APPENDIX

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 126

[Filed November 14, 2018]

The Alliance to End Chickens as Kaporos, et al.,	)
Appellants,	)
v.	)
New York City Police Department, et al.,	)
Respondents,	)
et al.,	)
Defendants.	)

Argued October 17, 2018; decided November 14, 2018

APPEARANCES OF COUNSEL

Law Office of Nora Constance Marino, Great Neck (*Nora Constance Marino* and *Brad Landau* of counsel), for appellants.

Zachary W. Carter, *Corporation Counsel*, New York City (*Elina Druker*, *Richard Dearing* and *Jane L. Gordon* of counsel), for respondents.

Vinson & Elkins LLP, Washington, D.C. (*Jason A. Levine* and *Christian D. Sheehan* of counsel) and New York City (*Ari M. Berman* and *Laurel S. Fensterstock*

of counsel), *First Liberty Institute*, Plano, Texas (*Kelly J. Shackelford*, *Jeremiah G. Dys*, *Roger L. Byron* and *Stephanie N. Taub* of counsel), and *Agudath Israel of America*, New York City (*Mordechai Biser* of counsel), for Agudath Israel of America, amicus curiae.

Richmond Law Group, Brooklyn (*Jay Shooster* of counsel), for Animal Legal Defense Fund, amicus curiae.

MEMORANDUM:

The order of the Appellate Division dismissing the pleading against the City defendants should be affirmed, with costs.

Plaintiffs appeal the Appellate Division's affirmance of an order denying their request for a writ of mandamus to compel the New York City Police Department and the New York City Department of Health and Mental Hygiene to enforce certain laws related to preserving public health and preventing animal cruelty (152 AD3d 113 [1st Dept 2017]).[1] Plaintiffs allege those laws are routinely violated when thousands of chickens are killed during the religious practice of Kaporos performed in certain Brooklyn neighborhoods prior to Yom Kippur.

A writ of mandamus "is an 'extraordinary remedy' that is 'available only in limited circumstances'" (*Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016], quoting *Klostermann v Cuomo*, 61 NY2d

[1] This action was originally brought as a plenary action and, consistent with the Appellate Division decision, this Court refers to the parties as plaintiffs and defendants.

525, 537 [1984]). Such remedy will lie "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *see also* CPLR 7803 [1]). While mandamus to compel "'is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion'" (*Klostermann*, 61 NY2d at 539, quoting *Matter of Gimprich v Board of Educ. of City of N.Y.*, 306 NY 401, 406 [1954]). Discretionary acts "'involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result'" (*New York Civ. Liberties Union*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983]). Further, mandamus may only issue to compel a public officer to execute a legal duty; it may not "'direct how [the officer] shall perform that duty'" (*Klostermann*, 61 NY2d at 540, quoting *People ex rel. Schau v McWilliams*, 185 NY 92, 100 [1906]).

Enforcement of the laws cited by plaintiffs would involve some exercise of discretion (*see Castle Rock v Gonzales*, 545 US 748, 760-761 [2005]). Moreover, plaintiffs do not seek to compel the performance of ministerial duties but, rather, seek to compel a particular outcome. Accordingly, mandamus is not the

appropriate vehicle for the relief sought (*see Walsh v LaGuardia*, 269 NY 437, 440-441 [1936]).[2]

* * * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia and Wilson concur. Judge Feinman taking no part.

Decided November 14, 2018

[2] We need not determine whether enforcement of the cited laws would infringe upon the First Amendment rights of the non-City defendants.

APPENDIX B

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Karla Moskowitz
Paul G. Feinman
Judith J. Gische
Ellen Gesmer, JJ.

3256
Index 156730/15

[Filed June 6, 2017]

The Alliance to End Chickens as Kaporos, et al.,
Plaintiffs-Appellants,

-against-

The New York City Police Department, et al.,
Defendants-Respondents,

Congregation Beis Kosov Miriam Lanynski, et al.,
Defendants.

Plaintiff appeal from the order of the Supreme Court, New York County (Debra A. James, J.), entered September 24, 2015, which upon converting the plenary action as against the City defendants to a CPLR article 78 proceeding granted the City defendants' motion to dismiss the proceeding.

Law Office of Nora Constance Marino, Great Neck (Nora Constance Marino of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York City (Damion K. L. Stodola and Jane L. Gordon of counsel), for respondents.

OPINION OF THE COURT

GISCHE, J.

The central issue raised by this appeal is whether plaintiffs have a right, via a writ of mandamus, to compel the municipal defendants to enforce certain laws related to preserving public health and preventing animal cruelty, which they allege are violated by Orthodox Jews who perform the religious practice of Kaporos. We affirm Supreme Court's dismissal of the proceeding against the City defendants, which include the New York City Police Department (NYPD), NYPD's Commissioner and the New York City Department of Health and Mental Hygiene (DOH) (collectively City), because mandamus does not lie where, as here, plaintiffs seek to compel the enforcement of laws and regulations implicating discretionary actions (*New*

York Civ. Liberties Union v State of New York, 4 NY3d 175, 184 [2005]).[1] [2]

The individual plaintiffs reside, work or travel within Brooklyn neighborhoods where the non-City defendants engage in the Kaporos ritual every year before Yom Kippur. Plaintiff the Alliance to End Chickens as Kaporos, of which some individual plaintiffs are members, is associated with nonparty United Poultry Concerns, a nonprofit organization promoting compassionate and respectful treatment of domestic fowl. The non-City defendants are individual Orthodox Jewish rabbis, members of yeshivas or other Orthodox Jewish religious institutions, and several Orthodox Jewish religious institutions, all based in Kings County.

Kaporos is a customary Jewish ritual practiced by the non-City defendants, who are ultra Orthodox. It dates back to biblical times and occurs only once a year, the few days immediately preceding the holiday of Yom Kippur. Adherents of Kaporos believe this ritual is required by religious law and that it brings atonement and redemption. The ritual entails grasping a live chicken and swinging the bird three times overhead

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[1] This action was originally styled as a plenary action against individual defendants and the City defendants. Supreme Court appropriately converted the relief against the City defendants into a CPLR article 78 proceeding seeking mandamus.

