Prepared By:
Michael Jones, CA Bar No. 271574
M. Jones & Associates, PC
505 North Tustin Ave, Suite 105
Santa Ana, CA 92705
Telephone: (714) 795-2346
Facsimile: (888) 341-5213
Email: mike@MJonesOC.com
Attorney for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED POULTRY CONCERNS, Plaintiff, v. **CHABAD OF IRVINE; ALTER TENENBAUM, IN HIS INDIVIDUAL, CAPACITY; DOES 1 THROUGH 50,** Defendants	Case No. **8:16-CV-01810**-AB-(GJSx) **DEFENDANTS' OPPOSITION AND RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION WITH MEMORANDUM OF POINTS AND AUTHORITIES** HEARING SCHEDULED DATE: 23 January 2017 TIME: 10:00 AM ASSIGNED TO HON. ANDRÉ BIROTTE JR., District Judge; HON. GAIL J. STANDISH, Magistrate Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. SUMMARY OF OPPOSITION AND ARGUMENT

Chabad of Irvine and Rabbi Alter Tenenbaum (collectively, "Chabad") submit this opposition to the motion of Plaintiff United Poultry Concerns ("UPC") seeking a preliminary injunction against for events that will not occur until late September of 2017.[1] Because preliminary injunctions are only appropriate when there is an *imminent* likelihood of irreparable harm, this Court must deny the preliminary injunction request. There is no urgency. Instead, the Court can fully address the issue of whether to grant an injunction on its own time after full development of the record.

The Court also must reject UPC's preliminary injunction request because UPC has not established a likelihood of success on the merits. As discussed in Defendants' Motion to Dismiss filed on November 7, 2016, this Court lacks jurisdiction, UPC lacks standing, and UPC's sole claim fails on the merits.[2] Defs.' Mot. Strike or Dismiss Compl. [hereinafter "Defs.' Mot. Dismiss"], Dkt. No. 50; Defs.' Anti-SLAPP Mot. Strike Compl. [hereinafter "Defs.' Anti-SLAPP Mot."], Dkt. No. 51.

---

[1] Kapparot is an annual religious ceremony that occurs between Rosh Hashanah and Yom Kippur. In 2017, Yom Kippur will begin at sunset on September 29th. This brief uses "Kapparot" as in the Complaint.

[2] Chabad reasserts all arguments from its Motion to Dismiss and Anti-SLAPP Motion filed on November 7, 2016. Dkt. Nos. 50-51.

UPC is unlikely to succeed because it fails to surmount the first requirement in any federal case — jurisdiction.[3] UPC grounds its amount in controversy assertion in an unsubstantiated estimate that Chabad made a profit of $7,500 in 2014. However, as indicated by Rabbi Tenenbaum's affidavit and supporting exhibit, Chabad does not operate the Kapparot ceremony for profit, and in fact performed the ceremony at a ***loss of $24*** in 2014.[4] Aff. Rabbi Tenenbaum, Dkt. No. 50-1, Ex. A. UPC does not address the $24 loss in its brief, and simply cannot meet the $75,000 threshold required for diversity jurisdiction.

Neither can UPC overcome the next hurdle — standing. UPC's brief ignores Chabad's dispositive arguments under both Article III and California's unfair competition law ("UCL").

Finally, UPC will not succeed on the merits because the Kosher killings in the Kapparot ceremony are humane and not "malicious" under California Penal Code § 597(a).

UPC's brief primarily focuses on Chabad's First Amendment defense. However, due to jurisdictional flaws and deficiencies in the *prima facie* case,

[3] In this brief, UPC only alleges diversity jurisdiction, not federal question jurisdiction.

[4] The finances of other synagogues are irrelevant.

it is likely that this case will be dismissed before ever reaching the question of constitutional defenses. In any event, UPC's brief fundamentally misstates Chabad's Free Exercise Clause arguments.

