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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

JEWISH COMMUNITY RELATIONS COUNCIL OF SAN FRANCISCO, THE PENINSULA, MARIN, SONOMA, ALAMEDA AND CONTRA COSTA COUNTIES; ANTI-DEFAMATION LEAGUE; JEREMY BENJAMIN; JENNY BENJAMIN; LEO FUCHS; JONATHAN JAFFE; YAEL FRENKEL-JAFFE; SHEILA BARI; LETICIA PREZA; KASHIF ABDULLAH; BRIAN MCBETH; and ERIC TABAS, Petitioners/Plaintiffs, vs. JOHN ARNTZ, in his capacity as Director of Elections of the City and County of San Francisco, and CITY AND COUNTY OF SAN FRANCISCO, Respondents/Defendants.	Case No. CPF-11-511370 RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO AND JOHN ARNTZ'S MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO PETITION FOR WRIT OF MANDATE Hearing Date: July 15, 2011 Hearing Judge: Hon. Loretta M. Giorgi Time: 9:30 a.m. Place: Department 302 Date Action Filed: June 22, 2011 Attached Documents: Declaration of Mollie Lee; Appendix of Non-California Authorities
LLOYD SCHOFIELD, Real Party in Interest.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Constitution, Statutes & Codes

INTRODUCTION

The City and County of San Francisco (the "City") rarely takes a position on the merits in pre-election litigation concerning the legality of proposed ballot measures. Even when faced with measures that present serious legal issues, the City generally takes a position only on procedural questions about the initiative process and refrains from making any statements regarding the substantive validity of the measure. This policy reflects due regard for the right of initiative, which is safeguarded in the City Charter and the State Constitution. In reviewing proposed ballot measures, the City's focus is on ensuring that the electoral process is fair and complies with all statutory and constitutional requirements. Thus, as a general rule, the City will take a position in pre-election litigation only if a measure is clearly invalid. This is such a case.

The City takes the unusual step of filing a brief in this matter because Petitioners' arguments raise the possibility that San Francisco voters might be presented with a measure that is clearly invalid in its only application. Petitioners argue that the proposed ban on circumcision is preempted by Business and Professions Code section 460(b), which prohibits municipalities from regulating medical procedures performed by medical professionals. The City takes no position on this preemption question. But notably, in ruling on Petitioners' preemption argument, the Court could reach three possible conclusions: 1) the measure is preempted in its entirety, 2) the measure is not preempted at all, or 3) the measure is preempted as applied to medical professionals but not as applied to circumcisions performed by religious officiants for non-medical reasons. The City submits this brief to address the serious constitutional question presented by this third possibility.

If the Court holds that the measure is preempted as applied to medical professionals, the only remaining application of the measure would be to prohibit circumcision by Jewish *mohels*. In other words, the measure would prohibit a single religious practice and nothing else. If the Court limits the measure's application in this way, the narrowed measure would violate the Free Exercise Clause of the First Amendment to the United States Constitution. Once limited by section 460(b), the narrowed measure would not be a neutral law of general applicability, but instead a law that prohibits a practice only when it is performed by religious officiants for religious purposes. The Free Exercise Clause demands strict scrutiny of such laws, and the measure cannot survive that heightened level of review.

The measure specifically targets the centuries-old Jewish religious practice known as *brit milah*, whereby infant boys are circumcised by religious practitioners known as *mohels*. That the measure is aimed at this practice is evident both from the text of the measure, which explicitly includes circumcisions performed because of a "belief . . . that the operation is required as a matter of custom or ritual,"[1] and from the promotional materials supporting the measure. Those materials include a "comic book" and "character cards" that portray the battle against circumcision as one between good, represented by a blonde, blue-eyed superhero and his fair-skinned female friend, and evil, represented by four dark-haired, dark-skinned menacing Jewish characters with prominent noses, sinister expressions and sadistic tendencies. The images of the Jewish characters mimic the anti-Semitic propaganda used against Jewish people by Nazis. And the words used to describe those same characters – "cunning," "depravity," "rich," "sadistic," "dangerous" and "Monster" – similarly evoke hideous stereotypes of Jews that have been used to justify their persecution. This pernicious messaging suggests a profound hostility toward a religious practice that, for many Jews, is central to their faith.

