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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.	**PETITION FOR EMERGENCY RELIEF** Appeal No. _____ District Court No. 100906446

Pursuant to Rule 8A of the Utah Rules of Appellate Procedure, Defendants/

Petitioners Daniel Callihan, Emmanuel Montoya, Roman Hernandez, and Evan Barros

(collectively, "Petitioners") hereby petition for emergency relief in the form of a provisional stay of the preliminary injunction entered by the district court below on September 28, 2010 ("Order"), a copy of which is attached hereto as Addendum A.

Petitioners have concurrently filed a Petition for Permission to Appeal Interlocutory Order under Utah Rule of Appellate Procedure 5 ("Petition for Interlocutory Review"), and a Motion for Stay Pending Appeal under Utah Rule of Appellate Procedure 8, both relating to the Order. This Petition for Emergency Relief seeks a provisional stay of the Order until the Court can timely address Petitioners' Rule 8 motion to render the stay more permanent. *See Snow, Christensen & Martineau v. Lindberg*, 2009 UT 72, ¶ 7 n.5, 222 P.3d 1141.

I. STATEMENT OF PRECISE RELIEF SOUGHT.

Petitioners request that this Court enter a provisional stay staying enforcement of the Order until this Court has ruled on Petitioners' Motion for Stay Pending Appeal under Utah Rule of Appellate Procedure 8.

II. STATEMENT OF THE FACTUAL AND LEGAL GROUNDS ENTITLING PETITIONERS TO RELIEF AND JUSTIFYING EMERGENCY ACTION.

This case arises from the district court's unprecedented decision to enter an "anti-gang injunction" that radically curtails the fundamental rights of hundreds of citizens in the city of Ogden. The case raises novel constitutional questions of first impression in Utah that will profoundly affect the most basic liberties of numerous individuals. Just days ago, the Ogden police began enforcing the Order on a small scale, and they have stated an intention to escalate enforcement in the coming days and weeks. Unless this

Court enters an immediate provisional stay, countless constitutional deprivations and arrests will occur, significantly impairing the meaningfulness of this Court's ultimate review of the merits of this appeal. Petitioners have requested a stay under Rule 8, but also request that a provisional stay be entered to prevent the escalating and widespread enforcement of the Order while Petitioners' Rule 8 motion is considered and decided.

To provide necessary context to this Petition, attached hereto as Addendum D is a full copy of Petitioners' concurrently-filed Petition for Interlocutory Review, which contains a detailed description of the Order, its numerous constitutional defects, and the errors committed by the court below. Also filed concurrently herewith is the Declaration of Darcy Goddard in Support of Petitioners' Motion for Stay Pending Appeal, which recounts the relevant facts from the proceedings below. The following is an abbreviated version of the issues pertaining to this Petition for Emergency Relief.

A. The District Court's Order.

On September 28, 2010, the court below became the first court in Utah to enter a so-called "anti-gang injunction," a civil order that purports to criminalize a wide range of otherwise legal and constitutionally-protected activity in the name of anti-gang law enforcement. Few courts have ever endorsed the idea of an "anti-gang injunction," and those few that have done so have sharply circumscribed the injunction's scope in an effort to minimize the obvious intrusion on fundamental liberties.

The district court's sweeping Order in this case, however, shows no such caution. Its geographic scope includes essentially the entire city of Ogden, constituting hundreds

of city blocks and more than twenty-five square miles. (Add. A at p. 2 and attached map thereto.) Within this vast area, the Order prohibits any of the hundreds of alleged members of the defendant, including Petitioners, from associating for any purpose except in churches and schools; it prohibits them from speaking or acting in ways that the police deem "annoying," "harassing," or "challenging"; it imposes a citywide curfew from 11 p.m. to 5 a.m. every night of the week; it prohibits individuals from possessing, or even being in the presence of, any firearms, alcohol, or controlled substances, whether legal or not; and it criminalizes the mere possession of anything that could be considered a "graffiti tool," such as felt tip markers and paint. (Add. A at pp. 2-4.)

