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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

PASADO’S SAFE HAVEN, et al.;

Plaintiffs,

vs.

STATE OF WASHINGTON and
WASHINGTON STATE DEPARTMENT OF
AGRICULTURE,

Defendants.

Case No.: 09-2-04904-0

**PLAINTIFFS’ MOTION TO STRIKE
AFFIRMATIVE DEFENSES
[justiciability, ripeness, standing, subject
matter jurisdiction]**

I. RELIEF REQUESTED

Plaintiff Pasado’s Safe Haven (“PSH”) and the Taxpayers of Washington, through their attorney Adam P. Karp, request an order striking Defendants’ affirmative defenses 3-6 (justiciability, ripeness, standing, subject matter jurisdiction).

II. STATEMENT OF FACTS

This action seeks to declare unconstitutional provisions of the Humane Slaughter of Livestock Act (“Act”), Ch. 16.50 RCW, and its implementing regulations, Ch. 16-24 WAC, permitting packers and slaughterers killing livestock in accordance with the ritual requirements

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1 of their religious faith to avoid criminal prosecution by severing the carotid arteries of livestock
2 with a sharp instrument after the animal has been shackled, after the animal has been hoisted,
3 after the animal has been thrown, after the animal has been cast, or after the animal has been cut
4 without having first rendered the animal insensible to pain, and without guaranteeing
5 instantaneous loss of consciousness. This identical conduct, if performed by packers and
6 slaughterers for nonreligious or nonritual reasons, or by religious individuals slaughtering
7 animals on a noncommercial scale, is a crime under the Act. RCW 16.50.110(3),.170.

8 Such conduct also violates “Pasado’s Law,”¹ the name given to Washington’s felony
9 animal cruelty law. Ch. 16.52 RCW makes it a felony, in relevant part, to do the following,
10 except when authorized by law:

- 11 (a) Intentionally inflict substantial pain on an animal;
- 12 (b) Intentionally cause physical injury to an animal;
- 13 (c) Intentionally kill an animal by a means causing undue suffering;

14 RCW 16.52.205(1)(a-c). RCW 16.50.110(3) does not authorize nonritual packers and
15 slaughterers to shackle, hoist, cast, cut, or throw livestock without first rendering them insensible
16 to pain. Accordingly, when such an individual intentionally and inhumanely slaughters livestock,
17 it is both a misdemeanor under RCW 16.50.170 and a felony under RCW 16.52.205(1). When
18 one knowingly, recklessly, or with criminal negligence inhumanely slaughters livestock, it is a
19 misdemeanor under RCW 16.50.170 and RCW 16.52.207(1) (“knowingly, recklessly, or with
20 criminal negligence inflicts unnecessary suffering or pain upon an animal.”). As described in the
21
22

23
24 ¹ The named plaintiff, Pasado’s Safe Haven, is Ch. 16.52 RCW’s namesake.

1 Mar. 17, 2009 letter of Mr. Karp to the Attorney General, the religious exemptions found in Ch.
2 16.50 RCW and Ch. 16-24 WAC, and permitted by the Washington Department of Agriculture,
3 expressly allow felony and misdemeanor animal cruelty to flourish – in the name, through the
4 establishment, and with the appropriation and application of public funds and money of religion.

5 On or before Dec. 8, 2008, Mr. Karp, on behalf of the named plaintiffs and taxpayers for
6 whom they serve as relators, petitioned the Washington State Attorney General’s office to take
7 steps to render these provisions unconstitutional. *Karp Decl.*, ¶ 1. On Dec. 22, 2008, Senior
8 Counsel Jerri Thomas, on behalf of that office, declined the petition. *Id.* Mr. submitted a second
9 petition on March 17, 2009, giving the Washington State Attorney General’s office an
10 opportunity to reconsider its earlier denial to remedy, cure, strike, or otherwise stop the
11 government’s illicit favoring of one religious group over another, or religious groups and
12 individuals over nonreligious groups. *Karp Decl.*, ¶ 2, Exh. 1. On April 1, 2009, Assistant
13 Attorney General Kristen Mitchell declined. *Id.*, Exh. 2. **The legal arguments and factual**
14 **assertions discussed in Exh. 1 are incorporated by reference here.**

15
16 On information and belief, the named plaintiffs pay the type of taxes that finance the
17 State of Washington’s Governor’s Office, Washington State Legislature, Washington State
18 Patrol, Washington Department of Agriculture, and the operational costs of law enforcement,
19 agricultural code enforcement, and animal control within the county limits of Snohomish and
20 State of Washington.

21
22 On April 30, 2009, the plaintiffs filed the *Complaint* in this action and served it on the
23 Defendants via the Attorney General. The State answered on May 21, 2009, raising numerous
24 affirmative defenses. Challenged in this motion are numbers three through six, the defenses

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1 pertaining to justiciability, ripeness, standing, and subject matter jurisdiction, which Plaintiffs
2 presently seek to dismiss under CR 12(f).

3 **III. ISSUES PRESENTED**

- 4 1. Should affirmative defense 3 (justiciability) be stricken? **Yes**.
5 2. Should affirmative defense 4 (ripeness) be stricken? **Yes**.
6 3. Should affirmative defense 5 (standing) be stricken? **Yes**.
7 4. Should affirmative defense 6 (subject matter jurisdiction) be stricken? **Yes**.

8 **IV. EVIDENCE RELIED UPON**

9 This motion is based on the *Complaint, Answer*, and subjoined *Declaration of Adam P.*
10 *Karp*.

11 **V. AUTHORITIES & ARGUMENT**

12 **A. CR 12(f) Permits Challenge to Insufficient Defense.**

13 (f) Motion to Strike. Upon motion made by a party before responding to a pleading
14 or, if no responsive pleading is permitted by these rules, upon motion made by a
15 party within 20 days after the service of the pleading upon him or upon the court's
16 own initiative at any time, the court may order stricken from any pleading any
insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

17 CR 12(f). As a matter of law, the Defendants cannot sustain their affirmative defenses 3-6. As
18 insufficient and without basis, they should be stricken with prejudice.

19 **B. Affirmative Defense 3 Fails (Justiciability)**

20 The issue presented in *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501
21 (2003) bears striking similarity to the case at bar in that Plaintiffs have primarily sought
22 declaratory and injunctive relief:
23

24 The PUD asserts that no justiciable controversy exists because the Taxpayers do
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25 **AFFIRMATIVE DEFENSES - 4**

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1 not claim any economic injury. The Taxpayers argue that their taxpayer status
2 gives them sufficient interest in the subject matter to sue. Further, according to
the Taxpayers, justiciability is not required where the issue is of major public
importance.

3 *Id.*, at 505. Standing overlaps with justiciability in an UDJA case. *To-Ro Trade Shows v. Collins*,
4 144 Wn.2d 403, 411 n.5 (2001). Applying the traditional justiciability test – i.e., (1) an actual,
5 present and existing dispute or the mature seeds of one, as distinguished from a possible,
6 dormant, hypothetical, speculative or moot disagreement, (2) between parties having genuine
7 and opposing interests, (3) which involves interests that are direct and substantial rather than
8 potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final
9 and conclusive [see *Spokane v. Taxpayers*, 111 Wn.2d 91, 96 (1988)], the Court of Appeals ruled
10 in favor of the taxpayer plaintiffs on both grounds of justiciable controversy and issue of major
11 public importance:
12

13 Here, the parties have an actual, present, and existing dispute: whether the PUD
14 has legal authority to repair appliances. This dispute is not hypothetical or
15 speculative. ... The parties also have "genuine and opposing interests," which are
16 both direct and substantial. ... The PUD has an interest in continuing its repair
17 services to serve customers and maintain its employees. The Taxpayers have an
18 interest in assuring that the PUD does not spend their tax dollars to repair
19 appliances (especially since it appears to be losing money). Finally, a judicial
20 determination of the dispute would be final and conclusive.

21 But even if no justiciable controversy exists, the court may hear a declaratory
22 judgment action if the issue is of major public importance. ... We conclude that
23 the issue is of widespread public interest because of the media coverage in Clark
24 County and because of the possibility that other PUD's statewide may be
25 interested in repairing appliances.

Kightlinger, 119 Wash. App. At 505 (citations omitted).

In accord, consider *Sasse v. King Cy.* 196 Wash. 242 (1938). The Supreme Court there
again acknowledges that certain types of taxpayer actions, like the instant one, provide both

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standing and the ability to state a claim where injunctive relief is sought:

As authority for his right to maintain this action, appellant cites the case of *Barnett v. Lincoln*, 162 Wash. 613, 299 P. 392. To this case may be added the following: ... *Maxwell v. Smith*, 87 Wash. 629, 152 P. 530;

Those cases, however, were actions for injunctions to prevent the doing of illegal acts involving the expenditure of public moneys. The authorities are agreed that in such cases a resident taxpayer has the right to invoke the interposition of a court of equity to prevent the consummation of a wrong which would result in an illegal disposition of the moneys of a municipal corporation. ... The reasons for sustaining such right of action are obvious.

Id., at 250 (citations omitted; emphasis added).

Walker v. Munro, 124 Wn.2d 402 (1994) also supports Plaintiffs' case. In *Walker*, the plaintiffs petitioned the Attorney General's Office precisely as did the Plaintiffs here. *Id.*, at 406. The Supreme Court agreed that taxpayers may bring a claim on behalf of all taxpayers even without alleging a personal stake in the matter, but found no justiciability because the tax initiative challenged by the plaintiffs had not yet gone into effect. *Id.*, at 419-20.

Further bolstering Plaintiffs' position is *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856 (1958) providing that the UDJA grants resident taxpayers the right to test the constitutionality of a statute when the Attorney General has declined to do so, even in the absence of special injury – precisely the set of circumstances applicable here. “We adhere to the interpretation, in the cited cases, of the declaratory judgment act, and hold that the act authorizes the appellant, as a taxpayer of this state, to challenge the constitutionality of chapter 214, since the attorney general has refused to do so.” *Id.*, at 861.² See also *Miller v. City of Pasco*, 50 Wn.2d 229 (1957)

² See also *Miller v. City of Pasco*, 50 Wn.2d 229 (1957) (accord)(finding that liberal construction of UDJA [RCW 7.24.120] provides that resident-taxpayer has standing to challenge constitutionality of law).

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1 (accord)(finding that liberal construction of UDJA [RCW 7.24.120] provides that resident-
2 taxpayer has standing to challenge constitutionality of law). In *Miller*, the Supreme Court
3 affirmed the trial court's determination, under the UDJA, that Pasco's ordinance permitting it to
4 lease and dispose of realty described in the act was unconstitutional as special legislation.

5 **1. Plaintiffs Satisfy the Traditional Justiciability Test.**

6 As in *Kightlinger, Sasse, and Miller*, the Plaintiffs have alleged a justiciable controversy.
7 The taxpayer action confers both standing and a claim upon which relief can be granted and is,
8 therefore, justiciable. For if the taxpayer cannot demonstrate illegal governmental activity, then
9 he has no standing to challenge those acts absent direct, special, or pecuniary injury in the first
10 place.

11 The dispute here is far from abstract or speculative, for it seeks to remedy numerous
12 facial, constitutional deficiencies in Ch. 16.50 RCW and Ch. 16-24 WAC that arguably condone
13 the present and future torture of thousands of animals within the borders of the State of
14 Washington and Snohomish County. The cruelty permitted by the religious exemptions at issue,
15 forcing cattle, calves, sheep, pigs, horses, mules, and goats to suffer at the hands of those who
16 assert a theological necessity to kill by a means that would otherwise constitute illegal
17 mistreatment, presents quite the opposite of a merely speculative or hypothetical disagreement.
18 The dispute is imminent, ongoing, and threatens the lives of nonhuman animal victims
19 throughout the region, those without voices but through taxpayers such as PSH. Where the State
20 has violated the constitutions by, for instance, by exonerating ritualists but criminalizing the
21 same conduct by non-ritualists, thereby misusing taxpayer dollars to permit state-sanctioned
22 animal cruelty to go unpunished, the State and Plaintiffs have genuine and opposing interests.

24 **PLAINTIFFS' MOTION TO STRIKE**
25 **AFFIRMATIVE DEFENSES - 7**

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1 Moreover, the Plaintiffs' interests in preserving taxpayer dollars for the enactment and
2 implementation of fair laws that avoid animal cruelty are direct and substantial, not potential or
3 abstract. Indeed, PSH's *raison d'être* is to end animal cruelty. Finally, judicial determination of
4 the exemptions' constitutionality will be final and conclusive.

5 **2. Plaintiffs Satisfy the Major Public Importance Alternative Test.**

6 Even if not justiciable, the court may still choose to hear a matter of major public
7 importance. The court is likely aware how the public reacts to animal cases, particularly those
8 involving abuse or neglect (with more attendance in, and letters to, the court, as well as outrage
9 over criminal acts against nonhumans versus those against humans). Further, the court may take
10 judicial notice of the fact that more than 95 percent of all Washingtonians consider themselves
11 omnivores and consume animal products, but who also do not desire that the animals giving their
12 lives should be treated cruelly. As explained in the Mar. 17, 2009 letter to the Attorney General
13 (*Karp Decl.*, Exh. 1), the federal Humane Methods of Slaughter Act was passed over 50 years
14 ago due to significant national concern over the manner in which the billions of land mammals
15 are killed in the United States alone each year. Washington followed suit nine years later in
16 passing its own humane method of slaughter law. Unlike its federal counterpart, Ch. 16.50 RCW
17 imposed criminal penalties. RCW 16.50.170. The purpose statement bespeaks the importance of
18 this issue:
19

20 **Declaration of policy.**

21 The legislature of the state of Washington finds that the use of humane methods
22 in the slaughter of livestock prevents needless suffering; results in safer and better
23 working conditions for persons engaged in the slaughtering industry; brings about
24 improvement of products and economy in slaughtering operations; and produces
25 other benefits for producers, processors and consumers which tend to expedite the
orderly flow of livestock and their products. It is therefore declared to be the

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1 policy of the state of Washington to require that the slaughter of all livestock, and
2 the handling of livestock in connection with slaughter, shall be carried out only by
3 humane methods and to provide that methods of slaughter shall conform generally
4 to those authorized by the Federal Humane Slaughter Act of 1958, and regulations
5 thereunder.

6 RCW 16.50.100. The court may also take notice that Washington's ritualistic packers and
7 slaughterers do not want to engage in activity that could expose them to criminal prosecution,
8 which is why eliminating the unconstitutional exceptions will provide greater certainty to those
9 industries and individuals who may not know what is a bona fide "ritual requirement[] of any
10 religious faith." RCW 16.50.110(3)(b). Lastly, the court may take judicial notice of the large
11 influx of immigrants from countries where ritualized slaughter is performed, typically by
12 Muslims from African countries following *halal* customs. In this regard, many such individuals
13 slaughtering animals for private consumption, though killing ostensibly in accordance with their
14 faith, will be prosecuted for animal cruelty since they do not constitute "packers" and
15 "slaughterers," groups defined as persons engaged in the "business of slaughtering" or
16 "commercial or custom slaughtering of" livestock. RCW 16.50.110(5,7).

17 It would be hard to fathom an issue that would command more attention from every
18 member of the public than the one before the court presently. In every supermarket, nearly every
19 restaurant, and on nearly every dinner table, the ethical and legal issue of cruelty to farmed
20 animals is one of national import and rhetorical consumption. Of recent note is Nicholas D.
21 Kristof, *Humanity Even for Nonhumans*, New York Times (Apr. 9, 2009), noting that "animal
22 rights are now firmly on the mainstream ethical agenda." As further evidence of public
23 importance, consider that on May 1, 2008, after an extensive 2-1/2 year examination, the Pew
24 Commission on Industrial Farm Animal Production ("PCIFAP") reported that current industrial

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1 farm animal production often poses unacceptable risks to public health, the environment and the
2 welfare of animal themselves. The commissioners determined that the negative effects of the
3 IFAP system are too great and the scientific evidence is too strong to ignore. Significant changes
4 must be implemented and start now. While some areas of animal agriculture have recognized
5 these threats and have taken action, it is clear the industry has a long way to go. See the full
6 report at www.ncifap.org.

7 ***3. The Purported Political Question Doctrine Does Not Apply Here.***

8 Plaintiffs do not ask the court to make a policy judgment. Rather, they seek invalidation
9 of a statute on constitutional grounds, which raises no nonjusticiable, political question. Whether
10 Congress has passed an unconstitutional law is not a political question; to the contrary, the
11 United States Supreme Court held, it “has a duty to conduct such a review.” *U.S. v. Munoz-*
12 *Flores*, 495 U.S. 385, 390-91 (1990) (claim that statute requiring courts to impose monetary
13 “special assessment” on any person convicted of federal crime passed in violation of origination
14 clause and did not present nonjusticiable political question, on theory that invalidation of statute
15 would evince lack of respect for determination of House of Representatives). “[I]t goes without
16 saying that interpreting congressional legislation is a recurring and accepted task for the federal
17 courts.” *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

18
19 “The political question doctrine excludes from judicial review those controversies which
20 revolve around policy choices and value determinations constitutionally committed for
21 resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is
22 particularly ill suited to make such decisions.” *Id.* At the same time, the courts must differentiate
23 between political questions that courts are precluded from addressing, and those with simply

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25 **AFFIRMATIVE DEFENSES - 10**

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1 “significant political overtones,” which courts may address. *Id.* (explaining that the political
2 question doctrine did not bar judicial resolution of controversy as to whether, under Pelly and
3 Packwood Amendments, Secretary of Commerce was required to certify that Japan's whaling
4 practices diminished effectiveness of International Convention for Regulation of Whaling
5 because Japan's harvest exceeded quotas established under Convention, since challenge to
6 decision not to certify Japan for harvesting whales in excess of quotas required "applying no
7 more than the traditional rules of statutory construction, and then applying this analysis to the
8 particular set of facts presented").

