No. _____

In The Supreme Court of the United States

CITY OF ANAHEIM, SERGEANT DANIEL GONZALEZ, OFFICER WOOJIN JUN, and OFFICER DANIEL WOLFE,

Petitioners,

vs.

FERMIN VINCENT VALENZUELA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

ROBERT FABELA, City Attorney
MOSES W. JOHNSON, IV,
Assistant City Attorney
CITY OF ANAHEIM
200 South Anaheim Boulevard,
Suite 356
Anaheim, California 92805
Telephone: (714) 765-5169
Facsimile: (714) 765-5123
E-mail: mjohnson@anaheim.net

STEVEN J. ROTHANS
JILL WILLIAMS
CARPENTER, ROTHANS &
DUMONT LLP
500 South Grand Avenue,
19th Floor
Los Angeles, California
90071
Telephone: (213) 228-0400
Facsimile: (213) 228-0401
E-mail:
srothans@crdlaw.com
jwilliams@crdlaw.com

Counsel for Petitioners City of Anaheim, Sergeant Daniel Gonzalez, Officer Woojin Jun, and Officer Daniel Wolfe

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Robertson v. Wegmann*, 436 U.S. 584, 589-90 (1978), the Court held that Congress had not addressed survival of claims under 42 U.S.C. § 1983, and hence under 42 U.S.C. § 1988, the survivorship law of the forum state must be applied to such claims unless inconsistent with the purposes of § 1983. California, like 44 other states, does not allow recovery of hedonic damages, i.e., damages for the decedent's loss of enjoyment of future life. In affirming a $13.2 million damage award to respondents in their § 1983 and state wrongful death action, the Ninth Circuit declined to apply California law with respect to the award of $3.6 million in hedonic damages. Eleven Circuit Judges expressed the view that en banc review was warranted, because the panel decision was inconsistent with *Robertson*, and the purposes of § 1983 were not served by permitting recovery of highly abstract, speculative damages for a loss not actually experienced by the decedent.

The question presented by this petition is:

> Under *Robertson v. Wegmann*, 436 U.S. 584 (1978) must a federal court apply a state law prohibition on hedonic damages to a 42 U.S.C. § 1983 survival claim as the Sixth Circuit held in *Frontier Ins. Co. v. Blatty*, 454 F.3d 590, 601-03 (6th Cir. 2006), or is a limitation on such damages inconsistent with the purposes of § 1983, as held by the Ninth Circuit here and the Seventh Circuit in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- City of Anaheim, Sergeant Daniel Gonzalez, Officer Woojin Jun, and Officer Daniel Wolfe, defendants in the district court and appellants in the Ninth Circuit and petitioners here; and
- Fermin Vincent Valenzuela; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased, plaintiffs and appellees below and respondents here.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- *Fermin Vincent Valenzuela; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased v.*

RELATED PROCEEDINGS—Continued

City of Anaheim, Sergeant Daniel Gonzalez, Officer Woojin Jun, and Officer Daniel Wolfe, United States Court of Appeals for the Ninth Circuit, Case No. 20-55372.

- *Fermin Vincent Valenzuela; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased v. City of Anaheim, Sergeant Daniel Gonzalez, Officer Woojin Jun, and Officer Daniel Wolfe*, United States District Court, Central District of California, Case Nos. SACV 17-00278-CJC (DFMx) and SACV 17-02094-CJC (DFMx).

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The district court's judgment in favor of respondents and order denying petitioners' post-trial motions are not published and are reproduced in the appendix to this petition ("Pet. App.") at pages 23-85. The Ninth Circuit's August 3, 2021 opinion is published, *Valenzuela v. City of Anaheim*, 6 F.4th 1098 (9th Cir. 2021), and is reproduced in the appendix at pages 1-22. The Ninth Circuit's March 30, 2022 Order denying panel and en banc rehearing and Statement respecting the denial of rehearing en banc and Dissent from denial of rehearing en banc is published at 29 F.4th 1093 (9th Cir. 2022) and is reproduced in the appendix at pages 86-122.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's August 3, 2021 decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed within 90 days of entry of the March 30, 2022 Order denying panel and en banc rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioners contend that the Ninth Circuit's refusal to apply California's limitation on hedonic, i.e., loss of enjoyment of future life damages in wrongful death cases, violated 42 U.S.C. § 1988(a) which provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases

> where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

A. Background Of The Action.

On July 2, 2016, police officers employed by petitioner City of Anaheim, petitioners Woojin Jun and Daniel Wolfe, received a 911 dispatch about a "suspicious person" near a laundromat in Anaheim who had followed a woman to her home. (Pet. App. 3-4, 20-21.) The dispatcher described Fermin Valenzuela's appearance and noted that it was unknown whether Valenzuela was on drugs or required psychiatric assistance. (*Id*. at 3-4.)

