No. 20-676

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENTS COUNTY OF ALAMEDA, ET AL. IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED [RESTATED]

The questions presented are:

1 and 2. Whether the Ninth Circuit Court of Appeals' decision to grant qualified immunity on Petitioner's First and Fourteenth Amendment claims is consistent with federal case law and the United States Constitution.

3. Whether the Ninth Circuit's holding that Petitioner could not pursue a First Amendment claim for the death of his sibling is consistent with federal case law and the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner J.P., by and through his Guardian ad Litem Shannon Villanueva, is the plaintiff in District Court Case No. 4:17-cv-05679-YGR, and the appellee in the Ninth Circuit appeal, Docket No. 18-15963.

Respondents County of Alameda, Diane Davis Maas (incorrectly identified as Diane Davis Mass), and Sue May are defendants in District Court Case No. 4:17-cv-05679-YGR, and appellants in the Ninth Circuit appeal, Docket No. 18-15963.

In the District Court, J.P. also named as defendants Maria Refugio Moore, his foster mother, and Triad Family Services, a private foster family agency which placed Petitioner and his sibling with Defendant Moore. Defendant Moore has been dismissed; Defendant Triad remains in the District Court case.

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INTRODUCTION

Petitioner J.P.'s sister M.M. died from an accidental ingestion of methamphetamines approximately two weeks after J.P. and M.M. were placed in foster care by Triad Family Services ("Triad"), a defendant that is not a party to the appeal which is the subject of this Petition. As a result of his sibling's death, five-year-old J.P., through his Guardian ad Litem, sued the County of Alameda, which had taken the minors into protective custody; Sue May, a placement worker employed by the County's Department of Children and Family Services ("DCFS"); Diane Davis Maas (erroneously identified as Diane Davis Mass), the minors' dependency case worker at DCFS, and Triad. J.P. asserted causes of action against the public entity defendants, Respondents here, under 42 U.S.C. section 1983 ("Section 1983") for (1) a violation of the Fourteenth Amendment for alleged "Danger Creation"; (2) a violation of the First Amendment for alleged interference with his right to "Intimate Association" with his sister; (3) a violation of the First Amendment for alleged interference with his right to "Expressive Association" with his sister, and several *Monell* claims under the First and Fourteenth Amendments. J.P. did not sustain any injuries while in foster care. The essence of his claim, stated under various theories, is that he should be awarded monetary damages for the death of his sibling.

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Respondents moved to dismiss the complaint for failure to state a claim, arguing that the individual respondents were entitled to qualified immunity and, in any event, Petitioner had failed to allege a viable claim under the United States Constitution or federal laws.

The district court issued an order granting in part and denying in part Respondents' motion to dismiss. Respondents appealed, and the Ninth Circuit Court of Appeals issued a Memorandum Disposition which held that the individual Respondents, Ms. Maas and Ms. May, are entitled to qualified immunity, and that J.P. had failed to state a viable claim as a result of his sibling's death, consistent with the Ninth Circuit Court of Appeals' prior decision in *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1991) ("*Ward*").

J.P. filed a "Petition for Hearing or Rehearing *En Banc*" in the Ninth Circuit Court of Appeals. The Petition was summarily denied. Petitioner now asks this Court to exercise its discretionary power and grant certiorari review. The subject Petition should also be summarily denied. The Memorandum Disposition being challenged by Petitioner does not have binding precedential effect on the United States Court of Appeals for the Ninth Circuit and, in any event, is consistent with *Ward*.

Petitioner has failed to identify a basis for certiorari review under Rule 10 of this Court ("Rule 10"). There is no conflict between the Ninth Circuit and another United States court of appeals on the same important matter and certiorari review is not warranted on that basis. Petitioner has also failed to demonstrate how his

Petition raises a question of national significance, as this case affects only the parties to it. The Memorandum Disposition is not published, and does not create binding precedent on other parties. Finally, the Petition contains numerous misstatements or mischaracterizations of the record below—and the record below is not particularly clear. The Petition, and the record of this case, simply do not present an appropriate vehicle for consideration of the Constitutional issues it purports to raise. Accordingly, Respondents respectfully request that the Petition be denied.

