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COURT OF APPEALS
STATE OF NEW YORK

THE ALLIANCE TO END CHICKENS AS KAPOROS, ET AL.,
Plaintiffs-Appellants,

v.

THE NEW YORK CITY POLICE DEPARTMENT, ET AL.;
CONGREGATION BEIS KOSOV MIRIAM LANYNSKI, ET AL.,
Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA

Kelly J. Shackelford
Jeremiah G. Dys
Roger L. Byron
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
rbyron@firstliberty.org
staub@firstliberty.org

Mordechai Biser
AGUDATH ISRAEL OF AMERICA
42 Broadway, 14th Floor
New York, N.Y. 10004
(212) 797-9000
mbiser@agudathisrael.org

Jason A. Levine
Christian D. Sheehan
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
(202) 639-6755
jlevine@velaw.com
csheehan@velaw.com

Ari M. Berman
Laurel S. Fensterstock
VINSON & ELKINS LLP
666 Fifth Avenue, 26th Floor
New York, N.Y. 10103
(212) 237-0228
aberman@velaw.com
lfensterstock@velaw.com

Counsel for Amicus Curiae Agudath Israel of America

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals for the State of New York, *Amicus Curiae* Agudath Israel of America states that it is a nonprofit corporation that has not issued stock and has no parent corporation or subsidiaries. It is affiliated with Agudath Israel of America Community Services, Inc., another nonprofit corporation that has not issued stock and has no parent corporation or subsidiaries.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

QUESTION PRESENTED 2

ARGUMENT 2

I. Appellants Misrepresent the Practice of Kaporos and Ignore its Religious Significance. 2

II. The Free Exercise Clauses of the United States and New York Constitutions Protect the Sincerely-Held Religious Beliefs of Kaporos Practitioners. 6

III. Application of the Animal Cruelty Statute to Ban the Use of Chickens in the Kaporos Ritual Would Be Unconstitutional. 9

A. Selective Application of the Animal Cruelty Statute to the Religious Killing of Chickens Would Fail Strict Scrutiny. 9

B. Application of the Animal Cruelty Statute to Bar the Use of Chickens in the Kaporos Ritual Would Burden Both Free Exercise and Free Speech Rights. 14

IV. The City Has Properly Declined to Use Other State and Local Laws to Ban the Public Practice of the Kaporos Ritual With Chickens. 15

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases

Animal Prot. & Rescue League, Inc. v. Chabad of Irvine,
No. 30-2015-00809469 (Cal. Super. Ct. Orange Cty. June 23, 2017) 10
Animal Prot. & Rescue League v. City of Los Angeles,
No. 17-cv-1581 (C.D. Cal. Jan. 30, 2018), ECF No. 32 10
Bernal v. Fainter,
467 U.S. 216 (1984) 17
Bowen v. Roy,
476 U.S. 693 (1986) 12
Catholic Charities of Diocese of Albany v. Serio,
7 N.Y.3d 510 (2006)..... 17, 18
Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) ..... *passim*
Congregation Yetev Lev D'Satmar, Inc. v. Kahana,
9 N.Y.3d 282 (2007).....9
Emp't Div., Dep't of Human Resources of Or. v. Smith,
494 U.S. 872 (1990) 8, 12, 14
Florida Star v. B.J.F.,
491 U.S. 524 (1989) 14
Globe Newspaper Co. v. Superior Court for Norfolk Cty.,
457 U.S. 596 (1982) 16
Hernandez v. Comm'r,
490 U.S. 680 (1989) 8
Hobbie v. Unemployment Appeals Comm'n of Fla.,
480 U.S. 136 (1987) 11
Holt v. Hobbs,
135 S. Ct. 853 (2015).....8
Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston,
515 U.S. 557 (1995) 14
Kaahumanu v. Hawaii,
682 F.3d 789 (9th Cir. 2012).....14
La Rocca v. Lane,
37 N.Y.2d 575 (1975).....17
Spence v. Washington,
418 U.S. 405 (1974) 14
Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 11