San Franciscans cannot be asked to vote on whether to prohibit religious minorities from engaging in a particular religious practice, when the same practice may be performed under non-religious auspices. If the Court concludes that the measure is preempted as applied to medical professionals, then the remaining application is unconstitutional and the Court should remove the measure from the ballot entirely.

STATEMENT OF FACTS

Circumcision of male infants is both a common medical procedure and a religious practice of Jews and Muslims. (*See* Petitioners' Memorandum of Points and Authorities [hereinafter "MPA"] at 2-3.) Jewish law commands that boys be circumcised on the eighth day after birth in a ritual known as *brit milah*. (*See id.*) Jewish circumcisions are traditionally performed by a religious officiant called a

[1] To this extent, the measure also targets the Islamic practice of circumcision. However, it is the City's understanding that Muslims generally use licensed medical professionals to perform circumcisions, not unlicensed religious officiants. Therefore, as discussed further below, if the measure is preempted as applied to medical professionals, it would not apply to circumcisions performed in the Islamic tradition.

mohel, who may be a practicing physician or a trained layperson. (*See id.* at 3.) Islamic law also imposes an obligation to circumcise Muslim boys, and these circumcisions are traditionally performed by a practicing physician. (*See id.*)

On October 13, 2010, Real Party in Interest Lloyd Schofield submitted to the San Francisco Department of Elections the text of a proposed measure to ban male circumcision in San Francisco, along with a notice of intent stating the reasons for the proposed measure. As required by the California Elections Code, the City Attorney prepared a title and summary for the measure. (*See* Cal. Elec. Code § 9203.) On November 8, 2010, Schofield began circulating a petition to place the measure on the San Francisco ballot, and on May 17, 2011, the Department of Elections certified that the petition had enough valid signatures to qualify for the ballot at the next election. The text of the proposed measure, the notice of intent, the City Attorney's title and summary, and the Department's certification are attached to the Declaration of Francis C. Ho in Support of Verified Petition and Complaint ("Ho Decl.") as Exhibits A, B, C, and E, respectively.

Although Schofield was the measure's official proponent, the organization claiming responsibility for the proposed measure is MGMbill.org. (*See* Declaration of Mollie Lee In Support of Respondents' Memorandum of Points and Authorities ["Lee Decl."], Exh. A.) MGMbill.org is led by San Diego resident Matthew Hess, and its self-declared purpose is to pass a law banning circumcision in the United States. (*See id.* at Exh. B.) The MGMbill.org website promotes the San Francisco measure, as well as other circumcision bans proposed throughout the nation. The website also promotes various anti-circumcision publications, including the *Foreskin Man* comic book series written by Hess, and it sells posters featuring Hess' fictional superhero, Foreskin Man. (*See id.* at Exhs. C, D.) The official website supporting the proposed San Francisco measure, SFMGMbill.org, in turn links to the MGMbill.org site. (*See id.* at Exh. E.)

On December 1, 2010, while signatures were being gathered to put the San Francisco measure on the ballot, MGMbill.org published the second issue of its *Foreskin Man* comic book series. The press release MGMbill.org issued announcing the publication states: "*Jewish Circumcision Under Fire in Second Foreskin Man Comic Book: Foreskin Man battles the ritual circumciser Monster Mohel in a follow-up story from MGMbill.org*." (*Id.* at Exh. F.) In the press release, Hess states: "Why should an

eight-day-old infant boy be forced to give up his foreskin for someone else's spiritual beliefs? We need laws to protect male children from this painful and scarring blood ritual, and our second Foreskin Man comic book was created to get that point across." (*Id.*) In the comic, the blond and blue-eyed superhero interrupts a Jewish *brit milah*, attacks the *mohel*, and leaves with the baby. A copy of the second issue of the *Foreskin Man* comic book series is attached to the Lee Declaration as Exhibit G.

