No. ______

In the

Supreme Court of the United States

CITY OF SACRAMENTO, SACRAMENTO POLICE DEPARTMENT, SAMUEL D. SOMERS, JOHN C. TENNIS, AND RANDY R. LOZOYA,

Petitioners,

v.

ROBERT MANN, SR., VERN MURPHY-MANN, AND DEBORAH MANN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment protects intimate associations absent expressive activity;

2. If so, whether that protection exceeds what the Due Process Clause provides;

3. Whether sibling relationships can qualify as intimate absent cohabitation; and

4. Whether liability under 42 U.S.C. § 1983 for associational deprivation requires an intent to harm the protected association, rather than also encompassing incidental results.

PARTIES TO THE PROCEEDING

Petitioners are the City of Sacramento, Sacramento Police Department, Samuel D. Somers, John C. Tennis, and Randy R. Lozoya. They were defendants in the District Court and appellees in the second appeal.

Respondents are Robert Mann, Sr., Vern Murphy-Mann, and Deborah Mann. They were plaintiffs in the district court and appellants in the second appeal.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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DECISIONS BELOW

The district court's initial order denying Petitioners' motion to dismiss is reported at 2017 U.S. Dist. LEXIS 152383 and is reprinted in the Appendix (App.) at 19-21. The circuit court's first panel decision is reported at 748 Fed. Appx 112 and is reprinted at App. 13-18. The district court's subsequent order is reported at 2019 WL 1168533 and is reprinted at App. 5-9. The circuit court's second panel decision is reported at 803 Fed. Appx 142 and is reprinted at App. 2-4.

JURISDICTION

The circuit court entered judgment on April 30, 2020. App. 85. Petitioners timely filed a joint petition for rehearing *en banc* on May 13, 2020. The circuit court denied *en banc* rehearing on June 10, 2020. App. 23-24. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Three siblings of Joseph Mann sue City of Sacramento, its chief of police, and the two officers who shot him for depriving those siblings of a putative First Amendment right of intimate relationship with Joseph – a liberty interest the siblings assert differs from that sheltered by the Due Process Clause. Because the Ninth Circuit alone imposes liability for incidental associational deprivation, such as when police officers seize or kill a suspect for reasons independent of his close relationships, Respondents essentially invoke section 1983 as a surrogate for state law wrongful death liability to relatives state law does not recognize as next of kin.

The officers' reason for shooting did not allegedly involve speech, petitioning, worship, or assembly. As do several other circuits, the Ninth suffers from an internal split over whether the First Amendment safeguards family associations unengaged in expressive activity. The first appellate panel mooted the split by stating the analysis would be the same under either the First or Fourteenth Amendments, and found the siblings failed to allege facts sufficient for intimate relationship protection, adding that, for siblings, intimacy requires cohabitation at the time of state action. But, after the district court entered judgment for City and the Officers because the amended complaint failed to allege Joseph Mann resided with

any sibling, a second appellate panel reversed, holding that sibling relationships can, even in the absence of due process protection, receive First Amendment protection regardless of expressive activity or cohabitation.

Amply manifested by the conflicting panel decisions in this case, no aspect of constitutional law suffers from greater disagreement amongst and within the circuit courts than protection for intrinsic relationships outside a common household. Although this Court devoted considerable attention over the past century to due process protection for individual liberty to make fundamental private choices such as marriage, procreation, cohabitation, and child-rearing, one of the Court's opinions, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987), uniquely referred to the First Amendment as the liberty source, a deviation that contributed to the circuit courts' complete disarray.

Absent this Court's intervention, not only will three significant questions about the scope of constitutional protection for intrinsic associations remain in national turmoil, but an equally important practical deterrent to prompt settlement of claims will remain in the Ninth Circuit, where the identity of potential plaintiffs cannot be feasibly ascertained. This action provides an ideal factual and procedural vehicle to resolve these issues because it undisputedly includes each key factual and legal component – a man not engaged in protected speech killed by police for reasons unrelated to his siblings, who were not part of a common household, which led to City settling with the estate and next of

kin, only to face a new suit based on the First Amendment where two appellate panels disagreed about the general scope of constitutional protection.

A. INITIAL DISTRICT COURT PROCEEDINGS

Within a month of Joseph Mann's death, his father as next of kin and on behalf of Joseph's estate sued City of Sacramento, Chief Somers, and Officers Tennis and Lozoya in the Eastern District of California ("*Mann I*"). App. 37. The case settled by City's payment to the father of $719,000. *Id.* Several months after the settlement, Respondents and two other siblings filed this action, alleging the shooting deprived them of their First and Fourteenth Amendment rights to intimate relationship with Joseph. App. 25-52. The complaint alleged the siblings' biological kinship with Joseph but did not contain facts either describing their interactions or connecting the Officers' reason for shooting with the siblings. App. 29-30. Because the siblings lack standing to sue for wrongful death under California law, no state law claims were alleged.[1] App. 45-50.

