No. 21-1598

IN THE

Supreme Court of the United States

CITY OF ANAHEIM, CALIFORNIA, et al.,
Petitioners,

v.

FERMIN VINCENT VALENZUELA, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Police officers chased down Fermin Vincent Valenzuela, Jr., and put him in a chokehold that caused him to fall into a coma and die eight days later. In the decision below, the Ninth Circuit affirmed a jury verdict awarding loss of life damages to Valenzuela's young children under 42 U.S.C. § 1983, based on the officers' use of excessive force in violation of the Fourth Amendment.

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

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INTRODUCTION

This case arises from the death of Fermin Vincent Valenzuela, Jr., at the hands of Anaheim police officers. Although Valenzuela was visibly unarmed and not suspected of any serious crime, two officers pinned him down as a third held him in a chokehold for over a minute while he gagged, turned purple, begged for his life, and ultimately fell into a coma, dying eight days later.

A jury awarded Valenzuela's young children $13.2 million in damages: $1.8 million each under state law for the loss of their father's love and companionship, and $9.6 million as Valenzuela's successors-in-interest for his Fourth Amendment excessive force claim under 42 U.S.C. § 1983. The defendants (petitioners here) sought to strike the entire § 1983 award on the ground that, at that time,[1] California law prohibited the two categories of damages underlying the award: pre-death pain and suffering ($6 million) and loss of life ($3.6 million). According to petitioners, these state law damages limitations governed the federal damages award under 42 U.S.C. § 1988.

The Ninth Circuit rejected this argument. It explained that the practical effect of applying the then-existing California damages limitations would be to eliminate any federal remedy for most fatal excessive force claims, contrary to "[o]ne of Congress's primary

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[1] The California legislature has amended the statutory scheme to permit pre-death pain and suffering damages beginning January 1, 2022. *See infra* p. 13.

goals in enacting § 1983": "provid[ing] a remedy for killings unconstitutionally caused or acquiesced by state governments." Pet. App. 8, 10-11 (quoting *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103-04 (9th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014)).

The question petitioners present to this Court is whether *Robertson v. Wegmann*, 436 U.S. 584 (1978), compels reversal of the Ninth Circuit's decision with respect to the $3.6 million loss of life award. The answer is easy: No, because *Robertson* explicitly identifies the circumstances here as outside the scope of its holding. *Robertson* "intimate[s] no view" about the application of state law to limit a § 1983 remedy where, as here, the "deprivation of federal rights caused death." *Id.* at 594. It further emphasizes that "[a] different situation might well be presented" where, as here, application of state law would "significantly restrict[]" recovery in the routine case rather than the exceptional one. *Id.* Further still, *Robertson* addresses a quintessential procedural survivorship law, not a substantive state damages scheme.

Although *Robertson* does not answer the question confronted by the Ninth Circuit in this case, the court of appeals' decision not to apply the California damages limitations is sound and supported by substantial Supreme Court precedent. This Court has consistently recognized § 1983 damages as a matter of federal law, and even if § 1988 pointed to the application of state damages law, the Ninth Circuit correctly found it inconsistent with § 1983's purposes to apply state law damages limitations that would foreclose any federal remedy for most Fourth Amendment unconstitutional killing claims.

Petitioners argue otherwise only by distorting the jury verdict. They depict the $1.8 million in wrongful death damages per child as a sufficient remedy for Valenzuela's death, omitting that those damages were awarded entirely under state tort law, not to remedy the Fourth Amendment violation under § 1983. Precluding federal recovery based on remedies available under state law "does not square with what must be presumed to be congressional intent in creating an independent federal remedy." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 490 (1980). Likewise, petitioners urge that the $6 million pre-death pain and suffering award renders an additional award for loss of life unnecessary, obscuring the fact that pain and suffering damages were allowed in this case only because the Ninth Circuit did *not* apply the then-existing California damages scheme, per its earlier decision in *Chaudhry*.

Petitioners also give the impression that awarding federal damages for Valenzuela's unconstitutional killing would render § 1983's remedial scheme an anomaly of American law, but the opposite is true. Every state—including California—provides damages for unlawful killings, using a mix of loss of life and wrongful death remedies. Loss of life damages are damages awarded to the estate through a survival action. In states that do not permit loss of life damages, like California, unlawful killings are instead remediated through the wrongful death cause of action, which provides specified heirs a right to bring suit in their own name (instead of the estate's) to recover for their own injuries from the death. Ninth Circuit precedent holds, however, that wrongful death damages are not permitted in § 1983 actions for Fourth

Amendment violations. Petitioners' position would thus transpose only the loss of life damages limitation on to § 1983 without incorporating the wrongful death remedy, thereby eliminating any federal compensatory remedy for fatal excessive force. Petitioners do not and cannot explain how that result would comport with state tort law.

Nor does petitioners' claimed circuit split warrant the Court's review. It is based solely on the Sixth Circuit's decision in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), which applied Michigan's damages scheme to disallow loss of life damages under § 1983. But the Sixth Circuit only found the loss of life limitation consistent with § 1983 because the Michigan statutory scheme as a whole allowed for recovery for most unconstitutional killing claims, whereas application of the California scheme confronted by the Ninth Circuit in this case did not. Had the Sixth Circuit faced the situation here, it likely would have reached a different conclusion.