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,
450 U.S. 707 (1981) 6, 8, 9
United Poultry Concerns, Inc. v. Bait Aaron, Inc.,
No. BC592712 (Cal. Super. Ct. Los Angeles Cty. July 6, 2016).....10
United Poultry Concerns v. Chabad of Irvine,
No. 16-cv-1810 (C.D. Cal. May 12, 2017), ECF No. 110 10
Ware v. Valley Stream High Sch. Dist.,
75 N.Y.2d 114 (1989).....6
Wisconsin v. Yoder,
406 U.S. 205 (1972) 16

Constitutional Provisions

N.Y. Const. art. I, § 3 6
U.S. Const. amend. I 6

Statutes

7 U.S.C. § 1902(b) 9
7 U.S.C. § 1906.....9
N.Y. Agric. & Mkts. Law § 353 ..... 7, 9, 10, 11
N.Y. Agric. & Mkts. Law § 353-a 7, 11
N.Y. Agric. & Mkts. Law § 374 11

Other Authorities

Gerber, Alan Jay, *Shlugging Kaporos and Other Confessions, Jewish Style*,
Jewish Star (Sept. 12, 2013).....4
Krakowski, Rabbi Y. Dov, *Hilchos Uminhagei Yom Kippur*, Orthodox
Union (Sept. 30, 2014) 3, 5
Rabbi Avrohom Reit, Author, Mosaica Press (last visited Feb. 20, 2018) 4
Reit, Avrohom, *Zeh Kaporosi: The Custom of Kaporos* (2013) 4
Ross, Barbara, *Lawsuit Aims to Stop Jewish Ritual That Involves Tossing,
Killing Chickens on Brooklyn Sidewalks*, N.Y. Daily News (July 6, 2015) 16
Schauss, Hayyim, *From Their Beginnings to Our Own Day* (Union of Am.
Hebrew Congregations, 1938).....5
Schwartz, Richard, *The Custom of Kapparot*, Jewish Virtual Library (last
visited Feb. 20, 2018) 3
The Kaparot Ceremony, Chabad.org (last visited Feb. 20, 2018)..... 2, 3, 4, 5
Translation: Arukh ha-Shulchan/Orach Chaim/605, Wikisource (last edited
Sept. 28, 2017).....5
Tribe, Laurence H., *Constitutional Law* (3d ed. 2000).....13

Yom Kippur – Its Significance, Laws, and Prayers (ArtScroll Mesorah Series, 1989) 3
Zalman, Rabbi Schneur, *Shulchan Aruch: Chapter 605 - Custom of Kaparos on Erev Yom Kippur*, Chabad.org (last visited Feb. 20, 2018).....3

INTEREST OF *AMICUS CURIAE*

Agudath Israel of America ("Agudath Israel") is a national grassroots Orthodox Jewish Organization founded in 1922. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government—federal, state, and local; legislative, administrative, and judicial (including through the submission or participation in *amicus curiae* briefs)—to advocate for and protect the interests of the Orthodox Jewish community in the United States and religious liberty more broadly.

One of Agudath Israel's roles is to serve as an advocate for Jewish tradition and rituals, which Orthodox Jews see both as a personal religious obligation and a critical factor in ensuring Jewish religious identity and continuity. For the last several years, Agudath Israel has issued a public statement, signed by major rabbinic figures in the Orthodox Jewish community, encouraging Kaporos practitioners to take special care during the ritual, carefully adhere to health and safety concerns, and scrupulously comply with the Torah's prohibition on causing unnecessary animal suffering.

Appellants' position questioning the validity, significance, and sincerity of Kaporos practitioners' beliefs not only disparages and minimizes the significance of

a longstanding Jewish religious tradition, but also encroaches on the Jewish community's free exercise of religion, as guaranteed by the United States and New York Constitutions. There are intra-faith differences in any religion and it is legally irrelevant that not all Jews practice Kaporos the same way. By asking the judiciary to step in to enforce a statutory "duty" that has repeatedly been deemed discretionary, thus requiring Orthodox Jewish communities in New York to practice Kaporos according to Appellants' preference, Appellants seek to have the government violate Orthodox Jews' right to the free exercise of religion.

QUESTION PRESENTED

Whether the City of New York has properly declined to effectively prohibit Orthodox Jews from practicing their sincerely-held religious beliefs by the kosher slaughtering of chickens in the Kaporos ritual, where such a prohibition would violate the United States and New York Constitutions.

