No. 21-10

In the Supreme Court of the United States

LORI BRAUN, AS ADMINISTRATRIX OF THE ESTATE OF CASSANDRA BRAUN, DECEASED, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF CASSANDRA BRAUN,

Petitioner,

v.

BRIAN RAY BURKE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT BILL BRYANT

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General
JENNIFER L. MERRITT
Senior Assistant Attorney General

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

QUESTIONS PRESENTED

(1) Whether, as all lower courts do, courts should consider the facts of individual cases in deciding whether to apply the intent-to-harm or deliberate-indifference standard to claims alleging that a police officer's high-speed driving violated motorists' substantive due process rights.

(2) Whether, in deciding whether a police officer had the opportunity to deliberate, a court should consider whether an officer believed he was responding to an emergency, as the Fourth and Eighth Circuits do, or whether the court believes he was responding to an emergency, as no court of appeals does.

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STATEMENT

1. On October 10, 2016, Arkansas State Police Trooper Brian Burke was one of two troopers assigned to patrol the entirety of Garland County, Arkansas. C.A. App. 155. That night, he was called to the scene of a hit-and-run accident on U.S. Highway 70. *Id.* While assisting the accident's victim, he noticed an SUV speeding with flashing hazard lights towards Hot Springs, a small city and popular tourist destination in Arkansas's Ouachita Mountains. *Id.* Based on his training, he estimated the SUV was traveling at 90 to 95 miles per hour, in a 55-mile-per-hour zone. *Id.*; Pet. App. 2.

Believing the SUV posed a serious risk to the motorists ahead, Trooper Burke decided to try to stop it. Pet. App. 3. Less than two minutes later, Trooper Burke wrapped up the hit-and-run investigation, returned to his patrol car, radioed a description of the vehicle to the county sheriff's office, and took off after the SUV. Pet. App. 2; C.A. App. 251. The SUV by then was well ahead of him, and Trooper Burke had to drive quickly—at an average of 90 miles per hour—to catch up. Pet. App. 2. Roughly eight miles later, Trooper Burke encountered Tavon Jenkins's car; it was turning left into Trooper Burke's lane. C.A. App. 30; Pet. App. 3. Though Trooper Burke tried to stop his car in time, he wasn't able to, and he crashed into Jenkins's car. *Id.* Cassandra Braun, Jenkins's passenger, died, and Trooper Burke was seriously injured. *Id.*

2. Rather than pursue her state-law remedies,

Braun's mother and estate administrator, Lori Braun, sued Trooper Burke and the Director of the Arkansas State Police under Section 1983, alleging Fourth and Fourteenth Amendment violations on Trooper Burke's part and failure to train him on the Director's part. Pet. App. 14. After discovery, the district court granted summary judgment for defendants on all claims. Pet. App. 19.

The district court first entered summary judgment for the defendants on Braun's Fourth Amendment claim because Trooper Burke, undisputedly, did not intend to seize Cassandra Braun. Pet. App. 16. Turning to Braun's Fourteenth Amendment substantive due process claim, the district court correctly noted that under Eighth Circuit precedent, an intent-to-harm standard applies to substantive due process claims challenging high-speed police driving so long as the officer believed he was responding to an emergency at the time. Pet. App. 17-18. Trooper Burke undisputedly had that belief, so the intent-to-harm standard applied, and because there was no evidence that Trooper Burke intended to harm Cassandra Braun, he was entitled to summary judgment. Pet. App. 18.

3. Braun appealed, as to her Fourteenth Amendment claim, and the Eighth Circuit affirmed on the same grounds. In an opinion by Judge Gruender, the court explained that it only applies the deliberate-indifference standard, Braun's preferred standard, in situations where "actual deliberation is practical." Pet. App. 4 (quoting *Terrell v. Larson*, 396 F.3d 975,

978 (8th Cir. 2005) (en banc)). When an officer believes he is responding to an emergency, past circuit precedent had held, deliberation is not practical. Pet. App. 5. Trooper Burke, the court explained, believed he was responding to an emergency, *id.*, and given he was "facing an active threat to public safety," it could hardly conclude he attested to that belief in bad faith. Pet. App. 7.

Therefore, the court applied the intent-to-harm standard. *Id.* And because Braun did not allege that Trooper Burke "intended to harm anyone," it held he did not violate Cassandra Braun's due process rights. *Id.* In turn, Braun's failure-to-train claim against Director Bryant failed for want of an underlying constitutional violation. *Id.*

Judge Grasz, though joining the court's opinion, wrote a concurring opinion to suggest the decision implicated a circuit split. In his view, while Eighth Circuit precedent looked to an officer's beliefs to decide whether he faced an emergency, two other circuits looked at "objective facts beyond the officer's subjective arguments" to decide that question. Pet. App. 12.