Ultimately, the lack of urgency is dispositive. Because the Court has time to fully hear the case and resolve the issues thoroughly, UPC's preliminary injunction request must be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts stated in Chabad's Motion to Dismiss are incorporated by reference. The following responds to assertions given in UPC's brief.

Kapparot is a traditional Jewish atonement ceremony dating back thousands of years. *See* Decl. Rabbi Alter Tenenbaum Opp'n Pl.'s Ex Parte Appl. TRO [hereinafter "Decl. Rabbi Tenenbaum"] ¶ 4, Ex. B.[5] UPC recognizes the lengthy history of the practice in Judaism worldwide, but denies its history in the United States. Pl.'s Mot. Prelim. Inj. [hereinafter "Pl.'s Mot."] 1, Dkt. No. 68-1. UPC also argues that it understands the requirements of Chabad's religion more thoroughly than the synagogue and that Chabad performs the ceremony incorrectly, implying that the Court

[5] Declaration given in the parallel state case, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Cal. Super. Ct., Sept. 17, 2015) [hereinafter "*APRL* case"], Dkt. No. 28.

should compel UPC's interpretation of the Torah. *Id.* at 2, 11 (arguing that "using chickens in these rituals is not required by any religious teaching"); Decl. Rabbi Klein, Dkt. No. 68-10.[6]

Chabad is a synagogue and a 501(c)(3) nonprofit religious organization. Aff. Rabbi Tenenbaum ¶ 2, Ex. A. It is not a business. Decl. Rabbi Tenenbaum ¶ 11, Ex. B. Chabad performs the Kapparot religious atonement ceremony for religious reasons in accordance with its religious beliefs. Aff. Rabbi Tenenbaum ¶ 3, Ex. A. It does not practice Kapparot for profit or for fundraising. *Id.* ¶¶ 3-4, 6. Participants may make a donation, but there is no set fee for participation. Decl. Rabbi Tenenbaum ¶ 11, Ex. B. Chabad does not sell chickens. *Id.* In 2014, the year described in the Complaint, Chabad incurred a *loss of $24* from facilitating the ceremony. Aff. Rabbi Tenenbaum ¶ 4, Ex. A.

At all times, Chabad treats chickens humanely and in accordance with California law, California regulations, and City of Irvine ordinances.[7] Decl. Rabbi Tenenbaum ¶ 6, Ex. B. When Chabad performs the atonement

---

[6] UPC's brief presents a new allegation, not found anywhere in previous briefing, that the purpose of Kapparot is not actually religious, but rather to have an "emotional moment." Pl.'s Mot. 2, Dkt. No. 68-1.

[7] Several local ordinances limit Chabad's ability to use chickens as food after the Kapparot ritual.

ceremony, it does so without causing waste in accordance with the religious requirements of the Torah. *Id.* at ¶¶ 5, 9-10. In 2014, chickens were rendered, not discarded. *Id.* at ¶ 10; Decl. Pease, Ex. E, Dkt. 68-13.

A parallel state court action has been proceeding since September 11, 2015. Compl., *APRL* case, Dkt. No. 1; Pl.'s Mot. 3, Dkt. No. 68-1. Both actions arise from Ronnie Steinau ("Steinau") attending Chabad's 2014 Kapparot ceremony. Am. Compl. ¶¶ 21-25, *APRL* case, Dkt. No. 189. Both plaintiffs argue standing using a law designed to protect Californians from business fraud. *Id.* ¶¶ 30-34. The actions include substantially similar claims of animal cruelty.[8] *Id.* ¶ 14(d). At issue in state court is whether the Kapparot ceremony involves "cruelly killing" chickens under Penal Code § 597(b), which closely mirrors the "malicious" killing prohibited under § 597(a). For instance, during a hearing on September 18, 2015, the court accepted Chabad's argument that because kosher slaughter is humane, Kapparot did not involve "cruel killing," and the court declined to issue a temporary restraining order against the synagogue. *See* Minute Entry, Sept. 18, 2015, *APRL* case, Dkt. No. 36; Decl. Rabbi Tenenbaum, Ex. B.

