

No. 25-1242

IN THE
Supreme Court of the United States

DENISE HUGHES, AS ADMINISTRATOR OF
THE ESTATE OF EDWIN DEWAYNE MOSS,

Petitioner,

v.

MONIQUE N. LOCURE, ADMINISTRATRIX OF
THE ESTATE OF DARIAN K. LOCURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING

Plaintiff-Petitioner is Denise Hughes, as Administrator of the Estate of Edwin Dewayne Moss, who was the Plaintiff-Appellee below.

Defendant-Respondent is Monique N. Locure, Administratrix of the Estate of Darian K. Locure, who was substituted as Defendant-Appellant below following the death of Darian K. Locure.

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INTRODUCTION

Respondent’s opposition brief confirms, rather than dispels, the need for this Court’s review. Respondent does not deny that Deputy Locure drove a police truck drunk, unlit, at nearly three times the speed limit, on no official business, killed Edwin Moss, and fled. Respondent does not deny that the Tenth Circuit in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), and the Fourth Circuit in *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407 (4th Cir. 2020), would deny qualified immunity on materially similar—indeed less egregious—facts. Instead, Respondent offers three defenses: that Ms. Hughes forfeited her argument below; that the circuits are merely “congruent,” and reach different results on different facts; and that Alabama tort law supplies an adequate remedy. Each fails. The conflict is real, it is acknowledged by a member of the panel below, and it decides cases. *Certiorari* should be granted.

REASONS FOR GRANTING THE PETITION

I. THE CONFLICT ISSUE WAS SQUARELY BEFORE THE ELEVENTH CIRCUIT AND WAS CENTRAL TO ITS DECISION

Respondent’s primary argument is that Ms. Hughes “changes tack,” raising *Lewis*’s footnote 13 and *Browder* for the first time here. That argument mistakes emphasis for preservation.

The governing question—whether the substantive due-process right against a police officer’s intentional misuse of a vehicle was “clearly established”—was the

express basis of the Eleventh Circuit’s holding. The panel resolved the case on the “clearly-established” prong of qualified immunity, assuming *arguendo* the constitutional violation. *Hughes v. Locure*, 166 F.4th 121, 128–30 (11th Cir. 2026). The right at issue, the culpability standard drawn from *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and the significance of *Browder* were all before the court. The district court also relied on *Browder* and on *Lewis*’s reasoning, *Hughes v. Locure*, 2023 WL 2457367, at *5 (M.D. Ala. Mar. 10, 2023), and the Eleventh Circuit directly engaged *Browder*, inadequately distinguishing it on the ground that it “was decided in light of earlier Tenth Circuit precedent.” *Hughes*, 166 F.4th at 129. A circuit court of appeals does not “decide” an issue that it never confronted; rather, here, the *Hughes* panel confronted *Browder* and incorrectly rejected it on the merits. The conflict was thus not merely preserved—it was adjudicated.

This Court “does not ordinarily decide questions not pressed or passed upon below,” but a party is “not limited to the precise arguments [she] made below.” *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Ms. Hughes has consistently pressed the same claim—that Deputy Locure’s conduct violated a clearly established right—and merely marshals additional authority for it. This is precisely that which *Yee* permits. Respondent’s reliance on *United States v. Sineneng-Smith*, 590 U.S. 371 (2020), is misplaced: that case condemned a court’s *sua-sponte* injection of a wholly new theory that the parties never raised. Here the clearly-established question was litigated by both parties and decided by the *Hughes* panel.

Respondent’s forfeiture theory is likewise not well-taken. Respondent contends (Resp. Br. 11) that Ms. Hughes’ failure below leaves “another litigant free to advance a different qualified immunity argument.” That, of course, ignores that the Eleventh Circuit *Hughes* panel indeed decided the subject “clearly-established” qualified-immunity issue, that this rule will bind future litigants—as it will, being published precedent—that the conflict it creates is thus entrenched and recurring, and that only this Court can resolve it.

II. FOOTNOTE 13 OF *LEWIS* CLEARLY ESTABLISHED THE RIGHT, AND THE CIRCUITS ARE IN DIRECT CONFLICT.

A. *Lewis* footnote 13 established the right. Respondent argues (Resp. Br. 12–15) that footnote 13 is a mere “*cf.*” citation that never “defines” intentional misuse, and so cannot clearly establish law. But this Court did not append footnote 13 as idle dictum—nor did then-Judge Gorsuch discuss it as such in *Browder*. *See Browder*, 787 F.3d at 1083 (“[The Supreme] Court also expressly noted when a private person suffers a serious physical injury ‘due to a police officer’s intentional misuse of his vehicle’ ” a viable due process claim can arise. 523 U.S. at 854 n. 13[.]”). This Court thus drew the constitutional line: “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 [or her] vehicle.” *Lewis*, 523 U.S. at 854 n.13 (quoting *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)) (emphasis in original). That distinction—negligent use versus intentional misuse—is

the line this case straddles, and Deputy Locure falls on the actionable side of it.

