No. _____

In the
Supreme Court of the United States

COUNTY OF ORANGE AND NICHOLAS PETROPULOS,
Petitioners,

v.

KATHY CRAIG AND GARY WITT, INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO BRANDON LEE WITT,
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under controlling Supreme Court authority, must a federal court apply a state law prohibition on "loss of life" damages in survival claims pursued via 42 U.S.C. § 1983, or is a state limitation on abstract, speculative damages of this type inconsistent with the purposes of Section 1983?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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

- County of Orange, Deputy Nicholas Petropulos, defendants in the district court and appellants in the Ninth Circuit and petitioners here; and
- Kathy Craig and Gary Witt, individually and as successors-in-interest to Brandon Lee Witt, deceased, plaintiffs and appellees below and respondents here.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- Kathy Craig; Gary Witt, individually and as successors-in-interest to Brandon Lee Witt, deceased v. County of Orange; Nicholas Petropulos, United States Court of Appeal for the Ninth Circuit, Case No. 19-55324.
- Kathy Craig, et al., v. County of Orange, et al., United States District Court, Central District of California, Case No. 8:17-cv-00491-CJC (KES).

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The district court's judgment in favor of respondents and its order denying Petitioners' post-trial motions are not published and are reproduced in the appendix to this petition ("App.") at pages 5-10. The Ninth Circuit's August 18, 2021 decision is not published and is reproduced in the appendix at pages 1-4. The Ninth Circuit's March 31, 2022 Order denying panel and en banc rehearing is not published and is reproduced in the appendix at pages 40-42.

The Ninth Circuit's August 3, 2021 opinion in a companion case (*Valenzuela v. City of Anaheim)* is published at 6 F.4th 1098 (9th Cir. 2021)), and is reproduced in the appendix at pages 43-66. The Ninth Circuit's March 30, 2022 Order denying panel and en banc rehearing and Statement respecting the denial of rehearing en banc and Dissent from denial of rehearing en banc in the companion *Valenzuela* matter is published at 29 F.4th 1093 (9th Cir. 2022) and is reproduced in the appendix at pages 67-103.

BASIS FOR JURISDICTION

This Court has jurisdiction to review the Ninth Circuit's August 18, 2021 decision on writ of certiorari under 28 U.S.C. § 1254(1). The petition is timely filed consistent with the extension of time granted on June 23, 2022, No. 21A848.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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

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

Consistent with the Petition for Writ of Certiorari filed in the companion *Valenzuela* case, Petitioners here contend that the Ninth Circuit's decision to not apply California's limitation on post-death "loss of life" damages in survival cases violates 42 U.S.C. § 1988(a), which provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

This case raises an important question concerning recoverability of hedonic "loss of life" damages in civil lawsuits brought under 42 U.S.C. § 1983. The Ninth Circuit's decision tracks a companion case decided by the same panel in *Valenzuela v. City of Anaheim*, 6 F.4th 1098 (9th Cir. 2021) which is presently before

this Court on a Petition for Writ of Certiorari.[1] The legal issues in this case and *Valenzuela* are indistinguishable: specifically, whether speculative, post-death "loss of life" damages are recoverable in Section 1983 litigation given California's express statutory bar on recovery of such damages in survival actions.

The decision in this case warrants this Court's attention for multiple reasons. Initially, if left unchecked, the Ninth Circuit's decision here (together with its ruling in *Valenzuela*) violates this Court's holding in *Robertson v. Wegmann*, 436 U.S. 584 (1978) which requires respect for California's ban on "loss of life" damages. The outcome in this case separately contradicts the teaching in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) which rightly bars speculative damages awards of the type just endorsed by the Ninth Circuit. Additionally, this case, 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) *with Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984).

A. Factual Background

On February 15, 2016, Orange County Sheriff's Department Deputy Nicholas Petropulos was on routine patrol in Yorba Linda, California, in an area known for narcotics use and drug transactions. (App.

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[1] *See*, Supreme Court Case No. 21-1598.

