No. 13-514

IN THE

Supreme Court of the United States

RITA HOAGLAND,

Petitioner,

v.

ADA COUNTY, *et al.*

Respondents.

On Petition for a Writ of Certiorari
to the Idaho Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This Court already decided in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), that the question presented here – whether 42 U.S.C. § 1988(a) permits reliance on state abatement rules that foreclose Section 1983 claims involving fatal constitutional violations – warrants its consideration. Pet. 22-23. On the merits, respondents never engage with this Court's decision, in the closely analogous context of *Bivens* actions, that foreclosing suits for fatal constitutional violations would "frustrate" full deterrence and vindication of constitutional commands in an "important way." *Carlson v. Green*, 446 U.S. 14, 25 (1980) (internal quotation marks omitted). Respondents thus are left to offer a barrage of vehicle arguments. All are unpersuasive.

Respondents first stress that "virtually all other states" take a position contrary to Idaho's. BIO 19. Rather than providing a reason to deny certiorari, this fact underscores the need for review. This Court regularly grants certiorari to deal with states that adopt outlier practices with respect to prisoners' constitutional rights. *See, e.g., Johnson v. California*, 543 U.S. 499, 508 (2005) (noting that California's prisoner-assignment policy differed from that of "[v]irtually all other States"); *Hope v. Pelzer*, 536 U.S. 730, 747 n.13 (2002) (Alabama was "the only State to authorize the use of the hitching post").[1]

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[1] If anything, respondents' argument provides a basis for summary reversal, not for denying review.

Respondents also suggest that the common-law origins of Idaho's abatement law and petitioner's failure to pursue a wrongful-death action make a difference. But neither does. Nor do respondents' quibbles regarding the caption warrant credence. This Court should grant certiorari to finish the job it began in *Jefferson*.

I. The Decision In This Case Deepens The Conflict Among The Lower Courts.

Respondents do not deny that the Second, Sixth, Seventh, and Tenth Circuits have held that state rules that abate Section 1983 claims involving fatal constitutional violations fail the consistency proviso of Section 1988(a). *Compare* Pet. 13-16 *with* BIO 14-15. Nor do they seriously deny that the Fifth and Eighth Circuits have held that states must permit such claims to proceed. *Compare* Pet. 16-17 *with* BIO 16-17. Instead, respondents advance the remarkable proposition that this case does not deepen the existing conflict between those courts and the Alabama Supreme Court because those cases involved "statute[s]" while Idaho is applying the "common law." BIO 14 (emphasis deleted). Not so.

1. Respondents nowhere explain why the purported distinction between state statutory and common law would make a difference to any of the circuits that refused to abate Section 1983 cases involving fatal constitutional violations. Respondents provide no basis for thinking those courts would have decided otherwise had the rules before them been products of state decisional law rather than statutes. Nothing in those courts'

reasoning depended on the source of those state rules.[2]

2. The text of Section 1988(a)'s consistency requirement reinforces that it applies whether the state rule is one of statute or common law. Section 1988(a) recognizes that in some jurisdictions the common law will be "modified and changed by the constitution and statutes of the State," but it permits courts to use that "common law" only "so far as the same *is* not inconsistent with the Constitution and laws of the United States." (Emphasis added.) Had Congress meant to impose a consistency requirement only with respect to the state "statutes," it would not have used the singular verb "is."

3. In any event, respondents' claim that "Idaho applies an unchanged common law rule of abatement dating back to the early 1800s" BIO 14, is false. First, Idaho's adoption of the English rule is based on a state statute. Idaho Code § 73-116. Second, Idaho in fact has "modified and changed" the common law.[3] Finally, in cases like petitioner's, Idaho today applies a far more perverse rule of its own legislation: causes of action "shall not abate upon the death of the injured person *from causes not related to the wrongful act or negligence*." *Id.* § 5-327(2) (emphasis

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[2] If anything, their refusal to apply even state statutes "modif[ying] the simple, if harsh, 19th-century common-law rule," *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978), would apply *a fortiorari* to state decisions to keep the rule.