The images of the Jewish *mohel* and his associates in MGMbill.org's *Foreskin Man* comic book are in the tradition of images used in classic anti-Jewish propaganda. Most notably, *Foreskin Man*'s evil Monster Mohel character is strikingly similar to images of Jews used in Nazi propaganda during the 1930s and 1940s. (*Compare* Lee Decl., Exh. H at 3 ["Monster Mohel" character] *with* Lee Decl. Exh. I [cover of *The Eternal Jew*, a book published by the Nazi Party in 1937]; Exh. J [poster for the 1940 Nazi propaganda film *The Eternal Jew*]; Exh. K [description of *The Eternal Jew*]; Exh. L [description of film program for *The Eternal Jew*]; Exh. M [cover of a flyer for the 1940 Nazi propaganda film *Jud Suss*]; Exh. N [article describing *Jud Suss*]; Exh. O [*Der Sturmer* cartoon captioned "every little Jewish baby grows up to be a Jew"].)

The Foreskin Man card set describes the Jewish characters using stereotypes long used to demonize Jewish people. For example, Monster Mohel not only has the title "Monster" but is described as sadistic, predatory and even cannibalistic. (*Id.*, Exh. H at 4 [describing Monster Mohel as "excite[d]" by the idea "of cutting into the penile flesh of an eight-day-old infant boy"; "the delicious metzitza b'peh [foreskin flesh] provides the icing on the cake"].) The Jewish father, Jethro Sacks, is describes as "rich" and ruthless. (*Id.*, Exh. H at 6 ["Sure, a few people got stepped on along the way, but that wasn't personal. It was just business."]; *compare* Lee Decl., Exh. L [anti-Semitic propaganda describing Jews' use "cunning" tactics to "gain[] financial supremacy"].) Yerik, "Monster Mohel's right hand man and heir apparent," is described as "cunning," "deprav[ed]" and "even more dangerous and sadistic than Monster Mohel himself." (*Id.*, Exh. H at 10.) All of the Jewish characters except the infant child are portrayed as grotesque and evil.

In addition to portraying the Jewish characters using classic negative stereotypes, the second *Foreskin Man* comic book specifically targets circumcision as a religious practice, which it portrays as ritualistic and evil. (*See id.*, Exh. G.) The dark-skinned and dark-haired Jewish father says to his wife

"Did you really think I was going to deprive our son of his religious heritage?" (*Id.* at 8.) The sadistic-looking Monster Mohel character states that he and his assistant, Yerik, "will carry out the holy covenant." (*Id.*) The comic shows the *mohel* ominously preparing to "make the sacred cut," praying with a Hebrew book in hand, and thanking God "for the joyous metzitzah b'peh for which I am about to partake." (*Id.* at 10.) With his clawed hands he holds the scissors above the crying infant telling him it is "time to make your sacrifice to God." (*Id.*)

On June 22, 2011, Petitioners filed the present suit requesting that the proposed measure be removed from the ballot. Petitioners argue that the measure should be removed from the ballot because it is preempted by section 460(b) of the California Business and Professions Code, which states that California municipalities may not prohibit medical professionals from performing any procedure that falls within the scope of their medical practice. Petitioners argue that the Court cannot sever the proposed measure to preserve its application to non-medical professionals, and even if the measure could be severed, applying the circumcision ban only to Jewish *mohels* would violate the Free Exercise Clause of the Federal Constitution.

ARGUMENT

The City takes no position on the threshold question of whether the proposed measure is preempted in whole or part, or whether its application to medical professionals can be severed from other applications. If, however, the Court holds that the proposed measure is preempted only as applied to medical professionals, then the measure would be unconstitutional because it would target a practice only when it is performed for religious reasons. Under this narrowed measure, circumcisions would be permitted when performed by a doctor as a medical procedure and would be banned when performed by a non-doctor *mohel* as a religious ritual. This would be a clear violation of the Free Exercise Clause of the Federal Constitution.[2]

[2] The courts have not determined the appropriate standard of review for a free exercise claim under the Article I section 4 of the California Constitution, which is the state's analog to the federal free exercise clause. *See North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court* (2008) 44 Cal.4th 1145, 1158. This Court need not resolve this open legal question because, as discussed below, the narrowed measure would violate the Federal Constitution.