Finally, even if the Court had an interest in the question presented, the petition would be a poor vehicle for review because the Court's ruling would not have any application beyond this particular case. The decision below addresses a state statutory regime that is no longer in effect: The California damages scheme permits pre-death pain and suffering damages as of January 1, 2022. As such, neither the Ninth Circuit's earlier decision in *Chaudhry* nor the decision below will control in future § 1983 cases.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

On July 2, 2016, Anaheim police officers Woojin Jun and Daniel Wolfe received a 911 dispatch about a "suspicious person" near a laundromat. Pet. App. 3.[2] There was no information that the person had injured or verbally threatened anyone. E.R. 473, 589. The dispatcher described the person's appearance, indicated that no weapons had been seen, and noted that it was unknown whether the person was on drugs or required psychiatric assistance. Pet. App. 3-4.

When the officers arrived at the scene, they spotted a man who fit the caller's description, Fermin Vincent Valenzuela, Jr., and followed him into the laundromat. Pet. App. 3-4. Once inside, they observed Valenzuela moving clothing from a bag into a washing machine. Pet App. 4. As the officers approached Valenzuela, Wolfe heard what he thought sounded like a glass methamphetamine pipe breaking. Pet. App. 4, 26; E.R. 599. Wolfe asked Valenzuela whether he was "alright," and Valenzuela responded that he was "good" and "just trying to wash" his clothes. Pet. App. 4; Trial Ex. 1 ("TE1") 0:50-0:55.[3] Wolfe then

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[2] Respondents cite to petitioners' Appendix (Pet. App.) and the Excerpts of Record (E.R.) filed in the Ninth Circuit on October 6, 2020.

[3] Trial Exhibit 1 contains video footage and was entered into evidence on November 15, 2019. Because it is not available on the electronic docket, respondents have provided it on a thumb drive to the Clerk's Office.

asked Valenzuela if he had just "br[oken] a pipe or something." TE1 0:55-0:57; *see* Pet. App. 4. Before Valenzuela could respond, Wolfe ordered him to stop and put his hands behind his back; Wolfe later said that he did so because he saw the handle of a screwdriver in Valenzuela's bag. TE1 0:57-1:02; *see* Pet. App. 4, 26. Although Valenzuela did not immediately comply, he removed his hands from the bag and stepped away from it as Wolfe began to move towards him. Pet. App. 4; E.R. 605-06, 711-12.

Wolfe grabbed Valenzuela's right arm and tried to pull it behind his back. Pet. App. 4. Jun quickly moved to put Valenzuela in a chokehold as Wolfe tried to maintain control of Valenzuela's hands. *Id.* Jun continued the chokehold as the officers knocked Valenzuela to the floor, face down. Pet. App. 4-5; TE1 1:15-1:31. The first chokehold lasted twenty-two seconds. *See* Pet. App. 5, 26-27. Jun then initiated a second chokehold, which lasted a minute and twenty seconds. *See id.* As Jun continued the chokehold, Valenzuela turned purple and repeatedly screamed "I can't breathe" and "help me." *Id.*

As the struggle continued, Wolfe tased Valenzuela, who then got up and tried to run out of the laundromat. Pet. App. 5. Wolfe grabbed Valenzuela's shirt, pulling it off, and then he grabbed Valenzuela's waistband, causing his pants to drop and revealing he had no weapons in his waistband. E.R. 524-25; TE1 3:37-3:50. The officers knocked Valenzuela to the ground and repeatedly tased him while he begged them to "stop it." TE1 3:50-4:10; *see* Pet. App. 5.

Despite multiple chokeholds and taser attacks, Valenzuela managed to run across the street with the officers in pursuit. Pet. App. 5. Out of breath, and now half-naked, Valenzuela pleaded with the officers, "please don't" and "don't kill me." *Id.*; *see also* TE1 4:20-5:00. He made it to a convenience store parking lot before he tripped and fell to the ground. Pet. App. 5.

Wolfe took the opportunity to place Valenzuela in yet another chokehold. *Id.* Again, Valenzuela turned purple, repeatedly screamed "help me" and "stop it," and loudly wheezed and gasped for air. *Id.* When Sergeant Daniel Gonzalez, a supervisory officer, arrived on the scene, he encouraged Wolfe to "hold that choke" and "put him out." *Id.* Wolfe maintained the chokehold for between one and two minutes as Jun and Gonzalez held down Valenzuela's arms. *Id.*

At some point during the chokehold, Valenzuela lost consciousness. *See* TE1 6:30-7:20; Pet. App. 5. Gonzalez told the officers to roll Valenzuela on his side because he was "going to wake up." Pet. App. 5. Valenzuela never regained consciousness. *Id.* Instead, he fell into a coma and died eight days later. *Id.*

II. District Court Proceedings

Valenzuela's father and two young children (respondents here) filed suit against the officers and the City of Anaheim under 42 U.S.C. § 1983, with the children serving as Valenzuela's successors-in-interest. The children also asserted wrongful death claims on their own behalf under state law. *See* Pet. App. 28-29; *see also* ECF No. 108 at 11, 16, 23-24; ECF No. 215 at 2-3.

The case proceeded to trial. Over the course of five days, the jury reviewed bodycam video footage from multiple angles covering the officers' interaction with Valenzuela from the time they approached him in the laundromat through his last moments of consciousness while Jun and Gonzalez pinned him down and Wolfe continued the final chokehold. *See* TE1. Because Valenzuela died by asphyxiation, *see* Pet. 4-5, the principal question for the jury was whether the officers acted reasonably in choking Valenzuela, *see* Pet. App. 23-24.

