

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE,
JOSH GOSCIAK, KENNETH T. JACKSON, MADELINE
NELSON, ELIZABETH SHURA, LUKE SON,

Plaintiffs

07 Civ. 2448 (LAK)

-against-

THE CITY OF NEW YORK, RAYMOND KELLY, Police
Commissioner of the New York City Police Department;
JAMES TULLER, Commanding Officer, Patrol Borough
Manhattan South; Lt. John Doe, and Captain Jane Doe,
New York City Police Department,

Defendants.

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**DEFENDANTS' MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

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MARCH 28, 2007

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FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE,
JOSH GOSCIAK, KENNETH T. JACKSON, MADELINE
NELSON, ELIZABETH SHURA, LUKE SON,

Plaintiffs

04 CV 6602 (WHP)
(ECF Case)

-against-

THE CITY OF NEW YORK, RAYMOND KELLY, Police
Commissioner of the New York City Police Department;
JAMES TULLER, Commanding Officer, Patrol Borough
Manhattan South; Lt. John Doe, and Captain Jane Doe,
New York City Police Department,

Defendants.

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**DEFENDANTS' MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

Defendants submit this memorandum of law in opposition to plaintiffs' eleventh-hour attempt to enjoin the City from enforcing the portion of the City's parade permit scheme which makes it unlawful for groups of 50 or more persons to bicycle together without first obtaining a parade permit from the Police Department against March 30, 2007 Critical Mass bicycle ride (a bicycle ride which routinely takes place on the last Friday of each month), and all other bicycle processions of 50 or more persons.

Pursuant to New York City Administrative Code ("Admin. Code") §10-110, "a procession, parade or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner" ("the parade permit

requirement”). The term “parade” is defined in regulations adopted by the Police Department to implement this statutory requirement and set forth in Chapter 19, Title 38 of the Rules of the City of New York (“RCNY”).

By amendments which were published in the City Record on January 26, 2007 and became effective on February 25, 2007, the Police Department amended the definition of “parade” so as to clarify the circumstances under which groups using City streets for purposes of assembly are required to obtain a permit. Under the amended definition, a parade is defined as “any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway.” 38 RCNY § 19-02(a).

In this action, plaintiffs challenge the constitutionality of the amended rules as applied to bicycle groups. Contrary to plaintiffs’ allegations, the parade permit statute is not impermissibly vague and the parade permit requirement does not restrict plaintiffs’ First Amendment rights to speech, expressive conduct, expressive association and travel. As a result, because plaintiffs’ last minute attempt to enjoin the City from enforcing the parade permit requirement against this Friday’s Critical Mass bicycle ride is barred by the doctrine of laches, and as plaintiffs cannot show irreparable injury and are otherwise unlikely to succeed on the merits of their claims, plaintiffs’ application for a preliminary injunction should be denied in its entirety.

ARGUMENT

**PLAINTIFFS' APPLICATION FOR A
PRELIMINARY INJUNCTION SHOULD BE
DENIED.**

A. Standard of Review.

In exercising its sound discretion to determine a motion for a preliminary injunction, a court of equity may consider a number of factors including whether the moving party is guilty of unreasonable delay and whether it comes to court with unclean hands. Turning first to delay, it is well established that the defense of laches bars a plaintiff's claim for equitable relief if the "plaintiff in asserting his right is guilty of unreasonable delay that prejudice[s] the defendants." Stone v. Williams, 873 F.2d 620, 623 (2d Cir.), cert. denied, 493 U.S. 959, vacated on other grounds, 891 F.2d 401 (2d Cir. 1989); King v. Innovation Books, 976 F.2d 824, 833 (2d Cir. 1992); Southside Fair Housing Comm. v. City of New York, 928 F.2d 1336, 1354 (2d Cir. 1991).

As set forth in the accompanying Declaration of Robin Binder, dated March 28, 2007 ("Binder Dec."), the Police Department first began the process of amending the definition of a "parade" to clarify its application to groups of bicyclists in July 2006. In the following months, the Police Department received voluminous public comments, held a November 27, 2006 public hearing at which numerous individuals spoke regarding the proposed rule amendments including Dan Lieberman, an Executive Board Member of plaintiff Five Borough Bicycle Club, and made several revisions to its initial proposal. Binder Dec., ¶¶ 15-17; Exhibit G.

By Notice of Adoption published in the City Record on January 26, 2007, the Police Department adopted its final rule amendments. On January 27, 2007, the New York Times ran an article entitled "New Permits For Mass Bike Riders," which stated, among other

things, that “the New York Police Department has adopted rules that require parade permits for bicyclists and others who take to streets in groups of 50 or more for processions, races and protests.” See, Exhibit H. Thus, there is no question that at least some, if not all, of the plaintiffs have been aware of the impending modifications to the definition of a parade for well over six months, if not longer. Moreover, plaintiffs have known the precise terms of the amended rules for two months and yet have waited until three days before the next 50 or more person bicycle ride to seek relief from this Court. That plaintiffs waited until the eleventh hour to make this motion is ground for the denial of preliminary injunctive relief, as it serves effectively to preclude defendants both from presenting a thorough defense on the merits, and from perfecting a full appeal in the event of an adverse determination.

