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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a law enforcement officer has violated the rights of the Petitioner Kodi Gaines ("Petitioner" or "Kodi") under the Fourteenth Amendment of the Constitution by accidently shooting him, where it is undisputed that Kodi was a hostage at the time of the shooting and that he was accidently shot in the course of the law enforcement officer ending a six-hour standoff and barricade with his mentally ill mother?

II. Whether the Maryland Supreme Court correctly held that Kodi's substantive due process claim under 42 U.S.C. § 1983 ("§ 1983") and the Fourteenth Amendment of the Constitution was barred by qualified immunity?

III. Whether Kodi is improperly attempting assert the Fourteenth Amendment rights of his mother vicariously as his own, when he was never the object of the shooting?

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INTRODUCTION

This Court should deny, out of hand, the petition for writ of certiorari filed by Petitioners, Corey Cunningham ("Cunningham") on behalf of his minor son, Kodi, because the petition does not present any compelling reason to grant it. *See* Sup. Ct. Rule 10(c). That is to say, the Maryland Supreme Court made a straightforward and correct application of qualified immunity to bar Kodi's § 1983 substantive due process claim under the Fourteenth Amendment of the Constitution, as it was far from "clearly established" that Corporal Royce Ruby ("Cpl. Ruby") of the Baltimore County Police Department ("B.C.P.D.") actually violated Kodi's rights by accidently shooting him. This is because the unintentional shooting occurred in a unique context, *i.e.*, Cpl. Ruby shot Kodi while ending a six-hour barricade and hostage standoff with his mentally ill mother, Korryn Gaines ("Korryn" or "Gaines").

Indeed, as explained in more detail below, it is questionable whether Kodi had any substantive due process right *at all* to avoid being accidentally shot during the hostage standoff, much less a "clearly established" right. In other words, the petition fails to provide any textual, historical or precedential support for Kodi's substantive due process claim.

In any case, even if Kodi had a substantive due process right under these unique circumstances, Cpl. Ruby did not violate that right by unintentionally shooting him. Rather, there is no question that the shooting is tied to several legitimate law enforcement purposes, among them to safely end the hostage standoff and barricade with a mentally ill and dangerous suspect, Gaines. This is so, irrespective of

whether Gaines raised her weapon to shoot in Cpl. Ruby's direction at the exact time that he shot her.

Perhaps most importantly, this Court has generally contemplated and rejected the very premise of Kodi's substantive due process claim here, *i.e.*, that a police officer's unreasonable use of force which results in the accidental injury to a hostage or bystander, is an automatic and "obvious" substantive due process violation. This Court's seminal case on accidental use of force by law enforcement stands for the very opposite proposition of law--meaning that a reckless police chase which resulted in a loss of life, but is nevertheless tied to legitimate law enforcement goals, *does not* qualify as a substantive due process violation. For all of these reasons, the petition fails the first prong of the qualified immunity test.

The petition also fails the second prong of the qualified immunity test, and the Maryland Supreme Court was correct in so holding. This is because the law was far from "clearly established" that a law enforcement officer violates a hostage's substantive due process rights by accidently shooting him or her during a hostage standoff or barricade. Rather, this Court has *never* expressly recognized such a right, and nearly every Circuit Court of Appeals that has considered the issue has held either that the hostage's substantive due process rights *were not* violated by law enforcement, or that the law enforcement officer was entitled to qualified immunity on the grounds that the right was not "clearly established." Federal courts have reached the same conclusions with respect to innocent bystanders who have been unintentionally shot by police.

Lastly, Kodi is, in essence, is attempting to vicariously assert the substantive due process rights of Gaines as his own. However, the law does not allow him to do so, as Gaines' Fourth and Fourteenth Amendment rights are personal to her and cannot be vicariously asserted.

This Court should deny the petition for writ of certiorari.

STATEMENT OF FACTS

The facts are those found by the Maryland Supreme Court and the Maryland Appellate Court in the original appeal of this case, since the original jury did not answer any special interrogatories. *See Cunningham v. Baltimore County, et al.*, 487 Md. 282 (2024)("*Cunningham II*"); *Cunningham v. Baltimore County*, 246 Md. App. 630, 647 (2020) ("*Cunningham I*"). On August 1, 2016, Gaines was in an armed standoff with BCPD Officers, including Cpl. Ruby, for six hours, before Cpl. Ruby ended the standoff by firing a fatal shot as she stood in the kitchen of her apartment. *Cunningham II*, 487 Md. at 294-95; *Cunningham I*, 246 Md. App. at 640-49. The armed standoff began when BCPD Officers attempted to serve arrest warrants on Gaines and her boyfriend (Mr. Kareem Courtney) in the apartment that they shared, and she confronted those officers by pointing a loaded, pistol grip shotgun at them. *Cunningham II*, 487 Md. at 294; *Cunningham I*, 246 Md. App. at 640-41.

After BCPD officers initially entered the apartment, Mr. Courtney gave himself up and he tried to convince Gaines to allow Kodi to leave, but she refused and instead instructed Kodi to stay close to her. 487 Md. at 294-95; 246 Md. App. at 640, 646-

49. After the BCPD Tactical Team arrived, Gaines' mother told them that she had a history of mental illness and that she had been off of her medication. 487 Md. at 294; 246 Md. App. at 647, 649. That information was relayed to Cpl. Ruby near the beginning of the standoff. 246 Md. App. at 649.

Despite repeated negotiation attempts, Gaines remained barricaded in the apartment, with Kodi by her side, for nearly six hours. 487 Md. at 294; 249 Md. App. at 648-649. 690, n. 41. Throughout the barricade and hostage standoff, Gaines resisted arrest, threatened BCPD Officers multiple times, disobeyed BCPD orders to put her gun down, and behaved irrationally and aggressively at times. 487 Md. at 294; 246 Md. App. at 648-649, 690 n. 41.

