No. 17-67

In The Supreme Court of the United States

CITY OF FRESNO and
OFFICER GREG CATTON,

Petitioners,

vs.

CHRIS WILLIS and MARY WILLIS,
individually and as successors
in interest to STEPHEN WILLIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. THE PLAINTIFFS HAVE IGNORED THE ARGUMENT ACTUALLY MADE BY THE DEFENDANTS ON THE QUALIFIED IMMUNITY ISSUE, AND HAVE NOT PRESENTED ANY BASIS ON WHICH THIS COURT MIGHT DENY THIS PETITION FOR WRIT OF CERTIORARI

The plaintiffs seem to have fundamentally misunderstood the defendants' argument as to why the resolution of the qualified immunity issue in this case justifies the granting of this petition for writ of certiorari. Specifically, the plaintiffs erroneously argue that:

> Petitioners' first 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.

Brief in Opposition, page 6. (See also Brief in Opposition, pages 1 and 10.)

But the defendants never made such an argument in their petition. The defendants' position is actually the opposite of what the plaintiffs contend it is: the defendants argue that Officer Catton is entitled to qualified immunity even if the decedent's hand was *not* within "inches" of his gun, so long as the decedent was in fact reaching for his gun at the time he was shot.

The defendants' argument focused on the assumption made by both the district court and the Court of Appeals that:

> since the jury determined that excessive force was used, it necessarily must have concluded that Mr. Willis was not reaching for his gun at the time Officer Catton fired. But the jury did not make such an explicit finding and, given the evidence presented to the jury, it did not have to reach that conclusion in order to decide that Officer Catton used excessive force.

Petition for Writ of Certiorari, page 13.

The defendants explained that given the evidence introduced at trial – specifically, the testimony of plaintiffs' expert witness Stephen Lowell D'Arcy (see Petition for Writ of Certiorari, page 13) – the jury, in fact:

> was presented with two possible grounds for concluding that Officer Catton's final shot(s) might not have been justified: 1) because Mr. Willis had not reached for his gun at all, or 2) because Mr. Willis *had* reached for the gun but had not gotten to within "inches" of the gun prior to Officer Catton firing.

Petition for Writ of Certiorari, page 14; italics in original.

The plaintiffs have not pointed to anything in the record that contradicts in any respect the defendants' description of the evidence or the conclusions the jury could have drawn from that evidence. They do attempt

to minimize the significance of Mr. D'Arcy's testimony, but are able to do so only by ignoring its most critical aspect: his limitation and qualification of his agreement that a suspect reaching for a gun can constitute an immediate threat allowing for the use of deadly force. See Brief in Opposition, page 9.

The plaintiffs assert that "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." Brief in Opposition, page 9. But the defendants in no way suggested that Mr. D'Arcy's testimony constituted evidence of "what must have taken place." The defendants cited Mr. D'Arcy's testimony for his purported expert analysis of the circumstances under which a law enforcement officer might use deadly force.

The plaintiffs rely on the fact that both the district court and the Court of Appeals held in this case that:

> The evidence presented at trial established that if Willis had been reaching for the gun, deadly force was justified. Since the jury concluded that the force used was not justified, it must have concluded that Willis was not reaching for the gun and thus did not pose an immediate threat of harm when Officer Catton fired.

App. 2-3. See Brief in Opposition at pages 1, 4, 5, 7, and 8.

But the whole point of the first issue raised by the defendants in their petition was that this assumption by the district court and the Court of Appeals was *not* consistent with the evidence actually presented to the jury. As noted above, while Mr. D'Arcy agreed that there were circumstances under which the use of deadly force would be appropriate in response to a suspect reaching for a gun, he qualified and limited that agreement.

> In response to the specific question "[a]nd he's moving toward the gun, which is two or three feet from him, and about to grab the gun, then deadly force is appropriate?" Mr. D'Arcy explained that "I wouldn't say two or three feet. If he's about to reach the gun, I'm talking inches from the gun. . . . If he has reached out his hands at two feet and he's about to touch the gun and re-engage the officer, that would be an immediate threat." 4 RT 986, 987.

Petition for Writ of Certiorari, page 13.

Thus, contrary to the assumption made by the district court and the Court of Appeals, and relied upon by the plaintiffs in their Brief in Opposition, the jury did *not* necessarily conclude that Mr. Willis was not reaching for his gun at the moment Officer Catton fired. Instead, the jury's verdict was consistent with two different factual scenarios, either of which would have resulted in the identical verdict: "1) [that] Mr. Willis had not reached for his gun at all, or 2) [that] Mr. Willis *had* reached for the gun but had not gotten to within 'inches' of the gun prior to Officer Catton

firing." Petition for Writ of Certiorari, page 14; italics in original.

The plaintiffs have entirely ignored this evidence and analysis in their Brief in Opposition and thus have not presented any factual or legal basis for denying certiorari as to this issue.

As the defendants pointed out in their petition – and which the plaintiffs have not even attempted to refute – it appears that:

> no court has ever held that a suspect's attempt to grab a gun that is within his or her reach does not constitute an immediate threat until the suspect's hand gets to within inches of that gun. Thus, even if we assume that Mr. D'Arcy's opinion accurately reflects the scope of an individual's rights under the Fourth Amendment, that particularized understanding of that right was not clearly established by any existing case law, or by any extension of the existing case law that a reasonable officer should have understood.

Petition for Writ of Certiorari, pages 15-16. Thus, if this was the factual scenario the jury found to be true – i.e., that the decedent was reaching for the gun at the time he was shot, but had not gotten to within "inches" of the gun – the denial of qualified immunity was improper.

