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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF UTAH
NORTHERN DIVISION**

LELAND KIM MCCUBBIN, JR.,

Petitioner,

vs.

**WEBER COUNTY, OGDEN CITY,
CHRISTOPHER ALLRED, in his official
capacity, and DOES 1-10**

Respondents.

Complaint

Case No. _____
Judge _____

PRELIMINARY STATEMENT

1. This case is about an overzealous use of government power by county and city government and its officials, and Plaintiff Leland McCubbin brings the suit to remind officials that the ends do not always justify the means.
2. While county and city governments and officials have the duty to fight and prevent crime, they must always pursue these goals within the guidelines of the state and federal constitutions, which are the bulwarks of personal liberty and freedom.

3. Moreover, to have meaningful checks on government power, the law and constitution must apply equally to all people, including those who are feared and stigmatized by society.
4. In this case, the Defendants secured and enforced a “gang injunction” that used the civil standards of state nuisance laws to place incredible liberty restrictions on hundreds of people the Defendants labeled as gang members.
5. In obtaining and enforcing this injunction, the Defendants engaged in conduct that violated the civil rights of those served in myriad ways.
6. This unlawful conduct included allowing law enforcement unfettered discretion about who to subject to the injunction’s restrictions, drafting restrictions that were excessively vague, imposing excessively burdensome restrictions, and shifting the burden to those served to disprove through unspecified procedures that the government should be allowed to restrict their liberty, among other conduct.
7. In Mr. McCubbin’s case, these civil rights violations were particularly egregious. Even though certain Defendants knew that Mr. McCubbin was no longer a member of the Trece gang, they nonetheless served him with the injunction, subjecting him to extreme restrictions of his property liberty and resulting in two criminal convictions related to violating the injunction.
8. To get himself out from under the injunction, Mr. McCubbin had to initiate proceedings to prove that he had left the gang. Even after he did so, the injunction was dismissed without prejudice, keeping the threat real against Mr. McCubbin until the injunction was finally declared void *ab initio* in late 2013.

9. Mr. McCubbin brings this suit to vindicate his rights, and to attempt to prevent Defendants from once again cutting corners and coloring outside the lines with his rights and the rights of others who were and who may be targeted.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court under 42 U.S.C. § 1983 and § 1988 as well as 28 U.S.C. §§ 1331 and 1343, and arises to enforce provisions of the United States Constitution.

11. Declaratory relief is authorized by 28 U.S.C. § 2201 and § 2202 and Rule 57 of the Federal Rules of Civil Procedure.

12. This Court has supplemental jurisdiction to hear Plaintiffs' state constitutional and tort claims arising from the same factual situation pursuant to 28 U.S.C. § 1367.

13. Venue is proper with this Court pursuant to 28 U.S.C. § 1391(b) as the claims herein arose in the Northern District of Utah, the Defendants conduct business in the Northern District of Utah and Defendants are subject to personal jurisdiction within this district.

PARTIES

14. Ogden City ("Ogden") is a municipal corporation in the State of Utah, which can sue and be sued in its own name. Ogden is a government entity created pursuant to Utah statute that governs the geographic area known as Ogden City, Utah. Ogden is a governmental subdivision of the State of Utah. Upon information and belief, Ogden employed some of the individuals who served and enforced the injunction against Mr. McCubbin.

15. Weber County (“Weber”) is a political subdivision of the State of Utah that can sue and be sued in its own name. Upon information and belief, Weber employed some of the people who served and enforced the injunction against Mr. McCubbin.

16. Christopher Allred is the Weber County Attorney. He is sued in his official capacity for declaratory judgment.

17. Does 1-10 are the Ogden City and Weber County employees and agents who were involved in the decision to serve Mr. McCubbin with the gang injunction.

18. Mr. McCubbin is an adult resident of Utah.

FACTUAL ALLEGATIONS

19. On August 20, 2010, Weber filed a complaint for permanent injunction to abate a public nuisance (the “nuisance suit”) against the Ogden Trece gang (the “Trece”). Weber asserted that the Trece was an unincorporated association.

20. Along with the complaint, Weber also filed motions for a temporary restraining order and preliminary injunction. The district court entered a temporary restraining order the day the complaint was filed.

21. On August 24, 2010, Weber personally served the nuisance suit on five alleged Trece members and also mailed process to twelve other alleged Trece members. Weber also sought and was granted an order allowing it to serve the Trece by publication.

22. Mr. McCubbin was never served with the complaint or a summons in the nuisance suit, nor was he served with the temporary restraining order.

23. The complaint in the nuisance suit did not allege that Mr. McCubbin was a member or agent of the Trece, or that Mr. McCubbin was creating a public nuisance in

Ogden or anywhere else. In fact, the complaint did not name or reference Mr. McCubbin at all.

