No. _____

In the
# Supreme Court of the United States

THE ALLIANCE TO END CHICKENS AS KAPOROS, ET AL.,
*Petitioners*,

v.

THE NEW YORK CITY POLICE DEPARTMENT, ET AL.,
*Respondents.*

**On Petition for Writ of Certiorari to the State of New York Court of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Can the New York State Judicial Branch refuse to issue a writ of mandamus when the executive branch defies the legislative branch;

2. Can the New York State Judicial Branch give the Executive Branch fact finding powers;

3. Can the New York State Judicial Branch defy the legislative branch and assume power it does not have, by in effect rewriting a clearly written statute that is unambiguous, by way of its failure to issue a writ of mandamus;

4. Can the New York State Judicial Branch blur the lines that govern separation of powers;

5. Can the New York State Judicial Branch allow violations of the Establishment Clause.

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners, Plaintiffs-Appellants below, are 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 Sasha 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.

Petitioners are a not-for-profit organization and individuals.

Respondents, Defendants-Respondents below, are The New York City Police Department, Commissioner William Bratton, in his official Capacity as Commissioner of the New York City Police Department, The City of New York, 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 Machzikai Hadas, Inc., Martin Gold, Congregation Beis Kosov Miriam Landynski, Lmm Group, LLC., Isaac Deutch, Lev Tov Challenge, Inc., Anthony Berkowitz, Yeshiva Sheareth Hapletah Sanz Bnei Berek Institute,

Mor Markowitz, Nellie Markowitz, and Bobover Yeshiva Bnei Zion, Inc. d/b/a Kedushat Zion, Rabbi Heshie Dembitzer were Defendants below, but no appeal on any level took place regarding the issues involving these parties.

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## OPINIONS BELOW

The lower court opinions are attached hereto. They are from New York State Supreme Court, New York County, dated September 14, 2015; New York Appellate Division, First Department, dated June 6, 2017; New York State Court of Appeals, dated November 14, 2018.

## JURISDICTION

On February 5, 2019, the Honorable Ruth Bader Ginsberg granted an extension to file the within petition to April 15, 2019. The basis for jurisdiction is 28 U.S.C. 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves Articles 1, 2, and 3, of the United States Constitution, specifically, the Separation of Powers, and the role of each branch of government. It also involves the Establishment Clause.

## INTRODUCTION

This matter is proper for consideration in this Honorable Court in that is involves important issues regarding constitutional separation of powers and constitutional checks and balances. To allow the New York State (hereinafter, "NYS") Court of Appeals' (hereinafter, "COA") decision to stand will allow an imbalance of the constitutionally carefully crafted separation of powers. It will allow the executive branch of government to have and to utilize new fact finding authority and power that should be reserved

exclusively for the judiciary branch. It will allow the executive branch of government to ignore and affirmatively disregard the clear intent of the legislative branch. Finally, it will allow the judicial branch of government to surrender their power and their obligation not only to act as sole fact finders, but also to be the checks and balances on the executive branch, and to make sure the executive branch follows the clear intent of the legislative branch.

This matter is further proper for consider in this Honorable Court in that the NYS court decisions allow blatant violations of the Establishment Clause to occur, and they also blatantly disregard past United States Supreme Court (hereinafter, "USSC") decisions.

## STATEMENT OF THE CASE

The following facts are all contained within the record on appeal, which of course would be provided should this petitioner for writ of certiorari be granted.

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

This case involves a lower court petition[1] asking the NYS Supreme Court (NYS's lowest court) to issue a writ a mandamus to compel the New York City Police Department ("NYPD") and other city agencies including the New York City Department of Health

[1] Petitioners were initially plaintiffs, in that the action commenced was a plenary action. The lower court, sua sponte, converted said plenary action into an Article 78 action. It is submitted, this is inconsequential for all intensive purposes.

(hereinafter, "DOH") to enforce fifteen laws that are violated during a religious ritual known as Kaporos. 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 food or water, in the elements, waiting for their death, as they will be sacrificed in the ritual. Practitioners[2] 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, for the purpose of absolving the participants of their sins. This all takes place on public streets and sidewalks.

The event, in essence, involves the illegal erection and unregulated operation of slaughterhouses on public streets and sidewalks, causing a public nuisance and major health hazard, as well as criminal animal cruelty. No permit is issued or applied for.

