No. 22-187

In the
Supreme Court of the United States

COUNTY OF ORANGE AND NICHOLAS PETROPULOS,
Petitioners,

v.

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

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

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Orange County Petitioners seek review of the Ninth Circuit's recognition of a new category of 42 U.S.C. § 1983 "loss of life" damages which is squarely at odds with this Court's precedent. First, the Ninth Circuit's new rule permits jury awards for post-death "losses" "experienced by" decedents – even though decedents, by definition, "experience" nothing provable in a courtroom setting. *See*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (a Section 1983 jury may only provide "compensation for ***provable*** injury…..[not] on the jury's subjective perception" of "abstract" matters) (emphasis added); *Cal. Health & Safety Code* § 7180(a) ("An individual who has sustained . . . irreversible ***cessation of all functions of the entire brain***, including the brain stem, ***is dead***.") (emphasis added). Respondents' Opposition briefing provides no good reason to think otherwise.

Moreover, the Ninth Circuit's new "loss of life" damages category fails to heed this Court's admonition that forum state court restrictions on available damages matter in Section 1983 litigation. *See*, *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978) (holding that a state law that totally eliminated a § 1983 claim did not violate the compensation and deterrence goals of § 1983). And the forum state at issue here, California, does not recognize "loss of life" damages awards. (App. 51) (Ninth Circuit recognizes that "California law forbids recovery for a decedent's loss of life."). Here too, Respondents' briefing fails to salvage their position.

As 11 dissenting judges have already found, the "loss of life" damages rule announced by the Ninth Circuit majority in this case crosses important bright lines drawn by this Court decades ago. Needless to say, fundamental errors of this sort represent a paradigm case for Supreme Court review. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents.").

ARGUMENT

I. THE NINTH CIRCUIT'S "LOSS OF LIFE" DAMAGES FORMULATION VIOLATES THIS COURT'S RULINGS BARRING SPECULATIVE DAMAGES

Respondents argue that "loss of life damages" are compensable under Section 1983 because "[o]ur system of law unequivocally recognizes the deprivation of life as a grave injury that juries may compensate for…." (Opp., 2). But Respondents ignore the nature of "loss of life" damages as well as this Court's existing precedent.

"[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 (1986). The common law of torts, in turn, provides for compensatory damages which must be, by definition, based on a loss which is actually experienced by a plaintiff. (*See*, App. 93-94 –

"traditional tort liability rules . . . require the victim to have a 'cognitive awareness of his or her loss to ensure that he or she receives compensation only for the injuries actually suffered.'") (citations omitted)); *see also*, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (finding that "no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury"). And the law rightly recognizes that the departed have no sensory awareness which can be established scientifically in a courtroom setting. *See, e.g.*, *Cal. Health & Safety Code* § 7180(a) ("An individual who has sustained . . . irreversible ***cessation of all functions of the entire brain***, including the brain stem, ***is dead***.") (emphasis added).[1]

The Sixth Circuit echoed all these points when it properly rejected "loss of life" damages awards to

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[1] *See*, Victor E. Schwartz & Cary Silverman, "Hedonic Damages, the Rapidly Bubbling Cauldron," 69 *Brooklyn L. Rev.* 1037, 1057 (2004) ("A cognitive awareness requirement for the recovery of pain and suffering is a necessary prerequisite if noneconomic damage awards are to serve some compensatory function. In sum, unless the plaintiff shows that he actually felt the claimed pain and suffering, such an award becomes not only a 'legal fiction,' but can only be understood as a means of punishment or as reallocation of wealth without regard to actual harm. Hedonic damages, as an element of pain and suffering, should be subject to this same threshold requirement."); *McDougald v. Garber,* 73 N.Y.2d 246, 251 (1989) (a plaintiff must have "some degree of cognitive awareness for recovery of damages for loss of enjoyment of life."); *Flannery v. United States*,718 F.2d 108, 111 (4th Cir.1983), *cert. denied*, 467 U.S. 1226 (1984) (damages award for "loss of enjoyment of life" to comatose patient cannot be justified as compensatory damages as a matter of law, because the patient is not aware of his or her condition).

decedents in Section 1983 litigation. Specifically, in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), the Sixth Circuit found that:

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

Id. at 601-603 (emphasis added; citations omitted).

All of which brings us to Respondents' "loss of life" jury instructions and their companion jury verdict form in this case. Given Respondents' counsel's knowledge of the foregoing principles, their proposed jury charge gave an initial, superficial nod to the requirement that compensatory damages must actually be "***experienced by***" a Section 1983 plaintiff. (App. 3) (quoting jury instruction) (emphasis added). But Respondents' proposal thereafter coupled this well-settled concept to the clinically impossible notion that a decedent possesses the sensory ability to "experience" potentially unpleasant events. (App. 3). The end result was a facially erroneous invitation for the jury to assign a

valuation for the "loss of life ***experienced by*** [Plaintiffs' Decedent]." (*Id.*) (emphasis added).

