APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: August 18, 2021]

MEMORANDUM[*]

No. 19-55324

D.C. No. 8:17-cv-00491-CJC-KES

KATHY CRAIG; GARY WITT, individually and as successors-in-interest to Brandon Lee Witt, deceased,

Plaintiffs-Appellees,

v.

NICHOLAS PETROPULOS,

Defendant-Appellant,

and

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

COUNTY OF ORANGE,

Defendant.

No. 19-56188

D.C. No. 8:17-cv-00491-CJC-KES

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.

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

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

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 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.

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

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.*

APPENDIX B

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case No.: SACV 17-00491-CJC(KESx)

[Filed: May 9, 2019]

KATHY CRAIG and GARY WITT, individually and as successors in interest to BRANDON LEE WITT, deceased,	)
Plaintiffs,	)
v.	)
COUNTY OF ORANGE, and NICHOLAS PETROPULOS, an individual, and DOES 1–10, inclusive,	)
Defendants.	)

JUDGMENT

This action came on regularly for trial on April 23, 2019 in Courtroom 7C of the United States District

Court, Central District of California, Honorable Cormac J. Carney, presiding. Plaintiffs Kathy Craig and Gary Witt were represented by attorneys Dale K. Galipo and Melanie T. Partow of the Law Offices of Dale K. Galipo and Scott D. Hughes of The Law Offices of Scott Hughes. Defendants County of Orange and Nicholas Petropulos were represented by David Lawrence and Natalie Price of Lawrence Beach Allen & Choi, PC.

A jury of eight persons was regularly empaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the case was submitted to the jury. The jury deliberated and thereafter returned a verdict as follows:

PHASE I

We, the jury in the above entitled case, find the following verdict on the questions submitted to us:

QUESTION 1:

Did Deputy Petropulos use excessive or unreasonable force against Brandon Witt?

____X____ YES _____ NO

If you answered "YES," proceed to Question 2.

If you answered "NO," answer no further questions, proceed to the end, and sign and date the verdict.

QUESTION 2:

Did Deputy Petropulos violate Brandon Witt's rights under California Civil Code § 52.1?

____X____ YES _____ NO

Proceed to Question 3.

QUESTION 3:

Was Brandon Witt also negligent during the incident in question?

____X____ YES _____ NO

If you answered "YES," then answer Question 4.

If you answered "NO," proceed to Question 6.

QUESTION 4:

Was Brandon Witt's negligence a substantial factor in causing his death?

___ X _____ YES _____ NO

If you answered "YES," then answer Question 5.

If you answered "NO," proceed to Question 6.

QUESTION 5:

What percentage of fault do you assign for negligence?

Deputy Petropulos	60%
Brandon Witt	40%

Your total must equal 100%.

Proceed to Question 6.

QUESTION 6:

Did Deputy Petropulos act with malice, oppression, or in reckless disregard of Brandon Witt's rights?

____X____ YES _____ NO

PHASE II

We, the jury in the above entitled case, find the following verdict on the questions submitted to us:

QUESTION 1:

What are Brandon Witt's survival damages for his loss of life and for his pre-death pain and suffering?

Brandon Witt:

Loss of life:	$ 1,800,000.00
Pre-death pain and suffering:	$ 200,000.00

Proceed to Question 2.

QUESTION 2:

What are Plaintiffs' wrongful death damages for their past and future loss of Brandon Witt's love, companionship, comfort, care, training, education, protection, affection, society, and moral support?

A. Kathy Craig

Past loss:	$ 700,000.00
Future loss:	$ 0.00

B. Gary Witt

Past loss:	$ 700,000.00
Future loss:	$ 0.00

Proceed to Question 3.

QUESTION 3:

What amount of punitive damages do you award against Deputy Petropulos to punish him and to deter similar acts in the future?

$ 0.00

IT IS NOW THEREFORE ORDERED, ADJUDGED, AND DECREED that final judgment in this action be entered as follows:

Total judgment in the sum of $3,400,000.00, plus costs pursuant to Federal Rule of Civil Procedure 54(d)(1), interest at the rate specified by 28 U.S.C. §1961, and reasonable attorneys' fees as will be determined by the court, is entered against Defendants County of Orange and Nicholas Petropulos in favor of Plaintiffs Kathy Craig and Gary Witt.

Plaintiffs Kathy Craig and Gary Witt are the prevailing parties and may apply to the court for an award of costs and reasonable attorneys' fees as permitted by state and federal law. **IT IS SO ORDERED.**

DATED: May 9, 2019

/s/ Cormac J. Carney
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case No.: SACV 17-00491-CJC(KESx)

[Filed: September 5, 2019]

KATHY CRAIG, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
COUNTY OF ORANGE, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANTS' MOTION TO ALTER JUDGMENT TO VACATE DAMAGES FOR LOSS OF LIFE [Dkt. 216] AND DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW [Dkt. 215]

I. INTRODUCTION

This case arises out of the fatal shooting of Brandon Lee Witt by Orange County Sheriff's Deputy Nicholas Petropulos while Witt was sitting in his car in a hotel

parking lot in Yorba Linda, California. On March 17, 2017, Witt's parents, Plaintiffs Kathy Craig and Gary Witt, filed this lawsuit in federal court against Defendants County of Orange and Deputy Petropulos. The case proceeded to trial in April 2019, where Plaintiffs presented evidence to support their claims for (1) excessive force under 42 U.S.C. § 1983, (2) battery, (3) negligence, and (4) violation of the Bane Act, Cal. Civ. Code § 52.1(b). After four days of trial, the jury returned a verdict in favor of Plaintiffs, finding Deputy Petropulos used excessive force. (Dkt. 189.) The trial proceeded to a second phase on damages. The jury returned with a second verdict, awarding Plaintiffs a total of $3.4 million in damages. (Dkt. 202.)

Before the Court are two post-trial motions: (1) Defendants' motion to alter the judgment to vacate the jury's award of damages for loss of life, and (2) Defendants' motion for judgment as a matter of law or, in the alternative, for a new trial. (Dkts. 215, 216.) For the following reasons, the motions are **DENIED**.[1]

II. BACKGROUND

On February 15, 2016, around 12:45 p.m., Orange County Sheriff's Deputy Nicholas Petropulos was on routine patrol at the Extended Stay America in Yorba

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for September 16, 2019 at 1:30 p.m. is hereby vacated and off calendar.

Linda, California.[2] He was not responding to any particular service call, but the area was known for narcotics use and transactions. While on patrol at the hotel, Deputy Petropulos noticed an individual, who was later identified as Brandon Lee Witt. Witt was sitting in a vehicle in the parking lot and talking to a man who was standing outside the vehicle. The vehicle had no front license plate.

