No. 22-187

IN THE

Supreme Court of the United States

COUNTY OF ORANGE, CALIFORNIA, et al.,
Petitioners,

v.

KATHY CRAIG, et al.,
Respondents.

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

BRIEF IN OPPOSITION

Dale K. Galipo
LAW OFFICES OF DALE K. GALIPO
21800 Burbank Blvd., Suite 210
Woodland Hills, CA 91367

Melanie T. Partow
LAW OFFICE OF MELANIE PARTOW
4470 Atlantic Ave., #17443
Long Beach, CA 90807

Kelsi Brown Corkran
Counsel of Record
Elizabeth R. Cruikshank
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION,
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

Counsel for Respondents

QUESTION PRESENTED

Orange County Sheriff's Deputy Nicholas Petropulos fatally shot Brandon Witt while Witt was unarmed, pleading for his life, and suspected of no serious crime. Dashboard camera footage established that Petropulos killed Witt "out of anger and frustration" rather than "any real threat." Pet. App. 31. In the decision below, the Ninth Circuit affirmed a jury verdict awarding loss of life damages to Witt's parents under 42 U.S.C. § 1983 as Witt's successors-in-interest, based on the officer's use of excessive force in violation of the Fourth Amendment.

The question presented is whether the Ninth Circuit's decision not to apply a state law damages limitation to the jury's loss of life award is consistent with *Robertson v. Wegmann*, 436 U.S. 584 (1978), which expressly "intimate[s] no view" on the application of state law to § 1983 claims where the "deprivation of federal rights caused death." *Id.* at 594.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

ADMINISTRATIVE AND EXECUTIVE MATERIALS

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Petitioners seek to align this case with the pending petition for certiorari in *City of Anaheim v. Valenzuela*, No. 21-1598, by presenting the same question for review: whether "controlling Supreme Court authority" requires application of "a state law prohibition on 'loss of life damages'" to respondents' Fourth Amendment excessive force claim under 42 U.S.C. § 1983. Pet. i. Specifically, petitioners argue that 42 U.S.C. § 1988, as interpreted by *Robertson v. Wegmann*, 436 U.S. 584 (1978), "compel[s]" application of California's damages limitations to respondents' § 1983 claim because those limitations fill a "'deficienc[y]'" in federal law and are "'not inconsistent'" with § 1983's purposes. Pet. 12-13 (quoting § 1988).

This argument, however, appears nowhere in petitioners' briefing before the Ninth Circuit. Instead, petitioners relied on poetry, religious scripture, and pop culture references to argue that death is "wholly outside of human understanding" and therefore is not a compensable injury as a matter of law. Appellants' Opening Br. 24. This mismatch between the question presented and petitioners' arguments below renders the petition an exceptionally poor vehicle for review, and the Court need go no further in denying the petition.

To the extent the Court is willing to consider the question presented in the context of this petition, it should deny review for the reasons identified in the

Valenzuela Brief in Opposition. Petitioners' additional argument—that loss of life damages are "impermissibly speculative" due to the "unknowable" nature of the post-death experience, Pet. 18-27—is easily dismissed. Our system of law unequivocally recognizes the deprivation of life as a grave injury that juries may compensate for without impermissibly speculating about the afterlife.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

On the afternoon of February 15, 2016, Orange County Sheriff's Deputy Nicholas Petropulos was on routine patrol at a hotel parking lot in Yorba Linda, California.[1] Pet. App. 12-13. Petropulos noticed Brandon Lee Witt sitting in his Toyota Avalon and speaking to a man standing nearby. Pet. App. 13-14. Petropulos had never seen Witt before and had no information about him. Pet. App. 13. While Petropulos circled the parking lot, Witt moved his car to another parking space, and Petropulos then parked his patrol car near Witt's car. *Id.* Meanwhile, the man with

---

[1] The factual recitation in this section is based on the district court's summary of the trial evidence in its order denying petitioners' post-trial motions, Pet. App. 11-39, and dashboard camera footage that was entered into evidence as Exhibit 5 on April 24, 2019. Because the video footage is not available on the electronic docket, respondents have provided it on a thumb drive to the clerk's office.

whom Witt had been speaking had been joined by a woman and was standing several spaces away. *Id.*

Petropulos approached Witt's car and asked Witt what he was doing. Pet. App. 14. Witt responded that he was in the middle of moving; consistent with this explanation, Witt's car was full of "a myriad of items." *Id.* Petropulos asked if Witt had any identification, whether he was on probation or parole, and whether he knew the man and woman in the parking lot. *Id.* Witt answered all three questions in the negative. *Id.* Petropulos then asked whether there was "anything [he] need[ed] to worry about"; Witt responded, "Not at all." *Id*. After Petropulos instructed him to turn off the car, Witt displayed a pen-like metal tool used to manipulate the vehicle's ignition; when Petropulos told him to drop the tool and get out of the car, Witt placed the metal item on the center console but remained in the car. *Id.* Petropulos continued engaging with Witt, telling him to keep his hands on the wheel and asking whether the car belonged to him; Witt confirmed that it did. *Id.*

