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 FOR THE LAW ENFORCEMENT ACTION PARTNERSHIP AS AMICUS CURIAE IN SUPPORT OF PETITIONER**


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## INTEREST OF AMICUS CURIAE[1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law-enforcement officials advocating for criminal-justice and drug-policy reforms to make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers' bureau numbers more than 300 criminal-justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through

[1] Pursuant to this Court's Rule 37, counsel for amicus curiae state that no party or counsel for a party, or any other person other than amicus curiae and its counsel, made a monetary contribution to fund the preparation or submission of this brief. Counsel further state that all parties were timely notified of the filing of this brief.

speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across diverse affiliations and beliefs, calling for more practical and ethical policies from a public-safety perspective.

As part of its mission to promote more sound and equitable law-enforcement practices, LEAP and its members have an interest in this Court's clarifying the contours of the qualified-immunity doctrine—in particular, instructing that, where the conduct in question is obviously unlawful, there is no need to present a prior case with similar facts to show that an officer violated clearly established law. This case presents an important opportunity to correct the overly cramped approach adopted by some courts, including the Maryland Supreme Court below, to ensure that officers who engage in egregious conduct are not unduly shielded from liability—while still retaining appropriate protections for the vast majority of officers who act reasonably and defensibly.

## Summary of Argument

Application of qualified immunity in the law-enforcement context makes sense when, for instance, police officers need the latitude to make split-second, life-or-death decisions. But conferring robust protection on an officer who engages in egregiously wrongful conduct simply because no factually analogous precedent exists extends the qualified-immunity doctrine beyond its justifiable limit, shielding bad actors from liability, diminishing respect for law enforcement, and endangering citizens.

Such an unwarranted extension of qualified immunity occurred here. Five-year-old Kodi Gaines suffered severe wounds to his face and elbow when Corporal Royce Ruby shot at Kodi's mother, Korryn Gaines—*with Kodi in the room*—at the end of a six-hour police standoff. Pet.

App. 8a–9a, 191a, 196a–208a. At the moment Corporal Ruby discharged his weapon and injured Kodi, Ms. Gaines presented no imminent threat of death or serious bodily injury to herself or anyone else. Pet. App. 213a. Moreover, Corporal Ruby knew both that Kodi was in the kitchen with his mother and that it was possible a bullet might strike Kodi, since Corporal Ruby's view of Kodi was obstructed by a wall. Pet. App. 9a–10a, 92a. He opened fire anyway because, as a witness after the shooting testified, Corporal Ruby said he was "hot" and "frustrated." Pet. App. 214a.

Even though Corporal Ruby's rash, dangerous decision was not justified by the exigencies of the situation or any sound law-enforcement practice, the Maryland Supreme Court nevertheless ruled that he was entitled to qualified immunity—just because his conduct did not violate any prior, factually analogous caselaw. Pet. App. 9a, 42a, 49a–50a.

As a group of law-enforcement professionals concerned with sound police practices and standards, LEAP asks the Court to grant certiorari and resolve the circuit split that has emerged on this important legal issue with significant public-safety ramifications. Specifically, the Court should make clear that obviously and egregiously unlawful conduct alone precludes qualified immunity, regardless of whether a prior decision involving similar facts does or does not exist.

## ARGUMENT

Law-enforcement misconduct is a key public concern with real and tragic consequences. At the same time, police work is inherently dangerous, and public safety depends on police officers having the freedom to act decisively and with dispatch when circumstances warrant. The qualified-immunity doctrine represents an attempt to

accommodate these twin imperatives in "the sometimes hazy border between excessive and acceptable force." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (cleaned up). The doctrine seeks to balance "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009).

Yet jurists and legal scholars across the ideological spectrum believe that qualified immunity goes too far when it shields gross misconduct, such as occurred in this case. Law-enforcement personnel like LEAP's members support efforts to clarify the qualified-immunity doctrine because, simply put, egregious misconduct is not good policework and is not conducive to public safety. LEAP's members seek just and sensible legal rules applicable to police uses of force—including a properly circumscribed application of qualified immunity that does not shield truly bad actors from liability and repercussion—because it is in the interests of both the public and law enforcement.

