SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

People of the State of California, Plaintiff, vs. Marcus Johnson, Defendant.	Court Nos. 10025389/10024070/ 10032951/11005186 **ORDER SUSTAINING DEMURRERS**

I. FACTUAL AND LEGAL BACKGROUND

The San Francisco Housing Authority (SFHA) has more than 50 public housing developments for low-income people. On July 17, 2009, the SFHA filed a civil complaint for injunctive relief against Marcus Johnson, an African-American man in his 20s. The SFHA complaint alleged that Johnson had assaulted and robbed people and possessed illegal drugs at its Yerba Buena Plaza East development. One episode had allegedly occurred 27 months earlier, in May 2007. Four others supposedly occurred before that, in 2006.

The SFHA complaint did not allege that Johnson had been convicted of any crime or been a gang member. Rather, claiming a "duty" to protect "the right to free use and enjoyment of the SFHA's property by the its [*sic*] tenants, employees and visitors," the complaint accused Johnson of being a private and public nuisance under Civil Code §§3479 and 3480.

The SFHA, a government corporation, has filed similar nuisance complaints against some 75 other people. Because the nuisance proceedings are in civil court, the

Public Defender does not represent the defendants. The vast majority, like Johnson, have no legal counsel, make no court appearance, and thus suffer a default judgment for injunctive relief.

With rare exceptions, these SFHA injunctions follow a stock form; the defendant's name is all that changes. Each defendant is enjoined "perpetually" from: (1) "being within 150 yards of any and all San Francisco Housing Authority property" (the injunction lists 53 properties around the city); (2) "entering into or onto" any SFHA property; and (3) "entering into, or onto, and ordered to stay away from [*sic*] any public street, avenue, boulevard, and other throughway, running through or bordering" any SFHA property.

Johnson has young children living with their mother on Buchanan Street in the Yerba Buena Plaza East development. On February 19, 2011, police arrested Johnson inside the Buchanan address for violating the SFHA injunction. Johnson was charged under Penal Code §166(a)(4) – for contempt of a court order. It was his fourth arrest on the same charge in seven months.

Johnson demurred to the four contempt complaints against him. Six other similarly situated defendants demurred on the same grounds and joined Johnson's brief. All of these demurrers are being considered together and all are resolved by this order.[1]

On April 29, 2011, the District Attorney's Office filed identical responses to the demurrers of all seven defendants. Those responses state: "the People will not oppose the Defendant's Demurrer."

[1] The six other defendants and their criminal case numbers are: Kevin Mitchell (Case Nos. 10037173, 11002298, 11007069); Deangelo Winston (10014332, 10006696); Wallace Pellette (2452032, 10018584); Maurice Lathan (11002047); Auton Jones (11008851); John Jackson (10020711). Johnson's case numbers are 10025389, 100240070, 100322951 and 11005186.

II. LEGAL ANALYSIS

Johnson contends – and the People do not dispute – that his demurrers should be sustained because the SFHA injunction impermissibly burdens his constitutional rights to: intrastate travel, freedom of movement, intimate association, petition the government for redress, and access to the courts. Johnson further contends that his demurrers should be sustained because the SFHA injunction is void for vagueness.

A. Demurrer Is A Proper Vehicle For Challenging The Injunction.

The California Supreme Court has long held that no contempt of a void injunction is possible, and that assertedly unconstitutional injunctions may be challenged by demurrer to a criminal-contempt complaint. *People v. Gonzalez*, 12 Cal. 4th 804, 808 (1996). Johnson and the six other defendants take that approach here.[2]

B. Constitutional Rights

Johnson has the constitutional rights his demurrers claim. His right to intrastate travel and the closely associated right to freedom of movement are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, section 7 of the California Constitution. *See*, *e.g.*, *In re White*, 97 Cal. App. 3d 141, 148 (1979); *People v. Beach*, 147 Cal. App. 3d 612, 620-22 (1983); *People v. Bauer*, 211 Cal. App. 3d 937, 943-45 (1989); *City of Chicago v. Morales*, 527 U.S. 41, 53, (1999); *Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997).

Johnson also has freedom-of-association rights protected by the First Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S.

[2] Because a court considering such a demurrer cannot assess the constitutionality of a civil injunction without knowing the injunction's terms and the circumstances under which it was entered, judicial notice of the civil court files at issue in these cases is requested by the defendants and hereby taken. Evid. Code §452(d).

Constitution, as well as Article I, sections 1, 2 and 7 of the California Constitution. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110 (1997); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 (1980). As the California Supreme Court emphasizes, "personal affiliations that attend…the raising and education of children" are "central to any concept of liberty." *Acuna*, 14 Cal. 4th at 1110.

Further, Johnson has rights to petition the government for redress of grievances and to access the courts, as protected by the First Amendment to the U.S. Constitution and Article I, sections 2 and 3 of the California Constitution. *See, e.g.*, *People v. Leon*, 181 Cal. App. 4th 943, 952-53 (2010); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Huminski v. Corsones*, 386 F.3d 116, 145-46 (2nd Cir. 2004).

Johnson's constitutional rights are burdened by the SFHA injunction. On the injunction's face, Johnson is banished "perpetually" from 53 large chunks of his home town – the SFHA properties and their surrounding 150-yard exclusion zones. While it is America's 13th-most-populous city, at 48 square miles San Francisco is compact. Thus, it is difficult for Johnson to legally travel the city through the quilt of 53 SFHA properties. This erects significant barriers to Johnson's ability to work, worship, eat, associate with family and friends – in short, to exist in San Francisco.

Johnson's rights to intimate association are also burdened. In fact, he was arrested for contempt of the injunction inside his children's home in an SFHA development. At a time when too many fathers fail to be involved in their children's lives, Johnson is apparently trying to fulfill this important role. But the SFHA injunction bars that involvement from occurring in the home.

Finally, because the San Francisco federal courthouse is located in an SFHA exclusion zone, the injunction bars Johnson from attending federal trials – even his own, should he ever face federal charges.

While Johnson has constitutional rights, the public – including SFHA tenants, employees and visitors – has rights too. Among them are "tranquility, security and protection." *See Acuna*, 14 Cal. 4th at 1102. Indeed, Johnson himself agrees: "These interests are certainly legitimate and even compelling." Def. Memo. 11:21-22.

When a violation of "public rights" is found, there must be what the California Supreme Court calls a "trade-off" between those rights and the violator's individual rights. *Acuna*, 14 Cal. 4th at 1102, 1104. However, the SFHA's civil complaint did not contend that Johnson was ever convicted of a crime. Nor did the complaint claim any attempt to secure a criminal stay-away order. So this apparently was not an instance in which "the criminal law prove[d] inadequate," forcing the government to resort to civil nuisance law. *See id.* at 1103.

Instead, the SFHA opted for a summary civil proceeding. No contested hearing. No live witnesses. No cross-examination. And then, a broad and perpetual injunction entered after a default. It is easy to say Johnson should have defended himself in civil court, but this asks a low-income person to either pay for a lawyer with money he may not have, or to cross wits *pro per* with seasoned civil practitioners.

In any event, even if Johnson in fact violated public rights, an injunction protecting those rights must be "narrowly tailored" to burden no more of the individual's fundamental constitutional rights than is necessary to serve a "compelling state interest." *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Huminski*, 386 F.3d at

152; *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994); *Acuna*, 14 Cal. 4th at 1115; *Bauer*, 211 Cal. App. 3d at 944.

The SFHA injunction is not narrowly tailored. Rather, it is several sizes too large.

