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IN THE SECOND JUDICIAL DISTRICT COURT

WEBER COUNTY, OGDEN DEPARTMENT, STATE OF UTAH

WEBER COUNTY,

Plaintiff,

v.

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

Defendants.

ACLU OF UTAH FOUNDATION, INC., a Utah non-profit corporation,

Amicus curiae and proposed intervenor.

BRIEF OF *AMICUS CURIAE* AND PROPOSED INTERVENOR AMERICAN CIVIL LIBERTIES UNION OF UTAH REGARDING *EX PARTE* TEMPORARY RESTRAINING ORDER AND PROPOSED INJUNCTION

(Hearing Requested)

Case No. 100906446

Judge Ernie W. Jones

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Amicus curiae and proposed intervenor the American Civil Liberties Union of Utah Foundation, Inc. ("ACLU") respectfully submits this brief in opposition to the *ex parte* temporary restraining order obtained, and the proposed preliminary and permanent injunction sought, by Weber County ("County") in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The County has asked this Court to issue a civil order that would, among other things, (i) bind hundreds of individuals who have never been named or appeared in court, (ii) curtail speech and conduct throughout the entire city of Ogden, and (iii) have a pervasive impact on the fundamental liberties of anyone against whom it would be enforced. No Utah court has ever endorsed such a remedy, and there is nothing about the facts of this case that warrant the Court breaking new legal ground when such fundamental liberties, protected by both the United States Constitution and the Utah Constitution, are at risk.

In the thirteen years since the California Supreme Court first upheld a so-called "gang injunction" in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), very few states have been willing to follow its lead. This is not just because the scope of such injunctions raises grave constitutional concerns, or because such injunctions purport to criminalize perfectly legal conduct while substantially curtailing fundamental rights. It is also because there is virtually no evidence that such injunctions have any measurable, real, and long-term positive impact on reducing gang-related crime. The lesson of California's unfortunate experience with "gang injunctions" over the past two decades is not a success story worthy of replication in other states.

To the contrary, it demonstrates that such heavy-handed measures are an ineffective reaction and interference with real means of crime abatement, and that they unduly sacrifice constitutional liberties in exchange for an illusion of security.

The County's motion should be denied for five basic reasons:

First, the *ex parte* temporary restraining order ("TRO"), obtained by the County without any prior notice to the defendant organization[1] or any of its alleged members, is invalid on its face. Although *ex parte* relief is sometimes proper under Rule 65A of the *Utah Rules of Civil Procedure*, *ex parte* orders are not permitted when they restrain First Amendment rights, as the TRO does here. The *ex parte* TRO should be vacated immediately.

Second, the geographic scope of the proposed "permanent injunction" is unconstitutionally overbroad. The few courts that have entered "gang injunctions" have stressed that such draconian remedies are warranted only within narrowly circumscribed geographic areas. The injunction in *Acuna*, for instance, covered only four square blocks in which none of the alleged gang members actually lived or worked. 929 P.2d at 601. Here, by contrast, the County asks the Court to enter a sweeping injunction that covers the entire city of Ogden, undoubtedly affecting the alleged members of the defendant organization where they live,

[1] Notably, the defendant named in this case is "Ogden Trece" itself, which is described as "an unincorporated association of more than two individuals joined together for social, recreational, profit and other common purposes . . . ." Amended Complaint for Permanent Injunction ¶ 2 (hereinafter "Amended Complaint"). Although the Amended Complaint alleges that Ogden Trece has "several hundred members who claim allegiance to it," *id.* ¶ 5, not even one alleged member is individually named as a defendant in the case. Instead, the County alleges that "defendants named herein as Does 1 through 200 are individuals, the full identities of which are presently unknown, who act as agents or in conjunction with defendant, Ogden Trece, in doing the activities herein alleged." *Id.* ¶ 6.

worship, go to school or work, and engage in countless other lawful activities. Such a broad remedy is unprecedented not just in Utah, but anywhere else as well. The County's request that this Court be "first" in this instance should be rejected.

Third, the proposed "permanent injunction" is also constitutionally overbroad and unconstitutionally vague in that it, for example, (i) includes no definition of gang member, (ii) provides no due process or orderly procedure for adjudication of an alleged member's status, and (iii) operates in apparent perpetuity with no procedure for former gang members to escape the injunction's reach. For those and other overbreadth and vagueness problems inherent in the extraordinary relief sought by the County in this case, the injunction should be denied.

Fourth, even if the scope of the injunction—both geographically and in terms of whom it would bind—were more narrowly drawn, its prohibitions on substantive conduct are constitutionally deficient. Those prohibitions are so broadly worded that they would improperly criminalize all manner of lawful activities that have nothing to do with any alleged public nuisance. As a result, they would inevitably invite discriminatory and arbitrary actions by law enforcement. For those and other reasons, the County's request is not narrowly tailored to the specific harm at issue, and could be denied on that basis alone.

Fifth, because the County has presented no evidence whatsoever that "gang injunctions" have any meaningful impact on gang-related crime, the County has failed to satisfy its burden under Rule 65A to show that the balance of harms and the public interest would be served by the injunction—a burden it must satisfy with clear and convincing evidence. Not only has the County failed to produce any such evidence, but the empirical evidence that does exist shows

that "gang injunctions" are not effective, and are more likely to be counterproductive as a means of abating gang-related nuisances. Weighed against the deprivation of the constitutional rights of those against whom the injunction would be enforced, the balance of equities weighs decidedly against issuance of the injunction. The County's motion thus fails under Rule 65A and should be denied.

