

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

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J.P., BY AND THROUGH HIS GUARDIAN AD LITEM,
SHANNON VILLANEUVA,

Petitioner,

vs.

COUNTY OF ALAMEDA, DIANE DAVIS MASS,
and SUE MAY,

Respondents.

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**On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit**

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FILED

MAR 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.P., by and through his Guardian Ad
Litem, Shannon Villanueva; SHANNON
VILLANUEVA,

Plaintiffs-Appellees,

v.

COUNTY OF ALAMEDA; DIANE
DAVIS MAAS; SUE MAY,

Defendants-Appellants,

and

TRIAD FAMILY SERVICES; MARIA
REFUGIO MOORE,

Defendants.

No. 18-15963

D.C. No. 4:17-cv-05679-YGR

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted July 17, 2019
San Francisco, California

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Before: PAEZ, RAWLINSON, and MURPHY, ** Circuit Judges.

Diane Maas (Maas), Sue May (May), and the County of Alameda (County, together with Maas and May, the Appellants) appeal the district court’s order denying qualified immunity for claims brought pursuant to 42 U.S.C. § 1983 (§ 1983) (1) under the state-created-danger and special-relationship doctrines; and (2) under the First Amendment for familial association. Our jurisdiction derives from 28 U.S.C. § 1291, and we review the denial of qualified immunity *de novo*. *See Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018).

1. The state rarely has an obligation to protect citizens from private harm. *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). However, there are two exceptions: (1) “when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (state-created danger exception)”; or (2) when a special relationship exists between the plaintiff and the state (special-relationship exception). *Patel v. Kent School Dist.*, 648 F.3d 965, 971-72 (9th Cir. 2011) (citations and internal quotation marks omitted).

We have held that the “clearly established” special-relationship doctrine

** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

applies to children in foster care, creating a duty to provide at least reasonable safety. *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012). Under this doctrine, a plaintiff must establish: (1) “an objectively substantial risk of harm”; and (2) that a reasonable official would have been compelled to draw an inference “that a substantial risk of serious harm existed.” *Id.* at 1001 (citation omitted).

“To determine whether qualified immunity applies in a given case, [courts] must determine: (1) whether a public official has violated a plaintiff’s constitutionally protected right; and (2) whether the particular right that the official has violated was clearly established at the time of the violation.” *Shafer v. City of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017) (citation omitted).

“For a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that what he was doing violates federal law.” *Id.* at 1117 (citations omitted).

The state-created danger exception “only applies in situations where the plaintiff was *directly* harmed by a third party.” *Willden*, 678 F.3d at 1002 (second emphasis in the original). Appellee alleged that the Appellants’ failure to remove him from his foster home caused him emotional distress, exposing him to potential harm from drugs. Appellee never alleged any direct harm to him, only to his

sibling. Our cases have not recognized a Fourteenth Amendment violation under these two exceptions for emotional distress alone, or for direct harm to another party. *See, e.g., Willden*, 678 F.3d at 998-1003; *see also Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 843-47 (9th Cir. 2010). Because no law clearly established that child welfare workers could be liable to a sibling who suffered no direct injury as a result of a state-created danger or special relationship, the defendants were entitled to qualified immunity. *See Shafer*, 868 F.3d at 1117 (holding that qualified immunity applies if no clearly established law exists on the issue); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) (reiterating that clearly established law must not be defined “at a high level of generality” but “particularized” to the facts of the case).

2. The dissent’s reliance on *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) is completely misplaced, as it does not even address foster home placement or sibling relationships. Rather, that case involved the exclusion of women from a fraternal organization. *See id.* at 621-22. Nothing in that case supports the dissent’s position that child welfare workers could be liable for indirect injury to a sibling, or the argument that a loss-of-familial-association claim exists for siblings under the First Amendment. As discussed below, our precedent is to the contrary.

No viable loss-of-familial-association claim exists for siblings under

the First Amendment. A familial relationship grounds the loss of familial association claims under the First and Fourteenth Amendments. *See Roberts*, 468 U.S. at 618-20. Thus far, that familial relationship has been limited to that between a parent and child. *See Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *rev'd on other grounds in Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999). In *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991), *as amended*, we explicitly ruled that siblings do not possess a cognizable liberty interest to assert a loss of familial association claim under the Fourteenth Amendment. No basis exists to disregard this precedent simply because the claim is raised under the First Amendment rather than the Fourteenth Amendment. Notably, the dissent cites no case to that effect.

REVERSED and REMANDED.

FILED

J.P. v. Cty. of Alameda, No. 18-15963

MAR 2 2020

PAEZ, Circuit Judge, dissenting:

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I agree in full with the district court’s thorough and reasoned analysis of J.P.’s constitutional claims in the order denying defendants’ motion to dismiss. *See* Order Granting In Part & Denying In Part County Defendants’ Motion to Dismiss (Dkt. 52), *J.P. v. Cty. of Alameda*, No. 17-cv-5679, 2018 WL 1933387 (N.D. Cal. Apr. 24, 2018). For those reasons, and as further explained below, I would affirm.

Ninth Circuit precedent clearly establishes that children “ha[ve] a protected liberty interest in safe foster care placement once they [become] wards of the state.” *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 847 (9th Cir. 2010). The child welfare workers here were thus well on notice that they had an affirmative obligation to (i) “safeguard [J.P.’s] wellbeing” after he was placed in their custody in foster care, *see id.* at 843; and (ii) not act with deliberate indifference toward a known or obvious risk of danger, *see id.* at 844. They overlooked these obligations when they allowed J.P. and his three-year-old sister to continue living in a foster home even after she had ingested methamphetamine there. *See id.* And, contrary to the majority’s position, J.P. *did* allege that he suffered a direct harm, even though he did not personally ingest methamphetamine; he claims that he suffered emotional distress as a result of

losing his younger sister when she died from ingesting methamphetamine a second time at that home. *See Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 307 (holding that damages awards under section 1983 “may include not only out-of-pocket loss and other monetary harms, but also such injuries such as . . . *mental anguish and suffering*”) (emphasis added) (quotation marks omitted); *Harper v. City of L.A.*, 533 F.3d 1010, 1029 (9th Cir. 2008).¹

I also disagree that it was not clearly established that the First Amendment protects cohabiting siblings from unwarranted government interference in their relationship. As the Supreme Court recognized almost forty years ago, childhood siblings share precisely the “kind[] of highly personal relationship” that warrant a “substantial measure of sanctuary from unjustified interference by the State.” *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). “[C]ertain kinds of personal

¹ The majority’s reliance on *Henry A. v. Willden*, 678 F.3d 991, 1002 (9th Cir. 2012) is misplaced. *Willden* did not hold that the state-created danger exception requires a showing that a third party directed harm at the plaintiff. We rejected only the proposition that a state official could escape liability simply by claiming that the danger pre-existed the state action. *See id.* Thus, to incur liability, the state official need not do more than expose the plaintiff to a danger he “would not have otherwise faced.” *Id.* at 1002–03; *see also Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). In dicta, we stated: “by its very nature, the doctrine only applies in situations where the plaintiff was directly harmed by a third party—a danger that, in every case, could be said to have ‘already existed.’” *Willden*, 678 F.3d at 1002. Whether the plaintiff establishes a sufficient showing of harm as a result of the state’s created danger is not part of the danger-creation exception analysis. For the reasons provided by the district court, J.P. has made the requisite showing. *See J.P.*, 2018 WL 1933387, at *4.

bonds,” such as those built from “cohabit[ing] with one’s *relatives*,” enjoy constitutional shelter because of the “emotional enrichment” one develops from doing so and the way it enables individuals to “cultivat[e] and transmit[] shared ideals and beliefs.” *Id.* at 619–20 (emphasis added). Because defendants interfered with J.P.’s relationship with his sister, however, he can no longer live with his sister, enjoy the emotional enrichment from doing so, or cultivate and transmit shared ideals and beliefs with her. *See id.*

Our decision in *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991), does not compel us to hold otherwise. *Ward* held only that the Fourteenth Amendment right to familial association does not protect a relationship between adult siblings. *See* 967 F.2d at 284. *Ward* did not, however, address the right to intimate familial associations under the First Amendment. Although the majority insists that there is “[n]o basis” to treat the First Amendment claim differently, Maj. Disp. at 5, the rights protected under the First and Fourteenth Amendments are doctrinally distinct and must be examined separately. That is because the Supreme Court and our court have developed different tests under both amendments to determine whether a certain activity or relationship is entitled to constitutional protection. For example, whether an alleged right constitutes a “liberty” interest under the Fourteenth Amendment depends, in part, on the “historic practices of our society, or whether on any other basis it has been

accorded special protection.” *See Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); *see also Rochin v. Cal.*, 342 U.S. 165, 172 (1952) (holding due process right protects against state action that “shocks the conscience”). In *Ward*, we ultimately determined that the right of an adult to associate with an adult sibling was not a substantive due process right.

On the other hand, the First Amendment goes beyond protecting what we deem “historic” or traditional, or against government action that shocks the conscience. It protects “certain intimate human relationships . . . that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) (citing *Bd. of Directors of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 545 (1987)) (quotation marks omitted). The relationship between two sibling children raised in the same foster home—and the emotional attachments that derive therefrom—would, in my view, certainly fall under the type of intimate relationship protected under First Amendment. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J.P., BY AND THROUGH HIS GUARDIAN AD LITEM, SHANNON VILLANUEVA,

Plaintiff,

vs.

COUNTY OF ALAMEDA, ET AL.,

Defendants.

CASE NO. 17-cv-05679-YGR

**ORDER GRANTING IN PART AND DENYING
IN PART COUNTY DEFENDANTS' MOTION
TO DISMISS**

Re: Dkt. No. 21

Plaintiff J.P., by and through his guardian *ad litem*, brings this civil rights action against defendants County of Alameda (the "County"), Diane Davis Maas in her individual and official capacities, Sue May in her official capacity, Triad Family Services ("Triad"), and Maria Refugio Moore. Relevant here, plaintiff asserts the following claims against the County, Maas, and May (the "County Defendants") pursuant to 42 U.S.C. section 1983 for: (1) violation of the Fourteenth Amendment – state-created danger (against Maas and May); violation of the First and Fourteenth Amendments based on (2) intimate association (against Maas and May), (3) expressive association (against Maas and May), (4) municipal liability – policy of failure to train (against the County), (5) municipal liability – customs, practices, de facto policy (against the County), (6) municipal liability – ratification (against the County); and (7) declaratory and injunctive relief (against the County). (Dkt. No. 1 at 14–20 ("Complaint").)¹

The County Defendants have moved to dismiss all counts alleged against them. (Dkt. No.

¹ The Court notes that the descriptions of plaintiff's causes of action as they appear in the body of the complaint (*See* Complaint at pp. 14–20) are inconsistent with the descriptions of the same causes of action as they appear on the caption page of the complaint (Complaint at ECF 1). In light of these inconsistencies, the Court interprets plaintiff's claims based on the arguments made in plaintiff's opposition to the County Defendants' motion to dismiss. (*See* Dkt. No. 23 ("Opposition").)

21 (“Motion”).) Having carefully considered the pleadings in this action, the papers submitted, and oral arguments held on February 13, 2018, the Court hereby **GRANTS IN PART AND DENIES IN PART** the County Defendants’ motion to dismiss. In sum, plaintiff can state: (i) a claim for violation of his Fourteenth Amendment rights to be free from state-created danger and to minimally adequate care; (ii) a claim for violation of his First Amendment right to familial association; and (iii) corresponding municipal liability claims.

I. SUMMARY OF RELEVANT ALLEGATIONS

The complaint alleges as follows:

This case arises from tragic events that occurred in the fall of 2015 and resulted in the untimely death of plaintiff’s two-year-old sister, M.M. Specifically, plaintiff alleges that he and M.M. (together, the “foster siblings”) were involuntarily removed from their biological mother’s custody on September 30, 2015 due to allegations of abuse and neglect suffered by the children. (Complaint ¶ 19.) Later that day, defendant May, a County employee, placed plaintiff and M.M. in the care of defendant Moore, an out-of-county foster mother approved by defendants Triad and the County. (*Id.* ¶¶ 23, 27, 28.) Moore’s live-in boyfriend at the time was granted an exemption to reside with and assist in the care or supervision of the foster siblings. (*Id.* ¶ 27.)

On the evening of October 3, 2015, just days before M.M.’s third birthday, Moore took M.M. to the hospital after having observed the child’s “strange” behavior earlier that day at the park. (*Id.* ¶¶ 30, 31.) Specifically, M.M. hallucinated in the presence of J.P., her brother, began shaking and sweating, and experienced an elevated heart rate. (*Id.* ¶ 30.) The following day, the results of the urine sample taken by the hospital revealed that M.M. had methamphetamine in her system. (*Id.*) Her final diagnosis was “Altered level of consciousness” and “Amphetamine abuse.” (*Id.*)

The County, through May and social worker Maas, was subsequently made aware of M.M.’s hospitalization for ingesting methamphetamine. (*Id.* ¶¶ 35, 39.) However, Maas and May failed to assess an emergency report that M.M. had ingested methamphetamine, or investigate it, or take any immediate steps to prevent further harm, despite being authorized and mandated to do so. (*Id.* ¶¶ 44, 46, 49, 51, 52, 54, 55, 60–63.) Consequently, on October 16, 2015, M.M. was

again exposed to methamphetamine in the same foster home. (*Id.* ¶ 64.) Once again, in plaintiff's presence, M.M. exhibited unusual behavior and symptoms, including being petrified by imaginary spiders, cramping and contortion of her hands, shaking fingers, speaking incoherently with her eyes closed, and stomach spasms. (*Id.* ¶ 65.) Hours later, M.M. died in her brother's arms. (*Id.* ¶ 67.)

II. LEGAL FRAMEWORK

A. Rule 12(b)(6) Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Dismissal under Rule 12(b)(6) is proper if there is a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the facts alleged do not support a reasonable inference of liability, stronger than a mere possibility, the claim must be dismissed. *Id.* at 678–79. Mere "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Adams v. Johnson*, 355 F.3d 1179, 1182 (9th Cir. 2004).

B. 42 U.S.C. Section 1983

Here, the complaint asserts claims under 42 U.S.C. section 1983 (herein "Section 1983"), which provides for a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the United States Constitution or the laws of the United States. "To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred 'under color of state law' and (2) the action resulted in the deprivation of a

constitutional right or federal statutory right.” *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). “The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws.’” *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. § 1983).²

C. Qualified Immunity

“Qualified immunity affords limited protection to public officials faced with liability under 42 U.S.C. § 1983, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017) (internal quotation marks omitted). “To determine whether qualified immunity applies in a given case, [courts] must determine: (1) whether a public official has violated a plaintiff’s constitutionally protected right; and (2) whether the particular right that the official has violated was clearly established at the time of the violation.” *Id.* “For a right to be clearly established, case law must ordinarily have been earlier developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant’s place, that what he was doing violates federal law.” *Id.* at 1117. “It is the plaintiff who ‘bears the burden of showing that the rights allegedly violated were ‘clearly established.’” *Id.* at 1118 (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000)).

III. DISCUSSION

The County Defendants’ motion challenges the alleged constitutional rights asserted and raises a qualified immunity defense. By way of overview, the County Defendants, relying principally on *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991), move to dismiss plaintiff’s entire complaint, arguing that “[a]s a sibling, Plaintiff does not have standing to assert a claim for loss of familial association under the Fourteenth Amendment.” (Motion at 4.) On this same basis, they contend that individual County Defendants Maas and May are entitled to qualified immunity. Plaintiff concedes that under *Ward*, he, as a sibling, lacks standing to assert a Fourteenth

² The County Defendants do not dispute that the “under color of state law” requirement is satisfied.

Amendment claim for loss of familial association. However, plaintiff argues that his claims actually stem from a “a sibling’s rights to be free from the government’s creation of danger and failure to protect foster children as proscribed by the Fourteenth Amendment, [and] invasion of a family member’s right to association under the First Amendment.” (Opposition at 1.) While not the model of clarity, the Court evaluates the complaint and addresses plaintiff’s asserted rights in turn, and in a light most favorable to plaintiff.³

A. First Cause of Action: Violation of Plaintiff’s Fourteenth Amendment Rights to be Free from State-Created Danger and to Minimally Adequate Care

Plaintiff appears to clarify that his first cause of action is based on both a danger-creation theory of Fourteenth Amendment liability *and* a special-relationship theory. (Opposition at 5.) With respect to the former, the County Defendants argue that “[t]he essence of Plaintiff’s claim is for the loss of a sibling relationship, which is simply not cognizable under the Fourteenth Amendment.” (Motion at 4.) The Court disagrees with this characterization of plaintiff’s Fourteenth Amendment claim and finds that plaintiff has adequately pleaded both danger-creation and special-relationship theories of Fourteenth Amendment liability.

As a preliminary matter, the state generally does not have an obligation to protect citizens from private harm. *See DeShaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189, 195–96 (1989); *see also Patel v. Kent Sch. Dist.*, 648 F.3d 965, 972 (9th Cir. 2011) (“In that vein, the Fourteenth Amendment’s Due Process Clause generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests.”). However, two exceptions to this general rule exist, both of which plaintiff claims apply: (1) when the state affirmatively places a plaintiff in danger by acting with “deliberate indifference” to a “known or obvious danger” (“state-created danger exception”), *see L.W. v.*

³ The Court notes that individual County Defendant May is named as a party-defendant in her official capacity only, while individual County Defendant Maas is named as a party-defendant in both her individual *and* official capacities. (*See* Complaint ¶¶ 8, 9.) While the parties have not briefed the issue, and the Court takes no position on the matter in this Order, plaintiff should consider whether it is appropriate to name Maas and May in their official capacities, while simultaneously naming the County, before filing his amended complaint.

1 *Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996); and (2) when a “special relationship” exists between the
 2 plaintiff and the state (“special-relationship exception”), *see DeShaney*, 489 U.S. at 198–202. If
 3 either exception applies, the state’s omission or failure to protect may give rise to a Section 1983
 4 claim. *Patel*, 648 F.3d at 972.

5 1. *Right to be Free from State-Created Danger*

6 The state-created danger exception applies when there is “affirmative conduct on the part
 7 of the state in placing the plaintiff in danger,” and the state acts with “deliberate indifference” to a
 8 “known or obvious danger.” *Id.* at 974 (internal quotation marks omitted). Accordingly, courts
 9 have concluded that state child protective agencies expose children in their care to a danger they
 10 otherwise would not have faced when the agency makes poor placement decisions. For example,
 11 in *Tamas v. Department of Social & Health Services*, 630 F.3d 833 (9th Cir. 2010), the Ninth
 12 Circuit determined that by approving a foster child’s adoption, the state “created a danger of
 13 molestation that [the child] would not have faced had the state adequately protected her as a result
 14 of referrals [reporting her foster father’s physical and sexual abuse].” *Id.* at 843.

15 Here, the complaint alleges, *inter alia* that:

16 Defendants’ misconduct deprived [J.P.] (and his sister) of Fourteenth Amendment
 17 rights by affirmatively placing, deciding, or recommending that [J.P.] (and [his
 18 sister]) continue to be placed in Moore’s foster-care home, without engaging in any
 19 necessary acts to protect these foster siblings from future harm after [M.M.]
 20 ingested methamphetamine on 10/3/15. Defendants’ misconduct resulted in [J.P.]
 (and [M.M.]) living with a foreseeable and significant risk of danger they otherwise
 would not have faced—that [J.P.] or his sister would die of a methamphetamine
 overdose.