COUNTER-STATEMENT OF THE CASE

A. Statement of Facts

Petitioner alleges he and his sister M.M. were removed from the custody of their biological mother on September 30, 2015, due to allegations of severe abuse and neglect.[1] J.P. was five years old at the time, and M.M. was almost three years old. Petitioner's Appendix ("App.") I5. The minors were delivered into the protective custody of DCFS. *Id.* Respondent Sue May ("May"), a placement worker employed by DCFS, contacted Defendant Triad in order to find a placement for the minors in a suitable foster home while dependency proceedings were initiated. App. I6. Triad is and was a foster family agency ("FFA") licensed and regulated by the State of California pursuant to Health and Safety Code sections 1502, 1506, and 1530, and 22 California Code of Regulations sections 88000 through 88087. *Id.* As

[1] As the appeal and petition in this case are taken from a motion to dismiss pursuant to F.R.C.P. 12(b), the facts alleged in Petitioner's complaint are assumed to be true at this stage in the proceedings.

an FFA, Triad was required to provide a certified foster parent for the minors, monitor the placement, and move the minors out of the placement in case of imminent risk to the minor, among other responsibilities. App. I6. The minors were placed that evening in the out-of-county foster home of Defendant Moore. Moore's qualifications as a foster parent, and her home, were both evaluated and certified by Triad as appropriate for the minors. *Id.*

Three days later, on October 3, 2015, Moore took M.M. to the emergency room at St. Joseph's Medical Center in Stockton. She reported that M.M. had been acting strangely, was hallucinating, and was unusually hyper while at the park earlier that day. App. I7. A urine sample revealed that M.M. had a small amount of methamphetamine in her system. Hospital staff contacted the Stockton Police Department, which investigated the incident. Hospital staff also faxed a report of suspected child abuse to the San Joaquin County Human Services Agency, which assigned it as requiring a 10-day response. App. I7, I9. M.M. was discharged from the hospital back into Moore's care that same evening. App. I7.

On October 5, 2015, the minors' Triad social worker allegedly left a voicemail for Respondent Diane Davis Maas ("Maas"), the minors' dependency case worker at DCFS, advising of M.M.'s hospitalization. The Triad social worker also faxed a one-page hospital record to Maas. App. I8. On October 6, 2015, the Triad social worker spoke with Maas, but did not submit a written report of suspected child abuse to the emergency response unit of DCFS, as required by law and Triad's own policies. App. I9-10.

On the evening of October 15, 2015, while in Moore's home, M.M. began exhibiting bizarre behavior similar to the previous occasion in the park. Moore and her boyfriend did not seek medical care for her and M.M. died several hours later. J.P. was immediately removed from Moore's foster home. App. I14. An autopsy determined that M.M. had died of methamphetamine toxicity. *Id.*

Notably, Petitioner did *not* allege that he suffered any physical abuse or injury at the hands of his foster parent; that there were any prior complaints against J.P.'s foster parent; if there were complaints, that Maas or May had actual or constructive knowledge of them; that Maas and May had actual or constructive knowledge that the methamphetamine that M.M. ingested on October 3, 2015 was from the foster home (if it was) as opposed to the park or elsewhere; or that May even knew about the first ingestion at all.

B. Procedural History

Plaintiff J.P., by and through his Guardian ad Litem Shannon Villaneuva, filed a complaint in the United States District Court, Northern District of California, on August 15, 2016 ("the Complaint"). J.P. asserted the following claims pursuant to 42 U.S.C. section 1983: (1) Violation of the Fourteenth Amendment – Danger Creation (against Maas and May only); (2) Violation of the First and Fourteenth Amendments – Intimate Association (against Maas and May only); (3) Violation of the First and Fourteenth Amendments – Expressive Association (against Maas and May only); (4) Municipal Liability – Failure to Train (against County of Alameda and Triad); (5) Municipal Liability – Customs, Practices, De

Facto Policy (against County of Alameda and Triad); (6) Municipal Liability – Ratification (against County of Alameda only); and (7) Declaratory and Injunctive Relief (against County of Alameda only).[2] App. I1-20.

