No. C051707

IN THE COURT OF APPEAL OF CALIFORNIA

THIRD APPELLATE DISTRICT

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PEOPLE OF THE STATE OF CALIFORNIA,
Ex rel. David C. Henderson as the District Attorney for the County of Yolo,

Plaintiff-Respondent,

v.

BRODERICK BOYS aka **BRK** aka **BSK** aka **NORTENO** aka **NORTE** aka **XIV**, an Unincorporated association,

Defendant-Respondent;

_____

KEITH EDWARDS, BENJAMIN JUAREZ, JASON SWEARENGIN and ANGELO VELAZQUEZ

Movants-Appellants.

Appeal from the Superior Court of California,
County of Yolo, Case Number CV04-2085
Thomas E. Warriner, Judge

APPELLANTS' OPENING BRIEF

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INTRODUCTION

On February 3, 2005, the Yolo County Superior Court entered a permanent injunction, declaring the Broderick Boys to be a criminal street gang and imposing permanent, probation-like restrictions on the otherwise lawful day-to-day activities of all who are bound by it. There has never been an adversary proceeding of any kind to test the sufficiency of the allegations that led to the issuance of this permanent injunction or to test the constitutionality of the restrictions it imposes. The State's concerted and successful effort to obtain its injunction by default, and appellants' subsequent effort to obtain redress for the denial of their due process rights, are the subject of this appeal.

The State's tactics in this case were calculated, from beginning to end, to result in the issuance of an injunction by default. Although the State claims that there are over 350 documented members of the Broderick Boys (CT 181; *see also* CT 67), and although it identified more than 50 members by name in either its complaint or the papers filed in support of its request for a preliminary injunction (*see generally* CT 1-9, 58-176), the State's complaint named only *one* defendant: the Broderick Boys. More important, when it came time to serve the complaint and the preliminary injunction papers, the State chose to serve one lone member of the Broderick Boys: Billy Wolfington.

The decision to serve only Wolfington had nothing to do with the State's ability to find and serve others who were the targets of the proposed injunction. Indeed, within less than a week of the issuance of the permanent injunction, police had served a number of people, often at their homes or places of work. *See, e.g.*, CT 262, 270, 274; *see also* CT 266. By March 25th, the number of people served had grown to approximately 80. CT 285; 288. Nevertheless, when it filed its complaint and sought a preliminary injunction, the State served only one person with notice of the proceedings. Moreover, the single person the State chose for service of process had already informed the police that he would not appear when the police gave him notice of the earlier hearing on the issuance of the Order to Show Cause. CT 564.

Not surprisingly, no one appeared at the preliminary injunction hearing or filed a response to the complaint on behalf of the Broderick Boys. Exactly one day after the time to file a response had passed, the State sought and obtained the entry of the Broderick Boys' default and the entry of the default judgment granting the permanent injunction. CT 217, 228, 231. Shortly thereafter West Sacramento police began serving the injunction.

The injunction provides no criteria for determining whether a particular individual is a member of the Broderick Boys. It simply designates the class of individuals subject to its provisions as the

"Broderick Boys, . . . its members, agents, servants, and employees, and all persons acting . . . in concert . . . with them." CT 233. The police thus have unfettered discretion in determining whom to serve. The criteria used are their own, unrestrained by legal definitions of who may be considered a gang member for purposes of a civil gang injunction. *Compare People v. Englebrecht*, 88 Cal. App. 4th 1236 (2001).

The injunction covers an approximately three square mile "safety zone" in West Sacramento in which most of those subject to the injunction live. Its restrictions impact the most ordinary aspects of daily life: It imposes a 10:00 p.m. to dawn curfew, even though many of those bound by it are adults with young children of their own. *See, e.g.*, CT 262, 265, 273-74. It prohibits associating in public with any other "known" member of the Broderick Boys, a prohibition that can affect the use of public transportation, being in the park, even if it is for a child's birthday party, or attendance at a close friend's wedding. It also prohibits being anywhere in public where alcohol is present—a restriction that puts most restaurants off limits—as well as being present on privately owned property without the prior written consent of the person in lawful possession or in the presence and with the permission of that person.

Appellants Angelo Velazquez, Jason Swearengin, Benjamin Juarez, and Keith Edwards are among those served with the injunction. That service—after the default judgment had been entered—was their first notice of the injunction proceedings. CT 263, 266, 271, 274.

On July 28, 2005, appellants filed a motion under Code of Civil Procedure section 473(d), seeking to set aside the default and default judgment as void, having been entered without affording the notice and opportunity to be heard required by the Due Process Clause of the United States Constitution. Appellants seek to have the default set aside so that they can intervene in the action and so that there can be a full adversary hearing in which *all* of the relevant issues can be litigated, including whether the State can produce clear and convincing evidence that there is a factual basis for entry of an injunction, and if so, whether the terms of the injunction meet constitutional standards and whether the State can prove, by clear and convincing evidence, that appellants meet the legal definition of an "active gang member." *See People v. Englebrecht*, 88 Cal. App. 4th at 1261.

On November 22, 2005, the trial court denied the motion. It concluded that because appellants "are not parties to the action and do not purport to be authorized representatives of the sole defendant Broderick Boys," they lack standing to raise the constitutional issue of whether the injunction was entered with adequate notice and an opportunity to be heard.

CT 874-75. Appellants could have their due process claim adjudicated only by admitting gang membership and claiming to act on behalf of the Broderick Boys (thus establishing a key element of the State's case) or by seeking a separate adjudication—and presumably losing—on the gang membership issue. *Id*. Appellants now appeal that ruling and ask this Court to hold that they have standing to move to set aside the default judgment granting the injunction that presumptively binds them and to declare that the injunction entered below is void, having been issued without adequate notice and an opportunity to be heard.

APPEALABLE ORDER

The trial court's order denying appellants' motion to set aside the default and default judgment pursuant to Code of Civil Procedure section 473(d) is appealable as an order made after a final judgment under Code of Civil Procedure section 904.1(a)(2). *Carlson v. Eassa*, 54 Cal. App. 4th 684, 691 (1997); *Residents for Adequate Water v. Redwood Valley County Water Dist.*, 34 Cal. App. 4th 1801, 1805 (1995).

STATEMENT OF FACTS

The Issuance of the Injunction

The State's tactic in serving only a single alleged member of the Broderick Boys was clearly designed to avoid providing the targets of the injunction with any notice of this action until after the trial court had issued

a final order, thereby eliminating the chance that any opposition to the requested relief would be heard. The State was successful. These stealth procedures resulted in proceedings that were *ex parte* from beginning to end and concluded, quite predictably, in a default judgment.

The events leading to the issuance of a permanent injunction by default were set in motion on December 29, 2004. That day Officer Gore served Billy Wolfington with notice that, on January 3, 2005, the State would be seeking an order to show cause ("OSC") in connection with its request for a preliminary injunction. CT 835.[1] Wolfington told Gore that "he would not be appearing." CT 564. Gore also supposedly told Wolfington that Gore was looking for "any other Broderick Boys who would want to appear." CT 564. Nevertheless, when, some twenty minutes later, Officers Gore and Villanueva encountered two other alleged Broderick Boys, neither officer made any attempt to serve them or tell them of the OSC hearing. *See* CT 564.

