

No. 07-56708

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LEILANI GUTIERREZ, a minor, by and through her Guardian Ad Litem, June Lee Gutierrez, *et al.*,

Plaintiffs and Appellees,

v.

UNITED STATES OF AMERICA,

Defendant and Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,
HONORABLE ALICEMARIE H. STOTLER, CHIEF JUDGE
CASE NO. SA CV 04-1045 AHS (ANx)

APPELLEES' OPPOSITION BRIEF

Wylie Aitken
Darren O. Aitken
Aitken Aitken & Cohn
3 Imperial Promenade, Suite 800
Santa Ana, CA 92707-2555

Steven Lansford
Stoody Mills Lansford Walker & Doyle
20320 Birch St., Suite 300
Newport Beach, CA 92660

Peter R. Afrasiabi
Christopher W. Arledge
Turner Green Afrasiabi & Arledge LLP
535 Anton Boulevard, Suite 850
Costa Mesa, CA 92626
Tel: 714-434-8753
Fax: 714-434-8756

*Attorneys for Defendants and Appellees
Leilani Gutierrez, et al.*

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I.

INTRODUCTION

The government argues that Leilani Gutierrez is the lucky recipient of a windfall. The truth is otherwise.

Before Mother's Day 2002, Leilani is a healthy and happy four-year-old child. She enjoys the piano, and loves horses. She often pretends to be a horse, playfully spending hours every day crawling on all fours with a tie or string hanging from her pants as a tail. She is young and carefree, her life full of promise. And as she celebrates Mother's Day at the mall with her mom, eating lunch and riding the carousel, she is enjoying life as only an innocent child can.¹

But in an instant, Leilani's life is forever altered. As Leilani and her family head home, an employee of the government runs a red light and crashes into their car. Leilani is left paralyzed from the neck down, her condition irreversible. Unable to breathe on her own, Leilani Gutierrez's life is controlled by invasive tubes and respirators. She requires constant medical supervision. She must endure the embarrassment and discomfort of diapers for the remainder of her life. And no

¹ Appellees' Supplemental Excerpts of Record ("SER") 130-36 & 149-55. For the Court's reference, when this brief cites to "SER 1" that indicates page 1 of the SER where the "1" is the handwritten and circled page number in the lower right corner of the SER, all of which pages in the SER have been sequentially numbered as such so as to avoid confusing the SER citation reference with the internal, underlying numbering of any such record materials.

matter how well she is cared for, Leilani will probably die by age 35, decades prior to her natural expected lifespan.

She will never again play horse. She will never again ride one. She will never again walk around the mall with her mother. She will never again hug her mother, or anybody else. She will never open a present on Christmas morning. She will never play a sport or a musical instrument. She will never play tag. She can never leave her wheelchair or bed, forever tied to the machines that breathe for her. Leilani will never have a family of her own, nor be free of the fear of imminent death, which could come at any time due to a malfunctioning piece of equipment or an inattentive caretaker.

To compensate Leilani for this unimaginable loss, Chief Judge Alicemarie H. Stotler awarded Leilani \$31 million in non-economic damages, an amount not substantially more than the \$23 million in economic damages that the government concedes is required just to keep her alive until the age of 35. The government never suggested an alternative amount or methodology to assess non-economic damages – not at trial, not during argument, and not in any post-trial procedures. Now, however, and for the first time, the government argues that Leilani got a windfall because, despite its admission that “no amount of money can ever reimburse” Leilani (SER 166:19-22), somehow the amount awarded by Chief Judge Stotler is not only wrong, but is clearly erroneous. Leilani Gutierrez, common sense, and numerous legal authorities beg to differ.

The government's argument rests on twin assertions: (1) that the award for non-economic damages – that is, for, among other things, Leilani's pain and suffering, her loss of life, and loss of enjoyment of life – is too large in "absolute" terms when compared to similar cases; and (2) that the law requires a particular "ratio" between economic and non-economic damages that is violated by Chief Judge Stotler's award. Neither assertion is consistent with California law, which controls this case, nor Ninth Circuit precedent applying California law. In fact, the government's arguments for a pre-determined "ratio" are arguably sanctionable.

But before this Court even examines the validity of the government's arguments, it should find that the government is estopped from making them. Unbelievably, before the district court, the government argued that Chief Judge Stotler should *not* consider verdicts in other cases, and the government objected to evidence of similar cases offered by Leilani's counsel. Instead, the government argued that the damages award must "be determined based on the evidence presented at trial, [because] each case must stand on its own facts," and the government stressed that "the lack of consistency" in other verdicts "*mandates review of this case based solely on the facts of this case.*" SER 57 n.5 (emphasis added). Unhappy with the outcome of that strategic decision, however, the government now wants to reverse course and criticize Chief Judge Stotler for doing exactly what the government asked her to do. This Court's precedent does not allow such a legal "about-face."

The government also loses on the merits. A comparison of this case to others shows that the award to Leilani is not extraordinary, and such comparisons offer no support for the required finding that Chief Judge Stotler’s award “must have been the result of passion or prejudice” and is “so out of line with reason that it shocks the conscience.” Indeed, the closest available comparison, *Buell-Wilson v. Ford Motor Co.*, 160 Cal.App.4th 1107 (2008), shows that the non-economic damages awarded to Leilani are reasonable even under the government’s mythical “absolute” standard. Moreover, the government’s “ratio” argument is not the law, should never be the law, and it has been suggested that arguing that such a ratio exists under California jurisprudence is frivolous. Furthermore, even if one were to consider the concept of a ratio, even a cursory examination of previous verdicts and published decisions in California demonstrates that Chief Judge Stotler’s decision here is actually conservative.

Given the dispositive, clear error standard of review, the question here is whether Chief Judge Stotler’s non-economic damages award “must have been the result of passion or prejudice” and is “so out of line with reason that it shocks the conscience.” Yet nowhere in its lengthy brief does the government actually say that Chief Judge Stotler acted out of passion or prejudice, and the government fails to offer even a shred of evidence to support such an argument. None exists. Chief Judge Stotler’s decision does not shock the conscience, and there is no basis in this record to conclude that it is clearly erroneous.

II.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291 over this Federal Tort Claims Act (FTCA) case, 28 U.S.C. § 1346(b). The district court's judgment was entered on September 7, 2007, and the government timely filed its notice of appeal on November 5, 2007.

III.

ISSUES ON APPEAL

1. Is the government estopped from arguing that this Court must compare Leilani's award to awards in other cases after it expressly urged the district court *not* to consider verdicts in other cases, and even objected to evidence of such verdicts when offered by Leilani's counsel?
2. Is the district court entitled to no deference even under the clear error standard of review?
3. Should this Court reverse the non-economic damages award to Leilani as excessive where there is no evidence that the award was the "result of passion or prejudice" and where the award is both consistent with the evidence presented and with awards in other, similar cases?
4. Should this Court reverse the non-economic damages award to Leilani on the ground that there is an improper ratio between the economic and non-economic damages where (a) California law, which governs this case, rejects the application

of such a ratio test, (b) the Ninth Circuit has never adopted a ratio test, (c) the proposed ratio test is arbitrary and fundamentally unjust, and (d) the ratio between economic and non-economic damages in this case is more conservative than previous awards approved by the Ninth Circuit and California appellate courts?

IV.

FACTUAL AND PROCEDURAL HISTORY

A. Mother's Day 2002 – the Accident.

The government stipulated to liability because the negligent driving of its employee, Michael Leinert, unquestionably caused Leilani Gutierrez's horrific injuries. Leinert, who was working as a computer specialist for the Nevada Army National Guard, traveled to Orange County for computer training. SER 53. Going about government business, Mr. Leinert ran a red light into an intersection and broadsided the Gutierrez family's SUV. *Id.* The SUV lost control as a result of the impact, hit a utility pole, and flipped over onto the driver's side. *Id.*

It was Mother's Day 2002, and Leilani Gutierrez, 4 years old at the time, was inside that SUV. Leilani and her family were returning from the mall, where they had celebrated Mother's Day by eating lunch, shopping, and riding the carousel. SER 130-37. Leilani's mother, June Gutierrez, and June's brother were able to climb out of the crumpled SUV. But June could not reach Leilani, who was hanging from her child's safety seat, eyes open, and apparently lifeless. ER tab 70

at ¶¶ 58-60; SER 140-47. Bystanders managed to pull Leilani from the SUV and apply CPR. She was rushed to a nearby hospital. SER 122-29.

