

07-2154-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

-v.-

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-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

Plaintiffs-appellants appeal from an opinion and order of the United States District Court for the Southern District of New York ("District Court" or "Southern District"), dated April 17, 2007 (SPA-1-53),¹ which order denied plaintiffs' motion for a

¹ Numbers preceded by "A-" contained in parentheses indicate pages of the Appendix; numbers preceded by "SPA-" contained in parentheses indicate pages of the Special Appendix.

preliminary injunction. In their motion, plaintiffs had sought to enjoin defendants from enforcing the portion of the City's parade permit scheme, New York City Administrative Code § 10-110, that makes it unlawful for groups of 50 or more persons to bicycle together without first obtaining a parade permit from the New York City Police Department ("NYPD").² The District Court was "not persuaded that plaintiffs are likely to prevail on their constitutional arguments" (SPA-53). The order was entered on April 17, 2007.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction of this case pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3) & (4), as a civil action raising questions of federal law and raising questions of civil rights, respectively. In this action, plaintiffs challenge the constitutionality of the City's amended parade permit scheme as applied to bicycle groups.

The District Court for the Southern District of New York issued an opinion and order, entered April 17, 2007, denying plaintiffs' motion for a preliminary injunction (SPA-1-53). The District Court's order is appealable, and this Court

² At the time the motion was made, plaintiffs specifically sought to enjoin enforcement of this portion of the parade permit scheme against the then-upcoming March 30, 2007 Critical Mass bicycle ride and all other bicycle processions of 50 or more persons.

has jurisdiction over the appeal herein, pursuant to 28 U.S.C. Section 1292(a)(1).

QUESTION PRESENTED

Did the lower Court properly determine that plaintiffs are unlikely to prevail on their constitutional arguments and, thus, are unlikely to succeed on the merits of this lawsuit?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs allege that enforcement of the portion of the City's parade regulations that require permitting for bicycle processions of 50 or more persons violates their First Amendment rights to speech, expressive conduct, expressive association, and travel. Plaintiffs also allege that the City's parade restrictions are unconstitutionally vague. In defense of the regulations, defendants maintain that the parade regulations' permitting scheme does not interfere with plaintiffs' constitutional rights to travel or of association, and it is a content-neutral time, place, and manner restriction that is narrowly tailored to a significant government interest and affords plaintiffs ample avenues for expression. In addition, defendants maintain that the parade permitting scheme is not unconstitutionally vague and does not vest the police department with unbridled discretion to grant or deny permit applications.

B. Course of the Proceedings

Plaintiffs filed this action on or about March 27, 2007 (A-5, A-273-307). On that same day, plaintiffs brought an order to show cause seeking a preliminary injunction, to bar enforcement of the portion of the City's parade regulations that require permitting for bicycle rides comprised of 50 or more bicycle riders. Several declarations were submitted in support of the order to show cause. On March 28, 2007, by declaration of Robin Binder (A-308), defendants opposed the order to show cause. Three other declarations, one of Sam Centamore (A-398), one of Joseph Caneco (A-416), and one of Dennis Gannon (A-464), were also submitted in opposition to the order to show cause.

On April 16, 2007, defendants City of New York, Kelly, and Tuller submitted an answer to the complaint in this action (A-7). By Opinion dated April 17, 2007, the Court denied the motion, brought by order to show cause, seeking a preliminary injunction (SPA-1-53). While the Court was "sympathetic to plaintiffs' concerns," it recognized that there must be a balance "struck between plaintiffs' interests in riding when and where they want and the City's interest in ensuring that all people and vehicles use its streets effectively and safely without overburdening scarce law enforcement resources" (SPA-52-53). The Court was not convinced that the plaintiffs were likely to prevail on the merits of the underlying lawsuit and,

thus, it denied their motion for a preliminary injunction (SPA-53).

C. District Court Determination

By Opinion dated April 17, 2007, the District Court (Kaplan, U.S.D.J.) denied defendants' motion for a preliminary injunction, which had sought an order prohibiting enforcement of the City's permitting scheme (SPA-1-53). After setting forth the facts, as taken from the various declarations submitted by the parties (SPA-3-7), and reviewing the City's parade regulations (SPA-8-13), the Court turned to a discussion of the law controlling preliminary injunctions and the merits of this action (SPA-13-52). First, the Court discussed the preliminary injunction standard. The Court noted that "a party seeking a preliminary injunction "to enjoin 'government action taken in the public interest pursuant to a statutory or regulatory scheme'" must show (1) irreparable harm in the absence of the injunction and (2) a likelihood of success on the merits (SPA-13-14). And, the Court noted, "where 'the injunction sought "will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits," the moving party must make a "clear" or "substantial" showing of a likelihood of success'" (SPA-14). As here, the Court noted, "plaintiffs seek to enjoin the City from enforcing the Parade Regulations against group

bicycle rides of 50 or more and 'retaliating and selectively prosecuting the laws against [Blythe, Gosciak, Shura, Nelson, and Son] based on their participation in group bicycle rides, including . . . Critical Mass,'" the Court found that they "seek to enjoin governmental action ostensibly taken in the public interest pursuant to a regulatory scheme" and concluded that, therefore, "[t]hey must demonstrate a likelihood of success on the merits in order to establish their right to a preliminary injunction" (SPA-14).

