No. 20-1276

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,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether the Court should apply the *Parratt-Hudson* doctrine to a substantive due process claim, contrary to the uniform construction the courts of appeals have given to this Court's precedents.

2. Whether Petitioner may challenge the deliberate-indifference culpability standard applied to his conduct based on his disputed view of key facts.

3. Whether the lower courts correctly denied Petitioner qualified immunity for misconduct previously recognized as obviously unlawful based on this Court's precedents.

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## INTRODUCTION

This intensely factbound case involves grave injuries suffered by Janel Harkness in a calamitous accident caused by sheriff's deputy Stephen McKinney. While on a routine assignment, McKinney engaged in reckless, high-speed, night-time driving even though he knew there was no emergency permitting him to disregard normal traffic laws. McKinney speeded along darkened roads for more than two minutes after acknowledging instructions not to do so before skidding through a sharp curve at 83 miles per hour in a 45-mile-per-hour zone and slamming into Harkness's car. The U.S. Court of Appeals for the Fourth Circuit held, based on this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), that, under these circumstances, the victim's allegations that McKinney acted with deliberate indifference to her safety stated a substantive due process claim because he had ample opportunity for "actual deliberation" about the extreme risk his behavior posed to the public. Pet. App. 12 (quoting *Lewis*, 523 U.S. at 851).

The court also held that McKinney was not entitled to qualified immunity on the facts pleaded because it was clearly established that such deliberate indifference in non-emergency circumstances violates substantive due process. *See* Pet. App. 19–23. Judge Gorsuch's majority opinion for a unanimous Tenth Circuit panel in *Browder v. City of Albuquerque*, 787 F.3d 1076 (2015), reached a similar conclusion nearly six years ago (and well over a year before the events in this case).

Finally, the court rejected McKinney's argument that the substantive due process claim should be barred by the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which hold that post-deprivation common law remedies are sufficient to satisfy *procedural* due process in some circumstances. The court held the *Parratt-Hudson* doctrine inapplicable to substantive due process claims because such claims, unlike procedural due process claims, rest on the view that "certain arbitrary, wrongful government actions" violate the Due Process Clause "regardless of the fairness of the procedures used to implement them." Pet. App. 25 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)).

McKinney now asks this Court to review each of those holdings, but he identifies no reasons justifying such review. His lead argument—that the Court should apply the *Parratt-Hudson* doctrine to a substantive due process claim—concededly presents the opposite of a conflict among the circuits: *No* court of appeals has disagreed with the Fourth Circuit's view on that issue, which is based squarely in this Court's precedents. Unless and until some lower court accepts McKinney's view and clearly articulates a basis for disagreement with the consensus view, there is no need for this Court to take on the issue. Moreover, should review of the issue ever be warranted, the Court should select a case in which the adequacy of post-deprivation procedures has been clearly addressed. This is not such a case.

McKinney's contentions that the lower court erred in applying the deliberate indifference standard of culpability to his conduct and in holding that

the conduct alleged violated clearly established law likewise fail to justify review of the Fourth Circuit's holding that he is not entitled to qualified immunity. The court of appeals followed this Court's decision in *Lewis* in holding that the deliberate indifference standard is properly applied to a substantive due process claim where the defendant had the opportunity to deliberate on the consequences of his conduct, and McKinney identifies no disagreement among the lower courts over that principle. Instead, his arguments rest on a *factual* disagreement over whether the circumstances permitted him the chance to deliberately consider the consequences of his actions. But such a disagreement with well-supported factual claims is not a proper basis for interlocutory appeal of a qualified immunity ruling, *see Johnson v. Jones*, 515 U.S. 304 (1995), and still less for invocation of this Court's discretionary review, *see* S. Ct. R. 10.

McKinney's claim that the court of appeals erred in holding the law clearly established likewise does not merit review by this Court. The court of appeals properly applied the qualified-immunity principles articulated by this Court and concluded, as did the Tenth Circuit in *Browder*, that it is clearly established that an officer's misuse of a police vehicle in non-emergency circumstances and with deliberate indifference to human life violates substantive due process. McKinney identifies no appellate authority supporting his view that the application of the deliberate indifference standard outside the context of police car chases or other emergency circumstances was not clearly established more than two decades after *Lewis*. McKinney knew and acknowledged that he had no lawful justification for not complying with

ordinary traffic laws, and cannot plausibly claim that an objectively reasonable officer would have thought his deliberate indifference to the safety of others was lawful.

## STATEMENT

Twenty-three-year-old Janel Harkness worked third shift at an appliance manufacturing facility in Anderson County, South Carolina. J.A. 12 ¶ 8. At approximately 10:30 p.m. on October 19, 2016, Harkness's Honda sedan was struck by Anderson County Sheriff Deputy Stephen McKinney's state-owned Chevrolet Tahoe. J.A. 12 ¶¶ 6-9. Photos show the impact to the front and side of Harkness's vehicle caused the entire driver's side to collapse on top of her. J.A. 72. Harkness was wearing her seatbelt, but the massive force of the high-speed collision caused catastrophic injuries. J.A. 13 ¶ 13; 69. She was airlifted from the scene to a trauma center and has endured a grueling road of medical treatment ever since. J.A. 13 ¶¶ 14-15. Harkness has been largely incapacitated by her extensive neurological injuries, and she requires a conservator and guardian to make financial and health care decisions on her behalf. J.A. 11 ¶ 2. Harkness is represented in this action by her conservator/guardian and mother Felicia Harkness Dean. *Id.* The collision has cost Harkness nearly $ 500,000 in medical expenses alone. J.A. 49.

