
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.

APPELLANTS' REBUTTAL BRIEF

ORIGINAL

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I. STRICT REPLY

Plaintiffs strictly reply to the Respondents' response.

II. REBUTTAL STATEMENT OF FACTS

Plaintiffs rebut misstated assertions in *Respondents' Brief* below:

1. Contrary to the assertion at page 3, the *Complaint* and the petition to the Attorney General's Office identified the precise factual bases and legal theories underlying the UDJA and taxpayer suit claims.

CP 419-426 (Petition); CP 442 ¶ 7, 443-48 ¶¶ 16-32 (Complaint).

2. Contrary to the assertion at page 9 fn. 1, where the Respondents object to the Plaintiffs' reference to the constitutional protections against unreasonable searches, seizures, and deprivation of due process, asserting that those fundamental rights were not identified at the trial level and should not be considered as part of the Plaintiffs' argument, the identical paragraph was cited to the trial court in response to their summary judgment motion. **CP 171:17—172:3.**

3. Contrary to the assertion at page 14, the specific acts challenged are identified plainly in the *Complaint*. **CP 442 ¶ 4; 443 ¶ 11; 445-447 ¶ 27(a-h).**

4. Contrary to the assertion at page 15, the enforcement or application of state law is at issue with respect to custom slaughterers, who are not operating under federal inspection, but are state-regulated and

governed by the WHSA. See Ch. 16.49 RCW and *Appellant's Op. Brief*, at 2 fn. 1. Further contrary to respondents' assertion, the Plaintiffs sought declaratory and injunctive relief. CP 447 ¶ 28; 448 ¶¶ 32, 34, B.

III. REBUTTAL ARGUMENT

Plaintiffs rebut Respondents' arguments as follows:

A. FMIA Preemption.

At page 6, Respondents assert that the state cannot impose a requirement in addition to or different than that contained in the FMIA for federally-inspected facilities, citing 21 U.S.C. § 678. This assertion is undermined by three federal cases – *Empacadora de Carnes de Fresnillo v. Curry*, 476 F.3d 326 (5th Cir.(Tex.)2007), *Cavel v. Madigan*, 500 F.3d 551 (7th Cir.(Ill.)2007), and *National Meat Ass'n v. Brown*, 2010 WL 1225477 (9th Cir.(Cal.)2010). *Brown* explicitly reversed the trial court's conclusion that California's ban on slaughtering nonambulatory livestock violated the FMIA by creating an additional meat-inspection requirement. *Slip op. at 3.*

Further, while the FMIA only applies to federally-inspected establishments, as identified in 9 CFR § 302.1, exempt are slaughter-by-owner for private consumption (9 CFR § 303.1(a)(1)) and custom slaughter for private consumption (9 CFR § 303.1(a)(2)). Thus, whether or not the FMIA preempts state laws pertaining to federally-inspected

establishments, it is undisputed that the FMIA does not preempt as to intrastate slaughterers, custom slaughterers, and owner-slaughterers, all of whom are governed by various provisions in the WHSA. Besides, the Respondents never raised FMIA-preemption as an affirmative defense, so the argument adds needless clutter to this appeal and should be ignored.

B. RCW 16.50.150.

At page 7, the Respondents claim that Ch. 16.50 RCW does not apply to private individuals, but only to statutorily defined “packers” and “slaughterers.” This argument ignores the plain language of RCW 16.50.150 (emphasis added), which states:

Nothing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of **any person or group**. Notwithstanding any other provisions of this chapter, ritual slaughter and the handling or other preparation of livestock is defined as humane.

The legislature defined the broader term “person” to include, as a subset, “packers” and “slaughterers.” RCW 16.50.110(6). Accordingly, RCW 16.50.150 extends to all private individuals and groups.

Nor, as Respondents contend, does RCW 16.50.150 apply only to slaughter by a “humane method.” The phrase “ritual slaughter and the handling or other preparation of livestock” is not expressly or impliedly restricted just to the “humane methods” identified in RCW 16.50.110(3).

Lastly, RCW 16.50.150's application is restrained as to all persons and groups only in a manner that would prohibit, abridge, or hinder religious freedom. Accordingly, nothing prevents courts and agencies from construing Ch. 16.50 RCW, and RCW 16.50.150 in particular, in any way to defend, enhance, bolster, and thereby endorse religion. In other words, while a packer and slaughterer may take advantage of RCW 16.50.150 to avoid prosecution for inhumane treatment of livestock, the broad language of RCW 16.50.150 invites application to all persons with the proper religious mindset.

C. Taxpayer Standing.

At page 13, the Respondents say a party does not have taxpayer standing simply for disagreeing with a public official's decision, citing *Petition by City of Bellingham*, 52 Wn.2d 497, 499 (1958). This case may be disregarded as inapplicable for the reason that the petitioner only relied on the UDJA as grounds to bring his claim. In failing to allege or prove any general damage to the taxpayers, much less an "attempt to prove how the transfer would adversely affect him, either as a taxpayer or otherwise," and in not seeking Attorney General intervention as a condition precedent to suit, taxpayer standing principles under which the Plaintiffs' case was heard were not at issue. *Id.*, at 499.

Over a half-century long line of Washington Supreme Court precedent requires no personal stake or injury to challenge illegal acts of government, so long as the condition precedent of Attorney General declination is met. *See Reiter v. Wallgren*, 28 Wn.2d 872 (1947). The Supreme Court described the prerequisite as follows:

As to the issue of Boyles' standing to raise the constitutional questions, her connection to the alleged injury is attenuated. She alleges no direct impact as a present or past offender in the County or City jail. Instead, she brings action as a taxpayer alleging that official government acts amount to an unconstitutional support of religion.

This court recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer. ... Generally, we have required that a taxpayer first request action by the Attorney General and refusal of that request before action is begun by the taxpayer. ... We have recognized however that even that requirement may be waived when "such a request would have been useless."

State ex rel. Boyles v. Whatcom Cy., 103 Wn.2d 610, 613-14 (1985)(citations omitted). Divisions I (*Robinson*) and II (*Kightlinger*) have reaffirmed this holding.¹

It is well settled that taxpayers, in order to obtain standing to challenge the act of a public official, **need allege no direct, special or pecuniary interest in the outcome of their action**, there being only a condition precedent to such standing that the Attorney General first decline a request to institute the action.

City of Tacoma v. O'Brien, 85 Wn.2d 266, 269 (1975)(emphasis added).

Aside from obtaining a decline letter from the Attorney General, the only

¹ *Robinson v. City of Seattle*, 102 Wash.App. 795 (Div.1,2000); *Kightlinger v. PUD No.*

remaining prerequisite for maintaining such an action is to prove taxpayer status. The Plaintiffs obtained this declination letter despite urging the Attorney General to take action. Further, the Respondents do not challenge the Plaintiffs' taxpayer status.

The case of *Robinson v. City of Seattle*, 102 Wash.App. 795 (2000) is on point. In *Robinson*, eight residents of the City of Seattle and a non-profit corporation who paid local sales and use taxes brought a Fourth Amendment and Art. I, § 7 (Washington Constitution) challenge to a Seattle ordinance requiring a preemployment urinalysis drug test for about half the vacancies filled by the City. *Id.*, at 800-804. None of the taxpayer plaintiffs applied for a job with the City of Seattle. *Id.*, at 804. The *Robinson* court found that the taxpayers had standing under the same doctrine that permits standing for the taxpayers in the present case. *Id.*, at 805.

