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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 PERMISSION TO APPEAL INTERLOCUTORY ORDER** **(Subject to Assignment to the Court of Appeals)** Appeal No. _____ District Court No. 100906446

Pursuant to Rule 5 of the Utah Rules of Appellate Procedure, Defendants/

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

(collectively, "Petitioners") hereby petition for permission to appeal an interlocutory order ("Order") of the Honorable Ernie W. Jones of the Second Judicial District Court for Weber County, Ogden Department, State of Utah. The Order (attached hereto as Addendum A) is a preliminary injunction prohibiting hundreds of individuals, including Petitioners, from associating for any purpose or engaging in numerous other lawful activities anywhere in the city of Ogden.

Because of the significant constitutional rights threatened by the Order, the unprecedented and sweeping nature of the relief, and the imminent enforcement of this unconstitutional mandate by Ogden police, immediate review by this Court is warranted.

I. FACTS MATERIAL TO CONSIDERATION OF THE ISSUES PRESENTED.

Alleged criminal activity by the Ogden Trece gang is not a new problem. According to Respondent Weber County's ("County") moving papers below, police in Ogden have been addressing such activity through normal enforcement of the criminal laws for more than three decades. By the County's own admission, gang-related crime is no worse in Ogden than in other urban communities in this state or across the country, and until last month, there was no suggestion that it presented any type of unique legal emergency.

Yet 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 dubious assertion that Trece

could fairly be classified and sued as an "unincorporated association"—the County's Complaint (attached hereto as Addendum B) alleged that Trece constituted a "public nuisance" and should be subject to a permanent injunction with restrictions akin to martial law.

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," attached hereto, without exhibits, as Addendum C) that granted the County essentially all the relief it sought in its Complaint.[1]

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

[1] Because the TRO so seriously restricted First Amendment rights, the singular fact that it was entered ex parte, with no effort to provide notice to any adverse party, renders it facially invalid. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968) (vacating ex parte TRO prohibiting assembly, and holding: "There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."). The district court, however, refused to vacate the ex parte TRO.

the mere possession of anything that could be considered a "graffiti tool," such as felt tip markers and paint. (*See* 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 this ex parte Order, 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* Add. C at p. 5.) Following service, each of the petitioners appeared in this case through counsel. (*See* Docket, attached hereto as Addendum 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 (attached hereto as Addendum E) 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. 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. (*See* Add. D. at p. 7.) The district court refused to consider either submission, claiming the case was too "urgent."[2] (Add. D at pp. 7-8.)[3]

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 whom the district court deemed, over Petitioners' objection, to be an "expert" on gangs. (*See* 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 there were many explanations for crime reductions, and that there are no statistical studies providing any evidence that gang injunctions are actually effective. (*See* Declaration of Darcy M. Goddard in Support of Petitioners' Motion for Stay Pending Appeal ("Goddard Decl."), filed concurrently herewith, at ¶ 2; Nate Carlisle, *Judge Upholds Ban on Ogden Gang Members*, SALT LAKE TRIBUNE, September 27, 2010, attached hereto as Addendum G.)

Although numerous motions, including motions to dismiss, are pending and awaiting responsive briefs by the County and oral argument on November 9, 2010, at the

[2] 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, to ensure that it was part of the record. (*See* Add. D at p. 9.)

[3] 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.

close of the September 27 hearing, the district court granted the Order from the bench. In making this ruling, the district court expressly relied on evidence that had been submitted in an entirely different trial over which Judge Jones had presided earlier this year, but which was never offered or received into evidence in this proceeding. The district court stated that it was taking "judicial notice" of this evidence, which had given the court "insight… about how Ogden Trece works, and what the gang's purpose is." (*See* Add. D at pp. 11-12.) The district court further 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." (*See* 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." (*See* Goddard Decl. ¶ 2.)[4]

Immediately following this bench ruling, Petitioners orally moved for a stay of the Order pending appellate review and further proceedings below. The district court denied the motion without explanation. (*See* Add. D at p. 12; Goddard Decl. ¶ 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, such as never getting

[4] These last two quotations are based on counsel's recollection of the district court's statements, given the present unavailability of the audio recordings.

a particular type of tattoo[5]—the final Order is essentially identical to the ex parte TRO entered on August 20. (*See* Add. A.)

