**Case No. 17-55696**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

UNITED POULTRY CONCERNS, a Maryland nonprofit corporation,

Petitioner,

vs.

CHABAD OF IRVINE, a California corporation; and ALTER TENENBAUM, an individual,

Respondents.

On Appeal from the United States District Court for the Central District of California, Case No. 8:16-CV-01810-AB-(GJS)

**RESPONDENTS CHABAD OF IRVINE AND RABBI ALTER TENENBAUM'S RESPONSE TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Respondent Chabad of Irvine hereby certifies that it is a nonprofit religious corporation (an Orthodox Jewish synagogue). It has no parent corporations, and no publicly held corporation owns more than 10% of Chabad of Irvine's stock.

Date: August 28, 2017

*s/ Hiram S. Sasser, III*
Hiram S. Sasser, III

## INTRODUCTION

Petitioner United Poultry Concerns' ("UPC") motion for an injunction pending appeal should be denied because UPC failed to first bring this motion in district court, violating Federal Rule of Appellate Procedure 8(a). UPC also failed to give opposing counsel any notice of the motion, violating Rule 8(a)(2)(C). Because UPC failed to bring its motion properly, the Court should deny the motion and need not reach the merits. Should the Court reach the merits, it will see that UPC has failed to establish any of the requirements for an injunction to issue.

Respondents Chabad of Irvine and Rabbi Alter Tenenbaum (collectively, "Chabad") respectfully request that the Court not issue a last-minute injunction against the two thousand year old atonement ritual of a small Orthodox Jewish synagogue. This motion is opposing counsel's third attempt in the past three years to ask a court for a last-minute injunction against Chabad. Each time, opposing counsel files an injunction motion without warning just days or weeks before the synagogue's annual pre-Yom Kippur ritual.[1] And each time, after reviewing the merits, courts ultimately reject the injunction.[2]

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[1] UPC's Ex Parte Appl. TRO, Sept. 29, 2016, Dkt. No. 2 (motion filed just twelve days before Yom Kippur began on Oct. 11, 2016); APRL's Ex Parte Appl. TRO, Sept. 16, 2015, *Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Cal. Super. Ct.) [hereinafter "*Parallel State Case*"] (motion filed just six days before Yom Kippur began on Sept. 22, 2015).

[2] Minute Order Denying Ex Parte TRO Appl., Sept. 18, 2015, *Parallel State Case*, Ex. A; Minutes Telephonic Conference Dissolving TRO, Oct. 11, 2016, Dkt. No.

Last year, before Chabad appeared, the district court entered a temporary restraining order against the synagogue. Chabad then retained counsel for the federal case and requested a hearing on the merits. After holding a hearing on the merits, the district court ***dissolved the TRO*** against the synagogue, just four days after it issued. UPC's motion fails to state that the TRO was dissolved.

Months later, after thorough briefing and oral argument, the district court correctly dismissed the case, holding that the synagogue's religious ritual was not a "business practice" under California's Unfair Competition Law. Cal. Bus. & Prof. Code § 17200. The court thus rejected UPC's attempt to use a law designed to prohibit the unfair competition of businesses to challenge the non-profit, religious ritual of an Orthodox Jewish synagogue.

In short, this motion and this case are meritless. Chabad of Irvine's atonement ritual is humane and lawful, involving the Kosher killing of chickens along with the recitation of prayers. UPC has a pattern of targeting Orthodox Jewish synagogues with frivolous lawsuits, in an attempt to stop a minority religious practice that UPC does not like.

This court should not grant an injunction, disturbing the status quo, while this case is pending on appeal.

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29, Ex. B.

## STATEMENT OF JURISDICTION

This Court lacks subject matter jurisdiction because the amount in controversy does not exceed $75,000, and Petitioner United Poultry Concerns lacks Article III standing. *See* Parts II.A.a-II.A.b.