[3] Respondents themselves place huge weight on one such change: Idaho's adoption of a wrongful-death statute. *See* BIO 26-29.

added). In other words, among Section 1983 suits *only* suits for fatal violations remain subject to the nineteenth-century rule; cases involving nonfatal violations survive. If, for example, police were to use excessive force in subduing a mentally ill suspect who subsequently committed suicide because he was denied medical attention, Idaho would permit the excessive use of force claim to proceed even as it forecloses the medical care claim. That result is not only "inconsistent with the Constitution," it is absurd.

II. The Idaho Wrongful-Death Statute Has No Bearing On The Question Presented.

Respondents criticize petitioner for not pursuing a state-law wrongful-death action. BIO 12, 26-29, 36. Their argument is both irrelevant and mistaken.

1. The availability of relief under Section 1983 is independent of whether a state-law cause of action exists. *See* Pet. 32-34. Under *Monroe v. Pape*, 365 U.S. 167 (1961), "[i]t 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." *Id.* at 183; *see also Zinermon v. Burch*, 494 U.S. 113, 124 (1990). Petitioner was thus not required to bring a claim under Idaho's wrongful-death statute. Her understandable decision to abandon that claim, Pet. 34, far from denying this Court "critical context," BIO 26 (capitalization omitted), is irrelevant.

2. Moreover, respondents fundamentally misunderstand the nature of wrongful-death claims.

As this Court long ago pointed out, "[w]rongful-death statutes are to be distinguished from survival statutes." *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 576 n.2 (1974). Wrongful-death statutes "permit recovery for harms suffered by the deceased's *family* as a result of his death." *Id.* (emphasis added). By contrast, survival statutes permit the prosecution of "any claims for personal injury *the deceased* would have had, but for his death." *Id.* (emphasis added).

So respondents are simply wrong to claim that Idaho's wrongful-death statute, Idaho Code § 5-311, "is designed to serve the same purpose as a survival action under Section 1983." BIO 26. The Idaho Supreme Court could not be clearer: "Idaho's wrongful death action does not create a survival action, but an entirely new cause of action on behalf of a decedent's heirs and personal representatives." *Castorena v. Gen. Elec.*, 238 P.3d 209, 216 (Idaho 2010). Accordingly, that court has rejected the argument that "a wrongful death action is treated like a continuation of the right that the decedent had to bring a cause of action for his injury." *Id.*; *see also Vulk v. Haley*, 736 P.2d 1309, 1312 (Idaho 1987) (wrongful-death lawsuits do not involve the "rights of a decedent").

The distinction between wrongful-death claims and survival actions matters. In many Section 1983 cases involving fatal constitutional violations, including this one, the wrongful-death damages available to surviving family members are likely to be minimal: inmates denied medical care, particularly

those denied mental health services, are seldom high wage earners whose deaths leave their families financially unsupported (BIO 27-28).[4] Deterrence will be achieved only if damages take into account the injury suffered by the direct victim of the constitutional violation. That injury consists not only of lost wages, but also of pain and suffering and the loss of the future enjoyment of life. Under respondents' theory, there would, for example, be virtually no damages in a case where the victim of a constitutional violation was a dependent, rather than a breadwinner. That result would be deeply "inconsistent with the Constitution and laws of the United States," and nothing in federal law commands it.

III. Respondents' Other Vehicle Arguments Are Meritless.

Respondents offer two other arguments for why this case is a poor vehicle for resolving the question

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[4] Respondents' assertion that petitioner "err[ed]" in pointing to suicide as the leading cause of death in local jails, BIO 23 n.17, is misplaced. The federal government report on which petitioner relied so characterized it. *See* Bureau of Justice Statistics, Mortality in Local Jails and State Prisons, 2000-2010 – Statistical Tables 2 (Dec. 2012), *available at* http://tinyurl.com/hoagland2. Respondents' contrary assertion rests on grouping all illnesses in order to exceed the number of suicides. Even so, respondents cannot deny that suicide accounts for roughly a third of all jail deaths. And their argument that the question presented is unimportant because few of those prisoners die in Idaho, BIO 22-23, is hard to take seriously.

presented: First, they claim that the petition "names the wrong petitioner" because petitioner advances arguments that belong solely to the decedent's estate. BIO 24 (capitalization omitted). Second, respondents claim that all the respondents were appropriately dismissed on other grounds. BIO 29-30. The first argument rests on a combination of wordplay and mischaracterization of Idaho law. The second argument ignores both the posture of this case and this Court's practice.