The Officers unsuccessfully moved to dismiss based on the siblings' lack of standing to sue. App. 20. After finding the siblings had conceded the lack of due process protection for their relationships, the district court framed the issue as "whether § 1983 actions for loss of association under the First Amendment are subject to the same limitation" and answered that question negatively based in part on the corresponding

[1] See Calif. Code of Civil Procedure § 377.60(a).

reference to family relationship protection in *Rotary Club*, 481 U.S. at 545.[2] App. 20-21. The district court candidly questioned the wisdom of broader First Amendment protection, quipping "[h]ere it might more appropriately be said that bad law makes tough cases." App. 21.

B. The First Panel Proceeding

The Officers appealed from the denial of qualified immunity, and the Ninth Circuit reversed. App. 13-18 ("*Mann II*"). The unanimous memorandum decision briefly cited some of the circuit's conflicting precedent as to the extent of First Amendment associational protection, and found the siblings failed to allege facts sufficient to show an associational deprivation "under any theory recognized by this court" in that neither expressive activity nor intimate relationships were historically described, quoting the same passage from *Rotary Club* as had the district court. App. 14-17. The decision continued to say that, because the same analysis governs the intimate relationship right "regardless whether we characterize it under the First or Fourteenth Amendments," the rejection by *Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991) of associational liberty between siblings unless they are cohabitating meant Respondents would otherwise lack

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[2] "We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" (partially quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

standing to sue. App. 17. The panel remanded the case to the district court with an express grant of discretion whether to allow an amended complaint. App. 18.

C. FURTHER DISTRICT COURT PROCEEDINGS

The district court granted leave to amend, resulting in a first amended complaint by Respondents. App. 5, 54-82. Although the pled constitutional bases for liability remained the same, Respondents added considerable history regarding Joseph's residences until the year of his death, at which point the description of his living arrangements became vague and undifferentiated between those three siblings. App. 57-61, 77-81. However, Respondents did disclose that Joseph often left whichever home he had been staying at, and remained away long enough for Respondents to look for and retrieve him. App. 61.

Petitioners again moved to dismiss, contending the factual averments did not show Joseph had chosen to reside with any sibling plaintiff at the time of his death. App. 6-7. The district court described the law of the case via *Mann II* as "adult, non-cohabitating siblings do not enjoy a constitutional right to intimate association," deemed the record as showing a series of visits or lodgings rather than actual shared residence, and granted the motion without leave to amend. App. 5-9. Judgment was entered that day. App. 10.

D. THE SECOND PANEL PROCEEDING

Respondents appealed. The second panel, which consisted of no judges from the first panel, reversed. ("*Mann III*"). App. 2-4. The memorandum decision

characterized *Mann II*'s requirement siblings cohabitate to qualify for intimate relationship protection as "*dicta*," limited *Ward v. City of San Jose*'s denial of sibling protection to due process claims, and reasoned that *Mann II*'s grant of discretion to the district court regarding amendment counter-indicated an intent to treat *Ward* as controlling First Amendment claims. App. 3-4. Yet, Mann *III* was silent about *Mann II*'s statement "we analyze the right of intimate association in the same manner regardless whether we characterize it under the First or Fourteenth Amendments." *Id*. *Mann III* concluded by remanding the case "for consideration of Plaintiffs' First Amendment claim under the standard set forth in *Rotary Club* . . ." App. 4. Although the Officers raised as an alternative defense qualified immunity for lack of clearly established law regarding a sibling First Amendment associational right, the panel did not address it. App. 2-4.

Petitioners jointly sought rehearing *en banc* based on the intra-circuit and inter-circuit splits about First Amendment protection for non-expressive associations, and regarding sibling relationship protection, but the court denied rehearing. App. 23-24.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ADDS TO A CIRCUIT PLURALITY REGARDING FIRST AMENDMENT PROTECTION FOR NON-EXPRESSIVE ASSOCIATIONS

Mann III undeniably regards the First Amendment as protecting non-expressive associations – a proposition that remains highly contested both within the Ninth Circuit (which division *Mann III* ignored), and elsewhere. As suggested above, the plurality partially stems from *Rotary Club*'s description of *Roberts* as placing intimate relationship protection in the First Amendment, whereas *Roberts*' discussion of family relationships makes no mention of the First Amendment as the source of that "fundamental element of personal liberty," either directly or by citation to other decisions (468 U.S. at 617-621); rather Justice Brennan's opinion specified the First Amendment solely when addressing expression (*id*. at 618, 622-623).