9 *Northwest Greyhound Kennel Ass'n v. State*, 8 Wash.App. 314 (II, 1973), and *Brown v.*
10 *Owen*, --- P.3d ---, 2009 WL 564432 (Wash.,2009) allude to the United States Supreme Court
11 factors of *Baker v. Carr* to determine nonjusticiability on political grounds. *Greyhound*, at 321;
12 *Brown*, at ¶ 21. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six factors
13 that may make a question nonjusticiable:
14

15 [1] a textually demonstrable constitutional commitment of the issue to a
16 coordinate political department; or

17 [2] a lack of judicially discoverable and manageable standards for resolving it; or

18 [3] the impossibility of deciding without an initial policy determination of a kind
19 clearly for nonjudicial discretion; or

20 [4] the impossibility of a court's undertaking independent resolution without
21 expressing lack of the respect due coordinate branches of government; or

22 [5] an unusual need for unquestioning adherence to a political decision already
23 made; or

24 [6] the potentiality of embarrassment from multifarious pronouncements by
25 various departments on one question.

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1 *Id.* at 217 (complaint containing allegations that a state statute affected an apportionment
2 depriving plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment
3 presented a justiciable constitutional cause of action, and the right asserted was within reach of
4 judicial protection under the Fourteenth Amendment, and did not present a nonjusticiable
5 political question). *See also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th
6 Cir.1992) (quoting the six *Baker* factors).

7 The *Baker* factors must be interpreted in light of the purpose of the political question
8 doctrine, which “excludes from judicial review those controversies which revolve around policy
9 choices and value determinations constitutionally committed for resolution to the halls of
10 Congress or the confines of the Executive Branch.” *Japan Whaling*, *supra*, at 230. A
11 nonjusticiable political question exists when, to resolve a dispute, the court must make a policy
12 judgment of a legislative nature, rather than resolving the dispute through legal and factual
13 analysis. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir.1992). As the Supreme Court
14 added:
15

16 The Government may be right that a judicial finding that Congress has passed an
17 unconstitutional law might in some sense be said to entail a "lack of respect" for
18 Congress' judgment. But disrespect, in the sense the Government uses the term,
19 cannot be sufficient to create a political question. If it were, *every* judicial
20 resolution of a constitutional challenge to a congressional enactment would be
21 impermissible. Congress often explicitly considers whether bills violate
constitutional provisions, and any law's enactment is predicated at least implicitly
on a judgment that the law is constitutional. These factors do not foreclose
subsequent judicial scrutiny of a law's constitutionality. To the contrary, this
Court has a duty to conduct such a review.

22 *U.S. v. Munoz-Flores*, 495 U.S. 385, 390-91, 110 S.Ct. 1964 (1990); *see also Arakaki v. Lingle*,
23 477 F.3d 1048 (9th Cir.2007) (in general, the political question doctrine does not bar adjudication

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1 of a facial constitutional challenge even though Congress has plenary authority, and the
2 executive has broad delegation, over Indian affairs).

3 *Brown v. Owen* did not reach the question of whether the supermajority requirement of
4 RCW 43.135.035 was constitutional because it found the action inappropriate for mandamus.
5 Nonetheless, it did address the political question raised by the plaintiff – viz., whether she could
6 ask the court to in essence “make a parliamentary ruling” by overturning the president of the
7 senate’s determination on her point of order, using a writ of mandamus. *Brown*, at ¶¶ 22-24. This
8 decision is eminently sensible since it clearly involves using the judicial branch to officiously
9 and directly interfere in the affairs of the legislature branch by “referee[ing] disputes over
10 parliamentary rulings between members of the same house.” *Id.*, ¶ 25. The *Brown* case sits at the
11 opposite end of the spectrum from this case when it comes to determining justiciability on a
12 political question. To read the cases as might be urged by Defendants would result in courts
13 never being permitted to declare a statute or regulation unconstitutional since, in doing so, the
14 court would be tinkering with the fruit of the political process.

15
16 *Brown* cites to *State v. Manussier*, 129 Wn.2d 652 (1996), which involved a claim that I-
17 593, the “three strikes law,” violated the federal constitution’s Guarantee Clause (i.e., republican
18 form of government), resulting in an attack on the very constitutionality of the initiative process
19 itself. *Id.*, at 670. Prudently, the Supreme Court held that such argument “presents an issue which
20 may be beyond the power of this court to decide[.]” adding that a similar challenge raised before
21 the United States Supreme Court was rejected when that court “held that the issue was political
22 and governmental and not within the judicial power to determine[.]” *Id.*, at 670-71 (citing *Pacific*
23 *States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912)). Unlike *Manussier*, the

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25 **AFFIRMATIVE DEFENSES - 13**

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1 Plaintiffs here are not attacking the legislative process itself, but the unconstitutional product of
2 that process. As it is the judiciary's job to interpret the laws passed by the legislature, no political
3 question arises here.

4 **C. Affirmative Defense 4 Fails (Standing)**

5 Defendants broadly assert that the Plaintiffs have no standing. Yet Plaintiffs have sought
6 injunctive and declaratory relief as part of a taxpayer action in their representative capacities as
7 taxpayers on behalf of all Washingtonians concerned with the government's making and
8 enforcing illegal laws and regulations using public funds. As a taxpayer action, the Plaintiffs
9 possess standing regardless of whether they suffered special injury.

10 The United States Supreme Court has relaxed the stringent federal standing requirement
11 at the municipal level to allow ordinary taxpayer standing. *ASARCO Inc. v. Kadish*, 490 U.S.
12 606, 613-14, 109 S.Ct. at 2043-44 (1989). Over a half-century long line of Washington Supreme
13 Court precedent requires no personal stake or injury to challenge illegal acts of government, so
14 long as the condition precedent of Attorney General declination is met. *See Reiter v. Wallgren*,
15 28 Wn.2d 872 (1947). The Supreme Court described the prerequisite as follows:

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

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

24 *State ex rel. Boyles v. Whatcom Cy.*, 103 Wn.2d 610, 613-14 (1985)(citations omitted). Divisions

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1 I (*Robinson*), II (*Kightlinger*), and III (*WPTA*) have reaffirmed this holding. *Robinson v. City of*
2 *Seattle*, 102 Wash.App. 795 (I, 2000); *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App.
3 501 (II, 2003); *Washington Public Trust Advocates v. City of Spokane*, 117 Wash.App. 178 (III,
4 2003).

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

9 *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269 (1975)(emphasis added).³ Aside from obtaining a
10 decline letter from the Attorney General, the only remaining prerequisite for maintaining such an
11 action is to prove taxpayer status. Arguably, any citizen who pays state sales tax, gasoline taxes,
12 property taxes, employment taxes, B & O taxes, business license taxes, and/or driver's license
13 tabs has standing to challenge the actions of the State since, ostensibly, any and all of these
14 revenue sources finance the operations of the legislative and executive branches of state
15 government.

16 The case of *Robinson v. City of Seattle*, 102 Wash.App. 795 (2000) is on point. In
17 *Robinson*, eight residents of the City of Seattle and a non-profit corporation who paid local sales
18 and use taxes brought a Fourth Amendment and Art. I, § 7 (Washington Constitution) challenge
19 to a Seattle ordinance requiring a preemployment urinalysis drug test for about half the vacancies
20 filled by the City. *Id.*, at 800-804. None of the taxpayer plaintiffs applied for a job with the City
21 of Seattle. *Id.*, at 804. The *Robinson* court found that the taxpayers had standing under the same
22 doctrine that permits standing for the taxpayers in the present case. *Id.*, at 805. The City of
23

24 **PLAINTIFFS' MOTION TO STRIKE**
25 **AFFIRMATIVE DEFENSES - 15**

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1 Seattle in *Robinson* pled lack of standing as an affirmative defense, as the Defendants do here:

2 Washington recognizes “litigant standing to challenge governmental acts on the
3 basis of status as a taxpayer.” ^{FN8} Under the doctrine of taxpayer standing, “a
4 taxpayer need not allege a personal stake in the matter, but may bring a claim on
5 behalf of all taxpayers [.]” ^{FN9} Taxpayers need not allege a direct, special, or
6 pecuniary interest in the outcome of the suit, but must demonstrate that their
7 demand to the Attorney General to institute the action was refused, unless such a
8 request would have been useless. ^{FN10}

9 FN8. *State ex rel. Boyles v. Whatcom County Super. Ct.*, 103 Wash.2d 610, 614,
10 694 P.2d 27 (1985).

11 FN9. *Walker v. Munro*, 124 Wash.2d 402, 419-20, 879 P.2d 920 (1994); see also
12 Kenneth R. Bjorge, *Standing to Sue in the Public Interest: The Requirements to
13 Challenge Statutes and Acts of Administrative Agencies in the State of
14 Washington*, 14 Gonzaga L.Rev. 141, 155-61 (1978).

15 FN10. *City of Tacoma v. O'Brien*, 85 Wash.2d 266, 269, 534 P.2d 114 (1975).

16 The Taxpayers assert their standing under this doctrine, and the City makes no
17 argument to the contrary. ^{FN11} We agree that the Taxpayers have standing. ^{FN12}

18 FN11. Although the City listed lack of standing as an affirmative defense in its
19 answer, the City did not argue lack of standing in its motion for summary
20 judgment or in its brief on appeal.

21 *Id.*, at 804-805. Where the fundamental legality of the action or inaction is called into question,
22 and the thrust of the lawsuit is to enforce the law, “a taxpayer need not allege a personal stake in
23 the matter, but may bring a claim on behalf of all taxpayers[.]” *Walker v. Munro*, 124 Wn.2d
24 402, 219-20 (1994) (citation omitted).⁴ Whether the acts, even if illegal, create a tax burden, is
25 irrelevant and such showing is not required. See *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 95
(1954) (permitting taxpayer suit even though no monetary loss to taxpayer alleged). Indeed, in

³ See also *Tabor v. Moore*, 81 Wn.2d 613, 617+ (1972) and *Farris v. Munro*, 99 Wn.2d 326, 329+ (1983).

⁴ See also *Times Publ'g Co. v. City of Everett*, 9 Wash. 518 (1894) (forcing City of Everett to abide by city code).

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1 California, even if illegal conduct results in a *savings* to the taxpayer, the action may nonetheless
2 commence.⁵

3 PSH's very mission to protect animals from unnecessary pain and suffering, and its status
4 as the namesake for Washington's first felony cruelty law,⁶ bespeaks precisely how it fits within
5 the zone of interests to be protected by what should be an unadulterated (i.e., unfettered by
6 unconstitutional limitations) and harmonious application of the anti-cruelty (Ch. 16.52 RCW)
7 and humane slaughter (Ch. 16.50 RCW) laws. Defendants may attempt to construe this suit as a
8 taxpayer challenge to *discretionary* acts of government for which special injury to the taxpayer
9 must be demonstrated. This interpretation should be rejected, for Washington has acknowledged
10 taxpayer standing in two regards:

11 (Category 1) when challenging government acts that are illegal or invalid; and

12 (Category 2) when challenging *otherwise legal and valid* government acts.

13
14 Category 1 requires no direct, special, or pecuniary interest in the outcome of the action, while
15 Category 2 does. It should be noted at the outset that, unless compelled to act, every task
16 undertaken by government is discretionary in nature, so that Category 1 relates to "discretionary
17 but illegal" acts and Category 2 to "discretionary but legal" acts. The subtext to the distinction,
18 apparently, is that the government has no discretion to engage in illegal or unconstitutional
19 conduct. That said, the action itself, at the time of being committed by government, was pursuant
20

21 ⁵ *Wirin v. Parker*, 313 P.2d 844, 894-95 (Cal. 1957)(stating that a "plaintiff may maintain an action to restrain the
22 expenditure of public funds for illegal purposes. It is immaterial that the amount of the illegal expenditures is small
23 or that the illegal procedures actually permit a saving of tax funds It is elementary that public officials must
24 themselves obey the law.") See also *E. Mo. Laborers Dist. Council v. St. Louis Cy.*, 781 S.W.2d 43, 46 (Mo.
25 1989)(holding that a taxpayer need not prove their taxes will increase because of the alleged expenditure, since the
impact is presumed).

1 to discretion, not a ministerial duty.

2 For example, if the City Council and Mayor of Seattle entered into a contract with a
3 hitman to kill the Mayor of Redmond, such government action would be discretionary in the
4 sense that no law compels such a contract to be created, however the contract itself is illegal and
5 invalid and properly subject to Category 1 taxpayer challenge.

6 Another example relates to the Washington State Legislature passing a law requiring all
7 people of a particular race or religion to be either arrested or shot on sight after curfew. Such a
8 legislative decision would be discretionary in that it was the product of a vote by the majorities
9 of the House and Senate leadership followed by signature into law by the Governor, yet it would
10 also be highly illegal and invalid and subject to Category 1 taxpayer challenge. If law
11 enforcement were to then enforce this unconstitutional law, using tax dollars, a separate
12 government action would arise allowing for Category 1 taxpayer standing. And if a prosecuting
13 attorney were to charge the arrestee (who is a member of the prohibited class with violating this
14 law, but not a person who is not a member of the prohibited class) for staying out after curfew,
15 yet another government action would exist giving rise to Category 1 taxpayer standing – since
16 the passing of the law, enforcement of the law by police, and prosecution of the law by the
17 district attorney would all involve highly unconstitutional actions.

18
19 The same type of challenge is raised here, and the *Complaint* seeks to capture those
20 nuances, even though the very existence of this unconstitutional law seems to be proof enough of
21 government action. The Washington Supreme Court has repeatedly allowed taxpayers to assert
22

23
24 ⁶ Ch. 16.52 RCW (originally passed in 1994 and entitled “Pasado’s Law.”)

1 Category 1 standing to facial challenges to otherwise illegal government activity:

- 2 • *Calvary Bible Presbyterian Church of Seattle v. Board of Regents*, 72 Wn.2d 912 (1968)
3 (finding Category 1 taxpayer standing to challenge tax-supported university teaching
4 course dealing with historical, biographical, narrative or literary features of the Bible in
5 violation of the First Amendment and Wash. Const. art. 1, § 11);
- 6 • *City of Tacoma v. O'Brien*, 85 Wn.2d 266 (1975) (finding Category 1 taxpayer standing
7 to facially challenge Laws of 1974, 1st Ex. Sess., ch. 194, and then declaring it
8 unconstitutional for violating separation of powers);
- 9 • *Kightlinger v. PUD No. 1 of Clark Cy.*, 119 Wash.App. 501, 506 (II, 2003) (finding
10 Category 1 taxpayer standing to challenge PUD's appliance repair business on basis that
11 activity was illegal and lacked statutory authorization);
- 12 • *Robinson v. City of Seattle*, 102 Wash.App. 795 (I, 2000) (finding Category 1 taxpayer
13 standing to challenge constitutionality of Ord. 119278);
- 14 • *State ex rel. Boyles v. Whatcom Cy. Sup. Ct.*, 103 Wn.2d 610 (1985) (finding Category 1
15 taxpayer standing to challenge county jail's work release program for violating First
16 Amendment and Wash. Const. art. 1, § 11).

17 As with the above cited cases, the Washington legislature does not have the authority to
18 enact unconstitutional laws. Nor do the directors and agents of the Washington State Department
19 of Agriculture, prosecuting attorneys, and police departments have the right to enforce
20 unconstitutional laws and grant unconstitutional exemptions. That much seems to be clear. As to
21 whether enacting an unconstitutional law is illegal, one need look no further than the
22 Washington and Federal Constitutions, the relevant excerpts of which are found in the Appendix
23 to this motion. As there indicated, the State is restrained by the 14th Amendment from "mak[ing]
24 or enforc[ing] any law" that violates the Privileges & Immunities Clause. Moreover, the State
25 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

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1 prohibitions that “[n]o law shall be passed” granting special privileges and immunities.
2 Wash.Const. Art. I, § 12.

3 As with the Federal Constitution, Washington forbids deprivation of life, liberty, or
4 property without due process of law and prevents the legislature from “excus[ing] acts of
5 licentiousness or justify[ing] practices inconsistent with the peace and safety of the state.”
6 Wash.Const. Art. I, §§ 3, 11. Further, the Washington Constitution echoes the First
7 Amendment’s prohibition that “Congress shall make no law” establishing religion, but adds that
8 “[n]o public money or property shall be appropriated for or applied to any religious worship,
9 exercise or instruction, or the support of any religious establishment.” Wash.Const. Art. I, § 11.
10 The First Amendment applies to the states through the Due Process Clause of the 14th
11 Amendment. *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 218 (1992).
12

13 Taxpayers fund legislative and executive branch activity. When those tax funds are used
14 in a fashion that violates the explicit terms of the Washington and Federal Constitutions, illegal
15 governmental activity has been identified. The Plaintiffs have alleged that the religious
16 exemptions under Ch. 16.50 RCW and Ch. 16-24 WAC, and as implemented by the WSDA, do
17 harm to our constitutions – both in the “mak[ing]” and “enforc[ing]” of these laws, injustices
18 inflicted through the use of taxpayer funds.

19 In this respect, the Supreme Court decision of *Boyles*, cited above, is judicious, for it
20 permitted a taxpayer to challenge the decision of Whatcom County to assign county prisoners to
21 a work release program conduct by the church-supported Lighthouse Mission, Inc. because that
22 decision violated the establishment clause. *Boyles*, at 615 (finding that though “alleged injury is
23 generalized, we recognize [Boyles’s] standing to sue on the basis of taxpayer status.”). The

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1 Court of Appeals’s decision in *Kightlinger* is also in concordance, as it finds that the Taxpayers’
2 challenge to the lawfulness of the PUD’s authority to operate an appliance repair business did
3 not require proof of special injury, citing *Boyles*. Further, the Court of Appeals’s decision in
4 *Robinson* found taxpayers had standing to facially challenge the validity of Seattle’s mandatory
5 drug testing law, even though the inquiry “is not whether application of the challenged
6 enactment violates a particular individual’s rights, but whether the government has acted
7 unlawfully.” And the Supreme Court in *Calvary Bible* found that individual minister-taxpayers
8 had standing to challenge the University of Washington’s teaching of a Bible class without proof
9 of special harm. 72 Wn.2d at 917-918.

10
11 As to the claim that the UDJA requires special injury, please see the above-cited case of
12 *Tattersall* as authority that taxpayers need not prove special harm to seek declaratory judgment
13 that a statute is unconstitutional.

