No. 21-10

In the Supreme Court of the United States

LORI BRAUN, ET AL.

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 OF RESPONDENT BRIAN RAY BURKE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there exists a split among the Circuit Courts of Appeal on applying the intent-to-harm standard or deliberate indifference standard to cases of police high-speed driving.

2. Whether a court reviewing high-speed driving by a police officer should consider the officer's subjective belief that he is responding to an emergency in determining the level of culpability.

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INTRODUCTION

The facts of this case are tragic. Two young people lost their lives, and a dedicated police officer was forced to retire due to his serious injuries. While tragic, this case has been properly adjudicated at both the District Court and Circuit Court level. To try to create a controversy for this Court's review, Petitioner, Lori Braun, attempts to paint the state of the law among the Circuit Courts on the issue of high-speed police driving as disparate and muddled. This could not be further from the truth. Any appearance of disparity between the decisions of the Circuit Courts is illusory as the difference in result is easily explained by the intensive, fact-based analysis that is required in substantive due process cases. Petitioner creates a false "objective" vs. "subjective" test for claims of emergency situations. These tests simply do not exist, and the Circuit Courts are not split over them. As there is no real split among the Circuit Courts on any issue proposed by the Petitioner, this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On the evening of October 10, 2016, Arkansas State Trooper Brian Ray Burke was attending the scene of a hit and run accident at the Pearcy Post Office along Highway 70 in Garland County, Arkansas. Appellant App. 248.[1] As he was reaching the end of his encounter with

[1] References to "Appellant App." and "Appellee's App." are to page numbers of the Appellate Appendices below.

the woman who complained of the accident, he heard the wind resistance created by a fast-approaching vehicle. *Id.* Trooper Burke looked up to witness a dark-colored SUV driving along Highway 70 heading east toward the city of Hot Springs at a high rate of speed with flashing hazard lights. *Id.* Based on his training as an officer, Trooper Burke estimated that the SUV was traveling around 90 to 95 miles per hour. *Id.* This was well above the posted speed limit of fifty-five (55) miles per hour. Trooper Burke said a few words in closing to the hit and run claimant and returned to his patrol car. *Id.* at 253-54.

In that moment, Trooper Burke made the decision to try and catch up to the SUV that he believed was traveling nearly twice the posted speed limit with flashing hazard lights, believing that the SUV created a dangerous situation that posed a risk to the public. *Id.* at 155. Trooper Burke radioed to the deputies with the Garland County Sheriff's Office a description and direction of the SUV to try to receive assistance in stopping the vehicle. *Id.* at 251. Trooper Burke sought assistance from the Garland County Sheriff's Office instead of the Arkansas State Police because only two troopers were assigned to all of Garland County, a large county consisting of around 678 square miles of land.[2] *Id.* at 232 and 252. Just as Trooper Burke monitors the Garland County Sheriff's Office radio frequency, it is likely that the other State Trooper assigned

[2] *U.S. Census Bureau Quickfacts: Garland County, Arkansas,* (2010) https://www.census.gov/quickfacts/fact/table/garlandcountyarkansas/PST045219.

to the county also heard his request for assistance.

As he entered the two-lane highway, Trooper Burke activated his emergency lights to maneuver safely around some immediate local traffic. *Id.* at 284. Once he was past the traffic, Trooper Burke deactivated his emergency lights and continued toward the city of Hot Springs to catch up to the SUV. *Id.* at 254-55. Trooper Burke safely passed multiple vehicles traveling in the same direction without activating his emergency lights and sirens. *Id.* at 256-57. Trooper Burke, consistent with his training and the policies and procedures of the Arkansas State Police, drove above the posted speed limits without his emergency lights and siren to catch up to the speeding SUV and affect a stop. *Id.* at 366; Appellee App. 41, 83 and 173.

Over the course of about eight miles, Trooper Burke reached a maximum documented speed of 113 miles per hour and had an average speed of over 90 miles per hour. Rec. 14 (¶ 16). As Trooper Burke approached the outer city limits of Hot Springs, the road expanded to a four-way highway and other vehicles were more present.[3] Though Petitioner describes this area on the outskirts of Hot Springs as "congested" and with "significant traffic," Pet. Writ Cert at 7, it is clear to any objective eye that this is simply not the case. It is evident in reviewing the video that Trooper Burke maintained control of his vehicle,

[3] The video can be accessed at this link provided by Petitioner Braun: https://www.dropbox.com/sh/u7c79hdnvqtld5q/AAAOG-4AUtij9WkxavIWoKNKa?dl=0.

even at high speeds, and could easily maneuver around what traffic was present. Video.

