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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MANUEL VASQUEZ, et al.,
Plaintiff-Petitioners,
vs.
TONY RACKAUCKAS, et al.,
Defendants-
Respondents.

CASE NO. SACV 09-1090 VBF(RNBx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AFTER
COURT TRIAL**

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1 After presiding over the bench trial, considering the evidence and counsel's
2 arguments, and reading the parties' post-trial briefs, this court rendered its
3 Statement of Tentative Decision after Court Trial and made an accompanying order
4 regarding preparation of proposed Findings of Fact and Conclusions of Law. L.R.
5 52-2 - 52-8. The Statement of Tentative Decision was made after an eleven day
6 court trial on the Plaintiffs' Complaint for Declaratory and Injunctive Relief and
7 Petition for Writ of Habeas Corpus. (Dkts. 1-3). After further considering the
8 evidence and the parties' documents filed in response to the Court's Tentative
9 Decision (Dkts. 396-404), the Court hereby makes its Findings of Fact and
10 Conclusions of Law after Court Trial.

11 Pursuant to grounds shown by the Plaintiffs as set forth herein, the Court
12 finds for the Plaintiffs and against the Defendants on the First Claim against each
13 Defendant (42 U.S.C. Section 1983 - Procedural Due Process Under U.S. Const.
14 Amend. XIV) and the Second Claim against each Defendant (Procedural Due
15 Process Under Cal. Const. Art. I, Section 7). The Plaintiffs prevail in their
16 challenge to the Defendants' action of enforcing the gang injunction against
17 Plaintiffs after the OCDA dismissed them from the state court suit prior to
18 judgment. Procedural due process required a pre-deprivation hearing in the
19 circumstances presented in this case. The remedies sought by Plaintiffs of
20 declaratory relief and injunctive relief are granted as addressed below. On the other
21 hand, the writ of habeas is denied in that the Plaintiffs have not shown that any of
22 them are in "custody" for purposes of a writ of habeas corpus.

23 There have been substantial changes since this court denied the Plaintiffs'
24 Motion for Preliminary Injunction. These changes justify a Judgment in favor of
25 the Plaintiffs. First, the Court has now had the benefit of a lengthy trial and live
26 testimony and therefore is in a better position to not only judge the weight of the
27 evidence but also its credibility. As set forth below, the Court finds that the weight
28 of the evidence and the law favors the Plaintiffs.

1 3. The Defendants are Tony Rackauckas, the Orange County District Attorney
2 (“OCDA”) and Robert Gustafson, Chief of the Orange Police Department
3 (“OPD”). The Defendants are sued only in their official capacities. Compl. ¶ 1.

4 **The Complaint in this Federal Action**

5 4. On September 23, 2009, the Plaintiffs Manuel Vasquez, Miguel Lara, Gabriel
6 Bastida, and Randy Bastida, on their own behalf and on behalf of Class Plaintiffs
7 (collectively "Plaintiffs") filed their Complaint for Declaratory and Injunctive
8 Relief and Petition for Writ of Habeas Corpus against the Defendants. The
9 Complaint has two causes of action for procedural due process violations: the first
10 is a 42 U.S.C. Section 1983 claim under the 14th Amendment of the U.S.
11 Constitution, and the second is a claim under the California Constitution, Art. I,
12 section 7. Compl. ¶¶ 97-103.

13 5. The Plaintiffs seek to enjoin Defendants and their directors, officers, agents
14 and employees from enforcing the terms of the permanent injunction order
15 against them issued in *People v. Orange Varrío Cypress Criminal Street Gang, et*
16 *al.*, Orange County Superior Court, 30-2009 00118739 and those similarly
17 situated “without first providing them with a full constitutionally-adequate
18 hearing.” Compl. Prayer for Relief; Plaintiffs’ Closing Brief (dkt. 376), page 50
19 and Reply Brief (dkt. 387), page 26.

20 6. Plaintiffs challenge Defendants’ tactics in subjecting them to a gang
21 injunction, obtained via default against the gang to which they allegedly belong,
22 after dismissing the Plaintiffs from that suit. Compl. ¶ 4.

23 7. On September 29, 2009, the Court denied the Plaintiffs’ Ex Parte
24 Application for a Temporary Restraining Order, but set an Order to Show Cause
25 re Preliminary Injunction hearing for November 5, 2009. Dkt. 45. On November
26 17, 2009, the Court denied Plaintiffs’ Motion for Preliminary Injunction. Dkt.
27 86. On September 27, 2010, the Court denied the parties’ cross motions for
28 summary judgment. Dkt. 213.

1 **The State Court Action**

2 8. On February 17, 2009, the OCDA, on behalf of The People of the State of
3 California, filed in the Superior Court of California for the County of Orange
4 (“OCSC”), a Complaint for Preliminary and Permanent Injunction to Abate a
5 Public Nuisance. *People v. Orange Varrio Cypress Criminal Street Gang, et al.*,
6 Orange County Superior Court, 30-2009-00118739 (hereinafter, the “State
7 Action”). 11/16 a.m. RT 17:5-14, 64:21-65:5; *see also* Trial Ex.126.¹

8 9. In the State Action, the OCDA sued not only the Orange Varrio Cypress
9 Criminal Street Gang (“OVC”) as an unincorporated association but also 115
10 individuals and 150 Does alleged to be active members or associates of OVC.
11 Trial Ex. 126.

12 10. On February 23, 2009, the OCDA filed an ex parte application to serve
13 OVC under California Civil Procedure Code § 416.40(c). Trial Ex. 274. The
14 OCDA requested and obtained permission to serve the gang via a named
15 defendant, Patrick DeHerrera, whom the OCDA alleged was an OVC member.
16 Trial Ex. 275.

17 11. On or about February 24 and 25, 2009, OPD officers served the summons,
18 complaint, and supporting papers totaling at least 500 pages on numerous
19 individuals named in the state court complaint, including Plaintiffs. 11/16 a.m.
20 RT 78:9-20; *see also* 11/9 a.m. RT 6:5-10.