Ironically, the Ninth Circuit was one of the first appellate courts to examine *Rotary Club* and *Roberts* in light of this Court's prior intrinsic relationship decisions; *IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192-1193 (9th Cir. 1988) concluded that protection resided solely under the Due Process Clause unless the intimate relationship also had an expressive component, citing *Roberts*.

The Seventh and Tenth Circuits soon joined the Ninth in limiting First Amendment protection to expressive activity, a position those two circuits

maintain.[3] But the Fifth and Eleventh Circuits reached the opposite conclusion, to which they still adhere.[4]

Notwithstanding *IDK*, the Ninth Circuit split internally even before *Mann III*.[5] The Second, Third, Fourth, and Sixth Circuits suffer from similar

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[3] *Burger v. County of Macon*, 942 F.3d 372, 374 (7th Cir. 2019) ("[t]he right of intimate association is secured by the Fourteenth Amendment, not the First Amendment"); *Swank v. Smart*, 898 F.2d 1247, 1252 (7th Cir. 1990) (op. of J. Posner, "it is sometimes suggested — erroneously, in light of *Roberts* and *Stanglin* — that the First Amendment protects nonexpressive associations"), *cert. denied*, 498 U.S. 853; *Christensen v. County of Boone, IL*, 483 F.3d 454, 462–63 (7th Cir. 2007); *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993) (citing *IDK* and *Swank*); *Muniz-Savage v. Addison*, 647 Fed. Appx 899, 905 (10th Cir. 2016) (citing *Griffin*).

[4] *Mote v. Walthall*, 902 F.3d 500, 506 (5th Cir. 2018); *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996); *Louisiana Debating & Literary Assoc. v. City of New Orleans*, 42 F.3d 1483, 1492-94 and 1500 (5th Cir. 1995); *Gaines v. Wardynski*, 871 F.3d 1203, 1213 (11th Cir. 2017) ("[t]he question in this case is not whether there is a First Amendment right to intimate association; there is"); *Shahar v. Bowers*, 114 F.3d 1097, 1102 at n. 9 (11th Cir. 1997) ("[t]he Supreme Court has identified the origin of the right to intimate association as First Amendment freedom of association," citing *Rotary Club*).

[5] Compare *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018), with *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) and *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) ("we 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").

dissension and confusion.[6] The Eighth Circuit categorically mooted the question by saying the same

[6] Compare *Sanitation and Recycling Industry, Inc. v. City of New York* (2d Cir. 1997) 107 F.3d 985, 996 ("as several circuits have held, the right to intimate association lies not in the First but in the Fourteenth Amendment") and *Gorman v. Rensselaer County,* 910 F.3d 40, 47 (2d Cir. 2018) (using due process analysis for lack of protected speech) with *Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 187 (2d Cir. 2017) ("'freedom of association' protected by the First Amendment has been generally understood to encompass two quite different types of associational activity"). See *United States v. Thompson*, 896 F.3d 155, 167 (2d Cir. 2018) ("[o]ur Court has not determined whether the right to intimate association finds its roots in the First Amendment or in the Due Process Clauses"), *cert. denied*, 139 S. Ct. 2715 (2019). Compare *Clayworth v. Luzerne County, Pa.*, 513 Fed. Appx 134, 137 (3d Cir. 2013) ("Clayworth's First Amendment claim fails because the right he asserts—the right to intimate association with family members—is anchored instead in the Fourteenth Amendment"); *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille,* 799 F.3d 216, 223 (3d Cir. 2015) ("[t]here are two such freedoms protected by the First Amendment: 'intimate association and expressive association'"). Compare *Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 146 (4th Cir. 2009) (1st Amend. protects both intimate and expressive assocs., citing *Roberts*) with *Willis v. Town Of Marshall, N.C.*, 426 F.3d 251, 261 (4th Cir. 2005) ("a constitutionally protected right to associate depends upon the existence of an activity that is itself protected by the First Amendment," citing *Roberts*). Compare *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 587 (6th Cir. 2013) (dismissing 1st Amend. claim on grounds intimate association protection falls exclusively under the 14th Amend., citing *Roberts*) with *Sowards v. Loudon County Tenn.*, 203 F.3d 426, 432 (6th Cir. 2000) ("we have analyzed the right of intimate association under the First Amendment"). See *Hartwell v. Houghton Lake Cmty. Sch.*, 755 F. App'x 474, 477-478 (6th Cir. 2018) (noting internal split and opting for solely due process protection).

liability analysis would apply regardless.[7] Neither the First, nor the D.C., Circuit has considered the question. Accordingly, no majority position exists. State high courts are similarly divided.[8]

