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 Writ of Certiorari to the Supreme Court of Maryland

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondents do not dispute that the approach employed by the Maryland Supreme Court conflicts with this Court's precedents establishing that police officers are not entitled to qualified immunity for obvious constitutional violations. Nor do Respondents dispute that the Maryland court's decision deepened a divide among lower courts over how to apply the clearly-established prong of the qualified-immunity analysis to police misconduct that shocks the conscience. Resolving that undisputed confusion by clarifying how to apply the clearly-established prong warrants this Court's review.

Respondents argue that Corporal Ruby did not violate Kodi's substantive due process rights. As an initial matter, the Questions Presented concern only whether the Maryland court applied the correct approach to determine whether the law was clearly established. That was the only issue decided below. It therefore is not necessary for the Court to decide whether Corporal Ruby violated Kodi's Fourteenth Amendment rights. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004) (per curiam) (granting petition for certiorari only as to "the second, qualified immunity" prong).

In any event, Respondents' arguments cannot withstand scrutiny, and they provide no reason to deny review. First, the argument that Kodi lacked any substantive due process right to be free from the arbitrary use of force by government officials (Opp. 7–15) contradicts the Court's precedents. This Court has "emphasized time and again that the touchstone of due process is protection of the individual against

arbitrary action of government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quotations and alterations omitted).

Second, Respondents' various arguments that Corporal Ruby did not violate Kodi's (supposedly non-existent) right to due process are premised on mistakes of law and misstatements of fact. On the law, Respondents wrongly claim that only the intended target of police misconduct can suffer a violation of his due process rights. As this Court "ha[s] expressly recognized," an officer may violate the Fourteenth Amendment with "less than intentional conduct." *Lewis*, 523 U.S. at 849–50.

On the facts, Respondents assert that Corporal Ruby's shot was justified by "legitimate" law-enforcement "objectives." Opp. 17–18. That assertion violates the requirement that the evidence be viewed in the light most favorable to Kodi. More fundamentally, a jury has already found to the contrary by determining that Corporal Ruby faced no "imminent threat," Pet. App. 213a, and that firing the shot was not "objectively reasonable." Pet. App. 18a.

It is not until the final pages of their brief that Respondents finally touch on the core issue presented by the petition: how the clearly-established prong of qualified immunity should be applied in cases involving obviously unlawful conduct. On that point, Respondents simply repeat the same errors made by the Maryland court. They refuse to apply this Court's obviousness principle. They insist on a factually identical prior case. And they rely on cases that bear no resemblance to this one—cases that instead involve hostages, shootouts where officers had a

legitimate reason for firing, and high-speed chases. Respondents' parroting of those mistakes confirms the need for this Court to clarify the proper application of the clearly-established standard in cases that involve conscience-shocking police misconduct.

The Court should grant the petition.

ARGUMENT

I. Corporal Ruby violated Kodi's Fourteenth Amendment right to be free from arbitrary government action.

A. Respondents devote much of their brief to arguing that Kodi has no Fourteenth Amendment due process right against being shot through an officer's conscience-shocking indifference and, alternatively, that Corporal Ruby did not violate that right. Those arguments do not counsel against review.

Courts employ "a two-pronged inquiry" to "resolv[e] questions of qualified immunity." *Tolan v. Cotton*, 572 U.S. 650, 655 (2014) (per curiam). The first is "whether … the officer's conduct violated a [federal] right," *id.* at 655–56 (alteration in original), and the second is "whether the right in question was 'clearly established,'" *id.* at 656. Courts may exercise "sound discretion" to resolve qualified-immunity questions under either prong. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The Maryland Supreme Court decided this case on the second prong. It held that Corporal Ruby is entitled to qualified immunity because no factually similar case clearly established that his conduct was

unlawful. In doing so, the court disregarded this Court's precedents holding that a violation may be so obviously unlawful that it precludes qualified immunity even in the absence of a prior decision. And that holding exacerbated a disagreement among the lower courts about how to determine whether police misconduct that shocks the conscience violates clearly established law.

