the procedures be tailored, in light of the decision to be made, to ensure that they are given a meaningful opportunity to present their case. *Mathews*, 424 U.S. at 349. The Fifth Circuit found more is required under

state law. That is, a criminal defendant should be afforded additional procedural protections under state law by way of a prompt arraignment or other pretrial court proceeding even after a grand jury has found probable cause. However, the Fifth Circuit imposes upon states liberty interests more onerous than constitutionally required. *See Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1349 (7th Cir. 1985) (violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the statute is guaranteed under the United States Constitution); *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974) (states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right).

A liberty interest under the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the states. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (observing only a limited range of interest fall within the Due Process Clause of the Fourteenth Amendment). State law creates a liberty interest only when the state places substantive limitations on official conduct by using explicitly mandatory language in connection with requiring specific substantive predicates and the state law require a specific outcome if those substantive predicates are met. *Fields v. Henry Cty.*, 701 F.3d 180, 186 (6th Cir. 2012); *see Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (state creates a protected liberty interest by placing substantive limitations on official discretion); *but see Sandin v. Conner*, 515 U.S. 472, 483 (1995) (convicted prisoner's

rights case: "The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] and *Meachum* [*v. Fano*, 427 U.S. 215 (1976)]"; *see also Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (where the Constitution does not provide a protected liberty interest, States are under no duty to afford such right. However, if a state creates a liberty interest, the Due Process Clause requires fair procedures for its vindication. In such cases, all that is required is adequate process and an opportunity to be heard. The Constitution does not require more.). Here, the Fifth Circuit mistakenly read Mississippi law to create a liberty interest where none is required by holding Respondent was entitled to an arraignment or other pretrial judicial proceeding under state law following her grand jury indictment.

As will be examined more fully in the merits brief, at the time of Respondent's detention, Mississippi Rules of Criminal Procedure were codified in the Uniform Rules of Circuit and County Court ("URCCC") and promulgated by the Mississippi Supreme Court. *See State v. Delaney*, 52 So. 3d 348, 351 (2011) (it is well established state constitutional separations of powers dictates it is within the inherent power of the Mississippi Supreme Court to promulgate procedural rules to govern judicial matters). Under URCCC Rule 6.03, every person in custody and charged with a crime shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance.

URCCC Rule 6.04 provides for a preliminary hearing before a judicial officer for a determination of probable cause and the conditions for release, if any. However, both of these rules must be read in conjunction with URCCC Rule 6.05 which provides a person who has been indicted by a grand jury shall not be entitled to an initial appearance or a preliminary hearing. The Fifth Circuit latched on to URCCC Rule 8.01, the court rule providing for arraignments, and declared this rule created a liberty interest in an arraignment protected by the Fourteenth Amendment.

URCCC Rule 8.01 provides arraignments are to be held within thirty days after a criminal defendant is served with an indictment. However, formal arraignment is not mandatory under state law. *See* URCCC 8.01. Nor is it required under federal due process. *See Garland*, 232 U.S. at 645; *see also Crossley v. State*, 420 So. 2d 1376, 1379 (1982) (observing *Garland* and holding objected to arraignment during vacation did not prejudice defendant by precluding him from raising any defense at trial or otherwise, and he was afforded adequate opportunity to defend). If an arraignment is not conducted within Rule 8.01's time frame, it is deemed waived if the defendant proceeds to trial without objection. URCCC 8.01; *see also Brady v. United States*, 397 U.S. 742, 748 (1970) (waivers of constitutional rights must be voluntary, knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences); *Garland*, 232 U.S. at 645 (waiver is implied where accused received sufficient notice of accusation and adequate opportunity

to defend). Thus, state law does not require an arraignment be had in order to proceed to a prosecution. The Fifth Circuit's finding that lack of an arraignment gives rise to a procedural due process violation of a constitutional dimension under state law is therefore misplaced.

