FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERMIN VINCENT VALENZUELA; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased, *Plaintiffs-Appellees*, v. CITY OF ANAHEIM; DANIEL WOLFE; WOOJIN JUN; DANIEL GONZALEZ, *Defendants-Appellants*.	No. 20-55372 D.C. Nos. 8:17-cv-00278-CJC-DFM 8:17-cv-02094-CJC-DFM OPINION

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

Argued and Submitted May 5, 2021
Pasadena, California

Filed August 3, 2021

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

Opinion by Judge Owens;
Dissent by Judge Lee

COUNSEL

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

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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,

[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.

and noted that it was unknown whether Valenzuela was on drugs or required psychiatric assistance.

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

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

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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.

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

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

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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.

against excessive force—perversely, it would incentivize officers to aim to kill a suspect, rather than just harm him." This appeal followed.

II. DISCUSSION

A. Standard of Review

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

B. Section 1983 and "Loss of Life" Damages

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

[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).

271–72 (1985) ("[Section] 1983 provides a 'uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution' . . . [that] make[s] it appropriate to accord the statute 'a sweep as broad as its language.' " (internal citation omitted)), *superseded by statute on other grounds*. Section 1983's goals include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power. *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978).

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

In reaching this conclusion, *Chaudhry* relied in part on *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984), *overruled in part on other grounds by*

Russ v. Watts, 414 F.3d 783 (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

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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.").

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

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

Second, the Defendants contend that the damages in this case are already adequate: Even if Valenzuela's family could not recover the $3.6 million loss of life award, they would still receive $9.6 million in pre-death pain and suffering and wrongful death damages, which sufficiently serves § 1983's deterrent purpose. But the above awards address different injuries. One can endure pain and suffering separately from dying, while another can die painlessly and instantly. "[T]o further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v.*

Piphus, 435 U.S. 247, 258–59 (1978). Additionally, such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene. That reading is not tenable in light of § 1983's remedial purpose. *See Zinermon v. Burch*, 494 U.S. 113, 124 (1990) ("[Section] 1983 was intended not only to . . . provide a remedy for violations of civil rights 'where state law was inadequate,' but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice.'" (citation omitted)).

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

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

AFFIRMED.

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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.

LEE, Circuit Judge, dissenting:

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

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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).

preventing an estate from recovering *anything* under § 1983. And because the plaintiff had no family members when he died, Louisiana's law effectively barred any damages. 436 U.S. at 590–91. While the unique facts of that particular case led to no recovery and perhaps an unjust result, the Court held that the state law was not "inconsistent" with § 1983 because "most Louisiana actions survive the plaintiff's death." *Id*. Writing for the Court, Justice Marshall explained that despite "the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." *Id.* at 590–91. In other words, the Court suggested that § 1983 does not trump state 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*, 436 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 *Chaudhry*'s implication, California law compensated the plaintiffs, even without pre-death pain and suffering damages. This omission strikes at the core of *Chaudhry*'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*, 751 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

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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*

to police misconduct are not monetary damages (which they do not personally pay anyway), but firings, negative media attention, and potential criminal liability.

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

I respectfully dissent.

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).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FERMIN VINCENT VALENZUELA, **Plaintiff,** **v.** **CITY OF ANAHEIM, *et al.*,** **Defendants.**	**Case No.: SACV 17-00278-CJC (DFMx) consolidated with SACV 17-02094-CJC (DFMx)** **ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW [Dkt. 392], DENYING DEFENDANTS' MOTION FOR NEW TRIAL [Dkt. 393], AND GRANTING IN SUBSTANTIAL PART PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS [Dkt. 385]** (Filed Mar. 11, 2020)
VINCENT VALENZUELA and XIMENA VALENZUELA by and through their guardian PATRICIA GONZALEZ, **Plaintiffs,** **v.** **CITY OF ANAHEIM, *et al.*,** **Defendants.**	

I. INTRODUCTION

On July 2, 2016, members of the Anaheim Police Department (the "APD") applied a neck restraint on Fermin Vincent Valenzuela Junior ("Mr. Valenzuela"). Mr. Valenzuela died. The principal question in the trial that resulted was whether it was appropriate for the

APD officers to use a particular type of neck restraint called the "carotid hold." The carotid hold involves wrapping an officer's arm around a suspect's neck, and attempting to apply bilateral pressure only to the sides of the neck. When applied correctly, the hold temporarily restricts blood flow from the carotid arteries to the brain and causes the suspect to lose consciousness for a few seconds, allowing the officers to gain control of the suspect. The suspect then quickly regains consciousness.

In practice, however, the hold is extremely difficult to execute, especially if a suspect is panicking or otherwise resisting. An improperly applied carotid hold can morph into an "air choke hold," which obstructs the subject's airway and prevents him from breathing. Even when the carotid hold is properly applied, using it too often or too long can cause permanent brain damage or even death. Because the hold is so dangerous, many police departments have prohibited it completely, or limited its use to deadly force situations. At the time of the incident in this case, APD had a policy of permitting the carotid hold even in non-deadly force situations. APD officers used it (or at least attempted to) and Mr. Valenzuela died.

Plaintiffs Fermin Vincent Valenzuela Senior (Mr. Valenzuela's father, "Mr. Valenzuela Sr."), Vincent Valenzuela (Mr. Valenzuela's son), and Ximena Valenzuela (Mr. Valenzuela's daughter) brought this civil rights action against Defendants City of Anaheim (the "City"), Officers Daniel Wolfe, Officer Woojin Jun, and Sergeant Daniel Gonzalez. In November 2019, they

presented evidence to a jury supporting their claims for excessive force, deprivation of substantive due process, municipal liability (on both unlawful policy and failure to train theories), wrongful death (on both negligence and battery theories), and violation of the Bane Act, Cal. Civ. Code § 52.1(b). After five days of trial, the jury returned a verdict in favor of Mr. Valenzuela's children, finding, among other things, that Officers Jun and Wolfe used excessive force when they attempted to use the carotid hold, that Sergeant Gonzalez was liable as the supervising officer, and that the City's policy permitting the carotid hold in nondeadly force situations was unlawful. (Dkt. 358.) The trial proceeded to a second phase on damages. After two additional days of trial, the jury returned with a second verdict, awarding Mr. Valenzuela's children a total of $13.2 million in damages. (Dkt. 372.)

Before the Court are three post-trial motions: (1) Defendants' motion for judgment as a matter of law (Dkt. 392, hereinafter "JMOL Mot."), (2) Defendants' motion for a new trial (Dkt. 393, hereinafter "New Trial Mot."), and (3) Plaintiffs' motion for attorney fees and costs (Dkt. 385, hereinafter "Fee Mot."). For the following reasons, Defendants' motions are **DENIED** and Plaintiffs' motion is **GRANTED IN SUBSTANTIAL PART**.

II. BACKGROUND

On the morning of July 2, 2016, Valentina Moya feared a man was following her while she was walking

home from work. She called her daughter, Enia Moya, and asked her to call the police. Enia called the APD and told them a Hispanic man in his late twenties carrying a blue duffel bag and wearing black pants, a black shirt, a tan beanie, and burgundy shoes was following her mother. APD Officers Jun and Wolfe responded to a broadcast regarding a "suspicious person" with this description at the corner of Magnolia Avenue and West Broadway.

When Officers Jun and Wolfe arrived to Magnolia and Broadway, they saw a man meeting Enia's description enter a laundromat. As the officers walked toward the man, who turned out to be Mr. Valenzuela, they heard what they believed was a glass methamphetamine pipe breaking. At the time, Mr. Valenzuela's bag was on the floor in front of a washing machine, and he was moving clothing from the bag into the machine. Officer Wolfe asked him: "Howdy, you alright? You break a pipe or something?" Mr. Valenzuela seemingly did not respond.

Officer Wolfe then observed the handle of a screwdriver in Mr. Valenzuela's bag. Officer Wolfe ordered Mr. Valenzuela to put his hands behind his back. When Mr. Valenzuela did not comply, Officer Wolfe grabbed his right arm and started to pull it behind his back. A struggle ensued where all three fell to the ground, and Officer Jun attempted to control Mr. Valenzuela using a neck restraint.

The parties disputed the type of neck restraint Officer Jun used. Officer Jun testified that he applied the

carotid hold. Plaintiffs asserted that Officer Jun either incorrectly applied the carotid hold or used an air choke hold. Officer Jun held the neck restraint with his right arm for twenty-two seconds, and with his left arm for another minute and twenty seconds. The body-worn camera footage clearly shows Mr. Valenzuela turning purple and screaming that he could not breathe.

The struggle continued as Mr. Valenzuela slipped out of his shirt, ran out the front door of the laundromat, overcame multiple tases, and ran across several lanes of traffic on Magnolia Avenue. As Mr. Valenzuela reached the parking lot of a 7-Eleven across the street, he tripped on a curb and fell to the ground. Officer Wolfe then got on top of Mr. Valenzuela and attempted to roll him onto his stomach. When he could not get Mr. Valenzuela on his stomach, Officer Wolfe placed his arm around Mr. Valenzuela's neck to get into position to apply another restraint hold.

APD Sergeant Daniel Gonzalez came to the scene to assist. As Officer Wolfe attempted to apply a neck restraint, Sergeant Gonzalez took hold of Mr. Valenzuela's left arm while Officer Jun still held his right. The parties again disputed the type of neck restraint applied. Sergeant Gonzalez testified that he saw Officer Wolfe apply a proper carotid hold that did not place pressure on Mr. Valenzuela's trachea. Plaintiffs contended that Officer Wolfe either improperly applied the carotid hold, or applied an air choke hold. Regardless, the video footage shows Officer Wolfe's right arm around Mr. Valenzuela's neck for at least sixty seconds.

With three officers now holding Mr. Valenzuela, Sergeant Gonzalez supervised Officer Wolfe's neck restraint. The video footage shows Mr. Valenzuela wheezing and having difficulty breathing. Nevertheless, Sergeant Gonzalez repeatedly directed Officer Wolfe to "hold that choke." Officer Wolfe did. When Officer Wolfe eventually loosened the restraint, he kept his arm around Mr. Valenzuela's neck and rolled him onto his stomach. Sergeant Gonzalez then handcuffed Mr. Valenzuela's left arm and asked Officer Wolfe, "Are you letting him breathe?" Officer Wolfe responded that he was.

