SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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THE CITY OF NEW YORK, RAYMOND KELLY, as COMMISSIONER of THE NEW YORK CITY POLICE DEPARTMENT, and ADRIAN BENEPE, as COMMISSIONER of THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Index No. 400891/05

Decision and Order

Plaintiffs,

- against -

TIMES' UP, INC., WILLIAM DiPAOLA, BRANDON NEUBAUER, LEAH RORVIG and MATTHEW ROTH,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Plaintiffs City of New York and its police and parks commissioners seek a preliminary injunction enjoining defendants "and all those acting in concert with them" from gathering in Union Square Park before the monthly Critical Mass bicycle rides and from "advertising" and participating in the rides unless permits are issued. Defendants publicize and participate in the rides. No one claims to be the organizer or sponsor of the Critical Mass rides. In the underlying plenary action, plaintiffs seek a declaratory judgment that defendants and others acting with them are violating laws and rules prohibiting participation and advertising of events without permits, punishable by fine or imprisonment or both.

Defendants contend, *inter alia*, that requiring parade and park use permits is unconstitutional as overbroad, and because it constitutes a prior restraint on speech and association protected under the First Amendment of the United States Constitution.

BACKGROUND

The Critical Mass bicycle rides occur in about 400 cities worldwide, customarily on the last Friday of the month. These rides have taken place in New York City for over a decade. The rides ostensibly promote the rights of bicyclists and rights of pedestrians on their own streets, and focus attention on the deteriorating quality of life resulting from, among other things, the air and noise pollution that cars produce. *See Bray v City of New York*, 346 F Supp 2d 480 (SD NY 2004).

Defendant Times' Up, Inc. describes itself as a grass roots, non-profit environmental interest group that seeks to promote a "more sustainable, less toxic" city through educational outreach. Its website posts various events, including different bicycle events such as the Critical Mass ride, to promote a cleaner environment. Defendant William DiPaola is the executive director of Times' Up, and defendant Matthew Roth acted as a "volunteer legal liaison and media point person" for Times' Up. Defendants Brandon Neubauer and Leah Rorvig are volunteers. The individual defendants have occasionally participated in Critical Mass rides.

The taxonomy of Critical Mass rides presents a conundrum that permeates all issues in this litigation. According to defendants, the Critical Mass rides are not sponsored by any organization, and are essentially the spontaneous, concurrent activity of many individuals. They claim that they neither organize nor sponsor the monthly rides that take place in Union Square Park. Although plaintiffs do not dispute that the rides are unorganized, they nevertheless contend that the rides require parade and park use permits.[1]

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[1] The City issues permits only to identified applicants. Some person or entity must assume responsibility for obtaining permits on behalf of the participants in any event requiring a permit.

Until the summer of 2004, the Manhattan rides took place with little police presence, and no arrests. In the summer of 2004, especially in August, immediately preceding the Republican National Convention, the City markedly increased police presence and involvement, and the police arrested 264 people. During the months that followed, there were further, albeit fewer, arrests of alleged participants in the Critical Mass rides. The City maintains that improper behavior by ride participants–including blocking the road, going through red lights, and going the wrong way on one-way streets–prompted the arrests. Affidavits from those arrested suggest that those arrested may not necessarily be those who engaged in unlawful behavior, and that some of those arrested may not have participated in the Critical Mass ride, but may have been bicycling in the same area.

At the Critical Mass ride on September 24, 2004, Police Department Assistant Chief Bruce Smolka negotiated an on-the-spot event route with Christopher Dunn, an attorney for the New York Civil Liberties Union.[2] All involved knew that there was no group leadership, and that Dunn was not in any way authorized to negotiate a route, but he thought that he would be able to get some of the cyclists to follow the agreed-upon route. According to plaintiffs, most of the cyclists did follow the route, but some riders veered from the route at West 36th Street and Seventh Avenue. The Police Department cut these riders off on West 36th Street between Fifth and Sixth Avenues. Some of those riders dropped their bicycles and left; others locked their bicycles to parking meters, lampposts, and stop signs. The Police Department took custody of those bicycles. *See generally Bray*, 346 F Supp 2d 480, *supra*.

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[2] In this lawsuit, the New York Civil Liberties Union has filed an amicus brief in support of defendants.

Five individuals whose bicycles were removed subsequently sued the City in the United States District Court for the Southern District of New York; that action has concluded. *Id.* In *Bray*, the City sought an injunction against the plaintiffs in that action, and all other participants in the Critical Mass bicycle rides, enjoining them from participating in the rides unless a parade permit were obtained from the Police Department. In October 2004, Judge Pauley denied the motion on the ground of laches. *Id.* at 491-492. Later in December 2004, Judge Pauley declined to exercise supplemental jurisdiction over the City's counterclaim, opining that the state court should decide whether participants in the Critical Mass bicycle rides violate the City's parade and park permit requirements. *Bray v City of New York*, 356 F Supp 2d 277 (SD NY 2004).