There is no question that gang violence and gang-related crime is a scourge on society, and the County has a clear and legitimate interest in addressing criminal gangs. But that interest does not warrant effectively imposing indefinite martial law on anyone suspected of being a gang member anywhere within the city of Ogden. For those and other reasons more fully addressed below, the ACLU respectfully requests that the County's motion be denied.

LEGAL ANALYSIS

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 impacts 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 proposed injunction could be construed as entirely content-neutral—which it

cannot[2]—the proponent of the injunction must demonstrate that 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 that 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*,

[2] As noted below, there are portions of the injunction sought by the County that are explicitly content-based, rather than content-neutral. These provisions are presumptively invalid and subject to even greater constitutional scrutiny. *See, e.g., Perry Ed. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

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 injunction 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.

Measured against these constitutional standards, the relief sought by the County in this case simply cannot be countenanced. The *ex parte* TRO that was obtained by the County without any notice to the defendant organization or any of its members, and without any opportunity for them to be represented at an adversarial hearing, violates precedent from the United States Supreme Court and should be immediately vacated. Moreover, the scope of the proposed injunction far exceeds permissible constitutional limits, both in its unprecedented geographic sweep and in the number and type of people whose conduct would be subject to its terms. The specific conduct prohibitions in the injunction are also riddled with constitutional deficiencies, ranging from content-based restrictions on speech to unconstitutionally vague and overbroad restrictions on protected conduct. Finally, the County has failed to satisfy its burden of showing that the injunction it seeks will have any positive effect on reducing gang-related crime in Ogden.

Simply put, the County has utterly failed to satisfy both the constitutional requirements and the standards set forth in Rule 65A for injunctive relief to issue. The County's motion should be denied.

I. THE *EX PARTE* TRO IS CONSTITUTIONALLY INVALID AND SHOULD BE VACATED.

It is the ACLU's understanding that the TRO entered by this Court on August 20, 2010, was obtained entirely *ex parte*, prior to any efforts by the County to actually serve or give notice to the defendant organization or any of its members. Although Rule 65A(b)(1) permits *ex parte* temporary restraining orders under certain limited circumstances, none of the relevant requirements appear to have been met here. *See* Utah R. Civ. P. 65A(b)(1) (allowing *ex parte* temporary restraining orders only when the movant shows irreparable harm in the interim between filing and service, and where counsel certifies to her efforts regarding notice or reasons why notice should not be required). The County's own moving papers assert that gang-related crime by Ogden Trece has been ongoing for more than three decades. Whatever its deleterious effects, such crimes are hardly a new issue. The ACLU is unaware of any reason why the facts of this case would have suddenly presented such an emergency that the County was permitted to move forward without providing any notice to any adverse party, or any meaningful opportunity for an adversarial hearing.[3]

[3] While the County's TRO papers did ask the Court to authorize means of serving the TRO on certain alleged members of the defendant organization after the TRO was entered, that is a far cry from providing prior notice of the TRO motion as required by Rule 65A. Moreover, the fact that the County has since apparently been able to serve personally certain individuals with copies of the TRO amply demonstrates that such service should have been possible prior to the TRO proceedings. The mere fact that the defendant organization does not itself have a physical

Even if the requirements of Rule 65A(b)(1) had been met, which they were not, *ex parte* relief is not permitted where, as here, the requested injunction restrains First Amendment rights. In *Carroll*, for example, the United States Supreme Court addressed the validity of a ten-day temporary restraining order, issued *ex parte* against a white supremacist group, that prohibited the group from assembling in the town for any purpose that would "tend to disturb and endanger the citizens of the County." *Carroll*, 393 U.S. at 177. As in this case, the TRO proceedings in *Carroll* "were *ex parte*, no notice being given to petitioners[.]" *Id*. Also as in this case, the party seeking an injunction served members of the defendant group with the *ex parte* TRO only after the TRO had been entered. Concluding that there was "no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights," *id.* at 183, the Supreme Court clearly and unequivocally found the TRO to be constitutionally invalid:

> The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. 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.

Id. at 180.

The same rule governs here. Although it may have been more efficient or convenient for the County to proceed *ex parte* in asking the Court to enter this TRO, efficiency and convenience

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address is an inadequate excuse for the County's failure to effectuate notice before the *ex parte* TRO was sought and entered.

provide no excuse for sacrificing constitutional rights or compromising the bedrock principles of the adversary system. The *ex parte* TRO should never have issued in the first place, and it should be vacated immediately by this Court.

II. THE SCOPE OF THE COUNTY'S PROPOSED INJUNCTION IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The injunction sought by the County is clearly not "tailored as precisely as possible to the exact needs of the case." *Carroll*, 393 U.S. at 184. The scope of the injunction is unnecessarily broad in at least two respects: (i) the geographic area covered; and (ii) the scope of individuals whose conduct would be subject to its terms.

