

STATEMENT OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK CONCERNING THE
PROPOSED NEW YORK CITY PARADE REGULATIONS

November 27, 2006

Founded in 1870, the Association of the Bar of the City of New York (“the Association”) is a professional organization of more than 22,000 attorneys. Through its many standing committees, including its Committee on Civil Rights, the Association educates the Bar and the public about legal issues relating to civil rights, including the rights of public assembly and freedom of expression.

The Association is submitting this statement to express its serious concerns about the proposed revisions to Chapter 19 of Title 38 of the Official Rules of the City of New York defining a “parade”. If adopted, these revisions would impose dramatic new restrictions on peaceful protests and other public gatherings in New York City – means of expression that are a cornerstone of our democratic system. As discussed more fully below, the Association firmly believes that, given the importance of the issues presented, it is the responsibility of the City Council to define a parade and to establish the criteria for issuing parade permits. Such a critical determination should not be relegated to a rulemaking or to ad hoc decision making by the New York City Police Department. This is particularly true given the history underlying the NYPD’s new proposed definition of “parade”. This proposed regulation is a direct outgrowth of the NYPD’s often ill-considered and overzealous efforts to control a single loosely organized event – the Critical Mass bike rides. Any public safety issues associated with that event can be addressed through enforcement of existing traffic regulations rather than by imposing daunting new permitting requirements on not just the Critical Mass rides but hundreds of other kinds of often-spontaneous public gatherings.

The Association also believes that the specific proposed definition of “parade” put forth by the NYPD is critically flawed. The first part of the definition – which focuses on

whether or not a “procession” complies “with all applicable traffic laws, rules and regulations” – is entirely unnecessary and inappropriate. To the extent that any individual or group is proceeding in the street without complying with existing traffic laws, the NYPD is already fully empowered to exercise control. The proposed regulation would simply allow the NYPD to add the charge of parading without a permit to an existing traffic law violation, which accomplishes nothing in terms of public safety. However, deeming any group of ten or more to be a “parade” if one of them jaywalks is a serious and unwarranted infringement on associational freedom.

The second part of the new proposed definition – which deems any group of 30 or more to be a “parade” if the group in any way “proceeds” on a public street – is both overbroad and unduly vague. There is simply no need to require that every group of 30 or more that gathers in public in New York obtain a permit in advance, and the proposed regulation would inevitably sweep within its reach many group events that are in no way a “parade” or a threat to public safety. Indeed, 30 or more students on a class trip would be deemed a “parade” under the proposed regulation (and required to obtain a permit in advance) if they all crossed the street.

The Association urges that the proposed regulation be withdrawn and that the issues relating to parade regulation be taken up by the City Council.

Background

The right of individuals to gather together in public places to express their views is firmly ingrained in the law and in the history of this country. “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating

thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939) (plurality opinion). As recently explained by the United States Court of Appeals for the Sixth Circuit in a case concerning municipal regulation of parades:

“[P]arades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. 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.”

American-Arab Anti-Discrimination Committee v. City of Dearborn, 418 F.3d 600, 611-12 (6th Cir. 2005).

Accordingly, although requiring permits for parades in order to protect the public safety can be a legitimate exercise of governmental authority, the First Amendment requires that any restrictions on the time, place and manner of parades – such as permitting schemes – “must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.” *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Prohibiting all permitless marches is inconsistent with the First Amendment because it would “destro[y] the spontaneity and enthusiasm which public demonstrations of this nature are meant to engender” and “chil[l] a substantial amount of speech related to current events”. *American-Arab Anti-Discrimination Committee*, 418 F.3d at 612.

Parade permitting schemes are a classic form of “prior restraint” on speech, and as such face a “heavy presumption” of invalidity. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Supreme Court long has held that “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (citing cases). The concern is that such regulations may “delegate overly broad licensing discretion to a government official” and therefore be applied arbitrarily, subject to the will of the local official. *Forsythe*, 505 U.S. at 130. Such a scheme is “inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.” *Id.* (quoting *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

Against this background, the existing scheme for parade regulation in New York City is clearly unacceptable. Administrative Code § 10-110 – the only aspect of the parade regulation scheme enacted by the City Council – requires that written permits be obtained from the Police Commissioner for any “procession, parade, or race”, but fails to define “parade” in any way. The Administrative Code also offers virtually no guidance concerning the criteria to be applied by the NYPD in deciding whether to issue a permit for a parade – other than to suggest that a permit should not be issued if the parade “will be disorderly in character or tend to disturb the public peace”. Admin. Code § 10-110(1).

