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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
RENE C. DAVIDSON COURTHOUSE

In re
MARIO CASILLAS,
MICHAEL LUBIN
JOANNE WARWICK,
CHLOE WATLINGTON,

Petitioners,

On Habeas Corpus.

MEMORANDUM OF POINTS AND AUTHORITIES ISO PETITIONS FOR WRITS OF HABEAS CORPUS

WWM 576339
WWM 576353
WWM 576366
WWM 576374

Dept. 9

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These four habeas petitions[1] challenge orders, all imposed as a condition of pre-trial release, that require petitioners to stay far away from the Plaza in front of Oakland City Hall. Petitioners, all of whom are associated with the Occupy Oakland, object to these orders on the grounds that they want to continue to exercise their free-speech rights in that area, and that the orders therefore violate the First Amendment.

The U.S. Supreme Court has held that judicial orders preventing demonstrators from approaching the site of their protest violate the First Amendment unless the government shows that they "burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center*, 512 U.S. 753, 765 (1994). It has invalidated orders that do not meet this standard, even when they push protestors with a proven history of violence only a few feet from the objects of their protest.

Because the government has failed to show that the orders here are necessary to serve any government interest, the orders are unconstitutional and this Court should grant relief. That the orders have been imposed as conditions of pre-trial release does not matter, because the government cannot avoid the First Amendment by simply showing probable cause that a person has committed a crime (the protestors involved in *Madsen* had repeatedly violated the court's original order and engaged in illegal activity) and because the persons involved in this action have a right to pretrial release. In addition, the orders are unconstitutionally vague; they also violate equal protection because the District Attorney has admitted in a recent published opinion piece that she sought them in least at part because of her perception that the defendants are anti-police and anti-government.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Petitioners therefore ask that this Court issue immediate relief. *See* Penal Code § 1476 (writ should issue "without

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[1] Petitioners have submitted individual petitions but a single, consolidated Memorandum of Points and Authorities so that a reader need not sift through multiple versions of the same arguments as applied to slightly different facts.

delay”).

I. FACTS

Petitioners have all been arrested and charged based on alleged conduct that occurred during demonstrations relating to the Occupy Oakland movement. As a federal court recently explained, members and supporters of Occupy Oakland “seek to raise awareness about economic inequality, and advocate political and social change. They have repeatedly convened on Frank Ogawa Plaza, in front of Oakland City Hall, with some erecting tents and others periodically gathering there for meetings and rallies. Most of these events, all acknowledge, have transpired without incident,” although some have resulted in conflict between the police and members of the public and arrests. *Campbell v. City of Oakland*, 2011 WL 5576921 at *1 (N.D. Cal. Nov. 16, 2011).

Petitioner Joanne Warwick was arrested during an Occupy Oakland march on 9th Street near Laney College; as can be seen on a map of the area, this is about 900 yards from the Plaza. Warwick Pet. ¶ 5 & Ex. C. This is the only time that Ms. Warwick has ever been arrested. *Id.* She was charged with violating Penal Code § 647c and § 148(a)(1) and was released on her own recognizance; as a condition of pre-trial release, the Court ordered Ms. Warwick to stay away from the Plaza “except for official business.” *Id.* ¶ 3 & Ex. A (minute order imposing this condition and the Court’s Order re: O.R./Bail Status). This exception was inserted because Ms. Warwick is an attorney. *Id.* ¶ 3. The order does not indicate how far away from the Plaza Ms. Warwick must stay or what constitutes official business.

Petitioner Chloe Watlington was arrested on suspicion of committing vandalism at the Marriott Hotel on Broadway at 10th Street, which is several blocks from the Plaza, and obstructing an officer at 14th St. and Broadway. *See* Watlington Pet. ¶¶ 1, 6, 9-11 & Ex. C-E. The arrest occurred during an Occupy demonstration. *Id.* at ¶ 6. Ms. Watlington was charged with three misdemeanor counts and was released on her own recognizance. *Id.* at ¶¶ 1, 2. As a condition of OR, the Court ordered Ms. Watlington to stay at least 300 yards away from the

Plaza. *Id.* at ¶ 3 and Exhibit A.

