FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERMIN VINCENT VALENZUELA; V.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased; X.V., by and through their Guardian, Patricia Gonzalez, individually and as successors-in-interest of Fermin Vincent Valenzuela, II, deceased, *Plaintiffs-Appellees*,	No. 20-55372 D.C. Nos. 8:17-cv-00278-CJC-DFM 8:17-cv-02094-CJC-DFM OPINION
v. CITY OF ANAHEIM; DANIEL WOLFE; WOOJIN JUN; DANIEL GONZALEZ, *Defendants-Appellants.*	

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted May 5, 2021
Pasadena, California

Filed August 3, 2021

Before: John B. Owens and Kenneth K. Lee, Circuit Judges, and Michael H. Simon,* District Judge.

Opinion by Judge Owens;
Dissent by Judge Lee

SUMMARY**

Civil Rights

The panel affirmed a jury verdict awarding "loss of life" damages to the family of Fermin Valenzuela, Jr., who died after an encounter with the police.

Valenzuela's father and children filed suit under 42 U.S.C. § 1983 and California law for excessive force, wrongful death, and similar theories of liability. After a five-day trial, the jury awarded the Valenzuela family a total of $13.2 million in damages on multiple theories of liability, including $3.6 million for Valenzuela's loss of life, which was independent of any pain and suffering that he endured during and after the struggle with the officers. In their post-trial motions, the Defendants argued that because California state law did not recognize loss of life damages, neither should § 1983. The district court disagreed. After reviewing the relevant in- and out-of-circuit case law, including *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir.

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

2014), the district court concluded that § 1983 permitted the recovery of loss of life damages and that California state law to the contrary was inconsistent with the federal statute's goals.

The panel saw no meaningful way to distinguish *Chaudhry* from this case. Both involved deaths caused by a violation of federal law, and both considered the limits that California's Civil Procedure Code § 377.34 places on § 1983 plaintiffs, limits that this court has squarely rejected. The panel determined that prohibiting loss of life damages would run afoul of § 1983's remedial purpose as much as (or even more than) the ban on pre-death pain and suffering damages. Following *Chaudhry*, the panel held that § 377.34's prohibition of loss of life damages was inconsistent with § 1983.

The panel resolved the remaining issues on appeal, including qualified immunity, in a concurrently filed memorandum disposition.

Dissenting, Judge Lee stated that this court should not jettison California state law to maximize damages for § 1983 plaintiffs. Judge Lee wrote that as tragic as Valenzuela's death was, the panel must follow the law, and California law prohibits damages for loss of life. While Judge Lee did not believe *Chaudhry* controlled this case, he thought this court should still revisit that decision in a future en banc proceeding because it misconstrued *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978), and relied on flawed assumptions.

COUNSEL

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OPINION

OWENS, Circuit Judge:

The City of Anaheim and individual officers ("Defendants") appeal from a jury verdict awarding "loss of life" damages to the family of Fermin Valenzuela, Jr., who died after an encounter with the police. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Death of Valenzuela

On July 2, 2016, Anaheim Police Department Officers Woojin Jun and Daniel Wolfe received a 911 dispatch about a "suspicious person" near a laundromat in Anaheim. The dispatcher described Valenzuela's appearance, indicated that no weapons had been seen, and noted that it was unknown whether Valenzuela was on drugs or required psychiatric assistance.

Arriving at the scene, the officers spotted Valenzuela and followed him into the laundromat, where they observed him moving clothing from a bag into a washing machine. As they approached, Wolfe said he heard the sound of breaking glass and saw what he recognized as a methamphetamine pipe. Wolfe then asked Valenzuela whether he was "alright" and if he had just "br[oke] a pipe or something." Valenzuela replied that he was "good" and "just trying to wash" his clothes.

[1] This opinion only addresses the issue of loss of life damages. A concurrently filed memorandum disposition resolves the remaining issues on appeal, including qualified immunity.

Wolfe claimed that he then saw a screwdriver in the bag, so he ordered Valenzuela to stop and put his hands behind his back. Valenzuela stepped away from the bag but did not immediately comply. Wolfe then grabbed Valenzuela's right arm and tried to pull it behind his back. Almost immediately after, Jun placed Valenzuela in a choke hold as Wolfe tried to maintain control of Valenzuela's hands.[2]

A violent struggle ensued, with Jun continuing the choke hold while the officers managed to knock Valenzuela to the floor, face down. Jun then initiated a second choke hold, and Valenzuela started turning purple and repeatedly screamed "I can't breathe" and "help me." Wolfe then tased Valenzuela, who jumped to his feet and ran out of the laundromat. The officers chased after Valenzuela, pulling off some of his clothes as he tried to escape and knocking him to the ground. The officers repeatedly tased Valenzuela, who begged for them to "stop it."

