Appeal No. 23-3991

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHANE LOVE,

Plaintiff-Appellant,

v.

AARON VILLICANA, et al,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Hon. Percy Anderson
Case No. 2:20-CV-65557

BRIEF BY AMICI CURIAE THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLEES

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IDENTITY STATEMENT AND INTEREST OF AMICI

Amicus curiae International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal appellate courts.

Amicus curiae California State Association of Counties ("CSAC") is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by its Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Amicus curiae League of California Cities ("Cal Cities") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhancing the

quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Introduction and Summary of Argument

Amici curiae acknowledge the gravity of the factual allegations underlying this appeal. They submit this brief not to downplay the seriousness of those allegations but rather to present their unique municipal perspective on three legal issues framed in the appeal.

Amici curiae believe that the judgment should be affirmed. The tests that Appellant proposes for determining whether a protectable liberty interest exists require a detailed and context-specific factual inquiry that would lead to an amorphous legal standard. The lack of a clear standard would discourage settlement of civil rights claims brought under 42 U.S.C. § 1983 ("Section 1983") and unduly burden local government and the legal federal judiciary.

Further, declining to extend due process protections to non-biological and non-adoptive parent-child relationships will not leave potential plaintiffs without remedies. State tort law, including the Tom Bane Civil Rights Act, Cal. Stat. 4544, creates a cause of action for a person whose civil rights have been impaired

through threats, intimidation or coercion.

Finally, contrary to Appellant's assertion, state law is not the only relevant factor in determining the scope of protectable interests. Given that fact, extending the scope of protectable interests by applying the murky "openly holds out" test should be rejected.

Federal Rule of Appellate Procedure 29(a)(4)(E) Statement

As required by Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the amici curiae state that this brief was not authored by counsel for a party to this action. No party, or counsel to a party, or any person provided any financial support or funding for preparing or submitting this brief

Federal Rule of Appellate Procedure 29(a)(2) Statement

Under Rule 29(a)(2) of the Federal Rules of Appellate Procedure, all of the parties to this appeal have consented to the filing of this amicus brief.

Federal Rule of Appellate Procedure 26.1 Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the amici are a corporation that is required to file a Rule 26.1 disclosure statement.

Dated: June 21, 2024

Respectfully submitted,

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ARGUMENT

A. Using either of Appellant's proposed standards to determine the existence of a due process liberty interest claim will discourage settlement and unduly burden local governments

Appellant argues that the Court should determine the existence of a due process liberty interest claim based on Appellant's relationship with Mr. Thomas using one of two alternative standards. One standard is based on California law on legal parent status. The second standard is based on Appellant's gloss on language taken from *Wheeler v. City of Santa Clara* (*Wheeler*), 894 F.3d 1046, 1058 (9th Cir. 2018). Both standards have an in-the-eye-of-the-beholder quality about them. Both require the parties to a dispute to gather and assess a number of facts from a variety of potential sources. The uncertain application of these standards will discourage settlement and unduly burden local governments made part of these disputes.

1. California law on "presumed" parent status requires a fact-intensive investigation whose results will be difficult to predict without extensive discovery and trial.

Appellant argues that his due process liberty interest claim is established under California law on legal parent status. Appellant's Opening Brief ("OB") 32-33. He points to the California Uniform Parentage Act. Cal. Fam. Code § 7600 et seq. The Act identifies several ways to establish a parent and child relationship. *Id*. at §§ 7610-7614. These include relationships between a child and the natural parent or adoptive parent, which involve straightforward proof. *Id*. at § 7610.

They also include relationships between a child and a "presumed" parent, which may be established by satisfying any one of a number of standards. *Id*. at § 7611. Appellant argues that he can satisfy the following "presumed" parent standard: "[a] person is presumed to be the natural parent of a child if . . . [t]he presumed parent receives the child into their home and openly holds out the child as their natural child." *Id*. at § 7611(d).

This standard requires an inquiry into a broad set of facts from a variety of potential sources. Evaluating these facts should be left to state courts to consider in the appropriate case. A federal court should not attempt to make this state-law determination in the context of adjudicating a due process liberty interest claim. There will rarely be a single "correct" answer. Whether the would-be parent "receives" the child into their home and "openly holds out the child as their natural child" will often be contested. A potential plaintiff considering filing a lawsuit based on a "presumed" parent and child relationship will not know if they can establish such a relationship. Neither will a potential defendant public agency. Parties will be encouraged to engage in costly discovery and motion practice to test application of the standard. The uncertainty of the standard may make it difficult to resolve "presumed" parent status, requiring trial. The absence of clarity will encourage potential plaintiffs to take their chances and file claims against public agencies, and public agencies will be discouraged from settling early and forced to

expend scarce public dollars litigating.