For example, Sergeant O'Neil testified that "Korryn's behavior became increasingly irrational and paranoid throughout the day. There were times when she would cut off communications but then start talking again." 246 Md. App. at 648. The Maryland Appellate Court also concluded that "[a]t times she stated that she did not want to hurt anyone, but officers testified that, at other times, she threatened to kill them, making statements like: "I have a gun, you have a gun. The only difference between you and me is I'm ready to die, and you're not[.]" Korryn referred to the officers as "devils" and said that, if they entered the apartment, she would "ha[ve] no problem shooting them and killing them." 246 Md. App. at 648-649.

At multiple times during the standoff, Kodi came close to the apartment door where Cpl. Ruby was standing, but Cpl. Ruby could not rescue Kodi without making any sudden movements. 246 Md. App. at 649.

Each time that Kodi came close the door, Gaines would yell at him to return to her side. 246 Md. App. at 649.

For most of the standoff, Gaines sat on the floor in the hallway between the living room and the kitchen in the apartment with her hand on the shotgun pointed at the doorway (where Cpl. Ruby was standing). 487 Md. at 295; 246 Md. App. at 650. Cpl. Ruby decided to end the standoff after both Gaines and Kodi suddenly went into the kitchen and was there for a period of time. 487 Md. at 295; 246 Md. App. at 650. It is undisputed that by moving to the kitchen with the gun in hand, it gave Gaines a tactical advantage because she was now closer to the door of the apartment (where all of the BCPD officers were gathered outside), *and she had cover* (as she was now partially behind a wall in the kitchen). 487 Md. at 295. This caused Cpl. Ruby to move from his position in front of the door of Gaines' apartment to the doorway of another apartment (with the door of Gaines' apartment cracked open), and as a result, he could only see the barrel of the shotgun and Gaines braids. 487 Md. at 295.

Believing that Gaines was raising her gun to shoot, Cpl. Ruby told the hostage negotiator to tell her put the gun down. 487 Md. at 295; 246 Md. App. at 650-652. On the other hand, Kodi disputed at trial whether Gaines was specifically pointing the gun at Cpl. Ruby at the exact time that Cpl. Ruby shot her. 487 Md. at 295; 246 Md. App. at 692-93. *The Maryland Supreme Court resolved the discrepancy by finding that although Gaines may have raised her shotgun, she was not aiming it directly toward officers stationed on the other side of the front door*. 487 Md. at 295.

Cpl. Ruby decided to end the standoff at that point by taking a single headshot. 487 Md. at 295-96. It is undisputed that Cpl. Ruby specifically understood the risk that Kodi could be accidently shot, and for this reason, he took *a headshot* against Gaines to end the standoff. 487 Md. at 295-296; 246 Md. App. at 652. Cpl. Ruby knew that Kodi was in the kitchen, but he did not know exactly were. 487 Md. at 295-296; 246 Md. App. at 652.

The initial shot went through the kitchen drywall, struck Gaines in her upper back, ricocheted off of a refrigerator and struck Kodi in the cheek. 487 Md. at 295-96; 246 Md. App at 652-53. Gaines, discharged her shotgun twice *within 30 seconds*, shortly after Cpl. Ruby fired the initial shot. 487 Md. at 296; 246 Md. App. at 653, n. 12. Cpl. Ruby then entered the apartment and ended the standoff by firing three more shots. 487 Md. at 296; 246 Md. App. at 653. As stated earlier, the first shot fired by Cpl. Ruby mortally injured Gaines, but also ricocheted off of a refrigerator and struck Kodi in the cheek. 487 Md. at 296; 246 Md. App. at 653. The initial shot is the only shot at issue in this case, as Gaines and Kodi conceded below that the subsequent shots were constitutional. *See* 246 Md. App. at 653, 660-661 (jury verdict sheet).

REASONS FOR DENYING THE PETITION

A. KODI DOES NOT HAVE ANY RIGHT UNDER THE FOURTEENTH AMENDMENT TO AVOID BEING ACCIDENTLY SHOT DURING THE HOSTAGE STANDOFF AND BARRICADE WITH HIS MENTALLY ILL MOTHER.

First and foremost, the petition is not worthy of certiorari review by this Court because it fails to precisely identify Kodi's so-called substantive due process right with any textual, historical or precedential support. Thus, this Court need not reach the qualified immunity question at all, because the petition fails to precisely explain what Kodi's substantive rights are under the Fourteenth Amendment, much less adequately show that those rights were "clearly established." *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be… In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all." (citations omitted)).

Analysis of whether Kodi ever stated a proper substantive due process claim starts with whether he is asserting a right under one of the first eight amendments of the Constitution (the Bill of Rights). *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022)("But our decisions have held that the Due Process Clause protects two categories of substantive rights…The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal

Government, … but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States." (internal citations omitted)); *see also Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

Kodi originally attempted to argue that Cpl. Ruby violated his rights under the Fourth Amendment of the Constitution, which prohibits unreasonable searches and seizures. *See United States Const.*, Amend. IV; *see also Graham v. Connor*, 490 U.S. 386, 394 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). However, the precedent from this Court directly foreclosed a Fourth Amendment violation because it is *undisputed* that Kodi *was not* the intended target of the shooting. *See Torres v. Madrid*, 592 U.S. 306, 317 (2021) ("A seizure requires the use of force with intent to restrain. *Accidental force will not qualify*." (emphasis added)(citing *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998)("We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but *accidentally* stopped the suspect by crashing into him. (citations omitted) (emphasis added)); *see also Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989).[1]

Since Kodi cannot show that his rights are covered by any of the first eight amendments to the Constitution (including the Fourth Amendment), his

[1] Indeed, Kodi expressly waived his § 1983 Fourth Amendment claim before the Maryland Courts for this very reason. *Cunningham II*, 487 Md. at 325.

only path to a viable substantive due process claim is to show that his right is in an unnamed "liberty interest that is deeply rooted in the Nation's history and tradition" and implicitly falls "into the concept of ordered liberty." *See Dobbs*, 597 U.S. at 231. (Noting that the Due Process clause of the Fourteenth Amendment "… has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

The petition does not come close to meeting this high burden. First, the petition fails to *carefully* identify the fundamental liberty interest that Kodi purports to assert. *See Glucksberg*, 521 U.S. at 721 (Generally observing that "…we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (citations omitted)); *see also Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. City of Harker Heights Tex.*, 503 U.S. 115 (1992).

