

I. INTRODUCTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-1, Petitioner UNITED POULTRY CONCERNS hereby respectfully moves this Court for a preliminary injunction reinstating the temporary restraining order previously issued by the District Court to prevent Respondents from violating California Penal Code § 597(a) by intentionally killing and discarding hundreds of chickens in their parking lot next month in a spectacle of mass cruelty.

Respondents are in the business of providing, killing and disposing of chickens used by individuals to perform a controversial version of a religious ritual known as “Kapparat,” in exchange for a fee or donation. Petitioner seeks an injunction to prohibit Respondents from accepting money in exchange for killing and discarding chickens rather than using them for food, in violation of California Penal Code §597(a). A TRO issued by the District Court last year enjoined Respondents from accepting money in exchange for killing and discarding chickens for reasons not permitted under California law. (Ex. 18, Dkt. #18.) Accordingly, in 2016 members of Chabad of Irvine performed the ritual at a live market where the animals could be lawfully used for food. (Ex. 16, Dkt. #94-15, Transcript of Deposition of Respondent Alter Tenenbaum, attached as Ex. I to Declaration of Bryan Pease, at page 67 of transcript, page 187 of exhibits.) Petitioner seeks to maintain this same status quo until this appeal can be fully heard.

The District Court found that it had diversity jurisdiction and that Petitioner had Article III standing and statutory standing under California's Unfair Competition Law ("UCL") to seek an injunction to require Respondents to comply with California Penal Code §597(a) and Penal Code §599c, which in conjunction prohibit killing chickens to be discarded rather than using them for food. (Order Granting Defendant's Motion to Dismiss, Ex. 1, Dkt. #110.) The sole basis for dismissal was the Court's finding that "Defendant Chabad of Irvine does not participate nor compete as a business in the commercial market by performing a religious atonement ritual that involves donations." (*Ibid.*)

However, Respondents do not accept money or donations in exchange for performing a religious ritual. Rather, Respondents supply the chickens to individual participants who each go off on their own to perform the ritual somewhere in Respondents' parking lot by reading a prayer while circling a chicken above their heads and then bring the chicken back to Respondents to kill and discard. The religious ritual is performed individually by these non-parties who pay the fee to Respondents, and not by Respondents, who collect the fee to provide, kill and discard the chickens. This is made clear in the Deposition of Alter Tenenbaum, attached as Exhibit I to the Declaration of Bryan Pease filed in opposition to Defendants' motion to dismiss, on pages 21-30. (Ex. 16, Dkt. #94-15.) Thus, the

District Court's ruling that accepting a donation to perform a religious ritual is irrelevant to the relief requested, and such relief should be granted.

The District Court previously granted a temporary restraining order in this case that prohibited Defendants from killing and discarding chickens for a purpose not permitted by law. (Ex. 18, Dkt. #18.) California Penal Code section 597(a) prohibits intentionally and maliciously killing any animal in California unless there is a legal exception. Penal Code section 7(4) defines "maliciously" as "intent to do a wrongful act, established either by proof or presumption of law." Penal Code section 599c provides certain exceptions, such as killing animals used for food. However, there is no exception for killing and discarding animals for a religious ritual when the animals are not being used for food.

Accordingly, Plaintiff respectfully requests reinstatement of the District Court's temporary restraining order as a preliminary injunction until the appeal can be heard on the merits.

II. ARGUMENT

The moving party bears the burden of demonstrating that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." (*Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).) Although a plaintiff must satisfy all four of the requirements set forth in

Winter, this Circuit employs a sliding scale whereby “the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” (*Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).) Accordingly, if Petitioner can demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction may issue so long as there are at least serious questions going to the merits and the balance of hardships tips sharply in Petitioner’s favor. (*Ibid.*)

As already determined by the District Court, the Court has diversity jurisdiction and Plaintiff has standing under California’s Unfair Competition Law (“UCL”), under *Animal Legal Def. Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270 (“*Napa Partners*”) based on diversion of organizational resources to combat Defendant’s illegal conduct. (See also *Animal Legal Defense Fund v. Great Bull Run* (June 6, 2014), Case No. 14-cv001171-MEJ, 2014 WL 2568685, 2014 U.S. Dist. LEXIS 78367.)

Accordingly, if this Motion raises serious questions going to the merits of Petitioner’s argument on appeal that Respondents are engaged in a business practice by accepting money in exchange for providing, killing and discarding chickens for individuals who use the chickens to perform a religious ritual, and the other *Winter* elements are satisfied, a preliminary injunction should issue to preserve the status quo pending final determination of the appeal.