McKinney cannot seriously contest causing the collision as the incident report lists him as the sole responsible party. J.A. 68. The appeal that gave rise to this petition is primarily about just how badly

McKinney was driving and what motivated his choices. An accident reconstruction determined McKinney was traveling at least 83 miles per hour when he began to skid around a sharp curve in pitch darkness and into Harkness's car. J.A. 70. The speed limit was just 45 miles-per-hour. J.A. 68. McKinney did not have his emergency lights and siren activated, as if her were responding to an emergency. J.A. 40 ¶ 6.

According to computer-aided dispatch ("CAD") data and incident reports, McKinney was first dispatched by his patrol shift supervisor Edward Scott Hamby to assist a fellow officer (Kenneth Lollis) at a traffic stop. J.A. 43, 73. Lollis had radioed in for backup, and Hamby perceived an unease in his voice. J.A. 43. Hamby ordered McKinney and other officers to make an emergency or "Code 3" response to Lollis's location. J.A. 40 ¶ 6; 43. "Code 3" is a term derived from the Anderson County Sheriff Office's "Emergency Vehicle Operations" policy denoting an "emergency response" and representing the only time the policy (based on South Carolina law) allowed officers to exceed posted speed limits or otherwise disregard traffic regulations. J.A. 74-75. The policy (and S.C. Code Ann. § 56-5-760(C)) required an officer to use emergency lights and siren for every Code 3 response. *Id.*

Within "seconds," Lollis made a second radio call advising Hamby and McKinney to "back down on emergency response." J.A. 43. Hamby responded by cancelling the Code 3. J.A. 40 ¶ 6. By definition, all non-emergency responses are designated "Code 1," which denotes a "normal run" where an officer must abide by all traffic laws. J.A. 74-75. These regula-

tions are essential because, as officers are taught, high-speed nighttime driving is a danger to others on the road, and ignoring these rules while operating a highly powered police vehicle is misusing "the most lethal weapon in the police arsenal." J.A. 167. McKinney was told this again and again in his law enforcement education and in remedial training he was forced to undergo after several on-the-job collisions. J.A. 115-27.

McKinney heard both Lollis' follow-up call and Hamby's revised order and claimed he was "backing down to Code 1." J.A. 43 (Hamby noting McKinney's "acknowledgment" of calls); 179 (hereafter "Audio Recording") at 3:35. That he understood there was no emergency is confirmed not only by his verbal acknowledgment, but also by the fact that he proceeded without his emergency lights and siren. Whether McKinney actually made any effort to slow down, however, is sharply disputed.[1] Hamby's order to assume a normal response came a full 2 minutes, 15 seconds before the collision, yet McKinney was traveling at 83 miles per hour when he struck Harkness's car. J.A. 70; 73 (end of Code 3 at 22:33:42 and collision at 22:35:57). This evidence suggests McKinney made no effort to heed Lollis' revised call or

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[1] Pursuant to the Court's Rule 15.2, Dean notes that the Petition incorrectly states McKinney "began to reduce speed" after the "Code 3" was cancelled and before the collision. Pet. at 2-3. Later, the Petition incorrectly states Dean's claim is based on McKinney's "failure to slow his vehicle sufficiently." Pet. at 8. Construed in the light most favorable to Dean, the record shows McKinney either never slowed his vehicle or initially slowed but then sped up again after crossing paths with his supervisor. J.A. 43, 68, 70.

Hamby's order. Any assertion to the contrary would require crediting the implausible supposition that McKinney managed to *accelerate* to over 83 miles per hour in only a few seconds but was unable to reduce his speed below that level for more than two minutes.

Hamby's incident report presents an even more troubling account. Hamby notes Lollis's revised call, Hamby's revised order to McKinney, and McKinney's acknowledgment of both. J.A. 43. Thereafter, Hamby reports he passed McKinney on the roadway. *Id.* McKinney was traveling toward Lollis's location, and Hamby was responding to an unrelated call. *Id.* Hamby reported that, when their vehicles passed, McKinney was traveling within the speed limit. *Id.* Yet McKinney was traveling nearly twice the speed limit when he later struck Harkness's car. J.A. 70. Thus, Hamby's incident report suggests McKinney chose to *increase* his speed to 83 miles per hour well after Lollis's call confirming there was no emergency, Hamby's call ordering McKinney to make a normal run, and McKinney's acknowledgment of that instruction. Based on this evidence, Harkness's law enforcement practices expert concluded McKinney's conduct was "totally irrational." J.A. 114.

Through her conservator/guardian, Harkness filed suit on January 10, 2017, alleging a claim pursuant to 42 U.S.C. § 1983 against McKinney for violations of Harkness's substantive due process rights as well as tort claims pursuant to the South Carolina Tort Claims Act ("SCTCA") against McKinney's employer, the Anderson County Sheriff's

Office.[2] J.A. 11-16. The SCTCA imposes vicarious liability on state agencies for the negligence of its employees but not for any employee's conduct undertaken with an "intent to harm." S.C. Code Ann. § 15-78-60(17). Citing federal question jurisdiction, the defendants removed the action to federal court.

