To Be Argued By:
Nora Constance Marino
Time Requested: 30 Minutes

APL-2017-00124

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Court of Appeals

STATE OF NEW YORK

The Alliance to End Chickens as Kaporos, RINA DEYCH, individually, and RINA DEYCH, as member of The Alliance to End Chickens as Kaporos, LISA RENZ, Individually, and LISA RENZ, as member of the Alliance to End Chickens as Kaporos, MICHAL ARIEH, JOY ASKEW, ALEKSANDRA SAHA BROMBERG, STEVEN DAWSON, VANESSA DAWSON, RACHEL DENT, JULIAN DEYCH, DINA DICENSO, FRANCES EMERIC, KRYSTLE KAPLAN, CYNTHIA KING, MORDECHAI LERER, CHRISTOPHER MARK MOSS, DAVID ROSENFELD, KEITH SANDERS, LUCY SARNI, LOUISE SILNIK, DANIEL TUDOR,

Plaintiffs-Appellants,

against

THE NEW YORK CITY POLICE DEPARTMENT, COMMISSIONER WILLIAM BRATTON, in his official Capacity as Commissioner of the New York City Police

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFFS-APPELLANTS

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Department, THE CITY NEW YORK, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC., SHLOMIE ZARCHI, ABRAHAM ROSENFELD, NATIONAL COMMITTEE FOR THE FURTHERANCE OF JEWISH EDUCATION AND AFFILIATES, RABBI SHEA HECHT, RABBI SHALOM BER HECHT, RABBI SHLOMA L. ABROMOVITZ, YESHIVA OF MAZCHZIKAI HADAS, INC., MARTIN GOLD, NELLIE MARKOWITZ and BOBOVER YESHIVA BNEI ZION, INC. d/b/a KEDUSHAT ZION, RABBI HESHIE DEMBITZER,

Defendants-Respondents,

and

CONGREGATION BEIS KOSOV MIRIAM LANYNSKI, LMM GROUP, LLC, ISAAC DEUTCH, LEV TOV CHALLENGE, INC., ANTHONY BERKOWITZ, YESHIVA SHEARETH HAPLETAH SANZ BNEI, BEREK INSTITUTE, MOR MARKOWITZ,

Defendants.

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Q2: Does the animal torture and slaughter that takes place during Kaporos constitute "justifiable" animal cruelty under the animal cruelty statute?

Q3: Are the NYC Health Codes ministerial statutes, via the NYC Charter, warranting judicial mandamus?

Q4: Does the NYPD: have constitutional authority to engage in fact finding and usurp the authority vested in the judiciary; have constitutional authority to usurp the intent of the legislature; have discretion to refuse to act with respect to mandatory statutes?

Q5: Does the judiciary have the authority to grant the executive branch fact finding power?

Q6: Did the lower court err in determining that plaintiffs' complaint did not set forth a cause of action for mandamus?

II. NATURE OF CASE/ STATEMENT OF FACTS

Appellants shall be referred to as plaintiffs, and respondents shall be referred to as defendants.

The lower court, and appellate division majority (hereinafter, "the majority"), incorrectly failed to issue a writ of mandamus, given that there are violations of ministerial (mandatory) laws.

The issue on appeal involves a request for a writ of mandamus against NEW YORK CITY POLICE DEPARTMENT ("NYPD"), COMMISSIONER BRATTON, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH ("DOH") (hereinafter, collectively "city defendants" or "defendants"). The lower court action also sought a preliminary injunction against all other defendants (the "non-city defendants").

The lower court denied both the mandamus portion of the action, and the preliminary injunction. Only the mandamus portion was appealed.

Detailed facts are set forth in the appendix (40-46),[1] in plaintiff's affidavits, (180-316) and photos (363-429). Abbreviated facts are as follows.

Kaporos is an annual three-day religious ritual practiced by ultra-orthodox Hasidic Jews following Yom Kippur. Sixty thousand chickens are trucked into residential neighborhoods, stacked in crates and left on the street for days, without

[1] Numbers in parenthesis reference pages of the appendix.

food or water, in the elements, waiting for their death, as they will be sacrificed in the ritual. Practitioners grasp live chickens by the wings, breaking bones and tearing ligaments, and swing the chickens above their heads. The birds' throats are slit, in makeshift illegal temporary slaughterhouses, absolving the participants of their sins (379, 380, 389, 418, 420), on public streets (410, 422). Practitioners claim to donate the carcasses to the poor for consumption, but offer no proof, and photographic and testimonial evidence confirms that birds are stuffed into large black garbage bags and left on the street for the Department of Sanitation (375, 379, 403, 185, 195, 221, 403, 406).

The event involves the illegal erection and unregulated operation of slaughterhouses on public streets and sidewalks, causing a public nuisance and health hazard (220, 373, 374, 419, 422, 426, 429, 377), as well as criminal animal cruelty (364, 365, 366, 367). No permit is issued or applied for (203).

Fifteen known laws are violated by Kaporos. While practitioners self-servingly claim they give the slaughtered chickens to the poor for consumption, they offer no evidence in support. Moreover, if true, that would violate a plethora of additional laws. See, AML§§96g-96t, regarding inspections, handling, refrigeration, labeling, possession of poultry products; see also Sections 96z, "liability for… farmed products distributed free of charge"; see also USDA Poultry Products Inspection Act.

The event is massive. For the 2016 event, just one non-city defendant alone had purchased 50,000 live chickens for the then-upcoming Kaporos event (23,fn). Mathematically, the event must generate hundreds of thousands of dollars for particular synagogues (389).

Many of the plaintiffs are Jewish, and live or work in the neighborhoods where Kaporos takes place, specifically, Crown Heights and Borough Park (the "subject locations"). Kaporos causes a major health risk due to unsanitary and toxic conditions, and also causes emotional trauma, as plaintiffs and others are forced to bear witness to horrifyingly violent bloody acts and gruesome animal cruelty (180-316).

Each of the twenty plaintiffs submitted an affidavit. Non-party witness LADD and private investigator TAMAZ, also submitted affidavits (280, 209).

There is photographic/video evidence and testimony supporting the following: Dead chickens, half dead chickens, blood, feathers, feces, toxins, and garbage such as used latex gloves and filthy tarps cover and contaminate public streets and sidewalks. There is no oversight and no system for cleanup (298, 209, 268, 180, 209, 280, 422, 373, 374, 375, 376, 377). There is an unbearable stench in the air; there are no adequate clean up and containment measures; streets are illegally blocked off; NYPD assists with, and provides material for, the event (180-316, 363-429).

A. EXCERPTS FROM AFFIDAVITS

Plaintiff Deych witnessed thousands of chickens in crates near her home. There were feces and feathers falling onto the sidewalk; there was an unbearable stench. The chickens were dehydrated and many were already dead. Deych called the police to file a complaint, but was told that the NYPD "had orders from on high not to disturb the practitioners" (192, 193, 195).

The participants attempted to drain the blood into NYPD-provided traffic cones, yet much of it flowed onto the sidewalk and the street (213).

NYPD delivered and erected barricades, lumber, tarps, and other equipment (217, 218).

There was an extremely foul odor of decomposing flesh. Trash bags were filled with chicken carcasses (218).

NYPD separated those participating in Kaporos from protesters using NYPD barricades (205).

The sidewalk was covered in feces and blood. In an inadequate attempt to absorb the blood and toxic substances, sawdust was used (206, 426).

Trash bags contained the bodies of chickens. Some were moving, as some were not killed after their throats were improperly slit (221).

Deych, over the course of the three-day event, did not witness any food being given to the animals. Given the structure of the crates, and the height of the

top crates, there was no possible way to feed the birds or give them water. Deych called 911 to report animal cruelty. There was no police response (193, 366, 367, 370, 371, 374, 395).

Deych observed chickens being grabbed by the Kaporos participants, with their wings pulled back, after which they were swung around. Birds were screaming; children were crying. NYPD was present, but despite Deych's request for them to enforce the laws, the officers stated "they were instructed to simply oversee the event" (195, 196, 368-371, 381-385, 426-428).

Hasidic males were present near a large curtain, ranging in age from 6 to 45. Several partially-decapitated chickens attempted to run onto the sidewalk; Hasidic children returned them to the area behind the curtain. Blood from the slit throats of the chickens spilled onto the sidewalk (212-213).

A child approximately 10 years old wore a white apron and disposable gloves, assisting men who were decapitating chickens. The participants used NYPD-provided traffic cones to drain blood, yet much of it flowed onto the sidewalk and the street (213-214, 427-428).

Plaintiff Renz initiated complaints to 311 regarding animal cruelty; response, via 311 online, read, 'problem was taken care of by NYPD.' The problem was not taken care of by NYPD. She also complained to 311 regarding health hazards of garbage, fecal matter, and blood soaked sawdust on the street;

two months later, she received a call from DOH stating that DOH found no evidence of the nature of my complaint. Renz explained that Kaporos occurred two months ago, and this response was not timely (200-208).

Deych called 911; reporting animal cruelty (thousands of dehydrated and starving dying chickens) and a health hazard. Two officers arrived and said that they were horrified by what they saw. Deych handed one officer a list of violated laws. The officer stated that he had never seen them and didn't know NYPD was supposed to enforce them. The sergeant came and also admitted that he wasn't aware of the law (192, 193).

V. Dawson called 911 to report public health violations and animal cruelty (249).

S. Dawson flagged down a police car and reported animal cruelty and health code violations. He also made a formal complaint to 311. There was no response (243).

B. TESTIMONY FROM EXPERT DR. MCCABE (120-144)

Plaintiffs submitted a twenty-five-page affidavit from Michael J. McCabe, Jr., Ph.D., DABT, ATS, a respected expert on matters involving toxicology, microbiology, immunology, human disease causation, and environmental health

sciences. McCabe sets forth the enormous health risks associated with this event (120-144).

McCabe opines that the practice of Kaporos poses an imminent threat to the health and safety of the residents of the subject locations, as well as the city as a whole. The activities of Kaporos subject the public to toxic and bio-hazardous materials associated with but not limited to chicken blood, feces, feathers, and animal carcasses, causing a significant public health risk. There are inadequate clean up and containment measures.

Poultry is a source of infectious diseases for humans and human pathogens. Public health concerns with respect to chickens as vectors for disease transmission are not limited to food borne illnesses. Salmonella and Campylobacter species of bacteria are the most important agents numerically; however avian viruses including certain strains of influenza and other bacterial pathogens such as Arcobacter, Chlamydophila, and Escherichia, that are found in poultry are dangerous human pathogens also. Campylobacter, mainly Campylobacter jejuni and C. coli, are recognized worldwide as a major cause of bacterial food-borne gastroenteritis.

The chaotic unrestricted access of the Kaporos event is in marked contrast to the biosecurity protocols that are implemented at [regulated] poultry facilities;

these are aimed at protecting the health of the animals as well as the people coming in contact with them.

Contaminants can become attached to the bottom of shoes and wheels and are then transported to other areas. Brooklyn has major mass transportation systems such as subways, buses, and airports, which increases the likelihood of the threat of a substantial, city-wide, and even world-wide outbreak of the illnesses described herein. The open-air construct of the makeshift slaughterhouses also permit airborne transmission of contaminants. The Kaporos activities taking place in the subject locations pose a significant public health hazard that could be catastrophic.

C. TESTIMONY FROM EXPERT DR. HYNES (161-169)

Hynes is an expert licensed veterinarian, who treats chickens specifically. He opines that the treatment of the chickens before and during Kaporos constitutes criminal animal abuse.

The birds' agonizing treatment begins with huge tractor-trailers full of chickens stacked up to 16 crates high with approximately 20 birds to a crate. This method of transport is inhumane and constitutes animal cruelty.

Once at the subject location, crates are thrown off the trucks, causing trauma, terror, and injury. The birds then remain at the ritual sites for several days,

crammed in crates, without food, water, or protection from the elements. Many die.

The transportation and harboring of the chickens causes extreme distress, typically exhibited by shock, metabolic collapse and death. This is compounded by the withholding of food and water. These actions constitute animal abuse and torture, in violation of the animal cruelty statutes.

The holding and swinging of birds by their wings leads to tearing of ligaments, causing agony. The actual slaughter, in most instances, is done improperly and inhumanely. Images and testimony confirms birds with their throats partially cut running around or flapping about in garbage bags before bleeding to death. Plaintiffs witnessed bloody chickens writhing on the street and chickens that were dead or dying in crates. Such a slaughter is inhumane. If the carotid artery is not completely severed, the bird (as with any animal) experiences a long, painful death.

D. TESTIMONY FROM EXPERT RABBI SHMULY YANKLOWITZ (172-176)

Rabbi Yanklowitz submitted an affidavit stating that the Torah and the Jewish religion permits the use of coins instead of chickens for the ritual of Kaporos; that the use of chickens is not required or necessary pursuant to any

religious dictum. Same has been written about in numerous periodicals (186-189, 317, 320, 324).

Two rabbis submitted affidavits on behalf of the non-city defendants, confirming that chickens are not required by religious dictate (433, 437).

Yanklowitz also said the use of chickens for Kaporos "violat[es] the *tzaar baalei chaim*, the Torah mandate to show animals compassion and to avoid causing them unnecessary pain" (175, 188).

Thus, the killing of chickens for Kaporos cannot be justified as a necessary religious requirement.

III. LAWS THAT ARE VIOLATED

The laws violated by Kaporos are abbreviated herein. (See 73-88 for complete texts with references as to evidence of their violations.)

A. STATE LAWS

New York Agriculture and Markets Law ("AML"), Article 5-A, §96-a: Licensing of Slaughterhouses: Whereas unsanitary conditions in the slaughtering of animals… have been found to exist…, and whereas such conditions endanger the health and welfare of the people.., it is hereby declared… that the supervision of the slaughtering of animals and fowl is in the public interest, and that this article is enacted in the exercise of the police power of the state and its purposes are the protection of the public health.

AML Art. 5-A, §96-b(1): License Required: No person… shall operate any place or establishment where animals or fowls are slaughtered… unless such person… be licensed by the commissioner...

AML Art. 5-A, §96-b(2): License Required: In a city with a population of one million or more, the commissioner shall not license any person… to operate… any establishment where animals… are slaughtered… within a fifteen hundred foot radius of a residential dwelling....

N.Y.S. Labor Law §133(2)(o): "No minor of any age shall be employed in or assist in . . . any occupation in or about a slaughter… establishment..."

CRR-NY 45.4[2] [precautions be taken to prevent the spread of avian influenza]: All persons entering any premises containing live poultry within the State… with any poultry truck… shall take every sanitary precaution possible to prevent the introduction or spread of avian influenza… [such as] the disinfecting of all footwear . . . In addition, all… distribution facilities containing live poultry shall be maintained in a clean and sanitary manner.

AML Art. 26, §353: A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame.., or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor… of the criminal procedure law, shall be treated as a misdemeanor...

AML Art. 26, §350(2): defines "torture or cruelty" as "every unjustifiable act, omission or neglect causing pain, suffering or death." It also defines "animal" in §350(1) as including every living creature except a human being.

AML Art. 26, §371: "A constable or police officer must… issue an appearance ticket…, summon or arrest, and bring before a court.. having jurisdiction, any person offending against any of the provisions of article twenty-six".

[2] Note, the lower court brief mistakenly categorized this law as a New York City law, erroneously labeling it as NYCRR (city) instead of NY-CRR, or CRR-NY (state).

AML Art. 26, §355: A person being the owner or possessor, or having charge or custody of an animal, who abandons such animal, or leaves it to die in a street…, or who allows such animal, if it becomes disabled, to lie in a public street… more than three hours…, is guilty of a misdemeanor.

AML Art. 26, §359: A person who carries or causes to be carried in or upon any vessel or vehicle or otherwise, any animal in a cruel or inhumane manner, or so as to produce torture, is guilty of a misdemeanor.

B. CITY LAWS

NYC Administrative Code §18-112(d): [U]nlawful to erect, establish or carry on… upon any lot fronting upon Eastern parkway or its extension to Bushwick avenue, or upon any lot bounded by either Union street or Lincoln place, easterly from New York avenue to the former city line of Brooklyn, or upon the streets intersecting Eastern parkway between St. Johns Place and President street, any slaughter- house . . . The term "slaughterhouse"… includes the activity of carrying on the slaughter of animals "in any matter whatever."

NYC Health Code §153.09: No person shall throw or put any blood…, offensive animal matter…, dead animals…, putrid or stinking… animal matter or other filthy matter of any kind, and no person shall allow any such matter to run or fall into any street, public place, sewer. . .

NYC Health Code §153.21(a): Every person who has contracted or undertaken to remove any diseased or dead animal . . . or who is engaged in such removal shall do so promptly. The operation shall be conducted in a clean and sanitary manner and shall not create any hazard to life or health. The offensive matter shall not lie piled… in any street.

NYC Health Code §161.09: A permit shall not be issued for the sale or keeping for sale of live… poultry on the same lot as a multiple dwelling…

NYC Health Code §161.11: (a) A permit required by § 161.09 shall not be issued unless the applicant proves… that the place for which the application is made does not constitute a nuisance because of its proximity to a residential, business, commercial or public building, and that the place will be maintained so as not to become a nuisance. (b) The… person in charge

of any place where animals are kept pursuant to a permit required by § 161.09, shall… conduct such place so as not to create a nuisance by reason of the noise of the animals, the escape of offensive odors, or the maintenance of any condition dangerous or prejudicial to public health. (c) Every place where animals are kept pursuant to a permit required by § 161.09 shall have implements and materials…, as may be required to maintain sanitary conditions. Such places shall have regularly assigned personnel to maintain sanitary conditions.

NYC Health Code §161.19: (a) (a) No person shall keep a live rooster… in the City of New York except (1) in a slaughterhouse authorized by federal or state law that is subject to inspection… or (2) as authorized by §161.01 (a) of this Article [permitted].

NYC Health Code §161.19(b): person who is authorized by applicable law to keep for sale or sell livestock… or poultry shall keep the premises in which such animals are held and slaughtered and the surrounding areas clean and free of animal nuisances.

24 RCNY (Rules of the City of New York") §161.03(a): A person who owns, possesses… [an] animal shall not permit the animal to commit a nuisance on a sidewalk of any public place.

