

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

JOHN O'DELL ET AL.,

Petitioners

v.

ANDREW ESPINOZA, ETC., ET AL

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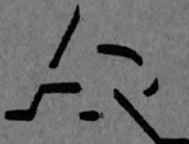
NO. 81-534

Washington, D. C.

April 26, 1982

Pages 1 thru 51

**ALDERSON**



**REPORTING**

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Petitioners :  
v. : No. 81-534  
ANDREW ESPINOZA, ETC., ET AL. :  
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Washington, D., C.  
Monday, April 26, 1982

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:05 a.m.

APPEARANCES:

THEODORE S. HALABY, ESQ., Denver, Colorado, on behalf  
of the Petitioners.  
SCOTT H. ROBINSON, ESQ., Denver, Colorado, on behalf of  
the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

THEODORE S. HALABY, ESQ.,

on behalf of the Petitioners

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SCOTT H. ROBINSON, ESQ.,

on behalf of the Respondents

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THEODORE S. HALABY, ESQ.,

on behalf of the Petitioners - rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments  
3 next in O'Dell against Espinoza. Mr. Halaby, I think  
4 you may proceed whenever you're ready.

5 ORAL ARGUMENT OF THEODORE S. HALABY, ESQ.,  
6 ON BEHALF OF PETITIONERS

7 MR. HALABY: Thank you. Mr. Chief Justice,  
8 and may it please the Court:

9 This case arises out of a confrontation that  
10 occurred in a Denver, Colorado, city park between three  
11 officers of the Denver police department and the father  
12 of the Respondents and a companion of that father.

13 QUESTION: Before you get too far into the  
14 merits, Mr. Halaby, let me ask you this question. As I  
15 read the State Supreme Court's opinion, the trial court  
16 had dismissed the 1983 action on a motion for summary  
17 dismissal on the ground that the remedy was exclusively  
18 under state law for death by a wrongful act. Now, on  
19 that basis the State Supreme Court reversed the trial  
20 court and said, no, you should not have had summary  
21 judgment sending it back, and therefore the case is now  
22 back where it started and would go to trial. Is that  
23 correct?

24 MR. HALABY: Not absolutely, Mr. Chief  
25 Justice.



1 QUESTION: Well, what would have happened if  
2 you had not brought the case here?

3 MR. HALABY: If we had not brought the case  
4 here, the two claims, the 1983 survivorship claims  
5 brought on behalf of the estate and the personal 1983  
6 claims of the children of the decedent, both would have  
7 been remanded for trial in the district court and tried  
8 there.

9 The relief Petitioners are seeking --

10 QUESTION: Well, before you go into that, did  
11 you raise the 1985, Section 1985 question here, or only  
12 the 1983?

13 MR. HALABY: We have only raised one issue,  
14 and that deals with the children of the decedent, the  
15 Respondents herein, and whether or not they may assert  
16 personal 1983 claims. We have not raised the dismissal  
17 of the 1985 claims. Neither have Respondents. We have  
18 not raised the dismissal of the 1983 claims with respect  
19 to the chief of police, who was sued strictly in a  
20 supervisory capacity. We have not raised the dismissal  
21 of those claims.

22 We have only raised the finding of the  
23 Colorado Supreme Court insofar as it recognized a  
24 personal constitutional right in the child to a  
25 continuing family relationship, which would afford that

1 child a claim pursuant to Section 1983 for deprivation  
2 of that right.

3 QUESTION: I'm sure it's apparent to you what  
4 I'm driving at is whether there is a case here, whether  
5 there is jurisdiction. And you say that if you had not  
6 brought the case here, if I understood you, you would  
7 have gone to trial on the 1983 question in the state  
8 court, with an obligation on the part of the state court  
9 to apply federal law. Is that correct?

10 MR. HALABY: That's correct. If we had not  
11 brought the case here --

12 QUESTION: Then is there a final judgment  
13 here?

14 MR. HALABY: There is a final judgment, we  
15 submit, with respect to the claims of the children,  
16 because unless the Court recognizes that constitutional  
17 right they are not parties to the action, they have no  
18 claims whatsoever. So with respect to the claims of the  
19 children there is -- unless this Court is to affirm the  
20 finding of the Colorado Supreme Court with respect to  
21 the claims of those children, since they did not assert  
22 their state rights under the wrongful death statute,  
23 they would have no claims, they would not be parties to  
24 the action.

25 QUESTION: But the Colorado Supreme Court

1 upheld those claims.

2 MR. HALABY: That's correct, Justice  
3 Rehnquist. And we submit they did so erroneously in an  
4 unprecedented fashion.

5 QUESTION: But if they did uphold them, it was  
6 simply to say that in the abstract it stated a claim for  
7 relief or what have you under Section 1983, and that the  
8 trial court, I take it, on remand, was to try the case.

9 MR. HALABY: That's correct.

10 QUESTION: Is that a final judgment under  
11 1257?

12 MR. HALABY: It is not a final judgment in  
13 that respect, in that the claims have not been tried and  
14 the Colorado Supreme Court has not ruled specifically on  
15 the merits of those claims. However, we would still  
16 urge consideration by this Court because of the profound  
17 ramifications of this finding, not only in the State of  
18 Colorado but nationwide.

19 QUESTION: Counsel, aren't there only about  
20 four exceptions to our taking -- to the final judgment  
21 rule, and how does this fit into any of those  
22 exceptions?

23 MR. HALABY: We would submit that because it  
24 is a decision in conflict with prior decisions of this  
25 Court and has such profound consequences, that this

1 issue is ripe for the consideration of this Court.

2 QUESTION: Well, that would be a new  
3 exception, in addition to any that we've ever recognized  
4 before.

5 MR. HALABY: I believe this Court -- it does  
6 fit within what this Court has recognized before with  
7 respect to fundamental decisions that have run contrary  
8 to this Court, which is what we asserted in our petition  
9 in the first instance, in terms of the fact that it was  
10 in conflict with the prior decisions of this Court, that  
11 if this decision of the Colorado Supreme Court is left  
12 unreversed that the profound negative consequences,  
13 which we submit are improper, would have ramifications  
14 that are uncorrected.

15 So we would submit that, while there is not a  
16 final decision on the merits of the children's claims,  
17 since they have not been tried in the district court,  
18 that it is still an issue that is ripe for consideration  
19 of this Court.

20 QUESTION: Well, what if you win below? What  
21 if there had been -- what if you hadn't come here and  
22 there were a remand and you won, or if the children got  
23 less than \$45,000.

24 MR. HALABY: Well, in either instance, Justice  
25 Blackman, if we won or they got less than that, we



1 necessarily would --

2 QUESTION: I mean, you would won your case.

3 MR. HALABY: We would have won our case.

4 QUESTION: And the case would never have come  
5 here.

6 MR. HALABY: Unless the other side appealed  
7 the case, of course. However, the law would still stand  
8 in Colorado --

9 QUESTION: If they brought it up here then, it  
10 may be that -- it may be that you could sustain the  
11 judgment then on the very ground you're now urging.

