No. 17-67

IN THE

# Supreme Court of the United States

CITY OF FRESNO AND
OFFICER GREG CATTON,

*Petitioners,*

v.

CHRIS WILLIS AND MARY WILLIS,
INDIVIDUALLY AND AS SUCCESSORS
IN INTEREST TO STEPHEN WILLIS,

*Respondents.*

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Would a reasonable police officer have known it was a clearly established constitutional violation to use deadly force by shooting in the back a man who is lying motionless on the ground and not reaching for a gun and thus poses no immediate threat to the officer or others?

2. Is the issue of attorneys' fees ripe for review when the final amount of attorneys' fees has not yet been determined because the Court of Appeals has remanded the case for further trial on additional damages to be awarded under 42 U.S.C. §1983?

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## INTRODUCTION

Neither question raised by the petition is worthy of certiorari.

The first question, relating to qualified immunity, is based on a factual account that is contradicted by the jury's verdict. Petitioners frame the issue based on the assumption that Officer Catton is entitled to qualified immunity because he shot respondents' decedent, Stephen Willis, while Willis was reaching for a gun that was "within inches" of his hand. (Pet. i.) Yet those were not the facts as determined by the jury. As the District Court concluded—and the Court of Appeals agreed—"[t]he jury's verdict does not permit a finding that Stephen Willis was reaching for his revolver. Indeed, the jury's verdict *necessarily* means the jury did not believe Stephen Willis was reaching for his revolver when Officer Catton fired the final shot(s)." (Pet. App. 30, italics in original.) There is no reason to grant certiorari to decide a hypothetical legal issue that is not supported by the facts of the case.

Petitioners next ask this Court to rule on a question of attorneys' fees when the amount of attorneys' fees awarded to respondents has not yet been finally determined in the District Court, so the question is not ripe for review. The Ninth Circuit Court of Appeals remanded this case back to the District Court for a trial on additional damages for Stephen Willis' pre-death pain and suffering. Those additional damages will affect the District Court's determination on attorneys' fees. The Ninth Circuit instructed the District Court to revisit the question of attorneys' fees after this new trial. There is no reason to grant

certiorari to decide an issue that is not ripe for review.

## STATEMENT OF THE CASE

Petitioners selectively recite the facts, relying almost exclusively on the self-serving testimony of Petitioner Catton and ignoring the jury's findings, which were based on the contrary testimony of his fellow officers.

The record reflects that Officers Astacio and Catton approached Stephen Willis while he was removing a holstered pistol from the trunk of his car to bring into his apartment for the night; that Catton shined his flashlight on Willis' back and that Willis turned toward the officers while holding the holstered pistol loosely in front of him. 2 RT 352-356. The butt of the pistol in the holster was plainly visible to both officers. Willis's hand was not on it. 2 RT 355-356, 417-418; 4 RT 864-865. Nevertheless, the officers pulled their guns and began firing at him from a distance of 10 to 12 feet. 4 RT 865; 2 RT357.

The officers, Catton in particular, claimed Willis fired multiple shots at them after they began firing at him. 3 RT 739-740, 4 RT 845-848. The evidence strongly suggests that Willis did not fire even a single shot. When Fresno police later opened his 6-shot revolver, they found five live rounds and the only spent cartridge was two slots over from where it would have been if he had just fired the gun. 3 RT 637; 2 RT 475-476, 484. Numerous Fresno officers spent hours searching the area for any spent bullet fired from Willis's .38 Smith & Wesson and could find none. 2 RT 512-514. It is undisputed, however, that

Catton and Astacio fired 41 bullets at Willis, hitting him 13 times at close range. 2 RT 499.

When either 39 or 40 of the 41 bullets had been fired and Willis was lying on the ground with multiple bullet wounds, Astacio stopped firing because, as he testified, "the immediate threat is not there" and moved away from his firing position. 2 RT 395, 425-426. Catton ran around from his firing position to get behind Willis and then shot him in the back. 4 RT 851.

Officer Cerda saw Willis lying on the ground both before and after Catton shot him in the back. 6 RT 1527. Cerda saw that Willis was not moving before Catton shot him. 6 RT 1528. He saw Willis was not reaching. *Id.* He saw Catton shoot Willis twice. 6 RT 1527, 1530.

