No. _____

In the Supreme Court of the United States

COUNTY OF ORANGE and NICHOLAS PETROPULOS,

Applicants

v.

KATHY CRAIG and GARY WITT, Individually and as successor-in-interest to Brandon Lee, Witt

Respondents

APPLICATION TO THE HON. ELENA KAGAN FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Supreme Court Rule 13.5, County of Orange and Nicholas Petropulos ("Applicants") move for an extension of time of 58 days, to and including Friday, August 26, 2022, to file a petition for writ of certiorari. Unless an extension is granted, the deadline for filing the petition for writ of certiorari will be Wednesday, June 29, 2022. Counsel for appellees below and respondents in this Court, Dale K. Galipo, has been advised of this request for extension of time and does not oppose the extension.

In support of this request, Applicants state as follows:

1. The United States Court of Appeals for the Ninth Circuit rendered its decision on August 18, 2021 (Exhibit 1), and denied a timely petition for panel

rehearing and rehearing en banc on March 31, 2022 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. § 1245(1).

2. This case raises an important question about recoverability of hedonic, "loss of life" damages in civil lawsuits prosecuted under 42 U.S.C. § 1983. The case stems from a fatal police shooting in Orange County, California. After a five day trial, a Central District of California jury awarded $3.4 million in survival and wrongful death damages to the decedent's estate and heirs. Of that, $1.8 million was awarded for "loss of life experienced by" decedent (Exhibit 1). Despite California's statutory prohibition on recovery of such damages, the Ninth Circuit affirmed the "loss of life" damages award (Exhibit 1).

3. The Ninth Circuit's decision tracks a companion case decided by the same panel in *Valenzuela v. City of Anaheim, et al.*, Ninth Circuit Case No. 20-55372. *Valenzuela* also arises from a law enforcement encounter that resulted in the death of a suspect (Exhibit 3). There, a Central District of California jury awarded $13.2 million in damages, of which $3.6 million were awarded for the decedent's "loss of life" (Exhibit 3). The Ninth Circuit affirmed the "loss of life" damages award (Exhibit 3). In reaching this conclusion, the court found that California's statutory prohibition on "loss of life" damages was "inconsistent with" the remedial policies animating § 1983 (Exhibit 3). Ninth Circuit Judge Kenneth K. Lee dissented from the opinion in *Valenzuela*, arguing, among other things, that the majority's opinion did not properly respect California's law banning recovery of post-death, "loss of life" damages (Exhibit 3).

4. The panel's opinion in *Valenzuela* was issued for publication on August 3, 2021 (Exhibit 3), just fifteen days before the panel's memorandum decision in *Craig* (Exhibit 1). The legal issues in *Craig* and *Valenzuela* mirror one another: specifically, whether post-death, "loss of life" damages are recoverable in Section 1983 litigation (Exhibit 3). The *Craig* memorandum cites directly to *Valenzuela* in support of its decision to affirm the "loss of life" damages award in *Craig*, holding that "*Valenzuela* is indistinguishable from this case" (Exhibit 1). Judge Lee dissented from the opinion in *Craig* "for the same reasons laid out in [his] dissent in *Valenzuela*" (Exhibits 1, 3).

5. In *Valenzuela*, on March 30, 2022, the Ninth Circuit denied a timely petition for panel rehearing and rehearing en banc (Exhibit 4). One day later, on March 31, 2022, the same panel that denied the petition for panel rehearing and rehearing en banc in *Valenzuela* denied a similar petition in *Craig* (Exhibits 2, 4). In *Valenzuela*, Judge Carlos Bea took issue with the denial of rehearing en banc (Exhibit 4). Judge Bea was joined in whole or in part by ten other Ninth Circuit judges. (*Id.*). Judge Bea's statement directly addresses the appealed damages award in *Craig* and what he contends was the Circuit Court's erroneous affirmance of same. (*Id.* at 17 – 19). Judge Daniel P. Collins separately dissented from the denial of rehearing en banc, and therein concurred with multiple portions of Judge Bea's statement (Exhibit 4).

6. The decision in *Craig* warrants this Court's attention for multiple reasons. Initially, if left unchecked, the *Craig* decision piles on top of *Valenzuela* to

violate this Court's holding in *Robertson v. Wegmann*, 436 U.S. 584 (1978) (finding that a state law that totally eliminated a § 1983 claim did not violate the compensation and deterrence goals of § 1983). Additionally, *Craig*, following in the wake of *Valenzuela*, deepens a circuit split that already exists between the Sixth and Seventh Circuits. *Compare Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601-603 (6th Cir. 2006) (relying on *Robertson* to hold that prohibitions on post-death "hedonic" damages awards are not inconsistent with § 1983 because § 1983 compensates for "actual damages suffered by the victim" and a loss of life is not "actual…because it is not consciously experienced by the decedent") *with Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (holding that a post-death hedonic damages ban was inconsistent with § 1983 because the ban created the perverse incentives for police officers to kill rather than injure). Further, whether viewed independently or collectively with *Valenzuela*, the outcome in *Craig* represents judge-made common law that improperly supplants California's statutory damages scheme — one that is echoed in 44 other states.

7. Applicants seek the requested extension of time in which to file a petition for writ of certiorari because the time allotted for the petition since the Ninth Circuit's denial of rehearing has been consumed with several other pressing matters pending in federal and state court. Counsel of record here is also lead trial counsel in *Gordon v. County of Orange*, Central District of California Case No. 8:14-cv-01050-CJC-DFM, which was scheduled to begin trial on June 7, 2022. *Gordon* is a federal civil rights case stemming from the death of an inmate in the Orange

County jail. It has been litigated for eight years and has resulted in two published Ninth Circuit opinions, one of which changed the legal standard on medical care claims under the Fourteenth Amendment. *See*, *Gordon v. County of Orange*, 888 F.3d. 1118 (9th Cir. 2018); *Gordon v. County of Orange*, 6 F.4th 961 (9th Cir. 2021). On the eve of trial, the district judge called for briefing on important threshold issues concerning the availability of certain damages, including "loss of life" damages that are at issue in the *Craig* and *Valenzuela*. These issues are not expected to be resolved until July 11, 2022 at the earliest. Given the age of the case, it is expected that trial will be put back on calendar shortly after resolution of this briefing. Counsel of record here is also the lead appellate attorney in *Feliz v. County of Orange*, California Fourth Appellate District, Division Three, Case No. G060596. The *Feliz* case is a twelve-year civil rights saga stemming from an inmate suicide. The case has spent time in the federal and state courts systems, with two Ninth Circuit memorandum dispositions. Counsel of record is now defending the matter on appeal in California state court and just filed respondent's brief on June 16, 2022. Counsel of record is also the lead appellate attorney preparing opening briefing in *Wheatley v. County of Orange*, California Fourth Appellate District, Division Three, Case No. G061149. *Wheatley* involves application of a new California Rule of Professional Conduct, Rule 1.18. How Rule 1.18 is interpreted and applied to certain attorney-client relationships is an issue of first impression in California appellate courts, and is at the center of counsel's briefing due August 15, 2022. Counsel of record has also been engaged in intensive discovery, including

numerous depositions and discovery motion briefings and hearings, in two civil rights matters stemming from Summer 2020 protests in the City of Los Angeles, *Jones v. City of Los Angeles*, Central District of California Case No. 2:20-cv-11147-FWS-SK, and *Montano v. City of Los Angeles*, 2:20-cv-07241-CBM-AS. The *Jones* and *Montano* lawsuits challenge and impact how law enforcement responds to protests in Southern California. In recent weeks and months, counsel of record has had to defend depositions of all levels of Los Angeles police officers, from the line duty officer all the way up to the Chief of Police. Counsel has also had to defend against broad-sweeping "*Monell*" discovery pursued in an effort to obtain injunctive relief and massive changes to law enforcement operations in the City of Los Angeles. Unless settled, the *Montano* case is presently scheduled to begin trial on July 26, 2022. The partner and associate assisting counsel of record with the petition in this case have also been enmeshed in intensive discovery in the last 90 days in the matter of *P.E.O.P.L.E. v. Spitzer, at al.*, Orange County Superior Court Case No. 30-2018-00983799-CU-CR-CXC. In *P.E.O.P.L.E.,* multiple plaintiffs sue the Orange County Sheriff and Orange County District Attorney in their official capacities based on their operation of an ongoing, illegal, and confidential "jailhouse informant program." Plaintiffs seek injunctive relief and institutional changes to fundamental law enforcement operations (which the Sheriff and District Attorney oppose). Representing the Sheriff, counsel of record's team has just completed production of over 113,000 records and is now preparing to defend at least twelve depositions of Sheriff's Department personnel (of all levels). The volume,

complexity, and sensitivity of this discovery has interfered with counsel's team's availability to contribute to the petition here. Finally, from September 2022 to December 2022, counsel of record is scheduled as lead trial counsel in ten jury trials across three Southern California counties and in the Central District of California. More than half of these trials are scheduled for September and October 2022, meaning the pre-trial preparation (including motion work, preparation of exhibits, and preparing witnesses for testimony), is beginning now and will carry through August 2022.

Applicants' counsel seek to provide a petition to this Court that best presents their clients' case in a manner that will be of most assistance to the Court in reaching a just decision. For this reason, Applicants request a modest 58 day extension for counsel to prepare a petition for writ of certiorari regarding the important issues raised in the intertwined *Craig* and *Valenzuela* decisions below.

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WHEREFORE, for the foregoing reasons, Applicants request that an extension of time up to and including August 26, 2022, be granted within which Applicants may file a petition for writ of certiorari.