After discovery, both defendants moved for summary judgment. The sheriff's office argued that, since McKinney was accused of conscience-shocking misconduct, the SCTCA's bar on vicarious liability for an employee's "intent to harm" entitled it to summary judgment. The district court disagreed, finding Harkness's complaint alleged, and the record supported, direct liability by the sheriff's office in failing to reasonably supervise and train McKinney. Harkness later settled her claims against the sheriff's office. McKinney argued he was entitled to qualified immunity as a matter of law because his conduct did not rise to a constitutional violation and did not violate any clearly established right. The district court denied McKinney's motion, concluding a jury could find McKinney acted with reckless indifference and violated due process rights clearly established by this Court's precedent and subsequent court of appeals rulings. Pet. App. 70-79.

McKinney noticed an interlocutory appeal on April 10, 2019, arguing the district court erred in finding the evidence supported a constitutional vio-

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[2] Harkness also alleged state-law claims against Anderson County Sheriff Chad McBride. The district court dismissed those claims, finding South Carolina law identifies a county sheriff's office as the only proper defendant for SCTCA claims arising from a sheriff deputy's conduct.

lation or a clearly established right infringed by McKinney's alleged misconduct. The court of appeals majority held evidence in the record supported Harkness's claim that McKinney acted recklessly in a non-emergency situation despite adequate time to deliberate over his actions. The panel majority also held that *Lewis* and subsequent court of appeals rulings (including *Browder*) clearly established Harkness's right to be free from this form of arbitrary government action. Finally, none of the panel members accepted McKinney's contention that the *Parratt-Hudson* doctrine barred Harkness's claim because that doctrine has been applied only to procedural due process claims rather than the substantive claim asserted here. In light of this distinction, the court of appeals did not reach the question whether the case would satisfy the other prerequisites for application of the *Parratt-Hudson* doctrine—including the existence of an adequate remedy for Harkness under South Carolina law.

## REASONS FOR DENYING THE PETITION

Officer McKinney's deliberate indifference to his fellow motorists permanently altered Janel Harkness's life. His choice to speed through the dark in pursuit of nothing lacks coherence. It was precisely what his boss, his training, and state law ordered him not to do and is even contrary to what he contemporaneously said he would do. As the court of appeals majority held, a police officer who arbitrarily acts on a whim risks liability under § 1983 when his conduct invades a citizen's protected liberty interests.

McKinney's petition raises three issues inappropriate for certiorari. He first asks the Court to make a change in a narrow legal doctrine that at least ten circuits have rejected, based on a theory that no federal appellate court has ever adopted. He then asks the Court to wade into the facts to apply a culpability standard that would only be applicable if the Court took McKinney's word on key events over objective evidence to the contrary. Finally, McKinney challenges the court of appeals' analysis of clearly established law even though, in the most directly analogous case, a Tenth Circuit panel opinion written by then-Judge Gorsuch held that the law concerning substantive due process liability for such conduct was already clearly established before 2013, years before McKinney took the actions that led to this lawsuit.

## I. The Petition's proposal to expand the *Parratt-Hudson* doctrine has never been adopted by this Court or any federal court of appeals.

McKinney first challenges the court of appeals' refusal to dismiss Dean's action—regardless of its merits—based on the *Parratt-Hudson* doctrine, which no federal appellate court has ever applied to a substantive due process claim. Expanding *Parratt-Hudson* is something federal courts have rarely considered in the past twenty-plus years, and ten different circuits have at some point expressly refused to apply it beyond procedural due process claims. Even if the question merited consideration by this Court, this case would not present the issue squarely as many of the factors cited for expanding the *Parratt-Hudson* doctrine are not present here.

### A. The petition does not cite any rulings applying the *Parratt-Hudson* doctrine to a substantive due process claim.

The *Parratt-Hudson* doctrine reflects the distinctive feature of procedural due process doctrine, under which a constitutional violation is not the deprivation of a protected interest but rather a deprivation without fair procedures. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). For some such deprivations, constitutionally adequate procedures are not feasible before the deprivation and may be provided afterward. *Id.* at 540-541. Thus, *Parratt* held that, for procedural due process claims based on a state actor's "random and unauthorized" misconduct, the availability of an adequate post-deprivation state law remedy may mean the claimant's due process right was never violated. *Id.* at 541.

In *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), this Court expanded the *Parratt* rule to procedural due process claims based on unauthorized, intentional misconduct for which post-deprivation remedies provide adequate *procedural* protections. A substantive due process claim, however, is fundamentally different because it arises when arbitrary state action amounts to a completed due process violation *regardless* of the procedures used to implement it. *Daniels*, 474 U.S. at 331; *Id.* at 337 (Stevens, J., concurring in judgment); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (citing *Daniels*).

This line between procedural and substantive has held since *Parratt*, with courts consistently ruling

that only procedural due process claims may be contingent on the absence of post-deprivation state law remedies. The court of appeals relied on previous Fourth Circuit precedent. Pet. App. 26 (citing *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991)). Nine other circuits have reached the same conclusion.[3]

McKinney argues the Court has since retreated from this distinction. Pet. at 5-6 (citing *Lewis*, 523 U.S. at 840 n.4 (1998) and *Albright v. Oliver*, 510 U.S. 266, 281-286 (1994) (Kennedy, J., concurring in judgment)). However, post-*Lewis* appellate rulings have not expanded the *Parratt-Hudson* doctrine to substantive due process claims. *Johnson*, 980 F.3d at 508, 513-515; *Miranda*, 900 F.3d at 353. And, as discussed further below, the Tenth Circuit has not expanded the doctrine, as McKinney suggests. Rather, that court reserved the issue "for another day." *Browder*, 787 F.3d at 1081; *see also Bledsoe v. Bd. of Cnty. Comm'rs*, ___ F. Supp. 3d ___, 2020 WL 6781389, at *43 (D. Kan. Nov. 8, 2020), *appeal pending*, No. 20-3252 (10th Cir.) ("[T]he Tenth Circuit hasn't foreclosed substantive due process claims under *Parratt* yet."). There is no split among the circuits on the *Parratt-Hudson* doctrine's scope that would support the Court's review.

