No. 20-161

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

REPLY BRIEF FOR PETITIONERS

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September 25, 2020

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Respondents challenge neither the presence, nor the extent, of the inter-circuit divisions over First Amendment intimate relationship protection, nor the corresponding anomaly in this Court's history of *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987), nor the circuits' dissension over sibling rights, nor that the Ninth Circuit uniquely recognizes liability for incidental associational deprivation. Nor do Respondents paint these questions as constitutionally insignificant. Thus the opposition silently concedes the petition amply satisfies Rule 10.

Instead, the opposition tries to dodge three of the four questions Petitioners posed by misrepresenting that (a) Petitioners argued below solely that sibling standing requires cohabitation, and (b) the Ninth Circuit hasn't yet decided anything beyond that cohabitation does not control the presence of an intimate relationship. The former is factually false, literally four times over. The latter ignores that *Mann III* expressly and necessarily recognizes the conceptual validity of a First Amendment intimate relationship claim that exceeds due process rights and doesn't require targeted interference. Perhaps most importantly, regardless of what outcome might occur in this case absent *certiorari*, the severe splits and pluralities described in the petition will persist, which renders the petition quite ripe.

As to the merits of Petitioners' constitutional defenses, Respondents largely beg those questions by persistently relying on *Rotary Club* as controlling precedent. Tellingly, the opposition does not attempt

to harmonize the severity of the circuit courts' disagreements with the purported clarity of *Rotary Club*'s governance. So, even if Respondents correctly construe *Rotary Club*, many circuit judges labor under the same miscomprehensions as Petitioners, which confusion only this Court can rectify.

I. PETITIONERS REPEATEDLY RAISED EACH ISSUE PRESENTED FOR REVIEW

Respondents neither attack the petition's statement of the case as incorrect, nor present a different litigation history. Instead, they summarily assert that Petitioners proceeded in *Mann II* and *III* exclusively by contending Joseph didn't reside with his siblings proximate to his death, failing to raise the other three issues advanced by the petition. Because this Court typically avoids reaching matters newly raised in a *certiorari* petition, Respondents paint this case as a poor vessel for addressing the corresponding circuit splits.

In their haste to escape the petition's substance, Respondents trample history, which reflects Petitioners' repeated efforts to obtain and uphold dismissal on each constitutional ground now presented, subject to limited and temporary exceptions mandated by other conflicting Ninth Circuit decisions the *Mann II* and *III* panels lacked the power to resolve, but which did not preclude review *en banc* or by this Court.

A. *MANN II*

The initial district court decision framed the question as whether First Amendment associational loss claims "are subject to the same [standing]

limitation" as those under the Due Process Clause, which it reluctantly answered negatively in light of *Rotary Club*. App. 20-21. The Officers' opening appellate brief in *Mann II* led with the argument that "the district court inaptly recognized First Amendment standing for an association both unrelated to protected expression and not targeted by the Officers." Reply App. 6. The Officers next showed that the Ninth Circuit alone recognizes standing to sue for an incidental family disassociation (Reply App. 6-9), then challenged the Manns' effort to shift the source of protection from the Due Process Clause to the First Amendment as contrary to both binding Ninth Circuit authority and numerous pertinent decisions from other circuits (*id*. at 10-14). That brief also noted that two circuits who recognized a First Amendment intimate association claim applied the same analysis as under the Due Process Clause. Reply App. 13.

Because, after briefing in *Mann II* completed, a new Ninth Circuit decision (*Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018)) recognized First Amendment protection for intimate relationships, the Officers so alerted the panel by letter pursuant to FRAP, Rule 28(j), and their counsel began oral argument by stating the corresponding intra-circuit split precluded the panel from resolving the threshold issue whether the First Amendment extends to associations not engaged in protected expression, a point he reiterated later in the argument.[1] When asked about the split by the panel, Respondents' counsel argued that the Ninth

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[1] Available at: https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014160 (0:20-1:00; 11:45-13:00).

Circuit had long recognized the First Amendment's extension to intimate associations lacking an expressive component.[2]

B. *MANN III*

Following *Mann II*'s reversal and remand, the Officers' Rule 12(b)(6) motion asserted that: (a) "five other circuits expressly reject(ed) First Amendment protection for any intimate relationships, absent expressive activity" (Reply App. 47); (b) prior to *Mann II*, "the Ninth Circuit had not . . . clarified whether the elements of a First Amendment associational claim matched those of a due process claim," whereas the Manns previously argued for greater First Amendment protection (Reply App. 49); and (c) the Ninth Circuit's anomalous allowance of incidental disassociation for due process claims should not extend to the First Amendment, where courts normally require a causal nexus between the protected conduct and state action (*id.* at 50-51).

On appeal, the Officers' answering brief repeated their lament that the intra-circuit split precluded panel determination of "whether the First Amendment extends to disruption of intimate relationships unrelated to protected expression," but asserted that the affirmance could be achieved on other grounds, rendering *en banc* review unnecessary. Reply App. 17-19, 20. On the other hand, the Officers argued reversal was barred because the admitted absence of expressive conduct precluded a "finding that the FAC adequately

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[2] *Id.* at 16:10-18:50. Respondents' counsel also conceded the absence of expressive conduct. *Id.* at 17:40-46.

pleads, or could be amended to plead, a First Amendment violation." Reply App. 20.

Alternatively, the Officers argued that First Amendment protection for intimate relationships clashed with this Court's decisional history (Reply App. 21-26):

> In summary, over the past 60 years, the Court has consistently identified the Due Process Clause as the source of intimate relationship protection, without suggesting a First Amendment analog – its unique contrary statement in *Rotary Club*, which inaccurately described its prior decisions, aptly held no sway over its subsequent analyses.

App. 25-26.

Given *Mann III*'s recognition of First Amendment protection for intimate relationships, and to an extent beyond that afforded by the Due Process Clause such that it could encompass siblings, the Officers and City jointly petitioned for *en banc* rehearing. Reply App. 27. The petition sought resolution of the intra-circuit split on First Amendment protection for non-expressive associations, as well as the "subsidiary internal split about whether such protection matches, or rather exceeds, that under the Due Process Clause." Reply App. 28-31. Yet again, Petitioners argued that the notion of First Amendment protection for intimate relationships contradicted this Court's jurisprudence (other than the stray reference in *Rotary Club*). Reply App. 33-37. Petitioners also repeated their position that the Ninth Circuit's unique allowance of

associational liability based on incidental interference/deprivation should not extend to siblings, where the absence of choice in relationship formation warrants a lesser level of protection. Reply App. 41-42.

In short, the Officers advanced below all four questions now presented to this Court, despite (1) the Ninth Circuit's internal split about First Amendment intimate relationship protection, which the Officers addressed in the alternative and challenged by petition for rehearing *en banc*; and (2) the constraint on their counsel and the panels imposed by the Ninth Circuit's binding precedent permitting recovery for incidental associational interference, which view the Officers nonetheless argued shouldn't extend to First Amendment or sibling situations. See *Joseph v. United States*, 574 U.S. 1038, 135 S. Ct. 705, 706 (2014) (stating in denial of *certiorari* that a party need not raise in its opening brief below a position foreclosed by binding circuit precedent).

II. THE NINTH CIRCUIT DECIDED EACH ISSUE PRESENTED

As indicated above, Respondents inaccurately portray *Mann III* as deciding only that cohabitation isn't necessary for their associational standing. Also, their companion assertion that the Ninth Circuit did not address their complaint's factual sufficiency, although correct, misses the mark. *Mann III* determined siblings *can* state a First Amendment associational violation regardless of protected expression or government's intent to interfere with the relationship, even where due process protection is absent. Thus *Mann III*'s reversal and remand legally

endorsed the complaint's constitutional theory of recovery, just as *Mann II* rejected it absent cohabitation.

A. Whether Liability For Associational Deprivation Requires An Intent To Harm The Protected Association

Respondents' position immediately rings hollow given their silent acknowledgement that the Ninth Circuit allows recovery for incidental family disassociations. See Petition, pp. 13-14. Likewise, the opposition offers no rebuttal to the petition's reasoning that *Mann III* functionally followed Ninth Circuit precedent "[b]y 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," and despite Petitioners' argument that only a targeted deprivation should suffice regarding siblings. *Id*. at 14.

B. Whether The First Amendment Protects Intimate Relationships Absent Expressive Activity

On the threshold constitutional issue, *Mann III* isn't silent – it expressly states First Amendment protection exists for relationships regardless of expressive conduct. App. 3 (describing *Rotary Club* as recognizing a "First Amendment right of familial or intimate association"). Furthermore, because Respondents conceded the absence of alleged protected speech, *Mann III* necessarily endorsed the notion of First Amendment protection by reversing and remanding the case to proceed under the *Rotary Club* standard, which

Mann III did not indicate required expressive speech/conduct. That remand would have been a futile act if protected speech were required.

C. WHETHER FIRST AMENDMENT PROTECTION EXCEEDS WHAT THE DUE PROCESS CLAUSE PROVIDES

Despite *Mann II*'s express statement "we analyze the right of intimate association in the same manner regardless whether we characterize it under the First or Fourteenth Amendments" (App. 17), *Mann III* expressly differentiated the intimate relationship right under the First Amendment from its due process counterpart by limiting Ninth Circuit precedent regarding siblings (*Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991)) to the Fourteenth Amendment. App. 4. By reversing the judgment for Petitioners, *Mann III* held sibling relationships can qualify for protection even without cohabitation, embracing Respondents' position that First Amendment protection exceeds that afforded by the Due Process Clause.