Prior to the July 2005 Critical Mass ride, Times' Up posted the following message in its Events Calendar:

> "It is our hope that Critical Mass, and all group bike rides, can return to the safe, harmonious and fun rides that they once were in New York City. In order to do our part in trying to make that happen, we suggest the following: Bicycles are traffic, and as such they have the same right to be on the road – and travel at their own speed – as other road users. We believe it follows that bicyclists also have the same responsibility as other road users to comply with the traffic laws, including observing such basic requirements as one-way street restrictions and traffic lights."

No arrests occurred at the October 28, 2005 ride. *See* Stipulation dated November 23, 2005.

Plaintiffs commenced this action pursuant to General City Law § 20 (22) seeking declarations that bicycle rides *"en masse"* (which the City does not define) without a permit, gathering in a park without permit prior to the bicycle rides, and advertising such events violate City laws, specifically Administrative Code § 10-110, Rules of City of NY Dept of Parks & Recreation (56 RCNY) §§ 1-03 (b)(6)(a) and 2-08. Although not pleaded as a cause of action, plaintiffs also seek a permanent injunction against defendants and other participants in the Critical Mass ride from

engaging in these activities without permits, and from advertising or otherwise promoting the Critical Mass ride unless permits have been obtained. *See* Complaint at 1, 9.

Plaintiffs now move for a preliminary injunction, enjoining and restraining the defendants, and all those acting in concert with them: (1) from participating in future Critical Mass bicycle rides absent the grant of a parade permit by the Police Commissioner; (2) from gathering in Union Square Park (or any other City park) with a group of 20 or more Critical Mass riders absent the grant of a permit by the Parks Commissioner; and (3) from advertising that Critical Mass bike ride participants gather in Union Square Park (or any other City park) immediately prior to the start of the monthly Critical Mass bicycle rides, absent the grant of a permit by the Parks Commissioner.

I.

While the instant motion seeks a preliminary injunction, plaintiffs' plenary action pleads three causes of action, each for declaratory judgment adjudicating defendants' criminal culpability.[3] Declaratory relief under these circumstances is highly irregular. As the Court of Appeals indicated in *Reed v Littleton*, civil determinations of defendants' criminal culpability are disfavored.

> "Should equity hold that no offense had been committed it would not be binding were the subsequent proof varied. . . . We might as well try out a larceny or a bigamy case in Equity. No doubt criminal prosecutions are always annoying and may disarrange the defendants' income and finances but never yet has this been sufficient to change the usual and customary course of prosecutions for crime. The declaratory judgment has proved and no doubt is a useful procedure but its usefulness will soon end when its advocates seek to make it a panacea for all ills, real or imaginary."

Reed v Littleton, 275 NY 150, 157 (1937).

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[3] Violations of Administrative Code § 10-110 or of the Parks Department rules may result in fine, imprisonment, or both. *See* Administrative Code § 10-110(c); 56 RCNY 1-07.

A civil action does not offer the same procedural and substantive protections of a criminal trial. A civil action has a lower standard of proof; the complaint is not subject to the heightened pleading standards applied to accusatory instruments; defendants may be deprived of a possible right to a jury trial (if they would have such right in the Criminal Court, *e.g,* Class A misdemeanors); and the plaintiff in a civil action need not prove that the alleged offending conduct was committed with criminal intent.

"A court in equity will not declare whether particular conduct constitutes a criminal violation unless there are no issues of fact and the sole question is one of law." *Hammer v Am. Kennel Club*, 304 AD2d 74, 82 (1st Dept 2003). "[D]eclaratory judgment will lie 'where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved.'" *Bunis v Conway*, 17 AD2d 207, 208 (4th Dept 1962 [citation omitted]). Except for those situations, such a determination could improperly interfere with the criminal process, and result in a waste of judicial resources. *See Reed,* 275 NY at 157. Here, the City is not challenging the constitutionality of its own laws. Neither is it asking for judicial interpretation of its laws.[4] Therefore, declaratory relief is not appropriate in this case.

Declaratory relief is as unnecessary as it is inappropriate. Under General City Law § 20 (22), the City may bring a plenary action "to compel compliance with or restrain by injunction the violation of any such ordinance or local law, notwithstanding that a penalty, forfeiture and/or imprisonment may have been provided to punish violations thereof." *See also Commissioner of*

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[4] The City could also amend its laws to reflect the interpretation that it desires, without court intervention. In so noting, the Court does not opine on the correctness or legality of any possible change in the local laws or regulations.