21 (Complaint ¶ 82.) Citing this paragraph of the complaint, the County Defendants argue that
 22 “[t]here are no facts indicating the Plaintiff personally suffered any abuse or neglect in the subject
 23 foster home, and in fact, he did not.” (Dkt. No. 24 at 2 (“Reply”).) The County Defendants are
 24 correct that the complaint is devoid of any allegations that *plaintiff* ingested methamphetamine or
 25 suffered any physical injury. However, there can be no serious dispute that, taking the allegations
 26 as true, plaintiff was exposed to a danger he would not have faced had Maas and/or May removed
 27 him and his sister from their foster home, namely “expos[ure] to methamphetamine and its toxic
 28 effects including the possibility of death.” (Complaint ¶ 62.) The County Defendants’ efforts to

argue otherwise are not well taken.

In order for the state-created danger exception to apply, plaintiff must additionally plead that “state officials . . . act[ed] with such deliberate indifference to the liberty interest that their actions ‘shock the conscience.’” *Tamas*, 630 F.3d at 844 (quoting *Brittan v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006)). Conduct that “shocks the conscience” is “deliberate indifference to a known, or so obvious as to imply knowledge of, danger.” *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1064 (9th Cir. 2006) (internal quotation marks omitted). In *Tamas*, the Ninth Circuit held:

[T]he deliberate indifference standard, as applied to foster children, requires a showing of an objectively substantial risk of harm and a showing that officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and that either the official actually drew that inference or that a reasonable official would have been compelled to draw that inference. . . . [T]he subjective component may be inferred from the fact that he risk of harm is obvious.

630 F.3d at 845 (internal quotation marks and citations omitted); *see also Henry A. v. Willden*, 678 F.3d 991, 1001 (9th Cir. 2012) (“[A] foster child’s due process rights are violated when a state official exhibits deliberate indifference to a child’s serious medical needs; to suspected physical abuse in a foster home; and to suspected sexual abuse in a foster home.”).

Viewing the complaint in a light most favorable to plaintiff, the Court finds that plaintiff adequately pleads facts that, if true, would establish that individual County Defendants Maas and May acted with deliberate indifference to a substantial risk of harm to plaintiff. For example, plaintiff alleges that prior to M.M.’s death, M.M. was “hospitaliz[ed] for ingesting methamphetamine while in the exclusive care and custody of the *same foster parent* [as plaintiff’s] for the previous four days.” (*Id.* ¶ 81 (emphasis supplied).) Moreover, plaintiff alleges: “Defendants were subjectively aware of these facts from which an inference could be drawn that a substantial risk of harm existed. Either they drew that inference or would have been compelled to draw that inference.” (*Id.*) According to plaintiff, despite being “on constructive notice about the details of 10/3/15, and the likelihood narcotics would again be available for the *foster siblings* to ingest” (*id.* ¶ 35 (emphasis supplied)), the County Defendants failed to inform the Dependency Court of facts regarding M.M.’s methamphetamine exposure (*id.* ¶ 40). Moreover, the County

Defendants allegedly “failed to make any Emergency Referral Protocol assessment” despite receiving numerous abuse or neglect referrals. (*Id.* ¶ 52.) In light of these allegations, the Court concludes that plaintiff has adequately pleaded a danger-creation theory of Fourteenth Amendment liability.

2. *Right to Minimally Adequate Care*

With respect to the special-relationship exception to the general rule that the state does not have a responsibility to protect the liberty of its citizens against invasion by private actors, the Constitution imposes upon the state a duty to assume some responsibility for the safety and general wellbeing of a person who is taken into its custody and held there against his will:

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause.

DeShaney, 489 U.S. at 200 (citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); *Youngberg v. Romeo*, 457 U.S. 307, 315–17 (1982)). This affirmative duty to protect arises from the state’s restraint of the individual’s freedom to act on his own behalf, not from its failure to act to protect his liberty interests against harms inflicted by other means. *See id.* This special relationship terminates when the individual is no longer in the state’s custody. *See id.* at 200–01 (where state briefly took custody of a child from his birth father to investigate alleged abuse, and the child was later severely beaten by his father, Supreme Court held special-relationship exception did not apply because the child was no longer in the state’s custody).

Here, plaintiff’s allegations establish that he was in the state’s custody during the time period in which his sister ingested methamphetamine on two separate occasions, the latter of which resulted in her death. Accordingly, the Court concludes that plaintiff adequately pleads a special-relationship theory of Fourteenth Amendment liability.⁴

⁴ The County Defendants do not assert a qualified immunity defense with respect to plaintiff’s Fourteenth Amendment claim based on his rights to be free from the government’s creation of danger and to minimally adequately care.

B. Second Cause of Action: Violation of Plaintiff's First Amendment Right to Familial Association

Plaintiff appears to clarify that his First Amendment claims are not based on freedom of expressive association, but rather on his right to *familial association*.⁵ The Court proceeds with its analysis of plaintiff's First Amendment claim accordingly.⁶

Recently, the Ninth Circuit addressed "the constitutional right to familial association" in the context of a parent-child relationship and a hospital's refusal to release the latter. *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018). Relevant here, the Ninth Circuit reiterated the well-established principle that the First Amendment protects "family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* (quoting *Lee v. City of L.A.*, 250 F.3d 668, 685 (9th Cir. 2001) (second internal quotation marks and citation omitted). The Supreme Court articulated this right over thirty years ago in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which found that protecting intimate relations "from unwarranted state interference" was necessary to safeguard "the ability independently to define one's identity that is central to the concept of liberty." *Id.* at

⁵ To the extent plaintiff relies on *Trujillo v. Board of County Commissioners of the County of Santa Fe*, 768 F.2d 1186 (10th Cir. 1985) to argue that he has a viable First Amendment expressive association claim (see Opposition at 6), this reliance is misplaced because *Trujillo* examined the *Fourteenth Amendment* right to freedom of *intimate* association between siblings, which the Ninth Circuit expressly rejected in *Ward*.

⁶ In contrast to plaintiff's complaint (see ¶¶ 92–97), plaintiff's opposition makes no reference to freedom of expressive association under the *Fourteenth Amendment* (see Opposition at 3–5). Thus, consistent with the caption page of the complaint, the Court interprets plaintiff's Third Cause of Action as an expressive association claim brought under the First Amendment. As to that claim, plaintiff does not appear to oppose its dismissal, and his non-opposition is well-advised. The Supreme Court has recognized under the First Amendment "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. at 200, 618 (1984); see also *IDK v. Clark Cty.*, 836 F.2d 1185, 1192 (9th Cir. 1988) ("The first amendment's freedom of association protects groups whose activities are explicitly stated in the amendment: speaking, worshipping, and petitioning the government.") Plaintiff has not attempted to state a proper claim under the First Amendment based on freedom of expressive association, and from his opposition it is apparent he does not seek to do so. Moreover, while the Court recognizes that "a single association may have intimate and expressive features," *IDK*, 836 F.2d at 1192, plaintiff's claims for deprivation of association in this case appear limited to intimate association (specifically, familial association). Accordingly, the County Defendants' motion to dismiss plaintiff's third cause of action is **GRANTED**.

619. Shortly thereafter, the Supreme Court reconfirmed that “the First Amendment protects . . . family relationships.” *Board of Dirs. v. Rotary Club*, 481 U.S. 537, 545 (1987). In light of this and other case law, the Ninth Circuit in *Keates* acknowledged, “we have held that claims under both the First and Fourteenth Amendment for unwarranted interference with the right to familial association could survive a motion to dismiss.” *Keates*, 883 F.3d at 1236 (citing *Lee*, 250 F.3d at 686).

The County Defendants’ reliance on *Ward* to argue that plaintiff fails to plead a cognizable claim for violation of association is thus misplaced as *Ward* did not address the First Amendment. There, the Ninth Circuit held that siblings do not possess a liberty interest in their siblings’ companionship under the *Fourteenth Amendment substantive due process clause*. 967 F.2d at 284. The County Defendants have not shown that the principle enunciated in *Ward* limits the “familial association” right previously articulated under the First Amendment. Indeed, a number of California district courts have determined that it does not. *See, e.g., Mann v. City of Sacramento*, No. 2:17-01201 WBS DB, 2017 U.S. Dist. LEXIS 152383, at *3 (E.D. Cal. Sept. 19, 2017) (in case brought by decedent’s siblings, court acknowledged *Ward* but declined to conclude “as a matter of law that plaintiffs do not have standing to bring their § 1983 claim for deprivation of their First Amendment right of association with decedent”); *Kaur v. City of Lodi*, No. 2:14-cv-828-GEB-AC, 2014 WL 3889976, at *7 (E.D. Cal. Aug. 7, 2014) (declining to apply *Ward* to preclude siblings from pursuing claims for violation of association under the First Amendment); *Graham v. Cty. of L.A.*, No. CV 10-05059 DDP (Ex), 2011 WL 3754749, at *2 (C.D. Cal. Aug. 25, 2011) (noting in light of *Ward* that fiancé of decedent did “not bring a 14th Amendment companionship claim” and concluding that her relationship with decedent “was sufficiently personal and intimate to merit the protection of the First Amendment”). Nor have the County Defendants cited any controlling authority that contradicts the cases discussed in *Keates*, noted above.

Plaintiff alleges:

Defendants were deliberately indifferent to plaintiff’s right of association. An objective substantial risk of harm is exemplified by a five-old’s [sic] almost three-year old sister requiring hospitalization for ingesting methamphetamine while in

the exclusive care and custody of the same foster parent for the previous four days. Defendants were subjectively aware of these facts from which an inference can be drawn that a substantial risk of serious harm existed. Either they drew the inference or would have been compelled to draw that inference.

(Complaint ¶¶ 89, 95.) Moreover, plaintiff alleges generally that rather than comply with various mandates and duties to assess the emergency report that M.M. had ingested methamphetamine, or investigate it, or take any immediate steps to prevent further harm, Maas and May did nothing to prevent M.M.'s foreseeable death. (*Id.* ¶¶ 3, 5, 8, 9, 44, 46, 49, 51, 52, 54, 55, 60–63.) Assuming the truth of these allegations and construing them in favor of plaintiff, the Court finds that plaintiff has adequately alleged that individual County Defendants Maas' and May's alleged misconduct constituted an "unwarranted interference" with plaintiff's relationship with his sister. *Keates*, 883 F.3d at 1236; *cf. Wittman v. Saenz*, 108 F. App'x 548, at 549–50 (9th Cir. 2004) (citing *Jaycees* and *Board of Directors*, court determined "First Amendment right of association extends to individuals involved in an intimate relationship, such as fiancés" and, thus, district court erred in dismissing complaint for failure to state a claim).⁷

Accordingly, the County Defendants' reliance on *Ward* to argue that Maas and May are entitled to qualified immunity because "siblings do not have a constitutionally protected liberty interest in familial association" is unavailing. (Motion at 6; *see also* Reply at 5.) Further, the alternative argument, that "[t]here was absolutely no authority or precedent in existence in 2015, or even now . . . clearly establishing that right" under the First Amendment, *see* Motion at 7, similarly fails. As noted, the Supreme Court articulated the right at issue in 1984. The Supreme Court does not "require a case directly on point" for the law to be clearly established, but "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. "[Q]ualified immunity operates 'to ensure that before they are subjected to suit,

⁷ Of note, plaintiff describes *Wittman* as "affirming [the] right to associate with one's fiancé was clearly established." (Opposition at 6.) However, the Ninth Circuit in *Wittman* held the exact opposite: "Although, as noted above, Wittman has alleged a violation of his First Amendment right to freely associate with his fiancé, that right was *not* clearly established such that a reasonable board member would have known that his or her alleged acts and omissions would violate Wittman's right to freely associate with his fiancé." *Wittman*, 108 F. App'x at 551 (emphasis supplied).

officers are on notice their conduct is *unlawful*.” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)) (emphasis supplied).

As early as 1984, the Supreme Court in *Jaycees* emphasized that the First Amendment protects “[f]amily relationships, [which] by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” 468 U.S. at 619–20 (emphasis supplied); *see also Board of Dirs.*, 481 U.S. at 545. In light of *Jaycees*, this Court finds that the relationship between siblings falls squarely within the articulated right such that state officials should be found on notice of the same. *See, e.g., Garcia-Mejia v. Gilkey*, No. 1:07-cv-00783-LJO-GSA (PC), 2009 WL 80411, at *3–4 (E.D. Cal. Jan. 13, 2009) (citing *Board of Directors* and *Jaycees* and concluding “[p]laintiff has a fundamental liberty interest in his relationship with his brother”). This case does not present a remotely novel proposition. Even if it did by virtue of the fact that it involves a sibling relationship, “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Pelzer*, 536 U.S. at 741. Accordingly, the County Defendants’ assertion of the qualified immunity defense fails.⁸

C. Claim for Injunctive Relief

The County Defendants also move to dismiss plaintiff’s claim for injunctive relief on the grounds that (i) plaintiff has not established that he is threatened with a real and immediate future

⁸ As the Ninth Circuit reiterated in *Keates*, the Court’s “denial of qualified immunity at this stage of the proceedings does not mean that the case must go to trial.” 883 F.3d at 1240. Once an evidentiary record has been developed through discovery, defendants will be free to move for summary judgment based on qualified immunity. *Id.*

With respect to plaintiff’s municipal liability claims, the County Defendants merely argue that the “fact” that “siblings simply do not have a protected liberty interest in familial association . . . bars” such claims. (Motion at 5.) Because the Court has determined that plaintiff has a First Amendment right to familial association, the Court **DENIES** the County Defendants’ motion to dismiss as to plaintiff’s municipal liability claims on the basis asserted. However, the Court **DISMISSES WITH PREJUDICE** plaintiff’s claims under Section 1983 for municipal liability to the extent they are based on plaintiff’s alleged Fourteenth Amendment right to intimate association or plaintiff’s alleged First Amendment right to expressive association. (*See supra* note 6.)

injury by the County; and (ii) plaintiff's request for injunctive relief is impermissibly vague and overbroad. The Court agrees that plaintiff's claim for injunctive relief should be dismissed.

To have standing for injunctive relief under Section 1983, a plaintiff must allege that he is likely to suffer future injury from the alleged misconduct by the defendants. *See City of L.A. v. Lyons*, 461 U.S. 95, 105, 110 (1983). The reasonableness of a plaintiff's apprehension is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. *Id.* at 107 n.8. Moreover, while "[a] district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction," *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991), "[t]here are limitations on this discretion; an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled," *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). "Injunctive relief . . . must be tailored to remedy the specific harm alleged. An overbroad injunction is an abuse of discretion." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (internal quotation marks and citations omitted).

Here, plaintiff seeks "injunctive or declaratory relief as necessary to ensure ALAMEDA COUNTY remedy [sic] the unlawful practices described in this complaint." (Complaint ¶ 119 (emphasis in original).) Plaintiff further seeks "injunctive or declaratory relief requiring ALAMEDA COUNTY to develop, implement, and, enforce systems to effectively coordinate and ensure a properly trained social worker timely respond [sic] to all referrals/reports of abuse or neglect against children in ALAMEDA COUNTY's custody." (*Id.* ¶ 120 (emphasis in original).) However, the complaint is inconsistent as to whether plaintiff remains in the foster care system such that he "will again be wronged in a similar way." *Lyons*, 461 U.S. at 111.⁹ Thus, plaintiff has failed to allege facts to show he has standing to seek injunctive relief. Moreover, plaintiff's claim is overbroad as this is not a class action, and plaintiff has not alleged that he has any other

⁹ Compare Complaint ¶ 76 ("Plaintiff, through his Guardian ad Litem, has retained private counsel to represent her *adoptive son* [J.P.] in this matter" (emphasis supplied)) with Complaint ¶ 6 ("At all relevant times, [J.P.] was *and is a dependent child* under the jurisdiction of the Alameda County Juvenile Court and is *placed in a foster care home*" (emphasis supplied)) and Complaint ¶ 116 ("[J.P.] is a *dependent foster child* in the legal custody of ALAMEDA COUNTY who *resides in a foster home*" (emphasis supplied)).

siblings in the foster care system such that any unconstitutional policies or practices could cause the same or similar injury in the future. Accordingly, the Court **GRANTS WITH LEAVE TO AMEND** the County Defendants' motion to dismiss plaintiff's seventh cause of action for injunctive relief.

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN PART** the County Defendants' motion to dismiss as follows:

The Court **DENIES** the County Defendants' motion as to: (i) plaintiff's claim under Section 1983 for violation of his Fourteenth Amendment rights to be free from state-created danger and to minimally adequate care; (ii) plaintiff's claim under Section 1983 for violation of his First Amendment right to familial association; and (iii) plaintiff's corresponding municipal liability claims under Section 1983.

The Court **GRANTS WITHOUT LEAVE TO AMEND** the County Defendants' motion as to: (i) plaintiff's claim under Section 1983 for violation of his Fourteenth Amendment right to intimate association; and (ii) plaintiff's claim under Section 1983 for violation of his First Amendment right to expressive association.¹⁰ Accordingly, the Court **DISMISSES WITH PREJUDICE** plaintiff's claims under Section 1983 for municipal liability to the extent they are based on violation of these two alleged rights.¹¹

The Court **GRANTS WITH LEAVE TO AMEND** the County Defendants' motion as to plaintiff's seventh cause of action for injunctive relief.

Plaintiff must amend his complaint by no later than **May 15, 2018**.¹² Defendants must respond within **21 days** of filing.

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¹⁰ See *supra* note 6.

¹¹ See *supra* note 8.

¹² The parties are reminded that all future filings must comply with Federal Rule of Civil Procedure 5.2(a).

1 This Order terminates Docket Number 21.

2 **IT IS SO ORDERED.**

3
4 Dated: April 24, 2018



YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California



Lizabeth N. de Vries | liza@devrieslawsf.com

Kelly K. Dixon | kelly@devrieslawsf.com

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Phone (415) 409-4009 | Fax (628) 280-6514 | devrieslawsf.com

April 30, 2020

Molly C. Dwyer, Clerk of the Court
U.S. Court of Appeals – Ninth Circuit
James R. Browning U.S. Courthouse
95 7th Street, Courtroom 1, 3rd Floor Rm 338
San Francisco, CA 94103

Re: *J.P. v. County of Alameda et al.*, Ninth Circuit Case No 18-15963
Petition for Rehearing or Rehearing *En Banc*, filed April 15, 2020, Dkt. Entry 45

Dear Ms. Dwyer:

J.P. by and through his Guardian Ad Litem Shannon Villaneuva, presents this letter pursuant to FRAP 28(j) and Circuit Rule 28-6.

This letter relates to the Ninth Circuit's March 2, 2020 Memorandum, Dkt 142, in this matter. The majority held at pages 4-5:

No viable loss-of-familial-association claim exists for siblings under the First Amendment.

....

In *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991), as amended, we explicitly ruled that siblings do not possess a cognizable liberty interest to assert a loss of familial association claim under the Fourteenth Amendment. No basis exists to disregard this precedent simply because the claim is raised under the First Amendment rather than the Fourteenth Amendment. Notably, the dissent cites no case to that effect.

In an unpublished Memorandum dated today, the Ninth Circuit held that *Ward v. City of San Jose*, 967 F.2d 280, 283-84 (9th Cir. 1991) does not apply to a plaintiff sibling's First Amendment right to associate with his deceased sibling. See, *Mann v. Sacramento Police Department*, 9th Cir. Case No. 19-15483, D.C. Case No. 2:17-ccv-01201-WBS-DB, Memorandum issued Apr. 30, 2020, DktEntry 4-1 in Case 19-15483. A courtesy copy of this decision is attached.

Respectfully submitted,
DE VRIES LAW, P.C.

/s/ Lizabeth N. de Vries

Lizabeth N. de Vries

cc: Jody Struck, Counsel for the County Defendants/Appellants
Darren Kessler, Co-Counsel for the Plaintiff/Appellee

FILED

APR 30 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT MANN, Sr.; et al.,

Plaintiffs-Appellants,

and

ZACHARY MANN; WILLIAM MANN,

Plaintiffs,

v.

