No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court held that, when a plaintiff sues for money damages in a civil rights action under 42 U.S.C. § 1983, but receives only nominal damages, the plaintiff generally is entitled to no attorney fees under 42 U.S.C. § 1988. In the decision below, the plaintiff brought a civil rights action for money damages (more than $10 million) but received only nominal damages ($2). The plaintiff did not seek or obtain declaratory relief, an injunction, or relief for a class; the verdict caused no change in government policy; and the government agency investigated the incident and exonerated the police officer involved in it. Nevertheless, the Ninth Circuit upheld an attorney fee award of nearly $137,000 on the grounds that the civil right at issue was "important" and that the verdict alone might deter public officials from future civil rights violations. The question presented is:

When a civil rights plaintiff seeks substantial money damages but receives only nominal damages, may the court award attorney fees under 42 U.S.C. § 1988, notwithstanding the failure of the litigation to achieve a significant public benefit such as declaratory, injunctive, or class relief?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Larry Depee, a California Highway Patrol Officer, and the State of California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 593 F.3d 1054 (9th Cir. 2010) and is reproduced at Appendix A (App. 1-21). The fee opinion and order of the U.S. District Court for the Northern District of California is not officially reported; it is reproduced at Appendix B (App. 22-31). Both sides petitioned for rehearing by the appellate panel, and for rehearing *en banc*, and the Court of Appeals denied both petitions on April 28, 2010 in an unpublished order that is reproduced at Appendix C (App. 32-33).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on February 1, 2010. The timely petitions for rehearing and for *en banc* hearing were denied on April 28, 2010 in an order reproduced at Appendix C (App. 32-33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely pursuant to

28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3 because it is filed within 90 days after the denial of a timely petition for rehearing.

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 42 U.S.C. § 1988(b), which states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT

1. The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than

the United States, a reasonable attorney's fee as part of the costs. . . ." In *Farrar v. Hobby*, 506 U.S. 103, 112 (1992), this Court held that a plaintiff who wins nominal damages is a prevailing party under § 1988. But the Court also ruled that when recovery of money damages is the purpose of civil rights litigation, and the plaintiff wins only nominal damages, "the only reasonable fee is usually no fee at all." *Id.* at 115. The Court emphasized that "'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Id.* at 114, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). "In a civil rights action for damages, . . . the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 115. The Court admonished the lower courts that "fee awards under § 1988 were never intended to 'produce windfalls to attorneys,'" *ibid., quoting Riverside v. Rivera*, 477 U.S. 561, 580 (1986), and upheld the circuit court's denial of a fee award to the plaintiff in that case. *Farrar*, 506 U.S. at 115.

Justice O'Connor joined in the Court's opinion and judgment but wrote separately to explain more fully her reasoning. *Id.* at 116 (O'Connor, J., concurring). In so doing, she noted the "substantial difference between the judgment recovered and the recovery sought" by the plaintiff: Farrar asked for $17 million but recovered only one dollar, which strongly suggested his victory was merely technical or *de minimis*. *Id.* at 121 (O'Connor, J., concurring). "When the plaintiff's success is purely technical or *de minimis*,

no fees can be awarded." *Id.* at 117 (O'Connor, J., concurring). "[T]he technical or *de minimis* nature of Joseph Farrar's victory is readily apparent: He asked for a bundle and got a pittance." *Id.* at 120 (O'Connor, J., concurring).

Justice O'Connor suggested, however, that two other factors might justify attorney fees when a plaintiff recovers only nominal damages: first, "the significance of the legal issue on which the plaintiff claims to have prevailed," and second, whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Id.* at 121-122.

2. Respondent Sylvia Mahach-Watkins is the mother of decedent John Watkins. Petitioner Larry Depee is an officer of the California Highway Patrol (CHP), an agency of petitioner State of California. Officer Depee shot and killed John Watkins during a struggle in December 2003. The Court of Appeals noted that "Watkins was unemployed and had a long history of schizophrenia, accompanied by drug and alcohol abuse." App., *infra*, 3.

