UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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PHILLIP SEMPER, et al., Plaintiff(s), v. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, et al., Defendant(s).	Case No. 2:20-CV-1875 JCM (EJY) ORDER

Presently before the court is defendants Las Vegas Metropolitan Police Department ("LVMPD"), Officer Andrew Bauman, Officer David Jeong, Officer Supreet Kaur, Officer Matthew Kravetz, and Officer Theron Young (collectively with Bauman, Jeong, Kaur, and Kravetz, "the officers") (collectively with the officers and LVMPD, "defendants")'s motion for partial dismissal. (ECF No. 92). Plaintiffs Connie Semper (in substitution for Phillip Semper as executrix of his estate), Ashley Medlock, Lonicia Bowie, Michael Green, Clinton Reece, Corey Johnson, and Demarlo Riley (collectively "plaintiffs") filed a response (ECF No. 92), to which defendants replied (ECF No. 97).

I. Background

According to the complaint, on April 19, 2018, dismissed plaintiff Cory Bass ("Bass") hosted a party in a large, rented suite at the Rio Hotel and Casino ("Rio") to celebrate his birthday with roughly 30 friends. (ECF No. 89). Plaintiffs are friends and family that attended the birthday party with the intent to "wish" Bass a "happy birthday." (*Id.*)

At 2:43 a.m., Bass answered a knock at the suite's door, where Rio security officer John Carlisle ("Carlisle") informed him that there had been a noise complaint. (*Id.*) Carlisle told Bass

that he and his party guests were being evicted from the property despite Bass's protestations that they had done nothing wrong. (*Id.*)

As Bass began to ask for a refund, uniformed LVMPD officers pushed past the two men, entered the room, confronted Bass, and ordered all thirty of the guests to line up by the front door. (*Id.*) Those officers systematically detained the partygoers, handcuffed most of them, subjected them to pat-down searches, and sat them out along the hallway outside the room for approximately six hours. (*Id.*)

Plaintiffs allege LVMPD did not investigate anyone for marijuana possession or use—one of the supposed reasons for the eviction—and no party attendee was accused of engaging in specific "gang activity" during this elongated *Terry* stop. (*Id.*) That being the case, it seems strange that a squad of LVMPD officers (allegedly 72 in total) was dispatched to handle what was a noise complaint.

As the complaint explains, LVMPD's zealous response actually began earlier that night, prior to the officers arriving at the party. Detective Nicholas Brigandi ("Brigandi") from LVMPD Criminal Intelligence Unit had spotted a photograph on social media depicting Bass and three other individuals in the Rio's elevator. (*Id.*) Brigandi recognized Bass in the photograph—that itself contained no evidence of criminal activity—because Bass had been designated as a "gang member" in GangNet, "a national database intended to track gang activity and in the prosecution of gang-related offenses, to which multiple government agencies at the state and federal levels have access." (*Id.*)

Brigandi contacted and informed a special police squad—a "FLEX" team headed by defendant Bauman and comprised of defendants Kravetz, Young, and Kaur—of Bass's presence at the Rio. (*Id.*) The FLEX team traveled to the Rio to, as they claim, prevent any criminal activity. (*Id.*)

Upon arrival, the FLEX team and Rio security located Bass's room, and plaintiffs allege Rio security reported previously receiving a complaint regarding noise and the smell of marijuana. (*Id.*) The officers and Rio security developed a "plan of action," where

approximately seventy-two officers were dispatched to the Rio to handle the purportedly crime-ridden birthday party. (*Id.*)

As a result of the events at the Rio, plaintiffs filed this lawsuit. They claim that despite the lack of "gang activity," LVMPD publicly announced that its officers had broken up a "gang party" to the media and claimed that all individuals arrested were "gang members." (*Id.*) Plaintiffs contend that LVMPD's own records established that these claims were untrue. (*Id.*) Plaintiffs further allege that LVMPD formally designated the people present at the party, including the plaintiffs, as "gang members" or "gang affiliates" and entered these designations into GangNet, basing many of the designations solely on the individual's presence at the party or their relationship to Bass. (*Id.*)

Plaintiffs argue that by LVMPD designating plaintiffs as "gang members" and "gang affiliates," LVMPD miscategorized plaintiffs into the agency's gang surveillance, investigation, and enforcement system. (*Id.*) Plaintiffs allege the designation in the database discriminated against the black residents of Clark County, because, according to LVMPD's statistics, fifty-nine percent of designated "gang members" and "gang affiliates" in its database are black. (*Id.*) Plaintiffs claim that the statistical disparity is linked to the agency's broad definition of "gang member" and "gang affiliate" coupled with its explicit categorization of criminal street gangs by race. (*Id.*)

