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UNITED STATES DISTRICT COURT

DISTRICT COURT OF NEVADA

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

Plaintiffs,

vs.

LAS VEGAS METROPOLITAN POLICE

Case Number:

2:20-cv-01875-JCM-EJY

OPPOSITION TO LVMPD DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT

DEPARTMENT, in its official capacity; ANDREW BAUMAN, 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; SUPREET KAUR, 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; THERON YOUNG, individually and in his capacity as a Las Vegas Metropolitan Police Department Officer,

Defendants.

Plaintiffs Lonicia Bowie, Michael Green, Corey Johnson, Ashley Medlock, Clinton Reece, Demarlo Riley, and Connie Semper, represented by the ACLU of Nevada, hereby file this opposition to Defendant LVMPD's Motion for Partial Dismissal of Plaintiff's Second Amended Complaint [ECF No. 92] pursuant to the Court's September 27, 2022, minute order [ECF No. 93].

Plaintiffs respectfully request that the Court deny the Defendant's motion in part, as described below. Opposition is made pursuant to LR 7-2 and based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument made in support of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Las Vegas Metropolitan Police Department ("LVMPD"), Andrew Bauman ("Bauman"), Matthew Kravetz ("Kravetz"), Supreet Kaur ("Kaur"), David Jeong ("Jeong"), and Theron Young ("Young") (hereinafter referred to collectively as "Defendants" and/or "LVMPD officers") filed their Motion to Dismiss [ECF No. 92] on September 26, 2022. The Court issued a Minute Order on September 27, 2022 [ECF No. 93] ordering Plaintiffs to respond within 14 days of the Order. Pursuant to FRCP 6(a)(1)(C), this response in opposition of the motion is timely filed.

I. Legal Standard

A motion to dismiss "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a

complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a 12(b)(6) motion to dismiss, the Court must accept as true all material allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150, n. 2 (9th Cir. 2000). The Court must also construe the allegations of the complaint in the light most favorable to the nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). While it is true that, in light of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a complaint must state "plausible" claims, that does not require a court to determine whether facts alleged are in fact true when considering a motion to dismiss. As the majority explained in *Iqbal*:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see also *Twombly*, 550 U.S. at 555 (complaint should be evaluated "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."). "And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citation and quotation marks omitted).

II. Legal Argument

Defendant, LVMPD, through its Motion to Dismiss [ECF No. 92] has raised challenges to officers being named in their official capacities, as well as Plaintiffs' First, Second, Third, Fourth, Ninth, and Tenth causes of action. Regarding preliminary matters:

- The inclusion of the individual defendants under Plaintiff's First Cause of Action pursuant to Title VI was an unintentional holdover from the First Amended Complaint. Plaintiffs do not oppose Defendant's motion to remove individual defendants from Plaintiff's First Cause of Action; ECF No. 92 at 5:1–11.

- Without conceding Defendants' underlying legal arguments regarding intercorporate conspiracy doctrine and § 1985, Plaintiffs do not oppose dismissal of Plaintiffs' Ninth and Tenth Causes of Action alleging civil conspiracy.
- To the extent that naming the individual defendants in their official capacity under Plaintiffs' Second, Third, Fourth, Fifth, and Seventh Causes of Action are redundant to naming Defendant LVMPD under Plaintiffs' Second, Third, Fourth, Sixth, and Eighth Causes of action, Plaintiffs do not oppose Defendants motion to dismiss individual defendants Bauman, Kravetz, Kaur, Jeong, and Young in their official (but not personal) capacity. ECF No. 92 at 4:17–28.

However, Plaintiffs do oppose Defendants' motion to the extent Defendants alleges Plaintiffs Second, Third, and Fourth Causes of Action are insufficiently pled.

