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13
14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO

17 PEOPLE OF THE STATE OF
18 CALIFORNIA, by and through Dennis
Herrera, City Attorney for the City and
19 County of San Francisco,

20 Plaintiff,

21 vs.

22 NORTEÑO, a criminal street gang sued as
an unincorporated association; and DOE
23 ONE through DOE FIVE HUNDRED,
inclusive,

24 Defendants.
25

Case No. CGC-07-464492

**[PROPOSED] BRIEF OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA AND
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS OF THE SAN FRANCISCO BAY
AREA IN OPPOSITION TO THE
PROPOSED PRELIMINARY
INJUNCTION**

Hearing Date: September 18, 2007
Time: 9:30 a.m.
Place: Dept. 302
Judge: Hon. Patrick Mahoney

Complaint Filed: June 21, 2007
Trial Date: None yet

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1 I. INTRODUCTION

2 Ten years ago, the California Supreme Court authorized a novel and unprecedented law
3 enforcement technique to deal with the problem of criminal street gangs – the issuance of a civil
4 public nuisance injunction against the alleged gang members. *People ex rel Gallo v. Acuna*, 14
5 Cal. 4th 1090 (1997). Since then, a number of gang injunctions have been issued throughout
6 California. However, there are only a handful of appellate court decisions that discuss the
7 standards and limitations that should apply in the gang injunction context, perhaps because many
8 of the injunctions that have been issued were not opposed by persons represented by counsel.
9 Importantly, each of the appellate decisions dealing with gang injunctions, including *Acuna* itself,
10 recognized that this is in many ways an extraordinary remedy that has to be applied with great
11 caution and that necessitates careful judicial scrutiny. *Acuna*, 14 Cal. 4th 1090; *People v.*
12 *Englebrecht*, 88 Cal. App. 4th 1236 (2001); *People ex rel Reisig v. the Broderick Boys*, 149 Cal.
13 App. 4th 1506 (2007). Accordingly, the courts have made it clear that the prosecutor must meet a
14 heightened standard of proof by presenting “clear and convincing” evidence that the necessary
15 elements of a gang injunction are present before a trial court can invoke its injunctive powers.
16 *Englebrecht*, 88 Cal. App. 4th at 1236.

17
18 Among the reasons for such careful judicial scrutiny are the following:

- 19
- 20 1. That gang injunctions affect and infringe the exercise of constitutional rights of those bound by its terms.
 - 21 2. That gang injunctions target commonplace and perfectly lawful activities, and thus can have a pervasive impact on the everyday lives of those bound and on their families, especially for those who live and work within the area covered by the injunction.
 - 22 23 3. That gang injunctions constitute in effect the imposition of probation-like conditions on a group of individuals accused of unlawful conduct, but without affording those individuals the due process protections that they would have under the criminal justice system, especially the right to appointed counsel. In fact, gang injunctions can impose restraints and sanctions on persons who have not had the opportunity or the means to mount any defense in a civil case. The relative ease and speed with which law enforcement can impose these restraints are
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1 undoubtedly a reason for their appeal, but this "efficiency" should also raise
2 cautionary flags in terms of judicial scrutiny.

- 3 4. While gang injunctions are intended to protect the safety of communities, they also
4 can have a stigmatizing affect on the life of a community. This dilemma is
5 underscored by the fact that every gang injunction in this State of which Amici are
6 aware has been imposed on predominantly persons of color and in communities of
7 color. The potential for racial profiling and racial stereotyping, something that has
8 been a national problem as well as a documented San Francisco Police Department
9 problem,¹ cannot be ignored in assessing this law enforcement tool.