N.Y.C. Department of Sanitation Rules and Regulations, §16-118(6): No… offensive animal matter.., or other filthy matter of any kind shall be allowed by any person to fall upon or run into any street or public place...

New York City Street Activity Permit Office ("SAPO"):
http://www1.nyc.gov/site/cecm/about/sapo.page
SAPO issues permits for street festivals, block parties…, and other events on the City's streets, sidewalks and pedestrian plazas while protecting the interests of the City, the community and the general public. SAPO permits include… Religious Events..."

IV. PROCEDURAL HISTORY

The subject lower court decision dismissed plaintiffs' complaint as it applied to the city defendants; denied plaintiff's request for a preliminary injunction

against the non-city defendants; converted, *sua sponte*, plaintiffs' plenary action into an Article 78 as against the city defendants.

Plaintiffs perfected their appeal in the First Department Appellate Division. Plaintiffs withdrew the portion of the appeal that addressed the denial of the preliminary injunction, and only proceeded with the appeal of the decision denying mandamus as against the city defendants. The First Department affirmed the lower court in a 3/2 decision. The issues before this Court are with respect to the city defendants only.

V. THE COMPLAINT STATES A CAUSE OF ACTION

The lower court granted the city defendants' motion to dismiss for failure to state a cause of action. It is respectfully submitted, the lower court erred, and the majority erred, by engaging in evidentiary consideration and fact finding, rather than accepting the facts as set forth in plaintiffs' complaint as true.

It is well settled law, that in "determining whether a Complaint fails to state a cause of action under CPLR 3211(a)(7), the Court is required to accept the facts as alleged in the Complaint as true, and accord the plaintiff the benefit of every possible inference. The Court must liberally construe the allegations and determine if, from the four corners of the pleadings and the submissions in opposition to the dismissal motion, the facts as alleged by plaintiff fit within any

cognizable legal theory. 511 W. 232nd Owners Corp. v. Jennifer Realty Co., *98 N.Y.2d 144 (2002)*; Leon v. Martinez, *84 N.Y.2d 83 (1994)*.

The Court's role in a motion to dismiss is not to determine whether there is evidentiary support for the complaint. Frank v. DaimlerChrysler Corp., *292 A.D.2d 118, 120-21 (1st Dept2002);* Bernstein v. Kelso & Co., *231 A.D.2d 314, 318 (1st Dept1997);* LoPinto v. J.W. Mays, Inc., *170 A.D.2d 582 (2nd Dept1991)*.

Plaintiffs' complaint should not have been dismissed. The complaint alleged that there are mandatory laws, *inter alia*, that there were violations of said laws, and that the defendants fail to enforce said mandatory laws, or address said violations on any level.[3] The affidavits submitted in motion practice solidify these allegations. Said affidavits can be considered. *See* 511 W. 232nd, *supra*; Leon, *supra*.

Accepting the facts set forth in the complaint as true, the cause of action for mandamus is adequately pled, and fits within a cognizable legal theory. Whether there is evidentiary support for these causes of actions was not for the lower court to decide at that juncture (although, there is a plethora of evidence in support).

The complaint sets forth fifteen laws that are violated (522; see also Section III). Of those, the animal cruelty statutes and health codes are mandatory; that said laws were violated; that the NYPD was not enforcing these mandatory laws; and

[3] The complaint takes it one step further, by alleging that defendants not only disregard the violations and their respective obligations, but they aid and abet in said violations.

thus, a writ of mandamus was warranted. The complaint sets forth, in detail, the factual allegations and exactly how these laws, and other non-mandatory laws, were violated, with specific instances and examples (518-523). The complaint alleged that the defendants fail to fulfill their mandatory obligations, warranting mandamus.

Instead of taking the alleged facts as true, the majority reasoned that said violations could be determined by police to not in fact be illegal animal cruelty, as they could be "justifiable" acts of animal cruelty, despite the fact that the NYPD has zero authority to make such a determination. (See Sections VI and VII.) The majority also erroneously determined that the health codes were not mandatory, despite the specific language contained within the NYC charter that deems these laws mandatory. (See Sections VI and VII.)

Taking plaintiff's allegations as true, plaintiffs' complaint should not have been dismissed. Plaintiff was under no legal obligation to address "justifiability", or any speculated defense, of the acts of animal cruelty at this juncture.

The majority also had no evidence before it that would support the notion that the acts of cruelty were justified; rather, the majority engaged in fact-finding and speculation, creating an unsupported defense of "justifiability", presumably, under the guise of religious freedom. Yet, religious freedom is not a license to violate the law. (See Section VIII.)

The complaint alleges that the defendants' failure to enforce mandatory laws, and aiding and abetting illegal acts, is an abuse of discretion, and that the defendants must be compelled to enforce the mandatory laws, as same is warranted, warranting judicial mandamus (523).

Taking all of the alleged facts as true, and considering the cognizable cause of action of judicial mandamus, coupled with the fact that the animal cruelty statute and health codes are ministerial, a cause of action has been stated.

The defendant's reasoning was flawed, and so was the majority's. The defendant claimed that plaintiffs failed to state a cause of action for mandamus because "mandamus does not lie to enforce the performance of a duty that is discretionary." Neither the animal cruelty statute, nor the health codes are discretionary.

VI. DISCRETIONARY VERSUS MINISTERIAL

Mandamus will lie to compel a body to perform a mandated duty, not how that duty shall be performed. Klostermann v. Cuomo, *61 NY2d 525 (1984)*. It lies "to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (New York Civ. Liberties Union, *4 NY3d 184*). Here, plaintiffs have a clear legal right to have the specified duties performed by the public officials.

The majority stated, "we hold that the laws which plaintiffs seek to compel the city defendants to enforce in this action involve the judgment and discretion of those defendants. That is because the laws themselves implicate the discretion of law enforcement and do not mandate an outcome in their application. With the exception of AML Law §371 (addressed separately []), there is nothing in the plain text of any of the laws and regulations relied upon by plaintiffs to suggest that they are mandatory. Nor is there anything in the legislative history supporting a conclusion that any of the implicated laws and regulations are mandatory."

It is respectfully submitted, this reasoning is inaccurate.

A. THE ANIMAL CRUELTY STATUTE: AML ARTICLE 26, §§353, 355, AND 371

ALM Art. 26, §353, states the following:

> A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame… or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink…, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor…

There is one exception for animals used in scientific tests, experiments or investigations. There is no exception for a religious ritual.

ALM Art. 26, §355, states the following:

> A person being the owner or possessor, or having charge or custody of an animal, who abandons such animal, or leaves it to die in a street…, or who allows such animal, if it becomes disabled, to lie in a public street… more than three hours…, is guilty of a misdemeanor…

AML Law, Art. 26, §371 states the following:

> A constable or police officer must… issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate… any person offending against any of the provisions of article twenty-six …

Section 371 makes every section of Article 26 mandatory, as it clearly states that a police officer "must… issue a… ticket…, summon, or arrest… any person offending against any of the provisions of Art. 26…." Thus, judicial mandamus is warranted.

1. HAMMER

This Court has already deemed that §353 is a mandatory statute. While Hammer v. Am. Kennel Club, *1 N.Y.3d 294, 298 (2003)*, dealt with the issue of standing and private right of action, it sets forth critical determinations that apply herein. In Hammer, the issue was "whether AML §353 grants plaintiff, who wishes to enter his dog and compete without penalty in breed contests, a private right of action to preclude defendants from using a standard that encourages him to 'dock' his [dog's] tail." This Court affirmed the Appellate Division dismissing the complaint.

While Hammer may not pertain the mandamus issue, the holding in Hammer is relevant, as it reflects this Court's position with respect to the legislative intent of the animal cruelty statute, and declares the statute is mandatory. This Court stated, "The Legislature explicitly addressed the enforcement of animal protection statutes in two provisions. Section 371 of the Agriculture and Markets Law ***requires*** police officers and constables to enforce violations of article 26…. In addition, §372 enables magistrates to issue search and arrest warrants '[u]pon complaint ... that the complainant has just and reasonable cause to suspect that any of the provisions of law relating to or in any ways affecting animals are being or about to be violated.' Through the adoption of these two sections, the Legislature established that enforcement authority lies with police… and violations would be handled in criminal proceedings." Hammer, *supra* (emphasis added).

This Court already determined §371 "requires" police officers to enforce violations of article 26, and has deemed that said violations would be handled in criminal proceedings – in other words, by the judiciary. To affirm the majority herein would be inconsistent with this Court's prior determination. It would also allow police to disregard legislative intent which requires arrests, and give police officers fact finding authority.

Hammer is also relevant because it found that this Court denied the plaintiff's private right of action, finding, "plaintiff is not asking law enforcement

officials to charge defendants with violations of the law subject to criminal penalties." In the instant matter, plaintiffs are doing just that – plaintiffs are addressing their issue the exactly as this Court dictated.