[2] Plaintiffs also sought a preliminary injunction against the practice of Kaporos, pending resolution of the underlying nuisance action. Supreme Court denied that relief. Although plaintiffs originally appealed from that portion of the order, they subsequently stipulated to withdraw that issue from the appeal.

while saying a prayer that symbolically asks God to transfer the practitioners' sins to the birds. Upon completion of the prayer, the chicken is killed in accordance with the kosher dietary laws, by slitting the chicken's throat. Its meat is then required to be donated to the poor and others in the community. Each year thousands of chickens are sacrificed in furtherance of this ritual and the practice takes place outdoors, on public streets in Brooklyn, and in full public view.

Plaintiffs allege that the manner in which Kaporos is practiced is a health hazard and cruel to the animals. They decry the practice as "party-like" and having a "carnival" atmosphere. They contend the practice involves the erection of makeshift slaughterhouses in which "[d]ead chickens, half dead chickens, chicken blood, chicken feathers, chicken urine, chicken feces [and] other toxins . . . consume the public streets" (amended complaint ¶168). They also allege that there is blatant animal abuse and cruelty (*id.* ¶174). It is plaintiffs' contention that Kaporos is a public nuisance to all those who, like them, pass through these locations for day to day activities, including going home, to work, or to shop. Their goal is to stop this practice. They argue that there are other, better ways for Kaporos adherents to practice their faith and express their devotion, including by using coins instead of live chickens. They denounce Kaporos as "a far cry from a solemn religious ritual." These claims are disputed by the non-City defendants, who otherwise claim that they have a constitutional right to practice Kaporos.

In seeking the remedy of mandamus against the City defendants, plaintiffs claim that this ritual violates numerous laws, rules and regulations, including Agriculture and Markets Law §§ 96-a; 96-b [requiring licensing of places where fowls are slaughtered or butchered]; Labor Law § 133(2)(o) [prohibiting employment of a minor in a slaughterhouse]; 1 NYCRR 45.4 [sanitary precautions against avian influenza when entering premises containing live poultry]; Administrative Code of City of NY § 18-112(d) [no slaughterhouse in parts of Brooklyn]; New York City Health Code (24 RCNY) § 153.09 [no blood, offensive animal matter, or dead animals to be put on city streets]; former New York City Health Code (24 RCNY) § 153.21(a) [persons contracted or undertaken to remove dead or diseased animals must do so promptly]; New York City Health Code (24 RCNY) § 161.11 [prevention of animal nuisances]; New York City Health Code (24 RCNY) § 161.19[c] [live poultry intended for sale prohibited on the same premises as a multiple dwelling]; New York City Health Code § 161.19(b) [areas of slaughter to be kept clean and free of animal nuisances]; Agriculture and Markets Law §§ 353, 371 [prohibiting animal cruelty]; Agriculture and Markets Law § 355 [prohibiting abandonment of animals to die in a street]; Agriculture and Markets Law § 359 [prohibiting carrying animals in a cruel manner]; former New York City Health Code (24 RCNY) § 161.03(a) [prohibition against animal blood, feces and body parts on pubic sidewalks]; and New York City Department of Sanitation Rules and Regulations §§ 16B118(6) [no offensive animal material shall be allowed to fall on a person or run into any street or public place]).

Plaintiffs claim that they are entitled to have the courts compel the City to enforce these laws. They seek to have this Court direct the City to "enforce the law, issue summonses, issue arrests, and issue violations when such situations are warranted" (amended complaint ¶84).[3]

Article 78 is the codification of the common-law writs, including a writ of mandamus to compel (CPLR 7801, 7803[1]). Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 96 [1981]). The availability of mandamus to compel the performance of a duty does not depend on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded – i.e., mandatory, non-discretionary action (*id.* at 97). A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result (*New York Civ. Liberties Union*, 4 NY3d at 184). Discretionary acts, on the other hand, are not mandated and involve the

[3] We do not agree with the dissent's conclusion that plaintiffs are not seeking to compel a particular action, but seek only to compel the City defendants to investigate. While the pleadings broadly claim such relief along with other relief, the facts plaintiffs allege simply belie any claim that they only seek the limited relief of an investigation. Plaintiffs concede that investigations were, in fact, made of their complaints, albeit, in their opinion, belatedly. Moreover, they admit that the City defendants were fully aware of the circumstances attendant to Kaporos, but failed to take the action they believe is necessary. It is clear that plaintiffs simply disagree with how the City defendants have acted.

exercise of reasoned judgment, which could typically produce different acceptable results (*id.*). Mandamus is not available to compel an officer or body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. In other words, 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, 539-540 [1984]). It lies "only 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 at 184).

Mandamus is generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued (*see e.g. Jones v Beame*, 45 NY2d 402, 409 [1978], citing *People ex rel. Clapp v Listman*, 40 Misc 372 [Sup Ct, Onondaga Special Term 1903] [mandamus does not lie to compel enforcement of Sunday "blue" laws]; *Matter of Walsh v LaGuardia*, 269 NY 437 [1936] [no right to compel Mayor and Police Commissioner to prohibit operators of nonfranchised bus routes]; *Matter of Perazzo v Lindsay*, 30 AD2d 179 [1st Dept 1968], *affd* 23 NY2d 764 [1968] [no right to compel enforcement of laws governing operation hours of coffee houses]; *Matter of Morrison v Hynes*, 82 AD3d 772 [2d Dept 2011] [cannot compel the initiation of a prosecution]; *Matter of Bullion v Safir*, 249 AD2d 386 [2d Dept 1998] [no mandamus to compel police to make arrests]). This reflects the long-standing public policy prohibiting the courts from instructing public officials on how to act under circumstances in which judgment and discretion are necessarily required in the fair administration of their duties.

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. This is because the laws themselves implicate the discretion of law enforcement and do not mandate an outcome in their application. With the exception of Agriculture and Markets Law § 371 (addressed separately below), 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. There is no express provision designating Kaporos as a prohibited act. There are disputes about whether the conduct complained of is in violation of the implicated laws and regulations. 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 of such practice, the United States Supreme Court has recognized animal sacrifice as a religious sacrament and decided that it is protected under the Free Exercise Clause of the Constitution, as applied to the states through the Fourteenth Amendment (*Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 531 [1993]).

Consequently, the decision whether and how to enforce these laws and regulatory provisions allegedly violated during Kaporos implicates the reasoning and discretion of the City defendants and the law enforcers. None of the laws or regulations plaintiffs rely on

preclude the City defendants from deciding whether or not to enforce those laws in the context of Kaporos. Plaintiffs do not have a "clear legal right" to dictate which laws are enforced and how, or against whom. Determining which laws and regulations might be properly enforced against the non-City defendants without infringing upon their free exercise of religion involves the exercise of reasoned judgment on the part of the City defendants. The outcome cannot be dictated by the court through mandamus.

