
Washington State Court of Appeals
Division I



Docket No. 64452-1-I

King Cy. Sup. Ct. Cause No. 09-2-04904-0

PASADO'S SAFE HAVEN, et al.,

Plaintiffs-Petitioners,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

APPELLANT'S BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Did the trial court err dismissing the Uniform Declaratory Judgments Act (“UDJA”) claim due to lack of standing (CP 10 ¶ 4, CP 13 ¶¶ 1-2)?
2. Did the trial court apply the wrong test for constitutionality – viz., “no set of circumstances” (CP 12 ¶ 11, CP 13 ¶¶ 3-4)
3. Did the trial court err finding that the challenged provisions of the Washington Humane Slaughter Act (“WHSa”) – i.e., Ch. 16.50 RCW and implementing regulations Ch. 16-24 WAC, did not violate the U.S. Const. Amend. I (CP 12 ¶ 13, CP 13 ¶¶ 3-4)
4. Did the trial court err finding that the challenged provisions of the WHSA did not violate the Wash. Const. Art. I, § 11 (CP 12 ¶ 13, CP 13 ¶¶ 3-4)
5. Did the trial court err finding that the challenged provisions of the WHSA did not violate the U.S. Const. Amend. XIV, § 1 (CP 12 ¶ 14, CP 13 ¶¶ 3-4)
6. Did the trial court err finding that the challenged provisions of the WHSA did not violate the Wash. Const. Art. I, § 12 (CP 13 ¶ 14, CP 13 ¶¶ 3-4)
7. Did the trial court err finding that the challenged provisions of the WHSA did not violate the nondelegation doctrine (CP 13 ¶ 15, CP 13 ¶¶ 3-4)
8. Did the trial court err every declaration and exhibit offered by the Plaintiffs, save letters identified in the order granting defendants’ motion (CP 7-8 ¶¶ 1-3)?

II. STATEMENT OF THE CASE

Pasado’s Safe Haven, a Washington nonprofit corporation devoted to stopping animal cruelty and providing sanctuary to its victims, *ex rel* all Washington taxpayers, sought to declare unconstitutional certain

provisions of the WHSA, viz., those permitting packers and slaughterers (including custom slaughterers regulated by WSDA¹) to kill livestock in accordance with the ritual requirements of any arguably religious faith, however cruel or inhumane, while avoiding criminal prosecution. For instance, ritualists may sever the animal's carotid arteries with a sharp instrument *after* being shackled, hoisted, thrown, cast, or cut – *without* having first been rendered insensible to pain, and *without* guaranteeing instantaneous loss of consciousness. This identical conduct, if performed for nonreligious or nonritualistic reasons, is a misdemeanor under the WHSA. RCW 16.50.170; WAC 16-24-012(3).

The WHSA states, “No slaughterer or packer shall bleed or slaughter any livestock except by a humane method[.]” RCW 16.50.120. It then defines “humane method” in expressly secular and religious terms²:

- (a) A method whereby the animal is rendered **insensible to pain** by mechanical, electrical, chemical or other means that is rapid and effective, **before** being shackled, hoisted, thrown, cast or cut; or
- (b) A method **in accordance with the ritual requirements of any religious faith** whereby the animal suffers loss of consciousness by anemia of the brain caused by the

¹ Ch. 16-24 WAC explicitly applies to custom farm slaughterers. Custom slaughter is regulated by the WSDA pursuant to Ch. 16-19 WAC and Ch. 16.49 RCW. Accordingly, the humane slaughter provisions of Washington apply to individual custom slaughter operations that are not USDA-inspected.

² The convention “Secular Method” applies to RCW 16.50.110(3)(a) and “Religious Method” to RCW 16.50.110(3)(b).

simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

RCW 16.50.110(3)(emphasis added). RCW 16.50.110(3)(a) captures the quintessential legislative intent of prescribing insensibility prior to shackling, hoisting, throwing, casting, or cutting as a safeguard against unnecessary animal suffering. Insensibility makes the Secular Method “humane.” Inexorably, sensibility during slaughter is “inhumane.”

Yet, the Religious Method offers no such protection. Defendants may argue that the “simultaneous and instantaneous severance of the carotid arteries with a sharp instrument” creates insensibility, but this is not even acknowledged, much less mandated, by RCW 16.50.110(3)(b), as it is in RCW 16.50.110(3)(a). Furthermore, the “loss of consciousness by anemia of the brain” need not be itself “simultaneous” or “instantaneous” with the severing of the carotid arteries. Indeed, loss of consciousness (and, thus, insensibility) is not immediate and can take sometimes over one minute. **CP 214-16, 223-24**. Lastly, it defies reason and candor to assert that having one’s throat slit is an experience that does not cause pain or suffering, particularly when this may occur *after* the animal has been shackled,³ hoisted, thrown (in an inverted box),⁴ or cast, and which

³ “Nevertheless, shackling and hoisting are still practiced in kosher slaughter today....” **CP 206**.

may involve use of a knife that is too short, as seen in *halal* (Muslim) slaughter. CP 227.

The Religious Method leaves room for considerable abuse and religiously-motivated cruelty. But whether animal suffering be proved is not the only question. Of fundamental constitutional import is whether one person should be jailed for killing an animal by precisely the same method as another, the distinction turning solely on *religious* state of mind. After all, an individual intentionally, knowingly, recklessly, or with criminal negligence and, by definition, “inhumanely,” slaughtering livestock commits a misdemeanor under RCW 16.50.170, a misdemeanor under RCW 16.52.207(1), or a felony under RCW 16.52.205(1) – unless done for religious reasons.

The phrase “in accordance with the ritual requirements of any religious faith” converts the method, otherwise defined in secular terms, from one that is humane under all circumstances to one that is humane only when religiously-motivated. Those who fail to slaughter “in accordance with the ritual requirements of any religious faith” face prosecution. Various iterations of criminal misconduct involving the

⁴ “Furthermore, inverted kosher slaughter is the primary method used for most countries outside of the United States.” CP 206; see also CP 233-34 (Dr. Grandin noting that the American Agriprocessors plant used a rotating box.

“Religious Method” include (1) a believer engaging in non-instantaneous severing, (2) a believer not using a sharp instrument, and (3) a nonbeliever instantaneously severing with a sharp instrument.⁵

The rub in scenarios 1 and 2 is that even a believer who engages in ritual slaughter pursuant to his own idiosyncratic interpretation of what is required by his religion may escape prosecution regardless of whether he fails to comply with the Secular Method, for RCW 16.50.150 states that notwithstanding any provision of Ch. 16.50 RCW, all forms of ritual slaughter are “humane.” Accordingly, such actions cannot be in violation

⁵ For example, a packer or slaughterer precisely goes through the motions of the ritual requirements of a religious faith and uses a technique involving the instantaneous severing of the carotids with a sharp instrument, but is not doing so “in accordance” with the common ritual requirement that the packer or slaughterer be a believer or person of the religious faith involved. For instance, in kosher slaughter, the slaughterer must be “religiously qualified.” “The mammals and birds that may be eaten must be slaughtered in accordance with Jewish law.” Deut. 12:21. The person who performs Jewish slaughter is called the *shochet*. He is not simply a butcher, but must be a pious man, well-trained in Jewish law, particularly as it relates to kashrut. www.jewfaq.org/kashrut.htm. Indeed, in the wrongful termination case of *Maruani v. AER Services, Inc.*, D.Minn.2006 (06-176-MJD), Leo Maruani sued a kosher slaughterhouse for firing him because he “was not living a pious life in conformance with Orthodox Jewish beliefs,” and, thus, could not slaughter in accordance with ritual requirements of the Jewish faith. Shlomoh Ben-David, President of the kosher slaughterhouse sued by Mr. Maruani, states: “Based on *kashruth*, the supervising rabbis require that animals be slaughtered according to strict religious rituals and that the slaughter be performed by a *shochet*, or specially trained ritual slaughterer and inspector. The rabbis further require, according to *kashruth*, that the *shochet* have a license issued by an Orthodox Jewish rabbi and be someone who lives a visibly pious life in strict conformance with Orthodox Jewish beliefs – someone who is ‘God-fearing in the public’s eye.’ The Orthodox Jewish community’s perception of the *shochet* as pious and God-fearing is extremely important: otherwise, the community will not be able to trust that the *shochet* has slaughtered the animals according to religious ritual and that the meat is fit for consumption.” CP 245 ¶ 3. See also CP 239 ¶¶ 9-12 (discussing religious qualifications of ritual slaughterer); ¶¶ 13-18 (concluding that Maruani was not religiously qualified).