Petitioner Mario Casillas was arrested on suspicion of assaulting a peace officer. Casillas Pet. ¶ 1. As the prosecution stated at Mr. Casillas' bail hearing, the arrest and alleged offense occurred during an Occupy march near 12th St. and Oak, which is some 900 yards from the Plaza, which is located at 14th St. and Broadway. *Id.* at ¶¶ 5, 11 & Ex. D. The prosecution argued that Mr. Casillas should be required to stay away from the Plaza because other demonstrators went there after Mr. Casillas was already in custody. *Id.* He also argued that "because of these allegations, Mr. Casillas has forfeited" his right to "peaceably gather and demonstrate and exercise [his] First Amendment privilege." *Id.* As a condition of bail, Mr. Casillas is required to stay at least 100 yards from the perimeter of the Plaza. *Id.* at ¶ 6.

Petitioner Michael Lubin was arrested on suspicion of assaulting two peace officers. The alleged offenses occurred near the intersection of 12th St. and Jackson and near the intersection of 19th Street and Rashida Muhammad Street; Mr. Lubin was later arrested in the 2300 block of Broadway. Lubin Pet. ¶ 5. All of these locations are far away from the Plaza. *See id.* ¶ 8 & Ex. C. Nevertheless, the Court ordered Mr. Lubin to stay 100 yards away from the perimeter of the Plaza as a condition of bail. *See id.* ¶¶ 3, 4 & Ex. A, B.

II. PROCEDURE

Habeas corpus lies to obtain relief from improper conditions of pre-trial release. *In re McSherry*, 112 Cal.App.4th 856, 859-60 (2003).

The government bears the burden of proof to show that the conditions at issue are constitutional, for two separate reasons. First, the government generally bears the burden at a bail hearing with respect to all issues other than the defendant's ties to the community. *Van Atta v. Scott*, 27 Cal.3d 424, 434-44, 446 (1980), *abrogated on other grounds by In re York*, 9 Cal.4th 1133, (1995). Thus, when the government seeks to impose a bail or OR condition it must justify it with evidence. *See People v. Stone*, 123 Cal.App.4th 153, 160-61 (2004)

(overturning protective order under Penal Code § 136.2 because "no evidence in the record to support" it). Second, under the First Amendment, the government *always*[2] bears the burden of proof when it seeks to restrict expressive activities. *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *see Schenck*, *infra*, 519 U.S. at 868.

III. DISCUSSION

A. The stay-away orders now before this court violate the First Amendment because they burden more speech than is necessary to achieve any legitimate governmental interest.

1. Under the First Amendment and Madsen, stay-away orders that keep speakers away from a public forum cannot burden more speech than the government has shown to be necessary

The U.S. Supreme Court has twice examined the constitutionality of court orders imposed on demonstrators as a result of prior disruptive conduct – including assaultive conduct – that require the demonstrators to stay away from the locus of their demonstration. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). In both cases, the Court upheld certain restrictions but held that others were unconstitutional because the evidence did not show that they were necessary to serve a significant government interest. The orders in this case are similarly unconstitutional.

Both *Madsen* and *Schenck* involved protests outside abortion clinics. In both cases, the defendants had a long history of engaging in illegal, disruptive, and sometimes violent behavior at the clinics at issues, including harassing and intimidating clinic patients, staff, and even, in *Madsen*, confronting the minor children of staff when they were home alone. *Madsen*, 512 U.S. at 759; *Schenck*, 519 U.S. at 385. Nevertheless, the high court held that, although court intervention was appropriate to stop the pervasive lawlessness, the trial courts had gone too far

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[2] With the possible exception of persons serving sentences following their conviction of crimes.

by issuing injunctions that burdened more speech than necessary to stop the unlawful behavior. *Madsen*, 512 U.S. at 771, 773-775; *Schenck*, 519 U.S. at 377. The proponent of such orders must justify "each contested provision" of the order. *Madsen*, 512 U.S. at 768.