Respectfully submitted,

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EXHIBIT 1

NOT FOR PUBLICATION

FILED

AUG 18 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHY CRAIG; GARY WITT, individually and as successors-in-interest to Brandon Lee Witt, deceased, Plaintiffs-Appellees, v. NICHOLAS PETROPULOS, Defendant-Appellant, and COUNTY OF ORANGE, Defendant.	No. 19-55324 D.C. No. 8:17-cv-00491-CJC-KES MEMORANDUM*

KATHY CRAIG; GARY WITT, individually and as successors-in-interest to Brandon Lee Witt, deceased, Plaintiffs-Appellees, v. COUNTY OF ORANGE; NICHOLAS PETROPULOS,	No. 19-56188 D.C. No. 8:17-cv-00491-CJC-KES

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted May 5, 2021[**]
Pasadena, California

Before: OWENS and LEE, Circuit Judges, and SIMON,[***] District Judge.
Dissent by Judge LEE

Nicholas Petropulos and the County of Orange ("Defendants") appeal from a jury verdict awarding $1.8 million in "loss of life" damages to Brandon Witt, who died in the custody of the Orange County Sheriff's Department. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

On appeal, the Defendants argue that the district court improperly awarded compensatory damages for "the loss of life experienced by" Witt. Specifically, the Defendants contend that death is not compensable because a person cannot "experience" his loss of life; such damages are inherently speculative; and loss of life awards are not authorized by *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014). We recently rejected these arguments in *Valenzuela v. City of*

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[***] The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

Anaheim, No. 20-55372, 2021 WL 3355499, at *4-5 (9th Cir. Aug. 3, 2021), when we upheld the jury's loss of life award and determined that California state law prohibiting such damages was "inconsistent with [42 U.S.C.] § 1983." *Valenzuela* is indistinguishable from this case. As a result, we affirm the jury's $1.8 million damages award for Witt's loss of life.

AFFIRMED.

Craig v. Petropulos, 19-55324

LEE, Circuit Judge, dissenting:

I agree that the issue in this case is indistinguishable from our previous discussion of loss of life damages in *Valenzuela v. City of Anaheim*, No. 20-55372, 2021 WL 3355499 (9th Cir. Aug. 3, 2021). Therefore, I respectfully dissent for the same reasons laid out in my dissent in *Valenzuela.*

EXHIBIT 2

FILED

MAR 31 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHY CRAIG; GARY WITT, individually and as successors-in-interest to Brandon Lee Witt, deceased, Plaintiffs-Appellees, v. NICHOLAS PETROPULOS, Defendant-Appellant, and COUNTY OF ORANGE, Defendant.	No. 19-55324 D.C. No. 8:17-cv-00491-CJC-KES Central District of California, Santa Ana ORDER

KATHY CRAIG; GARY WITT, individually and as successors-in-interest to Brandon Lee Witt, deceased, Plaintiffs-Appellees, v. COUNTY OF ORANGE; NICHOLAS PETROPULOS, Defendants-Appellants.	No. 19-56188 D.C. No. 8:17-cv-00491-CJC-KES Central District of California, Santa Ana

Before: OWENS and LEE, Circuit Judges, and SIMON,* District Judge.

Judges Owens and Simon have voted to deny the petition for panel rehearing. Judge Owens has voted to deny the petition for rehearing en banc, and Judge Simon so recommends. Judge Lee has voted to grant the petition for panel rehearing and rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

EXHIBIT 3

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellees*, v. CITY OF ANAHEIM; DANIEL WOLFE; WOOJIN JUN; DANIEL GONZALEZ, *Defendants-Appellants.*	No. 20-55372 D.C. Nos. 8:17-cv-00278-CJC-DFM 8:17-cv-02094-CJC-DFM OPINION

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted May 5, 2021
Pasadena, California

Filed August 3, 2021

Before: John B. Owens and Kenneth K. Lee, Circuit Judges, and Michael H. Simon,* District Judge.

Opinion by Judge Owens;
Dissent by Judge Lee

SUMMARY**

Civil Rights

The panel affirmed a jury verdict awarding "loss of life" damages to the family of Fermin Valenzuela, Jr., who died after an encounter with the police.

Valenzuela's father and children filed suit under 42 U.S.C. § 1983 and California law for excessive force, wrongful death, and similar theories of liability. After a five-day trial, the jury awarded the Valenzuela family a total of $13.2 million in damages on multiple theories of liability, including $3.6 million for Valenzuela's loss of life, which was independent of any pain and suffering that he endured during and after the struggle with the officers. In their post-trial motions, the Defendants argued that because California state law did not recognize loss of life damages, neither should § 1983. The district court disagreed. After reviewing the relevant in- and out-of-circuit case law, including *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

2014), the district court concluded that § 1983 permitted the recovery of loss of life damages and that California state law to the contrary was inconsistent with the federal statute's goals.

The panel saw no meaningful way to distinguish *Chaudhry* from this case. Both involved deaths caused by a violation of federal law, and both considered the limits that California's Civil Procedure Code § 377.34 places on § 1983 plaintiffs, limits that this court has squarely rejected. The panel determined that prohibiting loss of life damages would run afoul of § 1983's remedial purpose as much as (or even more than) the ban on pre-death pain and suffering damages. Following *Chaudhry*, the panel held that § 377.34's prohibition of loss of life damages was inconsistent with § 1983.

The panel resolved the remaining issues on appeal, including qualified immunity, in a concurrently filed memorandum disposition.

Dissenting, Judge Lee stated that this court should not jettison California state law to maximize damages for § 1983 plaintiffs. Judge Lee wrote that as tragic as Valenzuela's death was, the panel must follow the law, and California law prohibits damages for loss of life. While Judge Lee did not believe *Chaudhry* controlled this case, he thought this court should still revisit that decision in a future en banc proceeding because it misconstrued *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978), and relied on flawed assumptions.

COUNSEL

Timothy T. Coates (argued) and Peter A. Goldschmidt, Greines Martin Stein & Richland LLP, Los Angeles, California; Steven J. Rothans and Jill Williams, Carpenter Rothans & Dumont LLP, Los Angeles, California; Robert Fabela, City Attorney; Moses W. Johnson, Assistant City Attorney; City Attorney's Office, Anaheim, California; for Defendants-Appellants.

Dale K. Galipo (argued) and Hang D. Le, Law Offices of Dale K. Galipo, Woodland Hills, California; John Fattahi, Law Office of John Fattahi, Torrance, California; Garo Mardirossian and Lawrence D. Marks, Mardirossian & Associates Inc., Los Angeles, California; for Plaintiffs-Appellees.

Christopher D. Hu (argued), San Francisco, California, for Amicus Curiae

Steven S. Fleischman, Scott P. Dixler, and Yen-Shang Tseng, Horvitz & Levy LLP, Burbank, California, for Amicus Curiae Association of Southern California Defense Counsel.

Michael E. Gates, City Attorney; Brian L. Williams, Chief Trial Counsel; Daniel S. Cha and Pancy Lin, Senior Deputy City Attorneys; Office of the City Attorney, Huntington Beach, California; for Amicus Curiae City of Huntington Beach.

Steven J. Renick, Manning Kass Ellrod Ramirez Trester LLP, Los Angeles, California, for Amicus Curiae International Municipal Lawyers Association.

OPINION

OWENS, Circuit Judge:

The City of Anaheim and individual officers ("Defendants") appeal from a jury verdict awarding "loss of life" damages to the family of Fermin Valenzuela, Jr., who died after an encounter with the police. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Death of Valenzuela

On July 2, 2016, Anaheim Police Department Officers Woojin Jun and Daniel Wolfe received a 911 dispatch about a "suspicious person" near a laundromat in Anaheim. The dispatcher described Valenzuela's appearance, indicated that no weapons had been seen, and noted that it was unknown whether Valenzuela was on drugs or required psychiatric assistance.

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. As they approached, Wolfe said he heard the sound of breaking glass and saw what he recognized as a methamphetamine pipe. Wolfe then asked Valenzuela whether he was "alright" and if he had just "br[oke] a pipe or something." Valenzuela replied that he was "good" and "just trying to wash" his clothes.

[1] This opinion only addresses the issue of loss of life damages. A concurrently filed memorandum disposition resolves the remaining issues on appeal, including qualified immunity.

Wolfe claimed that he then saw a screwdriver in the bag, so he ordered Valenzuela to stop and put his hands behind his back. Valenzuela stepped away from the bag but did not immediately comply. Wolfe then grabbed Valenzuela's right arm and tried to pull it behind his back. Almost immediately after, Jun placed Valenzuela in a choke hold as Wolfe tried to maintain control of Valenzuela's hands.[2]

A violent struggle ensued, with Jun continuing the choke hold while the officers managed to knock Valenzuela to the floor, face down. Jun then initiated a second choke hold, and Valenzuela started turning purple and repeatedly screamed "I can't breathe" and "help me." Wolfe then tased Valenzuela, who jumped to his feet and ran out of the laundromat. The officers chased after Valenzuela, pulling off some of his clothes as he tried to escape and knocking him to the ground. The officers repeatedly tased Valenzuela, who begged for them to "stop it."

Despite multiple choke holds and taser attacks, Valenzuela ran across the street with the officers in pursuit. Out of breath, Valenzuela repeatedly asked the officers to "please don't" and "don't kill me." He managed to make it to a convenience store parking lot, where he tripped and fell to the ground. While on the ground, Wolfe placed Valenzuela in yet another choke hold. Again, Valenzuela turned purple, repeatedly screamed "help me" and "stop it,"

[2] The parties dispute whether the officers placed Valenzuela in a carotid hold or an air choke hold. A carotid hold involves compressing the carotid arteries on both sides of the neck. When properly applied, the hold should render someone unconscious within seven to ten seconds. But when improperly applied, a carotid hold can turn into an air choke hold, which applies pressure to the front of the neck and is much more dangerous. Without resolving this dispute, we use the term "choke hold" to describe the neck restraints placed on Valenzuela.

and was audibly gasping for air. Sergeant Daniel Gonzalez, a supervisory officer, arrived on the scene and encouraged Wolfe to "hold that choke" and "put him out," and gave Wolfe tips on how to accomplish this. Wolfe maintained the hold for between one and two minutes as Jun and Gonzalez held down Valenzuela's arms.

Towards the end of the encounter, Gonzalez asked Wolfe whether Valenzuela was able to breathe. Gonzalez told the officers to roll Valenzuela on his side because he was "going to wake up." Valenzuela never did, and he fell into a coma and died eight days later in the hospital. The Orange County medical examiner ruled the manner of death as a homicide caused by "complication[s] of asphyxia during the struggle with the law enforcement officer" while Valenzuela was "under the influence of methamphetamine."