The second part of the Court's "Discussion" section of the opinion is devoted to irreparable harm. The Court noted that normally, any loss of First Amendment freedoms constitutes irreparable harm. However, here, the Court was compelled to "consider the impact of plaintiffs' delay in making their motion" (SPA-14-15). In a case in which "the alleged irreparable injury is a prospective constitutional violation," the Court noted, "'the question of plaintiff's delay is appropriately addressed under the rubric of laches, not the irreparable harm prong of the preliminary injunction standard'" (SPA-15). The Court noted that plaintiffs filed the motion for a preliminary injunction more than eight weeks after the NYPD announced that it would amend the Parade Regulations so that groups of fifty or more bicycle riders would require permits and more than four weeks after the amendment went into effect (SPA-

15-16). The Court further noted that the City was prejudiced by plaintiffs' delay "by being forced to prepare for and contest litigation involving significant constitutional issues in a short period of time" (SPA-16). The Court, however, found that despite the delay being sufficient to deny the interim relief sought by plaintiffs to apply to the March 30, 2007 Critical Mass ride, that delay should not bar preliminary relief altogether (SPA-16).

The Court next addressed the likelihood of success on the merits prong of the preliminary injunction inquiry. The Court first recognized that the constitutional right to travel is not unlimited, and such right is not implicated when a statute or regulation merely has an effect on travel. Rather, to raise a constitutional question, a statute or regulation must actually deter travel, have as its primary goal the impedance of travel, or use a classification that penalizes the exercise of the right to travel (SPA-18). In addition, the Court noted, "travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right" (SPA-18). The Court stated that an intrusion on the right to travel is not unconstitutional if that intrusion is deemed "necessary to promote a compelling governmental interest" (SPA-18). Restrictions on freedom to travel must be weighed against the

justification offered for such restriction, and, the Court noted, "a restriction that burdens the right to travel too broadly and indiscriminately cannot be sustained" (SPA-18-19).

The Court found that requiring a permit for large bicycle rides is different from "forbidding or deterring travel or punishing someone for moving about" (SPA-19). As the Court noted, "[t]he Parade Regulations place no burdens on the rights of cyclists to ride through the streets of New York in groups of 49 or fewer. Nor do they prevent cyclists altogether from riding in groups of 50 or more. Cyclists are free to ride through the city in large groups so long as they first obtain a permit" (SPA-19). The Court concluded that "the permit requirement here effectively mandates some planning of large group bicycle rides. But it does not make the act of bicycling in large groups more burdensome or difficult. The Parade Regulations therefore do not impede, deter, or punish travel throughout New York City. They simply require cyclists to notify the NYPD before they travel in groups of 50 or more" (SPA-20).³

³ The District Court also rejected plaintiffs' argument that a suggestion about enforcement tactics -- that netting or other means to keep cyclists confined to a particular area, if there was not compliance with the regulations -- made during an oral argument in earlier litigation concerning the City's previous parade regulations should result in a preliminary injunction because it constituted a threat that deters plaintiffs from exercising their right to travel (SPA-20-21). The Court found

The Court next addressed plaintiffs' freedom of association rights. After clarifying that the rights at issue are "'freedom of expressive association,' which involves the 'right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion'" (SPA-21-22), the Court stated that this right is, like the right to travel, not absolute, and government conduct may incidentally inhibit this right, making it more difficult for individuals to exercise their freedom of association without resulting in a constitutional violation. To constitute a constitutional violation, the Court recognized, "the interference with associational rights must be "direct and substantial" or "significant"" (SPA-22). Further, a regulation will be upheld even if it places a constitutionally cognizable burden on the right of association, if its purpose is to serve compelling state interests that are not related to the

that such statement, made in 2004, was not enough to show a likelihood that such tactics would actually be used in the future. Moreover, the Court found that it was merely speculative that plaintiffs would be in a position of having such enforcement tactics used against them. The Court noted that if unlawful enforcement methods were used against plaintiffs, they would have legal redress under 42 U.S.C. § 1983, and a motion for a preliminary injunction herein was not the appropriate forum for challenging such action, which had never even taken place (SPA-20-21). A review of plaintiffs' appellants' brief to this Court reveals that plaintiffs are not challenging this determination.

suppression of ideas and that cannot be achieved through less restrictive means (SPA-22).

The Court found, and noted that the City did not dispute, "that the group bicycle rides at issue here constitute expressive association" (SPA-23). The Court pointed out that that Court had already ruled, in Bray v. City of New York, 346 F. Supp. 2d 480 (S.D.N.Y. 2004), that "because 'the rides are intended to promote the environmental and aesthetic benefits of alternative modes of transportation . . . and to espouse a view on an issue of public import -- namely, the environment,' they fall within the wide net cast by the Supreme Court in defining expressive association" (SPA-23). And, the Court noted, both the Five Borough Bicycle Club's and Professor Jackson's rides are educational and seek to instill values and, thus, qualify as expressive association under Supreme Court case law (SPA-24) (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 649-50 (2000)).

The Court next addressed whether the parade regulations had a direct and substantial or significant burden on plaintiffs' rights of association. Noting that the regulations merely require that groups of fifty or more obtain a permit prior to their rides, the Court observed that the regulations in no way prevent such groups from associating with one another or bicycling through the City. The Court found that plaintiffs failed to establish a likelihood of success on the

merits, because they did not show that the permit requirement imposes a direct and substantial or significant burden on plaintiffs' exercise of their associational rights (SPA-24).

The Court also found unpersuasive plaintiffs' claim that the ban on the use of certain parts of Fifth Avenue by groups of fifty or more infringes their constitutional right of freedom of association, as it does not impair group members' ability to ride together or demonstrate their commitment to their message. Although such restriction may impose an inconvenience on some group rides, the Court found that such an inconvenience on expressive association does not constitute a direct and substantial or significant burden (SPA-24-25).