SACRAMENTO POLICE
DEPARTMENT; SAMUEL D. SOMERS,
Jr.,

Defendants,

and

JOHN C. TENNIS; et al.,

Defendants-Appellees.

No. 19-15483

D.C. No.

2:17-cv-01201-WBS-DB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted April 14, 2020
San Francisco, California

Before: GOULD and CHRISTEN, Circuit Judges, and LASNIK,** District Judge.

Plaintiffs-Appellants Robert Mann, Sr., Vern Murphy-Mann, and Deborah Mann appeal from the district court’s order granting Defendants-Appellees’ motion to dismiss in a § 1983 action alleging deprivation of their First Amendment right to familial association with their adult brother. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.¹

A prior panel reviewed an interlocutory appeal in this case and concluded that Plaintiffs’ initial complaint failed to adequately allege facts showing that they had a constitutionally protected relationship with the decedent. *See Mann v. City of Sacramento*, 748 F. App’x 112 (9th Cir. 2018) (“*Mann II*”). In accordance with General Order 4.3.a, the memorandum disposition provided a concise explanation of its decision, but we recognize that the explanation may have caused confusion on remand.

As relevant here, *Mann II* concluded that Plaintiffs’ complaint did not allege facts establishing a First Amendment right of familial or intimate association, as

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

¹ Because the parties are familiar with the facts and procedural history of this case, we do not recite them here.

recognized in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), and its progeny. 748 F. App'x at 114. We stated that even if Plaintiffs' complaint met *Rotary Club*'s standard, their intimate-association claims would be foreclosed by *Ward v. City of San Jose*, 967 F.2d 280, 283–84 (9th Cir. 1991). *Ward* held that a decedent's adult siblings lacked “a cognizable liberty interest in their brother's companionship” under the substantive Due Process Clause of the Fourteenth Amendment. *Id.* *Ward* did not discuss cohabitation. Nevertheless, because *Mann II* stated that *Ward* barred intimate-association claims by “adult, non-cohabitating siblings,” 748 F. App'x at 115, the *Mann II* decision was interpreted on remand as requiring that Plaintiffs plead facts demonstrating their cohabitation with the decedent to sustain their First Amendment intimate-association claim.

We conclude that *Mann II*'s statement that *Ward* “would” foreclose Plaintiffs' First Amendment claim “even if” they had pleaded sufficient facts, *see id.*, is dicta. *See Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d 534, 537 (9th Cir. 1999). First, *Ward* did not create a cohabitation requirement or purport to govern First Amendment claims; *Ward* addressed only Fourteenth Amendment intimate-association claims brought by adult siblings. *See Ward*, 967 F.2d at 284.

Second, *Mann II* cited the *Rotary Club* line of cases in addressing the sufficiency of Plaintiffs' First Amendment allegations, and it recognized that cohabitation was one of several objective indicia that courts *may* consider when assessing whether Plaintiffs were deprived of their intimate-association right. 748 F. App'x at 114; *see also Rotary Club of Duarte*, 481 U.S. at 545; *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018); *Lee v. City of Los Angeles*, 250 F.3d 668, 685-86 (9th Cir. 2001); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995).

Finally, *Mann II* could not have held that *Ward* forecloses Plaintiffs' First Amendment claim because it expressly decided that the district court could allow Plaintiffs to amend on remand. *See* 748 F. App'x at 115. If *Ward* controlled the First Amendment analysis, amendment would have been futile because no amendment could change the fact that Plaintiffs are the decedent's adult siblings. We therefore remand for consideration of Plaintiffs' First Amendment claim under the standard set forth in *Rotary Club* and its progeny. 481 U.S. at 545; *Keates*, 883 F.3d at 1236; *Lee*, 250 F.3d at 685-86.

REVERSED and REMANDED.



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Phone (415) 409-4009 | Fax (628) 280-6514 | devrieslawsf.com

June 10, 2020

Molly C. Dwyer, Clerk of the Court
U.S. Court of Appeals – Ninth Circuit
95 7th Street, Courtroom 1, 3rd Floor Rm 338
San Francisco, CA 94103

Re: *J.P. v. County of Alameda et al.*, Ninth Circuit Case No 18-15963
Petition for Rehearing or Rehearing *En Banc*, filed April 15, 2020, Dkt. Entry 45

Dear Ms. Dwyer:

J.P. by and through his Guardian Ad Litem Shannon Villaneuva, presents this letter pursuant to FRAP 28(j) and Circuit Rule 28-6. This is another letter relating to the Ninth Circuit's March 2, 2020 Memorandum, Dkt 142, in this matter. The majority held at pages 4-5:

No viable loss-of-familial-association claim exists for siblings under the First Amendment.

....

In *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991), as amended, we explicitly ruled that siblings do not possess a cognizable liberty interest to assert a loss of familial association claim under the Fourteenth Amendment. No basis exists to disregard this precedent simply because the claim is raised under the First Amendment rather than the Fourteenth Amendment. Notably, the dissent cites no case to that effect.

In an unpublished Memorandum dated April 30, 2020, the Ninth Circuit held that *Ward v. City of San Jose*, 967 F.2d 280, 283-84 (9th Cir. 1991) does not bar a plaintiff sibling's First Amendment right to associate with his deceased sibling. See, *Mann v. Sacramento Police Department*, 9th Cir. Case No. 19-15483, D.C. Case No. 2:17-ccv-01201-WBS-DB, Memorandum issued Apr. 30, 2020, DktEntry 4-1 in Case 19-15483. A courtesy copy of that decision was attached to my letter to you dated April 30, 2020.

Today, in its June 10, 2020 Order attached to this letter, the Ninth Circuit denied the defendants' petition for review in the *Mann* case.

Respectfully submitted,
DE VRIES LAW, P.C.

/s/ Lizabeth N. de Vries
Lizabeth N. de Vries

cc: Jody Struck, Counsel for the County Defendants/Appellants
Darren Kessler, Co-Counsel for the Plaintiff/Appellee

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT MANN, Sr.; et al.,

Plaintiffs-Appellants,

and

ZACHARY MANN; WILLIAM MANN,

Plaintiffs,

v.

SACRAMENTO POLICE
DEPARTMENT; SAMUEL D. SOMERS,
Jr.,

Defendants,

and

JOHN C. TENNIS; et al.,

Defendants-Appellees.

No. 19-15483

D.C. No.

2:17-cv-01201-WBS-DB

Eastern District of California,
Sacramento

ORDER

Before: GOULD and CHRISTEN, Circuit Judges, and LASNIK,* District Judge.

Judges Gould and Christen have voted to deny the petition for rehearing en banc, and Judge Lasnik has so recommended.

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

FILED

UNITED STATES COURT OF APPEALS

JUN 12 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

J.P., by and through his Guardian Ad
Litem, Shannon Villanueva; SHANNON
VILLANUEVA,

Plaintiffs-Appellees,

v.

COUNTY OF ALAMEDA; DIANE
DAVIS MAAS; SUE MAY,

Defendants-Appellants,

and

TRIAD FAMILY SERVICES; MARIA
REFUGIO MOORE,

Defendants.

No. 18-15963

D.C. No. 4:17-cv-05679-YGR
Northern District of California,
Oakland

ORDER

Before: M. MURPHY,* PAEZ, and RAWLINSON, Circuit Judges.

A majority of the panel voted to deny the Petition for Panel Rehearing.

Judge Rawlinson voted, and Judge Murphy recommended, to deny the Petition for Rehearing En Banc. Judge Paez voted to grant the Petition for Rehearing En Banc.

* The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Plaintiff-Appellee's Petition for Hearing or Rehearing En Banc, filed April 15, 2020, is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 22 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

J.P., by and through his Guardian Ad
Litem, Shannon Villanueva and
SHANNON VILLANUEVA,

Plaintiffs - Appellees,

v.

COUNTY OF ALAMEDA; et al.,

Defendants - Appellants,

and

TRIAD FAMILY SERVICES and
MARIA REFUGIO MOORE,

Defendants.

No. 18-15963

D.C. No. 4:17-cv-05679-YGR
U.S. District Court for Northern
California, Oakland

MANDATE

The judgment of this Court, entered March 02, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Quy Le
Deputy Clerk
Ninth Circuit Rule 27-7

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

J. P., ET AL.,

Plaintiffs,

vs.

COUNTY OF ALAMEDA, ET AL.,

Defendants.

CASE NO. 17-cv-05679-YGR

ORDER STAYING CASE

On July 16, 2020, this Court ordered defendants to show cause why the case should not be stayed pending a decision by the U.S. Supreme Court regarding plaintiffs' forthcoming petition for certiorari. Only July 29, 2020, defendants responded, stating that they did not oppose the issuance of an order staying the case.

As such, the Court hereby **STAYS** this action pending a decision from the U.S. Supreme Court on plaintiffs' petition for certiorari. All pending dates in this action are hereby **VACATED**. Further, the Court hereby **SETS** a compliance deadline for **9:01 a.m. on Friday, October 30, 2020. Five (5) business days** prior to said date, the parties shall file a joint statement advising the Court of the status of plaintiffs' petition. If compliance is complete, the compliance deadline will be taken off calendar.

IT IS SO ORDERED.

Dated: August 4, 2020


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J.P., by and through his Guardian
Ad Litem, SHANNON VILLANUEVA

Plaintiffs,

v.

COUNTY OF ALAMEDA, DIANE DAVIS
MAAS, SUE MAY, TRIAD FAMILY
SERVICES, MARIA REFUGIO MOORE,
and DOES 1-30, inclusive.

Defendants.

Case No: 4:17-cv-05679-YGR

**COMPLAINT FOR DAMAGES AND
DECLARATORY AND INJUNCTIVE
RELIEF [AMENDED AND FILED
PUBLICLY PER COURT ORDER]**

1. § 1983 – 14th Am. Danger Creation
2. § 1983 – 1st Am. Intimate Association
3. § 1983 – 1st Am. Expressive Association
4. § 1983 – Failure to Train
5. § 1983 – Policy, Custom, Practice
6. § 1983 – Ratification
7. § 1983 – Injunctive Relief
8. Negligence

JURY TRIAL DEMANDED

COMES NOW PLAINTIFF J.P., by and through his Guardian ad Litem, SHANNON
VILLANUEVA, who hereby as follows:

INTRODUCTION

1. On 9/30/15, defendant COUNTY OF ALAMEDA removed plaintiff J.P. and his
then-two-year old sister, M.M., from their biological parent's home. ALAMEDA COUNTY
contracted with defendant TRIAD FAMILY SERVICES to place these children in an out-of-

1 county foster home, with defendant foster parent MARIA MOORE.

2 2. By contract, ALAMEDA COUNTY authorized TRIAD to monitor, supervise, and
3 remove foster children from placements where there was an imminent risk of harm. Four days
4 after the plaintiff and his sister were placed in Moore's home, on 10/3/15, M.M. was "acting
5 strangely after ingesting methamphetamine, and was hospitalized for "Amphetamine Abuse".

6 3. DIANE MAAS was the social worker from ALAMEDA COUNTY assigned to
7 these foster siblings. Rather than comply with multitudes of duties and mandates to assess this
8 emergency report, investigate it, and take immediate steps to prevent further harm, ALAMEDA
9 COUNTY, TRIAD, and MAAS did nothing.

10 4. Defendants failed to remove these children from a foster home, with multiple other
11 foster children, which allowed a minor to ingest narcotics. Predictably, J.P.'s sister died in his
12 arms of a second methamphetamine ingestion less than two weeks later, on 10/16/15.

13 5. Defendants all have M.M.'s blood on their hands from a senseless tragic death.

14 JURISDICTION AND VENUE

15 6. Jurisdiction is satisfied under 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4), which
16 provide for original jurisdiction in this Court of all suits brought pursuant to 42 U.S.C. section
17 1983. Jurisdiction is also conferred by 28 U.S.C. §1331(a) because claims for relief derive from
18 the United States Constitution and the laws of the United States. This Court has supplemental
19 jurisdiction over those claims of Plaintiff based on state laws, pursuant to 28 U.S.C. § 1367.

20 7. Venue properly lies in the Northern District of California, San Francisco/Oakland
21 Division, pursuant to 28 U.S.C. sections 1391 and 1392 and Local Rule 3-2(e), in that the events
22 and circumstances herein (a) a substantial part of the events or omissions giving rise to the claim
23 occurred in the County of Alameda.; and (b) and at least one defendant is a local public agency
24 and/or local public official located within /or residing within this judicial district.

25 PARTIES

26 5. Plaintiff J.P. (hereinafter "J.P."), was at all times mentioned herein a male citizen
27 of the United States and of the State of California, entitled to all rights and privileges conferred
28

thereby.

6. At all relevant times, J.P. was and is a dependent child under the jurisdiction of the Alameda County Juvenile Court and is placed in a foster-care home. Concurrent with the filing of this Complaint, Shannon Villanueva applied to be appointed to serve as Guardian Ad Litem on behalf of J.P. in connection with this action.

7. Defendant COUNTY OF ALAMEDA operates under its authority the Alameda County Social Services Agency, Department of Children and Family Services, Child Protective Services, (collectively referred to hereinafter "DCFS"). COUNTY OF ALAMEDA is a public entity duly organized and existing under the laws of the State of California. DCFS and COUNTY OF ALAMEDA shall be collectively and interchangeably referred to herein as "ALAMEDA COUNTY." At all times mentioned herein J.P. was a minor and a foster child under the temporary custody of Defendant, ALAMEDA COUNTY.

8. Defendant DIANE DAVIS MAAS (hereinafter "MAAS") was an employee, agent, and social worker of ALAMEDA COUNTY assigned to J.P. and his sister M.M.. Here MAAS is sued in her individual and official capacities.

9. Defendant SUE MAY (hereinafter "MAY") was an employee and agent of ALAMEDA COUNTY, which plaintiff alleges on information and belief was authorized to make placement decisions for J.P. and M.M.. Here MAY is sued in her official capacity.

10. Defendant TRIAD FAMILY SERVICES (hereinafter "TRIAD") is a business entity of unknown form and is an organization licensed by the State of California as a foster family agency. TRIAD is also an agent of and public actor with ALAMEDA COUNTY. Plaintiff alleges on information and belief that TRIAD conceived, developed, established, instituted and maintained a foster-care program for the placement of foster children for and on behalf of ALAMEDA COUNTY utilizing a foster parent it "certified" at all relevant times.

11. Defendant MARIA REFUGIO MOORE (hereinafter "Moore") was the foster-care mother to J.P. and M.M. from 9/30/15 through M.M.'s death on 10/16/15.

12. Plaintiff does not presently know the true names and capacities of defendants

DOES 1 through 30, inclusive, and therefore sues them by these fictitious names. Plaintiff is informed and believes that DOES 1 through 30, and each of them, were responsible in some manner for the acts or omissions alleged herein or were responsible for implementing, promulgating, maintaining, sanctioning, condoning, and/or ratifying policies, procedures, practice, and/or customs, under which the other defendants committed the illegal or wrongful acts as alleged herein. Plaintiff will seek leave to amend this Complaint to add their true names and capacities when they have been ascertained.

13. Plaintiff is informed and believes and thereupon alleges that each of the defendants named herein was acting under color of state law, in the course and scope of employment, or under a contract to act under state law with ALAMEDA COUNTY.

14. In doing the acts or omissions complained of, defendants were the agents and employees of the remaining defendants, and in doing the things alleged, were acting within the course and scope of said agency and employment. In addition, plaintiff alleges all defendants and DOES acted in concert with and/or conspired with other defendants named herein.

STATEMENT OF FACTS

A. Foster children have the right to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.

15. For all periods relevant to this Complaint, California has agreed to administer its foster-care program pursuant to the Child Welfare Act, related regulations, and policies promulgated by the Secretary of the United States Department of Health and Human Services. The Child Welfare Act provides that "the State shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children." (42 U.S.C. § 671(a)(22).)

16. Foster children also have federal-law entitlements arising from the Child Welfare Act, 42 U.S.C. §§ 670 et seq., and the Child Abuse Prevention and Treatment and Adoption Reform Act ("CAPTA"), 42 U.S.C. §§ 5101 et seq. These entitlements are property interests under the Due Process Clauses. Foster children are unconstitutionally deprived of these property interests when they are not provided with mandated supervision, protection, and care.

17. Children removed from their home by a county social worker and placed in foster care or emergency shelter care with a foster home, referred to collectively herein as foster care, enjoy Due Process and Association rights under the Fourteenth and First Amendments of the United States Constitution, and the California Constitution.

18. Foster children have, at the very least, a fundamental liberty interest in their own safety, health, and well-being, as well as intimate- and expressive-association interests. The duty to supervise and protect foster-children from harm by a foster parent is the quintessential responsibility of the social workers assigned to this helpless and vulnerable population.

B. ALAMEDA COUNTY removed J.P. and his sister, M.M., from their biological mother's home, and placed them in "protective" custody on 9/30/15.

19. On 9/30/15 at 3:00 p.m., ALAMEDA COUNTY involuntarily removed then-five old J.P. and his almost three-year old sister, M.M. (hereinafter "M.M."), from their mother's custody pursuant to California Welfare and Institutions Code §§ 305 and/or 306. ALAMEDA COUNTY detained the minors and placed the children in the protective custody of DCFS of ALAMEDA COUNTY based on allegations of abuse and neglect while in the biological mother's home.

20. ALAMEDA COUNTY initially took the siblings to an Assessment Center of the Alameda County Child Protective Services. There they were interviewed by a social worker and/or nurse and/or psychologist, including ALAMEDA COUNTY employee Sue MAY. That ALAMEDA COUNTY team concluded that M.M. was developmentally on target, both children were medically cleared, and there were no medical concerns about either child.

21. ALAMEDA COUNTY, as the court-ordered temporary custodian, had the ultimate responsibility and authority to ensure the safety and well-being of these foster siblings. To do so, it contracted with TRIAD thereby delegating some of those responsibilities and transforming the private entity, TRIAD, into a state actor.

22. ALAMEDA COUNTY retained TRIAD in part to place these foster siblings in one of TRIAD's vetted and certified out-of-county foster homes and to monitor the safety and

well-being of these children in the out-of-county foster home.

C. ALAMEDA COUNTY transferred J.P. and M.M. to an out-of-county foster parent and home on 9/30/15, based on and through its contract with TRIAD.

23. Sue MAY as ALAMEDA COUNTY's "Placement Worker Representative" placed these foster siblings in an out-of-county home through a contract between ALAMEDA COUNTY and TRIAD. Although the contract was dated 10/1/15, the placement was on 9/30/15.

24. In the 10/1/15 contract, TRIAD is identified as the Foster Family Agency ("FFA"); ALAMEDA COUNTY is identified as the Placement Agency. TRIAD agreed to perform numerous services, including the following: (1) provide these foster siblings with foster parent(s) who have been certified to care for these children's needs; (2) comply with all laws including Title 22, Division 6 regulations and all laws governing foster care; (3) notify ALAMEDA COUNTY within 24 hours by telephone followed in writing of "significant changes in the child's health, behavior" or "significant issues including suspected physical or psychological abuse, death, injury, unusual incidents"; (4) move the child in case of imminent risk to the child or family.

25. ALAMEDA COUNTY expressly contracted with TRIAD to perform the governmental function of removing children from foster-care placements. The contract states: "The FFA has the authority to move a child in the case of imminent risk to the child or family. The FFA shall notify the placing agency within 24 hours of such move."

26. As a foster family agency, TRIAD was also licensed and regulated by the State of California pursuant to California Health and Safety Code §§ 1502, 1506, 1530 and 22 Cal. Code Reg. §§ 88000 through 88087.

27. TRIAD certified and ALAMEDA COUNTY approved Maria Refugio Moore and her home to receive placement of these foster siblings during the period of 9/30/15 through 10/16/15. Plaintiff alleges on information and belief that Moore should never have been so approved, nor should her live-in boyfriend been granted an exemption to reside with or assist in the care or supervision of these foster siblings.

28. On or about 9/30/15, on behalf of and under the direction or approval of

ALAMEDA COUNTY, TRIAD placed these foster siblings in Moore's foster home. From the 9/30/15 to 10/16/15, Moore had physical custody, care and control of J.P. and M.M., but ALAMEDA COUNTY retained legal custody.

29. This placement with Moore was subject to the direction, approval, supervision, control and/or guidance of ALAMEDA COUNTY with and through its agent, TRIAD.

D. After being in the exclusive care of ALAMEDA COUNTY and Moore for four days, on 10/3/15, M.M. was hospitalized for ingesting methamphetamine.

30. On 10/3/15, just days before M.M.'s third birthday, Moore claimed that M.M. was "acting strange" and "talking to herself." That afternoon in a park, in J.P.'s presence, M.M. "strange" behavior was to see monkeys and bunnies running around when none were there, to shake and sweat, and her heart was racing. She was acting hyper, much different from her natural and previous shy demeanor. J.P. was very concerned about his baby sister, and, the fact that she needed medical care.

31. Yet Moore waited to take M.M. to a doctor until after 9:00 p.m. when Moore took her to St. Joseph's Medical Center hospital's Emergency Room, many hours after observing M.M.'s "strange" behaviors in a park. The hospital took a urine sample from M.M. at 11:00 p.m. On 10/4/15, the results revealed M.M. had methamphetamine in her system. Her final diagnosis was: "Altered level of consciousness" and "Amphetamine abuse."

32. On 10/4/15, a healthcare worker of the hospital prepared and faxed a Suspected Child Abuse Report (hereinafter referred to as "S.C.A.R.") to the San Joaquin Human Services Agency, as mandated by Penal Code §11166(a). A report was also made to the Stockton Police.

33. Plaintiff is informed and believes that, on or about 10/4/15, City of Stockton police officer Douglas Sheldon responded to the hospital to investigate the suspected abuse and/or neglect of M.M. and further risk to her and other children in the foster home, including J.P., in relation to M.M.'s exposure to methamphetamine.

34. Plaintiff is informed and believes that, on or about 10/4/15, a City of Stockton officer also left a voicemail for DOE at TRIAD regarding these facts. Also on that date, plaintiff alleges on information and belief the hospital discharged M.M. back into Moore's care.

35. MAAS, and on information and belief MAY, TRIAD, and DOES, had access to M.M.'s medical records and indeed were in possession of one medical record clearly indicating abuse or neglect by virtue of M.M.'s methamphetamine exposure. They were on constructive notice about the details of 10/3/15, and the likelihood narcotics would again be available for the foster siblings to ingest as a foreseeable and objectively significant risk of harm while the children were in foster parent Moore's ongoing care.

36. In M.M.'s discharge papers, she was referred to obtain follow-up care by a physician following her being under the influence of methamphetamine. But no defendant procured any further care for M.M. or J.P. before her death less than two weeks later.

E. MAAS and ALAMEDA COUNTY failed to disclose facts regarding M.M.'s methamphetamine exposure to the Dependency Court, Minor's Counsel, or anyone who could have advocated for and protected these foster siblings.

37. ALAMEDA COUNTY social worker MAAS was assigned as the siblings' case social worker to draft documents to qualify the siblings for federal income, and, prepare a Detention Report in advance of the 10/5/15 detention hearing for ALAMEDA COUNTY.

38. On information and belief, a DOE at TRIAD advised a DOE at ALAMEDA COUNTY on 10/4/15 about M.M.'s hospitalization and methamphetamine ingestion.

39. On 10/5/2015, Joanne Willis, a TRIAD social-worker, left a voicemail for MAAS regarding these issues. Also on 10/5/15, a DOE at TRIAD faxed a one-page summary medical record from St. Joseph's Medical Center to MAAS. That record advised MAAS that M.M. was seen on 10/3/15 for "Altered level of consciousness" and "Amphetamine abuse." It also advised that M.M. was referred for follow up care to her primary care physician.

40. Yet, at the 10/5/15 detention hearing, MAAS, MAY, ALAMEDA COUNTY, TRIAD and DOES failed to inform the Court or minors' counsel about M.M.'s 10/3/15 strange behavior, hospitalization, or urine test revealing methamphetamine. Notably, there was no information about this in MAAS's written Detention Report or any oral or written supplemental report to the Court or anyone else. Without this information, the Court ordered J.P. and M.M. detained out of the home of their parent and to be placed into foster care on 10/5/15 without being

provided with accurate information to assess the safety of the current placement with Moore. And no one involved had information to initiate a removal, other than defendants.

41. On 10/6/15, Willis spoke with MAAS to discuss these facts with Willis. MAAS's only response was to utter: "Poor thing."

F. ALAMEDA COUNTY, MAAS, MAY and DOEs received multiple reports about M.M.'s methamphetamine exposure on October 3, 4, 5, 6, and 14, but did nothing to prevent further neglect or abuse prior to M.M.'s death on 10/16/15.

42. As described above, TRIAD made abuse or neglect referrals to ALAMEDA COUNTY on 10/4/15, 10/5/16 and 10/6/16.

43. Also on 10/6/15, the San Joaquin Human Services Agency (SJHSA) called the DCFS of ALAMEDA COUNTY, repeatedly, and requested a return call, and, contacted a hotline to obtain a fax number for ALAMEDA COUNTY. That day SJHSA faxed its own S.C.A.R. regarding M.M.'s 10/3/15 methamphetamine exposure. Notably, the SJHSA assessed the referral it received on 10/4/15 as requiring a response within ten days pursuant to a statewide Emergency Referral Protocol, described below. But San Joaquin County was not legally responsible for the direct supervision and services for these children; ALAMEDA COUNTY was.

44. Having received *no* response from ALAMEDA COUNTY, on 10/14/15, the SJHSA again called DCFS and DOES to inquire as to the status of this referral regarding M.M.'s methamphetamine exposure while in foster care. A DOE at ALAMEDA COUNTY advised SJHSA that the referral was routed to the "open" social worker, MAAS.

45. On information and belief, SJHSA needed to ensure ALAMEDA COUNTY fulfilled its mandatory duties to these children within ten days, i.e., by 10/14/15. Accordingly, it made three attempts at reporting on 10/5/15, and, one on 10/14/15.

46. Plaintiff alleges on information and belief that ALAMEDA COUNTY never responded to SJHSA.

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G. The State of California has an Emergency Response Protocol which ALAMEDA COUNTY and its staff (and agent TRIAD) must enforce to protect foster children.

47. The State of California requires an Emergency Response Protocol be implemented in response to oral or written referrals that a child was subjected to abuse or neglect under Wel. & Inst. Code §16501(f). The implementing regulations require the social worker assigned to respond be trained and skilled in emergency response. That social worker must also initiate and complete the Emergency Response Protocol process to determine whether an in-person investigation is required, and, if so, within one or ten days. A social worker must conduct an in-person investigation of all referrals received from a law-enforcement agency which allege abuse or neglect of a child.

48. Despite this requirement, plaintiff alleges on information and belief that it was TRIAD's training, custom or practice to only inform the assigned-case social worker about any new allegations of abuse and neglect, rather than file a "new" report or a written referral which would trigger a mandatory response including the statewide Emergency Response Protocol. This practice or custom was contrary to TRIAD's duties as a mandatory reporter, and, its contractual agreement with ALAMEDA COUNTY to provide a writing regarding any such referral.

49. Here, on information and belief plaintiff alleges TRIAD failed to submit a written report to ALAMEDA COUNTY regarding 10/3/15. Instead, all DOES and Willis at TRIAD did was contact MAAS on the telephone.

50. Plaintiff alleges on information and belief that in ALAMEDA COUNTY, screeners in its Emergency Response Unit, which is part of Child Protective Services, do intake of telephonic or written child-abuse or -neglect referrals. Screeners are empowered to assess the seriousness of the report and designate whether there should be any follow-up. If so, the decision must be made whether an investigation be completed in one or ten days. Written referrals have the opportunity to be viewed by more individuals by their very nature. The matter is assigned to the case social worker for a foster child if he or she is the subject of the report.

51. Plaintiff also alleges on information and belief that ALAMEDA COUNTY's training, practice or custom rendered a mandatory and timely response system including the

Emergency Response Protocol infeasible or impossible if any report/referral, such as M.M.'s exposure to methamphetamine on 10/3/15, required a one-or ten-day response, and, that social worker were unavailable, disinterested, untrained, or deliberately indifferent, as was MAAS.

52. Plaintiff further alleges on information and belief that ALAMEDA COUNTY, MAAS, MAY, and DOES failed to make any Emergency Referral Protocol assessment in response to the 10/4/15, 10/5/15, 10/6/15, or 10/14/15 referrals. Rather these defendants failed to assess this referral, follow-up, conduct any investigation, obtain independent statements from any witnesses or residents in Moore's home or the plaintiff, or inspect the safety of the foster home. No response occurred until the next report was made for M.M.'s death on 10/16/15.

H. For this particular out-of-county foster-care placement, TRIAD served a public function, engaged in joint action, and satisfied a governmental nexus.

53. TRIAD performed multiple public functions by virtue of its contract with ALAMEDA COUNTY and its physical proximity to this out-of-county placement. Public functions traditionally and exclusively governmental include but are not limited to ensuring foster children's health and welfare relating to: (a) screening, certification and licensure, and placement of minors in a safe home, with safe foster parents and co-habitants; (b) procuring necessarily medical care; (c) ensuring foster care is free from neglect or physical abuse; (d) regular and necessary monitoring and supervision; (e) prompt response and investigation of complaints relating to abuse or neglect; (f) removal of children from unsafe foster-care placements; (g) recruitment, approval and training of sufficiently qualified social workers and foster parents; and, (h) providing services and support to foster parents and children.

54. ALAMEDA COUNTY put itself in an interdependent relationship with TRIAD to perform its mandatory duties. Pursuant to Welfare and Institutions Code §§ 281, 16000.1(a)(1), 16001.9, 16010, 16504, Title 22, and other laws, defendants MAAS, MAY, TRIAD, and DOES had mandatory duties to protect J.P. and M.M. and to supervise and monitor their placement in a foster home. Mandatory duties are set forth by the California Department of Social Services in the Manual of Policies and Procedures - Child Welfare Services, DSS Regulation at 31-000 *et. seq.*

55. These defendants were also required to ensure the safety, protection and proper care of foster children placed in foster homes who receive Federal AFDC-FC funds per 42 U.S.C. 672(a)(1)-(3), including both J.P. and M.M., as provided by 42 U.S.C. §671(a)(10) and (16) and §675(1).

56. Here, particularly after receiving information about the 10/3/15 referral, ALAMEDA COUNTY relied upon TRIAD to supervise and monitor these foster siblings in Moore's out-of-county home. TRIAD's social worker Joanne Willis visited the siblings (and other foster children placed) in Moore's home on 10/4/15, 10/7/15, and 10/14/15. She also met the siblings on 10/15/15 at TRIAD. Plaintiff alleges on information and belief that TRIAD was thus serving as ALAMEDA COUNTY's agent to perform affirmative mandatory duties to supervise and monitor the children.

57. Plaintiff further alleges on information and belief that ALAMEDA COUNTY relied upon TRIAD to perform other or all of its mandatory duties. Collectively, TRIAD's, ALAMEDA COUNTY's, MAAS's, MAY's, and DOES' misconduct was joint action.

58. ALAMEDA COUNTY also utilized TRIAD to solicit, investigate and train foster parents to certify them as foster parents to place foster children that are in the legal care and custody of ALAMEDA COUNTY, therefore benefitting the County by outsourcing, when on information and belief ALAMEDA COUNTY's staffing was insufficient.

59. In addition, plaintiff alleges on information and belief based on facts alleged herein that ALAMEDA COUNTY and TRIAD workers acted in concert to effect these deprivations of Constitutional rights described throughout this complaint.

I. ALAMEDA COUNTY, TRIAD and their staff did nothing to prevent M.M.'s death on 10/16/15 and her brother's foreseeable damages.

60. MAAS, and on information and belief MAY, TRIAD and DOES, were authorized and mandated to: (1) make entries into a statewide case-management system (CMS) to track contemporaneous descriptions of events effecting the siblings, particularly important for out-of-county placements; (2) notify the licensing office with jurisdiction over TRIAD about the methamphetamine exposure; (3) supervise and monitor these foster siblings' placement; (4)

procure medical records and care as needed; (5) respond to the 10/3/15 referral of abuse or neglect by: (a) completing an Emergency Response Protocol, or (b) conducting an immediate in-person investigation, or (c) conducting a timely in-person investigation, and, (d) enter the investigation disposition into the child's record, and, (e) submit the result of the investigation with the Department of Justice; (6) assess the siblings' physical and emotional condition; (7) assess the safety of Moore's home; and, (8) safeguard the children's growth and development.

61. MAAS, and on information and belief MAY, TRIAD, and DOES negligently, recklessly, and maliciously failed to: (1) document anything between 9/30/15 and 10/16/15 including the 10/3/15 incident except late-made entries;¹ (2) notify any agency about the 10/3/15 event; (3) adequately supervise and monitor the children; (4) procure any medical records or care before M.M.'s death, (5) do anything to respond to the 10/3/15 methamphetamine-exposure report; (6) assess the children's physical and emotional condition particularly following M.M.'s "amphetamine abuse"; (7) assess the safety of MOORE's home; and, (8) safeguard the children's growth and development by investigating, responding and removing these children.

62. Defendants knew or should have known that failing to investigate, respond, and/or remove these foster siblings from Moore's home created a risk that M.M. or another minor including J.P. would be exposed to methamphetamine and its toxic effects including the possibility of death. Accordingly, ALAMEDA COUNTY, MAAS, MAY, TRIAD, and DOES negligently, carelessly, recklessly, willfully and/or maliciously made decisions or recommendations allowing these foster siblings to remain in Moore's home.

63. Plaintiff alleges on information and belief that defendants conspired to retain the children in obvious danger by allowing them to be placed with someone they knew to be unfit, not investigating the toxic drugging of an almost three-year old, not removing the siblings from that home, and by abandoning the care of both siblings, knowing the foster mother or one of her associates had exposed M.M. to methamphetamine, and, was historically and currently unfit.

¹ On 9/30/16, MAY's supervisors at ALAMEDA COUNTY instructed her to "recreate" case notes between the date of the placement, 9/30/15, and her telephone conversation with the TRIAD placement person, Nyasha Dupree, on 10/8/15.

J. On 10/16/15, three-year old M.M. foreseeably and predictably, and again, ingested methamphetamine, received no immediate medical care, again, and died of methamphetamine toxicity while in her five-year old brother J.P.'s arms.

64. Tragically and predictably, on 10/16/15 M.M. was again allowed access to illegal and toxic drugs while in the same foster-care placement with Moore. That night before, M.M. exhibited similar "bazaar" behavior and symptoms that she did on 10/3/15. She was up all night complaining spiders were crawling all over her. The next morning, Moore alleged M.M. was taking "a nap" so she left the now three-year old, who was manifesting symptoms of methamphetamine exposure, with her boyfriend to do errands.

65. In J.P.'s presence, M.M. continued to be petrified by the "spiders" she was seeing, her hands were cramped and contorted, here fingers were shaking, she was talking nonsense with her eyes closed, she was cold, and her stomach was convulsing. She presented with the same symptoms she had on 10/3/15.

66. Plaintiff alleges on information and belief that J.P. complained to Moore, her boyfriend, and others in the home that something was wrong with his sister.

67. Hours later, M.M. died in J.P.'s arms. No medical care was procured until she was dead, after 11:00 a.m. An adult attempted to revive M.M. in front of J.P. when ambulance personnel were called and found M.M. unresponsive. Paramedics reported that a baggie with a methamphetamine rock was found in J.P.'s and M.M.'s room that morning.

68. The San Joaquin Sherriff-Coroner conducted an autopsy and determined that M.M. died of methamphetamine toxicity.

69. Later on 10/16/15, J.P. was removed from this foster home and placed in temporary shelter and, thereafter, placed into another foster home.

70. In a letter dated 1/25/16, fifteen months after 10/16/15, Michelle Love, the Assistant Agency Director of Alameda County Social Services of ALAMEDA COUNTY wrote: "we are not aware of whether that fatality was caused by abuse or neglect" in response to M.M.'s biological mother's record request.

71. In contrast, in response to the same request by M.M.'s biological mother, Mikey Habbestd, Deputy Director, Children's Services Bureau, San Joaquin County Human

Services Agency wrote on 4/26/16 that “the failure of the foster parent to seek medical care sooner was a material contributing factor to M.M.’s death.”

72. Logic compels interpreting M.M.’s senseless death and exposure to methamphetamine, twice in two weeks, as an obvious product of abuse and neglect.

STATEMENT OF DAMAGES

73. J.P. has suffered, and continues to suffer, general damages including the lingering and reoccurring effects of extreme emotional trauma from the danger created of experiencing his sister, M.M., suffer from drug exposure and death, as well as a loss of association, psychological injury, anguish, worry, humiliation, fear, emotional and mental distress, and anxiety as a result of defendants’ conduct in an amount to be proved at trial.

74. As a further result of defendants’ conduct, J.P. incurred and will incur general and special damages, occurring in the past and reasonably certain to occur in the future as proven at trial, in favor of plaintiff, in an amount to be proved at trial.

75. The individual defendants’ conduct was wanton, malicious and oppressive and/or done with a conscious or reckless disregard for the rights of plaintiff.

76. Plaintiff, through his Guardian ad Litem, has retained private counsel to represent her adoptive son J.P. in this matter. To the extent permitted by law, the plaintiff is entitled to his attorneys’ fees and costs.

77. J.P. therefore prays for an award of punitive and exemplary damages against individual or non-public-entity defendants including DOES according to proof.

CAUSES OF ACTIONS

FIRST CAUSE OF ACTION

[42 U.S.C. §1983 – Abridgement of Civil Rights – State-Created Danger
Against Defendants MAAS, MAY, and DOES]

78. Plaintiff incorporates by reference all paragraphs of this complaint herein.

79. Defendants MAAS, MAY, and DOES employed by ALAMEDA COUNTY or TRIAD acted under color of law.

80. Foster children’s due-process rights under the Fourteenth Amendment of the United States Constitution are violated when a state official affirmatively and with deliberate

indifference places a child in danger he otherwise would not have faced.

81. Defendants were deliberately indifferent to a known and obvious danger. An objective substantial risk of harm is exemplified by a five-old's almost three-year old sister requiring hospitalization for ingesting methamphetamine while in the exclusive care and custody of the same foster parent for the previous four days. Defendants were subjectively aware of these facts from which an inference could be drawn that a substantial risk of serious harm existed. Either they drew that inference or would have been compelled to draw that inference.

82. Defendants' misconduct deprived J.P. (and his sister) of Fourteenth Amendment rights by affirmatively placing, deciding, or recommending that J.P. (and M.M.) continue to be placed in Moore's foster-care home, without engaging in any necessary acts to protect these foster siblings from future harm after M.M. ingested methamphetamine on 10/3/15. Defendants' misconduct resulted in J.P. (and M.M.) living with a foreseeable and significant risk of danger they otherwise would not have faced—that J.P. or his sister would die of a methamphetamine overdose.

83. Defendants' misconduct was a substantial factor in causing plaintiff's harm.

WHEREFORE, plaintiff prays for relief as set forth herein.

SECOND CAUSE OF ACTION

[42 U.S.C. §1983 – First and Fourteenth Amendments – Intimate Association
Against Defendants MAAS, MAY, and DOES]

84. Plaintiff incorporates all paragraphs of this complaint herein.

85. Defendants MAAS, MAY, and DOES employed by ALAMEDA COUNTY or TRIAD acted under color of law.

86. Plaintiff's right to associate with his sister, M.M., is a fundamental right protected by the First and the Fourteenth Amendments. Family relationships involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of life.

