13-107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CENTRAL RABBINICAL CONGRESS OF THE UNITED STATES & CANADA; AGUDATH ISRAEL OF AMERICA; INTERNATIONAL BRIS ASSOCIATION; RABBI SAMUEL BLUM; RABBI AHARON LEIMAN; AND RABBI SHLOIME EICHENSTEIN,

Plaintiff-Appellants,

v.

NEW YORK CITY DEPARTMENT OF HEALTH & MENTAL HYGIENE; NEW YORK CITY BOARD OF HEALTH; AND DR. THOMAS FARLEY, COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH & MENTAL HYGIENE,

Defendant-Appellees,

On Appeal From The United States District Court
For The Southern District of New York
Honorable Naomi Reice Buchwald
Case No. 12-Civ.-7590 (NRB)

BRIEF OF PLAINTIFF-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Central Rabbinical Congress of the USA & Canada, Agudath Israel of America, and the International Bris Association disclose that they have no parent corporations and that no publicly held corporation owns any part of these entities.

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1. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because this suit involves claims under the First Amendment to the United States Constitution. The District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the claim under the New York State Constitution.

2. On January 10, 2013, the District Court denied Appellants' motion for a preliminary injunction. Dkt. 52. Appellants filed a notice of appeal the next day, on January 11, 2013. Dkt. 53. This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether the New York City Department of Health and Mental Hygiene's regulation of ritual circumcision should be enjoined because it violates the Free Speech Clause of the First Amendment by conscripting religious actors to transmit the Department's subjective advice about whether a religious practice should be performed.

2. Whether the New York City Department of Health and Mental Hygiene's regulation of ritual circumcision should be enjoined because it violates the Free Exercise Clause of the First Amendment and the Free Exercise Clause of the New York Constitution by targeting an exclusively religious practice for special and unwarranted burdens.

STATEMENT OF THE CASE

On October 11, 2012, Appellants sued the New York City Department of Health and Mental Hygiene, Board of Health, and Health Commissioner (collectively, the Department) seeking relief from a New York City regulation scheduled to go into effect later that month. Dkt. 1. Five days later, Appellants moved for preliminary relief pending adjudication of their claims. Dkt. 11.

The parties stipulated to a temporary stay of enforcement until the District Court held oral argument on Appellants' motion, thus avoiding the need to litigate a temporary restraining order. Dkt. 10. Oral argument was held on December 18, 2012, at which time the District Court extended the temporary stay pending the ruling on the motion. On January 10, 2013, District Judge Naomi Reice Buchwald denied Appellants' motion for preliminary injunction. SA (Special App.) 1-92; 2013 WL 126399. Appellants filed a notice of appeal the next day. JA (Joint App.) 774. Appellants requested that this Court stay enforcement of the regulation pending appeal, but that request was denied following referral to a motions panel.

STATEMENT OF FACTS

This case involves an unprecedented regulation, promulgated by New York City's Department of Health and Mental Hygiene, that specifically targets the way many Jews practice a foundational requirement of Jewish law: ritual circumcision. Acting on flawed, deficient, incomplete evidence, the Department promulgated a

rule that forces religious ministers, as a prerequisite to the ritual, to advise their co-religionists of the Department's recommendation *against* complying with religious law. Appellants, including rabbis subject to this rule, sued under the Federal and State Constitutions. But the District Court ruled that the regulation was subject only to the barest of judicial scrutiny, rational basis review, and therefore denied relief.

A. The Requirements of *Bris Milah* and *Metzitzah*.

Among the most important requirements of Jewish law is ritual circumcision, or *bris milah*. The Bible recounts that God, as part of a covenant with Abraham, commanded that every Jewish male infant be circumcised on the eighth day of life. *See* Book of Genesis 17:10-14. Jews around the world have faithfully adhered to that practice over the thousands of years since. The *bris milah* is performed by a *mohel* (plural: *mohelim*), typically a rabbi with special training in this area.

One of the essential steps of the *bris milah* is *metzitzah*, during which suction is used to draw blood from the area around the wound. *See* Babylonian Talmud, Tractate Shabbat, at 133b. Traditionally, *metzitzah* is performed using oral suction, in a technique known as *metzitzah b'peh* ("MBP"). Many prominent rabbinic authorities maintain that MBP is the proper, or even the only acceptable, way to fulfill the religious obligation. *See* SA 6-8.

MBP is performed around the world, and has been safely practiced for millenia. *Mohelim* are carefully trained to ensure that MBP is performed in a safe manner. Among other precautions, *mohelim* do not perform circumcisions if they are exhibiting any symptoms of the herpes virus, such as cold sores; they minimize the duration of the contact, so that it lasts only approximately one second; and they generally precede the procedure by rinsing their mouths with an antiseptic, which in the case of mouthwash has been shown to eliminate the herpes virus in the saliva even of individuals exhibiting *symptoms* of a herpes infection. *See* SA 6-7 & 9 n.2; *see also* JA 19 (Berman Aff. ¶ 20).

B. The Department's Unprecedented Regulation.

In June 2012, the Department issued a notice of public hearing to address a proposed amendment to the New York City Health Code. The proposal called for a new § 181.21, which—according to its statement of basis and purpose—was designed to target the "practice known as *metzitzah b'peh*." JA 96 (Goldberg-Cahn Decl. Exh. B). To media, the Department candidly described the regulation as an effort to "regulat[e] how part of a religious procedure is done." Sharon Otterman, *City Urges Requiring Consent for Jewish Rite*, N.Y. TIMES, June 12, 2012, at A23.

After opportunity for public comment, the Department's Board of Health voted on September 13, 2012, to adopt a slightly revised version of the proposal. SA 33. As adopted, the regulation forbids *mohelim* to perform MBP unless they

first obtain from an infant's parents a signed form acknowledging that the Department "advises" against MBP. The regulation states:

> (b) Written consent required. A person may not perform a circumcision that involves direct oral suction on an infant under one year of age, without obtaining, prior to the circumcision, the written signed and dated consent of a parent or legal guardian of the infant being circumcised using a form provided by the Department or a form which shall be labeled "Consent to perform oral suction during circumcision," and which at a minimum shall include the infant's date of birth, the full printed name of the infant's parent(s), the name of the individual performing the circumcision and the following statement: "I understand that direct oral suction will be performed on my child and that the New York City Department of Health and Mental Hygiene advises parents that direct oral suction should not be performed because it exposes an infant to the risk of transmission of herpes simplex virus infection, which may result in brain damage or death."

The regulation was scheduled to take effect on October 21, 2012. *See* N.Y.C. Administrative Procedure Act, § 1043(f).

C. The Flawed Scientific Basis for the Department's Regulation.

As the regulatory text makes clear, the Department's concern is that MBP may allow for transmission of the herpes simplex virus ("HSV"), a disease that people can contract, carry, and transmit via saliva, sometimes without showing symptoms. When contracted by a newborn without maternal antibodies to the virus, HSV is very serious. SA 9-11. The scientific basis for the Department's concern that MBP causes its transmission, however, is woefully lacking. Not only is there no DNA proof that HSV has *ever* been transmitted via MBP, but empirical

data fail to show even a statistical *correlation* between the practice and the disease. The Department has instead sought to justify its regulation by piecing together allegedly circumstantial evidence from fewer than two dozen incidents, over a period of *decades*, from all around the world.

At the outset, although the mode of transmission of HSV can be definitively proved by matching viral DNA from the infected person to that from the suspected source, transmission of HSV through MBP has *never*—not once, anywhere—been proved to have occurred. *See* JA 19 (Berman Aff. ¶ 19). The Department does not contend otherwise. New York's Orthodox community in 2006 voluntarily entered a protocol with New York State to provide for DNA testing of *mohelim*, so that the Department's theory could be conclusively tested—but New York City, alone of all of New York's counties, refused to join. *See* SA 16-19 & n.6.

The Department and its experts emphasize that transmission of HSV through oral-genital contact is biologically "plausible." JA 307 (Stanberry Aff. ¶ 7); JA 316 (Zenilman Aff. ¶ 19). But, for a variety of reasons, many plausible theories of disease transmission do not manifest in the real world—from transmission of hepatitis through breastfeeding, to transmission of HIV through saliva. JA 717-18 (Supp. Berman Aff. ¶¶ 4-7). In the absence of real *evidence*, biological plausibility is merely educated speculation.

If transmission through MBP were not only *plausible* but also *actually happening*, one would expect a statistically significant association to appear in data. Yet the existing data do not show a correlation—much less a causal connection—between MBP and neonatal herpes. In particular, data from Israel, where MBP is performed more frequently than anywhere else in the world, show that infants who receive MBP have statistically the *same* risk of contracting HSV as the general New York City population. JA 34 (Federgruen Aff. ¶ 4). And informal data from the Hasidic village of Kiryas Joel, New York, where nearly every male infant is circumcised using MBP, show only one case of neonatal HSV over nearly three decades—and the *mohel* in that case was proved *not* to be its source. JA 745 (Werzberger Aff. ¶ 6). These figures, drawn from substantial data sets, affirmatively refute the Department's theory.

