No. 21-1598

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. 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. *Robertson v. Wegmann* Squarely Holds That § 1988 Governs The Nature And Extent Of Survivorship For § 1983 Claims And Bars The Hedonic Damages Claimed Here.

In the Brief In Opposition ("BIO") respondents assert that *Robertson v. Wegmann*, 436 U.S. 584 (1978), and § 1988, are irrelevant to the Ninth Circuit's holding that hedonic, i.e., loss of future life, damages must be available in wrongful death claims under the Fourth Amendment. They contend that "*Robertson* 'intimate[s] no view' about the application of state law to limit a § 1983 remedy where, as here, the 'deprivation of federal rights caused death'" (BIO 2; *see also* BIO 15), and that availability of particular damages is wholly a question of substantive federal law (BIO 2, 20-22). Not so.

In *Robertson*, 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. 436 U.S. at 589. The Court 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*. 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.

Here the hedonic damages award was premised on a survival claim for violation of Mr. Valenzuela's rights under the Fourth Amendment. It is therefore not surprising that the Ninth Circuit analyzed the issue under *Robertson* and § 1988, as did the parties—including respondents. (Pet. App. 7 ("[B]ecause the relevant federal law is silent as to loss of life damages, California law controls our inquiry 'unless it is inconsistent with the policies of § 1983.'"); Appellees' Answering Brief at 54-60, *Valenzuela v. City of Anaheim*, 6 F.4th 1098 (9th Cir. 2021) (No. 20-55372.).) Respondents should not be permitted to change their position and argue for the first time that § 1988 is wholly inapplicable any time a question involving damages is presented. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 n.14 (2010) (argument waived where not asserted in lower courts: "The importance of enforcing the Rule is evident in cases where, as here, excusing a party's non-compliance with it would require this Court to decide, in the first instance, a question whose resolution could affect this and other cases in a manner

that the district court and court of appeals did not have an opportunity to consider.").

Moreover, the other circuits analyzing the availability of hedonic damages did so applying the principles of *Robertson* and § 1988, albeit coming to different conclusions. *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 600-01 (6th Cir. 2006) (state law prohibition on hedonic damages not inconsistent with § 1983); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1250-51 (7th Cir. 1984) (declining to apply multiple state law limitations on survival and wrongful death damages, including hedonic damages, in a § 1983 action as inconsistent with the purpose of the statute), overruled on other grounds, *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

Respondents cite no case authority purporting to distinguish survivorship statutes as being either procedural or substantive in nature. And the distinction respondents postulate, that a survival statute is procedural when it bars *all* recovery, but somehow substantive when it allows *some* recovery (BIO 15-17), is supported by neither law nor logic.

Respondents' contention that *Robertson* itself disclaimed any application to a case where the underlying death was caused by the constitutional violation is also meritless. Respondents do not cite the applicable language from *Robertson* in full, instead pulling one- or two-word quotations out of context, to craft a sentence suggesting some support for their position.[1] As noted

[1] BIO 2 ("*Robertson* 'intimate[s] no view' about the application of state law to limit a § 1983 remedy where, as here, the

in the petition (Pet. 14-15), the Court's language in *Robertson* concerning such wrongful death claims was quite limited. The full passage reads: "We intimate no view, moreover, about whether *abatement* based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Robertson*, 436 U.S. at 594 (emphasis added).

Thus, 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 and the state statute permitted *no claim at all*, the question here is not one of abatement. The issue here 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 v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014) (and the now-amended statute), pre-death pain and suffering damages.[2] As the dissent from rehearing en banc notes (Pet. App. 99-105, 121), as a result, the principles articulated in

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'deprivation of federal rights caused death.' "); BIO 15 ("*Robertson* expressly took 'no view' on the application of state law to § 1983 claims where the 'deprivation of federal rights caused death.' ")

[2] Citing *Board of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478 (1980) (BIO 26), respondents assert that because § 1983 supplements state remedies, the total damages available under state law are irrelevant. But *Tomanio* applied a state statute of limitations under § 1988, and as the en banc dissent here noted (Pet. App. 96), in *Robertson*, the Court looked at Louisiana law as a whole, and found that Louisiana's survival law which entirely abated the § 1983 action was not inconsistent with § 1983 in light of the fact that "most Louisiana actions survive the plaintiff's death." 436 U.S. at 591.

Robertson apply and foreclose ignoring § 1988 and imposing an open-ended damage award in contravention of California law to ensure maximum recovery in every wrongful death case.

Respondents cite Justice Stevens' dissent in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) to the effect that the Court has made it "perfectly clear that the measure of damages in an action brought under 42 U.S.C. § 1983 is governed by federal law." *Id.* at 85 (Stevens, J., dissenting); BIO 17, 22. However, respondents omit Justice Stevens' immediate citation of "*Cf.*" to the Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), abrogation recognized on other grounds by *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).

