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IN THE SUPREME COURT OF MARYLAND

September Term, 2023

No. 9

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

Petitioner,

v.

BALTIMORE COUNTY, MARYLAND, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF MARYLAND

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, PUBLIC JUSTICE CENTER, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONER, BY WRITTEN CONSENT

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union of Maryland is the state affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1931, the ACLU of Maryland has participated in many civil rights cases against the Government, both as direct counsel and as *amicus curiae*. The case before this Court is of vital interest to the ACLU of Maryland because it seeks to hold accountable police officers who engage in misconduct against Marylanders. The ACLU of Maryland participated as an *amicus* in an earlier appeal of this case before the Appellate Court of Maryland. *Cunningham v. Balt. Cnty.*, 246 Md. App. 630 (2020) ("*Cunningham I*"). On the present appeal of *Cunningham v. Balt. Cnty.*, No. 378, 2023 WL 2806063 (Md. Ct. Spec. App. Apr. 6, 2023) ("*Cunningham II*"), the ACLU of Maryland has a substantial interest in the qualified-immunity issue raised in the first question presented.

The Public Justice Center ("PJC") is a nonprofit civil rights and anti-poverty legal organization established in 1985. The PJC uses impact litigation, public education, and legislative advocacy to reform the law for its clients and client communities. Its Appellate Advocacy Project expands and improves representation of disadvantaged persons and civil rights issues before the Maryland and federal appellate courts. The PJC has a demonstrated commitment to opposing institutionalized racism and pursuing racial equity in policing and

[1] *Amici* adopt Petitioner's statement of the case, questions presented, statement of facts, and standard of review. *See* Pet. Br. 1–10.

the judicial system. *See, e.g.*, *Belton v. State*, 483 Md. 523 (2023) (*amicus*); *Washington v. State*, 482 Md. 395 (2022) (*amicus*); *Smith v. State*, 481 Md. 368 (2022) (*amicus*); *Sizer v. State*, 456 Md. 350 (2017) (*amicus*).

The Washington Lawyers' Committee for Civil Rights and Urban Affairs is a nonprofit civil rights organization established to eradicate racial discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy in the District of Columbia, Virginia, and Maryland. Since its founding in 1968, the Washington Lawyers' Committee has worked to reform the criminal justice system, including an active docket of police abuse litigation under § 1983.

INTRODUCTION

After Korryn Gaines missed a court date for misdemeanor traffic tickets, armed government officers kicked in the door of her home. Seeing that Ms. Gaines was armed, the officers initiated a standoff. Ms. Gaines and her five-year-old son, Kodi Gaines, remained in the apartment while more than 30 armed officers, police snipers, and armor-clad SWAT units patrolled the apartment complex. At least four armed officers remained stationed directly outside of Ms. Gaines's doorway. The standoff concluded after six hours when one of those officers—Corporal Royce Ruby—shot Ms. Gaines in the back, killing her. He also severely wounded Kodi when the bullet from his high-powered rifle exited Ms. Gaines' body, ricocheted off a refrigerator, and struck the child in his face. Kodi was forced to undergo several surgeries to remove the bullet fragments. He suffered an infection and enormous psychological trauma as a result.

There is no longer any possible dispute in this case that Corporal Ruby was

unjustified when he shot Ms. Gaines in the back while serving a warrant for minor traffic violations. The jury expressly found that "the first shot taken by Corporal Royce Ruby" was not "objectively reasonable." *Cunningham I*, 246 Md. App. at 660. In light of this finding, the Appellate Court of Maryland held in *Cunningham I* that Corporal Ruby was not entitled to qualified immunity for violating Ms. Gaines's Fourth Amendment constitutional rights. *Id.* at 694.

Here, the question is whether Corporal Ruby also violated *Kodi's* constitutional rights. The courts below erred in answering "no." The Appellate Court held that no precedent clearly established that an officer violates the Fourteenth Amendment when he "*unintentionally shoots* and injures an innocent bystander." *Cunningham II*, 2023 WL 2806063, at *19 (emphasis added). But Corporal Ruby did not "unintentionally shoot[]" his gun. Rather, he intentionally shot Ms. Gaines in the back while she was in her kitchen making Kodi a sandwich, and a jury unanimously found that his intentional actions were constitutionally unreasonable. That Corporal Ruby's intentional shot *also* hit a five-year-old child—who he knew was close by Ms. Gaines—does not alter his underlying culpability. Indeed, it was an entirely foreseeable consequence of shooting the gun. The lower court erred by analyzing Corporal Ruby's intentional shooting as an unintentional one.