13). While outside of a hotel, Deputy Petropulos noticed an individual, later identified as Brandon Lee Witt, sitting in a vehicle in the hotel parking lot and talking to a man who was standing outside the vehicle. (*Id.*). Deputy Petropulos drove past the two men before returning to their last known location. (*Id.*). By that time, Witt had moved his vehicle to another parking space and the man Witt was speaking with previously was now talking to a woman in the parking lot. (*Id.*). Deputy Petropulos parked his patrol car and approached Witt's vehicle on foot. (*App. 13*). Given his narcotics trafficking concerns, Petropulos initiated a verbal exchange with Witt. (App. 13-14).

Deputy Petropulos asked Witt several questions, to which Witt replied that he was in the process of moving, did not have any identification, was not on probation or parole, and did not know the woman in the parking lot. (App. 14). In response, Petropulos told Witt to turn off the car at least twice, after which Witt produced a "pen-like metal tool, which was apparently used to manipulate the vehicle's ignition." (*Id.*). Petropulos then instructed Witt to "drop it and step out of the car." (*Id.*).

Shortly thereafter, the woman approached Witt (who was still in the car) and asked for a baby bottle. (App. 14). Deputy Petropulos questioned whether Witt lied about knowing the woman and then ordered Witt to step out of the car. (App. 14-15).

From there, Witt began questioning Deputy Petropulos' authority and asked if he could call the

Deputy's sergeant. (App. 15). With Witt still in the car, Petropulos gave commands that Witt not move his hands. (App. 16). Eventually, Petropulos ordered Witt to put his hands outside of the car. (App. 17). Once Witt complied, Deputy Petropulos put his hands on Witts' wrists to hold them in place while the two continued to exchange words. (App. 17). Witt thereafter abruptly pulled his hands back into the vehicle, and in doing so pulled Petropulos partially inside the open car window. (App. 18).

At this point, Witt broke free from Deputy Petropulos' grip. (App. 18). Another Deputy, Brian Callagy, arrived on scene and parked his patrol car so that its front bumper touched Witt's car's rear bumper. (Id.). Petropulos then commanded Witt to put the vehicle in park, and both Deputies reached into Witt's car in an effort to control Witt's hands. (*Id.*). Video footage captures Witt's vehicle moving forward and backward during the ensuing struggle. (*Id.*).

As Witt's resistance continued, Deputy Petropulos unholstered his gun and pointed it at Witt. (App. 18). A tense exchange ensued during which Petropulos continued to command Witt to put the vehicle in park. (App. 18-19). During this exchange, Witt's vehicle moved back and forth "as he apparently shifted the gear from reverse to drive and back again." (App. 19).

Witt's car moved "five feet forward, away from the deputies, at about five miles an hour," which caused Deputy Petropulos to collide with Deputy Callagy.

(App. 19). Petropulos then saw Witt's left hand on the steering wheel, but lost sight of Witt's right hand for "two to five seconds." (*Id.*). At this point, Deputy Petropulos thought Witt was reaching for a weapon. (*Id.*). Accordingly, Deputy Petropulos fired one round to stop the threat. (*Id.*). Witt died from his resulting injuries. (*Id.*).

B. Procedural History

Respondents, Witt's biological parents, filed suit pursuant to 42 U.S.C. § 1983 and California state law against the County of Orange and Deputy Petropulos. (App. 20). They alleged "unreasonable detention," "excessive force," "violation of substantive due process," "battery," "negligence," and violation of California's "Bane Act" (Civil Code § 52.1). (*Id.*). The case proceeded to trial on only Respondents' federal "excessive force" and state law claims. (*Id.*).

Trial proceeded in two phases. (App. 20). After a four day jury trial on liability, the jury returned a verdict in favor of Respondents. (*Id.*). It found Deputy Petropulos "used excessive or unreasonable force against Witt"; "violated Witt's right under California Civil Code § 52.1"; acted negligently;[2] and acted "with malice, oppression, or in reckless disregard of Witt's rights." (App. 5-8, 20).