Judge Colloton, who also joined the court's opinion, wrote a concurring opinion in response. In his view, the split Judge Grasz described was "illusory." Pet. App. 9. In one of the cases Judge Grasz cited, he explained, there was a dispute about whether the officer sincerely believed he was responding to an emergency; in the other, the officer did not claim he believed he was. *Id.* Thus, neither applied a deliberate-indifference standard where an officer undisputedly

believed he was responding to an emergency, and neither rejected the Eighth Circuit's subjective test. Pet. App. 9-10.

Braun then petitioned for rehearing en banc. The court denied her petition; no judge dissented. Pet. App. 20.

REASONS FOR DENYING THE PETITION

I. The first question presented does not warrant review.

This case is an unsuitable vehicle to answer the first question presented. Indeed, this case does not implicate the first question listed in Braun's petition, as her second question presented demonstrates. Her first question presented claims the Eighth Circuit "appl[ies] the intent-to-harm standard of liability to all police high-speed driving," regardless of "whether there was an opportunity to deliberate." Pet. i. Yet her second question presented claims that in deciding whether to "employ[] the intent-to-harm standard" in a case of high-speed police driving, Pet. 30, the Eighth Circuit asks whether "an officer . . . subjectively believed there to be an emergency," Pet. i, that "justified high-speed driving" in response, Pet. 28.

Only one of those claims can be true, and it's the second. The first, by contrast, simply invents a rule that the Eighth Circuit has never adopted, much less applied below. While the Eighth Circuit does categorically apply the intent-to-harm standard to a subset of high-speed police driving—namely, high-speed

chases—it held that this case fell outside that subset. There is no circuit split over whether the intent-to-harm standard categorically applies to all high-speed police driving, and this case does not present an opportunity to decide whether it categorically applies to any type of high-speed police driving.

A. Two decades ago, this Court unanimously held that "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element[s]" of a due process claim. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998). Applying that holding shortly thereafter, the Eighth Circuit held that "the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender." *Helseth v. Burch*, 258 F.3d 867, 871 (8th Cir. 2001) (en banc). But it went no further. It did not hold that (or decide whether) the intent-to-harm standard applied to other types of police high-speed driving.

In a subsequent en banc opinion, reasoning that high-speed chases could not logically be distinguished from other emergency situations, the Eighth Circuit held that the intent-to-harm standard applied not only to high-speed chases, but "an officer's decision to engage in high-speed driving in response to other types of emergencies" as well. *Terrell v. Larson*, 396 F.3d 975, 979 (8th Cir. 2005) (en banc). *Terrell*, for example, involved a high-speed drive to a residence

where police were told a woman was threatening to harm her three-year-old child. But under the Eighth Circuit's rule, the application of this standard was not automatic. To receive its benefit, officers were required to show that they "believed that they were responding to an emergency" at the time. *Id.* at 980.

In sum, then, the Eighth Circuit, like this Court in *Lewis*, has adopted the intent-to-harm standard for all high-speed *chases* of suspected offenders. But in other high-speed driving cases, the Eighth Circuit applies that standard only if the officer believed he was responding to an emergency.

B. In this case, the Eighth Circuit applied the second of these rules, not the first. Viewing Trooper Burke's conduct as "a hunt for a suspect whose whereabouts were unclear," Pet. App. 11 (Grasz, J., concurring), rather than a "high-speed chase of a suspect," Pet. App. 4, or a "pursuit" of one, Pet. App. 8 (Colloton, J., concurring),[1] it required Trooper Burke to show "that he believed he was responding to an emergency" before applying the intent-to-harm standard. Pet. App. 5. Further, the Eighth Circuit required Burke to

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[1] Whether the Eighth Circuit was correct in that view is doubtful. It is far from clear that Trooper Burke's pursuit was any less "a high-speed automobile chase aimed at apprehending a suspected offender" because the speeding vehicle he saw was out of his sight by the time he started chasing after it. *Lewis*, 523 U.S. at 836. The distinct possibility this Court would hold this case involves a high-speed chase and is squarely controlled by *Lewis* makes it an especially poor case to address how *Lewis*'s rationale applies to other kinds of high-speed police driving.

show his belief "was not so preposterous as to reflect bad faith." Pet. App. 7. Because it held he believed, in good faith, that he was responding to an emergency, it applied the intent-to-harm standard. *Id.* ("Trooper Burke believed he was responding to an emergency, and thus we apply the intent-to-harm standard").