A. Likelihood of success on the merits

1. Defendants are engaged in a business practice

The District Court determined that accepting donations in connection with performing a religious ritual should not be considered a business practice within the meaning of the UCL. However, setting this question aside for purposes of this Motion, the record is clear that Respondents *do not* perform the religious ritual at issue. Rather, the participants who pay Respondents a fee or donation to provide them with a chicken perform the ritual themselves, and then return the chicken to be killed and disposed of. Thus, Respondents are engaged in the business practice of selling, killing and disposing of chickens, *not* in providing a religious ritual.

While Respondent's motion to dismiss was granted prior to any discovery and without any evidentiary hearing, the fact that Respondents only provide, kill and discard the chickens and do not perform the religious ritual is made clear in a deposition of Respondent Alter Tenenbaum from a separate state court case, which was made part of the record in the present case, attached as Exhibit I to the Declaration of Bryan Pease filed in opposition to Defendants' motion to dismiss. (Ex. 16, Dkt. #94-15.) The pertinent sections read as follows:

Pages 21-23 (pages 175-176 of exhibits):

23· · · ·Q· · If they give a donation at the door, what's the
24· ·process by which you record that donation?· In other

25 · words, does the person make the donation and get a slip
·1 · of paper and give it to someone else? Does anything
·2 · like that occur?

·3 · · · A · The process that we used in 2015 was **when you**
·4 · **made your donation, you get a little ticket, and you**
·5 · **simply show that and get your chicken.**

·6 · · · Q · Okay.

·7 · · · · · So you give the donation to one person who is
·8 · with the Chabad of Irvine and then you get your ticket
·9 · and provide that to another individual who is then
10 · performing the ceremony? Is that -- is that how it
11 · works?

12 · · · A · No. **The second individual is just standing**
13 · **there and handing you the chicken.**

14 · · · Q · And then what does the individual do with the
15 · chicken at that point?

16 · · · A · There's a prayer that is recited while holding
17 · the chicken.

18 · · · Q · Who recites the prayer?

19 · · · A · The individual holding the chicken.

20 · · · Q · Who is listening to the prayer?

21 · · · A · Hopefully the Good Lord.

22 · · · Q · Any particular individuals?

23 · · · A · Whoever is standing around them.

24 · · · Q · Is there a Rabbi or other spiritual leader who
25 · is overseeing this? In other words -- I'm just trying

·1· ·to understand how the process works.
·2· · **The person pays the -- makes the donation, gets**
·3· · **a slip of paper, they're handed a chicken, and then they**
·4· · **walk -- where do they go? Do they walk somewhere with**
·5· · **the chicken?**
·6· · . . . A · **They walk to wherever they want, hold the**
·7· · **chicken and recite the prayer.**
·8· · . . . Q · Okay. · And then what happens after that?
·9· · . . . A · After that the chicken is given to a shochet,
10· · or the ritual slaughterer.
11· · . . . Q · So the individual who was holding the chicken
12· · and saying the prayer then hands the chicken to the
13· · ritual slaughterer?
14· · . . . A · Or to someone in between. · I can't say every
15· · single person gives it directly. · But it's passed back
16· · to the shochet, ritual slaughterer.

Pages 29-30 (pages 177-178 of exhibits):

·1· · In 2014 did the same procedure happen
·2· · where a person would make a donation and then receive a
·3· · slip of paper?
·4· · . . . A · Yes.
·5· · . . . Q · And they would hand that slip of paper to
·6· · someone who would provide a chicken to them?
·7· · . . . A · Yes.
·8· · . . . Q · **Would the person -- would the participant then**
·9· · **in some cases walk around having conversations while**

10 · **holding the chicken?**

11 · · · · A · **We don't watch the people what they're doing.**

12 · **I don't know.**

13 · · · · Q · You just hand the person a chicken, and then at

14 · some point -- did they -- did they -- in 2014 did they

15 · say the prayer in the parking lot, or did they say the

16 · prayer in the yard?

17 · · · · A · Either/or.

18 · · · · Q · So, from your perspective, the person pays the

19 · donation, gets a slip of paper, then hands you or

20 · someone else a slip of paper. You or the other person

21 · handing the chickens would then hand a chicken to the

22 · participant, and then that participant would go

23 · wherever.

24 · · · · · At some point they would end up -- they could

25 · go say their prayer in the parking lot or in the yard,

· or wherever they wanted to, and then they would hand the

· 2 · chicken to the slaughterer? Is that --

· 3 · · · · A · Yes.