This case exemplifies why clarification from this Court is needed. "[S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.). That is the case here, where a police officer following established protocol and common sense would not have recklessly fired his weapon like Corporal Ruby did. Yet the Maryland Supreme Court nevertheless applied qualified immunity in a way that excused Corporal Ruby's obviously wrongful conduct, believing itself constrained

by the need to identify an analogous precedent—which the court suggested might require a finding of liability "under the Fourteenth Amendment for a ricochet shot." Pet. App. 47a. That is not the law, and it should not be the law. To avoid such unjust results—and to give law-enforcement personnel the guidance they need to make sound decisions—this Court should use this opportunity to clarify the limits of qualified immunity in instances of egregiously shocking police misconduct.

### A. Justices and judges of varied judicial philosophies and multiple legal scholars have questioned qualified immunity as currently applied.

The qualified-immunity doctrine has been the subject of criticism from Justices, judges, and legal scholars of all political and ideological stripes. Indeed, as one academic has noted, "[c]ritics who otherwise share little common ground attack the doctrine on multiple grounds."[2] This criticism can largely be divided into two categories: that the doctrine lacks sound legal underpinnings and that it has negative practical consequences.[3]

First, qualified immunity—at least as currently applied by some courts—rests on an unsound foundation. The "clearly established" standard "cannot be located in § 1983's text." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., respecting the denial of certiorari). Nor does it plausibly derive from the common-law "good-faith defense."[4] And while some have sought to justify it

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[2] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 203 (2023).

[3] *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 46–49 (2018) (exploring "two pillars" of qualified immunity).

[4] *See, e.g.*, *id.* at 55–60.

as remedying an earlier, mistaken broadening of section 1983—the so-called "two-wrongs-make-a-right" theory—that "extremely crude" approach lacks a principled basis in text or history.[5] The doctrine also fails to give fair warning to government officials, thus undermining any justification based on lenity.[6] Legal scholars and judges have also criticized the doctrine for ossifying the development of the law on constitutional rights.[7]

Practically speaking, overbroad application of the qualified-immunity doctrine leads to perverse and undesirable results by shielding official conduct that would otherwise be indefensible, thus "provid[ing] a judicial blessing for departments to keep unethical officers on the force—leaving good cops in bad company."[8] Qualified immunity is also partly to blame for the public's deteriorating confidence in the police, which makes it more difficult for law-enforcement personnel to do their jobs.[9] Moreover, the doctrine as currently applied does not even effectively achieve the policy goals touted by its proponents.[10] For example, research shows "that qualified

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[5] *See, e.g.*, *id.* at 69.

[6] *See, e.g.*, *id.* at 69–77.

[7] *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814–1820 (2018); *see also Manzanares* v. *Roosevelt Cnty. Adult Detention Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (Browning, J.) (noting that "to always decide the clearly established prong first and then to always say that the law is not clearly established could be stunting the development of constitutional law").

[8] James Craven et al., *How Qualified Immunity Hurts Law Enforcement*, CATO INST. (Feb. 15, 2022), https://tinyurl.com/yybwnwjb.

[9] *Id.*

[10] *See, e.g.*, Schwartz, *supra* note 7, at 1803–1814.

immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed."[11]

Reflecting these dual areas of criticism, Justices and judges appointed during both Republican and Democratic administrations have questioned the validity of the doctrine, often specifically criticizing the requirement that the law be "clearly established" at the time of an alleged constitutional violation—both as a matter of legal theory[12] and as applied in qualified-immunity cases.[13] As one judge has explained, "it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current 'yes harm, no foul' imbalance leaves

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[11] *Id.* at 1804. Professor Schwartz "reviewed the dockets of 1183 Section 1983 lawsuits filed against law enforcement officers and agencies over a two-year period in five federal districts" and "found that just seven of these 1183 cases (0.6%) were dismissed on qualified immunity grounds before discovery" and "just thirty-eight (3.2%) of the 1183 cases . . . were dismissed before trial on qualified immunity grounds." *Id.* at 1809.