Where the fundamental legality of the action or inaction is called into question, and the thrust of the lawsuit is to enforce the law, “a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers[.]” *Walker v. Munro*, 124 Wn.2d 402, 419-20 (1994) (citation omitted). In *Walker*, taxpayers facially challenged the constitutionality of a pending tax initiative, but because the terms of

1 of Clark Cy., 119 Wash.App. 501 (Div.2,2003), *rev. granted*, 152 Wn.2d 1001 (2004).

the initiative were not yet in effect, the matter remained nonjusticiable. Here, however, Ch. 16.50 RCW and Ch. 16-24 WAC have been in effect for years. Whether the acts, even if illegal, create a tax burden, is irrelevant and such showing is not required.²

Respondents may argue that this taxpayer challenge pertains to *discretionary* acts of government for which special injury to the taxpayer must be demonstrated. However, the Plaintiffs are not challenging discretionary decisions by government simply because they have a different political or ethical view. Rather, they are seeking to declare facially unconstitutional those official government acts that amount, *inter alia*, to an unconstitutional establishment of religion, delegation, violation of the equal protection clause, and violation of the privileges and immunities clause permitting religiously-motivated animal cruelty to flourish without inhibition.

The cruelty to animals and humane slaughter chapters, read as a whole, as enacted by the Washington State legislature, and enforced by the executive branches of each entity – using taxpayer dollars – suffers from serious constitutional infirmities. Such a challenge as the one brought here is not relevantly dissimilar to challenging the facial constitutionality of a

² See *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 95 (1954) (permitting taxpayer suit even though no monetary loss to taxpayer alleged).

law that excuses a suspect class (e.g., members of a racial, religious, or sexual minority) from prosecution for the same conduct of those not belonging to that class. Again, the plaintiffs are not challenging a specific, presumably *lawful* charging decision, predicated on enforcement of a *lawful* law. Instead, they are attacking the very *lawfulness* of the legislative enactment that enables the WSDA director to deny a license to a packer wanting to avoid the stunning requirement but permit the same to a religious minority, or for the prosecutor to charge a person for cruelly handling a goat in preparation for slaughter but prevents her from charging another whose ritual requires cruelty. In other words, the plaintiffs challenge the *legality and validity* of the state laws that authorize this discriminatory enforcement. The thrust of this suit is, therefore, to compel the State to follow the federal and state constitutions. Otherwise, they risk engaging in official, unlawful acts in contravention of the constitutions, acts that should not be funded with taxpayer monies.

In this respect, the Supreme Court decision of *Boyles*, cited above, is judicious, for it permits a taxpayer to challenge the decision of Whatcom County to assign county prisoners to a work release program conduct by the church-supported Lighthouse Mission, Inc. because that

decision violates the establishment clause.³ *Kightlinger* is also in concordance, as it finds that the Taxpayers' challenge to the lawfulness of the PUD's authority to operate an appliance repair business did not require proof of special injury, citing *Boyles*. Further, *Robinson*, at 806, bolsters this position, as that court found taxpayers had standing to facially challenge the validity of Seattle's mandatory drug testing law, even though the inquiry "is not whether application of the challenged enactment violates a particular individual's rights, but whether the government has acted unlawfully."

Moreover, in *Farris v. Munro*, 99 Wn.2d 326 (1983)(en banc), a constitutional challenge was brought to the recently established state lottery seeking to declare the law unconstitutional. The act in that case was the passing of the legislation itself. The court addressed the issue of standing by questioning whether the petitioner could facially challenge the constitutionality of the State Lottery Act. The court stated that "a taxpayer does not have standing to challenge the legality of the acts of public officers unless he first requests or demands that a proper public official bring suit on behalf of all taxpayers." *Id.*, at 329. It added, "Once such a request is refused, the taxpayer has standing to bring the suit." *Id.* Only

³*Boyles*, at 615 (finding that though "alleged injury is generalized, we recognize [Boyles's] standing to sue on the basis of taxpayer status.").

because the plaintiff “failed to make a request upon the Attorney General to bring suit, and [did] not allege any facts indicating that such a request would have been useless[,]” standing was not found. *Id.* Still, the court reached the merits because the petitioner presented issues of significant public interest. *Id.*, at 330.

On the issue of whether nonprofit organizations and concerned individuals may serve as spokespersons for the harmed animals – who otherwise might not have standing as juridical persons but are the real parties in interest – consider *Farm Sanctuary v. Department of Food and Agriculture*, 63 Cal.App.4th 495, 74 Cal.Rptr.2d 75 (1998). When faced with a challenge by Farm Sanctuary to California’s humane slaughter law, the California Court of Appeals concluded that the controversy was ripe.⁴

⁴ It noted:, at 502-503 (emphasis added):

In this case, the ripeness test is satisfied. As to the first prong, the question before us is not so abstract or hypothetical that we should await a better factual scenario. Farm Sanctuary contends that the ritualistic slaughter regulation is invalid *on its face* because it is inconsistent with the HSL. “[T]he issue tendered is a purely legal one: whether the statute was properly construed by the [department]” (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149 [87 S.Ct. 1507, 1515, 18 L.Ed.2d 681], followed in *Pacific Legal Foundation, supra*, 33 Cal.3d at pp. 171-173.) In addition, “[t]he regulation challenged here, promulgated in a formal manner after announcement ... and [after] consideration of comments by interested parties[,] is quite clearly definitive[, i.e., final].” (*Abbott Laboratories v. Gardner, supra*, 387 U.S. at p. 151 [87 S.Ct. at p. 1517], *fn. omitted.*)

As to the second prong, a significant and imminent injury is inherent in further delay. **If, as Farm Sanctuary contends, the ritualistic slaughter regulation authorizes a wholesale exemption from the HSL, poultry may be slaughtered through *inhumane* methods. By delaying a decision on the merits, we run the risk of allowing the needless suffering of animals-the evil that the HSL was intended to prevent. *503**

It seems obvious that the mere existence of the challenged laws constitutes government action. Plaintiffs believe that the *Complaint* put the Defendants on sufficient notice as to the nature of the challenge, which spanned all branches of government across all Washington jurisdictions. No case was ever cited by Defendants stating that legislative acts, *per se*,

We realize that Farm Sanctuary and its members might not face any hardship if we decline to reach the merits of the case. The HSL was enacted for the benefit of animals. If the ritualistic slaughter regulation is invalid, it will result in an unlawful injury to poultry, not humans. In essence, the affected animals in this case are the real parties in interest. In these unique circumstances, we should focus on the potential harm to the beneficiaries of the statute.

Further, as a practical matter, Farm Sanctuary should be allowed to challenge the ritualistic slaughter regulation. Assuming that the regulation authorizes an exemption from the HSL's humane slaughter requirement, someone who is granted an exemption is not about to challenge the regulation. By the same token, someone who is denied an exemption might seek to overturn the denial but would not attack the regulation's creation of an exemption. Thus, unless an organization like Farm Sanctuary is permitted to challenge the department's rulemaking authority, the ritualistic slaughter regulation will be immune from judicial review. (See *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100 [162 P.2d 627] [state board could pursue litigation on behalf of individuals who were not financially or physically able to seek relief]; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1519 [14 Cal.Rptr.2d 908] [association had standing to seek relief for third persons, in part because lack of standing would prevent judicial review of challenged conduct]; *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 24 [61 Cal.Rptr. 618] [declaratory relief action may raise justiciable issue if other means of testing validity of government's decision are not available].) As one court has observed: "Where [a statute] is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute." (*Animal Welfare Institute v. Kreps* (D.C. Cir. 1977) 561 F.2d 1002, 1007 [183 App.D.C. 109] [dictum].)

