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8 **In the Superior Court of the State of California**
9 **County of San Francisco**

11 People of the State of California, by
12 and through Dennis Herrera, City
13 Attorney for the City and County of San
Francisco,

14 Plaintiff,

15 vs.

16 Chopper City, a criminal street gang,
sued as an unincorporated association,
17 Eddy Rock, a criminal street gang, sued
as an unincorporated association, Knock
18 Out Posse, a criminal street gang, sued
as an unincorporated association, and
19 Does 1 through 500,

20 Defendants.

21 Makia Johnson,

22 Defendant/Intervenor.
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Case No. 464-493

Hearing Date: September 18, 2007
Time: 9:30 a.m.
Dept: Dept. 301
Judge: Hon. Peter Busch
Complaint Filed: June 21, 2007
Trial Date: None

**Memorandum of Points and
Authorities in Opposition to
Plaintiff's Ex Parte Application
for Order to Show Cause**

Re: Preliminary Gang Injunction

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Introduction

The City Attorney asks this court to issue an injunction on gang activity, claiming such an order will “effectively turn[] each defendant’s gang territory into a nuisance-free “Safety Zone.” (Application for preliminary injunction, page 1, lines 10-12.) Not only has plaintiff failed to meet its legal burden for obtaining such an injunction, but its premise — that a court order will redress the problem — is all wrong. As attested to both by people who actually live and work in these areas, and by expert testimony, “gang injunctions” are ineffective as a rule. This injunction would increase and institutionalize gang activity, turning what were essentially small, transitional groups into gangs. In sum, it will only make matters worse.

Factual and Procedural Background

12 The City Attorney for the City and County of San Francisco (“plaintiff”) filed a
13 Complaint for Injunctive Relief against “Chopper City,” “Eddy Rock,” and “Knock Out
14 Posse,” alleging that: they are criminal street gangs; responsible for creating a public
15 nuisance in two separate six-block areas of the Western Addition District of San
16 Francisco (“Safety Zones”); and the three named gangs are unincorporated associations.

17 Plaintiff seeks a preliminary injunction enjoining 13 named members of “Chopper
18 City” from engaging in certain activity within Safety Zone, including loitering,
19 trespassing, “intimidation,” graffiti vandalism, displaying gang signs or symbols, or
20 associating with other alleged gang members. Violations of the proposed injunction
21 could be pursued civilly by the City Attorney, for monetary penalties and county jail time
22 for each violation, or prosecuted criminally as a misdemeanor carrying six months in jail.

23 Plaintiff has named Makia Johnson [“Defendant-Intervenor”] as a member of the
24 Chopper City gang, by virtue of the inclusion of her name on the list of gang members.
25 The factual justification for including Johnson on the list is unclear, as police-officer
26

1 declarations establish no apparent link between Makia and Chopper City.

2 Johnson opposes the injunction on three grounds: 1) she has never been a member of
3 the Chopper City gang; 2) the injunction imposes unnecessary and harsh restrictions upon
4 her rights, liberties, and lawful activities within the “Safety Zone;” 3) there is no
5 immediate need for the injunction, as plaintiff has not shown an existing or imminent
6 substantial public nuisance.

7 **Argument**

8 **1. Chopper City and the other named gangs are not legal entities** 9 **capable of being sued, because they have no “lawful purpose.”**

10 The request for a preliminary injunction must be denied because plaintiff has not
11 demonstrated that the “Chopper City Criminal Street Gang” and the others named are
12 “unincorporated associations,” capable of being served and sued as legal entities.
13 Plaintiff named Chopper City, not individual alleged members as defendant in this
14 action, and therefore it must establish that the gang is a legal entity subject to suit.

15 Plaintiff alleges that Chopper City is, on the one hand, a criminal street gang
16 responsible for countless criminal acts enumerated in Section 186.22(e) of the Penal
17 Code and is, on the other hand, an “unincorporated association.” The latter is defined by
18 statute as “an unincorporated group of two or more persons joined by mutual consent for
19 a common lawful purpose, whether organized for profit or not.”¹ Plaintiff has not
20 established that persons joined Chopper City for any “lawful purpose.” On the contrary,
21 plaintiff’s complaint and declarations allege in great detail the unlawful and criminal
22 purposes of the Chopper City gang.