The case proceeded to trial on three claims: (1) Mahach-Watkins's own § 1983 claim under the Fourteenth Amendment to the United States Constitution, (2) plaintiff's § 1983 claim on behalf of John Watkins's estate for violation of his Fourth Amendment rights, and (3) Mahach-Watkins's wrongful death claim under state law. The jury found against the plaintiff on her own § 1983 Fourteenth Amendment

cause of action, but found liability against Officer Depee on the estate's § 1983 cause of action and on the state wrongful death cause of action. In the damages phase of trial, however, the jury awarded only nominal damages of one dollar on the § 1983 Fourth Amendment claim and one dollar on the state wrongful death claim. The jury awarded the plaintiff no punitive damages. *Id.* at 2, 6, 12-13. No other relief was sought by, or awarded to, the plaintiff.

Plaintiff filed a motion for attorney fees pursuant to 42 U.S.C. § 1988, seeking a total of $686,796.74 in fees. Defendants conceded that under this Court's holding in *Farrar*, the plaintiff was the "prevailing party" and thus met the minimum eligibility requirements for a fee award under § 1988 because of her nominal verdict on the § 1983 Fourth Amendment claim. But defendants argued that, under the reasoning of *Farrar*, plaintiff should not recover any fees. The district court disagreed, relying on the two factors from Justice O'Connor's concurrence in *Farrar*, the "significance of the legal issue on which the plaintiff claims to have prevailed" and whether the litigation "accomplished some public goal." App., *infra*, 24. However, the district court ruled that the plaintiff's attorney fees "should be significantly reduced in light of plaintiff's limited success" and awarded $136,687.35. *Id.* at 26, 28.

3. The Ninth Circuit affirmed. *Mahach-Watkins v. Depee*, 593 F.3d 1054 (9th Cir. 2010), App., *infra*, 1-21. After citing the district court's discretion under 42 U.S.C. § 1988 to award "a reasonable attorney's

fee" to the prevailing party, and noting that a plaintiff who receives a nominal damage award for a § 1983 claim is a prevailing party according to this Court's holding in *Farrar*, the Court of Appeals acknowledged the Court's admonition that "'[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.'" *Id.* at 10-11, *quoting Farrar*, 506 U.S. at 115. The court cited the "general rule" in the Ninth Circuit, "derived from Justice O'Connor's concurrence in *Farrar*," that a district court which chooses to award fees to a nominal damages plaintiff "must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." *Id.* at 11, *citing Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994) (emphasis in *Wilcox*).

The court stated "[t]here are three factors a district court should consider in determining whether a plaintiff succeeded in some way beyond the judgment for nominal damages." App., *infra*, 11. First, "the court should consider '[t]he difference between the amount recovered and the damages sought,' which in most nominal damage cases will disfavor an award of fees." *Ibid.*, *quoting Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). But the Ninth Circuit did not, in fact, consider this difference, for two reasons. First, the court noted that the plaintiff did not specify an amount of damages in her

complaint. App., *infra*, 12.[1] The court overlooked the facts that the plaintiff attached to her complaint a government claim seeking $10 million in damages, and incorporated that claim in her complaint (CR 12; ER at 9, 32), and at trial, she argued to the jury for compensatory damages of $10 million, plus punitive damages. (CR 243; ER at 298.) The court also reasoned that the district court had, as a matter of law, instructed the jury that it could award nominal damages of no more than one dollar on the estate's § 1983 claim. App., *infra*, 12. Notably, this instruction was given at the close of trial, after the district court had rejected the plaintiff's argument that she was legally entitled to compensatory damages, and the district court put no limit on the amount of punitive damages the jury could award. The jury returned a verdict of one dollar in nominal damages and declined to punish Officer Depee with an award of punitive damages. *Id.* at 12-13. Nevertheless, according to the Ninth Circuit, the disparity between the money that plaintiff sought and the nominal award only "somewhat disfavors an award of attorney's fees." *Id.* at 15.