Arriving at the scene, the officers spotted Valenzuela and followed him into the laundromat, where they observed him moving clothing from a bag into a washing machine. (*Id*. at 4.) As they approached, Wolfe said he heard the sound of breaking glass and saw

what he recognized as a methamphetamine pipe. (*Id.*) Wolfe then asked Valenzuela whether he was "alright" and if he had just "br[oke] a pipe or something." (*Id.*) Valenzuela replied that he was "good" and "just trying to wash" his clothes. (*Id.*)

Because Wolfe saw a screwdriver in the bag, he ordered Valenzuela to stop and put his hands behind his back. (*Id.*) Valenzuela stepped away from the bag but did not immediately comply. (*Id.*) Wolfe then grabbed Valenzuela's right arm and tried to pull it behind his back, and almost immediately after, Jun placed Valenzuela in a carotid restraint control hold as Wolfe tried to maintain control of Valenzuela's hands. (*Id.*)

A struggle ensued, during the course of which, the officers told Valenzuela to stop resisting 41 times, Jun tried several times to apply the carotid restraint, and the officers tased Valenzuela several times, culminating in Valenzuela breaking free and fleeing the laundromat. (*Id.* at 4-5, 21.) Valenzuela ran across a roadway, tripped and fell, at which point Wolfe again attempted to apply a carotid restraint, which he was instructed to hold by petitioner Daniel Gonzalez, a Sergeant who had just arrived on scene. (*Id.* at 5.)

As he was being restrained, Valenzuela lost consciousness, he could not be revived at the scene and died in the hospital eight days later. (*Id.*) The Orange County medical examiner ruled the cause of death to be "complication[s] of asphyxia during the struggle with the law enforcement officer" while Valenzuela was

"under the influence of methamphetamine." (*Id.* at 5-6.)

B. The Lawsuit.

Respondents, Valenzuela's father and children, filed suit against petitioners under 42 U.S.C. § 1983 and California law for excessive force, wrongful death, and similar theories of liability. (Pet. App. 6.) After a five-day trial, the jury returned a verdict awarding survival damages of $3,600,000 for Valenzuela's loss of enjoyment of future life and $6,000,000 for his pre-death pain and suffering. (*Id*. at 82-83.) The jury also awarded $1,800,000 each to V.V. and X.V. for wrongful death damages for their past and future loss of their father's love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance. (*Id.* at 83.)

In their post-trial motions, the petitioners argued, among other grounds, that because California state law did not allow loss of enjoyment of life damages in wrongful death cases, such damages were not available under § 1983. (*Id*. at 57-58.) The district court disagreed, and after reviewing in- and out-of-circuit case law, including *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), the court found that § 1983 permitted the recovery of hedonic loss of life damages and that California state law to the contrary was inconsistent with the federal statute's goals. (*Id*. at 58-62.) The district court concluded that to hold otherwise "would undermine the vital constitutional right

against excessive force—perversely, it would incentivize officers to aim to kill a suspect, rather than just harm him." (*Id*. at 58.)

C. The Appeal.

Petitioners appealed, and after briefing and argument, on August 3, 2021, the panel issued a published opinion upholding the hedonic damages award, while issuing an unpublished memorandum separately affirming other aspects of the lower court decision. (Pet. App. 1, 3 n.1)[1] Writing for the majority, Judge Owens concluded the reasoning of the Circuit's prior decision in *Chaudhry*, which had struck down California's limitation on pre-death pain and suffering damages as applied to § 1983 claims, compelled rejection of any limitation on hedonic damages. (*Id*. at 8-10.) The court reasoned that in some circumstances the wrongful death victim might not have any surviving relatives, and hence without exposure to hedonic damages, it

[1] Petitioners are not contesting issues addressed in the Memorandum, including the award of damages for pre-death pain and suffering. Effective January 1, 2022, California now allows recovery of such damages, with the impact of such awards to be assessed for possible future legislative action in four years. *See* Cal. Civ. Proc. Code § 377.34(b) ("Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.").

would be more advantageous for officers to kill rather than injure a suspect. (*Id*.)

