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**BY FACSIMILE**

Hon. Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

**5BBC, et al. v. City of New York, et al. 07 Civ. 2448**

Dear Judge Kaplan:

This responds to Defendants' letter and the declaration of Lt. Gannon of April 2, 2007. The record fully supports Plaintiffs' motion for preliminary relief. Nothing in Defendants' letter or declaration undercuts the basis for that relief.

It is undisputed that group bicycling is an expressive, associative activity protected by the First Amendment and by state law. *See, e.g., Transportation Alternatives, Inc. v. City of N.Y.*, 340 F.3d 72, 78 (2d Cir. 2003); *Bray*, 346 F. Supp. 2d at 488; *Times' Up!, Inc.*, 2006 WL 346491, at *9. Plaintiffs have also established beyond question that large group bicycle rides have routinely occurred in the City for many years, safely and without significant disruption to traffic or pedestrians. *See* Pl. Mem. at 40 and declarations cited therein. Against this backdrop, the Gannon Declaration is simply one police officer's personal view that 50 is a reasonable numerical cutoff for requiring group cyclists to get a parade permit. The Constitution requires far more.

The Gannon Declaration does not enable the Parade Rules to withstand strict scrutiny. Defendants concede that strict scrutiny applies to direct and substantial government interference with expressive association, and that such interference can only be justified if shown to "serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms". *See* Opp. Mem. at 12 n.2, citing *Jaycees*, 468 U.S. at 623. The Parade Rules' fixed-route requirement negates Plaintiffs' right to associate through open-route group rides of 50 or more participants, imposing a direct and substantial restriction on Plaintiffs' associational rights. Because Defendants have managed open-route 1,000-person rides using only the existing traffic and other laws — i.e., means "significantly less restrictive" than the Parade Rules — the rules are unconstitutional. *See* Pl. Mem. at 40.

The Gannon Declaration also does nothing to help the Parade Rules under intermediate scrutiny, because it does not show that the rules are narrowly tailored to serve the City's conceded interests in maintaining safety and traffic flow consistent with bicyclists' right to the road. To demonstrate narrow tailoring, the Parade Rules must *(1)* "promote a substantial government interest that would be achieved less effectively absent the regulation," ***and*** *(2)* not be "substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 798. The Gannon Declaration fails to establish that the Parade Rules satisfy either of these requirements as applied to the Plaintiffs, for the following reasons:

- Lt. Gannon has not observed 50-person group rides; he merely extrapolates from 150-person rides he observed on undisclosed dates, *see* Gannon Decl ¶¶ 12-13. His extrapolations do not address to Plaintiffs' group bicycle rides and therefore cannot establish narrow tailoring as to Plaintiffs.

- Lt. Gannon assumes without basis that group bicyclists "tend to try to stay together and disregard traffic regulations in order to do so" (*id.* ¶13), and ignores Plaintiffs' evidence that their group rides proceed lawfully and/or choose to splinter rather than violate traffic rules. *See* Pucher Decl. ¶¶ 69-81. To the extent the Parade Rules are designed to address unlawful conduct, they are overbroad as applied to Plaintiffs' law-abiding group rides.

- Lt. Gannon's assertion that law-abiding 150-person Critical Mass rides he has seen had a "significant impact on the flow of vehicular and pedestrian traffic" merely states the obvious: adding 150 bicyclists into existing traffic adds to congestion. *See* Gannon Decl. ¶ 12. The City does ***not*** have a substantial interest in alleviating traffic congestion for vehicles and pedestrians by imposing permit requirements on law-abiding bicyclists who have an equal right to the road.

- Lt. Gannon's only specific example of how law-abiding group bicyclists negatively impact safety and traffic flow — by requiring other roadway users to slow down before making a lane change — is specious. *See* Gannon Decl. ¶ 14. Lt. Gannon ignores that 5BBC rides proceed with large gaps between bicyclists (*see* Lieberman Decl. ¶¶ 4, 13), and even as to "compressed" rides, the City has no substantial interest in forcing bicyclists to keep their distance from each other so that motorists can freely merge.[1]

- Lt. Gannon's views concerning the need for the Parade Rules' fixed-route requirement are stated in the alternative: he "expect[s]" that "a significant

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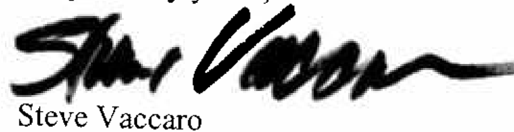
[1] *See* N.Y.S. Dep't Motor Veh. Drivers Manual ch. 4 (On a multilane roadway, "[y]ou may pass other vehicles or change lanes if you can do so safely and not interfere with traffic."), available at *http://www.nydmv.state.ny.us/dmanual/chapter04-manual.htm.*

percentage" of 50-person group rides would have "an impact on pedestrian and/or vehicular traffic that could be lessened with a police escort ***or*** designated route." Gannon Decl. ¶¶ 6, 7 (emphasis added). This statement does not establish that a fixed route requirement promotes any substantial interests. Defendants continue to manage open-route, un-permitted, 50-100 person Brooklyn Critical Mass rides with a minimal police escort, *see e.g.*, Nelson Decl. ¶¶ 28-29 (rides escorted by two scooter-mounted officers).

- Lt. Gannon also fails to address the substantial evidence that NYPD has no interest and sees no need to regulate group bicycle rides other than large Critical Mass rides, proving the overbreadth of rules as applied to other rides:
  - Rides of several hundred bicyclists, such as Professor Jackson's and the 5BBC Montauk Century, have proceeded for decades without drawing NYPD attention, much less requiring permits, *see* Lieberman Decl. ¶¶ 12-14; Jackson Decl. ¶ 10. ***NYPD refused to issue Professor Jackson a permit for his 2005 ride.*** *Id.*
  - NYPD ***did not even bother to show up*** to the permitted February 25, 2007 5BBC ride. *See* Ravin Decl. ¶ 21.

At argument, the Court inquired what distinguishes group bicycle rides from hypothetical group rides of oxen or horse-drawn cabs. There are two key distinctions. ***First***, group bicycle rides are protected by the Constitution. ***Second***, bicyclists have the same right to the road as motorists (VTL § 1231), while oxen are prohibited on City streets, and horse-drawn cabs generally are relegated to Central Park.[2] For these reasons, and the others described above, the Court is likely to find that the Parade Rules do not pass constitutional muster because they burden substantially more protected conduct than is necessary or reasonable to achieve the City's interests.

Respectfully yours,



Steve Vaccaro

cc: Robin Binder

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2 *See* 24 RCNY § 161.01(a) (no "wild animals" in the City except in zoos and like facilities); *id.* § 161.01(a)(15-16) (oxen and other ungulates are "wild animals"); NYCAC § 20-381.1 (horse drawn carriages not allowed beyond Central Park perimeter except on weekends, after 9 pm or en route to or from stables).

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