Trial then proceeded to a second phase on the question of damages. (App. 21). The jury thereafter

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[2] The jury assigned 60% of fault to Deputy Petropulos and 40% fault to Witt. (App. 7, 20).

awarded survival damages of $1,800,000 for Witt's "loss of life," $200,000 for Witt's "pre-death pain and suffering," and $700,000 to each Respondent (for a total of $1,400,000) in wrongful death damages for their "past loss of Witt's love, companionship, comfort, care, training, education, protection, affection, society, and moral support." (App. 8-10, 21). The jury awarded $0 in punitive damages against Deputy Petropulos. (App. 8-10, 21).

In their post-trial motions, Petitioners argued that "loss of life" damages were not available under § 1983 because California state law did not allow "loss of life" damages in survival actions. (App. 21). The district court disagreed and found that California's bar on "loss of life" damages is inconsistent with the policies behind § 1983. (App. 22-24). It concluded that not allowing "loss of life" damages "would undermine the vital constitutional right against excessive force" and "[p]erversely…would incentivize officers to aim to kill a suspect, rather than just harm him." (App. 21). In reaching its decision, the district court recognized that "[n]either the Supreme Court nor the Ninth Circuit has addressed" the availability of loss of life damages in Section 1983 litigation "directly." (App. 22-23).

Petitioners appealed, and after briefing, on August 18, 2021, the Ninth Circuit issued an unpublished memorandum decision affirming Respondents' "loss of life" damages award. (App. 1-4). In its decision, the panel rejected Petitioners' arguments for the same reasons that it rejected similar arguments in the

companion Ninth Circuit *Valenzuela* case, as both cases were decided by the same panel. (App. 3).

Valenzuela also arises from a law enforcement encounter that resulted in the death of a suspect. (App. 47-49). 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." (App. 49-50). As was the case here, the Ninth Circuit affirmed the "loss of life" damages award in *Valenzuela*. (App. 51-55).

In reaching this decision, the Ninth Circuit found that California's statutory prohibition on "loss of life" damages was "inconsistent with" the remedial policies animating § 1983; namely, compensation for those injured by a deprivation of federal rights and deterrence to prevent future misconduct. (App. 52-54). Ninth Circuit Judge Kenneth K. Lee dissented from the panel opinion in *Valenzuela*, finding, among other things, that the majority's opinion did not properly respect California's law banning recovery of post-death "loss of life" damages. (App. 55-66).

The Ninth Circuit panel's opinion in *Valenzuela* was issued for publication on August 3, 2021, just fifteen days before the panel's memorandum decision in this case. (App. 1, 43). The *Craig* memorandum cites directly to *Valenzuela* in support of its decision affirming the "loss of life" damages award, stating that "*Valenzuela* is indistinguishable from this case." (App. 3). Judge Lee agreed "that the issue in [*Craig*] is indistinguishable from [the court's] previous

discussion on loss of life damages in *Valenzuela*," and dissented from the decision in *Craig* "for the same reasons laid out in [his] dissent in *Valenzuela*." (App. 4).

On March 30, 2022, the Ninth Circuit denied a timely petition for panel rehearing and rehearing en banc in *Valenzuela*. (App. 67-103). 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 this case. (App. 40-42).

Judge Carlos Bea authored a statement respecting the denial of rehearing en banc in *Valenzuela* that was joined in whole or in part by ten other Ninth Circuit judges. (App. 71-103). In so doing, Judge Bea repeatedly referenced the appealed damages award in this case. (App. 85, 86, 91, 94, 102, 103). Judge Bea's dissent criticized the panel majority's decision as being foreclosed by this Court's holding in *Robertson v. Wegmann*, 436 U.S. 584 (1978) (finding that a state law that totally eliminated a Section 1983 claim did not violate the compensation and deterrence goals of Section 1983). (App. 71-72, 76-83). Judge Bea also highlighted how post-death "loss of life" damages run contrary to the common law of torts (and California statute) in part because the decedent does not actually experience the loss, resulting in impermissibly speculative damages awards. (App. 92-100). Ultimately, Judge Bea and his dissenting colleagues concluded:

> Post-death 'hedonic' damages awards are speculative, contravene traditional common law damages principles, contradict California state law, and where, as here, the awards would have been $9.6 million and $1.6 million respectively in *Valenzuela* and *Craig* without post-death 'hedonic' damages, are not necessary to satisfy the policy goals of § 1983 under Supreme Court precedent.

