No. 13-107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

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

Brief *Amicus Curiae* of
The Becket Fund for Religious Liberty
in support of Plaintiffs-Appellants and Reversal

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Becket Fund for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund has frequently represented religious people and institutions in cases involving the Religion Clauses. For example, The Becket Fund represented the successful Petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012), the first ministerial exception case to reach the Supreme Court.

The Becket Fund is concerned that the New York City Department of Health and Mental Hygiene's targeted regulation of a singularly Orthodox Jewish ritual has not received the constitutional scrutiny that the First Amendment requires. Close judicial scrutiny is particularly

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

necessary here because the City's targeted regulation comes in the context of a wide variety of government-sanctioned efforts in the New York metropolitan area to inhibit the practice of Orthodox Judaism. Especially against such a backdrop of religious discrimination, laws that target religious minorities must be tested to ensure that they are narrowly tailored to a compelling government interest.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

On the surface, this might appear to be a difficult appeal. The interests asserted are indisputably weighty. On one side there are the Plaintiffs: Orthodox Jews, especially Satmar, Bobov, Lubavitch, and other Hasidic groups, who seek to preserve a private, legal, consensual, millennia-old, and normally safe religious ritual from government interference. On the other side is the City of New York, arguing that it is trying to protect newborn babies from contracting a dangerous disease. These are among the most powerful interests known to constitutional law.[2]

But scratch below the surface, and this appeal becomes much easier. The regulation in question was, the City concedes, specifically targeted at Orthodox Jews like Plaintiffs and specifically at the religious ritual of *metzitzah b'peh*. The regulation stands alone; it is not part of a broader or more general effort to protect infants from consensual practices that carry similar risks or even greater risks of disease. Moreover, the regulation was put forward in a context of hostility towards Orthodox Jews. Thus although the interests in question are difficult and weighty

[2] *Amicus* expresses no opinion here on whether the regulation withstands strict scrutiny, only that strict scrutiny must be applied.

ones to be balanced, the proper *method* of balancing under the Free Exercise Clause in this case is strict scrutiny, not the rational basis review the district court erroneously applied. *Central Rabbinical Congress of the U.S. & Can. v. New York City Dep't of Health & Mental Hygiene*, 2013 WL 126399 at *78 (S.D.N.Y. Jan. 10, 2013) (applying rational basis scrutiny).

Indeed, the City's concession and the district court's finding that the City's regulation targets only a religious ritual of Orthodox Jews for disfavor is dispositive. That concession alone makes this appeal easier than *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the defendant city did not concede targeting. Moreover, the offensive ordinance in *Lukumi* burdened "almost" no one other than the targeted minority religion, *id.* at 536-537; here, the City's ordinance concededly burdens *only* the targeted minority religion.

Although the City's concession is enough to decide the appeal, there is another reason strict scrutiny is warranted. With the increase in the Orthodox Jewish population in the New York City metropolitan area, Orthodox Jews increasingly face laws and municipal regulations that inhibit their religious practices—many of which courts have found

deliberately designed to discourage the spread of Orthodox Jewish communities to integrated areas outside their traditional neighborhoods. That pattern of anti-Orthodox hostility is the telltale smoke alerting courts to strictly scrutinize the City's regulation of a religious ritual for anti-religious "fire." That is especially so where, as here, the judicial branch has a duty to conduct an "independent review" of the "constitutional facts" under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 519 n.2 (1984).

Orthodox Judaism follows an internal rule of decision that does not yield easily to contrary social norms or external regulation, leading many people—including some government officials—to treat Orthodox Jews as hostile outsiders to American society. But what may to some eyes seem a stubborn adherence to inscrutable rules is in reality a deep commitment to following what Orthodox Jews believe to be Divine command. They have persevered in that commitment despite some of the worst religious persecution in human history. Given both that history and the balance struck by the First Amendment, using government power to force Orthodox Jews to contravene their beliefs

should be a last step after the proper level of judicial review has been applied.

ARGUMENT

I. The regulation triggers strict scrutiny because it targets a particular religious practice, and only that practice.

The Free Exercise Clause, as applied to the states via the Fourteenth Amendment, provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. A law that burdens religious exercise violates the Free Exercise Clause if it is either "not neutral" or "not of general application" and the government cannot satisfy "strict scrutiny." *Lukumi*, 508 U.S. at 546; *see also Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). This form of analysis applies to both religious individuals and religious groups.

