New York Supreme Court

Appellate Division—Second Department

Docket No.: 2014-02374

In the Matter of the Application of:

PAUL BERGER and THE JEWISH DAILY FORWARD,

Petitioners-Appellants,

– against –

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondent-Respondent.

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ADVANCE PUBLICATIONS, INC., THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., DAILY NEWS, LP, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE NEWSPAPER GUILD - CWA, STUDENT PRESS LAW CENTER, AND THE TULLY CENTER FOR FREE SPEECH, IN SUPPORT OF APPELLANT

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AMICI CURIAE

The **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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The **Newspaper Guild – CWA** is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of

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The **Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae are The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The Association of American Publishers, Inc., Daily News, LP, National Press Photographers Association, The Newspaper Guild - CWA, Student Press Law Center, Tully Center for Free Speech. *Amici* are described in more detail in above. Appellants have consented to the filing of this brief. Appellee has not served timely opposition to *amici*'s filing.

This case concerns the denial of a Freedom of Information Law ("FOIL") request for information about adults suspected of spreading the herpes simplex virus to infants. It also involves a dangerous misreading of FOIL's privacy exemption. Reporter Paul Berger and the Jewish Daily Forward ("the Forward") made a FOIL request to the New York Department of Health and Mental Hygiene ("Health Department") for the record of a man suspected of infecting an infant with the virus. The Health Department denied the request on privacy grounds and the Supreme Court affirmed.

Amici are news media organizations who report on issues of pressing public concern, including threats to public health and open violations of local, state and federal laws. In this case, *amici* have an interest in helping this Court to properly define the parameters of the privacy exemption in New York's FOIL so as to best balance the pressing public interest in understanding public health and safety risks,

against individual privacy rights. *Amici* are also frequent public information requesters, and seek to demonstrate for the Court how important it is to remain true to New York's promise of open government and narrow FOIL exceptions.

SUMMARY OF THE ARGUMENT

The people of New York need broader access to government records than the Supreme Court granted in this case. The information Berger and the Forward seek in this case is critical to understanding an ongoing public health hazard in New York. The Supreme Court erroneously concluded that a privacy interest outweighed the public interest in this information. In doing so, the lower court made the privacy rights of an individual who continues to threaten the lives and health of New York infants more of a priority than clearly established public interests in health and welfare.

FOIL creates a privacy exemption to public access to government documents, which is limited to six specific categories of information and otherwise left to a public interest-private interest balancing test. The information at issue in this case does not fit into any of the six categories of exempt private material. Most importantly, it is not a medical history or the medical record of a patient; it is a man's name.

Even under a balancing test, the public interest in this information clearly outweighs any privacy right the man has in having his name connected to a case of infant herpes. The Supreme Court failed to acknowledge the high public interest in both ensuring compliance with duly enacted regulations and protecting the health

and welfare of children. Both interests are critical to society's functioning, and both are implicated in this case.

Additionally, privacy rights are not absolute, and there are different degrees of privacy rights when dealing with private activity verses professional activities. Because the mohel in this case was acting in his professional capacity when he allegedly infected the infant with herpes simplex virus, he has reduced privacy rights in the information related to how he performed his job. Since the infant's privacy rights are not implicated at all by Berger and the Forward's FOIL request, the Supreme Court should only have considered the mohel's reduced privacy interests in determining whether his name should be public record. Because the public interest in having the information is so high, and the potential benefit to the public so great, and because the mohel's privacy interests are so minimal, the Supreme Court erred in allowing the Health Department to withhold the mohel's name from Berger and the Forward.

Amici, specifically, work diligently to inform the public about violations of codes and laws, as well as about threats to public safety, and ensuring that the media has access to the information at issue here will further public understanding about this issue.

INTRODUCTION

This case concerns the balance of public health and a professional's privacy rights. Metzizah b'peh is a ritual circumcision practice used in some segments of the Orthodox Jewish community during "which a Mohel or circumciser uses his mouth to draw away blood after the surgical removal of the foreskin." *Berger v. NYC Dep't of Health & Mental Hygiene*, No. 7618/2013 (Sup. Ct. Queens Cnty. Dec. 13, 2013), Appellants' Record on Appeal pp. R-004 – R-017, at R-005. Because of the high risk of transmission of the herpes simplex virus during this procedure, the New York City Board of Health enacted a regulation in September 2012 requiring a mohel to first get the informed consent of an infant's parents before performing this type of oral suction during a circumcision. *See* 24 RCNY § 181.21(b). This case involves a FOIL request for the name of a mohel who has been connected to a case of infant herpes.