II. ISSUES PRESENTED AND STANDARDS OF REVIEW.

Issue No. 1: Is the Order unconstitutional under the First, Second, Fifth, and Fourteenth Amendments to United States Constitution, and Article I of the Utah Constitution?

Standard of Review: "Constitutional issues, including questions regarding due process, are questions of law that we review for correctness." *Chen v. Stewart,* 2004 UT 82, ¶ 25, 100 P.3d 1177, 1185.

Issue No. 2: Did the district court err in finding that the County had made a sufficient showing under Rule 65A of the Utah Rules of Civil Procedure to warrant entry of the Order?

Standard of Review: Whether the district court correctly applied the Rule 65A factors to the facts "is a question of law which we review for correctness." *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998); *see also Alta v. Ben Hame Corp.*, 836 P.2d 797, 804 (Utah Ct. App. 1992) (determining availability of injunctive relief as matter of law). The decision to grant a preliminary injunction is reviewed for abuse of discretion only when the factors were correctly applied by the court below. *Water &*

[5] The requirement in the Order's "opt-out provision" prohibiting specific types of tattoos is, by itself, a content-based restriction on pure speech, in violation of the First Amendment. *See Anderson v. City of Hermosa Beach*, __ F.3d __, 2010 U.S. App. LEXIS 18838, *2 (9th Cir. September 9, 2010) ("tattooing is purely expressive activity fully protected by the First Amendment, and… a total ban on such activity is not a reasonable 'time, place, or manner, restriction").

Energy Sys. Tech., Inc. v. Keil, 1999 UT 16, ¶ 6, 974 P.2d 821, 822. ("We will not disturb a district court's grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence.") "The trial court's discretion must be exercised consistently with sound equitable principles, taking into account all the facts and circumstances of the case." *Aquagen Int'l., Inc. v. Calrae Trust*, 972 P.2d 411, 412-13 (Utah 1998) (quoting *Kasco Servs. Corp. v. Benson*, 831 P.2d 86, 90 (Utah 1992)).

In addition, because the district court's decision in this case implicates fundamental constitutional rights, its factual findings are accorded less deference on appeal than they otherwise would be. *State ex rel. Z.D.*, 2006 UT 54, ¶ 24 n.2, 147 P.3d 401, 404 n.2 (noting that a less deferential standard of review is extended to issues of "constitutional fact" implicating First Amendment guarantees); *Jensen v. Sawyers*, 2005 UT 81, ¶ 92, 130 P.3d 325, 343 ("[A]n appellate court is duty bound to act in its role as the guardian of constitutional protections to undertake searching appellate review of judgments affecting speech.").

III. STATEMENT OF REASONS WHY IMMEDIATE INTERLOCUTORY APPEAL SHOULD BE PERMITTED.

A. The Subject Matter and Posture of This Case Warrant Immediate Interlocutory Review.

The district court's unprecedented decision to enter the sweeping Order requested by the County goes further to sacrifice constitutional rights in the name of anti-gang enforcement than any court has ever gone. The fundamental rights of hundreds of

citizens are imminently threatened by the enforcement of this Order, which apparently has already begun.[6] If this Court does not stay the enforcement of the Order and immediately review its dubious constitutional grounding, the impact on constitutional rights in the meantime will be incalculable. As the United States Supreme Court has noted, "[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).

The availability of immediate interlocutory review exists precisely to protect against such irreparable harms. Because constitutional liberties such as freedom of speech and assembly are fundamental rights, appellate courts routinely exercise their discretion to review interlocutory orders that threaten constitutional interests. This Court has been particularly vigilant, conducting interlocutory review on multiple occasions where, as here, significant First Amendment interests are at stake. *See*, *e.g.*, *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶¶ 1, 16, 25-28, 116 P.3d 323, 332 (reviewing on interlocutory appeal defendants' contention that "the district court erred when it denied their motion for summary judgment . . . because their petitions to the City Council were privileged under the First Amendment of the United States Constitution . . . ."); *I.M.L. v. State*, 2002

[6] *See* Tim Gurrister, *Trece Injunction Now Law*, OGDEN STANDARD EXAMINER, September 27, 2010 (attached hereto 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."); *see also* Add. 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.").