The Court discredited plaintiffs' argument that spontaneity is an important part of the expression of participants in the group rides and would be unconstitutionally stifled by groups having to predetermine their routes (SPA-25-27). The Court noted that plaintiffs pointed to no evidence demonstrating "that spontaneity is a crucial element of 5BBC's message or a necessary means of expressing it" (SPA-26) and found that the fact that it might be an attractive element to some riders, the fact that rides may have predetermined routes does not prevent riders from joining the rides (SPA-26-27). And while plaintiffs did offer evidence that spontaneity is central to Critical Mass's message that bicycles are a viable

alternative to cars, as the Parade Regulations apply equally to groups of cars and groups of bicycles, the Court found that having different rules regarding cars and bicycles would not further Critical Mass's message of equal rights to the road for bicycles (SPA-26-27). The Court observed that at most, "the predetermined route requirement inconveniences cyclists and perhaps makes group rides of 50 or more less attractive or enjoyable than they otherwise would be. It does not impose a direct and substantial or significant burden on cyclists' right to engage in expressive association" (SPS-27).

The District Court next addressed plaintiffs' claim that their free speech rights were being violated, recognizing that while municipalities may impose regulations regarding the use of city streets to ensure the safety and convenience of the people using them, they may not do so by denying or abridging First Amendment rights (SPA-27). The Court further recognized that the Supreme Court has held that government may impose reasonable time, place, and manner restrictions on speech and expressive conduct, so as to regulate potential hazards of nonspeech elements, even if such regulation results in an incidental limitation on First Amendment rights (SPA-28). The District Court recognized that such time, place, and manner restrictions on speech "[1] are justified without reference to the content of the regulated speech, [2] that they are narrowly

tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for the communication of the information"" (SPA-28).

The Court recognized that bicycle riding can combine speech and non-speech elements and, thus, cannot always be regulated without reference to First Amendment concerns (SPS-29). The Court continued to find that the Parade Regulations were content neutral, in that they serve a purpose unrelated to the content of any expression of plaintiffs -- they were enacted because of concerns about traffic flow and safety, not "because of the City's disagreement with the messages potentially conveyed by group bicycle rides" (SPA-30-31).

The Court next addressed the narrow tailoring prong of the test for determining whether a regulation impacting First Amendment freedoms is lawful (SPA-31). The Court noted that the regulation does not have to be the least restrictive means of advancing a substantial government interest and, rather, is narrowly tailored as long as the interest would be achieved less effectively absent the regulation (SPA-31). The Court found that the declarations of Lieutenants Caneco and Gannon demonstrate the following:

[G]roups of fifty or more bicycles can and often do disrupt the orderly flow of traffic and endanger other travelers. Large groups tend to ride aggressively, disobey traffic rules, and block intersections. Those that

do not nevertheless have a tendency to impede traffic due to their size alone. A permit scheme ensures that the police have advance notice of the group's whereabouts so that they may block off the intended route from vehicular and pedestrian traffic, enforce traffic regulations more effectively, and coordinate the movements of all large groups proceeding in the City at a given time so as to minimize there (sic) overall impact.

(SPA-31-32).

The Court found unpersuasive plaintiffs' argument that the fact that the City had considered earlier proposals that would have required permits for smaller groups demonstrated that the 50-person threshold in the regulation is not narrowly tailored to serve the substantial government interest at hand. The Court found that "the fact that the City ultimately adopted less restrictive regulations than it proposed initially does not demonstrate that the Parade Regulations are not narrowly tailored" and, instead, "[i]t shows at most that the City believed it could advance its interests by less restrictive means than it originally thought necessary" (SPA-32-33).

The Court also found unpersuasive plaintiffs' argument that since the NYPD has, in the past, allowed group rides of 50 or more bicyclists to proceed unpermitted, the new 50-person threshold of the Parade Regulation "'has been empirically proven unnecessary'" (SPA-33). The District Court noted that the fact that rides have occurred without permits does not mean that they

"did not disrupt traffic or threaten the safety of other travelers, or that future rides will not impose the same dangers" (SPA-33). In addition, the District Court found:

to the extent the police were able to manage prior group rides, this does not show that the NYPD would not be substantially better able to minimize the hazards associated with group rides or answer the vast demands it faces on scarce law enforcement resources by eliminating the need to guess the timing, whereabouts, and intended routes of large group bicycle rides.

(SPA-33).

The Court distinguished cases cited by plaintiffs that "involved situations where the government enacted a regulation and subsequently made exceptions to it, thus belying the government's belief that it could afford to be less restrictive while still furthering its substantial interest, or where past incidents demonstrated that no public danger or nuisance actually would occur in the absence of government regulation" (SPA-34). The Court stated that there was evidence that the government has made exceptions to the regulation since its enactment, and the Court pointed to the declarations of Lieutenants Caneco and Gannon, which it credited, as evidence that "large group bicycle rides in the past in fact have impeded traffic and endangered other travelers" (SPA-34).

The Court was not persuaded that the Parade Regulations did not further a substantial government interest

(SPA-35). This was despite plaintiffs' submission of a declaration by John Pucher, a professor of urban studies and expert on urban transportation planning and policy issues, which stated that group bicycle rides tend to increase safety for both cyclists and pedestrians and that traffic is not disrupted, because bicycles are smaller than vehicles and, thus, cause less congestion. The Court observed as follows:

Large groups of cyclists may be more visible than individual cyclists and may take up less space than large groups of vehicles, but their lack of predictability nevertheless may endanger other travelers as well as disrupt orderly traffic flow, and their presence may add traffic volume that otherwise would be absent. A permit requirement allows the government to avoid these hazards by making the movement of group bicycle rides more orderly and predictable and rerouting other traffic such that collisions with bicycles are even less likely to occur than otherwise would be the case.

