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ALAMEDA COUNTY SUPERIOR COURT

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12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

18 THE PEOPLE OF THE STATE OF
19 CALIFORNIA ex rel John A. Russo, City
20 Attorney for the City of Oakland,

21 Plaintiff,

22 vs.

19 NORTH SIDE OAKLAND, a criminal
20 street gang sued as an unincorporated
21 association; and DOE ONE through DOE
22 SEVENTY, inclusive,

23 Defendants.

Case No. RG10498901

**[PROPOSED] BRIEF OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA AND THE
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS IN OPPOSITION TO THE
PROPOSED PRELIMINARY INJUNCTION**

Assigned for All Purposes to:

Judge: Robert B. Freedman
Date: April 22, 2010
Time: 2:00 p.m.
Dept.: 20
Place: 1225 Fallon Street, Oakland, CA

Trial Date: No Trial Date Set
Case Filed: February 18, 2010

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I. INTRODUCTION

Twelve years ago, the California Supreme Court authorized a novel and unprecedented law enforcement tool to deal with the problem of criminal street gangs – the issuance of a civil public nuisance injunction against the gang and its members. *People ex rel Gallo v. Acuna*, 14 Cal. 4th 1090 (1997). Since then, a number of gang injunctions have been issued throughout California. However, there are only a handful of appellate court decisions that discuss the standards and limitations that should apply in the gang injunction context, perhaps because many of the injunctions that have been issued were entered as default judgments since the alleged gang members were unable to afford private counsel to represent them. Importantly, each of the appellate decisions dealing with gang injunctions, including *Acuna* itself, recognized that this is an extraordinary remedy that has to be applied with caution and that necessitates careful judicial scrutiny. *Acuna*, 14 Cal. 4th 1090; *People v. Englebrecht*, 88 Cal. App. 4th 1236 (2001); *People ex rel Reisig v. Broderick Boys*, 149 Cal. App. 4th 1506 (2007); *People ex rel Totten v. Colonia Chiques*, 156 Cal. App. 4th 31 (2007). In fact, the courts have made it clear that the prosecutor must meet a heightened standard of proof by presenting “clear and convincing” evidence that the necessary elements of a gang injunction are present before a trial court can invoke its injunctive powers– a standard that goes beyond the normal burden of proof in an injunction case, *Englebrecht*, 88 Cal. App. 4th at 1256-57.

Among the reasons that the courts have given for such careful judicial scrutiny are the following:

1. That gang injunctions constitute in effect the imposition of probation-like restrictions on a group of individuals accused of unlawful conduct, but without affording those individuals the due process protections that they would have under the criminal justice system, especially the right to appointed counsel. In fact, gang injunctions can impose restraints and sanctions on persons who have not had the opportunity or the means to

1 mount any defense in a civil case. The relative ease and speed with which law
2 enforcement can impose these restraints are undoubtedly a reason for their appeal, but
3 this “efficiency” should also raise cautionary flags in terms of judicial scrutiny.

- 4 2. That gang injunctions affect and infringe the exercise of constitutional rights of those
5 bound by its terms.
- 6 3. That gang injunctions target commonplace and perfectly lawful activities, and thus can
7 have a pervasive impact on the everyday lives of those bound and on their families,
8 especially for those who live and work within the area covered by the injunction.
- 9 4. While gang injunctions are intended to protect the safety of communities, they also
10 can have a stigmatizing effect on broad segments of the community. This dilemma is
11 underscored by the fact that every gang injunction in this State of which Amici are
12 aware has been imposed almost exclusively on persons of color and in communities of
13 color. The potential for racial profiling and racial stereotyping, something that has
14 been a national problem, cannot be ignored in assessing this law enforcement tool.

15 According to the court docket for this case as of April 7, 2010, no party or individual has
16 filed any opposition to the Order to Show Cause. Amici American Civil Liberties Union of
17 Northern California and Lawyers’ Committee for Civil Rights (“Amici”) seek leave to file an
18 amicus brief with the Court to respectfully explain our concerns with the Proposed Injunction in
19 what could be an otherwise uncontested proceeding. Amici have had long-standing concerns
20 about the impact of civil gang injunctions on individual constitutional rights. Amicus ACLU of
21 Northern California represented the defendants in *Acuna* and in *Broderick Boys*. While Amici
22 understand that the California Supreme Court has authorized civil gang injunctions, Amici
23 believe that it is of critical importance, especially at the preliminary injunction stage, that persons
24 who are targeted by this injunction, whether represented or not, be afforded the careful judicial
25 scrutiny of the evidentiary record and the terms of the injunction that *Acuna* and the subsequent
26 cases plainly require.