(App. 103).

Judge Daniel P. Collins separately dissented from the denial of rehearing en banc, and therein joined Judge Bea' conclusion that the panel majority's decision cannot be reconciled with *Robertson*. (App. 103). Judge Collins also agreed that "loss of life" damages are unavailable at common law, and that the panel majority erred in holding such damages are required in Section 1983 actions as a matter of federal common law under 42 U.S.C. § 1988. (App. 103).

On June 24, 2022, the *Valenzuela* defendants filed their Petition for Writ of Certiorari in this Court. (App. 104-135). Therein, the *Valenzuela* Petitioners identify this case as a "companion case" and contend, among other things, that "there simply no support for the Ninth Circuit's determination that California's prohibition of post-death hedonic damages is inconsistent with § 1983's goals of deterrence and compensation, given California's otherwise broad remedial scheme in its survivorship and wrongful death statutes, as evidenced by respondents' robust

recovery for damages [in *Valenzuela* and *Craig*]." (App. 124, 130).

On July 28, 2022, two amicus curiae briefs were filed in support of the *Valenzuela* Petition, both of which highlight the adequacy of California's remedial scheme in satisfying the twin goals of Section 1983 – and the consequent lack of need for an additional Section 1983 "loss of life" damages remedy. Both amicus briefs also encouraged this Court to halt the Ninth Circuit's disregard for established principles of federalism. (*See generally*, Brief of Amicus Curiae Association of Southern California Defense Counsel in Support of Petitioners, No. 21-1598 and Brief of Amici Curiae International Municipal Lawyers Association and League of California Cities In Support of Petitioners, No. 21-1598).[3]

WHY CERTIORARI IS WARRANTED

REVIEW IS NEEDED TO COMPEL COMPLIANCE WITH SECTION 1988 AND TO RESOLVE A CIRCUIT SPLIT

In *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978), this Court made plain that "[t]he policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state

[3] As the Ninth Circuit itself has found the issues in this case to be "indistinguishable" from those in *Valenzuela* (App. 3-4), portions of the following discussion track those offered in the pending *Valenzuela* Petition.

law." These policies work in unison: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey v. Piphus*, 435 U.S. 247, 256-257 (1978). Section 1983 provides no textual source for any measure of compensation. Rather, Congress directs damages in civil rights matters pursued via Section 1983 to be addressed under 42 U.S.C. § 1988.

Section 1988 provides that where "the laws of the United States" are not "adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law," courts are to turn to "the common law, as modified and changed by the constitution and statutes" of the forum state. 42 U.S.C. § 1988(a). State law is to control "so far as the same is not inconsistent with the Constitution and laws of the United States." *Id.* As explained by Judge Bea, applying Section 1988 involves a "two-step process." (App. 100). "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." (App. 100).

In *Robertson*, this Court addressed whether a Louisiana survival statute that totally eliminated a Section 1983 claim was inconsistent with the remedial

purposes of Section 1983. *Robertson*, *supra*, 436 U.S. at 587-588. The *Robertson* Court observed that "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" *Id.* at 589. Accordingly, and applying Section 1988, the Court found that Louisiana's "statutory law, modifying the common law, provides the principal reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is 'inconsistent with the Constitution and laws of the United States.'" *Id.* at 589-590 (citations omitted).

From this foundation, the Court found that Louisiana's survival law was not inconsistent with Section 1983, particularly given that "most Louisiana actions survive the plaintiff's death." *Id.* at 591. Important here, when evaluating the state statute's consistency with Section 1983, the Court did not focus on a particular claim; rather, it focused on whether Louisiana's survival scheme as a whole was inconsistent with Section 1983's goals. *Id.* at 593.