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. On the contrary, photographic and testimonial evidence confirms that dead birds' carcasses are stuffed into large black garbage bags and left on the street for the New York City Department of Sanitation to haul away. Moreover, even if it were true that the carcasses were

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[2] Those who host and participate in the event are referred to as practitioners.

donated to the poor for consumption, that would violate a plethora of additional laws and regulations, regarding inspections, handling, refrigeration, labeling, and possession of poultry products.

The event is massive. For the 2015 event, which was upcoming at the time the lower court petition was filed, just one non-city defendant alone (a practitioner/host of the event) had purchased 50,000 live chickens for the then-upcoming Kaporos event.[3] The live chickens are sold on the street. Mathematically, the event generates hundreds of thousands of dollars for particular synagogues.

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.

Photographic/video evidence and testimony contained in the record supported the following: Dead chickens, dying chickens, blood, feathers, feces, toxins, and garbage such as used latex gloves and filthy tarps cover and contaminate public streets and sidewalks. Bloody streams run into the streets and into the sewers. There is no oversight and no system for cleanup. There is an unbearable stench in the air;

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[3] A statement verifying this fact was made in open court during oral argument.

there are no adequate clean up and containment measures; streets are illegally blocked off by NYPD.

There is a large NYPD presence every year at this event. It is the NYPD who post "no parking" signs on particular streets, blocks off streets, and sets up NYPD-owned barricades, all to assist practitioners. NYPD also provides orange cones to the practitioners, which are used to "bleed out" the birds. Thus, NYPD does not "oversee" the event, but with their provision of materials, patrol cars, and manpower, NYPD actually aids and abets in the event.

Protests occur annually at the event and tensions rise. Complaints have been made via 911 and 311, as well as in-person to police in patrol cars. The complaints fall on deaf ears, as the city continues, to turn a blind eye to this animal slaughter massacre that puts the health of all city residents in jeopardy.

In the NYS proceedings, two expert affidavits were submitted (*inter alia*), in support of plaintiffs' claims.

**A. AFFIDAVIT OF DR. McCABE**

A twenty-five-page affidavit was submitted from Michael J. McCabe, Jr., Ph.D., DABT, ATS, a renowned expert on matters involving toxicology, microbiology, immunology, human disease causation, and environmental health sciences. McCabe set forth the enormous health risks associated with this event. He opined that the practice of Kaporos poses an imminent threat to the health and safety of the residents of the subject locations, as well as city-wide. 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.

McCabe continued, 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.

McCabe continued, the chaotic unrestricted access of the Kaporos event is in marked contrast to the biosecurity protocols that are implemented at [regulated] poultry facilities; such protocols are aimed at protecting the health of the animals as well as the people coming in contact with them.

McCabe continued, 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 even access to 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.

**B. DR. HYNES AFFIDAVIT**

Plaintiffs also submitted an affidavit from Dr. John G. Hynes, an expert licensed veterinarian, who treats chickens specifically. After reviewing the animal cruelty statutes and other materials, he opines that the treatment of the chickens before and during Kaporos constitutes criminal animal abuse.

Hynes opined that 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 before they even reach the slaughter period.

Hynes continued, 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 New York State animal cruelty statutes.

Hynes continued, 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, including humans) experiences a long, painful death.

## BASIC PROCEDURAL HISTORY

In 2015, a group of residents, fed up with the inaction by city agencies, and the NYPD's affirmative participation in aiding and abetting in the event, sued the city to demand enforcement of the laws that are routinely violated, laws that were designed to protect them, and animals. An action was filed in NYS Supreme Court (the state's lowest court). The city moved to dismiss under the theory that the police department had "discretion" as to what laws they enforced, and how they enforced them; and that consequently, plaintiffs failed to state a cause of action. The court agreed and dismissed the complaint, without affording plaintiffs any discovery.[4]

Plaintiffs appealed to the Appellate Division, First Department. The lower court decision was affirmed, but by a split decision; three of the five appellate justices agreed with the lower court; there were two

[4] The plaintiffs also named civilian practitioners and requested an injunction against them. That relief was denied; however, plaintiffs did not appeal that portion of the decision. Thus, that issue was not before the appellate courts in New York, and is not an issue now.

dissents. The split decision gave plaintiffs access to be heard in NYS's highest court, the Court of Appeals, as a matter of right. The COA affirmed the lower courts, and the matter remained dismissed.

Despite the clear language of the subject statutes, language that unequivocally and unambiguously requires the violated statutes to be mandatorily enforced, the NYS courts chose to relinquish their own fact finding powers, and instead, give the NYPD fact finding powers, by allowing them to make fact finding decisions on the street. (See below.)

This petition now ensues, to have the case heard in the USSC.

