David C. Reymann (8495)
Clemens A. Landau (12178)
PARR BROWN GEE & LOVELESS
185 South State Street, Suite 800
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Facsimile: (801) 532-7750

Michael J. Boyle (6703)
MICHAEL J. BOYLE, P.C.
2506 Madison Avenue
Ogden, Utah 84401
Telephone: (801) 392-9990
Facsimile: (801) 394-4923

Darcy M. Goddard, Legal Director*
ACLU OF UTAH
355 North 300 West
Salt Lake City, Utah 84103
Telephone: (801) 521-9862, ext. 108
Facsimile: (801) 532-2850
(* Utah admission pending; admitted in New York and Colorado)

Attorneys for Defendants/Petitioners Daniel Callihan, Emmanuel Montoya, Roman Hernandez, and Evan Barros

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.	**MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION FOR STAY PENDING APPEAL** Appeal No. _____ District Court No. 100906446

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

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

(collectively, "Petitioners") respectfully submit this memorandum in support of their concurrently-filed Motion For Stay Pending Appeal.

INTRODUCTION

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. On September 28, 2010, the court below became the first court in Utah to enter such a preliminary injunction ("Order"), which purports to criminalize a wide range of otherwise legal and constitutionally-protected activity in the name of anti-gang 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 attempt to minimize the obvious intrusion on fundamental liberties.

The district court's sweeping Order in this case, however, shows no such caution. Its prohibitions apply to essentially the entire city of Ogden, constituting hundreds of city blocks and more than twenty-five square miles. (*See* Order, attached hereto as Addendum A, at p. 2 and attached map thereto.) Within this vast area, the Order prohibits any of the hundreds of alleged members of the named defendant, Ogden Trece ("Trece"), 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 this Order, and have promised 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] Unless this Court acts immediately to stay enforcement of this unconstitutional Order pending appeal, 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 filed a Petition for Emergency Relief pursuant to Rule 8A of the Utah Rules of Appellate Procedure seeking a provisional stay of the Order while this motion is considered, but also move for a more permanent stay under Rule 8 to prevent the

---

[1] *See* Tim Gurrister, *Trece Injunction Now Law*, OGDEN STANDARD EXAMINER, September 27, 2010 (attached to Petitioners' concurrently-filed Petition for Permission to Appeal Interlocutory Order ("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 Standard-Examiner of Ogden on Tuesday. 'We'll respond to calls and take action appropriately.'").

escalating and widespread enforcement of the Order while the merits of Petitioners' interlocutory appeal are considered and decided.

RELEVANT FACTS

The facts relevant to this motion are set forth in the concurrently-filed Declaration of Darcy M. Goddard in Support of Petitioners' Motion for Stay Pending Appeal ("Goddard Decl."), and are incorporated herein by reference. Those facts are also set forth at greater length in the concurrently-filed Petition for Interlocutory Review, which attaches pertinent portions of the record below.

In accordance with Rule 8(a) of the Utah Rules of Appellate Procedure, Petitioners first sought a stay of the Order pending appeal in the district court. The oral motion was made immediately following the court's announcement that it would enter the Order, and it was denied without explanation. *See* Goddard Decl. ¶ 3.

ARGUMENT

A stay of the Order pending appeal is authorized by Rule 8 of the Utah Rules of Appellate Procedure and is within the inherent power of this Court. *See Lewis v. Moultree*, 627 P.2d 94, 96 (Utah 1981) ("It lies within the inherent powers of the courts to grant a stay of proceedings. It is a discretionary power, and the grounds therefor necessarily vary according to the requirements of each individual case."). In exercising its discretion, this Court applies the following four-factor balancing test:

> [I]t is generally required that (a) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant establish that unless a stay is granted he will suffer irreparable injury; (c) no

> substantial harm will come to other interested parties, and (d) a stay would do no harm to the public interest.

Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah Ct. App. 1987) (citation omitted). For reasons discussed below, application of these factors amply justifies the requested stay in this case.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THE APPEAL.

Petitioners have made "a strong showing of likelihood of success on the merits" of their appeal. *See id.* at 1028. The Order at issue here is unconstitutional and was entered even though the County failed to meet its burden under Utah Rule of Civil Procedure 65A(e) for issuance of a preliminary injunction.

A. The Order is Unconstitutional.

The numerous constitutional deficiencies inherent in the Order are detailed at length in the 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 undeniably 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 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 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" (including felt tip markers) 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.)

For all of these reasons, among others, the Order is facially invalid and should be reversed by this Court.

B. The County Failed to Establish Entitlement to Injunctive Relief Under Rule 65A.

Even if the Order were not unconstitutional on its face, which it is, Petitioners are still likely to prevail on the merits because the trial court clearly erred in determining that

the County had met its burden under Utah Rule of Civil Procedure 65A(e) for issuance of a preliminary injunction. Because an "anti-gang injunction" impacts fundamental rights, the movant must demonstrate its entitlement to relief "by clear and convincing evidence." *Englebrecht*, 106 Cal. Rptr. 2d at 752. Here, the Order sought by the County should have been particularly disfavored because it is a mandatory preliminary injunction that alters the status quo, and because it grants to the County all of the relief it would recover at the conclusion of a full trial on the merits. *See*, *e.g.*, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir.2004) (en banc) (preliminary injunctions are disfavored if they alter the status quo, are mandatory, or grant the movant all of its requested relief). Here, the County failed to carry its burden in several respects, at least two of which are fatal to the Order's issuance.