(SPA-35). The Court further found that, as Lieutenants Caneco and Gannon state in their declarations, "individual group cyclists on occasion do not obey traffic rules precisely because they travel in groups -- for example, by 'corking' intersections or running red lights in order to stay together" -- and, therefore, regular traffic rules were not sufficient and the permitting scheme would give the "police advance notice of group bicycle ride routes so that police are better able to enforce the rules of the road" (SPA-36).

The Court, in addition, discredited plaintiffs' argument that Lieutenant Caneco's statement that groups of cyclists present traffic and safety problems should not be credited (SPA-36-38). The Court noted that Lieutenant Caneco explained his earlier statement that groups up to 100 only minimally disrupt pedestrian and vehicular traffic when they disobey traffic regulations as having been made in comparison to much larger groups; and since he made that statement, he had observed many smaller groups and formed a belief that even those smaller groups have the potential to disrupt traffic (SPA-36). In any case, the Court noted, "[a]ny inconsistency in Lieutenant Caneco's affidavits . . . in all likelihood does not matter," because "Lieutenant Gannon stated in his declaration that groups of bicycles smaller than 50 potentially pose traffic and safety problems, but . . . the 50-person threshold 'was reached after balancing the City's safety concerns with the concerns voiced by the public regarding the need to apply for permits for each and every small procession taking place in the City" (SPA-37). Lieutenant Gannon further stated that "groups of 50 or more 'are likely to have an impact on vehicular and pedestrian traffic, thereby raising concerns about the safety' of other travelers" and that

"[a] group of fifty people traveling together by bicycle or vehicle is likely to create a 'moving column,' thereby blocking

the roadway" because groups of that size, "whether traveling across the entire width of the roadway or lined up on [sic] groups of two, tend to try to stay together and disregard traffic regulations in order to do so."

(SPA-37) (quoting Gannon Decl. at ¶ 7 (A-466)). The Court added that "even groups of 50 who obey traffic regulations potentially impede traffic," as "their sheer size . . . can prevent other vehicles on the road from merging or turning" (SPA-37-38).

The Court concluded that the 50-person threshold is a proper time, place, and manner restriction that is narrowly tailored to further a substantial government interest (SPA-38).

The Court next addressed the 24-hour applicability of the regulation, finding that the Parade regulations need not be drawn so narrowly as to take account of traffic patterns on every possible route at every possible time of day (SPA-38-39). Rather, the Court found, the regulations "advance a substantial interest that would be less well served in their absence," and [p]laintiffs offer no evidence to suggest that no area in New York City experiences vehicular or pedestrian traffic at night," thus making the 24-hour applicability a way that can ensure the NYPD that they will be able to "take appropriate precautions in the event that a proposed route were to include an area that was expected to experience late-night traffic" (SPA-39).

The Court also found unavailing plaintiffs' argument that the Fifth Avenue restriction serves no useful purpose, disagreeing and stating that the useful purpose that the restriction serves is "[k]eeping large groups off Fifth Avenue [and, thus,] protect[ing] other users of the avenue" (SPA-39). The Court similarly discredited plaintiffs' contention that the permitting scheme unfairly burdens bicyclists more heavily than organizers of parades and political demonstrations, as the reason it burdens bicyclists more is that their rides occur more frequently than do the other events and, thus, implicate the City's concerns more often than the other events do. As a final matter in its analysis of the narrow tailoring element of the time, place, and manner inquiry, the Court found, based on representations made by the City, that the fact that the City requires designation of a "chief officer" by permit applicants would not place any legal responsibility on that person for the actions of members of the permitted group and, thus, would not serve as a legitimate deterrent for seeking a permit. In addition, the Court noted that while the Parade Regulations might be "interpreted to impose liability on a chief officer for the actions of other cyclists, they in all likelihood would be unconstitutional if they did so; "[t]he Parade Regulations . . . easily are susceptible to the interpretation proffered by the City during oral argument, which would dispel the spectre of

unconstitutionality" (SPA-40-41). As between an unconstitutional interpretation and a constitutional one, the constitutional interpretation must be adopted by the Court, and therefore there is no valid argument that the regulations would deter expression (SPA-41).

In conclusion regarding narrow tailoring, the Court stated as follows:

The Parade Regulations, like all prophylactic measures that draw numerical lines, inevitably are overinclusive. Not every group bicycle ride of 50 or more participants necessarily will disrupt traffic, endanger other travelers, or disobey traffic regulations. Nevertheless, the NYPD has observed that group bicycle rides of that size can and do present such risks and concluded that police would be able better to prevent safety hazards and enforce traffic regulations if they knew in advance where and when large groups of cyclists were riding. It therefore chose to enact its permitting scheme, which does not forbid cyclists from traveling in large groups, but simply requires them to notify the police in advance of their intended routes.

In the last analysis, the Court is not persuaded that plaintiffs are likely to prove that the Parade Regulations are unnecessary to further a significant government interest, or that that interest would not be served less effectively in their absence. Indeed, as Judge Pauley noted in *Bray v. City of New York*, large groups of cyclists "cannot simply go 'wherever their wheels take them' month after month without someone getting hurt." At some point, bicycle rides of a certain

magnitude "require coordination with the police for everyone's safety."

(SPA-42-43) (quoting Bray, 346 F. Supp. At 492).

