

PRELIMINARY STATEMENT

Plaintiffs Five Borough Bicycle Club (“5BBC”), Sharon Blythe, Josh Gosciak, Kenneth T. Jackson, Madeline Nelson, Elizabeth Shura, and Luke Son submit this memorandum of law in support of their motion for a preliminary injunction against enforcement of 38 Rules of the City of New York § 19-02, as amended effective February 25, 2007, which governs parades (the “Parade Rules”). As amended, the Parade Rules prohibit 50 persons from bicycling together unless they obtain advance approval of their route and leader from the NYPD through an extraordinarily disorganized parade permit process. Implementation of the Parade Rules should be enjoined because they (1) unduly restrict Plaintiffs’ First Amendment rights to speech, expressive conduct and association, and travel; and (2) are impermissibly vague, allowing Defendants unbounded discretion to enforce the law in an arbitrary and discriminatory manner.

Each year, Plaintiffs and other New Yorkers participate in approximately 1,000 public group bicycle rides, ranging in size from two to 25,000 participants. All but the very largest of these rides proceed as part of ordinary street traffic, without causing any disruption. For Plaintiffs, these rides serve not only as transportation and recreation, but also a means of practicing and expressing a shared lifestyle and set of values. Plaintiffs’ group bicycling involves speech and expressive conduct and association protected by the First Amendment, which may only be restricted by government action narrowly tailored to serve a significant governmental interest. In addition, Plaintiffs’ group bicycling is a form of travel to which Plaintiffs have a fundamental right, which may only be restricted if necessary to achieve a compelling governmental interest.

The Parade Rules violate Plaintiffs' constitutional rights by imposing several requirements on groups of 50 or more bicyclists, including that bicyclists (1) obtain advance approval of their route from NYPD; (2) appoint a "Chief Officer" to be held responsible for group conduct; and (3) be prohibited from most of 5th Avenue and many other roadways, even though portions of them have been designated as bicycle routes.

Defendants assert that the Parade Rules are needed to protect public health and safety and the flow of traffic, but there is no evidence that 50-person bicycle rides implicate those concerns. To the contrary, empirical evidence — including Defendants' own report on bicycling safety — indicates that group bicycling *enhances* safety for bicyclists and pedestrians alike. Law-abiding bicycle rides involving 50, 100 or several hundred bicyclists can and do proceed on City roadways without significantly disrupting traffic. Plaintiffs 5BBC and Jackson have conducted group rides with hundreds of participants for years, without permits and without causing any significant traffic disruption.

Defendants likely will contend that the Parade Rules are necessary to manage "Critical Mass" group rides, which proceed without a fixed route or designated leaders, and can draw more than 1,000 participants. The promulgation of the Parade Rules is merely the latest of Defendants' attempts to suppress Critical Mass, some of which have been rejected by Judge Pauley in the *Bray* litigation, Judge Haight in the *Handschu* litigation, and Justice Stallman in the *Times' Up!* litigation. If it is true that the Parade Rules are needed to manage very large bicycle rides, then the rules represent unconstitutional overkill as applied to the rides of 50 or even several hundred bicyclists.

More fundamentally, the contention is false: Defendants are perfectly capable of managing rides of 1,000 or more bicyclists and have done so, for years, using the existing traffic laws without the need for parade permits. Recent Critical Mass rides estimated at many hundreds of participants have proceeded with minimal if any violations of traffic rules and without bicyclists causing a significant disruption of traffic.

The basic flaw in the Parade Rules is that they impose regulations developed for parades — processions which completely supplant the ordinary flow of traffic — on group bicycle rides that proceed *as* traffic. By requiring bicyclists to follow predetermined routes, the Parade Rules unconstitutionally restrict spontaneity in expression and association, in contravention of the Supreme Court’s holding in *Watchtower*. Imposing a regulatory framework intended for one kind of event upon another very different kind, the Parade Rules inevitably fail to pass constitutional muster.

The Parade Rules are also unconstitutionally vague. Under them, bicyclists’ rights turn on questions such as whether (1) a person is a member of a “recognizable group,” (2) a street is subject to “great traffic or congestion,” or (3) an event is one of “extraordinary interest.” The Parade Rules fail to guide the discretion of officials applying these amorphous concepts, inviting arbitrary and discriminatory application.

Because Plaintiffs have demonstrated a likelihood of establishing that the Parade Rules violate their constitutional rights and are vague on their face, the Court should issue a preliminary injunction that prevents enforcement of the rules.

FACTS

I. Group Bicycling in New York City

New York City is home to more than 120,000 regular daily or weekly bicyclists, the largest such population of any North American city. Declaration of Dani Simons (“Simons Decl.”) ¶ 4; John Pucher et al., *Bicycling renaissance in North America? Recent trends and alternative policies to promote bicycling*, 33 Transportation Research Part A 625 (1999). Through dozens of clubs and associations, these and other bicyclists organize and participate in approximately 1,000 group bicycle rides in New York City offered to the general public each year. Declaration of Daniel Lieberman (“Lieberman Decl.”) ¶ 8; Simons Decl. ¶ 24.

Plaintiffs are individuals and organizations that organize or participate, collectively, in more than 300 of these group bicycle rides each year:

- Plaintiff 5BBC exists to promote group bicycling and organizes approximately 250 group rides each year, many of which are implicated by the Parade Rules. Lieberman Decl. ¶¶ 7, 11.
- Plaintiff Kenneth T. Jackson is a Professor at Columbia University and a preeminent scholar of the City’s history who, since 1975, has conducted his students on an annual group bicycle tour of New York City which is implicated by the Parade Rules. Declaration of Kenneth Jackson (“Jackson Decl.”) ¶¶ 2-3.
- Plaintiffs Sharon Blythe, Josh Gosciak and Elizabeth Shura are New York City bicyclists who desire to participate in Critical Mass and other group bicycle rides but have been, and likely will be, chilled and prevented from doing so by Defendants acting pursuant to the Parade Rules. *See* Declaration of Sharon Blythe (“Blythe Decl.”) ¶¶ 34-36; Declaration of Josh Gosciak (“Gosciak Decl.”) ¶¶ 26-28; Declaration of Elizabeth Shura (“Shura Decl.”) ¶¶ 8-14, 21.
- Plaintiffs Madeline Nelson and Luke Son are New York City bicyclists who participate regularly in Critical Mass and other group bicycle rides

but have been, and likely will be, unlawfully detained, arrested and charged for doing so by Defendants acting pursuant to the Parade Rules. Declaration of Madeline Nelson (“Nelson Decl.”) ¶¶ 19-25; Declaration of Luke Son (“Son Decl.”) ¶¶ 20-23, 25.

A. The Rationale for Group Bicycling.

Plaintiffs ride in groups for several reasons, including to associate with other bicyclists, the desire for enhanced safety, and to advocate for bicycling as a clean and safe alternative to motor vehicle use. Son Decl. ¶¶ 8, 10; Gosciak Decl. ¶¶ 9, 14-15; Declaration of Edward DeFreitas (“DeFreitas Decl.”) ¶¶ 5-6.

1. Group Bicycling as Association.

Plaintiffs organize and participate in group bicycle rides because group rides afford bicyclists the opportunity to converse, cooperate, and otherwise associate with each other. Nelson Decl. ¶¶ 13-14; Blythe Decl. ¶¶ 12-13, 19; Son Decl. ¶ 13. Participants exchange views while they ride, and cooperate by alerting each other to roadway dangers and ensuring that the group stays together. *Id.* ¶ 8; DeFreitas Decl. ¶ 6. This collaborative aspect of group bicycling is reflected in the By-Laws of Plaintiff 5BBC, which make it a “primary goal[]” of the organization to “provide group experiences that develop teamwork and cooperation”. *Id.* ¶ 6 & Ex. B. “Group riding is a unifying force for bicyclists [who] . . . feel a sense of solidarity when riding with a group, aware that the other cyclists will help [if needed].” Gosciak Decl. ¶ 18. In this cooperative spirit, 5BBC ride leaders think of themselves as guides rather than authority figures, and generally are not willing or able to control group ride participants. Declaration of Edward Ravin (“Ravin Decl.”) ¶ 14.

Critical Mass is a broadly popular event that occurs in more than 400 cities worldwide on the last Friday of each month. Sarah Ferguson, *Critical Impasse: With Arrests Growing and Two Cops Hurt, Critical Mass Gets Messy*, The Village Voice, Feb. 21, 2006. Two different Critical Mass rides take place regularly in New York City, one in Manhattan and one in Brooklyn. Critical Mass has no standing organization or leaders; it simply happens. In Critical Mass rides, the riders at the front attempt to determine the route extemporaneously and cooperatively, on a block-by-block basis. Son Decl. ¶ 14; Declaration of Hugh James McGlincy (“McGlincy Decl.”) ¶ 37. The absence of designated leaders allows each participant to shape the tone and route of the ride. Nelson Decl. ¶ 17. Participants have likened this aspect of Critical Mass to a spontaneous, collective decision-making process. Shura Decl. ¶ 16. Critical Mass participants, like 5BBC ride leaders, are not inclined or able to control the behavior of other ride participants. Nelson Decl. ¶ 17. Courts have recognized that “Critical Mass bike rides fall within the expansive sweep of activities deemed ‘expressive association.’” *E.g., Bray v. City of New York*, 346 F. Supp. 2d 480, 488 (S.D.N.Y. 2004).

Because of Critical Mass’s international character, participants feel that they are part of a broader movement, and share a heightened sense of community and purpose:

I have met cyclists from Los Angeles, San Francisco, Seattle, and Austin while riding in Manhattan Critical Mass, and I have friends in London who ride in Critical Mass there. As a result, I feel like I am part of a broader movement when I participate in Critical Mass.

* * *

Before August 2004, participants in Manhattan Critical Mass were diverse in age, gender, class, and ethnicity. The

community spirit among this diverse group was one of the things that I especially enjoyed about the rides. Critical Mass is a celebration of this community.

Blythe Decl. ¶¶ 17, 19; *see also* Son Decl. ¶ 13.

These associative aspects of group bicycling are manifest in the direct, spontaneous, and social experience of the City that participants share. Unlike passengers in a motor vehicle encased in glass and steel, bicyclists are directly exposed to sights and sounds and can directly interact with people they encounter. Gosciak Decl. ¶¶ 4, 16, 19; Jackson Decl. ¶¶ 6-7. Traveling at a slower pace than motorists, and able to quickly dismount and park, bicyclists have a superior opportunity to appreciate context and detail as they explore. Gosciak Decl. ¶¶ 4, 16; Jackson Decl. ¶¶ 6-7. Each participant in a group ride can converse with any other, simply by changing position within the group.