The Supreme Court's decision in *Lukumi* outlines multiple ways in which laws may fail the tests of neutrality and general applicability, and thereby trigger strict scrutiny. 508 U.S. at 525-46. *See also Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 967-990 (W.D. Wash. 2012) (comprehensively discussing the multiple ways that a regulation may violate the Free Exercise Clause under *Lukumi*).

Under *Lukumi*, one of the ways that a law is not neutral and thus triggers strict scrutiny is if it "targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534, 546. This is measured by whether "the effect of [the] law in its real operation" accomplishes a "religious gerrymander." *Id.* at 535 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

Importantly, to make out a religious targeting or "religious gerrymander" claim, the plaintiff does not have to provide direct proof of animus or discriminatory intent. Instead the "effect of the law in its real operation" is an objective test, based on the contours of the regulation rather than the subjective motives of the regulators. *Lukumi*, 508 U.S. at 535. Under that objective test, there are three main factors that demonstrate that the regulation is a clear case of religious targeting.

First, "the burden of the ordinance, in practical terms, falls on [religious objectors] but almost no others." *Id.* at 536. In *Lukumi*, the burden fell on "almost" no one but the disfavored religious minority. *Id.* But here, unlike in *Lukumi*, the practical burden of the City's regulation falls exclusively on Orthodox Jews. *Central Rabbinical*

Congress, 2013 WL 126399 at *1-2. No one else in the largest and most diverse municipality in the country—a municipality that is larger than thirty-nine states, *see American Atheists, Inc. v. City of Detroit*, 567 F.3d 278, 286 (6th Cir. 2009)—feels the slightest impact from the regulation. Just as "[a] tax on yarmulkes is a tax on Jews," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), a regulation of "direct oral suction as a part of circumcision" is a regulation imposed on Orthodox Jews alone—and, indeed, only on some sects within Orthodox Jewry. *See also Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1298 n.10 (7th Cir. 1996) ("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 exclusive targeting of *metzitzah b'peh* makes this an even easier case than *Lukumi*, where the Court was unanimous and found that the challenged ordinances fell "well below" the minimum constitutional standard. 508 U.S. at 543.

Second, the City's regulation is a far clearer candidate for strict scrutiny than the ordinance in *Lukumi* because of the City's admission from the outset that it was targeting Orthodox Jews. *Central*

Rabbinical Congress, 2013 WL 126399 at *3. In *Lukumi*, the defendant city refused to make such a concession but the Supreme Court found targeting anyway. *Lukumi*, 508 U.S. at 537 (noting that, to the contrary, the city claimed that its "ordinance is the epitome of a neutral prohibition"). Here, the City specifically admitted below that "the only presently known conduct" that implicates the regulation is "this particular religious ritual," *Central Rabbinical Congress*, 2013 WL 126399 at *2, and the ritual is what "prompted" the regulation. Dkt. 34, at 6 & 9 n.8. Hence the district court's finding that *metzitzah b'peh* is "the only activity the [City] expected the regulation to realistically apply to." *Central Rabbinical Congress*, 2013 WL 126399 at *1.

Third, the history leading up to the regulation's enactment further shows that the City was targeting Orthodox Jews with the regulation. Starting in 2005, the City met with Jewish leaders to discourage the ritual and released "An Open Letter to the Jewish Community," which stated that the ritual should not be performed and that parents should learn about its risks. *See* Letter from New York Department of Health and Mental Hygiene to the Jewish Community (Dec. 13, 2005), *available at* http://www.nyc.gov/html/doh/downloads/pdf/std/std-bris-

commishletter.pdf. The City also created a pamphlet entitled "Before the Bris" that, in both English and Yiddish, provided the City's view on the ritual. *Id.*; *see also Central Rabbinical Congress*, 2013 WL 126399 at *6. New versions of the pamphlet were created in 2010 and again in 2012, and they were distributed to hospitals throughout New York. *Id.* at *7-*8. Because the City felt that its efforts were not sufficiently inhibiting the observance of *metzitzah b'peh*, it stepped up that effort by passing the regulation (and taking steps to ensure distribution of the City's brochure by hospitals). The regulation took the same message that the City had been expressing—namely, that *metzitzah b'peh* is dangerous and should not be performed—and made the Orthodox Jewish mohels who carry out the ritual legally responsible for conveying the City's message to the parents.

