

HELEN E. JONES as next friend and guardian for all livestock animals
now and hereafter awaiting slaughter in the United States of America;
HELEN E. JONES individually; the RABBI, DR. ELMER BERGER; MRS. RUTH
BERGER; DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; VIOLETTA LANDEK; CHARLES:
STEINBERG; MARY LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; SOCIETY
FOR ANIMAL RIGHTS, INC., on behalf of itself and its members; COMMITTEE:
FOR A WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICA;

Plaintiffs,

-against-

EARL S. BUTZ, as Secretary of Agriculture of the United States of
America; GEORGE GRANGE, as Acting Administrator of Consumer and Market
Services, United States Department of Agriculture; "JOHN DOE" being
a fictitious name referring to the member of the Secretary's Advisory
Committee under 7 U.S.C. §1905 who is "familiar with the requirements
of religious faiths with respect to slaughter;"

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW

1. IN OPPOSITION TO DEFENDANTS' MOTION:

- a. TO DISMISS FOR LACK OF JURISDICTION AND
FAILURE TO STATE A CLAIM, AND, IN THE
ALTERNATIVE,
- b. FOR SUMMARY JUDGMENT.

-AND-

2. IN SUPPORT OF PLAINTIFFS' CROSS-MOTION TO CONVENE
A THREE-JUDGE COURT.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN E. JONES as next friend and guardian
for all livestock animals now and hereafter :
awaiting slaughter in the United States of :
America; HELEN E. JONES individually; the :
RABBI, DR. ELMER BERGER; MRS. RUTH BERGER; :
DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; :
VIOLETTA LANDEK; CHARLES STEINBERG; MARY :
LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; :
SOCIETY FOR ANIMAL RIGHTS, INC., on behalf :
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IN AMERICA; : 73 Civil 1 (DBB)

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INTRODUCTION

This consolidated memorandum is submitted by plaintiffs both in opposition to the government's motion to dismiss, and in support of plaintiffs' cross-motion to convene a three-judge court. The few facts necessary to a decision of both motions are readily available --- in the complaint, in the exhibits annexed to the government's moving papers, and in the affirmation of Henry Mark Holzer, Esq., and the exhibits annexed thereto --- and these facts are not really in dispute.

More troublesome is the unfortunate circumstance that the government appears to have misconceived the gravamen of the plaintiffs' contention.

Both the complaint and the Holzer affirmation make clear beyond misunderstanding that plaintiffs allege that only certain sections of the Federal Humane Slaughter Act, 7 U.S.C. §§1901-1906 are unconstitutional against the religion clauses of the First Amendment.

This case in no way challenges the power of any meat packer or any religious group to slaughter a livestock animal by means of a throat-cut. Nor does it challenge the Congressional finding that a throat-cut is a humane method of slaughter.

(Holzer affirmation, paragraph 18).

* * *

Once the Act requires all meat packers subject

to it to render livestock animals insensible to pain before the handling process begins, and thus before they are shackled and hoisted, Section 1906 of the Act then makes a religious exception. It is this religious exception to the "render insensible" requirement of the Act's Section 1902(a) which is the crux of this case, and which plaintiffs claim violates the constitutional proscriptions of the First Amendment. (Holzer affirmation, paragraph 20).

Basically, then, this case involves the constitutionality of Section 1906 (and a portion of 1905 and 1902) of the Federal Humane Slaughter Act --- it asks whether Congress, in passing a much needed, long overdue law requiring livestock animals to be rendered insensible before being shackled and hoisted for slaughter, can make an exception for those animals which, allegedly, will later be slaughtered by a Jewish ritual throat-cut; it asks whether Congress, in passing humane legislation, can allow some people to insist upon the perpetuation of inhumane practices, allegedly in the name of their religion; it asks whether Congress, in mandating that a soon-to-be slaughtered animal must at least be rendered insensible to pain before anything is done to him (let alone shackling and hoisting), can constitutionally make an exception which is nakedly and unequivocally premised upon the alleged religious dogma of a particular religious group; it asks, again, whether the government can constitutionally throw its weight behind what some

segments of one religious group claim that they want.

These questions are the basic, substantive, constitutional ones which plaintiffs claim a three-judge court must answer. We respectfully wish to remind the court that these questions are not before it, at the present time on these motions.

Because plaintiffs have requested a three-judge court, their cross-motion and the government's motion to dismiss raise two questions, and two questions only: (1) does the complaint raise a substantial federal constitutional question, sufficient to require the convening of a three-judge court? and (2) do any of the plaintiffs have sufficient "standing to sue?"