· 4 · · · · Q · -- pretty much how it worked?

· 5 · · · · A · Shochet.

· 6 · · · · · MR. KAUFMAN: Slaughterer.

· 7 · · · · · THE WITNESS: Shochet.

· 8 · BY MR. PEASE:

· 9 · · · · Q · Okay.

10 · · · · · MR. KAUFMAN: Belated objection. That was a

- 11. long compound question.
- 12. But to the extent that every statement that
- 13. Mr. Pease asked is correct, is that your -- still your
- 14. answer?
- 15. THE WITNESS: Yes.

As the above testimony above shows, Respondents accept donations for providing, killing and discarding the chickens, not for performing the ritual, which is performed by the non-party participants who make the donation themselves. Thus the District Court's ruling that accepting donations to perform a religious ritual is not a business practice within the meaning of the UCL is irrelevant.

2. Respondents' Behavior is Malicious under Penal Code § 7(4) and Therefore Violates Penal Code § 597(a)

Penal Code Section 597(a) has been on the books since 1872, making it a crime to maliciously kill any animal in California. Penal Code section 7(4), defining "maliciously" as "intent to do a wrongful act, established either by proof or presumption of law," also became law in 1872.

In 1901, William Mauch was convicted of cruelty to animals under Penal Code section 597, and the complaint charged that he had acted "willfully and unlawfully" but did not specify he acted maliciously. (*Ex parte Mauch* (1901) 134 Cal. 500, 500.) Ruling on a writ of habeas corpus, the Supreme Court of California

held his imprisonment was lawful because “willful and unlawful cruelty is malice.” (*Id.* at 501.)

This definition of malice has a long history in other contexts as well. In 1886, the Supreme Court of California considered a case in which Ah Toon attacked Nun Keow with a hatchet and was charged with assault with intent to commit murder. He argued he did not have requisite malice required under the murder statute. However, the Court held, “we find in 2 Bouv. Law Dict. the definition of ‘malice’ to be, as to criminal law, ‘the doing a wrongful act intentionally, without just cause or excuse’; and the writer continues: ‘Malice is never understood to denote general malevolence or unkindness of heart, or enmity toward a particular individual, but it signifies rather the intent from which flow any unlawful and injurious act committed without legal justification.’” (*People v. Ah Toon* (1886) 68 Cal. 362, 362-363.)

The Court went on to hold that committing an act “with malice...with intent...is equivalent to saying that he did the act unlawfully.” (*People v. Ah Toon* (1886) 68 Cal. 362, 363.) “If malice implies, as is above stated, the intent to do a wrongful act, it follows that the act must be unlawful, and therefore not justifiable.” (*Ibid.*)

“We find authority for this conclusion in section 7, subdivision 4, Penal Code; also in *Maynard v. F. F. Ins. Co.*, 34 Cal. 48, and *People v. Taylor*, 36 Cal. 255, in which cases it is affirmed that ‘malice, in common acceptance, means ill-will against

a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse.”

In 1887, the California Supreme Court held, “the primary and generally received legal definition of malice includes the notion of intent. Some of the common definitions are ‘the doing of a wrongful act intentionally without just cause or excuse’; a ‘conscious violation of law’; ‘the intent from which flows any unlawful and injurious act committed without legal justification.’ (2 Bouv. Law Dict., p. 33, and cases there cited.)” (*People v. Kernaghan* (1887) 72 Cal. 609, 613.)

In 1899, the California Supreme Court referred again to the Penal Code section 7 definition of malice, holding an act is “done maliciously where it is wrongful and is done intentionally.” (*Davis v. Pacific Tel. & Tel. Co.* (1899) 127 Cal. 312, 319.) Thus, the plaintiff in that case acted maliciously because his act of “cutting the wires was unlawful,” and he acted without “any legal authority to cut them.” (*Id.* at 320.)

In 1945, the California Supreme Court held the terms “malice” and “maliciously” as defined in Penal Code section 7(4) “do not, at least insofar as implied malice is concerned, require a preexisting hatred or enmity toward the individual injured.” (*People v. Bender* (1945) 27 Cal.2d 164, 180.)