ARGUMENT

I. Information exposing a professional who regularly puts infants at risk of deadly infection in the course of his business does not fall into any exemption to New York's Freedom of Information Law, and it should be released to the public.

New York enacted its FOIL to facilitate public access to government information. "FOIL is based on a presumption of access to [government] records, and an agency . . . carries the burden of demonstrating that the exemption applies to the FOIL request." *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007) (citations omitted). Importantly, exemptions to FOIL are to be narrowly construed. *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 566 (1986). Among the most important things for the public to understand is how its government is addressing public health concerns. That is what is at issue in this case, and it necessitates a careful and narrow reading of any exemptions that might keep the information from the public.

FOIL exempts from public disclosure information that, "if disclosed would constitute an unwarranted invasion of personal privacy." Pub. Off. Law § 87(2)(b). The law goes on to partially define an "unwarranted invasion of personal privacy" by laying out six categories of information that would qualify:

> i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

> iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
>
> vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law.

Id. § 89(2)(b). That list is not comprehensive, however, and where none of the six enumerated examples apply, a court "must decide whether any invasion of privacy . . . is 'unwarranted' by balancing the privacy interests at stake against the public interest in disclosure of the information." *N.Y. Times Co. v. City of N.Y. Fire Dep't*, 4 N.Y.3d 477, 485 (2005).

In this case, the information sought does not fit into any of the enumerated privacy exemptions in Public Officers Law § 89(2)(b), and the public interest in access to the information clearly outweighs the privacy interests at stake.

A. The infected infant's privacy interests are not relevant to this case.

The first important step in assessing whether a FOIL privacy exemption applies is to determine whose privacy interests would be implicated. In this case,

Berger and the Forward have requested only information that would identify an adult accused of infecting an infant with a potentially deadly virus. Berger and the Forward do not seek any information that would identify the infant or his family. *Berger*, R-007 (quoting from the request for "the name of [the] mohel 'who is believed to have infected an infant with herpes during the Orthodox Jewish practice of metzizah b'peh").

The Supreme Court erroneously analyzed the FOIL privacy exemption as though the infant's privacy interests were at stake. Citing 24 RCNY § 11.03, the portion of the health code addressing cases of infant herpes, the lower court concluded that "the purposes of all these codes would be negated and seriously undermined if the names of persons reported under these sections were revealed to the public. Individuals would be dissuaded from complying with the reporting requirements if their anonymity was compromised." *Berger*, R-012. Section 11.03 of the New York City Health Code, however, only requires reporting the *infant*'s name, not the name of the person suspected of infecting the infant. As such, the revelation of the mohel's name would have no effect on the public's willingness to report cases of infant herpes.

If Berger or the Forward had requested the infant's name, then the lower court's analysis would have been appropriate and the conclusion correct. Because,

however, the infant's identity is not at issue, his privacy interests should not impact the analysis in this case.

B. The mohel's name is not the type of information that fits into any of the six specified personal privacy exemptions in FOIL.

Only "unwarranted" invasions of privacy are barred under FOIL. Pub. Off. Law § 87(2)(b). FOIL enumerates six categories of information that qualify as sufficiently private, but makes clear such unwarranted invasions "shall not be limited to" those six categories. *Id.* § 89(2)(b). Only two of those specified categories could even possibly encompass the information Berger and the Forward seek here. The first is the medical history category, *id.* § 89(2)(b)(i); the second is client or patient records, *id.* § 89(2)(b)(ii). Neither properly applies to the mohel's name.

None of the specified categories of private information should apply to the mohel's name in this case.

The sixth category, workers' compensation records (Pub. Off. Law § 89(2)(b)(vi)), clearly does not apply because the information sought is not a workers' compensation record. The same is true of the third category: names and address to be used for solicitation or fundraising information. *Id.* § 89(2)(b)(iii). No one is suggesting that Berger or the Forward intends to use the mohel's name for commercial purposes or to raise money.

At first glance, the fourth category may seem to apply to the mohel's name because the fourth category prohibits disclosure of information the release of which "would result in economic or personal hardship." Pub. Off. Law § 89(2)(b)(iv). However, the second clause of the exemption makes clear that the mohel's name would not fall in this category because it requires the information sought "not [be] relevant to the work of the agency . . . maintaining it." *Id.* The identity of the person suspected of infecting an infant with herpes is directly relevant to the Health Department's work in trying to track infant herpes cases. The fifth category of private information similarly does not apply as it prohibits the release of information shared with an agency in confidence, but only where the information is "not relevant to the ordinary work of such agency." *Id.* § 89(2)(b)(v).

The remaining two categories seem more likely to encompass the information Berger and the Forward seek here, but neither truly applies.

1. The mohel's name is not "medical history."

The New York Court of Appeals has made clear that Public Officers Law § 89(2)(b)(i) applies not to just to information submitted as part of a job application, but to all medical histories. *Hanig v. N.Y. Dep't of Motor Vehicles*, 79 N.Y.2d 106, 110 (1992). The same court indicated that disclosure of "medical histories" would involve disclosing "ongoing treatment for . . . medical

conditions." *Id.* at 111. No such treatment is involved here, and the disclosure of the mohel's name would not make a record of such treatment public. It is also useful to note that the information sought in *Hanig* was an application for a driver's license, which individuals are required to give to the government in return for a government-issued benefit. In this case, the information came into the government's possession in the course of investigating who may have harmed a child. The mohel was not compelled to reveal the information in order to qualify for some government benefit.

Information that in some circumstances might be private becomes public if it is collected in furtherance of a government investigation. In *Humane Society of the United States v. Fanslau*, the Third Department concluded that financial disclosure statements could be released publicly where the information collected was "clearly relevant to the Board's role of investigating ethical code violations." 54 A.D.3d 537, 538 (3d Dep't 2008). In that case, a FOIL requester was seeking financial disclosure statements submitted to a county ethics board. That is analogous to the information here, because the Health Department collected the mohel's name in the course of investigating possible violations of the health code and the informed consent law. In *Humane Society*, the possibility of a future ethics investigation was enough to overcome any privacy interest. There is a far greater and more direct danger to the public here.

2. The mohel's name is not a client or patient record.

The mohel's name is not a client or patient record in this case, because the mohel was not a client or patient of the Health Department. A "patient record" is "information furnished to health care providers in the course of treatment." *Hanig*, 79 N.Y.2d at 111. The Health Department is not a health care provider, and the mohel was not seeking treatment, so his name cannot be a patient record.

FOIL does not define "patient" or "client," but the statutory "[e]xemptions must be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and the general purpose and policy underlying FOIL." *Thomas v. NYC Dep't of Hous. Pres. & Dev.*, 12 Misc. 3d 547, 551 (Sup. Ct. N.Y. Cnty. 2006). Therefore, the common meanings of "client" and "patient" should apply in this case. *See In re Murawski*, 84 A.D.2d 496, 498 (4th Dep't 1982). The dictionary defines "patient" as "a person who receives medical care or treatment." *Merriam-Webster Dictionary*, http://www.m-w.com/dictionary/patient. "Client" means "a person who pays a professional person or organization for services." *Id.*, http://www.m-w.com/dictionary/client. Because the mohel in this case was not receiving or registered to receive medical treatment from the Health Department, nor was he using the department's professional services, he does not qualify as a client or patient for the purposes of FOIL, and Public Officers Law § 89(2)(b)(ii) does not apply to these records.

II. The public interest in being aware of people who knowingly infect infants with potentially deadly diseases substantially outweighs any privacy interest the mohel has in this case.

If the information sought does not fit into one of the six specified categories of private information, then courts must do a balancing test to determine whether the public interest in the information outweighs any privacy interest. *N.Y. Times Co.*, 4 N.Y.3d at 485. In this case, the public has a very strong interest in knowing who is infecting infants with a potentially deadly disease, and the mohel's privacy interests do not overcome the public's need to know.