Officer Jacobo ran up in time to see Willis lying only five to ten feet away from Catton. Jacobo testified that Catton was yelling in an excited voice that he had put a bullet hole in the man's back. 2 RT 575. Jacobo also testified that it was only *after* shooting Willis in the back that Catton shouted, "I can see the gun. I can see the gun." *Id.*

After Catton shouted that, Jacobo looked and saw the gun "about two feet south and west of Stephen's feet." 2 RT 576.

Catton, an inexperienced officer who admitted to pulling his gun approximately 50 times during his extended probation period with the Fresno Police Department (4 RT 818, 820-821) and another ten times in the two months he had been off probation (4 RT 822), made various claims as to why he shot Willis in the back while Willis was lying on the ground.

But the jury's verdict indicated that it rejected Catton's testimony, as discussed *infra.*

On the eve of closing argument, petitioners submitted several factual interrogatories for the jury to answer. 1 ER 64. The court rejected these interrogatories as untimely and as vague, argumentative, and misstating the law. *Id.* The Ninth Circuit upheld the court's ruling. (Pet. App. 4.)

The jury returned a verdict finding that Catton had used excessive force in shooting Willis in the back. (Pet. App. 8-9.) Reviewing the evidence in ruling on post-trial motions, the trial court stated, "The jury's verdict does not permit a finding that Stephen Willis was reaching for his revolver. Indeed, the jury's verdict *necessarily* means the jury did not believe Stephen Willis was reaching for his revolver when Officer Catton fired the final shot(s)." (Pet. App. 30, italics in original.) The court further noted that defendants' attempted reliance on Catton's trial testimony "ignore[d] significant testimonial evidence to the contrary." (Pet. App. 27.)

The City of Fresno and Officer Catton appealed to the Ninth Circuit. The Willises filed a cross-appeal, claiming, among other things, that they had been unlawfully deprived of their right to pursue their son's pre-death cause of action for pain and suffering under Section 1983, and that the trial court had abused its discretion in its award of attorneys' fees, including by reducing counsels' hourly rates and by imposing an across-the-board 35% reduction for partial lack of success. (Pet. App. 7.)

In an unpublished memorandum decision, the Ninth Circuit (Judges Melloy (8th Cir., sitting by

designation), Clifton, and Watford) ruled in pertinent part:

> 1. . . . Given the evidence presented at trial, a reasonable jury could conclude that Officer Catton used excessive force in firing the final shot or shots. . . . [I]t was for the jury to decide which version of events to believe. The jury could reasonably have concluded from the evidence that Willis was not reaching for his gun and that Officer Catton's use of force was therefore unreasonable.
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> . . .
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> 5. The district court erred by precluding plaintiffs from seeking damages for Willis' pre-death pain and suffering. . . . We must accordingly vacate the judgment on plaintiffs' 1983 claim and remand the case to the district court so that plaintiffs may present evidence in support of their claim for pre-death pain and suffering damages. . . .
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> . . .
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> 8. . . . We decline to rule on plaintiffs' contentions that the district court abused its discretion by reducing counsel's hourly rates and by imposing an across-the-board 35% reduction. The district court

> should revisit these issues following the limited re-trial on the issue of pre-death pain and suffering damages. The court predicated the 35% reduction at least in part on the degree of success plaintiffs achieved in the litigation, which could change depending on the extent to which plaintiffs recover damages for Willis' pre-death pain and suffering.

(Pet. App. 1-7.)

Petitioners' petitions for rehearing and rehearing en banc were unanimously denied. (Pet. App. 102.)

## REASONS FOR DENYING THE WRIT

### I. PETITIONERS' FIRST QUESTION, REGARDING QUALIFIED IMMUNITY, IS BASED ON AN ASSUMPTION ABOUT THE EXISTENCE OF FACTS THAT THE JURY REJECTED.

Petitioners' first question asks this Court to decide a legal issue that is not presented by the facts of this case, according to the findings of the jury, which were affirmed by the two lower courts. This question assumes that Officer Catton may be entitled to qualified immunity for his use of deadly force because he could have believed that Stephen Willis was "reaching for a nearby gun" and that his "hand [was] within inches of that gun." (Pet. i.) However, the jury, by its verdict, rejected that factual assumption. The jury found that Officer Catton "use[d] excessive force against Stephen Willis in violation of his

Fourth Amendment Constitutional rights." (Pet. App. 8.)