Madsen was decided on a limited factual record because the demonstrators had failed to provide a complete record, and the Court thus assumed that the record supported the trial court's findings that led it to issue a broad injunction. 512 U.S. at 770-71. The trial court found that protestors had "repeatedly" interfered with access to the clinic, even after it had issued an injunction to prohibit their actions. *Id.* at 768-71. Demonstrators also used bullhorns, other sound-amplification equipment, and car horns to make noise outside the clinic. *Id.* at 772. These activities imperiled not just physical access to the clinic but also the health of the women being treated, who sometimes required additional sedation because of their experience outside and because they could hear the protestors even inside during surgery and recovery. *Id.* at 758-59.

The bulk of the Court's opinion is devoted to determining the proper standard to be used in evaluating court orders that prohibit protestors who have engaged in disruptive or illegal activities from returning to the scene of their protests. Because of the special danger that such targeted orders pose to the First Amendment, the Court determined that its "standard time, place, and manner analysis is not sufficiently rigorous" to protect free-speech rights, and instead held that such orders are only permissible if their provisions "burden no more speech than necessary to serve a significant government interest." *Id.* at 765-66.

Applying this standard, the Court struck down part of the injunction. Although it held that the injunction could legitimately keep protestors off of public property within 36 feet the clinic, because the record showed that this was necessary to ensure access to the clinic's doors (a smaller distance was not possible because it would have meant that protestors would stand in the middle of a street and continue to block traffic), it also held that the injunction could not be used to keep protestors off of privately owned property within that 36-foot perimeter because there was no "evidence that petitioners standing on the private property ha[d] obstructed access to the clinic … or otherwise unlawfully interfered with the clinic's operation." *Id.* at 769-70, 771. The Court also invalidated the part of the order that prohibited demonstrators from approaching any

of the clinic's patients within 300 feet of the clinic, on the grounds that this provision "burden[ed] more speech than is necessary to prevent intimidation and to ensure access." *Id.* at 773-74. Finally, the Court struck down the prohibition against picketing within 300 feet of the residences of clinic staff, even acknowledging the importance of protecting the privacy and tranquility of the home, on the grounds that limitations on the time or manner of such pickets or "a smaller zone could have accomplished the desired result." *Id.* at 775.

In *Schenck*, the record was more complete and showed that the protestors had engaged in "numerous large-scale blockades" of the clinics, had trespassed inside the clinics, had thrown themselves on the hoods of patients' cars, and had engaged in assault and battery against persons entering and exiting the clinics by "pushing, showing, and grabbing" them. 519 U.S. at 362-63. Escorts were "elbowed, grabbed, or spit on." *Id.* Physical fights had broken out between the protestors and men who were escorting women into the clinics. *Id.* at 363.

The continuous protests "overwhelm[ed] police resources." *Id.* When the police did make arrests, demonstrators were rarely prosecuted because patients were too scared to cooperate, and protestors "who were convicted were not deterred from returning to engage in unlawful conduct." *Id.* at 363-64. The protestors harassed the police verbally and by mail. *Id.* The protestors continued this behavior even after a federal court issued a temporary restraining order prohibiting it. *Id.* at 365. The trial court specifically found that many of the protestors had "been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1425 (W.D.N.Y. 1992), upheld in relevant part by 519 U.S. 357; *see also id.* at 1424 (describing physical blockades of clinic by demonstrators); *id.* at 1426-27 ("the record shows that arrest and conviction pursuant to local laws has not deterred defendants from repeatedly engaging in their illegal pattern of activity.").

Even in light of this extensive record of pervasive lawlessness that overwhelmed police resources, the Court overturned 15-foot "floating buffer zones" around patients and vehicles, on the grounds that a "more limited" order would be sufficient to ensure physical access to the clinic and that the "15-foot floating buffer zones would restrict the speech of those who simply line the

sidewalk or curb in an effort to chant, shout, or hold signs peacefully." *Id.* at 380. The Court upheld a 15-foot stay away from the doors and driveways of the clinic based on the trial court's finding that this was "the only way to ensure access" to the clinic. *Id.*