For these reasons, Jackson has for more than 30 years incorporated an extensive bicycle tour of Manhattan into the course he teaches at Columbia University on the History of New York City. *Id.* ¶ 2. Jackson believes the pace, spontaneity, and collegiality of group bicycling make it the ideal method for investigating the City. Jackson has used bus tours, but finds them inferior to group bicycle rides. *Id.* ¶ 6.

In a similar vein, 5BBC conceives of the group bicycle rides it organizes as urban explorations. Ravin Decl. ¶ 5. In a statement of purpose, 5BBC declares: “By means of bicycling trips and related cycling activities, the Club intends to help promote a greater understanding of the world and its people through out-of-doors, educational and recreational travel.” DeFreitas Decl. Ex. B. This exploratory emphasis is evident in the descriptions of many 5BBC group rides, such as the “Queens Brooklyn Mosaic” ride, in

which participants explore different ethnic communities by bicycle, *see* DeFreitas Decl. ¶ 8, and the “Slaves of Sleepy Hollow” ride, in which participants visit an 18th century grist mill formerly powered with slave labor, *see* Ravin Decl. ¶ 13.

2. The Enhanced Safety of Group Bicycling.

Bicyclists in groups not only enjoy a richer social experience, but also are safer than if riding alone. Declaration of John Pucher (“Pucher Decl.”) ¶¶ 21-23. A group of bicyclists is more visible, and hence less likely to be accidentally hit by a motorist, than a solo bicyclist. *See id.*; P.L. Jacobsen, *Safety in numbers: more walkers and bicyclists, safer walking and bicycling*, 9 Inj. Prev. 205-09 (2003). This “safety in numbers” effect also helps reduce the risk of bicyclist-pedestrian collisions as the number and visibility of bicyclists increases. Pucher Decl. ¶ 24. A lone bicyclist is a greater source of danger to pedestrians precisely because the danger arises suddenly and unexpectedly, before the pedestrian can respond. *Id.* ¶ 31.

The enhanced safety of group bicycling is particularly important with bicyclists who are young, elderly, or inexperienced in urban cycling. *Id.* ¶ 26; DeFreitas Decl. ¶ 5. Group rides offer a “safe haven” for these individuals to develop expertise and comfort with the challenges of urban cycling. Declaration of Dani Simons (“Simons Decl.”) ¶ 5; Pucher Decl. ¶¶ 27. Some Plaintiffs brought their minor children to Critical Mass group rides specifically because of the safety in numbers:

Critical Mass provided a rare opportunity for [my daughter and I] to ride together safely in the city because the group of cyclists made us more visible to drivers, and we were protected from cars by the other cyclists around us. Prior to August 2004, I often saw other families with children ride in Critical Mass.

* * * *

[B]icycling can be dangerous for children due to the aggressive nature of the traffic in New York City. . . . I first rode in Manhattan Critical Mass in 2003. I decided to participate because riding with a large group offered a safe way for my daughter to bicycle at night, and I consider bicycling in the city at night to be a unique and valuable experience that I wanted to share with her. It was a safe and worthwhile cycling experience, and my daughter and I rode in Critical Mass frequently over the next year.

Blythe Decl. ¶ 12; Gosciak Decl. ¶¶ 21-22; *see also* Nelson Decl. ¶ 12.

In addition, bicyclists in groups are better able than bicyclists traveling alone to defend their right to proceed safely on the road at a reasonable pace. Shura Decl. ¶ 4. Bicyclists are required to ride as close to the curb “as practicable,” 34 RCNY 4-12(p)(3), but are also directed by the City to keep “at least three feet away from parked cars” to avoid the risk of being “doored.”¹ *See* Son Decl. ¶ 5; Gosciak Decl. ¶ 8. This places bicyclists in or near the middle of a traffic lane, which some motorists find objectionable. Pucher Decl. ¶ 25. Some motorists will tailgate or honk to force a bicyclist toward the curb so the motorist can pass, rather than changing lanes and passing on the left, or waiting for a safe opportunity to pass. Son Decl. ¶ 6; Gosciak Decl. ¶¶ 6-7; Shura Decl. ¶ 3; Blythe Decl. ¶ 7. A bicyclist proceeding in a group rather than alone is less likely to

¹ This directive is found in Defendant’s “NYC Cycling Map 2006,” excerpted below:



Beware of Car Doors
Be wary of parked cars. Motorists can unexpectedly open doors. Be particularly careful if you see a motorist in the car. Ride in a straight line at least three feet away from parked cars.

be forced by motorists into the hazards found at the margin of the roadway, such as vehicle doors, pedestrians, trash or ice. *Id.*; Gosciak Decl. ¶ 9; Shura ¶ 4.

The joint findings of NYPD and several other City agencies are consistent with the evidence that group bicycling increases traffic safety. *See Bicyclist Fatalities and Serious Injuries in New York City: 1996-2005* (2006) (“NYPD Report”), available at <http://www.nyc.gov/html/dot/pdf/bicycletfatalities.pdf>. The NYPD Report presents ten years of bicyclist-related traffic safety data. The Report found that driver inattention was the leading factor contributing to motorist-bicyclist collisions among drivers, underscoring the potential role of group bicyclists’ heightened visibility in increasing safety. *Id.* at 29. The Report identifies a number of factors potentially associated with bicyclist-motor vehicle collisions, but **does not mention group bicycling** as a potential contributing factor to bicyclist fatality or serious injury. *Id.* at 20. The Report also includes a “Special Focus” on pedestrian deaths caused by bicyclists, which likewise does not cite group bicycling as a factor contributing to such deaths. *Id.*

3. Group Bicycling As Expression.

By bicycling, Plaintiffs demonstrate the viability and advantages of bicycling as an urban transportation mode, and raise motorists’ awareness of and respect for bicyclists as equals on city roadways. *E.g.*, Shura Decl. ¶ 17; Gosciak Decl. ¶ 14; Nelson Decl. ¶ 6. Groups of bicyclists are more effective in getting these messages across because groups are more visible and unusual than individuals. *Id.* ¶ 11; Blythe Decl. ¶ 15. Pedestrians clearly recognize that the group shares a purpose in bicycling together, and often will wave and cheer the group on, or engage the group in discussion if it is not moving in

traffic. *Id.* ¶ 18 Nelson Decl. ¶ 12; Gosciak Decl. ¶ 19; McGlincy Decl. ¶ 39. Jackson finds that observers typically are delighted to encounter his rides, and often will honk or cheer in sympathy. Jackson Decl. ¶ 8. The consistency of these reactions from passersby demonstrates that by proceeding together, the bicyclists make an unmistakable statement in favor of bicycling. Nelson Decl. ¶¶ 11-12; Ravin Decl. ¶ 6.

Plaintiffs welcome and encourage these interactions, and will invite onlookers to join them or take the opportunity to explain to inquiring passersby why the group has chosen bicycling as a mode of transport. Gosciak Decl. ¶ 19; Ravin Decl. ¶ 6. Leaders of rides organized by 5BBC typically carry “cue sheets” or other literature concerning 5BBC’s mission of promoting group bicycling, to distribute to those they encounter. *Id.* ¶ 7.

Because sharing the road requires communication, bicyclists’ exchanges with motorists are often more frequent than with pedestrians. Plaintiffs will use hand signals and eye contact to notify motorists of the need to maintain a safe distance and speed. *Id.* ¶ 8; Nelson Decl. ¶ 9. In these ways, group bicyclists convey their right to the road.

Many group bicycle rides also incorporate formalized advocacy. A 5BBC ride entitled “Raiders of the Lost Greenways” was designed as an exploration of portions of Manhattan’s “Greenway” perimeter bike path that had fallen into disrepair. Ravin Decl. ¶ 7 & n.1. Participants received a “cue sheet” that aided them in navigating the various hazards, and urged them to write City officials to demand improvements. *Id.* & Ex. A.

During the ride, participants took photographs, which were posted publicly on the Internet to raise awareness of the City's neglect of its "Lost Greenways." *Id.* ¶ 7 & n.1.²

5BBC also uses group rides as an opportunity to raise funds for general purposes, including advocating for group bicycling. 5BBC raises significant income from its "Montauk Century" ride, the only single-day group ride for which the club charges a registration fee. Lieberman Decl. ¶ 5. Net revenue from the ride is used to promote group bicycling through various means, including public advocacy in 5BBC's newsletter, the Bicycleletter. *Id.* 5BBC representatives have also testified at public hearings. *Id.*

As with other group rides, Critical Mass's message is inherent in its character as a group of bicyclists exercising their right to roadways typically dominated by motor vehicle traffic. Blythe Decl. ¶¶ 14-15. However it is also common for Critical Mass bicyclists to engage in more traditional political advocacy. Bicyclists often chant and sing about the environment or bicycle rights, and distribute literature to those they pass along the way. Nelson Decl. ¶¶ 14-15. Some literature distributed during rides aims to educate passersby about the need for greater accommodation of bicyclists on city streets. One flier, for example, states:

Safety is the No. 1 reason that people don't ride their bikes in NYC. By linking up with others and riding together, we create safety bubbles. This encourages new riders to become more comfortable in their daily commute. It also pushes the city government to create better infrastructure to support safe biking and other nonpolluting transportation.

Id. ¶ 15 & Ex. A.

² A follow-up "Uptown Greenway Inspection Ride" was conducted after the City made improvements. *Id.* ¶ 26.

B. Group Bicycling As Traffic.

Defendants are expected to contend that groups of 50 or more bicyclists create a public hazard and disrupt traffic, necessitating the Parade Rules. As explained below, that contention has no basis in fact, given the traffic characteristics of group bicycle rides.

1. Configuration of Group Bicycle Rides.

Participants in a group bicycle ride form a configuration. Bicyclists may proceed single file with large gaps between riders; they may “mass” into a fully “compressed” configuration; or they may proceed in a configuration somewhere in between. On roadways without bike lanes, bicyclists proceeding single file generally will occupy an entire lane of traffic, to avoid dooring and other hazards associated with riding on the margin of the traffic lane. *See* Pucher Decl. ¶ 19.

