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IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR WEBER COUNTY, STATE OF UTAH, OGDEN DEPARTMENT

WEBER COUNTY, Plaintiff, v. OGDEN TRECE, AKA CENTRO CITY LOCOS, an alleged criminal street gang sued as an unincorporated association, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO SUSPEND INJUNCTION PENDING APPEAL** **(Expedited Consideration Requested)** Case No. 100906446 Judge Ernie W. Jones

Movants Roman Hernandez, Chase Aeschlimann, and Jesse Aeschlimann (collectively, "Movants") respectfully submit this Memorandum in Support of their Motion to Suspend Injunction Pending Appeal, filed concurrently herewith.

INTRODUCTION

When a district court grants an injunction, it is authorized by the *Utah Rules of Civil Procedure* to suspend enforcement of that injunction pending appeal. This case warrants such an order. The relief requested by the County and embodied in this Court's Permanent Injunction dated August 20, 2012 (the "Injunction") is unprecedented in Utah and impacts numerous core constitutional rights. Before the Injunction permanently and irreparably curtails the fundamental rights of hundreds of Ogden residents, the Utah Supreme Court should have the opportunity to consider and rule upon the constitutionality of this untested expansion of police powers.

Caution is warranted whenever fundamental rights are restricted by the government. Gang-related crime is not a new issue in Ogden, and there is no reason the time-tested tools of law enforcement will not suffice pending the appeal of this matter. This Court should ensure that the Utah Supreme Court has a meaningful opportunity to review this matter by suspending the Injunction pending appeal.

ARGUMENT

Rule 62(c) of the *Utah Rules of Civil Procedure* provides that when an order granting an injunction is appealed, "the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party." Utah R. Civ. P. 62(c). This authority is also

grounded in the court's inherent powers to stay proceedings. *See Lewis v. Moultree*, 627 P.2d 94, 96 (Utah 1981) ("It lies within the inherent powers of the courts to grant a stay of proceedings."). In exercising this discretion, courts generally engage in the following four-pronged inquiry:

> [I]t is generally required that (a) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (b) the applicant establish that unless a stay is granted he will suffer irreparable injury; (c) no substantial harm will come to other interested parties, and (d) a stay would do no harm to the public interest.

Jensen v. Schwendiman, 744 P.2d 1026, 1027 (Utah Ct. App. 1987) (citation omitted). Each of these factors weighs in favor of a stay in this case.

1. <u>Success on the Merits.</u>

First, as has already been briefed and argued at length,[1] which arguments are incorporated herein by reference, the Injunction curtails numerous constitutional rights and fails to satisfy the stringent constitutional standards that apply to such injunctions. *See, e.g., Carroll*

[1] *See, e.g.*, Brief of Amicus Curiae and Proposed Intervenor American Civil Liberties Union of Utah Regarding Ex Parte Temporary Restraining Order and Proposed Injunction, filed September 9, 2010; Memorandum in Support of Defendants Emmanuel Montoya, Evan Barros, Roman Hernandez, Samuel Parsons, Jaime Gomez, and Daniel Callihan's Motion to Dismiss Pursuant to Rule 12(b)(6), filed September 13, 2010; Memorandum of Law in Support of Motion to Dismiss, filed September 16, 2010; Memorandum of Law Submitted on Behalf of Defendants Emmanuel Montoya, Evan Barros, Roman Hernandez, Samuel Parsons, Jaime Gomez, and Daniel Callihan, filed September 22, 2010; Memorandum in Support of Motion for Hearing on Injunction, filed October 13, 2010; Arguments of Counsel at Motion Hearing, February 8, 2011, Transcript attached to the Supplementation of Record filed August 29, 2012; Memorandum in Support of Motion to Declare Injunction Unconstitutional as Applied to Defendant and Request for Hearing, filed November 11, 2011; Memorandum in Support of Motion to Vacate Preliminary Injunction for Lack of Jurisdiction – Roman Hernandez, filed April 9, 2012; Memorandum in Support of Motion to Vacate Preliminary Injunction for Lack of Jurisdiction – Chase Aeschlimann, filed April 9, 2012; Chase Aeschlimann's Reply Memorandum in Support of Motion to Vacate Preliminary Injunction for Lack of Jurisdiction, filed April 23, 2012; Roman Hernandez's Reply Memorandum in Support of Motion to Vacate Preliminary Injunction for Lack of Jurisdiction, filed April 23, 2012; Closing Arguments of Counsel, June 14, 2012 (transcript not yet available); Proposed Findings of Fact, Conclusions of Law, and Order on Injunction, submitted by Movants on June 26, 2012, attached to the Notice of Prior Submission of Proposed Findings of Fact, Conclusions of Law, and Order on Injunction, filed August 29, 2012.

v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183-84 (1968) (injunction that infringes on fundamental rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate" and "must be tailored as precisely as possible to the exact needs of the case"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (injunction must "burden no more speech than necessary to serve a significant government interest").

