13-107

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,

Plaintiffs-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,

Defendants-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

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Alliance Defending Freedom is a Virginia nonprofit corporation that has no parent corporation or stockholders.

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly in many cases before the United States Supreme Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Many of these cases involve the Free Speech Clause of the First Amendment, specifically the First Amendment's prohibition on compelled speech. For example, Alliance Defending Freedom (formerly known as Alliance Defense Fund) and its allies represented plaintiffs in both *Centro Tepeyac v. Montgomery County*, 779 F. Supp. 2d 456 (D. Md. 2011), *aff'd in relevant part by* 683 F.3d 591 (4th Cir. 2012), *reh'g en banc granted* Aug. 15, 2012, and *Evergreen Association, Inc. v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2011). These decisions

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

vindicated pregnancy centers' First Amendment right not to be compelled by local governments to post "disclosure" signs related to the nature of their services. Recognizing that affirmance in this case would undermine the compelled speech doctrine and these precedents, Alliance Defending Freedom seeks to shield the free exchange of ideas from interference by the state.

Alliance Defending Freedom files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Local Rule 29.1. All parties have consented to the filing of this brief.

INTRODUCTION

In response to concerns regarding an aspect of ritual Jewish circumcision known as *metzitzah b'peh* ("MBP"), the New York City Department of Health and Mental Hygiene (the "Department") enacted a regulation, § 181.21, that requires *mohilem*, religious leaders who perform the *bris*, to ensure that parents read and sign a consent form before performing MBP. This form must contain a warning from the Department derogating the ritual and urging parents to violate Jewish law by withholding their consent. Plaintiffs, associations of *mohilem* and individual *mohels*, filed suit to enjoin § 181.21, which compels them to propagate a message that is not only contrary to their faith, but also expressly intended to forestall *mohilem's* ability to carry out the religious duties that justify their existence.

The district court denied Plaintiffs' request for a preliminary injunction by incorrectly concluding that the regulation does not implicate *mohilem's* right to freedom of speech. Neither law nor logic supports this conclusion, which is contrary to the Supreme Court's longstanding compelled-speech precedent and is divorced from the regulation's real-world impact. In net effect, § 181.21 presents Plaintiffs with a Hobson's choice between not holding the *bris* on the eighth day after an infant's birth, as required by religious law, or spreading the Department's message urging parents to omit a religiously-mandated aspect of that rite. But the First Amendment protects *mohilem* from being compelled to speak a message that distorts their faith and undermines their own religious mission. This Court should accordingly hold that § 181.21 violates Plaintiffs' right to freedom of expression and reject the Department's unprecedented foray into private religious speech.

BACKGROUND

In denying Plaintiffs' request for a preliminary injunction, the district court acknowledged that "[t]he total incidence of neonatal herpes is quite small." *Cent. Rabbinical Congress of the USA & Canada v. N.Y. City Dep't of Health & Mental Hygiene*, No. 12-CIV-7590, at 10 (S.D.N.Y. Jan. 10, 2013). Out of approximately 125,000 live births in New York City each year, only about 15 newborn infants contract neonatal herpes. *See id.* at 10-11. That is an approximate percentage of .012%. Out of this miniscule group, the vast majority of newborn infants—

approximately 85%—are exposed to the herpes simplex virus in the birth canal. *See id.* at 10. Another 5% percent of infected infants acquire the herpes simplex virus in the womb. *See id.* Only 10% of this small subset of infants (.0012% of live births) is exposed to the herpes simplex virus after delivery. *See id.*

In keeping with this low rate of infection, the district court stated that "[b]etween 2004 and 2011, the Department learned of 11 cases of laboratory-confirmed herpes simplex virus infections in male infants following circumcisions that [it considered] likely to have been associated with [MBP]."[2] *Id.* at 35 (quoting § 181.21's Statement of Basis and Purpose). The district court did not rule on the reliability of the Department's study linking the religious practice of MBP to these 11 cases.[3] *See id.* at 43; *see also id.* at 49 (explaining the court "den[ied] [P]laintiffs' motion … without relying on the [Department's] Study"). The evidence supporting the court's preliminary injunction ruling thus consists predominantly of generalized statements by medical authorities that oral contact with a wound increases the risk of transmission of any infectious disease, including the herpes simplex virus. *See, e.g., id.* at 39-40.

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[2] Plaintiffs note that the Department actually identified these 11 cases during the 12-year period in between 2000 and 2011, not the 8-year period in between 2004 and 2011. *See* Opening Br. at 9.