Community Dev. of the City of Rochester v Macko, 144 AD2d 981 (4th Dept 1988). In deciding whether the City is entitled to permanent injunctive relief, the Court must decide whether the conduct sought to be enjoined violates the law, and may be called upon to decide whether the law itself is unconstitutional, as defendants contend.

Thus, in this context, declaratory judgment is redundant to the City's request for permanent injunctive relief.

II

A.

The preliminary injunction that plaintiffs seek mirrors the permanent injunctive relief requested. Courts are loathe to grant a party the ultimate relief under the guise of a preliminary injunction (*see SportsChannel Am. Assocs. v Natl. Hockey League*, 186 AD2d 417, 418 [1st Dept 1992]). The federal court held that participation in the Critical Mass bicycle rides constitutes "expressive association" entitled to First Amendment protection (*Bray,* 346 F Supp 2d at 488), and thus a preliminary or permanent injunction would constitute a prior restraint, which is also disfavored. "Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context" (*CBS, Inc. v Davis*, 510 US 1315, 1318 [1994]).

The part of the plaintiffs' injunction that seeks to enjoin "all those acting in concert with defendants" suggests potential jurisdictional problems. *See Regal Knitwear Co. v NLRB*, 324 US 9, 13 (1945) ("The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"). "Persons . . . who are not connected in any way with the parties to the action are not restrained by the order of the court." *Rigas v Livingston* 178 NY 20, 25 (1904).

Given the record, the City has not shown that all persons who ride bicycles in, or simultaneously with, Critical Mass rides are acting in concert with defendants.[5]

In sum, strong prudential concerns militate against granting the preliminary injunction, without reaching the particular arguments of this motion.

B.

As a threshold issue, the parties dispute whether plaintiffs must meet the traditional three-part test for injunctive relief. *See W.T. Grant Co. v Srogi,* 52 NY2d 496 (1981). Plaintiffs rely on cases concerning clear violations of the zoning ordinances which constitute public nuisances and clear violations of licensing requirements, where the traditional three-part test is inapplicable. *See e.g. City of New York v Castro*, 160 AD2d 651 (1st Dept 1990); *Incorporated Vil. of Freeport v Jefferson Indoor Marina, Inc.,* 162 AD2d 434 (2d Dept 1990); *City of New York v Cincotta,* 133 AD2d 244 (2d Dept 1987); *City of New York v Bilynn Realty Corp.*, 118 AD2d 511 (1st Dept 1986); *Town of Poughkeepsie v Hopper Plumbing & Heating Corp.*, 23 AD2d 884 (2d Dept 1965). Even in zoning cases, the municipality is exempt only from showing irreparable injury, after establishing a violation of the zoning ordinance. *Village of Chestnut Ridge v Roffino*, 306 AD2d 522 (2d Dept 2003); *Town of Esopus v Fausto Simoes & Assocs.*, 145 AD2d 840 (3d Dept 1988).

This Court is not persuaded that such an exception applies here. This case does not involve a violation of the Zoning Resolution; neither does it implicate the Nuisance Abatement Law (Administrative Code § 7-707[a]). In *People ex rel. Bennett v Laman* (277 NY 368, 383-384 [1938]), cited by plaintiffs, the Court granted an injunction against an individual from practicing

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[5] Acting in concert presupposes a common intent. Persons who independently decide to attend a concert are not acting in concert when attending it.

chiropractic medicine without a license. In reaching its decision, the Court stated, "[i]n the case at bar the People would not be entitled to an injunction upon a mere showing that the statute had been violated or that acts prohibited by the statute had been performed, in the absence of special statutory authority." *Id.* at 384.

Here, plaintiffs have not cited any such special statute or local law involved in this matter that provides for injunctive relief, comparable to that contained in the Nuisance Abatement Law. General City Law § 20 grants the City the power to seek injunctive relief, among other enumerated powers granted to cities. Nothing in the statute leads the Court to believe that it should be read as a restriction of the Supreme Court's equity jurisdiction, or as a modification of the accepted grounds for granting a preliminary injunction.

Consequently, the traditional three-part standard applies: plaintiffs must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in favor of their position. *W.T. Grant Co.*, 52 NY2d 496, *supra*; *Global Merchants, Inc. v Lombard & Co.*, 234 AD2d 98, 99 (1st Dept 1996).

C.

1. Likelihood of Success on the Merits

a. The Pre-Ride Gathering in Union Square Park

The Parks Department requires a special events permit for any assemblies, meetings or group activities involving more than 20 people in a City park. 56 RCNY 1-02, 1-05(a), 2-08.

