

07-2154-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



FIVE BOROUGH BICYCLE CLUB, SHARON BLYTHE, JOSH GOSCIAK,
KENNETH T. JACKSON, MADELINE NELSON, ELIZABETH SHURA,
and LUKE SON,
Plaintiffs-Appellants,
—against—

THE CITY OF NEW YORK, RAYMOND KELLY, POLICE COMMISSIONER OF THE
NEW YORK CITY POLICE DEPARTMENT, JAMES TULLER, COMMANDING
OFFICER, PATROL BOROUGH MANHATTAN SOUTH and LT. JOHN DOE and
CAPTAIN JANE DOE, NEW YORK CITY POLICE DEPARTMENT,
Defendants-Appellees.

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

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES..... 1

CORPORATE DISCLOSURE STATEMENT 2

STATEMENT OF JURISDICTION..... 3

STATEMENT OF THE CASE..... 4

STATEMENT OF FACTS 8

 I. Background 8

 II. Group Bicycling in New York City 9

 A. 5BBC’s Group Bicycle Rides 10

 B. Professor Kenneth Jackson’s Annual Bicycle Tour 11

 C. Critical Mass Bicycle Rides..... 12

 III. Constitutional Dimension of Group Bicycling 13

 A. Group Bicycling As Constitutionally-Protected
 Expression 13

 B. Group Bicycling as Constitutionally-Protected
 Association..... 15

 IV. The City’s Regulation of Group Bicycle Rides 16

 A. The City’s Accommodation of Group Rides 16

 B. The City’s Post-RNC Crackdown on Critical Mass..... 17

 C. The Parade Rules 19

 (i) Regulation of Parades Under NYCAC § 10-110 19

 (ii) The Amendment of 38 RCNY Section 19-02 20

V.	Appellants’ Preliminary Injunction Motion.....	20
A.	Impact of the Parade Rules on Appellants’ Rights.....	21
(i)	The Permit and Chief Officer Requirements.....	21
B.	Impact of Group Bicycling on Traffic Flow and Public Safety.....	23
VI.	The Proceedings in the District Court.....	24
VII.	The District Court’s Opinion.....	26
	SUMMARY OF ARGUMENT	29
	ARGUMENT	32
I.	THE DISTRICT COURT ERRED IN FAILING TO ADDRESS THE BURDEN IMPOSED BY THE PARADE RULES ON PROTECTED EXPRESSION THAT DOES NOT IMPLICATE THE CITY’S INTERESTS.....	32
A.	The District Court Failed to Properly Apply <i>Ward’s</i> Narrow Tailoring Requirement.....	33
B.	The District Court Failed to Properly Apply <i>Ward</i> to Undisputed Evidence Regarding Appellants’ Law- Abiding Weekend and Late-Night Group Bicycle Rides	37
(i)	Appellants’ Group Bicycle Rides, Most of Which Occur on the Weekends and Late at Night, Do Not Implicate Traffic Flow or Public Safety	38
(ii)	The Court Failed to Properly Apply the Law or Independently Evaluate the Evidence In Connection with Appellants’ Law-Abiding Weekend and Late-Night Group Bicycle Rides	43
C.	The City Failed to Establish That Any Law-Abiding 50- Person Group Bicycle Rides Implicate Substantial Government Interests.....	46

D.	The District Court Disregarded The Substantial Burdens Imposed By The Parade Rules	50
(i)	Permit Requirement Is Burdensome.....	50
(ii)	Fixed Route and “Chief Officer” Requirements Are Burdensome	53
II.	THE PARADE RULES IMPOSE AN ACTIONABLE BURDEN ON THE RIGHT TO TRAVEL	58
III.	THE PARADE RULES IMPOSE AN ACTIONABLE BURDEN ON THE RIGHT TO ASSOCIATE	60
	CONCLUSION	62
	ADDENDUM	63
	New York City Administrative Code § 10-110	63
	38 Rules of the City of New York § 19-02(a).....	66
	New York State Vehicle and Traffic Law § 1231	67

TABLE OF AUTHORITIES

FEDERAL CASES

<i>American-Arab Anti-Discrimination Comm. v. City of Dearborn</i> , 418 F.3d 600 (6th Cir. 2005).....	36, 51, 52
<i>Bery v. City of New York</i> , 97 F.3d 689 (2d Cir. 1996).....	29
<i>Bray v. City of New York</i> , 346 F. Supp. 2d 480 (S.D.N.Y. 2004)	12, 15, 17, 46
<i>Bray v. City of New York</i> , 356 F. Supp. 2d 277 (S.D.N.Y. 2004)	19, 46
<i>Campbell v. Westchester County</i> , No. 96 Civ. 0467, 1998 U.S. Dist. LEXIS 17757 (S.D.N.Y. Nov. 10, 1998)	58
<i>Disabled American Veterans v. United States Dep’t of Veterans Affairs</i> , 962 F.2d 136 (2d Cir. 1992)	56
<i>Deegan v. City of Ithaca</i> , 444 F.3d 135 (2d Cir. 2006)	44
<i>Diener v. Reed</i> , 232 F. Supp. 2d 362 (M.D. Pa. 2002).....	54
<i>Dinler v. City of New York</i> , No. 04 Civ. 07921 (KMK), 2006 WL 2788256 (S.D.N.Y. Sept. 27, 2006).....	17
<i>EM Ltd. v. Republic of Arg.</i> , 473 F.3d 463 (2d. Cir. 2007)	29
<i>Fighting Finest, Inc. v. Bratton</i> , 95 F.3d 224 (2d Cir. 1996)	61
<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123 (1992)	40
<i>Grossman v. City of Portland</i> , 33 F.3d 1200 (9th Cir. 1994).....	36
<i>Handschu v. Special Servs. Div.</i> , 475 F. Supp. 2d 331, 2007 U.S. Dist. LEXIS 11260 (S.D.N.Y. 2007)	18

<i>Handschu v. Special Servs. Div.</i> , 71 Civ. 2203 (CSH), 2007 U.S. Dist. LEXIS 43176 (S.D.N.Y. June 13, 2007)	18
<i>Hutchins v. Dist. of Columbia</i> , 188 F.3d 531 (D.C. Cir. 1999).....	60
<i>Johnson v. City of Cincinnati</i> , 310 F.3d 484 (6th Cir. 2002)	60
<i>Lyng v. Int’l Union</i> , 485 U.S. 360 (1998)	61
<i>Marinaccio v. Boardman</i> , No. 1:02-CV-00831 (NPM), 2007 U.S. Dist. LEXIS 16088 (N.D.N.Y. Mar. 7, 2007)	60
<i>Maxwell v. City of New York</i> , 93 Civ. 5834, 1995 U.S. Dist. LEXIS 5467 (S.D.N.Y. Apr. 27, 1995).....	59
<i>Metrop. Opera Ass’n, Inc. v. Local 100 Hotel Employees Int’l Union</i> , 239 F.3d 172 (2d Cir. 2001)	29
<i>New York State Nat’l Org. for Women v. Terry</i> , 886 F.2d 1339 (2d Cir. 1989)	59
<i>Olivieri v. Ward</i> , 801 F.2d 602 (2d Cir. 1986)	37, 45
<i>Parks v. Finan</i> , 385 F.3d 694 (6th Cir. 2004).....	54
<i>Santa Monica Food Not Bombs v. City of Santa Monica</i> , 450 F.3d 1022 (9th Cir. 2006).....	36, 49
<i>Schiller v. City of New York</i> , No. 04 Civ. 07922 (KMK), 2006 WL 2788256 (S.D.N.Y. Sept. 27, 2006).....	17
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969).....	59
<i>Spencer v. Casavilla</i> , 903 F.2d 171 (2d Cir. 1990)	58
<i>Transp. Alternatives, Inc. v. City of New York</i> , 340 F.3d 72 (2d Cir. 2003).....	14
<i>Vincenty v. Bloomberg</i> , 476 F.3d 74 (2d. Cir. 2007).....	34, 36, 48

Ward v. Rock Against Racism, 491 U.S. 781 (1989)..... 1, 29, 30, 33, 34

Watchtower Bible & Tract Soc. v. Vill. of Stratton, 536 U.S. 150 (2002).... 54

STATE CASES

City of New York v. Times’ Up, Inc., Index No. 400891/05 (N.Y. Sup. Ct. Feb. 14, 2006) 19

People v. Barrett, 821 N.Y.S.2d 416 (N.Y. Crim. Ct. 2006) 51, 52

People v. Bezjak, 812 N.Y.S.2d 829 (N.Y. Crim. Ct. 2006) 51

FEDERAL STATUTES & RULES

28 U.S.C. § 1292(a)(1)..... 3

28 U.S.C. § 1331 3

28 U.S.C. § 1343(a) 3

42 U.S.C. § 1983 3

42 U.S.C. § 1988..... 2

Fed. R. App. P. 26.1 2

STATE STATUTES

New York Veh. & Traf. Law § 1231 49

LOCAL STATUTES & RULES

NYAC § 10-110..... 19, 21, 56

38 RCNY § 19-02 20, 59

MISCELLANEOUS

Al Baker, *Police Move to Ease Proposed Rules on Permits for Protests*,
N.Y. Times, Aug. 19, 2006, at B1 20

Colin Moynihan, *Police Sawed Through Locks and Seized Bikes, Riders*
Say, N.Y. Times, Sept. 26, 2004, § 1, at 40..... 17

STATEMENT OF THE ISSUES

1. Whether the district court misapplied the narrow tailoring standard set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), when it upheld Defendants’ imposition of permit and other burdensome requirements on Appellants’ law-abiding, constitutionally-protected group bicycling activity without considering whether those requirements burdened more speech than necessary to further substantial government interests.
2. Whether the district court made clearly erroneous factual findings in evaluating the evidence concerning (a) the impact of law-abiding 50-person group bicycle rides on traffic flow and public safety and (b) the burdens imposed on such group rides by the permit and other requirements of Chapter 19 of Title 38 of the Rules of the City of New York and New York City Administrative Code Section 10-110 (together, the “Parade Rules”).
3. Whether the district court erred in finding that the Parade Rules “do not impede, deter, or punish travel throughout New York City” in violation of the United States Constitution.
4. Whether the district court erred in finding that the Parade Rules do not impose a “direct and substantial” burden on Appellants’ right to association as guaranteed by the United States Constitution.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Five Borough Bicycle Club (“5BBC”), as a not-for-profit corporation, states that it has no parent corporation and that no publicly-held corporation owns 10% or more of 5BBC’s stock.

STATEMENT OF JURISDICTION

Appellants brought the underlying action pursuant to 42 U.S.C. §§ 1983 and 1988 and the First and Fourteenth Amendments to the Constitution of the United States. The district court had jurisdiction over the underlying action under 28 U.S.C. § 1331 and § 1343(a)(3-4). The district court denied Appellants' motion for a preliminary injunction by order dated April 17, 2007. Appellants filed a timely Notice of Appeal.