27 In this case, Plaintiff named only the gang. Plaintiff did not name any individual
28 defendants either on the face of the complaint, or in the body of the complaint. Indeed, Plaintiff

1 claims that “the true identities” of the seventy Does “are presently unknown to Plaintiff.”
2 (Complaint (“Compl.”), ¶ 6). Despite this, the Order to Show Cause re Preliminary Injunction
3 (“OSC”) identifies nineteen individuals designated as gang members for purposes of service (any
4 three of whom the OSC required to be personally served, and any five of whom could be served
5 by mail)(OSC at 6) and numerous individuals are discussed in detail in the declarations filed with
6 this Court. (OSC at 4.)
7

8 This Court has before it a request to issue a gang injunction (the “Proposed Injunction”)
9 against the alleged North Side Oakland gang that would encompass an approximately 100 square-
10 block area (the “Safety Zone”) of North Oakland. For some of those served with this injunction,
11 the area affected by the Proposed Injunction will include not only their homes, but the homes of
12 many friends and relatives, the local restaurants they patronize—nearly every place they conduct
13 their daily lives. The Proposed Injunction will profoundly affect their basic liberty, limiting their
14 association with family and friends, their freedom of movement, and their political and cultural
15 activities. In order to address these constitutional concerns, Plaintiff should be required to serve
16 those individuals it seeks to bind with notice of the hearing, and present evidence to this Court
17 proving that each individual is an active gang member by clear and convincing evidence before
18 any injunction should issue.
19

20 Plaintiff has submitted evidence from law enforcement files and declarations from
21 Oakland Police Department officers, and this appears likely to be the only evidence that will be
22 before the Court at the hearing. But the one-sidedness of this evidence does not relieve the
23 Plaintiff of meeting its burden of convincing the Court that the Proposed Injunction “burden[s] no
24 more speech than necessary to serve a significant government interest.” *Acuna*, 14 Cal. 4th at
25 1115 (citing *Madsen v. Women’s Health Center*, 512 U.S. 753, 765 (1994)).
26
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1 Amici will address below three legal issues that it believes should be part of this Court's
2 consideration of this case:

- 3
- 4 1. Whether the Proposed Injunction can apply to persons who have not had an
5 opportunity to have their day in court to challenge whether the clear and convincing
6 standard has been met as to them.
 - 7 2. Whether the Proposed Injunction meets the constitutional standard of a narrowly
8 drawn restraint that burdens no more expressive activity than necessary.
 - 9 3. Whether Plaintiff has shown that the Proposed Injunction will result in the prevention
10 of harm required by equitable standards.

11 II. ARGUMENT

12 A. UNFETTERED DISCRETION TO ADD UNDESIGNATED PERSONS TO THE
13 INJUNCTION VIOLATES DUE PROCESS.

- 14 1. Plaintiff Should be able to Bind Only those Individuals Who have been
15 Served and about whom Clear and Convincing Evidence of Gang
16 Membership has been Presented.

17 The only defendant Plaintiff named is the alleged North Side Oakland Gang. In order to
18 effect service on the gang, the OSC required Plaintiff to serve eight individuals (three in person
19 and five by mail) (OSC at 6-7). Plaintiff seeks to bind not only these eight individuals, but "all
20 members of defendant North Side Oakland" under the preliminary injunction requested by the
21 OSC. (OSC at 2.)¹ This raises serious due process concerns.

22

23 ¹ We note that Plaintiff alleges in the Complaint that "the true identities" of the seventy Does "are
24 presently unknown to Plaintiff", and assures the Court that "Plaintiff will amend this complaint to
25 show the Doe defendants' true names when ascertained." (Compl. ¶ 6). Despite this, plaintiff has
26 designated alleged gang members for purposes of service and presented evidence of gang
27 membership on numerous individuals, including in some instances providing addresses of alleged
28 gang members. (OSC at 4)(See, e.g. Declaration of Sergeant James Bassett, ¶ 17 (discussing
address of Donte and Darryl Easley; Declaration of Melvin Bermudez, ¶ 21 (discussing probation
search at residence of Anthony Smith); Declaration of Officer Rochard Holton, ¶ 72 (discussing
address of Tyrone Elebeck; Declaration of Officer Douglass Keely, ¶ 86 (discussing address of

1 First, Plaintiff attempts to bind all seventy individual Doe defendants even though it has
2 only served the gang. This is despite the fact that Plaintiff had at its disposal names, addresses
3 and evidence of the alleged nuisance activity of numerous individuals. “A court passing on the
4 adequacy of notice should consider what else might have been done.” *People v. Broderick Boys*,
5 *supra*, 149 Cal.App.4th at 1527 (citing *Jones v. Flowers*, 547 U.S. 220, 229-33 (2006)).
6

7 Plaintiff had several options for providing service to affected individuals that would not
8 have required “heroic efforts”. *Id.* at 1528 (citing *Dusenbery v. United States*, 534 U.S. 161, 170-
9 71 (2002)). Indeed, very little extra effort on the part of Plaintiff would have provided many
10 more individuals with notice that they are at risk for being bound by the proposed injunction. For
11 example, Plaintiff could have published a list of names in the press, or at the very least, Plaintiff
12 could have served everyone for whom Plaintiff has an address, which would presumably include
13 anyone on probation or parole, anyone in jail or prison, and anyone for whom Plaintiff has listed
14 the address in the declarations attached to the complaint. Because Plaintiff failed to do this,
15 Plaintiff’s service of the OSC was not “such as one desirous of actually informing the absentee
16 might reasonably adopt to accomplish it.” *Id.* at 1519 (citing *Jones v. Flowers, supra*, 547 U.S. at
17 229). As the United States Supreme Court has held, the “effect [of the notice procedure] must be
18 judged in the light of its practical application to the affairs of men as they are ordinarily
19 conducted.” *Greene v. Lindsey*, 456 U.S. 444, 451 (1982). Here, where notice could have been
20
21

22 Yancie Young; and Declaration of Officer Frank Morrow, ¶ 1, 26 (discussing search of residence
23 of Marcelus Collins).