In the seminal case of *Garland*, this Court held lack of formal arraignment is not an error of due process of law and is not required in the prosecution of a defendant so long as the defendant had sufficient notice of the accusation and an adequate opportunity to defend himself. 232 U.S. at 645. The object of arraignment is to inform the accused of the charge against him and obtain an answer from him. *Id.* at 644. Due process does not require the State to opt any particular form of procedure, so long as it appears the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Id.* at 645. "[I]t cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial rights." *Id.*

Other Circuit Courts, including the Fifth Circuit, have followed *Garland* in holding that an arraignment is not a liberty interest protected by the Due Process Clause. *See Moya*, 887 F.3d at 1168; *United States v. Mancias*, 350 F.3d 800, 807 (8th Cir. 2003) (absence of formal arraignment is of little consequence); *United States v. Joyner*, 201 F.3d 61, 79 (2d Cir. 2000) (following *Garland*); *United States v. Lalonde*, 509 F.3d 750, 758 (6th Cir. 2007) (holding defendant waived

arraignment by lack of objection prior to trial); *Dell v. Louisiana*, 468 F.2d 324, 325 (5th Cir. 1972) (it is well established formal arraignment is not constitutionally required if it is shown the defendant knew what he was accused of and is able to defend himself adequately).

Moreover, this Court, as well as other circuits, have held the range of interest protected by procedural due process of the Fourteenth Amendment is not infinite. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *see also Moore*, 754 F.2d at 1349; *Street*, 492 F.2d at 372. Instead, this Court has time and again stated when a more particularized amendment furnishes a protected liberty interest, that amendment, and not general notions of due process, governs the analysis. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Because the Fifth Circuit has decided this important issue of constitutional law in a way that seemingly conflicts with the precedent of this Court, while in the process expanding the scope of the Fourteenth Amendment's Due Process Clause beyond its previously defined limits, this Court should grant this Petition to address and clarify whether a Fourteenth Amendment claim for procedural due process survives following this Court's decision in *Manuel*.

B. *MONELL* LIABILITY

1. The Fifth Circuit's Holding That the Moving Force Behind Respondent's Alleged Constitutional Deprivation Was the Official Policy of Choctaw County Conflicts With Decisions of This Court as Interpreted Through a Majority of the Courts of Appeals to Consider the Issue of Whether State Law Can Provide a Basis to Hold a Local Governmental Entity Liable Under § 1983.

A plaintiff in a § 1983 action against a local governmental entity must demonstrate that, through its deliberate conduct, the entities' official policy or custom was the "moving force" behind the alleged injury. *Bd. of the Cty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). Here, the Panel found official policy of the County and its Sheriff was the moving force behind Respondent's alleged constitutional deprivation. However, Respondent's detention was mandated by state law requiring a sheriff to hold and safely keep a pretrial detainee arrested on capias process until the next term of the state circuit court issuing the capias. Courts of Appeal addressing the question of whether and to what extent local governments may be held liable under § 1983 for following state law have come to varying conclusions, and this Court has yet to address the directives of *Monell* and *Pembaur* in the context of a local government's enforcement of a state law.

The seminal case on municipal liability is *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978), in which this Court set forth its

foundational holding that a local government may only be held responsible under § 1983 when "execution of a government policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury." "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Thus, while a municipality may be held liable under § 1983 for deprivations of federal rights, this liability is limited. Congress drafted § 1983 so as to impose civil liability on municipalities for their own illegal acts but did not draft it so to oblige municipalities to control the conduct of others, doubting it had the constitutional power to impose such liability. *Id.* at 665-83.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986), this Court observed official policy often refers to formal rules or understandings – often but not always committed to writing – that are intended to, and do establish fixed plans of action to be followed under similar circumstances. This Court held, "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 471.

In a minority of circuits, a municipality may be held liable under § 1983 when it officially adopts a policy notwithstanding the policy was mandated by state law. In *Davis v. Camden*, 657 F. Supp. 396, 402 (D.N.J.

1987), a New Jersey District Court following the minority rule held a municipality responsible for an unconstitutional strip search policy mandated by state law. The District Court there, however, acknowledged the dilemma faced by the city, but nonetheless held that a municipality cannot blindly implement state laws; they are required to independently assess the constitutionality of the law under consideration. *Id.* at 404. That court reasoned both *Monell* and *Pembaur* spoke only to attempts to hold a county or municipality liable under a theory of respondeat superior. *Davis*, 657 F. Supp. at 403; *see also Conroy v. City of Phila.*, 421 F. Supp. 2d 879, 886 (E.D. Pa. 2006); *Evers v. Custer County*, 745 F.2d 1196 (9th Cir. 1984) (county may be held liable for acting according to state law rather than county policy); *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005) (decision by policy maker to enforce unconstitutional state law subjects city to liability); Mark R. Brown, *The Failure of Fault under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1517-18 (1999) (compliance with state law should not shield municipalities from § 1983 liability because local governments can choose not to enforce the measure under the Supremacy Clause).

The majority of circuits have chosen a different approach. These circuits hold a municipality may only be held liable under § 1983 for adopting an unconstitutional policy that was authorized, but not required, by state law. Thus, in the view of these circuits, if a county or municipality has the discretion not to enforce an unconstitutional state statute, but chooses to enforce it,

the local government could be held liable. If, on the other hand, the local government had no discretion but to enforce the unconstitutional state law, the local government cannot be held liable for a constitutional violation as it was not the moving force behind the violation. *See Garner v Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (decision to authorize use of deadly force to apprehend nondangerous fleeing was deliberate choice under *Pembaur* where statute did not mandate deadly force); *Vives v. City of New York*, 524 F.3d 346, 353-54 (2d Cir. 2008) (a municipality cannot be liable under *Monell* if it merely carries out a state law without any "meaningful" or "conscious" choice, because the municipality does not act pursuant to its own policy); *Whitesel v. Sengenberger*, 222 F.3d 861, 868, 872 (10th Cir. 2000) (county cannot be liable for merely implementing a policy created by the state judiciary; also observing that judicial immunity may extend to persons performing acts or activities as an official aid to the judge); *Bockes v. Fields*, 999 F.2d 788, 791 (4th Cir. 1993) (county could not be held liable for personnel policy mandated by state, when county acted within its discretion afforded by state under policy); *Surplus Store and Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir. 1991) (holding insufficient for *Monell* liability claim city had a policy of enforcing state statutes: "It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law."); *see also* Dina Mishra, Comment, *Municipal Interpretation of State Law as "Conscious Choice,"* 27 YALE L. & POL'Y REV.

249, 250 (Fall 2008) (where a constitutional interpretation of a state statute exists, a municipality should be held liable for its conscious choice to enforce an unconstitutional interpretation).

Prior to the Panel's decision here, the Fifth Circuit adopted the majority view. In *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980), the Fifth Circuit held a county could not be held liable for enforcement of state law because the county's action in those circumstance may more fairly be characterized as the effectuation of the policy of the State for which the citizens of a particular county should not bear singular responsibility. Here, the Fifth Circuit has now adopted the minority view that regardless of whether state law mandates a particular outcome, it is the responsibility of the local sheriff to assess the constitutionality of a given state statutory procedure to make sure it complies with federal notions of due process.

Here, Sheriff Halford was left with no alternative but to follow direct state law or violate state law, his statutory duties as sheriff, and a directive of the state circuit court issuing the capias process. State law requires process for arrest following a grand jury indictment shall be a capias, which shall immediately issue on the return of the indictment into court. MISS. CODE ANN. § 99-9-1. A capias is returnable instanter unless the court orders otherwise. *Id.* If the capias cannot be executed by the time it is returnable, by operation of law it becomes returnable to the next term of court without an order for that purpose. *Id.* Furthermore, Mississippi law provides it is the duty of the sheriff to

"execute all order and decrees of [the circuit court] directed to him to be executed," and "[h]e shall take into his custody, and safely keep, in the jail of his county, all persons committed by order of [the circuit court], or by any process issuing therefrom, or lawfully required to be held for appearance before [the circuit court]." MISS. CODE ANN. § 19-25-35. Likewise, sheriffs are mandated to "execute all notices, writs, and other process, both from courts of law and chancery, and all orders and decrees to him legally issued and directed within his county." MISS. CODE ANN. § 19-25-37. Finally, the capias process here mirrors a sheriff's duties under §§ 19-25-35 and 19-25-37 of the Mississippi Code:

> You are hereby commanded to take Jessica Jauch if to be found in your County, and him/her safely keep, so that you have his or her body before the Circuit Court of the County of Choctaw in said State . . . on the 31st day of January, 2012 then and there to answer the State of Mississippi on an indictment found against him/her on the 24th day of January, 2012. . . .

