

No. 25-1242

IN THE
Supreme Court of the United States

DENISE HUGHES, AS ADMINISTRATOR OF
THE ESTATES OF EDWIN DEWAYNE MOSS,
Petitioner,

v.

MONIQUE M. LOCURE, ADMINISTRATRIX OF
THE ESTATE OF DARIAN K. LOCURE,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

RESPONDENT'S RESPONSE BRIEF

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QUESTIONS PRESENTED

Whether the Petitioner-Plaintiff properly preserved the argument that this Court's 13th footnote in *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 833, 118 S. Ct. 1708, 1710 (1998) establishes that "intentional misuse" – while never offering any analysis as to this phrase's meaning – of police vehicle constitutes a violation of clearly established law for the purposes of analyzing the defense of qualified immunity and, in fact, specifically averred before the Eleventh Circuit that there was no other caselaw on point, relying only on the "obvious clarity" prong of the qualified immunity analysis.

Whether the Eleventh Circuit's interpretation of *Lewis* is congruent with the Tenth and Fourth Circuit's interpretation of this Court's precedent and whether those arguments may be advanced when they were never cited to the Eleventh Circuit.

Whether the Petitioner-Plaintiff has stated a substantive due process claim and whether such due process rights are adequately protected by Alabama state tort claims.

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STATEMENT OF THE CASE

A. Factual Background

The recitation of the factual background in the Petition is, for the most part, fairly derived from the allegations of the operative pleadings, as recited by *Hughes v. Locure*, 166 F.4th 121 (11th Cir. 2026), and *Hughes v. Locure*, No. 3:22-CV-00312-RAH-JTA, 2023 WL 2457367 (M.D. Ala. Mar. 10, 2023). These allegations must be taken as true at this stage in the proceedings.

However, pursuant to Sup. Ct. R. 15(2), Respondent Monique Locure points out that Petitioner Hughes's statement that "Alabama's tort law could likely preclude state-law recovery against Deputy Locure and his estate" (Pet. at 3) is speculative at this stage and may be overblown.¹ Although Respondent Locure has not waived this defense, it is worth noting that an answer has been filed as to the State tort claims. *See also Hughes*, 166 F.4th at 130-131 (Pryor, CJ, concurring) (stating that it is doubtful that Locure would ultimately be found to have been operating "under color of law"); *Hughes*, 2023 WL 2457367, App. C, pg. 31a, n. 1 (statement by the district court that "both parties walk a tight rope as it concerns whether Locure's conduct was within the line and scope of his employment, within his discretionary authority, and under the color of law").

¹ For the sake of clarity, Respondent Monique Locure, Administratrix of the Estate of Darian K. Locure, states that Locure committed suicide after his indictment. "Locure" is therefore used throughout this Response to refer to the late Darian Locure; "Respondent" or "Respondent Locure" is used to refer to the defendant Estate.

B. Proceedings Below

Pursuant to Sup. Ct. R. 15(2), Respondent Locure points out that Petitioner Hughes's discussion of the Eleventh Circuit's opinion actually contains legal arguments with which Respondent plainly does not agree.

REASONS FOR DENYING THE WRIT

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Eleventh Circuit decided correctly, based upon this Court's decision in *Cnty of Sacramento v. Lewis* and the subsequent case law that developed in the Eleventh Circuit interpreting *Lewis*, that Deputy Locure did not violate clearly established law and is thus entitled to qualified immunity. 523 U.S. 833, 833, 118 S. Ct. 1708, 1710 (1998) This Court should reject the Plaintiff's petition for certiorari review for two primary reasons. First, the arguments raised before this Court concerning whether Defendant's conduct was clearly established are so fundamentally different than those raised before the Eleventh Circuit as to preclude consideration. Second, this Court should deny review because there is no circuit split warranting review and to the extent there is some substantive disagreement, the presence of a state law remedy provides equal protection. Discussed in detail *infra*, both the Eleventh Circuit's interpretation of *Lewis* in this case and the Tenth Circuit's interpretation of *Lewis* in *Browder v. City of Albuquerque*, 787 F.3d 1076, (10th Cir. 2015) are congruent, even though they reach different results.

Because the bulk of Petitioner Hughes’s argument revolves around the import of Footnote 13 in *Lewis*, it is first helpful to set out the text of this note. It is a “cf.” cite appended to *Lewis*’s holding “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, redressable by an action under § 1983.” 523 U.S. at 854. The footnote then states as follows: “*Cf. Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (“Where a citizen suffers physical injury due to a police officer’s *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer’s *intentional misuse* of his vehicle.”)”²

I. The issue of whether Footnote 13 in *Cnty. of Sacramento v. Lewis* clearly established that Locure violated Moss’s substantive due process rights was not raised to the courts below.

Petitioner Hughes argued both before the district court and the Eleventh Circuit that this case presents a rare instance where the constitutional violation is obviously clear. (App. 1a, pgs. 26a-28a) Her Petition to this Court changes tack. Hughes now argues – for the first time in this litigation – that Footnote 13 from this Court’s opinion in *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 833, 118 S. Ct. 1708, 1710, 140 L. Ed. 2d 1043 (1998) clearly establishes that Locure’s conduct violated a constitutional right, and that the Eleventh Circuit’s decision to the contrary conflicts with both *Lewis* and what Petitioner characterizes as “the Tenth Circuit’s faithful application of *Browder v. City of*

² Emphasis original to *Checki*.

Albuquerque, 787 F.3d 1076 (10th Cir. 2015).” (Pet., pg. 9)

This Court has stated many times that it is “one of final review, ‘not of first view.’” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)); see also, e.g., *Hunter v. United States*, No. 24-1063, 608 U.S. ___, ___ S.Ct. ___, 2026 WL 1751815 at *9 (June 18, 2026) (same); *Whitton v. Dixon*, 608 U.S. ___, 146 S.Ct. 1368, 1371 (2026) (per curiam) (same). This Court therefore does not ordinarily decide questions that have not been presented or decided below. *Id.*; see also, e.g., *Byrd v. U.S.*, 584 U.S. 395, 404 (2018). Admittedly, a party is not limited to the precise arguments it made below. *Yee v. Escondido*, 503 U.S. 519, 534 (1992). But Petitioner’s new-found reliance on *Lewis*’s footnote is not merely an additional argument; it represents a fundamental change in her approach to the qualified immunity analysis in this case. Her attempt to put the Eleventh Circuit in error on a theory that was never presented to it is due to be denied.

The Eleventh Circuit assumed, without deciding, the existence of a plausible constitutional claim, but ordered the dismissal of the substantive due process claim pursuant to the “clearly established” prong of the doctrine of qualified immunity. See *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). “The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (cleaned up). “A clearly established right is one that is sufficiently clear that every reasonable official would have understood that

what he is doing violates that right.” *Ibid.* (cleaned up). As stated by the Eleventh Circuit in this case:

A plaintiff can show that a right is clearly established for qualified immunity purposes in three ways:

(1) by pointing to a materially similar decision of the Supreme Court, of this Court, or of the supreme court of the state in which the case arose; (2) by establishing that a broader, clearly established principle should control the novel facts of the case; or (3) by convincing us that the case is one of those rare ones that fits within the exception of conduct which so obviously violates the constitution that prior case law is unnecessary.

Powell v. Snook, 25 F.4th 912, 920 (11th Cir. 2022) (citation modified). Under methods (2) and (3), we look for “obvious clarity”—“a principle or provision so clear that, even without specific guidance from a decision involving materially similar facts, the unlawfulness of the officer’s conduct is apparent.” *Id.* “In light of the rarity of obvious clarity cases, if a plaintiff cannot show that the law at issue was clearly established under the first ... method, that usually means qualified immunity is appropriate.” *King v. Pridmore*, 961 F.3d 1135, 1146 (11th Cir. 2020).

