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SUMMARY OF ARGUMENT

Appellants established in their opening brief (“App. Br.”) that preliminary relief is appropriate, and that the district court abused its discretion in four fundamental respects when denying Appellants’ motion to preliminarily enjoin enforcement of the Parade Rules:

- (1) By failing to consider whether the Parade Rules burden substantially more constitutionally-protected group bicycling than necessary to serve Appellees’ substantial interests, as required under the narrow-tailoring standard of *Ward v. Rock Against Racism*, see App. Br. at 32-37;
- (2) By making clearly erroneous factual findings (including *sua sponte* findings without evidentiary basis) that late-night and weekend 50-person group bicycle rides are likely to negatively affect traffic and public safety, despite the undisputed evidence to the contrary, see *id.* at 38-46;
- (3) By ruling that the restrictions imposed by the Parade Rules can be justified by the mere possibility that individual bicyclists within groups might violate traffic laws, contrary to First Amendment principles recognized by this Court most recently in *Vincenty v. Bloomberg*, see *id.* at 46-50; and
- (4) By dismissing as mere “inconveniences” the constitutionally significant burdens imposed by the Parade Rules on Appellants’ fundamental rights of speech, travel and association, see *id.* at 50-57, *id.* at 58-60, *id.* at 60-61.

Appellees fail to explain why the district court’s decision should not be reversed on these grounds. Appellees barely address Appellants’ chief legal argument, that the district court failed to properly apply *Ward*, simply asserting

without explanation that Appellants “are mistaken” that the district court failed to consider whether the Parade Rules burden substantially more speech than necessary. Appellees do not — and cannot — point to anything in the district court’s opinion showing that this crucial second prong of the *Ward* narrow tailoring test was applied.

Appellees also fail to address the district court’s erroneous findings that law-abiding, 50-person late-night and weekend group rides are likely to disrupt traffic or implicate public safety. Indeed, Appellees do not even mention (*a*) the testimony of Appellees’ own witness Lt. Caneco that such rides would not disrupt traffic; (*b*) the complete lack of evidentiary support for the district court’s *sua sponte* findings that such rides are “hazard[ous] due to their “lack of predictability” or “sheer size” (SPA-35, 37-38); or (*c*) the NYPD’s own recent ten-year bicycling safety report that fails to link a single death or serious injury to group bicycling. Appellees also fail to explain how the Declaration of Lt. Gannon can support the district court’s erroneous findings, when Lt. Gannon admits he has never observed a 50-person group ride, his declaration does not speak to the distinctive traffic conditions faced by late-night and weekend rides, and his concerns regarding “moving columns” of bicyclists were shown by undisputed evidence to be irrelevant to Appellant 5BBC’s hundreds of annual group rides.

Appellees further fail to address the flaws in the district court’s ruling as applied to all 50-person group rides, including those taking place on weekday evenings such as Critical Mass. The district court credited unfounded generalizations that participants in such rides tend to violate the law simply because they are traveling in groups, and concluded without basis that Appellants seek “unfettered . . . freed[om] from municipal regulation” to bicycle “wherever, whenever, and however they wish.” SPA-2, 52. Based on the mere possibility of traffic violations during a 50-person group ride, Appellees reason that restrictions must be imposed on *all* such rides because “one cannot know before the activity occurs” which rides will involve traffic violations. That approach is flatly inconsistent with the principle 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 v. Bloomberg*, 476 F.3d 74, 85 (2d Cir. 2007).

Appellees also fail to justify the district court’s findings that the restrictions imposed by the Parade Rules are not constitutionally significant burdens on Appellants’ rights to travel and association. Appellees simply repeat the district court’s conclusion that the cumbersome and disorganized parade permit application process, the fixed route requirement, and the resulting near-elimination of spontaneity from Appellants’ constitutionally-protected group bicycling activity are mere “inconveniences.” Appellees ignore the central principle of the very

decisions on which they rely for support: that permit requirements and prior restraints on the expressive activity of any size group are constitutionally significant burdens that require scrutiny of the government’s justification for the restraint. Because bicycling in groups is the core activity through which Appellants exercise their constitutional rights to travel and association, the requirement that Appellants obtain advance permission from NYPD for their rides and routes directly and substantially burdens those rights, triggering strict scrutiny of the governmental justifications for the requirement. Strict scrutiny should be applied, and preliminary relief should be granted.