ARGUMENT

I. Appellants Misrepresent the Practice of Kaporos and Ignore its Religious Significance.

Appellants grossly mischaracterize the history and practice of Kaporos, specifically the use of a live chicken in the ritual. Appellants' Br. 32. Kaporos is a centuries-old Jewish rite performed in preparation for the holy day of Yom Kippur (the Jewish Day of Atonement), and ideally occurs on the day preceding Yom Kippur. *The Kaparot Ceremony*, Chabad.org, http://www.chabad.org/holidays/

JewishNewYear/template_cdo/aid/989585/jewish/Kaparot.htm ("*Kaparot Ceremony*"). "The ritual is designed to imbue people with the feeling that their lives are at stake as Yom Kippur"—considered the holiest day of the year for Jews—"approaches, and that they must repent and seek atonement." *Yom Kippur – Its Significance, Laws, and Prayers* 46 (ArtScroll Mesorah Series, 1989). The rite involves taking a chicken, preferably a white chicken pursuant to biblical text,[1] and gently passing it over one's head three times while reciting the appropriate prayer. The chicken is then slaughtered in accordance with Jewish kosher procedures and, generally, its monetary worth is given to a society in need, or the edible portions of the chicken itself are donated to a charity.[2] *Kaparot Ceremony*, *supra*. The custom is said to symbolically transfer the sins of the person to the chicken. Rabbi Y. Dov Krakowski, *Hilchos Uminhagei Yom Kippur*, Orthodox Union (Sept. 30, 2014), https://www.ou.org/holidays/yom-kippur/hilchos-uminhagei-yom-kippur/. The hope is that the chicken will take on any misfortune that might otherwise have occurred to the individual who has taken part in the ritual as punishment for his or her sins. Richard Schwartz, *The Custom of Kapparot*, Jewish Virtual Library,

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[1] Rabbi Scheur Zalman, *Shulchan Aruch: Chapter 605 - Custom of Kaparos on Erev Yom Kippur*, Chabad.org, http://www.chabad.org/library/article_cdo/aid/3385298/jewish/Shulchan-Aruch-Chapter-605-Custom-of-Kaparos-on-Erev-Yom-Kippur.htm (last visited Feb. 20, 2018) (citing *Yeshayahu* 1:18).

[2] Local food safety laws may restrict some congregations' ability to donate the chickens to the poor.

http://www.jewishvirtuallibrary.org/the-custom-of-kapparot-in-the-jewish-tradition (last visited Feb. 20, 2018).

Kaporos is an organized religious event at a designated location. *Kaparot Ceremony*, *supra*. Traditionally, men perform the ritual using a rooster while women use hens; each individual uses his or her own chicken. *Id.* Children are also traditionally brought to Kaporos, and one of their parents typically passes the chicken over the child's head while reciting a prayer. *Id.* For the communities that take part in this practice, it is of the utmost importance to treat the chickens humanely, and not to cause them any pain or discomfort because Jewish law forbids causing unnecessary pain to any live creatures. *Id.* According to Rabbi Avrohom Reit, who has spent over twenty years studying rabbinic literature and published an entire book on the Kaparos ritual,[3] "[t]here isn't anything even remotely similar among the rest of our lifecycle customs. Yet, as minhagin [religious customs] go, kaporos is among the oldest." Alan Jay Gerber, *Shlugging Kaporos and Other Confessions, Jewish Style*, Jewish Star (Sept. 12, 2013), http://thejewishstar.com/stories/Shlugging-kaporos-and-other-confessions-Jewish-Style,4363?page=2&content_source= (quoting Avrohom Reit, *Zeh Kaporosi: The Custom of Kaporos* (2013)).

[3] *See Rabbi Avrohom Reit, Author*, Mosaic Press, http://mosaicapress.com/avrohom-reit/ (last visited Feb. 20, 2018).