Hughes v. Locure, 166 F.4th 121, 128 (11th Cir. 2026).

Petitioner Hughes *only* relied on the third prong of the clearly established test, *i.e.*, alleged “conduct which so obviously violate the Constitution that prior case law is unnecessary.” *Ibid.* Her brief to the Eleventh Circuit does not even cite *Browder v. City of*

Albuquerque or the other out-of-circuit cases on which she now relies, i.e., *Harkness v. McKinney*, 976 F.3d 407 (4th Cir. 2020). She went to great lengths to distinguish *Lewis* in her discussion of the substantive merits of the violation itself, specifically including the proper standard of culpability, as follows:

Locure relies heavily on *Lewis* (sheriff's deputy engaged in high-speed police pursuit), *Waldron [v. Spitcher]*, 954 F.3d 1297, 1306 (11th Cir. 2020) (deputy responding to emergency rescue call), and *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1331 (11th Cir. 2020) (school resource officer(s) responding to an active shooting) in support of his arguments. Yet, he fails to acknowledge the critical factual distinction that sets those cases apart from the context and circumstances raised by the Estate's Complaint in this case – namely, that the crash giving rise to *Lewis* and the actions of the officers in *Waldron* and *Hernandez* occurred while the officers were conducting a high-speed chase and answering emergency response calls, respectively....

The different context and circumstances of this case matters greatly. *Waldron* and *Hernandez* heavily referenced *Lewis* in reaching their ultimate holdings. In turn, close reading of the analysis forming the basis of the *Lewis* decision underscores why the district court correctly reasoned that the context and circumstances present in those cases – upon which Locure relied in arguing for application of the “intent to harm”

standard of culpability in this case – are factually distinguishable:

□

Accordingly, under *Lewis*, “intent to harm” is the proper standard for evaluating an officer’s conduct when he or she is confronted with “unforeseen circumstances” that “demand an officer’s instant judgment,” such as high-speed chase or emergency response scenarios...It was upon that contextual backdrop that the *Lewis* Court reached its finding of no constitutional violation given that the crash occurred during a high-speed police chase and there was no evidence the defendant officer had an intent to injure the plaintiff when the crash occurred.

(App. 1a, pgs. 13a-16a) Her only mention of the suddenly all-important Footnote 13 in the entire brief comes in the same section, when she asserts, without further elaboration: “It is axiomatic that the conduct alleged by the Estate far surpasses the simple act of speeding...and constitutes much more than mere negligence or even gross negligence. Rather, Locure’s conduct demonstrates ‘intentional misuse’ of his vehicle, which directly caused the fatal injuries suffered by Mr. Moss.” (App. 1a, pgs. 18a-19a)

In her discussion of whether the law was clearly established for the purposes of qualified immunity, Petitioner Hughes disclaimed the existence of any case law on point either under the “materially similar case” standard or that would constitute a “broader, clearly established principle” controlling the novel facts of the situation, including as follows:

Neither the Estate [of Locure], nor the district court identified any Eleventh Circuit cases with materially similar facts as those at issue in this case. Moreover, contrary to Locure's assertions, none of the United States Supreme Court or Eleventh Circuit decisions cited in his Brief are materially similar to the facts in this case. Given the outrageous and clearly egregious nature, character, and extent of Locure's conduct in causing the crash that killed Mr. Moss, this case fits within the exception of conduct "which so obviously violates the constitution that proper caselaw is unnecessary to establish the established nature of the substantive rights that were violated."

[(App. 1a, pg. 27a) (citations omitted)]

The Eleventh Circuit engaged with Petitioner Hughes's argument on its own terms:

Hughes does not argue that Moss's right was clearly established under methods (1) or (2). Instead, Hughes contends that Moss's right was clearly established under method (3)—obvious clarity. The district court also applied the third method in ruling that Moss's rights were sufficiently clearly established to overcome Locure's qualified immunity defense.

The problem with Hughes's reliance on the third method to clearly establish Moss's right is that our caselaw undermines her conclusion. Our caselaw indicates that Locure's conduct—as egregious as it may be—may not violate a right in the constitutional sense.

Hughes, 166 F.4th at, 128–29. The opinion discusses several Eleventh Circuit cases which indicate that the right was not obviously clear in a constitutional sense under Eleventh Circuit precedent. *Id.*; *see also Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) (holding “that a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right”); *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996) (determining that, even if an officer was grossly negligent in excessively speeding in a non-emergency situation, it still did “not transform a state tort claim into a constitutional deprivation”). It then states that “[t]hough these situations may be factually distinct, we cannot cast them aside in our ‘obvious clarity’ analysis. Where precedent injects such uncertainty, it does not follow logically that the complained of offense ‘so obviously violates the Constitution.’” *Id.* The Eleventh Circuit did recognize that other circuits “have reached the opposite conclusion,” including in *Browder*; however it distinguished *Browder* because it “was decided in light of earlier Tenth Circuit precedent.” *Id.*

In her Petition, Hughes attempts to make much of the Eleventh Circuit’s failure to address the import of *Lewis*’s Footnote 13, which she now claims clearly establishes the law under the second method identified by the court below, i.e., “a broader, clearly established principle that should control the novel facts of the case.” *Id.* at 129. But Hughes never discussed the import of Footnote 13 to the qualified immunity analysis. Further, Petitioner Hughes also chose not to cite *Browder* at all in her brief, much less engage in any discussion of it, despite the fact that (as

noted by the Eleventh Circuit) it had been cited by the district court in its opinion.

“In our adversarial system of adjudication, we follow the principle of party presentation.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). “[A]s a general rule, our system ‘is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.’” *Id.* (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J. concurring in judgment) (alteration made in *Sinenang-Smith*)). “That principle – the ‘rule that points not argued will not be considered’ – distinguishes our adversarial system of justice from an inquisitorial one.” *Margolin v. National Association of Immigration Judges*, 608 U.S. ___, 146 S.Ct. 1285, 1288 (2026) (quoting *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in judgment)). It is therefore hardly surprising that the Eleventh Circuit did not address the issue of whether the *dicta* contained in a footnote in *Lewis* could clearly establish law for the purposes of qualified immunity. Indeed, depending on the substance of any such hypothetical holding, it could have been error for it to engage in an entirely different analysis that had neither been argued by the parties nor relied on by the district court. *See Id.* (holding that Fourth Circuit violated party-presentation principle when it decided an appeal based on an argument that was not made or addressed by the parties).

Petitioner Hughes’s outrage regarding the lack of discussion of the *Lewis* footnote in the opinion below ultimately proves too much. The traditional rule is that certiorari will only be granted on matters “not pressed or passed upon in the courts below”

in “exceptional cases.” *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-46 (1940), *cited in Illinois v. Gates*, 462 U.S. 213, 219 (1983). One of the main rationales for this rule is that “questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.” *Gates*, 462 U.S. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). The fact that the Eleventh Circuit didn’t discuss an argument that wasn’t raised is all the more reason that certiorari is due to be denied.

Further, Petitioner Hughes’s failure to present this argument below also tends to negate the existence of a circuit split because (assuming, *arguendo*, that the Eleventh Circuit’s decision in this case is truly contrary to, e.g., *Broward*) another litigant would remain free to advance a different qualified immunity argument than that made by Hughes in the future. Hughes’s Petition for Writ of Certiorari is accordingly due to be denied.

II. There is no real conflict amongst appellate courts either on the underlying substantive due process issue or on the qualified immunity analysis.

Petitioner Hughes relies mainly on *Browder*, bolstered by a few other cases, as evidence that there is a split amongst the circuits such that review from this Court is warranted. Even overlooking the failure to present the issue to the court below, a closer examination of this claim shows that it is also insufficient to justify certiorari.

A. *Lewis*'s footnote does not define "intentional misuse" of a vehicle in a constitutional sense and therefore cannot clearly establish law.

