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IN THE UTAH SUPREME COURT

WEBER COUNTY, Plaintiff, vs. OGDEN TRECE, AKA CENTRO CITY LOCOS, an alleged criminal street gang sued as an incorporated association; and Does 1 through 200. Defendant.	**UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS' AMICUS BRIEF IN SUPPORT OF PETITION FOR EMEREGENCY REVIEW AND PETITION FOR INTELOCUTOR APPEAL** Appeal No. 20100804 District Court No. 100906446

Utah Association of Criminal Defense Lawyers, a Utah non-profit corporation,

Amicus Curiae.

INTRODUCTION

The Utah Association of Criminal Defense Lawyers ("UACDL") submits this amicus brief in support of the American Civil Liberty Union of Utah's ("ACLU") petitions for emergency relief and interlocutory appeal. The ACLU has identified numerous constitutional defects in the injunction Weber County has obtained against the

Ogden Trece criminal street gang. UACDL submits this brief to more thoroughly brief the due process violations that the injunction creates. Specifically, the injunction provides purported gang members no procedure for challenging their inclusion on the County's gang registry. Further, to remove one's name from the list, affected person's must admit gang affiliation (whether truthful or not), wait several years to seek removal, and rely on police officers' unfettered discretion. These defects violate basic due process protections and support the granting of the ACLU's petitions for immediate relief.

STATEMENT OF FACTS

On September 28, 2010, the Second Judicial District Court entered an order known as the "Anti-gang Injunction" (order) that radically curtailed the fundamental rights of hundreds of citizens in the City of Ogden, Utah. *See* Addendum A. The effects of that preliminary injunction criminalize a wide range of otherwise legal and constitutionally-protected activities in the name of anti-gang enforcement. The sweeping provisions of that order applied to the vast majority of the City of Ogden (an area of more than 25 square miles) and directly affected hundreds of named and unnamed alleged members of the defendant Ogden Trece and indirectly affected potentially thousands of acquaintances of these named and yet-to-be named individuals.

The provisions of the order were not only overarching in terms of geographical area and named and yet unnamed defendants, but prohibited a vast and almost indefinable list of actions and associations. The order prohibits the named and yet-to-be named individuals from associating for any purpose except churches and schools, from speaking

or acting in ways that police deem annoying, harassing, or challenging, and imposed a citywide curfew from 11 PM to 5 AM every night of the week. *Id.* at 2-4. The order also prohibits the named and yet-to-be named individuals from possessing or even being in the presence of any firearms, alcohol, or controlled substances, whether legal or not, and criminalizes the mere possession of anything that could be considered a graffiti tool such as a felt tipped marker or paint. *Id.* at 3-4.

Originally 14 individuals were served with the temporary injunction, and a hearing was conducted over several days regarding the issuance of the preliminary injunction. The trial court entered the temporary injunction, which temporarily restrained the named individuals from engaging in the acts, attitudes, and behaviors loosely defined in the order. Addendum A. At the end of the hearing, the trial court entered the order.

Since the entry of the order, a number of individuals have been subsequently served with the order, and at least two of the subsequently served individuals have been arrested for violations of the order. These individuals face class B misdemeanor charges, with the potentiality of six months in jail for each violation. (See Addendum A which is a newspaper article on recent arrests)

ARGUMENT

POINT I

STANDARD OF REVIEW

In the case of *State, In Re S.A. v. State* 37 P.3d 1172, 1176 (Utah Ct. App. 2001), the court held: "Constitutional issues, including . . . due process, are questions of law which we review for correctness." (Quoting *In re Adoption of S.L.F.,* 27 P.3d 583 (Utah

Ct. App. 2001) and *In Re K.M.* 965 P.2d 576,578 (Utah Ct. App. 1998)); *see also State v. Briggs,* 2008 UT 83, ¶ 11, 199 P.3d 935 ("A challenge to the constitutionality of a statute presents a question of law, which we review for correctness").

POINT II

THE OGDEN GANG INJUNCTION VIOLATES THE DUE PROCESS RIGHTS OF THE NAMED (AND YET-TO-BE NAMED) AFFECTED PERSONS BECAUSE THE INJUNCTION PROIVIDES NO PRCEDURE FOR CHALLENGING A PERSON'S DESIGNATION AS A GANG MEMBER.