24 California Code of Civil Procedure section 474 governs the service of defendants with fictitious
25 names and requires that plaintiffs allege that they are ignorant of the Doe defendants’ names.
26 Code Civ. Proc. § 474; *Fireman’s Fund Insurance Company v. Sparks Construction, Inc.*, 114
27 Cal. App. 4th 1135, 1143 (2004). “Moreover, the Plaintiff must actually *be* ignorant of the Doe
28 defendant’s names.” *Fireman’s Fund Insurance Company, supra*, 114 Cal. App. 4th at 1143.
These requirements are mandatory. *Id.* Plaintiff should therefore be required to amend the
complaint to name all of the Doe defendants whose identities Plaintiff has ascertained.

1 provided to numerous individuals with little more effort than was expended to serve eight
2 individuals, the “practical application” requires more than the notice provided.

3 Second, should this Court issue a preliminary injunction, only the eight individuals who
4 have been served should be bound by it. If Plaintiff seeks to bind more than these eight
5 individuals, due process requires Plaintiff to provide any individuals it seeks to bind with notice
6 and an opportunity to challenge whether they may be bound by the injunction. Further, Plaintiff
7 must prove by clear and convincing evidence that each new individual it seeks to bind is, in fact,
8 an active gang member as defined by *Englebrecht*. 88 Cal. App. 4th at 1261.

9 Despite these due process concerns, the Proposed Injunction purports to give the police
10 complete and unfettered discretion to impose the restrictions of the injunction on at least 62
11 unnamed persons simply by notifying them that they are considered a North Side Oakland gang
12 member. If the Plaintiff is allowed to use this method of service, those individuals will then be
13 subjected to the restrictive provisions prescribed by the injunction without having had any
14 opportunity to be heard in court to challenge their designation as an active gang member.²

15 In *Englebrecht*, the Court of Appeal held that the importance of defendants’ interests in
16 basic freedom to conduct every day, noncriminal activities, some of which are constitutionally
17 protected – like associating with family members anywhere in public or being out at a restaurant
18 with friends past 10 p.m. – required “that the findings of fact necessary to justify its issuance be
19 proved by clear and convincing evidence.” 88 Cal. App. 4th at 1256. The court explained:
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25 ² And if such an individual cannot afford to retain an attorney to defend himself in a civil case,
26 then the only way to effectively challenge the injunction would be to violate its terms and have a
27 public defender challenge the injunction in the resulting prosecution for criminal contempt. As
28 the court noted in *People v. Broderick Boys*, 149 Cal.App.4th 1506, 1518 (2007), “Although the
remedy of suffering an arrest and defending a contempt charge is *available*, it is not generally
prudent.”(italics in original)(citing *In re Berry*, 68 Cal.2d 137, 148-49 (1968)).

1 The need for a standard of proof allowing a greater confidence in the decision
2 reached arises not because the personal activities enjoined are sublime or grand but
3 rather because they are commonplace, and ordinary. While it may be lawful to
4 restrict such activity, it is also extraordinary. The government, in any guise, should
not undertake such restrictions without good reason and without firmly
establishing the facts making such restrictions necessary.

5 *Id.* The Court of Appeal in *Broderick Boys* made clear that this heightened standard of proof
6 applies to the issues of gang membership, reaffirming that a gang injunction may only bind
7 “active” gang members, as defined in *Englebrecht*.³ *Broderick Boys*, 149 Cal. App 4th at 1517
8 (holding that a “person is subject to the injunction *if the State proves by clear and convincing*
9 *evidence that the [Englebrecht] definition is met.*”) (emphasis in original).⁴

10
11 The Proposed Injunction would effectively give the police a roving warrant to
12 immediately bind individuals not named in any court paper and never previously adjudicated to
13 be an active gang member. It has no standards, guidelines, or criteria to guide the police as they
14 determine whom they can serve with the court’s order; in fact, the OSC does not even limit the
15 injunction’s scope to “active” gang members. (OSC at 2). *See People ex rel Reisig v. Acuna*,
16 2010 WL 763549, at *12-13 (Cal. App. 3 Dist.). This completely circumvents and undermines
17 the required showing of proof and the due process right to an opportunity to be heard. As Justice
18 Jackson warned in 1949:
19

20 We must remember that the extent of any privilege of search and seizure without warrant
21 which we sustain, the officers interpret and apply themselves and will push to the limit...
22 [¶] ... [¶] And we must remember that the authority which we concede to conduct searches
and seizures without warrant may be exercised by the most unfit and ruthless officers as

23 ³ *Englebrecht* defines “an active gang member” as “a person who participates in or acts in concert
24 with an ongoing organization, association or group of three or more persons, whether formal or
25 informal, having as one of its primary activities the commission of acts constituting the enjoined
26 public nuisance, having a common name or common identifying sign or symbol and whose
members individually or collectively engage in the acts constituting the enjoined public nuisance.
The participation or acting in concert must be more than nominal, passive, inactive or purely
technical.” *Englebrecht*, 88 Cal. App. 4th at 1261.