In National Council of Arab Americans, et. al. v. City of New York, et. al., 331 F. Supp.2d 258, 265-66 (S.D.N.Y. 2004), the plaintiffs sought preliminary injunctive relief overturning the Parks Department’s decision to deny the plaintiffs’ application for a permit to hold a demonstration on Central Park’s Great Lawn on the Saturday before the start of the August 2004 Republican National Convention. Plaintiffs, however, waited over six weeks after the Parks Department denied their application, until a mere 15 days before the proposed demonstration, to commence their constitutional challenge to the Parks Department’s determination and the underlying permitting scheme. Thus, as recognized by the Court, the “emergency” requiring an application for immediate injunctive relief in the National Council of Arab Americans case was, much like the situation here, created by the plaintiffs’ own actions. As a result, the Court concluded that the plaintiffs were barred by the doctrine of laches from seeking preliminary injunctive relief because, “with less than a week to respond to Plaintiffs’ motion for a preliminary injunction, Defendants were forced to defend a constitutional challenge

threatening the existence of the Parks Department's permit scheme . . . Plaintiffs' unreasonable delay prejudiced Defendants in the preparation of this case."

Similarly, in Robert MacDonald v. Chicago Park District, 1997 U.S. Dist. LEXIS 6900 (N.D. Ill. 1997), the plaintiff challenged the denial of a permit to it authorizing the conduct of a rally in a Chicago park and sought a preliminary injunction authorizing that rally. However, the court denied the plaintiff's request for preliminary injunction on the grounds of laches, having determined that the plaintiff's delay in filing the suit until fifteen days before the proposed rally date prejudiced the City of Chicago by effectively denying it an opportunity to appeal prior to the rally date.

Likewise, in Irish Lesbian and Gay Organization (ILGO) v. Giuliani, 918 F.Supp. 732 (S.D.N.Y. 1996), the plaintiffs brought a First Amendment challenge to the defendants' denial of the plaintiffs' application to march on the same day as the annual Hibernians St. Patrick's Day Parade. They sought a preliminary injunction enjoining the denial of their parade application only nineteen days prior to the date of the St. Patrick's Day parade. This Court likewise held that the ILGO was "guilty of laches for failing to bring the lawsuit earlier when the position of the parties could be thoroughly presented." 918 F.Supp. at 748. See also, WPIX v. League of Women Voters, 595 F. Supp. 1484, 1494 (S.D.N.Y. 1984) (denial of preliminary injunction request by television station to broadcast presidential debate in part because "WPIX's eleventh-hour demand for access ha[d] ... unjustly burdened the [defendant] with the task and expense of responding to a set of difficult legal issues on short notice."); ILGO v. N.Y.S. Board of Ancient Order of Hibernians, 788 F. Supp. 172, 175-76 (S.D.N.Y. 1992).

Here, defendants were first made aware of plaintiffs' intended lawsuit at approximately 10:30 a.m. on Tuesday, March 27, 2007, a mere three days before the day upon

which plaintiffs claim they will be irreparably injured without the requested injunctive relief. Moreover, defendants had only 29 and a half hours in which to prepare papers to respond to the plaintiffs' application, which includes a 51-page Memorandum of Law, 20 Declarations and numerous exhibits. That defendants should be put in such a position when plaintiffs have been aware, for at least two months, if not longer, that the definition of a parade had been amended to clarify its application to groups of 50 or more bicyclists is outrageous and severely prejudicial.

Aside from the fact that plaintiffs' eleventh-hour tactics warrant denial of their motion on laches grounds, nowhere in their papers do plaintiffs state that they have even attempted to obtain a parade permit for the upcoming Critical Mass bicycle ride. Plaintiffs' decision to not even attempt to apply for a permit for the March 30, 2007 Critical Mass bicycle when they have known since January 26, 2007 that a permit would be required for this ride demonstrates that they do not have the clean hands necessary for the grant of equitable relief. As set forth in the accompanying Declarations of Sam Centamore and Joseph Caneco dated March 28, 2007 ("Centamore Dec." and "Caneco Dec."), it would not have been difficult for any one of the plaintiffs to have applied for a permit for the March 30 Critical Mass bicycle ride. See Centamore Dec., ¶¶ 6-15; Caneco Dec., ¶ 9. As the United States Supreme Court stated in Precision Instrument Manufacturing Co., v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15 (1945),

The guiding doctrine in this case [seeking equitable relief] is the equitable maxim that "he who comes into equity must come with clean hands." This is more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however, improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of a court of equity as a vehicle

for affirmatively enforcing the requirements of conscience and good faith.

See also, The Age of Majority Educational Corporation v. Preller, 512 F.3d 1241 (4th Cir. 1973); Great Western Cities, Inc. v. Binstein, 476 F.Supp 827 (N.D.Ill. 1979); Williamson v. United States, 1979 U.S. Dist. LEXIS 11450 (D. N.J. 1979). Plaintiffs' decision not to even attempt to obtain a parade permit coupled with their eleventh-hour application to the Court in an attempt to obtain a last-minute injunction demonstrate that plaintiffs do not have the clean hands required for the grant of a preliminary injunction.