The next day, the State filed its complaint, application for an OSC, and its papers in support of its request for a preliminary injunction. CT 1, 10, 177. The State's memorandum of points and authorities avers that "there are over 350 documented members of the Broderick Boys." CT 181; *see also* CT 67. Its supporting declarations identify 51 different individuals

[1] Gore's proof of service was not actually signed until October 20, 2005, when the State submitted it in connection with the briefing on appellants' motion to set aside. CT 835.

by name. *See generally* CT 58-176. The complaint also refers by name to ten of those 51 individuals. CT 2. However, the complaint names *only a single defendant*, the Broderick Boys, and Does 1 through 400, whose identities the State claimed "are presently unknown." CT 2.

The OSC was entered on January 3, 2005, apparently without a hearing. CT 901 (showing hearing on OSC vacated). As part of its application for the OSC, the State had requested an order allowing it to serve the Broderick Boys as an unincorporated association under Corporations Code section 24007. CT 12. Under certain circumstances, section 24007 allows service "by delivery of a copy of the process to one *or more* of the association's members designated in the order and by mailing a copy of the process to the association at its last known address." *Id.* (emphasis added). There is no indication, however, that the trial court was aware that the State planned to serve only Wolfington. Accordingly, the trial court issued an OSC setting a hearing on the preliminary injunction motion for January 24, 2005 and requiring "personal service [of the complaint, summons, OSC, and plaintiff's points and authorities and evidence] on any one or more of the following [ten] designated members of the Broderick Boys . . . ." CT 215-16. Once again, the State served only Wolfington. CT 218.

On January 16, 2005, the Sacramento Bee ran an article quoting Deputy District Attorney Jeff Reisig and West Sacramento Police Officer

Villanueva in detail about the alleged problems created by the Broderick Boys. Yolo County District Attorney Henderson is also quoted. Not one of them, however, is reported as mentioning that the State was seeking a gang injunction or that a hearing on the preliminary injunction had been set for January 24, 2005. CT 293, 298-300. Indeed, no indication of the State's plans to obtain an injunction against the Broderick Boys appeared in the press until *after* the State had obtained the default permanent injunction. CT 293, 295-96; 279-80.

On January 24, 2005, the court granted the State's unopposed motion for a preliminary injunction. CT 227, 220. Although it appears that the trial court inquired about service of the papers in the case, the record does not reveal what information was provided to the trial court other than that Officer Gore had served the papers. *See* CT 227. We therefore do not know whether the court was informed that, while Wolfington had previously stated that he would not appear at the OSC hearing, the *only* person served with the summons, complaint, and notice of the preliminary injunction was none other than Wolfington.

Although we must presume that the State sought a preliminary injunction because there was some urgency in the matter, there is nothing in the record indicating that it was ever served on anyone, including Wolfington, the Broderick Boy's supposed representative. Instead the State waited quietly during the remaining 10 days within which the Broderick

Boys might interpose a response to the complaint (*see* CT 217) or within which one or more of the 350 individuals targeted by the injunction might move to intervene. Since no one but Wolfington had been given notice of the proceedings, the pendency of the litigation remained unknown in the community.

On February 3, 2005, one day after the time to respond to the complaint had expired, the State obtained the entry of the Broderick Boys' default and a default judgment granting the State a permanent injunction. CT 228, 231. It does not appear from the record that there was any sort of hearing at the time the trial court signed the default judgment granting the permanent injunction. The judgment recites only that "default was duly entered against defendant Broderick Boys . . . ." CT 233. It seems unlikely, then, that the court had any opportunity to inquire as to the adequacy of service or would have any reason to know that the preliminary injunction had gone unserved. Within less than a week, the State began serving the permanent injunction. *See e.g.*, CT 262, 266, 270, 274. Then, and only then, did appellants first learn of these proceedings. CT 263, 266, 271, 274. On February 10, 2005, the day after a number of individuals had been served, the State issued a press release announcing the injunction. CT 293, 295-96.

The Terms of the Injunction

The injunction covers close to a 3 square mile area of West Sacramento (CT 211), including the homes of appellants and many of its other targets. CT 79, 262, 265, 269, 273. While its restrictions resemble conditions of probation or parole, they have not been triggered by a criminal conviction or even an arrest. They have been imposed because the police have decided that a particular individual is a Broderick Boy. Moreover, unlike conditions of probation or parole, the restrictions are permanent; the injunction includes no termination date or termination procedure.

The impact of the injunction on the day-to-day lives of its targets cannot be overestimated. For example, it imposes a 10:00 p.m. to dawn curfew. CT 234. Although the curfew has exceptions, they do not include being out past 10:00 p.m. in order to pick up a family member who does not drive. *Id.* Thus appellant Edwards was stopped and cited for contempt when he picked up his wife, who works the late shift and does not drive. CT 270-71.

The injunction also prohibits being "anywhere in public view or anyplace accessible to the public" with any known member of the Broderick Boys. CT 233. There is no workplace exception; there is no public transit exception. Moreover, as noted, many of those served with the injunction live within the "Safety Zone." Because other members of one's

extended family may also be served with the injunction, family gatherings outside the home or a church are essentially forbidden.

Even core First Amendment activities are affected. There have been two community demonstrations against the injunction in West Sacramento since its issuance. Immediately before the first one, the District Attorney was quoted as saying that anyone served with the injunction would be arrested for attending. CT 285, 287-88. Since those two demonstrations, there has also been a community protest at City Hall against police brutality. CT 285, 290-91. Because it occurred within the "Safety Zone," people served with this injunction could not attend. *Id.*

Nor may anyone served with the injunction be anywhere in public or public view where alcohol is being consumed, thus making the local pizza parlor off limits when taking the Little League team out after a game. CT 234. There is no exception for attending a family wedding or college graduation party at a community center, or just a simple Fourth of July barbecue in the park. Attendance at occasions that others take for granted is simply forbidden as long as any alcohol is present or if, as noted above, a cousin, brother, sister, aunt or uncle has also been served with the injunction and may be in attendance.

Despite its draconian terms, the injunction provides no criteria for determining who is a Broderick Boy and hence is subject to its probation-like restrictions. The record is utterly silent as to the criteria used by the

State in determining that the 350 individuals targeted by the injunction are Broderick Boys. Because the State named no individual defendants, and because it pursued a course of action calculated to lead to the entry of a default judgment, the trial court never considered whether the membership criteria being used by the police are consonant with the definition of a gang member for purposes of a civil gang injunction. *See People v. Englebrecht*, 88 Cal. App. 4th at 1261. Thus, this injunction gives West Sacramento law enforcement officials a roving and blank warrant to serve the injunction, *in their sole, unfettered discretion*, on whomever they choose.

The Trial Court's Ruling

After being served with the injunction, appellants filed a motion pursuant to Code of Civil Procedure section 473(d) to set aside the default judgment granting the permanent injunction on the ground that it is void. The motion argued that service on a single gang member did not provide the notice required by the Due Process Clause, nor did it comply with the Corporations Code provision under which service was supposedly effected.