Amici are acutely aware of the public interest in this issue. Aside from the Forward's extensive coverage of the controversy over this circumcision ritual, there has also been news and editorial coverage in national outlets.[1] Those stories,

[1] *See, e.g.*, Susan Donaldson James, *Herpes Strikes Two More Infants After Ritual Circumcision*, ABC News (April 5, 2013), *available at* http://abcn.ws/Ng04cr; Hunter Stuart, *Infant Contracts Herpes through Orthodox Jewish Circumcision Ritual, NYC Health Officials Say*, Huffington Post (April 5, 2013), *available at* http://huff.to/1rVcjZz; Brittany Brady, *Babies' Herpes Linked to Circumcision Practice*, CNN (April 8, 2013), *available at* http://cnn.it/1lRz4O6; *Two Infants Contract Herpes Following Circumcision*, Fox News (April 8, 2013), *available at* http://fxn.ws/1j2dhTk; Michelle Castillo, *CDC: 11 Infants Contracted Herpes Due to Controversial Jewish Circumcision Practice*, CBS News (Oct. 12, 2012), *available at* http://cbsn.ws/1mv1wIA; Reuven Blau, *Religious Circumcision Ritual Leaves 2 Brooklyn Infants with Herpes*, N.Y. Daily News (April 4, 2013), *available at* http://nydn.us/1kCvcfK; Liz Robbins, *Baby's Death Renews Debate Over a Circumcision Ritual*, N.Y. Times (Mar. 7, 2012), *available at* http://nyti.ms/SsL7ac; Joel Rose, *New York, Orthodox Jews Clash Over Circumcision*, NPR (Dec. 3, 2012), *available at* http://n.pr/Rh0sK8; Religion News Service, *Circumcision Warning Heightens N.Y. Dispute*, Wash. Post (Dec. 31, 2005), *available at* http://wapo.st/RkZ4WP; Mary Murphy, *Another Baby Gets Herpes After Controversial Circumcision*, L.A. Times (July 2, 2012), *available at* http://lat.ms/1nej3Em; David B. Caruso, *NYC, Rabbis Clash Over Circumcision Ritual*, A.P. (Oct. 11, 2012), *available at* http://bigstory.ap.org/article/nyc-rabbis-clash-over-circumcision-ritual; Jonathan Stempel, *Judge Won't Block New York City Circumcision Law*, Reuters (Jan. 10, 2013), *available at* http://reut.rs/Rh2pqa; Jonathan Allen, *New York Approves Tougher Regulations on*

a sampling of the coverage on the issue, generated thousands of comments and shares on social media sites. The extensive coverage and commenting demonstrates that both *amici* and the general public believe there is real news value in information on this controversial ritual.

The desire for more information on this subject goes beyond a mere curious interest on the part of the public. Members of the public, particularly those living in areas where this type of circumcision ritual is practiced, have several clearly established interests in understanding who is engaging in this practice and what the ramifications of the ritual are. Chief among the interests the Forward and *amici* seek to vindicate on behalf of the public are the interest in ensuring compliance with the law and the interest in protecting children from mistreatment. In contrast to the information FOIL properly allows agencies to withhold, release of the mohel's name is not offensive or objectionable to a reasonable person; on the contrary, a reasonable person would want to protect public health and safety from a known risk.

A. The release of the mohel's name would not "be offensive and objectionable to a reasonable person of ordinary sensibilities."

New York City's informed consent law, 24 RCNY § 181.21, was passed in September 2012 in an effort to make clear to parents of infant boys that "the New

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Circumcision, Reuters (Sept. 13, 2012), *available at* http://reut.rs/1lRF7Cf; and Sharon Otterman, *Denouncing City's Move to Regulate Circumcision*, N.Y. Times (Sept. 13, 2012), *available at* http://nyti.ms/1ideCWU.

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." 24 RCNY § 181.21(b). The city's Board of Health added the language after receiving complaints from parents who were not aware their sons' circumcision ceremonies would involve oral suction. *Notice of Public Hearing: Opportunity to Comment on the Proposed Amendment of Article 181 (Protection of Public Health Generally) of the New York City Health Code*, NYC Dep't of Health & Mental Hygiene ("Public Hearing Notice") at 2, http://on.nyc.gov/1jvnWpd. The passage and implementation of that law indicates that New York City health officials felt strongly that at least parents deserved to know (1) that oral suction would be performed on their child and (2) that there was a general risk of transmission of the herpes virus during a circumcision involving direct oral suction.