## STANDARD OF REVIEW

A party seeking an injunction pending appeal must ordinarily first move in the district court. Fed. R. App. P. 8(a)(1)(C). A motion for an injunction pending appeal may be made directly to the court of appeals only if the movant is able to: "(i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." Fed. R. App. P. 8(a)(2)(A)(i)-(ii). Additionally, "[t]he moving party must give reasonable notice of the motion to all parties." Fed. R. App. P. 8(a)(2)(C).

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). "As with a preliminary injunction, to qualify for an injunction pending appeal, the moving party must show: (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest." *Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d 1204, 1207 (E.D. Cal. 2010).

## BACKGROUND

Respondent Chabad of Irvine is an Orthodox Jewish synagogue, and a 501(c)(3) nonprofit religious organization. Aff. Rabbi Tenenbaum ¶¶ 1-2, Dkt. No. 90-3, Ex. C. Most years, Chabad of Irvine gathers the local Orthodox Jewish community to engage in the "Kapparot" (or "Kaporos") atonement ritual. Am. Compl. ¶¶ 3, 18, Dkt. No. 85. The religious ritual dates back over two thousand years and takes place in the days between the Jewish High Holidays of Rosh Hashanah and Yom Kippur. *Id.* ¶ 3; Decl. Rabbi Tenenbaum ¶¶ 4, Dkt. No. 90-6, Ex. D. The atonement ritual involves gently holding a live chicken over a congregant's head, reciting a prayer, and then ritually slaughtering the chicken in a Kosher and humane manner. Decl. Rabbi Tenenbaum ¶¶ 4-6, Dkt. No. 90-6, Ex. D. Chabad's Kapparot ritual is not conducted for profit.[3] *Id.* ¶ 11. In 2014, a local animal control expert from the Irvine Police Department and a special investigator from the California Department of Food and Agriculture watched Chabad's ritual and affirmed that the ritual was done lawfully. *Id.* ¶¶ 12-14.

One of Petitioner United Poultry Concerns' goals is "to end the use of chickens in Kapparot nationally" because it believes that Kapparot should be performed with coins rather than chickens. Decl. Karen Davis ¶ 4, Dkt. No. 68-7;

[3] For instance, in 2014, the year at issue in the Complaint, Chabad incurred a loss of $24. Aff. Rabbi Tenenbaum ¶¶ 3-6, Dkt. No. 90-3, Ex. C (including accounting records). Chabad accepts voluntary donations, but does not charge a fee to participate in Kapparot. *Id.*

Am. Compl. ¶ 11, Dkt. No. 85. UPC repeatedly targets Orthodox Jewish organizations, synagogues, and rabbis with unsuccessful litigation, attempting to block the exercise of this minority religious practice.[4]

UPC filed its Complaint and Ex Parte Application for TRO on September 29, 2016. According to the Complaint, a UPC employee named Ronnie Steinau expended "time" to watch Chabad's 2014 ritual, but did not participate.[5] Compl. ¶¶ 24-25, Dkt. No. 1. The Complaint contained one cause of action under California's Unfair Competition Law, alleging that Chabad's religious ritual was an unfair business practice that violated California Penal Code § 597(a).

On October 7, 2016, before Chabad appeared, the district court entered a TRO against the synagogue. Order Granting Ex Parte Appl. TRO, Oct. 7, 2016, Dkt. No. 18. However, after a hearing on the merits, the court dissolved the TRO four days later on October 11, 2016. Minutes Telephonic Conference Dissolving TRO, Oct. 11, 2016, Dkt. No. 29, Ex. B. During the hearing, the district court concluded that UPC was improperly trying to force its interpretation of the

[4] *See, e.g.*, *United Poultry Concerns v. Bait Aaron*, No. BC592712 (Cal. Super. Ct., Aug. 26, 2015), Dkt. No. 90-7, Ex. E (suing seven Orthodox Jewish organizations and their rabbis); *All. to End Chickens as Kaporos v. N.Y.C. Police Dep't*, No. 156730/2015 (N.Y. Sup. Ct., Sept. 16, 2015), Dkt. No. 90-9, Ex. F (suing nine Orthodox Jewish organizations and their rabbis through UPC's Alliance to End Chickens as Kaporos).