On November 22, 2005, the trial court denied the motion, primarily on grounds of standing. Despite the fact that the State has served the injunction on all four appellants—and instituted contempt proceedings against one of them—the court reasoned that, because appellants "are not parties to the action and do not purport to be authorized representatives of

the sole defendant Broderick Boys[,]" they lack standing to challenge the validity of the injunction. CT 874. The court further held that service of an injunction "provides no limitations on the actions of the person served" if that person is not a member of the Broderick Boys. CT 874. Accordingly, regardless of whether the injunction is void for having been issued in violation of the Due Process Clause and the Corporations Code, in the trial court's view, those who dispute the State's assertion that they are members of the Broderick Boys are left with only unpalatable choices: they can abide by the injunction's harsh restrictions, they can disregard the injunction at their peril, or they can seek a judicial determination solely on the gang membership issue. CT 874. On January 11, 2006, appellants filed their notice of appeal.

SUMMARY OF ARGUMENT

There is no case or judicial precedent holding that service on and notice to a single gang member, occupying no position of leadership or authority in the gang, can confer jurisdiction over the gang and its 350 alleged members. The skeletal service and notice relied upon by the State here is extraordinary and unprecedented. It is unlike that followed in any other gang injunction case of which appellants are aware.

The State's conduct here had a predictable and intended result—the prosecutor was able to secure a permanent injunction in thirty-five days

with no opposition. Without any notice, any adversarial proceeding of any kind, any chance to contest the evidence submitted by the State, or any possibility of challenging the prosecutor's or the police's classification of any one person as a "validated gang member," the appellants and others subject to this permanent and extremely restrictive injunction have been denied their most basic rights to due process.

"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." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *Mullane* is quite clear on this point: "[A] mere gesture is not due process. The means employed must be such as one desirous of *actually informing* the absentee might reasonably adopt to accomplish it." *Id.* at 315 (emphasis added). These requirements serve as a "constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy." *Greene v. Lindsey*, 456 U.S. 444, 455 (1982).

The means were readily at hand to provide the kind of notice that would have dramatically increased the likelihood of an adversary proceeding in this case. The ease with which the State served the

permanent injunction once it was entered is a testament to that fact. Even service by mail using the many addresses available to the State would have been a better alternative. *See Greene v. Lindsey*, *supra*. Instead the State impermissibly chose a method "substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane*, 339 U.S. at 315.

Having avoided the necessity of proving its case in a contested hearing, the State now contends that appellants' standing to raise their due process claims requires an admission of the active gang membership that it would otherwise have been the State's burden to prove by clear and convincing evidence. *See People v. Englebrecht*, 88 Cal. App. 4th 1236, 1256, 1261 (2001). This is the final irony.

The trial court's ruling on standing puts appellants in a constitutionally untenable position: they must either concede an essential element of the State's case—that they are active gang members to whom the injunction may therefore be applied—or they will be relegated to bringing an independent action in which the *only* issue they may raise is the question of the applicability of the injunction *to them*. This conclusion is erroneous both as a matter of California law, *see People v. Gonzalez*, 12 Cal. 4th 804 (1996); *In re Berry*, 68 Cal. 2d 137 (1968), and as a matter of constitutional doctrine. *See Peralta v. Heights Medical Center*, 485 U.S. 80, 87 (1988); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

The California Supreme Court's rulings in *Berry* and *Gonzalez* are dispositive. They make clear that those served with an injunction, *even though not named as parties*, have a choice in challenging the court's jurisdiction: they can ignore the injunction and raise their constitutional challenge if they are cited for contempt, *or* they may follow the course followed by appellants: they may raise their constitutional claims in the court that issued the injunction by "seeking a judicial declaration as to its jurisdictional validity." *Berry*, 68 Cal. 2d at 148; *accord Gonzalez*, 12 Cal. 4th at 818. This rule is but a more specific application of the general rule that a non-party whose interests are affected by a default judgment may move to have it set aside. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 885-86 (1978); *Skolsky v. Electronovision Prods., Inc.*, 254 Cal. App. 2d 246, 252 (1967).

The State, however, argues that if appellants will not admit gang membership, they lack standing to raise their jurisdictional challenge. Having served appellants on the basis of their asserted membership in the gang, the State is estopped from now trying to deprive appellants of the opportunity to challenge the ex parte conditions under which the injunction was issued. *Mason v. U.S. Fidelity and Guaranty Co.*, 60 Cal. App. 2d 137 (1943).

Nor was the trial court correct in ruling that appellants have a sufficient remedy in seeking a judicial determination on the sole issue of

their gang membership. Binding Supreme Court precedent holds that when a judgment is entered without affording an individual notice and an opportunity to be heard, the only constitutionally adequate remedy is to vacate that judgment and require that the proceedings begin anew. *Peralta v. Heights Medical Center*, 485 U.S. at 87; *Armstrong v. Manzo*, 380 U.S. 545 (1965). Providing some alternative in which only one of the relevant issues can be litigated is not sufficient. Only by setting aside the judgment and considering the case anew can the due process violation be remedied. *Peralta*, 485 U.S. at 87; *Armstrong*, 380 U.S. at 552.

The trial court's constricted view of standing in this case would effectively insulate the State's tactics from meaningful judicial review. By deliberately choosing to name only the gang as a defendant and then serving only a single individual with notice of the proceedings, the State all but guaranteed that the permanent injunction would be entered unopposed. The State may not then go further and argue that those whom it contends are bound by the injunction must concede a key element of the State's case—active gang membership—in order to contest the other elements as well. If the State's arguments are permitted to succeed, no sensible prosecutor would follow any course other than that followed by the State in West Sacramento. That is not, and never has been, the law.

ARGUMENT

I.

STANDARD OF REVIEW

In reviewing an order denying relief under Code of Civil Procedure section 473(d), the court exercises independent review. *Falahati v. Kondo*, 127 Cal. App. 4th 823, 828 & n.3 (2005); *see Transamerica Title Insurance Co. v. Hendrix*, 34 Cal. App. 4th 740, 741-42 (1995) (holding, as a matter of law, that plaintiff failed to comply with statutory service requirements); *see also Pavlovich v. Superior Court*, 29 Cal. 4th 262, 273 (2002) (court engages in independent review of record on question of jurisdiction when no conflict in evidence exists). In addition, because there are no disputed facts affecting the standing determination, resolution of this issue is purely a question of law, subject to this Court's *de novo* review.

II.

APPELLANTS HAVE STANDING TO ARGUE THAT THE INJUNCTION WAS ENTERED WITHOUT ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD

In the trial court's view, appellants' refusal to admit membership in, and come into court as the representatives of, the Broderick Boys deprives them of standing to raise the jurisdictional defect that led to the default judgment granting the permanent injunction in this case. Employing

reasoning worthy of Joseph Heller,[2] the trial court insists that unless appellants concede an element of the State's case, they may not assert any defect in the injunction or its issuance. The fact that the injunction has an on-going negative impact on appellants' daily lives counts for nothing. Rather, their only remedy is to raise their constitutional claims if and when they are cited for contempt, or alternatively, to bring an action in the superior court seeking a determination that the injunction does not apply to them on the single issue of gang membership. CT 874.

The trial court was wrong on both counts. The California Supreme Court has made clear that unnamed parties served with an injunction may challenge its constitutionality through either of two courses of action. They may proceed cautiously and obey the injunction while seeking a judicial determination of its jurisdictional validity, or they may follow a riskier course and wait until they are cited for contempt, raising their constitutional arguments as a defense in the contempt proceeding. However, the choice is one that must be left to the person served with the injunction. *People v. Gonzalez*, 12 Cal. 4th 804 (1996); *In re Berry*, 68 Cal. 2d 137 (1968).