10 This Court now has before it the second and third gang injunction cases that have been
11 filed by the San Francisco City Attorney within the last year. These injunctions have targeted the
12 Bayview, Mission and Western Addition neighborhoods. Amici American Civil Liberties Union
13 of Northern California and the Lawyers' Committee for Civil Rights of the San Francisco Bay
14 Area ("Amici") have been informed that in the cases before this Court, persons who are alleged to
15 be gang members intend to move to intervene and, importantly, will be represented by counsel.
16 Amici understands that these intervenors intend to challenge the injunction, and to present a
17 factual record that will address the potential impact of the injunction on their constitutional rights
18 and daily lives. It is our understanding that their opposition papers will also include a number of
19 declarations that will give voice to a variety of community concerns questioning the need for this
20 remedy, and asserting that it will have a detrimental impact on community and family life. In
21 particular, the declarations submitted by the proposed intervenor-defendants will explain the
22 adverse effect that the injunction will have on current efforts in the community to address the
23 very real problems of crime and criminal street gangs.

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26 ¹ See *HIGH BLACK ARREST RATE RAISES CALL FOR INQUIRY: Range of explanations offered by*
27 *experts, officials for S.F.'s disparity with other cities*, Susan Sward, Sunday, December 17, 2006 (reporting
28 that San Francisco Police arrest African Americans for serious crimes at rates much higher than other
California cities). Available at: <http://sfgate.com/cgi-bin/article.cgi?file=/cfa/2006/12/17/MNGF8N04MD1.DTL>.

1 Amici have had long-standing concerns about the impact of civil gang injunctions on
2 individual constitutional rights, and attorneys for Amici represented the defendants in *Acuna*.
3 While Amici certainly understand that the California Supreme Court has authorized civil gang
4 injunctions, we believe that the instant case is factually and procedurally distinct from *Acuna*, and
5 that the presence of intervenors *represented by counsel* at the preliminary injunction stage
6 provides this Court with a unique opportunity to carefully consider not just the judicial
7 authorization of this remedy, but the judicial cautionary notes that are also part of the controlling
8 precedents. While the Plaintiff has submitted a bulky record, all from law enforcement files and
9 from S.F.P.D. officers, this Court must carefully scrutinize this evidence, as well as carefully
10 consider the record presented by intervenor-defendants, to insure that no injunction (including
11 any preliminary injunction) is issued unless the Plaintiff has met its clear and convincing standard
12 of proof.
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15 Amici fully understand that the role of the courts is limited to the legal claims and the
16 legal rights before it. It is not the job of a court to assess and adopt social policies or law
17 enforcement tactics and methods, and this Court's decision must be based on the law and not on
18 community sentiment or social policy. However, the extraordinary nature of the relief requested
19 – a public nuisance injunction over 60 square blocks – does require the Court to evaluate and
20 make judgments about the efficacy and the necessity of issuing such a broad restraint in the
21 Mission community. As the *Acuna* court emphasized, it is “this recognition and willingness to
22 vindicate the value of community and collective interests it furthers, rather than to punish
23 criminal acts, that lies at the heart of the public nuisance as an equitable doctrine.” *Acuna*, 14 Cal.
24 4th at 1109.
25

26 Furthermore, both the applicable substantive legal standards and the governing equitable
27 standard for issuance of a preliminary injunction necessitate that this Court engage in a careful
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1 balancing of interests – both to insure that the harms that will be prevented by the issuance of the
2 injunction will outweigh the harms that it will cause, as well as to insure that any terms of an
3 injunction burden no more constitutionally protected activity than necessary to achieve its goals.
4 These judicial tasks necessarily require the Court to make judgments about the real world effects
5 of this injunction in this community, and to take into account the very different circumstances
6 before the Court than those that the California Supreme Court was addressing in *Acuna*.
7

8 Amici will address below three of the issues that they believe should be part of this
9 Court's consideration of this case:

- 10 1. Whether the proposed injunction meets the constitutional standard of a narrowly
11 drawn restraint that burdens no more expressive activity than necessary.
- 12 2. Whether plaintiff has shown that the proposed injunction will result in the prevention
13 of harm required by equitable standards.
- 14 3. Whether the proposed injunction can apply to persons who have not had their day in
15 court to challenge whether the clear and convincing standard has been met as to them.

16 II. THE PROPOSED INJUNCTION IS NOT NARROWLY DRAWN AND
17 UNNECESSARILY BURDENS CONSTITUTIONALLY PROTECTED
18 ACTIVITIES.

