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, TROOPER, INDIVIDUALLY AS AN OFFICER OF THE ARKANSAS STATE POLICE; BILL BRYANT, COLONEL, INDIVIDUALLY AS THE CHIEF EXECUTIVE OFFICER OF THE ARKANSAS STATE POLICE,

Respondents.

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

REPLY BRIEF

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ARGUMENT

I. THERE IS A CIRCUIT SPLIT ON WHETHER A SINGLE CULPABILITY STANDARD, INTENT-TO-HARM, APPLIES TO ALL POLICE HIGH-SPEED DRIVING

A. Introduction

The essence of Braun's Petition for Certiorari is that dangerous high-speed driving by police officers occurs under a variety of circumstances, and that a "one size fits all" test is not sufficient to determine when high-speed driving by the police violates the constitutional rights of an injured person. Circuit Courts are split with respect to whether *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), compels a single approach.

An officer may engage in a high-speed pursuit of a fleeing suspect flouting the officer's directive to stop. Or the officer may be chasing or hunting for a potential suspect who has no knowledge of the officer's presence. The offense for which the suspect is sought may vary from trivial to serious. An officer may speed to the scene of an actual emergency. Or the officer may be driving to a scene that he claims is an emergency when no emergency exists. The supposed emergency might be anything from a life-threatening crisis to a minor misdemeanor. The officer might be forced to act

instantaneously with no time for reflection. Or the officer may have an opportunity for deliberation, either at the outset or as the situation develops. The officer may or may not have has notified his dispatcher; may or may not have engaged his emergency lights and siren; and may or may not be acting in accord with the requirements of state law, departmental policy, and the officer's training. The intent-to-harm test is not appropriate in all these situations and does not take into account all these variables.

B. Respondent Burke Incorrectly Asserts that the Eighth and Ninth Circuits Would Use a Test Other Than Intent-to-Harm in the Cases Petitioner Cited From Other Circuits

Respondent Burke argues that the Eighth and Ninth Circuits would have decided all the cases cited in the Petition the same way the Third, Fourth, Seventh, and Tenth Circuits did. He claims that the differences in analytical approach between the circuits are of no significance and that only the facts matter. Petitioner disagrees.

1. The Ninth Circuit

In *Bingue v. Prunchak*, 512 F.3d 1169 (2008), the Ninth Circuit applied the intent-to-harm standard to a case in which an officer was speeding toward what he believed was an emergency. Other officers were in immediate pursuit of a stolen car but, contrary to what

Burke implied, Officer Prunchak was not one of them. He had merely heard about the pursuit on the radio and was attempting to catch up to it. *Bingue* is similar to *Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020) and *Flores v. City of South Bend*, 997 F.3d 725 (7th Cir. 2021), where officers drove at high speeds to assist other officers involved in what they believed were emergencies. Speeding at around 100 miles per hour, Prunchak collided with plaintiffs' vehicle *before* he caught up to the pursuit. 512 F.3d at 1171.

The Ninth Circuit rejected the plaintiffs' argument that the officer had time to deliberate. 512 F.3d at 1175.[1] It held that the officer had not acted with an intent-to-harm, because he was responding to an emergency. The reasoning leads to the conclusion that the Ninth Circuit would have applied the intent-to-harm standard, found no intent-to-harm, and ruled for the defendants in *Dean* and *Flores*.

The Ninth Circuit would not distinguish *Dean* and *Flores* from *Bingue* on the ground that objectively there were no emergencies in the Third and Fourth Circuit cases, nor apply a standard other than intent-to-harm in *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), or *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), although there were no emergencies

[1] The Ninth Circuit interprets *Lewis* to mean there is no opportunity to deliberate whenever "an officer encounters fast paced circumstances presenting competing public safety obligations." *Porter v. Osborn*, 546 F.3d 1131, 1139 (2008) (finding no opportunity to deliberate in a five-minute encounter that led to an officer shooting a suspect).

in those cases. The Ninth Circuit considers all high-speed driving by the police as emergencies: "The sheer velocity of a high-speed chase necessarily converts each situation into a genuine 'emergency.'" 512 F.3d at 1176. It rejects "drawing an arbitrary distinction between 'emergency' and 'non-emergency' situations." *Id.* Thus in the Ninth Circuit, "The purpose to harm standard applies regardless of whether an 'emergency' or 'non-emergency' situation gave rise to the police chase. . . . " *McGowan v. County of Kern*, 2018 WL 2734970 (E.D. Cal. 2018) (unreported), citing *Bingue*, 512 F.3d at 1177, (applying intent-to-harm standard to officer speeding at 85 miles per hour to a "disturbing the peace" call at a saloon).

2. The Eighth Circuit

Since *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (*en banc*), was decided, the Eighth Circuit has never applied anything other than the intent-to-harm standard to high-speed police driving. Nonetheless, Burke argues that the Eighth Circuit would apply the standard of deliberate indifference in *Sauers, Flores*, and *Green* because the officers were not in pursuit of a fleeing vehicle and the officers did not claim there was an emergency. As to *Dean*, Burke also concludes the Eighth Circuit would have applied deliberate indifference. Petitioner disagrees with respect to each case.

