No. _____

In The Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A police officer at the scene of a no-injury accident observed an SUV with hazard lights flashing drive past his position at what he believed was a high rate of speed. He finished the accident call, then drove at high speeds in search of the SUV, which was no longer in sight, for approximately five minutes. Driving in a congested area at ninety-eight miles per hour at the time of impact, without emergency lights and siren, the officer collided with a vehicle making a left turn in front of him, killing both occupants of that vehicle.

The questions presented are:

1. Whether a court should apply the intent-to-harm standard of liability to all police high-speed driving, as have the Eighth and Ninth Circuits, or instead employ an analysis which examines the facts of individual cases to decide whether there was an opportunity to deliberate and apply the standard of deliberate indifference or another standard other than intent-to-harm, as have the Third, Fourth, Seventh, and Tenth Circuits.

2. Whether a court reviewing high-speed driving by a police officer should use an objective test to determine whether an emergency existed, as have the Third, Fourth, and Seventh Circuits, or rely merely on the asserted claim of an officer that he subjectively believed there to be an emergency, as has the Eighth Circuit.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Lori Braun, as Administratrix of the Estate of Cassandra Braun, Deceased, Individually and on Behalf of All Wrongful Death Beneficiaries of Cassandra Braun. Lori Braun was the plaintiff-appellant below.

Respondents are Brian Ray Burke, Trooper, Individually as an Officer of the Arkansas State Police, and Bill Bryant, Colonel, Individually as the Chief Executive Officer of the Arkansas State Police. Trooper Burke and Colonel Bryant were the defendant-appellees below.

RELATED PROCEEDINGS

Braun v. Burke, No. 4:18-cv-334-BRW, U.S. District Court for the Eastern District of Arkansas, Little Rock Division, Judgment entered August 30, 2019.

Braun v. Burke, No. 19-2961, U.S. Court of Appeals for the Eighth Circuit, Judgment entered December 23, 2020, Rehearing Denied February 1, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Lori Braun respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The Court of Appeals' February 1, 2021 Order denying rehearing and rehearing *en banc* is reproduced at App. 20. The opinion of the Court of Appeals is reported at *Braun v. Burke*, 983 F.3d 999 (8th Cir. 2020) and is reproduced at App. 1. The District Court's August 30, 2019 order granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment is reported at *Braun v. Burke*, 2019 WL 11542475 (E.D. Ark. 2019) and is reproduced at App. 13.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its decision affirming the District Court's grant of summary judgment on December 23, 2020. App. 1. Petitioner timely filed a petition for rehearing or rehearing *en banc* on January 5, 2021. (Eighth Circuit Entry ID: 4990916). The Court of Appeals for the Eighth Circuit entered its order denying the petition for rehearing and rehearing *en banc* on February 1, 2021. App. 20.

By Order dated March 19, 2020, this Court provided that "[i]n light of the ongoing public health concerns relating to COVID-19 . . . the deadline to file any petition for a writ of certiorari due on or after [March 19, 2020] . . . is extended to 150 days from the date of the lower court . . . order . . . denying a timely petition for rehearing." Therefore, this petition for a writ of certiorari is timely, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen

> of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Introduction

In 1998, this Court decided *County of Sacramento v. Lewis*, 523 U.S. 833, recognizing a cause of action under 42 U.S.C. § 1983 for a violation of substantive due process rights under the Fourteenth Amendment for injuries caused by high-speed chases by police officers. The Court had taken the case "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 523 U.S. at 839. The Court held in that case that liability could only be imposed where the officer intended "to harm suspects physically or to worsen their legal plight." 523 U.S. at 854.

In the past two decades, the lower federal courts have confronted numerous high-speed driving cases where the facts differed significantly from those in *Lewis*, including those in which officers were not engaged in a pursuit, where the decision to drive at high-speed was not instantaneous or made in a "split-second," where high-speed driving lasts for several

minutes affording officers an opportunity to deliberate, and where objectively there was no emergency requiring high-speed driving. This has led to a serious conflict in the Circuits respecting the standard of culpability for violating substantive due process rights in such cases.

Two Circuits, the Eighth and the Ninth, have imposed the intent-to-harm standard on all high-speed driving by officers. Four others, the Third, Fourth, Seventh, and Tenth, have examined the circumstances of individual cases to determine whether officers had an opportunity to deliberate before beginning or while continuing high-speed driving and have used an objective standard to determine whether an emergency justified such driving. In these four Circuits, the courts have employed deliberate indifference or another standard other than intent-to-harm to determine liability.

There is also a Circuit split with respect to how to determine whether emergency circumstances justified high-speed police driving. The Eighth Circuit employs a subjective test, relying upon the statement of the officer as to whether an emergency existed. The Third, Fourth, and Seventh Circuits employ an objective test, analyzing the circumstances to determine whether there was an emergency.

High-speed driving by police results in a fatal crash every day in the United States.[1] This Court should grant certiorari to clarify the standard of liability for constitutional claims arising from these incidents.

Facts

Shortly after 9:00 PM on October 10, 2016, Arkansas Trooper Brian Burke, driving nearly 100 miles per hour, with no blue lights or siren engaged, drove his cruiser into another vehicle, killing the driver and the passenger. 983 F.3d at 1001, Rec. 18-19.[2] Cassandra Braun was the passenger, riding in a Malibu driven by Tavon Jenkins that had been headed West on US Highway 70 in Hot Springs, Arkansas. Rec. 18. Jenkins had entered his left-hand turning lane to turn onto Kleinshore Drive. As he did so, Burke's cruiser crashed into the Malibu. 983 F.3d 1001.