On November 17, 2017, the County Defendants filed a motion to dismiss the Complaint for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants argued that May and Maas were entitled to qualified immunity and, in any event, Plaintiff had not stated a viable claim for a violation of his Constitutional rights, as he had alleged. Plaintiff opposed the motion.

On April 24, 2018, the district court, Judge Yvonne Gonzalez Rogers, entered an order granting in part and denying in part the motion to dismiss ("the District Court Order"). App. C. Judge Rogers first noted that "Plaintiff concedes that under *Ward,* he, as a sibling, lacks standing to assert a Fourteenth Amendment claim for loss of familial association." App. C4:25-5:1. Judge Rogers granted, without leave to amend, the 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. The court also dismissed, with prejudice, plaintiff's claims under Section 1983 for municipal liability to the extent they are based on these two alleged rights. Judge Rogers also granted the motion to dismiss the cause of action for injunctive relief,

[2] J.P. also asserted a claim for negligence against Triad and Moore only. That claim is not at issue here. J.P. dismissed Moore, but the claims against Triad are still pending.

with leave to amend. App. C14:7-19. Judge Rogers denied Defendants' motion to dismiss (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;[3] (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.

On May 24, 2018, Respondents appealed the District Court Order to the United States Court of Appeals for the Ninth Circuit. Respondents' Appendix ("Resp. App.") M.[4] Specifically, Respondents appealed the portions of the district order which denied their motion to dismiss Plaintiff's claims on the basis of qualified immunity, "and all issues inextricably intertwined therewith, including but not limited to whether any constitutional violation is stated in Plaintiff's Complaint." *Id.* Petitioner did not appeal the rulings against him.

The Ninth Circuit Court of Appeals issued its Memorandum Disposition on March 2, 2020. App. A. The Court held that the Defendants May and Maas were entitled to qualified immunity and that J.P., did not possess a cognizable Constitutional claim under the Fourteenth or First Amendment based on the loss of his sibling.

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[3] Plaintiff did not actually allege a cause of action for minimally adequate care, but the court allowed him to essentially add this claim under the Fourteenth Amendment based on his opposition to Defendants' motion to dismiss. App. C5:9-10.

[4] Petitioner did not include the Notice of Appeal to the United States Court of Appeals for the Ninth Circuit and Respondent has attached it to this Brief in Opposition. The Notice is lettered consecutively to follow the appendices in Petitioner's Appendix.

REASONS TO DENY THE PETITION

As this Court has observed, the power of certiorari "will be sparingly exercised." *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897). It is only when the Court is satisfied from the circumstances of the case "that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations," that the power will be exercised. *Id.*, at 514-15; *see also Camreta v. Greene*, 563 U.S. 692, 709 (2011); USCS Supreme Ct R 10 ("Rule 10").

Petitioner has not identified a reason for this Court to exercise its discretionary power of certiorari review. There is no conflict of authorities as a result of this Memorandum Disposition, which is not published and will not be binding on anyone except the involved parties. Nor is there a matter of national significance that is raised by the Petition. Instead, Petitioner apparently believes this Court should review the Memorandum Disposition simply because he seeks to overturn the Court of Appeals' decision against him. The Petition also contains numerous misstatements or mischaracterizations of the record below, which make it ill-suited for review by this Court. For these reasons, the Petition should be denied.