They further claim that the GangNet designations violated various constitutional rights, including their right to due process, freedom from unlawful detention, and their First Amendment rights to association, both in that they have been directly prohibited from engaging in protected conduct and chilled from exercising their rights. (*Id.*)

The court dismissed portions of plaintiffs' original complaint. (ECF No. 38). They filed an amended complaint soon after, which was quickly mooted by the filing of a second amended complaint pursuant to a stipulation. *See* (ECF No. 87). This court subsequently dismissed several plaintiffs, including Bass himself, for failure to prosecute the case. *See* (ECF No. 112).

After nearly three years of litigation, ten causes of action remain in the second amended complaint. *See* (ECF No. 89). Defendants now move for dismissal of (1) the individual claims

against the officers in their official capacities, (2) the Title VI claims against the individual defendants, (3) the First Amendment claims, (4) the procedural due process claim, (5) and the conspiracy claims. (*See* ECF No. 92).

II. Legal Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the

line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

III. Discussion

As an initial matter, plaintiffs concede to dismissal of the ninth and tenth causes of action in their entirety. (ECF No. 94 at 3-4). They also do not oppose dismissal of the officers (1) from the first cause of action entirely and (2) from all other remaining causes of action in their official (but not individual) capacities. (*Id.*) Thus, the ninth and tenth causes of action are hereby dismissed, the officers are dismissed from the first cause of action, and the officers, in their official capacities only, are also dismissed from causes of action two through eight. As a result, the remaining issues before the court are (1) whether plaintiffs' procedural due process claim fails as a matter of law, and (2) whether plaintiffs can demonstrate they are protected under the First Amendment.

"A complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted). None of the remaining claims specifically address any of the officers in their individual capacities. Therefore, these causes of action do not sufficiently provide notice to the individual officers of the conduct for which they might be held liable. The court therefore dismisses the claims made against the officers in their individual capacities in causes of action two, three, and four. Considering this and the court's previous orders of dismissal, the only remaining claims are the second, third, and fourth causes of action against LVMPD.

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A. Due Process Claim

To state a procedural due process claim, a plaintiff must allege "(1) a liberty or property interest protected by the constitution; (2) a deprivation of the interest by the government; and (3) lack of process." *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). "Although damage to reputation alone is not actionable, such reputational harm caused by the government can constitute the deprivation of a cognizable liberty interest if a plaintiff was stigmatized in connection with the denial of a more tangible interest." *Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022). This "stigma-plus" test requires plaintiff to show reputational harm from a government action (stigma) alongside the "alteration or extinguishment of a right or status previously recognized by state law" (plus). *Id.* (quotations omitted)

The parties do not meaningfully dispute that there has been a reputational harm/stigma here, nor can they. As plaintiffs allege, they were each listed in a database as gang members or affiliates, and an officer disclosed that designation in a televised interview.

The heart of the issue is whether plaintiffs have satisfied the "plus"—that is, is there something more than reputational harm at play? In short, yes. The complaint satisfactorily alleges at least one plus: abridgment of plaintiffs' Second Amendment rights.

Courts have previously endorsed stigma-plus claims when plaintiffs were placed on indexes of child abusers, *see Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1188 (9th Cir. 2008), *as amended* (Jan. 30, 2009*), rev'd and remanded on other grounds sub nom. Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29, (2010), and when a police chief posted a notice in liquor stores preventing certain individuals from purchasing alcohol because they drank to excess, *see Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Indeed, the heart of a stigma-plus claim is whether a plaintiff "legally [can]not do something that she could otherwise do." *Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004).

Under Nevada law, it is illegal to sell a firearm to anyone designated as a "gang member." Nev. Rev. Stat. 202.362. Even setting aside the allegations regarding associational interests, the fact that Nevada law prevents plaintiffs from purchasing a gun once named gang

members is enough.[1] That is an extinguishment of a right or status previously available under the law. *See Paul v. Davis*, 424 U.S. 693, 711 (1976).

The Second Amendment guarantees the right to bear arms to all American citizens, subject to some limited exceptions. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022). Some convicted felons may constitutionally be prevented from owning firearms. *See* 18 U.S.C. § 922(g)(1). However, plaintiffs are not convicted felons. Designating them in the database thus deprives them of a right they otherwise have—their Second Amendment right.

