APL-2017-00124

To be argued by:
ELINA DRUKER
15 minutes requested

Court of Appeals
State of New York

THE ALLIANCE TO END CHICKENS AS KAPOROS, RINA DEYCH, individually, and RINA DEYCH, as member of THE ALLIANCE TO END CHICKENS AS KAPOROS, LISA RENZ, individually and LISA RENZ, as member of THE ALLIANCE TO END CHICKENS AS KAPOROS, MICHAEL ARIEH, JOY ASKEW, ALEKSANDRA SASHA BROMBERG, STEVEN DAWSON, VANESSA DAWSON, RACHEL DENT, JULIAN DEYCH, DINA DICENSO, FRANCES EMERIC, KRYSTLE KAPLAN, CYNTHIA KING, MORDECHAI LERER, CHRISTOPHER MARK MOSS, DAVID ROSENFELD, KEITH SANDERS, LUCY SARNI, LOUISE SILNIK, DANIEL TUDOR,

Plaintiffs-Appellants,

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,

(Caption Continued on Inside Cover).

BRIEF FOR DEFENDANTS-RESPONDENTS

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March 8, 2018

(*Continued Caption*)

NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants-Respondents,

CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC., SHLOMIE ZARCHI, ABRAHAM ROSENFELD, NATIONAL COMMITTEE FOR THE FURTHERANCE OF JEWISH EDUCATION AND AFFILIATES, RABBI SHEA HECHT, RABBI SHALOM BER HECHT, RABBI SHLOMA L. ABROMOVITZ, YESHIVA OF MACHZIKAI HADAS, INC., MARTIN GOLD, CONGRATION BEIS KOSOV MIRIAM LANDYNSKI, LLM 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.

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PRELIMINARY STATEMENT

This is a mandamus proceeding by private individuals—a group of animal rights activists—seeking to compel the New York City Police Department and New York City Department of Health and Mental Hygiene to arrest or fine third parties who they believe are violating the law. The alleged lawbreakers are members of an Orthodox Jewish community who are practicing a centuries-old annual religious ritual that involves killing chickens. Longstanding precedent makes clear that mandamus will not lie.

Mandamus is rarely if ever available to compel officials to take particular law enforcement action. Individual citizens cannot dictate how a city of 8.5 million diverse people sets its enforcement priorities, assesses whether laws have been violated, and allocates its limited resources. So, to give a few examples, citizens cannot sue to force officials to cite every jaywalker, arrest suspected adulterers, or arrest people with small quantities of marijuana. Nor may appellants obtain an order compelling the city to arrest or fine people of faith for participating in a once-a-year religious ritual that's alleged to be unlawful.

QUESTION PRESENTED

Do appellants have a clear legal right, enforceable through a writ of mandamus, to compel city officials to exercise their law enforcement discretion in a particular manner against Orthodox Jewish practitioners of an annual atonement ritual in Brooklyn?

STATEMENT OF THE CASE

A. The practice of Kaporos—involving killing chickens in observance of Yom Kippur—by members of the Orthodox Jewish community

Yom Kippur is observed in the Jewish religion as the holy day of atonement (A431). This case centers on an atonement ritual called Kaporos that is part of observing Yom Kippur for some members of the Orthodox Jewish community (*id*.).

The Kaporos ritual dates back thousands of years (A432). Overseen by rabbis, Kaporos is held only once a year, outdoors, behind curtains, in the days before Yom Kippur (A41, 212-13). Adherents swing a chicken overhead while reciting a prayer, which they believe transfers the practitioner's sins to the chicken (A174). A rabbi then kills the chicken in accordance with kosher law by slitting its throat (A432). Those who practice Kaporos contend that it is required by their sincerely held beliefs (A433).

B. Appellants' application to compel the City to stop the practice of Kaporos for violating animal cruelty law and health codes

Appellants are animal rights activists and individuals residing in Brooklyn who believe that the practice of Kaporos is "disgusting," "unsanitary," "horrific," "sickening, disturbing, cruel," and not required under their reading of Jewish law (A242, 254, 314). They claim that Jewish law would permit practitioners to substitute coins for chickens in the ritual (A227, 307). Appellants contend that Kaporos organizers resist use of coins because "this event is now motivated by money and profits, and not by religious redemption" (A44, 205).