of RCW 16.50.120 (mandating a “humane method” of slaughter) and the individual will always escape prosecution regardless how flagrantly violated. Thus, while Ch. 16.50 RCW purports to impose criminal penalties upon religious minorities who fail to slaughter in accordance with the tenets of their religion and using the exclusive Religious Method, the other provisions of the chapter render this proscription, and the vast scope of pre-slaughter preparations,⁶ illusory.

The same cannot be said for nonbelievers, for it takes an otherwise secular method (i.e., cause instantaneous severing of carotids with sharp instrument) and makes it a crime not to perform that method with the proper religious credentials and pious calibration of soul. Of course, criminalization applies not just to the Religious Method, but also the Secular Method, thereby allocating all the peril to nonbelievers and none to believers. The WHSA would not offend the constitutions if it exposed all packers and slaughterers – religious and secular – to prosecution for failing to comply with the Secular Method. Instead, the legislature has exonerated religious minorities by offering them, and only them, an exception to the Secular Method, freeing them from the criminal repercussions that would otherwise apply, as described in the following scenarios, causing considerable pain and fear: (1) shackling before

⁶ See RCW 16.50.150.

insensibility; (2) hoisting before insensibility⁷; (3) casting before insensibility⁸; (4) throwing before insensibility; and (5) cutting before insensibility.

If the Religious Method required that the instantaneous severing of the carotid arteries cause “immediate” or “near immediate” loss of consciousness (i.e., insensibility), or if the Religious Method proscribed shackling, hoisting, casting, or throwing before loss of consciousness, the above scenarios would no longer offend the constitutions in the respect described – except for 5, where the conflict is direct and unmistakable (the act of cutting cannot render the animal insensible to the pain of being cut).

The WHSA goes much further, however, by expressly “defin[ing] as humane” both “ritual slaughter” and “the handling or other preparation of livestock for ritual slaughter[.]” RCW 16.50.150. The glaringly undefined term “ritual slaughter” invites tremendously unbridled discretion to not just statutorily defined “packers” and “slaughterers” (RCW 16.50.110(5,7)), but to “any person” (RCW 16.50.110(6)). The identical conduct, if part of *non-ritual* slaughter, or the handling or other preparation of livestock for *non-ritual* slaughter, would not enjoy the

⁷ CP 205-06.

laissez-faire religious privilege sanctioned by the Legislature and declared holy as a matter of public policy. The far-reaching impact of RCW 16.50.150, by its plain language, well precedes the *coup d'grace* to encompass every act or omission in preparation for slaughter. And because virtually all livestock are raised from birth for the express purpose of slaughter, RCW 16.50.150 amounts to a “cradle-to-grave” religious exemption for even admittedly cruel misconduct, including precisely the type of behavior outlawed by “Pasado’s Law,” the name given to Washington’s first felony animal cruelty law, codified as Ch. 16.52 RCW.⁹ This exemption showcases legislative inconsistency and religious favoritism when it comes to legitimately “humane” issues of transport, confinement, nutrition, exercise, ventilation, veterinary care, and all other aspects considered by Ch. 16.52 RCW. The exemption exonerates all ritualists from criminal liability under RCW 16.50.170, which applies broadly to a violation by “[a]ny person violating any provision of this chapter or of any rule adopted hereunder[.]” Conduct “defined as humane” irreconcilably conflicts with any prosecution as “inhumane.” Further, RCW 16.50.150 creates an express exemption to RCW 16.50.140, which

⁸ The use of an inverted box spins the animal in the air and puts her feet above her head, causing considerable fear and constituting “casting.” CP 211, 220. The Religious Method does not prohibit inversion.

⁹ The named plaintiff, Pasado’s Safe Haven, is Ch. 16.52 RCW’s namesake.

declares as “inhumane” the use of a manually operated hammer, sledge or poleaxe. Use of such implements is criminal – unless religiously motivated. RCW 16.50.170.

The WHSA does not expressly incorporate by reference any provision of the federal Humane Methods of Slaughter Act (“HMSA”). Instead, the WHSA’s intent statement ensures that “methods of slaughter” (not pre-slaughter handling or preparation) “conform generally” to those “methods of slaughter” authorized by the HMSA. RCW 16.50.100. Unlike the HMSA, the WHSA affirmatively declares certain methods inhumane (RCW 16.50.140) and criminalizes noncompliance (RCW 16.50.170). Unlike the HMSA’s refusal to address handling and preparation methods for ritual slaughter under 7 U.S.C. § 1902(b), by *exempting* them, the WHSA *affirmatively* defines them as *per se* “humane” without limitation to the Religious Method. To “conform generally” to “humane methods” articulated in the HMSA makes sense when interpreting nearly identical, alternative methods authorized by federal law at 7 U.S.C. § 1902. But it has no bearing on methods about which federal law is silent and which state law declares inhumane, or methods about which federal law expressly does not concern itself but which state law declares humane.

Additionally, the WWSA allows the following unacceptable double standard, turning the WSDA Director into the Grand Inquisitor, donning a mitre hat and instructing his agents to determine whether the slaughterer was killing with impure (i.e., other than religious) thoughts, and exonerating even the most heinous acts of ritual sacrifice (e.g., Satanism) so long as done in the name of a deity or for a religious purpose. **In every case, unless the violation was religiously-motivated** (i.e., “ritual slaughter” under RCW 16.50.150), the violator is subject to prosecution where:

1. The Secular Method is not performed as indicated.
2. The Religious Method is not performed as indicated.
3. The Religious Method is performed as indicated, but the person performing the Method was not doing so “in accordance with the ritual requirements of any religious faith” because he did not possess the proper religious qualification.
4. Any method other than the Secular or Religious Method is performed.

To make matters worse, “religious” is not defined, but Washington's constitution has been interpreted to confer upon even the most dubious creed a protected status, so long as “arguably religious.”¹⁰ Even the most idiosyncratic religion (e.g., comprised of one adherent),

¹⁰ See *State v. Balzer*, 91 Wash.App. 44 (II, 1998)(high priest of the Rainbow Tribe Church of the Living Light, a religion using psychoactive drugs and plants in prayer ceremonies and utilizing marijuana as a sacrament during the ceremonies, was a “religion” protected under our constitution).

nonbelievers, but excusing it for believers, backed by the compulsory police power.

To make matters worse, no state or federal case has interpreted or determined the following:

1. What does “in accordance with ritual requirements of any religious faith” mean?
2. How does the WSDA determine whether the Religious Method is one “in accordance” with “ritual requirements” or “any religious faith” without resorting to and applying, at some level, religious law, thereby violating the Constitutions?
3. What does “handling or other preparation of livestock for ritual slaughter” mean?
4. What does “ritual slaughter” mean?
5. In answering any of these questions, does the government unconstitutionally delegate regulatory authority to private religious individuals or groups?

