

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



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,)	ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION
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.¹

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.

25
26 ¹ 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 41.18² or 41.59³ impose impermissible time, place, or manner

21
22 ²Section 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.⁴

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,

9
10 _____
11 ²(...continued)
12 wall or abutment.

13 ³Section 41.59(b) states that: Aggressive Solicitation
14 prohibited. (1) No person shall solicit, ask or beg in an
15 aggressive manner in any public place. (2) "Aggressive manner" shall
16 mean any of the following: (A) Approaching or speaking to a person,
17 or following a person before, during or after soliciting, asking or
18 begging, if that conduct is intended or is likely to cause a
19 reasonable person to: (i) fear bodily harm to oneself or to another,
20 damage to or loss of property, or (ii) otherwise be intimidated into
21 giving money or other thing of value; (B) Intentionally touching or
22 causing physical contact with another person or an occupied vehicle
23 without that person's consent in the course of soliciting, asking
24 or begging; (C) Intentionally blocking or interfering with the safe
25 or free passage of a pedestrian or vehicle by any means, including
26 unreasonably causing a pedestrian or vehicle operator to take
27 evasive action to avoid physical contact; (D) Using violent or
28 threatening gestures toward a person solicited either before,
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 ⁴ 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
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

IT IS SO ORDERED.

Dated: November 17, 2010


DEAN D. PREGERSON
United States District Judge