19 When constitutional rights are involved, government must address the problems it seeks to
20 fix with a "narrowly drawn, constitutionally sensitive response" that "is narrowly focused on the
21 harm at hand." *Waters v. Barry*, 711 F.Supp. 1125, 1135 (D.D.C. 1989); *Carroll v. President of*
22 *Princess Anne*, 393 U.S. 175, 183-83 (1968) ("An order issued in the area of First Amendment
23 rights must be couched in the narrowest terms that will accomplish the pin-pointed objective
24 permitted by constitutional mandate and...must be tailored as precisely as possible to the exact
25 needs of the case.") In *Acuna*, the Court recognized that the restrictions on association involved
26 in a gang injunction implicate First Amendment interests, and thereby applied the United States
27 Supreme Court's *Madsen* standard of burdening "no more speech than necessary to serve an
28 important government interest." *Acuna*, 14 Cal. 4th at 1121, citing *Madsen v. Women's Health*

1 *Center*, 512 U.S. 753, 765 (1994). In its review of the preliminary injunction provisions, the
2 particular facts of the case were central to the *Acuna* Court's holding. The proposed injunction
3 covered only a four-block residential area, and none of the alleged gang members lived within
4 that small "safety zone." This area was simply the "turf" where the gang committed its unlawful
5 nuisance activities, and which the Court described as "occupied territory" and an "urban war
6 zone." *Id.* at 1100.

7 It is beyond dispute that the instant case is factually distinct from *Acuna* in several
8 material ways. The injunction covers a substantial part of the Mission district, including the heart
9 of its commercial, social and community life. As will be documented in the declarations
10 submitted by the proposed intervenor-defendants, many of the people targeted by the injunction,
11 as well as their families and relatives, live and conduct their daily lives within the bounds of the
12 "safety zone." This means that the terms of the proposed order will cut into the fabric of people's
13 family lives, political activities and expression, cultural activities and religious practices and
14 celebrations. Whereas the *Acuna* court found that "the gangs appear to have had no
15 constitutionally protected or even lawful goals within the limited territory of Rockspring." *Id.* at
16 1121, that is simply not the case for this injunction, which covers 60 square blocks (an area 15
17 times larger than the *Acuna* injunction) and targets individuals who conduct significant parts of
18 their family, political, cultural and work lives within the safety zone.

19 These factors are intrinsic to this Court's determination of whether the proposed order
20 burdens no more speech than is necessary to serve an important government interest. *Madsen*,
21 512 U.S. at 765. By choosing to seek an injunction for such a large geographical area, and one
22 which includes social, religious, community and commercial centers, Plaintiff has insured that the
23 proposed injunction will affect a great number of current associational activities and will
24 inevitably chill future expressive activities.² The scope of the provision, as written, would apply
25

26 ² See Scott E. Atkinson, *The Outer Limits of Gang Injunctions*, 59 Vand. L. Rev. 1693, 1716 (2006) ("Provisions
27 forbidding all association necessarily include politically motivated assembly, thereby prospectively abridging gang
28 members' First Amendment rights—even if the enjoined defendants were not using those rights at the time the
injunction was imposed.")

1 not just to association outside in public view, but also to associations inside any building
2 “accessible by or to the public,” which would include schools, polling places, grocery stores and
3 community centers, to name only a few. Thus, the act of walking into any store, restaurant,
4 business or meeting inside the “safety zone” would incur a risk of violating the injunction
5 depending on who else was present at the time. Even at the preliminary injunction stage, this
6 Court’s duty to narrowly tailor any injunction requires a careful review of the proposed safety
7 zone to determine whether Plaintiff has established by clear and convincing evidence the
8 necessity of an injunction over such a large and central area in the Mission.

9 It is also relevant to the *Madsen* analysis that the injunction proposed for this large
10 geographical area includes and prohibits many lawful and innocent activities, some of which are
11 constitutionally protected. The combined effect of the non-association provision, the curfew, and
12 the blanket ban on the color red and on all “gang symbols” and all “gang signs,” is that the
13 proposed injunction will interfere with participation in political protests, social and community
14 events and other activities that have nothing to do with gangs and that have nothing to do with
15 any nuisance.