27 ⁴ Proving active gang membership by clear and convincing evidence requires that Plaintiff’s
28 showing is “so clear as to leave no substantial doubt” and “sufficiently strong to command the
unhesitating assent of every reasonable mind.” *In re Angelia*, 28 Cal. 3d 908, 919 (1981).

1 well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as
2 in the case of the gravest felonies.

3 (*Brinegar v. United States* 338 U.S. 160, 182 (1949) (dis. opn. of Jackson, J.)).

4 It is because of the pervasive and sweeping effect of gang injunctions on individual liberty
5 that the courts have required a heightened standard of proof – clear and convincing evidence of
6 gang membership – before an individual can be enjoined. *Englebrecht*, 88 Cal. App. 4th at 1256.
7 It makes little sense to hold that such an injunction requires that the case for it be proven on clear
8 and convincing evidence, only to allow the police to apply it to new individuals without requiring
9 them to present evidence to any court that they are active gang members once the injunction has
10 issued.

11
12 Based on these same concerns, the San Francisco Superior Court, in a similar injunction
13 against the Norteño gang, expressly adopted a procedure to ensure that only active gang members
14 are enjoined. The court ordered that the gang injunction would operate solely against gang
15 members who have been served and against whom evidence had been presented to the court so it
16 could adjudicate whether they were active gang members. If the government seeks to add a
17 previously undesignated person to the injunction, the court has required it to provide notice and
18 an opportunity for that person to be heard, and present clear and convincing evidence to the court
19 of that person’s active gang membership. *See People v. Norteño*, Case No. CGC-07-464492,
20 Order Granting Preliminary Injunction at 8, n. 5 (San Francisco Sup. Ct. Oct. 12, 2007) (“The
21 preliminary injunction is effective only against those who have been named and served. Upon
22 service, these individuals have the right to challenge the People’s evidence.”); *see also People v.*
23 *Chopper City*, Case No. 464493, Order Granting Preliminary Injunction at 7, n.4 (San Francisco
24 Sup. Ct. Oct. 18, 2007) (same).
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1 While Plaintiff cites to *Acuna* in support of the right to bind nonparty members of an
2 enjoined entity to an injunction (Plaintiff’s Memorandum of Points and Authorities in Support of
3 *Ex Parte* Application for an Order to Show Cause re: Preliminary Injunction and for Preliminary
4 Injunction Against the North Side Oakland Criminal Street Gang (“Pl.’s Mem.”) at 9), the *Acuna*
5 Court’s decision stresses the importance of providing alleged individual gang members with their
6 day in court. In *Acuna*, the individuals sought to be enjoined were named as defendants, and 11
7 of the 38 named defendants appeared to oppose the preliminary injunction. 14 Cal. 4th at 1101.
8 The Supreme Court emphasized that the preliminary injunction “did not issue until after *these*
9 defendants had had their day in court, a procedure that assures ‘a prompt and carefully
10 circumscribed determination of the issue.’ ” *Id.* at 1114 (emphasis in original; citation omitted).
11 The *Acuna* Court stressed that the “only individuals subject to the trial court’s interlocutory
12 decree in this case . . . are *named parties* to this action; their activities allegedly protected by the
13 First Amendment have been and are being aggressively litigated.” *Id.* (emphasis in original).
14 Thus, despite Plaintiff’s claims that binding nonparty members of the alleged gang “raises no
15 ‘due process’ concerns,” *Acuna* provides no support for binding persons, who have not had their
16 “day in court” and against whom no evidence has been presented to any court. (Pl.’s Mem. at
17 10). Here, Plaintiff should be required to serve the individuals it intends to bind with notice of
18 the hearing, and then prove by clear and convincing evidence that each individual is an active
19 gang member as defined by the court in *Englebrecht*. *Englebrecht*, 88 Cal. App. 4th at 1256.

23 2. Individuals Who have not been Adjudicated “Active Gang Members”
24 Cannot be Bound by This Injunction unless They are Acting as Agents of
25 the Alleged Gang.

26 If the Court does permit individuals to be bound by the injunction without a judicial
27 determination of their active membership in the alleged gang, those individuals will only be
28 bound when they are acting as agents of the named defendant.