This Court has jurisdiction over this appeal from the denial of a motion for a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

Appellants seek to vindicate their rights to engage in constitutionally-protected speech, association and travel in the context of group bicycle rides. This appeal arises from the controversial crackdown on cyclists' First Amendment rights by Appellee City of New York (the "City") that began in connection with the 2004 Republican National Convention. Now the City has subjected Appellants' group bicycle rides involving 50 or more participants to the Parade Rules, which require participants to obtain advance permission from the police of their route and to designate a "Chief Officer" to be held responsible for the conduct of ride participants. The Parade Rules violate Appellants' constitutional rights by imposing a burdensome and disorganized permitting process, severely restricting their spontaneous group expression, materially limiting their right to travel, and dictating the terms on which they may associate for political and other purposes.

In denying Appellants' motion to preliminarily enjoin enforcement of the Parade Rules, the district court committed fundamental error, by (1) failing to apply the requirement, set out by the Supreme Court in *Ward v. Rock Against Racism*, that restrictions on expressive conduct must be narrowly tailored; (2) making clearly erroneous factual findings, apparently based on uncritical deference to the city's speculative and generalized assertions regarding group bicycling and on the court's own perceptions regarding group bicycling; and (3) failing to

recognize the constitutional gravity of the burdens the Parade Rules impose on Appellants' rights to speech, travel, and association.

On the very first and penultimate pages of its opinion denying preliminary injunctive relief, the district court set forth an incorrect premise that was central to the entire decision below:

Plaintiffs . . . claim that they should be free to ride in large groups wherever, whenever, and however they wish, free from municipal regulation. The City seeks to regulate these events by requiring permits that would . . . facilitate the flow of traffic and protect the safety of all concerned.

* * *

[T]he Parade Regulations in certain circumstances impose inconveniences that limit plaintiffs' ability to bicycle through the streets of New York City with unfettered freedom.

SPA-2; SPA-52.

Appellants simply do not argue in this case for any “unfettered” right to be “free from municipal regulation.” Appellants challenge the Parade Rules — a specific set of municipal regulations that unduly restrict law-abiding, constitutionally-protected group speech, travel and association. It goes without saying that the City has the right and obligation to maintain the safety and order of the public streets, but that proposition should mark the beginning and not the end of the rigorous constitutional analysis that Appellants' claims require.

Appellants produced undisputed evidence corroborated by the City's witnesses that the vast majority of their group bicycle rides, which take place on weekends and late at night, are law-abiding and pose no threat of disruption to traffic or to danger to the general public. Appellants further demonstrated that the City's highly speculative evidence as to the remainder of their rides — primarily, "Critical Mass" rides held on Friday evenings — failed to establish a substantial governmental interest in traffic flow or safety that could justify imposition of the Parade Rules on those rides. Appellants also demonstrated that the burdens imposed on them by the Parade Rules are very substantial and more than sufficient to trigger intermediate scrutiny of their free speech claims and strict scrutiny of their free travel and association claims. Appellants' evidentiary showing entitled them to preliminary relief on narrow tailoring and other grounds.

Instead of requiring the City to establish with empirical evidence the strength of its interests purportedly justifying the Parade Rules, the decision below assumed the validity of the City's assertions and then required Appellants to prove that their constitutionally-protected activity outweighed the City's purported interests. Thus, the mere possibility that Plaintiffs' activity might implicate traffic flow or safety were found sufficient to satisfy narrow tailoring requirements, and the serious burdens on Appellants' rights were deemed mere "inconveniences" not worthy of constitutional scrutiny. A correct analysis under *Ward* supports the

conclusion that Appellants were likely to establish that the Parade Rules are not narrowly tailored because they burden substantially more speech than is necessary to further substantial government interests.

Appellants ask this Court to reverse the district court's order and remand with instructions to enter a preliminary injunction against enforcement of the Parade Rules.

STATEMENT OF FACTS

I. Background

On January 26, 2007, the New York City Police Department (“NYPD”) published its final proposal to amend 38 Rules of the City of New York (“RCNY”) § 19-02(a). That amendment, which defines the processions regulated as “parades” under New York City Administrative Code (“NYCAC”) § 10-110 (together with 38 RCNY § 19-02, the “Parade Rules”), took effect on February 25, 2007. As amended, 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.” Under the Parade Rules, 50 or more persons traveling on city streets in a lawful manner but in a “recognizable group” must obtain advance approval of their route and other aspects of their group activity from NYPD.

On March 27, 2007, Plaintiffs-Appellants Five Borough Bicycle Club (“5BBC”), Sharon Blythe, Josh Gosciak, Kenneth T. Jackson, Madeline Nelson, Elizabeth Shura, and Luke Son (together, “Appellants”) filed an action against The City of New York, Raymond Kelly, James Tuller, Lt. John Doe and Captain Jane Doe (together, the “City”) in the United States District Court for the Southern District of New York alleging, among other things, that the Parade Rules violated

their rights under the First and Fourteenth Amendments to the United States Constitution. Simultaneously with the filing of their complaint, Appellants moved for a preliminary injunction against enforcement of the Parade Rules.

The district court, Judge Lewis A. Kaplan presiding, held a hearing on Appellants' Motion on March 29, 2007. The court heard oral argument but not oral testimony. Following the hearing, on April 2, 2007, Appellees submitted the Declaration of NYPD Lieutenant Dennis Gannon ("Gannon"), allowing Appellants 24 hours to respond to it. JA-461; JA-453. On April 5, 2007, Appellants deposed NYPD Lieutenant Joseph Caneco ("Caneco"), who also had submitted a declaration in opposition to the Motion. On April 17, 2007, the district court issued a written opinion denying Appellants' Motion. *See Five Borough Bicycle Club v. City of New York*, 483 F. Supp. 2d 351 (S.D.N.Y. 2007), SPA-1-53. Appellants filed a timely notice of appeal.

II. Group Bicycling in New York City

Appellants are individuals and organizations that organize or participate in, collectively, more than 300 group bicycle rides each year. JA-252 ¶ 7; JA-81-82 ¶ 2; JA-29-30 ¶¶ 7, 10-11; JA-88 ¶¶ 9-10; JA-74-75 ¶ 6; JA-61-67 ¶¶ 10, 26; JA-20-22 ¶¶ 3, 12. Appellants ride in groups for several constitutionally-protected reasons, including to associate with other bicyclists and to advocate for bicycling as a cleaner, safer alternative to motor vehicle use. JA-21 ¶¶ 8, 10; JA-88-90 ¶¶ 9,

14-15; JA-98 ¶¶ 5-6. Group bicycle rides in New York City may take a variety of forms such as the 5BBC, Jackson, and Critical Mass rides discussed below.

A. 5BBC's Group Bicycle Rides

Most 5BBC group rides are open to 5BBC members and the general public. JA-231 ¶ 4. 5BBC rides typically occur during the day and are roughly evenly split between Saturdays and Sundays. JA-252 ¶ 7. Most of 5BBC's group rides have a fixed destination and, with some exceptions, follow a fixed route. JA-233-34 ¶ 11.

Participants in 5BBC rides generally proceed single file or two abreast. JA-251 ¶ 4; JA-233 ¶ 10. 5BBC and its ride leaders encourage participants to ride safely and follow applicable traffic rules. JA-251 ¶ 4. Because ride participants observe red signals and stop lights, “cyclists may be divided [and] . . . lose visual contact with each other due to turns or gaps in the ride.” JA-89 ¶ 13. Ride participants use the “point-drop-sweep” method to ensure that the group stays together despite gaps and loss of visual contact among members. *Id.* In that method, “stragglers” delayed by traffic signals or intervening traffic are guided by “drops” — participants who dismount where gaps in the ride cause a loss of visual contact, in order to direct those behind them — and by the “sweep” — a trained leader that remains at the back of the ride to “sweep” stragglers along. *See* JA-99 ¶ 10; JA-233 ¶ 11; JA-251 ¶ 4. “In addition, the point [the foremost rider in the

group] may call periodic ‘compression stops’ so that stragglers at the end of the group can catch up and eliminate significant gaps that may have opened up between group members.” *Id.* Using these methods, a large group ride can proceed without losing members despite differences in speed, delays caused by traffic signals, or traffic intervening among group members.

5BBC does not pre-register participants for most rides. JA-253 ¶ 10. Those wishing to participate simply show up. *Id.* For this reason, 5BBC cannot predict with certainty the number of participants for a particular group ride, although past experience suggests that approximately 10 rides per year will draw 30 or more participants, and 2-3 these rides will draw 50 or more participants. JA-253 ¶¶ 10-11; JA-289 ¶ 52. Based on past participation, 5BBC estimates that it will have ten rides with 30-60 participants during the next 12 months, including 3-5 with 50 or more participants. JA-253 ¶ 11. This estimate includes the Montauk Century, a large group ride held in May of each year, which regularly draws several hundred participants to the portion of that ride conducted within New York City. JA-253-54 ¶ 12.

B. Professor Kenneth Jackson’s Annual Bicycle Tour

Kenneth T. Jackson (“Jackson”) is a Professor of History at Columbia University and a preeminent scholar of New York City history. JA-81 ¶ 1. Since 1975, Jackson has incorporated an extensive bicycle tour of Manhattan into the

“History of the City of New York” class he teaches. JA-81-82 ¶ 2. Each year, Jackson guides students and others on a bicycle tour of Manhattan and Brooklyn. JA-82 ¶ 3.

Jackson’s annual tour is always conducted late at night in order to avoid motor vehicle traffic. JA-82-83 ¶ 4. Jackson leads the ride along a predetermined route. *Id.* The ride has included approximately 250 participants in recent years. JA-82 ¶ 3. The group proceeds in a relatively compressed formation so that participants can investigate and discuss the sites visited as a group. JA-290 ¶ 53. Jackson’s annual bicycle tour has been conducted for 31 years without any allegations of unlawful conduct. JA-291 ¶ 56.

C. Critical Mass Bicycle Rides

Critical Mass is a popular event that occurs in more than 400 cities worldwide, usually on the last Friday of each month. *Bray v. City of New York*, 346 F. Supp. 2d 480, 483 (S.D.N.Y. 2004), JA-317. Critical Mass rides have been held in Manhattan since 1994, and can draw hundreds or even thousands of participants. *Id.* The ride originates at Union Square Park at 7 p.m. on the last Friday of every month. JA-22 ¶ 12. Critical Mass rides have been held in Brooklyn since August 2004. JA-38 ¶ 6. Participants meet at Grand Army Plaza and at the Williamsburg Bridge at 7 p.m. on the second Friday of every month. JA-22 ¶ 12.