[3] Plaintiffs presented the testimony of several medical experts sharply criticizing the reliability of the Department's study. *See, e.g., Cent. Rabbinical Congress*, No. 12-CIV-7590, at 43-46.

The district court also cited two studies published in 2000 and 2004 regarding a correlation between the religious practice of MBP and herpes simplex infection, as well as a history of 19th Century studies linking MBP to cases of neonatal syphilis. *See id.* at 41. But the court declined to hold that this body of evidence, either alone or in combination, "demonstrate[d] a statistically significant link between MBP and" the herpes simplex infection of newborn infants. *Id.* at 43. The district court ultimately determined that a significant link was not required because § 181.21 "neither compels speech nor impermissibly burdens [P]laintiffs' free exercise of religion." *Id.* at 42. The court accordingly held that "strict scrutiny does not apply" and used rational basis review instead. *Id.*

The district court held that, in order to obtain a preliminary injunction enjoining the Department's enforcement of § 181.21, Plaintiffs were required to show "that section 181.21 [would] be valid under 'no set of circumstances.'" *Id.* at 53 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2534 (2012), which quotes *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In the Court's view, Plaintiffs failed to meet that standard because "parents [could] obtain the [MBP consent] form themselves and give the signed form to the *mohel* without any communicative action by the *mohel*." *Id.* at 53 (emphasis added). However unlikely, the district court found that such a scenario was "plausible." *Id.* For instance, "the Department [might] distribute consent forms online or through other

avenues that did not involve communicative action by the *mohels*." *Id.* (emphasis added).

The district court thus held that § 181.21 did not unavoidably compel *mohilem* to speak. *See id.* at 52-53. Although the court recognized the likely scenario that "a parent [would] arrive[] with her infant on the day of the bris and … not have a consent form," it resolved this religious crisis merely by stating that "the *mohel* would still be free not to say anything or otherwise to undertake any communicate act. He simply could not perform MBP." *Id.* at 54 (emphasis added). The court thus deemed § 181.21 lawful under the Free Speech Clause because it purportedly "does not compel speech." *Id.* at 91.

SUMMARY OF THE ARGUMENT

The district court's erroneous holding is primarily due to its application of the wrong legal framework. Far from being required to show that § 181.21 is constitutional in "no set of circumstances," Plaintiffs may substantiate their facial claims by demonstrating a "substantial risk" that enforcement of the regulation will restrict their freedom of speech. That burden is clearly met here. In most circumstances, § 181.21 will force Plaintiffs into a catch-22 situation where they are required to violate their religious beliefs either (1) by failing to hold the *bris* on the eighth day after birth, or (2) by spreading a message designed to exclude them

from the *bris* and promote disobedience to Jewish law. Section 181.21 thus unquestionably puts Plaintiffs' right to free expression at "substantial risk."

Undermining Plaintiffs' pro-MBP message in this manner implicates the Free Speech Clause in several ways. In requiring *mohilem* to signal their agreement with the Department's message by shepherding the consent form to completion, for instance, § 181.21 transgresses Plaintiffs' fundamental right to refuse to advance a proposition they do not believe in and which condemns their own religious calling. The regulation also targets *mohilem's* pro-MBP speech for disfavored treatment based on its content, thus breaching one of the Free Speech Clause's most basic rules. Moreover, § 181.21 associates *mohilem* so closely with the Department's anti-MBP message that Plaintiffs face overwhelming pressure to speak out on an issue that they would otherwise decline to address.

By placing religious leaders between a rock and a hard place in forcing them to disseminate the Department's message or forego a central ritual of their faith, the Department's regulation plainly infringes upon Plaintiffs' free expression. As a result, § 181.21 must withstand strict scrutiny to pass constitutional muster, and this it cannot do. Under binding Supreme Court precedent, the evidence that purportedly supports the Department's regulation falls short of establishing a compelling government interest. And many less burdensome avenues for disseminating the Department's message are plain to see. This Court should

accordingly reverse and remand for the district court to enjoin the severe burden § 181.21 imposes on Plaintiffs' freedom of speech.

ARGUMENT

I. Plaintiffs are Not Required to Show that "No Set of Circumstances" Exist in Which § 181.21 May Constitutionally Be Applied.

