

No. 21-1367

In the
Supreme Court of the United States

AMY NICHOLS-STUART,
Petitioner,

v.

COUNTY OF AMADOR, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the
Court of Appeal of the State of California,
Third Appellate District**

BRIEF IN OPPOSITION

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NO CONSTITUTIONAL QUESTION IS PRESENTED

In California, after the county child welfare agency petitions the juvenile court to assume jurisdiction over a minor as a dependent, hearings are scheduled to decide that question, as well as, if jurisdiction is granted, the child's custodial situation pending the proceeding's outcome. Prior to those initial hearings, the handling social worker will submit to the juvenile court a report that states the pertinent history, reasons for jurisdiction, and recommendations for temporary custody. At the hearings, the biological parent(s) may contest all or just part of the report concerning either court jurisdiction or disposition of custody. If the juvenile court finds grounds for jurisdiction, it may leave the child in, or return it to, the parent(s)' care, or it may place custody in a different relative or in foster care. After that initial placement, either a parent or the agency may petition the court to modify the temporary custody order based upon changed circumstances during the dependency proceeding.

Petitioner, through her attorney, *affirmatively* agreed to the juvenile court taking jurisdiction, as well as to the proposed temporary placement of the boy with his father. As she voluntarily diminished her parental relationship, no deprivation of her right to intimate association under the Due Process Clause then occurred. More importantly, months later, upon gaining knowledge of the father's alcohol use, she did not ask the juvenile court to change or modify his custody. Rather, her suit rests on the notion the agency had an affirmative obligation to unilaterally remove

the boy from his father's custody, despite the lack of juvenile court authorization. Thus the primary waiver issue litigated in the state courts focused on whether, given her similar inaction, Petitioner could recover for Respondents' nonfeasance when the father's drinking resumed.

For this reason, the actual question presented would be whether the constitutional right to intimate association is forfeited by the failure to timely assert it before a tribunal having jurisdiction over the matter. But this Court long ago conclusively resolved that question. Moreover, the California appellate court correctly held that leaving the child with his father did not interfere with Petitioner's visitation, such that her implied waiver ultimately lacks substantive significance. As no other ground for *certiorari* under Rule 10 exists, the petition should be denied as merely expressing dissatisfaction with state court decisions for reasons unique to the factual record.

PARTIES TO THE PROCEEDING

Petitioner and Plaintiff-Appellant below is Amy Nichols-Stuart.

Respondents and Defendants-Appellees below are: County of Amador; Shannon Sutton; Shannon Diener; and Patricia Orey.

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DECISIONS BELOW

The trial/superior court's order sustaining Respondents' demurrer without leave to amend is reprinted at App-28-40. The court of appeal's opinion affirming the judgment is reprinted at App-3-25. The California Supreme Court's order denying review of that decision is missing from Petitioner's Appendix but is summarily referenced at App-2.

JURISDICTION

The California Supreme Court denied review on October 20, 2021. App-2. This Court has jurisdiction under 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment, Section 1, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PERTINENT CALIFORNIA STATUTES

Welfare & Institutions Code § 387, subd. (a) – "An order changing or modifying a previous order by removing a child from the physical custody of a parent, guardian, relative, or friend and directing placement in

a foster home, or commitment to a private or county institution, shall be made only after noticed hearing upon a supplemental petition.”

Welfare & Institutions Code § 388, subd. (a)(1) – “Any parent or other person having an interest in a child who is a dependent child of the juvenile court or a nonminor dependent as defined in subdivision (v) of Section 11400, or the child or the nonminor dependent through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child or the nonminor dependent, shall state the petitioner’s relationship to or interest in the child or the nonminor dependent and shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction.”

ADDITIONAL STATEMENT OF THE CASE

A. The Dependency Proceeding

Respondent County filed a petition with the superior court to assume jurisdiction over Petitioner’s three-year-old son Jace, who then resided with Petitioner and her boyfriend (now husband) Robert Stuart. The petition cited: Petitioner’s arrest for methamphetamine possession; her failure to obtain

medical care for a leg fracture Jace sustained; and Stuart's criminal and psychiatric history. App-5-6. Shortly after the petition's filing, both Stuart and Petitioner were arrested for methamphetamine possession, which prompted County to recommend Jace's father, Tyler, receive full interim custody. The juvenile court agreed, subject to substance testing for Tyler, supervised visitation by Petitioner, and no contact by Stuart with the boy. App-6.