## LAWS VIOLATED BY KAPOROS

There are fifteen laws that are violated during the Kaporos event. In addition to mandatory health codes and animal cruelty statutes, slaughterhouse rules and regulations are violated, as well as licensing regulations, administrative codes, sanitation regulations, and street activity permit rules. The health codes and the animal cruelty statutes are mandatory, as is evidenced by the unambiguous, clear, and plain text language of the statutes. Thus, enforcement of these laws is not discretionary.

The animal cruelty statutes, which are located in New York's Agriculture and Markets Law (hereinafter, "AML"), Article 26, are as follows:

> **§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...
>
> **§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.
>
> **§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.
>
> **§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.

These statutes are made mandatory by way of Section 371, which reads:

> **§371: 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 AML Article 26 mandatory, as it clearly used the word "must", rather than "may" or "can". The statute unambiguously states that a police officer "***must***… issue a… ticket…, summon, or arrest… any person offending against any of the provisions of Art. 26…." This is not discretionary; yet, the NYPD refuses to issues tickets, summonses, or effect arrests in the face of this incredible animal cruelty and torture that takes place right before them. In fact, they assist in effecting the crime.

Likewise, the New York City health codes are also mandatory, by way of the New York City charter. The violated health codes are as follows:

> **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.

These statutes, also, are mandatory via the New York City Charter. Chapter 22, §558(e) of the New York City Charter states, "Any violation of the health code shall be treated and punished as a misdemeanor." Section 435(a) of the NYC Charter says the NYPD "shall have the power and it shall be their duty... to guard the public health". Thus, due to the word "shall", the health code also must be mandatorily enforced.

In addition to these mandatory laws, there are other discretionary laws that are also violated. While they are not the subject of this litigation or this appeal, they are set forth, briefly:

> **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 [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…

**CITY LAWS**

**NYC Administrative Code §18-112(d)**: [U]unlawful to erect, establish or carry on… upon any lot fronting upon [the subject locations]… any slaughter- house . . . The term "slaughterhouse"… includes the activity of

carrying on the slaughter of animals "in any matter whatever."

**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..."

**A. THE ANIMAL CRUELTY STATUTE**

As set forth above, the animal cruelty statute is a mandatory statute by way of AML, Art. 26, §371, which states: "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". Thus, clearly, no discretion is permitted. The State's legislature was obviously careful in

choosing its word when crafting this statute, and by using the word "must", as opposed to "may" or "can", the legislature does not permit any discretion on behalf of the executive branch (law enforcement) when it comes to enforcing this statute. Moreover, the statute clearly states that anyone charged with animal cruelty should be brought before a court, a trier of fact for determination, *inter alia*, as to whether or not the cruelty can be deemed justifiable.

This is a key point, because the Appellate Division majority erroneously concluded that because the legislature defined animal "torture or cruelty" as "every ***unjustifiable*** act, omission or neglect causing pain, suffering or death [AML, Art. 26, §350(2)] [emphasis added], it determined that it is up to the street cop to determine whether or not an act of torture or cruelty is "justifiable". It was this reasoning that enabled them to further determine that because it is up to the street cop to determine "justifiability" of animal cruelty, that this then creates "discretion".

This reasoning flies in the face of the wording of the statute, Section 371, which also addresses the issue of justifiability, wherein it states, "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…" [AML Article 26, Section 371.] Clearly, the legislative intent was that it was for the fact finder, the judicial branch of government, to determine if the offending act against an animal was "justified" or not. It is written right in to the statute.

McKinney's Practice Commentary to AML §350, 353 correctly points out, "***Where a specific conduct exemption is needed, the legislature has acted accordingly***", and refers to §353-a, which sets forth exemptions: "Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing, as provided in article eleven of the environmental conservation law, the dispatch of rabid or diseased animals, as provided in article twenty-one of the public health law, or the dispatch of animals posing a threat to human safety or other animals… or any properly conducted scientific tests… involving the use of living animals… conducted in [approved] laboratories..." Moreover, further exemptions must be carved out by case law. See, People v. Beattie, *96 A.D.383, 390*, reasoning that the shoeing of horses could not constitute cruelty; People v. Arroyo, *3 Misc.3d 668*, discussing social exemptions for hunting, fishing, branding, and skinning.

The McKinney's commentary continues, *"**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* People v. Volker, *172 Misc.2d 564*; *see also* Hammer v. Am.Kennel Club, 1 NY3d 294; *People ex rel. Freel v. Downs*, *136 N.Y.S. 440, 444-45*. [Emphasis added.]