B. The harm to Leilani.

Before the car accident, Leilani was a strong, healthy, and active four-year old child. ER tab 70 at ¶ 1. But the accident injuries to Leilani were catastrophic, including severe head injuries and bleeding in the brain, a spinal cord injury resulting in tetraplegia, severe and chronic respiratory failure, the complete collapse of her left lung, pulmonary contusion, and trauma to the chest wall and abdomen. *Id.* at ¶¶ 2-3. Between the date of the accident and trial, Leilani was hospitalized no less than 18 times, and was taken to the emergency room on eleven other occasions. *Id.* at ¶¶ 4-6. During that same time period, she also underwent 25 different surgical, diagnostic, and remedial procedures as a result of her injuries. *Id.* at ¶ 5.

Because of those injuries, Leilani will be confined to a wheelchair for the remainder of her life, and she will forever be dependent on a ventilator to breathe. *Id.* at ¶¶ 7-11. She has no sensation below her neck, and she cannot feel or control any of her extremities. *Id.* at ¶¶ 7-8. She will require maximum assistance for all normal, daily activities, including grooming, bathing, eating, and physical transfer from her bed to her wheelchair. None of these conditions will change or improve over her lifetime. *Id.* at ¶ 8. She will never be gainfully employed. *Id.* at ¶ 40.

Before the accident, Leilani was four years old and had a life expectancy of eighty-one years. As a result of these injuries, Leilani has a shortened life expectancy of about 35 total years. *Id.* at ¶¶ 10-11.

C. The government takes a position at trial totally inconsistent with its position here.

Because the government stipulated to liability, the trial below “center[ed] solely on the amount of damages directly caused by the accident.” SER 55:18-19. The parties’ primary disputes concerned the scope and expense of a life care plan to help Leilani cope with her injuries, and the amount of non-economic damages. On the issue of non-economic damages, the government took a position in complete contradiction to its argument on appeal. In its Amended Memorandum of Contentions of Fact and Law, the government argued that any non-economic damages award must “be determined based on the evidence presented at trial, [because] each case must stand on its own facts.” SER 57:8-10. Moreover, the government included this critical footnote 5:

California courts criticize the practice of measuring the validity of an award by mechanically comparing average awards for particular injuries to awards in other cases. [Citation.] Such a comparison invades the realm of the factfinder when comparing an award based on comparison of other cases. [Citation.] Plaintiffs in this case attached brief summaries of jury verdicts from other cases that fail to specify similarities and/or differences from the case at hand and, as such, are neither admissible nor informative in deciding this case. Moreover, plaintiffs failed to present numerous other jury verdicts that awarded different amounts for other cases, copies of which are attached hereto. ***This demonstrates the lack of consistency in these***

verdicts and mandates review of this case based solely on the facts of this case.

Id. at n.5 (emphasis added).

Leilani's counsel included summaries of similar cases in its Amended Contentions of Fact and Law, and these summaries showed that California courts had awarded non-economic damages as high as \$41 million for lesser injuries.

SER 17 & 47.

D. The District Court's damages awards.

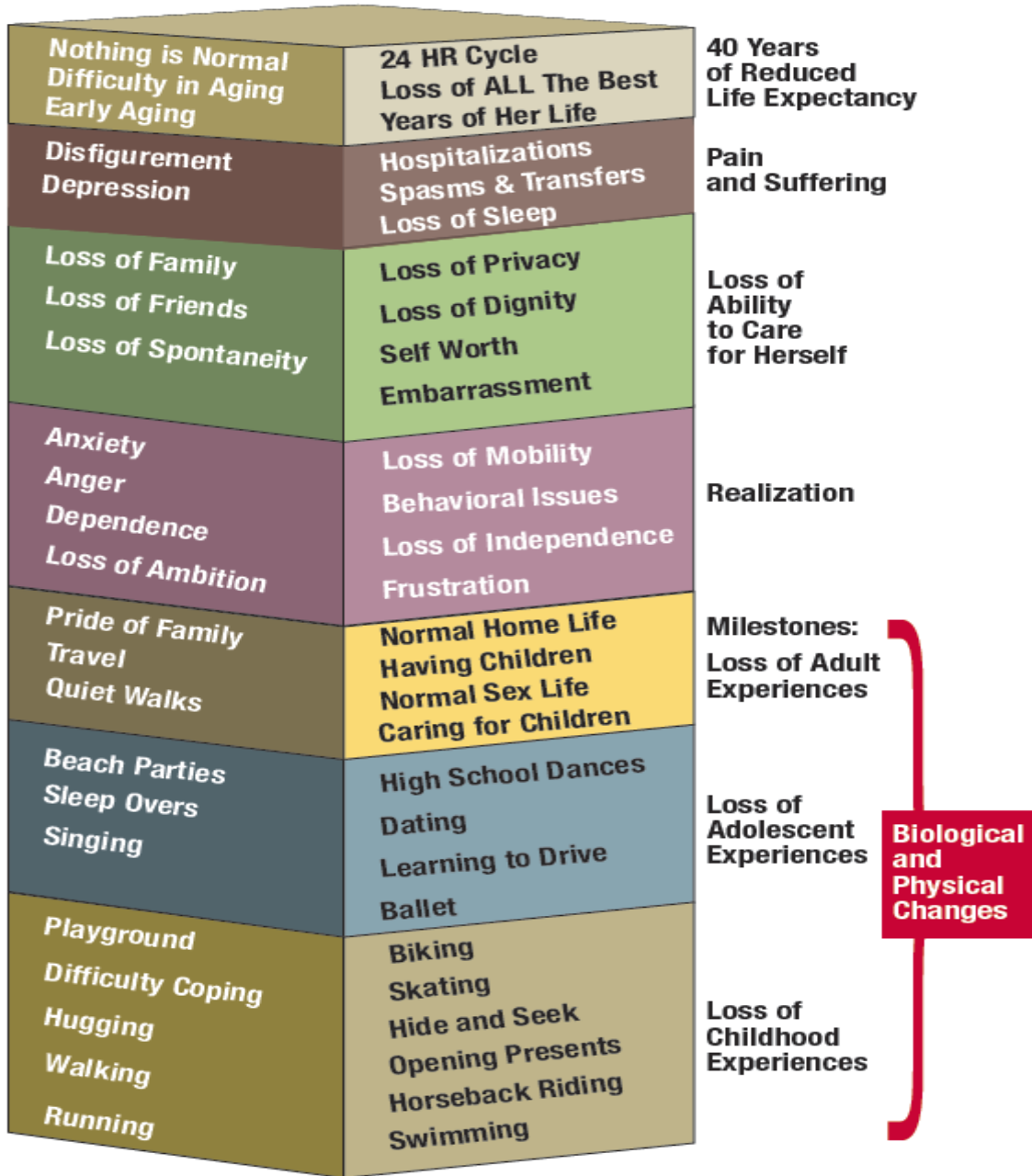
The district court awarded Leilani \$3,840,350 for past medical bills, \$18,667,553 for future medical bills, and \$635,467 for Leilani's future lost wages. The government has not appealed those portions of the verdict. The district court also awarded June Gutierrez \$290,918 in economic damages and \$750,000 in non-economic damages. The government has not appealed those awards either. (Blue Br. at 10; ER tab 70.)

Here, the government appeals only the award of non-economic damages to Leilani. Specifically, the district court awarded Leilani \$31,000,000 in non-economic damages for past and future physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, grief, anxiety, humiliation, and emotional distress. Consistent with the government's request, Chief Judge Stotler's written order does not expressly consider verdicts in other cases. But Chief Judge Stotler does offer a thorough and careful explanation of her \$31

million non-economic damages award. ER tab 70 at ¶¶ 43-53. Specifically, Chief Judge Stotler’s decision rested on detailed and numerous factual findings, none of which the government contends are wrong, including that Leilani lost 46 years of life expectancy, and will suffer due to (a) a constant fear of death, (b) an understanding that her life will end early and all the activities she once had enjoyed are no longer available to her, (c) an inability to control her bodily functions and the loss of any privacy or personal space, (d) significant harm to her self-esteem and sense of self-worth, (e) loss of intimacy and the resulting solitude, and (f) the “loss of all the best years of her life.” ER tab 70 at ¶¶ 43-53.