23 In *People v. Broderick Boys*, the Court of Appeal held that a prosecutor could not
24 name a criminal street gang as the sole defendant in a gang injunction case and thereby

25 ¹ Corp. Code §18035(a) (emphasis added).

1 make service on the gang as an unincorporated association under Code of Civil
2 Procedure sec. 416.40(b) and Corporations Code sec. 18220, without an evidentiary
3 showing that the gang “was formed for at least some lawful purpose.”² As the court
4 noted, “[w]e have not found any reference to a criminal group being treated as an
5 unincorporated association in California or elsewhere.”³ Thus, it invalidated a permanent
6 injunction because of the inadequacy of this method of service.

7 Here, the same result should follow, because plaintiff has attempted to assert
8 jurisdiction over Chopper City and the other gangs as unincorporated associations by the
9 same inadequate method of service. Plaintiff’s expert fails to assert any organizational
10 structure, business arrangement, division of labor and profits, or non-criminal group
11 intent. But for the friendship, location, “signs” and arrests, there is nothing to support
12 the assertion that these “gangs” are unincorporated associations subject to suit.

13 **2. Plaintiff has not met the requirements for a preliminary injunction.**

14 This court must consider two interrelated factors in evaluating whether plaintiff is
15 entitled to a preliminary injunction. First, plaintiff must show it is likely to prevail at trial
16 on the merits. Second, the court must weigh the interim harm plaintiff is likely to sustain
17 if the injunction is denied against the harm defendant will suffer if the preliminary
18 injunction issues.⁴ As to both factors, plaintiff fails to meet its burden.

19 **A. Plaintiff fails to show it is likely to prevail by clear and convincing evidence**
20 **at trial.**

21 To prevail at trial, plaintiff must prove by clear and convincing evidence all elements

22 ² *People ex rel Reisig v. The Broderick Boys* (2007) 149 Cal. App. 4th 1506, 1522.

23 ³ *Id.* at 1521.

24 ⁴ *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1109 (1997); *Continental*
25 *Bakery Co. v. Katz* (1968) 68 Cal. 2d 512, 527.

1 required for the issuance of a gang injunction.⁵ This heightened standard of proof
2 applies in the special context of gang injunctions “not because the personal activities
3 enjoined are sublime or grand but rather because they are commonplace, and ordinary.”⁶
4 As the *Englebrecht* court expressed it, there is a “need for a heightened standard of proof
5 [arising] both from constitutional due process and more general public policy
6 considerations,”⁷ because “particularly important individual interests or rights are at
7 stake.”⁸

8 Clear and convincing evidence requires a finding of high probability.⁹ The evidence
9 must be “so clear as to leave no substantial doubt” and “sufficiently strong to command
10 the unhesitating assent of every reasonable mind.”¹⁰ To satisfy the “clear and
11 convincing” standard in the injunction context it must appear with reasonable certainty
12 that the wrongful acts will be continued or repeated.¹¹

13 Specifically, to establish that a gang injunction is necessary under the public nuisance
14 doctrine, plaintiff must prove that: 1) Chopper City is a criminal street gang; 2) Chopper
15 City’s acts are causing a public nuisance, and; 3) each of the individuals whom plaintiff
16

18 ⁵ *People v. Englebrecht* (2001) 88 Cal.App.4th 1236.

19 ⁶ *Id.* at 1256.

20 ⁷ *Id.* at 1255-56.

21 ⁸ *Id.* at 1254.

22 ⁹ *Broadman v. Commission on Judicial Performance* (1988) 18 Cal. 4th 1079.

23 ¹⁰ *In re Angelia* (1981) 28 Cal. 3d 908; *People v. Caruso* (1968) 68 Cal. 2d 183.

24 ¹¹ *Russell v. Douvan* (2003) 112 Cal. App. 4th 39.

1 seeks to bind by the preliminary injunction is an "active gang member."¹²

2 Plaintiff has failed to provide clear and convincing proof of these requisite elements,
3 thus it cannot establish it is likely to prevail on the merits.

4 **1. Plaintiff failed to present clear and convincing evidence that Chopper City,
5 Eddy Rock and Knock Out Posse are criminal street gangs.**

6 Intervenor Johnson does not concede that the named gangs constitute criminal gangs.

7 **2. Plaintiff has not presented clear and convincing evidence that there is a
8 substantial public nuisance in the safety zone caused by the acts of defendant
9 Chopper City and the other named gangs.**

9 Plaintiff has not established that the acts relied upon to allege that defendants have
10 created a substantial public nuisance were directed by the alleged gangs, or in furtherance
11 thereof, rather than criminal acts of individuals or non-gang groups.

12 The public-nuisance doctrine is an equitable remedy designed to protect community
13 interests.¹³ A public nuisance is one that affects the entire community or neighborhood at
14 the same time.¹⁴ For an injunction to issue, the community-interest interference must be
15 substantial and unreasonable, and the invasion real and appreciable.¹⁵ Plaintiff has the
16 burden of establishing that the alleged objectionable activity falls within the terms of this
17 definition of public nuisance.¹⁶

18 Plaintiff makes blanket assertions, without evidentiary support, that Chopper City and
19 the other gangs named threaten the quality of life and the safety of residents in the

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21 ¹² *People v. Englebrecht, supra*, 88 Cal.App.4th at 1242-1243.

22 ¹³ *Acuna, supra*, 14 Cal.4th at 1103.

23 ¹⁴ Civ. Code Section 3480.

24 ¹⁵ *Acuna, supra*, 14 Cal.4th at 1105.

25 ¹⁶ *Id.* at p. 1107.

1 “Safety Zone.” Plaintiff attaches declarations from San Francisco police officers reciting
2 criminal or suspected criminal activity by named individuals. However, an injunction to
3 abate a public nuisance stems from the willingness to vindicate the value of community
4 and the collective interests it furthers, rather than punish criminal acts.¹⁷ Here, plaintiff
5 fails to include a single declaration from a member of the community to verify what the
6 police claim on the community’s behalf.

7 In contrast to plaintiff’s showing here, the *Acuna* court was able to rely heavily on the
8 48 declarations submitted by *community members* in finding cause for a preliminary
9 injunction against defendant gang members.¹⁸ Also distinct from this case, the proposed
10 Safety Zone in *Acuna* was a smaller area in which none of the alleged gang members
11 resided. The court found that people in the community had become “prisoners in their
12 own homes,” and the activities of the gang had turned the small, four-block area into
13 “occupied territory” and an “urban war zone.”¹⁹ No one in the community has attested to
14 such facts here, and plaintiff has not shown that this proposed injunction vindicates
15 community interests.

16 In fact, members of community organizations whose programs focus on violence
17 prevention and gang intervention dispute plaintiff’s underlying assumption that the
18 injunction is in the best interests of the community. Community members do not believe
19 the proposed injunction will improve the living conditions or level of violence in their
20 community. In short, they believe it will exacerbate, rather than diminish the gang-

23 ¹⁷ *Acuna, supra*, 14 Cal.4th at 1107.

24 ¹⁸ *Id.* at 1118.

25 ¹⁹ *Id.*, at 1100.

1 related problems in the safety zones.²⁰

2 Further, plaintiff presents insufficient evidence to show that the criminal activities
3 constituting a public nuisance were committed at the direction, or for the benefit, of the
4 gang. In gang-injunction case, an individual's criminal conduct is only material if it
5 relates to the activities of the gang as an entity, because individuals who are members of
6 organizations nevertheless retain the ability to act in their individual capacities. Here,
7 police describe much individual criminal conduct, but little to support a conclusion that
8 the acts are for gang benefit. It does not follow that, because young people raised in a
9 common area commit crimes in concert, those crimes are necessarily committed for gang
10 benefit. Nor does evidence that they may also be members of, or have former allegiances
11 to, a group, show that any given act was performed in association with that group. To
12 establish that Chopper City is responsible for the acts of individuals, plaintiff would need
13 to prove that the group directed these actions or benefitted from them.

