No. _____

In the Supreme Court of the United States

STEPHEN B. MCKINNEY,

Petitioner,

V.

FELICIA HARKNESS DEAN, AS GUARDIAN AND CONSERVATOR FOR AND ON BEHALF OF JANEL HARKNESS, AN INCAPACITATED ADULT IS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
Counsel of Record for Respondent
LINDEMANN & DAVIS, P.A.
Post Office Box 6923
Columbia, South Carolina 2960
(803) 881-8920
Email: andrew@ldlawsc.com

QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court of Appeals err in failing to apply the *Parratt-Hudson* doctrine to the Respondent's substantive due process claim?

2. Did the Circuit Court of Appeals err in denying Petitioner's qualified immunity defense by applying the "deliberate indifference" standard rather than the "intent to harm" standard and by finding that the Petitioner's conduct violated "clearly established" law in the absence of authority that would have given the officer "fair notice" that his conduct was unconstitutional?

LIST OF PARTIES TO THE PROCEEDING

All the parties to the proceeding are set forth fully in the caption.

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TABLE OF AUTHORITIES

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Statutes

Petitioner Stephen B. McKinney respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 976 F.3d 407 (4th Cir. 2020), and is included at App. 1 through App. 57. The order denying the petition for rehearing *en banc* is included at App. 58 through 59 The opinion of the district court is unpublished and is included at App. 60 through App. 80.

JURISDICTION

The Fourth Circuit Court of Appeals filed its decision on October 2, 2020. (App. 1-57). Thereafter on October 29, 2020, after obtaining an extension through October 30, 2020, the Petitioners filed a timely Petition for Panel Rehearing and Rehearing En Banc. The Fourth Circuit Court of Appeals entered an order denying Petitioner's petition for rehearing *en banc* on December 11, 2020. (App. 58-59). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides in pertinent part as follows: "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."

STATEMENT OF THE CASE

This appeal arises from a motor vehicle accident occurring on October 19, 2016. On that date, Petitioner Steven "Brent" McKinney, who was a deputy sheriff with the Anderson County Sheriff's Office, was on patrol when another deputy requested assistance during a traffic stop. The shift supervisor issued a "Code 3" emergency. Petitioner activated his siren and lights and proceeded in excess of the posted speed limit towards the deputy needing assistance. The shift supervisor subsequently cancelled the "Code 3" but advised deputies, Petitioner included, to proceed towards the other deputy. Petitioner acknowledged the cancellation of the "Code 3," deactivated his lights and siren, and

began to reduce speed. Shortly thereafter, Petitioner lost control of his vehicle in a curve, crossed over the center line, and collided with a vehicle driven by Janel Harkness. The parties dispute the amount of time that transpired from the cancellation of the "Code 3" until the collision. Respondent alleges that at least two minutes passed, and Petitioner avers that 41 seconds elapsed.

In her Complaint, Respondent alleges a violation of her right to substantive due process under the Fourteenth Amendment.[1] Petitioner removed the case to federal court and moved for summary judgment asserting that he is entitled to qualified immunity because Respondent failed to state a claim for a violation of substantive due process and the applicable law is not clearly established.

By Order dated March 14, 2019, District Judge Timothy M. Cain denied Petitioner's motion for summary judgment finding (1) that a reasonable jury could conclude that Petitioner abridged Respondent's substantive due process rights; (2) that Petitioner is not entitled to qualified immunity; and (3) that the *Parratt-Hudson* doctrine does not preclude Respondent's federal cause of action. (App. 60-80).

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[1] The Complaint also includes state law claims for negligence/gross negligence brought under the South Carolina Tort Claims Act against the Anderson County Sheriff's Office and the Anderson County Sheriff. The state law claims have been settled or were otherwise disposed of by the district court and are not at issue in this appeal.

By published opinion filed on October 2, 2020, a panel of the Fourth Circuit Court of Appeals affirmed the district court in a 2-1 decision. The majority ruled that Petitioner was not entitled to qualified immunity because a reasonable jury could conclude that Petitioner violated Harkness's clearly established substantive due process rights. The panel also ruled that the *Parratt-Hudson* doctrine does not bar Respondent's substantive due process claim. (App 7). Judge Richardson issued a dissenting opinion as to the qualified immunity defense. A petition for rehearing *en banc* was also denied. (App. 58-59).

REASONS FOR GRANTING THE PETITION

I. The Circuit Court of Appeals erred in failing to apply the *Parratt-Hudson* doctrine as a bar to Respondent's substantive due process claim.

The Petitioner contends that Respondent's due process claim is barred by application of the *Parratt-Hudson* doctrine, which provides that a state actor's random and unauthorized deprivation of a protected due process interest cannot be challenged under § 1983 if the State provides an adequate post-deprivation remedy.[2] *See Parratt v. Taylor*, 451 U.S.

[2] There is no dispute that Respondent has received a state law remedy pursuant to the South Carolina Tort Claims Act by way of a settlement reached on her state law claims.

527 (1981), *overruled in part on other grounds, Daniel v. Williams,* 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984). Citing to *Zinermon v. Burch*, 494 U.S. 113 (1990), the Fourth Circuit incorrectly found that the *Parratt-Hudson* doctrine applies only to procedural due process claims and does not bar Respondent's substantive due process claim.[3]

Citing to *Zinermon v. Burch*, 494 U.S. 113 (1990), the circuit court incorrectly believed that this Court has definitively held that the *Parratt-Hudson* doctrine applies only to procedural due process claims. However, as Judge Gorsuch (now Supreme Court Justice Gorsuch) wrote in his concurrence in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), "the suggestion along those lines [in *Zinermon*] came in dicta and several reasons exist to doubt it." 787 F.3d at 1085. Among his reasons, Justice Gorsuch points to a footnote in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), where this Court reserved the question of whether the *Parratt-Hudson* doctrine applies to substantive due process claims, which in Justice Gorsuch's view "confirms that the issue remains a live and open one." *Id.*, *citing Lewis*, 523 U.S. at 840, n.4. From a timing standpoint, *Lewis* was decided after *Zinermon*. Thus, the footnote in *Lewis* is illogical if *Zinermon* is to be read to limit the *Parratt-Hudson* doctrine only to procedural due process claims.

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[3] Judge Richardson did not address the *Parratt-Hudson* doctrine in his dissent.

This Court in *Lewis*, in fact, cites to the concurrence by Justice Kennedy (joined by Justice Thomas) in *Albright v. Oliver*, 510 U.S. 266 (1994). The concurrence, which was part of a plurality decision, is very instructive. Citing *Parratt* and *Hudson*, Justice Kennedy explained that "our precedents make clear that a state actor's random and unauthorized deprivation of [property or liberty interests] cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate post deprivation remedy." 510 U.S. at 284. Justice Kennedy explained:

> The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983 .... *Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."*

Id. (Emphasis added). Based thereon, Justice Kennedy concluded that "[t]he *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution." *Id*.

As Justice Kennedy further explains, which is disregarded in the circuit court's analysis, the application of the *Parratt-Hudson* doctrine to substantive due process claims would be limited to the "ordinary case where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act that can be remedied by state law." *Id*. at 285. As Justice Kennedy points out, "there is no basis for intervention under § 1983, at least in a suit based on 'the Due Process Clause of the Fourteenth Amendment *simpliciter*." *Id*. Justice Kennedy recognized that Illinois state law provides a tort remedy for malicious prosecution, and given that remedy, "there is neither need or legitimacy to invoke § 1983 in this case." *Id*. at 285-286.

Under this sound reasoning, the *Parratt-Hudson* doctrine would apply only to those substantive due process claims, like the present case, where the conduct is not based on or consistent with state law or policy, but rather a random and unauthorized act -- in essence, the breach of a duty of care established by tort law. In that instance, a remedy is available under state law, and there is no need for a

concurrent federal remedy -- which is the very essence of the *Parratt-Hudson* doctrine. The circuit court's analysis also fails to consider that this Court has consistently instructed that the concept of substantive due process is a narrow one and to be applied reluctantly and sparingly. In *Albright*, this Court writes: "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended. The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Id.* at 271-272. *See also Collins v. Harker Heights*, 503 U.S. 115 (1992). Thus, consistent with that judicial reluctance and narrow application of substantive due process, the wisdom of Justice Kennedy in his concurrence in *Albright* rings true. Substantive due process need not apply where the injury resulting from a random and unauthorized act by a governmental actor can be and is remedied under state law.

This case represents an excellent example of this and thus is an appropriate candidate for a writ of certiorari. Respondent did not allege nor show that she was harmed by the application of state law or policy. Instead, she was allegedly harmed by the random and unauthorized conduct -- the gross negligence -- of Petitioner in failing to slow his vehicle sufficiently after the "Code 3" was discontinued and ultimately lost control of his

vehicle in a curve. Respondent brought and settled her claim for negligence/gross negligence under state law. Accordingly, in the words of Justice Kennedy, "there is neither need or legitimacy to invoke § 1983 in this case." *Albright*, 510 U.S. at 285-286.

This rationale from the *Albright* concurrence was also addressed at length by the Tenth Circuit in the case of *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015). In that case, Justice Gorsuch wrote both the majority and concurring opinions, and both opinions refer to the fact that the defendant law enforcement officer had "forfeited" a viable *Parratt-Hudson* argument.[4] Both opinions strongly argue that a plaintiff is required "to show that state law supplies no adequate remedial course before proceeding in federal court." *Id.* at 1081. Unable to apply the *Parratt-Hudson* doctrine due to the plaintiff's failure to argue that defense, Justice Gorsuch devotes the entire concurrence to the *Parratt-Hudson* argument, stating that:

> [A]fter all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate

[4] In fact, the majority opinion found that the officer had forgone "perhaps the most significant" rejoinder by not presenting a *Parratt* argument. *Browder*, 787 F.3d at 1081.

> those same rights using a deep and rich common law that's been battle tested through the centuries.

Id. at 1084. Justice Gorsuch recognizes that "when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state law tort remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort." *Id.*

In sum, the majority opinion in *Browder*, which was also written by Justice Gorsuch, as does his concurrence, makes it very clear that the Tenth Circuit would have ruled the *Parratt-Hudson* doctrine as a bar to that substantive due process claim, if the defense had been asserted and not waived. He ultimately rejects the notion that the *Parratt-Hudson* doctrine applies to only procedural due process claims but not substantive due process claims. Justice Gorsuch wrote:

> Indeed, it's hard to identify a principled justification for extending *Parratt* piecemeal to procedural due process claims rather than wholesale to all due process claims. *Zinermon* observed that a substantive due process violation is complete upon a deprivation while a procedural due process violation requires us to wait and see what process the state provides. But it's unclear why that distinction makes a difference when *Parratt's* logic cuts across both kinds of cases, asking in all events

> whether there's a need for federal intervention or whether state remedial processes might do just as well.

Id. at 1085.

The applicability of the *Parratt-Hudson* doctrine to a substantive due process claim was more recently addressed in the Sixth Circuit case of *Guertin v. State of Michigan*, 924 F.3d 309 (6th Cir. 2019). Judge Sutton issued a concurring opinion on a denial of a petition for rehearing *en banc*. He noted that there was a companion case pending in state court seeking a remedy for the same harm under state constitutional and tort theories. Citing *Parratt, Hudson*, and the Kennedy concurrence in *Albright*, Judge Sutton wrote:

> [I]f the underlying state and federal claims in today's case turned on process in its conventional sense, the federal courts presumably would stay their hand to determine what process the State provided. If that approach makes sense in the context of *procedural* due process, it makes doubly good sense in the context of *substantive* due process. Otherwise, we give claimants more leeway when they raise the most inventive of the two claims, rewarding them for asking us to do more of what we should be doing less.

Id. at 314. He further noted that "[t]his is not a new concept. For some time, the federal courts tried to avoid federal constitutional claims when they can." *Id.*

As stated in *Lewis*, this remains an open question for this Court. Therefore, the Court is respectfully requested to grant certiorari on this issue, apply the *Parratt-Hudson* doctrine to a substantive due process claim, and dismiss Respondent's § 1983 claim based upon the availability of an adequate state law remedy which she has indeed already received.

II. The Circuit Court of Appeals erred in denying Petitioner's qualified immunity defense.

Qualified immunity shields governmental actors from suit unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As recognized by Judge Richardson in his dissenting opinion, the Fourth Circuit majority "ignor[ed] the Supreme Court's consistent admonition that it really must be *clearly established* that the Officer's particular conduct was prohibited by the Constitution." (App. 28). Because the Fourth Circuit should have applied the "intent to harm" standard rather than "deliberate indifference" to Petitioner's conduct and because the governing constitutional standards were not clearly established

prior to the incident, Petitioner is entitled to qualified immunity. Based thereon, Petitioner seeks a writ of certiorari and a reversal of the denial of qualified immunity by the district court, as affirmed by the Fourth Circuit below.

A. The Circuit Court of Appeals erred in applying the "deliberate indifference" standard rather than the "intent to harm" standard to Petitioner's conduct.

In the case at bar, the parties agree that the "shocks the conscience" standard set forth in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), applies to § 1983 claims alleging violation of substantive due process based on alleged police driving. The parties disagree, however, as to the level of culpability that is required for Petitioner's conduct to be seen as "conscience-shocking." As stated by the majority in the court below, "[a] determination as to which of these standards of culpability -- 'intent to harm' or 'deliberate indifference' -- applies requires 'an exact analysis of context and circumstances before any abuse of power is condemned as conscience shocking.'" (App. 10). The majority also acknowledges that "the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation," including "officers responding to an emergency call." (App. 12). In contrast, the deliberate indifference standard applies "when an officer is able to make unhurried

judgments with time to deliberate, such as in the case of a non-emergency." (App. 13).

