

No. 20-161

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In The  
**Supreme Court of the United States**

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CITY OF SACRAMENTO, CALIFORNIA, ET AL.,

*Petitioners,*

v.

ROBERT MANN, SR., ET AL.,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**RESPONDENTS' BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED**

1. Are the questions presented by Petitioners properly before the Court?
2. Should the Court grant review of the court of appeals' decision that "cohabitation [i]s one of several objective indicia that courts *may* consider when assessing whether Plaintiffs were deprived of their intimate-association right"?

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## INTRODUCTION

This case involves the question of whether siblings may pursue claims for the unlawful killing of their decedent sibling. Here, police officers John C. Tennis and Randy R. Lozoya hunted down, cornered, and killed in a hail of 14 bullets Joseph Mann, a mentally ill black man. Joseph's siblings, Robert Mann, Sr., Vern Murphy-Mann, and Deborah Mann, with whom Joseph shared particularly close sibling relationships, brought claims for unwarranted interference and termination of their intimate relationships, based on violations of their constitutional rights under the First and Fourteenth Amendments to the U.S. Constitution, pursuant to 42 U.S.C. § 1983.

On appeal from the district court's dismissal, the Ninth Circuit vacated the judgment for Petitioners, and remanded to the district court for "consideration of Plaintiffs' First Amendment claim under the standard set forth in *Rotary Club* and its progeny." In *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987), this Court "recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." While this Court has "not attempted to mark the precise boundaries of this type of constitutional protection," it has recognized that such protected relationship may take "various forms," including "marriage," "the begetting and bearing of children," "child rearing," and "education." But that is not all, as this Court has explained:

We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” [*Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)]. But in *Roberts* we observed that “determining the limits of state authority over an individual’s freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” 468 U.S., at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring)). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

*Id.*

The instant petition is premature and unripe for review because the lower courts have not yet had the opportunity to consider whether the claims in this case satisfy the standard set forth in *Rotary Club* and its progeny. Rather, the court of appeals has merely remanded this case to the district court for consideration of the issue in the first instance. Rather than wait for

this issue to be decided below, Petitioners attempt to obtain an answer to a question from this Court which the Ninth Circuit has asked the district court to answer but which it has not yet had the opportunity to consider.

Accordingly, the petition for writ of certiorari should be denied.

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## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS<sup>1</sup>

Joseph Mann, the decedent, was born in Newburgh, New York, in 1965. Robert Mann, Sr., is Joseph's older brother, and Vern Murphy-Mann and Deborah Mann are Joseph's older sisters.

The Mann family siblings, consisting of three boys and two girls, grew up as a tightknit family unit that lived, ate, played and prayed together. The Mann family were Jehovah's Witnesses and were very religious. The Mann family moved from Newburgh, New York, to Sacramento, California, in 1979. The Mann family siblings lived together in the same home until their parents separated around 1980.

In 1986, when Joseph was 21, he moved out to live on his own for the first time, but remained in Sacramento and frequently and regularly visited with his

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<sup>1</sup> The facts are taken from Respondents' currently-operative First Amended Complaint.



siblings. Shortly after moving into his own place, Joseph obtained employment with Raley's grocery stores where he worked for over 18 years. Since he was unmarried and had no children, he continued, regularly, to visit with his siblings, played with his nieces and nephews, and regularly participated in family get-togethers.

Around 1999, Joseph bought his own home and Vern moved in and lived with Joseph. They cooked and ate together. They lived together for two years until 2001. Throughout the years Joseph worked for Raley's, he and his siblings remained in frequent and regular contact, meeting at least once a week to visit or enjoy watching television, playing with the children, and having meals and barbecues together.

In 2009, shortly after his mother moved back to the ancestral community in Georgia, Joseph moved to Georgia to be close to his mother and grandmother. He remained in Georgia until 2011, when his mother died. Robert visited Joseph in Georgia at least four times.

In or around 2011, Joseph developed and began exhibiting symptoms related to mental illness, following the death of his mother. Joseph was never a violent man, even when experiencing the effects of his mental illness. Joseph never exhibited any violent tendencies or threatened violence to himself or others.

In 2012, Joseph moved back to Sacramento to be closer to his family. Joseph split his living arrangement between Robert and Vern's homes and the home of his niece, Vern's daughter. This living arrangement

continued until 2014 at which time Robert moved to Rancho Cordova, California, and allowed Joseph to move into the home he vacated. That house was lost to bank foreclosure in 2015, and Joseph moved back in with Robert as he struggled with his mental illness and drug addiction. Robert offered his encouragement to Joseph, assisted him in enrolling in narcotics anonymous and alcohol anonymous programs, and even accompanied him to the programs. Joseph's California identification card, valid until 2019, reflected Robert's residential address as his own residential address.