First, the County never explained why the issue of gang-related crime in Ogden, which the County alleged has been ongoing for more than three decades, is suddenly such an emergency that it requires provisional relief prior to a trial on the County's substantive claim for a permanent injunction. Although criminal activity certainly can have a significant adverse impact on crime victims, that impact alone cannot be enough to satisfy the element of irreparable harm necessary to justify immediate and provisional relief—especially where, as here, the relief sought would seriously curtail fundamental constitutional freedoms and would purport to criminalize undeniably lawful conduct by hundreds of individuals. If the law were otherwise, any governmental entity could obtain a civil injunction to enforce the criminal laws, or to create new "crimes" based on lawful

conduct. In this case, it appears the only reason the County rushed to the district court and obtained an ex parte order on August 20, 2010, is that the County had decided, after three decades, to try something new. That is not sufficient to demonstrate irreparable harm. *See Kansas Health Care Ass'n, Inc. v. Kansas. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("delay in seeking preliminary relief cuts against finding irreparable injury") (citation omitted).

Second, the County utterly failed to demonstrate that the unprecedented relief issued by the district court will actually have any real impact in reducing gang-related crime, and thus that its benefits outweigh the considerable and irreparable constitutional deprivations it will cause. *See* Utah R. Civ. P. 65A(e)(2)-(3); *City of New York v. Andrews*, 719 N.Y.S.2d 442, 449 (N.Y. Sup. Ct. 2000) (movant seeking civil injunction to abate criminal activity must show that a "benefit is likely to result from the injunction"). In its proposed brief of amicus curiae, which the court below rejected and Petitioners subsequently resubmitted on their own behalf, the ACLU of Utah presented the district court with copious empirical evidence demonstrating 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 the two Expert Declarations attached as Exs. A and B thereto.)

In response, the County offered the testimony of a single witness: Greg Anderson, a lawyer from California, whom the district court qualified, over Petitioners' objection, as an "expert" on gangs. (Petition for Interlocutory Review, Add. D at p. 10.) 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; Goddard Decl. ¶ 2.) Notably, in issuing its ruling from the bench, even the district court conceded that "no one can be certain that this will work." (Goddard Decl. ¶ 2.)

It was the County's burden to prove that the Order would do more good than harm. It was required to carry that burden by clear and convincing evidence, not offer mere speculation and the assertion that gang crime is so harmful that any new tactic is justified. The County here failed to carry its burden under Rule 65A to warrant the issuance of injunctive relief, much less the disfavored, sweeping relief entered by the district court. Petitioners have thus made a strong showing that they are likely to succeed on the merits of this appeal.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM UNLESS A STAY IS GRANTED.

Unless this Court grants a stay, Petitioners will unquestionably suffer irreparable harm from the imminent enforcement of the Order. 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))).

These constitutional deprivations will be irreversible and can be prevented only by an order of this Court staying enforcement of the Order pending appeal.

III. A STAY WILL NOT SUBSTANTIALLY HARM THE COUNTY.

For more than thirty years, according to the County below, the Ogden police have addressed alleged criminal activity by Trece (and others) through normal enforcement of the criminal laws. There was no emergency that required the County suddenly to seek a

new and unprecedented civil order on August 20, 2010, much less to do so ex parte without a full hearing on the merits. *See Kansas Health Care*, 31 F.3d at 1543-44 ("delay in seeking preliminary relief cuts against finding irreparable injury") (citation omitted).[3] The district court's draconian remedy has never been employed in Utah before, and there is no reason why it cannot wait to be imposed until this Court has the opportunity to review its dubious constitutional grounding.

Furthermore, while gang-related crime is unquestionably a source of harm, there is no evidence whatsoever that the Order will have any actual effect in abating that harm. Absent such evidence, the widespread constitutional deprivations that enforcement of the Order will cause easily outweigh whatever speculative benefit may be denied in the interim.

IV. GRANTING A STAY WILL NOT HARM THE PUBLIC INTEREST.

Finally, a stay will only advance, not harm, the public interest. As noted above, the district court's Order is unprecedented and imminently risks the curtailment of fundamental liberties of hundreds of individuals. This Court has not had the opportunity to address the grave constitutional questions raised by anti-gang injunctions. It will serve

[3] Although *Kansas Health Care* involved a motion for preliminary injunction, not a motion for stay pending appeal, "[t]he standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Indeed, the standard for evaluating stays pending appeal may be more lenient because of the shorter interval such stays are likely to be in place. *See Mohammed v. Reno*, 309 F.3d 95, 101 n.6 (2d Cir. 2002).

the public interest to have guidance from this Court before irreversible constitutional deprivations are allowed to proceed.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court stay enforcement of the district court's Order until the Court has had an opportunity to resolve the Petitioners' October 4, 2010 Petition for Permission to Appeal Interlocutory Order and, if permission is granted, for a further stay pending resolution of the underlying appeal.

RESPECTFULLY SUBMITTED this 4th day of October 2010.

_____

By: David C. Reymann

PARR BROWN GEE & LOVELESS
David C. Reymann
Clemens A. Landau

ACLU OF UTAH
Darcy M. Goddard*
(*Utah admission pending; admitted in New York and Colorado)

MICHAEL J. BOYLE, P.C.
Michael J. Boyle

Attorneys for Defendants/Petitioners Daniel Callihan, Emmanuel Montoya, Roman Hernandez, and Evan Barros

CERTIFICATE OF SERVICE

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

Dee W. Smith
Christopher F. Allred
Branden B. Miles
WEBER COUNTY ATTORNEYS
2380 Washington Blvd., Suite 230
Ogden, Utah 84401-1464

Michael P. Studebaker
STUDEBAKER LAW OFFICE, LLC
2550 Washington Blvd., Suite 331
Ogden, Utah 84401

Kent R. Hart
Executive Director
UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
c/o Utah Federal Defender's Office
46 West Broadway, Suite 230
Salt Lake City, Utah 84101

_____
David C. Reymann

ADDENDUM

Contents: