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SUPERIOR COURT 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,

v.

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.

LLOYD SCHOFIELD,

Real Party in Interest.

Case No. CPF-11-511370

Date Action Filed: June 22, 2011

[PROPOSED] BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

Date: July 28, 2011
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Loretta M. Giorgi

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INTRODUCTION

Because of its commitment to fundamental rights, *amicus curiae* American Civil Liberties Union of Northern California, Inc. ("ACLU-NC") joins Petitioners and the City and County of San Francisco in urging the Court to issue a writ of mandate restraining San Francisco's Director of Elections from placing the initiative criminalizing circumcision on San Francisco's November 8, 2011 ballot. While such preelection relief is appropriately limited to cases in which a ballot measure is "clearly invalid," this is just such a case: Article 50 is expressly preempted by California law, which explicitly precludes localities from prohibiting "recognized" medical procedures such as circumcision. In addition, the proposed ordinance threatens to deprive San Franciscans of fundamental protected constitutional rights, and to embroil the electorate in unnecessary and deplorable religious divisiveness. Under the circumstances, the Court should order the initiative removed from the ballot now, to avoid an expensive election campaign that will distract the voters' attention from other, valid ballot measures and will lead to deeply unfortunate—and wholly unnecessary—religious strife.

ARGUMENT

I. CALIFORNIA LAW PROHIBITS THE PROPOSED ORDINANCE.

The proposed ordinance clearly conflicts with Business and Professions Code Section 460(b). That statute unambiguously precludes local governments, such as San Francisco, from prohibiting licensed medical professionals from performing "recognized" medical procedures. The proposed ordinance, which would criminalize virtually all circumcisions of minor males, runs afoul of the statutory prohibition, as both its plain language and legislative history confirm.

A. Business and Professions Code Section 460(b) Expressly Preempts The Proposed Ordinance.

Section 460(b) provides,

> No city, county or city and county shall prohibit a healing arts professional licensed with the state under Division 2 (commencing with Section 500) from engaging in any act or performing any procedure that falls within the professionally recognized scope of practice of that licensee.

Cal. Bus. & Prof. Code § 460(b). Thus, the statute applies to physicians, surgeons, nurses, and a wide range of other health care professionals who are licensed by the state. Further, in sweepingly broad terms, the statute bars cities and counties from prohibiting medical professionals from "engaging in any act" or "performing any procedure" that falls with a licensee's professionally recognized scope of practice. On its face, Section 460(b)'s plain language makes clear that the Legislature intended to prevent local governments from interfering with state licensing and regulation of medical professionals.

There can be no doubt that Article 50 violates Section 460(b). The proposed ordinance purports to prohibit virtually all circumcisions of minor males. As Petitioners have shown, circumcision falls squarely within the "professionally recognized scope of practice" of physicians and other medical professionals. With 1.5 million circumcisions performed annually in the United States, it is one of the most common surgical procedures in the country. *See* Decl. of Dr. Edgar J. Schoen, M.D. ("Schoen Decl.") ¶ 9 ("newborn circumcision is an important and recognized part of medical practice in the United States.").[1] The proposed ordinance therefore is expressly preempted by the plain language of Section 460(b), as "[t]he Legislature has recognized that matters of health and medicine . . . are of statewide concern." *Northern Cal. Psychiatric Soc'y v. City of Berkeley*, 178 Cal. App. 3d 90, 99-108 (1986) (initiative measure that enacted a total ban on the administration of electric shock treatment in the City of Berkeley was preempted by state law); *see generally Comm. of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 500 (1988) (legislation in an area of statewide concern preempts conflicting regulation by a charter city); *City of Watsonville v. State Dep't of Health Svcs.*, 133 Cal. App. 4th 216 (2005) (charter city ballot initiative that effectively prohibited fluoridation of City's water supply was preempted by state law, as fluoridation of public water systems is a statewide concern).

[1] Indeed, circumcision is "one of the most ancient and widely performed operations in human history." *Valentine v. Kaiser Found. Hosps.*, 194 Cal. App. 2d 282, 288 (1961).

B. The Legislative History Of Section 460(b) Confirms That The Legislature Intended To Prevent Cities and Counties From Interfering With The Regulation Of Medical Services, Which Is A Matter Of Statewide Concern.