(2)

Aside from the equitable considerations discussed above, a preliminary injunction may not be issued unless the plaintiffs demonstrate “(i) that [they are] likely to suffer irreparable injury if the injunction is not granted, and (ii) either (a) a likelihood of success on the merits of its claim, or (b) the existence of serious questions going to the merits of its claim and a balance of the hardships tipping decidedly in its favor.” Beal v. Stern, 184 F.3d 117 (2d Cir. 1999). Where “the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,” as is the case here, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard. Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989). The Second Circuit has held that “[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.” Bery v. City of New York, 97 F.3d 689, 693 (2d Cir. 1996), cert. denied, 117 S. Ct. 2408 (1997). Thus in this case, the irreparable injury requirement dovetails with the requirement that plaintiffs demonstrate a likelihood of success on the merits.

As set forth below, plaintiffs cannot make a clear showing of the likelihood of success on the merits of their claims. “In exercising their sound discretion, courts of equity

should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). See also, Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334, 337-338 (1933); Million Youth March, Inc. v. Safir, 155 F.3d 124 (2d Cir. 1998) (Second Circuit modified injunction because District Court failed to consider government’s interest in public health, safety and convenience in balance against First Amendment rights). In considering an injunction, the Court must balance the interests and possible injuries to both parties. See Yakus v. United States, 321 U.S. 414, 440 (1944). Whether the relief sought is in the public interest is a factor which may be considered. See Standard & Poor’s Corp. v. Commodity Exchange, Inc., 683 F.2d 704 (2d Cir. 1982). As set forth below, the relief sought by plaintiffs is not in the public interest, because the parade permit requirement is designed to protect the health and safety of participants in group events on the public streets and members of the public who find themselves in the vicinity of these events. Indeed, as set forth in the Statement of Basis and Purpose accompanying the promulgation of the amendments to the parade permitting scheme, groups of 50 or more bicycles proceeding together on public streets have “the likelihood to significantly disrupt vehicular and pedestrian traffic and adversely affect public health and safety unless subject to regulatory control via the permitting process.” See Binder Dec., Exhibit A.

Thus, as plaintiffs cannot meet the rigorous standard to be entitled to a preliminary injunction, and as issuance of the injunction is not in the public interest, plaintiffs’ motion for a preliminary injunction should be denied.

B. Plaintiffs Cannot Make a Clear Showing of a Likelihood of Success on the Merits.

(a) The Parade Permit Requirement Does Not Impede on Plaintiffs' Right to Travel.

Plaintiffs' specious argument that the parade permit requirement restricts their fundamental right to travel fails. See Pl. Mem. at 29-30.¹ Plaintiffs' allegation in this regard is barebones and conclusory, insofar as it fails to articulate how this right is implicated. It is well-settled that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." Shapiro v. Thompson, 394 U.S. 618 (1969). This constitutional protection for interstate travel has been extended, in the Second Circuit, to intrastate travel as well. King v. New Rochelle Municipal Housing Auth., 442 F.2d 646, 648 (2d Cir.), cert. denied, 404 U.S. 863 (1971).

Here, however, plaintiffs fail to demonstrate how the parade permit requirements set forth in 38 RCNY. § 19-02 or Admin. Code § 10-110(a)(2)-(4) infringe upon their right to travel. Simply requiring plaintiffs — or other organizers or promoters of a bicycle procession, parade, or race with 50 or more participants — to apply for and obtain a parade permit does not in any way impede on plaintiffs' right to travel. Courts have found that "travelers do not have a constitutional right to the most convenient form of travel[, and] minor restrictions on travel do not amount to the denial of a fundamental right." Town of Southhold v. Town of East Hampton, 477 F.3d 38, 2007 U.S. App. LEXIS 2789, * 38-39 (Feb. 8, 2007), quoting Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991).

In Town of Southhold, the Second Circuit held that "[t]he fact that the [law] may make travel less direct for some passengers does not meet the threshold required for strict

¹ All references to "Pl. Mem." are to Plaintiffs' "Memorandum of Law in Support of Motion for Preliminary Injunction."

scrutiny review . . . ‘something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied.’” 2007 U.S. App. 2789, at * 39-40, citing Kansas v. United States, 16 F.3d 436, 442 (D.C. Cir. 1994). Moreover, in Turley v. New York City Police Dep’t, the plaintiff street musician challenged certain City regulations for violating the First Amendment, and raised a right to travel allegation arguing that he cannot afford to buy multiple permits for each day of performing for different locations. Turley, 1996 U.S. Dist. LEXIS 2582, (S.D.N.Y. 1996), aff’d in part, rev’d in part, after trial on other issues, 167 F.3d 757 (2d Cir. 1999). In Turley, the Court found that “the right to travel is not violated by police power regulations that impose reasonable restrictions on the use of streets and sidewalks.” Id. at *19. See also, Lutz v. City of York, 899 F.2d 255, 270 (3d Cir. 1990) (finding that state ordinance outlawing “cruising” was a reasonable time, place and manner restriction on right to localized travel).

Indeed, in Campbell v. Westchester County, 1998 U.S. Dist. LEXIS 17757 (S.D.N.Y. 1998) — one of the few cases cited by plaintiff — the Court found that the County’s denial to plaintiff of access to a specific hospital did not in any way burden plaintiff’s right to travel. Campbell, 1998 U.S. Dist LEXIS 17757, at * 2-4. There, the Court found that because there were other medical facilities available for plaintiff to seek medical assistance nearby, the plaintiff was not burdened by the denial of access to the medical facility in question. Id. The Court went on to further find that the County’s letter to plaintiff prohibiting him from entering the medical facility without contacting the County police prior to and after receiving treatment further did not infringe upon plaintiff’s right to travel. The Court found that “[t]his may have made scheduling treatment more burdensome for plaintiff, but it did not make the travel associated with treatment more burdensome.” Id. at * 3-4. As the parade permit requirement

challenged herein does not prohibit bicyclists from cycling in groups of less than 50 without a permit, or from obtaining a permit for groups of 50 or more, plaintiffs' argument is unavailing. Indeed, the parade permit requirement does not prevent the plaintiffs from traveling. The parade permit requirement is merely a time, place, and manner restriction, which, for the reasons set forth below, is entirely constitutional.

(b) The Parade Permit Requirement Does Not Impede on Plaintiffs' Right to Freedom of Association.

Similarly, the parade permit requirement does not violate plaintiffs' right to freely associate with other bicycle riders for expressive purposes. The First Amendment protects the right of individuals to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for redress of grievances, and the exercise of religion. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984); Sanitation Recycling Industries v. City of New York, 107 F.3d 985, 996-97 (1997). However, government regulation or conduct that makes it "more difficult for individuals to exercise their freedom of association ... does not, without more, result in a First Amendment violation." Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 228 (1996). Rather, "[t]o be cognizable, the interference with associational rights must be 'direct and substantial' or 'significant.'" Id., quoting Lyng v. UAW, 485 U.S. 360, 366, 367 & n. 5 (1988). Moreover, the existence of a "'chilling effect' even in the area of First Amendment rights" does not support a freedom of expressive association claim. Id., citing Younger v. Harris, 401 U.S. 37, 51 (1971).

In this case, the parade permit requirement does not directly and substantially interfere with the rights of plaintiffs and other bicyclists to exercise their right to freedom of association. Rather, that requirement simply affects the time, place and manner in which plaintiffs may associate with groups of 50 or more bicyclists. Nothing prevents plaintiffs from

associating with other bicyclists in smaller groups or from obtaining a parade permit to cycle in larger groups along a designated route.²

(c) The Parade Permit Requirement is a Content-Neutral, Time, Place and Manner Regulation That is Narrowly Tailored to a Significant Government Interest and Affords Plaintiffs Ample Avenues for Expression.

While defendants recognize that certain types of bicycle processions, including the monthly Critical Mass bicycle rides, may constitute speech that is entitled to First Amendment Protection, the United States Supreme Court has held, “the First Amendment does not guarantee the right to communicate one’s views at all times and places and in any manner that may be desired.” Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647, (1981). See also, United States v. Grace, 461 U.S. 171, 177-78 (1983); Olivieri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986), cert. denied, 480 U.S. 917 (1987) (“the First Amendment does not guarantee an absolute right to anyone to express their views any place, at any time, and in any way they want.”). “[E]xpressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used.” Housing Works, Inc. v. Kerik, 283 F.3d 471, 478 (2d Cir. 2002), quoting Burson v. Freeman, 504 U.S. 191, 196 (1992).

The Supreme Court has held that the use of public streets and parks, although covered by the First Amendment, is not considered “pure speech” within the First Amendment. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969). Accordingly, the government

² While a direct and substantial infringement on the right to expressive association can be justified only if it survives strict scrutiny, Roberts, 468 U.S. at 623 (infringing regulations must “serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms”), a content-neutral time, place and manner regulation of expressive conduct is subjected to the intermediate level of scrutiny described below.

“has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” Texas v. Johnson, 491 U.S. 397, 406 (1989). Thus, plaintiffs’ right to express their views may be curtailed by reasonable restrictions on the time, place or manner of speech. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Housing Works, Inc., 283 F.3d at 478. Indeed, plaintiffs recognize that First Amendment speech and conduct may “be restricted by government action narrowly tailored to serve a significant government interest.” Pl. Mem. at 1, 36. The parade permitting requirement at issue here, is exactly the type of regulation of expression that has been upheld on numerous occasions and in numerous contexts.³

To pass constitutional muster, a time, place and manner restriction of speech or conduct in a public forum must be content-neutral, narrowly tailored to meet a significant governmental interest, and leave open ample alternative means of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Olivieri, 801 F.2d at 605. In addition, the Supreme Court has found that “the nature of a place, and the pattern of its normal activities, dictate the kind of regulations of time, place and manner that are reasonable.” Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (citation omitted); New York State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1363 (2d Cir. 1989) (In examining a restriction on First Amendment rights, the inquiry is whether the exercise of those rights is compatible with the normal activities of that location at that time). Content-neutral permitting requirements for the