[12] *See, e.g.*, *Ziglar* v. *Abbasi*, 582 U.S. 120, 156–160 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (cleaned up)); *Horvath* v. *City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases.").

[13] *See, e.g.*, *Kisela* v. *Hughes*, 584 U.S. 100, 113–120 (2018) (Sotomayor, J., dissenting) (questioning Court's application of "clearly established" standard and emphasizing that caselaw has "never required a factually identical case to satisfy the 'clearly established' standard").

victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached." *Zadeh* v. *Robinson*, 928 F.3d 457, 479, 480–481 (5th Cir. 2019) (Willet, J. concurring in part and dissenting in part).

There is, in short, ideological consensus, both across the federal bench and in the academy, that qualified immunity—particularly the "clearly established" standard—is being applied in ways that are neither workable nor defensible.

### B. The current state of qualified immunity is not in law enforcement's interests.

The concerns articulated by judges and academics are shared by law enforcement. Confusion over the proper scope and application of qualified immunity—exemplified by the Maryland Supreme Court's ruling in this case—does little to engender trust in the nation's police forces or provide needed clarity and guidance to the officers who must conduct themselves in accordance with the law (and, in turn, the state and federal courts that must judge their actions).

#### 1. Lower courts need guidance on how to apply the qualified-immunity doctrine.

Properly applied, qualified immunity should be tailored to prevent chilling necessary government action while allowing the vindication of constitutional rights. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (noting that unmeritorious claims impose "a cost not only to the defendant officials, but to society as a whole" and "dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties" (cleaned up)). To "best [] accommodat[e these] competing values," *id.*, the Court has adopted a qualified-immunity framework according to which a plaintiff must show that (1) an officer violated a

constitutional right and (2) the right was "clearly established" at the time of the incident, *Pearson*, 555 U.S. at 227.

As noted in the pending petition for certiorari, however, the second requirement has led to a circuit split on a critical issue: whether conduct that shocks the conscience alone violates clearly established law. Pet. 20–23.[14]

LEAP agrees with Petitioner and the Second, Fourth, and Fifth Circuits that an officer's conduct that shocks the conscience necessarily violates clearly established law. Notably, LEAP's members know firsthand that law-enforcement officers sometimes face life-or-death

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[14] *Compare, e.g.*, *Edrei* v. *Maguire*, 892 F.3d 525, 538–540 (2d Cir. 2018) (concluding that conscience-shocking conduct violated Fourteenth Amendment and was clearly established and rejecting argument that "the circumstances before [defendants] were too dissimilar from then-existing precedents to provide [requisite] notice" because such stringent approach "would convert the fair notice requirement into a presumption against the existence of basic constitutional rights"); *Dean ex rel. Harkness* v. *McKinney*, 976 F.3d 407, 417–420 (4th Cir. 2020) ("[T]aking the facts in the light most favorable to the plaintiff, we find that [defendant's] actions were deliberately indifferent to [victim's] life and safety such that it shocks the conscience and rises to the level of a violation of a constitutional right that was clearly established at the time of the collision."); *Tyson* v. *Sabine*, 42 F.4th 508, 519–521 (5th Cir. 2022) ("We have little trouble finding that the constitutional offense was obvious because the physical sexual abuse alleged here is a 'particularly egregious' and 'extreme circumstance[]' of assault by a state official." (quoting *Taylor* v. *Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam))), *with Sauers* v. *Borough of Nesquehoning*, 905 F.3d 711, 718–723 (3d Cir. 2018) (alleged violation was not clearly established even though officer pled guilty to vehicular homicide and reckless endangerment); *Scott* v. *Smith*, 109 F.4th 1215, 1229–1230 (9th Cir. 2024) (concluding that shocking conduct alone does not vitiate qualified immunity because "clearly established law cannot be defined at such a 'high level of generality.'" (quoting *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (per curiam))).

situations that can escalate with little notice. At the same time, the mere presence of a gun or other perceived risk does not give police officers license to act with impunity; and, human behavior being what it is, the number and variety of scenarios in which police misconduct might occur with tragic results is nearly infinite. When these unfortunate situations arise, and especially when children are present, police officers who fail to follow basic and commonsense policing protocols can and should be held accountable.