The legislative history of Section 460(b) provides further confirmation, if any were needed, that the statute was enacted expressly to prevent local governments from interfering with the State's regulation of "any procedure that falls within the professionally recognized scope of practice." That is the precise harm threatened by Article 50.

Section 460(b) was enacted in 2009, in the wake of the Court of Appeal's split decision in *California Veterinary Medical Ass'n v. City of West Hollywood*, 152 Cal. App. 4th 536 (2007).[2] The City of West Hollywood banned the practice of animal declawing unless necessary for a therapeutic purpose. The trial court concluded the anti-declawing ordinance was preempted by the California Veterinary Medical Practice Act (the "VMPA") and by Business and Professions Code Section 460, which then precluded cities and counties from prohibiting certain state-licensed individuals from engaging in their business or profession "or any portion thereof." *Id.* at 541-42. The Court of Appeal, by a 2-1 vote, reversed. The court acknowledged that nontherapeutic declawing of cats "is part of the conventional practice of veterinary medicine" in the United States; indeed, it observed, if it were not, there would be little need for the ordinance in the first place. *Id.* at 550-51. It also rejected the City's argument that the measure was not intended to regulate the practice of veterinary medicine because it prohibits any person, not only licensed veterinarians, from performing such procedures, observing that "it is not only the stated purpose but also the direct, practical effect of the local legislation that determines its validity." *Id.* at 551-52 (citation omitted). However, the majority concluded that while Section 460 precludes local governments from imposing additional licensing requirements or other

[2] By the accompanying Request for Judicial Notice ("RJN"), *amicus curiae* seeks judicial notice of the following portions of the legislative history of SB 762 (Aanestad), the legislation by which Section 460(b) was enacted: S. Comm. on Bus., Professions & Econ. Dev., Analysis of S.B. 762 (2009-2010 Reg. Sess.) as introduced Feb. 27, 2009 (Exhibit A); S. Rules Comm., Office of S. Floor Analyses, 3d reading analysis of S.B. 762 (2009-2010 Reg. Sess.) as amended May 5, 2009 (Exhibit B); Assem. Comm. On Bus. & Professions, Analysis of S.B. 762 (2009-2010 Reg. Sess.) as amended May 5, 2009 (Exhibit C); Assem. Comm. on Bus. & Professions, 3d reading analysis of S.B. 762 (2009-2010 Reg. Sess.) as amended May 5, 2009 (Exhibit D).

qualifications on licensees, it does not preclude local regulation of the manner in which a business is operated or a profession is practiced. *Id.* at 552-55. The dissenting Justice would have found the ordinance preempted by Section 460 on the ground that localities lack the power to regulate declawing because it is a matter of statewide concern. *Id.* at 562-70 (Woods, J., dissenting).[3]

Section 460(b), which was enacted to "clarify" Section 460, effectively overruled the Court of Appeal's reasoning in *California Veterinary Medical Ass'n.*[4] Directly contrary to the ruling in that case, the statute broadly precludes local governments from prohibiting a licensed healing arts professional from "engaging in any act or performing any procedure" that falls within the licensee's professionally recognized scope of practice. Thus, the statutory prohibition would have mandated a different result in *California Veterinary Medical Ass'n*, since the court in that case found that declawing was just such a recognized procedure. As discussed above, circumcision likewise is a common and recognized medical procedure.

The legislative history of Section 460(b) establishes that in enacting Section 460(b), the Legislature sought to accomplish several closely related objectives. *First*, it sought to prevent "patchwork" local regulation that would interfere with statewide licensing and regulation of medicine. RJN, Ex. C at 5. Thus, the Senate Committee bill analysis summarized the bill's sponsors' view as follows:

> [T]he California Legislature, the [Department of Consumer Affairs], and the boards and bureaus overseen by the DCA, should have ultimate authority over both medical scope of practice issues and professional standards for non-medical boards in order to continue to adequately enforce statewide standards of professional practice. Without legislation ensuring uniform statewide governance of licensed professions, professional standards will be dissimilar and discordant.

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[3] Justice Woods observed that the ordinance would make it a crime for any person to perform the procedure, and that "this diversion into the criminal arena, if nothing more, relegates the ordinance to the status of statewide concern." *Id.* at 570. The same is true of Article 50, which makes performing a circumcision a crime punishable by incarceration and/or the imposition of a criminal fine.