Under Plaintiffs' Second Cause of Action, Plaintiffs have sufficiently pled a claim pursuant the Fourteenth Amendment. Defendants' designation of plaintiffs as "gang members" and "gang affiliates" and the resulting in a detrimental change in legal status is sufficient to establish a claim pursuant to the Fourteenth Amendment's "stigma plus" doctrine. Despite Defendants' claims to the contrary, Plaintiffs are not required to (1) show any additional harm beyond the change in legal status, (2) use the Defendants' definition instead of the plain meaning of "gang affiliate" to establish that the Defendants defamed them, or (3) identify all individual officers that caused the constitutional violation.

Pursuant to Plaintiffs' Third and Fourth Causes of Action, Plaintiffs have sufficiently pled claims pursuant the First Amendment. Defendants designated Plaintiffs as "gang members" and "gang affiliates" because Plaintiffs engaged in associative activities protected by the First Amendment, and those same designations unconstitutionally chills future associative activity. Defendants' arguments that (1) the First Amendment right to intimate association is limited to the "parent-child" relationship, (2) funerals and birthday parties are not forms of expressive association, and (3) LVMPD policies, procedures, and practices have not chilled Plaintiffs' intimate and expressive associations are not supported by current controlling authority. In the alternative, even if Defendants' representations are accepted as true, Plaintiffs have still sufficiently pled a

facial challenge to LVMPD Policy 5/206.16 as overbroad under the First Amendment.

A. Plaintiffs have pled sufficient facts to support their Second Cause of Action under the Due Process Clause of the Fourteenth Amendment.

A viable claim exists pursuant to the Due Process Clause of the Fourteenth Amendment when the plaintiff has "(1) a liberty or property interest protected by the Constitution," (2) the government deprives that interest, and (3) that deprivation occurred without proper process." *Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022). "Although damage to reputation alone is not actionable, such reputational harm caused by the government can constitute the deprivation of a cognizable liberty interest if a plaintiff was stigmatized in connection with the denial of a more tangible interest." *Id.* This standard is satisfied if the plaintiff "suffers stigma from governmental action plus alteration or extinguishment of a right or status previously recognized by state law." *Id.* Designation as a "gang member" or "gang affiliate" in the state of Nevada is sufficient to satisfy both prongs as these designations are both stigmatizing and cause the designees' legal status to change under Nevada law.

1. Plaintiffs' designation as "gang affiliates" is stigmatizing because they are not affiliated with a gang, only an individual designated by LVMPD as a "gang member".

Under the "stigma plus" doctrine, plaintiffs are deprived of a cognizable liberty interest when they suffer a "reputational harm caused by the government" in conjunction with an "alteration or extinguishment of a 'right or status previously recognized by state law." *Fikre*, 25 F.4th at 776. If the government defames the plaintiff, that is sufficient to show that the plaintiff suffered a "reputational harm". *See Synergy Project Mgmt.* v. *City of San Francisco*, 859 Fed. Appx. 99, 101 (9th Cir. 2021). Such defamation occurs when the government (1) asserts of an objective fact and (2) that assertion is false. *See Pegasus v. Reno Newspaper, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) ("Defamation is a publication of a false statement of fact."). In this matter, Defendants, including Defendant LVMPD through its employees acting in their official capacity, have asserted an objective fact: Plaintiffs Medlock, Johnson, and Bowie are each affiliated with a criminal gang. That assertion is false: Plaintiffs Medlock, Johnson, and Bowie do not affiliate with any criminal gangs.

Defendants argue that they are entitled to dismissal because their assertion that Plaintiffs are "gang affiliates" is true under LVMPD's definition of the term, ECF No. 92 at 9:10–20, but this argument conflicts with the very purpose of defamation law: to protect "an objective interest in one's reputation – either economic, political, or personal – *in the outside world*." *Banerjee v. Cont'l Inc., Inc.*, No. 2:16-CV-669 JCM (VCF), 2016 U.S. Dist. LEXIS 141891, at *24 (D. Nev. Oct. 11, 2016) (emphasis added); *see also Flowers v. Carville*, 266 F. Supp. 2d 1245, 1252 (D. Nev. 2003) ("If it is possible for a statement to have different meanings, one of which is defamatory, the trier of fact will resolve the ambiguity."). The stigma associated with the term "gang affiliate" stems from the meaning it has to "the outside world": that the designee affiliates or associates with the criminal gang itself, not merely a sibling or friend who is a member of that gang. This interpretation is supported in how Nevada law uses the term "affiliate" in the gang context, focusing on organizations, not members. *See* NRS 176.153 (requiring presentence report to include "any information relating to the defendant being *affiliated with . . . a criminal gang . . .*") (emphasis added); NRS 193.168 (creating enhanced penalties for "any person who is convicted of a felony committed knowingly . . . *in affiliation with, a criminal gang . . .*") (emphasis added).