14 In closing on this subject, a humane slaughter case worthy of mention is and *Jones v.*
15 *Butz*, 374 F.Supp. 1284 (S.D.N.Y.1974). There, the district court held that the plaintiffs had
16 standing to sue to challenge the religious exemption to the federal HSA. It found standing based,
17 in part, on federal taxpayer status. *Id.*, at 1289 (citing criteria of *Flast v. Cohen*, 392 U.S. 83
18 (1968), which allows federal taxpayer standing without special injury in challenges brought
19 under the First Amendment, and noting expenditure of money to pay for travel and subsistence
20 expenses of members of advisory committee authorized under section 5 of the Act and to
21 administer other provisions of the Act).

22
23 **D. Affirmative Defense 5 Fails (Ripeness)**

24 Ripeness is intended to “prevent the courts, through avoidance of premature adjudication,
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1 from entangling themselves in abstract disagreements.” *Abbott Labs. v. Gardner*, 387 U.S. 136,
2 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The role of
3 the courts is “to adjudicate live cases or controversies.” *Thomas v. Anchorage Equal Rights*
4 *Comm'n*, 220 F.3d 1134, 1138 (9th Cir.2000) (en banc).

5 Ripeness requires fitness of the issues for judicial decision and hardship to the parties of
6 withholding court consideration. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Fitness of
7 the issues is composed of three requirements: if the issues raised are primarily legal, do not
8 require further factual development, and the challenged action is final. *State v. Bahl*, 164
9 Wash.2d 739 (2008).

10 Purely legal or constitutional issues are generally fit for adjudication. *Pennell v. City of*
11 *San Jose*, 485 U.S. 1, 11-14 (1988) (due process and equal protection issue ripe). Moreover,
12 “passage of a statute and putting it into effect (even if the effect is not complete) gives rise to a
13 dispute ripe for judicial review.” *Buono v. Kempthorne*, 502 F.3d 1069, 1078 n. 6 (9th
14 Cir.2007). On the other hand, where a decision would require extensive factual findings of the
15 sort normally made by an agency in the course of its deliberations, the courts have held the
16 dispute unripe. *See, e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 165-66, 87 S.Ct. 1520,
17 1525, 18 L.Ed.2d 697 (1967) (challenge to FDA regulations unripe where administrative hearing
18 would set forth basis for regulations, supply factual basis of order). Here, the issue presented is
19 purely legal (viz., whether or not the statute and regulation in question are facially
20 unconstitutional). The issue does not require further factual development because the law stands
21 as written.
22
23

24 The imminent threat of disbursement of taxpayer funds in violation of the Constitution
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1 constitutes hardship to Plaintiffs. *See American Civil Liberties Union Foundation of Louisiana*
2 *v. Blanco*, 523 F.Supp.2d 476, 485 (E.D.La.,2007) (“[T]here will be hardship to the ACLU if the
3 Court withholds judicial decision, including the imminent threat of disbursement of taxpayer
4 funds in violation of the First Amendment.”). The Plaintiffs have in fact suffered an injury in the
5 misuse of their taxpayer dollars on promoting animal cruelty in favor of ritual slaughterers and
6 packers – a two-fold illegal preference: first, in contrast to nonritual slaughterers and packers;
7 and second, in contrast to noncommercial ritual slaughterers and packers – subverting a
8 fundamental goal of both Ch. 16.52 RCW and Ch. 16.50 RCW in stemming acts causing
9 unnecessary pain, suffering, and torturous deaths to nonhuman animals.

10
11 “[T]he Supreme Court [has] implicitly addressed many of the reasons why a case based
12 on taxpayer standing is fit for judicial decision.” *American Civil Liberties Union Foundation of*
13 *Louisiana v. Blanco*, 523 F.Supp.2d 476 (E.D.La.,2007) (civil rights advocacy group's motion
14 for preliminary injunction was ripe for adjudication alleging that state legislature's appropriations
15 of state taxpayer money to churches violated Establishment Clause, even though churches had
16 not yet submitted cooperative endeavor agreements necessary to obtain funds, where all legal
17 issues were before court, group's challenge did not depend on agreements' content, and there was
18 imminent threat of disbursement of taxpayer funds in violation of First Amendment) (*citing Flast*
19 *v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968)).

20
21 **[A] taxpayer will have standing ... when he alleges that ... his tax money is**
22 **being extracted and spent in violation of specific constitutional protections ...**
23 Under such circumstances, we feel confident that the questions will be framed
24 with the necessary specificity, that the issues will be contested with the necessary
adverseness and that the litigation will be pursued with the necessary vigor to
assure that the constitutional challenge will be made in a form traditionally
thought to be **capable of judicial resolution.**

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1 *Flast* at 106, 88 S.Ct. 1942 (emphasis added).The Supreme Court has stated that circumstances
2 satisfying the constitutional standing requirement also “would appear to satisfy [the ripeness]
3 requirement” to the extent the ripeness requirement derives from the constitutional requirement
4 of a case or controversy. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59,
5 81 (1978).

6
7 Furthermore, “Facial challenges to regulation are generally ripe the moment challenged.”
8 *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Kawaoka v. City of*
9 *Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.1994)(“Ripeness requirements are relevant only to
10 ‘as-applied’ challenges, and not to facial challenges.”). As noted, the Plaintiffs facially challenge
11 the religious exemptions of the Act and its WAC provisions.

12 The Defendants may reply that only First Amendment challenges permit facial attacks,
13 and that Plaintiffs present challenges other than strictly those raised by the First Amendment, but
14 Division I of the Washington Court of Appeals acknowledged that facial challenges brought
15 incidental to a taxpayer action need not be limited to First Amendment claims. The City of
16 Seattle argued:

17
18 The first question presented is what test applies when a taxpayer challenges the
19 constitutionality of an enactment. The City argues that because a taxpayer
20 challenge is a facial challenge, the Taxpayers here must satisfy the standard set
21 forth in *United States v. Salerno* ^{FN13} for facial attacks in First Amendment cases-
22 that is, the Taxpayers must prove “that no set of circumstances exists under which
the Act would be valid.” According to the City, the Taxpayers' concession ^{FN14}
that the ordinance is constitutional when applied to police officers or firefighters
is fatal to their challenge to the remainder of the ordinance.

23 *Robinson v. City of Seattle*, 102 Wash.App. 795, 805-806 (I, 2000). The Taxpayers responded:

24 It is true that the Taxpayers' challenge is inherently “facial,” because the inquiry

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1 is not whether application of the challenged enactment violates a particular
2 individual's rights, but whether the government has acted unlawfully. It is also
3 true, as the Taxpayers point out, that no Washington court has applied the *Salerno*
4 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.

5 *Id.*, at 806. Following suit with several other courts rejecting application of *Salerno* – viz., the
6 New Mexico Supreme Court, Minnesota Supreme Court, and California Supreme Court – our
7 Court of Appeals decided to reject the “no set of circumstances” test as inappropriate for a
8 taxpayer challenge under the state constitution, instead applying “the test dictated by the nature
9 of the challenge.” *Id.*, 807-808. The Court proceeded to examine – facially – the constitutionality
10 of Seattle’s ordinance under Art. I, § 7 of the Washington Constitution, and concluded that the
11 law was unconstitutional in part. *Id.*, at 828. As noted, the Plaintiffs have raised many state
12 constitutional challenges.
13

14 But even if the court decides to interpret Plaintiffs’ claims as raising “as applied”
15 challenges, Plaintiffs reiterate that those grounds have been satisfied. As mentioned, this case
16 presents an exclusively legal issue requiring no additional fact-finding. Plaintiffs, as taxpayers,
17 face an ongoing injury by the expenditure of public funds on the illegal enactment and
18 enforcement of Ch. 16.50 RCW and Ch. 16-24 WAC. Even if additional facts might be of aid,
19 the question here is overwhelmingly legal and the marginal value of more fact-finding is
20 insufficient to rob the case of ripeness. *American Forest & Paper Ass’n v. U.S. E.P.A.*, 137 F.3d
21 291, 297 (5th Cir.1998)(case ripe where any additional factual questions were “overshadowed by
22 the legal question that tower[ed] over [the] case.”). Where a new statute does not require further
23 interpretation by an agency and can be analyzed on purely legal grounds, a claim is ripe for

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1 review. *Pacific Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 201
2 (1983)(where question of preemption was predominantly legal and where postponement of
3 decision as to whether California statute was valid would work substantial hardship on utilities,
4 issue was ripe for adjudication even without knowing whether law was valid).

5 Lastly, persuasive precedent may be found with *Farm Sanctuary v. Department of Food*
6 *and Agriculture*, 63 Cal.App.4th 495, 74 Cal.Rptr.2d 75 (1998). When faced with a challenge by
7 Farm Sanctuary to California's humane slaughter law, the California Court of Appeals concluded
8 that the controversy was ripe. It noted:

9 **In this case, the ripeness test is satisfied.** As to the first prong, the question
10 before us is not so abstract or hypothetical that we should await a better factual
11 scenario. Farm Sanctuary contends that the ritualistic slaughter regulation is
12 invalid *on its face* because it is inconsistent with the HSL. "[T]he issue tendered
13 is a purely legal one: whether the statute was properly construed by the
14 [department]" (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149 [87
15 S.Ct. 1507, 1515, 18 L.Ed.2d 681], followed in *Pacific Legal Foundation, supra*,
16 33 Cal.3d at pp. 171-173.)In addition, "[t]he regulation challenged here,
17 promulgated in a formal manner after announcement ... and [after] consideration
18 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],
19 fn. omitted.)

