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Department, Andrew Bauman, Matthew Kravetz, Supreet Kaur,

David Jeong, and Theron Young

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CONNIE SEMPER¹, 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' REPLY IN
SUPPORT OF MOTION FOR PARTIAL
DISMISSAL OF PLAINTIFFS' SECOND
AMENDED COMPLAINT**

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.

**LVMPD DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL
DISMISSAL OF PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendants, the Las Vegas Metropolitan Police Department (the "Department" or "LVMPD"), 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 Reply in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint [ECF No. 92]. This Reply 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

Plaintiffs concede to several of LVMPD Defendants arguments, and therefore, the Court must at least grant the motion as to those admissions. Plaintiffs challenge LVMPD Defendants' motion as to the First and Fourteenth Amendment claims. Plaintiffs cite no authority to establish that they have a protected interest under the First Amendment either in relation to intimate association or expressive association. As such, Plaintiffs' First Amendment claims must be dismissed. Similarly, the law does not support Plaintiffs' Fourteenth Amendment claim as pled. Accordingly, dismissal is appropriate.

II. LEGAL ARGUMENT

A. PLAINTIFFS CANNOT MAINTAIN A FIRST AMENDMENT CLAIM.

1. Plaintiffs Failed to Establish a Right to Intimate Association.

Plaintiffs' reliance on the Ninth Circuit's decision in *Mann v. Sacramento Police Dep't*, 803 F. App'x 142, 144 (9th Cir.) (Mann II), *cert. denied sub nom. City of Sacramento, California v. Mann*, 208 L. Ed. 2d 229, 141 S. Ct. 622 (2020) ignores the subsequent decision expressly concluding that non-cohabiting siblings **do not** have a First Amendment right to intimate association. *See Mann v. City of Sacramento*, No. 21-15440, 2022 WL 2128906, at *1 (9th Cir. June 14, 2022) (Mann IV).

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1 In *Mann II*, the Court held that its previous decision in *Ward v. City of San Jose*, 967
2 F.2d 280 (9th Cir. 1991), “did not create a cohabitation requirement or purport to govern
3 First Amendment claims.” 803 F. App’x at 143. The Court also held that its previous
4 decision in *Mann v. City of Sacramento*, 748 F. App’x 112 (9th Cir. 2018) (“Mann I”),
5 simply “recognized that cohabitation was one of several objective indicia that courts may
6 consider when assessing whether Plaintiffs were deprived of their intimate-association
7 right.” *Id.*

8 On remand, upon applying the Rotary Club factors, the district court determined that
9 the plaintiff did assert an intimate association claim. *Mann v. City of Sacramento*, 521 F.
10 Supp. 3d 917, 924 (E.D. Cal. 2021), rev’d, No. 21-15440, 2022 WL 2128906 (9th Cir. June
11 14, 2022) (Mann III) Analyzing the first factor, size, the district court determined that each
12 plaintiff’s relationship with his or her brother involved only two people, and was enmeshed
13 within a “tightknit family unit” of five children and two parents. *Id.* Looking to the second
14 factor, the district court ruled that the selectivity factor weighed in favor of a protected
15 interest because of the blood relationship. *Id.* The district court elaborated that the
16 allegations asserted in the complaint demonstrated that the siblings maintained intimate
17 relationship after they moved out of their childhood home and demonstrate that plaintiffs
18 actively chose to keep one another in their lives and engaged in activities emblematic of an
19 intimate sibling relationship. *Id.* Similarly, the lower court determined that the plaintiffs
20 excluded “excluded [others] from critical aspects of the relationship” by sharing intimate
21 experiences in a way that only siblings or parents and children can. *Id.* Reviewing the
22 purpose factor, the district court held that the plaintiffs alleged facts that demonstrate the
23 purpose of their relationship with their brother was to serve an intimate human relationship
24 that necessarily entailed deep attachments and commitments. Finally, addressing the
25 frequency and significance of the relationship between plaintiffs and their brother, the
26 complaint alleged that they were in “constant contact” with one another, “made sure that
27 their brother knew he was welcome in their homes,” and provided care to him in the months
28 leading up to his death by allowing him into the most private areas of their lives. *Id.*