Nor may appellants be required to proceed at their peril, contesting only the hotly disputed issue of gang membership in a forum in which they may be at a significant procedural disadvantage, when the injunction, itself, may be entirely void as having been entered without jurisdiction.

[2] *See* Joseph Heller, Catch 22 (1996).

Armstrong v. Manzo, 380 U.S. 545 (1965). Having served appellants on the basis of their asserted membership in the gang, the State is estopped from claiming that appellants lack standing in this proceeding unless they admit such membership. *See Mason v. U.S. Fidelity and Guaranty Co.*, 60 Cal. App. 2d 137 (1943).

A. Those Served With An Injunction May Move To Have It Set Aside As Void Regardless Of Whether They Are Named Defendants In The Action.

Settled practice, as outlined by two California Supreme Court decisions, permits any individual served with an injunction to seek to have it set aside as void, regardless of whether that individual was a named defendant in the action. *See People v. Gonzalez*, 12 Cal. 4th 804 (1996); *In re Berry*, 68 Cal. 2d 137 (1968). Those cases apply here.

In re Berry, supra, is the seminal case. There, defendants in a contempt proceeding claimed they could challenge the constitutionality of the underlying temporary restraining order via habeas corpus. Like appellants here, petitioners in *Berry* were not named defendants in the action, although they had been served with the injunction. Moreover, like appellants, petitioners claimed that they were neither members of, nor acting in concert with, the labor union that was the subject of the TRO. *See id.* at 141, 145. The County argued that petitioners could not raise their

claims via the contempt proceeding because they had failed to raise the constitutional defect with the issuing court. 68 Cal. 2d at 146, 148.

Had the *Berry* petitioners lacked standing to move to vacate the underlying injunction, that would have been the end of the County's argument that petitioners should have sought relief from the court that issued the injunction. However, the Supreme Court expressed no doubt that, *as persons affected by the injunction*, petitioners would have been entitled to move to vacate the injunction in the issuing court. Instead, the Supreme Court held that, while this remedy was available, it was not one that the defendants were required to pursue:

> In this state *a person affected by an injunctive order* has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. (See *Mason v. United States Fid. & Guar Co.* (1943) 60 Cal.App.2d 590-591 [141 P.2d 475].) On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience.

68 Cal. 2d at 148-49 (emphasis added).

In short, the error in the County's argument was not that petitioners lacked standing to bring a motion to vacate. The error in the argument was

that, while that course was open to petitioners, they were not required to pursue it.

People v. Gonzalez, 12 Cal. 4th 804, applies *Berry* in the specific context of a gang injunction. The precise issue in *Gonzalez* was whether the defendant could raise a jurisdictional defect in an injunction issued by the superior court, when charged with contempt in municipal court. As here, Gonzalez was not a named party in the underlying proceeding. *Id.* at 809.

In holding that Gonzalez could challenge the validity of the injunction through the contempt proceeding, the Supreme Court *twice* emphasizes that Gonzalez, *as a person subject to the injunction*, had the choice of raising his constitutional challenge either in the contempt proceeding or by raising the jurisdictional defect directly in the issuing court. Thus the Court not only approvingly quotes the language from *Berry* quoted above, 12 Cal. 4th at 818, it makes the same point yet again:

> [O]ut of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that *a person subject to a court's injunction* may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court.

Id. (emphasis added).

Both *Berry* and *Gonzalez* demonstrate that unnamed parties served with an injunction need not wait until they are cited for contempt in order to challenge the issuing court's jurisdiction to enter the injunction in question. Whether the challenge to the injunction rests on a First Amendment defect, as in *Berry*, on a claim that the injunction is vague or overbroad, as in *Gonzalez*, or on a claim, as here, that the injunction was issued in violation of basic precepts of due process, anyone served with the injunction, and therefore presumptively subject to its terms, has standing to challenge the constitutionality of its issuance through a motion to vacate. *See also, Tory v. Cochran*, 544 U.S. 734, ___, 125 S. Ct. 2108, 2111 (2005) (because, under California law "a person cannot definitively know whether an injunction is legally void until a court has ruled that it is," the existence of an injunction, even one believed to be void, continues to impair the rights of those assertedly subject to it); *United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 907 n.3 (1975) ("our intention in *Berry* was to afford persons affected by such orders a choice of alternatives, not to force those persons into disobedience of suspect injunctions in attempting to prolong the controversy so as to circumvent potential mootness barriers.").

These cases are but particular examples of the more general rule that relief from a judgment, including a default judgment, is not limited to named parties to the action. Where, as here, the interests of unnamed parties are directly and importantly affected by a default judgment, those

parties may move to have it set aside. *See, e.g., Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 885-86 (1978); *Skolsky v. Electronovision Prods., Inc.*, 254 Cal. App. 2d 246, 252 (1967); *In re Guardianship of Levy*, 137 Cal. App. 2d 237, 244-45 (1955); *see also County of Alameda v. Carleson*, 5 Cal. 3d 730, 736-37 (1971) (one whose rights or interests are injuriously affected by a judgment may make himself a party by moving to set aside the judgment); *Eggert v. Pacific States Savings & Loan*, 20 Cal. 2d 199, 201 (1942) (same); *Elliott v. Superior Court*, 144 Cal. 501, 509 (1904) (same); *Plaza Hollister Ltd. v. County of San Benito*, 72 Cal. App. 4th 1, 15-16 (1999) (same).

Skolsky, *cited with approval in Clemmer*, *supra*, 22 Cal. 3d at 885, is illustrative. There Magna had an interest in certain property held by defendant Electronovision, but was not a party to the action. In granting Magna's motion to set aside the default, the court was confronted with the precise issue presented here: whether a non-party to an action may move to set aside a default under Code of Civil Procedure section 473. *Skolsky*, 254 Cal. App. 2d at 248. The *Skolsky* court held that Magna had standing, regardless of whether it was a party, so long as it had a sufficient interest in the underlying action. *Id.* at 248, 250 (citing *Elliott v. Superior Court*, 144 Cal. 501, 509 (1904)). Indeed, as the *Skolsky* court noted, "Even though we assume that plaintiff proceeded in good faith, and in ignorance of Magna's interest as financial backer of the release bond, the effect was to deprive

Magna of its property without notice or hearing." *Id.* at 252; *see also Plaza Hollister Ltd v. San Benito*, 72 Cal. App. at 15-16 (county assessor, who was not party to action, had standing to move to vacate judgment under court's inherent authority to set aside void judgments, because his interests were affected by the judgment).

B. The State's Decision To Serve Appellants With The Injunction Estops It From Claiming That Appellants Lack Standing To Pursue Their Due Process Challenge.

Although it adamantly insists that appellants are active gang members (*see* CT 552), has served them with the injunction based on that contention, and even instituted contempt charges against one of them, the State argued, and the trial court held, that, absent an admission of gang membership, appellants may not move to set aside the injunction. That is not the law. Indeed, just such reasoning was rejected by the court of appeal in *Mason v. U.S. Fidelity and Guaranty Co.*, 60 Cal. App. 2d 137 (1943), *cited with approval in Berry*, 68 Cal. 2d at 149.