The California Court of Appeal has, in another case involving an extensive record of blockades, harassment, and violations of prior orders by anti-abortion protestors, reiterated that such orders can stand only when they are truly necessary to "prevent intimidation and permit access." *Planned Parenthood Assn. v. Operation Rescue*, 50 Cal.App.4th 290, 301 (1996). The First District thus overturned an order requiring protestors to stay 250 feet away from an apartment complex in which a doctor resided on the grounds that this "250-foot zone denies the protesters any opportunity to demonstrate in front of [the doctor's] building" because the trial court had failed to first try "a less restrictive approach." *Id.* at 302. When First Amendment rights are involved, a court does not have the usual broad discretion to craft injunctive relief; "*Madsen* requires a more laser-like approach." *Id.* at 302. *See generally In re Berry,* 68 Cal.2d 137, 154-57 (1968) (invalidating injunction prohibiting defendants from demonstrating near government buildings as overbroad and vague).

2. The orders here fail the Madsen test because they burden more speech than has been shown to be necessary

First, some fundamental principles: Petitioners' protests against economic inequality and advocacy for political and social change constitute "core political speech," entitled to the highest constitutional protections. *Meyer v. Grant*, 486 U.S. 414, 421-422 (1988). And Frank Ogawa Plaza and the surrounding streets and sidewalks all constitute public fora under the First Amendment and Article I § 2 of the California Constitution, places where the right of free speech "is at its most protected." *Madsen*, 519 U.S. at 377 ("speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."); *see Burson v. Freeman*, 504 U.S. 191, 196 (1992); *Prisoners Union v. Department of Corrections*, 135 Cal.App.3d 930, 938-40 (1982). Our protections for free speech means that the speakers, not the government, get to decide where they want to speak. *Galvin v. Hay*, 374 F.3d 739, 749-53 (9th Cir. 2004); *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC*,

193 Cal.App.4th 168, 175-78 (2011) ("a regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground another place is available.").

And holding a political demonstration in front of city hall has a special value that the First Amendment protects, because it is "the seat of authority against which the protest is directed." *Galvin*, 374 F.3d at 752 (citation omitted); *see Berry,* 68 Cal.2d at 154 (invalidating injunction against demonstrations in front of certain government buildings because those "public buildings … are the very places where communication of the content of the Union's grievances would be most effective"); *Prisoners Union*, 135 Cal.App.3d at 941. Access to such "government offices and public places" is so important that courts have limited authority to restrict such access even as a condition of probation imposed on somebody convicted of a felony, where the court may lawfully impose orders to punish and rehabilitate the offender. *People v. Perez*, 176 Cal.App.4th 380, 384-86 (2009) (striking condition requiring felony probationer to stay 500 feet from court unless appearance required); *cf. Van Atta*, 27 Cal.3d at 445 (pre-trial bail may not be used for punitive purposes, unlike probation or bail on appeal).

The government's interest in these orders is seems to be preventing future crimes and maintaining public order. But although these are valid government interests, they cannot support these orders, for four distinct reasons.

First, stay-away orders are not necessary here because the government has less-restrictive ways to prohibit future unlawful conduct: if a person released pending trial commits a new crime he or she can be arrested and the amount of bail increased. Penal Code §§ 1275, 1289. Violation of a narrower pretrial order would itself be a crime. *See id.* § 166(a)(4). If the crimes are felonies, the enhancement of Penal Code § 12022.1 is intended to deter persons released from committing new crimes. *People v. Ormiston*, 105 Cal.App.4th 676, 687 (2003). Because there is no evidence that these less-restrictive deterrent measures that are an inherent part of the pre-trial release system are insufficient to prevent recidivism, the imposition of the stay away orders violates the First Amendment. *Planned Parenthood*, 50 Cal.App.4th at 302.

Second, as *Madsen* and *Schenck* demonstrate, the mere fact that a person has been arrested

and charged with a crime does not justify this type of limitation on free-speech rights. As the United States Court of Appeals has long made clear in this context, "[t]he law does not permit us to infer because a person has resorted to violence on some past occasions that he will necessarily do so in the future" such that the government can deny him the right to demonstrate in a public forum. *Collin v. Chicago Park District*, 460 F.2d 754 (7th Cir.1972); *accord Million Youth March, Inc. v. Safir*, 63 F.Supp.2d 381, 393-94 (S.D.N.Y. 1999). Prohibitory injunctive relief is not available unless there is evidence of future harm. *Russell v. Douvan*, 112 Cal.App.4th 399, 401 (2003). Although pervasive, repeated violations of the law may in some cases justify a court order to prevent additional violations, petitioners here are not accused of any such pattern of unlawful conduct.