In July 2015, they brought a plenary action seeking: (1) a writ of mandamus to compel the City of New York, the New York City Police Department, Commissioner William Bratton, and the New York City Department of Health & Mental Hygiene (DOH) to enforce certain laws to stop the practice; and (2) injunctive relief against a group of Orthodox Jewish rabbis and their congregants who practice Kaporos (A495-537). Appellants have since withdrawn all claims against the rabbis and congregants.

As for their claims against the City defendants, appellants complain that public officials and police have declined to enforce various laws against the ritual (A522). Appellants have abandoned reliance on any laws other than the State animal cruelty law and NYC Health Codes, which they continue to maintain must be enforced without discretion and implicate no discretion in their application to particular facts (Br. at 16). They claim that they have lodged numerous complaints with 311, 911, and directly with NYPD officers, but none have been resolved to their satisfaction. Appellants recount that police officers on the scene have declined to arrest Kaporos practitioners (A203-04, 249).

Likewise, appellants contend that the ritual poses a public health risk, although there is no evidence in the record of any documented health hazard caused by the ritual over the past 40 years (A526-30). Appellants suggest that the lack of evidence supporting their claims of public-health risk is due to DOH's failure to investigate in response to their complaints. While appellants acknowledge that DOH investigators responded to

their complaints, they allege that the inspectors either did not come fast enough or reached the wrong conclusions (A207).

Appellants also complain that the City defendants "aid and abet" Kaporos practitioners by blocking off streets and sidewalks, and proving barricades, cones, and other "taxpayer funded items … to protect this illegal event" (A519-521). At bottom, appellants seek to drive a particular outcome: to compel the City defendants to stop the practice of Kaporos and arrest its practitioners (A536). Supreme Court converted the plenary action against the City defendants into an Article 78 special proceeding and dismissed the proceeding in its entirety (A20-31).

C. The Appellate Division's decision that the remedy of mandamus to compel the City to stop Kaporos is not available

In the order currently on appeal, a divided panel (3-2) of the Appellate Division, First Department affirmed the dismissal, agreeing that mandamus to compel is not available to force law enforcement to exercise its discretionary judgment in a specific manner (A587-99). Two justices dissented on the ground that

enforcement of the animal cruelty law and health codes is merely ministerial in this context (A600-13).

ARGUMENT

MANDAMUS WILL NOT LIE TO FORCE CITY LAW ENFORCEMENT OFFICIALS TO ARREST OR FINE PRACTITIONERS OF KAPOROS

A. Enforcement decisions, as the paradigm of discretionary acts, are not ordinarily subject to mandamus.

The "extraordinary" remedy of mandamus is not available to compel public bodies to perform discretionary acts—those calling for an "exercise of reasoned judgment" that could "produce different acceptable results." *N.Y. Civ. Liberties Union v. State of New York*, 4 N.Y.3d 175, 184 (2005). It is instead limited to ordering purely ministerial acts that are required by direct adherence to a specific rule with a "compulsory result," *id.*, and to which the suing party has a "clear legal right," *Legal Aid Soc'y of Sullivan County, Inc. v. Scheinman*, 53 N.Y.2d 12, 16 (1981). *See, e.g.*, *Utica Cheese v. Barber*, 49 N.Y.2d 1028 (1980) (affirming writ compelling the Commissioner of Agriculture to render decision on petitioner's license application within 60 days); *Bottom v. Goord*,

96 N.Y.2d 870 (2001) (affirming writ compelling Department of Corrections to calculate petitioner's jail-time credit).

The Court has consistently rejected private parties' attempts to use mandamus to superintend public officials' decisions about whether and how to take law enforcement actions against third parties. It has thus turned back requests to compel a prosecutor to pursue a particular criminal case, *People ex rel. Hammond v. Leonard*, 74 N.Y. 443, 446 (1878), to direct the police commissioner to stop illegal buses from operating, *Walsh v. La Guardia*, 269 N.Y. 437, 441 (1936), and to compel police to enforce laws and ordinances governing operating hours of coffee houses, *Matter of Perazzo v. Lindsay*, 23 N.Y.2d 764, *aff'g*, 30 A.D.2d 179, 180 (1st Dep't 1968). *See also Matter of Horowitz v. N.Y.C. Police Dep't*, 82 A.D.3d 887 (2d Dep't 2011) (mandamus not available to compel police to investigate alleged larceny that might expose widespread nursing home abuses).

