

**In The  
Supreme Court of the United States**

— ◆ —  
CITY OF ANAHEIM, CA, et al.,  
*Petitioners,*

v.  
FERMIN VINCENT VALENZUELA, et al.,  
*Respondents.*

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

**BRIEF OF AMICUS CURIAE ASSOCIATION OF  
SOUTHERN CALIFORNIA DEFENSE  
COUNSEL IN SUPPORT OF PETITIONERS**

— ◆ —

HORVITZ & LEVY LLP	HORVITZ & LEVY LLP
CHRISTOPHER D. HU	STEVEN S. FLEISCHMAN
<i>(Counsel of Record)</i>	SCOTT P. DIXLER
505 SANSOME STREET	3601 WEST OLIVE AVE.
SUITE 375	8TH FLOOR
SAN FRANCISCO, CA	BURBANK, CA 91505
94111	(818) 995-0800
(415) 462-5600	sfleischman@horvitzlevy.com
chu@horvitzlevy.com	sdixler@horvitzlevy.com

*Counsel for Amicus Curiae  
Association of Southern California Defense Counsel*

---

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT .....	3
I. CALIFORNIA’S BAR ON HEDONIC DAMAGES IS CONSISTENT WITH 42 U.S.C. § 1983. ....	3
A. Under California law, plaintiffs in civil rights actions may pursue remedies that advance the purposes of § 1983.....	3
B. Civil rights plaintiffs in California routinely obtain significant recoveries in cases like this one. ....	7
C. The federal courts should respect California’s decision to retain its bar on hedonic damages. ....	10
CONCLUSION.....	13

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Bd. of Regents v. Tomanio</i> , 446 U.S. 478 (1980).....	10, 11
<i>Boeken v. Philip Morris USA, Inc.</i> , 230 P.3d 342 (Cal. 2010).....	5
<i>Carey v. Piphus</i> , 435 U.S. 247 (1978).....	6
<i>Chaudhry v. City of Los Angeles</i> , 751 F.3d 1096 (9th Cir. 2014).....	4, 5
<i>Corder v. Corder</i> , 161 P.3d 172 (Cal. 2007).....	5
<i>County of Los Angeles v. Superior Ct.</i> , 981 P.2d 68 (Cal. 1999).....	4, 6, 11
<i>Craig v. Petropulos</i> , 856 F.App'x 649 (9th Cir. 2021).....	7
<i>Hardin v. Straub</i> , 490 U.S. 536 (1989).....	10
<i>Krouse v. Graham</i> , 562 P.2d 1022 (Cal. 1977).....	5
<i>Rashidi v. Moser</i> , 339 P.3d 344 (Cal. 2014).....	4

*Robertson v. Wegmann*,  
436 U.S. 584 (1978)..... 3, 6, 11

*Wheeler v. City of Santa Clara*,  
894 F.3d 1046 (9th Cir. 2018)..... 4

**Statutes**

42 U.S.C.  
 § 1983..... *passim*  
 § 1988..... 11, 13  
 § 1988(a) ..... 11  
 § 1988(b) ..... 6

California Civil Procedure Code

§ 377.20..... 4  
 § 377.34(a) ..... 5, 11  
 § 377.34(b) ..... 5, 12  
 § 377.34(c)..... 12  
 § 377.34(d) ..... 12  
 § 377.60..... 5  
 § 377.61..... 5

**Miscellaneous**

Cal. S. Rules Comm., Office of S. Floor  
 Analyses, 2021–2022 Leg., Reg. Sess., S.  
 Floor Analyses of S.B. 447 ..... 12

David Schap & Andrea Thompson,  
*Recoverable Damages for Wrongful  
 Death in the States: A 2015 Review of  
 Statutory Law*, 22 J. Legal Econ. 143  
 (2016)..... 6