FN6

"We think it clear that the slaughtering of animals through humane methods, as required by the HSL, is a matter of public importance." *Id.*, at 504. The Respondents have only cross-appealed on the issue of standing, not ripeness or justiciability. In offering this passage, the Plaintiffs are not intending to raise ripeness as an assigned error but to offer a context within which standing may be upheld.

are not susceptible to taxpayer challenge absent special injury. Nor had they cited a case stating, alternatively, that a challenge to a legislative act must be accompanied by an executive act (e.g., issuing a permit, teaching a class, implementing a work release program) conducted pursuant to the legislative act. The Supreme Court has never made such a distinction but, instead, has broadly addressed all “acts” that are purported to be invalid or illegal. In other words, the test of taxpayer standing is **dictated by the nature of the challenge by the taxpayer** – i.e., what is said by the plaintiff about the act. Merely disagreeing with a government action is not the same as challenging it for being invalid and illegal, as here. If the act is challenged as “illegal” or “invalid,” then no special injury is required. But if the act is challenged for any other reason, then traditional standing principles apply.

Furthermore, it makes no sense to limit a generalized-injury taxpayer action to circumstances where a non-legislative act implementing a suspect statute or ordinance can be identified. After all, if a secondary act (i.e., “implementation and enforcement of a bad law”) committed pursuant to a primary act (i.e., “making and enacting a bad law”) is ripe for challenge, then why is not the challenge to the primary act? Are only acts of the executive branch capable of being challenged? If so, where

does authorization for this bias in favor of one branch over the other exist? And should the Defendants claim that the Plaintiffs are really just taking issue with legislative “functions,” not “acts,” the court should see through the semantics. Government has functions, to be sure, but it performs those functions through acts.

Unless the primary act is inert, as in a dead law that is ignored as a matter of universal operating procedure, then, passing a law and putting it into effect (even if the effect is incomplete) is an act ripe for review. *Buono v. Kempthorne*, 502 F.3d 1069 fn. 6 (9th Cir.(Cal.)2007). The Supreme Court has acknowledged that taxpayer actions challenging the expenditure of taxes for unconstitutional purposes are traditional examples of ripe disputes.⁵ And the trial court agreed, having denied Defendants’ request to deem the challenge unripe.

Ch. 16.50 RCW and Ch. 16-24 WAC are not dead laws. In their enforcement by WSDA directors and agents, police officers, animal control officers, and prosecutors statewide, a multitude of secondary executive acts are performed pursuant to these laws. In addition to the challenged invalidity and illegality of making an unconstitutional law, and regulation of the WHSA by the WSDA, other acts include:

⁵ *Flast v. Cohen*, 392 U.S. 83, 106 (1968)(evaluating First Amendment federal taxpayer claim). Facial challenges to regulations are normally ripe the moment challenged. *Suitum*

1. Imposing a restraint on prosecution through the enactment of an unconstitutional preference. The placing of the restraint (through the challenged exclusions) on prosecutorial and police action is an act of commission challenged as illegal.

2. Delegating legislative acts to non-governmental actors, who are engaging in practices which they solely define as “humane” under RCW 16.50.150 is for “ritual” purposes.” In essence, the legislature has mandated third parties to create regulations (so to speak) to assist in implementation of the law.

3. This act of delegating to third parties, who then engage in acts Plaintiffs claim are otherwise criminal, also permits **imputation of illegal action** (i.e., causing nonhuman animals to endure what would otherwise be considered animal cruelty) by third party agents to the government as principal.

4. Acquiescing to illegal conduct by third parties (i.e., legally permitting, either expressly or implicitly, acts involving animal cruelty) is an act of omission where it has an independent legal duty to act. While the government has no obligation to pass a law, once it undertakes the task of lawmaking, affirmative constitutional duties apply and its laws must be enacted in obedience to those mandates. When laws codify favoritism

v. Tahoe Reg. Planning Agency, 520 U.S. 725, 736 n. 10 (1997).

through illegal delegation, and excuse certain individuals from being prosecuted for felonies, the legislature is aiding, abetting, if not soliciting and participating in, criminal activity by third party actors.

Taxpayers are entitled to nonselective and uniform enforcement of anticruelty/humane slaughter laws without the legislature delegating, absent any guidelines, what amount to substantive decisions pertaining to what is and what is not criminal behavior, and letting those individuals (to whom the taxpayers have no recourse, as they would a legislator – i.e., by meeting with same, lobbying same, or voting same out of office) dictate who is and who is not engaging in a crime. Whether the government acts by *omission* or *commission* is beside the point, for in enacting a law challenged by the plaintiff-taxpayers as illegal and invalid, passing and enforcing the law itself is an act.

Defendants' highly restrictive interpretation of taxpayer actions should be rejected, for Washington has acknowledged taxpayer standing in two regards: (**Category 1**): when challenging government acts that are illegal or invalid; and (**Category 2**): when challenging *otherwise legal and valid* government acts.

Category 1 requires no direct, special, or pecuniary interest in the outcome of the action, while Category 2 does. It should be noted at the outset that, unless compelled to act, every task undertaken by government

is discretionary in nature, so that Category 1 relates to “discretionary but illegal” acts and Category 2 to “discretionary but legal” acts. The subtext to the distinction, apparently, is that the government has no discretion to engage in illegal or unconstitutional conduct.

The same type of challenge is raised here, and the *Complaint* sought to capture those nuances, even though the very existence of this unconstitutional law seems to be proof enough of government action. The Washington Supreme Court has repeatedly allowed taxpayers to assert Category 1 standing to facial challenges to otherwise illegal government activity.⁶

As with the above cited cases in footnote 6, the Washington legislature does not have the authority to enact unconstitutional laws or to

⁶ See *Calvary Bible Presbyterian Church of Seattle v. Board of Regents*, 72 Wn.2d 912 (1968) (finding Category 1 taxpayer standing to challenge tax-supported university teaching course dealing with historical, biographical, narrative or literary features of the Bible in violation of the First Amendment and Wash. Const. art. 1, § 11); *City of Tacoma v. O'Brien*, 85 Wn.2d 266 (1975) (finding Category 1 taxpayer standing to facially challenge Laws of 1974, 1st Ex. Sess., ch. 194, and then declaring is unconstitutional for violating separation of powers); *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501, 506 (II, 2003) (finding Category 1 taxpayer standing to challenge PUD’s appliance repair business on basis that activity was illegal and lacked statutory authorization); *Robinson v. City of Seattle*, 102 Wash.App. 795 (I, 2000) (finding Category 1 taxpayer standing to challenge constitutionality of Ord. 119278); *State ex rel. Boyles v. Whatcom Cy. Sup. Ct.*, 103 Wn.2d 610 (1985) (finding Category 1 taxpayer standing to challenge county jail’s work release program for violating First Amendment and Wash. Const. art. 1, § 11); *Farris v. Munro*, 99 Wn.2d 326 (1983)(en banc) (finding Category 1 taxpayer standing to facially declare State Lottery Act unconstitutional exists provided Attorney General declines petitioner’s solicitation to cure); *Walker v. Munro*, 124 Wn.2d 402 (1994) (finding that Category 1 taxpayer standing exists to challenge initiative that has gone into effect).

direct a state agency to implement them. Nor do prosecuting attorneys and police departments have the right to enforce unconstitutional laws and grant unconstitutional exemptions. That much seems to be clear. As to whether enacting an unconstitutional law is illegal, one need look no further than the Washington and Federal Constitutions. As there indicated, the State is restrained by the 14th Amendment from “mak[ing] or enforc[ing] any law” that violates the Privileges & Immunities Clause. Moreover, the State shall not violate the Due Process and Equal Protection Clauses. Enacting and enforcing laws that do precisely this injury are expressly rendered illegal. The Washington Constitution defers to the supremacy of the Federal Constitution. Wash.Const. Art. I, § 2. It then adds further express prohibitions that “[n]o law shall be passed” granting special privileges and immunities. Wash.Const. Art. I, § 12. As with the Federal Constitution, Washington prevents the legislature from “excus[ing] acts of licentiousness or justify[ing] practices inconsistent with the peace and safety of the state.” Wash.Const. Art. I, § 11. Further, the Washington Constitution echoes the First Amendment’s prohibition that “Congress shall make no law” establishing religion,⁷ but adds that

⁷ The First Amendment applies to the states through the Due Process Clause of the 14th Amendment. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 218 (1992).