I. There Is No Split Of Authority

The only purported split of authority that Petitioner identifies is an "intra- and inter-Circuit split" regarding "foster siblings' First Amendment rights." Pet. 30. In support of this asserted conflict, Petitioner merely refers to a string cite of

"First Amendment Cases" in an effort to bring this Petition within the Court's Rule 10. Pet. 24, 30. This effort is clearly insufficient. Petitioner has failed to identify an actual split of authority between two or more United States courts of appeals on the same important matter. Rule 10(a).

A. The Subject Memorandum Disposition Is Not Binding Precedent And Does Not Create A Split Between The Circuits

The Ninth Circuit Court of Appeals decision which is the subject of the Petition is a Memorandum Disposition. Such unpublished decisions are not binding as precedent, "except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." U.S. Ct. of App. 9th Cir. R. 36-3(a). As the Ninth Circuit Court of Appeals recently stated:

> Unpublished dispositions provide shorthand explanations meant to apprise the parties of the basis for a decision. This practice "frees us to spend the requisite time drafting precedential opinions in the remaining cases," and limits the "confusion and unnecessary conflict" that would result from publishing redundant opinions. *Hart v. Massanari*, 266 F.3d 1155, 1178–79 (9th Cir. 2001). The facts of cases resolved through memorandum dispositions, if described—they often are not—are typically opaque, as the parties already know the facts. Ninth Circuit General Order 4.3(a). And **the reasoning in the dispositions is rarely developed enough to acknowledge and account for competing considerations, reconcile precedents that could be seen as in tension with each other, or describe limitations to the legal holdings—because, in theory, there are no new legal holdings, just applications of established law to facts**. *Id.*; *see also* U.S. Ct. of App. 9th Cir. R. 36-2(a). Designedly lacking, because of their limited function, the nuance and breadth of precedential opinions, **this Court's memorandum dispositions are not only officially nonprecedential but also of little use to district courts or litigants in predicting how this Court—which, again, is in no way bound by such dispositions—will view any novel legal issues in the case on appeal.** *Hart*, 266 F.3d at 1177–78.

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Grimm v. City of Portland, 971 F.3d 1060, 1067 (9th Cir. 2020), *citing Hart v. Massanari*, 266 F.3d 1155, 1177–79 (9th Cir. 2001) emphasis added; *see also Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000) ("The first decision Reynolds Metals relies on … is an unpublished memorandum disposition, and thus is not binding precedent") and *United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019) ("memorandum dispositions are nonbinding in subsequent dispositions, as they are nonprecedential under our circuit rules").

For that matter, even published district court opinions are not binding on federal courts of appeal. As stated by this Court:

> "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011). Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity. See, *e.g., Kalka v. Hawk,* 215 F.3d 90, 100 (C.A.D.C.2000) (Tatel, J., concurring in part and concurring in judgment) (collecting cases). Otherwise said, district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.

Camreta, 563 U.S. at 709; *see also Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority") (Posner, C.J.).

It is clear that the Memorandum Disposition being challenged by Petitioner is not binding, and does not predict how the Ninth Circuit will rule in a published opinion. It is therefore impossible for this Memorandum Disposition to create a conflict between the Ninth Circuit and other United States circuit courts.

B. The Cases Cited By Petitioner Do Not Demonstrate A Split Of Authority Regarding The Constitutional Claims

Petitioner fails to articulate a split of authority regarding First Amendment rights to familial relationships. He states, without citation, that "the alleged and inferred characteristics" of his relationship with his sister "qualify as an intimate family relationship under the First Amendment." He refers, without analysis, to a string of opinions, several of which are unpublished appellate decisions or non-binding district court opinions. The cited cases do not create a split of authority that requires this Court to intervene.

It is well-established in the Ninth Circuit that, pursuant to *Ward,* siblings do not possess a right to familial association under the Fourteenth Amendment. As noted, Petitioner conceded this point in the district court. App. C4:25-5:1. Petitioner asserts a right to a familial relationship with his sibling under the First Amendment in order to avoid the clear bar of *Ward.* There are several obstacles to this approach. First, language in *Ward* supports the conclusion that it also bars a sibling's claim under the First Amendment. Second, there is legal authority for the proposition that Constitutional rights regarding familial relationships are the same whether analyzed under the Fourteenth or First Amendments. And third, even if *Ward* did not foreclose a First Amendment claim for state interference with a sibling relationship, there is no split of authority that merits certiorari review.