A lane of traffic on a New York City multi-lane roadway measures approximately 10 feet wide, Declaration of Katherine Worden (“Worden Decl.”) ¶ 5, and can accommodate bicyclists riding two or three abreast. This is demonstrated in video footage of a group bicycle ride entitled “Ride to End All Wars” held in Manhattan on March 18, 2007. *See* Declaration of Ian Lockwood (“Lockwood Decl.”) ¶ 6; Supplemental Declaration of Eileen Clancy (“Clancy Supp. Decl.”) ¶¶ 6-7 & Ex. A. This group of 47 bicyclists proceeded approximately two to three abreast in a single 10 foot-wide traffic lane on Second Avenue at East 39th Street. *See id.*; Worden Decl. ¶ 5. With the exception of one bicyclist separated from the group, the bicyclists occupied, on average, approximately 36 square feet each. Lockwood Decl. ¶ 13; Pucher Decl. ¶ 81. A group of 55 bicyclists in the same configuration (i.e., each bicyclist occupying 36 square

feet) would fit within a single 10 foot wide traffic lane on one standard city block (approximately 200 feet from crosswalk to crosswalk, Worden Decl. ¶ 6). *Id.* Such a group is not likely to cause any significant disruption to traffic. Pucher Decl. ¶ 82.

Larger rides may occupy more than a single lane of traffic without violating applicable traffic rules. *Id.* ¶ 81. Bicyclists in New York City generally have the same rights and obligations as motorists. N.Y. VTL § 1231 states:

Every person riding a bicycle . . . upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this title, except as to special regulations in this article and except as to those provisions of this title which by their nature can have no application.

Special regulations applicable only to bicyclists include the requirements that bicyclists (1) use bicycle lanes when they are safe and available to use, 34 RCNY § 4-12(p)(1); (2) on roadways greater than 40 feet wide, may stay as close to the left or right curb as is “practicable” (i.e., may stay as far from the curb as is necessary to safely navigate in traffic and avoid dooring and other hazards or obstructions). *Id.* § 4-12(p)(3).

Pursuant to VTL § 1231, bicyclists can lawfully occupy two or more traffic lanes of a roadway. As the portions of the roadway nearest the curb become filled, the remaining bicyclists may take positions progressively closer to the center of the roadway while remaining as “close as practicable” to the curb. Pucher Decl. ¶ 3. Thus the block of Second Avenue where the “Ride to End All Wars” was photographed, which has five traffic lanes approximately ten feet wide, can accommodate 55 bicyclists proceeding in the same configuration per lane. *See id.* ¶ 81. A group of bicyclists that can fit within a

single city block is unlikely to cause a significant disruption to traffic, assuming the bicyclists follow applicable laws. *Id.* ¶ 82.

Group bicycle rides can expand in length beyond a single city block and still proceed lawfully, stopping at all red signals and stop signs. 5BBC favors a stretched out ride configuration, with riders single file or no more than two abreast. Lieberman Decl. ¶ 4. In this configuration, bicyclists use the “point-drop-sweep” system to keep the group together. *Id.* One trained leader (the “point”) leads the ride; another (the “sweep”) rides at the rear to ensure no one is lost; and the remaining riders take turns as “drop” by dismounting at intersections where the ride turns and standing by the side of the roadway to help guide those behind them. *Id.* In this way, the rear portion of the ride may lose visual contact with the “point” due to traffic signals, and yet still remain with the group. The “point” may call compression stops to close up gaps in the ride. *Id.*

The Montauk Century, a large, long-distance ride organized by 5BBC, does not attempt to keep riders together. Lieberman Decl. ¶ 13. Several hundred participants start from Penn Station, and proceed through New York City and on to Montauk. *Id.* ¶ 12. Montauk Century participants arrive starting at 5 am to register, and depart after registration without waiting until all riders have arrived. *Id.* ¶ 13. As a result, the configuration of the Montauk Century on the roadway is a stretched-out series of individuals and clusters with gaps of a mile or more between them. *Id.* Riders in the clusters generally proceed single file or two abreast. *Id.* The clusters divide and combine with each other and with individual participants over the course of their 145 mile journey. *Id.* A cluster might include 50 or more bicyclists. *Id.*

Very large group rides proceeding in a “compressed” configuration can navigate traffic signals in two different ways: They can proceed through red traffic signals to keep the group together, or they can abide traffic signals and allow the group to be divided. NYPD officers escorting such rides often “cork” intersections, positioning themselves in front of oncoming traffic to prevent the group from being divided at traffic signals. Prior to August 2004, NYPD officers corked intersections for Manhattan Critical Mass rides, *Bray v. City of New York*, 356 F. Supp. 2d 277, 286 (S.D.N.Y. 2004), and occasionally allowed bicyclists to cork intersections. Declaration of Kevin Caplicki (“Caplicki Decl.”) ¶ 5. On Brooklyn Critical Mass rides, NYPD officers have always corked intersections and continue to do so. McGlinchy Decl. ¶¶ 15-16, 18, 20, 22, 29-33; Son Decl. ¶ 24; Nelson Decl. ¶ 29. Participants in Manhattan Critical Mass continued to cork intersections after NYPD officers stopped doing so in August 2004, but in February 2006, participants generally stopped corking. Son Decl. ¶ 19; Nelson Decl. ¶ 16. Recent Manhattan Critical Mass rides estimated to include many hundreds of participants have proceeded by stopping at red lights, without the need for corking. Son Decl. ¶ 19.

2. Fixed- and Open-Route Rides.

Rides may proceed along a fixed route agreed upon on by all participants, or on an open-route basis with the leader determining the route extemporaneously. Jackson’s annual group rides always follow a fixed route. Jackson Decl. ¶ 4. 5BBC’s rides usually follow a fixed route as well, but there are exceptions. Ravin Decl. ¶ 11. Many 5BBC rides provide participants with printed directions known as a “cue sheet” (*id.* ¶ 7), but even a ride with a cue sheet often will detour from the specified route in response to

traffic patterns or obstructions, changes in weather, to make food and rest stops, or to visit places or other attractions that participants wish to experience. *Id.* ¶ 10. The ability to detour makes the ride more safe and enjoyable. *Id.*

Critical Mass rides are by definition open-route, lack a fixed destination, and have no designated leaders. Nelson Decl. ¶ 18; Son Decl. ¶ 14. As a result, Critical Mass rides tend to splinter shortly after they begin. *Id.* Only at the beginning of the ride are all participants proceeding together in a single cohesive group. *See id.*; Blythe Decl. ¶ 29.

3. Timing and Size of Group Bicycle Rides.

5BBC group rides typically occur during the day and are roughly evenly split between Saturdays and Sundays. Lieberman Decl. ¶ 7. Jackson's annual group ride is always held at night. Jackson Decl. ¶ 4. The Brooklyn and Manhattan Critical Mass rides are held at 7 pm on the second and the last Friday of each month, respectively. Son Decl ¶ 12.

The size of 5BBC's day trips (excluding the Montauk Century Ride) are difficult to predict in advance. Lieberman Decl. ¶ 10. Pre-registration is not required; participants need only show up at the time and place designated on the 5BBC website. *Id.* While some rides consistently draw groups fewer than 30 participants, there were at least 32 rides that have recently drawn at least 30 participants. *Id.* ¶ 11. Depending upon the weather, any of these 32 rides could draw 50 or more participants. *Id.* The size of the ride may change after the ride begins because participants may join the ride *en route.* *Id.* ¶ 10. If participants turn out for 5BBC rides in roughly the same patterns as in the past,

5BBC anticipates that it will have approximately two to three day trips that will exceed 50 participants during the next 12 months. *Id.* ¶ 11.

In addition to 5BBC day trips and the Montauk Century, one or more of Plaintiffs would like to participate in the following New York City rides which are reasonably likely to draw 50 or more participants:

- Jackson's annual History of New York bicycle tour, which has drawn approximately 250 participants in recent years, Jackson Decl. ¶ 3;
- All of the monthly Manhattan Critical Mass Rides, which in the last year reportedly have ranged from approximately 50 participants in poor weather up to many hundreds of participants in fair weather, Son Del. ¶¶ 15-16;
- Approximately half of the Brooklyn Critical Mass rides held between April and October 2007, Nelson Decl. ¶¶ 25, 27; McGlincy Decl. ¶43; and
- Transportation Alternatives's NYC Century Bike Tour, Tour de Brooklyn and Tour de Bronx Rides, each of which have drawn 1,000 or more participants in recent years, Simons Decl. ¶¶ 7, 22-23.³

II. Defendants' Regulation of Group Bicycle Rides.

A. Defendants' Accommodation and Facilitation of Group Rides.

Prior to August 2004, Defendants had a long history of accommodating group bicycling in New York City, without requiring parade permits. Simons Decl. ¶¶ 11-12. 5BBC and Jackson have both conducted rides in excess of 50 participants for many years without a parade permit, as did Transportation Alternatives prior to August 2004. Lieberman Decl. ¶ 12; Jackson Decl. ¶ 3; Simons Decl. ¶ 8.

³ This is not a complete list of New York City group bicycle rides reasonably likely to draw 50 or more participants.

NYPD not only accommodated, but actively facilitated Brooklyn and Manhattan Critical Mass rides prior to August 2004, by supplying officers on scooters who escorted the ride and corked intersections to keep the bicyclists together and safe from intersection traffic. McGlincy Decl. ¶¶ 15-36, 38. NYPD provided this support without requiring Critical Mass participants to disclose their route or destination in advance, to appoint ride leaders, or to file a parade permit application. McGlincy Decl. ¶¶ 36-38. From approximately 2000 through July 2004, bicyclists' interactions with NYPD officers at Critical Mass rides generally were non-confrontational, with little if any arrest or summons activity. Blythe Decl. ¶ 20; Gosciak Decl. ¶¶ 23-24; McGlincy Decl. ¶¶ 41-42, 44. A similar relationship between NYPD officers and participants in Brooklyn Critical Mass continues to this day. *Id.*

However, on August 27, 2004 — days before the Republican National Convention (“RNC”) was held in New York City — approximately 5,000 bicyclists participated in Manhattan Critical Mass, and the NYPD arrested approximately 264 bicyclists who were later prosecuted in the New York City Criminal Court for various offenses, including, almost without exception, parading without a permit. Oliver Dec. ¶¶ 7-8.⁴

B. Defendants' Post-RNC Crackdown on Critical Mass.

At the Manhattan Critical Mass ride following the RNC, held on September 24, 2004, riders were confronted by a massive police presence. The police arrested eight

⁴ Numerous suits challenging the legality of NYPD's conduct in connection with the RNC protests and arrests are pending. *See, e.g., Schiller v. New York*, 04 Civ. 07921, 2006 WL 2788256 (S.D.N.Y. Sept. 27, 2006) and *Dinler v. New York*, 04 Civ. 07921 (S.D.N.Y. February 17, 2005).

people and seized 40 bicycles, in many cases, by power sawing through bicycle locks. See Colin Moynihan, *Police Sawed Through Locks and Seized Bikes, Riders Say*, N.Y. Times, Sept. 26, 2004, § 1, at 40.