ARGUMENT

I. PRELIMINARY RELIEF IS APPROPRIATE BECAUSE THE PARADE RULES VIOLATE THE NARROW TAILORING STANDARD SET FORTH IN *WARD v. ROCK AGAINST RACISM*.

A. The District Court Failed to Consider Whether the Parade Rules Burden Substantially More Speech Than Is Necessary to Serve Appellees’ Significant Interests.

Appellees cannot justify the district court’s failure to apply the narrow tailoring test set forth in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). To be upheld as narrowly tailored, regulations infringing expression must comply with *two* distinct requirements: (1) they must “promote[] a substantial governmental 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 district court’s failure to apply the second prong of the *Ward* test is undeniable. The court conceded that “not every group bicycle ride of 50 or more participants necessarily will disrupt traffic, endanger other travelers, or disobey traffic regulations.” *See* SPA-42. But the court never considered whether such unobjectionable group rides constituted a substantial amount of expressive conduct that is unnecessarily burdened by the Parade Rules. Instead, the court ruled preliminarily in favor of regulation of *all* 50-person rides simply because of the “risks” of unlawful, disruptive or dangerous conduct. SPA-42-43.

Most of the “risks” invoked by the district court in upholding the parade Rules are mere theoretical possibilities without any empirical basis. The district court repeatedly stressed the possibility that two 50-person group rides might fortuitously converge as a reason for imposing advance permitting and fixed-route requirements on all 50-person rides. *E.g.*, SPA-7, SPA-38. ***There is no evidence that such a convergence has ever occurred.*** The district court cited the alleged dangers of group bicycle rides, but did not mention in its decision that ***Appellees’ own ten-year bicycling safety study fails to link a single death or serious injury to group bicycling.*** *See* JA-562-601. The court rejected Appellants’ argument, supported by Appellees’ witnesses’ testimony, that late-night group rides do not

disrupt traffic because late-night traffic is light, on the ground that Appellants could not conclusively prove that “no area in New York City experiences vehicular or pedestrian traffic at night”. SPA-39. ***The court upheld application of the Parade Rules to late-night rides based on theoretical risks that Appellees’ own witnesses testified lacked substance.*** See App. Br. at 39-41.

Instead of investigating the extent to which the Parade Rules unnecessarily burden unobjectionable group riding activity, as the second prong of the *Ward* test requires, the district court approved blanket application of the Parade Rules to all 50-person group bicycle rides based on such theoretical “risks.” Appellees utterly fail to explain how this approach satisfies the *Ward* narrow tailoring standard. Appellees’ entire rebuttal on this point consists of the unsubstantiated assertion that “plaintiffs are mistaken in stating that the District Court ignored the requirement of *Ward* that to be narrowly tailored, a regulation must not burden substantially more speech than is necessary.” See Opp. Br. at 48. The district court’s indisputable failure to apply both prongs of the *Ward* standard, and its concomitant reliance on theoretical possibilities to justify restrictions on Appellants’ constitutional rights, was an incorrect application of the controlling legal standard requiring reversal.

B. The District Court’s Findings That Late-Night and Weekend Group Bicycling Impacts Traffic Flow and Public Safety Were Clearly Erroneous.

Appellants have demonstrated with extensive and largely undisputed evidence that the bulk of their group bicycling activity implicated by the Parade Rules takes place on the weekends or late at night, is law-abiding, and does not implicate governmental interests in promoting traffic flow and public safety. App. Br. at 37-49. The district court reached contrary findings, largely by ignoring this evidence and basing its analysis on speculation and NYPD’s past experience with a handful of large Critical Mass rides. Appellees fail to explain why the district court’s erroneous factual findings were not an abuse of discretion.

The district court’s most fundamental error was its misapprehension that Appellants seek “unfettered freedom” from “municipal regulation”:

[Appellants] . . . 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.

SPA-2; *see also* SPA-52 (framing the issue presented by Appellants’ claims to be whether they should have the “ability to bicycle through the streets of New York City with unfettered freedom”).

The district court’s mischaracterization of Appellants’ claims is highly significant and is without support in the record. Contrary to Appellees’ suggestion

(see Opp. Br. at 46 n.7), the undisputed evidence demonstrated that Appellants' late-night and weekend group bicycling activity is lawful, non-disruptive and safe. Appellants have explained in detail the "point-drop-sweep" and "compression stop" techniques they use to ride in groups without violating traffic laws. App. Br. at 10-11 Appellees' witness Lt. Caneco, who for years was responsible for receiving reports of traffic disturbances in midtown and lower Manhattan, could not recall receiving a single report regarding any of 5BBC's or Jackson's rides. *Id.* at 39. Caneco further testified that late night and weekend rides in general were unlikely to disrupt traffic. *Id.* at 39-40. NYPD has in various other ways indicated its lack of concern for the supposed traffic and safety impacts of 50-person late-night and weekend rides. *Id.* at 40-41. Appellees' own report summarizing a decade of bicycling safety data fails to link a single death or serious injury to group bicycling. JA-562-601. ***Neither the district court in its opinion nor Appellees in their brief mention this undisputed evidence of the safe, non-disruptive and law-abiding character of Appellants' late-night and weekend rides.***

The district court nonetheless rejected Appellants' preliminary challenge to the Parade Rules as applied late-night and weekend rides, on the ground that narrow tailoring under *Ward* does not require the fashioning of "a permitting scheme that [takes] account of traffic patterns on every possible route at every

possible time of day”. SPA-38.¹ Appellants do not seek such a permitting scheme, any more than they seek “unfettered freedom” from municipal regulation. Rather, Appellants seek a proper analysis under the second prong of the *Ward* narrow tailoring test of the burden imposed by the Parade Rules on their 50 person late-night and weekend group bicycle rides. Such an analysis would find that those rides constitute a substantial amount of constitutionally-protected expressive activity that does not implicate substantial government interests.

The district court erred by relying on the Declaration of Lt. Gannon in concluding that the Parade Rules likely can be constitutionally imposed on late-night, weekend and all other 50-person group rides.² Lt. Gannon’s Declaration cannot support that conclusion, for several reasons. *First*, Lt. Gannon has never witnessed a group ride of less than 150 persons, thus his opinions regarding 50-person group rides are speculative. JA-467-68 ¶¶ 12-13; *see* App. Br. at 25.

¹ The district court’s suggestion that anything less than “24/7” application of the Parade Rules would be burdensome or unworkable has no support in the record. In fact, the Parade Rules already require Appellees to distinguish among days of the week, hours of the day, and the traffic conditions on particular streets in applying them. *See, e.g.*, NY.C.A.C. §10-110(a)(2) (parade permits may not be granted for events on streets “ordinarily subject to great traffic or congestion” except on Sundays, holidays, or on weekdays between the hours of 6:30 a.m. and 9 p.m.)

² Apparently troubled by possible inconsistencies in Lt. Caneco’s statements regarding the disruptive potential of 50-person group bicycle rides, the district court stated that it would “reach the same result even if his evidence were disregarded entirely.” SPA-38 n.134.

Second, Lt. Gannon does not specifically opine with respect to late-night or weekend rides (*see* JA-466-68 ¶¶ 7-14), and he does not address Appellants’ undisputed evidence that late-night and weekend rides do not disrupt traffic.

Third, Lt. Gannon’s assertion that law-abiding group bicyclists disrupt traffic by proceeding in a “moving column” without “natural spaces” between among them (JA-467-68 ¶¶ 13-14) ignores the evidence that hundreds of Appellant 5BBC’s group rides proceed in a stretched-out configuration with large gaps between bicyclists. *See* App. Br. at 10-11. **Fourth**, Lt. Gannon cites no evidence that any group bicycle ride — whether configured as a “moving column” or otherwise — has ever contributed to a traffic collision in New York City. Appellees fail to address any of these crucial flaws in Lt. Gannon’s evidence.

Given this weakness in the evidence linking late-night and weekend 50-person group rides with danger or disruption, the district court’s additional *sua sponte* findings of fact on this point necessarily were material to its decision. The district court asserted that 50-person group bicycle rides (presumably, whenever conducted) are “hazard[ous]” due to their “lack of predictability” and their “sheer size.” SPA-35, 37-38. There is *no* basis in the record for these findings. To the contrary, Appellants submitted direct and undisputed evidence establishing that 50-person group rides are not unpredictable and do not disrupt traffic. *See* JA-200 ¶32; JA-212-13 ¶¶ 78-81; JA-616 at 1:18:28 (DVD of 48-person group bicycle ride

conduct on March 18, 2007). Because the decision below rests on these and other clearly erroneous findings of fact, it should be reversed with instructions to the district court to enter an injunction in Appellants' favor based on the undisputed, competent evidence in the record.

C. Preliminary Relief Cannot Properly Be Denied Based on the Possibility that Certain Cyclists May Break the Law.

The overwhelming weight of the evidence submitted below demonstrated that 50-person group bicycles rides taking place on weekday evenings — primarily, Critical Mass rides — do not pose a significant risk to traffic flow or public safety. Despite Appellees' claims to the contrary, lawlessness and disruption are not inherent in Critical Mass. Numerous Brooklyn Critical Mass rides involving 50 to 100 participants have proceeded without any arrests or summonses being issued. *See* App. Br. at 46. Appellants presented undisputed evidence of their law-abiding participation in Manhattan Critical Mass rides, and evidence of the generally law-abiding nature of such rides since February of 2006. App. Br. at 46-48. While NYPD cites numerous traffic violations during Manhattan Critical Mass rides, charges have been dismissed in most cases, including in 94% (290 of 308) of the cases in which the alleged violation resulted in arrest. JA-269-270 ¶¶ 12-15. The disruptions that have occurred during larger Manhattan Critical Mass rides that involve hundreds of bicyclists are in the nature of minor delays that are typical of New York City traffic. *See* App. Br. at 49. This

record does not support the imposition of the Parade Rules on 50-person Critical Mass rides.

The court nonetheless did so, apparently based on sweeping generalizations by Lts. Gannon and Caneco that group bicyclists “tend” to violate the law. SPA-32, 35-36. The court’s reliance on these generalizations contravened fundamental First Amendment principles. In *Vincenty v. Bloomberg*, 476 F.3d 74 (2007), this Court addressed the issue of whether restrictions on the possession of certain art supplies could be justified by the fact that such supplies could be used both for lawful and constitutionally-protected artistic expression, as well as for unlawful graffiti. The Court rejected the restrictions, based on the

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.

Id. at 85 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)).

Vincenty makes apparent that the Parade Rules are not a narrowly-tailored response to the perceived problem of traffic violations by group bicyclists. The undisputed record evidence established that numerous 50-person group rides (including Brooklyn Critical Mass rides, 5BBC rides and Professor Jackson’s History of New York City ride) can and generally do proceed lawfully and without disruption. Lts. Caneco and Gannon failed to address any of these rides, and it

appears that they based their sweeping assertions of lawlessness on observations of large Manhattan Critical Mass rides involving a hundred or more participants. *See* JA-492 at 64:25-65:5; JA-493-94 at 69:21-70:13; JA-467-68 ¶¶ 12-13. *Vincenty* requires that traffic violations incidental to a handful of very large group bicycle rides be dealt with through application of the traffic laws, not by “throttling” all constitutionally-protected group bicycling activity in advance. *See* 476 F.3d at 85.

Appellees openly disagree with *Vincenty*. According to Appellees, uncertainty as to whether or by whom unlawful activity will occur in the context of constitutionally-protected activity — the very factor that led the *Vincenty* court to reject restrictions on expressive conduct — justifies the imposition of advance restrictions on group bicycling:

As one cannot know before the activity occurs which rides will affect the public safety, steps must be taken beforehand to try to prevent adverse effects on public safety. To that end, the City determined that a permit requirement for rides of 50 or more was the best way to achieve the goal of public safety without overburdening the activity at hand, some of which would not cause a public safety problem, but which could not be identified until after the fact. ***Plaintiff’s suggestion of punishing the few who abuse rights of speech after they break the law fails to address the threat to public safety presented here.***

Opp. Br. at 49 (emphasis added).