The Fifth and Fourteenth Amendments to the United States Constitution, together with Article 1 Section 7 of the Constitution of the State of Utah provide that "no person shall be deprived of life, liberty, or property, without due process of law". Both the United States Supreme Court and the Supreme Court of the State of Utah have consistently held that minimum requirements of these due process guarantees include a right to notice and a fair and meaningful hearing before the a deprivation of life, liberty or property. The United States Supreme Court has consistently held that notice and a hearing are integral due process requirements guaranteed by the Constitution:

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' (citations omitted.)

Hamdi v. Rumsfeld, 542 507, 533 (2004). In a similar vein, the Utah Supreme Court, in the case of *Low v. City of Monticello* 2004 UT 90, ¶ 12, 103 P.3d 130, reaffirmed its

long-standing position that "[t]he minimum requirements [of due process] are adequate notice and an opportunity to be heard in a meaningful manner." (Citations omitted)

In the present case, the defendants and potential defendants are now being served with the above-described order without any notice of their rights to a hearing to contest the terms and/or application of this order to their particular case. Indeed, at least two individuals, and undoubtedly more in the near future, have been and will be charged with criminal offenses for violating the terms of the order. Based on the terms of the order, the individuals covered by the order have no apparent right to a hearing in which they could contest the scope, breadth or application of the order to their individual case. Furthermore, they have no opportunity to dispute their inclusion in this group, which was based upon an officer's subjective determination. They have no ability to protest the fact that the majority of individuals included in the Ogden/Weber gang databank is based upon hearsay and in some instances double and triple hearsay. They have no ability to dispute the constitutionality of the order, which severely impacts their First Amendment rights to free speech and freedom of association. It is these numerous deficiencies which invokes the application of the defendants' due process rights under federal and state constitutional provisions.

These deficiencies defeat the broad injunction imposed below. This Court in the case of *Chen v. Stewart*, 2004 UT 82, ¶68, 100 P.3d 1177, identified the guarantees which fall within the parameters of the federal and state due process amendments:

> Although the exact requirements of due process may vary from situation to situation, the minimum requirements of due process include adequate notice and an opportunity to be heard in a meaningful manner. *See Dairy Prod. Serv.,* 2000 UT 81 at ¶49, 13 P.3d 581. "To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker." *Id.*

Under the order as it currently stands, individuals served with the order have no apparent right to request a hearing on the constitutionality of the proposed injunction which restrains them from a myriad of otherwise legal and accepted actions.

The federal courts have invalidated similarly broad injunctions that lack essential due process protections. The Tenth Circuit, for example, requires injunctions to be narrowly tailored based on the axiom that "[i]t is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is 'clear and unequivocal.' *Kikumura v. Hurley,* 242 F.3d 950, 955 (10th Cir. 2001)". *Heideman v. South Salt Lake City,* 348 F.3d 1182, 1188 (10th Cir. 2003). That Court went further to describe the narrow parameters in which an injunction can be issued where they stated, "To constitute irreparable harm, an injury must be certain, great, actual "and not theoretical." *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985)." *Heideman*, 348 F.3d at 1189. Judge Jones' comments in ruling below that, "It may not work. I don't know. It may be that the citizens of Ogden will come to law enforcement and say, "we don't want it," fly directly in the face of the requirement that irreparable harm is 'certain, great, actual and not theoretical'." *Id.*

Rule 65A of the Utah Rules of Civil Procedure provide specific guidelines governing the issuance of temporary restraining orders and temporary injunctions. Some of the provisions of that rule require that "no temporary restraining order shall be granted without notice to the adverse party or that party's attorney" unless they can show "irreparable injury, loss, or damage" will result to the applicant before a hearing can be had. Utah R. Civ. P. 65A(a). Furthermore, there are specific requirements that the restraining order shall expire after ten days and that there is a required hearing within that ten-day period. Id. at 65A(b).

The court in the present case has failed to follow these rules and has issued an injunction that can apparently be served upon anyone that the police later determined is a gang member based solely upon an officer's determination of that designation. As has been proven in the last week, several individuals have been served with an injunction and thereafter arrested and jailed on violations of that injunction without ever having the proper notice and due process procedural requirements. In truth, they have been denied their day in court. The order issued by the court below allows the deprivation of constitutional rights to a group or class of individuals designated as gang members solely by police officers, without any judicial review.