Only a single, non-peer-reviewed study by the Department's own staff ("the Department's report") has purported to show a statistical link between MBP and HSV, on the basis of only five suspected cases over a period of almost six years. *See* SA 24-25. But that report, among other errors, is riddled with demonstrably erroneous assumptions. Indeed, the Department has largely declined to defend the report against these criticisms, and the District Court declined to rely on it. SA 43. Moreover, an independent review by Penn Medicine's Center for Evidence-based Medicine recently concluded that the evidence in the Department's report was

"significantly limited" by the "very small number of reported infections," "incomplete data," "confounding factors," and "methodological challenges." Joel Betesh & Brian Leas, *Risk of Neonatal Herpes Simplex Virus Type 1 Infection Associated with Jewish Ritual Circumcision*, PENN MEDICINE CENTER FOR EVIDENCE-BASED MEDICINE at 1 (Dec. 2012) ("*Penn Review*").

In particular, the Department's report compared the baseline rate of neonatal HSV to the rate among infants suspected to have undergone MBP. A critical part of that exercise was to estimate the total number of infants subjected to MBP during the study period—but the Department's report *vastly* underestimated that figure, skewing upward the estimated risk for infants who undergo MBP. The report proceeded by drawing from a census of K-12 Jewish day schools and then guessing that 100% of "Hasidic" students, 50% of "Yeshiva" students, and 0% of remaining students received MBP. JA 568 (Farley Decl. Exh. K). Those figures were not based on research; they were taken from an offhand, conservative guess included in a letter to the Department from a community leader seven years earlier. JA 384-85 (Farley Decl. ¶¶ 49-51). The assumption that *nobody* outside the Hasidic and Yeshiva subgroups is subjected to MBP is directly contradicted by the Department's report itself, which catalogues 11 suspected HSV cases subsequent to MBP since 2000—at least two of which the Department admits occurred *outside* those subgroups. JA 729 (Supp. Federgruen Aff. ¶¶ 12-14). The Department was

well aware of this basic flaw in its analysis. *See* JA 76 (Goldberg-Cahn Decl. Exh. A) (Department official acknowledging that MBP "is performed on infants born to non ultra-orthodox families" even though its report assumes the opposite); *see also Penn Review*, *supra*, at 9 (noting that "it is not possible to determine how accurately [the Department's report's assumptions] represent the true population" and recognizing "sources of bias" in connection with estimate).

Even accepting the report's assumptions about the percentages of each community that practice MBP, it erred significantly by relying on aggregate population figures from a census of K-12 day schools. The most accurate figures, since the goal is to estimate the number of *babies* born during the study period, are *kindergarten* populations—and the difference is material, because the same census reports that the Orthodox component of New York City's Jewish population has experienced explosive birthrates in recent years. JA 35 (Federgruen Aff. ¶ 8); JA 742 (Schick Aff. ¶ 8). Actual kindergarten enrollment figures provided by the New York Department of Education show that the number of MBP circumcisions in New York City during the study period was about *50% higher* than estimated by the Department's report. *See* JA 34-35 (Federgruen Aff. ¶¶ 5–9). Accounting for this error alone, the risk of contracting HSV among babies subjected to MBP is not statistically different from the risk among babies *not* so subjected. JA 35-36

(Federgruen Aff. ¶ 10); *see also* JA 729 (Supp. Federgruen Aff. ¶¶ 12-15); JA 750-52 (Zucker Decl. ¶¶ 4-15).[1]

Given the absence of meaningful statistical evidence and the insufficiency of biological "plausibility" alone, the Department has resorted to citing 12 individual cases—since 2000—in which infants developed HSV after supposedly being subject to MBP. *See* SA 25, 47-48. Of course, these are a tiny minority of the total number of HSV cases over that period, and if there is no statistically significant *correlation*, inferring *causation* is completely unwarranted. In any event, 9 of the 12 infections occurred *outside* the expected time period had transmission occurred at circumcision, given the incubation periods cited by the Health Commissioner. JA 719 (Supp. Berman Aff. ¶ 16). In at least 2 cases, there is strong evidence suggesting transmission from a particular, infected family member, rather than from a *mohel*. *See* JA 722 (Supp. Berman Aff. ¶¶ 28-30). And 4 cases involved sets of siblings, "indicating the possibility of transmission from other family members, caregivers, or between the cases." *Penn Review*,

[1] As explained by the author of the census invoked by the Department, there are also other reasons why use of its findings—and even the use of enrollment data generally—significantly underestimates the number of MBP circumcisions in New York City. JA 742-43 (Schick Aff. ¶¶ 9-12). Moreover, Dr. Federgruen, Dr. Zucker, and Dr. Brenda Breuer also challenged the statistical analysis of the Department's report on other, more technical grounds—such as the formula it used to compute the relevant "confidence interval" for its findings—all of which cast yet further doubt on the validity of its findings. *See* JA 730-32 (Supp. Federgruen Aff. ¶¶ 16-27); JA 750-52 (Zucker Decl. ¶¶ 4-15); JA 41-42 (Breuer Aff. ¶¶ 5-11).

supra, at 8; *see also* JA 17-19 (Berman Aff. ¶¶ 13, 16). The Department points out that these infants presented with lesions in the genital area, but the textbook on pediatric infectious disease states that lesions "tend to appear at sites of trauma," and so it is hardly surprising that circumcised boys would have genital lesions—whatever the virus' source. *See* JA 720 (Supp. Berman Aff. ¶¶ 19-20); *see also Penn Review*, *supra*, at 7 ("[T]he dressing on the circumcision wound is usually changed at home at least once daily for several days after the procedure, while diapers are changed very frequently in infants, which could increase potential exposure to infection in the genital area ….").[2]

In sum, the Department has no DNA proof that MBP has ever caused HSV, no reliable data showing a statistically significant correlation between the two, and no good evidence that a small number of cases were due to MBP rather than other causes.

[2] The Department has also cited three studies that report anecdotally on one, two, and eight cases, respectively, of infants with neonatal HSV who previously had MBP performed, drawing on incidents as far back as 1988. SA 14-15; JA 554-65 (Farley Decl. Exh. J). None of these studies conducted DNA analysis, however, and none even purported to find a statistically significant link between MBP and HSV. Infants subject to MBP sometimes develop HSV, just like infants *not* subject to MBP. Pointing out examples of the former does not prove that MBP *caused* the infection. *See Penn Review*, *supra*, at 10 (concluding that the "evidence base is small and significantly limited" and therefore can support the conclusion only that MBP "may be a risk factor for infection").

D. Appellants and Their Legal Challenge.

Appellants include three organizations that represent traditional Judaism, and three *mohelim*, with over 60 collective years of experience performing the *bris milah* ceremony, each of whom believes that, under Jewish law, *metzitzah* is to be performed using direct oral suction. *See* SA 7-8; *e.g.*, Blum Aff., Dkt. 15, ¶¶ 1–3. The *mohelim* believe that MBP, performed using appropriate precautions, is safe, and that the Department's warning could cause parents to violate Jewish law. *E.g.*, Blum Aff., Dkt. 15, ¶¶ 4–5.

Appellants filed suit on October 11, 2012, seeking declaratory and injunctive relief from § 181.21; a few days later, they sought preliminary relief pending adjudication of their claims. SA 37. Appellants argued that by forcing *mohelim* to denigrate their religious beliefs—and to discourage compliance with what they regard as a religiously mandated ritual—the regulation impermissibly burdens their constitutional rights to freedom of speech and religious exercise.

To avoid litigating a temporary restraining order, the parties stipulated to a stay of enforcement pending oral argument before the District Court. The court then ordered that the stay be extended pending its ruling. SA 37-38.

E. The District Court's Decision.

The District Court recognized that the propriety of a preliminary injunction turned, in this case, on the merits of Appellants' claims, because if a meritorious

First Amendment claim existed, "irreparable injury will be presumed." SA 51. But the court concluded that Appellants' claims failed as a matter of law, because § 181.21 was subject (in its view) only to minimal, rational basis review.

As to the Free Speech Clause, the District Court reasoned that no speech was compelled because the Department's regulation requires *mohelim* only to "obtain[]" signed parental consent forms before performing MBP. SA 52. "Nowhere in the regulation are mohels required to *provide* a consent form to parents or even to inform parents that such a form exists." SA 52-53 (emphasis added). As such, "parents would be able to obtain the form themselves and give the signed form to the mohel without any communicative action by the mohel." SA 53.

Responding to Appellants' rejoinder that, at the end of the day, the *mohel* would be required to transmit the Department's advice in at least those cases where the parent did *not* take the initiative of procuring the Department's consent form, the District Court held that a *mohel* in that circumstance "simply could not perform MBP," and thus avoid the compelled speech. SA 54. "Nothing in the regulation would require the mohel to provide the consent form himself." *Id.* The *mohel* might "choose" to distribute the forms, to ensure that he could conduct the ritual properly, but the regulation "does not require" that. SA 55 n.13.