We also reject any argument that Agriculture and Markets Law § 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.

Agriculture and Markets Law § 371 provides in pertinent part that:

> "A constable or police officer *must*, and any agent or officer of any duly incorporated society for the prevention of cruelty to animals may issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest, and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law" (emphasis added).

Notwithstanding the use of the word "must" in the statute,[4] it is still subject to the definition of animal cruelty as otherwise defined in the Agriculture and Markets Law. Agriculture and Markets Law § 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. For that reason, the parties' dispute concerning whether plaintiffs made complaints to law enforcement is irrelevant because enforcement of this statute is discretionary. The dissent's reasoning that a hearing should be held to determine whether the killing of these birds is "justified" proves the point. There is no ministerial determination to be made about the justification for killing chickens. Thus, the City defendants' decision of whether action is necessary, and if so, the nature of such action, is inherently discretionary. Opening up claims of this nature to discovery and possible trials would be an unjustified intrusion into the everyday affairs of the City defendants. Consequently, since the City defendants may exercise their judgment in deciding whether there has been a violation of Agriculture and Markets Law § 371, they cannot be compelled to act a certain way (*see Klostermann* at 540).

Matter of Jurnove v Lawrence (38 AD3d 895 [2d Dept 2007]), relied upon by plaintiffs, does not dictate a different result. The issue in *Jurnove* was that the

[4] The "must" language pertains only to constables or the police. Consequently, by its terms it cannot support a claim for mandamus against the DOH.

police had adhered to an internal policy of referring all article 26 violations, most of which involved animal cruelty, to the local society for prevention of cruelty to animals (SPCA) (*Jurnove* at 896). The Court held that a hearing was necessary on the issue of whether the officers had "abdicated their statutorily-imposed duty" by routinely referring the claims to the SPCA without considering them at all (*id.*). At bar, however, the plaintiffs are really challenging the core decision by law enforcement not to arrest or take other legal action against the non-City defendants for what plaintiffs believe are violations of law. In other words, they are seeking to drive a particular outcome. Notably, the Court in *Jurnove* observed that "[a] subordinate body can be directed to act, but not how to act," noting further that law enforcement has "broad discretion" in allocating resources and devising enforcement strategies (*id.*). This statement of law is harmonious with controlling Court of Appeals precedent, reminding courts "to avoid . . . the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches" (*Klostermann*, 61 NY2d at 541).

Plaintiffs' own claims demonstrate that the City defendants have not been derelict in their duties. Although plaintiffs deride NYPD for, and accuse it of, aiding and abetting the non-City defendants by enclosing the Kaporos area with barriers, placing orange cones, providing generators to supply light for the area and erecting "no parking" signs, these actions contain the event and maintain order, each of which is

a proper exercise of the NYPD's law enforcement obligations. As for DOH, it too has acted on plaintiffs' complaints, by sending an investigator. Notwithstanding plaintiffs' complaint that the investigator arrived after Kaporos ended, plaintiffs have no clear right to dictate when, how, or if at all, such investigation takes place.

Accordingly the order of the Supreme Court, New York County (Debra A. James, J.), entered September 24, 2015, which, upon converting the plenary action as against the City defendants to a CPLR article 78 proceeding, granted the City defendants' motion to dismiss the proceeding, should be affirmed, without costs.

All concur except Andrias, J.P. and Gesmer, J. who dissent in an Opinion by Gesmer J.

GESMER, J. (dissenting).

Because I believe that plaintiffs have stated a claim for mandamus relief sufficient to survive a motion to dismiss, I respectfully dissent.

Plaintiff Alliance to End Chickens as Kaporos, of which some individual plaintiffs are members, advocates for the substitution of coins, or other non-animal symbols of atonement, for chickens in the religious practice of Kaporos.[1] In this plenary action,

[1] Because the motion court converted the claims against the City defendants into a CPLR article 78 proceeding, the City defendants are denominated respondents, and the plaintiffs are denominated petitioners in that part of this matter. For simplicity, they are referred to as defendants and plaintiffs throughout this opinion.

plaintiffs seek to enjoin the performance of the religious ritual known as Kaporos to the extent that it is practiced with live chickens. As plaintiffs point out, other Orthodox Jewish communities use coins in place of live chickens, and plaintiffs do not oppose this practice.

As we must on a motion to dismiss, I accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into a cognizable legal theory (CPLR 3211; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). I have also considered plaintiffs' affidavits, which may be submitted on a motion to dismiss to remedy inartful pleading of potentially meritorious claims (*id.* at 88).

Plaintiffs claim that, for as many as four days before Yom Kippur, truckloads of crates overcrowded with live and some dead chickens are left on the streets of Brooklyn, with as many as 16 birds per crate, stacked up to 10 crates high. In the days before the birds are slaughtered, they remain crammed into their cages, are not given food or water, are not protected from the elements or from feces and urine falling from the crates above, and sometimes fall out of the crates onto the public street. Birds are injured during the ritual, and their throats are frequently cut incorrectly, to the extent that the carotid artery is not completely severed and the birds die an unnecessarily slow and painful death. The slaughter takes place on public streets in makeshift open-air slaughterhouses, and dead and nearly dead birds, blood, excrement, used tarps and gloves, and other by-products of the

slaughter are left on the street for days afterwards. This creates an unbearable stench and a health hazard both before and after the ritual. Children are present during, and sometimes assist in, the slaughter. Plaintiffs' toxicology expert states in his affidavit that these conditions create a risk of public exposure to, and spreading of, Salmonella, Campylobacter, strains of influenza, and other pathogens, toxins, and biohazards, which can cause respiratory complications, dermatitis, and infectious diseases in humans. The non-City defendants do not seek or obtain required permits, and there is no oversight and no system for cleanup. At the time the matter was argued before the motion court, the non-City defendants had purchased 50,000 live chickens for the approaching holiday. Plaintiffs have complained repeatedly about the situation and obtained no meaningful response.

Plaintiffs seek mandamus relief against the City defendants, claiming that the City defendants have failed and refused to act on their complaints, and that the police actively assist the non-City defendants by blocking off streets and allowing practitioners to use Police Department generators, barricades, traffic cones, and "no parking" signs during the event.