Appellants contend that "based on the trends we see in today's world . . . using chickens for Kaporos, when coins are permitted, [is] not justified." Appellants' Br. 32. Contrary to Appellants' allegations, however, the practice of using chickens in the Kaporos ritual is widely performed by Orthodox communities across the United States (and in Israel) today. *See* Krakowski, *supra*. Further, many Orthodox Jews believe that there are several important religious reasons to use a live chicken, including: (1) in Aramaic, a rooster is known as a *gever* and in Hebrew, a *gever* is a man, and thus Jews take a *gever* to atone for a *gever*; (2) a chicken is a commonly found and relatively inexpensive fowl; and (3) the chicken is not a species that was eligible for offering as a sacrifice in the Holy Temple of Jerusalem. *Kaparot Ceremony*, *supra*.

Moreover, many influential decisors of Jewish law have advocated for the use of chickens when carrying out the ritual.[4] While not all Jewish figures have endorsed the custom, and some Jewish communal leaders advocate for the use of coins, each

[4] *See Translation: Arukh ha-Shulchan/Orach Chaim/605*, Wikisource, https://en.wikisource.org/wiki/Translation:Arukh_ha-Shulchan/Orach_Chaim/605 (last edited Sept. 28, 2017) ("[T]here are also a great many authorities that endorse this custom, and it is even found in the responsa of the Gaonim . . . . The Tur . . . reports that their custom was with chicken and rams, and it took place on the day before Yom Kippur."); *see also* Hayyim Schauss, *From Their Beginnings to Our Own Day* 149 (Union of Am. Hebrew Congregations, 1938), http://www.archive.org/stream/MN40226ucmf_4/MN40226ucmf_4_djvu.txt ("The Kaporos ceremony is so universal in its appeal that it has crept into the language of the people.").

Jewish community is guided by its own accepted customs and authoritative decisors, and should be entitled to practice its rituals in accordance with those customs and authoritative decisors.

II. The Free Exercise Clauses of the United States and New York Constitutions Protect the Sincerely-Held Religious Beliefs of Kaporos Practitioners.

"Reflecting the rich religious pluralism that characterizes and distinguishes this Nation, the First Amendment to the Federal Constitution enjoins the State from enacting any laws 'prohibiting the free exercise' of religion." *Ware v. Valley Stream High Sch. Dist.*, 75 N.Y.2d 114, 123 (1989); U.S. Const. amend. I. The New York Constitution also protects the "free exercise and enjoyment of religious profession and worship, without discrimination or preference." N.Y. Const. art. I, § 3.

The free exercise of religion encompasses the right to perform physical acts for religious reasons, including ritual animal sacrifice. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). In determining whether conduct is protected by the Free Exercise Clause of the First Amendment, courts ask only whether the practitioners sincerely desire to engage in it for religious reasons. *Id.* The religious beliefs motivating the conduct "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

Despite these fundamental principles, Appellants contend that the City may (indeed, must) prohibit the use of chickens in the Kaporos ritual because some practitioners believe it can be performed with coins instead of chickens. Appellants' Br. 10-11, 28-30, 33; *see id.* at 11 ("[T]he killing of chickens for Kaporos cannot be justified as a necessary religious requirement."). Appellants even go so far as to inject the age-old anti-Semitic canard of accusing the members of the Orthodox Jewish community who use chickens of doing so not for religious reasons, but rather because it is financially profitable for Jewish organizations that provide the chickens. *Id.* at 30 ("[T]his animal slaughter event is nothing more than a massive money-making event, as chickens can be sold, while coins cannot, which makes the use of coins unappealing to those whose profits would be disturbed." (footnote omitted)).[5] Judge Gesmer's dissent similarly noted that because "other Orthodox Jewish

[5] Setting aside Appellants' ad hominem attack, their unsupported assertion is not only factually incorrect and offensive, it is also self-disproving. The individuals participating in Kaporos with chickens voluntarily incur the cost to purchase the chickens, rather than pursuing the far less expensive "alternative" of using coins, which they would do instead if money were the motivating factor described by Appellants. Thus, the practitioners' use of chickens underscores the sincerity of their *religious* beliefs and motivation. Similarly offensive (and non-justiciable) are Appellants' claims that the use of chickens in the Kaporos ritual is immoral (Appellants' Br. 32-41), and somehow akin to hypothetical Sharia law adherents "stoning women to death on public streets." *Id.* at 62. This equivalence between poultry and human beings fails any scrutiny except among animal rights extremists. Certainly the City's legislators recognize the difference, given that the animal cruelty statute has exemptions for activities such as recreational hunting and fishing. *See* N.Y. Agric. & Mkts. Law §§ 353, 353-a. The criminal code has no such casual exemptions for murder.

communities use coins in place of live chickens," A600, the purported violation of the City statutes at issue was not "necessary to carry out the religious ritual." A607.