UT 110, ¶¶ 6, 9-30, 61 P.3d 1038, 1040-48 (reviewing on interlocutory appeal the trial court's denial of a motion to dismiss a criminal libel charge based on a claim of First Amendment immunity); *State v. Krueger*, 1999 UT App 54, ¶¶ 1, 28-34, 975 P.2d 489 (reviewing on interlocutory appeal the denial of a motion to dismiss based on the claim that "prosecuting journalists engaged in news gathering activities . . . is unconstitutional under the First Amendment and Article I Section 15 of the Utah Constitution").

Courts across the nation have similarly recognized that expedited review is essential to safeguarding constitutionally-protected speech and other fundamental rights. *See, e.g.*, *United States v. P.H.E.*, 965 F.2d 848, 855 (10th Cir. 1992) (interlocutory review was proper due to "substantial evidence of an extensive government campaign . . . designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights"); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969) (interlocutory review warranted because "[t]he subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category"); *DVD Copy Control Ass'n, Inc. v. Bunner*, 75 P.3d 1, 26 (Cal. 2003) ("[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." (internal quotation marks omitted) (alteration in original)); *Scottsdale Publ'g, Inc. v. Superior Court*, 764 P.2d 1131, 1133 (Ariz. Ct. App. 1988) ("[While] review by special action of a trial court's denial of summary judgment is a

rarity and shall remain so . . . [w]e make an exception in this case in furtherance of the public's significant first amendment interest in protecting the press from the chill of meritless libel actions."); *cf. Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("In the First Amendment area, summary procedures are even more essential."); *Schaefer v. Lynch*, 406 So.2d 185, 187 (La. 1981) (recognizing an exception to the general rule prohibiting appeals from a court's refusal to grant summary judgment where issues on appeal implicate the First Amendment).

The gravity of the constitutional interests threatened by the district court's sweeping and unprecedented Order, as discussed more fully below, warrants this Court's intervention through immediate interlocutory review.

Furthermore, even if this case did not involve constitutional rights, this Court has, on numerous occasions, accepted for interlocutory review the grant or denial of a preliminary injunction. *See*, *e.g.*, *Centro de la Familia de Utah v. Carter*, 2004 UT 43, ¶ 1, 94 P.3d 261, 262 (reviewing a preliminary injunction on interlocutory appeal but ultimately dismissing the appeal as moot); *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶¶ 1, 15, 974 P.2d 821, 823 (reversing a preliminary injunction on interlocutory appeal after analysis of the likelihood of success prong); *Aquagen Int'l., Inc. v. Calrae Trust*, 972 P.2d 411, 412 (Utah 1998) (vacating a preliminary injunction on interlocutory appeal); *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 229 (Utah 1998) (affirming a district court's denial of preliminary injunction on interlocutory appeal); *Kasco Servs.*

Corp. v. Benson, 831 P.2d 86, 87 (Utah 1992) (reviewing the time frame and scope of a preliminary injunction on interlocutory appeal).

The Order appealed here, if left in place during the pendency of the lower court proceedings, would have such a significant and deleterious impact on the fundamental rights of hundreds of people that interlocutory review by this Court is necessary.

B. The Order Violates Fundamental Constitutional Rights.

The constitutional defects in the Order were briefed at length by the ACLU of Utah below, and then resubmitted by Petitioners following the district court's refusal to consider those arguments. (*See* Add. E.) To the extent that it is pertinent to this Court's decision to accept interlocutory review, the following is an abbreviated version of those arguments.

1. Standards for Injunctions That Infringe on Constitutional Rights.

The issuance of a preliminary injunction is an extraordinary remedy, subject in every circumstance to the requirement that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Where, as here, a proposed injunction infringes on constitutional rights, the movant must satisfy an even more rigorous constitutional standard. Unlike legislative enactments that have general application, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances. . . . [T]hese differences require a somewhat more stringent application of

general First Amendment principles in this context." *Id.* at 764-65. Thus, even if the Order in this case could be construed as entirely content-neutral—which it cannot—the proponent of the injunction must demonstrate the injunction "burden[s] no more speech than necessary to serve a significant government interest." *Id.* at 765.

The United States Supreme Court has explained this rigorous standard as follows:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In other words, the order 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) (finding unconstitutional a temporary restraining order and injunction against white supremacist organization prohibiting assembly in town). *See also Madsen*, 512 U.S. at 767 (noting the *Carroll* standard is the same as the "burden no more speech than necessary" standard employed in *Madsen*).

