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## Who is a gang member?

**Erwin Chemerinsky** is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.



In a narrow, but important decision, the 9th U.S. Circuit Court of Appeals has imposed long-overdue limits on gang injunctions. In *Vasquez v. Rackaukas*, 2013 DJDAR 14776 (Nov. 5, 2013), the court held that some process is required to determine who is covered by a gang injunction. This is a result supported not

only by the requirements of due process of law, but also by basic fairness and just common sense.

For over 25 years, district attorneys in California have been obtaining injunctions to limit the activities of street gangs and gang members. These injunctions prevent a vast array of both illegal and legal activities. In *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1119 (1997), the state Supreme Court upheld gang injunctions, but did not address the procedures that are required for determining who is a gang member.

The *Vasquez* case arose in 2009 when the Orange County district attorney's office filed a public nuisance action in Orange County Superior Court against the Orange Varrio Cypress Criminal Street Gang and 115 named individuals. The superior court issued an injunction that limited conduct within a 3.78 square mile area in the city of Orange.

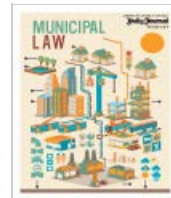
The injunction prohibited among other things, "stand[ing], sit[ing], walk[ing], driv[ing], bicycl[ing]," or "gather[ing] or appear[ing]" with any other enjoined parties, including family members; "confront[ing], intimidat[ing], annoy[ing], harass[ing], threat[ening], challeng[ing], provok[ing], assault[ing], or batter[ing]" anyone; using any unlawful drug; possessing a gun; drinking alcohol; wearing any clothes or communicating, by words or physical gestures or hand signs, that refer to the gang. It prevented gang members from being in any public place or business establishment, subject to exceptions, between 10 pm and 5 am.

These are only some of the restrictions imposed. They clearly interfere with freedom of association, freedom of speech, and freedom of movement. The 9th Circuit's opinion, though, did not focus on the constitutionality of such a broad injunction, including of legal, constitutionally protected behavior. Rather, the 9th Circuit focused on the procedures that must be followed to determine who is subject to the injunction.

**The 9th Circuit focused on the procedures that must be followed to determine who is subject to the injunction.**

### SPECIAL REPORT

#### Municipal Lawyers



Monday, November 11, 2013

#### Administrative/Regulatory

##### Case against pot dealer presses on

For almost exactly one year — from April 2006 until March 29, 2007 — Lynch was the driving force behind a marijuana operation that raked in more than \$2.1 million, according to fastidious records the now-convicted felon kept.

#### Mergers & Acquisitions

##### Latham advises on \$2.6 billion pharmaceutical company sale

California's bustling biotechnology industry saw another multi-billion dollar deal last week with the announcement of San Diego-based drugmaker Santarus Inc.'s sale to Salix Pharmaceuticals Ltd.

#### U.S. Court of Appeals for the 9th Circuit

##### Who is a gang member?

The 9th Circuit recently imposed long-overdue limits on the use of gang injunctions. By **Erwin Chemerinsky**

#### Law Practice

##### On the Move

A weekly roundup of lateral attorney moves, law firm office openings and partner promotions from around California.

#### Litigation

##### Orinda firm gets \$20 million settlement in bus accident case

Gillin, Jacobson, Ellis, Larsen & Lucey reached a \$20.4 million settlement with the Alameda-Contra Costa Transit District in a personal injury case involving a woman run over by a bus.

#### Law Practice

##### Attorneys earn accolades for assisting veterans

Finnegan, Henderson, Farabow, Garrett & Dunner LLP, Morgan, Lewis & Bockius LLP, Hewlett-Packard Co. and the National Veterans Legal Services Program all received awards for helping

In the context of this case, the conduct of the Orange County district attorney was particularly egregious. The district attorney's office initially asked the superior court to issue an injunction against 115 people who it said were members of the Orange Varrio Cypress Criminal Street Gang. When dozens of these individuals went to court to contest whether they were members of the gang, the district attorney's office dismissed them from the suit. The district attorney's office then went before the same superior court judge and sought and received an injunction against the gang as a whole. The district attorney and the Orange police department then began enforcing the injunction against the same people who had been dismissed from the lawsuit after contesting that they were members of the gang.