The failure of Sheriff Halford to execute the capias process could subject him to fine or imprisonment and potential criminal liability. *See* MISS. CODE ANN. § 97-11-35 (sheriff shall be fined and may be removed from office for refusal to return any person committing a crime of which he has notice for the purpose of avoiding knowledge of the crime); MISS. CODE ANN. § 97-11-37 (sheriff shall be fined or imprisoned for knowingly failing, neglecting or refusing to perform any duties required of him by law); MISS. CODE ANN. §§ 97-9-103

& 97-9-105 (person commits the Class 1 felony of hindering prosecution in the first degree if, with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a felony, he warns the other person of impending discovery or apprehension).

Thus, under state law, a person arrested on capias process following a grand jury indictment, but after an intervening term of court, is to be held by the sheriff pursuant to the court's capias until the next term of court. This is mandated state law, not county policy. Therefore, state law, not county policy, was the moving force behind Respondent's detention. Furthermore, the state statutes cited above leave no room for discretion on the part of the Sheriff in the execution of his duties with respect to holding a pretrial detainee arrested pursuant to a capias without violating state law. Circuit Court disagreement on this matter warrants granting of this Petition.

2. The Fifth Circuit's Holding That Sheriff Halford Was the Relevant Policy Maker With Respect to the Relevant Area of Policy Contravenes the Decisions of This Court, Other Circuits Addressing the Same Issue, and Mississippi Law as the Relevant Policy Maker for Scheduling and Conducting Arraignments Is The Circuit Court Judge.

The responsibility for Respondent's detention in this case clearly rests with the state circuit court judge.

See Davis v. Tarrant County, Tex., 565 F.3d 214, 227 (5th Cir. 2009) (acts of local judges acting in their judicial capacity do not subject county to liability under § 1983). The Panel held "there is no dispute that Sheriff Halford is the relevant policymaker." (*But see* Brief of Appellees at 22-23, *Jessica Jauch v. Choctaw County*, No. 16-60690 (5th Cir. Feb. 9, 2017) (arguing Respondent's liberty was controlled by state court judge who are not policy makers for Choctaw County); Memorandum of Authorities [Doc. 19] at 16-22, *Jessica Jauch v. Choctaw County*, No. 1:15-CV-75-SA-SAA (N.D. Miss. June 20, 2016) (Circuit Court, not Sheriff Halford, was the relevant policy maker with respect to Ms. Jauch's detention); *see also* Petition for Rehearing *En Banc* at 12-15, *Jessica Jauch v. Choctaw County*, No. 16-60690 (5th Cir. November 7, 2017) (under Mississippi law, Sheriff Halford is not a final policy maker with respect to matters committed to judiciary).) The Panel premised its conclusion solely on the principle sheriffs in Mississippi are final policy makers with respect to all law enforcement decisions made within their counties. The Panel, however, misstates the applicable rule: the relevant policy maker must be responsible for establishing policy respecting such activity. *See Pembaur*, 475 U.S. at 482-83. In the process, the Panel ignores state separation of powers and the statutory duties of a county sheriff.

In *Pembaur*, this Court formulated the applicable rule holding "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the subject matter

in question." *Id.* at 483. This Court explained the official must be "responsible for establishing final government policy respecting such activities before the municipality can be held liable." *Id.* This authority is a question of state law and may be granted by legislative enactment or delegated by an official who possesses such authority. *Id.* at 483. In holding Sheriff Halford was the relevant policy maker with respect to the decision to detain Respondent, the Panel ignores *Pembaur*'s directive that the official must be actually responsible for establishing the policy respecting the activity at issue.

Under Mississippi law, a sheriff is a county executive branch official, not a final policy maker with respect to judicial arraignments of persons accused of a crime, judicial calendaring of terms of court, or the continued detention of indicted pretrial detainees held on capias process. *See* MISS. CONST. art. 5, § 135 (specifying a sheriff is a county executive officer); MISS. CODE ANN. § 19-25-35 (sheriffs shall execute all orders and decrees of the circuit court directed to him to be executed and shall take into custody and safely keep in the county jail all persons committed by order of process of circuit court); MISS. CODE ANN. § 19-25-37 (sheriffs shall execute all notices, writs and other process from the circuit court and make due return thereof). Instead, a circuit court judge is vested with the exclusive authority over these functions under state law and a sheriff must abide by the circuit court's directives.

