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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CONNIE SEMPER[1], an individual; ASHLEY MEDLOCK, an individual; LONICIA BOWIE, an individual; MICHAEL GREEN, an individual; CLINTON REECE, an individual; COREY JOHNSON, an individual; DEMARLO RILEY, an individual; CORY BASS, an individual; CARLOS BASS, an individual; BREANNA NELLUMS, an individual; and ANTONIO WILLIAMS, an individual,

Plaintiffs,

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, in its official capacity; ANDREW BAUMAN, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer; DAVID JEONG, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer; SUPREET KAUR, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer; MATTHEW KRAVETZ, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer; and THERON YOUNG, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer,

Defendants.

Case Number:
2:20-cv-01875-JCM-EJY

LVMPD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[1] Pursuant to FRCP 25, Ms. Semper has been substituted for Phillip Semper pursuant to this court's order date January 13, 2022, as she is the executrix of his estate.

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LVMPD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, the Las Vegas Metropolitan Police Department (the "Department" or "LVMPD"), Sheriff Joseph Lombardo ("Lombardo"), Andrew Bauman ("Bauman"), Matthew Kravetz ("Kravetz"), Supreet Kaur ("Kaur"), David Jeong ("Jeong"), and Theron Young ("Young"), collectively ("LVMPD Defendants"), by and through their attorneys of record, the law firm of Marquis Aurbach, hereby submit their Motion for Summary Judgment. This Motion is made and based upon all papers, pleadings, and records on file herein, the attached Memorandum of Points and Authorities, and any oral argument allowed at a hearing on this matter.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The instant matter stems from an incident involving several individuals, including plaintiffs[2], who were detained and patted down after LVMPD defendant officers established reasonable suspicion. LVMPD arrived at the Rio Hotel and Casino (the Rio) after learning that several firearms were present at a party, involving Corey Bass and other known gang members. As LVMPD defendant officers accompanied hotel security to the room (after they received several complaints), they came across the odor of marijuana in the hallway. Once the registered guest opened the door, it was apparent to the officers that the smell was emanating from plaintiff's hotel room. Given the totality of the circumstances, LVMPD officers established a legal basis to detain the thirty-something guests and conduct pat-downs.

Plaintiffs' second amended complaint contains the following claims: Title VI, Fourteenth Amendment Due Process, First Amendment Right to Expression, and Fourth Amendment Unreasonable Seach and Seizure violations. Plaintiffs' further seek to hold LVMPD liable through a *Monell* claim.

[2] For purposes of the instant motion, "Plaintiffs" refers to the represented Plaintiffs and excludes Corey Bass, Carlos Bass, Breanna Nellums, and Antonio Williams.

Plaintiffs allege LVMPD's "GangNet" system, a database on gang members and their affiliates, violates Title VI as it is disparately impacts people of color. Additionally, plaintiffs contend LVMPD's "party crasher protocol" is used against African Americans but not white groups. A plaintiff may prove a Title VI violation by alleging "that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class." Plaintiffs' Title VI claim fails as a matter of law as these programs are not federally funded and plaintiffs fail to provide any evidence discriminatory intent, as required by law.

Plaintiffs further contend that the detention and frisk of all party goers following the intrusion was a constitutional violation. First, the majority of Plaintiffs' Fourth Amendment claims fail because they did not identify the specific officer that violated their constitutional rights. Second, possession and consumption of marijuana remains a federal crime, thus establishing a legal basis for LVMPD to detain the plaintiffs. Additionally, the Ninth Circuit as expressly recognized frisks in large settings, such as the instant case, can be deemed reasonable, absent individualized suspicion. Moreover, because Carlos and Corey Bass were initially arrested for trespass, LVMPD officers were permitted to conduct pat downs of the individuals in the room where there were suspected firearms. Alternatively, the defendants should be entitled to qualified immunity because

Plaintiffs also assert officers violated their freedom of expression by shutting down the birthday party. While the event itself was protected under the First Amendment, there are exceptions 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. LVMPD has a compelling interest to protect the community from criminal activity, including the use of narcotics, which is unrelated to the suppression of ideas, and in the instant matter could not be achieved without shutting down the birthday party.

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Plaintiffs Fourteenth Amendment Due Process Stigma claim also fails as a matter of law. First, Riley, Reece, and Green have all been previously convicted of felonies, prohibiting their possession of firearms. Furthermore, the remaining plaintiffs have not suffered any stigma as they were identified as affiliate to a gang member—not a gang, and therefore, there is no liberty interest at stake.

Finally, Plaintiffs Monell claim related to the Fourth Amendment violations cannot proceed as there was no constitutional violation, and to the extent there was a constitutional violation, Plaintiffs cannot demonstrate that LVMPD had a pattern, practice, or policy that was deliberately indifferent to the constitutional rights of Plaintiffs.

II. PROCEDURAL HISTORY.

Previously, this Court dismissed Plaintiffs' state law tort claims. *See* ECF No. 38. Additionally, this Court dismissed the claims asserted by unrepresented plaintiffs Cory Bass, Carlos Bass, Breanna Nellums, and Antonio Williams for failure to prosecute their claims. *See* ECF No. 38. Thus, Plaintiffs' remaining claims include:

- First Cause of Action: Title VI Claim
- Second Cause of Action: Fourteenth Amendment Due Process (Stigma-Plus Doctrine and Vague and Overbroad)
- Third Cause of Action: First Amendment Violation of Right to Expression
- Fourth Cause of Action: First Amendment Chilling Effect
- Fifth Cause of Action: Fourth Amendment Unreasonable Search and Seizure
- Sixth Cause of Action: Fourth Amendment (*Monell*) (party crasher's protocol)
- Seventh Cause of Action: Fourth Amendment Unlawful Detention
- Eighth Cause of Action: Fourth Amendment (*Monell*)

LVMPD defendants now seek summary judgment on these claims.

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III. STATEMENT OF UNDISPUTED FACTS

A. THE PARTIES.

1. The Plaintiffs[3]

a. Phillip Semper

Phillip Semper (Semper) died in December 2020 from multiple gunshots while at the house of the Bass brothers. *See* Deposition of Counnie Walker attached hereto as **Exhibit A** at 39-41.[4] Counnie Walker, Semper's mother and executrix of the Estate has no personal knowledge regarding Semper's criminal history prior to August 19, 2018. *Id.* at 19-20. In August 2019, Semper told his mother that he had been arrested in relation to the Rio incident. *Id.* at 19:4-21. There is also no evidence as to whether Semper had ever attended other birthday parties or funerals of gang members. **Exhibit A**, *generally*.

b. Ashley Medlock

Ashley Medlock (Medlock) is the sister of Corey and Carlos Bass. *See* Declaration of Ashley Medlock attached hereto as **Exhibit B**. At a minimum, since the Rio incident Medlock has had a registered firearm. *See* Deposition of Michael Green attached as **Exhibit D**, at 13-14. Medlock has had a relationship with Green for several years and was in a relation with Green at the time of the Rio incident. **Exhibit D** at 10:18-20.

c. Lonicia Bowie

Lonicia Bowie (Bowie) purchased a firearm after the Rio incident. *See* Deposition of Lonicia Bowie attached hereto as **Exhibit C** at 55:3-56:1. Bowie purchased the firearm from a gun store and was required to pass a criminal background check to acquire the firearm. *Id.* Bowie has never been told that she cannot possess a firearm. *Id.* Bowie has never attended a funeral of a gang member. *Id.* at 56:4-6. Around the time of the Rio

[3] As asserted in the Second Amended Complaint, it is undisputed that the individual plaintiffs were in attendance at the August 19, 2018 Rio party (also referred to as the "Rio incident.")

[4] *See* also, Coroner IDs man, 26, killed in North Las Vegas shooting, https://www.reviewjournal.com/crime/homicides/coroner-ids-man-26-killed-in-north-las-vegas-shooting-2211185/ (last accessed March 15, 2024).

incident, Bowie made several comments on Facebook referring to gangs and gang members in relation to the Rio incident. **Exhibit C**, at **Exhibit A**.

d. Michael Green

Michael Green (Green) is in a relationship with Medlock and was at the time of the Rio incident. **Exhibit D**, at 10:18-20. Green has been convicted of felonies. *Id.* at 10-13. In 2007, Green plead guilty to a felony related to a robbery charge. *Id.* Then, after the Rio incident, Green was arrested for felon in possession of a firearm. *Id.* The firearm was registered to Medlock. *Id.* at 13:24-14:1. Green also plead guilty to that charge. *Id.* at 13. Green further admits that when he was released from jail in 2018, prior to the Rio incident, he had learned that he had been designated as an active gang member. *Id.* at 115:9-15.

e. Clinton Reece

Clinton Reece (Reece) testified that he has a minimum of five felony convictions. *See* Deposition of Clinton Reece attached hereto as **Exhibit E**, Vol. 1 at 23:13-16. The felony charges mainly concern ex-felon in possession of a firearm. *Id.* at 23-24. Reece further admits that he was aware of his gang designation decades ago and was aware he remained in the gang file. *Id.* at Vol. 2, 115-117. Indeed, Reece acknowledged that at some point he was, in fact, an active gang member of the Gerson Park Kingmen. *Id.*

f. Corey Johnson

Prior to the Rio incident, Corey Johnson (Johnson) owned a firearm. Deposition of Corey Johnson attached hereto as **Exhibit F** at 69:8-19. He has no since purchased any firearms. At the Rio incident, Johnson was arrested and had his firearm seized. *Id.* Johnson subsequently had his firearm returned to him. *Id.*

g. Demarlo Riley

Demarlo Riley (Riley) was arrested in 2007 for Conspiracy for Attempted Murder, Conspiracy with a Deadly Weapon; Discharging a Firearm from a Motor Vehicle (gang enhancement); Discharging a Firearm into an Occupied Structure-Vehicle (gang enhancement) by LVMPD. *See* Arrest Report of Demarlo Riley attached hereto as **Exhibit G**. Based on the facts and circumstances alleged, Riley was documented as a Gang

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Member. *Id.* Ultimately, he plead guilty to a burglary charge that resulted in a felony sometime in 2009. *See* Deposition of Demarlo Riley attached hereto as **Exhibit H**, at 24:25-25:22. LVMPD was the law enforcement agency that arrested Riley for the initial burglary charge in 2007. *Id.* at 26:16-22. At a minimum, during the time of sentencing, Riley learned that he had been identified as a gang member by LVMPD. *Id.* at 104:7-13. Notably, due to the felony conviction, Riley is prohibited from possessing a firearm.

2. <u>The Defendants</u>

a. Officer David Jeong

David Jeong was employed as an LVMPD officer at the time of the August 19, 2018 incident. *See* LVMPD BWC 000040 Jeong, David attached as Exhibit I. Ofc. Jeong arrived to the Rio at approximately 3:00 a.m. *Id.* At no point in time did Ofc. Jeong have any contact with the Plaintiffs. *Id.*

b. Sgt. Andrew Bauman.

On August 19, 2018, Sgt. Bauman served as the Sergeant over the FLEX team at Convention Center Area Command. *See* Deposition of Andrew Bauman attached hereto as **Exhibit J** at 13:2-7. The FLEX team was a flexible, proactive enforcement unit that primarily dealt with hot spots and trying to prevent violent crime from occurring. *Id.*

c. Officer Matthew Kravetz.

At the time of the Rio incident, Officer Kravetz was a Police Officer II and part of the FLEX squad. *See* Deposition of Matthew Kravetz attached hereto as **Exhibit K** at 43; 105.

d. Officer Supreet Kaur.