14 **3. *Intervenor Makia Johnson is not an active member of Chopper City.***

15 Plaintiff also bears the burden of proving by clear and convincing evidence that each
16 individual it intends to bind is an active gang member vis-a-vis the nuisance activity.²¹
17 Active gang membership in this legal context requires that the individual to be enjoined
18 is shown to participate or act in concert with the Chopper City and that this participation
19 “be more than nominal, passive, inactive or purely technical.”²² The court in *People v.*
20 *Broderick Boys* reiterated this standard: “a person is subject to the injunction if the State
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22 ²⁰Declaration of Shawn Richard, attached as Exhibit A; Decl. of Carlos Levezier,
23 attached as Exhibit B; Decl. of James Queen, attached as Exhibit C.

24 ²¹ *Englebrecht, supra*, 88 Cal.App.4th at 1261.

25 ²² *Ibid.*

1 proves by clear and convincing evidence that the above definition [of active gang
2 membership] is met.”²³

3 The *Englebrecht* court rejected the argument that the criteria of the California Gang
4 Task Force amount to a definition of gang membership in the injunction context: “Those
5 factors may provide a useful guide for determining if a defendant is a gang member but
6 they do not ultimately define the concept of membership in the gang abatement
7 injunction context.”

8 Here, Makia Johnson’s declaration refutes any association with Chopper City or other
9 gangs.²⁴ Other than the inclusion of her name on “the list” of gang members, there is no
10 evidence that Makia Johnson is, or ever was, associated with Chopper City or any other
11 gangs.

12 **4. *Plaintiff has not shown that the proposed injunction is authorized under***
13 ***California’s unfair business practices law.***

14 Plaintiff asserts that Chopper City is engaged in unfair and unlawful business under
15 Business and Professions Code section 17200,²⁵ which defines “unfair competition” to
16 include “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive,
17 untrue or misleading advertising and any act prohibited by the false advertising law.”²⁶
18 Whether particular conduct is within section 17200 is a question of fact.²⁷ Here, plaintiff
19 summarily concludes that named gangs commit criminal acts for business purposes.

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21 ²³ *Broderick Boys, supra*, 149 Cal.App.4th at 1517 (emphasis by court).

22 ²⁴ Decl. of Makia Johnson, attached as Exhibit D.

23 ²⁵ *See* Application for preliminary injunction at page 11:3-19.

24 ²⁶ Bus. & Prof. Code § 17200 et seq.

25 ²⁷ *People v. EWAP* (1980) 106 Cal.App.3d 320.

1 To invoke the unfair competition law, plaintiff must show that Chopper City is a
2 business. Instead, plaintiff alleges Chopper City members sell drugs and commit violent
3 crimes. This criminal activity, itself, is not a business. What legitimate business is being
4 unfairly practiced is left unanswered. The City Attorney alleges crimes — not business
5 practices. There is no hint of loan sharking, money laundering, protection rackets, or
6 threats to specific businesses is found in the allegations. With no showing these named
7 gangs are “businesses,” Business and Professions code section 17200 does not apply.

8 In *People v. E.W.A.P.*,²⁸ the Court of Appeal found the defendant corporation engaged
9 in the unlawful business of distributing porn and liable under the Unfair Competition
10 Law. But the court noted that application of these provisions to persons engaged in
11 purely criminal enterprises would be a “misapplication of the law.”²⁹

12 Here, the alleged Chopper City gang is not incorporated in any state and has no known
13 legitimate or organized “business.” No evidence suggests any business organization,
14 structure, or plan. Plaintiff has merely offered examples of crime committed by alleged
15 Chopper City gang members. None of these examples show that the Chopper City is a
16 business.

17 **B. The balance of harms tips in favor of denying the preliminary injunction.**

18 As already noted, the court must weigh “the interim harm that the plaintiff is likely to
19 sustain if the injunction were denied as compared to the harm the defendant is likely to
20 suffer if the preliminary injunction were issued.”³⁰ Here, the terms of the injunction will
21 significantly harm Makia Johnson — who was raised in the Zone and lived there until
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23 ²⁸ *People v. EWAP, supra.*

24 ²⁹ *Id.* at 821.