Moreover, Corporal Ruby's actions did not take place in a vacuum. Put simply: "This has to stop." *Est. of Jones by Jones v. City of Martinsburg*, 961 F.3d 661, 673 (4th Cir. 2020), as amended (June 10, 2020). "Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for

the dignity and worth of black lives." *Id.* (reversing grant of summary judgment for police officers who "sho[t] a man 22 times as he lay motionless on the ground").

This case shows why qualified immunity must not be a rubber stamp for reckless police action. Ms. Gaines's underlying offense was a failure to appear for *minor traffic violations*. Citizens should appear in traffic court. But when a person misses a court date, armed officers of the State should not be given free rein to break into the person's home and open fire, creating the perfect storm for innocent children to be shot in the crossfire. Failing to hold police officers accountable under these circumstances risks adding to a growing list of bystanders who have been killed in Baltimore County at the hands of police.

In recent years, prominent scholars and jurists have conducted rigorous legal and historical analysis revealing the paper-thin foundations upon which qualified immunity rests. Although *amici* understand that this Court is bound by Supreme Court precedent recognizing qualified immunity, it should resist the lower court's call to radically expand the doctrine here. The practical effect of that court's approach would be to effectively preclude relief for bystanders who fall victim to police shootings—even where police officers intentionally and unjustifiably fire upon civilians. That misguided analysis is without support.

This Court should protect Kodi and other innocent Marylanders from police abuse by reversing the lower court's expansive and legally unfounded qualified immunity analysis.

ARGUMENT

I. CORPORAL RUBY IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A police officer is not entitled to qualified immunity where (i) he violates a constitutional right and (ii) that right is "clearly established." *Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015) (quotations omitted). The lower court analyzed only the second inquiry, but when properly considered, both prongs show that Corporal Ruby is not entitled to qualified immunity. *First*, Corporal Ruby violated Kodi's Fourteenth Amendment substantive due process right against being physically injured by agents of the State. *Second*, that right was clearly established when Corporal Ruby violated it.

A. Corporal Ruby Violated Kodi's Right To Substantive Due Process By Harming Him With Conduct Intended To Injure.

The Fourteenth Amendment's guarantee of substantive due process provides a right "against being physically injured by agents of the states."[2] *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991). The right "protect[s] everyone," including "bystander[s]." *Id.* at 281 (quotations omitted). An officer violates this right where his behavior "shocks the conscience." *Dean for & on behalf of Harkness v. McKinney*, 976 F.3d 407, 413–14 (4th Cir. 2020) (quotations omitted). There is a "'culpability spectrum' along which behavior may" satisfy the "'shocks the conscience' standard." *Id.* at 414. On one end, "customary tort liability" is typically not an adequate "mark" of "sufficiently shocking conduct." *Ibid.* (quotations omitted). But at the other end, "conduct intended to injure

[2] The Appellate Court did not apply the Fourth Amendment here because it found that there was no seizure as to Kodi, since he was not the intended target of the shooting. *See Cunningham II*, 2023 WL 2806063, at *13.

that is in some way unjustifiable by any government interest" "would most probably support a substantive due process claim." *Ibid.* (quotations and alterations omitted); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials[.]" (emphasis in original)).

Corporal Ruby's conduct satisfies the highest culpability threshold: intentional harm without justification. The jury in this case found that Corporal Ruby intentionally and unreasonably shot Kodi's mother. *Cunningham I*, 246 Md. App. at 694. In so finding, it resolved a "dispute of fact" in Petitioner's favor, crediting evidence that Ms. Gaines "was not raising her gun" or "pointing the weapon toward the" officers. *Id.* at 692–93. With its finding, the jury necessarily established that Ms. Gaines "pose[d] no immediate threat to the officer and no threat to others." *Id.* at 692 (quotations omitted). Corporal Ruby's intentional shooting inflicted injuries upon Kodi, including an infected wound resulting from "multiple surgeries to have bullet fragments removed." *Id.* at 653–54. Because the jury is "the sole arbiter of factual disputes," *Williams v. State*, 478 Md. 99, 128 (2022), its findings are binding, *see Cunningham I*, at 693–94.

