NO. 2015-51954

STATE OF TEXAS, *Plaintiff*	§	IN THE 164th DISTRICT COURT
KENDRICK D. ADAMS, et al. *Defendants*	§	OF HARRIS COUNTY, TEXAS

THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION'S, THE HARRIS COUNTY CRIMINAL LAWYERS ASSOCIATION'S, AND THE HARRIS COUNTY PUBLIC DEFENDER'S OFFICE'S *AMICI CURIAE* MEMORANDUM OF THE IN SUPPORT OF DEFENDANTS

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STATEMENT REGARDING APPEARANCE AS *AMICI CURIAE*

Texas Criminal Defense Lawyers Association

The Texas Criminal Defense Lawyers Association ("TCDLA") is the largest state association for criminal defense attorneys in the nation. TCDLA started more than 40 years ago as a small, nonprofit association and has grown into a state-of-the-art organization, providing assistance, support and continuing education to its members. TCDLA provides a statewide forum for criminal defense lawyers and is the only voice in the legislature interested in basic fairness in criminal defense cases.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief.

Harris County Criminal Lawyers Association

The Harris County Criminal Lawyer's Association ("HCCLA") is a bar association of over 700 lawyers in Harris County, Texas who practice criminal defense law. HCCLA is the largest local criminal defense bar in the country. HCCLA's mission is to assist, support, and protect the criminal defense practitioner in the zealous defense of individuals and their constitutional rights. It is further HCCLA's

mission to educate and inform the general public regarding the administration of criminal justice of the defense practitioner in the zealous defense of individuals and their constitutional rights. It is further HCCLA's mission to educate and inform the general public regarding the administration of criminal justice of the need for an independent, ethical, and professional criminal defense bar.

Neither HCCLA nor any of the attorneys representing HCCLA have received any fee or other compensation for preparing this brief.

Harris County Public Defender's Office

The Harris County Public Defender's Office was authorized by the Harris County Commissioners Court to represent indigent persons charged in the misdemeanor, felony, and juvenile courts. Persons represented by this office can expect zealous representation from the combined experience of lawyers, investigators, social workers, and other administrative staff.

The Chief Public Defender serves as a county department director who also works with other government officials to coordinate available services for indigent defendants. In particular, the Chief Public Defender will work with other organizations to improve criminal

defense, mental health treatment, and other services to indigent defendants.

Neither the Harris County Public Defender's Office nor any of the attorneys within the Harris County Public Defender's Office have received any fee or other compensation for preparing this brief.

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STATEMENT OF THE CASE

This case presents the question of whether the government may permanently banish individuals from a community.[1] Here, the question arises in the context of a civil gang injunction which seeks to explicitly and permanently enjoin the defendants from "[e]ntering, remaining, appearing, sitting, walking, driving, bicycling, or being physically present" within the "Southlawn Safety Zone." Plaintiff's First Amended Petition at 17. In conjunction with the other relief the State requests, the injunction would indefinitely banish the defendants from the "Southlawn Safety Zone." Plaintiff's First Amended Petition at 17-20.

The plaintiffs define the "Southlawn Safety Zone" as

> approximately 1326.38 acres or 2.08 square miles within the following boundaries: Starting at the intersection of the (610) South Loop East Service Rd. and (288) South Freeway Service Rd., and proceeding north to the (288) South Freeway service Rd. to Old Spanish Trail; then following Old Spanish Trail east to Griggs Rd. From the intersection of Griggs Rd. at Old Spanish Trail, continue east to Cullen Blvd where it turns south on Cullen Blvd. From Cullen Blvd, south to the intersection of Cullen Blvd and the (610) South Loop East Service Rd. Then, continuing west to the

[1] The State admits that it intends to banish the defendants from the "Southlawn Safety Zone." *See* Plaintiff's Answers to Defendant Bryants [*sic*] 1st Request for Admissions, *State v. Adams*, Cause No. 2015-51954 at Answers 115-116, 118-122, 124 (164th Dist. Ct., Harris Cty., Tex., Sept. 2, 2015) (Answers filed Jan. 29, 2016).

> intersection of the (610) South Loop East Service Rd. and (288) South Freeway Service Rd.