The rules promulgated by the NYPD do little to narrow the wide discretion provided by the City Council to the NYPD in deciding whether to issue a permit. Under its rules, the NYPD can deny any permit application on the vague ground that “the

proposed activity and surrounding events will substantially or unreasonably interfere with traffic in the area contiguous to the parade route”. Rules and Regulations of the City of New York Title 38, § 19-04(c)(iv).

Not surprisingly, the NYPD’s decisions in granting and denying parade permits have been the source of much controversy and litigation. Indeed, as the United States Court of Appeals for the Second Circuit noted – in a decision in which the court found Admin. Code § 10-100 to be unconstitutionally vague on its face – the language of the applicable parade regulations is “so loose that, as a practical matter, courts become the licensing bureau”. *MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000). The court cited numerous examples in which courts have been required to issue preliminary injunctions requiring the NYPD to issue parade permits after the NYPD improperly denied them.¹

The NYPD’s handling of the Critical Mass bike rides is a particularly glaring example of the failures of the existing parade regulations and NYPD’s implementation of them. By way of background,² Critical Mass bike rides take place in approximately 400

¹ See *MacDonald*, 206 F.3d at 191 n.4 (citing *Million Youth March, Inc. v. Safir*, 155 F.3d 124 (2d Cir. 1988) (upholding injunction of district court requiring Commissioner to issue a parade permit to the group); *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (finding unconstitutional the City’s limitation on licenses for sidewalk artists), *cert. denied*, 520 U.S. 1251, 117 S.Ct. 2408, 138 L.Ed.2d 174 (1997); *Million Youth March, Inc. v. Safir*, 63 F. Supp.2d 381 (S.D.N.Y. 1999) (again granting preliminary injunction requiring Commissioner to issue a parade permit to group); *Housing Works, Inc. v. Safir*, No. 98 Civ. 1994 (HB), 1998 WL 823614 (S.D.N.Y. Nov. 25, 1998) (granting preliminary injunction to allow group to hold a press conference on the steps of City Hall and to parade in support of its cause), *stay granted in part*, 1998 WL 824534 (2d Cir. Nov. 30, 1998) (order issuing partial stay later withdrawn); *United Yellow Cab Drivers Ass’n v. Safir*, No. 98 Civ. 3670 (RPP), 1998 WL 274295 (S.D.N.Y. May 17, 1998) (finding unconstitutional the City’s refusal to permit more than 20 taxi drivers to participate in a protest against proposed rules for pick-up and drop-off)).

² The relevant facts relating to the NYPD’s effort to impose the City’s parade regulations on the Critical Mass bicycle rides are described at some length in two of the

cities on the last Friday of each month. The rides are intended to promote the rights of bicyclists and pedestrians and focus attention on, among other things, noise and air pollution caused by automobiles. Accordingly, there is no question that “participation in the Critical Mass bike rides constitutes ‘expressive association’ entitled to First Amendment protection.” *Bray*, 346 F. Supp. 2d at 488 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995-96 (2d Cir. 1997)). The Critical Mass bike rides “are not sponsored by any organization, and are essentially the spontaneous, concurrent activity of many individuals.” *Time’s Up*, 2006 WL 346491 at *1.

Critical Mass bike rides began in Manhattan in 1994 and initially attracted few participants. The popularity of the rides grew over time and, by the summer of 2003, the rides consistently attracted over 1,000 cyclists. Nevertheless, “[u]ntil the summer of 2004, the Manhattan rides took place with little police presence, and no arrests”. *Time’s Up*, 2006 WL 346491 at *1. The August 2004 Critical Mass bike ride coincided with the Republican National Convention in New York and attracted over 5,000 participants. The police attempted to prevent that ride from proceeding and ultimately made over 250 arrests. Since that time, there has been a substantial police presence at almost every Critical Mass bike ride in Manhattan and the NYPD has repeatedly attempted to use the City’s parade regulation to prevent the rides from going forward (since they are unpermitted) and to arrest participants for, among other things, parading without a

court decisions involving constitutional challenges to the City’s parade regulation scheme – *City of New York v. Time’s Up*, 11 Misc. 3d 1052(A) 814 N.Y.S.2d 890 (Table), 2006 WL 346491 (S.Ct. N.Y. Co. 2006), and *Bray v. City of New York*, 346 F. Supp. 2d 480 (S.D.N.Y. 2004). The discussion herein is borrowed from those decisions.

permit. The magnitude of resources the NYPD has spent on this effort is staggering and wholly disproportionate to any legitimate concerns about public safety.³

The NYPD's handling of the Critical Mass bike rides has led to at least five litigated court cases. In the first case, participants in the Critical Mass rides sought a preliminary injunction in federal court preventing the police from seizing their bicycles and the City sought a preliminary injunction preventing the rides from proceeding at all without a parade permit. *Bray*, 346 F. Supp. 2d 480. The court partially sided with the riders by granting a preliminary injunction with respect to seizures and denied the City's request for a preliminary injunction, but ducked the larger issue of whether the parade regulations are constitutional – finding that the state courts should decide that issue in the first instance.

