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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

PEOPLE OF THE STATE OF CALIFORNIA, by and through Dennis J. Herrera, City Attorney for the City and County of San Francisco,

Plaintiff,

v.

OAKDALE MOB, a criminal street gang sued as an unincorporated association; and DOES 1– 500,

Defendants.

Case No. CGC-06-456-517

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Hearing Date:	October 30, 2006
Hearing Judge:	Hon. Peter Busch
Time:	9:30 a.m.
Place:	Dept. 301
Date Action Filed:	Sept. 27, 2006
Trial Date:	Not Yet Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

I. INTRODUCTION

This Court is being asked on October 30th to issue a preliminary injunction imposing probation-like restrictions on an unknown number of individuals identified by the police as being members of the Oakdale Mob. The practical consequence of the issuance of this injunction is that it will operate as a roving community warrant – authorizing law enforcement to serve the order and impose its restrictions immediately on any persons who they deem in their sole discretion are members or associates of, or "acting in concert with," this alleged gang. From the moment of service of this Court's order, the persons served are subject to arrest and criminal prosecution for violation of its terms.

The American Civil Liberties Union of Northern California ("ACLU-NC") is filing this brief *amicus curiae* to address a narrow but significant issue that the ACLU-NC believes raises questions of both constitutional principle and basic fairness concerning the scheduled October 30th proceeding. The City of San Francisco ("City"), acting through its City Attorney, has chosen to serve and give notice to only three individuals of the complaint and of this October 30th hearing, in spite of the fact that the City could easily have given additional notice to some or all of the 22 individuals who it has designated as gang members and/or the 80 individuals who are alleged to be documented as gang members. Furthermore, it now appears that the City intended to keep this proceeding essentially secret - from the public, the particular community affected and from almost all of the individuals targeted by this injunction - until after this Court had acted on October 30th.[1]

Because of the serious restrictions a gang injunction imposes on the rights and lives of people subject to it, the law requires that the City establish the necessity for such an extraordinary order by

[1] S.F. Chronicle of October 23, 2006, reports that the City Attorney "Herrera said he had planned to wait for the judge's ruling to make an announcement" of the law suit. p. A9.

"clear and convincing" evidence. *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1256 (2001). A non-adversarial proceeding in which the Court hears from only one side destroys the protections of this exacting standard; how much easier for a party to argue that its evidence is "so clear as to leave no substantial doubt"[2] when there is no opposition to find the holes there might be in that evidence or to present evidence that might raise a doubt. Amicus believes that the City's apparent plan of action – to serve only three persons out of a much larger group who are known and available for service, and who will in fact eventually be served but only **after** this Court has acted-- violates fundamental principles of due process and fairness that should guide this Court's consideration of this matter.

In view of the City's minimal service and notice, it is not surprising that no opposition papers were filed on October 18th, and that the hearing on October 30th is likely to essentially be another ex parte process. Accordingly, for the reasons discussed below, the ACLU-NC as *amicus curiae* respectfully suggests that this Court continue the hearing, and direct the City to provide broader service and notice so that this court may have the benefit of hearing from both sides before it issues an injunction that may expose dozens of minors and adults to arrest and prosecution for acts that are otherwise lawful.

II. DUE PROCESS REQUIRES THAT NOTICE BE REASONABLY CALCULATED TO INFORM THOSE WHOSE INTERESTS ARE DIRECTLY AFFECTED OF THE PENDENCY OF THE LITIGATION.

Amicus is aware that this Court signed an Order To Show Cause authorizing the City to serve "two or more" members of the Oakdale Mob, pursuant to Code of Civil Procedure § 416.40(c). However, while the City's service is in compliance with this Court's order, the ACLU-NC believes that this scope of service, under the circumstances of this case, does not comport with constitutional

[2] *In re Michael G.*, 63 Cal.App.4th 700, 709 n.6 (1998).

standards, and that the City's Memorandum of Points and Authorities submitted to this Court fails to address these well-established due process standards.

Due process requires that interested parties be provided with notice of the proceedings and an opportunity to object. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). As the United States Supreme Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections .... The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. (citations omitted).