Despite Petitioner's claim that Trooper Burke had to avoid 60 vehicles, Pet. Writ Cert at 9, the video shows that Trooper Burke only had to maneuver around 13 vehicles including three at the very beginning of his journey when he was traveling at only a few miles per hour with his emergency lights activated. Video. For most of his about five-minute journey, roughly three-and-half minutes, the road is nearly deserted and the only cars on the road are traveling in the opposite direction. Video. Again, despite Petitioner's claim that Trooper Burke crossed the center line of the road around 35 times, Pet. Writ Cert. at 9, the video shows that Trooper Burke only crossed the yellow center line nine times and most of those times were when no other traffic was present. Video. By every measure, the video shows Trooper Burke was always in complete control of his police vehicle.

A short time before the accident, Trooper Burke relocated the SUV with flashing hazard lights and activated his radar gun to attempt to determine its speed. Appellant App. 272-73. At the intersection of Airport Road/U.S. 70 and Kleinshore Road, Cassandra Braun was the passenger in a car being driven by her boyfriend, Tavon Desean Jenkins, that was sitting in the turning lane trying to make a left-hand turn onto Kleinshore Road. *Id.* at 30 (¶ 89). Both Ms. Braun and Mr. Jenkins had been drinking alcohol that night, and neither was wearing a seatbelt. Appellee App. 131-32, and 154. Mr. Jenkins had a reported blood alcohol content of 0.10, well over

the legal limit of 0.08 in the State of Arkansas.[4] *Id.* at 154. Under Arkansas law, someone with a blood alcohol content of 0.08 or more is considered intoxicated "to such a degree that the driver's reactions, motor skills, and judgment are substantially altered" causing the driver to "constitute[] a clear and substantial danger of physical injury or death to himself . . . or another person." Ark. Code Ann. § 5-65-102(4).

As Trooper Burke approached the intersection, Mr. Jenkins, either not noticing Trooper Burke approaching or failing to appreciate the speed at which he was approaching, turned into Trooper Burke's lane of travel. Appellant App. 30 (¶ 89), and 274. Trooper Burke did not have time to stop and crashed into the car driven by Mr. Jenkins at a speed of 98 miles per hour. *Id.* at 155; Appellee App. 132. The force of the impact combined with the fact that neither was wearing a seatbelt caused both Mr. Jenkins and Ms. Braun to be ejected from the car. Appellee App. 132. Tragically, neither survived the accident.

Trooper Burke was seriously injured during the accident and had to medically retire from the Arkansas State Police based on his injuries. Appellant App. 314-15. Colonel William J. Bryant, Director of the Arkansas State Police, sent Trooper Burke a congratulatory letter upon his medical retirement thanking him for his years of service and noting that "[Burke] will be dearly missed." Appellee App. 160.

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[4] Ark. Code Ann. § 5-65-103(a)(2).

Trooper Burke was in "immediate pursuit" of the suspected offender under the policies and guidelines of the Arkansas State Police:

> The officer driving an authorized emergency vehicle in immediate pursuit is exempt from posted speed limits. Immediate pursuit means the initial approach to a violator for the purposes of initiating a traffic stop or situations where a silent response is appropriate or necessary. The driver must determine whether the emergency equipment should be activated based on the totality of the circumstances, while always exercising ordinary care for the safety of all persons.

Id. at 452 (internal citations omitted). When Trooper Burke drove above the speed limit without lights and sirens, he did so within the boundaries of his training and the policies and guidelines of the Arkansas State Police. *Id.*

Trooper Burke believed that the SUV traveling at a high rate of speed with hazard lights activated, with a likely untrained driver, posed a serious risk to the motoring public and created a highly dangerous situation. *Id.* at 155. He believed, in keeping with his duties as a public servant, that he needed to act to end an emergently dangerous situation and only had about 45 to 50 seconds between the time he saw the SUV to the time he returned to his patrol car

and made the decision to pursue. *Id.* at 155, 253, and Video. He did not have the luxury of hindsight and made what he believed was the best decision based on the information he had available.

REASONS FOR DENYING THE PETITION

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION PRESENTED.

The Fourteenth Amendment's Due Process Clause guarantees citizens to be free from arbitrary government action that "shocks the conscience." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998). These types of claims are analyzed under a substantive due process analysis. *Id.* at 843. This Court's "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846.

To establish a substantive due process violation, the plaintiff must show that the officer's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847 n. 8. The constitutional concept of "conscious shocking" lies toward the "ends of the tort law's spectrum of culpability." *Id.* at 848. This Court held that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 848; see also *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986). The Court clarified that "conduct

intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis,* 523 U.S. at 849. Whether conduct that is less than intentional, such as recklessness is a much closer call for a court. *Id.*

The Court has left the door open for less than intentional conduct to be considered "conscious shocking," but only when the conduct is especially egregious. *Id.* Deliberately indifferent conduct may be enough to be considered "conscious shocking" *Id.* The Court cautions, however, that "deliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* The core of deliberate indifference is that actual deliberation was practical in the circumstances. *Id.* Taking this into account, the Court in *Lewis* held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment." *Id.* at 854.

a. The claimed circuit split relies more on factual differences among the cases than on disagreement about application of the law.