21 12. Ultimately, 32 defendants (adults and represented juveniles) – including
22 Plaintiffs Lara, Vasquez, and Gabriel Bastida – filed an answer, general denial,
23 or otherwise formally appeared in response to the complaint. Trial Exs. 68, 80,
24 174; Pls.’ RJN Ex. 3 at Dkt. Nos. 63 & 207; Pls.’ RJN Exs. 25 through 46,

25
26 ¹ The facts found in this section have not materially changed from the facts found in
27 the Court's ruling on Plaintiffs' Motion For Preliminary Injunction (dkt. 86), and are
28 supported by the evidence introduced at trial and through Plaintiffs' Request For
 Judicial Notice (*see* dkt. 329, 372).

1 114, 53, 101 through 104.

2 13. On May 12, 2009, the OCDA filed a request for dismissal against 62
3 individual defendants in the State Action. This group included the 32 individuals
4 who responded to the complaint either by filing a general denial and/or an answer
5 and approximately 27 unrepresented juveniles. The dismissal was entered by the
6 Clerk of the OCSC on May 12, 2009. 11/16 p.m. RT 39:3-23; Trial Ex. 17.

7 14. On May 14, 2009, the OCSC granted the OCDA's request for default and
8 judgment against OVC and those individual defendants who had not filed a
9 response to the complaint and had default entered against them. *See* Trial Ex.
10 267. The OCSC then signed the Order for Permanent Injunction (the "Order").
11 Trial Ex. 19.

12 15. The Order states that it applies to OVC and to all OVC's "members,
13 participants, agents, associates, servants, employees, aiders, and abettors whose
14 membership, participation, agency, association, service, employment, aid or
15 abetment is more than nominal, passive, inactive, or purely technical and all
16 persons acting under, in concert with, for the benefit of, at the direction of, or in
17 association with the OVC criminal street gang in any manner that is more than
18 nominal, passive, inactive, or purely technical." The terms of the Order applied
19 to a limited gang operation area in the City of Orange, which the state court
20 termed the "Safety Zone." Trial Ex. 19.

21 16. In early June 2009, the OCDA, by and through the OPD, began to serve the
22 Order for Permanent Injunction. 11/16 p.m. RT 46:6-8. As of September 3,
23 2009, 98 individuals were served with the Order for Permanent Injunction,
24 including at least 48 individuals who had been named in the litigation against
25 OVC and its members but were voluntarily dismissed by the OCDA. 11/16 p.m.
26 RT 46:15-47:8; *compare* Trial Ex. 17 *with* Trial Ex. 78; *see also* 11/23 a.m. RT
27 55:21-57:13.

28 17. Along with the Order for Permanent Injunction, the OCDA and OPD

1 served a notice stating:

2 YOU ARE HEREBY PUT ON NOTICE THAT ON MAY
3 14, 2009, JUDGE KAZUHA RU MAKINO SIGNED AN
4 ORDER FOR PERMANENT INJUNCTION AGAINST
5 THE ORANGE VARRIO CYPRESS CRIMINAL STREET
6 GANG.

7 ALL MEMBERS OF THE GANG ARE SUBJECT TO
8 THE TERMS OF THE PERMANENT INJUNCTION.

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

14 **ALL PERSONS DESCRIBED ABOVE WILL FACE CRIMINAL
15 PROSECUTION**

16 **PURSUANT TO PENAL CODE SECTION 166(a)(4)
17 FOR ANY WILLFUL VIOLATION OF ANY
18 PROVISION LISTED IN THE PERMANENT GANG
19 INJUNCTION.**

20 Trial Ex. 8; 11/16 p.m. RT 47:9-48:5. The OCDA did not submit the notice to
21 the OCSC for approval before the notice was served with the permanent order.
22 11/16 p.m. RT 48:6-9.

23 18. On July 10, 2009, the OCSC granted Plaintiff Gabriel Bastida's request to
24 vacate the default entered against him and to be permitted to contest the allegations
25 against him. Trial Ex. 205; *see also* Trial Ex. 204; 11/9 a.m. RT 26:13-15. On
26 May 12, 2009, the OCDA had sought and obtained entry of default against Mr.
27 Bastida. Trial Ex. 267; *see also* 11/9 a.m. RT 23:7-14. On May 15, 2009, Gabriel
28 Bastida had filed a request to vacate the default (Trial Ex. 204) and a general
denial (Trial Ex. 174), requesting that he be allowed to present a defense at trial
and contest the allegations against him.

19. On July 16, 2009, the OCDA dismissed without prejudice the case against
Gabriel Bastida. Trial Ex. 70; *see also* 11/9 a.m. RT 28:17-21.

20. On August 13, 2009, Defendant OPD served Gabriel Bastida with the

1 Order. Trial Ex. 78; *see also* 11/9 a.m. RT 30:9-13.

2 **Specific Findings After Bench Trial in the Federal Court**

3 21. The evidence presented at trial established that the factors set forth in
4 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) weigh clearly in favor of the
5 Plaintiffs. The evidence showed that Plaintiffs' private interest was strong, as
6 the Order restricts some of their most basic liberties. Plaintiffs were not given
7 pre-deprivation hearings before Defendants subjected them to the Order,
8 especially in light of the dismissals requested by the Defendants. (See e.g.
9 Anderson trial testimony 11/24 a.m. RT 34:20-51:23, 83:16-84:24 (regarding
10 decision to dismiss)). In sum, their constitutional rights were violated.

11 a. Procedural due process requires a pre-deprivation hearing in the
12 circumstances of this case especially where the class of individuals deprived of
13 rights is vaguely defined and difficult-to-discern, where the prohibited conduct is
14 indefinite or unclear, and where the Defendants' imposition of the Order on
15 Plaintiffs interferes with the Plaintiffs' ability to engage in common day-to-day
16 lawful activities. (Trial testimony Aaron Drootin, RT 11/19; trial testimony of Dr.
17 Malcolm Klein).