The District Court explained the fallacy of petitioners' argument, as follows:

> "Defendants argue the evidence produced at trial – Officer Catton's 'uncontroverted' testimony – demonstrates deadly force was necessary at the time Officer Catton fired the final shot(s) because Stephen Willis was reaching for his gun. . . . However, because the jury found Officer Catton's final shot(s) constituted excessive force, the jury necessarily found that Stephen Willis was not reaching for his gun when Officer Catton fired the last shot(s).
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> "Defendants argue there is no evidence contradicting Officer Catton's testimony; thus, there was no basis for the jury to conclude that Officer Catton used excessive force when he fired the last shot(s). Defendants ignore significant testimonial evidence to the contrary. [Court describes the evidence.] Accordingly, this Court finds . . . , based upon the jury's verdict, that Officer Catton's actions were not objectively reasonable when Officer Catton shot Stephen Willis in the back as he lay on the ground. . . .

> "Defendants' framing of this ["clearly established" qualified immunity] issue is misguided. The jury's verdict does not permit a finding that Stephen Willis was reaching for his revolver. Indeed, the jury's verdict *necessarily* means the jury did not believe Stephen Willis was reaching for his revolver when Officer Catton fired the final shot(s).
>
> "Properly framed within the factual findings implicit in the jury's verdict, the question to be answered for the second prong of the qualified immunity analysis is this: would a reasonable police officer have known it was a constitutional violation to use deadly force on an individual who poses no immediate threat to the officer or others? It is axiomatic that the answer to this question is 'yes.'"

(Pet. App. 26-30, italics in original.)

In attempting to find support for Catton's version, petitioners turn to a hypothetical question put to one of respondents' experts at trial and they attempt to convert that person's qualified response into concrete evidence as to what must have taken place. At a time in the trial when it had already been established that Stephen Willis was lying on the ground without a gun in his hand and that the gun he had been removing from the trunk of his car was "about two feet south and west of Stephen's feet" (*see* Officer

Jacobo's testimony, *supra*, 2 RT 575 and 576), petitioners' counsel asked respondents' expert to address the hypothetical issue of "what if" Mr. Willis were lying on the ground reaching for and about to grab a gun. 4 RT 986.

The trial court sustained a series of objections to petitioners' questions as argumentative and incomplete hypotheticals. 4 RT 986-987. Eventually, petitioners' counsel got around to the question, "If Mr. Willis is reaching for and about to grab the gun, deadly force is appropriate; correct?" To that hypothetical question, the expert answered that if Willis was "about to reach for the gun," that would be an immediate threat. 4 RT 986-987. But there was no evidence that was what happened.

Petitioners attempted to formulate some special interrogatories on this topic for the jury, but, as the Ninth Circuit noted, petitioners did not make a timely submission. Their special interrogatories were submitted 22 days after the deadline set by the District Court for jury instructions and verdict forms. (Pet. App. 3-4.) The first special interrogatories they proposed were offered as closing arguments were about to commence and these were found to be "vague, argumentative and misstated the law." 1 ER 64. Accordingly, when petitioners argued to the Ninth Circuit that they should have been allowed to submit their interrogatories to the jury, that court ruled:

> Given the lateness of the request and the fact that the verdict form already required a jury determination of all factual issues essential to the judgment, the district court

> did not abuse its discretion by refusing to submit defendants' untimely special interrogatories to the jury.

(Pet. App. 4.)

In sum, the jury was not "presented" with the possibility that Stephen Willis "had reached for the gun but had not gotten to within 'inches' of the gun prior to Officer Catton firing," as petitioners now contend. (Pet. 14.) That was just a hypothetical, an invention of counsel. There is NO evidence supporting the claim that Stephen Willis had gotten within inches of the revolver—not even from Catton himself. The absence of such evidence and the jury's finding that Catton used excessive force make petitioners' first question purely hypothetical.

## II. PETITIONERS' SECOND QUESTION, REGARDING AN AWARD OF ATTORNEYS' FEES UNDER SECTION 1983 WHERE THE JURY HAS AWARDED ONLY NOMINAL DAMAGES, IS NOT RIPE FOR REVIEW. THE COURT OF APPEALS HAS REVERSED THE JUDGMENT, AFTER RULING THAT THE DISTRICT COURT SHOULD NOT HAVE RESTRICTED THE JURY TO AWARDING ONLY NOMINAL DAMAGES, AND HAS REMANDED THE CASE FOR A NEW TRIAL ON DAMAGES, WHICH WILL AFFECT THE AMOUNT OF ATTORNEYS' FEES AWARDED.