The entirety of the district court's opinion rests on a faulty foundation. Citing the standard the Supreme Court laid down in *Salerno*, the district court held that Plaintiffs could not succeed on their facial challenge unless they demonstrated "that section 181.21 [is] valid under 'no set of circumstances.'" *Cent. Rabbinical Congress*, No. 12-CIV-7590, at 53 (quoting *Arizona*, 132 S. Ct. at 2534, which quotes *Salerno*, 481 U.S. at 745). That is demonstrably not the case.

For decades, it has been black letter law that the *Salerno* standard does not apply to facial claims brought under the First Amendment. *See, e.g.*, *Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 144 (2d Cir. 2000) ("*Salerno* … does not apply to this case, in which the plaintiffs assert the violation of rights protected by the First Amendment."). The district court was thus wrong to require Plaintiffs to overcome *Salerno's* "no-set-of-circumstances test." Where vital First Amendment rights are at stake, the bar is not set so high. *See id.* (explaining that Plaintiffs raising facial claims under the First Amendment need only demonstrate "a substantial risk" of a constitutional violation (quotation omitted)).

Striking down a governmental regulation on its face is, of course, serious business. But it is no more grave than a constraint on Plaintiffs' First Amendment rights, including the essential right to freedom of speech. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) (explaining that First Amendment "freedoms are delicate and vulnerable" and "need breathing space to survive"). Indeed, as the Supreme Court explained nearly forty years ago: "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Consequently, Plaintiffs need only "'demonstrate a substantial risk' that application of the challenged … provision will lead to a First Amendment violation" in order to prevail on their facial claims. *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 98 (2d Cir. 2007) (quotation omitted). Once Plaintiffs make this threshold showing, thereby demonstrating that their free speech rights are implicated, the burden shifts to the Department to "justify[] the challenged restriction." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999). This requires the Department—not Plaintiffs—to show that § 181.21 meets the conditions of strict scrutiny. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). And that standard "is the most

demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

II. There is a "Substantial Risk" That § 181.21's Application to Plaintiffs Will Implicate Their Right to Freedom of Speech.

Law does not operate in a vacuum, and federal courts, as enforcers of the Constitution, are required to guard the right to free discussion "with a jealous eye." *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 325 (1941); *see also Roth v. United States*, 354 U.S. 476, 488 (1957) (recognizing that "[c]easeless vigilance" is necessary "to prevent the[] erosion" of "freedom of speech"). The district court regrettably failed to perform that duty here. Instead, the court reasoned that § 181.21's language does not explicitly require *mohilem* to provide consent forms to parents or refer them to the Department's website to obtain one. Accordingly, it rejected Plaintiffs' free speech claims.

But "[j]udges, unlike ostriches, are not required to bury their heads periodically in the sand" and remain blissfully ignorant of real-world events. *N. Heel Corp v. Compo Indus. Inc.*, 851 F.2d 456, 473 (1st Cir. 1988). Nor must they be "so struthious as to believe that [the Department] did not intentionally seek to structure" the regulation to compel *mohilem* to distribute its anti-MBP message without explicitly commanding that result in § 181.21's circuitous text. *Id.*

In this case, *mohilem's* free speech conundrum is both acute and clear. Ritual Jewish circumcision must generally be performed on the eighth day after a

newborn's birth. *See Cent. Rabbinical Congress*, No. 12-CIV-7590, at 5. In the single week in between their infant's birth and the *bris*, researching city regulations concerning private religious practices is not likely to be high on parents' to do list. Just as Christians do not scout for consent forms from the Department before receiving communion from a common cup, Jews have never sought out government paperwork before holding a *bris*. The very idea is contrary to the religious liberty Americans traditionally regard as an immutable fact of life. *See, e.g.*, *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

Government, in this country, does not habitually intrude into areas of religious faith and doctrine that "the First Amendment to our Constitution … reserve[s] from all official control." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The district court's musings about new parents who independently (1) discover § 181.21's unusual requirements, (2) obtain or manufacture a proper consent form, (3) sign it, and (4) present it to a *mohel* at the appropriate time is thus clearly based more on fiction than fact.[4]

[4] Furthermore, even if parents obtain, sign, and hand over the consent form themselves, that simply demonstrates that Plaintiffs' involvement is unnecessary. It hardly supports forcing *mohilem* to propagate the Department's antithetical message.