The court then looked to the two additional factors discussed by Justice O'Connor in *Farrar*, the

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[1] This is due to the fact that this action was removed by the defendants to federal court after the plaintiff filed it in state court, where the court rules prohibit plaintiffs from pleading a specific dollar amount in a personal injury or wrongful death complaint. Cal. Code Civ. Proc. § 425.10(b).

first of which is the "significance of the legal issue" on which the plaintiff claims to have prevailed. "We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." *Id.* at 16. The court therefore ruled that this second factor supported the fee award. *Ibid.*

Finally, the court considered the other factor discussed by Justice O'Connor in her concurrence, whether the plaintiff accomplished some "public goal." The Court of Appeals recognized that the undisputed evidence showed the CHP had not been forced by this lawsuit to change any of its policies or practices (which had not been found constitutionally deficient in any respect) and that Officer Depee had not been disciplined for this shooting, which was deemed by the CHP's own investigation to be within policy. *Id.* at 17-18.[2] Dismissing this uncontested evidence, the court said: "We are unwilling to conclude that no public goal was served by Mahach-Watkins's § 1983 verdict merely because the CHP disagreed with the jury's conclusion that its officer used excessive force in

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[2] Petitioners provided this evidence to the trial court specifically to address the "public goal" factor because Ninth Circuit precedents had identified these considerations as possible justifications for a fee award under the "public goal" rationale. *See Wilcox*, 42 F.3d at 555 (lawsuit sparked change in unconstitutional police department policy, yielded finding with collateral estoppel effects in other cases, and prompted discipline against defendant officer); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1390 (9th Cir. 1995), *cert. denied*, 516 U.S. 1146 (1996) (class action lawsuit resulted in jail policy changes).

violation of the Fourth Amendment, and because the CHP has refused either to discipline the officer or to change its policies." *Id.* at 18. Instead, the court assumed "that the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct." *Id.* at 19. The court thus concluded that the third factor favored an award of attorney fees. *Ibid.*

Both the plaintiff and the defendants petitioned for rehearing by the Ninth Circuit panel, and for *en banc* rehearing (the plaintiff was dissatisfied with the size of the fee award granted by the district court). On April 28, 2010 the Court of Appeals denied both petitions. *See* App., *infra*, 32-33.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the decision below conflicts with this Court's decision in *Farrar* and conflicts with other decisions by the circuit courts. The lower courts are struggling with *Farrar*. Eighteen years after that decision, several circuits have developed tests that are based on differing views of the standard, particularly the factors discussed by Justice O'Connor in her concurrence. No other member of the Court joined Justice O'Connor at the time, and the Court has not examined the additional factors in her concurrence in any case after *Farrar*, leaving the lower courts with little guidance. The result is a growing body of case law that is

notable for both its doctrinal confusion and its inconsistent outcomes. Further guidance from this Court is needed to resolve the confusion among the lower courts and to clarify when it is appropriate to make exceptions to *Farrar*'s presumption that nominal damage plaintiffs should receive no attorney fees.

A. The Decision Below Conflicts with *Farrar v. Hobby*

The decision below extends a growing line of cases that narrow *Farrar*.

1. The core lesson of *Farrar* is that, when considering an application for attorney fees, the district court must give primacy to the degree of the plaintiff's success in achieving the purposes of the litigation. The Court in *Farrar* reiterated its prior pronouncements that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award under *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)." *Farrar*, 506 U.S. at 114; *accord, Texas State Teachers Assn. v. Garland Ind. School Dist.*, 489 U.S. 782 (1989). "Indeed, 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" *Farrar*, 506 U.S. at 114, *quoting Hensley*, 461 U.S. at 436. In measuring the plaintiffs' success in *Farrar*, the Court remarked that they had received nominal damages instead of the $17 million in compensatory damages they had asked for, concluding that the "litigation accomplished little beyond giving

petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Ibid., quoting Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

The Court went on to say that when the plaintiff has achieved limited success in the litigation, the usual method of determining a reasonable attorney fee award by multiplying attorney hours spent times a reasonable hourly billing rate to reach the lodestar may yield an excessive fee award. *Farrar*, 506 U.S. at 114. "'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.'" *Farrar*, 506 U.S. at 114, *quoting Riverside*, 477 U.S. at 585 (Powell, J., concurring in judgment). Having thus "considered the amount and nature of damages awarded," the district court may be justified in deciding the plaintiff "should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party." *Farrar*, 506 U.S. 115. This is because an element of the § 1983 plaintiff's cause of action is that she suffered actual, compensable harm, and that she is entitled to recover for that harm. As the Court explained: "In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable

injury." *Farrar*, 506 U.S. at 115.[3] Thus, the Court concluded: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citation omitted], the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115.