Officer Kaur was a police officer on the FLEX squad at Convention Center Area Command at the time of the subject incident. *See* Deposition of Supreet Kaur attached hereto as **Exhibit L** at 19-21.

e. Officer Theron Young.

See Deposition of Andrew Bauman attached hereto as Exhibit M

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B. LVMPD'S CHALLENGED POLICIES

1. LVMPD's Response To Criminal Street Gangs and GangNet.

In 2018, LVMPD maintained a written policy "Department Response to Criminal Street Gangs." *See* LVMPD Policy attached hereto as Exhibit N. This policy was limited to Criminal *street* gangs and did not address other criminal groups, such as outlaw motorcycle gangs or organized criminal groups. *Id.* That is not to say that LVMPD did not monitor or investigate such groups, but only that LVMPD's Gang Bureau was limited to investigating criminal street gangs while other Bureaus at LVMPD were responsible for the latter groups. *Id.*

The policy defined "criminal gang" in accordance with Nevada law. *Id.* In determining whether an individual could be identified as a gang member under LVMPD policy, officers must consider nine (9) factors and the individual must meet at least two of the criteria. *Id.* The factors include:

> 1. Self-admittance to an officer and the admission is credible.
>
> 2. Subject is or has been arrested alone or with known gang members for offenses whichare committed in furtherance of a gang.
>
> 3. Subject has been identified as a gang member by a reliable source/informant, and additional factors can be articulated to corroborate the claim. Examples of a reliable source/informant are: parent, teacher, law enforcement officer, judge.
>
> 4. Subject has been identified as a gang member by a source/informant of untested reliability and additional factors can be articulated to corroborate the claim.
>
> 5. Wearing gang attire and can be articulated to corroborate that the style of attire is worn to represent or identify the subject as a member of a gang.
>
> 6. Subject has gang specific tattoos which can be articulated to represent or identify the subject as a gang member.
>
> 7. Subject has been seen displaying symbols and/or hand signs which can be articulated to represent or identify the subject as a gang member.
>
> 8. Subject affiliates with known gang members and the officer can identify the affiliates by name and connection to a specific gang.
>
> 9. Self-admittance during detention classification at CCDC or any local, state, or federal correction facility. Individuals who admit gang membership during classification for incarceration are considered self-admitted, as well as

> satisfying jail admittance criteria, and meet at least one additional criteria listed above, are considered gang members.
>
> o NOTE: additional factors, such as frequenting a known gang area, non-specific gang related tattoos, previously identified in a crime report, intelligence report, or any other official report of a law enforcement agency, may be present and can be used to corroborate the criteria listed above.

Id.

As to the first factor, self-admittance requires a statement made by the individual that s/he is a gang member. *See* Deposition of Fred Haus attached here to as **Exhibit O** at 73:2-17. Prior admissions can also be relied upon to satisfy the factor. *Id.* at 70:2-25. For the second factor to apply, the individual must be arrested in relation to a crime that was committed in furtherance of a gang. *Id.* at 73:18-76:7. Factors three and four look to reliable sources to establish that the individual is in a gang. *Id.* at 78-79. This information can come from a parent, a teacher, an online source, or even a confidential informant. *Id.* at 83-84; 86:5-9. The subsequent note of additional factors within the policy related to factors three and four. *Id.* at 107:12-108:3. In relation to factor five, gang attire, the attire must be related to the specific gang. *Id.* at 88:7-20. For example, if the individual identifies as a crip and belongs to the Rolling 60's, it would be expected that he would wear the color blue and additional symbolic clothing, such as the Washington National symbol. *Id.* at 87:2-13. There is no set list of gang attire for specific gangs, instead this information is passed along in the field through experiences and advisories of officers. *Id.* at 89:22-90:1. Importantly, merely wearing a color and/or a sports team is not sufficient to satisfy the factor, investigative efforts are necessary to ensure that the attire is, in fact, tied to a particular gang. *Id.* at 93:5-94:2. The same holds true for factor 6 in relation to gang tattoos. *Id.* at 95:17-96:6. Gang-specific tattoos are based on symbology and whatever the gang identifies with. *Id.* at 96:7-97:8. Thus, there is no exclusive list of gang-specific tattoos but such information is determined and learned in the field and through advisories. *Id.* Next, factor 7 focuses on the display of gang symbols that are specific to a particular gang. *Id.* at 99:22-100:3. Like factors five and six, the symbology of the symbol must be particular to that gang to be designated a member of the gang. *Id.* at 100:4-17. Factor eight addresses an

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association or affiliation with other gang members. *Id.* at 102:11-17. To satisfy this factor, there must be some sort of contact or connection between the individual and the gang member. *Id.* at 103-104. As to the final factor, this is satisfied if an individual admits during classification at a correctional facility. *Id.* at 106:5-15. This is different than factor one because individuals tend to be more forthcoming in a detention facility or environment to avoid being housed with a rival gang. *Id.* And, to clarify, you could not rely on both factors one and nine if an individual admits to gang membership in a detention facility. *Id.* at 107:8-11.

LVMPD further designates individuals as an affiliate or associate to a gang member. Policy. This analysis is identical to factor eight in relation to gang membership. *Id.*; **Exhibit O** 103-104. Officers must articulate the association of the individual to the gang member. *Id.* at 121-22.

Part of the policy further addressed LVMPD's gang information system, GangNet. *Id.* To input an individual into GangNet as a gang member for information purposes, at least two of the nine factors must be satisfied. *Id.* The determination of whether an individual qualifies as a gang member for purposes of GangNet is strictly limited to the Gang Bureau. **Exhibit O**, 30:4-9. While field interview cards are what begins the process, other documents such as reports, body worn camera, and photographs can be relied upon to support a designation. *Id.* at 117-118.

As the administrator of GangNet, LVMPD shares agreements and/or memorandums of understanding with several federal agencies and their use of LVMPD's GangNet. *See* Agreements and/or Memorandum of Understanding with federal agencies collectively attached hereto as **Exhibit HH**. Nothing within these agreements or memorandums specify the use of federal funds in relation to the use of GangNet. *Id.* Indeed, the purchase order for GangNet demonstrates that it is not federally funded and solely paid by LVMPD. *See* Purchase Order attached hereto as **Exhibit II**.

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2. The Party Crasher Protocol.

In 2018, LVMPD had an informal training titled Unified Problem Abatement Concept (UPAC), also known as the Party Crasher's Protocol. *See* UPAC PowerPoint attached hereto as **Exhibit P**. UPAC is a comprehensive approach to "other disturbance" calls where there is a large party or gathering involving illegal activity. *Id.* UPAC is strictly limited to situations involving illegal activity. *Id.*

Once officers establish reasonable suspicion or probable cause to believe that illegal activity is or is about to be occurring at the large gathering, and other criteria is satisfied, LVMPD officers may implement UPAC. *Id.*; *See also*, Deposition of Landon Reyes attached hereto as **Exhibit Q** at 142:9-13; 145:2-15; 159:19-23.

After either reasonable suspicion or probable cause is established for a detention, the officers generally separate the individuals into groups. UPAC. Officer then obtain identifying information from the individuals to facilitate their investigations. *Id.*; **Exhibit Q** 142:9-13; 145:2-15; 159:19-23. If there is additional reasonable suspicion to conduct a pat down or probable cause for a search, those individuals are separated further. **Exhibit P**. Officers are also taught to ensure that they comply with the reasonableness requirement of the Fourth Amendment when implementing UPAC. **Exhibit Q** at 168:2-15. The Party Crasher Protocol is informally trained at patrol briefings at the various area commands. *Id.* at 142:9-13; 145:2-15; 159:19-23.

C. THE AUGUST 19, 2018 INCIDENT.

1. LVMPD Learns of Firearms at a Party at the Rio.

On August 19, 2018, Nicholas Brigandi worked for LVMPD as a detective with the Central Intelligence Unit assigned to serve as a liaison to the Convention Center Area Command. *See* Deposition of Nicholas Brigandi attached hereto as Exhibit S at 39:1-8; 42:13-16. Although Brigandi was off-duty at the time, he was monitoring his work social media accounts. *Id.* at 145-146.

While scrolling through social media, Brigandi came across a post involving four males known to him. *Id.* at 147-148. The four males had posted a picture of themselves at

an elevator bank within a casino and were advertising that they were having a party. *Id.* Brigandi specifically recalls both Corey Bass, Deandre Palm, and Emmet Ferguson pictured in the post. *Id.* at147-48; 163:13-15. Based on Brigandi's experiences and past investigations, including gang related crimes and shootings, in relation to Corey Bass, Deandre Palm and Emmet Ferguson, the picture drew his attention. *Id*. at 151-162.

Birgandi then forwards the picture to Sgt. Bauman's squad. *Id.* at 169: 11-20. Sgt. Bauman recall reviewing a screenshot of some sort of photograph involving Corey Bass. Exhibit J at 23-26. In speaking with Birgandi, Sgt. Bauman recalls further being advised that social media showed that the individuals within the photograph had at least two firearms. *Id*. at 26.

Sgt. Bauman initiates a plan to take his squad, comprised of Officers Young, Kravetz and Kaur, to meet with security at Rio to simply relay information. *Id*. at 47:10-18. When Sgt. Bauman first initiated this plan, there was no intent to make contact with anyone in the photograph or anyone in the hotel room. *Id*. at 47:19-24. Sgt. Bauman and his squad arrived at the Rio at approximately 2:10 a.m. *Id*. 48:16-25.

2. <u>After Rio Security Receives Complaints, Rio and LVMPD Approach Room 2037.</u>

John Carlisle (Carlisle) was working the graveyard shift on August 19, 2018 at the Rio as the Security Sergeant. *See* Transcript from Justice Court hearing attached hereto as **Exhibit R**, at ACLUNV 000112-13.

Prior to LVMPD's arrival, Carlisle learned of several complaints regarding loud music coming from room 2037, as well as the smell and smoke of marijuana coming from that floor. *Id.* at ACLUNV 000113-15. Carlisle directed security officers to investigate and potentially make contact with any related individuals. *Id.* at ACLUNV 000115. After Carlisle learned of the complaints and directed security officers to alleged problem area, an officer from LVMPD approached Carlisle to explain that, based on social media, there were issues with individuals staying in the Rio. *Id*. at ACLUNV 000112-13; 000115. Then, upon

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contact with the LVMPD officer, Carlisle redirected the security officers to their post and to not approach the room. *Id.* at ACLUNV 000116.

Sgt. Bauman spoke with Carlisle and informed him of the information that Sgt. Bauman and his squad received regarding a party at the property. **Exhibit J** at 49-50. He further advised Carlisle that social media was depicting firearms on the property. *Id.* Carlisle then explained to Sgt. Bauman about the complaints he had received coming from a particular room. *Id.* at 52-53. Sgt. Bauman offered to assist in a "keep the peace" format but clarified that LVMPD could not act as Rio's agent and would not be entering. *Id.* However, in the event the occupants of the room refused to leave after being advised to do so, Sgt. Bauman indicated that LVMPD could assist with the trespass. *Id.* at 54-55. Sgt. Bauman also affirmed the plan was for LVMPD to flank the sides of the room and not be visible to the occupants and allow Carlisle and his team to handle the situation. *Id.* at 63-64.

Together, Carlisle and LVMPD officers reached the floor where Room 2037 was located and began to walk towards the room.[5] **Exhibit R**, ACLUNV 000117. As they walked towards the room, they could hear loud music, smell the odor of marijuana and see marijuana smoke. *Id.* **Exhibit J** at 86-87; **Exhibit K** at 120:18-23 (marijuana odor); 122:8-13(marijuana smoke); **Exhibit L** at 82-83.

