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IN THE UTAH SUPREME COURT

WEBER COUNTY,

Plaintiff/Respondent,

v.

OGDEN TRECE, AKA CENTRO CITY
LOCOS, an alleged criminal street gang
sued as an unincorporated association; and
DOES 1 through 200,

Defendants.

**DECLARATION OF DARCY M.
GODDARD IN SUPPORT OF
PETITIONERS' MOTION FOR
STAY PENDING APPEAL**

Appeal No. 20100804

District Court No. 100906446

DARCY M. GODDARD hereby declares as follows:

1. I am co-counsel for Petitioners in this matter and was present at the two hearings held by the district court below regarding the preliminary injunction entered September 28, 2010 (“Order”). I submit this declaration in support of Petitioners’ concurrently-filed Motion for Stay Pending Appeal, and pursuant to the direction of the Utah Court of Appeals in *Jensen v. Schwendiman*, 744 P.2d 1026, 1028 (Utah Ct. App. 1987).

2. **Narrative of Pertinent Facts.** The pertinent facts from the proceedings below are, to the best of my knowledge, as set forth in Petitioners’ concurrently-filed Petition for Permission to Appeal from Interlocutory Order (“Petition for Interlocutory Review”). As set forth therein, those facts are as follows:

On August 20, 2010, the County approached the district court *ex parte*, without even attempting to give notice to any other party, and convinced the court to enter an emergency order of breathtaking and unprecedented scope. Naming only the Ogden Trece “street gang” (“Trece”) as a defendant—based on the assertion that Trece could fairly be classified and sued as an “unincorporated association”—the County’s Complaint alleged that Trece constituted a “public nuisance” and that it and all its alleged members should be subject to a permanent injunction with restrictions akin to martial law. A copy of the County’s Amended Complaint is attached to the Petition for Interlocutory Review as Addendum B.

That same day, again with no apparent attempt to notify the defendant or any of its hundreds of alleged members, the district court entered an ex parte temporary restraining order (“TRO”) essentially granting the County all of the relief it sought in its Complaint. A copy of the TRO, without exhibits, is attached to the Petition for Interlocutory Review as Addendum C.

Like the Order that is the subject of this appeal, the TRO was stunning in its scope and abridgement of fundamental rights. Among other things, the TRO prohibited any of the hundreds of alleged members of Trece, including Petitioners, from associating—for any purpose—anywhere in essentially the entire city of Ogden, except for churches and schools; it prohibited them from speaking or acting in ways the police deem “annoying,” “harassing,” or “challenging”; it imposed a citywide curfew from 11 p.m. to 5 a.m. every night of the week; it prohibited them from possessing, or even being in the presence of, any firearms, alcohol, or controlled substances, whether legal or not; and it criminalized the mere possession of anything that could be considered a “graffiti tool,” such as felt tip markers and paint. (*See* Petition for Interlocutory Review, Add. C at pp. 2-5.) The geographic area covered by the TRO included essentially the entire city of Ogden, constituting hundreds of city blocks and more than twenty-five square miles. (*Id.* at p. 2 and Ex. A thereto.)

Following entry of the ex parte TRO, the County began serving copies of the Complaint and TRO on individuals it believed were members of Trece, including Petitioners. According to the County and the terms of the TRO, this mere act of service

bound Petitioners to the overreaching terms of the TRO, without any actual hearing or judicial determination that these individuals were, in fact, members of a criminal “street gang” or that they had committed any crime. (*See id.* at p. 5.) Following this service, each of the petitioners appeared in this case through counsel. (*See* Petition for Interlocutory Review, Add. D at pp. 6-7.)

On September 9, 2010, while the TRO remained in effect, the American Civil Liberties Union of Utah Foundation, Inc. (“ACLU of Utah”) sought leave to file a brief of amicus curiae or for limited intervention in the district court proceedings for the purpose of briefing the numerous and significant constitutional issues at stake. A copy of the ACLU of Utah’s proposed amicus curiae brief is attached to the Petition for Interlocutory Review as Addendum E. Shortly thereafter, the Utah Association of Criminal Defense Lawyers also sought to submit an amicus curiae brief opposing the County’s unprecedented request for relief. (Petition for Interlocutory Review, Add. D. at p. 7.) The district court refused to consider either submission, claiming the case was too “urgent.”¹ (*Id.* at pp. 7-8.)²

¹ Based on the district court’s refusal, Petitioners resubmitted the ACLU of Utah’s amicus curiae brief on their own behalf on September 22, 2010, in order to ensure that it was part of the record. (*Id.* at p. 9.)