In Hammer, this Court recognized the importance of legislative intent; that the legislature created a "comprehensive statutory enforcement scheme" which must be honored. The "comprehensive statutory enforcement scheme… *requires* enforcement of the animal cruelty statute" by "law enforcement authority". Section 371 mandates arrest or summonses, and mandates that the perpetrator be brought before the judiciary, who would then determine if the violation occurred, or if there were any defenses, including justifiability. Yet, in this case, the majority ignores both Hammer, and the legislature, by deciding, without authority, that the police can determine if there is justification for a crime, and if the police deem so, that they have the authority to ignore the legislature's command that they must effect an arrest or issue a summons, and bring a perpetrator before the judiciary. The police can, according to the majority, now step in the shoes of the judiciary.

The majority ruling, as a matter of law, must be reversed. "The legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as choose the goals themselves." Hammer *(citing* Sheehy v. Big Flats Community Day, Inc., *73 N.Y.2d 629, 634-35 (1989)).* In §371, the

legislature selected the methods to effect its goals. In the instant matter, the majority disregarded the right and the authority of the legislature.

2. ART. 26 IS UNAMBIGUOUSLY MANDATORY

In the instant matter, the majority "reject[ed] that AML §371 may provide a basis for the court to mandate that the police either issue an appearance ticket, or summon, or arrest and bring before the court, the non-city defendants for having practiced animal cruelty." This is in direct conflict of the wording of the statute. The majority has no authority to "reject" this legislative intent. The statute clearly provides a basis for the court to mandate specific police action, with its unambiguous wording, that the police "must" effect an arrest or issue a summons, and "must" bring the offender before a court.

The majority tried to reason its conclusion with, "Notwithstanding the use of the word 'must' in the statute, it is still subject to the definition of animal cruelty as otherwise defined in the [AML]. [AML] §350 defines 'torture' or 'cruelty' to include 'unjustifiable physical pain, suffering or death.' Thus, a determination of whether a practice in killing animals is 'unjustifiable' implicates discretion and is not susceptible to a predictable, mandated outcome."

This reasoning is flawed. It is not for police to determine justifiability; the majority created discretion for police where there is none. The statute

unambiguously dictates that the police "must" arrest. It is not up to the street cop to determine if a defense to this crime exists; that is to be left to the judiciary. The NYPD's job is to effect the arrest, and bring the perpetrator before a court. Nowhere in the statute is there an "implication" of discretion for the police.

The majority continued, "For that reason, the parties' dispute concerning whether plaintiffs made complaints to law enforcement is irrelevant because enforcement of this statute is discretionary." To begin with, there is no "dispute" whether plaintiffs made complaints; this is undisputed. Moreover, enforcement is not discretionary. In §371, the legislature chose the words, "A police officer must… issue an appearance ticket…, summon or arrest, and bring before a court… any person offending against…article twenty-six…" To claim that this precisely worded, unambiguous, and totally clear language somehow "implicates discretion" is dismissing the intent of the legislature. It is essentially a re-write of the statute, a power or authority that the judicial branch of government does not have.

The determination of "unjustifiability" allows for a defense in a court of law, following arrest, which §371 also clearly and unambiguously addresses, when it states that after the officer "must" arrest or summons, they "must bring before a court." The majority's disregard of the clear and unambiguous language of the statute is in error, and it must be reversed.

What the majority is proposing is to furnish the NYPD with fact finding power. Such power only lies with the judicial branch of government.

In People v. Morin, *41 Misc. 3d 1230(A)*, where "justifiability" was asserted as a defense, the court said, "Indeed, defendant proffered no moral or philosophical explanation for his failure to provide medical care to [his animal], but simply said he could not afford to take her to a groomer or a veterinarian. Whether defendant's failure to provide care under these circumstances was justified… is a factual question that must be determined at trial. People v. Walsh, *19 Misc.3d 1105(A)*."

See also, People v. Curcio, *22 Misc. 3d 907*, "We find that arguments regarding whether the alleged conduct indicates a 'pattern of neglect' and whether the animal's suffering is unjustifiable are ill-suited for resolution on a motion to dismiss for facial insufficiency. Factual issues of this nature render cases of failure to provide medical care to an animal under A.M.L. §353 particularly unsuitable for determination on motion, and except in the most extreme cases, are best reserved for trial."

See People v. Peters, *79 A.D.3d 1274 (2010),* "County Court charged the jury that in order to find defendant guilty, it must find that defendant 'unjustifiably failed to provide [both] the mare horse and her foal with necessary sustenance and or food and or drink, caused or permitted physical pain or suffering to [both] the mare horse and her foal."

See, People v. Cherry, *2017 NY Slip Op 27284 (2nd Dept2017))*, "§353 forbids, among other things, a person from 'depriv[ing]' any animal 'of necessary sustenance, food or drink.' We find that, by using this language, the statute gives fair notice that this proscription applies to anyone, such as a caregiver, who is in a position to, and has the ability to, 'deprive[ ]' an animal of such sustenance… Regarding the second prong of the test, '[t]he combination of the precise terms described in the statute and the clearly pronounced elements adequately defines the criminal conduct for the police officers, Judges and juries who will enforce the statute' (People v. Foley, *94 N.Y.2d 668*)."

In the instant matter, the police officers were notified of animals languishing in cramped cages, deprived of "necessary sustenance, food or drink." The non-city defendants, those who purchased these birds, were in "a position to, and ha[d] the ability to" deprive these animals, and thus, engaged in animal cruelty pursuant to the statute, before the death of these animals even occurred. The police were made aware of these acts, by way of numerous 911 and 311 calls, in-person complaints, and in being present while the cruelty occurred. Yet, they disregarded their mandatory obligation.

Mandatory language such as this in a statute is rare. Another NYS statute containing such language is the domestic violence statute. Like §371, the domestic violence statute is a "must arrest" statute. See CPL 140.10(4). That said, consider

this scenario. Officers are called to a domestic dispute. Officers arrive on scene, to find a deceased woman holding a knife, and a man, holding a bloody lamp. The officers inquire as to what occurred, and the man states that he was defending himself, as the woman came at him with a knife, so he struck her with a lamp, and killed her. Should that be true, if it were self-defense, that could make the homicide "justifiable" under the law. But is this a question of fact for the police officers to determine on the scene? Do the police officers have the fact finding authority to say, "Looks good to us; sorry to bother you"? Of course not; that would be preposterous. Yet, that is precisely what the majority is proposing with respect to another mandatory statute, the animal cruelty statute.

Moreover, and even more egregiously, even with an abundance of evidence before them that crimes of animal cruelty have been committed, the NYPD is not only affirmatively disobeying the legislative mandate of §371, they are aiding and abetting in the illegal acts, by providing materials to facilitate these crimes.

If the police can use discretion with respect to a statute that states that a police officer "must" do something, then there is no point in using that word in a statute. This is illogical and not the intent of the legislature.

The majority said that the plaintiffs "are seeking to drive a particular outcome". Based on the wording of the statute, a more accurate statement would be that the ***legislature*** **is seeking to drive a particular outcome**.

Justification is a determination to be made by the judiciary, the fact finders. This begs the next question: what judiciary should decide this all-important question regarding the justifiability of the animal slaughter that takes place during Kaporos? It is respectfully submitted, this Court should make this important decision now, as it will in all likelihood inevitably come before this Court in the future, should this matter be remanded. Just as certain decisions are appropriate only for the United States Supreme Court, it is respectfully submitted, this decision, regarding the justifiability, or lack thereof, of the slaughter of 60,000 birds on public streets in the course of a religious event, should be made by the New York State Court of Appeals.

3. UNJUSTIFIABILITY

Plaintiffs ask this Court to address the justifiability issue now and deem the killing of chickens in Kaporos as an unjustified act of animal cruelty. In the alternative, plaintiff requests a hearing.

As the dissent so aptly put it, "None of the defendants has claimed that violating the ALM, or any of the other laws plaintiffs claim the non-city defendants have violated, is necessary to carry out the religious ritual and thus justifiable. In addition, plaintiffs have raised questions about whether the slaughtered birds are donated for human consumption as the non-city defendants

claim and, if so, whether the proper precautions are being taken to ensure consuming them is safe, each of which also bears of whether the cruelty alleged is justifiable" (607).

There is no evidence in the record that the birds are donated as food for the poor, other than a self-serving statement by a non-city defendant. On the contrary, photographic and video evidence shows that the birds are stuffed into garbage bags and removed by NYC Sanitation Department (putting sanitation workers' health at risk).

Importantly, and furthering the argument that the use of chickens for Kaporos is not necessary (and thus, not justified), the non-city defendants themselves acknowledge that the animal slaughter is not necessary; they themselves testified that the ritual allows for the use of coins instead of chickens. In addition to plaintiff expert Rabbi Yanklowitz stating that chickens are not necessary or required, and that coins can be used for Kaporos, non-city defendants Shloma L. Abramowitz and Shea Hecht, both ordained orthodox Jewish Rabbis, and members of defendant National Committee for the Furtherance of Jewish Education, submitted sworn affidavits, stating "Anyone who chooses to use coins instead of chickens is free to do so" (433, 437).

