No. 24-578

In the Supreme Court of the United States

COREY CUNNINGHAM, ON BEHALF OF KODI GAINES, A MINOR,

Petitioner,

v.

BALTIMORE COUNTY, MARYLAND; CORPORAL ROYCE RUBY

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Maryland

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Maryland Supreme Court misapply this Court's precedents by granting qualified immunity to a police officer who committed a conscience-shocking rights violation simply because it could find no prior decision involving nearly identical facts?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is the deleterious effect that qualified immunity has on the power of citizens to vindicate their constitutional rights, and the subsequent erosion of accountability among public officials that the doctrine encourages.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The facts of this case are harrowing. Without any imminent threat to life or limb, a police officer fired his rifle through the wall of a kitchen where he knew a five-year-old child, Kodi Gaines, was present but not visible, striking Kodi twice, because—in the officer's own words—he was "hot and frustrated." Pet. at 4–6. The officer admitted to knowing that his first shot could hit Kodi. *Id.* at 5. It is self-evident that the officer's conscience-shocking conduct violated the right of Kodi, an innocent bystander, to be free from arbitrary state action—"[t]he touchstone of due process." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Rosales-Mireles v. United States*, 585 U.S. 129, 138 (2018).

That should have been reason enough to deny qualified immunity in this case. Ordinarily, qualified immunity depends on whether (1) there was a rights violation, and (2) this was "clearly established" by precedent with close factual resemblance to the case at hand. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But this case implicates an important exception to the second requirement for sufficiently "obvious" rights violations. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (explaining that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"); *see also Taylor v. Riojas*, 592 U.S. 7, 9 (2020). Misapplying this exception, the Maryland Supreme Court deepened a split over how *Hope* and *Taylor* apply to egregious rights violations. Pet. App. 50a. This Court should grant the petition and resolve that split.

ARGUMENT

I. THIS COURT SHOULD RESOLVE CONFUSION OVER *TAYLOR* AND *HOPE*.

Persistent confusion about the obviousness exception in qualified immunity doctrine has engendered analytical inconsistency and avoidable injustices, like the one that occurred in this case. Generally, law is "clearly established" for purposes of qualified immunity when a prior holding in the relevant jurisdiction was based on similar enough facts to put a reasonable officer on notice that his conduct would be a "particularized" rights violation. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citation omitted). However, this Court has recognized an important exception. Because "it would be remarkable if the most obviously unconstitutional conduct [were] the most immune from liability only because it is so flagrantly unlawful that few dare its attempt," *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (per Gorsuch, J.), the Court has held that some rights violations are sufficiently obvious to violate clearly established law even without factually similar precedent. *See Taylor*, 592 U.S. at 8–9; *Hope*, 536 U.S. at 741; Pet. App. 71a (Watts, J., dissenting); Pet. App. 83a (Hotten, J., concurring and dissenting).

This rule seeks to balance the policy goal of shielding officers from liability for making close but defensible calls in the field while ensuring that they do not escape accountability for egregious misconduct that is manifestly unreasonable and indefensible. After all, at a certain point, official misconduct passes "so far beyond the bounds of . . . official duties that the rationale underlying qualified immunity is

inapplicable." *Hawkins v. Holloway*, 316 F.3d 777, 788 (8th Cir. 2003); *see also id.* at 786–87 (denying qualified immunity despite finding no factually similar precedent "where a public official has threatened to employ deadly force as a means of employee discipline or as a way to express frustration"). "By their nature, cases addressing the most flagrant forms of unconstitutional conduct seldom rise" to appellate courts, and therefore "the obviousness exception plays an important role in ensuring vindication" of Americans' rights. *Tyson v. County of Sabine*, 42 F.4th 508, 521 (5th Cir. 2022) (citation omitted).

The Maryland Supreme Court misapplied this exception. Though it recognized that "[c]learly established does not mean that there must be a case with precisely matching facts," the court essentially required precisely that—"a robust consensus" marked by "specificity." Pet. App. 40a–41a. Finding no such consensus, the court granted qualified immunity to an officer who took a blind and unnecessary shot that grievously injured an innocent child. *See id.* 43a (finding significant that other cases "were so different" from the factual situation presented here); *id.* 47a (noting a lack of precedent concerning "a ricochet shot" and "accidentally shooting a hostage when the officer had reason to believe that the hostage was in the line of fire"); *id.* 48a ("[T]here was no controlling authority or robust consensus that, under these circumstances, it would violate Kodi's substantive due process rights to end the six-hour standoff by shooting at [Kodi's mother's] upper body.").