87. Generally, sibling relationships are intimate human relationships that are protected from unjustified interference by a State. In the foster-care context, it is well-established, as

codified by the California Welfare & Institutions Code relating to foster children, and known by any reasonable person working with this population that maintaining sibling relationships, under the right circumstances, is imperative for the emotional well-being of the foster sibling child. This is particularly true for children who will never be returned to their parents; Siblings may be the only true family they will ever have.

88. Specifically, J.P. had only one sibling, M.M.. He and M.M. had just been separated from their biological mother by the State. J.P.'s birth mother's parental rights were terminated on 7/7/17.

89. Defendants were deliberately indifferent to plaintiff's right of association. An objective substantial risk of harm is exemplified by a five-old's almost three-year old sister requiring hospitalization for ingesting methamphetamine while in the exclusive care and custody of the same foster parent for the previous four days. Defendants were subjectively aware of these facts from which an inference could be drawn that a substantial risk of serious harm existed. Either they drew that inference or would have been compelled to draw that inference.

90. These defendants' misconduct deprived J.P. of his rights to intimate association under the First and Fourteenth Amendments to the United States Constitution.

91. Defendants' misconduct was a substantial factor in causing plaintiff's harm.

WHEREFORE, plaintiff prays for relief as set forth herein.

THIRD CAUSE OF ACTION

[42 U.S.C. §1983 – First and Fourteenth Amendments – Expressive Association
Against Defendants MAAS, MAY, and DOES]

92. Plaintiff incorporates all paragraphs of this complaint herein.

93. Defendants MAAS, MAY, and DOES employed by ALAMEDA COUNTY or TRIAD acted under color of law.

94. Plaintiff's right to expressive association with this sister, M.M., is a fundamental right protected by the First and the Fourteenth Amendments. J.P. enjoyed a close, nurturing, and protective relationship with his sister. J.P. regularly taught his sister new things she did not understand such as how to avoid dangers and be careful with animals and other children. J.P. also

shared his guidance, fun, and survival skills with M.M. throughout their precious time together in different homes.

95. Defendants were deliberately indifferent to plaintiff's right of association. An objective substantial risk of harm is exemplified by a five-old's almost three-year old sister requiring hospitalization for ingesting methamphetamine while in the exclusive care and custody of the same foster parent for the previous four days. Defendants were subjectively aware of these facts from which an inference could be drawn that a substantial risk of serious harm existed. Either they drew that inference or would have been compelled to draw that inference.

96. These defendants' misconduct deprived J.P. of his rights to expressive association under the First and Fourteenth Amendments to the United States Constitution.

97. Defendants' misconduct was a substantial factor in causing plaintiff's harm.

WHEREFORE, plaintiff prays for relief as set forth herein.

FOURTH CAUSE OF ACTION

[42 U.S.C. §1983 – Municipal Liability
Against Defendants ALAMEDA COUNTY and TRIAD – policy of failure to train]

98. Plaintiff incorporates all paragraphs into this complaint herein.

99. The acts and omissions of MAAS, MAY, and DOEs, acting under state law, deprived the plaintiff of his rights under the First and Fourteenth Amendments.

100. The training policies of the defendants ALAMEDA COUNTY and TRIAD were not adequate to prevent violations of the law by its employees or train its employees to handle the usual and recurring situations with which they must deal—including how to respond to subsequent allegations that a foster child is being abused or neglected while in foster care.

101. ALAMEDA COUNTY and TRIAD were deliberately indifferent to the substantial risk that each entity's training policies were inadequate to prevent violations of law by its employees, and, known or obvious consequences of each entity's failure to train its employees adequately.

102. The failure of ALAMEDA COUNTY and TRIAD to prevent violations of law by its employees or to provide adequate training caused the deprivation of the plaintiff's rights by

MAAS, MAY, and DOE(s); that is, the defendants' failures to prevent violations of law by its employees and to train them adequately is so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

WHEREFORE, plaintiff prays for relief as set forth herein.

FIFTH CAUSE OF ACTION

[42 U.S.C. §1983 – Municipal Liability]

Against Defendants ALAMEDA COUNTY and TRIAD – customs, practices, de facto policy]

103. Plaintiff incorporates all paragraphs of this complaint herein.

104. The acts and omissions of MAAS, MAY, and DOEs, acting under state law, deprived the plaintiff of his rights under the First and Fourteenth Amendments.

105. MAAS, MAY, and DOEs actions and omissions were pursuant to customs, practices and de facto policies of ALAMEDA COUNTY and/or TRIAD.

106. ALAMEDA COUNTY's and/or TRIAD's customs, practices and *de facto* policies caused the deprivation of the plaintiff's rights by MAAS, MAY and DOES. That is ALAMEDA COUNTY and/or TRIAD's practices or customs are so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

107. Plaintiff alleges on information and belief that ALAMEDA COUNTY's and TRIAD's customs, practices or *de facto* policies are in the alternative policies of inaction when enforcement was called for, such that these policies amount to deliberate indifference.

108. Defendants were deliberately indifferent to plaintiff's due-process and association rights as described herein. An objective substantial risk of harm is exemplified by a five-old's almost three-year old sister requiring hospitalization for ingesting methamphetamine while in the exclusive care and custody of the same foster parent for the previous four days. Defendants were subjectively aware of these facts from which an inference could be drawn that a substantial risk of serious harm existed. Either they drew that inference or would have been compelled to draw that inference.

109. Defendants' misconduct was a substantial factor in causing plaintiff's harm.

WHEREFORE, plaintiff prays for relief as set forth herein.

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SIXTH CAUSE OF ACTION

[42 U.S.C. §1983 – Municipal Liability
Against Defendants ALAMEDA COUNTY – Ratification]

110. Plaintiff incorporates all paragraphs of this complaint herein.

111. The acts and omissions of MAAS, MAY, and DOEs, acting under state law, deprived the plaintiff of his rights under the First and Fourteenth Amendments.

112. Plaintiff alleges on information and belief that a final policymaker for ALAMEDA COUNTY acted under color of state law, and had final policymaking authority from ALAMEDA COUNTY concerning the acts and omissions by MAAS, MAY, and DOES.

113. Plaintiff further alleges on information and belief that a final policymaker ratified MAAS's, MAY's and DOE's acts and omissions, that is, he or she knew of and specifically made a deliberate choice to approve MAAS, MAY, and DOE's acts and omissions and the basis for them.

WHEREFORE, plaintiff prays for relief as set forth herein.

SEVENTH CAUSE OF ACTION

[Declaratory & Injunctive Relief against Defendant ALAMEDA COUNTY]

114. Plaintiff incorporates all paragraphs into this cause of action.

115. There is currently an actual controversy between the plaintiff and ALAMEDA COUNTY that is ripe for adjudication as to whether the ALAMEDA COUNTY's municipal liability was triggered by training, customs or practice, or ratification to comply with Federal and State law to respond, investigate and take necessary action when it receives a report/referral of abuse or neglect to protect foster children in its legal custody.

116. J.P. is a dependent foster child in the legal custody of ALAMEDA COUNTY who resides in a foster home.

117. ALAMEDA COUNTY's failure to respond and investigate neglect or abuse reports/referrals as described herein deprives plaintiff of his rights, privileges and immunities under 42 U.S.C. § 1983.

118. Plaintiff is informed and believes that ALAMEDA COUNTY continued these

practices after M.M.'s death on 10/15/15, and, will continue to fail to comply with these mandates absent injunctive or declaratory relief.

119. Plaintiff seeks injunctive or declaratory relief as necessary to ensure ALAMEDA COUNTY remedy the unlawful practices described in this complaint.

120. Plaintiff further seeks injunctive or declaratory relief requiring ALAMEDA COUNTY to develop, implement, and, enforce systems to effectively coordinate and ensure a properly trained social worker timely respond to all referrals/reports of abuse or neglect against children in ALAMEDA COUNTY's custody.

121. Plaintiff suffered injuries that are irreparable in nature and the proximate result of this defendant's failures.

WHEREFORE, plaintiff prays for relief as set forth herein.

EIGHTH CAUSE OF ACTION

[Negligence Against Defendants TRIAD, Moore, and DOES]

122. Plaintiff incorporates all paragraphs of this complaint herein.

123. There was a special relationship between these foster siblings and TRIAD, as well as between these siblings and Moore, and possibly with DOES as well, which triggered several duties to act reasonably and with due care.

124. TRIAD was negligent in its failure to perform numerous services as a foster family agency retained by ALAMEDA COUNTY. Also, TRIAD committed negligence *per se* by violating numerous statutes, regulations, and other laws cited herein and to be discovered. These laws were designed to protect children in the foster-care system, like J.P., against harm inflicted upon him which is the subject of this complaint.

125. Plaintiff alleges on information and belief that Moore was an agent of TRIAD who was at all relevant times providing foster-care and a foster home to multiple children including J.P. and his sister, rendering Moore's negligence attributable to TRIAD through *respondeat superior*.

126. Plaintiff timely submitted a claim to the Foster Family Insurance Fund to the

State of California Office of Risk and Insurance Management for the damages sought in this action pursuant to Health and Safety Code § 1527.6(d) in relation to the acts and omissions by defendant, Moore. The claim was denied on November 8, 2016.

127. TRIAD and Moore negligently failed to monitor, supervise, care for, attend to and manage the mental and physical health and safety, and welfare and well-being, of the plaintiff (and his sister.)

128. TRIAD and Moore also negligently failed to follow reasonable and customary procedures for the supervision of foster children and maintaining a safe environment for these siblings when J.P. was in the home of Moore and DOES.

129. In addition, Moore and DOES negligently, carelessly and recklessly failed to supervise, monitor and control M.M. in the presence of J.P., such that M.M. was provided access to methamphetamine and did ingest the same on two occasions resulting in her hospitalization and ultimately, her death.

130. Defendants' misconduct was a substantial factor in causing plaintiff's damages.

WHEREFORE, plaintiff prays for relief as set forth herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendants, as follows.

1. For compensatory and economic damages according to proof;
2. For general damages according to proof;
3. For damages provided by law;
4. For an award of interest, including prejudgment interest at the legal rate;
5. For an award of attorneys' fees and costs;
6. For punitive damages against the individual and non-public entity defendants;
7. For declaratory and injunctive relief;
8. For other and further relief as the Court may deem just, necessary and appropriate.

JURY TRIAL DEMAND

Plaintiff hereby requests a jury trial on all issues so triable.

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SCOTT LAW FIRM

Dated: August 15, 2018

/s/Darren Kessler
Darren Kessler and Lizabeth N. de Vries
Attorneys for Plaintiffs

No. 18-15963

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

J.P., by and through his Guardian Ad Litem, Shannon Villanueva;
SHANNON VILLANUEVA,
Plaintiffs-Appellees,

v.

COUNTY OF ALAMEDA; DIANE DAVIS MAAS; SUE MAY,
Defendants-Appellants,
and

TRIAD FAMILY SERVICES; MARIA REFUGIO MOORE,
Defendants.

Appeal from the United States District Court for the Northern District of California
The Honorable Yvonne Gonzalez Rogers
Case No. 4:17-cv-05679-YGR

**BRIEF OF *AMICI CURIAE* YOUTH ADVOCACY ORGANIZATIONS
SUPPORTING PLAINTIFFS-APPELLEES J.P., et al.
AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae National Center for Youth Law, et al., disclose that the following Amici are non-profit corporations with no parent corporations or stock owned by any publicly held corporation:

- National Center for Youth Law
- Advokids
- Bay Area Legal Aid
- Children's Rights
- East Bay Children's Law Offices
- Juvenile Law Center
- Legal Services for Children
- National Association of Counsel for Children
- Youth Law Center

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<i>Carey v. Population Servs. Int’l</i> , 431 U.S. 678 (1977)	7
<i>Cnty. of L.A. v. Superior Court</i> , 102 Cal. App. 4th 627 (2002).....	20
<i>Garcia-Mejia v. Gilkey</i> , No. 1:07-cv-00783-LJO-GSA (PC), 2009 WL 80411 (E.D. Cal. Jan. 13, 2009)	12-13
<i>Henry A. v. Willden</i> , 678 F.3d 991 (9th Cir. 2012).....	24
<i>In re Adoption of Anthony</i> , 113 Misc. 2d 26 (N.Y. Fam. Ct. 1982).....	17
<i>In re Clifton B.</i> , 81 Cal. App. 4th 415 (2000).....	17
<i>In re Valerie A.</i> , 152 Cal. App. 4th 987 (2007).....	20
<i>Jesse E. v. N.Y.C. Dep’t of Soc. Servs.</i> , No. 1:90-07274 (S.D.N.Y. Nov. 3, 1990)	11
<i>Kaur v. City of Lodi</i> , No. 2:14-cv-828-GEB-AC, 2014 WL 3889976 (E.D. Cal. Aug. 7, 2014).....	12
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<i>K.H. ex rel. Murphy v. Morgan</i> , 914 F.2d 846 (7th Cir. 1990).....	24

<i>Lee v. City of L.A.</i> , 250 F.3d 668 (9th Cir. 2001).....	9
<i>Mann v. City of Sacramento</i> , No. 17-17048, 2018 WL 4268534 (9th Cir. Sept. 7, 2018).....	11, 12, 13, 14
<i>Marisol A. v. Giuliani</i> , 929 F. Supp. 662 (S.D.N.Y. 1996).....	24
<i>Moore v. City of E. Cleveland</i> , 431 U.S. 494 (1977)	7, 8
<i>New York ex rel. Sibley v. Sheppard</i> , 429 N.E.2d 1049 (N.Y. 1981)	17
<i>Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary</i> , 268 U.S. 510 (1925)	7
<i>R.G. v. Koller</i> , 415 F. Supp. 2d 1129 (D. Haw. 2006)	24
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	8, 9, 11, 13
<i>Smith v. Org. of Foster Families for Equal. & Reform</i> , 431 U.S. 816 (1977)	8
<i>Tamas v. Dep’t of Social & Health Servs.</i> , 630 F.3d 833 (9th Cir. 2010).....	24
<i>Trujillo v. Bd. of Cnty. Comm’rs of Cnty. of Santa Fe</i> , 768 F.2d 1186 (10th Cir. 1985).....	9
<i>Ward v. City of San Jose</i> , 967 F.2d 280 (9th Cir. 1991).....	11, 12, 13, 14
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Statutes

42 U.S.C.	
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Other Authorities

Alexandra Cook et. al., <i>Complex Trauma in Children and Adolescents</i> , 35 PSYCHIATRIC ANNALS 390 (2005)	25
Assem. Floor Analysis, 3d reading of Assem. Bill No. 705 (2000-2001 Reg. Sess.) as amended May 7, 2001, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB705#	21
Bruce Perry et al., <i>Childhood Trauma, the Neurobiology of Adaptation, and “Use-dependent” Development of the Brain: How “States” Become “Traits”</i> , 16 INFANT MENTAL HEALTH J. 271 (1995).....	24-25
Cal. Dep’t Soc. Servs., ACL 15-100 (Jan. 14, 2016), <i>Changes in Sibling Visitation for Children in the Dependency and Juvenile Justice System with the Passage of Senate Bill (SB) 1099</i> , http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2015/15-100.pdf	19-20

Children’s Bureau, <i>Sibling Issues in Foster Care and Adoption</i> (Jan. 2013) https://www.childwelfare.gov/pubpdfs/siblingissues.pdf	17-18, 22, 25
Children’s Bureau, <i>Placement of Children with Relatives: State Statutes</i> (Jan. 2018) https://www.childwelfare.gov/pubPDFs/placement.pdf	16
Children’s Rights, <i>Class Actions: CT – Juan F. v. Malloy</i> , https://www.childrensrights.org/class_action/connecticut/	16-17
Children’s Rights, <i>Class Actions: MI – Dwayne B. v. Snyder</i> , https://www.childrensrights.org/class_action/michigan/	16-17
Children’s Rights, <i>Class Actions: TN – Brian A. v. Haslam</i> , https://www.childrensrights.org/class_action/tennessee/	17
Columbia Legal Services, <i>Braam v. Washington</i> , http://columbialegal.org/BraamV.Washington	17
Consent Decree, <i>Aristotle P. v. Ryder</i> , No. 88-C-7919 (N.D. Ill., May 16, 2014), https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf	11
David M. Rubin et al., <i>The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care</i> , 119 PEDIATRICS 336 (2007).....	23
Krista Gass, Jennifer Jenkins & Judy Dunn, <i>Are Sibling Relationships Protective? A Longitudinal Study</i> , 48 J. CHILD PSYCHOL. & PSYCHIATRY 167 (2007)	26
Mark Courtney et al., <i>Youth Who Run Away from Out-of-Home Care</i> , Chapin Hall (2005), https://www.chapinhall.org/research/youth-who-run-away-from-out-of-home-care/	26
Mark D. Simms, <i>Foster Children and the Foster Care System, Part II: Impact on the Child</i> , 27 CURRENT PROBS. PEDIATRICS 345 (1991)	23
Mary Anne Herrick & Wendy Piccus, <i>Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System</i> , 27 CHILDREN & YOUTH SERVS. REV. 845 (2005).....	22, 26

Melissa S. Kittmer, <i>Risk and Resilience in Alcoholic Families: Family Functioning, Sibling Attachment, and Parent-Child Relationships</i> (ProQuest Information & Learning ed., 2005)	25-26
National Child Traumatic Stress Network, <i>Children with Traumatic Separation: Information for Professionals</i> , https://www.nctsn.org/resources/children-traumatic-separation-information-professionals	23
National Child Traumatic Stress Network, <i>Effects of Complex Trauma</i> , https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects	25
Randi Mandelbaum, <i>Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption</i> , 41 N.M. L. REV. 1 (2011)	16
Rosalind D. Folman, <i>“I Was Taken”: How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care</i> , 2 ADOPTION Q. 7 (1998)	23
Sen. Floor Analyses, 3d reading of Assem. Bill No. 705 (2000-2001 Reg. Sess.) as amended August 28, 2011, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB705#	21
Sonya J. Leathers, <i>Separation from Siblings: Associations with Placement Adaptation and Outcomes Among Adolescents in Long-Term Foster Care</i> , 27 CHILDREN & YOUTH SERVS. REV. 793 (2005)	26
U.S. Dep’t of Health and Human Servs., Administration for Children and Families, <i>Results of the 2007 and 2008 Child and Family Services Reviews</i> (June 1, 2012), https://www.acf.hhs.gov/archive/cb/resource/07-08-cfsr-results	15
U.S. Dep’t of Health and Human Servs., Administration for Children and Families, <i>Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008</i> (July 9, 2010), www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf	16

Victor G. Carrion & Shane S. Wong, <i>Can Traumatic Stress Alter the Brain? Understanding the Implications of Early Trauma on Brain Development and Learning</i> , 51 J. ADOLESC. HEALTH S23 (2012).....	25
William W. Patton & Dr. Sarah Latz, <i>Severing Hansel from Gretel: An Analysis of Siblings' Association Rights</i> , 48 U. MIAMI L. REV. 745 (1994).....	22

STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), non-profit legal and youth advocacy organizations the National Center for Youth Law, Advokids, Bay Area Legal Aid, Children’s Rights, East Bay Children’s Law Offices, Juvenile Law Center, Legal Services for Children, National Association of Counsel for Children, and Youth Law Center (“Amici”) respectfully submit this brief in support of Plaintiffs-Appellees.

The **National Center for Youth Law** (“NCYL”) is a private, non-profit organization that uses the law to help children in need nationwide. For more than forty years, NCYL has worked to improve the federal, state, and local systems responsible for protecting children, including the child welfare, juvenile justice, health and mental health, and public benefits systems. As part of the organization’s child welfare advocacy, NCYL works to ensure the safety, stability, and well-being of abused and neglected children. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children in litigation to ensure their access to safe child welfare systems.