Despite multiple choke holds and taser attacks, Valenzuela ran across the street with the officers in pursuit. Out of breath, Valenzuela repeatedly asked the officers to "please don't" and "don't kill me." He managed to make it to a convenience store parking lot, where he tripped and fell to the ground. While on the ground, Wolfe placed Valenzuela in yet another choke hold. Again, Valenzuela turned purple, repeatedly screamed "help me" and "stop it,"

[2] The parties dispute whether the officers placed Valenzuela in a carotid hold or an air choke hold. A carotid hold involves compressing the carotid arteries on both sides of the neck. When properly applied, the hold should render someone unconscious within seven to ten seconds. But when improperly applied, a carotid hold can turn into an air choke hold, which applies pressure to the front of the neck and is much more dangerous. Without resolving this dispute, we use the term "choke hold" to describe the neck restraints placed on Valenzuela.

and was audibly gasping for air. Sergeant Daniel Gonzalez, a supervisory officer, arrived on the scene and encouraged Wolfe to "hold that choke" and "put him out," and gave Wolfe tips on how to accomplish this. Wolfe maintained the hold for between one and two minutes as Jun and Gonzalez held down Valenzuela's arms.

Towards the end of the encounter, Gonzalez asked Wolfe whether Valenzuela was able to breathe. Gonzalez told the officers to roll Valenzuela on his side because he was "going to wake up." Valenzuela never did, and he fell into a coma and died eight days later in the hospital. The Orange County medical examiner ruled the manner of death as a homicide caused by "complication[s] of asphyxia during the struggle with the law enforcement officer" while Valenzuela was "under the influence of methamphetamine."

B. Procedural History

Valenzuela's father and children filed suit under 42 U.S.C. § 1983 and California law for excessive force, wrongful death, and similar theories of liability. After a five-day trial, the jury awarded the Valenzuela family a total of $13.2 million in damages on multiple theories of liability, including $3.6 million for Valenzuela's "loss of life,"[3] which was independent of any pain and suffering that he endured during and after the struggle with the officers.[4]

[3] The Ninth Circuit's Model Civil Jury Instruction 5.2 also recognizes damages for the "loss of enjoyment of life."

[4] The other awards were $6 million for Valenzuela's pre-death pain and suffering and $3.6 million for his children's loss of Valenzuela's love, companionship, society, and moral support.

In their post-trial motions, the Defendants argued that because California state law did not recognize loss of life damages, neither should § 1983. The district court disagreed. After reviewing the relevant in- and out-of-circuit case law, including *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014), the court concluded that § 1983 permitted the recovery of loss of life damages and that California state law to the contrary was inconsistent with the federal statute's goals. As the court recognized, 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." This appeal followed.

II. DISCUSSION

A. Standard of Review

We review de novo the district court's decision regarding loss of life damages. *See Chaudhry*, 751 F.3d at 1103.

B. Section 1983 and "Loss of Life" Damages

California law forbids recovery for a decedent's loss of life. Cal. Civ. Proc. Code § 377.34.[5] And because the relevant federal law is silent as to loss of life damages, California law controls our inquiry "unless it is inconsistent

[5] Section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred *before death*, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Cal. Civ. Proc. Code § 377.34 (emphasis added).

with the policies of § 1983." *Chaudhry*, 751 F.3d at 1103. We conclude that it is, mindful that § 1983 was meant to be a remedial statute and should be "broadly construed" to provide a remedy "against all forms of official violation of federally protected rights." *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (citation omitted); *see also Wilson v. Garcia*, 471 U.S. 261, 271–72 (1985) ("[Section] 1983 provides a 'uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution' . . . [that] make[s] it appropriate to accord the statute 'a sweep as broad as its language.'" (internal citation omitted)), *superseded by statute on other grounds*. Section 1983's goals include compensation for those injured by a deprivation of federal rights and deterrence to prevent future abuses of power. *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978).