III. THE OPPOSITION'S MERITS DISCUSSION SUPPORTS *CERTIORARI*

As noted above, the opposition neither denies that *Rotary Club* is the only time this Court cited the First Amendment as the source of intimate relationship protection, nor tries to harmonize *Rotary Club* with this Court's other intimate association decisions, nor attempts to explain why that inconsistency should be tolerated. So, by invoking *Rotary Club* as primary authority against Petitioners' position on each of the

four questions presented, Respondents effectively concede their legitimacy.

Additionally, notwithstanding *Rotary Club*'s nominal support for the notion of First Amendment intimate relationship protection, that decision fails to even superficially aid Respondents on any of the three other questions presented.

A. WHETHER THE FIRST AMENDMENT PROTECTS INTIMATE RELATIONSHIPS LACKING EXPRESSIVE ACTIVITY

On the threshold question, Respondents depend solely on *Rotary Club*'s singular First Amendment reference, arguing "this Court's resolution of this issue continues to control," which begs the question of the Court's differing prior and subsequent decisions. Opp. 14. But problems exist even beyond the anomaly of *Rotary Club*'s statement – that part of the opinion didn't claim to explore new legal territory; rather it offered a historical summary, echoing *Roberts* and other previous decisions without analytically expanding them. 481 U.S. at 544-545 ("[w]e have emphasized . . . "). Furthermore, Respondents' simplistic *stare decisis* contention flies in the face of the circuit courts' wide divergence on this question; the opposition does not explain how a contrary position embraced by numerous panels in various circuits can nonetheless lack analytical validity to such an extent as to be unworthy of this Court's review.

B. WHETHER FIRST AMENDMENT PROTECTION DIFFERS FROM DUE PROCESS PROTECTION

In contrast, concerning whether a First Amendment intimate relationship right differs from that the Due Process Clause affords, *Rotary Club* doesn't even facially support Respondents' proffered distinction of a historically recognized liberty (Fourteenth) versus a broader reach to those relationships qualifying under the *Roberts* intimacy factors (First) – no corresponding discussion occurs anywhere in *Rotary Club* or *Roberts*. Instead, the only associational distinction there mentioned concerned expressive/instrumental relationships versus intimate/intrinsic relationships. *Roberts*, 468 U.S. at 617-618; *Rotary Club*, 481 U.S. at 544 (so summarizing *Roberts*).

Michael H. v. Gerald D., 491 U.S. 110 (1989), cited by Respondents for the proposition that due process protection moves in lockstep with historical tradition, actually supports the petition.[3] Justice Scalia's plurality opinion expressly characterized *family* protection as falling under the Due Process Clause (*id.* at 121-124), as did all four concurring and dissenting opinions (*id.* at 132-163). Despite issuing just two years after *Rotary Club*, none of the five opinions described the First Amendment as a source of relationship protection. Thus the Manns' proffered distinction between First and Fourteenth Amendment

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[3] As noted in Justice Brennan's dissent, only Justice O'Connor subscribed to Justice Scalia's method of gauging when a liberty interest qualified for due process protection. *Michael H.*, 491 U.S. at 136.

associational rights, even if generally consistent with *Rotary Club*, wouldn't avail them here because their purported intimacy stems from family, falling under *Michael H.*, rather than from non-familial organizations, as considered in *Roberts* and *Rotary Club*.

And, once again, Respondents' implication that their position is obviously correct defies the circuit courts' division on the same issue.

C. WHETHER SIBLING PROTECTION CAN EXIST WITHOUT COHABITATION

Concerning siblings, Respondents wholly fail to address (a) whether a protected relationship must stem from mutual choice or (b) the lack of choice by siblings to become such.

As to the fundamental liberty to decide who to live with, the opposition mischaracterizes the petition. Petitioners don't need to show that people must live together as a universal prerequisite for intrinsic relationship protection. Although this Court emphasized that intimacy stems from "daily association" (Pet. 24), which typically derives from shared residence, protection for chosen relationships between spouses, or parents and children, can conceivably extend beyond or after a common household, such as when a child moves away. Resolution of that specific issue isn't here presented or necessary. Rather the pertinent question, which Respondents avoid, is whether a relationship can be constitutionally protected without involving a fundamental choice. In the case of siblings, because a

choice would occur only regarding whether to reside together, not with relationship formation, cohabitation is required.

D. WHETHER INCIDENTAL DEPRIVATIONS SUFFICE

Once more, Respondents misplace reliance on *Rotary Club* by citing it for the proposition that, although the Fourteenth Amendment requires targeted disassociation, the supposedly broader reach of the First Amendment supports liability for unintended deprivations. Like *Roberts*, *Rotary Club* solely addressed direct government regulation – California's anti-discrimination laws that precluded a requirement Rotary Clubs allow only male members. No language in *Roberts* or *Rotary Club* touches on, much less condones, the notion of incidental deprivation. Nor do Respondents attempt to square their position with this Court's proclamation in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) that law enforcement unrelated to speech and only indirectly burdening expression does not implicate the First Amendment.

The issue of targeted interference is where Respondents' silence about a corresponding inter-circuit split becomes most troubling for them. Presumably, if standard First Amendment analysis justified the recognition of liability for merely incidental disruption, at least a few circuits other than the Ninth would so hold. But *none* of those circuit courts that recognized First Amendment protection for intimate relationships also allowed liability for incidental loss. Ironically, Respondents fail to cite even a Ninth Circuit decision that shares their reasoning for broader First Amendment protection. Although this

complete lack of judicial support doesn't condemn Respondents as wrong, the dearth strongly suggests the petition bears merit on this question.

CONCLUSION

Undisputed are the persistent and growing divisions within and among the circuits relating to intrinsic relationship protection, proving that *Rotary Club* and *Roberts* worked well for analyzing large groups but clouded the picture for friends and relatives. Typically, this Court sees circuits openly disagree with their sisters in the relatively straightforward sense of two sides on a single issue. Here, not only are inter-circuit splits or pluralities present on *four* different issues, but the exceptional number of *internal* splits on the threshold First Amendment protection question – *five* circuits concurrently stand divided, most seemingly unknowingly – confirms a shocking level of analytical turmoil. The severity of those judicial disagreements confirms their sole remedy will be this Court's explanation of which Amendment(s) pertain and how.

This petition supplies a solid platform to achieve that goal by presenting a First Amendment claim by non-cohabitating siblings without any alleged speech or targeted interference, where Petitioners below challenged each legal aspect, two circuit panels reached differing results, yet both they and the district court heavily relied on *Rotary Club*.

Also present is the practical importance of resolving associational standing – this case uniquely stems from a settlement with the next of kin where state law wrongful death liability is thus precluded. Absent this

Court's guidance, settling § 1983 death and incarceration claims will be perilous, at best, due to the uncertainty of who qualifies as a proper plaintiff.

In short, this is the right case at the right time to return the constitutional boundaries of the family liberty interests to the clarity they enjoyed before *Rotary Club* by granting the petition.

Respectfully submitted,

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Case Number 17-17048

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: January 19, 2018]

ROBERT MANN, Sr., et al.,	)
	)
Plaintiffs/ Appellees,	)
	)
vs.	)
	)
CITY OF SACRAMENTO, et al.	)
	)
Defendants,	)
	)
AND	)
	)
JOHN C. TENNIS; RANDY R. LOZOYA,	)
	)
Defendants/Appellants.	)
	)

On Appeal From:
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. 2:17-cv-01201-WBS-DB
Honorable WILLIAM B. SHUBB

App. 2

APPELLANTS' OPENING BRIEF

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[pp. 18-32]

VIII. INTIMATE RELATIONSHIPS NOT TARGETED DUE TO EXPRESSION SHOULD RECEIVE SOLELY DUE PROCESS PROTECTION

A. THE ORIGIN AND NATURE OF CONSTITUTIONAL PROTECTION FOR FAMILIAL ASSOCIATION

A plaintiff suing under 42 U.S.C. § 1983 must allege a person acting under color of state law deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Thus one lacks standing to sue for deprivation of another's federal rights. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). As a result, state action against one person that injures him creates a cause of action solely for him.

But one constitutional right is necessarily shared – an individual's right to associate with other people for protected purposes. In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–618 (1984), the Court described the associational right as bearing two aspects: the *liberty* to enter into and maintain "certain intimate human relationships" free from undue government intrusion; and the right to associate for the purpose of First Amendment activity, i.e., speech, religion, petition, or assembly. *See Pickup v. Brown*, 740 F.3d 1208, 1233 (9th Cir. 2014) (so construing *Roberts*). *Roberts* also recognized that government can infringe both aspects when it interferes with a person's selection of who he wishes to "join in a common endeavor." 468 U.S. at 618. *Roberts* gave as examples of the *liberty*-protected relationships those "that attend the creation and sustenance of a family" – marriage, raising and educating children, and "co-habitation with one's relatives." *Id.* at 619–620. The Supreme Court deemed all other relationships to fall along a spectrum of potential protection from State incursion. *Id.* at 620.