Turning to the Free Exercise Clause of the First Amendment, the District Court inquired into whether § 181.21, while burdening religion, was a "neutral and

generally applicable law," such that it need satisfy only rational basis review. SA 65. Despite conceding that "there are no known instances other than MBP" to which the regulation would apply, *id.*, and that its "legislative history … focuses explicitly on MBP," SA 66, the court held that the regulation *was* neutral and generally applicable. It emphasized that § 181.21 addressed "legitimate governmental interests," namely "safeguarding children's health." SA 66-67. According to the court, these "valid secular objects" established that the regulation had no "discriminatory object against religion in general or Judaism in particular," and therefore qualified as a neutral law of general applicability. SA 67.

Recognizing that a law cannot be considered neutral if it regulates "religious conduct while failing to regulate secular conduct that is at least as harmful," the District Court analyzed whether § 181.21 is underinclusive. SA 68. It is not, the court concluded: While Appellants pointed to other types of (unregulated) conduct that could lead to transmission of HSV, and while 79 out of the 84 HSV cases identified by the Department during its study period indisputably did *not* involve MBP, the court said that "the Department's options for additional regulation are limited." SA 74. Moreover, although the Department has begun a comprehensive effort to distribute educational brochures about MBP to parents of Jewish newborns, the District Court ruled that conscripting *mohelim* to transmit the same

messages was not overinclusive, either, because § 181.21 would at least "increas[e] the chance that [parents] will read and consider" the warning. SA 76.

Accordingly, the District Court concluded that § 181.21 "is neutral and generally applicable," and so applied only "rational basis review." SA 81-82.

Finally, with respect to Appellants' separate claim under New York State's Free Exercise Clause—which subjects all burdens on religion to a balancing test—the District Court held that § 181.21 imposes only a "relatively minor burden" on religion (since it does not "ban" MBP) yet furthers "two important governmental interests" (health of children and informed decisionmaking). SA 86.

SUMMARY OF ARGUMENT

I. Forcing *mohelim* to convey the Department's subjective "advice" about whether to follow religious law is a quintessential compulsion to speak. Indeed, conscripting religious ministers to help disseminate government-approved warnings that conflict with their deeply held religious beliefs is anathema to every core First Amendment value. No court has ever upheld even a *purely factual* health disclosure in a private, religious context, much less authorized compelled dissemination of *hotly disputed* "advice" about a religious practice. Yet § 181.21 has just that effect and was designed with just that objective. To justify such an unprecedented regulation, the Department must surely satisfy heightened scrutiny.

Remarkably, the District Court ruled that the regulation does not deserve *any* special judicial scrutiny because it does not even *implicate* the Free Speech Clause. The premise for that stunning assertion was that the regulation does not *compel* speech because a *mohel* "simply could not perform MBP." SA 54. On that view, the government may force repetition of any government-dictated message, so long as the compulsion is contingent on voluntary conduct—even exercise of basic constitutional rights. That conflicts with seminal Supreme Court cases, creating a loophole so large as to eliminate compelled-speech doctrine altogether. Indeed, on that approach, the State could require drivers to display ideological messages on their license plates—because the drivers could "simply" choose not to drive. Or it could require Catholic priests to advise newlywed couples to use contraception—because the priest could "simply" not conduct the ceremony. That is not the law.

II. Moreover, singling out an exclusively religious practice like MBP for unique regulation constitutes the targeting of religion, triggering heightened review under the Free Exercise Clause. When government specifically reaches out to regulate a religious practice, it must satisfy a higher threshold (in importance and tailoring) than when a generally applicable law happens to incidentally burden religion. Here, § 181.21 concededly was *designed* to specifically regulate MBP and concededly will *actually* apply exclusively to MBP. Thus, the Department must satisfy heightened scrutiny under the Free Exercise Clause too.

The District Court reasoned that § 181.21 is a neutral, generally applicable regulation because it serves "valid secular" purposes. SA 67. This puts the cart before the horse. The law's purpose and importance determine *whether* it *satisfies* scrutiny, not *which* level of scrutiny *applies*. The latter question depends on whether the law happens to sweep in religious conduct or instead sets out to regulate a ritual: When society specifically targets a religious act, the Free Exercise Clause demands more substantial justification than when society imposes burdens across the board. This is particularly true here, where the Department has invoked interests in informed consent and the endangerment of children yet departed—in this unique, religious context only—from the ordinary, generally applicable rules and principles that society otherwise relies upon to protect those same interests.

III. The Department's regulation cannot satisfy any level of heightened scrutiny. Strict scrutiny demands that government action of this kind be a *last resort* to a *serious, proven* social harm, and *narrowly tailored* to address it. Yet the Department's concern about public awareness of MBP's alleged risks could readily be addressed without forcing dissenting rabbis to encourage what they view as sinful behavior. It suffices that the Department can—and, indeed, already has begun to—independently propagate its views about MBP, such as by arranging for local hospitals and doctors to distribute to new parents a Department-published brochure providing the same advice as § 181.21 forces *mohelim* to repeat.

Moreover, the scientific basis for the Department's warning is transparently deficient. Among other things, the Department has *no* definitive, DNA proof that MBP has *ever* transmitted the herpes virus; and the statistics show that there is not even a statistical *correlation* between the two. A small number of ambiguous incidents over many years is hardly a compelling basis to intrude upon a sacred ritual that has been practiced for millenia, especially given the lack of evidence that Jewish parents remain ignorant of this highly publicized issue.

Finally, § 181.21 is not narrowly tailored. The vast majority of neonatal herpes cases are unrelated to MBP, completely preventable, and not (as the District Court speculated) unregulable—yet their causes remain untouched by the Department. Moreover, while § 181.21 purports to preserve parents' informed consent and to protect children from mistreatment, in fact the rule imposes on this ritual unique burdens *on top* of New York's default standards in those areas.

Even under the (inapplicable) reduced scrutiny that applies to commercial transactions and licensed professionals, § 181.21 could not survive. The regulation goes well beyond the disclosure of "purely factual" information, instead requiring *mohelim* to dispense city bureaucrats' "advice," by definition a matter of opinion. And, under New York State's Constitution, the severe burdens that the regulation imposes on religious freedom cannot be outweighed by its dubious benefits.

ARGUMENT

To preliminarily enjoin government action, a party must show likelihood of success on the merits; that irreparable harm will otherwise result; and that such relief is consistent with the public interest. *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010). Here, the dispute is over likelihood of success on the merits. If Appellants' claims have merit, irreparable harm is presumed. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). *Accord* SA 50-51. Moreover, while the District Court ruled that the public interest did not favor an injunction, that was only after "[w]eighing" the Department's interests in § 181.21 against Appellants' argument that it was unconstitutional—an argument that the court had already found to lack merit. SA 89. There is no basis to withhold injunctive relief if the regulation *does* violate Appellants' constitutional rights.

The question on appeal is therefore whether Appellants are likely to succeed on the merits. As to that question, review is *de novo*, because while this Court reviews denial of an injunction for abuse of discretion, it "review[s] the district court's legal holdings de novo." *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006). Moreover, because this is a First Amendment case, this Court conducts an "independent review" of the entire factual record. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-501 (1984).

I. THE FREE SPEECH CLAUSE REQUIRES HEIGHTENED SCRUTINY, BECAUSE THE INTENT AND EFFECT OF § 181.21 IS TO FORCE RELIGIOUS MINISTERS TO TRANSMIT THE DEPARTMENT'S SUBJECTIVE ADVICE.

A. The Supreme Court's "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality op.)).

Compelled speech doctrine is robust, and the prohibition does not turn on fine technicalities about the nature of the speech or the manner of its compulsion. *First*, the doctrine applies most obviously when the State attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Thus, *Barnette* invalidated a requirement that schoolchildren repeat the pledge of allegiance. *Id.* Similarly, the Court has held that New Hampshire could not require drivers to display on their license plates the State's motto—"Live Free or

Die"—which some considered to be "repugnant to their moral, religious, and political beliefs." *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

But compelled speech is not limited to compelled affirmations of opinions or ideas. To the contrary, the principle barring compelled speech "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Thus, in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Court invalidated a law that required campaign literature to include the name of the person or entity responsible for it, even though such disclosure would obviously have been factual. *See id.* at 357. Likewise, the Court invalidated a requirement that professional fundraisers disclose truthful facts about the percentage of donations that they retain. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784, 796–97 (1988).

Second, the prohibition on compelled speech applies regardless of whether the private parties are forced to convey views or facts orally, in writing, or through other means. For example, the license plate in *Wooley* merely had to be attached to one's car; that was bad enough, because it forced the driver to "participate in the dissemination of an ideological message by displaying it on his private property." 430 U.S. at 713. In *Pacific Gas*, the Court similarly invalidated forcing a company to provide space in its billing envelope to publish a third party's views. *See* 475 U.S. at 9–12. And in *CTIA-The Wireless Association v. City and County of San*

Francisco, the Ninth Circuit recently affirmed invalidation of an ordinance requiring retailers to "display an informational poster" and "provide every customer [who purchases a cellular phone] with an information fact-sheet." 827 F. Supp. 2d 1054, 1056 (N.D. Cal. 2011), *aff'd*, 494 F. App'x 752 (9th Cir. 2012). The First Amendment forbids government to coerce a party to help, in whatever way, to disseminate facts or ideas to which the party objects.