Petitioners asserted that the officers used a "carotid hold," *see* Pet. 4; Pet. App. 26-27, which compresses the carotid arteries on both sides of the neck and should render someone unconscious within seven to ten seconds, Pet. App. 4 n.2. The trial evidence showed that the carotid hold is "extremely dangerous," Pet. App. 31: It is "very difficult" to execute and, when improperly applied, "can morph into an 'air choke hold,' which obstructs the subject's airway and prevents him from breathing," Pet. App. 24, 32. Even when properly applied, more than a minute of pressure on the carotid artery can cause permanent brain damage. Pet. App. 32. "Because the carotid hold is so dangerous, many police departments have prohibited its use completely, or limited its use to deadly force situations." *Id.* The City of Anaheim, however, had "a well-established policy of directing its officers to apply the carotid hold to gain control of a suspect, even in non-deadly force situations." Pet. App. 42.

Respondents presented the jury with "compelling evidence that the officers did not apply this very dangerous hold in the way they were taught." Pet. App.

32. The bodycam footage showed that the officers applied the hold to Valenzuela for over two and a half minutes, despite training that more than one minute could cause permanent brain damage. *Id.* They used the hold more than twice in 24 hours, contrary to training. Pet. App. 33. They improperly applied pressure to the front of Valenzuela's neck, breaking his hyoid bone. *Id.* And they "ignored numerous clear signs that Mr. Valenzuela was having trouble breathing," *id.*, as evident from video footage that "clearly show[ed] [him] turning purple and screaming that he could not breathe," Pet. App. 27.

The trial evidence further established that the officers did all this "despite the fact that Mr. Valenzuela was not suspected of any serious crime and did not pose an immediate threat" to anyone. Pet. App. 34-35. When the officers confronted Valenzuela at the laundromat, they had "little to no information that he had committed any crime." Pet. App. 33. Valenzuela was not armed at any point in his interactions with the officers. Pet. App. 34. "Nor was he taking any action that posed a threat of serious bodily injury to officers or to others." *Id.* "And he certainly posed very little threat during the final neck restraint when Officer Wolfe was on top of him and Officer Jun and Sergeant Gonzalez were holding his arms." *Id.*

The jury found the officers liable under § 1983 for using excessive force in violation of the Fourth Amendment, and liable under state law for negligence

and battery resulting in wrongful death.[4] Pet. App. 24-25, 28-29. The jury also found the City of Anaheim liable under § 1983 for its official policy of permitting carotid holds in non-deadly force situations. *Id.* After a second phase of trial on the issue of damages, the jury awarded each of Valenzuela's children $1.8 million in wrongful death damages for their loss of Valenzuela's love and companionship. *Id.* On the children's § 1983 excessive force claim as Valenzuela's successors-in-interest, the jury awarded $6 million for Valenzuela's pre-death pain and suffering and $3.6 million for his loss of life.[5] *See id.*

Petitioners filed post-trial motions asserting a host of challenges, including that the officers were entitled to qualified immunity, that respondents failed to establish municipal liability, and that the damages award was excessive. *See* Pet. App. 35-39, 42-46, 53-55.

The district court upheld the verdict. With respect to qualified immunity, the court held that "every reasonable officer on July 2, 2016, would have understood that applying the carotid hold for longer than a

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[4] The jury found the officers not liable for acting with a purpose to harm in violation of respondents' substantive due process rights. Pet. App. 29. Because Valenzuela's father's claims were grounded solely in a substantive due process violation, the jury only awarded damages to Valenzuela's children, *see* Pet. App. 84, and the father was not a party to the appeal.

[5] The petition uses the term "hedonic" in place of "loss of life". *See* Pet. i. Consistent with the decisions below and the jury verdict form, *see* Pet. App. 1-85, this brief refers to loss of life damages.

minute, more than once, with pressure on the front of the neck, despite clear signs the suspect could not breathe, was an excessive use of force." Pet. App. 39. With respect to municipal liability, the court held that the jury reasonably determined that the City's "well-established policy of directing its officers to apply the carotid hold to gain control of a suspect, even in non-deadly force situations" was unlawful given the "compelling evidence that the carotid hold is extremely dangerous," and that the policy "caused [Valenzuela's] tragic death." Pet. App. 42-44.

Regarding the size of the jury award, the district court explained that it was "not left with any conviction—much less a firm one—that the jury made a mistake" in awarding $13.2 million based on the evidence at trial. Pet. App. 55.

Petitioners also challenged the § 1983 award on the ground that California law prohibited damages for loss of life. E.R. 170 (citing Cal. Civ. Proc. Code § 377.34). Petitioners argued that under 42 U.S.C. § 1988, state law governs the measure of damages in § 1983 actions. E.R. 170. The then-existing statutory scheme also prohibited damages for pre-death pain and suffering, but petitioners acknowledged that Ninth Circuit precedent already rejected the application of that limitation to § 1983 claims. *Id.* In *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014), the Ninth Circuit recognized that "the practical effect" of applying California's prohibition on pre-death pain and suffering damages to § 1983 fatal excessive force claims would be "to reduce, and often to eliminate, compensatory damage awards for the survivors of people

killed by violations of federal law." *Id.* at 1104. The court of appeals rejected this result as contrary to "[o]ne of Congress's primary goals in enacting § 1983": "provid[ing] a remedy for killings unconstitutionally caused or acquiesced by state governments." *Id.* at 1103.