Exceedingly more likely, as the district court obliquely recognized, is the scenario in which tired and distracted parents arrive on the day of the *bris* without a signed consent form or any substantive knowledge of § 181.21. *See Cent. Rabbinical Congress*, No. 12-CIV-7590, at 54. And it is preposterous to suggest, as the district court did, that a *mohel* in these circumstances is free to stand quietly by while relatives question his silence and refusal to perform the time-sensitive religious ceremony on which the entire occasion depends. *See id.* Our Constitution does not allow for such willful blindness to matters of practical and religious necessity. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he Constitution … affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

Section 181.21's clear result in most, if not all, cases is a *mohel* stuck in between the Scylla of not performing the *bris*, and thus violating his religious belief that circumcision must occur on the eighth day after birth, and the Charybdis of handing or directing parents to an anti-MBP consent form that advises them to violate his understanding of Jewish law.[5] Complying with § 181.21 will, at a bare minimum, detract from *mohilem's* religious speech about the circumcision rite. Indeed, facilitating the Department's anti-MBP message through consent-form

[5] *See* Defendants-Appellees' Opposition to Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal at 16 (recognizing *mohilem* must, at a minimum, "inform the parents that he or she cannot perform the circumcision with [MBP] until the parents hand over a signed consent form").

propagation and retrieval will inevitably force *mohilem* to spend the bulk of their time defending the practice of MBP rather than explaining the *bris'* religious significance.

This tendency "to inhibit expression of [*mohilem's*] views in order to promote [the Department's]" establishes a "substantial risk" that § 181.21's application will violate the First Amendment. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986). For the Free Speech Clause plainly forbids government from "advan[cing] some points of view by burdening the expression of others." *Id.*; *see also id.* at 16 ("The danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude ….").

Moreover, Plaintiffs' religious dialogue with those attending the *bris* will be inevitably stifled by their forced propagation of a government message urging their own dismissal. For *mohilem* who believe MBP is religiously required cannot choose to omit that element from the *bris*. *See id.* at 16 (prohibiting government from "requir[ing] speakers to affirm in one breath that which they deny in the next"). Section 181.21's application to Plaintiffs thus undoubtedly creates a "substantial risk" of transgressing their free speech rights. In concluding otherwise and requiring Plaintiffs to demonstrate that § 181.21 is unconstitutional in every

imaginable circumstance, the district court not only plainly erred, but also turned the burden of proof on its head.

III. Section 181.21 Infringes Plaintiffs' Rights Under the Free Speech Clause of the First Amendment.

The First Amendment acts as a bulwark shielding a speaker's choice not to support a particular viewpoint. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 575 (1995). Plaintiffs accordingly have the "autonomy to choose the content of [their] own message" and "may also decide what not to say." *Id.* at 573 (quotation omitted). It is hardly surprising that religious leaders who view MBP as a divine commandment would choose to promote the practice and decline to serve as a conduit for the Department's diametrically opposed message. That choice, under well-established Supreme Court precedent, "is presumed to lie beyond the government's power to control." *Id.* at 575.

Section 181.21 immediately runs into rocky First Amendment shores because it coerces Plaintiffs to demonstrate "by word and sign [their] acceptance of the … ideas" the consent form represents. *Barnette*, 319 U.S. at 633. It is *mohilem* alone who are charged with ensuring that consent forms transmitting the Department's anti-MBP message has been signed, sealed, and delivered to parents at every *bris*. This type of individual responsibility inevitably communicates to

observers that Plaintiffs accept a number of Departmental judgments that are contrary to their sincerely held religious beliefs.

First, shepherding the consent form acquisition to completion indicates that Plaintiffs accept the notion that government has the authority to insert itself into matters of faith and doctrine and recommend how a religious ritual, like MBP, should be performed.[6] Second, Plaintiffs' coerced efforts to ensure that an anti-MBP consent form is filled out before every *bris* gives the impression not only that the Department's concerns have merit, but also that *mohilem's* standing in the Jewish community should be capitalized to give them voice.[7] Third, the introduction of consent forms and health warnings to the *bris* evinces the belief that circumcision should be viewed in a secular context that disregards the ceremony's religious significance as a central part of the Abrahamic Covenant.

It is simply no answer to say that observers will identify Plaintiffs as life-size marionettes with strings controlled by the Department's backstage

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[6] *See, e.g.*, *Cent. Rabbinical Congress*, No. 12-CIV-7590, at 33 (recognizing *mohilem* objected to the Department "inserting itself into [the MBP issue] at all").