1 Plaintiff argues that having an injunction bind nonparty members of an enjoined entity
2 raises no constitutional concerns, citing *Berger v. Superior Court*, 175 Cal. 719 (1917) and *Ross*
3 *v. Superior Court*, 19 Cal. 3d 899 (1977). (Pl.’s Mem. at 6). But the cases cited by Plaintiff
4 arose in a very different context from the instant case. The injunctions at issue in these cases, as
5 in most injunction cases, prohibit the parties (and the nonparty members and associates) from
6 engaging in a specific and limited act or course of conduct such as labor picketing (*Berger*) and
7 refusing to distribute welfare benefits (*Ross*), thus addressing a narrow act that works a specific
8 harm. While picketing, for example, involves a fundamental right, prohibiting it does not intrude
9 on a person’s liberty to go about his or her daily life in the city where one lives. An injunction
10 against picketing does not impose new rules that follow a person in their home, their place of
11 work, and in any place accessible to the public, and make punishable by criminal sanctions the act
12 of going outside in the evening, walking into a restaurant, or attending a peaceful meeting. A
13 gang injunction, therefore, goes far beyond other types of injunctions – it affects the lives of its
14 targets in not only their nuisance-related conduct, but also in their expressive activities and in
15 common everyday tasks that have no relationship to the nuisance or any other unlawful conduct.

16
17
18 While it is true that the courts have long held that an injunction may run not only against
19 named parties but also against the parties’ agents, servants, or employees, the law is clear that
20 persons who are bound as agents of a named party are only subject to the order’s prohibitions
21 when they are actually acting as agents of the named defendant. The leading cases on the topic
22 are *Berger v. Superior Court* 175 Cal. 719 (1917) and *Alemite Corp. v. Staff*, 42 F.2d 832 (2nd
23 Cir. 1930). See *People ex rel Gwinn v. Kothari*, 83 Cal.App.4th 759, 766-67 (2000) (discussing
24 *Berger*); *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394-
25 96 (5th Cir. 1996) (discussing *Alemite*). *Berger* gives a concise statement of the law: the effect of
26 the rule that agents of a named party are bound by an injunction “is simply to make the injunction
27
28

1 effectual against all through whom the *enjoined party* may act, and to prevent the prohibited
2 action by persons acting in concert with or in support of the claim of the *enjoined party*, who are
3 in fact *his* aiders and abettors.” (*Berger v. Superior Court supra*, 175 Cal. at 721. (italics in
4 original). In other words, agents of a defendant association may be held in contempt if they do
5 what the injunction prohibits not because they themselves are violating the court’s order, but
6 because they are aiding and abetting the *defendant’s* violation. *Id.*; *Additive Controls*, 96 F.3d at
7 1394-95.
8

9 In the gang injunction context, this means that an individual who has been adjudicated an
10 active gang member will be bound by all of the restrictions of the injunction. However,
11 individuals who have not had their “day in court” will only be bound by the injunction to the
12 extent that they are acting “on behalf of the gang.” So, for example, the active gang member
13 could be arrested for entering a grocery store where another active gang member is working, but
14 an individual whose gang membership had not been adjudicated would only be in violation of the
15 injunction *if they had entered the grocery store as an agent of the gang*.
16

17 Nothing in any of the cases Plaintiff discusses is to the contrary. In both *Acuna* and
18 *Englebrecht* the persons bound by the injunctions were named as defendants. *See Acuna*, 14 Cal.
19 4th at 1125; *Englebrecht*, 88 Cal. App. 4th at 1242. Nor do the dicta in *Acuna* that do discuss
20 enjoining the gang itself in any way suggest that the rule set forth in *Berger* is no longer good
21 law— in fact, the *Acuna Court* cites *Berger* with approval. *Acuna*, 14 Cal. 4th at 1125.
22

23 Thus, any injunction that this Court does issue should clearly state that persons not
24 actually adjudicated to be “active gang members” are bound only when they are acting on behalf
25 of the alleged gang. For, as Judge Learned Hand noted,
26

27 [t]he unlawfulness of his conduct has been determined, and if he has not been a party and
28 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 worse [*sic*] fears of those who are jealous of its prerogative.

1 *Alemite Corp.*, 42 F.2d at 833.

2 B. THE PROPOSED INJUNCTION IS NOT NARROWLY DRAWN AND
3 UNNECESSARILY BURDENS CONSTITUTIONALLY PROTECTED
4 ACTIVITIES.

5 When constitutional rights are involved, government must address the problems it seeks to
6 fix with a “narrowly drawn, constitutionally sensitive response” that “is narrowly focused on the
7 harm at hand.” *Waters v. Barry*, 711 F. Supp. 1125, 1135 (D.D.C. 1989); *see also Carroll v.*
8 *President of Princess Anne*, 393 U.S. 175, 183 (1968) (“An order issued in the area of First
9 Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed
10 objective permitted by constitutional mandate and . . . must be tailored as precisely as possible to
11 the exact needs of the case.”). In *Acuna*, the California Supreme Court recognized that the
12 restrictions on association involved in a gang injunction implicate First Amendment interests, and
13 thereby applied the United States Supreme Court’s *Madsen* standard of burdening “no more
14 speech than necessary to serve an important government interest.” *Acuna*, 14 Cal. 4th at 1121
15 (*citing Madsen*, 512 U.S. at 765). Under that standard, a court must pay “close attention to the fit
16 between the objectives of the injunction and the restrictions it imposes” so as to “ensure that the
17 injunction [is] no broader than necessary to achieve its desired goals.” *Madsen*, 512 U.S. at 765.