The district court found *Chaudhry*'s reasoning equally applicable to loss of life damages, explaining that to hold otherwise "would undermine the vital constitutional right against excessive force—perversely, it would incentivize officers to aim to kill a suspect, rather than just harm him." Pet. App. 58. The court concluded that it would be "a great injustice to allow a perpetrator of excessive force to get away with paying no damages just because the victim is dead and penniless. Loss of life damages are necessary to promote the important policies underlying § 1983 and the fundamental American value that every life matters." Pet. App. 62.

III. Court of Appeals Proceedings

On appeal, petitioners abandoned their excessive damages challenge, but again disputed municipal liability and the denial of qualified immunity, and also sought reversal of the § 1983 award based on California's damages limitations.

The Ninth Circuit rejected petitioners' challenge to the jury's finding of municipality liability and affirmed the denial of qualified immunity in an unpublished decision. *See Valenzuela v. City of Anaheim*, No. 20-55372, 2021 WL 3362847, at *1-3 (9th Cir. Aug. 3, 2021). In a separate published opinion, the Ninth Circuit affirmed the loss of life award. Pet.

App. 1-22. The court of appeals found "no meaningful way to distinguish *Chaudhry* from this case." Pet. App. 9. Prohibiting loss of life damages, the court reasoned, "would run afoul of § 1983's remedial purpose as much as (or even more than) the ban on pre-death pain and suffering damages." Pet. App. 9-10. Judge Lee dissented from both decisions. *Valenzuela*, 2021 WL 3362847, at *3-5; Pet. App. 12-22.

Petitioners asked the Ninth Circuit to rehear the case en banc to overrule *Chaudhry* and strike the entire § 1983 award—for both pre-death pain and suffering and loss of life—as foreclosed by California law. *See* Appellants' Pet. for Reh'g & Reh'g En Banc 4-13. The Ninth Circuit denied the petition over a dissent authored by Judge Bea and joined in full or in part by 10 other judges, including Judge Collins, who authored a separate dissent. *See* Pet. App. 86-122.

The California legislature has now amended the state damages scheme to permit pre-death pain and suffering beginning January 1, 2022. *See* Cal. Civ. Proc. Code § 377.34(b).

REASONS FOR DENYING THE PETITION

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

The question presented by petitioners is whether *Robertson v. Wegmann*, 436 U.S. 584 (1978), compels reversal of the Ninth Circuit's decision not to "apply a state law prohibition on hedonic damages" to respondents' Fourth Amendment excessive force claim under

42 U.S.C. § 1983. Pet. i. The answer is no: *Robertson* explicitly identifies the circumstances here as outside the scope of its holding.

Robertson involved a § 1983 action for malicious prosecution in Louisiana. 436 U.S. at 586. While the suit was pending, the plaintiff died from causes unrelated to his claims. *Id.* He was not survived by any immediate relatives. *Id.* at 587. After the executor of the estate moved to be substituted as plaintiff, the defendants moved to dismiss the action on the ground that, under Louisiana law, only the decedent's spouse, children, parents, or siblings could inherit the cause of action. *See id.* at 586-87. The defendants argued that under 42 U.S.C. § 1988, Louisiana law controlled because federal law does not address who has survivorship rights when the plaintiff in a § 1983 action dies after filing suit. *See id.*

This Court agreed with the defendants that Louisiana law governed under § 1988 because federal law was deficient with respect to who inherits a § 1983 claim if the plaintiff dies while the suit is pending, and because the Louisiana law was not inconsistent with § 1983's purposes. *Id.* at 588-93. The Court explained that Louisiana law was consistent with § 1983 because, although it required dismissal of this particular suit, there was "no claim that [Louisiana] law generally is inhospitable to survival of § 1983 actions," *id.* at 594; to the contrary, most Louisiana actions survived the plaintiff's death, *id.* at 591.

Describing its holding as "a narrow one," the Court emphasized that "a different situation might well be presented" if the state law "did not provide for survival of any tort actions" or "significantly restricted the types of actions that survive." *Id.* at 594 (internal quotation marks omitted). The Court also repeatedly emphasized that it "intimate[d] no view . . . about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id.*; *see also id.* at 592 (finding no inconsistency "at least in situations in which there is no claim that the illegality caused the plaintiff's death"); *id.* at 594 ("Here it is agreed that Shaw's death was not caused by the deprivation of rights for which he sued under § 1983 . . . .").

Robertson does not compel application of California's damages limitations to respondents' § 1983 claim for three reasons. First, petitioners' constitutional violation caused Valenzuela's death. *Robertson* expressly took "no view" on the application of state law to § 1983 claims where the "deprivation of federal rights caused death." *Id.* Two years later, the Court reaffirmed that *Robertson* does not control where "the plaintiff's death was . . . caused by the acts of the defendants upon which the suit was based." *Carlson v. Green*, 446 U.S. 14, 24 (1980). This distinction alone forecloses the conclusion that the Ninth Circuit's decision runs afoul of *Robertson*.