II. CIRCUIT COURTS ALSO DIVIDE ON WHETHER THE ASSOCIATIONAL RIGHT RECEIVES DIFFERENT PROTECTION UNDER THE FIRST AMENDMENT

Nor can the question of First Amendment protection be easily dismissed as purely academic. Although some courts, like *Mann II* and the Eighth Circuit, deemed the liability standard identical, others share *Mann III*'s view of broader, or at least different, First Amendment protection. Compare *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) ("[a]lthough the right to marry enjoys independent protection under both the First Amendment and the Due Process Clause, the Supreme Court has held that the same analysis applies in each context") and *Matusick v. Erie County Water Authority*, 757 F.3d 31, 57 at n. 17 (2d Cir. 2014) ("the precise constitutional origins of this right are not, in themselves, critical to our analysis")

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[7] *Muir v. Decatur County, Iowa*, 917 F.3d 1050, 1054 (8th Cir. 2019).

[8] Compare *Am. Legion Post #149 v. Washington State Dep't of Health*, 192 P.3d 306, 322-323 and n. 27 (Wash. 2008) and *Madison Teachers, Inc. v. Walker*, 851 N.W.2d 337, 352 (Wis. 2014) with *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 608 (Cal. 1997) and *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011); all of which cite *Roberts,* yet read it differently regarding the First Amendment's scope.

with *Sowards*, 203 F.3d at 433 ("cases involving the fundamental right to marry under the Due Process Clause of the Fourteenth Amendment are not applicable to Sowards' right of intimate association claim under the First Amendment"); *Stalter v. County of Orange*, 345 F. Supp. 3d 378, 389 at fn. 3 (S.D.N.Y. 2018) (1st Amend. analysis pertains to action against an individual relationship, whereas due process fits regulation of a class). See *J.P. by & through Villanueva v. County of Alameda*, 803 Fed. Appx 106, 110 (9th Cir. 2020) (dissent asserted 1st Amend. right is "doctrinally distinct" from due process); *Hartwell*, 755 F. App'x at 478 (questioning if divergent judicial analyses stem from "the prior confusion about whether the First or Fourteenth Amendment protects intimate association").

III. THE DECISION BELOW ALSO ENHANCES A SPLIT CONCERNING SIBLING PROTECTION

Inconsistent with *Mann II*, *Mann III* holds that sibling relationships can be protected even absent cohabitation. Here too the Ninth Circuit further divides itself. See *J.P. v. County of Alameda*, 803 Fed. Appx at 109 (no sibling protection under 1st Amend. or 14th). Nor is there consensus elsewhere. The Second and Tenth Circuits expressly recognized general sibling protection,[9] and the Third Circuit suggested, albeit

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[9] *Gorman v. Rensselaer County*, 910 F.3d 40, 47 (2d Cir. 2018); *Trujillo v. Bd. of County Comm'rs of Santa Fe County*, 768 F.2d 1186, 1189 (10th Cir. 1985); *United States v. Pacheco-Donelson*, 893 F.3d 757, 760 (10th Cir. 2018) (citing *Trujillo*).

inconclusively, such protection may exist.[10] Yet, the First, Sixth, and Seventh Circuits held against sibling rights, and the Fifth Circuit summarily rejected the lone adult sibling claim it has encountered.[11]

IV. THE NINTH CIRCUIT STANDS ALONE IN ALLOWING INCIDENTAL DISASSOCIATION

Far greater agreement exists about the lack of intimate relationship protection for the unintended impact on family member(s) of action against another relative, such as most police shootings or arrests. Every circuit except the Ninth to have considered the matter requires as an element of associational deprivation that the officer acted for the purpose of terminating/ interfering with the relationship, such as when police remove a child from the parents' custody due to suspected abuse.[12] See *Rentz v. Spokane County*, 438

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[10] *Rode v. Dellarciprete*, 845 F.2d 1195, 1204–05 (3d Cir. 1988) (protection for brother-in-law lacking as relationship neither chosen nor of blood kin).

[11] *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986); *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) (no associational right to visit, vs. to live with, brother); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1245-1247 (7th Cir. 1984), overruled in other part by *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *Hudspeth v. City of Shreveport*, 270 F. App'x. 332, 334 (5th Cir. 2008).

[12] See *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 568 (8th Cir. 2019) and *Russ*, 414 F.3d at 789-790 (describing supermajority view). Accord, *Robertson v. Hecksel,* 420 F.3d 1254, 1258 (11th Cir. 2005). The Fifth and D.C. Circuits have not addressed the issue.