25 ³⁰ *Acuna, supra*, 14. Cal.4th at 1109.

1 just recently — including disruption of familial relationships, daily educational and
2 social activities, and positive community activities.

3 In short, it would subject her to unconstitutional restrictions on her freedom of speech
4 and association, as well as put her at risk for arbitrary and unjustified harassment and
5 unlawful detentions from the police. It will also subject other African-American youth in
6 the Safety Zone to such harassment and detentions, raising the risk of racial profiling.

7 Makia Johnson does not dispute plaintiff’s premise that the community experiences
8 violence. However, it has presented no evidence that gang injunctions are an effective
9 remedy for abating this nuisance. On the other hand, this injunction would interfere with
10 significant constitutional interests. Before issuing an injunction that will restrict the
11 liberty of numerous individuals, there must be evidence that, in the absence of this
12 injunction, even greater harm will ensue.

13 Makia Johnson has presented declarations from community members and
14 organizations engaged in positive anti-gang, anti-violence, and anti-drug efforts in the
15 Western Addition, whose work will be undermined by this injunction, thereby increasing
16 — rather than diminishing — the risk of the harms to the community. Defendant, not to
17 mention the wider community, will be harmed by the injunction's interference with the
18 work of these organizations, which provide critical resources to community residents.

19 For example, within the safety zone is the Western Addition Community Technology
20 Center, providing educational services to community youth, the King/Garvey Coop,
21 offering a range of educational services to some of the very youth whose names are on
22 the gang-injunction list as well as staging numerous positive community events, and
23 Brothers Against Guns, an organization specifically geared toward the reduction of
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1 violence.³¹ The proposed injunction will interfere with access to these programs for the
2 very youth who need them most, because access to the services will necessitate or at least
3 risk “associating in the public view or in a place accessible to the public” with others on
4 the list.

5 Plaintiff’s failure to provide significant evidence that the issuance of the preliminary
6 injunction will improve the lives of residents in the purported “Safety Zone” is a relevant
7 factor in the balancing-of-harms analysis. Indeed, the inefficacy of gang injunctions as a
8 law enforcement tactic has been shown.³² These injunctions do little to improve
9 community life and have, in some cases, made things worse.³³ This research, combined
10 with the declarations by community-based organizations whose anti-gang work will be
11 undermined by the proposed injunction show that the community will be harmed if the
12 injunction is imposed.

13 In sum, the proposed injunction threatens disruption of protected, lawful activities and
14 the community itself does not support its imposition. Plaintiff has failed to show that the
15 harm suffered in the absence of the injunction outweighs the harm to defendants and the
16 community. In the balance-of-harms analysis, the scales tip far away from plaintiff.

17 **3. The proposed preliminary injunction is overbroad and must be**
18 **narrowly tailored to comply with constitutional mandates and**
19 **established principles of equity.**

20 This court must narrowly tailor the scope of any injunction within constitutional and
21 equitable standards. To be constitutionally sustainable, the proposed order must “burden
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23 ³¹ See Decl. of Caroso Levexier (Exhbiit B) and James P. Queen (Exhibit C).

24 ³² See Declaration of Judith Greene, attached as Exhibit E.

25 ³³ *Id.*

1 no more speech than necessary to serve a significant government interest.”³⁴ Equity
2 likewise requires that any proposed order be couched in the narrowest terms possible to
3 achieve the goals of the injunction. “It is a familiar doctrine of equity that the scope of
4 the injunction will be limited to the wrongful act sought to be prevented.”³⁵ This ensures
5 that individuals are not deprived of liberty without just cause. Plaintiff has failed to
6 make this showing as to many of the proposed provisions of this injunction.