Critical Mass rides are a unique form of group expression characterized by the absence of a ride organizer, rider leader, or a fixed route or destination. JA-64 ¶ 18; JA-22-23 ¶ 14; JA-42 ¶ 37. Individual riders may take turns being at the front of the ride and determining the route through an extemporaneous, collective decision-making process. JA-78 ¶ 16. This can result in the ride splintering into smaller groups, each proceeding in the same manner in different directions, sometimes reuniting by chance. JA-22-23 ¶14. Critical Mass rides throughout the world are conducted in the same way. JA-290-91 ¶ 55. The design of Critical Mass rides allows each participant an opportunity to meaningfully affect the tone and route of the ride. JA-64 ¶ 17. Participants believe that this format, which emphasizes spontaneity and egalitarianism, is essential to their expressive association. *Id.* ¶¶ 17-18; JA-22-23 ¶ 14; JA-78 ¶ 16. Participants also believe that the lack of a fixed route is essential to their message that bicyclists have a right to proceed as part of city traffic. JA-64 ¶ 18.

III. Constitutional Dimension of Group Bicycling

A. Group Bicycling As Constitutionally-Protected Expression

By bicycling, Appellants intend to demonstrate the viability and advantages of bicycling as an urban transportation mode, and to raise motorists' awareness of and respect for bicyclists as equals on city roadways. *E.g.*, JA-78 ¶ 17; JA-89 ¶ 14; JA-61 ¶ 6. Groups of bicyclists are more effective in getting these messages across

because groups are more visible and unusual than individuals. JA-62 ¶ 11; JA-31 ¶ 15.

Appellants' group 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. JA-232 ¶ 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.*; JA-241-43. During the ride, participants took photographs, which were posted on the Internet to raise awareness of the City's neglect of its "Lost Greenways." JA-232 ¶ 7 & n.1.

5BBC also uses group rides to raise funds for group bicycling advocacy. 5BBC raises significant income from its Montauk Century ride, the only single-day group ride for which the club charges a registration fee. JA-251-52 ¶ 5. Net revenue from the ride is used to promote group bicycling through various means, including public advocacy in 5BBC's newsletter. *Id.* Courts have held that group bicycle rides such as the "Raiders" and Montauk Century rides are constitutionally-protected speech. *See, e.g., Transp. Alternatives, Inc. v. City of New York*, 340 F.3d 72, 78 (2d Cir. 2003).

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. JA-31 ¶ 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 bicyclists' rights, and distribute literature to those they meet. JA-62-63 ¶¶ 14-15. Courts have held that Critical Mass rides conducted in New York City are constitutionally-protected speech. *E.g., Bray*, 346 F. Supp. 2d at 488, JA-328-29.

B. Group Bicycling as Constitutionally-Protected Association

Appellants also organize and participate in group bicycle rides because they afford bicyclists the opportunity to converse, cooperate, and otherwise associate with each other. JA-62 ¶ 13; JA-30-31 ¶¶ 12-13, 19; JA-22 ¶ 13. Participants exchange views while they ride, and cooperate by alerting each other to roadway dangers and keeping the group together. JA-21 ¶ 8; JA-98 ¶ 6.

Participants in group rides share a direct, spontaneous and social experience of New York City, in which each participant can converse with any other, simply by changing position within the group. Unlike passengers enclosed in a motor vehicle, bicyclists are directly exposed to the sights and sounds of the city and can easily interact with people they encounter. JA-87-91 ¶¶ 4, 16, 19; JA-83 ¶¶ 6-7. 5BBC conceives of its group bicycle rides as shared urban explorations. JA-231-34 ¶¶ 5, 13; JA-99 ¶ 8; JA-106. Similarly, Jackson believes the pace, spontaneity,

and collegiality of group bicycling make it the ideal method for investigating the City. JA-83 ¶ 6.

IV. The City's Regulation of Group Bicycle Rides

A. The City's Accommodation of Group Rides

Prior to August 2004, the City had a long history of accommodating group bicycling without requiring parade permits. JA-47-48 ¶¶ 11-12. 5BBC and Jackson have both conducted annual rides in excess of 50 participants since the 1970s without a permit, as did Transportation Alternatives since at least 2000. JA-47 ¶ 8; JA-82 ¶ 3; JA-253-54 ¶ 12.

NYPD not only accommodated, but actively facilitated, 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. JA-39-42 ¶¶ 15-36, 38. NYPD provided this support without requiring Critical Mass participants to disclose their route or destination in advance, appoint ride leaders, or file a parade permit application. JA-42 ¶¶ 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. JA-32 ¶ 20; JA-92 ¶ 24; JA-43 ¶¶ 38, 41-42. A similar relationship between NYPD officers and participants in Brooklyn Critical Mass

continues to the present, with NYPD personnel escorting but not directing non-permitted, open-route group rides of 50 or more participants. *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 in various demonstrations against the RNC. *Bray*, 346 F. Supp. 2d at 484, JA-318. NYPD arrested approximately 264 bicyclists along with hundreds of other protestors who were later prosecuted for various offenses, including, almost without exception, parading without a permit. JA-267-68 ¶¶ 7-8.¹

B. The City’s Post-RNC Crackdown on Critical Mass

At the Manhattan Critical Mass ride following the RNC, held September 24, 2004, riders were confronted by police. The police arrested eight bicyclists 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 met by a large police force — approximately 80-100 police officers on

¹ Numerous suits challenging the legality of NYPD’s conduct in connection with the RNC protests and arrests are pending. *See, e.g., Schiller v. City of New York*, No. 04 Civ. 07922 (KMK), 2006 WL 2788256 (S.D.N.Y. Sept. 27, 2006); *Dinler v. City of New York*, No. 04 Civ. 07921 (KMK), 2006 WL 2788256 (S.D.N.Y. Sept. 27, 2006).

scooters, and more in vans and flying overhead in helicopters. JA-75 ¶ 8. As the ride began, the scooter-mounted officers rode alongside the bicyclists. JA-75-76 ¶ 10. Shortly thereafter, and without warning, the scooter police cut the bicyclists off, using their scooters to contain them in smaller groups. JA-76 ¶ 11. Police dragged bicyclists to the ground, arresting them and seizing their bicycles. JA-76 ¶¶ 11-12.

Since then, NYPD has worked consistently to suppress Manhattan Critical Mass through a variety of tactics, including extensive video, helicopter and undercover surveillance; aggressive motorized pursuit and containment tactics; and questionable mass arrests. JA-32-34 ¶¶ 24-25, 31-32; JA-608-610 ¶¶ 5-13; JA-15-16 ¶¶ 10-14; JA-24 ¶ 20; JA-57-58 ¶¶ 8-10.

These tactics have proven controversial. NYPD's surveillance activities have been declared unlawful by Judge Haight in the *Handschu* litigation.² NYPD's pursuit and containment tactics have been criticized in the press. *See, e.g.,* Kareem Fahim & Jim Dwyer, *At Least 18 Arrests Made in Tense Night of a Monthly Cycling Protest*, N.Y. Times, Apr. 30, 2005, JA-181; Jim Dwyer, *Police Infiltrate Protests, Videotapes Show*, N.Y. Times, Dec. 22, 2005, JA-183; Jim Dwyer,

² *See Handschu v. Special Servs. Div.*, 475 F. Supp. 2d 331, 349-50, 2007 U.S. Dist. LEXIS 11260, (S.D.N.Y. 2007), JA-149-50. The court later vacated this ruling based on new evidence regarding demonstrations other than Critical Mass. 71 Civ. 2203 (CSH), 2007 U.S. Dist. LEXIS 43176 (S.D.N.Y. June 13, 2007).

Aggressiveness Of Bike Chase Stirs Questions For the Police, N.Y. Times, Feb. 24, 2006, JA-188. Ninety-four percent of NYPD's Critical Mass arrests have been dismissed. JA-269 ¶ 12. NYPD also has sought injunctions against Manhattan Critical Mass in both state and federal court, but in each case relief was denied. *Bray v. City of New York*, 356 F. Supp. 2d 277, 287 (S.D.N.Y. 2004), JA-363, JA-363; *Bray*, 346 F. Supp. 2d at 492, JA-339; *City of New York v. Times' Up, Inc.*, Index No. 400891/05, at *16-19, 23 (N.Y. Sup. Ct. Feb. 14, 2006), JA-381-84, 388.

C. The Parade Rules

(i) Regulation of Parades Under NYCAC § 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 public place only after a written permit therefore has been obtained from the police commissioner." NYCAC § 10-110(a). NYPD is required to deny a permit if, among other reasons, 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). 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 not exceeding ten days," or by both. *Id.* § 10-110(c).

(ii) **The Amendment of 38 RCNY Section 19-02**

NYCAC § 10-110 does not define what constitutes a “parade.” That definition is set forth in the 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.

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, or two or more bicyclists proceeding together unlawfully. JA-117. 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. On January 26, 2007, NYPD published its final proposal to redefine “parade” for purposes of Parade Rules as follows: “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.” JA-315. The Parade Rules became effective on February 25, 2007.

V. Appellants’ Preliminary Injunction Motion

On March 27, 2007, Appellants moved for a preliminary injunction against enforcement of the Parade Rules. In their Motion, Appellants argued and

presented extensive evidence that the permitting requirements and other restrictions imposed by the Parade Rules on group bicycle rides of 50 or more people violate their constitutional rights to free speech, travel and association. *See* Plaintiffs’ Memorandum Supporting Motion For Preliminary Injunction (“Pls.’ Mem.”)

A. Impact of the Parade Rules on Appellants’ Rights

The Parade Rules burden Appellants’ exercise of constitutional rights by transforming 50-person group bicycle rides into “parades” subject to a permit requirement and other restrictions.

(i) The Permit and Chief Officer Requirements

Under the Parade Rules, Appellants cannot travel on the public roadways in groups of 50 without advance approval of their route and destination by NYPD. The Parade Rules in effect prohibit open-route rides, such as Critical Mass and certain 5BBC rides, which by their very nature cannot satisfy the fixed route requirement. Also, the Rules purport to impose vicarious liability on the “Chief Officer” of the ride for the conduct of ride participants. *See* NYCAC §10-110(a)(5); JA-110 (“The Chief Officer of Any Procession, Parade or Race For Which a Permit May be Granted by The Police Commissioner, Shall be Responsible for the Strict Observance of All Rules and Regulations of Said Permit.”).