The woman in the parking lot approached Witt and asked for a baby bottle. Pet. App. 14. Apparently inferring that Witt must know the woman, Petropulos began badgering Witt, asking, "Why would you lie, bro?" Pet. App. 14-15. Petropulos ordered Witt to step out of the car. Pet. App. 15. When Witt asked why, Petropulos said, "I don't like the way you're acting right now. I haven't confirmed your ID, anything like that. I think you're lying to me." *Id.* In response, Witt said, "I can give you all the information you need," and explained that he was afraid to step out of the car

because he had recently had an incident with someone pretending to be a police officer. *Id.*; Trial Ex. 5 ("TE5") 6:38-7:12. Witt asked Petropulos for some verifying identification, but Petropulos refused. Pet. App. 15. Witt continued to decline to leave his car and asked if he could call Petropulos's sergeant. *Id.* Petropulos ordered Witt to drop his cell phone, and Witt complied. *Id.* Petropulos ran Witt's license plate, which came back current for a four-door Toyota registered to Brandon Witt. *Id.*

Petropulos asked for Witt's name, and Witt responded with his full name, birthday, and social security number. Pet. App. 16. The two continued to discuss whether Witt would step out of the vehicle, with Witt repeatedly asking Petropulos to identify himself and Petropulos saying, "You're lucky that I haven't ripped you out right now." *Id.*

Petropulos began shouting orders at Witt, telling him to keep his hands outside the car. TE5 7:31-32. Witt responded that he still did not know who Petropulos was, at which point Petropulos finally responded with his name and badge number. TE5 7:32-39. Witt told Petropulos that there was no need to touch him "like that," asked why Petroulos was "assaulting" him, and pleaded, "Come on, man." Pet. App. 16; TE5 7:41-8:01. Petropulos responded, "I'm going to shoot you . . . I'm going to fucking shoot you. Put your hands outside of this fucking car." *Id.*; TE5 8:08-13. Witt begged to be allowed to get out of the car; Petropulos continued screaming at him, "Put your hands outside the fucking car," and Witt replied, "They're out! They're out!" TE5 8:13-18. Witt continued pleading, "Let me get out" and repeated several

times, "I'm scared" and "I've been shot before, sir." Pet. App. 17; TE5 8:18-35.

Petropulos began attempting to control Witt's hands and Witt pulled his hands back into the vehicle, at which point Petropulos pinned Witt's body against the seat through the open window. Pet. App. 17-18. Petropulos pulled out his firearm. Pet. App. 18.

Another deputy arrived and parked his car so that his front bumper was touching Witt's rear bumper. Pet. App. 18. Petropulos reholstered his gun upon the other officer's arrival. *Id.* Witt asked, "Can I get out? Can I get out?" TE5 8:57-59. Both officers began attempting to control Witt's hands, while Witt reiterated that he had been shot before and Petropulos repeated that Witt was "going to get shot." Pet. App. 18. Dashboard camera footage reflects the car moving forward and backward during the struggle. Pet. App. 19.

Petropulos again pulled out his gun and pointed it at Witt, saying, "You're going to get shot. You're going to get shot motherfucker." Pet. App. 18. Witt begged him not to shoot. *Id.* Witt's car then slowly rolled five feet forward away from the officers, causing Petropulos to collide with the other deputy. Pet. App. 19. Petropulos briefly lost sight of Witt's right hand as the car inched forward. *Id.* Though Petropulos testified that he believed Witt was reaching for a weapon, he had not seen any weapon in the nearly ten minutes during which he was speaking with Witt, and he had no information to suggest that Witt was armed. *Id.*

As the car rolled forward, Petropulos said, "I'm going to shoot him." TE5 9:20. He then said, "Fuck it"

and fired one round at Witt, striking him in the chest and killing him. Pet. App. 19; TE5 9:20-25.

II. District Court Proceedings

In March 2017, Witt's parents, Kathy Craig and Gary Witt (respondents here), filed suit against Petropulos and the County of Orange (petitioners here). Pet. App. 20. In relevant part, they asserted state law wrongful death claims in their personal capacities for the loss of their son's love and companionship, and in their capacities as Witt's successors-in-interest, a claim under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment. *See* Third Am. Compl. ¶¶ 32-39, 69-78 (Trial Ct. Doc. #37).[2]

The case proceeded to trial in April 2019. Pet. App. 20. After a four-day liability trial, the jury returned a verdict in favor of respondents, finding unanimously that Petropulos used excessive force and acted with malice, oppression, or in reckless disregard of Witt's rights. Pet. App. 6-8, 20.

A trial on damages followed. Pet. App. 21. The jury returned a verdict awarding respondents $3.4 million in damages: $700,000 to each parent for their state law wrongful death claims based on the loss of their son's love and companionship, and in their capacities as Witt's successors-in-interest for his § 1983 claim,

---

[2] Respondents initially asserted a municipal liability claim against the County, but voluntarily dismissed it before trial. *See* Third Am. Compl. ¶¶ 48-61; Pet. App. 20 n.4.

$200,000 for Witt's pre-death pain and suffering and $1.8 million for his loss of life. Pet. App. 8-9, 21.

Petitioners filed two post-trial motions, one seeking judgment as a matter of law or a new trial, and the other seeking vacatur of the jury's award of loss of life damages. Pet. App. 12. The latter motion argued that the loss of life award was barred by California law, impermissibly speculative, and amounted to a double recovery for respondents. *See* Def.'s Mot. to Alter or Amend Judgment (Trial Ct. Doc. #216).

The district court denied both motions. With respect to petitioners' motion for judgment as a matter of law or a new trial, the court held that "substantial evidence" supported the jury's finding that Petropulos used excessive force. Pet. App. 29. "The recording and evidence at trial indicate[d] that Deputy Petropulos was not responding to any real threat," but rather "shot Witt out of anger and frustration." Pet. App. 31. The court explained that, under clearly established law, "[a]ny reasonable officer would know that you cannot shoot a suspect just because he is challenging your authority and not obeying your commands." Pet. App. 34.