The prospect of a public agency having to devote substantial resources to litigate will increase the cost of settling these cases. Many public agencies will deem settlement too risky given the uncertainty of the "presumed" parent status. As a result, everyone loses. Public agencies will expend significantly more money and resources litigating cases, fewer plaintiffs will be able to settle cases, and federal court dockets will be clogged with these additional cases that would have otherwise settled.

a. Does the "presumed" parent "receive[] the child into their home?"

Appellant claims that the complaint's allegations that he shared a residence with Mr. Thomas "far out-strips" what California law requires when determining whether the presumed parent "receives the child into their home." OB 34. But Appellant does not say where the court should draw the line in determining what facts or combination of facts are enough to "out-strip" what California law requires, that is, what facts are enough to satisfy the standard. Nor could Appellant (or anyone) draw such a fine line, given the uncertainty of what it means for a presumed parent to "receive" the child "into their home."

Appellant chides the City for arguing below that Mr. Thomas did not receive Appellant into Mr. Thomas' home because Mr. Thomas moved into Ms. Lindsey's apartment (rather than vice versa). OB 35. The City's interpretation of the

standard would bring some helpful clarity to what facts are enough to satisfy the standard and what facts are not enough. But Appellant would have none of that. Instead, Appellant argues that "[t]he home in which a family lives has nothing to do with the parents' commitment to the child but instead turns on a number of interpersonal and financial considerations." *Id.* Multiplying considerations diminishes clarity.

Appellant's discussion of California law on this point only highlights the uncertainty and therefore unworkability of this standard. He states that California courts have held the standard satisfied even where the presumed father did not reside full time with the child and received the child into his home only on "occasional temporary visits." OB 34, citing *Jason P. v. Danielle S.* (*Jason P.*), 9 Cal. App. 5th 1000, 1021-22 (2017), abrogated on other grounds by *In re R.T.*, 3 Cal. 5th 622, 628 (2017). *Jason P.* also quoted the trial court's order with approval to the effect that "sporadic visitations" is not enough. *Id.* at 1021. Is sharing a home for a couple of weeks a year an "occasional temporary visit," which counts, or just a "sporadic visitation," which does not count? It is not clear. *Jason P.* summed up the standard this way: "receipt of the child into the home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship, but it need not continue for any specific duration." *Id.* at 1023. A "sufficiently unambiguous" standard does not dispel the uncertainty either. The

standard does not give public agency defendants clarity regarding who can sue for an alleged deprivation of constitutional rights based on a "presumed" parent and child relationship. Defendants must understand the full universe of plaintiffs in order to settle claims. Indeed, here, the Appellees thought they had settled with all potential plaintiffs before Appellant brought his claim. (Appellant's Excerpts of Record ("ER")-58, 93.)

b. Does the presumed parent "openly hold[] out the child as their natural child?"

The other half of the "presumed" parent standard Appellant claims he can satisfy is that the presumed parent "openly holds out the child as their natural child." Cal. Fam. Code § 7611(d). Appellant describes several allegations from the complaint. OB 36. But Appellant once again does not say which allegations would be enough to satisfy the standard. Is it enough to allege that Mr. Thomas cared for Appellant? That he provided for him? That he called Appellant his son at home? Around teachers and coaches? How many times does a presumed parent have to do any of these things in order to satisfy the standard?

Appellant argues that courts have considered the following factors to determine whether a presumed parent "openly holds out the child as their natural child: "whether and how long the presumed parent cared for the child," "whether there is unequivocal evidence that he had acknowledged the child," "the number of people to whom he had acknowledged the child," and "whether his care was

merely incidental." OB 36, citing *In re T.R.*, 132 Cal. App. 4th 1202, 1211 (2005). These factors elaborate the inquiry. They do not make the answer any less opaque.