The following is a demonstrative chart (used in closing argument by Plaintiffs’ counsel) that visually depicts the predicates for the non-economic damages award. The chart summarized for the district court the evidence that was presented at trial detailing the scope and extent of Leilani’s non-economic damages. The chart encompass the loss of basic pursuits and enjoyments at each stage of life—childhood (walking, running, biking, hugging, and more), adolescence (driving, dancing, dating, parties, and more) and adulthood (marriage, children, sexual relationships, travel, and more)—as well as physical pain, utter dependence, dramatically shorter lifespan and the anguish caused by Leilani’s

realization of all she has lost and will lose in the future:



V.

STANDARD OF REVIEW

The clear error standard of review applies in this case. *Shaw v. United States*, 741 F.2d 1202, 1205 (9th Cir. 1984). Clear error is, of course, a deeply deferential standard of review. *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (“[R]eview for clear error is ‘significantly deferential,’ in that we must accept the district court’s factual findings absent a ‘definite and firm conviction that a mistake has been committed.’”) (internal citation omitted).

California law governs the determination of whether an award is excessive, and an award is excessive under California law only if it is “so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion or prejudice.” *Sefert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 508 (1961).

VI.

SUMMARY OF ARGUMENT

The government’s entire appeal rests on Chief Judge Stotler’s alleged passion or prejudice and the assertion that the Court should compare Leilani’s award to awards in other cases. The government, however, made the opposite argument before Chief Judge Stotler, urging the district court *not* to consider awards in other cases and instead award damages “based solely on the facts of this case.” The government’s new position is an impermissible about-face. A party

cannot make a strategic election at trial and, dissatisfied with the consequences of its own election, contend the opposite on appeal. Thus, the government is estopped from making its appellate arguments. *See Yniguez v. State of Arizona*, 939 F.2d 727, 738-39 (9th Cir. 1991), *abrogated on other grounds*, 520 U.S. 43 (1997).

The government's appeal also rests on a distortion of the standard of review. While the government concedes that this Court reviews the district court's award for clear error, the government also contends that this Court can exercise searching scrutiny because it is in as good a position as the district court to decide the issues before it. Not true. Clear error review is "significantly deferential." *Silva*, 279 F.3d at 835. Significant deference is appropriate in light of the fact that the district court saw the witnesses and documentary evidence first-hand, whereas this Court has only a "cold record" – a record that is devoid of the opportunity to observe testimony in court, the credibility of a mother, a child, a father, a nurse, doctors and others, and their expressions of the impact on the quality of life of an innocent child.

The government's substantive arguments have no merit whatsoever. The government's first contention – that the award to Leilani is too large in "absolute" terms when compared to other cases – is belied by the fact that in the closest comparison case, *Buell-Wilson*, 160 Cal.App.4th at 1107, a California Court of Appeal awarded \$18 million in non-economic damages for injuries much less

severe than Leilani's. Moreover, multiple California cases have resulted in non-economic damages awards comparable to or even larger than Leilani's, and the cases cited by the government are irrelevant because they come from other jurisdictions, are at least 20 years old, and involve very different circumstances and injuries.

Finally, the government is wrong to argue that the damages award is excessive because the "ratio" of economic to non-economic damages is too large in comparison to the ratios of damages found in other cases. The argument that economic and non-economic damages are tied by some numerical "ratio" has been rejected in California as frivolous (and California law controls here), and this Court has never accepted it. Nor *should* this Court accept it, because the theory is unprincipled, unjust, and arbitrary. In any event, the government is trapped by the fact that the ratio here is consistent with awards in other cases – in fact, much lower than most – and cannot be regarded as excessive on this basis.

Under the law, Chief Judge Stotler was tasked with determining the damages that will properly compensate Leilani. This Court is only to step in if the district court's order "shocks the conscience" and is the result of "passion or prejudice." The government offers no evidence or argument sufficient to overcome this deferential standard. In fact, to suggest that Chief Judge Stotler was overcome by passion and prejudice, thereby entering an award that shocks the conscience, stretches credibility past the breaking point. This Court must affirm the judgment.

VII. ARGUMENT

The government makes two major substantive arguments in its attack on Chief Judge Stotler’s ruling. First, the government contends that the \$31 million non-economic damages award is too large compared to the amounts awarded in other cases. Second, the government contends that the “ratio” between non-economic to economic damages is too great when compared to such alleged ratios found in other cases. We address each of these arguments in turn, but first address the judicial estoppel that precludes the government from advancing these arguments as well as the errors the government makes in attempting to eviscerate the controlling standard of review.

A. The government is estopped from arguing for a comparative methodology.

Both of the government’s assignments of clear error hinge on the contention that the district court erred by failing to make a comparison to other verdicts. *See* Blue. Br. at 10-23 (arguing: (1) that in absolute terms as compared to other cases the non-economic award is too large; and (2) the non-economic to economic ratio is too large compared to other cases). As such, the government urges this Court to adopt a comparative methodology to test the non-economic award to Leilani. *Id.* However, the government took the exact opposite tack before the district court,

arguing that any comparison to other cases was in fact improper and the law “mandates review of this case based solely on the facts of this case.” SER 57 n.5.

Now unhappy that the district court considered this matter “on the facts of this case” as urged, the government asserts Chief Judge Stotler clearly erred in failing to do that which the government asked her not to do. But legal tides do not shift in this manner. Having elected to argue to the district court that a comparative methodology was improper, the government is estopped from arguing for that comparative methodology now. *See Yniguez v. State of Arizona*, 939 F.2d 727, 738-39 (9th Cir. 1991), *abrogated on other grounds*, 520 U.S. 43 (1997).

Yniguez involved a challenge to an Arizona ballot initiative. There, the State of Arizona represented to the district court that it did not want to be a part of the pending voter rights lawsuit, it presented legal arguments in favor of dismissal, and it prevailed. Later, with the sole remaining defendant present, the district court ruled on the merits. The State of Arizona, unhappy with that decision, decided it wanted to be a party to the suit after all so as to challenge the decision. This Court rejected such a shifting sands approach: “[W]e will not allow a party to seek an outcome directly contrary to the result he sought and obtained in the district court. . . . We will not accept such a reversal in position.” *Id.* The “principle concern of the doctrine of judicial estoppel is the integrity of the judicial process.” *Id.* at 739.

The Ninth Circuit deemed the State of Arizona’s actions an “about-face.” *Id.* That “about-face” is effectively the same as the government’s “about-face”

here. The government argued below that other verdicts should not be considered in the analysis of Leilani's non-economic award precisely because a comparison to other verdicts "invaded the realm of factfinder," and that the award should be considered "based solely on the facts of this case." SER 57 at n.5. Chief Judge Stotler proceeded to gauge this case on its facts and in the fact-finder's realm. Only after a decision on the merits was entered that the government did not like – exactly like the State of Arizona's sudden change of heart after the merits decision was reached there – did the government suddenly seek an outcome based upon a legal argument directly contrary to that advanced to the district court. Just as in *Yniguez*, the "[government] should have realized that the district court might accept some but not all of these arguments, and should have made [its] tactical decisions accordingly." *Id.* at 739. Because all of the government's arguments in this appeal hinge on a comparative methodology, this appeal should be rejected under this Court's judicial estoppel doctrine. *See Yniguez*, 939 F.2d at 748-49; *see also Hamilton v. State Farm & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (judicial estoppel may be invoked "because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts.") (internal quotations omitted).

The government reaffirmed its strategic election when it *never* asserted any of these comparison/ratio arguments: (1) during final argument, SER 156-69; (2) in

opposition to the interim Findings of Fact, SER 77-78; (3) in opposition to the final, entered Findings of Fact (ER tab 70), despite the specific request of Chief Judge Stotler to state any objections, SER 192 & 76; or (4) in any post-trial motion.

Accordingly, the government should be held to its strategic election and this Court should reject its appellate “about-face” attempts, which are designed to “suit its current objectives.” *Whaley v. Belleque*, 520 F.3d 997, 1002-03 (9th Cir. 2008) (judicial estoppel prevents party from taking one position to gain an advantage – here, to consider the case on its facts and not consider other verdicts, some larger – and then seeking a second advantage by taking an inconsistent position – here, to consider other verdicts so as to reduce the verdict arrived at on the facts).