With respect to petitioners' challenge to the loss of life award, the court held that applying California's bar on loss of life damages to respondents' federal excessive force claim would be inconsistent with the policies underlying § 1983. Pet. App. 22, 24-25 (citing *Robertson v. Wegmann*, 436 U.S. 584 (1978)). The court also rejected petitioners' argument that loss of life damages are necessarily speculative because of the difficulty inherent in "plac[ing] a monetary value

on a human life." Pet. App. 25. The court explained that "[j]uries are frequently challenged to assign values where there is no clear formula or metric," and that "[j]ustice does not shy away from [such] difficult questions." Pet. App. 25-26. To the contrary, it is "absolutely necessary that juries do so" to ensure "there is compensation for wrongs, particularly a wrong so egregious as to have unnecessarily cost someone his life." Pet. App. 25.

The district court also rejected petitioners' contention that awarding damages for loss of life amounted to a double recovery, explaining that the loss of life damages under federal law and the wrongful death damages under state law were awarded for "separate injuries: one award provides compensation to Witt's estate for his loss of life, and one award provides compensation to [respondents] for their own personal loss from the death of their son." Pet. App. 26.

III. Court of Appeals Proceedings

On appeal, petitioners challenged only the loss of life award, and only on the ground that such damages are categorically barred as impermissibly speculative due to the "unknowable" nature of the "post-death 'experience.'" Appellants' Opening Br. 25, 34; *see also id.* at 13-34.

In an unpublished one-page memorandum disposition, the Ninth Circuit affirmed the jury verdict. Pet. App. 3. The court of appeals explained that it had recently held in *Valenzuela v. City of Anaheim*, No. 20-55372, 2021 WL 3355499 (9th Cir. Aug. 3, 2021), that loss of life damages are available for § 1983 fatal

excessive claims, and that "*Valenzuela* is indistinguishable from this case." Pet. App. 3. Judge Lee dissented "for the same reasons laid out in [his] dissent in *Valenzuela*." Pet. App. 4.

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle for review because petitioners did not raise the question presented before the Ninth Circuit.

Petitioners seek to align this case with the pending petition for certiorari in *City of Anaheim v. Valenzuela*, No. 21-1598, by presenting the same question for review: whether "controlling Supreme Court authority"—namely, *Robertson v. Wegmann*, 436 U.S. 584 (1978)—requires application of "a state law prohibition on 'loss of life damages'" to respondents' Fourth Amendment excessive force claim under 42 U.S.C. § 1983. Pet. i. Specifically, petitioners argue that, as interpreted by *Robertson*, 42 U.S.C. § 1988 "compel[s]" application of Cal. Code Civ. Proc. § 377.34 (a) to foreclose the jury's loss of life award because § 377.34(a) fills a "'deficienc[y]'" in federal law and is "'not inconsistent'" with § 1983's purposes. Pet. 12-13 (quoting § 1988); *see generally* Pet. 12-18.

The problem for petitioners is that this argument appears nowhere in their briefing before the Ninth Circuit. Petitioners' opening brief does not contain a single citation to § 1988 or § 377.34, and it cites *Robertson* only for the proposition that § 1983 damages "must be 'compensatory' in nature." Appellants' Opening Br. 31. Petitioners' reply brief likewise makes no

mention of § 377.34, cites only the attorney's fees provision of § 1988, and again quotes *Robertson* only for the proposition that damages should be compensatory. Appellants' Reply Br. 13-14.

Instead, petitioners relied on poetry, religious scripture, and pop culture references to argue that death is "wholly outside of human understanding" and therefore is not a compensable injury as a matter of law. Appellants' Opening Br. 24; *see also id.* at 13-30. Petitioners acknowledged the Ninth Circuit's earlier decision in *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), which found § 377.34's limitation on pre-death pain and suffering damages inconsistent with § 1983's purposes, but argued only that *Chaudhry*'s holding did not foreclose petitioners' argument that "the departed" do not "suffer compensable, negative post-death 'experiences.'" Appellants' Opening Br. 34.

Accordingly, when the Ninth Circuit held that petitioners' arguments failed for reasons articulated in *Valenzuela*, Pet. App. 3, it did not mean that petitioners made the *Robertson* argument featured in the *Valenzuela* petition for certiorari. Rather, the two appeals were "indistinguishable" in the sense that they both challenged a loss of life award for a § 1983 fatal excessive force claim, and the reasoning in *Valenzuela* also foreclosed petitioners' argument that death is not a compensable injury. Pet. App. 3. Consistent with this understanding of the Ninth Circuit's decision, petitioners' rehearing petition also contains no reference

to *Robertson* or § 1988, and cites § 377.34 only in describing *Valenzuela*'s holding. Appellants' Pet. for Reh'g & Reh'g En Banc 4.

Petitioners thus present this Court with a question that they did not raise before the Ninth Circuit, and that the decision below addresses only with a general cross-reference to *Valenzuela*. Because this mismatch renders the petition an exceptionally poor vehicle for review, the Court need go no further in denying the petition.

II. The question presented is unworthy of review for the reasons identified in the *Valenzuela* Brief in Opposition.

To the extent the Court is willing to consider the question presented in the context of this petition, it should deny review for the reasons identified in the *Valenzuela* Brief in Opposition and summarized below.