Several minutes before, Burke had been investigating a no-injury, hit-and-run accident at the Pearcy Post Office when he noticed a dark-colored SUV drive past at what he claimed was between 90 and 95 miles per hour, with its hazard lights flashing. 983 F.3d at 1001, Rec. 155, 244-45, 247-50. He did not immediately pursue the SUV. He spent over a minute wrapping up

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[1] Fatality Analysis Reporting System (FARS): 2005-2018 Final File and 2019 Annual Report File (ARF), Report Generated: Thursday, March 4, 2021 (3:24:46 PM)

[2] References to "Rec." are to page numbers of the Appellate Appendix below.

the hit-and-run call, then walked to his cruiser, pulled out of the Post Office lot, and began speeding down the road in the direction the SUV had been travelling. 983 F.3d 1001, Rec. 253-54.

Burke did not report his intentions to search for the SUV at high-speed to the Arkansas State Police (ASP). The ASP Policy on Pursuits required the primary unit initiating a pursuit to advise the communications center of the details, including location, direction of travel, speed, traffic volume, any hazardous conditions, reason for the pursuit, and descriptions of the fleeing vehicle and suspect driver.[3] Rec. 446-51. Instead of calling his communications center, Burke radioed the Garland County Sheriff's Department to report the SUV. Rec. 251-53. His intent was for them to try to find the vehicle and if it was still violating the law, to observe the violation and then stop it. Rec. 253.

Burke sped in the dark from the rural two-lane portion of Highway 70 to the more urban and congested highway nearer the city. Rec. 281-302. See Video filed of record as noted at Rec. 149.[4] He reached speeds

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[3] As we discuss *infra*, Burke was not engaged in a "pursuit" when he went hunting for the SUV. All the reasons for reporting a pursuit, however, would apply equally to the high-speed driving that Burke did.

[4] The video can be accessed at this link: https://www.dropbox.com/sh/u7c79hdnvqtld5q/AAAOG-4AUtij9WkxavIWoKNKa?dl=0. The reader must download the Watchguard program in order to view the vehicle's speed, lights, siren, and break usage.

of up to 117 mph and averaged over 90 mph. Rec. 54, 256. The longer he drove, the more traffic he encountered. Petitioner urges the Court to view the dashcam video. It documents the time and many opportunities the trooper had to reconsider his actions. Once Burke reached the congested portion of the highway there was significant traffic. The road crosses several intersections and passes numerous gas stations and other businesses. Seconds before the collision, Burke was weaving in and out of lanes, crossing the yellow center line, and passing a vehicle to his right. An accident was inevitable.

Immediately after driving over a little hill, Burke encountered the lights of the Malibu entering the left-turn lane on US Highway 70. Video. Rec. 302. The occupants of that vehicle had no way to discern how fast Burke was speeding. Burke was racing at 113 miles per hour. Rec. 57. At the moment of the crash, he was still moving at 98 miles per hour.[5] Rec. 57. The posted speed limit was 45 miles per hour.

Col. Bryant later testified that there was no doubt in his mind that he was going to terminate Burke because his driving had been "reckless," "shocking," "in

[5] The unrefuted testimony of Plaintiff's expert, Mathew Jackson, indicates that had Burke been traveling the speed limit, or even 15 miles per hour over the speed limit, Ms. Braun would have cleared the intersection and the crash would have been avoided. Jackson noted that had Burke utilized his lights and siren, his vehicle could have been observed in sufficient time for the victims to take evasive action. Rec. 73.

disregard to the safety of the motoring public," and "outside the scope of his duties." Rec. 103, Rec. 415. As it turned out, Burke was permitted to resign for medical reasons. Rec. 414-15.

It is undisputed that Burke was not answering an emergency call during his search for the SUV. Rec. 63. Neither the ASP nor Burke define what he was engaged in as a "pursuit." The ASP pursuit policy defines "Vehicle Pursuit" and "Pursuit" as an attempt by an ASP officer in an official vehicle to stop a moving vehicle *when the driver of such vehicle is aware the officer is signaling the vehicle to stop and disregards the officer's attempt to stop the vehicle*. Rec. 446 (emphasis added).

The ASP Policy further stipulates, "Emergency lighting equipment and siren *shall be in operation throughout the pursuit.*" Rec. 446 (emphasis added). Burke agreed that a "pursuit" does not exist until lights and siren are activated. Rec. 226. Col. Bill Bryant, the chief executive officer of the ASP, admitted that Burke was not in the "immediate pursuit of an actual or suspected violator of the law" during the incident. Rec. 97. There can be no pursuit until lights and siren are activated and the pursued vehicle begins to flee. Rec. 256. What Burke was engaged in was an illegal high-speed "catch-up."

Burke had one or two minutes to consider his actions before he started driving. He began driving with his blue lights and siren activated, but after passing two other cars, made the deliberate decision to turn

them off. Rec. 56. He then drove for approximately five minutes. Video. As revealed in the video, he was required to avoid sixty other vehicles before crashing into and killing the decedents. Video and Rec. 459. He crossed the center line of the road approximately thirty-five times, due to his speed. Video and Rec. 459.

Proceedings Below

Plaintiff filed suit under 42 U.S.C. § 1983, alleging that Defendant Burke had violated her decedent's substantive due process right to life. In addition, she claimed that Defendant Colonel Bryant was liable to plaintiff for his failure to train and supervise Burke.

All parties moved for summary judgment. Burke defended his actions with an affidavit, prepared after suit was filed, in support of his summary-judgment motion. He stated:

> 7. I believed that the SUV traveling at a high rate of speed with a likely untrained driver posed a serious risk to the motoring public, thus creating a dangerous situation.
>
> 8. Believing there was an emergently dangerous situation, I decided to try and stop the vehicle in order to end the risk to the public.
>
> 9. I believed at the time that I was responding to a dangerous situation and that I needed to drive in the manner that I was driving.