Plaintiff's First Amended Petition at 13. The "Southlawn Safety Zone" encompasses an entire community and contains living places, businesses, public parks, churches, public schools, and other community gathering places. *See* Plaintiff's First Amended Petition at 13-16.

SUMMARY OF THE ARGUMENT

If relief requested by the State is granted, the injunction will indefinitely expel the defendants from the "Southlawn Safety Zone." Banishment is one of the most ancient and historical forms of punishment. Banishment has the power to split apart families, remove residents from their houses, and can impose significant financial hardship. Banishment is of dubious validity under both the Federal and Texas Constitutions and has never been authorized under Texas law. While the State is free to try new and creative solutions to end a gang problem in the "Southlawn Safety Zone," banishment is not a tool that has ever been available to the State for solving its problems.

ARGUMENT

I. Limitations upon the injunctive relief a Texas court may grant

Although a district court has broad authority to grant equitable relief, there are limits to a court's equitable powers:

> Equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law, nor can it originate solely from a court's good intentions to do what seems "just" or "right;" the jurisdiction of Texas courts—the very authority to decide cases—is conferred solely by the constitution and the statutes of the state.

State v. Morales, 869 S.W.2d 941, 942 (Tex. 1994).

A. A court cannot issue an injunction which violates a person's lawful rights

"An injunction, although it must be broad enough to cover the prohibited conduct, must not be drafted so broadly as to prohibit the enjoyment of lawful rights, or to operate perpetually against acts that in the future may become lawful." *Ex parte Jackman*, 663 S.W.2d 520, 523 (Tex. App.—Dallas 1983, no writ). An injunction cannot operate to strip a person of his constitutional rights nor seek to impose conditions on a person that a court has no power to impose. *See Kinney v. Barnes,* 443 S.W.3d 87, 96-97 (Tex. 2014), cert. denied, 135 S. Ct. 1164 (2015) (Trial court cannot issue an overbroad injunction restricting a person's

speech); *Donovan v. City of Dallas*, 377 U.S. 408, 413-14 (1964) (Texas trial courts have no authority to take away a person's right to pursue remedies in federal courts). An invalid or unconstitutional injunction is subject to challenge or dissolution. *See Walker v. City of Birmingham*, 388 U.S. 307, 317 (1967).

B. A civil regulatory scheme like Section 125.065 of the Civil Practice and Remedy Code cannot operate to punish individuals

While the State may employ a wide variety of civil remedies to protect the community from individuals it deems dangerous, these civil remedies may not inflict punishment. *See Foucha v. Louisiana*, 504 U.S. 71, 72 (1992) ("Although a State may imprison convicted criminals for the purposes of deterrence and retribution," the state has no such interest in punishing a person absent a conviction). But even where a statute is intended to implement a facially valid, civil regulatory scheme, the scheme may be 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith v. Doe*, 538 U.S. 84, 92 (2003). If a civil statute is deemed punitive in effect, the designation has drastic consequences and is often fatal to the statute. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 784

(1994) (Punitive nature of drug tax statute rendered that statute an unconstitutional second punishment).

II. The State's request that the defendants be enjoined from "[e]ntering, remaining, appearing, sitting, walking, driving, bicycling, or being physically present" within the "Southlawn Safety Zone" is unlawful

A. Banishment has been traditionally deemed a punishment

Banishment has been traditionally employed as a punishment. *See Cummings v. Missouri*, 71 U.S. 277, 321-322 (1866) (Noting that banishment is a historical punishment). The use of banishment as a punishment may date back to humanity's earliest days: "[t]he device of thrusting out of the group those who have broken its code is very ancient and constitutes the most fearful fate which primitive law could inflict. The offender ... was driven forth naked into the wild." Michael Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. Pa. L. Rev. 758, 758 (1963). As the Supreme Court noted in *Kennedy v. Mendoza-Martinez*,

> banishment and exile have throughout history been used as punishment. […] Banishment was a weapon in the English legal arsenal for centuries, but it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'

372 U.S. 144, 170 (1963).

Several states have declared civil restrictions punitive and unconstitutional when those restrictions resembled banishment. Indiana, Kentucky, and Massachusetts have declared invalid sex offender registration statutes with residency restrictions as *ex post facto* punishments.[2] Each state noted that the restrictions placed by the civil scheme were excessive in relation to any legitimate purpose. The proposed banishment provision requested in this Case is even more akin to the punishment of banishment than the sex offender residency requirements rejected as unduly punitive.