The executive branch of government (the NYPD or other city agencies) does not maintain the power or authority, to determine if an act of cruelty is justifiable.

Period. Yet, in this case, the judicial branch of government handed such power to them, in stark contrast to the intent of the legislature, and disturbing and blurring the clear lines between the separation of powers. It is respectfully submitted, this act of the judiciary violates the constitution.

**B. THE HEALTH CODES**

The city's health codes are also mandatory, by way of the New York City Charter ("Charter"). As the dissent pointed out in the Appellate Division, "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".

This notion was affirmed in *New York City Coalition to End Lead Poisoning v. Koch*, 138 Misc. 2d 188 (Sup. Ct. N. Y. Co. 1987), 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 to be mandatorily enforced. 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."

**MANDAMUS WAS AND IS WARRANTED**

When a statute has the word "must" or "shall", it must and shall be enforced. There is no discretion. The judicial branch of government is the checks and balances on the other branches. The judicial branch can strike down a statute enacted by the legislature if said statute violates the constitution. The judicial branch can also compel the executive branch to follow the law as it is written. The tool for the latter is a writ of judicial mandamus. The subject case is a prime example of when mandamus is appropriate. Here, the executive branch is blatantly disregarding, even defying, the legislative branch. Here, the judicial branch needed to step in and issue a writ of mandamus, to fulfill its obligation as the branch of checks and balances of government. Instead of doing that, however, the NYS judicial branch awarded, improperly, new, and inappropriate, fact finding powers to the executive branch. The NYS judicial branch had no authority to do so, and this act violates the constitution and separation of powers.

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.

In NYS, writs of mandamus have been issued for rea sons far less compelling than those set forth herein, where the public health is at risk. *Klostermann v.*

*Cuomo,* 61 N.Y.2d 525, 531, 463 N.E.2d 588, 590 (1984)involved individuals treated at a state hospital who were subsequently released. They claimed that the respondents violated their constitutional and statutory right to receive residential placement, supervision and care. The lower courts dismissed complaints on the grounds that the controversies presented were nonjusticiable because their resolution would involve an excessive entanglement of the courts with the executive and legislative branches of government; the lower courts denied mandamus. The NYS COA reversed, and issued a writ of mandamus, stating that the relevant statute was not discretionary, and had to be mandatorily complied with. *Klostermann* 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."

In *New York City Coalition to End Lead Poisoning v. Koch,* 138 Misc. 2d 188, plaintiffs moved to compel defendants to enforce statutes designed to address lead poisoning in children. One of the statutes was a 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."

In *Matter of Flosar Realty LLC v New York City Hous. Auth.* (127 A.D.3d 147 [1st Dept 2015]), a matter against the New York City Housing Authority ("NYCHA") seeking to compel NYCHA to "process renewal leases requesting increases in Section 8 rent subsidies", the court held that the petition "states a claim for mandamus relief to the extent it seeks an order directing NYCHA to make a determination with respect to the rent increase requests." The applicable statues used "must" language, and, it was held that because of that, "NYCHA does not have discretion to simply not act and indefinitely continue suspension of the subsidies."

In *Joy Builders, Inc. v. Ballard* (20 A.D.3d 534 [2d Dept 2005]), the petitioner sought "mandamus to compel the respondent [Superintendent of Highways for the] to issue a road excavation permit" for the purpose of "connecting [a] sewer line" when the respondent "failed to act on the application". The court reversed a denial of mandamus as it found that the town code "sets forth certain requirements concerning the form and content of an application for an excavation permit, and provides that '[u]pon compliance with the foregoing requirements, a permit shall be issued'..." Again, the operative word is "shall", warranting mandamus.

In *North v. Foley* (238 A.D. 731 [3d Dept 1933]), the petitioners/taxpayers sought mandamus to compel respondents/mayor; comptroller; treasurer; commissioner of public works, to compel them to "permit petitioners and their attorney or accountant to examine and inspect certain books, records and

vouchers under the care, custody and control of such officials." The court held that "the Legislature intended to assert the right of all citizens to examine and inspect the public records…." Legislative intent prevailed.

In *Matter of Barhite v Town of DeWitt* (144 A.D.3d 1645 [4th Dept 2016]), petitioners/police officers sough mandamus to "compel [respondents/town] to place them in the seniority level that corresponds with their years of service." The court granted the petition as "Civil Service Law § 70 (2) states that transferees such as petitioners 'shall be entitled to full seniority credit for all purposes.'" Again, the word "shall" is operative.