A. The Broad Geographic Scope of the Injunction is Unprecedented.

Very few courts have endorsed so-called "gang injunctions," and those few that have done so have sharply limited the geographic area in which the injunctive terms may be enforced. That is because prohibitions on association and other perfectly lawful activities should not be imposed in a way that unduly interferes with citizens' rights to live their lives, associate with family and friends, and move without government interference. In *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), for instance, the primary case relied upon by the County, the injunction upheld by the California Supreme Court only affected "the four-block area of Rocksprings," *id.* at 617, where no members of the alleged gang lived or worked. 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.[4]

The "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. Indeed, the court repeatedly stressed the importance of this limited geographic scope. *See id.* at 617 ("here 'the injunction is confined,' encompassing conduct occurring within a narrow, four-block residential neighborhood" (citation omitted; emphasis added)); *id.* at 608-09 ("Without minimizing the value of the gang to its members as a loosely structured, elective form of social association, that characteristic is in itself insufficient to command constitutional protection, at least within the circumscribed area of Rocksprings." (emphasis added)); *id.* at 615 ("we cannot say that the ban on any association between gang members within the neighborhood goes beyond what is required to abate the nuisance"); *id.* at 601 (Rocksprings is a "four-square-block neighborhood" (emphasis added)); *id.* at 608 (no right to association "within the four-block precinct of Rocksprings" (emphasis added)); *id.* at 615 ("The provision seeks to ensure that, within the circumscribed area of Rocksprings, gang members have no opportunity to combine." (emphasis added)); *id.* at 616 ("Outside the perimeter of Rocksprings, the superior court's writ does not run;

[4] It is far from clear whether *Acuna* even remains 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). As one court has observed, "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).

gang members are subject to no special restrictions that do not affect the general population." (emphasis added)).

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").

In a radical departure from the California cases on which it relies, and despite its assertion that the "zone" at issue is "narrowly drawn," Plaintiff's Memorandum of Points & Authorities ¶ 2 (hereinafter "Plaintiff's Memorandum"), the County here asks the Court to impose an injunction that covers the entire city of Ogden. This geographic area consists of hundreds of square blocks and more than twenty-five square miles, unquestionably including the areas where some alleged members of the defendant organization live, work, go to church, and engage in any number of perfectly lawful activities. If two alleged members of the defendant happen to work together, they would be prohibited from doing so under the proposed injunction. If they happen to be family members or friends, they would be prohibited from appearing in public together anywhere in the city, apparently in perpetuity. There has been no showing—nor

can there be—that the entire city of Ogden is an "urban war zone" or "occupied territory."[5] The County's request that this Court impose constitutionally restrictive measures across the entire city cannot plausibly be seen as "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 County's sweeping request seeks an order of civil banishment barring these individuals from living or functioning in any meaningful way anywhere in the city of Ogden. There is no basis under the constitution or the common law for such a remedy, nor could there reasonably be. *See*, *e.g.*, *Andrews*, 719 N.Y.S.2d at 442 (denying as unconstitutional a request for injunctive relief seeking civil banishment of prostitution ring from a single city plaza). To the ACLU's knowledge, no court anywhere in the country has ever endorsed such an overbroad gang injunction covering an entire urban city, and this Court should decline the dubious distinction of being the first.

B. The Scope of Individuals Covered by the Proposed Injunction is Vague and Overbroad.

The scope of individuals covered by the proposed injunction is both unconstitutionally vague and far broader than is legally permitted—even by the standards of the few California courts that have approved such injunctions. Among other constitutional infirmities, the proposed injunction (i) lacks any definition of gang member, (ii) fails to afford due process for any

[5] 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, a copy of which is attached hereto as Exhibit A.

individual alleged to be a member of the defendant organization, and (iii) lacks any "opt-out" procedures for those who were, but are no longer, members. These deficiencies, even without more, render the proposed injunction unconstitutional.

1. The Injunction Lacks Any Definition of Whom it Covers.

The proposed injunction, if worded like the *ex parte* TRO, lacks any definition of the individuals it covers, stating only that it applies to "Defendant Ogden Trece and all members of Ogden Trece." TRO ¶ 1. Nowhere does the order define what is required to be a "member" of Ogden Trece or what procedures law enforcement should follow in making such a determination.

"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. The injunction sought by the County fails both tests. First, because the proposed injunction fails to define those to whom its restrictions would apply, even those served would not be properly put on notice as to whether their conduct would be prohibited. Second, because the proposed injunction provides no guidance whatsoever—much less orderly procedures—for classifying an individual to be a "member" of the defendant organization, law enforcement would retain extraordinary and unbridled discretion when enforcing the injunction. In the context of a "gang injunction," the danger that such unfettered discretion will lead to racial profiling and arbitrary and discriminatory enforcement is very real.

Even courts in California have refused to enter injunctions with such vague and overly broad definitions of gang membership. As the *Englebrecht* court concluded, "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." *Englebrecht*, 106 Cal. Rptr. 2d at 756. Without any such definition of what constitutes gang membership, the proposed injunction is unconstitutionally vague and overbroad.

2. <u>The Injunction Abdicates the Court's Role in Adjudicating Gang Membership.</u>

In addition to failing to provide any definition of what it means to be a "member" of the defendant, the proposed injunction also seeks to delegate to law enforcement, with no objective standards whatsoever, the determination of who qualifies as a gang "member." In so doing, the injunction 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. Such an arrangement would unquestionably violate due process.

In *Englebrecht*, the court recognized that "the importance of the interests affected by the injunction in this case requires that the finding of facts necessary to justify its issuance be proved by clear and convincing evidence." 106 Cal. Rptr. 2d at 752. This clear and convincing evidence standard has been applied directly to the question of whether a particular individual is actually an active member of the defendant organization. *See People ex rel. Reisig v. Broderick Boys*, 59 Cal. Rptr. 3d 64 (Cal. Ct. App. 2007). The 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.").

The County relies on *Acuna* as support for its attempt to bind nonparty members of the defendant organization with the injunction. This reliance is misplaced. In *Acuna*, the individuals sought to be enjoined were all named as defendants. The *Acuna* court stressed that "[t]he only individuals subject to the trial court's interlocutory decree in this case, including those features contested as 'overbroad,' are named parties to this action; their activities allegedly protected by the First Amendment have been and are being aggressively litigated." 929 P.2d at 611. *Acuna* provides no support for the novel proposition that law enforcement may unilaterally decide who constitutes an active gang member, and may thereby bind individuals who have never had their day in court. As Judge Learned Hand noted long ago:

> The unlawfulness of his conduct has been determined, and, if he has not been a party and has had no day in court, he is condemned without hearing. It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative. The District Court had no more power in the case at bar to punish the respondent than a third party who had never heard of the suit.