And just before the Board of Health voted unanimously to enact the regulation, Commissioner Farley, the Chair of the Board of Health, conceded that it would affect a religious "practice that has been taking place for hundreds, if not thousands of years." *Id.* at *12.

Given these facts, the district court concluded that "the legislative history of section 181.21 focuses explicitly on [*metzitzah b'peh*]." *Id.* at

*26. More accurately, the legislative history focuses *entirely* on *metzitzah b'peh*.

These factors show that the sole intended target of the City's regulation is an Orthodox Jewish religious ritual, and there is no question that the regulation's sole purpose is to discourage that ritual's observance. And as Appellants note, the City has undertaken no efforts to inhibit other common practices with similar or more serious health risks. App. Br. 41-43. Strict scrutiny is therefore required. [3]

II. The regulation also triggers strict scrutiny because of its legislative history and the historical context of hostility towards Orthodox Jews.

Amicus cannot see into the hearts of men and thus does not know the subjective purposes of those who advocated this regulation, and the district court did not conduct fact-finding regarding secular purpose. But this Court should be aware, as City politicians are aware, of the context in which regulations of this sort arise. Indeed, this Court has a

[3] There is at least one way that this case is a closer question than *Lukumi*: the City's effort to stop *metzitzah b'peh* does not amount to the complete ban imposed in *Lukumi*. But that difference does not go to whether this Court should *impose* strict scrutiny, it goes to whether the regulation will *survive* strict scrutiny because it used allegedly less restrictive means.

duty to conduct an "independent review" of the record to ensure the robust protection of First Amendment interests. *Bose Corp*., 466 U.S. at 499.

In *Lukumi*, Justice Kennedy, joined by one other Justice, said that determining whether a law or regulation is intended to discriminate requires consideration of the language of the law, its legislative history, and the broader historical context: "Relevant evidence includes . . . 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." *Lukumi*, 508 U.S. at 540. Although this part of the opinion garnered only two votes, elsewhere in the opinion the unanimous Court did look to legislative history, invalidating one of the four challenged ordinances solely because it was "passed the same day" and "was enacted, as were the three others, in direct response to the opening of the [plaintiff] Church." *Lukumi*, 508 U.S. at 540. In its next Free Exercise case, *Locke v. Davey*, 540 U.S. 712 (2004), the Court examined both "*the history* [and] text" of a law to probe for "anything that suggests animus toward

religion.") *Id.* at 723-25 (emphasis added). In Establishment Clause cases, it is commonplace to examine "legislative history" to see whether there was a "secular purpose" apart from *advancing* religion, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 863 (2005); legislative history evidence should be equally relevant when it indicates the equally illicit purpose of *inhibiting* religion.

Although proof of anti-religious animus is not necessary to finding a free exercise violation, courts following *Lukumi* have treated animus as a relevant line of inquiry. *See, e.g.*, *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court must examine "the 'historical background of the decision under challenge, the specific series of events leading to the enactment . . . and the [act's] legislative or administrative history'") (quoting *Lukumi*); *Wirzburger v. Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005) (considering, on free exercise challenge, "evidence of animus against Catholics in Massachusetts in 1855 when the [law] was passed," "the wide margin by which the [law] passed," and the convention's "significant Catholic representation"); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) ("the law's legislative history" is relevant); *Stormans*,

854 F. Supp. 2d at 985 (stating that, in Free Exercise challenges, "considering the historical background of a law is the best approach"). *See Shrum v. City of Coweta*, 449 F.3d 1132, 1138 (10th Cir. 2006) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." (citations omitted)).

The evidence in this appeal shows that the City's regulation was intended to affect *only* Orthodox Jews, and the broader historical context indicates that this targeting was not benign.

A. The history of the regulation itself demonstrates discriminatory intent.

As established above, the history of the regulation's adoption shows that the City was motivated by an intent to target religious behavior. There is no question that the history of the regulation—seven years of concerted efforts that focused entirely on stopping a single Orthodox Jewish ritual—evinced a specific intent to suppress Orthodox Jewish religious practices and literally no others.

B. The historical context of the regulation—widespread governmental hostility towards Orthodox Jews—also demonstrates discriminatory intent.