Second, the petition fails to cite to any common law history, common law tradition, or Supreme Court precedent expressly recognizing a hostage's right to evade being accidently shot by law enforcement. *See e.g.*, *Dobbs*, 597 U.S. 241-250 (Concluding that the right to an abortion *is not* rooted in the Nation's history and tradition and thus not a liberty interest protected by substantive due process); *Timbs v. Indiana*, 586 U.S. 146, 151-154 (2019)(Tracing the prohibition against excessive fines back to the Magna Carta); *Glucksberg*, 521 U.S. at 723-28 (Rejecting assisted suicide as a protected liberty interest because

right *was not* rooted in history and tradition of the Nation); *see also Lewis*, 523 U.S. at 862-865.

The petition only cites two cases *Rochin v. California*, 342 U.S. 165, 173 (1952), and *Lewis*, 523 U.S. at 854, that appear to support the so-called "obvious" liberty interest that Kodi contends that he has, *i.e.*, without expressly saying so, Kodi is really arguing that he has a right to complete body integrity during a barricade and hostage standoff. *See* Pet. at pp. 14-20. However, a close review of both cases shows that neither case supports such a broad liberty interest. *See Lewis*, 523 U.S. at 845-854; *Rochin*, 342 U.S. at 172.

Rochin, *supra,* involved an appeal of a criminal conviction for illegal possession of morphine. 342 U.S. at 166-67. The primary evidence against the defendant was two morphine capsules, which law enforcement obtained after they: (1) illegally broke into the room of an apartment that he shared with his mother without a warrant, (2) physically abused the defendant to prevent him from swallowing the capsules afterwards, and (3) took the defendant into custody, and had his stomach forcefully pumped at a hospital by induced vomiting (against the defendant's will). *Id.* at 166-67.

In overturning the defendant's conviction, this Court found that it was premised on violations of the defendants' Fourth Amendment rights (unreasonable searches and seizures) and his Fifth Amendment rights (self-incrimination). *Id.* at 172 ("This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of

proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities."). Therefore, the liberty interest at stake in *Rochin, supra*, was the defendant's right to *avoid a criminal conviction* based upon express violations of the Fourth and Fifth Amendments of the Constitution. *See id.*

On the other hand, *Lewis*, *supra*, involved § 1983 claim of the parents and estate of Philip Lewis, who was *accidently* killed by deputy sheriffs during a high-speed car chase. 523 U.S. at 836-37. Lewis was a passenger on a motorcycle driven by his friend. *Id.* at 836-37. The District Court granted summary judgment on the grounds of qualified immunity and the Ninth Circuit reversed, holding that there was an issue of fact as to whether law enforcement officers were "deliberately indifferent" to Lewis' safety. *Id.* at 836-37.

This Court's plurality opinion addressed two issues: (1) whether Lewis' claim was governed by Fourth Amendment principles or substantive due process principles under the Fourteenth Amendment; and (2) whether the facts, as alleged, sufficiently stated a Fourteenth Amendment claim. *Id.* at 841-842.

The plurality opinion answered the first question by holding that Lewis was never "seized" within the meaning of the Fourth Amendment, and thus, his claims were governed by Fourteenth Amendment substantive due process principles. *Id* at 843-45. The plurality opinion went on to hold that the accidental killing of Lewis, as alleged in the complaint, *did not* violate substantive due process. *Id* at 845-856.

On the Fourteenth Amendment substantive due process claim, this Court repeated the basic framework for a substantive due process violation: "[o]ur cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846 (quoting *Collins,* 503 U.S. at 129). After reviewing various precedents outlining "arbitrary" unconstitutional conduct, the opinion also reaffirmed that "[t]o this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Lewis*, 523 U.S. at 846. This Court settled on the following holding: "Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983." *Id.* at 854 (footnote omitted).

Thus, in *Lewis, supra*, this Court analyzed the substantive due process right as the right to evade death by a deliberate or reckless indifference to life during a high-speed police chase. *Id.* at 836, 845-55. Critically, this Court answered this question in the negative, specifically rejecting allegations that the deputy sheriffs were deliberately indifferent or reckless to the safety of Lewis as sufficient to meet "the shocks the conscience standard." *See Id.* at 836, 845-55. Therefore, because the use of force against Lewis: (1) was purely accidental (and not intentional conduct); and (2) was the result of a legitimate law enforcement objective (to make the driver come to a stop), there were insufficient facts to state a substantive due process claim under the Fourteenth Amendment. *Id.* at 854.

Most importantly, the plurality opinion in *Lewis*, *supra*, was crystal clear that a police officer may violate the reasonableness standard in tort law, or even the best practices of law enforcement, *and still* not violate the Fourteenth Amendment: "*Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983.*" *Lewis*, 523 U.S. at 855 (emphasis added).