As the final piece of its free speech analysis, the Court next addressed whether the Parade Regulations leave open ample alternative channels of expression and found that they do (SPA-43). The Court noted that "[t]he regulations do not ban group bicycle riding on public roads[, n]or do they have any 'effect on the quantity or content of that expression'" (SPA-43). The Court further noted that while there was a ban on groups of fifty bicyclists or more riding together on Fifth Avenue, there was no ban on any other roadway in the City (SPA-43). And while in some cases, other roadways are less convenient or desirable, they were not insufficient venues for the expression at issue (SPA-43-44). In addition, the Court noted, the regulations specifically provide that a suitable alternative location, date, or time shall be offered upon the denial of a permit application based on any of those grounds (SPA-44).

Next the Court turned to plaintiffs' claims that the Parade Regulations are unconstitutional because they constitute prior restraints on speech and are vague (SPA-44). The Court noted that "[r]egulations that require permits for expressive activity in traditional public fora are prior restraints on

speech and therefore are unconstitutional if they vest in a public official unbridled discretion to deny permits" (SPA-44). The danger is that "a regulation 'that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view'" (SPA-44). Thus, "'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain 'narrow, objective, and definite standards to guide the licensing authority'" (SPA-44).

First, plaintiffs challenge the part of the regulations that except "events of extraordinary public interest" from the restrictions. Such events are defined to include "celebrations organized by the City honoring the armed forces; sports achievements or championships; world leaders and extraordinary achievements of historic significance." 38 R.C.N.Y. § 19-10(b). Plaintiffs claim that the exception has been applied to allow events that do not fit within the definition to occur on Fifth Avenue, such as the Olympic relay (SPA-46). The Court, however, found that "[i]t would not be unreasonable to consider a relay honoring one of the most revered athletic traditions in the world a 'celebration[] . . . honoring sports achievements'" (SPA-47). The Court disregarded the claims about "a peace march and a demonstration in

connection with the shooting of an individual named Sean Bell," as there was no evidence in the record regarding such events (SPA-47).

Second, plaintiffs object to that portion of the regulations that calls for denial of a permit between 9:00 a.m. and 6:30 p.m. "for the use of any street . . . which is ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character," except on Sundays and holidays if businesses on the route sought are closed. See N.Y.C. Admin. Code § 10-110(a)(2) (SPA-47). Plaintiffs complain that if read literally, the NYPD would be able to deny permits for events proposed for nearly all avenues and many other streets, and if not read literally, the NYPD would have unfettered discretion to grant or deny permits (SPA-47-48). The Court found, however, that the regulations clearly provide that if a permit application is denied because of traffic concerns, an alternative will be offered; in addition, the record shows that permits are routinely granted for Saturdays and many large-scale bicycle rides, and there is no known occasion for which a permit has been denied for a large group bicycle ride (SPA-48). Further, the Court pointed out, Critical Mass rides occur at 7:00 p.m., approximately half of 5BBC's rides are on Sundays, and Professor Jackson's ride is at night, so this "great congestion or traffic" standard would not apply to any of those

rides (SPA-48-49). In addition, however, the Court noted, it did not find Section 10-110(a)(2) of the Administrative Code unconstitutionally vague, as "[i]t directs the Police Commissioner to consider 'objective factors' such as the location of the proposed procession and the time it is occurring" (SPA-49). And while it grants the Commissioner some discretion, in determining "whether an area 'ordinarily' is subject to 'great' congestion, or is 'chiefly' of a business character," there cannot be absolute precision from language, and it is clear that the Commissioner may not consider the content or purpose of the event and also that the City has not applied the regulations in a manner that has restricted freedom of speech or assembly rights or in a way that discriminates based on an applicant's identity or intended message (SPA-50).

Third, the Court addressed plaintiffs' complaints about whether police officers are required to exercise too much judgment in making a determination as to what is a "recognizable group," prior to issuing tickets to or arresting cyclists (SPA-50). The Court, however, was "not persuaded that the 'recognizable group' standard is so vague as to invite arbitrary enforcement" (SPA-51). Similar to its finding regarding the "great congestion or traffic" determination that must be made under the regulations, the Court found that "the constitution does not require 'mathematical certainty' from statutory

language," and the regulations certainly do give guidance to officers who must make the assessment of whether there is a "recognizable group," such as that they must be "proceeding together" (SPA-51). The Court noted that:

there is little reason to doubt that reasonable police officers would consider[, for example, whether cyclists are wearing similar clothing or identifiable marks or chanting the same songs and slogans] and similar factors in deciding if a group of cyclists were traveling as a group and not merely as a collection of individuals riding in proximity to one another.

(SPA-52). And, finally, the Court stated, "nor is it clear that any more precise language could have been used to narrow the applicability of the Parade Regulations" (SPA-52).

In conclusion, the Court stated as follows:

The Court is sympathetic to plaintiffs' concerns. It recognizes that tensions long have been high between Critical Mass participants and the NYPD and that the Parade Regulations in certain circumstances impose inconveniences that limit plaintiffs' ability to bicycle through the streets of New York City with unfettered freedom. But the Constitution requires a balance to be struck between plaintiffs' interests in riding when and where they want and the City's interest in ensuring that all people and vehicles use its streets effectively and safely without overburdening scarce law enforcement resources. The Court is not persuaded that plaintiffs are likely to prevail on their constitutional arguments. Accordingly, their motion for a preliminary injunction . . . is denied.

(SPA-52-53).

STATEMENT OF RELEVANT FACTS

New York City Administrative Code § 10-110 provides that "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") (A-308-09, A-315). 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") (A-309, A-315).

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 (A-309, A-315). 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" (A-309, A-315).