These issues regarding the clearly-established test are cleanly presented. This Court may address them—and provide much needed clarity regarding how to apply the obviousness principle in cases like this one—without resolving whether Corporal Ruby violated the Fourteenth Amendment, if it deems doing so appropriate. In that event, the Court could remand the case for the Maryland court to conduct the required analysis under the correct legal standard. *See, e.g.*, *Brosseau*, 543 U.S. at 195 (granting petition for certiorari only as to "the second, qualified immunity" prong).

B. In any event, Respondents' arguments fail on the merits because Kodi unquestionably had a Fourteenth Amendment due process right to be free from arbitrary police violence.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Indeed, this Court's "earl[iest] explanations of due process … understood the core of the concept to be protection against arbitrary action." *Lewis*, 523 U.S. at 845. That protection traces its roots to the "Magna Charta" and colonial constitutions, which enshrined protections "to secure the individual from the

arbitrary exercise of the powers of government." *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). Government action is "arbitrary in the constitutional sense" when it "shocks the conscience." *Id.* at 846–47 (collecting cases); *see also Rochin v. California*, 342 U.S. 165, 172 (1952).

Respondents' argument that Kodi has not identified any violation of a "fundamental liberty interest" protected by the Fourteenth Amendment (Opp. 9, 24, 25) is thus flatly wrong. Throughout this litigation, Kodi has invoked his Fourteenth Amendment right to be free from "conscience-shocking physical force." Pet. App. 12a (alterations accepted). This Court has "repeatedly adhered to" that formulation of the Fourteenth Amendment due process right to be free from arbitrary government action. *Lewis*, 523 U.S. at 847.[1] Thus, under this Court's precedents, Kodi's claim falls squarely within the Fourteenth Amendment's right to due process.

C. Respondents also err in disputing that Corporal Ruby's conduct violated Kodi's right to due process. As explained in the petition, the conscience-shocking facts of this case are simple, tragic, and settled by a jury verdict. Corporal Ruby shot Korryn Gaines in the back and through a wall, knowing full well that Kodi—an innocent, five-year-old child—could be hit. As the jury found, Corporal Ruby had no

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[1] Respondents repeatedly refer to *Lewis* as a "plurality opinion" (Opp. 11, 13), which they characterize as "questionable, at best" (Opp. 15 n.3). In fact, however, six Justices joined the Court's opinion in *Lewis*, and Respondents do not seriously dispute that opinion's accounting of the relevant history and unbroken line of precedent recognizing a right to be free from arbitrary government action.

"objectively reasonable" belief that deadly force was necessary to protect himself or others. Pet. App. 217a. Time was not of the essence. *See, e.g.*, Law Enforcement Action Partnership ("LEAP") Amicus Br. 16 ("Corporal Ruby had ample time—six hours—to consider alternatives[.]"). Taking the shot anyway—because he was "hot and frustrated"—evinced a "deliberate indifference" to Kodi's life and safety. *Lewis*, 523 U.S. at 851; Pet. 17, 19–20. That conduct violated Kodi's Fourteenth Amendment right to due process.

Respondents' only response is to mischaracterize both the law and the facts. First, on the law, Respondents claim that because Corporal Ruby shot Kodi "accidental[ly]" and did not "intend[ ] to harm" Kodi, he could not have violated Kodi's right to due process. Opp. 15–17. But this Court "ha[s] expressly recognized" that conduct "may be actionable under the Fourteenth Amendment" even where the officer's "culpability" is "less than intentional conduct." *Lewis*, 523 U.S. at 849–50. The question in such cases is not whether the officer intended to harm the victim but rather whether the officer's conduct "rise[s] to a constitutionally shocking level." *Id.* at 852. The actual standard in cases like this one—where an officer did not need to make an instantaneous judgment—is "deliberate *indifference*," *id.* (emphasis added), which, by definition, does not include a specific-intent requirement.

Respondents also assert that *Lewis* rejected the view that police may violate the Fourteenth Amendment when they cause harm through deliberate indifference. Opp. 12. Not so. *Lewis* held that deliberate indifference was insufficient to

establish liability in the context of a car chase requiring split-second decision making. But the Court expressly confirmed that the "'deliberate indifference' [standard] … is sensibly employed … when actual deliberation" occurs. *Lewis*, 523 U.S. at 851; *see also Rosales-Mireles v. United States*, 585 U.S. 129, 138 (2018). That is precisely the case here. *See* Pet. 15 & n.3, 19–20.