The following month, at the Critical Mass ride held on October 29, 2004, riders were once again met by a large police force — approximately 80-100 police officers on scooters, and more in vans and flying overhead in helicopters. Shura Decl. ¶ 8. As the ride began, the scooter-mounted officers rode alongside the bicyclists. *Id.* ¶ 10. Shortly thereafter, and without warning, the scooter police diverted the bicyclists, splitting them up and containing them in smaller groups. *Id.* ¶ 11. Police then began dragging bicyclists off of their bicycles, arresting them and seizing their bicycles. *Id.* ¶¶ 11-12. Some mass arrestees were charged by officers that had not witnessed their conduct. *Id.* ¶ 14.

Since then, NYPD has continued its efforts to suppress Manhattan Critical Mass through a variety of tactics: extensive video, helicopter and undercover surveillance; aggressive motorized pursuit and containment tactics; and questionable mass arrests. Blythe Decl. ¶¶ 24-25, 31-32; Clancy Decl. ¶¶ 5-13; Pengilly Decl. ¶¶ 10-14; Son Decl. ¶ 20; See Caplicki Decl. ¶¶ 8-10 & Exhibit A. One analysis of the cost of this crackdown on Critical Mass estimates that NYPD spent at least \$1.3 million between September 2004 and August 2006. *Summary of Cost Analysis of Government Expenditures to Suppress Critical Mass Bike Rides*, Nov. 16, 2006, available at

<http://www.streetsblog.org/critical-mass-cost-analysis>. NYPD also sought injunctions against Manhattan Critical Mass in both state and federal court.⁵

Most of NYPD's efforts at suppression have been rejected by courts:

- On February 15, 2007, Judge Haight found that NYPD's surveillance of Critical Mass was unauthorized and unlawful, and directed NYPD to cease. *See Handschu v. Special Svces. Div.*, 2007 U.S. Dist. LEXIS 11260 (S.D.N.Y. 2007), (Mathieu Decl. Ex. E); Clancy Decl. ¶ 5.
- Courts have dismissed approximately 94% of the charges against bicyclists arrested for parading without a permit or disorderly conduct while riding their bicycles in connection with Manhattan Critical Mass for the period of September 2004 through December 2005. Oliver Decl. ¶¶ 7-12; *see, e.g., People v. Barrett*, 821 N.Y.S.2d 416 (N.Y. City Crim. Ct. N.Y. Cty. 2006); *People v. Bezjak*, 812 N.Y.S.2d 829 (N.Y. City Crim. Ct. N.Y. Cty. 2006).
- Beginning in February 2006, NYPD officers wrote scores of tickets to perceived Critical Mass participants for violation of NY VTL § 1234(b) — riding a bicycle more than two abreast — which have all been dismissed, based on Corporation Counsel's concession that Section 1234(b) does not apply in New York City. Oliver Decl. ¶¶ 13-15 & Ex. A.
- Judge Pauley of the Southern District of New York and Justice Stallman of New York Supreme Court each rejected an NYPD request for an injunction against Critical Mass, partly on constitutional grounds. *Bray v. City of New York*, 346 F. Supp. 2d 480 (S.D.N.Y. 2004); *Bray v. City of New York*, 356 F. Supp. 2d 277 (S.D.N.Y. 2004); *City of New York v. Times' Up, Inc.*, 814 N.Y.S.2d 890, 2006 WL 346491, at *9 (Sup. Ct. N.Y. Cty. 2006).

C. The Parade Rules.

1. Regulation of Parades Under N.Y.C. Admin. Code § 10-110.

New York City Administrative Code § 10-110 governs the regulation of parades, and provides: "A procession, parade, or race shall be permitted upon any street or in any

⁵ *See also* Declaration of Emily Mathieu ("Mathieu Decl.") Exs. K, L, M (New York Times coverage of attempts to suppress Critical Mass).

public place only after a written permit therefore has been obtained from the police commissioner.” N.Y.A.C. § 10-110(a). NYPD is required to deny a permit under any of the following circumstances:

- The event seeks the “use of any street . . . which is ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character,” and will occur between the hours of 9:00 am and 6:30 pm, except on Sundays or holidays. *Id.* § 10-110(a)(2).
- The application does not contain information allowing NYPD to “designate specifically the route through which the procession, parade or race shall move.” *Id.* § 10-110(a)(3).
- The application does not designate a “chief officer” of the event who “shall be responsible for the strict observance of all rules and regulations included in said [parade] permit.” *Id.* § 10-110(a)(5).

Participating in an event that requires a permit under Section 10-110, but does not have one, is punishable by “a fine of not more than twenty-five dollars, or by imprisonment for not exceeding ten days,” or by both. *Id.* § 10-110(c).

2. Defendants’ Amendment of 38 RCNY Section 19-02.

N.Y.A.C. § 10-110 does not define what constitutes a “parade.” That definition is set forth in Chapter 19 of Title 38 of the Rules of the City of New York (“RCNY”), which NYPD has rulemaking authority to amend. Prior to January 26, 2007 the RCNY defined a “parade” to mean any march, motorcade, caravan, promenade, foot or bicycle race, or similar event of any kind, upon any public roadway.” 38 RCNY § 19-02.

NYPD officers arrested and charged hundreds of Critical Mass participants with parading without a permit under this definition, but the vast majority of the charges were dismissed. Oliver Decl. ¶ 8. The key legal grounds for dismissal were (1) Critical Mass did not constitute a “parade” within the definition of Section 19-02, and (2) punishing

Critical Mass for parading without a permit would raise serious constitutional issues regarding vagueness, lack of a scienter requirement, and lack of narrow tailoring. *Barrett*, 821 N.Y.S.2d 416, 421-29 (N.Y. City Crim. Ct. N.Y. Cty. 2006); *People v. Bezjak*, 812 N.Y.S.2d 829 (N.Y. City Crim. Ct. 2006). The New York State Supreme Court suggested that the NYPD would need to craft more specific rules in order to regulate Critical Mass as a parade consistent with the federal Constitution. *City of New York v. Times' Up, Inc.*, 814 N.Y.S.2d 890, 2006 WL 346491, at *9. (N.Y. Sup. Ct. 2006); *See* Oliver Decl. ¶ 9.

In July 2006, NYPD proposed to amend § 19-02 to expand the scope of activities covered by the Parade Rules to include, *inter alia*, roadway processions including 20 or more bicycles. Notice of Opportunity to Comment on Proposed Rule (July 2006) (Mathieu Decl. Ex. A). NYPD withdrew its proposal following significant public opposition. *See* Al Baker, *Police Move to Ease Proposed Rules on Permits for Protests*, N.Y. Times, Aug. 19, 2006, at B1. In October 2006, NYPD proposed another amendment to § 19-02, redefining “parade” to include, *inter alia*, roadway processions consisting of a “recognizable group” of 30 or more vehicles or bicycles. Notice of Opportunity to Comment on Proposed Rule (Oct. 2006) (Mathieu Decl. Ex. B). On January 26, 2007, the NYPD published its final proposal redefining “parade” under 38 RCNY § 19-02 (together with Section 10-110, the “Parade Rules”). The Parade Rules define a “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.” Notice

of Adoption (Jan. 26, 2007) (to be codified at 38 RCNY §19-02) (Mathieu Decl. Ex. C). Pursuant to New York City Charter § 1043, the Parade Rules became effective on February 25, 2007, thirty days after publication.

NYPD appended the same Statement of Basis and Purpose to each of its July 2006, October 2006 and January 2007 proposed amendments. That statement reads, in relevant part:

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.

* * *

[A group of 50 bicyclists proceeding together] 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

See Mathieu Decl. Exs. A, B, C.

3. Impact of the Parade Rules on Plaintiffs' Rights.

The Parade Rules transform 50-person group bicycle rides into “parades” subject to a permitting requirement and other restrictions, impacting Plaintiffs as follows:

- Plaintiffs would be required to obtain a parade permit for any rides that appeared reasonably likely to draw 50 participants, and to appoint “Chief Officers” responsible for group conduct on those rides.
- Open-route rides, such as Critical Mass and certain 5BBC rides, would be prohibited because these rides cannot supply a predetermined route.

- Plaintiffs would be prohibited from conducting 50-person group rides on most of 5th Avenue, or during Saturdays on most streets “ordinarily subject to great congestion or traffic,” without mayoral permission.

These restrictions are discussed in greater detail below.

(i) The Parade Permit Application and Process.

Plaintiffs and others have experienced the parade permit process as hopelessly confusing and burdensome. Edward DeFreitas applied for a parade permit for a 5BBC “Frostbite” ride scheduled for February 25, 2007. DeFreitas Decl. ¶ 12. DeFreitas downloaded a permit application from the NYPD’s website and completed it, *Id.* ¶¶ 13-15 & Ex. A. DeFreitas was required to list on the application the width of each roadway the ride would use, information he did not have. *Id.* ¶ 13 & Ex. A. Next to a statement in the application requiring that the ride have a “Chief Officer” who “Shall be Responsible for the Strict Observance of All Rules and Regulations,” DeFreitas wrote a notation reserving his right to challenge this condition. *Id.* ¶ 14 & Ex. A.

The NYPD’s website directs applicants to submit completed applications, regardless of the size of the proposed event, to the Chief of the Department at 1 Police Plaza. DeFreitas Decl. ¶ 15. Those instructions conflict with 38 RCNY § 19-03, which provides that an application for an event involving fewer than 1,000 people must be submitted to the precinct in which the “parade” will form. DeFreitas followed the instructions on the NYPD website, and submitted his application to 1 Police Plaza on February 20, 2007. *Id.*

DeFreitas’ application was refused. *Id.* ¶ 16. In a series of subsequent conversations, DeFreitas was misdirected by NYPD personnel a total of 5 additional

times to the following locations in his attempt to submit his application: the 24th Precinct, the 5th Precinct, Midtown South Precinct, the “Mayor’s Office,” and *back to 1 Police Plaza where his application had already been refused*. *Id.* ¶¶ 15-23.