Advokids is a 501(c)(3) non-profit organization that advocates for the child welfare system to actually provide the legal rights and protections to which every California foster child is entitled under law. Formed in 1992, Advokids operates a number of statewide programs to promote the well-being of California foster children, to advocate for protecting them from the additional traumas often

inflicted upon foster children by the child welfare system, and to provide training and information to child advocates. Advokids' programs include a telephone hotline, website, MCLE programs, and educational programs for child advocates on child welfare law, social science and neuroscience research on child development, and how this research should inform the juvenile courts' decisions.

Bay Area Legal Aid ("Bay Legal") is the largest provider of free legal services to low-income residents of the Bay Area. Bay Legal's Youth Justice Project ("Project") provides full-scope civil legal representation for youth, focusing on homeless youth involved in the delinquency or dependency systems. The Project operates multiple legal clinics for youth in the Bay Area. Since the Project was started in 2007, its attorneys and social workers have worked with and advocated for thousands of youth, a majority of whom were placed out of their homes due to abuse or neglect. The Project's policy work focuses on building support for kinship placement resources and ensuring that children are able to remain close to family, extended family, and non-relative familial supports.

Children's Rights is a national advocacy organization dedicated to improving the lives of vulnerable children in government systems. Children's Rights has a twenty-year track record of using civil rights litigation, policy expertise, and public education to keep children in state care safe and healthy. Children's Rights has long advocated for the recognition of a child's right to remain connected to siblings while in foster care, recognizing that, for the great

majority of children, separation from siblings inflicts emotional and psychological harm and compounds the trauma of being placed in foster care in the first place.

East Bay Children's Law Offices ("EBCLO") holistically represents children and youth at every juvenile dependency proceeding in Alameda County. Our mission is to protect and defend the rights of children and youth through effective, vigorous, and compassionate legal advocacy. The foster care system designed to protect children often adds another layer of trauma to their lives. Foster youth are more likely to be diagnosed with mental illness, less likely to graduate from high school, and more likely to enter the criminal justice system. EBCLO strives to disrupt those patterns by providing a voice for children in and out of court. We identify and request services for our clients, including advocating for their educational, developmental, physical, and mental health needs.

Juvenile Law Center advocates for rights, dignity, equity, and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds

of young people and filed influential amicus briefs in state and federal cases across the country.

Founded in 1975, **Legal Services for Children** (“LSC”) is one of the first non-profit law firms in the country dedicated to advancing the rights of youth. LSC’s mission is to ensure that all children in the Bay Area have an opportunity to be raised in a safe and stable environment with equal access to the services they need to become healthy and productive young adults. We provide holistic advocacy through teams of attorneys and social workers in the areas of abuse and neglect, immigration, and education. We empower clients by actively involving them in critical decisions about their lives. LSC regularly represents abused and neglected children in child protection proceedings and believes children have a fundamental right to sibling relationships.

The **National Association of Counsel for Children**, founded in 1977, is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America’s children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions, and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs include training, technical assistance, the national children’s law resource center, the attorney specialty certification program, policy advocacy, and

the amicus curiae program. The NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court.

Youth Law Center is a San Francisco-based public interest law firm that advocates nationally to transform child welfare and juvenile justice systems so young people can thrive. For more than forty years, Youth Law Center has worked to protect children and youth in out-of-home care from harmful practices and ensure that they receive the care, services, and supports they need to grow to their potential. Youth Law Center attorneys have represented children and youth in civil rights litigation and participated as amicus curiae in cases in more than two dozen states on foster care and juvenile justice issues. Youth Law Center's advocacy has resulted in extensive improvements in child and youth serving systems affecting the lives of hundreds of thousands of young people throughout the country.

Amici submit this brief to offer their unique perspective based on substantial experience in legal advocacy for individual children, youth, and families, and in legal and policy advocacy at a systemic level. All parties to the action have consented to the filing of this brief.

No party or counsel for a party has authored this brief in whole or in part, or made any monetary contribution to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The U.S. Supreme Court has afforded First Amendment protection to “the sanctity of the family” and emphasized the importance of “the emotional attachments that derive from the intimacy of daily association.” Supreme Court case law instructs that when evaluating First Amendment association rights, courts must carefully assess relationships on a “spectrum” of intimacy based on their “objective characteristics.” Plaintiff J.P. and his sister M.M. shared just the sort of intimate relationship that the First Amendment protects. As biological siblings growing up in the same home, they shared an emotional attachment from spending their entire lives under the same roof. According to social science research, this attachment was likely heightened when they were removed from their home and community due to allegations of maltreatment and placed together in a foster home, becoming each other’s only family and only connection to normalcy.

Notwithstanding clear Supreme Court precedent protecting such intimate relationships, Defendants seek a sweeping ruling from this Circuit extinguishing all First Amendment protections for all siblings, including cohabitating siblings in foster care. Such a ruling would run counter to Ninth Circuit law, federal and California statutory law, California public policy, and well-established social science research emphasizing the significance of sibling relationships as a means of promoting stability and improved outcomes for youth in foster care.

ARGUMENT

I. The U.S. Constitution protects the sibling relationships of youth in foster care.

A. U.S. Supreme Court precedent clearly establishes the importance of familial relationships.

The United States Supreme Court has recognized that “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.” *Bd. of Dirs. of Rotary Int’l. v. Rotary Club*, 481 U.S. 537, 545 (1987).

The Court has afforded constitutional protection to many different types of familial relationships, including: cohabitation with relatives, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); child rearing and education, *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); the begetting and bearing of children, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-86 (1977); and marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978).

In *Moore*, the Court emphasized that the Constitution “protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition” and “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.” 431 U.S. at 503-04. The Court did not limit this fundamental right to parents, stating “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the

nuclear family.” *Id.* at 504. The Court has noted that the importance of the familial relationship derives in part from “the emotional attachments that derive from the intimacy of daily association.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977).

B. Federal court precedent also clearly establishes a First Amendment right to familial association.

The Supreme Court has identified two separate forms of constitutionally protected associational rights within the First Amendment: freedom of “intimate association” and freedom of “expressive association.” *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). In *Roberts*, the Court indicated that protecting intimate relationships “from unwarranted state interference” was necessary to safeguard “the ability independently to define one’s identity that is central to any concept of liberty.” *Id.* at 619. The Court defined constitutionally protected intimate relationships to include those “personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.” *Id.* at 618-19.

In identifying the personal affiliations that may be entitled to constitutional protection, the Court pointed to “those that attend the creation and sustenance of a family—marriage . . . the raising and education of children . . . and cohabitation with one’s relatives.” *Id.* at 619 (internal citation omitted). The Court emphasized that the First Amendment protects relationships, including family relationships,

that “by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Id.* at 619-20; *see also Rotary Club*, 481 U.S. at 545.

Noting the broad range of relationships that could merit protection, the Court has stated that determining the limits of state authority requires “a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” *Roberts*, 468 U.S. at 620. Generally, only relationships that are distinguished by attributes such as “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship” are likely to be protected under the First Amendment. *Id.*; *see also Trujillo v. Bd. of Cnty. Comm’rs of Cnty. of Santa Fe*, 768 F.2d 1186, 1189 n.5 (10th Cir. 1985) (the siblings’ “relationships at issue clearly fall within the protected range” established in *Roberts*).

The Ninth Circuit has similarly held that the First Amendment protects familial relationships. In *Keates v. Koile*, the Ninth Circuit acknowledged that “claims under both the First and Fourteenth Amendment for unwarranted interference with the right to familial association could survive a motion to dismiss.” 883 F.3d 1228, 1236 (9th Cir. 2018) (citing *Lee v. City of L.A.*, 250 F.3d

668, 686 (9th Cir. 2001) (finding that plaintiff had adequately alleged a violation of the right to familial association under the First and Fourteenth Amendments)).

In considering the constitutional status of sibling relationships, a federal district court found that the First Amendment right to intimate association protects the sibling relationships of foster youth. In *Aristotle P. v. Johnson*, foster children under the guardianship of the Illinois Department of Children and Family Services (“DCFS”) brought a class action suit against the director of DCFS and the guardianship administrator, challenging the defendants’ practices of placing siblings in separate foster homes and failing to provide visits on a reasonable basis. 721 F. Supp. 1002 (N.D. Ill. 1989).

In ruling on defendants’ motion to dismiss, the district court in *Aristotle P.* found that plaintiffs had stated a Section 1983 claim for violation of their First Amendment and substantive due process rights. *Id.* at 1006-07, 1009-10. The court noted that the child welfare agency’s policies resulted in the physical separation of the plaintiffs and their siblings for extended periods of time, and in some cases the children were unable to maintain any relationship at all. *Id.* at 1007-08. Therefore, the court concluded that as “the defendants’ policies have seriously damaged, if not severed, the relationships between the plaintiffs and their siblings . . . [t]he plaintiffs have sufficiently alleged the existence of a policy which deprives their liberty interests in their sibling relationships” *Id.* at 1008.

Notably, the court emphasized sibling relationships as just “the sort of ‘intimate human relationships’ that are afforded ‘a substantial measure of sanctuary from unjustified interference by the State.’” *Id.* at 1005 (citing to *Roberts*, 468 U.S. at 618).¹

C. *Ward* and *Mann* do not limit the Plaintiff’s First Amendment right to familial association.

Defendants misconstrue the relevance of the Ninth Circuit’s decisions in *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991) and *Mann v. City of Sacramento*, No. 17-17048, 2018 WL 4268534 (9th Cir. Sept. 7, 2018) to Plaintiff J.P.’s First Amendment right to familial association. *See* Brief of Appellants-Defendants, ECF No. 8 (“Appellants’ Br.”), at 31-32 (stating that *Mann* “[found] that *Ward* barred the plaintiffs’ First Amendment sibling association claims to the same extent it barred their Fourteenth Amendment sibling association claims”).

¹ Subsequently, the parties entered into a consent decree, providing for placement of siblings together when possible, visitation and other contacts among siblings placed apart, training of caseworkers, and monitoring and data collection. *See* Consent Decree, *Aristotle P. v. Ryder*, No. 88-C-7919 (N.D. Ill., May 16, 2014), <https://www.clearinghouse.net/chDocs/public/CW-IL-0006-0006.pdf>. Advocates reached a similar settlement in *Jesse E. v. N.Y.C. Dep’t of Soc. Servs.*, No. 1:90-cv-07274-RJW (S.D.N.Y. Nov. 3, 1990), which challenged the practice of separating siblings in foster care as violative of children’s freedom of association under the First Amendment, their right to due process, and other statutory rights. The 1993 settlement established siblings’ right to be placed together unless contrary to their health, safety, or welfare, and rights to visitation and reunification if children had to be separated temporarily.

The facts of these cases involving adult siblings who were neither cohabitating nor subject to the *parens patriae* protections of the state are clearly distinguishable.

In *Ward*, the parents and adult siblings of a man shot and killed by police officers brought civil rights and wrongful death actions against the City of San Jose, the police chief, and the officers involved. 967 F.2d at 282. The Ninth Circuit dismissed the siblings' claims, holding that they did not possess a liberty interest in their sibling's companionship under the Fourteenth Amendment's substantive due process clause. *Id.* at 284. As the plaintiffs did not assert a claim for violation of their First Amendment right to familial association, the court's opinion did not address the First Amendment. *See id.* In *Mann*, the Ninth Circuit clarified the holding in *Ward*, stating that "this court held that *adult, non-cohabitating siblings* 'do not possess a cognizable liberty interest in their brother's companionship.'" *See* 2018 WL 4268534, at *2 (quoting *Ward*, 967 F.2d 280, 283-284) (emphasis added).

Multiple district courts in California have indicated that *Ward*'s Fourteenth Amendment analysis does not limit the right to familial association under the First Amendment.² Contrary to Appellants' assertions, *Mann* does not extend *Ward* to

² The District Court referenced several of these decisions in its Order Granting in Part and Denying in Part County Defendants' Motion to Dismiss. *See, e.g.*, ER 10 ("Kaur v. City of Lodi, No 2:14-cv-828-GEB-AC, 2014 WL 3889976, at *7 (E.D. Cal. Aug. 7, 2014) (declining to apply *Ward* to preclude siblings from pursuing claims for violation of association under the First Amendment)"); ER 12 ("Garcia-Mejia v. Gilkey, No. 1:07-cv-00783-LJO-GSA (PC), 2009 WL 80411, at *3-4

bar siblings’ First Amendment rights to familial association. *See* Appellants’ Br. 31-32.

In *Mann*, the adult siblings of a man shot and killed by police officers brought a civil rights action against the City of Sacramento and the police officers involved. 2018 WL 4268534, at *1. In considering the siblings’ claim, the court noted that “relationships involving marriage, child-rearing, or cohabitation are protected by the First Amendment, and other relationships, ‘including family relationships,’ may also be protected to the extent that the ‘objective characteristics’ of the relationship (i.e., ‘factors such as size, purpose, selectivity, and ... exclu[sivity]’) demonstrate that it is ‘sufficiently personal or private to warrant constitutional protection.’” *Id.* at *2 (quoting *Rotary Club*, 481 U.S. at 545-46) (alteration in original). However, the Ninth Circuit held that plaintiffs’ “conclusory and formulaic recitation of language from *Rotary Club*” was insufficient to show that they shared an intimate association right protected under the First or Fourteenth Amendment. *Id.* (internal citations omitted). The court also noted that even if sufficient facts had been plead, “*Ward* necessarily rejected any argument that *adult, non-cohabitating siblings* enjoy a right to intimate association.” *Id.* (emphasis added).

(E.D. Cal. Jan. 13, 2009) (citing *Board of Directors* and *Roberts* and concluding “[p]laintiff has a fundamental liberty interest in his relationship with his brother”)).

D. The objective characteristics of the sibling relationship between J.P. and M.M. strongly support an intimate association right.

The facts of this case are not in dispute. J.P., five years old, and M.M., three years old, were biological siblings removed from their biological mother's custody due to allegations of neglect and abuse. Complaint ¶ 19, ER 171; Appellants' Br. 5. J.P. and M.M. were then placed into the care of Defendant Moore. Complaint ¶ 28, ER 172-73. J.P. and M.M. lived together in Moore's care from September 30, 2015, to October 16, 2015. *Id.* On October 16, 2015, after ingesting methamphetamine for the second time, M.M. died in her brother's arms. Complaint ¶ 67, ER 180.

Far from the insufficient "formulaic recitation of language" in *Mann*, Plaintiff J.P. has demonstrated that he cohabitated with his biological sibling M.M. for an extended period of time. Unlike the adult, non-cohabitating siblings in *Ward* and *Mann*, J.P. and M.M. are minor siblings who had cohabitated for their entire lives at the time of M.M.'s death, and could expect to live together for years in the future. These facts alone demonstrate the kind of "intimate relationship" that the First Amendment protects. But, as discussed in more detail below, the additional intimacy resulting from the unique bond siblings in foster care experience must also be taken into consideration in distinguishing *Mann* from the facts of this case. *See infra* Section III; *see also Aristotle P.*, 721 F. Supp. at 1006 (noting that foster

children’s “relationships with their siblings are even more important because their relationships with their biological parents are often tenuous or non-existent.”)

II. Federal and California legislation have emphasized the importance of foster youth sibling relationships for decades.

A. Federal law requires state child welfare agencies to prioritize the sibling relationships of youth in foster care.

Two areas of federal law safeguard the sibling relationships of foster youth. In 2004, the Children’s Bureau of the Administration for Children and Families began considering “placement with siblings” and “visiting . . . siblings in foster care” as two indicators by which to evaluate the states’ efforts toward achieving permanency for foster children. U.S. Dep’t of Health & Human Servs., Administration for Children and Families, *Results of the 2007 and 2008 Child and Family Services Reviews* (June 1, 2012), <https://www.acf.hhs.gov/archive/cb/resource/07-08-cfsr-results>. States have therefore been required to assess their efforts at maintaining sibling relationships for nearly fifteen years.

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act, P.L. 110-351 (“Fostering Connections Act”). The Act sent a clear and powerful message to states about their systemic obligations to support sibling relationships in foster care. The law requires that, in order to receive federal funding, states must make “reasonable efforts” (1) to place siblings removed from their home together and (2) to provide for frequent visitation or

other ongoing interaction between siblings not jointly placed, unless a state documents that such placement, visitation, or ongoing interaction would be contrary to the safety or well-being of any of the siblings. 42 U.S.C. § 671(a)(31) (2008); *see also* U.S. Dep't of Health and Human Servs., Administration for Children and Families, *Guidance on Fostering Connections to Success and Increasing Adoptions Act of 2008* (July 9, 2010), at 22, www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf (reiterating requirements).

The vast majority of states now have statutes, regulations, or policies prioritizing joint placement of siblings in foster care. Children's Bureau, *Placement of Children with Relatives: State Statutes* (Jan. 2018), at 3, <https://www.childwelfare.gov/pubPDFs/placement.pdf>. In accordance with the Fostering Connections Act, numerous states also have statutes requiring the child welfare agency to make reasonable efforts to ensure that foster youth who cannot be placed together have frequent visitation or other ongoing interaction. *Id.* at 3-4. States have also focused on strengthening post-adoption sibling visitation laws and including sibling visitation in foster youth bill of rights provisions. *See* Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 11-12, 14-15, 22-23 (2011).³ State court decisions addressing the rights of foster

³ States have also recognized the importance of improving their outcomes relating to siblings in foster care. Notably, consent decrees under the continuing

youth to maintain connections with siblings who are also in state custody have frequently been sympathetic to the interests of foster youth.⁴

B. California law requires child welfare agencies to preserve and protect the sibling relationships of youth in foster care.

The state of California has focused on the needs of siblings in foster care for nearly three decades. California first enacted legislation focusing on sibling rights and visitation in 1993 and has since expanded these rights and protections on multiple occasions. Children’s Bureau, *Sibling Issues in Foster Care and Adoption* (Jan. 2013), at 3, <https://www.childwelfare.gov/pubpdfs/siblingissues.pdf>.

California law is “recognized by many as offering the strongest statutory

jurisdiction of federal courts in Connecticut, Georgia, Michigan, Mississippi, New Jersey, and South Carolina require those states to improve outcomes relating to sibling placement and/or visitation. *See, e.g.*, Children’s Rights, *Class Actions: CT – Juan F. v. Malloy*, https://www.childrensrights.org/class_action/connecticut/; Children’s Rights, *Class Actions: MI – Dwayne B. v. Snyder*, https://www.childrensrights.org/class_action/michigan/. Sibling outcomes have similarly been featured in consent decrees in Washington and Tennessee. *See* Columbia Legal Services, *Braam v. Washington*, <http://columbialegal.org/BraamV.Washington>; Children’s Rights, *Class Actions: TN – Brian A. v. Haslam*, https://www.childrensrights.org/class_action/tennessee/.