The *Mullane* notice requirement has been repeatedly affirmed as a due process standard by federal and California courts This requirement is no technicality, but the embodiment of "a basic principle of justice – *that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.*" *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953) (emphasis added).

In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Court made it clear that the *Mullane* notice requirement applies to all persons whose "legally protected interests are at stake":

> The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person *whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.*

Id. at 212-13 (emphasis added).

These standards serve as a 'constitutionally required assurance that the government has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continued interest in the resolution of the controversy. *Greene v. Lindsey*, 456 U.S. 444, 455(1982).

The City's course of action, under the circumstances of this case, ignores the letter and spirit of these principles of constitutional law and basic fairness. The City's actions so far are hardly that of a party "desirous of actually informing" either the Oakdale Mob or its alleged members that it intended to obtain a preliminary injunction that would impose significant restrictions on their individual liberties and subject them to criminal prosecution for activities that are not unlawful.. The City, rather than choosing a method of service "reasonably calculated" to inform the "interested parties" that the matter was pending so that they could choose for themselves "whether to appear or default, acquiesce or contest" the case, has instead pursued a course of action that has maximized the probability that the injunction in this case will be considered and granted unopposed. *Mullane*, 339 U.S. at 314

First, despite the fact that the City's moving papers claim the gang has at least 80 "documented members and associates," (Declaration of Officer Leonard Broberg, ¶ 18), and explicitly designated 22 named individuals for service of process, it has served only three of them with the complaint and notice of this hearing. If, as the City claims, the Oakdale Mob has taken over this four-block area, if its members are such a presence in the area that the other residents feel that they are under constant surveillance by the gang, if nobody but gang members can go outside, it should be certainly feasible for the City to serve personally in the "safety zone" many more than three of the people whom they are targeting in this suit.

Second, despite the fact that the City Attorney's Office issued a press release in December 2005 stating that they would be filing gang injunctions in San Francisco (without specifying when, where, or against whom), when the City actually came to court to file this suit nine months later, a

conscious decision was made not to notify the press or the community that will be affected, aside from the few individuals served. The City did not post notices in the area. It did not publish anything in the local community papers, or hold a press conference, or alert the media in any way. In light of the City Attorney Office's efforts over the past year to broadly publicize its plans to bring gang injunctions to San Francisco, this moment of silence suggests that the City was consciously waiting to start their media and community outreach only **after** this Court had issued an uncontested preliminary injunction. The City did not mail notices to anybody, although the police would surely have at least some contact information for everybody who has been arrested, is on probation or parole, or incarcerated.[3] This decision not to try to provide actual notice to targeted people whose identity is known or "reasonably identifiable" violates due process. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-99 (1983).

A 2006 case from the United States Supreme Court makes it even clearer that the City's chosen course of action is inconsistent with the principles of *Mullane*. In *Jones v. Flowers*, __U.S.__126 S. Ct. 1708 (2006), the Court held that when the government discovers that its prior attempts at notice have been unsuccessful it is required to take "reasonable follow up measures" to provide actual notice. *Id.* at 1718-19. This is true even when the original form of notice would, in the usual course of events, have met constitutional muster. *Id.* Thus, although sending a certified letter to the defendant's address satisfies due process, if that letter is returned undelivered, the government must do more, such

[3] The *Mullane* principles have been frequently applied to persons who are in government custody. When an interested party is held in government custody, the government has an obligation to provide notice of a civil proceeding at least by mail to the facility where the person is held. Thus, in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), the Court applied *Mullane* and held that mailing of notice to the last known home address was not sufficient when the addressee was confined in the county jail. "Under these circumstances, it cannot be said that the District Attorney made any effort to provide notice which was 'reasonably calculated' to apprise appellant of the pendency of the forfeiture proceeding." *Id.* at 40. *See Foehl v. United States*, 238 F.3d 474, 479-80 (3d Cir. 2001) (failure to check obvious law enforcement sources for party's service address "was unreasonable under the circumstances, and its minimal effort to notify the [claimant] of the forfeiture cannot fairly be considered to be 'within both letter and spirit of the law.'").

as posting notice on the door of the property at issue, or sending another letter. *Id.*

Here, the circumstances of the City's attempted service, including the lack of any opposition on October 18th from the three individuals served with the complaint and the OSC, should impel the City to take "reasonable follow up measures," such as those discussed above, to try to achieve broader notice to the people who are targeted by this injunction and provide them their day in court. Accordingly, the ACLU-NC respectfully suggests that this Court continue the October 30th hearing and order the City to provide notice that complies with these constitutional standards of fair play.