When Deputy Petropulos's patrol car passed the two men, the man talking to Witt stared at Deputy Petropulos. Deputy Petropulos drove to the front of the hotel parking lot to see if the men would leave. When the men did not leave, he went back to the location in the parking lot where they had been. By the time Deputy Petropulos returned, Witt had moved his vehicle to another parking space. Deputy Petropulos parked his patrol car near Witt's vehicle. Deputy Petropulos noticed that a woman had joined the man with whom Witt had been speaking, and the man and woman were now located a couple of parking spaces away.

Deputy Petropulos approached Witt's car. Deputy Petropulos had never seen Witt before and he had no information about Witt's criminal history or whether he was on probation or parole. Deputy Petropulos

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[2] Defendants failed to provide any transcripts in support of their motion to alter judgment and motion for judgment as a matter of law or, in the alternative, for a new trial. The Court's summary here is based on its recollection of the evidence at trial, which was largely consistent with the declarations and evidence that formed the basis of the Court's order granting in part and denying in part Defendants' motion for summary judgment.

initiated a consensual encounter with Witt. Deputy Petropulos's dash cam captured audio for the entirety of his conversation with Witt, although some portions are incomprehensible. Deputy Petropulos approached Witt and asked him what he was doing. Witt told Deputy Petropulos that he was in the middle of moving. Deputy Petropulos then asked if Witt had any identification and whether he was on probation or parole. Witt said he did not have any identification and that he was not on probation or parole.

Deputy Petropulos asked Witt whether he knew the man and woman in the parking lot. Witt responded that he did not. Deputy Petropulos told him to turn his car off. Witt's car, a Toyota Avalon, was full of a myriad of items. Deputy Petropulos asked Witt about the contents of the car: "Anything I need to worry about?" Witt replied, "Not at all." Deputy Petropulos repeated his command to turn the car off. At that point, Witt displayed a pen-like metal tool, which was apparently used to manipulate the vehicle's ignition. Deputy Petropulos told him to drop it and step out of the car. Witt placed the metal item on the center console near the gear shifter. Deputy Petropulos asked Witt if the Toyota Avalon was his car. Witt said it was. Deputy Petropulos told Witt to keep his hands on the wheel. Witt's response is inaudible on the recording. Deputy Petropulos then said to him, "You had no front plate on the car when I looked at it earlier." Witt responded, "It's right here. I had --."

Around that point, the woman in the parking lot approached Witt and asked for a baby bottle. Deputy Petropulos said to her, "What? Do you know him? Any

reason he would tell me he didn't know you a second ago?" Her responses are inaudible. Deputy Petropulos then turned to Witt, "Why would you lie, bro?" Witt's responses are mostly inaudible. Deputy Petropulos then said, "All right. Do me a favor. Open the door slowly. I'm going to have you step out, man." Witt asked Deputy Petropulos if he had a reason for this. Deputy Petropulos responded, "Yes, I don't like the way you're acting right now. I haven't confirmed your ID, anything like that. I think you're lying to me." Witt responded, "I can give you all the information you need."

Deputy Petropulos continued to ask Witt to step outside of the car. Witt tried to explain that he had some incident with someone pretending to be a police officer about six months ago. Witt asked Deputy Petropulos if he could verify his identity. Deputy Petropulos responded, "You can step out of the car and do as you're told, man." Witt told him he had no jurisdiction. Deputy Petropulos replied that he was with the Orange County Sheriff's Department and they were in the city of Yorba Linda. Witt asked if he could call Deputy Petropulos's sergeant. Deputy Petropulos responded, "Get out of the car. I'll get him here for you." Deputy Petropulos then continued to ask Witt to keep his hands on the wheel and keep his hands outside of the car. Witt said, "I'm going to call 911 and (inaudible) can I call your sergeant? I'm going to call your sergeant." At one point, Witt had a cell phone in his hand, but he dropped it when ordered by Deputy Petropulos. Deputy Petropulos ran Witt's license plate and it came back current for a four-door Toyota, registered to Brandon Witt out of Corona.

Deputy Petropulos then asked for Witt's name. Witt gave him his full name, birthday, and social security number. Deputy Petropulos then said, "You're (inaudible) how this is going right now." Witt gave an inaudible response. Deputy Petropulos then said, "I asked you to step out of the vehicle. You're lucky that I haven't ripped you out right now." Deputy Petropulos continued to tell Witt not to move his hands. After some time, Witt repeated his earlier request for Deputy Petropulos to identify himself. Deputy Petropulos responded with his name and badge number. He told Witt, "They're coming right now." The two continued to speak back and forth:

> DEPUTY PETROPULOS: Put your hands over here.
> WITT: Hey, there's no need to touch me like that. Come on. I --
> DEPUTY PETROPULOS: You're reaching in --
> WITT: (Inaudible.)
> DEPUTY PETROPULOS: Dude, I swear to God.
> WITT: Look, stop. Why are you assaulting me? Why are you assaulting me? Come on, man. Look, I stopped -- I stopped, all right.
> DEPUTY PETROPULOS: 104, I'm going to (inaudible) Code 3.[3] I'm going to shoot you (inaudible).
> WITT: No.
> DEPUTY PETROPULOS: I'm going to fucking shoot you. Put your hands outside of this fucking car.

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[3] "Code 3" means there is an emergency and the deputy needs assistance as soon as possible.

> WITT: Okay. Let me get out -- let me get out -- let me get out.
> DEPUTY PETROPULOS: Put your hands outside of the fucking car.
> WITT: All right. They're out. They're out. Let me get out.
> DEPUTY PETROPULOS: You just tried to (inaudible).
> WITT: No, I did not. I swear -- I'm scared -- I'm scared. Okay. I'm scared.
> DEPUTY PETROPULOS: I will shoot you if you throw that car in fucking drive again.
> WITT: Okay. All right. I'm scared.
> DEPUTY PETROPULOS: Just keep your hands outside the fucking window.
> WITT: Officer --
> DEPUTY PETROPULOS: You think I'm joking right now.
> WITT: But I've been shot before, sir.
> DEPUTY PETROPULOS: Okay. I'm not going to shoot you as long as you fucking listen.
> WITT: All right. All right. Yes, sir. Can you ask the girl to tell -- tell you whatever information.
> DEPUTY PETROPULOS: They're coming right now.
> WITT: Okay, that's fine. I'll stay right here.
> DEPUTY PETROPULOS: Stay right there. I'm not taking my hands off you. Dude, keep your hands where I can fucking see them.

During this exchange, Deputy Petropulos placed his hands on Witt's wrists while they were outside the car, holding them there. When Witt attempted to pull his arms and hands back into the vehicle, Deputy

Petropulos maintained his grip and partially went inside the vehicle's open window. Witt broke free of Petropulos's grip. Deputy Petropulos leaned in through the open window, placed his right arm across Witt's body in a seatbelt-like fashion, and tried to gain control of Witt's right hand. At some point during this struggle, Deputy Petropulos drew his firearm.