Roberts held that the Jaycees did not qualify for constitutional protection in either respect Their male membership lacked sufficient intimacy for liberty protection. *Id.* at 621. In addition, because "the right to associate for expressive purposes is not absolute," the statute requiring admission of women as members, although potentially impairing the male members' right to associate exclusively with other men, neither targeted suppression of speech nor favored a particular viewpoint, plus served the important policy goal of eliminating discrimination. *Id.* at 622–623.

A few years later, the Supreme Court reiterated its analysis that the freedom to engage in certain intimate relationships is a "fundamental element of liberty," again giving as examples marriage, bearing, rearing, and education of children, and "co-habitation with relatives." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). Soon thereafter, the Supreme Court also emphasized that, in the associational context of a public dance hall, freedom of speech "means more than simply the right to talk," as one can find some form of expression in almost every activity, and so found constitutional protection absent under either intimate or expressive aspects for an ordinance limiting dance hall attendees. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). *See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) (freedom of association concerns "the advancement of beliefs and ideas"); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000) (finding fraternity members possessed insufficient selectivity for intimate relationships and lacked expressional association where "[n]othing in the record indicates that the Chapter ever took a public stance on any issue of public political, social, or cultural importance"); *Vieira v. Presley*, 988 F.2d 850, 852 (8th Cir. 1993) (friendships not expressive associations where allegations showed "no protected political, social, economic, educational, religious or cultural purpose to these associations"); *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990) ("Casual chit-chat" between two persons or in a small group is unprotected for lack of advancement of knowledge, the transformation of taste, political change, or cultural expression).

Within the family setting, the Supreme Court expressly identified the Fourteenth Amendment's Due Process Clause as protecting the right to cohabitate with relatives (*Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499–500 (1977) (ordinance prohibiting residency with grandchildren)), but it has not yet articulated the parameters of that liberty interest protection. *See Troxel v. Granville*, 530 U.S. 57, 88 (2000), (Diss. Op. of J. Stevens, "[w]hile this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . ."); *Kottmyer v. Maas*, 436 F.3d 684, 690 (6th Cir. 2006) ("the Supreme Court has yet to articulate the parameters of this right").

Given *Moore v. East Cleveland*, most circuit courts, including the Ninth, deem the right to familial association to vest a cause of action under the Due Process Clause, even for that disassociated relative not the direct subject of state action. Such suits most often arise when the State generally regulates the family relationship, as in *Moore*, or takes specific action against a particular family, such as removing minor children from their parents' homes and placing them into protective custody. *See e.g., Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000).

On the other hand, expressive association claims falling under the First Amendment typically impact families where a public employee is terminated or disciplined due to protected speech or petitioning by a spouse or other relative. *See e.g., Adler v. Pataki*, 185 F.3d 35, 44 (2d Cir. 1999) (deeming claim for husband's termination based upon wife's prosecution of civil suit

against the State to fall under the First Amendment's right of association); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426, 433–34 (6th Cir. 2000) (applying 1st Amend. retaliation principles to intimate association claim by deputy terminated after her husband sought election as sheriff).

In summary, personal relationships fall into three constitutional categories: intimate (protected by the Due Process Clause as an aspect of personal liberty); expressive (protected by the First Amendment as part of freedom of speech, petitioning, or assembly); and merely social (e.g., friends and acquaintances, which are typically unprotected). Because Plaintiffs lack standing to sue for a due process violation, they successfully asserted First Amendment protection applies even absent expressive activity and reactive State action. In short, the district court inaptly recognized First Amendment standing for an association both unrelated to protected expression and not targeted by the Officers.

B. OTHER CIRCUITS GENERALLY REJECT UNINTENDED FAMILY DISASSOCIATIONS AS ACTIONABLE

What the Supreme Court hasn't addressed or even referenced is the situation where intentional deprivation of an individual's life or liberty, such as by seizure, *coincidentally* diminishes or severs his family relations, in contrast to where the State either regulates, or initiates specific action against, the relationship *per se*.

As asserted above, absent protected expressive activity, circuit courts typically address family disassociation claims exclusively under the Due Process Clause. Moreover, especially where the subject of government action is an adult child, every other circuit either denies that constitutional protection exists or requires the plaintiff show the government sought familial disassociation as a goal of its action; no standing to sue exists where the disassociation happens incidentally. *See Robles-Vazquez v. Garcia*, 110 F.3d 204, 206, fn. 4 (1st Cir. 1997) (requiring targeted disassociation); *Love v. Riverhead Cent. Sch. Dist*. 823 F.Supp.2d 193, 200 (E.D.N.Y. 2011) (predicting 2d Circuit would follow the majority view requiring targeted disassociation, even regarding minors)[5]; *Chambers v. Sch. Dist. of Phila. Bd. of Educ.*, 587 F.3d 176, 191–192 (3d Cir. 2009) (extending requirement of deliberate interference to parental relationships with minor children); *Shaw v. Stroud*, 13 F.3d 791, 804-805 (4th Cir. 1994) ("because the Supreme Court has never extended the constitutionally

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[5] *But see Patel v. Searles*, 305 F.3d 130, 137 (2d Cir. 2002) (stating in dicta the 2d Circuit had not previously held the officers' actions must target the family relationship but finding that, regardless, the facts alleged showed such conduct had occurred); *Morales v. City of N.Y.*, 59 F. Supp. 3d 573, 580 (S.D.N.Y. 2014) (holding qualified immunity applied for lack of clearly established law regarding incidental impact on family relations and explaining "the [*Patel*] Court's language was plainly dictum"); *Deskovic v. City of Peekskill*, 894 F. Supp. 2d 443, 470 (S.D.N.Y. 2012) ("Because Plaintiffs do not allege that Stephens' behavior was intentionally directed at the familial relationship, his alleged misconduct does not fall within the category of behavior that *Patel* held (in 2002) violated the right to familial association").

protected liberty interest incorporated by the Fourteenth Amendment due process clause to encompass deprivations resulting from governmental actions affecting the family only incidentally, we decline to sanction such a claim at the present time"); *De Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006) (incidental disruption of parental right insufficient); *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000) (no standing by minor children to sue for police shooting of father); *Russ v. Watts*, 414 F.3d 783, 790–791 (7th Cir. 2005) (no standing by parents to sue for unintentional disassociation from adult son by police shooting); *Reasonover v. St. Louis County*, 447 F.3d 569, 585 (8th Cir. 2006) (mother's incarceration did not target her relationship with her minor daughter); *Lowery v. County of Riley*, 522 F.3d 1086, 1092 (10th Cir. 2008) (father's incarceration did not target disruption of relationship with daughter); *Robertson v. Hecksel*, 420 F.3d 1254, 1260 (11th Cir. 2005) (no protection for untargeted disruption to adult child's association with parent); *Butera v. D.C.*, 235 F.3d 637, 656 (D.C. Cir. 2001) ("a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent").

Long before these decisions, this circuit took a contrary view of due process protection (i.e., that intent to disrupt the family relationship need *not* be shown), which was in turn based on the Seventh Circuit's decision in *Bell v. City of Milwaukee*, 746 F.2d 1205, 1238 (7th Cir. 1984), and later extended it to non-dependent adult children. As noted above, in *Russ*, 414 F.3d at 791, the Seventh Circuit expressly

overruled *Bell*, leaving the Ninth Circuit's view of due process protection unshared. Nonetheless, this circuit has maintained its unique position that protection extends to the untargeted disruption of adult parent-child relations. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1169 (9th Cir. 2013) ("in past cases, we have recognized a parent's right to a child's companionship without regard to the child's age"). Regardless of the split, *all* these decisions recognize the Due Process Clause as the potential or actual source of constitutional protection. *See Johnson*, at 1168–1169 ("[p]arents have a Fourteenth Amendment right to the companionship of a child").

In yet another significant respect, this circuit's view of familial association tracks with the majority of other circuits by recognizing a boundary to due process protection of that liberty interest – it does not extend to *siblings*. *Ward*, 967 F.2d at 283–84 (rejecting 10th Circuit's contrary view – "[w]e adopt the earlier and better rule of *Bell*. Neither the legislative history nor Supreme Court precedent supports an interest for siblings consonant with that recognized for parents and children"). *Accord Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986) (refusing to recognize claim by adult siblings for incidental disassociation). *See generally Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 928 (8th Cir. 1987) (explaining lack of grandparent standing for wrongful death claim: "[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct").

This circuit's various district courts have aptly followed *Ward*.[6] *See Garlick v. County of Kern*, 167 F. Supp. 3d 1117, 1163 (E.D. Cal. 2016) (re police action, "siblings do not possess a constitutionally protected liberty interest"); *Olvera v. County of Sacramento*, 932 F. Supp. 2d 1123, 1148 (E.D. Cal. 2013) (minor siblings lack protected right to association); *Ostling v. City of Bainbridge Island*, 872 F. Supp. 2d 1117, 1127 (W.D. Wash. 2012) ("[n]o such interest has been recognized for siblings"); *Rentz v. Spokane County*, 438 F. Supp. 2d 1252, 1265 (E.D. Wash. 2006) (adult siblings lack standing).