B. Banishment is abhorrent to the United States and Texas Constitutions

"At the time the Union was formed, banishment did not appeal to the United States, which had so recently been used as a depository for Europe's 'refuse.'" 111 U. Pa. L. Rev. at 759. Even in the 18th Century, the idea of banishment would have been repulsive to the framers and would have seemed a relic of the remote past. *Id.* In *Trop v. Dulles*, the Supreme Court labeled banishment "a fate universally decried by civilized people." 356 U.S. 86, 102 (1958) (Noting that the

[2] *See Com. v. Baker*, 295 S.W.3d 437, 444-447 (Ky. 2009); *Wallace v. State*, 905 N.E.2d 371, 377 (Ind. 2009); *Com. v. Cory*, 454 Mass. 559, 571 n. 19 (2009).

denationalization and possible banishment of individuals from the United States was cruel and unusual in violation of the Eighth Amendment).

The Texas Constitution explicitly forbids the banishment of citizens from this state. TEX. CONST., art. 1 § 20. Even in the context of a criminal case where a defendant may be punished, the Court of Criminal Appeals has repeatedly held that a court has no authority to banish an offender. *Gutierrez v. State*, 380 S.W.3d 167, 176-177 (Tex. Crim. App. 2012); *Hernandez v. State*, 613 S.W.2d 287, 288 (Tex. Crim. App. 1980). There is no statutory or constitutional authority that allows the State to expel a person from a community. *See e.g. Johnson v. State,* 672 S.W.2d 621, 623 (Tex. App.—Corpus Christi 1984, no pet.) ("[B]anishing appellant from the county, particularly when he is broke and unemployed is not reasonably related to his rehabilitation, and unduly restricts his liberty."). If the banishment of a person "unduly restricts" the liberty of a probationer, who may be punished under law, it must unduly restrict the liberty of a person civilly enjoined under a gang injunction statute. *See Green v. State*, 706 S.W.2d 653, 656 n. 5 (Tex. Crim. App. 1986) (probation is a form of punishment), *United*

States v. Ward, 448 U.S. 242, 248-49 (1980) (punishment under a civil regulatory statute imposes unconstitutional *ex post facto* punishment).

C. Banishment infringes upon fundamental rights

While the obvious consequence of banishment proposed by the State's petition is the physical expulsion of the defendants from the "Southlawn Safety Zone," many other rights would be impaired by the expulsion from the community.

1. Economic rights

In effect, those banished from the "Southlawn Safety Zone" are summarily evicted from their homes and are not permitted to return to collect personal property or to work within the zone. The injunction effectively banishes defendants from the "Southlawn Safety Zone" and will undoubtedly frustrate the Defendants' use and enjoyment of their private property. Chapter 125 of the Civil Practices and Remedies Code provides no mechanism to compensate enjoined individuals for any property interests they must abandon within the "Southlawn Safety Zone" and amounts to an unconstitutional taking. U.S. CONST., Amend. V, TEX. CONST., art. 1 § 17; *See City of Cincinnati v. Vester*, 281 U.S. 439, 446-447 (1930). Furthermore, Chapter 125 fails to set forth adequate

procedural safeguards necessary to protect the defendants' property interests within the "Southlawn Safety Zone." U.S. CONST., Amend. XIV, TEX. CONST., art. 1 § 19, *Cook v. City of Buena Park*, 126 Cal. App. 4th 1, 8-10 (2005). Finally, banishment from the "Southlawn Safety Zone" unduly interferes with the defendant's right to lawful employment within the zone. U.S. CONST., Amend. XIV, *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 547-548 (1922).