Third, three of the orders here are invalid because they require petitioners to stay away from the Plaza without any evidence that they engaged in illegal conduct in that area. Ms. Warwick and Mr. Casillas are accused of committing crimes some 900 yards away from the Plaza; Mr. Lubin's alleged offenses also took place far from it. There is no indication that they engaged in unlawful conduct in or around the Plaza. *Madsen* specifically holds that the First Amendment prohibits orders that keep persons from demonstrating in places where they have not previously engaged in unlawful behavior. *Madsen*, 519 U.S. at 771; *accord Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal.App.4th 1228, 1266 (2005) (overturning order prohibiting picketing of home because defendants had not previously engaged in that specific conduct).

Fourth, the orders here are overbroad. Three of the orders here (Watlington, Casillas, Lubin) and at issue are even broader than those invalidated in *Madsen* (limited activities in 300-foot zone) and *Planned Parenthood* (250-foot); *see Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal.4th 1009, 1025 (1995) (calling 100-yard stay-away zone "exceptionally large"). The 300-yard Watlington order is more than three times as large. As the maps attached to these petitions show, the orders cover the federal courthouse, a state office building, and city hall.

And the justification for broad exclusion zone is much less here than in those abortion-protestor cases, where the unlawful conduct was focused on particular individuals who lived,

worked, or were being treated at the areas in question. Petitioners here are not accused of assaulting anybody whose house or place of business lies within the exclusion zone. Even if some sort of protective order were appropriate, the orders that the magistrates issued here are much broader than could possibly be necessary to achieve legitimate goals and are for that reason alone unconstitutional. *See Berry*, 68 Cal.2d at 154.

B. The orders violate the First Amendment and due process because they are vague

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) (citations omitted). This means that judicial orders that limit where people can demonstrate must be precise so that persons who want to express themselves know exactly what is forbidden and what is allowed. *Schenck*, 519 U.S. at 378-79. Otherwise, a "lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378 (invalidating 15-foot floating buffer zones for this reason).

One order requires Ms. Watlington to stay at least 300 yards away from "Frank Ogawa Plaza" without specifying how that distance is to be measured or from what point or points. *Planned Parenthood* struck down a similar order that required protesters to stay at least 250 feet (approximately 83 yards) away from a doctor's residence, because the order failed to specify whether the 250 feet ran from the particular part of the apartment complex where the doctor lived, from the entire complex, or from the property line. *Planned Parenthood*, 50 Cal.App.4th at 301-302. The Watlington order shares this same infirmity.

The Warwick order is impermissibly vague for two different reasons. First, it orders Ms. Warwick to stay away from (as opposed to out of) the Plaza but does not say how far away. Second, it provides an exception for "official business," but does not define that term, so that it is impossible to know whether the exception covers only business in City Hall that Ms. Warwick has as a result of her being an attorney, or allows her to speak with people in the exclusion zone as long as she is doing so as part of her work as an attorney, or to attend official Occupy events. Because people of "common intelligence must necessarily guess at its meaning and [could] differ

as to its application," this order is unconstitutionally vague. *Berry*, 68 Cal.2d at 156 (citation omitted).

C. These fundamental First Amendment standards apply to these orders, even though they are styled as conditions of pretrial release

None of this analysis is affected by the fact that the orders were issued as part of pretrial release, because the government cannot circumvent a person's constitutional rights by charging him with a crime and then forcing him to forfeit that right as a condition of bail, as is made clear by *Gray v. Superior Court*, 125 Cal.App.4th 629 (2005). In that case, Dr. Gray was charged with a number of felonies, including sexually exploiting a patient or former patient and possession of child pornography and drugs. *Id*. at 635. As a condition of bail, the court ordered him to surrender his medical license. *Id*. The First District held that this violated Gray's constitutional rights, because the bail hearing failed to provide him with the same procedural rights that he would have been entitled to had the government moved in a separate proceeding to suspend or terminate his license, including notice, proof by clear-and-convincing evidence, and prompt review. *Id.* at 638-40.