B. Procedural History

Valenzuela's father and children filed suit under 42 U.S.C. § 1983 and California law for excessive force, wrongful death, and similar theories of liability. After a five-day trial, the jury awarded the Valenzuela family a total of $13.2 million in damages on multiple theories of liability, including $3.6 million for Valenzuela's "loss of life,"[3] which was independent of any pain and suffering that he endured during and after the struggle with the officers.[4]

[3] The Ninth Circuit's Model Civil Jury Instruction 5.2 also recognizes damages for the "loss of enjoyment of life."

[4] The other awards were $6 million for Valenzuela's pre-death pain and suffering and $3.6 million for his children's loss of Valenzuela's love, companionship, society, and moral support.

In their post-trial motions, the Defendants argued that because California state law did not recognize loss of life damages, neither should § 1983. The district court disagreed. After reviewing the relevant in- and out-of-circuit case law, including *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), the court concluded that § 1983 permitted the recovery of loss of life damages and that California state law to the contrary was inconsistent with the federal statute's goals. As the court recognized, 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." This appeal followed.

II. DISCUSSION

A. Standard of Review

We review de novo the district court's decision regarding loss of life damages. *See Chaudhry*, 751 F.3d at 1103.

B. Section 1983 and "Loss of Life" Damages

California law forbids recovery for a decedent's loss of life. Cal. Civ. Proc. Code § 377.34.[5] And because the relevant federal law is silent as to loss of life damages, California law controls our inquiry "unless it is inconsistent

[5] Section 377.34 provides: "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 are limited to the loss or damage that the decedent sustained or incurred *before death*, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Cal. Civ. Proc. Code § 377.34 (emphasis added).

with the policies of § 1983." *Chaudhry*, 751 F.3d at 1103. We conclude that it is, mindful that § 1983 was meant to be a remedial statute and should be "broadly construed" to provide a remedy "against all forms of official violation of federally protected rights." *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (citation omitted); *see also Wilson v. Garcia*, 471 U.S. 261, 271–72 (1985) ("[Section] 1983 provides a 'uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution' . . . [that] make[s] it appropriate to accord the statute 'a sweep as broad as its language.'" (internal citation omitted)), *superseded by statute on other grounds*. Section 1983's goals include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power. *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978).

Our analysis begins, and largely ends, with *Chaudhry*. In that case, we addressed whether § 377.34's prohibition of pre-death pain and suffering damages prevented § 1983 plaintiffs from obtaining such relief. We recognized that "[o]ne of Congress's primary goals in enacting § 1983 was to provide a remedy for killings unconstitutionally caused or acquiesced in by state governments," and that "[i]n cases where the victim dies quickly, there often will be no damage remedy at all under § 377.34." *Chaudhry*, 751 F.3d at 1103–04. Because California's bar on such relief had "the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim," we held that it clashed with § 1983's remedial purpose and undermined its deterrence policy. *Id*. at 1104–05. "Section 377.34 therefore does not apply to § 1983 claims where the decedent's death was caused by the violation of federal law." *Id*. at 1105.

In reaching this conclusion, *Chaudhry* relied in part on *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984), *overruled in part on other grounds by Russ v. Watts*, 414 F.3d 738 (7th Cir. 2005), a § 1983 case which rejected Wisconsin laws precluding loss of life damages because they made it "more advantageous [for officials] to kill rather than injure."[6] In doing so, *Chaudhry* implicitly disagreed with the Sixth Circuit's contrary decision in *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601, 603 (6th Cir. 2006), which held that § 1983 did not conflict with a similar Michigan law because § 1983 compensates only for "actual damages suffered by the victim," and a loss of life "is not 'actual' . . . because it is not consciously experienced by the decedent."

We see no meaningful way to distinguish *Chaudhry* from this case.[7] Both involve deaths caused by a violation of federal law, and both consider the limits that California's § 377.34 places on § 1983 plaintiffs—limits that we have squarely rejected. Prohibiting loss of life damages would run afoul of § 1983's remedial purpose as much as (or even

[6] *Chaudhry* also relied on similar cases from the Tenth and Second Circuits. *See Chaudhry*, 751 F.3d at 1104–05 (first citing *Berry v. City of Muskogee*, 900 F.2d 1489, 1506 (10th Cir. 1990) (rejecting an Oklahoma state law that limited survival damages to property loss and lost earnings as inconsistent with § 1983); and then citing *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) (holding the same for a New York law barring punitive damages in § 1983 survival actions)).

[7] Although district courts in our circuit once were split over the availability of loss of life damages under § 1983, they are unanimous after *Chaudhry*. *See Estate of Casillas v. City of Fresno*, No. 16-CV-1042, 2019 WL 2869079, at *16 (E.D. Cal. July 3, 2019) ("Critically, . . . the cases in California federal district courts denying survival damages, including 'loss of enjoyment of life' damages, are pre-*Chaudhry*; and courts in this district have authorized hedonic damages in the post-*Chaudhry* landscape.").

more than) the ban on pre-death pain and suffering damages. Following *Chaudhry*, we therefore hold that § 377.34's prohibition of loss of life damages is inconsistent with § 1983.

The Defendants' attempts to distinguish *Chaudhry* fall flat. First, the Defendants argue that the injury in this case is different because unlike pre-death pain and suffering, a person cannot "actually experience" the phenomenon of being dead. But we already rejected this quasi-metaphysical argument in *Chaudhry* when we endorsed the Seventh Circuit's analysis in *Bell*, which identified the rationale behind Wisconsin's restrictive statute—"that the victim once deceased cannot practicably be compensated for the loss of life to be made whole"—and, in light of § 1983's broad remedial purpose and deterrence goal, rejected the state law anyway. *Bell*, 746 F.2d at 1236, 1239–40.

Second, the Defendants contend that the damages in this case are already adequate: Even if Valenzuela's family could not recover the $3.6 million loss of life award, they would still receive $9.6 million in pre-death pain and suffering and wrongful death damages, which sufficiently serves § 1983's deterrent purpose. But the above awards address different injuries. One can endure pain and suffering separately from dying, while another can die painlessly and instantly. "[T]o further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 258–59 (1978). Additionally, such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene. That reading is not tenable in light of § 1983's remedial purpose. *See Zinermon v. Burch*, 494 U.S. 113, 124

(1990) ("[Section] 1983 was intended not only to . . . provide a remedy for violations of civil rights 'where state law was inadequate,' but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice.'" (citation omitted)).

Finally, the Defendants argue that loss of life damages are too speculative because juries have never experienced death. But juries are regularly asked to assess damages without direct sensory experience of the issue before them—including, in this case, for pre-death pain and suffering. And it is still better for juries to decide whether a plaintiff has received sufficient compensation than for our court to draw arbitrary lines denying compensation entirely.[8]

At bottom, the Defendants ask us to overrule *Chaudhry*. Not only is this outside our authority as a three-judge panel, but it is also inconsistent with the Supreme Court's repeated reminders of § 1983's goals and remedial purpose.

AFFIRMED.

LEE, Circuit Judge, dissenting:

Fermin Valenzuela, Jr. did not deserve to die, even if he defied police orders and forcefully resisted arrest. His father did not deserve to lose his son. His two children did not deserve to lose their father. Valenzuela's family deserves compensation. And the jury agreed: In a civil suit filed by his estate and his surviving family members against the City

[8] Contrary to the dissent's contention that we are mandating maximizing recovery, we continue to leave it to juries to decide the appropriate award in each case.

of Anaheim and its police officers, the jury awarded $13.2 million in damages — $6 million for pre-death pain and suffering, $3.6 million for wrongful death, and another $3.6 million for loss of life.

As tragic as his death was, we must follow the law — and California law prohibits damages for loss of life. That means Valenzuela's estate and his family members should receive $9.6 million instead of $13.2 million. The majority opinion, however, holds that they are entitled to the full $13.2 million, ruling that federal common law supplants California law because it is "inconsistent" with § 1983's goals of deterrence and compensation. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014).

But an award of $9.6 million (for wrongful death and pain and suffering) is not "inconsistent" with deterrence or compensation. We can respect state law enacted by the people of California *and* still meet the twin policy goals of §1983. We should not jettison California state law to maximize damages for §1983 plaintiffs. I thus respectfully dissent.

I. Section 1983 does not require us to maximize damages.

Section 1983 serves as a powerful tool to vindicate the constitutional rights of people who have suffered harm at the hands of the government. 42 U.S.C. § 1983. But because federal law does not provide for damages in § 1983 actions, state law governs the availability of damages unless it is "inconsistent" with the twin policy goals of § 1983, compensation and deterrence. *See Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978); 42 U.S.C. §1988(a). And for better or worse, California decided to bar "loss of life" damages in civil cases (though it allows a panoply of other

damages, including wrongful death and punitive damages). Cal. Civ. Proc. Code § 377.34.[1] So we must determine whether California's ban on loss of life damages is "inconsistent" with the goals of compensation and deterrence. *Id*.

Our analysis should start with the Supreme Court's decision in *Robertson v. Wegmann,* 436 U.S. 584 (1978). The plaintiff there had sued the government for violating his constitutional rights but he passed away before trial, and his estate tried to substitute itself as the plaintiff. Louisiana's statute, however, extinguished a person's tort claims at death, thus preventing an estate from recovering *anything* under § 1983. And because the plaintiff had no family members when he died, Louisiana's law effectively barred any damages. 436 U.S. at 590–91. While the unique facts of that particular case led to no recovery and perhaps an unjust result, the Court held that the state law was not "inconsistent" with § 1983 because "most Louisiana actions survive the plaintiff's death." *Id*. Writing for the Court, Justice Marshall explained that despite "the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." *Id.* at 590–91. In other words, the Court suggested that § 1983 does not trump state

[1] Section 377.34 provides: "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 are limited to the loss or damage that the decedent sustained or incurred *before death*, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Cal. Civ. Proc. Code § 377.34 (emphasis added).

law just because it does not provide maximum recovery for plaintiffs.