Petitioner Hughes's argument is based on the assumption that Locure's alleged conduct would necessarily rise to the level of "intentional misuse" of a vehicle in a constitutional sense. But *Lewis* does not undertake to define the term. *Lewis* is clear, however, that the existence of a substantive due process claim is not subject to a monolithic test but rather must be decided on a case-by-case basis. *Lewis*, 523 U.S. at 848–49. Whether the action of an officer amounts to an abuse of power giving rise to a constitutional violation necessarily lies instead somewhere on a spectrum, where at both poles, we can be sure that conduct either surely does or does not give rise to a violation:

“We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have 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. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; 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.

Id. (internal citations omitted). It is the conduct in the middle, such as actions that are grossly negligent

or reckless, where courts must decide the “close calls”.
Id. In other words, there is not a clear bright line test.

Again, the footnote in question is appended to *Lewis’s* holding “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 853. This Court then counter-balanced this holding, in footnote 13, with a quote from *Checki v. Webb*, 785 F.2d 534, 538 (C.A.5 1986):

“Where a citizen suffers physical injury due to a police officer’s *negligent use* of his vehicle, no section 1983 claim is stated. *Cannon v. Taylor*, 782 F.2d 947, 948–50 (11th Cir.1986). It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer’s *intentional misuse* of his vehicle.”

Id. (emphasis in original).

Analysis of the underlying allegations in *Checki* provides valuable insight into its definition of “intentional misuse,” as follows::

Factual development in this case could lead to a jury question whether this case could lead to a jury question whether Webb and Allisson’s car-chasing actions were ‘inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.’ [quoting *Cannon*, 782 F.2d at 948]...

A police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian’s face may not cause physical injury,

but he has certainly laid the building blocks for a section 1983 claim against him. Similarly, where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the “constitutional line.”

785 F.2d 538.

Petitioner has never analyzed the meaning of the phrase “intentional misuse.” Instead, all that is or has been presented, either here or to the Eleventh Circuit, is a conclusory statement that “[h]ere, Deputy Locure’s conduct falls squarely on the ‘intentional misuse’ of that clearly established line.” The problem is that it has long been recognized that the definition of “intentional” varies according to the specific context and claim. For example, “‘intentional torts,’ as distinguished from negligent or reckless torts...generally require that the actor intend ‘the consequences of an act,’ not simply ‘the act itself.’” *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (quoting Restatement (Second) of Torts §8A, Comment a, p. 15 (1964) (emphasis added in *Kawaauhau*)). In other circumstances, however, “intentional” conduct may include “not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent.” *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274 (2013) (interpreting term “defalcation” as used in provision of Bankruptcy Code that disallows discharge of a debt “for fraud or defalcation while acting in a fiduciary capacity...”)

Checki (and, as discussed *infra*, *Broward*) deals with conduct that is intentional in the first sense, meaning

that the outcome itself was intended. In other words, that the defendant officers maliciously intended to misuse their power for the very purpose of “terrorizing” the plaintiff driver. 785 F.2d at 538. The conduct at issue in this case may have been “intentional” in the second sense, meaning that Locure intended to drive while intoxicated, which is enough for criminal culpability – but that does not mean that it is “intentional” in the sense of an intentional tort, whether under the Constitution or common law. In fact, the Fifth Circuit has held since *Checki* that an accident caused by a drunk driver is still an “accident,” and not the result of an “intentional act” as the term is used to describe intentional torts, since it cannot be contended that a driver intended to cause a specific accident or that he “drank in hopes of causing an automobile collision.” *Frederking v. Cincinnati Insurance Company*, 929 F.3d 195, 198 (5th Cir. 2019).

Regardless of its content, the notion that a “cf.” citation in a footnote can clearly establish law is tenuous at best. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011) (characterizing the proposition that a footnote in a district court opinion could clearly establish law as “extraordinary”). Even if the issue had been argued to the Eleventh Circuit, Respondent would have taken the position that this particular footnote cannot clearly establish law both because it is not sufficient to put a reasonable officer on notice of the type of conduct that will be considered “intentional misuse” for the purpose of establishing an intentional constitutional tort.

B. The different results in *Browder* and *Hughes* do not amount to a circuit split.

Contrary to the facts alleged in the Tenth and the Fourth Circuit, Deputy Locure was *not* enjoying the

trappings of power to advance his own personal gain. Deputy Locure did *not* run any emergency lights or sirens in furtherance of *any* governmental purpose according to the Third Amended Complaint. This is precisely why there shouldn't be a Fourteenth Amendment violation at all under *Lewis*. Compare the allegations in this case with the facts in *Browder*, for instance. In *Browder*, the defendant officer finished his shift at the Albuquerque police department and “on no one’s business but his own” got into his police cruiser, flipped on the emergency lights, and drove at an average of about 66 miles per hour on city surface streets through ten intersections over a stretch of 8.8 miles. *Browder*, 187 F.3d at 1077. Officer Browder then ignored a red light, accelerated his police vehicle and collided into Ashley Browder’s vehicle, fatally wounding her. *Ibid.* Officer Browder claimed to be acting on official business in his response to the complaint and sought protection in the form of qualified immunity. *Id.*, at 1081. The problem with this defense was primarily the procedural posture of the case. “In order for the court to consider this assertion, it would require ignoring the well pleaded complaint at the motion to dismiss stage.” *Ibid.*

The Tenth Circuit applied the *Lewis* framework; however, there are key distinctions between the facts that explain why it found that the exercise of governmental power to be “arbitrary”. Officer Browder was using the trappings of power for his own personal gain. Put another way, Officer Browder could not have committed the act alleged *unless* he was in his police cruiser, wielding governmental power in the form of activating his emergency lights for his own personal gain. Contrast that reality with the fact pattern before this Court. Deputy Locure – as egregious as his acts might have been – is alleged to have committed an act

of gross negligence in operating a motor vehicle under the influence of alcohol on no business but his own. However, nothing in the operative complaint is premised on the use of governmental power in any way but for the fact that Deputy Locure happened to be in a patrol vehicle. The outcome may well have been more cut and dry under the *Lewis* analysis had Deputy Locure, all facts being the same, activated his blue lights while not in pursuit of official business. In other words, it was not necessary that any governmental power be used to commit the acts committed by Deputy Locure, yet it was necessary for the claim in *Browder*.

To that end, the Eleventh Circuit's interpretation of *Lewis* is congruent or, at least, not inconsistent with the Tenth Circuit's interpretation. Both circuits consistently applied the general principles of due process, and the "large concerns of the governors and the governed". *Lewis*, 523 U.S. 833 at 848, 118 S. Ct. at 1718. Both cases reached the correct result in light of this Court's precedent pronounced in *Lewis*. Simply because one Court held that the outcome gave rise to a Fourteenth Amendment claim and the other did not in two factually different scenarios does not constitute a circuit split sufficient to warrant that this Court grant certiorari review. To the contrary, it is precisely what the *Lewis* Court foresaw. *Lewis*, 523 U.S. 833 at 850, 118 S. Ct. at 1718–19.

"Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands

an exact analysis of circumstances before any *abuse of power* is condemned as conscience shocking.”

(emphasis added).

Finally, the existence of Judge Jordan’s dissent does not signal a circuit split. Like the majority opinion, the dissent engages with Petitioner Hughes’s “obvious clarity” argument on its own terms. *Hughes*, 166 F. 4th at 132-133 (Jordan J. dissenting). Although Judge Jordan agrees that the violation was clearly established for the purposes of qualified immunity (a concept with which he has expressed disagreement), the dissent was not based on Lewis’s footnote 13 – assumedly because, again, Petitioner Hughes did not make that argument.