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Ward based its holding that a plaintiff does not have a constitutional right to a sibling relationship largely on *Bell v. City of Milwaukee*, 746 F.2d 1205 (*overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (2016).)[5] *Ward*, 967 F.2d at 283-284. Like the plaintiffs in *Ward*, the plaintiffs in *Bell* brought their claims under the Fourteenth Amendment. However, *Bell* discussed the impact of both the First and Fourteenth Amendments in its analysis of whether the father or sibling plaintiffs possessed a "constitutional liberty interest in their association with Daniel Bell." *Bell*, 746 F.2d at 1242-1248. That court concluded:

> Obviously many human relationships stem from the "emotional attachments that derive from the intimacy of daily association," but we are unwilling to attach constitutional significance to such attachments outside the closely guarded parent-child relationship. Plaintiffs suggest that we could limit a holding in their favor to blood relatives in the nuclear family, arguing that injury to relationships within the nuclear family is the reasonably foreseeable result of any wrongful death. But in any wrongful death case it is reasonably foreseeable that many persons' relationships with the deceased will end, and the rationale offered for protecting blood relatives within the immediate family also extends beyond the immediate family. Therefore, the proffered limitations in such a holding are not viable; such a holding would require us to wander without principled guidance in deciding which, if any, of a decedent's brothers, sisters, aunts, uncles, cousins or even friends could recover under federal law for the deprivation of their association with the decedent.

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[5] Significantly, *Russ* further limited *Bell*, stating, "The issue before us is whether the United States Constitution, through the federal civil rights statute 42 U.S.C. § 1983, provides Russ's parents with a cause of action for the loss of the society and companionship of their son. That question leads us to revisit our decision in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), in which we held that a parent's constitutional liberty interest in his relationship with his adult son was violated when his son was killed by police. After careful consideration, we conclude that *Bell* was wrongly decided and must be overruled. We hold that the federal Constitution does not allow a parent to recover in such circumstances, and, on this basis, we affirm the district court's entry of summary judgment in favor of defendants." *Russ*, 414 F.3d at 783-84.

Bell, 746 F.2d at 1247. Similarly, the court in *Ward* stated, "Neither the legislative history nor Supreme Court precedent supports an interest for siblings consonant with that recognized for parents and children." *Ward*, 967 F.2d 284. There is no reason to surmise that the Ninth Circuit would have allowed plaintiffs to state a Section 1983 claim for interference with a sibling relationship under the First Amendment but not the Fourteenth Amendment.

In addition, some courts have analyzed both the First and Fourteenth Amendment claims together. For example, in *IDK, Inc. v. Clark County*, 836 F.2d 1185 (9th Cir. 1988), a case which predates *Ward*, the court observed, "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses." *Id.*, at 1191. The court went on to explain that claims of interference with rights of association have been decided under both the First and Fourteenth Amendments. After a review of several cases, the court stated, "Of course, a single association may have intimate and expressive features and therefore be entitled to claim the protection of both the first and fourteenth amendments." *IDK, Inc.*, 836 F.2d at 1192, citing *Roberts v. United States Jaycees,* 468 U.S. 609, 618 (1984). It is reasonable to assume that the *Ward* court would follow the same path only three years later if the plaintiffs in *Ward* had presented their Section 1983 claims under both the First and Fourteenth Amendments.

And finally, there is nothing in the subject Memorandum Disposition that creates a split of authority between the Ninth Circuit's decision in *Ward* and the

decisions of other circuit courts. Of the "First Amendment Cases" cited by Petitioner, only one is a published decision with precedential value that actually involves an alleged First Amendment right to familial association with a sibling.[6] That case, *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186 (10th Cir. 1985), is distinguishable from and does not conflict with *Ward*.