Rec. 155.

The district court granted the defendants' motions for summary judgment and denied the plaintiff's motion. It held that there was no due process violation in this case because Burke had no intent to harm Braun. App. 18. In reliance on Eighth Circuit precedent, the court declined to apply a standard other than intent-to-harm, whether or not Burke had an opportunity to deliberate and whether or not there was an objective emergency. Having found no constitutional violation by Burke, the court granted Col. Bryant summary judgment as well.

The Eighth Circuit agreed that intent-to-harm was the applicable culpability state, with two concurring opinions. App. 1. The crux of the decision was Burke's affidavit. As the opinion put it, the affidavit showed "Trooper Burke believed he was responding to an emergency, and thus we apply the intent-to-harm standard." 983 F.3d at 1003. Based on its prior decisions, the Eighth Circuit declined to consider whether there had been an objective emergency, or whether actual deliberation was practical. 983 F.3d at 1002-03.

Judge Grasz filed a concurring opinion, noting that he was joining in the court's opinion because precedent required it. He underlined that this was "not a case involving a high-speed pursuit of a fleeing suspect," but rather "a hunt for a suspect whose whereabouts were unclear." 983 F.3d at 1005.

Judge Grasz identified a "growing circuit split on when and how to apply the requisite level of culpability under *County of Sacramento v. Lewis*." 983 F.3d at 1005.

He compared courts that have used a standard other than intent-to-harm, *Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020) (*en banc*) and *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), both discussed *infra*, with *Bingue v. Prunchak*, 512 F.3d 1169 1176-78 (9th Cir. 2008), and *Terrell v. Larson*, 396 F.3d 975, 980 (8th Cir. 2005) (*en banc*) (applying an intent-to-harm standard). Judge Grasz noted that the need for greater clarity was particularly important where "as here, there was time to deliberate before engaging in the high-speed driving that caused the accident and it was not a situation where the circumstances demanded an officer's instant judgment or a decision under pressure."

The plaintiff Braun timely filed a petition for rehearing and rehearing *en banc*, which was denied by the Eighth Circuit on February 1, 2021. App. 20.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ABOUT WHETHER THE INTENT-TO-HARM STANDARD OF LIABILITY APPLIES TO ALL POLICE HIGH-SPEED DRIVING, OR WHETHER A COURT SHOULD EXAMINE THE FACTS OF INDIVIDUAL CASES TO DECIDE WHETHER TO APPLY A DIFFERENT STANDARD WHERE AN OPPORTUNITY TO DELIBERATE WAS PRESENT.

A. This Court Should Resolve Whether the Intent-to-Harm Culpability Standard Applies to All High-Speed Driving By Police.

Petitioner asks this Court to establish, as have the Third, Fourth, Seventh, and Tenth Circuits, that the exact circumstances of police high-speed driving must be analyzed to determine whether an officer had an opportunity for deliberation, and hence whether in appropriate cases deliberate indifference or another standard other than intent-to-harm would be the proper standard.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court granted certiorari to determine "the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839. There, an officer saw a motorcycle approaching at high speeds, turned on his overhead rotating lights, yelled at the vehicle to stop, and attempted to pen it in with his patrol car. Instead of

complying with the commands, the motorcycle "sped off," and another officer "began pursuit at high speed." *Id.* at 836-37. A mere 75 seconds later, the motorcycle tipped over and the police car skidded into the passenger, killing him. *Id.* at 837. The Court noted that the motorcycle driver had flouted law enforcement authority to control traffic, that his "outrageous behavior was practically instantaneous, and so was [the officer's] instinctive response." *Id.* at 855. Under those circumstances, the Court held that the officer could not be held liable for a substantive due process violation unless he had an intent to harm the suspect physically or to worsen his legal plight.

The Court rejected the plaintiff's request to apply a deliberate indifference standard, reasoning:

> 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. . . . As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is possible. *Id.* at 850-51.

Despite that caution, the **Eighth and Ninth Circuits** have applied the intent-to-harm standard of *Lewis* to all high-speed driving by police officers,

regardless of the circumstances. See *Braun v. Burke*, 983 F.3d 999 (8th Cir. 2020); *Sitzes v. City of W. Memphis*, 606 F.3d 461 (8th Cir. 2010); *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (*en banc*); *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001) (*en banc*); *Bingue v. Prunchak*, 512 F.3d 1169, 1170-71 (9th Cir. 2008) ("police officers involved in all high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm").

The **Third, Fourth, Seventh, and Tenth Circuits** have recognized that high-speed driving by police officers occurs under a variety of circumstances and that the single intent-to-harm standard of *Lewis* is neither appropriate under all circumstances, nor does it satisfy the rationale of the *Lewis* opinion itself. Thus, the Third Circuit, *Sauers v. Borough of Nesquehoning*, 905 F.3d 71 (3d Cir. 2018), the Fourth Circuit, *Dean v. McKinney*, 976 F.3d 407, 414-16 (4th Cir. 2020) (*en banc*), the Seventh Circuit, *Flores v. City of South Bend*, 997 F.3d 725 (7th Cir. 2021), and the Tenth Circuit, *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), have held that under some circumstances high-speed driving by police officers must be judged under a standard other than intent-to-harm.