But *Robertson* left open a more complex question: Would a similar state law conflict with § 1983 if the challenged governmental conduct directly caused the plaintiff's death? *Id.* at 594. In *Chaudhry*, we answered this question in the narrow context of damages for pre-death pain and suffering. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014). In that case, a police officer shot and killed a 21-year-old autistic man sleeping in front of an apartment building. The police officer alleged that he had lunged towards him with a knife, a claim that was hotly contested at trial. A jury awarded his estate $1 million for pain and suffering, but California law bans damages for pre-death pain and suffering (though California allows someone who does *not* die to sue for pain and suffering). This court reasoned that in "cases where the victim dies quickly" and does not suffer any pain and suffering, "there often will be no damage remedy at all." *Id.* The opinion also noted that "a prohibition against pre-death pain and suffering awards for a decedent's estate has the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim." *Id*. Based on the facts of that case, this court held that California's ban on pre-death pain and suffering was "inconsistent" with §1983's goals of deterrence and compensation. *Id.*

The majority believes that *Chaudhry* controls this case. It interprets that decision to allow federal common law to displace not only California's ban on pre-death pain and suffering (which was at issue in *Chaudhry*) but also the prohibition on loss of life damages (which is at issue here). I do not read *Chaudhry* as broadly as the majority does and

believe it would be unwise to expand its reach to loss of life damages (more on that later).

California's bar on loss of life damages does not undermine § 1983's goal of deterrence. This case is a prime example. Not only are the defendants on the hook for $9.6 million, but they will also likely have to shell out millions more in attorneys' fees. An eight-figure judgment deters even the largest city or police department. *Chaudhry* also highlighted the potentially perverse incentive of allowing someone who does *not* die to obtain pain and suffering damages but barring someone who does die from receiving those same damages. *Id.* But that incongruity does not exist for loss of life damages because someone who does not die cannot seek them. Thus, to borrow the language of *Chaudhry*, California's bar on loss of life damages does not make death more "economically advantageous" than injury. *Id.*

Nor does California's bar on loss of life damages undermine the goal of compensation. *Chaudhry* specifically focused on the danger that "there often will be *no damage remedy at all*" if someone dies quickly and experiences no pain and suffering. *Id.* at 1105 (emphasis added). Under those particular facts, California's state law might be "inconsistent" with § 1983's goals of deterrence and compensation. But that is not the case here. Here, even without loss of life damages, Valenzuela's estate and his children will still receive $9.6 million. While no amount of money can replace the loss of Valenzuela's life, that nearly eight-figure award is not *inconsistent* with § 1983's compensatory goal, especially given that pre-death pain and suffering damages are now recoverable under *Chaudhry*.

The majority warns that California's bar against loss of life damages may hypothetically "preclude recovery for the

decedent who is penniless, without family, and killed immediately on the scene." *Maj. Op.* at 11. But the Supreme Court has already rejected that argument: In assessing whether a state law is "inconsistent" with § 1983's goals, we cannot refuse to apply a state law just because it "caus[es] abatement of a *particular* action." *Robertson*, 36 U.S. at 590–91 (emphasis added). Rather, we must take a broader view to see if the state law denies recovery under § 1983 in "*most*" cases. *Id.* (upholding a state damages bar because "most Louisiana actions survive the plaintiff's death"). Put another way, courts cannot abrogate a state law just because it may lead to a seemingly unjust result in a particular § 1983 case. That is why the Court in *Robertson* upheld the Louisiana state law: Even though it meant that the plaintiff's estate would not receive a penny, it was not "inconsistent" with § 1983 because plaintiffs in most cases would still obtain damages.

The majority opinion also suggests that the pain and suffering and wrongful death damages do not adequately compensate Valenzuela's estate and his surviving family members because these "awards address different injuries." *Maj. Op.* at 11. But neither § 1983 nor any court decision suggests that we can ignore a state law unless it mandates damages for each theory of harm suffered by the plaintiff or his survivors. Simply put, we cannot supplant state law to mandate *maximum* recovery for § 1983 plaintiffs. Rather, we need to address whether the state law is inconsistent with § 1983's twin goals of deterrence and compensation. And here, I believe that $9.6 million satisfies both of those important goals, and that we should thus respect the decision by the people of California to bar loss of life damages.

II. We should revisit *Chaudhry*.

While I do not believe *Chaudhry* controls this case, this court should still revisit that decision in a future en banc proceeding because it misconstrued *Robertson* and relied on flawed assumptions.

First, *Chaudhry* ignored the Supreme Court's guidance about when a state law is "inconsistent" with § 1983's goals of deterrence and compensation. The opinion incorrectly suggested that if a state law denies recovery in a particular case or in *some* cases, that law conflicts with § 1983. *Chaudhry*, 751 F.3d at 1104 (rejecting California's ban on pre-death pain and suffering damages because the "practical effect" would be to "often . . . eliminate . . . damage awards for the survivors of people killed by violations of federal law").

But the Supreme Court in *Robertson* rejected such an expansive reading of the word "inconsistent." The Court upheld the Louisiana law limiting damages — even though it meant that the plaintiff in that case would receive nothing — because plaintiffs in "most" § 1983 cases would still obtain recovery. *Robertson*, 436 U.S. at 590–91. As the Court explained, 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." *Robertson*, 436 U.S. at 593. Put another way, a state law is "inconsistent" with §1983's goals only if "most" §1983 plaintiffs would not obtain recovery. But *Chaudhry* turned *Robertson* on its head and implied that a state law is inconsistent whenever it denies recovery in any case or some cases.

Second, the facts in *Chaudhry* do not support its reasoning. The court refused to apply California's law banning pre-death pain and suffering damages because following it would supposedly "eliminate . . . damage awards for the survivors of people killed by violations of federal law." *Chaudhry*, 751 F.3d at 1104. But the facts of the case belie that assertion: "The jury awarded $700,000 to the Chaudhrys for their wrongful death claim under state law." *Id.* at 1102. Curiously, despite briefly mentioning this fact in the background section of the opinion, the *Chaudhry* court never addressed why a wrongful death damages of $700,000 would not serve the goals of compensation and deterrence. So contrary to *Chaudry*'s implication, California law compensated the plaintiffs, even without pre-death pain and suffering damages. This omission strikes at the core of *Chadhry*'s reasoning for refusing to follow state law.

Finally, the opinion relied on a dubious assumption that state law limiting damages would not deter police officers and in fact may encourage them to deliberately kill suspects. It observed that "a prohibition against pre-death pain and suffering awards for a decedent's estate has the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim." *Chaudhry*, 851 F.3d at 1104.

That apparent assumption is not rooted in reality. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 50 n.17 (1980) (Rehnquist, J., dissenting) (rejecting the claim that law enforcement officers "would intentionally kill the individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability under *Bivens*").

Chaudhry does not provide any support for its assumption that law enforcement officers would deliberately

choose to kill, rather than injure, a suspect to avoid potential liability for pre-death pain and suffering. Most 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. *See* Jonathan Nix, "On the Challenges Associated with the Study of Police Use of Deadly Force in the United States: A Response to Schwartz & Jahn," (28 Jul. 2020), *PLoS One* 15(7); e0236158 at *3, *available at* https://www.ncbi.nlm.nih.gov/pmc/ articles/PMC7386827/ pdf/pone.0236158.pdf. (noting that "roughly 87% of the 5,134 citizens fatally shot by police officers since 2015 were in possession of a potentially deadly weapon") (citations omitted). 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.

In other situations, a seemingly normal investigation or arrest spirals out of control, leading to a tragic death. That is what happened here. Acting on a woman's complaint about a suspicious man following her, two Anaheim police officers approached Valenzuela in a laundromat. An officer asked him to put his hands behind his back, but he did not comply. In the ensuing struggle, all three men fell to the ground, and one of the officers put him in a neck restraint. But Valenzuela slipped away and fled the laundromat. One of the officers tased him multiple times, but Valenzuela sprinted across several lanes of traffic. The officers caught up to him and tried to handcuff him, but Valenzuela resisted. During this five-minute encounter, the officers told him to stop resisting 41 times, all to no avail. Once the officers finally managed to put handcuffs on Valenzuela, the officer who had him in the neck restraint released him immediately. Sadly, Valenzuela had lost consciousness and died eight

days later. As I noted in our related decision, I believe that the officers used excessive force because it was obvious that Valenzuela was in distress. But I do not believe they made a calculated decision to kill him because it would be "economically advantageous." Indeed, once they realized Valenzuela was unconscious, they tried to resuscitate him through CPR.

Finally, even the most malevolent officer would not kill a suspect because it would be "economically advantageous." Almost all police officers today do not face any personal financial liability because the government generally indemnifies them.[2] The real deterrents to police misconduct are not monetary damages (which they do not personally pay anyway), but firings, negative media attention, and potential criminal liability.

Although we must construe §1983 with a broad remedial purpose, we cannot ignore the tension between *Chaudhry* and the actual law that Congress enacted. If Congress really thought that this court's job is to overwrite state law to maximize recovery, why preserve state damages law? *Robertson*, 436 U.S. at 593. Surely, a uniform federal scheme would better accomplish that goal. Instead, Congress told us to respect states' sovereignty unless their law was "inconsistent" with our own. 42 U.S.C. § 1988. *Chaudhry*

[2] *See* Joanna C. Schwartz, "Qualified Immunity and Federalism All the Way Down," 109 Geo. L.J. 305, 321 (2020) (discussing the development of state indemnification practices after the Supreme Court invented modern qualified immunity). *See also* Martin A. Schwartz, "Should Juries Be Informed that Municipality Will Indemnify Officers' § 1983 Liability for Constitutional Wrongdoing?," 86 Iowa L. Rev. 1209, 1217 (2001) (discussing the common practice of state indemnification of officers entitled to qualified immunity).

ignores Congress' directive as well as the will of the California people.

I respectfully dissent.