It is respectfully submitted, the horrid animal cruelty that takes place in using chickens for Kaporos, rather than permissible coins, is not justifiable, on any

level. Animal cruelty is not required to carry out this religious ritual, and it would be impossible to consume these slaughtered animals, considering there is no refrigeration, and these birds are so ill-treated that some die in the crates, covered in feces, and thus, they could not be deemed fit for human consumption; moreover, no required federal or state poultry inspections take place. It is respectfully submitted, this animal slaughter event is nothing more than a massive money-making event, as chickens can be sold, while coins cannot[4], which makes the use of coins unappealing to those whose profits would be disturbed.

That said, we ask this Court to address and decide the issue of justifiability on two levels. First, we ask that this Court to decide if the killing of chickens in Kaporos can be deemed justified at all. Second, in the event this Court deems that it is justifiable on its own, we ask this Court to weigh the incredible public health risks this event causes. A balancing act would have to take place, weighing the alleged "necessity" of the use and slaughter of chickens on public streets in the name of a religious ritual, against the need for public safety, the right of the public to be free from a potential epidemic, and the responsibility of government to protect its citizens to subvert a health crisis.

[4] The fact that these chickens are sold on the street also opens up a slew of additional violations, with respect to the Department of Consumer Affairs, http://www1.nyc.gov/site/dca/businesses/license-checklist-temporary-street-fair-vendor.page.

Neither rabbi who submitted affidavits on behalf of the non-city defendants claimed that slaughtering chickens for Kaporos takes place in any manner other than what was testified to by plaintiffs or plaintiffs' nonparty witnesses. Nor did the city defendants submit any affidavits to dispute the gruesome, cruel, unsanitary, and disgusting manner in which the chickens are slaughtered, or the dangerous toxic conditions the slaughter creates on public streets.

Allowing slaughterhouses in residential neighborhoods, permitting chicken blood, feces, urine, and feathers to litter public streets, allowing toxins, pathogens, and other disease-causing contaminants to rampantly disperse throughout public streets, by way of surface and air, breaches not only laws, but governmental duties to society. The risks associated with Kaporos involve health threats that could be catastrophic, affecting millions of people.

Toxicologist McCabe said it is "greatly concerning" that "this event takes place on public streets and sidewalks. Pedestrians, [] bicycles, [] strollers, and motor vehicles track through the ground and surfaces that are covered in and contaminated with blood, feces, urine, and feathers. Contaminants can become attached to the bottom of shoes and wheels and are then transported to other areas. The fact that Brooklyn… has major mass transportation systems in place… increases the likelihood of the threat of a substantial, city-wide, and even nation-wide or world-wide outbreak of the illnesses described herein. The open-air

construct of the makeshift slaughterhouses and the activities of Kaporos also permit airborne transmission of contaminants due to weather… well outside the immediate area... further carrying pathogens, toxins, and allergens throughout the community, potentially impacting the health of millions of people" (120-144).

This is a clear and present public danger that existing laws have been put into place to avert. The public, and plaintiffs herein, have a clear legal right to have these laws enforced. These acts of animal cruelty, especially in conjunction with the health codes violations, cannot be justified.

4. CURRENT MORAL STANDARDS

Based on the trends we see in today's world, and the current moral standards of the community, it is respectfully submitted, the acts of cruelty inherent in using chickens for Kaporos, when coins are permitted, are not justified.

The McKinneys PRACTICE COMMENTARIES, by Jed L. Painter, provide a wealth of information with respect to the scope of protection and legislative history of §353. The Scope of Protection protects all "animals." *See* Practice Commentary to N.Y. Agric. & Mkts. L. §350. What follows is relevant excerpts from, and discussions about, the commentaries.

The notion of justifiability, with respect to animal cruelty or torture, is an evolving one. The statutory term derived from the terms "needlessly" and

"unnecessarily." As such, the term is not meant to be interpreted to refer to the defense of justification under section 30.05 of the Penal Law. *See People v. Rogers*, 183 Misc. 2d 538, 540 (concluding that the term is used "to set a verbal boundary between acceptable infliction of physical pain, suffering or death and/or the maiming or mutilation of an animal and when a person's conduct exceeds such boundary"); *People v. Voelker*, 172 Misc. 2d 564, 568-69 (holding that the term "is not a legal conclusion but a factual allegation that means what it says, i.e., with no apparent justification").

Because coins can be used for the Kaporos religious event, there is no justification for the gruesome slaughter of 60,000 birds. Moreover, no justification can even be asserted with respect to the deprivation of food, water, shelter, and sustenance that the birds are forced to suffer through for days prior to their merciless deaths, all clear violations of ALM Article 26, and none of which is required by Jewish law.

Where a specific conduct exemption (permissible animal cruelty) is needed, the legislature has acted accordingly. *See, e.g.*, N.Y. Agric. & Mkts. L. §§353-a. The legislature has not exempted religious rituals.

Moreover, *assuming arguendo* a "religious event" were exempted, this case would be an exception, in light of the potential health crisis. The event takes place on public streets, causing a major health risk, putting the citizens of and visitors to

this city in jeopardy of contracting illnesses. This event is not practiced privately behind closed doors; it uses public city property. Thus, the balancing act that must take place with respect to preserving the public health would have to outweigh any finding of justifiability, because the public health must take priority.

The commentaries say, ***"absent such a specified exemption, the generalized question of whether conduct is "unjustifiable" is a factual inquiry, appropriate for the trier of fact alone, based upon prevailing social mores and norms***. *See Voelker, 172 Misc. 2d at 569; People v. Bunt, 118 Misc. 2d 904, 909 (Just. Ct., Dutchess County, 1983); People v. Curcio, 22 Misc. 3d 907, 917 (Crim. Ct., Kings County, 2008); see also Hammer v. Am. Kennel Club, 304 A.D.2d 74, 78 (1st Dept. 2003), aff'd 1 N.Y.3d 294 (2003); Downs, 136 N.Y.S. at 445…* ***Indeed, it would seem that the term is even capable of evolution and adaptation to regional standards…*** Locking it to any specific definition, therefore, is extremely difficult." [Emphasis added.]

"Perhaps the most apt interpretation comes from *Arroyo, 3 Misc. at 678*, where it was articulated that 'unjustifiable' conduct, for purposes of §353, is that… conduct which is 'not reasonable, defensible, right, unavoidable, or excusable.'"

It is respectfully submitted, the killing of 60,000 chickens for a religious ritual that does not require the killing of 60,000 birds is certainly unavoidable. Moreover, it cannot be deemed reasonable, defensible, right, or excusable. Neither

can the abhorrent and morally reprehensible treatment of the birds that takes places in the days leading up to the ritual. The torture the birds used in Kaporos must endure is not justified. Even if the killing itself is deemed justified, the acts that inherently precede it, and the manner of the improper slitting of the throats and slow agonizing deaths, cannot. From the horrific transport, to the being stuffed into crammed crates for days, where the birds are deprived of basic sustenance such as food, water, and protection from the elements, literally dying in the crates, covered in feces, these acts of suffering and cruelty cannot be justified under any circumstance, considering that the religious texts do not call for such torture, and even call for the opposite: according to Rabbi Yanklowitz and Deych, the use of chickens for Kaporos "violat[es] the *tzaar baalei chaim*, the Torah mandate to show animals compassion and to avoid causing them unnecessary pain" (175, 188).

As the court said in Voelker, supra, "the generalized question of whether conduct is 'unjustifiable' is a factual inquiry, appropriate for the trier of fact alone, based upon prevailing social mores and norms." The court in People v. Curcio, *22 Misc. 3d 907* said, "Whether the People can prove that defendant unjustifiably committed [acts of animal cruelty] is a matter best left to the trier of facts based upon the moral standards of the community. *People v. Voelker,* 172 Misc.2d 564; *People v. Bunt,* 118 Misc.2d 904". So we look to the current the moral standards of our community and our prevailing social mores and norms.

We are living in a new time regarding the notion of an animal's right to be free from unnecessary torture, cruelty, and suffering. We are becoming a more compassionate, aware society. Science confirms, repeatedly, that animals are sentient, have feelings, emotions, love their families, and want to be free from suffering and harm. See,

https://www.psychologytoday.com/blog/animal-emotions/201306/universal-declaration-animal-sentience-no-pretending

https://inews.co.uk/essentials/news/science/animals-feelings-heres-science-prove/

https://www.livescience.com/39481-time-to-declare-animal-sentience.html

https://www.npr.org/sections/13.7/, "the conviction that the interests of animals need to be taken seriously is… very much the norm."

These new societal "norms" are reflected in new laws and trends. The City of New York recently banned exotic animals from all entertainment enterprises within city boundaries:

https://rosiecitycouncil.wordpress.com/2017/06/21/new-york-city-council-passes-intro-1233-the-exotic-animal-ban/).

The State of New York recently banned elephants from all entertainment enterprises within state boundaries:

https://www.usnews.com/news/best-states/new-york/articles/2017-10-19/new-york-state-bans-elephant-performances.

The FBI website states, “Acts of cruelty against animals are now counted alongside felony crimes like arson, burglary, assault, and homicide in the FBI’s expansive criminal database.”

https://www.fbi.gov/news/stories/-tracking-animal-cruelty.