At trial, respondents' counsel asked the jury to award $1.00 for the breach of Stephen Willis's Fourth

Amendment right to be free of unreasonable search and seizure.

This argument was made necessary because the trial court had erroneously ruled that respondents could not pursue compensation for Willis's pain and suffering before he died. The Ninth Circuit has since ruled that pre-death pain and suffering are compensable damages in a Section 1983 action. *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014).

The jury proceeded to award the $1.00 that respondents requested, and then awarded $1,500,000 (reduced by 80%)—based on the exact same evidence and legal standard—in respondents' California wrongful death claim. (Pet. App. 8-15), 1 ER 90-94. At no time did respondents claim that $1.00 was the true value of the violation of their son's Fourth Amendment right; indeed, they argued for entitlement to other damages in a pre-trial motion in limine, in a post-trial motion, and before the Court of Appeals—and the Court of Appeals agreed. It held, citing *Chaudhry*, that the district court erred by precluding respondents from seeking damages for Willis' pre-death pain and suffering. (Pet. App. 5).

It then ruled:

> We must accordingly vacate the judgment on plaintiffs' §1983 claim and remand the case to the district court so that plaintiffs may present evidence in support of their claim for pre-death pain and suffering damages.

(Pet. App. 5.) Thus, there has been no final determination of damages on respondents' Section 1983 claim and there has been no final determination of

the basis for, and amount of, respondents' attorneys' fees award.

"[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until find decree." *Hamilton-Brown Shoe Company v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also DTD Enters, Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (Kennedy, J., joined by Roberts, C. J., and Sotomayor, J.) (Concurring in denial of certiorari because "the petition is interlocutory"); *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Robert L. Stern, et al, Supreme Court Practice §4.18, at 282 (9th ed. 2007) ("[I]n the absence of some...unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

There is no final judgment in this case and nothing extraordinary warrants immediate review. Indeed, the inevitable impact of the Court of Appeals' ruling is that respondents are likely to be awarded more damages under Section 1983 for Willis' pre-death pain and suffering. By its ruling, the Ninth Circuit opened the door:

> We decline to rule on plaintiffs' contentions that the district court abused its discretion by reducing counsel's hourly rates and by imposing an across-the-board 35% reduction. The district court should revisit these issues following the limited re-trial on the issue of pre-death pain and suffering damages.

> The court predicated that 35% reduction at least in part on the degree of success plaintiffs achieved in the litigation, which could change depending on the extent to which plaintiffs recover damages for Willis' pre-death pain and suffering.

(Pet. App. 7).

Petitioners do not claim any conflict among the federal circuit courts on this issue, nor do they contend there is a conflict with this Court's precedents. To the contrary, the circuit courts that have ruled on the issue are in agreement and are aligned with this Court's precedent. *Compare Hensley v. Eckerhart*, 461 U.S. 424 (1983) *with Aubin v. Fudala*, 782 F.2d 287 (1st Cir. 1986), *Hawa Abdi Jama v. Esmor Corr. Servs.*, 577 F.3d 169 (3d Cir. 2009), *Bridges v. Eastman Kodak Co.*, 102. F.3d 56 (2d Cir. 1996), *NOW v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994).

Here, all claims stemmed from a single course of conduct: the shooting of Stephen Willis by police officers. Although respondents asked the jury to rule in their favor on two causes of action, the Fourth Amendment violation and the California wrongful death claim, the core of each was the same shooting, and the parties and the district court stipulated that both claims would be presented to the jury under identical legal standards. (Pet. App. 49.) As this Court held when presented with a similar situation in *Hensley, supra,* 461 U.S. at 435:

> Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on

> the significance of the overall relief obtained by the plaintiff. . . .
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> . . .
>
> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Prevailing on both causes, respondents got all that they were then allowed, given the District Court's erroneous ruling on pain and suffering. By comparison, in *Farrar v. Hobby*, 56 U.S. 103, 115 (1992), on which petitioners rely, there was a single award of $1.00 and a finding that such nominal damages highlighted the plaintiff's failure to prove actual, compensable injury. In the case at bar, respondents did prove actual, compensable injury, as shown by the $1.5 million award (reduced by 80% for Willis' comparative negligence) on the wrongful death cause of action. They are likely to be awarded far more than nominal damages on the retrial, thus mooting the question raised by petitioners.

## CONCLUSION

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

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Respectfully submitted,

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