In anticipation of the jurisdictional and dispositional hearings, Respondents submitted to the juvenile court a report recommending in-patient rehabilitation for Petitioner and continuing custody by the father. App-7. At the hearings, the parties, all of whom were represented by counsel, acknowledged receipt of the report, affirmatively waived their right to a trial on jurisdiction, and instead submitted that question on the facts contained in the report. App-6. The court sustained the petition, agreeing to exercise dependency jurisdiction over the boy. App-7. Concerning disposition/custody, "[Petitioner's] counsel agreed with the disposition plan except for the rehabilitation center recommendation," for fear of losing her job if treatment proved lengthy, and "requested argument solely as to visitation." App-7, 36. Accordingly, the juvenile court found all other dispositional objections *waived*, and ordered continued custody by the father, subject to Petitioner's ongoing visitation. App-7, 35.

Several months later, Petitioner notified one of the social workers and the Sheriff that the father had resumed alcohol use. App-8. "Social workers twice

warned Tyler to stop drinking but he continued to do so.” App-8. A month later, Respondents received another report of the father’s alcohol use, which prompted another verbal admonishment. *Ibid.* Four days after that, the father drove intoxicated with the boy and crashed. *Ibid.* County promptly filed a supplemental petition seeking to remove the boy to foster care, but the child soon died of injuries sustained in the crash. *Ibid.* At no time did Petitioner request the juvenile court terminate or modify the father’s custody. App-17, 36.

B. The Wrongful Death Action – Trial Court

Petitioner brought a California law wrongful death action against Respondents based on both the boy’s initial placement with his father and County’s subsequent failure to change that custody despite her warnings. App-8. Respondents successfully moved for judgment on the pleadings, after which Petitioner amended by abandoning her state law claims in lieu of a count under 42 U.S.C. § 1983 for violation of her due process right to familial association based on the same historical events previously pled. App-9-10. The trial court sustained without leave to amend Respondents’ demurrer, finding that Petitioner agreed to the father’s initial custody, and also waived her right to seek damages arising from subsequent events by failing to request custody relief from the juvenile court. App-33-36. Alternatively, the trial court held that Respondents lacked a constitutional obligation to remove the boy from his father’s physical custody because Respondents had not affirmatively acted so to enhance the risk of harm posed by the father’s alcohol use. App-11, 36-39.

C. The Wrongful Death Action – Appeal

After entry of judgment (App-26-27), Petitioner appealed, arguing her complaint stated a viable Fourteenth Amendment intimate association deprivation. App-11-12. The appellate court reviewed the judgment *de novo* under both federal pleading standards and constitutional principles, the latter of which it described as including a parent's fundamental liberty interest in the companionship of her offspring, with which the state may not unduly interfere. App-12-15.¹

In a unanimous unpublished opinion, the court of appeal held:

(1) initial removal of the boy from Petitioner's custody, though disruptive of their association, was proper because Petitioner expressly agreed to it, offering no opposition to Respondents' recommendations except regarding inpatient rehabilitation, which stipulation California and federal law treat as a waiver of associational right for the

¹ Here the court of appeal's otherwise correct exposition strayed by quoting *dicta* from *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001) suggesting intimate relationship protection also emanates from the First Amendment. This Court has consistently identified the Due Process Clause as the applicable source, subject to a single passing exception in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), which this Court has not since cited for that proposition. Regardless, since the California appellate court's opinion did not suggest any such First Amendment protection differs from that under the Due Process Clause, and the Petition invokes solely the latter, further discussion is unnecessary.

juvenile proceeding, as well as for any related civil damages suit (App-15-16);

(2) although Petitioner’s initial waiver did not bar her from complaining about subsequent events involving the father’s resumed alcohol use, her failure to invoke the judicial remedy available to her – a supplemental petition under Welfare & Institutions Code § 388 to change custody – constituted a distinct waiver (App-16-17); and

(3) per *DeShaney v. Winnebago County Social Services Dept.*, 489 U.S. 189 (1989), County lacked an affirmative obligation to protect the boy because it neither took physical custody of him, nor created the peril of his father’s drinking, nor affirmatively acted so to increase the boy’s risk of harm. App-17-23. The court of appeal expressly rejected as “a distinction without a difference” to *DeShaney*’s analysis that the boy was under the juvenile court’s legal jurisdiction at the time of his death. App-19-20.