Plaintiffs claim that, by their actions, the non-City defendants have violated, and the City defendants have failed to enforce and/or have "aided and abetted" the non-City defendants in violating, some 17 state and local statutes, regulations, and rules regarding the keeping and slaughter of animals, public health and safety, and animal cruelty, including provisions of the Agriculture and Markets Law, the Labor Law, the New

York City Health Code, the Rules and Regulations of the New York City Department of Sanitation, and the rules of the New York City Street Activity Permit Office. They further allege that defendants have unreasonably interfered with the rights of plaintiffs and the public, and have caused a public nuisance. Plaintiffs seek a permanent injunction against the non-City defendants to prevent them from erecting slaughterhouses and slaughtering chickens on public streets and sidewalks. Plaintiffs seek an order of mandamus against the City defendants, compelling them to

> "uphold the law, properly issue summonses where warranted, properly issue violations where warranted, properly engage in arrests where warranted [in connection with Kaporos] . . . [and] preventing the . . . City Defendants from encouraging, assisting, and participating in . . . Kaporos . . . [and] from aiding and abetting the [non-City] Defendants to engage in illegal acts . . . and improperly blocking off specific streets and sidewalks."

By order entered September 24, 2015, the motion court converted the plenary action as against the City defendants into a proceeding pursuant to article 78 of the Civil Practice Law and Rules, and granted the City defendants' motion to dismiss it as against them. The motion court based its dismissal as against the City defendants on its finding that plaintiffs had failed to allege that any of the City defendants had ever tried to file a complaint with regard to a violation of the Agriculture and Markets Law or that the police ever

refused to accept such a complaint. As discussed below, the record does not support this finding.

Section 7803 of the Civil Practice Law and Rules permits article 78 petitions in the nature of mandamus to determine "whether the body or officer failed to perform a duty enjoined upon it by law" (CPLR 7803[1]). Mandamus lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]). "[I]f a statutory directive is mandatory, not precatory, it is within the courts' 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" (*Klostermann v Cuomo*, 61 NY2d 525, 531 [1984]). It is the "function of mandamus to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" (*id.* at 540). However, courts must not intrude into the "broad legislative and administrative policy beyond the scope of judicial correction" (*Jones v Beame*, 45 NY2d 402, 408 [1978]). Accordingly, "rarely, if ever, should mandamus lie to command the Commissioner of Public Safety to enforce the Sunday 'blue' laws or the ordinance forbidding the riding of bicycles on the sidewalk" (*id.* at 409). Mandamus is not available to compel a general course of conduct by an official (*Matter of Walsh v LaGuardia*, 269 NY 437, 442 [1936]; *New York Civ. Liberties Union*, 4 NY3d at 184).

The motion court dismissed the proceeding as against the City defendants on two bases, both of which I conclude are faulty.

First, it found that the duties at issue are largely discretionary and not ministerial, and thus mandamus will not lie. However, where "the legislation in question established a standard of conduct which executive officers must meet unless or until the legislative body changes it, a dispute over compliance is generally considered justiciable because the courts can compel performance of the statutory command" (*Matter of Natural Resources Defense Council v New York City Dept. of Sanitation*, 83 NY2d 215, 220 [1994]). "The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus" (*Klostermann*, 61 NY2d at 540).

Here, the actions at issue are mandatory not discretionary. The Department of Health and Mental Hygiene (DOH) is required to enforce the Health Code (*New York City Coalition to End Lead Poisoning v Koch*, 138 Misc 2d 188, 191 [Sup Ct, NY County 1987], *affd* 139 AD2d 404 [1st Dept 1988]). Similarly, pursuant to section 435(a) of the New York City Charter, the New York City Police Department "shall have the power and it shall be their duty" to, inter alia,

> "disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public streets, sidewalks, parks and places; . . . guard the public health, preserve order at . . . all public meetings and assemblages; subject to the provisions of law and

> the rules and regulations of the commissioner of traffic, regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; remove all nuisances in the public streets, parks and places; . . . inspect and observe all places of public amusement . . .; 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." (New York City Charter § 435[a])

In addition, Agriculture and Markets Law § 371 directs that a "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 having jurisdiction, any person offending against any of the provisions of article twenty-six of the agriculture and markets law." The mandatory nature of this provision is "a stark and surprising contrast to the permissive language found in the arrest provisions of the New York Criminal Procedure Law" (Jed L. Painter, 2016 Practice Commentaries, McKinney's Cons Laws of NY, Book 2B, Agriculture and Markets Law § 371, Cum Pocket Part at 166). The article which the police are enjoined to enforce prohibits animal cruelty, including torture, unjustifiable injury, maiming, mutilating or killing of any animal, as well as depriving an animal of "necessary sustenance, food or drink," or causing such treatment (Agriculture and Markets Law § 353). It

further provides that such acts constitute a class A misdemeanor punishable by imprisonment for not more than one year, a fine of up to one thousand dollars, or both (Agriculture and Markets Law § 53; *see also* Penal Law §§ 60.01[3][c]; 70.15, 80.05). While the majority is correct that section 350 of the Agriculture and Markets Law defines animal cruelty as the infliction of "unjustifiable" pain, suffering or death (Agriculture and Markets Law § 350[2]), it is not at all clear that the alleged treatment of poultry in the days leading up to Kaporos, or in improper slaughter, is justifiable. None of the defendants has claimed that violating the Agriculture and Markets Law, 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 on whether the cruelty alleged is justifiable.

Thus, while the City defendants may exercise discretion in the process of determining whether a violation has occurred and, if so, how to respond to it, they have, at a minimum, an obligation to determine whether or not a reported violation has occurred. Pursuant to section 371 of the Agriculture and Markets Law, if the police determine that they have probable cause to believe that a violation of article 26 of the Agriculture and Markets Law has occurred, they "must" issue an appearance ticket or summons or make an arrest.

Second, the motion court incorrectly found that plaintiffs had not shown that any of them had tried to file a complaint with regard to violations under the Agriculture and Markets Law. The motion court found that plaintiffs' failure to do so distinguished this case from *Matter of Jurnove v Lawrence* (38 AD3d 895 [2d Dept 2007]), in which the Second Department held that the petitioners had stated a mandamus cause of action where they asserted that the local police failed and refused to accept their complaints alleging violations of article 26 of the Agriculture and Markets Law.