Judge Lee dissented, noting that under this Court's decision in *Robertson v. Wegmann*, 436 U.S. 584 (1978), federal courts were required to apply state law to § 1983 claims under § 1988, so long as state law affords meaningful recovery in most cases, even if, under some circumstances a particular claim might be barred. (*Id*. at 16-17.) Judge Lee further noted that particularly in light *Chaudhry*'s imposition of pre-death pain and suffering damages, California wrongful death recovery scheme could hardly be said to be lacking deterrent effect, even putting aside the additional deterrent effect of a fee award under § 1988. (*Id*. at 15-16.)

Judge Lee also called for the Circuit to reconsider *Chaudhry* en banc, noting that it too, failed to apply *Robertson*'s holding that so long as the state law afforded meaningful recovery in most cases, it was not inconsistent with the purposes of § 1983 and must be applied under § 1988. (*Id*. at 18-19.) He also noted that logic and data contradicted *Chaudhry*'s "dubious" premise that an officer's heat of the moment decision to use force was somehow informed by whether it might be more economically advantageous to kill as opposed to injure a suspect. (*Id*. at 19-21.)

Petitioners timely petitioned for panel and en banc rehearing, and after requesting a response from respondents, on March 3, 2022, the court issued a published Order denying the petition, along with a

Statement respecting denial of rehearing en banc joined in full or in part by 11 Judges, as well as a separate Dissent from denial of rehearing en banc authored by Judge Collins. (*Id*. at 86-122.) Writing in the Statement for the dissenting members of the Circuit (including Judge Collins, who concurred in this portion of the Statement), Judge Bea noted that California was not alone in prohibiting post-death hedonic damages, with only five states allowing such damages, and even then only through legislative enactment, not judicially created common law. (*Id*. at 93.)[2] He observed that especially post-*Chaudhry*, between direct recovery by a decedent's estate and successors, and awards to family members via a wrongful death action, California law made "available nearly every conceivable form of just damages" in § 1983 actions. (*Id*. at 92.)

Judge Bea echoed the panel dissent in noting that the panel majority's interpretation of *Robertson* as purporting to require some substantial recovery in every conceivable set of circumstances, ignored this Court's express direction in *Robertson* that state law must be applied under § 1988 unless it leads to insufficient relief in most cases—which could not be said of

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[2] The five states are Arkansas (*Durham v. Marberry*, 356 Ark. 481 (Ark. 2004)), Connecticut (*Kiniry v. Danbury Hosp.*, 183 Conn. 448 (Conn. 1981)), Hawaii (*Ozaki v. Ass'n of Apartment Owners of Discovery Bay*, 954 P.2d 652 (Haw. Ct. App. 1998)), New Hampshire (*Marcotte v. Timberlane/Hampstead Sch. Dist.*, 143 N.H. 331 (N.H. 1999)), and New Mexico (*Romero v. Byers*, 117 N.M. 422 (N.M. 1994)).

awards under California law. (*Id*. at 94-98, 104-105.)[3] The Statement of dissent also observed, as did the panel dissent, that this Court had rejected the notion that assuring some damages in every wrongful death action was necessary to deter officers from killing instead of wounding suspects. (*Id*. at 96-97.)

Finally, in a portion of the Statement of dissent joined by 10 judges, Judge Bea noted that post-death hedonic damages were inconsistent with the compensatory purposes of § 1983, in that the decedent does not actually experience the loss, and ultimately any award is paid to heirs—who have already received compensation via an ordinary wrongful death claim. (*Id*. at 110-12.) The result is purely speculative awards, as a jury has no rational means to assess hedonic damages. (*Id*. at 112-18.) As Judge Bea concluded:

> Post-death "hedonic" damages awards are speculative, contravene traditional common law damages principles, contradict California state law, and where, as here, the awards would have been $9.6 million and $1.6 million respectively in *Valenzuela* and *Craig* without post-death "hedonic" damages, are

[3] As Judge Bea noted, in *Craig v. Petropulos*, 856 F.App'x 649 (9th Cir. 2021) (unpublished), which was decided at the same time and by the same panel as *Valenzuela*, the jury awarded $200,000 in pre-death pain and suffering, $1.4 million for wrongful death, and $1.8 million for post-death loss of enjoyment of life. (Pet. App. 103.)