7 As specifically addressed below, provisions relating to association, gang signs and
8 symbols, and trespassing fail to meet these standards. Each of these provisions enjoins
9 more activities, both lawful and unlawful, than necessary to abate the nuisance, lacks a
10 sufficient nexus between the alleged harm and the proposed restrictions, and runs the risk
11 of impacting more First Amendment activity than necessary to meet legitimate
12 governmental interests.

13 **A. Prohibition of association**

14 Plaintiff’s proposed restriction on association risks grievous invasion of basic
15 constitutional rights, especially where, as here, the defendant is a young adult who was
16 raised in the area along with others on the list. An injunction “may not burden the
17 constitutional right of association more than is necessary to serve the significant
18 government interest at stake.”³⁶ When fundamental rights are involved, the government
19 must address the problems it seeks to address with a “narrowly drawn, constitutionally
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22 ³⁴ *Acuna, supra*, 14 Cal. 4th 1115, citing *Madsen v. Women's Health Center*
(1994) 512 U.S. 753, 761.

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24 ³⁵ *Magill Bros. v. Bldg. Service Employees' Int'l Union* (1942) 20 Cal. 2d 506,
512.

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26 ³⁶ *Acuna, supra*, 14 Cal.4th at 1115, 1120-1122.

1 sensitive response” that “is narrowly focused on the harm at hand.”³⁷

2 Two kinds of association are entitled to First Amendment protection: “intimate”
3 association, such as those affiliations that “attend the creation and sustenance of a
4 family”; and “instrumental” association, those affiliations that are involved in the
5 exercise of religious and political expression and activity.³⁸ Here, both types of
6 association are impacted by the proposed injunction.

7 In *Acuna*, the court acknowledged that a similarly-worded restriction on association in
8 a gang injunction involved First Amendment interests. In applying the *Madsen* standard
9 of burdening no more speech than necessary,³⁹ the court relied heavily on the fact that no
10 political, familial or religious activity took place among the alleged gang members within
11 the small four-block area affected by the injunction.⁴⁰ Not so here.

12 The proposed Western Addition “Safety Zone” is twelve square blocks, and many of
13 those on the list have immediate family members who live within that area.⁴¹ Indeed,
14 there are three brothers on the list whose grandmother lives in the zone,⁴² and the
15 injunction would subject them all to harassment or worse should they choose the wrong
16 time to visit. Intervenor Makia Johnson lived within the zone for twelve years and
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18 ³⁷ *Waters v. Barry* (D.D.C. 1989) 711 F.Supp. 1125, 1135; *Carroll v. President of*
19 *Princess Anne* (1968) 393 U.S. 175, 183-83.

20 ³⁸ *Acuna, supra*, 14 Cal.4th at 1110, citing *Roberts v. United States Jaycees*
21 (1984) 468 U.S. 609, 609.

22 ³⁹ *Id.* at 1121-23.

23 ⁴⁰ *Id.* at 1122.

24 ⁴¹ Decl. of Carlos Levexier (Exhibit B); Decl. Makia Johnson (Exhibit D).

25 ⁴² Decl. of Carlos Levexier (Exhibit B).

1 retains extensive ties there. Her daily routine, social life and family ties — her
2 associational life — all revolve around people and activities within the zone.

3 Further, the scope of the provision, as written, would apply not only to association
4 outside in public, but also to association inside any building “accessible by or to the
5 public.” Thus, the act of walking alone into any store, restaurant, business or meeting
6 inside the Zone would carry the risk of violating the injunction if the wrong person also
7 happens to be there. Intervenor Makia Johnson participates in all these constitutionally-
8 protected activities — and then some — within the Zone.⁴³ Her working mother picks
9 her up inside the Zone nearly every day. She has family members in the Zone, including
10 young cousins, in whose lives she is legitimately, legally and usefully involved. Because
11 of the dense urban area encompassed by the proposed injunction, Makia Johnson risks
12 violating the association provision when she participates in the ordinary, lawful activities
13 that make up her life.