> "'Special Event' means a group activity including, but not limited to, a performance, meeting, assembly, contest, exhibit, ceremony, parade, athletic competition, reading, or picnic involving more than 20 people or a group activity involving less than 20 people for which specific space is requested to be reserved. Special Event shall not include casual park use by visitors or tourists."

56 RCNY 1-02. According to Assistant Chief Smolka, a Critical Mass ride in August 2004 had

approximately 5,000 participants, and 1,200 participants the following month. *See* Smolka Aff. ¶¶ 8-10.

A critical issue is whether defendants "hold or sponsor" the Critical Mass pre-ride gatherings at Union Square Park. *See* 56 RCNY 1-05(a). The individual defendants deny in their affidavits that they are organizers of the Critical Mass rides, and plaintiffs have not shown otherwise. Dissemination of information about the Critical Mass rides is not a reliable indicator of sponsorship. Indeed, defendants submit a "Bike Month NYC" poster, listing the Critical Mass rides, which was published in conjunction with the City's own Department of Transportation.

Nevertheless, plaintiffs argue that, even if defendants did not organize the event, "No person shall conduct any activity for which a permit is required unless . . . such permit has been issued." 56 RCNY 1-03(b)(6). However, defendants argue that they fall within the exception of "casual park use" in the Parks Department's definition of "Special Event." *See* 56 RCNY 1-02. Casual park use is undefined in the City rules, and plaintiffs do not offer any reasonable definition of the term. Plaintiffs offer examples only where organizers of other events have requested permits for pre- and post-procession gatherings in parks.[6]

Plaintiffs offer no support for the questionable proposition that remaining in a park for as much as half an hour cannot be casual use. Plaintiffs' argument that the exception does not apply, implicitly assumes that Critical Mass riders are both distinct from other users of the park and a cohesive group, but the City has not articulated an objective test for distinguishing these people, aside from the fact that they have bicycles, which is not any reliable indicator of whether an

[6] Defendants are not bound by non-parties' prior assumptions, in other contexts, that permits were required.

individual will even participate in a Critical Mass ride. Plaintiffs' assumption is simply guilt by association. Plaintiffs essentially urge this Court to join in that assumption.

The Parks Department rules on park use create a dichotomy between special events and casual park use for group activities. If the group activity is not casual park use, then necessarily it is a special event. *See* 56 RCNY 1-02. Yet, neither the City's evidence nor its arguments demonstrate that the mere presence of defendants and the other Critical Mass riders falls into either category. Given that defendants' conduct may fall under the casual use exception, the Court does not reach defendants' argument that an injunction would constitute a prior restraint in violation of their First Amendment right to expressive association.

b. Promotion or Advertising of the Critical Mass Ride

56 RCNY 2-08(s) provides:

> It shall be a violation of these rules to advertise the location of any event requiring a permit under these rules via posting, print media, radio, television, or the internet when the location is under the jurisdiction of the [Parks] Department and the person who is responsible for placing the advertisement has been informed either that the Department does not intend to issue such permit, or that the Department has already issued another permit for that time and location. There shall be a rebuttable presumption that any person or organization whose name, telephone number or other identifying information appears on any advertisement and who has been informed of the Department's intent to deny an application for such permit or of the Department's issuance of another permit for that time and location has violated this subdivision by either (1) illegally advertising an event, or (2) directing, suffering, or permitting a servant, agent, employee or other individual under such person's or organization's control to engage in such activity; provided, however, that such rebuttable presumption shall not apply with respect to criminal prosecutions brought pursuant to this subdivision (s).

To show that this rule was violated, plaintiffs refer to the calender of events on Times' Up's website (www.times-up.org), which allegedly stated that the Critical Mass rides were scheduled to take place on April 29, May 27, June 24, and July 29, 2005.

Plaintiffs have not shown that Times' Up has violated, or will violate the rule. Dissemination of information is not necessarily synonymous with "advertising" as specified in the Park rules. For the rebuttable presumption to apply, plaintiffs would have to show evidence that Times' Up had been informed that the Parks Department was not intending to issue a permit for the Critical Mass rides, or that Times' Up knowingly advertised a Critical Mass ride that conflicted with another event for which a valid permit was issued. It is undisputed that no one has ever applied for a permit for Critical Mass rides from the Parks Department. Smith Aff. ¶ 9. Thus, plaintiffs would be hard pressed to prove that the Parks Department could have refused to issue a permit where none was ever sought. Although plaintiffs argue that such was not the intent of the Parks Department when it promulgated the rule, the unambiguous language of the rule clearly imposes a requirement of knowledge that a permit was denied. There is no evidence that a Critical Mass ride ever conflicted with an event holding a permit.