POINT III

THE OGDEN GANG INJUNCTION FURTHER VIOLATES DUE PROCESS OF LAW BECAUSE THE OPT-OUT PROCEDURE'S BURDEN-SHIFTING REQUIREMENTS PROVIDE NO SUBSTITUTE FOR NOTICE AND A HEARING.

Similarly, the injunction entered below provides no notice or any other substitute procedure that satisfies due process requirements. To illustrate, Utah's stalking injunction statute requires actual notice to the defendant that he/she has a right to contest the injunction and that a hearing must be held within ten days of submitting a request for a hearing. Utah Code Ann. § 77-3a-101 (2010). Thus, both this statute and Utah Rule of Civil Procedure 65A provide for the notice and hearing in compliance with a defendant's due process rights.

Although the Order Granting Preliminary Injunction in the present case provides an opt-out provision, it still does not meet constitutional due process requirements. There are glaring facial deficiencies in this opt-out provision. First, the individual must apply to the court for the opt-out and have the documents served on the County Attorney with a specific prohibition against shortening time for a hearing (which of course would be in violation of Rule 65A).

Secondly, the individual must make certain declarations, some of which may be impossible, in order for the injunction to be lifted. Specifically, an individual must first

admit that he/she was a member of the gang[1], announce that he/she is no longer a member of the gang, and then somehow convince the court that he/she has not been documented as being a gang member by the police for the past three years. The individual must also prove that he/she has not had any tattoos in the past three years and that he/she has been gainfully employed consistently for the period of one year. In essence, these provisions shift the burden of proof from the State to the defendant.

The obvious and glaring problems of these requirements are numerous. First, the police have unlimited discretion in designating an individual a gang member. There is no judicial review of that declaration. Once that label has been attached, an individual must go through extensive court proceedings to try to get the label lifted. Furthermore, it would be impossible to opt out if the person were inaccurately designated a gang member, as described above, without committing perjury.

Second, under the current order, it would be impossible for a disabled individual to be granted the opt-out since he would be unable to be gainfully employed for a period of one year. The Utah Association of Criminal Defense Lawyers ("UACDL") is aware of one such individual who has been identified as a gang member but who cannot work due to a disability.

Third, an individual that wanted to disassociate himself from the gang must wait for a minimum of three years and would be required to somehow satisfy an unknown law

[1] This would require a person who is truly not a gang member to commit perjury in order to get off the gang injunction list.

enforcement entity that he has not had any association or contact with a gang member during the three-year waiting period. Furthermore, if an individual truly wanted to remove himself from the gang, yet attended church, went to a funeral, cheered for the a local sports team, bagged groceries at a grocery store where a gang member happened to purchase items or had literally thousands of possible innocent contacts with any other known gang member, that person would be ineligible for the opt-out provision since all of the above would constitute having "been in the company… of any known active member of Ogden Trece." Such proof would be literally impossible for anyone but a hermit. The absolute absurdity of this requirement is illustrated by the fact that virtually every police officer, prosecutor, defense attorney, and even every district court judge in Weber County has "been in the company… of any known active member of Ogden Trece" within the last three years.

These impossibilities violate basic due process guarantees. Numerous courts in various areas of the law have invalidated laws that violate the due process guarantees against impossibility have been examined by. In the case of *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1039 (5th Cir. 1982), the Fifth Circuit Court of Appeals examined a case where the government, on paper, provided for a right to a fair hearing on a claim of asylum and yet did not allow time in which to apply for asylum before holding expedited deportation hearings. The Court stated, "We hold simply that the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible." *Id.*

Likewise, in *United States v. Dalton,* 960 F.2d 121, 126 (10th Cir. 1992), the Tenth Circuit Court of Appeals reversed a defendant's failure to register a machine gun conviction on the grounds that it was impossible to register a machine gun under state law:

> In our view, however, that is exactly the situation here. Sections 5861(d) and (e) punish the failure to register a machinegun at the same time that the government refuses to accept this required registration due to the ban imposed by section 922(o). As a result of section 922(o), compliance with section 5861 is impossible. Accordingly, we vacate Dalton's conviction and reverse with instructions to dismiss the indictment.