3. <u>Rio Security Demands Plaintiffs to Leave</u>

Carlisle is the first to approach Room 2037. **Exhibit R**, ACLUNV 000120-21. When he knocks on the door and it opens, Carlisle asks to speak with the registered guest. *Id.* A Mr. Bass identified himself as the registered guest. *Id.* Notably, when the door opened, a smoky haze and a stronger smell of marijuana emanated from the room. *Id.* Although Carlisle did not personally view anyone consuming marijuana, the strength of the odor and the smoke was a clear indication to him that he reasonably believed that consumption either had occurred or was occurring in the room. *Id.* Due to marijuana odor and smoke, and Rio's policy against the consumption of marijuana in the room (as well as

[5] The room where Plaintiffs were located had a limited capacity of four to six people. **Exhibit R**, ACLUNV 000116.

the number of people in the room), Carlisle determined that the party needed to be shut down and the individuals in the room needed to be evicted. *Id.* Accordingly, Carlisle advised Mr. Bass that everyone needed to leave. *Id.* at ACLUNV 000121-22; *See also* LVMPD BWC 49 attached hereto as **Exhibit T** at 0:00:39-0:01:25.

Mr. Bass immediately grew hostile with Carlisle and advised Carlisle that he had not been given any warnings about the noise complaint. **Exhibit R**, ACLUNV 000122-23; **Exhibit T** at 0:00:39-0:01:25. Carlisle continued his efforts to explain to Mr. Bass that everyone needed to leave; however, Mr. Bass refused to comply with Carlisle's requests. *Id.* Based on these circumstances, Carlisle considered Mr. Bass trespassing on the property. **Exhibit R**, ACLUNV 000123. When Mr. Bass became confrontational with Carlisle, including demanding his money back and taking a step forward, LVMPD stepped in. **Exhibit R**, ACLUNV 000123; **Exhibit T** at 0:01:25.

4. LVMPD Detained All Individuals in the Room and Conducted Pat-Downs.

After establishing that Carlisle asked, at a minimum, the Bass brothers to leave and they refused, LVMPD advised the partygoers that the party was over and that everyone needed to leave. **Exhibit T** at 0:01:25-0:02:40. Carlos and Corey Bass were removed from the room due to their failure to abide by Carlisle's demand to leave the premises. *Id.* Officer Kaur placed handcuffs on Carlos Bass and patted him down. *Id.* Officer Kravetz placed handcuffs on Cory Bass and patted him down. *Id.* Due to the number of individuals in the room and the limited number of officers, as well as the safety concern of, at least, two firearms still unaccounted for, Sgt. Bauman had the party-goers line-up so that the exit from the room was of a systematic nature. *Id.* The partygoers would, one-by-one exit the room and an officer would ensure that the individual did not have weapons on their person and, depending, may have put the individual in handcuffs. **Exhibit T**, generally.[6]

[6] For example, Officer Kravetz patted the purse of a female but did not pat down her person and did not place her in handcuffs. **Exhibit T** at 0:03:00-0:03:18.

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Bowie was wearing a black tank top and jean shorts. See Photograph of Plaintiffs attached hereto as **Exhibit BB**, at LVMPD 000334. Based on the fact that the two individuals that were expected to have firearms, the Bass Brothers, did not, Sgt. Bauman briefly patted Bowie's waist and her short pockets. **Exhibit T** at 0:02:49-0:02:57. Sgt. Bauman did not put handcuffs on Bowie and expressly stated females did not need to be handcuffed. *Id.*

Semper was wearing a white shirt with small designs, gold chains, and blue jeans. **Exhibit BB** at LVMPD 000325. An officer tells Semper to "come here" as Semper stands in the doorway of the hotel room. **Exhibit T** at 0:03:20. Semper then moves behind Sgt. Bauman and stands there for several seconds despite commands to get up against the wall. *Id.* at 0:03:20-0:05:30. Officer Kravetz and Sgt. Bauman are forced to grab Semper due to his refusal to obey commands and put him against the wall. *Id.* Once up against the wall and as Kravetz and Sgt. Bauman are attempting to handcuff Semper, Semper slurs that he does have a few guns on him. *Id.* Officer Kaur then removes a firearm from the left side of Semper's waist. *Id.* Semper further admits that he has "weed" in his pocket. *Id.* Sgt. Bauman then removed the second firearm concealed in Sempers waist. *Id.* After learning of the firearms and narcotics, Officer Kravetz and Sgt. Bauman conducted a pat-down of Semper.

Johnson was wearing a white shirt and pants. Exhibit BB at LVMPD 000326. As Officer Kravetz and Officer Kaur were asking Johnson to put his hands together, Johnson advised officers that he has his firearm on him and repeated several times "413 right here." **Exhibit T** at 0:05:35-0:06:40. After removing the concealed firearm from Johnson's waist, Officer Kravetz completed the pat down of Johnson. *Id.*

Reece was wearing a black and red shirt and red hat. **Exhibit BB** at LVMPD 000328. Officer Patrick Grimes put Reece in handcuffs and conducted a pat-down. *See* LVMPD BWC 00023, Grimes, Patrick attached hereto as **Exhibit EE** at 0:04:30 -0:05:30. Green was wearing a white shirt with black designs and dark pants. **Exhibit BB** at LVMPD

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000334. Green was handcuffed and patted down by Officer Grimes. **Exhibit EE** at 0:06:30-0:07:25.

Riley is wearing a white Champion shirt. *See* **Exhibit BB** at LVMPD 000330. Officer Edward LeBario puts Riley in handcuffs and conducted a pat-down. *See* LVMPD BWC 000001, Adkins, Phillips, attached hereto as **Exhibit U** at 0:04:00-0:04:45; LVMPD BWC 000054, Marcolini, Christopher attached hereto as **Exhibit FF** at 0:08:20-0:08:36.

Medlock was wearing an orange/yellow tank top and shorts. Exhibit BB at LVMPD 000325. A female officer (not Supreet Kaur) placed Medlock in handcuffs and conducted a pat down. LVMPD BWC 000037, Hoag, Thomas, attached hereto as **Exhibit GG**, at 0:05:57.

5. LVMPD Arrests Plaintiffs Semper and Johnson.

Due to the concealed weapons on both Semper and Johnson's persons and no concealed carry permit, Semper and Johnson were both immediately arrested for concealed carrying without a permit. *See* Declaration of Arrest for Corey Johnson attached hereto as **Exhibit V**; Declaration of Arrest for Phillip Semper attached as **Exhibit W**.

6. LVMPD Arrests Individuals with Outstanding Warrants.

Upon detaining the plaintiffs and other individuals, officers began to conduct record checks. *See* Criminal History Record Search of Plaintiffs attached hereto as **Exhibit X**. Plaintiffs Medlock, Bowie, and Green were arrested due to outstanding warrants. ECF No. 89; *See* Declaration of Arrest of Medlock attached hereto as **Exhibit Y**; Declaration of Arrest of Green attached hereto as **Exhibit Z**; and Declaration of Arrest of Bowie attached hereto as **Exhibit AA**. A person inquiry into LVMPD's databases, including SCOPE and CJIS, will inform officer's if the individual has outstanding warrants. **Exhibit X**. Accordingly, officers were advised that: (1) Medlock had outstanding warrants at approximately 3:06 a.m.; (2) Green had outstanding warrants at approximately 3:15 a.m.; and (3) Bowie had outstanding warrants at approximately 3:17 a.m. **Exhibit X**. Based on this information, Medlock, Green, and Bowie were arrested. **Exhibits Y, Z, and AA**. Other

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individuals were also arrested for outstanding warrants. Neither Reece nor Riley were arrested.

7. Plaintiffs are Entered into GangNet

After the Rio incident, Officer Young completed a Field Interview Card for all the partygoers. *See* Field Interview Card from August 19, 2018 Incident attached hereto as **Exhibit CC**.

Green was documented as a gang member of the Rollin 60's Crips. *Id.* at LVMPD 000372. This information was based on the fact that Green was affiliating with other gang members, including Corey and Carlos Bass; he had several tattoos that were associated with the Rollin 60's Crips, including RR on his right forearm and a Washington National Symbol on his right arm; and he was identified as a gang member from a reliable source. *Id.*

Reece was documented as a member of the Gerson Park Kingsmen. *Id.* at LVMPD 000388-89. This information was based on admissions by Reece; his affiliation with his affiliation with other gang members, including Corey and Carlos Bass as Hillside Crip gang members; and he was identified as a gang member from a reliable source. *Id.*

Riley was documented as a Squad Up gang member. *Id.* at LVMPD 000384-85. This information was based on his affiliation with other gang members, including Corey and Carlos Bass as Hillside Crip gang members; tattoos that were associated with his gang affiliation, including Myron Tip Toe Riley and praying hands both on his left arm; and he was identified as a gang member from a reliable source. *Id.*

Medlock, Bowie, Semper, and Johnson were all designated as affiliates to gang members Corey and Carlos Bass, who were documented as Hillside Gangster Crips. *Id.* at LVMPD 000375; 000376; 000379-82.

This Field Interview Card was then routed to the Gang Bureau. **Exhibit CC**. Consistent with LVMPD's testimony above, the Gang Bureau serves as the gatekeeper of determining whether a field interview card and other documentation satisfies the criteria for entering individuals into GangNet. **Exhibit O** at 30. Jackie Barnes within the Gang Bureau was responsible for entering the individuals into GangNet. *See* LVMPD's Answers to

Plaintiffs' Third Set of Interrogatories attached hereto as **Exhibit DD**. Reece, Riley, and Green were entered as gang members and the remaining plaintiffs, Medlock, Bowie, Semper, and Johnson were entered as affiliates to gang members Corey and Carlos Bass. **Exhibits CC; DD**.

IV. LEGAL STANDARDS

A. SUMMARY JUDGMENT.

Under Rule 56 of the Rules of Federal Procedure, "[a] party may move for summary judgment, identifying each claim or defense - - or the part of each claim or defense - - on which summary judgment is sought [and] [t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movement is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). It is well established that the purpose of summary judgment "is to isolate and dispose of factually unsupported claims." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986).

The rule, however, is not a "procedural short cut," but a "principal tool [] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. The moving party bears the initial burden of demonstrating the absence of a genuine dispute as to material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The burden then shifts to the non-moving party to go beyond the pleadings and set forth specific facts demonstrating there is a genuine issue for trial. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001). "If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law." *Id.*

B. QUALIFIED IMMUNITY.

A defendant in a 42 U.S.C. §1983 action is entitled to qualified immunity from damages for civil liability if his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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"In determining whether an officer is entitled to qualified immunity, [a court] consider[s] (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation omitted). Consequently, at summary judgment, a court can "only" deny an officer qualified immunity in a §1983 action "if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation." *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

Over the past several years, the United States Supreme Court has expressed "frustration with [appellate court] failures to heed its [qualified immunity] holdings." *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). The Supreme Court has consistently advised lower courts construing claims of qualified immunity to "not to define clearly established law at a high level of generality." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). The import of that instruction is, as the Supreme Court has explained, that "doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Id.*

The Supreme Court has explained that "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity shields an officer from liability even if his or her actions resulted from "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004).