Respondents, through their own "wrongful death" claim, have already been compensated for the value of their lost relationships with Decedent. (App. 8-9). This award was, of course, based on something of evidentiary value — observable quantifiable facts about what type of relationship Respondents had with Decedent, Respondents' testimony regarding how their life has changed since Decedent's passing, along with what Decedent's "love" and "companionship" meant to them. (*Id.*).

Respondents, through Decedent's survival claim, have also already been compensated for Decedent's "pain and suffering" from the point of his injury up to the point of his passing. (App. 8). This award was also based on something of evidentiary value — observable, quantifiable facts about what Decedent experienced between the point of his injury up to the time of his passing. (*Id.*).

But Decedent's "loss of life" damages claim features none of these evidence-based qualities. It takes the damages issue firmly and unavoidably into a speculative realm ill-suited for judicial regulation. As noted above, the trial court — at Respondents' urging — asked for a value to be placed on the "loss of life" "***experienced by***" Decedent. (App. 3) (quoting jury instruction) (emphasis added). But no one knows (or can know) what Decedent "experienced" on (and after) the point of his death. Decedent obviously did not testify about how he "felt" when (or after) he

passed. Therefore, no one knows what his "loss" is — or, given the limits on human understanding, whether he suffered any objectively identifiable "loss" at all. Any "answers" given by a jury to questions of this sort would be, of necessity, based on personal guesswork, taste and opinion — not on required experiential truth. And 11 Ninth Circuit judges rightly found just that. (App. 94).

This Court has emphasized that the requirement for ***proof of actual injury*** applies in all Section 1983 cases. *See*, *Stachura*, *supra*, 477 U.S. 299. Indeed, the *Stachura* Court reiterated that "damages based on the 'value' or 'importance' of constitutional rights are not authorized by § 1983 because they are not truly compensatory" (*Stachura*, *supra*, 477 U.S. at 309, n.13) and emphasized that a Section 1983 jury may only provide "compensation for ***provable*** injury…[not] on the jury's subjective perception" of "abstract" matters. *Stachura*, *supra*, 477 U.S. at 308 (emphasis added); *see*, *Farrar*, *supra*, 506 U.S. at 112 (reiterating that "no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury."); *Carey v. Piphus*, 435 U.S. 247, 256-257 (1978) (the policies underlying Section 1983 work in unison: "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, ***there is no evidence*** that it meant to establish a deterrent more formidable than that inherent in the award of ***compensatory damages***.") (emphasis added); *id.* at 254 (under § 1983 it is inappropriate to award "presumed damages.").

Simply put, it would be difficult to conceive of a more unprovable, "abstract" form of damages than Respondents' proposed "loss of life" recovery theory — premised, as it is, on unknowable speculation concerning what the dead might "experience" after they pass (if anything). *See, e.g.*, *Cal. Health & Safety Code* § 7180(a) ("An individual who has sustained . . . irreversible ***cessation of all functions of the entire brain***, including the brain stem, ***is dead***.") (emphasis added). For their part, Respondents make no discernible effort to demonstrate why the considerations thought controlling in this Court's leading Section 1983 damages cases—*Carey*, *Stachura* and *Farrar*—are somehow inapplicable here.

II. *ROBERTSON V. WEGMANN* COMPELS RESPECT FOR AND COMPLIANCE WITH CALIFORNIA'S BAN ON "LOSS OF LIFE" DAMAGES IN SECTION 1983 SURVIVORSHIP ACTIONS

Respondents' brief announces that "damages for loss of life are an appropriate federal remedy" for "unconstitutional killings by state actors" and that "[r]eference to state law is unnecessary." (Opp., 16-17). But Respondents' arguments cannot be characterized as watertight in their presentation.

For starters, Respondents' position is foreclosed by this Court's decision in *Robertson v. Wegmann*, 436 U.S. 584 (1978), as recognized by Judge Carlos Bea and 10 of his Ninth Circuit colleagues. (*See*, App. 76-83). With the "relevant federal law [being]

silent as to loss of life damages" (App. 51), a correct application of *Robertson* in Section 1983 survivorship suits (like this one) necessarily invokes 42 U.S.C. § 1988 and its requirement that courts look to the forum state's "common law, as modified and changed by" the state's constitution and statutes "so far as the same is not inconsistent with the Constitution and laws of the United States…." California's statutory damages scheme — both at the time of the February 2016 incident giving rise to this lawsuit and since a January 2022 amendment — forcefully bars recovery of post-death "loss of life" damages. Respondents do not adequately explain why the considered decision of the California legislature is unworthy of the type of respect *Robertson* almost always requires.

Respondents position is also undercut when one considers how they made their way into court on a Fourth Amendment "excessive force" claim in the first place. It is well-established that the rights protected by the Fourth Amendment are personal rights and only the person subject to the violation has standing to bring suit. *See*, *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990); *see also*, *Alderman v. United States*, 394 U.S. 165, 174 (1969) ("Fourth Amendment rights are personal rights which…may not be vicariously asserted."). The Congressional pronouncement that opens the door to sue under Section 1983 to someone other than the subject of "excessive force" resulting in death is Section 1988(a). *See*, *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 369 (9th Cir. 1998).

