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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

HOLLYWOOD CHARACTERS,	)	CASE NO. CV 10-5848 DDP (CWx)
et al.,	)	
	)	MEMORANDUM OF POINTS AND
Plaintiffs,	)	AUTHORITIES IN SUPPORT OF
	)	PLAINTIFFS' APPLICATION FOR A
vs.	)	PRELIMINARY INJUNCTION
	)	
CITY OF LOS ANGELES, et al.,	)	DATE: November 1, 2010
	)	TIME: 10:00 a.m.
Defendants.	)	Ctrm: 3 Hon. Dean D. Pregerson
	)	

Action Filed: August 6, 2010

Trial Date: None

This motion is filed in compliance with the meet and confer process of the
Local Rules.

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7 LAMC §41.59
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I. INTRODUCTION

Plaintiffs previously filed with the Court for a Temporary Restraining Order, which was denied without prejudice to filing for a preliminary injunction. Since the court denied the request for a temporary restraining order, the City has continued to enforce criminal laws against individuals performing in costume on Hollywood Boulevard, with ongoing threats of arrest. Moreover, because of the denial of plaintiffs' earlier motion, the message the police are boldly delivering is that the First Amendment does not protect the activity of plaintiffs on Hollywood Boulevard. In fact, as recently as this month, plaintiffs observed the police threatening those few individuals who have attempted to return to the Boulevard. The resulting fear of arrest for plaintiffs continues to be both real and immediate. They seek to do nothing more than engage in the precise type of First Amendment activity repeatedly affirmed by the Ninth Circuit in recent years. While tourists lie down on the sidewalk to take their photographs with embedded stars, plaintiffs are threatened with arrest if they even walk on the sidewalk in costume.

Plaintiffs are an unincorporated association of individuals who adopt the persona of, and dress as comic book movie characters, including among others, Wolverine, Batman, Superman, Catwoman, Iron Man, the Joker, and Transformer. They perform on Hollywood Boulevard. They challenge two recently implemented enforcement policies directed at them by defendants. The first is a restriction to "passive" solicitation for tips from individuals who stop to take their photograph with plaintiffs. The second is the threat of arrest and their arrest based on claims that they are in violation of Los Angeles Municipal Code ("LAMC") §41.18(a) for allegedly "obstructing" pedestrian traffic and "loitering" on the sidewalk when tourists stop to take plaintiffs' pictures.

II. STATEMENT OF FACTS

1 Over the course of the past several months, the Los Angeles Police Department
2 (“LAPD”) began enforcing a deliberate policy to arrest plaintiffs for violating Los
3 Angeles Municipal Code §41.18(a) for “obstructing” or “loitering” on a sidewalk. The
4 bulk of the arrests occurred in late May and June along the Hollywood Walk of Fame on
5 Hollywood Boulevard, a must-see location for tourists visiting Los Angeles. Plaintiffs
6 perform as various movie characters on the Walk of Fame on the sidewalk in front of the
7 Hollywood and Highland shopping center and Grauman’s Chinese Theater. They stand
8 on the sidewalk and entertain by impersonating famous actors and characters.