In attempting to answer these questions, Pasado’s offered declarations from a former USDA inspector/veterinarian and two rabbis (CP 93, 236-42, 244-48), video footage (CP 99-100), newspaper/television reports (CP 86-87, 90-91, 95-97, 102-104), and universally accessible articles from world-renowned expert Dr. Temple Grandin (CP 205-08, 210-212, 214-16, 218-30, 232-34) to provide the court with actual examples of methods of ritual slaughter and pre-slaughter handling (ritual or otherwise), as well as to showcase the

discordance in what satisfies the “ritual requirements of any religious faith” (given the rabbinical debate over whether particular practices – e.g., inverted box, “second cut,” Kapparos – comply with Jewish law). Other examples were offered respecting *halal*, *jhakta*, and Santeria (as described and incorporated by reference herein from *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524-25 (1993)), in addition to other less known practices, of which the court may take judicial notice. *Wyman v. Wallace*, 15 Wash.App. 395, *aff’d* 94 Wn.2d 99 (1980); ER 201.

On Mar. 17, 2009, Mr. Karp, on behalf of the named plaintiffs, petitioned the Washington State Attorney General’s office to take steps to render these provisions unconstitutional. **CP 419-426**. On April 1, 2009, Assistant Attorney General Kristen Mitchell declined. **CP 428**. As described in the Mar. 17, 2009 letter, the religious exemptions found in Ch. 16.50 RCW and Ch. 16-24 WAC, and permitted by the WSDA, expressly allow felony and misdemeanor animal cruelty to flourish – in the name, through the establishment, and with the appropriation and application of public funds and money, of religion.

The State answered (**CP 432-37**) Pasado’s *Complaint* on May 21, 2009 (**CP 441-49**) raising numerous affirmative defenses. Challenged by Pasado’s were justiciability, ripeness, standing, and subject matter jurisdiction. Defendants cross-moved for judgment on the pleadings. On

Nov. 2, 2009, Judge Weiss granted Pasado's motion to strike affirmative defenses as to the taxpayer derivative suit, but not as to the UDJA (CP 13 ¶ 1) and denied Defendants' cross-motion, except as to the UDJA (CP 13 ¶ 2). The parties cross-moved for summary judgment, litigating whether the WHSA violated Article I, §§ 11-12 of the Washington Constitution and the United States Constitution's First and Fourteenth Amendments, as well as the nondelegation doctrine. CP 13 ¶¶ 3-4. After striking all evidence offered by Pasado's (CP 7), Judge Weiss dismissed the case, and Pasado's appealed. CP 4. Defendants timely cross-appealed.

III. ARGUMENT

This court reviews summary judgment orders *de novo*. Any findings of fact are superfluous and not considered on appeal. *Sherman v. Kissinger*, 146 Wash.App. 855, 864 fn. 3 (I, 2008), as amended.

A. Standing Under the UDJA.

Defendants incorrectly convinced the trial court that the UDJA imposes a special injury standing requirement any time a party seeks to invalidate a statute as unconstitutional. This court should resist the argument for two reasons. First, the Supreme Court stated the contrary in *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 859, 861 (1958), finding that the UDJA grants a resident taxpayer the right to test the constitutionality of a statute when the Attorney General has declined to do

so. Second, for the legislature to, in essence, abrogate decades-long Supreme Court precedent, providing for the right to challenge the legality or validity of government action without proof of special injury, it must state so explicitly. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77 (2008). It did not. Rather, RCW 7.24.120 extends the common law as it is “to be liberally construed and administered” for “remedial” purposes. The *raison d’etre* of a taxpayer derivative action is to cease government activity by, first, declaring the action unconstitutional (hence, a declaratory judgment action) and, second, enjoining the government from continuing to engage in that activity (hence, injunctive relief). Judge Weiss found taxpayer standing, ripeness, and justiciability for the misuse of tax funds to finance unconstitutional government action. **CP 11 ¶¶ 6-8.** For the same reasons, standing under the UDJA exists.

B. The Salerno “No Set of Circumstances Test.”

To prevail, Pasado’s must prove that the WHSA violates various constitutional provisions according to the “nature of the challenge,” not “that no set of circumstances exists under which the Act would be valid[.]” as Defendants argued. In *Robinson v. City of Seattle*, 102 Wash.App. 795 (I, 2000), the City of Seattle’s position echoed that of the State. *Id.*, at 805-06. Rejecting it, the court noted:

It is true that the Taxpayers' challenge is inherently "facial," because the inquiry is not whether application of the challenged enactment violates a particular individual's rights, but whether the government has acted unlawfully. It is also true, as the Taxpayers point out, that no Washington court has applied the *Salerno* test to a taxpayer suit.^{ENL5} More importantly, Washington courts have not employed the *Salerno* test for any facial challenges, and it has little vitality elsewhere. Our review persuades us that *Salerno* is not the appropriate test for taxpayer challenges in Washington.

Id., at 806. Following several other high level sister courts, *Robinson* rejected the "no set of circumstances" test as inappropriate for a taxpayer suit under the state constitution, instead applying "the test dictated by the nature of the challenge." *Id.*, 807-808. The Court proceeded to examine – facially – the constitutionality of Seattle's ordinance under Art. I, § 7 of the Washington Constitution, and found it unconstitutional in part. *Id.*, at 828. The Plaintiffs have raised many state constitutional challenges. Hence, Judge Weiss disregarded on-point, in-division precedent.

C. The Act Violates the First Amendment.

The First Amendment to the U.S. Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As to what constitutes "respecting," the Supreme Court employs a three-prong test originally formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Government action violates the Establishment Clause under *Lemon* if it (1) does not have a secular

purpose, (2) has the principal or primary effect of advancing or inhibiting religion, and (3) fosters “an excessive government entanglement with religion.”

1. Not Secular in Purpose.

The plain language of the Religious Method and RCW 16.50.150 demonstrate that the WHSA, with respect to ritual slaughter, does not have a secular purpose. Rather, it expressly defines as humane all religiously-motivated preparation, handling, and slaughter but denies the same protection to conduct not religiously-motivated. The WHSA’s primary effect, therefore, is to protect certain religions and punish others with the force of law – both criminally and administratively, fostering an “excessive government entanglement with religion.”

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the court modified the *Lemon* test to apply the endorsement principle, holding a nativity display on the county courthouse steps unconstitutional because it endorsed a particular religion or irreligion. The coercion principle of *Lee v. Weisman*, 505 U.S. 577, 587 (1992) also refines Establishment Clause jurisprudence, holding unconstitutional a prayer at a public high school graduation because it coerced students to support or participate in religion. The Supreme Court’s first review of a challenge to a state law under the Establishment

Clause emerged in *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), where:

The Court articulated six examples of paradigmatic practices that the Establishment Clause prohibits: **“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.**

Lee v. Weisman, at 601, fn.2 (quoting *Everson*, at 511-12)(Blackmun, J., concurring)(emphasis added). The WWSA violates three of the six “paradigmatic practices.” Further, the endorsement (promoting religion over irreligion) and coercion is explicit: RCW 16.50.160 permits injunctions by the WSDA Director; and RCW 16.50.170 criminalizes violations of the WWSA.

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), a challenge to Congress’s exempting employees of religious, nonprofit organizations

from Title VII's prohibition against religious discrimination in employment, does not alter this conclusion. For, "At some point, accommodation may devolve into 'an unlawful fostering of religion[.]'" *Id.*, at 334-335 (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987)). Putting aside that one commentator called *Amos* "one of the most deferential and least logically convincing Establishment Clause analyses ever undertaken by the Court," Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 *Tex.L.Rev.* 247, 290-91 (1994), *Amos* acknowledged that accommodation may become endorsement. Properly understood, *Amos* cannot be said to validate *all* legislation enacted with the purpose of accommodating or exempting religion from general laws, as made clear in *Texas Monthly v. Bullock*, 489 U.S. 1, 25 (1989)(declaring Texas's sales tax exemption for religious publications violative of Establishment Clause). Justice Brennan, in authoring *Texas Monthly* and discussing how a secular purpose may incidentally benefit religion without violating the Establishment Clause, said:

In all of those cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.