B. The government distorts the controlling standard of review.

The government correctly states the standard of review: this Court reviews FTCA awards of damages for clear error, *see, e.g., Shaw*, 741 F.2d at 1205; California law governs the determination of whether an award is excessive; and an award is excessive under California law only if it is “so out of line with reason that it shocks the conscience and necessarily implies that the verdict must have been the result of passion or prejudice.” *Sefert*, 56 Cal. 2d at 508.

But the government proceeds to make a mockery of this standard, ultimately arguing that this Court owes Chief Judge Stotler no deference whatsoever: “in terms of quantification, these kinds of future non-economic losses are as

ascertainable to a panel of this Court as they would be to a District Court Judge.” (Blue Br. at 15.) Not so.

For this dubious proposition, the government cites *Felder v. United States*, 543 F.2d 657, 664 (9th Cir. 1976), but *Felder* does not support the government’s position. There, the panel simply concluded that the appropriate standard of review was clear error, rather than the standard of review applied by Arizona courts. *Id.* But *Felder* itself held that “[t]he calculation of damages ... is a question of fact,” *id.*, and unlike the district court, this Court has only a cold record with which to weigh the evidence presented at trial. Indeed, the *Felder* court was careful to stress that it extended “deference ... to a trial judge's first hand experience with the evidence and [understood] the due regard to be given his opportunity to judge the credibility of the witnesses.” *Felder*, 543 F.2d at 665.

Therefore, while the government might believe that “future non-economic damages are as ascertainable to a panel of this Court as they would be to a District Court Judge,” Blue Br. at 15, the law, and common sense, say otherwise. Chief Judge Stotler heard the witnesses, including Leilani Gutierrez, testify and was able to witness their demeanor. Chief Judge Stotler had this case in her court for over three years. Chief Judge Stotler heard and considered testimony about this case and Leilani’s damages for five full days where the only issue before her was the appropriate quantum of damages. Put simply, this Court is not in the same position to quantify how much distress Leilani suffers as a result of her injuries by way of a

“cold record” review. If the government is correct in its premise, then there is little reason for the district court *ever* to determine the amount of damages; the district court in these FTCA cases should simply find the facts and then let the appellate courts enter the non-economic damages amount. However, this is not the law and it turns on its head the historical roles of the trial and appellate courts. Indeed, the clear error standard of review exists precisely because this Court’s role differs from the district court’s. *See, e.g.,* W. Wendell Hall, STANDARDS OF REVIEW IN TEXAS, 29 Mary’s L.J. 351, 356 (1998) (“Standards of review distribute power within the judicial branch by defining the relationship between trial and appellate courts.”).

Finally, while *Felder* notes that an appellate panel is not bound by Seventh-Amendment considerations when reviewing an award from a bench trial, *id.* at 664, the government is wrong to conclude that this Court should bootstrap from that premise a conclusion that eviscerates clear error review. A jury, which conducts its deliberations in secret, offers no written explanation for its decision, and is unaccustomed to dealing with awards of money damages, is far more likely to be swayed by “passion or prejudice” than is a well-respected Chief District Judge who provides a thorough, 39-page explanation of the findings. Simply put, the notion that appellate panels should be more determined to root out “passion or prejudice” in Chief Judge Stotler’s chambers than in a jury box is nonsensical.

The government wants this Court to believe that its review of the non-economic damages award is stringent. It is not. Regardless of this panel's own opinions on the matter, unless this Court has a definite and firm conviction that Chief Judge Stotler's award "must have been the result of passion or prejudice" it must affirm the judgment. We now address the substantive arguments.

C. The damages award is not excessive in absolute terms.

The government's first contention is that Chief Judge Stotler's award is simply too high. (Blue Br. at 10-17.) However, the government never actually says what facts in the record are missing to substantiate the \$31 million award or what facts exist that show Chief Judge Stotler reached this number as a result of passion or prejudice. This is no mere accident, for there is no footing to sustain such an argument. Hence, the government builds a fallacious legal argument instead. In sum, and quite improperly, the United States tries to misdirect this Court into taking a "mechanical" approach in assessing the award, thereby ignoring the legal standard and the required finding of "passion and prejudice." This attempted "sleight of hand" should be rejected by this Court.

1. Each case must stand on its own facts and the usefulness of other cases on questions of damages is extremely limited.

This matter was tried pursuant to the FTCA, which authorizes suit against the federal government where personal injuries are caused by the negligent conduct of federal employees acting within the course and scope of their employment. 28

U.S.C. § 1346(b). Pursuant to the terms of the FTCA, the liability of the United States is to be determined, and damages assessed, to the same extent as recoveries are allowed for like torts committed under like circumstances by private persons in the state where the act or omission giving rise to the claim occurred. 28 U.S.C. § 2674; *Hunt v. United States*, 636 F.2d 580, 584-585 (D.C. Cir. 1980). The substantive law governing the action is the law of the state where the negligent act occurred. 28 U.S.C. §§ 1346(b), 2672. Therefore, in this particular action, the United States was to be judged, and damages assessed against it, as though it were a private individual which had caused an automobile collision in Orange County, California.

In its Opening Brief, the government first relies on a line of cases following *Felder* for the assertion that reviewing courts should compare damages awards in FTCA cases to awards in other, similar cases. But in implying that this Court must reverse if the award here is larger than in allegedly similar cases, the government significantly overstates its case. For while the cited cases discuss the issue of potential comparisons with other awards, they also make clear that “each case must stand on its own facts.” *Felder*, 543 F.2d at 674.

To be sure, other Ninth Circuit cases, both before and after *Felder*, make clear that the comparison tool is in fact of limited utility, and that courts should be slow to reverse damages awards merely because the awards are higher than awards in other cases. *See, e.g., United States v. English*, 521 F.2d 63, 72 (9th Cir. 1975)

(“While analogies to, and comparisons with, other cases may be helpful on many types of issues, *their usefulness on questions of damages is extremely limited.*”) (emphasis added); *Mattschei v. United States*, 600 F.2d 205, 209 (9th Cir. 1979) (same); *Rudelson v. United States*, 602 F.2d 1326, 1331 (9th Cir. 1979) (same); *Penetrante v. United States*, 604 F.2d 1248, 1252 (9th Cir. 1979) (same).

Thus, the issue here is not whether Chief Judge Stotler’s award was larger than non-economic damages awards in other cases. As the California Court of Appeal put it, “a verdict is not excessive as a matter of law simply because it exceeds the amount awarded in other cases.” *Buell-Wilson*, 160 Cal.App.4th at 1139-40. Instead, and at best, evidence of verdicts in other cases is “relevant as a point of reference, to provide context to the award,” *id.*, in a case that in all events “must stand on its own facts.” *Felder*, 543 F.2d at 674. This over-arching legal proposition condemns the government’s argument to failure. The background for this analysis is an injury so deep, so devastating, that no case we are aware of has ever described it, nor, we believe, has any judge, jury or lawyer until now observed it.

2. The most comparable case is *Buell-Wilson*, but Leilani’s injuries far exceed the injuries found there.

Here, one “point of reference” for judging the absolute size of a non-economic damages award is *Buell-Wilson*, 160 Cal.App.4th at 1107. There, a 46-year-old, married, mother of two was severely injured when her Ford Explorer

rolled over. The accident left Ms. Wilson a paraplegic with no sensation from the waist down other than “phantom pain.” She also suffers from constant upper-body pain. She has lost control of her bladder and must catheterize herself multiple times daily. She suffers from frequent urinary tract infections, severe bruising, swollen feet, and shoulder problems. At the time of trial, Ms. Wilson was expected to live a full life for another 35 years. A jury awarded Ms. Wilson \$4.6 million in economic damages and \$105 million in non-economic damages. The trial court reduced the non-economic damages award to about \$65.4 million. The California Court of Appeal further reduced the award to \$18 million, which was the amount of non-economic damages requested by plaintiff’s counsel during closing arguments. *Id.* at 1143-44.