Petitioner's main point of appeal is that there is a split among the Circuit Courts of Appeals on whether the intent-to-harm standard or deliberate indifference standard is applied to particular cases of high-speed driving by police. This seeming court split is illusory, as the differing decisions reached in these cases is based on factual differences and not on the application of different standards of culpability. Every case

cited by Petitioner would have had a similar result regardless of which Circuit Court it was in. This issue requires a close analysis of each case cited by Petitioner making up the alleged circuit split.

There are some differences in the way that the Third, Fourth, Seventh, and Tenth Circuits analyze police high-speed driving cases compared to the analysis performed by the Eighth and Ninth Circuits. Despite these distinctions, however, these differing analyses have not led to disparate results.

Eighth and Ninth Circuits

It is important to begin with the circuits that Petitioner alleges are outliers on this issue – the Eighth and Ninth Circuits – and compare their analyses with the other circuits.

The Eighth Circuit, in *Helseth v. Burch*, reviewed a case in which a driver passed an officer traveling 111 miles per hour. 258 F.3d 867, 869 (8th Cir. 2001). The officer went in pursuit, but the driver fled. *Id.* Officer Burch joined the pursuit and the driver went through stop signs, lawns, over retaining walls, and even the wrong way down highways. *Id.* Burch attempted three PIT maneuvers, but none stopped the fleeing vehicle. *Id.* The driver eventually ran a red light and collided with a pickup truck driven by Helseth. *Id.* The crash killed a passenger and left Helseth a quadriplegic. *Id.* Helseth filed a § 1983 action against Burch for conducting a dangerous pursuit. *Id.*

The Eighth Circuit applied the clear rule from *Lewis* 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 of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." *Id.* at 870. (quoting *Lewis*, 523 U.S. at 836.) The Eighth Circuit correctly notes that *Lewis* holds that the intent-to-harm standard applies to all high-speed pursuits aimed at apprehending suspected offenders. *Helseth,* 258 F.3d at 871. Deliberate indifference is appropriate only when actual deliberation is practical, and a high-speed pursuit is never such a situation. *Id.* Applying this standard, the Eighth Circuit held Burch did not have time for actual deliberation. Thus, since he did not intend to harm Helseth, there was no constitutional violation. *Id.* at 872.

The Eighth Circuit next applied *Lewis* outside the realm of high-speed pursuits on a case involving two deputy sheriffs responding to a domestic disturbance call in which a woman was threatening to harm her three-year-old child. *Terrell v. Larson,* 396 F.3d 975, 977 (8th Cir. 2005). The call was assigned priority level three, which was described as "very high priority." *Id.* The deputy sheriffs called in saying they would provide backup and proceeded toward the scene. *Id.* Another officer said he would also respond, and dispatch told the deputies that they *could* cancel. *Id.* They responded saying they would continue anyway. *Id.* As they approached an intersection, they slowed to 40 miles per hour, but then sped up when they saw no cars coming.

Id. Unfortunately, they were incorrect about the presence of cars, and when they went through the intersection, they collided with Terrell's car at a speed of around 60-64 miles per hour. *Id.*

Recognizing that the Court in *Lewis* framed its analysis of the culpability issue in fairly broad terms, such as likening the decision to pursue a fleeing suspect to that of the decisions that must be made in trying to quell a prison riot. *Id.* at 978. When officers decide whether to respond to an emergency domestic disturbance call, they must make balance many issues such as the need to arrive on the scene quickly to quell violence, protect any children, assist any injured, and protecting the public at large. *Id.* at 979. The Eighth Circuit noted that substantive due process liability was much like Eighth Amendment liability, in that it focused on a government official's evil intent – either criminal recklessness if deliberate indifference applies, or intent-to-harm if the standard in *Lewis* applies. *Id.* at 980. "[B]ecause the intent-to-harm standard applies 'when unforeseen circumstances demand an officer's instant judgment' and 'decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance," we conclude that this issue turns on whether the deputies subjectively believed that they were responding to an emergency." *Id.* (quoting *Lewis*, 523 U.S. at 853) (Internal citations omitted.)

Because the deputies were responding to a call in which a woman was threatening to harm a child and the call was ranked as priority level three, the deputies believed they were responding to an emergency. *Terrell,* 396 F.3d at

980. Thus, the intent-to-harm standard applies and there was no constitutional violation. *Id.* at 980-81. The Court even went one step further and analyzed the circumstances under the deliberate indifference standard. Even under this lower standard, there is not a constitutional violation because "[t]raffic accidents of this nature are tragic but do not shock the modern-day conscience." *Id.* at 981.