A relationship with Bass by itself is insufficient to establish that Plaintiffs are "gang affiliates" under the term's plain meaning. By designating them as "gang affiliates", LVMPD is representing that Plaintiffs are affiliates of a gang, not an individual, but have designated Plaintiffs as "gang affiliates" based solely upon their connection to an individual rather than a criminal organization. ECF No. 89 ¶ 309–10, 318–19, 326–27. In turn, Plaintiffs Johnson, Medlock, and Bowie admit to being associated with Cory Bass as friends and family but were unaware of his connection to the any criminal organization.[1] ECF No. 89 ¶ 311, 320, 328. That LVMPD can designate them "gang affiliates" without any evidence that they are connected to a criminal gang is precisely what gives rise to their Due Process claim.

[1] While it can be reasonably inferred from the Second Amended Complaint, *see LSO, Ltd. v. Stroh*, 205 F.3d at 1150 (requiring the Court to make reasonable inferences in favor of the Plaintiffs), Plaintiffs can amend their complaint to explicitly state that Johnson, Medlock, and Bowie do not affiliate with any gangs and did not do so on August 19, 2018.

2. Plaintiffs sufficiently pled that they have suffered a change in legal status; Plaintiffs are not required to show that they have suffered additional consequences beyond change in legal status.

To establish a "stigma plus" claim, Plaintiffs are only required to show that that their designations as "gang members" and "gang affiliates" are stigmatizing and have resulted in an "alteration or extinguishment of a right or status previously recognized by state law." *Fikre* at 35 F.4th at 776. Defendants argue that Plaintiffs must show more than a change in legal status, ECF No. 92 at 9:22–25, but this position is unsupported by Defendant's only legal citation, an authority from outside this jurisdiction. *See State v. Thompson*, 70 F.3d 390 (5th Cir. 1995) (holding that the plaintiffs must only show that "the state *sought* to remove or significantly alter a life, liberty, or property interest) (emphasis added).

Designation as a "gang member" results in an explicit change in legal status under Nevada law. First, "gang members" face additional criminal penalties and additional civil liability under Nevada statute. Pursuant to Nevada law, status as a "gang member" in LVMPD's database must be disclosed to a judge prior to sentencing in any felony case. NRS 176.153(2). Second, as it is a criminal act under Nevada law for anyone to sell or otherwise provide a firearm to a person designated as a "gang member," such a designation necessarily impinges on the right to bear arms. NRS 202.362. Furthermore, the Nevada's State Board of Parole is authorized to restrict parolees, as a matter of statute, from associating with designated "gang members" with no exceptions if that authority is exercised. NRS 213.1263. Designation as a "gang member" has a direct impact on the First Amendment right to engage in intimate and expressive association. *See supra* section B. In addition to these legal consequences, designation as a "gang member" may have an impact on employment, military service, and frequency of police contact.