Moreover, the parade permit application process is cumbersome and disorganized. NYPD's website directs applicants to submit their applications to the wrong address, and NYPD personnel are not trained to process applications. This was demonstrated when Edward DeFreitas ("DeFreitas"), a 5BBC ride leader, applied for a parade permit for a 5BBC ride that took place on February 25, 2007. JA-99-100 ¶ 12. DeFreitas was misdirected by various NYPD sources six separate times, and forced to affirmatively persuade the NYPD employee responsible for accepting his application to do so. JA-100-03 ¶¶ 15-25. Eventually, DeFreitas received oral approval of his application. JA-103 ¶ 26.³ In all, DeFreitas spent more time satisfying the requirements of the parade permit process than leading the bicycle ride. *Id.* ¶¶ 27-28. 5BBC is a volunteer organization that operates hundreds of such bicycle rides each year, any one of which might draw 50 or more participants. JA-252-53 ¶¶ 7, 11. Requiring 5BBC volunteers to devote substantial amounts of time to the permit application process would reduce the number of rides 5BBC can offer. JA-254-55 ¶ 15; JA-104 ¶ 30.

In 2005, Jackson attempted to obtain a parade permit for his late-night bicycle tour. JA-84 ¶ 10. Jackson spoke to several NYPD personnel who were unable to assist him in applying for a parade permit. *Id.* Jackson finally reached

³ DeFreitas never received a written permit, although NYCAC § 10-110(a) prohibits "parades" without a "written permit."

an officer who, upon hearing that Jackson intended to conduct a 250-person bicycle tour from Columbia University campus to Brooklyn, advised Jackson that he did not need a parade permit. *Id.*⁴

B. Impact of Group Bicycling on Traffic Flow and Public Safety

The City's stated interest in promulgating the Parade Rules is to protect traffic flow and public safety. Defs.' Mem. Opp. Prelim. Inj., 16. In support of their Motion, Appellants produced substantial evidence that law-abiding group bicycling does not negatively impact those interests. Appellants presented evidence that a group of 55 bicyclists would fit within a single 10 foot wide traffic lane on one standard city block (approximately 200 feet from crosswalk to crosswalk). JA-262-63 ¶ 13; JA-213 ¶ 81; JA-248 ¶ 6. Such a group is not likely to cause any significant disruption to traffic. JA-213 ¶ 82. Moreover, group bicycling promotes traffic safety by making bicyclists more visible. JA-197 ¶ 23. This is reflected in a report issued by NYPD in September 2006 presenting detailed information regarding the circumstances surrounding all reported bicycling fatalities and serious injuries for the prior 10 years. JA-562-601. That report did not link a single such incident to group bicycling.

⁴ In 2005, NYPD was engaged in routine mass arrests of Critical Mass bicyclists for parading without a permit. JA-267-68 ¶¶ 7-8; *see also* JA-12 ¶¶ 12-13; JA-15-16 ¶¶ 8-14; JA-34 ¶¶ 30-33; JA-57-58 ¶¶ 8-10; JA-65-67 ¶¶ 21-24.

VI. The Proceedings in the District Court

The district court, Judge Lewis A. Kaplan presiding, held a hearing on Appellants' preliminary injunction Motion on March 29, 2007. At the hearing, counsel for Appellants expressed a willingness to present oral testimony in support of the Motion. JA-421. The district court declined to hear witnesses and instead only heard oral argument. *Id.*

During the argument, counsel for Appellants explained the burdens of the parade permit application process. JA-421-24; JA-434. After prodding from the court, counsel for the City represented that the NYPD website would be changed to end the systematic misdirection of applicants, and the permit application form would be revised to remove the "Chief Officer" requirement where appropriate "within a few days." JA-444. Nine days after these representations were made, the City still had not made the promised revisions on the NYPD's website, <http://home2.nyc.gov/html/nypd/pdf/chfdept/paradepermit.pdf>.

Based on apparent contradictions in statements made by the City's witness Caneco, the court ordered that he be produced for deposition. JA-457-58. During the deposition, Caneco made numerous statements that undermined the City's contention that 50-person group bicycle rides require parade permits to protect public safety and traffic flow, including:

- Caneco has personally observed only group rides that proceeded unlawfully, and has never observed rides such as those organized by 5BBC or Jackson, JA-492 at 64:25 65:5; JA-493-94 at 69:21-70:13.
- It is the conduct of a group — not its size — that determines whether danger or disruption is likely to result, *see* JA-485-89 at 36:8-51:12; JA-517 at 162:12-21.
- Large groups of cyclists do not “caus[e] a host of safety issues” if they observe traffic rules, contrary to the assertion in paragraph 5 of his Declaration, *compare* JA-519-20 at 173:16-174:10 *with* JA-417 ¶ 5.
- Caneco is not aware that any group ride other than Manhattan Critical Mass (including any Brooklyn Critical Mass ride) has had a significant adverse effect on traffic or safety, JA-494 at 70:10-72:9; JA-504-05 at 113:3-117:19; JA-506 at 118:2-120:19.
- Jackson’s ride of 200 to 300 bicyclists conducted on 5th Avenue after midnight would not disrupt traffic (JA-518 at 168:15-169:23), nor would law-abiding 5BBC day trips held on Saturdays and Sundays significantly disrupt traffic (JA-518-19 at 169:24-173:8).
- Critical Mass rides that Caneco observed in 2007 at worst “*almost* ha[d] the same [disruptive] impact” as earlier rides which in 2005 he had characterized as having “minimal” disruptive impact. JA-517 at 164:16-20 (emphasis added).

The City also submitted the Declaration of NYPD Lieutenant Dennis

Gannon (“Gannon”) in support of its contention that 50-person group bicycle rides negatively impact traffic and public safety. Gannon never claimed to have seen a fifty-person bicycle ride; rather, he extrapolated from 150-person rides that he observed to form his opinions regarding 50-person rides. JA-467-68 ¶¶ 12-13. Gannon’s opined that group bicyclists “tend to try to stay together and disregard traffic regulations in order to do so” (JA-468 ¶ 13), although Gannon did not

identify any particular ride conducted by Appellants or others on which he based this assertion. Gannon also asserted that group bicycle rides impact traffic flow and safety because “[w]hen a group of bicyclists travel together, there are no natural spaces between the bicyclists,” thereby requiring vehicles “to slow down and maneuver . . . so that they can negotiate the lanes and make turns safely.” *Id.*

¶ 14. Gannon did not address or refer to Appellants’ evidence regarding techniques used by group bicyclists to allow spaces between them while avoiding traffic violations, such as the “point-drop-sweep” and “compression stop” methods. Pls.’ Mem., 13-16. Finally, Gannon asserted the possibility that multiple 50-person group rides might fortuitously converge as a factor justifying the requirement that each such group obtain a permit for their route in advance. JA-467 ¶ 9. There was no evidence to suggest that any such convergence had ever occurred.

VII. The District Court’s Opinion

The district court issued its opinion on April 17, 2007. As an initial matter, the court found that there was a likelihood that the Appellants would suffer irreparable harm because the loss of First Amendment freedoms, for even a minimal period of time constitutes irreparable injury and numerous group rides in excess of 50 participants were likely to occur in the future. SPA-14-16.

On the merits, the court acknowledged that group bicycle rides are protected by the First Amendment rights to free speech and intimate and expressive association. SPA-23-24. These holdings are not disputed on appeal.

With respect to Appellants' free speech claim, the court ruled that Appellants did not appear, upon motion for preliminary injunction, likely to prove that the Parade Rules are not narrowly tailored to serve substantial government interests. SPA-38. The court mistook Appellants to believe that "they should be free to ride in large groups wherever, whenever, and however they wish, free from municipal regulation," without explaining or citing any basis for this understanding. SPA-2. The court did not discuss the extent to which the Parade Rules burden substantially more constitutionally-protected conduct than necessary to achieve the City's interests in traffic flow and public safety. The court also declined to apply strict scrutiny to the Parade Rules pursuant to Appellants' right to travel and association claims, based on its perception that the advance permitting, fixed route and Chief Officer requirements were mere "inconveniences" that did not implicate Appellants' fundamental constitutional rights.

In evaluating the city's evidence, the district court credited all of Gannon's assertions that law-abiding 50-person group bicycle rides implicate traffic flow and public safety without explicitly discussing the contrary evidence presented by Appellants. SPA-37. In particular, the court credited Gannon's assertion that

group bicyclists “tend” to violate the law, without discussing the evidence that Appellants’ group rides are law-abiding. SPA-36. The court also elaborated upon Gannon’s assertions, by finding *sua sponte* that 50-person group bicycle rides were “hazard[ous]” due to a “lack of predictability” (SPA-35) and their “sheer size” (SPA-38), although there was no evidence to support these findings. SPA-35; SPA-37.

Although the court repeatedly cited to the Declaration and deposition testimony of Caneco, it ultimately declined to rely on Caneco’s Declaration and testimony. *See* SPA-38 n.134 (“[T]he Court would reach the same result even if [Caneco’s] evidence were disregarded entirely.”). Thus, based on the declaration of one NYPD officer who has never witnessed a group bicycle ride of less than 150 persons and its own perceptions of group bicycling, the district court denied Appellants’ constitutional claims.

SUMMARY OF ARGUMENT

This Court reviews the district court’s denial of a motion for a preliminary injunction for abuse of discretion. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). A district court abuses its discretion when it (1) applies the legal standard incorrectly; (2) relies upon clearly erroneous findings of fact or fails to consider all of the relevant evidence; or (3) proceeds on the basis of an erroneous view of the applicable law. *EM Ltd. v. Republic of Arg.*, 473 F.3d 463, 462 (2d Cir. 2007). When an injunction is sought to protect rights under the First Amendment, this Court must “make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Metrop. Opera Ass’n, Inc. v. Local 100 Hotel Employees Int’l Union*, 239 F.3d 172, 176 (2d Cir. 2001) (internal quotations and citations omitted); *see also Bery*, 97 F.3d at 693.

The district court’s order denying Appellants’ Motion should be reversed because the court incorrectly applied the legal standards applicable to Appellants’ free speech, association and right to travel claims, failed to consider critical evidence, and based its ruling on clearly erroneous findings of fact. Most fundamentally, the court failed to apply the controlling standard set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), for determining whether a content-neutral restriction on free speech rights is narrowly tailored. Under *Ward*,

a restriction on expression must be struck unless it is narrowly tailored to avoid burdening substantially more expression than necessary to serve substantial government interests. *Ward*, 491 U.S. at 791. Here, the district court essentially ended its narrow tailoring inquiry once it concluded that the Parade Rules serve the City's interests in traffic flow and public safety, without determining whether those Rules also burden law-abiding group bicycle rides that, according to the undisputed evidence, do not implicate those interests.

Had the court properly applied *Ward*, it would have found that the Parade Rules unnecessarily burden a great deal of unobjectionable expressive activity. Most of Appellants' group rides do not implicate the City's interests in traffic flow and safety because they take place late at night or on the weekend, as the City's own witness agreed. The court nonetheless relied upon scenarios of late-night traffic that might be impacted by such rides, and other "facts" that it found *sua sponte* without any basis in the record, to justify its ruling. Because there was no evidence, only speculation, that Appellants' late-night and weekend group rides implicate traffic flow and safety, the court's narrow tailoring finding as to those rides was an abuse of discretion.