2. Rather than give "primary consideration" to a comparison of the amount of damages sought by the plaintiff with the amount recovered at trial, the Ninth Circuit minimized the issue. The court noted that the plaintiff's complaint did not specify the amount of damages claimed. App., *infra*, 12. The court also observed that the trial judge had rejected the plaintiff's argument that she was entitled to recover compensatory damages for the estate on its § 1983 death claim, and instructed the jury that it could award no more than nominal damages on that claim, plus punitive damages. *Id.* at 12-13. But the circuit court suggested this result weighed in favor of an attorney fee award because the "jury returned a verdict of one dollar, the maximum allowed under the instruction." *Id.* at 12. This analysis failed to accord proper weight to this "most critical factor" as mandated by *Farrar*.

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[3] Justice O'Connor in her concurrence also emphasized this point: "When the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring).

The circuit court simply avoided the fact that the plaintiff sought $10 million, plus punitive damages. Plaintiff attached to and incorporated into her complaint a government claim for $10 million. (CR 12; ER at 9, 32.) In her closing argument at trial, plaintiff's counsel asked for a compensatory damages award of $10 million, plus an additional unspecified amount of punitive damages against Officer Depee. Despite this Court's admonition in *Farrar*, the district court's order awarding fees to plaintiff failed to discuss this huge discrepancy between the amount of damages sought and the nominal verdict achieved. *See* App. B, *infra*, 23-26.[4]

The similarity between *Farrar* and the present case is striking: plaintiffs in *Farrar* asked for $17 million and won only one dollar, while plaintiff here sought $10 million but received only one dollar on her § 1983 claim. As Justice O'Connor observed, "[i]t is hard to envision a more dramatic difference" between the amount sought and the amount won. *Farrar*, 506 U.S. at 121 (O'Connor, J., concurring). By minimizing this disparity, the decision below narrows the central holding in *Farrar*.

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[4] The district court gave no more than passing mention to this "primary consideration," without any discussion, saying "the Court rejects defendants' contention that fees should be denied due to the discrepancy between the damages sought and the damages awarded." App., *infra*, 26. The court's order failed to even note that a very sizable discrepancy existed.

3. The circuit court further narrowed *Farrar* by expansively interpreting the two other factors discussed in Justice O'Connor's concurrence, which, as discussed below, have driven much of the case law.

a. With respect to the first factor, the "significance of the legal issue," the court said: "We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death." App., *infra*, 16. This approach, unfortunately, lacks limiting principles. Everybody can agree that wrongful death is an important issue. But the result here is that the general presumption against attorney fees in *Farrar* does not apply in wrongful death cases because, by nature, wrongful death is a significant legal issue. Under this logic, any civil right could be deemed important. *Cf. Guy v. City of San Diego*, ___ F.3d ___, 2010 WL 2403761 (9th Cir. 2010) (awarding attorney fees in nominal verdict case where police arrested plaintiff during a fight outside a bar, and may or may not have used excessive force that resulted in plaintiff being sprayed with pepper spray and receiving cuts and bruises).

