

NOV 30 2010

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

LARRY DEPEE, a California Highway Patrol Officer,
and the STATE OF CALIFORNIA,

Petitioners,

v.

SYLVIA MAHACH-WATKINS, Individually and
as the Successor in Interest to the
Estate of John Joseph Wayne Watkins,

Respondent.

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

REPLY BRIEF OF PETITIONERS

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant
Attorney General
JAMES M. SCHIAVENZA
Senior Assistant
Attorney General
TYLER B. PON
Supervising Deputy
Attorney General

DAVID W. HAMILTON
Deputy Attorney General
Counsel of Record
S. MICHELE INAN
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2193
Fax: (510) 622-2121
David.Hamilton@doj.ca.gov

*Counsel for Petitioners Larry Depee
and the State of California*

Blank Page

TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. The Ninth Circuit Did Not Correctly Apply The <i>Farrar</i> Standard	3
A. The Court Rejected The Majority Holding In <i>Farrar</i> That, In Fixing Fees, Primary Consideration Be Given To The Discrepancy Between The Amount Of Damages Sought And The Damages Awarded.....	3
B. The Court Gutted The Majority Holding In <i>Farrar</i> By Approving A Fee Award Based On The Trial Judge's Ruling That Respondent Was Not Entitled To Compensatory Damages	8
C. The Court's Authorization Of Fees Based On The Gravity Of Decedent's Injury Is Not A Standard Authorized By The Majority Holding In <i>Farrar</i>	10
Conclusion.....	13
Appendix To Reply Brief	
Appendix D – Defendant-Appellant's Excerpts of Record, Volume II	App. 34
Appendix E – Defendant-Appellant's Excerpts of Record, Volume III.....	App. 54

TABLE OF CONTENTS – Continued

	Page
Appendix F – Defendant-Appellant’s Supplemental Excerpts of Record, Volume IV	App. 65
Appendix G – Plaintiff-Appellee’s Supplemental Excerpts of Record, Volume I	App. 96

TABLE OF AUTHORITIES

	Page
CASES	
<i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986).....	1
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992).....	<i>passim</i>
<i>Guy v. City of San Diego</i> , 608 F.3d 582 (9th Cir. 2010)	12
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	1
<i>Milton v. Des Moines</i> , 47 F.3d 944 (8th Cir. 1995), <i>cert. denied</i> , 516 U.S. 824 (1995).....	11
<i>Venerable v. City of Sacramento</i> , 185 F. Supp.2d 1128 (E.D. Cal. 2002).....	10
STATUTES	
42 United States Code § 1983	<i>passim</i>
42 United States Code § 1988	1
California Code of Civil Procedure § 377.34.....	9
CONSTITUTIONAL PROVISIONS	
Fourth Amendment	<i>passim</i>

Blank Page

INTRODUCTION

This Court's seminal decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), guides the federal courts in the exercise of their discretion whether to award attorney fees under 42 U.S.C. § 1988 when a civil rights plaintiff obtains only a nominal judgment on a § 1983 cause of action. Despite a plaintiff's prevailing party status, this Court held that for such a plaintiff "the only reasonable fee is usually no fee at all." *Id.* at 114. The Court ruled that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.*, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Thus, the Court held that when the plaintiff's objective in a lawsuit is restricted to recovery of damages for herself, her "extent of success" is defined by what damages she recovers. And the Court stated: "Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.*, quoting *City of Riverside v. Rivera*, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment).

Despite this precise legal prescription, respondent maintains that the *Farrar v. Hobby* presumption of zero attorney fees should not apply in her "unusual" case for three reasons. Brief in Opp. 1. First, she argues that the Ninth Circuit properly ignored the discrepancy between the amount of damages sought and the amount of damages awarded because she never "specified" the dollar amount of compensatory

damages sought for her Fourth Amendment § 1983 claim. *Id.* 1, 3, 12, 13. Second, she maintains that the Ninth Circuit properly concluded that the trial judge's ruling denying pain-and-suffering damages for her § 1983 claim justified an award of fees because the jury returned the maximum verdict (one dollar) to which she was entitled. *Id.* 1, 4, 13. Third and lastly, she maintains that, despite *Farrar's* holding that primary consideration be given to the amount of damages awarded as compared to the amount sought, there is ample justification for the Ninth Circuit's conclusion that fees are justified because her claim of excessive force resulted in a significant injury, a death. *Id.* 1, 14.