Braun is simply incorrect, then, in claiming the Eighth Circuit has "applied the intent-to-harm standard of *Lewis* to all high-speed driving by police officers, regardless of the circumstances." Pet. 13-14. Rather, except for cases that involve chases, the Eighth Circuit only applies the intent-to-harm standard in emergency circumstances. Braun may quarrel with *how* the Eighth Circuit "examines the facts of individual cases" and prefer an objective definition of emergencies, Pet. i, but the Eighth Circuit undeniably does examine the facts of individual cases before applying the intent-to-harm standard. There is no conflict between the Eighth Circuit and other circuits on whether the intent-to-harm standard applies to all high-speed police driving or only on a case-by-case basis.

C. Nor is there a conflict between the Ninth Circuit and other circuits on that score. Braun initially claims the Ninth Circuit has applied the intent-to-harm standard to "all high-speed driving by police officers." Pet. 13. But she later falls back to merely claiming that it has applied that standard to "all high-speed chases." Pet. 21. The latter claim is more accurate. In fact, the Ninth Circuit only categorically applies the intent-to-harm standard to "high-speed

chases aimed at apprehending a fleeing suspect." *Bingue v. Prunchak*, 512 F.3d 1169 (9th Cir. 2008). It has never held the intent-to-harm standard applies categorically to high-speed police driving. And whether its rule for chases is correct or not is not presented in this case because the Eighth Circuit held Trooper Burke's driving was not a chase.

To be sure, Braun has put her finger on a far more modest—and unpresented—split than the one she depicts. Whereas the Eighth Circuit, following *Lewis*, applies the intent-to-harm standard to all high-speed police chases of suspected offenders, and the Ninth Circuit applies that standard to all high-speed chases of fleeing suspects, the Third Circuit applies the deliberate-indifference standard to high-speed chases of suspected offenders who have only committed a minor offense, and aren't fleeing in a manner that "endanger[s] the public welfare." *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 718 (3d Cir. 2018); *see also id.* at 721 (noting inconsistency with the Eighth and Ninth Circuits' decisions). In an appropriate case, which of these approaches is right is a question that may warrant this Court's review. But this case has nothing to do with that question, because the Eighth Circuit did not view it as a chase case. Review of the first question presented should therefore be denied.

II. The second question presented does not merit review.

Braun's second question presented accurately states the basis for the Eighth Circuit's decision. The

Eighth Circuit does indeed ask, and asked here, whether an officer "believed there to be an emergency" before applying the intent-to-harm standard. Pet. i. But like her first question presented, her second question presented wrongly claims a circuit split. No circuit uses a purely "objective test to determine whether an emergency existed," *id.*, or rejects the Eighth Circuit's approach. Rather, the most that can be said for Braun is that in some circuits that have addressed the issue, the precise definition of emergency remains an open question.

A. Braun first claims the Eighth Circuit's test conflicts with the Third Circuit's decision in *Sauers*. Pet. 29. That is incorrect. In *Sauers*, a police officer saw a driver commit what the Third Circuit described as a "minor traffic infraction," 905 F.3d at 716, or "summary traffic offense," *id.* at 715. Though he radioed police in the neighboring town to request they pull the driver over when he reached their jurisdiction, he nevertheless decided to pursue the driver himself at speeds over 100 miles per hour. *Id.* He then lost control of his car, killed a third party, and pled guilty to vehicular homicide. *Id.* Understandably, given these facts, the officer made "no allegation that [he] believed he was responding to an emergency." Pet. App. 9 (Colloton, J., concurring). And given his tacit concession of the issue and the extremity of the fact pattern, the Third Circuit found it "obvious" there was none. *Sauers*, 905 F.3d at 718. It did not apply an "objective test" or reject a subjective one; whether there was an emergency simply wasn't disputed.

Braun next claims the decision below conflicts with the Fourth Circuit's decision in *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407 (4th Cir. 2020). Pet. 29. But *Dean*, in fact, applied a subjective test. In *Dean*, an officer who was called to assist with a traffic stop claimed "he was responding to what he believed to be an emergency." 976 F.3d at 414. Rather than treat this belief as irrelevant, the Fourth Circuit held a jury could find he wasn't responding to an emergency because it could find he didn't really believe he was, for several reasons.

First, it noted that after he was called to assist, he was told "that there was no emergency." *Id.* at 415. Second, it noted that he "not only acknowledged the change in the status of the call but stated affirmatively that he was 'backing down' to . . . a non-emergency response." *Id.* at 415-16. Third, it noted that he "deactivated his emergency lights and siren as required for non-emergency responses—indicating that he knew the situation was no longer an emergency." *Id.* at 416. On the basis of this evidence of what the officer knew and believed—not objective evidence that no emergency existed—the Fourth Circuit held that a jury could find he was not responding to an emergency. *See* Pet. App. 9 (Colloton, J., concurring) ("At a minimum, there was a factual dispute about whether the officer believed in good faith that he was responding to an emergency."). The Fourth Circuit's test is no different from the Eighth Circuit's.