Mr. Valenzuela lost consciousness. When he did not regain consciousness, Sergeant Gonzalez ordered the officers to start CPR. Their efforts were unsuccessful. Paramedics transported Mr. Valenzuela to Western Anaheim Medical Center, where he died eight days later.

On February 15, 2017, Mr. Valenzuela's father and two children filed this case, asserting claims against Officer Jun, Officer Wolfe, and Sergeant Gonzalez for excessive force, deprivation of substantive due process, wrongful death (on both negligence and battery theories), and violation of the Bane Act, and against the City for municipal liability (on both unlawful policy and failure to train theories). (*See* Dkt. 185 [Second Amended Complaint].)

On November 12, 2019, the Court impaneled a jury. (Dkt. 346.) Trial proceeded in two phases. After five days of trial, the jury returned a verdict in favor of

Mr. Valenzuela's two children, Vincent and Ximena, on the issue of liability for all of their claims except deprivation of substantive due process. The jury found that Officers Jun and Wolfe used excessive force against Mr. Valenzuela, and that Sergeant Daniel Gonzalez was liable as a supervisory defendant. (Dkt. 358.) The jury also found that the three officers committed battery that was a substantial factor in causing Mr. Valenzuela's death, and that the officers were negligent and their negligence was a substantial factor in causing Mr. Valenzuela's death. (*Id.*) The jury further found that Mr. Valenzuela was contributorily negligent, and assigned 85% of fault to Officer Jun, Officer Wolfe, and/or Sergeant Gonzalez, and 15% to Mr. Valenzuela. (*Id.*) The jury also found the officers acted with sufficient intent to violate Mr. Valenzuela's rights under the Bane Act. (*Id.*) However, the jury found that none of the officers acted with a purpose to harm in violation of Plaintiffs' substantive due process rights. (*Id.*) Finally, the jury found that the City was liable because it had an unlawful official policy, practice, or custom, but that it was not liable for a failure to train. (*Id.*)

After a second phase of the trial on the issue of damages, the jury returned a verdict awarding survival damages of $3,600,000 for Mr. Valenzuela's loss of life and $6,000,000 for his pre-death pain and suffering. (Dkt. 372.) The jury also awarded $1,800,000 each to Vincent and Ximena Valenzuela for wrongful death damages for their past and future loss of Mr. Valenzuela's love, companionship, comfort, care,

assistance, protection, affection, society, moral support, training, and guidance. (*Id.*)

III. DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants first move for judgment as a matter of law. 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), *aff'd*, 539 U.S. 90 (2003). Specifically, a court may enter judgment as a matter of law only 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). 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). The "high hurdle" this standard creates "recognizes that credibility, inferences, and factfinding are the province of the jury, not this court." *Costa*, 299 F.3d at 859.

A. Excessive Force

Defendants argue that they are entitled to judgment as a matter of law on all claims because the evidence at trial demonstrated the officers' use of force was objectively reasonable. (JMOL Mot. at 18–21.) Defendants are wrong. Under the Fourth Amendment, a police officer 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 several nonexhaustive 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).

The evidence at trial showed that the carotid hold is extremely dangerous. (*See*, *e.g.*, Dkt. 409 [Transcript from Trial Day 2, 11/13/19, AM, hereinafter "Day 2 AM"] at 122–23 [Officer Wolfe]; Dkt. 410 [Transcript from Trial Day 3, 11/14/19, AM, hereinafter "Day 3 AM"] at 95 [Officer Jun]; Dkt. 411 [Transcript from Trial Day 4, 11/15/19, AM, hereinafter "Day 4 AM"] at 41 [Sergeant Gonzalez]; Dkt. 412 [Transcript from Trial Day 5, 11/18/19, AM, hereinafter "Day 5 AM"] at

74 [Joe Callanan].) It involves wrapping an officer's arm around a suspect's neck, and attempting to apply pressure only to the sides of the neck. This is very difficult even under model conditions. And if there is any level of struggle or resistance, it is even more difficult to execute the carotid hold appropriately. Moreover, just one minute of pressure on the carotid artery, even when applying the hold correctly, can cause permanent brain tissue damage. (Dkt. 428 [Transcript from Trial Day 4, 11/15/19, PM, hereinafter "Day 4 PM"] at 94 [Sergeant Ciscel].) And as this case showed, attempting to use the hold can interfere with a person's ability to breathe and kill him. Because the carotid hold is so dangerous, many police departments have prohibited its use completely, or limited its use to deadly force situations. (*See*, *e.g.*, Day 2 AM at 21–23 [Scott DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].)

Especially troubling here was the compelling evidence that the officers did not apply this very dangerous hold in the way they were taught to—they applied it for too long, too often, and to the front of Mr. Valenzuela's neck, ignoring Mr. Valenzuela's clear symptoms of distress. Specifically, the officers applied the carotid hold for over two and a half minutes, despite statements in the Peace Officer Standards and Training ("POST") learning domain that pressure on the carotid for just 60 seconds can cause permanent brain tissue damage. *See Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002), *as amended* (Jan. 30, 2002) (relying on "regional and state-wide

police practice and protocol" in qualified immunity analysis); (Day 4 PM at 94 [Sergeant Ciscel]; *see* Day 5 AM at 22 [Joe Callanan testifying that a properly applied carotid hold "should render a person unconscious briefly in a matter of seconds"].) Also contrary to POST, the officers used the carotid hold more than twice in 24 hours. (Day 2 AM at 46 [Scott DeFoe].) In addition, they applied pressure to the front of Mr. Valenzuela's neck. (*See* Day 4 PM at 109 [Sergeant Ciscel testifying that proper application of the carotid hold should not cause hyoid bone fracture]; Day 2 AM at 56 [Scott DeFoe agreeing]; Dkt. 426 [Transcript from Trial Day 2, 11/13/19, PM, hereinafter "Day 2 PM"] at 15–16 [Coroner Dr. Aruna Singhania testifying that Mr. Valenzuela's hyoid bone was broken]; Day 4 AM at 62, 65 [Dr. Bennet Omalu testifying the same].) Finally, the officers ignored numerous clear signs that Mr. Valenzuela was having trouble breathing. (*See*, *e.g.*, Day 2 AM at 47 [Scott DeFoe testifying that if "someone's gasping and their face is red, you should be able to look and say, 'This is not working' "]; Day 4 PM at 62–63 [Dr. Gary Vilke testifying that the neck restraint was not released until 35 seconds after snoring indicating difficulty breathing began].) Mr. Valenzuela was turning purple, wheezing, gasping for air, and screaming that he could not breathe.

The jury's finding of excessive force was further supported by evidence showing that when the officers approached Mr. Valenzuela in the laundromat, they had little to no information that he had committed any crime—only that he was a "suspicious person." *See*

Graham, 490 U.S. at 396 (including "the severity of the crime at issue" as one of the factors bearing on reasonableness); (*see* Day 3 AM at 92–93 [Officer Jun testifying that they did not have any information that Mr. Valenzuela had harmed or had threatened to harm anyone]). Although Mr. Valenzuela was resisting or attempting to evade arrest at times, the most important factor is whether he posed an immediate threat to the officers or others. *See Graham*, 490 U.S. at 396; *Mattos*, 661 F.3d at 441. There was no evidence that Mr. Valenzuela was armed at any point in his interactions with the officers. (*See*, *e.g.*, Day 3 AM at 92–93 [Officer Jun testifying that he did not see a weapon in Mr. Valenzuela's hand or on his person]; Day 2 AM at 143 [Officer Wolfe testifying that he saw the handle of a screwdriver in Mr. Valenzuela's bag, but never indicating that Mr. Valenzuela accessed the screwdriver or any other potential weapon].) Nor was he taking any action that posed a threat of serious bodily injury to officers or to others. And he certainly posed very little threat during the final neck restraint when Officer Wolfe was on top of him and Officer Jun and Sergeant Gonzalez were holding his arms.

Viewing the facts in the light most favorable to Plaintiffs, and drawing all reasonable inferences in their favor, there was substantial evidence that the officers used excessive force, and the jury reasonably concluded they did. *See Johnson*, 251 F.3d at 1227; *Velazquez*, 793 F.3d at 1018. The carotid hold was dangerous, and the officers knew it. But they used it anyway. They used it despite the fact that Mr. Valenzuela

was not suspected of any serious crime and did not pose an immediate threat. Worse yet, they applied it in a way they were told not to—more times than they should have, for longer than they should have, and despite numerous indications that Mr. Valenzuela was in pain and distress. And they applied pressure to the center of Mr. Valenzuela's neck, making it impossible for him to even breathe. Tragically, their use of the carotid hold on Mr. Valenzuela led to his unnecessary death.

B. Qualified Immunity

Defendants argue that Officer Wolfe, Officer Jun, and Sergeant Gonzalez are entitled to qualified immunity on Plaintiffs' § 1983 claims. (JMOL Mot. at 2–8.) Qualified immunity shields public employees from § 1983 liability 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 qualified immunity applies, courts evaluate (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 in the preceding section, there is no question here that the first prong is met. Rather, Defendants focus on the second prong, arguing that there was no clearly established law at the time of the incident that would make a reasonable officer aware that using the carotid hold

on Mr. Valenzuela was unreasonable under the circumstances.

"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).

Officer Jun, Officer Wolfe, and Sergeant Gonzalez are not entitled to qualified immunity. Every reasonable officer on July 2, 2016 knew the carotid hold was dangerous. Wrapping an officer's arm around a suspect's neck and attempting to apply pressure only to the sides of the neck is very difficult, especially where there is any level of struggle or resistance, as there was here. (Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 5 AM at 74 [Joe Callanan].) Even when an officer executes the hold properly, using it for just one minute can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel].) Because the carotid hold is so dangerous, and can cause serious injury or death, many police departments have prohibited it altogether, or limited its use to deadly force situations. (*See*, *e.g.*, Day 2 AM at 21–23 [Scott

DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].)