Former Nassau County District Attorney and now Congresswoman Kathleen Rice urged the NY Senate and Assembly to pass a wide-ranging bill that would reform animal crime statutes to help police, prosecutors, and judges arrest, charge, and sentence animal abusers.

https://nassaucountyny.gov/CivicAlerts.aspx?AID=609

Moreover, chickens, particularly, have been found to be far more intelligent and emotional than previously thought, and society is taking notice so much, and public demand for better treatment of them is so strong, that even fast food giant McDonalds has vowed to treat its chickens better.

http://www.latimes.com/business/la-fi-mcdonalds-chicken-20171027-story.html

See also,

http://www.nydailynews.com/opinion/chickens-smarter-four-year-old-article-1.1428277

https://www.scientificamerican.com/article/the-startling-intelligence-of-the-common-chicken/

https://phys.org/news/2015-09-students-smart-chickens.html

It is becoming less and less acceptable to torture animals in the name of mankind's desires. This notion is further reflected and evidenced by the dramatic decline of attendance at places such as Sea World, *https://nypost.com/2014/11/12/seaworld-tanks-as-revenue-profit-and-attendance-decline/;*
the closing of Ringling Brothers Circus, *https://www.cbsnews.com/news/ringling-brothers-circus-closes-on-sunday-after-146-years/;*
and the international outrage of the deaths of Cecil the Lion *https://www.cbsnews.com/news/cecil-the-lion-killing-sparks-outrage-around-the-world/*
and Harambe the Gorilla *https://www.nbcnews.com/news/us-news/outrage-grows-after-gorilla-harambe-shot-dead-cincinnati-zoo-save-n582706.*

Plant based food products are flooding markets, *https://www.foodnavigator-usa.com/Article/2015/03/17/Vegan-is-going-mainstream-trend-data-suggests*
and those companies that continue to use animal products are capitalizing on "cage free" and "free range" tag lines, to address consumers' relatively new found ethical concerns of how animals are treated,

https://www.wattagnet.com/articles/22193-consumer-demand-for-cage-free-eggs-will-increase ;

https://www.theguardian.com/environment/2012/dec/29/ethical-goods-sales-increase

Even fashion powerhouses Gucci and Michael Kors have vowed to stop using animal fur in their clothing products, *http://www.harpersbazaar.com/fashion/designers/a12831795/gucci-fur-free/*, *https://www.businessoffashion.com/articles/news-analysis/michael-kors-commits-to-go-fur-free-in-2018*.

These facts are pointed out to demonstrate that the definition of "justifiable" animal cruelty, is evolving.

See, People v. Smith, *63 N.Y.2d 41(1984),* citing the "evolving standards of decency [mark] the progress of a maturing society." (*Trop v. Dulles,* 356 U.S. 86, US Sup.Ct.)

This Court has the power to make rulings that society will live with for decades, if not centuries. This Court is the change. Just fifty years ago, if one were to have claimed that someday gays would have the right to marry, or we would have an African American president, or a woman president, those notions would have been dismissed as absurd. Yet, brave proponents of those notions, despite resistance, were on the right side of history. It takes brave lawmakers to

rise above what is "tradition" and focus on what is right and morally correct. Just as our definitions of human rights must evolve, our definition of "justified" torture, mutilation, and death of animals must also evolve and progress in an ethical direction. The window of animal cruelty "justification" is slowly narrowing.

Plaintiffs ask this Court to address the justifiability issue now, and, in light of the record, deem killing and torturing of chickens for Kaporos as an unjustified act of animal cruelty.

It must also be pointed out, if deciding the issue of "justifiability", the public health threat caused by the illegal slaughter on public streets must factor into that equation. An act of animal cruelty that could be deemed justifiable on its own, may not be deemed justifiable if there is a risk that said act can cause substantial harm to humans. In the record, Dr. McCabe's findings are undisputed, and are common sense, since legal slaughterhouses are regulated for a reason; AML prevents slaughter houses from operating in residential neighborhoods for a reason. The slaughter and use of chickens in Kaporos creates a major and substantial health risk due to the contagious nature of the pathogens produced by slaughtering chickens on public streets.

Moreover, the health codes that this event violates are, themselves, mandatory. That said, even if the use of chickens in Kaporos is deemed a justified act of animal cruelty, the mandatory health codes still must be enforced..

In the alternative, if this Court does not wish to rule on the issue of justification at this juncture, at the very least, a hearing is warranted.

B. THE HEALTH CODES

The majority incorrectly found that the NYC Health Codes were not mandatory laws. The majority stated, "we hold that the laws which plaintiffs seek to compel the city defendants to enforce… involve the judgment and discretion of those defendants… [T]here is nothing in the plain text of any of the laws and regulations relied upon by plaintiffs to suggest that they are mandatory."

This is wholly inaccurate. The dissent was correct when it said, "the actions at issue are mandatory, not discretionary" and "the DOH is required to enforce the health Code", and "pursuant to section 435(a) of the NYC Charter, the NYPD 'shall have the power and it shall be their duty'….to guard the public health" (605-606)

The majority, without explanation and in error, improperly limited itself to the "plain text" of the laws and regulations, and failed to take into consideration the NYC Charter ("the Charter"), which intercepts and makes enforcement of the health codes unquestionably mandatory.

This issue was already addressed New York City Coalition to End Lead Poisoning v. Koch, *138 Misc. 2d 188,* where the First Department unanimously

affirmed the lower court's decision (*139 A.D.2d at 404*), adopting the lower court's reasoning, and finding the health codes were in fact mandatory. There, plaintiffs moved to compel defendants to enforce statutes designed to address lead poisoning in children. One of the statutes was §173.13(d) of the NYC Health Code, which authorizes the DOH to order the removal of paint. The court found this statute to be mandatory pursuant to the Charter "which defines the '[f]unctions, powers and *duties* of the department' of health (DOH) (emphasis added), including the enforcement of the Health Code, [and] imposes mandatory duties on DOH and its commissioner."

The court in NYC Coalition, citing Klostermann, *supra*, stated, "'if a statutory directive is mandatory, not precatory, it is within the court's competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature and, if it has not, to direct that the agency proceed forthwith to do so.' (Supra, 531.) Although a cause of action challenging the wisdom of a governmental program may not be justiciable, a request that a 'program be effected in the manner [in which] it was legislated' clearly is justiciable. Plaintiffs [in NYC Coalition] do not challenge the wisdom of local laws and regulations. Rather, they, like the plaintiffs in Klostermann, seek a determination and enforcement of their rights under law and regulations which impose mandatory duties on the municipal defendants." NYC Coalition, *supra.*

The Court in NYC Coalition found that there was "ample evidence that the municipal defendants do not adequately carry out their duties..." and that plaintiffs submitted affidavits that "support the allegations in the complaint with specific examples of the municipal defendants' failure to act and with observations gathered in their own efforts to secure compliance" with the law. Moreover, in NYC Coalition, the "municipal defendants' own papers suggest a serious lack of compliance." The same is true here.

Here, as in NYC Coalition, the plaintiffs submitted affidavits supporting the allegations in the complaints, with specific examples of the NYPD's and DOH's failure to act, despite specific complaints being made, and despite the fact that the police were physically present during the violations. Here, as well, the city defendants submitted nothing in their papers to suggest any attempt of compliance. Even more egregious, the facts on this record take NYC Coalition one step further -- not only do the city defendants fail to take action, they actually assist with these blatant violations of the health code by providing materials and contribute to their occurrence.

The majority's position that the DOH acted reasonably with respect to plaintiff's complaints by "sending an investigator" who "arrived after Kaporos ended" is flawed. The investigator arrived two months after Kaporos ended. If

someone called 911, and a responder appeared two months later, that is not a reasonable or acceptable response.

It is not for the judiciary to pick and choose which statutes or laws it wishes to acknowledge. Here, the majority blatantly failed to acknowledge the existence of the charter, or that it makes the health codes mandatory statutes, as it did in NYC Coalition.

1. THE NYC CHARTER

New York City is a charter city, that is governed by its charter document, the NYC Charter ("the charter"). The charter sets forth roles and obligations, *inter alia*, of city agencies. It defines the mayor, the city council, the law department, etc. It sets forth the obligations of city agencies, such as the police department and the department of health, *inter alia*.

Section 435(a) of the charter states: it "**shall be [the NYPD's] duty** to… disperse unlawful… assemblages **which obstruct the free passage of public streets, sidewalks**… **guard the public health**,… as well as **the proper protection of human life and health**; **remove all nuisances in the public streets**… **enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any**

law or ordinance for the suppression or punishment of crimes or offenses." The word used is "shall", an equivalent of "must" (mandatory).

This paragraph applies to Kaporos in almost every aspect. Kaporos **obstructs the free passage of public streets and sidewalks**, causes risk and threat to **the public health and** to **human life and health, and** causes **nuisances to exist in the public streets**.

Chapter 22 of the charter addresses the health code. §558(e) states, "Any violation of the health code shall be treated and punished as a misdemeanor."

§562 states: Except in cases where it is otherwise provided by law, every violation, neglect or refusal by any person to comply with any order of the commissioner or the board of health shall be triable by a judge of the New York city criminal court and shall be treated and punished as a misdemeanor.

There are seven health codes that are violated during Kaporos; there is zero enforcement, in direct violation of the charter.