Another deputy, Brian Callagy, arrived at the scene in his patrol car. Deputy Callagy noticed that the Toyota's reverse lights were on. He parked so that his police car's front bumper touched Witt's car's rear bumper. When Deputy Callagy arrived, Deputy Petropulos reholstered his gun. Deputy Petropulos again reached into the vehicle. He commanded Witt to put his car in park. Deputy Callagy attempted to assist Deputy Petropulos in controlling Witt's hands. The video footage shows Witt's vehicle moving forward and backward. During the struggle, Witt yelled, "I've been assaulted -- I've been assaulted before." Deputy Petropulos responded, "Stop fucking reaching around. You're going to get shot." Deputy Petropulos then unholstered his gun and pointed it at Witt. The conversation escalated:

> DEPUTY PETROPULOS: You're going to get shot, motherfucker.
> WITT: No, please. Please, don't.
> DEPUTY PETROPULOS: Put it in park.
> WITT: Please don't (inaudible).
> DEPUTY PETROPULOS: (Inaudible.)
> WITT: I just been shot -- I been shot.
> DEPUTY PETROPULOS: Put the car in park then -- in park and listen.

WITT: No, please, don't -- please.
DEPUTY PETROPULOS: I'm going to fucking --
WITT: (Inaudible.)

During this exchange, Witt's car moved back and forth as he apparently shifted the gear from reverse to drive and back again.

Then, Witt's car slowly moved five feet forward, away from the deputies, at about five miles per hour, causing Deputy Petropulos to collide with Deputy Callagy, and in turn causing Deputy Callagy to stumble and turn away. When Deputy Callagy turned away, he saw nothing in Witt's right hand. Deputy Petropulos could see Witt's left hand on the steering wheel, but Witt's right hand apparently went out of Deputy Petropulos's view for two to five seconds. Deputy Petropulos was standing beside the vehicle, not in front of it or in its direct path. Deputy Petropulos testified that he thought Witt was reaching for a weapon. Deputy Petropulos, however, had not seen any weapon in the eight to nine minutes that he was speaking with Witt, and he had no information that Witt was armed. Deputy Petropulos said, "Fuck it." He then fired one round at Witt, striking him in the chest.

The car moved forward into the bushes and came to a stop in a drainage area. The tires kept spinning, burning rubber and creating smoke. Deputies Petropulos and Callagy kept their distance. After the smoke cleared and backup deputies arrived, Witt was removed from the vehicle. The deputies initiated first aid, and paramedics arrived shortly thereafter. Witt died as a result of the gunshot.

On March 17, 2017, Plaintiffs Gary Craig and Kathy Craig, Witt's biological parents, filed this action against Defendants County of Orange and Deputy Petropulos in federal court. (Dkt. 1.) Plaintiffs asserted causes of action for (1) unreasonable detention, (2) excessive force, (3) violation of substantive due process, (4) battery, (5) negligence, and (6) violation of the Bane Act, Cal. Civ. Code § 52.1(b).[4] (*See* Dkt. 37 [Third Amended Complaint].) The Court granted summary judgment to Defendants on the unreasonable detention claim. (Dkt. 92.) Plaintiffs proceeded to trial on their excessive force, battery, negligence, and Bane Act claims.[5]

On April 23, 2019, the court impaneled a jury. Trial proceeded in two phases. After four days of trial, the jury returned a verdict in favor of Plaintiffs on the question of liability. The jury found that Deputy Petropulos used excessive or unreasonable force against Witt and that Deputy Petropulos violated Witt's rights under California Civil Code § 52.1. (Dkt. 189.) The jury also found that Witt was contributorily negligent during the incident. (*Id.*) The jury assigned 60% of fault to Deputy Petropulos and 40% of fault to Witt. (*Id.*) Lastly, the jury found that Deputy Petropulos acted with malice, oppression, or in reckless disregard of Witt's rights. (*Id.*)

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[4] Plaintiffs voluntarily dismissed their claims for denial of medical care and *Monell* liability under 42 U.S.C. § 1983. (Dkt. 75.)

[5] Plaintiffs did not proceed to trial on their substantive due process claim.

Next, the second phase of the trial proceeded on the question of damages. Since the jury found that Deputy Petropulos acted with malice, oppression, or in reckless disregard of Witt's rights, the jury heard evidence relevant to determining an award of punitive damages, including information regarding Deputy Petropulos's financial circumstances and ability to pay. The jury also heard evidence regarding Plaintiffs' relationship with Witt. The jury returned a verdict awarding survival damages of $1,800,000 for Witt's loss of life and $200,000 for Witt's pre-death pain and suffering. (Dkt. 202.) The jury also awarded $700,000 each to both Plaintiffs for wrongful death damages for their past loss of Witt's love, companionship, comfort, care, training, education, protection, affection, society, and moral support. (*Id.*) The jury awarded $0 in punitive damages against Deputy Petropulos. (*Id.*)

III. DAMAGES FOR LOSS OF LIFE UNDER 42 U.S.C. § 1983

Defendants first ask this Court to alter the judgment under Federal Rule of Civil Procedure 59(e) and vacate the jury's award of $1,800,000 for Witt's loss of life. (Dkt. 216.) Because California law bars recovery for a decedent's loss of life, Defendants argue the Court should vacate that portion of the jury's award. But doing so 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.

Because federal law is silent on the measure of damages in § 1983 actions, state law governs unless it is inconsistent with the policies of § 1983. *See* 42 U.S.C.

§ 1988; *Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978). California law does not allow a decedent's estate to recover for the decedent's loss of life. Cal. Civ. Proc. Code § 377.34. Instead, state law limits recovery to pre-death economic damages in an action brought by a decedent's successor-in-interest. *Id.*

A primary goal driving Congress's enactment of § 1983 was to provide for killings unconstitutionally caused or acquiesced in by state governments. *See Monroe v. Pape*, 365 U.S. 167, 172–76 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 690 (1978). There are two policies underlying § 1983: (1) to compensate persons injured by the deprivation of federal rights and (2) to prevent abuses of power by those acting under color of state law. *Robertson*, 436 U.S. at 590–91. Whether California's bar on loss of life damages applies in § 1983 actions depends on whether this limit is inconsistent with § 1983's twin goals of compensation and deterrence. *See id.* at 591–92.