Similarly, designation as a "gang affiliate" results in a change in legal status. Like the "gang member" designation, status as a "gang affiliate" in LVMPD's database must be reported to a judge prior to sentencing under Nevada law. NRS 176.153(2). Furthermore, due to criteria #8 under LVMPD Policy 5.206/16, an individual designated as a "gang affiliate" is at higher risk of designation as a "gang member" and the full panoply burdens that come with such a designation, leading individuals to avoid wearing colors or images they may otherwise wear to avoid "gang

attire," tattoo on their body to avoid "gang specific" or "non-specific, gang related" tattoos, making gestures that may be misconstrued as "symbols and/or hand signs" representing a gang, or travelling to areas designated as "gang areas" or otherwise risk a downgraded designation. *See Progeny v. City of Wichita*, No. 6:21-CV-01100-EFM-ADM, 2022 U.S. Dist. LEXIS 4677, at *36–37 (D. Kan. Jan. 10, 2022) (finding that these restrictions, in addition to an identifiable stigma, where sufficient to satisfy the "stigma plus" requirements because the "designation [on a gang list] has the effect of restricting Plaintiffs' ability to do significant things that they otherwise have the right to do freely.").

3. Plaintiffs are not required to identify each LVMPD employee who participated in the LVMPD process that designated Plaintiffs as "gang members" and "gang affiliates" to raise a Due Process claim.

As previously observed by the United States District Court of Nevada, plaintiffs may raise a Due Process claim against an entity defendant if they can show that the entity is "subject to § 1983 liability" and that the entity "subjected [them] to an unconstitutional custom or policy." *See Adams v. McDonald*, 2008 U.S. Dist. LEXIS 62418, *28 (D. Nev. August 15, 2008). A governmental entity, like LVMPD, may be held liable for violations of the Due Process Clause under a "stigma plus" analysis if the "stigma" and the "plus" were both caused by that entity's officials acting in their official capacity. *See Owen v. Independence*, 445 U.S. 622 (1980) (finding that the City of Independence could be held liable pursuant to 42 U.S.C. § 1983 for procedural due process violation pursuant to a "stigma plus" theory based upon the concerted actions of its officials acting in their official capacity); *see also Progeny*, 2022 U.S. Dist. LEXIS 4677, at *32–37, 51 (maintaining "stigma plus" claim against municipality for "gang member" designations while dismissing individual defendants from the suit).

Defendants argue that the Plaintiffs may only raise a "stigma plus" Due Process claim against individuals rather than entities, and that the same individuals rather than entity would need to the be source of both "stigma" and "plus". ECF No. 92 at 10:10–28, 11:1–13. The Defendant's own legal authorities, *URI Student Senate v. Town of Narrgansett* and *Hawkins v. Rhode Island Lottery Commission*, do not support their position.

First, *URI Student Senate* never states that "stigma plus" Due Process claims cannot be made against entities, only that "the stigma and the incremental harm" must derive from "distinct

sources . . . even if *both sources are governmental entities*." 631 F.3d 1, 10 (1st Cir. 2011) (emphasis added). Second, the plaintiff in *Hawkins* was denied relief because he failed to identify any party that had caused both the stigma and the incremental harm suffered by the plaintiff since the plaintiff failed to identify a single entity that all the defendants represented, not that he improperly raised a "stigma plus" claim against a governmental entity. 238 F.3d at 115 – 16 (noting that "though the defendants are all representatives of the state, the state is not a party."). The court in *Hawkins* specifically recognized that the plaintiff's *failure* to identify a governmental entity distinguished the matter from *Owen v. City of Independence*, where a city was held liable under the "stigma plus" analysis because the city was actually named as the defendant, and all the relevant conduct was completed city official acting in their official capacity. *Id.*

The Plaintiffs here easily satisfy all requirements recognized by the District Court of Nevada. As pled in the Second Amended Complaint, all of Plaintiffs allegations related to their designation as "gang members" and "gang affiliates" and associated lack of due process are related to Defendant LVMPD's policies, procedures, and practices as enacted by LVMPD's staff in their official capacity. There is no legal authority requiring Plaintiffs to name all LVMPD staff who participated in designation process or barring Plaintiffs from naming LVMPD as a defendant

B. Plaintiffs have pled sufficient facts allegations to support their Third and Fourth Causes of Action under the First Amendment.