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[3] *See Johnson v. City of Saginaw, Mich.*, 980 F.3d 497, 508 (6th Cir. 2020); *Miranda v. County of Lake*, 900 F.3d 335, 353 (7th Cir. 2018); *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 290 (5th Cir. 2002); *Wood v Ostrander*, 879 F.2d 583, 588-589 (9th Cir. 1989); *Williams-El v. Johnson*, 872 F.2d 224, 228 (8th Cir. 1989); *McClary v. O'Hare*, 786 F.2d 83, 86 n. 3 (2d Cir. 1986); *Simmons v. Dickhaut*, 804 F.2d 182, 185 (1st Cir. 1986); *Hall v. Sutton*, 755 F.2d 786, 787-88 (11th Cir. 1985); *Davidson v. O'Lone*, 752 F.2d 817, 825 (3d Cir. 1984).

### B. The dearth of precedent to even consider *Parratt-Hudson* doctrine expansion weighs heavily against review.

McKinney can make only a meager offering of citations supporting expansion of the *Parratt-Hudson* doctrine. He cites just two cases in the last twenty-three years (i.e., since *Lewis*) where federal appellate judges even broached the issue. Pet. at 10-12. In neither instance did the pro-expansion argument prevail.[4] Although McKinney argues the doctrine would be the governing law of the Tenth Circuit but for a procedural flaw, neither the cited case nor subsequent rulings support that conclusion. Pet. at 9-10 (citing *Browder*, 787 F.3d at 1081).

Then-Judge Gorsuch's opinion for the panel in *Browder* stated only that the issue was "open" and declined to address it because it had been waived. 787 F.3d at 1081. Only then-Judge Gorsuch's separate concurrence expressed "doubt" about the procedural-substantive distinction and stated that the court of appeals would "do well to consider" the issue "closely" in a future case in which it was properly presented. What followed shows the bench and bar did not read *Browder* to expand *Parratt-Hudson*. The doctrine was not cited as a basis for dismissal when *Browder* was remanded or when it later returned to the Tenth Circuit at the summary judgment stage. *Browder v. City of Albuquerque*, No. CIV 13-0599 RB/KBM, 2016 WL 4376054, at * 4 (D.N.M. May 10. 2016); *Browder v. Casaus*, 675 Fed. Appx. 845 (10th

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[4] Expanding *Parratt-Hudson* was also discussed in *Cordova v. City of Albuquerque*, 816 F.3d 645, 665-66 (10th Cir. 2016) (Gorsuch, J., concurring in judgment).

Cir. Jan. 11, 2017). District courts within the Tenth Circuit have been similarly unwilling to construe *Browder* as McKinney suggests. *See Bledsoe*, 2020 WL 6781389, at *43; *Chievers v. Reaves*, Case No. 1:13-cv-00171, 2017 WL 4296726, at * 10 (D. Utah Sept. 26, 2017) (citing *Zinermon*, 494 U.S. at 124).

With so little jurisprudence on *Parratt-Hudson* doctrine expansion, the Court has none of the helpful tools it often seeks before offering the final word on such an extensive change to existing law. For "frontier" legal issues, the Court benefits from diverse opinions handed down after the issue has a chance to percolate among the lower courts. *Arizona v. Evans*, 514 U.S. 1, 23 n. 1 (1995) (Ginsburg, J., dissenting); *see also Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S.Ct. 1780, 1784 (2019) (Thomas, J., concurring in denial of petition for certiorari) ("further percolation may assist our review of this issue of first impression"). A percolation period allows the lower courts to act as laboratories and grants this Court the benefit of seeing how their experiments turn out. *McCray v. N.Y.*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari). Two concurring opinions that contain brief calls for further exploration of an issue—both issued in the context of cases where the dispositive opinions did not address its merits at all—are no substitute for such percolation and suggest no immediate need for review by this Court.

Rather than immediately addressing an under-explored legal theory, the Court should wait to see if any lower court adopts McKinney's proposed rule and, if so, how the rule plays out in substantive due process claims from a variety of factual circumstances.

### C. The considerations that drive McKinney's proposed expansion of the *Parratt-Hudson* doctrine are not implicated here.

*Parratt-Hudson* expansion is not the subject of debate among the circuits or well-examined among the lower courts. Even if it were, the unique facts here make this case unsuitable for exploring the issue because Dean's specific claim does not implicate the prudential concerns animating the pro-expansion view.

Expansion proponents argue granting *Parratt-Hudson* greater breadth by curtailing more due process claims is consistent with the Court's historical wariness of expanding substantive due process. Pet. at 8 (citing *Albright*, 510 U.S. at 271-272 and *Collins v. Harker Heights*, 503 U.S. 115 (1992)). But Dean's claim would not expand substantive due process: *Lewis* already recognized deliberately indifferent police vehicle operation can shock the conscience and support a due process claim. 523 U.S. at 853; *Browder*, 787 F.3d at 1081. Dean's claim is a far cry from *Albright*, where the Court was asked to take substantive due process to a brand new place by finding it authorized a damages claim for an arrestee whose charges were later dismissed. 510 U.S. at 269.