This was error for two reasons. First, plaintiffs Rina Deych, Lisa Renz, and Steven and Vanessa Dawson submit affidavits in which they describe instances when they approached police officers personally or called the DOH, 911, and/or 311 to report animal cruelty and/or conditions posing a public health hazard, and when they participated in or observed protests concerning Kaporos in the presence of the police. In each instance described, their action led to no meaningful action by the police to address the violations of the Agriculture and Markets Law or by the DOH to respond to complaints of hazardous conditions.

Second, the City defendants do not claim that they have ever made a determination that the acts reported do not constitute violations of the statutes, regulations and rules cited by plaintiffs, including article 26 of the Agriculture and Markets Law. I disagree with the majority that plaintiffs seek to direct the City defendants how to act. The complaint seeks to compel them to issue summonses or make arrests "where

warranted," and to refrain from "aiding and abetting" the non-City defendants in violating the law. I view the complaint as seeking to compel the City defendants not to abdicate their mandatory duty.

Indeed, at least one plaintiff alleges that two police officers admitted to being "horrified" by what they saw when they arrived in response to her call, and that they were unaware of their obligation to enforce the Agriculture and Markets Law before she showed them the relevant sections. Nevertheless, she was told by the officers that they had "orders from on high not to disturb practitioners" of Kaporos. Other plaintiffs allege that their complaints to the police, the DOH, and/or 311 were not addressed at all. One plaintiff claims that the DOH did not investigate the area in response to her complaint until two months after Kaporos had ended. Unsurprisingly, they found no evidence of the blood, fecal matter, used gloves and feathers she had reported being on the street. In my view, these claims are sufficient to withstand a motion to dismiss plaintiffs' mandamus claim. If, as plaintiffs allege, the City defendants have made a policy decision to take no action against Kaporos practiced with chickens on the public streets, without even an investigation, this would appear to be an abdication, rather than, as the majority states, a "proper exercise" of the City defendants' obligations. Moreover, if, as plaintiffs allege, the City defendants are assisting the non-City defendants to violate the law, their provision

of supplies and assistance with street closures would not appear to be a proper exercise of discretion.[2]

The portion of plaintiffs' complaint that seeks to compel the City defendants to "uphold the law" seeks to compel a general course of conduct, for which mandamus relief is not available. Accordingly, I agree that that portion of the complaint should be dismissed (*Walsh*, 269 NY at 442; *New York Civ. Liberties Union*, 4 NY3d at 184). However, "to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties" (*Klostermann*, 61 NY2d at 541; *see also Matter of Jurnove v Lawrence*, 38 AD3d 895). Since, in my view, plaintiffs have established, at a minimum, that the police have a mandatory duty under the Agriculture and Markets Law, that portion of their complaint seeking an order compelling them to "issue summonses where warranted, . . . issue violations where warranted [and] properly engage in arrests where warranted" should not be subject to dismissal on this motion. Plaintiffs' allegation that the City defendants "encourag[e], assist[ ], and participat[e]" in the non-City defendants' violation of the specified laws and regulations is essentially an allegation that they have abdicated their duty to the point that they actively undermine a law

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[2] For example, plaintiffs allege that the City defendants "aid and abet" the non-City defendants' violation of Administrative Code of the City of New York § 18-112(d), which prohibits the erection of slaughterhouses "or any other . . . calling, which may be in anywise dangerous, obnoxious or offensive to the neighboring inhabitants" along Eastern Parkway or streets intersecting Eastern Parkway.

they are mandated to enforce. Therefore, this is also an appropriate subject of mandamus relief (*see Matter of Jurnove*, 38 AD3d at 896).[3] Accordingly, I would vote to reverse the dismissal of plaintiffs' mandamus cause of action against the City defendants, except to the extent that plaintiffs seek to compel the City defendants to "uphold the law" as a general matter.

In reaching this conclusion, I intimate no view as to the merits of plaintiffs' claims but I would permit them to proceed with discovery and a determination on the merits. Furthermore, I am by no means taking lightly the constitutional issues implicated by governmental involvement in religious activities. Plaintiffs' claims are all predicated on their allegations that the challenged acts take place in public places, on public streets and sidewalks, not within the confines of a religious institution or on its grounds (*cf. Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520 [1993] [invalidating laws which barred religious practice of animal sacrifice, even if practiced in private]). It appears that a court could grant the relief that plaintiffs seek without infringing on religious freedom.

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[3] I would also find that plaintiffs have a right to the relief they seek. The City defendants rely mainly on their argument that plaintiffs have failed to show a mandatory duty, and do not focus on whether plaintiffs have a legal right to the relief they seek. Plaintiffs clearly have a right to the relief they seek in the same sense that the petitioner National Resources Defense Council had a right to seek compliance with a local law requiring the Department of Sanitation to establish a recycling program in *Matter of Natural Resources Defense Council v New York City Dept. of Sanitation* (83 NY2d 215 [1994]) and petitioner citizens had a right to have their complaints of animal cruelty responded to by police in *Matter of Jurnove v Lawrence* (38 AD3d 895).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 6, 2017

s/_____
CLERK

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 59

Index No.: 156730/2015

[Filed September 14, 2015]

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,	)
- against-	)
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 COMMITIEE 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, 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, NELLIE MARKOWITZ and BOBOVER YESHIVA BNEI ZION, INC. d/b/a KEDUSHAT ZION, RABBI HESHIE DEMBITZER,

Defendants.

DECISION and ORDER

DEBRA A. JAMES, J.:

Plaintiffs commenced this plenary action seeking mandamus to compel defendants City of New York, by its agencies the Police and Mental Health and Hygiene Departments, and the Police Commissioner (City Defendants), to enforce and prohibit their "aiding and abetting" violations of a myriad of state and local statutes and regulations related to public sanitation and health. Plaintiffs seek injunctive relief from

irreparable injuries they allegedly will suffer (and have suffered in the past) as the result of the City Defendants' failure to enforce such laws and their "aiding and abetting" of violations thereof by the individual defendants, who are Orthodox Jewish rabbis or members of Yeshivas or other Orthodox Jewish religious institutions (Non-City Defendants), in the course of the performance of an annual religious ritual known as Kaporos on the advent of Yom Kippur observances.

