

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MELVIN JEFFERSON, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF ALBERTA K.
JEFFERSON, DECEASED, ET AL., Petitioners v. CITY
OF TARRANT, ALABAMA

CASE NO: 96-957

PLACE: Washington, D.C.

DATE: Tuesday, November 4, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MELVIN JEFFERSON, INDIVIDUALLY :

4 AND AS ADMINISTRATOR OF THE :

5 ESTATE OF ALBERTA K. :

6 JEFFERSON, DECEASED, ET AL., :

7 Petitioners :

8 v. : No. 96-957

9 CITY OF TARRANT, ALABAMA :

10 - - - - -X

11 Washington, D.C.

12 Tuesday, November 4, 1997

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:09 a.m.

16 APPEARANCES:

17 DENNIS G. PANTAZIS, ESQ., Birmingham, Alabama; on behalf
18 of the Petitioners.

19 JOHN G. ROBERTS, ESQ., Washington, D.C.; on behalf of the
20 Respondent.

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

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-957, Melvin Jefferson v. The City of
5 Tarrant, Alabama.

6 Mr. Pantazis.

7 ORAL ARGUMENT OF DENNIS G. PANTAZIS

8 ON BEHALF OF THE PETITIONERS

9 MR. PANTAZIS: Mr. Chief Justice, and may it
10 please the Court:

11 The supreme court of Alabama has held there is
12 no section 42 U.S.C. section 1983 claim for a cause of
13 action if the victim dies from the perpetration of the
14 act. The issue before this Court is, when the decedent's
15 death results from the deprivation of a Federal right
16 occurring in Alabama, does the Wrongful Death Act govern
17 the recovery of the decedent's estate?

18 QUESTION: Are you going to address the
19 jurisdictional issue?

20 MR. PANTAZIS: I will, if -- Your Honor.

21 QUESTION: I think you should.

22 MR. PANTAZIS: The Federal issue has been
23 totally adjudicated by the supreme court of Alabama, and
24 under the Cox case this Court has held an exception, or
25 held that jurisdiction is found where there's no further

1 Federal issue to be adjudicated and cannot be adjudicated
2 at the lower court.

3 QUESTION: But the Federal issue could become
4 academic if you go back and on the State claim there's a
5 determination that there was no wrongful conduct on the
6 part of the city.

7 MR. PANTAZIS: Under -- in Cox it's my
8 understanding, Your Honor, is that the Court held this
9 exception: where the Federal claim has been finally
10 decided and with further proceeding on the merits in the
11 State court to come, but that which later review of the
12 Federal issue cannot be had, whatever the ultimate outcome
13 of the case. That was the third exception.

14 QUESTION: But here you could conceivably, if
15 you should prevail on the State claim you could then bring
16 up that you should also have had a 1983 claim.

17 MR. PANTAZIS: I don't believe so. I think the
18 supreme court of Alabama has already adjudicated that in
19 this particular case.

20 QUESTION: And they would then say, it's law of
21 the case, and so we deny -- in dealing with the appeal you
22 would have a final disposition, and you could come here
23 again. In that respect it's different from Cox v. Cohn.

24 MR. PANTAZIS: I think it is different, but I
25 think the rationale of Cox is, looking at this particular

1 issue, this Court -- the Alabama supreme court has
2 adjudicated it to the fullest degree under the Federal
3 issue.

4 QUESTION: The issue isn't whether they have
5 adjudicated it finally and will not come back to it.
6 You're quite right that they wouldn't come back to it.
7 The issue is whether we could pick it up later on, after
8 they simply say, it's law of the case, there is no Federal
9 cause of action. At that point you have a final judgment,
10 the whole thing has been dismissed, and you could come
11 here. Is there some reason why you couldn't come here?

12 MR. PANTAZIS: It would require duplication in
13 trying the case twice, and I think that's part of the
14 rationale that Cox looked at.

15 QUESTION: Sure. Well, that may well be, but
16 we're bound by the Federal statute, which says that the
17 case has to be finally decided by the highest court of the
18 State, finally decided, and the highest court of the State
19 is going to have this case back again, or may well have
20 the case back again on the State law claims, no?

21 MR. PANTAZIS: It could, but the problem, Your
22 Honor, is that the third element in Cox specifically, I
23 think, addressed that rationale. It said that the Federal
24 claim was adjudicated in the Federal -- in the State
25 court.

1 QUESTION: But it says where further Federal --
2 it says, but in which later review of the Federal issue
3 cannot be had, and under the law of the case, Alabama
4 could conceivably change its mind if there were some
5 intervening decision, perhaps by the Eleventh Circuit.
6 Probably it won't, but nevertheless, you can't say, in
7 which later review of the Federal issue cannot be had.
8 that's just not -- that's -- you just haven't complied
9 with that exception.

10 Now -- and maybe you might ask us to have some
11 further exception and say, well, it's duplicative, or
12 something like that, but I don't think you can come within
13 exception 3.

14 MR. PANTAZIS: Well, I think, though, the
15 rationale in exception 3, if it does not meet this case,
16 it should meet this case, and maybe the Court should
17 accept that as a further --

18 QUESTION: I think perhaps the rationale of
19 section 3 was your -- a case called California v. Stewart
20 that was decided on -- where the State court says, this
21 evidence is inadmissible because it was violative of
22 Miranda. The State wants to appeal that. If it goes back
23 to the trial court, the State is prevented from getting
24 that evidence in, so it's lost forever the right to review
25 that claim because the trial court won't accept it, and if

1 there's a guilty verdict, or a not guilty verdict, the
2 State never will have an opportunity to review it.

3 You, on the other hand, will, as my colleagues
4 have pointed out, have -- could have an opportunity to
5 have this reviewed in a later proceeding.

6 MR. PANTAZIS: I think that, Your Honor, Mr.
7 Chief Justice, I do not believe that we will, because I
8 think the supreme court of Alabama has reviewed the issue
9 and has accepted it for that particular purpose.

10 QUESTION: Let's assume that, as I think my
11 colleagues have assumed, that the supreme court of Alabama
12 is going to say, as Justice Ginsburg, this is the law of
13 the case, we've decided it, but this is simply a necessary
14 step for you to then bring the case to us, and you will
15 not have the final judgment argument made against you at
16 that time.

17 MR. PANTAZIS: If that rationale holds, then
18 this case would be tried once with a State remedy, which
19 would exclude the entire 1983 cause of action. It would
20 then go up before the supreme court of Alabama, and they,
21 as Justice Scalia points out, would probably say, we've
22 already covered this, you know, the issue is moot, and
23 we'd be here again 2 or 3 years on the same issue, having
24 gone through the system without any -- moving the case any
25 further.

1 QUESTION: Well, that's always --

2 QUESTION: That's a happy ending. You could
3 lose on the State claim.

4 MR. PANTAZIS: That's true.

5 QUESTION: And then the whole thing could be
6 washed out, right?

7 MR. PANTAZIS: That's true.

8 QUESTION: The problem is that's always true
9 when you take an interlocutory appeal.

10 MR. PANTAZIS: That's correct.

11 QUESTION: It's always true, so the statutes
12 balance and allow you sometimes to take an interlocutory
13 appeal, sometimes not, but we have a statute here that
14 doesn't allow it. It says final, and is there anyway
15 around that? I mean, I don't see -- the word is final.
16 It doesn't allow this interlocutory thing to come up.