EXHIBIT 4

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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-Appellees*, v. CITY OF ANAHEIM; DANIEL WOLFE; WOOJIN JUN; DANIEL GONZALEZ, *Defendants-Appellants*.	No. 20-55372 D.C. Nos. 8:17-cv-00278-CJC-DFM 8:17-cv-02094-CJC-DFM ORDER

Filed March 30, 2022

Before: John B. Owens and Kenneth K. Lee, Circuit Judges, and Michael H. Simon,[*] District Judge.

Order;
Statement by Judge Bea;
Dissent by Judge Collins

[*] The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY[**]

Civil Rights

The panel denied a petition for panel rehearing and denied on behalf of the court a petition for rehearing en banc in a civil rights action in which the panel affirmed a jury verdict awarding "loss of life" damages to the family of Fermin Valenzuela, Jr., who died after an encounter with the police.

Respecting the denial of rehearing en banc, Judge Bea, joined by Judges Callahan, Ikuta, Bennett, R. Nelson, Bade, Lee, Bress, Bumatay, VanDyke, and joined by Judge Collins as to Parts I and II(A), stated that the panel's holding, that California's prohibition on post-death "hedonic" damage awards was inconsistent with the compensation and deterrence goals of 42 U.S.C. § 1983, was foreclosed by the Supreme Court precedent of *Robertson v. Wegmann*, 436 U.S. 584 (1978); deepened a circuit split that already exists between the Sixth and Seventh Circuits, *compare Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601-03 (6th Cir. 2006), *with Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984); relied on an incorrect application of 42 U.S.C. § 1988, which governs damages in § 1983 cases; and conflicted with the tort law schemes of the 44 other states which ban post-death "hedonic" damages.

Dissenting from the denial of rehearing en banc, Judge Collins stated that he agreed with Judge Bea that the panel's decision in this case could not be reconciled with *Robertson*

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

v. Wegmann, 436 U.S. 584 (1978). Judge Collins also agreed that the panel clearly erred in holding that loss of life damages, a remedy unavailable at common law, was somehow required in § 1983 actions as matter of federal common law under 42 U.S.C. § 1988(a). Judge Collins therefore concurred in Sections I and II(A) of Judge Bea's statement respecting the denial of rehearing en banc, and respectfully dissented from the order denying rehearing en banc.

COUNSEL

Timothy T. Coates and Peter A. Goldschmidt, Greines Martin Stein & Richland LLP, Los Angeles, California; Steven J. Rothans and Jill Williams, Carpenter Rothans & Dumont LLP, Los Angeles, California; Robert Fabela, City Attorney; Moses W. Johnson, Assistant City Attorney; City Attorney's Office, Anaheim, California; for Defendants-Appellants.

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Christopher D. Hu, Horvitz & Levy LLP, San Francisco, California; Steven S. Fleischman and Scott P. Dixler, Horvitz & Levy LLP, Burbank, California; for Amicus Curiae Association of Southern California Defense Counsel.

Steven J. Renick, Manning Kass Ellrod Ramirez Trester LLP, Los Angeles, California, for Amicus Curiae International Municipal Lawyers Association.

ORDER

Judges Owens and Simon have voted to deny the petition for panel rehearing. Judge Owens has voted to deny the petition for rehearing en banc, and Judge Simon so recommends. Judge Lee has voted to grant the petition for panel rehearing and rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Judge Bea's statement respecting the denial of rehearing en banc and Judge Collins' dissent from the denial of rehearing en banc are filed concurrently herewith.

Judge Watford did not participate in the deliberations or vote in this case.

BEA, Circuit Judge, with whom Judges CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, LEE, BRESS, BUMATAY, and VANDYKE join, and with whom Judge COLLINS joins as to Parts I and II(A), respecting the denial of rehearing en banc:

In *Valenzuela*, a divided panel of our court held that California's prohibition on post-death "hedonic" damages awards,[1] which purportedly compensate the deceased for the pleasure he would have taken from his life had he lived, is inconsistent with the compensation and deterrence goals of 42 U.S.C. § 1983. The court so held despite the $6 million awarded to Valenzuela's estate for his pre-death pain and suffering and the $3.6 million awarded to his family for wrongful death. Indeed, the "hedonic" damages were precisely a repetition of the wrongful death award: another $3.6 million.

The panel's holding is foreclosed by the Supreme Court precedent of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a state law that totally eliminated a § 1983 claim did not violate the compensation and deterrence goals of § 1983), deepens a circuit split that already exists between the Sixth and Seventh Circuits, *compare Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601–03 (6th Cir. 2006) (relying on *Robertson* to hold that prohibitions on post-death "hedonic" damages awards are not inconsistent with § 1983 because § 1983 compensates for "actual damages suffered by the victim" and a loss of life is not "actual . . . because it is not consciously experienced by the decedent"), *with Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (holding

[1] The word "hedonic" comes from the Greek word for "pleasure." Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 Brook. L. Rev. 1037, 1041 (2004).

that a post-death hedonic damages ban was inconsistent with § 1983 because the ban created perverse incentives for police officers to kill rather than injure), relies on an incorrect application of 42 U.S.C. § 1988, which governs damages in § 1983 cases, and conflicts with the tort law schemes of the 44 other states which ban post-death "hedonic" damages. For these reasons, *Valenzuela* should have been given en banc review.

I. BACKGROUND

A. Post-Death Damages at the Common Law: There Were and Are None.

Over 200 years ago, Lord Ellenborough declared that "[i]n a civil Court, the death of a human being could not be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808). Indeed, "[n]othing is better settled than, at common law, the right of action for an injury to the person is extinguished by the death of the party injured." *Mich. Cent. R. Co. v. Vreeland*, 227 U.S. 59, 67 (1913). Said another way: *actio personalis moritur cum persona*—a personal right of action dies with the person. *Henshaw v. Miller*, 58 U.S. 212, 213 (1854). The common law simply does not provide a cause of action, either for the victim's estate or the victim's family, against a tortfeasor if the victim dies before a judgment is obtained. It goes without saying that the common law, by failing to provide a cause of action, also fails to compensate the victim's estate and the victim's family for the value of the life the victim would have lived had he survived.

B. California's Statutory Scheme

Given the "manifestly unjust," *id.*, consequences of a rule which allowed a tortfeasor to escape all liability if his

wrongful deed resulted in the victim's death before judgment, this common law doctrine has been abrogated by "wrongful death" statutes. England started the trend back in 1846 with Lord Campbell's Act, and every state in the union has followed suit. Restatement (Second) of Torts, § 925 cmt. a. ("In the United States also, the omission of the common law has been corrected in every state by statutes colloquially known as 'wrongful death acts.' Most of these are modeled more or less closely on the English Act."). It was not the evolution of the common law but statutory law which gave rise to this cause of action. The common law did not change.

California, like most states, authorizes two types of civil actions for cases where a victim dies at the hands of his tortfeasor.

First, the executor of the decedent's estate may bring a survival action. Under the state's survival statute, the victim's estate is entitled to recover for the "loss or damage that the decedent sustained or incurred *before* death, including any penalties or punitive or exemplary damages that the decedent would have been able to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Cal. Civ. P. Code § 377.34(a) (emphasis added). These damages can include compensation for lost wages, medical expenses, funeral expenses, or other economic losses.

It is true that California's survival statute limits recovery to economic damages suffered by the victim before death. But while most states allow for pre-death pain and suffering damages, this limitation to pre-death damages is typical. Restatement (Second) of Torts § 925, cmt. a. ("If the defendant's act has caused the death, in most states the survival and revival statutes are interpreted as giving the

representative of the estate no more than the damages accruing before death.").

California's wrongful death statute further authorizes the decedent's family, separate from his estate, to recover "all just damages" incurred by the loss of their loved one. Cal. Civ. P. Code § 377.61. The victim's spouse may bring an action for loss of consortium, which compensates the spouse for "not only the loss of companionship and affection through the time of trial but also for any *future* loss of companionship and affection that is sufficiently certain to occur." *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 799 (Cal. 2010) (emphasis in original). The availability of these damages can result in substantial recovery for the families of victims of police violence, which I discuss below.

After *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014), which followed the same dubious reasoning as *Valenzuela* but goes unchallenged here, the decedent's estate is also entitled to recover for pain and suffering the decedent endured before death in a § 1983 action. The *Valenzuela* majority saw no "meaningful way" to distinguish *Chaudhry*," even though, unlike here, *Chaudhry* focused specifically on pre-death damages. The *Valenzuela* majority then found California tort law inconsistent with the compensation and deterrence purposes of § 1983, despite its making available nearly every conceivable form of just damages.

C. Post-Death "Hedonic" Damages

Post-death "hedonic" damages, which purport to compensate a victim for the lost pleasure he would have enjoyed from his life, can include injuries like the lost "ability to enjoy the occupation of your choice, activities of daily living, social leisure activities, and internal well-

being,"[2] or the lost enjoyment of "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities."[3]

California permits "hedonic" damages awards in tort cases where the victim survives. *Huff v. Tracey*, 57 Cal. App. 3d 939, 943 (Cal. 1976) ("California case law recognizes, as one component of general damage, physical impairment which limits the plaintiff's capacity to share in the amenities of life . . . No California rule restricts a plaintiff's attorney from arguing this element to a jury.") (internal citations omitted). But it does *not* allow recovery for post-death "hedonic" damages. *Garcia v. Superior Ct.*, 42 Cal. App. 4th 177, 185 (Cal. Ct. App. 1996).

But like the other limitations in its survival statute, California's prohibition on post-death "hedonic" damages is not unique; all but five states prohibit them.[4] And the states that do allow them do so only by statutory enactment, not as a judge-made invention under the common law.

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[2] Schwartz, *supra* note 1, at 1038.

[3] *Id.* at 1039 (citing *Kansas City S. Ry. Co. v. Johnson*, 798 So. 2d 374, 381 (Miss. 2001)).

[4] The five states are Arkansas (*Durham v. Marbery*, 356 Ark. 491 (Ark. 2004)), Connecticut (*Kiniry v. Danbury Hospital*, 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)).