**REASONS FOR GRANTING THE PETITION**

Despite the utter lack of ambiguity of the animal cruelty statute requiring mandatory enforcement, based on the clear language of the statute and the use of the word "must", and despite the charter unambiguously requiring the health codes to be mandatorily enforced, by use of the word "shall", the City of New York, the NYPD, and the DOH fail to enforce any of these mandatory laws during Kaporos. It has been speculated that the reason for this abdication is politically driven.

This matter is of proper substance for the USSC, as it involves the constitutional issue of separation of powers. Here, the executive branch of government (the NYPD and DOH) blatantly and improperly disregarded the clear and unambiguous will of the legislature. When that occurs, it is the role, the obligation, of the judiciary, to intervene and direct compliance with the law as written by the legislature. In this matter, the

judiciary abandoned its obligation to direct the executive branch to follow the clear and unambiguous directives of the legislature. What makes matters worse and even more problematic, is that the NYS judicial branch, instead of issuing a writ of mandamus, chose to afford new fact finding powers to the executive branch, by allowing street cops to determine if an act of animal cruelty is justified – a role that should be exclusively in the hands of the judiciary.

This is a clear violation of both the state and federal constitution.

### A. THE VIOLATION OF THE SEPARATION OF POWERS

As this Honorable Court obviously knows, 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 areas of responsibility. The separation of powers is the cornerstone of our constitution on both State and Federal levels.

In the instant case, what the NYS judicial branch and NYS COA did was two fold. First, it inserted itself into the legislative realm of power, thus violating the separation of powers doctrine. The NYS judiciary disregarded the "must" wording of §371 the animal cruelty statute by melding that statute with §350(2), which defines cruelty as being an "unjustifiable" act, and then making the leap that it is up to law enforcement to make that determination regarding justifiabilty – despie the fact that §371 cleraly states

that a court or magistrate is to make that determination. This was, in effect, a rewrite of the statute. Now, under this "new" rule, if a police officer responds to a call of animal abuse wherein someone is bludgeoning their dog, and the perpetrator states that the dog urinated on the carpet, the police officer can determine if that reason is "justifiable", and can choose not to issue a summons or effect an arrest. This was clearly not the intent of the legislature, as the statute states the officer "must" issue a summons or effect an arrest. Following that summons or arrest, the determination of justifiability, should lie only with the judicial, fact finding, branch of government.

Likewise, the NYS judiciary completely ignored the charter, which makes the health code ministerial as well, and again, the judiciary obliterated its meaning and effect. This issue was already visited by the NYS judiciary, *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), and found the health codes were in fact to be mandatorily enforced.

By way of the subject ruling, the NYS judiciary handed fact-finding power to the NYPD, the executive branch of government. Section 353-a of Article 26 of the AML clearly sets out exceptions to the animal cruelty statute, and religious rituals is not one of them. Thus, unlike a scenario where a police officer comes across someone fishing or hunting, there is no reason for the NYPD to not effect arrests or issue summons during the slaughter event Kaporos; and on the contrary, §371 requires that they do, by using the word

"must". Yet, instead of issuing a writ of mandamus, the NYS judiciary took no action, thus, allowing the executive branch to now enjoy fact finding power and authority. This cannot lie.

The subject decisions have far more profound and far reaching effects. 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.

Should this Court not hear this case, it is respectfully submitted, a slippery slope will be created that could have dramatic, if not devastating, effects on the balance of power. Fact finding powers and authority lie with the judicial branch of government, exclusively. What the NYS judiciary has done is to give fact finding powers to the executive branch, police officers, and allowed the executive branch to disregard the legislative intent overall. This issue must be addressed by this USSC.

**B. CASTLE ROCK IS DISTINGUISHABLE**

The COA decision said, "Enforcement of the laws cited by plaintiffs would involve some exercise of discretion", and cited a USSC case (also cited by the defendants), *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760-761 [2005]*).* This reliance is misplaced.

In *Castle Rock,* a father took his daughters from their mother's yard in violation of a restraining order. Despite repeated phone calls from the mother informing them that a restraining order had been

violated, the police did nothing. Eventually, the daughters were found to have been murdered by their father. The court determined that the restraining order was not subject to mandatory enforcement.

Defendants cited *Castle Rock*, stating that "'for a number of reasons, including legislative history, insufficient resources, and sheer physical impossibility, such statutes are not 'interpreted literally', and they 'clearly do not mean that a police officer may not lawfully decline to make an arrest.'"