> not necessary to satisfy the policy goals of § 1983 under Supreme Court precedent.

(*Id*. at 121.)

WHY CERTIORARI IS WARRANTED

REVIEW IS NECESSARY TO COMPEL COMPLIANCE WITH § 1988 AS INTERPRETED IN *ROBERTSON V. WEGMANN* AND TO RESOLVE A CIRCUIT SPLIT CONCERNING APPLICATION OF STATE LAWS FORECLOSING RECOVERY OF HEDONIC DAMAGES IN WRONGFUL DEATH CASES UNDER § 1983.

A. Under *Robertson v. Wegmann*, A State Survival Statute Is Only Inconsistent With The Purposes Of § 1983 Where It Fails To Allow Relief In Most Cases.

Although Congress created a specific wrongful death remedy for failure to prevent conspiracies under 42 U.S.C. § 1985,[4] Congress has not addressed the availability of survival or wrongful death claims under § 1983. However, in 42 U.S.C. § 1988(a) Congress set out a method to address such claims. If "the laws of the

[4] 42 U.S.C. § 1986 provides in pertinent part: "[I]f the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

United States" are not "adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," courts are to look to "the common law, as modified and changed by the constitution and statutes" of the forum state. *Id*. Courts are to apply this state law "so far as the same is not inconsistent with the Constitution and laws of the United States." *Id*.

Section 1988's direction to apply state law is "more than a mere technical obstacle to be circumvented if possible." *Burnett v. Grattan*, 468 U.S. 42, 60 (1984) (Rehnquist, J., concurring) (internal quotation marks omitted). Section 1988 reflects a congressional determination that state law, not federal common law, provides the most appropriate source of law for filling out § 1983's remedial scheme.

In *Robertson v. Wegmann*, 436 U.S. 584, the Court expressly held that the survival of a federal civil rights claim after the death of the injured party was necessarily determined by reference to state law under § 1988. The plaintiff in a federal civil rights action for malicious prosecution died shortly before trial, and the executor of his estate then sought to prosecute the action. *Id*. at 586-87. Under Louisiana law, survival actions for such a claim could only be brought by specified relatives, not simply by the personal representative of the estate. The district court declined to apply the state survival limitation under § 1988 as inconsistent with the remedial purposes of § 1983, and the Fifth Circuit affirmed. *Id*. at 587-88.

This Court reversed. Writing for the Court, Justice Marshall observed that "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" *Id*. at 589. As a result, "[u]nder § 1988, this state statutory law, modifying the common law, provides the principal reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is 'inconsistent with the Constitution and laws of the United States.'" *Id*. at 589-90.

In holding that the state survival statute was not inconsistent with the purposes of § 1983, Justice Marshall noted that Louisiana generally allowed survival claims for most causes of action. *Id*. at 591 ("No claim is made here that Louisiana's survivorship laws are in general inconsistent with these policies, and indeed most Louisiana actions survive the plaintiff's death."). The Court also observed that even as to claims, such as this one, where only a spouse, children, parents, or siblings could prosecute an action, the reality was that "surely few persons are not survived by one of these close relatives. . . ." *Id*. at 591-92. The fact that this particular claim might not survive, was irrelevant to determining whether the Louisiana survival scheme as a whole was inconsistent with the purposes of § 1983:

> That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot

> be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. Under the circumstances presented here, the fact that Shaw was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988.

Id. at 593.

Finally, the Court dismissed as "farfetched," the proposition that a state official "had both the desire and the ability deliberately to select as victims" those individuals who might not have relatives who would be able to bring a survivorship action. *Id*. at 592 n.10.

B. The Ninth Circuit's Creation Of A Federal Common Law Claim For Hedonic Damages Cannot Be Reconciled With § 1988 As Interpreted In *Robertson*.