Departing from the deliberate-indifference standard would lead to absurd results. Respondents themselves suggest that firing "into a crowd of people to apprehend a suspect"—presumably even a nonviolent suspect—may "not violate substantive due process." Opp. 24–25; *see* Pet. 18 n.4. But Respondents' reasoning necessarily extends even further than that. Under Respondents' misguided view, if an official bombed a city to kill one specific person, substantive due process would provide no protection to the thousands of innocents vaporized by the blast. This Court's precedents rightly preclude such an absurd rule.

Next, on the facts, Respondents both ignore the jury's verdict and fail to construe the evidence in favor of Kodi, as required in this posture. Pet. App. 7a n.7. Respondents assert that Corporal Ruby's "shooting was grounded in legitimate law enforcement objectives" such that "any reasonable law enforcement officer" would have considered deadly force appropriate. Opp. 21–22. That is not true even as a matter of sound police practice. LEAP Br. 14–15. But more important, Respondents made the same arguments to the jury—and lost. Pet. App. 14a, 18a. The jury credited testimony "that there was no immediate threat" when "Corporal Ruby took the first

shot," Pet. App. 262a, and that Corporal Ruby shot "because he was hot and frustrated," Pet. App. 214a (quotations omitted). The jury's finding that the shot was not "objectively reasonable" flatly precludes any argument that it was based on legitimate law-enforcement objectives and confirms that Corporal Ruby's decision to shoot reflected, at best, deliberate indifference to the risk of hitting Kodi.

Respondents go even further afield to claim that Kodi was being held as a "hostage" and "used as [a] human shield." Opp. 20, 22, 24–26. Those assertions bear no relation to the facts of the case, which show a mentally troubled mother whose five-year-old child was shot when she went into her own kitchen to make him a sandwich. There is no hint in the record that Ms. Gaines detained Kodi by force in order to compel action from a third party, as would be required to render him a hostage. *Cf.* 18 U.S.C. § 1203; Md. Code Ann. Crim. Law § 3-502. Respondents' "human shield" allegation is made up out of whole cloth. And, here again, Respondents' argument cannot be reconciled with the evidence construed in Kodi's favor or with the jury's verdict.

That the jury has already put to bed these factual disputes shows that this case is an ideal vehicle to resolve the purely legal Questions Presented.

II. This Court should grant review to clarify the proper application of the obviousness principle of the clearly-established prong of qualified immunity.

As explained in the petition (at 11–14), some conduct is so obviously unlawful that "a general

constitutional rule" will put an officer on notice, even where "the very action in question has [not] previously been held unlawful." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002) (alteration in original); *see also Taylor v. Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam). This "obviousness" principle "plays an important role in … ensur[ing] vindication of the most egregious constitutional violations." *Tyson v. Sabine*, 42 F.4th 508, 521 (5th Cir. 2022) (alterations in original) (internal quotation marks omitted).

Corporal Ruby's conduct was obviously unlawful. Taking the shot in callous disregard of Kodi's safety was so egregious as to shock the conscience and was thus necessarily obviously unlawful. Pet. 14–16. As one *amicus curiae* concisely explains, "[n]o 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." Cato Institute ("Cato") Amicus Br. 8; *see* Pet. 16–17. Law enforcement officials agree. *See* LEAP Br. 14.[2]

The Maryland court erred because it failed to apply the obviousness principle and instead granted qualified immunity because it could not find a prior case with similar facts. Pet. 17–20; Cato Br. 4. That

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[2] Although conduct that shocks the conscience is obviously unlawful, the converse does not hold. Not all conduct that is obviously unlawful is also conscience shocking. An officer's search of a person's bag for no reason obviously violates the Fourth Amendment, but it does not shock the conscience. Corporal Ruby's conduct was both conscience-shocking and obviously unlawful.

error further deepened a divide among the lower courts about how to apply the obviousness principle in due process cases. Pet. 20–23; LEAP Br. 9–10 & n.14; Cato Br. 3–7. And that lower-court confusion makes for an exceptionally important issue: preventing "the most obviously unconstitutional conduct" from becoming "the most immune from liability." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.); *see also* Pet. 23–26; LEAP Br. 10–14.