[8] The state court action includes additional claims that are not at issue here. Am. Compl., *APRL* case, Dkt. No. 189.

After delay caused by waiting on the state case, UPC filed this federal action on September 29, 2016 — just three days before Rosh Hashanah and twelve days before Yom Kippur. Pease Decl. ¶ 12, Dkt. No. 13; Compl., Dkt. No. 1. UPC obtained an Ex Parte Temporary Restraining Order ("TRO") on October 7, 2016. Minute Order, Dkt. No. 18.

In the evening of October 10, 2016, First Liberty Institute and WilmerHale were retained as counsel for Defendants' federal case, and they immediately filed a motion to dissolve the TRO in the morning on October 11, 2016. Aff. Rabbi Alter Tenenbaum Opp'n PI ¶ 2, Ex. C. The hearing took place on October 11, 2016, in which Chabad sought to dissolve the TRO in order to freely practice a legal religious ceremony without fear of reprisal.

On October 10, 2016, some members of the synagogue participated in a Kapparot ceremony that took place at a licensed slaughterhouse in Midway City. *Id.* ¶ 3. The slaughterhouse provided the chickens, and participants purchased chickens from the slaughterhouse. *Id.* Because several members of the community were unable to attend the ritual in Midway City, Chabad sought to offer the Kapparot ritual locally on October 11, 2016. *Id.* ¶ 4. However, Chabad was unable to offer the ceremony after

the TRO was dissolved because of the short time remaining before Yom Kippur began at sunset.[9] *Id.* ¶ 5.

On November 7, 2016, Chabad filed its Motion to Dismiss and Anti-SLAPP Motion. Dkt. Nos. 50-51. On December 26, 2016, UPC filed its motion for preliminary injunction. Dkt. No. 68. One week later, Chabad files this response.

III. OBJECTIONS

When necessary for the preliminary injunction analysis, "[t]he trial court may give even inadmissible evidence some weight," but it may do so only when it "serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Because there is no urgent need for a preliminary injunction, the Court should not give weight to inadmissible evidence.

Chabad objects to declarants' irrelevant statements about the Kapparot activity, religious beliefs, or finances of institutions unrelated to Chabad, including: (1) Paragraphs 2-15 of Bryan Pease's declaration and attached articles, Fed. R. Evid. 401, 403, 802, 805; (2) Michael McCabe's declaration, which was prepared for a case not involving Chabad, Fed. R.

[9] The hearing concluded at 5:40pm and sunset occurred at approximately 6:19pm. Aff. Rabbi Tenenbaum Opp'n PI ¶ 5, Ex. C.

Evid. 401, 403, 802, 805; and (3) Rabbi Jonathan Klein's declaration, as his religious beliefs are not relevant for determining the religious beliefs of Chabad. Fed. R. Evid. 401, 403.

Chabad objects to expert testimony in the declarations of Armaiti May, Ed Boks, Holly Cheever, Thomas Kelch, Michael McCabe, and Debra Voulgaris. Fed. R. Evid. 403, 702, 802, 805. Holly Cheever is not qualified to offer expert testimony on the purpose of religious sacrifice, nor is it relevant as Kapparot is not a "sacrifice," Fed. R. Evid. 401, 403, 702. Debra Voulgaris is not qualified to offer legal opinions, Fed. R. Evid. 403, 702.

Chabad objects to statements made by lay witnesses Robyn Hicks, Brenda Calvillo, Cheryl Bernstein, and Jill Mulato that are hearsay, speculative, or lack foundation. Fed. R. Evid. 403, 602, 701, 802, 805. Chabad objects to photographs and video in the declarations of Cheryl Bernstein and Brenda Calvillo as not properly authenticated and hearsay. Fed. R. Evid. 802, 805, 901.