The evidence presented to the district court shows that, at the time of the accident, Petitioner was on duty, was responding to an assistance call from another deputy that initially caused the supervisor to issue a "Code 3" emergency, and the situation was rapidly evolving. The unique situation with which Petitioner was presented was more akin to a high-speed chase, wherein his decisions were necessarily made "in haste, under pressure, and ... without the luxury of a second chance" than a situation that allowed sufficient time for actual deliberation. *See Lewis,* 523 U.S. at 853. *See also Sitzes v. City of West Memphis*, 606 F.3d 461 (8th Cir. 2010) (substantive due process liability turns on the intent of the government actor).[5] *Lewis* makes it clear that the intent-to-harm standard is appropriate for cases, as here, where "unforeseen circumstances demand an officer's instant judgment." *Lewis,* 523 U.S. at 853. As stated by the Eighth Circuit in *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005), "to our knowledge every circuit to consider the issue has applied the *Lewis* intent-to-harm standard to those myriad situations involving

[5] The "intent to harm" standard in *Lewis* is not limited to high-speed police driving aimed at apprehending a suspected offender. *See Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005). Respondent, in her filings below, conceded that *Lewis* is not limited to pursuit cases, and that the intent to harm standard is applicable to "other types of emergencies."

law enforcement and government workers deployed in emergency situations." *Id*. at 979.

As discussed by Judge Richardson in his dissent, the most analogous Fourth Circuit case existing at the time of the accident is *Temkin v. Frederick County Commissioners,* 945 F.2d 716 (4th Cir. 1991), where the court "rejected the very deliberate-indifference standard that the majority seeks to apply." (App. 43). "*Temkin* alone should preclude finding that it is clearly established that the deliberate-indifference standard applies here." (App. 43). Moreover, the four cases cited by the Fourth Circuit in *Temkin* present a clear window into the type of conduct that does *not* "rise to the level of conduct which would sustain a claim under section 1983." *Id*. at 721. In particular, the court referenced the Eleventh Circuit case of *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986), which held that "[a] person injured in an automobile accident caused by the negligent, *or even grossly negligent*, operation of a motor vehicle by a policeman *acting in the line of duty* has no section 1983 cause of action for violation of a federal right." *Id*. at 950. (Emphasis added). The three other cases relied upon by the Fourth Circuit in *Temkin* are *Roach v. City of Fredericktown,* 882 F.2d 294 (8th Cir. 1989), *Jones v. Sherrill,* 827 F.2d 1102 (6th Cir. 1987), and *Walton v. Salter,* 547 F.2d 824 (5th Cir. 1976) ("a showing of an isolated case of negligent operation of a police car would not state a claim under § 1983"). The court compared the facts in those cases to the particular facts in *Temkin* to conclude that the officers' conduct

did not rise to the level of a violation of substantive due process. *Id.* F.2d at 723.

Based on *Temki*n, and as explained further by Judge Richardson's dissent, the standard of culpability in this case should be intent-to-harm and the 2-1 decision to apply deliberate indifference should be reversed. Moreover, applying the intent-to-harm standard, Petitioner is entitled to summary judgment because there has been no argument and no evidence presented that his actions meet that standard.

B. The Circuit Court of Appeals erred in finding Petitioner's conduct violated "clearly established" law regarding a substantive due process claim under the Fourteenth Amendment.

In addition to applying the incorrect standard of culpability, the majority erroneously found that Petitioner's conduct violated clearly established law.[6] To ensure that "every reasonable official" would understand the illegality of the conduct, "the clearly established right must be defined with specificity."

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[6] As aptly observed by Judge Richardson in his dissent, "[t]he governing constitutional standards are not clearly established. And the caselaw's application to the hurried, discrete, and torn conduct underlying this case is also not clearly established. Yet the majority ignored this compounded uncertainty to forge new law that it then finds had been 'clearly established.'" (App. 29).

City of Escondido v. Emmons, 139 S.Ct. 500, 503 (2019).

As Judge Richardson emphasizes in his dissent, "the required specificity is especially important when the claim depends on substantive due process, which is even more unclear generally and offers even less guidance in particular circumstances than Fourth Amendment jurisprudence." (App. 33). As discussed above, this Court has routinely expressed "reluctan[ce] to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Albright v. Oliver*, 510 U.S. 266, 271-272 (1994). Thus, the analysis of "clearly established law" should be particularly discerning and cautious when a court is examining a substantive due process claim. Judge Richardson recognizes that "the lack of clarity surrounding substantive due process -- and the Court's admonitions in this area -- cautions us to seek cases that address the specific circumstances at hand to find clearly established law." (App. 34).

The case law is anything but clear when applied to the particular facts herein. In fact, both the district court opinion and the Fourth Circuit majority opinion acknowledge that there is little precedent for the courts to rely upon. As noted by the majority, "the parties concede that no other court decisions have addressed the factual circumstances upon which we must make a determination." (App. 20).

In applying the second prong of the qualified immunity analysis, this Court has directed that courts focus on the state of the law "at the time [the] action occurred" because "[i]f the law at that time was not clearly established, an official could not be reasonably expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Similarly, in *Wilson v. Layne*, 526 U.S. 603 (1999), this Court held that state officials "cannot have been expected to predict the future course of constitutional law." 526 U.S. at 617.

As a corollary, this Court has further explained and recognized that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).[7] Moreover, in 2009, this Court made the

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[7] The Fourth Circuit likewise has observed as follows:

> Although there might be instances where a reasonable jurist, but not a reasonable official, would consider particular conduct violative of clearly established law, if a reasonable jurist would not have viewed the defendant's action as violative of clearly established law, then it necessarily follows that the reasonable officer likewise would not have viewed that conduct as violative of clearly established law.

Hogan v. Carter, 85 F.3d 1113, 1116 (4th Cir. 1996). *See also*, *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("[i]f

following observations in the case of *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364 (2009):

> We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

Id. at 378-379.

In sum, given the absence of existing precedent, and the fact that three learned judges of the circuit

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judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"); *Doe ex rel. Johnson v. South Carolina Department of Social Services*, 597 F.3d 163, 176-177 (4th Cir. 2010) (same).

court cannot even agree as to the constitutional question presented, a reasonable law enforcement officer cannot be said to be on "fair notice" that his conduct as alleged in this action was unconstitutional.

Moreover, even if it was "clearly established" that "deliberate indifference" is the applicable standard to be applied herein, which is disputed, the law is not clearly established that Petitioner's actions met that standard.[8] As this Court has held, "a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 778-779 (2014). "In other words, existing precedent must have placed the statutory or constitutional question confronted by the official '"beyond debate."' *Id*. at 779.

As observed by Judge Richardson, no Supreme Court or Fourth Circuit case "has imposed liability in an even remotely similar circumstance." (App. 51). In addition, the majority opinion fails to show that a "robust consensus of persuasive authority"

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[8] "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850.

exists in other circuits that would have given Petitioner "fair warning that [his] conduct, under the circumstances, was wrongful." *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019). Certainly, there is no authority establishing the unconstitutionality of Petitioner's conduct is "beyond debate."

Judge Richardson recognizes that "[t]he only decision brought to [the panel's] attention that found that the officer violated clearly established law in even remotely similar circumstances -- then-Judge Gorsuch's decision for the Tenth Circuit in *Browder* -- is distinguishable along several fronts. The most obvious distinction is that the officer in that case was 'on no one's business but his own,' while the officer here was engaged in an on-duty response to another officer's call for assistance." (App. 52). The extreme facts found in *Browder* are certainly not analogous to the facts herein.[9]

In finding the law to be clearly established, the majority also relies on *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009); however, in that case, the Tenth Circuit actually found *no constitutional violation* even though the officer, while in pursuit of "a vehicle suspected of driving away from a gas station without

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[9] The Tenth Circuit specifically stated that this is a "murky area" and that "the line that separates executive actions that are 'reasonably justified' in the service of a 'legitimate governmental objective' and those that are 'arbitrary or conscience shocking' appears anything but clearly defined." *Browder*, 787 F.3d at 1080.

paying for approximately $30.00 worth of gas," driving a patrol vehicle without lights or sirens, struck another vehicle at "a high level of speed" in an intersection where the light was turning yellow. 574 F.3d at 1296-97. Unlike Petitioner, who was responding to a call for officer assistance that began as a "Code 3" emergency, the officer in *Green* admitted that he was not in an emergency situation but merely trying "to catch up to the suspected violator of the law, to verify that it was the vehicle involved in the theft of the gas." *Id*. It is difficult to fathom how *Green* can be cited as support for a finding of deliberate indifference against Petitioner, when the Tenth Circuit found that the officer's much less justifiable conduct did *not* even meet that standard.

Likewise, the only other case cited by the majority, *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), cannot be used to find that the law was "clearly established" at the time of the incident herein. *Sauers* was not decided until *after* the incident. This is no different than what this Court addressed in *Kisela v. Hughes*, 138 S.Ct. 1148 (2018), where this Court criticized the Ninth Circuit for relying on an opinion that *postdated* the incident as "the most analogous Ninth Circuit case" in its analysis of "clearly established" law. This Court observed that the postdated opinion "could not have given fair notice to [the officer] because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *Id*. at 1154. Moreover, in *Sauers*, the Third Circuit actually granted qualified

immunity to the officer. Notably, the majority cites no cases, and Petitioner is aware of none, decided between the date of the accident in *Sauers* (May 2014) and the date of the accident herein (October 2016) that "clearly established" the relevant law as applied to the particular facts of this case.

In sum, the cases cited by the majority as "clearly establishing" the constitutional rights of which a reasonable officer in Petitioner's position would have known do not, in fact, do so. The unconstitutionality of his conduct at issue is not "beyond debate." In light of the strong dissent from Judge Richardson and failure by the majority to correctly apply this Court's precedent in its application of qualified immunity principles, a writ of certiorari is warranted on this issue as well.

CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

Andrew F. Lindemann
Counsel of Record for Respondent
LINDEMANN & DAVIS, P.A.
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

James W. Logan, Jr.
LOGAN & JOLLY, LLP
Post Office Box 259
Anderson, South Carolina 29622
(864) 226-1910
Email: logan@loganandjolly.com

March 11, 2021

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19–1383

FELICIA HARKNESS DEAN, as Guardian and Conservator for and on behalf of Janel Harkness, an incapacitated adult,

Plaintiff – Appellee,

v.

STEPHEN B. MCKINNEY,

Defendant – Appellant,

and

CHAD MCBRIDE, in his official capacity as the Sheriff of Anderson County Sheriff's Office; THE ANDERSON COUNTY SHERIFF'S OFFICE,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Timothy M. Cain, District Judge. (8:17–cv–02088–TMC)

Argued: January 31, 2020
Decided: October 2, 2020

Before GREGORY, Chief Judge, MOTZ, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Motz joined. Judge Richardson wrote a dissenting opinion.

ARGUED: James William Logan, Jr., LOGAN & JOLLY, LLP, Anderson, South Carolina, for Appellant. Jordan Christopher Calloway, MCGOWAN, HOOD & FELDER, LLC, Rock Hill, South Carolina, for Appellee. **ON BRIEF:** Stacey Todd Coffee, LOGAN & JOLLY, LLP, Anderson, South Carolina, for Appellant. Robert V. Phillips, MCGOWAN, HOOD & FELDER, LLC, Rock Hill, South Carolina, for Appellee.

GREGORY, Chief Judge:

This civil action arises out of claims for injuries suffered in an automobile collision. Stephen B. McKinney appeals the district court's denial of his motion for summary judgment based on qualified immunity. For the reasons stated below, we affirm the decision of the district court.

I.

On October 19, 2016, Anderson County, South Carolina Deputy Sheriff Stephen B. "Brent" McKinney was on patrol in his government-owned SUV. At approximately 10:30 p.m., fellow Deputy Sheriff Kenneth Lollis radioed a request for assistance with a traffic stop. Believing that Lollis's voice sounded as if he was "shaken," J.A. 149, Shift Supervisor Lieutenant Scott Hamby issued a "Code 3" for available officers to assist Lollis. Per Sheriff's Office policy governing "Emergency Vehicle Operations" and state law,[1] a "Code 3" represents an

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[1] South Carolina Code § 56-5-760 provides in part: (A) The driver of an authorized emergency vehicle, *when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law* or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions of this section.

(B) The driver of an authorized emergency vehicle may . . . (3) *exceed the maximum speed limit if he does not endanger life or property* . . . .

"emergency response" where "human life or safety is threatened." J.A. 75. A Code 3 is the only time officers are permitted to exceed posted speed limits or otherwise disregard traffic regulations. *See* S.C. Code Ann. § 56-5-760. Other than with respect to certain exemptions described in Section 56-5-760(C)—none of which apply here—officers are required to use emergency lights and sirens for every Code 3 response. *See* S.C. Code Ann. §§ 56-5-4700; 56-5-4970.[2]

(C) The exemptions in this section granted to an authorized emergency vehicle apply only when the vehicle is making use of an audible signal . . . and visual signals . . . , except that an authorized emergency vehicle operated as a police vehicle need not use an audible signal nor display a visual signal when the vehicle is being used to: (1) obtain evidence of a speeding violation; (2) respond to a suspected crime in progress when use of an audible or visual signal, or both, could reasonably result in the destruction of evidence or escape of a suspect; or (3) surveil another vehicle or its occupants who are suspected of involvement in a crime.