12 MR. HALABY: If we had won the case, Justice  
13 White, the law would remain in Colorado --

14 QUESTION: We don't sit just to correct errors  
15 of law. We still decide cases and controversies, and  
16 avoid deciding, our deciding, constitutional questions  
17 as long as possible.

18 QUESTION: How do you know that the Colorado  
19 courts won't give you everything that you're seeking?

20 MR. HALABY: Well, based on the decision of  
21 the Colorado Supreme Court in recognizing the  
22 constitutional right of the child, that alone prevents  
23 us from accomplishing what we are seeking. Of course,  
24 on the trial on the merits in the district court we may  
25 be successful, which would then preclude any harm.

1           QUESTION: And if you are not successful on  
2 that issue, then you might be able to come here.

3           MR. HALABY: That's correct, Your Honor.

4           QUESTION: Is the other -- is the alternative  
5 ground for recovery still open in the district court?

6           MR. HALABY: The alternative ground for  
7 recovery under the wrongful death statute? No, simply  
8 because the Respondent children have not sought to seek  
9 their remedy under the state wrongful death statute.  
10 They have only asserted one claim and that's their  
11 federal claim pursuant to Section 1983.

12          QUESTION: And it's still open, isn't it? I  
13 mean, they can amend their claim, I suppose.

14          MR. HALABY: I believe they still can. They  
15 were granted leave by the district court to amend their  
16 claim. They chose not to, but stand simply on their  
17 1983 claim.

18          QUESTION: How do you understand -- what do  
19 you understand to be the position of the amicus in this  
20 case, the ACLU?

21          MR. HALABY: Well, my understanding of their  
22 position is that this issue, as Justice O'Connor raised,  
23 is not ripe for consideration by this Court. I do  
24 understand that to be their position. And so therefore  
25 they ask this Court to affirm and remand the rulings of

1 the Colorado Supreme Court, which would seem to me would  
2 be a decision on the merits.

3 QUESTION: Certainly if we affirm.

4 MR. HALABY: That was one of the alternatives,  
5 Justice Rehnquist, that was suggested by the amicus.

6 QUESTION: But their first suggestion is to  
7 vacate, isn't it?

8 MR. HALABY: Vacate on the grounds of  
9 certiorari being improvidently granted, similar to an  
10 analogous case arising out of Colorado in the Jones v.  
11 Hildebrant case, where this Court similarly dismissed as  
12 having been improvidently granted.

13 But we would submit that it is within the  
14 discretion of this Court to decide this issue at this  
15 time, and that the importance of this issue is so  
16 overwhelming that it would deserve resolution at this  
17 time.

18 QUESTION: Could you help me with one other  
19 procedural question? I had some -- I wasn't sure I  
20 entirely understood your Justice Erickson's concurring  
21 opinion. He said that the majority didn't really need  
22 to decide what it did, because it could remand on --  
23 just on the survivorship claim, is that what he was  
24 saying.

25 MR. HALABY: I believe what Justice Erickson

1 was suggesting was that the Colorado Supreme Court went  
2 far beyond the issues in terms of trying to fashion an  
3 overall remedy in consideration of 1983 claims being  
4 asserted in state courts. And I believe that is what he  
5 objected to, while he agreed with the bottom line  
6 findings of the court in terms of remanding both the  
7 1983 survivorship claims of the estate and the personal  
8 1983 claims of the children.

9 But what he objected to was the court's going  
10 beyond those particular issues in terms that he felt  
11 were not before the court, in terms of fashioning an  
12 overall remedy or procedural concept in how the state  
13 court should handle 1983 claims.

14 QUESTION: Did I correctly understand that on  
15 remand, as things stand now, there may be a death claim  
16 on behalf of the children for the injury to their  
17 relationship to their father, the loss of the father;  
18 and secondly, there may be a survivorship claim on  
19 behalf of the estate for the injury to the man himself?  
20 And you're not -- under 1983 -- and you're not  
21 challenging the latter?

22 MR. HALABY: Yes, we are not challenging the  
23 survivorship right.

24 QUESTION: And you say that the cause of  
25 action that the deceased had under 1983 survives?



1 MR. HALABY: Yes.

2 QUESTION: And that's a state law question,  
3 isn't it, or not?

4 MR. HALABY: No, Justice White, we would  
5 submit that is a federal law question --

6 QUESTION: Yes, right.

7 MR. HALABY: -- as determined --

8 QUESTION: Well, whatever it is, you agree it  
9 survives?

10 MR. HALABY: Yes. I think that this Court's  
11 decision in Robertson v. Wegmann supports that finding.  
12 We do not contest that finding.

13 QUESTION: And if you lost on both of the  
14 claims that would be open on remand, the survivorship  
15 claim and then this, the personal 1983 claim of the  
16 children, if you lost them both one wouldn't cancel out  
17 the other, I take it, or would they?

18 MR. HALABY: No, I believe --

19 QUESTION: I mean, the recovery in one would  
20 be added to the other?

21 MR. HALABY: I believe so. I believe they're  
22 mutually exclusive remedies.

23 QUESTION: Right.

24 MR. HALABY: I don't think there's any  
25 question about that.

1           QUESTION: And with respect to each of them,  
2 the federal recovery would be larger than the state law  
3 recovery, because they include these personal elements  
4 of damage other than pecuniary damages, or is that not  
5 correct?

6           MR. HALABY: We would submit that either under  
7 -- under either the state remedy or the federal remedy,  
8 the measure of damages would be the same. Under the  
9 survivorship claims, we would submit that the remedy  
10 provisions under the state survivor statute would  
11 control the relief that could be obtained pursuant to  
12 the 1983 survivorship statute.

13          QUESTION: Won't that be because we borrowed  
14 Colorado law?

15          MR. HALABY: That's correct.

16          QUESTION: But it's still federal law.

17          MR. HALABY: It's still federal law.

18          QUESTION: But we borrowed --

19          QUESTION: What supports that, may I ask?

20          MR. HALABY: Robertson v. Wegmann would  
21 support that.

22          I might point out that what we would submit  
23 has been considerable confusion concerning the  
24 construing the state death statutes, the wrongful death  
25 statute and the survivor statute, with claims under

1 1983. We would submit particularly in this instance  
2 that the state death statutes cannot bear any relevance  
3 as to whether or not a 1983 claim can be asserted in the  
4 first instance.

5           Following the rationale of the Colorado  
6 Supreme Court, it is consistent to state that it does  
7 not require death of the father in this case to give  
8 rise to the 1983 claim in terms of affecting this family  
9 relationship between the parent and child. Instead,  
10 false imprisonment could give rise and would be the same  
11 type of intrusion in the family relationship which,  
12 according to the Colorado Supreme Court's rationale,  
13 would afford the basis for the child to assert a  
14 personal 1983 claim.