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19
20 In *Acuna*, the particular facts of the case were central to the Court’s review of the
21 proposed preliminary injunction, and it is worth noting that these facts were dramatically different
22 than the facts of the instant case. The *Acuna* injunction covered only a four square-block
23 residential area, and *none* of the alleged gang members lived within that small “safety zone.”
24 *Acuna*, 14 Cal.4th at 1100. This area was simply the “turf” where the gang committed its
25 unlawful nuisance activities, and which the Court described as “occupied territory” and an “urban
26 war zone.” 14 Cal. 4th at 1100. As discussed above, the Proposed Injunction is factually distinct
27 from that in *Acuna* in that it covers approximately 100 square-blocks of North Oakland,
28

1 encompassing not only the homes of some of those enjoined, but shopping districts, several
2 Oakland public schools and surrounding Oakland’s Children’s Hospital. Whereas the *Acuna*
3 Court found that “the gangs appear to have had no constitutionally protected or even lawful goals
4 within the limited territory of Rockspring,” *id.* at 1121, that is simply not the case for this
5 injunction, which covers an area drastically larger than the *Acuna* injunction and targets
6 individuals who conduct many of their normal activities within the Safety Zone.
7

8 Here, the Proposed Injunction provisions regarding non-association and curfew enjoin
9 more activity than necessary to abate the claimed nuisance and impact more First Amendment
10 activity than necessary to meet legitimate governmental interests. If the Court does not deny the
11 preliminary injunction, the non-association and curfew provisions should be modified to meet
12 constitutional standards.

13
14 1. Prohibition on Association

15 Plaintiff proposes to prohibit “driving, standing, sitting, walking, gathering or appearing,
16 anywhere in public view or anyplace accessible to the public, with any known member of North
17 Side Oakland gang” ... “except : (1) when all individuals are inside a school attending class or
18 on school business, and (2) when all individuals are inside a church, provided however that this
19 prohibition against associating shall apply to all claims of travel to or from any of those
20 locations.” (OSC at 4.) This restriction on association is too severe.⁵

21
22 By choosing to seek an injunction for such a large geographical area, and one which
23 includes social, community, and commercial centers, Plaintiff has ensured that the Proposed
24 Injunction will affect a great number of current associational activities and will inevitably chill
25

26 ⁵ Although the court in *People ex rel Reisig v. Acuna* upheld the trial court’s ruling that the non-
27 association provision in that case passed constitutional muster, it did so using the abuse of
28 discretion standard. *People ex rel Reisig v. Acuna*, 2010 WL 763549 *3,*15 (Cal.App. 3 Dist.)
Nothing in that court’s decision requires this court to uphold the overly restrictive provision at
issue here.

1 future expressive and innocent activities.⁶ The scope of the provision, as written, would apply not
2 just to association outside in public view, but also to associations inside any building “accessible
3 by or to the public,” which could, for example, include polling places, grocery stores and
4 community centers. A person bound by the injunction who is employed at a restaurant or a
5 grocery store would, for the life of the injunction, be in violation of its terms if another alleged
6 gang member (who would also be in violation) patronized the business. Also, attending political
7 rallies (to, for example, oppose the injunction) or other events inside the Safety Zone would incur
8 a risk of violating the injunction depending on who else was present at the time. This provision
9 would have the same deterrent or prohibitive effect on attendance at any meeting or training
10 program in North Oakland that is available to help young people or former gang members turn
11 their lives around.
12

13
14 Therefore, this Court should amend the association prohibition to allow for other activities
15 essential to daily and productive life, such as presence in the workplace (or while engaging in
16 some lawful business activity), municipal buildings, and counseling or social services offices.
17 *See, e.g., Colonia Chiques*, 156 Cal. App. 4th at 45-46 (allowing for a business exception);
18 *People v. Oakdale Mob*, Case No. CGC-06-456-517, Order Granting Preliminary Injunction at 3
19 (San Francisco Sup. Ct. Nov. 29, 2006) (allowing for an anti-drug, anti-gang, or anti-crime
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26 ⁶ *See* Scott E. Atkinson, *The Outer Limits of Gang Injunctions*, 59 Vand. L. Rev. 1693, 1716
27 (2006) (“Provisions forbidding all association necessarily include politically motivated assembly,
28 thereby prospectively abridging gang members’ First Amendment rights--even if the enjoined
defendants were not using those rights at the time the injunction was imposed.”).