III. Petitioner Hughes does not state a claim of substantive due process.

This Court has long cautioned against using Fourteenth Amendment as a “font of tort law to be superimposed upon whatever systems may already be administered by the States...” *Lewis*, 523 U.S. at 848. Indeed, then-Judge Gorsuch’s concurrence in *Browder* warns against courts using “primordial constitutional tort principles that must be expounded more or less on the fly- by asking what’s ‘arbitrary’ or what ‘shocks the judicial conscience’” – while recognizing that the issue of whether the substantive due process clause was an appropriate remedy was not brought before it. *Browder*, 787 F.3d at 1084 (Gorsuch, N., concurring specially). Expansion of the Fourteenth Amendment’s substantive due process without an explicit finding that the conduct was “arbitrary” in a constitutional sense will naturally give way to varied results amongst the circuits. *Washington v. Glucksberg*, 521

U.S. 702, 720, 117 S. Ct. 2258 (1997) “[T]he guideposts for responsible decision-making in this uncharted area are scarce and open-ended.” *See also, Browder*, 787 F. 3d at 1079 (noting that “this area remains very much uncharted, and the conscience-shocking test does seem (in *Glucksberg’s* words) more than a little “open-ended,”...”. Put another way, Petitioner Hughes invites this Court to create a primordial pool of constitutional uncertainty that will be ripe for the growth of future circuit splits. This Court should reject granting certiorari review, particularly when a state remedy is pled and available.

In this case, the Eleventh Circuit correctly noted that the Petitioner Hughes claims would still proceed under Alabama state tort claims. *Hughes*, 166 F.4th at 130. “Even though Locure is entitled to qualified immunity, Hughes is not left without an available remedy. ... Indeed, as she has done, Hughes may pursue state law tort claims against Locure.” *Id.*; *See also, Daniels v. Williams*, 474 U.S. 327, 333, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (“That injuries inflicted by governmental negligence are not addressed by the United States Constitution is not to say that they may not raise significant legal concerns and lead to the creation of protectible legal interests.”). In Deputy Locure’s principle brief to the Eleventh Circuit, he explicitly raised *Parratt v. Taylor*, 451 U.S. 527, 544 101 S. Ct. 1908, 1917 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986) for the purpose that if a Fourteenth Amendment claim is allowed (for a claim such as this one), it is “hard to perceive any logical stopping place to such a line of reasoning.” *Parratt* states the following concerning the interplay between state remedies and the minimum threshold of due process:

“Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State. See Neb.Rev.Stat. § 81–8,209 *et seq.* (1976). Through this tort claims procedure the State hears and pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question but respondent did not use it. It is argued that the State does not adequately protect the respondent’s interests because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that

the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.”

Parratt, 451 U.S. at 543–44, 101 S. Ct. at 1917, (1981) (emphasis added).

Browder laments that the defendant officer failed to raise this argument, as follows:

“The [*Parratt* defense that defendant officer] forgoes is perhaps the most significant. According to the complaint, Sergeant Casaus’s conduct wasn’t authorized by any state rule, policy, or custom and—as we’ve noted—it’s an open question in cases like this whether Parratt requires the plaintiff to show that state law supplies no adequate remedial course before proceeding in federal court. See supra at 1078–79; Concurrence at 1085. But instead of pursuing a line of defense that would require him to accept that he acted without any legal authorization, Sergeant Casaus has chosen instead to pursue a defense in precisely the opposite direction (as we will see in a moment). In light of this tactical decision, we deem any *Parratt* argument forfeited and reserve for another day the question whether it applies to substantive due process claims—the very course the Supreme Court itself charted when the defendant in *Lewis* similarly failed to raise a *Parratt* argument. 523 U.S. at 840 n. 4, 118 S.Ct. 1708.”

787 F.3d at 1081. (emphasis added). Judge Gorsuch goes on to concur specially, commenting on the wisdom of allowing these “close calls” to be decided based upon state tort causes of action, in part out of a respect for the centuries of common law development and comity between the Federal and State court systems. *Browder*, 787 F.3d at 1083–84 (Gorsuch, concurring):

“We shouldn’t be surprised that the common law usually supplies a sound remedy when life, liberty, and property are taken. After all, the whole point of the common law as it evolved through the centuries was to vindicate fundamental rights like these. That’s the insight of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). While 42 U.S.C. § 1983 authorizes federal courts to remedy constitutional violations by state officials acting under color of state law, and while *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), has read this authorization broadly, the authority to remedy a claim doesn’t always mean the duty to do so. Federal courts often abstain when they otherwise might proceed out of respect for comity and federalism and the absence of any compelling need for their services. *See, e.g., Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Parratt* explains that this familiar principle applies in the § 1983 context just as it does elsewhere. Often, after all, there’s no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to

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

Ibid. (emphasis added).

In this case, Locure was criminally indicted for his behavior. The Third Amended Complaint avers that Deputy Locure was "... [not] undertaking any conduct in furtherance of the execution of his duties as a sheriff's deputy as he drove his [Macon County Sheriff's Office] vehicle while under the influence of alcohol or other impairing substance(s), without use of headlights or lamps, at speeds of 70 mph (or more) along the left-hand, eastbound lane of US-80 toward South Lake Street." (Third Amended Complaint, ¶ 17). This allegation, is precisely why Plaintiff's concern regarding the status of immunity granted to deputy sheriffs through the Alabama Constitution may ultimately be overstated. *See, Parker v. Amerson*, 519 So.2d 442, 443 (Ala. 1987) (holding that sheriffs are immune from monetary claims asserted in their individual capacity for actions which occur within the scope of the sheriff's official duties); *see Ex parte Underwood*, --- So. 3d ---, No. SC-2024-0263, 2025 WL 1776225 *3-4 (Ala. June 27, 2025) (noting that there were no allegations in the complaint that the sheriff or his deputy performed acts outside the line and scope of their duties, thus granting immunity).

The District Court denied Deputy Locure's claim of state immunity granted by the Alabama Constitution from state tort liability to deputy sheriffs, and Deputy Locure answered all state law claims.³ Plaintiff has made no valid assertion that Alabama courts, or the

³ The defense of State Immunity is preserved for review at summary judgment.

Federal Courts interpreting Alabama law, are unable to protect the Plaintiff's substantive due process rights.

Respondent Hughes's insistence that all conduct that "shocks the conscience" must necessarily state a substantive due process claim proves too much. The assumption "that if it's really bad, it has to be unconstitutional, a violation of so-called substantive due process" represents a potentially limitless expansion of this doctrine. *Hughes*, 166 F. 4th at 131 (Pryor, CJ, concurring.) (Cleaned up). The absence of a viable constitutional claim provides alternative grounds for affirmance. Accordingly, Respondents respectfully request that this Court deny the Petitioner's writ of certiorari in full.

CONCLUSION

Respondent, Monique N. Locure, Administratrix of the Estate of Darian K. Locure, respectfully requests that this Court deny the Petition for Writ of Certiorari by Denise Hughes, as Administrator of the Estate of Edwin DeWayne Moss. There can be no doubt that the underlying accident was tragic, claiming the life of both Moss, and, eventually, Darian Locure, and even shocking, in the ordinary sense of the word. But the severity of the outcome does not transform an all-too-ordinary traffic accident (even one that occurs in an official vehicle) into a constitutional violation. The Eleventh Circuit correctly held that any such violation was not clearly established. The fact that this outcome is different from another case with different facts does not establish a circuit split. Certiorari is accordingly not warranted in this case.

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Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10954-H

DENISE HUGHES, as Personal Representative of the
Estate of Edwin DeWayne Moss,

Plaintiff-Appellee,

v.

MONIQUE N. LOCURE, Administratrix of the Estate of
DARIAN K. LOCURE,

Defendant-Appellant.

Interlocutory Appeal from the United States
District Court for the Middle District of Alabama,
Northern Division

No. 3:22-cv-00312-RAH

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CERTIFICATE OF INTERESTED PERSONS

The Appellee hereby certifies that the Certified of Interested Persons contained in the Appellant's Brief is complete and without an errors or omissions.