In *Sauers*, the **Third Circuit** reviewed a case in which an officer made a U-turn to chase after a Dodge automobile he had seen commit a summary traffic offense in the oncoming lane. He radioed ahead to the police in the next borough to pull the Dodge over when it reached their jurisdiction, then began chasing it at

speeds over 100 mph. The officer lost control of his car on a curve and crashed into the plaintiff's car, killing the driver's wife who was a passenger. As in the instant case, the Dodge was unaware the officer was chasing him, and the officer had alerted another jurisdiction to the presence of the motor vehicle violator.

The Third Circuit recognized that *Lewis* described a continuum of culpability that falls along a spectrum dictated by the circumstances of each case. It defined "three distinct categories of culpability depending on how much time a police officer has to make a decision":

> In one category are actions taken in a 'hyper-pressurized environment[.]' They will not be held to shock the conscience unless the officer has 'an intent to cause harm.' Next are actions taken within a time frame that allows an officer to engage in 'hurried deliberation.' When those actions 'reveal a conscious disregard of a great risk of serious harm' they will be sufficient to shock the conscience. Finally, actions undertaken with 'unhurried judgments,' with time for 'careful deliberation,' will be held to shock the conscience if they are 'done with deliberate indifference.' *Sauers*, 905 F.3d at 717, citing *Haberle v. Toxell*, 885 F.3d 170, 177 (3d Cir. 2018) (internal citations and footnotes omitted).

The Third Circuit applies that framework to police high-speed driving.[6] In *Sauers* it held that the

[6] The plaintiff in *Sauers* had proceeded on a state-created danger theory. The elements of that claim in the Third Circuit

allegations that the officer "had at least some time to deliberate" before deciding to pursue a traffic offender at speeds in excess of 100 mph, that he called a neighboring police department as he was contemplating his actions, and that the court found that objectively there was no emergency, placed the case in a middle category of culpability where liability could be found based on a "conscious disregard of a great risk of serious harm." 905 F.3d at 717-18.[7] The court articulated the rule that governs high-speed driving as follows:

> [T]he level of culpability required to shock the conscience exists on a spectrum tied to the amount of time a government official has to act. In the police pursuit context, it is also necessary to take into consideration the officer's justification for engaging in the pursuit. We recognize that most high-speed police pursuits arise when officers are responding to emergencies or when they must make split-second decisions to pursue fleeing suspects. Our holding today does nothing to alter the longstanding principle that, in such cases, constitutional liability cannot exist absent an intent to harm. But when there is no compelling justification for an officer to engage in a

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required proof of behavior that shocks the conscience, 905 F.3d at 717. Thus, the issues with regard to establishing the standard of culpability were the same as in *Lewis* and the instant case.

[7] In his concurrence below, Judge Colloton attempted to distinguish this case because the *Sauers* court found there was no emergency. This argument ignores the fact that the Third Circuit also engaged in a detailed factual analysis to determine whether there was an opportunity to deliberate.

> high-speed pursuit and an officer has time to consider whether to engage in such inherently risky behavior, constitutional liability can arise when the officer proceeds to operate his vehicle in a manner that demonstrates a conscious disregard of a great risk of serious harm. 905 F.3d at 723.

In *Dean*, the **Fourth Circuit** reviewed a case in which the defendant officer was driving to assist another officer with a traffic stop at night. The Supervisor had issued a "Code 3" for officers to assist, which permitted a responding officer to exceed speed limits and disregard traffic regulations, but which required the officer to use emergency lights and sirens. The Supervisor then cancelled the Code 3 but advised responding officers to continue to the location of the stop. The defendant deactivated his emergency lights and siren but was still traveling at 83 mph when he skidded around a curve and struck an oncoming vehicle nearly head-on, causing the driver extensive and severe orthopedic and neurological injuries.

The Fourth Circuit read *Lewis* as establishing "a 'culpability spectrum' along which behavior may support a substantive due process claim" that required "an exact analysis of context and circumstances before any abuse of power is condemned as conscience shocking." 976 F.3d at 414, citing *Lewis*, 523 U.S. at 848-49. The court applied that spectrum to high-speed police driving. It stated, "Certainly, time to 'reflect on [one's] actions' is a factor in determining whether deliberate indifference is the appropriate standard." 976 F.3d at

415. The court found that the officer "had over two minutes to deliberate—to apply his knowledge and training to the situation, reflect on his actions, and conform his behavior—before he lost control of his vehicle." 976 F.3d at 417. It found that was "ample time" to consider his actions. 976 F.3d at 416.

Thus, the court determined that deliberate indifference was the appropriate standard of culpability.[8] In assessing the defendant officer's conduct, the court took into account that there was no emergency, the officer was speeding, and, as in the instant case, driving without emergency lights and a siren, which "increased the danger, as it eliminated any warning to other drivers that a law enforcement vehicle was approaching at a high rate of speed." 976 F.3d at 416-17.

In the **Seventh Circuit** case *Flores*, officer Gorny, on his own initiative, "careened through residential streets and a red light at speeds up to 98 mph," making infrequent use of his lights and siren, to reach a speeding vehicle that two officers patrolling together had radioed they planned to stop. On his way, Gorny crashed into Flores's car, killing her. The two patrolling officers were part of a five-officer team. None of the members

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[8] Judge Colloton, in his concurrence in *Braun* below, argued that *Dean* was not in conflict with Eighth Circuit jurisprudence because the emergency call in *Dean* had been cancelled and the officer had "backed down." That argument, however, ignores the fact that the officer only *claimed* to have backed down, but was still speeding through traffic to get to the scene. There was no question that it was the officer's high-speed driving without emergency lights and siren that the court was evaluating.

of the team signaled that the routine traffic stop constituted an emergency, none requested assistance from officers outside their group, and the other three officers on the team did not pursue the driver.

