

**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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**BRIEF FOR PETITIONER J.P. IN REPLY
TO OPPOSITION OF RESPONDENTS COUNTY OF ALAMEDA, ET AL. TO
J.P.'S PETITION FOR A WRIT OF CERTIORARI**

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IN THE**SUPREME COURT OF THE UNITED STATES****BRIEF OF PETITIONER J.P. IN REPLY TO OPPOSITION OF RESPONDENTS COUNTY OF
ALAMEDA, ET AL. TO J.P.'S PETITION FOR A WRIT OF CERTIORARI**

J.P., by and through his Guardian Ad Litem, Shannon Villanueva, respectfully submits his brief in Reply to the Opposition of Respondents County of Alameda, et al. to J.P.'s Petition for a writ of *certiorari* to review an order of the Ninth Circuit.

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I. INTRODUCTION

Only this Court can declare the Constitutional rights of foster children nationwide to be free from the emotional harm and exposure to risk of harm that the Ninth Circuit has declared do not exist. In direct conflict with other Circuits, including intra-Circuit opinions, the Ninth Circuit unequivocally held that foster children are not entitled to protection from emotional harm and that “siblings do not possess a cognizable liberty interest to assert a loss familial association claim” Children, especially siblings in foster care, are now threatened with the loss of Constitutional protection to which others, less vulnerable, are entitled. This unsettled conflict is not limited to the First Amendment rights of foster siblings to familial association, but all plaintiffs bringing Section 1983 claims under the

danger-creation doctrine or special-relationship theories of Fourteenth Amendment liability.

This Petition appeals the Ninth Circuit's inescapable conclusion that children, even those in the protective custody of the State, are *never* permitted to bring claims under the First Amendment for interference in familial association or for emotional injury under the Fourteenth Amendment. Such preclusion is inconsistent with this Court, other Circuits that recognize these rights, as well as the opinions of the District Court and the dissent in this case.

Respondents' opposition erroneously contends the Memorandum is irrelevant because (1) it was unpublished and (2) the issues presented lack nationwide significance. Both grounds fail. The Memorandum is binding and citable as to *issue and claim preclusion* and is thus worthy of scrutiny by this Court because it precludes these Constitutional claims from *ever* being raised. U.S. Ct. of App. 9th Cir. R. 36.3, subdivisions (a) and (b). The issues raised are of national importance as presented and confirmed by amici in support of Petitioner's case: Advokids, Bay Area Legal Aid Children's Rights, East Bay Children's Law Center, Juvenile Law Center, Legal Services for Children, National Association of Counsel for Children, National Center for Youth Law, Pacific Justice Institute, and Youth Law Center.

The other themes of Respondents' brief, that Petitioner suffered no harm, and, that Respondents engaged in no wrongful conduct, are based on Respondents'

misrepresentation of facts. These arguments demonstrate the need for review and should be reserved for full briefing.¹

II. Emotional Harm Alone Triggers Section 1983 Liability

Implicitly finding emotional injuries alone to be *sufficient*, the District Court found that Petitioner “has adequately pleaded both danger-creation and special-relationship theories of Fourteenth Amendment liability” and “deliberate indifference to a substantial risk of harm”; thus Respondents were not entitled to qualified immunity. **App. C 5, 8.**

The Memorandum rests on the flawed premise that emotional injury without physical harm is not subject to Constitutional protection. Consequently, the Appellate Court and Respondents neglected to analyze the well-settled exceptions to qualified immunity because, they claim, there is no Constitutional harm upon

¹ For example, Respondents claim that Petitioner’s sister “had a small amount of methamphetamine in her system.” However, Petitioner’s Complaint does not mention that M.M.’s intoxication was from a “small” quantity, and, in fact, this is untrue. Suggesting that they were not put on constructive notice of the risk to these foster siblings, Respondents omit the fact that they received written notice of the abuse through a Suspected Child Abuse Report from the San Joaquin Human Services Agency on October 3, 2015, and instead represent that Triad only provided verbal, not written notice to Respondents of M.M.’s drug exposure. **Petition 5, App. I 9.** Respondents then misleadingly claim that Petitioner did not allege that Respondents “had actual or constructive knowledge that the methamphetamine was from the foster home (if it was) as opposed to the park or elsewhere...,” as if the origin of the drugs ingested by M.M. makes a difference. **Respondents Brief, 5.** Further, Respondent neglect to address the alleged (actual) fact that M.M. ingested drugs “while in foster care” and that Respondents failed to investigate ongoing risk to M.M. and Petitioner of drug exposure. **App. I 9-10.** This is the cornerstone of Respondents’ conduct that caused constitutional harm to Petitioner. The District Court acknowledged that this aspect was adequately alleged in the Complaint. **App. C 11.**

which Petitioner can make a claim. By denying emotional harm to be a cognizable injury, the Memorandum is in direct conflict with *Carey v. Piphus*, 435 U.S. 3 (1987) and its progeny and other courts, as set forth in the Petition. **Petition 11.** Thus, whether emotional harm, without physical injury, is sufficient to bring Constitutional claims, especially where exceptions to qualified immunity clearly apply, is a question upon which there is a split of authority and one that must be settled by this Court.