(D) The provisions of this section do not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons. S.C. Code Ann. § 56-5-760(A)-(D) (emphasis added).

[2] *See also* S.C. Code Ann. § 56-5-4970 ("Any authorized emergency vehicle may be equipped with a siren, whistle or bell capable of emitting sound audible under normal conditions from a distance of not less than five hundred feet . . . but such siren shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which latter event the driver of such vehicle shall sound such siren when necessary to

McKinney activated his emergency lights and siren and proceeded to Lollis' location. "[A] few seconds" later, Lollis radioed that units could "back down on emergency response but continue to him 'priority.'" J.A. 149. Hamby cancelled the Code 3 but advised responding officers to continue to Lollis's location. McKinney acknowledged Hamby's cancellation of the Code 3 and "cut back to normal run," J.A. 43, a non-emergency response where officers must abide by all traffic laws. J.A. 75, *see* S.C. Ann. §§ 56-5-760. McKinney deactivated his emergency lights and siren, and, according to McKinney, "began to reduce the speed of [his] vehicle." J.A. 40. As he continued along the road to assist Lollis, McKinney passed Hamby, who was travelling in the opposite direction. Approximately two minutes after Hamby cancelled the Code 3, McKinney lost control of his vehicle on a curved and unlit section of the road. He crossed the center line and struck Janel Harkness's sedan nearly head-on. Harkness sustained extensive and severe orthopedic and neurological injuries. An accident reconstruction determined that McKinney was travelling at least 83 miles per hour when he began to skid around the curve—at least 38 miles per hour over the 45 mile-per-hour speed limit.[3] The Traffic Collision Report

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warn pedestrians and other drivers of the approach thereof.").

[3] Hamby's incident report notes that he did not observe McKinney "traveling faster than the posted speed limit." J.A. 43. But the district court inferred that McKinney proceeded to Lollis's location at a speed "well in excess of the posted speed limit" based on (1) McKinney's affidavit that he had to decrease

indicates, and McKinney does not contest, that he "contributed to [the] collision" and was "driving too fast for conditions." J.A. 68.

As a sheriff's deputy, McKinney received training on the operation of a police vehicle, including when department policy and state law required him to use his emergency lights and siren, and when and under what circumstances he could exceed the speed limit. His training also included instruction on the risks of night driving. The rules regarding safe vehicle operations were reinforced during remedial counseling McKinney received following his involvement in a series of incidents involving his operation of police vehicles.

Harkness's mother, Felicia Harkness Dean (the "plaintiff"), acting as Harkness's Guardian and Conservator, filed a civil action in state court against McKinney, Anderson County Sheriff Chad McBride, and the Anderson County Sheriff's Office. The complaint included a claim pursuant 42 U.S.C. § 1983 alleging that McKinney violated Harkness's substantive due process rights under the Fourteenth Amendment by "driving his vehicle at such an extreme rate of speed without responding to an emergency [or] chasing a criminal suspect," exhibiting "conscience-shocking deliberate

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his speed after the Code 3 was cancelled, and (2) the accident reconstructionist's conclusion that he was traveling at approximately 83 miles per hour at the time of impact. J.A 160-61.

indifference" to Harkness's life and safety. J.A. 13. The complaint also included a claim asserting negligence and gross negligence under the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-10, *et seq*.[4]

McKinney removed the case to federal court, and thereafter moved for summary judgment, asserting that he was entitled to qualified immunity as to the plaintiff's Fourteenth Amendment claim because the plaintiff failed to establish a violation of Harkness's substantive due process right. The district court denied McKinney's motion, finding that (1) a reasonable jury could conclude that McKinney violated her substantive due process right; (2) McKinney is not entitled to qualified immunity; and (3) the *Parratt-Hudson* doctrine does not preclude her § 1983 action.

We affirm the decision of the district court. We find that McKinney was not entitled to summary judgment based on qualified immunity. A reasonable jury could conclude that McKinney violated Harkness's clearly established substantive due process right. Further, the *Parratt-Hudson* doctrine does not bar the plaintiff's substantive due process claim.

II.

A.

[4] These claims are not at issue in this appeal.

A district court's denial of summary judgment based on qualified immunity is reviewed *de novo*. *Iko v. Shreve*, 535 F.3d 225, 237 (4th Cir. 2008) (citing *Johnson v. Caudill*, 475 F.3d 645, 650 (4th Cir. 2007)). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See also Williams v. Strickland*, 917 F.3d 763, 768 (4th Cir. 2019) (citing *Iko*, 535 F.3d at 234) (a court, when viewing facts in the light most favorable to the plaintiff, and drawing all reasonable inferences in the plaintiff's favor, must determine whether defendant is entitled to qualified immunity); *Brown v. Elliott*, 876 F.3d 637, 641–42 (4th Cir. 2017) ("[W]hen resolving the issue of qualified immunity at summary judgment, a court must ascertain the circumstances of the case by crediting the plaintiff's evidence and drawing all reasonable inferences in the plaintiff's favor.") (internal quotation marks omitted).

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In considering a qualified immunity defense, the court must consider whether the official violated a statutory or constitutional right, and if so, whether

that right was clearly established at the time of the alleged conduct. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Miller v. Prince George's Cty.*, 475 F.3d 621, 627-28 (4th Cir. 2007).

McKinney argues on appeal that he is entitled to qualified immunity because his actions in driving his vehicle did not rise to the level of a Fourteenth Amendment substantive due process violation that was clearly established at the time of the collision. We examine each prong of qualified immunity analysis in turn.

B.

1.

First, McKenney asserts that the district court erred in finding that there was sufficient evidence of a constitutional violation. To establish a substantive due process violation, the plaintiff must show that McKinney's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). The parties agree that this "shocks the conscience" standard applies to § 1983 claims alleging a violation of substantive due process based on alleged police misconduct. *See Temkin v. Frederick Cty. Commissioners*, 945 F.2d 716, 722 (4th Cir. 1991). As a threshold matter then, we must first determine what level of culpability is required for McKinney's

actions to be considered "conscience shocking." *Lewis*, 523 U.S. at 850.

The Supreme Court in *Lewis* described a "culpability spectrum" along which behavior may support a substantive due process claim. *Id.* at 848-49. The Court rejected "customary tort liability as any mark of sufficiently shocking conduct" and held that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* At the other the end of the spectrum, the Court explains, is behavior "that would most probably support a substantive due process claim; conduct intended to injure [that is] in some way unjustifiable by any government interest." *Id.* at 849. "[This] sort of official action is most likely to rise to the conscience-shocking level." *Id.* "[C]loser calls," however, are presented by conduct that is "something more than negligence but 'less than intentional.'" *Id.* A determination as to which of these standards of culpability—"intent to harm" or "deliberate indifference"—applies requires "an exact analysis of context and circumstances before any abuse of power is condemned as conscience shocking." *Id.* at 850.

The parties disagree as to what standard of culpability should apply in this case. McKinney argues that the district court should have applied the higher standard of "intent to harm" to his actions because he was responding to what he believed to be an emergency, and the plaintiff presented no evidence that he intended to harm Harkness. But

even if the lesser "deliberate indifference" standard applies, he contends his actions did not demonstrate deliberate indifference and were not conscience-shocking. The plaintiff asserts that there was no emergency, and that McKinney's conduct was so egregious that it undoubtedly establishes that he acted with deliberate indifference to Harkness's life and safety. We have examined each standard in light of the facts and circumstances in this case and conclude that for purposes of summary judgment, deliberate indifference is the standard by which McKinney's conduct should be measured.

In *Lewis*, the Court made it clear that regarding police actions, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment [that is] redressible by an action under § 1983." 523 U.S. at 854. As the Court explained, the police are often called upon "to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance." *Terrell*, 396 F.3d at 978 (citing *Lewis*, 523 U.S. at 853) (internal citations omitted). Thus, "the intent-to-harm standard most clearly applies 'in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.'" *Id.* at 978 (citing *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir.2000)).

Since *Lewis*, courts have extended the application of the intent-to harm standard, holding that it applies not only "to an officer's decision to engage in high-speed driving in response to other types of emergencies, [but also] to the manner in which the police car is then driven in proceeding to the scene of the emergency." *E.g.*, *Terrell*, 396 F.3d at 979. Thus, under *Lewis*, the intent-to-harm culpability standard applies to officers responding to an emergency call. *Terrell*, 396 F.3d at 980. *See also Radecki v. Barela*, 146 F.3d 1227, 1230 (10th Cir. 1998) (intent-to-harm standard applies to "situations involving law enforcement and governmental workers deployed in emergency situations.").

Along the culpability spectrum, deliberate indifference is "an intermediate level of culpability" that can, if proven, also establish a due process violation. *See Lewis*, 523 U.S. at 848–49; *see also Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001) (citing *Lewis*, 523 U.S. at 849) (conduct "falling within the middle range" of culpability— that is, conduct that is more than negligent but less than intentional—can give rise to liability under the Fourteenth Amendment). But unlike the intent-to-harm standard, this standard "is sensibly employed only when actual deliberation is practical." *Lewis*, 523 U.S. at 851; *see Wilson v. Lawrence Cty.*, 260 F.3d 946, 956 (8th Cir. 2001). Certainly, time to "reflect on [one's] actions" is a factor in determining whether deliberate indifference is the appropriate standard. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

"[L]iability for deliberate indifference . . . rests upon the luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853. Thus, when an officer is able to make unhurried judgments with time to deliberate, such as in the case of a non-emergency, deliberate indifference is the applicable culpability standard for substantive due process claims involving driving decisions. *See id.*

Under this legal framework and viewing the facts in the light most favorable to the plaintiff,[5] we

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[5] For purposes of summary judgment, the district court accepted as true the plaintiff's contention that two minutes and fifteen seconds elapsed between the cancellation of the Code 3 and the collision. J.A. 70, 73. The court relied on the computer aided dispatch ("CAD") report which shows a "CODE 3" status entry at 22:32:53 p.m., and a "PRIORITY" status entry at 23:33:42 p.m. adjacent to McKinney's name. At 22:35:57 p.m., the status entry is "Case Number 2016-18359." J.A. 73. The district court held that a trier of fact could conclude that the "priority" entry reflects that the Code 3 was cancelled at 10:33:42 p.m. and that the collision occurred two minutes and fifteen seconds later at 10:35:57 p.m. J.A. 161-62. But McKinney disputes that over two minutes elapsed, suggesting instead, based on an audio recording of police radio traffic, that only forty-one seconds had elapsed. Adoption of McKinney's view, however, would require[] us to "impermissibly . . . view the facts in the light most favorable to him rather than the [plaintiff]." *See Browder*, 787 F.3d at 1081 (10th Cir. 2015).

find that a jury could conclude that McKinney was not responding to an emergency and had time to deliberate his actions. First, McKinney argues that he was responding to a potential emergency because he had been ordered to assist Lollis, who sounded "on edge or shaken," with a traffic stop. J.A. 39-40. But McKinney's argument ignores other facts that support a finding that there was no emergency. Although Hamby initially issued an emergency call and directed McKinney to assist, Lollis, after only "a few seconds," radioed that there was no emergency, stating that "units could back down on emergency response." J.A. 149. McKinney not only acknowledged the change in the status of the call but stated affirmatively that he was "backing down" to Code 1– a non- emergency response. J.A. 49; Audio Recording of Police Radio at 3:34.

Second, McKinney also had time to deliberate and consider his actions. *See Lewis*, 523 U.S. at 853. The district court, relying on the objective data found in the CAD Report—including time stamps that correspond to the deputies' radio transmissions—concluded that a reasonable jury could find that two minutes and fifteen seconds elapsed between the cancellation of the emergency response and the collision. Thus, McKinney had ample time to consider, based on his training, department policy and state law, the proper response given that the call was no longer an emergency. He deactivated his emergency lights and siren as required for non-emergency responses—indicating that he knew the situation was no longer an emergency—but did not

reduce his speed to conform to the speed limit. The evidence therefore supports a finding that there was no emergency, and that McKinney had ample time to deliberate his actions. Accordingly, deliberate indifference is the appropriate standard of culpability at this posture, under the facts and circumstances of this case, to determine whether McKinney violated Harkness's substantive due process rights.

2.

Next, having established that deliberate indifference is the proper standard, this Court must consider whether McKinney's conduct, when viewed in the light most favorable to the plaintiff, demonstrated deliberate indifference to Harkness's to life and safety. We find that a reasonable jury could conclude that McKinney was deliberately indifferent and that his conduct was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Lewis*, 523 U.S. at 847 n.8.

An officer's actions demonstrate deliberate indifference where the evidence shows that the officer subjectively recognized a substantial risk of harm and that his actions were inappropriate in light of the risk. *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) (citing *Rich v. Bruce*, 129 F.3d 336, 340 n.2 (4th Cir. 1997)). *See also Terrell*, 396 F.3d at 984 (citing *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (deliberate indifference

standard requires that the defendant disregard a known substantial risk of serious harm). A defendant's subjective knowledge of the risk may be inferred from circumstantial evidence. *Parrish*, 372 F.3d at 303 (quoting *Farmer*, 511 U.S. at 842).