Indeed, decisions like the Maryland Supreme Court's in this case call the qualified-immunity doctrine itself into disrepute. Pet. 25. Corporal Ruby shot with the intent to kill another human being who posed no threat to him or anyone else because he was "hot and frustrated" after a long standoff. And he fired that shot knowing it might hit an innocent five-year-old child. If qualified immunity protects an officer who engages in such conduct, something is badly wrong with the doctrine. But properly applied consistently with this Court's precedents, the doctrine offers no protection for such obviously unlawful conduct.

A. Respondents argue that the obviousness principle does not apply in Fourteenth Amendment due process cases. Opp. 27–30. In particular, they contend that because one of the Court's obviousness cases—*Hope v. Pelzer*, *supra*—concerned an Eighth Amendment violation, the principle is limited to the Eighth Amendment context. Opp. 28–29.

Respondents are wrong. This Court has never held that the obviousness principle applies to violations of some constitutional provisions but not others, and

there is no principled basis on which it should. Indeed, in *Brosseau v. Haugen*, *supra*, this Court assessed a Fourth Amendment excessive-force claim by first asking whether the alleged constitutional violation in the "present case" was "obvious" enough that general Fourth Amendment principles "alone offer a basis for decision." 543 U.S. at 199. Although the Court answered in the negative, it reiterated that, even in the excessive-force context, standards articulated at "a high level of generality" will "clearly establish" the constitutional violation "in an obvious case." *Id.* Thus, the obviousness principle applies to the qualified-immunity analysis generally, with no Amendment-by-Amendment exceptions.

Respondents' argument to the contrary highlights the need for this Court's guidance. As the Cato Institute explains, there is lower-court "confusion over the [obviousness principle]'s applicability beyond claims involving cruel and unusual punishment." Cato Br. 5–6. That confusion is more, not less, reason for this Court to grant certiorari.

B. Respondents next contort the factual record in ways that both contradict the jury verdict and violate the obligation to view the evidence in the light most favorable to Kodi. Specifically, Respondents assert that "a reasonable officer would [have] conclude[d] that" Corporal Ruby's use of "deadly force to end the standoff was justified." Opp. 25; *contra* LEAP Br. 14–15. That is quite literally the opposite of the jury's determination that Corporal Ruby's fatal shot was not "objectively reasonable." Pet. App. 18a.

C. Next, Respondents rely on markedly dissimilar cases involving hostages, shootouts, and

high-speed chases (Opp. 26–27) to argue that Corporal Ruby's conduct did not violate "clearly established" law. But just as an "obvious" constitutional violation need not be clearly established with "similar" precedent, *Hope*, 523 U.S. at 741, neither can "dissimilar" cases "create any doubt about the obviousness of" an asserted right. *Taylor*, 592 U.S. at 9 n.2. Respondents' reliance on dissimilar cases mirrors the Maryland court's error and confirms that this Court's review is warranted. *See* Pet. 19–20.

D. Finally, Respondents assert that Corporal Ruby's conduct could not have been obviously unlawful because the jury did not "award punitive damages." Opp. 32–33. Under Maryland law, however, "the award of punitive damages lies within the discretion of the trier of fact" "[e]ven where … malice is established." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 818 A.2d 1159, 1168 n.1 (Md. Ct. Spec. App. 2003). Consistent with this law, the trial court expressly instructed the jury that if it "f[ound] that the legal requirements for punitive damages are satisfied," it could still "decide not to award them." Trial Tr., Feb. 15, 2018, 50:23–51:3. Thus, the jury's decision not to award punitive damages does not represent a factual finding of any kind.

If anything, the now-set-aside damages award strongly suggests that the jury believed Corporal Ruby's conduct was conscience-shocking. As Justice Watts explained below, "[t]he jury awarded damages to Kodi as follows: $23,542.29 for past medical expenses and $32,850,000.00 in noneconomic damages. Enough said." Pet. App. 68a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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