Joseph was occasionally hospitalized in connection with his mental illness. His siblings would visit him during these hospitalizations. Robert, Vern, and Deborah supported Joseph financially, and, right up until his death, they fed him, and provided him housing. Joseph kept his clothes and personal belongings at Robert, Vern, and Deborah's homes and received mail and listed their residences as his own addresses.

In the last six months of his life, Joseph Mann was deteriorating and suffering from both mental illness and addiction. Often, he would stay out, at times for several days; Robert, Vern, and Deborah would search for him at places he habitually frequented and would bring him back home to bathe, rest, and eat. Despite his absences, Robert, Vern, and Deborah were in constant contact with Joseph and made sure that he knew he was welcome in their homes.

On July 11, 2016, Joseph was experiencing the effects of his mental health illness. Persons observed

Joseph Mann acting erratically, including performing karate-style moves. Joseph's actions were consistent with that of a person suffering from mental illness. Two persons called 9-1-1 to report sightings of Joseph to police.

The first caller reported that a man was carrying a knife, which he was throwing up into the air, and had a black gun in his waistband. The caller later reported that the man "pulled the gun out" of his waistband.

The second caller reported that there was a mentally ill man with a gun and a knife outside her apartment and that there were children around. The caller stated that the man was throwing and flipping the knife in the air and catching it. The caller later stated that she did not actually see a gun—rather, another of her neighbors had told her that the man had a gun.

Joseph Mann did not have a gun and the reports that he did were false.

Sacramento Police Department police officers were dispatched to respond to the reports of a suspicious subject with weapons. First-responding officers observed Joseph and, using a patrol vehicle's loudspeaker system, commanded Joseph to get on the ground and drop the knife he held. Joseph questioned why the officers were confronting him. The officers responded that they had received reports that he was carrying a gun. Joseph denied that he had a gun. The officers observed that Joseph was not carrying a gun in his hands and could not see a gun on his person. The officers commanded Joseph to drop his knife.

Joseph walked away from the officers' vehicle. The officers reported that Joseph held a knife in his right hand, that he was not complying, and that he was very hostile. The officers used the loudspeaker again and commanded Joseph to put his hands in the air and to drop the knife. Joseph threw a metallic coffee mug near the front of the officers' patrol vehicle. The officers radioed that Joseph was being extremely hostile, was throwing items at them, and he still had the knife in his hand.

Joseph Mann continued walking away from the officers. Other officers began to arrive on the scene, including John C. Tennis and Randy R. Lozoya. Officer Tennis was driving a patrol vehicle and officer Lozoya was in the front passenger seat. A dash-camera recorded conversations between Tennis and Lozoya, from inside of their vehicle, as they arrived on scene:

Lozoya: "Fuck. Fuck this guy."

Tennis: "I'm gonna hit him."

Tennis: "Okay. Go for it. Go for it."

Officer Tennis maneuvered his vehicle towards Joseph, attempting to strike him with the vehicle. Joseph narrowly escaped being hit by the vehicle. Officer Tennis' vehicle came to an abrupt stop, backed-up in reverse, and was again maneuvered to face Joseph, who was standing on a sidewalk. Officer Tennis again accelerated his vehicle towards Joseph, attempting to strike him. Joseph again avoided getting hit by the

vehicle. Officer Tennis stated: “We’ll get him. We’ll get him.”

Officers Tennis and Lozoya exited the patrol vehicle and pursued Joseph on foot, each with their service pistols drawn down on Joseph. Joseph solely jogged away from the officers, until he was backed-up against a storefront. Joseph stopped and pointed with his left arm. Officers Tennis and Lozoya, who were chasing behind Joseph, continued to advance. After Joseph stopped and pointed with his left arm, Officers Tennis and Lozoya immediately began to shoot Joseph. Officers Tennis and Lozoya were approximately 25 to 30 feet away from Joseph when they first began shooting him. Joseph doubled-over suddenly and lurched back, crumpling to the ground as he was shot. Even as Joseph was falling to the ground, Officers Tennis and Lozoya continued to advance towards Joseph, closing the distance, and continuing to shoot. In total, Officers Tennis and Lozoya fired 18 shots at Joseph, striking him 14 times. Officer Tennis fired eight times, and Officer Lozoya fired 10 times. Officers Tennis and Lozoya began shooting Joseph less than 35 seconds after they attempted to run him over in the patrol vehicle.

Joseph died at the scene of the shooting.

## **II. PROCEDURAL HISTORY**

On June 8, 2017, Robert, Vern, and Deborah (collectively, “Respondents”) initiated the instant action. Therein, Respondents alleged claims for “Deprivation

of Association” under the First and Fourteenth Amendment to the U.S. Constitution against the City of Sacramento, Sacramento Police Department, Chief of Police Samuel D. Somers, Jr., John C. Tennis and Randy R. Lozoya (collectively, “Petitioners”), based on the unlawful killing of Joseph.