18 b. The Order on its face implicates Plaintiffs' liberty interests, including
19 the following provisions: "Do Not Associate",² "Curfew" (barring Plaintiffs from
20 being out in public, in public view, or any place accessible to the public between
21 the hours of 10 p.m. and 5 a.m., with limited exceptions for activities including
22 school, work, religious activities, or paid entertainment), "Stay Away From
23 Alcohol" (barring Plaintiffs from consuming, possessing or being in the presence
24

25 ² The "Do Not Associate" provision prohibits Plaintiffs, "in any public place, any
26 place accessible to the public, or in public view," from standing, sitting, walking,
27 driving, bicycling, gathering or appearing with anyone named as a defendant in the
28 State Action, or anyone they know to be a "member, participant, agent associate,
servant, employee, aider, or abettor of" OVC, or anyone they know to be "acting
under, in concert with, for the benefit of, at the direction of, or in association with"
OVC. Trial Exh. 19 at 10.

1 of an open container of alcohol, in any place in public or accessible to the public),
2 “Do Not Intimidate” (barring “confront[ing]”, “annoy[ing]...” provok[ing] anyone
3 in any public place....”), “Do Not Wear Gang Clothing” (prohibiting wearing the
4 words or color orange). See Trial Ex. 19 at 10, 13, 14-16. As the Plaintiffs show,
5 the Order implicates Plaintiffs’ fundamental rights, including rights of free
6 movement, free speech and associational rights. (Pls. Closing Brief, Dkt. 376, pg.
7 10-13 and trial evidence cited page 13:9-22). Plaintiffs’ trial testimony provides
8 examples that further illustrate the deprivation of liberties:

- 9 i. Plaintiff Manuel Vasquez, who has lived his entire life in the
10 Safety Zone, has curtailed going to parks, stores, restaurants,
11 and the mall, for fear of being arrested for violating the
12 association clause of the Order. (11/10 a.m. RT 25:23-26:5,
13 27:3-12, 28:6-29:11.) Mr. Vasquez testified that he no longer
14 goes anywhere in the injunction area with his brother, with
15 whom he lives and who has also been served with the Order.
16 (11/10 a.m. RT 28:18-29:5.)
- 17 ii. Plaintiff Miguel Lara no longer goes with his family to their
18 favorite restaurants, to the local pool where Mr. Lara learned to
19 swim, to parks where the family previously picnicked, or to the
20 City of Orange’s annual street fair. (11/10 p.m. RT 53:19-55:9,
21 56:8-19; 11/23 a.m. RT 55:21-57:13.) Mr. Lara also
22 participated in vigils, demonstrations, and protests within the
23 injunction area, but ceased doing so after being served with the
24 Order, for fear he would be violating its terms by confronting
25 and challenging government policies and associating with
26 individuals on the injunction list. (11/10 p.m. RT 42:17-43:12,
27 47:16-48:14, 49:18-20, 50:5-15.) Such persons include Mr.
28 Lara’s twin brother, who also has been served with the Order.

1 iii. Plaintiffs Gabriel and Randy Bastida, brothers who have both
2 been served with the Order, do not drive through the injunction
3 area together or visit family together, or attend family functions
4 that are held outdoors, for fear of violating the Order. (11/9 a.m.
5 RT 4:5-5:13, 36:24-37:13; *see also* 11/9 a.m. RT 33:16-34:1.)
6 When their grandfather had a stroke and was taken to a hospital
7 in the Safety Zone in the middle of the night, their mother was
8 forced to decide whether to permit the brothers to visit the
9 publicly accessible hospital, an act that would violate both the
10 curfew and association provisions of the Order. (11/9 p.m. RT
11 8:3-9:10.) The Bastidas also refrained from participating in
12 protests, at the behest of their mother, out of fear of violating the
13 Order’s “Do Not Associate” provision. (11/9 p.m. RT 6:9-7:10.)

14 c. On November 30, 2010, the Court toured the Safety Zone by car on a
15 route that took well over an hour. The Safety Zone covers an area of approximately
16 3.78 square miles, or about sixteen percent of the City of Orange. (11/16 a.m. RT
17 45:9-46:8; *see also* Pls.’ RJN Ex. 2.) The Safety Zone covers various types of
18 neighborhoods, including the following: dense residential areas; several schools and
19 the Friendly Center; at least four parks (Hart, El Camino, Killefer, and Sycamore);
20 the Chapman University campus and its surroundings; the historic downtown
21 Orange area around “the Circle,” which includes a vibrant commercial district;
22 government buildings and offices (including Orange City Hall, the police station,
23 and the public library); a hospital; and several busy commercial areas, including
24 long commercial strips along Tustin Avenue, Chapman Avenue, Main Street, and
25 Batavia Street, which include small independent businesses, large chain stores and a
26 mall. This area encompasses hundreds of retail and commercial businesses, and
27 hundreds of homes and apartments. (11/16 a.m. RT 45:9-46:5; 11/9 a.m. RT 34:2-
28 36:15; Trial Exs. 355 & 355A; *see also* RJN Ex.2.) Application of the Order’s

1 terms in this area, particularly as against individuals who have spent much of their
2 lives living in and around the area, imposes significant restrictions on Plaintiffs’
3 liberty interests.

4 d. Defendants’ admitted policy is to arrest, transport and book those
5 Plaintiffs alleged to have violated the Order and hold them pending bond or
6 arraignment, rather than citing and releasing them. (11/18 a.m. RT 8:18-9:20;
7 Trial Ex. 6 at 26). Defendants also have a policy of seeking increased bail
8 amounts for violations of the Order. (11/18 a.m. RT 10:10-22; Trial Ex. 6 at
9 28, 33.)

10 e. Deprived of discovery and a hearing by OCDA’s voluntary dismissal,
11 the Plaintiffs were not given notice of and access to evidence, or the opportunity
12 to confront and to be heard as required by due process. (11/16 p.m. RT 66:21-
13 67:23; 11/16 a.m. RT 70:11-13; 11/17 p.m. RT 24:8-14; 11/18 p.m. RT 36:25-
14 37:10; 11/9 a.m. RT 8:16-9:7; 11/16 a.m. RT 78:21-79:8). Nor were the Plaintiffs
15 given the right to have a neutral decision-maker decide whether they were active
16 participants in OVC.

17 f. In this case, post-deprivation hearings cannot cure the lack of
18 process. Intervention in the State Action, post-arrest contempt proceedings and
19 the “removal” procedure are not adequate post- deprivation remedies in this
20 case.