We find that in this case, a reasonable jury could conclude that McKinney deliberately operated his police vehicle in a dangerous and reckless manner with full knowledge of the risks involved. The evidence supports a finding that McKinney knew that he was no longer responding to an emergency. He acknowledged the cancellation of the Code 3 and stated he was "dropping back to Code 1," a regular, non-emergency response. J.A. 49. Further, the evidence tends to show that based on his training, he understood that department policy and state law required that he deactivate his emergency lights and siren and follow the speed limit. Contrary to that training, however, McKinney continued to drive at 83 miles per hour—nearly forty miles per hour over the 45-mph speed limit—on a dark, curved road with full knowledge of the risks of night driving under such conditions. Driving without his emergency lights and siren increased the danger, as it eliminated any warning to other drivers that a law enforcement vehicle was approaching at a high rate of speed. And McKinney had over two minutes to deliberate—to apply his knowledge and training to the situation, reflect on his actions, and conform his behavior— before he lost control of his vehicle and collided with Harkness. Thus, a reasonable jury could conclude that McKinney knowingly

disregarded a substantial risk of serious harm, and that his deliberate indifference to life and safety was conscience-shocking, in violation of Harkness's Fourteenth Amendment substantive due process rights. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 718 (3d Cir. 2018) (responding to non-emergency call at over 100 mph demonstrates conscious disregard for a great risk of serious harm); *Browder*, 787 F.3d at 1081 (where off-duty officer was not chasing suspect or responding to an emergency, "a reasonable jury could infer . . . a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right").

C.

McKinney argues that notwithstanding a conclusion by this Court that the plaintiff has established a substantive due process violation, he is entitled to qualified immunity because Harkness's constitutional right was not "clearly established at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (citing *Harlow*, 457 U.S. at 818). To be clearly established, the right violated must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004). This determination "is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what a hypothetical, reasonable officer would have thought in those circumstances." *Id.* at 279 (citing *Wilson v.*

Kittoe, 337 F.3d 392, 402 (4th Cir.2003)). "'Clearly established' does not mean that 'the very action in question has previously been held unlawful,' but it does require that, 'in the light of pre-existing law the unlawfulness [of the official's conduct] must be apparent.'" *Owens*, 372 F.3d at 279 (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). *See also Amaechi v. West*, 237 F.3d 356, 362 (4th Cir.2001) ("exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established").

To determine if a constitutional right was clearly established, we must examine controlling authority in this jurisdiction, which includes "the decisions of the Supreme Court, [this Circuit], and the highest court of the state in which the case arose." *Owens*, 372 F.3d at 279. If "there are no such decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions if such exists." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538-39 (4th Cir. 2017) (quoting *Owens*, 372 F.3d at 280). But the absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity. *See Kittoe*, 337 F.3d at 403. "We must consider not only 'specifically adjudicated rights,' but also 'those manifestly included within more general applications of the core constitutional principles invoked.'" *Booker*, 855 F.3d at 538 (citing *Wall v. Wade*, 741 F.3d 492 (4th Cir. 2014)).

That there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful. As then- Judge Gorsuch wrote for the panel in *Browder*:

> [S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Browder, 787 F.3d at 1082–83 (citations omitted). *See also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (cases involving "fundamentally" or "materially similar" facts are not necessary to a finding that the law is clearly established). Accordingly, public officials "'can still be on notice that their conduct violates established law even in novel factual circumstances,' so long as the law provided 'fair warning' that their conduct was wrongful." *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018) (citing *Booker*, 855 F.3d at 538). Further, this Court has found that "we need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if

X is illegal, then Y is also illegal, despite factual differences between the two." *Williams*, 917 F.3d at 770.

With this legal framework in mind, the question to be resolved is whether a reasonable officer in McKinney's position would have known that his conduct—driving a police vehicle without activating his emergency lights and siren at over 80 miles per hour on a curved, unlit road at night while not responding to an emergency or pursuing a suspect—could give rise to a claim for a Fourteenth Amendment violation. As the district court noted, "there is relatively scant caselaw imposing liability in these specific circumstances." J.A. 176. Neither the Supreme Court nor this Court has considered the exact conduct presented here. McKinney urges that the facts of this case are most similar to the circumstances presented in *Lewis*, where the Court declined to find a constitutional violation. But *Lewis*, 523 U.S. at 837, as well as this Circuit's opinion in *Temkin*, 945 F.2d at 718, involved officers who caused injuries while actively pursuing a fleeing suspect. We have already established here that the facts, viewed in the light most favorable to the plaintiff, do not support a conclusion that these circumstances are akin to a high-speed chase or that McKinney was responding to an emergency. Beyond this, the parties concede that no other court decisions have addressed the factual circumstances upon which we must make a determination.

But while there is no case directly on point factually to inform our analysis, core constitutional principles set forth in numerous cases lead us to the conclusion that Harkness's substantive due process right was clearly established. *See Williamson*, 912 F.3d at 187. *Lewis* is not factually analogous to our case, but the Supreme Court did find that an officer not actively pursuing a suspect or responding to an emergency requiring quick decision-making, *i.e.*, where "deliberation is practical," may be liable based on a deliberate indifference standard for unintentional conduct. 523 U.S. at 851. *See Young*, 238 F.3d at 574-75; *see also Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (*quoted in Lewis*, 523 U.S. at 854 n.13) (viable due process claim can arise when person suffers serious physical injury "due to a police officer's intentional misuse of [a] vehicle").

After *Lewis*, two Tenth Circuit cases adopted the view that an officer can be liable for a substantive due process violation under a deliberate indifference standard when not responding to an emergency or chasing a suspect. First, in *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), the court assessed the conduct of a speeding officer who was not in pursuit of anyone or responding to an emergency using a deliberate indifference standard. *Id.* at 1302-03. The Tenth Circuit then affirmed its view in *Browder*, where the court applied the deliberate indifference standard to an off-duty officer who used his emergency lights and drove at a high rate of speed on personal business, resulting in a fatal accident. The court found that proof of intent to

harm is not required in cases where there is no emergency or official business. 787 F.3d at 1081. The court further noted, based on the Supreme Court's decision in *Lewis* and Third Circuit precedent, that "as of 2006, it was clearly established 'a police officer could be liable under the Fourteenth Amendment' for driving in a manner that exhibits 'a conscience-shocking deliberate indifference' to the lives of those around him." *Id.* at 1083 (citing *Green*, 574 F.3d at 1306). Similarly, the Third Circuit reaffirmed in *Sauers* that it has "been clear in recent years that the level of culpability required to shock the conscience when an officer has time for hurried deliberation is 'a conscious disregard of a great risk of serious harm.'" 905 F.3d at 717 n.6 (citing *Sanford v. Stiles*, 456 F.3d 298, 310 (3d Cir. 2006)).

Thus, while the courts have yet to consider a case where an officer engaged in the same conduct as McKinney, he is not absolved of liability solely because the court has not adjudicated the exact circumstances of his case. We find that a reasonable officer in McKinney's position would have known, based on rights "manifestly included within more general applications of the core constitutional principles invoked," *Booker*, 855 F.3d at 538, that an officer may be subject to a claim under the Fourteenth Amendment under a deliberate indifference standard for unintentional injuries caused when not responding to an emergency or chasing a suspect. This substantive due process right was clearly established at the time McKinney engaged in the conduct that caused Harkness's

injuries. A reasonable officer in McKinney's position would have known his conduct was not only unlawful, but that it created a substantial risk of serious harm to those around him. As the court stated in *Browder*, some conduct is so obviously unlawful that an officer does not need a detailed explanation. *See* 787 F.3d at 1082. Thus, we affirm the district court's finding that "in October 2016, it was clearly established that an officer driving more than 80 mph at night, on a curved section of an unlit road, in a non-emergency, non-pursuit situation could be subject to liability under the Fourteenth Amendment for deliberate indifference to a substantial risk of harm to those around him" and that "[a] reasonable officer in McKinney's position would have realized such conduct was unlawful." J.A. 174.

Accordingly, taking the facts in the light most favorable to the plaintiff, we find that McKinney's actions were deliberately indifferent to Harkness's life and safety such that it shocks the conscience and rises to the level of a violation of a constitutional right that was clearly established at the time of the collision. We acknowledge that in the context of qualified immunity, officials are not liable for "bad guesses in gray areas." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir.1992) (citing *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987)). But McKinney's actions, construed in the light most favorable to the plaintiff, do not constitute a "bad guess in a gray area" that qualified immunity protects. *See Sims v. Labowitz*, 885 F.3d 254, 264

(4th Cir. 2018). Thus, McKinney is not entitled to qualified immunity and his motion for summary judgment on that basis must be denied.

III.

Finally, McKinney asserts that even if this Court determines that he violated a clearly established constitutional right, the plaintiff's Fourteenth Amendment substantive due process claim is barred by the *Parratt-Hudson* doctrine. *See Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds, Daniel v. Williams*, 474 U.S. 327, 330 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984). Because the doctrine's applicability is limited to procedural due process claims, the district court correctly held that the *Parratt- Hudson* doctrine does not apply to the plaintiff's substantive due process claim.

Under the *Parratt-Hudson* doctrine, a state actor's random and unauthorized deprivation of a protected due process interest cannot be challenged under § 1983 if the state provides an adequate post-deprivation remedy. *See Parratt*, 451 U.S. at 543-44; *Hudson*, 468 U.S. at 533. *See also Bogart v. Chapell*, 396 F.3d 548, 563 (4th Cir. 2005) (where state employees do not have authority to deprive persons of their property and liberty, and have no duty to provide pre-deprivation safeguards, doctrine bars a § 1983 due process claim based on employees' random and unauthorized conduct). McKinney argues that the *Parratt-Hudson* doctrine controls the viability of

the plaintiff's Fourteenth Amendment substantive due process claim, first because his actions were unauthorized, and second, because the plaintiff was afforded a post-deprivation remedy—the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, which allows plaintiffs who have suffered a tortious loss at the hands of the state to recover for gross negligence by a state employee. He contends that the plaintiff's case is nothing more than a negligence action related to the operation and control of his police vehicle, and that plaintiff's Fourteenth Amendment claim—which is based on the same facts as her state claim for negligence and gross negligence—is simply a tort claim "couched in terms of constitutional deprivation [seeking relief] under § 1983." *See Parratt*, 451 U.S. at 533.

But the *Parratt-Hudson* doctrine does not bar the plaintiff's substantive due process claim. In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court limited the application of the doctrine to procedural due process claims for which the state provides an adequate post-deprivation remedy. As the Court explained, "the Due Process clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Id.* at 125 (citing *Daniels*, 474 U.S. at 331). In such cases, "[a] plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Zinermon*. 494 U.S. at 125 (internal citations omitted). Thus, "[t]he fact that

the alleged wrongdoing also violated state law and could support a tort claim is not sufficient to invoke the *Parratt* doctrine." *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015) (citing *Zinermon*, 494 U.S. at 128).

Our Circuit has adopted the Supreme Court's reasoning, holding that

> [S]ome abuses of governmental power may be so egregious or outrageous that no state post-deprivation remedy can adequately serve to preserve a person's constitutional guarantees of freedom from such conduct. Thus, conduct that 'shocks the conscience' . . . violates substantive guarantees of the Due Process Clause independent of the absence or presence of post-deprivation remedies available through state tort law.

Temkin, 945 F.2d at 720 (citing *Daniels*, 474 U.S. at 338 (Stevens, J., concurring)). *See also Lewis v. McDorman*, 820 F. Supp. 1001, 1003 n.3 (W.D. Va. 1992), *aff'd*, 28 F.3d 1210 (4th Cir. 1994) (where Fourteenth Amendment deprivation at stake is substantive, not procedural, *Parratt* does not apply, as it applies only to procedural due process violations); *McDonald v. Dunning*, 760 F. Supp. 1156, 1168 (E.D. Va. 1991) (*Parratt*'s holding that state post-deprivation remedies may constitute adequate due process is relevant only where the claim is a violation of procedural due process).

Here, the plaintiff has made only a substantive due process claim. Such a claim focuses on egregious state conduct rather than unfair procedures. McKinney's argument fails because the availability and adequacy of a post-deprivation state remedy is irrelevant to the analysis for a substantive due process claim. And according to *Zinermon*, the availability of a state law remedy for McKinney's egregious conduct does not impact the plaintiff's § 1983 suit. *Id.* at 125.

We are not persuaded by McKinney's reliance on then-Judge Gorsuch's concurrence in *Browder v. City of Albuquerque*, 787 F.3d at 1085, which suggests *Zinermon*'s application of the *Parratt-Hudson* doctrine to procedural, but not substantive, due process claims was dicta and thus "the question whether *Parratt* applies to substantive due process claims . . . remains a live and open one." *Browder*, 787 F.3d at 1085 (quoting *Lewis*, 523 U.S. at 840 n. 4). On remand, the district court acknowledged that "federal courts have been granted authority pursuant to 42 U.S.C. § 1983 'to remedy constitutional violations by state officials acting under color of state law,' *id.* at 1083 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)), and the law has been clearly established that substantive due process violations fall within this grant of authority." *Browder v. City of Albuquerque*, No. CIV 13-0599 RB/KBM, 2016 WL 4376054, at *4 (D.N.M. May 10, 2016) (citing *Zinermon*, 494 U.S. at 125).

This Court, relying upon the body of well-reasoned Fourth Circuit precedent and persuasive authority, declines to extend the *Parratt-Hudson* doctrine to the plaintiff's substantive due process claim. Such an extension would be inconsistent with the jurisprudence that recognizes the fundamental differences between substantive and procedural due process claims. Accordingly, we find that the plaintiff's Fourteenth Amendment substantive due process claim against McKinney is not barred by the *Parratt-Hudson* doctrine.

IV.

For these reasons, we affirm the decision of the district court and remand the case for further proceedings.

AFFIRMED

RICHARDSON, Circuit Judge, dissenting:

The majority dutifully recites the familiar rule that qualified immunity shields an officer from suit unless he violated a constitutional right that was "clearly established." Yet the majority fails to faithfully follow that rule—ignoring the Supreme Court's consistent admonition that it really must be *clearly established* that the officer's particular conduct was prohibited by the Constitution.