1 program exception).⁷ Plaintiff has not shown “clear and convincing” evidence sufficient to
2 justify such a broad ban on so much non-gang-related and constitutionally protected activities.⁸

3 2. The Curfew Provision
4

5 The Proposed Injunction’s curfew would prohibit alleged gang members from “Being
6 present in public view, in a public place or in any place accessible to the public, between the
7 hours of 10:00 p.m. on any day and 5:00 a.m. of the following day,” with limited exceptions for
8 legitimate business activities, a lawful entertainment event, or a legitimate emergency. (OSC at
9 5.)⁹
10

11 Like all curfews, this provision impacts constitutionally protected rights of free
12 expression, freedom of association, and free movement. In *Nunez v. San Diego*, the Ninth Circuit
13 struck down a juvenile curfew ordinance as an overly broad restriction on constitutional rights,
14 even though the government has greater latitude in imposing restrictions on minors. 114 F.3d
15 935, 946 (9th Cir. 1997). The *Nunez* court relied on *Waters v. Barry*, where a federal district
16 court invalidated an overly broad curfew law because it made thousands of innocent juveniles
17 prisoners at night in their homes. *Waters*, 711 F. Supp. 1125. Here, the curfew applies to adults,
18 and for those residing in the Safety Zone, it imposes a virtual nighttime house arrest.
19

20 ⁷ Amici do not refer to this and other trial court orders in this brief for their precedential value on
21 any point of law, but simply as alternate procedures that other courts have used. Amici intends to
22 attend the hearing on April 22nd in order to respond to any inquiries the Court may have
23 regarding our brief or the Proposed Injunction in general. If the Court desires, Amici will make
24 available at the hearing copies of these trial court orders for the Court and Plaintiff’s counsel.

25 ⁸ In *People v. Varrío Lampara Primera* (Santa Barbara Superior Court No. 1148758), the Santa
26 Barbara Superior Court (Iwasko, J.) narrowed a proposed gang injunction by limiting the
27 association provision to prohibit association only “under circumstances that would warrant a
28 reasonable person to believe that the purpose or effect of that behavior is to enable [the gang]
and/or its members to engage in the nuisance conduct prohibited in this order.” (Statement of
Decision on Motion for Preliminary Injunction at 10.)

⁹ Although the curfew provision in *People ex rel Reisig v. Acuna* was upheld, it was significantly
more specific than the provision at issue here. For example, in that case, the curfew defined
many more of its terms and also excluded being outside in one’s own yard. 2010 WL 763549
*16-18 (Cal. App. 3 Dist.). Moreover, as noted above, that case was decided using the abuse of
discretion standard. Therefore, this court is not required to uphold the curfew provision here.

1 The curfew provision fails to meet the *Madsen* test of burdening no more First
2 Amendment activity than is necessary to accomplish the legitimate governmental purpose. *See*
3 *Nunez*, 114 F.3d at 946. In a San Francisco gang injunction case, *People v. Oakdale Mob*, (in
4 which the ACLU and Lawyers' Committee also appeared as amici at the preliminary injunction
5 hearing) the court rejected a similar curfew provision and ordered a narrower restriction that
6 enjoined the named individuals from "[l]oitering in any place between midnight on any day and
7 5:30 a.m. of the immediate next day." *Oakdale Mob*, Case No. CGC-06-456-517, Order Granting
8 Preliminary Injunction at 4 (San Francisco Sup. Ct. Nov. 29, 2006).

9
10 If, as Plaintiff states, the government's interest in a curfew is to abate the most violent
11 "nocturnal behavior" (Pl.'s Mem. at 13), a narrower prohibition on loitering would adhere more
12 closely to the *Acuna* Court's admonition that a gang injunction should "burden no more speech
13 than is necessary to serve an important government interest." 14 Cal. 4th at 1121. Plaintiff's
14 proposed restriction on loitering "in a manner and under circumstances manifesting the purpose
15 and with the intent to commit" specified offenses (OSC at 6) is sufficient to address the alleged
16 criminal and nuisance activities. Even with its exceptions, the curfew provision of the Proposed
17 Injunction would not permit attendance at constitutionally protected political and community
18 meetings, or a midnight mass at a church. The restriction on such expressive activities was one
19 ground on which the Ninth Circuit struck down the *Nunez* curfew, explicitly *rejecting* the
20 argument that "a broad First Amendment expression exception would effectively reduce a curfew
21 ordinance to a useless device." *Nunez*, 114 F. 3d at 951.

22
23
24 Consistent with these principles, this Court should narrow the curfew restriction to make it
25 clear that lawful First Amendment activities are not unnecessarily swept up into this prohibition.¹⁰

26
27 ¹⁰ The Proposed Injunction also fails to include a provision allowing for a person bound by the
28 injunction to be released from it upon a showing that they are no longer a member of the gang.
As set forth above, the gang injunction runs against the gang and binds all members of the alleged
[PROPOSED] BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AND LAWYERS'
COMMITTEE FOR CIVIL RIGHTS
Case No. RG1049801

1 C. PLAINTIFF MUST ESTABLISH THAT THIS INJUNCTION WILL BE
2 EFFECTIVE AND THAT ITS BENEFITS OUTWEIGH THE HARMS IT WILL
3 CAUSE.