21 22. The risk of erroneous deprivation is substantial.

22 a. Defendants served the Order on individuals they determined to be
23 “active participants” of OVC causing a nuisance in the Safety Zone. (11/16
24 p.m. RT 45:16-23; 11/23 a.m. RT 55:21-57:13; 11/18 a.m. RT 25:5-9, 26:6-
25 21.) The term “active participant” of a criminal street gang is defined in the
26 penal code and case law as a person who participates in, or acts in concert with
27 a criminal street gang in more than a nominal, passive, inactive, or purely
28 technical way. (11/16 a.m. RT 33:17-21; *see People v. Englebrecht*, 88

1 Cal.App.4th 1236, 1261 (2001).) The OPD tracked who had been served with
2 the Order. (11/17 p.m. RT 83:4-6.) Once an individual had been served with
3 the Order, Defendants could arrest and prosecute the individual for a violation
4 of the Order's terms. (11/18 a.m. RT 10:1-4; Trial Ex. 6 at 26; 11/18 a.m. RT
5 18:2-19:5; Trial Ex. 32 at 019.; 11/23 a.m. RT at 25:21-26:6.))

6 b. In determining which individuals were active participants of OVC
7 and should be served with the Order, the Defendants undertook a unilateral,
8 fact-intensive determination, based on one-sided and untested evidence and
9 requiring judgmental questions not determined by objective measures. (Trial
10 testimony of DDA Hernandez and Det. Nigro; 11/17 p.m. RT 57:25-58:11;
11 11/18 a.m. RT 39:3-6; trial testimony of Aaron Drootin, 11/19 p.m.; and
12 Plaintiffs' Closing Brief, Dkt. 376, pages 17 - 20). The Court bases this
13 determination on the following findings:

14 i. Defendants repeatedly testified that they did not use a
15 mathematical formula and had no fixed list or set criteria to determine
16 whether an individual was an active participant of OVC. Instead,
17 Defendants testified that whether or not someone was an active
18 participant of OVC was a fact-intensive, case-by-case determination
19 based on a wide variety of information and factors. (11/17 p.m. RT
20 57:25-58:11 (Det. Nigro testifying that there is no "equation" to
21 determine gang membership); 11/16 a.m. RT 39:19-21(Mr.
22 Hernandez's assessment of whether or not an individual is an active
23 participant of OVC was fact specific, case-by-case); 11/16 a.m. RT
24 37:15-18 (Mr. Hernandez looked at a lot of factors); 11/16 a.m. RT
25 39:5-11 (Mr. Hernandez had no objective criteria); 11/17 p.m. RT
26 55:7-11 (Det. Nigro made a case-by-case determination for each
27 individual based on any and all factual information available to him);
28 11/17 p.m. RT 56:19-21 (Det. Nigro did not have a fixed list of

1 criteria); 11/24 a.m. RT 58:8-19, 89:6-14 (Assistant District Attorney
2 John Anderson testifying that determination of gang participation was
3 made on “totality of the circumstances,” that there was no “bright line
4 rule”).) For example, Detective Nigro testified that there were “many,
5 many different ways that somebody could participate in OVC,” so that
6 there was no list of activities that equaled active participation, and that
7 membership in OVC is “different for different people,” such that
8 “every situation can be different.” (See 11/17 p.m. RT 53:23-54:4,
9 54:21-55:5, 61:22-25.)

10 ii. Defendants evaluated the information provided to them based on
11 subjective impressions as gang police and prosecutors, rather than
12 clear standards or specific, objective measures. (11/17 p.m. RT 56:22-
13 57:1 (Det. Nigro used his “knowledge [and] experience[,] guided by
14 the law” to determine active participation); 11/16 a.m. RT 42:10-17
15 (whether an individual was an active participant of OVC was based on
16 Hernandez’s experience as a prosecutor). Such a determination, which
17 is not “susceptible of reasonably precise measurement by external
18 standards,” poses a high risk of error and requires greater procedural
19 protections. *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir.
20 1989); *see infra*, Concl. Law ¶10(b). For example, OPD Officer Aaron
21 Drootin testified that, although he had submitted a sworn declaration in
22 the State Action attesting that individuals were “known OVC gang
23 participants,” he had no basis for this statement, that such a
24 determination was outside his expertise as a patrol officer, and that he
25 had no opinion on how to determine gang membership or participation.
26 (11/19 p.m. RT 39:3-40:12.) Defendants’ reliance on factors such as
27 association with gang members, spending time in a gang area,
28 “admissions,” or examples of criminal conduct does not provide clear

1 standards or measures because of the significant ambiguity and range
2 of conduct encompassed in these factors. *See, e.g.*, 11/19 p.m. RT
3 32:10-33:7 (OPD Officer Drootin admitting that a person knowing
4 people from OVC does not indicate gang membership); 11/19 p.m. RT
5 64:4-66:4) (Dr. Klein testifying that “admissions” vary; 11/19 p.m. RT
6 33:14-34:12 (Drootin testifying consumption of drugs or alcohol not
7 gang-related activities); 11/19 p.m. RT 66:17-67:1 (Dr. Klein testifying
8 that drug and alcohol crimes “not at all” valuable to determining gang
9 membership because crimes very common among non-gang members);
10 (11/19 p.m. RT 29:14-24 (despite describing admission of gang
11 membership in declaration, officer had no recollection of individual’s
12 statement); *compare* 11/19 a.m. RT 34:11-23 (Det. Nigro stating that
13 non-gang member could have friends or family that are gang
14 members); 11/19 p.m. RT 60:21-61:5 (Dr. Klein testifying same); *with*
15 11/19 a.m. RT 9:16-20, 34:7-9, 35:10-23 (Det. Nigro stating
16 association was in his view sufficient to establish gang participation).