Moreover, every reasonable officer on July 2, 2016 knew that using the carotid hold for more than two minutes and thirty seconds and more than twice in 24 hours, applying pressure to the center of the neck, and continuing the hold despite clear signs that the subject could not breathe was an unreasonable use of force. *See Hamby*, 821 F.3d at 1090. Yet the officers here did exactly that. They applied the carotid hold for far longer than the period POST teaches can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel]; *see* Day 5 AM at 22 [Joe Callanan].) They used it more than twice in 24 hours. (Day 2 AM at 46 [Scott DeFoe explaining that POST says not do to this]); *see Headwaters*, 276 F.3d at 1131 (relying on "regional and state-wide police practice and protocol" in qualified immunity analysis). They applied pressure to the front of the neck, preventing Mr. Valenzuela from breathing. (*See* Day 4 PM at 109 [Sergeant Ciscel]; Day 2 AM at 56 [Scott DeFoe]; Day 2 PM at 15–16 [Dr. Singhania]; Day 4 AM at 62 [Dr. Omalu].) And they continued the hold despite numerous clear signs that Mr. Valenzuela was having trouble breathing—he was turning purple, wheezing, gasping for air, and screaming that he could not breathe. (*See*, *e.g.*, Day 2 AM at 47 [Scott DeFoe]; Day 4 PM at 62–63 [Dr. Vilke].) All of this despite the fact that Mr. Valenzuela was merely a "suspicious person," was not armed, and was not posing any immediate threat.

The circumstances in this case are similar to those in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). There, with Mr. Drummond on the ground and his hands cuffed behind him, officers put their knees on his back and neck and placed the weight of their bodies on him. *Id.* at 1054. He "soon fell into respiratory distress," told the officers he could not breathe and that they were choking him, and asked for a glass of water. *Id.* at 1054–55. One eyewitness said the man was "obviously" having trouble breathing. *Id.* at 1055. After the officers then used a "hobble restraint," binding his ankles, he went limp and lost consciousness. *Id.* Mr. Drummond went into a "permanent vegetative state." *Id.* The Ninth Circuit held "that, under the circumstances, a reasonable officer would have had fair notice that the force employed was unlawful, and that any mistake to the contrary would have been unreasonable." *Id.* at 1060. The Circuit further found that the law at that time was clearly established, and "any reasonable officer would have known that the force used amounted to a constitutional violation." *Id.* at 1062.

Drummond is not the only case on point. *See*, *e.g.*, *Booker v. Gomez*, 745 F.3d 405, 425 (10th Cir. 2014) (finding clearly established law made qualified immunity inappropriate where carotid hold was applied for two minutes and 55 seconds, despite training to use it only for one minute, during which time the suspect was handcuffed, 50-75% of officer's body weight put on suspect's back, and tased); *Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008) (finding clearly established

law precluded qualified immunity where, "even after it was readily apparent for a significant period of time (several minutes) that [the suspect] was fully restrained and posed no danger, the defendants continued to use pressure on a vulnerable person's upper torso while he was lying on his stomach").

Simply stated, every reasonable officer on July 2, 2016 would have understood that applying the carotid hold for longer than a minute, more than once, with pressure on the front of the neck, despite clear signs the suspect could not breathe, was an excessive use of force. Qualified immunity does not apply.

C. Bane Act

Defendants argue they are entitled to judgment as a matter of law on Plaintiffs' Bane Act claim because there was no evidence that the officers had the specific intent to violate Mr. Valenzuela's rights. (JMOL Mot. at 16.) Although the elements of a Bane Act excessive force claim are similar to a § 1983 excessive force claim, 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, a defendant 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). "[I]t is not necessary for the defendants to have been "thinking in constitutional or legal terms at the time of the

incidents, because a reckless disregard for a person's constitutional rights is evidence of a specific intent to deprive that person of those rights." *Id.*

Contrary to Defendants' assertion, there was substantial evidence that Officers Jun and Wolfe had a specific intent to use unreasonable force and that Sergeant Gonzalez had a specific intent to permit and encourage that use of unreasonable force. All three officers testified that they knew the carotid hold was dangerous. Officer Wolfe testified that at the time he used the hold, he knew he should not apply the carotid for more than 30 seconds, and that a properly applied carotid hold should not interfere with someone's ability to breathe. (Day 2 AM at 122–23.) He further knew on the day of the incident that an improperly applied carotid hold could interfere with someone's ability to breathe, and if he put pressure in the front of the neck rather than the sides, that could cause serious injury or death. (*Id.*) Officer Jun testified similarly that he was trained to be careful in applying the carotid hold because applying pressure to the front of a neck could cause serious injury or death. (Day 3 AM at 95.) Sergeant Gonzalez testified that prolonged use of the carotid hold can cause serious injury or death, and that he knew other departments had prohibited the use of the carotid hold. (Day 4 AM at 41, 44.) Nevertheless, the officers deliberately chose to apply the carotid hold on Mr. Valenzuela.

Making matters worse, the officers applied or directed its application in a way contrary to POST—for longer than 60 seconds, more than twice in 24 hours,

and ignoring signs that Mr. Valenzuela was having trouble breathing. They also applied it contrary to APD policy and practice, which was to not use the carotid hold for longer than 30 seconds. (Day 4 PM at 94 [Sergeant Ciscel explaining APD training to use the hold for 30 seconds, and if a suspect has not "gone out, reassess the hold or move on to a different force option"].) Moreover, Mr. Valenzuela was not presenting an immediate threat—indeed, for much of the final hold, Mr. Valenzuela was on his stomach, Officer Wolfe was on top of his back, and Officer Jun and Sergeant Gonzalez were holding his hands. (*See* Day 4 AM at 41–42.) Based on the substantial evidence presented, the jury reasonably inferred an intent to use unreasonable force from the fact that the officers deliberately chose to use a dangerous hold and then used it contrary to POST and APD training despite many signs that Mr. Valenzuela was in pain and distress.[1]

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[1] Defendants also argue that the jury's verdict on the Bane Act claim was inconsistent with its verdict on the substantive due process claim. Not so. To prove a substantive due process violation, Plaintiffs had to prove that "Officer Wolfe, Officer Jun, and/or Sergeant Gonzalez acted with a *purpose to harm* Mr. Valenzuela that was not related to a legitimate law enforcement objective," which "include detention, arrest, self-defense, or the defense of others." (Dkt. 360 [Court's Instruction No. 16, emphasis added].) Based on the substantial evidence presented, the jury reasonably concluded that the officers intended to use unreasonable force, as described above, but did not act with a purpose to harm Mr. Valenzuela unrelated to any legitimate law enforcement objective. Put simply, the officers intended to use excessive force to gain complete control and arrest Mr. Valenzuela, but they did not intend to kill him.

D. *Monell*

To prevail on their *Monell* claim on an unlawful custom, practice, or policy theory, Plaintiffs had to prove: (1) that the officers acted under color of state law, (2) that the officers deprived Mr. Valenzuela of his constitutional rights, (3) that the officers acted pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the APD, and (4) that the APD's official policy, practice, or custom caused the deprivation of Mr. Valenzuela's rights. (Dkt. 360 [Court's Instruction No. 13].) Defendants argue that judgment as a matter of law is appropriate because "plaintiffs never articulated what the specific custom, practice or policy of the City was that led to a violation of Valenzuela's rights." (JMOL Mot. at 14.) Defendants are wrong. Defendants admitted the City had a well-established policy of directing its officers to apply the carotid hold to gain control of a suspect, even in non-deadly force situations. (*See* Day 4 AM at 34 [Sergeant Gonzalez testifying that APD policy does not classify the carotid hold as deadly force]; Day 4 PM at 71, 82, 89 [Sergeant Ciscel describing the APD's policy regarding the carotid hold, and testifying that Officer Jun and Officer Wolfe's use of the carotid hold was within that policy].) There was no question at trial as to what the relevant policy was. The question was whether that policy was lawful. Based on the substantial evidence presented at trial, the jury reasonably concluded that it was not. *See Johnson*, 251 F.3d at 1227.

Specifically, Plaintiffs presented compelling evidence that the carotid hold is extremely dangerous. Even properly applied, for example, one minute on the carotid artery can cause permanent brain tissue damage. (Day 4 PM at 94 [Sergeant Ciscel testifying about what POST teaches].) Misapplication of the carotid hold—which again is very easy in situations where there is even minimal struggle—including by applying pressure to the front of the neck, can cause serious injury or death. (*See*, *e.g.*, Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41 [Sergeant Gonzalez]; Day 5 AM at 74 [Joe Callanan testifying that improper application of the carotid hold can cause serious injury or death].)

Plaintiffs further presented evidence that because the carotid hold is so dangerous, other police departments prohibit use of the carotid altogether, and that others, like the LAPD, prohibit it in non-deadly force situations. (*See*, *e.g.*, Day 2 AM at 21–23 [Scott DeFoe testifying that "[m]any departments throughout the country prohibit the use of (the carotid hold) altogether," and the LAPD puts it "on the same parallel with utilization of a firearm . . . [s]o you only can use the carotid restraint hold if . . . an imminent threat of great bodily injury or death exists, not when someone is just being resistive, like in this case"]; Day 4 AM at 44 [Sergeant Gonzalez stating that the carotid hold is not allowed in some police departments, "[b]ut it's in my policy and a lot of different policies"]; Day 4 PM at 108–09 [Sergeant Ciscel testifying that he has heard complaints about the carotid hold throughout his

career and some departments classify it as deadly force]; Day 5 AM at 74 [Joe Callanan testifying that LAPD classifies the carotid hold as deadly force].) But the APD decided that the carotid, in Sergeant Gonzalez's words, was "a good option to render someone temporarily unconscious and make them secure." (Day 4 AM at 19.)

Plaintiffs also presented substantial evidence that the APD's policy caused the deprivation of Mr. Valenzuela's constitutional rights. (*See* Day 2 PM at 26–29 [coroner Dr. Singhania testifying regarding the cause of death]; Day 4 AM at 64–65, 71–72 [Dr. Omalu testifying that cause of death was asphyxiation and that "[t]here is no scientific evidence that methamphetamine killed him or hypertension killed him"].) Indeed, it caused his tragic death.