Several declarants make conclusions regarding the proper legal interpretation of Penal Code § 597(a). These should be afforded little weight because legal issues are, of course, for the Court to determine.

IV. ARGUMENT

A. STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). All four factors must be satisfied. *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 1131 (quoting *Winter*, 555 U.S. at 20). "[T]he basic function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

B. UPC CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

The Court lacks jurisdiction, UPC lacks standing, and UPC's sole claim fails on the merits.[10] Instead of responding to these fatal deficiencies, UPC's brief focuses its legal argument on an attempt to counter Chabad's First Amendment defense. However, UPC misrepresents Chabad's Free

[10] Chabad reasserts each argument from Chabad's Motion to Dismiss. This section contains summaries and responses to new arguments.

Exercise argument and ignores Supreme Court precedent that protects religious exercise.

1. UPC Is Unlikely to Establish Diversity Jurisdiction Because Amount in Controversy Does Not Exceed $75,000.

Because the value of the requested injunction does not exceed $75,000, the amount in controversy is not sufficient to confer diversity jurisdiction.[11] 28 U.S.C. § 1332(a); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). According to UPC's brief, the value of an injunction against Chabad's Kapparot ceremony is equal to Chabad's lost profits over "a reasonable period of time." Pl.'s Mot. 6, Dkt. No. 68-1. The Complaint guesses that Chabad made $7,500 in profits from the ceremony in 2014 and assumes that it would earn the same each year for the next "ten years." Compl. ¶ 7, Dkt. No. 1. However, as shown by the attached Affidavit of Rabbi Tenenbaum, Chabad does not perform the ceremony for profit and in fact incurred a ***loss of $24*** from the ceremony in 2014. Aff. Rabbi Tenenbaum ¶¶ 2-6, Ex. A. UPC has not addressed this $24 loss or offered any evidence to dispute it. In short, UPC's calculation of the amount in controversy is pure "speculation and conjecture." *Lowdermilk v. United States Bank Nat'l Ass'n*,

[11] UPC also cannot establish, and its brief does not allege, federal question jurisdiction.

479 F.3d 994, 1002 (9th Cir. 2007). The value of the injunction over the next ten, twenty, or thirty years is nowhere near $75,000.

Plaintiff's alternate attempt to reach $75,000 using attorneys' fees also fails. The amount in controversy generally does not include fees, and the Complaint does not make allegations required to be eligible for a discretionary fee award. *See* Order to Show Cause at 1, Dkt. No. 16; Cal. Civ. Proc. Code § 1021.5; *Conservatorship of Whitley v. Maldonado*, 241 P.3d 840, 846 (Cal. 2010). Even if attorneys' fees could be included in the amount in controversy, UPC's calculation is not credible. UPC asserts, without evidence, that its fees "have already exceeded $75,000." Pl.'s Mot. 6, Dkt. No. 68-1. However, the Court only considers fees "incurred as of the date the complaint is filed." *Animal Prot. & Rescue League, Inc. v. Northridge Owner, L.P.*, No. 16-cv-01494-BLF, 2016 U.S. Dist. LEXIS 114232, at *7 (N.D. Cal., Aug. 24, 2016). Because UPC's Complaint is nearly identical to the parallel state court action, accruing over $75,000 in fees from copying a complaint is not credible. Moreover, UPC bears the burden of establishing jurisdiction and has failed to produce any evidence regarding attorneys' fees. This is fatal to its jurisdiction argument.

2. UPC Is Unlikely to Establish Standing Because Chabad Caused No Injury to UPC.

Chabad did nothing to cause injury to UPC, and therefore UPC does not have Article III standing. According to the Complaint, a UPC employee named Steinau chose to expend time trying to stop Chabad from performing a Kapparot ceremony. Compl. ¶ 25, Dkt. No. 1. If there is any injury in that, it is purely self-inflicted harm and not sufficient to confer federal standing. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (holding an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all").