As observed by the *Moreland* court: "In § 1983 actions…the survivors of an individual killed as a result of an officer's excessive use of force may assert a Fourth Amendment claim on that individual's behalf if the relevant state's law authorizes a survival action." *Moreland*, *supra*, 159 F.3d at 369 (citing 42 U.S.C. § 1988(a)). California has such an authorizing survival statute — one that sits within the same chapter and article of the *Code of Civil Procedure* as the statute that prohibits "loss of life" damages. *See*, *Cal. Code Civ. Proc.* §§ 377.30, 377.34. Accordingly, Respondents were able to prosecute a federal "excessive force" claim on behalf of their Decedent only because California maintains a statutory scheme affording them "survivorship" standing.

It cannot be that civil rights plaintiffs are permitted to avail themselves of the state-sourced ability to prosecute a federal "excessive force" claim on behalf of a decedent (authorized by Section 1988) yet not be subject to the same state's limitations on recoverable damages (which must also be applied per Section 1988). The *Robertson* Court followed this logic, where resort to state law meant the entire abatement of a Section 1983 claim. As demonstrated in this case and in the companion *Valenzuela* petition, *Robertson* forecloses such an outcome here, and does so by merely limiting a type of damages — rather than by wholly dispensing with an entire claim.

Respondents' complaints about California's statutory damages scheme "render[ing] fatal

excessive force by state officers almost entirely irremediable under [Section] 1983" cannot withstand even superficial scrutiny. (*See*, Opp. 17). As Judges Bea and Lee rightly observed, California maintains a robust damages scheme (as reflected by Respondents own sizeable trial court recovery) and there is no requirement that Section 1983 maximize recovery for litigants at the expense of jettisoning state law. (App. 45, 56, 65, 84-92). Respondents likewise offer no support for their conclusion that the *Valenzuela* court had the authority to essentially legislate from the bench and "provid[e] a federal remedy for loss of life" in contravention of an already generous state law compensation scheme. (*See*, Opp. 18).

III. THE PROPRIETY OF "LOSS OF LIFE" DAMAGES IS BEFORE THE COURT IN TWO RELATED PETITIONS

The Petition here demonstrated that the "loss of life" issue is properly before the Court in two separate pending cases: this matter and *City of Anaheim v. Valenzuela*, 21-1598. Both cases involve the question of whether "loss of life" damages awards are properly compensable under existing law.

The Ninth Circuit decided *Valenzuela* first, followed days later by its decision in this case. For a wealth of reasons, the Ninth Circuit found that "*Valenzuela* is indistinguishable from this case" and it consequently reached the same result (recognizing "loss of life" damages) in both cases. (App. 3.) Judge Lee dissented in this case "for the same reasons laid out in [his] dissent in *Valenzuela*." (App. 4.).

The Ninth Circuit's conclusions on this point came with good reason. The municipal appellants in both cases challenged the notion that "loss of life" damages could survive scrutiny under this Court's precedent. Specifically, Appellants in *Valenzuela* emphasized that California's ban on "loss of life" damages required rejection of "loss of life" damages awards in Section 1983 litigation. (App. 53-54). Petitioners in this case emphasized that that "loss of life" damages awards are impermissibly speculative under this Court's Section 1983 precedent. (App. 3).

Given the foregoing, the Petition here demonstrated that an order finding *certiorari* appropriate in *Valenzuela* would be appropriately accompanied by a *certiorari* order in this case as well. (Pet., 27). Respondents seem to contend otherwise. Notwithstanding the Ninth Circuit's finding that the "loss of life" issue in the two cases is intertwined, Respondents seem to argue that *certiorari* is not appropriate in this case because the two cases placed different emphasis on different defects in "loss of life" damages in Ninth Circuit proceedings. (Opp., 9).

But Respondents do not deny that the issue emphasized by Petitioners in the Ninth Circuit (and here) — *i.e.*, the scope and limits of permissible damages awards under Section 1983 — has been thought important enough to merit multiple opinions from this Court. *See, e.g.*, *Stachura*, *supra*, 477 U.S. at 308 (Section 1983 jury may only provide "compensation for provable injury…[not] on the jury's subjective perception" of "abstract" matters); *Carey*, *supra*, 435 U.S. at 256-257 ("presumed damages"

impermissible under Section 1983); *Farrar*, *supra*, 506 U.S. at 112 (finding that "no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury.").

Respondents also do not dispute that circuit court opinions which traverse this Court's teachings are eminently worthy of this Court's corrective attention. *See, e.g.*, *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (review granted where circuit court opinion "appears to be inconsistent with prior decisions of this Court."); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) (review granted where circuit ruling "appeared to be in conflict with our precedents"). Nor do Respondents demonstrate — or even claim — that different briefs from different parties on the same issue must all take the exact same approach in order to be of benefit to this Court.

CONCLUSION

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

Respectfully submitted,

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