17 MR. PANTAZIS: Well --

18 QUESTION: So how do we get around that?

19 MR. PANTAZIS: I personally do not believe the
20 supreme court of Alabama will adjudicate the same Federal
21 issue again, and the reason is the defendants in this case
22 are going to say, this case is already decided. That was
23 already addressed. The parties were before it. It was a
24 final order on the 1983 issue. That's over with. And
25 I --

1 QUESTION: We don't resolve finality issue by
2 issue. I mean, our cases make it clear that if any of the
3 claims in the case are still alive, the judgment is not
4 final, and there are claims still alive here, the State
5 claims.

6 MR. PANTAZIS: The State claims are.

7 QUESTION: So the only way you can get out of
8 the problem is to say, this comes within one of the
9 exceptions, to wit, there's no other way to appeal this
10 Federal claim unless I can appeal it now, which was the
11 situation in the case that the Chief Justice described,
12 but I don't see why that's the situation here. It seems
13 to me you can come back up here.

14 I know it takes 2 more years, and we're
15 duplicating effort and all of that, but that's what this
16 statute envisions. I mean --

17 MR. PANTAZIS: I believe the Court could expand,
18 if that's the term, in the Cox rationale and to allow this
19 particular appeal.

20 QUESTION: Yes, but how could -- I mean, it's
21 like a trial judge. The trial judge makes a ruling
22 against you at the beginning of the case.

23 MR. PANTAZIS: Yes.

24 QUESTION: You run up to the court of appeals,
25 you say, you know, judge, an awful lot of time and

1 effort's going to go by. Why don't you and the court of
2 appeals reverse him now? And if we have a statute that
3 says final, we can't do it. We have to look to some other
4 statute that gave us the interlocutory right, or that gave
5 us, you know, the certificating right. We couldn't do it
6 on a word that says final.

7 MR. PANTAZIS: Right.

8 QUESTION: And that's the dilemma, it seems to
9 me, here. I'm putting that because maybe you can think of
10 something.

11 MR. PANTAZIS: Well --

12 QUESTION: I don't know what it is.

13 MR. PANTAZIS: The difference in that is that if
14 it is an issue, an evidentiary issue or something, it
15 would be adjudicated and revisited at the end of the
16 trial, as all evidentiary issues.

17 The issue of whether you have a cause of action
18 has reached the highest level it can reach in Alabama, and
19 it has been adjudicated at the highest level it can reach
20 within the Alabama system, and that issue has been taken
21 care of both from a fact standpoint and from a
22 representation of the parties, and I don't believe the
23 supreme court of Alabama can go back and review it. It's
24 already said, I've made that decision on that issue.

25 I think that we would be --

1 QUESTION: Suppose there were some intervening
2 decisions. Couldn't you tell the Alabama supreme court,
3 you made a mistake here, there are some intervening
4 decisions from this Court, or from a court of appeals of
5 the Eleventh Circuit, which there might well be, please
6 take another look at this? They have the discretion to do
7 that. The rule of law of the case is discretionary, I
8 take it, in Alabama.

9 MR. PANTAZIS: They possibly could do that, Your
10 Honor, but in -- because the supreme court of Alabama has
11 ruled on a motion to dismiss pleadings -- this was not a
12 summary judgment. It was a motion to dismiss pleadings --
13 it dismissed the counts in this case that involved 1983,
14 and they're forever gone, and the supreme court of Alabama
15 has ruled that issue finality. Those issues are no longer
16 present in the State court and in the trial court.

17 QUESTION: If you were to prevail on the State
18 claim and then ultimately prevail here on your 1983 case,
19 you wouldn't have to have a whole new trial. Couldn't you
20 get some mileage from the State, the trial on the State
21 claim in which you succeeded so that you wouldn't have to
22 duplicate all that evidence?

23 MR. PANTAZIS: I would think not, and the reason
24 is because the State measure of damages in Alabama for
25 wrongful death is the wrongfulness of the conduct of the

1 defendant. It is not compensatory. It is purely
2 punitive, and if -- 1983 against municipalities is
3 compensatory damages only. There is no compensatory
4 damages for wrongful death.

5 QUESTION: but with respect to the liability and
6 fault --

7 MR. PANTAZIS: Well, the issues that would be
8 tried in the case in the -- for the wrongful death, the
9 issues and the evidence and even the measure of damages,
10 what the jury is allowed to consider, would totally be
11 different.

12 QUESTION: Measure of damages would certainly be
13 different, but I don't understand why the --

14 MR. PANTAZIS: The conduct --

15 QUESTION: The fault issues would necessarily be
16 different.

17 MR. PANTAZIS: It may not, Your Honor. It
18 may -- a lot of it would parallel, but a lot of it --
19 there's also issues that would be allowable in '83 from an
20 evidentiary standpoint that wouldn't be allowable or
21 relevant just for a wrongful death case.

22 QUESTION: Mr. Pantazis, just for fun, why don't
23 you tell us about the merits of the case.

24 (Laughter.)

25 MR. PANTAZIS: Okay. It is fun.

1 (Laughter.)

2 MR. PANTAZIS: Your Honor, this case involves a
3 lady who was an elderly black lady in Tarrant, Alabama.
4 She died in a fire. She had both legs amputated
5 previously. She died when her husband -- when the house
6 caught on fire and her husband tried to pull her to a
7 first floor window, could not get her out.

8 The firefighters of Tarrant City arrived. On
9 two requests he asked them to pull her out. On both
10 requests, two different firefighters, they both refused.
11 His son and her son approached, and got there. When he
12 did, he pulled her out. She was laying on the ground.
13 They refused to administer any first aid. They refused to
14 even take her pulse.

15 The allegations in the complaint, and as the
16 record reflects, this was a custom and practice of
17 depriving black citizens in Tarrant, Alabama of
18 fundamental equal protection rights under the Fourteenth
19 Amendment, and we had filed a section 1983 cause of
20 action, and as this Court knows, section 1983 does not
21 provide a remedy, remedial damage remedy under that
22 section. We have to look for guidance to 1988.

23 1988 tells us that we look first, or consider
24 first the State common law and State statutory law, and if
25 that is not inconsistent with the purpose and policy of

1 the Federal Constitution, the United States laws it's
2 intended to protect, then we apply it, but if it is, that
3 is the balancing test, or that is the test that the courts
4 must look at.

5 This Court in Robertson v. Wegman has held that
6 the purpose and policy of 1983 is to compensate and to
7 prevent prevention of abuses and power by those acting
8 under color of State law, or in my words, deterrence, and
9 if you apply that standard to what we have in Alabama, or
10 we're left with in Alabama -- because what's left are two
11 State statutes. One of them is the wrongful death
12 statute, which is cited at 6-5-410, and as I've indicated
13 is purely compensatory.

14 Even the supreme court's decision in this case
15 states that, I think, in the first or second paragraph --
16 excuse me. It's purely punitive. I said compensatory. I
17 misstated. It's purely punitive, and the jury charges,
18 they're admonished never to consider any compensatory
19 aspects, just punitive, it certainly frustrates the
20 purpose of compensation.