F. Supp. 2d 1252, 1263-65 (E.D. Wash. 2006) (cataloging Ninth Circuit decisions and describing its position on incidental deprivation as unsupported by "any extensive or rigorous analysis").[13] By reversing the judgment in a situation where Respondents neither pled, nor offered to plead, that the Officers shot Joseph in order to deprive their relationships with him, *Mann III* perpetuates the Ninth Circuit's maverick position.

V. THE DECISION BELOW IS WRONG IN MULTIPLE REGARDS

Mann III especially warrants review because it falls on the wrong side of each split described above; it recognizes First Amendment protection for incidental disruption of a family relationship not the product of a fundamental privacy choice.

A. THIS COURT'S DECISIONS WEIGH AGAINST FIRST AMENDMENT INTIMACY PROTECTION

No language in the First Amendment references, or even suggests, intimate relationships. Yet, widespread is the notion such coverage exists. As in this case, the vast majority of circuit court opinions cited above based their conclusions on *Roberts* and/or *Rotary Club*. But reading only those two decisions fails to yield a definitive answer to whether the First Amendment protects intimate, as well as expressive, associations. Over the past century, this Court's repeated journeys into freedom of choice regarding family matters tethered that liberty to the Due Process Clause,

[13] Order amended at 2006 WL 8437720, at *9-10 (E.D. Wash. Aug. 4, 2006).

without mention of the First Amendment, starting with *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923) (addressing the freedoms "to marry, establish a home and bring up children") through *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is a fundamental freedom regardless of potential spouse's race); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (re child-bearing and rearing – "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause"); *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 842 (1977) (quoting *LaFleur*); *Moore v. City of E. Cleveland, Ohio,* 431 U.S. 494, 499-501 (1977) (right of relatives to cohabitate); and *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (citing *Moore* as an example of "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

Accordingly, *Roe v. Wade*, 410 U.S. 113, 153 (1973) addressed challenges to anti-abortion laws pled under almost every Amendment, cataloged the Court's prior privacy right decisions by the Amendment cited, yet placed only one under the First Amendment: *Stanley v. Georgia*, 394 U.S. 557, 564-565 (1969), which

recognized the convicted man's right to watch obscene films in his home as part of free speech.[14] *Roe* deemed the Due Process Clause the most apt source of protection – "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is* . . . " (Emphasis added.) Essentially, *Roe* combined liberty and privacy analysis to a single result – that government may not unduly interfere with a person's freedom to make certain choices about fundamentally private matters.

Thus, prior to hearing *Roberts*, the Court had not once invoked the First Amendment as a source of family relationship/privacy protection. *Roberts* addressed a fraternal organization's challenge to Minnesota's anti-discrimination laws regarding the exclusion of females as club members. The Court described the associational right as bearing two aspects: the fundamental liberty to enter into and maintain "certain intimate human relationships" free from undue government intrusion, which it labeled "intrinsic;" and the right to associate for the purpose of First Amendment activity, i.e., speech, religion, petition, or assembly, which the Court termed

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[14] *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965) reversed the convictions of doctors who advised spouses about contraceptives because the First Amendment preserved the doctors' right to disseminate information and to associate with their patients for that purpose. But because Griswold did not suggest that the First Amendment also protected the marital relationship or the couple's right to choose against child-bearing, *Roe* categorized it as invoking the "penumbra of the Bill of Rights." 410 U.S. at 152.

"instrumental"; concluding that it would separately analyze each claim/right. 468 U.S. at 617-618. Although nowhere in the intrinsic relationship discussion did *Roberts* identify a particular constitutional source, it included citations to *Moore, LaFleur*, and *Stanley v. Illinois*. *Id*. at 619. In contrast, later, and under a separate heading, Justice Brennan's opinion for a unanimous Court addressed the expressive freedoms, stating that "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622.

Rotary Club too involved the exclusion of women from a fraternal organization. Justice Powell's opinion for an (again) unanimous Court stated it would track *Roberts*' approach of separately analyzing intimate relationships from expressive ones. 481 U.S. at 544-545. After stating the "freedom to enter into and carry on certain intimate relationships is a fundamental element of liberty protected by the Bill of Rights," the Court noted it had previously recognized corresponding protection for marriage, children, and "cohabitation with relatives," added that non-family relationships could be protected, then stated that "[w]e have emphasized that the First Amendment protects those relationships, including family relationships, that" bear sufficient hallmarks of privacy, citing *Roberts*. *Id.* at 545. But, as shown above, no such First Amendment emphasis previously occurred; to the contrary, *Roberts* spoke of it solely regarding expression; otherwise the

past family focus lay squarely on the Due Process Clause.