While the proposed measure purports to target both medical and religious circumcision, the narrowed measure would apply only to religious circumcision. As such, the narrowed measure would be neither generally applicable nor neutral. The narrowed measure's impermissible targeting of a religious practice is evident from the actual effect of the proposed law and from materials presented to the voters in support of its passage. Because the narrowed measure would target a religious practice and apply only to that practice, it would be subject to strict scrutiny, which it could not survive.

I. IF NARROWED BY PREEMPTION, THE PROPOSED MEASURE WOULD BE SUBJECT TO STRICT SCRUTINY UNDER THE FREE EXERCISE CLAUSE.

A. The Court must apply strict scrutiny unless the narrowed measure is both generally applicable and neutral.

Under the Free Exercise Clause, laws that are "neutral and of general applicability" are constitutional, even if they have "the incidental effect of burdening a particular religious practice." (*Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531 [hereafter *Lukumi*].) But when a law singles out a religious practice in a manner that is not neutral or generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (*Id.*) A law fails the "generally applicability" requirement when it regulates only religious conduct and not other similar non-religious conduct. (*Id.* at 542-43.) And a law fails the neutrality requirement if its "object . . . is to infringe upon or restrict religious practices because of their religious motivation." (*Id.* at 543.) General applicability and neutrality are "interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." (*Id.* at 531.)

The two leading Supreme Court cases, *Employment Division v. Smith* (1990) 494 U.S. 872, and *Lukumi*, together demonstrate the meaning of this two-pronged general applicability/neutrality test. In *Smith*, the Court upheld the application of federal drug laws against individuals who used sacramental peyote for religious purposes. In reaching its conclusion, the Court noted that the law was both generally applicable and neutral because it did not single out religious practices for disparate treatment and did not "represent[] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." (*Smith*, 494 U.S. at 536.) Thus, the State

could apply the law to all citizens, including those who used peyote for religious purposes, without running afoul of the Free Exercise Clause.

At the other end of the spectrum, the Court in *Lukumi* struck down a Florida city ordinance that was enacted in response to concerns that a Santeria church would perform ritual animal sacrifice in the city. The law prohibited only religious sacrifices while allowing citizens to kill animals for many other purposes. (508 U.S. at 527-28.) The Court concluded that the law was not generally applicable because it "in a selective manner impose[d] burdens on conduct motivated by religious belief." (*Id.* at 543.) And the law was not neutral because its object – expressed in the ordinance's text and its legislative history – was to "suppress . . . conduct because of its religious motivation." (*Id.* at 538.) Because the law was neither generally applicable nor neutral, the Court applied strict scrutiny and concluded it was unconstitutional.

Here, as discussed below, the narrowed measure would be neither generally applicable nor neutral. It would more closely resemble *Lukumi*, where a law singled out a particular religious practice for criminal treatment, than *Smith*, where a generally applicable law happened to proscribe religious conduct along with a range of non-religious activities. As discussed below, the Court should apply strict scrutiny.

B. The narrowed measure would not be generally applicable.

If the Court holds that the measure cannot be applied to doctors, the narrowed measure would fail the "general applicability" test because it would prohibit only one type of circumcision – those performed by *mohels* without medical licenses – while allowing all others. That is exactly what the Free Exercise Clause forbids: a selective law that burdens only religious conduct.

In *Lukumi*, the city ordinance at issue proscribed religious animal sacrifice while forbidding few other animal killings. The law allowed residents to kill animals in any number of ways – hunting, fishing, slaughtering livestock, exterminating rodents, and euthanizing pets and stray animals. (*Id.* at 543-44.) But the law prohibited animal sacrifice for religious purposes, and the Court concluded that it was therefore not generally applicable. (*Id.*) The Court noted that the law was substantially underinclusive to achieve the proffered government interests of preventing animal cruelty and protecting public health. (*Id.* at 543-45.) Instead, the law "pursue[d] the city's governmental interests

only against conduct motivated by religious belief." (*Id.* at 545.) The ordinance had "every appearance of a prohibition that society is prepared to impose upon Santeria worshippers but not upon itself," and that "precise evil is what the requirement of general applicability is designed to prevent." (*Id.* at 546; *see also Smith*, 494 U.S. at 877 [observing that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban [religious] acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief they display" (internal punctuation omitted)].)