“[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.” *Id.*

Taxpayers fund legislative and executive branch activity. When those tax funds are used in a fashion that violates the explicit terms of the Washington and Federal Constitutions, illegal governmental activity has been identified. The Plaintiffs have alleged that challenged provisions do harm to our constitutions – both in the “mak[ing]” and “enforc[ing]” of these laws, injustices inflicted through the use of taxpayer funds.

Respondents cite no authority categorically stating that general-injury (as opposed to special injury) taxpayer suits may not be brought to challenge the enacting of unconstitutional laws, on the premise that the passing of an illegal statute is not a government “act.” Yet the Supreme Court concluded that an “initiative measure limiting the taxing power” is as “much a legislative act as is [a statute].” *Love v. King Cy.*, 181 Wash. 462, 469 (1935). “The passage of an initiative measure as a law is the exercise of the same power of sovereignty as that exercised by the Legislature in the passage of a statute.” *Id.*

To be clear, no challenge has been made to the Legislature’s compliance with rules of parliamentary procedure. Instead, they challenge the product of that process, including fundamentally the delegating of core

legislative functions to the executive branch (i.e., police officers, animal control officers, prosecutors), the judicial branch (i.e., all judges), nongovernmental and unelected private parties, and randomly-selected sets of six or twelve jurors to define what is and what is not criminal. The thrust of this suit seeks to preserve the tenets of representative democracy. Further, because the WSDA is tasked with enforcing the WHSA, the entire administrative layer devoted to implementing this law satisfies the public “act” requirement asserted by the Respondents.

In addition to the regulatory challenge, Plaintiffs seek review of the criminal component of the WHSA, RCW 16.50.170. No case says that taxpayer standing principles will not permit facial challenges to a criminal law, yet this is the practical effect of Respondents’ argument – i.e., to restrict taxpayer suits to civil law challenges. To accept Respondents’ position will result in amputating the reach of decades-old common law doctrine by practically limiting taxpayer challenges to noncriminal laws, while disregarding that:

Crimes have always represented a special case, constitutionally and philosophically. The criminal penalty represents the ultimate governmental intrusion on individual freedom, together with a sense of community approbation not present in other government action.

Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 644-46 (1992). Taxpayers’

rights to challenge illegal and invalid government acts are not restricted only to those noncriminal in nature.

Yet Respondents persist in demanding that the Plaintiffs furnish an “act” distinct from passage of an allegedly illegal law in order to serve as a qualifying taxpayer litigant. True, most noncriminal state and local laws instruct or permit a public official to administer, enforce, enter into contract, buy, sell, regulate, or otherwise do some act in order to effectuate the purposes of the enacted law. For example, a law raising taxes directs the Department of Revenue to collect that tax; a law permitting a lottery directs the Washington State Lottery Commission to monitor and conduct the lottery; a law assigning county prisoners to a work release program directs the relevant agencies to implement that program (*see Boyles*, 103 Wn.2d 610 (1985)); a law requiring preemployment drug testing directs the personnel department to administer that test (*Robinson*, 102 Wash.App. 795 (2000)); a law allowing a PUD to sell appliances directs the PUD to go into that business (*Kightlinger*, 119 Wash.App. 501 (2003)). As in these cases, in the administrative context, the WHSA directs the WSDA Director to implement administrative regulations and to license, permit, discipline, and otherwise monitor compliance with the WHSA. Furthermore, the WHSA also wields a criminal component.

What “act” would ever exist in the criminal justice system other than its presumptive enforcement by the police-prosecutor complex? Once a criminal law is enacted, it becomes the official duty of law enforcement to police the law and for the prosecuting attorney to prosecute that law. Upon going into effect, a new criminal statute is put into circulation among the executive and judicial branches, and becomes the law of Washington. At any moment after the effective date, those not exempt are immediately subject to prosecution upon violating that law. The constitution directed the Legislature to determine the duties of the prosecuting attorney.⁸ Hence, government action challenged by the Plaintiffs under the WHSA impacts all levels – legislative, executive (both regulatory and prosecutorial), and judicial.

D. UDJA Standing.

At page 17, the Respondents admit that *Tattersall* found taxpayer standing. Accordingly, in also finding standing under the UDJA, the *Tattersall* case supports the assignment of error to the trial court’s denying standing to the Plaintiffs under the UDJA but granting standing under taxpayer principles. As to the need to prove redressability under the

⁸ See Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecution attorney). The Legislature promptly assigned various duties to the prosecuting attorney, among which was the obligation to “[p]rosecute all criminal and civil actions in which the state or the county may be a party.” RCW 36.27.020(4).

UDJA, should the court declare that the provisions challenged under the WHSA are unconstitutional, and strike those portions of the law, then redress will come in the form of declaratory and injunctive relief, relieving the taxpayers of the financial burden of funding the enactment and implementation of an illegal set of laws that promote activities in fundamental opposition to compelling state interests favoring humane treatment of animals.

E. Salerno's Applicability to a State Taxpayer Suit.

At page 20, the Respondents contend that the *Robinson* court, whose decision has not been overruled, simply did not realize that the Supreme Court allegedly already said that the *Salerno* “no set of circumstances” test applied to facial challenges, citing page 806 fn. 15. This page and footnote of the *Robinson* opinion state (emphasis added):

It is also true, as the Taxpayers point out, that no Washington court has applied the *Salerno* test to a taxpayer suit.^{FN15} 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.

FN15. The importance of this observation is debatable; the only Washington case after *Salerno* involving a taxpayer's constitutional challenge was decided on grounds of mootness. *See Boyles*, 103 Wash.2d at 612, 694 P.2d 27.

While it is true that the “no set of circumstances” test has been used for facial challenges premised on federal and state constitutional provisions in

non-taxpayer suits,⁹ the *Robinson* court was correct in rejecting the *Salerno* standard, recognizing the U.S. Supreme Court's own germane limitation of *Salerno* in cases such as the one at bar, as found at 807-808:

Third, the City does not explain why the *Salerno* test should be applied to a state court challenge, particularly a challenge under the state constitution. In *City of Chicago v. Morales*,^{FN22} the U.S. Supreme Court clarified that *Salerno* does not require a party mounting a facial challenge in state court to establish that no set of circumstances exists under which the challenged statute would be valid: "We need not, however, resolve the viability of *Salerno's* dictum, because this case comes to us from a state-not a federal-court.... Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases-a proposition which is doubtful-state courts need not apply prudential notions of standing created by this Court."^{FN23} Finally, the City cites no case in which our courts have applied the "no set of circumstances" test, and we find none.^{FN24}

Hence, *Robinson* remains binding and on point in this taxpayer challenge under both state and federal constitutional law.

F. Jones's Inapplicability.

At pages 22 and 25, the Respondents cite to *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y.1974), *summarily affirmed*, 419 U.S. 806 (1974). An out-of-circuit federal district court ruling on a federal law not challenged in this state court suit provides hardly any persuasive precedential value. A U.S. Supreme Court decision summarily affirming that federal district court decision, without signature by any of the justices,

⁹ No case cited by the Respondents at pages 18-19 fits within the taxpayer suit/state constitutional challenge mold because all are non-taxpayer suits.

in a one sentence opinion, “Facts and opinion, D.C., 374 F.Supp. 1284. [¶] Judgment affirmed,” commands little more attention.