Tellingly, just a year later, Justices Stevens and Blackmun concurred in *City of Dallas v. Stanglin*, 490 U.S. 19, 28 (1989) by saying that the freedom to "enjoy the company of other people," regardless of location, "involves substantive due process rather than the First Amendment right of association," which is especially significant because Justice Stevens had joined in both the *Roberts* and *Rotary Club* majority opinions. Nor did Chief Justice Rehnquist's majority opinion in *Stanglin* suggest otherwise – it merely said in the context of a purely First Amendment challenge that the First Amendment embraces an associational right "in certain circumstances," quoted *Roberts* for the proposition two different associational rights are protected by the Constitution, found no possible intimate relationship existed regarding dance hall patrons, and went on to analyze whether expressive activity protected by the First Amendment was involved. *Id.* at 23-24. Thus *Stanglin* did not hold that the First Amendment protects intimate relationships any more than did *Roberts*.

Indeed, a few years after *Stanglin*, *Planned Parenthood of S. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) included family relationships in a list of "matters, involving the most intimate and personal choices a person may make in a lifetime . . . central to the liberty protected by the Fourteenth Amendment." None of the five separate opinions suggested First Amendment protection for intrinsic relationships.

Nor, in any other decision since *Stanglin*, has a Supreme Court justice (even in a dissent) referenced the First Amendment as a source of intrinsic/intimate relationship protection. To the contrary, *Troxel v. Glanville*, 530 U.S. 57 (2000), which dealt with the conflicting state law child visitation rights of parents and grandparents, yielded a plurality with six different opinions. Justice O'Connor's opinion (joined in by Justices Breyer, Ginsburg, and Rehnquist) identified the parents' right to custody of their children as a fundamental liberty interest protected by the Due Process Clause. *Id*. at 65-66. Neither that opinion, nor any of the other five, mentioned the First Amendment, save for Justice Kennedy's dissent, which alluded to it merely hypothetically and in a different regard. *Id*. at 95.

The same year as *Troxel*, the Court decided *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) where it deemed New Jersey's public accommodations law to impermissibly infringe on the Boy Scouts' expressive right to exclude a homosexual as scoutmaster. Justice Stevens' dissent (joined by three others) mentioned Boy Scout's alternative contention of interference with intimate association, noting that a corresponding due process right generally existed (though not for BSA), as contrasted with the expressive "First Amendment right to associate." *Id*. at 698, fn. 26.

Lawrence v. Texas, 539 U.S. 558 (2003) was equally silent about the First Amendment – its analyses of the sodomy law rested on due process and equal protection. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) stated only that "the Constitution" protects certain highly

personal relationships; it expressly declined to address the merits of the inmates' purported First and Fourteenth Amendment intimate relationship rights. Likewise, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), in the context of homosexual marriage, repeatedly identified the Fourteenth Amendment as the source of protection for the intimacy of marriage. *Id.* at 2598, 2600, 2602 ("[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment . . .") and 2604. Although the opinion went beyond due process to address the implications to the Equal Protection Clause from a ban on gay marriage (*id.* at 2602-2604), it mentioned the First Amendment only in the context of clarifying that it preserves the right to *debate* the morality of same-sex marriages, but not as a source of direct protection for the marriage itself (*id.* at 2607).

In short, *Rotary Club*'s single unwarranted reference to the First Amendment as the source of intrinsic relationship rights cannot withstand the Court's otherwise unanimous attribution of such protection to the Due Process Clause.

B. BROADER FIRST AMENDMENT PROTECTION IS UNSUPPORTED

Although one can easily understand how reading *Roberts* and *Rotary Club* in isolation misled numerous lower courts about the source of the intrinsic relationship right, no justification exists for *Mann III*'s view that the First Amendment extends that right farther than does the Due Process Clause to encompass non-cohabitating siblings. In this regard, *Mann III* cited nothing from this Court supposedly suggesting

such a distinction. All the Ninth Circuit opinions *Mann III* cites for the general notion of First Amendment protection are correspondingly empty. App. 4. And, despite the district court's observation broader First Amendment protection appeared unsound, *Mann III* failed to analyze *why* First Amendment protection should be relatively greater. *Id.* Instead, the panel re-characterized *Mann II*'s remand as necessarily recognizing a difference in protection. That reasoning is deeply flawed because (a) *Mann II* expressly stated the protection doesn't vary by Amendment; and (b) the remand is easily explained by the possibility of additional facts showing cohabitation, which is exactly what Respondents did (albeit insufficiently).