17 iii. In making a determination as to who was an active participant of
18 OVC, Defendants considered voluminous records from varied sources,
19 including police reports, field interview cards, STEP notices, and
20 photographs. (11/17 p.m. RT 45:22-46:9, 46:19-48:1; 11/16/10 a.m.
21 RT 37:11-14.) The documents, taken together, totaled thousands of
22 pages. (11/18 a.m. RT 62:10-21; see Trial Ex. 818 (collected packets).)
23 Defendants also relied on information outside these documents to
24 reach their conclusions, including undocumented interviews and
25 information from confidential informants, citizen informants, members
26 of the community, and other gang participants, as well as the personal
27 knowledge and observations of members of OCDA and OPD. (11/17
28 p.m. RT 50:24-51:3; 11/18 p.m. RT 36:25-38:6.)

1 iv. In determining who was an active participant of OVC,
2 Defendants made credibility determinations of the type typically
3 reserved for Courts and/or juries. Det. Nigro testified that some of the
4 documentation he reviewed contained explicit denials of membership
5 in OVC by Plaintiffs, but he did not “give th[ose] statement[s] much
6 weight.” (11/19 a.m. RT 47:4-17.)

7 c. As Plaintiffs’ assert in their closing memorandum (Dkt. 376) and as
8 the evidence presented at trial showed, determining whether an individual is an
9 active participant of a criminal street gang is a multi-factored, complex and fact
10 specific determination.

11 i. The testimony of plaintiffs’ experts established that gangs in
12 general are “informal” groups — groups without explicit structures
13 such as constitutions, bylaws, or appointed or elected officers. (11/17
14 p.m. RT 60:3-4; 11/19 p.m. RT 55:17-25.) As such, gangs – and OVC
15 in particular – lack formalities that might provide objective and easily
16 verifiable ways of establishing membership, such as rosters, or dues-
17 paying lists, lists of employees, or employment schedules. (11/19 p.m.
18 RT 55:21-56:12; *see also* RT 11/10 p.m. 3:17-24.) Deciding who is a
19 member or participant of OVC thus requires judgment rather than
20 simply confirming objective criteria. (11/19 p.m. RT 56:9-12.) In other
21 words, there is an absence of clear, objective criteria for determining
22 whether a person is an active gang participant.

23 ii. The testimony of plaintiffs’ experts established that joining a
24 gang is often a “fluid process” in which there is not always a clear
25 point at which a person becomes a member or participant of a gang.
26 (11/19 p.m. RT 62:10-63:8; 11/17 p.m. RT 61:12-21.) Both Dr. Klein
27 and Prof. Vigil testified that while gangs sometimes have rites for
28 entering a gang, those individuals who have grown up in the local

1 neighborhood or who have family members in the gang may be
2 deemed members of the gang without undergoing any kind of
3 initiation. (11/10 a.m. RT at 114:12-115:1; 11/19 p.m. RT 62:10-24.)
4 This lack of clear, objective criteria for initiation into a gang further
5 complicates the determination of who is an “active participant.”

6 iii. The testimony of plaintiffs’ experts established that a person’s
7 gang participation often changes over time. Plaintiffs’ experts testified
8 that gang members often leave the gang as they age. (11/10 a.m. RT at
9 113:18-114:5 (Vigil); 11/19 p.m. RT 62:7-12 (Klein)), with median
10 gang tenure lasting from about a year to as long as three to five years,
11 depending on the type of gang. (11/19 p.m. RT 61:6-21.) Dr. Klein
12 testified that people frequently move in and out of gangs, which makes
13 it difficult to determine membership or participation at any single point
14 in time. (11/19 p.m. RT 58:8-10.)

15 iv. The testimony of plaintiffs’ experts demonstrated that gang
16 membership may be particularly difficult to determine in longstanding,
17 territorial gangs based around a neighborhood, because gang members
18 and nonmembers often grow up together in the same neighborhood and
19 have social relationships and friendships unrelated to the gang. (11/19
20 p.m. RT 60:7-14 (Dr. Klein testifying about conflation between gang
21 and family and neighborhood).) For example, plaintiffs put on
22 evidence that individuals use the term “OVC” to refer to the historical
23 Cypress Street Barrio located within the Safety Zone, and thus use of
24 the term “OVC” may not be an indication of gang membership. (11/19
25 a.m. RT 69:9-70:25; see also 11/23 a.m. RT 4:9-19), which is often
26 identified by the same name, “OVC” (11/23 a.m. RT 11:1-14, 12:7-
27 14.)

28 d. The trial testimony shows that additional procedural protections –

1 such as access to evidence, discovery, and cross-examination – would significantly
2 reduce the risk of error in such a fact-intensive, vaguely defined determination as
3 who is an active gang participant, in particular by helping to distinguish between
4 the parties’ subjective judgments and objective facts. (See 11/19 p.m. RT 29:6-13,
5 39:3-7, 40:2-12, 71:23-72:16; Trial Ex. 26.) For example, Det. Nigro testified that
6 his determination that one Plaintiff was a gang participant relied in part on field
7 interview cards where an officer had checked a box indicating that the subject was
8 “flying colors/gang attire,” although Det. Nigro admitted that he did not see the
9 clothing and did not know why the officer had checked the box. (11/18 p.m. RT
10 44:9-17 (Trial Ex. 800 at 12); 11/19 a.m. RT 39:16-19, 40:8-11, 41:14-23.) As
11 another example, Det. Nigro testified that he relied in part on reports of admissions
12 from other officers on field interview cards, where a box marked “admission” was
13 checked, even though he did not know what question had been asked or what
14 response was given that caused the officer to check the box. (11/19 a.m. RT 43:14-
15 20, 44:18-45:3.)

16 23. The government has no legitimate interest in failing to provide a pre-
17 deprivation hearing.

18 a. Although the OCDA and OPD have a strong interest in protecting
19 the community against criminal activity and in an fiscally sound manner, the
20 relevant inquiry for the *Mathews* analysis is not into the government’s interest
21 generally, but rather into the government’s interest “in providing (or not
22 providing) specific procedures.” *Haygood v. Younger*, 769 F.2d 1350, 1355-1358
23 (9th Cir. 1985). Here, the government has no interest in failing to provide a pre-
24 deprivation hearing. As Assistant District Attorney Anderson recognized,
25 holding an evidentiary hearing before someone is subjected to a gang injunction
26 promotes important government interests, and that allowing only post-
27 deprivation remedies creates “a huge problem.” 11/24 a.m. RT 101:11-102:2; *see*
28 *Haygood*, 769 F.2d at 1357.