Enforcement decisions are the paradigmatic example of actions committed to the discretion of executive officials—those with constitutional authority and institutional competence to

assess the numerous relevant and often competing considerations in play. Those officials may weigh enforcement priorities and resource limitations. *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 695 (1979). They may also develop strategies to deter wrongdoing, focus on particular violations, or even target geographic areas "where the probability or rate of violations is high." *Id*. And they may rightly strive to avoid appearing to target minority communities or interfere unnecessarily with religious practices. *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (municipalities cannot target religious animal sacrifice).[1]

Appellants offer no answer to this settled law. They fail to recognize the fundamental distinction between asserting a private right of action seeking relief against third parties—for example, their abandoned nuisance claim against Kaporos organizers—and filing suit to compel public officials to exercise their discretion to

[1] Appellants miss the point in arguing that the neutral city and state laws at issue here would survive constitutional scrutiny (Br. at 49-58). We cite *Lukumi* only for the proposition that respecting the sincerely held beliefs of religious minorities, even those we might find upsetting, is a bedrock principle of our pluralistic society.

arrest or fine those third parties. The latter raises serious separation-of-powers concerns, calls upon courts to make broad policy determinations on a necessarily limited record, and threatens to "involve the judicial branch in responsibilities it is ill-equipped to assume." *Jones v. Beame*, 45 N.Y.2d 402, 406 (1978) (mandamus is not available to direct "the vast municipal enterprise" to allocate its resources to improve animal welfare in municipal zoos). Judicial orders directing particular arrests or fines would also undermine the appearance of the courts' impartiality when they later preside over resulting criminal prosecutions or challenges to regulatory enforcement action. *See* Z. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, at 1573 (2016).

All of these points undergird the strong and deeply rooted tradition against issuing writs of mandamus to compel law enforcement actions. Appellants do not come close to justifying a departure from that tradition here.

B. Mandamus cannot be used to force NYPD to perform its discretionary duties to enforce criminal laws at appellants' command.

Appellants seek an order compelling NYPD to arrest Kaporos practitioners for violating criminal animal cruelty laws. But their citations to the City Charter, the animal cruelty laws, and the United States Constitution do not support that extraordinary relief.

1. The City Charter does not alter the general rule that courts cannot compel NYPD to arrest Kaporos practitioners.

Appellants first contend that § 435(a) of the New York City Charter deprives NYPD of discretion to decide how to enforce criminal laws (Br. at 44-45). The argument defies basic legal principles, common sense, and statutory history.

The Charter charges NYPD with the duty to enforce "all laws and ordinances" and "arrest all persons" who violate them. N.Y.C. Charter § 435(a). Appellants read the word "all" to strip NYPD of enforcement discretion and permit private suits to force criminal enforcement against particular individuals. But this Court has warned against reading a statute superficially to

conclude that no discretion is intended, urging that the "real meaning of the legislature [should] be ascertained from a consideration of the nature of the authority, the character of the public agency, and the public duty involved." *People ex rel. Wooster v. Maher*, 141 N.Y. 330, 337 (1894) (observing that "legislature cannot always anticipate the circumstances" that require discretion). Indeed, "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (noting "[t]he deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands").

Appellants' contention does not hold up against this deeper, practical perspective. In a diverse city of 8.5 million residents and 50 million annual visitors, New York City's law enforcement apparatus must be wielded with prudence and pragmatism. Given the sheer scale of NYPD's responsibility, the Charter necessarily grants NYPD the traditional discretion to set enforcement priorities and allocate resources.

The implications of appellants' contrary argument are staggering. It would make each of the thousands of state and local laws enforced by NYPD a proper subject for mandamus at the behest of private individuals. The same would be true in Syracuse and Rochester, among other cities, whose charters contain comparable provisions. *See e.g.*, Syracuse City Charter § 5-1401 (the police "shall … make all legal searches, seizures, and arrests," and "it shall be their duty to arrest any person found by them violating any [state or local] penal" law); Rochester City Charter § 8A-1 ("members of the Police Department" have the "duty to arrest any person found by them violating any penal ordinances"). There is no indication that these unexceptional charter provisions were intended to have such profound consequences. Such provisions are best understood as charging police with a general duty to enforce the laws in the public interest, not as creating a universal arrest mandate enforceable by private parties.