In addition to these important restrictions on scope, injunctions that impact constitutionally protected activities are unconstitutionally vague under the due process clause of the Fifth Amendment if they "either (1) fail to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' or (2) [are] written in a way that encourages arbitrary and discriminatory enforcement." *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 55, 225 P.3d 153, 171 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); citing *City of Chicago v.*

Morales, 527 U.S. 41, 56 (1999)). Conduct-related prohibitions that are "so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (Black, J., concurring).

Finally, injunctions are unconstitutionally overbroad if they seek to "authorize[] the punishment of constitutionally protected conduct." *Coates*, 402 U.S. at 614. This is particularly true where, as here, the Order purports to criminalize conduct that is not wrongful by any independent measure, attempting to make "a crime out of what under the Constitution cannot be a crime." *Id.* at 616. Such injunctions are facially invalid.

2. The Scope of the Order is Unconstitutionally Vague and Overbroad.

The scope of the Order entered by the district court below is unprecedented, even measured against those few courts that have approved so-called "anti-gang injunctions." These problems with scope fall into two basic categories: (i) the geographic scope of the injunction; and (ii) the scope of individuals subject to its prohibitions.

(a) Geographic Scope.

First, the geographic scope of the Order is clearly overbroad, covering essentially the entire city of Ogden. Those few courts from other states that have entered anti-gang injunctions have done so only within sharply circumscribed geographic areas. In *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), for instance, the primary case on which the County relied below, and on which the Order is largely based, the injunction upheld by the California Supreme Court only affected "the four-block area of Rocksprings,"

where no members of the alleged gang lived or worked. *Id.* at 617, 601. The court in *Acuna* found that gang members came to the area for the sole purpose of conducting illegal activities, thereby converting the small area into "an urban war zone" and "an occupied territory." *Id.* at 601. Only because of the limited geographic scope and the fact that all of the gang members "live elsewhere," *id.*, was the *Acuna* court willing to conclude that the defendants had "no constitutionally protected or even lawful goals within the limited territory of Rocksprings." *Id.* at 615.[7] This "limited area within which the superior court's injunction operates," *id.* at 616, was crucial to the *Acuna* court's decision to uphold the injunction at issue.[8]

Here, by contrast, the district court's Order is not narrowly drawn, but operates virtually everywhere in the entire city of Ogden. This geographic area consists of hundreds of city blocks and more than twenty-five square miles, unquestionably

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[7] In any event, it is not clear that *Acuna* is still good law. Two years after it was decided, the United States Supreme Court invalidated as unconstitutionally void a similar anti-gang loitering ordinance passed by the city of Chicago. *City of Chicago v. Morales*, 527 U.S. 41 (1999), cited by this Court in *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 55. Given the similarity between the restriction upheld in *Acuna* but struck down in *Morales*, "the viability of *Acuna* may fairly be called into question after the holding of the Supreme Court in [*Morales*]." *City of New York v. Andrews*, 719 N.Y.S.2d 442, 454 (N.Y. Sup. Ct. 2000).

[8] Other California courts that have upheld "gang injunctions" have similarly stressed the importance of a limited geographic scope. *See, e.g.*, *People v. Englebrecht*, 106 Cal. Rptr. 2d 738, 741, 750 (Cal. Ct. App. 2001) (upholding gang injunction covering one-square mile, and stating that "[w]hile the injunction curtails associational and expressive activities, it does so only in a limited geographic area and only in a limited manner." (emphasis added)); *People ex rel. Totten v. Colonia Chiques*, 67 Cal. Rptr. 3d 70 (Cal. Ct. App. 2007) (limited area within Oxnard, California covering 6.6 square miles); *cf. Madsen*, 512 U.S. at 775 (finding unconstitutional a prohibition on protests within a 300-foot zone, because "a smaller zone could have accomplished the desired result").

including the areas where some alleged members of Trece live, work, go to church, and engage in any number of perfectly lawful activities. If two alleged members of Trece happen to work together, they are now prohibited from doing so under the Order. If they happen to be family members or friends, they are now prohibited from appearing in public together anywhere in the city. The County below made no showing that the entire city of Ogden is an "urban war zone" or "occupied territory."[9] *Id.* at 601. To the contrary, what little evidence the County presented on this point amply demonstrated that large portions of the city have little or no recorded allegedly gang-related crime in the last several years. Without question, and certainly on this factual record, an Order that imposes constitutionally restrictive measures across an entire city is not "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll*, 393 U.S. at 183.