Alemite Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930).

To comport with even the most basic of due process requirements, any individual whom the County seeks to bind with a court-issued injunction must first be given notice and an opportunity to be heard regarding his or her alleged status as an "active gang member." Only

after such a hearing, in which the County would be required to prove its case by clear and convincing evidence, could the injunction properly be applied against such an individual. Because the proposed injunction fails to include such a procedure, it is unconstitutional on its face.

3. The Injunction Includes No "Opt-Out" Provision for Former Gang Members.

Third, even if the proposed injunction properly allowed for individualized adjudications of gang membership, which it does not, it includes no procedure for individuals to be released from the injunction upon a showing that they are no longer members of the gang. As set forth above, such an injunction cannot properly bind anyone whose association with the defendant is merely "nominal, passive, inactive or purely technical." *Englebrecht*, 106 Cal. Rptr. 2d at 756. Gang membership is not a perpetual condition, and is often quite temporary.[6] Any injunction must provide a process by which individuals who are no longer associated with the defendant organization may be removed from the injunction's scope.

III. THE SPECIFIC CONDUCT PROHIBITIONS IN THE PROPOSED INJUNCTION ARE UNCONSTITUTIONAL AND UNWARRANTED.

Even if the County's proposed injunction were properly tailored to a sufficiently narrow geographic area, which it is not, and even if the injunction properly defined active gang members and provided a process for meaningful adjudication of that status, which it does not, the substantive conduct prohibitions in the injunction would still need to be "couched in the

[6] Data from the United States Department of Justice indicates that 69.4% of gang members are involved for one year or less, and that 26% are involved for three years or less. *See* Expert Declaration of James Hernandez ¶ 12, attached hereto as Exhibit C.

narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate," *Carroll*, 393 U.S. at 183 (emphasis added), such that its provisions "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765. Although the County undoubtedly has a legitimate interest in abating public nuisances, any injunctive relief it seeks should extend no further than abatement of the targeted nuisance activity. *Id.*

Against this background, it is important to remember that many of the activities the County complains constitute a nuisance are already illegal and may be prosecuted under the relevant criminal statutes. "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint." *Carroll*, 393 U.S. at 180-81. Although not every type of conduct enjoined as a public nuisance must be independently criminal, any provisions that extend beyond that scope to criminalize otherwise lawful conduct must be extremely narrow and closely circumscribed.

The various provisions of the County's proposed injunction fail these constitutional standards.

A. The Ban on Association.

The proposed injunction prohibits virtually all interaction between alleged members of the defendant organization anywhere in the city of Ogden. This ban includes "[d]riving, standing, sitting, walking, gathering or appearing, anywhere in public view or anyplace

accessible to the public, with any known member of Ogden Trece[.]" Amended Complaint at 6.[7] This sweeping prohibition, particularly given the expansive geographic scope of the injunction, is unconstitutional in at least three respects: (i) it unduly burdens the fundamental right to association and associational speech; (ii) it is overbroad because it is not narrowly targeted to nuisance activity; and (iii) its standard of "known" membership is unconstitutionally vague.

1. The Ban Violates the Right of Association and Associational Speech.

The United States Supreme 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." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (citations omitted). "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619. In addition to this right to associate and to form personal relationships, the Court has also 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." *Id.* at 622. And, most recently, the Court has recognized a right to associational speech that cannot be abridged based on the identity of the speaker. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 928 (2010) (Scalia, J., concurring) ("the individual person's right to speak includes the right to speak

[7] This provision provides two narrow exceptions for association inside churches and schools (but not places of business), though it apparently prohibits carpooling to such places. *Id.*

in association with other individual persons"); *id.* at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.").

The association ban in the County's proposed injunction violates all of these associational rights. With respect to personal relationships, the proposed injunction covers the entire city of Ogden. For many, the enormous area affected by the injunction will include not only their homes, but also the homes of their friends and relatives, their schools, their places of employment, the local restaurants they patronize—in other words, nearly every place they conduct their daily lives. The proposed injunction would profoundly affect their basic liberty, limiting their association with family and friends, their freedom of movement, their political and cultural activities, and their religious practices. Whereas the *Acuna* court addressed a narrow four-block area where none of the alleged gang members lived, and in which they "had no constitutionally protected or even lawful goals," 929 P.2d at 615, that is not the case for this injunction, which covers an area hundreds of times larger, including where the defendant organization's alleged members likely live.

Furthermore, with respect to the right to associate for social, recreational, and various other ends, the County has not shown that the sole purpose of association between the defendant organization's members is criminal. To the contrary, the County has expressly alleged otherwise in its Amended Complaint, stating that "Ogden Trece is an unincorporated association of more than two individuals joined together for social, recreational, profit, and other common purposes. . . ." Amended Complaint ¶ 2 (emphasis added). As such, these associational rights are protected

by the First Amendment and are unduly burdened by the sweeping prohibition on all association, for any purpose, under the proposed injunction.

Finally, the proposed injunction is not generally directed at any criminal enterprise, but is specifically targeted at one particular organization. Its prohibition on any meaningful association discriminates against the defendant organization based on its identity and precludes its members from "the right to speak in association with other individual persons." *Citizens United*, 190 S.Ct. at 928 (Scalia, J., concurring). While association between gang members may be a component of some criminal activity, the County has not shown that all association in any context between the hundreds of members of the defendant organization falls within that category. The injunction therefore burdens far more speech than is necessary to accomplish its purported goals.