DeFreitas finally reached Officer Lee (“Lee”), the Community Affairs Officer for the 1st Precinct, who first stated that no permit was necessary for a 50-person bicycle ride. *Id.* ¶ 24. DeFreitas urged Lee to check with his supervisor. *Id.* Lee did so, and then called DeFreitas back and asked him to submit his application. *Id.* ¶¶ 24-25. On February 23, DeFreitas received oral approval of his application from Officer Lee. *Id.* ¶ 26. In all, DeFreitas spent 6.25 hours complying with the parade permit process, as compared to 5.50 hours leading the bicycle ride. *Id.* ¶¶ 27-28.⁶

Plaintiff Jackson has also attempted to obtain a parade permit. Jackson Decl. ¶ 10. In 2005, following the mass arrests of bicyclists at the RNC, Jackson contacted the NYPD precinct in which Columbia is located, and asked to apply for a parade permit for his annual History of New York bicycle tour. *Id.* Jackson spoke to a number of NYPD employees who were unable to assist him in applying for a parade permit. *Id.* Jackson finally reached an employee who, after hearing that Jackson intended to conduct a 250-person bicycle ride starting at the Columbia University campus and ending in Brooklyn, advised him that he did not need to apply for a parade permit. *Id.*

Transportation Alternatives has also participated in the parade permit process. Following the RNC, Transportation Alternatives was directed by City officials to obtain a

⁶ DeFreitas never received a written permit, although N.Y.A.C. § 10-110(a) prohibits “parades” without a “written permit.”

parade permit for its 2005 NYC Century Bike Tour (the “NYC Century”). Simons Decl. ¶ 16. Having been asked to submit an application, Transportation Alternatives did not have difficulty finding an NYPD representative to accept it. A representative of Transportation Alternatives was summoned to a conference regarding its application and told that it must change the NYC Century route it had used for nine of the prior ten annual rides because that route included 5th Avenue. Simons Decl. ¶¶ 10, 17. Pursuant to 38 RCNY § 19-04(d)(viii), parades conducted on 5th Avenue annually since 2001 may be conducted there. *Id.* Transportation Alternatives decided not to challenge the NYPD’s request at that time, and was required to spend fifteen to twenty hours planning a new route for the Century, in addition to the several days it spent completing and negotiating its permit.

(ii) The Route Restrictions On “Parades”.

The Parade Rules ban “parades” on most of 5th Avenue except with mayoral permission, even though 5th Avenue is favored by bicyclists for a variety of reasons. It is marked as a bike route along Central Park and south of 23rd Street, and excludes commercial vehicles which are responsible for a disproportionate number of bicyclist deaths. *See* Pucher Decl. ¶ 65; NYPD Report, at 17-18. In addition, there are only a handful of roadways that actually enter Central Park at 5th Avenue, greatly minimizing interference of cross-traffic with bicyclists proceeding south along the Park perimeter. Pucher Decl. ¶ 65. These features make the traffic flow simpler and safer for cyclists. *Id.*

5th Avenue is also historically and culturally significant. Jackson’s annual bicycle tour includes a one-mile stretch on 5th Avenue during which participants visit the

New York Public Library, Madison Square Park, the Flat Iron Building, and other sites. Jackson Decl. ¶ 4. 5BBC also conducts rides on 5th Avenue due to its architectural significance. Lieberman Decl. ¶ 17 & Ex. A; Ravin Decl. ¶ 27.

In addition to the 5th Avenue ban, the Parade Rules prohibit parades on roadways that are “chiefly of a business or mercantile character” and are “ordinarily subject to great congestion or traffic.” § 10-110(a)(4). Although the phrase “great congestion or traffic” is ambiguous, the New York City Department of Transportation (“DOT”) and the New York Metropolitan Transportation Council (“NYMTC”) classify most of the through and local truck routes in New York City as “congested” or “severely congested.” This suggests that many, perhaps most, 5BBC rides would need to materially change their routes in order to accommodate 50 participants on a Saturday. Pucher Decl. ¶ 64. Since approximately half of the group rides organized by 5BBC and other bicycle clubs in New York City take place on Saturday before 6:30 pm, these route restrictions, if enforced, could reduce club bicycle rides in the City by as much as half. *See* Lieberman Decl. ¶ 7.

ARGUMENT

The Court should enjoin Defendants from implementing the Parade Rules because they are an unconstitutional restraint on Plaintiffs’ rights under the First and Fourteenth Amendments to the U.S. Constitution. Plaintiffs are entitled to a preliminary injunction because they can demonstrate irreparable harm and a likelihood of success on the merits, in this suit challenging “governmental action taken in the public interest pursuant to a statutory or regulatory scheme.” *Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006).

Plaintiffs demonstrate irreparable harm because implementation of the Parade Rules restricts their constitutional rights to travel freely, associate with others and express themselves through group bicycling. Plaintiffs are likely to succeed on the merits of their claims under a strict scrutiny standard of review because the Parade Rules restrict their fundamental right to travel, but are not necessary to achieve a compelling state interest. Alternatively, Plaintiffs' claims will likely prove meritorious under an intermediate standard of review because the Parade Rules are not narrowly tailored to achieve a significant government interest. In addition, Plaintiffs are likely to succeed in demonstrating that the Parade Rules violate due process because they are in several respects too vague to provide reasonable standards for their application.

I. PLAINTIFFS WILL SUFFER
IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF

Plaintiffs' allegations that the Parade Rules deprive them of their First Amendment rights are sufficient to establish irreparable harm. "Violations of First Amendment rights are presumed irreparable." *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000); *see also Bery*, 97 F.3d at 694; *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991). Here, Plaintiffs have made allegations supported by evidence showing that the Final Rules impose a number of concrete and direct burdens on their Constitutional rights exercised within the context of 50-person bicycle rides.

A. The Parade Rules Restrict Plaintiffs' Fundamental Right to Travel.

"The Second Circuit has treated violations of the constitutional right to interstate and intrastate travel the same, finding both to be fundamental rights and subjecting violations of either to strict scrutiny." *Campbell v. Westchester County*, 1998 U.S. Dist.

LEXIS 17757, *2-3 (S.D.N.Y. 1998) (Mathieu Decl. Ex. F); *see also Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990) (acknowledging fundamental right to intrastate travel).

The Parade Rules impose a direct restriction on Plaintiffs' right to travel in groups of 50 or more with an undisclosed route. For years, Defendants' avowed goal has been to suppress such travel by participants in Critical Mass. In *Bray*, Defendants described to the court their plan to corral Critical Mass bicyclists in netting unless the bicyclists agreed to disclose their route in advance through the permit application process. *Bray*, 346 F. Supp. 2d 480. Corporation Counsel warned that "if this group [Critical Mass] doesn't get a permit, [the City will] ***stop this group from riding in its present form. . . . [b]y putting up netting, by keeping people out of the park, by keeping people from leaving the park.*** *Bray*, 12/9/04 Tr. at 223 (emphasis added), (Mathieu Decl. Ex. D). NYPD has on many prior occasions used netting to stop Critical Mass rides. *See infra* § II.C.1.

Defendants now have clarified 38 RCNY § 19-02 and may well seek a state court injunction with which to suppress Critical Mass as they have previously vowed to do, as soon as March 30, 2007, the next scheduled Manhattan Critical Mass ride. The requirement that Plaintiffs seek advance approval of their intended route as a condition of traveling with others, or face detainment in netting for trying, is a grievous violation of the right to travel freely. The route restrictions under § 10-110(a)(2)-(4) further burdens the right to travel on fixed-route rides taking place on Saturdays. Plaintiffs will be irreparably harmed unless Defendants are enjoined from enforcing the Parade Rules.

B. The Parade Rules Restrict Plaintiffs' Expressive Conduct.

The Parade Rules will cause Plaintiffs irreparable harm by limiting their expressive conduct, primarily in two ways. *First*, by requiring fixed routes and a “Chief Officer” for all 50-person bicycle rides, the rules all but eliminate the spontaneity that is a key element of Plaintiffs’ expressive conduct. *Second*, by discouraging rides of 50 or more bicyclists, the rules blunt the impact of Plaintiffs’ expressive conduct.

Courts have recognized that spontaneity is an aspect of expression that is protected by the First Amendment. In *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), the Court invalidated an ordinance that required members of the Jehovah’s Witnesses to register before they could conduct door-to-door solicitation. The Court rejected the permitting scheme because under it “a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor’s permission.” *Id.* at 167. The Court recognized that some “patriot[s]” “have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.” *Id.* at 167. Subsequent courts have applied *Watchtower* to strike down advance permit requirements on non-religious speech because those requirements impeded spontaneous expression. *E.g.*, *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004); *Diener v. Reed*, 232 F. Supp. 2d 362 (M.D. Pa. 2002).

Spontaneity is the defining characteristic of Critical Mass. Nelson and Son both relish the spontaneity of these rides, in which participants do not know from one moment

to the next where they may take the group's pro-bicycling message, or who may be leading them (or led by them). Nelson Decl. ¶¶ 17-18; Son Decl. ¶ 14. Imposing a fixed route and a chief officer on Critical Mass would fundamentally alter the ride and its message. Instead of a statement that bicycles are traffic with an equal right to the road, Critical Mass would simply follow a predetermined route, directed, presumably, by a "Chief Officer," and separated by police from passersby. Nelson Decl. ¶ 18. Like the "patriots" in *Watchtower*, Nelson and Son would rather cease participation in Critical Mass than participate under a fixed route requirement. *Id.*; Son Decl. ¶ 14.

In addition to eliminating spontaneity, the Parade Rules minimize the expressive impact of group bicyclists by imposing burdens for groups of 50 or greater. The larger the group, the more striking it is to passersby. Nelson Decl. ¶ 12. This effect takes ultimate form in Critical Mass rides, in which bicyclists may become, for a few moments, majority users of the roads and are able to realize the bicycle-friendly city that they advocate for and envision. *Id.* at 13. By discouraging group rides of 50 or greater, and imposing requirements that would radically transform or perhaps eliminate Critical Mass, the Parade Rules would cause irreparable harm.