Additionally, the courts have not applied this factor consistently. The court below and some other circuits have interpreted the "significance of the legal issue" to refer to the general legal importance of the plaintiff's successful § 1983 claim. *See Mercer v. Duke Univ.*, 401 F.3d 199, 206 (4th Cir. 2005) ("This factor is concerned with the general legal importance of the issue on which the plaintiff prevailed."); *Maul v. Constan*, 23 F.3d 143, 145 (7th Cir. 1994) ("[W]e

understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed."). In other circuits, however, those vague terms have been construed to require examination of the extent to which the plaintiff succeeded on her theory of liability, compared to other claims on which she lost. *See Barber v. T. D. Williamson, Inc.*, 254 F.3d 1223, 1230-1231 (10th Cir. 2001) (reviewing the cases across the nation and noting that this factor "has received different treatment in different courts"); *Cartwright v. Stamper*, 7 F.3d 106, 110 (7th Cir. 1993) (the second factor "looks not at the relief obtained but to the extent the plaintiffs succeeded on their theory of liability"). If the Court of Appeals here had construed "the significance of the legal issue" in this fashion, the outcome might well have been different. Plaintiff in this case pled seventeen causes of action altogether, and after pretrial motions disposed of most of those claims, she obtained a liability verdict on only two claims. At trial she lost on what was arguably her central liability theory, violation of her own Fourteenth Amendment due process rights by the wrongful killing of her son (a theory which, had she won, would have allowed her to argue for a broad range of wrongful death damages), and prevailed on only the estate's Fourth Amendment cause of action and the state law claim, for which she won merely a nominal damages verdict.

b. Similarly, the court below undercut *Farrar* when it held that plaintiff had achieved a "public goal." *Farrar*, 506 U.S. at 121-122 (O'Connor, J.,

concurring). The court acknowledged that this lawsuit had not resulted in a declaration that any CHP policy was unconstitutional, nor had it prompted CHP to take disciplinary action against Officer Depee (whom CHP's own investigation of the shooting had exonerated). App., *infra*, 17-18. Nevertheless, the court stated it was "unwilling to conclude that no public goal was served by Mahach-Watkins's § 1983 verdict merely because the CHP disagreed with the jury's conclusion that its officer used excessive force in violation of the Fourth Amendment, and because the CHP has refused either to discipline the officer or to change its policies." *Id.* at 18. The court did not explain why CHP should be faulted for "refusing" to change policies which were not declared unconstitutional, or for rejecting punishment for an officer who acted in compliance with those policies (and whom the jury itself declined to sanction with punitive damages). The court simply said that the "jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct" and would act as "a deterrent to . . . others who establish and implement official policies governing arrests of citizens." *Id.* at 19.

There is no evidence in the record to support these speculative conclusions. It is also difficult to see how such a finding could not be made in any case where the plaintiff wins nominal damages, given that a nominal damage award presupposes a liability verdict. "Where a plaintiff proves a violation of constitutional rights, nominal damages must be awarded as

a matter of law." *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005). The alleged deterrent value of such a finding thus cannot supply the "something more" necessary for a fee award, because "a finding of a constitutional violation will always be present in a civil rights case where nominal damages have been awarded." *Benton v. Oregon Student Assistance Comm'n*, 421 F.3d 901, 908 (9th Cir. 2005), *citing Farrar*, 506 U.S. at 120 (O'Connor, J., concurring). The Ninth Circuit's rationale thus seems adequate to award attorney fees to almost any nominal damage plaintiff – a result which would effectively reverse *Farrar*'s presumption that such plaintiffs should not be awarded fees.[5]

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[5] The circuit court's deterrence rationale also seems at odds with this Court's pronouncement in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986): "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." If an award of compensatory damages, which the plaintiff here failed to achieve, is presumed to have a deterrence value, it would seem untenable if not illogical to find that a purely symbolic verdict of nominal damages would have the same deterrence value when "the awarding of nominal damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Farrar*, 506 U.S. at 115.

B. The Lower Courts Have Not Interpreted and Applied *Farrar v. Hobby* Consistently, and the Ninth Circuit's Ruling in This Case Conflicts with Decisions of the Seventh and Eighth Circuits

In the nearly two decades since *Farrar*, the circuits have produced a body of case law with widely divergent standards and outcomes, displaying the lower courts' confusion in construing *Farrar* and, in particular, the two factors discussed in Justice O'Connor's concurrence.