The First Amendment does not allow imposition of a blanket restriction on all 50-person group rides based on the possibility that some participants in some rides might violate the law. Such a restriction cannot be justified by generalized

assertions that group bicyclists “tend” to violate the law (SPA-32; SPA-36), any more than by the assertion that teenagers “tend” to use wide-tip markers to make unlawful graffiti rather than constitutionally-protected art. *See Vincenty*, 476 F.3d at 86-87. As explained above, the “threat to public safety” invoked by Appellees is entirely speculative. *See supra* pp. 5-6. 9-10. Even if a restriction would likely further the government’s interest in deterring unlawful conduct, it will not be upheld unless its “*incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance [the government’s substantial] interest.*” *Id.* at 84 (emphasis in original, internal quotes and citations omitted). Because there is no evidence that imposing the fixed route requirement and other restrictions of the Parade Rules on 50-person Critical Mass rides is “essential to the furtherance” of Appellees’ substantial interest, the district court’s ruling was an abuse of discretion.

D. The Burdens of the Parade Rules are Substantial.

Appellants have documented the numerous, substantial burdens imposed by the Parade Rules on their constitutional rights. Those burdens include:

- Subjecting Appellant 5BBC, an all-volunteer organization which annually organizes hundreds of rides implicated by the Parade Rules, to a cumbersome and disorganized advance permitting requirement that can consume more than 6 hours per ride application. App. Br. at 50, 52-53.
- Prohibiting open route and leaderless rides, the spontaneity of which is integral to the expressive component of Critical Mass. *Id.* at 53-55.

- Discouraging spontaneous participation in group bicycle rides by subjecting riders to the risk of a summons or arrest should their participation result in the group exceeding 49 in number unless a permit has been issued. *Id.* at 50-51.
- Imposing strict liability on ride participants by subjecting them to potential criminal penalties regardless of whether they were aware of, or intended to commit, a violation of the law, in contravention of established First Amendment doctrine. *Id.* at 52.

Appellees offer nothing of substance to contradict Appellants’ extensive showing of burden. Instead, Appellees seize on the district court’s erroneous characterization of these burdens as mere “inconveniences,” and urge that “inconveniences” are justified by the alleged beneficial effect of the Parade Rules on traffic flow and safety. *See Opp. Br.* at 50-52.

Appellees’ dismissive approach ignores the holdings of the cases on which Appellees rely. *See Opp. Br.* at 52-53. Appellees cite several cases holding that requiring individuals to obtain a permit in advance of engaging in constitutionally-protected public demonstrations is a burden that triggers scrutiny under *Ward*. *See id.*; *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (“Any notice period is a substantial inhibition on speech.”); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994) (“advance notice provisions such as that subsumed within [the challenged] permit requirement drastically burden free speech”) (internal quotations omitted); *see also Douglas v.*

Brownell, 88 F.3d 1511, 1521(8th Cir. 1996) (“A permit requirement controlling the time, place and manner of speech must also be . . . narrowly tailored . . .”).³

City of Dearborn, *Grossman*, and *Douglas* establish that an advance permitting requirement is sufficiently burdensome to trigger constitutional scrutiny, whether the requirement is applied to groups of two, eight or ten (as in those cases), or to larger groups as are at issue here. The district court here failed to apply the requisite scrutiny, apparently based on its view that that the Parade Rules impose mere “inconveniences” rather than constitutionally significant burdens. The court acknowledged that spontaneity was “central to the message expressed by of a Critical Mass rides”, but failed to recognize that a fixed-route requirement would eliminate the spontaneity of such rides. “[T]he most that can be said,” concluded the court, “is that the predetermined route requirement

³ Appellees cite the holding in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), as evidence that an advance permit requirement for 50-person group bicycle rides “advance[s] the City's interests in protecting the public health and safety.” Opp. Br. at 53. However *Thomas* did not address the propriety of a 50-person threshold, an issue not raised by the litigants. *Thomas* dealt exclusively with the procedural aspects of the permitting scheme at issue, *see* 534 U.S. at 323-25, and therefore is irrelevant to the question of whether a 50-person threshold is an appropriate trigger for applying a permitting requirement.

inconveniences cyclists and perhaps makes group rides of 50 or more less attractive or enjoyable than they otherwise would be.” SPA-29.⁴

Appellees’ right of spontaneous expression deserves much greater consideration, as the Supreme Court recognized when it struck down an ordinance requiring advance licensing of door-to-door canvassers. *See Watchtower Bible & Tract Soc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002), and cases cited in Appellants’ Brief, at 54. Neither Appellees in their brief nor the district court in its decision discuss *Watchtower* or its progeny, or recognize the constitutional significance of the open route format of Critical Mass rides.