Evidence of discriminatory intent goes beyond the history of the specific law in question. More broadly, it includes "consistent pattern[s] of official . . . discrimination," *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), and the broader societal context of discrimination. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 369 (1978) (broadly considering both government discrimination and societal discrimination in determining the history of discrimination against a minority); *see also Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 363 (5th Cir. 2011) (considering "any history of discrimination by the decisionmaking body").

Thus, in *Goosby v. Town Board*, 180 F.3d 476 (2d Cir. 1999), this Court evaluated voting-related discrimination by considering a broad range of factors, including the history of relevant discrimination by the State and its political subdivisions, the racial polarization within the State and its subdivisions, the use of racial appeals by public officials to obtain election, and effects of discrimination on the minority group. *See*

also League of United Latin Am. Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 738 (5th Cir. 1993) (allowing plaintiffs to prove discrimination by, *inter alia*, showing a "history of official discrimination . . . and other features of the current or past racial climate of the community in question").

Here, that broader historical and societal context shows a pattern of targeted regulations against Orthodox Jews. Indeed, targeted government measures against Orthodox Jews are becoming depressingly regular features within the City and surrounding municipalities. As an initial matter, this may stem from an antagonism on the part of the secular leadership of the City toward public manifestations of religion in general, epitomized by the City's hard-fought eighteen-year battle to single out and ban "religious worship services" from its public school facilities. *See Bronx Household of Faith v. Bd. of Educ. of New York*, 876 F. Supp. 2d 419 (S.D.N.Y. 2012), on appeal as No. 12-2730 (2d Cir., argued Nov. 19, 2012).

But Orthodox Judaism is perhaps the religion that suffers the most hostility. In fact, this Court has previously held that several municipalities in New York were incorporated out of sheer "animosity

toward Orthodox Jews as a group." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (quoting leader of the incorporation movement as stating "the reason [for] forming this village is to keep people like you [i.e., Orthodox Jews] out of this neighborhood"). That animosity appears to have worsened as the Orthodox Jewish population has grown dramatically in the City and surrounding areas. *See*, *e.g.*, Sharon Otterman, *Jewish Population Is Up in the New York Region*, N.Y. Times, Jan. 17, 2013, *available at* http://www.nytimes.com/2013/01/18/nyregion/reversing-past-trend-new-yorks-jewish-population-rises.html (noting the increase in the City's Jewish population as overwhelmingly the result of growth by "deeply Orthodox Jewish neighborhoods"); *see also* Steven M. Cohen, Jacob B. Ukeles, and Ron Miller, Jewish Community Study of New York: 2011 Comprehensive Report 123 (2011), *available at* http://www.ujafedny.org/get/494344/ ("61% of Jewish children in the eight-county area live in Orthodox households").

Recent examples of this hostility are lawsuits recently filed by the City's Commission on Human Rights against seven Orthodox Jewish businesses in Brooklyn. The lawsuits claim gender discrimination

because these businesses post signs that are a variation on the commercially common "no shoes, no shirt, no service" sign. *See* Michele Chabin, *New York City sues Orthodox shops over dress codes*, Religion News Service, Feb. 28, 2013, *available at* http://www.religionnews.com/2013/02/28/new-york-city-sues-orthodox-shops-over-dress-codes/. The signs read "No shorts, no barefoot [sic], no sleeveless, no low cut neckline allowed in this store." *Id.* Not only are the signs patently gender-neutral, the City's Commission on Human Rights turns a blind eye to upscale clubs and private schools that actually do have gender-specific attire requirements. *Id.* (quoting Marc Stern, General Counsel of the American Jewish Committee). Under the City's selective approach, dress codes are illegal only if they are motivated by Orthodox Jewish beliefs.