1 b. Defendants do not show the existence of an administrative, fiscal
2 or other substantial burdens in providing additional pre- deprivation safeguards.
3 They do not, for example, show that a pre-deprivation hearing would cause
4 more expense or delay than post- deprivation proceedings.

5 c. Defendants did not show that a need for prompt action justified a
6 lack of due process.

7 i. By May 2009, when the OCDA dismissed Plaintiffs from the
8 State Action, the OCDA had already obtained preliminary injunctions
9 against OVC as an entity and nearly eighty seven individuals. (Tr. Ex.
10 80 at 2; Tr. Ex. 82.) Thus, to the extent that Defendants had any
11 interest in the prompt imposition of a gang injunction, that interest had
12 been met through these preliminary injunction orders.

13 ii. Defendants introduced the testimony of Dr. Jeffrey Grogger, an
14 economist, who testified that gang injunctions reduce violent crime, on
15 average, by five to ten percent a year in the first year after they are
16 introduced, but that measurable statistically significant reductions
17 occur only in assaults, rather than other crimes, and only for the first
18 year after injunction are introduced. 11/23 p.m. RT 18:3-22; 12:16-
19 16:4. Plaintiffs' expert, Dr. Klein, testified that there were conflicting
20 studies as to the effectiveness of gang injunctions in reducing crime.
21 11/19 p.m. RT 77:7-79:17. The ultimate effectiveness of gang
22 injunctions, however, is not relevant to whether a hearing should be
23 required before subjecting a person to one. Dr. Grogger testified that
24 he had no opinion on whether providing a hearing before subjecting
25 somebody to an injunction would make a gang injunction more or less
26 effective. 11/23 p.m. RT 23:18-21.

27 24. In sum, the Defendants failed to provide adequate due process. Claimed
28 post-deprivation remedies do not cure the lack of process and are in any event

1 inadequate. Additional safeguards are required in this case, particularly some kind
2 of hearing - notice and the opportunity to be heard - before the State deprives a
3 person of liberty.

4 a. As the Plaintiffs set forth, intervention in the State Action is not an
5 adequate remedy for the lack of pre-deprivation hearing. First, the nature and
6 even the very possibility of intervention as a post-deprivation remedy is
7 speculative: Plaintiffs would have to move for intervention in the state court--a
8 motion that could be denied. *See* Cal. Code Civ. Proc. § 387. No statute or case
9 law establishes that plaintiffs would be entitled to intervene as a matter of right,
10 and no clear procedures exist to guide how such intervention would take place or
11 what procedural safeguards might be provided to plaintiffs. *See* 11/17 a.m. RT
12 7:2-16. Second, even if plaintiffs were successful in intervening in the State
13 Action, Defendants provided no indication of how long the process of obtaining
14 procedural protections such as discovery and an evidentiary hearing could take--
15 factors that would be significant because, in Defendants' view, Plaintiffs would
16 remain subject to the Order until the State Court ruled to the contrary. Finally,
17 even assuming the adult Plaintiffs could intervene pro per, the class of juvenile
18 Plaintiffs, who cannot represent themselves in Court or have their parents
19 represent them without a guardian ad litem, have no ability to intervene in the
20 State Action. 11/24 a.m. RT 35:4-37:22; 11/17 a.m. RT 33:12-18, 34:2-21; CAL.
21 CIV. CODE § 372; CAL. FAM. CODE § 6601 *see also* Trial Exs. 80, 82
22 (illustrating that many of the minors were unrepresented).

23 b. As the Plaintiffs set forth, post-arrest contempt proceedings are
24 an inadequate remedy. (Plaintiffs' Closing, pages 38 - 40.) In order to avail
25 themselves of a contempt hearing, Plaintiffs would first have to violate the
26 Order's terms, thereby subjecting themselves to arrest, jail, significant bail
27 payments, and a potential sentence of up to six months in jail and a \$1,000
28 fine. 11/18 a.m. RT 8:18-9:20, 10:10-22; Trial Ex. 6 at 26, 28, 33; *see also*

1 Cal. Penal Code § 166(a)(4).) Moreover, even if the individual plaintiff was
2 found not guilty of contempt, this finding would not preclude Defendants
3 from arresting that Plaintiff for any subsequent alleged violation of the Order.

4 c. The Defendants’ proposed “removal” procedure is not adequate.
5 First, the precise nature of the process and the potential relief it offers remain
6 unclear. Defendants admitted that the only written information that exists
7 concerning the procedure is the single-page document that was served on
8 named defendants at the outset of the State Action. (Trial Ex. 16; 11/16 p.m.
9 RT 70:24- 71:7.) Defendants also admitted that the process described in this
10 document had never been implemented with regard to OVC or any of the five
11 other injunctions the OCDA had obtained. (11/16 p.m. RT 73:4-7.) The one
12 individual that Defendants stated had taken advantage of the “removal”
13 procedure appeared to negotiate an informal agreement under which the
14 Defendants voluntarily agreed not to enforce the Order against him, without
15 use of the “removal” procedure. (11/16 p.m. RT 76:9-16, 77:16-21.)
16 Moreover, even if the “removal” process operates as set forth in the one-page
17 document, it falls short of providing adequate process in several respects.
18 The petition for removal is adjudicated not by a neutral decision-maker, but
19 by a “panel of two Senior Deputy District Attorneys” and “a representative
20 from the Probation Department” – in other words, a majority of the Panel is
21 composed of representatives of the entity (OCDA) that made the decision to
22 subject the individual to the injunction in the first place. (Trial Ex. 16.) There
23 is no provision for discovery, and the burden is placed on the petitioning
24 individual to demonstrate that he or she is not and has never been an active
25 participant in the gang. (See Trial Ex. 16.) Neither does the procedure
26 provide for any right to appeal the decision of the three-person panel. In
27 short, this process strips away many of the critical components of due
28 process, including an adversarial hearing before a neutral decision-maker,

1 prior notice of the evidence, the ability to confront witnesses, and the
2 heightened standard of proof.