Plaintiffs also claim that the Non-City Defendants have created and will create a public nuisance in carrying out Kaporos, and now seek a preliminary injunction to restrain such defendants from violating various state and local sanitary and health statutes and codes. Upon final disposition of this action, plaintiffs seek to permanently enjoin the Non-City Defendants from creating such public nuisance.[1]

The Kaporos ritual, as allegedly practiced by the Non-City Defendants, involves the practitioners' grasping of live chickens by their wings and swinging them above their heads three times and reciting prayers. The purpose of this act is to transfer the practitioner's sins to the birds. After swinging the bird, the adherents slit the chickens' throats with a sharp knife. The meat is then donated to the poor.

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[1] In their Show Cause Order submitted to the court, plaintiffs sought a permanent injunction only but upon oral argument on August 25, 2015, plaintiffs' counsel moved to amend the Order to Show Cause to seek a preliminary injunction. The court deems the Show Cause Order as seeking such provisional remedy.

Plaintiffs allege that the upcoming Kaporos activities to be carried out by the Non-City Defendants on the public streets of Brooklyn will violate many laws, including but not limited to:

- Article 7 of New York State Agriculture and Markets Law § 96-b, which makes it illegal for any person, firm or corporation to operate any place or establishment where animals or fowls are slaughtered or butchered for food unless licensed by the state commissioner of agriculture;
- Article 26 of New York State Agriculture and Markets Law § 353, which defines as a class A misdemeanor the torturing, or cruelly beating or unjustifiably maiming, mutilating or killing any animal, whether wild or tame, and whether belonging to such person or another, or depriving any animal of necessary sustenance, food or drink, or engaging in any acts of cruelty to any animal;
- New York State Rules and Regulations 45.4 that requires any persons entering premises containing live poultry within the State of New York to take sanitary precaution to prevent the introduction or spread of avian influenza into or within the State, including disinfecting of all footwear before entering and after leaving any premises containing live poultry);
- New York City Administrative Code § 18-122(d) that makes it unlawful to erect, establish or carry on, in any manner whatsoever, upon any

lot fronting on Eastern Parkway of any slaughter-house, or other trade or business, which may be in any way dangerous, obnoxious or offensive to the neighboring inhabitants);

- New York City Health Code § 153.09 that prohibits any person from throwing, dropping, or putting any blood, swill, brine, offensive animal matter, noxious liquid, dead animals, putrid or stinking vegetable or animal matter or allowing any such matter to run or fall into any street, public sewer, or standing or running water;

- New York City Health Code § 161.09 that requires a permit to sell or keep live poultry on the same lot as a multiple dwelling and prohibiting the issuance of such a permit unless the coops are more than twenty five feet from inhabited building other than a one-family home occupied by the applicant.

THE PARTIES

United Poultry Concerns, according to the affidavit of its founder and president Karen Davis, is a nonprofit organization that "promotes the compassionate and respectful treatment of domestic fowl including a sanctuary for chickens in Virginia." Davis alleges that United Poultry Concerns has approximately 15,000 members. She also alleges that she is the founder and head of plaintiff The Alliance (Alliance) to End Chickens as Kaporos, which is an "informal" subsidiary of United Poultry Concerns. Davis states that since 2010 she has attended protests against the use of

chickens in rituals in Crown Heights and other neighborhoods in Brooklyn.

According to their Amended Verified Complaint and affidavits, the individual plaintiffs Rina Deych, Joy Askew, Sasha Bromberg Steven Dawson, Vanessa Dawson, Rachel Dent, Julian Deych, Francis Emeric, Cynthia King, Dawn Ladd, Lucy Sarni, are persons who reside or work or travel to work, within the neighborhoods of Crown Heights, Boro Park and Williamsburg in Brooklyn, where the Non-City Defendants carry out the Kaporos ritual every year before Yom Kippur. They complain that in past years for days before the ritual, the Non-City Defendants have left truckloads of living and sometimes several dead chickens crowded in crates stacked without food or water or shelter from the elements. They claim the Non City Defendants erect make-shift slaughterhouses on the public streets of their neighborhoods, where they slaughter chickens. They contend that in many instances, the practitioners have injured the birds in the course of swinging them, and that they have seen dead birds and the by-products of the slaughter thrown into the streets. They dispute that the chickens are donated to the needy and allege that after the slaughtering has ended, they observed chickens carcasses dumped into big metal dumpsters in the alleyways where they remain for a few days. According to plaintiffs, there is no oversight for clean-up of the accumulation of bacteria-filled debris. Many of the affiants complain that they have suffered illness and mental anguish from the stench and sights of maimed, mutilated or dead poultry on the public streets. Several of the plaintiffs assert that the activity has grown

exponentially over the years creating a carnival-like and chaotic public nuisance.[2]

The City Defendants oppose plaintiffs' motion for a preliminary injunction and affirmatively move to dismiss.

In opposition, the attorney for defendants National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hect, Rabbi Shalom Ber Hect, Rabbi Shloma L. Abramovitz, Bobover Yeshiva Beni Zion Inc. and Rabbi Heshie Dembitzer argues that the hearing on plaintiffs' application should be adjourned until after Yom Kippur to allow more time for the Non-City Defendants to submit opposition papers. Arguing that plaintiffs deliberately engaged in brinkmanship by bringing the application in the middle of the summer with responsive papers due on the eve of Yom Kippur, defense counsel points out that plaintiffs fail to inform the court that plaintiffs made a similar application to restrain the Non-City Defendants from carrying out the Kaporos chicken slaughtering religious rite in the Supreme Court, Kings County, in September 2014, and that plaintiffs have failed to prosecute such action, which is still pending. Attached to the opposition papers is a copy of the Show Cause Order dated September 29, 2014, and entered as

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[2] At the hearing, defense counsel represented that the Non-City Defendants have already purchased 50,000 live chickens for Kaporos, which is to take place the weekend of September 18, 2015.

"declined to sign" on October 8, 2014[1], by the judge (Martin, J.) of Supreme Court, County of Kings.

Defense counsel contends that in any event, the application of plaintiffs must be denied, as plaintiffs make no demonstration that they are likely to succeed on the merits of their public nuisance claim. Defendants Schect and Abramovitz, each by his affirmation, states that he is an ordained rabbi and member of the Executive Committee of the defendant National Committee for the Furtherance of Jewish Education and Affiliates (Affiliates). Each states that the custom of using chickens for the purpose of atonement in the Kaporos ritual before Yom Kippur has been practiced for at least two thousand years. Each acknowledges that some rabbis authorize the use of coins, instead of chickens, but that they and Affiliates' members are compelled to follow their own custom. Each argues that plaintiffs who are vegetarians or animal rights activists and disapprove of their use of chickens should not be allowed to interfere with their religious practices. Each further points out that the Affiliates operate only one site in Brooklyn on Eastern Parkway, and that there are numerous unknown vendors, who sell chickens for the Kaporos ritual who have nothing to do with Affiliates.