STATEMENT REGARDING ORAL ARGUMENT

The Appellee does not request oral argument in this matter. It is the position of the Appellee that the issues presented in this interlocutory appeal would not be significantly advanced or aided by oral arguments. However, the Appellee would be pleased to participate in oral arguments should the Court deem it necessary or desirable.

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STATEMENT OF THE ISSUES

- I. Whether the district court correctly declined to use a heightened “intent to harm” standard of culpability to evaluate Locure’s voluntary conduct giving rise to the fatal crash in this case;
- II. Whether the district court correctly determined that the allegations and claims set forth in the Third Amended Complaint properly demonstrated a viable constitutional violation sufficient to overcome dismissal at the motion to dismiss stage; and,
- III. Whether the district court correctly denied Locure’s claim of qualified immunity at the motion to dismiss stage based upon the allegations and claims within the Complaint demonstrating violation of the decedent’s clearly established substantive due process rights.

STATEMENT OF THE CASE

The crash giving rise to this case occurred approximately 0.5 miles (or less) from the center of downtown Tuskegee, Alabama on US-80 – a 4-lane stretch of highway consisting of two eastbound lanes and two westbound lanes that is populated on both sides by businesses, homes, and residential streets and is governed by a posted speed limit of 25 mph. (Doc. 36, p. 3-4, ¶¶ 12-13.)¹

¹ The Appellant Brief cites to the record on appeal by using the header generated via the district court's e-filing system. Likewise, the Estate has utilized the same manner of citation to the record herein. Any citation to documents filed with the Eleventh Circuit following commencement of this interlocutory appeal are preceded by the reference "USCA11."

Sometime after 5:00 PM on January 19, 2021, the decedent, Edwin Moss, was the front-seat passenger in a 2003 Hyundai Sonata traveling westbound on US-80 in Tuskegee toward Mr. Moss's home off South Lake Street. (*Id.* at p. 3, ¶ 9.) At the same time, Deputy Darian K. Locure² was traveling eastbound on US-80 in the direction of South Lake Street in a black 2013 Ford F150 owned by the Macon County Sheriff's Department ("MCSD") and provided to Locure in connection with his position as a sheriff's deputy for the department. (*Id.* at ¶¶ 10-11.)

Upon information and belief, Locure was not scheduled to be "on duty" for the MCSD on January 19, 2021. (*Id.* at p. 13, ¶ 51.) However, he was contacted by someone at the sheriff's office that day and instructed to report to the MCSD office to care for his law enforcement canine ("K-9") partner, prompting Locure to drive to the sheriff's office that afternoon. (*Id.*) Sometime after 5:00 PM, Locure departed the sheriff's office in his MCSD vehicle. (*Id.* at ¶ 52.) In doing so, Locure was not responding to an emergency, in "hot pursuit" of a suspect, assisting other law enforcement personnel, nor undertaking to respond to an emergency call. Instead, it appears that he departed the sheriff's office with the intent to travel back to home after completion of his canine duties. (*Id.* at ¶ 55.)

² Defendant Locure died from cause(s) unrelated to this crash in March 2023, shortly before the district court entered its Memorandum Opinion forming the basis of this interlocutory appeal. (*See generally*, USCA11 Doc. 17, *Mot. to Substitute* (Jun. 6, 2023).) This Court granted the Locure Estate's motion for substitution as the party-appellant on July 10, 2023. (USCA11 Doc. 19.) However, for the sake of brevity and to alleviate confusion, the Appellee will continue to refer to the Appellant as "Locure" or "Defendant Locure" throughout this filing.

After leaving the MCSD facility, he navigated a short distance toward downtown Tuskegee, where he turned right onto US-80 in the downtown area. (*Id.* at p. 4, ¶ 14.) Upon entering the highway, Locure began driving his MCSD vehicle at or above 70 mph in the left-hand, eastbound lane of US-80 toward the direction of South Lake Street. (*Id.*) Although it was already dark outside, Locure did not activate his vehicle's headlights, running lights, or any other illuminating lamps on his black truck as he drove through the 25-mph zone of US-80 eastbound at speeds exceeding 70 mph. (*Id.* at ¶ 15.) Notably, Locure was under the influence of alcohol and/or other intoxicating substances as he sped down the road in the dark without activating his vehicle's headlights. (*Id.* at ¶ 16.)

As Locure's unlit, speeding truck neared the area of South Lake Street, Mr. Moss's vehicle reached that turnoff and the driver of his vehicle began making a left turn from westbound US-80 toward the residential neighborhood off South Lake Street (where the decedent and his young children lived). (*Id.* at ¶ 18.) Upon information and belief, the driver of Mr. Moss's vehicle was unable to see or detect Defendant Locure's unlit, black-colored truck as it sped toward them in the left-hand, eastbound lane of US-80. (*Id.* at p. 5, ¶ 19.) On the other hand, Locure was approaching the decedent's vehicle on a downward grade and had an unobstructed view of the roadway ahead and the white sedan carrying the decedent and his driver. (*Id.* at ¶ 20.)

Despite having a clear view of the decedent's vehicle as it began making a turn toward South Lake Street, Locure failed to slow, stop, or otherwise make any evasive maneuvers to avoid crashing into the

decedent's vehicle, instead causing or allowing his truck to violently slam into the passenger side of the decedent's sedan. (*Id.*) The impact occurred squarely within the left-hand, eastbound lane of US-80 (*i.e.*, the same lane where Locure had been traveling on approach to the crash location). (*Id.* at ¶ 21.) Furthermore, upon information and belief, Locure was still traveling at or above 70 mph in this 25-mph zone at the point of impact. (*Id.* at ¶ 22.)

On impact, the decedent's vehicle flipped several times before coming to an uncontrolled rest in a ditch off the eastbound side of the roadway. (*Id.* at ¶ 23.) After the crash, Locure exited his vehicle but did not undertake any effort to check on or render aid or assistance to the decedent or the driver of his vehicle. (*Id.* at ¶ 24.) Tragically, the decedent sustained massive traumatic injuries in the crash – including several broken bones and extensive internal trauma. (*Id.* at p. 6, ¶ 26.) First responders had to extricate the decedent from his vehicle, and he was subsequently pronounced deceased at the scene of the crash. (*Id.*)

On February 11, 2022, a Macon County, Alabama Grand Jury issued a criminal indictment charging Locure with Felony Reckless Manslaughter for:

[C]aus[ing] the death of another, to-wit: Edwin Dewayne Moss, by operating a motor vehicle while under the influence of alcohol and/or by driving at an excessive rate of speed and/or operating said motor vehicle without the use of lighted lamps and illuminating devices contrary to and in violation of [Ala. Code §] 13A-6-3(a)(1).

(Doc. 14, p. 4.) Locure died on March 9, 2023, before the criminal case against him could be brought to trial.

SUMMARY OF THE ARGUMENT

Locure erroneously argues that the “intent to harm” standard of culpability must be employed to evaluate law enforcement conduct in *every* case asserting a due process violation arising from the officer’s use and operation of his law enforcement vehicle, regardless of whether the officer had actual time and opportunity to deliberate upon his actions or, rather, was “forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving.” *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). In making this argument, Locure fails to grasp the reasoning behind use of the heightened “intent to harm” standard in cases where an officer must make quick decisions, such as in during high-speed police chases or when responding to emergency calls: that is, to account for the fact that officers in those emergency situations do not have the luxury of time to deliberate and consider their conduct before being forced to act. Therefore, in recognition of the risks faced by officers and their need to act quickly and decisively in such emergency scenarios, their conduct will not rise to the level of a constitutional violation absent proof that the officer acted with intent to injure or cause harm in some way that is unjustifiable by any governmental interest. *See, e.g., Lewis*, 523 U.S. at 849-54.