2. The Ban is Overbroad by its Own Terms.

Even if the injunction were able otherwise to pass constitutional muster, which it cannot, the Court must pay "close attention to the fit between the objectives of an injunction and the restrictions it imposes" so as to "ensure that the injunction [is] no broader than necessary to achieve its desired goals." *Madsen*, 512 U.S. at 765. The County's proposed injunction, however, provides exceptions only for association at church and school. If two members of the defendant organization happen to work at the same place, they would be precluded from both showing up to work. If two members of the defendant organization happen to be in the same family, they would be precluded from traveling anywhere together. The terms of the proposed injunction would even preclude more than one member of the defendant organization from

showing up to hearings in this proceeding. This blanket prohibition sweeps far too broadly to satisfy the *Madsen* standard.

3. The "Known Member" Standard is Unconstitutionally Vague.

Finally, the association ban purports to apply to association with "any known member of Ogden Trece," but nowhere defines what this "knowledge" standard means. If this language means that the person is "known" to law enforcement as a member of the defendant organization, but is not "known" to the alleged violator of the injunction, then the injunction imposes a strict liability criminal offense without justification. *See Morales*, 527 U.S. at 63 (anti-gang loitering ordinance was unconstitutionally vague when it created possibility of unknowing violations). If, on the other hand, this language means that the person is "known" to the alleged violator to be a member of the defendant organization, then the injunction still contains no procedure for proper adjudication of this fact consistent with due process, as discussed above. In either case, the provision is unconstitutional.

B. The Ban on "Intimidation".

Although the paragraph title in the proposed injunction refers only to "intimidation," the scope of this provision is far broader, precluding members of the defendant organization from "[c]onfronting, intimidating, annoying, harassing, threatening, challenging, provoking, [or] assaulting any person known to be a witness to any activity of Ogden Trece, known to be a victim of any activity of Ogden Trece, or known to have complained about any activity of Ogden Trece." Amended Complaint at 7.

Although it may be legitimate—albeit unnecessary, given the existing criminal law—to enjoin criminal activity such as assault and witness intimidation, the other provisions of this paragraph are unconstitutionally vague and overbroad. "Conduct that annoys some people does not annoy others." *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." *Id.* at 615.

The Supreme Court faced a similar restriction in *Madsen*, in which it struck down provisions of the injunction that went beyond merely "prevent[ing] intimidation" of women entering an abortion clinic. As the Court explained:

> Absent 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. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. [This provision therefore] burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Madsen, 512 U.S. at 774. (citations and quotation marks omitted).

Likewise, in this case, the County's proposed injunction seeks to ban speech that is not "independently proscribable," rendering the proposed injunction impermissibly vague. In particular, the words "confronting," "annoying," "harassing," "challenging," and "provoking" are (i) not narrowly drawn to avoid burdening protected speech, (ii) not so infused with threats of violence as to be "indistinguishable from a threat of physical harm," *Madsen*, 512 U.S. at 774,

and (iii) so inherently ambiguous that they are an "invitation to discriminatory enforcement," *Coates*, 402 U.S. at 615.

Furthermore, this provision goes beyond content-neutral regulation and seeks to impose a content-based prior restraint on speech. Both content-based restrictions and prior restraints are presumptively invalid and rarely justified under either the First Amendment or article I, section 15 of the Utah Constitution.[8] *See Perry Ed. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (content-based restrictions); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (same); *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"); *KUTV, Inc. v. Conder*, 668 P.2d 513, 522 (Utah 1983) (*ex parte* prior restraint invalid). The County has not established, nor can it, that the facts of this case justify such extreme relief.

[8] Notably, the Utah Constitution is even more protective of speech than the First Amendment, and thus provides an independent basis for invalidating the injunction. Whereas the First Amendment merely proscribes "abridging the freedom of speech, or of the press," U.S. Const. amend. I (emphasis added), the Utah Constitution reads in pertinent part, "[n]o law shall be passed to abridge or restrain the freedom of speech or of the press. Utah Const. art. I, § 15 (emphasis added). Because of the additional prohibition against "restrain[ing]" freedom of speech or of the press, the language "contained in article I, section 15 of the Utah Constitution is broader than its federal counterpart," and further "narrows the scope of permissible governmental action." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 21, 140 P.3d 1235, 1242; *see also 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"). *See also* Utah Const. art. I, § 1 (securing right of assembly, protest, and petition, and right to "communicate freely their thoughts and opinions").

Finally, this paragraph includes the same constitutionally infirm language regarding a person "known" to be a witness or victim of any activity of the defendant—again without any explanation for what this knowledge standard means or to whose knowledge it refers. For the same reasons set forth above, this standard is unconstitutionally vague.

C. The Ban on Possession of Firearms.

The County's proposed injunction attempts to criminalize the mere possession of all firearms, "imitation" firearms, ammunition, and "illegal weapon[s]," Amended Complaint at 7, regardless of whether such possession is independently unlawful. This provision directly conflicts with article I, section 6 of the Utah Constitution, which provides that "[t]he individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed[.]" Utah Const. art. I, § 6. Although this provision allows the Utah Legislature to define the "lawful use of arms," *id.* (emphasis added), it does not confer that power on the courts—even if the County's proposed injunction were limited to restrictions on firearms use, which it is not. *See 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'").