Just days ago, Ogden police began the initial stages of enforcing the Order, promising an escalation of arrests in the coming days and weeks.[1] Ogden Police Chief Jon Greiner has all but admitted that enforcement will be arbitrary, given the impossibility of uniform enforcement against hundreds of citizens.[2] Police have also

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[1] *See* Tim Gurrister, *Trece Injunction Now Law*, OGDEN STANDARD EXAMINER, September 27, 2010 (attached to the Petition for Interlocutory Review as Addendum F) ("Officials said that while it could happen any time, it's likely the first arrest on the injunction would be a matter of days… Stepped-up enforcement would begin Wednesday [September 29, 2010], when the Ogden Metro Gang Unit begins its regular Wednesday through Saturday workweek."); Nate Carlisle, *Judge Upholds Ban on Ogden Gang Members*, SALT LAKE TRIBUNE, September 27, 2010 (attached to the Petition for Interlocutory Review as Addendum G) ("Ogden police Chief Jon Greiner said his gang detectives on Wednesday [September 29, 2010] will start serving members of Ogden Trece with copies of the injunction and enforcing its provisions.").

[2] *See Ogden Enforcing Ban on Street Gang*, DESERET NEWS, September 28, 2010 (attached hereto as Addendum B) ("Police Chief Jon Greiner said he won't launch a dragnet but that his officers will be on the lookout for violations of the court order. 'We can't really just go looking for them to be sure they're not associating,' Greiner told the

admitted that arrests pursuant to the injunction will be used to gather evidence of other crimes, apparently without a warrant or probable cause.[3] These unconstitutional enforcement efforts are already having a chilling effect on association.[4] Unless this Court acts immediately to stay enforcement of this unconstitutional order, the irreparable and irreversible deprivations of fundamental rights in the meantime will be incalculable.

B. The Unconstitutionality of the Order.

To Petitioners' knowledge, no court has ever entered an anti-gang injunction of the breadth endorsed by the district court below. Its breathtaking scope severely curtails the fundamental liberties of hundreds of individuals who have never had their day in court, who have never been proven to be "gang members," but who now will face the prospect of being arrested for engaging in legal and constitutionally-protected conduct. The district court's order also essentially provides police with a roving warrant to arrest anyone who, in their unfettered discretion, appears to be a "gang member" or is not engaged in "legitimate" activities like attending church.

Standard-Examiner of Ogden on Tuesday. 'We'll respond to calls and take action appropriately.'").

[3] *See* Tim Gurrister, *Trece Members Laying Low in Ogden*, OGDEN STANDARD EXAMINER, October 3, 2010 (attached hereto as Addendum C) ("But officials expect to find evidence of other crimes as Treces are arrested on the injunction. Most of those will be prosecuted in 2nd District Court, which handles all class A misdemeanors and felonies.").

[4] *See id.* ("'I think it's having an effect already,' said Sgt. Will Cragun, a supervisor of the Ogden Metro Gang Unit. 'They're trying to avoid us. They don't want to be served. They're not sure how to deal with this.'").

The numerous constitutional deficiencies inherent in the Order are detailed at length in the attached Petition for Interlocutory Review. The law is clear that any injunction that infringes on fundamental rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate," and that it "must be tailored as precisely as possible to the exact needs of the case." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968) (emphasis added); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (injunction must "burden no more speech than necessary to serve a significant government interest").

The Order here fails that test. Its sweeping geographic scope is clearly overbroad and not narrowly targeted to specific areas of gang activity. Its application to hundreds of individuals who have never been adjudicated as gang members is unconstitutionally vague, overbroad, and in violation of due process. Its widespread ban on association virtually anywhere in the city of Ogden is tantamount to an order of civil banishment, in clear violation of the fundamental rights of association and associational speech guaranteed by the First Amendment. Its citywide curfew violates the fundamental right to movement and is not narrowly targeted to address criminal or nuisance activity. Its prohibition on all speech that police deem "annoying" or "harassing" criminalizes speech that is perfectly legal and squarely within the protections of the First Amendment. Its restriction on firearms violates the Utah and the United States Constitutions' guarantees of the right to bear arms, and impermissibly usurps the Utah Legislature's exclusive role

in regulating the use of firearms. Its prohibitions on possessing, or merely being in the presence of, alcohol, controlled substances, and "graffiti tools" are unconstitutionally overbroad. And its overarching command that defendants "obey all laws" needlessly elevates minor infractions to allegedly gang-related crimes without any constitutional justification. (*See* Petition for Interlocutory Review at pp. 12-24.)