In *Mason*, an action for attorneys fees on a bond securing a TRO, the bonding company claimed that because the TRO was void on its face, Mason need never have incurred the fees required to dissolve it; he simply should have ignored it. The court quite properly rejected that argument holding that the bonding company was estopped from relying on the

asserted invalidity of the bond it had vouched for. *Mason*, 60 Cal. App. 2d at 591. As the court pointed out:

> If this theory were sound it would require each person served with a restraining order to make a quasi judicial determination as to the validity of the order. If it were void he would have to ignore it and could recover attorney's fees expended in securing its dissolution only if it were not void. There is no logical or legal reason why such a burden should be placed on the innocent person served with the restraining order.

Id. at 590.

Just as the bonding company's willingness to underwrite the validity of the injunction in *Mason* estopped it from arguing that Mason should not have incurred attorneys' fees in dissolving that injunction, so the State's actions here estop it from attacking appellants standing to pursue a motion to vacate. Simply put, the State may not simultaneously insist that appellants are bound by, and potentially subject to contempt proceedings under, the injunction served on them, while denying that appellants are suffering any injury that entitles them to challenge the jurisdictional foundations of that injunction.

C. Appellants' May Not Be Required To Seek A Judicial Resolution On The Issue Of Gang Membership As A Precondition To Moving To Set Aside The Injunction.

The trial court suggested that appellants' remedy in this case was to seek a judicial determination on the issue of gang membership. *See* CT 874. Under the trial court's reasoning, they could move to vacate the

injunction on due process grounds, if at all, only after an adverse ruling on the membership question.

As the California Supreme Court pointed out almost 65 years ago, "[a]n independent action in equity would be almost as dilatory and cumbersome [as requiring defendant to proceed via contempt]. Under such circumstances, a motion to vacate the decree is a proper procedure . . . ." *Sontag Chain Stores v. Superior Court*, 18 Cal. 2d 92, 96 (1941). Even more to the point, the United States Supreme Court has made clear that the proceeding suggested by the trial court is no substitute for the constitutionally required remedy of setting aside the judgment as void and requiring adequate notice so that there can be a full and fair adversary hearing on whether there are grounds for the issuance of the injunction. *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

Had appellants been named and served as defendants in this case, or had there been sufficient notice to allow them to intervene prior to its issuance, the State would have born the burden of proving by clear and convincing evidence that the issuance of the injunction was warranted, as well as that each of the appellants is, in fact, a member of the Broderick Boys. *See People v. Englebrecht*, 88 Cal. App. 4th at 1256. The proceeding suggested by the trial court completely eliminates the possibility of consideration of the first issue. Yet, if there was no factual

basis for issuing the injunction, it is irrelevant whether any given individual, including appellants, is a member of the Broderick Boys.

Moreover, requiring appellants to bring a separate action on the issue of their gang membership may very well improperly shift the burden of proof to appellants on the issue of gang membership. Indeed, if appellants are required to initiate judicial proceedings on this issue, it is quite possible that the State will argue that appellants, having instituted the action, bear the burden of proving that they are not members of the Broderick Boys.

The United States Supreme Court's decisions in *Armstrong v. Manzo*, 380 U.S. 545 (1965) and *Peralta v. Heights Medical Center*, 485 U.S. 80 (1988), speak directly to these points. They hold that where an individual is denied adequate notice and, hence, an opportunity to be heard, the *only* constitutionally adequate remedy is to "restore[] the petitioner to the position he would have occupied had due process of law been accorded him in the first place." *Armstrong*, 380 U.S. at 552; *Peralta*, 485 U.S. at 86-87 (holding that default judgment entered without notice and opportunity to be heard must be set aside even where, as in that case, defendant has no meritorious defense). No alternative remedy is sufficient. It is precisely because burdens of proof may change, or opportunities to assert one's rights in other ways are lost, that the constitution requires "wip[ing] the slate clean" by setting aside the earlier judgment and

considering the case anew. *Armstrong*, 380 U.S. at 551-52; *Peralta*, 485 U.S. at 85; *see also Falahati v. Kondo*, 127 Cal. App. 4th 823, 832-33 (2005) ("A deprivation of due process is no less a deprivation merely because the person deprived has a remedy. Kondo had a statutory and due process right to respond to the complaint *before* a default was entered. Kondo was denied this right and no post hoc remedy can change that fact.").

Unless and until there is an adjudication on appellants' due process claim, appellants may not be required to address the issue of their alleged membership in the Broderick Boys. *Cf. San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 7 (1979) ("Similarly it is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies were improper because of the district's failure to exhaust its administrative remedies under the EERA."). Because the default judgment granting the permanent injunction directly and immediately affects the rights of all who are served with it, the State may not seek to insulate the injunction from meaningful review by requiring those served to either admit an element of the State's case or bear the burden of instituting a proceeding which, by its very nature, is inadequate because it would address only the issue of gang membership and not the underlying issue of the State's ability to prove its entitlement to the

injunction. Appellants are entitled to have the slate wiped clean so that the State can be required to prove each element of its case.

III.
THE JUDGMENT MUST BE SET ASIDE AS VOID BECAUSE IT WAS ENTERED WITHOUT PROVIDING ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD

An order or judgment, including a default judgment, entered without affording a party due process of law is void. *Falahati v. Kondo*, 127 Cal. App. 4th 823, 829 (2005); s*ee People v. Gonzalez*, 12 Cal. 4th 804, 817 (1996) (constitutionally invalid orders are void); *In re Berry*, 68 Cal. 2d 137 (1968) (same). Where service is insufficient, the court has "a legal duty, not merely discretionary power, to vacate the default it ha[s] erroneously entered." *Transamerica Title Insurance Co. v. Hendrix*, 34 Cal. App. 4th 740, 746 (1995).

"For service to be proper, it must not only comply with the relevant rule, but must comport with due process by providing '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.'" *LSJ Investment Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 323 (6th Cir. 1999) (quoting *Whisman v. Robbins*, 712 F. Supp. 632, 638 (S.D. Ohio 1988)); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (service that complied with New York statute did not confer personal jurisdiction because it did not provide adequate notice).

When the adequacy of service is challenged, the plaintiff bears the burden of proving that it has met the necessary statutory and constitutional requirements. *Bolkiah v. Superior Court*, 74 Cal. App. 4th 984, 991-92 (1999); *Dill v. Berquist*, 24 Cal App. 4th 1426, 1441 (1994) (plaintiff bears burden of showing adequate service of process when defendant seeks relief pursuant to CCP § 473(d)); *see also Pavlovich v. Superior Court*, 29 Cal. 4th 262, 273 (2002) (plaintiff bears burden of proof on issue of personal jurisdiction where issue is minimum contacts).

A. Due Process Requires That A Plaintiff Employ A Method of Service Reasonably Calculated To Provide Adequate Notice To The Defendant.

> 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.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (emphasis added).