Instead, the majority hangs its hat on a murky substantive-due-process claim. The governing constitutional standards are not clearly established. And the caselaw's application to the hurried, discrete, and torn conduct underlying this case is also not clearly established. Yet the majority ignores this compounded uncertainty to forge new law that it then finds had been "clearly established." The only course available to us as inferior- court judges is to respect the Supreme Court's instructions and hold that the officer is immune from suit. I respectfully dissent.

I. The doctrine of qualified immunity

The doctrine of qualified immunity—controversial, contested, and *binding*—is a familiar rule.[1] The doctrine shields the officer from suit unless his conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Perhaps reflecting the lack of explicit textual support in the statutory scheme, the Supreme Court has justified the doctrine as, among other things, a creature of public policy—the "best []

[1] To follow the thoughtful critiques and defenses of qualified immunity, start by comparing William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45 (2018), with Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018).

accommodation" of "competing values." *Harlow*, 457 U.S. at 815; *see also, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (offering a historical justification); *Screws v. United States*, 325 U.S. 91, 100–04 (Douglas, J., plurality) (suggesting a fair-notice justification); *cf. Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting) (asserting a second-best-constitutionalism justification). On the one hand is the pressing need to ensure the "vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. *Compare Marbury v. Madison*, 5 U.S. 137, 163 (1803), *with* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999). On the other, "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole," creating "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d. Cir. 1949) (Learned Hand, J.)). The Supreme Court instructs that qualified immunity, rather than absolute immunity (or absolute liability), best reconciles these competing demands so that executive officials remain both accountable to the law and energetic in their duties—wielding the sword with neither tyranny nor trepidation. *Harlow*, 457 U.S. at 819. This balance is not perfect, but it is the law.

The resulting doctrine demands we clear a high bar before concluding that a right was "clearly

established." "We do not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). But we do require that "existing precedent" place the "question beyond debate," so that "'the contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Mullenix v. Luna,* 136 S. Ct. 305, 308 (2015); *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Of course, reasonable officials are capable of "drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). But they are not soothsayers—expected to divine what some judges might suss out of oblique prior pronouncements, only to be personally liable when they fail to see the future. *See Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

To ensure that "every reasonable official" would understand the illegality of the conduct, "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018)); *see also al-Kidd*, 563 U.S. at 742; *Broseau v. Haugen*, 543 U.S. 194, 198 (2004). It is "not enough" to say that it is clearly established that an individual has a constitutional right to be free from unreasonable seizures. *Saucier*, 533 U.S. at 202; *see also City and*

County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1776 (2015). Instead, we must examine the specifics of the existing precedents, determining whether the particulars of those cases would place a reasonable law-enforcement officer on notice that particular conduct is unlawful. *See Kisela*, 138 S. Ct.at 1152; *Mullenix*, 136 S. Ct. at 308; *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).[2]

The Supreme Court has made it clear that "specificity is especially important" where it is "difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (highlighting the needed specificity under the excessive-force doctrine of the Fourth Amendment); *see also District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (Because of its "imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in the precise

[2] The Supreme Court repeatedly reminds courts how high the "clearly established" bar is. *See, e.g.*, *City of Escondido*, 139 S. Ct. at 503; *Kisela*, 138 S. Ct. at 1152; *Wesby*, 138 S. Ct. at 593; *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 308. Indeed, over the last 35 years, the Supreme Court has found that official conduct violated "clearly established law" in two cases, *Groh v. Ramirez*, 540 U.S. 551, 564 (2004), and *Hope v. Pelzer*, 536 U.S. 730, 741–42 (2002). Baude, 106 CAL. L. REV. at 82 n.1. *Groh* involved a warrant that completely failed the particularity requirement while *Hope* involved the use of a hitching post for prison discipline despite several sources declaring that particular practice unconstitutional. 540 U.S. at 564; 536 U.S. at 741–42.

situation encountered . . . Thus, we have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment . . . While there does not have to be a case directly on point . . . a body of relevant caselaw is usually necessary to clearly establish the answer." (cleaned up)). The more unclear the general rule, the more specific the circumstances must be to find clearly established law. *Id.*

The required specificity is especially important when the claim depends on substantive due process, which is even more unclear generally and offers even less guidance in particular circumstances than Fourth Amendment jurisprudence. This is because "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended . . . [thus] self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). In finding a substantive-due-process right, the Court requires a close analysis of the "Nation's history and tradition" and requires a "careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Recognizing the complexities and uncertainties of this doctrine, other courts have described this process as "wad[ing] into the murky waters of that most amorphous of constitutional doctrines, substantive due process." *Tun v. Whitticker*, 398 F.3d 899, 900 (7th Cir. 2005).

The lack of clarity surrounding substantive due process— and the Court's admonishments in this area—cautions us to seek cases that address the specific circumstances at hand to find clearly established law.

In looking for clearly established law that gives a defendant "fair warning" that his particular conduct was unlawful, we turn first to the Supreme Court. *City of Escondido*, 139 S. Ct. at 503. We also consider our own controlling circuit precedent. *Williams*, 917 F.3d at 769. And our Circuit has held that we may also find 'fair warning' for a reasonable officer by canvassing the mass of cases from the thirteen judicial circuits in search of a "robust consensus of persuasive authority." *Id.* But no matter how wide we cast our net, we must heed the repeated admonition that the standards for a law to be 'clearly established' remain specific and demanding. *See, e.g.*, *al-Kidd*, 563 U.S. at 741.

II. The officer is entitled to qualified immunity

The majority, regrettably, forgets that qualified-immunity doctrine is a demanding standard requiring specificity. Whatever the first-principles answers to the questions raised here, the majority's fundamental problem is simple: no clearly established law placed the unconstitutionality of this officer's conduct beyond debate.

According to the plaintiff, Officer McKinney violated her right to substantive due process by

colliding with her vehicle while the officer, in violation of state law, was exceeding the speed limit. Around 10:30 p.m., Deputy Lollis radioed a request for assistance with a traffic stop. The Shift Supervisor believed that Lollis's voice sounded "shaken" and issued a "Code 3" "emergency response" for nearby officers to help. J.A. 40–43, J.A. 75. A "Code 3" allows officers to disregard traffic regulations using emergency lights and sirens. *See* S.C. Code Ann. §§ 56-5-760; 56-5-4700; 56-5-4970. Shortly after the "Code 3," Lollis radioed to "back down on emergency response but continue to him 'priority.'" J.A. 43, 149. It is contested whether the accident occurred forty seconds after the "Code 3" cancellation or if two minutes elapsed. But either way, Officer McKinney had acknowledged the "Code 3" cancellation and turned off his emergency lights and siren. Officer McKinney then hit Janel Harkness's vehicle—severely injuring her—while traveling at least 83-mph around a curvy road in the dark.

The majority divines clearly established law that showed the officer's actions were constitutionally prohibited. This is wrong for two interrelated reasons. First, the general legal standards here are unsettled. And second, even accepting the majority's preferred legal standard, its specific application here is unsettled as well. Although I respect the majority's valiant effort to deduce clearly established law from such compounded uncertainty, the majority's trudge through this murky morass suggests a simple

truth—if clearly established law is so hard to find, perhaps that is because it does not (yet) exist.[3]

A. Lack of clearly established standards

The majority's first problem is that the general standard the majority requires to reach its result is far from clearly established. Diving into an area with broad indeterminacies, the majority fails to prove that it is beyond debate what general standard should be applied. Though it settles on requiring 'deliberate indifference' rather than an 'intent to harm,' the majority's conclusion is anything but compelled by prior caselaw.

1. Substantive due process

[3] At the outset, I acknowledge that the doctrine of substantive due process, like qualified immunity, remains controversial in many quarters. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980); *United States v. Carlton*, 512 U.S. 26, 39–42 (1994) (Scalia, J., concurring). Everyone seems to recognize that this doctrine, perhaps because of its unusual textual foundation, is often uncertain in its rules and unsettled in its applications. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (observing that "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (cleaned up)). Yet we are bound as inferior-court judges to follow the Supreme Court's instructions, whatever their contested status. Regrettably, as discussed below, the majority only respects this role for inferior courts halfway—pulling its punches on qualified immunity's clear requirements while aggressively expanding what few substantive-due-process cases we have.

To begin, the standards for substantive-due-process violations are famously unclear and frequently underdeveloped. Perhaps struck by the "great silences" of the Fourteenth Amendment's Due Process Clause, *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949); *see* U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."), the Supreme Court has articulated the governing test for substantive due process in highly general—sometimes diverging, but firmly demanding—terms. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

The governing test for substantive due process is a two-part inquiry. *See id.*; *Glucksberg*, 521 U.S. at 720–21; *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978). We first ask whether the government has infringed a carefully described fundamental right. *See Glucksberg*, 521 U.S. at 720–21; *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Zablocki*, 434 U.S. at 387. That first step is undisputed here, since no one doubts that the collision was a direct and substantial impairment of the plaintiff's fundamental right. So everything here turns on the second step, whether the "executive action . . . can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense," so that it lacks "any reasonable justification in the service of a legitimate governmental objective." *Lewis*, 523 U.S. at 847 (quoting *Collins*, 503 U.S. at 115). "[T]he Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already

be administered by the States.'" *Id.* at 848 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).[4] So "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846. The conduct must truly "shock the conscience." *Id.* at 847 n.8.

But that broad "shocks the conscience" standard, whatever its virtues or vices, is "no calibrated yardstick." *Id.* at 847. And while it might "point the way," this amorphous and malleable test—by itself—fails to provide enough guidance to hold that the officer violated clearly established law. *See id.* at 846–47 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d. Cir. 1973) (Friendly, J.)); *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1078–80 (10th Cir. 2015) (surveying "what guidance we've received in this murky area"). So the majority turns to another general standard.

2. Culpability spectrum

[4] South Carolina established the "South Carolina Tort Claims Act" as "the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C. Code §15-78-200. Though these plaintiffs brought a tort action as prescribed by the South Carolina Tort Claim Act, they also sought to add a constitutional due process claim that extends beyond the state's limitations on suits against government employees.

Searching for more specificity, the majority looks to the "culpability spectrum" provided by *Lewis*. There, the Court provided some guidance (though not clear directions) for evaluating when executive action violates substantive due process. *See Lewis*, 523 U.S. at 845–54. On the Supreme Court's "culpability spectrum," "negligence" is never enough to find a substantive-due-process violation, "deliberate indifference" is only sometimes enough, and "intent to harm" is usually enough. *Id.* The majority claims that it is clearly established that the plaintiff's substantive-due-process right is violated here so long as the officer's conduct was "deliberately indifferent."

I am not persuaded. At most one might decide that the deliberate-indifference standard should apply to a substantive-due-process claim where there is 'actual time for deliberation,' like when addressing a prison inmate's medical condition. *See Lewis*, 523 U.S. at 851, 853; *Green v. Post*, 574 F.3d 1294, 1301 n.8 (10th Cir. 2009) (reflecting that "the meaning of the term 'deliberation,' and a determination of when an officer has time for 'actual deliberation,' is elusive" and "context-specific"); *see also Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001) (instructing that "deliberate indifference," in "limited circumstances," can be "sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim"). But it is not clearly established that the type of conduct here—hurried, discrete, and torn between the competing needs of speed and safety (to say nothing of the only recently downscaled

emergency call)—constitutes the type of unhurried, iterative, and uncomplicated deliberation that is classically subjected to the deliberate-indifference standard. *See Lewis*, 523 U.S. at 851, 853. This doubt as to the proper standard persists wherever we turn—the cases and their lessons are too sparse, too distinguishable, and too conflicted to clearly establish that 'deliberate indifference' is the right standard here.

a. Controlling caselaw

Controlling authority from the Supreme Court and our Circuit fails to clearly establish that the deliberate-indifference standard applies in reviewing the officer's conduct here. *See William*, 917 F.3d at 769.

i. Supreme Court

Start with Supreme Court precedent. There is not much here for the majority to rely upon (as the majority seems to concede). Indeed, the only real decision on which the majority stakes its claim is *Lewis*. But that decision—even if it provides a helpful framework for structuring the analysis—does not provide clear answers that resolve the fight over the legal standard here.

While *Lewis* recognized a "culpability spectrum" that governs claims like the one before us here—with negligence being "categorically"

insufficient, and intent to harm being "most likely sufficient"—the Court was careful to avoid establishing when "culpability falling within the middle range" would be enough. *Lewis*, 523 U.S. at 849 (observing that this conduct "is a matter for closer calls"). Within this uncertain middle range, the Court clarified, there are some potentially helpful guideposts. One guidepost is in the custodial prison context, where "liability for deliberate indifference . . . rests upon the luxury of unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations," and so the deliberate-indifference standard is "sensibly employed only when actual deliberation is practical." *Id.* at 851 n.11, 853. The holding in *Lewis* itself provided another guidepost. For actions taken during a high-speed chase aimed at apprehending a suspected offender, where unforeseen circumstances demand an instant judgment on the part of an officer who feels the pulls of competing obligations, only an intent to cause harm will satisfy the shocks-the-conscience test. *Id.* at 853–55.