California has its own statutory scheme covering civil actions where a victim dies due to tortious conduct. For starters, an executor of the decedent's estate may bring a survival action 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…." *Cal. Code Civ. Proc.* §§ 377.34(a). California does not allow recovery of post-death "loss of life" damages. *Cal. Code Civ. Proc.* § 377.34(a), (b) (limiting recovery to damages incurred before a decedent's death). As such, California mirrors the remedial schemes of 44 other states which also proscribe recovery for "loss of life."[4]

Separately, a decedent's family may bring suit for "wrongful death" to recover "all just damages" flowing from their lost relationship with the decedent. *Code Civ. Proc.* § 377.61. Thus, and as Judge Bea observed, California's state tort scheme is "robust" (App. 91) and "makes available *every* category of damages, *except* post-death 'hedonic' damages.'" (App. 78) (emphasis original).

Following *Robertson*, California's prohibition of "loss of life" damages within an otherwise broad remedial scheme is not enough to render California's survival damages statute "inconsistent with" Section 1983. As Judge Bea put it: "[i]t stands to reason that if abatement of an entire cause of action can be not inconsistent with the policy goals of § 1983," as in

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[4] The five states that have permitted them have done so by legislative enactment only. They 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)). (App. 76 and n.4).

Robertson, then "a law prohibiting a single category of damages should be not inconsistent as well." (*Id.*).

But despite *Robertson* having been on the books for over 43 years, this is exactly what the *Valenzuela* and *Craig* majority panels found. (App. 78).

The Ninth Circuit panel decision in *Valenzuela* (and by extension, in *Craig*) largely avoided discussing *Robertson* in favor its own circuit precedent – chiefly *Chaudry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014); (App. 52 – Ninth Circuit stating: "Our analysis begins, and largely ends, with *Chaudry*."); (App. 53 – Ninth Circuit stating: "We see no meaningful way to distinguish *Chaudry* from this case").

Robertson, however, undermines much of the Ninth Circuit's reliance on *Chaudry*, as Judge Bea rightly observed. (App. 79-80). The *Valenzuela* Petitioners highlight the many ways in which *Robertson* forecloses the panel majority's conclusion, and each of those reasons apply with equal force to the "indistinguishable" *Craig* case now at bar. (App. 120-124). As stated in the *Valenzuela* Petition, "There is simply no support for the Ninth Circuit's determination that California's prohibition of post-death hedonic damages is inconsistent with § 1983's goals of deterrence and compensation, given California's otherwise broad remedial scheme in its survivorship and wrongful death statutes, as evidenced by respondent's robust recovery for damages here and the similarly substantial recovery

in the companion case, *Craig v. Petropulos*, 856 F. App'x 649." (App. 124).

In contrast to this case, the Sixth Circuit has respected a forum state's prohibition on "loss of life" damages – just as *Robertson* teaches. Specifically, in *Frontier Ins. Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), the Sixth Circuit followed *Robertson* and held a Michigan ban on post-death hedonic damages was not inconsistent with Section 1983 because Section 1983 compensates for "actual damages suffered by the victim," and post death compensation claims are not based on anything "actual…because it is not consciously experienced by the decedent" *Frontier Ins. Co.*, *supra*, 454 F.3d at 601-603.[5] By disagreeing with the Sixth Circuit, the panel majority more closely aligned itself with the Seventh Circuit's decision in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984), which held a Wisconsin law barring post-death hedonic damages was inconsistent with Section 1983 because it created "perverse incentives" for law enforcement to kill rather than injure suspects. As Judge Bea recognized, however, *Robertson* "has already rejected this argument." (App. 79-80). Accordingly, by aligning itself with the Seventh Circuit, the Ninth Circuit is deepening a circuit split predicated on a flatly erroneous application of this Court's precedent.

This issue is important, as evidenced by the discussion herein, the forceful 11-judge dissent in

[5] As further addressed *infra*.