In *Trujillo*, a mother and daughter appealed the dismissal of their action filed under 42 U.S.C. section 1983, which alleged that the wrongful death of their son and brother while he was incarcerated deprived them of their constitutional right of familial association under both the First and Fourteenth Amendments. *Trujillo*, 768 F.2d at 1187. The Tenth Circuit held that the mother and sister had "constitutionally protected interests in the relationship with their son and brother." *Id.*, at 189.

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[6] Of the remaining cases, *Moore v. East Cleveland*, 431 U.S. 494 (1977) did not involve siblings; *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) held that a group's First Amendment rights of association were not violated by a state statute that required they admit women; *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) held that California civil rights statute did violate First Amendment by requiring all-male club to admit women; *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002) discusses interference with familial association under the Fourteenth Amendment; *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) held that a half-sister and foster parent to two children living in her home should have been provided with greater due process protections under the Fourteenth Amendment when the state removed the children from her custody; *Mann v. Sacramento Police Dep't*, 803 F. App'x 142 (9th Cir. 2020) (*Mann II*) is an unpublished decision which does not have precedential value. U.S. Ct. of App. 9th Cir. R. 36-3(a). In any event, despite Petitioner's claim that *Mann* stands for the proposition that "siblings enjoy First Amendment association rights based on the *Roberts* case-by-case factual analysis" (Pet. 24), *Mann II* simply opined that *Ward*, 967 F.2d 280, did not foreclose Plaintiffs' First Amendment claim and remanded the case "for consideration of Plaintiffs' First Amendment claim under the standard set forth in *Rotary Club* and its progeny." *Mann*, 803 F. App'x at 144. *Mann II* was decided after the case had been remanded and gone back up on appeal. A different Ninth Circuit panel issued the earlier decision in *Mann v. City of Sacramento*, 748 F. App'x 112 (9th Cir. 2018) (*Mann* I), which held, "Because we analyze the right of intimate association in the same manner regardless whether we characterize it under the First or Fourteenth Amendments, *Ward* necessarily rejected any argument that adult, non-cohabitating siblings enjoy a right to intimate association." *Mann*, 748 F.App'x. at 115. The district court opinions are not included here because they are not binding on the courts of appeal and therefore cannot create a split of authority under Rule 10. *See Camreta*, 563 U.S. at 709.

Significantly, however, the *Trujillo* court set forth a significant limitation on constitutional claims for loss of familial association. It observed that "most cases that have protected expressive or intimate associational interests have done so when the state has directly interfered with these relationships." *Trujillo*, 768 F.2d at 1190, citations omitted. The court concluded:

> [A]n allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under section 1983. We realize that other courts have not imposed any state of mind requirement to find a deprivation of intimate associational rights. *See e.g., Bell*, 746 F.2d 1205; *Mattis*, 502 F.2d 588; *Jones*, 429 F. Supp. 848. However, their rationale would permit a section 1983 claim by a parent whose child is negligently killed in an automobile accident with a state official, a result expressly disapproved in *Parratt*, 451 U.S. at 544. As the Seventh Circuit recognized in *Bell*, we must provide a logical stopping place for such claims. 746 F.2d at 1205; *see also, Parratt*, 451 U.S. at 544.

Trujillo, 768 F.2d at 1190, emphasis added.

It is insufficient to allege that state actors intended to interfere with the direct victim's rights. For example, in the *Trujillo* case, the direct victim of the alleged wrongful conduct was Richard Trujillo, in this case, it is J.P.'s sibling, M.M. Instead, the plaintiff must allege that his relationship with the sibling was the target of the intentional conduct.

> Although the complaint alleges intent with respect to [Richard Trujillo's] rights, this intent may not be transferred to establish intent to deprive his mother and sister of their constitutionally protected rights. The alleged conduct by the State, however improper or unconstitutional with respect to the son, will work an unconstitutional deprivation of the freedom of intimate association only if the conduct was directed at that right.