The Ninth Circuit panel decision contains no discussion of *Robertson*, other than citing the decision for

the well-accepted proposition that the twin goals of § 1983 are compensation to injured parties and deterrence of future misconduct. (Pet. App. 8.) Instead, the panel majority relies almost exclusively on the court's decision in *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), which had struck down California's now repealed limitation on recovery of pre-death pain and suffering damages as inconsistent with the purposes of § 1983. (Pet. App. 8-10.)

As the panel majority emphasized, the central premise of *Chaudhry* was that because there might be *some* cases where a decedent had little in the way of assets, or no family and hence little in the way of economic loss, defendants would have an incentive to kill, as opposed to merely injure a potential victim. (Pet. App. 9 (citing *Chaudhry*, 751 F.3d at 1105).) Thus, the court held that hedonic damages must also be available in § 1983 wrongful death cases in order to avoid similar problems, and to effectuate "§ 1983's goals and remedial purpose." (Pet. App. 11.)

As the 11 Circuit Judges dissenting from the denial of rehearing en banc noted, the panel majority's analysis does not withstand scrutiny. As a threshold matter, the panel majority's focus on hypothetical cases where there might not be a basis for substantial economic recovery, is contrary to *Robertson*'s clear holding that the question is whether state law affords a remedy in *most* cases, even if it may altogether foreclose relief *in a particular case.* 436 U.S. at 590-91. And, while *Robertson* left open the issue whether a state abatement law might conflict with § 1983 if the

challenged governmental conduct directly caused the plaintiff's death (*id*. at 594), the question here is not one of abatement, it merely involves limitations on one item of damages after allowing pre-death economic damages, wrongful death damages, damages for loss of consortium, and per *Chaudhry* (and the now amended statute) pre-death pain and suffering damages. As both the panel and en banc dissents observed, the fact is that, as a general matter, California affords a broad range of recovery in survival and wrongful death actions, as evidenced by the $9.6 million in other damages awarded to respondents. (Pet. App. 12, 101-05.)

Moreover, the entire focus on the amount of potential awards as being relevant, much less determinative in applying § 1988, is refuted by this Court's recognition that compensatory damages will not always be available for violations of § 1983. *See*, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) ("punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"); *Carey v. Piphus*, 435 U.S. 247, 266-67 & n.24 (1978) ("deprivation of [constitutional] rights [is] actionable [under § 1983] for nominal damages without proof of actual injury"). The Court has never suggested, however, that this result is intolerable in light of the general compensation aim of § 1983.

In addition, as discussed above, *Robertson* expressly rejected the "farfetched" notion that state actors would contemplate potential liability based upon the possible pool of relatives who might maintain a

claim. 436 U.S. at 592 n.10. As Judge Bea observed in the dissent from denial of en banc review:

> *Robertson* is not alone among Supreme Court precedents in its rejection of the majority's claim that police officers respond to their economic incentives when deciding to use deadly force. As the Court wrote in *Whitley v. Albers*, 475 U.S. 312, 320 (1986), police officers making decisions "in haste, under pressure, and frequently without the luxury of a second chance" do not stop and evaluate whether the victim in a fast-developing confrontation has family before using deadly force. In the words of Justice Holmes, "[d]etached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921).

(Pet. App. 106-07.)

The entire notion that any state law limitation on recovery for wrongful death claims will encourage officers to "deliberately kill suspects" is, as Judge Lee noted in his panel dissent, "not rooted in reality." (Pet. App. 19-20.) He similarly observed that data demonstrated that "[m]ost fatalities involving law enforcement occur during chaotic, messy, and dangerous situations in which officers must make split-second decisions to protect others' lives or their own." (*Id*. at 20.) As Judge Lee further observed:

> All these deaths are tragic, and many were unwarranted in hindsight. But no evidence even remotely suggests that these police

> officers acted out of some macabre desire to seek an "economically advantageous" outcome.

(*Id.*)

There is simply no support for the Ninth Circuit's determination that California's prohibition of post-death hedonic damages is inconsistent with § 1983's goals of deterrence and compensation, given California's otherwise broad remedial scheme in its survivorship and wrongful death statutes, as evidenced by respondents' robust recovery for damages here and the similarly substantial recovery in the companion case, *Craig v. Petropulos*, 856 F. App'x 649.