The Mississippi Constitution declares "[t]he circuit court shall have original jurisdiction in all matters

civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law." MISS. CONST. art. 6, § 156. Once an indictment issues, it is beyond the authority of anyone but the circuit judge to dispose of the charges or release a defendant from custody. *See* MISS. CODE ANN. § 99-15-53 (every cause must be tried unless dismissed by consent of the court); *see also Lyons v. State*, 196 So. 3d 1131, 1134-35 (Miss. Ct. App. 2016) (after indictment, exclusive criminal jurisdiction over the accused is acquired by circuit court). For counties embraced within a multi-county circuit court district, like Choctaw County, the circuit court is required to schedule at least two court terms per year. MISS. CONST. art. 6, § 158. These terms are set by the circuit judges themselves. MISS. CODE ANN. § 9-7-3. A circuit judge may, by order, call a special term of court within a county to transact both civil and criminal business. MISS. CODE ANN. § 9-7-87. However, setting of the court's calendar is left exclusively to the circuit judges themselves. Therefore, as a matter of state law, a criminal defendant being held on circuit court capias process following an indictment by a grand jury is under the exclusive jurisdiction of the circuit court and cannot be released, or her case disposed of, without intervention of the circuit court whose schedule is controlled exclusively by a circuit judge.

A county sheriff is not responsible for judicial oversight of a state circuit court judge as such responsibility would violate state separation of powers. *See* MISS. CONST. art. 1, § 2; *Ward v. Colom*, No.

2016-M-01072-SCT at *4 (Miss. June 7, 2018) (holding that when the executive branch or legislative branch has been properly delegated a power, judiciary is without authority to assume that power; the converse is also true). Mississippi law properly requires a local county sheriff to execute all orders and decrees of the state circuit court directed to him to be executed; take into his custody and safely keep in the county jail all persons committed by order or by process issuing from the circuit court; and to execute and promptly return all process issuing from the circuit court. *See* MISS. CODE ANN. §§ 19-25-35 & 19-25-37. Thus, the proper function of a county sheriff in Mississippi is subordinate to that of a state circuit court judge in matters of the judiciary.

While the Panel places on the Sheriff the responsibility to see that a post-indictment, pretrial detainee is timely arraigned, this allocation of responsibility is hardly clear under Mississippi law, especially given this Court holding in *Garland* and that arraignment is not mandatory under state law. *See Garland*, 232 U.S. at 645; URCCC 8.01. The Tenth Circuit in *Moya* addressed this issue and found "arraignments could not be scheduled by anyone working for the sheriff or wardens; scheduling of the arraignments lay solely with the responsibility of the state trial court." 887 F.3d at 1164. In *Moya*, similar to the undisputed facts here, a grand jury indicted the Plaintiffs and both were arrested on outstanding warrants. *Id*. After Plaintiffs' arrests, jail officials notified the court the Plaintiffs were in custody. *Id.* The court held the state court was firmly in control because compliance with the timely

arraignment requirement lay solely with the court. *Id.* The Tenth Circuit reasoned an arraignment is a court proceeding that takes place only when scheduled by the court. *Moya*, 887 F.3d at 1164; *see also* URCCC Rule 8.01 (arraignment, which may be expressly or impliedly waived, shall be held in open court, and shall consist of reading the indictment to the accused and calling upon the defendant to plead to the charge in the indictment); *see also Garland*, 232 U.S. at 645.

C. THE PANEL'S DECISION DENYING QUALIFIED IMMUNITY TO SHERIFF HALFORD CONFLICTS WITH THIS COURT'S RECENT DECISION IN *WESBY* BECAUSE IT WAS NOT CLEARLY ESTABLISHED UNDER *WESBY* THAT AT THE TIME OF RESPONDENT'S DETENTION HER DETENTION WAS UNCONSTITUTIONAL.