The court's ruling as to Appellants' other rides (primarily, Critical Mass rides) should also be reversed because it is based on clearly erroneous findings of fact and a failure to consider all of the relevant evidence. This ruling rests entirely

upon the opinions of one NYPD lieutenant — Gannon — who admits he has never witnessed a 50-person group of bicyclists. The court’s reliance on Gannon’s view that 50-person bicycling groups “tend to . . . disregard traffic regulations” was completely improper, and in effect presumes that Appellants have a propensity for lawlessness. The court’s adoption of Gannon’s other speculations regarding fortuitous convergences of bicyclists and the impact of groups proceeding in compressed configurations was also clearly in error and justifies reversal.

The district court failed to consider or properly assess much of the undisputed evidence regarding the serious burdens imposed by the Parade Rules. The 50-person advance permitting requirement affects a larger number of group rides, and discourages persons from spontaneously joining group rides they may encounter. The fixed route requirement further diminishes spontaneity of expression and association, fundamentally transforming the nature and meaning of Appellants’ group rides. The “Chief Officer” requirement intrudes on ride participants’ right to freely associate and chills would-be ride organizers with the threat of vicarious liability. The court sidestepped the serious constitutional issues raised by these burdens by labeling them “inconveniences,” or declaring them moot based on questionable reasoning. SPA-25; SPA-27; SPA-52; SPA41.

The court also incorrectly analyzed plaintiffs’ right to travel claim, apparently concluding that the Parade Rules’ permit requirements and route

restrictions did not impose a cognizable burden on that right. SPA-20. The court did not understand that the Parade Rules broadly restrict 50-person groups from traveling not only by bicycle but also by foot or vehicle.

The district court also misapplied the law to Appellants' association claim. The court concluded that requiring NYPD permission for groups of 50 to bicycle together was a mere "inconvenience" rather than a "direct and substantial" restriction that would trigger constitutional scrutiny. SPA-24-25, SPA-27. The undisputed evidence demonstrated that law-abiding group bicycling is fundamental to Appellants' association, and that the Parade Rules directly and substantially interfere with such bicycling and therefore Appellants' association.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO ADDRESS THE BURDEN IMPOSED BY THE PARADE RULES ON PROTECTED EXPRESSION THAT DOES NOT IMPLICATE THE CITY'S INTERESTS.

The district court's finding that Appellants were unlikely to establish the merits of their free speech claims reflects the court's failure to properly apply the narrow tailoring standard of *Ward*. The court failed even to ask whether the Parade Rules burden substantially more conduct than necessary to achieve the City's interests. *See* Point I.A below. The court ignored the undisputed evidence that most of Appellants' group rides do not implicate the interests that purportedly justify the Parade Rules. *See* Point I.B below. Moreover, the court's factual

finding that the City has a substantial interest in regulating any 50-person group rides was clear error. *See* Point I.C below. Appellants are entitled to preliminary injunctive relief because the burdens imposed by the Parade Rules materially interfere with Appellants’ exercise of their constitutional rights. *See* Point I.D. For all of the foregoing reasons, the district court abused its discretion and its denial of Appellants’ Motion should be reversed.

A. The District Court Failed to Properly Apply *Ward*’s Narrow Tailoring Requirement.

To be upheld as narrowly tailored against Appellants’ challenge, the Parade Rules must meet two distinct requirements: (1) they must “promote[] a substantial government interest that would be achieved less effectively absent the regulation[,]” *and* (2) they must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 799. The Supreme Court in *Ward* stressed that narrow tailoring requires more than simply demonstrating that a regulation may in some applications further government interests:

[T]his standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. Indeed, the “essence of narrow tailoring” is “focus[ing] on the source of the evils the city seeks to eliminate . . . and eliminat[ing] them without at the same

time banning or significantly restricting a substantial quantity of speech that does not create the same evils.” *Id.* at 800 n.7.

This Court has recently affirmed the importance of *Ward’s* second, “essen[tial]” narrow tailoring requirement. In *Vincenty v. Bloomberg*, 476 F.3d 74, 76 (2d. Cir. 2007), the Court addressed an administrative code provision that punished young adults for possessing art supplies that could be used for graffiti. The Court stressed that the art supplies in question were as readily used for constitutionally-protected expression as for vandalism. *Id.* at 87. The Court articulated the following standard for determining whether the law was narrowly tailored: if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; ***and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.***” *Id.* at 84 (emphasis in original, internal quotes and citations omitted). Applying this standard, the Court found that even though the law served the City’s interests in preventing graffiti, it was nonetheless unconstitutional because it burdened too much law-abiding, constitutionally-protected expression. *Id.* at 88-89.

In this case, the district court ignored the second, essential prong of the *Ward* narrow tailoring test and failed to consider whether the Parade Rules unnecessarily burden too much law-abiding constitutionally-protected group

bicycling. The court described its narrow tailoring standard exclusively in terms of *Ward*'s first prong:

A content-neutral time, place, or manner regulation need not be the least restrictive or least intrusive means of advancing a substantial government interest. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

SPA-31 (quotations and citations removed). *See also* SPA-39. (“The Parade regulations need only advance a substantial interest that would be less well served in their absence.”).

The district court’s failure to quantify or otherwise assess the law-abiding, unobjectionable group bicycling activity burdened by the Parade Rules represents a critical failure to properly apply *Ward*. The court did recognize that the Rules are “overinclusive,” since “[n]ot every group bicycle ride of 50 or more participants necessarily will disrupt traffic, endanger other travelers, or disobey traffic regulations.” SPA-42. However, the court did not follow through on this “overinclusiveness” concern, quickly concluding that, because “group bicycle rides can and do present such risks,” advance permitting of *all* 50-person group rides was justified. SPA-42-43.

In essence, the district court found that the mere *potential* for 50-person group rides to disrupt, endanger or proceed unlawfully was a sufficient basis for subjecting *all* 50-person group rides to the Parade Rules. This Court rejected the

same logic in *Vincenty*. 476 F.3d at 87. Similarly, in *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1041 (9th Cir. 2006), the court rejected the notion that an advance permitting requirement could be imposed on processions that “may impede” use of a public way. Such a requirement is constitutional only if it includes a “provision tailoring the regulation to events that realistically present *serious* traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks.” *Id.* at 1039 (emphasis in original).⁵

The district court’s order should therefore be reversed because the court failed to consider, under the second prong of the *Ward* test, (1) the undisputed evidence that law-abiding late-night and weekend rides do not impact the City’s substantial interests (see Point I.B below), and (2) the overwhelming evidence that Appellants other law-abiding group bicycling does not affect the City’s substantial interests (see Point I.C. below).

⁵ See also *Grossman v. City of Portland*, 33 F.3d 1200, 1207-08 (9th Cir. 1994) (city failed to demonstrate sufficient actual impact on traffic to justify permit requirement); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (same).

B. The District Court Failed to Properly Apply *Ward* to the Undisputed Evidence Regarding Appellants’ Law-Abiding Weekend and Late-Night Group Bicycle Rides.

The district court failed to address Appellants’ undisputed evidence, confirmed by the City’s NYPD witness, that the bulk of their group bicycle rides do not implicate the City’s interests in traffic flow, safety or public convenience. The vast majority of the rides that Appellants organize or participate in occur on the weekends or late at night, and proceed lawfully. Ignoring this evidence, the court uncritically embraced the generalized assertions of the City’s witnesses to the contrary. Thus the court failed to “independently determine the rationality of the government[’s]” asserted rationale for the Parade Rules, as it was required to do:

When First Amendment concerns are involved a court may not simply assume that a decision by local officials will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity. When reviewing the reasonableness of time, place and manner restrictions on First Amendment rights, a court must independently determine the rationality of the government interest implicated and whether the restrictions imposed are narrowly drawn to further that interest.

Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986) (internal quotes and citations omitted).

As explained below, proper analysis of the evidence compels the conclusion that Appellants are entitled to preliminary injunctive relief.

(i) **Appellants’ Group Bicycle Rides, Most of Which Occur on the Weekends and Late at Night, Do Not Implicate Traffic Flow or Public Safety.**

Among Appellants, 5BBC organizes the most group rides, approximately 250 annually. JA-252 ¶ 7. Most of these rides occur on weekend mornings. *Id.* 5BBC and Jackson also each conduct a large annual group ride, typically involving hundreds of participants, that takes place late at night or early in the morning. JA-253-54 ¶¶ 12-13; JA-82-83 ¶¶ 3-4. Appellants other than 5BBC and Jackson participate in 5BBC rides, as well as bi-weekly Critical Mass rides and other group rides. JA 30 ¶ 10; JA-88 ¶ 10; JA-90 ¶¶ 16-17; JA-94 ¶ 32; JA-67 ¶ 26; JA-74 ¶ 6; JA-20 ¶ 3; JA-22 ¶ 12.

The undisputed evidence submitted to the district court shows that 5BBC’s weekend group rides proceed in a law-abiding manner, single file or two abreast. JA-233 ¶ 10; JA-251 ¶ 4. This results in gaps opening up between riders large enough for participants to lose visual contact with each other. JA-99 ¶ 10. Participants use the “point-drop-sweep” and “compression stop” techniques to keep the group together, despite the loss of visual contact, without causing any traffic disruption or violations. JA-251 ¶ 4; JA-99 ¶ 10; JA-233 ¶¶ 10-11.

5BBC’s annual Montauk Century and Jackson’s annual tour do not use either of these techniques, but proceed between midnight and dawn when there is minimal traffic. JA-254 ¶ 13; JA-518 at 169:16-23. There have been no

allegations that either group ride has involved unlawful conduct at any time during the decades the rides have been conducted. *E.g.*, JA-291 ¶ 56.

The City produced no evidence suggesting that any of 5BBC's weekend rides, the Montauk Century or the Jackson ride have ever negatively impacted traffic flow, public safety, or involved unlawful conduct. For the three years ending in January 2007, the City's witness NYPD Lt. Caneco was responsible for reviewing reports of traffic disruptions in Manhattan south of 59th Street, in addition to playing a central role in the City's management of Critical Mass. JA-483 at 28: 25-29:8; JA-525 at 195:23-196:9. Caneco could not recall any reports of disruption during this period due to the Montauk Century or the Jackson tour (both of which proceed through lower Manhattan, *see* JA-253-54 ¶ 12; JA-82 ¶ 4), or due to any of 5BBC's weekend rides that proceed in lower Manhattan, *e.g.*, JA-112.

Going further, Caneco affirmatively testified that Appellants' law-abiding weekend and late-night rides would not implicate the City's interests in traffic flow or safety. When asked about the impact of law-abiding, 40 to 60 person 5BBC weekend rides, Caneco was unable to identify any traffic disruption or unusual safety concerns that such rides would present. In his words, a 50-person law-abiding group ride conducted on a weekend "would not disrupt" traffic and would be "fine." JA-519 at 172:22-24; 173:8; *see generally* JA-518-19 at 169:24-173:8.

Even a law-abiding 100-person weekend ride, in Lt. Caneco’s opinion, would have only a “minimal” impact on traffic. JA-496 at 78:3-25; *see also* JA-497 at 84:15-85:5; JA-517-518 at 165:24-167:13.

Caneco also confirmed that group rides involving hundreds of participants conducted late at night or early in the mornings — such as the Montauk Century or Jackson’s tour — did not implicate the City’s legitimate traffic and safety concerns. Asked whether Jackson’s tour of 250 bicyclists conducted on 5th Avenue after midnight would disrupt traffic, Caneco replied “I don’t see it.” JA-518 at 168:15-169:23. In Caneco’s view, a ride occurring at 5 a.m. on a Sunday, such as the discussion would have “no impact” on traffic.⁶ JA-518 at 168:4-14.

The City’s lack of concern for the supposed traffic and safety effects of 5BBC weekend group rides is further apparent from the fact that *NYPD didn’t even bother to attend* a fully-permitted 5BBC ride on February 25, 2007, of which four different precincts, Manhattan South Borough Command, and 1 Police Plaza had all been advised. JA-101-03 ¶¶ 16-24. Ordinarily, NYPD personnel attend

⁶ Caneco identified only one potential safety issue arising from late-night large group rides: the possibility that cars “picking up speed” on the nearly-deserted streets might hit bicyclists. Such motorists would be violating applicable traffic law requiring use of due care to avoid hitting bicyclists. JA-518 at 169:6-12. To rely as Caneco suggests on the potential safety issue created by unlawful motorists as an excuse to burden bicyclists’ constitutionally-protected conduct would be tantamount to sustaining a “heckler’s veto,” which the Supreme Court has definitively rejected. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-35 (1992).

each permitted event. JA-497 at 82:16-20. However, NYPD failed to visit the formation area of this ride (and, to 5BBC's knowledge, every other 5BBC ride, even though the formation dates, times and locations of each are advertised on the Internet). Similarly, Jackson sought a permit from NYPD to conduct his September 2005 ride, but *was told by NYPD that he did not need a permit*. JA-84 ¶ 10.

The evidence of the City's other witness, Gannon, consists of generalized assertions that do not bring Appellants' evidence into dispute. Based on his observation of 150-person rides, Gannon opined that he "expect[s]" that "a significant 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." JA-466 ¶ 7. Even if Gannon's opinion is competent with respect to 50-person rides, it does not negate or even address the possibility that *most* 50-person group rides would not impact traffic. Gannon's opinion merely asserts that a "significant percentage" of 50-person rides — perhaps 10% — implicate the City's interests and that those interests would be furthered by applying the Parade Rules to those rides. JA-466 ¶ 7. This does not establish that the Parade Rules do not burden substantially more speech than necessary to achieve the City's interests.

Gannon asserted that 50-person group rides “tend to try to stay together and disregard traffic regulations in order to do so.” JA-468 ¶ 13. This assertion fails to specifically address 5BBC’s “point-drop-sweep” and “compression stop” techniques used to keep participants together even as they observe traffic regulations. JA-99 ¶¶ 9-10; JA-233 ¶ 10; JA-251 ¶ 4. It is undisputed that on the Montauk Century, participants do not even attempt to stay together. Gannon’s view that traffic violations follow inevitably from group bicycling is simply inapplicable to these rides.

Gannon also asserted that “[w]hen a group of bicyclists travel together, there are no natural spaces between the bicyclists,” thereby requiring vehicles “to slow down and maneuver . . . so that they can negotiate the lanes and make turns safely.” JA-468 ¶ 14. This assertion ignores the undisputed evidence that on 5BBC rides, there are typically gaps between riders wide enough to break visual contact among participants. JA-99 ¶ 10; JA-233 ¶ 10. If such gaps are present, then the difficulties Gannon describes do not arise. Moreover, Gannon’s scenario involves significant motor vehicle traffic, which generally is absent during the late-night rides.

Furthermore, as demonstrated by the videotape of the 48-person bicycle ride conducted on Second Avenue on Sunday, March 18, 2007, and the Pucher Declaration, a single lane of traffic is more than enough to accommodate a group

of approximately 50 bicyclists. *See* JA-616 at 1:18 p.m. (DVD of group ride); JA-213 ¶ 81. Motorists seeking to pass a group of bicyclists can do so simply by changing lanes and passing them. There is nothing extraordinary or dangerous in motorists proceeding or turning on a block on which 50 persons are bicycling. A ten-year study of collisions involving bicyclists in New York City released in 2006 by Defendants City and NYPD ***did not report a single fatality or serious injury involving group bicycling***, even though hundreds of group bicycle rides are conducted in new York City each year. JA-562-601. Gannon’s generalized fears of group bicycling are illogical and inconsistent with the available evidence.

(ii) **The Court Failed to Properly Apply the Law or Independently Evaluate the Evidence In Connection with Appellants’ Law-Abiding Weekend and Late-Night Group Bicycle Rides.**

Responding to Appellants’ arguments that blanket, round-the-clock and weekend restrictions on group rides were not narrowly tailored, the district court simply restated the first prong of *Ward* — that the Parade Rules “need only advance a substantial interest that would be less well served in their absence.”

SPA-39. The court then proceeded to find that Appellants had failed to establish a likelihood of success on the merits because they:

offer[ed] no evidence to suggest that no area in New York City experiences vehicular or pedestrian traffic at night. The City’s permit scheme therefore ensures that the NYPD can take appropriate precautions in the event that a proposed route were to include an area that was expected to experience late-night traffic.

Id. at 39.⁷

There are three apparent errors in the district court’s decision. **First**, even assuming that some 50-person group bicycle rides might significantly disrupt late-night traffic, the court utterly failed to consider the impact of the Parade Rules on the Montauk Century and Jackson late-night rides which undisputed evidence showed do not cause such disruptions.

Second, there was no evidence that **any** late-night group bicycling has **ever** disrupted traffic. Caneco indicated that such rides would have “no impact” due to the absence of traffic. JA-518 at 168:6-169:23. The court erroneously invented a scenario with no support in the record — a 50-person group of bicyclists disrupting late-night traffic — to justify the regulation of late-night rides.

Third, the court required Appellants to establish that their constitutionally-protected expressive conduct could not possibly implicate traffic and safety interests, *i.e.*, that “no area in New York City experiences vehicular or pedestrian traffic at night.” SPA-39. This materially misstates Appellants’ burden, which should have been limited to demonstrating that the Parade Rules burden substantial late-night group bicycling activity that does not implicate the City’s interests. *See Deegan v. City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006) (finding that the district

⁷ The district court’s opinion does not even discuss Appellants’ evidence that weekend 50-person group rides do not significantly implicate the City’s interests.

court erred when it assigned to plaintiff the burden of demonstrating that the government interest did not justify the restriction imposed on speech).

The district court also relied heavily on Gannon’s speculation regarding the potential impact of multiple group rides coincidentally converging, citing this point three times. SPA-7; *id.*; SPA-38. However, there is no evidence that such convergences have ever occurred. If one did occur, it presumably would last only long enough for the multiple groups to intersect and then each continue on their respective, separate ways. Indeed, the Parade Rules purport to regulate only groups “proceeding together” and therefore cannot be justified by speculation regarding the dangers posed by momentary convergences among groups that are not proceeding together. The court’s uncritical enthusiasm for this illogical “convergence” rationale violated its duty under *Olivieri* to “independently determine the rationality of the government interest.” 801 F.2d at 606.

Remarkably, the district court supplemented the City’s evidence by finding additional facts *sua sponte* that had no evidentiary basis. The court found that the “lack of predictability” of large groups of cyclists “may endanger other travelers as well as disrupt orderly traffic flow, and their presence may add traffic volume that otherwise would be absent.” SPA-35. The court also found that the “add[ed] traffic volume” group bicyclists represent constitutes a “hazard.” SPA-37-38, 35. The City adduced no evidence that group bicycle rides behave any less predictably

than other traffic, or that the mere presence of a 50-person bicycling group presents a “hazard.” These findings apparently reflect the court’s own understandings and experiences of traffic, not evidence in the record, and are clearly erroneous. The district court’s unwarranted deference to the City’s generalized assertions, disregard for Appellants’ evidence, and supplementing of the record with its own traffic insights reflect a profound failure to properly analyze the evidence under *Ward*.

C. The City Failed to Establish That Any Law-Abiding 50-Person Group Bicycle Ride Implicates Substantial Government Interests.

Appellants presented extensive evidence that even on weekday evenings, rides involving more than 50 bicyclists can and do take place in New York City without a fixed route and without significantly disrupting traffic or implicating public safety. That evidence included:

- The City’s ten-year survey of bicycle collision data, which did not link a single bicycling fatality or serious injury to group bicycling. *See* JA-562-99.
- The opinion of transportation expert Professor John Pucher that a law-abiding 50-person group bicycle ride would occupy less than a single lane of traffic on a single standard City block, and would not implicate traffic flow or public safety. JA-192 ¶ 4; JA-204 ¶¶ 51-52.
- A video recording of a 48-person group bicycle ride conducted on Second Avenue in Manhattan on March 18, 2007, demonstrating that such rides do not implicate traffic or safety. JA-616.
- Evidence that participants in Brooklyn Critical Mass have since 2004 conducted numerous 50-person rides that, although closely monitored by NYPD, have not resulted in any arrests, summonses, or reported traffic disruptions. JA-23 ¶ 15; JA-43 ¶ 43; JA-67 ¶ 27.

- Evidence that prior to the 2004 RNC, NYPD managed large Manhattan Critical Mass rides involving hundreds or thousands of participants without the need for a fixed route. *Bray*, 346 F. Supp. 2d at 483-84; *Bray*, 356 F. Supp. 2d at 286.

The City’s witness Caneco submitted conflicting testimony regarding the disruptive effect of Critical Mass rides, but his testimony taken as a whole confirms that law-abiding 50-person group rides do not disrupt traffic. His 2007 Declaration in opposition to Appellants’ motion stated that “[l]arge group bicycle rides (with approximately fifty or more cyclists) may significantly disrupt vehicular and pedestrian traffic and adversely affect public safety.” JA-417 ¶ 3. However, at his deposition he repeatedly testified that the key factor determining the disruptive impact of a group bicycle ride was whether participants obeyed the traffic regulations, not the size of the group. JA-485-89 at 36:8-51:12; JA-517 at 162:12-21. Confronted with his statements in 2005 that 100-person Critical mass rides that violated traffic regulations had only a “minimal” disruptive impact, he testified that 50-person group rides he had later observed had, at worst, “*almost* ha[d] the same [disruptive] impact” as those earlier, minimally-disruptive rides. JA-517 at 164:16-20 (emphasis added).