Similarly, here, the narrowed measure would apply only to religious conduct. To the extent the measure seeks to protect male infants by prohibiting circumcision, the reach of the narrowed measure would be vastly underinclusive, as in *Lukumi*. Baby boys would continue to be circumcised by doctors, and the only circumcisions that would be prohibited would be those by non-doctor *mohels*. The measure would not accomplish any goal other than to prohibit a religious practice as conducted by certain religious officiants.

The fact that the text of the proposed measure does not single out *mohels* for disparate treatment does not make it generally applicable. A law that appears non-discriminatory on its face will nonetheless fail the "general applicability" test if, "as construed and applied," it singles out particular religions or religious practices. (*Fowler v. State of R.I.* (1953) 345 U.S. 67, 68.) In *Fowler*, the Court considered a local ordinance prohibiting political or religious addresses in public parks. Although the text of the law did not discriminate between religious practices, the Court found it "fatal" that the city had construed the ordinance to allow most religious services while banning Jehovah's Witness meetings. (*Id.*) The narrow application of the law to prohibit one particular religious practice violated the First Amendment. Similarly, as the Seventh Circuit Court of Appeals explained, a "regulation that prohibited all private groups from displaying nine-pronged candelabra may be facially neutral, but it would still be unconstitutionally discriminatory against Jewish displays. The lack of general applicability is obvious not from the government's motives but from the narrowness of the regulation's design and its hugely disproportionate effect on Jewish speech." (*Grossbaum v. Indianapolis-Marion County Bldg. Authority* (7th Cir. 1996) 100 F.3d 1287, 1298 n.10.) Here, although the text of the measure targets all circumcisions in San Francisco, if the Court holds that it is

preempted as applied to doctors, the measure's actual effect would be to prohibit only or predominately those circumcisions performed by *mohels* for religious purposes.

C. The narrowed measure would not be neutral.

Not only would the narrowed measure fail the "general applicability" prong of the *Smith/Lukumi* test, but it also would fail the second prong because it would not be neutral. "A law is not neutral towards religion if its 'object . . . is to infringe upon or restrict practices because of their religious motivation. . . .'" (*Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 550 [quoting *Lukumi*, 508 U.S. at 533].) If the proposed measure's only possible application were to circumcisions performed solely for religious purposes, the measure would effect a "'religious gerrymander,' an impermissible attempt to target petitioners and their religious practices." (*Lukumi*, 508 U.S. at 535 [quoting *Walz v. Tax Comm'n of New York City* (1970) 397 U.S. 664, 696].)

To determine whether a challenged law is neutral towards religion, courts begin with the text. (*See Catholic Charities*, 32 Cal.4th at 502.) "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." (*Id.* at 550.) In *Catholic Charities*, the Supreme Court distinguished between neutral laws that refer to religious practices in order to exempt them from a prohibition (the case in *Catholic Charities*) and non-neutral laws that refer to religious practices in order to prohibit them (the case in *Lukumi*). (*Id.* at 551.) The text of the proposed measure here refers to religious circumcision, suggesting that one object of the measure is to prohibit religious practices, but the proposed measure is not directly analogous to either *Catholic Charities* or *Lukumi*. The proposed ban includes only one exemption – for medically necessary circumcisions – and expressly notes that "no account shall be taken of the effect . . . of any belief . . . that the operation is required as a matter of custom or ritual." The proposed measure's references to "custom" and "ritual" have strong religious connotations (*cf. Lukumi* 508 U.S. at 533-34) and the apparent purpose of the clause is to ensure that religious circumcisions by Jews and Muslims will be prohibited by the measure. To be sure, the text of the proposed measure envisions that religious circumcisions would be prohibited along with all other infant circumcisions, but the measure's references to religion at least indicates that one of the purposes of the measure is to prohibit a religious practice.