Therefore, plaintiffs have not established a likelihood of success with respect to advertisement of the Critical Mass rides. At this time, the Court does not reach defendants' arguments that 56 RCNY 2-08 (s) is unconstitutionally overbroad on its face.

c. The Critical Mass Rides

Under section 10-110 of the Administrative Code of the City of New York, any person who participates in any "procession, parade, or race, for which a permit has not been issued" is subject to a fine or imprisonment.[7] Thus, whether defendants have violated this local law depends on

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[7] Section 10-110 (3) (c) of the Administrative Code of the City of New York states:

> "Violations. Every person participating in a procession, parade or race, for which a permit has not been issued when required by this

(continued...)

whether Critical Mass rides require a permit. Administrative Code § 10-110 (a) states:

> "A procession, parade, or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner."

The law does not define the terms "procession, parade or race." The Police Department has issued rules defining a "parade or procession" as "any march, motorcade, caravan, promenade, foot or bicycle race, or similar event of any kind, upon any public street or roadway." Rules of City of NY Police Dept (38 RCNY) § 19-02 (a).

Plaintiffs contend that the conduct of Critical Mass bicycle riders fits squarely within the Police Department's definition of "parade or procession," and they cite several cases that purportedly applied the permit requirement to planned marches or processions. Plaintiffs also argue that the Critical Mass rides in Manhattan are subject to the permit law because cyclists allegedly engage in egregious, lawless behavior. Defendants argue that the Critical Mass rides are not parades or processions because they are unorganized, and participants join on a spontaneous, *ad hoc* basis. According to defendants, the bicycle rides are nothing more than vehicular traffic.

Defendants' assertion that Critical Mass rides are ordinary traffic is at best curious, and at worst, disingenuous: Critical Mass riders in other cases have consistently maintained that the Critical Mass rides are worthy of protection under the First Amendment. *Bray*, 346 F Supp 2d 480, *supra*; *People v Bezjak*, NYLJ, Jan. 17, 2006, at 20, col 1; *People v Namer*, NYLJ, Jan. 12, 2006, col 4.

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[7](...continued)

> 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 punishment."

If the Critical Mass rides are nothing more than ordinary traffic, then riders are not exercising a right of association "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Bray*, 346 F Supp 2d at 488. Key to the federal district's court decision in *Bray* was the determination that Critical Mass rides "are meant to espouse a view on an issue of public import - namely, the environment" thus falling withing the expansive sweep of activities deemed "expressive association." *Ibid.*

The Court appreciates that an individual's choice of a mode of transportation or even the make of vehicle may be prompted by political, social, or environmentally conscious reasons. However, when these individual choices join traffic, the traffic itself loses any discernible expressive content. Thus, ordinary bicycle traffic does not inherently espouse any view at all. Furthermore, riders who are next to one another by chance are not exercising a right of association.

On other hand, plaintiffs' arguments were raised and rejected by Judge Pauley in *Bray v City of New York*, 356 F Supp 2d 277 (SD NY 2004):

> "But 38 R.C.N.Y. § 19-02(a) makes no reference to traffic laws and includes specific types of processions that may not violate traffic laws (*e.g.*, a "caravan"). The statute does no more than list specific types of parades and processions, without explaining what makes them so. Apart from bicycle races, the definition provides no guidance concerning when a group of cyclists is required to obtain a parade permit. Thus, the City's interpretation does not follow ineluctably from the statutory language.
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> * * *
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> The City offers three decisions involving organizers of marches and car processions who unsuccessfully sought parade permits for their events. [citation omitted] However, in those cases, the scope of § 10-110(a) was not at issue because each plaintiff conceded that the planned event was a 'parade or procession' by applying for a parade permit."

Bray, 356 F Supp 2d at 284.

In the aftermath of *Bray*, a New York Criminal Court judge has held that one cyclist's act of riding a bicycle "down the road side by side with about one hundred other cyclists" can be described as "a caravan, promenade and is also similar to the other events described thereof." *People v Shura*, Crim Ct, NY County, May 2, 2005, Docket No. 2004NY084889. However, the Court respectfully declines to follow *People v Shura*, because the Criminal Court gave no rationale for its finding.

The Critical Mass bicycle rides do not fall under any of the examples of "parade or procession" set forth in the 38 RCNY 19-02. They do not seem to conform to the ordinarily understood sense of a march, motorcade, or a promenade. The bicycles are not motorized, and Critical Mass riders are not on foot. Critical Mass rides are not a foot or bicycle race, because the record does not indicate that the rides follow a discrete route and have a fixed terminus, i.e., a finish line. Neither do they have any apparent competitive aspect. Critical Mass bicycle rides are not a caravan, which the dictionary defines as "a number of vehicles traveling together."[8] The definition of a "vehicle" under the City's rules and under state law expressly excludes "devices moved by human power." *See* Rules of City of NY Dept of Transportation (34 RCNY) § 4-01; Vehicle & Traffic Law § 159.