III. THE SKELETAL NOTICE PROVIDED BY THE CITY WILL TAINT THE HEARING AND IMPAIR THE COURT'S ABLILITY TO MAKE THE NECESSARY FINDINGS

Both the United States and the California Supreme Courts have warned about the dangers of issuing injunctions based on *ex parte* determinations rather than a contested proceeding in which the court has the benefit of hearing from both sides and the plaintiff is put to its proof:

> The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. . . . There is a danger in relying exclusively on the version of events and dangers presented by prosecuting officials, because of their special interest.
>
> *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183 & n.10 (1968); *see United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 907-08 (1975).

Yet in this case, the City's skeletal service will in all likelihood make the October 30th exactly the type of ex parte proceeding that the Supreme Court is warning against – a non-adversary proceeding in which the Court is being asked to act but has only heard the police version of the facts and the prosecutor's views on the community impact of the Oakdale Mob and the necessity for this injunction.

A preliminary injunction may not issue unless and until the City has proven each element of its

case by "clear and convincing evidence". *People v. Englebrecht*, 88 Cal. App. 4th at 1256, 1258. The *Englebrecht* court made it quite clear that it recognized that the restrictions of a gang injunction on individual rights was "extraordinary", and that this heightened burden of proof was necessary to provide "greater confidence" that the government has "firmly establishe[ed] the facts making such restrictions necessary." *Id.* at 1256. If the Court hears from only the City on the merits,, however, the "clear and convincing" standard becomes essentially meaningless, because there will be nobody to contest the accuracy of any of the declarations now before this court, to comb the hundreds of pages of factual assertions for inconsistencies, or to represent in any way the interests of the defendant and any of the individuals whose liberties will be curtailed if the Court issues the City's proposed injunction.

Especially in a case of this nature, this Court should exercise its discretion to insure that both its decision, and the proceedings leading up to it, reflect principles of fairness and justice that are the bedrock of due process. Requiring further notice and an opportunity to respond to the City's case would further those ends.[4]

IV. THE CITY'S METHOD OF SERVICE HAS NOT BEEN APPROVED BY THE APPELLATE COURTS AND STANDS IN MARKED CONTRAST TO THE PRACTICE FOLLOWED IN OTHER GANG INJUNCTION CASES

The City relies on dictum in *People ex rel. Gallo v. Acuna*, 14 Cal 4th 1090 (1997) as support for its method of service on the Oakdale Mob. (Mem. at 13-14), However, the issue here is not *who* was named as a party but the *adequacy of notice*. Certainly nothing in *Acuna* authorizes or endorses the imposition of a gang injunction when only three individuals targeted by the injunction have been

[4] For these same reasons the Court should consider appointing counsel for affected persons, many of whom are apparently minors, some of whom "as young as nine or ten, " or who may be unable to come to court because they are incarcerated. *See* Broberg Dec. ¶¶ 30, 68. *See* Cal. Code Civ. Pro. §372 (minors); *Payne v. Superior Court*, 17 Cal.3d 908 (1976) (incarcerated persons).

served. In *Acuna*, service was such that 11 of the 38 named defendants appeared to oppose the preliminary injunction. *Id.* at 1101. The California Supreme Court emphasized that the preliminary injunction "did not issue until after *these* defendants had had their day in court, a procedure that assures 'a prompt and carefully circumscribed determination of the issue.'" *Id* at 1114 (emphasis in original; citation omitted). The *Acuna* Court stressed that the "only individuals subject to the trial court's interlocutory decree in this case...are *named parties* to this action; their activities allegedly protected by the First Amendment have been and are being aggressively litigated." *Id.* (emphasis in original). The procedures adopted by the City here are in fact denying an opportunity for a "day in court" with respect to this preliminary injunction for persons actually identified as its intended targets.