Id., at 11; *see also Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)(striking down statute requiring employers to accommodate employees' observation of Sabbath days). By granting home court advantage and criminal immunity to all ritualists engaging in identical conduct or misconduct as secularists, the WHSA is incompatible even with the principles of *Amos*.

While states may strive to accommodate religious diversity through "benevolent neutrality," as noted in *Amos*, "accommodation is not a principle without limits[.]" *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994). In *Kiryas Joel*, the Supreme Court determined that the statute at issue failed to foreclose religious favoritism for a collective of Satmar Hasidim seeking to create what amounted to an exclusive school district, and crossed the line from permissible accommodation to impermissible establishment:

Petitioners' proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, ... it is clear that neutrality as among religions must be honored.

Id. At the heart of the Establishment Clause is the principle "that government should not prefer one religion to another, *or religion to irreligion.*" *Kong v. Scully*, 341 F.3d 1132, 1142 (9th Cir.2003)(quoting

Kiryas Joel, at 703 (emphasis in *Kong*, McKeown, J., concurring). Therefore, if the Defendants assert that only one Religious Method of slaughter is permitted (but not *jhakta*, for instance), then it may violate *Kiryas Joel*. If it applies to all religious groups (but not atheists or agnostics), then it constitutes an excessive entanglement and non-neutral law in violation of the First Amendment, for:

[A] religious accommodation impermissibly advances or inhibits religion only if it imposes a substantial burden on nonbeneficiaries, ... or provides a benefit to religious believers without providing a corresponding benefit to a large number of nonreligious groups or individuals[.]

Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1095 (8th Cir.2000)(citing *Texas Monthly*, at 18 n.8 and *Estate of Thornton*, at 709-10).

2. Not Facially Neutral or Generally Applicable.

In *Lukumi*, the Court reiterated:

the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

508 U.S. at 531. However, “[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny,” *id.* at 456, and is “invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest[.]” *Id.*, at 533.

“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.” *Id.* Unlike *Lukumi*, where the plain text of the Hialeah ordinances specifically referred to the prohibited practices as “sacrifice” and “ritual,” the WHSA turns *Lukumi* on its head, by specifically referring to similar practices as permitted, immune from criminal prosecution, and *per se* humane. “A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.” *Id.* Were the WHSA to excise any reference to religious or ritual, it would be facially neutral. As drafted, however, it is facially pro-religion and anti-secular.

Next, one must determine if the law is “generally applicable.” A law is not generally applicable when the government, “in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief.” *Id.*, at 543.¹¹ In determining selectivity, the court should test for substantial underinclusiveness. Finding the Hialeah ordinance not generally applicable, the *Lukumi* court criticized its underinclusiveness in advancing the prevention of cruelty to animals for:

They fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city’s proffered interest in

¹¹ Again, the term “religious” applies equally to “irreligion.” Hence, imposing burdens on conduct arising from disbelief also violates the First Amendment.

preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision.

Id., at 543. With similarly objectionable underinclusivity, our State has failed to prohibit religious conduct endangering identical interests to a similar or greater degree than nonreligious slaughter.¹²

As Justices O'Connor and Blackmun noted, in *Lukumi*:

A harder case would be presented if [the Santerians] were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment.

Id., at 580. Justice Kennedy, delivering the opinion of the court, offered similarly:

¹² The WHSA is drafted to allow religious killings (and pre-kill preparation and handling) of all manner but prohibit same for secular reasons. Thus, many types of animal deaths or kills for religious reasons are not prohibited or are approved expressly. Here, it is religion, and religion alone, that exonerates ritual slaughterers and persecutes nonritual slaughterers. In this sense, the WHSA is substantially underinclusive in that the legislature pursued its interests only against conduct without a religious motivation (i.e., omitting insensibility requirement for the Religious Method and prosecuting those who use the Religious Method without proper religious qualification). The means fail to match the ends (i.e., humane slaughter of livestock) and therefore targets nonreligious conduct while at the same time favoring religion.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter.

Id., at 521; *see also, id.*, at 538 (Stevens, J., concurring).¹³ This is the “harder case” referenced by Justice O’Connor.

As humane treatment of animals is a legitimate and compelling governmental interest,¹⁴ even under Wash.Const. Art. I, § 11, religious objections to a facially neutral WHSA would be overruled. Indeed, the Intent statements of the WHSA and HMSA unambiguously state that “humane treatment” of animals is one of the purposes of each law. RCW

¹³ To learn more, see Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 *Animal L.* 83 (1995) and David Cassuto, *Animal Sacrifice and the First Amendment: The Case of Lukumi Babalu Aye*, in *ANIMAL LAW AND THE COURTS: A READER* (Thomson West, 2008).

¹⁴ Other courts have found that stopping animal cruelty serves a compelling state interest. *See Waters v. People*, 46 P. 112, 113 (Colo. 1896); *Johnson v. District of Columbia*, 30 App. D.C. 520 (D.C. Mar. 3, 1908); *City of St. Louis v. Schoenbusch*, 8 S.W. 791, 792-93 (Mo. 1888); *Commonwealth v. Higgins*, 178 N.E. 536, 538 (Mass. 1931); *Stephens v. State*, 3 So. 458, 459 (Miss. 1888) (stating that cruelty to animals “manifests a vicious and degraded nature, and it tends inevitably to cruelty to men”); *People v. O’Rourke*, 369 N.Y.S.2d 335, 341-42 (N.Y. City Crim. Ct. 1975) (affirming a conviction for overdriving an injured horse and noting that “the moral obligation of man toward the domestic animal is well documented in the Bible. ‘A righteous man regardeth the life of his beast’ (Proverbs 12:10).”); *Pennsylvania Co. for Ins. on Lives & Granting of Annuities v. Helvering*, 66 F.2d 284, 287 (D.C. Cir. 1933) (reversing a Board of Tax Appeals holding that a bequest to the American Anti-Vivisection Society of Philadelphia was not exempt for charitable purposes because “[i]t is certainly in the public interests to correct and prevent the reckless or useless dissection of animals, for its unchecked and unrestrained practice inevitably will tend to brutalize and coursen the human race”).

16.50.100; 7 U.S.C. § 1901 (1958). The policies stated therein over forty years ago are no less compelling today. In similar vein is the Intent statement accompanying the 1994 overhaul of Ch. 16.52 RCW, felonizing animal cruelty. 1994 c 261 § 1. Since 1994, the legislature amended Ch. 16.52 RCW in significant respects, showing an evolving compulsion to protect animals from undue suffering.¹⁵

The case of *State v. Balzer*, 91 Wash.App. 44 (II, 1998) is instructive. *Balzer* held that a statute prohibiting possession of marijuana (RCW 69.50.401) did not violate the free exercise clause and Balzer's self-elected position as high priest. While any burden upon free exercise must withstand strict scrutiny under Washington's constitution, the state succeeded in proving that the criminal law served a compelling state interest and was the least restrictive means for achieving same. *Id.*, at 53. "Courts have repeatedly concluded that the State has a compelling interest where it enforced laws under its police power even though enforcement burdened the free exercise of religion." *Id.*, at 56-57. Following *Balzer* and *Lukumi*, were the WWSA to eliminate RCW 16.50.150 and delete reference to RCW 16.50.110(3)(b)'s phrase "in accordance with the ritual requirements of any religious faith," it would not violate the Washington

¹⁵ See RCW 16.52.225 (2004); RCW 16.52.205 (2005 and 2006); RCW 16.52.207 (2007); RCW 16.52.225 (2009).

or federal constitutions. Otherwise, the WWSA grants ritual exemptions that excuse “acts of licentiousness” and justify “practices inconsistent with the peace and safety of the state.” Wash.Const.Art. I, § 11.