2. HEALTH CODES ARE MANDATORY

The majority erred in its decision finding the health codes were not mandatory. Taking into consideration the charter in conjunction with the health code itself, the health codes are mandatory. The court in NYC Coalition found as such, and so did the First Department, and the dissent herein.

For the First Department majority now to state that "there is nothing in the plain text of any of the laws and regulations… to suggest that they are mandatory" is inconsistent with their own precedent, and it is reversible error.

VII. SEPARATION OF POWERS

There are three branches of government: the legislative branch, the executive branch, and the judicial branch. Separation of powers is the principle that each branch of government enjoys separate and independent powers and area of responsibility. The separation of powers is the cornerstone of our constitution on both State and Federal levels.

In the instant case, what the majority did was insert itself into the legislative realm of power, thus violating the separation of powers doctrine. Here, the majority disregarded the "must" wording of the animal cruelty statute by melding that statute with a defining statute, and then taking the position that the plain meaning of the animal cruelty statute is somehow obliterated. This was, in effect, an attempt to rewrite the cruelty statute.

Likewise, the majority completely ignored the charter, which makes the health code ministerial as well, and again, the majority obliterated its meaning and effect.

The majority decision has far more profound and far reaching effects than the specific case before this Court now. This decision strikes at the very core of our three-branches-of-government system of checks and balances, and is precisely why we have the judicial tool of writ of mandamus, to be used, *inter alia,* when the executive branch ignores clear legislative intent, as is the case here.

Furthermore, the majority also ignored legislative intent, and even attempts to afford new fact finding powers on the executive branch, when it has no authority to do so.

Should the majority be affirmed, it is respectfully submitted, a slippery slope will be created that could have dramatic, if not devastating, effects on the balance of power in this state. Fact finding powers and authority lie with the judicial branch of government, exclusively. What the majority has done is to give fact finding powers to the executive branch, police officers. The majority has determined that it is police officers, and not the judiciary, that should determine if defense to a crime exists, and if so, whether that defense should exonerate the perpetrator. In doing so, the police can disregard the legislative intent overall. This, it is respectfully submitted, cannot lie.

A. PROBABLE CAUSE

The police must approach a crime scene from a prosecutorial standpoint; their obligation is to determine only if a law has been violated, not whether or not there is a defense to same. The standard for the determination of probable cause is low. *See* NYPD Patrol Guide, probable cause is: A combination of facts, viewed through the eyes of a police officer, which would lead a person of reasonable caution to believe that an offense is being or has been committed. *http://ksapublications.info/updates/Mar10PatrolGuideUpdate.pdf*

In People v. Vandover, *20 N.Y.3d 235, 237 (2012),* this Court held "In determining probable cause, the standard to be applied is that it must 'appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator…" People v. Carrasquillo, *54 N.Y.2d 248, 254 (1981).*

NYPD need only concern itself with probable cause; not whether or not there is a defense to a crime. Here, probable cause clearly exists; thus, the burden for the police to act is met.

VIII. CONSTITUTIONAL ISSUES AND RELIGION

The majority said, "There are disputes about whether and to what extent the implicated laws can be enforced without violating constitutional rights belonging to the non-City defendants. Rituals involving animal sacrifice are present in some

religions and although they may be upsetting to nonadherents…, the United States Supreme Court has recognized animal sacrifice as a religious sacrament and decided that it is protected… (Church of the Lukumi Babalu Aye, Inc. v Hialeah, *508 U.S. 520, 531 [1993]*)."

This is wholly inaccurate; this was not the holding in Lukumi.

A. LUKUMI – THE SANTARIA ANIMAL SACRIFICE ADDRESSED BY THE UNITED STATES SUPREME COURT ("USSC")

The majority completely misinterpreted what the USSC said in Lukumi, which did not say, anywhere, that animal sacrament is protected under Free Exercise. The USSC has never decided that religious animal sacrifice, or any other religious action, enjoys blanket protected under the Free Exercise Clause of the Constitution. No American citizen has a right to violate any law one chooses, and then use the notion of "religious freedom" as a license to do so. To allow that would cause havoc and chaos.

The issue in Lukumi was whether or not certain enacted ordinances were constitutional. Here, there is no such question.

The Lukumi Court echoed the longtime principle that protections of the Free Exercise Clause *pertain only if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for*

religious reasons. *See e.g.*, Braunfeld v. Brown, *366 U.S. 599, 607 (1961) (plurality opinion)*; Fowler v. Rhode Island, *345 U.S. 67, 69-70 (1953) (Emphasis added).*

In Lukumi, the Court said, "where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny." Here, there is no law under scrutiny. No one has challenged the city's health codes or the state's animal cruelty statute. On that level, Lukumi does not apply.

The facts in Lukumi were as follows:

> Petitioner church… practice the Santeria religion, which employs animal sacrifice... After the church leased land in respondent city and announced plans to establish a house of worship.., the city council held an emergency public session and passed:
>
> Resolution 87–66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87–40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever ... unnecessarily or cruelly ... kills any animal," and has been interpreted to reach killings for religious reasons;
>
> Ordinance 87–52, which defines "sacrifice" as "to unnecessarily kill ... an animal in a ... ritual ... not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law;
>
> Ordinance 87–71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87–52;

> and Ordinance 87–72, which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law.

To begin with, the subject NYC health codes and NYS cruelty statutes were not passed in an "emergency public session" to prevent chickens used in Kaporos. The laws in connection with this lawsuit have existed for decades, or centuries, and apply to everyone. Moreover, there is no exemption in either the NYC health codes, or the NYS slaughter regulations, allowing some slaughters over others, which is part of what made the Lukumi ordinances unconstitutional.

In Lukumi, the issue was the lack of neutrality in the ordinances. The USSC found that "The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice." Lukumi, *supra*.

This is not the case herein. None of the health codes or the animal cruelty statute have as their objective the suppression of Hasidic Jews animal sacrifice during Kaporos. Moreover, there is no "law" that is being challenged before this Court. What lies before this court is the seeking of a writ of judicial mandamus with respect to compelling enforcement of neutral laws that are already in place and have general applicability. Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest ***if it is neutral and of general applicability***. Lukumi (citing *Employment Div., Dept. of*

Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)). It is respectfully submitted, that is precisely the case herein. The laws at issue are neutral and of general applicability; they are not "targeted", as they were in Lukumi.

In Lukumi, the challenged ordinances "demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice… [as] evidenced by… the use of the words "sacrifice" and "ritual" in [the] Ordinances... Moreover, the latter ordinances' 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. They also suppress much more religious conduct than is necessary to achieve their stated ends. **The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter**." Lukumi, *supra (Emphasis added).*

The facts in Lukumi are wholly distinguishable, and, in fact, the laws that are the subject of this litigation are precisely what the court in Lukumi recommended, emphasized above. Here, there are in fact general health code

regulations that have generally applicability, and the cruelty statutes address "care of animals regardless of why they are kept, or on methods of slaughter."

Lukumi continued, "Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief and thereby violates the requirement that laws burdening religious practice must be of general applicability." Here, there is no such "religious belief motivation"; on the contrary, there is general applicability.

Lukumi continued, "Ordinances 87–40, 87–52, and 87–71 are substantially underinclusive with regard to the city's interest in preventing cruelty to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice." This is not the case with respect to the subject laws in the instant matter. Here, AML Article 26 makes no mention of applying only to killings occasioned by religious sacrifice. Again, the statute has general applicability, and is distinguishable.

Lukumi continued, "Ordinance 87–72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner…" Again, the health codes and state slaughterhouse statutes regulate all forms of slaughter equally, and make no mention of religious slaughter. They are unlike the ordinances in Lukumi, and have general applicability. Moreover, the ordinances in Lukumi set forth a specific exemption, to allow animal slaughter in the same area,

as long as it wasn't for a religious ritual. The USSC said, "[R]espondent [did] not explain[] why the commercial slaughter of 'small numbers' of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health.'" No such exemption exists herein.

The USSC said, "in addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. Employment Div., *supra.*

In the instant matter, and unlike Lukumi, the laws in question are neutral and of general applicability. Thus, they need not be justified by a compelling governmental interest, even if the laws have the incidental effect of burdening a particular religious practice, such as the use of chickens as Kaporos. Unlike the laws in Lukumi, none of the laws herein were enacted to prevent the use of chickens in Kaporos; they are health, slaughterhouse, and cruelty laws that were already in existence, and apply to all citizens, in all instances, and make no mention of religious sacrifice or ritual.

Lukumi continued, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. *See* Employment Div., *supra*." Here, the object of the subject laws are not to infringe

upon any religious practices; the object is to protect the public health, and protect animals. The subject laws have general applicability.

Lukumi continued, "A law lacks facial neutrality if it refers to a religious practice... Petitioners contend that… the ordinances fail this test of facial neutrality because they use the words 'sacrifice' and 'ritual,' words with strong religious connotations." This absolutely does not apply herein. There are no references to religion or sacrifice with respect to the health code or the animal cruelty statute.

No one in the lower court proceedings questioned the validity of the health codes or the animal cruelty statute, anywhere in the record. Said laws are not targeted and have general applicability. Plaintiffs are simply asking that the practitioners be held to the same standard as everyone else in the city and state. Moreover, failure to do so would be a violation of the Establishment Clause, as it appears as though the Hasidic practitioners are receiving "special treatment" from the NYPD and the DOH. (*See* Section VIII(2).)