15           And clearly, if the father is not dead and has  
16 simply been removed from that family relationship,  
17 albeit for life, that family relationship with the child  
18 is affected almost to the same degree as if the father  
19 was dead. Yet clearly, with the father not being dead  
20 the death statutes, the wrongful death statute and the  
21 survival statute of Colorado, would not apply in any  
22 instance.

23           Therefore, any discussion, we submit, that the  
24 remedies provided under the state death statutes can  
25 somehow relate to claims under 1983 has no basis.

1           The finding of the Colorado Supreme Court is  
2 premised, as was mentioned, on a personal liberty  
3 interest in the continuing family relationship with that  
4 father. We submit that this is an unprecedented  
5 finding, that this Court nor any other appellate court  
6 has ever so recognized such a personal constitutional  
7 interest in a child.

8           There has been one court that decided the  
9 issue on point. The Seventh Circuit affirmed without  
10 comment an opinion of the Illinois District Court in  
11 *Evain v. Conlisk* that found that no such right exists.  
12 The Colorado court, we submit erroneously, deduced from  
13 this Court's finding in *Stanley versus Illinois* that  
14 this Court recognized a constitutionally protected right  
15 between the relationship of the father toward the child,  
16 and therefore that reciprocal right of the child to the  
17 parent must also exist.

18           But Petitioners further submit that that was  
19 an erroneous finding, was a misinterpretation of  
20 *Stanley*, and even if it was a correct interpretation of  
21 *Stanley* that such a -- there was a constitutionally  
22 protected right of the father toward the child, one  
23 cannot state that this reciprocal right between -- of  
24 the child to the parent ipso facto exists. That is a  
25 right of a different kind, of a different nature, and



1 whether or not this right exists must be determined on  
2 the basis of the principles set forth by this Court in  
3 the abortion case of Roe v. Wade as to whether it is a  
4 constitutional liberty interest that exists.

5           It must be fundamental or implicit in the  
6 concept of ordered liberty, and what has normally been  
7 found to be fundamental or implicit in the concept of  
8 ordered liberty normally involves those choices, freedom  
9 of choices or freedom of decisions, such as a parent to  
10 have a child or not to have a child.

11           And with respect to the child's relationship  
12 with the parent, this does not involve a freedom of  
13 choice for a decision. It is a happenstance, of course,  
14 which the child has no control over. And we have found  
15 this carried through in lawsuits that children have  
16 sought to bring for wrongful life, where there was found  
17 to be no basis in fact because the child doesn't have  
18 any choice.

19           So therefore, even if this Court were to  
20 recognize a personal liberty interest and protection of  
21 the parent with respect to the protection of his  
22 relationship with this child, that reciprocal  
23 constitutional right in the child would not exist with  
24 respect to his continuing family relationship with his  
25 parent.

1           I don't think one needs to use one's  
2 imagination to any great degree to recognize the  
3 profound ramifications, not only upon the liability of  
4 public entities, but on the federal judiciary itself,  
5 because if this concept of continuing family  
6 relationship is afforded constitutional protection we  
7 submit that even the slightest state intrusion in this  
8 family relationship would give rise not only to one 1983  
9 claim, but every member of that family relationship  
10 would be afforded each a personal 1983 claim.

11           QUESTION: What about a parent's interest in  
12 the child?

13           MR. HALABY: In what respect, Justice White?

14           QUESTION: Do you say that -- have any cases  
15 recognized that as a constitutionally protected right,  
16 the parent's relationship with the child?

17           MR. HALABY: We submit that no cases have  
18 recognized such a right. The Colorado Supreme Court  
19 seemed to imply in its decision that Stanley versus  
20 Illinois recognized such a right. However, we disagree  
21 with that decision and we have not been able to find,  
22 nor did the Colorado court cite, any other cases that  
23 would --

24           QUESTION: You say you disagree with Stanley  
25 or with the decision -- with the reading of Stanley?

1                   MR. HALABY: Yes, we disagree with the  
2 interpretation of Stanley.

3                   QUESTION: Is it your view that if a  
4 30-year-old man were killed by the police his children  
5 would have no cause of action, but his parents would?  
6 Neither?

7                   MR. HALABY: That's correct, Justice Stevens,  
8 neither would have a claim.

9                   QUESTION: Your argument about the reciprocal  
10 business would not defeat a claim by the grandparents,  
11 though, would it? You argued, as I understood you, that  
12 Stanley would stand for the -- arguably might stand for  
13 the proposition that the parent has an interest in the  
14 relationship, but the child does not.

15                  MR. HALABY: We say it hasn't been recognized,  
16 nor would it exist, that the parent would have a  
17 constitutionally protected relationship with the child.  
18 But even if that were found to be so, as the Colorado  
19 Supreme Court found, clearly the child would not have a  
20 constitutionally protected relationship with respect to  
21 the parent.

22                  QUESTION: So that rule would protect against  
23 suits by the children, but not against suits by the  
24 parents.

25                  MR. HALABY: That's correct.

1 QUESTION: Ironical to say that the grandparent  
2 had a greater interest in the child.

3 MR. HALABY: Well, one thing it would do is  
4 serve to limit the number of claims, which of course  
5 wouldn't go to the finding itself. But we submit that  
6 the family relationship, be it between parent and child,  
7 between grandparent and child, between brothers and  
8 sisters, simply does not exist.

9 QUESTION: Well, I understood your basic  
10 position, or at least one of your positions, was that the  
11 matter of the survivorship rights is purely a matter of  
12 state law for state statute, and that if the state  
13 statute does not recognize any rights in a survivor  
14 there are none.

15 MR. HALABY: If the state does not have a  
16 survivorship statute that allows for the claims of a  
17 decedent to survive his death, then there would not be a  
18 means of bringing the federal 1983 claim. However, in  
19 Colorado and I believe all states now, such survivorship  
20 statutes exist.

21 QUESTION: But we don't know yet whether the  
22 state courts will recognize under the federal law that  
23 was asserted the rights claimed, until you try the  
24 case.

25 MR. HALABY: The Colorado Supreme Court has



1 recognized that right. That was the finding of the  
2 court below. We do not know whether or not the child  
3 will be successful on the claim that has now been  
4 recognized by the Colorado Supreme Court. However, we  
5 again submit that, while that claim has not been tried  
6 on its merits, the issue is so fundamental and contrary  
7 and has such wide-ranging ramifications that it  
8 nonetheless is ripe for decision at this time.

9 QUESTION: And because the state court has  
10 construed a federal statute, we should now decide  
11 whether they construed it correctly?