Without unduly repeating arguments already presented to the Court, the prohibitions in the Injunction against freedom of association, the right to movement, the right to expression, and the right to bear arms, among others, all of which apply in perpetuity to any served individual within virtually the entire City of Ogden, are constitutionally overbroad, criminalize core constitutional conduct such as peaceable political assembly, are imposed without procedural or substantive due process, and are not narrowly tailored to serve the "pin-pointed objective" of preventing gang-related crime. *Carroll*, 393 U.S. at 184 (striking down prior restraint on speech and assembly as unconstitutional; *Madsen*, 512 U.S. at 774 (striking down injunction that restricted speech that was not "independently proscribable"); *Vasquez v. Rackauckas*, No. SACV 1090 VBF, 2011 WL 1791091 (C.D. Cal. May 10, 2011) (gang injunction unconstitutional for failure to provide pre-deprivation hearing to alleged gang members).

The Injunction is also unconstitutionally vague because it does not clearly prescribe what conduct it prohibits and permits arbitrary and discriminatory enforcement, as the testimony at trial established. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (provision is void for vagueness if it allows for "arbitrary and discriminatory enforcement" (Stevens, J., concurring)).

Further, this Court was and is without jurisdiction to enjoin Ogden Trece as an entity because the entity was never properly served with process. *See* Utah R. Civ. P. 4(d)(1)(E) (service on unincorporated association may only be made upon an officer, managing or general agent, or registered agent); Utah R. Civ. P. 17(d) (unincorporated associations are only amenable to suit if they are engaged in "transacting business"); *Beard v. White, Green & Addison Assocs., Inc.*, 336 P.2d 125, 126 (Utah 1959) (service on mere member of unincorporated association does not satisfy Rule 4); *Garcia v. Garcia*, 712 P.2d 288, 290 (Utah 1986) (without "effective service of process, [a] court [is] without jurisdiction").

Finally, even if the Injunction were narrowly tailored, the County has failed to carry its burden of showing that the Injunction actually *serves* the government interest at issue because there is no competent evidence that the Preliminary Injunction has caused, or that the Permanent Injunction will cause, any measurable reduction in overall gang-related crime. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976) (party seeking restraining order affecting speech must demonstrate to a "degree of certainty" that the order would actually "serve its intended purpose"); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1071 (10th Cir. 2001) (proponent of restriction on speech must show "that its restriction will in fact alleviate [the purported harm] to a material degree" (internal quotation marks omitted)). If anything, as the testimony of Dr. Nathan Perry established at trial, the Ogden Police Department's crime statistics show that the Preliminary Injunction has either had no measurable effect on gang-related crime or has actually *increased* violent crimes.

At a minimum, this case presents issues of such constitutional magnitude that this Court should exercise caution before allowing the permanent restraint of fundamental rights for hundreds of Ogden residents. Before that irreversible threshold is crossed, this Court should allow the Utah Supreme Court to consider and rule on the constitutionality of the County's unprecedented request for relief.

2. Irreparable Harm.

Second, unless this Court suspends the Injunction pending appeal, Movants (and hundreds of others) will suffer irreparable harm. 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). Indeed, irreparable injury "is presumed to exist whenever First Amendment constitutional rights are infringed." *Albright v. Bd. of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 687 (D. Utah 1991); *see also, e.g.*, *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (citation omitted)); *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) ("'any 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))).

Given the gravity of the constitutional interests at stake in this case, and the undeniable impact of the Injunction on constitutional rights, the element of irreparable harm is easily satisfied here.

3. Balance of Harms.

Third, the balance of harms weighs decidedly in Movants' favor. The issue of gang-related crime in Ogden is decades old, and there is no reason the use of this constitutionally suspect tool cannot wait until this state's highest court has had the chance to review it. *Cf. Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitation Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("delay in seeking preliminary relief cuts against finding irreparable injury" (citation omitted)). Empirically, as noted above, there is no competent evidence that the Preliminary Injunction has had, or that the Permanent Injunction will have, any measurable impact on the reduction of overall gang-related crime. Without such evidence, there can be no showing of harm to the County from a suspension of the Injunction pending appeal.

4. Public Interest.

Finally, a stay will advance, not harm, the public interest because "[v]indication of constitutional freedoms and protection of First Amendment rights is in the *public interest*."

Albright, 765 F. Supp. at 686-87. The Utah Supreme Court has not yet had the opportunity to consider and address the significant constitutional concerns raised by so-called "gang injunctions." Before the permanent restraints imposed by the Injunction are allowed to be deployed against hundreds of Ogden's residents, the fundamental liberties at stake warrant full and meaningful consideration on appeal.

CONCLUSION

For all of the foregoing reasons, Movants respectfully request that this Court suspend enforcement of the Permanent Injunction and, to the extent it is still in effect, the Preliminary Injunction during the pendency of the appeal in this matter.

RESPECTFULLY SUBMITTED this 12th day of September 2012.

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By: David C. Reymann

Attorneys for Roman Hernandez, Chase Aeschlimann, and Jesse Aeschlimann

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September 2012, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO SUSPEND INJUNCTION PENDING APPEAL** was served via hand-delivery on the following:

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