16 This Court must pay “close attention to the fit between the objectives of an injunction and
17 the restrictions it imposes” so as to “ensure that the injunction [is] no broader than necessary to
18 achieve its desired goals.” *Madsen*, 512 U.S. at 765. This Court adhered to this important
19 principle in the *Oakdale Mob* case when it rejected the City Attorney’s request for a curfew from
20 10 a.m. to sunrise, and imposed a narrower prohibition on nighttime “loitering.” *People v.*
21 *Oakdale Mob*, San Francisco Superior Court, Case No. CGC-06-456-517, Order Granting
22 Preliminary Injunction at 4.³ Any injunction issued in this case must also be narrowly tailored to
23 the specific facts and circumstances, so that there is a nexus between the enjoined activity on the
24 one hand, and the complained-of nuisance and the activities of the gang on the other.

25 ³ In *People v. Varrio Lampara Primera* (Santa Barbara Superior Court No. 1148758), the Santa Barbara Superior
26 Court (Iwasko, J.) narrowed a proposed gang injunction by limiting the association provision to prohibit association
27 only “under circumstances that would warrant a reasonable person to believe that the purpose or effect of that
28 behavior is to enable [the gang] and/or its members to engage in the nuisance conduct prohibited in this order.”
(Statement of Decision on Motion for Preliminary Injunction at 10.) Amici has been informed that intervenor-
defendants will request that the Court take judicial notice of this decision and attach a copy to their request.

1 The terms of the proposed injunction dealing with gang symbols and gang signs and the
2 color red require particular scrutiny from this Court in applying the *Madsen* standard. The
3 blanket prohibition on “wearing red garments” and on displaying any “gang signs” or “gang
4 symbols” is not narrowly tailored. By not limiting the prohibition to symbols or signs that refer
5 in any way to the Norteños, this injunction goes beyond the injunctions issued in *Acuna* and
6 *Englebrecht*. *Acuna*, 14 Cal. App. 4th at 1136 (Mosk, J. dissenting) (preliminary injunction
7 restricted gang clothing and gang signs that referred to “VST” or “VSL”); *Englebrecht*, 88 Cal.
8 App 4th at 1243 (injunction prohibited symbols or signs “which describe or refer to the gang
9 known as Posole”).

11 The constitutional problems caused by such injunctive terms which sweep too broadly are
12 compounded by their vagueness. “It is a basic principle of due process that an enactment is void
13 for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S.
14 104, 109 (1972). Without more, the terms “gang signs” and “gang symbols” are
15 unconstitutionally vague because they fail to provide adequate notice as to what acts are
16 prohibited, and because, by failing to provide specificity and guidance to the police officers
17 enforcing the injunction, these open-ended terms make the injunction highly susceptible to
18 “arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999);
19 *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In the context of a gang injunction, the
20 potential for such discriminatory enforcement in the form of racial profiling is very real.

23 Likewise, the blanket ban on “wearing a red garment” is not narrowly tailored and is
24 certainly vague. How much red does it take to make a garment red in the eyes of a police officer
25 – is a red stripe, or a red patch, or a red button enough? Will this provision be strictly enforced
26 during festivals and special events in the Mission such as Cinco De Mayo or Carnival? What if
27 there is a celebration if the 49ers make the playoffs – will wearing 49ers’ colors in public be a
28

1 criminal offense for those bound by the injunction? The injunction as proposed could be applied
2 to far too many acts that have nothing to do with gang or nuisance activity, and would interfere
3 unnecessarily with innocent and constitutionally protected activities.