Appellants also established that Friday evening Critical Mass rides can proceed lawfully — by stopping at traffic signals and following other applicable traffic regulations — even though doing so splinters the ride into smaller subgroups. JA-23-24 ¶¶ 18-19; JA-63 ¶ 16. Although NYPD has attempted to

suppress law-abiding Critical Mass bicyclists by arresting them, the charges have been dismissed in 94% of those cases. JA-269 ¶ 12. Scores of other improperly-issued Critical Mass summonses have also been dismissed. JA-269-270 ¶¶ 13-15. Appellants Blythe, Nelson, Shura and Son each were improperly arrested and/or ticketed at Critical Mass rides, although they had not violated any traffic regulations or other laws. JA-76-77 ¶¶ 12-14; JA-34 ¶ 33; JA-65-66 ¶¶ 21-24; JA-25 ¶ 23. The charges against each of them were dismissed. *Id.*

Thus there is no basis to presume that any of Appellants' rides proceed unlawfully, apart from their status as un-permitted "parades" under the recently-amended Parade Rules. The district court nonetheless mistook Appellants to be arguing that "they should be free to ride in large groups wherever, whenever, and however they wish, free from municipal regulation." *See* SPA-2. The court's mistaken view that Appellants seek freedom from all traffic regulation permeated its analysis of the all of the evidence, and is the likely cause of the court's crediting of Gannon's opinion that group bicyclists "tend" to violate the law. *See* SPA-32. The court's confusion as to the nature and scope of Appellants' claims is sufficient in itself to justify reversal.

Moreover, even if the City had established a tendency among group bicyclists to violate the law — and it did not — the Parade Rules that still would not justify the Parade Rules. There is a "fundamental general principle, deeply

etched in our law, that a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.” *Vincenty*, 476 F.3d at 85 (emphasis in original; internal quotations and citations omitted). The City cannot burden all 50-person group rides simply because some ride participants might violate traffic regulations.

Gannon’s opinion regarding the need for gaps among bicyclists also fails as a basis for imposing the Parade Rules on 50-person Critical Mass rides. The March 18, 2007 group ride demonstrates that approximately 50 bicyclists proceeding in a compressed configuration would delay a motorist for approximately 25 seconds. JA-616, at 1:18 p.m.; JA-261 ¶ 9. Such delays are commonplace in New York City traffic, and motorists seeking to pass or merge across the path of other traffic — including bicyclists — are in any event required to yield to such traffic. *See* JA-470 & n.1; *City of Santa Monica*, 450 F.3d at 1040 (only serious traffic disruptions significantly worse than those typical of urban traffic could justify parade permit requirement). As Caneco admitted at his deposition, it is the impatient motorist that attempts to pass bicyclists when it is unsafe to do so that disrupts traffic, not the slower-moving bicyclists that have an equal right to be in the road. JA-516 at 159:15-161:20; New York Veh. & Traf. Law § 1231. Protecting motorists from *de minimis* delays or slower-moving bicycle traffic is not a substantial City interest.

D. The District Court Disregarded The Substantial Burdens Imposed By The Parade Rules.

The district court also erred in failing to recognize that the advance permit, fixed route and Chief Officer requirements of the Parade Rules impose substantial, unnecessary burdens on Appellants' constitutionally-protected group expression.

(i) The Permit Requirement Is Burdensome.

Participation in most of Appellants' group rides is spontaneous — pre-registration is not required and ride organizers do not know in advance whether a given ride will exceed 50 bicyclists. Consequently, the advance permitting requirement imposes a serious burden on volunteer group ride organizers such as 5BBC, which annually organizes hundreds of rides, any one of which could each exceed 50 participants. During the previous three years, 5BBC held 30 rides with more than 30 participants, but only 5 of those rides with more than 50 participants (excluding the Montauk Century). JA-253 ¶ 11. The Parade Rules are not narrowly tailored as applied to these rides, because they require 5BBC to obtain permits for 30 or more rides when a fraction of them likely to draw 50 participants.

The permitting requirement also burdens the constitutional rights of those considering joining group bicycle rides. Those who join risk a summons or arrest if the group exceeds 49 participants unless a permit has been issued. Courts have struck parade permitting schemes because of this particular burden on spontaneous action:

There is scarcely a more powerful form of expression than the political march. Unlike stationary demonstrations or other forms of pure speech, the political march is capable of reaching and mobilizing the larger community of citizens. It is intended to provoke emotive and spontaneous action, and this is where its virtue lies. As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession as a statement of solidarity. Automatically criminalizing participation in a permitless march destroys the spontaneity and enthusiasm which public demonstrations of this nature are meant to engender . . . [T]he potential protestor would be well-advised to seek personal verification from a city official that the demonstration has been authorized, or run the risk of being thrown in jail. Requiring potential march participants to seek authorization from city officials before joining a public procession or risk being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear.

American-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 611-612 (6th Cir. 2005).⁸

In contrast to the Sixth Circuit in *City of Dearborn*, the district court viewed the effect of the permit requirement on Appellants' group rides as a non-issue:

The Parade Regulations place no restrictions on the rights of cyclists to ride through the streets of New York in groups of 49 or fewer. Nor do they prevent cyclists altogether from riding in groups of 50 or more. Cyclists are free to ride through the city in large groups so long as they first obtain a permit.

⁸ See also *People v. Barrett*, 821 N.Y.S. 2d 416, 428-29 (N.Y. Crim. Ct. 2006) (quoting above passage and citing constitutional considerations in refusing to give effect to superseded version of Parade Rules); *People v. Bezjak*, 812 N.Y.S. 2d 829, 838-39 (N.Y. Crim. Ct. 2006) (similar observation by court declining to enforce superseded version of Parade Rules).

SPA-19; *see also* SPA-43. The court’s failure to understand the constitutional gravity of the burden imposed by the advance permitting requirement underlies its erroneous conclusion that the Parade Rules are narrowly tailored.⁹

City of Dearborn and other decisions have also rejected “strict liability” provisions such as the Parade Rules, under which participants in constitutionally-protected expression are subject to criminal penalties regardless of whether they were aware of, or intended to commit, a violation of the law. *See City of Dearborn*, 418 F.3d. at 610-12 (strict liability for parade permit law is “antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear”); *Barrett*, 821 N.Y.S. 2d at 428-29 (New York City parade rules unconstitutionally chill expression insofar as “the casual cyclist who comes abreast of a group of cyclists and joins them” spontaneously “runs the risk of being sentenced to . . . jail”). Although Appellants raised this issue in their motion, the district court failed even to address it. *See* Pls.’ Mem., 48.

The burden of the advance permit requirement is magnified by NYPD’s arbitrary permit application process. NYPD’s website systematically directs applicants for permits for events of fewer than 1,000 participants to apply to the wrong address, and the NYPD precinct-level personnel that are actually designated

⁹ Because the permit requirement discourages 50-person groups, it also blunts the expressive power of Appellants’ group riding activities, which are more effective in larger groups. *See* JA-62 ¶ 12.

to handle such applications refuse to receive them. JA-602; JA-84 ¶ 10. A ride organizer may spend more time finding an NYPD officer willing to accept his application than actually riding. JA-103 ¶¶ 27-28. The permitting requirement will reduce the number of group rides organized by the all-volunteer 5BBC. *See* JA-104 ¶ 30 (“I would have to reduce the number of rides I lead each year if I had to prepare a permit application for all or even some of them.”); JA-254 ¶ 15 (“There are leaders in our club who would stop organizing rides if they were required to go through the permit process for each one.”). The City conceded that its permit application procedures were arbitrarily and unnecessarily burdensome, but failed to modify them.¹⁰

(ii) **The Fixed Route and “Chief Officer” Requirements Are Burdensome.**

Government restrictions on the spontaneity of expression violate the First Amendment unless justified. The district court recognized that the spontaneity of an open route was “central” to the expressive component of Appellants’ Critical Mass rides, yet ultimately concluded that the fixed route requirement of the Parade Rules merely “inconveniences cyclists and perhaps makes group rides of 50 or

¹⁰ Even after Appellants’ brought NYPD’s systematic misdirection of applicants to the City’s attention, the misdirection continued, despite representations by Corporation counsel in the district court that speedy reforms were forthcoming. Pls.’ Mem. 25-26; JA-437-38 at 25:23-27:6, JA-444 at 36:14-20; JA-523-24 at 188:14-191:14; <http://www.nyc.gov/html/nypd/html/misc/pdffaq1.html>.

more less attractive or enjoyable than they otherwise would be.” SPA-26-27. The court’s finding contravenes *Watchtower Bible & Tract Soc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

In *Watchtower*, the Supreme Court invalidated an ordinance that required members of the Jehovah’s Witnesses to register before conducting door-to-door solicitation. The Court rejected the ordinance 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 also recognized that some “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.* Subsequent courts have applied *Watchtower* to strike down advance permit requirements on non-religious speech because those requirements impeded spontaneous expression. *See Parks v. Finan*, 385 F.3d 694, 702 (6th Cir. 2004) (finding regulation requiring permit before using capitol grounds for speeches and public gatherings was “substantially overbroad”); *Diener v. Reed*, 232 F. Supp. 2d 362, 387-88 (M.D. Pa. 2002) (concluding requirement to obtain permit before distributing literature or making speeches in public parks was not narrowly tailored and would curtail spontaneous speech).

Spontaneity is the defining characteristic of Critical Mass. Participants relish the fact that they 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). JA-64 ¶¶ 17-18; JA-22 ¶ 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. JA-64 ¶ 18. Like the plaintiffs in *Watchtower*, Nelson and Son would rather cease participation in Critical Mass than participate under fixed route and Chief Officer requirements. *Id.*; JA-22 ¶ 14.

The district court somehow failed to grasp how these requirements burdened Appellants' expressive conduct. The court concluded that requiring Critical Mass to follow a police-approved route along streets from which police had excluded other traffic "reinforce[s] the message that bicycles have an equal right to the road," because under the Parade Rules the police would treat a 50-vehicle motorcade in the same manner. SPA-26, 27. This reasoning ignores the substance of Critical Mass's message — that bicyclists have a right to proceed as part of traffic.

The court did recognize that requiring 50-person processions to designate a "Chief Officer" to be held responsible for the conduct of participants was

objectionable. However, the court found that the issue was moot based on representations of the City's counsel that the requirement merely provided for designation of a "point person" at each permitted event to liaise with NYPD on logistics, and assurances that the parade permit application form would be changed accordingly. SPA-41-42. As noted, the City has not modified the Chief Officer requirement.