UPC's brief ignores Article III standing, and instead briefly states that it has statutory standing under California's unfair competition law based on "diversion of organizational resources."[12] Pl.'s Mot. 6, Dkt. No. 68-1. However, UCL standing only exists where defendants caused plaintiffs to lose "money or property." *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 881 (Cal. 2011). The Complaint makes no allegation that it lost *money or property*, nor that Chabad *caused* any economic injury to UPC. Considering

[12] It is also unclear why pursuing Chabad would be a "diversion of resources," because according to UPC founder Karen Davis, one of UPC's goals is "working to end the use of chickens in Kapparot nationally." Decl. Karen Davis ¶ 4, Dkt. No. 68-7.

that UPC is a resident of Virginia and Maryland, UPC has alleged nothing to explain how the actions of a California synagogue have caused it harm. Pl.'s Mot. 3, Dkt. No. 68-1. Plaintiff UPC lacks standing.

3. UPC Is Unlikely to Show that Chabad's Religious Ceremony Is a "Business Act or Practice."

UPC's brief concedes, as it must, that it can only bring a private attorney general action under California's unfair competition law if it is seeking to enjoin "unlawful business practices." Pl.'s Mot. 1, 3, 11, Dkt. No. 68-1. The UCL is only concerned with "wrongful conduct in commercial enterprises" and acts or practices "committed pursuant to business activity." *People v. Nat'l Research Co. of Cal.*, 20 Cal. Rptr. 516, 520 (Cal. Ct. App. 1962); *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 937 (N.D. Cal. 2011); Cal. Bus. & Prof. Code § 17200. UPC's brief cites no authority to support its assertion that "accepting money in exchange for killing and discarding the chickens" is a business practice. *Id.* at 11. Under UPC's reasoning, any religious service that accepts donations would be considered a business activity. Such a rule would transform all places of worship into commercial enterprises and subject them to numerous regulations that, while appropriate for regulating commercial activity, would not be appropriate for regulating places of worship. Regulating synagogues,

mosques, and churches as businesses carries a strong likelihood of interfering with the principle of separation of church and state. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012). A religious ritual is not a "business act."

4. UPC is Unlikely to Show that Chabad Violated the Penal Code Because Its Religious Ceremony Is Humane.

Section 597(a) prohibits the *malicious* and intentional killing of an animal. Maliciousness is not synonymous with intentionality; rather, it is a culpable intent to do something "wrongful." Cal. Penal Code § 7(4). Numerous state and federal laws regard Kosher practices as humane. *See, e.g.*, Cal. Code Regs. tit. 3, § 1246.15(a); Cal. Food & Agric. Code § 19501(b)(2); 7 U.S.C. § 1902(b); 7 U.S.C. § 1906. Therefore, conducting a kosher killing of chickens during a Kapparot atonement ceremony is not malicious. Chabad at all times treats chickens humanely and in accordance with Jewish law. Decl. Rabbi Tenenbaum ¶ 6, Ex. B. UPC's animal cruelty claim fails.

UPC's brief attempts to read the "maliciousness" requirement out of the statute. Despite the presence of two standard *mens rea* requirements in the statutory text, UPC asserts that Penal Code § 597(a) has no *mens rea* requirements and, instead, the killing of an animal for non-specified uses is

a "*per se*" crime. Pl.'s Mot. 3, 11, Dkt. No. 68-1. However, the presence of any *mens rea* element in a statute makes it not a "per se" crime.[13] UPC cannot succeed on the merits.

5. Enjoining Chabad's Kapparot Ceremony Violates the Free Exercise Clause.

Chabad and UPC agree that under *Employment Division v. Smith*, 494 U.S. 872 (1990), courts must apply rational basis scrutiny to neutral and generally applicable laws applied in neutral and generally applicable ways. The converse is also true. For laws that are not neutral or generally applicable (or not applied in such a way), courts apply strict scrutiny.