14 Unlike in *Acuna*, where the gang members “engaged in no expressive or
15 speech-related activities which were not either criminally or civilly unlawful,”⁴⁴ Makia
16 Johnson and others whom plaintiff seeks to enjoin regularly participate in lawful
17 community activities within the Zone. The association provision here would apply to a
18 significant geographical area and would limit entirely lawful familial, educational, and
19 political associational activities that are unrelated to the purported nuisance. Without
20 requiring some nexus between the prohibited associational activities and the alleged
21 nuisance, or without broadening the exceptions, the proposed injunction will not only
22 enjoin more associational activity than necessary, but will also discourage alleged
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24 ⁴³ Decl. of Makia Johnson (Exhibit D).

25 ⁴⁴ *Acuna, supra*, 14 Cal.4th at 1121.

1 members from engaging in activities to better their community and themselves.

2 **B. Prohibition of gang signs and symbols**

3 The proposed injunction prohibits “[f]lashing gang signs . . . or showing any gang
4 symbols, including but not limited to: “Knock Out Posse,” “KOP,” “KO,” “567,”
5 “1600,” “uptown,” “Chopper City,” “Choppa City,” “223,” “1800,” the “okay” hand
6 sign, the “C” hand sign and the “thumbs up” hand sign, and more. (OSC pp. 3, 5.)

7 The prohibition on “gang signs” and “gang symbols” here is considerably more
8 indefinite than both the gang-sign provision upheld in *Englebrecht*⁴⁵ and the preliminary
9 injunction issued by the Superior Court in *Acuna*. *Englebrecht* emphasized that “[t]he
10 provision specifically described [the prohibited] signs and gestures.”⁴⁶ By contrast here,
11 plaintiff fails to specify which gestures would constitute “gang signs.” Thumbs up and
12 okay, for example, are ubiquitous in common speech and gesture, such that any order
13 forbidding them is substantially overbroad. While the provision mentions numerous
14 prohibited gang symbols allegedly connected to Chopper City, the prohibition does not
15 limit itself to those signs and symbols, nor to signs and symbols relating in any way to
16 Chopper City. It applies to the signs and symbols of any gang, without standards that
17 give notice to those enjoined or that limit police discretion in its enforcement. It is hard
18 to imagine a provision more susceptible to law-enforcement abuse and overreaching at
19 the street level.

20 Courts have specifically invalidated regulations on “gang” symbols that fail to provide
21 clear guidance. In the school setting — where restrictions on expression have
22 traditionally been afforded more deference than in other contexts — the Eighth Circuit
23

24 ⁴⁵ *Englebrecht, supra*, 88 Cal. App. 4th 1236.

25 ⁴⁶ *Id.* at 1243.

1 federal appeals court found void for vagueness a prohibition on “gang related activities
2 such as display of 'colors,' symbols, signals, signs, etc.,” because the word “gang” was
3 “the sole adjective for the prohibited 'colors, symbols, signs, signs, etc.’”⁴⁷

4 Here, the proposed Chopper City injunction is drafted with the same “sole adjective.”
5 The lack of specificity is particularly problematic because “[g]ang symbols . . . take many
6 forms and are constantly changing.”⁴⁸ Thus, like the regulation in *Stephenson*, the gang
7 symbol and gang sign prohibition is “fatally vague,” because “the term ‘gang’” fails to
8 give adequate notice to those bound by the injunction and this lack of specificity
9 impermissibly grants “local police unfettered discretion to decide what represents a gang
10 symbol.”⁴⁹

11 In addition to its vagueness, the gang-sign provision also “suffers from fatal
12 overbreadth” because it is not limited to symbols and signs known by those bound “to
13 have a gang connotation.”⁵⁰ Even in the context of a probation condition, applying a
14 lesser standard of judicial scrutiny than must be applied to a civil injunction, the *Lopez*
15 court modified the condition to apply only to “clothing with gang significance” and
16 “gang insignia, moniker or other markings of gang significance known to be such by
17 defendant....”⁵¹ Here, without such carefully crafted limitations, the gang-signs
18 provision is unconstitutional.

21 ⁴⁷ *Stephenson v. Davenport Community Sch. Dist.* (8th Cir. 1997) 110 F.3d 1303.

22 ⁴⁸ *Id.* at 1309.