The First Amendment "encompasses a freedom of association right, which includes the freedom of intimate expression and the right to associate with others in activities otherwise protected by the First Amendment." *Dible v. City of Chandler*, 502 F.3d 1040, 1050 (9th Cir. 2007). Furthermore, "[i]t has long been established that guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." *Santopietro v. Howell*, 857 F.3d 980, 989 (9th Cir. 2017).

As discussed below, Plaintiffs have pled sufficient factual allegations to establish that Defendants have violated and continue to violate the Plaintiffs' rights to both intimate and expressive association.

1. As made clear by the *Rotary Club* factors, the right to intimate association under the First Amendment protects many different types of relationships, including but not limited to the "parent-child" relationship.

Under the First Amendment, the right to intimate association "protects those relationships, including family relationships, that presuppose deep attachments and commitments to necessarily few other individuals with whom one shares not only a special community of beliefs but also distinctly personal aspects of one's life." *Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). While this right certainly covers relationships between family members, including the relationship between parents and children, it is not restricted to those relationships. *Id.*; *see Club Level, Inc. v. City of Wenatchee*, 618 Fed. Appx. 316, 318 (9th Cir. 2015) (finding that "the roommate relationship easily qualifies" for protection under the First Amendment right to intimate association), *quoting Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012); *see also United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018) (stating that sibling relationships are protected under the First Amendment right to intimate association). When considering whether a plaintiff is protected under the First Amendment's right to intimate association, this Court must apply the factors laid out in *Rotary Club* to determine whether the plaintiff's association is protected as an intimate association: (1) the size of the association; (2) the purpose of the association; (3) selectivity of the association; and (4) whether others are excluded. 481 U.S. at 537.

Defendants misinterpret the Ninth Circuit's position in *J.P. v. Cnty of Alameda*, 803 F. App'x 106 (9th Cir. 2020), in arguing that the First Amendment right to intimate association is limited to the "parent-child" relationship and *per se* excludes sibling relationships. ECF No. 92 at 6:8–22. In *J.P.*, the plaintiff alleged that the County of Alameda generally violated their First and Fourteenth Amendment rights due to the wrongful death of the plaintiff's sibling while in foster care. *J.P.*, 803 F. App'x at 108. The *J.P.* plaintiff did not allege that the government took direct action against the plaintiff for actually associating with that sibling, as is the matter currently before the Court. *Id.* In turn, the *J.P.* Court characterized the plaintiff's claim as a "loss-of-familial-association", analyzed the claim pursuant to existing Fourteenth Amendment precedent as the issue was related to the death of a family member, and then determined that the Plaintiff could not use

the First Amendment to conduct an end-run around the Fourteenth Amendment limitation. *Id.* at 109. In stating that the plaintiff had no "loss-of-familial-association" claim under the First Amendment, the Court specifically relied on other cases involving the deaths of family members. *See J.P.*, 803 Fed. Appx. at 109, *citing Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987) (matter arising from the death of a child), *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991) (matter arising from the death of a sibling).

Here Plaintiffs' claims are not "loss-of-familial-association" claims. Plaintiffs do not allege that Defendants caused the deaths of Cory Bass or anyone else involved in this matter. Rather, Plaintiffs allege that the Defendants have directly regulated the Plaintiffs' act of association. Furthermore, the Ninth Circuit has explicitly rejected the position that the First Amendment right to intimate association mirrors the right under the Fourteenth Amendment. When a district court relied on *Ward* under circumstances similar to *J.P.* to find that a sibling relationship was *per se* unprotected under the First Amendment, the Ninth Circuit found that "*Ward* addressed only Fourteenth Amendment intimate association-claims brought by adult siblings," reversed the district court, and remanded for the district court to apply the *Rotary Club* factors. *Mann v. Sacramento Police Dep't*, 803 Fed. Appx. 142, 143–44 (9th Cir. 2020). Similarly, the Court must apply the *Rotary Club* factors to the associations at issue.