21 QUESTION: Why -- you say it frustrates the
22 purpose. A moment ago you said the purpose is deterrence,
23 and it certainly doesn't frustrate the purpose of
24 deterrence. It's a classic example of a deterrent remedy.

25 MR. PANTAZIS: That's correct, it does satisfy

1 the second element of deterrence, but it frustrates the
2 first element of underlying policy of compensation.

3 There is a second statute that comes into play.

4 QUESTION: Well, it doesn't satisfy it. I don't
5 know that it frustrates it.

6 MR. PANTAZIS: Well, it runs in conflict with
7 it, Your Honor.

8 There's a second statute that frustrates both,
9 is inconsistent with both policies, and that is section
10 11-93-2, which arbitrarily places a limit of \$100,000 on
11 any recovery against a municipality, which would apply in
12 this case with no 1983 cause of action.

13 QUESTION: But we don't get to that, do we?

14 MR. PANTAZIS: We do --

15 QUESTION: Well, we don't get to it because of
16 the Federal rule, right?

17 MR. PANTAZIS: Well, if we have no 83 claim, as
18 the supreme court of Alabama has said, it's all State.
19 The supreme court did not modify its wrongful death --

20 QUESTION: No, but your argument, as I
21 understand it, is that even to the extent of the
22 deterrence there is a frustration of purpose here because
23 the punitive damages cannot be recovered against the
24 municipality. Isn't that your argument?

25 MR. PANTAZIS: That is -- that is an argument.

1 We take the position, Your Honor, that because it's purely
2 punitive, that it doesn't comply with the compensatory
3 aspects, while it may comply with the deterrence.

4 The court, the supreme court of Alabama has said
5 that in removing the 1983 action, and that's what it did,
6 it dismissed it, said that we are now under the wrongful
7 death. While we're under that statute, we're also under
8 the statute that arbitrarily limits us to \$100,000
9 damages, and that frustrates both deterrence as well as
10 compensation.

11 QUESTION: Yes, but you never get to that limit
12 because of the effect of the Federal law, do you?

13 MR. PANTAZIS: Well --

14 QUESTION: Because whether there is a limit or
15 whether there isn't a limit, you can't get any punitive
16 damages against the municipality --

17 MR. PANTAZIS: Well --

18 QUESTION: -- under 1983, and that's a matter of
19 Federal law, right?

20 MR. PANTAZIS: I disagree, and the reason I
21 disagree is, the supreme court said there is no 83 claim,
22 so we're not under any Federal law for this case, as it
23 sits now at the trial level.

24 QUESTION: Well, but you don't claim an
25 independent Federal basis for challenging the \$100,000

1 limit on punitive damages for wrongful death in Alabama if
2 it didn't involve a Federal claim, do you?

3 MR. PANTAZIS: Exactly, Your Honor.

4 QUESTION: When you say exactly, do you mean yes
5 or no?

6 MR. PANTAZIS: Yes. I do not challenge it. I
7 agree with your statement.

8 I do not challenge it because what we're saying
9 is, if we have a 1983 claim, then the limitation would not
10 apply, and that's why it's so important that this Court
11 consider and instruct the supreme court of Alabama that
12 our 1983 claim is not satisfied by the Alabama wrongful
13 death statute, because if it does apply, if we have an 83
14 claim, the arbitrary caps do not apply.

15 If we don't have an 83 claim, if the case is as
16 it's left right now, without any reference to 1983, then
17 all of the State laws would apply, and we would have a
18 punitive remedy and a \$100,000 --

19 QUESTION: Could I ask what you're seeking under
20 the 1983 claim? Is it damages for Mrs. Jefferson's death
21 and pain and suffering, not the loss of association or
22 consortium by the remaining family members?

23 MR. PANTAZIS: Your Honor, we're asking for the
24 wrongful death statute to compensate the estate.

25 QUESTION: Well, under the 1983 action, as I

1 read the complaint, it seemed to be asking for damages for
2 Mrs. Jefferson's death and pain and suffering, as opposed
3 to anything suffered by the children or the spouse.

4 MR. PANTAZIS: We are asking for the damages as
5 listed in the Weeks case, which was a district court case
6 in Alabama, which did say that the estate's damages are
7 the measure of the pain and suffering, the funeral
8 expenses of the decedent's heirs, or the descendants, and
9 that is what we think the typical compensatory damage is
10 that is encompassed in 49 States.

11 QUESTION: I'm sorry, you say you are not
12 asking, then, for her pain and suffering.

13 MR. PANTAZIS: No.

14 QUESTION: Even though that's what -- how the
15 complaint reads.

16 MR. PANTAZIS: If the complaint reads that way,
17 that may be an inartful pleading, but we're asking that
18 the Court compensate the estate, and in compensating the
19 estate, the Court look at traditional compensation
20 measures for wrongful death, which, like we've indicated,
21 48 or 49 States -- the only one I'm unsure of is
22 Massachusetts -- have held that when you compensate for
23 death, the beneficiaries or the descendants are the ones
24 whose -- are the ones who suffer the loss and suffer the
25 pain and also pay the medical bills and pay the funeral

1 expenses.

2 QUESTION: Mr. Pantazis, there's a distinction,
3 I'm sure you are aware, between survival statutes and
4 wrongful death acts, and one is thought as compensating
5 the bereaved family members, and the other is thought as
6 going to the estate, as the claims that the decedent would
7 have if she had survived, her pain and suffering, and that
8 goes to the estate.

9 But you seem, in your answer to Justice
10 O'Connor, to blend those two, and I was wondering why you
11 cast your complaint in survival act terms, and yet in your
12 response just now about the family members you seem to be
13 shifting over to the wrongful death mode.

14 MR. PANTAZIS: I believe, Your Honor, the
15 damages go to the decedent's estate. That's the only --
16 the wrongful death damages or the 1983 damages would go to
17 the estate, and would be passed --

18 QUESTION: That's quite wrong. The decedent's
19 damages would go to her estate. The wrongful death action
20 is brought on behalf of the relatives and third parties.
21 You're just asking for the latter? Your complaint seems
22 to cover both.

23 MR. PANTAZIS: Well, we are --

24 QUESTION: Why would you limit yourself to one
25 rather than both?

1 MR. PANTAZIS: Well, we are asking for both, but
2 the way you compensate a decedent for death in reality,
3 and what most of the States have done, is by compensating
4 the heirs for what they have lost, or the descendents for
5 what they have lost.

6 QUESTION: Well, not in the normal survival
7 action. The money goes into the estate and, of course,
8 whoever is the beneficiary of the estate gets the money,
9 but that's analytically quite distinct from a death action
10 brought on behalf of the survivors.

11 I don't -- I -- if you want to limit yourself to
12 one, that's your privilege, of course.

13 MR. PANTAZIS: Well

14 QUESTION: And the money in the estate may never
15 get to the family. I mean, the decedent may owe a lot of
16 money, and all the money in the estate would go to his
17 creditors.

18 MR. PANTAZIS: Under the Alabama wrongful death
19 statute it goes directly to the descendents and not
20 attached by debts.

21 QUESTION: That's the wrongful death recovery.

22 MR. PANTAZIS: That's correct.

23 QUESTION: But not survival recovery. The
24 survival recovery, the recovery that the decedent gets for
25 the decedent's own pain and suffering goes into the

1 decedent's estate, and the creditors can gobble it all up.