[4] The provision of the legislation that grandfathered existing ordinances, Bus. & Prof. Code § 460(b)(1), preserved the validity of the City of West Hollywood ordinance, and therefore did not overrule the court's specific holding in the case.

Id., Ex. A at 4. As the Court of Appeal has expressed the same point, the regulation of the medical profession and of medical treatment "requires statewide uniformity rather than fragmented localization." *Northern Cal. Psychiatric Soc'y*, 178 Cal. App. 3d at 102.

Second, the Legislature recognized that allowing such local regulation would subject the public and professionals alike to conflicting and confusing directions:

> Local jurisdictions that promulgate their own "standards of practice" will produce major public confusion, creating an environment of uncertainty for professionals whose practices and clientele often cross city/county boundary lines, and undermine statewide uniformity in licensed practice standards and harm professional practice and professional service.

RJN, Ex. B at 9. Thus, if local regulation were permitted, a practitioner in one county could be "prohibited from performing a professionally-recognized act that a practitioner in the next county may perform." *Id.* Moreover, such local regulation would result in arbitrary and irrational differences in the availability of treatments and procedures, depending on the particular city or county in which a patient found himself or herself.

The Legislature intended to prevent this balkanization for all health care procedures, including procedures like circumcision that may be legally performed by both licensed professionals and unlicensed practitioners. Thus, the committee reports on SB 762 noted that "alternative health care such as homeopathic medicine" is an area "that could be affected by local government bans on specific practices." *Id.* Ex. A at 4-5, Ex. C at 4-5. Notably, California does not require all alternative health care providers to be licensed.[5] The reports also cited "the ability of pharmacists to dispense . . . emergency contraception" as another example of a practice that could be affected by a local government ban. *Id.* With evolving drugs, new state laws, and changing FDA regulation, emergency contraception is available over the counter in California to adults and teenagers over 16, but teenagers 16 or younger must have a prescription.[6] In passing

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[5] *See, e.g.*, Cal. Bus. & Prof. Code § 2053.6 (listing certain disclosure requirements for unlicensed providers offering a "treatment [that] is alternative or complementary to healing arts services licensed by the state").

[6] U.S. Food and Drug Administration, *Postmarket Drug Safety Information for Patients and Providers Regarding Plan B and Plan B One-Step*, http://www.fda.gov/drugs/drugsafety/ (Continued...)

SB 762, the Legislature intended to prevent cities from outlawing emergency contraception for *anyone*. If a county banned emergency contraception, it would make no sense to conclude that Section 460(b) preempts the ban as to teenagers but not adults, simply because adults do not need a prescription. The statute protects *all* recognized medical procedures from local prohibition.

Third, the Legislature foresaw the possible restrictions on availability of common procedures that could arise if local jurisdictions were free to enact total prohibitions on specific procedures. As examples of professions and acts that could be affected by such local government bans, it listed the following:

> the practice of acupuncture and other alternative health care such as homeopathic medicine; the performance of cosmetic surgery and other elective surgeries that are not medically necessary; [and] the ability of pharmacists to dispense various drugs like emergency contraception, vaccinations, and psychotropic drugs.

Id. Ex. A at 4-5. As a result, the Committee analysis concluded, the legislation was crafted to be comprehensive: "This measure will clarify that it is the intent of the Legislature to preempt local jurisdictions from prohibiting *any* and *all acts* or *any procedure* that would be considered as legitimate under the licensed professions[']] scope of practice." *Id.* at 18-19 (emphasis in original).

The legislative history of 460(b) makes plain that the licensing and oversight of medical professionals is also a statewide concern and should not be interfered with by local governments (much less the voters).[7] *See, e.g., id.* Ex. D at 2. Many circumcisions are performed in hospitals by licensed medical professionals. Section 460(b) clearly applies to them. Many *mohels* are doctors or other licensed medical professionals, such as certified nurse midwives (who are

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postmarketdrugsafetyinformationforpatientsandproviders/ucm109775.htm ("Plan B, Plan B One-Step [emergency contraceptives], and their generic versions remain available by prescription only for women 16 years and younger.")