Neither the Supreme Court nor the Ninth Circuit has addressed this issue directly. The Ninth Circuit came closest to the question in *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014). The court there considered whether California's bar on survival damages for pre-death pain and suffering was inconsistent with § 1983. *Chaudhry*, 751 F.3d at 1103. It held that it was. By limiting damages in survival actions to the victim's pre-death economic losses, "[t]he practical effect of [California Code of Civil Procedure] § 377.34 is to reduce, and often to eliminate, compensatory damage awards for the survivors of

people killed by violations of federal law." *Id.* at 1104. In cases where the victim dies quickly, there will often be no remedy at all. *Id.* And "[e]ven in cases of slow death where pre-death economic damages might be available, § 377.34's limitation will often be tantamount to a prohibition, for the victims of excessive police force are often low-paid or unemployed." *Id.* A prohibition against pre-death pain and suffering creates a perverse effect: it is more economically advantageous for a defendant to kill rather than injure his victim. *Id.* California's prohibition against pre-death pain and suffering damages thus limits recovery too severely to be consistent with § 1983's deterrence policy. *Id.* at 1105.

Chaudhry cited with approval an out-of-circuit decision, *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). *Bell* held that a Wisconsin statute barring damages for loss of life was inconsistent with § 1983. *Id.* at 1239, *overruled in part on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). In that case, a Milwaukee police officer shot and killed the decedent, planted a knife on his body, and then lied about the circumstances of the killing. *Id.* at 1215–18. The decedent's siblings and estate sued under § 1983. In rejecting a Wisconsin law precluding recovery of damages for loss of life in survival actions, *Bell* concluded that "if Section 1983 did not allow recovery for loss of life notwithstanding inhospitable state law, deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure." *Id.* at 1239.

Other courts have reached the same conclusion. The majority of California district courts considering the issue have held that § 377.34's bar on loss of life damages is inconsistent with the policies of § 1983. *See, e.g.*, *T.D.W. v. Riverside Cty.*, 2009 WL 2252072, at *7 (C.D. Cal. July 27, 2009) (finding excluding damages for loss of enjoyment of life would be inconsistent with the purposes of § 1983); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167–68 (N.D. Cal. 1981) (finding § 1983's deterrent purpose "is hardly served when the police officer who acts without substantial justification suffers a harsher penalty for injuring or maiming a victim than for killing him"); *see also Thomas v. Cannon*, 2017 WL 2954920, at *3 (W.D. Wash. July 10, 2017) (finding Washington's limit on damages for loss of life was inconsistent with § 1983's policies). And since *Chaudhry*, no court has held otherwise. *See Estate of Casillas v. City of Fresno*, 2019 WL 2869079, at *16 (E.D. Cal. July 3, 2019) (collecting cases).

The Court agrees with the weight of authority holding that California's bar on loss of life damages is inconsistent with the policies behind § 1983. Foreclosing recovery for loss of life creates a perverse incentive: officers should aim to kill, not injure. Even more, they should kill quickly, lest the decedent's estate recovers damages for pre-death pain and suffering, now available under *Chaudhry*. Incentivizing the use of executioner-style force is clearly inconsistent with § 1983's policy of deterrence. It also trivializes our fundamental right against excessive force. The Constitution demands more from those entrusted by the government to use deadly force. They must do so

only when necessary to protect themselves and others from serious physical injury.

Damages for loss of life also provide compensation for individuals killed by a violation of their constitutional rights. Every life has a value. This platitude rings true even if someone is unemployed, homeless, or broke. In the name of tort reform, California law subverts this principle by limiting damages in survival actions to the victim's pre-death economic losses. Consider how this limit impacts § 1983 actions where an officer unjustifiably used deadly force. Victims of excessive force are often low paid or unemployed. They are more likely to be persons of color, and thus statistically likely to be paid less on the dollar. These lives have worth beyond economic loss. Barring recovery for the innate value of a life, particularly where an officer has killed someone, conflicts with § 1983's policy of compensation.

Defendants contend that allowing loss of life damages creates "insurmountable" trial and pretrial issues, mainly because it is difficult to place a monetary value on a human life. It is indeed difficult—and uncomfortable—to assign a dollar value to an individual's life. But it is absolutely necessary that juries do so. It is the responsibility of the justice system to ensure there is compensation for wrongs, particularly a wrong so egregious as to have unnecessarily cost someone his life. Juries are frequently challenged to assign values where there is

no clear formula or metric.[6] Justice does not shy away from difficult questions.

Lastly, Defendants argue that awarding damages for loss of life provides double recovery. Defendants claim that awarding $1,800,000 to Witt's estate in loss of life damages, when the jury also awarded Plaintiffs $1,400,000 on their own state law wrongful death claims, amounts to impermissible double recovery because Plaintiffs receive both. However, there is no double recovery here because these are separate injuries: one award provides compensation to Witt's estate for his loss of life, and one award provides compensation to Plaintiffs for their own personal loss from the death of their son.

It would be a great injustice to allow a perpetrator of excessive force to get away with paying no damages, so long as the victim is dead and penniless. Loss of life damages are necessary to promote the important policies underlying § 1983 and the fundamental American value that every life matters. Defendants' motion to alter the judgment and vacate damages for loss of life is **DENIED**.[7]

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[6] Defendants also argue that allowing recovery for loss of life contradicts *Memphis Community School District v. Stachura*, where the Supreme Court held "the abstract value of a constitutional right may not form the basis for § 1983 damages." *See* 477 U.S. 299, 308 (1986). Not so. Assigning a value for loss of life does not require the jury to discern the amorphous value of a constitutional right. It is a compensatory award arising from the concrete loss of a person's life.

[7] Defendants also argue that Plaintiffs did not request damages for loss of life in the Third Amended Complaint. This argument has no

IV. JUDGMENT AS MATTER OF LAW AND NEW TRIAL

Defendants also move for judgment as a matter of law. (Dkt. 215.) A court may enter judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [prevailing] party" as to an issue on which that party has been fully heard during trial. Fed. R. Civ. P. 50(a)–(b). A party seeking judgment as a matter of law has a "very high" standard to meet. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 859 (9th Cir. 2002). The jury's verdict must be upheld if, viewing the facts in the light most favorable to the nonmoving party, there is substantial evidence for a reasonable jury to have found in the nonmoving party's favor. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). When considering the motion, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015).

In the alternative, Defendants move for a new trial. After a jury trial, a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "[E]ven if substantial evidence supports the jury's verdict, a trial court may grant a

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merit. In their Prayer for Relief, Plaintiffs requested "compensatory damages, including wrongful death and survival damages, under federal and state law." (Dkt. 37 [Third Amended Complaint].) As the Court previously concluded, damages for loss of life are survival damages available under federal law.

new trial if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (quoting *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999)).