[7] The Department justified its refusal to participate in the Protocol Jewish leaders formulated with NYSDH by citing the concern that so doing would wrongly suggest that its safety measures are effective. *See Cent. Rabbinical Congress*, No. 12-CIV-7590, at 19. But the Department apparently has no trouble forcing *mohilem* to participate in a consent-form program designed to undermine a religious practice they view as medically safe. What is good for the goose is good for the gander. If the Department cannot be compelled to support health-safety efforts it views as wrong-headed, the same is true of *mohilem* who practice MBP.

puppeteers.[8] This argument was rejected long ago in *Wooley v. Maynard*, 430 U.S. 705 (1977), which concerned individual opposition to an unmistakable government message—the State of New Hampshire's official motto. *See id.* at 706-07. New Hampshire law required noncommercial vehicles to bear license plates emblazoned with the "Live Free or Die" motto for which that state is famed. *See id.* at 707. The Maynards disagreed with this message on religious, moral, and political grounds, covered up the state motto imprinted on their license plates, and were sanctioned as a result. *See id.* at 708.

Weighing this regulation under the First Amendment, the *Wooley* majority focused not on the state-issued license plates, but on the Maynard's private vehicle as a "'mobile billboard'" the state was co-opting to spread its "ideological message." *Id.* at 715. And it considered that "automobile" to be a form of "public[] advertise[ment]" that others would "readily associate[] with its operator." *Id.* at 717 n.15. The *Wooley* majority thus necessarily rejected the argument pressed in dissent that transporting messages on license plates that are obviously attributable to the state should not be considered "advocating political or ideological views." *Id.* at 721 (Rehnquist, J., dissenting).

If a state violates drivers' free speech rights by requiring them to display a disagreeable motto on their license plates, a city regulation that compels Plaintiffs

[8] *But see* Defendants-Appellees' Opposition to Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal at 16 n.3 (making this contention).

to disseminate an antithetical message about a religious ritual hand-to-hand is clearly unconstitutional as well. The Department forces Plaintiffs to propagate a message that is not only contrary to their faith, but also expressly intended to forestall *mohilem's* ability to carry out their very *raison d'être*. Section 181.21 thus essentially compels Plaintiffs to serve as agents of their own extinction. But the Department cannot simply waive its regulatory wand and transform *mohilem* from executors of Judaic law into instruments of its subversion.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The Free Speech Clause consequently prohibits government from turning private individuals into "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Wooley*, 430 U.S. at 715. This includes *mohilem* who disagree with the Department's take on the religious practice of MBP and who clearly have the constitutional right "to refuse to foster … an idea they find morally objectionable." *Id.*

That does not mean the Department is powerless to transmit its concerns regarding MBP to the Jewish community. It "may legitimately pursue such

interests in any number of ways."[9] *Id.* at 717. But compelling Plaintiffs to propagate an anti-MBP message that condemns their own religious function simply is not one of them. *See Turner Broad.*, 512 U.S. at 641. Nor should this limitation on the Department's authority come as a surprise. "Government action that … requires the utterance of a particular message [it] favor[s]" has long been held to violate the First Amendment. *Id.*; *see also Barnette*, 319 U.S. at 633-34.

The freedom of speech "necessarily compris[es] the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). Government, at any level, is thus constrained to disseminate its views through a coalition of the willing, not by conscripting an army of nonadherents. *See Turner Broad.*, 512 U.S. at 641-42. Regardless of whether one views the Department's anti-MBP message as unsolicited advice or "statements of fact the speaker would rather avoid," employing § 181.21 to force Plaintiffs to propagate a message they strongly oppose violates that principle. *Hurley*, 515 U.S. at 573; *see also Riley*, 487 U.S. at 798 (recognizing government may not compel the "disclosure" of information that "could encourage or discourage [a] listener" from engaging in a certain activity).

Furthermore, the district court appears to have concluded that Plaintiffs could not make out a free speech claim without showing that § 181.21 directly

[9] *See also Playboy Entm't Group*, 529 U.S. at 826-27 (explaining that government must address problems "in a way consistent with First Amendment principles.").

compels *mohilem* to voice the Department's anti-MBP perspective. *See Cent. Rabbinical Congress*, No. 12-CIV-7590, at 52-54. But the First Amendment is not so anemic, nor the Supreme Court's free speech precedent that narrow. Government cannot lawfully "adopt[] a regulation of speech because of [official] disagreement with the message it conveys" and that is precisely what the Department has done here. *Turner Broad.*, 512 U.S. at 642 (quotation omitted).