³ Contrary to plaintiffs’ assertions, the parade permit requirement does not impede spontaneous expression. As recognized in Thomas, it is simply a regulation of the time, place and manner of processions in the public street consisting of 50 or more participants. Nothing prevents plaintiffs from riding in spontaneous groups of less than 50 individuals (or from obtaining a permit when coordinating a ride of 50 or more individuals). Moreover, it is disingenuous for plaintiffs to claim that “[s]pontaneity is the defining characteristic of Critical Mass,” Pl. Mem. at 31, when Critical Mass rides are scheduled for the last Friday of every month. While plaintiffs may have a

use of public streets and parks have been routinely upheld as constitutional methods of regulating competing uses of public forums. See, e.g., Thomas v. Chicago Park District 534 U.S. 316, 322 (2002); Cox v. New Hampshire, 312 U.S. 569, 576 (1941); Utah Animal Rights Coalition v. Salt Lake City Corporation, et. al., 371 F.3d 1248, 1258 (10th Cir. 2004) (“Permitting schemes are necessary to ensure that scarce space is allocated among conflicting applicants, to protect public access to thoroughfares and public facilities, and to enable police, fire, and other public safety officials to function.”).

(1)

While plaintiffs mention in passing that the parade permit requirement is not content-neutral [Pl. Mem. at 36], plaintiffs do not support this assertion with any facts or legal argument. Indeed, plaintiffs would be hard pressed to find support for such an assertion as there is no question that the parade permit requirement is content-neutral. “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” Rock Against Racism, 491 U.S. at 791. “The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” Id. A regulation is content-neutral where, as here, it is “justified without reference to the content of the regulated speech.” Id. (quoting Clark, 468 U.S. at 295).

As defined in 38 RCNY §19-02(a), a parade is “any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street

First Amendment right to ride together to express a message, they do not have a right to spontaneously choose a route in the City streets to do so.

or roadway.” The permitting requirement contained in Admin. Code § 10-110, thus governs use of the City’s streets by all genres of processions and races, without regard to whether the participants are proceeding in vehicles, on bicycles, on horseback or on foot. As discussed above and in the accompanying Binder Declaration, the parade permit requirement was first enacted, and recently amended, to ensure orderly usage of the City’s streets by parades or processions, and not because of a disagreement with any messages that may be associated with one of these events. Indeed, the parade permit requirement has already been found to be content neutral. See ILGO v. Bratton 882 F. Supp. 315, 319, aff’d 52 F. 3d 311 (2d Cir. 1995) (“§10-110 of the Administrative Code is obviously, from a reading thereof, itself content-neutral”); IGLO v. Giuliani, 918 F. Supp. 732, 744 (S.D.N.Y. 1996) (“neither the permitting ordinance nor the interpretative regulation reveal any contact-based consideration”).

(2)

The bulk of plaintiffs’ attack on the constitutional viability of the parade permit requirement as a valid time, place and manner regulation focuses on their argument that the permit requirement is not narrowly tailored to a significant government interest. Specifically, plaintiffs claim that: 1) the 50-person threshold set by the Parade Rules is arbitrary and inconsistent with the Defendant’s historical ability to accommodate much larger group rides; 2) bicycle rides of 50 do not have a significant adverse effect on public health, safety or convenience; and 3) group bicycle rides can be managed solely by applicable traffic regulations. Pl. Mem. at 37.⁴

⁴ As Justice Stallman recognized in City v. Time’s Up, 11 Misc.3d 1052A, 814 N.Y.S.2d 890, 2006 N.Y. Misc. LEXIS 257 (Sup. Ct. N.Y. Co. 2006), there is a tension between plaintiffs’ claim that their rides are expressive conduct and their claim that bicycle processions are “traffic” that can be regulated adequately by traffic laws. Justice Stallman noted that the “assertion that Critical Mass rides are ordinary traffic is at best curious, and at worst, disingenuous: Critical

As a preliminary matter, it is undisputed that the City has a significant government interest in protecting the public health and safety, as well as the convenience of individuals and groups using a public forum. See, e.g., Heffron, 452 U.S. at 650 (“As a general matter, it is clear that a State’s interest in protecting the ‘safety and convenience’ of persons using a public forum is a valid governmental objective.”); Cox, 312 U.S. at 574 (concluding that requiring permits for marches or parades on public rights of way constitutes a legitimate exercise of governmental authority as the government has a significant interest in ensuring the safety of travelers on public rights of way). That plaintiffs take issue with the City’s chosen method for protecting the safety of participants in group bicycle rides and the safety of the pedestrians and vehicles in the vicinity of the rides is not legally significant. Indeed, the requirement that groups of 50 or more bicyclists obtain parade permits is narrowly tailored to these significant government interests.

It is well-established that the parade permit requirement need not be “the least restrictive or least intrusive means” of achieving the City’s interest in managing the use of public space and protecting the safety of participants in parades and those who find themselves in the vicinity of parades. See Ward, 491 U.S. at 798. Rather, “the narrow tailoring requirement is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Id., quoting, United States v. Albertini, 472 U.S. 675, 689 (1985).

Mass riders in other cases have consistently maintained that the Critical Mass rides are worthy of protection under the First Amendment. If the Critical Mass rides are nothing more than ordinary traffic, then riders are not exercising a right of association ‘in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,’” as they claim. 2006 N.Y. Misc. LEXIS 257 at *8, citing Bray v. City of New York, 346 F.Supp.2d 480, 488 (S.D.N.Y. 2004).

Moreover, municipalities are afforded substantial deference in determining what steps are necessary to protect the public health, welfare and safety. So long as the regulations are “not substantially broader than necessary to achieve the government’s interest ... the regulation[s] will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” Ward, 491 U.S. at 798. “The validity of [time, place or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests’ or the degree to which those interests should be promoted.” Id., quoting, Albertini, 472 U.S. at 689. Indeed, the “‘essence’ of narrow tailoring is a ‘focus on the source of the evils’ that the regulation seeks to eliminate and the elimination of those evils ‘without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.’” See Carew-Reid v. Metropolitan Transp. Authority, 903 F.2d 914, 917 (2d. Cir. 1990), quoting, Ward 491 U.S. at 800, n. 7.

Here, as stated in the Statement of Basis and Purpose accompanying the amendments to the definition of a parade, groups of 50 or more bicycles proceeding together have the likelihood to significantly disrupt vehicular and pedestrian traffic and adversely affect public health and safety unless subject to regulatory control via the permitting process. Contrary to plaintiffs’ allegations, the promulgation of amendments to the parade permitting scheme is not “merely the latest of Defendants’ attempts to suppress Critical Mass.” [Pl. Mem. at 2] Rather, the amendments were promulgated to, inter alia, clarify that that the parade requirement applies to groups of bicyclists, in response to New York State Supreme Court Justice Michael Stallman’s decision in City of New York v. Time’s Up, that it was not previously clear that the parade permit requirement applied to bicycle processions. See Binder Dec. ¶ 13; Exhibit D. However,

it is the City's position that the parade permit requirement applied to bicycle processions, including the Critical Mass ride, even before the 2007 amendments to the definition of parade. In fact, the City's determination that the parade permit requirement applied to bicycle processions even before the 2007 amendments formed the predicate for the City's application for an injunction in the Time's Up case enjoining the Critical Mass rides absent the grant of a parade permit from the Police Department.

As explained in the Caneco Declaration, groups of 50 or more bicyclists are likely to disrupt vehicular and pedestrian traffic by attempting to take up the entire roadway to the exclusion of other bicycles and vehicles, disrupting other pedestrian and vehicular traffic in the vicinity of the ride, and violating traffic regulations. See Caneco Dec., ¶¶ 3-6. Plaintiffs' self-serving "evidence" that bicycle groups of 50 or more do not cause traffic safety issues and that existing traffic regulations applicable to bicyclists are sufficient to protect the public health and safety, are not sufficient to render the Police Department's determination to the contrary incorrect or unconstitutional. Pl. Mem. at 41-45. Indeed, as explained above, the fact that plaintiffs would have chosen to regulate differently is constitutionally insignificant.⁵

⁵ Plaintiffs' claims that group rides are safer than individuals biking on their own [see, e.g., Pl. Mem. at 8-10, 41-42] are of no moment to the requirement that bicycle groups of 50 or more require permits from the Police Department. Indeed, whether it is safer to ride in a group has no place in this lawsuit as: 1) group rides of 50 or fewer persons do not require parade permits; and 2) there is nothing to suggest that group rides 50 or more persons will not be able to continue to take place, as nothing prevents these groups from obtaining parade permits. Plaintiff Five Borough Bicycle Club ("5BBC") appears to complain that the amended definition of a parade will require them to need to apply for permits for "two to three day trips . . . during the next 12 months." Pl. Mem. at 17-18, 45. Certainly, it is not a hardship for 5BBC to have to apply for two to three parade permits in a 12-month period. Nor is it unreasonable for Professor Jackson to have to apply for a permit for his 250-person yearly History of New York Bicycle Tour, or for someone to take responsibility and apply for permits for the monthly Critical Mass bicycle rides. Pl. Mem. at 18, 45. As explained in the Caneco and Centamore Declarations, the permit application process is not onerous. See Centamore Dec., ¶¶ 6-15; Caneco Dec., ¶ 9. Plaintiffs'