Valenzuela and by the *Valenzuela* Petitioners' own well-stated Petition. If left unchecked, the Ninth Circuit's decision piles on top of the erroneous conclusions reached in *Valenzuela* (and by the Seventh Circuit's errant *Bell* decision). Only this Court can correct these eyebrow-raising errors.

REVIEW IS NECESSARY TO PROTECT AGAINST PROLIFERATION OF IMPERMISSIBLY SPECULATIVE DAMAGES AWARDS

This Court has long held that for damages to be awarded under Section 1983, they must be "compensatory" in character. *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978) (the deterrence and compensation policies underlying Section 1983 work in unison: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."). And since their inception, "compensatory" damages have addressed only negative events actually experienced by the aggrieved party. *See*, Prosser, Wade and Schwartz, Cases and Materials on Torts, p. 535 (10th ed. 2000) (tort law has long required that the plaintiff have a "cognitive awareness" of his or her loss to ensure that s/he receives compensation only for the injuries s/he actually suffered).

As a clinical matter, decedents lack sensory perception. *See*, Alexa Hansen, *Unqualified Interests,*

Definitive Definitions: *Washington v. Glucksberg* and the Definition of Life", 36 Hastings Const. L.Q. 163, 178 (Fall 2008) ("clinical death is defined as 'cardiac arrest accompanied by apnea and loss of consciousness'") (citations omitted). Thus, and as Judge Bea correctly observed, "compensatory" damages for a decedent's unknowable negative post-death "experiences" represent an "'end-run' around traditional tort liability rules which require the victim to have a 'cognitive awareness' of his or her loss to ensure that he or she receives compensation only for the injuries actually suffered." (App. 94) (internal quotation omitted).

California law that informs survival damages in Section 1983 cases properly protects against unfairly speculative damages awards by limiting one's remedies to damages for injuries experienced *before* death. *See*, Cal. Code Civ. Proc. § 377.34. This is true even after a recent state law amendment permitting recovery for "pre-death pain and suffering" on a limited trial basis,[6] and even after the Ninth Circuit's decision in *Chaudry v. City of Los Angeles*, 751. F.3d

[6] Effective January 1, 2022, California now allows recovery of pre-death pain and suffering, with the impact of such awards to be assessed over the course of four years. *See*, Cal. Code Civ. Proc. 377.34(b) ("Notwithstanding subdivision (a), in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.").

1096 (9th Cir. 2014) (allowing pre-death pain and suffering damages in Section 1983 cases).

Thus, California's statutory scheme comports with common law tort principles banning speculative awards for losses not actually experienced, which this Court has found to be controlling in Section 1983 litigation. *See*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986) ("when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts."); *see also*, Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron,* 69 Brook. L. Rev. 1037, 1057 (2004) ("A cognitive awareness requirement for the recovery of pain and suffering is a necessary prerequisite if noneconomic damage awards are to serve some compensatory function. In sum, unless the plaintiff shows that he actually felt the claimed pain and suffering, such an award becomes not only a 'legal fiction,' but can only be understood as a means of punishment or as reallocation of wealth without regard to actual harm. Hedonic damages…should be subject to this same threshold requirement."). The "loss of life" damages award in this case wrongly casts this "cognitive awareness" requirement aside.

Before the Ninth Circuit's opinion in *Valenzuela* and the decision in this case, two federal circuits had taken up the issue of whether "loss of life" damages should be awarded to decedents in Section 1983

litigation, and they came to opposite conclusions. In *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984), the Seventh Circuit held that a ban on post-death hedonic damages was inconsistent with Section 1983 and then declined to apply multiple state law limitations on survival damages in purported furtherance of Section 1983's "compensation" objective. In contrast, the Sixth Circuit flatly rejected "loss of life" damages in Section 1983 litigation – thereby giving force to Michigan's law on the subject. Specifically, in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590, 601-603 (6th Cir. 2006), the court found:

> [A] decedent's pain and suffering are compensable under [borrowed Michigan tort law] only if they were experienced consciously 'between the time of injury and death.'… If hedonic damages are recoverable, therefore, they are recoverable only to the extent that the decedent experienced a loss of enjoyment of life before dying…. Loss of the enjoyment that would have been experienced but for the decedent's death is not compensable….