Even more puzzlingly, Braun finally claims that the decision below conflicts with the Seventh Circuit's

decision in *Flores v. City of South Bend*, 997 F.3d 725 (7th Cir. 2021). Pet. 29. In *Flores*, the officer didn't argue that he was responding to an emergency, or even that the intent-to-harm standard should apply; he only disputed whether he was deliberately indifferent. *See id.* at 729-30. Understandably so; overhearing on the police radio that two officers, who didn't request assistance, were about to stop a speeding car, the defendant sped to the scene at 98 miles per hour from two miles away to assist. *See id.* at 728. Given his arguments, the Seventh Circuit presupposed that he was "not responding to an emergency" and that the deliberate-indifference standard applied. *Id.* at 729. *Flores* is not a precedent on the "test" for deciding when an emergency exists. Pet. i.

B. Finally, even if some circuit did apply an objective test to decide whether an officer was facing an emergency, this case would come out no differently under that test. Indeed, the Eighth Circuit has already indicated how it would decide the case under an objective test, aptly describing the circumstances Trooper Burke faced as "an active threat to public safety." Pet. App. 7.

The proper disposition of this case under an objective test is also illustrated by Braun's own arguments. On the one hand, Braun maintains that the risk of "damage to life and liberty" posed by high-speed police driving is so great that unjustified high-speed police driving generally violates the Constitution. Pet. 32. On the other, she paradoxically claims that an untrained civilian's driving at 90 to 95 miles per hour

towards a city does not even pose an emergency. Her only rationale for that claim is that Trooper Burke was merely "speculat[ing] that a driver he once saw speeding might still be speeding." Pet. 27 n.14. But that's little more than Braun's own speculation that the driver may have voluntarily stopped speeding. And requiring Trooper Burke to make such an assumption—rather than attempting to catch up to the driver—would have left him in the untenable position of letting a dangerous situation continue.

Thus, on the undisputed facts, even a court that defined emergencies objectively would have concluded that Trooper Burke was responding to one. *Cf. Sauers*, 905 F.3d at 718 (granting that "[p]ursuing an actively fleeing suspect who is endangering the public welfare" justifies high-speed driving). And that means that this case would come out the same way in any circuit. There is no conflict.

III. This case is a poor opportunity to review the questions presented.

Even if Braun prevailed on both questions presented, she would not obtain relief. In part this is because, as explained above, the Eighth Circuit already agreed with her on the first question presented, and she would lose under her preferred approach to the second. But it's also because even if the courts below held on remand that Trooper Burke didn't face an emergency, and was deliberately indifferent, Respondents would be protected by qualified immunity. After all, under settled circuit precedent at the time of

the accident, Trooper Burke's actions were clearly lawful. This Court's review, therefore, would be an entirely academic exercise.

In response, Braun may claim that this Court occasionally grants certiorari to decide substantive constitutional questions when defendants will likely be protected by qualified immunity. *See, e.g.*, *Torres v. Madrid*, 141 S. Ct. 989 (2021). But in those rare cases, the Court is usually presented with a deep and entrenched circuit split that demands resolution. *See* Pet. for Writ of Cert. 9-17, *Torres* (No. 19-292) (detailing four-to-two split among courts of appeals and state courts of last resort in decisions seven to 24 years old). Here, stating the case for Braun most charitably, on the only question truly presented, there is at most an ambiguous tension between the decisions of one circuit, the Eighth, and a very recent decision of one other circuit, the Third. Even if that tension could be called a split, the Court should wait for a more appropriate case, and further percolation, before resolving it.

Braun may also suggest that if qualified immunity bars review now, it would bar review forever, because the law will never be clearly established until this Court settles it. But that is not correct. If a court of appeals adopts her proposed objective test, that test will become clearly established law in that circuit. If an officer in that circuit who believed he was responding to an emergency then petitioned from a decision denying him immunity, this Court's review would not merely be academic. It would resolve the case. As a

general matter, even in cases presenting deep splits, that kind of exercise of this Court's certiorari jurisdiction is more appropriate than granting review when qualified immunity will ultimately control the outcome. But that is especially true here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
Counsel of Record
VINCENT M. WAGNER
Deputy Solicitor General
ASHER L. STEINBERG
Assistant Solicitor General
JENNIFER L. MERRITT
Senior Assistant Attorney General

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

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