Petitioner’s request for review by the California Supreme Court was summarily denied. App-2; Pet. p. 1.

WHY CERTIORARI SHOULD BE DENIED

A. The Petition Fails to Satisfy Rule 10’s Criteria

Petitioner asserts neither the existence of a split among state or federal courts regarding waiver of associational right, nor a conflict between the appellate court’s decision and any decision of this Court. Rather Petitioner implies that the court of appeal decided an

important federal question about waiver that this Court has not yet reached, but should address – whether the relinquishment must be express and/or knowing. However, the petition does not directly dispute that “[n]o procedural principle is more familiar to this Court than that a constitutional right’ . . . ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it,’”² which the court of appeals quoted in its opinion, as did the trial court in its order. App-15-16, 33. Accordingly, an affirmatively-expressed waiver is definitely not required.

Furthermore, knowledge of an established right’s existence and of the need to affirmatively assert it is presumed, especially where the party has legal representation. *See Duignan v. United States*, 274 U.S. 195, 199 (1927) (citing *Kearney v. Case*, 79 U.S. 275, 284 (1870), “we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver”). *See also United States v. Moore*, 340 U.S. 616, 621 (1951) (failure to file written request for jury waived that fundamental right). Yet nowhere does Petitioner assert ignorance during the juvenile case of her associational right or of the related California statutory procedures.

² *U.S. v. Olano*, 507 U.S. 725, 731 (1993), quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944).

Accordingly, the petition mundanely challenges the California courts' decisions as factually erroneous or having misapplied settled law requiring a constitutional right to be knowingly waived. Moreover, since the court of appeal's decision is unpublished, and California procedure prohibits citation as precedent of unpublished opinions by its intermediate courts, the consequences of any analytical error will not extend beyond Petitioner. *See* California Rules of Court, Rule 8.1115(a).

**B. The Fundamental Falsity On Which The
Petition Rests Involves An Allegation Of
Merely Minor Importance**

Essentially stated, Petitioner asserts that only by an express statement could she waive her associational right. In arguing she never affirmatively agreed to the father's physical custody, Petitioner heavily relies on the historical premise that, at the combined jurisdictional/dispositional hearing in the dependency proceeding, she solely "submitted on the report," i.e., she accepted Respondents' factual recitations without also agreeing to the report's custody recommendations. But her version of events at the hearing directly conflicts with that found by both the trial court and the court of appeals as recounted above, and the petition contains no supporting citation to the record. Indeed, Respondents' demurrer cited the reporter's transcript of the dispositional hearing, which reflected Petitioner's *express* agreement to the father's physical

custody during her inpatient treatment.³ See App-34 (“[h]owever, the juvenile records reflect Plaintiff submitted to the dispositional issue on the County’s custody recommendation”), 36 (“the hearing transcripts confirm Plaintiff conditioned her dispositional agreement only regarding her in-patient rehabilitation treatment”). In any event, whether the court of appeals made correct factual findings is not a ground for *certiorari*.

Furthermore, whether Petitioner expressly waived her right to seek temporary physical custody ultimately proves inconsequential because the court of appeal’s opinion confirms she did not thus lose her right to later seek modification of custody via a supplemental petition. App-16 (“[a]lthough appellant did not [thus] waive what happened to her son after his removal from her custody . . .”). Instead, her waiver of the right to seek damages based upon County’s non-removal of the boy from his father stemmed from her own failure to request that same relief from the juvenile court. App-16-17 (describing statutory procedure for seeking custody modification and finding “Appellant . . . did not avail herself of the procedure protecting her interest in his care and custody during the dependency proceeding”), 36. Tellingly, the petition avoids discussing this critical matter. As discussed in Section D, *post*, Petitioner has avoided the implied waiver defense since the suit incepted, and so failed to preserve it for this Court’s review.