Despite the passage of nearly four decades, the Seventh Circuit has yet to formulate a jury standard for making "loss of life" awards. *See*, Federal Civil Jury Instructions of the Seventh Circuit, No. 7.26, p.194 (2017) ("The Seventh Circuit has not provided a standard for awarding damages for loss of life.") (committee comment). This appears to be for good reason, as it sharply diverges from the well-settled

rule that damages awards must be tied to events which are actually experienced by the aggrieved party. For its part, the Ninth Circuit's pattern jury instructions rightly embrace this long-settled principle. *See*, Ninth Circuit Manual of Model Civil Jury Instructions, No. 5.2 (2017) (providing that compensatory damages must actually have been "experienced" in the past or "with reasonable probability will be experienced in the future").

All of which brings us to the Ninth Circuit panel's decisions in this case and *Valenzuela*. By endorsing *Bell*, the panel affirmed its approach is in direct conflict with *Frontier Ins. Co.*, both in analysis and conclusion. (App. 52-54). Indeed, despite the language of its own jury instruction, the panel brushed aside the undebatable point that a "person cannot 'actually experience' the phenomenon of being dead" as a "quasi-metaphysical argument." (App. 54). But to characterize Petitioners' point as such is to evade the real issue. And eleven Ninth Circuit judges recognized as much, as evidenced by Judge Bea's observation that one's cognitive awareness of "the lost pleasure of life…seems difficult to prove by a preponderance of the evidence…." (App. 94). As Judge Bea stated, it follows that "[p]ost-death 'hedonic' damages are difficult to calculate and largely speculative." (App. 94).

And Judge Bea is correct. How to measure what "loss of life" means to those who "experience" it is a deep question which is unanswerable in a judicial

setting, not least because we cannot even pose it seriously as a question in an institution devoted to finding and announcing objective "truth." *See*, *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (the "integrity and fairness of the judicial process" is founded on a "search for the truth.") (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). By allowing a jury to place a value on the "loss of life" experienced by a decedent, the Ninth Circuit has unleashed improperly speculative litigation which is at odds with at least 2,500 years of received judicial wisdom. *See*, Adriaan Lanni, *Publicity and The Courts of Classical Athens*, 24 Yale J.L. & Human. 119 (Winter 2012) ("Athenian public trials" were notable for "fostering *truth*. . ..") (emphasis added).

The problem comes into sharper focus when contrasted with the other damages awarded in this case. Respondents, through their wrongful death claim, were awarded $1,400,000 for the value of their lost relationship with Decedent Witt. (App. 8-9). This award was, of course, based on something of evidentiary value — observable quantifiable facts about what type of relationship Plaintiffs had with Decedent, Plaintiffs' testimony regarding how their life has changed since Decedent's passing, along with these parties' ages (and consequent life expectancy). (App. 21). Respondents, through Decedent's survival claim, have also already been compensated for Decedent's "pain and suffering" from the point of his injury up to the point of his passing. (App. 8). This award was also based on something of evidentiary

value — observable, quantifiable facts about what Decedent experienced between the point of his injury up to the time of his passing. (App. 19). Judge Bea and ten other dissenting judges in Valenzuela recognized all of this. (App. 95).

But the "loss of life" damages claim now endorsed by the Ninth Circuit features none of these evidence-based qualities. As stated by Judge Bea, "[H]ow does a jury put a number on the pleasure the particular decedent would have enjoyed from life had it not been cut short?" (App. 95). The panel majority's opinion provides no good answer to this question. Rather, the majority takes the damages issue firmly and unavoidably into a speculative realm ill-suited for judicial regulation.