IV. DEFENDANTS' MOTION FOR NEW TRIAL

Even where judgment as a matter of law is not appropriate because substantial evidence supports the jury's verdict, a court may grant a 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)); *see* Fed. R. Civ. P. 59(a)(1)(A) (stating that courts 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").

A. *Monell*

Defendants argue a new trial is warranted on their *Monell* claim because the jury's verdict on that claim was contrary to the clear weight of the evidence. Defendants are wrong. The clear weight of the evidence showed that the carotid hold is extremely dangerous, even when properly applied, and that there is a serious possibility that using the carotid hold may cause serious injury or death. (*See* Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41 [Sergeant Gonzalez]; Day 5 AM at 74 [Joe Callanan].) Because the hold is so dangerous, other police departments had prohibited it or restricted its use to deadly force situations. (*See*, *e.g.*, Day 2 AM at 21–23 [Scott DeFoe]; Day 4 AM at 44 [Sergeant Gonzalez]; Day 4 PM at 108–09 [Sergeant Ciscel]; Day 5 AM at 74 [Joe Callanan].) The APD directed its officers to use the carotid hold despite the dangers. (*See* Day 4 AM at 34 [Sergeant Gonzalez]; Day 4 PM at 71, 82, 89 [Sergeant Ciscel].) What's more, they directed their officers to use it even in non-deadly force situations. (*See id.*)[2] The

[2] Defendants argue that Plaintiffs failed to present evidence of deliberate indifference. (New Trial Mot. at 6–7.) However, they confuse the requirements for finding municipal liability for failure to train with liability for an unlawful official policy, practice, or custom. Deliberate indifference is an element for failure to train, but there is no such requirement for an unlawful policy. (*Compare* Dkt. 360 [Court's Instruction No. 13] *with id.* [Court's Instruction No. 14].)

jury's verdict on Plaintiffs' *Monell* claim was not contrary to the clear weight of the evidence.

B. Bane Act

Defendants argue that the Court should grant a new trial on Plaintiffs' Bane Act claim because Plaintiffs did not present any evidence showing the officers acted with the requisite intent. (New Trial Mot. at 9–11.) The Court disagrees. The officers all testified that they knew the carotid hold was dangerous. (Day 2 AM at 122–23 [Officer Wolfe]; Day 3 AM at 95 [Officer Jun]; Day 4 AM at 41, 44 [Sergeant Gonzalez].) Nevertheless, they decided to use the hold, and further decided to use it in a way contrary to POST and APD policy. Specifically, they used the hold more times than they were taught to, for longer than they were taught to, and despite numerous signs that Mr. Valenzuela was in pain, distress, and having trouble breathing. The clear weight of the evidence showed that the officers intended to use unreasonable force.

C. Allocation of Fault

Defendants argue that a new trial is warranted because the jury's allocation of fault—85% to Officer Jun, Officer Wolfe, and/or Sergeant Gonzalez, and 15% to Mr. Valenzuela—was contrary to the weight of the evidence. (New Trial Mot. at 11–14.) They point to evidence that Mr. Valenzuela had a methamphetamine pipe, did not put his hands behind his back when officers instructed him to, resisted arrest, and struggled

with the officers. (*Id.* at 12.) They also point to the medical examiner's determination that the cause of death was "a complication of asphyxia during the struggle with the law enforcement officer under the influence of methamphetamine and cardiomegaly [enlarged heart] as other condition contributing in the death." (Day 2 PM at 24.)

Defendants miss the point. Mr. Valenzuela was not a saint. He did not obey every command officers gave him. He ran across the street after the struggle in the laundromat. He resisted arrest. But the evidence showed it was totally unnecessary to use this extremely dangerous hold. Mr. Valenzuela was not armed. He was taking no action that threatened serious bodily injury to officers or to others. Indeed, during the final hold, Mr. Valenzuela was on the ground with one officer on top of him, one officer holding his right arm, and another officer holding his other arm. Mr. Valenzuela did not deserve to die. The jury's allocation of fault was not contrary to the clear weight of the evidence.

D. Misconduct by Plaintiffs' Counsel

Defendants next argue that a new trial is warranted because four instances of purported "misconduct" by Plaintiffs' counsel, taken together, "permeated the entire trial" and "clearly demonstrate that the verdict was the result of passion." (New Trial Mot. at 15; Dkt. 421 [New Trial Reply] at 2.) To receive a new trial because of attorney misconduct, Defendants must

meet a very high standard: the misconduct must have "substantially interfered with [Defendants'] interest," and the "flavor of [the] misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *S.E.C. v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012). This standard is not even close to being met here.

The first alleged act of "misconduct" Defendants argue warrants a new trial is Plaintiffs' counsel Garo Mardirossian's comment in opening statement that Mr. Valenzuela and his sister were sexually and physically abused as children by their step-grandfather. (Dkt. 425 [Transcript from Trial Day 1, 11/12/19, PM [hereinafter "Day 1 PM"] at 24.) As background, many of the Court's rulings on Plaintiffs' fourteen motions in limine and Defendants' eleven motions in limine favored Defendants. (*See* Dkt. 325.) For example, the Court ruled that in both the liability and damages phases, Defendants could introduce evidence that Mr. Valenzuela was under the influence of drugs at the time of the incident, that Mr. Valenzuela had a drug-related criminal history, that officers heard a methamphetamine pipe break in the laundromat, and that Defendants could refer to Mr. Valenzuela as an "addict." (*Id.* at 13–18.) The Court concluded that this evidence was relevant to critical questions at trial, including whether the force used was reasonable and whether the carotid hold caused Mr. Valenzuela's death. (*Id.*)

In an attempt to explain the evidence regarding Mr. Valenzuela's drug and criminal history that

Defendants were going to introduce, Mr. Mardirossian referred to childhood abuse in his opening statement. (Day 1 PM at 24.) The Court immediately sustained Defendants' objection to the comment, stating that this evidence would be appropriate for the damages phase but not the liability phase. (*Id.*) Although evidence regarding childhood abuse was certainly relevant (and the jury was going to find out about it in the damages phase), during the liability phase it would have unduly delayed the trial and confused the jury. The evidence was not prejudicial to Defendants—indeed, mentioning the childhood abuse essentially confirmed that Mr. Valenzuela had a drug problem.

Defendants moved for a mistrial based on Mr. Mardirossian's comment. (Day 1 PM at 47–51.) The Court denied the motion. (*Id.* at 51.) Nevertheless, the Court agreed to instruct the jury again after opening statements that those statements are not evidence and that the jury may not consider them in deciding what the facts are. (Day 1 PM at 82; *see id.* at 11 [Court's pre-trial instruction that an opening statement is not evidence].) The Court specifically addressed Mr. Mardirossian's comment about sexual abuse:

> One of the critical issues in the liability phase is whether the force used by the officers was excessive under the totality of the circumstances. Whether Mr. Valenzuela was under the influence of methamphetamine and whether he had an enlarged heart due to methamphetamine use are relevant to whether the force used by the officers was

> excessive and, if so, whether that force was the substantial factor in causing Mr. Valenzuela's death. The reasons why Mr. Valenzuela may have taken methamphetamine before the encounter with the police officers or the reasons why he may have had a methamphetamine abuse problem are not relevant to the liability issues. I'm instructing you that you cannot consider those reasons during your deliberations for the first phase, liability issues.

(*Id.*) After trial, the Court again instructed the jury that both opening statements and closing arguments are not evidence. (Dkt. 360 [Court's Instruction No. 4].)

The second instance of purported "misconduct" are two questions by Plaintiffs' counsel Dale Galipo. Specifically, Mr. Galipo asked Officer Wolfe and Officer Jun whether they were trained on how to deal with people with post-traumatic stress disorder. (Day 2 AM at 141; Dkt. 427 [Transcript from Trial Day 3, 11/14/19, PM] at 31.) Defendants objected to these questions based on relevance and under Federal Rule of Civil Procedure 403. The Court overruled the objections. The testimony Mr. Galipo elicited was relevant to at least two issues: first, whether the force used was reasonable, including because the video of the incident made clear that Mr. Valenzuela had mental health issues, and second, whether the APD failed to train its officers, especially given the possibility that individuals with mental health issues may not submit to police authority as a rational person would. In response to Mr. Galipo's question, Officer Wolfe testified that officers learn

about "a variety of conditions," but the focus of training "is behavior, how to keep them safe, and how to keep the public safe," and the questioning then moved to safety. (Day 2 AM at 141–142.) Officer Jun testified that he did not remember whether he was trained on post-traumatic stress disorder specifically, and the questioning quickly turned to what force is reasonably necessary. (*Id.* at 31–32.) The Court instructed the jury that questions and objections by lawyers are not evidence. (*Id.*)

The third occurrence of supposed "misconduct" is that during his closing argument at the damages phase, Mr. Galipo mentioned (accurately) that the City of Anaheim was a defendant in the case. (Dkt. 414 [Transcript from Trial Day 7, 11/20/19, hereinafter "Day 7"] at 40.) Defendants did not object. (*Id.*) However, Defendants now contend that this isolated statement "violat[ed] their agreement and the Court's subsequent order that there be no mention that the City would pay any judgment entered against the officers." (New Trial Mot. at 16.) But Mr. Galipo never said the City would pay any judgment. His statement did not violate any Court order, nor did it prejudice the Defendants in any way. Moreover, the Court instructed the jury on what it could and could not consider in deciding how much to award damages. (Dkt. 377 [Court's Instruction Nos. 1–4].)

The fourth instance of asserted "misconduct" is that Plaintiffs introduced during the damages phase a letter that Plaintiffs did not produce in discovery. (New Trial Mot. at 17; *see* Dkt. 430 [Transcript from Trial

Day 6, 11/19/19, PM, hereinafter "Day 6 PM"] at 16–19.) This was a handwritten letter Mr. Valenzuela wrote to the mother of his children, Patricia Gonzalez. (Day 6 PM at 16.) Ms. Gonzalez testified that in the letter, Mr. Valenzuela asked how "little Vince" was doing in school. (*Id.*) He wrote, "Man, I'm so proud of him for being such a good boy and attending [the 'Cops for Kids'] program." (*Id.* at 17.) He continued, "I love him. Miss him. He's always going to be my big guy." (*Id.*) Turning to his daughter, Mr. Valenzuela wrote, "My Little Ximena. How is she doing in school? Oh, my baby girl. She's still a baby I love her to heck." (*Id.*) He added, "it's cool when she sings." (*Id.* at 18.) This evidence showed the relationship Mr. Valenzuela had with his children and was therefore directly relevant to the jury's determination of what dollar value to put on Vincent and Ximena Valenzuela's loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance. The Court overruled Defendants' hearsay objection to the letter because the evidence was relevant to show Mr. Valenzuela's state of mind and his relationship with and feelings toward the children. (*Id.* at 135.) The Court also overruled Defendants' Rule 403 objection because there was no prejudice.