Even if the text of the proposed measure is facially neutral, however, a holding that the law cannot be applied to medical professionals would mean that law will not be neutral in operation. The Free Exercise Clause "extends beyond facial discrimination" and "the effect of a law in its real operation is strong evidence of its object." (*Lukumi*, 508 U.S. at 534-35.) As discussed above, the only apparent application of the narrowed ban would be to persons performing circumcisions for religious reasons. This stands in stark contrast to laws that courts have upheld as neutral. (*See*, *e.g.*, *North Coast Women's Care Medical Group*, 44 Cal.4th at 1156 [Unruh Civil Rights Act is neutral because it requires all business establishments to provide services to all persons regardless of sexual orientation]; *Catholic Charities*, 32 Cal. 4th at 556 [statutory exemption for "religious employers" in the Women's Contraceptive Equality Act means that some Catholic employers are treated more favorably than others, but non-exempt Catholic organizations are treated the same as all other employers]; *Smith v. FEHC* (1996) 12 Cal.4th 1143, 1175 [Fair Employment and Housing Act is not "a law directed against religious exercise, but a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive"].) The extremely narrow application of the proposed circumcision ban is evidence that it serves the impermissible object of targeting a religious practice.

In operation, the narrowed measure would be similar to the initiative measure invalidated on Equal Protection grounds by the Supreme Court in *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457. In that case, a Washington State ballot measure prohibited busing students to non-neighborhood schools. The measure was facially neutral, but it included exceptions that permitted busing for virtually any purpose except school desegregation. (*Id.* at 462-463.) As the Court noted, the "Washington electorate surely was aware" of the limited application of the measure, because the initiative sponsors assured the voters that "99% of the school districts in the state – those that lacked mandatory integration programs – would not be affected by the passage of [the measure]." (*Id.* at 471 [internal quotation marks and citations omitted].) This informed the Court's holding that despite the initiative's facial neutrality, it was enacted because it would negatively impact busing for integration and therefore violated Equal Protection. (*Id.*)

As in *Seattle School District*, the statements of the proposed measure's sponsors here provide further evidence of its impermissible object to target particular religious practices. While the proposed measure was being circulated for signatures, its sponsors released Issue 2 of the Foreskin Man comic book series. This issue features the Jewish circumcision ritual known as *brit milah*, and the villain is a character named Monster Mohel. As described above, the images and descriptions of Jewish characters in the comic book are blatantly anti-Semitic and drawn on stereotypes that are eerily reminiscent of propaganda used in Nazi Germany during the Holocaust. In a press release accompanying the release of this issue, MGMbill.org President Matthew Hess stated: "Brit milah is child abuse in a religious context." (Lee Decl., Exh. F.) He continued: "Why should an eight-day-old infant boy be forced to give up his foreskin for someone else's spiritual beliefs? *We need laws to protect male children from this painful and scarring blood ritual*, and our second Foreskin Man comic book was created to get that point across." (*Id.* [emphasis added].) The press release drew a direct connection between these statements about Jewish religious practices and the proposed San Francisco measure, noting that "Jewish groups" were mobilizing to fight the measure but that the measure's proponent was "undeterred." (*Id.*)

These statements and images indicate that the proposed measure is not neutral because its object is to target a religious practice. When construing initiative measures, "the intent of the drafters may be considered by the court if there is reason to believe that the electorate was aware of that intent and [the courts] have often presumed, in the absence of other indicia of the voters' intent such as ballot arguments or contrary evidence, that the drafters' intent and understanding of the measure was shared by the electorate." (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700 n.7 [internal citations omitted]; *see also Lukumi*, 508 U.S. at 540 [in determining neutrality of legislation, court can consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body"] [opinion of Justices Kennedy and Stevens].) Here, Hess's materials show that one of the central purposes of the proposed measure is to prohibit the Jewish ritual of a *brit milah*. And if the measure is preempted as applied to doctors, that purpose will be the only remaining object of the measure.

This targeting of religion is of particular concern where the targeted practice is integral to parents' religious upbringing of their children. Parents' interests in "the care, custody, and control of their children" are "perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court." (*Troxel v. Granville* (2000) 530 U.S. 57, 65.) Of particular note here, the Court has recognized the central importance of "parental control over religious upbringing and education of their minor children," and noted that "an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom." (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 231; *see also Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-35 [state statute requiring children to attend public school "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"]; *Meyer v. Nebraska* (1923) 262 U.S. 390 [state law prohibiting teaching of foreign languages to grade school students violated parents' constitutional rights].)[3] A law that targets not only a religious practice but one involving basic parental decisions must be subject to the most searching judicial review.