Consequently, there is *no split* amongst the Circuit Courts of Appeals (contrary to the suggestion of the petition) on the issue of whether a hostage, or a bystander who is accidently shot has suffered a violation of his or her substantive due process rights. Nearly all the Circuits who have addressed the issue have found that accidental shootings generally do not violate substantive due process principles. *See e.g.*, *Neal v. St. Louis Cnty. Bd. of Police Comm'rs*, 217 F.3d 955 (8th Cir. 2000)(accidental shooting of undercover officer does not violate substantive due process); *Claybrook v. Birchwell*, 199 F.3d 350, 360–61 (6th Cir. 2000)(innocent bystander injured in shootout between her father-in law and police officers failed to state substantive due process claim); *Childress v. City of Arapaho*, 210 F.3d 1154, 1158 (10th Cir. 2000)(police who accidently shot two hostages, a mother and her child, did not violate their substantive due process rights); *Medeiros v. O'Connell*, 150 F.3d 164, 170 (2d Cir. 1998)(state trooper did not violate the substantive due process rights of child hostage whom the state trooper accidently shot in the course of shooting an armed robber); *Schaefer v. Goch*, 153 F.3d 793, 797-798 (7th

Cir. 1998)(accidental killing of hostage by police did not violate the victim's substantive due process rights); *Rucker v. Harford Cnty.,* 946 F.2d 278 (4th Cir. 1991) (innocent bystander who was accidently shot and killed by law enforcement officers did not suffer a substantive due process violation); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 797 (1st Cir. 1990)(no substantive due process claim for restaurant manager who was accidently shot by police, during the course of ending an armed robbery); *see also Simpson v. City of Fork Smith*, 389 F. App'x 568, 570 (8th Cir. 2010)(accidental shooting of innocent bystander who was killed during shoot out did not state a substantive due process claim); *Emanuel v. District of Columbia*, 224 F. App'x 1, 2 (D.C. Cir. 2007)(unpublished)(accidental shooting of undercover police officer did not violate substantive due process); *Pahler v. City of Wilkes-Barre*, 31 F. App'x 69, 71 (3d Cir. 2002)(same).[2]

Here, simply because the jury may have found that the initial shot was unreasonable under the Fourth Amendment *against Gaines does not* obviously or automatically mean that it "shocks the conscious"

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[2] The Court may also summarily reject the so-called "State created danger" theory as a basis for supporting Kodi's substantive due process rights. First, this theory of substantive due process is premised on the legal obligations under the Eighth Amendment for prison officials to protect prisoners in their custody from dangers created by prison officials themselves (and Kodi was never in the custody of Cpl. Ruby). *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). Second, the danger to Kodi in this case was actually created by Gaines who engaged in the six- hour hostage armed standoff with BCPD Officers before Cpl. Ruby shot her. *See id.* (no substantive due process right to protection from third party violence or danger).

under the Fourteenth Amendment because the same shot accidently hit Kodi. To the contrary, Cpl. Ruby unintentionally shot Kodi while simultaneously ending the six-hour hostage standoff and barricade with Gaines. Kodi does not identify any right under the Bill of Rights that Cpl. Ruby allegedly violated (including the Fourth Amendment), nor does Kodi show that his right to avoid an accidental shooting is deeply rooted in the history and tradition of the Nation. Consequently, Kodi does not have any substantive due process rights at all under these conditions.

This Court can deny the petition for writ of certiorari for this reason alone.[3]

B. CPL. RUBY DID NOT VIOLATE KODI'S SUBSTANTIVE DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT, IF KODI HAS ANY SUCH RIGHT.

This Court, in *Lewis*, *supra*, outlined two paths of arbitrary official conduct which may satisfy the "shocks the conscience standard." *Lewis*, 523 U.S. at 849. First, this Court found that "conduct intended to

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[3] Lastly, because the Court in *Lewis, supra*, failed to employ the proper methodology for assessing a substantive due process claim, its continuing viability is questionable, at best. *Cf. Dobbs*, 597 U.S. at 234-250 (rejecting liberty claims that are not rooted in the history and traditions or the Nation); *Glucksberg*, 521 U.S. at 723-28 (same); and *Lewis*, 523 U.S. at 845-854 (failing to explain how the right to avoid an accidental death from a reckless police chase was rooted in the history and traditions of the Nation); *see also Lewis*, 523 U.S. at 860-856 (Scalia, J and Thomas, J concurring) ("I would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right.").

injure in some way unjustifiable by any government interest is the sort of official action *most likely* to rise to the conscience-shocking level." *Id.* at 849. Second, the Court found that "deliberate indifference" might satisfy the "shocks the conscience" standard, at least where prison officials ignore the basic medical needs of prisoners in their custody. *Id.* at 850. The Court frankly acknowledged that deliberate indifference may not satisfy the "shocks the conscience" standard, particularly in a circumstance where there is less time to deliberate. *Id.* at 850-853.

In the case at bar, neither standard can be met. First and foremost, Kodi's substantive due process claim fails because there is no evidence that Cpl. Ruby intended to harm him as a hostage. *See e.g.*, *Childress*, 210 F.3d at 1158 ("Plaintiffs claim that the officers were grossly negligent, reckless and even deliberately indifferent to their plight. Nowhere do plaintiffs present specific facts suggesting that the officers harbored an intent to harm them."); *Schaefer*, 153 F.3d at 798 ("Nobody has suggested that the officers intended to harm Kathy Nieslowski, and so the straightforward application of the *Lewis* analysis yields a verdict in favor of defendants."); *Landol-Rivera*, 906 F.2d at 796–97 ("In this tense, rapidly developing situation, where the fleeing suspect was armed, had threatened to kill his hostage, and had commandeered a car and abducted its driver, the decision to shoot toward the hijacked vehicle, by itself, falls far short of demonstrating reckless or callous indifference toward the hostage's rights…"); *Browell v. Davidson*, 595 F. Supp. at 921–22 ("Clearly the officers were attempting to apprehend the likely armed Lile, a legitimate governmental interest, and not intending to harm Ms. Browell."); *Lee*, 138 F.