The *Browder* concurrence's similar concerns were grounded in cases like *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), where the Court was asked to fashion a due process remedy from the legally unexplored, ethically-charged debate over physician-assisted suicide. Dean's claim, in contrast, would only require the Court to apply its existing substantive

due process ruling from *Lewis*. Thus, the prospect of an expanded *Parratt-Hudson* doctrine as protection against an unwieldy substantive due process doctrine cannot be explored through this case.

Justice Kennedy's *Albright* concurrence also highlighted *Parratt*'s concern that substantive due process not extend so far as to become a mere "font of tort law." *Albright*, 510 U.S. at 284 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). As *Parratt* expressed it, due process was not meant to encompass every minor wrong a state inflicts on its citizens, such as when a prison loses a prisoner's craft supplies in the mail or when a state actor's error is "nothing more than an automobile accident." 451 U.S. at 544. Justice Kennedy urged caution to avoid blurring the line between egregious misconduct and an "ordinary case" for a state actor's tort. *Albright*, 510 U.S. at 285.

Again, this valid concern is not implicated here because, as *Browder* acknowledged for similarly egregious police action, "this case does not seem . . . to implicate any serious borderline disputes." 787 F.3d at 1080. What Dean's evidence shows is not an "automobile accident" in any ordinary sense. Instead, McKinney made a series of exceedingly reckless choices reflecting disregard for the lives of others despite contemporaneously receiving orders to act more cautiously. McKinney was assured by a fellow officer that the call he was pursuing was not an emergency and instructed by his supervisor not to drive above the speed limit. J.A. 43. McKinney unquestionably heard both calls because he acknowledged them on the radio, said he would stand down, and proceeded without the flashers and siren that

would have signified an emergency response. *Id.*; Audio Recording at 3:35. Yet, more than two minutes later, McKinney was still exceeding the speed limit by more than 35 miles per hour when he struck Janel Harkness's car. J.A. 68, 70. Accepting his supervisor's initial report at face value, it is possible McKinney initially did heed the calls to slow but then speeded up again before the collision. J.A. 43.

A core underlying policy concern in *Parratt* and for proponents of *Parratt-Hudson* doctrine expansion is that the egregiousness required for a constitutional claim not be watered down by federalizing run-of-the-mill tort claims. The extreme facts of this case prevent a fair airing of that concern. McKinney's intentional misuse of his police vehicle strikes at the core of the arbitrary executive action a substantive due process claim is designed to remedy. Ultimately, if *Parratt-Hudson* doctrine expansion garners the Court's consideration, it should not be before the issue has received more extensive treatment by lower courts and should not arise in a case like this where extreme facts will limit the policy discussion that may determine the doctrine's scope.

### D. There is no appellate record for the Court to review on the application of the *Parratt-Hudson* doctrine to Harkness's claim.

Finally, beyond the parties' dispute over the *Parratt-Hudson* doctrine's scope lies the unexplored issue of whether McKinney can meet its elements. The doctrine only applies when state law offers an "adequate" remedy. *Hudson*, 468 U.S. at 519. Whether the SCTCA provides an "adequate" remedy for

McKinney's deliberately indifferent misconduct is a question McKinney asks the Court to address in the first instance. The district court and court of appeals' rulings both categorically rejected expanding the *Parratt-Hudson* doctrine to substantive due process claims and, therefore, neither explored whether the SCTCA's remedies are "adequate" as applied to Harkness's suit. Pet. App. 26-28; 72-73 n.4. In fact, the court of appeals cited with approval Seventh Circuit precedent rejecting *Parratt-Hudson* in part because state law did not provide an adequate remedy. Pet. App. 25-26; *see also Armstrong v. Daily*, 786 F.3d 529, 545 (7th Cir. 2015).

The Petition does not explain how the SCTCA offers an adequate remedy and instead asks the Court to assume adequacy without any support from the record. Pet. at 12. But asking the Court to infer adequacy from Harkness's settlement with McKinney's former co-defendant is no substitute for the showing the *Parratt-Hudson* doctrine requires. Where Parratt applies, a state law remedy need not provide the full amount of recovery that a § 1983 claim offers, but applying *Parratt* here would require consideration of whether the available state remedy "fully compensated" Harkness for the loss she suffered. *Hudson*, 468 U.S. at 535; *Parratt*, 451 U.S. at 544. The SCTCA offers Harkness at most $ 300,000 for losses McKinney caused. S.C. Code Ann. § 15-78-120(a)(1). Harkness's medical bills alone are nearly double that figure (J.A. 49), and her permanent injuries mean the future damages are exponentially more.

Ultimately, ruling on the adequacy question would require the Court to make a careful examina-

tion of the relevant state law. Here, that would mean addressing SCTCA intricacies including its limitations on the waiver of sovereign immunity for some forms of intentional misconduct and its limited recognition of direct tort claims against state employees for such acts. S.C. Code Ann. §§ 15-78-60(17) and 15-78-70(b). Since this question is so heavily grounded in unique state law considerations and the lower courts did not address those considerations, the issue is not squarely presented for this Court's review.

## II. McKinney's proposed culpability standard challenge asks the Court to resolve key factual disputes in his favor.

McKinney challenges the culpability standard applied to Dean's substantive due process claim, based not on an assertion that the legal principles the court of appeals applied are erroneous, but on the application of those agreed-upon principles to McKinney's view of the disputed facts. McKinney points to no failing or ambiguity in *Lewis*'s governing principles and to no disparity among the circuits in their application. Instead, McKinney argues he had less time to act and less opportunity to reflect than the objective CAD data and his radio calls show. McKinney's fact-based challenge is not supported by the record and provides no reason for review by this Court.