10 At approximately 7:30 p.m. on June 4, 2010, Plaintiffs Balke, Beithan and Harrell
11 were standing on the curb, facing away from the street. Dec. of Balke ¶3 Beithan ¶3,
12 Harrell ¶2. There was light pedestrian traffic, with no pedestrians at all some of the time.
13 Plaintiffs observed that all pedestrians could freely walk and move about on the sidewalk.
14 At no point were they obstructing the sidewalk in any way. Defendants Chacon,
15 Gonzalez, and Machado ordered plaintiffs to leave and, when they did not, arrested them.
16 *Id.* and Exhibits A, B and D; Supplemental Dec. of Balke and Exhibit I. Just a few days
17 earlier, defendants Jordon and Rutkowski made a custodial arrest of Plaintiff Tomey,
18 holding him for a day and then releasing him without charges. Dec. of Tomey at ¶¶3-5;
19 Ex. F; Supplemental Tomey Dec and Ex. J. Plaintiff Dennis was on the sidewalk in
20 costume as Superman, passing out flyers for two stores on Hollywood Boulevard, when
21 he was arrested for loitering. Dec. of Dennis at ¶2, Exhibit C; Supplemental Dec. of
22 Dennis and Exhibits G, M. Plaintiff Junt was arrested on June 4, 2010 and initial told
23 he was arrested for loitering, then told he was arrested for soliciting donations. Dec. of
24 Junt at ¶3 and Exhibit E; Supplemental Dec. of Junt and Exhibit H. None of the
25 defendants was convicted of criminal acts and none have pending charges. Balke ¶9,
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1 Beithan ¶6, Dennis ¶3, Harrell ¶4, Junt ¶4, Tomey ¶5.

2 On June 3, 2010, after the initial arrests occurred, James Hinton Hill III, one of the
3 members of Hollywood Characters, came to Hollywood Boulevard armed with a laptop
4 with a video camera. He was not in costume. Hill videotaped for nearly 15 minutes
5 before he was approached by the police, asked if he had a permit to film in the area, and
6 told he could not do so without a permit, even though all around him were tourists
7 videotaping the same scenes. Hill Declaration at ¶3. As is shown on the video, the
8 officer volunteered that he knew who Hill was and that he had seen him dressed not as
9 a civilian, and that Hill had to move on. *Id.* and Exhibit K. Hill left the north side of
10 Hollywood Boulevard and started filming from across the street. *Id.* at ¶4. He was then
11 cited by the officer for “blocking” and ordered to leave the area and that, if he returned,
12 he would be cited again and possibly jailed. *Id.* and Exhibit L.

13 On Saturday, October 2, 2010, the police were again threatening to arrest
14 individuals who appeared on Hollywood Boulevard in costume. Plaintiff Balke was
15 speaking with a friend who was dressed in costume when Officer Alfraimo and a second
16 officer approached and threatened first Balke’s friend and then a second character with
17 arrest. Supplemental Declaration of Balke at ¶¶ 2-3.

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21 **III. PLAINTIFFS’ ARRESTS AND THE THREATENED ARRESTS OF THE**
22 **HOLLYWOOD CHARACTERS VIOLATE THE FIRST AMENDMENT**

23 **A. Plaintiffs Were Engaged in Fully Protected First Amendment Activity**

24 As the Ninth Circuit recently held, street performances are protected expressive
25 activity under the First Amendment. *Berger v. City of Seattle*, 569 F.3d 1029, 1037 n.4
26 (9th Cir. 2009) (“Music and performance art are forms of expressive activity protected
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1 by the First Amendment.”) (citations omitted). Like the balloon artist in *Berger*, the
2 Hollywood Characters are performers who engage in constitutionally protected activity.

3 First Amendment protections are not diminished if donations are solicited. *ACLU*
4 *v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006). “It is beyond dispute that
5 solicitation is a form of expression entitled to the same constitutional protections as
6 traditional speech.” *Id.* (citations omitted). As *Perry v. Los Angeles Police Dep't*, 121
7 F.3d 1365, 1368 (9th Cir. 1997), held about performers on Venice Boardwalk, speech
8 “do[es] not lose [its] constitutional protection simply because [it is] sold rather than given
9 away.” 121 F.3d 1365, 1368 (citations omitted) (bracketed edits supplied).
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11

12 **B. Unwritten Time, Place and Manner Restrictions on First Amendment**
13 **Activities in Public Fora Impermissibly Create Unbridled Discretion**

14 Defendants have no written regulations governing performers on Hollywood
15 Boulevard. The government’s ability to restrict the First Amendment in traditional public
16 fora such as streets, sidewalks, and parks is very limited. *United States v. Grace*, 461
17 U.S. 171, 177 (1983). In such areas, speech may only be constrained by the enactment
18 of reasonable time, place or manner regulations. *Id.* To be valid, such rules must be
19 “content-neutral, [] narrowly tailored to serve a significant government interest, and leave
20 open ample alternative channels of communication.” *Id.*
21
22