But those guideposts fail to provide answers for the appropriate standard to apply here. How are we—much less an officer—to know where on the spectrum an officer responding to a recently downgraded emergency call for assistance falls? Does that situation have the type of prolonged, iterative, and uncomplicated opportunity for deliberation that *Lewis* observed generally justifies application of the deliberate- indifference standard? Or does that

situation look more like "decisions [that] have to be made in haste, under pressure, and frequently without the luxury of a second chance" in "circumstances that are tense, uncertain, and rapidly evolving" with "obligations that tend to tug against each other"? *Id.* at 853 (instructing that prison officials tasked to quell a riot or police officers engaging in a high-speed chase are not subject to the deliberate-indifference standard). Maybe others think it obvious, but this framework fails to provide me with certainty, much less fair notice to a reasonable officer in his patrol car.

ii. Fourth Circuit

Our own precedents provide no greater clarity. Like other circuits, we have wrestled with what to make of *Lewis*, continually failing to definitively identify what standard should govern an officer's non-emergency response to a request for assistance.

What cases we have in this general area are scarce and, just as importantly, more than a little unclear on how to extend their lessons to contexts beyond the particular circumstances they consider. Even viewing the few cases we have at a higher level of generality—something the Supreme Court prohibits, *see City of Escondido*, 139 S. Ct. at 503—fails to establish that the deliberate-indifference standard must apply here. *See Young v. City of Mount Ranier*, 238 F.3d 567, 574–76 (4th Cir. 1991) (applying the deliberate-indifference standard to review the death of a suspect in police custody, based

on the unique context of the suspect's detention in a prison setting).

Indeed, the most analogous guidance we have instructs us that the deliberate- indifference standard cannot apply. In *Temkin v. Frederick County Commissioners*, we refused to apply the deliberate-indifference standard or find a substantive-due-process violation when an officer struck a bystander with his vehicle during a long-lasting high- speed chase that proceeded from a minor legal violation and that implicated violations of police protocols. 945 F.2d 716, 721–23 (4th Cir. 1991) (gathering similar cases from other circuits). And while a jurist can find distinctions, *Temkin* alone should preclude finding that it is clearly established that the deliberate-indifference standard applies here.

At their very most, our few precedents in this area offer far too little. There are some contexts that call for the deliberate-indifference standard (*Young*'s pretrial detention). But we also know that this standard is inappropriate in other contexts (*Temkin*'s high-speed car chases). Yet our law does nothing to firmly place the type of conduct here on the end of the spectrum that justifies applying deliberate indifference. If anything, it seems telling that in the closest *situation* to our case—the high-speed chase in *Temkin*—we rejected the very deliberate-indifference standard that the majority seeks to apply.[5]

[5] Indeed, we have, like *Lewis*, recognized that the hallmarks

b. Persuasive authority

With no help from controlling precedent, the majority must turn elsewhere. But that too turns up dry. Try as it might, the majority fails to show that a "robust consensus of persuasive authority" clearly establishes that the deliberate-indifference standard applies here. *Williams*, 917 F.3d at 769. The majority does not make any serious attempt to establish a truly robust 'consensus.' Instead, the majority relies on a smattering of passing citations and on brief nods to a handful of tangentially related Third and Tenth Circuit decisions, which is understandable given that the cases are, as everyone concedes, few and far between. *See* Majority Op. 18–19; *see also id.* 10–11. And the limited caselaw that the majority does rely on—fairly sparse, often distinguishable, and somewhat conflicted—does not clearly establish that the hurried, discrete, and torn conduct here is subject to the deliberate-indifference standard. Instead of clear answers, this caselaw leaves us with landmarks at the polar extremes of the doctrinal spectrum—with some cases applying the deliberate-

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of substantive due process for violations by executive officials are far from certain and depend on the particular context in which the conduct took place—further undermining the contention that our precedent clearly establishes that the deliberate-indifference standard should apply to the novel situation before us. *See Temkin*, 945 F.2d at 723 n.5; *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991); *Young*, 238 F.3d at 574–75; *Hawkins v. Freeman*, 195 F.3d 732, 742 (4th Cir. 1999).

indifference standard (generally distinguishable) and other cases applying the higher intent-to-harm standard (generally closer). But it provides no clear guidance that tells us, beyond debate, where we should put this officer's conduct on the spectrum between the two extremes.

At one end of the spectrum, some cases brought to our attention by the plaintiff apply the deliberate-indifference standard. Those cases affirm the Supreme Court's broad principle that 'actual time to deliberate' generally triggers the deliberate-indifference standard. But in doing so those cases deal with different situations and thus provide little guidance for how we should consider the conduct here.[6] While these cases are neither clear nor consistent on which factors count for how much in different situations (part of the problem for the majority), they seem far afield from what we have before us.

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[6] *See, e.g.*, *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 431–32 (2d. Cir. 2009) (applying the deliberate-indifference standard where officers failed to respond to a request for protection from domestic violence, where repeated requests had been made over time and did not require officers to balance competing considerations in formulating response); *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 469 (6th Cir. 2006) (applying the deliberate-indifference standard where a school teacher failed to protect minor students by leaving those students alone with a classmate known to have behavioral problems as the teacher "had the opportunity to reflect and deliberate before deciding to [leave] children unsupervised in the classroom" and "did not need to make a split-second decision").

The closest cases the majority has—the Tenth Circuit's decisions in *Browder* and *Green* and the Third Circuit's decision in *Sauers*—do little to convince me that the conduct here falls under the rubric of the deliberate-indifference standard. While the *Browder* decision applied the deliberate-indifference standard, it did so where the officer was on his personal time, not pursuing any official business at all. *See Browder*, 787 F.3d at 1080–81 (applying the deliberate-indifference standard where the officer had been speeding for eight minutes on his personal time, with no official business or emergency). And the *Green* decision, beyond whatever differences we might draw, is at most one dim point in a confused constellation that the majority calls on to answer the case before us today. *See Green*, 574 F.3d at 1301 n.8, 1310 (recognizing that whether there is sufficient time to deliberate is "elusive" and "context-specific," and holding that the deliberate-indifference standard was appropriate when an officer collided with another car while engaged in a high-speed chase of a car that had stolen gasoline). In fact, after finding that the officer did not act unconstitutionally, the Tenth Circuit in *Green* concluded that it was "not clearly established what specific standard applied to the particular facts of this case—*i.e.*, where the officer was engaged in a high-speed non-emergency response." 574 F.3d at 1304 (surveying different circuits).

The *Sauers* decision, also distinguishable, cuts the other way by refusing to apply the deliberate-

indifference standard to a high-speed, long-lasting chase of a suspect for a minor traffic offense. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717–18 (3d Cir. 2018). Rather than provide clarity, the Third Circuit only muddied the waters further by applying its own unique standard—higher than deliberate indifference but lower than intent to harm. *Id*. The Third Circuit has held that when officers have time to engage in "hurried deliberation," there will be liability when those actions "reveal a conscious disregard of a great risk of serious harm." *Id*. The Third Circuit applied this higher standard rather than deliberate indifference where an officer lost control of his car and hit the plaintiff while engaged in a high-speed pursuit (sometimes exceeding 100-mph) over a non-emergency "summary traffic offense." *Id.* at 715. The Third Circuit found that the officer violated the Constitution in this situation, but after surveying cases from across the country, including *Green*, the court held that the law had not been clearly established. *Id.* at 719–23.

After granting qualified immunity, the Third Circuit stated that its decision would establish the law for similar cases within that circuit. *Id*. at 723. But *Sauers* cannot provide clearly established law here, as *Sauers* came two years after this crash. *See Wesby*, 138 S. Ct. at 589 ("To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent."); *DiMeglio v. Haines*, 45 F.3d 790, 795 (4th Cir. 1995) (stating that one "analyze[s] the law at the time of the alleged

conduct in order to determine whether the plaintiff has established that the defendant's conduct, when perpetrated, violated clearly established law" (quoting *Hinton v. City of Elwood,* 997 F.2d 774, 779–80 (10th Cir. 1993))); *see also* Majority Op. 18–19 (analyzing the law at the time of the accident in October 2016 but also relying on *Sauers*). Whatever utility *Sauers* offers the Fourth Circuit in this area now, it could not have provided notice to the officer here.

And whatever alleged 'consensus' might be drawn from those cases is undermined by other cases applying the intent-to-harm standard in analogous circumstances. As this Circuit did in *Temkin*, those cases suggest that where an officer is tasked to respond immediately to an unfolding situation in a manner that balances the competing needs to respond quickly but drive safely, something more than deliberate indifference is generally required. As the Third Circuit noted, "the Eighth and Ninth Circuits [] have adopted an 'intent to harm' standard for all police pursuit cases, whether or not an emergency existed at the time of pursuit." *Sauers*, 905 F.3d at 721.[7]

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[7] *See Sitzes v. City of West Memphis*, 606 F.3d 461, 464 (8th Cir. 2010) (requiring intent to harm where officer crashed into a car while driving in excess of 80-mph on a 30- mph road without sirens or lights in response to a robbery of $55 and an alleged assault even though the crime was not ongoing and other officers were already en route); *Terrell v. Larson*, 396 F.3d 975, 978–79 (8th Cir. 2005) (applying the intent-to-harm standard where officer collided with bystander while engaged in high-speed response to an emergency domestic disturbance call); *Bingue v. Prunchak*, 512 F.3d 1169, 1177 (9th Cir. 2008)

Taking these cases together, no consensus, much less a robust one, emerges. Reasonable arguments exist that the conduct here—hurried, discrete, and torn between competing interests in responding quickly but safely to a newly downscaled call—falls either on the "deliberate indifference" or "intent to harm" side of the line (or perhaps somewhere in-between). The situation here required a quick (but not split-second) response. It implicated important (but not compelling) interests. And it involved an urgent (but no longer an emergency) situation. So what to make of the precise conduct here is challenging. Without a clearly established general standard, the majority's case for stripping the officer of qualified immunity is off to a poor start.

B. Lack of clearly established application

Even were one to find a robust consensus requiring the officer act with only deliberate indifference and not an intent to harm, the application of that standard to the particular conduct here was not clearly established. *See Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 302 (4th Cir. 2004). In part, this is because "deliberate indifference is a very high standard," so "in order to be liable under this standard, the official must both be aware of facts

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(agreeing with the "Eighth Circuit and declin[ing] to try to draw a distinction between 'emergency' and 'non-emergency' situations involving high-speed chases aimed at apprehending a fleeing suspect").

from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." *Id.* (cleaned up). The analysis is highly context dependent, as the "rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850.

While the majority contends that "core constitutional principles" establish the substantive-due-process violation alleged here, Majority Op. 17 (citing *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018)); *cf. Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), the majority's concession that there is "little precedent imposing liability under these specific circumstances" is a telling sign about the state of the law in this muddled, underdeveloped area. Majority Op. 16; *see also al-Kidd*, 563 U.S. at 741 (explaining why that concession is not an ideal starting place on the path to the ultimate conclusion that a rule of constitutional law was "clearly established").

1. Controlling caselaw

To begin, our "controlling precedent" does not establish that the officer's conduct clearly violated

the plaintiff's substantive-due-process right. No Supreme Court case has imposed liability in an even remotely similar circumstance. *See Lewis*, 523 U.S. at 853– 54 (rejecting a substantive-due-process claim where police engaged in a high-speed chase of a motorcycle for speeding and failing to stop before crashing into the motorcycle). Nor has any Fourth Circuit case done so. *See, e.g.*, *Temkin*, 945 F.2d at 723 (rejecting a substantive-due-process claim when the plaintiff was struck by a suspect fleeing during a high-speed chase, even though the chase continued over ten-miles, began because of a minor violation, occurred after officers already had a partial identification of the license plate, and violated police protocols during the chase).

2. Persuasive caselaw

The only source left for the majority to find clearly established law—persuasive out- of-circuit cases that might form a "robust consensus" on the question—does little more to establish that the officer's hurried, discrete, and torn conduct reflected such deliberate indifference that it unquestionably shocks the conscience. Even leaving aside the majority's lack of any attempt to establish a robust consensus of caselaw that applies the deliberate-indifference standard to factual contexts like the scenario presented here, the handful of cases that the majority cites to assert that the officer's conduct was deliberately indifferent are not very helpful.

The only decision brought to our attention that found that the officer violated clearly established law in even remotely similar circumstances—then-Judge Gorsuch's decision for the Tenth Circuit in *Browder*—is distinguishable along several fronts. The most obvious distinction is that the officer in that case was "on no one's business but his own," while the officer here was engaged in an on-duty response to another officer's call for assistance. *See Browder*, 787 F.3d at 1077. The Tenth Circuit made clear that the officer was not "pursuing any emergency or any official business at all," so that "[t]he officer in these circumstances face[d] no tug between duties owed to two sets of innocents, . . . no emergency, no one . . . call[ing] for his aid, and [sat] instead in the same place as everyone else when it comes to respecting the rights of others." *Id.* at 1081. The officer here, on the other hand, was responding to another officer's call for assistance that had just been downgraded from an emergency.

The remaining decisions relied on by the majority that apply anything like the deliberate-indifference standard undermine, rather than support, the majority's result. Most importantly, the Tenth Circuit's decision in *Green* found no constitutional violation even though the officer driving a patrol vehicle without lights or sirens struck another vehicle at "a high level of speed" in an intersection where the light was turning yellow, while in pursuit of "a vehicle suspected of driving away from a gas station without paying for approximately $30.00 worth of gas." 574 F.3d at

1296–97. The officer admitted that this was not an "emergency situation" but merely trying "to catch up to the suspected violator of the law, to verify that it was the vehicle involved in the theft of the gas." *Id.* at 1297. The court applied the deliberate-indifference standard but found that the conduct did not violate the Constitution because "while not an emergency, [the situation] nonetheless required a rapid response." *Id.* at 1303–04. Again, the officer in our case was responding to a call for assistance that began as an emergency call and was downgraded just before the crash. To borrow from *Green*, this case too required a "rapid response," and thus no violation occurred. *Id.*

The Third Circuit in *Sauers* applied its own unique standard but did find that the officer's conduct leading to a wreck during a high-speed chase of a traffic offender was unconstitutional. 905 F.3d at 717–18. But in doing so, the Court recognized that there was no clearly established law at the time of the crash in 2014 and granted qualified immunity. *Id.* Decided two years after the wreck in this case, the *Sauers* decision provides no support for the majority.