On September 19, 2017, the district court denied a Fed. R. Civ. P. 12(b)(6) motion to dismiss by Officers Tennis and Lozoya. An appeal to the Ninth Circuit followed.

On September 7, 2018, the Ninth Circuit issued a memorandum disposition. *See Mann v. City of Sacramento*, 748 F. App’x 112 (9th Cir. 2018). Therein, the Ninth Circuit reversed the district court because: (1) “Plaintiffs ha[d] not pleaded sufficient facts to show that they and Joseph shared an ‘expressive association’ right protected by the First Amendment”; and (2) “[n]or ha[d] Plaintiffs pleaded sufficient facts to show that any of them shared an ‘intimate association’ right protected under the First or Fourteenth Amendments,” where “Plaintiffs ha[d] not alleged specific facts sufficient to show that any of them shared with Joseph a relationship of a type discussed in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), and its progeny, *see, e.g., [Lee v. City of Los Angeles*, 250 F.3d 668, 685-86 (9th Cir. 2001)] (holding a mother adequately alleged a protected First Amendment association with her son under *Rotary Club*); [*Keates v. Koile*, 883 F.3d 1228, 1228 (9th Cir. 2018)] (holding parents

have a First Amendment right of association with their children under *Lee* and *Rotary Club*)." *Id.* The Ninth Circuit remanded the case back to the district court to "consider whether to grant Plaintiffs leave to amend their complaint." *Id.*

On December 10, 2018, Plaintiffs filed the currently-operative First Amended Complaint, after the district court granted leave to amend on remand.

On March 13, 2019, the district court granted a Fed. R. Civ. P. 12(b)(6) motion to dismiss by Officers Tennis and Lozoya and Judgment was entered. A second appeal to the Ninth Circuit followed.

On April 30, 2020, the Ninth Circuit issued a memorandum disposition. *See Mann v. City of Sacramento*, 803 F.App'x 142 (9th Cir. 2020). Therein, the Ninth Circuit reversed the district court because "the [Ninth Circuit's first] decision was interpreted on remand as requiring that Plaintiffs plead facts demonstrating their cohabitation with the decedent to sustain their First Amendment intimate-association claim" but "cohabitation was one of several objective indicia that courts *may* consider when assessing whether Plaintiffs were deprived of their intimate-association right." *Id.* The Ninth Circuit "remand[ed] for consideration of Plaintiffs' First Amendment claim under the standard set forth in *Rotary Club* and its progeny. 481 U.S. at 545; *Keates*, 883 F.3d at 1236; *Lee*, 250 F.3d at 685-86." *Id.*

On June 10, 2020, the Ninth Circuit denied a petition for rehearing *en banc*. This petition for writ of certiorari followed.



## **REASONS FOR DENYING THE WRIT**

### **I. THE QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THE COURT**

Petitioners did not advance for the lower courts' consideration the issues it now argues warrant this Court's extraordinary review in this case. Rather, before the district court, Petitioners argued only that Joseph's most recent "visitation" and prior "residency" with Robert, Vern, and Deborah did not constitute "cohabitation."

Now, however, Petitioners purport to offer several other bases for reviewing Respondents' claims on certiorari—none of which was presented or preserved in the courts below. *See, e.g., Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). For example, Petitioners argue that the First Amendment does not protect intimate associations absent expressive activity; that the First Amendment does not provide any protection independent from the Fourteenth Amendment; and that any First Amendment claim requires demonstration of an "intent to harm" the protected relationship. But these were not the bases for Petitioners' motion to dismiss and, thus, were not considered by the courts below.



Therefore, such argument cannot serve as the basis for granting certiorari in this case.

**II. THE COURT OF APPEALS' DETERMINATION THAT "COHABITATION" IS NOT THE ONLY OBJECTIVE INDICIA COURTS MAY CONSIDER WHEN ASSESSING ALLEGED DEPRIVATIONS OF INTIMATE-ASSOCIATION RIGHTS WAS NOT MANIFESTLY ERRONEOUS**

Petitioners' argument for granting certiorari is premised on alleged inter- and intra-circuit splits concerning interpretations of this Court's decisions in *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984). Critically, however, no such ruling on this issue has resulted below which would permit this Court to review any error.