The Utah Legislature has specifically codified the protections of article I, section 6, explicitly providing that, "except as specifically provided by state law, a local authority or state entity may not: (a) prohibit an individual from owning, possessing, purchasing, selling, transferring transporting, or keeping a firearm in the individual's place of residence, property,

business, or in any vehicle lawfully in the individual's possession or lawfully under the individual's control." Utah Code Ann. § 53-5a-102(2) (emphasis added). Moreover, "[u]nless specifically authorized by the Legislature by statute, a local authority or state entity may not enact, establish, or enforce any ordinance, regulation, rule, or policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property." *Id.* § 53-5a-102(5) (emphasis added). This prohibition is clear and unequivocal, and has been enforced by the Utah Supreme Court to invalidate firearms restrictions that are not enacted by the Legislature. *See Shurtleff*, 2006 UT 51.[9]

The County's proposed injunction plainly violates these provisions. Even if the County had made the requisite showing that mere possession (as opposed to use) of firearms constituted a public nuisance, this Court lacks the legal authority to impose any restriction regarding the right to keep and bear arms, and the concomitant right to carry ammunition for such arms. *Id.*

With respect to the portion of this paragraph that restricts the possession of "imitation firearms," that provision is unnecessary, vague, and overbroad. Taken to its extreme, this provision would bar an individual from using a water gun at a public pool. There is no definition of what constitutes an "imitation" firearm, nor any adequate nexus between the possession of a toy gun and any alleged public nuisance.

[9] Even if the Utah constitutional analysis were not so clear, the County's proposed injunction would also likely run afoul of the Second Amendment to the United States Constitution. *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

D. The Ban on "Graffiti Tools".

The prevention of unlawful graffiti and defacement of public property is unquestionably a legitimate government interest. But the County's proposed injunction goes beyond merely prohibiting graffiti, in that it would criminalize the mere possession of "any spray paint container, felt tip marker, or other graffiti tools[.]" Amended Complaint at 7. This provision is not even limited to possession of these objects in public, and so would prevent individuals from picking up a felt tip marker to draw in school or in their homes. The provision also contains no intent requirement that would limit the prohibition to possession only with the intent to commit vandalism.

This provision is both unconstitutionally vague and overbroad. It is vague because there is no definition of what constitutes a "graffiti tool," and that phrase could be interpreted to include virtually any object capable of marking or scratching any surface. Such language is an invitation to arbitrary and discriminatory enforcement. The provision is also overbroad because it criminalizes perfectly lawful conduct, e.g., possession of a felt tip marker, that may have no connection whatsoever with any criminal activity or public nuisance. Even the plaintiff in *Acuna* did not obtain such sweeping relief, and it declined even to appeal the rejection of a similar provision by the California Court of Appeals. *People ex rel. Gallo v. Acuna,* 40 Cal. Rptr. 2d 589, 598 (Cal. Ct. App. 1995) (holding that "these objects have legitimate, noncriminal uses, as do other objects 'capable of' defacing property, and their possession and use by defendants, other than for criminal purposes, may not be judicially enjoined"); *id* at 625, 625 n.4 (Mosk, J., dissenting) (noting that city did not appeal ruling on graffiti tool ban); *Vincenty v. Bloomberg*,

476 F.3d 74, 90 (2d Cir. 2007) (striking down ban on possession of spray paint because it burdened "substantially more speech than is necessary to achieve the [plaintiff's] legitimate interest in preventing illegal graffiti").

The County may properly seek to abate illegal graffiti and vandalism as a public nuisance. But its attempt to extend that prohibition to the mere possession of "graffiti tools" is unconstitutional.

E. <u>The Ban on Drugs and Drug Paraphernalia.</u>

The proposed injunction prohibits the use, possession, and sale of "any controlled substance or related paraphernalia," and also prohibits "knowingly remaining in the presence" of someone engaging in such acts or such controlled substances or paraphernalia." Amended Complaint at 7-8. This provision does not define a "controlled substance," and it is entirely possible that the provision could be construed to prevent the legitimate possession and use of prescription medicine or legal over-the-counter drugs. *See, e.g.*, Utah Code Ann. § 58-37-4 (listing controlled substances); *id*. § 58-37-2(f)(ii) (providing only limited exceptions). Furthermore, while the use and possession of illegal drugs is unquestionably unlawful, it is a significant social problem that extends far beyond criminal street gangs. This Court should not transform minor drug offenses, for which the State may deem the appropriate response to be treatment or non-criminal punishment, into gang crimes that could lead to substantial jail time and gang probation conditions.

In addition, this provision continues to use the same unconstitutionally vague "knowing" standard discussed above, and therefore fails meaningfully to define the conduct it proscribes.

F. The Ban on Alcohol.

The proposed injunction prohibits the possession of an open container of an alcoholic beverage, or even knowingly remaining in the presence of an alcoholic beverage or anyone possessing an alcoholic beverage, "[a]nywhere in public view or any place accessible to the public, except on properly licensed premises." Amended Complaint at 8. The ban on mere possession "anywhere in public view" and "anywhere accessible to the public" renders the provision extraordinarily broad. Under its terms, an alleged gang member would be in violation if he consumed a beer while watching TV in a friend's living room with the curtains open to the street, or while sitting on his own front steps at the end of the day. This broad provision is not narrowly tailored to any actual nuisance activity. The consumption of alcohol is neither illegal nor uncommon, and violations of the open-container laws are already addressed in the criminal law. There is no justification for radically expanding those prohibitions, as the County requests, by criminalizing the mere possession of alcohol, or the act of being in the presence of another person who has an open container of alcohol.