In effect, the Order imposes a civil banishment on all of the hundreds of alleged members of Trece, prohibiting them from engaging in numerous meaningful and perfectly legal activities anywhere in the city in which they live. Such a heavy-handed and draconian remedy is unprecedented in Utah and, to Petitioners' knowledge, anywhere else in the country. *See*, *e.g.*, *Andrews*, 719 N.Y.S.2d at 442 (denying as unconstitutional

[9] Indeed, Ogden Police Chief Jon Greiner has expressly admitted that "his city does not struggle with gangs any more than other communities[.]" *See* Shenna McFarland, *Ogden Injunction Declares Gang a Public Nuisance*, SALT LAKE TRIBUNE, August 28, 2010 (attached as Ex. A to Add. E hereto.)

a request for injunctive relief seeking civil banishment of prostitution ring from a single city plaza).

(b) Scope of Covered Individuals.

Second, the scope of individuals covered by the Order is both unconstitutionally vague and overbroad. The Order purports to apply to "Defendant Ogden Trece and all members of defendant Ogden Trece[.]" (Add. A at p. 2.) Nowhere does the order define what is required to be a "member" of Trece or what procedures law enforcement should follow in making such a determination. Instead, 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. (*See* Goddard Decl. ¶ 2.)

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned*, 408 U.S. at 108. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56 (Stevens, J., concurring).

Here, the Order fails to define those to whom its restrictions apply, providing no guidance—much less orderly procedures—for classifying an individual as a "member" of

Trece. The Order instead impermissibly grants law enforcement extraordinary and unbridled discretion in its enforcement. Even courts that have entertained anti-gang injunctions have refused to enter them with such vague and overly broad definitions of gang membership. *See*, *e.g.*, *Englebrecht*, 106 Cal. Rptr. 2d at 756 ("gang injunctions" can only apply to "an active gang member," and not to an individual whose connection to the gang is "nominal, passive, inactive, or purely technical").

Furthermore, the delegation to law enforcement of the decision of who constitutes a "gang member" effectively provides the police with a roving warrant to bind individuals not named in any court paper, and who have never been given the right to have their status as a gang member adjudicated in court, to criminal charges for conduct that would otherwise be perfectly legal. The district court cannot abdicate this function and delegate it solely to the unfettered discretion of law enforcement without impermissibly violating the due process rights of all individuals against whom the injunction might be enforced. *Cf. Madsen*, 512 U.S. at 776-77 (Souter, J., concurring) ("the issue of who was acting 'in concert' with the named defendants was a matter to be taken up in individual cases"); UTAH CONST. art. I, § 7 ("No person shall be deprived of life, liberty or property, without due process of law."); *cf. People ex rel. Reisig v. Broderick Boys*, 59 Cal. Rptr. 3d 64 (Cal. Ct. App. 2007) (question of whether an individual is a member of the defendant gang must be proved by clear and convincing evidence).

To comport with even the most basic of due process requirements, any individual whom the County seeks to bind with the Order must first be given notice and an opportunity to be heard regarding his or her alleged status as an "active gang member." Here, the Order simply delegates this determination to police, giving them the power to enforce the Order's onerous provisions against any individual whom they deem to be a gang member and who is handed a copy of the Order. This lack of due process renders the Order unconstitutional on its face.

3. The Specific Conduct Prohibitions in the Order are Unconstitutional.

Finally, the specific prohibitions on conduct in the Order are not "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate," *Carroll*, 393 U.S. at 183 (emphasis added), nor do they "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765. While the County may have a legitimate interest in fighting crime and abating public nuisances, the measures in the Order sweep far broader than is constitutionally permitted.

First, the blanket ban on all association anywhere in the city of Ogden, other than in churches and schools, violates the fundamental associational rights secured by the First Amendment. The United States Supreme Court has recognized "as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

In addition, "the individual person's right to speak includes the right to speak in association with other individual persons." *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 928 (2010) (Scalia, J., concurring); *see also id.* at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

The Order directly and broadly violates these rights, precluding association between hundreds of individuals who may be family members, friends, or business associates. There is no restriction limiting the Order to association connected with actual criminal activity, or even nuisance activity. Instead, all association is banned, apparently in perpetuity, profoundly affecting the basic liberties of those against whom the police choose, in their unfettered discretion, to enforce the Order. *See Roberts*, 468 U.S. at 618 ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.").[10]

Second, the curfew provision in the Order violates the fundamental right to move about freely, which is protected by the due process clause of the United States

[10] Notably, the County has not claimed that Trece exists solely for criminal purposes or that it has no legitimate associational purpose. To the contrary, the County's Complaint expressly alleges that "Ogden Trece is an unincorporated association of more than two individuals joined together for social, recreational, profit, and other common purposes. . . ." (Add. B at ¶ 2.)