3. Excessive Entanglement.

Under either the “no set of circumstances” or “nature of challenge” tests, Pasado’s meets its burden. Classifying an activity as humane only when performed for ritual purposes, and then prosecuting only those who engage in it for non-ritual purposes exemplifies religious establishment. For if the practice is humane under all circumstances, then the religious language is surplusage. Hence, the legislature’s use of the phrase “with the ritual requirements of any religious faith” means that the Religious Method is lawful only when done in accordance with religious tenets, turning an otherwise inhumane (and illegal) practice into a humane (and legal) one solely due to an individual’s religious belief. The legislature cannot say a practice is humane because performed pursuant to a religious practice and inhumane if not without using public funds to pass and enforce unconstitutional laws endorsing cruel religious practice – unless Washington is a theocracy.

Kosher fraud law cases *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F.Supp.2d 445 (E.D.N.Y.2000), *Ran-Dav’s County Kosher*,

Inc. v. State, 129 N.J. 141, 155 (1992), *cert. den'd*, 507 U.S. 952 (1993), and *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337, 1342 (4th Cir.1995), each finding the law unconstitutional, also support the proposition that the WHSA violates the constitution. *Commack* found that the New York State laws mandating what products may be called “kosher” incorporated Hebrew religious requirements into State law, and added:

It is incontrovertible, given the context, that in order to consistently enforce the religious code adopted by the Challenged Laws, New York State is forced to rely on advisors chosen specifically because of their religious knowledge.

Id., at 458 (adding at 459, citing *Barghout*, that even if membership in the Bureau were not restricted to adherents of Orthodox Judaism or even if there were no Bureau at all, adopting Orthodox rules requires intimate involvement with members of that faith in discerning the applicable standard.) Further: “[T]he State’s adoption and enforcement of the substantive standards of the laws of *kashrut* is precisely what makes the regulations religious, and is fatal to its scheme.” *Ran-Dav’s*, at 155.

Whether prosecution under the ordinance focuses on the subjective intent of the vendor, or on the vendor’s compliance with the Orthodox standards of *kashrut*, the ordinance still fosters excess entanglement between city officials and leaders of the Orthodox faith with each and every prosecution.

Barghout, at 1344. Defendants have produced no authority that the WSDA will not be tasked, at some level, with confirming that religious tenets, in fact, compel adherence to ritual requirements that permit deviation from the secular method.¹⁶

While the phrase “in accordance with the ritual requirements of any religious faith” has never been interpreted under federal or state law with respect to the WHSA or the HMSA, the *Commack* court held that the phrase “in accordance with orthodox Hebrew religious requirements” and “kosher,” for purposes of determining whether the kosher fraud laws violated the Establishment Clause, created an unconstitutional entanglement. “The kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation.” *Commack*, at 457. The entanglements engendered by the Challenged Laws, in themselves, “violate the First Amendment, but they also, by their nature, reflect an impermissible state advancement of religion.” *Id.* Just like *Commack*, the WHSA incorporates by reference the “ritual requirements of any religious faith” and calls upon the state to

¹⁶ After all, what would prevent a person from asserting that her religion, the Church of the Holy Hamburger, which she founded and is the sole member, requires slaughter by the Religious Method. Is the government to just take her word for it and leave her be, or engage in some investigation, interpretation, and, if unsatisfied, enforcement power based on purported membership in a specific religious sect? And if the prosecution commences, will not the State enlist the help of the religious leaders of the faith in question?

determine whether the person to be regulated has complied with religious doctrine. Even if no religious leaders serve on a WSDA, as noted in *Barghout*, determining if the method is, in fact, authorized by the alleged religion's tenets, necessitates intimate involvement with religious leadership. That constitutes excessive entanglement.

D. The Act Violates Wash. Const. Art. I, § 11.

Washington's Establishment Clause states (emphasis added):

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; **but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment ...**

Wash. Const. Art. I, § 11 is "far stricter" than the federal counterpart. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 489 (1986). The language "[n]o public money or property shall be ... applied to any religious worship, exercise or instruction, or the support of any religious establishment" is as fatal to the WHSA's pro-ritual scheme as it was to the state funding a private Christian school. *Witters v. State Com'n for the Blind*, 112 Wn.2d 363, 370 (1989) (noting that the "sweeping and

comprehensive” language of Art. I, § 11, renders *application* of public funds to religious instruction, not mere *appropriation*, illegal).

The WHSA’s primary goal is openly religious, advancing religion through lifting the criminal prohibition and penalty that applies exclusively to nonbelievers, eliminating the insensibility requirement, and broadly declaring that all ritual slaughter, preparation, and handling, without regard for any details, is “humane.” In so doing, it has appropriated and applied public money to transform WSDA agents and directors into ecclesiastical apologists and religious superintendants, a secular counterpart to the Va’ad,¹⁷ charged with determining whether slaughter is being conducted in accordance with religious doctrine. Public funds are therefore applied at every stage of the process – from making the law, passing the law, enforcing the law through police and WSDA agents and directors (who may also grant permits and exemptions), and prosecuting violators of the law, with the sole beneficiaries being those who kill for religious convenience. Tax dollars spent enacting and enforcing the WHSA require the government regulator to devote considerable energies to performing nonsecular tasks – i.e., interrogating the sincerity of the religious beliefs asserted by the packer and slaughterer;

¹⁷ The rabbinical authority that determines, *inter alia*, whether certain restaurants may publicize Kosher status to its patrons.

examining whether the ritual requirements of that faith have been met; drawing a religious conclusion as to whether the method of slaughter employed comports with the tenets of the faith at issue; and then exerting the police power to enforce, fine, and prosecute religious noncompliance.

To be clear, the WHSA cannot become anything other than a dead law unless public money and property is appropriated to its interpretation, enforcement, and administration. In effectuating those purposes, religious inquiries and determinations must be made. Indeed, the fatal discriminatory flaw in the Hialeah ordinance was that to determine if a violation occurred, “it require[d] an evaluation of the particular justification for the killing.” *Lukumi*, at 537. The motivation-specific evaluation represents an “individualized governmental assessment of the reasons for the relevant conduct.” *Id.* The WHSA requires precisely the same evaluation to determine not only if a purported believer committed a violation, but also a nonbeliever. As a result, those who do not follow the religion of the ritual slaughterer (e.g., non-Jews, non-Muslims, non-Hindus, non-Santerians), but who may be Christians or adherents to Judaism, Islam, or Hinduism not believing in ritual slaughter (e.g., reform Jews), are forced to give special treatment to these minorities and have the added insult of paying for it – both financially and criminally. This violates Art. I, § 11, as discussed in *Dearle*:

In prohibiting the application of “public money or property” [FN212] to religion, the provision focuses on protecting the religious freedom of the individual by ensuring that **people are not forced to support the “religious worship, exercise or instruction, or . . . any religious establishment” of a religion in which they do not believe.** [FN213] The structure of the federal Establishment Clause, by contrast, focuses on prohibiting government actions “respecting” religious establishment. [FN214] The structure of the state constitution shows that courts should center religious-liberty jurisprudence under Article I, Section 11, on the rights of individuals.

State ex rel. Dearle v. Frazier, 102 Wash. 369, 370 (1918) (quoting 1 Op. Att’y Gen. 142)(emphasis added). Thus, in forcing the taxpayers to finance the authorization and decriminalization of religious practices in which they do not believe, but using those same funds to prosecute themselves, the WHSA violates Art. I, § 11.