2 MR. PANTAZIS: The only -- if you're speaking of
3 a Federal remedy, that would be correct, but the only
4 remedy we have in Alabama is the wrongful death, which
5 would not allow that under Alabama common law, statutory
6 law.

7 QUESTION: You say that under Alabama law, for a
8 wrongful death, the proceeds have to go to the estate?

9 MR. PANTAZIS: No. The proceeds are -- the
10 estate bring -- is the property party to bring the cause
11 of action, the personal representative through the estate,
12 but the damages go directly to the descendents, and in
13 Weeks the Court analyzed that the compensatory aspect of
14 1983 is to compensate the decedent by the measure of
15 damages that the descendents had suffered, and pay the --
16 through that proceeds, through that process.

17 QUESTION: What a strange system. I mean, I
18 guess it's the civil law, but I -- why would the estate
19 sue to get money for -- not for the estate, but for
20 relatives?

21 MR. PANTAZIS: It's the only remedy available.

22 QUESTION: Well, I hope you have a sympathetic
23 administrator of the estate, who likes the family, because
24 it's no money in his pocket.

25 MR. PANTAZIS: That happens often, Your Honor,

1 that the administrator is in conflict with the heirs.

2 What we're asking is that this Court instruct
3 the supreme court of Alabama that the 19 -- that there
4 cannot abolish the 1983 action, because in doing so it
5 directly is inconsistent with the purpose of compensation
6 and deterrence and, in doing so, we're asking this Court
7 to instruct the supreme court of Alabama that the 1983
8 cause of action is supplemental to the wrongful death
9 statute, and that the damages that are allowable under
10 1983 are those typical compensatory damages that are found
11 in 48 or 49 other States.

12 QUESTION: Where would the Court be getting
13 those rules from? They don't get them from Alabama,
14 because Alabama allows only a punitive damage recovery.
15 They don't -- and 1983 itself doesn't tell us. That's why
16 we usually plug in the State remedy.

17 So we don't have a Federal remedy, we don't have
18 the State remedy, so where does the Court get the
19 instruction, where does this Court get the instructions to
20 give the Alabama supreme court?

21 MR. PANTAZIS: We ask that the Court use the
22 rationale that has been decided or looked at in the Weeks
23 case, the district court case in Alabama, and if I may
24 I'll quote that section. It's page 1309 of that decision.

25 It says, the compensatory damage award shall be

1 measured by the losses incurred by the descendent
2 survivors, who are entitled to recover under Alabama
3 statute of distribution as a result of the death.

4 Such losses may include but are not restricted
5 to expenses incurred in the treatment of or burial of the
6 descendent, loss of income from the descendent, loss of
7 companionship and consortium, pain and suffering of the
8 survivors.

9 This particular case, the Weeks case, was
10 brought simply on the claim of the executor of the estate.

11 QUESTION: Where would the district court get
12 its law from?

13 MR. PANTAZIS: These type of damages are what
14 most of the State statutes hold as compensatory damages in
15 wrongful death, the typical --

16 QUESTION: So that you say is the source from
17 which the district court obtained it? It just polled the
18 various States and decided what was the common
19 denominator.

20 MR. PANTAZIS: The briefs in the district court
21 case did have -- I mean, there are several cases that they
22 looked at.

23 QUESTION: Does the district court say where it
24 got its law from?

25 MR. PANTAZIS: The district court -- I'm only

1 familiar with this -- the opinion does not. I'm familiar
2 with it, but --

3 QUESTION: I'm not asking you to --

4 MR. PANTAZIS: Right.

5 QUESTION: -- examine the judge's mind. Does
6 the opinion say where --

7 MR. PANTAZIS: The opinion does not. I am aware
8 that the briefs filed in this case show typical
9 compensatory damages that are found in other States.

10 Alabama happens to be an unusual animal, to say
11 the least, on wrongful death.

12 QUESTION: May I ask this question as a matter
13 of Alabama law? Suppose you had a single person who was
14 90 years old, and a millionaire, no relatives at all. The
15 person is seriously injured and runs up \$500,000 in
16 hospital expenses and then dies. Can the administrator of
17 that person's estate recover a dime?

18 MR. PANTAZIS: On the wrongful death? No.

19 QUESTION: They have to -- is there any
20 provision under Alabama law for the estate to recover
21 anything for that person?

22 MR. PANTAZIS: No, and it gets even worse than
23 that, Your Honor, if I could explain.

24 The measure of damages --

25 QUESTION: I knew Alabama had its

1 idiosyncracies, but this is really surprising.

2 MR. PANTAZIS: The --

3 (Laughter.)

4 MR. PANTAZIS: The damages would go directly to
5 the heirs. It would not even pass through the estate.

6 QUESTION: No heirs in my case.

7 MR. PANTAZIS: Well, then there would be nobody
8 getting -- there would be somebody.

9 QUESTION: I mean, she had left a will leaving
10 everything to Alabama University, or something like that,
11 but Alabama University would get nothing.

12 MR. PANTAZIS: The will -- the will wouldn't
13 apply. It would go directly to the heirs at law.

14 QUESTION: But there are no heirs in my case.

15 MR. PANTAZIS: Then there would be no recovery.
16 It --

17 QUESTION: Mr. -- oh, I'm sorry.

18 MR. PANTAZIS: I was going to explain even
19 further what problem we have in trying to implement a 1983
20 remedy here. Because the wrongful death statute is purely
21 punitive, it doesn't take anything in nature from
22 compensatory damages.

23 One example of two cases I have had. One was a
24 32-year-old Georgia Tech engineer with children, making X
25 dollars. He dies in an accident that there was a slight

1 negligence. It was enough for a cause of action. That
2 recovery was very nominal, because the wrongfulness of the
3 defendant's conduct was minute, maybe applicable.

4 Another case in which I represented an 82-year-
5 old Episcopal priest who was a ward of the church, was
6 involved in an accident, but in that case the defendant's
7 conduct violated the law. They put an unreasonably
8 dangerous load, and as a result, that case had tremendous
9 damages.

10 The point I'm trying to make is, the recovery,
11 as you have indicated, is unfair in one regard. It's also
12 unfair as to the compensation aspect. It is the only
13 State, and the reason I say that, Massachusetts used to
14 have a similar rule, but I believe -- I'm not sure -- they
15 have changed the rule. It's the only State that has this
16 punitive damage statute, and it totally frustrates a 1983
17 action that deals with compensation for the injured, the
18 person injured, as the statute says.

19 QUESTION: Mr. Pantazis, going back to the Chief
20 Justice's question about where the court in Weeks got its
21 law, if I understand your answer, it got its law from sort
22 of looking generally to the common law recovery rules
23 beyond the State.

24 MR. PANTAZIS: That's correct.

25 QUESTION: But it's not authorized to do that

1 under 1988, is it, which refers to the common law of the
2 State in which the court having jurisdiction is held, so
3 how does -- how did the Weeks court make this leap to the
4 rest of the republic?