Rooks, <i>Recovery for Wrongful Death</i> §§ 12:45, 12:60 (5th ed. 2021) .....	11
Senate Bill 447, 2021–2022 Leg., Reg. Sess. (Cal. 2021) .....	11, 12
Thomson Reuters/West, <i>Archibald, as Successor-in-Interest to Pickett, Estate of v. County of San Bernardino; Deputy Sheriff Woods</i> , JVR No. 2001060032, 2018 WL 10230033 (C.D. Cal.) .....	8
Thomson Reuters/West, <i>Davis, an[ ] Individual and as a Successor in Interest to Smith, Estate of v. Sergeant Anthony</i> , JVR No. 1903220042, 2018 WL 7822193 (C.D. Cal.) .....	8
Thomson Reuters/West, <i>Herrera and Ordaz on Behalf of Herrera, Estate of v. Police Officer Downey</i> , JVR No. 1711200040, 2017 WL 5564147 (C.D. Cal.) .....	8
Thomson Reuters/West, <i>Lam, Estate of v. City of Los Banos; Police Officer Acosta</i> , JVR No. 1809080002, 2018 WL 4357670 (E.D. Cal.) .....	8
Thomson Reuters/West, <i>Pream, Estate of v. The City of Long Beach; Police Officer Domingo; Police Officer Muhlenkamp</i> , JVR No. 1908060040, 2019 WL 3712138 (C.D. Cal.) .....	7

Thomson Reuters/West, *R.S.; Amici, on Behalf of Zerby, Estate of v. City of Long Beach; Officer Ortiz; Officer Shurtleff*, JVR No. 1402210018, 2013 WL 7852950 (C.D. Cal.).....9

Thomson Reuters/West, *Rose and Rose, Individually and as Successors in Interest to Rose, Estate of v. County of Sacramento; Deputy McEntire*, JVR No. 1711200043, 2017 WL 5564148 (E.D. Cal.) .....9

Thomson Reuters/West, *Simplis, as Representative of Grissom, Estate of v. Culver City Police Department; Officer Martinez*, JVR No. 1309060015, 2013 WL 4854438 (C.D. Cal.).....9



## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Association of Southern California Defense Counsel (ASCDC) is a preeminent regional organization of lawyers who specialize in defending civil actions. It consists of about 1,100 leading attorneys in California. ASCDC dedicates itself to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. It actively seeks to assist the courts by appearing as amicus curiae in cases involving issues of vital significance to its members.

Among the clients represented by ASCDC's members are state and municipal entities and employees. ASCDC's members help these entities and employees comply with their legal obligations and manage their legal risk, and represent them in 42 U.S.C. § 1983 actions, wrongful death actions, and other lawsuits. ASCDC's members thus benefit from clarity in the law governing the damages available to plaintiffs in civil rights cases.

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity other than ASCDC made a monetary contribution to fund its preparation or submission. Counsel for all parties received timely notice of ASCDC's intent to file this brief; all parties have consented to its filing.

This case significantly interests ASCDC because it involves a question of fundamental importance in § 1983 actions when official conduct results in death: whether California’s survival and wrongful death laws apply to a plaintiff’s claim for damages and therefore bar a plaintiff from recovering damages for the decedent’s loss of life—also known as hedonic damages. Given its significant interest in this question, ASCDC filed an amicus brief in the court of appeals, participated in oral argument, and filed an amicus brief in support of the petition for panel rehearing or rehearing en banc. 9th Cir. ECF No. 22; 9th Cir. ECF Nos. 71–72; 9th Cir. ECF No. 84. This amicus brief supports the petition for writ of certiorari by providing additional detail on why California’s generally applicable remedial scheme is consistent with § 1983.



### **SUMMARY OF THE ARGUMENT**

The court of appeals was wrong to hold that California’s prohibition on hedonic damages is inconsistent with § 1983. As Petitioners have explained, the broader context of California’s remedial scheme belies the court of appeals’ assertion that California law fails to achieve the purposes of § 1983. *See* Pet. 17.

In the argument below, we provide further detail on the remedies civil rights plaintiffs can and do seek in California. We then summarize recent verdicts in cases like this one, showing that plaintiffs routinely obtain verdicts that provide meaningful compensation and deterrence. Finally, we address why Petitioners

are correct to assert that “respect for principles of federalism” highlights the need for review. Pet. 21. California’s Legislature recently amended the State’s survival statute to permit recovery of damages for *pre*-death pain and suffering yet retained California’s longstanding bar on *post*-death hedonic damages. That legislative determination is entitled to federal courts’ respect.

Given ASCDC’s institutional interests, this brief focuses on how cases are litigated in California. But California is not alone in barring recovery of hedonic damages: forty-four other states also prohibit such damages. Pet. 8 & n.2. Since nearly all states share the same rule as California, the question presented has national implications, and this issue has produced a split of authority among the courts of appeals. *See* Pet. 24–27. That conflict warrants this Court’s review.