Third, such coercion is no less unconstitutional if the compelled message is *identified* as the view of the government. Being forced to give voice to the views of others is precisely what the First Amendment protects against. Thus, in *Wooley*, "Live Free or Die" was self-evidently the State's message. 430 U.S. at 713. In *CTIA*, the "fact sheet" listed actions that "San Francisco" recommends but was still invalidated. 827 F. Supp. 2d at 1058. And when the FDA sought to force cigarette manufacturers to print "QUIT-NOW" on product labels, that was the *FDA's* view, not the *manufacturers'*. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012); *see also Centro Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 459, 472 (D. Md. 2011) (invalidating requirement that pregnancy centers post sign stating that "Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider").

Relatedly, it is irrelevant whether the speaker is free to openly disagree with the message he is forced to disseminate. "[T]he State is not free … to force

appellant to respond to views that others may hold." *Pac. Gas*, 475 U.S. at 11. In *Pacific Gas*, the Court explained that the utility forced to distribute a third party's message would "be forced either to appear to agree with [the] views or to respond," a dilemma "antithetical to" the First Amendment. *Id.* at 15-16. Likewise, in *Wooley*, drivers were free to affix "a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto," but that did not change the result. 430 U.S. at 722 (Rehnquist, J., dissenting).

B. Laws that compel speech are subject to the highest level of judicial scrutiny, namely, strict scrutiny. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and therefore is "subject to exacting First Amendment scrutiny." *Riley*, 487 U.S. at 795, 798.[3]

[3] A somewhat reduced standard applies in the contexts of commercial transactions and the exercise of licensed professions: In those narrow situations, where "the interests at stake … are not of the same order," "purely factual and uncontroversial" disclosures may be compelled. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *accord Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc). This reduced scrutiny is not applicable to private, religious speech, which falls within the heartland of First Amendment protection. *See, e.g.*, *Tepeyac*, 779 F. Supp. 2d at 463-66 (applying strict scrutiny to rule compelling speech by pregnancy center providing free services motivated by religious belief). In any event, § 181.21 is neither purely factual nor uncontroversial. *See infra*, Part III.D.1.

C. In practice, § 181.21 requires the *mohel* to inform parents that "the New York City Department of Health and Mental Hygiene advises parents that direct oral suction should not be performed because it exposes an infant to the risk of transmission of [HSV] infection, which may result in brain damage or death." This is a quintessential example of compelled speech; it transforms the *mohel* into the Department's mouthpiece. It squarely infringes upon his right, under the First Amendment, "to tailor" and "shape" his own speech. *Hurley*, 515 U.S. at 573–74.

Indeed, the regulation requires a *mohel* to transmit the Department's *advice* about whether to follow religious law, thereby violating the most basic "fixed star in our constitutional constellation"—that government may not "prescribe what shall be orthodox in … religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. While *risk* itself may be a matter of objective (albeit disputed) fact, the choice whether to engage that risk—the type of choice we all make countless times a day—is one of subjective *judgment*. And § 181.21 compels transmission of just that sort of judgment, by requiring the *mohel* to inform parents that the Department "advises" that MBP "should not be performed." That advice is "repugnant" to Appellants' religious beliefs. *Wooley*, 430 U.S. at 707.

Moreover, even the purportedly factual part of the disclosure—that MBP "exposes an infant to the risk of transmission of [HSV]"—triggers strict scrutiny.

"[C]ompelled statements of 'fact,'" no less than affirmations of belief, "burden[] protected speech." *Riley*, 487 U.S. at 797–98; *accord Hurley*, 515 U.S. at 573.[4]

D. The District Court nevertheless concluded that § 181.21 does not compel speech because it requires the *mohel* only to "obtain" an acknowledgement from the parents. The court reasoned that the *mohel* need not *give* the parents the form, and speculated that parents may somehow procure it on their own, without "communicative action" by the *mohel*. SA 53. In any case, the court said, the *mohel* can always avoid the speech by refraining from MBP.

1. The notion that § 181.21 does not compel the *mohel* to speak is belied by common sense and the regulatory record. The Department did not, after all, regulate parents; it chose to regulate *mohelim*. Further, the regulation's Notice of Adoption admits, in a published note following § 181.21's operative text, that it was added "to require that persons who perform circumcisions … [using MBP] *warn the parent* of the Department's concerns about the risks of infection." SA 55 (emphases added). Contrary to the District Court, that admission does not reflect "confusion" by the Department about "what the regulation requires." SA 56. It

[4] Notably, the reduced scrutiny applicable in commercial and professional contexts (*see supra*, n.3) does not govern here, because *mohelim* are neither commercial actors nor regulated professionals; they are unlicensed—indeed, unlicenseable—religious ministers who demand no payment for their services. *See Zakhartchenko v. Weinberger*, 605 N.Y.S.2d 205, 206 (N.Y. Sup. Ct. 1993) ("[A] circumcision performed as a religious ritual … does not constitute the practice of the profession of medicine."); *see also* SA 7 (*mohelim* demand no pay).

shows that those who designed the rule understood perfectly well what the District Court sought through creative semantics to avoid: that the practical effect of § 181.21 is to compel the *mohel* to play the *communicative* role of conveying the Department's advice. *See* JA 85 (Goldberg-Cahn Decl. Exh. A) (Department's counsel describing § 181.21 as requiring "at least" that parents will "hear from the *mohel*" about the alleged risks of MBP).

In any event, the rule *in practice* requires the *mohel*, in many situations, to provide parents with the Department-mandated warning. Granted, if the parents show up at the *bris* and hand the *mohel* a signed form, no speech is required. But many parents will inevitably *not* do so. In all such cases, the *mohel* must, if he is to conduct the ritual as required by Jewish law, transmit the Department's advice against MBP—by providing it to the parents or directing them to procure it. He thus plainly serves as the conduit for a government message that he rejects, exactly the ideological manipulation prohibited by the First Amendment. Indeed, this is obviously the application of § 181.21 to which Appellants object.[5]

[5] Contrary to the District Court, that § 181.21 may not compel speech in every case *of MBP* does not defeat Appellants' challenge. SA 53. Appellants seek to enjoin the rule's enforcement *against them*, *i.e.*, when it would require them to do something. This is not a case, like *United States v. Salerno*, 481 U.S. 739 (1987), where challengers seek to avoid a valid application of a law just because it might later be unconstitutionally applied to someone else.

Put another way, the fact that the regulation directs the *mohel* to "obtain" the signed form without requiring him to first "provide" the unsigned form could not possibly be dispositive. In reality, at least where parents do not procure the form on their own initiative, there is no way to "obtain" the signed form without first giving or directing the parent to a copy. Drawing a formalistic line on this basis, and ignoring the practical reality of the regulation, would be incompatible with the Supreme Court's caselaw. *Cf. Carroll v. Blinken*, 957 F.2d 991, 998 (2d Cir. 1992) (observing that compelled speech does not have "only one *modus operandi*"). And it would open a gaping loophole in that doctrine: Any compulsion to speak in connection with an activity could be rewritten as a requirement to "obtain" an acknowledgement that the listener has heard the government message. For example, San Francisco could have required cellular phone retailers to "obtain" signed fact sheets from its customers. *But see CTIA*, 827 F. Supp. 2d at 1058. Montgomery County could have required pregnancy centers to "obtain" acknowledgements from their patrons of the County's advice that they consult a licensed health care provider. *But see Tepeyac*, 779 F. Supp. 2d at 459, 471. And the FDA could have forced retailers to "obtain" acknowledgements from smokers of its advice to "QUIT-NOW." *But see R.J. Reynolds*, 696 F.3d at 1217 The real-world impact remains exactly the same—to engage in the activity, the actor must transmit the message.

2. The District Court implicitly acknowledged all of this. SA 54. But § 181.21 *still* did not constitute a compulsion to speak, in its view, because even if the parent did not bring the signed form to the circumcision, "the *mohel* would still be free not to say anything or otherwise to undertake any communicative act. He simply could not perform MBP." *Id*. *Mohelim* might *choose*, observed the court, "to carry extra consent forms" and to distribute them as a means of ensuring "their own fulfillment of religious duties," but the regulation "does not require them to do so"—it simply forbids them to perform MBP *unless* they do so. SA 55 n.13. This notion—that the regulation is not a compulsion to speak because it operates merely as a condition on the *mohel*'s voluntary activity—is the critical premise of the District Court's Free Speech Clause holding, because it is the *only* rationale purporting to justify the regulation as applied to cases in which parents do not complete the form on their own accord.

That premise, however, is plainly spurious. It is nearly *always* true that the regulated actor could avoid the compulsion to speak by refraining from the activity in question. In *Wooley*, the individuals who objected to New Hampshire's "Live Free or Die" motto could simply have chosen not to drive a car. In *Riley*, the fundraisers could simply have refrained from soliciting charitable donations. Yet the Supreme Court still viewed these laws as compelling speech, and invalidated them. *See Wooley*, 430 U.S. at 707; *Riley*, 487 U.S. at 784.