The Seventh Circuit applied a standard of "criminal recklessness," which it equated to "deliberate indifference." It held that this standard was appropriate in a non-emergency situation in which the officer had actual knowledge of an unjustifiable risk to human life and consciously disregarded that risk. The court concluded that the officer's reckless conduct, unjustified by any emergency, allowed the inference that he subjectively knew of the risk he created and consciously disregarded it and remanded the case for trial.

Two opinions from the **Tenth Circuit,** one authored by then Judge Gorsuch, also involve deviations from the intent-to-harm culpability standard. In *Green*, a deputy sheriff drove through an intersection at a high rate of speed without emergency lights or siren and killed a driver making a left turn in front of him. The officer was pursuing a person he suspected of driving away from a gas station without paying for $30 worth of gas. The court reasoned that under *Lewis* plaintiffs could establish a substantive due process violation either by showing that the deputy intended to harm the decedent "or that he had sufficient time to actually deliberate and exhibited conscience-shocking 'deliberate indifference' towards [decedent]." 574 F.3d at 1302. The court found that the facts placed the case "in the middle range of the culpability spectrum, where the conduct is more than negligent but less than

intentional," and where "there may be some conduct that is egregious enough to state a substantive due process claim." *Id*. (citation omitted).[9] The court noted that, "we do not attempt to set out any bright-line rules regarding all police conduct. Given the Supreme Court's directive that we examine the particular circumstances of the case before deciding whether our consciences are shocked, such bright-line rules are difficult, if not impossible, to draw." 574 F.3d at 1304.

Subsequently, in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), an off-duty officer sped through the city with emergency lights on, ran a red light, and killed another driver. The parties stipulated that he was acting under color of law. 787 F.3d at 1078. He was not, however, on police business at the time. Given that, the court, in an opinion by then Judge Gorsuch, held that "conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right" would be sufficient to establish liability, and that the specific intent standard of *Lewis* did not apply. 787 F.3d at 1081. Of particular significance to the instant case, the court rejected the argument that the officer only had 2.5 seconds to deliberate (the time it took him to travel through the intersection where the collision occurred). The court stated, "On the facts alleged, after all, one could just as easily conclude

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[9] The court then inexplicably added an additional "conscious shocking" test on top of the culpability standard and found that the deputy's actions did not "demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." 574 F.3d at 1303-04.

that the officer had more like eight minutes than 2.5 seconds to reflect on his actions—from the time he started driving at high speed on city surface streets through eleven intersections over 8.8 miles until the time of the crash." 787 F.3d at 1082.

There is a clear split in the Circuits. Decisions from the **Third, Fourth, Seventh**, and **Tenth Circuits** have analyzed the circumstances of individual cases to determine the standard to be applied to assess high-speed driving by police. The **Eighth Circuit** has explicitly declined to conduct such an inquiry: "we do not 'reject intent-to-harm as the governing standard whenever a judge or a jury could say, with the wisdom of hindsight, that an officer engaged in a high-speed pursuit had ample time to deliberate.'" *Sitzes*, 606 F.3d at 468, citing *Helseth*, 258 F.3d at 871. The **Ninth Circuit** in *Bingue* adopted the *Helseth* analysis and applied the intent-to-harm standard for all high-speed chases, regardless of whether the officer had time to deliberate or whether the situation was an emergency. 512 F.3d at 1175-77.

Subsequent to *Lewis*, this Court has itself recognized that officers have opportunities for deliberation during a high-speed pursuit. In *Scott v. Harris*, 550 U.S. 372 (2007), the pursuit, as depicted in the video the Court examined, was characterized by Justice Scalia as "a Hollywood-style car chase of the most frightening sort." 550 U.S. at 380. Yet the opinion documents conscious deliberation and decision-making by the officer during the pursuit. Six minutes and ten miles into a high-speed chase, the officer deliberated

how to terminate the pursuit. 550 U.S. at 375. At first, he considered a "Precision Intervention Technique" (PIT) maneuver. On second thought, he rejected that option and decided to apply his bumper to the rear of the pursued vehicle. The officer changed his mind after calculating that the vehicles were moving too quickly to safely execute the PIT. 550 U.S. at 375, n. 1.

Because the officer in *Scott* consciously decided to ram the other vehicle and did so, a pursuit that otherwise would have been subject to a substantive due process analysis became a Fourth Amendment seizure. Despite the fact this seizure took place during the pursuit, Justice Scalia concluded, "Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'" 550 U.S. at 383. This required *both the officer and the Court* to balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," "the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate," and "not only the number of lives at risk, but also their relative culpability." 550 U.S. at 583-84. After conducting that complicated analysis, the Court concluded that the officer's decision was "reasonable." The necessary sloshing and balancing by the officer *were taking place during the pursuit*.

The Eighth Circuit's assumption that officers involved in high-speed driving do not have an opportunity for deliberation has been firmly rejected by the policing community itself. Training materials of the International Association of Chiefs of Police (IACP) require an officer to perform a balancing test before initiating a pursuit:

> The decision to pursue must be based on the pursuing officer's determination that the immediate danger to the officer, the suspect, and the public created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large.[10]

And the IACP requires that this balancing test be applied throughout a pursuit:

> If it appears at any time during a pursuit that the risks associated with continuing the pursuit outweigh the potential benefit of continuing, the pursuit should be **terminated**. (emphasis in original)[11]

Moreover, many police departments have adopted the Supervisory Review pursuit philosophy discussed in the IACP training materials. In these departments, once an officer begins a pursuit, he or she must contact the dispatcher so that a supervisor may assume

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[10] IACP, Vehicular Pursuits, December 2019, 1, https://www.theiacp.org/sites/default/files/2019-12/VehicularPursuits-2019.pdf.

[11] *Id.*, Concepts and Issues paper, at 10.

control over all pursuit decisions.[12] Under these circumstances, there is even greater opportunity for deliberation and objective, rational decision-making.

The point that police officers are trained to deliberate was acknowledged by Eighth Circuit Judge Bye, concurring in *Helseth*:

> Behavioral and tactical training enables officers . . . to process the events in a rapidly-evolving situation as if they occurred at a more deliberate pace. In this respect, officers are analogous to professional athletes who study film and plot gameplans to 'slow' the speed of a game, enabling them to understand and react instantaneously to complex, changing circumstances. Because police officers are regularly trained to adjust to fast-paced situations, we must expect that their conduct will usually be deliberate—despite the pace at which events occur to the untrained eye. *Lewis* suggests that we can't expect officers to think while they act, a proposition that might offend every well-trained officer in this country. 258 F.3d at 875.

B. This Case Is an Appropriate Vehicle to Resolve an Important and Frequently Recurring Issue.

The instant case is an excellent vehicle for resolving the split in the Circuits. The Eighth Circuit's resolution of the question presented, rejecting the

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[12] *Id.*, Concepts and Issues paper, at 2.

deliberate indifference standard, dictated the outcome below. This case is a clear example of high-speed driving by police where the officer in question had an opportunity to deliberate, thus squarely presenting the question of whether intent-to-harm is the appropriate culpability standard.

In the first place, this case did not involve a "pursuit." The Arkansas State Police (ASP) Pursuit Policy defines "Vehicle pursuit" and "Pursuit" as an attempt by an ASP officer in an official vehicle to stop a moving vehicle *when the driver of such vehicle is aware the officer is signaling the vehicle to stop and disregards the officer's attempt to stop the vehicle*. Rec. 446 (emphasis added). Col. Bryant, the chief executive officer of the ASP, admitted that Burke was not in the "immediate pursuit of an actual or suspected violator of the law" during the incident. Rec. 97. In addition, the ASP policy stipulates, "Emergency lighting equipment and siren *shall be in operation throughout the pursuit*." Rec. 446 (emphasis added). Burke agreed that a "pursuit" does not exist until lights and siren are activated. Rec. 226. In this case, there was no driver who had failed to comply with an order to stop, there was no flouting of the officer's authority to direct traffic, there was no driver with any knowledge that he was being chased, and in the absence of emergency lights and a siren, the public was unaware that high-speed driving was in progress.

Significantly, as opposed to the 75-second pursuit in *Lewis*, here there was ample opportunity for the officer to deliberate. Burke had, by his own account,

one or two minutes to consider his course of action before he began driving. The suspect was out of sight and more than a mile and a half down the road, if we assume he had maintained his estimated rate of speed.[13]

Burke's own conduct demonstrated that he had an opportunity to deliberate, and in fact *engaged in deliberation* at the beginning of this incident. First, he radioed the County Sheriff's Department to give them a general description of the vehicle so that they could look for it and stop it if it was still violating the law. Rec. 251-53. Second, he decided not to report his intentions to the ASP communication center, as required by ASP Policy. At his deposition, he claimed the reason for that was that there was only one other trooper on the road, and he was in a different location. Rec. 252. A jury could infer, however, that the true reason Burke failed to report to communications was that he might be told not to engage in the chase he wanted to commence. Third, Burke began driving with his blue lights and siren engaged, but after passing two other cars, made the deliberate decision to turn them off. Rec. 56. He then drove for approximately five minutes. Video, Rec. 149.

As established by the video from his cruiser's camera, Burke had to avoid sixty other vehicles before

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[13] Worse yet, Burke had no way of knowing whether the suspect vehicle was still on the road. If he had caught up to an SUV, he probably would not have been able to identify it as the SUV he originally saw. All Burke knew was that the SUV was "dark-colored" and had its emergency flashers on when it first passed him.

finally crashing into and killing the decedents. Video, Rec. 459. He crossed the center line of the road approximately thirty-five times, losing control of his vehicle due to his speed. Video, Rec. 459. This Court has characterized even less dangerous driving by a civilian as "outrageously reckless," posing "a grave public safety risk."[14]

Unlike the officer in *Lewis*, the officer here had multiple "second chances." Five minutes of driving cannot fairly be characterized as a "split-second." As plaintiff's expert Dr. Geoffrey Alpert stated, "Each time Trooper Burke encountered a motorist while he was traveling at an excessive speed without his lights and sirens represented an opportunity and obligation to evaluate the necessity of his actions." Rec. 143.

Petitioner requests the Court to grant certiorari to resolve the split between the Third, Fourth, Seventh, and Tenth Circuits, on the one hand, and the Eighth and Ninth Circuits, on the other, and to rule that the circumstances under which high-speed driving by the police takes place must be analyzed to determine whether an officer had an opportunity to deliberate to

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[14] In *Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014), the suspect pursued by the officer "exceeded 100 miles per hour" for "over five minutes" and "passed more than two dozen vehicles, several of which were forced to alter course." The instant case does not involve an officer forced to pursue such a driver. It involves an officer who was himself creating "a grave public safety risk" based only on speculation that a driver he once saw speeding might still be speeding and still on the road.

determine the appropriate standard to judge the officer's actions.

II. THERE IS A CLEAR SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ABOUT WHETHER TO USE AN OBJECTIVE TEST OR A SUBJECTIVE TEST TO DETERMINE WHETHER THE EXISTENCE OF AN EMERGENCY JUSTIFIED HIGH-SPEED DRIVING BY A POLICE OFFICER.