In this action, plaintiffs challenge the constitutionality of the amended rules as applied to bicycle groups and seek to permanently and preliminarily enjoin their

enforcement against such groups (A-273-307). On March 27, 2007, plaintiffs filed their complaint and an order to show cause returnable just two days later, seeking a preliminary injunction enjoining the enforcement of the parade permit requirement against the Critical Mass bicycle ride scheduled for Friday March 30, 2007 and other processions of more than 50 bicycles pending the determination of this action (A-309, A-5).

A. Prior Critical Mass Litigation

Prior to the recent rule amendments, a "parade or procession" was defined in the Police Department regulations as "any march, motorcade, caravan, promenade, foot or bicycle race, or similar event of any kind upon any street or roadway" (A-309).

Critical Mass bicycle rides have taken place in New York City on the last Friday of the month for a number of years, with numbers swelling in 2004 to the hundreds and even thousands (A-310, A-317-19). Although it is defendants' position that bicycle processions were subject to the parade permit requirement even before the recent rule amendments, organizers and facilitators of the Critical Mass ride had steadfastly refused to apply for a permit so that the Police Department could maintain traffic safety along a prescribed route (A-310, A-321-22).

In 2004, five individuals commenced an action in the Southern District of New York entitled Bray, et al. v. City of New York, et al., 04 Civ. 8255, challenging the seizure by the Police Department of bicycles that had been left unattended on the city streets during the September 24, 2004 Critical Mass bicycle ride. Consequently, in its answer to the Bray complaint, the City interposed a counterclaim and sought a preliminary injunction enjoining the Bray plaintiffs and all other participants in the Critical Mass bicycle rides from participating in the rides unless a parade permit was obtained from the Police Department (A-310). On or about October 28, 2004, the District Court denied the City's motion on laches grounds (A-310, A-316-39).

Thereafter, the City made a motion to amend its counterclaim and again moved for a preliminary injunction in Bray. The Bray plaintiffs then cross-moved to dismiss the City's counterclaim (A-310). In late December 2004, the District Court issued a decision declining to exercise supplemental jurisdiction over the City's counterclaim (which was based entirely on state law) and instead opined that the state court should decide whether participants in Critical Mass bicycle rides violate the City's parade permit requirement (A-310, A-340-64).

Consequently, the City then commenced an action in New York State Supreme Court, New York County, entitled City of New York v. Time's Up, Index No. 400891/05, to permanently enjoin the violation of the parade permit requirement by the named defendants and other participants in Critical Mass bicycle rides in New York City. The defendants in that action were a non-profit corporation known as Time's Up, which regularly advertises, encourages and promotes the New York City Critical Mass bicycle rides (see www.times-up.org), and key members of that organization including their Executive Director and media and legal liaisons⁴ (A-311)

At the outset of that action, the City moved for a preliminary injunction seeking, inter alia, to enjoin the Critical Mass rides absent the grant of a parade permit from the Police Department. By decision and order dated February 14, 2006, the motion was denied (A-311, A-365-89). Justice Stallman denied the City's motion, in part, because the definition of parade set forth in the Police Department regulations lacked descriptive and numerical criteria, stating that "[f]or many reasons, it would be sensible for [the City] to develop and promulgate criteria for what constitutes a parade or procession,

⁴ The Bray plaintiffs were not named as defendants in the state court action because there was no evidence that any of the Bray plaintiffs are regular participants in the monthly Critical Mass bicycle rides.

as a function of its size" (A-311, A-381). In this regard, the Court cited to American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 608 (6th Cir. 2005), in which the United States Court of Appeals for the Sixth Circuit invalidated a Dearborn, Michigan ordinance requiring permits for special events, because the definition of "special event" lacked numerical criteria (A-311, A-381).

B. Adoption of the Rule Amendments

Accordingly, pursuant to the City Administrative Procedure Act ("CAPA"), set forth in New York City Charter § 1045, et seq., the Police Department sought to amend the definition of "parade" set forth in its rules so as to address Justice Stallman's concerns (A-312).

On July 17, 2006, a Notice of Opportunity to Comment on Proposed Rule was published in the City Record together with the text of the proposed rule amendment (A-312, A-117-18). The proposed rule set forth a new, three-pronged definition of the term "parade" by establishing numerical thresholds for groups of pedestrians, vehicles, and bicycles proceeding together on any public street (A-312, A-117). The notice indicated that a public hearing on the proposed rule amendments would be held on August 23, 2006 and included instructions for submitting written comments regarding the proposed rules (A-312, A-117).

In response to numerous public comments received even before the public hearing took place, the Police Department withdrew its initial rule proposal prior to the hearing and modified that proposal (A-312). On October 18, 2006, a new Notice of Opportunity to Comment on Proposed Rule was published in the City Record together with the text of a modified rule amendment (A-312, A-119-20). The modified two-pronged definition likewise defined the term "parade" by setting forth numerical thresholds for groups of pedestrians, vehicles and bicycles proceeding together on any public street (A-312, A-119). The notice indicated that a public hearing on the proposed rule amendments would be held on November 27, 2006 and included instructions for submitting written comments (A-312, A-119). At the public hearing conducted on November 27, 2006, numerous individuals spoke regarding the proposed rule amendments including Dan Lieberman, an Executive Board Member of plaintiff Five Borough Bicycle Club (A-312, A-390-96).

In response to public written comments as well as those made at the hearing, the Police Department again modified the definition. By Notice of Adoption published in the City Record on January 26, 2007 (A-313, A-315), the Police Department adopted rule amendments that define "parade" 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."

