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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

NORTEÑO, a criminal street gang sued as an unincorporated association; and DOES ONE through TWO HUNDRED FIFTY, inclusive,

Defendants.

Case No. FCS033620

[PROPOSED] BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN OPPOSITION TO THE PROPOSED PRELIMINARY INJUNCTION

Assigned for All Purposes to:

Judge Harry S. Kinnicutt
Date: July 2, 2009
Time: 9:30 a.m.
Dept.: 3
Place: 321 Tuolumne Street, Vallejo, CA

Trial Date: No Trial Date Set
Case Filed: June 1, 2009

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I. INTRODUCTION

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

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

1. That gang injunctions affect and infringe the exercise of constitutional rights of those bound by its terms.

2. That gang injunctions target commonplace and perfectly lawful activities, and thus can have a pervasive impact on the everyday lives of those bound and on their families, especially for those who live and work within the area covered by the injunction.

3. That gang injunctions constitute in effect the imposition of probation-like restrictions on a group of individuals accused of unlawful conduct, but without affording those individuals the due process protections that they would have under the criminal justice

system, especially the right to appointed counsel. In fact, gang injunctions can impose restraints and sanctions on persons who have not had the opportunity or the means to mount any defense in a civil case. The relative ease and speed with which law enforcement can impose these restraints are undoubtedly a reason for their appeal, but this "efficiency" should also raise cautionary flags in terms of judicial scrutiny.

4. While gang injunctions are intended to protect the safety of communities, they also can have a stigmatizing effect on broad segments of the community. This dilemma is underscored by the fact that every gang injunction in this State of which Amicus are aware has been imposed on predominantly persons of color and in communities of color. The potential for racial profiling and racial stereotyping, something that has been a national problem, cannot be ignored in assessing this law enforcement tool.

This Court has before it a request to issue a gang injunction (the "Proposed Injunction") against the alleged Norteño gang that would encompass 4.19 square miles (the "Safety Zone") of central Fairfield. For some, if not most, of those served with this injunction, the area affected by the Proposed Injunction will include not only their homes, but the homes of most friends and relatives, their schools, their places of employment, the local restaurants they patronize---nearly every place they conduct their daily lives. The Proposed Injunction will profoundly affect their basic liberty, limiting their association with family and friends, their freedom of movement, and their political and cultural activities. Plaintiff does not shy away from the extraordinary and pervasive scope of the Proposed Injunction, characterizing it as "new 'rules for living' " for all who will be bound by its terms. (Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Ex Parte Application for Order to Show Cause ("Pl.'s Mem.") at 7.)

According to the court docket for this case as of June 26, 2009, no party or individual has filed any opposition to the Order to Show Cause. Amicus American Civil Liberties Union of Northern California ("Amicus") seeks leave to file an amicus brief with the Court to respectfully explain our concerns with the Proposed Injunction in what could be an otherwise uncontested proceeding. Amicus has had long-standing concerns about the impact of civil gang injunctions on individual constitutional rights. Amicus represented the defendants in *Acuna* and in *Broderick*

Boys. While Amicus understands that the California Supreme Court has authorized civil gang injunctions, Amicus believes that it is of critical importance, especially at the preliminary injunction stage, that persons who are targeted by this injunction, whether represented or not, be afforded the careful judicial scrutiny of the evidentiary record and the terms of the injunction that *Acuna* and the subsequent cases plainly require.

Plaintiff has submitted evidence from law enforcement files and declarations from Fairfield Police Department officers, and this appears likely to be the only evidence that will be before the Court at the hearing. But the one-sidedness of this evidence does not relieve the Plaintiff of meeting its burden of convincing the Court that the Proposed Injunction "burden[s] no more speech than necessary to serve a significant government interest." *Acuna*, 14 Cal. 4th at 1115 (citing *Madsen v. Women's Health Center*, 512 U.S. 753, 761 (1994). Furthermore, this Court must carefully scrutinize the specific evidence presented against the twenty-eight "designated gang members," regardless of whether they are represented by counsel, to insure that the heightened standard of proof is met and that each person subject to the injunction has been proven to be an active gang member. As the Court of Appeal held in *Broderick Boys*, a "person is subject to the injunction *if the State proves by clear and convincing evidence that the [Englebrecht] definition is met.*"[1] *Broderick Boys*, 149 Cal. App. 4th at 1517 (emphasis in original) (citing *Englebrecht*, 88 Cal. App. 4th at 1256-57).