Supp. 2d at 763 ("In the instant case, applying the "shocks the conscience" standard post-*Lewis,* no reasonable fact finder could conclude that Deputies Clem or Barley maliciously or sadistically employed force against Lee in a manner that violated Lee's substantive due process rights,").

Second, even if Kodi were an innocent bystander (as opposed to a hostage), his substantive due process claim would still fail for the same reason, *i.e.*, Cpl. Ruby harbored no intent to harm him. *See e.g.*, *Claybrook*, 199 F.3d at 360 ("[N]o rational fact finder could conclude, even after considering the evidence in the light most favorable to Quintana, that those peace enforcement operatives acted with conscience-shocking *malice* or *sadism* towards the unintended shooting victim."); *Rucker*, 946 F.2d at 281("The police, including Vernon, the presumed direct actor, were legitimately about the dangerous business of apprehending a madman run amok, threatening the lives of everyone in his way"); *Brandon,* 157 F. Supp. 2d at 925 ("Nothing in the record suggests that the officers had "a purpose to cause harm" to Mr. Brandon, so a reasonable jury could not conclude that the officers' conduct "shocks the conscience."); *Rodriguez*, 819 F. Supp. 2d at 950 ("Plaintiff here has alleged no facts that, if proven, would tend to show that Chavez acted toward her with malicious or sadistic intent or for the purpose of causing harm to her."); *see also Simpson*, 389 F. App'x. at 570("Simpson does not present any argument, let alone any evidence, that Officer Carter acted with an intent to harm Stewart.").

There are at least four legitimate and generally applicable objectives explaining why it was constitutional under the Fourteenth Amendment for

Cpl. Ruby to deploy deadly force against Gaines, an armed hostage taker: (1) officer safety; (2) the safety of the hostage; (3) apprehension of an armed suspect; and (4) protection of the public at large in the event of escape. *See Ochoa v. City of Mesa*, 26 F.4th 1050, 1057-58 (2022)("Under this test, the officers' conduct was consistent with legitimate law enforcement objectives and did not violate the Fourteenth Amendment. As the district court noted, when officers confronted Ochoa, "at least four law enforcement objectives [were] apparent: officer safety, protection of the occupants still inside the home, apprehension of an apparently dangerous suspect, and protection of the public at large in the event [Ochoa] escaped from the backyard.").[4]

Thus, the following explanation by two members of this Court in *Lewis, supra,* completely describes why the accidental shooting of Kodi during a hostage standoff does not come close to violating his substantive due process rights:

> "To decide this case, we need not attempt a comprehensive definition of the level of causal participation which renders a State or its officers liable for violating the substantive commands of the Fourteenth Amendment. *It suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process*

[4] Ironically, had Cpl. Ruby not attempted to rescue Kodi and Gaines injured him, Kodi or his estate, would invoke the so-called "State created danger" theory as a basis for supporting his so-called substantive due process rights. Kodi would argue that Cpl. Ruby created a special relationship with him when he attempted to rescue him numerous times and left him alone with his mentally ill mother.

> *violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop.*"

See Lewis, 523 U.S. at 858 (Kennedy, J. and O'Conner, J. concurring)(emphasis added).

The petition's implied argument that Cpl. Ruby could only fire if he or other BCPD Officer were under an immediate threat of harm ignores the realities of a hostage circumstance. *See* Pet. at pp.14-20. As correctly explained by retired Justice Breyer and his colleagues on the First Circuit, accepting this argument would effectively hamstring Cpl. Ruby and all law enforcement officers during dangerous hostage standoffs:

> "To hold that shooting in such circumstances violates the constitutional rights of a hostage whom the officers are trying to free would be to hamstring seriously law enforcement officers in their efforts to resolve explosive situations. It is inevitable that the police response to violent crime will at times create some risk of injury to others, including innocent bystanders. We decline to hold that the mere presence of risk reflects a callous indifference to the constitutional rights of those individuals potentially harmed. Any other conclusion would both chill law enforcement officers in the performance of their duties and encourage hostage-taking and criminal activity in public settings so as to minimize police intervention."

See Landol-Rivera, 906 F.2d at 797.

Therefore, even if Cpl. Ruby *was mistaken* that Gaines was raising the gun to shoot when he shot her

(and even if he was "hot and bothered") Gaines had the last clear chance to avoid the unfortunate and resulting outcome by simply surrendering to law enforcement or otherwise releasing Kodi. *She did neither*. *See Schaefer v. Goch*, 153 F.3d 793, 798 (7th Cir. 1998) ("Under the analysis employed in Lewis, however, the officers' decision to fire does not 'inch close enough to harmful purpose' to shock the conscience, *even assuming that John never swung his weapon in the direction of the officers*. Given the high-pressure, life-and-death nature of the standoff, the officers were not required to wait until John actually pointed his shotgun at them." (emphasis added)).

Here, it was undisputed that BCPD officers had a warrant for the arrest of Gaines-meaning that they had *the legal authority* to take her into custody. It is undisputed the Gaines (who was mentally ill and off of her medication), resisted and obstructed those efforts by refusing to give herself up, arming herself with a dangerous weapon, and again, using Kodi as a human shield (*all for the purpose of avoiding a lawful arrest*).

The petition is plainly wrong and wholly misses the point, as the conditions facing Cpl. Ruby were very dangerous for everyone involved (including Kodi). It is undisputed that throughout the standoff, Gaines threatened officers and indicated that she was willing to die. It was also undisputed that she held BCPD Officers (including Cpl. Ruby) at bay for six hours, *precisely* because she was armed and she had a hostage in her son Kodi. It was undisputed that Cpl. Ruby attempted to rescue Kodi *unharmed* prior to shooting Gaines, only to have her yell at Kodi to return to her side.