Indeed, as a practical matter, the Parade Rules amount to a ban on Critical Mass Rides because the lack of a fixed route (and of a leader without authority to seek advance approval of such a route) are the defining characteristics of Critical Mass, as it is practiced in hundreds of cities around the world on the last Friday of each month. *See App. Br. at 53-57*. Thus there is no merit to the argument that the Parade Rules should be upheld because they merely make the exercise of constitutional rights inconvenient rather than outright prohibiting their exercise. *See Opp. Br. at 55; SPA-19; SPA-43*.

⁴ This passage is taken from the district court’s discussion of plaintiffs’ right to association claim, but the court did not separately discuss the issue of spontaneity and open routes in the context of plaintiffs’ free speech claim.

The burdens of the Parade Rules also implicate the constitutional rights of Appellants 5BBC and Jackson. Although most 5BBC rides use a fixed route, the administrative burden of obtaining permits for all of the scores of 5BBC rides that potentially are regulated under the Parade Rules would force the club to limit the number of rides it can offer. *See* App. Br. at 52-53. The Parade Rules' prohibition on routes including 5th Avenue, "Chief Officer" requirement, and other restrictions impose unnecessary and unconstitutional burdens on Prof. Jackson's ride and virtually all of the rides organized by 5BBC. *See id.* at 57.

II. THE PARADE RULES IMPOSE AN UNCONSTITUTIONALLY HEAVY BURDEN ON APPELLANTS' RIGHT TO TRAVEL.

Appellants organize hundreds of group bicycle rides that are (with a handful of exceptions) open to the public, any one of which may draw 50 or more participants. Under the Parade Rules, Appellants must obtain advance permission from the NYPD for their route. As Appellants have demonstrated, the application process can take 6 or more hours per ride. This requirement materially burdens Appellants' constitutional right to intrastate travel. *See* App. Br. at 58-59.

The district court dismissed the significance of this burden without discussing the undisputed evidence establishing its practical effect on volunteer-organized group activities:

[T]he permit requirement here effectively mandates some planning of large group bicycle rides. But it does not make the act of bicycling in large groups more burdensome or difficult. The Parade Regulations therefore do not impede, deter, or punish travel throughout New York City. They simply require cyclists to notify the NYPD before they travel in groups of 50 or more.

SPA-20.

This analysis has no support in fact or logic. To require the organizers of a group bicycle ride to spend 6 or more hours obtaining permission from the NYPD clearly makes group rides “more difficult” to organize. Organizers must do more than simply “notify” NYPD of their ride, they must affirmatively obtain NYPD’s permission of their route and accept conditions that NYPD chooses to impose on the permit. If ride organizers miscalculate and fail to obtain a permit for a ride to which 50 participants show up, the Parade Rules force them to forego their right to travel (cancel the ride), forego their right to associate (disband), or face criminal sanctions. These features of the Parade Rules materially burden Appellants’ right to travel, triggering strict scrutiny of Appellees’ justifications.

Campbell v. Westchester County, No. 96 Civ. 0467, 1998 U.S. Dist. LEXIS 17757 (S.D.N.Y. Nov. 10, 1998) is inapposite in several respects. The plaintiff in *Campbell* retained access to a number of medical centers “just as, if not more, convenient to his residence” despite the restrictions imposed on his travel, 1998 U.S. Dist. LEXIS 17757 at *3, while the Parade Rules affect and restrict

Appellants' ability to conduct group bicycle rides (or, for that matter, processions by car or by foot) throughout New York City, a significantly greater burden. In *Campbell*, only travel to a single location was limited, while Appellants, even after successfully navigating NYPD's byzantine parade permit application process, are restricted to a single pre-determined route. This Court found unconstitutional a curfew ordinance with a similar effect of materially limiting mobility. *See, e.g., Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003) (late-night curfew on minors traveling or present in public places without an enumerated purpose or the express permission of an adult rejected as an unconstitutional restriction on right to freely move about). Because the restrictions on travel imposed by the Parade Rules are far greater than that at issue in *Campbell*, the district court failed to properly apply the law by declining to apply strict scrutiny to Appellants' right to travel claims.