4 This Court must carefully consider and determine whether the harms likely to occur in the
5 community if the injunction does not issue outweigh the harms that will occur (to the targeted
6 individuals and to the community) if it does, *Acuna*, 14 Cal. 4th at 1109. Plaintiff makes a
7 conclusory argument that the North Oakland community will suffer great harm if the preliminary
8 injunction is denied. However, to balance the harms, the Court must look beyond the assertions
9 in the Plaintiff's declarations and take into account the individual rights that will be imperiled by
10 the injunction. In the public nuisance context, the legitimate purpose of an injunction is to protect
11 the community as a whole from a substantial and unreasonable interference. *Acuna*, 14 Cal. App
12 4th at 1105. As the *Acuna* Court emphasized, it is "this recognition of – and willingness to
13 vindicate – the value of community and the collective interests it furthers, rather than to punish
14 criminal acts, that lies at the heart of the public nuisance as an equitable doctrine." *Id.* at 1109.

15
16 In fact, a groundbreaking study has concluded that gang injunctions can *cause* harm
17 because they are ineffective and counterproductive ways of meeting the purported goal of
18 community safety.¹¹ The Justice Policy Institute report ("JPI Report") examined and analyzed
19 "the successes and failures of approaches that have been employed to respond to gangs" and
20 concluded that police suppression efforts like civil gang injunctions "can increase gang cohesion
21

22
23 gang. Thus, once an individual leaves the gang, the injunction can no longer be binding on him
24 or her. Any injunction issued by this Court should create a clear path for those who are no longer
25 active gang members to be removed from its restrictions. This is particularly important in view of
26 the fact that in most gang injunction cases, the overwhelming number of affected individuals do
27 not have individual representation by attorneys.

28
¹¹ Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the
Need for Effective Public Safety Strategies*, Justice Policy Institute, July 2007, available at:
[http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf]

1 and police-community tensions, and they have a poor track record when it comes to reducing
2 crime and violence.” JPI Report, at 3, 5. The Report recommends redirecting resources from
3 failed gang enforcement efforts to proven public safety strategies, finding that “gang injunctions,
4 gang sweeps and ominous-sounding enforcement initiatives reinforce negative images of whole
5 communities and run counter to the positive youth development agenda that has been proven to
6 work.” *Id.* at 7.

8 The JPI Report also deals with the cloud of racial profiling that hangs over gang
9 injunctions. The Report details the fact that African-American and Latino communities bear the
10 cost of failed gang enforcement initiatives because “young men of color are disproportionately
11 identified as gang members and targeted for surveillance, arrest, and incarceration, while
12 whites—who make up a significant share of gang members—rarely show up in accounts of gang
13 enforcement efforts.” JPI Report at 6. This fact is particularly disturbing in light of the fact that
14 whites make up the largest racial group of gang youth, and white gang members commit
15 delinquent acts at the same rate as their African-American and Latino peers.¹²

17 These concerns have been echoed by community members and city officials in Oakland.
18 Prior to filing this gang injunction, Plaintiff appeared before the Oakland City Council’s Public
19 Safety Committee and presented an informational report on the proposed injunction.¹³ Several
20 committee members raised serious questions regarding whether the injunction would be an
21

22
23 ¹² According to the JPI Report, “The public face of the gang problem is black and brown, but
24 whites make up the largest group of adolescent gang members. Law enforcement sources report
25 that over 90 percent of gang members are nonwhite, but youth survey data show that whites
26 account for 40 percent of adolescent gang members. White gang youth closely resemble black
and Latino counterparts on measures of delinquency and gang involvement, yet they are virtually
absent from most law enforcement and media accounts of the gang problem. The disparity raises
troubling questions about how gang members are identified by police.” *Id.* at 4.

27 ¹³ *Joint Informational Report from the Oakland Police Department and the City Attorney*
28 *Concerning the feasibility of Implementing Civil Gang Injunctions in Oakland: Hearing Before*
the Oakland City Council Public Safety Committee (February 9, 2010).

1 effective violence reduction strategy, and did not move forward with providing funding for the
2 injunction. The concerns raised by the Oakland City Council’s Public Safety Committee
3 underscore the risk of potential harm to the North Oakland community if the injunction is issued.

4 The issues raised by the JPI Report, community members and city officials are relevant to
5 the balancing of harms in which this Court must engage. There are serious questions as to
6 whether the proposed injunction will make North Oakland safer and whether any incremental
7 benefits are outweighed by the civil liberties restrictions that will be imposed. These questions go
8 to the heart of the equitable considerations that this Court must resolve. As the California
9 Supreme Court stated in *Acuna*, “the availability of equitable relief to counter public nuisances is
10 an expression of interest of the public in the quality of life and the total community environment.”
11 *Acuna*, 14 Cal. 4th at 1107 (citing *People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d
12 42, 52 (1976)). In balancing the harms as required by *Madsen*, this Court should be cognizant,
13 not just of how Plaintiff describes the impact of the injunction on the community, but also of how
14 the North Oakland community itself perceives the impact of the proposed injunction.
15
16

17 III. CONCLUSION

18 For the foregoing reasons, this Court should not issue the Preliminary Injunction as
19 proposed by Plaintiff.
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Respectfully Submitted,

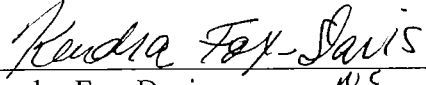
AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA

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