Furthermore, contrary to the City's assertion, the limited notice they have provided in this matter is not "standard practice in gang injunction cases." (Mem at 13). In the published appellate decisions, local prosecutors named as defendants the individual gang members sought to be enjoined. *See Acuna*, 14 Cal. 4th at 1113 (38 gang members named as defendants; plaintiff served 24); *Iraheta v. Superior Court*, 70 Cal. App. 4th 1500 (1999) (injunction sought against 92 specifically named gang members); *Englebrecht*, 88 Cal. App. 4th at 1242 (28 individuals named as defendants).

In a number of gang injunction cases from other jurisdictions, the prosecutors provided significantly broader service to the targeted individuals (and thus to the affected communities): [5]

- *People v. Vista Home Boys et al.*, San Diego Superior Ct. Case No. GIN044867 (2005) (gang and approximately 88 individual gang members named as defendants; at least 87 individuals served);

[5] Amicus respectfully requests that that this Court take judicial notice of these records from the courts of this state. *See* Cal. Evidence Code §§ 452(d)(1), 453. The sealed, signed documents are self-authenticating. *See id.* §§ 647, 1452(b), 1453(b), *Poland v. Department of Motor Vehicles*, 34 Cal.App.4th 1128, 1135 (1995). They are attached as Exhibits 1-6 to the Request for Judicial Notice filed with this brief.

- *People v. Varrio Posole Locos et al.*, San Diego Superior Ct. Case No. N76652 (1997) (gang and 28 individuals named as defendants; at least 25 individuals served);
- *People v. Old Town National City Gang et al.*, San Diego Superior Ct. Case No. GIS 22336 (2005) (gang and 102 individuals named as defendants; at least 90 individuals served. The court ordered that certain named defendants were "not subject to [the Preliminary Injunction], as they were not served with notice of [the] hearing." *See* 10/31/05 Preliminary Injunction at 8).

Every one of these cases involved the service of an order to show cause regarding the issuance of a preliminary injunction or temporary restraining order. Even in the two cases that the City gives as examples of how courts in other jurisdictions have proceeded (Mem. at 13, n.38), the prosecutors served more than three individuals although only the gang was named as a defendant. In *People v. Krazy Ass Mexicans aka KAM*, L.A. Superior Ct. Case No. BC282629 (2002), eight individuals identified by name in the complaint were served with the OSC. *Id.* Similarly, in *People v. Canoga Park Alabama*, L.A. Superior Ct. Case No. BC267153 (2002), the plaintiff served eight of the gang members identified in the complaint. In another case in which only the gang was named as a defendant, *People v. Colonia Chiques et al.*, Ventura Superior Ct. Case No. CIV226032 (2004), the trial court expressed concern about the "method of service" even though four individuals appeared personally at the hearing for the issuance of the OSC. The judge first "suggested,' and then ordered, the prosecutor to serve the OSC on the specified gang members by personal service and *also* publication.

The City's narrow service of process in this case falls short of the scope of service and notice that was afforded in these other jurisdictions. There is no reason that the City cannot readily serve, or at least attempt to serve, as many individuals they have already identified as being part of the Oakdale Mob as is reasonably possible.

V. CONCLUSION

For the foregoing reasons, the amicus ACLU-NC respectfully suggests that this Court not proceed to adjudicate the proposed preliminary injunction, but rather continue the hearing until such time as the City provides broader notice of this preliminary injunction to those easily identifiable individuals who will be directly affected by such an order.

Respectfully submitted,

Date: October 25, 2006

By: _____
Alan Schlosser
Legal Director

_____
Michael Risher
Staff Attorney

Attorneys for Amicus Curiae

PROOF OF SERVICE

I, Michael Risher, declare that I am employed in the City and County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, California 94111.

On October 25, 2006, I served a copy of the attached

APPLICATION OF AMICUS AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE BRIEF OF AMICUS CURIAE

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

REQUEST FOR JUDICIAL NOTICE OF COURT RECORDS BY AMICUS AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

on each of the following by delivering by hand to the office of the attorney for plaintiff, addressed as follows:

Dennis J. Herrera
Owen J. Clements
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(Attorneys for Plaintiff)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service was executed on October 25, 2006 at San Francisco, California.

_____
Michael Risher