[7] Section 460(b) reserves local regulation of health care to such limited municipal concerns as "zoning, business licensing, or reasonable health and safety requirements for establishments or businesses of a healing arts professional licensed under Division 2 (commencing with Section 500)." *Id.* § 460(b)(2). Article 50 does not fall within that exception. Instead, it would enact a nearly-complete prohibition on circumcision, a recognized medical procedure—the very subject matter explicitly prohibited by the statute.

licensed by the Nursing Board).[8] Of those *mohels* who are not licensed medical professionals, many obtain some form of religious certification attesting to specialized training and experience performing circumcision.[9]

Even if there is some small number of unlicensed individuals performing circumcisions, that is properly the State's concern, not the voters'. As established by the Senate committee report, "it is critical that *only educated, trained professionals working in conjunction with the Legislature and California professional boards and bureaus*, define policies relative to permissible practice standards, including those standards pertaining to highly complex human . . . medical procedures." *See id.* Ex A at 5 (emphasis added). That the Business & Professions Committee, the Medical Board, and the Nursing Board have all allowed non-M.D. *mohels* certified by rabbinical groups to perform circumcisions indicates that these experts are satisfied with the *mohels'* screening, training, and clinical experience. The sponsors of Article 50 have never suggested that San Francisco has a problem with septic, back alley circumcisions performed by incompetent practitioners. The objective of the initiative is to eliminate *all* infant circumcision within the city limits; it is not an attempt to regulate the licensing of circumcision providers. Regardless, both of these goals are preempted by state law.

All of these considerations support the relief sought here. Allowing San Francisco—alone out of 58 counties and over 450 cities in California—to enact an outright ban on circumcision would interfere with the statewide licensing and regulation of medical practice and professionals; would subject physicians and other professionals whose practices extend outside San Francisco to other parts of the Bay Area to conflicting and confusing regulation; and would require parents of baby boys in San Francisco who wish to have their sons circumcised to travel to another neighboring jurisdiction where circumcision would still be legal. Section 460(b) was enacted to prevent exactly these results.

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[8] *See, e.g.,* Mohel USA, *California Mohels*, http://www.mohelusa.com/California.htm.

[9] *See, e.g.,* Berit Mila Program of Reform Judaism, *Become a Mohel/et*, http://www.beritmila.org/BecomeMohel/index.htm; Brit Yoseph Yitzchak, *Kosher Mohel, Brit Milah (Circumcision) Procedure*, http://www/brityy.org/content.asp?dept=1017&article=466.

II. PREELECTION RELIEF IS APPROPRIATE.

A. The Ordinance Is Clearly Invalid And Therefore May Not Be Submitted To The Voters.

"When a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters." *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 221 (2006) (citations omitted). In particular, a court will prevent an initiative measure from being placed on the ballot upon "a compelling showing that the substantive provisions of the initiative are clearly invalid." *Am. Fed'n of Labor v. Eu*, 36 Cal. 3d 687, 696 n.11 (1984) (citations omitted). As the California Supreme Court has explained,

> The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

Id. at 697.

"It is well accepted that pre-election review of ballot measures is appropriate where the validity of a proposal is in serious question, and where the matter can be resolved as a matter of law before unnecessary expenditures of time and effort have been placed into a futile election campaign. There is no constitutional right to place an invalid initiative on the ballot." *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 389 (2001) (citations omitted). "It serves no legitimate purpose to permit a measure whose invalidity can be determined as a matter of law to remain on the ballot after such a ruling has been made." *Id.* at 403 (citation omitted). As shown above, this is precisely such a case: the proposed ordinance is clearly invalid because it is expressly prohibited by state law.

In such circumstances, courts have not hesitated to strike invalid measures from the ballot. *See, e.g., Bighorn-Desert View Water Agency*, 39 Cal. 4th at 221 (proposed county initiative measure that would have imposed unauthorized voter-approval requirement on all future adjustments of water delivery charges was properly withheld from county ballot); *Comm. of Seven Thousand*, 45 Cal. 3d at 491 (lower courts properly removed from ballot proposed initiative

that was invalid because it conflicted with state law on a matter of statewide concern); *Am. Fed'n of Labor*, 36 Cal. 3d at 716 (issuing writ of mandate commanding Secretary of State not to take any action, including the expenditure of public funds, to place proposed balanced budget initiative on ballot); *City of San Diego*, 86 Cal. App. 4th at 388-89, 402-03 (preelection review and removal of proposed ballpark initiative from ballot was proper because initiative sought to enact measures that were beyond the power of the voters to adopt); *Debottari v. City Council*, 171 Cal. App. 3d 1204, 1210 (1985) (upholding city council's refusal to submit properly certified referendum to voters on the ground that repeal of the challenged ordinances would result in a legally invalid zoning scheme).