## ARGUMENT

- I. **California’s bar on hedonic damages is consistent with 42 U.S.C. § 1983.**
  - A. **Under California law, plaintiffs in civil rights actions may pursue remedies that advance the purposes of § 1983.**

Courts assessing the adequacy of state law must consider whether that law—viewed in context of the state’s broader remedial scheme—is “in general” consistent with § 1983. *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978). When, as here, a California civil rights plaintiff alleges that unconstitutional

conduct caused the decedent's death, that plaintiff may pursue various remedies that advance the compensation and deterrence goals of § 1983.

California law provides for the survival of personal tort actions, which allows survivors to recover for “the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death.” *County of Los Angeles v. Superior Ct.*, 981 P.2d 68, 75 (Cal. 1999); *see* Cal. Civ. Proc. Code § 377.20 (West 2022). “California's survivorship law is expansive—permitting either a personal representative or successor in interest to bring a claim on behalf of a decedent—and thus claims should rarely abate for lack of a proper plaintiff.” *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018) (explaining why California survivorship law is generally consistent with § 1983).

In addition to recovering economic damages, plaintiffs in a survival action may recover noneconomic damages for pain and suffering the decedent experienced before death. Under California law, noneconomic damages are “not readily subject to precise calculation” and are left to the discretion of the trier of fact. *Rashidi v. Moser*, 339 P.3d 344, 349 (Cal. 2014) (citation omitted). Although pre-death pain and suffering damages were once barred under California law, the Ninth Circuit has held that such damages must be available in § 1983 actions “where the decedent's death was caused by the violation of federal law.” *Chaudhry v. City of Los Angeles*, 751 F.3d 1096,

1105 (9th Cir. 2014).<sup>2</sup> And, as of January 1, 2022, California has made damages for pre-death pain and suffering generally available in survival actions. Cal. Civ. Proc. Code § 377.34(b) (West 2022); *see infra* Part I.C.

In addition to pursuing the decedent's claims through a survival action, family members may also assert their own claims for wrongful death. Cal. Civ. Proc. Code §§ 377.60, 377.61 (West 2022). Plaintiffs in a wrongful death action can recover noneconomic damages for the loss of the decedent's comfort, society, and protection, as well as economic damages for items such as the loss of the decedent's financial assistance or household services. *Corder v. Corder*, 161 P.3d 172, 183 (Cal. 2007); *Krouse v. Graham*, 562 P.2d 1022, 1025 (Cal. 1977). As a subset of wrongful death damages, a surviving spouse may recover damages for loss of consortium. *Boeken v. Philip Morris USA, Inc.*, 230 P.3d 342, 347 (Cal. 2010).

Moreover, in an appropriate case, plaintiffs can seek punitive damages to deter and punish misconduct by public officials. Civ. Proc. § 377.34(a) (stating that damages available in survival actions include "any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the

---

<sup>2</sup> In the court of appeals, the parties disputed the validity of *Chaudhry's* holding regarding pre-death pain and suffering damages. *See* Pet. App. 18–22. Petitioners do not contest that issue in this Court. Pet. 6 n.1.

decedent lived”); see *County of Los Angeles*, 981 P.2d at 75 (recognizing that “[b]y specifically providing for punitive or exemplary damages, our state law seeks to deter future wrongful behavior,” and that such damages are available in § 1983 actions).

Finally, as a matter of federal law, prevailing plaintiffs may seek attorneys’ fees and costs under 42 U.S.C. § 1988(b). As this Court has observed, the prospect of fee awards in § 1983 cases “provides additional—and by no means inconsequential—assurance” that civil rights actions will deter unconstitutional conduct. *Carey v. Phipps*, 435 U.S. 247, 257 n.11 (1978).

Taken together, these remedies dispel any notion that California’s generally applicable bar on hedonic damages is somehow “inconsistent with the Constitution and laws of the United States.” *Robertson*, 436 U.S. at 589–90 (citation omitted). If anything, California’s remedial scheme is *more* generous than that available in most states. See David Schap & Andrea Thompson, *Recoverable Damages for Wrongful Death in the States: A 2015 Review of Statutory Law*, 22 J. Legal Econ. 143, 146, 149–50 (2016) (showing that California is one of only a few states that expressly provides statutory punitive damages, compensatory economic damages, compensatory noneconomic damages, loss of consortium recovery, and loss of future earnings recovery).

**B. Civil rights plaintiffs in California routinely obtain significant recoveries in cases like this one.**

This case illustrates why California’s remedial scheme is consistent with § 1983. Even without hedonic damages, Plaintiffs obtained \$9.6 million in compensatory damages, including \$6 million for pre-death pain and suffering and \$3.6 million for wrongful death. Pet. App. 12. They also obtained more than \$1 million in attorneys’ fees. Pet. App. 76–77.