⁴ *See, e.g.*, *In re Clifton B.*, 81 Cal. App. 4th 415, 427 (2000) (finding that the “Agency may not suspend sibling visitation unless the court finds such interaction would be detrimental to either sibling . . .”); *New York ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981) (holding that a family court could order visitation between siblings to protect the children’s best interests, despite opposition by adoptive parents); *In re Adoption of Anthony*, 113 Misc. 2d 26 (N.Y. Fam. Ct. 1982) (allowing a twelve-year-old boy to maintain contact with his siblings after his adoption by foster parents).

protections for the needs of siblings in foster care and adoption among existing State statutes.” *Id.*

California Welfare and Institutions Code Section 16002 requires California child welfare agencies to place siblings together unless the placement would be contrary to the “safety and well-being” of any sibling. Cal. Welf. & Inst. Code § 16002(b). This sibling placement requirement reflects “the intent of the Legislature to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child’s family ties” Cal. Welf. & Inst. Code § 16002(a)(1). Child welfare agencies are also required to make a “diligent effort . . . to develop and maintain sibling relationships.” Cal. Welf. & Inst. Code § 16002(b). If siblings are not placed together, the social worker “shall explain why the siblings are not placed together and what efforts he or she is making to place the siblings together or why making those efforts would be contrary to the safety and well-being of any of the siblings.” *Id.* The social worker is required to prepare a case plan “to provide for ongoing and frequent interaction among siblings until family reunification is achieved, or, if parental rights are terminated, as part of developing the permanent plan for the child.” *Id.*

Social workers are also required to include detailed information about sibling relationships in every social study, evaluation, and supplemental report that is submitted to the court. *See* Cal. Welf. & Inst. Code § 358.1(d)(1)-(2) (Social Study or Evaluation Report); Cal. Welf. & Inst. Code § 366.1(g)(1)(A)

(Supplemental Report). These reports must include a factual discussion of, inter alia: “[t]he nature of the relationship between the child and his or her siblings;” “[t]he appropriateness of developing or maintaining the sibling relationships;” “[t]he impact of the sibling relationships on the child’s placement and planning for legal permanence;” and, for siblings not placed together, an explanation of why, what efforts are being made to place them together (or why such efforts are not appropriate), and details about sibling visits. Cal. Welf. & Inst. Code § 358.1(d)(1). The reports must specifically address “whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child’s best emotional interest.” Cal. Welf. & Inst. Code § 358.1(d)(2).

The social study or evaluation report discussing sibling relationships must be received in evidence and considered before the dependency court may render a disposition decision. Additionally, the social worker must update the report in advance of all subsequent review hearings. *See* Cal. Welf. & Inst. Code § 366(a)(1)(D) (Periodic Status Review); Cal. Welf. & Inst. Code § 366.21(e)(4) (Status Review Hearing); Cal. Welf. & Inst. Code § 366.3(e)(9) (Permanency Review). The California Department of Social Services issued an All County Letter to all child welfare agencies regarding these requirements in 2016. Cal. Dep’t Soc. Servs., ACL 15-100 (Jan. 14, 2016), *Changes in Sibling Visitation for*

Children in the Dependency and Juvenile Justice System with the Passage of Senate Bill (SB) 1099,

<http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2015/15-100.pdf>.

The importance of sibling relationships is also reflected elsewhere in California statutes. Child welfare agencies are required to give siblings notice of hearings in each other's cases. Cal. Welf. & Inst. Code § 290.1(a)(5). When siblings are not placed together, their social workers are required to ensure that the "siblings are informed of significant life events that occur within their extended family." Cal. Welf. & Inst. Code § 16501.1(g)(6). If a child in foster care is placed for adoption, the court may include provisions for post-adoptive sibling contact in their final adoption order. Cal. Welf. & Inst. Code § 366.29. Finally, the California Foster Youth Bill of Rights includes a right "to visit and contact brothers and sisters." Cal. Welf. & Inst. Code § 16001.9(a)(7). California state courts have acknowledged the importance of sibling relationships in decisions interpreting these statutes.⁵

⁵ See, e.g., *In re Valerie A.*, 152 Cal. App. 4th 987, 1003 (2007) ("[M]aintaining sibling relationships, under the right circumstances, is imperative for the emotional well-being of the [dependent] child now and in the future. For children who will never be returned to their parents, siblings may be the only true family they will ever have.") (quoting Sen. Comm. on Judiciary, Rep. on Assem. Bill No. 705 (2000–2001 Reg. Sess.) as amended June 11, 2001, at 4) (alteration in original); *Cnty. of L.A. v. Superior Court*, 102 Cal. App. 4th 627, 642 (2002) (finding that the purpose of sibling placement under Welfare and Institutions Code § 16002 is to "preserve familial relationships").

The legislative history of these provisions recognizes the important role that sibling relationships play in the lives of foster youth. One legislative analysis commented that “when children have been separated from their parents due to abuse and neglect, sibling relationships become even more important to them. Academics and children’s advocates agree that maintaining sibling relationships can be critically important to the emotional well-being of these children whose lives and trust have been shattered” Assem. Floor Analysis, 3d reading of Assem. Bill No. 705 (2000-2001 Reg. Sess.) as amended May 7, 2001, at 3, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB705#. Another legislative analysis stated that “[m]aintaining sibling relationships is particularly important to children who have already lost their homes, their parents, changed schools and lost contact with their friends. Siblings are the only family, the last link to normalcy, that these children have left.” Sen. Floor Analyses, 3d reading of Assem. Bill No. 705 (2000-2001 Reg. Sess.) as amended August 28, 2001, at 5, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB705#.

Defendant social workers Maas and May were subject to a myriad of state-mandated requirements regarding the preservation and protection of J.P. and M.M.’s sibling relationship. As social workers working with foster youth in California, Maas and May are required to include detailed information about their

minor clients' sibling relationships in every single social study, evaluation, and supplemental report that they submit to the dependency court.

III. Social science research has demonstrated the extraordinary importance of sibling relationships for youth in foster care.

Sibling relationships provide emotional support, stability, and a sense of belonging. Leading researchers have noted that sibling relationships “validate the child’s fundamental worth as a human being . . . [and] produce hope and motivation.” Mary Anne Herrick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 CHILDREN & YOUTH SERVS. REV. 845, 851 (2005). Siblings also play an important role in advancing each other’s identity, self-esteem, and moral and social development. See William W. Patton & Dr. Sarah Latz, *Severing Hansel from Gretel: An Analysis of Siblings’ Association Rights*, 48 U. MIAMI L. REV. 745, 766-67 (1994). Sibling relationships are “emotionally powerful and critically important not only in childhood but over the course of a lifetime. . . . [They] can provide a significant source of continuity throughout a child’s lifetime and are likely to be the longest relationships that most people experience.” Children’s Bureau, *Sibling Issues in Foster Care and Adoption* (Jan. 2013), at 4, <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf>.

Children entering foster care must cope with the trauma that resulted in their entry into care as well as the pain and stress caused by separation from their

families. *See* National Child Traumatic Stress Network, *Children with Traumatic Separation: Information for Professionals*, https://www.nctsn.org/sites/default/files/resources/children_with_traumatic_separation_professionals.pdf; Rosalind D. Folman, “*I Was Taken*”: *How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care*, 2 ADOPTION Q. 7 (1998). While foster care should be a safe haven for abused and neglected children, all too often foster children experience additional emotional, psychological, developmental, and neurological harm as a result of their experiences in the system, including unsafe placements and multiple placement changes. *See, e.g.*, Mark D. Simms, *Foster Children and the Foster Care System, Part II: Impact on the Child*, 21 CURRENT PROBS. PEDIATRICS 345 (1991); David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 PEDIATRICS 336 (2007).

J.P.’s treatment in the foster care system shocks the conscience and exemplifies systemic failure at its most extreme, including: placement of five-year-old J.P. in a foster home where he faced a significant risk of harm from exposure to methamphetamines; the traumatizing experience of watching his little sister suffer an extreme reaction from ingesting methamphetamines; the ongoing significant risk of harm from being forced to live in the same unsafe home where his sister ingested methamphetamines; and, finally, the devastating trauma of watching his

sister suffer a second time from ingesting methamphetamines and then die in his arms. A more traumatic and harmful series of events is difficult to fathom.⁶

Decades of medical research have established that traumatic experiences impact children's brain development. See Bruce D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-dependent" Development of the Brain: How "States" Become "Traits"*, 16 INFANT MENTAL HEALTH J. 271, 276 (1995) ("[T]he organizing, sensitive brain of an infant or young child is more malleable to experience than a mature brain. Although experience may alter the

⁶ Although this brief focuses on J.P.'s First Amendment rights, amici note that J.P. easily demonstrates an actionable claim for violation of his Fourteenth Amendment substantive due process rights. "[O]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (citations omitted). Foster children's clearly established substantive due process rights include protection from agency practices that place them at an unreasonable risk of harm. See, e.g., *Henry A.*, 678 F.3d at 1000-01; see also *Tamas v. Dep't of Social & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010) (surveying cases in other circuits). Foster children's substantive due process rights also extend to practices that result in *actual* emotional or psychological harm. See, e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006) (in juvenile justice context, liberty interest in personal security and well-being encompasses a right to protection from psychological as well as physical abuse); *Marisol A. v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997) (children in state custody "have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being"); *Aristotle P.*, 721 F. Supp. at 1010 ("The fact that the plaintiffs' injuries are psychological rather than physical is of no moment."); see also *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990) ("The extension of [the protection of the due process clause] to the case in which the plaintiff's mental health is seriously impaired by deliberate and unjustified state action is straightforward.").

behavior of an adult, experience literally provides the organizing framework for an infant and child.”). Exposure to trauma carries significant risks, including the risk of causing or exacerbating mental and behavioral health problems and disorders, as well as the risk of altered brain development. *See, e.g.,* Victor G. Carrion & Shane S. Wong, *Can Traumatic Stress Alter the Brain? Understanding the Implications of Early Trauma on Brain Development and Learning*, 51 J. ADOLESC. HEALTH S23 (2012); Alexandra Cook et al., *Complex Trauma in Children and Adolescents*, 35 PSYCHIATRIC ANNALS 390 (2005); National Child Traumatic Stress Network, *Effects of Complex Trauma*, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects>.

Maintaining sibling connections can reduce the stress and trauma youth experience as they enter and adjust to life in the foster care system. For many children involved with the child welfare system, sibling relationships take on more significance because they can provide stability, support, and care that is not consistently provided by parents. Maintaining these sibling relationships helps foster children to cultivate a positive sense of identity and connection with their cultural and family histories. Research has shown that sibling relationships can promote resilience and diminish the impact of adverse circumstances such as parental mental illness, substance abuse, or loss. *See* Children’s Bureau, *Sibling Issues in Foster Care and Adoption* (Jan. 2013), at 1, <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf>; Melissa S. Kittmer, *Risk*

and Resilience in Alcoholic Families: Family Functioning, Sibling Attachment, and Parent-Child Relationships (ProQuest Information & Learning ed., 2005); Krista Gass, Jennifer Jenkins & Judy Dunn, *Are Sibling Relationships Protective? A Longitudinal Study*, 48 J. CHILD PSYCHOL. & PSYCHIATRY 167 (2007).

Social science indicates that the anxiety and pain foster children feel over being separated from their parents is exacerbated when they are also separated from their siblings, often causing them to feel that “they have lost a part of themselves.” Herrick & Piccus, at 849. Not surprisingly, studies have shown that siblings who are separated during their time in foster care are more likely to exhibit challenging behaviors than those whose sibling relationships stay intact. Sonya J. Leathers, *Separation from Siblings: Associations with Placement Adaptation and Outcomes Among Adolescents in Long-Term Foster Care*, 27 CHILDREN & YOUTH SERVS. REV. 793, 796 (2005). In addition, research demonstrates that separated siblings are at greater risk for negative outcomes. *Id.* at 795 (foster youth placed apart from siblings are at greater risk for placement disruption and less likely to exit to adoption or guardianship); Mark Courtney et al., *Youth Who Run Away from Out-of-Home Care*, Chapin Hall (2005), <https://www.chapinhall.org/research/youth-who-run-away-from-out-of-home-care/> (foster youth placed with a sibling less likely to run away than foster youth placed without siblings).

As siblings in foster care, J.P. and M.M. shared this significant bond. Social science research suggests that, for J.P., the trauma associated with removal from his home and entry into the foster care system could have been mitigated by having his sister M.M. by his side. Instead, it was compounded by the emotionally devastating experience of watching his sibling suffer and ultimately die in his arms.

CONCLUSION

For the reasons stated above, amici National Center for Youth Law, Advokids, Bay Area Legal Aid, Children's Rights, East Bay Children's Law Offices, Juvenile Law Center, Legal Services for Children, National Association of Counsel for Children, and Youth Law Center respectfully urge this Court to affirm the district court's ruling.

Dated: January 23, 2019

Respectfully submitted,

By: /s/ Leecia Welch
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 18-15963

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J.P., by and through his Guardian Ad Litem, Shannon Villanueva; SHANNON
VILLANUEVA

Plaintiffs - Appellees,

vs.

COUNTY OF ALAMEDA; DIANE DAVIS MAAS; SUE MAY,

Defendants - Appellants.

and

TRIAD FAMILY SERVICES,

Defendants.

**BRIEF OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE
SUPPORTING PLAINTIFFS-APPELLANTS PETITION FOR
REHEARING OR REHEARING EN BANC AND AFFIRMANCE OF
DISTRICT COURT ORDER**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Pacific Justice Institute discloses that it is a non-profit 501(c)(3) legal defense organization with no parent corporation or stock owned by any publicly held corporation.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), non-profit legal defense organization Pacific Justice Institute respectfully submits this brief in support of Plaintiffs-Appellees' Petition for Rehearing / Rehearing En Banc.

Pacific Justice Institute is a 501(c)(3) non-profit organization that advocates for parental rights, religious freedom, and other civil liberties. Pacific Justice Institute works to protect the fundamental rights of parents and their children.

Amicus submits this brief to offer its perspective on critical constitutional rights of minor, cohabiting siblings.

No party or counsel for a party has authored this brief in whole or in part, or made any monetary contribution to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

On January 23, 2019, a number of youth advocacy organizations, including the National Center for Youth Law, Advokids, Bay Area Legal Aid, Children’s Rights, East Bay Children’s Law Offices, Juvenile Law Center, Legal Services for Children, National Association for Children, and Youth Law Center, submitted a brief supporting Plaintiffs-Appellees’ brief seeking to affirm the underlying District Court decision in this matter.

This excellent brief emphasized the important First Amendment protection of the sanctity of the family and “the emotional attachments that derive from the intimacy of daily association.” *Roberts v. United States Jaycees*, 468 U.S. 609, 619-620 (1984). This sanctity, and corresponding Constitutional Right, has been held by the United States Supreme Court to extend to marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); the begetting and bearing of children, *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-86 (1977); child rearing and education, *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); and the right to cohabit with relatives, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977).

As also emphasized in that brief, Federal law and California state law emphasize the importance of daily association for minor, cohabiting siblings. All legislation governing the placement of minor children, whether during family law proceedings, juvenile dependency proceedings, or foster and adoption

proceedings, supports the notion that every effort must be made to keep minor, cohabiting siblings together. The importance of sibling relationships is also firmly shown in research performed by evidence-based disciplines such as social science.

Recognizing the sanctity and importance of this relationship, the District Court in this case held that the relationship between Plaintiff J.P. and his sister M.M., who were minor siblings cohabiting in foster care, was protected by both the Fourteenth and First Amendments. In this Court's decision, the dissent also recognized the constitutionally-protected right between these cohabiting minor siblings in foster care. Yet the majority determined no such right existed, relying upon cases involving *adult, non-cohabiting siblings* whose relationships are in no way akin to those of *minor siblings*, living in the same home, sharing the same daily experiences and dependent on one another for the love and support of the other in their daily association.

This ruling runs counter to Ninth Circuit law, federal and California statutory law, public policy, and evidence-based research into the importance of the sibling relationship. This is exactly the type of intimate association the First Amendment protects.

ARGUMENT

The First Amendment Is Designed to Protect and Preserve the Nuclear Family's Right to Intimate Association, Which Includes the Relationships Between Minor, Cohabiting Siblings

As discussed above, the First Amendment protects the sanctity of the family and “the emotional attachments that derive from the intimacy of daily association.” As discussed by this Court in *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir.2018), the first Amendment protects “family relationships, that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”” “[P]rotecting intimate relations ‘from unwarranted state interference’ [is] necessary to safeguard ‘the ability independently to define one’s identity that is central to any concept of liberty.’” *Id.*

This right is separate and distinct from the Fourteenth Amendment right of familial association. That right, which has only been recognized between parents and their children, has been held to be a “fundamental liberty interest.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Thus, where the Fourteenth Amendment right depends upon the Supreme Court’s recognition of a relationship as a liberty interest, the First Amendment right depends upon the nature of the relationship, the “deep attachments and commitments” fostered by

that relationship, and the “community of thoughts, experiences, and beliefs” between the individuals in the relationship.

A. Recognition of the Importance of the Sibling Relationship

The relationship between minor, co-habiting siblings is, in fact, recognized by federal law, California state law, and evidenced-based research as a critical relationship within the nuclear family – as deserving (and in some cases more deserving) of protection and preservation as the parent-child relationship.

1. Federal Law

Congress has recognized the importance of maintaining and preserving sibling relationships by enacting legislation to protect these critical family ties. Since 1935, the federal government has provided funding to the states to provide foster care, transitional independent living programs for children, adoption assistance for children with special needs, and kinship guardian assistance. In order to qualify for such funding the federal government mandates that a state’s plan must provide that reasonable efforts be made “to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings.” 42 U.S.C. §671 (a)(31)(A). Where siblings are not jointly placed, the federal government mandates that each state’s plan “provide for frequent visitation or ongoing interaction between the siblings.” 42 U.S.C. §671 (a)(31)(B). This mandate was

intended by the legislature to improve outcomes for children in foster care. To further support the critical sibling relationships, the federal legislature also advised that a state may relax the limitations on the number of children who may be cared for in a single home “to allow siblings to remain together.” 42 U.S.C. § 672(c)(1)(B)(ii).

The federal legislature also recognizes the importance of sibling relationships during family reunification, requiring the states provide services and activities to “facilitate access to and visitation of children by parents and siblings.” 42 U.S.C. § 629a(a)(7)(B). And in permanency planning, the federal legislature recognizes that any permanency plan should recognize that “children should be placed with their siblings unless there is a finding by the court that such placement is contrary to their best interest.” 42 U.S.C. § 675a(c)(a)(B)(iii)(VI).

There is no question that Congress has deemed that sibling relationships are fundamental to the fabric of family life and must be protected and preserved by the federal government and by the states.

2. California Law

Consistent with the federal congressional mandate that states work to preserve and protect sibling relationships, California has enacted statutes and regulations to do just that.

In Welfare & Institutions Code § 16002, the California Legislature declared its intent “to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child’s family ties by ensuring that when siblings have been removed from their home . . . the siblings will be placed in foster care together.” § 16002(a). The Legislature further declared its intent to “preserve and strengthen a child’s sibling relationship so that when a child has been removed from his or her home and he or she has a sibling or siblings who remain in the custody of a mutual parent subject to the court’s jurisdiction, the court has the authority to develop a visitation plan for the siblings.” § 16002(b). This code section mandates that during all steps of a juvenile dependency proceeding, the child welfare agency must consider siblings as a family unit which must be protected and preserved.

The California Legislature has recognized that the sibling relationship is so critical and worthy of protection that one of the reasons a court may not terminate parental rights is when “there would be substantial interference with a child’s sibling relationship.” Welf. & Inst. Code § 366.26(c)(1)(v). In such circumstances, the court should consider “whether the child shared significant common experiences or has existing close and strong bonds with a sibling,” and whether “the child’s long-term emotional interest” in his or her relationship with a sibling is more beneficial than legal permanence through adoption.

And it is not just the juvenile dependency context where the State of California has declared the sibling relationship worthy of protection and preservation. The concept that the sibling bond “should be preserved whenever possible” has been declared by California courts to be a “strong policy” of California law. *In re Marriage of Heath*, 122 Cal.App.4th 444, 449 (2004). In that decision, the court stated, “At a minimum, **the children have a right to the society and companionship of their siblings.**” *Id.* (emphasis supplied), citing *In re Marriage of Williams*, 88 Cal.App.4th 808, 814 (2001). In *Williams*, the court cited to a Florida state decision in which the court held that justice requires that “society exercise its **moral right**” to ensure siblings grow up together, calling it a “natural right.” *Williams*, at 814, citing *Arons v. Arons*, 94 So.2d 849, 853 (Fla.1957) (emphasis supplied).