III. FOSTER CHILDREN’S FOURTEENTH AMENDMENT RIGHTS: ADEQUATE CARE & FREEDOM FROM STATE-CREATED DANGER

Dependent children are in a special relationship with the State whereby social workers have specific legal duties to place them in safe homes and to make sure they remain safe while there. This duty to ensure safety encompasses, by statute and Constitutional mandate, a child’s physical *and* emotional well-being. When alerted that there is a risk of harm to foster children in their protective custody, social workers *must* take action by well-established law. When one of two siblings placed together is physically hurt, the duty to protect is not limited only to the child who directly suffered a physical injury, but also to his/her sibling who was emotionally injured as a result and who remained exposed to danger. A social worker must ensure that *both* children are no longer at risk of further harm.

It is irrelevant whether the harm was caused in the foster home, in a park, or elsewhere, or, what a foster parent claimed caused an injury—the question is what should the State have known or inferred at the time. Depending on the risk, once alerted to an injury to a foster child, a social worker is legally required to either

remove the child(ren) or investigate the ongoing risk to determine if that foster placement continues to be a safe environment.

Nationwide, foster children enjoy Fourteenth Amendment rights to adequate care, i.e. to receive the services that social workers are mandated to perform. If this Court declines review, only in the Ninth Circuit will foster children no longer have any legal recourse when a social worker's shocking and deliberate indifference causes profound emotional harm.

As specifically alleged in the Complaint and extensively argued in the Petition, *both* siblings were *directly* harmed by Respondents' conduct. Like M.M., Petitioner was a young minor in the protective custody of Respondents, a foster child completely dependent on Respondents for his safety and emotional well-being. The Complaint set forth the natural and inevitable consequence that, after receiving verbal and written notice of M.M.s drug intoxication in foster care, Respondent's intentional decision not to investigate or to take any action to protect these siblings directly harmed *Petitioner* when, days later, Petitioner saw M.M. suffer drug exposure symptoms and die in his arms as he desperately and futilely tried to help her. **App. C 11; I 5, 7.**

IV. SIBLINGS' FIRST AMENDMENT RIGHTS

Respondents disingenuously reframed the legal issues presented by omitting fundamental facts alleged in the Complaint and misrepresenting the record. Respondents' handiwork restated Petitioner's Question 3 by improperly limiting and characterizing the scope of the First Amendment issue as a "claim for the *death*

of his sibling.” This is neither an issue raised by Petitioner nor a claim alleged in his Complaint. Petitioner adequately alleged harm he, himself, suffered, both *before* his sister’s death, and after.

Respondents’ myopic and unfounded conflation of the alleged Constitutional violations with wrongful death effectively deprives Petitioner and others similarly situated from seeking legal redress for violation of fundamental Constitutional rights under the First Amendment because one sibling died. While this ruling will have a particularly devastating effect on vulnerable at-risk foster children, it also has the overarching effect of precluding legitimate claims of all siblings nationwide.

In a footnote, Respondents dismiss Petitioner’s authorities that clearly set forth the right of individuals to bring First Amendment right to association claims including a “half-sister and foster parent.” **Respondent’s Brief 14, FN 6.**

Respondents then argue that only M.M., and not Petitioner, was the “direct victim of the alleged wrongful conduct,” citing *Trujillo v. Board of County Comm’rs*, 768 F.2d 1186, 1190 (10th Cir. 1985). However, along with other authorities cited by Petitioner, *Trujillo* acknowledged a sibling’s First and Fourteenth Amendment protected interests in the relationship with his/her sibling without any limitation, contra to Respondents’ erroneously suggestion. *Id.*, at 1189; Petition, p.23.

V. CONCLUSION

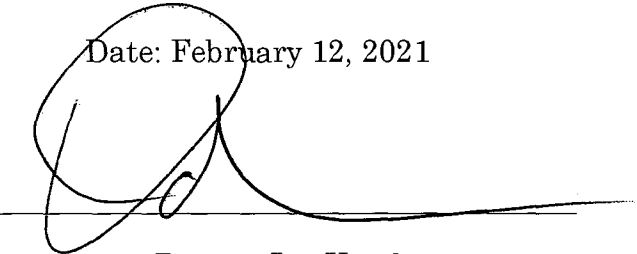
The Panel’s finding that Petitioner’s claim cannot survive a motion to dismiss without disputing that the qualified immunity exceptions would otherwise apply,

illustrates the misplaced position of the Ninth Circuit relating to the Constitutional rights underlying these claims.

Should this Court decline review here, the result will be an *absolute immunity* for State misconduct that causes Constitutional injuries suffered by Petitioner and anyone else in the State's custody. This is not the law of our land and must be reviewed.

Respectfully submitted,

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