Therefore, the issue is whether a Critical Mass bicycle ride is an event similar to marches, promenades, motorcades, caravans, or foot and bicycle races. According to plaintiffs, the Critical Mass rides are akin to other parades or processions because riders "travel *en masse*." Plaintiffs also

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[8] Webster's Second New International Dictionary (1979) defines "caravan" as: "1. a company of travelers, pilgrims, or merchants, traveling in a body for safety, as over deserts; 2. a number of vehicles traveling together; 3. a large closed vehicle for conveying passengers, circus animals, gypsies, etc; a van."

maintain that it is the practice of the Police Department to issue permits for "bicycle related events."

For many reasons, it would be sensible for plaintiffs to develop and promulgate criteria for what constitutes a parade or procession, as a function of its size.[9] However, a statute should be construed to avoid mischievous or disastrous consequences (McKinney's Cons Laws of NY, Book 1, Statutes § 148). Plaintiffs' "*en masse*" label does not distinguish the Critical Mass rides from ordinary bicycle traffic. In their supplemental memorandum of law, plaintiffs concede that if there was no impact on traffic, the Police Department would have no way of knowing that a group of bicycles was parading or traveling as a procession in the streets. Following plaintiffs' reasoning, New Yorkers commuting over the Brooklyn Bridge on bicycles during a transit strike could be considered as "bicycling *en masse*" and affecting vehicular traffic.

Administrative Code § 10-110 has a "close nexus to 'conduct commonly associated with expression." *MacDonald v Safir*, 206 F3d 183, 189 (2d Cir 2000). "[I]f rules condition the exercise of expressive activity on official permission . . . they . . . constitute a 'prior restraint' on speech." *Id.* at 194 (internal quotation marks and citation omitted). Thus, the law must have "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v City of Birmingham, Ala.*, 394 US 147, 150-151 (1969). "Bicycling *en masse*" does not meet this test. As defendants indicate, the City did not take the position that Critical Mass rides in Brooklyn require a permit, even though a particular ride in August 2005 had 90 participants. *See* Oliver Affirm., Ex B (McGlincy Aff. ¶¶

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[9] Recently, the United States Court of Appeals for the Sixth Circuit invalidated a permit ordinance of the City of Dearborn, Michigan, because the definition of a special event was overly broad and not narrowly tailored. *American-Arab Anti-Discrimination Comm. v City of Dearborn*, 418 F3d 600, 608 (6th Cir 2005). The court reasoned that, on its face, the ordinance would apply to a small group of people, which would not have advanced the City's interest in crowd or traffic control, property maintenance, and protection of the public. *Ibid.*

36-46).

Plaintiffs' unsupported assumptions and vague "*en masse*" label also raise constitutional concerns. *See People v Stuart*, 100 NY2d 412, 419 (2003). Riding a bicycle on city streets is lawful conduct, as long as one observes the applicable traffic laws and rules. Vehicle & Traffic Law § 1231. A distinction based solely on an indeterminate number of riders in a given area would not give a person of ordinary intelligence fair notice of the conduct that would result in criminal prosecution, because the person would be punished for conduct not reasonably understood to be prohibited. Neither would the "*en masse*" label provide officials with clear standards for enforcement. For example, one person commuting home from work on a bicycle alleges that he was arrested because the Police Department could not distinguish him from the Critical Mass riders, despite protests to the contrary. He asserts that, when he told the arresting officer that he was trying to get home from work, the officer responded, "I don't know that, do I? You're under arrest now." *See* Oliver Affirm., Ex H (Pengilly Aff. ¶ 12).

A New York City Criminal Court judge interpreted the parade permit law to include the Police Department's definition of "demonstration."[10] *People v Namer*, NYLJ, Jan. 12, 2006, at 18, col 4 (Jackson, J.). This definition would provide clearer guidance than simply "bicycling *en masse*." However, plaintiffs do not argue that Administrative Code § 10-110 should include this definition. The word "demonstration" itself does not appear anywhere in the law. Moreover, had

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[10] 38 RCNY 19-02 (d) states:

> "'Demonstration' shall mean a group activity including, but not limited to a meeting, assembly, protest, rally, or vigil, moving or otherwise, which involves the expression of views or grievances, involving more than 20 people."

the Police Department intended to adopt this definition, it could just have easily included it in the definition of "parade or procession."[11]

To the extent that plaintiffs rely upon a policy or practice of the Police Department, defendants have submitted affidavits disputing these policies. According to defendants, plaintiffs did not require permits for 47 out 50 bicycle rides listed on a Bike Month NYC calender during the course of the year, even when the event organizers were listed. *See* Oliver Affirm., Ex C (Neff. Aff. ¶ 18).