The contention that a comment in opening statement regarding childhood abuse, two questions about police training on post-traumatic stress disorder, an accurate statement in closing argument that the City was a Defendant, and the use of a highly relevant letter amounted to misconduct that sufficiently

"permeated" this entire trial and unfairly prejudiced Defendants so severely as to warrant throwing out a jury verdict rendered after two phases and seven days of trial is simply not credible. The jury was properly instructed on what evidence it could consider in determining liability and damages, and none of the purported misconduct was the type that would appeal to jurors' passions and make them unable to follow Court instructions. It is absolutely implausible that these issues led the jury to be "influenced by passion and prejudice in reaching its verdict." *See Jasper*, 678 F.3d at 1129.

E. Excessive Damages Award

Defendants argue that a new trial is warranted because the jury's damages award was excessive. (New Trial Mot. at 17–19.) "Doubts about the correctness of the verdict are not sufficient grounds for a new trial: the trial court must have a firm conviction that the jury has made a mistake." *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987) (citing *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.")).

Defendants specifically take issue with Plaintiffs' counsel's statements in closing argument regarding the value of a B-1 bomber, a Picasso painting, or

LeBron James' basketball contract. It is somewhat disingenuous for Defendants to complain about these statements. Defendants' counsel himself in closing argument explicitly asked the jury to tie the children's loss of love, companionship, comfort, care, protection, affection, society, moral support, training, and guidance to something improper—the cost of going to college. He told the jury that Plaintiffs' attorneys want them "to award millions and millions of dollars to these kids," but he instead suggested that "we should take care of their college." (Day 7 at 35.) He then outlined the cost of going to a California State University or a University of California school. (*Id.*) There had been, of course, no evidence presented during trial about the cost of a college education. Indeed, there was not even any evidence that Mr. Valenzuela would have paid for the children's college education had he lived.

Nevertheless, Defendants contend that Plaintiffs' counsel improperly asked the jury to use the value of a B-1 bomber, a Picasso pointing [sic], or Lebron James' Lakers contract "as benchmarks." (New Trial Mot. at 17.) Plaintiffs' counsel did not. Rather, he used these items in the context of his argument that all life has value. (*See* Day 7 at 22 ["Next. 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."].) This was not improper.

In any event, Defendants suffered no prejudice from Plaintiffs' counsel's brief and isolated statements

during closing argument. "[N]o citation is required for the elementary proposition that attorneys are allowed wide latitude in their closing arguments to juries." *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1288 (9th Cir. 1984) (Ely, J., concurring). Bringing up the value of a B-1 bomber or a Picasso painting did not have any tendency to so appeal to jurors' passions that they would not have been able to follow the Court's instructions. Indeed, the jury's verdict was nowhere near the values Mr. Mardirossian placed on the plane or the painting.

The Court is not left with any conviction—much less a firm one—that the jury made a mistake. *See Landes Const. Co.*, 833 F.2d at 1372. It is very difficult to assign a dollar value to an individual's life. It is very difficult to quantify the pain and suffering involved in being choked to death. It is very difficult to quantify children's loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance when they lose their father. In the context of the jury's attempt to put a dollar value on the love and support of a father, Plaintiffs' counsel's statements were hyperboles and, quite frankly, inconsequential.

F. Duplicative Damages Award

Defendants argue that a new trial is warranted because the jury's damages award was duplicative. (New Trial Mot. at 19–20.) They contend that the jury awarded a particular damages amount for each

category of love, companionship, comfort, care, protection, affection, society, moral support, training, and guidance, and the award is duplicative because those categories overlap. (*Id.* [citing Day 7 at 23–24].) But the jury did no such thing. In fact, the jury asked questions about these categories that show the jury purposely *avoided* awarding overlapping damages. Specifically, the jury asked the Court for the legal definition of "society." (Dkt. 364.) The Court responded that "society" means "the love, companionship, comfort, care, protection, affection, moral support, training and guidance that a child receives from a father's continued existence." (Dkt. 365.) The jury then asked: " 'Society' was one of the components of the list of 11 'areas' on the verdict sheet. Your answer implies that 'society' is not a 'stand alone' area. Is this correct or is society to be looked at on its own? Is 'society' a stand alone or a summation of the entire list of 11?" (Dkt. 367.) The Court responded, "It is a combination of all the other words on the list." (Dkt. 369.) The jury's questions show that the jury understood the potential overlap in the categories in the jury instruction, and wanted to ensure that it did *not* award overlapping damages.

G. Bifurcation

Defendants argue that a new trial is warranted because the Court erred in refusing to bifurcate individual liability claims from supervisory and municipal liability claims. (New Trial Mot. at 20–21.) The evidence presented at trial confirmed the Court's reasoning that the individual, supervisory, and municipal

liability issues were all inextricably linked and the evidence to prove them overlapped substantially. (*See* Dkt. 325 at 7–8.) The evidence showed that the officers attempted to apply the carotid hold because they were trained to use it in non-deadly force situations to control and arrest a suspect. To bifurcate liability the way Defendants suggested would have unfairly prejudiced Plaintiffs, the Court, the jury, and the individual officers. And it would also have created undue delay, wasted time, and resulted in the needless presentation of duplicative evidence. Specifically, evidence relating to supervisory and municipal liability was directly relevant to the individual officers' liability, because the jury had to decide whether the officers used excessive force and acted with a purpose to harm Mr. Valenzuela, as Plaintiffs alleged, or whether the neck restraint was reasonably applied in conformity with their supervision by Sergeant Gonzalez, their training, and APD policy, as Defendants contended.[3]

H. Damages for Loss of Life Under 42 U.S.C. § 1983

Finally, Defendants argue that the Court erred in allowing the jury to award damages for Mr.

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[3] Defendants argue that the Court should have bifurcated the liability issues to "protect the individual officer defendants from the prejudice that might result if a jury heard evidence regarding the municipal defendant's allegedly unconstitutional policies." (New Trial Mot. at 21 [quoting *Green v. Baca*, 226 F.R.D. 624, 633 (C.D. Cal. 2005)].) But as explained, the evidence of APD's allegedly unconstitutional policies was central to the individual officers' defense.

Valenzuela's loss of life. (New Trial Mot. at 21–22.) But failing to award damages for Mr. Valenzuela's loss of life 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 when officials deprive them 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*, where it considered whether California's bar on survival damages for pre-death pain and suffering was inconsistent with § 1983. 751 F.3d 1096, 1103 (9th Cir. 2014). 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.* Prohibiting recovery for pre-death pain and suffering therefore creates a perverse effect: it is more economically advantageous for a defendant to kill rather than injure his victim. *Id.* Consequently, the Ninth Circuit held that California's prohibition on pre-death pain and suffering damages 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*, which held that a Wisconsin statute barring damages for loss of life was inconsistent with § 1983. 746 F.2d 1205, 1239 (7th Cir. 1984), *overruled in part on other grounds by Russ v.*

Watts, 414 F.3d 783 (7th Cir. 2005). In *Bell*, 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 the 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. A majority of 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 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 backwards incentive: officers should aim to kill, not injure. Even more, they should kill quickly, lest the decedent's estate recover 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 the government entrusts 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 value. This platitude rings true even if someone is unemployed, homeless, a drug addict, and 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 uses 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 a law enforcement officer has unlawfully killed

someone, conflicts with § 1983's policy of compensation.

It would be a great injustice to allow a perpetrator of excessive force to get away with paying no damages just because 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.

V. PLAINTIFFS' MOTION FOR ATTORNEY FEES

"The general rule in our legal system is that each party must pay its own attorney's fees and expenses." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). In an action brought under 42 U.S.C. § 1983, however, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Attorney fees are also recoverable under the Bane Act. Cal. Civ. Code § 52.1(i) ("In addition to any damages, injunction, or other equitable relief awarded . . . the court may award the . . . plaintiff reasonable attorney's fees."). Under this authority, Plaintiffs seek an award of $1,333,355 in fees and $51,639.07 in costs, in addition to the costs allowable under 28 U.S.C. § 1920. (Fee Mot. at 2.)

A. Prevailing Party

Plaintiffs may be considered prevailing parties if they succeed on any significant issue in litigation that

achieves some of the benefit sought in bringing the lawsuit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiffs Vincent and Ximena Valenzuela prevailed on their claims when the jury found that the officers used excessive force, that Sergeant Gonzalez was liable as a supervisory defendant, and that the City was liable based on an unlawful policy, practice, or custom, and awarded a total of $13.2 million in damages. As the prevailing party on the pivotal issue of whether the use of the neck restraint was reasonable, they are entitled to their reasonable attorney fees. Specifically, Vincent and Ximena Valenzuela prevailed on the issues of unreasonable force, supervisory liability, municipal liability on an unlawful policy, practice, or custom theory, battery, negligence, and liability under California's Bane Act.

Defendants argue that Mr. Valenzuela Sr. was not a prevailing party because the jury found against Plaintiffs on his only claim—violation of substantive due process. This matters because Plaintiffs seek fees for the work of Dale Galipo, who appeared in this case for the first time on October 30, 2019, on behalf of Mr. Valenzuela Sr. only. (*See* Dkt. 324 [Notice of Appearance of Counsel].) Then, on November 18, 2019—after the jury found for Defendants on Mr. Valenzuela Sr.'s claim but before the damages phase began—Mr. Galipo was added as counsel of record for Vincent and Ximena Valenzuela as well. (Dkt. 352.) Defendants argue that all of Mr. Galipo's work before November 18, 2019[4] is

[4] Although Mr. Galipo worked on this case "from its inception," Plaintiffs seek reimbursement only for time incurred

not compensable as "time incurred while representing a non-prevailing party." (Dkt. 404 [Defendants' Opposition to Fee Motion, hereinafter "Fee Opp."] at 5–6; Dkt. 404-1 [Defendants' objections to Mr. Galipo's time].)