City and County of San Francisco v. Patterson, 202 Cal. App. 3d 95 (1988), involved very similar considerations. An initiative would have prohibited the City and County of San Francisco and the San Francisco Unified School District from leasing or selling certain real property without obtaining approval by the electorate. The Superior Court (Pollak, J.) concluded that the electorate lacked the authority to impose any such restrictions on the District, and issued a writ of mandate removing the initiative from the San Francisco ballot "to avoid voter confusion as well as frustration of the initiative process." *Id.* at 98. The Court of Appeal affirmed on the ground, among others, that it was "abundantly clear" that the ordinance concerned public education, a matter of statewide concern, and was therefore preempted by state law and "unmistakably beyond the power of the people to enact." *Id.* at 100-02. Likewise here, it is abundantly clear that Article 50 interferes with the statewide regulation of medical professionals and procedures, matters of statewide concern, and is therefore preempted and should be stricken from the ballot.

B. The Ordinance Cannot Be Saved By Severance.

Even if the Court were to conclude that the proposed ordinance is only partially invalid (to the extent that it applies to licensed physicians and nurses), the Court should still direct that it not be placed on the ballot. In *American Federation of Labor v. Eu*, the California Supreme Court observed that even if it could uphold a portion of the balanced budget initiative involved in that case, "we would still be impelled to exclude the initiative from the ballot." 36 Cal. 3d at 715. The Court explained that the "most important parts of the initiative" would still be invalid, and

that under such circumstances, "to submit the measure to the voters without redrafting would confuse the electorate and mislead many voters into casting their ballot on the basis of provisions which had already been found invalid." *Id.* at 716. Indeed, the Court emphasized that relying upon severability to deny relief after an initiative has been found partially invalid is particularly inappropriate at the preelection stage:

> After the election, no harm ensues if the court upholds a mechanically severable provision of an initiative, even if most of the provisions of the act are invalid. In a preelection opinion, however, it would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that most of its provisions, including those provisions which are most likely to excite the interest and attention of the voters, are invalid.

Id. at 716 n.27; *accord Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1035 (1991) ("While severance of offending portions of a statute is often a permissible approach if the law has been enacted, the policy must be different when a court is faced with a *proposed* law").

Indeed, even where initiative measures have contained express severability clauses, courts have summarily refused to give effect to such clauses to save invalid initiative measures. *See, e.g., id.*, 1 Cal. App. 4th at 1035 ("we reject the suggestion that we apply the initiative's severability provision to save at least some parts of the proposal"); *City and County of San Francisco*, 202 Cal. App. 3d at 105-06 ("We conclude that the existence of the severability clause . . . is of no legal effect") (footnote omitted); *City of Atascadero v. Daly*, 135 Cal. App. 3d 466, 470 (1982) ("Appellants advanced the argument that the presence of the severability clause in the proposed initiative ordinance might save it. Such is not the law"). Here, the proposed initiative measure does not even contain such a clause, and cannot be saved by severance.

C. The Initiative Threatens To Deprive San Francisco Voters Of Fundamental Rights And Holding An Election On This Initiative Would Foment Religious Divisiveness.

1. The Initiative Threatens The Right Of Parents To Direct Their Children's Religious Upbringing And Medical Care.

Few ideas are more entrenched in our constitutional jurisprudence than the notion that

parents, not the government, are presumptively entitled to make decisions about the best interests of their children. As the Supreme Court has observed, "the interests of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). As such, it is well established that the Due Process Clause protects the right of parents to control the upbringing of their children, absent clear unfitness or harm warranting state intervention. *See id.* at 65-66 (collecting cases). This protection extends to parents' decisions about the religious upbringing of children and medical treatment of infants. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979).