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The purpose of qualified immunity is to strike a balance between the competing "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law'." *Al-Kidd*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"In determining whether an officer is entitled to qualified immunity, [a court] consider[s] (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal*, 746 F.3d at 1116 (citing *Pearson*, 555 U.S. at 232). This Court should address the first prong of he qualified immunity analysis (i.e., whether a constitutional right was violated) by engaging in a careful examination of the "totality of the circumstances" analysis conducted from the perspective of a reasonable officer. *Plumhoff*, 572 U.S. at 779 (citations omitted). The analysis is accordingly quite deferential to the officer. *See Saucier v. Katz*, 533 U.S. 194, 205 (2001).

The test for the second prong of the qualified immunity analysis is different and adds yet another level of deference. *Id.* First, a court must define the alleged constitutional violation in terms of the officer's "particular conduct." *Mullenix v. Luna*, 577 U.S. 7 (2015) (quoting *al-Kidd*, 563 U.S. at 742). Thus, courts may not define the clearly established right at a high level of generality that covers a wide range of conduct, as that would "mak[e] it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quotation marks omitted). Second, having identified the context-specific conduct that allegedly violated the Constitution, courts must determine whether any precedent existing at the time placed beyond debate that the use of force in such circumstances violated the Fourth Amendment.

See, e.g., White v. Pauly, 580 U.S. 73 (2017); *Mullenix*, 136 S.Ct. at 308. The "beyond debate" standard is a high one: Officers are entitled to qualified immunity unless "every reasonable official" - which excludes only the plainly incompetent and those who knowingly violate the law - "would have understood that what he is doing violates [the plaintiff's] right." *Mullenix*, 136 S.Ct. at 308 (quoting *Reichle v. Howards*, 566 U.S. 658 (2012)). And officers remain entitled to qualified immunity even if they make "reasonable mistakes" about "the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205. Given this high standard, the Supreme Court has made clear that an official can lose qualified immunity only if an earlier case held that conduct closely analogous to the specific conduct at issue violated a constitutional right. *E.g., Mullenix*, 136 S.Ct. at 308.

V. LEGAL ARGUMENT

A. DAVID JEONG MUST BE DISMISSED AS HE DID NOT PERSONALLY PARTICIPATE IN ANY ALLEGED CONSTITUTIONAL VIOLATIONS.

In order for a person acting under color of state law to be liable under § 1983, there must be a showing of personal participation in the alleged rights deprivation. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (requiring personal participation in the alleged constitutional violations); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980) (holding that § 1983 liability must be based on the personal involvement of the defendant). In *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996), the Ninth Circuit defined the contours of individual liability further when it stated a plaintiff could not hold an officer liable simply because of his membership in a group without a showing of individual participation in the unlawful conduct. The court required that a plaintiff must establish "integral participation" on the part of the individual officer in the alleged constitutional violation. *Id.* (quoting *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989)).

Here, there is no evidence that Ofc. Jeong personally participated in any alleged constitutional violation. Accordingly, summary judgment is appropriate in favor of Ofc. Jeong against Plaintiffs.

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B. PLAINTIFFS TITLE VI CLAIM FAILS AS A MATTER OF LAW.

1. Legal Standard.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." "To state a claim for damages under 42 U.S.C. § 2000d, et seq., a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance." *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001).

A plaintiff may prove a Title VI violation by alleging "that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class." *The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 702-03 (9th Cir. 2009) ["CCCI"]. When a plaintiff challenges such a governmental policy, "proof of disproportionate impact on an identifiable group, such as evidence of 'gross statistical disparities,' can satisfy the intent requirement where it tends to show that some invidious or discriminatory purpose underlies the policy." *CCCI*, 583 F.3d at 703. The Supreme Court has also recently noted that a plaintiff must show a causal link between a statistical disparity and the defendant's policy or policies.

The statistical disparities that a plaintiff uses to show disparate impact must constitute "[a]n appropriate statistical measure." *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 520 (9th Cir. 2011). Such a measure "involves a comparison between two groups—those affected and those unaffected by the facially neutral policy." *Id.* (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003)). A district court may not find the existence of disparate impact "on the sole basis of [a statistic] unless it reasonably [finds] that [the statistic] would be a reliable indicator of a disparate impact." *Id.* at 519 (citation omitted). "[C]ourts [and] defendants [are not] obliged to assume that plaintiffs' statistical

evidence is reliable." *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 (1988).

A plaintiff's disparate impact claim fails when the plaintiff relies on the wrong base population in a statistical sample. For example, the Ninth Circuit rejected a disparate impact claim based on a "show[ing] that the percentage of Blacks in Orange County and in surrounding counties is higher than the percentage of Blacks employed by Orange County." *Robinson v. Adams*, 847 F.2d 1315, 1318 (9th Cir. 1987). The Ninth Circuit rejected this disparate impact claim because the "general population statistics" did not "represent a pool of prospective applicants qualified for the jobs for which [the plaintiff] applied." *Id.* The plaintiff in *Robinson* would have had to show that the number of qualified black applicants that the county hired was significantly lower than the number of qualified non-black applicants that the county hired. *Id.*

Here, Plaintiffs bring a Title VI claim under three separate grounds. First, Plaintiffs claim that LVMPD's use of GangNet violates Title VI because it disparately impacts Blacks. Second, Plaintiffs further contend that LVMPD's implementation of the Party Crasher Protocol is discriminatory because it is not used or relied upon in relation to White parties. Third, Plaintiffs assert that LVMPD's training of categorizing gangs as Black Gangs violates Title VI. As discussed in detail below, this claim fails as a matter of law for several reasons. There is no evidence that these activities or programs are federally funded. Plaintiffs also cannot demonstrate that LVMPD engaged in discriminatory conduct. Accordingly, summary judgment must be entered in favor of LVMPD.

2. <u>The Complained of Activities are not Federally Funded.</u>

The Supreme Court has held that Title VI prohibits discrimination in a *program* or *activity* which receives federal funds. *Barnes v. Gorman*, 122 S. Ct. 2097 (2002). Further, Nevada courts maintain the same, "Title VI provides the exclusive mechanism for recovery to individuals who were discriminated against on the basis of race by any **program** or **activity** receiving federal financial assistance." *Alexander v. Underhill*, 416 F. Supp. 2d 999 (D. Nev. 2006). (Emphasis added).

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Lastly, the Ninth Circuit agrees "Title VI does not subject a state or local government to sweeping liability for discrimination claims in programs or activities that receive no federal funding merely because some other aspect of the state or local government may receive federal funding. Instead, Title VI specifically applies only to a "program or activity" defined as "all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government...." 42 USC § 2000d–7. *Gebray v. Portland Int'l Airport, the Port of Portland*, CV-01-755-ST, 2001 WL 34039138, (2001).

As recited, Title VI does not subject a state government to sweeping liability for discrimination claims in programs or activities that receive no federal funding merely because some other aspect of the state or local government may receive federal funding. Therefore, to bring a Title VI claim, it must be proven that the complained of programs and activities, including GangNet, the Party Crasher Protocol, and LVMPD's Gang Training is operated, in part, by using federal funds. GangNet is purchased by LVMPD and there is no evidence of federal funding. Even agreements between the federal government and LVMPD regarding federal funding specifically identify where such federal funds must be allocated to, such as equipment rentals, payment for investigators and overtime for officers. There is no evidence in this case that the CCAC Flex team received federal funds, nor is there any evidence that the use of GangNet by LVMPD is supported by federal funds. Likewise, the Party Crasher Protocol is implemented at the patrol level at the various area commands. Plaintiffs have no evidence to demonstrate that the Party Crasher Protocol is supported by federal funding. Finally, the Gang Bureau training challenged by Plaintiffs is also conducted at a local level with no input by the federal government or the use of federal funds. Because Plaintiffs cannot demonstrate that the challenged activities and programs are federally funded, Plaintiffs Title VI claims fail as a matter of law.

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3. There is no Evidence that LVMPD Engaged in Intentional Discrimination.

For plaintiffs Title VI claim to succeed, they must prove that LVMPD is intentionally engaging in racial discrimination. *Daviton v. Columbia/HCA Healthcare Corp*., 241 F.3d 1131 (9th Cir. 2001). In order to do so, a plaintiff must demonstrate "that actions of the defendants had a discriminatory impact, and that defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class." *CCCI*, 583 F.3d 690, 702-03 (9th Cir. 2009).

Here, Plaintiffs allege that defendant LVMPD's Gang Crimes Section[7] implementation of the party crashers protocol results in a discriminatory impact because the policy is enforced against a party attended by African Americans but not against parties attended predominately by Caucasian individuals. Likewise, the entry of people of color into GangNet, a system utilized by defendant LVMPD's Gang Crimes Section, is discriminatory because people of white gangs are not entered.

a. LVMPD's actions did not have a disparate impact.

Plaintiffs must prove LVMPD actions had a discriminatory impact. As recited, the statistical disparities that a plaintiff uses to show disparate impact must constitute an appropriate statistical measure and involve a comparison between two groups—those affected and those unaffected by the facially neutral policy. *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 520 (9th Cir. 2011). A disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that "[r]acial imbalance ... does not, without more, establish a prima facie case of disparate impact" and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653(1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k).

[7] It should also be noted that LVMPD's Gang Bureau was not involved in implementing the party crasher's protocol. Indeed, the responsive officers were from CCAC Flex Team and were not part of the Gang Bureau.

Here, plaintiffs will have to rely on an appropriate statistical measure that analyzes the party crasher protocol and GangNet. As to the party crasher protocol, plaintiffs have no evidence that LVMPD disparately crashes African American parties in relation to Caucasian parties. While it is likely that plaintiffs will claim that LVMPD failed to implement the party crasher's protocol at the mainly Caucasian parties at the Rio, plaintiffs have insufficient evidence regarding who was in attendance at those parties. But, more importantly, there lacks any evidence that those parties were similarly situated. For example, plaintiffs have no evidence regarding the number of individuals or whether marijuana odor and smoke were also emanating from those parties. The court in *Opara* ruled self-serving testimony and affidavits are not enough to prove disparate discrimination. *Opara v. Yellen*, 57 F.4th 709, 726–27 (9th Cir. 2023). Plaintiff has failed to demonstrate disparate treatment under the party crasher protocol outside their own self-serving narrative. As such, plaintiffs cannot maintain a Title VI claim in relation to the Party Casher Protocol.

Similarly, plaintiffs must prove that African Americans who are associates to gang members are entered into GangNet, but Caucasians of similar gang members are not entered. No such statistical analysis has been provided, nor exists.

Further, the basis for a successful disparate impact claim involves a comparison between two groups—those affected and those unaffected by the facially neutral policy." *Tsombanidis v. W. Haven Fire Dep't,* 352 F.3d 565, 575 (2d Cir.2003). An appropriate statistical measure must therefore consider the correct population base and its racial makeup. *See Robinson v. Adams,* 847 F.2d 1315, 1318 (9th Cir. 1987). *Darensburg v. Metro. Transp. Comm'n,* 636 F.3d at 519–20.

Plaintiffs' assertion that the exclusion of white gangs caused their injuries is further negated by the fact that **White Outlaw Biker gangs only comprise 2.5% of America's total gang population**, according to FBI stats in 2013. *See Gang Report*, National Gang Intelligence Center, https://www.fbi.gov/stats-services/publications/national-gang-report-2013. Additionally, plaintiffs' complaint that white people only comprise 14% of GangNet database is ironic because on average, white people make up 11% of gang population

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nationwide. Compared to the national averages, GangNet's number of white gangsters is almost the exact same to the FBI database. *See National Youth Gang Survey Analysis: Demographics*, National Gang Center, https://nationalgangcenter.ojp.gov/survey-analysis/demographics#:~:text=The%20most%20recent%20figures%20provided%20by%20law%20enforcement%20are%2046,race%2Fethnicity%20of%20gang%20members.