5 MR. PANTAZIS: I believe it does through
6 Robertson, Your Honor, that it's the caveat of, where it
7 states that it cannot be inconsistent with a policy --

8 QUESTION: Well, I know that puts a block on
9 what it can borrow from the State in which it sits, but it
10 doesn't function as an affirmative authorization to travel
11 to other States, does it?

12 MR. PANTAZIS: Well --

13 QUESTION: Is it Federal common law?

14 MR. PANTAZIS: It would be an establishment of
15 some sort of Federal common law, similar to the --

16 QUESTION: So it's not borrowing at all. It's a
17 fashioning of Federal common law, pure and simple.

18 MR. PANTAZIS: Well, where they are absent of
19 those statutes, that's what 88 I think envisions. That's
20 what Robertson, and I think this Court has done so in
21 Carlson earlier.

22 QUESTION: Then why did we need the 1988
23 provision in the first place?

24 MR. PANTAZIS: Well, you need the 1988 provision
25 for the test. The 1988 provision gives you the test. You

1 go -- it says you consider first the State law and the
2 State statutes, but where they're inconsistent, and in
3 this particular case not only inconsistent but totally
4 devoid of the underlying purposes because of the two
5 Alabama statutes that defeat them, you must supplement
6 that with a Federal remedy, and that is what Weeks did,
7 and that is what we're asking this Court to instruct the
8 supreme court of Alabama to do.

9 QUESTION: Do you wish to reserve the rest of
10 your time, Mr. Pantazis?

11 MR. PANTAZIS: I do. Thank you, Your Honor.

12 QUESTION: Thank you.

13 Mr. Roberts, we'll hear from you.

14 ORAL ARGUMENT OF JOHN G. ROBERTS

15 ON BEHALF OF THE RESPONDENT

16 MR. ROBERTS: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 The Court lacks jurisdiction to review the
19 interlocutory decision of the Alabama supreme court.
20 Section 1257 of the Judicial Code limits this Court's
21 jurisdiction to review State court decisions to final
22 judgments. The Alabama supreme court in this case did not
23 issue a final judgment. It instead remanded the case back
24 to the trial court for trial on the State law wrongful
25 death claim, which remains pending.

1 This is also not a case of mere technical
2 nonfinality, nor is it within any of the Cox exceptions.

3 QUESTION: What about like a -- is -- there is
4 no doctrine here like waiver, because this particular
5 argument I don't think was raised in the petitioner's
6 reply -- you were not the lawyer then, but the response --

7
8 MR. ROBERTS: The --

9 QUESTION: The petition for cert, it didn't
10 raise this argument.

11 MR. ROBERTS: I think that's correct. The best
12 that can be said is --

13 QUESTION: If it had we might have caught it,
14 but it didn't, and --

15 MR. ROBERTS: Well, the opposition --

16 QUESTION: Is there any waiver principle or
17 anything in --

18 MR. ROBERTS: No, there is not.

19 The best that can be said is that the opposition
20 that was filed did point out that the decision was
21 interlocutory. It did state that the case was remanded.
22 It did note that the State law claim remained pending.
23 But I think it's fair to say that the finality issue was
24 not argued.

25 It is, however, of course, a jurisdictional

1 objection. As this Court indicated in Flynt v. Ohio and
2 also in O'Dell v. Espinoza, if there's a lack of finality
3 it goes to the jurisdiction of the Court, and therefore
4 under this Court's rule 15.2 cannot be waived.

5 QUESTION: Can he argue that he comes within
6 your -- the petitioner comes within the second exception
7 because the Federal issue will necessarily survive on the
8 grounds that the standard of care is different and less
9 under the Federal cause of action that they want to apply?

10 MR. ROBERTS: I don't think so, Your Honor.
11 There's no --

12 QUESTION: I mean, it seems to me that's the
13 only way they could do it, to come within section 2.

14 MR. ROBERTS: Under the second exception it
15 necessarily must be the case that the Federal cause of
16 action would survive, and that's not the case here,
17 because this pending State law claim involves the same
18 parties, and the same underlying allegations.

19 Under this Court's decisions, that trial on a
20 decision on that claim could well be preclusive of any
21 1983 claim, and therefore it is not necessarily the case,
22 and it would survive.

23 It may survive, again depending on the results
24 of the State law proceedings, which is why it's not within
25 the third exception on which my brother relied. The fact

1 that it may or may not survive depending on the outcome of
2 the pending proceedings is why it is not within any of the
3 Cox exceptions.

4 It's also not a rare situation. I would suspect
5 that in most cases in which you have 1983 claims they're
6 joined with State law claims, because conduct that
7 violates section 1983 typically would also violate some
8 State law, and most attorneys would bring both a State law
9 claim and a Federal claim, so if the Court creates a new
10 precedent here, a new exception to Cox, it would not be
11 one of limited applicability, but would apply broadly to a
12 wide range of 1983 cases.

13 QUESTION: There was a case some years ago --
14 Justice Powell's decision in Pennsylvania v. Ritchie would
15 seem to come pretty close to what is being sought here.

16 MR. ROBERTS: My understanding of Pennsylvania
17 v. Ritchie, and it's a very complicated case, but my
18 understanding of it was that on the facts in that case the
19 Federal claim could not survive regardless of the result
20 on remand, which is why it was necessary to review it in
21 the interlocutory posture.

22 Regardless of whether the petitioner in that
23 case won or lost, the Federal claim would be gone, and
24 that's not the case here, because the 1983 claim could
25 well survive the State law proceedings. It may not, which

1 is why it's not within the second exception, but it may,
2 which is why it's not within the third.

3 QUESTION: How do you understand the complaint
4 with regard to the 1983 claim? Is it a survival cause of
5 action --

6 MR. ROBERTS: That's how I read it, Your Honor,
7 because the complaint seeks --

8 QUESTION: The deceased.

9 MR. ROBERTS: -- relief for the injuries that
10 the decedent suffered. Although it's brought under what's
11 called the Wrongful Death Act in Alabama, I believe that's
12 properly characterized as a survival action. If you're
13 seeking relief for injuries to the decedent, it's
14 survival. If you're seeking relief on your own behalf,
15 it's a wrongful death action.

16 This is a survival action, as I understand it.
17 It was brought by the representative of the estate.

18 QUESTION: And how do you understand Alabama law
19 with regard to a survival action here under 1983?

20 MR. ROBERTS: Well, it would be under the
21 wrongful death action, although again I think it's
22 properly classified as a survival claim, and the -- must
23 be brought by the representative of the estate, and
24 they're entitled to punitive damages to punish the
25 wrongful death of the decedent.

1 Alabama's view is that you cannot compensate the
2 dead, and from the beginning -- it's a very old statute,
3 almost going back as far as Lord Campbell's Act -- they've
4 recognized that it's punitive in nature. It's brought to
5 punish. It's original title was An Act to Prevent
6 Homicide, and they've adhered to that interpretation.

7 QUESTION: But Federal law says you can't
8 recover that against a municipality.

9 MR. ROBERTS: That's right. This Court's
10 decision in Fact Concerts means that you can't recover
11 that, and that poses -- if we reach the merits that poses
12 the issue, is that Alabama rule inconsistent with Federal
13 law?

14 QUESTION: A real dilemma.

15 MR. ROBERTS: Yeah. It is a dilemma, but we
16 think the Alabama supreme court reached the correct
17 result. Under Robertson v. Wegman you look to the whether
18 the policies under 1983, compensation.