Accordingly, the Court should grant certiorari here to resolve this circuit split as Petitioner and LEAP urge, applying the obviousness principle to hold that shocking and egregious conduct violates clearly established law and thereby renders qualified immunity inapplicable, even in the absence of similar prior cases. Pet. 20–21.

**2. The "clearly established" standard as currently applied leads to unjust results.**

This is far from the only case where the "clearly established" standard has led to results that cannot be justified. To give just one example, in *Martinez* v. *High*, 91 F.4th 1022 (9th Cir. 2024), the court granted qualified immunity to a defendant police officer who told another officer about his girlfriend's confidential reports of domestic abuse; the disclosure led to the other officer severely beating and sexually assaulting his girlfriend. The court concluded that the defendant officer had violated Ms. Martinez's due-process rights by indifferently putting her at risk of foreseeable harm, and it acknowledged the obvious danger and unconscionability of the defendant's conduct: the officer "understood that a victim's confidential reports should not be disclosed to the abuser" and "[y]et . . . told [her colleague] about Ms. Martinez's confidential report

for no apparent reason other than to discredit Ms. Martinez." *Id.* at 1028–1030. Yet the court nevertheless determined that the officer's actions were shielded by qualified immunity because "no existing authority gave Officer High sufficient notice in 2013 that her conduct violated due process." *Id.* at 1032.

Federal and state reporters alike abound with similar examples of perpetrators of egregious and indisputably wrongful acts evading liability simply because no sufficiently analogous case was on the books at the time of their misconduct—even though they should have known as a matter of basic humanity and decency that their actions were wrong.[15] The "clearly established" standard thus leads to perverse results without any cognizable benefit to law enforcement or society generally.

**3. Law enforcement does not benefit from a doctrine that provides robust protection for the worst conduct.**

As Petitioner aptly notes, "[p]ermitting a qualified immunity defense in cases involving egregiously wrongful conduct because there is no prior decision addressing similar facts distorts the qualified immunity doctrine by, in effect, providing the strongest protection for the most egregious conduct." Pet. 24. This case presents an opportunity for the Court to clarify the law and make policing safer for both the public *and* law enforcement.

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[15] *See, e.g.*, *Mattos* v. *Agarano*, 661 F.3d 433, 452 (9th Cir. 2011) (en banc) (use of taser on seven-months-pregnant woman pulled over for speeding while driving her son to school); *Mason* v. *Faul*, 929 F.3d 762, 763 (5th Cir. 2019) (per curiam) (officer who released his service canine on and repeatedly shot prostrate armed-robbery suspect); *Winzer* v. *Kaufman County*, 916 F.3d 464 (5th Cir. 2019) (per curiam) (officers who shot at young man on bike who had toy pistol and then repeatedly tased him while he was dying in his father's backyard).

It is in the nature of modern society that police officers must sometimes use force—including, in certain circumstances, lethal force—to address threats to the public or officers themselves. The statistics tell a grim story. Police shootings have killed more than 1,000 people in the past 12 months in the United States, with an overall increase in frequency—and news coverage—in recent years.[16] Even more numerous are the tens of thousands of yearly injuries, many of which are serious.[17] Given the severity of the consequences and the sheer extent of the problem, it is essential for the law to hold police officers to a basic set of societal and professional standards, ensuring that force is used only as a last resort.

To be sure, policing is dangerous work, and most uses of force by police officers are well justified. An average of sixty police officers per year were killed in the line of duty between 2020 and 2023,[18] illustrating the risks that officers face on a daily basis. Faced with myriad threats across their many encounters with those engaged—or potentially engaged—in wrongdoing, police officers must sometimes make split-second, life-or-death decisions to protect themselves and others. And these uses of force might well be necessary and legitimate, even when the consequences are unavoidably tragic.