In sum, plaintiffs lack sufficient evidence that any of LVMPD programs challenged by them result in a disparate impact. Without such evidence, the Court should grant summary judgment in favor of LVMPD.

b. LVMPD did not intentionally discriminate against plaintiffs based on their race.

Lastly, plaintiffs must prove that LVMPD intended to discriminate against them based on their race. First, plaintiffs failed to allege LVMPD intended to discriminate against them based on race. In plaintiffs Second Amended Complaint, the majority of their Title VI allegations only allege disparate impact, rather than intentional discrimination. The only allegations which allege *intentional discrimination* are:

1. Metro explicitly categorizing all criminal gangs by race. ¶*374*

2. Labeling criminal gangs that do not restrict membership by race as "Black Gangs". ¶*375*

3. Explicitly excluding predominantly white gangs including Outlaw Motorcycle Gangs and the Russian Mafia from the definition of criminal gang. ¶*377*

All other allegations in the Title VI claim specifically relate to *disparate impact*, and the Court should dismiss them because there is no evidence of the requisite intent.

LVMPD was not intentionally targeting African Americans by implementing the Party Crasher Protocol, adding individuals to GangNet or directing other bureaus within the agency to investigate other groups, such as organized crime or outlaw motorcycle gangs. For example, the court in *El v. Se. PA Transp. Auth* upheld a criminal record policy, despite effecting more African American individuals, as they found there was no evidence that the policy was created to discriminate against African Americans. Instead, they found its sole

intention and purpose was to keep its customers safe. *El v. Se. PA Transp. Auth.*, 418 F. Supp. 2d 659, 673 (E.D. Pa. 2005), *aff'd sub nom. El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007). (Black paratransit driver trainee terminated because of 40-year-old homicide conviction was not discriminated against and policy was upheld.).

Simply put, there is no evidence that LVMPD was targeting African Americans Therefore, plaintiffs have failed to allege discriminatory intent and the facts fail to prove it.

4. Plaintiffs Title VI claim is barred by the statute of limitations.

The Ninth Circuit has held that claims brought under 42 U.S.C. § 2000d are governed by the same state limitations period applicable to claims brought under § 1983. *Taylor v. Regents of Univ. of California*, 993 F.2d 710, 712 (9th Cir. 1993). Nevada's personal injury statute of limitations is two years. NRS 11.190. Accordingly, Plaintiffs had two years to bring a Title VI claim from the time they had reason to believe, or should have had reason to believe, they were in a Gang database or file.

Plaintiff Riley admits that during an interaction with police in 2005, they had asked him questions about who he was with, why he was with them, and if he knew certain people. He stated, "that's when it fully hit me that it just, they're gonna put you in [GangNet] no matter what or who you're around." **Exhibit H** 106:3-4. According to Riley's own testimony, he has been aware of his designation in GangNet since at least 2007. *Id*. 104:23.

Plaintiff Reece testified that he was aware, at least from 2002, that "they put me in the gang file. Every time I get pulled over even way back then, when I was a kid, like 16, 15, and they pulled us over and stopped us… they put us in that bracket." **Exhibit E**, Vol. 2 1165-15. When questioned exactly when he became aware of his designation in GangNet, he responded, "At like 16, 17. No. I want to say when I got shot-2002." *Id*.

Plaintiff Green admitted that he was arrested in Las Vegas in 2018, before the instant matter, and his paperwork designated him as an active gang member. **Exhibit D** 115: 9-14. Green was told a known informant had told police that he was affiliated with a gang.

As it is evident that Plaintiffs Riley, Reece, and Green had knowledge of their gang designations several years prior to 2018, these plaintiffs are barred from now raising a claim.

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Plaintiffs have been aware since 2002 and 2006 that they were designated as members or affiliates of gangs in GangNet and therefore have long surpassed the statute of limitations.

C. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIMS FAIL AS A MATTER OF LAW

To state a procedural due process claim, a plaintiff must prove "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000) (alteration in original) (quoting *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)). Although "[d]amage to reputation alone is not actionable," *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (quoting *Paul v. Davis*, 424 U.S. 693, 711–12 (1976)), 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," *Id.* at 1069–70 (quoting Paul, 424 U.S. at 701–02,). Under this "stigma-plus" test, a plaintiff who has suffered reputational harm at the hands of the government may assert a cognizable liberty interest for procedural due process purposes if the plaintiff "suffers stigma from governmental action plus alteration or extinguishment of 'a right or status previously recognized by state law.' " *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1185 (9th Cir. 2009) (quoting *Paul*, 424 U.S. at 711), *rev'd in part on other grounds*, 562 U.S. 29, (2010)). A plaintiff may bring a § 1983 due process claim under a "stigma plus infringement" theory by showing a stigmatizing statement plus a deprivation of a "life, liberty, or property interest." *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991).

1. <u>There is No Stigma Caused by LVMPD.</u>

"With regard to the stigma element, courts look to whether the government has publicly stigmatized an individual such that his 'good name, reputation, honor, or integrity' has been called into question." *Pedrote-Salinas v. Johnson*, No. 17 C 5093, 2018 WL 2320934, at *5 (N.D. Ill. May 22, 2018). A plaintiff sufficiently alleges stigma by showing

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the statement is "false and assert[s] some serious wrongdoing on the part of the plaintiff." *Vander Zee v. Reno*, 73 F.3d 1365, 1369 (5th Cir. 1996) (citations omitted).

In the Second Amended Complaint, plaintiffs asserted that that LVMPD caused this stigma when someone at LVMPD disclosed during an interview that the plaintiffs were designated as gang members. While the Court found the allegation compelling to deny dismissal, plaintiffs did not suffer stigma as no officer from LVMPD publicly stigmatized plaintiffs. First, plaintiffs rely on a tweet from CCAC.[8] Nothing in the tweet suggests plaintiffs were in attendance or that plaintiffs themselves were gang members or affiliates. Indeed, absent from the tweet is any reference to a specifical or particular individual. Likewise, the two new stories relied upon by plaintiffs do not make a sufficient connection to statements by LVMPD officers.[9] In reviewing the articles and videos contained in the news stories, LVMPD does not identify who the individuals that were arrested nor do they discuss their designation/affiliation. While the articles include photographs of some of the plaintiffs, including Corey Johnson, Phillip Semper, Ashley Medlock, and Michael Green, LVMPD officers did not confirm that these are the individuals that were being referred to as gang members. In other words, LVMPD did not make a formal statements publicly stigmatizing Plaintiffs. To the extent the Court construes statements made within the article not specifically quoting LVMPD officers to be attributed to LVMPD, the remaining plaintiffs including, Lonicia Bowie, Demarlo Riley, Clinton Reece cannot maintain a stigma-plus doctrine claim because there is absolutely no reference to these individuals within the news articles.

[8] *See* LVMPD Convention Center Area Command (@LVMPDCCAC), Twitter (Aug. 19, 2018, 11:04 AM), https://twitter.com/LVMPDCCAC/status/1031240416119599110.

[9] *See*, Katherine Jarvis, Nine identified after gang party arrests at Rio Las Vegas hotel-casino, KTNV Las Vegas (Aug. 19, 2018, 11:30 PM), https://www.ktnv.com/news/gang-membersarrested-at-local-casino;
Phillip Moyer, Police break up 'large gang party' at Rio Hotel and Casino, (Aug. 19, 2018), https://www.ktnv.com/news/gang-membersarrested-at-local-casino; Phillip Moyer, Police break up 'large gang party' at Rio Hotel and Casino, (Aug. 19, 2018) https://news3lv.com/news/local/police-break-up-large-gang-party-at-riohotel- and-casino.

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Moreover, plaintiff Riley testified that he knowingly associates with gang members. Riley testified that he was caught by police hanging out with gang members from various gangs. *See Deposition of Demarlo Riley*, p. 106-107, ll. 22-4. When questioned if he knew those individuals were gang members, he answered, "yeah." *Id* at pg. 107, ll. 7. Plaintiff Reece testified that he had been an active member of the gang "GPK". *See Deposition of Clinton Reece*, p. 115, ll. 8. Therefore, Reece knowingly affiliated himself with gang members, as he himself was one. Accordingly, there is no stigmatization of either Reece or Riley as they knowingly hang out with gang members on their own volition.

In sum, the Court should conclude that plaintiffs failed to satisfy the stigma portion of their claim because no one from LVMPD publicly stigmatized the individuals. To the extent the Court construes the news articles, not published by LVMPD, sufficient to demonstrate publication of a stigma, at a minimum, plaintiffs Bowie, Reece and Riley cannot maintain a claim. Additionally, Reece and Riley must be precluded from being able to maintain a claim because they testified that they regularly associate with gang members.

2. Plaintiffs did not Suffer an Infringement.

Infringement is satisfied where a plaintiff shows "the state sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or one of the incorporated provisions of the Bill of Rights." *State v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995) (citation omitted). In addressing this argument in its Order, the Court considered plaintiffs' state and federal right to own a firearm. *See* ECF No. 113.

Both Nevada and federal law prohibit the ownership of a firearm by a convicted felon. *See* NRS 202.360; 18 U.S.C. Section 922(g). Plaintiffs Reece, Riley, and Green have all be previously convicted of felonies and are prohibited from possessing and purchasing a firearm under both Nevada and federal law. Accordingly, this claim must be resolved in favor of LVMPD defendants as to these three plaintiffs because they have not suffered any infringement due to placement into GangNet as a gang member.

The remaining plaintiffs, Medlock, Semper, Johnson, and Bowie were never designated as gang members. Nevada law bars an individual who has been convicted of a

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crime in furtherance of a gang from possessing a firearm. NRS 202.362 (citing NRS 193.168). NRS 202.362 does not apply to affiliate of a gang member. Thus, to the extent the court relies on NRS 202.362 as a basis for a liberty interest, it does not apply to these plaintiffs as NRS 202.362 is limited to instances where an individual is convicted of a crime with a gang enhancement. Moreover, these plaintiffs have continued to purchase or possess firearms after their designation, defying any interpretation that NRS 202.362 applies to affiliates of gang members without any formal conviction. Thus, Medlock, Semper, Johnson, and Bowie should be barred from maintaining such a claim.

3. The individually named defendants did not Publicly Stigmatize Plaintiffs.

Plaintiffs have failed to properly assert the stigma-plus claim against a named defendant, requiring dismissal of this claim. First and foremost, LVMPD cannot be liable in a respondeat superior capacity pursuant to *Monell* and the "stigma" and "plus" must be committed by the same state actor. *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 10 (1st Cir. 2011) ("Where the stigma and the incremental harm—the 'plus' factor'—derive from distinct sources, a party cannot make out a viable procedural due process claim ... even if both sources are government entities.") and *Hawkins v. Rhode Island Lottery Commission*, 238 F.3d 112, 115–16 (1st Cir. 2001) (affirming dismissal of stigma-plus due process claim where different individual actors were responsible for different conduct).