II. DISCUSSION

A. *Valenzuela*'s Holding is Foreclosed by *Robertson*.

Judge Lee correctly pointed out that our analysis in this case should begin with the Supreme Court's holding in *Robertson*. *Valenzuela*, 6 F.4th at 1104 (Lee, J., dissenting). In *Robertson*, the plaintiff, Clay Shaw, filed a civil rights action under § 1983 in the Eastern District of Louisiana claiming malicious prosecution. Shortly before trial commenced, Shaw died from causes unrelated to the alleged civil rights violation. 436 U.S. at 585. After Shaw's death, the executor of his estate, Edward Wegmann, moved to be substituted as plaintiff. *Id.* at 586. When the district court granted the motion, the defendants responded by moving to dismiss the action on the ground that the action had abated on Shaw's death. *Id.* Under Louisiana law, tort claims survived death only if brought by close relatives. Because Wegmann was not a close relative but a mere executor of Shaw's estate, applying Louisiana law would cause Shaw's § 1983 action to abate. *Id.* at 587–88.

The district court held that the Louisiana law was inconsistent with federal law under § 1988 and denied the defendants' motion to dismiss. *Id.* at 587. The defendants filed an interlocutory appeal to the Fifth Circuit. *Id.* The Fifth Circuit affirmed and found the Louisiana law which caused the action to abate was "inconsistent with the broad remedial purposes embodied in the Civil Rights Acts." *Shaw v. Garrison*, 545 F.2d 980, 983 (5th Cir. 1977) (overruled). The Supreme Court reversed, writing that "despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." *Id.* at 590.

1. If a state law causing total abatement of a particular claim is consistent with § 1983, so is a law barring a single category of damages.

The *Valenzuela* majority adopted the same failed position as the Fifth Circuit in *Robertson*, arguing that California's prohibition on post-death "hedonic" damages, "run[s] afoul of § 1983's remedial purpose . . . ." *Valenzuela*, 6 F.4th at 1103. But just as the *Robertson* Court found "nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship," *Robertson*, 436 U.S. at 590, the *Valenzuela* majority has pointed to "nothing in the statute or its underlying policies to indicate that a state law" prohibiting the award of a single category of damages "should be invariably ignored in favor of a rule of" damages maximization. *Id.* Yet that is precisely what the majority held.

Robertson found that Louisiana's survival law which entirely abated the § 1983 action was not inconsistent with § 1983 especially in light of the fact that "most Louisiana actions survive the plaintiff's death." *Id*. at 591. Similarly, California's tort damages scheme, as modified by *Chaudhry*, is consistent with § 1983 because it makes available *every* category of damages, *except* post-death "hedonic" damages. It stands to reason that if abatement of an entire cause of action can be not inconsistent with the policy goals of § 1983, a law prohibiting a single category of damages should be not inconsistent as well.

2. *Robertson* rejected the majority's point that post-death "hedonic" damages are necessary to incentivize police not to kill.

The *Valenzuela* majority also argued that California law was inconsistent with the deterrent purpose of § 1983 because it has "the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim." *Valenzuela*, 6 F.4th at 1102 (citing *Chaudhry*, 751 F.3d at 1103–04). As a practical and mathematical matter this is not accurate, as discussed below. But more importantly, as a legal matter, the Supreme Court in *Robertson* has already rejected this argument:

> In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit . . . and who would not be survived by any close relatives.

Robertson, 436 U.S. at 592 n.10. To think that a police officer, when deciding to use deadly force, calculates the difference in exposure of himself and his employer to damages for the victim's pain and suffering versus wrongful death damages arising from the instant death of the victim is necessarily based on the "rather far-fetched assumption" that the policeman had information about the suspect's family and earning potential, and had the *sang-froid*, the cynicism, and the time to calculate the optimal result in damage reduction before he used that force.

3. *Robertson* considered and rejected the majority's hypothetical about the victim with no family.

The *Valenzuela* majority also argued that, in the absence of post-death "hedonic" damages, the availability of a wrongful death claim in California is insufficient to bring California's damages scheme in line with the federal law because, "such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene." *Valenzuela*, 6 F.4th at 1103. But the Supreme Court had rejected this argument as well; a zero-recovery result is no basis to disregard state law. *See id.* at 1106 (Lee, J., dissenting) ("[W]e cannot refuse to apply a state law just because it causes abatement of a particular action." (quoting *Robertson*, 436 U.S. at 590–91) (cleaned up)).

Acknowledging that Louisiana's survival law precluded recovery for people without families, the Court went on to say that "surely few persons are not survived by one of these close relatives, and in any event no contention is made here that Louisiana's decision to restrict certain survivorship rights in this manner is an unreasonable one." *Id.* at 592. Indeed, "[t]he reasonableness of Louisiana's approach is suggested by the fact that several federal statutes providing for survival take the same approach . . . ." *Id.* at 592 n.8. Similarly, here, there are no federal statutes which state a possible recovery for post-death "hedonic" damages, and the reasonableness of California's approach is evidenced by the fact that 44 other states prohibit such damages. Confronted with the majority's hypothetical, the Supreme Court was unpersuaded and found no inconsistency between the Louisiana law and the remedial purposes of § 1983, even when total abatement of the family-less and penniless victim's claim was at stake.

4. Any limitations in *Robertson*'s holding do not support the panel majority's conclusion.

The opposition to the petition for rehearing en banc downplays the applicability of *Robertson*'s holding because, in that case, the victim's death was not due to his unconstitutionally inflicted injuries.[5]

But the *Robertson* holding left open only the narrow question of "whether *abatement* based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id*. at 594–95 (emphasis added). The California law at issue does not cause any action to abate—it merely fails to award one item of damages after allowing pre-death economic damages, wrongful death damages, damages for loss of consortium, and now, per *Chaudhry,* pre-death pain and suffering damages.

Furthermore, *Robertson*'s limited holding did not make this court's holding in *Valenzuela* a foregone conclusion. Leaving the question open did not preordain its answer, and the majority opinion fails to explain how *Valenzuela* is meaningfully distinguishable from *Robertson*. Confronted with the facts of *Valenzuela*, in which the family of the victim of the constitutional violations was awarded millions of dollars, it is a stretch to infer that the Supreme Court would have reached a different conclusion than the one it

[5] I acknowledge that *Robertson*'s holding is limited: "Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law . . . has no independent adverse effect on the policies underlying § 1983 . . . 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.

reached in *Robertson*, where the victim's estate went entirely uncompensated.

5. *Robertson* is widely applicable.

The Sixth Circuit, relying on *Robertson* has already held that prohibitions on post-death "hedonic" damages are not inconsistent with § 1983 because § 1983 compensates for "actual damages suffered by the victim" and a loss of life is not "actual . . . because it is not consciously experienced by the decedent." *Frontier Ins. Co.*, 454 F.3d at 601–03.[6]

In *Sharbaugh v. Beaudry*, 267 F. Supp. 3d 1326, 1335 (N.D. Fla. 2017), the court held that Florida's prohibition on pre-death pain and suffering damages in wrongful death actions was not inconsistent with § 1983 because "neither § 1983 nor the common law expressly provided for the survival of a personal injury pain and suffering claim after death occurs, and . . . Congress has placed the survival of claims in the legislative hands of the states."

In that case, the plaintiff argued that the lack of pre-death pain and suffering damages would not satisfy the compensation and deterrence goals of § 1983 because the victim, "had a learning disability which limited his earning potential, he had no loss of earnings before his death, he

[6] Why the Sixth Circuit's opinion is perfectly consistent with the common law theory of awarding damages only for harms consciously experienced is discussed below. *See infra* Part II(C)(2). However, the Seventh Circuit has reached the opposite conclusion. *See Bell*, 746 F.2d at 1239 (holding that a Wisconsin law precluding post-death "hedonic" damages was inconsistent with § 1983 because it created perverse incentives for police officers to kill rather than injure). If not vacated en banc, the panel majority's opinion here will deepen the circuit split.

permitted his children to be adopted by his father-in-law, and the State of Florida paid for his cremation." *Id.* at 1336.

The court was unpersuaded. Citing *Robertson*, the court correctly noted that the "inquiry under § 1988 . . . is not whether the level of damages that a particular plaintiff will receive in the specific circumstances of one case is inconsistent with the civil rights policies but rather whether *the state law* is inconsistent with federal policies." *Id.* Even if looking at the actual damages awarded to the plaintiff was the relevant inquiry under *Robertson*, in this case, Valenzuela's estate and his family were awarded millions of dollars even without the "hedonic" damages.

B. California Tort Law is Consistent with the "Broad Remedial Purposes" Which Underlie § 1983.

Consistent with the Supreme Court's decision in *Robertson*, California's ban on post-death "hedonic" damages awards should not be viewed in a vacuum. *Robertson* found that Louisiana's survival law which entirely abated the action was not inconsistent with § 1983 in light of the fact that "most Louisiana actions survive the plaintiff's death." *Id*. at 591. Similarly, here, California's prohibition on post-death "hedonic damages" should be viewed in the context of the other available categories of damages, including damages for pre-death economic losses, wrongful death, loss of consortium, and, as modified by *Chaudhry*, pre-death pain and suffering.

1. Unconstitutional police killings do not save money in California.

Not only has the majority's "perverse effect" argument been rejected by the Supreme Court but given the wide availability of damages under California law, there is simply

no evidence that police officers are economically incentivized to kill rather than injure. *Valenzuela*, 6 F.4th at 1102 (citing *Chaudhry*, 751 F.3d at 1103–04). In fact, the facts of *Valenzuela* belie this assertion.

Imagine if Valenzuela's injuries were not fatal and he survived his encounter with police long enough to obtain a judgment at trial. Under California law, plaintiffs are not entitled to a separate pain and suffering instruction and a pre-death "hedonic" damages instruction. *Huff*, 57 Cal. App. 3d. at 944. Thus, in this hypothetical, the jury would have been able to compensate Valenzuela only for his pain and suffering and any economic damages he incurred as a result of the officers' excessive force. Based on what the jury awarded Valenzuela's estate for his pre-death pain and suffering, we can assume this number would be in the ballpark of $6 million. *Valenzuela*, 6 F.4th at 1101 n.4.