Our analysis begins, and largely ends, with *Chaudhry*. In that case, we addressed whether § 377.34's prohibition of pre-death pain and suffering damages prevented § 1983 plaintiffs from obtaining such relief. We recognized that "[o]ne of Congress's primary goals in enacting § 1983 was to provide a remedy for killings unconstitutionally caused or acquiesced in by state governments," and that "[i]n cases where the victim dies quickly, there often will be no damage remedy at all under § 377.34." *Chaudhry*, 751 F.3d at 1103–04. Because California's bar on such relief had "the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim," we held that it clashed with § 1983's remedial purpose and undermined its deterrence policy. *Id*. at 1104–05. "Section 377.34 therefore does not apply to § 1983 claims where the decedent's death was caused by the violation of federal law." *Id*. at 1105.

In reaching this conclusion, *Chaudhry* relied in part on *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 (7th Cir. 1984), *overruled in part on other grounds by Russ v. Watts*, 414 F.3d 738 (7th Cir. 2005), a § 1983 case which rejected Wisconsin laws precluding loss of life damages because they made it "more advantageous [for officials] to kill rather than injure."[6] In doing so, *Chaudhry* implicitly disagreed with the Sixth Circuit's contrary decision in *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601, 603 (6th Cir. 2006), which held that § 1983 did not conflict with a similar Michigan law because § 1983 compensates only for "actual damages suffered by the victim," and a loss of life "is not 'actual' . . . because it is not consciously experienced by the decedent."

We see no meaningful way to distinguish *Chaudhry* from this case.[7] Both involve deaths caused by a violation of federal law, and both consider the limits that California's § 377.34 places on § 1983 plaintiffs—limits that we have squarely rejected. Prohibiting loss of life damages would run afoul of § 1983's remedial purpose as much as (or even

[6] *Chaudhry* also relied on similar cases from the Tenth and Second Circuits. *See Chaudhry*, 751 F.3d at 1104–05 (first citing *Berry v. City of Muskogee*, 900 F.2d 1489, 1506 (10th Cir. 1990) (rejecting an Oklahoma state law that limited survival damages to property loss and lost earnings as inconsistent with § 1983); and then citing *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) (holding the same for a New York law barring punitive damages in § 1983 survival actions)).

[7] Although district courts in our circuit once were split over the availability of loss of life damages under § 1983, they are unanimous after *Chaudhry*. *See Estate of Casillas v. City of Fresno*, No. 16-CV-1042, 2019 WL 2869079, at *16 (E.D. Cal. July 3, 2019) ("Critically, . . . the cases in California federal district courts denying survival damages, including 'loss of enjoyment of life' damages, are pre-*Chaudhry*; and courts in this district have authorized hedonic damages in the post-*Chaudhry* landscape.").

more than) the ban on pre-death pain and suffering damages. Following *Chaudhry*, we therefore hold that § 377.34's prohibition of loss of life damages is inconsistent with § 1983.

The Defendants' attempts to distinguish *Chaudhry* fall flat. First, the Defendants argue that the injury in this case is different because unlike pre-death pain and suffering, a person cannot "actually experience" the phenomenon of being dead. But we already rejected this quasi-metaphysical argument in *Chaudhry* when we endorsed the Seventh Circuit's analysis in *Bell*, which identified the rationale behind Wisconsin's restrictive statute—"that the victim once deceased cannot practicably be compensated for the loss of life to be made whole"—and, in light of § 1983's broad remedial purpose and deterrence goal, rejected the state law anyway. *Bell*, 746 F.2d at 1236, 1239–40.

Second, the Defendants contend that the damages in this case are already adequate: Even if Valenzuela's family could not recover the $3.6 million loss of life award, they would still receive $9.6 million in pre-death pain and suffering and wrongful death damages, which sufficiently serves § 1983's deterrent purpose. But the above awards address different injuries. One can endure pain and suffering separately from dying, while another can die painlessly and instantly. "[T]o further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 258–59 (1978). Additionally, such a framework would still preclude recovery for the decedent who is penniless, without family, and killed immediately on the scene. That reading is not tenable in light of § 1983's remedial purpose. *See Zinermon v. Burch*, 494 U.S. 113, 124

(1990) ("[Section] 1983 was intended not only to . . . provide a remedy for violations of civil rights 'where state law was inadequate,' but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice.'" (citation omitted)).

Finally, the Defendants argue that loss of life damages are too speculative because juries have never experienced death. But juries are regularly asked to assess damages without direct sensory experience of the issue before them—including, in this case, for pre-death pain and suffering. And it is still better for juries to decide whether a plaintiff has received sufficient compensation than for our court to draw arbitrary lines denying compensation entirely.[8]

At bottom, the Defendants ask us to overrule *Chaudhry*. Not only is this outside our authority as a three-judge panel, but it is also inconsistent with the Supreme Court's repeated reminders of § 1983's goals and remedial purpose.