19 QUESTION: Mr. Roberts, may I just go back to
20 the final judgment question for a minute to be sure I have
21 it in mind.

22 It is your view -- is it your view that the only
23 possibility for a second shot at the Federal claim will
24 arise if the plaintiff prevails on the State law claim?

25 MR. ROBERTS: Well, that's the most likely one.

1 I suppose there could be some argument, even if they lose
2 on the State law claim, that it shouldn't for some reason
3 or another be given collateral estoppel effect. I
4 don't -- I can't at this point --

5 QUESTION: Well, that would depend on what the
6 finding is, and if it turns out that the -- the defense,
7 as I understand it, is we did nothing wrong. We came as
8 quickly as we could. She was already dead.

9 If those are the findings that are made, then
10 there couldn't be any 1983 claim.

11 MR. ROBERTS: I think that's right, yes. I
12 think that's right. It would be precluded because the
13 1983 claim is, just from a reading of the complaint is
14 based on the same underlying allegations.

15 QUESTION: Right, but then your point -- I want
16 to be sure I have it fairly in mind. Your point is that
17 even though the denial of a Federal claim is the law of
18 the case as far as Alabama courts are concerned, and
19 there's virtually -- there's always the possibility, but
20 there's -- it's already been decided. The case would
21 still be alive, so the plaintiff could come back here and
22 make the same argument he's making today.

23 MR. ROBERTS: Oh, yes. Yes, and if they --

24 QUESTION: And you think that's enough to --
25 that's enough not to come within any of the Cox

1 exceptions.

2 MR. ROBERTS: Yes. Of course, unless -- my
3 brother pointed out they would have to go through the
4 perhaps futile exercise of preserving the claim before the
5 Alabama supreme court, but that's true in every case of
6 nonfinality. You can expect that the court that has
7 already decided the Federal issue will most likely adhere
8 to its position. If that were enough to get it outside
9 the finality rule there would be no finality rule, because
10 that's true in every case.

11 QUESTION: Maybe Cox did cut way back on what
12 the finality rule had been before, of course. But
13 anyway --

14 MR. ROBERTS: It recognized what some have said
15 a more pragmatic approach, but my point is that this is
16 not within any of those exceptions, largely because the
17 underlying claim that still remains alive, although a
18 State law claim, is based on the same underlying
19 allegations and it involves the same parties. It could
20 well have an effect on whether the Federal claim survives.

21 Turning back again to the merits in Robertson v.
22 Wegman, the policies of 1983 are compensation and
23 deterrence. There is no adverse impact on 1983's
24 compensation policy in this case for the reason recognized
25 in Robertson, that when the only claim for compensation is

1 by the representative of the estate, that compensation
2 interest is not duplicated. The reality is, you cannot
3 compensate the dead. Alabama law --

4 QUESTION: But Robertson was a peculiar case in
5 that there were no surviving members of the family. It
6 was --

7 MR. ROBERTS: Well --

8 QUESTION: -- idiosyncratic in that respect I
9 thought, where here, there would be no case in which there
10 could be a recovery.

11 MR. ROBERTS: In Robertson there were no
12 immediate relatives. Survivor was limited to parent,
13 child, or siblings, and there were none of those, but
14 it's -- the language about the compensation policy not
15 being implicated was not based on any finding that there
16 were no heirs, legatees, other ancestors or descendants,
17 though not within the narrow category.

18 It was simply based on the fact that the claim
19 was brought by the representative of the estate and
20 therefore, as the complaint in this case, looked to the
21 injuries that the decedent suffered. It recognized
22 that --

23 QUESTION: Mr. Roberts, I don't have the opinion
24 in Robertson in front of me, but I vaguely remember
25 something in the opinion that pointed out that this was a

1 peculiar case because there were no surviving members of
2 the family.

3 MR. ROBERTS: Justice Marshall's opinion did
4 point out that this was peculiar in the sense that the
5 decedent, Mr. Shaw, was not survived by parent, child, or
6 sibling. That was what Louisiana limited survivorship to.

7 But it was not the case that there was any
8 finding that he had no heirs at all, that he didn't have a
9 will -- the case was brought by his executor -- that there
10 was nobody who stood to inherit if, in fact, he could get
11 damages, but the Court said the compensation interest is
12 not implicated because the person on whose behalf you're
13 suing as representative of the estate cannot be
14 compensated.

15 QUESTION: Mr. Roberts, can I ask just a little
16 more basic question? Would you agree that the question
17 whether punitive damages are available in the 1983 case is
18 a Federal question, and that's what both Smith v. Wade and
19 Fact Concerts decide, so that if a State denied a punitive
20 damage remedy 1983 would trump the State denial?

21 MR. ROBERTS: Well, it would depend under what
22 guise. Certainly if the State had a rule there are no
23 punitive damages --

24 QUESTION: Right.

25 MR. ROBERTS: -- in 1983 even against

1 individuals, I would agree that would be inconsistent with
2 Federal law. But if it was a more narrowly applicable
3 rule, for example --

4 QUESTION: Well, I'm just asking broadly. In
5 other words, if it were just a damage question in this
6 case, the Federal law would trump the State, contrary
7 State law. If it was -- for example, years ago there used
8 to be, in the wrongful death field there would be a
9 \$10,000 limit on recovery. If the State had such a limit
10 on recovery, do you think that would defeat a larger
11 recovery for -- in the 1983 case?

12 MR. ROBERTS: No, and I want to emphasize that
13 that question, although it was adverted to earlier, is not
14 before the Court today. The Alabama supreme court did not
15 address --

16 QUESTION: Well, it's a question whether it's
17 before the Court as to whether one views this as a damage
18 issue or a question of standing.

19 MR. ROBERTS: Even if you view it as a damage
20 issue, the validity of State caps on wrongful death
21 recovery and whether they're overridden by 1983 is a
22 difficult issue. It's a different one than the one before
23 the Court today, and it has to be informed by, for
24 example, the fact that in 1871 many States had such caps.

25 QUESTION: Correct.

1 MR. ROBERTS: Congress, when it passed the one
2 wrongful death provision it did pass in the Civil Rights
3 Act in 1986 imposed a cap. Those are different questions,
4 whether the separate Alabama cap applies.

5 QUESTION: Okay. But if you would agree that on
6 the issue of punitive damages Federal law would trump the
7 State law whichever way it went -- here it's kind of
8 perverse -- why isn't the same rule appropriate for
9 compensatory damages, that if a State denies compensatory
10 damages and the Federal law generally allows it, why
11 wouldn't the State -- Federal law trump it there --

12 MR. ROBERTS: I --

13 QUESTION: -- just as it would in reverse, if a
14 State granted it and -- you couldn't say -- anyway, go
15 ahead.

16 MR. ROBERTS: I think it is, the same rule is
17 applicable as a general matter, but not with respect to
18 the wrongful death or survival question, because 1983
19 doesn't address that more narrow category, what are the
20 appropriate -- what is the appropriate relief, if any, in
21 a wrongful death or survival case.

22 Yes, if a State law purported to bar recovery of
23 compensatory damages in a normal 1983 case we would -- the
24 Court should find that inconsistent with 1983, but it's
25 difficult to argue that a State limitation on recovery in

1 a wrongful death action or a survival action is
2 inconsistent with 1983, when 1983 has no survival or
3 wrongful death provision.

