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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HOLLYWOOD CHARACTERS, an unincorporation association,	)	Case No. CV 10-05848 DDP (CWx)
MATTHIAS BALKE, MELISSA BEITHAN, PAUL HARRELL,	)	<b>ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION</b>
TERRELL "TONY" TOMEY,	)	[Motion filed on October 4, 2010]
Plaintiff,	)	
v.	)	
CITY OF LOS ANGELES, a municipal entity, OFFICER CHACON ; OFIVER GONZALES; OFFICER JORDAN; OFFICER RUTKOWSKI ,	)	
Defendants.	)	

This matter comes before the court on a Motion for Preliminary Injunction filed by the plaintiffs Hollywood Characters, Matthias Balke, Melissa Beithan, Paul Harrell, and Terrell "Tony" Tomey (collectively "Plaintiffs"). Plaintiffs are various individuals who adopt the personas of, and dress as comic book movie characters such as Wolverine, Batman, Superman, Catwoman, Iron Man, the Joker, and Transformer, and perform on Hollywood Boulevard. Plaintiffs allege that the City of Los Angeles and individual officers of the

1 Los Angeles Police Department (collectively "Defendants") have  
2 impermissibly arrested and threatened Plaintiffs with arrest while  
3 Plaintiffs were in costume on Hollywood Boulevard in violation of  
4 Plaintiffs' First Amendment rights. Plaintiffs seek an injunction  
5 to protect their right to perform and solicit tips on Hollywood  
6 Boulevard.

7 Defendants opposes the preliminary injunction on the grounds  
8 that Plaintiffs have failed to establish either "a legitimate fear  
9 of imminent arrest if they appear on Hollywood Boulevard dressed in  
10 costume," or "an unwritten policy on the part of the City of  
11 arresting street performers for soliciting donations on Hollywood  
12 Boulevard or engaging in any other form of protected speech."  
13 (Def.'s Opp. 1:12-18.)

14 After reviewing the papers submitted by the parties and  
15 hearing oral argument, the court GRANTS Plaintiffs's request for a  
16 preliminary injunction.

17 **I. BACKGROUND**

18 Plaintiff Tomey is a performer on Hollywood Boulevard. For  
19 the past three years, Tomey has been performing as the character  
20 Batman. (Tomey Decl. ¶ 2.) On June 2, 2010, Tomey was arrested by  
21 an officer for the Los Angeles Police Department for blocking the  
22 public sidewalk of Hollywood Boulevard in violation of Los Angeles  
23 Municipal Code ("L.A.M.C.") section 41.18. (Id. ¶ 3.) Plaintiff  
24 Junt is also a performer on Hollywood Boulevard. On June 4, 2010,  
25 at approximately 1:30pm, Junt was arrested. Junt was told by the  
26 arresting LAPD officer that he was being arrested for loitering,  
27 but he was ultimately arrested for open solicitation in violation  
28 of L.A.M.C. section 42.00(b). (Junt Decl. ¶ 2.) Plaintiffs Balke,

1 Beithan, and Harrel are performers on Hollywood Boulevard who  
2 perform respectively as Wolverine, Catwoman, and the Dark Knight.  
3 (Balke Decl. ¶ 2; Biethan Decl. ¶ 2; Harrell Decl. ¶ 2.) On June 4,  
4 2010, at approximately 7:30pm, Balke, Beithan, and Harrel were each  
5 arrested for "blocking the sidewalk" of Hollywood Boulevard in  
6 violation of L.A.M.C. section 41.18. (Balke Decl. ¶ 2; Biethan  
7 Decl. ¶ 2; Harrell Decl. ¶ 2.) Christopher Dennis performs the  
8 character Superman on Hollywood Boulevard. (Dennis Decl. ¶ 2.) On  
9 July 8, 2010, Dennis was arrested for loitering on Hollywood  
10 Boulevard. (Id.) None of the Plaintiffs was convicted of criminal  
11 acts and none have pending charges.