People v. Dunn (1974) 39 Cal.App.3d 418, 420 provides an overview of the legislative history of Penal Code section 597 and held that the first definition of

malice, “a wish to ‘vex, annoy, or injure another person’...has no place in a statute intended to prohibit cruelty to animals, which section 597 clearly is intended to do.” (*Id.* at 421.) Rather, the second definition in Penal Code Section 7(4), “intent to do a wrongful act, established either by proof or presumption of law,” is the proper definition to apply to this code section. The “Legislature by no means intended to switch emphasis from the cruelty to animals element to a factor of malice toward the animal’s owner.” (*Id.* at 421.) *Dunn* refers to “the necessity of malice in the second sense of the code definition (Pen. Code , § 7, subd. 4, 2d cl.), ‘an intent to do a wrongful act.’” (*Id.* at 420.)

Accordingly, because Respondents kill birds without using them for food or other exception to Penal Code § 597(a), they do so with the intent to do a wrongful act established by presumption of law. Accordingly, Defendants act with malice within the meaning of Penal Code § 7(4), and they violate Penal Code § 597(a).

3. The First Amendment Does Not Protect Respondents’ Behavior

Respondents have argued for a judicially created exception to Penal Code §597(a) the legislature did not see fit to provide for behavior that would otherwise be unlawful, just because it is part of a religious ritual.

However, contrary to Respondents’ contention, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537-38 (1993), does not require a religious exception for a particular practice whenever there are other exceptions to a general

law. *Lukumi* reaffirmed the holding in *Employment Division v. Smith*, 494 U.S. 872 (1990) (“*Smith*”), that “a law that burdens religious practice *need not* be justified by a compelling governmental interest if it is neutral and of general applicability.” (*Lukumi* at 523; emphasis added.) The Supreme Court went on to discuss how the ordinances at issue in *Lukumi* were not neutral or of general application because they had “*as their object* the suppression of Santeria’s central element, animal sacrifice.” (*Ibid.*, emphasis added.) Additionally, the “various prohibitions, definitions, and exemptions demonstrate that they were ‘gerrymandered’ with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings.” (*Ibid.*)

In 1993, shortly after *Lukumi* was decided reaffirming *Smith*’s holding that strict scrutiny is *not* required when a neutral law of general applicability happens to proscribe a religious practice, and that strict scrutiny is *only* triggered when the law’s exceptions show that it is intended to specifically target a religious practice, Congress passed the Religious Freedom Restoration Act (42 U.S. Code Chapter 21B “RFRA”), which requires the application of strict scrutiny to any federal laws that burden religion. States then began passing versions of RFRA as well. However, California is not such a state, and as the only laws at issue here are California state laws, RFRA does not apply to this case.

In *Merced v. Kasson*, 577 F.3d 578 (2009) (“*Merced*”), the Fifth Circuit considered another animal sacrifice case in which state law prohibited the killing. The petitioner in *Merced* advocated for the same broad interpretation of *Lukumi* that Respondents advocate for in the present case. However, the Fifth Circuit based its decision on the Texas Religious Freedom Restoration Act, specifically declining to address *Merced*’s argument that exceptions to the general animal cruelty law at issue should require a judge-made exception for religious sacrifice under the Free Exercise Clause of the First Amendment. (*Merced* at 595.)

In claiming that an exception for religious conduct is required whenever there is any other exception to a general statute, the petitioner in *Merced* relied heavily on *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (“*Newark*”), which considered a police department’s “no beards” policy. Then a D.C. Circuit Judge, Justice Samuel Alito wrote the opinion. After the policy had been implemented, two exceptions were considered simultaneously: a medical and religious one. The department allowed a medical exception and denied a religious exception. In requiring a court-made religious exception analogous to the medical one, the D.C. Circuit found “the Department’s decision to provide medical exemptions while refusing religious exemptions is *sufficiently suggestive of discriminatory intent* so as to trigger heightened scrutiny under *Smith* and *Lukumi*.” (*Id.* at 365, emphasis added.) However, the state law at issue in the present case was

first enacted in 1872, well before any religious exception was requested or even contemplated. There is no evidence this law was passed with discriminatory intent, nor that religious rituals were even considered in passing this neutral law of general applicability, which prohibits *anyone*, regardless of purpose, from killing and discarding animals in a parking lot, not to be used for food.

While there was one ordinance considered in *Lukumi* that unlike the others actually was a neutral law of general applicability, the Supreme Court made clear it was striking down this ordinance along with the other three passed at the same time because of the *discriminatory intent* in passing it:

Ordinance 87-72 -- unlike the three other ordinances -- does appear to apply to substantial nonreligious conduct and not to be overbroad. For our purposes here, however, ***the four substantive ordinances may be treated as a group for neutrality purposes***. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, ***had as their object the suppression of religion***. We need not decide whether Ordinance 87-72 ***could survive constitutional scrutiny if it existed separately***; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

(*Id.* at 539-540, emphasis added.)