It is important to understand that the Eighth Circuit initially applied deliberate indifference to a police high-speed pursuit. In *Feist v. Simonson*, 222

F.3d 455 (8th Cir. 2000), an officer pursued a stolen vehicle at high speeds for six minutes, ultimately following it as it turned and drove the wrong way on a freeway. The court concluded that the chase may have required split second reactions at the outset, but "graduated from one requiring heated responses to one allowing conscious deliberation," and applied the deliberate indifference standard. 222 F.3d at 464.

Helseth overruled *Feist*. It concluded that the intent-to-harm standard must be applied "to *all* high-speed police pursuits aimed at apprehending suspected offenders." 258 F.3d at 871 (emphasis in original). Subsequently, in *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (*en banc*) the court extended *Helseth* to require the intent-to-harm standard in all cases of police high-speed driving where an officer subjectively believed he was responding to an emergency. In *Terrell*, the defendant officers interrupted their dinner at the police station to proceed at high speeds to a domestic disturbance involving a threat to a child, despite the fact that another cruiser had responded to the call, that yet another deputy was providing backup, and that both that deputy and the dispatcher had told the defendant officers they could cancel. The Eighth Circuit ruled in the officers' favor. This provoked the following response from the dissenting judges:

> Today's decision has the effect of giving police officers *un*qualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer

> may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends *Lewis*'s high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the *field* to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the *police station*. 396 F.3d at 981 (emphasis in original).

The dissenting judges accurately summarized the current state of the law in the Eighth Circuit.

Burke claims the Eighth Circuit would have rejected the intent-to-harm test in *Dean*, *Sauers*, *Flores*, and *Green*. In *Dean*, the defendant McKinney claimed he was responding to what he believed was an emergency. 976 F.3d at 414. That would have been enough to compel the Eighth Circuit to use the intent-to-harm standard, but Burke argues that court would have found McKinney's claim preposterous and rejected it. In *Sauers*, *Flores*, and *Green*, the defendants did not claim to believe there was an emergency. The officers in those cases, however, might well have claimed belief in an emergency if that would have provided a defense.

Dicta in some Eighth Circuit opinions suggests a bad faith exception might exist, but it has never been

employed. Cases in which the Eighth Circuit has credited subjective claims of emergencies raise serious doubt whether it ever would be.

In *Terrell*, the officer's belief in an emergency was credited, despite the fact that the call was being covered by other officers, including backup. There was no objective emergency. Indeed, as the dissent noted, the defendant Larson stated that he continued to the scene primarily to give his partner, a trainee officer, experience in a high-priority call. 396 F.3d at 983-984. In *Sitzes*, the court noted that the situation was not as serious as in other cases, that it might not qualify as an "emergency" under the police policy and procedures manual, and that other officers testified they would not have driven in the manner that the defendant did. Even the fact that the defendant proceeded without emergency lights or siren in operation was disregarded because it did not constitute "direct evidence" of his subjective belief and therefore was inferior to the officer's affidavit. 606 F.3d at 468. In the instant case, the Eighth Circuit relied on *Sitzes* to reject Braun's argument that Burke's failure to employ his emergency lights and siren undercut his claim that he believed he was responding to an emergency. *Braun*, 983 F.3d at 1003.

These cases render unpersuasive Burke's argument that the Eighth Circuit would have rejected the officer's claim that he believed an emergency existed in *Dean* or similar claims that might have been made in other cases.

C. Respondent Bryant Incorrectly Argues There Are No Circuit Splits Which This Court Should Address

Question 1

Respondent Bryant argues that this case is not a police high-speed chase and thus is not comparable to the cases from other circuits. Bryant claims the Eighth Circuit did not treat this case as a high-speed "chase" or "pursuit," and that the "Eighth Circuit held Trooper Burke's driving was not a chase." Bryant Opp. 8.[2] This contention is hard to fathom, inasmuch as the court's opinion begins, "The high-speed police pursuit of a speeding vehicle tragically ended with a car crash killing Cassandra Braun." 983 F.3d at 1001. The court's opinion refers to Burke's "pursuit" of the vehicle, or his decision to "pursue" it repeatedly. At no point does the court's opinion state a holding that there was no chase or pursuit. Indeed, even Bryant himself refers to the fact that Burke "took off after the SUV." Bryant Opp. 1.

It is appropriate to compare the instant case to *Sauers* and *Green*, in both of which an officer was chasing after a suspect who was unaware of the officer's presence. One should expect a similar analysis

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[2] Only concurring Judge Grasz characterized this case as not involving "a high-speed pursuit of a fleeing suspect." He did so to emphasize that the result depended on Burke's belief he was responding to an emergency. 983 F.3d at 1005. That was a point that concurring Judge Colloton stated was not "legally significant." 983 F.3d at 1004.

in these three cases, but they are treated differently by the different circuits.