While the Ninth Circuit has not squarely addressed the issue, its decision in *Cooper* is instructive. *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir.1991). There, one of the plaintiffs, Michael Cooper, was arrested on suspicion of being a serial rapist. *Id.* at 1524. Despite knowing that the evidence on which the arrest was made was incorrect and the result of negligence, Peter Ronstadt, the Tucson Chief of Police, gave a press conference defending the arrest and making what the plaintiff contended were defamatory and false statements about him. *Id.* at 1525. The Ninth Circuit found that Ronstadt had violated Cooper's constitutional rights based on a "stigma-plus" theory. *Id.* at 1534–36. To be sure, the circuit court's opinion is not crystal clear as to what role Ronstadt played in Cooper's

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arrest. But the opinion repeatedly refers to Ronstadt's personal responsibility for Cooper's arrest and for the allegedly defamatory remarks—the holding turns on the fact that Ronstadt was personally involved in both events. The Ninth Circuit emphasized that "part of the alleged due process violation perpetrated by Ronstadt was the false arrest ... So even if true that Ronstadt had to say something, he put himself in this position by his own allegedly wrongful conduct." *Id.* at 1536; *see also Id.* at 1534 ("Ronstadt's statements were intertwined with his arrest of Cooper").

Here, plaintiffs assert being designated as a gang member or affiliate/associate to a gang member and the publication of it to the public resulted in their harm. Plaintiffs cannot maintain this claim against the named Defendants because there is no evidence that the named defendants inputted the individual defendants into GangNet (as that was Jackie Barnes from the Gang Bureau) and none of the individual defendants publicly identified the plaintiffs as gang members or affiliates to gang members (Plaintiffs assert that Captain John Leon made such statements). Accordingly, this claim cannot be asserted against the individual defendants.

D. PLAINTIFFS CANNOT ESTABLISH A RIGHT OF EXPRESSIVE ASSOCIATION CLAIM.

In general, a relationship may be protected under either the First Amendment or the Due Process Clause of the Fourteenth Amendment. *Erotic Service Provider Legal Education & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018) ("There are two distinct forms of freedom of association: (1) freedom of intimate association, protected under the Substantive Due Process Clause of the Fourteenth Amendment; and (2) freedom of expressive association, protected under the Freedom of Speech Clause of the First Amendment."), *as amended*, 881 F.3d 792 (9th Cir. 2018); *see also Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) ("[W]e have held that claims under both the First and Fourteenth Amendment for unwarranted interference with the right to familial association could survive a motion to dismiss." (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001)). Plaintiffs assert a First Amendment claim for Freedom of Association and

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Expression; however, the Court determined there was no familial association claim. Thus, this claim is analyzed under only Expressive Association under the First Amendment.

1. LVMPD had a compelling state interest in public safety and GangNet is the least restrictive means.

The First Amendment's free speech protections encompass the freedom to engage in "expressive association," which protects a group's right to gather for a particular expressive purpose. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *cf. Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) (explaining group's coming together for different associational purpose, like dancing, does not "involve the sort of expressive association that the First Amendment has been held to protect").

Parties bringing an expressive-association claim under the First Amendment must demonstrate that they are asserting their 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.* The right to expressive association is not an absolute right and can be infringed upon if that infringement is: (1) unrelated to the suppression of expressive association; (2) due to a compelling government interest; and (3) narrowly tailored. *Roberts v. U.S. Jaycees*, 468 U.S. at 623.

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).

The lower court determined, "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*,

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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.")." ECF No. 113.

Here, plaintiffs alleged defendants violated their freedom of expression by appearing at plaintiff Corey Ross's birthday party at the Rio Hotel and for stopping plaintiffs Riley and Reece while they were at a funeral for a deceased friend. While these events may be protected under the First Amendment, there are exceptions 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.

LVMPD has a compelling interest, unrelated to the suppression of ideas, that cannot be achieved through a less restrictive means. It is undisputed that LVMPD has a compelling interest to keep the Las Vegas Valley safe and more specifically, to fight crime and gang related violence. This interest, on its face and in practice, is unrelated to the suppression of ideas.

(1) Birthday Party

On August 19, 2018, the Central Intelligence Unit (CIU) learned about a party involving multiple gang members from various gangs that was taking place in a hotel room on or near Las Vegas Blvd. He obtained this information via anonymous social media pages used to track gang related activity. Brigandi recognized Corey Bass and other members from past encounters with the groups. He informed Sgt. Bauman of the CCAC FLEX Team about the pictures and videos he had witnessed. Based on the descriptions, Defendant Bauman

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believed that the party was located at the Rio. Detective Brigandi further advised Defendant Bauman that the videos and/or photographs depicted multiple firearms. Accordingly, Defendant Bauman and his Flex Team, including Defendants Kravetz, Young, and Kaur, merely went to advise Rio of individuals staying in their hotel possessing firearms. The officers never had any intent to approach the plaintiffs or intrude on the party.

Upon arriving at The Rio, hotel security informed Sgt.Bauman that they had just went up to the room and they "heard loud music and could smell a really strong odor of marijuana." *See Deposition of Andrew Baumann*, pg. 52, ll. 17-18. At this point, Baumann asked hotel security what they wished to do, as he has helped with evictions of hotel parties numerous times. *Id* at pg. 57, ll. 12-16.

Upon reaching the outside of the hotel room, marijuana odor and smoke was clearly seeping out of the door. Officers now had reason to believe drugs and guns were involved, which amounts to criminal activity, was occurring in the suite. After the Bass brothers were essentially trespassed from the premise, the officers had to dispel the reasonable suspicion of criminal activity, including the possession and consumption of narcotics and possession/consumption of narcotics while possessing a firearm.

As stated, LVMPD has a compelling interest to protect and serve the community, which includes shutting addressing criminal activity (the trespass) and the potential of any criminal activity in line with *Terry* (marijuana odor and smoke). LVMPD attempted to address the situation in the least aggressive way possible. At this point, to ensure the safety of the community, specifically those in the Rio, defendant officers employed a system to address the partygoers without endangering the community, other individuals, or the officers. Accordingly LVMPD officers had a compelling interest to address the alleged "birthday party."

(2) Funerals

According to Officer Brigandi, gang members are a recurring problem in Las Vegas, constantly involved in violent events. *See Deposition of Officer Nichoals Brigandi*, pg. 93, ll. 16-17. Therefore, because they are a constant problem, LVMPD must keep track of their

whereabouts and activities. *Id* at pg. 94, ll. 7-10. This includes monitoring the illegal street racing, retail theft, and funerals. *Id* at pg. 94, ll. 18-22.

When a gang member is killed, it becomes necessary for LVMPD to "work" that funeral. *Id* at pg. 94, ll. 22. This is done to ensure there are no retaliatory shootings. Funerals are one of the few places an entire gang may congregate, publicly, and therefore rivals can see it is an opportunity to conduct an overt violent act. Therefore, LVMPD's presence can act as a deterrent to this violence. According to Brigandi, their presence at the funerals is actually to ensure "they are able to mourn and that the funeral goes smooth." *Id* at pg. 95, ll. 3-4.

Here, plaintiffs allege that officer's presence, and in certain instances interactions, at funerals violated their freedom of expression. As stated, LVMPD, and all their specialized units, have a compelling interest to keep the community safe. Gang violence is a recurring theme in the Las Vegas valley and therefore may require monitoring. LVMPD does not take enforcement action at funerals. Essentially, Plaintiffs complain that they commit traffic infractions and are asked during the stop questions. Plaintiffs are free to refrain from answering questions unrelated to a stop. *See* NRS 171.123. As explained by Det. Brigandi, funerals are a hunting ground for gang violence. Rivals see it as an opportunity to kill as many individuals as possible, considering they will all be congregated in a small area. Therefore, LVMPD's presence is simply to eliminate or limit this violence. LVMPD's presence is not to intrude on the gang's freedom to express their condolences and conduct a proper funeral. On the contrary, Brigandi testifies their presence is encouraging successful expression. Plaintiffs' complaints are not presence at the actual funerals but any interaction with police they may have after attending a funeral. Officers are free to conduct consensual encounters and the public is not required to answer. In sum,

2. <u>LVMPD's Gang Policy is Constitutional.</u>

LVMPD interprets Plaintiffs First Amendment claim to also attack LVMPD's Gang policy for being unconstitutionally vague. A law or policy is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that people of common intelligence

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must necessarily guess at its meaning and differ as to its application." *Ovadal v. City of Madison*, 416 F.3d 531, 535–36 (7th Cir. 2005) (quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926)). In other words, the government must "articulate its aims with a reasonable degree of clarity," *Roberts v. United States Jaycees*, 468 U.S. at 629, and ensure any prohibitions are "clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This doctrine exists because "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239 (2012).

"[A] party challenging the facial validity of an ordinance on vagueness grounds outside the domain of the First Amendment must demonstrate that 'the enactment is impermissibly vague in all of its applications.' " *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir. 2003) (citation omitted). "The touchstone of a facial vagueness challenge in the First Amendment context, however, is not whether some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) (emphasis in original). Put differently, a policy is not vague in the First Amendment context, so long as it is clear what the policy proscribes "in the vast majority of its intended applications." *Id.* at 1151. "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

A statute, or here a policy, can be impermissibly vague for either of two independent reasons. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Plaintiffs assert the latter.

LVMPD's policy is not unconstitutionally vague as it clearly sets forth criteria that must be satisfied prior to designation. And, on its face, it does not implicate the First Amendment, expressive activity, or speech. Indeed, it is evident that LVMPD must follow.

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Moreover, plaintiffs have no evidence how this specific policy is arbitrarily or discriminatorily enforced. And, speculation, as asserted in the Second Amended Complaint is insufficient to maintain such a claim. *Hill*, 530 U.S. at 733 ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.' ") (citation omitted). Indeed, Plaintiffs cannot demonstrate that the alleged consequences they suffer is a direct result of the Gang policy. Thus, plaintiffs cannot show that LVMPD's Gang policy is unconstitutional.

E. PLAINTIFFS FOURTH AMENDMENT UNREASONBALE SEARCH, SEIZURE, AND DETENTION CLAIMS FAIL AS A MATTER OF LAW.

1. Plaintiffs Medlock, Reece, Green, and Riley Cannot Maintain a Fourth Amendment Claim.

Plaintiffs Medlock, Reece, Green, and Riley cannot maintain a Fourth Amendment claim against the individual named defendants as they did not personally participate in their detention and pat downs. Indeed, Officer Grimes detained, handcuffed and patted down Reece and Green. Riley was patted down by Officer LeBario. And, Medlock was handcuffed, detained and patted down by an unknown female officers. Because none of the named defendants were involved in these plaintiff's alleged constitutional violations, the Plaintiffs cannot maintain such a claim the named defendants. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (requiring personal participation in the alleged constitutional violations).

2. The odor of Marijuana and Marijuana smoke Created a Legal Basis to Detain Plaintiffs.

The general rule is that "searches and seizures conducted outside judicial process, without a warrant are per se unreasonable under the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). However, if an officer possesses sufficient information to justify a stop, an officer may make a brief investigatory stop of an individual. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). An officer must have at least a minimal level of objective justification for making a "Terry" stop. *Illinois v. Wardlow*, 528 U.S. 119, 123

(2000). The Ninth circuit holds that an officer, even acting without a search warrant, has the authority to detain the occupants of the premises while a proper search is conducted, regardless of whether or not the occupants appear dangerous. *Sanchez v. Canales*, 547 F .3d 1169 (9th Cir. 2009). Citing the Supreme Court, the Ninth Circuit noted that such a detention is constitutional regardless of whether the police had a warrant because "the additional intrusion caused by detention is slight while the justifications for detention are substantial." *Id.* at 1174.

Police officers may make "limited intrusions on an individual's personal security based on less than probable cause." *Michigan v. Summers*, 452 U.S. 692, 698 (1981). An officer briefly may detain a suspect to maintain the status quo while investigating criminal activity. *Id.* Such detentions, which are sometimes referred to as *Terry* stops, may be made on less than probable cause so long as the officers have "a reasonable, articulable suspicion that justifies their actions." *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002) (quotation omitted). The reasonable suspicion standard "merely requires a minimal level of objective justification." *Id.* (quotation omitted).