A. *Robertson* does not address whether state law damages limitations apply to § 1983 fatal excessive force claims.

Robertson does not compel application of California's damages limitations to respondents' § 1983 claim for three reasons. First, petitioners' constitutional violation caused Witt's death. *Robertson* expressly took "no view" on the application of state law to § 1983 claims where the "deprivation of federal rights caused death." *Id.* Two years later, the Court reaffirmed that *Robertson* does not control where "the

plaintiff's death was . . . caused by the acts of the defendants upon which the suit was based." *Carlson v. Green*, 446 U.S. 14, 24 (1980).

Second, the Louisiana statutory scheme at issue in *Robertson* addressed the proper beneficiaries to inherit an action when a plaintiff dies; it was a quintessential procedural survivorship law. *See generally Nathan v. Touro Infirmary*, 512 So.2d 352, 353 (La. 1987). The dispute here, by contrast, is not over who has a legal right to inherit Witt's interests in this suit, but rather involves a substantive question of damages: whether § 1988 requires application of California's damages limitations to Fourth Amendment unconstitutional killing claims under § 1983. *Robertson* "does not bear on the question whether a state limitation on the measure of damages applies to a § 1983 claim." *Jefferson v. City of Tarrant*, 522 U.S. 75, 86 n.2 (1997) (Stevens, J., dissenting from dismissal of writ as improvidently granted). To the contrary, as discussed in Part II.B, an abundance of precedent holds that federal law provides § 1983 damages without resort to state law.

Third, while the Louisiana inheritance scheme provided a beneficiary for most § 1983 actions, subjecting § 1983 claims to California's then-existing damages limitations would have foreclosed any federal remedy for most fatal excessive force claims.

Under California law in effect at the relevant time for this suit (the "pre-2022" statutory scheme), compensation for an unlawful killing was available only

for harm suffered by designated family members through a wrongful death tort claim. Cal. Civ. Proc. Code §§ 377.60, 377.61, 377.34.[3] Ninth Circuit precedent holds, however, that such wrongful death damages are not permitted in § 1983 actions for Fourth Amendment violations. *See Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1228-29 (9th Cir. 2013).[4]

Accordingly, if the pre-2022 California damages limitations had applied to § 1983 claims, there would have been no compensatory remedy available for excessive force resulting in death, and effectively no municipality liability at all in such cases. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that municipalities are immune from puni-

---

[3] Although § 377.34 permits damages for pre-death economic losses, that exception has practically no application in unconstitutional killing cases because the decedent's death is itself the basis of the claim. *See Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1104 (9th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014) (noting that such damages would be available in an unconstitutional killing case only if the victim died a "slow death" such that he missed days of work after he was attacked but before he died).

[4] The Ninth Circuit has noted the possibility of a "right[] to family association" claim for wrongful death under the Fourteenth Amendment, but only where the state actor deliberately killed the family member with a "purpose to cause harm" unrelated to any law enforcement objective, *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372-73 (9th Cir. 1998) (as amended)—i.e., not in the typical unconstitutional killing case where the use of excessive force by police to subdue someone results in death.

(cont'd)

tive damages under § 1983). And while punitive damages might be available against an individual officer in the rare case where evidence establishes that the officer acted with "evil motive" or "callous indifference," *Smith v. Wade*, 461 U.S. 30, 56 (1983), most fatal excessive force claims would simply have been irremediable under § 1983.[5] *Robertson* specifically identifies this situation—where application of state law to a § 1983 claim would foreclose or significantly restrict the availability of relief not just in one action, but generally—as outside the scope of its holding. 436 U.S. at 591, 594.

At minimum, these three distinctions make § 1988's application in the circumstances here an open question after *Robertson*.

B. The Ninth Circuit correctly declined in *Valenzuela* to apply California's limitation on loss of life damages to pre-2022 § 1983 fatal excessive force claims.

The Ninth Circuit's decision in *Valenzuela* is sound and supported by substantial Supreme Court precedent. This Court has consistently treated § 1983 damages as a matter of federal law, and even if there were a deficiency, the Ninth Circuit correctly found it inconsistent with § 1983's purposes to apply a state

---

[5] Moreover, as this case demonstrates, even where the officer acted with demonstrable malice, punitive damages may be unavailable if the officer lacks the ability to pay such an award. *See* Pet. App. 25.

law damages scheme that would foreclose any federal remedy for most Fourth Amendment unconstitutional killing claims.

Section 1988 instructs courts to look to state law only on issues where federal law provides no guidance, such as the statutes of limitations for § 1983 claims. *See Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483-85 (1980). But § 1983 is not silent on the availability of damages: It provides that state actors who violate the Constitution "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." State law may, as in *Robertson*, determine who inherits that cause of action if the plaintiff dies, but § 1983 itself provides the plaintiff with "an explicit remedy in damages." *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 733 (1989). Section 1988 thus "points . . . in the direction of the express federal damages remedy" for § 1983 claims rather than reliance on "state common law principles." *Id.*

In accordance with § 1983's text, this Court has consistently treated the types of damages available under § 1983 as a matter of federal law. In considering whether § 1983 permits nominal damages, the Court did not inquire into state law or test its inconsistency with § 1983's purposes. *See Carey v. Piphus*, 435 U.S. 247 (1978). It held, rather, that "damages awards under § 1983" are "governed by the principle of compensation"—i.e., "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." *Id.* at 257-59 & n.13. Thus, without looking to state law, the

Court determined that § 1983 permits nominal damages for constitutional violations that do not result in "actual" injury. *Id.* at 261-62, 266.