In addition, as Judge Bea noted in the en banc dissent, an award of hedonic damages does not further the purposes of § 1983. This is because the goal of § 1983 is to compensate the injured party for losses experienced by the injured party, but a person who dies as a result of the underlying incident does not actually experience the loss of future life. (Pet. App. 110-11.) Moreover, such awards are ultimately not paid for the benefit of decedent, but to any heirs. (*Id.*) As the Court emphasized in *Robertson*: "The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." *Robertson*, 436 U.S. at 592.

As Judge Bea further noted in the en banc dissent, the widespread rejection of hedonic damages in wrongful death actions is understandable given the abstract

nature of such damages and the inability to tether any award to some rational standard. (Pet. App. 112-18.) Such damages are ultimately purely speculative and prompt exhortations of the sort employed by respondents' counsel in the closing argument here, to award damages based on "the value of a B-1 bomber, a Picasso painting, or LeBron James' Lakers contract." (1ER 24.)[5] The result is inflated awards that bear no relationship to compensating any concrete injury, are effectively punitive in nature, and circumvent the Court's decisions in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) foreclosing punitive damages against municipalities, and *Smith v. Wade*, 461 U.S. 30 (1983) requiring a finding of malice or reckless disregard as a prerequisite for imposing punitive damages against an individual—a showing respondents did not even attempt to make here.

The Ninth Circuit has created a federal common law claim for hedonic damages, though under the plain terms of § 1988, it lacks any authority to do so. This Court has made it clear that federal common lawmaking authority is extremely limited: "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and

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[5] Respondents' counsel argued: "Now, how do we value things in society? Things like a B-1 bomber, almost a billion dollars. You know, you look at a painting by Picasso, beautiful painting, $155 million. This is our life. This is how we value things. Life is far more important." (1 ER 24.)

international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 641 (1981); *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997). "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-13 (1981).

The determination of "whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton*, 519 U.S. at 218 (internal quotation marks omitted). Section 1988 does not contemplate federal common lawmaking. In *Runyon v. McCrary*, 427 U.S. 160, 184-85 (1976), this Court rejected the argument that § 1988 "commission[s] . . . courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the substantive provisions of Sec. 1981 and other civil rights statutes." Indeed, in *Robertson*, the Court emphasized that "rules in areas where the courts are free to develop federal common law," such as in admiralty, "have no bearing" with respect to § 1988. *Robertson*, 436 U.S. at 593 n.11. As a result, any dissatisfaction

with the remedies available to § 1983 plaintiffs must be addressed to Congress, not the courts.[6]

Merely invoking § 1983's broad purposes as justification for maximizing recovery in such cases is insufficient to oust the state law rules that Congress has required courts to apply under § 1988. As this Court noted in *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995), general statutory purposes may not be invoked to "add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *See also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates

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[6] Nor would hedonic damages even be within the contemplation of Congress at the time the substantive aspects of § 1988 were enacted in 1866. *Moor v. County of Alameda*, 411 U.S. 693, 705 n.18 (1973). As Judge Bea's dissent notes, such damages were not available at common law. (Pet. App. 90.) And as this Court observed only six years after enactment of § 1983 in *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756-57 (1877), "[t]he authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found."

rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (Emphasis in original). Courts do not have license to supplement federal statutes as they desire, whenever they believe the statutory purposes will be better served. As *Robertson* makes clear, this fundamental principle of statutory construction is fully applicable to § 1983. In short, the general policies of § 1983 are not an invitation for courts to "improve" the statute's remedial scheme as they wish.

In addition, the aspects of § 1988 that evince Congressional respect for principles of federalism cannot be lightly ignored. Indeed, "[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 492 (1980). Such concerns are particularly compelling here, given that determining the nature and extent of recovery for particular claims rests more appropriately in the hands of legislative bodies, which have the ability to comprehensively evaluate the need for, and ramification of, particular awards. This is especially true of hedonic damages—rejected by all save five states.