The Court is not persuaded. The work Mr. Galipo performed on behalf of Mr. Valenzuela Sr. is not separable from Vincent and Ximena Valenzuela's case. Mr. Galipo questioned every witness in the liability phase. He performed the closing argument for all Plaintiffs. The work he performed preparing for trial clearly served all Plaintiffs, not just Mr. Valenzuela Sr. There was no evidence or argument at trial that went *only* to Mr. Valenzuela Sr.'s substantive due process claim—indeed, any evidence relevant to that claim was also relevant to Vincent and Ximena Valenzuela's substantive due process claim. Accordingly, the evidence Mr. Galipo reviewed, the arguments he developed, the strategy he contributed, and the other work Mr. Galipo performed was all relevant to Vincent and Ximena Valenzuela's claims and was related to their ultimate success. *Cf Hensley*, 461 U.S. at 435 (analyzing treatment of fees on unsuccessful claims, and explaining that the correct analysis hinges on whether the plaintiff's work on the other claims was related to the plaintiff's ultimate success). Simply put, Mr. Galipo's stellar advocacy was key to Vincent and Ximena's success.

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beginning August 24, 2019. (Dkt. 385-5 [Declaration of Garo Mardirossian] ¶ 14.)

B. Reasonableness of the Fee

The customary method of determining fees is known as the lodestar method. *Morales v. City of San Rafael*, 96 F.3d 359, 364 (9th Cir. 1996). The lodestar amount is the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. There is a strong presumption that the lodestar figure represents a reasonable fee. *Morales*, 96 F.3d at 363 n.8; *see also Harris v. Marhoerfer*, 24 F.3d 16, 18 (9th Cir. 1994) ("Only in rare instances should the lodestar figure be adjusted on the basis of other considerations."). The lodestar approach captures the factors that courts have traditionally considered in assessing the reasonableness of a fee award: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to the acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Morales*, 96 F.3d at 364 & n.9 (citing *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976)).

1. Hourly Rates

The Court first determines Plaintiffs' attorneys' reasonable hourly rates. "The hourly rate for successful civil rights attorneys is to be calculated by considering certain factors, including the novelty and difficulty of the issues, the skill required to try the case, whether or not the fee is contingent, the experience held by counsel, and fee awards in similar cases." *Moreno v. City of Sacramento*, 534 F.3d 1106, 114 (9th Cir. 2008). Courts also are guided by "the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996); *see also Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005). "The fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1263 (9th Cir. 1987). Once the party claiming fees presents evidence supporting the claimed rate, the burden shifts to the party opposing fees to present countervailing evidence that persuasively rebuts the fee seeker's proof of a reasonable hourly rate. *See Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992).

a. Dale Galipo

Dale Galipo, the lead trial lawyer in this case, requests an hourly rate of $1,000. (Fee Mot. at 8.) When

it comes to police excessive force cases in Los Angeles, Mr. Galipo is without question at the top of his field. In a recent case similar to this one, this Court found that an hourly rate of $1,000 for Mr. Galipo is reasonable and consistent with the prevailing rate in the Central District for attorneys of comparable skill, experience, and reputation. (*See Craig et.al. v. County of Orange et.al.*, Case No. SACV 17-00491-CJC (KESx), Dkt. 245.) The Court again finds that $1,000 is a reasonable hourly rate for Mr. Galipo.

b. Garo Mardirossian

Garo Mardirossian seeks an hourly rate of $900. Mr. Mardirossian graduated from Whittier College School of Law and was admitted to the California Bar in 1981. He has managed his own law firm ever since, and has litigated numerous police excessive force cases. (Dkt. 385-5 [Declaration of Garo Mardirossian] ¶¶ 6–8.) In 2006, he was selected as one of the "Best Lawyers in America" by ABOTA, and in 2012, he was recognized by the Daily Journal as one of the top 100 California lawyers. (*Id.* ¶ 12.)

Defendants submit that a more reasonable hourly rate for Mr. Mardirossian is $650. (Fee Opp. at 11.) They rely principally on *R.S., et al v. City of Long Beach, et al.*, Case No. SACV11-536-AG, Dkt. 221 (C.D. Cal. Jan. 31, 2014), another case where Mr. Mardirossian conducted a trial with Mr. Galipo, where another court in this district determined that a

reasonable hourly rate for Mr. Mardirossian was $550. (*See id.*)

The Court agrees that $650 is a reasonable hourly rate for Mr. Mardirossian, and is more in line with the prevailing rate for attorneys with his experience performing the services he performed here. *See Novel v. L.A. Cty. Sheriff's Dep't*, 2019 WL 6448955, at *3 (C.D. Cal. Aug. 20, 2019) (finding that $690 per hour was a reasonable hourly rate for a partner working under another partner in a Los Angeles § 1983 trial); *Smith v. Cty. of Riverside*, 2019 WL 4187381, at *6 (C.D. Cal. June 17, 2019) (relying in § 1983 case on evidence that the median rate for partners with more than 21 years of experience across all-sized law firms and all practice areas in Los Angeles was $688).

Plaintiffs have not met their burden of showing that $900 is in line with the prevailing rates in the community for lawyers who perform the type of services Mr. Mardirossian performed in this case. In asserting that a $900 rate is reasonable, Plaintiffs argue that "[f]or many decades [Mr. Mardirossian] has been one of the top attorneys in California and it is impossible to find an attorney with his resume whose reasonable rate is $650/hour." (Dkt. 422 [Plaintiffs' Reply in Support of Fee Motion, hereinafter "Fee Reply"] at 3.) But Plaintiffs miss the point. It is not enough to say that other attorneys with 38 years of experience have hourly rates around $900. (Fee Mot. at 9 [citing *McKibben v. McMahon*, 2019 WL 1109683, at *14 (C.D. Cal. Feb. 28, 2019), where the court relied on a compilation of fee awards in civil rights cases stating that civil

rights litigation attorneys with 26–49 years of experience bill $887-$1230 per hour].)[5] Mr. Mardirossian was not the lead lawyer in this case. He conducted no witness examination during the liability phase of trial, and played only a minor role in the damages phase. The services he performed simply did not require the skill and experience of an attorney with 38 years of experience. (*See* Dkt. 385-6 [Mr. Mardirossian's timesheets].) Mr. Galipo's representation and stellar advocacy were what led to the multi-million dollar verdict, not those of Mr. Mardirossian.

c. Lawrence Marks

Lawrence Marks seeks an hourly rate of $750. Mr. Marks graduated from University of the Pacific, McGeorge School of Law and was admitted to the California Bar in 1991. (Dkt. 385-7 [Declaration of Lawrence D. Marks] ¶ 3.) He spent about ten years defending attorneys and doctors for malpractice, and has spent about 18 years representing plaintiffs in personal injury matters, including civil rights matters. (*Id.* ¶¶ 4–5.) He has tried or second-chaired more than 20 jury trials, taken thousands of depositions, and participated in several civil rights police excessive force cases. (*Id.* ¶¶ 6–8.) Defendants argue that a more

[5] Nor is Mr. Galipo's declaration supporting Mr. Mardirossian's request for $900 per hour enough to tip the balance. (*See* Fee Mot. at 10; Dkt. 385-1 ¶ 22 ["I believe that given his accomplishments, the length of time he has been an attorney and his significant contributions and excellent work on this case, Mr. Mardirossian should be awarded $900 per hour."].)

reasonable hourly rate is $400 per hour, again citing *R.S.*, Case No. SACV11-536-AG, Dkt. 221, and the fact that the only support for this rate are the attorneys' own declarations. (Fee Opp. at 8.)

The Court finds that $550 is a reasonable hourly rate for Mr. Marks. Mr. Marks did not present any evidence at trial. The work he performed was akin to an associate behind the scenes, including obtaining evidence and drafting briefing and discovery. (Dkt. 385-8 [Mr. Marks' timesheets]). Plaintiffs have not met their burden to show that a $750 hourly rate is in line with the prevailing community rates for lawyers with Mr. Marks' experience who perform the types of services Mr. Marks performed in this case (which did not require the skill of an attorney with 28 years' experience). A $550 rate accounts for the role Mr. Marks played supporting Mr. Galipo and Mr. Mardirossian, and what appears to be the prevailing rate for similar associate work in Los Angeles § 1983 cases. *See*, *e.g.*, *Novel*, 2019 WL 6448955, at *3 (finding that $550 per hour was a reasonable hourly rate for an associate working under two partners in a Los Angeles § 1983 trial); *Smith*, 2019 WL 4187381, at *6 (relying in § 1983 case on evidence that the median rate for associates with more than 7 years of experience across all-sized law firms and all practice areas in Los Angeles was $524); *Mkay Inc. v. City of Huntington Park*, 2019 WL 1751823, at *3 (C.D. Cal. Mar. 7, 2019) (noting that associates from the Greenberg Gross and D.R. Welch firms billed at rates between $325 and $395 per hour).

d. John Fattahi

To oppose Defendants' post-trial motions, Plaintiffs added new counsel, John Fattahi. (*See* Dkt. 403 [January 31, 2020 Notice of Association of Counsel]; Fee Reply at 17.) Plaintiffs seek an hourly rate of $725 per hour for Mr. Fattahi's work.

Mr. Fattahi graduated from UCLA School of Law and was admitted to the California Bar in 2006. (Dkt. 422-7 [Declaration of John Fattahi] ¶ 6.) He served for one year as a law clerk to Chief U.S. District Judge Virginia A. Phillips in the Central District of California, and was then a litigation associate for two years at Quinn Emanuel Urquhart & Sullivan, LLP. (*Id.*) He then worked for about two and a half years in Mr. Galipo's office, and opened his own solo practice in July 2011. (*Id.* ¶ 7.) Mr. Fattahi has been selected as a Rising Star of Southern California by Super Lawyers magazine each year between 2015 and 2019. (*Id.*) Mr. Fattahi represents that a court has awarded him a $550 hourly rate for second-chairing a police excessive force trial, and that he has also obtained fee settlements resulting in $540 and $550 hourly rates. (*Id.* ¶ 5.)