[5] The Complaint alleges that Steinau was told that the cost to participate was $27. Compl. ¶ 26, Dkt. No. 1.

Kapparot ritual onto Chabad, requiring Chabad to use coins rather than chickens, in violation of the First Amendment. The court summarized its ruling as:

> And I am looking at the case, *Hernandez*, at 490 U.S. It makes it clear it's not within the judicial ken to question the validity of a particular litigant's interpretation of those creeds. We heard today at the hearing and throughout this lengthy and robust discussion that that's, in essence, what's going on, an interpretation of the creed of the kaparos. And so, based on that, I am going to dissolve the temporary restraining order so that the ceremony can proceed this evening. That is the Court's ruling.

Hr'g Tr. 52:17-53:1, Oct. 11, 2016, Dkt. No. 64, Ex. G (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

In January 2017, the district court dismissed the original Complaint for failure to allege complete diversity. Minutes (In Chambers), Dkt. No. 84. UPC filed its First Amended Complaint in February 2017. Am. Compl., Dkt. No. 85.

Months later, upon full consideration of Chabad's Motion to Dismiss and UPC's Preliminary Injunction Motion, the federal district court dismissed the case. Order Granting Def.'s Mot. Dismiss, May 12, 2017, Dkt. No. 110, Ex. H. The federal district court held that the UCL does not apply to Chabad's Kapparot ceremony:

> The Court cannot find, and Plaintiff does not cite a single case in which the acceptance of a donation in connection with the performance of religious ritual has been treated as a "business act" under the UCL. Moreover, the Court finds that Defendant Chabad of Irvine does not participate nor compete as a business in the commercial market by performing a religious atonement ritual that involves donations. For these reasons, the Court finds that Plaintiff

> fails to state a claim against Chabad of Irvine for a violation of the Unfair Competition Law (B.P.C. § 17200 et seq.)

*Id.* at 10. UPC filed its notice of appeal on May 15, 2017.

## ARGUMENT

### I. UPC Failed to Meet the Requirements of Rule 8; Therefore, the Motion Should Be Denied.

Although UPC filed its motion for a preliminary injunction under Federal Rule of Appellate Procedure 27, all motions for an injunction pending appeal must abide by the requirements set forth in Federal Rule of Appellate Procedure 8. UPC's motion failed to meet those requirements.

First, UPC failed to bring its motion for an injunction pending appeal in the district court or explain why doing so would be impracticable. Fed. R. App. P. 8(a)(1)(C), -(2)(A). Instead of offering such an explanation, UPC mischaracterizes the district court's actions below. UPC repeatedly asserts that the district court granted a TRO in 2016, but omits the fact that the district court dissolved that TRO just four days later after a full hearing on the merits. Likewise, UPC fails to give the reason why the TRO was dissolved.

Second, UPC failed to give Chabad any notice of its motion. Rule 8(a)(2)(C) requires that "[t]he moving party must give reasonable notice of the motion to all parties." Fed. R. App. P. 8(a)(2)(C). Similarly, Circuit Advisory Committee Note 5 to Rule 27-1 also requires advanced notice to opposing counsel, stating "[u]nless

precluded by extreme time urgency, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position."

For the foregoing reasons, UPC's motion should be denied.[6] *See, e.g.*, *Brady v. Hegge*, 221 F.3d 1347 (9th Cir. 1997) (denying request for an injunction because of failure to comply with Rule 8).

## II. UPC Is Not Entitled to the Extraordinary Remedy of an Injunction Pending Appeal.

UPC fails to meet its burden of establishing any of the four prongs necessary for an injunction pending appeal.

### A. UPC Has Not Shown a Likelihood of Success on the Merits.

Because the Court lacks subject matter jurisdiction, UPC lacks standing, and UPC's sole claim fails on the merits, UPC will not succeed on the merits.

#### a. The Court Lacks Subject Matter Jurisdiction.

Challenges to subject matter jurisdiction may be raised at any time. Fed. R. Civ. P. 12(h)(3). In this action, diversity jurisdiction is lacking because the amount in controversy does not exceed $75,000. 28 U.S.C. § 1332. UPC failed to meet its burden of establishing the threshold amount in controversy.