The Eighth Circuit further clarified its culpability analysis in *Sitzes v. City of W. Memphis,* 606 F.3d 461 (8th Cir. 2010). In this case, Officer Wright responded to a 911 call in which a man claimed that two people stole fifty-five dollars ($55.00) from him in the Wal-Mart parking lot. *Id.* at 464. The man then called a second time to report that one of the robbers had assaulted him. *Id.* Wright then drove on a residential street with a 30 miles per hour speed limit at speeds of 80-90 miles per hour without lights or sirens. *Id.* At an intersection, he collided with a car making a left-hand turn killing the driver, Britney Sitzes, and seriously injuring her sister, Shelby. *Id.* at 464-5. Officer Wright stated in an affidavit that he believed the situation at Wal-Mart was an emergency which required him to drive in the manner he did. *Id.* at 465.

The Eighth Circuit followed the same analysis from the previous cases but sought to define the contours of its application of the rule in *Lewis*. The Court again said that the case would turn on an officer's subjective belief that they were responding to an emergency. *Id.* at 467. Yet the Court clarified that there is an exception "if an official's claim of perceived emergency is so preposterous as to reflect bad

faith." *Id.* (quoting *Terrell,* 396 F.3d at 980 n. 2.). This is a key point that Petitioner fails to address in her petition, in which she falsely claims that the Eighth Circuit provides a blanket application of intent-to-harm to all high-speed police driving cases regardless of the circumstances. Pet. Writ Cert. at 13-14. Though the Eighth Circuit ultimately applied the intent-to-harm standard in *Sitzes*, the Court left open the option for a court to reject an officer's claim of subjective belief of an emergency. *Sitzes*, 606 F.3d at 469-70.

> "[W]e do not understand this case to establish a per se rule that an officer's self-serving affidavit will always insulate that officer from substantive due process liability. Instead, we simply hold that the plaintiffs have failed to create a genuine issue of fact as to Officer Wright's subjective belief and that this belief is not so preposterous as to reflect bad faith on the part of Officer Wright."

Id. at 470. As the Eighth Circuit points out, Wright's belief that the situation at Wal-Mart was an emergency "lies somewhere in the vast middle ground" between "clear" emergencies and "clear" non-emergencies. *Id.* at 469. A clear non-emergency would not shield an officer's bad faith claim. *Id.* at 470.

The Ninth Circuit borrowed the analysis from the Eighth Circuit and applied it to a case involving a high-speed pursuit. *Bingue v. Prunchak*, 512 F.3d 1169 (9th Cir. 2008). In this case, Las Vegas police tried to pull over a car

reported as stolen. *Id.* at 1171. The driver refused and a chase ensued. *Id.* The pursuit lasted about an hour, over 90 miles, and involved dozens of units and a helicopter. *Id.* Officer Prunchak believed that he was close enough to assist but was not aware how many other units were involved. *Id.* Prunchak activated his emergency lights and went in pursuit. *Id.* Prunchak was traveling around 100 miles per hour when he lost control in a long-wide curve and sideswiped Bingue's vehicle. *Id.* Both vehicles spun out of control and came to rest in the median. *Id.* Luckily, neither Prunchak nor Bingue were seriously injured. *Id.*

The Ninth Circuit applied the *Lewis* analysis crafted by the Eighth Circuit in *Helseth*. *Id.* at 1175-76. Using the rule developed in *Lewis*, the Ninth Circuit applied the intent-to-harm standard to all high-speed chases, or pursuits. *Id.* at 1176. As Prunchak was involved in a *pursuit*, the intent-to-harm standard of *Lewis* applies, thus no constitutional violation occurred. *Id.* at 1177.

The distinction between high-speed *chases or pursuits* and high-speed *driving* is particularly important here. In her petition, Petitioner claims that the crux of the split between the circuits on culpability is that the Eighth and Ninth Circuits "have applied the intent-to-harm standard of *Lewis* to all high-speed driving by police officers, regardless of the circumstances." Pet. Writ Cert. at 13-14. This is not true.

As shown in the above cases (the very same cases cited by Petitioner as evidence of a split), the Eighth and Ninth Circuits have only

applied the intent-to-harm standard to high-speed *pursuits* or to high-speed driving in which the officer claimed that he was responding to an *emergency* with no genuine issue of fact to counter that claim. To say that these circuits have applied this standard to *all* high-speed driving, regardless of the circumstances, is a gross misstatement of their case analysis.

Third Circuit

To clarify the lack of a split among the circuits, it is important to compare the analysis of the Eighth and Ninth Circuits with that of the Third, Fourth, Seventh, and Tenth Circuits, as these circuits are the ones that Petitioner asks this Court to use as a model.