The proposed ordinance in this case is irreconcilable with this constitutional vision. Newborn male circumcision is a tenet of the Jewish and Islamic faiths. By criminalizing the circumcision of boys, the proposed ordinance would prevent parents from allowing their children to participate in an essential religious ritual, which is directly contrary to Supreme Court precedent. In *Yoder*, for example, Amish parents successfully challenged a compulsory school attendance statute that conflicted with Amish beliefs. *Yoder,* 406 U.S. at 214. The statute required children to attend formal high school until the age of 16 even though high school attendance is contrary to the Amish religion and way of life. *Id.* at 209. The Supreme Court recognized that the case involved "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Id.* at 232. This fundamental interest, coupled with the parents' free exercise interest, outweighed the state's strong interest in education. *Id.* at 233-34. Similarly here, the proposed ordinance impermissibly infringes upon the fundamental interest of parents to guide the religious future of their children.

Moreover, the proposed ban also interferes with the right of parents to direct the medical treatment of their newborns. As the Supreme Court has recognized, parents have a right and a duty to make decisions about their children's medical care. *Parham*, 442 U.S. at 602-04. This right exists even when the proposed treatment presents some risk (as virtually all medical procedures do). "[S]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer

of the state." *Id.* at 603. Here, there is evidence from an eminent professor of pediatrics that infant male circumcision can reduce the risk of kidney infection, penile cancer, and certain sexually transmitted infections and that adult circumcision does not confer the same protection. Schoen Decl. ¶¶ 3-6, 8. Given benefits such as these, "[a] circumcised newborn boy has a lifetime health advantage compared to one who is uncircumcised," and the proposed ordinance therefore "subjects the child to a higher risk of disease." *Id.* ¶¶ 3, 10. While the proponents of the ordinance may dispute these benefits, parents nevertheless reasonably may choose circumcision for health reasons, just as parents choose other permanent medical procedures for their children for health reasons, such as tonsillectomies or tooth extraction. The proposed ordinance improperly seeks to transfer the power to make the decision about circumcision from parents to the voters. *See Northern Cal. Psychiatric Soc'y*, 178 Cal. App. 3d at 105 ("The Berkeley ordinance is an outright ban on a particular kind of psychiatric treatment, which, although controversial, is recognized by the psychiatric and medical communities as being useful under certain circumstances. Berkeley Ordinance 5504, by criminalizing the use of ECT in all cases, clearly infringes on the free choice of psychiatric patients who voluntarily and competently elect ECT . . . .").

2. The Initiative Threatens The Right Of Mature Teenage Boys To Make Decisions About Their Bodies.

To be sure, parental rights are not absolute, as mature adolescents have rights to make fundamental decisions about their own health care. Here, the initiative also infringes on teenagers' rights to seek circumcision for religious, health or other reasons. By criminalizing the circumcision of boys under the age of 18, the proposed ordinance effectively forbids mature boys from choosing circumcision. This means that a devout teenager who wished to become circumcised could not do so legally, even if his parents consented to the procedure. The Supreme Court has recognized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). In the reproductive rights context, these constitutional protections allow a mature pregnant minor to choose to have an abortion—even without parental consent. *See, e.g., Am. Acad. of Pediatrics v.*

Lungren, 16 Cal. 4th 307 (1997).[10] Similarly here, mature teenage boys should be able to choose circumcision. The proposed ordinance, which bans circumcision of males under the age of 18, with or without parental permission, seeks to take this extremely personal decision away from the mature minor (and his parents) and give it instead to the voters.

3. The Initiative Threatens Religious Freedom.

In addition to impermissibly infringing upon the rights of both parents and mature minors, the proposed ordinance also violates religious liberty. The California Constitution "guarantees" religious freedom: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Cal. Const., Art. I, § 4. Here, the initiative not only tramples the liberty of Jewish and Muslim families to honor a religious duty, it embodies a disturbing hostility to minority faiths. Although the proposed ordinance bans both secular and religious circumcision, there is troubling evidence that the object of the law may in fact be to ban circumcision for religious reasons. Notably, the proposed ordinance expressly excludes an exemption based on religious reasons: "[N]o account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual." Article 50, § 5002(b). By including this language in the proposed ordinance, the drafters implicitly acknowledged what is widely known—that certain religions require circumcision. Despite acknowledging that a religious mandate exists, the drafters nevertheless seek to criminalize the circumcision of baby boys, thereby forbidding people from acting in accordance with their religious beliefs.[11]

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[10] Recognizing that mature minors are entitled to make decisions about their own bodies, California law authorizes minors to consent to all sensitive medical treatment, including pregnancy-related medical services (Cal. Fam. Code § 6925), diagnosis and treatment of sexually transmitted diseases (Cal. Fam. Code § 6926), HIV testing (Cal. Health & Safety Code § 121020), and diagnosis and treatment of drug and alcohol related problems (Cal. Fam. Code § 6929).