In sum, plaintiffs have not demonstrated the applicability of Administrative Code § 10-110, as interpreted by 38 RCNY 19-02 (a), to Critical Mass bicycle rides. On this motion, the Court need not reach defendants' contentions that Administrative Code § 10-110 is unconstitutional on its face due to overbreadth, or that plaintiffs selectively enforce the parade permit law.[12]

"[C]onstitutional issues affecting legislation will not be determined . . . in advance of the necessity of deciding them . . . if a construction of the statute is fairly possible by which the question may be avoided." *Cipolla v Golisano*, 84 NY2d 450, 455 (1994). "The overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.'" *N.Y. State Club Assn., Inc. v City of New York*, 487 US 1, 14 (1988).[13] The Court appreciates that invalidating the law in its

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[11] Nothing prevents the City from amending the local law and rules prospectively.

[12] One Criminal Court judge declared Administrative Code § 10-110 unconstitutional, while another reached the opposite conclusion. *Compare People v Bezjak*, NYLJ, Jan. 17, 2006, at 20, col 1. *with People v Namer*, NYLJ, Jan. 12, 2006, at 18, col 4.

[13] Moreover, a law otherwise overbroad on its face because it permits the exercise of unfettered discretion may "be remedied by the [C]ity's narrowing construction" by administrative regulation or its implementation. *Ward v Rock against Racism*, 491 US 781, 796 (1989).

entirety would wreak havoc on the City's ability to organize even those parades for which permits have been routinely obtained, because a permit would no longer be required.

2. Irreparable Injury

According to plaintiffs, Critical Mass rides prevent emergency vehicles from getting through traffic, cause vehicular traffic stoppages, create safety issues for pedestrians, and prompt altercations between motorists and bikers. Cyclists who gather in Union Square Park before the ride allegedly "block vehicular and pedestrian flow throughout the park." Smith Aff. ¶ 8.

Defendants and amicus submit affidavits disputing plaintiffs' claims. According to an attorney representing riders who were arrested, none of the hundreds of accusatory instruments that he reviewed contain charges for violating a traffic law or regulation, or running a red light. Oliver Affirm. ¶¶ 45-46.

Given that Critical Mass rides have taken place for many years without prior incident (*Bray*, 356 F Supp 2d at 286), plaintiffs' claims of traffic problems invite some skepticism. For example, it does not seem reasonable to attribute the traffic disruptions that took place during the month of the Republican National Convention (August 2004) to the Critical Mass rides. Thousands of protestors, and thousands of police and other law enforcement and security personnel and vehicles had converged on Manhattan, which undoubtedly affected normal pedestrian, vehicular, and bicycle circulation.

Notwithstanding the strongly disputed factual contentions, a hearing on this motion is not warranted. By affidavit, defendants indicate that they are neither organizers nor sponsors of Critical Mass rides, and the City does not offer evidence to the contrary. Neither do plaintiffs offer any

evidence that defendants have broken any traffic laws, or encouraged other Critical Mass riders to do so. Indeed, the evidence indicates that defendants cautioned riders (e.g. the website) to obey the law. Enjoining these individual defendants from participating in Critical Mass rides will not remedy the alleged traffic problems. Moreover, the scope of such an evidentiary hearing would require extensive disclosure proceedings, and would be coterminous with a full trial.

The requirement of irreparable injury embraces the question of whether the movant has an adequate remedy at law. *See e.g. Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 5 AD3d 328, 329 (1st Dept 2004). The adequacy of the remedy generally refers to whether money damages would be a sufficient remedy. *See e.g. Republic of Lebanon v Sotheby's*, 167 AD2d 142 (1st Dept 1990). In this context, where a money judgment is not sought, the adequacy of the remedy depends on whether the City has other available, effective means to address the alleged harm to the public.

Plaintiffs argue that an injunction would have a greater deterrent effect than individual arrests and prosecutions, and that putting an end to rides at the outset (for lack of a permit) would "be more protective of the safety of cyclists, pedestrians, motorists, and officers" than enforcing traffic laws. *See* Smolka Aff. ¶ 22.

Plaintiffs' arguments do not show that existing means of enforcing traffic laws and regulations are inadequate to address the alleged traffic problems.[14] Rather, plaintiffs argue only that an injunction could be more expedient. *See Bray*, 356 F Supp 2d at 28 ("Tellingly, the Police Department conceded that it 'can enforce the laws without an injunction, but an injunction would

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[14] Defendants maintain that the Police Department enforces the traffic laws too aggressively with respect to Critical Mass rides. They submit affidavits from individuals who claim that they had obeyed traffic laws and followed police instructions, but they were arrested anyway. *See* Oliver Affirm., Exs A, B (Cotton Aff., Carta Aff.).

be helpful.'").