1. The inconsistency is illustrated by the lower courts' attempts to state the applicable rule. In *Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996), the Second Circuit stated: "In short, while there is no per se rule that a plaintiff recovering nominal damages can never get a fee award, *Farrar* indicates that the award of fees in such a case will be rare." Similarly, the Eleventh Circuit in *Gray v. Bostic*, 570 F.3d 1321, 1326 (11th Cir. 2009), held: "Plaintiffs in nominal-damage cases should not be awarded attorney's fees in any but exceptional circumstances." The First Circuit, on the other hand, takes a much more liberal view, making fee awards in nominal verdict cases nearly automatic. *See Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 124 (1st Cir. 2004): "[A]lthough this fee-shifting provision [42 U.S.C. § 1988] is couched in permissive terminology, awards in favor of prevailing civil rights plaintiffs are virtually obligatory." The governing approach of the Second and Eleventh Circuits – declaring that attorney fee awards to

nominal damage plaintiffs should be "rare" or "exceptional" – is much more faithful to *Farrar* than the First Circuit's "virtually obligatory" formulation, which inverts this Court's presumption that for a plaintiff who wins only nominal damages, "the only reasonable fee is usually no fee at all." *Farrar*, 506 U.S. at 115.

2. The lower courts have also demonstrated confusion on the meaning of Justice O'Connor's reference to the "significance of the legal issue." *Id.* at 121 (O'Connor, J., concurring). A number of courts have construed the "significance of the legal issue" to mean the abstract legal importance of the constitutional issue litigated and declared a given issue to be sufficiently important to merit a fee award to a plaintiff who otherwise would have been denied fees under the *Farrar* majority's ruling. *See, e.g., Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995) (noting that the plaintiff's "right to be free from illegal detention was a significant one"); *Diaz-Rivera*, 377 F.3d at 124-125 (violation of plaintiffs' due process rights; litigation "settled a significant issue whose resolution benefitted the plaintiffs and the public"); *Mercer*, 401 F.3d at 206 (right to be free from discrimination in school sponsored contact sports); *Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994) (right to be free from cruel and unusual punishment).

These decisions are in tension with other circuit decisions where the courts have judged the legal issue on which the plaintiff prevailed to be insufficiently significant to justify a fee award. *See, e.g., Boston's Children First v. City of Boston*, 395 F.3d 10 (1st Cir.

2005) (school district's unlawful assignment of student plaintiffs to schools on basis of their race not a victory on a significant legal issue); *Pouillon v. Little*, 326 F.3d 713 (6th Cir. 2003) (circuit court overturned district court fee award based on plaintiff's vindication of his First Amendment right to protest on city hall steps); *Gray v. Bostic*, 570 F.3d 1321 (attorney fee award vacated; violation of nine-year-old child's Fourth Amendment rights by handcuffing her for punitive purposes not significant legal issue). In *Maul v. Constan*, 23 F.3d at 145-146, the Seventh Circuit acknowledged that the issue on which the plaintiff there prevailed – whether an inmate is entitled to a hearing before administration of antipsychotic drugs against his wishes – was "clearly a significant constitutional question," but it reasoned that this was the least important of the *Farrar* factors and therefore denied attorney fees to the plaintiff. The Second Circuit has adopted a similarly restrictive interpretation of this factor, stating in *Pino v. Locascio*, 101 F.3d at 239: "The vast majority of civil rights litigation does not result in ground-breaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief." This statement cannot be squared with the reasoning of the Eighth Circuit, which upheld a fee award to an inmate plaintiff because "civil rights litigation serves an important public purpose" by vindicating a policy Congress believed to be important. *Jones*, 29 F.3d at 424.

These irreconcilable statements by the Second and Eighth Circuits demonstrate the need for this Court to clarify the relevance and meaning of this factor. At some level, all civil rights are important, but there are no firm principles to determine how this factor influences whether a nominal verdict plaintiff is entitled to attorney fees. This case is a good example. The Ninth Circuit required only a brief paragraph to analyze this issue before rendering the *ipse dixit* conclusion that the plaintiff had prevailed on the "significant" issue of "the legality of state-sanctioned force resulting in death." App., *infra*, 16.