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

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.

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1 Further, as a practical matter, Farm Sanctuary should be allowed to
2 challenge the ritualistic slaughter regulation. Assuming that the regulation
3 authorizes an exemption from the HSL's humane slaughter requirement,
4 someone who is granted an exemption is not about to challenge the
5 regulation. By the same token, someone who is denied an exemption might
6 seek to overturn the denial but would not attack the regulation's creation of
7 an exemption. Thus, unless an organization like Farm Sanctuary is permitted
8 to challenge the department's rulemaking authority, the ritualistic slaughter
9 regulation will be immune from judicial review. (See *Bd. of Soc. Welfare v.*
10 *County of L.A.* (1945) 27 Cal.2d 98, 100 [162 P.2d 627] [state board could pursue
11 litigation on behalf of individuals who were not financially or physically able to
12 seek relief]; *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992)
13 11 Cal.App.4th 1513, 1519 [14 Cal.Rptr.2d 908] [association had standing to
14 seek relief for third persons, in part because lack of standing would prevent
15 judicial review of challenged conduct]; *California Water & Telephone Co. v.*
16 *County of Los Angeles* (1967) 253 Cal.App.2d 16, 24 [61 Cal.Rptr. 618]
17 [declaratory relief action may raise justiciable issue if other means of testing
18 validity of government's decision are not available].) As one court has observed:
19 “Where [a statute] is expressly motivated by considerations of humaneness
20 toward animals, who are uniquely incapable of defending their own interests in
21 court, it strikes us as eminently logical to allow groups specifically concerned
22 with animal welfare to invoke the aid of the courts in enforcing the statute.”
23 (*Animal Welfare Institute v. Krepes* (D.C. Cir. 1977) 561 F.2d 1002, 1007 [183
24 App.D.C. 109] [dictum].)^{FN6}

25 *Id.*, at 502-503 (emphasis added). “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 case at hand is ripe. The issue of the constitutionality of the challenged statutes are
not merely “abstract disagreements.” The issue is fit for judicial resolution because (1) it is
primarily legal; (2) it does not require further factual development; and (3) the challenged action
is final. Moreover, the Plaintiffs and the Taxpayers face a definite hardship as long as the court
withholds court consideration (i.e., tax dollars spent sanctioning the enactment and selective
enforcement of unconstitutional laws that condone animal cruelty).

E. Affirmative Defense 6 Fails (Subject Matter Jurisdiction)

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1 The Superior Court shall have original jurisdiction ... for such special cases and
2 proceedings as are not otherwise provided for and ... all proceedings in which
jurisdiction shall not have been by law vested exclusively in some other court.

3 RCW 2.08.010. In addition, the Supreme Court shall have appellate jurisdiction in all actions and
4 proceedings involving the validity of a statute. RCW 2.04.010. Lastly, as a “court of record,” the
5 superior court has explicit jurisdiction to enter declaratory judgment as to “any question of
6 construction or validity arising under the ... statute [or] ordinance ... and obtain a declaration or
7 rights, status or other legal relations thereunder.” RCW 7.24.020. Of particular relevance is
8 RCW 7.24.110, which provides that the attorney general shall be served with a copy of the
9 proceeding and be entitled to be heard in any matter where a statute or ordinance is alleged to be
10 unconstitutional, as here. Further, superior courts also have the express power to issue
11 injunctions. RCW 7.40.010.

12
13 It is emphatically the province and duty of the judicial department to say what the law is.
14 Those who apply the rule to particular cases, must of necessity expound and interpret that rule.
15 *Marbury v. Madison*, 1 Cranch 137, 1803 WL 893 (U.S. Dist. Col., 1803). Thus, the Court reviews
16 the validity of statutes. The court has subject matter jurisdiction to review a state statute for
17 constitutionality, as the Supreme Court often rules on such matters as the appellate authority for
18 cases originally addressed by the trial court. Jurisdiction of the subject matter means not only
19 authority in the court to hear and determine the class of actions in which the particular action is
20 comprised, but also authority to hear and determine the particular question which it assumes to
21 determine; hence the essential elements of jurisdiction are said to be three: (1) the court must
22 have cognizance of the class of cases to which the one to be adjudged belongs; (2) the proper
23 parties must be present; and (3) the point decided must be, in substance and effect, within the

24 **PLAINTIFFS’ MOTION TO STRIKE**
25 **AFFIRMATIVE DEFENSES - 28**

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1 issues before the court. *State ex rel. New York Casualty Co. v. Superior Court for King Cy.*, 31
2 Wn.2d 834, 840 (1948).

3 In the case at bar, there is no doubt that the three requirements are met. The Superior
4 Court has cognizance of the class of actions here involved by virtue of Art. IV, § 6 of the
5 Washington constitution, RCW 2.28.010, and via case law. The proper parties have made
6 general appearances before the court under the provisions of RCW 4.28.210. The allegations
7 raised are within the issues before the Court, and are matters that the court is empowered to
8 consider by virtue of RCW 2.08.010, Ch. 7.24 RCW, and Ch. 7.40 RCW.

9 **VI. CONCLUSION**

10 For the reasons stated above, the court should grant Plaintiffs' motion to strike
11 affirmative defenses 3-6 and allow the case to proceed on the merits. A proposed order is
12 attached as *Exhibit A*.

13
14 Dated this June 1, 2009

15 ANIMAL LAW OFFICES

16 /s/ **Adam P. Karp**

17 _____
18 Adam P. Karp, WSBA No. 28622
19 Attorney for Plaintiffs

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DECLARATION

I, ADAM P. KARP, being over the age of eighteen and fully competent to make this statement, and having personal knowledge of the matters contained herein, hereby affirm:

1. The herein-stated factual allegations are true and correct to the best of my recollection.
2. Attached as **Exhibits 1-2** are true copies of the purported documents.

I declare under penalty of perjury under the laws of the State of Washington that the above is true to the best of my knowledge.

Executed this June 1, 2009, in the city of Bellingham, Washington.

ANIMAL LAW OFFICES

/s/ Adam P. Karp

Adam P. Karp, WSBA 28622

APPENDIX

WASHINGTON CONSTITUTION

(emphasis added)

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 11 RELIGIOUS FREEDOM. 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**

1 **property shall be appropriated for or applied to any religious worship,**
2 **exercise or instruction, or the support of any religious establishment: ...**

3 **SECTION 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED.**
4 **No law shall be passed** granting to any citizen, class of citizens, or corporation
5 other than municipal, privileges or immunities which upon the same terms shall
6 not equally belong to all citizens, or corporations.

7 **FEDERAL CONSTITUTION**
8 (emphasis added)

9 Amendment I.

10 **Congress shall make no law** respecting an establishment of religion, or
11 prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
12 press, or the right of the people peaceably to assemble, and to petition the
13 Government for a redress of grievances.

14 Amendment IV.

15 **The right** of the people to be secure in their persons, houses, papers, and effects,
16 against unreasonable searches and seizures, **shall not be violated**, and no
17 Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
18 and particularly describing the place to be searched, and the persons or things to
19 be seized.

20 Amendment V.

21 No person shall be held to answer for a capital, or otherwise infamous crime,
22 unless on a presentment or indictment of a Grand Jury, except in cases arising in
23 the land or naval forces, or in the Militia, when in actual service in time of War or
24 public danger; nor shall any person be subject for the same offense to be twice put
25 in jeopardy of life or limb, nor shall be compelled in any criminal case to be a
witness against himself, **nor be deprived of life, liberty, or property, without
due process of law; nor shall private property be taken for public use without
just compensation.**

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the
jurisdiction thereof, are citizens of the United States and of the State wherein they
reside. **No State shall make or enforce any law which shall abridge the
privileges or immunities of citizens of the United States; nor shall any State
deprive any person of life, liberty, or property, without due process of law;
nor deny to any person within its jurisdiction the equal protection of the
laws.**

1
2 **CERTIFICATE OF SERVICE**

3 I HEREBY CERTIFY that on June 1, 2009, I caused a true and correct copy of the foregoing and
4 note for motion to be served upon the following person(s) in the following manner:

- 5 [x] Email (stipulated for **motion**)
6 [x] Fax (stipulated for **note for motion**)

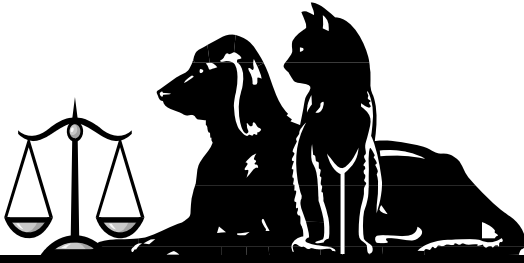
7 Mark H. Calkins
8 Kristen K. Mitchell
9 Attorney General of Washington
10 PO Box 40109
11 Olympia, WA 98504
12 (360) 586-6500
13 F: (360) 586-3564
14 markc@atg.wa.gov
15 ahdolyef@atg.wa.gov
16 kristenm1@atg.wa.gov

17
18 **/s/ Adam P. Karp**

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20
21
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Adam P. Karp, WSBA No. 28622

EXHIBIT 1



Vice Chair, ABA Animal Law Committee
WSBA Animal Law Section, Founder and Member
Washington State Association for Justice, Eagle
Member, Animal Legal Defense Fund
Member, National Animal Control Association
Member, Washington Animal Control Association
Editor, Animal Legal Reports (Welfare & Law Enf.)