The majority's cited cases hardly constitute the "body of relevant case law . . . necessary to clearly establish the answer" in this specific circumstance, especially when the standard to be applied is as general and amorphous as the substantive-due-process claim is here. *Wesby*, 138 S. Ct. at 590. And so, taking these controlling and out-

of-circuit cases together, it is not clearly established that the officer's conduct here was so deliberately indifferent to the plaintiff's substantive-due-process rights that it shocked the conscience.[8] The 'shocks-the-conscience' inquiry, sometimes narrowed to the deliberate- indifference standard, is a demanding test in the best of times. But here, when asked to run it through the qualified-immunity analysis, the only thing that is clear is that the majority falls short. What cases and instructions we have are too sparse and too distinguishable to provide a sound foundation for concluding that the officer here is not entitled to qualified immunity, whether we consider the lack of clearly established standards or their unsettled applications to the conduct in this case.

C. Aggregated uncertainty

The problems with the majority's decision so far—its failure to show either clearly established standards or applications that lead to its sought-

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[8] The majority does little to line up the particular conduct here with the particular conduct reviewed in related decisions. *See* Majority Op. 16 ("That there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful."). Given the scant and uncertain caselaw reviewing situations like this, the majority instead resorts to "core constitutional principles," *id*. 17, relying on broad generalizations to conclude both that conduct occurring after actual time for deliberation is actionable if taken with deliberate indifference and that such deliberate indifference was present here. But that is not how we have been instructed to apply the qualified-immunity doctrine.

after result—are not unique. What is special here, and part of what makes today's decision troublesome, is how the majority's isolated errors at each step of the analysis compound. Although the majority engages in a two-step approach to the qualified-immunity analysis (first considering the standard and then considering that standard's application), the majority neglects to consider the extent to which doubts as to the standard (step one) and doubts as to its application (step two) must be *aggregated* to determine whether the officer violated clearly established law. Rather than aggregating the uncertainty inherent at each step of the analysis, the majority treats each in isolation as a threshold requirement with no carryover effect— violating a rule of elementary statistics.[9] And so, while I believe that the majority has stumbled at each step of its analysis, I also believe that the majority's decision today has created a more serious problem. That is, the majority apparently proposes that when engaged in a multi-step analysis in search of clearly established law, the doubts at each step of the analysis need not be aggregated at the end. Surely, there must be at least *some* relationship between how confident we are that we are using the right doctrinal yardstick and how confident we are that

[9] To see why this is problematic, imagine that one was 60 percent sure that the proper standard is deliberate indifference and, similarly, 60 percent sure that the officer's conduct was deliberately indifferent. The aggregated confidence in an outcome of liability would not be 60 percent but less than 40 percent.

the officer's conduct falls short. But the majority, apparently, finds none. That is a mistake.

* * *

What happened to Harkness was a tragedy (one for which state tort law provides a remedy). But there is no clearly established constitutional law here. This case arises at a seldom-visited crossroads in our doctrinal landscape—the rare rendezvous where the demanding requirement that the law must be "clearly established" meets the famously malleable set of amorphous commitments that go by the name of "substantive due process." Sometimes, the common-law process, developing from one case to the next, can distill clear answers from even the murkiest fonts. But that is not the case here. As the majority itself seems to acknowledge, the cases in this area of law are scarce. And the more abstract and general the standard, the more concrete and specific the application must be. Yet what cases we have are distinguishable and countered by cases cutting the other way—leaving us with little guidance on what to do with the hurried, discrete, and torn conduct here. Without clear standards with clear application, the only thing that seems clearly established is that the majority has gone awfully far afield from the Supreme Court's instructions.

What, then, to make of today's decision? With no clearly established law, perhaps it has less to do with the Supreme Court's qualified-immunity doctrine and more to do with misgivings about the

wisdom of that doctrine. Those misgivings, to be sure, are understandable. Even after all these years, the doctrine of qualified immunity remains controversial, and there are thoughtful reasons for reconsidering or reforming it. But those are decisions for the Supreme Court (or Congress). Not us. And so, with respect for my colleagues, I cannot join an opinion that I fear will have the effect of quietly diluting and tacitly cheapening a doctrine that we are bound to apply so long as it remains standing. I respectfully dissent.

FILED: December 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1383
(8:17-cv-02088-TMC)

FELICIA HARKNESS DEAN, as Guardian and Conservator for and on behalf of Janel Harkness, an incapacitated adult

Plaintiff - Appellee

v.

STEPHEN B. MCKINNEY

Defendant - Appellant

and

CHAD MCBRIDE, in his official capacity as the Sheriff of Anderson County Sheriff's Office; THE ANDERSON COUNTY SHERIFF'S OFFICE

Defendants

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Motz, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Felicia Harkness Dean, *as Guardian and Conservator for and on behalf of Janel Harkness, an incapacitated adult*,	)	Case No. 8:17-cv-2088-TMC
Plaintiff,	)	
v.	)	**ORDER**
Stephen B. McKinney, Chad McBride*, in his official capacity as Sheriff of Anderson County*, and the Anderson County Sheriff's Office,	)	
Defendants.	)	

In October 2016, Janel Harkness ("Janel") sustained severe injuries in a traffic accident with Deputy Sheriff Stephen B. McKinney ("McKinney"), who was on duty at the time. Plaintiff Felicia Harkness Dean ("Plaintiff"), acting as Guardian and

Conservator for Janel, brought this action in South Carolina state court seeking redress against McKinney, Anderson County Sheriff Chad McBride, and the Anderson County Sheriff's Office. (ECF No. 1-1). The complaint asserted a substantive due process claim under 42 U.S.C. § 1983, as well as a negligence claim under the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-10 *et seq*. (ECF No. 1-1 at 4-6).

Defendants removed the action to this court on the basis of federal question jurisdiction. (ECF Nos. 1 and 2); *see* 28 U.S.C. § 1331. Before the court is McKinney's motion for summary judgment as to the substantive due process claim. (ECF No. 21). As explained below, the court concludes that McKinney is not entitled to qualified immunity against this claim. Accordingly, the court denies McKinney's motion for summary judgment. *Id.*

I. Background

Viewed in the light most favorable to Plaintiff, the relevant facts are these. On October 19, 2016, shortly before 10:30 p.m., McKinney, a Deputy Sheriff employed by the Anderson County Sheriff's Department, was on patrol and driving a government-owned 2010 Chevrolet Tahoe SUV. (ECF Nos. 21-2 at 1; 30 at 2; 30-2 at 1). At the same time, Janel was driving her 2000 Honda Accord to a manufacturing plant in Anderson, where she was scheduled to work the third shift. (ECF No. 30 at 2). At approximately 10:30 p.m., Deputy Kenneth Lollis, who was also on patrol, radioed requesting

assistance. (ECF Nos. 21-2 at 1; 21-3 at 3). McKinney believed that Lollis sounded "shaken." (ECF No. 21-2 at 1). The shift supervisor, Lieutenant Scott Hamby, issued an "emergency" call—a "Code 3" in law enforcement parlance—for available officers to assist Lollis. (ECF Nos. 21-3 at 3; 21-2 at 2). McKinney activated his lights and siren, and he proceeded down Masters Boulevard toward Lollis's location, well in excess of the posted speed limit.[1] (ECF No. 21-2 at 2). Shortly thereafter, Lollis indicated there was no emergency. (ECF No. 21-3 at 3). Lt. Hamby cancelled the Code 3 but advised responding officers to continue moving toward Lollis's location. (ECF Nos. 21-3 at 3; 21-2 at 2). McKinney acknowledged Lt. Hamby's cancellation of the Code 3 directive, deactivated his lights and siren, and, he claims, "began to reduce the speed of [his] vehicle." *Id*.[2]

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[1] Even though there is no evidence of exactly how fast McKinney was traveling right after responding to the Code 3, the court draws this inference based on McKinney's affidavit that he had to decrease his speed after the Code 3 was subsequently cancelled and Plaintiff's evidence that McKinney was traveling approximately 83 mph at impact. *See Brown v. Elliott*, 876 F.3d 637, 641–42 (4th Cir. 2017) ("[W]hen resolving the issue of qualified immunity at summary judgment, a court must ascertain the circumstances of the case by crediting the plaintiff's evidence and drawing all reasonable inferences in the plaintiff's favor." (internal quotation marks omitted)).

[2] McKinney told Lt. Hamby he would proceed to Code 1, which, according to Sheriff's Department policy, requires on-duty officers to observe posted speed limits and all traffic signals. (ECF No. 30 at 3).

A little more than two minutes after Lt. Hamby cancelled the Code 3, McKinney lost control of the Tahoe on a curved and unlit section of Masters Boulevard. (ECF No. 30-1 at 2). McKinney crossed over the center line and struck Janel's Accord, which was traveling in the opposite direction. (ECF No. 30-1 at 1). The Tahoe overturned and came to rest on its passenger side. The Accord was knocked off the road, and Janel sustained severe injuries requiring her to be airlifted from the scene of the accident. (ECF Nos. 1-1 at 4; 30-1 at 1).

McKinney disputes that two minutes elapsed between the cancellation of the Code 3 and the collision, suggesting instead that it was a matter of "seconds." (ECF No. 21-2 at 2). McKinney points to an audio recording of police radio traffic on October 19, 2016, (ECF No. 30-5), as proof that only forty-one seconds elapsed between the time the Code 3 was cancelled and the collision. (ECF No. 38 at 6). Plaintiff, on the other hand, submitted the police dispatch report ("CAD" report) for the evening of October 19, 2016 (ECF No. 30-4), to show that at least two minutes elapsed between Lt. Hamby's cancellation of the Code 3 emergency and the collision. The CAD report has a "CODE 3" status entry at 10:32:53 p.m. and a "PRIORITY" status entry at 10:33:42 p.m. adjacent to McKinney's name. *Id.* At 10:35:57 p.m., the status entry set forth on the CAD report is "Case Number 2016- 18359," id., but there is no officer's name associated with the entry. A trier of fact could conclude, as Plaintiff submits, that the "PRIORITY" entry reflects that the Code 3

emergency was cancelled at 10:33:42 p.m., and that "Case Number 2016- 18359" indicates the collision occurred two minutes and fifteen seconds later at 10:35:57 p.m. Therefore, a trier of fact could also reasonably conclude the CAD report shows that McKinney had more than two minutes to reduce his speed to the posted limits before encountering Janel's vehicle. Because this matter is before the court on summary judgment, the court will accept as true Plaintiff's position that two minutes and fifteen seconds passed between the cancellation of the emergency and the collision.

According to McKinney, he immediately turned off his blue lights and siren and reduced his speed when Lt. Hamby advised all units that Deputy Lollis's matter was no longer an emergency. Plaintiff, however, presented evidence that McKinney was traveling at least 38 mph over the posted speed limit of 45 mph. Specifically, Plaintiff offered the affidavit of an accident reconstructionist who, based on a physical examination of the accident scene and vehicles and a review of police documents related to the crash, opined that "Deputy McKinney was operating the 2010 Chevrolet Tahoe travelling west on Masters Blvd. [at a speed of] at least 83 Miles Per Hour prior to the start of the skid" causing McKinney to "rotate[] counter clockwise" into the "left front" part of Janel Harkness's Accord. (ECF No. 30-2). Additionally, the official police Traffic Collision Report Form indicated that McKinney was operating his vehicle too fast for conditions. (ECF No. 30-1). McKinney did not present contradictory

evidence with respect to his rate of speed at the moment of impact.[3]

As previously noted, Plaintiff asserted a § 1983 claim against McKinney, alleging he violated Janel's substantive due process rights under the Fourteenth Amendment by "driving his vehicle at such an extreme rate of speed without responding to an emergency" that he exhibited "deliberate indifference" to Janel's life and safety. (ECF No. 1-1 at 4). McKinney moved for summary judgment on the basis of qualified immunity. (ECF No. 21-1 at 8). McKinney also seeks summary judgment on the ground that Plaintiff failed as a matter of law to establish a substantive due process claim against McKinney. *Id*. at 4. Plaintiff filed a memorandum in opposition (ECF No. 30), and McKinney filed a reply memorandum (ECF No. 38). The matter is ripe for review, and the court concludes that a hearing is unnecessary to render a decision.

II. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ.

[3] McKinney did present an incident report prepared by Lt. Hamby following the accident indicating that after the Code 3 was cancelled, he and McKinney passed each other traveling in opposite directions and he "did not observe [McKinney] traveling faster than the posted speed limit." (ECF No. 21-3).

P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *Celotex Corp.*, 477 U.S. at 322.

III. Qualified Immunity

Qualified immunity protects government officials from civil liability and suit for "conduct [that] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In considering an official's claim of qualified immunity, the court must determine whether "(1) the official violated a statutory or constitutional right, and (2) . . . the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (internal quotation marks omitted). This court enjoys the discretion to address these two prongs in any order it sees fit. *See Pearson v. Callahan*, 555 U.S. 223, 226 (2009). If the plaintiff fails to establish either one of these prongs, the official is entitled to qualified immunity. *See id.* at 244-45.