3 d. The weight of the evidence also shows that the Defendants
4 violated Plaintiffs' due process rights under the California Constitution. *See*
5 *People v. Ramirez*, 25 Cal. 3d 260, 268 (1979). In examining when procedural
6 safeguards are required under the California Constitution, California courts
7 apply the *Mathews* balancing inquiry with the addition of a fourth factor: the
8 dignitary interest in informing individuals of the nature, grounds, and
9 consequences of the action and in enabling them to present their side of the
10 story before a responsible governmental official. *Id.* at 269; *Ryan v. Cal.*
11 *Interscholastic Fed'n*, 94 Cal. App. 4th 1048, 1071-72 (2001). This dignitary
12 interest encompasses the appearance of fairness to those involved. *See People*
13 *v. Hernandez*, 160 Cal. App. 3d 725, 747-48 (1984). Here, the decisions about
14 whom to subject to the injunction's restrictions are made unilaterally and
15 without notice or opportunity to be heard, by the same police and prosecutors
16 whose thresholds for enforcement and prosecution are made significantly
17 lower by the injunction. The appearance of fairness factor under the California
18 constitution weighs further in favor of Plaintiffs.

19 25. The evidence proves that OPD and OCDA are liable individually on
20 counts one and two of the Complaint and that they are also are liable as co-
21 conspirators. Contrary to the arguments made in the OPD brief, (Dkt. 373),
22 the elements of conspiracy as well as individual liability have been met. *See*
23 *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010) ("To
24 establish liability for a conspiracy in a § 1983 case, a plaintiff must
25 demonstrate the existence of an agreement or meeting of the minds to violate
26 constitutional rights.") (internal quotation marks and citation omitted); *see*,
27 *e.g.*, cross-examination of Nigro 11/16 p.m. and Hernandez 11/16 a.m; *see also*
28 testimony of Anderson, 11/24 a.m. regarding the OCDA working with the

1 OPD re the injunction.

2 a. The testimony of DDA Hernandez and Det. Nigro shows that OPD and
3 OCDA explicitly agreed to co llaborate in seeking a gang injunction against OVC
4 and enforcing that injunction against Plaintiffs.

5 i. Det. Nigro and DDA Hernandez tes tified that OPD worked
6 collaboratively with the OCDA offi ce to provide documentation that
7 they requested for the State Action. (11/17 p.m. RT 43:15-24; 45:22-
8 47:4; 47:14-48:1; 70:22-71:13; 11/16 a.m. RT 29:6-30:24.) Throughout
9 this process, OPD and OC DA were in cl ose contact as to exactly what
10 was needed for the State Action. (11/17 p.m. RT 41:2-10.)

11 ii. At the time OCDA sought to dism iss Plaintiffs from the State Action,
12 OPD and OCDA specifically discussed whether the injunction could be
13 enforced against indi viduals who had been dism issed. (11/17 p.m . RT
14 81:3-83:4; 11/18 a.m. RT 47:12-48:2.)

15 iii. Even beyond its role in obtaining the underlying order, OPD played an
16 active and necessary role in enforcin g the Order against Plaintiffs. It
17 was prim arily OPD who identified new indivi duals who should be
18 served with the permanent Order against OVC. (11/18 a.m. RT 22:1-4.)
19 Det. Nigro's testimony establishes that for each i ndividual who was
20 dismissed from the State action but subsequentl y served with the
21 Order, OPD gathered and review ed his or her documentation and
22 submitted it to OCDA as a reco mmendation that the individual be
23 served with the Order. (11/18 a.m. RT 26:6-14, 30:12-18.)

24 iv. OPD makes the threshold de cision ab out enforcement of the Order.
25 Individual OPD officers retain discretion whether to effect an arrest for
26 a violation of the Injunction; OPD officers do not have t o consult
27 OCDA before they make an arrest fo r a violation of the Orde r. (11/18
28

1 a.m. RT 32:21-33:3.)

2 b. Further, the weight of the evidence shows that the constitutional
3 violations were the result of a “municipal policy or custom” of the OPD. Detective
4 Nigro testified as to the policies established by OPD (in some instances
5 independently, and in others after consultation with the OCDA) for subjecting the
6 Plaintiffs to the Order. (Plaintiffs' Reply, page 24 n. 19; e.g., 11/17 p.m. RT 83:4-
7 21, 83:24-84:1, 84:8-13; 11/18 a.m. RT 4:20-23, 5:2-15, 8:18-9:20, 19:1-5, 22:1-4,
8 22:5-24, 25:5-9, 26:6-21, 27:5-12, 28:17-29:8, 29:19-30:4, 30:12-31:1, 32:21-
9 33:3.)

10 **Conclusions of Law**

- 11 1. As an initial matter, there is federal question subject matter over the
12 Plaintiffs’ Section 1983 claim and supplemental jurisdiction over their state
13 constitutional claim.
- 14 2. Plaintiffs do not have to exhaust to pursue their Section 1983
15 claims. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982); *see also Outdoor*
16 *Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).
- 17 3. The Plaintiffs do not provide sufficient support for their argument that
18 the service of the state court permanent injunction order places them in
19 custody for purposes of a writ of habeas corpus. Plaintiffs’ habeas corpus
20 claims fails as it is not sufficiently supported.
- 21 4. The *Rooker-Feldman* doctrine does not apply in this case. The doctrine is
22 confined to “cases brought by state-court losers complaining of injuries caused by
23 state-court judgments rendered before the district court proceedings commenced
24 and inviting district court review and rejection of those judgments.” *Exxon Mobil*
25 *Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The Plaintiffs did
26 not lose in state court, but rather were dismissed by the Defendants and no adverse
27 judgment was entered against them. Additionally, the Plaintiffs do not ask the
28 Court to review and reject the state court judgment; they ask the Court to prevent

1 its enforcement. *Maldonado v. Harris*, 370 F.3d 945, 950 (9th Cir. 2004).

2 5. The Anti-Injunction Act, 28 U.S.C. Section 2283, does not apply in this
3 case because Section 1983 claims are authorized exceptions to this Act. *See*
4 *Mitchum v. Foster*, 407 U.S. 225 (1972).

5 6. The abstention doctrine established by *Colorado River Water*
6 *Conservation District v. United States*, 424 U.S. 800 (1976) does not apply in
7 this case because there is no ongoing state proceeding that is parallel to this
8 federal case.