As the district court observed in a pre-*Chaudhry* decision applying California's limitation on pre-death pain and suffering damages, *Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1131-33 (E.D. Cal. 2002), California's wrongful death statute is the product of decades of legislative review and revisions. That legislative process reflected "neither the product of

anachronistic formalism nor inattention, but represents a considered judgment as to the appropriate balance among a number of competing considerations. In this instance, the legislature apparently concluded that whatever increment of deterrence would be achieved by permitting a claim for pain and suffering to survive is outweighed by other considerations." *Id*. at 1132.[7]

As noted, the California legislature has now revised the Code of Civil Procedure section 377.34(b) to allow recovery of pre-death pain and suffering for actions filed after January 1, 2022, on a trial basis, so that its impact can be assessed in contemplation of

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[7] The *Venerable* court noted the volume of empirical information relevant to considering whether to allow damages for pre-death pain and suffering, factors similarly relevant to determining the propriety of allowing post-death hedonic damages:

> (1) In states that permit such awards, how much are they?; (2) Where such awards are permitted, what other damages are awarded and in what amounts?; (3) Is the incremental addition, if any, to the overall award of damages sufficient to affect law enforcement decision-making whether in the field or in other areas such as training, hiring, supervision, staffing and the like? (4) What are the full range of possible consequences—career, emotional, financial—to an individual officer whose negligent action leads to death as opposed to injury and what relative importance is it to the officer that the decedent may recover for pain and suffering in addition to other damages? (5) Do law enforcement officers weigh the extent of possible civil remedies in determining the amount of force to use in any particular threatening situation?

185 F. Supp. 2d at 1133.

possible future legislative revision. Significantly, the legislature did not believe it necessary to allow recovery of post-death hedonic damages.

As the panel majority recognized (Pet. App. 9 n.7), even prior to its decision here, hedonic damages claims were ubiquitous in the district courts, and as reflected by the awards here and in the companion *Craig* case, can total millions of dollars.[8] Petitioners and other public entities acknowledge responsibility to pay fair compensation for injuries improperly inflicted in the course of performing official duties. However, no public interest is served by adding millions of dollars of potential liability in each wrongful death case, which has nothing to do with serving the purpose of either deterrence or compensation. The issue presented here is

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[8] These cases are not outliers. *See Estate of Casillas v. City of Fresno*, No. 1:16-CV-1042 AWI-SAB, 2019 WL 2869079, at *1 (E.D. Cal. July 3, 2019) (denying post-trial motions contesting jury award of $250,000 for decedent's "mental, physical, and emotional pain and suffering experienced prior to death," $2,000,000 for decedent's "loss of enjoyment of life," and $2,500,000, divided among decedents heirs for loss of decedent's love and companionship); *Mears v. City of Los Angeles*, No. LA CV15-08441 JAK (AJWx), 2018 WL 11305362, at *1, 14 (C.D. Cal. May 7, 2018) (denying post-trial motions challenging jury award of $2.5 million for decedent's loss of enjoyment of life and pain and suffering, and $3 million to decedent's heirs); *Archibald v. Cnty. of San Bernardino*, No. ED CV 16-01128-AB (SPx), 2018 WL 6017032, at *1, 11 (C.D. Cal. Oct. 2, 2018) (denying post-trial motions challenging $7 million award for decedent's loss of enjoyment of life and for pre-death pain and suffering and $8.5 million to decedent's family for past and future damages for loss of decedent's love, companionship, care, assistance, protection, affection, society, and moral support).

important and "appears likely to recur in § 1983 litigation against municipalities." *City of Newport*, 453 U.S. at 257. It is vital that this Court grant review.

C. Review Is Also Warranted In Order To Resolve An Acknowledged Circuit Split On Applying State Law Prohibitions On Hedonic Damages In § 1983 Actions.

As the panel majority acknowledged, it has added to a circuit split on whether state law prohibitions on hedonic damages apply to § 1983 actions under § 1988. (Pet. App. 9-10.) In *Frontier Ins. Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), the district court declined to award hedonic damages in a § 1983 action arising from the death of a minor in government custody in Michigan, and the Sixth Circuit affirmed. The court observed that Michigan law limited recovery of hedonic damages to those instances where the injured party actually experienced the loss, and hence did not allow recovery of such damages in survivorship actions. 454 F.3d at 599 ("If hedonic damages are recoverable, therefore, they are recoverable only to the extent that the decedent experienced a loss of enjoyment of life before dying."). As the court noted, "[h]edonic or loss of enjoyment of life damages are only available to a plaintiff still living, in order to compensate that individual for aspects of their life they may no longer enjoy due to the tortious actions of another." *Id*. at 600.