This erroneous approach—granting qualified immunity simply because there is no case exactly on point, no matter how manifestly unlawful the rights

violation—is regrettably common in the lower courts. *See, e.g., Rivera v. Redfern*, 98 F.4th 419, 424–25 (2d Cir. 2024) (holding obviousness exception inapplicable because "the facts of this case are far afield from" *Hope*, *Taylor*, and other previous cases); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) (granting qualified immunity for negligently shooting a ten-year old in the leg while attempting to shoot an unthreatening family dog); *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."); *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019) (granting qualified immunity to officer who stole $275,000 in cash and coins while executing a search warrant in plaintiff's home); *Allah v. Milling*, 876 F.3d 48 (2d Cir. 2017) (granting qualified immunity to jailers who for placed a prisoner in solitary confinement for five months because he asked why he could not visit the commissary). The Court should take this opportunity to clarify the rule announced in *Hope* and confirmed in *Taylor* given that "some lower courts have applied the obvious violation exception, while others have eschewed it." Bailey D. Barnes, *The Obvious Violation Exception to Qualified Immunity: An Empirical Study*, 99 WASH. L. REV. 725, 744 (2024).

Besides some courts' inclination to simply ignore the obviousness principle, there is also confusion over the rule's applicability beyond claims involving cruel and unusual punishment. *See Thorpe v. Clarke*, 37 F.4th 926, 940 (4th Cir. 2022) ("[W]hile the [Supreme] Court has regularly insisted on highly particularized

law in the Fourth Amendment context, it has not done the same with Eighth Amendment claims."). Although *Hope* and *Taylor* both involved Eighth Amendment claims, their holdings are general. *See Hope*, 536 U.S. at 741 ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"); *Taylor*, 592 U.S. at 9. This Court should reaffirm that *Hope* and *Taylor* apply to any case involving obvious rights violations. *See, e.g.*, *Tyson*, 42 F.4th at 519 (denying qualified immunity in suit alleging "abusive sex acts" by police officer); *Hawkins*, 316 F.3d at 786–87 (denying qualified immunity "where a public official . . . threatened to employ deadly force as a means of employee discipline or as a way to express frustration").

One frequent question is whether "obvious" constitutional violations must also necessarily be "egregious," and what these terms mean in the context of qualified immunity. For instance, according to one district court, "for a right to be clearly established despite the absence of cases with similar facts, . . . the actions [of the officer] must be so egregious that they would be obviously unlawful in light of general legal principles." *Johnson v. City of Biddeford*, 665 F. Supp 3d 82, 117 (D. Me. 2023). So construed, *Hope* and *Taylor* provide a narrow exception for misconduct that is "extreme," as measured by "a comparative analysis of the facts in their cases to those in *Hope* and *Taylor*." Barnes, *supra* at 758. In practice, this approach tends to restrict the obviousness exception to claims of cruel and unusual punishment or other extreme physical misconduct. *See Tyson*, 42 F.4th at 508 (concerning sexual abuse at the hands of a police officer); *Seweid v. County of Nassau*, No. 21-cv-03712, 2024 U.S. Dist.

LEXIS 28821 (E.D.N.Y. Feb. 20, 2024) (concerning a corrections officer urinating on a detainee).

Other courts hold that violations can satisfy the obviousness exception even without being so viscerally appalling. *See Mack v. Yost*, 63 F.4th 211, 236 n.22 (3d Cir. 2023) ("To say that an obvious case is also an egregious one is not to say that only egregious cases present obvious violations."); *see also Prude v. Meli*, 76 F.4th 648, 659–60 (7th Cir. 2023) (denying qualified immunity for denial of the "right to a fair, impartial decisionmaker"). Taking this approach, the Third Circuit denied qualified immunity in a suit where corrections officers "disturb[ed] [a Muslim prisoner's] daily prayers, as well as harassing and mocking him for his faith," even though this conduct did not "entail the brutality and physical abuse on display in the worst Fourth Amendment and Eighth Amendment cases." *Mack*, 63 F.4th at 232–33. Adding to the confusion, the Tenth Circuit has seemingly combined the two approaches into a standard requiring "obvious egregiousness," but not restricting the exception to cases involving physical violence. *Truman v. Orem City***,** 1 F.4th 1227, 1240 (10th Cir. 2021).