C. INCIDENTAL DISASSOCIATION DOES NOT QUALIFY AS A FIRST AMENDMENT VIOLATION

Likely due to the cold reception by other circuits of incidental disassociation liability, and the Ninth Circuit's limitations on standing to assert due process protection, those relatives more removed than parents, children, and spouses have increasingly shifted their intimate relationship claims to the First Amendment. These efforts have, prior to this action, proven highly unsuccessful.

IDK, Inc. v. Clark County, 836 F.2d 1185, 1191–1192 (9th Cir. 1988), read *Roberts*, *Moore*, and

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[6] That the Tenth Circuit recognizes sibling standing is rendered here unavailing to Plaintiffs by its requirement of state action targeting that relationship. "In order to show deprivation of the right to familial association, a plaintiff must show that the state actor intended to deprive him or her of a specially protected familial relationship." *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1175 (10th Cir. 2013).

other Supreme Court decisions to identify the Due Process Clause as the source of protection for intimate relationships "as a fundamental element of personal liberty," reserving First Amendment protection to groups formed for speech, worship, or petition. *IDK* deemed the interaction between female escorts and their clients too transitory and devoid of household function to warrant due process protection as intimate (*id*. at 1193) and found that an expressive component to the relationship, if present at all, was ancillary to its commercial purpose (*id*.at 1193–1196).

In *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), this circuit referenced in *dicta* (though presented as a holding) the defendants' refusals to disclose to a mother her wrongly-incarcerated son's location as actionable disruptions of familial association under the First and Fourteenth Amendments.[7] Significantly, the *Lee* opinion referenced the officers' deliberate refusal to aid the mother in locating her son, and not his underlying seizure and incarceration, as violations, suggesting that First Amendment protection applied due to the mother's petitioning activity.[8] Regardless, the *Lee* opinion did

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[7] *Lee*'s record shows neither party to the appeal addressed the mother's familial association claim regarding failure to disclose the son's location. Instead, the appellants' opening brief focused on the wrongful nature of the son's earlier arrest and extradition to New York. *See* 1999 WL 33607094 (C.A.9) at * 21–59.

[8] *Lee*'s emphasis on the mother's requests for government aid in finding her son, even though the vast majority of claims in that case centered on the son's prior wrongful seizure, defies Plaintiffs' position that this circuit doesn't require expressive activity for a

not describe the First Amendment right other than by a single quote from *Roberts*.

True to *Roberts*' distinction between intimate and associational relationships, sister circuits share *IDK*'s view that relationship interference unrelated to expressive conduct falls exclusively under the Due Process Clause. These courts have either completely rejected efforts to recast incidental disassociation as a First Amendment deprivation or just nominally permitted them by applying due process standards. *See Christensen v. County of Boone, IL*, 483 F.3d 454, 462–63 (7th Cir. 2007) (disruption of unmarried romantic relationship that lacked expressive aspect better addressed under Due Process Clause than under 1st Amend.); *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 587 (6th Cir. 2013) (dismissing 1st Amend. claim on grounds intimate association protection for a child removal falls exclusively under the 14th Amend.); *Thompson v. Ashe,* 250 F.3d 399, 406 (6th Cir. 2001) (municipal housing policy restricting visitation by non-residents did not implicate intimate association under the 1st Amend.); *McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) (absent allegation of association with husband to engage in 1st Amend. activity, interference with marriage claim solely implicated liberty interest, citing *IDK*); *Uwadiegwu v. Dep't of Soc. Servs. of the Cty. of Suffolk*, 91 F. Supp. 3d 391, 397 (E.D.N.Y. 2015) (disruption of family relations

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First Amendment violation. *See Lee*, 250 F.3d at 678 ("Over the course of the next two years, Mrs. Lee repeatedly contacted the LAPD regarding the whereabouts of [son] Kerry Sanders. Each time she was informed that his whereabouts were unknown").

falls under 1st Amend. analysis if retaliatory for speech, but otherwise is analyzed under substantive due process), *aff'd*, 639 F. Appx. 13 (2d Cir. 2016); *JL v. New Mexico Dep't of Health*, 165 F. Supp. 3d 996, 1040-1041 (D.N.M. 2015) (right to family association "is not protected by the First Amendment but rather by the Fourteenth Amendment" where "[t]he complaint alleges the deprivation of the right to family association as an end in itself, not as a deprivation of an association for the purpose of pursuing activities protected by the First Amendment"); *Evans v. Pitt County Dep't of Soc. Servs.*, 972 F. Supp. 2d 778, 796 (E.D.N.C. 2013) (holding 1st Amend. right to intimate association entitled to no greater protection than under due process), *reversed* in other part as to other parties, 578 F. Appx. 229 (4th Cir. 2014), and *aff'd* in pertinent part, 616 F. App'x 636 (4th Cir. 2015), *cert. den.*, 136 S. Ct. 2013 (2016). *See also Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) ("Although 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").

Thus *IDK*'s separation of protected associations between the First and Fourteenth Amendments, depending on their purpose, matches that by other courts. A synthesis of these authorities yields the following conclusions:

a) Due process analysis governs suits for interference with intimate relationships unless the relationship had a significant First Amendment

expressive component that caused the adverse governmental action;

b) All circuits either reject adult sibling standing or require deliberate interference with a sibling relationship for a due process violation;

c) The two courts that recognized a First Amendment intimate association claim absent expressive conduct analyzed it identically to a due process claim; and

d) No Ninth Circuit decision suggests a First Amendment claim lies absent targeted disassociation and/or protected expression, or that adult siblings, simply by virtue of their blood relations, would possess corresponding standing to sue.

D. THE DISTRICT COURT'S ORDER IGNORED THE PERTINENT PRECEDENT

Although the district court's order quoted *IDK* for the notion that *expressive* associations fall within the First Amendment, the order failed to apply to the complaint the corresponding requirement of such protected activity; instead it leapt to the much broader conclusion that relatives beyond spouses, parents, and children must be embraced. (ER 11–12.) Although *Moore v. East Cleveland* confirms that another

* * *

APPENDIX 2

Case Number 19-15483

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: July 24, 2019]

ROBERT MANN, Sr., et al.,	)
	)
Plaintiffs/ Appellants,	)
	)
vs.	)
	)
CITY OF SACRAMENTO, et al.	)
	)
Defendants,	)
	)
AND	)
	)
JOHN C. TENNIS; RANDY R. LOZOYA,	)
	)
Defendants/ Appellees.	)
	)

On Appeal From:
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. 2:17-cv-01201-WBS-DB
Honorable WILLIAM B. SHUBB

APPELLEES' ANSWERING BRIEF

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[pp. 21-25]

Court reviews that heightened pleading requirement for abuse of discretion. *See McBride v. Int'l Longshoremen's Assn.*, 778 F.3d 453, 461 and 463 (3d Cir. 2015) (applying abuse of discretion standard to district court's orders following remand with grant of discretion).

The only part of the appeal where *de novo* review still pertains is whether the FAC's factual averments met the heightened pleading standard.

C. LEAVE TO AMEND

A district court's decision to dismiss a complaint without leave to amend is reviewed for abuse of discretion. *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013). The district court's discretion is

"particularly broad" where the plaintiff has previously amended. *Id*. at 1133.[8]

D. THE THRESHOLD FIRST AMENDMENT ISSUE REMAINS UNREVIEWABLE EXCEPT *EN BANC*

Because this circuit has issued irreconcilable decisions regarding whether the First Amendment extends to disruption of intimate relationships unrelated to protected expression, and no intervening pertinent Supreme Court decisions exist, this foundational question may not be decided at the panel level. *Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477 (9th Cir.1987) (*en banc*), *cert*. denied, 485 U.S. 989 (1988). The split's existence is undeniable. *Compare IDK, Inc. v. Clark County*, 836 F.2d 1185, 1191-1192 (9th Cir. 1988) (the source of protection for personal relationships is "the due process clause . . . not the first amendment's freedom to assemble" because the latter "protects groups whose activities are explicitly stated in the amendment: speaking, worshiping, and petitioning the government"); *Kraft v. Jacka*, 872 F.2d 862, 871 (9th Cir. 1989) (citing *IDK* for the notion personal relationships involving protected expression fall under the First Amendment whereas intimate relationships fall under the Due Process Clause);[9] *Pickup v. Brown*, 740 F.3d 1208, 1233 (9th Cir. 2014) (deeming intimate relationship claim to fall under

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[8] And, of course, here present is the added factor of the *Mann II* decision's grant of discretion.

[9] Abrogated in other part by *Dennis v. Higgins*, 498 U.S. 439 (1991) (Commerce Clause).

solely the Fourteenth Amendment);[10] and *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018) (interpreting *Roberts* as placing intimate relationship protection exclusively under the Due Process Clause) with *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") and *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) ("[t]he First Amendment, while not expressly containing a 'right of association,' does protect 'certain intimate human relationships,' as well as the right to associate for the purpose of engaging in those expressive activities otherwise protected by the Constitution").[11]

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[10] Abrogated on other grounds by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (level of scrutiny for content-based speech regulation).