In light of surface similarities between the cases, the government has no choice but to spend a great deal of time on *Buell-Wilson*. But in order to use *Buell-Wilson* as an argument in favor of reversal – an admittedly difficult task in light of the substantial non-economic damages award in that case – the government is compelled to contend that Ms. Wilson’s injuries were greater than Leilani’s, thereby warranting a reduction of Leilani’s award to less than, or at most the same as, the plaintiff in *Buell-Wilson*. (Blue Br. at 24.) However, the government is reluctant to entertain a precise comparison between the two so it resorts to euphemism, stating that *Buell-Wilson* “involved a serious injury to a 46-year old married mother of two. *Compensation for her loss is difficult to compare to the*

losses here to a four-year old child.” (Blue Br. at 7, emphasis added.) Eventually, apparently so uneasy with its contention that it relegates it to a cryptic (and frankly nonsensical) footnote, the government asserts that a comparison is problematic because this Court should “exclude comparisons with severely injured adults who, while their future economic losses might be relatively low, *would lose the ability to carry on a developed lifestyle.*” (Blue Br. at 21 n.7, emphasis added.)

This is a stunning foundation for an argument that Leilani’s award is an unjust and clearly erroneous one. First, no law supports the government’s argument that that *Buell-Wilson*’s situation is worse because she had a “developed lifestyle.” In other words, the government contends, because Ms. Wilson had 46 years to engage in an active lifestyle, get married, have children, work, and generally enjoy life, her lifestyle was “developed.” The government means, apparently, that as a matter of law non-economic damages awards to children must always be significantly less than adults because those children – Leilani specifically – have not yet lived long enough to grow accustomed to their right to a normal, happy and healthy life and develop a concomitant lifestyle. No law of this nation (or in nature) sustains this proposition. In fact, it is the inability to ever reach or possess a “lifestyle” of any kind that is so devastating and incomprehensible here.

Second, *Buell-Wilson* cannot be distinguished on its facts in a manner that supports the contention that the plaintiff’s injuries in that case were more serious

than were Leilani's. Without diminishing Ms. Wilson's suffering, we can say with certainty that paraplegia and a lack of feeling below the waist are less serious than tetraplegia and a lack of feeling below the neck. Ms. Wilson can use her arms. That alone gives Ms. Wilson an ability to control her environment—to hug a loved one, to grab things, to write, to communicate non-verbally, to play the piano or even scratch an itch—that Leilani does not and never will have. SER 148. Even in some of the most unfortunate aspects of her injury, Ms. Wilson is in a better position than is Leilani. While Ms. Wilson lacks the ability to control her bladder, and we do not underestimate how awful that must be, she is at least able to catheterize herself. Leilani is deprived even of that, and must rely wholly on caretakers to perform all bladder and bowel functions for her. ER tab 70 at ¶ 47; SER 138-39.

Likewise, Ms. Wilson did not require the use of a respirator to breathe. Leilani does; indeed, if she is left alone even for a minute, her respirator could become disconnected, and Leilani—who lacks the use of her hands—would be powerless to save herself. She could only watch the respirator tube lie on the floor and wait to die. ER tab 70 ¶ 45; SER 137. Ms. Wilson on the other hand does not face that prospect, nor does she have to live in constant fear of it.

In addition, Ms. Wilson's injuries do not subject her to the significantly shortened life expectancy that Leilani faces. Ms. Wilson was 46 years old when she suffered her accident, and the experts believed she was likely to live a full

normal life for another 35 years. Leilani is not expected to live to 81 years of age; she is expected to die at age 35, many decades shy of a normal life expectancy, during which she is forced to ponder her shortened existence and condition. ER tab 70 ¶¶ 10-11, 45. That is a critical distinction that renders Leilani's non-economic damages award not clearly erroneous.

Here, of course, Leilani is in the particularly hard position of living for decades, never being able to experience so much of what makes life so rich and without hope of having the opportunity to experience it, yet having the ability to *see and comprehend* all that she must live without. ER tab 70 at ¶¶ 46, 48. As tragic as Ms. Wilson's situation is, as she sits in a wheelchair watching her daughter's wedding or her son's graduation, she is unlikely to wish that she had been as fortunate as Leilani, who will never be able to have children the way Ms. Wilson does. ER tab 70 at ¶ 49. When Ms. Wilson hugs her grandchildren with her two functioning arms, she is unlikely to wish that she could have suffered horrific injuries at four instead of 46, so she could have avoided the indignity of having to love those grandkids from a wheelchair. And as she sits on her deathbed at the age of 80, surrounded by her family, she is unlikely to wish that she could have died at age 35. The idea that Leilani would prefer her situation to Ms. Wilson's because the latter would involve the loss of a "developed lifestyle" is nothing short of insulting.

The government's position is also inconsistent with our deepest intuitions about life, which perhaps is why it turns on its head Lord Alfred Tennyson's famous line that "'Tis better to have loved and lost/Than never to have loved at all.'" *In Memoriam*: 27 (1850). When someone dies at an advanced age, having accomplished much and touched the lives of many others, we often say as a mitigating factor that the person "lived a full life." But when a young child loses the opportunity to live a full or developed life, we mourn the loss as especially tragic for everything that could have been and should have been.

Ultimately, the government has no reasonable argument that Ms. Wilson's injuries are worse than Leilani's thereby warranting a reduction in Leilani's award under the clearly erroneous standard. If a California appellate court can affirm a non-economic damages award of \$18 million to Ms. Wilson on *those* facts, this Court can unquestionably affirm an award of \$31 million to Leilani on *these* facts.

3. Other California cases support the size of Leilani's award.

It is not just *Buell-Wilson* that teaches there is nothing shocking about a \$31 million award to Leilani. Other California decisions confirm the conclusion. Leilani's award is in absolute terms not larger than other awards in California. Under *Buell-Wilson*, "these verdicts are "relevant as a point of comparison to provide context." *Buell-Wilson*, 160 Cal.App.4th at 1139-40. For example, one case involved a \$41 million non-economic damages award for a woman who was left an *incomplete* quadrapalegic after a car accident. SER 17-19, 47-49.

Interestingly, that case was identified in *this* record (*id.*), yet it does not find the light of day in the government’s brief, which instead manages to find Washington cases from the early 1980’s. In any event, in absolute terms Leilani’s award is less than the \$41 million awarded in that instance – and Leilani’s condition is more severe as she is a *complete* quadrapelgic, ER tab 70 ¶¶ 7-8 – and so even in an absolute comparative approach this Court would have to conclude that Leilani’s award does not “shock the conscience.”

Moreover, verdicts in other California cases show that Leilani’s award is reasonable. This year, in *Hall v. North American Indus. Serv. Inc.*, 2008 WL 789895 (E.D. Cal. 2008), a federal district court allowed non-economic damages of \$10,000,000 to a 41-year-old man for burn injuries. Those injuries, while terrible, did not cut the plaintiff’s life expectancy in half, they do not leave him in imminent fear of death, they do not make him completely independent on around-the-clock caregivers for the rest of his life, they did not require him to breathe through a machine, and they have not left him completely without the ability to move and interact with the world around him.

Likewise, Leilani’s counsel also offered the district court summaries of other California cases with verdicts similar to Leilani’s, including non-economic damages of \$20,000,000 to a young man who suffered paraplegia from a car accident, SER 45, and a \$25,000,000 award for pain and suffering to an accident

victim who suffered brain damage and is now confined to a wheelchair. SER 50-51.²

Given these cases, an award of \$31 million to Leilani does not shock the conscience. It is more likely that the failure to award such an amount would shock the conscience.

4. The government’s 25 year old medical malpractice cases from Washington are patently irrelevant.

No doubt realizing that *Buell-Wilson* and the other California authorities devastate its argument, the government encourages this Court to compare Leilani’s case to three medical malpractice cases “from Washington State in the 1980’s.” (Blue Br. at 7.) In doing so, the government wants this Court to violate the very Ninth Circuit authorities it is asked to apply, because those cases require comparisons only “to other awards in similar cases *within the jurisdiction.*” *Shaw v. United States*, 741 F.2d 1202, 1209 (9th Cir. 1984) (emphasis added). Thus, and

² The government also argues that the award to Leilani is excessive because the amount awarded per-year is too high. This argument merits very little attention, because the government has not shown that any courts have adopted a per-year metric as the basis for judging awards. But it is worth noting that even one of the government’s own cited cases, *Bakkie v. Union Carbide*, 2007 WL 4206739 (Cal. App. 2007), undercuts its argument. There, the California Court of Appeal affirmed an award to a severely ill man of \$1.2 million for one year of past non-economic damages and \$3.1 million for future non-economic damages despite the fact that the plaintiff’s life expectancy following trial was *six months or less*. The \$1.2 million per year awarded per annum for past non-economic losses, and the \$3.1 million awarded for six months for future non-economic losses clearly exceed, on *absolute* terms, that \$1 million per year awarded by Chief Judge Stotler here.

ironically, the government's own cases teach that as a matter of law they are irrelevant to this California case.