3. Evidence-Based Research

Evidence-based research in disciplines such as social science and psychology has also recognized the importance of sibling relationships. In June 2019, the Children’s Bureau issued a bulletin emphasizing the importance of protecting and preserving sibling relationships. Children’s Bureau, “*Sibling Issues in Foster Care and Adoption*” (June 2019).

<http://www.childwelfare.gov/pubPDFs/siblingissues.pdf>.

Citing to research, this bulletin highlights how being placed with siblings reduces behavior problems, anxiety, and depression, improves school performance, and fosters close connections with caregivers.

The January 23, 2019 Amicus brief filed by the various youth advocacy organizations provides additional citations to evidence-based research that has been done on the importance of preserving and protecting sibling relationships during child dependency, foster, and adoption proceedings. These studies emphasize the concept that a sibling relationship is often the longest relationship a person will ever have in their life, and as such, must be protected by the law.

B. Minor Cohabiting Siblings Have a First Amendment Right to Associate Without Undue Government Influence Based on a Settled Expectation Arising out of State and Federal Law

This Court and the United States Supreme Court have held that federal constitutional rights, including Fourth and Fourteenth Amendment substantive and procedural due process rights, may be based on “a settled expectation arising out of state law.” *Gonzalez v. Spencer*, 336 F.3d 832, 839 (9th Cir.2003), *dissent*. Thus, in *Gonzalez*, this Court held that the California laws governing a juvenile’s right to privacy over his or her juvenile case file established a constitutional privacy right protected by the Fourth Amendment.

This Court’s recognition of federal constitutional rights based on settled expectations is consistent with United States Supreme Court authority, such as *Vitek v. Jones*, 445 U.S. 480 (1980), wherein the Supreme Court held that

state statutes may “create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.” *Id.* 488. So long as the state law identifies a substantive liberty interest created or protected by the statute, the law may serve as the basis for a 1983 claim. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir.1995). As stated by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), regarding the basis for a Fourteenth Amendment procedural due process claim, “We think a person’s liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.” *Id.* at 558.

This Court, also, has recognized that a Fourteenth Amendment procedural due process claim may have its genesis in state law. In *Carlo v. City of Chino*, 105 F.3d 493 (9th Cir.1997), this Court held that a jailer’s violation of the California law requiring that an inmate be provided with a post-booking telephone call “merits constitutional due process protection.” *Id.* at 500. This Court noted, “While the right to use a telephone may not per se rise to the level of a liberty interest protected by the procedural mandate of the Fourteenth Amendment, the right of an arrestee not to be held incommunicado involves a substantial liberty interest.” *Id.* at 496.

The same analysis should be applied to the First Amendment right to preserve and protect family relationships from unwarranted state interference. As discussed above, there is a settled expectation in both federal and California state law that the sibling relationship is one of the most important familial relationships, that it must be preserved and protected by law, and that siblings have a right to society and companionship with one another. The relationship between minor, cohabiting siblings is exactly the type of intimate relationship that must be protected “from unwarranted state interference” under the First Amendment. *Roberts, supra*, 468 U.S. at 619.

The constitutional right afforded to the relationship between minor, cohabiting siblings has been recognized by other courts. *See, e.g., Trujillo v. Bd. Of Cnty. Comm’rs of Cnty. Of Santa Fe*, 768 F.2d 1186, 1189 n. 5 (10th Cir.1985); *Aristotle P. v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989). And until the panel decision in this case, this Court had not issued a ruling on the subject.

By basing its decision on this Court’s earlier holding in *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir.1991), this Court conflates the First Amendment right to intimate association with the Fourteenth Amendment liberty interest. The *Ward* siblings were asserting they held a “cognizable liberty interest in their brother’s companionship.” *Id.* at 283. This Court held

there was no Supreme Court precedent supporting a liberty interest for siblings consonant with that recognized for parents and children. This Court did not address whether the siblings had a First Amendment right to intimate association. The *Ward* siblings were adult, non-cohabiting siblings, and thus did not allege that they had a constitutional right to preserve and protect the daily, intimate relationship with their siblings. *Ward* thus has very little precedential value in this case, where the claim is by a minor foster child who is claiming a First Amendment right to the daily, intimate association with his minor sister without government interference.

The panel's decision will have far-reaching ramifications for minor, cohabiting siblings in this and other Circuits. It is based on a misapplication of the law to the facts, and does not recognize that both federal law and state law have mandated that minor, cohabiting siblings have a right to each other's companionship and society. The settled expectation in this area of the law establishes that the relationship between minor, cohabiting siblings is protected by the First Amendment of the Constitution.

CONCLUSION

For the reasons stated above, amicus Pacific Justice Institute respectfully urges that this Court rehear this matter, or rehear this matter *en banc*, and affirm the district court's ruling.

DATED: April 23, 2020

/s/ Donnie R. Cox

DONNIE R. COX

On Behalf of Amicus Pacific Justice Institute

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Local Rule 29-2, I do hereby certify that this Brief was produced using Word and that the brief contains 2,521 words based on Word's word count.

DATED: April 23, 2020

/s/ Donnie R. Cox

DONNIE R. COX

On Behalf of Amicus Pacific Justice Institute

**APPENDIX OF CALIFORNIA DEPENDENCY STATUTES
(EFFECTIVE ON OCTOBER 3, 2015)**

§ 11164. Short title; intent and purpose of article

(a) This article shall be known and may be cited as the Child Abuse and Neglect Reporting Act.

(b) The intent and purpose of this article is to protect children from abuse and neglect. In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim.

Cal. Penal Code §11164 (West 2001).

§ 300. Children subject to jurisdiction; legislative intent and declarations; “guardian” defined

Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

...

(j) The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.

Cal. Welf. & Inst. Code §300(j) (West 2014).

§ 300.2. Purpose of chapter

Notwithstanding any other provision of law, the purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent reabuse of children. The focus shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child. The provision of a home

**APPENDIX OF CALIFORNIA DEPENDENCY STATUTES
(EFFECTIVE ON OCTOBER 3, 2015)**

environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.

Cal. Welf. & Inst. Code §300.2 (West 2000)

§ 306.5. Placement of minor in custody with any siblings or half-siblings

In any case in which a social worker takes a minor into custody pursuant to Section 306, the social worker shall, to the extent that it is practical and appropriate, place the minor together with any siblings or half-siblings who are also detained or include in the report prepared pursuant to Section 319 a statement of his or her continuing efforts to place the siblings together or why those efforts are not appropriate.

Cal. Welf. & Inst. Code §306.5 (West 2002).

§ 358.1. Social studies or evaluations; contents

Each social study or evaluation made by a social worker or child advocate appointed by the court, required to be received in evidence pursuant to Section 358, shall include, but not be limited to, a factual discussion of each of the following subjects:

....

(d)(1) Whether the child has siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, all of the following:

(i) The frequency and nature of the visits between the siblings.

(ii) If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.

(iii) If there are visits between the siblings, a description of the location and length of the visits.

(iv) Any plan to increase visitation between the siblings.

**APPENDIX OF CALIFORNIA DEPENDENCY STATUTES
(EFFECTIVE ON OCTOBER 3, 2015)**

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(2) The factual discussion shall include a discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interest.

Cal. Welf. & Inst. Code §358.1(d)(1)-(2) (West 2015)

§ 361. Limitations on parental or guardian control; right to make educational or developmental services decisions; appointment of responsible adult; relinquishment of child; grounds for removal of child; placement; findings

(c) A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive, and, in an Indian child custody proceeding, paragraph (6):

(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody....

Cal. Welf. & Inst. Code §361(c)(1) (West 2015).

§ 362.1. Visitation; parents, guardians, and siblings

(a) In order to maintain ties between the parent or guardian and any siblings and the child, and to provide information relevant to deciding if, and when, to return a child to the custody of his or her parent or guardian, or to encourage or suspend sibling interaction, any order placing a child in foster care, and ordering reunification services, shall provide as follows:

....

(2) Pursuant to subdivision (b) of Section 16002, for visitation between the child and any siblings, unless the court finds by clear and convincing

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evidence that sibling interaction is contrary to the safety or well-being of either child.

...

- (b) When reunification services are not ordered pursuant to Section 361.5, the child's plan for legal permanency shall include consideration of the existence of and the relationship with any sibling pursuant to Section 16002, including their impact on placement and visitation.
- (c) As used in this section, "sibling" means a child related to another person by blood, adoption, or affinity through a common legal or biological parent.

Cal. Wel. & Inst. Code Section 362.1(a)(2), (b), and (c) (West 2015).

§ 366. Periodic status review

(a)(1) The status of every dependent child in foster care shall be reviewed periodically as determined by the court but no less frequently than once every six months, as calculated from the date of the original dispositional hearing, until the hearing described in Section 366.26 is completed. The court shall consider the safety of the child and shall determine all of the following:

....

(D)

(i) Whether the child has other siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(I) The nature of the relationship between the child and his or her siblings.

(II) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(III) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(IV) If the siblings are not placed together, all of the following:

(ia) The frequency and nature of the visits between the siblings.

(ib) If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.

(ic) If there are visits between the siblings, a description of the location and length of the visits.

(id) Any plan to increase visitation between the siblings.

(V) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(VI) The continuing need to suspend sibling interaction, if applicable, pursuant to subdivision (c) of Section 16002.

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(ii) The factors the court may consider in making a determination regarding the nature of the child's sibling relationships may include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

Cal. Welf. & Inst. Code §366(a)(1)(D) (West 2015).

§ 366.1. Supplemental report; contents

Each supplemental report required to be filed pursuant to Section 366 shall include, but not be limited to, a factual discussion of each of the following subjects:

....

(f)

(1) Whether the child has any siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, all of the following:

(i) The frequency and nature of the visits between the siblings.

(ii) If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.

(iii) If there are visits between the siblings, a description of the location and length of the visits.

(iv) Any plan to increase visitation between the siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(2) The factual discussion shall include a discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live

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with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

Cal. Welf. & Inst. Code §366.1(f) (West 2015).

§ 366.21. Status review hearings

(e)

....(4) For the purpose of placing and maintaining a sibling group together in a permanent home, the court, in making its determination to schedule a hearing pursuant to Section 366.26 for some or all members of a sibling group, as described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, shall review and consider the social worker's report and recommendations. Factors the report shall address, and the court shall consider, may include, but need not be limited to, whether the sibling group was removed from parental care as a group, the closeness and strength of the sibling bond, the ages of the siblings, the appropriateness of maintaining the sibling group together, the detriment to the child if sibling ties are not maintained, the likelihood of finding a permanent home for the sibling group, whether the sibling group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the same home, the wishes of each child whose age and physical and emotional condition permits a meaningful response, and the best interests of each child in the sibling group. The court shall specify the factual basis for its finding that it is in the best interests of each child to schedule a hearing pursuant to Section 366.26 within 120 days for some or all of the members of the sibling group.

....

Cal. Welf. & Inst. Code §366.21(e)(4) (West 2015).

§ 366.26. Hearings terminating parental rights or establishing guardianship of children adjudged dependent children of court

(c)(1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, or subdivision (b) of Section 366.25, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of

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Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless either of the following applies:

....

(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

....

(v) There would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption.

Cal. Welf. & Inst. Code §366.26(c)(1)(B)(5) (West 2012).

§ 366.3. Order for permanent plan of adoption, tribal customary adoption, adoption of nonminor dependent, or legal guardianship; termination of guardianship; change of circumstances; status review

(d) Except as provided in subdivision (g), at the review held every six months pursuant to subdivision (d), the reviewing body shall inquire about the progress being made to provide a permanent home for the child, shall consider the safety of the child, and shall determine all of the following:

....

(9) Whether the child has any siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(A) The nature of the relationship between the child and his or her siblings.

(B) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(C) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(D) If the siblings are not placed together, all of the following:

(i) The frequency and nature of the visits between the siblings.

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(ii) If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.

(iii) If there are visits between the siblings, a description of the location and length of the visits.

(iv) Any plan to increase visitation between the siblings.

(E) The impact of the sibling relationships on the child's placement and planning for legal permanence.

The factors the court may consider as indicators of the nature of the child's sibling relationships include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

Cal. Welf. & Inst. Code §366.3(e)(9) (West 2015).

§ 16001.9. Rights of minors and nonminors in foster care

(a) It is the policy of the state that all minors and nonminors in foster care shall have the following rights:

(1) To live in a safe, healthy, and comfortable home where he or she is treated with respect.

(2) To be free from physical, sexual, emotional, or other abuse, or corporal punishment.

....

(5) To be free of the administration of medication or chemical substances, unless authorized by a physician.

....

(7) To visit and contact brothers and sisters, unless prohibited by court order.

Cal. Welf. & Inst. Code §16001.9(a)(1), (2), (5), and (7) (West 2014).

§ 16002. Sibling group placement; sibling interaction; suspension; modification of forms

(a)(1) It is the intent of the Legislature to maintain the continuity of the family unit, and ensure the preservation and strengthening of the child's family ties by ensuring that when siblings have been removed from their home, either as a group on one occurrence or individually on separate

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occurrences, the siblings will be placed in foster care together, unless it has been determined that placement together is contrary to the safety or well-being of any sibling. The Legislature recognizes that in order to ensure the placement of a sibling group in the same foster care placement, placement resources need to be expanded.

(2) It is also the intent of the Legislature to preserve and strengthen a child's sibling relationship so that when a child has been removed from his or her home and he or she has a sibling or siblings who remain in the custody of a mutual parent subject to the court's jurisdiction, the court has the authority to develop a visitation plan for the siblings, unless it has been determined that visitation is contrary to the safety or well-being of any sibling.

(b) The responsible local agency shall make a diligent effort in all out-of-home placements of dependent children and wards in foster care, including those with relatives, to place siblings together in the same placement, and to develop and maintain sibling relationships. If siblings are not placed together in the same home, the social worker or probation officer shall explain why the siblings are not placed together and what efforts he or she is making to place the siblings together or why making those efforts would be contrary to the safety and well-being of any of the siblings. When placement of siblings together in the same home is not possible, a diligent effort shall be made, and a case plan prepared, to provide for ongoing and frequent interaction among siblings until family reunification is achieved, or, if parental rights are terminated, as part of developing the permanent plan for the child. If the court determines by clear and convincing evidence that sibling interaction is contrary to the safety and well-being of any of the siblings, the reasons for the determination shall be noted in the court order, and interaction shall be suspended.

Cal. Welf. & Inst. Code §16002(a)-(b) (West 2015).

§ 16004. Sibling placement resources

(a) The Legislature finds and declares that there is an urgent need to develop placement resources to permit sibling groups to remain together in out-of-home care when removed from the custody of their parents due to child abuse or neglect. Multiple barriers exist, including local ordinances and community care licensing standards, that limit or prevent the county placement agency from fulfilling its obligation pursuant to subdivision (b) of Section 16002 to place siblings together.

Therefore, the Legislature declares its intent to develop specific placement resources to accommodate sibling groups.

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(b) The State Department of Social Services shall, in consultation with the County Welfare Directors Association, the Judicial Council, organizations representing foster youth, and other similar, interested organizations, make recommendations to increase the available sibling placement resources. The possible policy changes to be addressed shall include, but shall not be limited to, the following:

- (1) The creation of a special licensing category for sibling care, including sibling group foster homes.
- (2) Development of children's villages with separate cottages to provide a home for each sibling group.
- (3) Funding for targeted recruitment of foster parents for large sibling groups.
- (4) Establishment of a higher foster care payment rate for caretakers who accept sibling groups.
- (5) Funding for one-time capital improvement costs to remodel homes to accommodate placement of siblings and provide for other up-front costs, such as vans, car seats, and other items.
- (6) Establishment of guidelines for placing siblings, who cannot be placed in the same home, within geographic proximity to each other and exploration of the possibility of permitting these siblings to have the option of enrolling in the same school district even when the siblings reside in different school districts.

(c) The department shall develop recommendations for the Legislature, in consultation with the Chief Probation Officers Association and the County Welfare Directors Association, regarding procedures for doing both of the following:

- (1) Placing siblings together when one or more siblings are in the juvenile dependency system and one or more siblings are in the juvenile delinquency systems, when such placements are appropriate.
- (2) Maintaining contact and sharing information between siblings who are placed separately in out-of-home care under the juvenile dependency and the juvenile delinquency systems.

(d) The department shall submit the recommendations described in subdivisions (b) and (c) to the Legislature by November 1, 2001.

Cal. Welf. & Inst. Code §16004 (West 2001).

§ 16208. Statewide emergency response protocol; telephone screening of emergency response referrals

(a)(1) The department, in consultation with the Child Welfare Training Advisory Board, shall contract with the University of California or the California State University system to develop a statewide protocol for

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telephone screening of emergency response referrals to protect children from abuse and neglect, to be called the Emergency Response Protocol. The department shall seek the advice of the California Children's Lobby in the development of this protocol.

(2) The Emergency Response Protocol shall incorporate written procedures for screening each referral of abuse or neglect to assess whether abuse of another family or household member is occurring. This additional domestic violence assessment and referral criteria shall be developed by the department in consultation with domestic violence victims' advocates, and other public and private agencies that provide programs for victims of domestic violence or programs of intervention for perpetrators and the County Welfare Directors Association.

(b) The department shall utilize available child welfare training funds in the development of the protocol.

(c) The department shall incorporate the protocol into the child welfare training program described in this article no later than February 15, 1992.

Cal. Welf. & Inst. Code §16208 (West 1996).

§ 16501. Child welfare services; service funded activities; approved service plans and regulations; security procedures for county employees having frequent contact with children

(a) (1) As used in this chapter, "child welfare services" means public social services that are directed toward the accomplishment of any or all of the following purposes: protecting and promoting the welfare of all children, including disabled, homeless, dependent, or neglected children; preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children. . . .

....

(f) As used in this chapter, emergency response services consist of a response system providing in-person response, 24 hours a day, seven days a week, to reports of abuse, neglect, or exploitation, as required by Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code for the purpose of investigation pursuant to Section 11166 of the Penal Code and to determine the necessity for providing initial intake services and crisis intervention to maintain the child safely in his or her own home or to protect the safety of the child. County welfare departments shall respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days. An in-person response is not required when the county welfare department, based upon an evaluation of risk, determines that an in-person response is not appropriate. This evaluation includes collateral, contacts, a review of previous referrals, and other relevant information, as indicated.

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Cal. Welf. & Inst. Code §16501(a) and (f) (West 2013).

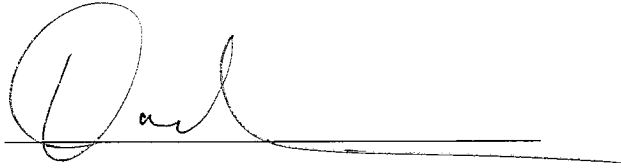
§16504. Eligibility of endangered child for intake and evaluation of risk services

Any child reported to the county child welfare services department to be endangered by abuse, neglect, or exploitation shall be eligible for initial intake and evaluation of risk services. Each county child welfare services department shall maintain and operate a 24-hour response system. An immediate in-person response shall be made by a county child welfare services department social worker in emergency situations in accordance with regulations of the department. The person making any initial response to a request for child welfare services shall consider providing appropriate social services to maintain the child safely in his or her own home. However, an in-person response is not required when the county child welfare services department, based upon an evaluation of risk, determines that an in-person response is not appropriate. An evaluation of risk includes collateral contacts, a review of previous referrals, and other relevant information....

Cal. Welf. & Inst. Code §16504(a) (West 2015).

Respectfully submitted,

Date: November 5, 2020

A handwritten signature in dark ink, appearing to read 'Darren', followed by a horizontal line extending to the right.

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