The historical backdrop of § 435 of the New York City Charter proves the point. While close antecedents date back to the

nineteenth century,[2] New York City's voters adopted § 435 itself in 1936. The very same year, the Court refused to compel the New York City Police Commissioner to enforce a law against operators of illegal bus lines, citing the rule that mandamus should not be "used for the purpose of preventing third parties from doing illegal acts." *Walsh*, 269 N.Y. at 441. This contemporaneous understanding further refutes appellants' attempt to upend decades of precedent by arguing that § 435 imposes a ministerial duty enforceable in mandamus.

2. Neither does the animal cruelty law alter the rule that mandamus is unavailable to compel an arrest of third parties.

Appellants also rely (Br. at 19-40) on N.Y. Agriculture & Markets Law § 371, which provides that police "must" issue an appearance ticket, summon, or arrest any person who is violating any provision in article 26 of the Agriculture & Markets Law,

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[2] Comparable provisions date back to the Greater New York Charter, L. 1897, chap. 378, § 315, and even earlier to New York City Consolidation Act, L. 1882, chap. 410, § 282. The unavailability of the writ of mandamus to compel discretionary executive branch acts pre-dates those earlier charters. *People ex rel. Broderick v. Morton*, 156 N.Y. 136, 142, 153 (1898) (discussing well settled limits on mandamus to compel, citing English common law).

which includes the animal cruelty law. This argument fails for two independent reasons. First, police officers retain discretion to determine whether the animal cruelty law has even been violated. Second, even if that determination could be assumed away, the "must" phrasing of § 371 should not be read to deprive police of their traditional discretion regarding arrest decisions.

First, the Agriculture and Markets Law confirms that the statute leaves room for police discretion. The animal cruelty provision, § 353, declares that any person who "unjustifiably injures … or kills any animal" is guilty of a misdemeanor. By the statute's plain language, to find a violation of the animal cruelty law, police must decide whether a person *unjustifiably* harmed an animal—a question that plainly requires the exercise of judgment and could produce different acceptable results.

Appellants wave away this language, claiming that the term "unjustifiably" merely leaves room for a justification defense—a question that must be decided by a criminal jury and thus provides no basis for police to decline to make an arrest (Br. at 23-25). But it is not clear that the statutory requirement that the act

be "unjustifiable" is a defense, rather than a core element of what the offense prohibits. *See People v. Arroyo*, 3 Misc. 3d 668, 676 (Crim. Ct., Kings Cnty. 2005) ("[A]nticruelty statutes, including Agriculture and Markets Law § 353, do not prohibit causing pain to animals but [rather prohibit] causing 'unjustifiable' pain."). Nor does the relatively sparse precedent construing the statute settle that question.

The deeper point, though, is that appellants' understanding would lead to absurd consequences. Police would be compelled to arrest every person who sets a mousetrap, swats a mosquito, or hunts or fishes for sport, and only the criminal jury could assess whether those acts injuring or killing animals were justifiable. Fortunately, the statute does not enact this rigid vision: police have discretion to determine at the outset whether a particular act is "unjustifiable."[3] As one trial court has noted, while § 353 may leave something "to be desired from a draftsman's point of

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[3] Appellants' three-page discussion of a stray passage in *Hammer v. Am. Kennel Club*, 1 N.Y.3d 294, 300 (2003), about the requirement for police action is irrelevant because, as appellants concede, *Hammer* does "not pertain to mandamus" (Br. at 21).

view," it may fairly be understood to target a defined universe of conduct: "unjustified, needless and wanton inhumanity towards animals." *People v. Bunt*, 118 Misc. 2d 904, 908, 910 (Just. Ct., Dutchess Cnty. 1983) (applying § 353 to defendant charged for beating a dog with a baseball bat).