As set forth more fully below, respondent's contention that she is entitled to fees under *Farrar* because she did not specify the amount of compensatory damages sought for her Fourth Amendment § 1983 claim is undermined, not only by her complaint and closing argument to the jury which sought \$10 million, but by an extensive record of efforts on her part seeking significant compensatory damages on behalf of the decedent. Her contention that, because the trial judge ruled that she was not entitled to general damages on the § 1983 claim, she received the maximum verdict to which she was entitled (one dollar) cannot absolve her from *Farrar's* requirement that she show some success in order to justify an award of fees. And finally, her contention that she is entitled to fees under *Farrar* because the excessive force claim resulted in a death is a prescription for fees that is

not authorized by *Farrar* and that is not measurable by any standard. All of these excuses, including the assertion that the constitutional violation resulted in a grave injury, could apply to any number of civil rights actions, and they therefore cannot rebut the presumption of *Farrar* that, where a plaintiff is awarded a nominal judgment only, “the only reasonable fee is usually no fee at all.” *Id.* at 114.¹

ARGUMENT

I. The Ninth Circuit Did Not Correctly Apply The *Farrar* Standard

A. The Court Rejected The Majority Holding In *Farrar* That, In Fixing Fees, Primary Consideration Be Given To The Discrepancy Between The Amount Of Damages Sought And The Damages Awarded

As stated in the petition, the Ninth Circuit ignored the entire operative complaint, expressly

¹ Respondent’s recitation of the decision of the court below includes a lengthy quotation citing a forensic pathologist’s declaration opposing summary judgment, which the Ninth Circuit itself cited as part of the record. Brief In Opp. 2. But this case went up on appeal from a jury verdict, not summary judgment, and the pathologist did not testify at trial. The Ninth Circuit’s statement that “[t]he evidence at trial was largely consistent with this narrative” is both inexplicable and inaccurate because the evidence does not appear in the trial record.

incorporating by reference an attached government claim, that specified respondent was seeking \$10 million for the death of the decedent, and indeed, respondent argued to the jury for compensatory damages of \$10 million.² Petition 7; *see* Petitioners' Appendix D, *infra*, 37, 49-53; Brief In Opp., Appendix A, 5a.³ These are inarguably the two most important points in any litigation, and at these two points, respondent was very clear that she sought significant compensatory damages for the death of her decedent.

In closing argument specifically, respondent's counsel asked the jury to award her client compensatory damages in excess of \$10 million, plus an unspecified amount of punitive damages on her Fourth Amendment § 1983 cause of action. Respondent's plea for \$10 million in general damages explicitly referred to Claim 1 on the verdict form, which was the Fourth Amendment § 1983 cause of action, rather than Claim 3, which was respondent's separate wrongful

² Respondent admits that she expressly incorporated her \$10 million government claim into her complaint, but suggests now that the claim specified damages for loss of companionship and future income for her, and did not specify damages of the decedent for her Fourth Amendment claim. Brief In Opp. 3, fn 2. The suggestion is based on a tortured and unjustified reading of the claim. Appendix D 49-53. The claim does not distinguish between respondent's claims and her claims on behalf of the decedent. Nor does the claim limit the damages sought to only those damages to which respondent is entitled on her claims. *Id.*

³ Petitioners' Appendix to the Reply Brief consists of excerpts of the record provided to the Ninth Circuit.

death cause of action under state law. Brief In Opp., Appendix A, 5a; Appendix E, *infra*, 55-57. Respondent now insists that she asked the jury for a \$10 million verdict only on her state wrongful-death cause of action, and for nothing more than nominal damages on her Fourth Amendment § 1983 claim (*see* Brief In Opp. 4-5, fn 4), but the record speaks for itself.

Moreover, as will be shown presently, between the filing of the complaint seeking \$10 million and respondent's plea to the jury for \$10 million on her Fourth Amendment § 1983 claim, an extensive record also overlooked by the Ninth Circuit shows that respondent fought hard for significant compensatory damages on her Fourth Amendment § 1983 claim, refuting any contention that the extent of her success should not be measured under *Farrar* because she failed to seek a specific amount of damages against which her nominal damage verdict can be compared.

To begin with, respondent's First Amended Complaint for Damages sets forth respondent's Fourth Amendment § 1983 cause of action, and it expressly pleads and prays for compensatory damages on behalf of the decedent's estate. Appendix D, *infra*, 35, 38-47. Paragraph 76 in that cause of action alleges that respondent and her decedent "suffered great mental and physical pain, suffering and anguish" and "the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial." *Id.* at 47. These are typical categories of general and special damages, for which respondent specifically

asked in the prayer of the complaint. *Id.* at 47-48. And, as set forth above, attached to the complaint was respondent's government claim seeking \$10 million in damages for the death of the decedent, which was expressly incorporated by reference as part of the Fourth Amendment § 1983 cause of action on behalf of the decedent. Appendix D, *infra*, 49-53.