³ The hearing transcript is contained in the sealed clerk’s transcript filed September 20, 2019, with the cited passages located at pages 149-152, 159.

C. The Petition Also Depends On Non-Existent Interference

Nor does the implied waiver issue actually involve an associational deprivation. As the appellate court noted, Petitioner's custodial right definitely existed at the dispositional hearing's outset, when she expressly waived it. In contrast, her theory that Respondents subsequently interfered with her association by failing to remove the boy from his father's custody collapses for lack of either disruption to her visitation or diminished prospects of ultimately regaining physical custody. Significantly, Petitioner neither alleged, nor contended, the boy should have then reunited with her – she remained in a rehabilitation facility. And placing the boy in foster care would not allegedly have increased her visitations or enhanced her chances of future reunification. Accordingly, Respondents' decision not to earlier petition the juvenile court for a custody change was neutral to Petitioner's associational right.

Petitioner will likely reply that disassociation occurred due to the boy's death rather than via a prior separation. But, although this view might suffice for a wrongful death claim under state law, it falls short of a due process deprivation because the boy's death was accidental. *Zablocki v. Redhail*, 434 U.S. 374, 386-387 (1978) held that a due process violation occurs only when government intends to interfere with an associational choice and does so directly; incidental disruptions caused by laws or decisions aimed at another goal are insufficient. *Zablocki* thus rejected the notion of actionable relationship interference indirectly flowing from a social security benefit regulation.

Circuit courts have extended *Zablocki*'s "direct" interference requirement beyond general regulation to personal acts by officials. *Starnes v. Butler County Ct. of Common Pleas, 50th Jud. Dist.*, 971 F.3d 416, 432 (3d Cir. 2020) (sexual harassment); *Gorman v. Rensselaer County*, 910 F.3d 40, 47-48 (2d Cir. 2018) (co-officer threats of violence); *Christensen v. County of Boone, IL*, 483 F.3d 454, 463 (7th Cir. 2007) (stalking).

Petitioner's position bears an additional flaw. For Respondents to have removed the child from his father's physical custody would undeniably have intentionally and directly interfered with the *father's* associational right, which then at least equaled, if not surpassed, the mother's non-custodial visitation right. *See Brittain v. Hansen*, 451 F.3d 982, 989 (9th Cir. 2006) (visitation is a lesser interest than cohabitation); *Weller v. Dep't of Soc. Servs. for City of Baltimore*, 901 F.2d 387, 394 (4th Cir. 1990) (liberty interest in custody exceeds that in visitation). The existence of the father's custodial right is precisely why California Welfare & Institutions Code § 387(a) forbade Respondents from that course of action absent prior juvenile court approval following hearing of a noticed motion.

In summary, this case does not present an implied waiver situation where an associational *right* was actually lost due as a direct result of deliberate government action. Instead, the suit paradoxically blames Respondents for *not* interfering with the father's associational right awarded by the juvenile court.

D. Petitioner Did Not Preserve The Implied Waiver Question For Review

Unmentioned by the appellate court's opinion is the trial court's finding that Petitioner forfeited by briefing silence Respondents' implied waiver defense. Despite the demurrer's heavy reliance on the absence of a supplemental petition seeking a custody change following Petitioner's discovery of the father's resumed drinking, her opposition brief wholly ignored the subject. Unsurprisingly, the trial court deemed Petitioner to have conceded Respondents' implied waiver defense. App-35 ("Plaintiff failed to oppose her failure to thereafter seek a change in custody") and 36 ("Plaintiff ignores her own conduct in failing to petition the court to change Jace's placement under Welfare & Institutions Code § 388. The Opposition is silent on this issue").