AFFIRMED.

LEE, Circuit Judge, dissenting:

Fermin Valenzuela, Jr. did not deserve to die, even if he defied police orders and forcefully resisted arrest. His father did not deserve to lose his son. His two children did not deserve to lose their father. Valenzuela's family deserves compensation. And the jury agreed: In a civil suit filed by his estate and his surviving family members against the City

[8] Contrary to the dissent's contention that we are mandating maximizing recovery, we continue to leave it to juries to decide the appropriate award in each case.

of Anaheim and its police officers, the jury awarded $13.2 million in damages — $6 million for pre-death pain and suffering, $3.6 million for wrongful death, and another $3.6 million for loss of life.

As tragic as his death was, we must follow the law — and California law prohibits damages for loss of life. That means Valenzuela's estate and his family members should receive $9.6 million instead of $13.2 million. The majority opinion, however, holds that they are entitled to the full $13.2 million, ruling that federal common law supplants California law because it is "inconsistent" with § 1983's goals of deterrence and compensation. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014).

But an award of $9.6 million (for wrongful death and pain and suffering) is not "inconsistent" with deterrence or compensation. We can respect state law enacted by the people of California *and* still meet the twin policy goals of §1983. We should not jettison California state law to maximize damages for §1983 plaintiffs. I thus respectfully dissent.

I. Section 1983 does not require us to maximize damages.

Section 1983 serves as a powerful tool to vindicate the constitutional rights of people who have suffered harm at the hands of the government. 42 U.S.C. § 1983. But because federal law does not provide for damages in § 1983 actions, state law governs the availability of damages unless it is "inconsistent" with the twin policy goals of § 1983, compensation and deterrence. *See Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978); 42 U.S.C. §1988(a). And for better or worse, California decided to bar "loss of life" damages in civil cases (though it allows a panoply of other

damages, including wrongful death and punitive damages). Cal. Civ. Proc. Code § 377.34.[1] So we must determine whether California's ban on loss of life damages is "inconsistent" with the goals of compensation and deterrence. *Id*.

Our analysis should start with the Supreme Court's decision in *Robertson v. Wegmann,* 436 U.S. 584 (1978). The plaintiff there had sued the government for violating his constitutional rights but he passed away before trial, and his estate tried to substitute itself as the plaintiff. Louisiana's statute, however, extinguished a person's tort claims at death, thus preventing an estate from recovering *anything* under § 1983. And because the plaintiff had no family members when he died, Louisiana's law effectively barred any damages. 436 U.S. at 590–91. While the unique facts of that particular case led to no recovery and perhaps an unjust result, the Court held that the state law was not "inconsistent" with § 1983 because "most Louisiana actions survive the plaintiff's death." *Id*. Writing for the Court, Justice Marshall explained that despite "the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." *Id.* at 590–91. In other words, the Court suggested that § 1983 does not trump state

[1] Section 377.34 provides: "In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred *before death*, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement." Cal. Civ. Proc. Code § 377.34 (emphasis added).

law just because it does not provide maximum recovery for plaintiffs.

But *Robertson* left open a more complex question: Would a similar state law conflict with § 1983 if the challenged governmental conduct directly caused the plaintiff's death? *Id.* at 594. In *Chaudhry*, we answered this question in the narrow context of damages for pre-death pain and suffering. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014). In that case, a police officer shot and killed a 21-year-old autistic man sleeping in front of an apartment building. The police officer alleged that he had lunged towards him with a knife, a claim that was hotly contested at trial. A jury awarded his estate $1 million for pain and suffering, but California law bans damages for pre-death pain and suffering (though California allows someone who does *not* die to sue for pain and suffering). This court reasoned that in "cases where the victim dies quickly" and does not suffer any pain and suffering, "there often will be no damage remedy at all." *Id.* The opinion also noted that "a prohibition against pre-death pain and suffering awards for a decedent's estate has the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim." *Id*. Based on the facts of that case, this court held that California's ban on pre-death pain and suffering was "inconsistent" with §1983's goals of deterrence and compensation. *Id.*

The majority believes that *Chaudhry* controls this case. It interprets that decision to allow federal common law to displace not only California's ban on pre-death pain and suffering (which was at issue in *Chaudhry*) but also the prohibition on loss of life damages (which is at issue here). I do not read *Chaudhry* as broadly as the majority does and

believe it would be unwise to expand its reach to loss of life damages (more on that later).