Constitution. As Justice Stevens explained in *Morales* in striking down a similar anti-gang loitering ordinance:

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.

527 U.S. 41, 53-54 (Stevens, J., concurring) (internal citations omitted).[11]

The curfew provision in the Order is not limited to those who would be in public for the purpose of engaging in criminal or nuisance activity, but rather provides exemptions only for certain enumerated purposes that law enforcement may, in its apparently unfettered discretion, deem to be "legitimate" or "lawful." No standards are provided to determine whether any particular activity is "legitimate," or even "gang-related." And given the expansive sweep of the other provisions in the Order, virtually every aspect of the alleged members' lives would fall into that category.

Third, the Order imposes a content-based ban on all speech that police deem to be "confronting," "annoying," "harassing," "challenging," and "provoking." (Add. A at p.

[11] The right to travel and movement is "a virtually unconditional personal right, guaranteed by the Constitution to us all," and "is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Stewart, J., concurring)). *See also Andrews*, 719 N.Y.S.2d at 451 ("[T]he 'right to move freely about one's neighborhood or town' exists as a matter of substantive due process, is 'implicit in the concept of ordered liberty' and [is] 'deeply rooted in the Nation's history.'") (quoting *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990)).

2.) This attempt to criminalize speech that is not otherwise unlawful is unconstitutional. *See Coates*, 402 U.S. at 614 ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."); *Madsen*, 512 U.S. at 774 (striking down similar provision, and holding that "[a]bsent evidence that the protester's speech is independently proscribable (*i.e.*, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand."); *cf. Citizens United*, 130 S.Ct. at 782 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); *Carroll*, 393 U.S. at 181-82 (ex parte prior restraint on speech was constitutionally invalid); *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976) (prior restraints are "the most serious and least tolerable infringement on First Amendment rights"); UTAH CONST. art. I, § 15 ("No law shall be passed to abridge or restrain the freedom of speech or of the press."); *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989) (noting that "article I, section 15 . . . by its terms, is somewhat broader than the federal clause").

Fourth, the Order attempts to criminalize the otherwise lawful possession of firearms, in violation of both the Utah and United States Constitutions. Article I, section 6 of the Utah Constitution prohibits the infringement of the right "to keep and bear arms," and delegates solely to the Legislature the power to define the "lawful use of arms." UTAH CONST. art. I, § 6. This prohibition has been codified in Utah statute and

specifically upheld by this Court, invalidating attempts by any governmental entity other than the Utah Legislature to regulate firearms. *See* Utah Code Ann. § 53-5a-102(5); *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 22, 144 P.3d 1109, 1115 (power to "define the lawful use of arms" can be exercised only "through [the Legislature's] lawmaking power," and the Legislature is the "only entity with authority to enact legislation defining the 'lawful use of arms'"). Even if there were justification for the district court's firearms ban (which there is not), the court lacks the constitutional authority to issue it.[12]

Fifth, the prohibitions on possessing, or merely being in the presence of, alcohol, controlled substances, and "graffiti tools" (including felt tip markers) are constitutionally overbroad and invalid on their face. Taken literally, they prohibit an individual from drinking a beer on his front porch, carrying a felt tip marker in his backpack, and being in the presence of a person with prescription medicine. Graffiti and the illegal use of alcohol and drugs are already criminalized under the criminal laws. The Order impermissibly expands that reach to perfectly lawful conduct in a way that is neither narrowly tailored nor targeted at actual nuisance activity.

Sixth, the ban on trespassing and the command to "obey all laws" are both overbroad and unnecessary. Trespassing is already unlawful by Utah statute. *See* Utah Code Ann. § 76-6-206. The Order, however, substantially expands the meaning of trespass, criminalizing being present in a relative's house while she runs to the store, watering a neighbor's plants while he is on vacation, and even opening a friend's gate

[12] *Cf. District of Columbia v. Heller*, 554 U.S. 570 (2008) (construing scope of Second Amendment to the United States Constitution).

and walking up to her front door to ring the bell. The requirement that the individual obtain "written consent" before undertaking these activities is both impractical and an invitation to arbitrary and discriminatory enforcement. Furthermore, the command to "obey all laws" is duplicative, and it has the deleterious effect of elevating even small infractions to alleged gang-related crimes. There is simply no justification for such prohibitions.