The jury's finding is dispositive of the substantive due process analysis. Indeed, it is well established that police officers violate substantive due process rights where they intentionally inflict physical harm without justification. For example, in *Rochin v. California*, 342 U.S. 165 (1952), the U.S. Supreme Court held that police officers violated an individual's substantive due process rights when they intentionally and forcibly pumped his stomach in search of evidence. *Id.* at 172–74. And in *Gray by Gray v. Kern*, 702 F.

App'x 132 (4th Cir. 2017), the Fourth Circuit reinstated a substantive due process claim where the facts could establish that a police officer fired on a victim without justification and with "inten[t] to harm." *Id.* at 141. At bottom, it is beyond reasonable dispute that armed government agents violate the Fourteenth Amendment when they inflict violence intentionally and without justification.

Other factors here confirm the conscience-shocking nature of Corporal Ruby's actions. Officers were not trying to apprehend a violent criminal or a suspect fleeing in a high-speed chase. Instead, they were serving a warrant for *misdemeanor traffic violations at a person's home*. *See Cunningham I*, 246 Md. App. at 640. Further, Corporal Ruby knew there was a five-year-old child in the kitchen with his mother when he made the decision to shoot Ms. Gaines in the back. *See id.* at 646, 653. And again, Ms. Gaines "pose[d] no immediate threat." *Id.* at 692 (quotations omitted). A witness testified that Corporal Ruby explained that his "justification for the shot" was that he felt "'hot' and 'frustrated.'" *Id.* at 657. The result of Officer Ruby's actions was both tragic and entirely foreseeable: a vulnerable child had to witness the killing of his own mother, and was himself grievously injured. The jury itself plainly found these circumstances conscience-shocking, choosing to award "Kodi a total of $32,873,542.29."[3] *Cunningham II*, 2023 WL 2806063, at *5.

[3] To the extent this Court finds some gap in the jury's excessive-force finding and the shocks-the-conscience standard, the jury's conclusion at the very least establishes intentionality. That finding is sufficient for the Court to hold that the court below erred by analyzing the substantive due process claim under the rubric of an "unintentional[]" shooting. *See Cunningham I*, 2023 WL 2806063, at *19; *see also* Section I.B *infra*.

Finally, it does not matter that Corporal Ruby was aiming for Ms. Gaines when he unjustifiably harmed Kodi. The Ninth Circuit's decision in *Robins v. Meecham*, 60 F.3d 1436 (9th Cir. 1995) is instructive. In that case, a correctional officer intentionally fired birdshot at one prisoner but hit another prisoner. *Id.* at 1438. The officers argued that the second prisoner could not assert an Eighth Amendment claim because the harm to him was unintentional. *Id.* at 1439. The Ninth Circuit unequivocally rejected that argument. Because the Eighth Amendment is designed to "protect the interests and safety of inmates—all inmates" against "governmental overreaching," the relevant inquiry is whether the officers "have a specific intent to harm." *Id.* at 1440. Thus, "[w]hom the prison official[] shot . . . is not relevant—what is relevant is that they fired a shotgun blast at an inmate," *i.e.*, the "conduct that the Eighth Amendment is designed to restrain." *Ibid.*

A similar analysis applies here. Just as the Eighth Amendment protects incarcerated person from government overreaching, so too does the Fourteenth Amendment protect people from "government power arbitrarily and oppressively exercised." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *see Whitley v. Albers*, 475 U.S. 312, 327 (1986) (noting analytical equivalence of "substantive protection" afforded by Eighth Amendment and protections of "Due Process Clause"); *Walker v. Bishop*, 2018 WL 1920585, at *10 & n.12 (D. Md. Apr. 24, 2018) (same); *Robins*, 90 F.3d at 1439 (explaining that "Cruel and Unusual Punishments Clause affords inmates protection which is at least coextensive with that of the Due Process Clause of the Fourteenth Amendment"). Thus, "[w]hom" Corporal Ruby intended to shoot "is not relevant—what is relevant is that [he] fired" at someone without any legal justification. *Robins*, 60 F.3d at 1440.

Maryland's federal court confirmed as much in *Johnson v. Balt. Police Dep't*, 452 F. Supp. 3d 283 (D. Md. 2020). In that case, two plainclothes officers ambushed individuals in a parked car without probable cause. *Id.* at 289. "Fearing for their lives," the driver "sped away, and the officers gave chase." *Ibid.* During this unjustified pursuit, the driver killed a bystander. *Ibid.* The bystander's estate sued, alleging a substantive due process violation. The court found that the bystander plausibly alleged that the officers acted with an "improper or malicious motive" because there was no "probable cause to initiate the high-speed chases." *Id.* at 302. The court then rejected the argument that there could not "be any constitutional violation . . . because [there] is no allegation that any of the Defendants intended to harm the Plaintiffs." *Ibid.* (quotations omitted). Rather, the court explained, "[a]n officer's actions motivated by an intent to harm a suspect are no less conscience shocking, whether the resulting harm accrues to the intended target (the suspect), or an innocent third party." *Id.* at 303 (collecting cases).