Here, as in *Gray*, the petitioners all had a right to be released pre-trial. Some of them have posted bail. *See id*. at 644. Others are charged with misdemeanors and have been released on their own recognizance. *See* Penal Code § 1270; *In re York*, 9 Cal.4th 1133, 1138 n.2 (1995). In both situations, they "ha[ve] a right to be free from confinement. The trial court cannot justify imposing bail conditions in a manner depriving [them] of due process *or other constitutional rights* on the ground that [they] would otherwise be confined and effectively deprived of those rights." *Gray*, 125 Cal.App.4th at 644 (emphasis added). *See United States v. Scott*, 450 F.3d 863, 864-75 (9th Cir. 2006) (court could not condition bail on waiver of Fourth Amendment rights).[3]

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[3] Even the judges on the Ninth Circuit who disagreed with the *Scott* majority agreed that the government could not condition bail on a waiver of First Amendment rights. *See Scott*, 450 F.3d. at 896 (Callahan, J., dissenting from denial of rehearing en banc).

This rule must apply with particular exactitude in free-speech cases, because the government cannot strip somebody of his First Amendment rights simply by offering probable cause to show that he has committed a crime. Both *Madsen* and *Schenck* involved protestors who had been arrested and prosecuted for crimes relating to the demonstration at issue; our supreme court has since applied the *Madsen* standard to evaluate public-nuisance injunctions against gangs, even though this conduct was *per se* criminal and could also have been punished as a crime. *People ex rel Gallo v. Acuna*, 14 Cal. 4th 1090, 1108-09 (1997) ("Acts or conduct which qualify as public nuisances are enjoinable as civil wrongs or prosecutable as criminal misdemeanors …."); *id*. at 1120-22 (applying *Madsen*).[4]

Thus, although the Fourth Amendment allows the seizure of evidence or contraband based on probable cause, the Supreme Court has repeatedly held that the First Amendment prohibits the government from taking a book or film out of circulation simply by showing probable cause to believe it is obscene or that its owner has violated the obscenity laws; instead, it may only do so after proving the material is obscene after trial. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 65-66 (1989). In California, the government must prove this by clear and convincing evidence. *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater*, 128 Cal.App.3d 937, 940 (1982). The government must meet this same burden of proof when it seeks a gang injunction under *Acuna* and *Madsen*, because of the effects that such injunctions have on the defendant's free-speech and other rights. *People v. Englebrecht*, 88 Cal.App.4th 1236, 1256-57 (2001). This same standard applies when a person seeks an order prohibiting harassment. *Russell v. Douvan*, 112 Cal.App.4th 399, 402 (2003). Thus, any order issued as a condition of bail or, for persons accused only of misdemeanors, as a condition of release on their own recognizance, that prevents people from exercising their free-speech rights in or around Frank

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[4] The *Acuna* court upheld some parts of the injunction there at issue because none of the gang's conduct was protected by the First Amendment. 14 Cal.4th at 1110-12; *id*. at 1121 ("the gangs appear to have had no constitutionally protected or even lawful goals" in the area affected). Here, by contrast, Petitioners and the Occupy movement itself are engaged in core political speech.

Ogawa Plaza, must comply with the rules set forth above. A mere documentary showing of probable cause to think someone has committed a crime is not enough.

D. The stay-away orders are invalid under *Murgia v. Municipal Court* because the District Attorney is using them to target a political group