C. The Parade Rules Restrict Plaintiffs' Expressive Association.

Plaintiffs' expressive associations are based on experiences and values shared in bicycling together. Thus in *Bray*, 346 F. Supp. 2d at 488, the court concluded that "[b]ecause they are meant to espouse a view on an issue of public import -- namely, the environment -- the Critical Mass bike rides fall within the expansive sweep of activities deemed 'expressive association.'" Expressive associations may be based on "pursuit of a

wide variety of political, social, economic, educational, religious, and cultural ends.”

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

All of the Plaintiffs’ group bicycle rides manifest expressive association.

Jackson’s History of New York bike tours are composed primarily of Columbia students who accompany Jackson to share his, and each other’s, insights into New York City history and culture. Jackson Decl. ¶ 2. 5BBC day trips make accessible to all New York City bicyclists a similar kind of shared cultural investigation, with a greater emphasis on bicycling. DeFreitas Decl. ¶¶ 7-8; Ravin Decl. ¶ 7. 5BBC’s By-Laws include among the organization’s primary goals the teaching of leadership, cooperation and self-reliance, along with practical skills. DeFreitas Decl. ¶ 6 & Ex. B; Ravin Decl. ¶ 5. This mission marks 5BBC as an expressive association. *See Dale*, 530 U.S. at 649-50 (education, leadership training and inculcation of values marks the Boy Scouts of America as an expressive association). Virtually all of Plaintiffs’ group rides involve private expression among participants jointly pursuing “political, social, economic, educational, . . . and cultural ends.” *Roberts*, 468 U.S. at 622; Blythe Decl. ¶¶ 14-19; Gosciak Decl. ¶¶ 15-22; Nelson Decl. ¶¶ 11-15; Shura Decl. ¶¶ 5, 7; Son Decl. ¶¶ 10, 13.

The Parade Rules interfere with Plaintiffs’ expressive association in a direct and substantial way, causing irreparable harm. *See Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (“To be cognizable, [government] interference with associational rights must be ‘direct and substantial’ or ‘significant.’”) (quoting *Lyng v. Int’l Union*, 485 U.S. 360, 365-67 & n.5). Unlike *Bratton*, which involved a restriction of an activity that was incidental to association, the Parade Rules place direct restrictions on group

bicycling, the very activity that embodies Plaintiffs' expressive association. Those restrictions are substantial, limiting the size of the group, the routes available for use, and imposing a "Chief Officer" responsible for group conduct.

Spontaneity is also an important aspect of expressive association among bicyclists. 5BBC conducts open-route rides in which the unpredictability of the route is an attraction. Ravin Decl. ¶ 12. Though the open-route feature does not have overriding significance as in a Critical Mass ride, it is a manifestation of the group's expressive association that the Parade Rules directly and substantially restrict. The ability to detour from the route to explore unexpected places and attractions is fundamental to expressive association via group bicycling. *Id.* ¶ 11.

5BBC rides require flexibility and spontaneity on a more pragmatic level as well. Because the size of a ride cannot be determined in advance, an advance permitting requirement promises to waste substantial amounts of 5BBC's resources applying for permits that will ultimately not be needed due to turnout under 50 bicyclists. Lieberman Decl. ¶¶ 11, 20. Once the ride begins, ride leaders need the flexibility to detour in response to weather, safety concerns, or simply to investigate something unexpected. Ravin Decl. ¶ 11. Unless NYPD provides an officer able to authorize such detours on the spot — and none was provided in connection with 5BBC's February 25, 2007 ride which had been orally issued a permit — ride participants apparently are bound to inflexibly follow the approved route. *Id.* ¶ 21. Such inflexibility impairs expressive association, is unnecessary and is potentially unsafe when imposed on group bicyclists.

II. PLAINTIFFS WILL LIKELY SUCCEED
ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS.

Plaintiffs challenge the burdens imposed by the Parade Rules on two principal grounds. *First*, insofar as the Parade Rules burden Plaintiffs' fundamental right to travel, the rules are not necessary to achieve a compelling government interest and therefore cannot withstand strict scrutiny. Alternatively, insofar as the Parade Rules burden Plaintiffs' rights of expression and association, they are not narrowly tailored to achieve significant government interests, and therefore cannot survive intermediate scrutiny. *Second*, the rules are vague on their face, failing to provide meaningful guidance to the public officials charged with interpreting and applying them.

A. The Parade Rules' Restriction on the
Right to Intrastate Travel Cannot Withstand Strict Scrutiny.

Courts in the Second Circuit have consistently held that a restriction on the fundamental right to intrastate travel will not be upheld unless it is necessary to promote a compelling government interest. *Maxwell v. City of New York*, 1995 U.S. Dist. LEXIS 5467, *21-24 (S.D.N.Y. 1995) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)), (Mathieu Decl. Ex. G); *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (applying intermediate scrutiny to a curfew on travel by minors, but observing that "were this ordinance applied to adults, it would be subject to strict scrutiny"); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971) (applying strict scrutiny to durational residency requirement for receipt of public benefits).

The Parade Rules cannot withstand strict constitutional scrutiny. As discussed *infra* II.B.2, the Parade Rules do not promote public safety, order or convenience, and therefore are not “necessary” to achieving them. The Parade Rules cannot be “necessary,” because Defendants historically have managed large Critical Mass and other bicycle rides involving more than 1,000 participants without parade permits. *See infra* II.B.1. In addition, the apparent purposes of many of the restrictions in the Parade Rules are not compelling, such as the reduction of Saturday bicycle traffic on roadways that are congested during the week, or the general reduction of congestion on 5th Avenue. *See infra* II.B.2-II.B.3. There simply is no rationale for compelling law-abiding citizens to obtain advance permission from NYPD in order to travel in groups of 50 or more.

B. The Parade Rules Are Not Narrowly Tailored to Serve Any Significant Governmental Interest.

Although Defendants have the authority to “impose regulations in order to assure the safety and convenience of the [city’s] people”, including regulations that restrict the time, manner and place of public assemblies (*Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)), the regulations at issue violate the Constitution because they are not:

(1) content-neutral and (2) narrowly tailored to serve a significant government interest; and (3) do not leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). To be narrowly tailored, a content-neutral regulation must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Id.* at 799. Because prior restraints on First Amendment rights such as those imposed by Section 10-110 are strongly disfavored, *MacDonald*, 206 F.3d at 194, Defendants bear the burden of proving that the Parade

Rules pass constitutional muster. *See Housing Works v. Safir*, 101 F. Supp. 2d 163, 170 (S.D.N.Y. 2000); *United Yellow Cab Drivers Ass'n v. Safir*, 1998 U.S. Dist. LEXIS 7742, at *7 (S.D.N.Y. 1998), (Mathieu Decl. Ex. H).

Defendants cannot satisfy this burden because

- (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 fifty, several hundred, and even more than a thousand can proceed on city streets without having a significant adverse effect on public health, safety or convenience; and
- (3) The imposition on bicyclists of rules designed for traditional pedestrian-and-float parades and political demonstrations inevitably yields a regulatory scheme that is not narrowly tailored.

Accordingly, Plaintiffs are entitled to injunctive relief.

1. The 50-Person Threshold Set By the Parade Rules Is Arbitrary.

There is no basis for the 50-person threshold set by the Parade Rules. This is clear from the evolution of NYPD's seriatim proposals to amend 38 RCNY § 19-02. NYPD first proposed that groups of 20 law-abiding bicyclists should be regulated as a "parade," stating for a basis that such groups have "the likelihood to significantly disrupt vehicular and pedestrian traffic and adversely affect public health and safety." *See* Mathieu Decl. Ex. A. Faced with widespread public opposition, NYPD withdrew that proposal and substituted one with a 30-bicyclist threshold — giving as its basis the identical description of dangers proffered with the earlier, discredited proposal. *See id.* Ex. B. Then, two months after a public hearing on its second proposal, NYPD issued its proposal in the final, current form, with the same recycled Statement of Basis. *See id.*

Ex. C. It is apparent that the NYPD did not craft its proposal based on evidence regarding the respective dangers presented by 20-, 30-, and 50-person groups of bicyclists, but rather on a political calculus as to the lowest possible threshold that might be established.

Applicable law requires that the NYPD's threshold be justified in light of the governmental interests at stake, not political considerations. "[T]he government must go a great distance to justify a parade registration scheme," and will fail if it makes simple assertions without any empirical basis. *NAACP v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984). Arbitrary limits are overbroad and will not be enforced. *Rock Against Racism v. Ward*, 658 F. Supp. 1346, 1359 (S.D.N.Y. 1987).

Even if some regulation arguably is necessary, the *particular* limit chosen must be justified. In *Ward*, NYPD imposed a limit of 3,000 participants at a rock concert held at the Bandshell in Central Park. *Id.* at 1358. The Court acknowledged that there was "surely some justifiable limitation available to meet the City's legitimate interest in keeping the area beyond the Bandshell clear for pedestrian traffic," but refused to uphold NYPD's proposed limit of 3,000 because "the City ha[d] not yet determined what that justifiable limitation is." *Id.* at 1359. Here, it is apparent that Defendants have no basis for their claim that 50 people riding bicycles together present a danger or disruption unless subject to a permit process.

Courts in this district have not hesitated to strike on narrow tailoring grounds numerical limits or thresholds in permitting schemes that are not supported by particularized evidence. *United Yellow Cab Drivers Ass'n v. Safir* exemplifies the

rejection of arbitrary numerical limits on expressive parading in the public streets. *United Yellow Cab* 1998 U.S. Dist. LEXIS 7742 (S.D.N.Y. May 27, 1998). There, New York City taxi cab drivers moved for a preliminary injunction to block police from interfering with their plan to protest proposed taxi regulations by driving in a procession of 250 to 500 cabs from Long Island City to City Hall. *Id.* at *1. In response to the motion, the NYPD told the court that it wished to limit the procession to twenty cabs. *Id.* at *9. The Court found that the NYPD had “shown no support for such a small figure” and issued the preliminary injunction in favor of the drivers. *Id.*; *see also Housing Works*, 101 F. Supp. 2d 163 (permanently enjoining implementation of regulation limiting assemblies on City Hall plaza to 50 people); *Local 32B-32J, Svces. Employees Int’l Union v. Port Auth. of NY & NJ*, 3 F. Supp. 2d 413, 422-23 (S.D.N.Y. 1998) (invalidating unsubstantiated limits on expressive activity at Port Authority Bus Terminal and World Trade Center). Based on the lack of evidence supporting Defendants’ 50-person threshold, Plaintiffs are entitled to the same finding here — that the Parade Rules are arbitrary and overbroad, and their implementation should be enjoined.