California's bar on loss of life damages does not undermine § 1983's goal of deterrence. This case is a prime example. Not only are the defendants on the hook for $9.6 million, but they will also likely have to shell out millions more in attorneys' fees. An eight-figure judgment deters even the largest city or police department. *Chaudhry* also highlighted the potentially perverse incentive of allowing someone who does *not* die to obtain pain and suffering damages but barring someone who does die from receiving those same damages. *Id.* But that incongruity does not exist for loss of life damages because someone who does not die cannot seek them. Thus, to borrow the language of *Chaudhry*, California's bar on loss of life damages does not make death more "economically advantageous" than injury. *Id.*

Nor does California's bar on loss of life damages undermine the goal of compensation. *Chaudhry* specifically focused on the danger that "there often will be *no damage remedy at all*" if someone dies quickly and experiences no pain and suffering. *Id.* at 1105 (emphasis added). Under those particular facts, California's state law might be "inconsistent" with § 1983's goals of deterrence and compensation. But that is not the case here. Here, even without loss of life damages, Valenzuela's estate and his children will still receive $9.6 million. While no amount of money can replace the loss of Valenzuela's life, that nearly eight-figure award is not *inconsistent* with § 1983's compensatory goal, especially given that pre-death pain and suffering damages are now recoverable under *Chaudhry*.

The majority warns that California's bar against loss of life damages may hypothetically "preclude recovery for the

decedent who is penniless, without family, and killed immediately on the scene." *Maj. Op.* at 11. But the Supreme Court has already rejected that argument: In assessing whether a state law is "inconsistent" with § 1983's goals, we cannot refuse to apply a state law just because it "caus[es] abatement of a *particular* action." *Robertson*, 36 U.S. at 590–91 (emphasis added). Rather, we must take a broader view to see if the state law denies recovery under § 1983 in "*most*" cases. *Id.* (upholding a state damages bar because "most Louisiana actions survive the plaintiff's death"). Put another way, courts cannot abrogate a state law just because it may lead to a seemingly unjust result in a particular § 1983 case. That is why the Court in *Robertson* upheld the Louisiana state law: Even though it meant that the plaintiff's estate would not receive a penny, it was not "inconsistent" with § 1983 because plaintiffs in most cases would still obtain damages.

The majority opinion also suggests that the pain and suffering and wrongful death damages do not adequately compensate Valenzuela's estate and his surviving family members because these "awards address different injuries." *Maj. Op.* at 11. But neither § 1983 nor any court decision suggests that we can ignore a state law unless it mandates damages for each theory of harm suffered by the plaintiff or his survivors. Simply put, we cannot supplant state law to mandate *maximum* recovery for § 1983 plaintiffs. Rather, we need to address whether the state law is inconsistent with § 1983's twin goals of deterrence and compensation. And here, I believe that $9.6 million satisfies both of those important goals, and that we should thus respect the decision by the people of California to bar loss of life damages.

II. We should revisit *Chaudhry*.

While I do not believe *Chaudhry* controls this case, this court should still revisit that decision in a future en banc proceeding because it misconstrued *Robertson* and relied on flawed assumptions.

First, *Chaudhry* ignored the Supreme Court's guidance about when a state law is "inconsistent" with § 1983's goals of deterrence and compensation. The opinion incorrectly suggested that if a state law denies recovery in a particular case or in *some* cases, that law conflicts with § 1983. *Chaudhry*, 751 F.3d at 1104 (rejecting California's ban on pre-death pain and suffering damages because the "practical effect" would be to "often . . . eliminate . . . damage awards for the survivors of people killed by violations of federal law").

But the Supreme Court in *Robertson* rejected such an expansive reading of the word "inconsistent." The Court upheld the Louisiana law limiting damages — even though it meant that the plaintiff in that case would receive nothing — because plaintiffs in "most" § 1983 cases would still obtain recovery. *Robertson*, 436 U.S. at 590–91. As the Court explained, if "success of the §1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Robertson*, 436 U.S. at 593. Put another way, a state law is "inconsistent" with §1983's goals only if "most" §1983 plaintiffs would not obtain recovery. But *Chaudhry* turned *Robertson* on its head and implied that a state law is inconsistent whenever it denies recovery in any case or some cases.