Appellant acknowledges that even this multi-factor inquiry may not resolve the matter. "[T]he holding out presumption of parenthood can be rebutted in an appropriate action only by clear and convincing evidence." OB 37, citing Cal. Fam. Code § 7612(a). Qualifying rebuttal evidence includes "competing claims to parenthood" or "evidence of abuse." OB 37. This is another area of inquiry that may not be easily resolved, and will make applying the holding out presumption less predictable in outcome. At best, these factors mean that public agencies would need to expend significant resources in the form of motion practice and discovery to resolve whether someone met this factor, again dissuading settlement.

2. Appellant's alternative test, a gloss on language in *Wheeler v. City of Santa Clara*, is no less uncertain.

Appellant's alternative test for the existence of a due process liberty interest based on Appellant's relationship with Mr. Thomas is based on language from various federal cases. Again, instead of asking the court to apply a clear rule, Appellant advocates use of a muddy standard. The most recent of Appellant's citations is the Ninth Circuit's 2018 decision in *Wheeler*, 894 F.3d at 1058-1059. *Wheeler* held that the biological son of a suspect that died after being shot during a confrontation with police officers could not assert Fourteenth Amendment claims for loss of companionship. The suspect surrendered her son for adoption as an

infant, but allegedly had a close relationship with her son during part of his childhood and throughout his adult life. *Id*. at 1058. Appellant quotes *Wheeler* to describe an alternative standard for determining the existence of a due process liberty interest claim: an "enduring relationship that reflected an assumption of parental responsibility" and "emotional attachments that derive from the intimacy of daily association." OB 51 (internal quotation marks omitted), citing *Wheeler*, 894 F.3d at 1059.

Appellant distinguishes *Wheeler*'s facts to argue that Appellant satisfies *Wheeler*'s standard. OB 52-54. But this standard is no more certain than the California "presumed" parent standard discussed above. What facts are enough to show an "enduring relationship" that "reflected an assumption of parental responsibility?" How much contact is required? Must the would-be parent live with the child all the time, some of the time, or no time at all? How much time is enough? What actions or combinations of actions are enough? Are rides to school and watching a child play sports enough? Is shared financial or homemaking support also required? How much?

What about "daily association?" Does a would-be parent flunk the test if they are absent from the child's life for days every week or month? What counts for purposes of daily association? Is contact by social media enough? Texting? Phone calls? Or is in person, physical contact the only thing that counts?

Appellant's interpretation of *Wheeler* and other cases would require the parties and the courts to look at many facts. But that approach would make it difficult for a public agency to determine who has a right to sue for violation of a due process liberty interest.

The district court correctly required not just daily association, but also a biological connection or formal adoption. (ER-5-6, citing *Wheeler*, 894 F.3d at 1058.) The first part of the standard is subjective, but the second part—a biological connection or formal adoption—is a bright line rule that is easy to apply. A district court may still have to perform some subjective daily association analysis, depending on the case. The advantage to having one part of the standard being a bright rule is that defendants are likely to be more willing to settle with biological or adoptive relatives and forgo disputes over daily association. But if the entire standard were reduced to daily association, it would likely make litigation necessary just to determine whom the agency should settle with. Requiring either a biological connection or formal adoption enables local governments to quickly determine who is eligible to sue and thereby encourages early settlement of claims. This will minimize the use of scarce local government and judicial resources. Appellant's alternative test would require that the parties to a dispute gather and assess a number of facts from a variety of potential sources. The uncertain application of Appellant's alternative test would discourage

settlement and unduly burden local governments made part of these disputes.

B. California's Bane Act provides a state law remedy for violation of civil rights arising from coercion, intimidation or threats.

State statutes waiving sovereign immunity and allowing tort claims to proceed against local governmental entities and their agents are meaningful. California's local governmental entities and their agents are regularly held liable under California's tort law. *See, e.g., Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 221 (1991) (upholding jury verdict for plaintiff against city in the amount of $150,000, where plaintiff presented evidence that police officer misused official authority by sexually assaulting woman whom officer detained); *Bonilla v. City of Covina*, 2019 WL 8013104 *4 (C.D. Cal. Aug. 22, 2019) (denying city's motion for judgment on the pleadings with respect to negligence claim arising out of plaintiff's arrest); *C.A., a Minor, etc. v. William S. Hart Union High School District*, 53 Cal. 4th 861, 879 (2012) (holding that a public school district may be vicariously liable for the negligence of administrators or supervisors in hiring, supervising, and retaining a school employee who sexually harasses and abuses a student).