The Supreme Court of Utah has similarly recognized the doctrine of impossibility as applied to due process violations. In the case of *Gallegos v. Midvale City,* 492 P.2d 1335, 1339 (Utah 1972), the Court recognized the ridiculousness of a statute that required a two-year-old infant to give notice of an injury claim:

> A statute which by its terms prevents an infant from suing for injuries received unless it gives notice at a time when it is impossible for the infant to do so does not seem to me to afford due process of law to the infant. The law does not require the doing of an impossible thing, and yet this notice statute requires a two-year-old infant to give verified, written notice within 30 days of her injury or to have it given by some person authorized to sign the same.

Further, in the case of *State v. Johnson*, 856 P.2d 1064, 1073 (Utah 1993), the Court reversed the prison sentence of a defendant on whom the trial court placed the burden of attempting to negate a scurrilous and unreliable claim that had been asserted by the prosecution:

> Although defendant had the burden of establishing his eligibility for probation under all the fact-based criteria in the statute, he did not have to disprove any and all allegations of other crimes based on rumor or other unreliable evidence. The burden of proving a negative is nearly impossible to meet. The difficulty is compounded when proof of the negative can be rebutted by hearsay and rumor. To require a defendant to assume the burden of disproving highly unreliable evidence might well violate due process . *See State v. Howell,* 707 P.2d 115, 118 (Utah 1985); *State v. Casarez,* 656 P.2d 1005, 1007 (Utah 1982); *State v. Lipsky,* 608 P.2d 1241, 1248 (Utah 1980). (Emphasis added).

More recently, in *Thurnwald v. A.E.,* 2007 UT 38, ¶¶ 35-41, 163 P.3d 623, the Utah Supreme Court reviewed an adoption case in which state law required unwed fathers to affirmatively declare their parental rights. But, this requirement's timing provisions rendered it impossible to make the declaration when a child was born on weekends or holidays. The court weighed the State's interests in finally determining parentage against whether the declaration requirement created an impossibility that infringed on these fathers' constitutional interests. The Court, invoking the due process implications of a statute with the built-in impossibility clause, held:

> Yet we are persuaded that as interpreted by the district court in this case, the statute's effect of cutting off post birth weekend and holiday filing opportunities for unwed fathers is not necessary to achieve the state's compelling interests, nor is such an interpretation a narrowly tailored means of achieving those interests. Under the adoption statutes as interpreted by the district court, the unwed father whose child is born on a weekend or holiday would have no opportunity to assert his paternity after the birth of the child. Accordingly, no unwed father could be certain of when he must file a paternity action and register with the Department of Health in order to preserve his rights. He could not be certain that he will have time after the birth of his child to file because his child may be born on a weekend or holiday . . . .
>
> . . .

> [T]he district court's interpretation of the statutes unconstitutionally deprives unwed fathers of due process.

Id. at ¶¶ 36, 41.

Finally, in *Molaire v. Smith*, 743 F.Supp. 839, 847 (S.D. Fla. 1990), the Court held, "[w]hereas here, the Government makes the exercise of a right to petition for political asylum utterly impossible, the Government violates the fundamental fairness, which is the essence of due process."

One of the most troubling due process violations of the preliminary gang injunction is the arbitrary nature of inclusion in the prohibited class of gang member. This capriciousness could perhaps be best illustrated by a recent capital homicide trial of *State v. Riqo Perea*, in which one of the primary defenses revolved around the issue as to whether a particular individual was a member of the Ogden Trece gang. Defense claimed that the individual Angelo Gallegos was a gang member, which allegation was vigorously opposed by the prosecution, (the same Weber County Attorney's Office that is plaintiff in the present proceedings). The Weber County Attorney's Office presented as an expert witness, a member of the Ogden/Weber gang strike force. Addendum B. This police officer incredulously testified under oath that Mr. Gallegos was not a gang member even though Mr. Gallegos (1) had family members who belonged to Ogden Trece; (2) associated with friends who were Ogden Trece gang members; (3) had been convicted of a drug crime; and, (4) had declared to the police when being booked into jail that he associated with the Ogden Trece gang. *Id.*

This officer's testimony demonstrates the sheer arbitrariness of the Ogden/Weber gang strike force and the Weber County Attorney's Office in identifying who is and who is not a gang member. To suit their needs to convict Mr. Perea of aggravated murder, the Weber County Attorney's Office denied that Mr. Gallegos was a gang member even though he satisfied four of the eight criteria that the police rely upon for the gang registry. Despite this apparently compelling evidence of gang affiliation, that same police officer in these injunction proceedings has designated hundreds of individuals as gang members even though they only meet two of the eight criteria (typically, associating with gang members and dressing in gang colors). This selective use of information demonstrates the vagueness, arbitrariness, and facial invalidity of the preliminary injunction order under the Due Process Clauses of the State and Federal Constitutions. Addendum C (affidavit of attorney Randall W. Richards).