2. Family Rights / Right to Association

The injunctive relief sought by the State would prohibit the defendants from meeting within the "Southlawn Safety Zone" with family members, relatives, or friends not associated with any gang. *See* Emily Friedman, *Gang-Free Zone Prevents Brothers from Hanging Out*, ABC NEWS (Aug. 18, 2010) (documenting a similar outcome following a gang injunction in Brazos County). The suit does not discriminate between defendants with strong family connections in the "Southlawn Safety Zone" or defendants who are lifelong residents of the area and those defendants whose connection with the area is solely related to gang activities. The banishment of defendants would violate defendants' First Amendment right of free association. U.S. CONST., Amend. I; *c.f.*

People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1120-21 (1997) (ban on association between gang members constitutional because it only prohibited public association between the gang members). Additionally, as the banishment of the defendants leaves no way for the defendants to meet with family members or participate in family activities within the "Southlawn Safety Zone," it interferes with the defendants' fundamental liberty interests in domestic relations. U.S. CONST., Amend. XIV, *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

3. Religious rights / Freedom of assembly

If the defendants are banished from the "Southlawn Safety Zone," the defendants would be prevented from participating in any Constitutionally-protected activities within the "Southlawn Safety Zone," including attending religious services or attending political meetings within the zone. The "Southlawn Safety Zone" contains many places of worship, which the defendants may have been attending for years. By summarily excluding the defendants from religious communities of their choosing, the defendants' banishment could infringe upon the defendants' religious freedoms. U.S. CONST., AMEND.

I, TEX. CONST., art. 1 § 6, *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15-16 (1947). Similarly, defendants would be excluded from participating in protected civic events with their former neighbors and families. U.S. CONST., Amend. I, TEX. CONST., art. 1 § 27, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 918-20 (1982).

4. Federal rights

The plaintiffs' banishment from the safety zone may impair the plaintiff's federal rights. As the "Southlawn Safety Zone" abuts a federal interstate highway and a federal United States highway, it may hamper the defendant's right to travel. U.S. CONST., art. IV § 2, cl. 2; *Buck v. Kuykendall*, 267 U.S. 307, 314 (1925). Similarly, banishment from the "Southlawn Safety Zone" interferes with the plaintiffs' lawful access to any federal services, including the interstate highways, within that zone. Such State interference is prohibited by the Supremacy Clause. *See* U.S. CONST., art. VI, cl. 2; *Sperry v. State of Fla. ex rel. Florida Bar*, 373 U.S. 379, 385 (1963).

D. Banishment is against Texas's public policy

An injunction may not seek relief that is prohibited by public policy. *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 50 (1936). The "gang" injunction sought in this case would merely shift any problems in the "Southlawn Safety Zone" to a new community.[3] Rather than provide any valid solution to a perceived gang problem, the State's proposed solution merely "robs Peter to pay Paul." Realizing that banishment provides no real protective function, but merely dumps a problem into a new community, other states have rejected banishment as contrary to public policy. *See e.g. In re Babak S.*, 18 Cal. App. 4th 1077, 1084 (1993) (Banishment "not reasonably related to future criminality does not serve the statutory ends of probation and is invalid"). The State's proposed solution is both under-inclusive, in that

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[3] *See e.g. People v. Baum*, 251 Mich. 187, 189 (1930).

> To permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy.

it does not meaningfully discourage the commission of gang-related activities, and over-inclusive, in that it suppresses the exercise of rights unrelated to gang membership, and should be rejected as contrary to public policy. *See Kinney v. Barnes,* 443 S.W.3d at 96-97.

III. Conclusion

Though the State's motivation of protecting its citizens from gang-related crime may be laudable, no Texas court has been permitted to banish citizens from a community. Banishment is contrary to the Texas Constitution and raises several Federal constitutional concerns, particularly when part of a civil regulatory scheme. The State should be prohibited from banishing the defendants from the "Southlawn Safety Zone," and should be restricted to more narrowly-tailored relief.

PRAYER

The Texas Criminal Defense Lawyers Association and the Harris County Criminal Lawyers Association pray that this Court deny the State's unlawful request to banish the defendants from the "Southlawn Safety Zone."

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to TEX. RULES OF CIVIL PROC., Rules 21 and 21a, I certify that a copy of this Memorandum *Amici Curiae* in Support of Defendants has been electronically served on February 26, 2016 though Texas's e-filing portal upon the State of Texas − Harris County District Attorney's Office (Caroline Dozier), upon Harris County Texas – Harris County Attorney's Office (Celena Vinson), and the Attorneys of Record for the defendants (Monique Sparks, Jen Gaut, Gemayel Haynes, U.A. Lewis, Drew Willey, and Brennan Dunn).

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