On appeal, Petitioner repeated her avoidance of this key defense – her opening brief contained neither analysis nor authority concerning her failure to seek relief from the juvenile court – so Respondents' answering brief on appeal (at page 40) argued that a distinct second forfeiture had occurred. Because Petitioner below functionally conceded the question of her implied waiver, she did not preserve that ground for this Court's review. *See Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (denying *certiorari* because "it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court").

E. The Suit Is Otherwise A Poor Vehicle To Present The Waiver Question

Even assuming Petitioner (a) did not forfeit the implied waiver question, and (b) stated an associational injury, the suit still would lack a deprivation for several manifest reasons. As this Court explained in *DeShaney*, the fundamental liberty interest protected is freedom from undue government *interference* with, or intrusion to, family relationships. On the other hand, no right to government intervention exists – aid or rescue is discretionary rather than obligatory unless the government takes physical custody of the person, such as a prison inmate, or affirmatively acts to create or exacerbate the peril in question. 489 U.S. at 195 and 199-201.

Since Respondents neither assumed physical custody of the boy, nor caused his father to use alcohol, nor actively exacerbated the father's drinking, both the trial court and the appellate court correctly held Respondents lacked a constitutional obligation to rescue the boy by taking him away from his father. App-17-23, 38-39. Accordingly, the mother, as the boy's successor-in-interest, could not allege on his behalf a corresponding constitutional violation.

The Petition treats this critical flaw with merely a single unsupported point – that a protective obligation arose because the juvenile court granted dependency jurisdiction over the boy – which supposedly distinguishes his situation from the child's in *DeShaney*. Petition, p. 7. But good reasons support the appellate court's rejection of this argument as a "distinction without a difference" (App-19):

(1) nothing in Justice Rehnquist's opinion suggests ongoing dependency jurisdiction would have impacted the *DeShaney* Court's analysis; the majority's emphasis on *physical* custody defeats the idea that the pendency of a juvenile proceeding (which does not by itself deprive or constrain liberty) can *per se* create a municipal obligation to safeguard;

(2) even the *DeShaney* dissent works against Petitioner; Justice Brennan's opinion contended that, by serving as the exclusive agency for acting on suspected child abuse and by actively monitoring the boy, DSS affirmatively assumed responsibility for his welfare. This analysis suggests that a juvenile court's presence would have insulated the agency from a duty to intervene by providing the mother a more effective petitioning option versus depending on DSS for the boy's safety (489 U.S. at 209-210);

(3) thus those federal circuit courts to have considered the question rejected the notion that legal custody equates to physical custody for the purpose of *DeShaney*;⁴ and

(4) even if legal custody could suffice to create a special relationship, here jurisdiction was granted by the *juvenile court*, not possessed by Respondents, who

⁴ *Wooten v. Campbell*, 49 F.3d 696, 700-701 (11th Cir. 1995) (no special relationship arose during juvenile proceeding because the mother had physical custody, with the father allowed visitation, so the county merely monitored, rather than provided for the child's basic needs); *Burton v. Richmond*, 370 F.3d 723, 727 (8th Cir. 2004) (no special relationship, despite court's legal custody over children and ongoing social worker supervision, where physical custody remained with their relatives).

simply monitored the boy and reported to the court, lacking the power to change custody without a court order following a noticed motion (Cal. Welfare & Institutions Code § 387(a)), whereas in *DeShaney* the agency possessed the authority to unilaterally determine custody following dismissal of the juvenile case (see 489 U.S. at 192, 209-210).

CONCLUSION

Petitioner lost this suit primarily because she failed to seek relief in the juvenile court, then failed to contest the corresponding waiver defense in the civil trial court and in her opening brief on appeal. Accordingly, she did not preserve the implied waiver question she now presents.

Nor does that question deserve this Court's consideration. The law concerning waiver of constitutional rights is well-established. Plus, this case doesn't involve a deprived intimate relationship right – it lacks intentional or direct disassociation. Plus, Respondents neither physically housed the child, nor increased the risk of harm posed by his biological father, so to generate a duty to safeguard. Although some aspects of intimate relationship protection so warrant this Court's attention, this case does not present any of those controversial questions, much less in a vehicle fit for review. The petition should be denied.

Respectfully submitted,

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