Likewise, the Court did not consider state law damages limitations when it held in *Smith v. Wade*, 461 U.S. 30 (1983), that punitive damages are allowed in § 1983 cases when the plaintiff can demonstrate the state actor had evil intent or acted with callous indifference in violating the plaintiff's constitutional rights. *Id.* at 51. In short, because "[a]s a matter of federal law . . . damages may be recovered," "state-law limitations on the particular measure of damages are irrelevant." *Jefferson*, 522 U.S. at 86 (Stevens, J., dissenting from dismissal of writ as improvidently granted).

These cases reflect the Court's recognition that the availability of damages for constitutional violations under § 1983 is not a peripheral issue that Congress left unaddressed, but rather "go[es] to the substance of the § 1983 cause of action" and "affect[s] the underlying conduct § 1983 was intended to control." Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559, 618 (1985). Because Congress intended § 1983 to provide a remedy for unconstitutional killings by state actors, *see Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978), damages for loss of life are an appropriate federal remedy for such claims. *See also New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1537 (2020) (Alito, J., dissenting from dismissal for mootness) ("Noneconomic damages such

as loss of enjoyment are available in § 1983 litigation"). Reference to state law is unnecessary.

C. Applying California's pre-2022 damages scheme to fatal excessive force claims would be inconsistent with § 1983's purposes.

Where federal law is "deficient in the provisions necessary to furnish suitable remedies," § 1988 directs courts to apply state law only if doing so would "not [be] inconsistent with the Constitution and laws of the United States." The Ninth Circuit correctly determined in *Valenzuela* that it would be inconsistent with § 1983's purposes to apply a state law damages scheme that would eliminate any federal remedy for most unconstitutional killing claims.

Although the California legislature recently amended the state's damages scheme to permit claims for pre-death pain and suffering brought by a decedent's successors-in-interest, the pre-2022 statute relevant here provided for recovery for unlawful killings only through wrongful death claims brought by designated beneficiaries, Cal. Civ. Proc. Code § 377.61, not through an action brought on behalf of the decedent's estate, *id.* § 377.34. But under Ninth Circuit precedent, wrongful death beneficiaries cannot assert Fourth Amendment claims on behalf of the decedent under § 1983. *Hayes*, 736 F.3d at 1229. The interaction of these incompatible regimes would render fatal excessive force by state officers almost entirely irremediable under § 1983.

Eliminating any federal remedy for most Fourth Amendment fatal excessive force claims would be inconsistent with § 1983, "a remedial statute, [which] should be liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (internal quotation marks omitted). It cannot be that Congress intended § 1983 to provide a federal remedy when nonfatal physical injuries result from excessive force by state actors, but not when that force is so excessive that the victim dies from his injuries. Section 1983 instead reflects Congress's judgment that imposing liability on state actors "for *all* of [their] injurious conduct" is necessary to "create an incentive for officials" to respect constitutional rights. *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980) (emphasis added).[6] The *Valenzuela* decision properly acknowledges that providing a federal remedy for loss of life resulting from unconstitutional government killings is crucial to § 1983's purposes.

---

[6] To be sure, *Robertson* observes that a defendant's incentives are not changed simply because a rare and unpredictable event—like the plaintiff dying from unrelated causes with no surviving heirs—happens to limit recovery in a particular instance. 436 U.S. at 592 & n.10. But that is because state actors have no way to know or to influence whether such an event will occur. *Robertson* did not reject the basic premise of tort law that where unlawful conduct causes injury, additional harm warrants additional liability. To the contrary, "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." *Id*. at 592. A rule that consistently limits recovery when the defendant's "illegality caused the plaintiff's death" materially changes the incentives faced by state actors. *See id.*

Petitioners argue that application of California's damages scheme is nonetheless consistent with § 1983's purposes because it allows for pre-death pain and suffering and wrongful death damages. Pet. 14-15. The first problem with this argument is that petitioners rely on the newly amended version of § 377.34 (a), which made pre-death pain and suffering damages available beginning January 1, 2022. That amendment was not in effect when Petropulos killed Witt, and therefore is irrelevant to whether application of the California damages scheme relevant to *this c*ase would be inconsistent with § 1983's purposes.

The second problem is that, as just discussed, *supra* p. 17, wrongful death damages are not available for § 1983 fatal excessive force claims in the Ninth Circuit. Accordingly, wrongful death damages may be awarded only under state law. Precluding federal recovery based on the remedies available under state law "does not square with what must be presumed to be congressional intent in creating an independent federal remedy." *Tomanio*, 446 U.S. at 490. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 365 U.S. at 183.

Petitioners also give the impression that awarding federal damages for Witt's unconstitutional killing renders § 1983's remedial scheme an anomaly of American law, Pet. 8, but the opposite is true. Every state—including California—provides damages for unlawful killings, using a mix of loss of life and

wrongful death remedies.[7] States that limit the estate's recovery of loss of life damages provide an alternative remedy through the wrongful death cause of action. *See* Restatement (Second) of Torts § 926 cmt. a (Am. L. Inst. 1979). Indeed, that is the choice the California legislature made in enacting Cal. Civ. Proc. Code §§ 377.61, 377.34. Section 377.34's limitation on damages recoverable "applies only to causes of action personal to the decedent and not to causes of action that others may have for the decedent's wrongful death." *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 789 (Cal. 1997) (citing California Law Revision Commission, *Litigation Involving Decedents*, 22 Cal. L. Revision Comm'n Rep. 895 (1992)). The separate wrongful death remedy is designed to provide compensation other than the "damages recoverable under Section 377.34." Cal. Civ. Proc. Code § 377.61.