23 A regulation is not reasonable if it grants unbridled discretion to an enforcement
24 agency. *See e.g. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992);
25 *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and*
26 *the Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 793 (9th Cir. 2008);
27 *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1065-1066 (9th Cir. 1991).
28

1 Unbridled discretion impermissibly “grants officials the power to discriminate and raises
2 the spectre of selective enforcement on the basis of the content of speech.” *Id.* at 1066
3 (citation omitted). The First Amendment prohibits such laws. *Forsyth County*, 505 U.S.
4 at 133.
5

6 To pass constitutional muster, a restraint on expression must "contain adequate
7 standards to guide the official's decision and render it subject to effective judicial
8 review." *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002). There must be
9 “narrowly drawn, reasonable and definite standards” to provide guidance. *Forsyth*
10 *County*, 505 U.S. at 133 (citation omitted). Unwritten restrictions necessarily lack
11 standards and leave room for differential application, inevitably vesting unbridled
12 discretion in officials. *See Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1198-
13 1199 (11th Cir. 1991) (unwritten news rack regulations gives unfettered discretion).
14
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16 Under threat of arrest, Plaintiff Junt was told he may not only accept unsolicited
17 donations for performing. Junt ¶3. There is no authority for this policy. LAMC § 41.59
18 prohibits only aggressive solicitation, but this is different from active solicitation.
19 “Aggressive solicitation” is the conduct or manner in which people solicit while active
20 solicitation refers to what people can say.¹ Without written rules, the police have
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25 ¹ Defendants will likely argue that restrictions their actions are needed to address complaints
26 about the conduct of some street performers. As *Berger* instructed, broad prophylactic measures
27 may not be used when “most street performers are not problematic.” 569 F.3d at 1045. The
28 restrictions and enforcement efforts here would “burden[] all performers to root out the
occasional bad apple” and, “[b]y doing so, ... fails to ‘target [] and eliminate [] no more than the
exact source of the ‘evil’ it seeks to remedy.’” *Id.* at 1045-1046 (citation omitted).

1 unlimited authority to decide when a street performer has violated their rules. Such an
2 informal, standardless scheme is an unreasonable time, place, and manner restriction.

3 The reach of defendants' unconstitutional actions in this instance are illustrated,
4 as well, by the citation issued to Hill, who was simply videotaping other people engaging
5 in the same activities that led to the arrest of other Hollywood Characters just days earlier.
6 Even though Hill was not in costume, he was singled out by the police while tourists not
7 only videotaped the activities on Hollywood Boulevard, but took turns lying down on the
8 sidewalk to take their photographs with various "stars." So, not only may plaintiffs not
9 be present in character, they may not be present at all on Hollywood Boulevard, even
10 when they only engage in the very same activity that tourists engage in every day. And
11 only the characters appear to be singled out for threats, citation and arrest, while groups
12 such as the break dancers tie up the entire sidewalk with impunity at the very same time
13 that two solitary characters are ordered to leave. Supplemental Dec. of Balke at ¶4.

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17 **C. The Restriction on Active Solicitation Violates the First Amendment**

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19 **1. The restriction is an unreasonable as a content-based time,**
20 **place, and manner regulation.**

21 The restriction on active solicitation limits speech based on its content. *Grace*, 461
22 U.S. at 177. A regulation is content-neutral if it is "justified without reference to the
23 content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468
24 U.S. 288, 292 (1984). "A regulation is content-based if either the underlying purpose of
25 the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles
26 out particular content for differential treatment." *Berger*, 569 F.3d at 1051 (citations
27 omitted). In *Berger*, the court held that the ordinance banning active solicitation was a
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1 content-based restriction because “[i]t specifically restricts street performers from
2 communicating a particular set of messages -- requests for donations, such as ‘I’d like you
3 to give me some money if you enjoyed my performance.’” *Id.*

4
5 The active solicitation restriction on Hollywood Boulevard is indistinguishable
6 from the ban struck down in *Berger*. Here, as in *Berger*, defendants single out for
7 differential treatment speech that expressly requests tips and restricts performers from
8 communicating certain messages. Because it is not content neutral, this unwritten rule
9 fails to meet the first requirement of a reasonable time, place, and manner restriction.