A. Excessive Force

Defendants argue that they are entitled to judgment as a matter of law or a new trial because Deputy Petropulos's conduct was reasonable. Under the Fourth Amendment, a police officer over may use only such force as is "objectively reasonable" under all of the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). "The 'reasonableness' of a particular use of force [is] judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396; *see also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Factfinders assess reasonableness using the nonexhaustive *Graham* factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. The most important factor is whether the suspect posed an immediate threat. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011). Deadly force is reasonable if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

There was substantial evidence to support the jury's finding that Deputy Petropulos used excessive force. When Deputy Petropulos approached Witt in the parking lot, he had no information that Witt had committed any crime. Deputy Petropulos testified that he never saw any weapons, a gun, or anything that looked like a gun on Witt's person at any time during the incident. The only items that Deputy Petropulos ever saw in Witt's hands were a cell phone and a metal tool for starting the car, both of which Witt dropped when ordered to do so. Witt spoke respectfully, never used any profanity, and never threatened anyone. He tried multiple times to explain about a prior incident that caused him to fear law enforcement. Deputy Petropulos, in contrast, grew increasingly agitated. He started yelling and grabbed Witt's arms. He drew his firearm and repeatedly yelled he was going to "fucking shoot" Witt. In these moments, the recording captures Witt pleading for his life: "No, please. Please don't." It was only after Deputy Petropulos threatened to shoot that Witt placed his hand on the gear shifter, presumably to get away from the deputy threatening to shoot him. Deputy Petropulos testified that Witt's hands never went out of his view for the first eight to nine minutes of the encounter. In fact, just before the shooting, Witt's car began rolling slowly away from the officers. A jury could reasonably find that Witt did not pose an immediate threat and that there was absolutely no need to shoot him.

Nor was the jury's verdict against the clear weight of the evidence. There was ample evidence that a reasonable officer would not have seen Witt as a threat. Deputy Callagy never even drew his gun. When Deputy

Petropulos shot Witt, Witt's car was slowly rolling away from the officers. Deputy Petropulos never saw a weapon and had no reason to believe Witt was armed. Witt never made any threats. The recording captures the gravity and tragedy of the Witt's final moments. Witt, anxious but polite, pleaded for his life, saying "please" and referring to the officer as "sir." Deputy Petropulos muttered, "Fuck it." He then fired a bullet at Witt through the window of the moving car.

B. Bane Act, Cal. Civ. Code § 52.1

Defendants argue they are entitled to judgment as a matter of law or a new trial on Plaintiffs' Bane Act claim because there was no evidence that Deputy Petropulos had the specific intent to violate Witt's rights. Although the elements of an excessive force claim under the Bane Act are similar to those under § 1983, the Bane Act requires an additional element of specific intent. *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1044–45 (9th Cir. 2018). To violate the Bane Act, the defendants must have "intended not only the force, but its unreasonableness, its character as more than necessary under the circumstances." *Id.* at 1045 (quoting *United States v. Reese*, 2 F.3d 870, 885 (9th Cir. 1993)) (internal quotation marks omitted). There does not need to be proof that the defendants were "thinking in constitutional or legal terms at the time of the incidents." *Id.* (quoting *Reese*, 2 F.3d at 870) (emphasis omitted). "[A] reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights." *Id.* (quoting *Reese*, 2 F.3d at 870)).

Contrary to Defendant's assertion, there was substantial evidence that Deputy Petropulos had a specific intent to violate Witt's rights. Deputy Petropulos testified that he held the gun as close to Witt's chest as possible, about six inches away. He also testified that he knew his shot was likely to kill. At the time of the shooting, Witt had committed, at most, a drug misdemeanor or a traffic violation, and he never threatened either deputy. In the minute before Deputy Petropulos fired the shot, Witt was begging not be shot and asking to be let out of the car. The recording captures how Deputy Petropulos grew impatient, raised his voice, and threatened to rip Witt out of the car and shoot him. A jury could reasonably conclude that Deputy Petropulos intended to deprive Witt of his right against excessive force, just because Witt was challenging the deputy's authority and failing to comply with all his commands.

And the jury's verdict is not against the clear weight of the evidence. Deputy Petropulos's own words provide evidence of his intent, as he told Witt, "I will shoot you if you throw that car in drive again," "I'm not going to shoot you as long as you fucking listen," "You're going to get shot motherfucker," and "Fuck it," before pulling the trigger. The recording and evidence at trial indicates Deputy Petropulos was not responding to any real threat. He shot Witt out of anger and frustration.

C. Qualified Immunity

Deputy Petropulos contends he is entitled to judgment as a matter of law on Plaintiffs' § 1983 claim on the basis of qualified immunity. Qualified immunity shields public employees from civil liability under

§ 1983 if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To determine whether a public employee is entitled to qualified immunity, courts evaluate two independent questions: (1) whether the employee's conduct violated a constitutional right, and (2) whether that right was clearly established at the time of the incident. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). As discussed above, there was substantial evidence to support the jury's finding that Deputy Petropulos violated Witt's constitutional rights by using excessive force. In the specific circumstance here, it was unreasonable for Deputy Petropulos to shoot Witt when he reached down in the car, as Deputy Petropulos had no information that Witt was armed or dangerous, he had not seen a weapon, and the vehicle was slowly moving away from the officers.

"To be clearly established, a right must be sufficiently clear that *every* reasonable official would have understood *what he is doing* violates that right." *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016) (quoting *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015)) (per curiam) (emphasis in *Hamby*). "Although a plaintiff need not find 'a case directly on point, existing precedent must have placed the . . . constitutional question beyond debate.'" *Id.* at 1091 (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2001)). The Court must make its inquiry "in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

It was clearly established on February 15, 2016 that deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. The evidence at trial paralleled the circumstances in *Haugen v. Brosseau*, 351 F.3d 372 (9th Cir. 2003), *rev'd on other grounds*, 543 U.S. 194 (2004). In *Haugen*, a police officer shot a suspect through the window of a car as he appeared to reach for something. *Id.* at 383. *Haugen* held that "[m]ovements by a suspect are not enough to justify deadly force if, in light of the relevant circumstances, those movements would not cause a reasonable officer to believe that the suspect was reaching for a weapon." *Id.* Based on *Haugen*, a reasonable officer would have understood that it was objectively unreasonable to shoot Witt because he appeared to reach for something in the car, when the circumstances would not cause a reasonable officer to believe that Witt was reaching for a weapon.

Haugen is not the only case on point. Courts have repeatedly held that it is not objectively reasonable to use deadly force where decedents did not have weapons on their persons, brandish weapons, or threaten to use them. *See Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997) (holding a shooting was not objectively reasonable where suspect was attempting to flee officers and made "no threatening movement of any kind"); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (finding it was clearly established law that officers could not use deadly force to shoot a suspect who was not pointing a gun at the officers and was not facing them).