4
5 The need for careful judicial scrutiny has been underscored by the California Court of
6 Appeal in establishing a heightened standard of proof in the gang injunction context. While it
7 may seem counter-intuitive, there is a very clear and compelling reason that the *Englebrecht* court
8 imposed a higher burden of proof on a plaintiff seeking an injunction against a criminal street
9 gang than on one seeking an injunction against, for example, labor picketers or abortion clinic
10 protestors. That is because injunctions on protest or picketing activity only affect individuals
11 when they are at the site of the protest and are engaged in the act of protesting or picketing. No
12 one could possibly equate living under such an injunction as being on probation or parole. A
13 gang injunction, however, goes far beyond other types of injunctions— it has the impact of
14 affecting the daily lives of its targets not only in their nuisance-related conduct, but also in their
15 expressive activities and in common everyday tasks that have no remote relationship to the
16 nuisance or any other unlawful conduct. Furthermore, they are not limited to the site of the
17 protest, but follow the target wherever they go in a defined (and in this case large) geographical
18 area. When, as in this case, that area includes one’s place of residence or work, then it is clear
19 why it is important that this probation-like civil sanction not be imposed without “clear and
20 convincing” evidence.
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23 III. PLAINTIFF MUST ESTABLISH THAT THIS INJUNCTION WILL BE
24 EFFECTIVE AND THAT ITS BENEFITS OUTWEIGH THE HARMS IT WILL
25 CAUSE.

26 This Court must carefully consider and determine whether the harms likely to occur in the
27 community if the injunction does not issue outweigh the harms that will occur (to the targeted
28 individuals and to the community) if it does, *Acuna*, 14 Cal. 4th at 1109; *Continental Bakery Co.*

1 v. *Katz*, 68 Cal. 2d 512, 527 (1968). Plaintiff makes a conclusory argument that the Mission
2 community will suffer great harm if the preliminary injunction is denied. However, to balance
3 the harms, the Court must look beyond the assertions in the Plaintiff's declarations and take into
4 account both the individual rights that will be imperiled by the injunction and the evidence
5 submitted in opposition to the injunction that tends to establish the adverse affects of this
6 injunction on the life of this community.
7

8 In the public nuisance context, the legitimate purpose of an injunction is to protect the
9 community as a whole from a substantial and unreasonable interference. *Acuna*, 14 Cal. App 4th
10 at 1105. As the *Acuna* Court emphasized, it is "this recognition of – and willingness to vindicate –
11 the value of community and the collective interests it furthers, rather than to punish criminal acts,
12 that lies at the heart of the public nuisance as an equitable doctrine." *Id.* at 1109.
13

14 The proposed intervenor-defendants will be submitting declarations that will be relevant
15 to the adverse affects that this injunction will have on the community. The Mission is an active
16 cultural and political neighborhood that invests significant community resources in working
17 preventatively and constructively on the problem of youth violence and gang activity.
18 Organizations and individuals who live and work in the "safety zone" will present evidence to
19 this Court detailing how the proposed injunction will interfere with their positive community
20 work and stating why they believe it will achieve nothing more than increased tension between
21 law enforcement and Mission residents.
22

23 In fact, a recent groundbreaking study has concluded that gang injunctions can *cause* harm
24 because they are ineffective and counterproductive ways of meeting the purported goal of
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1 community safety.⁴ The Justice Policy Institute report (“JPI Report”) examined and analyzed
2 “the successes and failures of approaches that have been employed to respond to gangs” and
3 concluded that police suppression efforts like civil gang injunctions “can increase gang cohesion
4 and police-community tensions, and they have a poor track record when it comes to reducing
5 crime and violence.” JPI Report, at 3, 5. The Report recommends redirecting resources from
6 failed gang enforcement efforts to proven public safety strategies, finding that “gang injunctions,
7 gang sweeps and ominous-sounding enforcement initiatives reinforce negative images of whole
8 communities and run counter to the positive youth development agenda that has been proven to
9 work.” *Id.* at 7.

11 The issues raised by the JPI Report, and its conclusions, are relevant to the balancing of
12 harms in which this Court must engage. It raises serious questions as to whether the proposed
13 injunction will make the Mission safer and whether any incremental benefits are outweighed by
14 the costs. These questions go to the heart of the equitable considerations that this Court must
15 resolve. As the California Supreme Court stated in *Acuna*, “the availability of equitable relief to
16 counter public nuisances is an expression of the interest of the public in the quality of life and the
17 total community environment.” *Acuna*, 14 Cal. 4th at 1107 citing *People ex rel. Busch v.*
18 *Projection Room Theater* 17 Cal.3d 42, 52 (1976).