Considering that, plaintiffs have sufficiently pled a stigma-plus claim. Defendants' motion to dismiss is DENIED as to cause of action two against LVMPD.

B. First Amendment Claims

Plaintiffs also bring a pair of First Amendment claims. They argue that inclusion in the GangNet database both directly prohibited them from enjoying their First Amendment right to associate with whom they please, as well as chilled them from exercising that right in the future.

The Supreme Court has identified two distinct rights to associate protected by the First Amendment. First, the right to intimate association affords "the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The second, the right of expressive association, protects an individual's "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." *Id.*

In other words, the Bill of Rights protects an individual's right to maintain certain familial and quasi-familial relationships without government interference. It also protects the right to associate with other to undertake an activity otherwise protected by the First Amendment.

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[1] To be clear, this is a bit of a paraphrase. It is not illegal for plaintiffs themselves to *purchase* the guns as "gang members," but it illegal for a merchant to *sell* plaintiffs a gun. Functionally, this is a "six in one hand, half a dozen in the other" semantic difference because the effect is the same—state law prevents plaintiffs from purchasing firearms they would otherwise be entitled to buy.

Here, plaintiffs claim that both of these rights have been violated. They appear to assert that by designating them as gang members or affiliates after the incident at the Rio, defendants violated their right to intimate association with Bass and their right to expressive association to wish him a happy birthday.

1. Intimate Association

Plaintiffs first posit that they have a right of intimate association with Bass on account of their friendships and familial status. As the argument goes, because they have been subject to designation in GangNet and could face penalties for associating with Bass and others, defendants' actions both directly prohibited exercise of their rights and chill them from future actions.

The plaintiffs here represent two different levels of relationship to Bass—the central figure of this lawsuit. Plaintiff Medlock is Bass's sister. The remaining plaintiffs are more remote family members and friends and were amongst the approximately 30 people in the suite at the Rio during the incident.

The right to intimate association unquestionably extends to parent-child relationships, *see Keates v. Koile*, 883 F.3d 1228 (9th Cir. 2018), cohabitating family members, *see Moore v. East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality opinion), and even to unrelated roommates, *see Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012). "In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, [courts] consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987).

Plaintiffs point to no binding precedent explicitly extending the right of intimate association to even non-cohabitating siblings, much less more attenuated family members. The only case plaintiffs provide holding that the *Rotary Club* factors weighed in favor of an intimate association right between non-cohabiting siblings was explicitly overturned by the Ninth Circuit, albeit with next to no explanation. *See Mann v. City of Sacramento*, No. 21-15440, 2022 WL 2128906 (9th Cir. June 14, 2022).

Examining the *Rotary Club* factors, plaintiffs' complaint fails to sufficiently allege a protectible intimate relationship. There were at least 30 people attending the birthday party at the Rio. While true that all of these individuals fit into one (large) room, the complaint is wholly unclear as to the contours of the specific relationship of each plaintiff to Bass.

As the court is able to glean from the complaint, plaintiffs each have a familial relationship with Bass and were together at his birthday party. Otherwise, the pleadings are rather vague. There is no indication as to how many people were invited to the party overall, how Bass selected the individuals to invite, or what level of interaction plaintiffs had with Bass outside of the night of the party. The complaint invites the court to assume that because there was some level of friendship and familial relationship amongst the plaintiffs and Bass, that an intimate association right applies to this specific party on this specific night. The court will not do so, even in the case of the sibling relationship between Medlock and Bass.

In the absence of any authority to the contrary, this court will not extend the right of intimate association to seven individuals that attended a birthday party alongside roughly two dozen others. Plaintiffs' complaint assumes that the right exists in this case, but it fails to plead any facts alleging that the *Rotary Club* factors apply.

Bass may have been close with each of the seven remaining plaintiffs—not to mention the approximately 25 other people at the party. But being close does not confer a right to intimate association. Plaintiffs fail to plead their entitlement to a right of intimate association on the basis of attending the party, and the court dismisses the third and fourth claims insofar as they rely on that right.

2. Expressive Association

Next, plaintiffs contend that their attendance at the birthday party is also protected by the right to expressive association. That right protects the ability of groups to associate and congregate such that they can undertake activities otherwise entitled to First Amendment protection. *See Roberts*, 468 U.S. at 618.

Obviously, there was a gathering here. So, the dispute rests on the second prong. Parsed down, defendants' claim is that attending a birthday party—or a subsequent funeral in the cases

of plaintiffs Riley and Reece—is not an activity protected by the First Amendment. The court is persuaded otherwise.