Three other cases involved criminal charges brought against Critical Mass bike riders for parading without a permit. In one case, the court upheld the parade regulation by, among other things, importing into it a requirement (not appearing on the face of the Administrative Code or the NYPD's rules) that a parade include at least 20 participants. *People v. Namer*, 812 N.Y.S.2d 824, 827-28 (N.Y. Crim. Ct. 2006). In two other cases, the court struck down the City's parade regulations as unconstitutionally vague and overbroad, and thus dismissed all charges arising under the parade regulations. *People v. Bezjak*, 812 N.Y.S.2d 829 (N.Y. Crim. Ct. 2006); *People v. Barrett*, 821 N.Y.S.2d 416 (N.Y. Crim. Ct. 2006). In the fifth case, the City again sought a preliminary injunction –

³ The Time's Up Organization recently released a study estimating that the total taxpayer cost associated with the NYPD crackdown on Critical Mass Rides from September 2004 through August 2006 exceeds \$1 million or \$55,000 per ride. At many rides, there were over 250 police personnel in over 100 vehicles, including a helicopter.

this time in state court – seeking to prevent the Critical Mass bike rides from proceeding without a parade permit. That request was denied on the basis that the vague definition of parade in the Administrative Code did not apply to the Critical Mass rides. *Time’s Up*, 2006 WL 346491 at *10. Because it found that the Administrative Code provision did not apply, the court did not reach the constitutional issue.

In the wake of the *Bezjak*, *Barrett* and *Time’s Up* decisions, the NYPD originally came forth in July of this year with a new proposed definition of “parade” that was intended to be able to survive judicial scrutiny and yet still sweep within its reach the Critical Mass bike rides (as well as hundreds of other kinds of – even quite small – public gatherings). Under this proposal, there would have been three separate categories of “parades”: (1) any group of two or more proceeding on any street in a manner not complying with all traffic laws; (2) any group of 20 or more proceeding on any street regardless of whether they comply with the traffic laws; and (3) any group of 35 or more proceeding on a sidewalk. After an understandable public outcry, that proposal was withdrawn.

Under the NYPD’s new proposal announced in October, there would be two categories of “parades” requiring permits (applied for at least 36 hours in advance): (1) any group of 10 or more proceeding on any street for two or more blocks in a manner not complying with all traffic laws; and (2) any “recognizable group” of 30 or more proceeding on any street regardless of whether they comply with the traffic laws.

Comments

The Association believes that parades and other collective gatherings of public expression – including wholly spontaneous unplanned events – are constitutionally

protected activities that are an integral part of our democracy. Any limitations on such gatherings, including imposing a burdensome permitting requirement that would effectively prevent most spontaneous events, raise serious constitutional and public policy issues that should be given critical attention.

The Association has two kinds of concerns about the revised proposed regulations prepared by the NYPD. First, the Association believes that an issue of this magnitude should be considered by the City Council, which should itself establish an appropriate definition of “parade” and develop specific, content-neutral criteria to govern NYPD’s decisions in granting or denying parade permits. Second, the specific definition of “parade” proposed by the NYPD is vague, overbroad and would unnecessarily interfere with legitimate rights of public assembly.

1. It Is The Responsibility of the City Council, not the NYPD, to Develop An Appropriate Definition of “Parade” and To Set Forth The Criteria For Granting Parade Permits.

As matters now stand, the City Council has effectively delegated all responsibility to determine which events are truly “parades” requiring permits and when and how parade permits should be issued. The Administrative Code merely provides that parades require permits, but offers no meaningful guidance whatsoever on what constitutes a parade or the criteria to be applied in determining whether and when parade permits should be issued. All of those functions have been delegated to the NYPD, which has been put in the role of both developing and enforcing all parade regulations, without any guidance or limits whatsoever from the City Council. While executive agencies are frequently delegated authority to enact and enforce rules, such delegations of rulemaking authority must be accompanied by clear and meaningful standards enacted by the legislative branch to achieve a valid public policy. The need for such legislatively

adopted standards is especially compelling where, as here, rights of free expression are at stake.