1. Petitioner has appeared throughout this lawsuit in two capacities – "individually and in her capacity as personal representative of the estate of Bradley Munroe." Pet. ii. Sometimes, the case caption has spelled that out, *see, e.g.*, Pet. App. 36a, 38a, 61a, 111a. Sometimes, including before the Idaho Supreme Court, the caption has referred to her solely as "Rita Hoagland," *e.g.*, *id.* 1a, 2a. But it has always been understood by all concerned that petitioner was proceeding in both capacities: the Idaho Supreme Court described this case as "a 42 U.S.C. § 1983 civil rights action brought by Rita Hoagland, ("Hoagland") on behalf of herself and the estate of her deceased son, Bradley Munroe." Pet. App. 3a.

Petitioner continues to appear in both capacities before this Court, and respondents nowhere suggest any confusion on that point. Petitioner is therefore baffled by respondents' assertion that "she is not listed as the administrator of the estate." BIO 25. Idaho law nowhere uses the term "administrator" to describe the party authorized to bring or maintain a suit stemming from a decedent's injuries. Instead, it uses the terms "heirs or personal representatives on

their behalf" in its wrongful-death statute, Idaho Code § 5-311(1), and "personal representative" in its truncated survival statute, *id.* § 5-327. "Personal representative" – the statutory term – is precisely how petitioner has always described herself.[5]

Respondents' argument that "the petition raises issues concerning a party – i.e., the decedent's estate – who is simply not a petitioner in this Court," BIO 26, is even more misguided. As a matter of Idaho law, the cause of action created by the Idaho wrongful-death statute "does not benefit the estate." *Russell v. Cox,* 148 P.2d 221, 223 (Idaho 1944). The Idaho Supreme Court reiterated recently that "a decedent's estate is not legally entitled to recover damages for the decedent's wrongful death; only the decedent's heirs may recover those damages, either through an action brought by the heirs themselves or through an action brought by the estate on behalf of the heirs." *Farm Bureau Mut. Ins. Co. v. Eisenman*, 286 P.3d 185, 189-90 (Idaho 2012). Thus, to the extent that Section 1988(a) directs courts to use state law to determine who should maintain a Section 1983 action challenging unconstitutional treatment of a decedent, petitioner Hoagland is the proper party to appear before this Court. She is both Munroe's heir,

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[5] That the caption in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), used the word "Administrator," BIO 25, may be an artifact of Alabama law. *Cf. United States v. Windsor*, 133 S. Ct. 2675 (2013) (referring to respondent as an "executor"). And respondents' citation of *Jones v. Hildebrant*, 432 U.S. 183 (1977), is seriously misleading. The problem there was that the petitioner had *never* proceeded in a representative capacity, not that she had omitted magic words in the caption of her petition.

see Idaho Code §§ 15-2-102, 15-2-103(b) (establishing that Hoagland is Munroe's heir because he died intestate and the estate of an intestate passes to the parents where the decedent has neither a spouse nor children), and she was duly appointed under Idaho law as the personal representative of his estate, *see* R. 1452.

2. Respondents' argument that certiorari should be denied because they might conceivably win on remand, BIO 29-30, is no reason for denying review. Pet. 27. This Court often grants review to determine whether a petitioner's legal theory states a cause of action, even in cases where there is the possibility that the defendants will have other defenses on remand. Indeed, in *Carlson v. Green* itself, there was nearly a decade of subsequent litigation involving whether the defendants were entitled to qualified immunity. *See, e.g.*, *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989), *cert. denied*, 498 U.S. 949 (1990). And this Court frequently grants certiorari in criminal cases where the prosecution as respondent argues that the alleged constitutional error would be found harmless on remand.