The analysis is much different when an officer is not required to make rapid, split-second decisions in dangerous or rapidly-evolving scenarios but, instead, has the luxury of time and opportunity to deliberate

and make reasoned and considered choices. *See id.* In those instances, when an officer fails or refuses to actually deliberate, despite the opportunity to do so, and undertakes a course of wrongful or unlawful conduct (more than mere negligence) that causes the injury or death of another, his indifference can be considered so conscious-shocking, in the constitutional sense, as to rise to the level of a substantive due process violation. *See id.* In other words, “deliberate indifference” is the appropriate standard of culpability to evaluate voluntary conduct undertaken by an officer in a non-emergency scenario when the officer has the ability and opportunity to deliberate and is not being forced to make split-second judgments “in haste, under pressure,” or “without the luxury of a second chance.” *Id.* at 852 (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

In this case, it is undisputed that Locure was not engaged in a “hot pursuit” or emergency response that required him to act quickly and without the benefit of time to deliberate. Instead, he had repeated opportunities to deliberate and weigh his intended course of conduct before he voluntarily chose to get behind the wheel of his sheriff’s department vehicle while he was intoxicated and travel along the darkened streets without his headlights while traveling more than twice the posted speed limit. The nature of Locure’s egregious conduct – which he voluntarily undertook in a non-emergency situation while operating his sheriff’s department vehicle as he traveled home from engaging in official sheriff’s department duties – truly shocks the conscience and gives rise to a viable substantive due process claim for the death of the decedent, who was killed as a direct result of Locure’s unlawful conduct. Moreover, any reasonable official, including Locure, was on notice that his

egregious and obviously unlawful conduct – including his failure or refusal to slow, stop, or take an evasive action to avoid the decedent’s vehicle as it was visible on the roadway ahead – was a violation of the decedent’s clearly established substantive due process rights. For those reasons, the district court’s denial of Locure’s motion to dismiss was proper and must be affirmed by this Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE COMPLAINT STATED A VIABLE CLAIM FOR VIOLATION OF THE DECEDENT’S SUBSTANTIVE DUE PROCESS RIGHTS.

A. *Lewis* Does Not Require Proof of Intent to Harm When There Is Opportunity For Actual Deliberation.

Locure’s main argument on appeal is that deliberate indifference does not rise to the level of a substantive due process violation in *any* non-custodial case arising from an officer’s use and operation of his law enforcement vehicle. (See USCA11 Doc. 13, p. 18-34.) However, this argument oversimplifies the concept of substantive due process and ignores the long-held understanding that, in evaluating whether a due process violation has occurred, the “[c]ontext and the circumstances [of each case] are significant, and the level of culpability required can vary with the context.” *Waldron v. Spitcher*, 954 F.3d 1297, 1306 (11th Cir. 2020). See also *Lewis*, 523 U.S. at 850 (the due process of law “formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less

a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.” (internal punctuation omitted)).

Locure relies heavily on *Lewis* (sheriff’s deputy engaged in high-speed police pursuit), *Waldron* (deputy responding to emergency rescue call), and *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1331 (11th Circ. 2020) (school resource officer(s) responding to an active shooting) in support of his arguments. Yet, he fails to acknowledge the critical *factual* distinction that sets those cases apart from the context and circumstances raised by the Estate’s Complaint in this case – namely, that the crash giving rise to *Lewis* and the actions of the officers in *Waldron* and *Hernandez* occurred while the officers were conducting a high-speed chase and answering emergency response calls, respectively.³ Conversely, when the fatal crash in this case occurred, Locure was not engaged in a high-speed chase, responding to an emergency call, or otherwise in a high-pressure, threatening, or potentially dangerous position that forced him to make a split-second judgment call. He had the luxury of time and the ability to actually deliberate upon his actions before he undertook them, unlike the defendant officers in *Lewis*, *Waldron*, and *Hernandez*.

The different context and circumstances of this case matters greatly. *Waldron* and *Hernandez*

³ Furthermore, in *Waldron*, the court relied upon a prior Eleventh Circuit decision with almost identical facts in reaching its ultimate holding in the case. Neither the Estate or the district court have identified any Eleventh Circuit cases with identical or substantially and materially similar facts as those at issue here. (See Doc. 48, p. 13, *Memorandum Opinion* (Mar. 10, 2023).)

heavily referenced *Lewis* in reaching their ultimate holdings. In turn, close reading of the analysis forming the basis of the *Lewis* decision underscores why the district court correctly reasoned that the context and circumstances present in those cases – upon which Locure relied in arguing for application of the “intent to harm” standard of culpability in this case – are factually distinguishable:

As the very term ‘deliberate indifference’ implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate’s welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

...

‘[I]n making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. . . . In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.’

We accordingly held that a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot. In those circumstances, liability should turn on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.’ ***The analogy to sudden police chases (under the Due Process Clause) would be hard to avoid.***

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made ‘in haste, under pressure, and frequently without the luxury of a second chance.’ A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.

To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that *liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to*

*make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. **When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment,*** even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.' Accordingly, *we hold 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[.]*

County of Sacramento v. Lewis, 523 U.S. 833, 852–54 (1998) (emphasis added) (internal citations omitted).

Accordingly, under *Lewis*, “intent to harm” is the proper standard for evaluating an officer’s conduct when he or she is confronted with “unforeseen circumstances” that “demand an officer’s instant judgment,” such as high-speed chase or emergency response scenarios. *Id*; see also *Waldron*, 954 F.3d at 1310 (“In support of our position, we note that the Supreme Court in *Lewis* held that allegations of recklessness, conscious disregard, and deliberate indifference were insufficient levels of culpability to state a substantive due process claim *in the non-custodial context of a high-speed chase.*” (emphasis added)). It was upon that contextual backdrop that the *Lewis* Court reached its finding of no constitutional violation given that the crash occurred during a high-speed police chase and there was no

evidence the defendant officer had an intent to injure the plaintiff when the crash occurred.

Locure does not solely rely on motor vehicle cases involving hot pursuits or emergency response scenarios in his Brief. He also directs the Court to two Eleventh Circuit cases – *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996) and *Wilcox v. Fenn*, 380 F. App'x 837, 840 (11th Cir. 2010) (*per curiam*) – wherein the defendant officers were not engaged in any emergency response when their complained of conduct occurred. In both cases, the officers drove over the posted speed limit without using emergency lights or sirens, resulting in crashes with other motorists on the roadway. *See Rooney*, 101 F.3d at 1379 (on-duty, on-patrol officer was traveling 73 mph without emergency lights or sirens); and *Wilcox*, 380 Fed. App'x at 838 (on-duty, on-patrol officer was traveling 90 mph on the interstate without emergency lights or sirens). And, in both cases, the court held that the officers' conduct amounted to mere negligence or, at most, gross negligence, and therefore did not meet the minimum culpability threshold for establishing a viable constitutional deprivation under §1983. *See Rooney*, 101 F.3d at 1381; *Wilcox*, 380 Fed. App'x at 840.

At first blush, there appear to be factual similarities between the present case and the conduct at issue in *Rooney* and *Wilcox*, but those parallels are illusory. In that regard, both *Rooney* and *Wilcox* involved allegations of speeding, *and nothing more*. On the other hand, the Estate alleges not only that Locure drove his sheriff's vehicle through the populated downtown Tuskegee area at speeds more than twice the posted limit, but also that he operated his speeding vehicle while he was intoxicated, at

night, and without the use of headlights to illuminate his black vehicle as he sped along the darkened streets. Moreover, the Estate avers that when Locure was confronted with the presence of Mr. Moss's clearly visible vehicle in the roadway ahead, he made no effort to slow, stop, or avoid it before slamming at full speed into the passenger side of the car (as demonstrated by the lack of skid marks in the roadway; the pavement gouges marking the point of impact as squarely within the same lane where Locure's unlit, speeding truck was captured by surveillance video approximately 1000 feet from the point of impact; the massive damage sustained by Mr. Moss's vehicle in the crash; and the post-impact movement of Mr. Moss's vehicle as it was thrown across the roadway and over an embankment).