And this is not just a case where an officer acted unreasonably. The jury here made an explicit finding that Deputy Petropulos *intended* to deprive Witt of his constitutional rights and *acted with malice* towards Witt's rights. Any reasonable officer would know that you cannot shoot a suspect just because he is challenging your authority and not obeying your commands. *See, e.g.*, *Porter v. Osborn*, 546 F.3d 1131, 1140–41 (9th Cir. 2008) (finding an officer who uses force against a suspect to "teach him a lesson" or "get even" violates the Constitution).

D. Conduct Warranting Punitive Damages

Defendants argue the Court should vacate the jury's finding that Deputy Petropulos acted with malice, oppression, or in reckless disregard of Witt's rights. First, Defendants contend this finding is inconsistent with the jury's finding that Witt was 40% at fault. Defendants, however, cite no authority for the proposition that an attribution of comparative negligence is inconsistent with a finding that Deputy Petropulos acted with malice, oppression, or in reckless disregard of Witt's rights under federal law. The fact that Witt was negligent does not preclude Deputy Petropulos from acting maliciously. The findings also relate to different measures of damages. Unlike compensatory damages, punitive damages under federal law are not intended to compensate plaintiffs for their loss. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490–93 (2008) (noting that punitive damages are "separate and distinct from compensatory damages" and aimed "principally at retribution and harmful conduct").

Second, Defendants contend the jury's award of $0 in punitive damages in the second phase is inconsistent its finding in the first phase that Deputy Petropulos acted with malice, oppression, or in reckless disregard of Witt's rights. There is no inconsistency. The first phase of the trial focused on Deputy Petropulos's conduct during the incident. There was substantial evidence that Deputy Petropulos acted with malice or oppression towards Witt's rights. The recording captures the deeply troubling moments leading up to the shooting, as Witt pleaded for his life in the face of Deputy Petropulos's escalating temper and profanity-laced threats. In the second phase, however, the jury heard evidence that Deputy Petropulos is the sole provider for his young family, that he has no other sources of income, and that his salary varies significantly based on whether he works overtime. The jury also heard evidence regarding Deputy Petropulos's mortgage, his monthly bills, his assets, and his debt. The Court then instructed the jury to consider Deputy Petropulos's ability to pay as a factor in determining the amount of punitive damages to award. (Dkt. 198 [Part II Supplemental Jury Instructions] No. 2.) The jury could have reasonably concluded that even though Deputy Petropulos's conduct warranted punitive damages, he had little or no money to pay a punitive damages award.

Since this verdict is not against the clear weight of the evidence, the Court also declines to grant a new trial. If anything, this result stems from Defendants' own trial strategy. It was Defendants who requested that punitive damages be bifurcated into two phases. And when the first phase concluded, after the jury

found punitive damages were warranted, Defendants requested a punitive damages jury instruction that told the jury that it must decide the amount of punitive damages to award "*if any*." (*See id.*) It would be unjust to allow Defendants to use this now as a basis to amend the judgment or to seek a new trial.

E. Admission of Evidence

Defendants argue the Court should grant a new trial because it erroneously admitted certain evidence. None of these asserted issues suggest error, much less grounds for a new trial. The Court previously analyzed many of these issues in its pretrial order addressing the parties' motions in limine. (*See* Dkt. 159.)

First, Defendants contend that the Court should have excluded as irrelevant evidence that Witt was subsequently determined to be unarmed. This evidence, however, was highly relevant to determining the credibility of the deputies. Deputy Petropulos testified that he thought Witt was reaching for a gun near the floorboard of his car and that he believed Witt was going to turn and fire on him. Plaintiffs contested whether Deputy Petropulos's belief was sincere or reasonable. Plaintiffs presented evidence that Deputy Petropulos never saw a gun, had no information that Witt was armed or dangerous, and had not been threatened by Witt. The fact that Witt was unarmed makes it less likely that Deputy Petropulos actually or reasonably believed Witt was reaching for a gun. *See Boyd v. City & Cty. of S.F.*, 576 F.3d 938, 944 (9th Cir. 2009) (stating that a factfinder may consider outside evidence "in assessing the credibility of an officer's

account of the circumstances that prompted the use of force" (quoting *Graham*, 490 U.S. at 399 n.12)).

Defendants assert that *Cruz v. City of Anaheim*, 765 F.3d 1076 (9th Cir. 2014), required the Court to exclude this evidence. As discussed previously in the Court's April 15, 2019 Order, Defendants' citation to *Cruz* is unpersuasive. Defendants, again, mischaracterize *Cruz*. Because the relevant inquiry on an excessive force claim is the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight, the Ninth Circuit noted that "the fact that Cruz did not have a gun on him normally wouldn't factor into the reasonableness analysis because the officers couldn't know what was (or wasn't) underneath Cruz's waistband." *Cruz*, 765 F.3d at 1079 n.3. But, because the officers killed Cruz, the Ninth Circuit clarified that a factfinder "must examine whether the officers' accounts are 'consistent with other known facts,'" including the fact that no gun was found on Cruz. *Id.* (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)). *Cruz* thus stands for the opposite of Defendants' assertion. Here, like *Cruz*, Witt was killed and Deputy Petropulos testified he thought Witt was reaching for a gun. The fact that Witt was unarmed is relevant to assessing the credibility of Deputy Petropulos's account.

Second, Defendants argue the Court erred by admitting five "gruesome" post-death photographs of Witt. Defendants contend these photographs have no probative value. To the contrary, these photographs were relevant as evidence of Witt's pre-death pain and suffering, since they indicated Witt's wounds. The

Court also does not find that the photographs were unduly prejudicial. The three hospital photos and two autopsy photos were a small portion of the forty-nine hospital photos and eighty-five autopsy photos that Defendants produced in discovery. None of the photos were unnecessarily bloody, and none showed any part of Witt's body other than the gunshot wounds.

Third, Defendants assert the Court erred by allowing testimony from William Krone, Plaintiffs' expert in forensic video analysis. Krone prepared a combined audio and video file of the incident using footage from the deputies' two dash cams. Defendants argue the Court should have excluded Krone's testimony under Federal Rule of Civil Procedure 37 because his testimony exceeded his Rule 26 report. To the contrary, Krone's Rule 26 expert report adequately describes how he used Sony Vegas Pro editing software to prepare the combined audio and video footage of the incident. The Court has reviewed both the original and the enhanced footage, and it has found no evidence that Krone combined or edited the video in a misleading way. Defendants also have failed to establish any prejudice regarding any purported omission in Krone's expert report. Defendants further argue that Krone rendered substantial testimony regarding what he heard and saw in the videos of the incident, contrary to this Court's April 15, 2019 Order. Yet Defendants offer no citations to the record and completely fail to submit any trial transcripts in support of their motion. In any event, by the time Krone testified, the jurors had already had an opportunity to see, hear, evaluate, and draw conclusions from the footage on their own.