Notably, petitioners do not argue that California's wrongful death statute supplies the correct measure of damages under § 1983; their position instead would cherry-pick only the loss of life damages limitation

---

[7] Petitioners' claim that only five states allow recovery for loss of life damages, Pet. 15, is also wrong: several states beyond those cited by petitioners expressly allow hedonic damages. *E.g.*, *Bibbs v. Toyota Motor Corp.*, 815 S.E.2d 850, 856 (Ga. 2018); *Westcott v. Crinklaw*, 133 F.3d 658, 661 (8th Cir. 1998) (Nebraska law). Other states have broad statutory regimes that entrust the jury to determine the measure of lost life, *e.g.*, Del. Code Ann. tit. 10, § 3724(d); Idaho Code Ann. § 5-311(1); Mont. Code Ann. § 27-1-323, or award damages for loss of life that is not subjectively experienced by the injured party, *e.g., Holston v. Sisters of the Third Ord. of St. Francis*, 618 N.E.2d 334, 347 (Ill. App. Ct. 1993), *aff'd*, 650 N.E.2d 985 (Ill. 1995); *Boan v. Blackwell*, 541 S.E.2d 242, 245 (S.C. 2001).

without incorporating the wrongful death remedy, thereby eliminating any federal compensatory remedy for death that results from excessive police force. Petitioners do not and cannot explain how that result would comport with state tort law.

D. The alleged circuit split does not warrant review.

The courts of appeals are in overwhelming agreement that § 1988 "does not require deference to a [state] survival statute that would bar or limit the remedies available under [§] 1983 for unconstitutional conduct that causes death." *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983), *cert. denied*, 464 U.S. 961 (1983); *see Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1104-05 (9th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014); *Berry v. City of Muskogee*, 900 F.2d 1489, 1503-04 (10th Cir. 1990); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1240-41 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *see also Jones v. Prince George's Cnty.*, 355 F. App'x 724, 730 n.8 (4th Cir. 2009) ("We recognize that after *Robertson* . . . it would appear that a federal rule of survival supersedes any state law requiring abatement when the acts of § 1983 defendants caused the death of the injured party.").

Petitioners base their claimed circuit split solely on the Sixth Circuit's decision in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), which applied Michigan's damages scheme to disallow loss of life damages under § 1983. But the Sixth Circuit only found the loss of life limitation consistent with § 1983 because the scheme as a whole allowed for recovery

for most unconstitutional killing claims: It provided both for pre-death pain and suffering damages and for wrongful death damages to the decedent's survivors. *See id.* at 601, 603-04; *see also id.* at 598-99 (discussing Mich. Comp. Laws § 600.2922(6)).

Application of the Michigan damages scheme thus differed from application of the California damages scheme in two important respects. First, Michigan law provided for pre-death pain and suffering damages, while the California law in effect at the time of this case did not. Second, the Sixth Circuit assumed that § 1983 permits wrongful death claims, which is not true in the Ninth Circuit. *See supra* p. 17. In other words, in *Blaty*, application of the state scheme left meaningful damages available for most § 1983 unconstitutional killing claims, whereas application of the state scheme confronted by the Ninth Circuit in this case did not. Had the Sixth Circuit faced this situation in *Blaty*, it likely would have reached a different conclusion. *Cf. Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (declining to apply an Ohio damages limitation that would have largely eliminated any federal remedy for fatal excessive force claims).

E. The question presented addresses a state statutory scheme that is no longer in effect and that the Court would not be able to adequately assess in this case.

Review of the question presented is further unwarranted because it addresses a state statutory scheme that is no longer in effect. As discussed, *supra* p. 17, the California legislature amended the state damages

scheme to permit pre-death pain and suffering damages beginning January 1, 2022. *See* Cal. Civ. Proc. Code § 377.34(b). As such, neither the Ninth Circuit's decision in *Valenzuela* nor its decision below will control future cases involving loss of life damages for unconstitutional killing claims under § 1983; the Ninth Circuit will need to assess the new damages scheme in the first instance to determine whether its application would be consistent with § 1983's purposes. It would not be a good use of this Court's resources to review *Robertson*'s application to a state damages scheme that is no longer in effect.

Moreover, the petition does not even adequately present the pre-2022 California damages scheme for the Court's review. Although petitioners do not challenge the jury's pre-death pain and suffering award, the state statutory scheme in effect with respect to this case foreclosed those damages too. Assessing that scheme's application to respondents' § 1983 claim requires considering the scheme in whole, which the Court would not be able to do in the case's current posture.

Finally, further complicating review is that one important reason that applying the pre-2022 California damages scheme to Fourth Amendment unconstitutional killing claims would be inconsistent with § 1983's purposes is that prior Ninth Circuit precedent holds that § 1983 does not permit wrongful death damages for such claims, foreclosing the one type of damages that California allowed. *See supra* p. 17.