Other proponents of broader First Amendment protection fare just as poorly. The Sixth Circuit's dismissal of due process cases as inapposite in *Sowards*, 203 F.3d at 433 was unaccompanied by a substantive explanation. In contrast, Judge Paez's dissent in *J.P. v. County of Alameda* did attempt to explain the proffered difference – that a right under the Due Process Clause exists if it was a historic social practice or otherwise afforded "special protection," citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989), whereas the First Amendment extends further to the type of intimate relationships described in *Roberts* and repeated in *Rotary Club*. The defect in this reasoning is that *Roberts* didn't purport to expand associational protection beyond the due process precedents it relied on; rather it distilled them into certain qualities that typify an intimate relationship. 468 U.S. at 619-620 ("[b]etween these poles [family and

large organization], of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State").

Equally flawed is the district judge's differentiation in *Stalter*, 345 F. Supp. 3d at 389, fn. 3 between the First Amendment, as applying to action against an individual relationship, and due process, as used regarding regulation of a class. Neither *Roberts* nor *Rotary Club* involved state action directed against particular persons, much less suggested different analyses for that scenario versus for general regulation.

C. SIBLING RELATIONSHIPS DO NOT INVOLVE A FUNDAMENTAL CHOICE

Those family rights this Court has recognized as fundamental all rest on the concept of freedom to decide an inherently private matter – whether to marry; who to marry; whether to have children; how the children should be educated or reared; where to live; and whether to reside with other relatives. *Roberts* categorized these choices as "those that attend the creation and sustenance of a family." 468 U.S. at 619. But one cannot choose to have a brother or sister – that choice is made by one's parents. Nor does one decide to create aunts, uncles, nephews, cousins, or grandchildren; all those biological or in-law connections stem from the marital or procreation decisions of others. Despite the very high level of intimacy two siblings might achieve, their relationship doesn't originate from a choice either person made. Thus, except for spouses and parents-children, relatives don't

satisfy *Roberts*' test to determine which relationships qualify as intimate: those kinships possess "relative smallness" and can have "seclusion from others in critical aspects of the relationship," but they do not bear "a high degree of selectivity in decisions to begin and maintain the relationship" because no such commencement decision occurs. See *id.* at 620 ("[d]etermining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments"). Indeed, friends fare better under *Roberts* than do most relatives because one chooses to form friendships.[15]

Mann II correctly perceived the lack of origination freedom for siblings; their relationships achieve constitutional protection only when they make the private choice to live together, as this Court held in *Moore v. East Cleveland*, 431 U.S. at 499-501 regarding an extended family. *Mann II* harmonized *Ward*, 967 F.2d at 284 with *Moore v. East Cleveland* by implying

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[15] Nor is the notion of associational standing in friends far-fetched; several courts have already embraced it. *Akers v. McGinnis*, 352 F.3d 1030, 1039–40 (6th Cir. 2003) ("[p]ersonal friendship is protected as an intimate association"); *Tillman v. City of W. Point, Miss.*, 953 F. Supp. 145, 150-151 (N.D. Miss. 1996), *aff'd* 109 F.3d 765 (5th Cir. 1997). But see *Copp v. Unified Sch. Dist. No. 501,* 882 F.2d 1547, 1551 (10th Cir. 1989) (deeming close friendships insufficient for intimate relationship); *Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir.1988) (close friendship insufficient as not relating to a household).

a cohabitation exception to *Ward*'s rejection of sibling standing.

Here the Respondents siblings are adults and undisputedly not part of a single household, whereas this Court emphasized that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children [citation], as well as from the fact of blood relationship." *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 844 (1977). Not once has this Court actually found intrinsic associational protection outside the household. For this reason, most circuits do not recognize associational protection for non-cohabitating persons, even parents and adult offspring. See *Russ v. Watts*, 414 F.3d at 787 (noting no circuit except the Ninth "has allowed a parent to recover for the loss of his relationship with his child in these circumstances [not living together]").

Petitioners acknowledge that *Roberts* contemplates potential protection for non-familial relationships. But that postulated extension doesn't defeat the household as an essential feature. People can live together without being a "family," such as friends who pool resources to share rent or a mortgage, or just to more enjoy each other's company. See e.g., *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (applying *Roberts* factors: "it's hard to imagine a relationship more intimate than that between roommates"). Generally speaking, a fundamental choice regarding a

matter of personal privacy outside of a family that also involves daily association means cohabitation.

Hence *Mann II*'s remand to the district court correctly required cohabitation proximate to death and granted the district court discretion whether to allow Respondents to so amend.[16] By erroneously disregarding *Mann II*'s alternative cohabitation holding as "*dicta*" – the question was expressly briefed and argued in *Mann II* – *Mann III* essentially eliminates the benchmarks of choice and daily association from the relationship analysis.[17]

D. ALLOWING RECOVERY FOR INCIDENTAL DEPRIVATION UNDULY EXPANDS STANDING TO SUE

Unlike the pervasive First Amendment and sibling association splits, in every circuit except the Ninth the question of standing to sue for an associational deprivation is easily answered – those persons whose relationship government targeted. Because the Officers did not allegedly target any of Joseph's

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[16] *Mann III* misfired by stating *Mann II*'s grant of discretion regarding amendment to the district court confirmed an independent First Amendment analysis ("no amendment could change the fact that Plaintiffs are the decedent's adult siblings") – the potential amendment instead involved the key historical issue of cohabitation, on which the original complaint was silent. App. 4.