Looking specifically to August 18, 2019, Defendants designated all Plaintiffs "gang members" and "gang affiliates" due to Plaintiffs' presence at a private party celebrating Bass's birthday. ECF No. 89 ¶ 309–10, 317, 318–19, 326–27, 332, 343, 357. Applying the *Rotary Club* factors, the party was an intimate association. While 32 people is an astounding number for a single *Terry* stop, it was still a small enough party to fit into a single hotel suite. ECF No. 89 ¶ 33–34. The purpose of the association was a personal matter, a birthday celebration for Cory Bass. ECF No. 89 ¶ 25. Most people in attendance were friends and family, as seen by Plaintiffs' personal relationships to Cory. ECF No. 89 ¶ 32–35. And the party itself was a private affair: when LVMPD arrived, the door was closed, no music was audibly coming from the room when Defendants arrived, and the party was sufficiently intimate that LVMPD officers felt comfortable designating every person present either as a "gang member" or "affiliated" with the party. ECF No. 89 ¶ 72–

75, 186**.** In sum, all Plaintiffs associated by purposefully gathering for a private birthday party, and according the *Rotary Club* factors, that association is entitled to protection pursuant to the First Amendment.

Furthermore, Defendants explicitly designated Plaintiff Medlock a "gang affiliate" because she associated with her sibling, the sort of relationship and association that is at the core of the First Amendment's right to intimate association. ECF No. 89 ¶ 327**.** Unlike in *J.P.* and *Ward* where the defendants denied plaintiffs the theoretical opportunity to associate with their siblings in the future, the Defendants here punished Medlock for in-fact associating with her brother. Applying the *Rotary Club* factors, her association with Bass on August 19, 2018, was inherently small, selective, and exclusive: it is an association that existed because they were family, the most intimate of associations. As to purpose, Medlock associated with Bass on August 19, 2018, to celebrate her brother's birthday, a fundamentally personal reason to associate. ECF No. 89 ¶ 25**.** Medlock's association with Bass on August 19, 2018, due to their familial relationship is entitled to protection pursuant to the First Amendment.

2. The Plaintiffs have specifically pled two specific instances where the Defendants have violated the right to expressive associate.

In addition to intimate association, the First Amendment protects expressive association, which is associative conduct convened for the purpose of First Amendment activity. *Dible City of Chandler*, 502 F.3d at 1050. This right necessarily includes "the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," *Santopietro v. Howell*, 857 F.3d 980, 989 (9th Cir. 2017). "Association for the purpose of engaging in protected activity is itself protected by the First Amendment." *Id.* at 989. In other words, to determine whether a gathering is protected as an expressive association, the Court must ask (1) did the participants intentionally gather, and (2) was the purpose of the gathering to engage in conduct protected under the First Amendment. *See id.* at 989–92 (finding that two street performers dressing up in costume, taking photographs with tourists, and soliciting tips together were engaged in expressive association).

Even in light of *Santropietro* finding that two women soliciting tips dressed as "sexy cops"

constituted "expressive association", *id.*, Defendants suggest that right to expressive association only applies to individuals who "take positions on public questions," ECF No. 92 at 7:12–14. The Defendants' position fails to recognize the full extent of activity protected under the First Amendment. Defendants cite *Dallas v. Stranglin* to support its position, but *Stranglin* explicitly recognized that "the right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics." 490 U.S. 19, 26 (1989).[3]

Defendant LVMPD's policies, practices, and procedures related to gang enforcement necessarily include a wide range of conduct protected by the right to expressive association. After all, its policies explicitly designate individuals as "gang members" and "gang affiliates" based solely upon association without exceptions for associations dedicated to expressive activities. While this necessarily implicates concerns related to chilling, the Plaintiffs have sufficiently pled direct interference.