Section 181.21 applies not at all circumcisions or even at all religious circumcisions but only where *mohilem* wish to practice a traditional mode of Jewish circumcision that includes MBP. The provision is thus content based because it requires *mohilem* to ensure delivery of the Department's anti-MBP message only at a *bris* where pro-MBP speech is probable. *See id.* at 643 ("[L]aws that by their terms … disfavor[] speech on the basis of the ideas or views expressed are content based."). And it is a basic free speech principle that no level of government may "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642.

Requiring Plaintiffs to undermine their own pro-MBP message with the Department's counter-speech inevitably places a unique burden on their expression. *See Playboy Entm't Group*, 529 U.S. at 812 ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."). It also forces *mohilem* to defend a religious

practice they view as beyond secular debate. This implicates another dimension of the Supreme Court's compelled speech precedent.

Government cannot "force[] speakers to alter their speech to conform with an agenda they do not set." *Pac. Gas*, 475 U.S. at 9. This includes forcibly associating individuals with third-party expression in a manner that compels them to extricate themselves from another's viewpoint by addressing topics on which they "prefer to be silent." *Id.* at 10. Hence, the mere fact that Plaintiffs are required to "alter [their] own message as a consequence of the government's coercive action" is enough to violate their right to freedom of speech. *Id.* at 16.

In short, § 181.21 unconstitutionally "requires [Plaintiffs] to associate with speech with which [they strongly] disagree," *id.* at 15, thereby placing "impermissible pressure on [them] to respond to" the Department's inimical message, *id.* at 15 n.11. This effect of "[m]andating speech that [*mohilem*] would not otherwise make" independently establishes a violation of Plaintiffs' free speech rights. *Riley*, 487 U.S. at 795; *see also Pacific Gas*, 475 U.S. at 20-21 (invalidating a government order because it "force[d] appellant to associate with the views of other speakers, and … select[ed] the other speakers on the basis of their viewpoints").

IV. To Sustain § 181.21, the Department Must Demonstrate That It Satisfies the Requirements of Strict Scrutiny, Not an Intermediate Standard Reserved for Commercial or Professional Speech.

Because "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles," *Playboy Entm't Group*, 529 U.S. at 812, § 181.21 must undergo the rigors of strict scrutiny, *see id.* at 813. That standard, "the most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 509, requires a showing that § 181.21 is "a narrowly tailored means of serving a compelling state interest." *Pacific Gas*, 475 U.S. at 19. And the burden to clear these hurdles falls squarely on the Department's shoulders. *See Playboy Entm't Group*, 529 U.S. at 816. Doing so here is no small task, as speech-coercive and content-based regulations are presumptively invalid under the First Amendment. *See id.* at 817.

Only governmental "interests of the highest order" may overcome individuals' fundamental liberties, *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (quotation omitted), including the right to freedom of speech. While, "[a]s a general matter, governments are entitled to attack problems piecemeal," this rule does not apply where governmental "policies implicate rights so fundamental that strict scrutiny must be applied." *Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio*, 471 U.S. 626, 651 n.14 (1985). In such circumstances, like the one presented here, government regulations cannot be

"seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741-42 (2011).

The narrowly-tailored prong of the strict scrutiny test further demands that no "less drastic means" exist for achieving the government's "same basic purpose." *Wooley*, 430 U.S. at 716-17. Accordingly, if "more benign and narrowly tailored options are available" to serve § 181.21's essential purpose, the Department's regulation will fail to satisfy strict scrutiny. *Riley*, 487 U.S. at 800. Our Constitution demands that "[i]f a less restrictive alternative would serve the Government's purpose, [it] must use that alternative," rather than burdening free speech. *Playboy Entm't Group*, 529 U.S. at 813.

At various times, the Department has suggested that Plaintiffs' expression regarding MBP is not subject to full First Amendment protection because *mohilem* may receive some form of compensation for their services.[10] But both law and common sense demonstrate that strict scrutiny applies to Plaintiffs' free speech claims. The Department has presented no evidence suggesting that *mohilem's* speech concerning the *bris* is profit-driven, rather than religious in nature. It is, for example, unsurprising that *mohilem* would have a strong religious interest in performing a ritual that has formed a central part of the Jewish faith for millennia.

[10] *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 28 n.20.

Further, the Department assumes that a possibility of some form of honorarium renders *mohilem's* religious activities commercial. But one could say the same about pastors who receive donations after giving wedding sermons, which are clearly religious and not commercial speech. In any case, the prospect of remunerative "yeast" is not enough to leaven the whole First Amendment "loaf." The Supreme Court has rejected the notion that "speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796. That Plaintiffs' "speech taken as a whole" is religious in nature is enough to warrant the application of strict scrutiny. *Id.* Consequently, the Department cannot seek shelter in a lower standard reserved for commercial speech.