Other recent examples show that plaintiffs in cases like this one—often represented by the very same counsel as Plaintiffs here—routinely obtain significant recoveries without the need for hedonic damages:

- In a companion appeal decided by the same court of appeals panel as this case, the plaintiffs obtained \$1.4 million in wrongful death damages, as well as \$200,000 for the decedent’s pre-death pain and suffering. Pet. App. 103 (citing *Craig v. Petropulos*, 856 F.App’x 649 (9th Cir. 2021)).
- The jury awarded \$3.5 million for pre-death pain and suffering and \$5.5 million in damages to surviving family members after police officers shot and killed a mentally ill woman. Thomson Reuters/West, *Pream, Estate of v. The City of Long Beach; Police Officer Domingo; Police Officer Muhlenkamp*, JVR No. 1908060040, 2019 WL 3712138 (C.D. Cal.).

- An officer fatally shot a man with a mental disability. The jury awarded \$3.5 million in damages, including \$2.5 million in wrongful death damages. Thomson Reuters/West, *Herrera and Ordaz on Behalf of Herrera, Estate of v. Police Officer Downey*, JVR No. 1711200040, 2017 WL 5564147 (C.D. Cal.).
- An officer fatally shot a man with mental disabilities. The jury awarded \$2.5 million, including \$1 million in wrongful death damages, later reduced based on comparative fault. Thomson Reuters/West, *Davis, an[ ] Individual and as a Successor in Interest to Smith, Estate of v. Sergeant Anthony*, JVR No. 1903220042, 2018 WL 7822193 (C.D. Cal.).
- An officer fatally shot decedent while he was experiencing a mental health crisis. His estate obtained \$250,000 for pre-death pain and suffering, and his surviving father received \$2 million in damages. Thomson Reuters/West, *Lam, Estate of v. City of Los Banos; Police Officer Acosta*, JVR No. 1809080002, 2018 WL 4357670 (E.D. Cal.).
- An officer's fatal shooting of a man who suffered from mental illness resulted in a \$33.5 million award, including \$18 million in punitive damages and \$8.5 million for wrongful death. After the district court reduced the award, defendants settled for roughly \$5.7 million. Thomson Reuters/West, *Archibald, as Successor-in-*

*Interest to Pickett, Estate of v. County of San Bernardino; Deputy Sheriff Woods*, JVR No. 2001060032, 2018 WL 10230033 (C.D. Cal.).

- An officer's fatal shooting of a man with mental disabilities resulted in \$4.5 million in wrongful death damages to his parents. Thomson Reuters/West, *Rose and Rose, Individually and as Successors in Interest to Rose, Estate of v. County of Sacramento; Deputy McEntire*, JVR No. 1711200043, 2017 WL 5564148 (E.D. Cal.).
- Officers' fatal shooting of a man resulted in \$4.5 million in wrongful death damages to his son and mother. Thomson Reuters/West, *R.S.; Amici, on Behalf of Zerby, Estate of v. City of Long Beach; Officer Ortiz; Officer Shurtleff*, JVR No. 1402210018, 2013 WL 7852950 (C.D. Cal.).
- Decedent's minor children obtained a total of \$8 million in noneconomic damages following an officer's fatal shooting during a traffic stop. Thomson Reuters/West, *Simplis, as Representative of Grissom, Estate of v. Culver City Police Department; Officer Martinez*, JVR No. 1309060015, 2013 WL 4854438 (C.D. Cal.).

The majority below speculated that California's remedial "framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene." Pet. App. 11. But many of the cases listed above involved the types of

decedents the court of appeals seemed to be worried about: people with severe mental illness or other serious disabilities who might have little earning capacity and strained relationships with their families. Many died at the scene or shortly thereafter. Even so, their surviving family members obtained significant monetary recoveries.<sup>3</sup>

**C. The federal courts should respect California’s decision to retain its bar on hedonic damages.**

This petition presents an opportunity for this Court to confirm that a state’s decisions about its generally applicable remedial scheme should not be easily cast aside.

Federalism is one of the “subsidiary goals” of § 1983. *Hardin v. Straub*, 490 U.S. 536, 539 (1989); see *Bd. of Regents v. Tomanio*, 446 U.S. 478, 491–92 (1980) (noting that “[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983,” and concluding that application of New York’s rule for tolling of the statute of limitations was more consistent with federalism than “displac[ing] the state rule in favor of an ad hoc federal rule”).