On August 19, 2018, all Plaintiffs were engaged in expressive association because a birthday party is a form of expressive association. The Plaintiffs intentionally gathered at the Rio Hotel and Casino for a party, satisfying the first prong. ECF No. 89 ¶ 25. Satisfying the second prong, the purpose of that gathering was to express a message to Cory Bass: "Happy Birthday". ECF No. 89 ¶ 25. While they may not be political or religious message, statements such as "Happy Birthday" are still entitled to protection under the First Amendment because they intend "to convey a particularized message . . ., and in the surrounding circumstances the likelihood was great that the messaged would be understood by those who viewed it." *Hilton v. Hallmark Cards*, 599 F.3d 894, 904 (9th Cir. 2010) (finding that the statement "Have a smokin' hot birthday" was protected First Amendment speech). In turn, the Defendants designated all Plaintiffs either "gang members"

[3] The Defendants are also incorrect to the extent they believe that *Stranglin* found that associating for the purpose of dancing is not "expressive association". The *Stranglin* Court, in evaluating whether a "dance hall" was a form of expressive association, determined that the individuals patronizing a business establishment did not qualify as an "association" under the First Amendment because the individuals did not intend to gather but rather met by chance; the Court did *not* rule that an actual association that had the specific purpose of dancing would be unprotected under the First Amendment. 490 U.S. at 24–26 ("Unlike the Court of Appeals, we do not think the Constitution recognizes a generalized right of "social association" that includes *chance* encounters at dance halls") (emphasis added). A night at a dance hall may not qualify as expressive association, but a performance by a ballet troupe would certainly qualify under the First Amendment.

or "gang affiliates" explicitly due to the Plaintiffs' engagement in expressive association, i.e. participating in Cory Bass's birthday celebration. ECF No. 89 ¶ 310, 317, 319, 327, 332, 343, 357.

Defendants' direct interference with Plaintiffs' right to expressive association continued after August 19, 2018. Defendant LVMPD and its officers investigated Plaintiffs Riley and Reece, conducting traffic stops on both men and completing field interview cards on both occasions, because Riley and Reece attended funeral services for individuals designated as "gang members" by LVMPD. ECF No. 89 ¶ 444, 439. In fact, LVMPD explicitly trains its officers to conduct surveillance and document individuals attending such funerals. ECF No. 89 ¶ 302–303, 418. Funerals are quintessential forms of expressive associations: they are intentional gatherings to engage in religious rites dedicated to mourning the recently deceased. It is difficult to imagine an activity that is a purer example of expressive association outside the political context.

3. Defendant LVMPD's policies, practices, and procedures as alleged in the Second Amended Complaint necessarily chill First Amendment activity related the right to association, both intimate and expressive.

State action that "would chill or silence a person of ordinary firmness from future First Amendment activities" violates the First Amendment. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). In the context of the right to associate, exacting scrutiny is triggered by state action which "*may* have the effect of curtailing the freedom to associate." *Ams. For Property Found. v. Bonta*, 141 S. Ct. 2373 (2021). Even informal government means of ""coercion, persuasion, or intimidation" can "chill" speech in violation of the First Amendment. *White*, 227 F.3d at 1228. Investigating an individual for engaging in activity protected by the First Amendment is sufficient to establish a "chilling" violation even if there is no subsequent prosecution. *See id.* at 1228 (finding that an investigation by a government agency "unquestionably chilled the plaintiffs' exercise of their First Amendment rights."). Defendant LVMPD's Policy 5.206/16 designation of individuals as "gang members" and "gang affiliates" based on any association with a designated "gang member" and LVMPD's trainings instructing officers to target "gang member" funerals for investigation necessarily chill associations protected under the First Amendment.

As pled in the Second Amended Complaint, Defendant LVMPD's Policy 5.206/16 authorizes its officers to designate individuals as "gang members" and "gang affiliates" based in

part or entirely on association with a designated gang member, regardless the purpose of that association. ECF No. 89 ¶ 236, 238; *see Progeny*, 2022 U.S. Dist. LEXIS 4677, at *48–52 (finding that similar standards used for the Wichita Police Department' "Gang List" supported a claim of a First Amendment chilling). As this authority permits this designation for *any* association with a "gang member", including associations unrelated to gang activity, it necessarily includes associations protected by the First Amendment even under Defendants' narrow interpretations of intimate and expressive associations. Relationships with parents, children, and romantic partners are implicated. Expressive activities such religious services, political actions, and group performing arts are implicated. Such a policy forces the Plaintiffs to decide whether to avoid these associations or have consequences inflicted upon themselves and others.