12 On August 6, 2010, Plaintiffs filed a Complaint against the  
13 City of Los Angeles and various police officers. (Compl., Dkt. No.  
14 1.) The Complaint alleges that Defendants violated Plaintiffs'  
15 First and Fourth Amendment rights by arresting them for obstructing  
16 the sidewalk, loitering, or soliciting donations on the sidewalk  
17 without probable cause in order to prevent them from performing and  
18 seeking donations. (Compl. ¶ 31.) On August 31, 2010, Plaintiffs  
19 filed an Ex Parte Application for a Temporary Restraining Order  
20 ("TRO"). On September 2, 2010, the court denied without prejudice  
21 the TRO. (Order, Dkt. No. 7.)

22 Now, Plaintiffs once again argue that they are entitled to  
23 injunctive relief. Plaintiffs argue that the LAPD's two recently  
24 implemented enforcement policies – related to L.A.M.C. §§ 41.59  
25 (concerning aggressive solicitation) and 41.18 (concerning  
26 obstructing pedestrian travel/loitering) – are unconstitutionally  
27 directed at them by defendants. (Pls.' Mem. 2:6-7.) The first  
28 policy or practice that Plaintiffs allege is a policy by the

1 Defendants of restricting Plaintiffs to only engage in passive  
2 solicitation for tips. (Id. 2:23-26.) The second policy or  
3 practice that Plaintiffs allege is a policy by the Defendants of  
4 threatening arrest and/or arresting costumed street performers on  
5 Hollywood Boulevard for obstructing pedestrian traffic or loitering  
6 on the sidewalk when there was no obstruction or violation of local  
7 loitering law. (Id. 2:26-28.) Plaintiffs each state that they  
8 fear arrest and have accordingly stopped performing on Hollywood  
9 Boulevard. (Id. 13: 1-5.) Plaintiffs argue that Hollywood  
10 Boulevard is a public forum and that they have a First Amendment  
11 right to perform and solicit tips there. Accordingly, they argue  
12 that an injunction is required. (Id. 13:6-21.)

13 Defendants oppose the injunction. They argue that there is no  
14 evidence of a policy or practice in place by Defendants of  
15 arresting street performers for soliciting donations on Hollywood  
16 Boulevard or engaging in any other form of protected speech. (Opp'n  
17 1:12-19.)

18 **II. LEGAL STANDARD**

19 In any case where a party seeks a preliminary injunction, the  
20 party must meet exacting criteria. Under Winter v. Natural  
21 Resources Defense Council, Inc., 129 S. Ct. 365, 376 (2008),  
22 plaintiffs seeking a preliminary injunction must establish that:  
23 (1) they are likely to succeed on the merits; (2) they are likely  
24 to suffer irreparable harm in the absence of preliminary relief;  
25 (3) the balance of equities tips in their favor; and (4) a  
26 preliminary injunction is in the public interest. See Sierra  
27 Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009).  
28 Furthermore, a plaintiff seeking injunctive relief must establish

1 that she has standing to do so by demonstrating that the threat of  
2 injury she fears "as a result of the challenged official conduct"  
3 is "both 'real and immediate,' not 'conjectural' or  
4 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 101  
5 (1983).

6 **III. DISCUSSION**

7 Plaintiffs claim that they were arrested pursuant to an  
8 unconstitutional City policy of arresting costumed street  
9 performers on Hollywood Boulevard. (See Balke Decl. ¶ 11; Biethan  
10 Decl. ¶ 8; Dennis Decl. ¶¶ 4,6; Harrell Decl. ¶ 6; Hill Decl. ¶ 7;  
11 Junt Decl. ¶ 5; Tomey Decl. ¶¶ 6,7.) Defendants argue that  
12 Plaintiffs lack standing and, in the alternative, deny any such  
13 policy. Before the court considers the merits of Plaintiffs' First  
14 Amendment argument, the court is obligated to consider Defendants'  
15 jurisdictional argument.