In 2018, the Third Circuit reviewed a case in which an officer was passed by a vehicle going in the opposite direction who committed a summary traffic offense. *Sauers v. Borough of Nesquehoning,* 905 F.3d 711, 715 (3d Cir. 2018). The officer turned around to pursue and radioed to police in a neighboring borough to pull the car over if it reached their jurisdiction. *Id.* The officer reached speeds of over 100 miles per hour to try to catch the car, but lost control in a curve and crashed into another vehicle seriously injuring the driver and killing the driver's wife. *Id.* A key point here is that the officer was charged and pleaded guilty to vehicular homicide, which required proof beyond a reasonable doubt of reckless or grossly negligent driving, and reckless endangerment. *Id.*

There is no indication that the officer either pled or stated under oath that he believed there was an emergency. *Id.* at 716. A minor traffic

offense would not rise to the level of an emergency even if the officer claimed differently. As the Third Circuit rightly noted, when there is time for careful deliberation and unhurried judgments, deliberate indifference is the proper standard of culpability. *Id.* at 717. The officer here did not have to make a split-second decision because he was not in pursuit of a fleeing suspect, nor was he responding to an emergency. *Id.* at 718. An important note is found in Judge Vanaskie's concurring and dissenting opinion. Judge Vanaskie points out that the Eighth Circuit case of *Helseth* and the Ninth Circuit case of *Bingue* do not apply to the conduct of the officer in *Sauers*, because both cases dealt with officers engaged in "hot pursuit of a 'fleeing' suspect and, as such, were clearly governed by *Lewis*." *Id.* at 726. He adds that *Sitzes* in the Eighth Circuit also did not apply because the officer in that case stated a subjective belief that he was responding to an emergency. *Id.* at 726-27. Judge Vanaskie correctly points out that *Sitzes* suggests that an officer could not insulate himself from liability by claiming an emergency when doing so would be clearly false. *Id.* at 727.

Based on the prior analysis of the cases from the Eighth and Ninth Circuits, it is reasonable to conclude that they too would have applied the deliberate indifference standard to the actions taken by the officer in *Sauers*. He was not in pursuit of the vehicle, and he did not claim that he believed it was an emergency. Even if he had made such a claim, it is likely, based on the facts, that the Eighth and Ninth Circuit would find that it fell within the realm of claims that

are "so preposterous as to reflect bad faith," *Sitzes,* 606 F.3d at 470.

Fourth Circuit

The Fourth Circuit recently decided a case that involved an officer radioing for assistance with a traffic stop. *Dean v. McKinney*, 976 F.3d 407, 411 (4th Cir. 2020). The Shift Supervisor believed that the officer sounded "shaken," and issued a "Code 3" allowing for an emergency response. *Id.* Officer McKinney responded by activating his lights and siren and heading toward the location. *Id.* at 412. The officer that radioed for help alerted that the other units could back down on the emergency response but continue to his location as priority. *Id.* The Code 3 was cancelled by the Shift Supervisor and Officer McKinney acknowledged the cancellation of the Code 3 and said that he was "cut[ting] back to normal run." *Id.* Around two minutes later, McKinney lost control in a curve and hit another car head-on causing severe injuries. *Id.* A reconstruction showed that McKinney was traveling 83 miles per hour in a 45 miles per hour zone. *Id.*

This case differs from *Sauers* in that Officer McKinney claims that he believed he was responding to an emergency. *Id.* at 414. The facts, however, disagree with his stated belief. The Code 3 was cancelled, and McKinney acknowledged. *Id.* at 415. Yet he went beyond just acknowledging, he stated that he was going back to a normal, non-emergency status. *Id.* Two minutes and fifteen seconds then elapsed between the time McKinney said he was going to a non-emergency status and the accident. *Id.* at

416. The evidence is clear that, at the time, McKinney no longer believed that he was responding to an emergency. Thus, any claim to the contrary during litigation is preposterous on its face. So, the deliberate indifference standard was applied, and not intent-to-harm.

When applying the *Dean* facts to the analyses of the Eighth and Ninth Circuits, it becomes a close case as to whether the Circuits would accept the officer's claim of a subjective belief of an emergency. As has been explored previously, the Eighth and Ninth Circuits will accept the subjective belief of an officer that he is responding to an emergency unless the claim was "so preposterous as to reflect bad faith," *Sitzes,* 606 F.3d at 470. *Dean* is not unlike the facts of *Terrell* where an officer was responding to a domestic disturbance call, given priority level three, that he believed was an emergency. *Terrell*, 396 F.3d at 977. The officer was told he *could* not respond, but he decided to proceed anyway. *Id.* That is where the similarities end. Even though he was given the option of not responding, the officer in *Terrell* still had every reason to believe that an emergency was ongoing and made the decision to keep going. That is different from the facts of *Dean.* Officer McKinney contemporaneously stated he was ending his emergency response and was responding at a normal, non-emergency manner. *Dean*, 976 F.3d at 415. His after-the-fact claim that he was responding to an emergency is demonstrably false. It is reasonable to conclude that the Eighth or Ninth Circuit would apply a deliberate indifference standard to this case, just

as the Fourth Circuit did, because the claim of an emergency was clearly false.