Indeed, on the District Court's theory, compelled speech in the commercial context would escape not just strict scrutiny, but *any scrutiny at all*—because all commercial activity is voluntary, and so the actor could simply refrain from the regulated transaction and thereby avoid the speech compulsion. Yet the Supreme Court has treated such laws as compulsions to speak, and even established a special test for scrutinizing compelled commercial disclosures. *See Zauderer*, 471 U.S. at 651. And the lower courts routinely invalidate laws that fail that test. For example, the FDA never *forced* cigarette companies to display graphic warnings on packages—only to do so *if* they wanted to sell cigarettes. *But see R.J. Reynolds*, 696 F.3d at 1216. San Francisco did not *force* retailers to distribute advice about use of cellular phones—only to do so *if* the retailers wanted to sell them. *But see CTIA*, 494 F. App'x 752. And Illinois did not *force* retailers to label violent video games with an "18" sticker—only to do so *if* they chose to sell them. *But see Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-53 (7th Cir. 2006).

Obviously, the precedent requiring heightened scrutiny in cases involving *commercial* activity apply *a fortiori* here. Here, the activity being regulated is not selling cigarettes or driving a car, but the *fundamental right to religious exercise*. Thus, avoiding the compulsion by "simply … not perform[ing] MBP" would, as even the District Court acknowledged, "undoubtedly … raise a free exercise issue." SA 54-55. If the State may require transmission of government advice to

practice one's religion, then it could do the same for any other constitutional right: Doctors could be forced, before performing abortions, to obtain acknowledgements that abortion is a sin. Or, as a prerequisite to voting, constituents could be forced to obtain signed statements from family members that the State advises voting for one candidate. If the District Court were correct, such rules would be subject to *no scrutiny at all*. Quite plainly, this is not the law.

To the contrary, this Court has gone so far as to hold that even conditioning *receipt of federal grants* on espousal of the government's message violates the First Amendment. *See Alliance for Open Soc'y Int'l , Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2d Cir.), *cert. granted*, 133 S. Ct. 928 (2013). The majority reasoned that compelling speech—even "as a condition of receiving a government benefit"— "cannot be squared with the First Amendment." *Id.* at 234. Again, Appellants' case is far stronger, because § 181.21 requires speech as a condition on exercising a core constitutional right, not on receiving funds to which nobody has a right and that need never be offered at all. Not even the *Alliance for Open Society* dissenters suggested that government could go that far. *See id.* at 243 (Straub, J., dissenting) (arguing that "different framework applies" when government coerces speech only "through conditions on federal spending"); 678 F.3d 127, 129 (2d Cir. 2011) (Cabranes, J., dissenting from denial of rehearing en banc) (contending that "subsidy conditions" are analyzed under "unconstitutional conditions doctrine").

* * *

Section 181.21, in operation and by design, conditions the religious exercise of *mohelim* on their transmission of the Department's subjective recommendation against complying with religious law—a message that the *mohelim* vigorously reject. The District Court's mistaken holding that the Free Speech Clause is not even *implicated* by this conscription is grounds to vacate the decision below. And, as explained below, *see infra*, Part III, because the regulation cannot satisfy heightened scrutiny, this Court should grant preliminary relief.

II. THE FREE EXERCISE CLAUSE ALSO REQUIRES HEIGHTENED SCRUTINY, BECAUSE THE INTENT AND EFFECT OF § 181.21 IS TO REGULATE AN EXCLUSIVELY RELIGIOUS PRACTICE.

A. The First Amendment's guarantee of the free exercise of religion "embraces two concepts": the "freedom to believe" and the "freedom to act." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Religious liberty would mean nothing if the government could regulate, without any meaningful scrutiny, the religious acts and rituals that individuals' faiths prescribe.

Of course, that does not mean that religious practitioners are categorically exempt from every otherwise-applicable law that incidentally burdens religious exercise. The Supreme Court explained that in its seminal decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court acknowledged that religion "often involves not only belief and profession but the performance of (or

abstention from) physical acts," *id.* at 877, and considered the question of what level of judicial scrutiny ought to apply to laws that regulate such acts. To answer that question, the Court distinguished between two types of regulations.

On the one hand, some laws are "not *specifically directed* at [a] religious practice" and have "merely the *incidental* effect" of burdening religious exercise. *Id.* at 878 (emphases added). The law in *Smith* was such a law, as it applied across the board to anyone who used drugs for any purpose; their use for religious reasons constituted a tiny fraction of the regulated conduct. *Id.* Other examples include child labor laws, Social Security taxes, and military conscription. *Id.* at 879-80. All of these requirements apply across society; their "object," *id.* at 878, is clearly not to regulate a religious act. To require exemptions from these laws for any individual who could assert a religious objection would, the Court worried, allow every religious objector "to become a law unto himself." *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)). The Court therefore held that such "generally applicable prohibitions" are presumptively constitutional.

On the other hand, *Smith* distinguished laws that do not just *incidentally* burden religion as part of an "across-the-board" regulation, *id.* at 884, but rather apply *only* to a religious practice. The Court drew an analogy to a tax that "applied only to newspapers." *Id.* at 878. Unlike a "general tax" applicable to all entities, a specific tax on newspapers violates the First Amendment. *Id.* (citing *Grosjean v.*

Am. Press Co., 297 U.S. 233, 250-51 (1936)). Similarly, a regulation applicable *only* to a religious practice raises far more concern than a "generally applicable" rule with some "concededly constitutional" applications. *Id.* A law like the former must therefore meet a far higher threshold of justification.

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court elaborated on *Smith*'s distinction between "neutral [laws] of general applicability" and those "failing" that test (which "must be justified by a compelling government interest and must be narrowly tailored to advance that interest"). *Id.* at 531-32. *Lukumi* explained that a law is not neutral or generally applicable if the State has "attempt[ed] to target … religious practices." *Id.* at 535; *see also id.* at 524 (noting that laws have an "impermissible object" where they apply "only with respect to conduct motivated by religious beliefs"). In making this determination, the courts must apply a "practical" inquiry, meaning that "the effect of a law in its real operation is strong evidence of its object." *Id.* at 535-36.

Unlike in *Smith*, which involved a prohibition on drugs that applied across society, "almost the only conduct subject to" the animal-slaughter ordinances in *Lukumi* was the religious practices of the Santeria faith. 508 U.S. at 535. The burdens, "in practical terms, f[ell] on Santeria adherents but almost no others." *Id.* at 536. The Court found that the ordinances attempted "to target" the Santeria practice of ritual slaughter and so were neither neutral nor generally applicable. *Id.*

at 534, 542–43. As Justice Scalia, the author of *Smith*, explained, the distinction between the cases was that only in *Lukumi* did the ordinances "target the practices of a particular religion." *Id.* at 557 (Scalia, J., concurring in part and in judgment).

In sum, as this Court has explained, laws that regulate religious exercise are subject to strict scrutiny unless "the burden on religion" is "merely the 'incidental effect' of an otherwise valid provision." *Genas v. State of N.Y. Corr. Servs.*, 75 F.3d 825, 831 (2d Cir. 1996) (quoting *Smith*, 494 U.S. at 878-79). "[A] court must ask whether a law's impact on religious practices is merely incidental (in which case the regulation is neutral) or intentional and targeted (in which case it is not)." *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1188 (W.D. Wash. 2012).

B. Here, there can be little doubt that § 181.21 is "specifically directed" at a particular religious practice—MBP. *Smith*, 494 U.S. at 878. The rule is limited to "oral suction as part of a circumcision"—a uniquely religious ritual practiced exclusively by Jews. When the Department announced the public hearing on § 181.21, it admitted that the regulation was designed to target the "practice known as *metzitzah b'peh*." JA 96 (Goldberg-Cahn Decl. Exh. B). An official candidly described the regulation as an effort to "regulat[e] how part of a religious procedure is done," Otterman, *City Urges*, *supra*, confirming that its *object* (not simply its *incidental effect*) is to regulate religion. And contextual evidence suggests that the proposal represents "an escalation of the city's efforts to

curtail the ancient Jewish procedure of *metzitzah b'peh*," *id.*, just as the ordinances in *Lukumi* were an effort "to suppress Santeria religious worship," 508 U.S. at 540. *Accord* JA 88 (Goldberg-Cahn Decl. Exh. A) (Department official describing its "long-term approach" as seeking to end this "longstanding religious tradition").

Indeed, the Department *conceded* below that MBP "prompted" § 181.21 and is "the only presently known conduct" covered by it. Dkt. 34, at 6 & 9 n.8. The District Court, too, acknowledged that MBP is "the only activity the Board of Health expected the regulation realistically to apply to." SA 2. There are "no known instances other than MBP" to which the regulation would apply, and its "legislative history … focuses explicitly on MBP." SA 65-66. To be sure, the regulation would theoretically apply to direct oral suction as part of a circumcision even if performed for secular reasons. But the Department well knows that nobody does this for secular reasons; the real-world burden of the rule falls on religion, and that is enough to warrant application of heightened scrutiny.

Accordingly, as in *Lukumi*, the MBP ritual is "the only conduct subject to" the regulation, which was "drafted … to achieve this result." 508 U.S. at 536. The regulation's effect on MBP is "intentional," not "merely incidental." *Stormans*, 844 F. Supp. 2d at 1188. Section 181.21 is not, apart from its effect on MBP, "otherwise valid," *Genas*, 75 F.3d at 831, because it *has* no practical effect apart

from on MBP. In sum, because it exclusively targets a religious ritual for unique burdens, § 181.21 falls well outside the *Smith* exception to strict scrutiny.