4 QUESTION: No, but Alabama has provided a remedy
5 that's just some -- but the damages it provided are
6 unavailable, but the -- if the Fact Concert had been
7 decided the other way, the plaintiff would prevail.

8 MR. ROBERTS: I don't think you can sever the
9 damages from the remedy under the Alabama regime. Alabama
10 has provided a wrongful death remedy for punitive damages.

11 QUESTION: Well, it's provided a wrongful death
12 remedy for administrators of estates like this, but it
13 does not allow damages. That's the one thing it doesn't
14 do. It doesn't allow the damages that would normally be
15 recoverable in a 1983. It allows the party to sue.

16 MR. ROBERTS: I'm not sure that the Court can
17 sort of pick and choose which aspects of the Alabama
18 remedy it wants to incorporate, saying we're going to
19 incorporate the fact that you allow a wrongful death
20 action, but we're not going to take the only way you allow
21 it, which is for punitive damages.

22 QUESTION: Well, the line of reasoning Justice
23 Stevens is exploring was the reasoning of the court in --
24 the district court in Weeks, was it not?

25 MR. ROBERTS: Yes. It --

1 QUESTION: As I read that -- read that opinion,
2 it says, well, there's a wrongful death action, and that
3 other problem, and so we'll -- and we'll keep that. That
4 other problem is damages. You can't have punitive
5 damages, but that's a Federal rule. You can't have
6 compensatory damages, that's an Alabama rule, and we'll
7 set that aside.

8 MR. ROBERTS: That is the approach of the court.

9 QUESTION: That was the reasoning, anyway.

10 MR. ROBERTS: It is.

11 QUESTION: And you think that's wrong.

12 MR. ROBERTS: We do think that's wrong, and we
13 also think it's inapplicable even in this case, because
14 the one thing the court did in Weeks is say, you get no
15 recovery for injuries to the decedent, because we're going
16 to give you wrongful death -- we're going to measure
17 compensation based on your loss as a survivor. Then you
18 don't get any recovery for losses to the decedent.

19 Here, the only claims that are sought are what
20 are technically survival claims for injuries to the
21 decedent, so even under the approach in Weeks there would
22 be no recovery in this case.

23 QUESTION: Mr. Roberts, you said a second ago
24 that you can't separate -- shouldn't separate damages from
25 remedy. Do you mean you shouldn't separate remedy from

1 cause of action? So that what in effect you're arguing
2 is, there isn't a general cause of action here. What
3 there is, is a cause of action for certain punitive
4 damages, period, and that's the only cause of action.

5 MR. ROBERTS: Yes.

6 QUESTION: You can't split the two in that
7 respect.

8 MR. ROBERTS: I think that's right.

9 QUESTION: Conceptually you've got to say the
10 only thing Alabama allows here is a punitive remedy, in
11 effect, period.

12 MR. ROBERTS: That's right, and, of course, it's
13 not an approach that it's adopted in any way
14 discriminatory to 1983 or this Court's decisions.

15 It adopted this rule long before anyone thought
16 municipalities could be liable for anything under section
17 1983.

18 QUESTION: Did you come across any historical --
19 I'm just curious historically. Probably in 1880 or
20 sometime like that, there probably were quite a few States
21 that said what Alabama says basically. A person who dies
22 loses whatever tort actions that person may have had
23 before the person died. That was probably the basic rule.
24 Once you die, they're gone. If you didn't bring them,
25 it's too late.

1 And there probably were a lot of States that
2 hadn't passed survivorship actions, statutes, which is
3 what we're talking about here.

4 MR. ROBERTS: Yes.

5 QUESTION: The names get us mixed up.

6 MR. ROBERTS: Yes.

7 QUESTION: But it's a survival statute for any
8 tort, or certain tort claims.

9 MR. ROBERTS: Yes.

10 QUESTION: There probably were quite a few that
11 hadn't. What were the people thinking when they passed
12 1983? I mean, they were worried about, say, like the
13 local sheriff in the south might murder somebody, or might
14 beat him up, and what were they thinking?

15 They were thinking that we give a cause of
16 action to people when they're beaten up but we don't give
17 a cause of action to people when they're murdered. That
18 would be such an obvious question that maybe somebody
19 thought about that and talked about it. Was there
20 anything historically that --

21 MR. ROBERTS: Not in the -- there are
22 references, of course, in the legislative history of 1983
23 to murders, lynchings, and of course Congress did provide
24 remedies for those in the Civil Rights Act.

25 There's a specific remedy in section 1986 which

1 allows a cause of action for the widow or next of kin.
2 There is a criminal provision now codified at section 242
3 which could also be invoked in cases of murder, and there
4 was 1988 which says, look to State law to fill gaps in
5 this remedial program and, to the extent States allowed
6 survival or wrongful death actions, perhaps the Congress
7 thought that those would be invoked to recover in those
8 situations.

9 Most States had survival and wrongful death
10 provisions when 1983 was enacted. I think it's --

11 QUESTION: But I wonder -- it says the common
12 law, too, doesn't it?

13 MR. ROBERTS: It says, if the laws of the United
14 States are deficient, you look to the common law as
15 modified.

16 QUESTION: So maybe it meant that there was
17 Federal common law at that time. It would have been Smith
18 v. Tyson.

19 MR. ROBERTS: Well, but it's the common law as
20 modified by the statutes of the forum State, and my
21 understanding is that if it's --

22 QUESTION: There would be no modification in a
23 State that hadn't passed a survival action.

24 MR. ROBERTS: That's right.

25 QUESTION: So it wouldn't be an issue of the

1 common law as modified. It would be a question of the
2 common law.

3 MR. ROBERTS: In the --

4 QUESTION: At which time they might have thought
5 Federal common law, or is that -- that's --

6 MR. ROBERTS: Well, whether it was Federal
7 common -- whether it was Federal common law or State
8 common law, it was unambiguous that in the absence of
9 legislative change there was no recovery in the case of
10 wrongful death.

11 QUESTION: Well, Swift v. Tyson didn't cover
12 statutes, did it? I mean, if you had to have a statute
13 for a wrongful death or a survival recovery, that wasn't
14 something that the Federal courts just undertook to
15 provide for themselves.

16 MR. ROBERTS: No, not at all, and this Court
17 recognized in the Brame case 6 years after 1983 was passed
18 that at the common law -- and it didn't differentiate
19 between State and Federal, but at the common law they
20 thought it was beyond question that there was no wrongful
21 death or survival action.

22 QUESTION: And of course they did not assume
23 that there could be a separate concept, did they, of
24 Federal common law at that point? I mean, there was just
25 a generalized concept of common law.

1 MR. ROBERTS: I think --

2 QUESTION: I asked your brother a question
3 premised on exactly the opposite assumption, but I think I
4 was wrong in doing that.

5 MR. ROBERTS: I think at the time the decisions
6 recognized -- they didn't break it down as Federal common
7 law and State common law -- that there were some issues
8 that would be governed by the common law, more local
9 issues --

10 QUESTION: Mr. Roberts, it was neither State nor
11 Federal. The common law was this mystical concept we
12 inherited from England. It was English common law, was
13 what that term normally refers to.