High-speed driving by a police officer may be justified because the officer is in pursuit of a suspect who has refused to stop on the officer's command, or because there is an emergency requiring the officer to act. Where an officer has been called to a specific location to investigate a situation that his dispatcher has identified as an emergency, the officer has an objective basis for an emergency response. Where the officer has determined that an emergency exists based on his own observations, a reviewing court may use either an objective or subjective test to evaluate whether there was in fact an emergency.

There is a clear split in the Circuits on whether the existence of an emergency should be determined by an objective or subjective test. The **Third Circuit**, in *Sauers v. Borough of Nesquehoning, supra*, the **Fourth Circuit** in *Dean v. McKinney, supra*, and the **Seventh Circuit** in *Flores v. City of South Bend, supra*, applied

an objective test.[15] Those courts examined the facts of those cases to find whether there was objective evidence of an emergency. The **Eighth Circuit** has employed a subjective test, deferring to the officer whose conduct is at issue to determine whether there was an emergency.

In *Sauers*, the **Third Circuit** drew the "obvious inference" that there was no emergency from the "mild provocation" presented—"there was no emergency arising from a simple traffic violation." 905 F.3d at 718. The court noted that the defendant could have let officers from the neighboring jurisdiction handle this routine traffic stop. In *Dean*, the **Fourth Circuit** concluded that a reasonable jury could find there was no emergency because the officer who reported the incident changed his characterization of it within a few seconds and radioed that there was no emergency and that "units could back down on emergency response," and that the officer who caused the accident acknowledged the change. 976 F.3d at 415-16. The court stated that the factual issue of whether there was an emergency was an issue for the jury, a clear conflict with the Eighth Circuit's approach. In *Flores*, the **Seventh Circuit** found there was no emergency based on the fact that officers on patrol were making a routine traffic stop of someone speeding, did not characterize it

[15] Judge Colloton in his concurrence below argued that the conflict was illusory because the officers in the Third and Fourth Circuit cases did not believe they were responding to an emergency. That distinction is beside the point. The question is whether a reviewing court should apply an objective test. The Third and Fourth Circuits do.

as an emergency, and did not request assistance from other officers. The court did not consider it significant whether or not the defendant officer who raced to the scene at high-speed might have characterized himself as responding to an emergency.

The **Eighth Circuit**, on the other hand, employs a subjective test. In the decision below, the court stated:

> Whether an officer was responding to an "emergency" is a subjective, not objective, inquiry. (citing *Terrell v. Larson*, 396 F.3d at 980). Accordingly, we will accept an officer's statement that he believed he was responding to an emergency unless it is "so preposterous as to reflect bad faith." (citing *Sitzes*, 606 F.3d at 469).

Because Burke "believed he was responding to an emergency," the court employed the intent-to-harm standard. *Braun*, 983 F.3d at 1002.

The "bad faith" exception to the subjective test in the Eighth Circuit is illusory, as demonstrated by that court's opinion in *Terrell*. There, two deputy sheriffs, Larson and Longen, were on duty, eating their dinner at a police substation. The police dispatcher transmitted a call concerning a domestic disturbance in which a child was threatened. Another patrol car was already answering the call and Larson and Longen advised they would supply back-up, but another deputy radioed that he was already responding as back-up and Larson and Longen could cancel. The dispatcher also

advised Larson and Longen that they could cancel. They insisted on responding. Blowing through a red light at 60-64 mph, they collided with another vehicle and killed the driver. The district court found that whether there was an emergency was an issue of fact that precluded summary judgment, but the Eighth Circuit reversed on the ground that the issue turned only on whether the deputies subjectively believed they were responding to an emergency.

The Eighth Circuit standard leaves it to the unreviewed discretion of the speeding officer to determine whether he was responding to an emergency. The officer is permitted to characterize the situation as an emergency after the event—in the instant case, after extinguishing the lives of two innocent motorists. The officer's incentive to claim he believed there was an emergency is obvious. Had the officer in *Flores*, for example, been in the Eighth Circuit, he could have claimed he believed there was an emergency and avoided liability.

An objective test of whether emergency conditions existed is essential for accountability. This Court should grant certiorari to resolve the conflict in the Circuits and rule that high-speed driving by police violates an injured party's substantive due process rights unless it was justified by an objective emergency.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT AND ADDRESS THE EXTENSIVE HARM CAUSED BY UNJUSTIFIED HIGH-SPEED DRIVING BY POLICE.

For the reasons we have stated, the Eighth Circuit's decision below conflicts with the rationale of this Court's opinion in *Lewis*, that deliberate indifference "is sensibly employed only when actual deliberation is possible." 523 U.S. at 850-51. When deliberation is possible, deliberate indifference should be the standard. Examining the individual circumstances of cases to determine when deliberation is possible, as have the Third, Fourth, Seventh, and Tenth Circuits, is essential to minimize the damage to life and liberty that unjustified high-speed driving by police causes.

The dangers posed by high-speed police driving are not controlled by state motor vehicle laws or tort claims. Data compiled by the National Highway Traffic Safety Administration (NHTSA) demonstrate that for several years motor vehicle crashes involving a police pursuit have resulted in more than one fatality per day in the United States.[16]

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[16] Fatality Analysis Reporting System (FARS): 2005-2018 Final File and 2019 Annual Report File (ARF), Report Generated: Thursday, March 4, 2021 (3:24:46 PM).