Chabad and UPC also agree that *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), does not confer an unqualified right to conduct rituals involving animals at any time. Pl.'s Mot. 8, Dkt. No. 68-1. Chabad never insisted that it did. Rather, Chabad asserts its constitutional right to be free from a non-generally-applicable law if and when it is applied in a discriminatory manner against its religious practices without sufficient justification.

[13] Even under UPC's argument that the statute does not consider motivations and only considers actions, kosher killings are considered humane actions and therefore are not malicious or wrongful acts.

Beyond these two points of agreement, UPC fundamentally misstates Chabad's Free Exercise argument. Contrary to UPC's assertion, Chabad is not arguing that *Lukumi* requires "a religious exception for a particular practice whenever there are other exceptions to a general law." Pl.'s Mot. 6, Dkt. No. 68-1. Rather, Chabad argues that the existence of many exceptions renders the law not "generally applicable." When a law is not generally applicable, that only triggers a certain type of review (strict scrutiny), and it does not dictate the *outcome* in any particular case.

UPC implies that it would "wreak havoc" on the penal code if this Court were to apply strict scrutiny. Pl.'s Mot. 9, Dkt. No. 68-1. However, strict scrutiny was the norm in *all* Free Exercise cases for roughly three decades from *Sherbert v. Verner*, 374 U.S. 398 (1963) to *Employment Division v. Smith*, 494 U.S. 872 (1990). Courts are capable of distinguishing when the government has a sufficiently compelling interest to justify a burden on religion. For instance, UPC proffers an absurd "religious kidnapping" example in which anyone could get away with kidnapping if they assert a religious purpose. Pl.'s Mot. 9, Dkt. No. 68-1. Of course, no court would hold that the government's interest in preventing kidnapping is not sufficiently compelling to overcome strict scrutiny. Strict scrutiny is only a standard of review. It does not dictate the outcome.

Next, UPC insists that the holding of *Lukumi* is much narrower than it is.[14] Pl.'s Mot. 7, Dkt. No. 68-1 (arguing that "strict scrutiny is *only* triggered when the law's exceptions show that [the drafters] intended to specifically target a religious practice") (emphasis in original). The *Lukumi* case involves a particularly egregious form of religious discrimination where the goal of the lawmakers was to target a particular religious exercise for punishment. 508 U.S. at 533-34. Such a law is clearly not neutral or generally applicable. *Id.* However, *Lukumi* does not hold that purposeful targeting by lawmakers is the *only* instance in which strict scrutiny is appropriate or the *only* way to prove that a law is not neutral or generally applicable. It is merely one way.

For instance, in *Fraternal Order of Police v. City of Newark*, the lawmakers did not have a discriminatory intent when they wrote the police officers' dress code. 170 F.3d 359 (3d Cir. 1999). Nevertheless, the court held that the application of the "no beards" policy against Muslim officers but not against officers requesting medical exceptions was subject to strict scrutiny. *Id.* at 365-66. The court concluded that the government was

[14] UPC oddly questions why the Fifth Circuit in *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009), decided its case on statutory grounds without reaching the constitutional question. Pl.'s Mot. 7-8, Dkt. No. 68-1. As *Merced* itself explains, this order of resolution is a "well-established principle" in federal court. 577 F.3d at 586-87.

"deciding that secular motivations are more important than religious motivations" because the government "create[d] a categorical exemption for individuals with a secular objection but not for individuals with a religious objection." *Id.*; *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165-67 (3d Cir. 2002) (holding "selective application" of an otherwise neutral and generally applicable law triggers strict scrutiny).

Similarly, selective application of an animal cruelty statute against the religious ceremony of a synagogue — especially where such an application contradicts the straightforward meaning of the statute, where it treats a place of worship as a business, and where there are numerous secular exceptions — triggers strict scrutiny. *See* Cal. Penal Code § 597(a); Cal. Penal Code §599c (listing exceptions).