First, the district court opinion is decided not by a single judge, but a three-judge panel pursuant to a federal statute, arguably 28 U.S.C. § 2284.¹⁰ The panel found standing on several grounds and then determined that the HMSA did not violate the federal Establishment Clause or the Free Exercise Clause. Second, note that no certiorari determination was made. This is because the Plaintiffs sought direct review by the Supreme Court. A party may appeal as of right to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. 28 U.S.C. § 1253.

Third, the court may wonder why there are no Supreme Court briefs on the merits, argument before the court, or an opinion of any substance or signature by any justices. This is because the Supreme Court’s summary affirmance fails to provide any meaningful review or explanation at all. That is, after all, what “summary” means. But what precedential value this summary affirmance carries is dubious. The Solicitor General filed a motion to affirm, noting that the matter did not

¹⁰ Knowing the exact vehicle for obtaining the three-judge panel is unknown without obtaining the trial-level briefs.

raise a substantial federal question, which was joined by intervenors who framed the question as whether the kosher slaughter method was constitutional and humane (which was not the issue at all, but whether the HMSA could constitutionally exempt religious groups from the “render insensible” requirement to those animals ritually slaughtered).

The Supreme Court rendered its decision, but not even *per curiam*. Perhaps the Clerk of the Supreme Court issued it at the direction of the Supreme Court, but one cannot discern from a one-line affirmance what was affirmed, and why. It is settled law that summary decisions by the Supreme Court are binding on the inferior federal courts and are decisions on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). “[L]ower court judges are left to guess as to the meaning and scope of our unexplained dispositions.” *Colorado Springs Amusement Ltd. v. Rizzo*, 428 U.S. 913, 919 (Brennan, J., dissenting from denial of certiorari).

The precedential significance of the summary action in *Salera* [a summary disposition], however, is to be assessed in the light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case.

Mandel v. Bradley, 432 U.S. 173, 176 (1977); *see also Hicks*, at 345 n. 14 (applying precedent if “issues ... [are] sufficiently the same.”). Further, the Supreme Court noted “[w]hen we summarily affirm, without opinion, ... we affirm the judgment but not necessarily the reasoning by which it

was reached[,]” and “the rationale of [summary] affirmance may not be gleaned solely from the opinion below[.]” *Mandel*, at 176 (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (Burger, C.J., concurring)(1975)).¹¹

Accordingly, in addition to the reasons stated in the previously submitted pleadings, while the summary affirmance does carry precedential weight, it is readily distinguishable from the facts and statutes (i.e., WHSA vs. HMSA) in this case, and can be safely disregarded as inapplicable.

Whether the Supreme Court “decision” carries any precedent is beside the point, for the distinctions are critically noted as follows:

1. HMSA does not impose any penalty – criminal or civil, while the WHSA does.
2. Only the federal constitution was examined, and only with respect to the First Amendment.
3. Only the Jewish method of slaughter is scrutinized. Muslim and other religious slaughter methods are not considered.

¹¹ Further, as articulated by the Supreme Court in *Socialist Workers Party v. Illinois State Board of Elections*, 566 F.2d 586 (7th Cir. 1977), *affirmed*, 440 U.S. 173 (1978), “[a] summary disposition affirms only the judgment of the court below[.]” and the reasoning of the lower court opinion cannot be examined to determine the precedential reach of the summary affirmance. Questions that “merely lurk in the record” are unresolved and no resolution may be inferred. *Illinois*, at 182-83.

4. *Jones* predated *County of Allegheny* (1989) and *Weisman* (1992), cases changing how the Establishment Clause was evaluated.

5. The WHSA goes far beyond the HMSA by blanketly declaring all ritual slaughter “humane” and exempt from even the prescribed religious method.

6. The arguments raised successfully in *Commack*, *Ran-Dav’s*, and *Barghout* were not before the *Jones* court.

These distinctions render *Jones* of limited utility. Of note, however, is the concession that in practice, “because of Department of Agriculture regulations,” the “Jewish slaughter method often involves the animal's being shackled and hoisted before the animal suffers loss of consciousness.” *Id.*, at 1290 and fn. 8 (explaining this uncontradicted statement). This statement underlies part of the present challenge, for it presents a similarly unrefuted position that the religious slaughter method excuses what would otherwise constitute animal cruelty by shackling, hoisting, casting, and throwing a conscious animal without first rendering her insensible to pain.

G. 1st Amendment.

At page 22, Respondents attempt to style this matter as a Free Exercise case. It should be noted at the outset that the Plaintiffs strongly dispute this characterization. The Plaintiffs are not asking this court to

create a new law. Rather, they seek the invalidation of an existing law. The legislature will then be free to create a new, constitutional law if it desires. As enacted, however, with respect to the only iteration of the statute and rule before it, the challenged provisions do not, and Plaintiffs do not allege they do, violate the Free Exercise Clauses of the state and federal constitutions, yet this is where the Defendants lead the court.

Rather, they violate the Establishment Clauses. Were Plaintiffs religious individuals asserting infringement upon their religious beliefs and practices, then the Defendants would be correct in framing the issue under the Free Exercise Clause. Instead, the Plaintiffs are taxpayers disputing the use of public funds to enact and enforce laws that constitute a grant of positive favoritism to religious minorities. Accordingly, Defendants' attempt to invoke and apply the Free Exercise tests of state and federal law should be disregarded as unripe, immaterial, nonjusticiable, and raised without proper standing (after all, the state is not religious and cannot claim interference with free exercise of a religion it does not, and cannot be said to, believe or practice).

At page 23, Respondents claim that the Plaintiffs want to outlaw religious ritual slaughter. Not so. Rather, they seek to ensure comity among citizens with varying degrees of belief and disbelief and safeguard the compelling state interest in the humane treatment of animals. Several

criminal laws, most notably drug laws, have survived challenges for refusing to exempt religious minorities from their ambit “Anything goes” is not the rule for religious minorities, and animal cruelty and inhumane slaughter are no less a crime than possession of marijuana.

To the extent the court wishes to construe this challenge under the Free Exercise Clause, it may wish to consider a recent Ninth Circuit decision holding that Washington’s regulations pertaining to pharmacists and pharmacies and their obligation to dispense Plan B (the “morning after” pill) did not violate the religious freedom of pharmacists conscientiously objecting to filling those prescriptions. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127-28 (9th Cir.(Wash.)2009)(citing *Smith*’s concern that a presumptive invalidity of every neutral law applied to the religious objector could have “wide-ranging and injurious effects on our society, as exemptions could be mandated from ... animal cruelty laws[.]”); *see also id.*, 1129-30 (discussing *Smith* and *Lukumi* in context of religion not being excused from compliance with otherwise valid criminal laws). In *Stormans*, the court concluded that the new rules “make no reference to any religious practice, conduct, or motivation. Therefore, the rules are facially neutral.” *Id.*, at 1130.¹²

¹² The court added at 1131:

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. The WHSA lacks general applicability at the expense of nonbelievers. If the WHSA omitted references conferring special rights upon certain believers, regardless of religious orientation or motivation, and imposing a duty upon them to humanely slaughter livestock, it would then be truly neutral and generally applicable. Opponents to the modified WHSA could object on religious or secular (e.g., moral, philosophical, discriminatory, cruel, anti-animal) grounds, but the government would not be singling out religious motivations for preferential treatment.

That the rules may affect pharmacists who object to Plan B for religious reasons does not undermine the neutrality of the rules. The Free Exercise Clause is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct. See *Reynolds*, 98 U.S. at 166-67 (upholding a polygamy ban though the practice is followed primarily by members of the Mormon church); cf. *United States v. O'Brien*, 391 U.S. 367 (1968) (rejecting a First Amendment challenge to a statutory prohibition of the destruction of draft cards though most violators likely would be opponents of war). The Fourth Circuit's decision in *American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir.1995), is instructive. The *Reno* court upheld the Freedom of Access to Clinic Entrance Act, which established criminal penalties and civil remedies for certain conduct intended to injure, intimidate, or interfere with persons seeking to obtain or provide reproductive health services. *Id.*, at 656. The court found no free exercise violation--even though it acknowledged that Congress passed the law in response to anti-abortion protests--because it recognized that the Act "punishe[d] conduct for the harm it causes, not because the conduct is religiously motivated." *Id.* at 654; see also *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir.2006) (finding no free exercise violation even if a zoning ordinance targeted a proposed plan for a new church because the commission was concerned about the nonreligious effect of the church on the community); *Knights of Columbus, Council No. 94 v. Town of Lexington*, 272 F.3d 25, 35 (1st Cir.2001) (finding no free exercise violation although a regulation limiting displays on the town green was adopted in response to a flood of religious groups seeking to erect displays). Thus, the district court erred in finding that "the object of the regulations is to eliminate from the practice of pharmacy ... those pharmacists who, for religious reasons, object to the delivery of lawful medications, specifically Plan B."

At page 24, Respondents incorrectly assert that Plaintiffs argue, without support, that recognition and accommodation of religious practice is *per se* unconstitutional. Plaintiffs never made such an assertion but took pains to note that accommodation make cross the line to endorsement, as noted and not rebutted by Respondents, in the cases *Amos*, *Kiryas Joel*, *Texas Monthly*, *Estate of Thornton*, and *Min De Parle*. *Appellant's Op. Brief*, at 19-21. At page 26, Respondents interpret *Texas Monthly* to hold that a religious exemption from a generally-applicable law does not violate the Establishment Clause if it alleviates a burden on the free exercise of religion. They also cite to Prohibition-era examples to support this interpretation.

Materially distinct from the sacramental wine and ritual peyote cases cited by Respondents is the fact that the WHSA and Washington's anticruelty laws seek to protect third party victims – viz., the nonhuman animals. Drug crimes, at least in the posture presented to the U.S. Supreme Court in *Smith*, are victimless offenses. Imbibing sacramental wine during mass or smoking peyote during a Native American ritual does not create a situation where third parties will foreseeably risk life and limb. Here, however, a religious exemption is tantamount to letting those of one religion commit aggravated assault or murder on those not belonging to that religion, solely to alleviate a burden on free exercise.

Such a religious murder exemption to freely maim and kill the “heathen,” however, would never pass constitutional muster. The *Stormans* case, *supra*, recognized as much by refusing to support a religious exemption for pharmacists on the basis that it would adversely impact third party victims.

Further, Respondents fail to rebut *Estate of Thornton*, which struck down a statute requiring employers to accommodate employees’ observation of Sabbath days – certainly a law that would alleviate the burden on the free exercise of religion but one that also granted unyielding weight in favor of Sabbath observers over all other interests, having the primary effect of impermissibly advancing a particular religious practice. 472 U.S. 703, 710 (1985). As drafted, the WHSA similarly grants unyielding weight in favor of religious minorities over the primary beneficiaries of the “Humane Slaughter Act,” viz., the animals to be protected against cruel handling and inhumane slaughter. Further, it advances a particular religious practice over irreligious practice for the reasons stated herein. Concern for these victims who have no voice except through organizations like Pasado’s may be characterized as the “humane treatment principle.” Echoing this concern is the California Court of

Appeals's decision in *Farm Sanctuary v. DFA*, 63 Cal.App.4th 495 , 504 (cit. om.)(1998).¹³

At page 29, Respondents misstate the holding of *Commack* by saying that it held the phrase “in accordance with the ritual requirements of the Jewish faith or any other religious faith,” as used in the FHSA, was a permissible accommodation of free exercise. To the contrary, *Commack* merely cited to *Jones* and paraphrased that court's holding. *Jones* never evaluated constitutionality of the FHSA on the ground considered in *Commack* – viz., that the law requires the state to make religious law determinations. Further, *Commack* distinguished *Jones*, which was raised in defense of the kosher fraud law, in order to strike it down as unconstitutional. The precise phrase deemed unconstitutional on grounds separate from *Jones*? – “in accordance with orthodox Hebrew religious requirements.” *Id.*, at 457. The slight variation in phrasing is negligible and does not affect the holding that the WHSA is unconstitutional.

H. Washington's Art. I, § 11.

¹³ “We think it clear that the slaughtering of animals through humane methods, as required by the HSL, is a matter of public importance. ‘It has long been the public policy of this country to avoid unnecessary cruelty to animals.’ (*Humane Soc. of Rochester & Monroe Cty. v. Lyng* (W.D.N.Y. 1980) 633 F.Supp. 480, 486.) “[T]here is a social norm that strongly proscribes the infliction of any ‘unnecessary’ pain on animals, and imposes an obligation on all humans to treat nonhumans ‘humanely.’”

At page 30-31, Respondents cite *Maylon* as a basis to limit the scope of Art. I, § 11's terms "appropriated" and "applied" to religious worship, exercise, instruction, and support of any religious establishment. It further cites to *Bill of rights*, *Gallwey*, and *Saucier* as counterexamples to the one at bar. The question for the court is whether the state's direct and unmistakable involvement in permitting an individual to engage in conduct that would otherwise violate criminal and administrative laws if performed without a license or out of compliance with regulatory law (see, e.g., RCW 16.49.035, .105; RCW 16.50.170), where the license itself is a necessary condition to freely exercise one's religion, implicates Art. I, § 11 of the Washington Constitution.

In the cases cited by Respondents, the financial, administrative, and legal support lent by the State to the religious beneficiaries was not a *sine qua non* of religious worship, exercise, and support. In other words, the uniforms and transportation afforded the volunteer chaplain program with the Pierce County Sheriff's Office in *Maylon* did not prevent ministry to inmates through other avenues. Nor would withdrawing co-sponsorship of a lecture series with a church, as provided in *Bill of Rights*, mean that the church could not sponsor a lecture series on its own. The educational grants for "placebound" students enrolled in religiously affiliated colleges, as debated in *Gallwey*, did not take away from those students the right to

attend a sectarian university. And eliminating public funding of the Salvation Army's secular drug treatment program, as discussed in *Saucier*, would not mean that the program itself would cease to exist as a matter of law. In contrast to all these cases that purportedly involve purchasing "secular" items or furthering a "secular" program, and where there is nothing presumptively illegal about the aided activity, the case at bar presents a presumptively criminal activity (cruel mishandling and slaughter of livestock) to be performed only by a licensed individual (at least with respect to statutorily defined packers and slaughterers) that is allegedly pivotal to religious worship and exercise. There is nothing "secular" about ritual handling and religious slaughter.

The closest analogy to this case could be made with respect to using public funds to buy sacramental wine for Catholic priests or ritual peyote for Native American ceremonial use. Undoubtedly, such funding would constitute an improper appropriation or application of public funds in support of religion. Whether the wine is bought *directly* with public funds is irrelevant if public funds are used to *indirectly* permit only Catholic priests to purchase the alcohol. The WWSA, in using public funds and resources to process applications, issue licenses, and regulate ritual packers and slaughterers in such a fashion as to permit them to kill an animal in a way that otherwise would constitute animal cruelty is not

relevantly dissimilar from the WDFW using public funds to process hunting and fishing permits only for religious minorities to kill animals out of season but in accordance with purely religious dictates.

The rule that can be articulated, thereby harmonizing the outcome requested by the Plaintiffs with the cases cited by the Respondents, is that when the government decides to supplement with public funding an already legal activity that is secular in nature, Art. I, § 11 is not violated. But where an activity only becomes legal when non-secular in nature, and where the government has the power to give and take away the legal right to engage in that activity, Art. I, § 11 is contravened not only as an illegal “appropriation” of public funds, but also as an illegal “application” thereof. See *Witters v. State Com’n for the Blind*, 112 Wn.2d 363, 370 (1989)(noting broader scope of Art. I, § 11 to include application).

Further, in contrast to *Bill of Rights Legal Found’n v. Evergreen State College*, 44 Wash.App. 690 (1986) (cited by *Maylon*, at 802 fn. 36), where the program challenged did not involve a captive audience, was open to the public, and unarguably secular in nature, the “program” here involves licensing and regulating individuals seeking to engage in acts that inflict pain and suffering on animals, contravening Washington’s strong public policy against animal cruelty. The “audience,” as it were, comprised of licensees subject to penalties and prosecution, is properly

regarded as “captive,” and while licensure as a custom slaughterer is open to any member of the public, once licensed, strict compliance with licensing regulations is mandated. In other words, an applicant or current licensee is not “free to leave” and seek certification elsewhere if he wishes to continue slaughtering livestock within Washington. Unlike *Maylon*, where the sheriff’s department neutrally sought any qualified volunteers regardless of religious status, here the very lawfulness of the slaughter method turns on religious status.

At page 32, without citing any direct authority, the Respondents state that “[p]ublic funding spent by an agency on administration of its own programs and enforcement of statutes and rules does not constitute establishment of religion.” As noted above, what matters most is the practical effect of administering the program and enforcing its rules. Expenditures made relative to the WHSA transform the WSDA into the exclusive permitting agency for Jewish, Muslim, and other religious minority worship and exercise in the context of preparing animal flesh for human consumption, where the livestock are killed or sacrificed solely in furtherance of religious practice. Absent the exception given under the WHSA, as legislatively granted, administratively enforced, and judicially interpreted, the challenged rules would cease to become the necessary conditions that effectuate religious practice within the State of

Washington and, therefore, fall squarely within the proscription of Art. I, § 11.

Lastly, focusing only on the second sentence of Art. I, § 11, the Respondents completely ignore the first sentence and its prohibition that states “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.” Excusing animal cruelty, which has repeatedly been criminalized ever since Washington felonized animal abuse in 1994, in order to sanctify “liberty of conscience,” remains forbidden regardless of the application or appropriation of public funds.

I. Washington’s Art. I, § 12.

At pages 34-35, Respondents contend that the WHSA does not burden any fundamental right, but protects one – viz., the right to freely exercise one’s religion. Free exercise, however, sits on the opposite side of the religious establishment coin. If free exercise constitutes a fundamental right of the state’s citizenry, then so is the enhanced constitutional protection against religious entanglement. *Witters v. Washington Dep’t of Services for the Blind*, 474 U.S. 481, 489 (1986)(recognizing that Art. I, § 11 is “far stricter” than federal counterpart). Other fundamental constitutional rights include those protected by the Bill of Rights – viz.,

the Fourth, Fifth, and Fourteenth Amendments, all of which are implicated by excusing religious cruelty under the WHSA.

The privilege granted by the act is to engage in animal cruelty with impunity based purely on religious views. It burdens the fundamental rights of due process that inhere in all, religious and nonreligious. The Respondents want to apply strict scrutiny to the “rights” of a religious minority, but those facts are not before the court, for this is not a free exercise challenge raised by a ritual slaughterer under a version of the WHSA that does not provide for a religious exemption. As an establishment, equal protection, and privileges and immunities challenge, the fundamental constitutional rights of the class not protected by the WHSA are at issue. For this reason, strict scrutiny applies.

What compelling governmental interest, therefore, could possibly require sacrificing the Bill of Rights in favor of a religious minority wanting to subject a third party victim to cruelty? Even if, assuming *arguendo*, there is a compelling state interest in preserving free exercise of religion, that interest is inherently limited by the establishment clause to which it is wedded, and is further restricted by the disparate impact such favoritism would have upon the fundamental rights bestowed to all others. Consider also the compelling government interest in protecting animals from inhumane treatment. *See Appellants’ Op. Brief*, at 24 fn. 14.

At page 35, the Respondents contend that the Plaintiffs have relied on a “false premise” that the WHSA treats two categories of packers and slaughterers differently and that the WHSA does not require the State to inquire into religious sincerity of any person. As to the first point, the Respondents are disingenuous in claiming that two *methods*, not two *classes*, are identified. True, a licensed slaughterer may kill by either method, but this is subject to the express limitation that the religious slaughter takes place “in accordance with the ritual requirements of any religious faith.” RCW 16.50.110(3)(b). Thus, a Jewish *shoichet* may slaughter using the stunning method or the *kosher* (non-stunning) method, but he could not use the *halal* (i.e., Muslim) method because he is not Muslim. Nor could he engage in any other non-Jewish religious method, including pre-slaughter handling and preparation for ritual slaughter not set forth as part of the Jewish faith. A Christian packer may, in contrast, only slaughter using the stunning method. He cannot choose the religious method since Christianity does not ritually require no-stun slaughter by means of a sharp instrument.

Of course, the reader may wonder how the Plaintiffs can assume that the Christian packer’s religious views do not call for slaughter by a method akin to that employed by Jews and Muslims. This is a keen inquiry, for one should not assume anything, particularly in criminal

prosecution, but this is precisely the haphazard, arbitrary process that the Respondents suggest takes place when claiming the WHSA does not require the State to inquire into the sincerity of religious belief. Such an assertion brings into sharp focus precisely how plenary a religious endorsement has been given by the State. In that regard, the WHSA is hardly the least restrictive variation available to the legislature when balancing competing fundamental rights.

But such an interpretation should be rejected for another reason, for it would render meaningless the phrase “in accordance with the ritual requirements of any religious faith.” Why include it at all if the legislature did not intend for some public official to determine – for regulatory, prosecutorial, or judicial purposes – whether the otherwise secular method “whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument” was religiously compliant? *See State v. Roggenkamp*, 153 Wn.2d 614, 624 (2005)(drafters of legislature are presumed to have used no superfluous words and meaning must be accorded, if possible, to every word in a statute).

J. Nondelegation.

At page 39, the Respondents state that the exercise of enforcement authority does not present a nondelegation doctrine issue. They add that

RCW 16.50.150 cannot be interpreted as a delegation to individuals to immunize any act, noting that it only defines as humane “specified methods in the statute *used by packers and slaughterers.*” For the reasons stated in Section III(B), *supra*, this reading is completely unsupported by the plain language of the statute. Lastly, the Respondents elide the distinction between the power to define a crime and the power to prosecute or judge a crime by saying guilt is decided by jury.

In determining whether to prosecute a violation of RCW 16.50.150, RCW 16.52.205, and RCW 16.52.207, however, the prosecutor is making what amounts to a legislative decision – i.e., defining what is, in fact, “humane” and, thus, not animal cruelty. A prosecutor’s decision not to file charges is virtually unreviewable by the courts. The primary barrier to such review is the separation of powers doctrine, which recognizes that the executive branch may not exercise judicial power, and the judiciary cannot enter upon executive functions. *People v. Smith*, 53 Cal.App.3d 655 (1975).

Such a notion undermines the nondelegation doctrine and the “principle of legality.” Herbert L. Packer, *The Limits of the Criminal Sanction* 80 (1968); John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 189 (1985). Crimes must be legislatively rather than judicially (or even executively) defined.

The principle of legality forbids the retroactive definition of criminal offenses. It is condemned because it is retroactive and also because it is judicial – that is, accomplished by an institution not recognized as politically competent to define crime.