These arguments are seriously misguided as a matter of law. The fact that some Orthodox Jews may practice Kaporos in a different (and perhaps to some, more palatable) way is of no constitutional significance. "[T]he guarantee of the Free Exercise Clause is 'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015) (quoting *Thomas*, 450 U.S. at 715-16). On the contrary, "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Thomas*, 450 U.S. at 715. As a result, the Supreme Court of the United States has repeatedly held that "[i]t 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." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *accord Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *see, e.g.*, *Holt*, 135 S. Ct. at 862-63 (irrelevant that "not all Muslims believe that men must grow beards"); *Thomas*, 450 U.S. at 715-16 (improper for lower court to consider that other Jehovah's Witnesses did not object to producing armaments).

"Courts," after all, "are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716; *accord Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 286 (2007) (courts may not "interpret[] . . . ecclesiastical doctrine").

Accordingly, it is not for this Court (or any other) to determine whether practitioners of Kaporos should use chickens or coins.[6] Because the Kaporos practitioners targeted by this lawsuit "sincer[ely] . . . desire" to conduct the ritual with chickens "for religious reasons," their conduct is constitutionally protected. *See Lukumi*, 508 U.S. at 531-32.

III. Application of the Animal Cruelty Statute to Ban the Use of Chickens in the Kaporos Ritual Would Be Unconstitutional.

A. Selective Application of the Animal Cruelty Statute to the Religious Killing of Chickens Would Fail Strict Scrutiny.

Kosher slaughter is considered humane under federal law, *see* 7 U.S.C. §§ 1902(b), 1906, and therefore does not fall within New York's prohibition of "unjustifiabl[e]" or cruel killings. NY Agric. & Mkts. Law § 353. Appellants seek to twist the animal cruelty statute to prohibit lawful activity merely because they prefer the Kaporos ritual were conducted using coins.[7]

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[6] For the same reason, it is not germane that an Orthodox rabbi cooperating with Appellants has opined that the use of chickens in the Kaporos ritual conflicts with Jewish law proscribing animal cruelty. *See* Appellants' Br. 11. This is precisely the sort of ecclesiastical quarrel that is beyond the judicial realm.

[7] This lawsuit is the latest salvo in a misguided years-long crusade by the extremist animal rights group United Poultry Concerns ("UPC") to force Orthodox Jews to practice Kaporos as UPC sees fit. UPC and affiliated groups, including

Even if the statute could apply to the Kosher slaughter at issue here, the City has properly "resist[ed] [Appellants'] importunate demands" to apply the statute to prohibit the use of chickens in the Kaporos ritual because doing so would be unconstitutional. *See Lukumi*, 508 U.S. at 547. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546. The New York animal cruelty statute is not of general application. It specifically exempts—and thus permits—the killing or infliction of pain on animals that occurs during "properly conducted scientific tests, experiments or investigations . . . performed or conducted in laboratories or institutions," and recreational activities such as hunting, trapping, or fishing. N.Y. Agric. & Mkts.

Appellant The Alliance to End Chickens as Kaporos, have repeatedly targeted Orthodox Jewish communities with frivolous lawsuits seeking to prohibit the use of chickens in Kaporos. Every court to consider UPC's arguments has rejected them. *See* Notice of Ruling (Dismissal) at 19, *United Poultry Concerns, Inc. v. Bait Aaron, Inc.*, No. BC592712 (Cal. Super. Ct. Los Angeles Cty. July 6, 2016) (UPC improperly "seeking recourse of the secular courts to end a religious practice on the grounds that Plaintiffs do not like it"); Order Granting Mot. to Dismiss, *Animal Prot. & Rescue League v. City of Los Angeles*, No. 17-cv-1581 (C.D. Cal. Jan. 30, 2018), ECF No. 32 (dismissing complaint for lack of standing, noting that plaintiffs affirmatively "sought out the Kapparot events" in an effort to manufacture an injury-in-fact and were improperly seeking to "involve themselves in the discretionary enforcement of criminal laws through civil litigation"); Statement of Ruling, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469 (Cal. Super. Ct. Orange Cty. June 23, 2017) (ruling that Kaporos is a religious ritual and not a business practice); Order Granting Mot. to Dismiss 10, *United Poultry Concerns v. Chabad of Irvine*, No. 16-cv-1810 (C.D. Cal. May 12, 2017), ECF 110 (holding that UPC lacked statutory standing to challenge practice of using chickens in Kaporos ritual), *appeal pending*, No. 17-55696 (9th Cir. filed May 15, 2017) (briefing complete).