First, the SFHA injunction completely bars Johnson from its 53 properties and their surrounding 150-yard exclusion zones – *i.e.*, much of San Francisco. Territorial banishment orders that broad are not constitutionally permitted even against convicted criminals. *See White*, 97 Cal. App. 3d at 148; *Beach*, 147 Cal. App. 3d at 620-22; *Bauer*, 211 Cal. App. 3d at 943-45.

Second, unlike the gang injunction in *Acuna* (14 Cal. 4th 1090), the SFHA injunction is not tailored to dissuade Johnson from nuisance activities. Rather, the injunction outlaws *all* activity by Johnson – even mere presence.

Third, the injunction is not tailored to permit constitutionally protected activities such as child-rearing and court access. *See Acuna*, 14 Cal. 4th at 1110; *Leon*, 181 Cal. App. 4th at 952-53.

Fourth, the SFHA injunction "perpetually" bars Johnson from its properties. This shows no recognition that Johnson at age 60 may well differ from Johnson at 20. In gang cases, "opt out" provisions tailor injunctions so they are not lifetime restrictions. *See, e.g., People v. Colonia Chiques*, 156 Cal. App. 4th 31, 37-38 (2007).

Fifth, the injunction is not tailored to fit hours when illicit activities are likely to occur. *See, e.g., City of New York v. Andrews*, 719 N.Y.S. 2d 442, 447 (N.Y. Sup. Ct. 2000). Instead, the SFHA injunction operates 24/7/365.

Sixth, the injunction covers all 53 SFHA properties and their adjacent exclusion zones, though no act by Johnson was even alleged at 52 of the properties. This again

contrasts with gang cases like *Acuna*, in which the injunction narrowly covered a single four-block area where illicit activity actually occurred. 14 Cal. 4th at 1100.

C. Void For Vagueness

An injunction is constitutionally void for vagueness when "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Acuna*, 14 Cal. 4th at 1115. Two concerns underlie this rule: "the core due process requirement of adequate notice," and the impermissible delegation of "basic policy matters" to law enforcement. *Id.* at 1115-16 (emphasis deleted). The SFHA injunction is void for vagueness in two ways.

First, the injunction's third restriction bars Johnson from "entering into, or onto and ordered to stay away from [*sic*] any public street, avenue, boulevard and other throughway, running through or bordering" any SFHA property. Consider Geary Boulevard. It runs east-west almost the entire width of San Francisco. It also runs through SFHA exclusion zones. So when Johnson is south of Geary, he apparently is barred from traveling across it to the north side, because he would be "entering into, or onto" Geary. This is so even if no SFHA 150-yard exclusion zone is entered.

One might argue that the injunction's third restriction only applies to those parts of Geary actually within an SFHA exclusion zone. However, the injunction's first and second restrictions already cover that territory – all of it is "within 150 yards" of an SFHA property. So the third restriction must either be read broadly or it is superfluous. Defendants are left to guess. *See Acuna*, 14 Cal. 4th 1115.

Second, the 150-yard exclusion zones are also vague. Are they measured from each of the building addresses in an SFHA property, from each property's periphery, or from other points? Again, defendants must guess.

III. RESOLUTION

As the People do not dispute, the SFHA injunction against Johnson is unconstitutional, and thus void, because it (a) impermissibly violates his rights to intrastate travel, freedom of movement, intimate association, petition government for grievances, and access the courts, and (b) is vague.

The same form of injunction applies to the other six defendants who have demurred, so – as the People also do not dispute – those injunctions too are unconstitutional and void. It is noted that the vast majority of 65-plus other SFHA nuisance injunctions follow the same unconstitutional form, though they are not presently before this Court.

No contempt charge may lie when an underlying injunction is unconstitutional. *Gonzalez*, 12 Cal. 4th at 808. The defendants' demurrers are thus all sustained with prejudice, and all of the contempt charges against the seven defendants must be, and hereby are, dismissed.

Dated: May 24, 2011

By: _____
Richard B. Ulmer Jr.
Judge of the Superior Court