Defendants respond that $550 is a more appropriate rate for Mr. Fattahi. (Dkt. 423 at 1.) They cite cases where courts determined that a reasonable hourly rate for Mr. Fattahi was $400, $350 (2 cases), $320 (2 cases), and $280 per hour. (*Id.* at 2–4.) "[A]n attorney's prior fee award may bear on the selection of a reasonable fee in a later case, particularly when the award was for

work performed in the relevant community." *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 908 (9th Cir. 1995). However, it is not alone sufficient to support the rate's reasonableness.

The Court finds that Plaintiffs have not carried their burden to show that $725 per hour is the prevailing rate in the community for similar services of lawyers of reasonably comparable skill and reputation. The more novel and difficult legal issues and the impressiveness of the results obtained by the Plaintiffs happened before and during trial, not after trial when Mr. Fattahi participated. Moreover, the prevailing rate in the community for attorneys of similar experience does not appear to be as high as Mr. Fattahi seeks. *See McKibben*, 2019 WL 1109683, at *14 (collecting awards between $485 and $665 for attorneys with 13 to 14 years of experience); *Mkay Inc.*, 2019 WL 1751823, at *4 (concluding that $525 was a reasonable hourly rate for a 2006 UCLA Law graduate in Los Angeles § 1983 case). Considering these factors, the skill required to file the oppositions Mr. Fattahi filed, and awards other courts have found reasonable for Mr. Fattahi, the Court determines that $500 is a reasonable hourly rate for Mr. Fattahi.

2. Billed Hours

The Court now determines whether the billed hours are reasonable. A court may award fees only for the number of hours it concludes were reasonably expended on the litigation. *See Hensley*, 461 U.S. at 434.

"[T]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of th[e] hours worked." *Deukmejian*, 987 F.2d at 1397–98.

In support of Plaintiffs' fee motion, each attorney submitted time records detailing the work they performed. Defendants argue various categories of hours should be excluded. One category of hours Plaintiffs' counsel spent that Defendants argue is not reasonable are what Defendants call "duplicative" hours. For example, Defendants object that it is duplicative to award fees for multiple attorneys to prepare witnesses for depositions and attend depositions. (Dkt. 404-2 at 6 [objecting that Mr. Mardirossian and Mr. Marks both billed to prepare for and attend depositions of Dr. Omalu and Mr. DeFoe]; Dkt. 404-3 at 16 [objecting to recovery of Mr. Marks' time spent preparing an outline for Dr. Singhania's direct examination where Mr. Galipo did the examination].) However, it is not uncommon for multiple attorneys to participate in depositions or for one attorney to prepare materials for another attorney's preparation, and the Court does not see how the number of hours billed for these tasks was unreasonable.

Defendants further object to many of Mr. Marks' time entries as "duplicate work" because the entries have the same text as prior days' entries. (*See*, *e.g.*, Dkt. 404-3 at 16 [objecting to entry for "Prepare Index Of Portions Of Deposition Of Witness/Defendant Sgt. Daniel Gonzalez Plaintiffs Intend To Offer At Trial, Per Local Rule 16-2.7" because it reflects "[d]uplicate work,

same as task performed on 10/20/19"].) However, it is not unusual for an attorney to spread one task across multiple days, and the Court has no evidence that these billing entries represent the same work.

Defendants also object to certain entries reflecting what they argue is excessive time. (*See*, *e.g.*, Dkt. 404-3 at 3, 6 [objecting to "[e]xcessive amount of time for legal research"]; *id.* at 5 [objecting that time spent reviewing certain document and photos was excessive].) As to most of these objections, the Court disagrees that the amount billed appears excessive. However, Defendants request very limited reductions for Plaintiffs' re-filing of various motions in limine, arguing that the time Plaintiffs spent reviewing, updating, and re-filing those nearly identical motions is excessive. (Dkt. 404-3 at 12.) The Court will make those few requested reductions, which result in a total of 7.5 hours' reduction from Mr. Marks' time.

Next, Defendants object to hours Mr. Mardirossian billed for conversations with the children's mother on issues regarding their behavior at school because these are not "litigation-related activity." (Dkt. 404-2 at 2 [0.8 hours on July 11, 2016 for "[t]elephone conversation with Ms. Gonzalez re: Vincent Valenzuela having fainted at school"]; *id.* at 5 [0.3 hours on January 9, 2019 for conversation "re: Ximena's behavior at school, and need to bring stuffed animal to class with her"].) The Court disagrees that this time was not related to the litigation. In the damages phase, the jury had to decide whether Vincent and Ximena Valenzuela lost love, companionship, comfort, care, protection,

affection, society, moral support, training, and guidance, and if they did, how much money that loss was worth. The information Mr. Mardirossian obtained in those conversations was directly relevant to those damages issues, and some was presented at trial. (*See*, *e.g.*, Day 6 PM at 62–63 [Ximena's first grade teacher testifying about how Ximena brought a stuffed animal to school and hugged it when she felt sad about her dad].) Accordingly, the Court does not exclude these hours from Plaintiffs' attorney fee recovery.

Defendants further argue that one task Mr. Marks performed at the very beginning of the case is "paralegal work" and thus the time spent (2.4 hours) should be reduced by half. Though the Court agrees in principle that nonattorney work should not be reimbursed at attorney rates, the Court finds that Plaintiffs' counsel did not improperly bill for nonattorney work here.

Defendants also object that the 99.3 hours Mr. Fattahi billed was excessive for preparing two oppositions to post-trial motions. (*See* Dkt. 423.) For example, Defendants contend that "given Mr. Fattahi's representation of his considerable skill and experience in civil rights litigation, particularly police use of force cases," the over 50 hours he spent on legal research on excessive force, qualified immunity, and similar issues is excessive. (*Id.*) The Court agrees that the amount of time spent by a lawyer who did not participate in the case previously does not appear reasonable. Under the circumstances, the Court finds that 70 hours were reasonably expended on Plaintiffs' responses to Defendants' post-trial motions.

The parties agree that 4 hours of time should be deducted from both Mr. Mardirossian and Mr. Marks' time because they billed for an "MSC with Judge Otero" on May 29, 2019, when the settlement conference occurred on May 30, 2019, and they also billed time on that date. (Dkt. 404-2 at 7; Dkt. 404-3 at 11; Fee Reply at 9.) Accordingly, the Court will exclude these hours.

For the reasons discussed, the Court reduces the hours billed by Mr. Mardirossian by 4 hours, the hours billed by Mr. Marks by 11.5 hours, and the hours billed by Mr. Fattahi by 29.3 hours.

3. Lodestar Calculation

Based on the above analysis, the lodestar amounts for Plaintiffs' counsel are as follows:

Attorney	**Hourly Rate**	**Hours**	**Lodestar**
Dale Galipo	$1,000	284.1	$284,100
Garo Mardirossian	$650	404.7[6]	$263,055
Lawrence Marks	$550	910.5[7]	$500,775
John Fattahi	$500	70	$35,000
Total		1,669.3	**$1,082,930**

[6] This number is calculated by subtracting 4 from the 404.7 hours requested for Mr. Mardirossian's time, as reflected in the table on page 17 of Plaintiff's Fee Reply.

[7] This number is calculated by subtracting 11.5 from the 922 hours requested for Mr. Marks' time, as reflected in the table on page 17 of Plaintiff's Fee Reply. The Court notes that Defendants calculate the total number of hours Mr. Marks billed to be higher than the number of hours Plaintiffs request. (Dkt. 404-3 at 18.) The Court relies on Plaintiffs' lower calculation.

C. Costs

Section 1988 also allows for recovery of reasonable out-of-pocket expenses that "would normally be charged to a fee paying client." *Woods v. Carey*, 722 F.3d 1177, 1180 n.1 (9th Cir. 2013). Plaintiffs seek $51,639.07 in such costs for photocopying, travel, and various costs associated with depositions and trial. (Fee Mot. at 16–18.) Defendants argue the Court should not award such costs because "[t]his is not a situation where neither the attorneys who incurred the costs, nor the plaintiff cannot afford to pay." (Fee Opp. at 13–14.) Defendants present no argument or evidence that these expenses would not normally be charged to a fee-paying client, and the Court concludes that awarding these costs is appropriate here. *See Woods*, 722 F.3d at 1180 n.1.

VI. CONCLUSION

For the foregoing reasons, Defendants' motions for judgment as a matter of law and for a new trial are **DENIED**. Plaintiffs' motion for attorney fees is **GRANTED IN SUBSTANTIAL PART**. Based on the Court's lodestar calculation, Plaintiffs are awarded $1,082,930 in attorney fees, and $51,639.07 in out-of-pocket costs.

DATED: March 11, 2020

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FERMIN VINCENT VALENZUELA, **Plaintiff,** **v.** **CITY OF ANAHEIM, *et al.*,** **Defendants.**	**Case No.: SACV 17-00278-CJC (DFMx) consolidated with SACV 17-02094-CJC (DFMx)** **JUDGMENT ON JURY VERDICT** (Filed Dec. 4, 2019)
VINCENT VALENZUELA and XIMENA VALENZUELA by and through their guardian PATRICIA GONZALEZ, **Plaintiffs,** **v.** **CITY OF ANAHEIM, *et al.*,** **Defendants.**	

This action came on regularly for trial on November 12, 2019 in Courtroom 7C of the United States District Court, Central District of California before the Court and a jury, the Honorable Judge Cormac J. Carney presiding.

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 on Phase I on November 18, 2019, and on Phase II on November 20, 2019 as follows:

PHASE I VERDICT

Question 1: Did Officer Woojin Jun or Officer Daniel Wolfe use excessive or unreasonable force against Fermin Vincent Valenzuela Junior in violation of his constitutional rights under the Fourth Amendment?

Officer Woojin Jun __X__ Yes. _____No.

Officer Daniel Wolfe __X__ Yes. _____No.