12 MR. HALABY: Yes.

13 QUESTION: That's the finality that you rely  
14 on, isn't it?

15 MR. HALABY: Yes, that was exactly what our  
16 position is, Mr. Chief Justice.

17 Thank you.

18 CHIEF JUSTICE BURGER: Mr. Robinson.

19 ORAL ARGUMENT OF SCOTT H. ROBINSON, ESQ.

20 ON BEHALF OF RESPONDENT

21 MR. ROBINSON: Mr. Chief Justice and may it  
22 please the Court:

23 This Court has before it in a 1983 context a  
24 state statute which basically makes it more profitable  
25 for police officers to kill than to wound. It's an

1 unusual statute. It's a four-part survival and wrongful  
2 death statute, and three parts of it are set forth in  
3 our brief to this Court. There's an additional portion  
4 which is cited to the Court in both briefs, but which  
5 was left out, I think through inadvertence, and that's  
6 the first part of what we call the survivorship claim.

7 But when you read these four statutes you'll  
8 see that they're very complicated, they're very  
9 confusing. Basically, Colorado law on the subject of  
10 wrongful death and on the subject of survivorship is  
11 that very little survives, and as regards wrongful death  
12 damages are limited to \$45,000 unless a dependent,  
13 mother or father, child or spouse, is left living.

14 There's also what we call the net pecuniary  
15 loss rule, which translated means you're only worth what  
16 you can earn. That's the statute -- those are the  
17 statutes which are before this Court.

18 QUESTION: Mr. Robinson, do you have any  
19 position as to whether this is a final judgment within  
20 28 U.S.C. 1257?

21 MR. ROBINSON: Yes, I do, Justice Rehnquist.  
22 I have actually several positions. I'm ambivalent  
23 because obviously I would not want to try the case under  
24 one set of rules, lose, and then be forced to come back  
25 to this Court, or in the alternative win below in the

1 trial court and have a later judgment on the  
2 associational rights thrown out the window. I don't  
3 want that to happen.

4 I think the Court has the jurisdiction to hear  
5 the case. For example, I would cite to the Court two  
6 recent decisions, Green versus Carlson and Percunier  
7 versus Navarette. In both those cases the district  
8 court dismissed, one on a summary judgment ground --

9 QUESTION: Neither of those were from state  
10 courts, were they?

11 MR. ROBINSON: That's correct, Justice  
12 Rehnquist. Those are federal court questions.

13 QUESTION: And we don't require finality when  
14 you're reviewing a judgment of a federal court of  
15 appeals. 1257 just applies to the judgment of the  
16 highest court of a state.

17 MR. ROBINSON: I understand. But the  
18 principle is there, Your Honor, that when a court below  
19 has dismissed and the appellate court then reaffirms --  
20 reestablishes the complaint, you then have a final  
21 judgment at least as to legal questions. And that's  
22 something that I think the amicus brief overlooks.

23 The legal question is postured for review in  
24 this Court. If the Court chooses not to hear it --

25 QUESTION: That may be so, but there are

1 thousands of cases that we have denied relief on when  
2 there's been no question but that what a federal  
3 question has been finally decided in the state court,  
4 but there are further proceedings still to come. If  
5 that federal question can be said to survive or might be  
6 said -- if it's possible that that federal question  
7 would disappear in the process of the remand, no one has  
8 ever held that that is final.

9 MR. ROBINSON: I agree under those  
10 circumstances, Your Honor. The problem here --

11 QUESTION: I know, but you may lose.

12 QUESTION: On the merits.

13 MR. ROBINSON: Then we'll be back here, Your  
14 Honor, because one of our grounds --

15 QUESTION: Well, that may --

16 QUESTION: If you lose on the merits?

17 MR. ROBINSON: We may very well be, and that's  
18 a problem. And I want to cite to the Court very clearly  
19 that portion of the Colorado Supreme Court's opinion  
20 which puts us all in a quandary.

21 QUESTION: Well, if you lose on the merits  
22 under instructions from the trial judge to the jury  
23 which are consistent with the present Supreme Court of  
24 Colorado opinion, how would you get here?

25 MR. ROBINSON: We won't know, because of the

1 way they structured their opinion, whether or not we  
2 were denied relief because of the associational claims  
3 or because of the survivorship claims, and that's --

4 QUESTION: That would depend on whether the  
5 correct instructions -- that is, instructions consistent  
6 with the Colorado Supreme Court's opinion -- were  
7 given.

8 QUESTION: Well, they're surely going to  
9 instruct separately on the decedent's own rights and the  
10 children's own rights, I would think.

11 MR. ROBINSON: But the way the opinion is  
12 structured, Justice White, is this: They have held very  
13 clearly that there are associational rights for which  
14 damages are recoverable, and also that the wrongful  
15 death and survivorship statutes are inconsistent with  
16 the federal remedy. Then they pass on to the second  
17 issue, the issue of survivorship, and what they held was  
18 that because we've given the survivors this other remedy  
19 we do not need to determine whether the estate has a  
20 claim.

21 QUESTION: Mr. Robinson, do you think you're  
22 entitled to win on both points?

23 MR. ROBINSON: I do.

24 QUESTION: You mean you don't think it's  
25 possible you'll win on one?



1           MR. ROBINSON: Well, I don't mean to sound  
2 greedy, Your Honor. But this is a question of federal  
3 law. We have two claims --

4           QUESTION: I mean, I don't think -- where do  
5 you get the right to have it done the way you want it  
6 done? You don't have a right to win.

7           MR. ROBINSON: Your Honor, I represent two  
8 separate classes of claimants. One class of claimants  
9 in this case are the children. Another class of  
10 claimants are the heirs to the estate, who really stand  
11 in the shoes of the decedent.

12          QUESTION: Well, most lawyers I've known are  
13 willing to win a case on any ground they can. You're  
14 different, then, aren't you?

15          MR. ROBINSON: That's true, I'll win on any  
16 grounds, Your Honor, I can. But I do represent two  
17 separate classes, and I think that's an important  
18 distinction.

19          QUESTION: But it's still true, isn't it, that  
20 the jury might find that the police acted in  
21 self-defense and there's no liability at all?

22          MR. ROBINSON: Anything's possible --

23          QUESTION: And then you wouldn't be back.

24          MR. ROBINSON: It's not going to change the  
25 legal --

1           QUESTION: You're not going to appeal to us on  
2 a fact question of liability.

3           MR. ROBINSON: That's true, Your Honor.

4           QUESTION: So this case clearly is not final.  
5 The judgment now is clearly not final.

6           MR. ROBINSON: The judgment is certainly final  
7 on the question of the legal questions. And again, if I  
8 could cite the Court Justice Blackmun's opinion in Fact  
9 Concerts, as was the instruction issued there, this is  
10 an important issue, and more importantly, it's likely to  
11 recur.

12           I just point out again Jones versus  
13 Hildebrant. This Court per curiam sent back the case as  
14 improvidently granted. Here we are again; very similar  
15 issue, just a few years later.