That holding, however, is itself the subject of a circuit split. *Compare Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1229 (9th Cir. 2013) (not permitting Fourth Amendment wrongful death claims under § 1983), *with Carringer v. Rodgers*, 331 F.3d 844, 849-50 (11th Cir. 2003) (permitting Fourth Amendment wrongful death claims under § 1983), *Andrews v. Neer*, 253 F.3d 1052, 1058 (8th Cir. 2001) (same), *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996) (same), *and Brazier v. Cherry*, 293 F.2d 401, 408-09 (5th Cir. 1961) (same). The resolution of that circuit split could significantly impact whether a state damages limitation forecloses any federal remedy in fatal excessive force claims. But because the petition does not (and could not) present that split for review, the Court would not be able to reach it in this case.

III. Petitioners' speculative damages argument does not warrant review of the question presented in this case.

As noted, *supra* pp. 9-11, petitioners' sole argument before the Ninth Circuit was that death is not a compensable injury under § 1983 because people who are alive do not know what death is like. *See* Appellants' Opening Br. 13-34. The petition attempts to fold this argument into the question presented by asserting that California's limitation on loss of life damages should be applied to § 1983 fatal excessive force claims because loss of life damages are "impermissibly speculative" due to the "unknowable" nature of the post-death experience. Pet. 18-27. As they did before the Ninth Circuit, petitioners rely on sources ranging

from television shows to religious texts in their contemplation of what happens after death, ultimately leading them to question "whether [Witt] suffered any objectively identifiable 'loss' at all." Pet. 24.

This argument falls far short of warranting the Court's review of the question presented. Petitioners fail to identify a single legal authority holding in any context that death is not a cognizable injury, let alone one suggesting that this is a basis under § 1988 for applying a state law damages limitation to a § 1983 fatal excessive force claim. To the contrary, our system of law unequivocally recognizes the deprivation of life as a grave injury that juries may compensate for without impermissibly speculating about the afterlife.

A. Death is a cognizable injury in our legal system generally and under § 1983 specifically.

Petitioners' claim that death is not an "objectively identifiable 'loss'" is fundamentally at odds with the core values anchoring our system of government. "[T]he principal aim of society is to protect individuals in the enjoyment of [certain] absolute rights," first among these being the right to live: "LIFE is the immediate gift of God, a right inherent by nature in every individual." William Blackstone, *Commentaries on the Laws of England* 124, 129 (8th ed. 1778). The Declaration of Independence holds it "self-evident" that "all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life . . . ." Declaration of Independence para. 1 (U.S. 1776); *see also* U.S. Const. amend. XIV ("nor shall any

State deprive any person of life . . . without due process of law"). Consistent with these Founding principles, this Court has held that states may "simply assert an unqualified interest in the preservation of human life." *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990); *see also Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (recognizing the injury of death as unique in its "severity and irrevocability") (citation and quotation marks omitted).

Congress likewise recognized the value our legal system places on the preservation of life when it enacted § 1983. The Civil Rights Act of 1871 reflects Congress's "vital[] concern[] with the unlawful killings that characterized the reign of terror in the southern states. [The legislators] repeatedly referred to wrongful killings in identifying the evils they were addressing, and they relied extensively on the investigative report that vividly described the state of lawlessness." Steinglass, *supra*, at 648-49. As Justice Rutledge observed with respect to the Civil Rights Act of 1866, the protection of other constitutional rights matters little without assuring "the right which comprehends all others, the right to life itself." *Screws v. United States*, 325 U.S. 91, 133 (1945) (Rutledge, J., concurring). *See also Brazier v. Cherry*, 293 F.2d 401, 404 (5th Cir. 1961) ("Violent injury that would kill was not less prohibited than violence which would cripple . . . it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but . . . it meant

to withdraw the protection of civil rights statutes against the peril of death.").[8]

Petitioners contend that "tort law has long required that the plaintiff have a 'cognitive awareness' of his or her loss," Pet. 18-19, but their only supporting citation is a page from a textbook on which the phrase "cognitive awareness" is nowhere to be found. Pet. 18 (citing Victor E. Schwartz et al., *Prosser, Wade, and Schwartz's Torts: Cases and Materials* 535 (10th ed. 2000)). Contrary to petitioners' assertion, general principles of tort law require only that the asserted harm be legally cognizable. *See, e.g.*, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts §1 (2d ed. 2022) ("A tort is conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability.") (citations omitted); *Pa. R.R. Co. v. McCloskey's Adm'r,* 23 Pa. 526, 531 (1854) ("The duty of the wrongdoer to make compensation is very plain, and such as he has, which the law can reach, it compels him to give: though it may never reach the consciousness of the person injured."). A jury need not adopt any particular philosophical or religious perspective to conclude that the victim of an unlawful killing has been grievously injured by the deprivation of his life.

Notably, this Court has already dismissed petitioners' specific complaint that loss of enjoyment of

---

[8] Even more absurdly, by petitioners' reasoning, the "unknowable" nature of death would arguably be a defense to murder. *Contrast, e.g.*, *People v. Harris*, No. A116841, 2010 WL 2625767, at *7 (Cal. Ct. App. June 30, 2010) (affirming conviction of person who murdered her children so that they would go to heaven).

life damages are not compensatory if awarded to a plaintiff who is not aware of the loss. In *Molzof v. United States*, 502 U.S. 301 (1992), the Court rejected the notion that "an award of damages for loss of enjoyment of life" is necessarily punitive because such damages "can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss." *Id.* at 304 (internal quotation marks omitted).