It is axiomatic that the conduct alleged by the Estate far surpasses the simple act of speeding at issue in *Rooney* and *Wilcox* and constitutes much more than mere negligence or even gross negligence.⁴

⁴ For the same reason, there is no merit to Locure's argument that "sanctioning claims *like the one in the present case* will open the flood gates to constitutional claims against state officials[.]" (USCA11 Doc. 13, p. 24 (emphasis added).) Yet, while he claims this case is "nothing more than an automobile accident," (*id.*), the Estate's allegations show this crash was anything but simple or routine. Throughout his Brief, Locure fails to cite to or rely upon any other case (in this Circuit or beyond) with the same or similar facts as those at issue here, and it is because of the outrageous and especially egregious nature of Locure's conduct that this dearth of factually similar cases exists. The shocking nature of Locure's conduct when operating his sheriff's vehicle as he traveled from the sheriff's office after conducting official sheriff's deputy duties makes it precisely the kind of case upon which a substantive due process claim should proceed. Accordingly, the Court is in no danger of opening the flood gates

Rather, Locure's conduct demonstrates "intentional misuse" of his vehicle, which directly caused the fatal injuries suffered by Mr. Moss. *See Lewis*, 523 U.S. at 854 n.13 (*citing Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)) ("Where a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle" (emphasis in original)).

Locure has no viable basis for arguing the heightened "intent to injure" standard must be applied in every non-custodial case, including those where the official has "the luxury . . . of having time to make unhurried judgments" and "the chance for repeated reflection[.]" *Id.* In short, it is the context and circumstances of each case – and not the mere fact that an officer was operating a motor vehicle in a non-custodial situation – that determines which standard of culpability should be applied when evaluating whether a substantive due process violation has properly been alleged.

B. Deliberate Indifference is the Proper Standard of Culpability Applicable to Locure's Non-Pursuit, Non-Emergency Conduct.

The context and circumstances of the present case demonstrate why "intent to harm" is not the proper standard of culpability to be employed in this matter. Instead, because Locure had the chance to *actually deliberate* upon his entirely voluntary actions before undertaking them, the appropriate standard to be

to constitutional claims against state officials by sanctioning claims "like the one in the present case."

employed is one of deliberate indifference. *See, e.g., Hernandez*, 982 F.3d at 1331 (“Conduct that is not intentionally harmful can violate substantive due process only in contexts “when actual deliberation is practical.”). To that end, it is undisputed that Locure was not engaged in a “hot pursuit” or carrying out an emergency response of any kind at the time of the fatal crash involving the decedent, Mr. Moss. As the district court noted, Locure had the luxury of time to consider his conduct, make unhurried judgments, and engage in repeated reflection of his actions leading up to this violent crash. Despite having time to consider and reflect, Locure nonetheless undertook to operate his vehicle at an excessive speed, in the dark, without the use of headlights, and while under the influence of intoxicating substances. His conduct continued even in the moments before impact, when he failed to slow, stop, or make any evasive maneuvers to avoid Mr. Moss’s vehicle in the roadway ahead, as demonstrated by the absence of skid marks, the location of the impact within the same lane of travel where he was captured on surveillance video just seconds before impact, and the excessive speed of his vehicle at the moment of impact.

The crash at issue in this case – and Locure’s conduct giving rise thereto – did not occur during a “hot pursuit” or other emergency response scenario, such that Locure is not entitled to the higher “intent to harm” standard. Instead, deliberate indifference is the proper standard of culpability where Locure was not acting in response to an emergency, had the luxury of time to actually deliberate and “extended opportunities to do better[,]” yet demonstrated a clear, unequivocal, and “protracted failure even to care,” such that his “indifference is truly shocking.”

Id. at 853. Thus, the Estate has satisfied its burden of asserting a viable claim for violation of Mr. Moss's substantive due process rights under U.S. Const. Amend. XIV, §1.

C. The Nature and Content of the Estate's §1983 Claims Sufficiently Demonstrate a Substantive Due Process Violation.

Locure repeatedly mischaracterizes the nature of content of the Estate's Complaint to argue against the existence of a viable substantive due process violation in this case. In that regard, Locure altogether ignores the Estate's claims of "willful" and "unlawful" conduct in some arguments while alternately (and erroneously) lumping the Estate's separate claims of "willful" and "wanton" conduct together (as "wanton/willful" conduct) and suggesting that "willful" acts and omissions are the same as "wanton" and "reckless" conduct. (*Compare* USAC11 Doc. 13, p. 15 (the Estate "*merely alleged wanton/willful conduct and deliberate indifference*"); *with* p. 25-26 (the Complaint "*alleged only reckless and/or deliberately indifferent conduct*" and contains no facts from which an intent to injure could be inferred) (emphasis added).)

Locure's efforts in this regard are patently erroneous. On its face, the Estate's Complaint asserts that Locure "acted **willfully**, wantonly, and/or with knowledge of and deliberate indifference to the extremely great risk of harm that would likely result therefrom." (Doc. 36, p. 15, ¶ 61 (emphasis added).) Likewise, the Estate avers that Locure "deprived Edwin Moss of his substantive due process right to life when he operated his vehicle **unlawfully, willfully**, wantonly, and/or with deliberate indifference to the great risk of harm that would – and did

– result to Mr. Moss[.]” (*Id.* at ¶ 63 (emphasis added).)

The Estate purposefully set forth separate allegations of “unlawful” and “willful” and “wanton” conduct in its §1983 claim, as Alabama law recognizes a distinction between “wanton” and “willful” conduct, with the latter embodying an intent to act or not act with the purpose to injure or conscious knowledge of injury:

Under Alabama law ‘wantonness’ is defined as the ‘doing of some act or something with reckless indifference to the consequences’ or ‘a failure or omission to do something, with reckless indifference to the consequences.’ *Weatherly v. Hunter*, 510 So. 2d 151, 152 (Ala. 1987).

To constitute ***willful conduct***, there ‘must be knowledge of danger accompanied with ***a design or purpose to inflict injury***.’ *English v. Jacobs*, 82 So. 2d 542, 545 (Ala. 1955). ***Thus, wantonness differs from willfulness*** ‘in that intentional injury requires both knowledge of the danger and a design or purpose to inflict injury.’ *Id.*

Blankenship v. Baker Foods, Inc., 2018 WL 6725326, *1, *4 (N.D. Ala. Dec. 21, 2018) (emphasis added). *See also Hooper v. Columbus Reg’l Healthcare Sys., Inc.*, 956 So. 2d 1135, 1140 (Ala. 2006) (“To constitute ‘willful or intentional injury,’ there must be knowledge of danger accompanied with a design or purpose to inflict injury, whether the act be one of omission or commission.”)

The Complaint expressly avers that Locure acted *willfully* (and unlawfully) when he operated his

vehicle while under the influence at speeds more than double the posted limit; sped through the downtown area at night in his black truck without using headlights; failed to slow, stop, or try to avoid the decedent's vehicle at any point before slamming into his car at speed; failed to render aid and assistance to his victims before leaving the scene of the crash; and directly caused Mr. Moss to die. (Doc. 36, p. 15, ¶¶ 61, 63.) Those express allegations and factual assertions constitute viable claims, at this stage of proceedings, that Locure "knew an accident was imminent but consciously and culpably refused to prevent it." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996).