C. The District Court resisted this logic. Instead, it found that § 181.21 is neutral and generally applicable because it furthers "legitimate governmental interests" and was promulgated to address those interests, not to discriminate against "religion in general or Judaism in particular." SA 67.

1. In effect, the District Court's position was that laws need not satisfy heightened scrutiny, even if they *exclusively* burden religious practice, so long as the legislature was furthering a valid secular purpose, rather than intending to suppress religious conduct *because* of its religious nature. That position unduly limits the scope of the Free Exercise Clause to state action motivated by animus.

On the District Court's approach, the only laws subjected to heightened scrutiny are those that have no "valid secular" purpose or do not genuinely serve one, *i.e.*, those motivated by animus toward religion. But, as Justice Scalia, the author of *Smith*, has explained, it does not matter "that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens." *Lukumi*, 508 U.S. at 559 (Scalia, J., concurring in part and in judgment). Thus, even if the ban on animal slaughter in that case had "been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), [it] would

nonetheless be invalid." *Id.* Consequently, as courts have recognized, animus toward religion is a *sufficient*—but not *necessary*—condition to establish violation of the Free Exercise Clause. *See, e.g.*, *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." (citations omitted)); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent …."); *see also* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1184 (2007) (describing the theory that animus is required as "false").

If the rule were otherwise, a court would never have to apply strict scrutiny or assess the substance or weight of a government interest, because the court would only reach the scrutiny stage if the government interest were *per se* illegitimate (as animus is, *see Romer v. Evans*, 517 U.S. 620, 632 (1996)). That makes no sense. The importance of the state interest is a consideration when *applying* heightened scrutiny—not, as the District Court held, in deciding *whether* it applies.

And when government *intentionally* and *specifically* intrudes into a religious practice, it makes good sense to demand a stronger rationale. When *Smith* carved out neutral, generally applicable laws for more relaxed treatment, it was referring to those that affect religious conduct only as an "incidental effect"—rules (like, in

the Court's examples, military conscription and general taxes) that apply across society, clearly not "specifically directed" at a particular religious practice. *Smith*, 494 U.S. at 878. The Court worried that it "would be courting anarchy" to require "religious exemptions from civic obligations of almost every conceivable kind," creating a society where "each conscience is a law unto itself." *Id.* at 888-90.

None of *Smith*'s concerns applies when a legislature consciously decides to regulate how a religious ritual like MBP is performed—whatever its reasons. Such a regulation is the *opposite* of "generally applicable"; it is specifically targeted. And its impact on religion is the *opposite* of "incidental"; it is intentional and direct. When a law burdens *only* religion, plaintiffs are not asking to be relieved of a duty that lawfully falls on the rest of society. They are asking only that the secular government show a compelling interest before crossing the longstanding "wall of separation between church and State," *Reynolds*, 98 U.S. at 164. Given that the Free Exercise Clause is meant to grant "special protection" to religion, it would be "particularly odd" if the Clause were "totally inapplicable" whenever a legislature "decides that other factors"—like health or public safety—"are of sufficient importance to outlaw [religious] conduct." Mark L. Rienzi, *Smith, Stormans, and the Future of Free Exercise: Applying the Free Exercise Clause to Targeted Laws of General Applicability*, 10 ENGAGE 146, 149 (2009).

Thus, whether the Department was motivated by animus toward religion, or was simply indifferent to it, is irrelevant. Section 181.21's *object* is an exclusively religious ritual, and its burdens "in its real operation," *Lukumi*, 508 U.S. at 535, fall solely on religion; it is thus not neutral or generally applicable. Regardless of the Department's motivation, § 181.21 "in fact singles out a religious practice for special burdens." *Id.* at 559 (Scalia, J., concurring in part and in the judgment).

2. For the reasons above, no inquiry into the "underinclusivity" or "overinclusivity" of the Department's regulation is required here. *Lukumi* engaged in those inquiries, to be sure, and they can assist in establishing that a law was motivated by animus. *See Lukumi*, 508 U.S. at 543. But *Lukumi* had no need to "define with precision the standard used to evaluate whether a prohibition is of general application," because the ordinances there fell "well below the minimum standard." *Id.* A law similarly falls below the standards of general applicability when, by design and in operation, it applies *exclusively* to a religious ritual.

In any event, § 181.21 *is* underinclusive. The Department's regulation may not have been motivated by open animus toward Judaism, but it does nonetheless impose different, more demanding standards on religion.

The District Court said that, to establish underinclusivity, Appellants had to give specific examples of other regulations that the Department could have passed to address the risks of HSV transmission. SA 68. It then rejected, for one reason

or another, all of the examples that Appellants proffered. But the court's reasons only confirm that the Department treated religious conduct categorically differently than non-religious behavior that presents risks of HSV transmission.

For example, the court acknowledged that many mothers are infected with HSV when they give birth and that such a mother, while not showing symptoms of the infection, "may infect her child during the birth process." SA 70 n.17. In fact, 85% of neonatal HSV cases are "transmitted by mothers to infants during the birth process." SA 70, 73. And "caesarean delivery significantly reduces the risk of HSV-1 transmission during birth." SA 70. Yet no warnings are mandated in that context, even to advise women of this risk and the potential to minimize it.

The District Court denied that this showed any discrimination, because "c-sections … involve obvious medical risks"; the Department could therefore have "reasonably concluded" that warnings about vaginal delivery would not have furthered public health "at least as much as a warning against MBP." SA 71. That is, while the *religious* costs of refraining from MBP are insubstantial relative to the risk of HSV, the *secular* costs of caesarean-sections outweigh it. As in *Lukumi*, where the city banned *ritual* sacrifice but not hunting "for sport," § 181.21 "devalues religious reasons for" exposure to risk "by judging them to be of lesser

import than nonreligious reasons." 508 U.S. at 537-38.[6] If informed consent is the goal, *all* risks of equivalent degree should at least be *disclosed*.

Appellants also suggested that the Department could undertake educational efforts regarding other ways in which HSV can be transmitted to infants. The District Court responded that the Department *already* does so. SA 72. All that shows, however, is that the Department treats MBP differently than other behavior that could transmit HSV. *Education* suffices for the latter, but *regulation* is needed for only the former. For example, it is undisputed that certain sexual contact during late pregnancy is especially dangerous to the child, because pregnant women who contract HSV at that time often do not produce (or provide) sufficient maternal antibodies to protect the infant during the birth. SA 72-73. But, while the Department "lecture[s]" on that risk, SA 72, it does *not* require pregnant women to sign acknowledgements before engaging in sexual activity. Perhaps the Department is wary of intruding into the bedroom—but, given the Free Exercise Clause, it should be equally wary of intruding into the synagogue.

[6] The District Court also contended that the Department lacks authority to regulate hospitals, because the latter fall under State authority. But the City is an arm of the State, and so this distinction has no First Amendment significance. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 364 (2009) ("Given the relationship between the State and its political subdivisions, … it is immaterial [for purposes of First Amendment] how the State allocates funding or management responsibilities between the different levels of government."). Anyway, the City could at least have mandated warnings to pregnant mothers by doctors *outside* of hospitals, or sought to procure hospitals' *voluntary* agreement to provide this information.

Specific examples aside, § 181.21 targets a practice allegedly responsible for at most 5 of the 84 cases of neonatal HSV reported during nearly six years since mandatory reporting was instituted. All of those 84 cases were preventable and, as the District Court admitted, "there are undoubtedly a number of possible means of HSV-1 transmission that the Department did not regulate." SA 74. That alone shows that § 181.21 is underinclusive. It is not Appellants' job to draft regulations that the Department should have promulgated.

Finally, § 181.21's differential treatment of religion is obvious when one examines how it furthers the public interests in informed consent and prevention of harm to children compared to how New York *generally* pursues those interests. New York law *generally* safeguards the interest in informed decisionmaking by allowing civil actions for negligence or battery. *See Dries v. Gregor*, 72 A.D.2d 231, 235-36 (N.Y. App. Div. 1980) (explaining that "treatment beyond the scope of a patient's consent" was traditionally battery and is now considered negligence); N.Y. Pub. Health Law § 2805-d (setting forth elements for informed-consent cause of action in medical context). And New York *generally* protects children from harm by criminalizing their endangerment. N.Y. Penal Law § 260.10.

But those *general* rules require warnings only for "material risks," *Dries*, 72 A.D.2d at 236, not "remote" ones, *Blackmon v. Strong Mem. Hosp.*, 289 A.D.2d 1018, 1019 (N.Y. App. Div. 2001); and prohibit only actions that "present a

'likelihood' of harm" to children, *People v. Johnson*, 95 N.Y.2d 368, 372 (2000). Those standards are not met here, because the alleged risks of MBP are so small and speculative. Thus, solely in the unique, religious context of MBP, the Department has departed from *truly* generally applicable standards of "material" risk and "likely" harm, imposing a categorical rule above and beyond them. This is yet another illustration of how the Department's regulation treats MBP differently from similar secular conduct, and why § 181.21 cannot fairly be characterized as neutral or generally applicable.