[11] Although *Keates* referenced *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), *Lee* is not properly deemed part of the intra-circuit split because its discussion of the First Amendment (a) was *dicta* – neither party briefed the First Amendment claim on appeal (see 1999 WL 33607094 (C.A.9) at * 21–59) and (b) referenced as the associational violation the officers' deliberate refusal to aid the mother in locating her son, despite her repeated inquiries, rather than his underlying seizure and incarceration, indicating that First Amendment protection applied due to the mother's *petitioning* activity. *Id.* at 678. ("Over the course of the next two years, Mrs. Lee repeatedly contacted the LAPD regarding the whereabouts of [son] Kerry Sanders. Each time she was informed that his whereabouts were unknown").

Thus the *Mann II* decision may not be read as recognizing First Amendment protection for non-expressive relationships; rather that panel acknowledged the split by citing *IDK*, *Keates*, and *Erotic Services Provider* regarding which Amendment pertains to what type(s) of relationships (748 F. Appx. at 114), and steered a neutral course by holding that (a) the original complaint fell short "under any theory recognized by this court;" and (b) could not be viably amended "regardless whether we characterize it under the First or Fourteenth Amendments," except by facts showing cohabitation at the time of death. *Id*. at 114-115.

1. The Split Precludes the Officers' Threshold Argument

Although the Officers' opening brief in *Mann II* argued against the First Amendment's application to non-expressive relationships, *Keates*' issuance post-briefing forced the Officers to refrain from that position at oral argument.[12] The same constraints remain in

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[12] Although, due to *Freeman*, a split arguably pre-existed *Keates*, *Freeman*'s proclamation of First Amendment protection for intimate relationships rested on a misreading of *Dallas v. Stanglin* as analyzing such associations under the First Amendment. 68 F.3d at 1188. The Supreme Court actually did the converse. 490 U.S. at 24-25 ("It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*. The Texas Court of Appeals, however, thought that such patrons were engaged in a form of expressive activity that was protected by the First Amendment. We disagree."). Unsurprisingly, as no published Ninth Circuit decision has so cited *Freeman*, its contribution to the current split lies in its existence rather than precedential influence.

place. However, notwithstanding the general desirability of resolving the intra-circuit split, because the judgment can be affirmed without deciding whether the First Amendment protects non-expressive associations, *en banc* hearing isn't mandatory. See *Go v. Holder*, 744 F.3d 604, 614 (9th Cir. 2014) (conc. op. of J. Wallace).

2. The Split Precludes Reversal

But the split also hampers Plaintiffs by precluding reversal on any ground that would extend First Amendment protection to non–expressive associations. Because Plaintiffs admitted the absence of protected expression, *IDK* and *Erotic Services Provider* bar this panel from finding that the FAC adequately pleads, or could be amended to plead, a First Amendment violation.[13] Instead, short of an *en banc* hearing, reversal could have hypothetically occurred only if this Court found a viable Fourteenth Amendment substantive due process claim, where the question of expressive conduct does not arise. But, as further discussed in Section VI.D, *post*, this lone scenario for reversal

* * *

[13] This Court might question how the described constraints can be harmonized with *Mann II*'s remand regarding possible amendment. The answer is that because solely a *due process* claim involving cohabitating siblings avoids the present intra-circuit split, the panel deferred to the district court whether the Manns should receive an opportunity to resurrect that previously abandoned ground for liability.

[pp. 31-37]

split, nor deviate from *IDK*, it lacks the power to address the merits of Plaintiffs' argument siblings need not cohabit to obtain intimate relationship protection.

VI. THE SUPREME COURT HAS NOT CONFIRMED PLAINTIFFS' EXPANSIVE VIEW

Even if this panel could consider the merits of Plaintiffs' primary argument, the strong weight of authority rejects it. Read in isolation, the quoted passage from *Rotary Club* does suggest First Amendment intimate relationship protection can exceed fundamental family/household choices. Nonetheless, as *IDK* concluded, other Supreme Court decisions indicate a different and narrower view.

A. THE SUPREME COURT HISTORICALLY PLACED INTIMATE RELATIONSHIP PROTECTION IN THE DUE PROCESS CLAUSE

SCOTUS opinions preceding and following *Rotary Club* cast considerable doubt on the precision of that opinion's First Amendment reference. In *Nat'l Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court considered whether a state could, as a condition of doing business there, compel the NAACP to reveal all its members' identities. Justice Harlan's opinion stressed that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id*. at 460.

In *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) the Court deemed fundamental the right to conceive and raise children, noting that "the integrity of the family unit" was guaranteed by the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment. Two years later, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974) proclaimed "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause," which Justice Brennan's majority opinion reiterated in *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 842 (1977) (quoting *LaFleur*).

Likewise, *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499-500 (1977) expressly and exclusively identified due process protection for the right of a grandmother to live with her grandson in public housing. Justice Powell's plurality opinion noted that the Court had previously found due process protection for "freedom of choice" regarding childbearing, child custody, and child education, and concluded that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 500-501. *Santosky v. Kramer* (1982) 455 U.S. 745, 753 cited *Moore* and various other Supreme Court decisions as examples 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."

B. *ROBERTS* DISTINGUISHED THE SOURCES OF ASSOCIATION PROTECTION

None of the above cases even hinted at potential First Amendment protection for non-expressive relationships. Consistently with this dearth, in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–618 (1984), where the excluded females pled both First and Fourteenth Amendment violations, the Court described the associational right as bearing two aspects: the liberty to enter into and maintain "certain intimate human relationships" free from undue government intrusion; and the right to associate for the purpose of First Amendment activity, i.e., speech, religion, petition, or assembly; concluding that it would separately analyze each claim/right.

Roberts gave as examples of the liberty-protected relationships those "that attend the creation and sustenance of a family" – marriage, raising and educating children, and "co-habitation with one's relatives," citing *Moore, NAACP, LaFleur*, and *Stanley*. *Id*. at 619–620. Here, the Court emphasized the attributes of relative smallness, high selectivity in formation and maintenance, and seclusion from others as hallmarks of intimacy, deeming all other relationships to fall along a spectrum of potential protection from various State incursions. *Id*. at 620. Only later, and under a separate heading, did Justice Brennan's opinion for a unanimous Court[15] address the expressive freedoms, stating that "we have long

[15] Justice O'Connor concurred in the judgment but diverged on the First Amendment expression analysis. *Id*. at 631-636.

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.

Thus, *Rotary Club*, after reciting the protection for intimate family relationships afforded by the Court's past decisions (including *Moore*) incorrectly categorized its intimate relationship quote of *Roberts* to the *First* Amendment. 481 U.S. at 545 ("We have emphasized that the First Amendment protects those relationships, including family relationships"). No such prior emphasis had occurred; to the contrary, the past emphasis rested squarely on the Due Process Clause. And, like *Roberts*, *Rotary Club* addressed First Amendment protection for *expressive* conduct in a separate section of the opinion. *Id*. at 548.

C. LATER OPINIONS ARE INCONSISTENT WITH *ROTARY CLUB*'S SOLITARY REFERENCE

Subsequent Supreme Court opinions confirm *Rotary Club*'s mistaken tethering of intimate relationships to the First Amendment. *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989) cited and quoted *Roberts*' distinction between the two types of protected associations, finding that neither intimacy nor expressive conduct was involved for dance-hall patrons. The concurring opinion of Justices Stevens (who had joined in the *Rotary Club* majority opinion) and Blackmun stated that protection for "the opportunity to make friends and enjoy the company of other people" fell under the Due Process Clause rather than under the First Amendment. *Id*. at 28.

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 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. *Id*. at 95.[16]

Far more recently, *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 summary, over the past 60 years, the Court has consistently identified the Due Process Clause as the source of intimate relationship protection, without

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[16] "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion."

suggesting a First Amendment analog – its unique contrary statement in *Rotary Club*, which inaccurately described its prior decisions, aptly held no sway over its subsequent analyses.

D. PLAINTIFFS ABANDONED THEIR DUE PROCESS CLAIM

Despite the suitability of a substantive due process theory as the vehicle for an intimate relationship claim, and the absence of a corresponding intra-circuit split, Plaintiffs may not so proceed because:

(a) the opening brief fails to address the Fourteenth Amendment violation theory's dismissal, so the matter is waived (see *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005));

(b) nor should this Court exercise its discretion to nonetheless consider the FAC's substantive due process claim (e.g., for lack of apparent prejudice to the Officers). After pleading such a violation in the *Mann II* complaint, Plaintiffs abandoned it in the district court, which abandonment they expressly confirmed on appeal. Yet, they re-pled that theory following remand without permission from the

* * *

APPENDIX 3

Case Number 19-15483

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: May 13, 2020]

ROBERT MANN, Sr., et al.,	)
Plaintiffs/ Appellants,	)
	)
vs.	)
	)
CITY OF SACRAMENTO, et al.	)
Defendants/ Appellees,	)
and	)
JOHN C. TENNIS; RANDY R. LOZOYA,	)
Defendants/ Appellees.	)
	)

On Appeal From:
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Case No. 2:17-cv-01201-WBS-DB
Honorable WILLIAM B. SHUBB

JOINT PETITION FOR REHEARING EN BANC

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[pp. 2-6]

A. REHEARING IS NEEDED TO RESOLVE AN INTRA-CIRCUIT SPLIT ABOUT THE SUPREME COURT'S INTIMATE RELATIONSHIP DECISIONS

Over the past century, the Supreme Court repeatedly recognized the personal liberty to make decisions about fundamentally private matters such as marriage, bearing and raising children, and cohabitation. With just one exception – *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) – the Supreme Court never identified this freedom's source as the First Amendment's assembly protection; rather the Court persistently selected the Fourteenth Amendment's Due Process Clause. Accordingly, in *IDK, Inc. v. Clark*

County, 836 F.2d 1185, 1191-1192 (9th Cir. 1988), this Court surveyed those decisions and held that relationships not involving expressive conduct/speech lack First Amendment protection, meaning that purely intimate relationships, such as in households, fall solely under the Due Process Clause.