16           The question was raised in Jones. It's raised  
17 more squarely here. And I think maybe it's time for the  
18 Court to act.

19           QUESTION: But if we don't have jurisdiction,  
20 no matter how much we might like to, we really don't  
21 have the power to do so.

22           MR. ROBINSON: Well, again, I'm just reading  
23 Justice Blackmun's opinion in Fact Concerts.

24           QUESTION: That's another federal case.

25           MR. ROBINSON: Footnote 6 --

1 QUESTION: That came from the First Circuit.

2 MR. ROBINSON: The principle is the same. If  
3 it's an issue that's likely to recur, this Court does  
4 stand in that regard as the final tribunal of the  
5 country.

6 QUESTION: Well, this isn't a question of  
7 mootness. This is a question of jurisdiction, of  
8 appellate jurisdiction under the statute. We need to  
9 have a final judgment from a state court.

10 MR. ROBINSON: Well, I guess my position is I  
11 fail to see or understand how a factual determination in  
12 this particular case changes in any iota the  
13 jurisdictional power of the Court. Maybe I am too  
14 unaware of the federal statute to give you a passable  
15 argument to assist you in that respect.

16 I feel that this case is ripe for review,  
17 which is why we join --

18 QUESTION: Are you familiar with a case called  
19 Cox Broadcasting Company?

20 MR. ROBINSON: Versus Cohn?

21 QUESTION: Yes.

22 MR. ROBINSON: Not in this context.

23 QUESTION: Why not?

24 MR. ROBINSON: I'm not familiar with it. I'm  
25 not familiar with it in this context. It's a case --

1 QUESTION: In any other context?

2 MR. ROBINSON: Perhaps. At least I remembered  
3 the name, Justice Rehnquist.

4 QUESTION: But that dealt with a question of  
5 final judgments from state courts. When a federal  
6 question has been finally decided in a state court, but  
7 there are still proceedings still to come, that case  
8 dealt with when is that federal question -- when do we  
9 have jurisdiction over that federal question prior to  
10 finishing the proceedings in the state court.

11 And as I understand that opinion, this case  
12 doesn't fit in any of the situations where we said the  
13 case is reviewable at this stage.

14 But you're not familiar with that case?

15 MR. ROBINSON: No, I can't assist the Court.  
16 I'm sorry, I really am.

17 QUESTION: If you win, if you go to trial now,  
18 if there had been no effort to bring the case here and  
19 you prevail on everything and on all the theories that  
20 you advance, then where is the finality of the present  
21 judgment?

22 MR. ROBINSON: Well, obviously if we prevail  
23 on all theories we won't be asking this Court for --

24 QUESTION: Of course not. But --

25 MR. ROBINSON: I think maybe our adversaries

1 --

2 QUESTION: He might. Your friend might have  
3 some question about the applicability of the federal  
4 statute in this case. But until then, where is the  
5 case?

6 MR. ROBINSON: All I can do is repeat that  
7 which I've said.

8 QUESTION: Of course, I don't blame you for  
9 this final judgment business. We just granted  
10 certiorari. You would have thought that we thought we  
11 had jurisdiction. I don't blame you for not being  
12 prepared to -- maybe we should have thought about it in  
13 the first place.

14 MR. ROBINSON: Actually, Justice White, I  
15 joined in the request that the Court take cert as well.

16 QUESTION: I know.

17 MR. ROBINSON: And that's basically because  
18 both I and our clients felt that this was an important  
19 issue which needed final resolution. And certainly we  
20 are aware that --

21 QUESTION: Five of us agreed with you.

22 MR. ROBINSON: Well, we're risking a lot by  
23 taking the case up at this point. My clients were aware  
24 of that. But this is the kind of case where the issue  
25 is obviously going to recur at some point, and that's



1 why we feel that it's ripe at this time.

2 I would like to --

3 QUESTION: The fact that you think the issue  
4 is important and your opponent thinks it's profound  
5 together does not give us jurisdiction.

6 MR. ROBINSON: I'm hoping maybe we can  
7 convince you that it's both profound and important,  
8 Justice Marshall.

9 QUESTION: That doesn't give us jurisdiction.

10 MR. ROBINSON: I think the real issue here and  
11 one of the problems we've had from the start, once the  
12 Colorado Supreme Court entered its decision, was again  
13 this bifurcation of the associational interests and the  
14 survivorship interests. That's what caused me great  
15 concern.

16 When I responded to the petition, in my  
17 response I did indeed bring in the survivorship statute,  
18 the question of inconsistency. In the reply brief it  
19 has been intimated that perhaps the Respondent did not  
20 raise these questions. But they were fairly presented  
21 to the Court in the response, and then of course the  
22 Court granted cert.

23 The questions before this Court, some of them  
24 are very novel, some of them are fairly well  
25 established. And if the Court does accept the case for

1 review the Court will need to determine what happens in  
2 the 1983 context when the act causes death. This is  
3 obviously not the Robertson versus Wegmann situation,  
4 because there it's a question of abatement. The  
5 wrongful act did not cause the death.

6 This case differs substantially. This is  
7 indeed the case presaged by Justice Marshall in that  
8 case, and this is that other case, a case where the  
9 constitutional deprivation resulted in death.

10 Several lower courts have held that parents  
11 have rights in their children in the 1983 context. We  
12 have cited several of these in our brief. They include  
13 the Smith versus Wickline, the Beard versus Robinson  
14 case.

15 Also, of course, there's this Court's own  
16 opinion in Carlson, Green versus Carlson, which  
17 certainly stands for the proposition that federal law  
18 may in certain circumstances require a uniform rule of  
19 survivorship.

20 Now, this Court first, then, needs to  
21 determine, if again it accepts or continues to accept  
22 jurisdiction, whether the appropriate remedies lie with  
23 both the children or with the estate or both.  
24 Obviously, our position is that the decedent suffered  
25 the greatest injury of all. The decedent was killed.

1 Colorado law offers nothing, literally  
2 nothing, to the survivors under those circumstances,  
3 under what is normally called our wrongful death act.  
4 In other words, an 81-year-old man who is unemployed, a  
5 14-year-old son who is unemployed, or for that matter a  
6 35-year-old man who's unemployed, has no real value to  
7 his family in Colorado.

8 Now, this is a state law question as regards  
9 wrongful death. But when the 1983 claim is filed it  
10 becomes --

11 QUESTION: While you're up there again on the  
12 state wrongful death action, I thought there was some  
13 recovery. Isn't there a pecuniary loss recovery?

14 MR. ROBINSON: Net pecuniary loss.

15 QUESTION: Oh, so there is some damage  
16 recovery?

17 MR. ROBINSON: Yes. Let's assume, for  
18 example, that a particular young man --

19 QUESTION: So your disagreement with the state  
20 remedy is that it does not allow sufficient damages?

21 MR. ROBINSON: That's correct, Your Honor.

22 QUESTION: Is it your position that -- say  
23 there were a shootout between a police officer with six  
24 children and Mr. Espinoza and each of them was killed,  
25 and so the respective families sued each other -- that

1 the family of the police officer could have the lesser  
2 recovery, but the family of the civilian would get a  
3 greater recovery?