10
11 **2. The active solicitation ban fails strict scrutiny.**

12 Just as the content-based ban in *Berger* limiting street performers to “passive”
13 solicitation failed to meet strict scrutiny, defendants’ arbitrary ban also fails in this
14 instance. “As a content-based regulation, the ban on active solicitation is valid only if it
15 serves a compelling government interest in the least restrictive manner possible.” *Berger*,
16 569 F.3d at 1052. “Although the government ‘may have a substantial interest in
17 preventing solicitors from harassing pedestrians on public streets and sidewalks[,] ...
18 these substantial interests ... may not be compelling’” *Id.* (quoting *S.O.C., Inc. v. County*
19 *of Clark*, 152 F.3d 1136, 1146 (9th Cir. 1998)). *See also, Perry Educ. Ass’n v. Perry*
20 *Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (content-based restrictions are valid only
21 if they can show “regulation is necessary to serve a compelling state interest and that it
22 is narrowly drawn to achieve that end”) (citation omitted).

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25 No compelling interest exists to meet strict scrutiny. The only justification that
26 could possibly exist for the active solicitation ban is to prevent the street performers from
27 harassing pedestrians. Preventing harassment of pedestrians is a significant government
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1 interest but not a compelling one, so the restriction on active solicitation is
2 unconstitutional. *Berger*, 569 F.3d at 1052.

3 **D. The Arrest of Plaintiffs for “Obstruction” Pursuant to LAMC**
4 **§41.18(a) Violated Their First and Fourth Amendment Rights**

5 Plaintiffs were wrongfully arrested for “obstructing the sidewalk” under Los
6 Angeles Municipal Code §41.18(a) when they refused orders to leave the area. These
7 arrests were unconstitutional for two reasons. First, plaintiffs did not bar the free flow
8 of pedestrian traffic while on this very wide sidewalk. Second, if anyone blocked the
9 sidewalks, it was the tourists who stopped to look not only at plaintiffs, but at the “stars”
10 in Hollywood Boulevard. Yet, they were not threatened with or arrested.

11
12 LAMC §41.18(a), captioned “Sidewalks, Pedestrian Subways – Loitering,” was
13 last amended in 1968. It states:

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15 “No person shall stand in or upon any street, sidewalk or other
16 public way open for pedestrian travel or otherwise occupy any
17 portion thereof in such a manner as to annoy or molest any
18 pedestrian thereon or so as to obstruct or unreasonably
19 interfere with the free passage of pedestrians.”
20

21 The decisions In *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) and
22 *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), compel the conclusion that
23 defendants’ enforcement of §41.18(a) is unconstitutional. *Shuttlesworth* invalidated a
24 conviction under a similar sidewalk obstruction statute and held that a person’s “mere
25 refusal to move on after a police officer's requesting that a person standing or loitering
26 should do so is not enough to support the offense ... [T]here must also be a showing of
27 the accused’s blocking free passage.” *Id.* at 91. *Shuttlesworth* had been standing with
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1 a group of approximately a dozen people on the sidewalk. *Id.* at 89. They were ordered
2 to disperse three times for allegedly blocking pedestrians, *id.* at 89, even though they
3 occupied only half of the sidewalk. *Id.* at 100. Only Shuttlesworth refused to leave and
4 was arrested. *Id.* at 89. Even if the larger group had obstructed passage, a single
5 individual (Shuttlesworth) could not physically do so. *Id.* at 101 (Fortas, J. concurring).
6 Here, as In *Shuttlesworth*, pedestrians could easily pass the group on the sidewalk without
7 having to step into the street, *id.* at 97, particularly because plaintiffs were small in
8 number and standing at the curb. Balke Dec. at ¶3.