As required by CAPA, the Notice of Adoption included a Statement of Basis and Purpose setting forth the basis and purpose of the rule amendments. It states as follows:

The Police Department is charged with preserving the public peace and preserving order at assemblies that obstruct the free passage of public streets and sidewalks. In that connection, the Department is authorized to promulgate rules and regulations governing permits for processions, parades and races that occur on City streets and sidewalks. These amendments are intended to clarify the circumstances under which groups using City streets for purposes of assembly are required to obtain a permit. By clarifying the type of activity that constitutes a parade and is thus required to obtain a permit, these rules are 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.

Accordingly, in response to public comments received, the definition of parade is amended to include groups of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power that proceed together on public streets.

Each of these types of activities has 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. The amendments to the rules will permit the Police Department to adequately preserve the public peace and

prevent obstructions of public streets and sidewalks.

(A-313, A-315).

The adoption of the rule amendments received press coverage in local newspapers. For example, on Sunday, January 27, 2007, the New York Times ran an article under the headline "New Permits for Mass Bike Rides" noting in its lead sentence that "[t]he Police Department has adopted rules that require parade permits for bicyclists and others who take to the streets in groups of 50 or more for processions, races and protests" (A-314, A-397).

As set forth in the Notice of Adoption and, pursuant to CAPA, the rule amendments became effective thirty days after their publication, on February 26, 2007, four weeks prior to the commencement of this action in the District Court (A-314).

SUMMARY OF ARGUMENT

As the District Court found, plaintiffs failed to establish the right to a preliminary injunction, because they failed to establish a likelihood of success on the merits of their underlying claims. Specifically, plaintiffs have failed to establish that either their Constitutional right to travel or their Constitutional right to freedom of association has been violated, rather than simply minorly restricted. Further, plaintiffs fail to establish that the parade permit requirement

is anything but a proper time, place, and manner restriction. Defendants have successfully demonstrated that the parade permit requirement is content-neutral, narrowly tailored to meet a significant governmental interest, and leaves open ample alternative means of communication. Here, the record clearly demonstrates that the permitting scheme, which requires groups of 50 or more to have permits for their rides, does not burden substantially more speech than necessary to achieve a significant governmental interest, namely public safety. Further, the permitting scheme is not unconstitutionally vague and does not vest the Police Department with unbridled discretion to grant or deny permits. The regulation provides specific criteria that must be considered in the review of a permit application and provides clear standards for the decisionmakers.

ARGUMENT

**PLAINTIFFS' APPLICATION FOR A
PRELIMINARY INJUNCTION WAS
PROPERLY DENIED.**

A. Standard of Review

An appellate court reviews a district court's grant of a preliminary injunction for an abuse of discretion. See Tunick v. Safir, 228 F.3d 135, 138 (2d Cir. 2000). To establish the right to a preliminary injunction, plaintiffs must 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. See Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989). This Court 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, 520 U.S. 1251 (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 that may be considered. See Standard & Poor's Corp. v. Commodity Exchange, Inc., 683 F.2d 704 (2d Cir. 1982).

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" (A-315). 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 was properly denied.

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

1. The Parade Permit Requirement Does Not Impede Plaintiffs' Right to Travel.

Plaintiffs' argument that the parade permit requirement restricts their fundamental right to travel fails. Plaintiffs' allegation 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. See King v. New Rochelle Mun. Hous. 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 N.Y.C. 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 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, 54 (2d Cir. 2007) (quoting Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir.), cert. denied, 502 U.S. 907 (1991)).

In Town of Southhold, this Court held that "[t]he fact that the [law] may make travel less direct for some passengers does not meet the threshold required for strict scrutiny review . . . 'something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied.'" 477 F.3d at 54 (citing Kansas v. United States, 16 F.3d 436, 442 (D.C. Cir.), cert. denied, 513 U.S. 945 (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 could not afford to buy multiple permits for each day of performing for different locations. See Turley, 1996 U.S. Dist. LEXIS 2582 (S.D.N.Y. 1996), aff'd in part, rev'd in part, 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).

In Campbell v. Westchester County, 1998 U.S. Dist. LEXIS 17757 (S.D.N.Y. 1998), 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. See Campbell v. Westchester County, 1998 U.S. Dist LEXIS 17757, at *2-4. There, the Court found that because there were other medical facilities nearby where the plaintiff could seek medical assistance, the plaintiff was not burdened by the denial of access to the medical facility in question. See 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 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 fewer than 50 persons without a permit, or from obtaining a permit for groups of 50 or more, plaintiffs' argument regarding the right to travel 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 is entirely constitutional.

2. The Parade Permit Requirement Does Not Impede 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 Indus. v. City of New York, 107 F.3d 985, 996-97 (2d Cir. 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 (2d Cir. 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, the permit 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.⁵

3. 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 Soc'y for Krishna

⁵ 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.

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. See Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969). Accordingly, the government "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, 283 F.3d at 478. Indeed, plaintiffs recognize that First Amendment speech and conduct may be restricted by a narrowly-tailored government restriction to serve a significant government interest. 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.⁶

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. See 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), cert. denied, 495

⁶ Contrary to plaintiffs' assertions, the parade permit requirement does not impede spontaneous expression. As recognized in Thomas v. Chicago Park District, 534 U.S. 316, 322 (2002), 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 fewer 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," Brief for Plaintiffs-Appellants at 55, when Critical Mass rides are scheduled for the last Friday of every month. While plaintiffs may have a 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.