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1 As a result of the district court’s decision, the defendants appealed. *See Mann IV*.
2 There, the Ninth Circuit expressly recognized that neither plaintiffs nor the district court
3 point to any authority that has applied the *Rotary Club* factors and held that non-
4 cohabitating siblings have a First Amendment right to familial association. *See Mann v. City*
5 *of Sacramento (Mann IV)*, 521 F. Supp. 3d 917, 919–20 (E.D. Cal. 2021). The Ninth Circuit
6 further held that neither *Rotary Club* nor its progeny extended the First Amendment to cover
7 the circumstances alleged in *Mann IV* and reversed the district court’s decision. Similarly,
8 Plaintiffs cannot point to any authority that permits non-cohabiting siblings to maintain an
9 intimate association claim under the First Amendment.

10 Even applying the *Rotary Club* factors, the Court cannot find that Plaintiffs have an
11 intimate relationship protected by the First Amendment based on the allegations in the
12 Complaint. To determine whether a particular relationship is protected by the right to
13 intimate association we look to “size, purpose, selectivity, and whether others are excluded
14 from critical aspects of the relationship.” *Bd. of Dirs. of Rotary Int’l v. Rotary Club of*
15 *Duarte*, 481 U.S. 537, 545, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). None of this
16 information is plead in the Second Amended Complaint.

17 In the wake of *Rotary Club*, the Ninth Circuit has held that the right to intimate
18 association as guaranteed by the First Amendment extends to parents and children, *see Lee*
19 *v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); *Keates v. Koile*, 883 F.3d 1228 (9th
20 Cir. 2018), as well to unrelated, cohabitating roommates, *see Fair Housing Council of San*
21 *Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (applying
22 *Rotary Club* factors: “it’s hard to imagine a relationship more intimate than that between
23 roommates” because the home forms the “center of our private lives”).

24 As the Supreme Court stated in *Smith v. Org. of Foster Families for Equality and*
25 *Reform*, 431 U.S. 816, 844 (1977), a case where the Court suggested (though did not decide)
26 that foster parents and children have a constitutionally-protected liberty interest in their
27 association, “the importance of the familial relationship ... stems from the emotional
28 attachments that derive from the intimacy of daily association, and from the role it plays in

1 ‘promot(ing) a way of life’ through the instruction of children, as well as from the fact of
2 blood relationship.”

3 Likewise, in *Fair Housing Council*, the Ninth Circuit reasoned that roommates are
4 entitled to protection under the First Amendment because they have “unfettered access to the
5 home” and thus “learn intimate details most of us prefer to keep private,” “note [their
6 roommates’] comings and goings,” and are “fully exposed to [their roommates’] belongings,
7 activities, habits, proclivities, and way of life.” *Fair Housing Council*, 666 F.3d at 1221.

8 There are no facts alleged in the Second Amended Complaint that could allow this
9 Court to infer that the Rotary Club factors weigh in favor of recognition of a protected
10 interest.

11 **2. Plaintiffs have no Expressive Association Interest.**

12 Parties bringing an expressive-association claim under the First Amendment must
13 demonstrate that they are asserting their right to associate “for the purpose of engaging in
14 those activities protected by the First Amendment—speech, assembly, petition for the
15 redress of grievances, and the exercise of religion.” *Hurley v. Irish-Am. Gay, Lesbian and*
16 *Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *cf. Dallas v. Stanglin*, 490 U.S. 19, 24
17 (1989) (explaining group’s coming together for different associational purpose, like dancing,
18 does not “involve the sort of expressive association that the First Amendment has been held
19 to protect”). Plaintiffs assert that attending a birthday party is expressive conduct.
20 However, Plaintiffs fail to cite to a single case in support of such a position. Instead, the case
21 relied upon by Plaintiffs pertain to “speech” not expressive conduct about an individual
22 saying “happy birthday.” Likewise, Plaintiffs fail to cite to any authority that the attendance
23 of funerals is also protected under the First Amendment. The facts as asserted by Plaintiffs
24 are more akin to *Dallas*, which expressly rejected that a group coming together for the
25 purpose of dancing is not protected under the First Amendment.