III. FOR MULTIPLE REASONS, § 181.21 FAILS ANY CONCEIVABLY APPLICABLE FORM OF HEIGHTENED SCRUTINY.

As explained, the District Court upheld the regulation without subjecting it to any meaningful constitutional scrutiny. SA 42, 91. For that reason alone, its judgment must be *vacated*. Because it is clear, however, that § 181.21 cannot satisfy heightened scrutiny, a preliminary injunction should be granted.[7]

A. Conscription of *Mohelim* Is Not the Least Restrictive Means, Because the Department Could Spread Its Views Independently.

1. To invalidate the regulation under strict scrutiny, it suffices that compelling speech by *mohelim* is plainly not the least restrictive means of conveying to the public what (in the Department's view) are the risks of MBP. *See*

[7] If this Court prefers to remand to allow the District Court to consider in the first instance whether § 181.21 satisfies heightened scrutiny, Appellants request that this Court at least issue a stay of enforcement pending that determination.

Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that strict scrutiny requires "least restrictive means to further the articulated interest"); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 879 (1997).

In particular, where the government could publicize its own message, compelled speech is not the least restrictive means of educating the public. Thus, in *Riley*, the Court noted that the goals of disclosure could be served equally well if the State "itself publish[ed] the detailed financial disclosure forms." 487 U.S. at 800. In *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), the court held that an "enhanced education campaign" by the government would be a "less-restrictive means" of achieving its goal. *Id.* at 965; *see also Blagojevich*, 469 F.3d at 652 (holding that government could initiate "broader educational campaign" instead of compelling speech). And, in *Tepeyac*, the court explained that, instead of forcing pregnancy centers to transmit the county's advice, the county itself "could post notices encouraging women to see a doctor in county facilities or launch a public awareness campaign." 779 F. Supp. 2d at 469 n.9.

2. The same is true here. If the Department wants to speak to parents about the alleged risks of MBP, it need not conscript an army of *mohelim* marionettes. Instead, it could pursue its own educational campaign. For example, the Department could publish pamphlets and distribute them in hospitals—during

the many interactions that governments already have with parents of newborns—or through pediatricians, who examine all newborn infants within days of birth.

Indeed, the Department has already begun to do just that. Specifically, in June 2012—at the public hearing on § 181.21—the Department stated that it had "gotten the permission of many hospitals in New York City, particularly the hospitals that largely serve this [Jewish] population, to distribute a brochure [("*Before the Bris*")] that … educate[s] families about this exact issue." SA 32. *See* http://www.nyc.gov/html/doh/html/pr2012/pr017-12.shtml. Yet, instead of waiting to see if that comprehensive approach would prove sufficient, the Department plunged ahead with its unprecedented regulation.

To be sure, Appellants believe *Before the Bris* to be false, misleading, and an unreasonable interference into religious affairs. Yet, under the Free Speech Clause, the Department is entitled to spread its contrary view, so long as it does so itself; and the Department's efforts to spread its own message about MBP proves that it lacks the need—and thus legal authority—to compel *mohelim* to do the same.

3. The District Court doubted the adequacy, as an alternative to § 181.21, of the *Before the Bris* campaign, but its criticisms miss the mark.

The court first reasoned that "[m]erely distributing educational materials at hospitals would not alert parents that MBP will be performed on *their child*." SA 75. But the brochure provides the information needed to ask the *mohel* whether he

intends to perform MBP—or to direct him not to do so. And, if the only deficiency of *Before the Bris* is that it cannot alert parents to whether MBP will be performed on their child, that "problem" could be "fixed" far less intrusively than through the overbroad requirements of § 181.21: The regulation requires *mohelim* to convey the Department's advice against MBP and warning about its alleged risks, not merely to notify parents that they intend to perform MBP.

Recognizing that point, the District Court said that educational outreach is "plainly not as effective" as including the anti-MBP advice "on a form that parents must sign prior to a circumcision," because parents are (according to the court) more likely to read the latter. SA 76. But that is mere speculation. It is at least as likely that being informed about MBP by a *mohel* who opposes the Department's message just minutes before the circumcision—when the guests are already present and there is no time to find another *mohel*—would be far less effective than distribution of a brochure eight days *beforehand*, when parents would still have some time to digest its contents, by a hospital or pediatrician who *agrees* with its message. Dispositively, the burden "is on the Government" to prove that the alternatives would *not* be as effective as compelled speech. *Ashcroft v. ACLU*, 542

U.S. 656, 665 (2004); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (government cannot satisfy burden "by mere speculation or conjecture").[8]

The District Court also said, citing a claim by Department's counsel at oral argument, that the brochure distribution agreement involves only a "small number" of hospitals. SA 76. But, as Department officials stated at the hearing on § 181.2, the Department chose to work with hospitals *that serve the affected community*. *See* SA 32 (quoting Department's statement that agreement was with "the hospitals that largely serve this [Jewish] population"). If there are other hospitals whose participation the Department believes is needed, it must at least *try* to obtain such participation before compelling private speech. But the Department tellingly does *not* claim that any hospitals refused its entreaties.[9]

[8] The only *empirical* objection that the Department has raised to the efficacy of *Before the Bris* is that it apparently received, in June 2012, one complaint from a parent whose son's circumcision included MBP. *See* SA 24 n.8. But the Department has not provided the substance of that complaint, or the date of either the complaint or the circumcision in question—even though it has all of that information in its possession. The circumcision almost certainly predated *implementation* of the agreement to distribute *Before the Bris* in hospitals, which was only *announced* on June 6, 2012.

[9] The District Court noted that the Department cannot *compel* private hospitals to distribute brochures, as the State (not the City) regulates hospitals. *See* SA 32, 76. For one thing, as explained above, *see supra*, n.6, that distinction has no First Amendment significance. *Ysursa*, 555 U.S. at 364. In any event, power to *compel* is irrelevant if hospitals (or pediatricians) are open to voluntary participation—as the hospitals to whom the Department reached out clearly were.

In short, the Department launched, simultaneously with the promulgation of § 181.21, a campaign to distribute *Before the Bris* to all affected parents—an effort that required no compulsion and that intuitively appears to be equally if not more effective than coercing dissenting *mohelim* to transmit the same message. The Department was plainly obligated to gauge the success of that campaign *before* resorting to regulation. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("[R]egulating speech must be a last—not first—resort.").

B. The Department Cannot Establish a Compelling Interest in Regulating MBP Without Showing That MBP *Actually* Causes HSV and That the Relevant Public Remains Ignorant.

Moreover, the Department cannot show that MBP *actually* causes the harm of neonatal herpes; it therefore lacks a compelling interest. Under strict scrutiny, the government must identify an "'actual problem' in need of solving." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). And when attempting to identify such a problem, it is the Department that "bears the risk of uncertainty," meaning that "ambiguous proof," such as "predictive judgment[s] based on competing … studies" "will not suffice." *Id.* at 2738-39. Here, meeting that burden means demonstrating (i) that MBP *actually* increases the risk of contracting neonatal HSV, and (ii) that parents are not aware of that risk. The Department has not satisfied its burden on either point.

1. As explained above, *see supra*, pp. 6-12, the scientific basis for the Department's warning is woefully lacking. The Department has no definitive DNA proof that HSV has ever been caused by MBP. Data from Israel and Kiryas Joel show that there is not even a statistical *correlation* between the practice and the disease; the single, non-peer-reviewed study purporting to show otherwise was set aside by the District Court after the Department largely declined to address the many challenges to that report (including those recently noted by an independent literature review, *see Penn Review*, *supra*).

There have been, to be sure, individual reported cases of neonatal HSV in infants who happen to have undergone MBP (twelve, in New York City, over more than a decade; eleven others from around the world dating back to 1988), but since the disease can be—and is *most often*—transmitted in other ways, individual cases do not prove anything absent DNA proof or a statistically significant relationship drawn from broader empirical data. *See Penn Review*, *supra*, at 9 (concluding that published data provides only "a very limited evidence base" due to "confounding factors" and "very small number of observable events," which are "significant limitations"). Moreover, Appellants have shown that many of the reported cases do not support the Department's theory—because they fall outside the expected incubation period or because of affirmative evidence showing transmission from other sources. *See* JA 718-24 (Supp. Berman Aff. ¶¶ 9-42).

Whether or not the "educated guess" provided by the Department's experts would suffice under rational basis review, as the District Court concluded, strict scrutiny requires more than speculation based on the mere "plausibility" of transmission and less than two dozen ambiguous cases. *Cf. Penn Review*, *supra*, at 9 (finding that data at most "present a plausible link" between MBP and HSV).