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Web: www.animal-lawyer.com

By Certified Mail, Return Receipt Requested

Tuesday, March 17, 2009

Attorney General Rob McKenna
Washington State Attorney General's Office
1125 Washington St. SE
PO Box 40100
Olympia, WA 98504
(360) 753-2536

**RE: Petition for AGO Involvement Concerning:
*Ch. 16.50 RCW's Religious Exemption***

Dear Attorney General McKenna,

On behalf of the Pasado's Safe Haven ("PSH"); its individual members; a number of residents and taxpayers in every Washington county subject to enforcement of Ch.16.50 RCW; and residents and taxpayers who pay the type of taxes that fund legislative and executive operations (e.g., Washington State Legislature, Washington State Attorney General's Office, Governor's Office, Washington Department of Agriculture), I am petitioning your office to take action to remedy, cure, modify, strike, or otherwise stop the government's favoring of one religious group over another, or religious groups and individuals over nonreligious groups. This letter is brought with the intent of, and as a condition precedent to, bringing a taxpayer action under *State ex rel. Boyles v. Whatcom Cy. Sup. Ct.*, 103 Wn.2d 610 (1985) and related precedents.

Ch. 16.50 RCW Religious Exemption Challenged

RCW 16.50.100 declares that humane methods of livestock are required to prevent needless suffering of "cattle, calves, sheep, swine, horses, mules and goats." RCW 16.50.110(4)(defining "livestock"). It incorporates by reference the "humane methods" outlined by the Federal Humane Slaughter Act of 1958, and regulations thereunder. RCW 16.50.100. The federal humane slaughter act prohibits, at 7 U.S.C. § 1902, any "method of slaughtering or handling in connection with slaughtering ... unless it is humane." The statute specifies humane methods to include:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter 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 and handling in connection with such slaughtering.

RCW 16.50.150 of the State Humane Slaughter Act is broader than 7 U.S.C. § 1902 and includes an exemption for ritual slaughterers, as follows:

16.50.150

Religious freedom – Ritual slaughter defined as humane.

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 for ritual slaughter is defined as humane.

[1967 c 31 § 10]

Pursuant to RCW 16.50.130, the Director of the Washington State Department of Agriculture was delegated the task of administering the provisions of Ch. 16.50 RCW. Those regulations are found at Ch. 16-24 WAC.

WAC 16-24-010(3) presently defines “humane method” as either:

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

WAC 16-24-012(1) presently states:

Slaughter by humane method -- Violation.

(1) No slaughterer or packer shall bleed or slaughter any livestock except by a humane method: Provided, That the director may, by administrative order, exempt

a person from compliance with this order for a period of not to exceed six months if he finds that an earlier compliance would cause such person undue hardship.

WAC 16-24-012(3) presently states: “Any person violating any provision of chapter 16-24 WAC is guilty of a misdemeanor and subject to a fine of not more than two hundred fifty dollars or confinement in the county jail for not more than ninety days.”

WAC 16-24-012(4) presently states:

Nothing in chapter 16-24 WAC 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 order, ritual slaughter and the handling or other preparation of livestock for ritual slaughter is defined as humane.

A violation of Ch. 16.50 RCW is a misdemeanor. RCW 16.50.170. Among other possible bases, Ch. 16.50 RCW and Ch. 16-24 WAC violate the equal protection clauses, commerce clause, privileges and immunities clause, establishment clause, and nondelegation doctrine, whether under the state or federal constitution.

Slaughter Facts

Shackling and hoisting became widespread practice when the United States’s Pure Food and Drug Act of 1906 required, for sanitary reasons, that animals not be slaughtered on the ground, whereby they would fall into the blood of another animal. Traditionally, the shackled and hoisted animal was restrained by a chain around his back leg and lifted into the air while fully conscious, sometimes for minutes prior to slaughter. In 1958, the federal Humane Methods of Slaughter Act banned shackling and hoisting of conscious animals as inhumane and required that the animal be rendered unconscious prior to being lifted from the ground. Dr. Temple Grandin has commented on shackling and hoisting as follows:

Hanging a 1,000 to 1,200-pound animal upside down by one leg unquestionably causes tremendous suffering. It is common that this method causes bruising, torn flesh, and even broken bones. Furthermore, stress levels can be measured empirically through stress hormone (cortisol) levels. Stress levels for inverted slaughter with devices known as the Weinberg pen (which are less stressful than shackling and hoisting) have yielded the highest average stress ratings ever published (almost 300% higher than cattle killed in upright pens).

The Committee on Jewish Law & Standards of the Rabbinical Assembly (“CJLS”), on September 20, 2000, held that shackling and hoisting is a violation of Jewish laws forbidding cruelty to animals. *Shackling and Hoisting*, YD 6.2000.

RCW 16.50.110(3)(a) defines the non-ritual “humane method” of slaughter as rendering an animal insensible to pain before being shackled, hoisted, thrown, cast, or cut. Definitions will help understand why Ch. 16.50 RCW is unconstitutional:

Shackle = affix metal brace or clasp to animal's body

Hoist = lifting up an animal by the leg, often by a shackle

Cast = putting an animal down to the ground

Throw = forcing an animal to the ground

Cut = sever skin and blood vessels to bleed, stick, and kill animal

Prior to cutting a shackled-and-hoisted animal, sometimes nose tongs are used to pull the head back to allow for the throat to be cut.

Thus, if an animal is shackled, hoisted, thrown, cast, or cut *without first* having been rendered insensible to pain, the non-ritual packer or slaughterer has violated state law and is guilty of a misdemeanor.

RCW 16.50.110(3)(b) defines the ritual "humane method" of slaughter as causing the animal to suffer loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument. What is not included in this definition is what matters most. Absent from this "humane method" of slaughter is the same prohibition that the animal be rendered insensible to pain before shackling, hoisting, casting, throwing, or cutting. Thus, under this alternative religious exemption, the packer or slaughterer will not violate state law and be guilty of a misdemeanor even if he severs the carotid arteries with a sharp instrument:

- **After** the animal has been shackled;
- **After** the animal has been hoisted;
- **After** the animal has been thrown;
- **After** the animal has been cast; or
- **After** the animal has been cut

On the last point, a cut – without anesthesia or loss of consciousness – must be made prior to severing the carotid arteries. Thus, on all accounts, Jews, Muslims, and other "religious" minorities adhering to tenets of ritual slaughter may get away with shackling, hoisting, casting, throwing, and cutting without having first rendered the animal insensible to pain. Such conduct otherwise would amount to animal cruelty¹ and is explicitly criminalized by RCW 16.50.110(3)(a). The Legislature would not have criminalized shackling, hoisting, casting, throwing, and cutting without the animal having been first rendered unconscious unless it believed she was unduly suffering. How, then, can it justify letting religious minorities engage in such criminal conduct?

The two primary religious minorities engaging in ritual slaughter are Jews and Muslims. Large Jewish (or kosher) slaughterhouses primarily rely on a box to press and hold cattle upright, without shackling, hoisting, casting, or throwing prior to being cut.

Jewish Slaughter

¹ RCW 16.52.205(1)(c) makes it a felony to intentionally kill an animal by a means causing undue suffering; and RCW 16.52.207(1) makes it a misdemeanor to inflict unnecessary suffering or pain on an animal.

Although, when performed correctly, the Jewish slaughter method can nearly instantaneously sever the carotid arteries, it is not ever truly simultaneous but may be delayed by a fraction of a second, or longer. Still, it is undisputed that this method will not cause loss of consciousness immediately. A delay of several seconds is common, and delay has been known to extend to over one minute. Over that period, the animal is conscious as blood is gushing from her throat onto the floor. And, if reports of those who have attempted suicide by slicing one's wrists is any indication, there is some pain and suffering involved in having one's throat sliced, regardless of the sharpness or speed of the knife.

A minority of large kosher slaughterhouses, such as AgriProcessors, use a box that presses and holds cattle only to invert them so that their legs are in the air prior to being cut. For video footage of this inversion box in use, go to www.humanekosher.com. Box inversion is tantamount to casting (if not throwing) and causes fear and discomfort to livestock. In the case of AgriProcessors, footage clearly shows the removal of the esophagus and trachea of conscious cattle moments after the carotids are severed, a practice that the existing Washington law would appear to permit so long as it followed the instantaneous and simultaneous severing of the carotid arteries. The reason: Washington's law does not mandate that loss of consciousness be first confirmed before engaging in any other painful handling. The video footage of AgriProcessors, while deeply upsetting and ghastly the extent of its inhumane treatment of cattle, and while roundly condemned by experts such as Temple Grandin,² was nonetheless defended by Menachem Genack, CEO of the Kosher Division of the Orthodox Union and Nathan Lewin, AgriProcessors representative who said, "There was absolutely nothing on that tape that indicated that there was the slightest doubt about the fact that the meat was slaughtered kosher." www.humanekosher.com/jsf_kosher_med.wmv, timestamp 13:26).