24. On September 14 and 27, 2010, the district court in the nuisance suit held evidentiary hearings on Weber's motion to convert the temporary restraining order to a preliminary injunction.

25. Mr. McCubbin received no notice of these hearings, and neither he nor anyone representing him was present during the hearings.

26. Following the hearings, the district court converted the temporary restraining order to a preliminary injunction. A copy of the preliminary injunction is attached as Exhibit 1.

27. The preliminary injunction applied to the "Safety Zone," a twenty-five square-mile area encompassing most of Ogden.

28. The preliminary injunction prohibited those individuals served with it from engaging in a wide variety of otherwise completely lawful conduct in the Safety Zone.

29. For example, the injunction prohibited those served from any association with any "known member" of the Trece in public places or public view. This extended to "[d]riving, standing, sitting, walking, gathering, or appearing together with any known member of Ogden Trece anywhere in public view or anyplace accessible to the public."

30. The preliminary injunction did not define how the served person was supposed to identify a "known member" of the Trece, leaving completely to the discretion of law enforcement to determine who such a "known member" was.

31. The preliminary injunction contained no provision allowing a served person to publicly associate with a “known member” of the Trece who was a family member of the served person.

32. The preliminary injunction also prohibited those served with it from “[c]onfronting, intimidating, annoying, harassing, threatening, challenging, provoking, [or] assaulting any person known to be a witness to any activity of Ogden Trece, known to be a victim of any activity of Ogden Trece, or known to have complained about any activity of Ogden Trece.”

33. Another provision of the preliminary injunction criminalized possession of firearms, “imitation” firearms, ammunition, and “illegal weapon[s],” and prohibited those served with it from being in the presence of such weapons or another person possessing them.

34. The preliminary injunction further imposed a curfew on those served with it between the hours of 11 p.m. and 5 a.m. The preliminary injunction included certain exceptions, including traveling to and from work and emergencies.

35. The preliminary injunction also prohibited those served with from creating graffiti or possessing tools that could be used to create graffiti, using and distributing drugs and drug paraphernalia, and consuming alcohol except in their homes or in properly licensed establishments.

36. The preliminary injunction also required those served with it to “obey all laws.”

37. The preliminary injunction contained an “opt-out” provision under which those who been served with the preliminary injunction could be “dismissed” and render the

injunction unenforceable by stating, among other things, that he or she was a former, non-active member of the Trece.

38. The preliminary injunction contained no court procedure for people served to “opt-out,” and placed the cost of attempting an “opt-out” on the served person.

39. The preliminary injunction did not specify how people who were not members of the Trece but who were served with the order could “opt-out” without perjuring themselves.

40. The preliminary injunction also contained a “hardship exemption process” under which a served individual could request the Weber County Attorney make exceptions to the curfew and association restrictions.

41. The preliminary injunction stated that a served person’s eligibility to “opt-out” was not a defense to a civil or criminal case for that person’s violating the preliminary injunction.

42. This provision meant that former members like Mr. McCubbin could defend themselves against criminal charges for violating the preliminary injunction by proving that they were not members when they were served or charged.

43. The preliminary injunction became effective on the served person immediately upon service.

44. Under Utah Code section 76-10-807, violation of the injunction was a class B misdemeanor punishable by up to six months imprisonment and up to a \$1,000 fine.

45. Despite placing immediate criminal penalties on the everyday activities of those served with the preliminary injunction, the preliminary injunction contained no provision requiring Weber and its agents to establish in court that any person who they intended to

serve was actually a member or agent of the Trece, or that the person to be served was engaged in any activities that could be considered a public nuisance.

46. This lack of pre-deprivation process allowed Weber and its agents, such as the Ogden Police, unfettered discretion as to which individuals they chose to serve with the preliminary injunction and impose immediate criminal liability for various constitutionally protected activities.

47. After it obtained the preliminary injunction, Weber and its agents, including Ogden police officers, served it on over three hundred individuals.

48. Various individuals served with the injunction went to the district court in the nuisance suit to move to intervene and to challenge the injunction on various grounds.

49. The district court denied all motions to intervene as well as the constitutional objections of the attempted intervenors.

50. The district court reasoned that due process was satisfied because once the persons were served with the injunction, they became aware of the nuisance suit.

51. On June 11, 12, and 14, 2012, the district court held an evidentiary hearing in the nuisance suit to consider whether to make the preliminary injunction permanent.

52. Mr. McCubbin received no formal notice of that hearing, and was not present or represented at it.

53. At the conclusion of the hearing, the district court entered a permanent injunction that was substantially identical to the preliminary injunction.