Respondent’s attempt to redefine “intentional misuse” as requiring a malicious purpose to “terrorize” (Resp. Br. 13–15) contradicts *Lewis* itself. *Lewis* demanded the heightened intent-to-harm standard only in the emergency, split-second context of a high-speed pursuit, where officers face “obligations that tend to tug against each other.” 523 U.S. at 853. Where no emergency exists, and “actual deliberation is practical,” deliberate indifference suffices. *Id.* at 851. Locure was on no official business, faced no competing obligations, and had ample time to deliberate. Respondent’s *Frederking* analogy—a drunk-driving insurance-coverage case (Resp. Br. 15)—is inapposite; the question is constitutional culpability under *Lewis*’s sliding scale, not whether a private insurer must indemnify an “accident.”

B. The split is direct, not illusory. Respondent insists (Resp. Br. 15–18) that *Browder* and *Hughes* are “congruent” because *Browder*’s officer activated his emergency lights and thus “wielded governmental power,” while Locure “happened to be in a patrol vehicle.” This distinction is backwards. The Tenth Circuit held Casaus liable despite—not because of—his lights, and grounded liability on the absence of any emergency or official business. *Browder*, 787 F.3d at 1080–81. Locure’s conduct was more egregious: he was intoxicated, drove without any lights, and fled the scene. If lights-on, sober, on-personal-business conduct violates clearly established law in the Tenth Circuit, then lights-off, drunk conduct cannot be immune in the Eleventh. The results diverge on facts that point the same direction—the hallmark of true conflict. Sup. Ct. R. 10(a).

Dean for & on behalf of Harkness v. McKinney, 976 F.3d 407 (4th Cir. 2020), removes any doubt. There, the officer was not even off-duty; he was responding (non-emergency) to assist another deputy, drove 83 mph on an unlit curve, and the Fourth Circuit held that it was “clearly established” that such conduct “could be subject to liability under the Fourteenth Amendment for deliberate indifference.” 976 F.3d at 419. The Seventh Circuit reached a similar conclusion in *Flores v. City of South Bend*, 997 F.3d 725, 728–30 (7th Cir. 2021), where an officer speeding to an uninvited traffic stop was held to have plausibly acted with deliberate indifference. Three circuits thus recognize the claim; and the Eleventh alone forecloses it. A citizen’s constitutional protection now turns on geography.

C. Judge Jordan’s dissent confirms the conflict.

Respondent dismisses Judge Jordan’s dissent (Resp. Br. 18) as engaging only the “obvious-clarity” prong. Wrong. Judge Jordan aligned himself with *Browder* and *Lewis*, concluding that Locure “acted with a ‘conscious contempt of the lives of others ... precisely the sort of *mens rea* *Lewis* says will normally suffice to establish liability,’” and that “[n]o reasonable officer in January of 2021 could have possibly believed” his conduct was constitutional. *Hughes*, 166 F.4th at 132–33 (Jordan, J., concurring in part and dissenting in part) (quoting *Browder*, 787 F.3d at 1081). This reasoning also addresses the clearly unconstitutional nature of the conduct. He further explained that the majority’s reliance on *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), and *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996), was misplaced because those officers acted “in the line of duty,” while intoxication was “the critical aggravating factor” here. *Hughes*, 166 F.4th at 133–34. A sitting Eleventh Circuit judge, reading the

same precedents, concluded that the right was clearly established. That a member of the panel would follow the Tenth and Fourth Circuits' approach underscores that the disagreement is genuine, not semantic.

III. REVIEW IS WARRANTED, AND ALABAMA LAW OFFERS NO ADEQUATE REMEDY.

Respondent's final refuge is that state tort law supplies relief, invoking *Parratt v. Taylor*, 451 U.S. 527 (1981), through then-Judge Gorsuch's *Browder* concurrence. But that concurrence reserved on whether *Parratt* applies to substantive due-process claims, 787 F.3d at 1085, and the Fourth Circuit in *Dean* held that it does not, following *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). *Dean*, 976 F.3d at 420–21. A substantive due-process violation “bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them”; the availability of a state remedy is “irrelevant.” *Id.* (quoting *Zinermon*, 494 U.S. at 125). Respondent's *Parratt* theory would itself deepen the split.

In all events, Respondent's assurance that Alabama law will make Petitioner whole is hollow. Alabama broadly extends constitutional immunity to sheriffs and their deputies for acts within the scope of their duties. *Parker v. Amerson*, 519 So. 2d 442, 443 (Ala. 1987); Ala. Const. Art. I, § 14; Ala. Code §§ 36-1-12, 36-22-3. Just last year, this immunity was reaffirmed. *Ex parte Underwood*, No. SC-2024-0263, --- So. 3d ----, 2025 WL 1776225 (Ala. June 27, 2025). Respondent has not waived that defense (Resp. Br. 1), preserving it for summary judgment (Resp. Br. 23 n.3). Respondent thus argues out of both sides of its mouth: for federal purposes, Locure acted under color of law

within his discretionary authority; for state purposes, he may claim the very immunity that flows from official duty. The § 1983 claim is likely Ms. Hughes' only viable path to recovery—which is exactly why the constitutional question matters, and why the Eleventh Circuit's suggestion of an “available remedy,” *Hughes*, 166 F.4th at 130, cannot justify denying review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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