16 Defendants argue that Plaintiffs' injury is not immediate but  
17 hypothetical and that, therefore, Plaintiffs lack standing. See  
18 Lopez v. Candaele, --- F.3d ----, 2010 WL 3607033, (9th Cir. 2010)  
19 (explaining that to demonstrate Article III standing at the  
20 preliminary injunction stage, a plaintiff must make a clear showing  
21 of his injury in fact); see also Western Watersheds Project v.  
22 Kraayenbrink, 620 F.3d 1187, 1197 n.6 (2010).

23 The court disagrees. Contrary to Defendants' arguments,  
24 Plaintiffs have made a sufficient showing that they are likely to  
25 suffer immediate harm in the absence of a preliminary injunction.  
26 The court is sensitive that "[p]ast exposure to illegal conduct"  
27 does not "in itself show a present case or controversy regarding  
28 injunctive relief." O'Shea v. Littleton, 414 U.S. 488, 495-496

1 (1974). Here, however, the prior arrests are accompanied by  
2 "continuing, present adverse effects." Id. Plaintiffs each state  
3 that since their respective arrests they have not returned to  
4 Hollywood Boulevard in costume because they fear arrest. (See Junt  
5 Decl. ¶ 5; Balke Decl. ¶ 11; Biethan Decl. ¶ 8; Harrel Decl. ¶ 6;  
6 Tomey Decl. ¶ 6.) Plaintiff Balke also states that he no longer  
7 solicits tips or donations when he performs on Hollywood Boulevard  
8 because he fears arrest. (Balke Decl. ¶ 4.)

9 For their part, Defendants offer no evidence to contradict  
10 Plaintiffs' claims or to suggest that Plaintiffs' fears are  
11 unfounded. There is, for example, no evidence in the record that  
12 street performers have continued to perform on Hollywood Boulevard.  
13 Nor have Defendants offered evidence to rebut Plaintiffs'  
14 allegations that their arrests were targeted at costumed performers  
15 and pretextual.<sup>1</sup>

16 The court is satisfied, based on Plaintiffs declarations and  
17 individual arrests, which occurred during four separate instances,  
18 that Plaintiffs have an on-going and legitimate fear of arrest that  
19 has chilled both their costumed performance on Hollywood Boulevard  
20 and their active solicitation of tips therefore. Plaintiffs have  
21 submitted evidence of no less than six individual arrests of  
22 costumed performers on Hollywood Boulevard on no less than four  
23 separate occasions. The court, therefore, proceeds to consider the  
24 merits of Plaintiffs' Application.

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26 <sup>1</sup> The only evidence of the underlying grounds for the various  
27 arrests is found in the arrest records submitted by Plaintiffs in  
28 their own pleadings. These records, however, are form documents  
that do little more than list the charging ordinance. (See, e.g.  
Balke Decl., Ex. A; Harrel Decl., Ex. D.)

1 As noted above, in considering whether an injunction should  
2 issue, the court considers Plaintiffs' likelihood of success on the  
3 merits, likelihood of irreparable harm, the balance of equities,  
4 and the public interest. Winter, 129 S. Ct. at 376. In weighing  
5 Plaintiffs' likelihood of success on the merits, the court  
6 recognizes that it is well settled that "solicitation is a form of  
7 expression entitled to the same constitutional protections as  
8 traditional speech." ACLU v. City of Las Vegas, 466 F.3d 784, 792  
9 (9th Cir. 2006); see also Perry v. Los Angeles Police Dep't, 121  
10 F.3d 1365, 1368 (9th Cir. 1997). The court is also mindful of the  
11 Ninth Circuit's recent opinion in Berger v. City of Seattle, 569  
12 F.3d 1029 (9th Cir. 2009) (en banc). In Berger, the Ninth Circuit  
13 reaffirmed the longstanding principle that "protections afforded by  
14 the First Amendment are nowhere stronger than in streets and parks,  
15 both categorized for First Amendment purposes as traditional public  
16 fora." Id. at 1035-36. Relevant to the present case, the court in  
17 Berger also recognized performance art as a form of expressive  
18 activity protected by the First Amendment, id. at 1037 n.4.