Seventh Circuit

Earlier this year, the Seventh Circuit reviewed a case in which an officer rushed to a traffic stop to which he was not invited. *Flores v. City of S. Bend*, 997 F.3d 725 (7th Cir. 2021). Five officers were part of a team (known as the Hipakka team) that was assigned to the northwest part of the city of South Bend. *Id.* at 728. This team consisted of two patrolling officers and three others that waited until called for assistance. *Id.* The patrolling officers radioed that they spotted a speeding vehicle and planned to make a traffic stop. *Id.* They did not seek assistance either from the other members of their team or any other officer. *Id.* All indications pointed to this being a routine traffic stop. *Id.* Officer Gorny, who was not a member of the Hipakka team, decided to assist with the stop despite not being requested. *Id.* He then sped through a residential neighborhood at 78 miles per hour in a 30 miles per hour zone. *Id.* He then turned onto Western Avenue and sped up to about 98 miles per hour. *Id.* He reached an intersection with an obstructed view, disregarded the red light, and crashed into Erica Flores's car, killing her. *Id.*

There is no indication that Officer Gorny, at any time, claimed that he believed that he was responding to an emergency. Nor is there any indication in the facts that an emergency was occurring. Another officer was merely performing a routine traffic stop. Thus, the Seventh Circuit applied the deliberate indifference standard. *Id.*

at 729-30. The Court rightly points out that Officer Gorny's actions were "unjustified by any emergency or even an order to assist" *Id.* at 730. By this statement about the possibility of justification by emergency, the Seventh Circuit is allowing for times when the high-speed driving of an officer may be justified by the presence of an emergency. That would put the Seventh Circuit in line with the cases in the Eighth Circuit discussed above.

It would be reasonable to conclude that the Eighth and Ninth Circuits would also apply the deliberate indifference standard in this case. Gorny never claimed that he had a subjective belief that he was responding to an emergency. Even if he had, the facts reflect that this was simply a routine traffic stop that he was not asked to assist. Any potential claim of emergency by Gorny would have failed.

Tenth Circuit

The Tenth Circuit has reviewed two cases in which they apply the deliberate indifference standard. In the first, an officer was trying to catch up to a vehicle suspected of driving away from a gas station without paying for about $30.00 of gas. *Green v. Post*, 574 F.3d 1294, 1296 (10th Cir. 2009). The officer drove through an intersection, facing a yellow light, at a high rate of speed without lights and siren. *Id.* Green made a left turn in front of him, and the officer collided with his car. *Id.* Unfortunately, Green was ejected from the car and killed. *Id.* at 1296-97. The officer testified that it was not an emergency and that he was not in actual pursuit of the vehicle. *Id.* at 1297.

The Tenth Circuit cites approvingly to both *Lewis* and *Terrell* (in the Eighth Circuit):

> The intent to harm standard is not limited to situations calling for split-second reactions. Rather, it applies whenever decisions must be made "in haste, under pressure, and frequently without the luxury of a second chance." As the Eighth Circuit recently noted, "the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation."

Id. at 1301 (quoting *Perez v. Unified Gov't of Wyandotte Cnty./Kansas City, Kan.,* 432 F.3d 1163, 1167 (10th Cir. 2005)).

Since the officer admitted that it was not an emergency and he was not in pursuit, the Tenth Circuit applied the deliberate indifference standard. *Green,* 574 F.3d at 1302. Ultimately, the Court held that the officer speeding through a yellow light was mere negligence and not enough qualify as "conscience shocking" for a substantive due process violation. *Id.* at 1303. The Court included in their consideration that although not an emergency, catching up to the vehicle did require a rapid response. *Id.*

In applying these facts to the Eighth and Ninth Circuits' prior analyses, it is reasonable to conclude that they would apply the same standard. Again, the officer clearly stated it was not an emergency and he was not in pursuit of the suspected offender. That would preclude the

use of the intent-to-harm standard from the Eighth and Ninth Circuit cases discussed above. These Circuit Courts have provided no avenue for an intent-to-harm standard to be applied in non-emergency or non-pursuit situations. Like the Tenth Circuit here, they would apply the deliberate indifference standard.

The second case reviewed by the Tenth Circuit involved an off-duty officer who decided to turn on his emergency lights and drive through ten intersections at an average speed of 66 miles per hour for no purpose but his own business. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1077 (10th Cir. 2015). The officer ultimately ran through a red light and hit another car killing one person and injuring another. *Id.* The officer was charged with reckless vehicular homicide. *Id.*

In the opinion, by then Judge Gorsuch, the Court outlined that whenever the government actor does not have the luxury of forethought, such as responding to an emergency, specific intent to impair a plaintiff's fundamental right is required. *Id.* at 1080.

> The Court has adopted this high standard in recognition of the fact that in emergency situations officers face "obligations that tend to tug against each other"—the duty to come to the aid of citizens in distress and the duty to protect the rights of those who may innocently stand in the way—and little time in which to deliberate their resolution.