But despite *IDK*'s theoretically binding effect on subsequent panels, only some Ninth Circuit opinions adhered to its distinction between First and Fourteenth Amendment associational protections[2] – several other panel opinions stated or indicated, without mentioning *IDK*, that intimate relationships qualify for First Amendment protection even absent expressive conduct.[3] Unknowingly, the latter cases created an

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[2] *Kraft v. Jacka*, 872 F.2d 862, 871 (9th Cir. 1989) (citing *IDK* for the notion personal relationships involving protected expression fall under the 1st Amend. whereas intimate relationships fall under the Due Process Clause), abrogated in other part by *Dennis v. Higgins*, 498 U.S. 439 (1991); *Pickup v. Brown*, 740 F.3d 1208, 1233 (9th Cir. 2014) (analyzing 1st Amend. intimate relationship claim solely under the 14th Amend.), abrogated on other grounds by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). See also *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1169 and n.5 (9th Cir. 2013) (expressing uncertainty over plaintiff's reference to 1st Amend. rights and analyzing family association claim solely under due process).

[3] *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) ("[t]he First Amendment, while not expressly containing a 'right of association,' does protect 'certain intimate human relationships,' as well as the right to associate for the purpose of engaging in those expressive activities otherwise protected by the Constitution"). See *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001) (stating in *dicta* that the 1st Amendment too protects intimate relationships).

intra-circuit split, which peaked in 2018 when published opinions on each side of the split issued within months of one another. Compare *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018) (stating intimate relationship claims fall under the Due Process Clause, while expressive association claims come under the First Amend.), with *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").

Mann III functionally joins the split by recognizing First Amendment protection for purely intimate relationships. (Appx. at 003-004.) Accordingly, *en banc* review under F.R.A.P., Rule 35(b)(1)(A) is needed to establish uniformity both within the circuit and with the Supreme Court.

B. THE MEMORANDUM DECISION ALSO CREATES A DIFFERENT INTRA-CIRCUIT SPLIT REGARDING PROTECTION FOR SIBLINGS

Although generally entertaining the notion of First Amendment protection for non-expressive associations, *Mann II* essentially mooted it by stating "we analyze the right of intimate association in the same manner regardless whether we characterize it under the First or Fourteenth Amendments." 748 F. Appx. at 115. Indeed, neither *Freeman*, nor *Lee*, nor *Keates*, suggested First Amendment intimacy protection is broader than under the Due Process Clause. Because *Ward v. City of San Jose*, 967 F.2d 280, 283-284 (9th Cir. 1991) held sibling relationships *per se* lack due

process protection, *Mann II* deemed cohabitation necessary for a constitutional claim to proceed. See *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499-500 (1977) (city could not prohibit relatives from residing together).

Yet *Mann III* disagreed, stating that, since *Ward* governs solely Fourteenth Amendment claims, siblings need not show cohabitation to gain First Amendment protection, which necessarily treats the latter as broader. Appx. at 003-004. Another panel recently experienced, and more sharply, the same disagreement. *J.P. by & through Villanueva v. County of Alameda*, 2020 WL 995203 (9th Cir. 2020) (compare *2 ["{n}o viable loss-of-familial-association claim exists for siblings under the First Amendment"] with *3 [diss. op. of J. Paez – *Ward* did not address distinct and broader sibling rights under the 1st Amend.]). See *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1061 (9th Cir. 2018) (conc. op. of J. Wardlaw – "siblings do not have a constitutional right to loss of companionship," citing *Ward*). Accordingly, if First Amendment protection can apply to a non-expressive relationship, *en banc* rehearing is required to resolve the subsidiary internal split about whether such protection matches, or rather exceeds, that under the Due Process Clause, and thus whether *Ward* has ongoing practical viability.

C. THE QUESTION OF SIBLING ASSOCIATIONAL RIGHTS SHOULD BE RESOLVED

Strictly speaking, as a memorandum decision, *Mann III*'s sibling rights divergence from *Mann II* and *Ward* doesn't qualify as a true precedential split. Nonetheless, under what circumstances, if any, the

Constitution encompasses sibling relationships (absent expressive conduct) qualifies as an exceptionally important question under Rule 35(b)(1)(B) because (1) such standing to sue will greatly expand the class of potential plaintiffs in child removal, police seizure/force, and prison/institutional death cases; and (2) other circuits to consider the matter found either no, or far more limited, constitutional protection. *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8-9 (1st Cir. 1986) (refusing to recognize claim by adult siblings); *Gorman v. Rensselaer County*, 910 F.3d 40, 47 (2d Cir. 2018) (interference with siblings must target their relationship); *Trujillo v. Board of County Commissioners*, 768 F.2d 1186 (10th Cir. 1985) (siblings possess standing to sue only if their relationship was the target of state action); *Bell v. City of Milwaukee*,

* * *

[pp. 9-21]

The Manns appealed. The second panel: labeled *Mann II*'s requirement of cohabitation for sibling associational protection "*dicta*;" stated that cohabitation was merely one of various intimacy criteria the district court could consider; restricted *Ward*'s holding to Fourteenth Amendment claims (and thus indicated that First Amendment intimate association rights may be broader); asserted *Mann II*'s remand logically contradicted a recognition *Ward* barred a sibling First Amendment claim; and remanded for the district court to reevaluate the First Amendment claim. *Id*. at 003-004. This petition followed.

III. SOME PANELS HAVE NOT FOLLOWED *IDK*'S LIMITATION OF FIRST AMENDMENT ASSOCIATIONAL PROTECTION

A. *IDK* APTLY REGARDED *ROTARY CLUB*'S REFERENCE TO THE FIRST AMENDMENT AS ANOMALOUS

As asserted above, for decades the Supreme Court tethered the liberty to make certain personal choices to the Fourteenth Amendment's Due Process Clause, which the Court stated in *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923) preserved the freedoms "to marry, establish a home and bring up children." Forty years later, *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965) reversed the convictions of doctors who advised spouses about contraceptives, with Justice Douglas' majority opinion explaining that the First Amendment preserved the doctors' right to disseminate information and to associate with their patients for that purpose. But *Griswold* did not suggest that the First Amendment also protected the marital relationship or the couple's right to choose against child-bearing.

Accordingly, the Court continued to cite due process, but not the First Amendment, as the liberty source in *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*, 431 U.S. at 499-501 (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").

Similarly, *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,[6] and 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 v. U.S. Jaycees*, 468 U.S. 609, 617–618 (1984), the Court had not once invoked the First Amendment as a source of family relationship protection. *Roberts* addressed a fraternal organization's challenge to Minnesota's anti-discrimination laws regarding the exclusion of females

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[6] *Roe* placed only one prior decision in the First Amendment category, *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. *Roe* described *Griswold* as invoking the "penumbra of the Bill of Rights." 410 U.S. at 152.

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 "instrumental;" concluding that it would separately analyze each claim/right. *Id*. at 617-618.

Roberts gave as examples of the liberty-protected "highly-personal" relationships those "that attend the creation and sustenance of a family" – marriage, raising and educating children, and "co-habitation with one's relatives." *Id*. at 619–620. Here the Court emphasized the attributes of relative smallness, high selectivity in formation and maintenance, and seclusion from others as hallmarks of intimacy, deeming all other relationships to fall along a spectrum of potential protection from various State incursions. *Id*. at 620.

Nowhere in that first discussion did *Roberts* identify a particular constitutional source of intrinsic relationship protection. 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. Thus *Roberts* neither declared the First Amendment as preserving intrinsic relationships, nor

deemed those relationships to encompass mere blood kinship.

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 intimacy, citing *Roberts*. *Id.* at 545.

But, as demonstrated 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. And, 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 Stevens had joined in both the *Roberts* and *Rotary Club* majority opinions. Nor, since *Rotary Club*, has a Supreme Court justice (even in a dissent) referenced

the First Amendment as a source of intrinsic/intimate relationship protection.