In small kosher slaughterhouses, shackling and hoisting of cattle is still commonly practiced prior to cutting the carotid arteries, *without stunning*. Small slaughterhouses also prevalently engage in unstunned shackling and hoisting of sheep and lambs prior to slaughter.

Islamic Slaughter

Islamic slaughterhouses use similar methods of restraint as Jewish slaughterhouses (i.e., an upright box for the majority of large slaughterhouses; an inverted box for the minority of large slaughterhouses; and shackling-and-hoisting in small slaughterhouses). For goats and sheep, as with Jews, Islamic slaughterhouses tend to rely on shackling-and-hoisting without stunning. A primary difference between Jewish and Muslim slaughter is the sharpness of the knife, and experts such as Temple Grandin have concluded that Islamic slaughter is rife with more complications and performance failures (i.e., quick kills by simultaneous and instantaneous severing of the carotid arteries) than with Jewish slaughter. Another difference between Jewish and Muslim slaughter is that Jews oppose stunning prior to slaughter, while some Muslim religious leaders have permitted stunning – thereby complying with the same rule that all non-ritual slaughterers must abide by.

² www.grandin.com (Answers to questions about cattle insensibility and pain during kosher slaughter and analysis of the Agriprocessors video).

Further, while Jews and Muslims engage in virtually all “ritual slaughter,” Washington’s law broadly uses the phrase “any religious faith,” thereby permitting even the tiniest, marginal, borderline, fictitious, or *ad hoc* sect to assert a need to preserve the most eccentric ritual slaughter technique conceived – even though it would be criminal if performed by a nonbeliever of that faith. Thus, even if all Jews and Muslims in Washington are slaughtering by first rendering the animal insensible to pain, this does not prevent other religious groups to open slaughter operations within our boundaries in a manner that does not involve stunning.

The Problem with the Law

Exempting all ritual slaughterers from criminal prosecution for the same actions performed by non-ritual slaughterers fails the rational basis test of both the federal equal protection and state privileges & immunities clauses. From the animal’s standpoint, it does not matter whether the person inflicting the killing stroke is Jewish, Hindu, Muslim, Christian, or Atheist. Primarily Jews and Muslims partake in ritual slaughter. Thus, from the standpoint of an agnostic, atheist, non-Jew, or non-Muslim believer whose faith does not impose ritual requirements for slaughter, the law in essence gives Jews and Muslims immunity from prosecution not enjoyed by anyone else. In so doing, the law violates Washington’s religious establishment clause.

Washington’s Religious Establishment Clause

Washington’s **religious establishment clause** states, in relevant part:

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. Washington’s religious freedom clause is “far stricter” than the federal counterpart. *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (citing *Witters v. Com’n for the Blind*, 102 Wn.2d at 626). 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 State Humane Slaughter Act’s express exemption from criminal liability for religious, ritual slaughters 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).

Federal Equal Protection Clause

Washington's Humane Slaughter Act also violates the equal protection and privileges and immunities clauses of both constitutions. In favoring religious minorities over nonreligious minorities and religious majorities, more than rational basis review is required. 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. For nonsuspect classifications, only minimal rational-basis scrutiny applies. Under this standard, a statute is presumed constitutional and the party challenging it has a heavy burden of proof. *Cosro v. Liquor Control Bd.*, 107 Wn.2d 754, 760 (1987). To show a violation of this clause, a party must establish that the challenged act treats unequally two similarly situated classes of people. *Id.* "Under rational basis review plaintiffs have the burden of proving that the classification drawn by the law is not rationally related to a legitimate state interest." *Andersen v. King Cy.*, 158 Wn.2d 1, 138 P.3d 963, 980 (2006)(citing *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144 (1998)). **However, Washington's Humane Slaughter Act relies on suspect classifications (i.e., religion).** Accordingly, far more than rational basis scrutiny applies.

Washington's Privileges & Immunities Clause

The Washington Constitution echoes the federal equal protection clause, stating that "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. 1, § 12. Washington's article 1, section 12 (Privileges & Immunities clause) 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 grant of positive favoritism. *Grant Cy. Fire Prot. Dist. v. City of Moses Lake*, 150 Wn.2d 791 (*Grant County II*)(2004); see *Andersen v. King Cy.*, 158 Wn.2d 1, 138 P.3d 963, 971 (2006).

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).

There is no rational basis to distinguish one class of animal from another when, from the animal's standpoint, suffering is suffering. If a dog were slaughtered by means of a ritual slaughterer handling a bovine, abusers would be convicted under existing anticruelty laws while their abusing counterparts in the kosher and Islamic slaughter industries would escape prosecution:

...to an animal that is suffering, it does not make any difference whether it is the only one or one of thousands; just as it does not matter to the animal *why* anything is being done to it, or for what purpose. What matters to the animal is the degree, extent and duration of the suffering.³

While the CJLS forbid unstunned shackling and hoisting for kosher slaughter in 2000, this nongovernmental body does not prevent any ostensible Jewish "outlaw" from shackling,

³ Colin Spedding, *Animal Welfare* (Earthscan Publ. Ltd. 2000), at 2.

hoisting, casting, throwing, or cutting livestock without having first rendered the animal insensible to pain. Indeed, small kosher slaughterhouses still engage in this practice. Furthermore, religious law does not override Washington state law, for we are not a theocracy. And 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 CJLS may take one position, it does not prevent a minority position (such as the one taken by AgriProcessors) from being asserted as equally humane and in accordance with the requirements of the Jewish faith. In other words, Washington's law does not require or 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. In so doing, RCW 16.50.110(3)(b) also appears to violate the nondelegation doctrine.

Conclusion

As described in *Reiter v. Wallgren*, 28 Wn.2d 872 (1947), this letter is submitted as a condition precedent for a taxpayer action against the State of Washington and every county or city that may enforce Ch. 16.50 RCW. One sincerely hopes that you will take action as requested. That said, if I do not hear back from you within 7 calendar days, I will assume that you are declining this request. Please call with any questions.

Respectfully,

ANIMAL LAW OFFICES

Adam P. Karp, Esq.

Enclosures: As stated

EXHIBIT 2



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

7141 Cleanwater Dr SW • PO Box 40109 • Olympia WA 98504-0109

April 1, 2009

Adam P. Karp, Esq.
Animal Law Offices of Adam P. Karp, JD, MS
114 W. Magnolia Street, Suite 425
Bellingham, WA 98225

Re: *Petition For AGO Involvement Concerning: Chapter 16.50 RCW's
Religious Exemption*

Dear Mr. Karp:

I am writing in response your letter petitioning the Attorney General's Office to take action to remedy what you describe in your letter as "the government's favoring of one religious group over another, or religious groups and individuals over nonreligious groups" in relation to chapter 16.50 RCW, the Humane Slaughter of Livestock Act.

You state that you have sent this letter as a condition precedent to filing a taxpayer suit under *State ex rel. Boyles, et al v. Whatcom Cy. Super. Ct.*, 103 Wn.2d 610 (1985). After thorough review, the Attorney General's Office declines to initiate a taxpayer suit in this matter. This decision is not intended as a comment on the merits of the issues raised in your letter and we express no view as to whether the requirements for taxpayer standing would be met in this case.

Sincerely,

KRISTEN K. MITCHELL
Assistant Attorney General
(360) 586-6500

KKM:sb

EXHIBIT A

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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH**

9 PASADO'S SAFE HAVEN, et al.;

Case No.: 09-2-04904-0

10 Plaintiffs,

[proposed]

**ORDER GRANTING MOTION TO
STRIKE AFFIRMATIVE DEFENSES**

11 vs.

Clerk's Action Required

12 STATE OF WASHINGTON and
13 WASHINGTON STATE DEPARTMENT OF
AGRICULTURE,

14 Defendants.

15 **ORDER**

16
17 This matter came before the court on Plaintiffs' motion to strike Defendants' affirmative
18 defenses 3-6. Based on the pleadings filed herein, the court finds good cause to order the
19 following:

- 20 1. Plaintiffs' motion is GRANTED.
- 21 2. Defendants' affirmative defense 3 is STRICKEN WITH PREJUDICE.
- 22 3. Defendants' affirmative defense 4 is STRICKEN WITH PREJUDICE.
- 23 4. Defendants' affirmative defense 5 is STRICKEN WITH PREJUDICE.

24 **ORDER GRANTING PLAINTIFFS'
25 MOTION TO STRIKE - 1**

LAW OFFICE OF ADAM P. KARP
ADAM P. KARP, ESQ.

114 W. Magnolia St., Ste. 425 • Bellingham, WA 98225
(360) 738-7273 • Facsimile: (360) 392-3936
adam@animal-lawyer.com

1 5. Defendants' affirmative defense 6 is STRICKEN WITH PREJUDICE.

2 Dated this June 9, 2009.

3
4

The Honorable Superior Court Judge

5 Presented by:

6 ANIMAL LAW OFFICES

7
8

ADAM P. KARP, WSB No. 28622
9 Attorney for Plaintiffs

10 Approved as to form:

11 ROBERT M. MCKENNA
12 Attorney General

13

By: MARK H. CALKINS, WSB No. 18230
14 Assistant Attorney General

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24 **ORDER GRANTING PLAINTIFFS'**
25 **MOTION TO STRIKE - 2**

LAW OFFICE OF ADAM P. KARP
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