*Lewis* establishes that (1) a substantive due process claim may arise from conscience-shocking police vehicle operation; (2) the level of misconduct that shocks the conscience varies by circumstances; and (3) the key circumstances include the amount of time

an officer has to respond and the relative urgency of the matter he is addressing. 523 U.S. at 846-53. Deliberately indifferent conduct is conscience-shocking in a non-emergency where circumstances permit reflection, but intent to harm may be required if the time pressures and competing imperatives of an emergency render deliberation impractical. *Id.* at 853. The petition admits these principles are established and were correctly cited in the Fourth Circuit majority's analysis. Pet. at 13 (citing App. 10, 12).

The panel majority held only that evidence in the record could lead a reasonable juror to conclude McKinney faced no emergency and had "ample time to deliberate his actions." Pet. App. 14. Whether an officer had adequate time to contemplate his next move is an inherently factual question. *Nicholson v. City of Los Angeles*, 935 F.3d 685, 692-93 (9th Cir. 2019) (affirming finding of triable issues as to whether deliberation was practical); *Nelson v. City of Madison Heights*, 845 F.3d 695, 703 (6th Cir. 2017) ("The jury will have to decide whether actual deliberation was practical"). Thus, it was the court of appeals' view of the facts alleged and supported for summary judgment purposes that led it to the deliberate indifference standard, and that view is what McKinney challenges here.[5] This court's Rule 10

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[5] The same is true for Judge Richardson's dissent, which starts from the premise that McKinney's conduct was "hurried, discrete, and torn between competing needs of speed and safety." Pet. App. 39, 44, 49. Because the call McKinney pursued was not an emergency and he was ordered to obey traffic laws, McKinney had no "need" to speed. Nor could he have reasonably perceived one. State law bars officers from speeding to non-emergency calls. S.C. Code Ann. § 56-5-760(B).

states that claims of erroneous factual findings rarely support certiorari.

This is not that rare case. Objective evidence points to an extended time period during which McKinney made an informed, deliberate decision to defy the law. Radio calls from McKinney's supervisor and fellow officer gave clear notice that McKinney was not responding to an emergency and must obey the speed limit. J.A. 43. McKinney's recorded responses show he heard, understood, and said he would heed those calls. Audio Recording at 3:35. CAD data shows an additional two minutes and fifteen seconds elapsed before a collision where, according to an accident reconstruction, McKinney was traveling at nearly forty miles per hour over the posted speed limit. J.A. 70, 73.

The panel majority reasonably concluded this evidence suggested McKinney had time and opportunity before the collision to consider his supervisor's orders as well as state law and his employer's policy demanding he not speed. McKinney's responses suggest he did in fact understand the situation and still chose to exceed the speed limit. McKinney may not ask the Court to overlook this evidence or to favor his version of events at the summary judgment stage, especially given the limited scope of review for the denial of qualified immunity. *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014); *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (declaring "evidence sufficiency" questions in qualified immunity cases are not appealable).

McKinney's skewed version of the facts leads him to lump Dean's suit in with substantive due process

claims arising from alleged police negligence during high-speed chases. Pet. at 13-14 (citing *Temkin*). But the cancelled emergency, his supervisor's order to slow, and the intervening two-plus minutes before the collision sharply distinguish this case from *Temkin*, where an officer pursuing a fleeing suspect faced both time constraints and conflicting imperatives. Moreover, the persuasive authority that informed *Temkin* establishes only that negligence-based misconduct fails to shock the conscience. 945 F.2d at 721-22 (citing *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) and *Walton v. Salter*, 547 F.2d 824, 825 (5th Cir. 1986)). That point is not at issue here because Dean's claim is one of deliberate indifference, a culpability standard grounded in reckless misconduct. *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 306-07 (4th Cir. 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)).

Indeed, McKinney's reliance on *Temkin* only underscores that there is no circuit conflict over the culpability standard: The Fourth Circuit agrees with McKinney and with the other circuits that, under this Court's rulings, negligent misconduct does not violate substantive due process, and deliberately indifferent conduct does so only when an officer is not involved in a car chase or other emergency action that prevents deliberation over the consequences of his actions. McKinney's criticism of the court of appeals' application of that standard to this case reflects only a factual disagreement that is unsupported by the record and inherently unworthy of this Court's consideration.

## III. The Fourth Circuit's holding that deliberately indifferent police vehicle operation in a non-emergency situation violated a clearly established right does not merit review by this Court.

More than a year before Harkness's injury, a court of appeals opinion written by a current member of this Court held that it was already clearly established that nearly identical police misconduct deprived an innocent, injured motorist of her constitutionally secured liberty interest. *Browder*, 787 F.3d at 1080. That ruling relied primarily on the principles this Court announced almost twenty years earlier in *Lewis*. In *Browder*, then-Judge Gorsuch explained that, under *Lewis*, the egregious misconduct of an officer who drove with deliberate indifference to human life in the absence of an emergency does not present a close call. *Id.*

Rather than addressing these principles directly, McKinney contends that the court of appeals' somehow erred in applying the rules for examining clearly established law. But the Fourth Circuit's approach was step-by-step the same as the one this Court used earlier this term to reverse a lower court's erroneous grant of qualified immunity for egregious misconduct. Based on these established legal principles, as well as the knowing misconduct he deliberately chose, McKinney is not immune from suit. He had fair warning of the stakes when he defied his supervisor's orders and state law.