26 **3. There is No Chilling if There is no First Amendment Right.**

27 Plaintiffs cannot establish a First Amendment protected activity. Without an interest
28 protected by the First Amendment, there can be no claim for Chilling under the First

1 Amendment. *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th
2 Cir.1999) (citing *Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir.1994)).

3 **B. PLAINTIFFS CANNOT MAINTAIN A *MONELL* CLAIM AGAINST**
4 **LVMPD UNDER THE FOURTEENTH AMENDMENT.**

5 Plaintiffs must show that, as the result of being listed in the CACI, “a right or status
6 previously recognized by state law was distinctly altered or extinguished.” *Paul v. Davis*,
7 424 U.S. 693, 711 (1976); *see also Siekert v. Gilley*, 500 U.S. 226, 233 (1991) (reaffirming
8 that an injury to reputation by itself is not a protected liberty interest under the Fourteenth
9 Amendment).

10 As the Court explained in *Paul*, when the chief of police in *Constantineau* posted the
11 plaintiff's name on a list forbidding the sale of alcohol to her, it “significantly altered her
12 status as a matter of state law” by depriving her “of a right previously held under state
13 law[—]the right to purchase or obtain liquor in common with the rest of the citizenry.” *Paul*,
14 424 U.S. at 708, 96 S.Ct. 1155. The Court concluded that “it was that alteration of legal
15 status which, combined with the injury resulting from the defamation, justified the
16 invocation of procedural safeguards.” *Id.* at 708–09, 96 S.Ct. 1155.

17 In *Paul* itself, the Louisville Chief of Police placed Davis' name on a flyer distributed
18 to Louisville merchants containing a list of individuals thought to be active in shoplifting.
19 *Id.* at 695, 96 S.Ct. 1155. In contrast to the mandatory nature of the statute in *Constantineau*,
20 the flyer merely “came to the attention” of Davis' supervisor who warned him not to repeat
21 his actions in the future. *Id.* at 696, 96 S.Ct. 1155. The Court found that this harm to Davis'
22 reputation was not sufficient to create a liberty interest. *Id.* at 712, 96 S.Ct. 1155. Notably,
23 no law had required the Chief of Police to distribute this flyer, nor did any law require
24 employers to check the list. Thus, although any impairment to Davis' employment
25 opportunities “flow[ed] from the flyer in question,” his injury only occurred because the
26 flyer happened to have “c[o]me to the attention of [his] supervisor.” *Id.* at 696–97, 96 S.Ct.
27 1155.
28

1 The analysis in Paul applies equally to the statutes relied upon by Plaintiffs. The
2 designation itself does not cause the “plus” harm to Plaintiffs. Rather, the impairment under
3 Nevada law results not in the designation but in the Plaintiffs committing a crime. Thus,
4 there is no change in legal status under Nevada law by the alleged designation. And, without
5 an underlying constitutional violation, there can be no liability under *Monell*, the only theory
6 in which LVMPD can be held liable in § 1983 actions. *Monell v. Dep’t of Social Services of*
7 *City of New York*, 436 U.S. 658 (1978)

8 **III. CONCLUSION**

9 Based on the foregoing, LVMPD Defendants respectfully request the Court grants
10 their Motion for Partial Dismissal of Plaintiffs’ Second Amended Complaint.

11 Dated this 19th day of October, 2022.

12 MARQUIS AURBACH

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LVMPD DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS' SECOND AMENDED COMPLAINT** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 19th day of October, 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:

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/s/ Krista Busch
An employee of Marquis Aurbach

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