Simply put, Defendants fail to identify any basis justifying judgment as a matter of law or grounds for a new trial. Defendants' motion for judgment as matter of law or for a new trial is **DENIED**.[8]

V. CONCLUSION

Defendants' motion to alter the judgment to vacate the jury's award for loss of life is **DENIED**. California's prohibition on damages for loss of life is inconsistent with the policies of 42 U.S.C. § 1983. For the reasons stated above, Defendants' motion for judgment as a matter of law or, in the alternative, for a new trial is **DENIED**.

DATED: September 5, 2019

/s/ Cormac J. Carney
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[8] Defendants also assert there are grounds for a new trial because the Court erred by allowing the jury to award damages for loss of life. As discussed in Part III, it was not error to allow recovery for Witt's loss of life.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed: March 31, 2022]

ORDER

No. 19-55324

D.C. No. 8:17-cv-00491-CJC-KES
Central District of California, Santa Ana

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. 19-56188

D.C. No. 8:17-cv-00491-CJC-KES
Central District of California, Santa Ana

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.	)

Before: OWENS and LEE, Circuit Judges, and SIMON,[1] 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.

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

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

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-55372

D.C. Nos.
8:17-cv-00278-CJC-DFM
8:17-cv-02094-CJC-DFM

[Filed: August 3, 2021]

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.*	)

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,[1] District Judge.

Opinion by Judge Owens;
Dissent by Judge Lee

SUMMARY[2]

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

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

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

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. 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

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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

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[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.

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.

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.

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[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.

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," 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]

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.

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[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.

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 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*

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[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).

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 more than) the ban on pre-death pain and suffering damages. Following

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[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.").

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

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[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.

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 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

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[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).

"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 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.

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[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).

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

I respectfully dissent.

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-55372

D.C. Nos.
8:17-cv-00278-CJC-DFM
8:17-cv-02094-CJC-DFM

[Filed: March 30, 2022]

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*.	)

ORDER

App. 68

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

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*,

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[*] 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.

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 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.

Dale K. Galipo 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, 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

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[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).

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 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

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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)).

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.

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.

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[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)).

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

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[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.

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 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]

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[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.

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 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.

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

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[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.

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]

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

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

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:

> 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,"

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[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.

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 § 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

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

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

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 postdeath "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.

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.

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

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

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] 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

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[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).

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 government's willingness to impose safety violations." [17] "For instance, assume that an optional driver's side air bag costs $500, and that

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[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).

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

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]

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

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[18] *Id.* at 1062.

[19] *Id.* at 1062–63.

> 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 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

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[20] *Id.* at 1063.

[21] *Id.*

[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).

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 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

[23] *Id.* at 127–28.

> 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

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[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.*

does not provide a damages 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*.

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[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.").

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 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.

APPENDIX G

[Filed: June 24, 2022]

No. _____

In The
Supreme Court of the United States

♦

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

vs.

FERMIN VINCENT VALENZUELA, et al.,
Respondents.

♦

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

♦

PETITION FOR WRIT OF CERTIORARI

♦

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QUESTION PRESENTED

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

The question presented by this petition is:

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

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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

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

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

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

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

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

[*Table of Contents and Table of Authorities Omitted for Printing Purposes*]

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[p. 1]

OPINIONS BELOW

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

denial of rehearing en banc is published at 29 F.4th 1093 (9th Cir. 2022) and is reproduced in the appendix at pages 86-122.

BASIS FOR JURISDICTION IN THIS COURT

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

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

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

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

> Columbia shall be considered to be a statute of the District of Columbia.

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

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

STATEMENT OF THE CASE

A. Background Of The Action.

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

Arriving at the scene, the officers spotted Valenzuela and followed him into the laundromat, where they observed him moving clothing from a bag into a washing machine. (*Id*. at 4.) As they approached, Wolfe said he heard the sound of breaking glass and saw what he recognized as a methamphetamine pipe. (*Id*.) Wolfe then asked Valenzuela whether he was "alright" and if he had just "br[oke] a pipe or something." (*Id*.) Valenzuela replied that he was "good" and "just trying to wash" his clothes. (*Id*.)

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

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

As he was being restrained, Valenzuela lost consciousness, he could not be revived at the scene and died in the hospital eight days later. (*Id.*) The Orange County medical examiner ruled the cause of death to be "complication[s] of asphyxia during the struggle with the law enforcement officer" while Valenzuela was "under the influence of methamphetamine." (*Id.* at 5-6.)

B. The Lawsuit.

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

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

C. The Appeal.

Petitioners appealed, and after briefing and argument, on August 3, 2021, the panel issued a published opinion upholding the hedonic damages award, while issuing an unpublished memorandum separately affirming other aspects of the lower court decision. (Pet. App. 1, 3 n.1)[1] Writing for the majority,

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

Judge Owens concluded the reasoning of the Circuit's prior decision in *Chaudhry*, which had struck down California's limitation on pre-death pain and suffering damages as applied to § 1983 claims, compelled rejection of any limitation on hedonic damages. (*Id*. at 8-10.) The court reasoned that in some circumstances the wrongful death victim might not have any surviving relatives, and hence without exposure to hedonic damages, it would be more advantageous for officers to kill rather than injure a suspect. (*Id*.)

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

Judge Lee also called for the Circuit to reconsider *Chaudhry* en banc, noting that it too, failed to apply *Robertson*'s holding that so long as the state law afforded meaningful recovery in most cases, it was not inconsistent with the purposes of § 1983 and must be applied under § 1988. (*Id*. at 18-19.) He also noted that

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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.").

logic and data contradicted *Chaudhry*'s "dubious" premise that an officer's heat of the moment decision to use force was somehow informed by whether it might be more economically advantageous to kill as opposed to injure a suspect. (*Id*. at 19-21.)

Petitioners timely petitioned for panel and en banc rehearing, and after requesting a response from respondents, on March 3, 2022, the court issued a published Order denying the petition, along with a Statement respecting denial of rehearing en banc joined in full or in part by 11 Judges, as well as a separate Dissent from denial of rehearing en banc authored by Judge Collins. (*Id*. at 86-122.) Writing in the Statement for the dissenting members of the Circuit (including Judge Collins, who concurred in this portion of the Statement), Judge Bea noted that California was not alone in prohibiting post-death hedonic damages, with only five states allowing such damages, and even then only through legislative enactment, not judicially created common law. (*Id*. at 93.)[2] He observed that especially post-*Chaudhry*, between direct recovery by a decedent's estate and successors, and awards to family members via a wrongful death action, California law made "available nearly every conceivable form of just damages" in § 1983 actions. (*Id*. at 92.)