In this case, the Idaho Supreme Court never suggested that respondents would have prevailed had petitioner's suit not been abated at the outset. To the contrary, it held that all of petitioner's arguments as to why the trial court erred were "rendered moot and will not be considered." Pet. App. 23a. The numerous errors in the trial court's reasoning that petitioner raised in her appeal to the Idaho Supreme Court should be addressed on remand.

IV. Categorically Foreclosing Section 1983 Claims For Fatal Constitutional Violations Is "Inconsistent With The Constitution."

The rule Idaho applied here fails Section 1988(a)'s "important proviso that state law may not be applied" when it is "inhospitable to survival of § 1983 actions" and has an "adverse effect on the policies underlying § 1983," *Robertson v. Wegmann*, 436 U.S. 584, 590, 594 (1978). Idaho can cling to common law abatement for state-law torts, but "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978).

1. Contrary to respondents' argument, BIO 34-36, Idaho's rule finds no support in *Robertson*. The Louisiana rule at issue there did not foreclose an entire category of Section 1983 suits. Instead, "most Louisiana actions survive the plaintiff's death." 436 U.S. at 591. Indeed, the claim at issue in *Robertson* itself would have survived had the original plaintiff left behind "a spouse, children, parents, or siblings." *See id.* at 587. It was only because "no person with the requisite relationship to [the decedent] was alive at the time of his death," *id.* that the claim abated. Thus, the last sentence of this Court's opinion emphasized that the case concerned the "mere fact of abatement of a particular lawsuit." *Id.* at 595. Here, by contrast, Idaho abates the entire category of Section 1983 claims for fatal constitutional violations.

2. This Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), confirms the "essentiality of the

survival of civil rights claims for complete vindication of constitutional rights." *Id.* at 24 (internal quotation marks omitted). *See* Pet. 28-30. Respondents misleadingly quote *Robertson* for the proposition that it would be "far-fetched" to worry that categorical abatement might undermine deterrence. BIO 35. But respondents ignore that in *Carlson,* this Court expressed precisely that concern. Quoting instead *Robertson*'s insistence that a government official "contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him," 446 U.S. at 25 (quoting 436 U.S. at 592), this Court observed that foreclosing suits for fatal constitutional violations would materially undermine full deterrence because "an official could know at the time he decided to act whether his intended victim's claim would survive," *id.* n.12. *See also* Pet. 32.

3. Especially in light of Section 1988(a)'s directive that common law apply only when it is consistent with constitutional values, this Court should reject respondents' reliance on nineteenth-century practice, BIO 31-33.

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court confronted the question whether an 1886 decision rejecting the availability of wrongful-death claims under maritime law "should any longer be regarded as acceptable." *Id.* at 376. Holding that it should not, this Court observed that "the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into [the twentieth] century – the felony-merger doctrine." *Id.* at 382. And it explained that "nothing in ordinary notions of justice suggests that a

violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous.'" *Id.* at 381. Given every states' adoption of wrongful-death statutes, this Court concluded that the rejection of common-law abatement "has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Id.* at 390-91. Thus, when it came to maritime law – "a species of judge-made federal common law," *Yamaha Motor Corp v. Calhoun*, 516 U.S. 199, 206 (1996) – this Court rejected rigid adherence to the English rule as "sharply out of keeping with the policies of modern American maritime law." 398 U.S. at 388.

So too with respect to modern American constitutional law. In *Carlson*, when this Court crafted "a uniform federal rule of survivorship," 446 U.S. at 23, it could have adopted the rule respondents invoke here. It didn't. Instead, it held that such a rule would "frustrate in [an] important way the achievement of the goals of *Bivens* actions." *Id.* at 25 (internal quotation marks omitted). Respondents have provided no argument as to why the same is not true with respect to achieving the goals of Section 1983.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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