As further evidence of arbitrariness, one of the named plaintiffs in the injunction, Samuel Parsons, was designated an Ogden Trece member based upon the fact that he lives in a gang area, has associated with gang members (he owns a hip hop music studio) and, when booked into jail, purportedly admitted that he had some association with Ogden Trece. Despite the fact that these three criteria are less in number and seriousness than the four criteria in the Gallegos case mentioned above, Weber County officials maintain that Mr. Parsons is a known gang member. Incidentally, Mr. Parsons asserts that he has never been a gang member and that he has not admitted gang membership.

Like the Perea case, this treatment of Mr. Parsons establishes the unconstitutional arbitrariness of the police in attaching this gang label.

UACDL opposes the issuance of any injunction that deprives individuals located in the State of sacred constitutional rights. UACDL has consistently supported and protected the constitutional rights of all people as guaranteed by the United States Constitution and the Constitution of the State of Utah. Contrary to this mission, the trial court in the present case has allowed the wholesale stripping of precious constitutional rights from a large group of individuals without due process of law.

The deprivation of due process is especially disturbing given the trial judge's curious statements that applauded Weber County's decision to seek an injunction against members of the Ogden Trece gang. A review of the rulings made by the trial court include statements such as, "I gotta tell you, as a judge I admire what the prosecution with the police department are trying to do here." (Sic, at page 5, transcript of court ruling September 27, 2010), and, "So I admire, again, what the police department is willing to try to attack and what the county attorney is willing to take on. Will a preliminary injunction work? I don't know." (At page 6 transcript). The fact that the trial court issued a statement indicating its desire for this type of action to be commenced renders that judge biased and unable to make an impartial decision.

As a further indication of bias, the same judge who presided over the Perea case detailed above is the same judge that presided over the injunction proceedings. The judge referred to the Perea case several times during the hearing on the motion for an

injunction and expressed his disdain for gang members and their lifestyle. And, as explained previously, the trial judge openly admitted that even though he was certain that the injunction would be effective, he impose the injunction anyway regardless of the merits of the case. These circumstances, when viewed together with the vast scope and reach of the injunction, present a disturbing case of due process violations and trampled constitutional rights.

POINT IV

THE CONTINUATION OF THE INJUNCTION WILL CAUSE IRREPARABLE HARM AS ADDITIONAL PERSONS' LIBERTY INTERESTS ARE CAST ASIDE IN THE NAME OF PUBLIC SAFETY.

Unless this court grants a stay, petitioners will unquestionably suffer irreparable harm from the imminent enforcement of the order. Already, at least two individuals have been designated, served, and arrested for violation of an order that they have had no ability to oppose. 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)). The trial judge'sown doubts about whether the injunction would be successful reinforce the conclusion that the injunction will cause irreparable harm.

POINT V

UACDL ADOPTS BY REFERENCE THE ACLU'S ARGUMENTS IN ITS PETITION FOR INTERLOCUTORY APPEAL AND RELATED PLEADINGS.

Rather than repeat the well-reasoned arguments that the American Civil Liberties Union of Utah ("ACLU") has presented in its filings, UACDL adopts by reference the additional constitutional objections to the injunction. Those arguments present a compelling case for granting an immediate appeal and reversing the trial court's decision. The far-reaching injunction in this case fails to even resemble the narrowly-tailored injunctions in other states that have targeted specific and discrete gang activity. Here, Weber County unconstitutionally seeks to banish almost 500 people from an entire city of 25 square miles. Such heavy-handed tactics are unwarranted based on the facts of this case and are blatantly unconstitutional under the numerous provisions detailed in the ACLU's briefs.

CONCLUSION

The lack of due process protections in the injunction against the Ogden Trece gang demand this court's immediate intervention and this court's reversal of the trial court's decision. UACDL requests this court to grant the ACLU's petitions for emergency relief and for interlocutory appeal.

Submitted this 18th day of October, 2010.

s/_____
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CERTIFICATE OF SERVICE

I certify that on October 18, 2010, I caused to be delivered via facsimile and/or hand delivery a true and correct copy of this Amicus Brief to the following:

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