Therefore, there is no question that from the moment that Gaines got up and went into the kitchen *with the weapon in hand*, the circumstances facing Cpl. Ruby had changed and were fast evolving. From the prospective of a reasonable law enforcement officer on the scene, Gaines was now in a superior tactical position because she was closer to the door of her apartment and she had cover.

A reasonable law enforcement officer would not have known what Gaines was capable of doing once she got up and went into the kitchen. This is so, regardless of whether Gaines was fixing a peanut butter sandwich (as Petitioners contend), or whether she had more nefarious motives (as Cpl. Ruby believed). At that point, Cpl. Ruby, or any reasonable law enforcement officer, *could not rule out suicide, murder-suicide, suicide by cop, or simply a maniacal attempt to shoot her way out of the apartment because she was now closer to the door (and she had cover).* Critically, there is no dispute of fact that shortly before Cpl. Ruby shot Gaines, he instructed the hostage negotiator to tell her to put her weapon down. *Again, she did not obey*.

As such, the use of force in this matter was far from "a brutal and inhumane abuse of official power shocking to the conscience," regardless of whether Cpl. Ruby was mistaken that Gaines was about to fire her weapon.[5] Rather, the shooting was grounded in

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[5] For similar reasons, Cpl. Ruby's conduct does not reach the second level of misconduct, "deliberate indifference" sufficient to meet a substantive due process claim. *See Lewis,* 523 U.S. at 850-853. From the moment that Gaines and Kodi got up and moved to the kitchen, Cpl Ruby was faced with a myriad of choices, all which involved some risk of harm to Kodi, Gaines,

legitimate law enforcement objectives, including ending the armed standoff and apprehending Gaines (who was armed, dangerous and had a warrant for her arrest), and protecting Kodi (an innocent hostage being used as human shield to keep law enforcement at bay).

Given all of these goals that were at stake while Gaines was in the kitchen, shooting her, and accidently shooting Kodi, *who was not directly in the line of fire*, to end the perilous standoff and barricade certainly did not violate the Fourteenth Amendment.[6] This Court can reject the petition wholesale, and not reach the qualified immunity question at all.

C. THE MARYLAND SUPREME COURT CORRECTLY HELD THAT KODI'S SUBSTANTIVE DUE PROCESS CLAIM WAS BARRED BY QUALIFIED IMMUNITY.

1. The controlling authority has never recognized a hostage's or bystander's substantive due process right to escape an accidental shooting during an armed standoff with law enforcement.

It is now axiomatic that "[t]he doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of*

himself and his fellow BCPD officers. *See Ewolski v. City of Brunswick*, 287 F.3d 492, 513-514 (6th Cir. 2002).

[6] *See Simpson,* 389 F. App'x at 571. ("The record contains no evidence from which a reasonable jury could conclude that Officer Carter knew that Stewart was in the line of fire and intentionally or wrongfully disregarded that danger when he shot at Nixon.")

Tahlequah, Oklahoma v. Bond, 595 U.S. 9, 12 (2021)(quoting *Pearson*, 555 U.S. at 231); *see e.g., District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018); *Reichle v. Howards,* 566 U.S. 658, 664 (2012); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

"Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that *every reasonable official* would understand that what he is doing is unlawful." *Wesby*, 583 U.S. at 63 (quoting *al–Kidd*, 563 U.S. at 741; and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)(cleaned up)(emphasis added)). "In other words, existing law must have placed the constitutionality of the officer's conduct *beyond debate*." *Wesby*, 583 U.S. at 63 (quoting *al–Kidd*, 563 U.S. at 741 (cleaned up)(emphasis added)). "This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 583 U.S. at 63 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

It is also well settled that for qualified immunity purposes, this Court must look to "controlling authority or a robust consensus of cases of persuasive authority" to determine if the constitutional right at issue is 'clearly established.'" *Wesby*, 583 U.S. at 63 (quoting *al-Kidd*, 563 U.S. at 741–742). Accordingly, "*it is not enough that the rule is suggested by then-existing precedent*. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 583 U.S. at 63 (citing *Reichle,* 566 U.S. at 666)(emphasis added). In other words, "[t]he clearly established standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's

contours must be *so well defined* that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Wesby*, 583 U.S. at 63 (quoting *Saucier v. Katz,* 533 U.S. 194, 202 (2001)(emphasis added); *see also Bond*, 595 U.S. at 12.

This Court has *never* held that a hostage has a substantive due process right to avoid being accidently shot by law enforcement. To the contrary, this Court's seminal decision *Lewis*, *supra*, stands for the very opposite proposition of law, *i.e.*, an accidental and *even reckless* use of force by a law enforcement officer who has legitimate law enforcement goals *does not* violate the Fourteenth Amendment. *See id.* at 854-855. Again, this Court in *Lewis, supra*, generally contemplated that a police officer's chase (a show of force to apprehend a suspect) could be unreasonable and excessive under regular tort law standards and police best practices (essentially a Fourth Amendment violation), *and yet does not* violate substantive due process principles under the Fourteenth Amendment. *See id.* at 855.

Likewise, the mandatory authority of the Fourth Circuit would not have told Cpl. Ruby that accidently shooting Kodi would violate his substantive due process rights. *See Rucker*, 946 F.2d at 280-82 (accidental shooting of bystander did not violate substantive due process); *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716, 719-725 (4th Cir. 1991)(deputy sheriff's reckless chase of suspect did not violate substantive due process rights of innocent bystander who was severely injured when deputy's car crashed into her).