[6] As an additional procedural deficiency, UPC failed to properly include a corporate disclosure statement. Fed. R. App. P. 26.1.

Because there was no claim for damages, the amount in controversy is calculated based upon value of the injunction sought at the time the Complaint is filed. As demonstrated in the hearing, it is unclear exactly what injunction UPC sought. *See* Hr'g Tr. 4:5-16, Apr. 10, 2017, Dkt. No. 113. At various times in the litigation, UPC sought to require Chabad to use coins instead of chickens, to not accept voluntary donations in connection with the Kapparot ritual, or to use the chickens for food rather than have the chickens rendered. Chabad argues that the injunction cannot be valued because the injunction would only harm Chabad's religious exercise, which has no monetary value. Even if the object of the litigation could be valued, Chabad produced evidence that it does not perform the ceremony for profit and in fact loses money from facilitating the ritual.[7] Aff. Rabbi Tenenbaum ¶¶ 3-6, Dkt. No. 90-3, Ex. C (including accounting records). Therefore, the amount in controversy is less than zero.

By contrast, UPC produced no evidence about the costs to Chabad of facilitating Kapparot. Nevertheless, UPC asserts that the synagogue makes a profit of $8,100 per year by performing the Kapparot ritual. Am. Compl. ¶ 21, Dkt. No. 85. UPC then multiplied that figure by ten in order to approach the amount in controversy threshold. This calculation is unsupported and far too speculative to

[7] Chabad raised factual and facial jurisdictional challenges in the district court.

support diversity jurisdiction. Because the Court lacks subject matter jurisdiction, UPC is unlikely to succeed on the merits.

**b. UPC Lacks Both Article III and Statutory Standing.**

**i. Because Chabad Did Nothing to Injure UPC, UPC Lacks Article III Standing.**

UPC lacks Article III standing because self-inflicted injuries do not meet the injury-in-fact requirement necessary to bring a lawsuit in federal court. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see also Abigail All. for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) ("[W]e do not recognize such self-inflicted harm."); *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing.").

Article III standing requires a plaintiff to have suffered an "injury in fact," which is an invasion of a "concrete and particularized" legally protected interest. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). That interest must be "actual or imminent," rather than "conjectural" or "hypothetical." *Id.*

Chabad did nothing to cause injury to UPC. According to the First Amended Complaint, a UPC employee chose to expend "time" trying to stop Chabad from performing a Kapparot rite. Am. Compl. ¶ 36, Dkt. No. 85. If there is any injury in that, it is purely self-inflicted harm and not sufficient to confer federal standing.

Under *La Asociacion de Trabajadores de Lake Forest*, an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." 624 F.3d at 1088. Instead, it must show that "it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.*; *see also Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1019 (9th Cir. 2013). UPC does not allege that it would have suffered any injury if it had not chosen to pursue Chabad.

**ii. UPC Lacks Statutory Standing Because UPC Cannot Show that Chabad Caused It To Lose "Money or Property."**

UPC also cannot establish that it meets the statutory requirements to bring a lawsuit under the UCL. In 2004, the California electorate heightened the UCL's standing requirements through Proposition 64 to prevent un-injured people from bringing suit. *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 881 (Cal. 2011). California eliminated standing "for those who have not engaged in any business dealings with would-be defendants[.]" *Id.*

Under the revised statute, standing only exists where the plaintiff has lost "money or property," and that loss must have been "caused by" the unfair business practice. *Id.* at 885 (emphasis in original); Cal. Bus. & Prof. Code § 17204. Because UPC did not pay any money to Chabad and Chabad did nothing to cause UPC harm, UPC's claim fails on both elements. UPC makes no allegation that it

engaged in any business dealings with Chabad nor that Chabad caused any economic injury to UPC. The First Amended Complaint only alleges a diversion of "time," rather than "money or property" as required by the statute. Am. Compl. ¶ 36, Dkt. No. 85. Thus, UPC lacks statutory standing.