10 *Foti* invalidated a portion of municipal ordinance enacted to force anti-abortion
11 protestors off of a public sidewalk in front of a women's health care provider. The
12 ordinance singled out for regulation picketers with signs, while pedestrians, other
13 protestors and leafletters were unrestricted. *Id.* at 640-43. In addition to limits on the
14 size of signs, the law required picketers carrying signs to keep moving on the sidewalk
15 so as not to impede the "free flow of pedestrian traffic on public sidewalks." *Id.* at 642.
16 *Foti* recognized a valid government interest in regulating use of the sidewalks, but held
17 that this provision was not narrowly tailored since pedestrians could easily "negotiate
18 around a stationary picketer" as "[a] peaceful picketer carrying a sign creates no more of
19 an obstacle than a picketer carrying a cross or a pedestrian waiting for a bus." *Id.*

22 The same is true here. Only those in costume – or those like Hill who are
23 recognized even when out of costume – are alleged to be "obstructing" on Hollywood
24 Boulevard while tourists and other pedestrians walking, standing, and milling about on
25 the sidewalk are not threatened with arrest. Tourists stand still, alone and in groups, all
26 along the sidewalk to take photos of themselves on the Walk of Fame, the foot and hand
27 prints in front of Grauman's Chinese Theater, and the Hollywood Characters. Just a few
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1 feet away from plaintiffs, they lie down on the sidewalk to take their photos with
2 embedded “stars.” Exhibit K. Here, as in *Foti*, there is no lawful basis to apply LAMC
3 §41.18(a) to the Hollywood Characters for allegedly obstructing the sidewalk when
4 tourists, shoppers and those leaving the Metro station are not subject to the regulation.
5

6 **E. The “Loitering” Arrests Also Violate the First Amendment**

7 Plaintiff Dennis was charged with a violation of LAMC §41.18(a) based on an
8 allegation of “loitering.” Plaintiffs have an absolute right to stand in public fora,
9 including the sidewalk on Hollywood Boulevard, dressed in costumes without risking
10 arrest for “loitering.” A conviction for “loitering” requires proof that the individual was
11 present for an unlawful purpose. *See e.g., Papachristou v. City of Jacksonville*, 405 U.S.
12 156 (1972); *Coates v. Cincinnati*, 402 U.S. 661 (1971); *City of Chicago v. Morales*, 527
13 U.S. 41 (1999). As set forth above, there is no unlawful purpose here. In fact, Dennis
14 was engaged in the very conduct validated by the Ninth Circuit in *S.O.C. v. County of*
15 *Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (off-premise commercial leafletting on Vegas
16 strip was protected).
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19 **IV. A PRELIMINARY INJUNCTION SHOULD ISSUE**

20 Plaintiffs seeking “a preliminary injunction must establish that [they are] likely to
21 succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of
22 preliminary relief, that the balance of equities tips in [plaintiffs’] favor, and that an
23 injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*,
24 129 S.Ct. 365, 374 (2008). The standard for preliminary relief is the same whether the
25 moving party seeks to maintain the status quo or stop a continuing deprivation of rights.
26
27 *Textile Unlimited, Inc. v. ABMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001). While
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1 plaintiffs have the “general burden of establishing the elements necessary to obtain
2 injunctive relief, the City has the burden of justifying the restriction on speech.” *Klein*
3 *v.. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009).