The NYPD's job is to enforce applicable laws and regulations, not to legislate. Under the City Charter, it is the New York City Council that is vested with "broad power to regulate the use of the city streets and to provide by local law for the good government of the city and the preservation and promotion of the health, safety and general welfare of its inhabitants." *Good Humor Corp. v. City of New York*, 49 N.E.2d 153, 155 (N.Y. 1943) (citing what is now N.Y. City Charter § 28 and Municipal Home Rule Law § 10); *see also* N.Y. Const. art. 9, § 2(c)(10). In short, the City Council's job is to legislate and to provide oversight and guidance to the NYPD. *See* N.Y. City Charter §§ 21, 28, 29. That oversight is currently lacking altogether in the area of parade regulation.

Indeed, the current concentration of power in the NYPD – both to define parades and to decide who gets parade permits – puts personal liberty at risk of arbitrary action by officials, an incursion that the City Charter's separation of legislative and executive function is designed to prevent. *See Council of City of New York v. Bloomberg*, 846 N.E.2d 433, 447 (N.Y. 2006) (Rosenblatt, J., dissenting) ("The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement." (internal quotation marks and citation omitted)). Moreover, the NYPD's regulations are so vague and overbroad that the NYPD effectively maintains unfettered discretion to allow or disallow any public gathering or procession for any reason whatsoever. This is a recipe for selective enforcement and other abuses and is unacceptable.

The correct course is for the City Council now to fulfill its responsibilities to the people of New York by amending the New York City Administrative Code – after public hearings and debate – to clearly define what a “parade” is and to establish specific criteria for issuing parade permits.⁴ These criteria should spell out exactly which types of traffic and other legitimate considerations can be the basis for denying a permit. The City Council should also make clear that these criteria must be applied in a manner that is neutral as to the content and purpose of the proposed parade.

2. In Any Event, The Proposed Regulations Are Critically Flawed.

Even beyond the procedural irregularity of the NYPD’s proposed rules, the specific proposed new definition of parade is wrongheaded and inappropriate. It is in the first instance an irrational overreaction to the Critical Mass bike rides – rides that proceeded peacefully and largely without incident for over a decade prior to 2004. The NYPD’s draconian crackdown on the Critical Mass rides since 2004 cannot be explained by public safety concerns alone. Moreover, and more importantly, in its rush to shut down the Critical Mass bike rides, the NYPD has developed proposed new parade regulations that would unnecessarily sweep within their extremely broad scope hundreds of other kinds of peaceful public gathering and processions.

We address each of the two parts of the new proposed definition of “parade” in turn.

⁴ Indeed, the City Council is in a superior position to design better regulations. It has the ability to hold hearings, gather testimony from affected persons and experts, conduct an investigation and, of course, as a more neutral and democratic body representing the interests of the entire community, legislate regulations that reflect the appropriate balance between public safety and free expression from a neutral position. By contrast, the NYPD, as an enforcement agency which has, as its primary responsibility, the protection of public safety is hardly a neutral arbiter for striking this balance.

A. Part 1 of the New Proposed Definition of “Parade”.

The first part of the NYPD’s new proposed definition is easiest to address because it is so obviously unnecessary. Under this part of the definition, any group of 10 or more constitutes a “parade” if it proceeds “together upon any public street or roadway for more than two city blocks in a manner that does not comply with all applicable traffic laws, rules and regulations”.

The Association submits that it makes no sense to define “parade” with reference to whether each and every participant complies with the traffic laws. To the extent traffic laws are not being complied with, the NYPD is already empowered to act and certainly does not need parade regulations. Indeed, this first proposed definition of “parade” seems intended simply to allow the NYPD to cite Critical Mass bike riders and participants in other similar gatherings with multiple offenses – not just with traffic offenses, but also with “parading without a permit”.

Moreover, it defies logic to suggest that an otherwise permissible “procession” of 10 or more people is somehow transformed into a “parade” – subjecting each and every participant to arrest for parading without a permit – if any one individual in the group jaywalks or otherwise commits a minor traffic violation. Indeed, any such kind of retroactive designation of what constitutes a parade would raise serious due process concerns. As the Supreme Court has stated:

“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”
Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

And, in addition to these fairness concerns, the proposed rule's retroactive reach may have a severe "chilling effect" on public demonstration given the rule's potential to transform pedestrians into paraders based on previous, then-non-criminal behavior. *See Marks v. United States*, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.").