The absurdity of this statement lies in the fact that in Kaporos, there are no "insufficient resources" and no "sheer physical impossibilit[ies]" to enforce either the animal cruelty statute or the health codes – the police are already there, using their resources, their manpower, their vehicles, their materials, to aid and abet the event and facilitate the crimes.

*Castle Rock* discussed "discretion", stating, "The deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands, is illustrated by *Chicago v. Morales*, 527 U.S. 41 (1999), which involved an ordinance that said a police officer '"shall order' persons to disperse in certain circumstances. This Court rejected… the possibility that 'the mandatory language of the ordinance ... afford[ed] the police *no* discretion.' It is, the Court proclaimed, simply 'common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.'"

However, and importantly, *Castle Rock* continued, "***The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.*** Cf. *Donaldson v. Seattle,* 65 Wash.App. 661 ('There is a vast difference between a mandatory duty to arrest [a violator who is on the scene] and a mandatory duty to conduct a follow up investigation [to locate an absent violator]... [which] would be completely open-ended as to priority, duration and intensity')." [Emphasis added.]

This is entirely distinguishable to, and in favor of, the instant case. Here, the violators are present, their whereabouts are known, and the crimes are committed in the face of the police officers. Moreover, this is all planned ahead of time; it has been predetermined, by the NYPD that there will be a police presence, but no enforcement. Not only does the NYPD show up and fail to enforce, but it provides materials, vehicles, manpower, and uses these tax-payer funded resources to actually assit in the event.

There are numerous cases decided post *Castle Rock* wherein courts declined to follow it. In *Robinson v. Lioi*, 536 F. App'x 340, 345 (4th Cir. 2013), the court said, "[t]he instant case is distinguishable from *Castle Rock*. Lioi attempts to characterize his conduct in this case as a mere failure to act. However, according to the complaint, that is a gross mischaracterization… Lioi's alleged conduct in this case was not confined to a failure to execute the arrest warrant [as in *Castle Rock*]. Lioi affirmatively acted to interfere with

execution of the warrant... Whereas *Castle Rock* is, fundamentally, a case about inaction, Plaintiffs in the instant case have alleged affirmative misconduct on Lioi's part...' *Pinder,* 54 F.3d at 1177. Accordingly, Plaintiffs' claims are not foreclosed by *Castle Rock*."

See, also*, Turczyn v. City of Utica*, No. 6:13-CV-1357 GLS/ATB, 2014 WL 6685476, "Unlike *Castle Rock*…[where] police had limited interaction with either the victim or killer prior to the victim's demise…, the allegations here go substantially farther. Turczyn alleges several occasions when Shanley knew of Anderson's threatening acts and did nothing…."

Here, too, plaintiffs in the instant case have alleged affirmative misconduct on NYPD's part. Here, NYPD knows of the illegal acts, and helps to facilitate them. Here, NYPD has advance knowledge that these crimes will take place; they know the date, time, and location; they plan for and aid in the commission of these crimes. These facts are diametrically opposed to the facts in *Castle Rock*.

**C. THE RUSE OF DISCRETION**

The Appellate Division majority and COA found that the laws cited by plaintiff involve "some exercise of discretion". This is not accurate. The animal cruelty statute and the health codes use words "must" and "shall", allowing for no discretion.

Moreover, the police officers who are assigned to Kaporos are not exercising "discretion". They are following specific orders to facilitate the event. They are not there to "keep the peace"; they are there to protect and assist religious practitioners, and provide

the practitioners with materials they need. There is no discretion; rather, the record reflects that some of the police officers take issue with the event, but they actually have no discretion to issue summons and/or arrests, should they want to, because they have been ordered not to. Thus, the "discretion" argument is a ruse.

In the instant matter, the Appellate Division dissent aptly found, "[what takes place during Kaporos regarding the NYPD] would appear to be an abdication, rather than, as the majority states, a 'proper exercise' of the City defendants' obligations".

*Boung Jae Jang v. Brown*, 161 A.D.2d 49 (N.Y. App. Div. 1990), addressed discretion: "although the Police Department enjoys a broad measure of discretion in committing resources and devising tactical strategies, law enforcement personnel are not…, at liberty to effectively 'abdicate [their] responsibilities by either ignoring them or by failing to discharge them whatever [their] motive may be' (*see, Burton v. Wilmington Parking Auth.,* 365 U.S. 715)… Under the circumstances, the Supreme Court was not required to surrender its authority to act, merely because it is generally contended that the Police Department must be accorded discretion in exercising a law enforcement function. We note, moreover, that the Federal courts have not hesitated to direct law enforcement personnel to undertake specific measures… (*see, e.g., New Alliance Party v. Dinkins,* 743 F.Supp. 1055 [(S.D.N.Y. 1990)]…, *citing Olivieri v. Ward,* 801 F.2d 602 [(2nd Cir. 1986)]; *see also, Cottonreader v. Johnson,* 252 F.Supp. 492 [(M.D. Ala. 1966)])."