The arbitrariness of the 50-person threshold is further demonstrated by the NYPD’s historical willingness and ability to accommodate 50-person and even much larger bicycle rides without permits. In rejecting NYPD’s repeated efforts to enjoin Critical Mass, the court in *Times’ Up* emphasized NYPD’s past facilitation of Manhattan Critical Mass rides involving hundreds and thousands of bicyclists. *City of New York v. Times’ Up, Inc.*, 814 N.Y.S.2d 890, 2006 WL 346491, at *11 (N.Y. Sup. Ct. Feb. 14, 2006). “Given that Critical Mass rides have taken place for many years without prior

incident . . . plaintiffs' claims of traffic problems invite some skepticism." NYPD has allowed countless group bicycle rides with 50, hundreds, and even thousands of participants, to proceed without permits. These rides include:

- Monthly Manhattan Critical mass rides conducted prior to August 2004. *Bray v. City of New York*, 346 F. Supp. 2d 480, 483-84 (S.D.N.Y. 2004); Transcript of Record, Dec. 8, 2004, at 72-75, *Bray v. City of New York*, 356 F. Supp. 2d 277 (S.D.N.Y. 2004).
- Monthly Brooklyn Critical Mass rides from September 2004 through the present, which include 50-100 participants approximately 3 times a year. Nelson Decl. ¶ 28; Son Decl. ¶ 15; McGlinicy Decl. ¶ 43.
- Jackson's History of New York City bicycle tours, which included approximately 250 participants in recent years, 100 to 200 participants throughout the 1990s, and more than 80 participants throughout the 1980s. Jackson Decl ¶ 3.
- 5BBC's Montauk Century ride, which typically includes hundreds of participants in its New York "leg" starting at Penn Station. Lieberman Decl. ¶ 12.
- 5BBC's day trips, several of which include 50 or more participants. *Id.* ¶ 11.
- Transportation Alternatives's NYC Century from 1993 through 2005, and its Tour de Brooklyn in 2005 and 2006, each of which have drawn more than 1,000 participants. Simons Decl. ¶¶ 8, 22.

The court in *Times' Up* was justifiably skeptical of NYPD's claims, as are most courts when confronted with the argument that prior restraints on protected conduct are necessary despite the fact that the same activity previously was managed without them. "[C]ourts in this Circuit have consistently held that numerical limits on First Amendment activity are not narrowly tailored when it has been shown that the government has sanctioned activity beyond the numerical limits prescribed in the policy." *Housing Works v. Safir*, 1998 U.S. Dist. LEXIS 10962, at *10 (S.D.N.Y. 1998) (Mathieu Decl. Ex.

I). *See, e.g., Bery*, 97 F.3d at 697-98 (limit on vending licenses not narrowly tailored where city made exception to rule and granted additional licenses); *Housing Works*, 101 F. Supp. 2d at 170-71 (50-person limit on assembly at City Hall plaza not narrowly tailored where city permitted numerous previous events on plaza with larger groups); *United Yellow Cab*, 1998 U.S. Dist. LEXIS 7742, at *10 (20-car limit on taxicab procession not narrowly tailored where NYPD allowed four previous processions of larger numbers of cabs); *Rock Against Racism*, 658 F. Supp. at 1358-59 (3,000 person limit on concerts in Central Park not narrowly tailored where city previously permitted over 4,000 people at similar events).

NYPD cannot contend that permitting requirements and other restrictions are necessary in order to accommodate and manage 50-person bicycle rides, when it has accommodated and managed such rides so often in the past — and continues to do so in the present — without prior restraints. Because the 50-person threshold has been empirically proven unnecessary and will burden substantial amounts of protected conduct, implementation of the Parade Rules should be enjoined.

2. Fifty Person Bicycle Rides
Enhance Safety and Do Not Disrupt Traffic.

Even if Defendants were able to gather some evidence to support their traffic flow and public health and safety concerns, that evidence would be far outweighed by the affirmative evidence to the contrary showing that law-abiding bicyclists in groups of 50 or several hundred or even more than a thousand do not implicate those concerns.

Rather, available scientific evidence and common sense show that group bicycling leads to “safety in numbers” for bicyclists and pedestrians alike. P.L. Jacobsen,

Safety in numbers: more walkers and bicyclists, safer walking and bicycling, 9 Inj. Prev. 205-09 (2003); Pucher Declaration ¶¶ 21-29. Bicyclists in a group educate and alert each other regarding roadway dangers and are able to hold a lane of traffic, discouraging motorists from attempting to push them toward the hazards at the margin of the roadway. *E.g.*, Son Decl. ¶ 8. They are more visible, and so less likely to fall victim to motorist inattention, which is the leading causal factor attributed to motorists in bicycle-vehicle collisions. NYPD Report at 29. A group of bicyclists are more visible to pedestrians as well, and therefore less likely to be a cause of pedestrian injuries. Pucher Decl. ¶ 31.

Empirical evidence confirms that there is “safety in numbers.” The NYPD Report contains an extensive analysis of every reported collision involving a bicyclist from 1995 through 2005, and yet it does ***not once mention group bicycling as a factor in any collision***. Plaintiffs are aware of significant injuries that have occurred as a result of Critical Mass rides, but both were caused by police, not bicyclists.⁷ There is no reason to assume that any of Plaintiffs’ rides present a danger to public safety that cannot be managed through existing traffic rules and laws. *See* Pucher Declaration ¶¶ 71, 73, 77.

Fifty-person bicycle rides do not disrupt traffic, either. Approximately 55 bicyclists can fit within a single 10 foot lane of traffic on a standard city block (measured from crosswalk to crosswalk). Pucher Decl. ¶ 81. More than 100 bicyclists can fit within two lanes of a single block and proceed lawfully without disruption to intersecting traffic.

⁷ These are (1) the injury resulting when two scooter-mounted officers were injured when they collided with each other while performing a dangerous containment maneuver against the bicyclists, *see* Son Decl. ¶ 20-21; and (2) the cyclist that broke her collarbone after a collision with the door of a police car in May 2006, *see* Ben McGrath, *Holy Rollers*, *The New Yorker*, Nov. 13, 2006.

Id. Larger groups riding in a stretched out configuration are similarly unlikely to cause significant disruption to traffic. *See* Pucher Decl. ¶ 73.

Even very large groups of riders, such as the Manhattan Critical Mass rides conducted in summer 2006, can and do proceed lawfully without significantly disrupting intersecting traffic — by stopping at red traffic signals, and then re-uniting with or splintering off from the group ahead of them after the signal changes to green. *Son Decl.* ¶ 19. Corking may facilitate large rides, Pucher Decl. ¶ 77, but it is not necessary. If group ride participants intend to proceed lawfully, there is no reason to assume that they will disrupt traffic. Pucher Decl. ¶¶ 71, 73, 77; *see United Yellow Cab Drivers Ass'n*, 1998 U.S. Dist. LEXIS 7742, at *8 (allowing protest in the form of a 250-500 car motorcade based partly on plaintiffs’ assertion that “they will comply with the traffic and parking regulations of the City . . . and will not engage in an effort to create traffic congestion, or make Manhattan a parking lot”).

The fact that bicycles proceed more slowly than motor vehicles does not mean that a “disruption” of traffic occurs behind them. There is no minimum speed limit in New York City, and under applicable law bicyclists have an equal right to be on the road without being held to “automotive speeds.” *See Secor v. Kohl*, 67 A.D.2d 358, 362-63 (App. Div. 2d Dep’t 1979) (holding that VTL provision “gauged to automotive speeds” did not apply to “bicyclists riding in the flow of motor vehicle traffic” given the “much lower speeds of bicycles”). Despite their slower speeds, bicycles can carry seven times more people through a lane of traffic in a given period of time than cars can, because bicycles occupy so much less volume than cars. Pucher Decl. ¶ 47. There is no basis for

characterizing the movement of people by bicycles instead of cars as a “disruption” of traffic, particularly when the NYPD Report has set as a goal that bicycling in New York City be increased. NYPD Report at 3.

3. Group Bicycle Rides Are Not Parades
And Can Be Managed With Traffic Laws.

The lack of narrow tailoring in the Parade Rules results inevitably from the fact that the rules were designed to manage traditional pedestrian-and-float parades and political demonstrations, not group bicycle rides. The differences between these types of events could not be more apparent. Each failure of the Parade Rules to account for those differences demonstrates a lack of narrow tailoring:

- Group bicycle rides do not supplant traffic, but proceed as traffic. Therefore police do not need to know the route group bicyclists will take in advance, because there is no need to divert traffic. Pucher Decl. ¶ 77.
- Because group bicycle rides proceed as traffic, they can be managed with ordinary traffic and other laws, without the need for special permitting requirements or a “Chief Officer” to enforce rules and regulations specific to the “parade.” *See id.* ¶¶ 69-77; *cf. Times’ Up*, 814 N.Y.S.2d 890 (“[the City’s] arguments do not show that existing means of enforcing traffic laws and regulations are inadequate to address the alleged traffic problems.”).
- The “Chief Officer” requirement is particularly inappropriate for 5BBC and Critical Mass group bicycle rides, in which each participant is deemed responsible for his or her own conduct, and cooperation among equals is the key principle underlying participants’ expressive association. *See Shura Decl* ¶ 16; *Nelson Decl.* ¶ 17; *Son Decl.* ¶ 14; *Ravin Decl.* ¶ 22.
- Because group bicycle rides draw few if any spectators and do not necessitate roadway closures, they do not burden the local communities and roadways through which they pass, making the 5th Avenue and other route restrictions of Section 10-110 unnecessary. *See International Action Ctr. v. City of N.Y.*, 2006 U.S. Dist. LEXIS 93387, at *10-11 (S.D.N.Y. Dec. 26, 2006) (rationale for 5th Avenue parade ban is to avoid “overtaxing” community near 5th Avenue) (Mathieu Decl. Ex. J).