No one knows (or can know) what a decedent "experienced" on (and after) the point of his death. Obviously, no decedent can testify about how he "felt" when (or after) he passed. Therefore, no one knows what his "loss" is — or, given the limits on human understanding, whether he suffered any objectively identifiable "loss" at all. Any "answers" given by a jury to questions of this sort would be, of necessity, based on personal guesswork, taste, and opinion rather than required experiential truth.

A modern jury does, of course, have many cultural references to draw upon in pondering what, if anything, a decedent "experiences by" their "loss of

life." Religion offers comfort on this point.[7] Poets write eloquently for (and against) the possibility of a positive human death "experience."[8] Hollywood provides entertainment on the question.[9] Almost all musical genres offer lyrics.[10]

But none of this counts as legitimate courtroom evidence. Science — which does matter from a courtroom evidentiary standpoint — has been unable to "prove" or "disprove" any of our cultural depictions of the death experience. And as Judge Bea observed, science has equally fallen short in its attempt to bridge the "analytical gap" to "'quantify the value of human life….'" (App. 95-96) (quoting *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000); *see*, *id.* ("the federal courts which have considered expert testimony

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[7] *See*, Revelation 21:4 (God "will wipe every tear from their eyes. There will be no more death or mourning or crying or pain, for the old order of things has passed away.").

[8] Some poets see the death "experience" as being a grim fade to insensate darkness. *See, e.g.*, Dylan Thomas, *Do Not Go Gentle Into That Good Night* (1951) (imploring the dying to "[r]age, rage against the dying of the light."). Other poets more optimistically see the death "experience" as a release from this world's burdens and the start of a new joy-filled age. *See, e.g.*, D. H. Lawrence, *New Heaven and Earth* (1917) ("I was carried by the current in death over to the new world,…a new earth, a new I, a new knowledge, a new world of time. [¶] I cannot tell you the mad, astounded rapture of its discovery.").

[9] *See, e.g.*, "Heaven Can Wait" (1978) (motion picture); "The Good Place" (2016-20) (television); "Touched by an Angel" (1994-2003) (television).

[10] *See, e.g.*, Bruno Mars, "Locked Out Of Heaven" (2012); Guns N' Roses, "Knockin' On Heaven's Door" (1987); Led Zeppelin, "Stairway To Heaven" (1971).

on hedonic damages . . . have unanimously held quantifications of such damages inadmissible.")).

Inside and outside of the Section 1983 context, this Court has repeatedly emphasized the requirement that damages awards be based on something more than speculation. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("Doubtless 'the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.' [Citation]. For this reason, no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury.") (quoting *Carey*, *supra*, 435 U.S. at 254); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (". . . *no* compensatory damages c[an] be awarded for violation of [a Constitutional] right absent proof of actual injury. [Citation]. [Our precedent] thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.") (citing *Carey*, *supra*, 435 U.S. at 264); *id.* at 308 (emphasizing that a Section 1983 jury may not provide compensation "on the jury's subjective perception" of "abstract" matters.); *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U.S. 199, 208 (1891) ("In an action for damages by the plaintiff for breach of the contract, it was held that the loss of possible profits, which might have been made if the mill had run properly, was not a proper subject of damages, for the reason that such damages were too remote and speculative.").

The Ninth Circuit failed to properly appreciate the import of these decisions in its opinion recognizing "loss of life" damages in this case. Certiorari should be granted for this reason alone.

IF CERTIORARI IS GRANTED IN THIS CASE AND VALENZUELA, THE CASES SHOULD BE CONSOLIDATED

When appropriate, this Court consolidates cases for hearing when granting certiorari. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56 (2007) ("We consolidated the two matters and granted certiorari to resolve a conflict in the Circuits as to whether § 1681n(a) reaches reckless disregard of FCRA's obligations, and to clarify the notice requirement in § 1681m(a)."); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (consolidating Texaco's and Shell Oil's separate petitions and granting certiorari to determine the extent to which the per se rule against price-fixing applies to join ventures).

By common consent, this case is "indistinguishable" from *Valenzuela* (App. 3-4). Accordingly, Petitioners request that a grant of certiorari be coupled with a consolidation order.

CONCLUSION

For all the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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