E. The Act Violates the Fourteenth Amendment and Washington’s Privileges & Immunities Clause.

The federal constitution provides that states shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. 14, § 1. Equal protection analysis turns on the level of judicial scrutiny employed. Given that suspect classifications and fundamental rights are implicated, far more than rational basis scrutiny applies. Exempting all ritual slaughterers from criminal prosecution for the same actions performed by non-ritual slaughterers fails both the rational basis test and cannot withstand strict scrutiny. What *compelling governmental*

interest could the state possibly have to engage in preferential treatment of religious minorities, where the purported intent of the WHSA is, *inter alia*, focused on humane treatment and halting needless suffering of slaughtered animals; and if the interest is stated, how has it been *narrowly drawn* to achieve that end – particularly given the wholesale condoning of all ritual slaughter by RCW 16.50.150? From the animal’s standpoint, it does not matter whether the person inflicting the killing stroke is Jewish, Hindu, Muslim, Christian, or Atheist.

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash.Const. Art. I, § 12 requires an independent analysis from, and provides broader protection than, the federal equal protection clause in instances involving a grant of privilege or immunity, or of positive favoritism. *Grant Cy. Fire Prot. Dist. v. City of Moses Lake*, 150 Wn.2d 791 (2004). As in *Grant*, Pasado’s challenges legislation granting a privilege or immunity to a minority class:

We recognized our framers’ “concern with avoiding favoritism” to a select group and that this “clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.”

Andersen v. King Cy., 158 Wn.2d 1, 14 (2006) (quoting *Grant*). As conceived by the Supreme Court:

article I, section 12 has been historically viewed as securing equality of treatment by prohibiting undue favor, while the equal protection clause has been viewed as securing equality of treatment by prohibiting hostile discrimination.

Id., at 15. In granting criminal immunity to a minority class (“a few”), this matter is ripe for independent analysis under Art. I, § 12. As to nonsuspect classes, the court must next evaluate whether a “reasonable ground” exists for the disparate treatment. Suspect classifications demand strict scrutiny. *Id.*, at 18-19. So to do burdens on fundamental rights. *Id.*, at 24. Fundamental rights are those that stem explicitly from or are implicitly guaranteed by the Constitution.

The WWSA grants privileges based on suspect classification and, in threatening citizens with jail time and fines, burdens the fundamental rights against unlawful seizures (Fourth Amendment) and due process deprivations of liberty and property. While a liberty interest alone requires only intermediate (not strict scrutiny), when the bases for the classification are religious, strict scrutiny applies. *See State v. Danis*, 64 Wash.App. 814, 818-19 (1992)(liberty interest alone calls for intermediate scrutiny). Religion is a suspect criterion. *Yakima Cy. Dep. Sheriff's Ass'n v. Bd. of Comm'rs for Yakima Cy.*, 92 Wn.2d 831, 842 (1979).

It is settled law that a statute prescribing different punishments or different degrees of punishment for the same act under the same circumstances by persons in like situations violates both the privileges and immunities clause of the state constitution and the federal constitution's equal protection clause. *Olsen v. Delmore*, 48 Wn.2d 545, 550 (1956); *State v. Mason*, 34 Wash.App. 514, 516-517 (1983)(accord). The WHSA affords religious minorities special treatment by excusing them from criminal prosecution and adverse licensing decisions for engaging in precisely the same conduct as nonbelievers,¹⁸ thereby violating Art. I, § 12 and *Olsen*. Though no rational basis exists for such disparate treatment, that is not the standard.

For in essence, WHSA endorses reverse “religious” discrimination subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306 (2003), stated, “We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” *Grutter*, at 326 (quoting *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 227 (1995)). The concept of reverse racial discrimination has extended to reverse religious discrimination under a Title VII disparate treatment claim by an employee

¹⁸ *Consider*: A Lutheran slaughters a sheep by using a sharp blade that instantaneously severs the carotids that is otherwise in accordance with Jewish ritual requirements (i.e., pure act), but he is not a Jew and, thus, “religiously qualified” (i.e., impure mind or soul, as it were). The Lutheran faces prosecution but the Jew does not.

who did not adhere to the religious beliefs promoted by management. See *Noyes v. Kelly Services*, 488 F.3d 1163 (9th Cir.(Cal.)2007). Accordingly, a packer or slaughterer who does not adhere to the religious faith that calls for ritual slaughter by Religious Method (or any other method), but who may adhere to a different religious faith (or no religion at all) faces prosecution for failing to engage in precisely the same conduct without the proper religious calibration and orientation. The result: a devil-may-care attitude inuring solely to the benefit of believers and penalty of nonbelievers. A more complete favoring and support of religion would be hard to fathom.

Defendants may argue that it is Plaintiffs' burden to demonstrate that there is no set of circumstances where RCW 16.50.150 would be constitutional, and note simply that so long as there is one ritual slaughter method that is undisputedly humane, Plaintiffs have failed. But this would be a deceptively facile approach to resolving the constitutionality of RCW 16.50.150, notwithstanding that the *Salerno* test does not apply here. The language of RCW 16.50.150 does not speak to a specific method of slaughter, but has an all-encompassing purview, rendering illusory other provisions of the WHSA ("ritual slaughter and the handling or other preparation of livestock for ritual slaughter" without regard for "any other provisions of this chapter"). The problem with RCW 16.50.150 is that it

always presents a moving target – i.e., it is as variable as the religious belief of each individual.¹⁹ If one specifies the practice declared “humane,” a court may meaningfully examine whether it is constitutional under all circumstances. But because RCW 16.50.150 is so overbroad and deliberately vague in its failure to enumerate precisely what methods are deemed “humane,” as it did in defining the Methods at RCW 16.50.110(3) and prohibiting the pole axe under RCW 16.50.140, it either unconstitutionally fails to apprise the public as to what conduct is illegal or, as a whole, it is so completely deferential to religious whimsy as to dismantle the semblance of any wall between church and state.

F. The Act Violates the Nondelegation Doctrine.

Article I of the Constitution provides that “[a]ll legislative powers ... shall be vested in the Congress of the United States.” *U.S. Const.* art. I, § 1. Similarly, Washington’s legislature must reserve for itself the sole power to make central legislative decisions, notwithstanding the power of initiative and referendum. Wash. Const. Art. II, § 1. Thus, legislative power is nondelegable. *State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135 (1957). “The [U.S. Supreme] Court has unanimously invalidated

¹⁹ Would burning a goat on a pyre be deemed humane? Perhaps hacking off the heads of water buffalos and goats as part of the *Durga Pooja* festival? Maybe slaughtering cattle the AgriProcessors way (CP 86-87, 99-100, 232-34)? Leaving a pig immobilized in a crate for most of her adult life so she cannot get up or turn around as preparation for

legislation in which Congress delegated ‘to others the essential legislative functions with which it is ... vested.’” *Weiss v. U.S.*, 510 U.S. 163, 114 S.Ct. 752 (U.S.,1994) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)). The “non-delegation doctrine” is a judicial interpretation of the separation of powers doctrine, applying in any situation in which a legislature delegates legislative duties, and holding that legislatures cannot delegate their most central duties to *anyone* outside of the legislature, whether an individual, an unofficial group, or an organization of some sort.²⁰ The people of the state elect and entrust to the legislature this policy-making power. In exchange, they expect and demand that the representatives be accountable for decisions made with this power. The Supreme Court has held that legislative authority may constitutionally be delegated to an *administrative body* if (1) the Legislature provides standards defining generally what is to be done and what body is to accomplish it; and (2) procedural safeguards exist to control arbitrary administrative action. This doctrine applies equally to criminal statutes. *In re Powell*, 92 Wn.2d 882, 891 (1979); *State v. Holmes*, 98 Wn.2d 590, 594 (1983).

ritual slaughter?

²⁰ *Panama Refining Co. v. Ryan*, 55 S.Ct. 241 (1935).