- Blanket, round-the-clock route restrictions on group bicycle rides are inappropriate because some rides, like Jackson’s, are held late at night when there is little or no traffic. *See* Jackson Decl. ¶ 4.
- The 5th Avenue ban is particularly inappropriate because 5th Avenue is the safest and most desirable on-street southbound route for most group bicycle rides; banning group bicyclists from 5th only imposes added danger on them without serving any useful purpose. *See id.* ¶¶ 4-5; Pucher Decl. 65 ¶; Simons Decl. ¶¶ 18-19; Ravin Decl. ¶ 27.
- Because group bicycle rides occur much more frequently than traditional parades — approximately twenty rides per week on average throughout the year — NYPD’s Kafkaesque parade permit process burdens bicyclists far more heavily than organizers of annual parades or ad-hoc political demonstrations, for no apparent purpose. *See* DeFreitas Decl. ¶¶ 15-29; Lieberman Decl. ¶¶ 15-16; Ravin Decl. ¶¶ 19-20, 23-26; Gosciak Decl. ¶ 31.
- The permitting requirement falls even more heavily on Critical Mass, which has no organizer or standing organization. While those who advertise Critical Mass are technically capable of applying for a permit, there is no reason to believe any advertiser would agree to provide a responsible “Chief Officer” and route for Critical Mass, only to have ride participants repudiate them.

C. Section 10-110 and The Parade Rules Violate Due Process Because They Are Facially Vague.

The Parade Rules violate the Due Process Clause of the Fourteenth Amendment because in several respects they are so vague that they “authorize[] or even encourage[] arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Vagueness is “particularly troubling” where, as here, First Amendment rights are involved. *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006).

In a case involving a similar attempt by the City to impose a numeric cap on public assemblies, the court observed that “restrictions on the right to free speech or assembly must not be so vague as to afford unbridled discretion to the government

authority seeking to abridge those rights.” *Housing Works v. Safir*, 101 F. Supp. 2d at 167-68 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969)). To pass constitutional muster, prior restraints on public speech or processions must contain “narrow, objective, and definite standards to guide” the appropriate government authority. *Shuttlesworth*, 394 U.S. at 150-51. Standards that “involve[] appraisal of facts, the exercise of judgment, [or] the formation of an opinion” fail this test. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992).

The Parade Rules contain three provisions that are unreasonably susceptible to arbitrary and discriminatory enforcement: (1) the “recognizable group” standard of § 19-02(A); (2) the “events of extraordinary interest” standard of § 10-110(a)(4) and § 19-01(b); and (3) the “ordinarily subject to great traffic and congestion” standard of § 10-110(a)(2).

1. The “Recognizable Group” Standard Is Vague.

The Parade Rules define 50 or more bicyclists proceeding together as a “parade” if they are a “recognizable group.” No guidance is provided for determining the membership of a “recognizable group,” inviting arbitrary or discriminatory enforcement against any person with a bicycle in proximity to others with bicycles. The “recognizable group” standard fails the *Forsyth* test in all three ways: It forces members of the NYPD, without any guidance, to appraise facts (by engaging in an on-the-spot head count of group ride members), exercise judgment (by deciding which riders are actually part of the group ride), and form an opinion (as to which riders should be arrested and/or ticketed for parading without a permit). *Forsyth County*, 505 U.S. at 131.

The danger of arbitrary enforcement is not hypothetical. Prior to January 25, 2007, 38 RCNY § 19-02(a) did not specify what number of bicyclists proceeding together constituted a “parade.” Under that standard, NYPD arrested numerous bicyclists who simply happened to be in the “wrong place at the wrong time” and found themselves caught in the NYPD dragnet. David Pengilly, an editor at Business Week magazine, was arrested on May 27, 2005 near Times Square, simply because he was on his bicycle in an area where NYPD was searching for Critical Mass participants:

I saw that a plastic, orange-mesh barrier had been stretched across Seventh Avenue . . . Not wanting to go this way, I slowed down and moved to the west side of the avenue, hoping to get to the sidewalk so I could get away from the rider[s] and walk to Ninth Avenue.

All of a sudden, a policeman took hold of my arms from behind and said: “You’re under arrest.”

In a quiet, steady voice, I replied: “Officer, I think you’re making a mistake. I wasn’t part of the ride. I’m just trying to get home from work.”

The policeman bellowed: “I DON’T KNOW THAT, DO I? YOU’RE UNDER ARREST NOW.”

Declaration of David Pengilly (“Pengilly Decl.”) ¶¶ 10-13.

Pengilly’s is not an isolated case. Repeatedly, NYPD officers have arrested bicyclists based on the apparent principle that any person on a bicycle in the vicinity of a group bicycle ride is part of the group. Another bicyclist, Neal Aldrich was caught in a similar NYPD dragnet on March 25, 2005 on his way home alone by bicycle from the beach. Declaration of Neal Aldrich ¶¶ 8-12; *see also* Declaration of Stuart Desser ¶¶ 4-13 & Ex. A (group of bicyclists detained by police near Union Square).

The indiscriminate arrests by NYPD in the vicinity of Critical Mass have caused some residents living near Union Square be chilled from riding their bicycles when Critical Mass rides are in progress, for fear of false summons or arrest. *Id.* ¶ 13. This danger of chilling lawful, protected conduct through application of a criminal law that does not require scienter was foreseen by the court in *Barrett*, which dismissed NYPD's charges for parading without a permit against Critical Mass bicyclists. *People v. Barrett*, 821 N.Y.S.2d 416 (Crim Ct. N.Y. Cty 2006). Because Section 10-110 punishes group members whether they know they breaking the law or not — and even if they are misled into believing that the event they joined had a permit — it impermissibly chills bicyclists from joining group rides:

A New Yorker – or even a mere visitor to our city – who sees a march and joins it spontaneously runs the risk of being sentenced to 10 days in jail for violating the Parading Law, as does the casual cyclist who comes abreast of a group of cyclists and joins them. This risk would certainly chill the potential participant's willingness to join the march or the larger group. Therefore, the Parading Law's imposition of strict criminal liability would require a finding that [NYAC] §10.110 is unconstitutional, had I found that defendants were within its reach.

Id. at 428-29.

NYPD's infiltration of group rides with undercover police officers posing as bicyclists increases the chance of wrongful arrests under the "recognizable group" standard. This infiltration practice has been observed by Critical Mass participants and others and widely reported in the press. *N.Y.C. Police Surveillance* (New York Times video report by Jim Dwyer, Dec. 22, 2005), available at http://video.on.nytimes.com/?fr_story=8be43bbe911fe4027477fad3f56017ec4672d86c; Jim Dwyer, *Police Infiltrate*

Protests, Videotapes Show, N.Y. Times, Dec. 22, 2005 (Mathieu Decl. Ex. L) (“Dwyer”); Clancy Decl. ¶¶ 5-13; Caplicki Decl. ¶ 12; Oliver Decl. Exhibit B, at ¶¶ 24-26, 55-58, 79, 81, 122. NYPD infiltrators have participated in rides as small as 15 bicyclists, *see* Dwyer, and have mistakenly been “arrested” by uniformed NYPD officers who do not recognize them. Dwyer, *supra*; Oliver Decl. Exhibit B, at ¶¶ 69-70, 110, 129-140. The vague “recognizable group” standard set by the Parade Rules would allow the arrest of group bicyclists proceeding lawfully without a permit but for the presence among them of NYPD undercover agents pushing the group over the 50-person threshold.

The “recognizable group” standard does nothing to prevent further mistaken arrests such as Pengilly’s and Aldrich’s, because criminal liability is based on an officer’s subjective view as to who belongs to the group. Absent a scienter requirement or an explicit standard for determining group membership, Section 10-110 essentially becomes a prohibition on possessing a bicycle near 49 other people who also do. Such a vague prohibition will inevitably result in punishing the innocent for lawful conduct.

2. The “Extraordinary Event” Standard of 38 RCNY § 19-01(b) Has Already Been Applied in an Arbitrary and Discriminatory Manner.

The ban on “parades” on 5th Avenue that have not been in existence since 2001 has an exception for “events of extraordinary interest” receiving mayoral permission. Section 10-110(a)(4). This phrase is defined in 38 RCNY § 19-01(b) to include “celebrations organized by the City honoring the armed forces; sports achievements or championships; world leaders and extraordinary achievements of historic significance.”

Defendants have applied this “extraordinary events” standard in an arbitrary and discriminatory way that renders it devoid of meaning and a tool for effecting viewpoint

discrimination. For example, NYPD allowed an “Olympic Relay” in connection with the 2004 Olympics, an August 29, 2004 peace march, and a December 16, 2006 demonstration concerning the Sean Bell shooting to take place on 5th Avenue.⁸

The mayoral permission given to these events cannot be squared with any reasonable interpretation of RCNY § 19-01(b). Jackson and Ravin should not be required to justify the group bicycle rides they intend to conduct on 5th Avenue later this year as “events of extraordinary interest,” when it is apparent that permission to use 5th Avenue for “parades” is given out according to an entirely different, unwritten standard.

3. The “Great Congestion or Traffic” Standard Is Vague.

Section 10-110(2) prohibits group bicycle rides on Saturdays on roadways “ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character.” This prohibition is hopelessly vague when interpreted in the disjunctive to mean “ordinarily subject to great . . . traffic and chiefly of a business . . . character.” If this provision is given its plain meaning, virtually every Avenue and many other major roadways in New York City would qualify (Pucher Decl. ¶ 64). Defendants would have the practical ability to force 50-person group bicycle rides held on Saturdays (which constitute up to 50% of many club-sponsored group bicycle rides) off the roads completely. *See* Lieberman Decl. ¶ 7. If Section 10-110(2) is not given its plain meaning, NYPD would still be left with unfettered discretion. Absent narrow, objective and definite standards, Section 10-110(2) vests the NYPD with too much discretion to grant

⁸ *See International Action Center v. City of New York*, 2006 U.S. Dist. LEXIS 93387 (S.D.N.Y. Dec. 26, 2006) (Olympic Torch Relay given permission to use 5th Avenue in 2004). There are conflicting reports as to whether the Sean Bell demonstration received a permit.

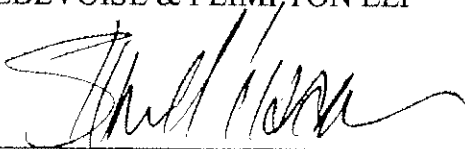
or deny parade permits to 50-person group rides, based on a subjective determination of the degree of traffic on the proposed route.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion for a preliminary injunction be granted in its entirety.

Dated: New York, New York
March 27, 2007

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