B. *IDK* Construed the Precedents to Grant Solely Due Process Protection

This circuit did not mechanically accept at face value *Rotary Club*'s inexplicable First Amendment reference. Reviewing First and Fourteenth Amendment challenges to a Nevada regulation of escort services, *IDK* cited *Roberts*' distinction between intrinsic and instrumental associations, noting that the same relationship could be both intrinsic and instrumental, then stated that for intrinsic relationships "the Supreme Court has most often identified the source of the protection as the due process clause of the fourteenth amendment, not the first amendment's freedom to assemble" because the latter instead protects speech, worship, and petitioning. 836 F.2d at 1191-1192. *IDK* then analyzed the escort service's intimate association claim solely under due process, reserving First Amendment analysis for the expressive association argument. *Id.* at 1193-1194. Judge Reinhardt's dissent also observed this distinction, though he deemed the escort relationship to qualify for protection either way. *Id.* at 1201.[7]

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[7] *IDK* was not alone in its position. Two years later, Judge Posner wrote "it is sometimes suggested —erroneously, in light of *Roberts* and *Stanglin* — that the First Amendment protects nonexpressive associations." *Swank v. Smart*, 898 F.2d 1247, 1252 (7th Cir. 1990), *cert. den.* 498 U.S. 853. See *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993) ("[w]e believe the familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment,'" citing *IDK*).

C. THE SPLIT UNKNOWINGLY EMERGED

Seven years after *IDK*, this circuit in *Freeman* reviewed a bar's First Amendment claim of municipal interference with its customer relations and (mis)cited *Roberts* for the proposition the First Amendment protects both intimate and expressive associations, ultimately finding the bar's relations lacked either quality. 68 F.3d at 1188. *Freeman* also mistakenly construed *Dallas v. Stanglin* as applying First Amendment analysis to intimate relationships.[8] *Freeman* made no mention of *IDK*. However, this divergence proved practically uneventful until *Mann III*, as no Ninth Circuit opinion ever cited *Freeman* in this respect.

The same inconspicuousness did not accompany *Lee v. City of Los Angeles*, which arose from a wrongfully-seized man's extradition to New York, and city officials' later refusal to disclose his location to his mother, despite her repeated inquiries. 250 F.3d at 678. Despite that neither party to the appeal briefed the mother's associational claims' dismissal (see 1999 WL 33607094 (C.A.9) at * 21–59), the panel opinion quoted *Rotary Club* regarding First Amendment protection for family relationships and concluded the alleged police misrepresentations to the mother about her incarcerated son's location supported such liability, as

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[8] "It is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*. The Texas Court of Appeals, however, thought that such patrons were engaged in a form of expressive activity that was protected by the First Amendment. We disagree." 490 U.S. at 24-25.

well as constituted a due process violation. *Id*. at 685-686. *IDK* again went unmentioned.

Not only was this section of *Lee dictum* but it correctly focused on the mother's *expressive* conduct (petitioning) rather than the original separation from her son by his arrest. Nonetheless, *Lee* truly spawned the internal split – *Keates* cited it (and *Rotary Club*) as precedent, in the non-expressive context of state removal of a child from the parent's custody, for the notion of First Amendment intimate relationship protection. 883 F.3d at 1236. And, like *Lee*, *Keates* made no mention of *IDK*. Similarly, despite Petitioners' briefing on the split, *Mann III* cited solely *Freeman*, *Lee*, and *Keates*, while ignoring *IDK*, *et al*. Conversely, neither *Erotic Service Provider*, nor *Pickup*, mentioned *Freeman* or *Lee*.

In summary, the current split among panel opinions originated blindly 25 years ago, deepened, and seems to be worsening, without any recognition it even exists, much less an attempt to distinguish *IDK* or show superseding Supreme Court authority that would remove *IDK* as precedent. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*). Absent *en banc* review of this matter, no reason exists to believe the growing split will somehow reconcile.

IV. *MANN III* CREATES A NEW SPLIT

Contrasting with its internal disagreement about First Amendment protection for purely intimate associations is this circuit's previously universal stance, through *Mann II*, that the same analysis applies to all intrinsic relationship claims, First or

Fourteenth. See 748 F. Appx. at 115. Certainly, nothing in *Freeman*, *Lee*, or *Keates* suggests a broader First Amendment protection.

Concerning siblings, *Ward* stated that "Supreme Court precedent" did not support a sibling associational right, which history would include *Rotary Club* and thus seem to transcend which Amendment was invoked. 967 F.2d at 284. Presumably, *Ward* considered that, unlike spouses and parents, siblings do not choose their relationships but are born into them via their parents' decision. Similarly, the cites to *Ward* in *Wheeler*, especially in Judge *Wardlaw*'s concurrence, suggest a universal view of sibling rights. 894 F.3d at 1061 ("siblings do not have a constitutional right to loss of companionship"). Yet, by cabining *Ward*'s holding of no sibling associational right to the Fourteenth Amendment, and allowing the Manns' First Amendment claim to proceed, *Mann III* necessarily treats the later as broader in scope regarding siblings. This holding also directly conflicts with *Mann II*. Nor is the disagreement limited to this case; as earlier noted, the same dispute occurred this year, albeit more openly, in *J.P. v. County of Alameda*.

Accordingly, if the First Amendment pertains to intimate association, *en banc* rehearing is needed to address (a) whether the same analysis governs all intimate association claims, First or Fourteenth, and (b) if not, whether siblings receive greater protection under the First Amendment, such that *Ward*'s analysis governs solely due process claims, which will fade to insignificance as plaintiffs' attorneys elect to plow the more fertile ground.

V. NO OTHER CIRCUIT RECOGNIZES AN INCIDENTAL SIBLING INTERFERENCE CLAIM

Since this circuit has not previously recognized by published opinion sibling relationships as protected in any setting, *Mann III* raises an important new issue: assuming First Amendment sibling protection exists, does it reach the same level as parent-child so as to pertain even when the siblings are non-cohabitating adults and regardless of whether the state actor knowingly interfered with their relationship?

Underscoring this question's importance is that, of the four other circuits to have addressed sibling relationship protection, the First and Seventh categorically rejected it, whereas the Second and Tenth allowed such a claim only where state action targeted the kinship. (See Section I.C, *ante*.) Indeed, no other circuit recognizes liability for incidental interference with *any* family relationship, even parents and children – the Ninth Circuit stands alone in that regard – which is ironic because the Ninth reached its position (also in *Ward*) by following the Seventh, who thereafter reversed it. See *Partridge v. City of Benton, Arkansas*, 929 F.3d 562, 568 (8th Cir. 2019) (citing various circuits' decisions and noting solely the Ninth Circuit does not require targeted deprivation); *Russ v. Watts*, 414 F.3d at 791 (reversing *Bell*); *Rentz v. Spokane County*, 438 F. Supp. 2d 1252, 1264-1265 (E.D. Wash. 2006) (noting change in the Seventh's position and describing the Ninth's recognition of incidental deprivation as "inadvertent and/or not particularly well

thought out under Supreme Court precedent"), amended in other part at 2006 WL 8437720 (2006).

Although this circuit's unique position about incidental family disruption need not be now generally addressed, whether to extend that anomalous view to siblings should be decided. Again, because siblings don't choose to form their relationships, a lesser level of constitutional protection fits the lesser liberty interest involved. And, to date, the Supreme Court's family protection decisions haven't strayed beyond the household to embrace non-cohabitating relatives. Prior to *Mann III*, this circuit proceeded in a similarly narrow manner. *Wheeler*, 894 F.3d at 1046 (describing S. Ct.'s emphasis on daily association rather than biological relation, such that "few close relationships – even between blood relations" warrant protection); *Mullins v. State of Oregon*, 57 F.3d 789, 793–795 (9th Cir. 1995) (constitutional protection for family association requires more than blood kinship).

Thus, if it recognizes First Amendment protection for sibling associations, this circuit should determine *en banc* whether that protection reaches the same level as for spouses and parents-children.

VI. CONCLUSION

Thirty years ago, the combination of *Ward* and *IDK* plainly declared that sibling relationships must involve some protected conduct, such as speech or cohabitation, to achieve constitutional protection. Since then, various inconsistent panel opinions issued, leading to *Mann III*'s contrary holding that sibling relationships may be protected even absent expressive conduct, cohabitation,

or even targeted interference, as other circuits would require. The precedential division has recently intensified, affecting this circuit's decisions both published and memorandum. Only *en banc* review can resolve these internal splits and bring this circuit closer to its sisters and the Supreme Court.

Dated: May 13, 2020

ANGELO, KILDAY & KILDUFF

/s/ John A. Whitesides
By:_____
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APPENDIX 4

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT MANN, SR., et al.,

Plaintiffs,

vs.

CITY OF SACRAMENTO, et al.,

Defendants.

Case No.: 2:17-cv-01201-WBS DB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS JOHN C. TENNIS AND RANDY R. LOZOYA'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [Rule 12(b)(6)]

Date: March 11, 2019
Time: 1 :30 PM
Ctrm. 5
Honorable William B. Shubb

[pp. 10-13]

(9th Cir. 1985) ("{i}n other words, the plaintiff must show that the particular facts of his case support a claim of clearly established right").

B. PLAINTIFFS' PUTATIVE RIGHTS WERE NOT CLEARLY ESTABLISHED BY ANY COURT

1. Sibling Association Under The Due Process Clause

Plaintiff(s)' associational right under the Due Process Clause was unclear as of July of 2016. First, neither the Ninth Circuit, nor the Supreme Court, nor a consensus of other circuits had previously recognized a protected associational right between adult siblings. The Ninth Circuit squarely rejected sibling rights under the Fourteenth Amendment in *Ward v. City of San Jose,* 967 F.2d 280, 283-84 (9th Cir. 1991), without

referring to cohabitation.[5] Furthermore, *Ward* disagreed with the Tenth Circuit's recognition of sibling rights in *Trujillo v. Board of County Commissioners,* 768 F.2d 1186 (10th Cir.1985). The First Circuit, including then Judge Breyer, held similarly to *Ward* in *Valdivieso Ortiz* v. *Burgos,* 807 F.2d 6, 8 (1st Cir. 1986) (refusing to recognize sibling associational right without discussing residency). Accordingly, adult sibling associational protection under the Due Process was not clearly established outside of the Tenth Circuit.