Without any evidence of discriminatory intent in passage of California Penal Code section 597(a), without any federal law at issue that would invoke RFRA, and without a state law version of RFRA, Defendants are not entitled to a judge-made exception for their conduct in killing and discarding of chickens for a fee in a parking

lot – conduct that directly violates a neutral law of general applicability, as testified to by numerous experts in enforcing animal cruelty laws. (Exhs. 2-14, including Boks Decl., Dkt. #94-3, ¶5; Cheever Decl., Dkt. #94-5, ¶4; May Decl., Dkt. #94-1, ¶9; Voulgaris Decl., Dkt. #94-13, ¶3; Kelch Decl., Dkt. #94-8, ¶4.)

In *Stormans v. Wiesman* (9th Cir. 2015) 794 F.3d 1064, 1079, the Ninth Circuit held that only a rational basis analysis was necessary to review a law requiring pharmacies to provide birth control to customers – despite some pharmacies’ request to be excused on religious grounds – even though there are secular exceptions to the law. “In other words, if a law pursues the government’s interest ‘only against conduct motivated by religious belief’ but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government’s interest, then the law is not generally applicable.” (*Ibid.*) *Stormans* goes on to analyze the exceptions at issue and explains how there was no discriminatory intent to single out religious beliefs, or “unfettered discretion that would permit *discriminatory treatment of religion* or religiously motivated conduct.” (*Id.* at 1082, emphasis added.)

In the present case, there is simply no argument that by having exceptions for food, medical research, euthanasia, etc., California’s ban on intentionally killing animals is intended to discriminate against religious conduct. Unlike the laws at issue in *Lukumi*, which accomplished a “religious gerrymander” solely around

killing motivated by religion, Penal Code section 597(a) is not concerned with motivation at all but rather with what the animal is being used for. Religious motivation for the killing is not targeted, and religious ceremonies or rituals around the killing can be carried out legally in California, so long as the animal is being used for food rather than discarded.

C. Irreparable harm

Allowing Defendants to charge a fee to hundreds of participants to kill and discard chickens would cause irreparable harm to Plaintiff, its members and the general public for which there is no remedy at law. If Defendants are allowed to continue to flout the law, systematically killing hundreds of chickens in their parking lot and tossing them in trash cans in a spectacle of mass cruelty, there is no monetary amount that can compensate for the damage to the social fabric in which people are entitled to live in a society where the rule of law applies to everyone, regardless of their personal or religious beliefs.

D. Balance of equities

The only harm to Respondents in granting a preliminary injunction would be financial, and a bond posted by Petitioner would protect them from even this harm should the preliminary injunction later be determined to be unsupported. Chabad of Irvine's members would not be prevented from performing the Kapparot ritual using chickens if they so choose, as they can go to a live market like they did in 2016

where the animals can lawfully be used for food, rather than paying Respondents to illegally kill chickens to be discarded in their parking lot.

E. Public interest

The public interest is always served by requiring corporations like Chabad of Irvine to follow the law. Violating the law in the name of religion is a violation of the public interest, because the legislature and not private religious organizations determine what laws everyone must follow.

III. CONCLUSION

Petitioner respectfully asks that this Court reinstate the TRO previously issued by the District Court enjoining Respondents from accepting money in exchange for killing chickens except for reasons allowed by law. The only legally permissible reason for such killing would be if the chickens are being used for food pursuant to Penal Code §599c, and not simply to discard them after non-parties have used the chickens for a religious ritual. Respondents can and did carry out the Kapparot ritual in a live market last year so the birds could lawfully be used for food while the TRO was in effect, and the preliminary injunction would continue to preserve this status quo while this matter is pending.

Respectfully submitted,

**SIMON LAW GROUP
LAW OFFICE OF BRYAN W. PEASE**

Dated: August 18, 2017 By: /s/ Bryan W. Pease
David R. Simon
Bryan W. Pease
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I certify the above motion is proportionately spaced, has a typeface of 14 points and contains 4,341 words.

Dated: August 18, 2017 By: /s/ Bryan W. Pease

CERTIFICATE OF SERVICE

I certify that I am not a party to this action. On August 18, 2017, I served all parties who have appeared in this action with the foregoing document through the ECF electronic filing system.

Dated: August 18, 2017 By: /s/ Bryan W. Pease