Whether certain acts harming animals are "unjustifiable" is a question about which reasonable minds can and do disagree, and which might lead to a range of acceptable outcomes. A "moral or philosophical explanation" for the acts may suffice to place them outside the statute's scope. *People v. Morin*, 41 Misc. 3d 1230[A], 1230A (Crim. Ct., Bronx Cnty. 2013). Appellants' extensive briefing on unjustifiability, going as far as urging this Court to declare that coins may be substituted for chickens under Jewish law, only underscores that the question is far from simple or clear.

Trading in anti-Semitic stereotypes, appellants' argue that Kaporos is not justifiable because it "is nothing more than a massive money-making event" and is not performed as part of practitioners' sincerely held beliefs (Br. at 30). But appellants' invitation for the Court to wade into murky "questions of religious

doctrine"—an area where courts are "constitutionally limited," *Avitzur v. Avitzur*, 58 N.Y.2d 108, 114-115 (1983)—confirms that this case presents fact-bound and discretionary questions about whether performing Kaporos violates the law. Nor should the Court undertake to resolve unsettled questions about the scope of § 353's criminal prohibition—especially as it may intersect with religious practice—in a mandamus proceeding. *See also Legal Aid Soc'y*, 53 N.Y.2d at 16 (mandamus is limited to enforcing "clear legal right[s]").

Second, even if the existence of a violation were assumed, the question whether to make an arrest under the animal cruelty law would remain discretionary, as it is under practically every other criminal law. The mere use of the word "must" in Agricultural & Markets Law § 371 does not oust the traditional enforcement discretion of the police. As the United States Supreme Court has pointed out, every State has longstanding statutes that, "by their terms, seem to preclude nonenforcement by the police," yet are not construed that way. *Town of Castle Rock*, 545 U.S. at 760 (citation omitted). "[F]or a number of

reasons, including legislative history, insufficient resources, and sheer physical impossibility," such statutes are not "interpreted literally," and they "clearly do not mean that a police officer may not lawfully decline to make an arrest." *Id.*; *see also City of Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999) (it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances," including as to ordinance stating that police "shall" disperse loiterers).

History confirms this understanding. The ancestor of current § 371 dates back to 1888, when it was added, without any apparent ado, to Penal Code § 668, *see* L. 1888 chap. 144, § 6. By that time, the rule limiting writs of mandamus to "purely ministerial" acts was already deeply entrenched. *Broderick*, 156 N.Y. at 142 (tracing limits on mandamus to English common law). It is implausible that the Legislature would have done away with the police's traditional discretion, without saying so quite explicitly. *See ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 224 (2011) ("If the Legislature actually intended … to extinguish the historic rights [at issue], we would expect to see

evidence of such intent within the statute."). Legislatures do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001).

There is no merit to appellants' attempt (Br. at 26-28) to analogize the animal cruelty laws to the Family Protection and Domestic Violence Intervention Act. Under the latter, Criminal Procedure Law § 140.10[4] provides that police "shall arrest a person, and shall not attempt to reconcile the parties or mediate" in certain domestic violence cases. The Court has not yet had an opportunity to resolve whether aspects of § 140.10[4] are ministerial and may be a proper subject for mandamus. *Cf. Valdez v. City of N.Y.*, 18 N.Y.3d 69, 79 n.6 (2011).

In any case, the mandatory phrasing of that provision, underscored by its explicit prohibition on attempts by police to mediate domestic disputes, was a deliberate response to a pronounced pattern of under-enforcement in domestic violence cases, as is made clear in the legislative history, *see* L. 1994, chap. 222, § 1 (Legislative Findings). *See also Town of Castle Rock*, 545 U.S. at 762 (noting that, "in the specific context of domestic

violence, mandatory-arrest statutes have been found in some States to be more mandatory than traditional mandatory-arrest statutes"). But nothing comparable exists in the animal cruelty law's history.[4] Indeed, appellants (Br. at 25-26) point to a number of criminal animal cruelty cases following arrests in the city, suggesting that the law's enforcement is not languishing.