G. The Ban on Trespassing.

The proposed injunction attempts to ban "trespassing," but defines that term significantly more broadly than the criminal law. *See* Utah Code Ann. § 76-6-206 (defining criminal trespass). As written, the provision would prohibit alleged gang members from being present in a relative's house while she runs to the store, watering a neighbor's plants while he is on vacation, and arguably even opening a friend's gate and walking up to her front door to ring the bell. The overreaching requirement that the individual obtain "written consent" before

undertaking these activities is both impractical and an invitation to arbitrary and discriminatory enforcement.

Furthermore, trespass is already unlawful in the ways in which the Legislature has defined. Enforcement of those laws is the proper approach to unlawful trespass. Expanding that definition and elevating this minor offense to a gang crime is decidedly against the public interest and unjustified under the constitutional standard applicable to "gang injunctions."

H. <u>The Curfew Provision.</u>

The proposed injunction would prohibit the act of being "present in public view"[10] or anywhere in public between the hours of 11 p.m. and 5 a.m., unless required for certain enumerated activities or emergencies. Amended Complaint at 8-9. This broad provision is not narrowly tailored to the alleged nuisance activity and violates the fundamental right to move and travel.

Courts have long recognized that the right of individuals to move about freely is protected by the due process clause of the United States Constitution. As Justice Stevens explained in *Morales* in striking down an 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.

[10] This provision, like the prohibition on alcohol, could be interpreted to prohibit an individual from having his curtains open at night.

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

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)).

The proposed curfew sought by the County burdens the basic liberties of those against whom the County would choose to enforce it. The proposed injunction does not exempt adults who are in public during the curfew time period for non-gang related activities, 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 or is not "gang-related." And given the expansive sweep of the other provisions in the injunction, it is likely that virtually every aspect of the alleged members' lives would fall into that category.

The mere fact that more gang-related crime may occur at night does not warrant a draconian and overbroad response that delegates to law enforcement the impossibly arbitrary task of deciding whether an individual is in public for a "legitimate" purpose. The Supreme Court in *Morales* condemned the use of such overbroad prophylactic measures to address the

legitimate issue of gang violence. *Morales*, 527 U.S. at 62-63 (striking ordinance that prohibited presence in public for "no apparent purpose"). The County's proposed injunction here runs afoul of the same constitutional standards and should accordingly be rejected.

I. The Command to Obey All Laws.

Finally, the proposed injunction contains a command to "obey all laws." Amended Complaint at 9.[11] A court, however, cannot enjoin a defendant simply to "obey the law" or otherwise to abstain from committing illegal activities other than those related to acts a court finds a particular defendant committed. *See NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435-36 (1941); *City of Redlands v. County of San Bernardino*, 117 Cal. Rptr. 2d 582, 594 (Cal. Ct. App. 2002) (injunction must be related to similar or related unlawful activity). A blanket prohibition is improper under the law, not only because it would turn a number of minor offenses such as trespass and nuisance into criminal gang offenses, but also because it is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen*, 512 U.S. at 765.

If an individual is found to be violating a law, including those explicitly listed in the County's proposed injunction, there are already means to enforce those laws and prosecute the offender. There is no need for an overbroad, duplicative, and constitutionally infirm provision in the injunction that would further demand obedience to laws already on the books.

For all of these reasons, the specific conduct prohibitions in the County's proposed injunction fail all relevant constitutional standards and should be rejected by this Court.

[11] The title of this paragraph is inconsistent with its content, which lists specific laws that the defendant's members are ordered to obey. It is not clear whether the provision intends to sweep more broadly than these enumerated statutes, but the list alone is expansive.

IV. THE COUNTY FAILS TO MEET ITS BURDEN OF SHOWING THAT THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH IN FAVOR OF THE INJUNCTION UNDER RULE 65A.

In addition to the myriad constitutional problems with the County's proposed injunction—which standing alone are sufficient to deny the County's request—the County has also failed to meet the requirements for injunctive relief under Rule 65A. Under Rule 65A, the County may not get an injunction unless it demonstrates both (i) that the balance of harms favors the proposed relief and (ii) that the injunction serves the public interest. Utah R. Civ. P. 65A(e). To satisfy that dual burden, the County must prove that a "benefit is likely to result from the injunction." *Andrews*, 719 N.Y.S.2d at 449. Because of the extraordinary nature of the relief requested, the County must carry this burden by "clear and convincing evidence." *Englebrecht*, 106 Cal. Rptr. 2d at 752.

Gang-related crime is unquestionably a source of harm to the County and its citizens. But for injunctive relief to issue, the County must demonstrate that the requested relief will actually remediate that harm. This is especially so where, as here, the resulting harm imposed on those covered by the injunction would significantly curtail their constitutional rights. As the Supreme Court has recognized, "[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).[12]

[12] *See also.*, *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)

In its moving papers, the County makes essentially no effort to demonstrate that the requested "gang injunction" would actually be effective in abating gang-related crime in Ogden. The County openly acknowledges that such a remedy is both untested and unprecedented in Utah. And yet the only purported "justification" offered by the County in support of the extraordinary relief it requests is the single sentence: "Civil gang injunctions have proved to be a successful tool to address this exact problem in the State of California." Plaintiff's Memorandum at 5. That sentence is not supported by any evidence, nor—the ACLU believes—could it ever convincingly be so supported.

The empirical evidence that has been gathered since "gang injunctions" became popular in California suggests that they are remarkably ineffective, and that they may actually increase gang-related crime. Even in the years immediately following *Acuna*, researchers noted, "[a] growing body of statistical and anecdotal evidence suggests that anti-gang injunctions are actually not effective and may even be counter-productive." Matthew M. Werdegar, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 439 (1999) (hereinafter "*Werdegar*"). Just last year, an analysis compiling the empirical data in this field noted that "[r]esearchers have found little evidence that

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("[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))).

gang injunctions have reduced the gang problem in large cities." Thomas A. Myers, *The Unconstitutionality, Ineffectiveness, and Alternatives of Gang Injunctions*, 14 MICH. J. RACE & L. 285, 296 (2009) (hereinafter "*Myers*").