To be clear, there *is dicta* in Rucker suggesting that a reckless shooting by a police officer might

violate substantive due process (for example, if the officer simply shot into a crowd of people to apprehend a suspect). *See id.* at 282. However, because this Court in *Lewis, supra*, found that a reckless police chase did not violate substantive due process, a reasonable police officer reading *Lewis* and *Rucker* together would conclude that the discussion of a reckless shooting referred to in *Rucker's* dicta *was not good law*. *Cf. Lewis*, 523 U.S. 849-854 (reckless police chase which killed passenger in motorcycle did not violate substantive due process rights of passenger); and *Rucker*, 946 F.2d at 282 (dicta surmising that reckless shooting into a crowd by police officer might violate substantive due process).

Given the danger facing Cpl. Ruby during the barricade, *i.e.*, an armed mentally ill suspect who had a hostage and who suddenly changed tactical positions, a reasonable officer would also conclude that employing deadly force to end the standoff was justified by legitimate government interests. *See Rucker*, 946 F.2d at 282 (goal of employing deadly force was to stop a madman gone amuck.) This is so, especially if there was no intent to injure the hostage. *See Lewis*, 523 U.S. at 849-854; *Rucker*, 946 F.2d at 282.

In sum, the mandatory authority would not have put Cpl. Ruby on notice that ending the hostage barricade with deadly force would violate the hostage's substantive due process rights.

2. <u>The robust consensus of authority would have told a reasonable officer that accidently shooting a hostage (or bystander) *is not* a violation of the hostage's (or bystander's) substantive due process rights</u>.

Likewise, the Circuit Courts of Appeals have been near unanimous in holding that the accidental shooting of a hostage *is not* a violation of the hostage's substantive due process rights (both pre-*Lewis* and post-*Lewis*). *See e.g.*, *Childress*, 210 F.3d at 1158; *Medeiros*, 150 F.3d at 170; *Schaefer*, 153 F.3d at 797-798; *Landol-Rivera*, 906 F.2d at 797.

Significantly, some of these cases found no substantive due process violation, even where the police officer knew that there was *some risk* that the hostage could be shot. *See e.g.*, *Medeiros*, 150 F.3d at 167, 169-170 (no substantive due process violation even though officer knew that hostages were in van at the time that he shot); *Schaefer*, 153 F.3d at 795, 797-798 (same, even though officers could see both deranged husband and hostage wife at the time of the shooting); *Landol*, 906 F.2d at 797 (no substantive due process violation and explaining that in rapidly evolving circumstance there is *always* some risk of injury to third parties, including innocent bystanders).

Similarly, a review of the federal cases involving the accidental shootings of innocent bystanders who are not hostages (including ironically *Rucker, supra*) have also found no substantive due process violation for the accidental shooting of an innocent bystander. *See e.g.*, *Claybrook*, 199 F.3d at 360–61; *Rucker*, 946

F.2d at 282; *see also Emanuel* 224 F. App'x at 2; *Simpson*, 389 F. App'x at 570.

In short, a reading of "the robust consensus of authority" would show that accidently shooting a hostage or innocent bystander did not violate the substantive due process rights of the hostage or innocent bystander. Kodi's substantive due process rights were far from "clearly established" and qualified immunity bars his § 1983 claim. This Court can deny the petition for writ of certiorari for these reasons as well.

3. The petition's reliance on *Hope v. Pelzer*, 536 U.S. 730 (2002) is misplaced.

Most importantly, the petition misplaces its' reliance on this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), another case directly implicating the Bill of Rights, for the proposition that that Kodi need not showcase precedent involving similar cases in order to defeat Cpl. Ruby's qualified immunity against his substantive due process claim. *See* Pet., at pp. 10-14. *Hope*, *supra*, is a § 1983 case involving prison guards in Alabama handcuffing a disruptive inmate to a hitching post outside in the scorching sun for long periods of time (on one occasion up to seven hours). *Id.* at 733-34. The guards gave the inmate limited bathroom and water breaks. *Id.*

At issue in *Hope*, *supra*, was whether prison guards were entitled to qualified immunity for their conduct. *Id.* at 743-45. This Court used its own Eighth Amendment precedent generally outlawing "cruel and unusual punishment," along with precedent in the Fifth and Eleventh Circuits (questioning the constitutionality of the very practice of handcuffing inmates to fences and prison cells for

long periods of time), as well as the State of Alabama's own regulations and guidance from the Department of Justice, to deny qualified immunity to the prison guards. *Id.* at 743-45. Under these circumstances, this Court found that the law generally gave the prison guards fair warning that their conduct was unconstitutional, even if there was not a case directly on point. *Id.* at 743-45.

In contrast, this Court has not adhered to the same methodology in applying qualified immunity to the context of use of force by law enforcement. It is true that this Court generally does not require a case to be directly on point in order for the law to be "clearly established." *See Wesby*, 583 U.S. at 64. Nevertheless, in the Fourth Amendment use of force context, this Court has also been unequivocal that a body of relevant case law is *usually required* for a right to be "clearly established." *See City of Escondido, Cal. v. Emmons*, 586 U.S. 38, 43-44 (2019).

For these reasons, this Court has long required a high degree of specificity in Fourth Amendment excessive force cases in order to show that the law is "clearly established." *See e.g., Emmons*, 586 U.S. at 42-44; *Kisela v. Hughes*, 584 U.S. 100, 104-105 (2018); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). As this Court has explained: "[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent *squarely governs* the specific facts at issue." *Kisela*, 584 U.S. at 104 (quoting *Mullenix*, 577 U.S. at 13 (internal quotations omitted)(cleaned up)(emphasis added). Thus, "[p]recedent involving similar facts can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby

provide an officer notice that a specific use of force is unlawful." *Kisela*, 584 U.S. at 105 (quoting *Mullenix,* 577 U.S. at 14 (cleaned up)).