The *Mullane* notice requirement has been repeatedly affirmed as a due process standard by many federal and California courts. *See, e.g.*, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Dusenbery v. United States*, 534 U.S. 161, 167-68 (2002); *People v. Swink*, 150 Cal. App. 3d 1076, 1080 (1984); *Albrecht v. El Dorado Superior Court*, 132 Cal. App. 3d 612 (1982). 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, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953) (emphasis added); *accord*, *Swink*, 150 Cal. App. 3d at 1080 ("Although the fundamental requisite of due process of law is the opportunity to be heard, this right is meaningless unless one knows the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). It stands as a "constitutionally required assurance that the State has not allowed its power to be invoked against a person who has not had opportunity to present a defense despite a continuing interest in the resolution of the controversy." *Greene v. Lindsey*, 456 U.S. 444, 455 (1982).

The notice that the Due Process Clause requires is not a "mere gesture." *Mullane*, 339 U.S. at 315. "The means employed must be such as *one desirous of actually informing the absentee* might reasonably adopt to accomplish it." *Id.* (emphasis added). As the Supreme Court subsequently explained in *Greene v. Lindsey*, 456 US. at 451, "In arriving at the constitutional assessment, we look to the realities of the case before us."

The course of action pursued by the State here is hardly that of a party "desirous of actually informing" either the Broderick Boys, or its alleged members, that it intended to obtain an injunction that would

radically alter the fabric of their daily lives. The hard reality of this case is that the State, 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" (*Mullane*, 339 U.S. at 314), instead pursued a course of action that almost guaranteed that the injunction in this case would be granted unopposed and by default.

First, despite the fact that the State's moving papers identified 51 individuals by name (*See generally* CT 58-176), the State sought and obtained an order allowing service "on any one or more" of only the ten individuals mentioned by name in the complaint. CT 193, 215-16. Then, although Wolfington had already informed the State that he would not appear at the OSC hearing, it was Wolfington, and Wolfington *alone*, whom the State chose to serve with the summons, complaint, and preliminary injunction papers.

At the hearing on the motion for the preliminary injunction, it appears that the trial court made some inquiry as to whether service had been made, most likely because no one had appeared to defend. CT 227. The record is silent as to what representations Officer Gore and the District Attorney made other than that the papers had been served and the recitation in the Order Granting Preliminary Injunction—a document prepared by the District Attorney's office—that "this Court finds by clear and convincing

evidence that service is proper under the circumstances, ..." CT 221, 226. However, the shoddy manner in which the State purportedly provided notice of the proceedings to the Broderick Boys was anything but proper under the circumstances.

1. The State's Decision To Name Only The Broderick Boys, And To Then Serve Only Wolfington, Made A Default Judgment In This Case An Inevitability.

The complaint in this case identified ten individuals as members of the gang "responsible in some manner for the nuisance referred to in this complaint." CT 2. Forty-one other individuals are identified in the State's supporting papers. *See generally* CT 58-176. The State claimed that, altogether, there are over 350 documented members of the Broderick Boys (CT 181), and the charging allegations of the complaint repeatedly refer to both the collective and individual actions of the "defendants." *See e.g.*, CT 3 ("Defendants, collectively, individually, and in concert"); *see generally* CT 3-6. Nevertheless, the State did not sue even a single individual by name, despite naming 400 Doe defendants, "the true identities of whom are presently unknown to Plaintiff" but each of whom "Plaintiff is informed and believes . . . is a member of Broderick Boys [and] is responsible in some manner for the nuisance referred to in this complaint . . ." CT 2. Although the State stated its intent to amend the complaint when the true names of these Doe defendants were ascertained (*id.*), instead, it dismissed

the 400 Doe defendants at the same time it sought entry of the default and default judgment in this case. CT 228-31.

Despite the foregoing, the State's decision to name only the Broderick Boys as a defendant might have been less remarkable had it chosen to serve notice on a critical mass of alleged Broderick Boys, informing them of its intention to seek an injunction. This Court cannot be blind to the fact that the weight of the injunction in this case falls, not on an entity, but on the more than eighty individuals whom the State has already served with the injunction, drastically altering the contours of their daily lives.[3] It is their liberty, not that of an organization, that is at stake here. They are the ones who are precluded from attending a social event or a political protest held at a public place because other individuals served with the injunction might also be present. It was Keith Edwards, not the Broderick Boys, who was charged with contempt for picking up his wife when she worked the late shift. And it is all of the individuals served with the injunction, not the Broderick Boys, who are barred from restaurants or public gatherings where alcohol is being served.

The State may not circumvent the requirements of due process through the subterfuge of claiming that the only "defendant" in this litigation is the Broderick Boys and that jurisdiction over this defendant and

[3] This figure comes from a March 23, 2005 interview given by Deputy District Attorney Jeff Reisig in the Sacramento Bee. CT 285, 288. By now the number of individuals served could be much higher.

its alleged 350 members was established by service on a single "member." The Due Process Clause requires more.

2. Wolfington's Relationship To The Broderick Boys Was Too Tenuous For Service On Him, Alone, To Constitute Notice To The Broderick Boys As An Entity.

Serving an unincorporated association by serving its purported representative does not meet due process standards unless the person served has a relationship with the association such that the notice provided to him was "reasonably calculated" to actually reach the association. *Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. 160, 166 (W.D. Pa. 1978). Here, the State submitted no evidence establishing that Wolfington's status and role within the Broderick Boys was such that service on him constituted notice to the entire entity. Mere membership in an unincorporated association is not enough. *Id.* ("service on any one of the members [of an unincorporated association of building owners and operators], without more, cannot reasonably be expected to reach the association as a whole, nor can we say that such service is reasonably calculated to do so."); *see Hanley v. Sheet Metal Workers International Ass'n*, 72 Nev. 52, 55, 293 P.2d 544, 545 (1956) ("Service of process upon associations should be such as to give reasonable assurance that notice of the institution of proceedings will promptly be conveyed to those having the responsibility of defending."); *cf. Warner Bros. Records, Inc. v. Golden West Music Sales*, 36 Cal. App. 3d 1012, 1017 (1974) (in determining whether service on agent will confer

jurisdiction over an individual named as a defendant, it must be "'highly probable' that defendant[] would receive actual notice of the service of process"); *Bailey v. Transportation-Communication Employees Union*, 45 F.R.D. 444, 447 (N.D. Miss. 1968) ("The general principle [under F.R.C. Pro. R. 4(d)(3)] is that service upon an agent must be upon a person of sufficient character and rank to make it reasonably certain that the unincorporated association will be apprised of the service made through the agent.").

The State has conceded that the Broderick Boys lacks any formal organization or structure. *See, e.g.*, CT 96, 192. It has no officers or managers, no mailing address or permanent location where members meet. CT 103, 192, 195-97. In such circumstances, it becomes particularly important to employ a manner of service that will provide the notice necessary to ensure an opportunity to contest the plaintiff's claims. *See Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) ("particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence."); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.15 (1978) (same). The State *must* choose a method of service that is "reasonably certain to inform those affected . . . ." *Mullane*, 339 U.S. at 315. Service on Wolfington failed to meet this requirement.

When the State asked leave of court to serve the papers in this action pursuant to Corporations Code section 18220,[4] it did not claim that Wolfington or *any* of the other nine individuals designated for potential service occupied any position of leadership or control in the Broderick Boys. *See generally* CT 10-13; 107-15; 128-29; 178-212. Instead, the State told the trial court that "serving the gang by serving *one* member" would result in actual notice to the Broderick Boys because the Broderick Boys keep each other informed. CT 193 (emphasis added). What the State did *not* tell the trial court was that the individual they intended to serve was none other than Wolfington—the very same person who had earlier been served with notice of the OSC hearing and who had flatly told Officers Gore and Villanueva that he would not appear. CT 564.[5]

The State may not rely on notice by word of mouth. "It may be that news of the summons and complaint would spread among some of the [Broderick Boys'] members; however, due process requirements cannot be met by notice through hearsay or rumor. Some more direct nexus between

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[4] When the State filed its application for the OSC on December 30, 2004, Corporations Code section 24007 was the relevant statute. Section 24007 was superseded by section 18220, which took effect on January 1, 2005, and therefore was the governing statute when the court issued the OSC on Jan. 3, 2005.

[5] Those conversations apparently were not revealed until the State submitted Officer Villanueva's supplemental declaration in response to appellants' motion to set aside the judgment granting the permanent injunction. *See* CT 564.

service and notice is required." *Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. at 166. In short, the State could not rely, as it did, on a manner of service that was "substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane*, 339 U.S. at 315; *see also Greene v. Lindsey*, 456 U.S. at 453 (posting eviction notice on tenants' doors did not satisfy minimum standards of due process because notices typically torn down before tenant returned home).

3. The State Easily Could Have Provided Notice Of These Proceedings To A Large Enough Number Of Individuals To Make It Likely That The Injunction Would Not Be Entered By Default.

The State attempted to justify serving only a single member of the Broderick Boys as "the only practical way to effect service on a street gang." CT 191. That assertion was wrong for two reasons. First, the ease with which the State did, in fact, serve the injunction on numerous individuals within days of its issuance is irrefutable evidence that giving notice to a larger number of individuals could have been, and when it suited the State's purposes was, easily accomplished. Second, as discussed in the next section, the practice followed by other jurisdictions in serving notice of pending applications for civil gang injunctions demonstrates how far from the norm the State strayed in this case.

There can be no question that, once the trial court issued the default judgment granting the permanent injunction, the State wasted no time and

had no difficulty in serving numerous individuals. Appellants Velazquez, Edwards, and Swearingen were all personally served on February 9, 2005. CT 263, 270, 274. Appellant Juarez was served a few days later. CT 266. In addition, the "Gang Intelligence" documents attached to the Villanueva supplemental declaration indicate that Michael Hernandez and Douglas Allen were served with the injunction on February 9, 2005, and that David Sandoval was served with the injunction on February 10, 2005, all within a week of the issuance of the permanent injunction. CT 567, 568, 566.

Those same documents show that the police had addresses for Hernandez, Allen, and Sandoval. We can only presume that, at the least, the State had similar Gang Intelligence documentation on the other 48 individuals discussed in its moving papers, if not on all 350 individuals that Officer Villanueva asserted were members of the Broderick Boys. CT 67. Similarly, although the police contacted parole and probation officers for addresses of targeted persons *after* the permanent injunction was issued *(see, e..g.,* CT 274), it failed to make any similar efforts earlier, even after no one appeared at the hearing on the motion for the preliminary injunction. While the State may not have been required to knock on all 350 doors, it was certainly required to knock on more than one.

At a bare minimum, the State had a ready alternative to personal service. It could have mailed notice to the potential targets of the injunction using the last known addresses from its Gang Intelligence

documents. Indeed, before filing their motion to set aside the default judgment, appellants were able to locate the addresses of 24 of the 51 individuals mentioned in the State's papers in support of its motion for a preliminary injunction. Appellants used the Accurint database, the very same database that the State's investigator consulted in searching for an address for the Broderick Boys. *Compare* CT 277-78 *with* CT 196. "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions v. Adams*, 462 U.S. at 800; *accord Greene v. Lindsey*, 456 U.S. at 455 (1982); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956).

The ease with which the permanent injunction was served once it was issued leaves little doubt that the State's decision to serve only Wolfington was nothing more than a "mere gesture." *Mullane*, 339 U.S. at 315. The State's deliberate decision to employ a manner of service that was "substantially less likely to bring home notice than other of the feasible and customary substitutes" (*Mullane*, 339 U.S. at 315) requires that this Court reverse the trial court and set aside the default judgment granting the permanent injunction.

4. The State's Actions Here Stand In Marked Contrast To The Practice Followed In Other Gang Injunction Cases.

The State assured the trial court that "[s]erving a street gang by serving *a member* has become the routine method of service on [sic] gang injunction cases." CT 191 (emphasis added); *see also* CT 201 ("It is the well established practice to allow service on the gang by service on one or more gang members."). The State's decision in this case—to name only the Broderick Boys without naming any individual defendants *and then to serve only one lone member*—constitutes a glaring departure from the practices of other City Attorneys and District Attorneys across the state in similar situations.

In all the published decisions, as well as numerous other cases filed across the state, prosecutors typically named as defendants the individual gang members sought to be enjoined. *See People v. Acuna*, 14 Cal. 4th 1090, 1113 (1997) (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); *People v. Englebrecht*, 88 Cal. App. 4th at 1242 (28 individuals named as defendants); *see also 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) (CT

690-92, 709-12);[6] *People v. Varrio Lamparas Primera (Westside) and Southside*, Santa Barbara Superior Ct. Case No. 1148758 (2005) (two gangs named as defendants; more than 30 individuals served as "parties") (CT 714; RJN, Ex. A); *People v. Varrio Posole Locos et al.*, San Diego Superior Ct. Case No. N76652 (1997) (gang and 28 individuals named as defendants; at least 26 individuals served) (CT 733, 746-781); *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 (CT 864-66, 869).

Even in the cases that the State gave as examples of how courts in other jurisdictions have proceeded (*see* CT 191-92), the plaintiff served more than one lone individual, although only the gang was named as a defendant. For example, in *People v. Krazy Ass Mexicans aka KAM*, L.A. Superior Ct. Case No. BC282629 (2002), seven individuals identified by name in the complaint were served with process. CT 598-626. Each of those interested parties was read a statement and provided a written explanation of the upcoming proceedings. *Id.* Similarly, in *People v. Canoga Park Alabama*, L.A. Superior Ct. Case No. BC267153 (2002), the plaintiff served seven of the gang members identified in the complaint; an

[6] The trial court refused to take judicial notice of these documents, ruling that they were irrelevant in light of its ruling on the issue of standing. CT 874. Appellants respectfully request that this Court take judicial notice of this information, found at pages 594-782 of the Clerk's Transcript. *See* Request for Judicial Notice on Appeal ("RJN"), served and filed herewith.

additional four members were served with the preliminary injunction after it was issued. CT 628-85. In the only other case appellants discovered 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 service issue and ordered the plaintiff to serve the identified gang members by personal service and *also* serve the gang by publication. CT 687-88.

The State's decision to serve only Wolfington was utterly incompatible with the demands of due process. Nothing in the practices of other jurisdictions can begin to excuse the State's determined effort to ensure that it would obtain its permanent injunction unhindered by the rigors of an adversary proceeding.

5. The Lack Of An Adversary Hearing Undermines The Integrity Of The Proceedings That Lead To The Issuance Of The Permanent Injunction.

Both the United States and the California Supreme Courts have warned about the dangers of allowing *ex parte* determinations to take the place of 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); *accord United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 907-08 (1975).

Had there been adversary proceedings on the need for a preliminary and permanent injunction, the State would have been required to prove *each element* of its case by clear and convincing evidence. *People v. Englebrecht*, 88 Cal. App. 4th at 1256. The *Englebrecht* court was quite emphatic in explaining that this extraordinary burden of proof was justified because the restrictions imposed on day-to-day activities are "extraordinary." *Id.* When the court hears from only the State, however, the clear and convincing standard becomes little more than a rubber stamp for the State's version of the facts.

The first thing the State would have been required to prove by clear and convincing evidence is that the Broderick Boys and its members are creating a "significant" public nuisance *and* that *each* of the restrictions imposed by the injunction are justified by public safety needs. *See People v. Acuna*, 14 Cal. at 1105, 1125. Had the State failed to make its case on

these first two elements, the issue of whether any particular individual is or is not a member of the Broderick Boys would have been irrelevant. Because no one knew of the pendency of these proceedings, however, the State's assertions on these crucial points went unchallenged.

The clear and convincing evidence standard also applies to the issue of gang membership. *See Englebrecht*, 88 Cal. App. 4th at 1256, 1258. The *Englebrecht* court gave careful consideration to the question of defining gang membership for purposes of a civil gang injunction. It specifically rejected the State's argument that "the criteria established by the Gang Task Force amounts to a definition of gang membership." *Id.* at 1261. Instead it held that in order to be bound by the injunction one must be an "active" gang member whose participation "must be more than nominal, passive, inactive or purely technical." *Id.*

The State in this case avoided having to meet the *Englebrecht* standard on the definition of gang membership by not naming any individual defendants. Instead, it obtained a permanent injunction by default that nowhere sets out the standard to be used in determining whether an individual is an "active" gang member whose conduct falls within the *Englebrecht* standard. *See* CT 232-38. That left the police with a roving commission to serve the injunction based on vague criteria that have never been subject to judicial scrutiny.

If allowed to stand, the advantages of the strategy adopted by the State in this case will not be lost on other prosecutors or city attorneys. Rather than going to the effort, expense, and risk of the contested hearing that would result from providing adequate notice, municipalities seeking civil gang injunctions will follow the West Sacramento model: They will name only the gang as a defendant and then will serve one lone member with the summons, complaint, and papers in support of the request for the preliminary injunction. As long as the case is not publicized and the preliminary injunction is not served, with luck the entire proceeding can be completed and a permanent gang injunction can be obtained by default within little more than 30 days from start to finish. Once obtained, moreover, the injunction will be immune from attack except by those willing to admit gang membership as the price of challenging the State's tactics.

B. The State's Attempted Service On The Broderick Boys Did Not Meet The Standards Of The Code Of Civil Procedure Or Of The Corporations Code.

Wholly apart from the State's failure to provide the notice and opportunity to be heard demanded by the Due Process Clause, the State's decision to serve only a single individual failed to comport with the requirements of Code of Civil Procedure section 416.40(c) and Corporations Code section 18220. Where the manner of service is

improper, the trial court has "a legal duty, not merely discretionary power, to vacate the default it ha[s] erroneously entered." *Transamerica Title Insurance Co. v. Hendrix*, 34 Cal. App. 4th 740, 746 (1995).

1. The State Has Not Met Its Burden of Proving That The Broderick Boys Is An Unincorporated Association Capable of Being Sued As An Entity.

The Corporations Code defines an unincorporated association as "an unincorporated group of two or more persons joined by mutual consent *for a common lawful purpose*, whether organized for profit or not." Corp. Code section 18035(a) (emphasis added). Given that the State claims, and the court—based on hearing only one side of the story—found, that the Broderick Boys is a "criminal street gang" within the meaning of Penal Code section 186.22, it seems doubtful that the State can claim that the Broderick Boys is a group operating "for a common lawful purpose."[7]

Moreover not every group of individuals that associates together may be considered an unincorporated association. Rather, the group must have some system of organization and means of functioning as a group, such that "fairness requires the group be recognized as a legal entity." *Barr*

[7] The current definition of an unincorporated association went into effect on January 1, 2005. *See* Corp. Code § 18035, *Credits*. Although former Corp. Code section 24000, from which section 18035 was drawn, does not contain the "lawful purpose" language, because the court's order respecting service was issued on January 3, 2005 (CT 213-216), and because Billy Wolfington was not served until January 3, 2005 (CT 218), section 18035 provided the operative definition of the entity on whose behalf he was purportedly served.

v. United Methodist Church, 90 Cal. App. 3d 259, 266 (1979). Although the evidence that the State provided to the trial court on this issue is scant, what evidence there is indicates that the Broderick Boys is an extremely amorphous entity with little or no structure. *See* Part III.A.2, *supra*. There is no evidence of meetings at which either the leadership or the members make decisions about how the group will conduct its affairs. The most that the State's untested allegations show is some sort of loose affiliation or identification. Where, as here, the relief sought acts not against the entity but against the individuals that the State claims are its members, it cannot be said that "fairness requires" that the Broderick Boys, as the sole defendant in this action, be treated as a legal entity.

2. Service On Billy Wolfington Did Not Meet the Requirements of Corporations Code Section 18220.

Corporations Code section 18220 speaks in terms of service on "one *or more*" members of the association being served. The italicized language is not mere surplusage. *Delaney v. Superior Court*, 50 Cal. 3d 785, 799 (1990) ("a construction that renders a word surplusage should be avoided.") Plainly the Legislature understood that, in some situations, service on a single member would be insufficient to provide notice to the association and hence would not satisfy the dictates of the Due Process Clause. This is such a case. Otherwise, for all the reasons stated in part III.A., *supra*, section 18220 would be unconstitutional as applied in this case.

Section 18220 was designed to provide an alternative means of service on unincorporated associations when other, more traditional means of service are unavailable. It was not designed to provide for service that is simply a sham. Given the admittedly diffuse structure of the Broderick Boys, Wolfington's lack of any sort of position of leadership or responsibility in the Broderick Boys, his earlier stated intention not to appear in these proceedings, and the ease with which service on a larger number of individuals was demonstrably possible, service on Wolfington cannot be said to comply with section 18220. The State's deliberate decision to limit service of process to Wolfington did not confer notice on the Broderick Boys as contemplated by section 18220 and demanded by the Due Process Clause.

CONCLUSION

Neither appellants' standing to bring their motion to set aside the default judgment in this case, nor the utter failure of the State to comply with the dictates of the Due Process Clause and California's statutes governing service of process, is in doubt. Accordingly, this Court must

reverse the trial court's ruling and order that the default judgment granting the permanent injunction in this case be set aside as void.

Dated: April __, 2006

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The text of this brief consists of 12,178 words, including footnotes, as counted by the Microsoft Office Word 2003 word processing program used to generate this brief.

Dated: April __, 2006

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PROOF OF SERVICE

I, Leah Cerri, 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 1663 Mission Street, Suite 460, San Francisco, California 94103.

On April 28, 2006, I served a copy of the attached

APPELLANT'S OPENING BRIEF

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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Supreme Court of California
350 McAllister Street
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(4 Copies)

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 April 28, 2006 at San Francisco, California.

_____
Leah Cerri