The court rejected the contention that disallowing hedonic damages would be inconsistent with the

purposes of § 1983, stating: "[W]e hold that federal law does not require, in a § 1983 action, recovery of hedonic damages stemming from a person's death." *Id*. As the court observed:

> The loss of enjoyment caused by death is not "actual," in the sense that is relevant here, because it is not consciously experienced by the decedent. There being no means of making the decedent whole, recovery of damages for this (or any other) post-death loss is not required to advance [and] would not advance section 1983's compensatory policy.

Id. at 601 (citations omitted).

The court emphasized that because the injured party did not actually suffer the loss, hedonic damages simply compensate heirs for an injury they did not suffer. *Id*. This runs afoul of *Robertson*'s holding that "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." *Robertson*, 436 U.S. at 592.

As the *Frontier Ins. Co.* court noted, the Michigan wrongful death statute afforded meaningful relief, even if, as in the case before it, a particular plaintiff might not recover the full measure of damages. The court observed:

> To the extent that damages stemming from the death itself might be needed to fulfill the deterrent purpose of section 1983 (there being no compensation from the death as such), we

> see no reason to think that damages for injuries suffered by the decedent's survivors and hedonic damages suffered before death *would not be sufficient in most cases*.

454 F.3d at 601 (emphasis added).

The Ninth Circuit recognized that the holding of *Frontier Ins. Co.* is in direct conflict with its decision here, both in analysis, and ultimate conclusion. As the Ninth Circuit further noted, *Frontier Ins. Co.* conflicts with the Seventh Circuit's decision in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1250-51 (7th Cir. 1984), overruled on other grounds by *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), which declined to apply multiple state law limitations on survival and wrongful death damages, including hedonic damages, in a § 1983 action. As in the panel decision here, the *Bell* court, although not discussing hedonic damages separately, justified jettisoning state law by invoking § 1983 general goal of providing compensation to injured parties. *Id*.

The stark contrast between the different modes of analysis employed by the divergent appellate courts—*Frontier Ins. Co.* hewing closely to *Robertson*'s command to assess the general adequacy of state law in compensating wrongful death claims, with *Bell* and the Ninth Circuit employing analysis requiring not simply an adequate, but maximum award in every case—requires resolution by this Court. It has been more than forty years since the Court addressed the application of § 1988 to state survival statutes in *Robertson*, and

as the divergent views of the Circuit courts indicate, there is a need for the Court to reaffirm the mode of analysis it directed the courts to apply in addressing such issues. And this case provides a firm basis to do so. The hedonic damages issue was briefed by the parties and addressed by the trial and appellate courts. The judgment is also final, with no further proceedings contemplated save for appellate attorney fees and ultimate enforcement of the judgment. *Cf. Jefferson v. City of Tarrant*, *Ala.*, 522 U.S. 75 (1997) (petition challenging application of Alabama wrongful death statute under § 1988 dismissed because lack of final judgment).

As reflected by the fact that 11 judges dissented from the denial of rehearing en banc, the issues raised in this petition are important, and the panel majority's glaring departure from *Robertson* on the serious issue of damages in § 1983 cases requires intervention by this Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-mail: tcoates@gmsr.com

ROBERT FABELA, City Attorney
MOSES W. JOHNSON, IV,
Assistant City Attorney
CITY OF ANAHEIM
200 South Anaheim Boulevard,
Suite 356
Anaheim, California 92805
Telephone: (714) 765-5169
Facsimile: (714) 765-5123
E-mail: mjohnson@anaheim.net

STEVEN J. ROTHANS
JILL WILLIAMS
CARPENTER, ROTHANS &
DUMONT LLP
500 South Grand Avenue,
19th Floor
Los Angeles, California
90071
Telephone: (213) 228-0400
Facsimile: (213) 228-0401
E-mail:
srothans@crdlaw.com
jwilliams@crdlaw.com

Counsel for Petitioners City of Anaheim, Sergeant Daniel Gonzalez, Officer Woojin Jun, and Officer Daniel Wolfe