3. NYPD cannot be compelled to stop providing police protection to Kaporos practitioners.

Appellants also complain that NYPD should not be permitted to provide cones, barricades, traffic control, and police protection during Kaporos. But they must still demonstrate a clear legal right to the requested relief, regardless of whether they couch their request as enjoining municipal assistance of Kaporos or compelling NYPD to prevent the practice. Either framing

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[4] A more likely explanation for the "must" language in the animal cruelty law is that it reflects an inartful attempt to distinguish between the public enforcement duty of police officers and the optional enforcement authority granted to private humane societies' officers and agents under the statute. *Am. Soc'y for the Prevention of Cruelty to Animals v. New York*, 205 A.D. 335, 337, 340 (1st Dep't 1923) (explaining that "very broad general powers have been conferred upon" ASCPA to "assist in the enforcement of the criminal laws relative to cruelty to animals").

impermissibly intrudes into the police's discretionary judgment. *See, e.g.*, *Matter of Juniper Park Civic Ass'n, Inc. v. City of N.Y.*, 14 Misc. 3d 1203A (Sup. Ct., Queens Cnty. 2006) (rejecting request to compel NYPD to stop actively encouraging violations of law requiring dogs be leashed and instead enforce the law).

Even if the practice of Kaporos were deemed to violate laws, as appellants contend, mandamus cannot be used to force NYPD to abdicate its responsibility to provide law enforcement protection and traffic control during Kaporos, for the benefit of practitioners, protestors, and bystanders alike. *People v. Nixon*, 248 N.Y. 182, 188-189 (1928) ("Police officers are guardians of the public order. Their duty is not merely to arrest offenders but to protect persons from threatened wrong and to prevent disorder.").

According to appellants' own affidavits, thousands of people gather during Kaporos to participate in the ritual (A284), there are "annual demonstrations and protests" (A44), and there is open hostility between practitioners and protestors (A220, 273). NYPD has broad discretion to exercise its police power to maintain public order and ensure public safety, and contrary to appellants'

contentions, the police's power to keep the peace does not depend on whether Kaporos is lawful. Rather, just as NYPD may provide traffic control to facilitate a spontaneous march or police protection for an unpermitted protest, and just as DOH may distribute clean hypodermic needles to intravenous drug users, the City's police power is not dependent on whether all who benefit from it are law-abiding.

Nor is there merit to appellants' misguided claim that NYPD violates the Establishment Clause by providing barricades and crowd control during Kaporos. NYPD does not endorse any religion by its neutral act of maintaining public safety during a crowded event on a public street. To the contrary, refusing police protection to religious groups would be "odious to our Constitution" because religious groups are entitled to the same public benefits as secular groups. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

Everson v. Bd. of Educ., 330 U.S. 1 (1947), on which appellants rely, only supports defendants' position (Br. at 59-60). *Everson* holds that a State cannot hamper individuals' religious

exercise by denying public benefits, including "ordinary police and fire protection," which are granted to their secular counterparts. Rather, the State must be "neutral in its relations with groups of religious believers and non-believers." *Id.* at 16-18. In short, the First Amendment does not require that religious institutions be "quarantined from public benefits that are neutrally available to all," even if government action frees up the institutions' resources "to be put to sectarian ends." *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746-747 (1976).

C. Mandamus is not available to compel the Department of Health and Mental Hygiene to stop Kaporos on public health grounds.

Appellants also argue that DOH must levy fines or take other enforcement actions to stop Kaporos, citing DOH's general duty to protect public health and appellants' own belief that Kaporos is a threat to public health (Br. at 41-46). This claim also fails under settled principles of the mandamus remedy.

Appellants' sweeping attempt to strip DOH of enforcement discretion fails for the same reasons that mandamus is unavailable to dictate NYPD's discretionary enforcement

decisions. DOH's broad mandate to protect public health, granted in Section 558 of the New York City Charter, does not make each and every provision of the New York City Health Code ministerial (Br. at 45). Just as with NYPD, a broad mandate implies broad discretion, because of the "sheer physical impossibility" of "literally" enforcing all of the health codes all of the time. *Castle Rock*, 545 U.S. at 760. And it would present acute separation-of-powers problems to force DOH to find that a practice poses a health risk, where the agency has concluded otherwise based on its expertise in public health matters and after weighing the medical evidence.