Moreover, the cases are on their facts simply useless as comparative benchmarks. In *McCarthy v. United States*, 870 F.2d 1499 (9th Cir. 1989), as a result of medical malpractice the child plaintiff suffered from disorders such as “severe mixed spastic athetoid quadriplegia, microcephaly, severe developmental delay and seizure disorder.” *Id.* at 1500. Unlike Leilani, the plaintiff there did not lose complete control of all extremities (he was apparently able to play video games, *id.* at 1501), he did not live in fear of imminent death, he was not on a respirator, he did not require constant medical supervision, and he would be able to work as an adult. Furthermore, unlike Leilani, the plaintiff there was “unaware of his diminished capacity” and, therefore, did not suffer from Leilani's trauma of being fully aware of all that she has lost and will never have.

Critically, this Court had reason to be suspect of the district court's award in *McCarthy* in light of the fact that the *plaintiff's* trial counsel “with commendable candor and concern for his client” argued that “both *Shaw* and *Trevino* would require that the noneconomic damages award be limited to \$1,000,000.” *Id.* at 1501. Yet the district court—and this Court expressly noted it was “the same court reversed in both *Shaw* and *Trevino*”—gave an award larger than was requested. The appellate panel “note[d] this regrettable situation in the hope it will not recur.” *Id.* In short, then, a comparison with *McCarthy* is useless as the *McCarthy* verdict

is over 20 years old, comes from a different jurisdiction, involves completely different facts, was entered despite plaintiff's own counsel's plea that the award be smaller, and was penned by a trial court that the Ninth Circuit had seemingly come to believe was a loose cannon.

The government's two other medical malpractice cases are no more relevant, and each involved appeals from that same district judge in Washington. In *Trevino v. United States*, 804 F.2d 1512 (9th Cir. 1986), the child plaintiff suffered from "permanent brain damage, a form of cerebral palsy that involves all four extremities, and a seizure disorder." *Id.* at 1514. *Trevino* sounds like *McCarthy*; it sounds nothing like this case. The court noted that "[i]t is her set of physical disabilities, rather than her mental or emotional disabilities, that affect her the most." *Id.* But those physical disabilities do not compare to Leilani's. *Trevino* was "able to walk unassisted at home" and "with proper training and encouragement, [she] will be able to function in a fairly independent manner." *Id.* She was also able eventually to work outside the home.

How does *Trevino* have anything to do with this case? Leilani is not "fairly independent"; unless somebody watches Leilani at all times, she might die simply because her respirator slips off. ER tab 70 at ¶¶ 20, 28, 35, 45, 52. And while Sophia Trevino is working outside the home, Leilani will her entire life require somebody to change her diapers to relieve her. ER tab 70 at ¶ 47. The two cases are not similar enough to warrant any conclusion of clear error.

Finally, *Shaw*, 741 F.2d at 1202, is no more similar to this case than the *Trevino* and *McCarthy* decisions. There, as in *Trevino*, the child plaintiff suffered severe brain damage during delivery, which resulted in “spastic quadraparesis, blindness, a seizure disorder, and profound mental and physical retardation.” Because the court in *Shaw* did not spend any substantial time describing the plaintiff’s injuries, it is difficult to compare them to Leilani’s. That alone makes *Shaw* useless in the government’s comparative methodology approach. But one thing, at least, is clear. Scotty Shaw does not live with the knowledge of his loss and the accompanying frustration that Leilani does. ER tab to at ¶¶ 45-52. Scotty Shaw apparently was “capable of feeling, c[ould] perceive his environment, and [was] sensitive to auditory stimuli such as music.” *Id.* at 1209. Leilani, by contrast, “will experience anxiety, mental suffering, and emotional distress brought about by the fact that she is above average intelligence and prior to the accident was a bright, active, four-year-old who enjoyed many activities such as biking, piano, being around horses and other animals, and family outings of varied types and natures, and her subsequent realization that all of these activities are substantially and permanently impaired.” ER tab 70 at ¶ 46. Again, the two cases simply are not comparable, and *Shaw* does not justify a finding of clear error.

Accordingly, this Court should reject the government’s contention that Chief Judge Stotler’s non-economic damages decision is clearly erroneous.

D. The damages award cannot be reversed under a ratio analysis.

The government’s second argument for reversal is that the 1 to 1.3 ratio of economic to non-economic damages is too great.³ In other words, the government maintains that the \$31 million awarded in non-economic damages is too great on a *relative* basis when compared to the \$23.1 million that the United States *concedes* it owes in economic damages. But any attempt to impose an abstract “ratio” of damages is wholly inconsistent with settled California law; in fact, some California decisions have described such attempts as frivolous and sanctionable.

Furthermore, even if one were to disregard the entirety of California damages jurisprudence and entertain the notion of imposing such a ratio, the ratio proposed by the United States is wholly inconsistent with the historic relationship between economic and non-economic damages found in the reported California cases.

1. *Arpin*, the source of the government’s ratio argument, is irrelevant here.

The government encourages this Court to analyze the damages award from “another perspective,” by comparing the ratio of economic damages to non-

³ Perhaps as evidence that the government does not take its own ratio argument seriously, in this very matter the government chose not to appeal the award to June Gutierrez, where the ratio between economic and non-economic damages is 1 to 3, much greater than the nearly 1 to 1 ratio in Leilani’s award. (Blue Br. at 10.)

economic damages in this case with other cases. The government’s authority for this argument is *Arpin v. United States*, 521 F.3d 769 (7th Cir. 2008). In *Arpin*, a government doctor’s malpractice resulted in a man’s death in Illinois. His wife and children prevailed in an FTCA action where the court awarded economic damages as well as non-economic damages for loss of consortium: \$4 million to the decedent’s wife, and \$750,000 each to his four children.

On appeal, the Seventh Circuit reversed the damages award. The court noted “the lack of a formula for calculating appropriate damages for loss of consortium,” despite the fact that such damages are obviously real and compensable. *Id.* at 776 (“The plaintiff’s lawyer ... did not attempt—how could he?—to connect the evidence to the specific figures that he requested in closing argument.”). To rest the award on a firmer basis, the panel believed that “[t]he judge should have considered awards in similar cases, both in Illinois and elsewhere.” *Id.* Specifically, the panel opined that “[c]ourts may be able to derive guidance for calculating damages for loss of consortium from the approach that the Supreme Court has taken in recent years to the related question of assessing the constitutionality of punitive damages.” *Id.* at 777.

The “first step” in such a “ratio approach” would be to “examine the average ratio [between economic damages and loss of consortium damages] in wrongful-death cases in which the award of such damages was upheld on appeal.” *Id.* Next, a court should “consider any special factors that might warrant a departure from

the average in the case at hand.” *Id.* The court “suspect[ed]” that “such an analysis would lead to the conclusion that the award in this case was excessive,” but the panel also concluded that “it is not our place to undertake the analysis” and so remanded the case.

Note that the Seventh Circuit did not say that the district courts there *must* conduct ratio analyses in every case before awarding lack-of-consortium or other non-economic damages awards. To the contrary, the panel was careful to make clear that it “*suggested (without meaning to prescribe) an approach* that would enable [the district court] to satisfy” its obligations. *Id.* (emphasis added). Hence, even under Seventh Circuit law there is no firm ratio requirement.

The problem in *Arpin* was not the lack of a ratio analysis so much as the fact that the damages “figures were plucked out of the air,” *id.* at 776, and the appellate court could not sustain the damages award “on the meager analysis in the judge’s opinion.” *Id.* at 777. The Seventh Circuit thus offered the ratio approach as “an” approach—not the only approach—that could satisfy the court’s responsibility to provide a reasoned award.