19 Here, Plaintiffs do not allege that either L.A.M.C. section  
20 41.18<sup>2</sup> or 41.59<sup>3</sup> impose impermissible time, place, or manner

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22 <sup>2</sup>Section 41.18(a) states that: No person shall stand in or  
23 upon any street, sidewalk or other public way open for pedestrian  
24 travel or otherwise occupy any portion thereof in such a manner as  
25 to annoy or molest any pedestrian thereon or so as to obstruct or  
26 unreasonably interfere with the free passage of pedestrians.  
27 Section 41.18(b) states that: No person shall loiter in any  
28 tunnel, pedestrian subway, or on any bridge overpass, or at or near  
the entrance thereto or exit therefrom, or at or near any abutment  
or retaining wall adjacent to such entrance or exit, or any  
retaining wall or abutment adjacent to any freeway, street or  
highway open and used for vehicular traffic, or adjacent to that  
portion thereof used for vehicular traffic, or on any public  
property in the proximity of such bridge, overpass, or retaining  
(continued...)

1 restrictions on their speech, but rather, that Defendants  
2 selectively and impermissibly apply the L.A.M.C. to target  
3 Plaintiffs and to prevent them from performing and soliciting tips  
4 on Hollywood Boulevard.<sup>4</sup>

5 The court recognizes that some restrictions on acts of  
6 solicitation passed to support legitimate government concerns  
7 unrelated to suppressing any particular message are content  
8 neutral. See, e.g., ACLU, 466 F.3d at 794 & n. 10. Here, however,

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9  
10 <sup>2</sup>(...continued)  
11 wall or abutment.

12 <sup>3</sup>Section 41.59(b) states that: Aggressive Solicitation  
13 prohibited. (1) No person shall solicit, ask or beg in an  
14 aggressive manner in any public place. (2) "Aggressive manner" shall  
15 mean any of the following: (A) Approaching or speaking to a person,  
16 or following a person before, during or after soliciting, asking or  
17 begging, if that conduct is intended or is likely to cause a  
18 reasonable person to: (i) fear bodily harm to oneself or to another,  
19 damage to or loss of property, or (ii) otherwise be intimidated into  
20 giving money or other thing of value; (B) Intentionally touching or  
21 causing physical contact with another person or an occupied vehicle  
22 without that person's consent in the course of soliciting, asking  
23 or begging; (C) Intentionally blocking or interfering with the safe  
24 or free passage of a pedestrian or vehicle by any means, including  
25 unreasonably causing a pedestrian or vehicle operator to take  
26 evasive action to avoid physical contact; (D) Using violent or  
27 threatening gestures toward a person solicited either before,  
28 during, or after soliciting, asking or begging; (E) Persisting in  
closely following or approaching a person, after the person  
solicited has been solicited and informed the solicitor by words or  
conduct that such person does not want to be solicited or does not  
want to give money or any other thing of value to the solicitor; or  
(F) Using profane, offensive or abusive language which is  
inherently likely to provoke an immediate violent reaction, either  
before, during, or after solicitation.

24 <sup>4</sup> Again, the court notes that Defendants have provided the  
25 court with no evidence to rebut Plaintiffs sworn statements that  
26 they were not obstructing the flow of pedestrians at the time of  
27 arrest or violating the plain language of the L.A.M.C. There are,  
28 for example, no declarations from arresting officers offering an  
alternate account of the various arrests, nor are there any  
assurances from the Defendants that costumed characters performing  
on Hollywood Boulevard will not be arrested so long as they comply  
with the relevant ordinances.