These principles must apply with even greater force in the context of applying qualified immunity to any § 1983 Fourteenth Amendment substantive due process claims involving excessive force, as those claims *are not* covered by the Fourth Amendment. *See Lewis*, 523 U.S. at 843-45. Again, it is critical that any substantive due process liberty interest be identified *with particularity* before this Court even recognizes the right. *See Glucksberg*, 521 U.S. at 721 (requiring "careful description" of the asserted fundamental liberty interest. (citations omitted); *Flores*, 507 U.S. at 302 (same).

It follows that the petition's suggestion that any substantive due process violation for excessive force is automatically "obvious" within the meaning of *Hope, supra*, is plainly wrong and at odds this Court's jurisprudence on the substantive due process standard itself. Again, Kodi's so-called substantive due process rights were far from "obvious," given this Court's holding in *Lewis*, *supra*, that that a purportedly reckless police chase which resulted in the death of Mr. Lewis *did not* violate his substantive due process rights, *irrespective* of whether the police chase was reasonable under tort law, or whether the chase violated internal police standards or best practices. *See Lewis*, 523 U.S. at 854-55.

This is *exactly* why there was a split amongst the members of this Court in *Lewis*, *supra*, whether qualified immunity should have barred the substantive due process claim of Mr. Lewis altogether, as the law was far from "clearly

established" that he had any substantive due process rights at all. *See Lewis*, 523 U.S. at 841, n.5, 845-855 (bypassing District Court's analysis applying qualified immunity and instead holding that facts of accidental use of force, as pled, did not meet the substantive due process standard); *id.,* at 858-59 (Breyer J and Stevens J, concurring)(holding that qualified immunity should have applied because the law was not "clearly established"); *id.,* at 860-65 (Scalia J and Thomas, J concurring)(concluding that Lewis failed to show that he had any substantive due process rights under the facts of the case).

Accordingly, although all substantive due process claims, by definition, have a high legal standard, it *does not* follow that all such violations are "obvious" within the qualified immunity rule. Rather, this Court in *Lewis*, *supra*, generally contemplated that a use of force by police can be unreasonable, and yet not a substantive due process violation at all. It is why this Court has *never* expressly held that a party who is the subject of an accidental use of force actually has substantive due process rights. The Maryland Supreme Court followed the correct analytical approach in granting qualified immunity against Kodi's substantive due process claim.

D. KODI DOES NOT HAVE ANY RIGHT TO ASSERT THE FOURTEENTH AMENDMENT RIGHTS OF HIS MOTHER VICARIOUSLY AS HIS OWN, WHEN HE WAS NEVER THE OBJECT OF THE SHOOTING.

Finally, this Court should reject the petition because, in reality, Kodi is attempting the assert the rights of Gaines when he argues that Cpl. Ruby's shooting is outrageous and "shocking to the judicial conscious." Pet. at pp. 10-14. Petitioner is trying to

argue, in essence, that because the use of force on Gaines was inherently unreasonable to the degree to be "shocking to the judicial conscious," the resulting injury to Kodi in the course of the same course of conduct must be a Fourteenth Amendment violation. This argument is neither supported by the factual findings of the Maryland Courts, the initial jury verdict itself, nor the law.

The law is clear that Kodi cannot vicariously assert the rights of his mother as his own. *See Alderman v. United States*, 394 U.S. 165, 174 (1969)("We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (citations omitted); *see also Barrows v. Jackson*, 346 U.S. 249, 255 (1953). This principle applies equally to the so-called liberty interests under the Fourteenth Amendment rights, *i.e.*, Kodi has no standing to assert Gaines' substantive due process rights as his own. *See Tileston v. Ullman*, 318 U.S. 44, 46 (1943)(party generally does not have any standing to assert the Fourteenth Amendment rights of another party).

Further, despite Kodi's contention that the use of force was "shocking to the conscious," a simple review of the verdict sheet in this case shows the very opposite, *i.e.*, the jury did not award punitive damages on any of the constitutional claims (including Gaines' § 1983 Fourth Amendment claim). *See Smith v. Wade*, 461 U.S. 30, 56 (1983)("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the

federally protected rights of others."); *Schaefer v. Miller*, 322 Md. 297, 300 (1991).

This Court has explained the purpose of punitive damages is to punish the defendant for outrageous conduct. *See Smith*, 461 U.S. at 54. Similarly, under Maryland law "[a]ctual or express malice ... has been characterized as the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Schaefer*, 322 Md. at 300.

Here, the jury declined to award punitive damages on *any* of the constitutional claims, including importantly, Korryn's Fourth and Fourteenth Amendment claims. *See Cunningham I*, 246 Md. App. at 660-661 (verdict sheet). Accordingly, the jury's failure to award punitive damages means that they did not find Cpl. Ruby's conduct malicious or outrageous under the circumstances. *See id.* Since the jury found that the evidence proffered at trial was insufficient to meet the punitive damages standard for Kodi's and Gaines' federal and state constitutional claims, the Maryland trial court correctly deemed the same evidence was insufficient to meet the "shocks the conscience" standard as a matter of law (which is, of course, reserved for the Court).[7] *See Cunningham II*, 487 Md. at 309 (Circuit Court concluding on

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[7] *See e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 753 (1999)(Souter, J., concurring in part and dissenting in part)("Substantive due process claims are, of course, routinely reserved without question for the court," (citations omitted); *see also Lewis*, 523 U.S. at 862 (Scalia J and Thomas, J concurring).

remand that evidence at trial did not meet the "shocks the conscious" standard).

CONCLUSION

The Court should deny the petition for writ of certiorari.

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