In *Sullivan*, the Court noted that "[c]ompensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988," and "as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." *Id*. at 239-40. Under § 1988, the "rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.* at 240. Here, as even the Ninth Circuit recognized, having identified no federal rule concerning survivorship at all, let alone damages available in such actions, § 1988 applies, as do the governing standards of *Robertson*.

Respondents cite no federal statute allowing hedonic damages, and as noted in the petition (Pet. 18-21) and unaddressed by respondents, this Court has repeatedly held that federal courts do not have license to create additional remedies via the common law to supplement statutes as they think best.

Moreover, in citing Justice Stevens' dissent in *Jefferson* as suggesting that § 1988 has no relevance to the damages available in civil rights actions (BIO 16-17), even giving credit to respondents' assertion, it simply underscores that the issue presented here warrants review.[3] Indeed, as noted in the petition (Pet. 27), the issue here parallels *Jefferson*, albeit in a procedural posture that makes it an ideal vehicle for review.[4]

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[3] In *Jefferson*, the parties agreed that § 1988 governed the survivorship damages issue. Brief for Respondent, *Jefferson*, 522 U.S. 75 (No. 96-957) 1997 WL 401190, at *16. Respondents also assert that the grant of certiorari in *Jefferson* "would have been unnecessary if the Alabama Supreme Court's decision was mandated by *Robertson*." (BIO 19.) Yet, the primary issue (aside from jurisdiction) was whether the state statute, which, unlike California's, limited survivorship recovery to punitive damages alone, was inconsistent with the purposes of § 1983, applying the *Robertson* standards. 522 U.S. at 79-80.

[4] Respondents emphasize that the Court denied a petition for writ of certiorari in *City of Los Angeles v. Chaudhry*, 574 U.S. 876 (2014). (BIO 19 n.9.) However, the Court has repeatedly held that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *see Huber v. N.J. Dept. of Env't Prot.*, 562 U.S. 1302 (2011) (Alito, J., respecting denial of certiorari).

Respondents' invocation of *Smith v. Wade*, 461 U.S. 30 (1983) and *Carey v. Piphus*, 435 U.S. 247 (1978), as supporting their contention that federal common law is the sole source for determining damages under § 1983 (BIO 21-22), is unavailing. Neither *Smith* nor *Carey* was a survivorship action, which, as *Robertson* establishes, falls squarely within § 1988. *Smith* addressed the substantive elements of proof of punitive damages. 461 U.S. at 31. In *Carey*, the Court addressed the substantive elements of a cause of action for violation of procedural due process under § 1983. 435 U.S. at 248. The Court held that plaintiffs asserting a procedural due process claim need not prove actual damages in order to establish liability. *Id.* at 266. If they suffered no actual damages, or such damages were difficult to fix, they would still be entitled to an award of nominal damages. *Id.*

In so holding, the Court rejected the plaintiffs' assertion that mere violation of a constitutional right in and of itself could justify substantial damages absent proof of actual injury. *Id.* at 264. Instead of endorsing abstract and amorphous damages claims, as noted in the petition (Pet. 15), the Court found that the purposes of § 1983 could be served, even without assuring a substantial recovery. The Court has recognized that in many cases, punitive damages might be the only available remedy under § 1983. *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980) ("[P]unitive 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."). The Court has repeatedly found that the deterrence aspect of § 1983 is sufficiently fulfilled through the availability of punitive damages (as in a California survivorship action) or a fee award, which as in this case may well be close to, or exceed, $1 million.

Applying *Robertson*, as the en banc dissent notes (Pet. App. 99-105, 121), there is no justification to maximize wrongful death awards by allowing recovery of wholly speculative hedonic damages that have been rejected by the vast majority of states.[5] Respondents' suggestion that such awards, if inappropriate, may be

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[5] Respondents dispute the number of states that allow hedonic loss of life damages, asserting, at bottom, that there may be 12, not 5 such states. (BIO 29 n.15.) While ultimately irrelevant—it being clear that no matter what the exact number, the states allowing such damages constitute a small minority, and in any event their legislative judgment must be properly respected via § 1988, just as California's—the cited authority does not support respondents' contention. *Bibbs v. Toyota Motor Corp*., 815 S.E.2d 850, 856 (Ga. 2018) merely holds that where an injured plaintiff settles their personal injury claim, upon their death, no later wrongful death claim for loss of life damages can be maintained. *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998) held the district court did not err in refusing to instruct on a separate hedonic damages claim, because Nebraska law merely allowed pain and suffering damages. Respondents urge that Delaware, Montana and Idaho "have broad statutory regimes that entrust the jury to determine the measure of lost life," yet, none of the cited statutes, nor any case law, is cited suggesting that hedonic damages are recoverable. *Boan v. Blackwell*, 541 S.E.2d 242 (S.C. 2001) is not a wrongful death case and *Holston v. Sisters of the Third Order of St. Francis*, 618 N.E.2d 334 (Ill. App. Ct. 1993) did not hold that loss of future life damages were recoverable in a wrongful death action.