The Tom Bane Civil Rights Act, Cal. Stat. 4544, is one such statute. The California Legislature adopted the Bane Act in 1987 initially to address hate crimes, but the California Supreme Court clarified that the Act is not limited to hate crimes and plaintiffs do not need to prove discriminatory purpose. *Venegas v.*

County of Los Angeles, 32 Cal. 4th 820, 843 (2007); see also, *Reese v. County of Sacramento*, 888 F.3d 1030, 1040-41 (9th Cir. 2018).

Codified at California Civil Code section 52.1, the Bane Act states in part:

> "(b) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured .... [¶]
>
> (c) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages...."

Cal. Civ. Code § 52.1 (1987).

Qualified immunity is not available for Bane Act claims. *Reese*, 888 F.3d at 1040-41.

Admittedly, the Bane Act is not a wrongful death statute and "provides no derivative liability for persons who were not present and did not witness the violence or threats." *Dela Torre v. City of Salinas,* 2010 WL 3743762 * 6 (N.D. Cal. Sept. 17, 2010); *see also, Bay Area Rapid Transit District v. Superior Court*, 38 Cal. App. 4th 141, 144 (1995) (holding that parents who did not witness alleged unconstitutional shooting of son by police lacked standing to bring derivative claim for violation of right to parent under Bane Act). The Bane Act, however, does provide a "personal cause of action" for violation of a plaintiff's civil rights (*Bay Area Rapid Transit, supra*, 38 Cal. App. 4th at 144, emphasis omitted), as well as a survival cause of action by a decedent's successor-in-interest is available under the Bane Act. *Moore v. County of Kern*, 2007 WL 2802167 * 6 (E.D. Cal. Sept. 23, 2010).

Alternative state remedies to a federal Section 1983 claim exist. It is therefore not necessary to extend Section 1983 liability to include non-biological and non-adoptee parent child relationships, particularly when doing so would require application of the muddy analysis discussed in subsection A above.

Essentially, the rule that Appellant urges would allow plaintiffs to have it both ways by taking advantage of broader state law definition of parenthood while

litigating in federal court, where state law immunities do not apply. If a plaintiff wishes to use state law definitions for standing purposes, they can bring a Bane Act claim in state court.

C. Federal courts do not look only to state law to determine which interests are protectable.

Appellant contends that state law is the "baseline" for determining liberty interests. OB at 30. But federal courts do not automatically look only to state law to determine what interests are protectable under the United States Constitution. Instead, case law reveals a more nuanced approach to when and how federal courts apply state law in determining a protectable interest.

Takings cases exemplify this. In *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 638-39 (2023), which Appellant cites, the Supreme Court recognized that although "state law is an important source" for determining property rights, "state law cannot be the only source." Similarly in *Murr v. Wisconsin*, 582 U.S. 383, 399-400 (2017), the Supreme Court rejected a "formalistic rule" tethered to solely state law in deciding a regulatory takings case. Instead, the Court adopted a test that "considers state law but in addition weights whether the state enactments at issue accord with other indicia of reasonable expectations of property." *Id*. at 400.

Federal cases regarding exhaustion of administrative remedies as a prerequisite to bringing a Section 1983 claim also belie Appellant's claim that state

law is the beginning and end of defining protectable interests. In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516 (1982), the United States Supreme Court rejected the proposition that a plaintiff must exhaust available state administrative remedies before bringing a Section 1983 claim in federal court. The Court stated that as a general rule, federal courts "cannot require exhaustion" of state court remedies in Section 1983 actions. *Id*. at 512. This general rule, however, does not apply to claims brought by inmates challenging prison conditions. Instead, the Prison Litigation Reform Act of 1995 requires an inmate to exhaust state administrative remedies before "seeking redress for prison circumstances or occurrences" through a Section 1983 claim. *Porter v. Nussle*, 534 U.S. 516, 520-21 (2002).

Contrary to Appellant's assertion, the federal courts' inquiry into what interests are protectable or not does not begin and end with only state law. The courts look to context and other factors as well. Here, applying the California Family Code to create a parental relationship in the absence of a biological link or legal adoption would create an muddy and unworkable standard with negative impacts to important public policies, including those favoring settlement and finality.

CONCLUSION

Amici curiae respectfully request that this Court affirm the underlying

judgment.

Dated: June 21, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 32-1(a) because it contains 3,104 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: June 21, 2024

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