21 The JPI Report also deals with the cloud of racial profiling that hangs over gang
22 injunctions. The Report details the fact that African American and Latino communities bear the
23 cost of failed gang enforcement initiatives because “young men of color are disproportionately
24 identified as gang members and targeted for surveillance, arrest, and incarceration, while
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26 ⁴ Judith Greene and Kevin Pranis, *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public*
27 *Safety Strategies*, Justice Policy Institute, July 2007, available at: http://www.justicepolicy.org/reports_jl/7-10-07_gangs/GangsFullReport2.pdf

1 whites—who make up a significant share of gang members—rarely show up in accounts of gang
2 enforcement efforts.” JPI Report at 6. This fact is particularly disturbing in light of the fact that
3 whites make up the largest racial group of gang youth, and white gang members commit
4 delinquent acts at the same rate as their African American and Latino peers.⁵ In balancing the
5 harms, this Court should be cognizant of this disparity.
6

7 IV. THE PROPOSED INJUNCTION VIOLATES DUE PROCESS PRINCIPLES BY
8 PURPORTING TO BIND PERSONS WHO HAVE NOT HAD AN OPPORTUNITY
9 TO CONTEST THE CASE AGAINST THEM

10 As the Court of Appeal recently reaffirmed, a gang injunction can only apply to an active
11 gang member (as defined in *Englebrecht*), and a “person is subject to the injunction *if the State*
12 *proves by clear and convincing evidence that the [Englebrecht] definition is met.*” *Broderick*
13 *Boys*, 149 Cal. App 4th at 1517 (emphasis by the court), citing *Englebrecht*, 88 Cal.App. 4th at
14 1256-1257. Therefore, if an injunction issues, it can only bind those individuals about whom
15 Plaintiff has presented clear and convincing evidence of active gang membership to this Court.

16 However, the proposed preliminary injunction, as stated in the Order to Show Cause,
17 would apply to the Nortefios gang “and its associates, affiliates and recruits, and all persons acting
18 in concert with or participating with it or acting on its behalf.” Order to Show Cause Re:
19 Preliminary Injunction, at 2, lines 1-5. Thus, this form of injunction will, on its face, apply to any
20 person whom the prosecutor or the police deem to be a member or “associate” of the Nortefios, or
21 “acting in concert with or participating” with the Nortefios. This leaves the door open to the
22 police to serve with the injunction individuals who have not yet even been named by Plaintiff in
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25 ⁵ According to the JPI Report, “The public face of the gang problem is black and brown, but whites make up the
26 largest group of adolescent gang members. Law enforcement sources report that over 90 percent of gang members
27 are nonwhite, but youth survey data show that whites account for 40 percent of adolescent gang members. White
28 gang youth closely resemble black and Latino counterparts on measures of delinquency and gang involvement, yet
they are virtually absent from most law enforcement and media accounts of the gang problem. The disparity raises
troubling questions about how gang members are identified by police.” *Id.* at 4.

1 its court papers. Any injunction issued by this Court should make it clear that it can only bind
2 individuals who have first had the opportunity to appear in court and to have the Court determine
3 whether they are active gang members. Only such an explicit narrowing of the proposed
4 injunction is consistent with the Court's admonition in *The Broderick Boys* that an injunction can
5 only apply to persons who have been proven to be active gang members by clear and convincing
6 evidence. *Id.* at 1517.

8 V. CONCLUSION

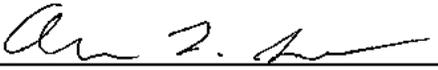
9 For the foregoing reasons, this Court should not issue the Proposed Preliminary
10 Injunction.

12 DATED: September 4, 2007

Respectfully Submitted,

14 LAWYERS' COMMITTEE FOR CIVIL
15 RIGHTS OF THE SAN FRANCISCO BAY
16 AREA

17 AMERICAN CIVIL LIBERTIES UNION OF
18 NORTHERN CALIFORNIA

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