² Due to the emergency nature of this appeal, Petitioners requested a copy of the audio recordings of the district court proceedings immediately following the bench ruling on September 27, 2010. To date, however, the district court has not yet provided Petitioners with those recordings. Petitioners have attempted to recount relevant statements made from the bench based on counsel’s best recollection, and will supplement the record in this matter when the audio recordings are provided.

On September 14 and 27, 2010, the district court held a day-and-a-half of hearings on the County's request. The court heard testimony from a total of three witnesses—two Ogden police officers and an Assistant District Attorney from California, Greg Anderson, whom the district court deemed, over Petitioners' objection, to be an "expert" on gangs. (See Petition for Interlocutory Review, Add. D at pp. 8-11.) Although Mr. Anderson was permitted to offer his opinion about a reduction in crime in Fresno, California after entry of a limited gang injunction in 2003, he conceded that (i) there are many explanations for crime reductions, (ii) he had engaged in no long-term analysis of the injunction's effectiveness (or ineffectiveness) in Fresno, and (iii) there are no statistical studies providing any evidence that any gang injunctions are actually effective long term. (Petition for Interlocutory Review, Add. G.)

Regarding the criteria for what qualifies an individual as an alleged "gang member," the County's principal witness on this point, Officer Powers, admitted that a determination of gang membership is based on his and other officers' broad discretion when considering a list of eight criteria, which criteria themselves are largely subjective. To be considered an alleged gang member, an individual need meet, in the officers' minds, only two of the eight criteria.

Following the hearings, and although numerous motions, including motions to dismiss, remain pending and are awaiting responsive briefs from the County and oral argument on November 9, 2010, the district court granted the Order from the bench. In making this ruling, the district court expressly relied on evidence that had been

introduced in a different trial involving different parties over which Judge Jones presided earlier this year. The district court stated that this evidence—none of which was introduced in this proceeding—was, if anything, more compelling than any evidence actually introduced by the County in this matter. (Petition for Interlocutory Review, Add. D at pp. 11-12). The district court stated that it was taking “judicial notice” of this evidence, which the claimed provided “insight... about how Ogden Trece works, and what the gang’s purpose is.” (Petition for Interlocutory Review, Add. D at pp. 11-12.) The district court stated that “[g]angs seem to be all about death and destruction,” and, “[a]s a judge, I admire what the prosecutor and police are trying to do here.” (Petition for Interlocutory Review, Add. G.) As a result, even though the district court expressly acknowledged that “no one can be certain that this will work,” the court concluded that it was “worth a try.”³

The final Order was entered by the district court the next day, September 28, 2010. Except for the addition of an onerous “hardship exemption”—which puts the burden on individuals to justify to police why they should be allowed, in the police’s sole discretion, to associate with specific named persons—and an ineffectual “opt-out provision”—through which persons may apply to be removed from the scope of the injunction if they “renounce gang life” and undertake other unjustified requirements, the final Order is

³ Given the present unavailability of the audio recordings, these last two quotations are based on the declarant’s recollection of the district court’s statements. Although the quotations may not be verbatim, the declarant believes they are materially the same as the court’s actual statements.

essentially identical to the ex parte TRO entered on August 20. (*See* Petition for Interlocutory Review, Add. A.)

3. **Petitioners' Request for a Stay Below.** Immediately following the court's announcement from the bench that it would enter the Order, Petitioners orally moved for a stay of the Order pending appellate review and further proceedings below, on the same bases that are now presented to this Court. The district court denied Petitioners' motion without explanation. (*See* Petition for Interlocutory Review, Add. D at p. 12.)

4. I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

DATED this ____ day of October 2010.

DARCY M. GODDARD
Co-Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October 2010, a true and correct copy of the foregoing **DECLARATION OF DARCY M. GODDARD IN SUPPORT OF PETITIONERS' MOTION FOR STAY PENDING APPEAL** was served via hand-delivery on the following:

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