Jeffries, at 190. The court system is “an institution not recognized as politically competent to define crime.” *Id.*

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

U.S. v. Bass, 404 U.S. 336, 348 (1971). *Bass* states the overarching principle in criminal law that the legislative branch, not the police, prosecutors, or courts, and certainly not the regulated entities themselves, should define the contours of criminal prohibitions. Yet this is precisely what RCW 16.50.150 has sanctioned. In so doing, it violates the nondelegation doctrine and the rule of lenity. The rule of lenity is one species of the nondelegation doctrine. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000)(concluding that nondelegation doctrine is “alive and well” having been “relocated rather than abandoned”). The concern of allowing police, prosecutors, and judges to define what constitutes inhumane handling and preparation for ritual slaughter, and inhumane ritual slaughter, is that ambiguous criminal statutes tempt them to be unfairly selective in enforcing criminal law. *See*,

e.g., *U.S. v. Kozminski*, 487 U.S. 931, 951-52 (1988).As Justice Scalia

noted several years ago:

the Justice Department ... knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, to give persuasive effect to the Government's expansive advice-giving interpretation of [a criminal statute] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

Crandon v. U.S., 494 U.S. 152, 178 (1990) (emphasis added). Justice Scalia's comments apply conversely as well, where the county prosecutor takes an erroneously broad view of what it cannot prosecute due to the ambiguous and impermissible statutory exemptions. Thus, while prosecutors might have an institutional interest in expansively interpreting criminal statutes, such predisposition does not apply in the face of quite broad and vague exemptions to prosecution. Well aware of the rule of lenity, prosecutors will steer clear of prosecuting cases that might trigger the challenged exemptions due to our legal system's instinctive distaste for extinguishing individual liberty without clear legislative warrant and desire to assure citizens fair notice of what is proscribed. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 345-46 (1994)(quoting *U.S. v. Bass*, at 349).¹⁴

¹⁴ While prosecutors might be tempted to test the uncertain limits of an ambiguously-worded criminal law, where those limits are so broadly stated, a prosecutor will not likely

Due process implications also arise so that individuals have advance notice of what conduct will subject them to criminal penalties. Lenity reflects “the due process value” that criminal punishment is illegitimate unless individuals are given “reasonable notice that their activities are criminally culpable.” William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1029 (1989). Then-Judge and later Solicitor General Kenneth Starr observed:

[i]n the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them.

U.S. v. McGoff, 831 F.2d 1071, 1077 (D.C.Cir.1987).

Of additional concern with RCW 16.50.150 is separation of powers. Under Article I and the separation of powers, “the lawmaking function belongs to Congress ... and may not be conveyed to another branch or entity.” *Loving v. U.S.* 517 U.S. 748, 758 (1996). The distinction is between impermissible delegation of *lawmaking* functions and permissible delegations of responsibility to *execute* or *administer* the laws.

invest political capital, funds, and office resources to charging behavior that has a high risk of falling through the exemptions “cracks.” And though the institutional legitimacy of deterring animal cruelty has garnered support over the years, animal crimes do not enjoy the same primacy in triage as human crimes. As with prosecutors, judges and juries will be functioning with too little guidance in applying criminal law standards to individual cases, leading to a high rate of reversible errors. “Delegated criminal lawmaking and lenity cannot peacefully coexist.” *Kahan*, at 347.

See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). RCW 16.50.150 permits one person (i.e., the defendant) to determine what is criminal solely based on whether the activity was in furtherance of ritual, turning the courts into religious tribunals.

Limits on delegations of power are necessary to foster the political processes that check congressional action. Open-ended delegations are objectionable because they permit responsibility for government action to pass out of the hands of the legislature and thereby undermine this electoral check. Justice Brennan incisively observed:

[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive to the same degree to the people.

United States v. Robel, 389 U.S. 258, 276 (1967) (concurring opinion).

While the Supreme Court has upheld relatively broad delegated standards in the past, after diligent search, it appears to have never done so when the standards are to be determined by the very persons subject to penalty for violation of those standards. While the individual person facing a criminal charge under RCW 16.50.150 (and the animal cruelty suite of laws in Ch. 16.52 RCW) will likely represent the lowest common denominator for what constitutes “humane” ritualized treatment, this self-

legislation comes at the expense of the primary beneficiaries of the humane slaughter law – viz., those animals to be protected from cruelty. Putting aside the fundamental interests of the animals, which were central to the Legislature’s intent of passing Pasado’s Law and amendments, and the WHSA, the existing exemptions foster such ambiguity and deference as to reward religious factions with criminal immunity and transform them into a criminal organization with an acquittal-defining monopoly.

Washington has invalidated several statutes on nondelegation grounds. *See State ex rel. Kirschner v. Urquhart*, 50 Wn.2d 131, 135 (1957); *State v. Matson Co.*, 182 Wash. 507 (Wash. 1935). As quoted by the Supreme Court in *Matson Co.*, and following its reasoning to strike down the Agriculture Adjustment Act:

It is difficult to conceive of a more complete abdication of legislative power than is involved in this act. **Not only is the power to determine whether or not there shall be a law at all delegated to an indefinite class or group, but the Governor and all other public officers are rendered powerless to act except upon the initiative of a preponderant majority of a group.** It must be borne in mind that the power delegated is not the power to organize and adopt self-governing ordinances. **The power delegated is the power to frame and adopt a code which, when approved, becomes a law with penal sanctions.**

Id., at 514-515 (quoting *Gibson Auto Co. v. Finnegan*, 259 N.W. 420, 423 (1935)(emphasis added)). RCW 16.50.150 is even more objectionable because no need to defer to a majority exists. A religion of one adherent

plunges enforcement and adjudication of RCW 16.50.150 into absolute legal relativism.

A criminal law was stricken as an unconstitutional delegation of lawmaking authority in *In re Powell*, 92 Wn.2d 882, 891 (1979)(finding that legislature’s delegation to Board of Pharmacy the right to promulgate an emergency regulation rescheduling a drug as a controlled substance without notice and public comment procedures, which, having been so rescheduled makes possession a crime, was an unconstitutional delegation).¹⁵

K. Motion to Strike

Plaintiffs’ opening brief amply rebuts Respondents’ points.

L. Attorney’s Fees.

At page 47, the Respondents claim that the Plaintiffs did not challenge the expenditure of public funds. This is incorrect. Indeed, taxpayer standing would not have been granted but for an allegation, and subsequent finding by the trial court, that tax monies were used to further the allegedly unconstitutional activity. *See also* CP 442 ¶ 4, 443 ¶ 11.

¹⁵ *State v. Brown*, 95 Wash.App. 952, 957-58 (III, 1999) noted that, “Where a felony is in question agencies must provide adequate notice for the procedural safeguards to be sufficient.” *Brown* cited *Powell* to conclude that the charge of offense of persistent prison misbehavior against a prison inmate was properly dismissed on grounds of nondelegation where the Department of Corrections had the exclusive right to define “serious infraction.” Barring the protection of RCW 16.50.150, ritual slaughter preparation, handling, and killing would undeniably constitute felony animal cruelty under RCW

This case is on all fours, as it were, with *Weiss v. Bruno*, where the constitutional principle protection variant of the common fund doctrine resulted in an award of fees to the plaintiffs who preserved the rights of the citizens to avoid the expenditure of public funds to further an excessive entanglement between church and state.

IV. CONCLUSION

The State cannot have it both ways. If this court finds no standing, then it cannot reach the merits. If it does, then it should reverse in whole or in part with respect to the constitutionality of the challenged provisions.

Dated this Apr. 22, 2010

ANIMAL LAW OFFICES

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Apr. 23, 2010, I caused a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF to be served upon the following person(s) in the following manner:

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