One of the most common manifestations of hostility towards Orthodox Jews is abuse of land use regulations. It is a well-known fact that Orthodox Jews may not drive on the Sabbath and that they therefore must reside within walking distance of a synagogue. Thus if a community wishes to prevent Orthodox Jews from moving into the neighborhood, it will manipulate land use regulations to forbid the

synagogue from being opened in the neighborhood. A number of cases with this fact pattern—neighbor-driven attacks on new Orthodox Jewish land use—have arisen in the New York City metropolitan area. *See*, *e.g.*, *United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel*, 899 N.Y.S.2d 63 (N.Y. Sup. Ct. 2009) (Town mayor illegally prevented issuance of certificate of occupancy for Orthodox synagogue on the basis that it was a "community center" rather than a house of worship and thus subject to additional zoning requirements); *Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989) (neighborhood association sought to keep Orthodox synagogue out of neighborhood); *Landau v. Twp. of Teaneck*, 555 A.2d 1195 (N.J. Super. Ct. Law Div. 1989) (neighbors sought to invalidate sale of land to Orthodox synagogue).

An example of particularly virulent hostility towards Orthodox Jews is evident in *Congregation Rabbinical College of Tartikov v. Village of Pomona*, --- F. Supp. 2d ---, 2013 WL 66473 (S.D.N.Y. 2013). In that case, which is still pending, Orthodox Jewish plaintiffs have submitted copious evidence showing that the defendant municipality enacted anti-Orthodox Jewish zoning laws because local citizens found Orthodox

Jewish communities undesirable. *Tartikov*, No. 7:07-cv-06304 (S.D.N.Y.), Docket No. 28-2 at ¶¶ 150-155 (quoting a *New York Times* article where a citizen said that hearing about Orthodox Jewish communities "literally" made her "nauseous" and want to "throw up"); ¶ 176 (describing "Preserve Ramapo," a citizen group that wants to use Ramapo's zoning laws to stop "population growth in Ramapo's Hassidic communities"). Local officials had successfully run political campaigns based in part on promises that they would prevent the growth of Orthodox Jewish communities. *Id.* at ¶¶ 178-180. And the officials' constituencies were equally unenamored of Orthodox Jews. Just to list some of the more printable insults, citizens opposing Orthodox Jewish communities have referred to them in newspapers as "tribal ghetto[s]" and to Orthodox Jews as "fake people" and "blood sucking self centered leeches" who create Jonestown-like cults where they drink "spiked kool aid . . . kosher of course." *Id.* at ¶¶ 187-190.

In another case, *Westchester Day School v. Village of Mamaroneck*, 417 F. Supp. 2d 477, 485 (S.D.N.Y. 2006), affirmed, 504 F.3d 338 (2d Cir. 2007), an Orthodox Jewish day school successfully sued under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42

U.S.C. § 2000cc(a)(1), to challenge a zoning law that prevented the renovation of its school buildings. The district court found that the Orthodox school's permit "[a]pplication apparently was denied not because it failed to comply with the Village Code or otherwise would have an adverse impact on public health, safety or welfare, but rather upon undue deference to the opposition of a small but politically well-connected group of neighbors." 417 F. Supp. 2d at 539.

A variation on the attempt to zone Orthodox Jews out by zoning out their synagogues concerns *eruvim*, boundary lines typically consisting of wire, string, or plastic strips that Orthodox Jews use to mark a continuous boundary around their communities. An *eruv* sets a boundary inside which Orthodox Jews may engage in certain activities on the Sabbath—for example carrying objects or pushing a stroller—without breaking religious laws. They are an unobtrusive way to relieve Orthodox Jewish families from being confined to their homes for the duration of the Sabbath. But some people do not like living near *eruvim*—comparing them to "ghetto[s]" and an unwelcome "ever-present symbol" of the Orthodox Jews' religious presence. *See* Michael A. Helfand, *An* eruv *in the Hamptons?*, L.A. Times, Aug. 15, 2012,

available at http://articles.latimes.com/2012/aug/15/opinion/la-oe-0815-helfand-eruv-westhampton-sikh-20120815.

One of the most important *eruv* cases from the New York area was *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003). In that case, the Borough of Tenafly refused to allow demarcation of an *eruv* on telephone poles in the borough. This decision came after Tenafly residents "expressed vehement objections prompted by their fear that an *eruv* would encourage Orthodox Jews to move to Tenafly." 309 F.3d at 153. One Council member at a public meeting noted "a concern that the Orthodoxy would take over." *Id.* (quotation omitted). Another "voiced his 'serious concern' that 'Ultra–Orthodox' Jews might 'stone [ ] cars that drive down the streets on the Sabbath.'" *Id.* (quoting district court opinion; alteration in original). The Borough invoked a municipal ordinance that prohibited affixing items to telephone poles to require removal of the *eruv*; however, the Borough did not apply this ordinance to other items such as house numbers, which it had long allowed to be affixed to the poles. *Id.* at 167. The Third Circuit held that the

Borough's discriminatory approach violated the Free Exercise Clause. *Id.* at 168.