The Department's attempt to represent *mohilem* as licensed healthcare professionals is even further from the mark.[11] It is true that those who "practice … medicine [are] subject to reasonable licensing and regulation by the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992). But Plaintiffs are not healthcare workers, they are religious leaders and the State of New York has never attempted to impose licensing or regulatory requirements on their faith-based activities. To the contrary, state courts recognize that "a circumcision performed as a religious ritual by … a *Mohel*" does not qualify as "the practice of

[11] *See, e.g.*, Defendants-Appellees' Opposition to Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal at 18-19.

the profession of medicine." *Zakhartchenko v. Weinberger*, 605 N.Y.S.2d 205, 206 (Sup Ct, King's County 1993) (emphasis added). Accordingly, the Department's regulation must withstand strict scrutiny to survive. [12]

V. The Department Cannot Establish that § 181.21 Meets the Arduous Requirements of Strict Scrutiny.

Strict scrutiny's application in this case is guided by the Supreme Court's recent decision in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). At the outset, the *Brown* Court explained that justifying a regulation like § 181.21 requires a state to "specifically identify an 'actual problem' in need of solving" and demonstrate that "the curtailment of free speech [is] actually necessary to the solution." *Id.* at 2738 (quotation omitted). Instead of accepting the State of California's broad assertions that "violent video games [caused] harm to minors," *id.*, and thus that California had a compelling interest in protecting children, the Supreme Court examined whether any of the "State's evidence" supporting the harm caused by violent video games was "compelling," *id.* at 2739.

The reasons the *Brown* Court answered "no" to this question are equally applicable here. Just as California was unable to "show a direct causal link between violent video games and harm to minors," *id.* at 2738, the Department has failed to prove one in this case. In fact, the Department failed to cite a causal link

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[12] *But see Cent. Rabbinical Congress*, No. 12-CIV-7590, at 42-43 (applying rational basis review to § 181.21).

between even one case of infant herpes simplex infection in the City of New York and a *mohel* who practices MBP. *See Cent. Rabbinical Congress*, No. 12-CIV-7590, at 35 (recognizing the Department relied on "11 cases" it considered "*likely* to have been associated with [MBP]") (emphasis added). Perhaps such evidence would have been forthcoming if the Department had established a program similar to the Protocol agreed to by *mohilem* and New York State. But the Department did not pursue the type of blood and DNA testing that would have enabled it to prove a definitive connection between MBP and acquisition of the herpes simplex virus.

What the Department, like the State of California in *Brown*, offers instead is "research … based on correlation, not evidence of causation," most of which "suffer[s] from significant … flaws in methodology," 131 S. Ct. at 2739 (quotation omitted), as Plaintiffs have convincingly shown. *See, e.g.*, *Cent. Rabbinical Congress*, No. 12-CIV-7590, at 43-46. Because such evidence was insufficient to establish a compelling governmental interest in *Brown*, there is no doubt that it is similarly lacking here. No compelling evidence thus supports the onerous burden § 181.21 imposes on Plaintiffs' freedom of speech.[13]

Moreover, as in *Brown*, that the Department's regulation is "underinclusive when judged against its asserted justification … is alone enough to defeat it." 131 S. Ct. at 2740. Section 181.21, contrary to much of the Department's

[13] *Playboy Entm't Group*, 529 U.S. at 804 (recognizing that even if the scientific evidence was in equipoise, "the tie goes to free expression").

argumentation in this case, does not universally proscribe the ritual practice of MBP. It requires instead that *mohilem* ensure parents hear and reject the Department's concerns regarding MBP before performing that rite.

The Department is thus "perfectly willing to leave this [allegedly] dangerous" practice in place "so long as one parent … says it's OK.[14] And there are not even any requirements as to how this parental … relationship is to be verified …." *Id.* Indeed, the Department did not even bother to require that *mohilem* file the consent paperwork § 181.21 mandates they collect as a matter of course. That is simply "not how one addresses [an allegedly] serious social problem," *id.*, particularly when the Department claims the authority to ban the practice of MBP entirely.[15] *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 2.

Furthermore, § 181.21 is not narrowly tailored to accomplish its essential purpose. The Department makes much of the fact that its prior informational efforts were only "successful in part" because rare cases of neonatal herpes

[14] *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 9.