Still controlling is *Schechter*, a United States Supreme Court nondelegation case evaluating the National Industrial Recovery Act's ("NIRA") inclusion of not simply a broad standard ("fair competition"), but its conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry. *Id.* at 521-525. Essentially, Section 3 of NIRA authorized the President to create codes of "fair competition" based upon applications for such codes by industry associations. Invalidating this section on nondelegation grounds, the Court stated:

Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.

Id., at 846. It added:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. **Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.**

Id., at 846 (emphasis added). As Justice Cardozo put it, the legislation exemplified “delegation running riot,” which created a “roving commission to inquire into evils and upon discovery correct them.” *Id.*, at 553, 551 (concurring). He likened such delegation to an overflowing river lacking banks to keep it contained and directed.²¹ Permitted to exercise unrestrained discretion, delegates will very likely allow their decision-making to be led by “whim... favoritism, or ... unbridled discretion,”²² leading them to wield their legislative power either completely arbitrarily or, on the other hand, for their own personal interests.²³

Exactly the same type of “unfettered discretion” is given to religious individuals and entities in RCW 16.50.150 to determine what constitutes “ritual slaughter,” as well as preparation and handling for ritual slaughter. Such terms, unlike the HMSA, are undefined, and blanketly defined as “humane,” thereby allowing any person with an “arguably religious” motivation to judicially “back-calculate” a self-defined method of slaughter grounded in “ritual” to achieve exemption through legislative pronouncement. Not even unintelligible, broad standards exist here. No standards exist save an *ipse dixit* from the Legislature. Such power to

²¹ *A.L.A. Schechter Poultry Corporation v. U.S.*, 55 S.Ct. 837, 852 (concurrence) (1935).

²² *Lewis v. Bank of Pasco County*, 346 So.2d 53, 56 (Fla. 1977).

²³ *Eubank v. City of Richmond*, 33 S.Ct. 76, 77 (1912).

determine the meaning of what is “humane” cannot possibly be lawfully delegated to private parties.²⁴ In other words, the WHSA either does not really contemplate that the government will test the legitimacy of one’s asserted religious faith or the genuineness of the purported ritual requirements of that faith, instead delegating that task to the regulated individual or entity, or it tests based on the slightest and most sham grounds, deferring to the point of *de facto* delegation.

Delegation of Congress’ administrative power to fill in the interstices of the law is proper only if the Legislature defines generally what is to be done, which administrative body is to accomplish the specified purposes, and what procedural safeguards are in effect to control arbitrary administrative action. *See Diversified Inv. Partnership v. Department of Social and Health*, 113 Wn.2d 19 (1989). Moreover, delegation of regulatory authority to private parties is only proper *if*, in addition to the above requirements, proper standards, guidelines, and procedural safeguards exist. *Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept.*, 153 Wn.2d 657 (2005).

²⁴ Indeed, RCW 16.50.110(3)(b) does not say that a ritual method of slaughter is permitted only if it comports with a specific denomination of an identifiable religious faith. Thus, while the Conservative Jews may take one position, it does not prevent a minority Orthodox Jewish position (such as the one taken by AgriProcessors) from being asserted as equally humane and in accordance with the requirements of the Jewish faith.

It is therefore an unconstitutional delegation of authority for Washington to confer upon religious individuals the power to determine what is “humane,” in the singular interests of the adherent. Washington has invalidated several statutes on nondelegation grounds on less flagrant grounds. *See, supra, Urquhart*, at 264; *State v. Matson Co.*, 182 Wash. 507 (1935). The United States Supreme Court and various states have said that it is unconstitutional for a legislature to delegate elsewhere the power to define crimes (as well as the power to prescribe penalties therefore). Deciding what is and is not a crime necessarily involves creating a law. Because legislatures can never delegate the power to make a law, they cannot delegate the power to decide which acts are and are not crimes.²⁵ Washington allows private individuals and churches to decide which ritual slaughter acts will be legal and which will not. This error is the result of legislatures failing to convey to delegates intelligible principles. Because the delegates in this situation have no pre-determined legal parameters inside of which to work, they are forced to make them as they proceed: thereby violating the law strictly separating delegated work from law-making work. Of note is the recent decision of *New Jersey SPCA v. N.J. Dep’t of Agriculture*, 196 N.J. 366 (2008)(declaring provisions of the

²⁵ *U.S. v. Grimaud*, 31 S.Ct. 480, 483 (1911); *People v. Grant*, 275 N.Y.S. 74, 77 (1934); *People v. Brongofsky*, 50 N.Y.S.2d 32, 34 (1943).

cruelty regulations void on nondelegation grounds for prescribing “unworkable standards and an unacceptable delegation of authority to an ill-defined category of presumed experts.”)

G. The Court Improperly Struck Pasado’s Evidence.

Judge Weiss erred striking as inadmissible Pasado’s evidentiary submissions. In assessing authenticity and admissibility, CR 1’s liberal construction applies.

1. Authentication.

In a summary judgment motion, only a prima facie showing of authenticity is required and this can be satisfied if the proponent shows proof sufficient for a reasonable factfinder to find in favor thereof. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wash.App. 736, 745-46 (I, 2004); Tegland, 5C Wash.Prac. Evidence Law & Practice § 901.2 (5th ed.). If properly authenticated, “it is irrelevant whether the [] attorneys had personal knowledge of the proffered documents.” *Id.*, at 746. The ten categories listed under ER 901(b) are “illustrations” and provided “not by way of limitation.” ER 902(f) provides that newspapers and periodicals are self-authenticating. Premised on this standard is the notion that “[t]he likelihood of forgery or newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them.” FRE 902(6) comment. Further, several courts have held

that copies of web sites and web pages were authenticated under ER 901 by (a) accessing the web site using the domain address given and verifying that the web page existed at that location, and (b) viewing the documents in combination with circumstantial indicia of authenticity, such as dates and Web addresses appearing thereon, which would lead a reasonable juror to conclude that they were what the proponent said they were.²⁶

The CJLS and Grandin articles (CP 205-34) were authenticated under ER 901(a) and publicly accessible on Dr. Grandin's website www.grandin.com. The web page and videos taken from www.goveg.com were similarly authenticated. The Ralbag, Ben-David, and Larson declarations and affidavits (CP 93, 236-48) were made on personal knowledge not subject to Defendants' objection.²⁷ A court may take judicial notice of court records. ER 201. Finally, the newspaper articles

²⁶ See Jay Zitter, *Authentication of Electronically Stored Evidence, Including Text Messages & E-mail*, 34 A.L.R.6th 253 (2009); see also *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D.Cal.2002)(relying in part on *U.S. v. Tank*, 200 F.3d 627 (9th Cir.2000)). Following the same logic, downloaded videos and photographs taken from identifiable web pages also fall within ER 901(a).

²⁷ Mr. Karp obtained the Rabbis' declaration through PACER, accessing the electronic court file of the *Maruani v. AER Services, Inc.* case before the District Court of Minnesota. Mr. Karp drafted the *Larson Decl.* and submitted it to her for review and signature. She faxed it back to him on the date indicated on the exhibit. The District Court's docket header notation provides authenticity, when coupled with Mr. Karp's confirmation that he downloaded the documents from the District Court's ECF repository. CP 47 ¶ 1.

(CP 86-91, 95-97, 102-04) are self-authenticating under ER 904(f) and ER 901(a) based on the indicia of authenticity contained on each document.