For all of these reasons, the Order violates both the United States and Utah Constitutions and should be vacated by this Court.

C. The District Court Erred in Concluding that the County Had Satisfied Its Burden Under Rule 65A For Issuance of This Order.

Even if the Order were not unconstitutional on its face, it is still subject to reversal 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.[13]

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 O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir.2004) (en banc) (preliminary injunctions

[13] The Order itself contains no findings or conclusions regarding any of the Rule 65A factors, which also violates Rule 65A(d).

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); *Andrews*, 719 N.Y.S.2d at 449 (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* 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. (*See* Add. D at p. 10; Goddard Decl. ¶ 2.) 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 in the long

term. (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." (*Id.*)

The district court then went further, augmenting the County's evidence by sua sponte taking judicial notice of the evidence 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—gave him "insight" into how Trece works, as well as its "purpose," and that this evidence was, if anything, more compelling than any evidence actually introduced by the County in this matter. (Add. D at pp. 11-12; Goddard Decl. ¶ 2.) Aside from the fact that this unknown evidence cannot possibly have any bearing on the question of whether a civil gang injunction would be effective, the district court's reliance on evidence that was never introduced in this proceeding is clear error. *See State v. Shreve*, 514 P.2d 216, 217 (Utah 1973) ("[R]ecords of other proceedings in the court cannot be judicially noticed and must be introduced in evidence in order to be considered in the pending case."); *State in Interest of Hales*, 538 P.2d 1034, 1035 (Utah 1975) (a court "should not take notice sua sponte of the proceedings in another case unless the files of the other case are placed in evidence in the matter before the court.").

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-related crime is so harmful that any new tactic is warranted by the law. The district court failed to hold the County to that burden,

and accepted conjecture in lieu of evidence. As the court in *Andrews* properly concluded when faced with a similar lack of evidence in support of a proposed civil banishment injunction:

> Here, where the proposed injunction is so extraordinary and completely unprecedented, this aspect of the three-pronged test takes on even more than its usual significance. Where the injunction has not been shown to produce any tangible benefit to the City, while greatly limiting the defendants' freedom to travel about the City and remain where they choose, rights of constitutional dimensions . . . I will not seriously consider it in the absence of clearly proven allegations of wrongdoing and equally clearly proven allegations of substantial benefit to the City. . . . A court of law cannot act on subjective beliefs but must insist on proof.

Andrews, 719 N.Y.S.2d at 450-51.

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. The Order should be vacated.

IV. STATEMENT OF REASONS WHY IMMEDIATE INTERLOCUTORY APPEAL WILL MATERIALLY ADVANCE TERMINATION OF THE LITIGATION.

The County's sole claim in this case is for issuance of a permanent injunction virtually identical to the Order entered by the district court. In entering the Order, the district court has already granted the County all of the relief it seeks. As a result, a decision by this Court reversing the Order will effectively terminate the litigation below. In the event that this Court upholds the Order, which it should not, its guidance on the issues raised by this appeal will substantially aid in resolution of any remaining issues regarding the residual question of whether the Order should be made permanent.

V. STATEMENT OF REASONS WHY THE SUPREME COURT SHOULD RETAIN THE APPEAL.

The district court's sweeping decision in this case is unprecedented, involves constitutional questions of first impression in this state, and imminently risks the curtailment of fundamental liberties for hundreds of individuals. *See* Utah R. App. P. 9(c)(9) (listing "novel constitutional issue[s]" and issues "of first impression" as appropriate for Supreme Court retention). If this Court does not act on this appeal, more "anti-gang injunctions" by other law enforcement agencies in other Utah communities are sure to follow. Petitioners respectfully request that this Court retain this appeal so that the significant constitutional issues it raises can be expeditiously and conclusively resolved.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Petition be granted, and that immediate appeal of the district court's Order be permitted.

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 PERMISSION TO APPEAL INTERLOCUTORY ORDER** was served via hand-delivery on the following:

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ADDENDUM

Contents: