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## NOTES

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# A NEW UNDERSTANDING OF GANG INJUNCTIONS

Wesley F. Harward\*

### INTRODUCTION

There were over 1.4 million active gang members in the United States as of 2011<sup>1</sup>—an increase of forty percent in gang membership from 2009.<sup>2</sup> It is estimated that “[g]angs are responsible for an average of 48 percent of violent crime in most jurisdictions and up to 90 percent in several others.”<sup>3</sup> Many of the more than 33,000 gangs are increasing in sophistication and organization.<sup>4</sup> Additionally, these “[g]angs are increasingly engaging in non-traditional gang-related crime, such as alien smuggling, human trafficking, and prostitution.”<sup>5</sup>

The rise in gang membership and gang violence “has overwhelmed conventional law enforcement techniques.”<sup>6</sup> State legislatures, city attorneys, and law enforcement officers have been forced to search for new and innova-

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1 NAT'L GANG INTELLIGENCE CTR., FED. BUREAU OF INVESTIGATION, 2011 NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 9 (2011), <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends> [hereinafter NATIONAL GANG THREAT ASSESSMENT].

2 *Id.* Gangs themselves, however, are hardly new. James Leito, *Taking the Fight on Crime from the Streets to the Courts: Texas's Use of Civil Injunctions to Curb Gang Activity*, 40 TEX. TECH L. REV. 1039, 1043 (2008) (“Gangs have plagued cities across the United States since the eighteenth century.”).

3 NATIONAL GANG THREAT ASSESSMENT, *supra* note 1, at 9.

4 *Id.*

5 *Id.*

6 Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47, 48 (1999); see Ryan Young, Note, *Sharpen the Blade: Void for Vagueness and Service of Process Concerns in Civil Gang Injunctions*, 40 McGEORGE L. REV. 1001, 1006 (2009) (noting that “traditional law enforcement approaches to curbing gang violence are ineffective”).

tive techniques that may prove to be more effective.<sup>7</sup> Enjoining a gang (or its members) as a public nuisance is one such innovation that is increasing in use.

#### A. Acuna—*The Beginning*

Public nuisance actions against criminal street gangs were first upheld by the Supreme Court of California in the seminal case of *People ex rel. Gallo v. Acuna*.<sup>8</sup> In that case, the City of San Jose (City) sought injunctive relief against a street gang known as the Varrío Sureño Treces (VST). An injunction was granted and appeals followed, which brought the case before the California Supreme Court.<sup>9</sup> The City successfully argued that the gang's behavior was so egregious that it both substantially and unreasonably interfered with a public right—"the comfortable enjoyment of life or property."<sup>10</sup>

The court began its opinion by detailing the effect of the gang on the neighborhood in question. It described Rocksprings as "an urban war zone."<sup>11</sup> The four-block area was an "occupied territory."<sup>12</sup> Gang members would congregate in the area at all hours and "display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars."<sup>13</sup> Additionally, "[m]urder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft [were] commonplace" in the community.<sup>14</sup>

Residents' property was regularly damaged as the gang members "t[ook] over sidewalks, driveways, carports, apartment parking areas, and impede[d] traffic on the public thoroughfares to conduct their drive-up drug bazaar."<sup>15</sup> Residents' "garages [were] used as urinals; their homes commandeered as escape routes; [and] their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti."<sup>16</sup> Rocksprings residents themselves were frequently "subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets."<sup>17</sup> They were "prisoners in their own homes."<sup>18</sup> In the community, "[v]iolence and the threat of violence [were] constant" and "[v]erbal harass-

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7 See Walston, *supra* note 6, at 74 (arguing that "the several states and their citizens must continue to act resourcefully in finding creative solutions [to gang violence]" and that "[a]nti-gang injunctions are one of the most promising methods of curbing urban violence").

8 929 P.2d 596 (Cal. 1997).

9 *Id.* at 601.

10 *Id.* at 604.

11 *Id.* at 601.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

ment, physical intimidation, threats of retaliation, and retaliation [were] the likely fate of anyone who complain[ed] of the gang's illegal activities" or cooperated with the police.<sup>19</sup>

It was under these extraordinary circumstances that the district court granted the City's request for injunctive relief, deeming the gang to be a public nuisance. The injunction prohibited, among other things, VST members from (1) congregating in public view with other members in Rocksprings, and/or (2) "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents . . . or visitors to 'Rocksprings.'"<sup>20</sup> The California Supreme Court ruled that the injunction did not violate the Constitution and that it was validly issued.<sup>21</sup>

### B. Common Characteristics and Challenges

Since *Acuna*, many other gang injunctions have been issued in California as well as in several other jurisdictions.<sup>22</sup> While the specific terms of the injunctions differ in important ways, all gang injunctions share one common feature—the "safety zone."<sup>23</sup>

The safety zone is the heart of the injunction. It is the geographical area over which the provisions of the injunction are enforced. In *Acuna*, the safety zone was only four square blocks.<sup>24</sup> The size of later safety zones, however, quickly increased. A later gang injunction in California covered approximately one square mile,<sup>25</sup> and yet another California injunction covered 6.6 square miles.<sup>26</sup> More recently, a Utah district court issued an injunction against a gang with a safety zone of twenty-five square miles that encompassed almost the entire city.<sup>27</sup> An expansion of the size of the safety zone will obviously increase the burden on the enjoined individuals. Such an increase in the burden may have significance in any challenge requiring the court to balance competing interests—it may be enough to tip the scales in the opposite direction.<sup>28</sup>

The most controversial, and arguably the most important, prohibition common to gang injunctions is the "no-association" provision. While the

19 *Id.* at 601–02.

20 *Id.* at 624 n.3 (Mosk, J., dissenting) (listing the exact provisions of the injunction).

21 *Id.* at 618–19 (majority opinion). For an analysis on the constitutional challenges presented, see *infra* Parts I–II.

22 These jurisdictions include Utah and Texas. See *Weber Cnty. v. Ogden Trece*, 321 P.3d 1067, 1080 (Utah 2013) (ruling on challenges to a gang injunction in Utah); Leito, *supra* note 2, at 1051–52 (discussing the use of gang injunctions in Texas).

23 *People ex rel. Totten v. Colonia Chiques*, 67 Cal. Rptr. 3d 70, 74 (Cal. Ct. App. 2007).

24 *Acuna*, 929 P.2d at 615.

25 *In re Englebrecht*, 79 Cal. Rptr. 2d 89, 91 (Cal. Ct. App. 1998).

26 *Colonia Chiques*, 67 Cal. Rptr. 3d at 74.

27 *Ogden Trece*, 321 P.3d at 1072 (invalidating the injunction for insufficient process and not reaching the constitutional issues).

28 See *infra* Part II.

exact function of a no-association provision differs in important ways from injunction to injunction, the idea remains the same. Gang members are prohibited from publicly associating with other gang members inside the safety zone.<sup>29</sup> This prohibition extends to all associations and includes noncriminal and seemingly harmless, commonplace activities.<sup>30</sup> These prohibitions are attacked on both nuisance law and constitutional grounds.<sup>31</sup>

One common hurdle throughout most gang injunctions is a challenge in determining the proper entity or individual to sue. The simplest solution is to name specific gang members and sue them individually. This was the procedure followed in *Acuna*.<sup>32</sup> While this method is certainly the easiest to accomplish procedurally, it has its drawbacks. Many criminal street gangs have hundreds, if not thousands, of members. As is to be expected in organizations of that size, membership is constantly changing with new members joining the gang and other members leaving. In response to these challenges, city and county attorneys frequently choose to bring suit against the gang as an entity, either in combination with<sup>33</sup> or in lieu of naming individual members.<sup>34</sup> When the gang is sued as an entity, suit is brought under the theory that the gang is an unincorporated association.<sup>35</sup> Due process con-

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29 See, e.g., *Acuna*, 929 P.2d at 624 n.3 (Mosk, J., dissenting) (prohibiting the named defendants from “[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known ‘VST’ . . . member”); *Colonia Chiques*, 67 Cal. Rptr. 3d at 74–75 (prohibiting Colonia Chiques “and its active members, as well as all persons who participate with or act in concert with the Colonia Chiques in more than a nominal, passive, inactive or purely technical way, from engaging in the following activities within the Safety Zone: . . . associating with known Colonia Chiques members,” but enforcing the injunction “ONLY AGAINST GANG MEMBERS who have been SERVED, and who are in the SAFETY ZONE” (internal quotation marks omitted)); *Ogden Trece*, 321 P.3d at 1072 (prohibiting “the alleged gang members [served with the injunction] from . . . ‘[d]riving, standing, sitting, walking, gathering, or appearing together with any known member of Ogden Trece anywhere in public view or anyplace accessible to the public’” inside the safety zone (alteration in original)).

30 Scott E. Atkinson, Note, *The Outer Limit of Gang Injunctions*, 59 VAND. L. REV. 1693, 1712 (2006) (“Associational provisions thus prevent . . . gang members from eating together at the same restaurant, grocery shopping together, driving each other to work or school, or performing any number of typical family activities.”).

31 See *infra* Parts I–II.

32 *Acuna*, 929 P.2d at 602 (explaining that there were thirty-eight named defendants).

33 See *Colonia Chiques*, 67 Cal. Rptr. 3d at 74 (describing that the complaint was against the gang and 500 unnamed “Does”).

34 See *Ogden Trece*, 321 P.3d at 1073 (noting that the only named defendant was the gang).

35 *Colonia Chiques*, 67 Cal. Rptr. 3d at 74 (“The complaint stated that [the gang] is an ‘Unincorporated Association.’”); *People ex rel. Reisig v. Broderick Boys*, 59 Cal. Rptr. 3d 64, 67 (Cal. Ct. App. 2007) (“[T]he district attorney filed a complaint to enjoin a . . . criminal street gang . . . alleged to be an unincorporated association.”); *Ogden Trece*, 321 P.3d at 1070 (holding that the gang “is an unincorporated association and amenable to suit”).

cerns arise when the injunction is served on individuals who were never party to the original suit.<sup>36</sup>

### C. *The Aims of This Note*

This Note argues that no-association provisions can be constitutional, given a requisite factual background, even in the face of an increase in size of the safety zone. Furthermore, it argues that it is possible to bring suit against a gang as an unincorporated association without naming individual defendants and not violate due process requirements. It is also possible to construct the injunction in such a way as to enjoin gang members without violating their due process rights.

Part I of this Note will explain how public nuisance doctrine applies to criminal street gangs. Part II will then analyze the constitutionality of the no-association provisions of gang injunctions, especially in light of the ever-increasing size of the safety zone. Part III then examines the due process considerations, namely the practice of serving gang injunctions on individuals who were never parties to the suit itself. This Part relates and comments on and relates a recent federal case, which involves the first court, either federal or state, to consider these issues. Finally, Part IV concludes by making recommendations for the factual inquiries that must be made at the trial level and suggests further areas of research.

## I. THE PUBLIC NUISANCE DOCTRINE

As the *Acuna* court stated: “There are few ‘forms of action’ in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances, whether public or private.”<sup>37</sup> At its core, the public nuisance doctrine is about “balancing individual liberty against the liberties of others.”<sup>38</sup> A public nuisance is, by its very nature, “characterized by an unreasonable exercise of an individual is [sic] right at the expense of a *public* right.”<sup>39</sup>

In determining whether an activity is a nuisance, the courts must consider the totality of the circumstances and determine whether the activity amounts to a substantial and unreasonable interference with a public right.<sup>40</sup> The *Restatement (Second) of Torts* classifies public rights into five categories: “the public health, the public safety, the public peace, the public comfort or the public convenience.”<sup>41</sup> As Justice Brown stated in *Acuna*, “[i]n the public nuisance context, the community’s right to security and protection must be reconciled with the individual’s right to expressive and associative free-

36 See *infra* Part III.

37 *Acuna*, 929 P.2d at 603; see also Walston, *supra* note 6, at 54–56 (providing an overview of the development of the public nuisance doctrine from common law to statutory law).

38 Walston, *supra* note 6, at 54.

39 *Id.* at 55.

40 *Id.* at 55–56.

41 RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979).

dom.”<sup>42</sup> Although the common law doctrine is increasingly being replaced by statutes,<sup>43</sup> they generally rely on common law principles and definitions.<sup>44</sup>

Anti-gang injunction suits are brought under a theory of public nuisance, so a correct understanding of a gang’s behavior is critical. It is the nuisance activity of the gang, barring constitutional challenges,<sup>45</sup> which will govern the scope of the injunction. Since an injunction is an equitable action, the court must balance the restrictions on gang members’ liberties (the provisions of the injunction) with the public’s liberties of being protected. Thus, the greater the nuisance activity of the gang, the greater the court’s ability to impose restrictive provisions in the injunction. There are many common gang activities that may be properly classified as a nuisance, especially illicit activities.<sup>46</sup> Walston has explained:

A neighborhood occupied as gang “turf” becomes unsafe for local residents. Residents’ property rights become subservient to the mob rule of the gang members, who enter residents’ homes, deface their vehicles, threaten their friends and families, peddle drugs, and loudly congregate on their lawns. Such actions are utterly devoid of any public benefit and are a naked and unmitigated interference with the public safety and welfare rights of the local community.

Accordingly, gang activities are unreasonable under a public nuisance analysis. Given the totality of the facts, gang activities substantially interfere with the property rights of the members of the local community, who are coerced into allowing gang members [sic] trample the rights of community residents by using fear and coercion. Further, the gang has no social benefit to mitigate its detrimental impact on the community. Thus, street gangs fall squarely within the definition of a public nuisance.<sup>47</sup>

The size of the safety zone, then, is the proper way to balance the equities of the injunction. On the one hand, there are the burdens of the injunction on the gang members. On the other, there is the desired abatement of the public nuisance itself.<sup>48</sup> The size of the safety zone should bear a one-to-one correspondence with the geographical locations of the gang’s nuisance

42 *Acuna*, 929 P.2d at 603.

43 *See, e.g.*, ALA. CODE § 6-5-160.1 (2014); IDAHO CODE ANN. § 18-5901 (West 2014); MICH. COMP. LAWS ANN. § 600.2425 (West 2014); UTAH CODE ANN. §§ 76-10-806, 78B-6-1101(2)(e) (West 2014).

44 *See* Walston, *supra* note 6, at 56–57.

45 *See* *infra* Part III.

46 *See* Walston, *supra* note 6, at 56–57.

47 *Id.* (footnotes omitted).

48 It is beyond the scope of this Note to evaluate the overall effectiveness of the injunction at reducing both serious and minor crime. For more information regarding the effectiveness of such injunctions, see Matthew D. O’Deane & Stephen A. Morreale, *Evaluation of the Effectiveness of Gang Injunctions in California*, 2 J. CRIM. JUST. RES., no. 1, 2011, at 1–32. *But see* ACLU FOUND. OF S. CAL., FALSE PREMISE, FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (1997), available at <https://www.aclusocal.org/issues/police-practices/false-premise-false-promise-blythe-street-gang-injunction/> (concluding that gang injunctions are ineffective).

activity. In that way it is really the gang's own activities that determine the size of the safety zone.

While some have criticized the apparent trend of increasingly large safety zones,<sup>49</sup> any analysis that considers only the size of the safety zone is incomplete. Public nuisance law requires a balancing of the equities. A large gang which frequently engages in public nuisance behavior over a wide area should not be beyond the power of the court to enjoin simply because it is large. That would yield the perverse result that the larger, and likely more powerful, gangs would not be subject to an injunction precisely because they engage in too much public nuisance activity. Of course the courts do not have a blank check to make the safety zone as large as they please. The city must prove that the benefit to the public outweighs the burdens of those enjoined.

#### A. *The Presence Theory*

The no-association provisions of gang injunctions are commonly challenged on the grounds that they seemingly prohibit non-nuisance activity—congregating in public with other gang members.<sup>50</sup> The challenge is that the no-association “provisions thus prevent . . . gang members from eating together at the same restaurant, grocery shopping together, driving each other to work or school, or performing any number of typical family activities.”<sup>51</sup> This behavior is viewed as being non-nuisance, and thus different from the behavior described in the *Acuna* case.<sup>52</sup>

I argue, however, that it is possible to classify this behavior too as a public nuisance. The Utah Supreme Court explained in *Weber County v. Ogden Trece*<sup>53</sup> that during testimony at trial:

[A] self-identified “shot caller” [leader of the gang] . . . testified that the two main rules of the gang are to not “rank out” and to “represent to the fullest,” which means to “always let everybody know where you are from.” . . .

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49 See Atkinson, *supra* note 30, at 1696 (“These injunctions are problematic because they . . . expand the geographical scope of injunctions without demanding rigorous proof of nuisance activity and without regard for burdens on gang members’ associational rights . . .”).

50 This concern is really two objections rolled into one. The first objection is that the behavior is not really a nuisance, so it cannot be enjoined under a public nuisance theory. The second is that the no-association provision is so broad, and includes so much non-nuisance activity, that it violates the Constitution. See *id.* at 1706 (“When no constitutional rights are burdened by injunction provisions, an injunction’s outer bounds (in terms of both proscribed conduct and geographic scope) will be determined by equity. However, when constitutional rights are implicated by an injunction, those rights demand protection even in the absence of limiting equitable principles.”).

51 *Id.* at 1712.

52 See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 618 (Cal. 1997) (holding that the conduct of gang members was a public nuisance).

53 321 P.3d 1067 (Utah 2013).

[The gang] Trece derives its power and influence in the community from exactly this type of “representing.” It is one of the two cardinal rules of the gang that members represent the gang wherever they go. This representation by the members’ [gang] clothing, the gang signs, the tattoos, and the graffiti has the effect of making the gang almost omnipresent in the community. Trece’s presence is felt even when its members are not engaged in gang-related activity because they constantly use the name of the gang and “represent.”<sup>54</sup>

This evidence introduces another possible nuisance activity that I call the “presence theory.” Under this theory, because the gang members make efforts to constantly identify themselves as gang members through their clothing, tattoos, gang signs, and speech, their presence in public, as a group, may constitute nuisance activity. They have affirmatively committed to “represent” the gang and what it stands for—namely illicit activity. The very concept of a “gang” is inseparably connected to a group, and the word “gang” itself is defined in terms of multiple people.<sup>55</sup> Most gangs rely on intimidation, threats, and violence to maintain power over their “turf.”<sup>56</sup> A group of self-identified gang members furthers the objective of the gang by their mere presence in public, even when they are not engaged in illicit activity. The point is to make the gang’s presence felt. Clearly intimidation, threats, and violence are more effective when there is a group of gang members than when each member is alone.

This is not an unintentional result. The intimidation felt by citizens of the community and their recognition of the implicit threat is not an over-reaction to some foundationless fear. The gang is purposely trying to instill this fear in the community as a form of control. As Walston noted, “[e]ach gang member, in joining his fellow gang members on the ‘turf,’ knowingly furthers the gang’s criminal purpose by providing additional strength to the presence of the gang.”<sup>57</sup> As noted above, the requirement of “representing” the gang is one of the two cardinal rules.<sup>58</sup> The gang’s name is its brand.<sup>59</sup> Just like any other brand, it is only valuable insofar as it is recognized—recog-

54 *Id.* at 1076. The Utah Supreme Court was describing this testimony in determining whether the gang conducts business under a common name, which is a requirement for the gang to be sued in Utah as an unincorporated association. *Id.*

55 See BLACK’S LAW DICTIONARY 748 (9th ed. 2009) (defining “gang” as “[a] group of persons who go about together or act in concert, esp[ecially] for antisocial or criminal purposes”).

56 See Walston, *supra* note 6, at 63–64 (“Gang members congregate for the unlawful purpose of establishing a neighborhood as their ‘turf.’ Once a neighborhood is claimed to be gang turf, it is subject to the lawless activities of the street gang, which frequently include drug trafficking and violence. Thus, gang activities may not be classified as expressive of any meaningful viewpoints.” (footnotes omitted)).

57 *Id.* at 66.

58 *Ogden Trece*, 321 P.3d at 1076. There is an important caution, however, to the presence theory. A district court cannot simply take for granted that gang members are required to “represent” their gang. Rather, there must be a sufficient factual showing demonstrating that the gang does use its presence in an intimidating and threatening way. See *People v. Englebrecht (Englebrecht II)*, 106 Cal. Rptr. 2d 738, 753 (Cal. Ct. App. 2001)

nized for the quality of the goods or services associated with the business. In the case of a gang, its business includes “‘obtain[ing] money through many different type[s] of illegal activities, from selling drugs to trafficking in stolen property.’ The gang’s revenue is generated through ‘criminal activity such as burglaries, thefts, robberies, drug dealing, etc.’”<sup>60</sup> The increase in visibility of gang members in the community increases the control or, at the very least, the public’s perception of the gang’s control over the community.

Gang members’ public associations are, therefore, part of the public nuisance activity and may be enjoined in equity. As the *Acuna* court noted:

It is the threat of *collective* conduct by gang members loitering in a specific and narrowly described neighborhood that the provision is sensibly intended to forestall. . . . [W]e cannot say that the ban on any association between gang members *within the neighborhood* goes beyond what is required to abate the nuisance.<sup>61</sup>

## II. CONSTITUTIONAL CHALLENGES TO THE NO-ASSOCIATION PROVISION

### A. Associational Rights

Even if the injunction is appropriate after the proper balancing test required by public nuisance law, the injunction may still be invalid if it violates gang members’ constitutional rights.<sup>62</sup> The first possible constitutional challenge to the no-association provision is that it violates gang members’ association rights as guaranteed by the First and Fourteenth Amendments. The Supreme Court has explained that while there is a generalized right of association,<sup>63</sup> there are two types of protected associations: (1) intimate association and (2) expressive association.<sup>64</sup> As explained by Justice Brennan:

Our decisions have referred to constitutionally protected “freedom of association” in two distinct senses. In one line of decisions, the Court has

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(“While it may be lawful to restrict such activity, it is also extraordinary. The government . . . [must] firmly establish[ ] the facts making such restrictions necessary.”).

59 *Ogden Trece*, 321 P.3d at 1075. The Utah Supreme Court stated:

The gang very jealously protects its own name. It goes to great lengths in order to protect its brand. It has internal processes for induction of new members and advancement into leadership positions. It also punishes individuals who falsely attempt to identify themselves as gang members. Members who are “jumped out” of the gang must cover up their tattoos and no longer claim membership in the gang.

*Id.* at 1076.

60 *Id.* at 1075 (quoting trial court order).

61 *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 615 (Cal. 1997).

62 See Atkinson, *supra* note 30, at 1706 (“When no constitutional rights are burdened by injunction provisions, an injunction’s outer bounds (in terms of both proscribed conduct and geographic scope) will be determined by equity. However, when constitutional rights are implicated by an injunction, those rights demand protection even in the absence of limiting equitable principles.”).

63 *City of Dall. v. Stanglin*, 490 U.S. 19, 25 (1989).

64 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.<sup>65</sup>

These protections are not absolute and “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.”<sup>66</sup> Even when an association is constitutionally protected, however, “[i]nfringements . . . may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom.”<sup>67</sup>

In the context of gang injunctions, then, there is a two-part test to determine whether a no-association provision is unconstitutional. The first inquiry is whether or not the association in question is afforded *any* constitutional protection. If there is some protection, then a balancing test is used to determine whether there is a sufficient government interest to allow the provision. Factors to be included are the nature of the government’s interest, the extent of the intrusion on the protected associations, and whether other less intrusive means exist to accomplish the government’s interest.<sup>68</sup>

### B. *The Right to Intimate Association*

The first type of protected association is the right to intimate association. This right is “exemplified by personal affiliations that ‘attend the creation and sustenance of a family—marriage . . . the raising and education of children . . . and cohabitation with one’s relatives.’”<sup>69</sup> These associations necessarily “involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspects of one’s life.”<sup>70</sup> Importantly, the Supreme Court has given guidance on identifying the types of associations protected under this right. These associations “are distinguished by such attributes as relative smallness, a high degree of

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65 *Id.*

66 *Id.* at 618.

67 *Id.* at 623.

68 See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 605 (Cal. 1997) (“The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors.” (citations omitted)); *supra* text accompanying note 61.

69 *Acuna*, 929 P.2d at 608 (quoting *Roberts*, 468 U.S. at 619).

70 *Roberts*, 468 U.S. at 619–20.

selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”<sup>71</sup>

It is clear that the constitutional right to intimate association does not protect the gang as a whole.<sup>72</sup> A street gang fails almost all of the distinguishing factors listed above. Many street gangs are large organizations.<sup>73</sup> They have “hundreds of members, each having varying degrees of involvement in gang activities and not all of whom know each other.”<sup>74</sup> They are not established for an intimate purpose but rather to exercise territorial control and carry out criminal activities.<sup>75</sup>

Even though the gang as a whole does not have a constitutional right to intimate association, its individual members certainly do. The *Acuna* court briefly dealt with arguments that the no-association provision in the Rocksprings injunction violated gang members’ intimate association rights. The court stated that “protected rights of association in the intimate sense are those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization’s fundamental values, against which even the state is powerless to intrude.”<sup>76</sup> It then concluded that “[w]e do not . . . believe that the activities of the gang and its members in Rocksprings at issue here are either ‘private’ or ‘intimate’ as constitutionally defined.”<sup>77</sup> This was in spite of the fact that the gang members “exercise[d] some discrimination in choosing associates [by a] selective process of inclusion and exclusion.”<sup>78</sup> This outcome is unsurprising given that the injunction covered only four square blocks and none of the enjoined defendants lived in the safety zone.<sup>79</sup>

Arguably, it is a much different situation when some of the enjoined individuals live inside the safety zone. This was the case in *Englebrecht II*.<sup>80</sup> In a case to abate a public nuisance brought by the District Attorney of San Diego County, the trial court found that Mr. Englebrecht was an active member of the Posole gang.<sup>81</sup> The Posole gang was enjoined with the usual provi-

71 *Id.*; see also *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 546–47 (1987) (holding that the constitutional right to intimate association did not apply to the Rotary Club); *Acuna*, 929 P.2d at 608 (explaining the essential attributes of such associations).

72 See Leito, *supra* note 2, at 1070–71.

73 See Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *YALE L.J.* 2249, 2273–75 (1998).

74 See Walston, *supra* note 6, at 62.

75 *Id.* at 62–63.

76 *Acuna*, 929 P.2d at 609.

77 *Id.*; see also NATIONAL GANG THREAT ASSESSMENT, *supra* note 1, at 9–10 (describing gang activities).

78 *Acuna*, 929 P.2d at 609 (alteration in original) (quoting *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988)).

79 *Acuna*, 929 P.2d at 601.

80 *Englebrecht II*, 106 Cal. Rptr. 2d 738, 757 (Cal. Ct. App. 2001) (noting that “many gang members are related and live in the [safety zone]”).

81 *Id.* at 742.

sions.<sup>82</sup> Many of the gang members lived inside the safety zone of this injunction.<sup>83</sup> Mr. Englebrecht contended, among other things, that the no-association provision “should have been limited in manner to lessen its effect on familial relationships.”<sup>84</sup> He claimed that the no-association provision violated his constitutional rights to intimate association because it interfered with familial relations because many of the gang members were closely related.<sup>85</sup>

The court acknowledged that “many gang members are also related by family, and . . . the injunction’s associational restrictions may affect, in the [safety zone], contact between those family members.”<sup>86</sup> It held, however, that those facts alone are “not determinative” and that “[w]hile the injunction may place some burden on family contact in the target area, it by no means has . . . a fundamental impact on general family association.”<sup>87</sup> It appears to have arrived at this conclusion based on two facts: (1) “[t]he injunction places no restrictions on contact between any individuals outside the [safety zone]” and (2) “[i]n the [safety zone] the injunction merely requires gang members not to associate in public.”<sup>88</sup> It is unclear, however, which of these two factors was weighed most heavily by the court. If the former factor is weighed heavily, then, presumably, injunctions with larger geographical areas could run afoul of the Constitution. If, however, the latter factor is the most important, then future injunctions are permissible regardless of size, so long as the gang members retain the right to associate in private.

Rather than simply declare that there was no impingement on the constitutional right to intimate associations, the court proceeded to the second part of the test—the balancing prong. The court agreed with Englebrecht that “gang and familial ties often overlap and gang membership is often multigenerational.”<sup>89</sup> It used this fact, however, as support for the necessity of the prohibition’s inclusion of familial gang members in the no-association provision. The court said that “any change in the injunction to allow greater association of family related gang members would tend to limit the effectiveness of the association provisions . . . [and] would . . . also make it more difficult to enforce.”<sup>90</sup> It then held that “[t]he injunction as issued does not impermissibly burden Englebrecht’s associational rights.”<sup>91</sup>

Not everyone agreed with the court’s decision. Critics have challenged the court’s reasoning based on two mutually exclusive and exhaustive pos-

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82 *Id.*

83 *Id.* at 757.

84 *Id.*

85 *Id.*

86 *Id.* at 758.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

sibilities.<sup>92</sup> Either family-related gang members comprise a large number of the individuals enjoined or they do not: “If related gang members are a small minority, any exception to an injunction’s associational provision allowing family association would necessarily ease the injunction’s strictures only on a select few.”<sup>93</sup> Since the easement is small, this injunction would still remain effective.<sup>94</sup> This argument, though, does not address courts’ concerns about enforceability.<sup>95</sup> A provision providing an exception for related family members would require law enforcement officers to know the family tree of all enjoined gang members. Even if there are only a small number of related gang members, it would still be much more difficult to enforce.<sup>96</sup>

The second argument is that if, in contrast, there are many gang members, then a “family member exception would apply to large numbers of gang members” and “the injunction would necessarily prevent less collective gang conduct.”<sup>97</sup> Under that scenario, though, the no-association provision would then necessarily impact many gang members’ fundamental rights of association with family so as to be unconstitutional.<sup>98</sup> This argument is fundamentally flawed because it is incomplete. As noted above, in order for the provision to be unconstitutional not only must the right to intimate association be impinged—the infringement on the rights must also not be outweighed by a compelling state interest. It is the latter requirement that the argument fails to address. The state interest in abating the nuisance still remains.<sup>99</sup> It is that state interest that must be weighed against the infringement on the right to intimate association. *Englebrecht II*’s two principal arguments are still perfectly applicable: the injunction only applies in the safety zone and it only prevents public associations.<sup>100</sup>

### C. *The Right to Expressive Association*

The second type of protected association is the right to expressive association. The right to expressive association protected by the First Amendment is not limited to political assemblies<sup>101</sup> but is available for groups who gather together for “a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>102</sup> This “protection [of] collective effort on behalf

92 See Atkinson, *supra* note 30, at 1713.

93 *Id.*

94 *Id.*

95 *Englebrecht II*, 106 Cal. Rptr. 2d at 758.

96 See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 615 (Cal. 1997) (explaining that “the [associational] prohibitions enumerated in [the injunction] are not easily divisible”).

97 Atkinson, *supra* note 30, at 1713.

98 See *id.*

99 See *supra* Part I (detailing the state’s interest).

100 *Englebrecht II*, 106 Cal. Rptr. 2d at 758.

101 *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[W]e have protected forms of ‘association’ that are not political . . .”).

102 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); see *Acuna*, 929 P.2d at 608 (quoting *Roberts*, 468 U.S. at 622).

of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.”<sup>103</sup> In determining whether an organization’s associations enjoy First Amendment protection, the Supreme Court has considered factors such as the following: (1) whether the members “take positions on ‘public questions,’”<sup>104</sup> (2) whether the organization “pertain[s] to the social, legal, and economic benefit of the members”<sup>105</sup> and (3) the nature of the association.<sup>106</sup> The Court has cautioned that while “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall . . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”<sup>107</sup>

The injunction in *Acuna* was challenged for violating gang members’ right to expressive association.<sup>108</sup> The lower appellate court had held that the no-association provision violated the First Amendment by denying gang members’ right to associate with fellow gang members.<sup>109</sup> The California Supreme Court disagreed.<sup>110</sup> It held that the First Amendment offered no protection for the gang members’ associations.<sup>111</sup> There was no evidence that the gang’s activities within the safety zone established “an association of individuals formed ‘for the purpose of engaging in protected speech or religious activities.’”<sup>112</sup> Indeed there was no evidence that the gang engaged in any kind of protected “ends”<sup>113</sup> at all—be they political, religious, social, educational, economic, or cultural.<sup>114</sup> The court ended its analysis by relying on *Madsen v. Women’s Health Center, Inc.*,<sup>115</sup> stating that “[f]reedom of association, in the sense protected by the First Amendment, ‘does not extend to

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103 *Roberts*, 468 U.S. at 622.

104 *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 548 (1987).

105 *Griswold*, 381 U.S. at 483.

106 *See City of Dall. v. Stanglin*, 490 U.S. 19 (1989).

107 *Id.* at 25 (holding that “the activity of . . . dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment”).

108 *See People ex rel. Gallo v. Acuna*, 929 P.2d 596, 608–09 (Cal. 1997) (analyzing the “[a]ssociational [i]nterests” of the gang).

109 *Id.* at 608.

110 *Id.*

111 *Id.*

112 *Id.* (quoting *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 544 (1987)).

113 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

114 *See Walston, supra* note 6, at 63–64 (“A plain examination of the attributes of urban street gangs reveals that they do not advance any expressive purpose. Even the opponents of anti-gang injunctions cannot deny that the activities of street gangs are illicit. Gang members congregate for the unlawful purpose of establishing a neighborhood as their ‘turf.’ Once a neighborhood is claimed to be gang turf, it is subject to the lawless activities of the street gang, which frequently include drug trafficking and violence. Thus, gang activities may not be classified as expressive of any meaningful viewpoints.” (footnotes omitted)).

115 512 U.S. 753 (1994).

joining with others for the purpose of depriving third parties of their lawful rights.’”<sup>116</sup>

While gang members may not be currently engaged in any sort of protected behavior under the Constitution’s guarantee of the right to expressive association, it may prevent any future behavior that would be protected. This poses special difficulties when the safety zone encompasses governmental buildings.<sup>117</sup> The problem is that under the no-association provisions

gang members would not be allowed to petition the government as a group for redress of any perceived grievances while they were within the [safety zone]. . . . Gang members would not be allowed to stand in line together at a polling place on Election Day while exercising their right to vote. Situations where government buildings are located in the enjoined area are especially problematic: the [Colonia Chiques] injunction . . . envelops both the . . . [c]ity [h]all and [police station] buildings, effectively preventing gang members from picketing their local government and law enforcement agencies.<sup>118</sup>

This type of situation crossed the line from hypothetical to realistic in Utah’s Trece injunction. There, because the courthouse was within the safety zone, legal counsel for the alleged gang members advised their clients not to attend the proceedings because that would have been a violation of the preliminary injunction.<sup>119</sup>

While these situations raise important challenges to no-association provisions, there is a simple solution. Careful drafting of the language of the injunction could simply exclude government buildings from the safety zone. This solution has several practical advantages: it remains very simple to enforce, it does not meaningfully decrease the efficacy of the injunction, and, most importantly, it provides gang members the opportunity to exercise their rights to protest the government and appear in court.

An exclusion of, for example, the police department, city hall, and courthouses would not make the injunction much more difficult to enforce. Law enforcement officers would simply know that, on those areas, the injunction was not enforceable. There is no reason to think this makes it any harder to enforce than any of the other boundary lines. It also has the added

116 See *Acuna*, 929 P.2d at 609 (quoting *Madsen*, 512 U.S. at 776).

117 As the size of safety zones being used grows it is more likely that government buildings will be included. See *supra* notes 24–28 and accompanying text (discussing the trend of increasingly large safety zones).

118 Atkinson, *supra* note 30, at 1716.

119 Brief of Appellants Roman Hernandez, Chase Aeschlimann, and Jesse Aeschlimann at 32, *Weber Cnty. v. Ogden Trece*, 321 P.3d 1067 (Utah 2013) (No. 20120852-SC) (“When it was brought to the district court’s attention that the Injunction even precluded alleged members from attending court at the same time in this case, the district court remarked that it would ‘probably’ permit more than one alleged gang member to attend hearings, if defense counsel had sought permission in advance, an exception that (aside from an unworkable and lengthy ‘hardship exemption process’) is nowhere in the Injunction itself and underscores its arbitrary enforcement.”).

advantage of being a bright-line rule that may alleviate any subjectivity in enforcement.<sup>120</sup>

It is unlikely that such a limited exclusion would decrease the efficacy of the injunction. The purpose of the gang injunction is to abate the public nuisance behavior of gangs. This behavior includes criminal acts as well as intimidation and threats.<sup>121</sup> It is very unlikely that the criminal street gangs will be able to establish their turf in these locations.<sup>122</sup> Government buildings (especially police stations) are bound to have security and be guarded, which will already deter the behavior the injunction seeks to prevent. Furthermore, given that there is security at all of these buildings, it is unlikely that gangs' efforts to maintain control by constantly "representing" will similarly be unfruitful.<sup>123</sup> This will undercut gangs' omnipresence and prevent any intimidation.

Lastly, and most importantly, it provides the gang with adequate opportunities to exercise its right to protest. Gang members would be able to attend court together to represent their interests. They would also be able to stage protests at city hall to engage in their protected rights (including, perhaps, to protest the injunction itself). The gang, and its members, would still be able to petition the government for redress as a group.

### III. DUE PROCESS CONCERNS—A WATERSHED CASE?

In addition to challenging the substantive provisions of gang injunctions, critics also challenge the injunctions as violating the Due Process Clause of the Fourteenth Amendment. Those challenges have increased as the practice of suing a gang as an entity, rather than the individual gang members themselves, has become more common. When a gang is sued as an entity and an injunction is entered, there exists the difficulty of determining who specifically is a gang member. Regardless of whether "gang member" is a defined term in an injunction, there is always a question of *who* determines whether the individual to be served actually meets the definition. Is it a judge? The police? Some other official? Recently the Ninth Circuit ruled on

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120 This is in contrast to an exclusion that provided that gang members could gather within the safety zone for the purpose of a protest, where there is much more subjectivity since the law enforcement officer has to make a determination of whether there is an actual protest.

121 See *supra* Part I (discussing the public nuisance behavior of criminal street gangs).

122 See Walston, *supra* note 6, at 53, 62–64 (stating that "the activities of street gangs rely on territorial control carried out by violence and threats of violence," and that "[g]ang members congregate for the unlawful purpose of establishing a neighborhood as their 'turf'"); see also *Ogden Trece*, 321 P.3d at 1070 (explaining the district court's findings that members of the gang "commit crime for the purpose of intimidating rival gang members, asserting their dominance over an area, intimidating citizens and witnesses, and obtaining money through many different types of illegal activities, from selling drugs to trafficking in stolen property").

123 See *supra* Part I (discussing what I call the "presence theory" of gang nuisance behavior).

a due process claim in *Vasquez v. Rackauckas*.<sup>124</sup> This was the first time such a claim was heard by a federal circuit court.<sup>125</sup>

While establishing the facts of the case, the *Vasquez* court noted that “[o]ur analysis depends in significant part on the procedural history of the state case. We therefore describe the parties’ litigation decisions and the relevant state and federal [court] orders in some detail.”<sup>126</sup> It is necessary, for the same reason, to include the facts of the case here. In February 2009, the Orange County District Attorney’s (OCDA) office filed a public nuisance in state court against the Orange Varrio Cypress Criminal Street Gang (OVC).<sup>127</sup> The named individuals in the suit were alleged to be “members, agents, servants, employees” or “persons acting under, in concert with, for the benefit of, at the direction of, or in association with” the gang.<sup>128</sup> The complaint alleged various criminal and nuisance activity allegedly committed by OVC including “attempt[ed] murders, shootings, robberies, assaults, burglaries, felony gang graffiti and the illegal sale of controlled substances” as well as vandalism and trespassing.<sup>129</sup>

The OCDA also filed an application for a preliminary injunction against the defendants.<sup>130</sup> The court granted the OCDA’s motion to serve the complaint on the OVC via a named defendant, Patrick DeHerrera.<sup>131</sup> Additionally, the OCDA served “numerous individuals named in the state court complaint, including the current Plaintiff-Appellees, with the complaint and the . . . documents in support of the preliminary injunction.”<sup>132</sup> Thirty-two individuals filed answers or otherwise formally appeared.<sup>133</sup> The state court granted a preliminary injunction against the gang and the defendants who had not appeared.<sup>134</sup> That preliminary injunction was soon extended to include eighteen other adult defendants who were unrepresented by counsel.<sup>135</sup> The court also set a hearing as to other adult defendants and all juvenile defendants.<sup>136</sup>

Before that hearing “some of the adult defendants represented by counsel—including plaintiff-appellee Miguel Lara—filed motions opposing the entry of a preliminary injunction against them as individuals.”<sup>137</sup> In support of these motions the defendants filed their own declarations contesting,

124 734 F.3d 1025 (9th Cir. 2013).

125 *Id.* at 1030 (“[N]o court—either state or federal—has previously addressed the particular due process issue presented here.”).

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.* (alteration in original).

130 *Id.* at 1031.

131 *Id.*

132 *Id.* (internal quotation marks omitted).

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

among other things, the sufficiency of the evidence to establish that they were active members of the OVC gang.<sup>138</sup>

The court denied OCDA's motion for a preliminary injunction as to the juvenile defendants as well as to some of the named defendants who were represented by counsel, including one of the current plaintiff-appellees, Randy Bastida.<sup>139</sup> "Patrick DeHerrera, the person on whom OCDA chose to serve the complaint on behalf of OVC as an entity," was also excluded from the preliminary injunction.<sup>140</sup> These individuals were excluded from the preliminary injunction for lack of evidence that they were active participants of the gang.<sup>141</sup> The court granted the preliminary injunction against some of the other named defendants including plaintiff-appellee Miguel Lara.<sup>142</sup>

Shortly after the hearing, Orange County "filed a request to dismiss from the case, without prejudice, sixty-two individual defendants, including the thirty-two adults and juveniles who had filed a general denial or an answer and all unrepresented juvenile defendants."<sup>143</sup> Orange County did this "because of the aggressive effort on [the] part of those individuals to defend themselves in court."<sup>144</sup> The court granted this dismissal request.<sup>145</sup>

Orange County then "requested and obtained a default judgment, including a permanent injunction . . . against OVC as an entity."<sup>146</sup> The injunction named as parties all of the individuals who had not been dismissed by Orange County.<sup>147</sup> The terms of the injunction were very similar to the other injunctions previously considered and included a no-association provision, prohibitions against using gang signs, possessing weapons, possessing illegal drugs, as well as a curfew provision.<sup>148</sup> The injunction applied not only to named defendants but to any of "OVC's members, without regard to whether such individuals were acting on behalf of OVC or, except as specified in the [injunction], with other OVC members, when engaged in proscribed activities."<sup>149</sup>

Importantly, the injunction did "not provide any procedures for the parties or the [state court] to determine which, if any, unnamed parties were

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138 *Id.*

139 *Id.* There were over twenty defendants originally named in the suit who were excluded from the preliminary injunction for insufficient evidence. *Id.* at 1032.

140 *Id.* at 1031.

141 *Id.*

142 *Id.* at 1031–32.

143 *Id.* at 1032.

144 *Id.* (internal quotation marks omitted).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at 1031–33. The *Vasquez* court conveniently attached a copy of the injunction as Exhibit A to its opinion. *See id.* at 1057–72.

149 *Id.* at 1033 (internal quotation marks omitted).

‘members’ of OVC and therefore subject to the [injunction’s] terms.”<sup>150</sup> It also had no expiration date.<sup>151</sup>

Within weeks after the default judgment was entered, the police department, at the instruction of the OCDA, began serving the injunction on both individuals named in the suit as well as on individuals who had originally been named but who the OCDA voluntarily dismissed.<sup>152</sup> Within just a few months at least forty-eight individuals had been served with the injunction that had previously been voluntarily dismissed by the OCDA from the suit.<sup>153</sup>

In addition to the terms of the injunction itself, the police served a “Notice” which advised that:

YOU ARE HEREBY PUT ON NOTICE THAT ON MAY 14, 2009, JUDGE KAZUHARU MAKINO SIGNED AN ORDER FOR PERMANENT INJUNCTION AGAINST THE ORANGE VARRIO CYPRESS CRIMINAL STREET GANG.

ALL MEMBERS OF THE GANG ARE [HEREBY] SUBJECT TO THE TERMS OF THE PERMANENT INJUNCTION.

ALL MEMBERS OF THE GANG, WHETHER OR NOT NAMED IN THE ORIGINAL LAWSUIT . . . AND LATER DISMISSED FROM THE LAWSUIT . . . ARE SUBJECT TO THE TERMS OF THE PERMANENT GANG INJUNCTION . . . .

ALL PERSONS DESCRIBED ABOVE WILL FACE CRIMINAL PROSECUTION PURSUANT TO PENAL CODE SECTION 166(a)(4) FOR ANY WILLFUL VIOLATION OF ANY PROVISION LISTED IN THE PERMANENT GANG INJUNCTION.<sup>154</sup>

The state court “had no role in reviewing or approving the notice.”<sup>155</sup>

About four months after the injunction was granted, various individuals<sup>156</sup> brought an action under 42 U.S.C. § 1983 against the heads of the OCDA and the police department alleging that the “dismiss-and-serve strategy” violated the Due Process Clause.<sup>157</sup> The plaintiffs sought an injunction barring the county from enforcing the injunction “without first providing them with a full constitutionally . . . adequate hearing.”<sup>158</sup>

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* at 1033–34 (emphasis omitted).

155 *Id.* at 1034.

156 *Id.* Four individuals brought suit and

sought to represent two classes: (1) adults and minors named as individual defendants in the state case, who appeared . . . in [the state court] to defend themselves and were voluntarily dismissed by [OCDA], and (2) minors named as individual defendants in the state case for whom no guardian ad litem was appointed and who were voluntarily dismissed by OCDA.

*Id.* (internal quotation marks omitted).

157 *Id.*

158 *Id.* (internal quotation marks omitted).

The district court held an eleven-day bench trial.<sup>159</sup> Eventually, the court ruled that the “Defendants deprived the Plaintiffs and those similarly situated of their constitutionally protected liberty or property interests without adequate procedural protections.”<sup>160</sup> The court granted an injunction prohibiting the defendants from enforcing the order against the plaintiffs.<sup>161</sup> An appeal was filed bringing the case before the Ninth Circuit Court.<sup>162</sup>

The court began its due process analysis by quoting *United States v. Juvenile Male*,<sup>163</sup> which explains that “[w]e analyze a procedural due process claim in two steps. The first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.”<sup>164</sup>

A. *Step 1—Was There an Interference with a Protected Liberty or Property Interest?*

The first step is a threshold test to determine whether any protected rights are implicated. To pass this threshold a plaintiff need not demonstrate that the state has impermissibly interfered with a protected right, merely that it *has* interfered with one. As to the first step, the court agreed with the district court that the injunction “profoundly implicates liberty interests protected by the Due Process Clause, including rights of free movement, association, and speech, and that [the county’s] conduct interferes with those protected liberty interests.”<sup>165</sup> This is unsurprising since the design of the

159 *Id.* At trial the district court “hear[d] testimony from fourteen witnesses, receiv[ed] more than 100 exhibits, and personally tour[ed] the area . . . covered by the [safety zone].” *Id.*

160 *Id.* (quoting *Vasquez v. Rackauckas*, No. SACV 09-1090 VBF, 2011 WL 1791091, at \*15 (C.D. Cal. May 10, 2011)) (internal quotation marks omitted).

161 *Id.* The district court was careful to note that it was “*not instructing the state court as to the nature of any hearing* . . . [T]he Court’s order [is] directed to the Defendants, and not the state court.” *Id.* (alteration in original) (internal quotation marks omitted).

162 *Id.*

163 670 F.3d 999 (9th Cir. 2012).

164 *Vasquez*, 734 F.3d at 1042 (quoting *Juvenile Male*, 670 F.3d at 1013).

165 *Id.* The court explained that the above mentioned liberties were subject to due process protection:

“Freedom of speech and . . . other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978). “[T]he freedom to loiter for innocent purposes is” also “part of the ‘liberty’ protected by the Due Process Clause.” *City of Chi. v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion). The Constitution likewise guarantees the “fundamental right of free movement” to both adults and minors. *See Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) (invalidating a juvenile curfew ordinance under strict scrutiny review). The Order places a heavy burden on the exercise of these protected liberty interests.

*Id.*

injunction is to restrict gang members' behavior—which, under any definition, is interference.

The court then turned from the terms of the injunction to Orange County's actions in subjecting the plaintiffs to the injunction.<sup>166</sup> While the injunction did not specifically name the plaintiffs, Orange County subjected them to the injunction.<sup>167</sup> It notified the plaintiffs "they could face [criminal prosecution] for violating the [injunction's] terms."<sup>168</sup> County officials also testified at trial to a "'policy [of] arrest[ing], transport[ing], and book[ing] those Plaintiffs alleged to have violated the [injunction] and hold[ing] them pending bond or arraignment, rather than citing and releasing them,' as well as a 'policy of seeking increased bail amounts for violations of the [injunction].'"<sup>169</sup> The court believed these actions "also constitute further interfere[nce] with liberty interests triggering scrutiny under the Due Process Clause."<sup>170</sup>

Having determined that Orange County's actions constituted an "interfere[nce] . . . by the State,"<sup>171</sup> the court turned "to an examination of whether [the county] was obligated to provide Plaintiffs with additional procedural protections."<sup>172</sup>

*B. Step 2—Were the Procedures Attendant to the Deprivation of the Liberty Interests Constitutionally Sufficient?*

The court began by following the framework provided by the Supreme Court in *Mathews v. Eldridge*,<sup>173</sup> which directed the court to examine:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

166 *Id.* at 1043.

167 *Id.*

168 *Id.*

169 *Id.* (alterations in original).

170 *Id.* (alteration in original) (internal quotation marks omitted) (citing *United States v. Juvenile Male*, 670 F.3d 999, 1013 (9th Cir. 2012)). The court also provided some examples of plaintiffs who had refrained from exercising their rights because of the injunction. Among those examples was a man who "no longer goes anywhere in the injunction area with his brother, with whom he lives and who has also been served with the [injunction]." *Id.* at 1044. Another pair of brothers, whose grandfather had a stroke and was taken to a hospital within the safety zone, had to choose whether to violate the injunction. *Id.* And yet another plaintiff, who used to participate in vigils, demonstrations, and protests within the safety zone, "ceased doing so after being served with the [injunction], for fear he would be violating its terms by confronting and challenging government policies and associating with individuals on the injunction list." *Id.*

171 *Juvenile Male*, 670 F.3d at 1013.

172 *Vasquez*, 734 F.3d at 1044.

173 424 U.S. 319 (1976).

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>174</sup>

These *Mathews* factors are to be balanced remembering “the requirements of due process are ‘flexible and cal[.] for such procedural protections as the particular situation demands.’”<sup>175</sup> The district court concluded that the *Mathews* factors “‘weigh clearly in favor’ of the conclusion that [the county] violated [the Plaintiffs’] procedural due process rights by failing to provide any form of hearing before subjecting them to the [injunction].”<sup>176</sup> The Ninth Circuit agreed.<sup>177</sup>

Following the *Mathews* framework, the court considered the strength of the private interests at stake.<sup>178</sup> The interests, as noted above,<sup>179</sup> were very strong,<sup>180</sup> and the safety zone encompassed a geographical area in which many individuals spend much of their lives.<sup>181</sup> Additionally, the injunction is permanent with no expiration or sunset provision.<sup>182</sup> Thus, the first *Mathews* factor—the plaintiffs’ interests—was “truly weighty.”<sup>183</sup>

The second *Mathews* factor considered is the risk of an erroneous deprivation through the procedures used; in this case that a non-gang member would be erroneously labeled as a gang member and subject to the provisions of the injunction.<sup>184</sup> The court identified four considerations that weigh on this second factor: (1) “the fact-intensive nature of assessing whether an individual is an active gang member or participant;” (2) “the adequacy of the

174 *Id.* at 334–35; *see Vasquez*, 734 F.3d at 1044 (quoting *Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006)).

175 *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see Vasquez*, 734 F.3d at 1044.

176 *Vasquez*, 734 F.3d at 1044.

177 *Id.*

178 *Id.* at 1044–45.

179 *See supra* note 157 and accompanying text (discussing the private interests in determining whether there was any state interference with a right protected by the Due Process Clause).

180 *Vasquez*, 734 F.3d at 1045.

181 *Id.*

As the district court found after personally touring the Safety Zone, the geographical area covered by the Order encompasses “dense residential areas,” “several schools,” “at least four parks,” “the Chapman University campus and its surroundings,” “the historic downtown Orange Area . . . which includes a vibrant commercial district,” “government buildings and offices (including Orange City Hall, the police station, and the public library),” “a hospital,” and “hundreds of retail and commercial business [sic], and hundreds of homes and apartments.”

*Id.* (quoting *Vasquez v. Rackauckas*, No. SACV 09-1090 VBF, 2011 WL 1791091, at \*6 (C.D. Cal. May 10, 2011)).

182 *Id.* As the *Mathews* Court explained, “the possible length of wrongful deprivation . . . is an important factor in assessing the impact of official action on the private interests.” *Mathews v. Eldridge*, 424 U.S. 319, 341 (1976) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975)) (internal quotation marks omitted); *see Vasquez*, 734 F.3d at 1045.

183 *Vasquez*, 734 F.3d at 1045.

184 *Mathews*, 424 U.S. at 335.

procedures [the county] used in making that determination;” (3) “the value of additional procedural safeguards;” and (4) “the sufficiency of post-deprivation remedies.”<sup>185</sup>

Under California law “‘an active gang member is a person who participates in or acts in concert with’ a gang, where ‘[t]he participation . . . [is] more than nominal, passive, inactive, or purely technical.’”<sup>186</sup> Additionally, under California law, “the state has the burden of demonstrating active gang membership by ‘clear and convincing evidence,’ rather than a lower ‘preponderance’ standard, given ‘the importance of the interests affected by [such an] injunction.’”<sup>187</sup>

Determining whether an individual is an “active gang member or participant” is a fact-intensive inquiry.<sup>188</sup> This inquiry is complicated by the fact that gangs are often “loose knit [and] without structure.”<sup>189</sup> Gangs do not have organization minutes, formal membership records, or other normal means of identification.<sup>190</sup> During the trial at the district court, experts testified to the fluid nature of gangs in general and to the OVC in particular.<sup>191</sup> They explained that “most gang members eventually leave gangs, making it difficult to determine membership or participation at any single time based on a past record of an individual’s involvement in a gang.”<sup>192</sup> As such, the district court found that the determination of whether “an individual is an active participant of a criminal street gang is a multifaceted, complex[,] and fact specific inquiry.”<sup>193</sup> The circuit court agreed and noted that the risk of error is significant “without any participation by, or opportunity to provide evidence on behalf of, the individual served with the [injunction] and, according to [the county,] putatively covered by it.”<sup>194</sup>

The court then examined the procedures actually used to determine which individuals would be served with the injunction. Testimony at trial established that the county “lacked clear standards for determining on whom to serve the [injunction].”<sup>195</sup> There was “no fixed list or set criteria to determine whether an individual was an active participant of OVC.”<sup>196</sup>

185 *Vasquez*, 734 F.3d at 1045.

186 *Id.* (quoting *Englebrecht II*, 106 Cal. Rptr. 2d 738, 753 (Cal. Ct. App. 2001)).

187 *Id.* (quoting *Englebrecht II*, 106 Cal. Rptr. 2d at 750, 752).

188 *Id.*

189 *Id.* at 1046 (quoting ATT’Y GEN.’S YOUTH GANG TASK FORCE, CAL. DEPT. OF JUSTICE, REPORT ON YOUTH GANG VIOLENCE IN CALIFORNIA 3 (1981)); see *Weber County v. Ogden Trece*, 321 P.3d 1067, 1078 (Utah 2013) (explaining that the government claims that the gang, “as an unincorporated association, does not have a known management structure, officers, directors, or like managerial personnel”).

190 See *Vasquez*, 734 F.3d at 1046 (citing *United States v. Hankey*, 203 F.3d 1160, 1169–70 (9th Cir. 2000)).

191 *Id.* at 1046–47.

192 *Id.* (internal quotation marks omitted).

193 *Id.* at 1047 (internal quotation marks omitted).

194 *Id.*

195 *Id.*

196 *Id.*

Orange County argued that the state court made sufficient findings at the preliminary injunction stage about gang membership.<sup>197</sup> Importantly, however, those findings were preliminary rather than final.<sup>198</sup> Before the defendants (plaintiff-appellees in this action) were able to present a defense the OCDA dismissed them from the state court proceedings.<sup>199</sup> Thus, “the ultimate accuracy of the state court’s preliminary findings was—through no fault of the state court—entirely undermined by the very procedural tactic that gave rise to this lawsuit.”<sup>200</sup>

The court then analyzed the value of additional procedural safeguards.<sup>201</sup> Although there was a purported “removal process, . . . the precise nature of the process and the potential relief it offers remains unclear.”<sup>202</sup> Nothing in the record indicated that the individuals served with the injunction were notified of the removal process when they were served.<sup>203</sup> Lastly, this procedural safeguard was insufficient because it placed the burden on the individual to prove that he or she was not an active gang member when California law requires the burden to be on the state.<sup>204</sup>

Orange County tried to assert that intervention was a sufficient procedural safeguard.<sup>205</sup> The court quickly rejected that argument because the plaintiffs had been dismissed from the action by the OCDA.<sup>206</sup> It is absurd to say that after being dismissed they should have moved to intervene.

The final *Mathews* factor to be considered is the government’s interest in providing or refusing specific procedures.<sup>207</sup> The operative question then is “‘not whether [the county] has a significant interest in [combating gang violence]—no one doubts that [they] do[ ]—but rather whether [they] ha[ve] a significant interest in’ failing to provide a pre-deprivation process through which an individual can challenge [the county]’s allegations of his active gang membership.”<sup>208</sup> Orange County presented no evidence of “an administrative, fiscal or other substantial burden[ ] in providing . . . pre-deprivation safeguards.”<sup>209</sup> The record indicated that at least two other California juris-

197 *Id.* at 1048.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* at 1049 (internal quotation marks omitted).

203 *Id.* at 1049–50. The court also noted that it was unclear whether the removal process would apply to named defendants only or to anyone served with the injunction. *Id.* at 1050.

204 *See id.* at 1050 (“Most critically, the burden is on the petitioning individual to demonstrate that he or she is *not* an active gang participant, even though the State ordinarily has the burden of demonstrating active gang participation by ‘clear and convincing evidence.’” (quoting *Englebrecht II*, 106 Cal. Rptr. 2d 738, 752 (Cal. Ct. App. 2001))).

205 *Id.*

206 *Id.*

207 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Vasquez*, 734 F.3d at 1052.

208 *Vasquez*, 734 F.3d at 1052 (quoting *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1194 (9th Cir. 2008)).

209 *Id.* (internal quotation marks omitted).

dictions provide such a process.<sup>210</sup> There was also no evidence that pre-deprivation hearings would decrease the efficacy of the injunction against the gang and its members.<sup>211</sup> The Ninth Circuit agreed with the district court that Orange County established no “administrative, fiscal or other substantial burden[ ] in providing” pre-deprivation procedures to determine gang membership.<sup>212</sup>

In conclusion, the court weighed the *Mathews* factors and determined that there were very weighty interests at stake, a high probability of erroneous deprivation under current practices, valuable potential additional procedural safeguards, and no significant governmental interest in denying those procedures.<sup>213</sup> It therefore affirmed the district court’s injunction against the defendants, prohibiting them from enforcing the gang injunction.<sup>214</sup> It held that “*some* adequate process to determine membership in the covered class is constitutionally required.”<sup>215</sup>

*Vasquez*, however, leaves many questions unanswered. It is unclear from the majority opinion what difference in outcome, if any, would have resulted had the county not used a dismiss-and-serve strategy. That strategy had a considerable impact on the court’s weighing of the *Mathews* factors. The concurring opinion explained at length that the weighing of the *Mathews* factors

cannot be severed from [the county]’s unsettling and indefensible decision to voluntarily dismiss every individual who tried to challenge the injunction in the state court proceeding, and then serve those same dismissed individuals with the injunction it obtained uncontested. . . .

. . . Indeed, [the county]’s dismiss-and-serve strategy is the *linchpin* to its procedural due process violation because today’s opinion applies only to those individuals whom [the county] dismissed and later served.

We need not hold, and I do not read today’s opinion as holding, that the post-deprivation procedural remedies that [the county] proffered are constitutionally inadequate as to any other class of individuals.<sup>216</sup>

While *Vasquez* was clearly a victory for the critics of gang injunctions, cities and counties still have several ways to continue using gang injunctions. The first option would be to simply try to enjoin only named gang members. Each member would be individually served with the suit and would be able to contest his or her gang membership. The government would then only request an injunction against those individuals who have been adjudicated to be gang members. This would clearly withstand even the closest scrutiny under *Mathews*, as each individual had a full opportunity to present his or her defense.

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210 *Id.* at 1053.

211 *Id.*

212 *Id.* at 1052.

213 *Id.* at 1053.

214 *Id.*

215 *Id.* at 1056.

216 *Id.* at 1074 (Tallman, J., concurring).

While serving each member would solve *Vasquez* due process concerns, there are significant drawbacks. Such a strategy would likely prove unwieldy against the largest gangs. Even more importantly, though, is the static nature of this type of an injunction. Any gang member who subsequently joins the gang would not be bound. New suits would have to be filed for every new gang member. Again, this would be particularly burdensome when applied against large gangs whose membership is constantly in flux.

Surely a compromise strategy is possible—one that satisfies scrutiny under *Mathews* but is not overly burdensome for the government. The government could, for example, bring suit against the gang as a whole and establish a clear definition of who qualifies as a gang member. The injunction would then bind all the gang members, including future ones. The injunction could be served on anyone the police (or city attorney) believe meets the definition. Upon being served with the injunction those individuals would then be given the opportunity to contest their membership.<sup>217</sup> Lastly, before anyone was convicted of violating the injunction the state would have to prove that the individual did meet the definition in the terms of the injunction.

This compromise strategy is but one example of how the government can institute procedural safeguards to ensure that the Due Process Clause is not violated by gang injunctions. These safeguards certainly increase the cost of the injunction when compared to cases that provide no opportunity to contest gang membership. However, the cost is certainly less than naming every individual to be covered by the injunction. If these injunctions are as effective as cities and counties claim then surely it is money well spent. There will undoubtedly be much experimentation across jurisdictions in establishing constitutionally mandated safeguards.

#### CONCLUSION

Anti-gang injunctions, while a relatively modern invention, are becoming increasingly popular. While gang injunctions cover a broad swath of activities, they are justifiable in the face of public nuisance activity. Although most public nuisance actions fall under statute, they are equitable at heart. As such, the court must balance the public's interest in quelling the nuisance with the liberty interests of the enjoined.

Only with a proper understanding of the nuisance behavior itself, however, can the proper balance be struck. While critics of gang injunctions have argued that the no-association provisions of most gang injunctions are overinclusive because they allegedly prohibit non-nuisance behaviors, this misunderstands the nature of the nuisance itself. In their battle to establish control over "turf," gangs take specific measures to ensure their presence is felt in an area. Gang members are told that one of the cardinal laws of the

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217 Differing systems to contest gang membership are possible. Perhaps there could be some type of administrative hearing, which is appealable to the district court. Another possibility would be to bring the dispute before the district court in the first instance.

gang is to “represent” the gang at all times. This “representing” is accomplished through gang signs, clothing, symbols, colors, and the physical presence of members in the community.

The presence of multiple gang members who are all “representing” the gang is meant to send a clear message to both the community and rival gangs. The more a gang’s presence is felt the more effectively it may intimidate others and accomplish its other illicit objectives. This presence is, by the gang’s very design, meant to intimidate and inspire fear. Thus the presence does not just lead to other nuisance behavior (vandalism, drug dealing, trespassing, etc.)—it is itself nuisance behavior. This is what I have called the presence theory.

With increasing popularity, government officials are choosing to sue gangs as an entity either alone or in combination with named defendants. District attorneys and police departments then serve and seek to enforce these injunctions against individuals who had no part in the underlying injunction hearings. These practices raise due process questions with which courts have only just begun to wrestle. *Vasquez v. Rackauckas* is a recent, clear victory for critics, although it remains to be seen if it was a major victory or a minor one. Even after *Vasquez*, cities and counties still have a range of constitutionally permissible ways to continue using gang injunctions. Varying procedural safeguards will be implemented to protect served individuals’ due process rights and satisfy scrutiny under *Mathews*. It appears then, that gang injunctions are here to stay.