If Valenzuela had died prior to trial but the jury had not awarded post-death "hedonic" damages in violation of California law, the jury could have awarded the $6 million for pre-death pain and suffering to Valenzuela's estate *and* the $3.6 million it awarded for wrongful death to the family, for a total of $9.6 million. That is a damages award $3.6 million dollars greater than what Valenzuela would have received had he lived, even without post-death "hedonic" damages. We see that the same is true 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*. There, 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 life. Even operating under the doubtful assumption that police officers respond to their economic incentives when choosing to apply deadly force, they are still properly incentivized to avoid the use of

deadly force, and thereby avoid an adverse wrongful death award. This is so even without post-death "hedonic" damages added to the equation. The majority's math does not add up.

2. The awards, even absent post-death "hedonic" damages, were more than adequate as to deterrence and compensation.[7]

Westlaw has several tools to compare the wrongful death awards that the families in *Valenzuela* and *Craig* received to see whether my claim that wrongful death awards in § 1983 cases are sufficient to satisfy the remedial goals of § 1983 is borne out.

First, take a look at the Westlaw Personal Injury Valuation Handbook. This resource compiles statistics from wrongful death jury trials to create an average, or "basic injury value" for wrongful death claims based on the age, marital status, and number of children of the deceased. This basic injury value can then be adjusted for income. Valenzuela was thirty-two when he died, single, and had two children. Thus, his basic injury value for wrongful death according to the handbook is $1,737,197. However, he had no employment nor salary at the time of his death. Thus, we decrease this base number by 94%, which leaves us with $104,231.82. Someone in the position of Valenzuela's family could hope to recover only $104,231.82 at a jury trial for wrongful death on average. Valenzuela's family was awarded $3.6 million.

[7] Neither the plaintiffs in *Valenzuela* nor *Craig* sought *additur* to increase the damages awards; *additur* is available under California law. Cal. Civ. Proc. Code § 662.5.

We see a similar result in *Craig*. Brandon Witt was thirty-nine and single, with no children at the time of his death. It does not appear that evidence of his income or salary was presented at trial, so without adjusting for income, the basic injury value for his wrongful death amounts to $975,000. His parents were awarded $1.4 million for his wrongful death.

And there is no reason to believe that these outcomes are statistical aberrations. Westlaw has another tool, California Jury Verdicts and Settlements, which allows us to compare wrongful death awards in similar cases. In *Estate of Rose v. County of Sacramento*, 2017 WL 5564148 (E.D. Cal. 2017), the parents of an excessive force victim who died by police gunshot received $4.5 million in wrongful death damages. In *Sentell v. City of Long Beach*, 2013 WL 6515430 (C.D. Cal. 2013), the excessive force victim's family received $4.5 million in wrongful death damages. In *Estate of Pickett v. County of San Bernardino*, 2018 WL 10230033 (C.D. Cal. 2018), the excessive force victim's parents were awarded $8.5 million in wrongful death damages.

The availability of other forms of damages, including wrongful death damages, brings California's tort scheme in line with federal law, even in the absence of post-death "hedonic" damages. In *Garcia*, 42 Cal. App. 4th at 185, the California Court of Appeal reached that conclusion when it held that California's prohibition on post-death "hedonic" damages awards was not inconsistent with § 1983 because the availability of punitive damages in survival actions satisfied the compensation and deterrence goals of § 1983.

3. The majority's rebuttal is unpersuasive.

The majority opinion in *Valenzuela* offers two counterpoints to explain why the availability of a wrongful

death remedy is not enough to bring California's prohibition on post-death "hedonic" damages in line with federal law. Neither of these arguments are persuasive.

a. The victim without family is not before us.

First, the majority argues that California's wrongful death remedy is insufficient to deter police killings because "such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene." *Valenzuela*, 6 F.4th at 1103. But these are not the facts before us. Moreover, this argument was already foreclosed by *Robertson*, which, as discussed above, refused to toss aside state tort law merely because that law resulted in a zero-recovery outcome for that particular plaintiff, even if that plaintiff died with no family.

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). Yet the idea that police officers perform this "detached reflection" out of economic self-interest is the dubious assumption upon which *Valenzuela*'s holding rests.[8]

[8] Judge Lee's dissent also correctly points out that even in the unlikely event that officers take time to reflect on their economic

b. Post-death "hedonic" damages do not compensate the victim.

The majority also dismissed out of hand the possibility that California's wrongful death claim brings California's statutory scheme in line with § 1983 simply because the wrongful death award "address[es] different injuries." *Valenzuela*, 6 F. 4th at 1103. Really? If the wrongful death award and the post-death "hedonic" damages award are for "different injuries," why then do the two awards in *Valenzuela* match to the penny? Much more likely than attempting to speculate how the elements of one award might differ in economic value from those of the other is the likelihood that the jury simply doubled the awards for Valenzuela's death: $3.6 million and $3.6 million for each of the divorced Valenzuela's two children.

This assumption is borne out by the closing arguments. Valenzuela's attorney did not argue that the jury should award a specific amount for Valenzuela's loss of life to his estate and a specific amount for wrongful death to the children separately. Instead, he repeatedly stated that all damages were to compensate Valenzuela's children:

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incentives before deploying deadly force, most are not personally liable for the damages awards they incur. *Valenzuela*, 6 F.4th at 1108 ("[E]ven the most malevolent officer would not kill a suspect because it would be 'economically advantageous.' Almost all police officers today do not face any personal financial liability because the government generally indemnifies them. The real deterrents to police misconduct are not monetary damages (which they do not personally pay anyway), but firings, negative media attention, and potential criminal liability.") (Lee, J., dissenting) (footnote omitted). Of course, neither of the *Valenzuela* nor *Craig* juries found the officers were "malevolent," since punitive damages were not awarded against them.

> So I know it sounds a little confusing because you're talking about the pain and suffering for someone who has died already and his loss of life, but under the Fourth Amendment, because you found excessive or unreasonable force, those are damages that are recoverable by law and they go to the children. Those damages go to the children.

This point was driven home by the court's own jury instructions: "Ladies and gentlemen, I just want to be clear . . . You must award only the damages that fairly compensate the children for their loss."

Instead of the jury performing a separate calculation for the lost pleasure of Valenzuela's life, Valenzuela's children enjoyed double recovery for their wrongful death damages.[9] Rather than "compensation," this double counting seems like over-compensation, especially since § 1983 also provides for an award of attorney's fees.[10]

Just because the wrongful death claim compensates the family of the victim instead of the victim's estate (and thus, possible creditors) does not mean that the wrongful death claim by itself cannot satisfy the deterrent purpose of § 1983. What matters for deterrence is the size of the damages award, not the person to whom the award is paid. As for compensation, *Robertson* already held that compensating the victim's estate does not serve the compensation goal of

[9] The two awards for the death of Brandon Witt are only slightly more disguised: his two parents were awarded post-death "hedonic" damages of $1.4 million and wrongful death damages of $1.8 million.

[10] The prevailing party in a § 1983 action is entitled to attorney's fees under 42 U.S.C. § 1988(b).

§ 1983 anyway, as those awards are always enjoyed by the beneficiaries of the victim's estate, and not the victim of the unconstitutional violation himself. *Robertson*, 436 U.S. at 592.[11]

The size of the wrongful death damages awarded to the families of the victims in *Valenzuela* and *Craig* demonstrate why California's prohibition on post-death "hedonic" damages is not inconsistent with the compensation and deterrence goals of § 1983. And the majority's only response to this point rests on flawed assumptions about how police officers respond during emergencies and who is ultimately responsible for paying out these multi-million-dollar damages awards. The majority would toss aside a robust state tort law scheme for failure to achieve the unenumerated policy goals of § 1983 based on a hypothetical which strains credulity and then replace that state law with a rule which, as the numbers show, does not do a better job of serving those goals.

C. Post-death "hedonic" damages are contrary to the common law of torts.

It is not the role of this court to decide whether post-death "hedonic" damages are a good idea as a policy matter. California, one of the most plaintiff-friendly of jurisdictions, has already decided to prohibit them—along with 44 other states. But there is good reason *not* to second guess California's choice. Post-death "hedonic" damages contravene traditional tort law liability rules and cannot be reliably calculated.

[11] Why *Robertson*'s analysis on this point is consistent with traditional tort law rules I discuss below. *See infra* Part II(C)(1).

1. Post-death "hedonic" damages do not compensate the victim of the unconstitutional injury.

"[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." Restatement (Second) of Torts, § 901, cmt. a. Because post-death "hedonic" damages are not awarded to the victim of the tort but are awarded only after the victim has died, the award is always enjoyed by the decedent's estate. Awards that go to the decedent's estate are never able to restore the decedent to his prior position of being alive nor do they provide substitute compensation to the victim.

Indeed, because post-death "hedonic" damages are awarded to the estate of the victim, and not the victim's relatives, that award would be distributed pursuant to California's probate code, which pays the estate's creditors before the estate's heirs. Cal. Prob. Code § 11640(a). If the award does end up with the victim's family, now the family enjoys double-recovery, as they can also receive damages for the loss of their loved one via a wrongful death action.

According to *Robertson*, compensating the estate of the victim of the constitutional violation does not serve the compensation goal of § 1983. "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.

Because the compensation purpose of § 1983 is to compensate the victim of the constitutional violation, and not the victim's family, the rule offered by the *Valenzuela* majority does nothing to serve § 1983's compensation goal, as post-death "hedonic" damages will always be enjoyed by

the beneficiaries of the victim's estate—some of whom may be creditors, or non-family legatees—and not the victim himself. *Robertson* dictates that compensating the victim's estate is irrelevant in determining whether a state law is consistent with the compensation goal of § 1983.

2. Post-death "hedonic" damages evade the cognitive awareness requirement of tort law.

Failing to compensate the victim of the unconstitutional injury is not the only problem with post-death "hedonic" damages. They also create an "end-run" around traditional tort liability rules which require the victim to have "'cognitive awareness' of his or her loss to ensure that he or she receives compensation only for the injuries actually suffered.'"[12] This is the same conclusion the Sixth Circuit reached when it upheld Michigan's ban on post-death "hedonic damages" as not inconsistent with § 1983. *Frontier Ins. Co.*, 454 F.3d at 601–03.