The issue addressed below was narrow and limited in scope: Whether "cohabitation" was a prerequisite element of an "unwarranted inference" claim based on the deprivation of intimate-association. The district court concluded that "cohabitation" was a necessary element, divined a four-factor test for determining whether "cohabitation" existed, and dismissed the case when it concluded that Joseph did not cohabit with Robert, Vern, or Deborah. The Ninth Circuit reversed and remanded, in a brief memorandum disposition, explaining that "cohabitation was one of several objective indicia that courts *may* consider when assessing whether Plaintiffs were deprived of their

intimate-association right.” *Mann v. City of Sacramento*, 803 F. App’x 142, 143 (9th Cir. 2020) (citing *Rotary Club of Duarte*, 481 U.S. at 545). Accordingly, the Ninth Circuit “remand[ed] for consideration of Plaintiffs’ First Amendment claim under the standard set forth in *Rotary Club* and its progeny.” *Id.* at 144.

The Ninth Circuit’s disposition was narrow because Petitioners’ challenge to Respondents’ claims was narrow. Before the district court, Petitioners argued only that Joseph’s most recent “visitation” and prior “residency” with Robert, Vern, and Deborah did not constitute “cohabitation.” When the district court agreed, the Ninth Circuit reversed on the basis that “cohabitation” was not the *only* factor relevant to the inquiry but, rather, was “one of several objective indicia” relevant to the inquiry. *Mann*, 803 F. App’x at 143.

That is all that the Ninth Circuit has done. For example, there has been no determination that Respondents’ claims are, in fact, cognizable under the First Amendment, *Rotary Club*, and its progeny, because the district court has not yet received the opportunity to consider the claims under the appropriate standard. The only action taken by the Ninth Circuit was to instruct the district court to analyze the “objective indicia” identified by this Court—*e.g.*, “size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship,” *Club of Duarte*, 481 U.S. at 545-46—in relation to Respondents’ intimate-association claims alleged in this case.

Accordingly, until the claims are analyzed and a decision issues, there is no decision for this Court to review and the court of appeals' decision was not erroneous.

### III. PETITIONERS' CLAIMS ARE MERITLESS

Even if the Court were to entertain Petitioners' unpreserved and premature arguments, they have no merit.

First, Petitioners ask this Court to consider: "Whether the First Amendment protects intimate associations absent expressive activity." However, this issue is controlled by *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987), which "recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights" and, specifically, "ha[s] emphasized that the First Amendment protects those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life'" (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)). *Stare decisis* principles dictate that this Court's resolution of this issue continues to control. See *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals,

and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

Second, Petitioners ask this Court to consider: “whether [First Amendment] protection exceeds what the [Fourteenth Amendment’s] Due Process Clause provides.” Petitioners advocate that First Amendment protections are restricted by those provided under the Fourteenth Amendment. However, Petitioners’ position is undercut by this Court’s development of different tests and standards governing both provisions to determine whether a certain activity or relationship is entitled to constitutional protection. For example, whether an alleged right constitutes a “liberty” interest under the Fourteenth Amendment depends, in part, on the “historic practices of our society, or whether on any other basis it has been accorded special protection.” *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989). In contrast, the First Amendment goes beyond protecting what is deemed “historic” or traditional, or against government action that shocks the conscience, where it *also* protects “certain intimate human relationships . . . that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” *Rotary Club of Duarte*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20).

Third, Petitioners ask this Court to consider: “Whether sibling relationships can qualify as intimate

absent cohabitation.” Again, as discussed above, this Court has never conditioned intimate-association rights on “cohabitation”—whatever meaning may be ascribed to that term. Indeed, “cohabitation with relatives” is expressly recognized as a protected relationship. *See Rotary Club of Duarte*, 481 U.S. at 545 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977)). However, it is not the *only* protected relationship, where other relationships may also be protected, “including family relationships, that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” *Id.* (quoting *Roberts*, 468 U.S. at 619-20).

Fourth, Petitioners ask this Court to consider: “Whether liability under 42 U.S.C. § 1983 for associational deprivation requires an intent to harm the protected association, rather than also encompassing incidental results.” Again, Petitioners attempt to superimpose requirements applicable to Fourteenth Amendment claims, which generally require an intentional deprivation of constitutional rights, *see County of Sacramento v. Lewis*, 523 U.S. 833, 849-51 (1998), onto First Amendment claims. However, “[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights.” *Parratt v. Taylor*, 451 U.S. 527, 534 (1981). “One of Congress’s primary goals in enacting § 1983 was to provide a remedy for killings unconstitutionally caused or acquiesced in by state

governments.” *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1103 (9th Cir. 2014) (citing *Monroe v. Pape*, 365 U.S. 167, 172-76 (1961)). As noted above, in contrast to the Fourteenth Amendment, the First Amendment goes beyond protecting what is deemed “historic” or traditional, or against government action that shocks the conscience, where it *also* protects “certain intimate human relationships . . . that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” *Rotary Club of Duarte*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20). The relationships at issue here are alleged to meet this standard and, as a result, should not be subject to additional requirements.

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## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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