Instead, UPC erroneously argues that choosing to "divert resources" to pursue an organization that would not otherwise affect UPC is sufficient to establish harm. First, UPC's argument is flatly contradicted by the text of the statute and the California Supreme Court's *Kwikset* opinion. 246 P.3d at 887. Second, even assuming the facts alleged in the First Amended Complaint are true, there was no diversion of resources away from UPC's mission. UPC seeks to end the use of chickens in Kapparot. Am. Compl. ¶ 11, Dkt. No. 85. Protesting Chabad in an attempt to stop Chabad from using chickens falls squarely within UPC's mission. UPC's legal argument is erroneous and without support.[8]

Choosing to spend time in pursuit of a synagogue on the other side of the country is not harm sufficient to confer standing.

**c. The Unfair Competition Law Does Not Apply to Religious Rituals of Places of Worship.**

[8] *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1288 (Cal. Ct. App. 2015) provides no support to UPC. *Napa Partners* involved a business transaction between a restaurant and an individual who ordered foie gras. However, there is no monetary transaction with UPC in this case, and therefore no loss of money or property attributable to Chabad.

UPC attempts to use a law designed to prohibit the unfair competition of businesses in order to challenge the non-profit, religious ritual of an Orthodox Jewish synagogue. Needless to say, California's Unfair Competition Law ("UCL") has never been applied in this way. Cal. Bus. & Prof. Code § 17200. The UCL applies to "business acts," not religious rituals. The federal district court correctly held that the UCL does not apply to Chabad's Kapparot ceremony:

> The Court cannot find, and Plaintiff does not cite a single case in which the acceptance of a donation in connection with the performance of religious ritual has been treated as a "business act" under the UCL. Moreover, the Court finds that Defendant Chabad of Irvine does not participate nor compete as a business in the commercial market by performing a religious atonement ritual that involves donations. For these reasons, the Court finds that Plaintiff fails to state a claim against Chabad of Irvine for a violation of the Unfair Competition Law (B.P.C. § 17200 et seq.)

Order Granting Def.'s Mot. Dismiss, May 12, 2017, Dkt. No. 110, Ex. H.

To try to get around this ruling, UPC's motion now makes the unconstitutional argument that the synagogue is not *truly* doing a Kapparot ritual because it is up to each individual congregant to say the atonement prayer.[9] UPC argues that by gathering the local Orthodox Jewish community together at the synagogue along with all the necessary elements and Rabbis to help the congregants with Kapparot prayers, the synagogue is not engaging in a religious ritual. However, under this theory, a church that provides communion wine and

[9] This argument was not raised in the district court below.

wafers and an opportunity to partake in communion together is not engaging in a religious ritual, and therefore the church's communion is a business practice. This theory is absurd. UPC again is trying to foist its interpretation of Chabad's religion onto Chabad, arguing that what Chabad understands as its religious ritual is not actually a religious ritual. The Court must reject this argument as a threat to the free exercise of all faiths, especially less-understood minority faiths.

**d. Chabad's Kapparot Ritual is Lawful.**

Because the district court below did not reach the issue of whether the Complaint adequately alleged a violation of Penal Code § 597(a), the question is not properly before this Court. *See Ho-Chuan Chen v. Dougherty*, 225 F. App'x 665, 666-67 (9th Cir. 2007).

In any event, Chabad has not violated Penal Code § 597(a) because Chabad's Kapparot ritual is not malicious. Section 597(a) prohibits the malicious and intentional killing of an animal. "Malicious" is a *mens rea* element necessary so that only those with the culpable intent to do a "wrongful" act can be punished under the criminal code. Cal. Penal Code § 7(4). Numerous state and federal laws regard Kosher killings as humane acts, rather than malicious or wrongful. *See, e.g.*, Cal. Code Regs. tit. 3, § 1246.15(a); Cal. Food & Agric. Code § 19501(b)(2); 7 U.S.C. § 1902(b); 7 U.S.C. § 1906. Therefore, simply stated, Penal Code § 579(a)

does not prohibit humane and kosher killings of chickens during a synagogue's religious atonement ceremony.