With respect to the Florida animal cruelty statute (Fla.Stat.§828.12), that statute was not deemed unconstitutional – rather, Ordinance 87–40, which incorporated it, was. Lukumi found that "Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." There is no ordinance before this court that is drafted in this manner.

The ordinances in Lukumi were undoubtedly unconstitutional. In fact, they even inferred an exception for Kosher slaughter, but not for Santeria slaughter, claiming that Santeria slaughter was less humane than Kosher slaughter, and went so far as to have a "religious classification". USSC said, "If the city has a real concern that other methods are less humane.., the subject of the regulation should be the method of slaughter itself, not a religious classification..." Lukumi, *supra*. This is obviously a violation of religious right, as that law favored one religion over another. However, none of the facts from Lukumi exist herein; none of the unconstitutional language that was implicit in the ordinances of Lukumi exist in any of the subject laws here.

In Lukumi, it was found that the ordinances had one main objective: "to suppress Santeria religious worship." This cannot be said of any of the animal cruelty statutes, health codes, or any of the fifteen laws that are violated during the illegal mass chicken slaughter that takes place on public streets and sidewalks during Kaporos.

In Lukumi, it was found that "The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat." But it was found that "Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction… [T]he same public health

hazards result from improper disposal of garbage by restaurants…, [yet] restaurants are outside the scope of the ordinances… [R]espondent addresses [this] only when it results from religious exercise." Again, this is not the case here. Restaurants, held to rigorous standards, are not outside the scope of the NYC health code. *See http://www1.nyc.gov/assets/doh/downloads/pdf/rii/article81-book.pdf*

In Lukumi, the USSC concluded, "that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' Fla. Star v. B.J.F., *491 U.S. 524, 542 (1989)*. This precise evil is what the requirement of general applicability is designed to prevent."

This does not apply to the facts herein.

USSC in Lukumi did not hold that animal slaughter in the name of religion is blanketly legal. Rather, Lukumi dealt with a "targeted" aspect of specific ordinances. It held that the subject ordinances were not neutral; that they were not of general applicability; and that governmental interest assertedly advanced by the ordinances did not justify the targeting of religious activity. Lukumi, *supra*. USSC struck down the targeted ordinances.

Here, this Court would have to "strike down" the health codes and animal cruelty statutes,[5] and deem them unconstitutional, in order to absolve the Kaporos practitioners from their (and everybody else's) obligation to abide by the laws. It is respectfully submitted, this is not practical.

No one is free to violate the law in the name of religion. In W. Va. State Bd. of Educ. v. Barnette, *319 U.S. 624, 643–44 (1943)*, USSC said, "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity."

Moreover, the animal sacrifice in Lukumi occurred in private. Here, governmental intervention is even more warranted, because public streets and sidewalks are used. Instead of intervening, however, the government assists. This actually violates the Establishment Clause.

[5] Also the sanitation codes, slaughterhouse regulations, and SAPO requirements.

B. ESTABLISHMENT CLAUSE

It is respectfully submitted, to give the Kaporos practitioners a free pass, and not issue a writ of mandamus requiring the NYPD and DOH to enforce the general applicable existing laws that apply to everyone else, would violate the Establishment Clause. It appears as though the Kaporos practitioners are given special treatment, as they do not have the same obligations to which all other citizens must adhere. *See* Griffin v. Coughlin, *88 N.Y.2d 674, 680 (1996)* ("the… program violates Establishment Clause principles requiring governmental neutrality with respect to religion (*see*, Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet, *512 U.S. 687 (1994)*; Abington School Dist. v. Schempp, *374 U.S. 203, 222 (1963)*, and prohibiting governmental endorsement of religion (Bd. of Educ. v. Grumet, *512 U.S. 687 (1994);* County of Allegheny County v. ACLU, *492 U.S. 573 (1989)*; Lemon v. Kurtzman, *403 U.S. 602 (1971)*)".

Should this Court allow the police to abdicate their responsibilities to enforce mandatory laws with respect to this one religious sect, it would, in effect, permit the government to dismiss its responsibility to remain neutral and would endorse and favor one religion over all others.

In McGowan v. Maryland, *366 U.S. 420, 564 (1961)*, USSC stated that the "'establishment' clause prevents… the selection by government of an 'official' church. Yet the ban plainly extends farther than that. We said in Everson v. Board

of Education, *330 U.S. 1, 16 (1947)*, that it would be an 'establishment' of a religion if the Government financed one church..." Here, are not the defendants, by providing manpower, barricades, generators, orange cones, paying overtime, etc., for the direct benefit of the Kaporos practitioners, "funding" this ritual, this church, this synagogue, this religious establishment?

McGowan continued, "The 'establishment' clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it..."

That said, by defendants' protection of Hasidic Jews who are engaging in the violation of laws that apply to everyone else, there is a violation of the Establishment Clause.

IX. INTRUSION INTO THE AFFAIRS OF THE DEFENDANTS

The majority claimed that "[o]pening up claims of this nature to discovery and possible trials would be an unjustified intrusion into the everyday affairs of the City defendants."

The majority is, in essence, stating that they do not want the defendants to be inconvenienced. This is not a determination that can stand.

"We are bound to construe statutes as we find them and may not sit in review of the discretion of the Legislature or determine the expediency, wisdom or

propriety of its action on matters within its powers. A plea that a statute imposes inconvenience or hardship upon a litigant should be addressed to the Legislature; we may not usurp its functions by legislating judicially." People v. Friedman, *302 N.Y. 75 (1950)*; (citing Lawrence Constr. Corp. v. State, *293 N.Y. 634 (1944)*; Russo v. Valentine, *294 N.Y. 338 (1945);* United States v. Carolene Products Co., *304 U.S. 144 (1938))*.

X. THE DISSENT

It is respectfully submitted, the dissenters were correct, and the dissenting opinion is incorporated herein in its entirety (600-613). The only portion for which this writer has a different opinion is that a hearing is not necessary, and that the record encompasses sufficient facts and law to determine mandamus now with respect to the animal cruelty statute and the health codes, and to determine the issue of animal cruelty justifiability.

Should this Honorable Court disagree, a hearing is requested.

XI. CONCLUSION

There is no evidence in the record disputing the manner in which Kaporos using chickens takes places, including the toxic health hazard, or the animal cruelty.

The majority said that by the city defendants providing barriers, cones, and other materials, they are "maintain[ing] order", a "proper exercise of NYPD's law enforcement obligation." If in the practice of Sharia Law, men were stoning women to death on public streets, would it be a "proper exercise" for law enforcement to provide barriers, cones, and other materials to "maintain order"? It is respectfully submitted, it is not a proper exercise of law enforcement obligation to "maintain order" with respect to the commission of crimes.

As the dissent noted, by assisting in the non-city defendant's violation of the laws, the NYPD has "abdicated their duty to the point that they actively undermine a law they are mandated to enforce. Therefore, this is… an appropriate subject of mandamus relief (Matter of Jurnove, *38 AD3d 896*) (611).

All citizens must obey the law, regardless of religious belief. Should that not be the case, then men practicing Sharia Law could stone women to death, and Mormons could have multiple wives, in the name of "religious freedom". Existing laws cannot be violated in the name of religion; rather, laws can be deemed unconstitutional if they infringe upon one's religious beliefs or if they "target" a religious sect. Such laws can be struck down as unconstitutional; but there is no issue of constitutionality of any law before this court.

Lukumi did not state that animal sacrifice is constitutionally protected. Lukumi found that ordinances that targeted a specific religious sect or ritual, that did not apply to anyone else, were unconstitutional.

The NYC health codes are mandatory via the NYC Charter. Violation of same warrants mandatory arrests and/or summonses.

The NYS animal cruelty statute is mandatory. Violation of same warrants mandatory arrests and/or summonses.

The definition of animal cruelty is unjustifiable torture, maiming, etc., of any animal. What constitutes justifiable cruelty must be in line with the societal morals and norms of the times. The concept of justifiable animal cruelty has evolved dramatically over the past decade and that must factor into any decision regarding justifiability. It is respectfully submitted, the subject animal cruelty is not justifiable.

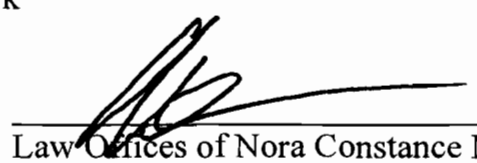
Kaporos can be practiced using coins. This is undisputed; plaintiffs submitted an affidavit from a respected rabbi, and the non-city defendants produced two affidavits from respected rabbis, all confirming this. Thus, there is no requirement for the use of animals and the cruelty resulting therefrom is not necessary or justified.

The NYPD does not have fact finding authority, and the judiciary does not have the power to award fact finding authority to them. Nor can the judiciary disregard the legislative intent of a statute.

The plaintiffs' complaint stated a cause of action and should not have been dismissed.

This Court should decide mandamus and justifiability now. In the alternative, discovery and a hearing should take place.

Dated: Great Neck, New York
December 18, 2017



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: Great Neck, New York
December 18, 2017

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