Robins and *Johnson* are plainly correct. Any other theory of substantive due process would hardly make sense. How could it possibly be the law that an officer who intentionally, and unlawfully, shoots person A is not also liable for the injuries to person B caused by the same bullet that passed through person A? But that scenario encompasses the precise facts of this case. It would strain credulity to find that Corporal Ruby's actions did not shock the conscience when he injured Kodi—an innocent child—by intentionally and without justification shooting Kodi's mother in the back. Thus, as *Robins* and *Johnson* teach, it is Corporal Ruby's conduct that matters, and Corporal Ruby's conduct plainly violates the Fourteenth Amendment.

B. Kodi Had A Clearly Established Right Not To Be Physically Injured By Intentional, Unjustified Acts Of Government Agents.

The Fourteenth Amendment will not "afford brutality the cloak of law." *Rochin*, 342 U.S. at 173. Thus, it has long been clearly established that officers acting with "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test." *Lewis*, 523 U.S. at 834. Where, as here, an officer's conduct is "obviously unlawful," a clearly established right does not require a "detailed explanation." *McKinney*, 976 F.3d at 417–18.

It was and is clearly established that an officer violates a victim's Fourteenth Amendment substantive due process rights where he "intentionally" and without justification shoots the victim with his "service weapon." *Kern*, 702 F. App'x at 140–41. Indeed, the Supreme Court squarely held as far back as 1985 that it is "constitutionally unreasonable" for an officer to use "deadly force" against someone who "poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). That is exactly what happened here. The jury, in rendering its verdict, necessarily accepted that Corporal Ruby killed Ms. Gaines absent any "threat of death or serious bodily injury to the officers," rendering his actions "inconsistent with the use of deadly force." *Cunningham I*, 246 Md. App. at 657 (quotations omitted). Thus, Corporal Ruby violated Kodi's clearly established right to not be physically injured by intentional, unjustified acts of state agents.

Further, this right was clearly established notwithstanding the fact that Corporal Ruby's shot hit Kodi after first going through his mother. In *Robins*, the correctional

officers who shot a bystander with birdshot argued that "they should still be entitled to qualified immunity because the doctrine of transferred intent has never been applied to the Eighth Amendment." *Robins*, 90 F.3d at 1441–42. But, the Ninth Circuit explained, there was no need to "rely on the doctrine of transferred intent" because it is the "*conduct* that the Eighth Amendment is designed to restrain." *Id.* at 1440, 1442 (emphasis added). Because the conduct was clearly proscribed by the Constitution, the "situation present[ed] no new principles of which the officers could not have reasonably been aware regarding the constraints" of the Constitution. *Id.* at 1442.

Here, as in that case, Corporal Ruby violated Kodi's clearly established right to be free from intentional, unjustified harm by state agents. The Appellate Court of Maryland erred because it misapprehended Corporal Ruby's culpability. That court assessed whether there was "clearly established law" holding that a police officer violates a victim's substantive due process rights when he "*unintentionally* shoots and injures an innocent bystander." *Cunningham II*, 2023 WL 2806063, at *19 (emphasis added). But Corporal Ruby did not "unintentionally shoot[]" his gun. Rather, the jury established that he intentionally shot Ms. Gaines in the back. That his intentional shooting *also* harmed Kodi does not render the shooting unintentional. *See Robins*, 60 F.3d at 1439–42; *Johnson*, 452 F. Supp. at 302–03. Had the court looked to the proper body of caselaw, it would have held that there was clearly established law that a police officer may not intentionally—and without justification—use violence to injure an individual consistent with the Fourteenth Amendment's guarantee of substantive due process.