II. THE NARROWED MEASURE CANNOT SURVIVE STRICT SCRUTINY.

Under strict scrutiny, a law cannot "substantially burden a religious belief or practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a compelling interest.'" (*North Coast Women's Care Medical Group*, 44 Cal.4th at 1158 [quoting *Catholic Charities*, 32 Cal.4th at 562].) Here, the narrowed measure would substantially burden the Jewish practice of circumcision by preventing Jewish parents from having their sons circumcised by a *mohel* who does not hold a medical license, and it would not be narrowly tailored to any compelling government interest.[4]

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[3] *Yoder* suggests that courts should apply heightened scrutiny even to neutral, generally applicable laws if they inhibit both free exercise of religion and another fundamental right, such as the right to raise one's children. (*See Catholic Charities*, 32 Cal.4th at 557; *Smith*, 494 U.S. at 881-82.) But the viability of this so-called "hybrid rights" doctrine is unsettled (*see Catholic Charities*, 32 Cal.4th at 557), and the Court need not address it here. The "hybrid rights" analysis applies when a party seeks a religious exemption to a generally applicable law, and as discussed above, the narrowed measure would not be generally applicable or neutral.

[4] This burden is not eliminated simply because some mohels are licensed medical professionals and many Jewish parents choose to use these mohels. The right to free exercise of religion is the right to practice religion in accordance with personal beliefs, which need not be universally shared with others of the same religion. (*See Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist.* (E.D.Tex. 1993) 817 F.Supp. 1319, 1330 ["Finally, plaintiffs are not stripped

The City is aware of no facts indicating that the narrowed measure is necessary to a compelling governmental interest. The state has a compelling interest in the welfare of children, and Real Party in Interest may argue that prohibiting circumcision advances that interest. Medical opinion on circumcision is divided, and there may be room for legitimate debate about the benefits or harms of circumcision, but the Court need not weigh in on those medical or policy debates in order to decide the present challenge.[5] Even if there were a compelling governmental interest in banning circumcision, the narrowed measure would not be narrowly tailored to that interest because it would prohibit only a subset of circumcisions – those performed by *mohels* or other religious officiants rather than by doctors. The proponents of the measure have not suggested any special concerns about non-doctor *mohels* performing circumcisions – other than the statements in the *Foreskin Man* comic and accompanying press release, which do not reflect legitimate government interests. In short, the record falls far short of justifying an outright ban on circumcisions performed by *mohels*.

CONCLUSION

For the foregoing reasons, the City submits that it would violate the Free Exercise Clause to submit to the voters a narrowed version of the proposed measure that applies only to religious circumcisions performed by *mohels*. If the Court concludes that the proposed measure is preempted as

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of their right to free exercise of their own religious beliefs simply because wearing one's hair long is not absolutely mandated by the Tribe or its religious or cultural leaders."].)

[5] Proponents of the circumcision ban assert that circumcision is a "major health risk." (*See* Declaration of Francis C. Ho In Support of Verified Petition For Writ Of Mandate, Exh. B [Notice of Intent and Statement of Reasons for the proposed measure].) Petitioner's evidence suggests that there are many medical benefits to circumcision. (*See* Declaration of Edgar J. Schoen, M.D. In Support Of Petitioners' Memorandum of Points and Authorities.) The American Academy of Pediatrics recognizes potential benefits and risks to circumcision, and recommends that the decision be left to parents. (*See* Circumcision Policy Statement, American Academy of Pediatrics, PEDIATRICS Vol. 103 No. 3 March 1999, pp. 686-693, [statement of reaffirmation published September 1, 2005], available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;103/3/686.)

applied to doctors, the City respectfully requests that the Court remove the measure from the ballot in its entirety.

Dated: June 30, 2011

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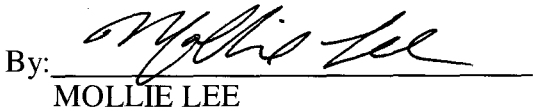
By: 
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