B. Part 2 of the New Proposed Definition of "Parade"

The second part of the new proposed definition of "parade" is less objectionable in that it does not unnecessarily duplicate the traffic laws. However, this part of the proposed definition is still deeply troubling because it would require every "recognizable group of 30 or more" that in any way "proceed[s] together upon any public street or roadway" to obtain a parade permit in advance.⁵

In the Association's view, the NYPD's proposed definition of parade incorrectly proceeds from the premise that all spontaneous or otherwise unpermitted public gatherings are inappropriate and should be banned when they involve 30 or more participants. That is, we submit, simply wrong. Spontaneous public gatherings have a long and revered history in this country and any suggestion that they all pose an undue risk to public safety requiring a permit in advance is not credible. Indeed, one does not

⁵ It is unclear what is intended by the term "recognizable group", a term that appears to be just as inappropriately vague and open-ended as the term "procession" that the court in the *Time's Up* matter found to be objectionable. 2006 WL 346491 at *7-8. Spontaneous expression – a core First Amendment concern – often does not occur in "recognizable" groups. A political march, for example, "may stir the senses of those it passes", *American-Arab Anti-Discrimination Committee*, 418 F.3d at 612, causing an initially small group suddenly to become much larger. Whether such an expanded gathering also becomes a "recognizable" group is, thus, an inevitably arbitrary and unfair determination.

have to think long or hard to come up with many examples of spontaneous public gatherings that serve valuable public purposes and do not endanger the public safety – *e.g.*, the crowds that gathered outside the Dakota building following John Lennon’s death, the spontaneous gatherings in and around Union Square following the September 11 tragedy, the crowds in Times Square following VJ Day in 1945 (the images of which are so well-preserved in the many moving photographs of that day).

Nor is it the case that every public gathering of 30 or more people, even if known of or planned in advance, necessarily requires a permit. School trips, baseball games, church outings and wedding and funeral processions all often involve groups of 30 or more participants who “proceed” to some extent in a public roadway (*e.g.*, by crossing the street) and yet clearly are not “parades” in any meaningful sense. There are also legitimate reasons why protest marches or other more traditional processions should be able to take place without a permit.

The permitting process is technical and daunting, requiring a detailed description in advance of, among other things, “the nature or purpose of the parade”; “the date, time and route of the parade”; “the locations and approximate times for formation and dismissal of the parade”; “the number of participants, animals and/or vehicles that will constitute the parade and a description of such vehicles and animals”; and “any additional information that the department shall reasonably require to make a fair determination as to whether a permit should issue” (whatever that means). Official Compilation of Rules of the City of New York, Title 38, Chapter 19, § 19-03. Not only are all those details sometimes unknowable in advance, but some groups – particularly those speaking out in opposition to the city government or the police – understandably do not wish to discuss

the purpose of their gathering with the police or disclose in advance every detail of an anticipated event. Certain other loosely organized events – in particular, the Critical Mass bike rides themselves – lack a leader or formal organization to apply for a permit. In short, the permitting process itself discourages parades and other public gatherings and thus should be required only when absolutely necessary.

In the Association's view, the role of the parade permitting process should be to allow large groups that want and feel they need special police assistance or accommodation to apply for and obtain permits in advance. For example, to the extent a group seeks to exempt itself from otherwise applicable traffic regulations by taking over a street in a manner that blocks traffic, the appropriate route is to seek and obtain a parade permit. But that is not the approach taken by the NYPD's new proposed parade regulations. Instead, the NYPD's proposal would have the City's parade regulations apply to – and effectively criminalize – entirely legal activities such as biking down the street in a group of people that is complying with all traffic regulations. We believe this approach is ill-conceived and fundamentally wrong.

To be sure, there can be legitimate public safety concerns associated with large public gatherings in an urban environment as dense as New York City, particularly if there are processions on a public roadway. But the NYPD already has at its disposal a comprehensive traffic law and regulation scheme that can be used to address those concerns. If an individual or group is proceeding in the street outside of a cross-walk and/or in a manner that blocks or interferes with traffic, the NYPD is already empowered to act, independent of any parade regulations. Similarly, the NYPD is also already

empowered, independent of the parade regulations, to deal with any individuals or groups that disturb the peace or ignore traffic signals or parking signs.

The Association understands and appreciates the importance of a parade regulation scheme and the Association is not suggesting that New York's parade regulation scheme needs to be repealed or abandoned altogether. To the contrary, as discussed above, the Association believes that this is an important issue that should be taken up promptly by the City Council. Nor does the Association underestimate the complexities and difficulties of developing definitions, standards and criteria that strike the appropriate balance between public safety and free expression. But that is another reason for insisting on the searching, thoughtful and deliberate process that is the province of the City Council. The Association simply urges that consideration of any parade regulation be undertaken in a manner that is respectful of the rights of assembly and public expression and that is grounded in a proper perspective about the role of parade regulations in the first place.