1 Defendants offer no evidence in support or explanation of the  
2 challenged practice of arresting or threatening to arrest costumed  
3 performers on Hollywood Boulevard. The court is further sensitive  
4 that although costumed performance may not be a traditional form of  
5 speech, it is without doubt a protected one. It is well  
6 established that, "performance art [is a] form[] of expressive  
7 activity protected by the First Amendment." Berger, 569 F.3d at  
8 1037 n.4; see also Schad v. Borough of Mount Ephraim, 452 U.S. 61,  
9 65-66 (1981) ("Entertainment, as well as political and ideological  
10 speech, is protected; motion pictures, programs broadcast by radio  
11 and television, and live entertainment, such as musical and  
12 dramatic works fall within the First Amendment guarantee.") In sum,  
13 the court is persuaded that Defendants have not shown a compelling  
14 government interest in keeping costumed performers off of Hollywood  
15 Boulevard and Plaintiffs have established a likelihood of success  
16 on the merits.

17 In considering the balance of hardships, Plaintiffs' allege  
18 that Defendants' policy of arresting costumed performers has had a  
19 chilling effect on their presence and solicitation of tips on  
20 Hollywood Boulevard. Plaintiffs state that because they fear  
21 arrest, they have stopped performing on Hollywood Boulevard.  
22 (Balke Decl. ¶ 11; Biethan Decl. ¶ 8; Dennis ¶¶ 4, 6; Harrel ¶ 6;  
23 Hill ¶ 7; Junt ¶ 5; Tomey ¶¶ 6, 7.) Defendants do not allege any  
24 hardship. Because Defendants would remain free to arrest Hollywood  
25 Boulevard performers who were actually blocking the sidewalk and  
26 not in compliance with the L.A.M.C., the court sees no hardship to  
27 Defendants if the injunction issues. The court therefore concludes  
28 that Plaintiffs have demonstrated that they would experience

1 irreparable harm if the preliminary injunction is denied, and that  
2 this harm is much more serious than the hardship Defendants have  
3 shown they would endure if the injunction were granted. See Ebel  
4 v. City of Corona, 698 F.2d 390, 393 (9th Cir. 1983).

5 Finally, the court is persuaded that it would be in the public  
6 interest to issue an injunction. See Westlands Water Dist. v.  
7 Natural Resources Defense Council, 43 F.3d 457, 459 (9th Cir. 1994)  
8 ("If the public interest is involved, the district court must also  
9 determine whether the public interest favors the [movant].")  
10 "Courts considering requests for preliminary injunctions have  
11 consistently recognized the significant public interest in  
12 upholding First Amendment principles." Sammartano v. First  
13 Judicial District Ct., 303 F.3d 959, 973 (9th Cir. 2002); see also  
14 G & V Lounge, Inc. v. Mich. Liquor Control Com'n, 23 F.3d 1071,  
15 1079 (6th Cir. 1994) (noting that "it is always in the public  
16 interest to prevent the violation of a party's constitutional  
17 rights").

18 For the foregoing reasons the court concludes that Plaintiffs'  
19 requested preliminary injunction must issue.

20 **IV. CONCLUSION**

21 Accordingly, it is ordered that:

22 Pending a hearing on a permanent injunction or trial in this  
23 action, Defendants are hereby enjoined from doing any of the  
24 following:

- 25 1. Arresting or citing, or threatening to arrest or cite  
26 Plaintiffs for obstructing the sidewalk absent evidence  
27 that each, individually, is blocking pedestrian traffic  
28 on the sidewalk in violation of L.A.M.C. § 41.18(a);

- 1           2.    Arresting or citing, or threatening to arrest or cite
- 2                    Plaintiffs for "loitering" on the sidewalk of Hollywood
- 3                    Boulevard absent a violation of L.A.M.C. § 41.18(b);
- 4           3.    Arresting or citing, or threatening to arrest or cite
- 5                    Plaintiffs for soliciting donations or contributions in
- 6                    exchange for their performances so long as Plaintiffs
- 7                    comply with L.A.M.C. § 41.59.

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9 IT IS SO ORDERED.

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Dated: November 17, 2010

  
DEAN D. PREGERSON  
United States District Judge