Question 2: Is Sergeant Daniel Gonzalez liable as a supervisory defendant for the unlawful actions of Officer Woojin Jun or Officer Daniel Wolfe?

__X__ Yes. _____No.

Question 3: Is the City of Anaheim liable for the actions of any of its defendant police officers based on an unlawful official policy, practice, or custom of the Anaheim Police Department?

__X__ Yes. _____No.

Question 4: Is the City of Anaheim liable for the actions of any of its defendant police officers based on the Anaheim Police Department's failure to train?

_____ Yes. __X__No.

Question 5: Did any of the defendant police officers act with a purpose to harm unrelated to legitimate law enforcement objectives in violation of Plaintiffs' substantive due process rights to familial relations under the Fourteenth Amendment?

Officer Woojin Jun	_____ Yes. __X__No.
Officer Daniel Wolfe	_____ Yes. __X__No.
Sergeant Daniel Gonzalez	_____ Yes. __X__No.

Question 6: Did any officer use unreasonable force and commit battery under state law?

Officer Woojin Jun	__X__ Yes. _____No.
Officer Daniel Wolfe	__X__ Yes. _____No.
Sergeant Daniel Gonzalez	__X__ Yes. _____No.

Question 7: Was any officer's unreasonable force and battery a substantial factor in causing Fermin Vincent Valenzuela Junior's death?

Officer Woojin Jun	__X__ Yes. _____No.
Officer Daniel Wolfe	__X__ Yes. _____No.
Sergeant Daniel Gonzalez	__X__ Yes. _____No.

Question 8: Was any officer negligent under state law?

Officer Woojin Jun	__X__ Yes. _____No.
Officer Daniel Wolfe	__X__ Yes. _____No.
Sergeant Daniel Gonzalez	__X__ Yes. _____No.

Question 9: Was any officer's negligence a substantial factor in causing Fermin Vincent Valenzuela Junior's death?

Officer Woojin Jun	__X__ Yes. _____No.
Officer Daniel Wolfe	__X__ Yes. _____No.
Sergeant Daniel Gonzalez	__X__ Yes. _____No.

Question 10: Was Fermin Vincent Valenzuela Junior also negligent during the incident in question?

__X__ Yes. _____No.

Question 11: Was Fermin Vincent Valenzuela Junior's negligence a substantial factor in causing his death?

__X__ Yes. _____No.

Question 12: What percentage of fault do you assign for the negligence?

Officer Woojin Jun, Officer Daniel Wolfe, and/or Sergeant Daniel Gonzalez	__85___%
Fermin Vincent Valenzuela Junior	__15___%

Question 13: Did any of the defendant police officers violate Fermin Vincent Valenzuela Junior's rights under California Civil Code § 52.1?

Officer Woojin Jun	__X__ Yes.	_____No.
Officer Daniel Wolfe	__X__ Yes.	_____No.
Sergeant Daniel Gonzalez	__X__ Yes.	_____No.

PHASE II VERDICT

Question 1: What are Fermin Vincent Valenzuela Junior's survival damages for his loss of life and for his pre-death pain and suffering?

Loss of Life:	$___3.6 Million___
Pre-death pain and suffering	$___6 Million___

Question 2: What are Vincent Valenzuela's damages for the past and future loss of Fermin Vincent Valenzuela Junior's love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance?

$___1.8 Million___

Question 3: What are Ximena Valenzuela's damages for the past and future loss of Fermin Vincent Valenzuela Junior's love, companionship, comfort, care, assistance, protection, affection, society, moral support, training, and guidance?

$___1.8 Million___

BASED UPON THE FOREGOING, IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs Vincent Valenzuela and Ximena Valenzuela shall recover from Defendants City of Anaheim, Officer Woojin Jun, Officer Daniel Wolfe and Sergeant Daniel Gonzalez, jointly and severally, the total sum of $13,200,000, costs in this action, and statutory attorney fees to be determined by the Court. This amount is broken down as follows:

    a. Plaintiffs Vincent Valenzuela and Ximena Valenzuela, as successors in interest to Fermin Vincent Valenzuela Junior, shall recover from Defendants City of Anaheim, Officer Woojin Jun, Officer Daniel Wolfe and Sergeant Daniel Gonzalez, jointly and severally, the total sum of $9,600,000, and costs in this action, to be determined by the Court.

    b. Plaintiff Vincent Valenzuela shall also recover from Defendants City of Anaheim, Officer Woojin Jun, Officer Daniel Wolfe and Sergeant Daniel Gonzalez, jointly and severally, the sum of $1,800,000, and costs in this action, to be determined by the Court.

    c. Plaintiff Ximena Valenzuela shall also recover from Defendants City of Anaheim, Officer Woojin Jun, Officer Daniel Wolfe and Sergeant Daniel Gonzalez, jointly and severally, the sum of $1,800,000, and costs in this action, to be determined by the Court.

2. In addition to the foregoing, and as the prevailing parties on their Fourth Amendment Claim, their Monell Claim and their Bane Act Claim, Plaintiffs

are entitled to recover statutory attorney fees and applicable costs, to be determined by the Court.

3. Plaintiffs Vincent Valenzuela and Ximena Valenzuela shall recover post-judgment interest on all of the above sums at the rate of 1.60% from the date of this Judgment, or $578.63 per day, for the first year, and compounded annually thereafter, pursuant to 28 U.S.C. § 1961.

DATED: December 4, 2019

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

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERMIN VINCENT VALENZUELA; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased, *Plaintiffs-Appellees*, v. CITY OF ANAHEIM; DANIEL WOLFE; WOOJIN JUN; DANIEL GONZALEZ, *Defendants-Appellants*.	No. 20-55372 D.C. Nos. 8:17-cv-00278-CJC-DFM 8:17-cv-02094-CJC-DFM ORDER

Filed March 30, 2022

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

Order;
Statement by Judge Bea;
Dissent by Judge Collins

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

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

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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).

his life had he lived, is inconsistent with the compensation and deterrence goals of 42 U.S.C. § 1983. The court so held despite the $6 million awarded to Valenzuela's estate for his pre-death pain and suffering and the $3.6 million awarded to his family for wrongful death. Indeed, the "hedonic" damages were precisely a repetition of the wrongful death award: another $3.6 million.

The panel's holding is foreclosed by the Supreme Court precedent of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a state law that totally eliminated a § 1983 claim did not violate the compensation and deterrence goals of § 1983), deepens a circuit split that already exists between the Sixth and Seventh Circuits, *compare Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601–03 (6th Cir. 2006) (relying on *Robertson* to hold that prohibitions on post-death "hedonic" damages awards are not inconsistent with § 1983 because § 1983 compensates for "actual damages suffered by the victim" and a loss of life is not "actual . . . because it is not consciously experienced by the decedent"), *with Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984) (holding 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. Tracy*, 57 Cal. App. 3d 939, 943 (Cal. 1976) ("California case law recognizes, as one component of general damage, physical impairment which limits the plaintiff's capacity to share in the amenities of life . . . No California rule restricts a plaintiff's attorney from arguing this element to a jury.") (internal citations omitted). But it does *not* allow recovery for post-death "hedonic" damages. *Garcia v. Superior Ct.*, 42 Cal. App. 4th 177, 185 (Cal. Ct. App. 1996).

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

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

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

[4] The five states are Arkansas (*Durham v. Marberry*, 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)),

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. 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

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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)).

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

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

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

in favor of a rule of" damages maximization. *Id.* Yet that is precisely what the majority held.

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

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

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

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

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

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

The *Valenzuela* majority also argued that, in the absence of post-death "hedonic" damages, the availability of a wrongful death claim in California is insufficient to bring California's damages scheme in line with the federal law because, "such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the

scene." *Valenzuela*, 6 F.4th at 1103. But the Supreme Court had rejected this argument as well; a zero-recovery result is no basis to disregard state law. *See id.* at 1106 (Lee, J., dissenting) ("[W]e cannot refuse to apply a state law just because it causes abatement of a particular action." (quoting *Robertson*, 436 U.S. at 590–91) (cleaned up)).

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

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

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

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

Furthermore, *Robertson*'s limited holding did not make this court's holding in *Valenzuela* a foregone conclusion. Leaving the question open did not preordain its answer, and the majority opinion fails to explain how *Valenzuela* is meaningfully distinguishable from

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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.

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]

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

[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.

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

[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.

how the elements of one award might differ in economic value from those of the other is the likelihood that the jury simply doubled the awards for Valenzuela's death: $3.6 million and $3.6 million for each of the divorced Valenzuela's two children.

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

> 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

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.

"hedonic" damages of $1.4 million and wrongful death damages of $1.8 million.

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

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

The majority would toss aside a robust state tort law scheme for failure to achieve the unenumerated policy goals of § 1983 based on a hypothetical which strains credulity and then replace that state law with a rule which, as the numbers show, does not do a better job of serving those goals.

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

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

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

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

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

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

The plaintiff's bar has attempted to use expert economist testimony to fill this analytical gap. But after *Daubert*,[14] these expert opinions are often excluded for failing to meet the requirements of Federal Rule of Evidence 702. The Journal of Legal Economics has

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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).

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

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

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

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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).

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

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

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

The third method is

> based on the cost-benefit analysis conducted by government agencies in deciding

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

[18] *Id.* at 1062.

[19] *Id.* at 1062–63.

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

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

As one can imagine, these methodologies are rife with flaws. Many of the lowest-paying jobs are also the most dangerous. Human life valuations by the government are used to weigh the relative costs and benefits of preventing small risks of death (like plane crashes and automobile accidents) over large population groups—these calculations are not used to compensate individual and idiosyncratic plaintiffs.[22] Moreover, asking jurors to determine "the amount that the victim would have paid to avoid the risk" to determine the value of his lost life does not take into account the victim's individual risk tolerance, and also suffers from

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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).

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 we place

[23] *Id.* at 127–28.

> 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.

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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.*

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

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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.").

applicable law of damages, it would have applied the common law and would have had no legal basis to uphold the post-death "hedonic" damages awards in *Valenzuela* and *Craig*.

III. CONCLUSION

Post-death "hedonic" damages awards are speculative, contravene traditional common law damages principles, contradict California state law, and where, as here, the awards would have been $9.6 million and $1.6 million 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.