As the district court correctly pointed out, the Estate's Complaint describes conduct by Locure that exceeds mere negligence or even gross negligence. (Doc. 48, p. 11 ("[A]llegations of driving 50 mph over the posted speed limit while intoxicated at night with no lights easily could be found by a reasonable jury to far exceed a level of gross negligence.")) As discussed in § I. A., *supra*, the Estate vehemently disputes that "intent to injure" is required to establish a viable substantive due process claim in every case involving a motor vehicle collision with a police officer. However, even if the Court is inclined to agree with Locure on this point, when viewing the Complaint's allegations of fact and the express claims of willful and unlawful conduct set out therein, the Estate has satisfied its burden at the motion to dismiss stage of pleading a viable substantive due process claim against Locure. Accordingly, the district court properly denied Locure's motion to dismiss the Estate's §1983 claim, and that denial is due to be affirmed by this Court.

II. THE DISTRICT COURT CORRECTLY
FOUND LOCURE WAS NOT ENTITLED TO
DISMISSAL OF THE ESTATE'S DUE PRO-
CESS CLAIM ON THE BASIS OF QUALI-
FIED IMMUNITY.

When, as here, government officials are sued in their individual capacity, qualified immunity operates to protect the official from liability “unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Melton v. Abston*, 841 F.3d 1207, 1220-21 (11th Cir. 2016) (qualified immunity “does not offer protection if an official knew or reasonably should have known that the actions he took within the sphere of official responsibility would violate the constitutional rights of the plaintiff.”). To establish entitlement to qualified immunity, “the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly unconstitutional acts took place.” *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004) (emphasis omitted). If the official makes this threshold showing, the burden shifts to the plaintiff to prove that the official is not entitled to qualified immunity by showing “(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation.” *Id.*

Appellate review of a district court’s decision to grant or deny the defense of qualified immunity on a motion to dismiss is conducted de novo, with the appellate court “accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiffs favor” in determining

whether the alleged facts “show the alleged conduct violated the person’s constitutional rights.” *Davis v. Carter*, 555 F.3d 979, 981 (11th Cir. 2009). Locure asserted, both in the district court and on interlocutory appeal, that he is entitled to qualified immunity because he was operating his sheriff’s department vehicle in the scope of his discretionary authority at the time of this crash and because there is no binding precedent that would have alerted every reasonable official that his conduct on the date of this crash was a violation of substantive due process under the 14th Amendment, based on the allegations set forth in the Estate’s Complaint. (*See, e.g.*, Doc. 9, p. 20.) Conversely, the Estate claims Locure’s conduct in causing this fatal crash violated Mr. Moss’s clearly-established substantive due process rights, and the Complaint clearly sets forth facts demonstrating this violation.

Regarding the condition precedent of actions within the defendant’s discretionary authority, Locure argues he was acting within the scope of that authority when this crash occurred because he was driving his sheriff’s department vehicle home after conducting official sheriff’s deputy duties (*i.e.*, caring for his law enforcement canine at the request of the sheriff). (Doc. 48, p. 16-17). In response, the Estate argued that Locure’s act of driving in the dark, without headlights, at more than twice the posted speed limit, and while intoxicated does not constitute conduct undertaken within the scope of Locure’s discretionary authority. (*Id.* at p. 17). The district court noted that when determining if conduct was undertaken within an individual’s discretionary authority, courts must “look to the general nature of the defendant’s action, temporarily putting aside the fact that it may have been committed for an uncons-

titutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances.” *Holloman*, 370 F.3d at 1266. Accordingly, the district court found that Locure had satisfied the condition precedent, at the motion to dismiss stage, of showing that he was acting within his discretionary authority at the time of the crash made the basis of this case, thus shifting the burden to the Estate to prove why Locure is not entitled to qualified immunity in this case. (*Id.*)

A. The Complaint Sufficiently Alleges a Violation of The Decedent’s Substantive Due Process Rights.

As discussed in depth in Section I, *supra*, the Estate has alleged sufficient facts and claims regarding Locure’s conduct in causing the death of Mr. Moss, such that the Complaint sets forth a viable claim for violation of the decedent’s substantive due process rights. Accordingly, the Estate has properly satisfied the first prong of overcoming Locure’s claim of qualified immunity in this case. *See Holloman*, 370 F.3d at 1264.

B. The Constitutional Right Violated by Locure Was Clearly Established At the Time of the Crash.

The second prong needed to overcome a claim of qualified immunity is evidence from the plaintiff that the right violated by the defendant was clearly established at the time of the conduct at issue in the case. *See id.* To satisfy this requirement, the plaintiff can “show that a materially similar case has already been decided, giving notice to the police[;]” or “show that a broader, clearly established principle should control the novel facts in this situation[;]” or “show

that this case fits within the exception of conduct which so obviously violates that constitution that prior case law is unnecessary.” *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005) (internal citations omitted).

Neither the Estate nor the district court identified any Eleventh Circuit cases with materially similar facts as those at issue in this case. (See Doc. 48, p. 13.) Moreover, contrary to Locure’s assertions, none of the United States Supreme Court or Eleventh Circuit decisions cited in his Brief are “materially similar” to the facts in this case. *See Mercado*, 407 F.3d at 1159 (case law that is “materially similar” must come from decisions of the Supreme Court or the Eleventh Circuit with facts that are truly substantially and materially similar to the facts of the case at bar).

Given the outrageous and clearly egregious nature, character, and extent of Locure’s conduct in causing the crash that killed Mr. Moss, this case fits within the exception of conduct “which so obviously violates the constitution that proper case law is unnecessary” to establish the established nature of the substantive rights that were violated. *Id.* As specifically detailed within the Complaint and throughout this Brief, this crash occurred when Locure left the sheriff’s department facilities after performing official duties for the sheriff and got behind the wheel of his sheriff’s department vehicle. He began driving down the roadways of downtown Tuskegee in his sheriff’s department vehicle despite the fact that he was intoxicated. Moreover, even though it was dark outside, he failed or refused to engage the headlights on his black vehicle. Furthermore, as he drove in the dark without headlights and while under the influ-

ence, his vehicle reached speed more than double the posted limit, and he continued to drive at that excessive speed on approach to, and at the moment of, impact with the side of the decedent's vehicle.

At the time of this crash, Locure was a law enforcement officer tasked with knowing, following, and upholding the law. Locure's conduct – which he carried out despite the luxury of time and multiple opportunities to deliberate and choose a different course of action – were such that “every reasonable law enforcement official would know that this conduct – as unlawful and unjustifiable as it was – is so facially egregious and conscious shocking that it violates clearly established law protecting the life interest of law-abiding persons.” (Doc. 48, p. 19-20.) Accordingly, the Estate's Complaint properly satisfies both prongs needed to overcome Locure's assertion of qualified immunity at the motion to dismiss stage, such that the district court's ruling must be upheld and the Estate must be allowed to proceed with litigation of its substantive due process claim against Locure.

CONCLUSION

The district court properly denied Locure's motion to dismiss the Estate's § 1983 claim in this case. Because the Estate has pled sufficient facts and legal claims to overcome Locure's assertion of qualified immunity and establish a plausible

violation of the decedent's substantive due process rights, the district court's ruling must be upheld, and the Estate must be permitted to move forward with litigation of its § 1983 claim against Defendant Locure.

DATE: August 7, 2023

29a

s/ Victoria L. Dye

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CERTIFICATE OF COMPLAINT WITH TYPE-
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AND TYPE-STYLE REQUIREMENTS

This undersigned hereby certifies that this document complies with the page and word limitations of Fed. R. App. P. 32(a)(7)(A)-(B), in that it does not exceed 30 pages in length and contains 6,181 words, excluding those parts of the document exempted by Fed. R. App. P. 32(f).

Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) in that it was prepared using Times New Roman in 14-point font.

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Date: August 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2023, I filed the foregoing APPELLEE'S BRIEF with the Court via the CM/ECF system and send a copy of the same via electronic and U.S. Mail delivery to the following persons of record:

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