[17] "[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter* [*dictum*], but each is the judgment of the court, and of equal validity with the other.'" *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924).

relationships, this case could not exist in any other circuit. See *Russ*, 414 F.3d at 789-790 ("under any standard, finding a constitutional violation based on official actions that were not directed at the [family] relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court").

All the other circuits did not err; *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) supports a targeting requirement because the Court there stated liability turned on the fact the regulation "does interfere directly and substantially with the right to marry." Incidental disruption is not "direct." See *id*. at n. 12 (distinguishing social security rule terminating child's benefits upon parent's remarriage as not attempting to interfere with marital choice); *Christensen v. County of Boone,* 483 F.3d at 463 (citing *Zablocki*, "[t]he Constitution prevents fundamental rights from being aimed at; it does not, however, prevent side effects that may occur if the government is aiming at some other objective"). Like most of this Court's associational precedents, *Roberts* dealt with direct regulation – Minnesota's anti-discrimination law's application to a private club that excluded females from membership. Nothing in *Robert*s indicates constitutional protection pertains to state action against an individual unrelated to his associations.

The practical benefit of requiring a direct, or targeted, interference lies in the restriction of potential plaintiffs. The emotional and financial impacts to a terminated public employee foreseeably disrupt

familial relations but such indirect consequences don't justify allowing relatives to sue the public employer under an associational interference theory. See *Christensen,* 483 F.3d at 464 ("[t]his is why being fired from a public job (after any hearing that may be required) does not create constitutional difficulties if it turns out that the ex-employee becomes moody and makes the family miserable"). Rather the employee's remedy is loss of consortium damages under state law.

But, because the Ninth Circuit allows liability for unintentional/incidental disassociation, who possesses standing to sue becomes far more complex and uncertain. In *Mann I*, the City of Sacramento settled with the next of kin, Joseph's father, because Ninth Circuit precedent rendered his associational standing undeniable (and he possessed wrongful death standing under state law), only to be confronted with new federal claims by the siblings in *Mann II*.

Per *Mann III*, determining intrinsic associational standing in the Ninth Circuit requires a district court to essentially bifurcate each case so to first determine which, if any, of plaintiff's relationships with the prisoner or decedent was "close" enough to qualify under *Roberts*. Even more impractically, a defendant desiring to settle prior to, or in the early stages of, suit (as City did in *Mann I*), would either have to undertake the Herculean task of ascertaining all the friends and relatives it might need to bargain with, or else risk paying money to solely the next of kin without receiving the security of closure (as happened here).

Finally, the Ninth Circuit's allowance of liability for incidental disassociation clashes with standard First

Amendment analysis. Laws designed to regulate non-expressive conduct that just incidentally burden a protected speech right need not withstand any level of constitutional scrutiny. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) ("we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books"). No fathomable reason exists for different treatment of non-regulatory action (here a police shooting) directed at individual conduct unrelated to association that incidentally disrupts or terminates an intimate relationship. Just as "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities" (*id.* at 706), so does every arrest, shooting, or incarceration disrupt the suspect's relationships.

Nor does incidental disruption square with due process analysis. In rejecting negligence as sufficiently culpable for constitutional liability, *Daniels v. Williams*, 474 U.S. 327, 331 (1986) emphasized that "[h]istorically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." And this Court has never found a due process violation where government action affected a family relationship only incidentally. See *Shaw v. Stroud*, 13 F.3d 791, 805 (4th Cir. 1994). See *Gorman*, 910 F.3d at 48 (so quoting *Shaw*). The Officers did not allegedly decide to deprive associations. They did knowingly deprive life but that liability was resolved in *Mann I*.

CONCLUSION

Though the right to form an intimate relationship was recognized a century ago, the identity and implementation of its originating Amendment(s) remains clouded and chaotic. Almost four decades have passed since *Roberts* and *Rotary Club*, yet appellate panels continue to fundamentally disagree about the nature and extent of protection afforded, even within the same circuit and, here, in the same case. As Virgil guided Dante through the perils of the underworld, so may this Court, by granting this petition, provide a beacon of analytical clarity to help judges and counsel navigate the turbulent associational landscape.

Respectfully submitted,

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