3. The "public goal" factor has likewise received disparate treatment by the circuit courts. *See Barber*, 254 F.3d at 1231-1232. The Second Circuit, again, takes a restrictive view of this factor in deciding whether to award attorney fees to nominal damage plaintiffs, noting that "not every tangential ramification of civil rights litigation *ipso facto* confers a benefit on society." *Pino*, 101 F.3d at 239; *but see Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994) (fee award appropriate because plaintiff prevailed on a novel issue of law). The Seventh Circuit similarly concluded that a lawsuit did not serve a public purpose because the "plaintiff brought suit only on his own behalf, alleging only violations of his own rights" and seeking redress for his injuries only. *Maul*, 23 F.3d at 146. Other courts have adopted a broader reading of this factor, holding that a public goal is accomplished if the plaintiff's victory encourages attorneys to represent civil rights

litigants, affirms an important right, puts the defendant on notice that it needs to improve, or provokes a change in the defendant's policies or conduct. *See, e.g., O'Connor v. Huard*, 117 F.3d 12, 17-18 (1st Cir. 1997) (plaintiff's victory was not *de minimis* because it provided an incentive to attorneys to represent civil rights litigants and served as a deterrent to future abuses); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997) (plaintiff's nominal verdict "accomplished a public goal, namely, encouraging governments scrupulously to perform their constitutional duties"); *Piper*, 69 F.3d at 877 ("a public goal had been served by [the plaintiff's] victory in encouraging [defendants] to refashion their forfeiture procedures to avoid future illegality"); *Koopman v. Water Dist. No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994), *cert. denied*, 516 U.S. 965 (1995) (plaintiff's victory established basic rights for public employees holding a similar property interest).

As illustrated by these cases, the lower courts have been no more consistent in their interpretation and application of Justice O'Connor's "public goal" factor than they have been in utilizing "the significance of the legal issue" as a touchstone for awarding attorney fees. The circuits have found enough flexibility in this factor to uphold fee awards on the ground that a nominal damages verdict would "encourage" the government to be scrupulous in protecting civil rights, *Muhammad*, 104 F.3d at 1070, and to "avoid future illegality," *Piper*, 69 F.3d at 877. Such loose invocations of the public goal factor, in which

courts simply assume that a mere nominal damages judgment will alter a defendant's behavior without requiring any proof in the record, could justify a fee award nearly every time a plaintiff wins a nominal damages verdict. (The Ninth Circuit adopted just such a method in the present case by upholding the district court's "finding," without any evidentiary basis, that "the jury's verdict will likely deter defendant Depee from engaging in future unconstitutional conduct." App., *infra*, 18-19.)[6] But that result would effectively render *Farrar* a dead letter. In order to be faithful to *Farrar*'s injunction to avoid windfall awards to attorneys, *Farrar*, 506 U.S. at 115, the "public goal" factor (if adopted by the Court) should be more precisely construed to apply where the plaintiff obtains a litigation result that realistically benefits a class of litigants or the public at large. *See, e.g., Lowry v. Watson Chapel School Dist.*, 540 F.3d 752, 765 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 1526 (2009) (fee award upheld where plaintiffs obtained

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[6] Another Ninth Circuit panel, in a published opinion, recently reversed the district court's denial of attorney fees to a plaintiff who won a nominal damages verdict against a police officer for using excessive force in violation of the Fourth Amendment. *Guy v. City of San Diego*, ___ F.3d ___, 2010 WL 2403761 (9th Cir. 2010). Despite the absence of any evidence showing the San Diego police department had changed its policies or disciplined the defendant officer as a result of this lawsuit, the circuit panel made its own finding that the *attorney fee award* itself (not the nominal verdict) "serves a purpose beneficial to society" by encouraging the city to ensure its officers are well trained to avoid using excessive force.

nominal damages for violation of free speech rights and permanent injunction benefiting all students in the school district); *Phelps v. Hamilton*, 120 F.3d 1126, 1131-1133 (10th Cir. 1997) (plaintiffs entitled to attorney fee award because they obtained declaratory judgment invalidating state statute on constitutional grounds, resulting in legislature amending statute).