Assuming for the moment the Seventh Circuit’s analysis is correct and applies here, this case stands in stark contrast. Chief Judge Stotler did not just pluck a number out of the sky untethered to any evidence. Quite the contrary, she entered a very detailed set of Findings of Fact showing the incredible emotional distress and suffering that Leilani has and will suffer, all on the basis of expert

testimony. ER tab 70 at ¶¶ 45-53. This is the antithesis of the “meager analysis” rejected by the Seventh Circuit. And Chief Judge Stotler was given by all parties a range of decisions in California, within which this ratio fits in any event. Thus, even if *Arpin* were good law, it would not support the government on these facts. But *Arpin* is not good law, as we now discuss.

2. *Arpin*’s approach has been rejected by California courts as frivolous and sanctionable.

Here, the government asks this Court to apply *Arpin*’s ratio analysis. However, this case is governed by California law, and California courts have not only rejected *Arpin*’s approach, they have dismissed ratio arguments as frivolous. In *Westphal v. Wal-Mart Stores, Inc.*, 68 Cal.App.4th 1071 (1998), the defendant in a personal injury case argued that the plaintiff’s non-economic damages “award of \$158,000 is excessive because it is several times the amount of plaintiff’s out-of-pocket expenses for medical bills and lost income.” *Id.* at 1078. The Court of Appeal rejected that argument, concluding that there is “no authority establishing limits upon a general damage award based on a small amount of special damages. In fact, there is no specific requirement that any special damages be awarded before general damages may be awarded.” *Id.* at 1079 (internal citations omitted).

In fact, the Court of Appeal was so unimpressed with the argument that it *sanctioned* defendant’s counsel for bringing a “frivolous” appeal. *Id.* at 1082 (“[W]e conclude this appeal is frivolous in that it ‘indisputably has no merit.’

[citation] Defendant is assessed sanctions in the amount of \$11,000, payable to plaintiff within 15 days after issuance of the remittitur, to compensate her for the expense consumed in defending against this frivolous appeal.”); *see also Damele v. Mack Trucks, Inc.*, 219 Cal.App.3d 29, 37 & n.5 (1990) (rejecting appellant’s contention that non-economic damages were excessive, an argument which was “based on the ratio of the special damages to general damages” and noting that if “*this had been the only issue raised in this appeal we would have contemplated imposing sanctions for filing a frivolous appeal.*”) (emphasis added).

Since the government concedes California law controls here (Blue Br. at 9), the *Arpin* theory is not capable of application in this case, and should be rejected on this basis alone.

3. The Ninth Circuit has not and should not require a ratio analysis.

In invoking *Arpin*, the government asks this Court to require a form of analysis that has been rejected as frivolous by the governing state law and which has never been adopted by the Ninth Circuit. Aside from that, there are compelling reasons why this Court should reject the government’s invitation. Specifically, the Seventh Circuit’s treatment of the ratio theory as an analogous “related question” to punitive damages jurisprudence makes little sense. Punitive damages are distinct from compensatory damages—economic or non-economic—in a critical way; they are not intended to compensate a plaintiff but are instead designed to

deter and punish a defendant. *See, e.g., Dumas v. Stocker*, 213 Cal.App.3d 1262, 1266 (1989) (“[P]unitive damages constitute a windfall, create the anomaly of excessive compensation, and are therefore not favored in the law.”). Because punitive damages awards are windfall awards, limiting the size of such awards—even through an arbitrary device like a ratio between compensatory damages and punitive damages—can never result in an incomplete recovery to a plaintiff. But limiting *non-economic damages* through an arbitrary ratio mechanism certainly threatens a plaintiff’s ability to recover fully for her injuries.

Likewise, the Supreme Court’s punitive damages rules, as expressed, arise out of a need to ensure constitutional due process. But the Seventh Circuit does not tie its theory to the Due Process Clause or explain what due process jurisprudence would counsel in favor of such a rule. Indeed, being that the ratio rule would arbitrarily deny full recovery for injuries in some cases, not only would applying a ratio analysis in this context not be *required* by due process, it would likely *violate* it.

Notably, the ratio analysis would be particularly troubling where the plaintiff suffered only non-economic damages. In light of the mathematical impossibility of conducting a ratio where one of the numbers is zero, the government’s proposed

rule would seem to demand that such a plaintiff receive no recovery, regardless of real non-economic damages.⁴

Finally, and most importantly, there is often little connection between economic damages and non-economic damages and, therefore, there is no legitimate rationale for the ratio approach. As articulated by District Judge Panner in Oregon, “[i]njuries justifying a large award of non-economic damages, such as permanent disfigurement and severe pain, are not always accompanied by commensurate economic harm.” *Longfellow v. Jackson County*, 2007 WL 682455 *1 (D. Or. 2007). Indeed, imagine that a plaintiff’s injuries require her to take a particular prescription medicine every day, a medicine that costs \$5,000 per month. Now imagine that a second plaintiff a year later suffers identical injuries, but by this time a generic form of the drug has been released that costs only \$5 per month. Under a ratio analysis, the second plaintiff is entitled to far less in non-economic damages for pain-and-suffering and disfigurement simply because the lower drug costs resulted in a lower economic damages award. The damages are identical—it

⁴ Adopting an *Arpin* analysis would create numerous other problems for courts. For example, if a child sues for wrongful death when a parent dies and that child was to receive no actual economic damages (the parent’s income was not the child’s after all), then is the child only entitled to a *de minimis* non-economic damages award for her loss of a parent? Likewise, a retiree may have very minimal economic damages, so does that mean the pain and suffering she may experience is also to be severely limited in compensation? Or, in race discrimination cases, it is often the case that there are minimal economic damages, but that could bizarrely imply that a person should receive no non-economic damages either. Thus, adopting an *Arpin* analysis opens Pandora’s Box.

is only the economic damages award that is different. Allowing a ratio analysis to dictate the amount of non-economic damages under these facts leads to an arbitrary, and inequitable, result.

Indeed, applying a ratio analysis is worse than arbitrary, because the analysis unjustifiably discriminates against the poor. As Judge Panner noted, “the pain and suffering of a person working for minimum wage would be valued far below the pain and suffering of a rich man, though both sustain the identical injury.”

Longfellow, 2007 WL 682455 at *1. What justification is there for a legal rule that consistently and unnecessarily finds the physical pain and suffering of a high wage-earner to be more compensable than a low wage-earner?

For all of these reasons, the Seventh Circuit’s ratio approach is based on faulty logic, and this Court should reject the government’s invitation to adopt it.

4. Even if this Court applies a ratio approach, the award must stand.

(a) Having invoked *Buell-Wilson*, the government then ignores it precisely because it is the most relevant comparison.

Even under a “ratio” analysis, the award to Leilani must be affirmed. The government argues that the ratio of economic to non-economic damages should be somewhere in the neighborhood of 1 to .33 to 1 to .11, basing its conclusion largely on a handful of 20-year-old medical malpractice cases from Washington

and Alaska. But the government fails to address meaningfully the most relevant case, the recent California decision in *Buell-Wilson*. *Buell-Wilson* is a few months old, not 20 years old; it involves a plaintiff from California, not Alaska or Washington; the plaintiff in *Buell-Wilson* was also paralyzed (though the injuries were not as severe as were the injuries to Leilani); and in that case, like this one, the plaintiff is expected to live approximately 30 more years.

Yet the government asks this Court to ignore *Buell-Wilson*, stating “we would not compare this case, for purposes of a ratio analysis, with *Buell-Wilson*.” (Blue Br. at 21 n.7.) Indeed, it would not, because *Buell-Wilson* affirmed a ratio of 1 (economic) to 4.5 (non-economic), which is over *three times greater* than Leilani’s comparatively meager 1 to 1.3 ratio! If the parties are to go down the rabbit hole of ratios, then *Buell-Wilson* (among other California cases) is the best available comparison, and the government is wrong to bury it in a footnote and deny its relevance.

(b) Other tort cases confirm affirmance here.