Defendant officers have testified that the marijuana odor protruding from the room served as reasonable suspicion to detain. As of August 19, 2018, recreational marijuana was legalized. NRS 453D.100. Based on this law, Plaintiffs contend that LVMPD violated their Fourth Amendment rights when they were unlawfully detained. Plaintiffs, however, misunderstand the law. Assuming that the Plaintiffs' arrests violated state law (given that Marijuana was legal), it was not necessarily a violation of their Fourth Amendment rights. The Supreme Court has rejected the notion that a violation of state law automatically violates the Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164, 173 (2008). "[W]hen a State chooses to protect ... beyond the level that the Fourth Amendment requires, these additional protections exclusively are matters of state law." *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1122 (9th Cir. 2021) (quoting *Moore*, 553 U.S. at 171, 128 S.Ct. 1598) (quotation marks and brackets omitted); *Cornel v. Hawaii*, 37 F.4th 527, 534 (9th Cir. 2022) (Cornel's arrest was reasonable under the Fourth Amendment despite the parole

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office's possible violation of the Hawai'i Penal Code). The Ninth Circuit has held that the validity of a search conducted by state law enforcement officers is ultimately a question of federal law. *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991); *see also United States v. George*, 883 F.2d 1407, 1412 (9th Cir. 1989) (citing *United States v. Chavez–Vernaza*, 844 F.2d 1368, 1372–74 (9th Cir. 1987) (evidence seized by state officers in compliance with federal law admissible without regard to state law)).

In applying federal law, marijuana odor is sufficient to satisfy reasonable suspicion to detain. *U.S. v. Cephas*, 254 F.3d 488, 191 A.L.R. Fed. 699 (4th Cir. 2001) (The court stated that the odor of marijuana alone would almost certainly have given the officer probable cause to believe that contraband was present in the apartment and that the tip given to him provided additional evidence to support probable cause); *United States v. Wright*, 844 F.3d 759, 762–63 (8th Cir. 2016) (Once the uniformed officer detected an odor of marijuana coming from Wright's person, the officer had probable cause to arrest Wright and, a fortiori, reasonable suspicion to detain him for further investigation); *United States v. Humphries*, 372 F.3d 653, 659–60 (4th Cir. 2004) (holding that "if an officer smells the odor of marijuana in circumstances where the officer can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana" and thus has "authority to arrest him without a warrant in a public place"*); United States v. Perdoma*, 621 F.3d 745, 749 (8th Cir. 2010) (Eberle had probable cause to arrest Perdoma for marijuana possession once he detected the odor of marijuana emanating from Perdoma); *United States v. Johnson*, No. 2:06-CR-00092-PMP-PA, 2007 WL 186655, at *8 (D. Nev. Jan. 18, 2007) (officers had reasonable suspicion to investigate based on odor of marijuana).

Pursuant to the recited law, plaintiffs Fourth Amendment claim regarding seizure and detention should be dismissed as a matter of law. The marijuana smoke and odor smelled by LVMPD officers and security was enough to create, at a minimum, reasonable suspicion to detain the individuals that were in the room. All of the plaintiffs were located in the room and were removed from the room. The facts known to a reasonable officer at

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the time of the encounter established that reasonable suspicion existed as to the possession and consumption of marijuana, which is a violation of federal law. Because reasonable suspicion existed, Plaintiffs cannot maintain an unlawful seizure/detention claim.

3. Detaining the entire group was reasonable under the Fourth Amendment.

The scope of permissible police activities during an investigatory detention must be reasonably related to the circumstances that initially justified the detention. *See U.S. v. Sharpe*, 470 U.S. 675, 682 (1985); *See also Hiibel v. Sixth Judicial District* Court, 542 U.S. 177, 185–86 (2004). *United States v. Clay*, 2:06CR00056-KJD-PAL, 2007 WL 37949, at *6 (D. Nev. Jan. 3, 2007). The Ninth Circuit has recognized that "[p]olice officers are entitled to employ reasonable methods to protect themselves and others in potentially dangerous situations." *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995). An officer is particularly vulnerable during a *Terry* investigative detention in part because a full custodial arrest has not been made. *Id*. A police officer in a *Terry* stop must make quick decisions on how to protect himself and others from possible dangers. *Id.*

"A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). But although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure ... the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez–Fuerte*, 428 U.S. 543, 560–61 (1976). Based on this logic, the Ninth Circuit has held that the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1194–95 (9th Cir. 2015). Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances. *Id*.

Several courts have acknowledged that police officers can have reasonable suspicion to search, or even probable cause to arrest, a group or crowd of people without

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individualized suspicion as to each person in the group. For example, in *Carr v. District of Columbia*, 587 F.3d 401 (D.C.Cir.2009), a group of persons arrested in a protest march sued under § 1983, alleging that they were arrested without probable cause. They argued that the government was required to prove that the police possessed probable cause to believe that each individual person arrested was engaged in the crime of rioting. *Id.* at 406. But the D.C. Circuit rejected that argument, stating that it would impose "an impossible burden" on police and holding that "[p]olice witnesses must only be able to form a reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law." *Id.* at 408.

In *Lyall*, the Ninth Circuit affirmed a jury instruction that the defendants were not required to have individualized suspicion with respect to each plaintiff in order to have reasonable suspicion to search and detain them. *Lyall*, 807 F.3d 1194-95. To be sure, the fact that the officers did not see specific plaintiffs with weapons or engaging in violent behavior, and that many of the plaintiffs did not match the police call's description of the suspects as "male Hispanic juveniles," bore on the question whether the searches and seizures were reasonable. Standing alone, however, the officers' lack of individualized suspicion did not make the searches and seizures unlawful. Id.

The Ninth Circuit distinguished *Ybarra* from the *Lyall* case. In *Ybarra*, the police received a tip from an informant that "Greg," a bartender at a certain tavern, possessed heroin and would have some for sale at the tavern on a particular date. *Ybarra v. Illinois*, 444 U.S. 85 (1979). On the basis of the tip, the police obtained a warrant to search the tavern and Greg's person for heroin and other contraband. *Id.* at 87–88. When the police arrived at the tavern to execute the warrant, they announced upon entering that they would be conducting a "cursory search for weapons" of each of the nine to thirteen customers in the tavern. One of the officers frisked Ybarra, a patron in the tavern, and felt a cigarette pack in Ybarra's pocket during the frisk; a few minutes later, he frisked Ybarra again, took the pack out of his pocket, and found six packets of heroin inside. Ybarra was subsequently indicted for, and convicted of, possession of heroin. *Id.* at 88–89.

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The Supreme Court held that the search violated Ybarra's Fourth Amendment rights. The Court explained the police lacked probable cause to believe that Ybarra was committing any crime: "Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers." *Id.* at 91. Indeed, the only thing the police officers knew about Ybarra was that he was "present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Id.* The Court deemed this fact insufficient to give the police probable cause to believe that Ybarra was committing a crime. The Court went on to hold that the initial search could not be upheld as a reasonable Terry frisk, because Ybarra had done nothing to indicate to the police that he was armed and dangerous. *Id.* at 93–94.

The *Lyall* Court explained that Ybarra stands for the proposition that, if a person is simply present in the vicinity of potential criminal activity, without doing anything else to indicate that he is engaging in criminal activity or that he is armed and dangerous, the police do not have probable cause to search him or reasonable suspicion sufficient to detain him and frisk him for weapons. Ybarra does not, however, imply that the police can never possess reasonable suspicion or probable cause unless it is individualized. If a group or crowd of people is behaving as a unit and it is not possible (as it was in Ybarra) for the police to tell who is armed and dangerous or engaging in criminal acts and who is not, the police can have reasonable suspicion as to the members of the group. *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1194–95 (9th Cir. 2015).

Here, multiple plaintiffs had active arrest warrants, there were firearms present, and gang members had been identified. All attendees were certainly behaving as a group, as they have plead to, and it would have been impossible for officers to identify who is armed and dangerous, who is engaging in criminal activity, and who is not. Therefore, it was not unreasonable under the Fourth Amendment for the officers to detain everyone in the party until more information could be deciphered in order to ensure their own safety.

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4. The Frisk of Plaintiffs was Reasoanable.

"Reasonable suspicion requires far less than actual proof of wrongdoing by a preponderance of the evidence, but it does require that the officer be able to articulate facts which create grounds to suspect that criminal activity may be a foot". *United States v. Sokolow*, 490 U.S. 1, 7 (1989). The "totality of the circumstances" is considered when evaluating "reasonable suspicion". *Sokolow*, 490 U.S. at 7. In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v. Ohio*, 392 U.S. at 20 (1968). An officer evaluating whether reasonable suspicion is present is entitled to draw on his "own experience and specialized training to make inferences from and deductions about the cumulative information available." *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

In *Terry v. Ohio*, the Supreme Court recognized that effective crime prevention and detection requires that officers be allowed to detain individuals briefly when there is reasonable suspicion to believe a crime has been committed. 392 U.S. 1, 21-24 (1968). *Terry* also recognized that law enforcement officers need to protect themselves and the public at large from violence that may ensue in the course of such encounters. 392 U.S. at 23-24. It therefore held that if police officers are justified in believing that the individuals whose suspicious behavior, they are investigating at close range are armed and presently dangerous to the officers or to others, they may conduct a limited protective search for concealed weapons. *Terry*, 392 U.S. at 24; *see also Adams v. Williams*, 407 U.S. 143, 146 (1972) (an officer may conduct a limited protective search for concealed weapons if there is reasonable belief the suspect may have a weapon).

An officer may frisk an individual for weapons where he has reason to believe that he is dealing with an armed and dangerous individual. *Terry*, 392 U.S. at 27. *Terry* held:

> ... where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, wherein the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where

> nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

The Ninth Circuit has "identified a wide variety of factors that can support a reasonable belief that an individual is armed." *United States v. Flatter*, 456 F.3d 1154, 1157 (9th Cir. 2006). Significant weight is given to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon. *Id.* Sudden movements, or repeated attempts to reach for an object that is not immediately visible may give rise to a reasonable suspicion a defendant is armed. *Id.* at 1158. The nature of the crime suspected, and whether it is associated with weapons may create reasonable suspicion for a pat down search. *Id.* An officer need not be certain that an individual is armed; the issue is whether a reasonably prudent man could believe, based on "specific and articulable facts," that his safety or that of others is in danger. *Terry*, 392 U.S. at 27; *see also Maryland v. Buie*, 494 U.S. 325, 327, 337 (1990).

Courts have routinely approved pat-downs of individuals when narcotics are present. *U.S. v. Sakyi*, 160 F.3d 164, 169 (4th Cir.1998) (guns often accompany drugs); *People v. Collier*, 166 Cal. App. 4th 1374, 1377–78, 83 Cal. Rptr. 3d 458, 459–60 (2008)("[I]n connection with a lawful traffic stop of an automobile, when the officer has a reasonable suspicion that illegal drugs are in the vehicle, the officer may, in the absence of factors allaying his safety concerns, order the occupants out of the vehicle and pat them down briefly for weapons to ensure the officer's safety and the safety of others.); *Somee v. State*, 124 Nev. 434, 442–43, 187 P.3d 152, 158 (2008) (reasonable articulable suspicion of narcotics activity is a factor which, in light of the totality of the circumstances, may give rise to a reasonable articulable suspicion that a suspect poses a danger to the officer or the public such that a brief pat-down search of the suspect is justified).