4. More specifically, the circuits inconsistently apply *Farrar* to nominal verdicts and fee awards in police excessive force cases like the present one.

In *Milton v. Des Moines*, 47 F.3d 944 (8th Cir.), *cert. denied*, 516 U.S. 824 (1995), the plaintiff was injured during an arrest; the evidence showed he suffered blows to the head when the police beat him with their flashlights, and he incurred medical bills totaling $6,000. The plaintiff alleged excessive force in violation of his constitutional rights as well as assault and battery under state law (like the plaintiff in the present case). A number of the plaintiff's claims were dismissed before trial. The jury found one of the three defendant officers liable for use of excessive force and battery, but awarded the plaintiff only one dollar in nominal damages. While the circuit court "acknowledged that a claim of excessive force is of great public importance," and that "the civil right Milton sought to vindicate was a significant issue" (echoing Justice O'Connor's factors), it affirmed the district court's denial of attorney fees. *Id.* at 946-947.

In *Briggs v. Marshall*, 93 F.3d 355 (7th Cir. 1996), the plaintiffs got into an altercation with the

defendant policeman, and one of them was dragged by her head out of a restaurant. (The police officer was later convicted of misdemeanor battery for this incident.) The four plaintiffs filed suit under § 1983 alleging excessive force and various state law torts. *Id.* at 358-359. They asked the jury for $75,000 in compensatory damages, plus significant punitive damages, but were awarded only four dollars. The district court denied attorney fees based on *Farrar* and the Court of Appeals affirmed. Like the Ninth Circuit here, the Seventh Circuit in *Briggs* employed "the three part test from Justice O'Connor's concurrence" in *Farrar*. *Id.* at 361. Notwithstanding the acknowledged "significance of the legal issue" (excessive force in violation of the constitution), which the court deemed "the least significant" of the three factors, the court upheld the denial of attorney fees. The court's rationale could be applied verbatim to the present case: "Here . . . the plaintiffs received only nominal damages, they did not obtain an injunction prohibiting future violations, and they did not establish that the defendants' conduct was sufficiently reprehensible to warrant punitive damages." *Ibid.* (internal quotes omitted).

Yet the Ninth Circuit in the decision below affirmed a fee award while the Seventh and Eighth Circuits denied fees in *Milton* and *Briggs*. No principled distinctions can be drawn to explain the different outcomes: all three cases arose from police use of force against citizens which juries found to be excessive and in violation of the Fourth Amendment, albeit

unworthy of an actual damage award, and each plaintiff's vindication was acknowledged by all three circuits to be significant and important to the public. To be sure, the present case resulted in death, but the Ninth Circuit also awarded attorney fees in *Guy*, where the plaintiff's struggle with police officers resulted in relatively minor injuries (cuts, bruises, and pain from pepper spray), and the court admitted that it was unclear whether the police or the plaintiff himself had caused the injuries. *Guy*, ___ F.3d ___, 2010 WL 2403761.

5. Finally, the issue here is significant and recurring. As shown in the foregoing analysis, dozens of circuit decisions have attempted to apply *Farrar*, either granting or denying fee awards to nominal damage plaintiffs. Most of them have looked to Justice O'Connor's concurring opinion for guidance, but there has been no consensus among the lower courts about what Justice O'Connor meant, or how to apply her suggested factors. The result is disarray among the lower courts.

Petitioners respectfully suggest that attorney fee awards to nominal damage plaintiffs should be allowed only where the litigation has accomplished some identifiable public purpose supported by the lower court's judgment – such as invalidating an unconstitutional policy of the defendant or securing injunctive, declaratory, or class relief. As in the case of enhancements to the lodestar fee award under § 1988, which the Court recently held should be "rare," *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1674

(2010), attorney fee awards to plaintiffs who win only nominal damages should be reserved for the exceptional situation in which the plaintiff obtains a litigation result that benefits a class of litigants or the public at large, meriting a fee award for plaintiffs and attorneys who truly perform a public service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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