U.S. 947 (1990) (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 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 Dist. 534 U.S. 316, 322 (2002); Cox v. New Hampshire, 312 U.S. 569, 576 (1941); Utah Animal Rights Coalition v. Salt Lake City Corp., 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.").

a. Content Neutrality

Plaintiffs do not and cannot demonstrate that the parade permit requirement is not 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." Ward, 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 or roadway." The permitting requirement contained in Administrative Code Section 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, 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"); ILGO v. Giuliani, 918 F. Supp. 732, 744 (S.D.N.Y. 1996) ("neither the permitting ordinance nor the interpretative regulation reveal any content-based consideration").

b. Narrow Tailoring

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.⁷

⁷ As Justice Stallman recognized in City of New York v. Time's Up, 11 Misc. 3d 1052A, 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 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, 346 F. Supp. 2d at 488).

Further, plaintiffs' claim on appeal that the District Court herein mistook them to be arguing that they should be free from all traffic regulation, see Brief for Plaintiffs-Appellants at 48, has no basis in the District Court opinion and is a misinterpretation by plaintiffs.

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)). In this regard, plaintiffs are mistaken in stating that the District Court ignored the requirement of Ward that to be narrowly tailored, a regulation must not burden substantially more speech than is necessary (SPA-31-43). Rather, plaintiffs clearly and simply dispute the District Court's conclusion that the regulation does not burden substantially more speech than is necessary.

Moreover, this Court's decision in Vincenty v. Bloomberg, 476 F.3d 74 (2d Cir. 2007), upon which plaintiffs rely, is clearly distinguishable from this case. In Vincenty, this Court addressed the City of New York's prohibition against "the sale of, inter alia, aerosol spray point containers and broad tipped indelible markers to persons under 21 years of age" and against possession by persons under 21 of such items on property other than their own. See Vincenty, 476 F.3d at 76. The permit requirement here at issue is clearly not a ban on the protected activity in question, as it was in Vincenty. In addition, it does not impose a substantial burden on more speech than is necessary. Plaintiffs argue that more often than not, bicycle rides of 50 or more riders do not result in violations

of the law that negatively affect public safety. Even assuming, arguendo, that this is true, it does not mean that a permitting requirement for all such rides substantially burdens more speech than is necessary. As one cannot know before the activity occurs which rides will affect public safety, steps must be taken beforehand to try to prevent adverse effects on public safety. To that end, the City determined that a permit requirement for rides of 50 or more was the best way to achieve the goal of public safety without overburdening the activity at hand, some of which would not cause a public safety problem, but which could not be identified until after the fact. Plaintiffs' suggestion of punishing the few who abuse rights of speech after they break the law fails to address the threat to public safety presented here. See Brief for Plaintiffs-Appellants at 49.

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. Auth., 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. The amendments were promulgated to, inter alia, clarify that the parade requirement applies to groups of bicyclists, in response to New York State Supreme Court Justice Michael Stallman's decision in Time's Up, which found that it was not previously clear that the parade permit requirement applied to bicycle processions (A-365-89). However, it is the City's position that the parade permit requirement applied to bicycle processions, including the Critical Mass rides, 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 (A-417). As further explained in the Gannon Declaration, groups of 50 or more are "likely to create a 'moving column,' thereby blocking the roadway . . . because groups of people, whether traveling across the entire width of a roadway or lined up [i]n groups of two, tend to try to stay together and disregard traffic regulations in order to do so" (A-467). And even if traffic regulations are not disregarded, groups of 50 or more impact pedestrian and vehicular safety, affecting the flow of traffic and presenting the potential for traffic accidents, due to the fact that there are no natural spaces between bicycles into which other traffic can merge (A-467-68). Plaintiffs' statements 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 the regulation unconstitutional. Indeed, as explained above, the fact that plaintiffs would have chosen to regulate differently is constitutionally insignificant.⁸

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

⁸ As explained in the Caneco and Centamore Declarations, the permit application process is not onerous (A-400-403, A-419). Plaintiffs' 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 statement made to divert the Court's attention from the fact that Critical Mass participants simply choose not to obtain parade permits.

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. That the Police Department chose to listen to arguments presented during the public comment period and amend the definition of a parade so as not to 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 (A-466).

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. See Brief of Plaintiffs-Appellants at 16-17. While there may have been situations in the past in which 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 un-permitted 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 (A-418). 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.

c. Ample Alternative Means of Communication

The permitting scheme affords permit applicants ample channels of communication. Indeed, Administrative 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), cert. denied, 534 U.S. 1113 (2002).

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

While plaintiffs do not appear to be continuing on appeal their argument made below, that the parade permit statute

affords the Police Department unlimited discretion to deny a parade permit application, defendants respectfully submit, as the District Court held, that the parade permitting scheme provides specific criteria for the police to consider in reviewing an application for a permit, specifying "that only groups of 50 or more bicycles 'proceeding together' are required to obtain a permit" (SPA-50). Moreover, while the "recognizable group" standard has flexibility, there is nothing either to indicate that that standard would be abused or that it could have been more precise (SPA-52). "[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 Ams. v. City of New York, 331 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (quoting Thomas, 534 U.S. at 323); Housing Works, 283 F.3d at 478-79.

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, 408 U.S. at 110 (1972), "[c]ondemned to the use of words, we can never expect mathematical certainty [from] our language." See, e.g., 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); Ward, 491 U.S. at 794 (rejecting facial challenge to the Parks Department's use of 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").

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)). In addition, 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 Ams., 331 F. Supp. 2d at 269, n.2 (noting that the Supreme Court in Thomas discussed the appealability provisions of the Chicago permit scheme).

Further, any argument 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" 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. 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, the

exercise of discretion by a City official in implementing or enforcing the law does not render the regulation of expressive activity unconstitutional. See Ward, 491 U.S. at 794.

CONCLUSION

**THE ORDER APPEALED FROM SHOULD BE
AFFIRMED.**

Dated: New York, New York
November 8, 2007

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CERTIFICATE OF COMPLIANCE

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