4 As set forth above, plaintiffs have the law of the Circuit on their side, which
5 establishes a strong probability of prevailing on the merits. They have also established
6 a strong need for injunctive relief based on the evidence that here the “police misconduct
7 flow[s] from a policy [or] plan.” *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F. 3d
8 1486, 1500 (9th Cir. 1996). The plaintiffs have all been arrested or cited once, as has
9 Dennis, Junt and Hill. The threat continues, as described by the Supplemental
10 Declaration of Balke at ¶2, describing that he changed his appearance dramatically to be
11 able to walk through his neighborhood without being recognized by the police. Based on
12 what he observed just days ago, he continues to be afraid that he will be arrested if he
13 returns to Hollywood Boulevard in character. *Id.* at ¶4. “[T]he wrong that the Fourth
14 Amendment is designed to prevent is completed when a[n individual] is cited without
15 probable cause.” *Id.*, at 1501. Neither defense to criminal prosecution nor monetary
16 recompense remedies this injury.

17 While defendants argue that there is no “policy,” that is irrelevant to the evidence
18 in this instance that the officers are acting from a deliberate instruction to banish the
19 Hollywood Characters from the Boulevard. In fact, defendants were so emboldened by
20 the Court’s prior denial of the temporary restraining order, that they now announce there
21 is no First Amendment right to engage in their expressive activities on the Boulevard.

22 Plaintiffs have also shown that they will suffer irreparable harm unless Defendants
23 are enjoined from unlawfully applying the LAMC prohibitions on blocking, loitering, and
24 an unwritten “solicitation” ban and arresting them without probable cause. They want
25

1 to continue to perform on Hollywood Boulevard, a right protected by the First
2 Amendment in public fora, but they are afraid to do so for fear of arrest again. They
3 were threatened and intimidated with arrest if they return to the area to perform. Balke
4 ¶11; Biethan ¶8; Dennis ¶¶4,6; Harrell ¶6, Hill ¶7, Junt ¶5; Tomey ¶¶6,7.
5

6 A preliminary injunction should issue to protect Plaintiffs' lawful rights to be in
7 this archetypal forum and communicate with the public unencumbered by unfounded and
8 unreasonable arrests on allegations of "obstructing the sidewalk." Each individual
9 plaintiff has been arrested and or cited under the challenged plan. *See Foti*, 146 F.3d at
10 643. It is black letter law that "the loss of First Amendment freedoms, for even minimal
11 periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S.
12 347, 373 (1976), *Foti*, 146 F.3d at 643.
13

14 The balance of hardships tips sharply to Plaintiffs. While they will suffer
15 irreparable harm to their First and Fourth Amendment rights if an injunction is not
16 granted, the City will not suffer at all if it is ordered to follow the law. Moreover, the
17 public interest also favors an injunction, as "it is always in the public interest to prevent
18 the violation of a party's constitutional rights." *G&V Lounge v. Michigan Liquor Control*
19 *Commission*, 23 F.3d 1071, 1079 (6th Cir. 1994). Accord, *Iowa Right to Life Committee*
20 *v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999).
21

22 Finally, the issuance of an injunction is in the public interest. "The public has a
23 fundamental interest in the protection of all people's constitutional rights." *See*
24 *Sammartano v. First Judicial District Ct.*, 303 F.3d 959, 973 (9th Cir. 2002).
25

26 **V. The Requirement of a Bond Should Be Waived**

27 When there is no likelihood of harm to the party enjoined, bond may be dispensed
28 with entirely. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant the temporary restraining order enjoining defendants from interfering with Plaintiffs' constitutionally protected rights under the First and Fourth Amendments.

Dated: October 4, 2010

Respectfully submitted,

LAW OFFICE OF CAROL A. SOBEL

LAW OFFICE OF REBECCA F. THORNTON

/s/

BY: CAROL A. SOBEL

Attorneys for Plaintiffs

CERTIFICATION OF SERVICE

The undersigned hereby certifies that the City of Attorney has been served this date by the Court's Electronic Court Filing system:

JOHN CARVALHO
200 N. Main Street
City Hall East, 9th fl.
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 4th day of October, 2010 at Santa Monica, California.

/s/
CAROL A. SOBEL