9 7. The Court also finds that the *Younger* abstention doctrine does not bar
10 this action. The requirements for *Younger* abstention are not met. There is no
11 on-going state-initiated proceeding and the federal court action here would
12 not enjoin the state court proceeding or have the practical effect of doing so.
13 In other words, this federal action would not interfere with the state
14 proceeding in a way that *Younger* disapproves. *Green v. City of Tucson*, 255
15 F.3d 1086 (9th Cir. 2001); *AmerisourceBergen Corp. v. Roden*, 495 F.3d
16 1143, 1147 (9th Cir. 2007) (citing *Younger v. Harris*, 401 U.S. 37, 41
17 (1971)).

18 a. Because the Plaintiffs are not parties to the state court's injunction, it
19 is not the equivalent of a pending state court action for purposes of *Younger*. *See*
20 *Gottfried v. Medical Planning Servs., Inc.*, 142 F.3d 326, 329 (6th Cir. 1998).

21 8. There is no reason that the application of injunctions to non-parties
22 should be categorically exempted from due process scrutiny. In certain
23 circumstances, due process prevents injunctions from being entered against
24 non-parties without a prior hearing on whether they are acting in concert or
25 participation with the defendants. *See Zenith Radio Corp. v. Hazeltine*
26 *Research, Inc.*, 395 U.S. 100, 112 (1969). Here, Defendants' enforcement of
27 the Order against Plaintiffs based on their purported status as gang members
28 is akin to Defendants attempting to treat Plaintiffs as if they were named in

1 the Order.

2 9. *People ex rel. Totten v. Colonia Chiques*, 156 Cal. App. 4th 31 (2007),
3 *People ex Rel. Gallo v. Acuna*, 14 Cal. 4th 1090 (1997), and *People v.*
4 *Englebrecht*, 88 Cal. App. 4th 1236 (2001) are inapposite. None of these cases,
5 nor the federal cases on which they rely, addresses whether a Court should apply
6 a *Mathews*- type analysis to claims such as those brought by Plaintiffs here, and
7 none of these cases holds that a *Mathews*-type analysis would result in a decision
8 in favor of defendants if presented with an injunction similar to the Order at issue
9 here.

10 10. The inquiry pursuant to *Mathews v. Eldridge* , 424 U.S. 319 (1976),
11 including the evidence presented at trial, provides solid support for the
12 equitable relief sought by the Plaintiffs.

13 a. By subjecting Plaintiffs to the Order, Defendants have imposed a
14 significant restraint on their liberties. *See supra*, Finding of Fact ¶¶ 21b, c, d; *see*
15 *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (the “liberty” protected by the Due
16 Process Clause “extends to the full range of conduct which the individual is free to
17 pursue”); *Raich v. Gonzales*, 500 F.3d 850, 862 (9th Cir. 2007); *People v.*
18 *Englebrecht*, 88 Cal. App. 4th 1236, 1255-1256 (2001) (noting that because a gang
19 injunction restricts lawful, commonplace activity, it is an extraordinary remedy and
20 holding that it must be proven by clear and convincing evidence).

21 b. Defendants determination as to who was an “active participant” was
22 fact-intensive, based on one-sided and untested evidence and requiring judgmental
23 questions not determined by objective measures. A determination such as this one
24 that is not “susceptible of reasonably precise measurement by external standards”
25 poses a high risk of error (*see* Findings of Fact ¶¶ 21a, 22) of the sort that weighs
26 strongly in favor of higher procedural protections. *Chalkboard*, 902 F.2d at 1381;
27 *see also Connecticut v. Doehr*, 501 U.S. 1, 8 (1991); *cf. Mitchell v. W. T. Grant*
28 *Co.*, 416 U.S. 600, 609 (1974) (no hearing necessary for issue involving “ordinarily

1 uncomplicated matters that lend themselves to documentary proof”).

2 c. The Defendants’ unilateral determination lacked the procedural
3 protections that characterize due process and would lessen the risk of error, such as:

4 i. Notice of and access to evidence, *Mathews*, 424 U.S. at 345-46;
5 *American-Arab Anti-Discrim. Comm. v. Reno*, 70 F.3d 1045, 1069 (9th
6 Cir. 1995);

7 ii. Opportunity to confront witnesses, *American-Arab Anti-Discrim.*
8 *Comm.*, 70 F.3d at 1069;

9 iii. A neutral decision-maker. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533
10 (2004); *Concrete Pipe & Products of Cal., Inc. v. Construction*
11 *Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 617 (1993); *Doe v.*
12 *Gallinot*, 657 F.2d 1017, 1024 (9th Cir. 1981); cf. *Prieto- Romero v.*
13 *Clark*, 534 F.3d 1053 1065-66 (9th Cir. 2008).

14 d. The government has no legitimate interest in refusing to provide a pre-
15 deprivation hearing. See Finding of Fact ¶ 23. *Haygood*, 769 F.2d at 1356.

16 11. The Plaintiffs met their burden of showing entitlement to injunctive relief,
17 demonstrating (1) that they have suffered irreparable injury; (2) that remedies,
18 available at law are inadequate; (3) that the balance of hardships between
19 Plaintiffs and Defendants warrant a remedy in equity; (4) and that the public
20 interest would not be disserved by a permanent injunction. *eBay Inc. v.*
21 *MercExchange, LLC*, 547 U.S. 388, 392 (2006); Fed. R. Civ. P., Rule 65.

22 **Declaratory Relief Order**

23 As to the First Claim and Second Claim against the Defendants, the court enters
24 judgment in the Plaintiffs’ favor and declares that by subjecting Plaintiffs and
25 those similarly situated, or causing them to be subjected, to the enforcement of
26 the Order, Defendants deprived the Plaintiffs and those similarly situated of their
27 constitutionally protected liberty or property interests without adequate
28 procedural protections.

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Permanent Injunction Order

For the reasons set forth above, the court issues an injunction barring Defendants from enforcing the Order against the Plaintiffs.

Dated: 5-10-11
Hon.
United



Valerie Baker Fairbank
States District Judge