Counsel for defendant Abraham Rosenfeld states that Rosenfeld was not served with process, and joins in the application to adjourn the hearing of Show

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[1] Yom Kippur began on October 3 and ended on October 4, 2014; any provisional remedy was rendered moot at the time the Kings County Supreme Court Justice declined to sign the show cause order.

Cause Order for further papers. By affidavit, defendant Schlomie Zarchi raises an issue of fact with respect to whether he was served properly with process. Counsel for Zarchi also argues that plaintiff Alliance has no standing or authority to prosecute a lawsuit in New York pursuant to Not-for-Profit Corporation Law § 1314, as Alliance has no independent legal existence in the State of New York and its affiliate United Poultry Concerns exists only under the laws of the State of Maryland, and that defendant Zarchi is immune from liability pursuant to CPLR § 3211(a) [see Not-for-Profit Corporation Law § 720-a].

DISCUSSION

On August 25, 2015, the court denied defendants' application to adjourn the hearing of the instant Show Cause Order. The Show Cause Order required that the papers be personally served upon the defendants on or before July 27, 2015, with responsive papers directed to be served by defendants on or before August 17, 2015. Upon a telephone conference with the court, plaintiffs' counsel consented to extend the deadline for one week to August 21, three days before the hearing. The court found such extension adequate.

Defendants are correct that on September 29, 2014, in Decht v The New York City Police Department (Kings County Supreme Court Index No. 14065/2014), two of the plaintiffs sought the identical relief against the City and three of the individual defendants, as plaintiffs seek here. As the plaintiffs in the Kings County action, which is still pending, were represented by the same attorney as represents the plaintiffs now before this court, the "ex parte motion (should have

been) accompanied by an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown." CPLR 2217(b). However, ancient law holds that such omission is an irregularity that the court may disregard. See Terry v. Green, 53 Misc. 10 (Supreme Court, Herkimer County 1907). Nor does this court find that the instant application constitutes a motion for leave to renew, stay, vacate or modify a prior order. As plaintiffs point out, there are a multiplicity of parties on both sides in the matter at bar that are not before the Kings County Supreme Court, and in any event plaintiffs do not seek to affect the declination made by the Kings County Justice in 2014. Nor have defendants moved either to stay the instant action pending resolution of the other action pending in Kings County Supreme Court or to transfer and consolidate the instant action.[3]

Nevertheless, the court shall deny the motion of plaintiffs for a preliminary injunction and dismiss the action against the City Defendants.

It is axiomatic that "[to] be entitled to a preliminary injunction, the [movant] was required to demonstrate a likelihood of success on the merits, irreparable injury in the absence of provisional relief, and a balancing of the equities in its favor" (City of New York v 330

[3] As to venue, although all of the individual parties reside and the factual allegations all took place in Kings County, this action must be heard in New York County since it would be an abuse of discretion for this court to sua sponte transfer this action to Kings County. See Kelson v Nedicks Stores. Inc., 104 AD2d 315 (1st Dept. 1984).

Continental LLC, 50 AD3d 226, 230 [1st Dep.t 2009]). The City Defendants are correct that plaintiffs have failed to make the requisite showing.

As argued by the City Defendants, this plenary action brought by plaintiffs is improper. Plaintiffs were required to commence an Article 78 special proceeding to seek mandamus relief against the City of New York. See CPLR 7803(1).

Nonetheless, pursuant to CPLR 103(c), the court sua sponte converts the action into an article 78 proceeding. See Manshul Constr. Corp. v Board of Education of City of New York, 154 AD2d 38 (1st Dept. 1990).

Treating the instant Show Cause Order and the City Defendants' motions as made in a special proceeding pursuant to CPLR § 103 (b) and § 404, respectively, this court concurs with the City Defendants that the plaintiffs (now petitioners) are unable to demonstrate a likelihood of success on merits of their mandamus claim, since such relief lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (NY Civil Liberties Union v State of New York, 4 NY3d 175, 184 [2005]). Mandamus does not lie to compel the enforcement of a duty that is discretionary, as opposed to ministerial.

"A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (NY Civil Liberties,

53 NY2d at 184). Mandamus is not available to compel government officers to perform discretionary acts such as the general enforcement of laws and regulations. See Walsh v LaGuardia, 269 NY 437 (1936) (petitioner had no right to relief to compel Mayor and Police Commissioner to "perform their duty" and prohibit operators of non-franchised bus routes); Perazzo v Lindsay, 30 AD2d 179, 180 (1st Dept. 1968) (petitioners did not have general right to maintain an Article 78 proceeding to secure broad mandamus relief directed to the enforcement of specified laws and ordinances).

The City Defendants (now City Respondents) are correct, that whether and in what instances police power should be exercised in connection with the enforcement of the statutory and regulatory provisions that petitioners contend will be violated with the Kaporos practice of the Non-City Defendants (with the exception of Article 26 of the New York State Agriculture & Markets Law (see [infra]) are not ministerial or mandatory in any way. Enforcement of such provisions implicates the discretionary function of the executive branch comprised by the City Defendants, which executive branch is permitted to allocate its resources and prioritize police enforcement action as a matter of its discretion.

The court concedes that one of the laws referenced by petitioners is mandatory. New York State Agriculture and Markets Law § 371 mandates police officers to issue an appearance ticket pursuant to section 150.20 of the criminal procedure law, summon or arrest and bring before a magistrate any person offending against any of the provisions of Article 26 of

the New York State Agriculture and Markets Law. In their Amended Verified Complaint, plaintiffs reference Article 26 of New York State Agriculture and Markets Law, specifically, § 353, which classifies cruelty to animals as a misdemeanor. However, petitioners do not claim, or offer even one instance, specific or otherwise, where any petitioner ever tried to file, let alone, where the New York City Police Department ever refused to accept, any complaint with respect to any violations of Agriculture and Markets Law§ 353 by the Non-City defendants that they allegedly witnessed.