The Court recognizes that the City made an ingenious attempt to organize the Critical Mass rides. For the October 29, 2004 ride, the City planned a route for riders and distributed leaflets to them about the planned route. *See* Smolka Aff. ¶¶ 13-17. The City promised not to arrest anyone who followed the route. In hindsight, this attempt, although well-intentioned, was unlikely to succeed. If Critical Mass riders wish to be treated no differently from their motorist counterparts, then it comes as no surprise that they would reject efforts to treat them as a parade, as opposed to ordinary traffic. By the same token, if Critical Mass riders wish to be treated as ordinary traffic, then they cannot argue in good faith that stopping at a red light would jeopardize their safety. *See* Oliver Affirm., Ex D (Taylor Aff. ¶ 26) ("stopping at the red lights had the effect of splintering the mass into smaller groups almost immediately, which made the ride less safe").

3. Balancing of the Equities

On the one hand, plaintiffs have a responsibility to address traffic and crowd control problems. Pedestrians, motorists, and cyclists have legitimate concerns about efficient, safe travel on city streets. Plaintiffs seem frustrated by the difficulty of managing an event they view as a traffic- and crowd-control problem, by the "in your face" attitude and provocative conduct of certain riders, and by defendants' unwillingness either to acknowledge or to assume responsibility for organizing the rides.

On the other hand, defendants seem frustrated by, among other things, plaintiffs' apparent unwillingness to modify what defendants regard as a provocative and chilling enforcement strategy and unrealistic assumptions about what defendants do and are capable of controlling.

When balancing the equities, courts are required to look at the relative prejudice each party is likely to suffer from the grant or denial of the relief requested. *Ma v Lien*, 198 AD2d 186, 187 (1st Dept 1993).

In their search for practicable means of reining in the Critical Mass rides, plaintiffs have little to gain from enjoining these defendants. Plaintiffs have not shown either that defendants run the rides, or that they would have any power to ensure that every participant will follow a pre-ordained route, or will observe the traffic laws. The individual defendants do not even participate in all of the rides.

By contrast, defendants' First Amendment freedoms would be affected if an injunction were granted against them. As discussed above, a federal district court has held that participation in Critical Mass rides constitutes "expressive association" entitled to First Amendment protection. *Bray*, 346 F Supp 2d at 488. Enjoining these defendants from gathering prior to the Critical Mass ride similarly implicates First Amendment concerns.

In this context, the injunctive relief that plaintiffs seek will not provide the easy fix they assume. First, it presents conceptual and practical problems of collective responsibility and use of a civil remedy in equity as a substitute for administrative enforcement and criminal prosecution. *See* Section I, *supra*. Second, because injunctions are enforced by the court's contempt power, it presages a torturous enforcement process: it would likely trigger hundreds of individual contempt proceedings and trials in the Supreme Court, with procedural issues more numerous and complex than those of administrative proceedings or criminal trials.

It cannot be said that plaintiffs have demonstrated that the balance of the equities tip in their favor.

III.

Union Square, historically a venue for protest and non-conformity, is a public park, available to all who live, work, and frequent the neighborhood for recreation and rest. Just as various park users have legitimate concerns about being accommodated, the City has legitimate concerns about accommodating diverse uses and preventing conflict, hazards, and park damage. Similar concerns apply to the use of the streets by pedestrians, motorists and cyclists and to the City's interest in maintaining orderly traffic flow and safety.

The social compact and the realities of living in a crowded place demand patience, mutual respect and self-restraint. Of course, the law does not require accommodation of clear unconstitutionality or illegality. Yet, adamant insistence on absolute, theoretical views of permissibility of expressive conduct and appropriateness of law enforcement tactics may ultimately prove self-defeating. Mutual de-escalation of rhetoric and conduct, and a conciliatory attitude, may help the parties and the Critical Mass riders resolve the litigation and arrive at a workable *modus vivendi*.[15]

CONCLUSION

In conclusion, plaintiffs have not met the three-part test for a preliminary injunction with respect to the pre-ride gatherings for the Critical Mass rides, advertising of the rides, or the rides themselves.

Accordingly, it is hereby

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[15] After plaintiffs brought this litigation, the Court and counsel conferenced the case repeatedly. Despite the cooperation and collegiality of the attorneys, agreement could not be reached.

ORDERED that plaintiffs' motion for a preliminary injunction is denied.

This constitutes the decision and order of the Court.

Dated: February 14, 2006
New York, New York

ENTER:

/s/
MICHAEL D. STALLMAN, J.S.C.