The court held in the alternative that it would not rule on the constitutional issues raised by the Chief Officer requirement because the City's interpretation of it rendered it unobjectionable. SPA-41. However, the constitutional issue cannot so easily be sidestepped, because the City's interpretation of the requirement is patently unreasonable. *Disabled American Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 140-141 (2d Cir. 1992) ("courts should avoid an interpretation of a . . . statute that engenders constitutional issues if a **reasonable** alternative interpretation poses no constitutional question") (emphasis added; quotations removed). The Parade Rules state that "The chief officer of any procession, parade or race, for which a permit may be granted by the police commissioner, **shall be responsible** for the strict observance of all rules and regulations included in said permit." NYCAC § 10-110(a)(5) (emphasis added). The permit application requires the applicant to stipulate to this condition under penalty of perjury. *See* JA-110. Under any reasonable reading, the Chief Officer

provision of the Parade Rules imposes vicarious liability on the organizers of permitted events. To allow the City to avoid Appellants' constitutional claim based on an interpretation so clearly at odds with the plain text is to invite arbitrary and discriminatory enforcement.¹¹

Given the district court's surmise that the Chief Officer requirement "in all likelihood would be unconstitutional" if applied as written (SPA-41), it may be presumed to have a burdensome, chilling effect on Appellants' constitutionally-protected group bicycling. Because 5BBC's rides are open to the general public and are conducted according to egalitarian principles, 5BBC will not accept responsibility for the potential misconduct of ride participants. See JA-237 ¶ 22 (Chief Officer requirement fundamentally inconsistent with 5BBC group ride practices); JA-100 ¶ 14 & JA-110 (same, and making "protest" against this condition in permit application). The Chief Officer requirement is even more fundamentally antithetical to the ethos of Critical Mass. Because the Chief Officer requirement is unconstitutional on its face, has a chilling effect, and interferes with the internal organization of Appellants' group rides, the district court should have ruled upon it.

¹¹ Moreover, even if the City's interpretation of the Chief Officer requirement were reasonable and binding on the City, that would not stop a ride participant from invoking the stipulation regarding the requirement in the permit application to impose civil liability on a ride organizer.

II. THE PARADE RULES IMPOSE AN ACTIONABLE BURDEN ON THE RIGHT TO TRAVEL.

The Second Circuit has repeatedly recognized and upheld a constitutional right to intrastate travel. *See Spencer v. Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990). (“[T]hough the Supreme Court has dealt only with the right to travel between states, [the Second Circuit] has held that the Constitution also protects the right to travel freely within a single state.”). “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*, No. 96 Civ. 0467, 1998 U.S. Dist. LEXIS 17757, *2 (S.D.N.Y. Nov. 10, 1998).

It is apparent that the Parade Rules materially burden the right to travel in groups of 50 or more by requiring persons to obtain NYPD permission in advance of traveling. The district court dismissed this burden as a mere “inconvenience” (SPA-19), based primarily on *Campbell*. There, the plaintiff challenged a medical center policy that required him, based on his past behavior, to inform the police before visiting the medical center to obtain services. The *Campbell* court noted that there were several other medical centers “just as, if not more, convenient to [the plaintiff’s] residence,” and thus the notification policy did not force plaintiff to travel any further than he already did for medical services. 1998 U.S. Dist LEXIS 17757 at *3, JA-157. In contrast, the Parade Rules cover travel to all destinations

within New York City, a significantly greater burden than that upheld in *Campbell*. Compare *New York State Nat'l Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) (holding that pro-life demonstrators that denied women access to New York City clinics burdened the women's right to travel because the women would have had to travel unreasonable distances outside of New York City in order to get similar treatment).

The court also based its ruling on the rationale that Appellants “do not have a constitutional right to the most convenient form of travel.” SPA-18. However, the Parade Rules restrict travel not only by bicycle, but also by foot, motor vehicle, and other conveyances. 38 RCNY §19(a), JA-315. Because they burden numerous common modes of group travel, the Parade Rules are far more than a minor inconvenience — they are a substantial burden on the right of 50-person groups to travel by virtually any means other than mass transit.

The Second Circuit has consistently refused to uphold a restriction on the fundamental right to intrastate travel unless it is necessary to promote a compelling government interest. *Maxwell v. City of New York*, 93 Civ. 5834, 1995 U.S. Dist. LEXIS 5467, at *21-24 (S.D.N.Y. Apr. 27, 1995) (citing *Shapiro v. Thompson*, 394 U.S. 618 at 634 (1969)), JA-165-66. To meet this standard, a law that burdens the right to travel must be supported with empirical evidence demonstrating that the challenged law actually advances the asserted government interest. *See*

Johnson v. City of Cincinnati, 310 F.3d 484, 504 (6th Cir. 2002) (requiring the City to provide evidence of necessity and effectiveness in order to justify restrictions on movement in drug-exclusion zones); *Hutchins v. District of Columbia*, 188 F.3d 531, 542 (D.C. Cir. 1999) (noting that the District presented “reams of evidence depicting the devastating impact of juvenile crime” to justify its curfew ordinance).

The Parade Rules cannot meet this standard because the City fails to advance a compelling government interest that the Parade Rules are “necessary” to further. The City has historically managed large Critical Mass and other bicycle rides involving more than 1,000 participants without parade permits. *See* JA-97-99; JA-253. During this time period, ordinary New York City traffic laws were sufficient to promote and ensure public safety. *See Johnson*, 310 F.3d at 504 (to justify burdens on travel, city was required to demonstrate that measures already in place was required for reducing drug-related crimes were ineffective). The City has not shown that the pre-existing New York City traffic laws are insufficient to ensure public safety.

III. THE PARADE RULES IMPOSE AN ACTIONABLE BURDEN ON THE RIGHT TO ASSOCIATE.

It is undisputed that Appellants’ group bicycling activities are a constitutionally-protected form of intimate association. Restrictions on the right to intimate association are subject to strict scrutiny when they impose a “direct and substantial” burden on those rights. *See Marinaccio v. Boardman*, No. 1:02-CV-

00831 (NPM), 2007 U.S. Dist. LEXIS 16088, 7-8 (N.D.N.Y. Mar. 7, 2007); *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (quoting *Lyng v. Int'l Union*, 485 U.S. 360, 365-67 & n.5 (1998)) (“To be cognizable, [government] interference with associational rights must be ‘direct and substantial’ or ‘significant.’”). Appellants demonstrated that the Parade Rules interfered with their associational rights in a direct and substantial manner, but the district court mischaracterized that interference as a mere “inconvenience.” That holding was an abuse of discretion and should be reversed.

At the heart of the district court’s erroneous ruling was its failure to recognize that group bicycling is the *raison d’etre* of Appellants’ intimate association. For this reason, the restrictions on group bicycling imposed by the Parade Rules — the permit requirement, the restrictions on routes and the imposition of a “Chief Officer” requirement responsible for group conduct — necessarily interfere with Appellants’ right to associate in a direct and substantial way. These restrictions fundamentally shape Appellants’ intimate association by dictating when and where they will occur, the number that can participate, and the relationships among participants. These burdens are not merely “inconveniences” or “incidental” restrictions, but rather encumber the very embodiment of Plaintiffs’ association. For these reasons, the district court’s ruling on Appellants’ right of association claim should be reversed.

CONCLUSION

For the foregoing reasons, the Court should REVERSE the decision of the district court and REMAND to the district court with instructions to grant a preliminary injunction.

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New York, New York

Respectfully Submitted,

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ADDENDUM

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

Title 10: PUBLIC SAFETY

Chapter 1: PUBLIC SAFETY

Current through Dec. 31, 2006

§ 10-110 Processions and parades.

a. Permits. A procession, parade, or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner. Application for such permit shall be made in writing, upon a suitable form prescribed and furnished by the department, not less than thirty-six hours previous to the forming or marching of such procession, parade or race. The commissioner shall, after due investigation of such application, grant such permit subject to the following restrictions:

1. It shall be unlawful for the police commissioner to grant a permit where the commissioner has good reason to believe that the proposed procession, parade or race will be disorderly in character or tend to disturb the public peace;

2. It shall be unlawful for the police commissioner to grant a permit for the use of any street or any public place, or material portion thereof, which is ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character, except, upon loyalty day, or upon those holidays or Sundays

when places of business along the route proposed are closed, or on other days between the hours of six thirty post meridian and nine ante meridian;

3. Each such permit shall designate specifically the route through which the procession, parade or race shall move, and it may also specify the width of the roadway to be used, and may include such rules and regulations as the police commissioner may deem necessary;

4. Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the commissioner for any street or public place, and for any day or hour, with the written approval of the mayor;

5. The chief officer of any procession, parade or race, for which a permit may be granted by the police commissioner, shall be responsible for the strict observance of all rules and regulations included in said permit.

b. Exemptions. This section shall not apply:

1. To the ordinary and necessary movements of the United States army, United States navy, national guard, police department and fire department; or

2. To such portion of any street as may have already been, or may hereafter be duly, set aside as a speedway; or

3. To processions or parades which have marched annually upon the streets for more than ten years, previous to July seventh, nineteen hundred fourteen.

c. Violations. Every person participating in any procession, parade or race, for which a permit has not been issued when required by this section, shall, upon conviction thereof, be punished by a fine of not more than twenty-five dollars, or by imprisonment for not exceeding ten days, or by both such fine and imprisonment.

RULES OF THE CITY OF NEW YORK
Title 38: POLICE DEPARTMENT
Chapter 19: RULES FOR PROCESSIONS AND PARADES
Current through Jan. 26, 2007

38 RCNY § 19-02(a)

§ 19-02 [Definitions.]

For purposes of these rules, the following terms shall have the following meanings:

(a) A “parade” is any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway.

NEW YORK STATE VEHICLE AND TRAFFIC LAWS
Article 34: OPERATION OF BICYCLES AND PLAY DEVICES
Section 1231: TRAFFIC LAWS APPLY TO PERSONS RIDING BICYCLES OR
SKATING OR GLIDING ON IN-LINE SKATES
Current through Dec. 2004

§ 1231

Every person riding a bicycle or skating or gliding on in-line skates 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.

RULE 32(A)(7) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in a 14-point Times New Roman font.

I certify that the foregoing is true and correct.

Dated: New York, New York
 September 6, 2007

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ANTI-VIRUS CERTIFICATION

Case Name: 5 Borough v. NYC

Docket Number: 07-2154-cv

I, Nadia R. Oswald, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 9/6/2007) and found to be VIRUS FREE.

/s/ Nadia R. Oswald

Nadia R. Oswald
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Dated: September 6, 2007