One of the petitioners in her affidavit states that she personally visited the precinct in one of the neighborhoods where Kaporos was taking place and requested to see permits for the rituals. Another asserts that she telephoned "311". Neither alleges that either ever telephoned "911" to report a misdemeanor. In her affidavit, Davis states she personally attended protests for the past four years at various Kaporos sites, in which many of her members participated. Neither in the Amended Verified Complaint nor any of the supporting affidavits is there any claim that the Police Department refused a 911 call about the alleged unlawful activity. Nor are the assertions that the police department placed barricades and blocked off public streets and sidewalks to "aid and abet" violations of Agriculture and Markets Law § 353 by the Non-City Defendant tantamount to an assertion by any of the petitioners that any one of them ever made a 911 call to the New York City police department about any alleged illegal activity. On that basis, the matter at bar is distinguishable from the facts of Jurnove v Lawrence, 38 AD3d 895 (2d Dept. 2007).

For their failure to state a cognizable mandamus cause of action, the petition against the City Defendants must be dismissed.

The Non-City Defendants' argument that the Alliance lacks standing is inconsequential, since individual members of that association are participating as named plaintiffs in this action. Compare New York State Association of Nurse Anesthetists v Novello, 2 NY3d 207 (2004). Nor are disputes as to personal jurisdiction dispositive of the instant motion for a preliminary injunction, as resolution of such issue awaits either a motion to dismiss or interposition of such affirmative defense in such defendants' answers. See Glikiad v Cherney, 97 AD3d 401 (1st Dept. 2012).

However, he court is persuaded by the arguments of counsel for the Non-City Defendants that plaintiffs have failed to demonstrate a likelihood of success on the merits of their public nuisance claim.

"A public nuisance is actionable by a private party only if it is shown that the person suffered special injury beyond that suffered by the community at large" (532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 292 (2001).

In that regard, Wheeler v Lebanon Valley Auto Racing, 303 AD2d 791 (3d Dept. 2003) is instructive.

> A public nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all ... in a manner such as to offend public morals, interfere with use by the public of

a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 [1977]; see 532 Madison Ave. Gourmet Foods v Finlandia Ctr., 96 NY2d 280, 292 [2001]; Restatement [Second] of Torts § 821B; R. Abrams and V. Washington, The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer, 54 Albany L Rev 359, 374). Racetracks are among the sources of "[n]oise and other disturbances of the peace in a neighborhood" that have been found to be public nuisances (Hoover v Durkee, 212 AD2d 839, 840 [1995]; see State of New York v Waterloo Stock Car Raceway, 96 Misc. 2d 350 [1978]; cf. State of New York v Bridgehampton Rd. Races Corp., 54 AD2d 929 [1976]).

It has long been settled, however, that "[a] public nuisance is actionable by a private persons only if it is shown that the person suffered special injury beyond that suffered by the community at large" (532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 292; see Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 334 [1983]; Copart Indus. v Consolidated Edison Co. of N.Y., supra at 568; People v Brooklyn & Queens Tr. Corp., 283 NY 484 [1940]; Francis v Schoellkopf, 53 NY 152; Hoover v Durkee, supra at 840; Leo v General Elec. Co., 145 AD2d 291, 294 [1989]). As a result, where the claimed injury is "common to

> the entire community," a private right of action is barred (Burns Jackson Miller Summit & Spitzer v Lindner, supra at 334-335; compare Hoover v Durkee, supra [where record on appeal indicates that raceway noise levels caused the plaintiffs to suffer special damages consisting of decreased property values], with Queens County Bus. Alliance v New York Racing Assn., 98 AD2d 743 [1983] [neighboring , racetrack caused the plaintiffs to suffer no damages different from Queens County's other residents]). In addition, the Court of Appeals has recently confirmed that the requisite "special" or "peculiar" injury suffered by private persons must be different in kind, and not just degree, from that sustained by the community surrounding the source of the public nuisance (532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 294).
>
> (Wheeler, 303 AD3d at 792-793.)

Here, as in Wheeler, plaintiffs and their experts fail to demonstrate a likelihood that all of the plaintiffs and other persons in community were not and will not be "similarly impacted" by exposure to the stench and debris of the slaughter-house conditions created during the Kaporos rituals in their Brooklyn neighborhoods. Plaintiffs' claims of undifferentiated medical conditions are insufficient to demonstrate a likelihood of success on their claims for special injury, i.e. that they are affected by Kaporos in a fundamentally different manner than members of their community at large.

It is likely that plaintiffs will establish no more than a public nuisance with respect to the activities of the Non-City Defendants.

> A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority (Copart Indus. v Consolidated Edison Co., 41 NY2d 564, 568).

(532 Madison Ave. Gourmet Foods v Finlandia Ctr., supra at 292).

Based on the foregoing, this court need not yet reach the constitutional question of whether a restraint on the Non-City Defendants against violating certain statutory and regulatory provisions would interfere with their rights to free exercise of religion under the Free Exercise Clause of the United States Constitution Bill of Rights. See Nussenweig v Dicorica, 38 AD3d 339 (151 Dept. 2007).[2]

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[2] The history and import of the statutes and regulations at bar do not resemble the law banning religious animal sacrifice enacted by city of Hialeah, which the United States Supreme Court struck down in Church of the Lukum Babalu Aye v City of Hialeah, 508 U.S. 520 (1993). In its holding, the Supreme Court found that the history of the Hialeah enactment show that the law specifically targeted the African Cuban Santeria practice of animal sacrifice, while providing numerous exemptions for other instances of

Accordingly, it is hereby

ORDERED that the motion of plaintiffs for a preliminary injunction is denied in its entirety; and it is further

ORDERED that pursuant to CPLR 103(c), the herein plenary action as against the City of New York is converted to a CPLR Article 78 proceeding, and the plaintiffs, now deemed petitioners, and the defendants, now deemed respondents, and such proceeding is dismissed; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, on October 27, 2015, 2:30 PM; and it is further

ORDERED that defendants shall serve an answer within twenty (20) days of service of this order with notice of entry pursuant to CPLR 3012(d).

This is the decision and order of the court.

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animal slaughter, including kosher slaughter. On that basis the Court held that the law violated the First Amendment Free Exercise clause of the United States Constitution. The Non-City Defendants do not dispute at this juncture that the New York State and New York City laws and regulations cited by plaintiffs were enacted to promote the prevention of animal cruelty and public health, and are neutral in their application to all secular or religious conduct.

Dated: September 14, 2015

ENTER:

s/_____
J.S.C.
DEBRA A. JAMES