### A. Fact-based challenges to a court of appeals' application of qualified immunity principles do not support the Court's review.

McKinney's petition makes little pretense of offering any reason for review by this Court beyond McKinney's disagreement with the result below. This Court's Rule 10 states that review is rarely granted "when the asserted error consists of . . . the misapplication of a properly stated rule of law." McKinney does not challenge the court of appeals statement of the rule governing the search for clearly established law. He asserts that a clearly established right is one that is sufficiently definite that any reasonable officer in McKinney's position would know he is violating it. Pet. at 20 (citing *Plumhoff v. Rickard*, 572 U.S. 765, 778-779 (2014)). The court of appeals stated the governing rule in nearly identical terms. Pet. App. 17 (quoting *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004)). McKinney ultimately concedes his challenge is to the lower court's "application" of this rule. Pet. App. 23.

That challenge is heavily based on factual disputes. For example, as discussed above, McKinney's challenge to the clarity of the applicable culpability standard rests on his attempt to dispute the timing of key radio calls relative to the collision. He claims he had less time to deliberate and more competing concerns than Harkness's evidence suggests. This key question is a "quintessential example of the kind that [the Court] almost never review[s]." *Taylor v. Riojas*, 141 S.Ct. 52, 55 (2020) (Alito, J., concurring in judgment). The Court's rejection of such cases is grounded in several practical considerations. Cases

where operative facts are disputed are manifold, but the Court's resources are limited. *Id.* Plus, such cases offer no larger jurisprudential benefit as they "turn[] entirely on an interpretation of the record in one particular case" and "add[] virtually nothing to the law going forward." *Id*. This principle should apply in equal measure regardless of whether the petitioner is an officer opposing the denial of qualified immunity or a plaintiff objecting to its grant. *Salazar-Limon v. City of Houston, Tex.*, 137 S.Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). Because McKinney does not suggest a circuit split and disputes only the application of an unchallenged rule, a grant of certiorari is not appropriate "here.

### B. The Tenth Circuit's holding in *Browder* illustrates the absence of any need for review.

Far from presenting an intercircuit conflict, the result below is fully consistent with the one court of appeals decision most closely on point, the Tenth Circuit's decision in *Browder*. On very similar facts, *Browder* held, well before the events in this case, that *Lewis* provided the clearly established law to defeat a qualified immunity claim at the summary judgment stage. 787 F.3d at 1081-83. The officer in *Browder* raced through the streets of downtown Albuquerque, disregarded a red light, and caused a fatal collision with an innocent motorist. *Id.* at 1077. *Browder* held that, when those events occurred in 2013, *Lewis* already clearly established that an officer who has not "been asked to respond to emergencies of citizens in need" and who "faces no tug between duties owed to two sets of innocents," *id*. at 1081, violates substantive due process when he in-

jures an innocent bystander because of his deliberate choice to operate a police car with indifference to human life. *See id.* at 1082–83.

Although McKinney refuses to concede the deliberate indifference standard is either clearly established or the governing rule for his conduct, *Browder* recognized deliberate indifference (i.e. "reckless indifference") is "precisely the sort of mens rea *Lewis* says will normally suffice to establish liability." *Id.* at 1081. *Lewis* is just as clear in placing an officer on notice that McKinney's form of misconduct bears constitutional consequences. *Lewis* "spoke unmistakably" in holding a viable due process claim may arise from a police officer's "intentional misuse" of his vehicle. *Id.* at 1083 (citing *Lewis*, 523 U.S. at 854 n.13 and *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)).

The Petition dismisses *Browder* in a single paragraph, never addressing the holdings from *Lewis* that it highlights. Pet. at 21. McKinney first argues *Browder* is irrelevant because the officer there was alleged to be off-duty. However, reading *Browder* as limited to off-duty officers misinterprets its meaning. The officer's conduct violated clearly established law not because of his duty status but rather because he was speeding and violating other traffic laws "for no law enforcement reason." *Browder v. Casaus*, 675 Fed. Appx. at 851; *see also Browder*, 787 F.3d at 1081. There was also no law enforcement reason for McKinney to defy his supervisor's order after he knew the situation he faced was not an emergency. Just like the officer in *Browder*, he sat "in the same place as everyone else when it comes to respecting the rights of others," *id.*, once he learned that the

circumstances did not permit him to speed or violate any other traffic laws.

McKinney's contrary position that an officer may only invade a civilian's substantive due process rights when off duty finds no support in precedent. This Court has sanctioned a substantive due process claim when an officer compelled an invasive medical procedure while investigating a suspected drug offense, and the Fourth Circuit has applied the doctrine to an officer's on-duty sexual assault. *Rochin v. California*, 342 U.S. 165 (1952); *Jones v. Welham*, 104 F.3d 620 (4th Cir. 1997). Indeed, it is only when an officer is acting under color of state law that the Fourteenth Amendment is even implicated by his actions.

McKinney also contends *Browder* makes a fatal admission by noting substantive due process can be a "murky" area of the law. Pet. at 21 n.9 (citing *Browder*, 787 F.3d at 1080). But the doctrine's potential murkiness at the margins does not immunize the egregious disregard for human life at issue in *Browder* and here. No one can reasonably dispute the damage McKinney has done to Harkness is a substantial impairment of her liberty interest. *Browder*, 787 F.3d at 1080. Moreover, this case "does not seem . . . to implicate any serious borderline disputes" between ordinary tort and arbitrary government action, *id*., because McKinney's conduct was so far removed from what the law allowed and what the circumstances demanded.