Second, the Louisiana statutory scheme at issue in *Robertson* addressed the proper beneficiaries to inherit an action when a plaintiff dies; it was a

quintessential procedural survivorship law. *See generally Nathan v. Touro Infirmary*, 512 So.2d 352, 353 (La. 1987) (describing the relevant statutory provisions as governing "whether a succession representative as plaintiff may continue a . . . personal injury suit brought by a victim who died without [any of the] surviving beneficiaries designated" to inherit the cause of action).[6]

Although petitioners describe this case as also involving "survivorship," Pet. 24, that is accurate only in the loose sense that the suit arises from Valenzuela's death. The dispute here is not over who has a legal right to inherit Valenzuela's interests in this suit; it is uncontested that Valenzuela's children are the proper beneficiaries of his § 1983 claims under California survivorship law. *See* Cal. Civ. Proc. Code §§ 377.20(a), 377.30; Cal. Prob. Code § 6402.

The dispute instead involves a substantive question of damages: whether § 1988 requires application of California's damages limitations to Fourth Amendment unconstitutional killing claims under § 1983. *Robertson* "does not bear on the question whether a state limitation on the measure of damages applies to

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[6] Notably, in *Nathan*, decided nine years after *Robertson*, the Louisiana Supreme Court interpreted the relevant state law provisions to *allow* a personal injury suit to proceed without an immediate relative beneficiary if the plaintiff initiated the suit before death, *see* 512 So.2d at 354-56, contrary to this Court's application of those provisions in *Robertson*, *see* 436 U.S. at 587-88 (noting that the plaintiff had conceded that the § 1983 suit would abate if Louisiana law controlled).

a § 1983 claim." *Jefferson v. City of Tarrant*, 522 U.S. 75, 86 n.2 (1997) (Stevens, J., dissenting from dismissal of writ as improvidently granted). To the contrary, as discussed in Part II.A, an abundance of precedent holds that federal law provides § 1983 damages without resort to state law.

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

Under California law in effect at the relevant time for this suit (the "pre-2022" statutory scheme), compensation for an unlawful killing was available only for harm suffered by designated family members through a wrongful death tort claim. Cal. Civ. Proc. Code §§ 377.60, 377.61, 377.34.[7] Ninth Circuit precedent holds, however, that wrongful death damages are not permitted in § 1983 actions for Fourth

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

Amendment violations. *See Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1228-29 (9th Cir. 2013).[8]

Accordingly, if the pre-2022 California damages limitations had applied to § 1983 claims, there would have been no compensatory remedy for excessive force resulting in death, and effectively no municipality liability at all in such cases. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that municipalities are immune from punitive damages under § 1983). And while punitive damages might be available against an individual officer in the rare case where evidence establishes that the officer acted with "evil motive" or "callous indifference," *Smith v. Wade*, 461 U.S. 30, 56 (1983), most fatal excessive force claims would simply have been irremediable under § 1983. *Robertson* specifically identifies this situation—where application of state law to a § 1983 claim would foreclose or significantly restrict the availability of relief not just in one action, but generally—as outside the scope of its holding. 436 U.S. at 591, 594.

At minimum, these three distinctions make § 1988's application in the circumstances here an

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

open question after *Robertson*. Indeed, in 1996, this Court granted certiorari in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), to review an Alabama Supreme Court decision applying a state law damages limitation to a § 1983 unconstitutional killing claim. That grant would have been unnecessary if the Alabama Supreme Court's decision was mandated by *Robertson*.[9] The Court ultimately dismissed *Jefferson* as improvidently granted due to a jurisdictional problem, *see id.* at 77-84; as discussed in Part IV, the vehicle obstacles here—in particular that the California statutory scheme at issue in this case is no longer in effect—are also fatal.

II. The Ninth Circuit correctly declined to apply California's limitation on loss of life damages to respondents' § 1983 claim.

Although *Robertson* does not answer the question confronted by the Ninth Circuit in this case, the court's decision not to apply California's damages scheme to respondents' § 1983 claim is sound and supported by substantial Supreme Court precedent. This Court has consistently treated § 1983 damages as a matter of federal law, and even if there were a deficiency, the Ninth Circuit correctly found it inconsistent with § 1983's purposes to apply a state law damages scheme that would foreclose any federal

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[9] Meanwhile, the Court denied review in *Chaudhry*, the Ninth Circuit's earlier decision declining to apply California's pre-2022 damages scheme to unconstitutional killing claims under § 1983. *See City of Los Angeles v. Chaudhry*, 574 U.S. 876 (2014).

remedy for most Fourth Amendment unconstitutional killing claims.

A. This Court has long treated categories of damages under § 1983 as a matter of federal law.

Section 1988 directs courts to resolve suits brought under § 1983 in "conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect," and to turn to state law only when federal law is "not adapted to the object, or [is] deficient in the provisions necessary furnish suitable remedies." 42 U.S.C. § 1988. This "mandate implies that resort to state law—the second step in the process—should not be undertaken before principles of federal law are exhausted." *Wilson v. Garcia*, 471 U.S. 261, 268 (1985).

The petition skips the threshold question of whether federal law is deficient with respect to the provision of damages. The panel below had no opportunity to reach this question because it was bound by *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014*), cert. denied*, 574 U.S. 876 (2014). *Chaudhry* assumed without discussion that federal law fails to provide for damages, and instead focused its § 1988 analysis entirely on why application of the pre-2022 California damages scheme would be inconsistent with § 1983's purposes. *Id.* at 1103-05.