Carey v. Piphus, 435 U.S. 247, 256-57 (1978), relied upon by petitioners, is not to the contrary. In *Carey*, the Court held only that a student's suspension from school without due process did not entitle him to substantial nonpunitive damages in the absence of any "proof of actual injury." *Id.* at 266. Nowhere in the opinion does the Court suggest that death does not qualify as "actual injury." Similarly, in *Memphis Community School District v. Stachura*, 477 U.S. 299, 310-11 (1986), the Court held only that injury from a constitutional violation cannot be presumed, not that death is an incognizable injury.[9]

---

[9] Justice Marshall's concurring opinion underscores that the problem was not that constitutional deprivations in and of themselves are not compensable as actual injuries—in the right instances, they doubtless would be—but that the jury instructions in that case were "speculative" insofar as they "invited the jury to speculate on matters wholly detached from the real injury occasioned . . . by the deprivation of the right" and thus "might have led the jury to grant . . . damages based on the 'abstract value' of the right to procedural due process." *Memphis Cmty. Sch. Dist.*, 477 U.S. at 316 (Marshall, J., concurring).

B. Damages for loss of life are not categorically barred as impermissibly speculative.

Nor is there any merit to petitioners' argument that any damage award for loss of life is impermissibly speculative. The jury found that Petropulos unlawfully inflicted the ultimate injury of death on Witt based on the evidence before it. The jury was then properly left to ascertain the value of that loss. *See, e.g.*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount.").

Petitioners postulate that juries are incapable of assessing the value of lost life because, by virtue of being alive, jurors cannot know "what a decedent 'experienced' on (and after) the point of his death." Pet. 24. But jurors have been competently awarding damages for injuries they have not personally experienced for centuries, including the loss of life. In affirming a jury award to a decedent's estate for the loss of life in 1854, the Supreme Court of Pennsylvania explained that the trial court had properly entrusted the jury to "place a money value upon the life of a fellow being, very much as they would upon his health or reputation," even though "the law can furnish no definite measure for damages that are essentially indefinite." *McCloskey's Adm'r*, 23 Pa. at 532.

The New York Court of Appeal similarly observed in 1868: "The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain . . . by making the experience of mankind, or, rather, the judgment which is founded upon such experience, the guide." *Taylor v. Bradley*, 39 N.Y. 129, 144-46 (1868). Put simply, jurors can competently measure the loss of a person's life by exercising their judgment founded not on experiencing death, but on their experience of living life.[10]

---

[10] Assigning a dollar amount to human life is a familiar concept in other contexts as well. Government agencies must consider costs and benefits when acting, *e.g.*, Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), and so must calculate a monetary value for loss of human life in order to compare death risks with financial burdens. *E.g.*, Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A-4, at 29 (Sept. 17, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf. Thus, for example, the Department of Transportation determined that $11.8 Million is the monetary value of each life saved or lost—a number well in excess of the amount awarded by the jury below. Dep't of Transp., Departmental Guidance on Valuation of a Statistical Life in Economic Analysis, https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis; *see also* Dep't of Transp., Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses (Mar. 2021) (explaining calculation), https://www.transportation.gov/ sites/dot.gov/files/2021-03/DOT%20VSL%20Guidance%20-%202021%20Update.pdf. Were an agency to act by assigning no value to life, as petitioners here propose, the agency action would be swiftly reversed as arbitrary and capricious. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

This Court, too, has observed that the difficulty in placing a value on the loss of life does not preclude compensating for the loss altogether: "'In one sense it is true that no money can be compensation for life or the enjoyment of life, and in that sense it is impossible to fix compensation for the shortening of life. But it is the best the law can do. It would be paradoxical if the law refused to give any compensation at all because none could be adequate.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 389 n.6 (1970) (quoting *Rose v. Ford*, [1937] A.C. 826 (HL) 848 (Lord Wright, concurring)). *See also Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("For nothing is better settled than . . . where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); Prosser, *supra*, at 534 (where a category of damages is "not capable of being reduced to any precise equivalent in money, [so] there can be no fixed standard by which damages for them can be measured[,] [t]he best that can be done is to leave the question to the jury").

Indeed, as noted earlier, *supra* pp. 19-20, every state—including California—as well as federal law provides damages for unlawful killings, using a mix of loss of life and wrongful death remedies. The states, moreover, typically give juries wide latitude to determine the appropriate measure of compensation. *E.g.*, Del. Code Ann. tit. 10, § 3724(d) (the "jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death"); Idaho Code Ann. § 5-311(1) ("such damages may be given as under all the circumstances of the case as may be just"); Mont. Code Ann. § 27-1-323 (similar). Indeed, several

states enshrined the jury's discretion into their state constitutions. *See* Ariz. Const. art. II, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death . . . of any person."); Ky. Const. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death."); N.Y. Const. art. I, § 16 ("The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.").

Damages for lost life are neither speculative nor uncertain. When death occurs, it is observable, unequivocal, and finite. There is no dispute that Deputy Petropulos unlawfully shot and killed Brandon Witt. The jury was competent and legally empowered to award damages for the injuries that directly flowed from that unlawful conduct, and to draw from common sense and subjective experience in determining a monetary value for what might otherwise be an irreplaceable loss. Petitioners' contrary rule defies centuries of law and the most fundamental values of our democracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Dale K. Galipo
LAW OFFICES OF DALE K. GALIPO
21800 Burbank Blvd., Suite 210
Woodland Hills, CA 91367

Melanie T. Partow
LAW OFFICE OF MELANIE PARTOW
4470 Atlantic Ave., #17443
Long Beach, CA 90807

Kelsi Brown Corkran
Counsel of Record
Elizabeth R. Cruikshank
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

NOVEMBER 4, 2022