Second, the facts in *Chaudhry* do not support its reasoning. The court refused to apply California's law banning pre-death pain and suffering damages because following it would supposedly "eliminate . . . damage awards for the survivors of people killed by violations of federal law." *Chaudhry*, 751 F.3d at 1104. But the facts of the case belie that assertion: "The jury awarded $700,000 to the Chaudhrys for their wrongful death claim under state law." *Id.* at 1102. Curiously, despite briefly mentioning this fact in the background section of the opinion, the *Chaudhry* court never addressed why a wrongful death damages of $700,000 would not serve the goals of compensation and deterrence. So contrary to *Chaudry*'s implication, California law compensated the plaintiffs, even without pre-death pain and suffering damages. This omission strikes at the core of *Chadhry*'s reasoning for refusing to follow state law.

Finally, the opinion relied on a dubious assumption that state law limiting damages would not deter police officers and in fact may encourage them to deliberately kill suspects. It observed that "a prohibition against pre-death pain and suffering awards for a decedent's estate has the perverse effect of making it more economically advantageous for a defendant to kill rather than injure his victim." *Chaudhry*, 851 F.3d at 1104.

That apparent assumption is not rooted in reality. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 50 n.17 (1980) (Rehnquist, J., dissenting) (rejecting the claim that law enforcement officers "would intentionally kill the individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability under *Bivens*").

Chaudhry does not provide any support for its assumption that law enforcement officers would deliberately

choose to kill, rather than injure, a suspect to avoid potential liability for pre-death pain and suffering. Most fatalities involving law enforcement occur during chaotic, messy, and dangerous situations in which officers must make split-second decisions to protect others' lives or their own. *See* Jonathan Nix, "On the Challenges Associated with the Study of Police Use of Deadly Force in the United States: A Response to Schwartz & Jahn," (28 Jul. 2020), *PLoS One* 15(7); e0236158 at *3, *available at* https://www.ncbi.nlm.nih.gov/pmc/ articles/PMC7386827/ pdf/pone.0236158.pdf. (noting that "roughly 87% of the 5,134 citizens fatally shot by police officers since 2015 were in possession of a potentially deadly weapon") (citations omitted). All these deaths are tragic, and many were unwarranted in hindsight. But no evidence even remotely suggests that these police officers acted out of some macabre desire to seek an "economically advantageous" outcome.

In other situations, a seemingly normal investigation or arrest spirals out of control, leading to a tragic death. That is what happened here. Acting on a woman's complaint about a suspicious man following her, two Anaheim police officers approached Valenzuela in a laundromat. An officer asked him to put his hands behind his back, but he did not comply. In the ensuing struggle, all three men fell to the ground, and one of the officers put him in a neck restraint. But Valenzuela slipped away and fled the laundromat. One of the officers tased him multiple times, but Valenzuela sprinted across several lanes of traffic. The officers caught up to him and tried to handcuff him, but Valenzuela resisted. During this five-minute encounter, the officers told him to stop resisting 41 times, all to no avail. Once the officers finally managed to put handcuffs on Valenzuela, the officer who had him in the neck restraint released him immediately. Sadly, Valenzuela had lost consciousness and died eight

days later. As I noted in our related decision, I believe that the officers used excessive force because it was obvious that Valenzuela was in distress. But I do not believe they made a calculated decision to kill him because it would be "economically advantageous." Indeed, once they realized Valenzuela was unconscious, they tried to resuscitate him through CPR.

Finally, even the most malevolent officer would not kill a suspect because it would be "economically advantageous." Almost all police officers today do not face any personal financial liability because the government generally indemnifies them.[2] The real deterrents to police misconduct are not monetary damages (which they do not personally pay anyway), but firings, negative media attention, and potential criminal liability.

Although we must construe §1983 with a broad remedial purpose, we cannot ignore the tension between *Chaudhry* and the actual law that Congress enacted. If Congress really thought that this court's job is to overwrite state law to maximize recovery, why preserve state damages law? *Robertson*, 436 U.S. at 593. Surely, a uniform federal scheme would better accomplish that goal. Instead, Congress told us to respect states' sovereignty unless their law was "inconsistent" with our own. 42 U.S.C. § 1988. *Chaudhry*

[2] *See* Joanna C. Schwartz, "Qualified Immunity and Federalism All the Way Down," 109 Geo. L.J. 305, 321 (2020) (discussing the development of state indemnification practices after the Supreme Court invented modern qualified immunity). *See also* Martin A. Schwartz, "Should Juries Be Informed that Municipality Will Indemnify Officers' § 1983 Liability for Constitutional Wrongdoing?," 86 Iowa L. Rev. 1209, 1217 (2001) (discussing the common practice of state indemnification of officers entitled to qualified immunity).

ignores Congress' directive as well as the will of the California people.

I respectfully dissent.