IV. Discussion

A. Constitutional Violation

1. Standard of Culpability

Plaintiff contends that McKinney violated Janel's substantive due process rights by driving his vehicle recklessly and with deliberate indifference to Janel's safety. (ECF No. 1-1 at 4-5). The due process clause of the Fourteenth Amendment includes a substantive component that "bar[s] certain government actions regardless of the fairness of the

procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), which includes a safeguard against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," *Daniels*, 474 U.S. at 331. When the act in question involves an executive, rather than legislative, exercise of power, the Supreme Court's decisions "have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Specifically, the Court has articulated "the cognizable level of executive abuse of power [to be] that which shocks the conscience." *Id.* at 846. In other words, substantive due process rights are abridged by executive action only when such action "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992) (internal quotation marks omitted).

The starting point for determining the applicable standard of culpability in this case is the Supreme Court's *Lewis* decision. *See, e.g.*, *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078-82 (10th Cir. 2015) (Gorsuch, J.). In *Lewis*, the Court considered a claim that police deprived a motorcycle passenger of his substantive due process right to life when the passenger was killed during a high- speed chase that began after the motorcycle failed to pull

over. *See* 523 U.S. at 836-37. The Ninth Circuit concluded that the level of fault required to shock the conscience in "high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Id.* at 838 (internal quotation marks omitted).

The Supreme Court disagreed with the Ninth Circuit, observing that the level of culpability required to "shock the contemporary conscience" is dictated by the particular circumstances of that case. *See id*. at 848-49. First, the Court dismissed negligence as a basis for liability under the Fourteenth Amendment, explaining that mere acts of negligence by the police fall "categorically beneath the threshold of constitutional due process." *Id*. at 849. Next, the Court indicated that on "the other end of the culpability spectrum" is "conduct intended to injure" which always "rise[s] to the conscience-shocking level." *Id*. *Lewis* makes clear that the intent-to- harm standard is appropriate for cases where "unforeseen circumstances demand an officer's instant judgment." *Id*. at 853. On the facts before it in *Lewis*, the Court held that the officer "was faced with a course of lawless behavior" that was "practically instantaneous," and that, therefore, in order to establish liability, plaintiffs were required to show an intent to harm. *Id*. at 855.

Lewis also recognized that police conduct "falling within the middle range,"— *i.e*., acts that constitute "something more than negligence but less than intentional conduct, such as recklessness or gross negligence" is actionable under the Fourteenth

Amendment. *Id*. at 849. Deliberate indifference, *Lewis* explained, is more appropriate when officials "hav[e] time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id*. at 853; *see also id*. at 851 (utilization of the "deliberate indifference" standard of culpability is appropriate, as the term implies, "[w]hen actual deliberation is practical").

McKinney argues that, in situations requiring a high-speed response from law- enforcement officers, there can be no liability unless the officer intended to harm the injured party. (ECF No. 38 at 3). Plaintiff does not allege that McKinney intended to harm Janel or suggest that she can meet this standard. Rather, plaintiff contends that the deliberate indifference standard applies because McKinney was not responding to an emergency and had ample time to consider "how he would drive his police vehicle before he encountered [Janel] and caused the collision that injured her." (ECF No. 30 at 8).

The court agrees that the deliberate indifference standard applies here. The facts, when viewed in a light most favorable to Plaintiff, permit a reasonable trier of fact to conclude that McKinney was not driving over 80 mph as a result of a split-second decision made "under pressure." *Lewis*, 523 U.S. at 853. After Lt. Hamby cancelled the Code 3, McKinney had ample time to reduce his speed to comply with the posted speed limit of 45 mph. Even

if McKinney's opportunity to deliberate was somewhat "hurried," he had at least some time to contemplate how to respond to Lollis's non-emergency call. This fact-pattern falls within the "middle range" of culpability referenced in *Lewis*. *See* 523 U.S. at 847. Conduct encompassed by this "'middle range' of culpability" is considered "sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim" if the conduct "amounts to 'deliberate indifference.'" *Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001).

2. Deliberate Indifference

The court turns next to consider whether McKinney's conduct—again, based on the facts viewed in the most favorable light to Plaintiff—could reflect a deliberate indifference to a "great risk of serious injury to someone in Plaintiff's position." *Green v. Post*, 574 F.3d 1294, 1303 (10th Cir. 2009) (internal question marks omitted). The court concludes that it could.

The "deliberate indifference" standard imposes liability where the evidence shows (1) the officer subjectively recognized a substantial risk of harm, and (2) the officer subjectively recognized that his actions were inappropriate in light of that risk. *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004). "'A factfinder may infer that an officer knew of a substantial risk from the very fact that the risk was obvious.'" *Id.* (quoting *Farmer v.*

Brennan, 511 U.S. 825, 842 (1994)). Likewise, a trier of fact may conclude that the officer's response to the risk was so clearly inadequate as to justify an inference that the officer realized his response to the risk was inappropriate under the circumstances. *Id.*

Driving at excessive speeds of over 80 mph—nearly twice the posted speed limit—at night on a curved section of an unlit road threatens anyone in the vicinity, "be they suspects, . . . passengers, other drivers, or bystanders." *Lewis*, 523 U.S. at 853. Accordingly, law enforcement officers may engage in such risky conduct "only when reasonable justification exists." *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 718 (3d Cir. 2018) (internal quotation marks omitted). "Responding to a true emergency" or "[p]ursuing an actively fleeing suspect who is endangering the public welfare" may constitute "reasonable justification" for an officer's operation of his vehicle at such high speeds. *Id.* The facts here suggest no such justification. There was no emergency. There was no fleeing suspect or ongoing crime that that endangered the public. Thus, McKinney was traveling a curved section of an unlit road at night at more than 80 mph for no legitimate reason. A reasonable trier of fact could conclude that this conduct demonstrated a deliberate indifference to the safety of those in McKinney's vicinity and, therefore, constituted conduct that was "arbitrary" or "conscience shocking" in violation of Janel's substantive due process rights. *See Collins*, 503 U.S. at 128.[4] Other courts agree. *See, e.g., Sauers*, 905

[4] In his opening brief, McKinney referred to *Parratt v.*

F.3d at 718 (having "no difficulty in concluding" that deciding to respond to a non- emergency call "at speeds of over 100 miles-per-hour . . . demonstrates a conscious disregard of a great risk of serious harm); *Browder*, 787 F.3d at 1081 (holding that where off-

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Taylor, 451 U.S. 527 (1981), and suggested that because Plaintiff has a remedy available under the South Carolina Tort Claims Act, the court ought to abstain under *Parratt*. (ECF No. 21-1 at 7). McKinney fully developed this argument in his reply brief. (ECF No. 38 at 15-17).

Parratt held that the Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently deprives an inmate of property, provided that the state makes available a meaningful post-deprivation remedy. *See Parratt*, 451 U.S. at 543. The Court explained that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id.* at 544. McKinney relies on then-Judge Gorsuch's concurrence in *Browder* opining that abstention under *Parratt* may be appropriate because "when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state tort law remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort." *Browder*, 787 F.3d at 1084 (Gorsuch, J.).

The court declines to abstain under *Parratt* in this case. Federal courts have been granted authority pursuant to § 1983 "to remedy constitutional violations by state officials acting under color of state law," *id.* at 1083, and substantive due process violations are included within this grant of authority, *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("A plaintiff . . . may invoke § 1983" for a substantive due process violation "regardless of any state–tort remedy that might be available to compensate him for the deprivation of these rights.").

duty officer was traveling over 100 mph even though he was not chasing a suspect or responding to an emergency, "a reasonable jury could infer something more, a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right").

Accordingly, the court concludes that the evidence, viewed in a light most favorable to Plaintiff, is sufficient for a reasonable jury to conclude that McKinney abridged Janel's substantive due process rights under the Fourteenth Amendment

B. Clearly Established Law

Despite the court's determination that a reasonable trier of fact could conclude that McKinney violated Janel's constitutional rights, McKinney is nonetheless entitled to qualified immunity if Janel's constitutional rights were not "clearly established at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (internal quotation marks omitted). In order to decide whether a right was clearly established at the time of the constitutional violation, the court looks to "cases of controlling authority in [this] jurisdiction." *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001) (internal quotation marks omitted). Controlling authority consists of "the decisions of the Supreme Court, [Fourth Circuit Court of Appeals], and the highest court of the state in which the case arose." *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004).

If "there are no such decisions from courts of controlling authority, [the district court] may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538- 39 (4th Cir. 2017) (quoting *Owens*, 372 F.3d at 280).

The "clearly established" inquiry asks whether the conduct in question "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. A "right is clearly established only if its contours are` sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In making this assessment, district courts must be mindful of the Supreme Court's repeated admonishment "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (internal quotation marks omitted).

On the other hand, the "clearly established" requirement does not mandate that "the very action in question has previously been held unlawful." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). "Clearly established" law includes "not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle involved." *Owens*, 372 F.3d at 279 (internal quotation marks omitted). Accordingly, government officials can violate clearly

established law even under "novel factual circumstances, so long as the law provided fair warning that their conduct was wrongful." *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018). As the Fourth Circuit recently observed,

> although we must avoid ambushing government officials with liability for good-faith mistakes made at the unsettled peripheries of the law, we need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two.

Williams v. Strickland, No. 18-6219, 2019 WL 1030673, at *4 (4th Cir. Mar. 5, 2019).

The specific question before the court is whether a reasonable officer in McKinney's position would have believed that driving a police vehicle in excess of 80 mph on a curved section of a dark road at night even though he was not responding to an emergency or pursuing a fleeing suspect was permissible under established legal standards. The court concludes that a reasonable officer in McKinney's position would have known in October 2016 that such conduct could give rise to a claim under the Fourteenth Amendment.

Although the Fourth Circuit has not adjudicated the lawfulness of the precise conduct in question,[5] Janel's substantive due process rights fell within the ambit of clearly established "general applications of the core constitutional principles invoked." *Stirling*, 912 F.3d at 187. Although *Lewis* technically considered the culpability standard applicable to an officer's high-speed pursuit of an actively- fleeing suspect, *Lewis* also made clear that in cases where officers are not actively pursuing a suspect or responding to emergency circumstances requiring a split- second decision, an officer may face liability for less than intentional conduct—*i.e.*, where "deliberation is practical," liability based on a "deliberate indifference" standard is appropriate. *See Lewis*, 523 U.S. at 851.

Prior to October 2016, a few circuit courts of appeal had embraced the position that *Lewis*'s intent-to-harm standard does not apply to an officer's operation of his vehicle at excessive speeds where he is not responding to an emergency or chasing an

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[5] The court is aware of the Fourth Circuit's pre-*Lewis* decision in *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991). *Temkin* involved a substantive due process claim brought by a driver who was struck by a suspect fleeing an officer in active pursuit at high speeds. *Id.* at 718. Unlike the case currently before this court, *Temkin* presented precisely the kind of fact pattern that under *Lewis* does not easily rise to a conscience-shocking level—an officer actively pursuing a fleeing suspect. *See* 523 U.S. at 855. The instant case is nothing like *Temkin*, as it presents neither an emergency nor the pursuit of a fleeing criminal suspect.

escaping suspect For example, the Tenth Circuit concluded that the conduct of an officer traveling at a high rate of speed even though he was not "actually in pursuit" of anyone or responding to an emergency should be assessed under a deliberate indifference standard. *See Green*, 574 F.3d at 1302-03. The Tenth Circuit reiterated its position in *Browder*, where an off-duty officer was sued when he finished his shift but used his lights and drove at high speed on personal business, ultimately causing a fatal traffic accident. *See* 787 F.3d at 1077 (Gorsuch, J.). *Browder* concluded that proof of intent-to-harm is not required in cases where an officer "isn't pursuing any emergency or any official business at all" and "no one has called for his aid." *Id.* at 1081. Significantly, *Browder* noted that "as of 2006, it was clearly established a police officer *could* be liable under the Fourteenth Amendment for driving in a manner that exhibits a conscience-shocking deliberate indifference to the lives of those around him." *Id.* at 1083 (internal quotation marks omitted). And, the Third Circuit also applied a culpability standard that is less than intent-to-harm in non-emergency cases, stating that it has "been clear in recent years that the level of culpability required to shock the conscience when an officer has time for hurried deliberation is a conscious disregard of a great risk of serious harm." *Sauers*, 905 F.3d at 717 n.6 (citing *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006)).

In this case, the fact that there is relatively scant caselaw imposing liability in these specific circumstances does not deprive officers of "fair

warning that their conduct . . . was wrongful." *Williamson*, 912 F.3d at 187 (internal quotation marks omitted). Indeed, "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder*, 787 F.3d 1076, 1082 (10th Cir. 2015). The court concludes, therefore, that in October 2016, it was clearly established that an officer driving more than 80 mph at night, on a curved section of an unlit road, in a non-emergency, non-pursuit situation could be subject to liability under the Fourteenth Amendment for deliberate indifference to a substantial risk of harm to those around him. A reasonable officer in McKinney's position would have realized such conduct was unlawful. Thus, McKinney is not entitled to qualified immunity.

V. Conclusion

For the foregoing reasons, the court concludes that the evidence, viewed in a light most favorable to Plaintiff, is sufficient for a reasonable jury to conclude that McKinney abridged Janel's substantive due process rights under the Fourteenth Amendment. The court further concludes that McKinney is not entitled to qualified immunity as to Plaintiff's substantive due process claim. Accordingly, the court **DENIES** McKinney's motion for summary judgment (ECF No. 21) as to that claim.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

March 14, 2019
Anderson, South Carolina