Further, the Department has no substantive response to the scientific evidence that, even if HSV could be transmitted through MBP, rinsing with an antiseptic like Listerine mouthwash (as Appellants do, *see* SA 6-8) *eliminates* the presence of the virus in the *mohel*'s saliva for at least 30 seconds. Appellants identified a peer-reviewed study saying so. *See* SA 9 n.2. The District Court's only response was to quote the study's caveat that, for "clinical" purposes, there may still exist a "risk of cross contamination" because it is not known whether low levels of viral presence suffice to cause infection. (*Id.*) But that caveat clearly related to the study's *other* finding, that viral levels "remained at a significant reduction for approximately 30 minutes" post-rinse. (*Id.*) That is, the rinse resulted in "effectively zero" viral presence for at least thirty *seconds*, and in a "significant reduction" thirty *minutes* later. In the context of clinical dentistry, a thirty-second elimination might not suffice—but MBP takes only one second to complete (*see* SA 7), so there is no reason to doubt the efficacy of the rinse in this context. And, anyway, it is the *Department*'s burden to prove the existence of the

problem, *Brown*, 131 S. Ct. at 2738, and so any "uncertainty" about whether Appellants' precautions are fully effective cuts against the regulation.

2. Even if the Department had satisfied its burden of proving that MBP does cause transmission of HSV, justification of § 181.21 also requires a showing that those who practice MBP are unaware of that issue. There could exist a compelling interest in education only if the relevant population is uneducated. Indeed, this Court has held, on *intermediate* scrutiny, that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." *Int'l Dairy Foods*, 92 F.3d at 74. If consumers are not even curious—because they are already familiar with the disputed issue—then it is *a fortiori* that coerced disclosure cannot stand, especially on strict scrutiny.

Yet the only evidence that the Department has presented is Commissioner Farley's statement that there have been "complaints" from parents whose infants were subjected to MBP "without their prior knowledge or permission." JA 399 (Farley Decl. ¶ 94). These are parents, in other words, who allegedly did not know that MBP would be performed on *their* child. *See* SA 35 (quoting claim in regulatory background that Department had received complaints from parents who were "not aware that direct oral suction was going to be performed"); SA 26 (quoting claim that Department had "received several complaints from parents that they were not aware ahead of time that direct oral suction would be performed").

But ignorance about *whether* MBP would be done cannot justify forced disclosure of MBP's alleged *risks*. No compelling interest supports the latter unless parents are ignorant *of those alleged risks*. And the complaints cited by the Commissioner show, if anything, just the opposite. *See* JA 400 (Farley Decl. ¶ 94) ("[P]arents have contacted DOHMH with concerns about the potential infectious risk to their child resulting from [MBP]."). In light of the vocal recent debate over this issue within the Jewish community and even the secular media, that is hardly surprising.

C. Section 181.21 Is Not Narrowly Tailored, and Its "Advice" Component Cannot Survive on *Any* Facts.

Appellants have already addressed the underinclusivity of § 181.21, and how it singles out MBP for special burdens even though the Department has seen fit to address other risks—of HSV in particular, and of harms to informed consent and child welfare in general—in less draconian ways. *See supra*, Part II.C.2.

Section 181.21 is also *overinclusive*, because it goes further than simply providing parents with the "facts" and allowing them to make informed decisions. Rather, it forces *mohelim* also to transmit the "advice" that parents refrain from MBP—potentially encouraging them to sin, raising very troubling constitutional concerns. *That* aspect of the rule, at minimum, is not supported by any compelling interest. Not even cigarettes, *commercial* products that *concededly* involve health risks, carry the Surgeon General's "advice" to quit smoking—only his "warning" about the risks. Indeed, courts regularly invalidate compelled disclosures of advice

or recommendations. *See Tepeyac*, 779 F. Supp. 2d at 459, 471 (invalidating rule requiring sign stating that "Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider"); *CTIA*, 827 F. Supp. 2d at 1058 (invalidating compelled distribution of fact sheet listing acts that "San Francisco recommends"); *R.J. Reynolds*, 696 F.3d at 1216-17 (invalidating label encouraging smokers to "QUIT-NOW"). On any view of the facts and law, this component of § 181.21 is clearly unconstitutional.

D. The Regulation Fails Even the Reduced Scrutiny Applicable to Commercial Speech and Under the New York State Constitution.

Even if strict scrutiny were not the appropriate test here, § 181.21 cannot survive under any applicable fallback level of scrutiny either.

1. Even in the narrow contexts where government-mandated disclosures are permissible, uncontroversial factual accuracy is a *sine qua non*. The speech must involve "clear statements that [a]re both indisputably accurate and not subject to misinterpretation." *R.J. Reynolds*, 696 F.3d at 1216 The information provided must be "truthful, nonmisleading, and relevant." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012). Thus, this Court has upheld requirements (in the special commercial context) that manufacturers of products that contain mercury label those products to so indicate, *see Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001); that restaurants post accurate caloric information, *see N.Y. State Restaurant Association v. N.Y.C. Board*

of Health, 556 F.3d 114, 134 (2d Cir. 2009); and that debt relief agencies provide accurate, nonmisleading disclosures about bankruptcy law, *Conn. Bar Association v. United States*, 620 F.3d 81, 94–100 (2d Cir. 2010).

Subjective opinion is "a much different animal," *R.J. Reynolds*, 696 F.3d at 1216; the distinction is "between factual information" and "positions or arguments," *Lakey*, 667 F.3d at 577 n.4. The State may never compel dissemination of a "point of view." *Id.* (quoting *Wooley*, 430 U.S. at 715). For example, Illinois could not require retailers to affix a sticker stating "18" onto video games the State defined as "sexually explicit," because that was "opinion-based," "subjective and highly controversial." *Blagojevich*, 469 F.3d at 651-52. And San Francisco could not compel distribution of the City's "recommend[ations]" about how to use cellular phones, because the fact sheet "contain[ed] more than just facts"; it also conveyed "recommendations as to what consumers should do" and the "opinion that using cell phones is dangerous." *CTIA*, 494 F. App'x at 753 ; *see also R.J. Reynolds*, 696 F.3d at 1216-17 (invalidating FDA's graphic warnings for cigarettes because the images were not "pure attempts to convey information").

Moreover, even if a disclosure purports to be factual, the First Amendment forbids its compulsion if the alleged facts are reasonably disputed and thus not "uncontroversial," *Zauderer*, 471 U.S. at 651. Thus, San Francisco's rule was also unconstitutional because the fact sheets left an "impression … that cell phones are

dangerous," even though they have only been labeled "possibly" carcinogenic. *CTIA*, 827 F. Supp. 2d at 1062-63, *aff'd*, 494 F. App'x at 753-54 (citing "debate in the scientific community about the health effects of cell phones").

Here, the information that § 181.21 compels *mohelim* to transmit is not "purely factual and uncontroversial." *First*, by its very terms, § 181.21's required language expresses an opinion, not an uncontroverted fact, by noting that the Department "advises" parents and suggests that they "should not" take a particular action. This is language of advocacy. It reflects the Department's subjective opinion about how the risks of MBP should be weighed against Jewish law; in the Department's view, MBP "should not" be performed because the former outweigh the latter. But that is a *judgment*, not a fact.

Second, "there is debate in the scientific community about the health effects" of MBP, *CTIA*, 494 F. App'x at 753-54, and so the Department cannot claim that its warnings are purely factual and uncontroversial. This is not a case where the speaker concedes that the government's message is accurate, but simply wishes to avoid saying so. Rather, § 181.21 requires transmission of a view that is "highly controversial" in medical and religious communities. *Blagojevich*, 469 F.3d at 652. Like the experts who testified below (*see supra*, pp. 7-12), Appellants do not agree with the compelled disclosure, and they have at least a reasonable basis for their view. It does not matter, for these purposes, who is right. Either way, § 181.21

conflicts with the basic principle that government may not, in *any* context, "compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573.

2. Finally, the absolute *minimum* level of scrutiny applicable to § 181.21 is that mandated by New York's Free Exercise jurisprudence. In New York, courts weigh "the interest of the individual right of religious worship against the interest of the State which is sought to be enforced." *People v. Woodruff*, 26 A.D.2d 236, 238 (N.Y. App. Div. 1966). This test governs even neutral laws that incidentally burden religion. *See Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 527 (2006) (listing, as examples of laws that would fail, "prohibition of alcohol consumption" and "uniform regulation of meat preparation").

For all of the reasons discussed, § 181.21 fails this balancing scrutiny. On the one hand, the regulation's imposition on religious exercise is substantial, as it requires *mohelim* to denigrate their beliefs by suggesting (i) that MBP is optional; (ii) that MBP poses a threat to health; and (iii) that it is proper to consider the Department's view on matters of religious law. To transmit this "advice" is to encourage sin, which is itself a sin. On the other hand, the Department has (i) no evidence that MBP causes HSV, especially when precautions are taken; (ii) no evidence that the Jewish population is unaware of the Department's opposition; and (iii) no evidence that devout parents will be dissuaded from their religious duty by advice from a municipal agency.

On these facts, the dubious, unlikely benefits of § 181.21 cannot overcome its real, substantial harm to religious freedom.

CONCLUSION

The District Court's order denying preliminary relief should be reversed, and a preliminary injunction entered. At minimum, the case should be remanded for reconsideration of Appellants' motion under the proper legal framework.

Dated: April 8, 2013

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify on this 8th day of April, 2013, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit the foregoing Brief of Plaintiff-Appellants, using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 8th day of April, 2013, I filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit six copies of this Brief of Plaintiff-Appellants via UPS.

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