Amicus will address below two legal issues that it believes should be part of this Court's consideration of this case:

[1] *Englebrecht* defines an active gang member as "a person who participates in or acts in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance." 88 Cal. App. 4th at 1262. *Englebrecht* further requires that "[t]he participation or acting in concert must be more than nominal, passive, inactive or purely technical." *Id.*

1. Whether the Proposed Injunction meets the constitutional standard of a narrowly drawn restraint that burdens no more expressive activity than necessary.

2. Whether the Proposed Injunction can apply to persons who have not had an opportunity to have their day in court to challenge whether the clear and convincing standard has been met as to them.

II. ARGUMENT

A. THE PROPOSED INJUNCTION IS NOT NARROWLY DRAWN AND UNNECESSARILY BURDENS CONSTITUTIONALLY PROTECTED ACTIVITIES.

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

In *Acuna*, the particular facts of the case were central to the Court's review of the proposed preliminary injunction, and it is worth noting that these facts were dramatically different than the facts of the instant case. The *Acuna* injunction covered only a four-block residential area, and *none* of the alleged gang members lived within that small "safety zone." This area was simply the "turf" where the gang committed its unlawful nuisance activities, and which the Court described as "occupied territory" and an "urban war zone." 14 Cal. 4th at 1100. As discussed above, the Proposed Injunction is factually distinct from that in *Acuna* in that it covers

approximately 4.19 square miles of the City of Fairfield, encompassing not only the homes of many of those enjoined, but the main financial and shopping districts, and Fairfield's municipal buildings. Whereas the *Acuna* Court found that "the gangs appear to have had no constitutionally protected or even lawful goals within the limited territory of Rockspring," *id.* at 1121, that is simply not the case for this injunction, which covers an area drastically larger than the *Acuna* injunction and targets individuals who conduct the majority of their normal activities within the Safety Zone.

Here, the Proposed Injunction provisions regarding non-association and curfew enjoin more activity than necessary to abate the claimed nuisance and impact more First Amendment activity than necessary to meet legitimate governmental interests.

1. Prohibition on Association

Plaintiff proposes to prohibit "driving, standing, sitting, walking, gathering or appearing, anywhere in public view or anyplace accessible to the public, with any known member of Norteño, but not including: (1) when all individuals are inside a school attending class or on school business, and (2) when all individuals are inside a church." (OSC at 2.) This restriction on association is too severe.

By choosing to seek an injunction for such a large geographical area, and one which includes social, community, and commercial centers, Plaintiff has insured that the Proposed Injunction will affect a great number of current associational activities and will inevitably chill future expressive and innocent activities.[2] The scope of the provision, as written, would apply not just to association outside in public view, but also to associations inside any building "accessible by or to the public," which would include polling places, grocery stores and community centers, to name only a few. A person under the injunction who gets a job at a restaurant, movie theater, or a grocery store would for the life of the injunction be in violation of its terms if another alleged

[2] *See* Scott E. Atkinson, *The Outer Limits of Gang Injunctions,* 59 Vand. L. Rev. 1693, 1716 (2006) ("Provisions forbidding all association necessarily include politically motivated assembly, thereby prospectively abridging gang members' First Amendment rights--even if the enjoined defendants were not using those rights at the time the injunction was imposed.")

gang member (who would also be in violation) patronized the business. Also, attending City Council meetings, school board meetings, or political rallies or events inside the Safety Zone would incur a risk of violating the injunction depending on who else was present at the time. This provision would have the same deterrent or prohibitive effect on attendance at any meeting or training program in Fairfield that is available to help young people or former gang members turn their lives around.

Therefore, this Court should amend the association prohibition to allow for other activities essential to daily and productive life, such as presence in the workplace (or while engaging in some lawful business activity), municipal buildings, and counseling or social services offices. *See, e.g.*, *Colonia Chiques*, 156 Cal. App. 4th at 45-46 (allowing for a business exception); *People v. Oakdale Mob*, Case No. CGC-06-456-517, Order Granting Preliminary Injunction at 3 (San Francisco Sup. Ct. Nov. 29, 2006) (allowing for an anti-drug, anti-gang, or anti-crime program exception).[3] Plaintiff has not shown "clear and convincing" evidence to justify such a broad ban on so much non-gang-related and constitutionally protected activities.[4]

2. The Curfew Provision

The Proposed Injunction's curfew would prohibit alleged gang members from "being present in public view, in a public place or in any place accessible to the public, between the hours of 10:00 p.m. on any day and 5:00 a.m. of the following day," with limited exceptions for legitimate business activities, a lawful entertainment event, or a legitimate emergency.

Like all curfews, this provision impacts constitutionally protected rights of free expression, freedom of association, and free movement. In *Nunez v. San Diego*, the Ninth Circuit

[3] Amicus does not refer to this and other trial court orders in this brief for their precedential value on any point of law, but simply as alternate procedures that other courts have used. Amicus intends to attend the hearing on July 2nd in order to respond to any inquiries the Court may have regarding our brief or the Proposed Injunction in general. If the Court desires, Amicus will make available at the hearing copies of these trial court orders for the Court and Plaintiff's counsel.

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

struck down a juvenile curfew ordinance as an overly broad restriction on constitutional rights, even though the government has greater latitude in imposing restrictions on minors. 114 F.3d 935, 946 (9th Cir. 1997). The *Nunez* court relied on *Waters v. Barry*, where a federal district court invalidated an overly broad curfew law because it made thousands of innocent juveniles prisoners at night in their homes. *Waters*, 711 F. Supp. 1125. Here, the curfew applies to adults, and for those residing in the Safety Zone, it imposes a virtual nighttime house arrest.

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

If, as Plaintiff states, the government's interest in a curfew is to abate "evil nocturnal behavior" (Pl.'s Mem. at 9), a narrower prohibition on loitering would adhere more closely to the *Acuna* Court's admonition that a gang injunction should "burden no more speech than is necessary to serve an important government interest." 14 Cal. 4th at 1121. Even with its exceptions, the curfew provision of the Proposed Injunction would not permit attendance at constitutionally protected political and community meetings, a midnight mass at a church, or an evening vigil. The restriction on such expressive activities was one ground on which the Ninth Circuit struck down the *Nunez* curfew, explicitly *rejecting* the argument that "a broad First Amendment expression exception would effectively reduce a curfew ordinance to a useless device." *Nunez*, 114 F. 3d at 951.[5]

[5] It also appears that Plaintiff's own expert, Sergeant Jeff Osgood, believes that a curfew should begin at 11 p.m. rather than at 10 p.m., as proposed by Plaintiff. Osgood cites to Fairfield's general juvenile curfew from 11 p.m. to 5 a.m. for support and states that "prohibiting Norteños from even being in public view . . . between the hours of 2300 and 0500 would lead to less violence in the proposed Safety Zone." (Osgood Dec. ¶ 602.) Thus, at the very least, the curfew should be modified to begin at 11 p.m.

Consistent with these principles, this Court should narrow the curfew restriction to prohibit "loitering" and to make it clear that lawful First Amendment activities are not unnecessarily swept up into this prohibition.

B. THE PROPOSED INJUNCTION GIVES THE POLICE UNFETTERED DISCRETION TO ADD UNDESIGNATED PERSONS TO THE INJUNCTION WITHOUT PRESENTING ANY EVIDENCE ESTABLISHING THEIR GANG MEMBERSHIP OR PROVIDING SUCH PERSONS WITH THEIR DAY IN COURT TO CHALLENGE THE ALLEGATIONS OF GANG MEMBERSHIP.

In its papers, Plaintiff asserts that there are at least 250 members of the Norteño gang, and names them in the complaint as Does 1-250. (Osgood Decl. ¶ 102.) The Order to Show Cause re Preliminary Injunction ("OSC") identifies 28 Designated Gang Members. (OSC at 4.) Plaintiff has presented to this Court what it claims is "clear and convincing evidence" concerning the active gang membership of these 28 individuals. Proofs of service have been filed as to these Designated Gang Members, who thus theoretically have had an opportunity to come to court to contest these allegations concerning their gang membership. However, the preliminary injunction requested by the OSC would apply not to only to the 28 Designated Gang Members, but to "all members of defendant Norteño." (OSC at 2.) Under this formulation, the police would have the discretion to serve any of these 250 individuals whom they believe to be members of Norteño, or any other person whom they believe to be a Norteño member during the life of this injunction. Upon service or even just actual notice, that individual is bound by all the restrictive terms of the injunction, and subject to arrest and criminal prosecution for any violation.

This sweeping power raises serious due process concerns. As discussed above, a gang injunction can only bind those individuals about whom Plaintiff has presented clear and convincing evidence of active gang membership to this Court. Yet, the Proposed Injunction purports to give the police the complete and unfettered discretion to impose the restrictions of the injunction on potentially at least 222 persons simply by notifying them that they are considered a

Norteño gang member. Those individuals will have been subjected to these new "rules of living" prescribed by the prosecutor and the police without having had any opportunity to be heard in court to challenge their designation, and in fact without this or any other court having received an iota of evidence supporting the police's claim that the individual is an active gang member. Furthermore, the Proposed Injunction has no standards, guidelines, or criteria to guide the police's discretion of whom they can serve with the court's order; in fact, the OSC does not even limit the injunction's scope to "active" gang members. And if such an individual cannot afford to retain an attorney to defend him in a civil case, then the only way to effectively challenge the injunction would be to violate its terms and have a public defender challenge the injunction in the resulting prosecution for criminal contempt.

In *Englebrecht*, the Court of Appeal held that the importance of defendants' interests in basic freedom to conduct every day, noncriminal activities, some of which are constitutionally protected – like associating with family members anywhere in public or being out at a restaurant with friends past 10 p.m. – required "that the findings of fact necessary to justify its issuance be proved by clear and convincing evidence." *Englebrecht,* 88 Cal. App. 4th at 1256. The court explained:

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

Id. The Court of Appeal in *Broderick Boys* made clear that this heightened standard of proof applies to the issues of gang membership, reaffirming that a gang injunction may only bind "active" gang members, as defined in *Englebrecht*, and that a "person is subject to the injunction

if the State proves by clear and convincing evidence that the [Englebrecht] definition is met."[6] *Broderick Boys*, 149 Cal. App 4th at 1517 (emphasis in original).

The Proposed Injunction would effectively give the police a roving warrant to impose the injunction immediately on individuals not named in any court paper and never previously adjudicated to be an active gang member. This completely circumvents and undermines the required showing of proof and the due process right for an opportunity to be heard. Therefore, this Court must make it clear that no alleged gang member can be subjected to the injunction until they have had notice to appear at a proceeding where the prosecutor has presented evidence of the individual's active gang membership, and there is an opportunity for the individual to challenge such evidence as not meeting the clear and convincing standard. Requiring a hearing on gang membership *prior* to binding individuals properly vests this Court, rather than police officers, with the power to apply probation-like restrictions on individuals they seek to add to the injunction.

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[6] While Amicus does not represent any of the individuals who have been designated as gang members in this case, we have concerns about the sufficiency of the evidence presented by Plaintiff to demonstrate each individual's active gang status. For example, the evidence put forth regarding Mario Huezo appears to be far from clear and convincing. Plaintiff's expert, Sergeant Osgood, states that on August 11, 2005, Mr. Huezo and his associate Carlos Cordova (who is not listed as a designated gang member) were suspects in a residential burglary and battery on a self-proclaimed former Sureno, and that Mr. Huezo was later arrested for vehicle theft in connection with the case. (Osgood Dec. ¶ 454.) However, in the accompanying officer declaration, Mr. Huezo's gang affiliation is based solely on the word of one lay witness. (Carter Dec. at 53-54.) Furthermore, the officer declaration does not state that Mr. Huezo was ever arrested, much less convicted. (*Id.*) The next incident put forth by Plaintiff is an arrest on March 10, 2006 for public intoxication (outside of the safety zone) in the presence of another alleged gang member. (Osgood Dec. ¶ 455.) The last incident put forth by Plaintiff's expert is an incident on June 14, 2008 in which Mr. Huezo was stopped (again outside of the safety zone) with other alleged gang members, but the officer was unable to determine whether any criminal activity was happening. (*Id.* ¶ 457.) Plaintiff has failed to provide any evidence that Mr. Huezo participates in the Norteño gang at all, much less in a way that is "more than normal, passive, inactive or purely technical." *Englebrecht,* 88 Cal. App. 4th at 1261. Plaintiff has submitted no evidence to suggest that Mr. Huezo has claimed membership in Norteño or performed any act in furtherance of Norteño's criminal enterprise. Simply because Mr. Huezo may have violated the law does not necessarily mean that he is an active gang member. In addition, besides the mere contact made with Mr. Huezo in June of 2008, the previous contacts were more than three years ago. This lack of evidence would fail to justify Mr. Huezo's inclusion under the clear and convincing standard that requires Plaintiff's showing to be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *In re Angelia*, 28 Cal. 3d 908, 919 (1981). The court should carefully review the record to ensure that Plaintiff has put forth adequate evidence of gang membership for each designated gang member.

Based on these same concerns, the San Francisco Superior Court, in a similar injunction against Norteño gang, expressly adopted a procedure to ensure that only active gang members are enjoined. The court ordered that the gang injunction would operate solely against gang members who have been individually named and against whom evidence had been presented to the court so it could adjudicate whether they were active gang members. If the government seeks to add a previously undesignated person to the injunction, the court has required it to provide notice and an opportunity for that person to be heard, and present clear and convincing evidence to the court of that person's active gang membership. *See People v. Norteño*, Case No. CGC-07-464492, Order Granting Preliminary Injunction at 8, n. 5 (San Francisco Sup. Ct. Oct. 12, 2007) ("The preliminary injunction is effective only against those who have been named and served. Upon service, these individuals have the right to challenge the People's evidence."); *see also People v. Chopper City*, Case No. 464493, Order Granting Preliminary Injunction at 7, n.4 (San Francisco Sup. Ct. Oct. 18, 2007) (same).

The Plaintiff argues that having an injunction bind nonparty members of an enjoined entity raises no constitutional concerns, citing *Berger v. Superior Court*, 175 Cal. 719 (1917) and *Ross v. Superior Court*, 19 Cal. 3d 899 (1977). (Pl.'s Mem. at 6). But the cases cited by Plaintiff arose in a very different context from the instant case. The injunctions at issue in these cases, as in most injunction cases, prohibit the parties (and the nonparty members and associates) from engaging in a specific and limited act or course of conduct such as labor picketing (*Berger*) and refusing to distribute welfare benefits (*Ross*), thus addressing a narrow act that works a specific harm. While picketing, for example, involves a fundamental right, prohibiting it does not intrude on a person's liberty to go about his or her daily life in the city where one lives. An injunction against picketing does not impose new "rules of living" that follow a person in their home, their place of work, and in any place accessible to the public, and make punishable by criminal

sanctions the act of going outside in the evening, walking into a restaurant, or attending a peaceful meeting. A gang injunction, therefore, goes far beyond other types of injunctions – it affects the lives of its targets in not only their nuisance-related conduct, but also in their expressive activities and in common everyday tasks that have no remote relationship to the nuisance or any other unlawful conduct.

While Plaintiff also cites to *Acuna* in support of the right to bind nonparty members of an enjoined entity to an injunction (Pl.'s Mem. at 6), the Court's decision stresses the importance of providing alleged individual gang members with their day in court. In *Acuna*, the individuals sought to be enjoined were named as defendants, and 11 of the 38 named defendants appeared to oppose the preliminary injunction. 14 Cal. 4th at 1101. The 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). Thus, *Acuna* provides no support for binding persons who have not had their "day in court" and against whom no evidence has been presented to any court.

It is because of this pervasive and sweeping effect of a gang injunction on individual liberty that the courts have required a heightened standard of proof – clear and convincing evidence of gang membership – before an individual can be enjoined. *Englebrecht*, 88 Cal. App. 4th at 1256. It makes little sense to hold that such an injunction requires that the case for it be proven on clear and convincing evidence, only to allow, once the injunction has issued, for it to be applied by the police or prosecutors to additional individuals without any hearing at all or even evidence presented to any court on whether they are active gang members.

Accordingly, any injunction issued by this Court should make it clear that it can only bind individuals who have first had the opportunity to appear in court and to have the Court determine based on evidence before it whether they are active gang members.[7]

III. CONCLUSION

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

DATED: June 29, 2009

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

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[7] The Proposed Injunction also fails to include a provision allowing for a person bound by the injunction to be released from it upon a showing that they are no longer a member of the gang. As set forth above, the gang injunction runs against the gang and binds "all members of defendant Norteño." Thus, once an individual leaves the gang, the injunction can no longer be binding on him or her. Any injunction issued by this Court should make it clear how individuals who are no longer active gang members can be removed from its restrictions. This is particularly important in view of the fact that in most gang injunction cases, the overwhelming number of affected individuals do not have individual representation by attorneys.