Lower court decisions involving the obviousness exception have generated significant disagreement and confusion that this Court should clarify to prevent further avoidable injustices that frustrate the remedial purpose of § 1983.

II. KODI GAINES'S RIGHTS WERE OBVIOUSLY VIOLATED.

The exceptionally horrific facts of this case make it a straightforward vehicle for clarifying the obviousness exception. The officer's misconduct here

was shocking to the conscience, and the constitutional violation was self-evident. Hot and frustrated by waiting for six hours in summer heat without air conditioning, Corporal Ruby "blindly fired his gun into a room that, as he knew, contained . . . Kodi, [a] five-year-old child . . . he could not see." Pet. App. 66a. Ruby's reckless shot struck "Kodi in the face and arm, and caused him to suffer serious physical injuries." *Id.* There was simply no justification under the circumstances for taking a blind shot through a kitchen wall into a room where an innocent child was known to be—especially when Ruby knew his bullet could strike Kodi. Pet. App. 68a.

No prior case law is necessary for officers to know that they must not shoot blindly toward innocent bystanders—let alone unarmed children—without compelling justification. As Justice Hotten emphasized in dissent:

> [T]he decision by an officer to shoot through a wall, at a target he could not see, when he knew a child was on the other side of that wall and could be injured or killed, is patently offensive to a "universal sense of justice."

Pet. App. 84a (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (citation omitted)).

Even if guiding precedent *were* necessary, cases from this Court and the Fourth Circuit "stand[] for the proposition that, as a threshold for firing, an emergency situation must be present." Pet. App. 85a (internal quotation marks omitted). In *Lewis*, this Court ruled for an officer engaged in an "instinctive" chase, reasoning that when "circumstances demand an

officer's instant judgment, even precipitate recklessness" does not shock the conscience. 523 U.S. at 853, 855. However, it continued that where government actors have "the luxury" of "time to make unhurried judgments" and "the chance for repeated reflection"—as Corporal Ruby did before deciding to take the shot that injured Kodi—even "indifference is truly shocking." *Id.* at 853.

The Fourth Circuit provided even more relevant guidance in *Rucker v. Harford County*, 946 F.2d 278, 279 (4th Cir. 1991): "the due process clause provides substantive protection to . . . a bystander," like Kodi, "against the infliction of personal injury by police conduct sufficiently outrageous to constitute completely arbitrary state action."

The Sixth Circuit has illustrated what this protection looks like. In *Ewolski v. City of Brunswick*, 287 F.3d 492, 510–11 (6th Cir. 2002), it held that deliberate indifference triggers liability "when actual deliberation is practical" (quoting *Lewis*, 523 U.S. at 851). Like this case, *Ewolski* involved scrutiny of police force used to end a standoff. *Id.* at 496. Like in this case, the force was used only after a long time and "split-second decision making was not required." *Id.* at 511 (evaluating a decision made after five hours, akin to the six-hour timeframe here). Like in this case, there was no shooting or imminent threat of violence at the time the police used force. *Id.* at 512. Like in this case, the armed person in *Ewolski* "was contained in his house and surrounded by a vastly superior police presence. The police were never forced to make a hasty decision to use force to prevent his escape into the community." *Id.* Like in this case, there was no

immediate danger to the armed person's family "as long as [he] was not provoked." *Id.*

The Sixth Circuit held that immunizing even deliberate indifference under such circumstances—a lower level of culpability than the officer here committed—"would effectively give the police free licence [sic] to take *any* risk with the lives of hostages in an armed standoff situation, as long as they did not act maliciously and sadistically with the intent to cause harm." *Id.* at 513. The court denied liability for the police chief in *Ewolski* only because he carefully made a "choice among necessarily risky alternative tactics" and was no more than negligent. *Id.* at 514.

The contrast with this case is stark. Kodi was shot and grievously injured not in spite of careful police deliberation but due to its complete absence. The defendant officer became "hot and frustrated" during a six-hour standoff and blindly opened fire. Pet. at 4–6.

This Court's *Lewis* decision, together with *Rucker* and *Ewolski*, articulate an "obvious principle," Pet. App. 71a—namely, that "absent an imminent threat to life, i.e. an emergency, there is little justification for a police shooting." *Id*. 87a. An officer's "personal frustration" is no emergency justifying blindly shooting into a room occupied by an innocent child who might be killed or wounded. *Id.*

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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