UPC mistakenly argues that it is per se "malicious" to kill an animal unless a person uses the animal for food or for another reason expressly listed in California Penal Code § 599c. However, under UPC's reasoning, it would also be "malicious" for a veterinarian to euthanize a suffering animal because this is not a reason listed in California Penal Code § 599c. This is clearly an absurd result. The malicious *mens rea* requirement operates independently from the exceptions listed in California Penal Code § 599c. Neither a veterinarian nor a religious adherent act "maliciously," and therefore neither violate the statute. Therefore, UPC failed to show a likelihood of success on the merits.

**e. The First Amendment Prohibits Targeting a Religious Practice for Extinction.**

UPC seeks to target a particular Orthodox Jewish practice for extinction. As acknowledged in the declaration of UPC's founder Karen Davis, UPC seeks to "end the use of chickens in Kapparot nationally." Decl. Karen Davis ¶ 4, Dkt. No. 68-7; *accord* Am. Compl. ¶ 11, Dkt. No. 85.

UPC's true reason for this lawsuit is to improperly pressure Chabad into stopping a lawful religious practice. Repeatedly throughout this case, UPC has sought to force Chabad to use coins rather than chickens, without any lawful basis for this unconstitutional argument. Pl.'s Ex Parte Appl. TRO 7, Dkt. No. 2 ("Many

other entities have stopped killing chickens and instead perform the ceremony by swinging small bags of coins overhead."); *Id.* at 10 ("As Defendants can easily perform their same ceremonies using bags of coins . . . there is no harm to Defendants in granting this TRO."); TRO Hr'g 40:2-6, Dkt. No. 64 ("[T]hey have not shown that they are going to suffer irreparable harm by performing the ritual with coins."); PI.'s Mot. Prelim. Inj. 1, Dkt. No. 68-1 (asserting that Kapparot "usually" involves coins); *Id.* at 2 ("[U]sing chickens in these rituals is not required by any religious teaching."). As the federal district court recognized when it dissolved the TRO, it would be unconstitutional for a court to require Chabad to use coins rather than chickens based upon the religious beliefs of others. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); *Hernandez*, 490 U.S. at 699.

UPC has a pattern of pursuing frivolous litigation in an attempt to chill the First Amendment rights of synagogues and other Orthodox Jewish organizations. In *United Poultry Concerns v. Bait Aaron*, No. BC592712 (Cal. Super. Ct., Aug. 26, 2015), Ex. E, UPC sued ***seven*** Los Angeles Orthodox Jewish organizations and their rabbis because they performed Kapparot with chickens rather than coins. The California court dismissed the lawsuit on multiple grounds, and expressly held that UPC was "in fact, seeking recourse of the secular courts to end a religious practice

on the grounds that Plaintiffs do not like it, and do not believe it is essential to use chickens for the religious ritual." *Id.* at 19. UPC's "Alliance to End Chickens as Kaporos" brought a similar unsuccessful suit against ***nine*** Orthodox Jewish organizations and their rabbis in New York. *All. to End Chickens as Kaporos v. N.Y.C. Police Dep't*, No. 156730/2015 (N.Y. Sup. Ct. Sept. 16, 2015), Ex. F. Finally, one of UPC's attorneys sent cease and desist letters designed to chill the lawful activity of Orthodox Jewish entities that conduct Kapparot with chickens. The Simon Law Group "threatened the Hebrew Academy [in Huntington Beach] with a legal action if it did not agree to sign a certification stating that it would never engage in the Jewish ceremony of Kaporos." Decl. Ronan Cohen ¶ 3, Dkt. No. 90-8, Ex. J.

Permitting UPC to assume the role of government criminal prosecutor, and thereby allowing it to target synagogues, would violate the First Amendment. *See Lukumi Babalu Aye v. City of Hileah*, 508 U.S. 520, 534 (1993) (holding official action that "targets religious conduct for distinctive treatment" unlikely to withstand strict scrutiny); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding strict scrutiny applies to applications of the law that target religious beliefs, and not merely to the lawmakers who first drafted the law); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165-67 (3d Cir. 2002) (holding "selective application" of an otherwise neutral and generally applicable

law triggers strict scrutiny). This selective application of a criminal statute against the religious rite of a synagogue triggers strict scrutiny and violates the Free Exercise clause. The Court should not allow UPC to abuse the judicial process to put improper pressure on synagogues to change their religious practices.