In the parties' Joint Pretrial Conference Statement, respondent outlined the damages she was seeking and the evidence she planned to introduce to prove those damages. Appendix F, *infra*, 66-72. She described three categories of "relief prayed", and she specifically distinguished between her own damages for wrongful death under California law and the decedent's (as well as her own) § 1983 civil rights damages. *Id.* at 67-68. Those compensatory damages under § 1983 included special damages for medical expenses and lost income, as well as general damages (pain and suffering). With regard to the decedent's § 1983 damages, which would have been relevant only to the Fourth Amendment § 1983 cause of action, respondent said she planned to introduce the expert testimony of a doctor, who would "testify as to the pain and suffering experienced by Decedent during the time that he was shot and the time that he died." *Id.* at 68.⁴ Respondent also included a legal

⁴ Respondent ultimately elected not to present this evidence, so the record contains no evidence at all to prove that the decedent experienced any pain and suffering prior to his death.

argument that she was entitled to seek damages for pain and suffering, as well as punitive damages, on behalf of the decedent under § 1983. *Id.* at 69-70.

Before trial respondent submitted proposed jury instructions in which she again requested compensatory damages for her Fourth Amendment § 1983 cause of action. Respondent requested an instruction on the “Measure of Types of Damages,” and specifically listed a claim for compensatory damages for the “mental, physical, emotional pain and suffering experienced by John Watkins prior to his death.” Appendix F, *infra*, 73-75.

Respondent continued her campaign for compensatory damages on the Fourth Amendment § 1983 claim even after the verdict of one dollar. She filed a motion for new trial as to damages only. Appendix F, *infra*, 92-95. In that motion she reargued the legal question whether a § 1983 plaintiff may recover pain and suffering damages, despite California’s survival statute, stating: “Clearly, the plaintiff was entitled to an instruction of compensatory damages for her son’s Section 1983 wrongful death claim.” *Id.* at 94. The trial court reaffirmed its earlier decision on this question and denied the respondent’s motion for a partial new trial. Appendix E, *infra*, 58-64.

By focusing exclusively on the complaint’s failure to specify the amount of damages claimed and failing to consider the entire record, the Ninth Circuit and the respondent make a mockery of the *Farrar*

reasoning requiring that, in fixing fees, the primary consideration be given to the amount of damages awarded as compared to the amount sought. *Farrar*, 506 U.S. at 114. In actuality, the entire record shows that respondent specified the amount of compensatory damages she sought for the death of her son in her government claim incorporated into the complaint and her closing argument to the jury, and she fought hard for significant compensatory damages for more than two years, never once intimating that she would have been perfectly satisfied with only nominal damages to vindicate the claim of civil rights violation. The lower court's analysis guts *Farrar* of any substance and invites counsel simply to refrain from specifying any particular sum for damages as insurance towards an award of fees.

B. The Court Gutted The Majority Holding In *Farrar* By Approving A Fee Award Based On The Trial Judge's Ruling That Respondent Was Not Entitled To Compensatory Damages

The Ninth Circuit's conclusion, echoed by respondent, that the trial judge's ruling denying pain-and-suffering damages weighs in *favor* of a fee award because the jury returned a verdict of one dollar (the maximum respondent was entitled to under law), defies logic and turns on its head *Farrar's* mandate that respondent show some "degree of success" in order to overcome the usual presumption of zero attorney fees in a nominal verdict case. *Farrar*, 506 U.S. at 114.

The record shows that respondent tried hard to persuade the trial judge that pain and suffering damages were available on her § 1983 claim but ultimately failed in that attempt, and she was unable to prove any other compensatory damages as the decedent died before he could receive medical treatment (*see* Brief In Opp. 4, fn 3).