Id. at 1080 (citing *Lewis*, 523 U.S. at 853-54, 118 S.Ct. 1708). The Tenth Circuit notes that the officer's actions are the very model of arbitrary or conscience shocking. *Browder,* 787 F.3d at 1080. He was acting for his personal pleasure and with no governmental business of any kind. *Id.* Thus, the Court applied the deliberate indifference standard and held that his actions gave rise to a claim under the Fourteenth Amendment. *Id.* at 1083.

It is easy to conclude that this case would have the same result if it occurred in the Eighth or Ninth Circuits. Not only was there no pursuit and no emergency, but there was no governmental business at all. Without an emergency or a pursuit, the Eighth and Tenth Circuits would apply the deliberate indifference standard and find that a constitutional violation occurred.

Petitioner's main argument for the grant of her writ is that there is a "clear split" among the Circuit Courts of Appeals on whether to apply the intent-to-harm standard or the deliberate indifference standard to cases of high-speed driving by police. As shown above, Petitioner misstates the way that the Eighth and Ninth Circuits apply the culpability standard framework in such cases. Consistent with the Court's decision in *Lewis*, the Eighth and Ninth Circuits only apply the intent-to-harm standard in cases of pursuit and emergencies. Their cases are aligned with those from the other circuits. There is no split among the Circuit Courts and there is no basis for this Court to review this case.

b. Even when applying the standard that Petitioner prefers, the result of this case would not change.

If this Court were to apply the deliberate indifference standard to this case, as Petitioner requests, the outcome would still be the same because: (1) the Court is likely to find that Trooper Burke was not acting with deliberate indifference, and (2) even if a constitutional violation were found, the law was not clearly established in October 2016.

Deliberate Indifference

Using Petitioner's preferred cases, we gain a clear picture of the deliberate indifference standard. Negligence is never enough to rise to the level of a constitutional violation. *Browder*, 787 F.3d at 1080. The key to a substantive due process violation is that the government actor's actions are "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n. 8. The most likely actions to be conscience shocking under a deliberate indifference standard are arbitrary that are not reasonably justified by a legitimate governmental interest. *Browder,* 787 F.3d at 1080. "'Arbitrary' actions are those performed capriciously or at one's pleasure and without good reason. *Id.* (citing 1 The Oxford English Dictionary 602 (2d ed. 1989); Black's Law Dictionary 119 (9th ed. 2009)). Length of time for deliberation of one's actions is a factor in determining if the subsequent behavior is conscience shocking. *Green,* 574 F.3d at 1303.

However, "a prolonged opportunity to deliberate" is not enough to automatically label actions as conscience shocking. *Id.* "[L]iability for deliberate indifference . . . rests upon the luxury . . . of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* (quoting *Lewis,* 523 U.S. at 853, 118 S.Ct. 1708) (internal citations omitted).

In applying the deliberate indifference standard to this case, it is likely there is still no constitutional violation alleged. Trooper Burke did not have a prolonged period for deliberation. Roughly 45 to 50 seconds elapsed between the time he saw the SUV driving at a high rate of speed with hazard lights flashing, and the time that he made it back to his vehicle. Video. At that point, he had to make a quick decision. Does he simply call it in and hope that some other officer in this large county may be able to find this vehicle, or does he try to catch up to it and stop what he believes is an emergently dangerous situation? Appellant App. 155. In that moment, Trooper Burke decided to try to catch up. To catch up to a speeding vehicle, he also had to go above the speed limit, which was expressly allowed by state police policy. For most of his journey, he faced a nearly desolate strip of road with very few cars and none on his side of the road. He did not have to start maneuvering around other vehicles until he began to enter the outskirts of Hot Springs. At that point, he had to make another quick decision. Does he slow down and let the SUV go, or does he continue to try and catch up to it? In that moment, he decided to continue while balancing his obligations to keep

the public at large safe with his belief that the SUV was creating a dangerous situation. Trooper Burke did not have to make just *one* decision that night, but a cumulative series of decisions as he preceded to catch up to the speeding vehicle.

Much like the officer in *Green* that was trying to catch up to a driver suspected of not paying for $30.00 in gas, Trooper Burke's situation did require a rapid response. See *Green*, 574 F.3d at 1303. Unlike the officer in *Green*, whose actions were found not to shock the conscience, Trooper Burke subjectively believed he was responding to an emergently dangerous situation. Appellant App. 155. Even if we apply the lower deliberate indifference standard, we cannot say that Trooper Burke's high-speed driving in response to an SUV traveling nearly twice the speed limit with hazard lights flashing, requiring a rapid response and a series of decision unfolding in the moment, would shock the contemporary conscience. Thus, it is likely that this Court or any other in the nation, would find that Trooper Burke did not violate Petitioner's substantive due process rights.