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Trujillo, 768 F.2d at 1190, emphasis added. Accordingly, the court upheld the dismissal of the complaint for failure to state a constitutional claim. *Id.*

Trujillo holds that collateral or indirect harm to the plaintiff is insufficient to state a claim under the First Amendment. Similarly here, Petitioner has alleged Respondents' wrongful conduct toward his sibling, which affected him emotionally. These alleged facts do not support a claim under *Trujillo* or *Ward*.

C. The Ninth Circuit Court Of Appeals Properly Stated And Applied The Test For Evaluating Whether Respondents Are Entitled To Qualified Immunity

Petitioner claims that the Ninth Circuit "erred by creating an erroneous standard to assess qualified immunity based on plaintiff's damages rather than the defendant's conduct." Pet. 11. This claim is apparently based on Petitioner's mis-reading of the Ninth Circuit's reference to a "direct" injury. *Id.* In fact, the Ninth Circuit Court properly stated and applied the well-established analysis for qualified immunity developed by this Court.

In its Memorandum Disposition in this case, the Ninth Circuit Court of Appeals explained, "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." App. A3, citing *Shafer v. City of Santa Barbara*, 868 F.3d 1110, 1115 (9th Cir. 2017). This two-step analysis for resolving government officials' qualified immunity claims is based on this Court's decisions in *Saucier v. Katz*, 533 U.S. 194, 201 (2001) and *Pearson v.*

Callahan, 555 U.S. 223, 235 (2009).

In order to show that a right was clearly established, "the 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." App. A3, citing *Shafer*, 868 F.3d at 1115. As this Court has stated, a government actor "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent . . . placed the statutory or constitutional question beyond debate." *City & Cty. of S.F. v. Sheehan,* 135 S. Ct. 1765, 1774 (2015) (citations and quotations omitted). "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

It is clear that the Ninth Circuit followed Supreme Court precedent in stating the two-step analysis for qualified immunity. Petitioner's objection cannot be to the statement of the law, but rather to its application in this particular case. In that respect, too, the Ninth Circuit's Memorandum Disposition is consistent with existing federal law and the United States Constitution. However, to the extent Petitioner claims that the Ninth Circuit misapplied the law regarding qualified immunity, the Petition is not appropriate for certiorari review. Rule 10.

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In holding that Respondents are entitled to qualified immunity, the Ninth Circuit observed that "[Petitioner] never alleged any direct harm to him, only to his sibling." App. 3-4. The court explained that the state rarely has an obligation to protect citizens from harm caused by third parties. Two exceptions are when the state creates the danger or has a special relationship with the plaintiff. App. 2. No prior Ninth Circuit cases had recognized a Fourteenth Amendment violation under either exception where the claim was "for emotional distress alone, or for direct harm to another party." App. 4. Accordingly, "[b]ecause 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." *Id.*

Petitioner argues that the Ninth Circuit's analysis is flawed because it is inconsistent with *Carey v. Piphus*, 435 U.S. 247, 264 (1978), which allowed recovery of emotional distress damages without a physical injury. Pet. 9. *Carey* is a procedural due process case brought by suspended public school students against school officials. It does not involve substantive due process. Significantly, the Court held that even though the students did not receive procedural due process "in the absence of proof of actual injury, the students are entitled to recover only nominal damages." *Carey*, 435 U.S. at 248. *Carey* does not support Petitioner's attack on the Ninth Circuit's qualified immunity analysis in this case.

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II. The Petition Does Not Involve Questions That Merit Certiorari Review

Petitioner has also failed to show how his case presents questions that are important enough to merit certiorari review by this Court. As noted above, the Memorandum Disposition is binding only on the parties to the appeal, Petitioner and Respondents here. The resolution of this case will not have broader significance beyond these parties.