The permit requirement at issue here is unlike those in cases such as American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005), which have been found not to satisfy the narrow tailoring requirement because they are applicable to “a few individuals” or “small groups of people.” See also, Grossman v. City of Portland, 33 F.3d 1200, 1207 (9th Cir. 1994) (stating that six to eight people carrying signs in a public park does not constitute enough of a threat to the safety and convenience of park users to justify a permit requirement, but that a park permit requirement for a group of 50 or more appears to be narrowly tailored); Douglas v. Brownell, 88 F.3d 1511, 1524 (8th Cir. 1996) (expressing concern about the application of a parade permit requirement to groups of ten or more, but acknowledging that cases such as Cox have held that a parade permit requirement, applied to a ‘parade or procession’ of groups of fifteen to twenty, serves a significant government interest). Indeed, plaintiffs cannot seriously contend that a group of 50 bicyclists is “a few” or “small” or that requiring a permit for a group of 50 bicyclists proceeding together does not advance the City’s interests in protecting the public health and safety. See, e.g., Thomas, 534 U.S. at 318 (upholding constitutionality of Chicago Park District ordinance which requires a person to obtain a permit in order to, inter alia, “conduct a public assembly, parade, picnic, or other event involving more than fifty individuals”). Plaintiffs’ attempt to argue that the 50-person threshold is not narrowly tailored because earlier incantations of the recent amendments to the definition of a parade sought to require permits for groups of fewer than 50 persons is unavailing. Pl. Mem. at 37. That the Police Department chose to listen to arguments presented during the public comment period and

allegation with regard to the Critical Mass ride that it is unduly burdensome for someone to take responsibility for the event as a “Chief Officer,” is untrue and simply a red herring designed to divert the Court’s attention from the fact that Critical Mass participants choose not to obtain parade permits as part their political statement about the role of bicycles on the City’s streets.

amend the definition of a parade so as to not include groups of less than 50 is not an indication that groups of fewer than 50 do not have the potential to disrupt vehicular and pedestrian traffic, or that groups of 50 or more do not have the potential to disrupt vehicular and pedestrian traffic. Rather, the Police Department's decision not to trigger the permit requirement for groups of fewer than 50 simply reflects the Police Department's effort to accommodate concerns raised by the public.

Finally, contrary to plaintiffs' assertions, the Police Department has not demonstrated a "historical willingness and ability to accommodate 50-person and even much larger bicycle rides without permits." Pl. Mem. at 39-40. While there may have been situations in the past where supervising Officers have made on-the-spot determinations to provide assistance to bicycle rides to ensure their safety and to prevent vehicular traffic from getting into the crowd, this does not demonstrate a "historical willingness" to "accommodate" bicycle rides that choose to evade the parade permit requirement. In fact, it is extremely difficult for the Police Department to protect the public safety when large groups take to the streets for unpermitted events, as officers cannot be assigned to the event in advance. Once a permit is issued, the Department is able to assign officers who can block off the designated event route, escort the procession through the route and re-route pedestrian and vehicular traffic as needed. See Caneco Dec., ¶ 6. Parade permits thus enable the Police Department to respond to the needs of event participants while protecting the health, safety and welfare of these participants as well as other pedestrians, motorists and bicyclists in the area.

(3)

The permitting scheme affords permit applicants ample channels of communication. Indeed, Admin. Code § 10-110, "does not attempt to ban any particular manner or type of expression at a given place or time." Ward, 491 U.S. at 802. Rather, the parade

permit requirement allows First Amendment expressive activity on the City's streets subject to certain limited time, place and manner restrictions. Moreover, in the event that a parade permit application is disapproved by the Police Department for any reason other than the fact that the applicant has not submitted a complete application, has proposed illegal conduct or has made material misrepresentations on its application, the Police Department is required to employ reasonable efforts to offer the applicant a suitable alternative location, date and/or time for the parade. See 38 RCNY § 19-04(b). As a result, the permitting scheme affords permit applicants ample channels of communication. See MacDonald v. City of Chicago, 243 F.3d 1021, 1034 (7th Cir. 2001).

(d) The Parade Permitting Scheme is Not Unconstitutionally Vague and Does Not Vest the Police Department With Unbridled Discretion to Grant or Deny Permit Applications.

Contrary to plaintiffs' allegations [Pl. Mem. at 45-51], the parade permit statute does not afford the Police Department unlimited discretion to deny a parade permit application. "[W]hen assessing the constitutionality of a content-neutral time, place and manner restriction, the analysis hinges on whether the regulation 'contain[s] adequate standards to guide an official's decision and render that decision subject to effective judicial review.'" National Council of Arab Americans, 331 F. Supp. 2d at 268, quoting Thomas, 534 U.S. at 323; Housing Works, Inc. v. Kerik, 283 F.3d 471, 478-79 (2d Cir. 2002).