23 ⁴⁹ *Id.* at 1310; see *City of Chicago v. Morales* (1999) 527 U.S. 41.

24 ⁵⁰ *People v. Lopez* (1998) 66 Cal. App. 4th 615, 629.

25 ⁵¹ *Lopez, supra*, at 625 (emphasis added).

1 **C. The trespassing provision requiring written consent is overbroad.**

2 Plaintiff's proposed trespassing provision would restrict presence on any private
3 property without the prior written consent of the owner, or unless in the physical
4 presence of the owner or lawful resident. This would wrongly enjoin more activity than
5 necessary to abate the alleged nuisance and would interfere with lawful associational
6 activities. In contrast to the limited area at issue in the Oakdale Mob injunction, the
7 Zone in the Western Addition would encompass a densely populated, 12-block area
8 including public housing projects and public parks used for sporting activities, as well as
9 other spots vital to people's lawful daily lives. Plaintiff has not shown that trespassing is
10 so huge a problem that this restriction needs to encompass everything within the Zone.

11 Here, innocent visitation with friends and family members residing in the Zone, or
12 even going at work, unless with written consent, could be punishable under the proposed
13 injunction. The right to visit in housing complexes was recently addressed by the Ninth
14 Circuit in *People v. Edgerly*,⁵² where the police temptation to use "trespassing" in a
15 public housing area as an excuse for a general exploratory search was condemned. The
16 inclusion of Housing Authority property within the scope of the provision risks the same
17 temptation on the part of police, and means that a person enjoined, even a resident, could
18 violate the injunction by walking through the area to a family member's apartment
19 without the written permission of the San Francisco Housing Authority. Finally, there is
20 no exception in the proposed provision for emergencies, including medical.

21 In sum, the injunction would cast an unreasonably wide net, encompassing legitimate,
22 lawful and essential activities in the lives of residents and others within the Zone.

23
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⁵² *Edgerly v. City and County of San Francisco* (9th Cir. 7/17/05) __ F.3d __; 2007
26 U.S. App. LEXIS 16949.

1 **D. The drug and paraphernalia provision**

2 The proposed injunction prohibits using or possessing (or remaining in the presence of
3 anyone using or possessing) controlled substances or related paraphernalia. (OSC, p. 2).
4 This provision should be struck, because — although these activities are crimes — there
5 is no evidence that drug use or simple possession by gang members is in furtherance of
6 the purposes of the gang. Such conduct is driven by human nature and habit, not gang
7 motives. This court must limit any drug-related provision to that conduct which plaintiff
8 proves is done on behalf of the gang.

9 **Conclusion**

10 Established, community-based organizations, working from within the community to
11 address the problems of gangs, violence and crime, hold the considered opinion that this
12 proposed injunction will make matters worse⁵³ — as one community leader put it,
13 “residents are afraid to go outside, not because of the gangs, but because they fear how
14 the police will enforce the injunction.”⁵⁴ In short, the benefits are low, and the harm —
15 increased distrust of police, disruption of families and routines, — weigh against the
16 injunction. The injunction, if granted, will only aggravate the very evil it purports to
17 redress. For all the above reasons, the preliminary injunction should not be issued, or, if
18 issued, it should be modified in accordance with the arguments above.

19 Dated: September 5, 2007

Respectfully submitted,

20
21 BY: _____
22 Christopher F. Gauger
23 Deputy Public Defender
24 Attorneys for Makia Johnson

25 ⁵³ Declarations of Shawn Richard, Carlos Levexier, and James Queen (Exhibits A,
26 B, and C, respectively).

27 ⁵⁴ Declaration of James Queen (Exhibit C).

1 **Proof of Service**

2 I, the undersigned, say:

3 I am over eighteen years of age and not a party to the above action. My business
4 address is 555 Seventh Street, San Francisco, California 94103.

5 On September ____, 2007, I personally served copies of the attached on the following:

6 Office of the City Attorney
7 San Francisco, California 94103

8
9 I declare under penalty of perjury that the foregoing is true and correct.

10 Executed on September _____, 2007 at San Francisco, California.

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Exhibit F

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Exhibit E