14 MR. ROBERTS: And under 1988 it was applicable
15 unless modified by the statutes -- now, here, of course --

16 QUESTION: You would agree, wouldn't you, Mr.
17 Roberts, that if there was no survival statute or wrong
18 death statute in a State, a particular State in 1871, and
19 they pass it in 1890, that would nevertheless control in
20 cases after 1890?

21 MR. ROBERTS: Yes, because it incorporates -- it
22 doesn't stay frozen --

23 QUESTION: Modified from time to time.

24 MR. ROBERTS: At the time.

25 Now, the other prong under Robertson v. Wegman

1 they ask, what is the effect on deterrence, and here again
2 there's no adverse effect on 1983's deterrence policy by
3 application of the Alabama law.

4 To find an adverse effect, the Court has to
5 hypothesize a city employee who is familiar with the
6 intricacies of the wrongful death law and 1983 law and
7 who, solely to avoid subjecting his employer to liability
8 under 1983 for compensatory damages, would kill rather
9 than injure the victim of his constitutional violation
10 even though --

11 QUESTION: Mr. Roberts, isn't it -- and this is
12 a Federal claim, and it picks up on State law, auxiliary
13 State law, that you could have a result on this -- under
14 this Federal claim for relief of no recovery at all in
15 Alabama and a whopping recovery in the neighboring State,
16 all under this Federal cause of action. It seems to me
17 that the State law that says no recovery would be
18 inconsistent --

19 MR. ROBERTS: Well --

20 QUESTION: -- and the Federal court would have
21 to supplement it from some other source.

22 MR. ROBERTS: The fact that you get a different
23 result from State to State, as this Court recognized in
24 Robertson, is, of course, a necessary consequence of the
25 terms of 1988.

1 It says that you're -- if you're borrowing State
2 law. You're necessarily contemplating that there may be a
3 different result in one State than in another State, and
4 the Court reiterated that point in Carlson v. Green in
5 distinguishing the remedy it was creating there.

6 QUESTION: You could have minor variations, who
7 are the survivors might be different in one State or
8 another, some might have grandmothers and some might not,
9 but this kind of basic variation of the question is, is it
10 incompatible with the idea of a recovery to have this
11 setup which says, you get -- you end up getting nothing?

12 MR. ROBERTS: Well, I think it begs the question
13 to say that 1983 assumes there's going to be recovery in
14 cases of survivor and wrongful death. 198 --

15 QUESTION: Is there any other State in the union
16 that has this situation where the only recovery under
17 State law is punitive damages?

18 MR. ROBERTS: Massachusetts used to have that
19 rule. It changed it. At this point Alabama is the only
20 State that remedies wrongful death through punitive
21 damages alone. That doesn't make it an illegitimate
22 policy, based on the --

23 QUESTION: For an Alabama claim Alabama could do
24 whatever it wants, have a cap on punitives and no cap on
25 damages if one survives, which I understand is the law in

1 Alabama.

2 MR. ROBERTS: But the only way to have a
3 survival or wrongful death cause of action under 1983 is
4 by incorporating the State law, because when 1983 was
5 passed there was no survival or wrongful death at common
6 law. The Congress knew that if it wanted to create an
7 exception to that it had to be done legislatively, as it
8 had been in Lord Campbell's Act, as that Congress did in
9 section 1986.

10 The opinion, Justice Ginsburg, you announced
11 this morning indicated -- and I'm going just on the basis
12 of the announcement -- that when Congress in the same
13 statute provides a remedy in one section and not in the
14 other, you don't assume that --

15 QUESTION: Ah, but we've already crossed that
16 bridge, haven't we, in this series of laws? How about
17 1982 and 1983 with respect to damages? 1982, if I
18 remember correctly, just speaks in terms of declaratory
19 relief, and yet you can get damages for a violation of
20 1982, can't you?

21 MR. ROBERTS: I believe so, yes.

22 QUESTION: Right next to 1983, which says
23 damages.

24 MR. ROBERTS: But here you're talking about an
25 exception to the prevailing common law rule, and when you

1 have a narrow exception in one section, I think the only
2 logical inference is that Congress did not intend it in
3 the other section.

4 There was no doubt Congress knew what the
5 prevailing law was, no recovery for survival or wrongful
6 death. The most that can be said is that they would give
7 you that right if you had one under State law. 1988 would
8 provide it.

9 Here, Alabama does provide such a right, and it
10 doesn't leave them with no remedy. Under the Alabama rule
11 you still have a remedy under 1983 applying the Alabama
12 rule against individuals, and this Court has recognized
13 repeatedly in Robertson, in Carlson, and in Fact Concerts,
14 that the most effective deterrent is an action against the
15 individuals.

16 In fact, the situation --

17 QUESTION: And that would be if you take Alabama
18 law wholesale. If you could identify the individual
19 firefighters, then you would be subject to the \$100,000
20 cap. Is that right?

21 MR. ROBERTS: Oh yes, and again, I don't think
22 that issue is before the Court because the only -- because
23 that's not part of the wrongful death statute. Those are
24 general --

25 QUESTION: But on your reasoning I take it there

1 would be no incompatibility there.

2 MR. ROBERTS: I think not, largely because at
3 the time 1982 was passed many States -- I'm not sure if
4 there was quite a majority or not, but many had such caps.
5 Congress put a cap in in the only wrongful death provision
6 it provided in 1986.

7 The situation in Alabama under the Wrongful
8 Death Act is quite similar to the situation this Court has
9 formulated under Bivens. We know from FDIC v. Myer that
10 you have a Bivens action against Federal officials, the
11 individuals, but no Bivens action against the agency.

12 Here, applying the Alabama Wrongful Death Act
13 you have a 1983 action in the case of wrongful death in
14 Alabama against individuals for punitive damages, but you
15 do not have one against the municipality.

16 Thank you, Your Honor.

17 QUESTION: Thank you, Mr. Roberts.

18 Mr. Pantazis, you have 1 minute remaining.

19 REBUTTAL ARGUMENT OF DENNIS G. PANTAZIS

20 ON BEHALF OF THE PETITIONER

21 MR. PANTAZIS: Thank you.

22 Your Honor, you had indicated that Robertson had
23 an exception. Robertson does have an exception. On page
24 1997 it says, we intimate no view, moreover, about whether
25 abatement based on State law could be allowed in a

1 situation in which the deprivation of the Federal right
2 causes a death, which is exactly what we have here.

3 One final statement. If 1988 did not intend for
4 this Court to review the State court's common law and
5 statutes to determine whether or not they were
6 inconsistent, they would have left that sentence out, but
7 they didn't. The sentence, a statement that this Court
8 and all Federal courts are to view the State common law
9 and the State statutory laws for their inconsistency to
10 the policy of the Federal 1983, and that I think answers
11 Your Honor's question of why and how this Court has to
12 review the State laws.

13 Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
15 Pantazis.

16 The case is submitted.

17 (Whereupon, at 11:05 a.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

MELVIN JEFFERSON, INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF ALBERTA K. JEFFERSON, DECEASED, ET AL., Petitioners v. CITY OF
TARRANT, ALABAMA
CASE NO: 96-957

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico-----

(REPORTER)