Since then, some rabbis and mohels in New York have been very public about the fact that they will not abide by the informed consent law, refusing not just to get a signed consent form, per 24 RCNY § 181.21(b),(c), but also refusing to notify parents that there is a risk of herpes transmission inherent in the ritual. *See, e.g.*, Sharon Otterman, *Denouncing City's Move to Regulate Circumcision*, N.Y. Times (Sept. 13, 2012), *available at* http://nyti.ms/1ideCWU (citing one

rabbi as saying "he would rather go to jail than comply with the consent requirement"). Even many leaders in the Jewish community have come out in support of the city's informed consent law. *Id.* The city clearly cannot rely on mohels and rabbis to ensure that members of the public who seek the religious leaders' services for circumcisions are informed about the risks of oral suction. Given this opposition to the law, the public must have alternative ways to access information about who and what represent risks to their children.

While the release of someone's health status, especially their status as it relates to a sexually transmitted disease, may in may circumstances be "offensive and objectionable" to a reasonable person, these are no ordinary circumstances. In these cases, adults are knowingly putting infants at risk for death or serious injury, and are openly violating New York City law in the process of doing so. Releasing relevant information about this public health hazard is not likely to offend a reasonable person.

B. There is a reduced privacy interest in this information because it concerns professional activities instead of personal ones.

The mohels who use oral suction during circumcision ceremonies are performing the rite as a professional service, not in their capacity as individual citizens of New York. The herpes virus is present in 60 percent of American adults and 73 percent of adults in New York City, and does not usually cause symptoms in adults, so mohels may carry the virus without even being aware that

they are infected. *Cent. Rabbinical Cong. of U.S. & Canada v. NYC Dep't of Health & Mental Hygiene*, 2013 WL 126399, at *4 (S.D.N.Y. Jan. 10, 2013). The Health Department has stated unequivocally based on academic studies and investigations into infant herpes outbreaks in New York City that "'there is no proven way to reduce the risk of herpes infection posed by metzitzah b'peh.'" *Id.* at *6 (citation omitted). Given this overwhelming evidence, the practitioners of oral suction routinely engage in high-risk behavior in the course of performing their professional obligations, and, in the process, threaten public health.

Individuals have less of a privacy interest in their professional conduct than they do in purely personal matters. *See, e.g., N.Y. Times Co. v. N.Y. State Dep't of Health*, 173 Misc. 2d 310, 318 (Sup. Ct. Albany Cnty. 1997); *Goyer v. N.Y. State Dep't of Envtl. Conservation*, 12 Misc. 3d 261, 271 (Sup. Ct. Albany Cnty. 2005); *Glover v. Troy*, 2004 WL 1570279, at *2 (W.D.N.Y. May 17, 2004); *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988). The lower court erroneously found that "[i]n analyzing the release of this type of information, any distinction between 'personal' privacy and 'professional' privacy, is a hollow differentiation." *Berger*, R-014. But in fact, New York courts have allowed the release of physician identifying data from the state Department of Health in the past, determining that "as to their professional services, [all physicians] do not possess a personal privacy interest in information collected and maintained by the Department of Health."

N.Y. Times Co. v. N.Y. State Dep't of Health, 173 Misc. 2d at 318. In this situation, the mohels are performing not just a religious procedure, but also a medical one. The same limited privacy rights that apply to physicians in the course of conducting their professional duties should apply to the mohels practicing oral suction during circumcisions.

Additionally, the Supreme Court failed to recognize the fact that even if there is *some* privacy interest in this information, there is also a heightened public interest specifically because it involves professional conduct. There would be little public interest in this information if the mohel at issue were a private citizen who did not routinely come into contact with the most vulnerable members of society. Instead, he presumably receives compensation (whether for the specific ceremony or for his position as a spiritual leader in the community), for performing a service for customers, just like anyone who sells professional services to members of the public. However, what sets these professionals apart is the fact that they are likely not informing their customers of the possible life-threatening risks. The public has a strong interest in tracking this type of dangerous behavior among people holding themselves out as performing risk-free public services.

C. The public has a strong interest in ensuring compliance with all laws and codes.

In general, there is a strong public interest in enforcing all valid laws and codes. *See, e.g.*, *Sheinberg v. Fluor Corp.*, 514 F. Supp. 133 (S.D.N.Y. 1981)

(discussing the public interest in compliance with the federal security laws); *Sierra Club v. Alexander*, 484 F. Supp. 455 (N.D.N.Y. 1980) (discussing the public interest in compliance with the National Environmental Policy Act); and *Verizon N.Y., Inc. v. Optical Commc'ns Grp., Inc.*, 91 A.D.3d 176 (1st Dep't 2011) (acknowledging the public's interest in compliance with statutory and regulatory schemes). It is in the best interest of all members of the public if everyone complies with valid statutes.