Law §§ 353, 353-a. The statute also permits the "dispatch" of rabid or diseased animals and "animals posing a threat to human safety or other animals," *id.* § 353-a, as well as euthanasia of lost, stray, homeless, or improperly confined animals. *Id.* § 374. As Appellants readily admit (Appellants' Br. 19), there are no similar exceptions for the killing of animals in religious ceremonies.

"All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment)); *see Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) ("[T]he Free Exercise Clause's mandate of neutrality toward religion prohibits government from deciding that secular motivations are more important than religious motivations." (internal quotation marks and citation omitted)).

In *Lukumi*, the Supreme Court considered (among several other laws) an animal cruelty ordinance punishing "[w]hoever . . . unnecessarily or cruelly kills any animal," which state and local officials interpreted to ban animal sacrifices during religious ceremonies. In holding that the ordinance was not generally applicable (and thus was subject to strict scrutiny), the Court reasoned that the ordinance "fail[ed] to prohibit nonreligious conduct" that raised concerns about animal cruelty

"in a similar or greater degree than [religious animal] sacrifice does." *Lukumi*, 508 U.S. at 526, 543. Among other things, the ordinance expressly permitted hunting, fishing, extermination of mice and rats, euthanasia of stray animals, destruction of animals removed from owners that were "of no commercial value," and "infliction of pain or suffering 'in the interest of medical science.'" *Id.* at 543-44. These exceptions are nearly identical to those in the New York animal cruelty statute.

Further, because the ordinance in *Lukumi* "require[d] an evaluation of the particular justification for the killing," it "represent[ed] a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Id.* at 537 (quoting *Smith*, 494 U.S. at 884). The Court explained that in such a circumstance, where "individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* (quotation marks and citation omitted); *see also Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion) ("If a state creates . . . a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."). The city's selective application of the ordinance in *Lukumi* to bar ritual animal sacrifice impermissibly "devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons" and thus "singled out [religious practice] for discriminatory treatment." 508 U.S. at 537-38.

The same devaluation of religious motivations would result from selective application of New York's animal cruelty statute—which expressly permits the killing of animals for numerous secular reasons and requires an individual assessment as to whether other killings are "justifiable"—to bar the ritual killing of chickens in the Kaporos ritual.[8] If the City were to apply the law in that way, its actions would be subject to strict scrutiny—meaning that they must be "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. But no compelling interest exists here. Appellants themselves do not attempt to identify such interests, instead rejecting the need for strict scrutiny analysis. Appellants' Br. 54. As the Supreme Court held in *Lukumi*, where government restricts constitutionally-protected conduct and "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id.* at 546-47. Put differently, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage

[8] Appellants argue that the animal cruelty statute has been in place for decades and thus, unlike in *Lukumi*, the New York Legislature had no intent to target religious groups. Appellants' Br. 51. Discriminatory legislative intent, however, is not required. "[A] law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure." Laurence H. Tribe, *Constitutional Law* § 5-16, at 956 (3d ed. 2000).

to that supposedly vital interest unprohibited." *Id.* at 547 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989)).

For these reasons, selective application of the animal cruelty statute to ban the use of chickens in the Kaporos ritual would fail strict scrutiny. The City has rightly declined to take such an unconstitutional action.

B. Application of the Animal Cruelty Statute to Bar the Use of Chickens in the Kaporos Ritual Would Burden Both Free Exercise and Free Speech Rights.