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The Ninth Circuit has also concluded that a criminal's companion may be frisked without individualized reasonable suspicion. *United States v. Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971). While some courts have specifically denounced the automatic companion rule, other courts have approved of the same. *Trice v. United States*, 849 A.2d 1002 (D.C.App.2004) ("immediate safety concerns, so long as they are reasonable under the circumstances, will justify the police in stopping, or stopping and frisking, the companion of a person whom the police have reason to seize, even if the police have no particularized suspicion that the companion is armed, dangerous, or engaged in criminal activity"); *People v. Evans*, 22 Ill.App.3d 733, 317 N.E.2d 734 (1974); *United States v. Simmons*, 567 F.2d 314, 319 (7th Cir.1977) (approving of *Berryhill* "where a search is limited to a 'pat down' "); *United States v. Poms*, 484 F.2d 919, 922 (4th Cir. 1973) ("Since we agree that [all companions may be searched under Berryhill], we see no reason why officers may not similarly engage in a limited search for weapons of a known companion of an arrestee, especially one reported to be armed at all times, who walks in on the original arrest by sheer happenstance"); *United States v. Del Toro*, 464 F.2d 520, 521 (2d Cir. 1972) (holding permissible "pat-down" of sole companion of narcotics dealer confronted late at night on street under the reasoning of *Terry v. Ohio*, and noting that, although "appellee was not uncooperative, and ... the police were present in force, it would nevertheless be unreasonable to expect them to expose themselves to a violent escape attempt, however futile, when the limited intrusion of a pat-down would promptly defuse what officers experienced in narcotics enforcement perceived as a potentially explosive situation," citing *Berryhill*); *State v. Clevidence*, 153 Ariz. 295, 298, 736 P.2d 379, 382 (Ct.App. 1987) ("The right to a limited search for weapons extends to a suspected criminal's companions at the time of arrest"); *Lewis v. United States*, 399 A.2d 559, 561 (D.C. 1979) ("The fact that his companion had just been arrested for unlawful possession of a firearm is a particularly compelling justification for the frisk of appellant"); *People v. Myers*, 246 Ill.App.3d 542, 545-546, 186 Ill.Dec. 443, 616 N.E.2d 633 (1993) ("While a police officer may not search a person merely because he is with someone who has been arrested, the officer may conduct a pat-

down of the arrested person's companions to protect himself or others"); *State v. Moncrief*, 69 Ohio App.2d 51, 59, 431 N.E.2d 336 (1980) ("The right to frisk for the limited purpose of searching for weapons has been extended to other occupants of a stopped automobile").

Here, there are several factors that warranted a pat down by defendant officers Bauman, Kravetz, and Kaur. These circumstances include but are not limited to the clothing worn by each of the Plaintiffs; the Plaintiffs' conduct (i.e., Semper evading police); the fact that officers were outnumbered; gang affiliation related to the party; known firearms amongst the group of individuals; known firearms after retrieving three from two people, and it being a high-crime area. As defendant officers were completely outnumbered, dealing with plaintiffs affiliated to a gang, and in a high crime area, it was necessary to pat down plaintiffs to ensure their own safety. Additionally, Semper was noticeably evading the officers, raising concern. Lastly, all plaintiffs were dressed in clothing that made it impossible to ascertain if they were carrying weapons without patting them down.

Additionally, it should be noted that both Johnson and Semper articulated that they had firearms on their person before a pat-down occurred. Johnson's and Semper's statement that they had firearms on their person prior to the frisk of their person demonstrates that the officers had individualized, articulable suspicion that Johnson and Semper were both armed and dangerous. Likewise, under *Berryhill* and *Lyall*, LVMPD officers had a legal basis to frisk the group as a whole. Accordingly, summary judgment is warranted on plaintiffs' unlawful search claim.

5. <u>Alternatively, LVMPD officers are entitled to Qualified Immunity as the Law was not Clearly Established.</u>

At a minimum, qualified immunity should be given. There is no law by the Supreme Court or the Ninth Circuit that marijuana cannot serve as a basis for detention in that states that have legalized it, especially considering that marijuana is still unlawful under the Controlled Substances Act. The Ninth Circuit affirmed qualified immunity under similar circumstances. *Beasley v. City of Keizer*, No. CIV. 09-6256-AA, 2011 WL 2008383, at *5–6 (D. Or. May 23, 2011), aff'd, 525 F. App'x 549 (9th Cir. 2013). There, the issue was

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whether police had probable cause to search plaintiff's home pursuant to a warrant which identified "the manufacture of hash oil as the crime and conduct alleged." Oregon had legalized medical use of marijuana back in 1998 but did not legalize recreational use until 2015. The District of Oregon held that the officers had probable cause to search plaintiff's home, based on plaintiff's federal 1983 claim and the federal prohibition of marijuana. Affirming the district court's order, the Ninth Circuit reasoned, whether OMMA provides qualified persons an exception from state criminal charges, or an affirmative defense is irrelevant in the context of plaintiff's civil rights action brought under 42 U.S.C. § 1983. *See, e.g., Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or. 159, 178, 230 P.3d 518 (2010) ("To the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it without effect.") (internal citations omitted). Instead, the analysis depends on federal law, which classifies marijuana as a schedule I controlled substance. *See* 21 U.S.C. § 812 Schedule I(c)(10). This classification prohibits, among other things, the possession of marijuana outside of approved research projects. *See* 21 U.S.C. §§ 812, 823(f). Furthermore, the prohibition of marijuana exists regardless of medical needs. *See, e.g., Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007). The Court held that it was not clearly established that a search conducted by local officials pursuant to a state search warrant violates the Fourth Amendment when those officials do not have probable cause of a state violation but do have probable cause of a federal violation. Accordingly, LVMPD Defendants are entitled to qualified immunity as the possession and consumption of marijuana remains a federal crime.

F. PLAINTIFFS HAVE NO EVIDENCE TO SUPPORT THEIR MONELL CLAIMS IN RELATION TO THE FOURTH AMENDMENT.

Plaintiffs attempts to saddle LVMPD with liability by obtaining municipal liability. This is commonly referred to as *Monell* liability. Courts describe *Monell* liability as

"rigorous." To obtain *Monell* liability, Plaintiff must demonstrate that her constitutional rights were violated.

1. Relevant *Monell* Law

In 1978, the Supreme Court issued its landmark decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). In *Monell*, the Court held that when a municipal policy of some nature is the cause of the unconstitutional actions taken by municipal employees, the municipality itself will be liable. Liability only exists where the unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by municipal officers, or where the constitutional deprivation is visited pursuant to governmental "custom" even though such a "custom" has not received formal approval. *Monell*, 436 U.S. at 690-91. The Court defined "custom" as "persistent and widespread discriminatory practices by state officials." *Id.* at 691, (citing *Adickes v. S.H. Dress & Co.*, 398 U.S. 144, 167-68 (1970)).

The doctrine of respondeat superior does not apply to 42 U.S.C. §1983 claims against municipalities. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) (citing *Monell*, 436 U.S. at 691). In other words, municipal liability is not established merely by showing that a municipal employee committed a constitutional tort while within the scope of employment. *Id.* at 478-79. For liability to attach to a municipality, a plaintiff must establish that the wrongful act complained of was somehow caused by the municipality. *Monell*, 436 U.S. at 691-95. Such liability can be imposed only for injuries inflicted pursuant to a governmental "policy or custom." *Monell*, 436 U.S. at 694. In addition, there must be shown to be an affirmative link between the policy or custom and the particular constitutional violation alleged. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). The alleged policy or custom must be the "moving force" for the constitutional violation in order to establish liability under §1983. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (citing *Monell*, 436 U.S. at 694). Causation must be specific to the violation alleged, meaning that merely proving an unconstitutional policy, practice, or custom however loathsome, will not establish liability unless the specific injury alleged relates to the specific

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unconstitutional policy proved. *Board of County Comm'rs of Bryan City, Oklahoma vs. Brown*, 520 U.S. 397, 404 (1997). Once each of these elements are met, a plaintiff must further prove that the unconstitutional policy that caused her injury was the result of something more than mere negligence on the part of the municipality, and was instead the result of "deliberate indifference" – a state of mind that requires a heightened level of culpability, even more than mere "indifference." *Id.* at 411. In fact, the *Monell* standard for municipal liability has been interpreted as more restrictive than "common law restrict[ions] [on] private employers' liability for punitive damages." *See David Jacks Achtenburg, Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2191 (2005). Proof of a single incident is insufficient to establish a custom or policy. *Tuttle*, 471 U.S. at 821.

As the Ninth Circuit has explained, a plaintiff may recover from a municipality under §1983 on three different theories: commission, omission, or ratification. *See Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1249-50 (9th Cir. 2010). "Commission" refers to a local government implementing its official policies or established customs when those polices or customs themselves inflict the constitutional injury. *Id.* at 1249. "Omission" refers to a local government's deliberate indifference to a constitutional right and includes, for example, the inadequate training of government officials. *Id.* "Ratification" refers to an authorized policymaker's purposeful approval of a subordinate's unconstitutional conduct. *Id.*

2. <u>A Constitutional Violation is Required.</u>

Importantly, for a *Monell* claim to proceed, PlaintiffS must have suffered a constitutional violation. And, that particular violation must have occurred as a result of a LVMPD pattern, practice, or custom. Based on the analysis above, Plaintiffs constitutional violation claims related to the Fourth Amendment fail as a matter of law. Accordingly, Plaintiffs cannot maintain a *Monell* claim against LVMPD and summary judgment is appropriate.

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3. LVMPD Does Not Have an Unconstitutional Policy, Practice or Custom

A municipality may be held liable "when execution of a government's policy or custom, whether made by its lawmakers or by those edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 694. A plaintiff seeking to impose liability on a municipality due to an official policy must establish the existence of a formal policy pursuant to which the defendant was acting when he or she violated the plaintiff's rights. *See Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Monell liability may attach where a local government has failed to train or supervise their employees. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). Inadequacy of police training may serve as basis for § 1983 municipal liability only where failure to train amounts to deliberate indifference to rights of persons with whom police come into contact; only where municipality's failure to train its employees in relevant respect evidence "deliberate indifference" to rights of its inhabitants can such shortcoming be properly thought of as city "policy or custom" that is actionable under 42 U.S.C.A.§ 1983.

Alleged abuses of police power are sufficiently arbitrary to rise to constitutional magnitude only when the conduct at issue "shocks the conscience." *County of Sacramento*, 523 U.S. at 843. The Supreme Court stated that whether the point of the conscience-shocking is reached when injuries are produced with culpability falling within the middle range, something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence,' is a matter for closer calls. *Daniels v. Williams*, 474 U.S. at 334 (1986). The level of culpability required to meet the conscience-shocking standard depends on the context. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). In determining whether deliberate indifference is sufficient to shock the conscience, or whether the more demanding standard of purpose to harm is required, "the 'critical consideration [is] whether the circumstances are such that actual deliberation is practical.'" *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). Where actual deliberation was practical, then an officer's "deliberate indifference may suffice to shock the conscious." On the other hand,

where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to a legitimate law enforcement objective. *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010); *United States v. Lanier*, 520 U.S. 259, 272 n. 7, (1997); *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

Here, Plaintiffs have no evidence of an unconstitutional policy, practice or custom that is deliberately indifferent to the constitutional rights of plaintiffs. Thus, summary judgment must be granted in favor of LVMPD.

VI. CONCLUSION

Based on the foregoing, LVMPD Defendants respectfully request the Court grants their Motion for Summary Judgment.

Dated this 25th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LVMPD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 25th day of March, 2024.

☒ I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

☒ I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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