National Highway Traffic Safety Administration (NHTSA) Motor Vehicle Crash Data Querying and Reporting

Motor Vehicle Crashes Filter Selected: Involving a Police Pursuit: *Yes*
Years: *2015-2019*

Fatal Motor Vehicle Crashes

	Crash Date (Month)												
Crash Date (Year)	**January**	**February**	**March**	**April**	**May**	**June**	**July**	**August**	**September**	**October**	**November**	**December**	**Total**
2015	15	16	33	23	28	28	31	27	25	31	30	24	311
2016	21	26	30	30	32	34	37	36	22	38	26	27	359
2017	33	17	20	41	35	23	31	42	39	26	33	28	368
2018	30	27	20	24	25	40	42	38	32	23	31	27	359
2019	25	18	24	33	29	36	36	38	40	22	27	28	356
Total	124	104	127	151	149	161	177	181	158	140	147	134	1,753

This level of fatalities is unacceptable and should be addressed by a realistic appraisal of the need for a constitutional standard that will deter this indifference to life. This case is an appropriate vehicle to make that appraisal, as demonstrated by the Arkansas experience that led to the fatal crash in this case.

As noted above, Tpr. Burke began driving with his emergency lights and siren on, but after passing a couple of vehicles, made the deliberate and conscious decision to turn them off. This alone would have constituted sufficient evidence for a jury to find that he was both capable of deliberation, and guilty of deliberate indifference to the safety of other vehicles on the road. Burke violated Arkansas state law, which allowed an emergency vehicle to exceed the speed limit only when "the driver thereof is operating the vehicle's emergency lights and is also operating an audible signal by bell, siren, or exhaust whistle if other vehicles are present."[17]

Tpr. Burke in this case flouted the law of his own state and the nearly universal standard for emergency police driving in the United States. All but four states require emergency vehicles that are violating the rules of the road to employ emergency lights and/or sirens.[18]

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[17] Ark. Code Ann. § 27-51-202. The statute was amended following the filing of this lawsuit so that lights and a siren were not required to obtain evidence of speeding, a crime in progress, or for surveillance of a vehicle suspected of involvement in crime.

[18] Ala.C. 1975 § 322-5A-7; 13 Al.A.C. 02.517; Ar.R.S. § 28-624; Cal.V.C. § 21055-6; Col.R.S. § 42-4-108; Conn.G.S.A. § 14-283; 21 Del.C. § 4106; Ga.C.A. § 40-6-6; Haw.R.S. § 291C-26; Id.C.

This violation of law was encouraged by Burke's agency. Burke admitted his driving was pursuant to his training by ASP, that he "was trained by the ASP that it was acceptable to exceed the speed limit without lights and sirens in an effort to catch up to a person suspected of speeding before pulling the suspected speeder over for a traffic violation," that "the ASP had a known established custom and practice of allowing ASP Troopers to exceed the speed limit without lights and sirens in an effort to catch up to suspected speeders," and that "Defendant Bryant's established custom and policy resulted in Burke's decision to refrain from engaging his lights and siren while driving at speeds in excess of the posted speed limits." Rec. 52, 65, 69.

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§49-623; 625 Il.C.S. 5/11-205; Ind.C. 9-21-1-8; Io.C.A. § 321.231; Kan.S.A. 8-1506; Ken.R.S. § 189.940; La.R.S. 32:24; Ma.R.S.A. § 2054; Mich.C.L.A. 257.632; Minn. § 169.03; Miss.C.A. § 63-3-517; V.A.Mo.S. 304.022; Mon.C.A. 61-8-107; Nev.R.S. 484B.700; N.H.R.S. § 265:8; N.M.S.A. 1978, § 66-7-6; McKinney's V.T.L. of N.Y. § 1104; N.D.C.C. 39-10-03; Oh.R.C. § 4511.24; Okl.S.A. § 11-106; Pa.C.S.A. § 3105; R.I.G.L. 1956, § 31-12-8; S.D.C.L. § 32-31-2; Tenn.C.A. § 55-8-108; Vernon's Tx.C.A., Transportation C, § 546.001, § 547.702; U.C.A. 1953 § 41-6a-212; Vt.S.A. § 1015; Va.C.A. § 46.2-920; W.Va.C. § 17C-2-5. The four exceptions are: Fla.S.A. § 316.072; Mass.G.L.A. 89 § 7B; Neb.R.S. § 60-6,114; Wy.S. 1977 § 31-5-106. Five other states have a lights and siren requirement with limited exceptions: N.C.G.S.A. § 20-156, § 20-145 (not required for exceeding speed limit, but required for violating right-of-way); Ore.R.S. § 820.300, § 820.320 (not required when it would hamper apprehension or detection of violator); S.C.C. 1976 § 56-5-760 (not required to obtain evidence of speeding, for a crime in progress, or for surveillance of a vehicle suspected of involvement in crime); Wis.S.A. 346.03 (not required to obtain evidence of speeding or a felony in progress); Arkansas (discussed in fn. 10).

As of the date of Plaintiff's expert report in this case, the ASP had been involved in 139 crashes since 2013. Between 2014 and 2016, there were 740 high-speed pursuits. Plaintiff's expert's report catalogued 25 investigations by the ASP Office of Professional Standards of the most egregious incidents of high-speed driving that resulted in serious crashes and fatalities. Rec. 134-40.

Col. Bryant, head of the ASP, was aware of and failed to address overwhelming evidence of high-speed driving by Arkansas state troopers with deliberate indifference to tragic consequences. He knowingly allowed state troopers to routinely engage in high-speed driving without engaging their blue lights and siren, in violation of state law. Rec. 144-148. Following a fatal crash in 2009, testimony of multiple officers at a hearing established that if every trooper who drove without lights and siren were fired, there "probably wouldn't be anyone left." Rec. 130-33; Doc. 65-1, pp. 186-87. In short, high-speed driving by troopers in Arkansas has been disastrous.

CONCLUSION

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

Respectfully submitted,

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