In its brief, UPC does not argue that its claim could survive if this court applies strict scrutiny. Indeed, it could not. UPC cannot meet its burden of establishing that enjoining the religious ceremony furthers a compelling interest and is the least restrictive means of accomplishing that interest. UPC, standing in the shoes of the government through a private attorney general action, targeted Chabad because of its mission to "end the use of chickens in Kapparot nationally." Decl. Karen Davis ¶ 4, Dkt. No. 68-7.

UPC's singling out a religious practice for national eradication cannot withstand strict scrutiny.

6. Enjoining Chabad's Kapparot Ceremony Would Be an Unconstitutional Prior Restraint on Speech.

As discussed in the Motion to Dismiss, granting an injunction against Chabad, as Plaintiff requests, would be an unconstitutional prior restraint on speech because it would prevent the synagogue from engaging in future religious expression. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1135 (9th Cir. 2004).

C. UPC HAS NOT SHOWN A LIKELIHOOD OF IRREPARABLE INJURY.

The Court need not consider whether to grant a preliminary injunction at this time because the next Kapparot ceremony will not take place until late September 2017. Consequently, the Court has time to resolve the case fully before September. Currently, Chabad's Motion to Dismiss and Anti-SLAPP Motion, which could resolve this case, are to be heard on January 23, 2017. Assuming the case proceeds, the Scheduling Conference will take place on March 6, 2017. Trial could be set in August. Because nothing will change until late September, UPC has not demonstrated that denying a preliminary injunction at this time would cause irreparable harm.

A plaintiff seeking a preliminary injunction must establish a likelihood of irreparable injury. *Winter*, 555 U.S. at 22. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks omitted). The injury must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). "A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (quoting *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)) (emphasis in original).

In addition to failing to show an imminent need, UPC also has not demonstrated that its organization will be irreparably harmed if the Kapparot ceremony continues. Instead, UPC's brief alleges the ceremony will cause "general social harm" to UPC, UPC's members, and the general public. Pl.'s Mot. 11, Dkt. No. 68-1. UPC also alleges social harm from not living "in a society where the rule of law applies to everyone." *Id.* However, general harm to society is not a type of injury sufficient to constitute a case or

controversy for which Article III courts can grant relief.[15] For the same reason that UPC lacks Article III standing, UPC has not demonstrated that it will be harmed here. *See Boardman*, 822 F.3d at 1022 (noting the harm must be, at minimum, "sufficient to establish standing"). Plaintiff has failed to demonstrate that not issuing a preliminary injunction at this time will cause its organization harm, let alone irreparable harm.

D. THE BALANCE OF HARDSHIPS FROM NOT GRANTING THE PRELIMINARY INJUNCTION DOES NOT FAVOR UPC.

The balance of hardships strongly weighs in favor of Chabad. An injunction barring Chabad from performing the Kapparot ceremony in accordance with its religious beliefs would cause irreparable injury to Chabad and its members' First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very

[15] In a Kapparot action, New York state court dismissed claims because plaintiffs failed to allege "the harm that they suffered as a result of the . . . Kapparot ritual was any different from that experienced by other members of the communities." *All. to End Chickens as Kapparot v. N.Y.C. Police Dep't*, No. 156730/2015, slip op. at *6 (N.Y. Sup. Ct. Nov. 13, 2015).

least the balance of hardships tips sharply in [the religious adherent's] favor." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotation marks omitted). In the Ninth Circuit, merely "demonstrating the existence of a colorable First Amendment claim" is sufficient to establish irreparable injury. *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005). In short, a preliminary injunction restricting the Chabad's religious exercise would severely burden Chabad and sharply tilts the balance of equities against UPC.