Numerous other empirical studies have reached the exact same conclusion—i.e., that "gang injunctions" are ineffective, that reductions in crime (if any) are merely temporary, and that such injunctions have counterproductive effects that exacerbate gang unity and related criminal activity. *See, e.g.,* ACLU FOUNDATION OF SOUTHERN CALIFORNIA, FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (May 1997)[13] (hereinafter "*Blythe Street Study*") (finding that crime continued to rise in enjoined area even after imposition of injunction); Jeffrey Grogger, *The Effects of Civil Gang Injunctions on Reported Violent Crime: Evidence from Los Angeles County*, 45 J.L. & ECON. 69 (2002) (hereinafter "*Grogger*") (studying the effects of fourteen injunctions imposed in Los Angeles County and finding no statistically significant decrease in murders or rapes); JUSTICE POLICY INSTITUTE, GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES (July 2007)[14] (hereinafter "*JPI Report*") (noting that civil gang injunctions "can increase gang cohesion and police-community tensions, and they have a poor track record when it comes to reducing crime and violence." *Id*. at 3, 5. The two expert declarations attached to this memorandum offer the same opinion regarding the ineffectiveness

[13] Available at www.streetgangs.com/injunctions/topics/blythereport.pdf (last visited September 7, 2010).
[14] Available at www.justicepolicy.org/content-hmID=1811&smID=1581&ssmID=22.htm (last visited September 7, 2010).

and potentially counterproductive effects of "gang injunctions" such as the one sought in this case.[15]

The reasons why "gang injunctions" generally fail to decrease, and may actually increase, crime are manifold. First, "while some gang members continue to commit crimes in the target area after an injunction has been imposed against them, others simply relocate to adjoining areas to commit crimes." *Myers* at 297. If crime overall is not being reduced, the public interest is not served. Second, "gang injunctions" "increase[] gang cohesiveness and give[] them a sense of identity, which is one of the reasons people join gangs in the first place." *Id.* (quoting Professor Marcus Klein); *see also JPI Report* at 3, 5. Third, the dispersal effect created by "gang injunctions" actually inhibits law enforcement efforts by making known gang members more difficult to find. *Myers* at 297-98 (noting that, after entry of a "gang injunction," efforts to find members are "like looking for the proverbial 'needle in a haystack' because gang members will have dispersed outside the target area and separated into much larger vicinities."). Fourth, "gang injunctions" brand and stigmatize alleged gang members, making it less likely that otherwise transitory members will actually leave the gang. *See* Greene Declaration ¶¶ 23-24. Fifth, "gang injunctions" undermine more successful alternatives, such as community outreach and intervention, for addressing gang-related crime; as the *JPI Report* explains, "gang injunctions, gang sweeps and ominous-sounding enforcement initiatives reinforce negative images of whole

[15] *See* Expert Declaration of Judith Greene ¶¶ 20-27, attached hereto as Exhibit B; Expert Declaration of James Hernandez ¶¶ 34-35, attached hereto as Exhibit C.

communities and run counter to the positive youth development agenda that has been proven to work." *JPI Report* at 7; *see also* Hernandez Declaration ¶ 35; Green Declaration ¶ 25.

For these reasons, some California law enforcement agencies that once championed the use of "gang injunctions" have abandoned them. The Chief of Police in Pasadena has referred to "gang injunctions" as "an intellectual substitute for responsible public policy," and Deputy Michael Bostic of the Los Angeles Police Department has publicly declared that "gang injunctions" are not the best solution to gang violence. *See Werdegar* at 442.

Given the significant constitutional deprivations that the County's proposed injunction would effect, its failure to offer any evidence that the proposed injunction would actually abate gang crime—much less the "clear and convincing" evidence required to justify the relief requested—is alone sufficient to deny the motion. As the court in *Andrews* concluded when faced with a similar lack of evidence in support of a proposed civil injunction:

> A balancing of the equities requires, however, that the motion may only be granted if the harm the movant would suffer absent the injunction is greater than the harm to be imposed upon the opponent by the 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.

Rank speculation alone may not be used to justify any injunctive relief, much less the wide-ranging relief sought here. This Court should decline the County's invitation to act as a

laboratory for law enforcement, particularly when to do so would trample the fundamental liberties of those against whom the injunction would be enforced.

CONCLUSION

Injunctions are extraordinary relief. They may never be justified by mere speculation that the requested remedy might address a social ill. That is especially so where, as here, the proposed injunction is unconstitutional on its face, and is so vague and overbroad that it could not conceivably be applied consistent with constitutional protections. For all of these reasons and others discussed above, the ACLU respectfully requests that the County's motion be denied.

RESPECTFULLY SUBMITTED this 9th day of September 2010.

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

Attorneys for *amicus curiae* and proposed intervenor ACLU of Utah Foundation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2010, I caused a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* AND PROPOSED INTERVENOR AMERICAN CIVIL LIBERTIES UNION OF UTAH REGARDING *EX PARTE* TEMPORARY RESTRAINING ORDER AND PROPOSED INJUNCTION** to be 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
Facsimile: 801.399.8304

Michael J. Boyle
BOYLE & DRAGE, P.C.
2506 Madison Avenue
Ogden, Utah 84401
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Courtesy copy to:

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

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