*Boung Jae* continued, "The Court of Appeals has observed, [the] function of mandamus [is] to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so' (*see, Klostermann, [supra]*; *see also, Korn v. Gulotta,* 72 N.Y.2d 363)…. mandamus is essentially a judicial command to perform a ministerial act specifically required of a public or corporate officer or body by law, which, as we have held, may embody a ruling… laid down in the form of a judicial determination (*see, State Div. of Human Rights [Geraci] v. New York State Dept. of Correction Servs., supra,* 90 A.D.2d at 65–66).

It is undisputed that the police are present during Kaporos, and that they are there for the benefit of religious practitioners. Defendants claim that to prevent the NYPD from providing materials to effect crimes, and aid and abet in the operations of illegal slaughterhouses, extreme animal cruelty, and dangerous health code violations, would "impermissibly intrude into the police's discretionary judgment". No law enforcement agency, including the NYPD, has "discretion" to facilitate crimes, and the animal cruelty statute and health codes are not discretionary.

Likewise, any argument regarding "resource allocation" can also not be taken seriously. Defendants claimed that "in a diverse city of 8.5 million residents and 50 million annual visitors, NYC's law enforcement apparatus must be wielded with prudence and pragmatism. Given the sheer scale of NYPD's responsibility, the charter necessarily grants NYPD the traditional discretion to set enforcement priorities and allocate resources." First, the charter is not cited, and

more importantly, in this situation, the absurdity of this statement is evident in that the NYPD is already present at Kaporos, and uses massive amounts of resources to facilitate the event.

**D. ESTABLISHMENT CLAUSE**

In the record before the COA, was the issue of the Establsihement Clause. Defendants state that NYPD's "act of maintaining public safety during a crowded event on a public street" does not violate the Establishment Clause. This is a mischaracterization. Defendants are not "maintaining public safety", but rather, are disregarding their duty to enforce mandatory laws, and, are aiding and abetting in the violations of laws. Clearly, the city defendants are favoring one religious sect over all others; every other New Yorker must obtain a permit for a simple block party, while this sect is permitted to erect make-shift slaughterhouses in residential neighborhoods and create massive health hazards and engage in egregious animal cruelty, unfettered. As stated, it has been speculated by journalists and others, that this decision is politicaly motivated.

The USSC has long held that "the Establishment Clause prohibits government from favor[ing] the adherents of any sect or religious organization." *Gillette v. United States*, 401 U.S. 437 (1971); *see also Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), "The Establishment Clause prohibits sponsorship, financial support, and active involvement of the sovereign in religious activity." The USSC "has come to understand the Establishment Clause to mean that government… may not involve itself too deeply in

such an institution's affairs." *County of Allegheny v. ACLU,* 492 U.S. 573 (1989).

Here, defendants are favoring religious Kaporos practitioners; they are doing far more than providing ordinary police protection. The actions of the NYPD demonstrate it is not being "neutral" with "groups of religious believers and non-believers," but rather, "favor[ing]" the practitioners. Everson, *330 U.S. at 17.* Here, the NYPD is clearly assisting in the financing of the Kaporos event by providing said equipment, manpower, and resources, resulting in excessive government entanglement with religion.

Moreover, the practitioners are somehow exempt from applying for or obtaining any of the necessary permits that the rest of NYC citizens must obtain. There are no permits obtained from SAPO[5], NYPD, DOH, Sanitation Department, Fire Department, Dept. of Consumer Affairs, Dept. of Environmental Protection, or any other agency who requires permits for an event such as this, where streets are closed, a religious event is held, goods are sold, food products are allegedly sold, money is exchanged, and generators and electricity are used. See, *http://www1.nyc.gov/assets/cecm/downloads/pdf/NYC_CECM_Comprehensive_Event_Permitting_Guide_2018%20FINAL.pdf*

This is a clear violation of the Establishment Clause.

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[5] New York City's Street Activity Permit Office, *http://www1.nyc.gov/site/cecm/about/sapo.page*

## E. THE SUBJECT DECISIONS CONFLICT WITH PAST USSC DECISIONS

The subject NYS decisions fly in the face of and blatantly disregard the holdings of several USSC cases.