Even if the animal cruelty statute were generally applicable (which it is not), it nonetheless would be unconstitutional if applied to prohibit the use of chickens in the Kaporos ritual. Generally applicable laws are subject to strict scrutiny where they implicate rights protected by "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." *Smith*, 494 U.S. at 881. Conduct qualifies as protected speech when "the nature of [the] activity, combined with the factual context and environment in which it was undertaken," shows that the "activity was sufficiently imbued with elements of communication to fall within the scope [of the First Amendment]." *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). "[A] narrow, succinctly articulable message is not a condition of constitutional protection . . . ." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). Religious ceremonies may be protected expression under the First Amendment. *See Kaahumanu v. Hawaii*, 682 F.3d 789,

798-99 (9th Cir. 2012) (religious wedding ceremonies protected because participants "express their religious commitments and values").

Here, the practice of Kaporos involves symbolic physical acts (including the ritual killing of a chicken) in conjunction with a spoken prayer. Orthodox Jewish congregations gather together on Brooklyn sidewalks and streets to perform the ritual, which expresses religious commitments, beliefs, and values that are likely to be understood by those viewing the ceremony. The physical acts cannot be separated from the accompanying spoken words any more than the exchange of rings can be separated from the vows in a wedding ceremony. Those acts therefore are protected as expressive conduct under the First Amendment.

Accordingly, because a law prohibiting the killing of chickens in the Kaporos ritual would burden both free exercise and free speech rights, it would be subject to strict scrutiny. As discussed above, the New York animal cruelty statute, if applied in this way, would not withstand strict scrutiny.

IV. The City Has Properly Declined to Use Other State and Local Laws to Ban the Public Practice of the Kaporos Ritual With Chickens.

Agudath Israel disputes that the public practice of the Kaporos ritual with chickens violates the New York City Health Code, the New York City Administrative Code, or any of the other miscellaneous laws that Appellants cite. As an Orthodox Jewish rabbi who practices Kaporos attested, "[c]hickens are slaughtered in a professional manner by a licensed slaughterer according to Jewish

religious law," and his community exercises "the utmost responsibility for cleanliness." A432, Aff. of Shea Hecht ("Hecht Aff."). Local government officials have similarly disputed Appellants' characterization of the Kaporos ritual as a public health and safety hazard. *See* Barbara Ross, *Lawsuit Aims to Stop Jewish Ritual That Involves Tossing, Killing Chickens on Brooklyn Sidewalks*, N.Y. Daily News (July 6, 2015), http://www.nydailynews.com/new-york/brooklyn/brooklyn-suit-aims-stop-barbaric-jewish-chicken-ritual-article-1.2283412 (Brooklyn Assemblyman: "They make it sound like there's blood running in the streets. It's just not true."); *see also* A432, Hecht Aff. (unaware of a single person becoming ill in the 40 years Kaporos has been practiced by his organization). Tellingly, despite their expert witness's parade of horribles, Appellants cite no evidence of any *actual* impacts on public health and safety resulting from the use of chickens in the Kaporos ritual during its many years of public practice in Brooklyn. *See* Appellants' Br. 7-9, 31-32.[9]

[9] To the extent that Appellants in reply attempt to characterize their expert witness's assertions as evidence of a "compelling interest" for strict scrutiny purposes, this effort would fail. The prevention of merely speculative prospective harms cannot stand as a compelling interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) (holding state law compelling Amish parents to send their children to high school unconstitutional under First Amendment and rejecting as "highly speculative" and unsupported by "specific evidence" the government's argument that Amish children who leave the community will be ill-equipped for life); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596, 609-10 (1982) (rejecting government's asserted interest in a law infringing on First Amendment rights as "speculative" where government "offered no empirical support" for its

Nonetheless, even if some Kaporos practitioners did run afoul of local laws, the relief sought by Appellants—effectively a prohibition on the use of chickens—is far too Draconian. The New York Constitution is "more protective of religious exercise than [the U.S. Constitution]," and even generally-applicable laws are subject to a balancing test. *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 525 (2006). This Court has held that "when the State imposes 'an incidental burden on the right to free exercise of religion,' [courts] must consider the interest advanced by the legislation that imposes the burden and that '[t]he respective interests must be balanced to determine whether the incidental burdening is justified.'" *Id.* (quoting *La Rocca v. Lane*, 37 N.Y.2d 575, 583 (1975)). The Court explained that this balancing test would require religious exemptions for generally-applicable laws related to compelled witness testimony, alcohol consumption, and discrimination on the basis of sex or marital status. *Id.* at 527 (requirement that all witnesses must testify to facts within their knowledge would abrogate confidentiality of Catholic confessional); *id.* (general prohibition on alcohol consumption could make the Christian sacrament of communion illegal); *id.* (prohibition of discrimination on the basis of sex or marital status could end male celibate