McKinney's final argument is that *Browder* should be cast off as an outlier with "extreme facts." Pet. at 21. However, McKinney's alleged misconduct is no less extreme. As *Browder* recognized, *Lewis*'s

prohibition on intentional misuse of a police vehicle is precisely the type of core constitutional principle that forms clearly established law. 787 F.3d at 1083. The evidence strongly supports its application here. McKinney misused his vehicle by driving in an unauthorized and illegal manner. His fellow officer's call cancelling an emergency response informed McKinney that speeding was unnecessary. (J.A. 43). His supervisor's call notified him that speeding was against his employer's order. (J.A. 40 ¶ 6). McKinney's training made clear that unjustified speeding was both unauthorized and exceedingly dangerous, especially at night without the warning lights/siren required by state law. (J.A. 115-27); S.C. Code Ann. § 56-5-760(C). McKinney's intent to misuse is also supported by evidence. He acknowledged his fellow officer's report that the situation was not an emergency and his supervisor's order to slow down. J.A. 43. Crucially, he even stated on tape that a "Code 1" (non-emergency, no speeding) response was required. Audio Recording at 3:35.

McKinney's extreme violation of the speed limit over the next two-plus minutes was an intentional choice to disobey the law. A reasonable jury could also choose to credit two other pieces of evidence: (1) The supervisor's report that he saw McKinney driving within the speed limit after the Code 3 was cancelled (J.A. 43); and (2) an uncontested expert report that McKinney was driving 83 miles-per-hour when he collided with Harkness. (J.A. 70). That evidence suggests McKinney intentionally chose to speed up once out of his supervisor's sight and despite knowing there was no emergency. All told, the evidence amply supports a finding that, on the summary judgment record, McKinney violated the clearly es-

tablished rule that intentional misuse of a police vehicle supports a substantive due process claim.

### C. The court of appeals' application of qualified immunity principles is in line with the Court's recent precedent.

The remainder of McKinney's qualified immunity argument questions the Fourth Circuit's analysis of precedent to determine clearly established law. (Pet. at 20-23). The court of appeals' analysis, however, closely tracks that employed by this Court earlier this Term.

In *Taylor v. Riojas*, the Court's per curiam opinion reversed the Fifth Circuit and denied summary judgment to Texas corrections officers who sought qualified immunity for claims by a prisoner alleging he was housed in sewage-filled cells. 141 S.Ct. at 53. The Court made four crucial points in finding the misconduct alleged would violate a clearly established right. First, while the officers' precise conduct had not been previously addressed in precedent, a "general constitutional rule may apply with obvious clarity" and create a clearly established right even without a previous case directly on point. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Second, for some egregious misconduct, the obvious cruelty of an officer's act will provide some notice that his conduct offends the constitution. *Taylor*, 141 S.Ct. at 54 (quoting *Hope*, 536 U.S. at 745). Third, the Court examined the record and found no evidence the misconduct was the product of exigency; rather, the evidence showed the offending officers acted with deliberate indifference. *Taylor*, 141 S.Ct. at 54. Fourth, the Court held that the Fifth Circuit's citation to distinguishable case law did not "create any doubt

about the obviousness of [the plaintiff's] right." *Id.* n.2 (citations omitted).

The Fourth Circuit's ruling in this case, issued one month before *Taylor*, makes each of the same points. McKinney's egregious decisions while behind the wheel of his police vehicle had not been previously addressed in the Fourth Circuit, but the court correctly looked to rights "manifestly included within more general applications of the core constitutional principles involved." Pet. App. 18 (citing *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017)). Then, following *Browder*'s lead, the court noted that such reckless police vehicle operation for no legitimate law enforcement objective was "obviously unlawful" in a way that would provide the required fair notice even in the absence of similar precedent. Pet. App. 19 (quoting *Browder*, 787 F.3d at 1082, 1083). The court of appeals also examined the record and found that, construing the evidence in Dean's favor, McKinney acted with deliberate indifference in a non-emergency situation. Pet. App. 23. Finally, similar to *Taylor*, the court of appeals rejected McKinney's citation to inapposite authority (here, high-speed-chase cases like *Temkin*), finding they did not render Harkness's right any less clear under these very different circumstances. Pet. App. 20.

*Taylor*'s confirmation that the Fourth Circuit applied the proper qualified-immunity analysis underscores the absence of any basis for reviewing the court's conclusion that McKinney is not entitled to qualified immunity. This case has none of the hallmarks of one that requires exercise of this Court's discretionary review. *Lewis*'s clearly established

rules provided McKinney with fair notice of his potential liability—just as *Browder* recognized on nearly indistinguishable facts. And each step of the court of appeals' analysis aligns with the approach approved in *Taylor*.[6] Ultimately, qualified immunity belongs to an officer who "reasonably misapprehended the law governing the circumstances []he confronted." *Taylor*, 141 S.Ct. at 53 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). When McKinney made his fateful choices in this case, no reasonable officer in his position could have misapprehended his legal obligations or the constitutional peril he would face for ignoring them.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] The court of appeals' detailed review of precedent is a far cry from a case like *City of Escondido, Cal. Emmons*, 139 S.Ct. 500, 502 (2019), where the Court granted review and reversed the denial of qualified immunity because the Ninth Circuit's entire "clearly established" analysis consisted of one sentence.

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