In addition, the questions presented in the Petition do not merit resolution by the Supreme Court. Rather, they are fact specific and, if anything, involve the misapplication of properly stated law, rather than misstatements of the law. *See* Rule 10. The Petition should not be accepted for review.

III. The Petition Contains Mischaracterizations Of The Record Below And Is Not A Good Vehicle For Consideration Of The Issues Purportedly Presented

For a variety of reasons, this case is not a good vehicle for consideration of the issues presented. As noted by the district court, the complaint is "not the model of clarity." App. C5:4-5. In fact, Petitioner's opposition to Respondents' motion to dismiss apparently persuaded the district court to find that Petitioner's first cause of action was actually based both on a danger-creation theory *and* a special relationship theory of liability under the Fourteenth Amendment. App. C5:9-10.

Due to the lack of clarity in the complaint, there was confusion as to the scope of the allegations and therefore Respondents' motion to dismiss. *See* App. C8, n. 4. In fact, Respondents intended to move to dismiss on the ground that the actions of the individual Respondents were entitled to qualified immunity as to all claims against them, and that no viable constitutional claims were stated as to any of the

Respondents. This is reflected in the Notice of Appeal, in which Respondents appealed the portions of the district order which denied their motion to dismiss Plaintiff's claims on the basis of qualified immunity, "and all issues inextricably intertwined therewith, including but not limited to whether any constitutional violation is stated in Plaintiff's Complaint." Resp. App. M.

Further, the Ninth Circuit stated that Respondents appealed the district court's order denying qualified immunity for claims brought pursuant to 42 U.S.C. section 1983 "(1) under the state-created-danger and special-relationship doctrines; and (2) under the First Amendment for familial association." App. A2. But that was not all. As noted above, Respondents' Notice of Appeal also encompassed the question of whether the complaint stated a constitutional violation. Resp App. M. Thus, the issue of whether Petitioner alleged a viable constitutional violation was squarely before the Ninth Circuit Court of Appeal, and the court properly held there was no viable constitutional claim; however, the Memorandum Disposition could have expressed that more clearly. *Id.*, at 4-5.

Petitioner has also misconstrued or mischaracterized portions of the record in this case. For example, he states that the court "announced new law," namely that "all siblings are excluded from First Amendment intimate- association protections." Pet. 8. The court merely stated it did not see a basis to disregard its precedent simply because the claim was made under the First Amendment instead of the Fourteenth. App. 5. Moreover, the Memorandum Disposition is binding only on the parties to the appeal, so it cannot "announce new law."

Perhaps most significantly, Petitioner claims throughout his Petition that he is making Section 1983 claims under the First and Fourteenth Amendments for his own injuries, not the injuries to his sibling. However, nowhere in the complaint does Petitioner state a clear claim for personal injuries. The only possible cause of action for personal injuries, as opposed to loss of association claims, would be the First Cause of Action for State-Created Danger. App. I1-16. In that cause of action, however, he makes general statements regarding "foster children's due-process rights," discusses the injury to his sibling, and says that he was deprived of his Fourteenth Amendment rights because he lived with "a foreseeable and significant risk of danger" that he or his sister would die of an amphetamine overdose. App. I15-16. None of these allegations state an injury that is direct or personal to Petitioner.

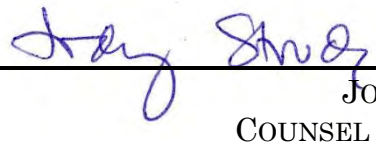
Given the muddled record in this case, the deficient pleading, and the misstatements by Petitioner, this case does not provide a good vehicle to consider the issues that might be raised by the Petition.

CONCLUSION

The Memorandum Disposition challenged by Petitioner is not binding precedent except for the parties involved in the appeal, and it has not created a split of authority. Petitioner has not identified any issues of importance or significance that would affect anyone other than the parties to the appeal. In addition, the record in this case does not lend itself to certiorari review by this Court. For these

reasons and as discussed above, Respondents respectfully request that the Petition be denied.

Respectfully submitted,



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