Indeed, as recently as 2013, this Court found no sibling associational right under the Due Process Clause as to a cohabitating, but not blood kin or adopted, minor removed from the home, with the primary analytical ground being the general lack of sibling associational protection (vs. the lack of biological or legal relation). *Olvera v. County of Sacramento,* 932 F. Supp. 2d 1123, 1148 (E.D. Cal. 2013) (J. Shubb). Also, this Court will likely recall that, during the original motion to dismiss, Plaintiffs expressly stated that the Due Process Clause did *not* protect sibling relationships, which position was tantamount to an admission such rights were not clearly established. (ECF # 18, p. 10 [p. 5 of opp.: "{h}owever, unlike Fourteenth Amendment claims which encompass only familial parent-child and spousal relationships not including siblings," the First Amendment provides broader protection].)

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[5] The *Ward* opinion didn't describe which relatives lived with the decedent at the time of death.

2. Sibling Association under the First Amendment

Prior to July of 2016, neither the Supreme Court, nor the Ninth Circuit, nor a strong majority of other circuits, had recognized intimate relationship rights for adult siblings under the First Amendment. To the contrary, five other circuits expressly reject(ed) First Amendment protection for *any* intimate relationships, absent expressive activity. See *Christensen v. County of Boone, IL*, 483 F.3d 454, 462-63 (7th Cir. 2007) (disruptioii of unmarried romantic relationship that lacked expressive aspect better addressed under Due Process Clause than under 1st Amend.); *Kolley v. Adult Protective Servs.,* 725 F.3d 581, 587 (6th Cir. 2013) (dismissing 1st Amend. claim on grounds intimate association protection for a child removal falls exclusively under the 14th Amend.); *Griffin v. Strong,* 983 F.2d 1544, 1547 (10th Cir. 1993) ("[w]e believe the familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment'"); *McCabe v. Sharrett,* 12 F.3d 1558, 1563 (11th Cir. 1994) (absent allegation of association with husband to engage in 1st Amend. activity, interference with marriage claim solely implicated liberty interest); *Uwadiegwu v. Dep't of Soc. Servs. of the Cty. of Suffolk,* 91 F. Supp. 3d 391, 397 (E.D.N.Y. 2015) (disruption of family relations falls under 1st Amend. analysis if retaliatory for speech, but otherwise is analyzed under substantive due process), *affd*, 639 F. Appx. 13 (2d Cir. 2016); *JL v. New Mexico Dep't of Health,* 165 F. Supp. 3d 996, 1040-1041 (D.N.M. 2015) (right to family association "is not protected by the First Amendment but rather by the Fourteenth-Amendment" where "[t]he

complaint alleges the deprivation of the right to family association as an end in itself, not as a deprivation of an association for the purpose of pursuing activities protected by the First Amendment").

And, prior to the panel decision in this case, the Ninth Circuit's position regarding First Amendment protection for familial association was anything but clear. *IDK, Inc. v. Clark County,* 836 F.2d 1185, 1191-1192 (9th Cir. 1988) deemed the Due Process Clause the *exclusive* source of family relationship protection,[6] whereas *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001) referenced both the First and Fourteenth Amendments as applicable to the parent-child relationship, although that reference focused on *expressive* activity, i.e., the mother's petitioning of local authorities for assistance in locating her son, rather than the original disassociation by his seizure and incarceration. Although *Lee* and *IDK* can be harmonized by *IDK's* recognition (at 1192) that "a single association may have both intimate and expressive features and therefore be entitled to claim the protection of both the first and fourteenth amendments," the Ninth Circuit remains divided on this threshold issue. Compare *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 458 (9th Cir. 2018), amended at 881 F.3d 792 (9th Cir. 2018) (interpreting *Roberts* as placing intimate

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[6] *Kraft v. Jacka,* 872 F.2d 862, 871 (9th Cir. 1989), abrogated in other part by *Dennis v. Higgins,* 498 U.S. 439 (1991) (Commerce Clause), cited *IDK* for the notion personal relationships involving protected expression fall under the First Amendment whereas intimate relationships fall under the Due Process Clause.

relationship protection exclusively under the Due Process Clause) with *Keates v. Koile,* 883 F .3d 1228, 1236 (9th Cir. 2018) (deeming both First and Fourteenth Amendments to apply to familial association claim by mother regarding removed child). In short, no Ninth Circuit case prior to the panel decision herein even suggested First Amendment protection for adult sibling association might exist in the absence of a causal link to protected conduct.[7]

Finally, even assuming the Ninth Circuit generally recognized before 2016 sibling relationship protection under the First Amendment, the Ninth Circuit had not until the panel decision herein clarified whether the elements of a First Amendment associational claim matched those of a due process claim. In opposing the original motion to dismiss, Plaintiffs argued their elements did *not* duplicate; asserting that solely the First Amendment protected siblings. (ECF #18, pp. 5-7.) In one key respect, that uncertainty warrants qualified immunity - whether the Officers had to intentionally interfere with the sibling relationship. The FAC doesn't *factually* allege the Officers knew Joseph's siblings existed, much less that the Officers shot Joseph because of their family relations. To the contrary (and despite the boilerplate malice averments), the historical averments describe a field

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[7] Plaintiffs previously invoked the rule that a clearly established civil right is not rendered unclear by judicial dispute over which Amendment provides the right's source. That principle is misdirected here because the Officers contend Plaintiffs' putative right wasn't clearly established *anywhere,* i.e., by either the First or the Fourteenth Amendment.

response to citizen reports of an unidentified armed man rather than a planned assault on an identified person such as a search or arrest warrant execution.

Although the Ninth Circuit held prior to 2016 a *due process* relationship claim did not require targeting of the family association, First Amendment violation claims typically do require a causal nexus between the protected conduct and the state action. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005); *Camacho v. Brandon,* 317 F.3d 153, 160 (2d Cir. 2003) ("To prevail on a First Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff must prove by a preponderance of the evidence that . . . a causal relationship existed between the constitutionally protected expression and the retaliatory action"); *Wingate v. Gage County Sch. Dist.,* No. 34, 528 F.3d 1074, 1081 (8th Cir. 2008) (freedom of association claim requires protected conduct as a substantial factor in the defendant's decision to act). Accordingly, one other circuit requires a causal connection between the state action and the family relationship for First Amendment liability. *Clemente v. Vaslo,* 679 F.3d 482, 495-496, at n. 7 (6th Cir. 2012) (treating intimate association claim as sounding solely under Due Process Clause where no evidence showed a causal connection between family relationship and employment termination).[8] Thus the

[8] Although a single sister circuit holding may, at first blush appear, underwhelming, that paucity stems from the fact most circuits refuse to recognize liability for coincidental family interference even under the Fourteenth Amendment. See *Robles-Vazquez v. Garcia,* 110 F.3d 204, 206, fn. 4 (1st Cir. 1997); *Love v. Riverhead Cent. Sch. Dist.* 823 F.Supp.2d 193, 200 (E.D.N.Y. 2011) (predicting 2d Circuit would follow the majority view requiring

law in sister circuits as of 2016 did not indicate that the Ninth Circuit or Supreme Court would likely recognize First Amendment liability for deprivations of family association causally unrelated to expressive/ associational activity.

3. Protection for Visitation or past Cohabitation Wasn't Recognized

Although the right of family members to cohabitate was established by the U.S. Supreme Court prior to July of 2016, neither the Court, nor the Ninth Circuit, nor other circuits, had by then held that a sibling claim for deprivation of an intimate relationship can rest on *past*

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targeted disassociation, even regarding minors); *Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 587 F.3d 176, 191-192 (3d Cir. 2009) (extending requirement of deliberate interference to parental relationships with minor children); *Shaw v. Stroud,* 13 F.3d 791, 804-805 (4th Cir. 1994) ("because the Supreme Court has never extended the constitutionally protected liberty interest incorporated by the Fourteenth Amendment due process clause to encompass deprivations resulting from governmental actions affecting the family only incidentally, we decline to sanction such a claim at the present time"); *De Fuentes* v. *Gonzales,* 462 F.3d 498, 505 (5th Cir. 2006) (incidental disruption of parental right insufficient); *Russ v. Watts,* 414 F.3d 783, 790-791 (7th Cir. 2005) (no standing by parents to sue for unintentional disassociation from adult son by police shooting); *Reasonover v. St. Louis County,* 447 F.3d 569, 585 (8th Cir. 2006) (mother's incarceration did not target her relationship with her minor daughter); *Lowery v. County of Riley,* 522 F.3d 1086, 1092 (10th Cir. 2008) (father's incarceration did not target disruption of relationship with daughter); *Robertson v. Hecksel,* 420 F.3d 1254, 1260 (11th Cir. 2005) (no protection for untargeted disruption to adult child's association with parent).