The Third Circuit used deliberate indifference in *Sauers*, having found that the officer "had at least some time to deliberate," 905 F.3d at 718; the Eighth Circuit used intent-to-harm in the instant case; and the Tenth Circuit in *Green* employed a two-step analysis. In *Green*, the court first found the facts placed the case "in the middle range of the culpability spectrum" and employed a "middle range standard" of "'deliberate indifference' or 'calculated indifference' which is sufficient to 'shock the conscience.'" 574 F.3d at 1302. The court uses the deliberate indifference standard "when actual deliberation is practical." 574 F.3d at 1303. In the second step, however, the court ruled that "a culpable mental state, alone, is insufficient to establish a violation of substantive due process." *Id.* It analyzed whether the conduct was "conscience shocking" as a separate issue from the culpability standard, found that it was not, and therefore there was no deliberate indifference. The Tenth Circuit's analysis is dissimilar to both the Third and the Eighth Circuits' and departs from this Court's analysis in *Lewis* where the Court established the culpability standard precisely to define what constituted conscience shocking behavior.

Question 2

Both Respondents argue that there is no split in the circuits over whether to use a subjective or an objective test in determining the existence of an

emergency. They are simply wrong. First, the argument ignores the plain and very clear language of Eighth Circuit opinions insisting on a subjective standard. *Braun*, 983 F.3d at 1002; *Sitzes*, 606 F.3d at 467; *Terrell*, 396 F.3d at 980.

In contrast, as we explained in the Petition, the Third, Fourth, and Seventh Circuits use an objective test to determine whether there was an emergency; for example, in *Sauers*, "There was no emergency at all." 905 F.3d at 716-17. What the officer *believed* was never discussed in the opinion. In *Dean*, the decision was based on "facts that support a finding that there was no emergency." 976 F.3d at 415-26. Whether there was an emergency was an objective fact that could be determined by the jury. 976 F.3d at 415. In *Flores*, two officers made a routine stop of a car for speeding, none of the other three members of their tactical group pursued the driver, and none of the five officers made a request for assistance from any other officers. 997 F.3d at 725. There was simply no emergency.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IT WILL CLARIFY THE LAW FOR THE LOWER FEDERAL COURTS AND A DECISION IN PETITIONER'S FAVOR WILL CHANGE THE OUTCOME IN THIS CASE

A. DELIBERATE INDIFFERENCE

Respondent Burke jumps ahead to the merits to predict that Braun would lose this case even under the deliberate indifference standard. The Petition for a Writ of Certiorari stage is not the appropriate moment for a full briefing on the merits of the claim which, in the ordinary case, would be passed on by the Court of Appeals before consideration by this Court. Therefore, Petitioner will limit this argument to only a few observations.

Burke was not in immediate pursuit of a fleeing suspect. He was attempting to catch up to another vehicle which was unaware of his presence, which might not have been still on the road, might not have still been speeding, and which he might not have been able to recognize if he saw it again. Rocketing down the road at over 100 miles per hour without his emergency lights and siren, Burke doubled whatever hypothetical danger the other driver might have posed. Given that his own conduct was fatally dangerous, it cannot be persuasively argued that Burke's speeding was justified by an objective emergency. His conduct was quintessentially arbitrary, the essence of a due process violation.

Burke had multiple opportunities to reflect on his decision to initiate and continue high-speed driving. Although it was a terrible and fatal mistake, his decision to disengage his emergency lights and siren demonstrated that he was capable of deliberation. That decision alone demonstrated deliberate indifference to the safety of everyone else on the road and violated Arkansas statutory law, with no justification. Why not let the car he was chasing know that an officer was behind him with flashing lights and a siren? That is the accepted means for signaling the offending speeder to stop, as well as for warning all other drivers of the presence of the speeding officer.

Respondent Burke cites the conventionally gracious language of Col. Bryant in the letter Burke received upon his medical discharge to try to portray himself in a favorable light. A jury's decision on deliberate indifference, however, is far more likely to be influenced by Col. Bryant's testimony that there was no doubt in his mind that he was going to terminate Burke because his driving had been "reckless," "shocking," "in disregard to the safety of the motoring public," and "outside the scope of his duties." Rec. 103, 415. The defense lawyers are free to argue there was no deliberate indifference, but Respondent Bryant himself doesn't leave much room for doubt that there was.

B. QUALIFIED IMMUNITY

Both Respondents argue that this Court should deny certiorari because Braun will lose in any event on qualified immunity grounds. Qualified immunity is not an issue on this petition for certiorari. The Eighth Circuit made no decision with respect to qualified immunity and "qualified immunity" is never mentioned in that court's opinion. Nor did the district court reach qualified immunity in its decision.

If qualified immunity were an issue here, Petitioner would argue that it does not protect Respondents from liability for the reasons she set forth in her briefs in the Eighth Circuit. App. Br. 35-41; Reply Br. 9-10. Petitioner would also argue that this Court should reverse its previous jurisprudence and abandon the doctrine of qualified immunity, which has no appropriate jurisprudential or experiential basis.

Moreover, it is essential that this Court decide the substantive constitutional question presented to provide necessary guidance to the lower federal courts and the law enforcement community. As this Court has acknowledged, resolving the constitutional issue "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

III. CONCLUSION

For the foregoing reasons, Petitioner Braun requests the Court to grant the Petition for Certiorari.

Respectfully submitted,

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