Aside from *Buell-Wilson*’s 1 to 4.5 ratio, it is also worth noting that other cases confirm the absence of any defect in this case. Although none of the cases talk in terms of a “ratio” because it is not the law, if those cases are analyzed in that light it is readily apparent that any divined ratios of economic to non-economic awards are greater than Leilani’s 1 to 1.3 ratio. For example, the *Felder* case itself – heavily relied on by the government to support its *Arpin* construct – modified

and affirmed an FTCA award where the ratio of economic to non-economic was 1 to 1.125. *Felder*, 543 F.2d at 676 (Timothy Burns received \$40,000 in economic and \$50,000 in non-economic damages, a 1 to 1.25 ratio). This 1 to 1.25 ratio barely differs from Leilani's ratio of 1 to 1.3 (they are the same with standard mathematical rounding principles). Certainly, *Felder* does not teach a maximum ratio of 1 to 1.25 as a matter of law, nor, in light of *Felder*, can the government contend that a 1 to 1.3 ratio so shocks the conscience that it must have been the product of passion or prejudice.⁵

Similarly, in a very recent matter in the Eastern District of California, the parties submitted substantial evidence of non-economic damages figures, and the district court allowed a non-economic damages award of \$10 million in comparison to economic damages of \$5 million. *See Hall v. North American Indus. Serv., Inc.*, 2008 WL 789895 (E.D. Cal. 2008). The district court there noted that the plaintiff had supplied evidence showing economic to non-economic damages ratios of "1:1, 1:5(-), 1:16(+), 1:3(+), 1:5(+), 5:1 (a ten year old case), 1:14(+), 1:13.6(+), 1:20.5(+), 1:4:7(-), and 1:12.6(+)." *Id.* at *10. Thus, the district court would have felt comfortable "applying a 1:3 to 1:4 ratio for economic

⁵ The government ignores this record evidence that addresses a range of verdicts and instead selectively cites cases where the ratio is more favorable to it. *See, e.g., Fortman v. Hemco, Inc.*, 211 Cal.App.3d 241 (1989); *Scott v. United States*, 884 F.2d 1280, 1282 (9th Cir. 1989). Ironically, the government told the district court that this practice of selective citations is the very problem that instead requires each case be decided on its own facts. SER 57 n.5.

to non-economic damages,” *id.* at *12, and eventually approved non-economic damages twice as large as the economic damages. Therefore, there is no reason to believe that this case’s comparatively tiny 1 to 1.3 ratio is clearly erroneous.

Finally, the government also fails to mention—indeed, fails even to include in its excerpts of record—Plaintiff’s Memorandum of Contentions of Fact and Law, which includes summaries of other California matters where the ratio of economic to non-economic damages is consistent with—in some cases far exceeds—the 1 to 1.3 ratio in this case. *See* SER at 5-6 & 12-21, *citing Karlsson v. Ford Motor Co.* (L.A. Super. Ct. 2003) (1:2 ratio in favor of non-economic damages); *Lampe v. Continental Tire Co.* (L.A. Super. Ct. 2001) (1:4.6 ratio in favor of non-economic damages for one plaintiff; 1:818 ratio in favor of non-economic damages for a second plaintiff; and \$1 million in non-economic damages without an economic award to a third); *Burch v. Children’s Hospital* (O.C. Super. Ct. 2001) (1:1 ratio – approximately \$25 million each for economic and non-economic damages).

Accordingly, there is nothing shocking or outrageous, or quite frankly, even uncommon, about the ratio between the economic and non-economic damages awarded in this case. The relative difference here is comparatively tiny compared to other reported awards; indeed, the ratio in dispute here is only one-third the size of the *non*-appealed ratio Leilani’s mother received in this very case.

VIII.

CONCLUSION: WHAT DOES THE GOVERNMENT WANT?

The government argues that Chief Judge Stotler’s award constitutes a windfall recovery to Leilani. Its brief concludes by asking the court to reduce the amount of Leilani’s award from \$31 million to \$8 million under a “ratio” analysis or maybe \$18 million under an “absolute” amount analysis, or maybe some other arbitrary figure that the government finds more agreeable simply because it is smaller. (Blue Br. at 24.)

“Poor [Leilani]!”⁶ How quickly the government forgot its own apologies and its professed recognition that “no amount of money can ever reimburse [you] for the pain [you] have suffered as a result of this accident.” SER 166:20-22, 193:24-194:2.

But how can this Court grant the government’s request when:

⁶ *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 213, 109 S. Ct. 998, 1013 (1989) (Blackmun, J., dissenting) (“Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . ‘dutifully recorded these incidents in [their] files.’ It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about ‘liberty and justice for all’—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.”).

- Adopting the government’s position on appeal would require this Court to countenance a transparent “about-face” that results from the government’s disappointment with its own strategic decisions below;
- The government cannot show any basis for concluding that Chief Judge Stotler was overcome by passion and prejudice and therefore entered a clearly erroneous award that shocks a reasonable conscience;
- The government cannot point to evidence to show that with a lower award Leilani would be fully compensated for her injuries, but that an award of \$31 million leaves her the beneficiary of a windfall;
- The government cannot explain why under the “significantly deferential” clear error standard of review, this Court should substitute its opinions for that of a district court judge who presided over a full trial and witnessed all of the evidence first-hand.

Stripped of legalese, the government’s appeal is little more than a naked request that this Court pick a lower number because the government prefers a lower number. That is not enough to justify reversal under any standard of review. Leilani’s human dignity and the law vests Chief Judge Stotler with the right to determine Leilani’s damages. This Court is only to step in if Chief Judge Stotler’s decision was clearly erroneous. Chief Judge Stotler’s non-economic damages

award is not clearly erroneous, and there is no evidence that it is the product of passion or prejudice. This Court must affirm the judgment.

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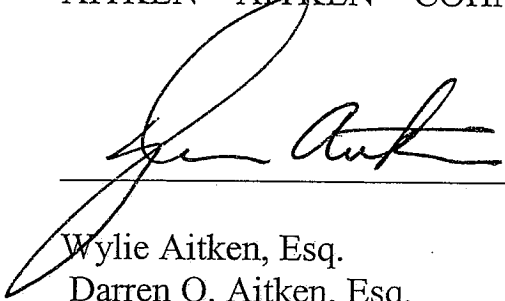
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Respectfully Submitted,

July 7, 2008

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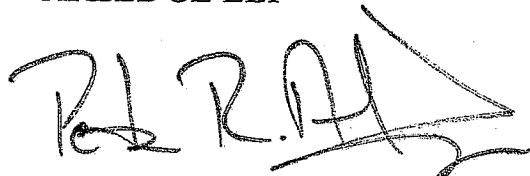


Wylie Aitken, Esq.
Darren O. Aitken, Esq.

STOODY MILLS LANSFORD
WALKER & DOYLE

TURNER GREEN AFRASIABI &

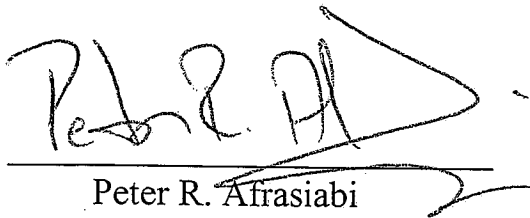
ARLEDGE LLP



Peter Afrasiabi, Esq.


CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I hereby certify this Brief uses a proportionally spaced typeface, consists of less than 14,000 words, and complies in all respects with Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1. This word count does not include the Table of Contents, the Table of Authorities, this Certificate of Compliance, or the Certificate of Service.


Peter R. Afrasiabi

STATEMENT OF RELATED CASES

I, the undersigned, hereby certify that I am aware of no related cases.


Peter R. Afrasiabi

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 535 Anton Boulevard, Suite 850, Costa Mesa, California 92626.

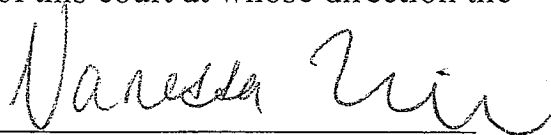
On July 7, 2008 I served the document (s) described as **APPELLEES' OPPOSITION BRIEF** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

Thomas Bondy William G. Cole Appellate Staff Civil Division, Rm. 7320 U.S. Department of Justice 950 Pennsylvania Ave., N.W. Washington, D.C. 20530-0001 <i>Attorneys for Defendant-Appellant</i>	Clerk U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103-1518 (Original plus 15 copies of Brief)
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- (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (BY FAX) I transmitted, pursuant to Rules 2001 *et seq.*, the above-described document by facsimile machine (which complied with Rule 2003 (3), to the above-listed fax number (s). The transmission originated from facsimile phone number (714) 434-8756 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.
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- (PERSONAL) I caused _____ to personally serve the addressee(s).

Executed on July 7, 2008 at Costa Mesa, California.

- (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Vanessa Zinn