2. Hearsay.

Admissibility hinges on the offered purpose. If offered for any purpose other than just to prove their veracity, statements are not hearsay. “If the statement is relevant only if true, it is hearsay. If the statement is relevant on some issue regardless of its truth, it is not hearsay.” Tegland, 5B Wash.Prac. Evidence Law & Practice § 801.8 (5th ed.). The declarations were based on personal knowledge and do not call for hearsay. Excepting the narrative content and quotations shown on the screen, the video images and sounds produced in CP 99 are not “statements” under ER 801(a) and not hearsay. With similar effect, the expert opinions given by Dr. Grandin and Rabbis Dorff and Roth (CP 205-208) do not contain hearsay, as they rely upon learned treatises and facts and data of the type reasonably relied upon by those in their field. ER 804(a)(18); ER 703. To the extent the remaining exhibits do constitute ER 801(a) statements, to be “hearsay,” however, they must be offered to prove the truth of the matter asserted. None of the proffered items sought a judicial determination as to veracity.²⁸

²⁸ Pasado’s did not have the court determine if shackling and hoisting animals in the process of slaughtering violates Jewish laws. Instead, they offered CJLS’s position

3. Judicial Notice of Adjudicative Facts (ER 201).

Even if hearsay, ER 201 provides that a court may take judicial notice of *adjudicative facts*. Tegland, 5 Wash.Prac. Evidence Law & Prac. § 201.2 (5th ed.). ER 201(b)(2) allows a court to take judicial notice of a fact “not subject to reasonable dispute in that it is ... generally known within the territorial jurisdiction of the trial court...” The court can take judicial notice of several facts presented by the offered exhibits.²⁹ Several, for instance, are on par with the court acknowledging that whiskey is

statement to note the diversity of opinion within the Jewish faith as to whether omission of the insensibility requirement constitutes an “exception,” or merely an alternative “humane method.” Pasado’s, furthermore, is not trying to prove that “humane slaughter using upright pens is both possible and widespread,” but that kosher slaughter may take many forms, some of which would violate the Secular Method and some which would not. Dr. Grandin’s articles are not offered simply to prove that her scientific assertions are, in fact, true. Rather, they were each offered to educate the court about the “animal welfare” issues arising in the context of examining the scope and nature of the methods identified in RCW 16.50.110(3). The newspaper articles and goveg.com website (CP 99-100) were not offered just to prove the truth, either. Rather, as above, these documents were offered to provide the court with evidence that humane slaughter is an issue of significant public importance; that not all methods of pre-slaughter handling, preparation, and slaughter are uniformly accepted as humane, whether based on ritual or not (e.g., Midway Meats example); and that kosher slaughter methods are not univocally endorsed, but that there are schisms as to what constitutes humane slaughter under RCW 16.50.110(3)(b) and humane pre-slaughter handling under RCW 16.50.150.

²⁹ (1) Ritual slaughter is performed by Jews, Muslims, and Santerians; (2) some Jews and Muslims in Washington are presently slaughtering or consuming animals who have been slaughtered purportedly in accordance with the ritual requirements of their faiths; (3) within the Jewish faith, there is a difference of opinion as to the ritual requirements for kosher slaughter (e.g., between Orthodox and Conservative Jews); (4) animals shackled, hoisted, cast, thrown, or cut without having been first rendered insensible will result in fear, pain, or suffering; and (5) there is no single authoritative source that WSDA and law enforcement can access that outlines, without contention, the specifications for performing ritual slaughter, or preparation and handling for ritual slaughter, in accordance with any particular religious faith or sect save taking the individual adherent at his word (in other words, the religious texts that supposedly source the ritual

intoxicating, wood alcohol is poisonous, or gasoline vapor is explosive, since the Legislature would not have required insensibility in the Secular Method unless it believed that being conscious during shackling, hoisting, casting, throwing, or cutting is inhumane. See *State v. Kekich*, 25 Wn.2d 482 (1946); *Peterson v. Betts*, 24 Wn.2d 376 (1946); *DeCano v. State*, 7 Wn.2d 613 (1941). Such facts are “verifiable with certainty by consulting authoritative reference sources,” such as those provided. ER 201(b); Tegland, 5 Wash.Prac. Evidence Law & Prac. § 201.5 (quoting Broun, *McCormick on Evidence* §§ 328, 330).

4. Judicial Notice of Legislative Facts.

Even if hearsay or otherwise inadmissible, courts may also take judicial notice of *legislative facts*. In *re Marriage of Campbell*, 37 Wash.App. 840 (III, 1984) (“A court can ... take notice of legislative facts, those facts which enable the court to interpret the law.”) In *State v. Balzer*, the Court of Appeals took judicial notice of the effects and harmfulness of marijuana in finding that the State had a compelling interest in enforcing laws forbidding marijuana possession, doing so without prodding by the State. *State v. Balzer*, 91 Wash.App. 44 (II, 1998).³⁰

requirements are themselves subject to vast interpretation).

³⁰ Consider also *State ex rel. T.B. v. CPC Fairfax Hosp.*, 129 Wn.2d 439 (1996) (considering excerpts from scholarly articles included in brief submitted by amicus curia, refusing to strike materials from brief); *State v. Greene*, 92 Wash.App. 80 (I, 1998),

Generally speaking, the term *legislative facts* refers to the sort of background information a judge takes into account when determining the constitutionality or proper interpretation of a statute, when extending or restricting a common law rule, or the like.

Tegland, 5 Wash.Prac., Evidence Law & Prac. § 201.16 (5th ed.; cit.om.); *Balzer*, at 58-59. In order for this court to assess the constitutionality of the WHSA, the court should take judicial notice of those social, economic, and scientific realities and facts provided through the exhibits in order to interpret the law.

H. RAP 18.1 Request for Fees.

Appellants request attorney's fees under RAP 18.1 on the equitable bases that they are conferring a substantial benefit to an ascertainable class (i.e., the State and public), by protecting constitutional principles and preserving the common fund. *See City of Seattle v. McCready*, 131 Wn.2d 266, 273-274 (1997); *Grein v. Cavano*, 61 Wn.2d 498, 505 (1963)(a specific fund need not be identified). On point is *Weiss v. Bruno*, 83 Wn.2d 911, 914 (1974), providing fees to taxpayer petitioners successfully challenging (i.e., protecting "the constitutional right of all Citizens to the

overruled o.g., 139 Wn.2d 64 (1999)(in determining whether scientific principle satisfies *Frye* test of general acceptance, "appellate courts undertake a searching review that need not be confined to the record and may involve consideration of the available scientific literature, secondary legal authority, and cases in other jurisdictions.")

separation of church and state”) the expenditure of public funds to further patently unconstitutional legislative and administrative actions.

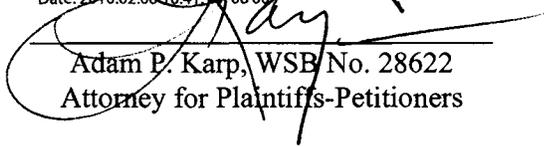
IV. CONCLUSION

The state cannot remain neutral when it rewards “arguably religious” people engaging in pre-slaughter animal cruelty and disregarding the insensibility requirement, but punishing identical secular thought and action. Nor can the state determine whether a slaughter method is “in accordance with ritual requirements of any religious faith” without unconstitutionally applying religious law and delegating enforcement to religious leaders to confirm “religious qualifications.” For the reasons stated, the assignments of error should be sustained, the WWSA declared unconstitutional, and Pasado’s awarded fees.

Dated this Feb. 8, 2010

ANIMAL LAW OFFICES

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Bellingham, WA
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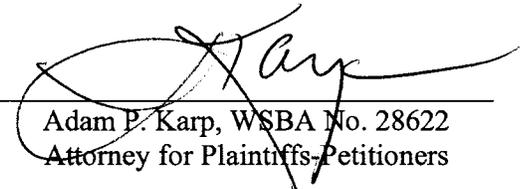


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Feb. 8, 2010, I caused a true and correct copy of the foregoing APPELLANTS' BRIEF, to be served upon the following person(s) in the following manner:

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