*Employment Div.*, supra, infra, found that there, "Respondents seek to carry the meaning of 'prohibiting the free exercise of religion' one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons." The court continued, "w**e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."**

To permit a religious act that violates the law, as is what is occurring here, would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. See, *Reynolds v. United States*, 98 U.S. 145, 167, 25 L. Ed. 244 (1878); see also, *Davis v. Beason*, 133 U.S. 333, 344, 10 S. Ct. 299, 301, 33 L. Ed. 637 (1890), *abrogated by Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

What the NYS judiciary has done is "to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." As USSC stated in *Employment Div*., "We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. 'Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.' *Gillette v. United States, supra,* 401 U.S., at 461, 91 S.Ct., at 842." Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 882, 110 S. Ct. 1595, 1602, 108 L. Ed. 2d 876 (1990).

See, also, *Board of Ed. Of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), "Petitioner's proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored (citing *Larson v. Valente*, 456 U.S. at 244).

### F. FREEDOM OF RELIGION IS NOT AN ISSUE

It should be noted, that freedom of religion is not, or should not be, an issue in this case. While the COA stated, in a footnote, "we need not determine whether enforcement of the cited laws would infringe upon the

First Amendment rights of the non-city defendants", the NYS Appellate Division majority (hereinafter, the "majority") used Freedom of Religion as part of their opinion in justifying the blatant violations of law that take place during Kaporos while the police look the other way. Thus, this topic will briefly be addressed herein.

In raising the issue of religious freedom, the majority cited to *Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993). 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… [*Lukumi*, supra]."

The majority did not understand the issues in Lukumi, nor its holding. The holding in *Lukumi* was not that animal sacrifice was recognized as a constitutionally protected activity. Rather, the holding was that a targeted ordinance or statute is unconstitutional. This is a profound, and important, distinction.

The issue before the USSC in *Lukumi* involved an ordinance that was enacted for the sole intent of prohibiting a religious act, that happened to be animal sacrifice, from taking place inside one local church. It became known to residents of Hialeah, Florida, that a Santeria church was planning on engaging in animal

sacrifice. Citizens were outraged, and an emergency session of the local city council was held, during which four ordinances were crafted and enacted, making the specific killing of animals inside that specific church illegal. Yet, the killing of animals right outside the front door of that church was permitted. The ordinances were clearly religiously targeted. The Church sued, and the case went to the USSC, which found the ordinances to be religiously targeted, and thus, unconstitutional. The USSC did not deem animal sacrifice to be constitutionally protected – rather, it deemed that these four religiously targeted ordinances were unconstitutional, because they were religiously targeted.

In *Williams-Yulee v. Florida Bar,* 135 S. Ct. 1656 (2015), USSC clarified its decision in *Lukumi*, making clear that the law banning the subject animal sacrifice was struck down only because the city looked the other way with respect to other animal welfare issues, and thus, the law, in its application, was discriminatory and not neutral. The *Williams-Yulee* court stated, "we invalidated a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare [citing *Lukumi*]."

*Lukumi* is completely inapplicable in the instant matter, as there was no constitutional challenge of a law before any court. No one was challenging NYS's health codes or animal cruelty statute. Thus, to invoke *Lukumi* was inapplicable and incorrect. Moreover, the laws that are at issue, and that are violated, during Kaporos, are not "targeted"; they are generally

applicable neutral laws that apply to all citizens of New York City and New York State.

*Lukumi* found, "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 subject laws do not infringe upon any religious practices; the object is to protect the public health, and protect animals, with general applicability.

The Free Exercise Clause does not permit the violation of any law, to be justified in the name of religion. This Court has ruled, more than once, that freedom of religion is limited to freedom of belief; it is not freedom to act; that all men and women must obey the law, and that the law of the land must trump religious freedom. See *Reynolds v. United States,* 98 U.S. 145 (1878), declaring that Mormons cannot engage in polygamy in the name of religious freedom; see, also, *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990), declaring that native Americans cannot be permitted to smoke peyote in the name of religious freedom.

Since the health codes and animal cruelty statute do not "target" the Hasidic community, but rather, have general applicability to all citizens, religious targeting is not an issue. In order to make *Lukumi* applicable, the courts would have had to "strike down" the health codes and animal cruelty statutes,[6] and deem them unconstitutional, in order to absolve the Kaporos

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

practitioners from their (and everybody else's) obligation to abide by said laws.

## CONCLUSION

For the reasons set forth herein, plaintiffs/ petitioners pray that this most Honorable and Highest Court of the land hear this very important matter that involves serious constitutional issues.

Respectfully submitted,

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