---

<sup>3</sup> To be sure, there might be no recovery in a case where the decedent had no surviving family members and there was no other personal representative of the decedent’s estate. In that scenario, however, it is doubtful whether anyone would have the legal standing and personal motivation to file a § 1983 action in the first place.

Concern for federalism is written into § 1988. As discussed, Congress has directed that the law of the forum state fill gaps in federal law so long as state law “is not inconsistent with the Constitution and laws of the United States.” 42 U.S.C. § 1988(a). Thus, “Congress ‘quite clearly instructs [federal courts] to refer to state statutes’ when federal law provides no rule of decision for actions brought under § 1983,” *Tomanio*, 446 U.S. at 484 (citation omitted), even if doing so results in a lack of uniformity among the states, *Robertson*, 436 U.S. at 593 n.11.

In 1949, California’s Legislature enacted a statute abrogating the common law rule that personal injury actions abate with the victim’s death. *County of Los Angeles*, 981 P.2d at 70. It amended and recodified the statute in 1961 and again in 1992. *Id.* at 70–71. California’s survival statute, however, has never permitted recovery of post-death hedonic damages. Instead, damages are limited to “loss or damage that the decedent sustained or incurred *before death*.” Civ. Proc. § 377.34(a) (emphasis added). California’s bar on hedonic damages is no outlier. It reflects the State’s choice to align itself with the overwhelming majority of states that preclude such damages. *See* Pet. 8 & n.2; Rooks, *Recovery for Wrongful Death* §§ 12:45, 12:60 (5th ed. 2021).

Last year, California’s Legislature made a significant change to the survival statute, but it retained the state’s longstanding bar on hedonic damages. In late 2021, the Legislature enacted Senate Bill 447, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (Senate Bill 447), which amended California’s survival statute to allow damages for pre-death pain and

suffering in actions filed between January 1, 2022, and the end of 2025. Civ. Proc. § 377.34(b). California’s court system will collect data on such awards and must prepare a report to the Legislature. *Id.* § 377.34(c), (d). At that point, the Legislature will have a chance to consider whether to make the change permanent.<sup>4</sup>

If the majority below were correct that hedonic damages are necessary to afford adequate compensation and deterrence in § 1983 actions, Pet. App. 9–11, one would think the same reasoning would apply broadly across the tort system. After all, constitutional violations committed by state and local officials are not the only torts that may result in death. In fact, proponents of Senate Bill 447 raised arguments about preventing “a windfall for the wrongdoer” whose actions kill the decedent and avoiding a “perverse incentive” for defendants to prolong litigation in the hope that an injured plaintiff might die before judgment. Cal. S. Rules Comm., Office of S. Floor Analyses, 2021–2022 Leg., Reg. Sess., S. Floor Analyses of S.B. 447 at 7.

Yet nothing in the legislative history of Senate Bill 447 suggests California lawmakers believed that hedonic damages were necessary to address those concerns. Instead, the Legislature decided to allow pre-death pain and suffering damages while retaining the State’s longstanding bar on hedonic damages. And

---

<sup>4</sup> The Legislature enacted Senate Bill 447 while the rehearing petition in this case was pending in the court of appeals. *See* Pet. App. 86.

the Legislature decided to proceed with caution, making the change temporary and mandating further study of its impact. The court of appeals' holding short-circuits California's legislative process, a result that conflicts with § 1988 and the broader federalism goals underlying § 1983. Especially given the California Legislature's recent activity in this area, federal courts should be wary of supplanting state law rules enacted by the people's elected representatives.



### CONCLUSION

For all these reasons, ASCDC asks that this Court grant the petition for writ of certiorari.

Respectfully submitted,

<p>HORVITZ &amp; LEVY LLP CHRISTOPHER D. HU <i>(Counsel of Record)</i> 505 SANSOME STREET SUITE 375 SAN FRANCISCO, CA 94111 (415) 462-5600 chu@horvitzlevy.com</p>	<p>HORVITZ &amp; LEVY LLP STEVEN S. FLEISCHMAN SCOTT P. DIXLER 3601 WEST OLIVE AVE. 8TH FLOOR BURBANK, CA 91505 (818) 995-0800 sfleischman@horvitzlevy.com sdixler@horvitzlevy.com</p>
--	--

*Counsel for Amicus Curiae*  
*Association of Southern California Defense Counsel*

July 28, 2022