Section 1988 instructs courts to look to state law only on issues where federal law provides no guidance, such as the statutes of limitations for § 1983 claims. *See Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 483-85 (1980). But § 1983 is

not silent on the availability of damages: It provides that state actors who violate the Constitution "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[10] State law may, as in *Robertson*, determine who inherits that cause of action if the plaintiff dies, but § 1983 itself provides the plaintiff with "an explicit remedy in damages." *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 733 (1989). Section 1988 thus "points . . . in the direction of the express federal damages remedy" for § 1983 claims rather than reliance on "state common law principles." *Id.*; *accord, e.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

In accordance with § 1983's text, this Court has consistently treated the types of damages available under § 1983 as a matter of federal law. In considering whether § 1983 permits nominal damages, the Court did not inquire into state law or test its inconsistency with § 1983's purposes. *See Carey v. Piphus*, 435 U.S. 247 (1978). It held, rather, that "damages awards under § 1983" are "governed by the principle of compensation"—i.e., "the rules governing

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[10] When enacted, § 1983's predecessor expressly contemplated a federal rule of decision, directing courts to provide "remedies provided in like cases in [federal] courts . . . and the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13. This language appears to have been dropped during codification, a process that was not intended to change the substance of the law. *See Kush v. Rutledge*, 460 U.S. 719, 724 n.6 (1983).

compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 257-59 & n.13. Thus, without looking to state law, the Court determined that § 1983 permits nominal damages for constitutional violations that do not result in "actual" injury. *Id.* at 261-62, 266.

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

These cases reflect the Court's recognition that the availability of damages for constitutional violations under § 1983 is not a peripheral issue that Congress left unaddressed, but rather "go[es] to the substance of the § 1983 cause of action" and "affect[s] the underlying conduct § 1983 was intended to control." Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559, 618 (1985). Because Congress intended § 1983 to provide a remedy for unconstitutional killings by state actors, *see Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S.

658, 690 (1978),[11] damages for loss of life are an appropriate federal remedy for such claims. Reference to state law is unnecessary.

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

Where federal law is "deficient in the provisions necessary to furnish suitable remedies," § 1988 directs courts to apply state law only if doing so would "not [be] inconsistent with the Constitution and laws of the United States." In other words, "[r]egardless of the source of the law applied in a particular case . . . the ultimate rule adopted under § 1988" must be "responsive to the need whenever a federal right is impaired." *Robertson*, 436 U.S. at 588 (internal quotation marks omitted).

The Ninth Circuit correctly determined that it would be inconsistent with § 1983's purposes to apply a state law damages scheme that would eliminate any federal remedy for most unconstitutional killing claims. As explained *supra* pp. 17-18, pre-2022 California tort law provided for recovery for unlawful killings only through wrongful death claims brought by

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[11] *See also* Steinglass, *supra*, at 648-49 ("The debate on the Civil Rights Act of 1871 makes clear that its proponents were vitally concerned with the unlawful killings that characterized the reign of terror in the southern states. They repeatedly referred to wrongful killings in identifying the evils they were addressing, and they relied extensively on the investigative report that vividly described the state of lawlessness.").

designated beneficiaries, Cal. Civ. Proc. Code § 377.61, not through a survival action brought on behalf of the decedent's estate, *id.* § 377.34. But under Ninth Circuit precedent, wrongful death beneficiaries cannot assert Fourth Amendment claims on behalf of the decedent under § 1983. *Hayes*, 736 F.3d at 1229. The interaction of these incompatible regimes would render fatal excessive force by state officers almost entirely irremediable under § 1983.

Eliminating any federal remedy for most Fourth Amendment fatal excessive force claims would be inconsistent with § 1983, "a remedial statute, [which] should be liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (internal quotation marks omitted). It cannot be that Congress intended § 1983 to provide a federal remedy when nonfatal physical injuries result from excessive force by state actors, but not when that force is so excessive that the victim dies from their injuries. Section 1983 instead reflects Congress's judgment that imposing liability on state actors "for *all* of [their] injurious conduct" is necessary to "create an incentive for officials" to respect constitutional rights. *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980) (emphasis added).[12]

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[12] Petitioners suggest that this Court has blessed the elimination of compensatory damages for § 1983 claims, Pet. 15, but the cases they cite say no such thing. *Carlson* observed only that there may be cases where "the victim cannot prove compensable injury," 446 U.S. at 22 n.9, not that compensation is unnecessary if the injury is so severe it results in death. Likewise, in *Carey*, *(cont'd)*

As this Court has long recognized, damages for unlawful killings help "preserve human life by making homicide expensive." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927); *cf. Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008) (imposing the same punishment for murder as for less serious crimes would remove "a strong incentive . . . not to kill the victim"), *modified on denial of reh'g*, 554 U.S. 945 (2008).[13] The decision below properly acknowledges that providing a federal remedy for unconstitutional killings is crucial to § 1983's purposes.

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the Court approved nominal damages awards for constitutional violations where there is no "proof of actual injury," 435 U.S. at 266, not where the injury is death.

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

C. A state law damages limitation that would eliminate any federal remedy for most fatal excessive force claims is not consistent with § 1983 simply because other damages were awarded in this particular case.