Qualified immunity in § 1983 actions is the norm rather than the exception. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Officers are entitled to qualified immunity unless 1) they violated a federal statutory or constitutional right, and 2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Here, the Panel found that Sheriff Halford detained Respondent while awaiting the next term of court in violation of the Fourteenth Amendment because he did not provide Respondent with an arraignment or other pretrial appearance. It is submitted no violation of a constitutional right occurred here. The Panel's

analysis that Respondent's detention was unconstitutional was not clearly established at the time of her detention. Therefore, Sheriff Halford should be entitled to qualified immunity.

The Panel relied extensively on the Fifth Circuit decision in *Jones v. City of Jackson*, 203 F.3d 875, 881 (5th Cir. 2000) to find Respondent's Fourteenth Amendment right was clearly established. The Panel also cited *Mathews*, 424 U.S. at 319 and *Medina v. California*, 505 U.S. 437 (1992), in an attempt to discern the applicable test as to what process Respondent was due. However, the Panel decided not to decide which test applied "because we need not do so." However, *Jones* cannot serve as a foundation to deny qualified immunity in this case because *Jones* was not a close analogy to Respondent's case. Indeed, *Jones*' Fourteenth Amendment analysis was perfunctory at best, and dealt with an entirely different set of circumstances.

Wesby discussed how closely analogous a case must be in order for qualified immunity to be denied. 138 S. Ct. at 589-90. *Wesby* was decided after the Panel rendered their decision in the instant case, but before the Fifth Circuit's Order denying the Petition for Rehearing *En Banc* was rendered. Thus, while the Panel did not have the benefit of *Wesby*, prior decisions of this Court, as observed in *Wesby*, had sufficiently clarified the specificity required to hold a right as clearly established:

> "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official

would understand that what he is doing'" is unlawful. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al-Kidd*, supra, at 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *al-Kidd*, supra, at 741-742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. See *Reichle v. Howards*, 566 U.S. 658, 666 (2012). Otherwise, the rule is not one that "every reasonable official" would know. Id., at 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (internal quotation marks omitted).

> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 577 U.S. ___, ___, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255, 260 (2015) (per curiam). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Anderson*, supra, at 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523.

Wesby, 138 S. Ct. at 589-90.

The *Jones* case does not meet the exacting requirements of *Wesby* to clearly establish Respondent's detention was unconstitutional. *See id.* at 590 (stressing the need to identify a particular case where an officer acting under similar circumstances violated the Constitution or a body of relevant case law to place the lawfulness of the particular conduct beyond debate). As Judge Southwick penned in his dissent, "*Jones* fails

to put, and I would say *any*, reasonable jail official on notice as to the constitutionally permissible limits of detention following a capias warrant." *Jauch v. Choctaw Cty*., 886 F.3d 534, 539 (5th Cir. 2018) (Southwick, J., dissenting).

Jones was about overdetention of a prisoner who pled guilty to three counts of burglary and was released only to be arrested on unrelated charges and detained on two old bench warrants stemming from the prior guilty pleas. What is not clear is whether *Jones* was speaking in terms of substantive or procedural due process. *See Jauch v. Choctaw Cty.*, 874 F.3d 425, 430 (2017) ("*Jones* is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach)."). Equally unclear is what legal rules were violated or clearly established in *Jones*, much less what process was due or that a court appearance was necessary. *See Wesby*, 138 S. Ct. at 589 ("It is not enough that the rule is suggested by then existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply."). Neither *Roth*, 408 U.S. at 575, 592, nor *Deshaney v. Winnebago County*

Department of Social Services, 489 U.S. 189, 196 (1989), the only authority cited in *Jones*, were criminal cases, and therefore cannot serve to hold Respondent's Fourteenth Amendment right to be free from detention despite a finding of probable cause was clearly established. *See Wesby*, 138 S. Ct. at 589. The law of qualified immunity "now makes clear that law enforcement officials are not required to discern how civil cases in much different contexts would apply to their activities." *Jauch v. Choctaw Cty.*, 886 F.3d 534, 540 (5th Cir. 2018) (Southwick, J., dissenting).

CONCLUSION

For the reasons stated herein, this Petition for Certiorari should be granted.

Respectfully submitted,

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