Appellants contend that the practice of Kaporos violates several provisions of the City Health Code, (Br. at 13-14, citing NYC Health Code §§ 153.09, 153.21(a), 161.09, 161.11, 161.19, 161.19(b)), which address where live animals may be kept and how animals carcasses must be disposed of. But each of these laws is framed as a prohibition on conduct by third parties, not as an affirmative requirement to fine or arrest every alleged violator that is imposed on any government agent. Appellants have thus

"failed to demonstrate the existence of a nondiscretionary, ministerial duty and, hence, mandamus to compel does not lie." *Hassig v. N.Y. State Dept. of Health*, 5 A.D.3d 846, 848 (3d Dep't 2004) (denying mandamus because "although the Department must provide a breast cancer detection and education program, there is no requirement that it do so in the fashion urged by petitioner").

Equally unavailing is appellants' reliance on *New York City Coalition to End Lead Poisoning v. Koch*, 138 Misc. 2d 188 (Sup. Ct., N.Y. Cnty. 1987), *aff'd in summary order,* 139 A.D.2d 404 (1st Dep't 1988), and *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984). In *New York City Coalition*, the City failed to create any enforcement regulations for lead poisoning abatement although adoption of such regulations had been "required by the statute for over fifteen years." *G.M.M. v. Kimpson*, 92 F. Supp. 3d 53, 64 (E.D.N.Y. 2015); *see also Abrajan v. Kabasso*, 2003 N.Y. Slip. Op 51391[U], *6 (Sup. Ct., Kings Cnty. 2003) (the City's "only statutory obligation … [wa]s to enact regulations" to enforce the State's lead poisoning

abatement statute).[5] Likewise, in *Klostermann*, the State failed to create any program to provide housing or services to people with mental illness despite being required by statute required to do so. 61 N.Y.2d at 536. In both cases, while public officials were required to adopt some regulatory program, the courts recognized that the officials had broad discretion to decide what to adopt and how to implement it. *Id.* at 539-40.

DOH's decision not to cite practitioners of Kaporos on health code grounds is not comparable. DOH has not ignored a specific law that requires it to regulate Kaporos; no such law exists. Rather, appellants merely disagree with how DOH has decided to enforce generally applicable rules and regulations that govern the keeping and disposal of animals.[6] Their pleadings prove this point:

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[5] *New York City Coalition* is also distinguishable because plaintiffs had a statutorily created private right of action, based on the special relationship between them, a class of parents whose children had lead poisoning, and the government agency charged with abating the lead poisoning epidemic. 138 Misc. 2d at 197. *See Jaramillo v. Callen Realty*, 154 Misc. 2d 869, 875 (Sup. Ct., N.Y. Cnty. 1992) (distinguishing *New York City Coalition* because the regulations were not aimed at the general public but at a narrow class of children who were uniquely placed at risk by the hazardous condition).

[6] For the same reason, appellants' reliance on *In re Jurnove v. Lawrence*, 38 A.D.3d 895 (2d Dep't 2007), is misplaced (Br. at 62). In *Jurnove*, the petitioners sought to compel the police to accept complaints of animal cruelty,

(cont'd on next page)

there is an established mechanism for lodging complaints with DOH—a procedure that they followed, which led to an inspection of the site by a DOH inspector (A207). Appellants are simply unhappy with how these enforcement matters were resolved.

Appellants' objections to the practice of Kaporos are no doubt sincere. They may bring any private right of action against Kaporos practitioners that the law recognizes and they have standing to assert. They may also petition their elected representatives to enact laws regulating the practice, to the extent permitted by the Constitution, or to direct any enforcement action that is authorized by existing laws. And they may vote against representatives who do not act as they wish. But, under established precedent, a suit against city officials seeking mandamus to compel law enforcement action against Kaporos practitioners "is an improper vehicle for the redress of any of their

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instead of referring all complaints to the Nassau County Society for the Prevention of Cruelty to Animals. *Id.* There is no claim here that DOH (or NYPD) refused to accept complaints, as the Nassau County police had done. And even while holding that Nassau County police had a duty to accept petitioners' complaints, the Second Department acknowledged that the police had "broad discretion to allocate resources and devise enforcement strategies." *Id.*

alleged grievances." *Community Action against Lead Poisoning v. Lyons*, 43 A.D.2d 201, 203 (3d Dep't 1974), *aff'd*, 36 N.Y.2d 686 (1975).

CONCLUSION

For the foregoing reasons, the Appellate Division's decision should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 5,092 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

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