III. THE PARADE RULES IMPOSE A DIRECT AND SUBSTANTIAL BURDEN ON APPELLANTS' CONSTITUTIONAL RIGHT TO ASSOCIATION.

Appellees do not dispute that Appellants' group bicycling is a constitutionally protected form of association, and that "significant" or "direct or substantial" interference with such association triggers strict constitutional scrutiny. The burdens imposed by the Parade Rules on Appellants' associational rights should have been scrutinized by the district court under this standard. Under

the Parade Rules, Appellants must obtain a permit from NYPD in order to engage in lawful group bicycling in groups of 50 or more — a process that takes 6 or more hours. In order to obtain permission, Appellants are required, in advance, to select from among ride participants a person to serve as “Chief Officer,” as well as to designate a route that the group must follow. These requirements interfere in a significant, direct and substantial way with Appellants’ associational rights.

Appellants explained in their opening brief why the “Chief Officer” requirement directly violates their associational rights. *See* App. Br. at 55-57. The Parade Rules explicitly require each permitted event to have a “Chief Officer” that “shall be responsible for the strict observance of all rules and regulations” applicable to the event. N.Y.C.A.C. § 10-110(a)(5). The district court applied *no constitutional scrutiny whatsoever* to this requirement, on the bases that (a) Appellees represented they would not enforce the requirement, and (b) in any event, such a requirement is in itself likely unconstitutional. SPA 41-42. Neither Appellees’ representations nor the district court’s observations cure the direct and substantial interference that the express Chief Officer requirement of the New York City Administrative Code imposes on associational rights.

Appellees’ response to this argument is to quote *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996), in a misleading manner to suggest that a chilling effect on associational rights is irrelevant to the constitutional analysis.

See Opp. Br. at 40 That is not true. The full sentence creatively excerpted by Appellants reads: “the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, *in and of itself*, for prohibiting state action.” *Fighting Finest*, 95 F.3d at 228 (emphasis added). Here, Appellants do not rely exclusively on the chilling effect of the Chief Officer requirement. Indeed, the district court acknowledged that the Chief Officer requirement was a likely unconstitutional precondition purportedly imposed on the right to associate in groups of 50 or more. SAP-41. This unconstitutional requirement cannot be saved by the district court’s fanciful saving construction, and clearly goes beyond the mere chilling.⁵

The designated route requirement also interferes in a direct, substantial way with Appellants’ association rights. Critical Mass is at its essence a form of association in which a group of bicyclists determine their route collectively and extemporaneously. That is how the ride is practiced, every month, in hundreds of cities across the globe. It is most likely this aspect of Critical Mass that makes it the most popular monthly group bicycle ride in New York City and elsewhere. To impose a predetermined fixed route on Critical Mass is to fundamentally interfere

⁵ Moreover, even if the chilling effect of the Chief Officer requirement on the Appellants were to be deemed cured by the fact Appellants are aware of the City’s representation that the requirement will not be enforced (and it is not, *see* App. Br. at 57 n.11), the remaining chilling effect on others without such notice required the district court to pass on the issue.

with the participants' rights of association, triggering strict scrutiny. The district court's refusal to scrutinize this burden on Appellants' associational rights based on the view that "the predetermined route requirement inconveniences cyclists and perhaps makes group rides of 50 or more less attractive or enjoyable than they otherwise would be" was an abuse of discretion. *See* SPA-27.

Because the Chief Officer and fixed-route requirements of the Parade Rules strike at the very heart of Appellants' associational rights, they are nothing like the petty restriction at issue in *Fighting Finest*. There, NYPD restricted the opportunities of police officers to publicize group sporting activities by preventing them from doing so on official NYPD bulletin boards. 95 F.3d at 28. This Court rightly saw that the restriction was merely incidental to the sporting activity and did not "burden in any significant manner" the plaintiffs' ability to associate together. *Id.* Appellees' attempts to analogize this restriction to the direct interference in Appellants' associational rights under the Parade Rules fails. *See* Opp. Br. at 40.

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.

Dated: November 21, 2007
New York, New York

Respectfully Submitted,

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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 5486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that the foregoing is true and correct.

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