4 MR. ROBINSON: That's correct, because again  
5 this was the whole purpose of passage of the Civil Right  
6 Act in 1971, was to prevent officer state lawlessness,  
7 because, the theory goes -- and it's a true one -- the  
8 state has all of the power of the state at its  
9 disposal. And obviously Section 1 of the 1871 Act was  
10 designed both to deter and compensate. You so stated in  
11 --

12 QUESTION: Is there anything to indicate that  
13 it should be a greater recovery than if it were from  
14 unofficial lawlessness?

15 MR. ROBINSON: The problem at that point in  
16 time, Your Honor, was a simple one. There was no state  
17 recovery.

18 QUESTION: Right.

19 MR. ROBINSON: The statute was designed not  
20 only for inadequate laws, of which there were many at  
21 the time, including the black codes, but also the  
22 ineffective enforcement. But in Colorado I would submit  
23 that our present day statute, although it differs in  
24 terms of its lack of racial stigma, nonetheless  
25 completely deprives a 1983 action of its compensatory

1 value. Net pecuniary --

2 QUESTION: Does it deprive all death action  
3 plaintiffs of the fair value?

4 MR. ROBINSON: The issue is not whether or not  
5 it discriminates intentionally on its face. This Court  
6 has made that clear in Moore --

7 QUESTION: Well, you're asking for a  
8 discriminatory construction in effect, because you're  
9 asking for your clients to get more than they can get  
10 under -- than they could get if they were suing someone  
11 other than a police officer.

12 MR. ROBINSON: It's a matter of federal law,  
13 Your Honor. This Court has to implement what was  
14 Congress' intent. And whether the Colorado legislature  
15 still thinks people's lives are worth \$45,000 or less or  
16 not certainly should not bind a federal court in  
17 applying the 1983 action.

18 QUESTION: Mr. Robinson, I gather your  
19 argument is it's federal law, right, that we ought to  
20 bar, as a matter of federal law, the state law  
21 limitation?

22 MR. ROBINSON: Section 1988 --

23 QUESTION: Did I correctly understand?

24 MR. ROBINSON: I think that's correct. In  
25 fact, my reading of the Petitioner's position is that



1 --

2 QUESTION: But as a matter of federal law we  
3 could follow the state law limitations, could we not?

4 MR. ROBINSON: You certainly look to them  
5 under Section 1988.

6 QUESTION: That wasn't my question. Could we  
7 not follow them?

8 MR. ROBINSON: If the Court ruled that it was  
9 conducive to the federal policy, certainly. That's the  
10 teaching of Moore. That's the teaching of Sullivan  
11 versus Little Hunting Park. You formulate the rule  
12 which is responsive to the federal need. So obviously,  
13 if state law is not inconsistent with, did not hinder  
14 federal recovery, certainly we would borrow state  
15 statutes.

16 The Timaneo case with the tolling statute --  
17 maybe that's not the greatest analogy. Robertson versus  
18 Wegmann. But in any event, certainly it's possible.

19 What you have to do, though, is analyze the  
20 state statute. And of course this state statute offers  
21 nothing, literally nothing.

22 QUESTION: Mr. Robinson, do you think that a  
23 state court 1983 action must inevitably apply all the  
24 substantive and procedural rules that a federal court  
25 1983 action would apply?

1           MR. ROBINSON: If I could break your question  
2 down, I think, yes, they have to apply all substantive  
3 rules. I don't think there's any question about that.

4           QUESTION: How about procedural rules?

5           MR. ROBINSON: I think then if it's a mere  
6 matter of procedure they can go ahead and use their own  
7 state procedures. For example, one of the reasons we  
8 filed the case in state court is that in Colorado the  
9 jurors are selected by voir dire of the counsel as well  
10 as the judge. We feel this gives us more rapport with  
11 the juries, whereas in federal court the judge does all  
12 the questioning and it's a little colder and more  
13 distant. And we feel that that's appropriate for the  
14 state courts to use the procedural rules.

15           And obviously, we're not going to clog up the  
16 federal judiciary if we can do what we think is in the  
17 strategic interest of our clients.

18           Does that answer the Court's question?

19           QUESTION: Yes. The critical question I  
20 suppose is what's procedural and what's substantive, but  
21 no use debating that here.

22           MR. ROBINSON: There are times when that gets  
23 beyond the ken.

24           The point I'd like to leave the Court with  
25 with regard to the Colorado Supreme Court's ruling is

1 that it is based on various decisions of this Court. As  
2 Justice White pointed out in the Jones versus Hildebrant  
3 dissent --

4 QUESTION: It was only a dissent.

5 QUESTION: They don't help too much.

6 MR. ROBINSON: Well, since he's from Colorado  
7 his dissents bear more weight.

8 [Laughter.]

9 MR. ROBINSON: As Justice White pointed out in  
10 his dissent, these are questions this Court has never  
11 addressed and they are recurring. They're recurring  
12 daily. There'll be plenty more filings with a new  
13 theory in Colorado and hopefully some other states. And  
14 whether the Court avoids the issue on this occasion or  
15 not, the point of the matter is that this Court is going  
16 to get faced with a question of state law which severely  
17 restricts recovery in the 1983 context when death  
18 occurs.

19 This is simply a result of some failure of  
20 legislatures around the country to be enlightened as to  
21 the value of human life.

22 QUESTION: Well, under this Supreme Court  
23 decision in Colorado if that theory stands up you're not  
24 going to be deprived of very much, are you?

25 MR. ROBINSON: Well, maybe for three or four

1 years, until such other time as a case this Court deems  
2 appropriately postured comes up. It's just not a  
3 prospect I particularly like, because it leaves us in a  
4 state of limbo.

5 QUESTION: Of course, there's no question that  
6 you can try this case out on the survivorship theory.  
7 You're going to do that too, aren't you?

8 MR. ROBINSON: The problem is -- this is why  
9 we're in a quandary, because the Colorado Supreme Court  
10 said, well, now that we've givenn you all you wanted  
11 over here in the associational rights, you're stuck with  
12 state law on the survivorship rights. And I don't know  
13 --

14 QUESTION: Well, what about the claim of the  
15 decedent himself for wrongful death? Does that claim  
16 survive to the benefit of the estate or not?

17 MR. ROBINSON: Yes, but.

18 QUESTION: But what?

19 MR. ROBINSON: But the Colorado Supreme Court  
20 held that because we gave you these associational  
21 rights, that survivorship claim for the death of the  
22 decedent is limited by the \$45,000 rule, the net  
23 pecuniary loss rule, and, which hasn't been mentioned,  
24 the ban on exemplary damages.