Whether a victim was cognitively aware of the lost pleasure of the life he would have lived, while perhaps an interesting spiritual or metaphysical question, seems difficult to prove by a preponderance of the evidence. This is especially so in cases involving police encounters in suspected crime cases which typically, as in *Valenzuela* and *Craig*, develop and end quite quickly.

[12] Schwartz, *supra* note 1, at 1045.

3. Post-death "hedonic" damages are speculative and expert attempts to quantify them are inadmissible.

Tort damages should be calculated "with as much certainty as the nature of the tort and the circumstances permit." Restatement (Second) of Torts § 912 (1979). Indeed, "chief significance attaches to the nebulous but universally accepted rule which proscribes uncertain or speculative damages. In some cases, it prevents any substantial recovery, though it is clear that serious harm has been suffered." Restatement (First) of Torts, § 944 cmt. c.

Post-death "hedonic" damages are difficult to calculate and largely speculative. In contrast, in a wrongful death action, courts use evidence of the decedent's earning capacity to calculate a fair award. As to pre-death pain and suffering, the jury can use its own experience with pain and suffering.[13] But how does a jury put a number on the pleasure the particular decedent would have enjoyed from life had it not been cut short?

The plaintiff's bar has attempted to use expert economist testimony to fill this analytical gap. But after *Daubert*,[14]

[13] Indeed, "[o]ne of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." *Pearl v. City of Los Angeles*, 36 Cal. App. 5th 475, 491 (Cal. App. 2019). California's model jury instructions for non-economic damages in a tort case provide: "No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." Judicial Council of California Civil Jury Instructions 3905(A)(2022).

[14] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

these expert opinions are often excluded for failing to meet the requirements of Federal Rule of Evidence 702. The Journal of Legal Economics has observed that "[t]he primary trend in federal cases has been continuing rejection of hedonic damages testimony . . . There still has never been a reported federal decision decided under *Daubert* in which a trial court permitted hedonic damages testimony involving specific dollar values for the plaintiff."[15] As of 2018, this trend has changed little, apart from a single unpublished district court order denying a defendant's motion to exclude hedonic damages expert testimony.[16]

"Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert* have unanimously held quantifications of such damages inadmissible." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (collecting cases).

Experts attempt to quantify post-death "hedonic" damages by using several approaches. First is "willingness to pay." Experts compare "(1) consumer willingness to purchase safety devices; (2) worker willingness to accept higher compensation for a greater risk of death; and (3) the

[15] Thomas R. Ireland, *Trends in Legal Decisions Involving Hedonic Damages From 2000–2012*, 19 J.L. & Econ 61, 63 (2012).

[16] Thomas R. Ireland, *Legal Decisions Involving Hedonic Damages From January 2013-February 2018*, 24 J.L. & Econ 51, 53 (2018) (citing *Farring v. Hartford Fire Ins. Co.*, 2014 WL 12770120 (D. Nev. 2014) (unpublished).

government's willingness to impose safety violations." [17] "For instance, assume that an optional driver's side air bag costs $500, and that this air bag reduces the chance of death in an accident from six in 10,000 down to two in 10,000. Reducing the chance of dying by four in 10,000, or one chance in 2,500 at a cost of $500 suggests, according to this theory, that the consumers place a value of $1,250,000 (2,500 x $500) on their lives."[18]

The second method is called the "individual avoidance" approach, which is

> based on the theory that workers will demand higher wages in jobs with a greater risk of death . . . For example, consider a twenty-five-year-old college graduate earning forty thousand dollars a year who works as a salesperson – an occupation with a negligible work-related risk of death. Suppose that now he is offered a different job, with a one in 10,000 annual risk of death . . . If the individual is willing to accept a job with a one in 10,000 chance of death for an additional $5,000 in salary, then it would stand to reason, according to this theory, that he or she would accept certain death for 10,000 times this amount, or $50,000,000 dollars.[19]

[17] Schwartz, *supra* note 1, at 1061–1062.

[18] *Id.* at 1062.

[19] *Id.* at 1062–63.

The third method is

> based on the cost-benefit analysis conducted by government agencies in deciding whether to adopt a safety regulation . . . According to Dr. Smith [one of the nation's leading experts in hedonic damages], most of these government studies "show a willingness to implement legislation at a cost of approximately two million dollars per life saved; very little legislation beyond three million."[20]

"Hedonic" damages experts use one of these three methodologies to establish a base number for the value of human life, and then employ a "loss of pleasure of life scale" to determine the extent of the damages, ranging from "minimal" to "catastrophic," as would be the case in a post-death "hedonic" damages award, where the victim's life is entirely lost.[21]

As one can imagine, these methodologies are rife with flaws. Many of the lowest-paying jobs are also the most dangerous. Human life valuations by the government are used to weigh the relative costs and benefits of preventing small risks of death (like plane crashes and automobile accidents) over large population groups—these calculations are not used to compensate individual and idiosyncratic

[20] *Id.* at 1063.

[21] *Id.*

plaintiffs.[22] Moreover, asking jurors to determine "the amount that the victim would have paid to avoid the risk" to determine the value of his lost life does not take into account the victim's individual risk tolerance, and also suffers from immense hindsight bias.[23] As the California Court of Appeal put it in *Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 768 (Cal. Ct. App. 1998), these "baseline calculations have nothing to do with [a] particular plaintiff's injuries, condition, hobbies, skills, or other factors relevant to her loss of enjoyment of life." The Seventh Circuit, in *Mercado v. Ahmed*, 974 F.2d 863, 871 (7th Cir. 1992), upholding a district court's decision to exclude expert testimony on "hedonic" damages, wrote the following:

> [W]e have serious doubts about [the] assertion that the studies [relied] upon actually measure how much Americans value life. For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions made by profit-seeking manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, spending on safety items reflects a

[22] W. Kip Viscusi, *The Flawed Hedonic Damages Measure of Compensation for Wrongful Death and Personal Injury*, 20(2) J. Forensic Econ. 113, 117 (2007).

[23] *Id.* at 127–28.

> consumer's willingness to pay to reduce *risk*, perhaps more a measure of how cautious a person is than how much he or she values life. Few of us, when confronted with the threat, "Your money or your life!" would, like Jack Benny, pause and respond, "I'm thinking, I'm thinking." Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an airbag is not immediately obvious.

If "hedonic" damages are difficult to calculate reliably when jurors can hear the testimony of a living victim, these methodological issues are exacerbated when the victim cannot take the stand, and experts, friends, and family are forced to speculate as to how much pleasure the victim would have taken in his remaining years of life.

D. The Majority Misapplied the Text of § 1988.

By upholding the awards of post-death "hedonic" damages in *Valenzuela,* the majority misapplied the text of § 1988 to award a form of damages not available under applicable (California) state law or the common law.

Section 1988 instructs courts to award damages in accordance with "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." 42 U.S.C. § 1988(a). Thus, § 1988 indicates a two-step process. First, the federal court determines the common law as modified by the state constitution and statutes of the applicable state. Second, the court decides whether that state law is inconsistent with the Constitution and laws of the United States.

Performing the first step, the *Valenzuela* majority properly identified the relevant state law: California Civil Code § 377.34, which allows for § 1983 claims to survive but limits damages to those the "decedent sustained or incurred before death." The majority then moved on to the second step and, while I disagree with the conclusion it reached, analyzed whether California law was consistent with the policies which underlie the federal law.[24]

After steps one and two are completed, "section 1988 runs out of gas." *Dobson v. Camden*, 705 F.2d 759, 766 (5th Cir. 1983). If the state law is consistent with federal law, it is simple enough to apply it. But if federal law fails to provide the desired remedy, and the state remedy is inconsistent with the federal law, what law of damages should be applied? The only plausible course of action supported by the text of the § 1988 statute would be to apply the "Constitution and laws of the United States."

Of course, nothing in the Constitution or its amendments deals with the availability of damages caused by deprivation of rights by state actors.

And "the laws of the United States" are no more fruitful. To the extent that the "laws of the United States" refers to federal law as enacted by Congress, there is not a single federal statute awarding post-death "hedonic" damages. That includes § 1983, which does not provide a damages

[24] While this concept is unsupported by the text of § 1988, we are bound by precedent which states that in determining whether the state law is consistent with the laws of the United States, we also look to "the policies expressed in them." *Robertson*, 436 U.S. at 585 (1978). In the case of § 1983, those policies include "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Id.*

remedy at all. To the extent that "the laws of the United States" refers to precedent from the United States Supreme Court, I can find no decision which awards post-death "hedonic" damages. As noted, there is no Ninth Circuit precedent to follow and the other circuits are split.

Supreme Court precedent instructs the lower federal courts in § 1983 cases to look to the common law.[25] But as discussed at perhaps too much length above, the common law did not and does not allow for any recovery in tort after the death of the victim—let alone recovery for post-death "hedonic" damages. The common law as practiced in the fifty states similarly prohibits post-death "hedonic" damages. Recall that only five states allow them, all by statutory enactment, not their judge-developed common law.

Here, had the *Valenzuela* majority properly applied § 1988 and looked to the Constitution, the laws of the United States, or the common law to find the applicable law of damages, it would have applied the common law and would have had no legal basis to uphold the post-death "hedonic" damages awards in *Valenzuela* and *Craig*.

III. CONCLUSION

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

[25] *See Carey v. Piphus*, 435 U.S. 247, 257 (1978) ("[O]ver the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.").

respectively in *Valenzuela* and *Craig* without post-death "hedonic" damages, are not necessary to satisfy the policy goals of § 1983 under Supreme Court precedent. For these reasons, our court should have ordered a review of the two cases by an en banc panel.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

I agree with Judge Bea that the panel's decision in this case cannot be reconciled with *Robertson v. Wegmann*, 436 U.S. 584 (1978). I also agree that the panel clearly erred in holding that loss of life damages, a remedy unavailable at common law, is somehow required in § 1983 actions as matter of federal common law under 42 U.S.C. § 1988(a). I therefore concur in Sections I and II(A) of Judge Bea's statement respecting the denial of rehearing en banc, and I respectfully dissent from today's order denying rehearing en banc.