54. On information and belief, Weber and its agents continued to arrest people who had been served with only the preliminary injunction for violations of that preliminary injunction, even after the district court entered the permanent injunction.

55. On October 18, 2014, the Utah Supreme Court ruled the permanent injunction and the other orders of the district court in the nuisance suit were void *ab initio*.

56. The Utah Supreme Court reasoned that Weber had not followed the Utah Rules of Civil Procedure regarding service of process to unincorporated associations.

57. Since that ruling, Weber officials have publicly stated that they intend to remedy the service issues and refile the nuisance suit against the Trece and seek another injunction.

58. As recently as June 2015, in an interview with the Ogden Standard Examiner newspaper, the Weber County Attorney publicly stated that he hopes to seek another injunction within a year.

FACTS REGARDING MR. MCCUBBIN

59. Mr. McCubbin does not deny that for many years, he was a member of the Trece.

60. On or around April 16, 2008, however, Mr. McCubbin decided to leave the Trece.

61. As part of leaving the Trece, Mr. McCubbin was subjected to a ritual in which he was physically assaulted by a number of individuals, injuring him to the point of needing to be hospitalized.

62. Members of the Ogden Police Department investigated the assault of Mr. McCubbin.

63. During that investigation, Mr. McCubbin informed the officers that the reason that he had been assaulted was because he had decided to leave membership of the Trece.

64. On information and belief, the fact that Mr. McCubbin had left the Trece was communicated by those officers to the Weber and Ogden gang units.

65. In or around February 2010, Mr. McCubbin started to serve a sentence in the Utah State Prison.

66. While at the prison, Mr. McCubbin had to be placed in restrictive housing in part because prison officials knew that he had left the Trece, which raised security concerns for him.

67. On or around June 2011, Weber served Mr. McCubbin with a copy of the preliminary injunction in the nuisance suit, even though he was in restrictive housing in prison because he was no longer a member of the Trece.

68. Mr. McCubbin was released from prison on or around August 31, 2011 upon the expiration of his sentence.

69. When he was released and returned to his home and family in Ogden, Mr. McCubbin was immediately subjected to the preliminary injunction's restrictions on his liberty.

70. For example, Mr. McCubbin was prohibited from being in public with members of his own family whom Mr. McCubbin knew had been served with the injunction or whom he feared were likely considered "known members" of the Trece by law enforcement.

71. In December 2011, Ogden charged Mr. McCubbin charged with violating Utah Code section 76-10-807, violation of an order enjoining a public nuisance, a class B misdemeanor, as well as another misdemeanor.

72. The injunction he was charged with violating was the preliminary injunction from the nuisance suit.

73. The alleged violation stemmed in part from Mr. McCubbin being in public in Ogden after 11 p.m.

74. Later in December 2011, Mr. McCubbin was convicted of violating the injunction.

75. Mr. McCubbin received a 60-day sentence suspended in lieu of a \$500 fine on the violation. Mr. McCubbin later went into arrears in paying that fine, and on July 20, 2012, he was sentenced to 60 days in jail or a fine of about \$250.

76. On December 27, 2011, Weber charged Mr. McCubbin with violating Utah Code section 76-10-807, violation of an order enjoining a public nuisance, a class B misdemeanor, and several other charges.

77. Again, the injunction-related charge was related to Mr. McCubbin being in public in Ogden past 11 p.m.

78. On January 4, 2012, Mr. McCubbin pleaded no contest to violating the injunction and two other charges.

79. Mr. McCubbin was sentenced to 180 days in jail on each of the charges, to run concurrently with each other.

80. On April 18, 2012, on Mr. McCubbin's motion to reduce the sentence for violating the injunction, the court suspended 60 days from Mr. McCubbin's overall sentence.

81. In support, the court stated that Mr. McCubbin had been determined not to be member of the Trece and ordered him released.

82. In April 2012, Mr. McCubbin undertook affirmative court proceedings in the nuisance suit to "opt out" of the injunction.

83. At an April 11, 2012 hearing, Mr. McCubbin proved that he was not a member of the Trece. This was the first time in the nuisance suit that he had been heard on this issue.

84. The nuisance suit court dismissed the injunction against Mr. McCubbin, but did so without prejudice, which allowed Weber and its agents free to serve Mr. McCubbin with the injunction again.

85. In September 2014, after the Utah Supreme Court voided the injunction, Mr. McCubbin moved under the Utah Post Conviction Remedies Act to vacate his convictions related to violating the injunction in the nuisance suit.

86. On June 5, 2015, a state district court vacated the convictions.

87. Among other things, the court reasoned that Weber and Ogden obtained the convictions in violation of Mr. McCubbin's rights under the Utah and United States Constitutions.