Yet some uses of force go beyond the bounds of what any reasonable person would deem acceptable—indeed, are so egregious as to shock the conscience—and this

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[16] Hayden Godfrey et al., *Fatal Force*, WASH. POST, https://tinyurl.com/yc6uf43w (Dec. 3, 2024).

[17] *U.S. Data on Police Shootings and Violence*, UNIV. OF ILL. CHI., https://tinyurl.com/yzt2kmdy (last visited Dec. 18, 2024).

[18] *Statistics on Law Enforcement Officer Deaths in the Line of Duty from January Through July 2024*, FBI, https://tinyurl.com/3kjjs8rm (last visited Dec. 18, 2024).

minority of cases presents a source of significant public concern. Police, trained to presume danger, might overuse physical force and aggression in even routine, nonviolent situations.[19] Or they might wildly overreact to a situation that, while potentially fraught and perilous, still does not present a risk of *imminent* harm. In these situations, as in this case, police officers who flagrantly violate established protocols and basic law-enforcement procedures—with tragic and foreseeable consequences—should not enjoy the shield afforded by qualified immunity.

As an organization of current and former law-enforcement professionals, LEAP believes in the paramount importance of building trust between police forces and the communities they serve. This is true now more than ever, with more than two-thirds of Americans supporting major police reform—and one-third in favor of defunding the police.[20] Transparency and accountability are indispensable components of this needed trust, which is eroded by the perception that officers who commit misconduct will rarely be held accountable. This perception is not limited to the general public: Remarkably, nearly 72% of 8,000 interviewed *police officers* disagreed with the statement that officers who consistently do a poor job are held accountable.[21]

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[19] *See, e.g.*, David D. Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES, https://tinyurl.com/2s3h3py2 (Nov. 30, 2021); Mike Baker et al., *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe.'*, N.Y. TIMES (June 29, 2020), https://tinyurl.com/59d4h722.

[20] Maya King, *How 'Defund the Police' Went from Moonshot to Mainstream*, POLITICO (June 17, 2020), https://tinyurl.com/3zeccz5m.

[21] Rich Morrin et al., *Behind the Badge*, PEW RSCH. CTR. 13 (Jan. 11, 2017), https://tinyurl.com/429payh2.

By protecting officers from suit for (and thus from the consequences of) egregious misconduct, qualified immunity as currently applied undermines the trust that LEAP and other law-enforcement personnel seek to instill in their communities. And the Maryland Supreme Court's decision here—in particular, the blinkered application of the "clearly established" standard that it and other courts have embraced—will further erode public trust and shield bad actors from scrutiny and accountability.

**C. Corporal Ruby's conduct shocks the conscience.**

Corporal Ruby's actions are a prime example of a reckless, nonurgent decision that led to severe consequences for an innocent young child—and why this Court's intervention is necessary.

That Corporal Ruby violated one of Kodi's clearly established Fourteenth Amendment rights—namely, his substantive due-process right against being physically injured by agents of the State—is beyond reasonable dispute. The facts in this case matter and merit emphasis. Officers were at Ms. Gaines's home to serve her with a warrant for missing a court date, a misdemeanor offense. Pet. App. 190a. Ms. Gaines was off her mental-health medication but posed no immediate threat to Kodi, Corporal Ruby, or anyone else. Pet. App. 201a, 202a, 249a, 262a. Corporal Ruby *knew* that five-year-old Kodi was in the kitchen with his mother. Pet. App. 198a, 203a. And Corporal Ruby's stated justification for opening fire was, as a witness testified, that he was "hot" and "frustrated." Pet. App. 214a.