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

Judge Bea echoed the panel dissent in noting that the panel majority's interpretation of *Robertson* as purporting to require some substantial recovery in every conceivable set of circumstances, ignored this Court's express direction in *Robertson* that state law must be applied under § 1988 unless it leads to insufficient relief in most cases—which could not be said of awards under California law. (*Id*. at 94-98, 104-105.)[3] The Statement of dissent also observed, as did the panel dissent, that this Court had rejected the notion that assuring some damages in every wrongful death action was necessary to deter officers from killing instead of wounding suspects. (*Id*. at 96-97.)

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

> Post-death "hedonic" damages awards are speculative, contravene traditional common law damages principles, contradict California state law, and where, as here, the awards would have

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

> 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.

(*Id*. at 121.)

WHY CERTIORARI IS WARRANTED

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

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

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

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

out a method to address such claims. If "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 look to "the common law, as modified and changed by the constitution and statutes" of the forum state. *Id.* Courts are to apply this state law "so far as the same is not inconsistent with the Constitution and laws of the United States." *Id.*

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

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

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

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

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

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

Id. at 593.

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

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

The Ninth Circuit panel decision contains no discussion of *Robertson*, other than citing the decision for the well-accepted proposition that the twin goals of

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

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

As the 11 Circuit Judges dissenting from the denial of rehearing en banc noted, the panel majority's analysis does not withstand scrutiny. As a threshold matter, the panel majority's focus on hypothetical cases where there might not be a basis for substantial economic recovery, is contrary to *Robertson*'s clear holding that the question is whether state law affords a remedy in *most* cases, even if it may altogether foreclose relief *in a particular case.* 436 U.S. at 590-91. And, while *Robertson* left open the issue whether a state abatement law might conflict with § 1983 if the challenged governmental conduct directly caused the plaintiff's death (*id.* at 594), the question here is not

one of abatement, it merely involves limitations on one item of damages after allowing pre-death economic damages, wrongful death damages, damages for loss of consortium, and per *Chaudhry* (and the now amended statute) pre-death pain and suffering damages. As both the panel and en banc dissents observed, the fact is that, as a general matter, California affords a broad range of recovery in survival and wrongful death actions, as evidenced by the $9.6 million in other damages awarded to respondents. (Pet. App. 12, 101-05.)

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

In addition, as discussed above, *Robertson* expressly rejected the "farfetched" notion that state actors would contemplate potential liability based upon the possible pool of relatives who might maintain a claim. 436 U.S.

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

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

(Pet. App. 106-07.)

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

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

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

(*Id*.)

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

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

As Judge Bea further noted in the en banc dissent, the widespread rejection of hedonic damages in wrongful death actions is understandable given the abstract nature of such damages and the inability to tether any award to some rational standard. (Pet. App.

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

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

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

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

The determination of "whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton*, 519 U.S. at 218 (internal quotation marks omitted). Section 1988 does not contemplate federal common lawmaking. In *Runyon v. McCrary*, 427 U.S. 160, 184-85 (1976), this Court rejected the argument that § 1988 "commission[s] . . . courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the substantive provisions of Sec. 1981 and other civil rights statutes." Indeed, in *Robertson*, the Court emphasized that "rules in areas where the courts are free to develop federal common law," such as in admiralty, "have no bearing" with respect to § 1988. *Robertson*, 436 U.S. at 593 n.11. As a result, any dissatisfaction with the remedies available to § 1983 plaintiffs must be addressed to Congress, not the courts.[6]

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[6] Nor would hedonic damages even be within the contemplation of Congress at the time the substantive aspects of § 1988 were enacted in 1866. *Moor v. County of Alameda*, 411 U.S. 693, 705 n.18 (1973). As Judge Bea's dissent notes, such damages were not available at common law. (Pet. App. 90.) And as this Court

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

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observed only six years after enactment of § 1983 in *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 756-57 (1877), "[t]he authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found."

fundamental principle of statutory construction is fully applicable to § 1983. In short, the general policies of § 1983 are not an invitation for courts to "improve" the statute's remedial scheme as they wish.

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

As the district court observed in a pre-*Chaudhry* decision applying California's limitation on pre-death pain and suffering damages, *Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1131-33 (E.D. Cal. 2002), California's wrongful death statute is the product of decades of legislative review and revisions. That legislative process reflected "neither the product of anachronistic formalism nor inattention, but represents a considered judgment as to the appropriate balance among a number of competing considerations. In this instance, the legislature apparently concluded that whatever increment of deterrence would be achieved by permitting a claim for pain and suffering

to survive is outweighed by other considerations." *Id.* at 1132.[7]

As noted, the California legislature has now revised the Code of Civil Procedure section 377.34(b) to allow recovery of pre-death pain and suffering for actions filed after January 1, 2022, on a trial basis, so that its impact can be assessed in contemplation of possible future legislative revision. Significantly, the legislature did not believe it necessary to allow recovery of post-death hedonic damages.

As the panel majority recognized (Pet. App. 9 n.7), even prior to its decision here, hedonic damages claims were ubiquitous in the district courts, and as reflected

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

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

185 F. Supp. 2d at 1133.

by the awards here and in the companion *Craig* case, can total millions of dollars.[8] Petitioners and other public entities acknowledge responsibility to pay fair compensation for injuries improperly inflicted in the course of performing official duties. However, no public interest is served by adding millions of dollars of potential liability in each wrongful death case, which has nothing to do with serving the purpose of either deterrence or compensation. The issue presented here is important and "appears likely to recur in § 1983 litigation against municipalities." *City of Newport*, 453 U.S. at 257. It is vital that this Court grant review.

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

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

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

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

> The loss of enjoyment caused by death is not "actual," in the sense that is relevant here,

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

Id. at 601 (citations omitted).

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

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

> To the extent that damages stemming from the death itself might be needed to fulfill the deterrent purpose of section 1983 (there being no compensation from the death as such), we see no reason to think that damages for injuries suffered by the decedent's survivors and hedonic damages suffered before death *would not be sufficient in most cases.*

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

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

The stark contrast between the different modes of analysis employed by the divergent appellate courts—*Frontier Ins. Co.* hewing closely to *Robertson*'s command to assess the general adequacy of state law in compensating wrongful death claims, with *Bell* and the Ninth Circuit employing analysis requiring not simply an adequate, but maximum award in every case—requires resolution by this Court. It has been more than forty years since the Court addressed the application of § 1988 to state survival statutes in *Robertson*, and as the divergent views of the Circuit courts indicate, there is a need for the Court to reaffirm the mode of analysis it directed the courts to apply in addressing such issues. And this case provides a firm basis to do so. The hedonic damages issue was briefed by the parties and addressed by the trial and appellate courts. The judgment is also final, with no further proceedings contemplated save for appellate attorney

fees and ultimate enforcement of the judgment. *Cf. Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1997) (petition challenging application of Alabama wrongful death statute under § 1988 dismissed because lack of final judgment).

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

CONCLUSION

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

Respectfully submitted,

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