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position); *see also Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984) (government identified no compelling interest in excluding resident aliens from notary jobs where it "fail[ed] to advance a factual showing" that the purported interest addressed "a real, as opposed to a merely speculative, problem").

priesthood). The Court also noted that it would be "well beyond the bounds of constitutional acceptability" to apply laws regarding the uniform regulation of meat preparation to ban kosher slaughterhouses. *Id.*

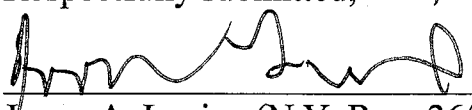
Under this balancing test, a prohibition on the use of chickens in the Kaporos ritual would be unconstitutional. Such a ban would impose a tremendous burden on Orthodox Jews who practice Kaporos in this fashion, as they would be prevented from engaging in an important religious ritual of atonement with other members of their community in accordance with their sincere religious beliefs. By contrast, a ban would serve no legitimate governmental interest. The City can achieve its public health and safety objectives through far less drastic measures, by working with the Orthodox Jewish community to ensure that Kaporos is practiced in a safe and orderly manner. This is precisely what the City currently (and correctly) does. *See* A598-99 ("proper exercise of the NYPD's law enforcement obligations" to "enclos[e] the Kaporos area with barriers, plac[e] orange cones, provid[e] generators to supply light for the area and erect[] 'no parking' signs").[10]

[10] This effort to balance religious liberty and public order does not violate the Establishment Clause. Appellants' Br. 59-60. The City neither "endorses" Orthodox Judaism nor provides it with an advantage over any other religion. *Id.*

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgments of the Supreme Court and Appellate Division, First Department.

Respectfully submitted,



Jason A. Levine (N.Y. Reg. 2657153)
Christian D. Sheehan
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
(202) 639-6755
jlevine@velaw.com
csheehan@velaw.com

Ari M. Berman
Laurel S. Fensterstock
VINSON & ELKINS LLP
666 Fifth Avenue, 26th Floor
New York, N.Y. 10103
(212) 237-0228
aberman@velaw.com
lfensterstock@velaw.com

Counsel for Amicus Curiae Agudath Israel of America

Kelly J. Shackelford
Jeremiah G. Dys
Roger L. Byron
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444
rbyron@firstliberty.org
staub@firstliberty.org

Mordechai Biser
AGUDATH ISRAEL OF AMERICA
42 Broadway, 14th Floor
New York, N.Y. 10004
(212) 797-9000
mbiser@agudathisrael.org

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 500.1, 500.2, and 500.13 of the Rules of Practice for the Court of Appeals, I certify the following:

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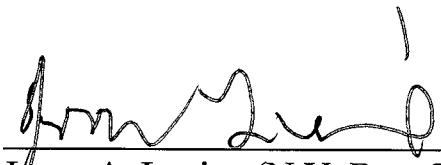

Jason A. Levine (N.Y. Reg. 2657153)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
(202) 639-6755
jlevine@velaw.com

Counsel for Amicus Curiae Agudath Israel of America

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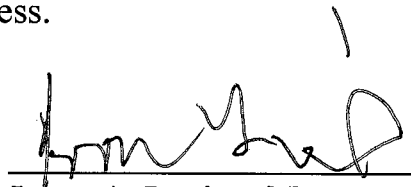
I hereby certify that on this 13th day of March, 2018, a true and correct copy of the foregoing Brief of *Amicus Curiae* Agudath Israel of America was served on all counsel of record via Federal Express.



Jason A. Levine (N.Y. Reg. 2657153)
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
(202) 639-6755
jlevine@velaw.com

Counsel for Amicus Curiae Agudath Israel of America