**B. UPC Has Not Shown A Likelihood Of Irreparable Injury.**

A party seeking a preliminary injunction must establish a likelihood of irreparable injury. *Winter*, 555 U.S. at 22. To constitute irreparable harm, an injury must be "certain, great, actual," and "not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). UPC grossly mischaracterizes the Kapparot ritual, which involves humane religious ceremonial killings and proper disposal of approximately 100 chickens. State and local animal control officials were on site in 2014 and concluded that the practice was done safely and lawfully. Decl. Rabbi Tenenbaum ¶ 6, Dkt. No. 90-6, Ex. D.

UPC has not demonstrated that its organization will be irreparably harmed if the Kapparot ceremony continues. Instead, UPC's brief alleges the ceremony will cause harm to the "social fabric." However, generalized harm to society is not an injury for which Article III courts can grant relief. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (noting the harm must be, at minimum, "sufficient to establish standing"). Plaintiff has failed to demonstrate that not issuing an injunction at this time will cause it harm, let alone irreparable harm.

### C. The Balance Of Hardships From Not Granting The Preliminary Injunction Does Not Favor UPC.

The balance of hardships strongly weighs in favor of Chabad. An injunction barring Chabad from performing the Kapparot ceremony in accordance with its religious beliefs would cause irreparable injury to Chabad and its members' First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the religious adherent's] favor." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotation marks omitted). In the Ninth Circuit, merely "demonstrating the existence of a colorable First Amendment claim" is sufficient to establish irreparable injury. *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005). In short, an injunction restricting Chabad's religious exercise would severely burden Chabad, sharply tilting the balance of equities against UPC.

UPC alleges that the only harm to Chabad if the preliminary injunction issues is "monetary" because UPC insists that Chabad should perform the Kapparot ceremony in the way that UPC prefers. The law does not require Chabad to move the ritual away from its synagogue or to otherwise perform it differently. To restrict the Orthodox Jewish community's lawful ability to conduct a millennia-

old ritual in the way it prefers would burden its First Amendment rights. Here, a preliminary injunction would be a substantial burden on Chabad's religious belief because it would force the synagogue to alter the way it practices Kapparot.

By contrast, as explained previously, it is unclear whether UPC will incur any injury from the lack of a preliminary injunction. The only injury alleged is a general social harm and UPC offers no authority to indicate that the Court may take that kind of harm into consideration.

**D. Public Interest Favors Protecting Constitutional Rights.**

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531 (internal citation omitted). At all times, Chabad's Kapparot practice treats chickens humanely and safely in compliance with all state and local laws. Decl. Rabbi Tenenbaum ¶ 6, Dkt. No. 90-6, Ex. D. There is simply no legal violation here. The public interest sharply weighs in favor of protecting minority religious beliefs from being silenced by those determined to target their practices.

**CONCLUSION**

UPC's motion for an injunction pending appeal should be denied.

Date: August 28, 2017

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS CHABAD OF IRVINE AND RABBI ALTER TENENBAUM**

## STATEMENT OF RELATED CASES

*Animal Prot. & Rescue League, Inc. v. Chabad of Irvine*, No. 30-2015-00809469-CU-BT-CJC (Cal. Super. Ct., judgment entered on June 23, 2017), arises from the same Kapparot event and raises closely related issues. The state court found that Chabad of Irvine's Kapparot ritual was not a business practice under the UCL. The case is currently on appeal, No. G055229.

Date: August 28, 2017

*s/ Hiram S. Sasser, III*
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## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Fed. R. App. P. 27(d)(2)(A). The brief is 4,964 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Date: August 28, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 28, 2017. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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*s/ Hiram S. Sasser, III*
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