As the 9th Circuit explained, "A few weeks after default entry of judgment, the OPD [Orange police department], at the OCDA's [Orange County district attorney's] instruction, began serving the Order not only on the individual defendants against whom the injunction had issued, but also on individuals originally named as defendants in the state court case but voluntarily dismissed by OCDA. By September 2009, OCDA and OPD had served at least forty-eight individuals who had been named in the nuisance suit against OVC but whom OCDA voluntarily dismissed."

The 9th Circuit, in an opinion by Judge Marsha Berzon, held that this violated the Constitution: individual liberty was restricted without any semblance of due process. The Orange police department and the Orange County district attorney's office had no established procedures for determining who was a member of the gang. At the trial in the district court, police witnesses testified that Orange "lacked clear standards for determining on whom to serve the Order" and that there was "no fixed list or set criteria to determine whether an individual was an active participant of OVC."

Nor is it enough that the Orange County district attorney's office created a procedure for individuals to get themselves removed from the list of gang members.

Under this procedure, a panel of two senior deputy district attorneys from the Orange County district attorney's office and a probation department representative may review an individual's request to be removed from the ambit of the order. But this leaves it entirely to law enforcement, not to a neutral judge, to decide whether liberty should be restricted. Moreover, under the procedure, the burden is on the individual to demonstrate that he or she is not an active gang member; proving a negative always is enormously difficult. Perhaps most importantly, the city of Orange admitted at trial that the exclusion process "had never been implemented with regard to OVC or any of the five other injunctions the OCDA had obtained."

The 9th Circuit simply held there must be a procedure for determining who is a gang member and thus covered by an anti-gang injunction. This is clearly correct. The anti-gang injunction restricts basic freedoms and no one's liberty can be restricted without due process of law.

Anti-gang injunctions are often imposed. Dozens have been obtained in Los Angeles alone. It is a tool to deal with a serious problem, but one that is deeply disturbing from the perspective of civil liberties and civil rights. Under the terms of the gang injunctions, two brothers who were reputed to be gang members could not walk down the street together. The government is taking away constitutionally protected liberties, including the right to be able to engage in legal activities, on the basis of mere suspicion by police officers and lawyers in the district attorney's office.

The 9th Circuit's opinion in [Vasquez] is a significant step to applying the Constitution to gang injunctions. Hopefully, it is just the first step and courts will become more involved in limiting the sweep of these injunctions which are inconsistent with basic constitutional principles.

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veterans secure benefits in 2013.

### Litigation

#### **Federal judge partially certifies class in NCAA player likeness case**

A federal judge on Friday certified a class of all current and former Division I college football players who claim the National Collegiate Athletic Association conspired to profit off the use of their names and likenesses.

### Criminal

#### **Man who spent 34 years in prison wins release**

A Los Angeles County Superior Court judge on Thursday threw out the conviction of 53-year-old Kash Delano Register, who was wrongfully convicted of first-degree murder in 1979.

### Law Practice

#### **Former Southern District chief judge jumps to JAMS**

Irma E. Gonzalez is one of the rare federal judges from the Southern District to take on a role as a neutral, having started on Monday with JAMS, where she will act as an arbitrator, mediator and special master.

### **Report: Legal sector lost jobs in October**

The nationwide legal sector lost jobs in October, according to a government report, making it the first month the industry has seen a decline since July.

### Corporate

#### **Zynga general counsel steps down**

The departure of the gaming giant's chief legal counsel, Reginald D. Davis, comes in wake of a companywide reorganization.

### Law Practice

#### **Former Southern District chief judge jumps to JAMS**

Irma E. Gonzalez is the second federal judge from the Southern District ever to take on a role as a neutral, having started on Monday with JAMS, where she will act as an arbitrator, mediator and special master.

### Government

#### **Judge seems to side with rail authority on high speed rail contracts**

Opponents of the state's troubled \$68 billion high speed rail project may have failed to convince a Sacramento County judge Friday to stall its progress.

### Law Practice

#### **IP practitioner swaps Weil for WilmerHale**

Jason D. Kipnis has joined the Palo Alto office of Wilmer Cutler Pickering Hale and Dorr as a partner after spending the vast majority of his