On February 19, 2012, the Alameda County District Attorney wrote an opinion piece in the San Francisco Chronicle titled "Occupy Oakland tamed with stay-away orders," in which she defended her office's requests for the stay-away orders on the grounds that the targets of them are "militant, anti-government, anti-police, and anarchists" who are part of a group engaged in "militant operations that call for violence against the police and the city of Oakland."[5] But our supreme court has long made it clear that prosecutors cannot target individuals because of their political views or their membership in controversial organizations: "Just as discrimination on the basis of religion or race is forbidden by the Constitution, so is discrimination on the basis of the exercise of protected First Amendment activities, whether done as an individual or, as in this case, as a member of a group unpopular with the government." *Murgia v. Municipal Court*, 15 Cal.3d 286, 302-03 (1975) (citations omitted). In *Murgia*, the defendants argued that they were being prosecuted for a number of misdemeanor and felony offenses because they were members and supporters of the United Farm Workers. The court held that, if true, this selective prosecution would violate the state and federal equal-protection clauses, even if a non-discriminatory prosecution would have been perfectly proper. *Id*. at 298-99, 301-02. The court has since made clear that a defendant need not show that the prosecutor intends to punish the defendants for their membership in the group; Rather, the purpose or intent that must be shown is simply intent to single out the group or a member of the group on the basis of that membership for prosecution that would not otherwise have taken place. *Baluyut v. Superior Court*, 12 Cal.4th

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[5] Alameda County District Attorney Nancy O'Malley, *Occupy Oakland tamed with stay-away orders*, San Francisco Chronicle, Feb. 19, 2012, at F-7, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/19/IN391N7O9U.DTL and attached as the final exhibit to each Petition.

826, 835 (1996). In other words, "that the government selected the course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.'" *Id.* (citing *Wayte v. United States*, 470 U.S. 598 (1985)).

The District Attorney's opinion piece shows that her office is asking for stay away orders "at least in part" because it believes the targets are members of an anti-government and anti-police group who must be "tamed." This violates both the First Amendment and equal protection. And just as a conviction and sentence that results from discriminatory prosecution must be set aside even when discrimination played no part in the decisions of the jury and judge, so must these orders be set aside because of the prosecution's improper motive, regardless of whether the Court shared or was even aware of that motive. *See Murgia*, 15 Cal.3d at 303-04 ("prohibition [against discriminatory enforcement] applies to the misuse of *any* criminal law.").

E. The orders are invalid prior restraints because the District Attorney is using them to target individuals based on the content of their speech and their association with a political group

"The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions- *i.e.*, court orders that actually forbid speech activities-are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted, emphasis added). Although the government does not violate the rule against prior restraints when it obtains a court-order prohibiting picketing or demonstrating in a particular place "without reference to the content of the regulated speech," when the government's actions are based on the content of the speech at issue such orders do constitute prior restraints. *Madsen*, 512 U.S. at 763 (citations omitted); *see id.* (distinction depends on the "government's purpose").[6]

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[6] The orders in *Madsen* and its progeny were not prior restraints because there was no indication of content-based discrimination by any governmental authority; the parties seeking the injunction were private individuals.

As discussed above, the District Attorney's opinion piece indicates that her office is seeking these orders because of the defendants' message and because they are associated with a particular movement. The orders are therefore prior restraints, and the government has not come close to meeting its "heavy burden of showing justification for the imposition of such a restraint." *New York Times v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotation marks, citations omitted); *see Freedom Communications, Inc. v. Superior Court*, 167 Cal.App.4th 150, 153-54 (2008).

F. Because First Amendment freedoms are at stake, the Court should act expeditiously and should shorten time for any Return or Denial

"Every moment's continuance of a prior restraint amounts to a flagrant, indefensible, and continuing violation of the First Amendment." *Freedom Communications, Inc. v. Superior Court*, 167 Cal.App.4th 150, 154 (2008) (citation and internal changes omitted). And any loss of free-speech rights for even a brief moment creates an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Petitioners thus ask that this Court to exercise its discretion under Rule of Court 4.555(h) to shorten the time for the filing of papers in this matter.

IV. CONCLUSION

Because these stay-away orders violate Petitioners' fundamental state and federal rights to free speech and equal protection, this Court should order the People[7] to show cause why this Court should not vacate the pre-trial orders that require Petitioners to stay away from Frank Ogawa Plaza, and grant other appropriate relief.

A proposed Order to Show Cause is included with each Petition.

DATED: March ____, 2012

Respectfully Submitted,

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[7] Because Petitioners have been released from actual custody neither their presence nor the sheriff's is necessary. *In re Pearlmutter*, 56 Cal.App.3d 335, 336-37 (1976).