Clearly Established Law

A right is clearly established when the law is so clear that all reasonable government officials would understand that his actions violate that right. *Sauers*, 905 F.3d at 718. The "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074 (2011). "Existing precedent is sufficient to place a constitutional question beyond debate and to defeat qualified immunity

only if it is controlling authority in the relevant jurisdiction, or if a robust consensus of cases of persuasive authority in the Court of Appeals has settled the question." *Sauers*, 905 F.3d at 718 (internal quotations and citations omitted). Even then, some actions are so obviously unlawful that detailed, on-point precedent is not necessarily required. *Browder*, 787 F.3d at 1082. As then Judge Gorsuch writes, "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Id.* at 1082-83.

As shown by the lengthy analysis of the Circuit Court of Appeals cases above, the law was not clearly established in October 2016 that an officer driving above the speed limit without lights and siren to catch up to a suspected violator of the law would give rise to constitutional liability. This is especially true if we accept Petitioner's own argument that there is a split among the Circuit Courts of Appeal as to which culpability standard to apply to such a situation. Further, the Eighth Circuit's own precedent, the governing law for Trooper Burke in Arkansas, establishes that there is no constitutional violation if his actions responded to a subjective belief that he was responding to an emergency.[5] Thus, even if this Court were to find that Trooper Burke acted with deliberate indifference and violated the substantive due process rights of the Petitioner, he would still be

[5] As long as that subjective belief was not "so preposterous as to represent bad faith." *Sitzes*, 606 F.3d at 467.

entitled to qualified immunity because the law was not clearly established in October 2016.

If the Court were to grant Petitioner's Writ of Certiorari, the outcome would remain the same. The Court would likely not find that Trooper Burke's actions "shocked the contemporary conscience" under a deliberate indifference standard, and, if it did, the law was not clearly established in October 2016. Thus, the Petition for a Writ of Certiorari should be denied.

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION PRESENTED BECAUSE THERE IS NO "OBJECTIVE" VS. "SUBJECTIVE" SPLIT AMONG THE CIRCUIT COURTS

The Petitioner's second issue claims that there is a split among the Circuit Courts on whether to use an objective test or a subjective test in determining the existence of an emergency in cases of high-speed driving by police. Though there are differences in the way that the Circuit Court's consider this issue, the case analysis above shows that there is not a cognizable difference in the way the courts analyze these cases and the result likely would not have changed had they used a different analysis. Thus, there is no justification for the Court reviewing this issue.

The Petitioner seeks for this Court to adopt the "objective test" she believes is used by the Third, Fourth, Seventh, and Tenth Circuits, and reject the "subjective test" used by the Eighth and Ninth Circuits. Of the "objective test" Circuit cases cited by the Petitioner, only one determines

that an officer's claim of emergency was false. See *Dean,* 976 F.3d at 416. In *all* of the other cases, the officer either never claimed there was an emergency or openly admitted that there was no emergency. Thus, there was no reason for the courts to even consider the issue. Petitioner seems to create the idea that these other courts use an objective test because the courts state that there was no emergency, which was never plead or alleged anywhere in the case. See *Sauers,* 905 F.3d 711; *Flores*, 997 F.3d 725; *Browder,* 787 F.3d 1076; and *Green,* 574 F.3d 1294.

In *Dean*, the officer does claim that he believed he was responding to an emergency. 976 F.3d at 414. It is not clear from *Dean* that the Fourth Circuit necessarily used an objective test to determine the presence of an emergency. While the Court considered his subjective belief, the claim of an emergency was refuted by not only his acknowledging of the cancellation of the emergency code but also by stating at the time that he was "backing down" to a non-emergency mode. *Id.* at 415-16. Such clear contemporaneous statements disprove the officer's after-the-fact attempts to claim that he still believed it was an emergency. Such a self-serving statement would likely not be accepted in Eighth or Ninth Circuits either.

The Eighth Circuit has held that it will accept the subjective belief of an officer that he is responding to an emergency, *but only* if that "belief is not so preposterous as to reflect bad faith." *Sitzes*, 606 F.3d at 470. There is little doubt that the Eighth Circuit would find that the officer in *Dean*'s claim of an emergency was "preposterous" and made in "bad faith" when

there are such clear contemporaneous statements to rebut such a defense. The Ninth Circuit has also never applied either an objective or a subjective test to a claimed emergency. The sole Ninth Circuit case cited by Petitioner involved a high-speed pursuit and the Court relied on the clear standard laid out in *Lewis*.

The Petitioner attempts to craft a legal fiction where the officers in the other circuits would suddenly claim an emergency if they found themselves in the Eighth Circuit. *See* Pet. Writ Cert. at 31. There is no basis for Petitioner's speculation on this which should be disregarded. Our judicial system deals in facts and the facts are that only one non-Eighth Circuit case, *Dean*, dealt with a claimed emergency and it was rejected because it was so obviously false. Petitioner's attempt to manufacture a circuit split should be ignored and their Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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