Petitioners argue that application of California's damages scheme must be consistent with § 1983's purposes because, in addition to the $3.6 million in loss of life damages, the jury also awarded Valenzuela's children $6 million for Valenzuela's pre-death pain and suffering and $1.8 million each for their own wrongful death claims. Pet. 15, 17, 23; *see also* Pet. App. 12 (Lee, J., dissenting) ("an award of $9.6 million . . . is not 'inconsistent' with . . . . [the] goals of § 1983"). This argument obscures two critical points.

First, the wrongful death damages were awarded entirely under state tort law. Precluding federal recovery based on the remedies available under state law "does not square with what must be presumed to be congressional intent in creating an independent federal remedy." *Tomanio*, 446 U.S. at 490. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 365 U.S. at 183; *see also Burnett v. Grattan*, 468 U.S. 42, 50 (1984) ("In the Civil Rights Acts, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes. These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state

law. They are judicially enforceable in the first instance.").

Second, the pre-death pain and suffering award was allowed in this case only because the Ninth Circuit did *not* apply the pre-2022 California damages scheme, per its earlier decision in *Chaudhry*. Petitioners challenged those damages, too, in the Ninth Circuit, arguing that California's ban on pre-death pain and suffering damages should apply to respondents' § 1983 claim. *See* Appellants' Pet. for Reh'g & Reh'g En Banc 11-13; Appellants' Opening Br. 44 n.4. Petitioners now reverse course, adopting *Chaudhry*'s inconsistency finding in an effort to leverage the pain and suffering award into an excuse to deny recovery for Valenzuela's loss of life. *See* Pet. 14-15. But the fact that petitioners have now abandoned their challenge to the pain and suffering award does not change its unavailability under the California damages scheme that the Ninth Circuit confronted below.

Moreover, even if pre-death pain and suffering damages had been allowed under the pre-2022 California law, they would not be available in many unconstitutional killing cases. The significant pain and suffering damages in this case arise from the unusually prolonged and excruciating circumstances of Valenzuela's death, which included him begging for his life as the police officers choked him into unconsciousness—all recorded on video—and then spending eight days in a coma before he died. *See supra* pp. 5-7. In the more typical fatal shooting case, death occurs quickly and off-camera such that pre-death pain

and suffering is minimal and/or hard to establish.[14] Petitioners' argument thus reflects the same basic error rejected in *Robertson*: They ask this Court to conduct § 1988's inconsistency inquiry based on the circumstances of "a particular action" rather than whether application of the state law would "generally [be] inhospitable" to § 1983's purposes. 436 U.S. 590-95.

Petitioners' objection to the jury award ultimately boils down to a claim that the amount is simply too high and too speculative. *See* Pet. 17-18. As the district court found, however, the jury's award of $13.2 million appropriately reflects the horrific circumstances of Valenzuela's death and the magnitude of his loss to his young children. Pet. App. 53-56. More importantly, the remedy for an excessive or speculative jury award is a new trial or remittitur to correct the award. Indeed, petitioners recognized as much when they moved for a new trial on that ground before the district court. *See id.* Having chosen not to appeal the denial of that motion, petitioners should not be

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[14] Sarah DeGue, Katherine A. Fowler, & Cynthia Calkins, *Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009–2012*, 51 AM. J. PREV. MED. S173, S177 (2016) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6080222/ (93% of people killed by police were killed by a firearm); *Fatal Force: 1,050 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited Sept. 19, 2022) (only 14% of police shootings from 2015-2022 had body camera footage).

allowed to turn § 1988 into a backdoor for remitting respondents' federal constitutional claim.

D. Petitioners' position would place § 1983 out of step with the law of every state in the country, all of which provide a compensatory remedy for unlawful killings.

Petitioners give the impression that awarding federal damages for Valenzuela's unconstitutional killing would render § 1983's remedial scheme an anomaly of American law, Pet. 8, but the opposite is true. Every state—including California—provides damages for unlawful killings, using a mix of loss of life and wrongful death remedies.[15] States that limit the estate's recovery of loss of life damages provide an alternative remedy through the wrongful death cause of action. *See* Restatement (Second) of Torts § 926 cmt. a (Am. L. Inst. 1979). Indeed, that is the choice the California legislature made in enacting Cal. Civ. Proc. Code §§ 377.61, 377.34. Section 377.34's limitation on

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

damages recoverable "applies only to causes of action personal to the decedent and not to causes of action that others may have for the decedent's wrongful death." *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 789 (Cal. 1997) (citing California Law Revision Commission, *Litigation Involving Decedents*, 22 Cal. Law Revision Comm'n Rep. 895 (1992)). The separate wrongful death remedy is designed to provide compensation other than the "damages recoverable under Section 377.34." Cal. Civ. Proc. Code § 377.61.

Notably, petitioners do not argue that California's wrongful death statute supplies the correct measure of damages under § 1983; their position instead would cherry-pick only the loss of life damages limitation without incorporating the wrongful death remedy, thereby eliminating any federal compensatory remedy for death that results from excessive police force. Petitioners do not and cannot explain how that result would comport with state tort law.