One does not need specialized law-enforcement training to conclude that this conduct was unconscionable and unjustifiable. But it is worth noting that Corporal Ruby's conduct and decision-making in this situation contradicted foundational practices for SWAT threat

assessments, which are designed to assist tactical police deployment.[22] Those practices emphasize the importance of
*de*-escalating fraught encounters such as the one that unfolded that hot summer's day, not suddenly and precipitously *escalating* them.[23] In determining the appropriate course of action when confronted with an armed individual, law enforcement is trained and expected to ask and consider a few simple questions before using deadly force. For example: Is there specific or articulable information that the suspect is mentally or emotionally disturbed? Is the offense for which arrest is sought a violent offense? Are children present at the location? Are hostages believed to be present?[24]

Corporal Ruby had all this information available to him yet acted contrary to the basic de-escalatory protocol that a reasonable police officer would have followed in such a situation. As the Maryland Supreme Court recognized, officers were told during the standoff that Ms. Gaines "had a history of mental illness and that she had been off her medication." Pet. App. 8a. Corporal Ruby knew that Kodi was with his mother in the kitchen, Pet. App. 9a–10a, and he knew—or should have known—that she was not holding her son "hostage," *cf.* Pet. App. 48a (noting that "Ms. Gaines . . . declined an opportunity to let

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[22] *See generally, e.g.*, *S.W.A.T. Operational Guidelines and Standardized Training Recommendations*, CAL. COMM'N ON PEACE OFFICER STANDARDS & TRAINING, https://tinyurl.com/4wcsff3j (Sept. 2019).

[23] *See id.* at 7 ("Philosophy of SWAT—The mission of SWAT is to save lives. The primary focus of SWAT is to provide tactical solutions that increases the likelihood of de-escalation and safe resolution of high-risk incidents.").

[24] *Id.* at 49–52.

Kodi exit the standoff" but not characterizing him as hostage). Corporal Ruby also knew that the warrant for Ms. Gaines's arrest was based on a nonviolent misdemeanor, and there is no suggestion that she had ever committed a violent offense. And Corporal Ruby had ample time—six hours—to consider alternatives to precipitously shooting Ms. Gaines with Kodi present and in the zone of danger. Nothing had changed at the time of the shooting except that Corporal Ruby was hot and frustrated.

Corporal Ruby's failure to undertake any one of these alternatives, and his gross deviation from standard law-enforcement protocols, led him to a course of conduct—opening fire in a closed, obstructed area where a child was known to be present—that shocks the conscience. Such conduct obviously violated Kodi's Fourteenth Amendment rights,[25] thus establishing the absence of qualified immunity regardless of the existence *vel non* of a precedent involving the same or similar facts.

As the dissent noted below, "[t]hat the case is unusual does not make the violation of a clearly established right any less identifiable." Pet. App. 66a. And, indeed, the majority's approach would have the perverse effect of immunizing precisely the types of outrageous conduct that are so shocking that they rarely occur—and so rarely produce judicial precedent declaring such conduct illegal. As a current member of this Court observed while serving

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[25] *See, e.g.*, *Rucker* v. *Harford County*, 946 F.2d 278, 279 (4th Cir. 1991) ("[T]he due process clause provides substantive protection to [] a bystander against the infliction of personal injury by police conduct sufficiently outrageous to constitute completely arbitrary state action[.]"); *Simpson* v. *City of Fort Smith*, 389 F. App'x 568, 570 (8th Cir. 2010) (per curiam) (recognizing that Fourteenth Amendment violation might lie where officers (1) had moment of reflection, (2) knew bystander was in "the line of fire," and (3) consciously disregarded risk that bystander would be shot).

as a judge on a federal court of appeals, "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder*, 787 F.3d at 1082–1083 (Gorsuch, J.). Few cases illustrate the illogic of such an outcome as poignantly as this one. The Maryland Supreme Court's conclusion that an analogous precedent must be identified to overcome qualified immunity rested on a misapplication of the "clearly established" standard that this Court can and should remedy.

* * *

LEAP respectfully requests that the Court grant the petition for a writ of certiorari. This case presents an important opportunity to fix qualified immunity rather than abolish it—and, in so doing, address the concerns articulated by judges and scholars across the ideological spectrum. Moreover, failure to correct the Maryland Supreme Court's misapplication of the qualified-immunity doctrine would serve to protect even the most egregious instances of official misconduct and, consequently, damage public trust in law enforcement.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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