For Plaintiffs Green, Reece, and Riley, who have been designated as "gang members", every person they meet runs the risk of being designated a "gang affiliate" or even a "gang member" and documented in GangNet, regardless the reason for that contact.

For Plaintiffs Medlock, Bowie, and Johnson, any association with individuals labelled "gang members", including Cory Bass, runs the risk of having their status as a "gang affiliate" renewed or, if they happened to satisfy any other criteria such as wearing "gang attire," have their status downgraded to "gang member".

Beyond LVMPD Policy 5.206/16, LVMPD's practice of targeting funerals for proactive enforcement by investigating participants and pretextually stopping vehicle leaving memorials necessarily chills First Amendment activity related to those rites. Such investigations are not based on criminal activity but specifically due to the target's engagement in First Amendment religious activity.

4. In the alternative, as they have been designated by Defendant LVMPD as "gang members" and "gang affiliates" due to their associative activity, Plaintiffs have sufficiently pled a challenge to LVMPD Policy 5.206/16 as overbroad on its face in violation of the First Amendment.

Under the overbreadth doctrine of the First Amendment, "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). The overbreadth doctrine also applies to policies issued by government agencies, including

the policies of law enforcement agencies. *See Hernandez v. City of Phoenix*, 43 F.4th 966, 980–82 (determining that police officer pled valid facial overbreadth challenge to portions of department's social media policies). When raising an overbreadth claim under the First Amendment, a plaintiff may still argue that a policy is "unconstitutional as to others" even if the policy was "constitutionally valid as applied to [them]." *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 891 (9th Cir. 2007). Under those circumstances, a plaintiff need only show that they have "suffered an injury in fact" and they "can satisfactorily frame the issues on the behalf of [the] non-parties." *Id.*

As previously discussed, Plaintiffs have sufficiently pled that their First Amendment rights have been violated by Defendants because (1) they were designated as "gang members" and "gang affiliates" due to engaging in intimate and expressive association on August 18, 2019, and (2) their designation as "gang members" and "gang affiliates" has "chilled" them from engaging in intimate and expressive association out of fear that others will be similar designated. However, even if this Court accepts all of the Defendants' legal and factual representations, the Plaintiffs have still pled sufficient facts to challenge LVMPD Policy 5/206.16 as overbroad on its face. On its face, LVMPD Policy 5/206.16 designation criteria necessarily includes "parent-child" relationships, which Defendants acknowledge are "intimate associations" as a basis for designation. ECF No. 89 ¶ 236, 238; ECF No. 92, 6:11–12**.** On its face, LVMPD 5/206.16 designation criteria necessarily includes expressive associations "who take positions on public questions." ECF No. 89 ¶ 236, 238; ECF No. 92, 7:12–13. Even under Defendants own interpretation of the law, the Plaintiffs have standing to challenge the Policy on behalf of individuals whose associations are impacted by the Policy's sweeping criteria for "gang member" and "gang affiliate" designations.

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CONCLUSION

Plaintiffs request that the Court deny in part the Defendants' Motion for Partial Dismiss, as described above. Plaintiffs further request leave to supplement their Second Amended Complaint if the Court finds that the Second Amended Complaint fails to state a claim for any of the contested claims and is inclined to dismiss a claim for relief.

Dated: October 11, 2022

AMERICAN CIVIL LIBERTIES UNION OF NEVADA

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPRESENTED PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on October 11, 2022.

☐ 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:

Cory Bass, 2621 Sommer Ct., North Las Vegas, NV 89032

Carlos Bass, 2621 Sommer Ct., North Las Vegas, NV 89032

Breanna Nellums, 4012 Warm Hearted Ct., North Las Vegas, NV 89032

Antonio Williams, 3912 Red Trumpet Ct., North Las Vegas, NV 89081

/s/ Christopher Peterson
An employee of ACLU of Nevada