[11] Moreover, as Petitioners and the City have shown, the drafter of the proposed ordinance has a blatantly anti-Semitic website and comic book series called "Foreskin Man" that he uses to promote the legislation. *See* Ho Decl. in Supp. of MPA ¶¶ 2-3, Exs. A, B. Such anti-religious propaganda strongly suggests that the proposed ordinance, while nominally directed at all circumcisions, is explicitly targeted at the religious practice of circumcision.

4. The Law Supports Removing An Invalid Initiative From The Ballot, Particularly Where The Campaign Fosters Religious Divisiveness.

Conducting a popular vote on whether to criminalize a minority religious practice fosters sectarian strife. This concern is heightened by the specter of a local initiative—preempted by California law—in which the majority may trample the cultural and religious child rearing customs of minority communities. The courts have emphasized the critical importance of preventing the government, in a pluralistic society, from taking actions that promote religious divisiveness. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), for example, the Supreme Court struck down a school district policy that permitted students to decide by election whether prayer should be offered before high school football games. Noting that the school district's decision to allow the "constitutionally problematic election [was] clearly a choice attributable to the State," the Court criticized the district for "encourag[ing] divisiveness along religious lines . . . ." *Id.* at 311 (internal quotation omitted). Similarly, the City and County of San Francisco will encourage divisiveness along religious lines if it is forced to place this initiative, which is clearly invalid and constitutionally problematic, on the November ballot.

Even outside the sensitive context of religion, California courts recognize the societal harm caused by presenting an invalid initiative to the public, particularly where "the heated rhetoric of an election campaign may open permanent rifts in the community." *Citizens for Responsible Behavior*, 1 Cal. App. 4th at 1023. The people's right to legislate through the initiative process does not include the right to create "emotional community divisions concerning a [legally invalid] measure." *Id.* This consideration is so profound that the Court of Appeal recently relied upon it in rejecting an invalid initiative even before the initiative's proponent had attempted to gather signatures to qualify the initiative for the ballot. *See Widders v. Furchtenicht*, 167 Cal. App. 4th 769, 781 (2008) (observing that the circulation of a petition can invoke the same level of "heated rhetoric" capable of creating "permanent rifts in a community" as a full-blown election campaign).

As discussed above, the proposed ordinance here is clearly invalid. It is categorically preempted by state statute, and it presents serious constitutional deficiencies. These

deficiencies—particularly as they relate to religious beliefs and practices—have sparked a painful debate that risks opening permanent rifts within the community. Individuals within the Jewish and Islamic communities understandably feel targeted by this measure. Even the measure's proponent, in his recent application to redact his contact information from the court file, has asserted that he, too, believes himself to be under attack, and claims to have suffered "repeated threats to [his] personal safety" because others believe he is anti-Semitic. Ex Parte App. of Real Party in Interest 2:14-15. Whatever credence may be given to such claims, the vitriolic debate surrounding this issue threatens to surpass the level of "heated rhetoric" that *Citizens for Responsible Behavior* and *Widders* cautioned may create permanent rifts within the community. Given that the ordinance is clearly invalid, there is no good reason to continue subjecting the San Francisco community to such a divisive debate by allowing the initiative to be placed on the ballot.

CONCLUSION

For the foregoing reasons, the Court should issue the requested writ of mandate to restrain Respondents City and County of San Francisco and its Director of Elections from placing the proposed ordinance on San Francisco's November 8, 2011 ballot.

Dated: July 15, 2011

Respectfully submitted,

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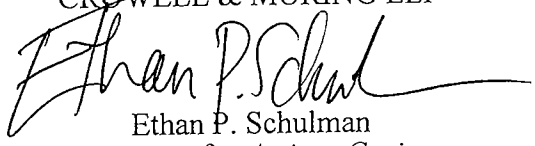

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