Defendants rest their argument on *City of Dallas v. Stanglin*, a 1989 Supreme Court case wherein the Court held that there was no right to "social association." 490 U.S. 19, 25 (1989). Thus, in that case, a dance hall in Dallas could not constitutionally challenge age-based restrictions on entry promulgated by the city. But that case is a tenuous fit, at best, to the facts at hand.

The people at the dance hall in *Stanglin* had no outside connection to each other. They were simply "patrons of the same business establishment" meeting each other in "chance encounters." *Id.* at 24–25. That is a far cry from a hotel suite of people coming together by invitation to celebrate a birthday or an individual attending a funeral to grieve the death of a friend.

Plaintiffs do not contend that wishing Bass a "happy birthday" or attending a funeral is some sort of political or social manifesto, nor need they. The First Amendment protects all speech intended "to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Tex. v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.*, 418 U.S. 405, 410–11 (1974)) (alterations omitted); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (holding that the intended message need not even be "narrow" or "succinctly articulable" in certain circumstances).

Under that definition, plaintiffs have adequately pled entitlement to First Amendment protection. They gathered to share particularized messages (happy birthday or condolences at a funeral) and those messages would be clearly understood by anyone looking on at the events. *Accord Wilson v. City of Bel-Nor, Missouri*, 924 F.3d 995, 1003 (8th Cir. 2019) (noting that tying birthday balloons to a door to wish someone a happy birthday was expressive conduct). While it is true that almost everything a person does expresses *something*, the court is satisfied that the events here go beyond a mere modicum of expression and are sufficiently communicative to invoke First Amendment protection. *See United States v. O'Brien*, 391 U.S.

367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

At bottom, "[t]he First Amendment … restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982). That is exactly what the GangNet system does. It brands individuals with the scarlet letter of gang association solely because they chose to socialize with someone who may or may not be a gang member themselves—even if LVMPD purports to have made that determination.

It is not hard to imagine an inferential chain wherein individuals increasingly attenuated from the original "gang member" are listed in GangNet based on nothing but uncorroborated designations from purely social encounters. An individual who was not even at the party could find himself designated in GangNet for going to dinner with one of the thirty-plus people who were. That outcome is untenable in a constitutional scheme that purports to protect the right to associate.

Certainly, there are exception where the government can infringe upon the right to association—namely, where regulations are "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. While defendants cite this proposition in their motion, they do no more than that. They fail to make any argument as to what the supposedly compelling state interest is, how the regulations are unrelated, or whether there are any least restrictive means. They do not seriously contend with the test in *Roberts*, and the court will not invent arguments for a party.

Even assuming that both (1) a compelling government interest exists and (2) the regulation is unrelated to the purpose of the expression, the court is not convinced that LVMPD's policy is narrowly tailored. It indiscriminately and arbitrarily places people under suspicion of gang activity. Defendants fail to justify the breadth of the policy in their motion, so the court will not dismiss plaintiffs' claims based on its own speculation. Plaintiffs have thus pled their

entitlement to First Amendment protection for their conduct, and the court DENIES the motion to dismiss as to the third cause of action.

3. Chilling Effect

Plaintiffs' fourth (and here, final) cause of action is a chilling effect First Amendment claim. Summarized and paraphrased, because of defendants' GangNet policies, plaintiffs are afraid to undertake protected First Amendment behavior—like associating with certain people—for fear of consequences related to GangNet designation.

Across two filings, defendants spend a total of eight sentences arguing for dismissal of these claims. (ECF Nos. 92 at 7–8; 97 at 5–6). In sum and substance, they argue that because plaintiffs cannot demonstrate that their activities were protected by the First Amendment, this claim cannot survive.

The court has already found that plaintiffs have established at least two protected activities—the birthday party and the funerals. In light of that, defendants' arguments for dismissal fail, and the court need not address this claim further at this stage. Defendants' motion to dismiss the fourth cause of action is also DENIED

IV. Conclusion

In summary, the court dismisses the individual defendants from all causes of action in both their official and individual capacities, as well as the ninth and tenth causes of action in their entirety. The second, third, and fourth causes of action against defendant LVMPD remain.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' motion to dismiss (ECF No. 92) be, and the same hereby is, GRANTED in part and DENIED in part, consistent with the foregoing.

DATED July 5, 2023.

James C. Mahan

UNITED STATES DISTRICT JUDGE

James C. Mahan
U.S. District Judge