The Police Department's evaluation of a parade permit application is limited to the simple application of uniform content-neutral criteria which do not vest the Police Commissioner with the unfettered ability to deny permit applications. In this regard, the Police Department may only deny a parade permit application for one of the eight specific reasons set forth in 38 RCNY §19-04(d). These criteria, which are the only ones that will be evaluated by the Police Department in determining whether to approve a permit application, provide clear,

concise and objective standards for determining whether a permit should be granted. As explained by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 110 (1972), “[c]ondemned to the use of words, we can never expect mathematical certainty [from] our language.” See also, Cox, 312 U.S. at 576 (upholding parade permitting scheme which gave the licensing board the power to investigate the application and revoke the license, but was silent as to the criteria governing the granting of permits); Rock Against Racism, 491 U.S. at 794 (rejecting facial challenge to the Parks Department’s use guidelines for sound amplification, and rejecting plaintiff’s claim that the use guidelines vested “unbridled discretion” in the hands of the city officials, ruling that “[w]hile these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity”); Graff v. City of Chicago, 9 F.3d 1309, 1317-18 (7th Cir. 1993) (en banc), cert. denied, 511 U.S. 1085 (1994) (city officials may constitutionally employ limited [but not unbridled] discretion when considering permit or license applications; Court upheld a newsstand licensing provision that gave City officials far more discretion than the regulations involved here); United States v. Kistner, 68 F.3d 218, 221 (8th Cir. 1995) (park permit regulation allowing consideration of effect on public health, safety and welfare did not vest unbridled discretion).

Here, as in Thomas, the factors that the Police Department may look to in evaluating a parade permit application are “reasonably specific and objective, and do not leave the decision ‘to the whim of the administrator.’” Thomas, 534 U.S. at 524, citing, Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992). Additionally, should the Department deny a parade permit application, as set forth in 38 RCNY §19-04(e), the applicant has the ability to administratively appeal that determination (and then, if necessary, to pursue a

challenge pursuant to Article 78 of the New York Civil Practice Law and Rules). See National Council of Arab Americans, 331 F.Supp.2d at 269 fn. 2 (noting that the Supreme Court in Thomas discussed the appealability provisions of the Chicago permit scheme).

Notwithstanding the fact that the parade permit statute provides clear and concise standards for the Police Department to employ when reviewing parade permit applications, plaintiffs take issue with three specific aspects of the statute. Pl. Mem. at 46-51. Plaintiffs first argue that the fact that 38 RCNY § 19-02 defines a parade as being a “recognizable group” of 50 or more bicyclists invites arbitrary or discriminatory enforcement because no guidance is provided to the Police Department in determining the membership of a “recognizable group.” Pl. Mem. at 46-49.

Plaintiffs’ citation to a few instances prior to the adoption of the definition of parade at issue here, where individuals on bicycles have been arrested for parading without a permit simply because they found themselves on bicycles and in the vicinity of the Critical Mass ride, is unavailing. Indeed, the fact that the amended definition of a parade encompasses only those groups of 50 or more bicyclists that are recognizable (i.e. and not simply 50 individuals on bicycles or in vehicles proceeding at their own pace and along individual routes) actually reduces the probability of arrest for those who are not actually part of the bicycle procession. That Police Officers will have to make an on-the-spot determination as to whether they are able to identify a group of 50 or more individuals proceeding together on bicycles before they begin to enforce the parade permit requirement against a group bicycle ride is a) not difficult and b) of no legal moment. First, it can hardly be said that it will be difficult for a Police Officer to look at a group of bicyclists and make a determination that they are proceeding together as a group because, for example, they are wearing identifying clothing, proceeding together along the same route,

chanting the same phrases or songs, etc. Moreover, as explained above, the exercise of discretion by a City official in implementing or enforcing the law does not render the regulation of expressive activity unconstitutional. See Rock Against Racism, 491 U.S. at 794.

Plaintiffs next argue that the parade statute is fatally flawed because the City has recently given permission to two groups to use Fifth Avenue for a parade in violation of 38 RCNY § 19-04(d)(viii) when those events were not “occasions of extraordinary public interest,” as defined in 38 RCNY § 19-01(b). This argument has no place in the instant motion for a preliminary injunction and, in any event, is incorrect. First, the requirement that groups of 50 or more bicyclists obtain parade permits does not mean that individuals and small groups of bicyclists cannot ride in the bicycle lanes on Fifth Avenue, as plaintiffs contend. *Centamore Dec.*, ¶ 16. Second, even if the City improperly allowed new events to take place on Fifth Avenue, such action does not warrant the grant of the injunction requested herein as plaintiffs’ concern in this regard is addressed to the group bicycle rides that plaintiffs “Jackson and Ravin intend to conduct on 5th Avenue later this year” and not to the imminent Critical Mass bicycle ride. *Pl. Mem.* at 50.

Finally, plaintiffs contend that Admin. Code § 10-110(2) “prohibits group bicycle rides on Saturdays on any roadway [which is] ‘ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character.’” *Pl. Mem.* at 50. The “business or mercantile character” of a designated route is not used by the Police Department as a basis for denial of a parade permit. Rather, the Police Department will deny a parade permit if “the proposed activity ... will substantially or unreasonably interfere with traffic in the area contiguous to the parade route,” no matter the character of the neighborhood through which the route passes. See, *Centamore Dec.*, ¶¶ 12-13; Exhibit I. Indeed, contrary to plaintiffs’

unsupported speculation, parade permits are routinely granted for events on Saturdays. Centamore Dec., ¶ 29.

CONCLUSION

As plaintiffs' application for injunctive relief is barred by the doctrine of laches and as plaintiffs cannot establish irreparable injury or a likelihood of ultimate success on the merits, their application for a preliminary injunction should be denied.

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