25 So to me it seems like the biggest --

1                   QUESTION: The fundamental claim is -- isn't  
2 it a 1983 claim also? The decedent's claim is a 1983  
3 claim?

4                   MR. ROBINSON: That's correct, they're both  
5 1983 claims.

6                   QUESTION: And so he wouldn't be limited by  
7 state law if it were contrary to federal policy.

8                   MR. ROBINSON: Well, that's not what the  
9 Colorado Supreme Court opined.

10                  QUESTION: I know, but it nevertheless is a  
11 federal -- that's a federal question.

12                  MR. ROBINSON: Well, so is the question of  
13 associational rights. And on the one hand they told us  
14 --

15                  QUESTION: They'll all survive.

16                  MR. ROBINSON: Well, that's certainly our  
17 hope. And obviously, if the case goes back in its  
18 present posture, I'll attempt to convince the trial  
19 court that it should also not bar our recovery under the  
20 survivorship statute.

21                  QUESTION: But I gather if the trial court  
22 says, oh, yes, the Supreme Court has settled that, you  
23 are barred, limited rather, and you get that limited  
24 recovery, what you're telling us, you'll be back here  
25 again?



1           MR. ROBINSON: Well, hopefully we'll have such  
2 a substantial recovery that we won't be.

3           QUESTION: I know, but isn't the limitation  
4 \$45,000?

5           MR. ROBINSON: That's correct.

6           QUESTION: And you think you ought to get --  
7 at least the jury ought to be able to give you more?

8           MR. ROBINSON: Actually, more important in  
9 this particular case --

10          QUESTION: Am I right about that?

11          MR. ROBINSON: Yes.

12          QUESTION: And therefore if you end up with  
13 \$45,000 you'll not be happy with that.

14          MR. ROBINSON: It's a net pecuniary loss  
15 question more than the limit.

16          QUESTION: I see.

17          MR. ROBINSON: The problem is that Arthur  
18 Espinoza, though this is not in the record, was not  
19 contributing to his children.

20          QUESTION: How can we upset that? How can we  
21 upset the \$45,000 rule?

22          MR. ROBINSON: The same way this Court in  
23 Green versus Carlson disregarded for federal law  
24 purposes Indiana's survivorship laws.

25          QUESTION: What are you going to give,

1 exemplary damages or something?

2 MR. ROBINSON: Well, that's true too, Your  
3 Honor.

4 QUESTION: How can you get exemplary damages  
5 under 1983?

6 MR. ROBINSON: I would cite to the Court  
7 dicta, since this Court has never --

8 QUESTION: I have very great problems with  
9 dicta.

10 MR. ROBINSON: Well, it's Justice Powell's  
11 dicta. Does that make it any better?

12 [Laughter.]

13 QUESTION: I doubt it's dicta if it's Justice  
14 Powell. He doesn't write dicta.

15 MR. ROBINSON: Okay. In Carey versus Piphus,  
16 in Owen, there certainly have been plenty of indications  
17 by this Court that exemplary damages are recoverable in  
18 appropriate cases.

19 QUESTION: He used the words "exemplary  
20 damages"?

21 MR. ROBINSON: Well, or punitive. To my  
22 knowledge --

23 QUESTION: I thought so. I didn't remember  
24 exemplary, though.

25 MR. ROBINSON: All right.

1 QUESTION: You said exemplary.

2 MR. ROBINSON: Well, maybe I'm --

3 QUESTION: My question was based on your

4 language.

5 MR. ROBINSON: I see.

6 QUESTION: And I thought you were going to

7 give me your answer, instead of Mr. Justice Powell's

8 answer. Now may I have your answer?

9 MR. ROBINSON: As far as I know, exemplary

10 damages and punitive damages are one and the same, Your

11 Honor.

12 QUESTION: Not under 1983, or are they under

13 1983?

14 MR. ROBINSON: It's my understanding, whether

15 it's a long-term ignorance or just a temporary insanity,

16 that I always thought that they were exactly the same,

17 that it was a matter of mere semantics, Your Honor.

18 QUESTION: You have punitive damages under

19 1983? Well, certainly the statute doesn't say so.

20 MR. ROBINSON: That's correct.

21 QUESTION: What case says so?

22 MR. ROBINSON: Well, again I'm drawing from

23 Carey versus Phipps, Owen versus City of Independence.

24 This Court has -- I'm trying to remember if you said so

25 in Robertson versus Wegmann.

1 QUESTION: I never said it.

2 MR. ROBINSON: I can't recall. There  
3 certainly have been stirrings, if not outright holdings,  
4 that punitive damages are recoverable. And it's always  
5 been in the context of an appropriate case.

6 QUESTION: Did you allege punitive damages?

7 MR. ROBINSON: Yes, we did, Your Honor, yes.

8 QUESTION: I don't see how that's before us.  
9 It wasn't discussed at all.

10 MR. ROBINSON: That was one of the three areas  
11 of Colorado law which we and the Colorado Supreme Court  
12 felt were inconsistent. We have the exemplary damages  
13 or punitive damages question, the net pecuniary loss  
14 rule question, and the \$45,000 ceiling question. Those  
15 three aspects of Colorado law are those elements that at  
16 the beginning of my presentation I stated I felt gave an  
17 incentive to law enforcement officers to kill rather  
18 than maim, because by so doing they limit their  
19 liability extensively.

20 And there's also an indemnification statute,  
21 incidentally, if the recovery was \$45,000, which would  
22 ensure that the officer involved never had a penny come  
23 out of his pocket.

24 QUESTION: That statute goes as high as  
25 \$100,000, doesn't it?

1 MR. ROBINSON: That's correct.

2 So the gut reaction, the final result of all  
3 of this, is that a police officer in Colorado kills in  
4 violation of the constitutional rights secured by  
5 Section 1983, or at least the civil right is secured,  
6 then winds up out of pocket not at all, no exemplary or  
7 punitive damages.

8 QUESTION: What would happen if Colorado had  
9 no wrongful death statute?

10 MR. ROBINSON: I think this Court would find  
11 as a matter of federal law --

12 QUESTION: We'd write one for them. We'd  
13 write one for them.

14 MR. ROBINSON: That's correct, because --

15 QUESTION: I thought that was your position.  
16 You might want us to write one anyhow.

17 MR. ROBINSON: Well, Justice Marshall, in 1871  
18 when the Ku Klux Klan Act was passed, of which this is  
19 Section 1, there were no wrongful death statutes, and  
20 yet the legislative history as we have set forth in our  
21 brief makes clear that it was the murders, the killings,  
22 the lynchings, that impressed upon Congress and upon  
23 President Grant, who went before Congress --

24 QUESTION: It wasn't just the killings. It  
25 was also such laws as one in Maryland which prevented a



1 Negro from flying a kite. It covered the whole  
2 panoply. It wasn't restricted to death.

3 MR. ROBINSON: I agree it wasn't restricted to  
4 death, Your Honor. But certainly several  
5 Congresspersons did respond to the problem of murders in  
6 their various jurisdictions.