88. Weber and Ogden did not appeal that ruling.

Claims for Relief

First Claim for Relief: 42 U.S. C. Section 1983: Violation of Procedural Due Process (Against All Defendants)

89. Mr. McCubbin re-alleges Paragraphs 1-88 as though fully set forth here.

90. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of liberty and property interests without due process of law.

91. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction against Mr. McCubbin with no pre-deprivation hearing and no clear post-deprivation process, among other problems, Mr. McCubbin is

entitled to a declaratory judgment that, as drafted, the injunction is a violation of Mr. McCubbin's rights as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

Second Claim for Relief: 42 U.S. C. Section 1983: Violation of Substantive Due Process (All Defendants)

92. Mr. McCubbin re-alleges Paragraphs 1-91 as though fully set forth here.

93. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of liberty and property interests without due process of law.

94. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction against Mr. McCubbin as currently drafted, Mr. McCubbin is entitled to a declaratory judgment that, as drafted, the injunction is a violation of Mr. McCubbin's rights as protected by the Fifth and Fourteenth Amendments to the United States Constitution.

Third Claim for Relief: 42 U.S. C. Section 1983: Violation of First Amendment Right to Free Association (All Defendants)

95. Mr. McCubbin re-alleges Paragraphs 1-94 as though fully set forth here.

96. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of his right to free association under the First Amendment of the United States Constitution.

97. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction with the same prohibitions on association against Mr. McCubbin, among other things, Mr. McCubbin is entitled to a declaratory judgment that,

as drafted, the injunction is a violation of Mr. McCubbin's rights as protected by the First and Fourteenth Amendments to the United States Constitution.

Fourth Claim for Relief: 42 U.S. C. Section 1983: Violation of First Amendment Right to Free Expression (All Defendants)

98. Mr. McCubbin re-alleges Paragraphs 1-98 as though fully set forth here.

99. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of his right to free expression under the First Amendment of the United States Constitution.

100. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction against Mr. McCubbin that includes the same prohibitions on expression, among other things, Mr. McCubbin is entitled to a declaratory judgment that, as drafted, the injunction is a violation of Mr. McCubbin's rights as protected by the First and Fourteenth Amendments to the United States Constitution.

Fifth Claim for Relief: Violation of State Constitution Right to Due Process (All Defendants)

101. Mr. McCubbin re-alleges Paragraphs 1-101 as though fully set forth here.

102. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of liberty and property without due process of law in violation of Article 1, Section 7 of the Utah Constitution.

103. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction against Mr. McCubbin as currently drafted, among other things, Mr. McCubbin is entitled to a declaratory judgment that, as drafted, the injunction is a violation of his rights as protected by Article 1, Section 7 of the Utah Constitution.

Sixth Claim for Relief: Violation of State Constitutional Right to Free Expression and Assembly (All Defendants)

104. Mr. McCubbin re-alleges Paragraphs 1-103 as though fully set forth here.

105. Through the conduct described herein, Defendants, acting under color and authority of law, deprived Mr. McCubbin of his rights to free expression and assembly in violation of Article 1, Sections 1 and 15 of the Utah Constitution.

106. Because an actual controversy exists with respect to whether it is proper to allow Defendants to enforce an injunction against Mr. McCubbin as currently drafted, among other things, Mr. McCubbin is entitled to a declaratory judgment that, as drafted, the injunction is a violation of his rights as protected by Article 1, Sections 1 and 15 of the Utah Constitution.

Seventh Claim for Relief: State Law Wrongful Injunction (Weber)

107. Mr. McCubbin re-alleges Paragraphs 1-106 as though fully set forth here.

108. By the conduct described herein, Defendants wrongfully enjoined Mr. McCubbin for a period of over a year.

Eighth Cause of Action: Declaratory Judgment (Weber and Weber County Attorney)

109. Mr. McCubbin re-alleges Paragraphs 1-107 as though fully set forth here.

110. Mr. McCubbin is entitled to a declaratory that any attempt to serve him in the future with an injunction identical to the one issued by the district court in the nuisance suit would violate his civil rights.

PRAYER FOR RELIEF

WHEREFORE Mr. McCubbin demands the following relief:

- A. For declaratory relief that the injunction violates the constitutional rights of Mr. McCubbin as protected by the Utah and United States Constitutions.
- B. For an award of monetary damages to Mr. McCubbin from each Defendant not named in his official capacity for each violation they have caused Mr. McCubbin to date.
- C. For an award of attorney fees and court costs under 42 U.S.C. § 1983 and § 1988, and Rule 65A of the Utah Rules of Civil Procedure.
- D. For such other and further relief as the court deems just and proper.

Respectfully submitted this 16th day of October, 2015.

SIGNED

s/ John Mejia

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