The Supreme Court seems to have reached the opposite conclusion. The lower court held that "the disclosure of the names of the reported persons would likely subject the named individuals . . . to possible sanctions for violations of the NYC Health Code if they infected others." *Berger*, R-015 - R-016. It is unclear why the Supreme Court believed that the possibility that an individual who has violated a duly enacted law should be protected under a privacy exemption *because* he may face sanctions for violating the law. The court's reasoning is flawed for two reasons.

First, there is a clear public interest in ensuring that those who violate any code are sanctioned for doing so. The Supreme Court's conclusion that privacy interests protect an individual from sanctions or prosecution for violating valid laws has no foundation.

Secondly, the Supreme Court specifically found that the Forward had failed to show a "further or particularized public interest" in obtaining the mohel's name, rather than a redacted copy of the Health Department record. *Berger*, R-015. By acknowledging that there may be further ramifications for the mohel if his identity were released, the lower court identified just such a "further or particularized" interest. The public has an interest in the fact that this infection was spread, certainly, but New Yorkers also have a "further" interest in knowing *who* is spreading this infection to infants and in ensuring that person is appropriately sanctioned for violating 24 RCNY § 181.21.

D. The public has a strong interest in protecting children.

Distinct from any general interest in ensuring laws are enforced, the public also has a well-recognized interest in "protecting children from injury or mistreatment and in safeguarding their physical, mental and emotional well-being." *In re Stephen F.*, 118 Misc. 2d 655, 657 (Fam. Ct. Queens Cnty. 1982). *See also In re Maximo M.*, 186 Misc. 2d 266 (Fam. Ct. Kings Cnty. 2000); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). There can be no real dispute that exposure to the herpes virus puts an infant's well-being at risk and subjects him to possible injury, seeing as how herpes simplex virus can cause death or serious brain damage in an infant. Public Hearing Notice at 2. *See also Cent. Rabbinical Cong.*, 2013 WL 126399 at *4. As such, the public interest in

protecting children from injury and harm to their physical or emotional well-being is triggered in this case.

E. New York City recognized the importance of this type of information when it released a mohel's name in another case.

In 2007, the Health Department released records related to one mohel who had been connected to four cases of infant herpes. Hella Winston, *Mohel at Center of Bris Controversy Tested Positive for Herpes, Documents Show*, The Jewish Week (April 6, 2012), *available at* http://bit.ly/1lVurCH. Those documents:

> [A] copy of the 2007 New York State Health Department order obtained by *The Jewish Week*, through a Freedom of Information Law request, noted that [the mohel] tested positive for an infection he was capable of communicating to others. The redacted document -- required by law to protect Fischer's privacy -- does not make specific reference to herpes, however both the context of the order and the facts surrounding Fischer's case strongly suggest that the infection for which, according to the order, he tested positive is herpes.

Id. The *Jewish Week* report makes clear that the Health Department not only released the mohel's name (Yitzchok Fischer), but did so pursuant to a FOIL request. The Department withheld other information that would have violated the mohel's privacy, but – critically – did not believe his name was exempt for privacy purposes. The documents the Department released indicated that mohel was likely responsible for four infected infants between 2003 and 2007. *Id.* The Health Department banned that mohel from performing oral suction during circumcisions,

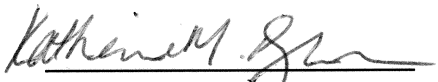
but there was evidence to indicate he continued the practice after the ban was in effect. *Id.*

The Health Department's handling of the Fischer case was proper in that it allowed the public access to information about a known public health risk. The neither the fact that Fischer might face sanctions for continued violations of the health code, nor any personal privacy interest he had, justified withholding his name from the public. The Health Department properly recognized the public interest in knowing Fischer's identity, and the same logic should apply to the release of the mohel's name in this case and in future cases.

CONCLUSION

For the reasons stated above, this Court should reverse the Supreme Court's January 9, 2014, order upholding the Health Department's FOIL denial and find that the Supreme Court reached the wrong conclusion in balancing the public interest and the privacy interests at stake.

Respectfully submitted,



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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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