Judge Bea's dissent also cites the long-abrogated common law rule precluding a cause of action for wrongful death. Pet. App. 90-91. That rule, however, was a "legal anomaly," a "striking departure from the result dictated by elementary principles in the law of remedies." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381-82 (1970).[16] It was controversial even during its brief existence, and by the time Congress

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[16] The rule depended on the felony-merger doctrine, under which a tort claim could not lie if the circumstances amounted to a felony. This doctrine was a quirk of English law that "never existed in this country at all." *Moragne*, 398 U.S. at 381-82.

enacted § 1983, "nearly all the States [had] passed laws to prevent such a failure of justice." *Am. Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522, 534 (1872). Congress has also "rejected wholesale the rule against wrongful death," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23 (1990), and this Court abrogated it as a matter of federal common law, *Moragne*, 398 U.S. at 408-09. The Ninth Circuit correctly declined to resurrect an ancient common law rule that most American jurisdictions had abandoned well before § 1983's enactment, and that none follow today.

III. The alleged circuit split does not warrant review.

The courts of appeals are in overwhelming agreement that § 1988 "does not require deference to a [state] survival statute that would bar or limit the remedies available under [§] 1983 for unconstitutional conduct that causes death." *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983), *cert. denied*, 464 U.S. 961 (1983); *see Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1104-05 (9th Cir. 2014), *cert. denied*, 574 U.S. 876 (2014); *Berry v. City of Muskogee*, 900 F.2d 1489, 1503-04 (10th Cir. 1990); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1240-41 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *see also Jones v. Prince George's Cnty.*, 355 F. App'x 724, 730 n.8 (4th Cir. 2004) ("We recognize that after *Robertson* . . . it would appear that a federal rule of survival supersedes any state law requiring abatement when the acts of § 1983 defendants caused the death of the injured party.").

Petitioners' claimed circuit split is based solely on the Sixth Circuit's decision in *Frontier Insurance Co. v. Blaty*, 454 F.3d 590 (6th Cir. 2006), which applied Michigan's damages scheme to disallow loss of life damages under § 1983. But the Sixth Circuit only found the loss of life limitation consistent with § 1983 because the scheme as a whole allowed for recovery for most unconstitutional killing claims: It provided both for pre-death pain and suffering damages and for wrongful death damages to the decedent's survivors. *See id.* at 601, 603-04; *see also id.* at 598-99 (discussing Mich. Comp. Laws § 600.2922(6)).

Application of the Michigan damages scheme thus differed from application of the California damages scheme in two important respects. First, Michigan law provided for pre-death pain and suffering damages, while the California law in effect at the time of this case did not. Second, the Sixth Circuit assumed that § 1983 permits wrongful death claims, which was not true in this case before the Ninth Circuit. *See supra* pp. 17-18, 24. In other words, in *Blaty*, application of the state scheme left meaningful damages available for most § 1983 unconstitutional killing claims, whereas application of the state scheme confronted by the Ninth Circuit in this case did not. Had the Sixth Circuit faced this situation in *Blaty*, it likely would have reached a different conclusion. *Cf. Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (declining to apply an Ohio damages limitation that would have largely eliminated any federal remedy for fatal excessive force claims); *see generally Berry*, 900 F.2d at 1506 ("In considering whether the purposes of § 1983 are satisfied by adoption of state survival and wrongful death actions, we must consider that different

states will define them differently, thus requiring individual analyses of each state's law.").

Accordingly, there is no circuit split meriting the Court's review.

IV. This case is a poor vehicle for review.

As explained in Part I, petitioners present the Court with only a narrow question—whether *Robertson* compels reversal of the decision below—the answer to which is indisputably no. To the extent the Court is interested in reviewing more broadly whether state law limitations on loss of life damages apply to unconstitutional killing claims under § 1983, the petition is a poor vehicle because the Court's ruling would not have any application beyond this particular case.

As petitioners acknowledge, Pet. 6 n.1, the decision below addresses a state statutory regime that is no longer in effect: The California legislature amended the state damages scheme to permit pre-death pain and suffering damages beginning January 1, 2022. *See* Cal. Civ. Proc. Code § 377.34(b). As such, neither the Ninth Circuit's decision in *Chaudhry* nor the decision below will control future cases involving loss of life damages for unconstitutional killing claims under § 1983; the Ninth Circuit will need to assess the new damages scheme in the first instance to determine whether its application would be consistent with § 1983's purposes. Although, as discussed at pp. 27-28, there are good reasons to conclude that pre-death pain and suffering damages alone are insufficient to

serve § 1983's purposes, the Ninth Circuit may well hold otherwise. In any event, it would not be a good use of this Court's resources to review *Robertson*'s application to a state damages scheme that is no longer in effect.

Moreover, the petition does not even adequately present the pre-2022 California damages scheme for the Court's review. Before the Ninth Circuit, petitioners challenged the entire federal damages award—both for loss of life and for pre-death pain and suffering—as foreclosed by California law. *See* Appellants' Pet. for Reh'g & Reh'g En Banc' Pet. 4-13. Before this Court, petitioners challenge only the loss of life award because pre-death pain and suffering damages are now available in California. Pet. 6 n.1.

The fact remains, however, that the state statutory scheme in effect with respect to *this* case foreclosed both types of damages. Assessing that scheme's application to respondents' § 1983 claim requires considering the scheme in whole, which the Court would not be able to do in the case's current posture. By presenting only a portion of the relevant state law, the petition invites the Court to undertake a puzzle with only half the pieces.

Additional pieces are missing as well: One important reason that applying the pre-2022 California damages scheme to Fourth Amendment unconstitutional killing claims would be inconsistent with § 1983's purposes is that prior Ninth Circuit precedent holds that § 1983 does not permit wrongful death

damages for such claims, foreclosing the one type of damages that California allowed. *See supra* pp. 17-18, 24.

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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