[15] In the same vein, the Department fails to present any compelling evidence that § 181.21 "meet[s] a substantial need of parents." *Brown*, 131 S. Ct. at 2740. It steadfastly refuses to cite the number of purported complaints about the religious practice of MBP, thus failing to substantiate the existence of an "'actual problem.'" *Id.* at 2738 (quotation omitted). And the *Brown* Court clearly held that "[f]illing [any] modest gap in concerned-parents' control can hardly be a compelling state interest." *Id.* at 2741.

infection continue to occur. Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal at 13 n.2. But this evidence does not mean that voluntary education efforts, such as those the Department arranged with hospitals that serve a large Jewish population, are ineffective.

Uncommon cases of neonatal herpes simplex infection will arise regardless of whether MBP is practiced, as no one regards MBP as the sole cause of that occurrence. *See, e.g., Cent. Rabbinical Congress*, No. 12-CIV-7590, at 68-69 (discussing other ways in which infection may occur). Even if the Department's concerns regarding MBP are valid, something it has failed to prove in this case, educational efforts that depend upon ideological acceptance are simply incapable of eliminating all risk of neonatal infection. That infections continue to occur is, at the very most, evidence that parents are not buying what the Department is selling, not that the department's message has failed to reach its target audience. *See, e.g., id.* at 53 ("[P]arents who seek a *bris* involving MBP … feel, for religious or other reasons, that having MBP performed is deeply important.") (emphasis added). Consequently, no compelling evidence supports the proposition that "the curtailment" of Plaintiffs' free speech is "actually necessary" to communicate the Department's anti-MBP message to Jewish parents. *Brown*, 131 S. Ct. at 2738.

What is clear is that distributing pamphlets to Jewish parents through a voluntary partnership with hospitals in the City of New York area has proven to be

a highly effective way for the Department to disseminate its viewpoint to a key demographic. That a limited number of hospitals currently engage in the program is neither here nor there as the Department has not yet made any effort to solicit others' participation. *But see Cent. Rabbinical Congress*, No. 12-CIV-7590, at 21 (focusing inappropriately on the Department's lack of power "to mandate" such participation). Because this avenue of communication is "a less restrictive alternative [that] would serve [§ 181.21s] purpose," the Department must use it before restricting private speech. *Playboy Entm't Group*, 529 U.S. at 813.

Another way in which the Department could discourage the practice of MBP would be to take a lesson from New York City hospitals, which have run voluntary *mohel* certification programs for decades. These hospitals "certif[y] 'mohels' [after] investigat[ing] their qualifications" and practices. *Oliner v. Lenox Hill Hosp.*, 431 N.Y.S.2d 271, 272 (Sup Ct, NY County 1980). Subsequently, these *mohilem* are allowed to perform ritual circumcisions on site. Establishing a voluntary certification program for the entire City of New York would enable the Department to identify and promote the services of *mohilem* who do not believe that MBP is religiously required. This process would not implicate Plaintiffs' private speech and would also serve as a valuable resource for any Jewish parents who actually have concerns about the practice of MBP.

Numerous ways exist in which the Department could effectively discourage the practice of MBP without compromising *mohilem's* free speech rights. Suffice it to say that severely burdening Plaintiffs' freedom of speech must be a last resort, not an intermediate impulse. That is all the Department has established here. Many "sorts of 'problems'" exist "that cannot be addressed by governmental restriction of free expression." *Brown*, 131 S. Ct. at 2739 n.8. Until the curtailment of Plaintiffs' freedom of speech is "actually necessary" to combat a compelling societal problem, *id.* at 2738, this just happens to be one of them.

Such limitations on the Department's authority should not be cause for concern because, as the Supreme Court recently explained, a ban on "government [exercising] a broad censorial power" over private expression is central to "our constitutional tradition." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion). Even the "potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* Accordingly, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

CONCLUSION

In this case, the district court failed to apply the correct legal standards and thus incorrectly ruled that § 181.21 does not implicate *mohilem's* right to freedom of speech. That holding cannot be reconciled with binding Supreme Court precedent. Section 181.21 clearly infringes Plaintiffs' freedom of expression and the Department has failed to demonstrate that it clears the high bar set by strict scrutiny. Consequently, this Court should reverse and remand for the district court to enter a preliminary injunction enjoining § 181.21's enforcement.

Respectfully submitted this 15th day of April, 2013.

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CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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I hereby certify that on April 15, 2013, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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