UPC alleges that "the only harm to Defendants if the preliminary injunction issues is monetary" because UPC insists that Chabad should perform a Kapparot ceremony in the way that UPC prefers – with coins. Pl.'s Mot. 11-12, Dkt. No. 68-1; *see id.* at 2 (arguing that "using chickens in these rituals is not required by any religious teaching").[16] However, it is well established that neither UPC nor the Court may dictate what Chabad's religion requires. As the Supreme Court has consistently held, "[I]t is not within the judicial function and judicial competence to inquire [which of two

[16] UPC alternatively argues that chickens could be used as long as California law is not violated. Pl.'s Mot. 11, Dkt. No. 68-1. However, the parties disagree about the scope of the Penal Code and issuing an injunction restating Penal Code § 597(a) would not clarify the parties' conflict. As such, an injunction would chill First Amendment activity.

people has] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (holding it was erroneous to rely on the fact that "not all Muslims believe that men must grow beards" to deny protections to a Muslim man holding a different religious belief); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (holding "it is not for [the Court] to say that [a party's] religious beliefs are mistaken or insubstantial"); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").[17] In short, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas*, 450 U.S. at 716. Although Orthodox Jews may hold different beliefs about how Kapparot should be performed, the Court may not make any holding as to which perspective in the religious debate is correct. Here, a preliminary injunction would be a

[17] UPC criticizes Chabad's citation to *Hernandez*. Pl.'s Mot. 12, Dkt. No. 68-1. However, Chabad did not cite *Hernandez* because of any particular factual similarity, but instead because it follows in this line of clearly established Supreme Court cases holding that secular courts are not arbiters of religious disputes.

substantial burden on Chabad's religious belief because it would force the synagogue to alter the way it practices Kapparot. It is not legally relevant how others practice Kapparot.[18]

By contrast, as explained previously, it is unclear whether UPC will incur injury from the lack of a preliminary injunction. The only injury alleged is "general social harm" and UPC offers no authority to indicate that the Court may take that kind of harm into consideration. *See* Pl.'s Mot. 11, Dkt. No. 68-1. The balance of equities weighs against UPC.

E. PUBLIC INTEREST FAVORS PROTECTING CONSTITUTIONAL RIGHTS.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby*, 723 F.3d at 1145. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (internal quotation marks omitted). At all times, Chabad's Kapparot practice treats chickens humanely and safely in compliance with all state and local

[18] UPC's brief also argues for the first time that Kapparot is about having an "emotional moment," not about religion. Because emotions, such as feeling a need for atonement, can be religious, UPC's argument is unpersuasive. More importantly, UPC does not decide what is considered religious. *New York* v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("[L]itigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]").

laws. Decl. Rabbi Tenenbaum ¶ 6, Ex. B. When Chabad performs the atonement ceremony, it does so without causing waste in accordance with its religious beliefs. *Id.* at ¶¶ 5, 9-10. In 2014, Chabad did not simply dispose of the chickens, but safely and lawfully had the chickens taken for rendering. *Id.* at ¶ 10. There is simply no public health threat. In summary, the public interest sharply weighs in favor of protecting minority religious beliefs from being silenced by those determined to target their practices.

V. Conclusion

For the foregoing reasons, Chabad requests that the Court deny UPC's Motion for a Preliminary Injunction.

Dated this January 2, 2016.

Respectfully submitted,

M Jones and Associates, PC
Attorneys for Defendants

Michael Jones

Hiram S. Sasser, III*
hsasser@firstliberty.org
Jeremy Dys*
jdys@firstliberty.org
Stephanie N. Taub – CAB 301324
staub@firstliberty.org
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Ste. 1600
Plano, TX 75075
Ph.972-941-4444/Fx.972-941-4457
*Admitted Pro Hac Vice

Matthew T. Martens*
matthew.martens@wilmerhale.com
Gregory Boden – CAB 3001779
gregory.boden@wilmerhale.com
Kevin Gallagher*
kevin.gallagher@wilmerhale.com
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Ph.202-663-6921/Fx.202-663-6363