Some of the most contentious of these disputes have taken place in Westhampton Beach, New York, where those opposed to an Orthodox Jewish presence are attempting to use municipal regulatory authority to prevent an *eruv* from being erected. *See East End Eruv Ass'n v. Village of Westhampton Beach*, No. 11-cv-00213 (E.D.N.Y.). Indeed, in their television appearances opponents of the *eruv* have been open—even absurdly so—about their goal of keeping Orthodox Jews out of their community. *See*, *e.g.*, John Stewart, *The Thin Jew Line*, The Daily Show, Mar. 23, 2011, *available at* http://www.thedailyshow.com/watch/wed-march-23-2011/the-thin-jew-line. Residents of Westhampton Beach "fear the prospect of more Orthodox Jews moving in if the eruv is constructed" and have stated "that the eruv 'will make more Orthodox people come in, and it's not right to the history of these towns.' 'Why are they forcing the community to change?'" Sharon Otterman, *A Ritual Jewish Boundary Stirs Real Town Divisions*, N.Y. Times, Feb. 4, 2013, *available at* http://www.nytimes.com/2013/02/05/nyregion/in-westhampton-beach-a-

ritual-jewish-boundary-stirs-real-town-divisions.html; *see also ACLU v. City of Long Branch*, 670 F.Supp. 1293 (D.N.J. 1987) (rejecting residents' Establishment Clause challenge to the erection of an *eruv*); *Smith v. Cmty. Bd. No. 14*, 491 N.Y.S.2d 584 (N.Y. Sup. Ct. 1985) (same).

Beyond the land-use context, Orthodox Jews consistently face a variety of other types of hostility and discrimination. For instance, in *Incantalupo v. Lawrence Union Free School District No. 15*, 652 F. Supp. 2d 314 (E.D.N.Y. 2009), the court rejected a lawsuit claiming that a school board was unduly influenced by its Orthodox Jewish members. The court took plaintiffs to task for making allegations in the complaint about Orthodox Jews' different "grooming habits" and "wardrobes," "large nuclear families," and "political agendas," all offered in the course of insinuating that Orthodox Jewish members of the school board were wrongfully diverting money away from public schools for the benefit of Jewish private schools. *Id.* at 318 n.3.

Nor is the problem of anti-Orthodox hostility limited to the New York metropolitan area; similar conflicts continue to occur across the country.[4]

* * *

Our point in putting these cases before the Court is not to assert that every claim of discrimination by an Orthodox Jewish plaintiff is valid. It is instead to point out what is common sense: deep hostility towards Orthodox Jews is present in American society in general and in New York in particular. And one of the methods used by municipalities to prevent an influx of Orthodox Jewish residents is to make it impossible for them to practice their religion in that jurisdiction. The existence of such endemic hostility does not mean that Plaintiffs automatically

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[4] *See*, *e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214 (11th Cir. 2004) (town violated civil rights laws by applying zoning ordinances to allow synagogues only out of walking distance for most of the Orthodox Jewish population); *Chabad Lubavitch v. Borough of Litchfield*, 796 F. Supp. 2d 333 (D. Conn. 2011) (Orthodox synagogue land use dispute); *Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280 (S.D. Fla. 2008) (city violated civil rights laws by using zoning ordinances to prevent Orthodox Jewish Outreach Center from opening); *Toler v. Leopold,* 2008 WL 926533 (E.D. Mo. 2008) (prison violated civil rights laws by refusing to provide kosher food to Orthodox Jewish inmate); *Murphy v. Carroll*, 202 F. Supp. 2d 421 (D. Md. 2002) (prison officials forced Orthodox Jewish inmate to clean his cell on Saturday).

prevail under strict scrutiny—it is a balancing test—but it does mean that strict scrutiny must be applied to the targeted regulation in this appeal.

CONCLUSION

Amicus respectfully urges the Court to evaluate the regulation under strict scrutiny on appeal or remand the case with instructions for the district court to do so.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 4,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Eric Rassbach
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 15, 2013.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

April 15, 2013

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