The plaintiffs argue that "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.)" Brief in Opposition, page 10. But as was shown above, the jury was presented with that possibility through the testimony of Mr. D'Arcy. Further, although Officer Catton testified that the decedent was reaching for his gun at the time the officer fired the final shot(s), Officer Catton did not specify how close the decedent had gotten to his gun at the moment the officer fired. See 4 RT 880-881.

Thus, the issue framed by the first of the defendants' questions presented is directly raised in this case and by the decisions reached by the district court and the Court of Appeals: "Is the law clearly established that a suspect reaching for a nearby gun does not present an immediate threat, justifying the use of deadly force, unless and until the suspect's hand is within inches of that gun?"

The plaintiffs seem to suggest that the defendants have waived any complaint they might have about this factual issue not having been determined by the jury because the defendants did not timely submit their proposed special interrogatories. See Brief in Opposition, pages 9-10. But the plaintiffs are ignoring the fact that the district court not only considered multiple versions of such special interrogatories, despite their "lateness", it even proposed its own such interrogatories. See Petition for Certiorari, pages 8-9. And the district court itself acknowledged that "when qualified immunity depends on genuinely disputed issues of material fact, the Court must submit the fact related issues to the jury." 9 RT 2078.

It is not too late to rectify this omission and to provide the district court with *all* of the facts it needs to decide the question of whether Officer Catton is entitled to qualified immunity. As the plaintiffs pointed out in their Brief in Opposition at page 5, the Court of Appeals "remand[ed] the case to the district court so that plaintiffs may present evidence in support of their claim for pre-death pain and suffering damages." (See also Petition for Writ of Certiorari, page 11.) This will necessarily involve a review of the facts occurring immediately following the final shot(s) fired by Officer Catton. It would require only a minimal amount of additional evidence to also review the facts occurring at the moment the final shot(s) were fired.

Thus, there is a simple and practical way to resolve whether the decedent was reaching for the gun at the time of the final shot(s) and, if so, how close he was to grabbing the gun at that moment. So granting certiorari as to the first of the two questions presented by the defendants would not require this Court to decide an abstract issue with no actual application to this matter.

For all these reasons, this Court should grant the defendants' petition for certiorari as to the first of the two questions presented in their petition.

2. THE ATTORNEY'S FEE ISSUE IS IN FACT RIPE FOR REVIEW BECAUSE THE REMAND FROM THE COURT OF APPEALS WILL NOT AFFECT IN ANY WAY ITS DECISION THAT THE DISTRICT COURT PROPERLY CONSIDERED THE RESULT IN THE PLAINTIFFS' PENDENT STATE LAW CLAIMS IN DETERMINING THE AMOUNT OF ATTORNEY'S FEES TO BE AWARDED TO THE PLAINTIFFS

The sole argument offered by the plaintiffs in response to the second of the questions presented by the defendants in their Petition for Writ of Certiorari is that the issue "is not ripe for review [because] [t]he court of appeals has . . . remanded the case for a new trial on damages, which will affect the amount of attorneys' fees awarded." Brief in Opposition, page 10. But that remand will have no effect on the issue raised by the defendants' second question presented.

The Court of Appeals, in its decision, explicitly "reject[ed] defendants' argument that the district court erred by considering plaintiffs' pendent state law claims when evaluating the degree of success plaintiffs achieved in the litigation", citing to "*Farrar v. Hobby*, 506 U.S. 103, 112-13 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983)." App. 6-7. The court's remand of the attorney's fee issue related solely to the district court's decision to "reduc[e] counsel's hourly rates and [to] impos[e] an across-the-board 35% reduction." App. 7.

Thus, the issue of whether it was appropriate for the district court to "consider[] plaintiffs' pendent state law claims when evaluating the degree of success plaintiffs achieved in the litigation" has been finally, and conclusively, decided in this matter, and thus the issue is ripe for review by this Court.

The plaintiffs argue that there is no "conflict among the federal circuit courts on this issue, nor . . . a conflict with this Court's precedents." Brief in Opposition, page 13. But this statement is based on a misunderstanding of the question actually presented by the defendants.

The defendants have not asked this Court to address the general question of whether district courts may "consider the success obtained by plaintiffs on pendent state law claims in determining whether to award attorney's fees under §1988 and how much to award as such fees." Petition for Writ of Certiorari, page 20. Instead, the defendants have asked this Court to review the much narrower question of whether the district court can consider such success in a pendent state law claim "if the state law claim involves injuries suffered by different parties than the person whose constitutional rights were at issue in the §1983 claim". Petition for Writ of Certiorari, page i. The plaintiffs, in their Brief in Opposition, have not even acknowledged this distinction.

The plaintiffs have not responded to, much less refuted, the defendants' showing that in this case, although the plaintiffs in the federal and state law

actions were technically the same, the claims in the two causes of action involved injuries suffered by entirely separate individuals, seeking compensation under distinctly different legal theories: one for violation of constitutional rights, the other based on a state statute.

Nor have the plaintiffs responded to, much less refuted, the defendants' showing that this Court's existing precedents, which appear to provide the basis for the lower court's conclusions that district courts can consider the success obtained by plaintiffs on pendent state law claims in determining award attorney's fees under §1988, would not extend to allowing district courts to consider the success obtained by plaintiffs *other* than the §1983 plaintiffs in determining the attorney's fees to be awarded to the §1983 plaintiffs (as essentially happened here).

Thus, as with the first question presented, the plaintiffs have not presented any factual or legal basis for denying certiorari as to the second question presented in the defendants' Petition for Writ of Certiorari. For the reasons set out in the defendants' petition and in this reply, this Court should grant the defendants' petition for certiorari as to the second of the two questions presented in that petition.

CONCLUSION

For all these reasons, the petitioners urge this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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