7 Do any other members of the Court have any  
8 questions? Thank you --

9 QUESTION: Can I ask you one, Mr. Robinson?

10 MR. ROBINSON: Certainly, Justice Powell.

11 QUESTION: You rely on the parent-child  
12 relationship as creating the liberty interest. Does it  
13 matter whether actually there is a parent? Suppose  
14 there were a grandparent or an aunt or a guardian or a  
15 neighbor or a child born out of wedlock who was in the  
16 care of its mother. How far would this go?

17 MR. ROBINSON: Under the facts of the case  
18 we're asking the Court simply to decide it on the  
19 question of a parent being taken from the children. I  
20 think the Court --

21 QUESTION: Do you see any principled way of  
22 limiting the relationship to the parent-child  
23 relationship?

24 MR. ROBINSON: Certainly, Your Honor. I have  
25 no problem with it. This Court has --

1 QUESTION: What would it be?

2 MR. ROBINSON: This Court has delineated many  
3 times under its various rulings, such as Stanley, as  
4 opposed to Quillon, that the subtle differences in  
5 societal relationships can make all the difference in  
6 the world in determining legal relationships.

7 We can look, as Justice Burger pointed out in  
8 Wisconsin versus Yoder, we can look at our history of  
9 western civilization and recount many, many instances in  
10 literature and the like of parent-child relationships.

11 QUESTION: Wasn't there a grandmother involved  
12 in Moore?

13 MR. ROBINSON: In Moore?

14 QUESTION: Yes.

15 MR. ROBINSON: Not to my knowledge.

16 I thought Hamlet was kind of based on  
17 father-son, just to give the Court one example. It  
18 seems to me that the parent-child relationship is the  
19 most sacred family relationship of all.

20 QUESTION: You would limit it to that?

21 MR. ROBINSON: Yes, I would.

22 QUESTION: Would you include -- say a young  
23 father is in prison without due process of law and kept  
24 in jail for ten years and then is let out because he was  
25 wrongfully imprisoned. Would the child have this kind

1 of claim?

2 MR. ROBINSON: No. I think that floodgate  
3 theory is an erroneous one. Just because we recognize  
4 the theory when death irrevocably cuts off the  
5 relationship does not mean that we're going to extend it  
6 to the ends of the earth. And I think that one point  
7 illustrates it.

8 QUESTION: How do you distinguish between the  
9 two in terms of some kind of principle?

10 MR. ROBINSON: Well, we can look first to  
11 legislative history and the intent of Congress to have a  
12 civil claim arise when someone is killed. Certainly  
13 somebody's got to carry the ball.

14 Secondly, I think this Court's decisions in  
15 Stanley, for example, they're premised totally on that  
16 relationship.

17 QUESTION: No death in Stanley.

18 MR. ROBINSON: I realize that, but they're  
19 premised on a specific, specific factual basis. And if  
20 there's one interest -- and this is the point I made in  
21 the brief, I hope -- if there's one interest which seems  
22 to me to be a sacred one, it's the interest not to have  
23 one's parents murdered by state action. And that's what  
24 I feel this Court can in a principled manner distinguish  
25 this from wrongful imprisonment.

1 Thank you.

2 CHIEF JUSTICE BURGER: Very well.

3 Mr. Halaby.

4 REBUTTAL ARGUMENT OF THEODORE S. HALABY, ESQ.

5 ON BEHALF OF PETITIONERS

6 MR. HALABY: I'd like to clear up a certain  
7 amount of confusion with respect to the wrongful death  
8 and survival remedies. I think it's clear to the  
9 Justices in reading other decisions that often other  
10 courts have used wrongful death and survival  
11 interchangeably in describing their particular state  
12 statute.

13 In Colorado there are two separate statutes,  
14 and therefore in Colorado, because there is a  
15 survivorship statute that allows vindication of the  
16 decedent's deprivation to survive his death, wrongful  
17 death is an entirely different animal. And we submit  
18 that by definition there cannot be a wrongful death 1983  
19 claim, because by the nature of that statute under  
20 wrongful death you'd be suing for deprivation of  
21 another's civil rights, not your own personal civil  
22 rights.

23 The only way you can sue for deprivation of  
24 the decedent's civil rights is pursuant to the survivor  
25 statute. And therefore when Respondent speaks of the

1 limitation on the wrongful death statute in this area of  
2 a 1983 claim, we submit that there is no such animal,  
3 that one cannot assert a 1983 wrongful death claim.

4           Now, we would also submit that what the  
5 Respondent is seeking to do is to fashion a right to fit  
6 the remedy, as opposed to fashioning a remedy to fit the  
7 right. The right must exist irrespective of the remedy,  
8 and we must have the right before we can even consider  
9 the remedy.

10           But what Respondent is urging is, because of  
11 the remedies available under the survivorship statute  
12 and under the wrongful death statute in Colorado, which  
13 Respondent believes is not substantial enough, this  
14 Court should now fashion a right that would provide for  
15 remedies unrestricted by those two statutes. We submit  
16 this is in effect what the Colorado Supreme Court did by  
17 recognizing this unprecedented right in the child when  
18 the child is a living victim.

19           Of course it would be difficult to argue that  
20 a wrongful death statute or a survival statute, both of  
21 which are premised on death, could affect a living  
22 victim, the child, because when the child's rights are  
23 deprived with respect to a continuing family  
24 relationship that child becomes the victim. The  
25 father's death is only a factual circumstance to show



1 the intrusion into that family relationship, but it is  
2 still the living child that is the victim and therefore  
3 logically it would be difficult to argue that the death  
4 statutes could limit it in any respect.

5 But this is what -- this we submit has been  
6 the approach of the Respondent.

7 The survivorship limitation with respect to  
8 the decedent's rights has not been an issue presented by  
9 either the Petitioners or the Respondents in the  
10 petition phase or in the issues presented by Petitioners  
11 in their brief. Respondents did refer to the wrongful  
12 death limitations in their response to our initial  
13 petition. But Respondents did not address the  
14 limitation with respect to the survivorship statute with  
15 respect to the decedent's rights. We submit that is not  
16 in issue before the Court.

17 But if this Court chooses to consider that  
18 issue, we believe the answer has already been made by  
19 this Court in Robertson v. Wegmann that that is, the  
20 survivorship statute, is a permissible limitation on  
21 that survivorship claim.

22 Thank you.

23 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
24 The case is submitted.

25 (Whereupon, at 12:02 p.m., the case in the

1 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JOHN O'DELL, ET AL., vs. ANDREW ESPINOZA, ETC., ET AL # 81-534

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY

Deane Hammond

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