II. POLICE OFFICERS SHOULD BE HELD ACCOUNTABLE AND HARMS REDRESSED WHEN THEY VIOLATE MARYLANDERS' CONSTITUTIONAL RIGHTS.

A. The Court Should Not Allow Qualified Immunity To Perpetuate Harm Against Marylanders Like Kodi.

Qualified immunity plays a significant role in tragic police shootings. Scholars have long recognized that "the qualified immunity regime erects a significant doctrinal hurdle to holding police officers accountable for acts of violence." Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1522 (2016). Indeed, although "[t]he doctrine is called 'qualified immunity," in "real life it operates like absolute immunity." *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391 (S.D. Miss. 2020). By "sanctioning a 'shoot first, think later' approach to policing," *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting), courts have allowed "officers to evade accountability for excessive abuses, including killing people," Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. Pa. L. Rev. 407, 412 (2022). This evasion of accountability undoubtedly influences police behavior.

Other Marylanders in Baltimore County have borne the burden of this judicial choice, not just Kodi. In 2020, for example, County police officers shot bystander Freddie Jackson when firing at his older brother fleeing from the encounter. Willborn P. Nobles III, *'It was senseless': Relatives question Essex police shooting as Baltimore County police identify officer*, BALT. SUN (May 22, 2020, 6:17 pm), https://www.baltimoresun.com/news/crime/bs-md-co-cr-essex-police-shooting-20200522-ukvjqbo6srarhlwrne7fcqrl4q-story.html. In 2017, a shootout resulted in a 21-

year-old bystander suffering two gunshot wounds after four Baltimore County officers opened fire on a robbery suspect. Michael Brice-Saddler, *Gunman killed in Dundalk shootout was determined not to go back to jail, police say*, BALT. SUN (June 15, 2017), https://www.baltimoresun.com/news/crime/bs-md-co-dundalk-shooter-motive-20170615-story.html. In 2015, an off-duty Baltimore County officer shot a bystander when he killed Rashad Bugg-Bey at Union Station in D.C. Clarence Williams & Martin Weil, *Knife allegedly was pointed at off-duty officer before D.C. shooting*, WASH. POST (Nov. 16, 2015, 7:45 pm), https://www.washingtonpost.com/local/public-safety/knife-allegedly-was-pointed-at-off-duty-officer-before-dc-shooting/2015/11/16/6dc53f0c-8cb8-11e5-ae1f-af46b7df8483_story.html.

Maryland bystander injuries from police shootings are not unique to the Baltimore County police. In 2019, Baltimore City police officers shot bystander Ray Maier after firing 161 rounds at an unrelated suspect in a crowded intersection. See Complaint, *Maier v. Sinchak*, No. 24-C-22-003716 (MD Cir. Ct. filed Mar. 25, 2022). And in 2015, National Security Agency police officers shot Brittany Fleming—the passenger in a stolen vehicle—when the driver took a wrong turn. Peter Hermann, *Baltimore's transgender community mourns one of their own, slain by police*, WASH. POST (Apr. 3, 2015, 10:00 pm), https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d_story.html. Further, in 2020, a gas station clerk in Frederick County suffered injuries from shattered glass after Frederick County deputies shot Bryan Selmer

in front of a gas station.[4] *See Man Fatally Shot By Police In Emmitsburg Following 2-State Pursuit Identified As Bryan Selmer*, CBS NEWS BALT. (Oct. 20, 2020, 5:00 p.m.), https://www.cbsnews.com/baltimore/news/emmitsburg-police-shooting-chase-man-killed-identified-as-bryan-selmer-latest/.

Every one of these victims matters. Police should not be allowed to evade liability when they engage in misconduct merely because that misconduct happens to harm an innocent third party. That is particularly true in this case, where the victim was a five-year-old child.

B. The Court Should Not Expand Qualified Immunity.

Amici appreciate that this Court is bound by Supreme Court precedent recognizing qualified immunity. But this Court should not condone the lower court's decision to *expand* qualified immunity so as to shield police officers from liability when they harm bystanders through acts that a jury has determined to be intentional and unlawful. Qualified immunity is not available under such circumstances—particularly here, where an armed

[4] Bystanders are not the only ones injured by Baltimore County Police Officers' shootings. On multiple occasions, Baltimore County Police Officers have shot each other. For example, in 2019, an officer was hit by friendly fire when Baltimore County police shot and killed Robert Uhl Johnson, who was holding an unloaded gun. Brandon Weigel, *Police: Parkville man killed in shooting had empty gun; cop likely shot by another officer*, BALT. FISHBOWL (May 3, 2019), https://baltimorefishbowl.com/stories/police-parkville-man-killed-in-shooting-had-empty-gun-cop-shot-by-another-officer/. In another similar situation, a Baltimore County officer nearly died from friendly fire, after a regional taskforce of Baltimore County police, Baltimore City police, and U.S Marshals shot Michael Marullo seventeen times. Tim Prudente, *Prosecutors rule fatal 2020 police shooting in Northeast Baltimore justified*, BALT. SUN (Mar. 12, 2021, 5:13 p.m.), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-police-officers-cleared-20210312-qrpbbz4k3zbmhmm3me3cd5oxju-story.html.

County officer intentionally shot a victim who posed no immediate threat, resulting in severe injuries to an innocent five-year-old child. *See supra* section I. But that is just the tip of the iceberg.

The entire doctrine of qualified immunity rests on shaky foundations. While qualified immunity has been recognized as a defense to Section 1983 actions, the statute makes no mention of immunity of any kind. *See* 42 U.S.C. § 1983. Where, as here, "the plain and unambiguous language of the statute" is clear, that would normally end the inquiry. *See Lockshin v. Semsker*, 412 Md. 257, 274–79 (2010); *accord Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Statement of Thomas, J.) ("our § 1983 qualified immunity doctrine appears to stray from the statutory text").

But the "the context of the statutory scheme" and its "purpose," *Elsberry v. Stanley Martin Companies, LLC*, 482 Md. 159, 180 (2022), likewise counsel against inferring an atextual immunity defense. Originally enacted in the Reconstruction Era, section 1983 was designed to create "a legal mechanism that Black Americans could use to hold state actors accountable for racialized violence and vindicate constitutional rights," which would, in turn, "create financial disincentives that would discourage local and state officials from using their authority to terrorize Black communities." Obasogie, *Plainly Incompetent*, 170 U. Pa. L. Rev. at 419. This broad remedial scope counsels *against*—not in favor of—a doctrine that shields police from liability when they harm Black Americans through intentional acts of violence. Indeed, this Court has rejected calls to create such untethered immunity under Maryland's State Constitution. *Cf. Clea v. Mayor & City Council of Balt.*, 541 A.2d 1303, 1311-14 (Md. 1988) (rejecting common law qualified immunity as a

defense to state constitutional claims as inconsistent with the text and purpose of the Declaration of Rights); *see also Lee v. Cline*, 863 A.2d 297, 305-06 (Md. 2004) (discussing history of rejecting common law qualified immunity for state constitutional claims).

And indeed, it is only in relatively recent times that the doctrine "shifted from its origins" and "morphed into a" mechanism "to protect police." Obasogie, *Plainly Incompetent*, 170 U. Pa. L. Rev. at 450; *accord Baxter*, 140 S. Ct. at 1863 ("For the first century of the law's existence, the Court did not recognize an immunity under § 1983 for good-faith official conduct."). Against this backdrop, it is unsurprising that qualified immunity has "been criticized for being atextual, ahistorical, and driven by policy considerations." *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 684 (4th Cir. 2023).

Indeed, rigorous textual and historical analysis has revealed that qualified immunity rests on deeply flawed premises. For example, as Judge Don R. Willett recently explained, the "Notwithstanding Clause" of Section 1 of the Civil Rights Act of 1871 is powerful evidence that Congress did not want to incorporate common-law immunities. *See Rogers v. Jarrett*, 63 F.4th 971, 979–81 (5th Cir. 2023) (Willett, J., concurring); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 207, 235–37 (2023). And even if Congress did intend to incorporate such background principles, Professor William Baude has offered compelling evidence that modern-qualified immunity doctrine is far afield from any common-law defense. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 49–60 (2018).

To be sure, *amici* understand that this Court must apply the qualified-immunity analysis prescribed by the United States Supreme Court. But this Court need not—and

should not—expand this deeply flawed doctrine to strip Marylanders of their right to redress for egregious violations of their fundamental rights. Accordingly, it should reverse the lower court's erroneous ruling that would act to strip innocent victims like Kodi of the remedy to which they are plainly entitled.

CONCLUSION

This Court should reverse the lower court's finding that Petitioner's Fourteenth Amendment claim was barred by qualified immunity.

October 20, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 5,232 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112, including margin, font, spacing, and type size requirements.

/s/ Richard A. Simpson
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 20-201(g), on October 20, 2023, the foregoing Brief of *Amicus Curiae* in Support of Petitioner was served via the MDEC File and Serve Module, and that, pursuant to Rule 8-502(c), two copies of each will be timely mailed, postage prepaid, first-class, to:

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