challenged as excessive by motion (BIO 28-29) rings hollow, since, as the en banc dissent observes (Pet. App 112-18), there being no proper rational measure of calculating such damages, how is one to measure excessiveness in the first place?[6]

As the dissent from denial of en banc review notes, the Ninth Circuit's decision authorizing massive, speculative awards of hedonic damages as a routine matter in Fourth Amendment survivorship cases is plainly inconsistent with *Robertson*. Review is necessary to correct the Ninth Circuit's egregious departure from the governing law, and at the very least to clarify application of § 1988 to such claims.

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

Respondents argue that there is no actual circuit split warranting review. (BIO 31-33.) The argument is untenable. The Ninth Circuit panel decision expressly acknowledged the circuit split on the issue of requiring hedonic damages in § 1983 survivorship actions. (Pet. App. 8-9.) And the panel majority's reasoning in authorizing such damages cannot be reconciled with *Frontier Insurance Co. v. Blaty*, 454 F.3d 590, 600 (6th

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[6] Respondents' counsel argued that loss of life recovery could be measured by the value of a B-1 bomber, or a Picasso. (Pet. 18 n.5.)

Cir. 2006), where the court rejected such damages because they do not serve the purposes of § 1983 in that they purport to compensate for a loss not actually suffered by the decedent.

Respondents speculate that the *Frontier Insurance* court would have rejected application of the California survivorship statute in its entirety, as not allowing for pain and suffering damages. (BIO 32.) But even assuming the *Frontier Insurance* court would embrace the reasoning of *Chaudhry* (and that is not clear), the opinion makes it clear the court would not conclude that a highly speculative hedonic damages award was required *in addition* to damages for pre-death pain and suffering to ensure maximum recovery in every conceivable case.

The circuit split is clear. The Ninth and Seventh Circuits hold that hedonic damages must always be available in § 1983 cases. The Sixth Circuit has concluded that such damages do not serve the purposes underlying § 1983 and are not required. The Court should resolve this conflict.

C. The Case Is An Excellent Vehicle To Review The Issues Presented.

Respondents assert that the case is not a good vehicle for review, because one portion of the underlying survivorship statute has been amended, and the case does not present any issue concerning federal wrongful

death as opposed to survivorship claims. (BIO 33-35.) The arguments are baseless.

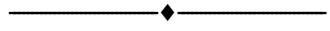
First, the portion of the California survivorship statute barring hedonic damages claims has not been amended. Such damages are still not permitted under California law. Cal. Civ. Proc. Code § 377.34(a). Section 377.34(b) of the California Code of Civil Procedure was only amended to allow recovery of pain and suffering damages after January 1, 2022, with the impact of such awards to be assessed for possible future legislative action in four years. (Pet. 6 n.1.)

The current state of the law is thus exactly what the Ninth Circuit addressed in the decision below. Bound by its prior decision in *Chaudhry* striking down California's prohibition on pre-death pain and suffering, it found that an award of hedonic damages was required *in addition* to damages for pre-death pain and suffering in order to ensure significant recovery in every conceivable circumstance. Respondents make no logical argument as to how or why the Ninth Circuit's resolution of the hedonic damages issue in future cases would somehow be altered by the statutory amendment.

Second, the notion that the survivorship issue is not squarely presented because the case does not also encompass some claim that federal law must recognize a full § 1983 wrongful death remedy by heirs of a decedent, borders on a non sequitur. The issue presented is straightforward and narrow: Must survivorship claims

allow recovery of hedonic damages in every case in order to ensure maximum recovery in every conceivable factual situation?

Robertson compels the conclusion that state law should be respected and such damages are not required. But the issue has nothing to do with what appears to be respondents' contention that § 1983 requires a full blown federal wrongful death action—an issue they were free to pursue below but elected not to do so. Indeed, respondents' constant and inaccurate refrain that federal law as interpreted by petitioners affords no remedy for wrongful death in contrast to existing state tort schemes, seems stripped from some petition or brief urging adoption of such a federal claim. The contention, however, is irrelevant here.



CONCLUSION

Petitioners respectfully submit that the petition should be granted.

Respectfully submitted,

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