The County's justification for this rampant sacrifice of constitutional liberties is predicated on the assertion that gang-related crime is harmful, and that extraordinary remedies are needed. The County's argument could be made about any crime problem, and it has never been sufficient to justify unconstitutionally vague and overbroad enforcement measures. *See City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down anti-gang loitering ordinance as unconstitutional). But even if the County's argument were relevant, there is no evidence whatsoever that anti-gang injunctions have any positive effect on actually reducing gang-related crime. In the proceedings below, Petitioners presented the district court with copious evidence and expert opinions indicating that: (i) anti-gang injunctions have no actual effect on reducing gang-related crime; (ii) any reductions are short-lived and coupled with increased crime in surrounding areas; and (iii) such heavy-handed enforcement tactics actually make the problem worse by increasing gang cohesion, stigmatizing alleged members, and interfering with effective means of gang outreach. (*See* Petition for Interlocutory Review, Add. E at pp. 38-42 and Exs. A and B thereto.)

The County presented no studies or empirical data to rebut this evidence, and its sole witness on this point conceded that there are no statistical studies showing that gang injunctions are actually effective. (Petition for Interlocutory Review, Add. G; Declaration of Darcy M. Goddard in Support of Petitioners' Motion for Stay Pending Appeal ("Goddard Decl."), filed concurrently herewith, at ¶ 2.)[5] In entering the Order, even the district court acknowledged that "no one can be certain that this will work." (*Id.*)

In light of this complete lack of evidence, the district court's endorsement of a speculative experiment at the expense of the basic liberties of hundreds of individuals is utterly unjustified, in violation of the Utah and United States Constitutions, and should be reversed.

C. Justification For Emergency Relief.

Unless this Court grants a provisional stay, enforcement of the Order by Ogden police will continue to escalate while Petitioners' Motion for Stay Pending Appeal is briefed and decided. Even if that motion is resolved relatively quickly, there could be dozens of arrests and countless unconstitutional enforcement efforts in the meantime, undermining the meaningfulness of this Court's ultimate review of the merits.

[5] 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.

Rule 8A emergency relief is warranted "when adherence to the regular deadlines would effect a denial of justice." *Snow, Christensen & Martineau*, 2009 UT 72 at ¶ 5. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also*, *e.g.*, *O'Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) ("Even the temporary deprivation of First Amendment rights constitutes irreparable injury[.]"); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury."); *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1160 (2d Cir. 1974) ("[D]eprivation of . . . the public's first amendment rights . . . in itself constitutes irreparable injury . . . because there is no means to make up for the irretrievable loss of that which would have been expressed"); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 367 (S.D.N.Y. 2008) (finding "irreparable injury if a stay [pending appeal] is not ordered and [the regulation at issue] is later found to violate the First Amendment"); *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981) ("'[A]ny significant denigration of First Amendment rights inflicts . . . irreparable harm'" (quoting *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App. 1979))).

Weighed against these constitutional deprivations is the County's assertion that a stay would allow gang-related crime to continue. The support for that assertion is far from clear, because no study has ever shown anti-gang injunctions to have any long-term salutary effect on gang-related crime. But even if there were such evidence, gang-related

crime is not a new issue. It has been ongoing, according to the County, for more than three decades in Ogden, and the County will suffer little, if any, prejudice if the imposition of this unprecedented remedy awaits a considered and proper determination on the merits by this Court.

This Court has specifically endorsed the idea of a "provisional stay under Rule 8A, followed by a decision under rule 8 as to whether to lift the stay or render it more permanent[.]" *Snow, Christensen & Martineau*, 2009 UT 72 at ¶ 7 n.4. That is precisely the remedy Petitioners seek here, justified by the irreparable harm to constitutional liberties that will occur if enforcement of the district court's Order is permitted to continue unabated in the interim.

III. CONCLUSION.

For all of the foregoing reasons, Petitioners respectfully request that this Court immediately enter a provisional stay staying enforcement of the Order until this Court has ruled on Petitioners' Motion for Stay Pending Appeal under Utah Rule of Appellate Procedure 8.

RESPECTFULLY SUBMITTED this 4th day of October 2010.

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By: David C. Reymann

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October 2010, a true and correct copy of the foregoing **PETITION FOR EMERGENCY RELIEF** was served via hand-delivery on the following:

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ADDENDUM

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