The issue whether respondent could recover compensatory damages for her decedent's pain and suffering under § 1983 was hotly contested and briefed by both sides before trial. Petitioners filed a motion in limine to exclude evidence of decedent's alleged pain and suffering before death. Petitioners argued that California's survival statute did not allow for a survivor (here, respondent herself) to recover for the decedent's pain and suffering damages (*see* Cal. Code Civ. Proc. § 377.34) and that this state law limitation applied to respondent's claim for the decedent's compensatory damages on her Fourth Amendment § 1983 cause of action. Appendix F, *infra*, 76-79. Respondent argued in opposition that California's survival statute is inconsistent with the remedial purpose of § 1983 and, therefore, the decedent's "pain and suffering [should be] recoverable under his Section 1983 claim." *Id.* at 79. Respondent continued to press her argument all the way through trial.⁵

⁵ On the very last day of the trial, with the trial judge still undecided on this question, the parties argued the issue out of the jury's presence about the proposed jury instructions. Appendix F, *infra*, 80-91. Respondent's counsel insisted the relevant

(Continued on following page)

Ultimately, however, the trial court agreed with petitioners' view of the law and relying on the California statute and citing *Venerable v. City of Sacramento*, 185 F. Supp.2d 1128 (E.D. Cal. 2002), the court elected to give a jury instruction that did not include such damages. Appendix G, *infra*, 97-98.

Civil rights cases are difficult cases to prove, and many plaintiffs fail to win compensatory damages either because of the law or a failure of proof. If winning a nominal verdict after trying *and failing* to win compensatory damages can justify an award of substantial fees, private counsel will have every incentive to bring non-meritorious civil rights actions in federal court because a substantial attorney fee award awaits them in the end.

C. The Court's Authorization Of Fees Based On The Gravity Of Decedent's Injury Is Not A Standard Authorized By The Majority Holding In *Farrar*

Respondent reiterates the Ninth Circuit's reasoning that significant attorney fees are authorized

case law supported her position that respondent was entitled to recover, not just nominal damages, but compensatory damages for the decedent's pain and suffering. *Id.* at 86-87. When the court tentatively agreed with respondent on this point during oral argument, counsel stated: "I obviously agree with the Court, in that the [respondent] is entitled to – as a successor in interest, to get those compensatory damages for Mr. Watkins himself . . ." *Id.* at 91.

because “a police officer’s excessive force *results in death*.” Brief In Opp. 14. The majority holding of *Farrar* did not adopt either of Justice O’Conner’s two alternative justifications for fixing fees in a § 1983 case – the “significance of the legal issue” and “public purpose” justifications. See Petition 9. But even if it had, the Ninth Circuit’s announcement of a standard based on the gravity of the injury effectively makes fees the rule rather than the exception – even when only nominal damages are recovered. Unconstitutional force causing death is certainly important, but it is no more or less important than unconstitutional force causing, e.g., permanent brain injury, loss of limbs, long-term psychiatric trauma, or merely cuts and bruises, and it is no more or less important than any other civil right violation causing injury. See *Milton v. Des Moines*, 47 F.3d 944 (8th Cir. 1995), *cert. denied*, 516 U.S. 824 (1995) (plaintiff suffered blows to the head when police beat him with their flashlights, but the circuit court denied attorney fees).

And therein lies the problem with Justice O’Conner’s two alternative justifications for fixing an award of fees – they are so vague and imprecise that they create no standard to guide the exercise of judicial discretion. They permit courts to award fees in any civil rights case despite a plaintiff’s failure to receive anything more than nominal damages, on the grounds that violations of civil rights are important, or injuries are important, or nominal verdicts serve some public purpose. That these alternative justifications fail to provide meaningful guidance to the lower

courts was recently demonstrated once again by the Ninth Circuit in *Guy v. City of San Diego*, 608 F.3d 582 (9th Cir. 2010), where the court reversed a district court's denial of attorney fees in a nominal-verdict excessive force case. In *Guy*, the plaintiff was sprayed with pepper spray and received only cuts and bruises; the Ninth Circuit justified a fee award on the rationale that the fee award (not the nominal verdict itself) would serve the public purpose of encouraging cities to train police officers to avoid excessive force. Petitioners submit that the inconsistent results in the lower courts occur because the "significance of the legal issue" and "public purpose" justifications are empty standards that invite the federal courts to routinely award significant attorney fees in nominal verdict cases, trumping the majority holding of *Farrar* that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114.



CONCLUSION

For these reasons and the reasons stated in the petition for certiorari, the petition for certiorari should be granted.

Dated: November 30, 2010

Respectfully submitted,

EDMUND G. BROWN JR.

Attorney General of California

MANUEL M. MEDEIROS

State Solicitor General

DAVID S. CHANEY

Chief Assistant Attorney General

JAMES M. SCHIAVENZA

Senior Assistant Attorney General

TYLER B. PON

Supervising Deputy Attorney
General

S. MICHELE INAN

Deputy Attorney General

DAVID W. HAMILTON

Deputy Attorney General

*Counsel for Petitioners Larry Depee
and the State of California*

Blank Page