Since the answer to both questions must be answered affirmatively, plaintiffs' cross-motion to convene a three-judge court must be granted, and the government's motion to dismiss must be denied.

POINT 1

The Complaint Raises A Substantial
Federal Constitutional Question,
And A Three-Judge Court Must Be Convened.

28 U.S.C. §2282 requires the impanelling of a three-judge court in every case where the relief sought is "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States." (Zemel v. Rusk, 381 U.S. 1,5(1965)).

Here, among other relief, the complaint seeks "[a] permanent injunction ... against the enforcement of §§1902(b) and 1906, and so much of §1905 as aforesaid, of the Federal Humane Slaughter Act"

The complaint alleges that such sections are repugnant to the Establishment and Free Exercise Clauses of the First Amendment.

Thus, it is clear that the complaint formally satisfies the requirements of 28 U.S.C. §§2282 and 2284.

Therefore, one question remains: is the federal constitutional question which the complaint raises a "substantial" question?

"When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial ... (Idlewild Bon Voyage Liquor Corp., v. Epstein, 370 U.S. 713, 715(1962)).

How a court is to ascertain if the constitutional question raised is substantial was recently discussed once again by the Second Circuit, which said that on an application for the convening of a three-judge court, the

issue ... is not whether [the challenged statute] is unconstitutional but whether plaintiff's claim of unconstitutionality was unsubstantial "either

because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] court as to foreclose the subject." California Water Service Co. v. City of Redding, 304 U.S. 252,255 ... (Latham v. Tynan, 435 F.2d 1248,1252 (2 Cir. 1970); see also Ex parte Poresky, 290 U.S. 30 (1933), Bailey v. Patterson, 369 U.S. 31 (1962), Zemel v. Rusk, supra).

Thus, two tests emerge for "substantiality": (1) is the question "obviously without merit?" and (2) do previous decisions foreclose it? (Needless to say, the government has the burden of proving "plainly unsubstantial," so as to warrant not convening a three-judge court and to justify dismissal of the complaint. (Ex parte Poresky, supra)).

As was stated in the Holzer affirmation, and supra, and as is evident from its papers, especially from its memorandum of law (Point II), the government apparently thinks that plaintiffs are arguing about whether a throat-cut method of slaughter is humane. As a result, the government has ignored what the plaintiffs are claiming and thus failed to carry its burden of proving that plaintiffs' actual claims are "obviously without merit" or "foreclosed." However, even if the government had discussed the actual issue involved here, there would have been a failure of proof. As a matter of fact, most of the religion cases so liberally sprinkled throughout the government's Point II demonstrate the very opposite of what the government asserts --- the constitutional

question presented here is meritorious, and is not foreclosed.

There is so much that can be said to demonstrate meritoriousness and non-foreclosure, that it is difficult deciding where to begin.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a State Church or a State Religion, an area history shows they regarded as very important and fraught with great dangers. 'Instead they commanded that there should be "no law respecting and establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a State Religion but nevertheless be one "respecting" that and in the sense of being a step that could lead to such establishment and hence offend the First Amendment. (Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 2111(1971)).

In Lemon, Chief Justice Burger observed that every analysis of a potential Establishment problem "must begin with consideration of the

cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. " He drew the first two from Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923(1968):

First, the statute [here, the challenged sections] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion.

Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409(1970) supplied the third test:

finally, the statute must not foster "an excessive government entanglement with religion."

What must be analyzed now is whether, under the facts of this case as measured by Lemon's three tests, plaintiffs have stated at least a bona-fide, arguable claim of unconstitutionality as to the challenged sections of the Act.

Section 1905 of the Federal Humane Slaughter Act, in effect, places a person of the Jewish faith on the Secretary's Advisory Committee. Section 1902(b) involves the government in passing on whether the Jewish ritual method of slaughter is humane. Section 1906, the most offensive, makes a religious (Jewish) exception to the "render insensible" requirements of Section 1902(a).

A "Secular Legislative Purpose"

Manifestly, the above sections do not evidence the government's interest in protecting the general public in a usual "police power" sense. The sections have nothing whatever to do with the public health, welfare, safety or morals. Indeed, even the most vigorous supporters of the sections have never made such a claim. Nor has any argument ever been made, nor could it be, that the sections evince a governmental interest in fostering charitable giving, as in Walz, supra, or any other comparable public purpose. Unlike in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504(1947), where the Court approved of New Jersey providing bus transportation to all school children, and Board of Education v. Allen, 392, U.S. 236, 88 S.Ct. 1923(1968), where the Court approved of New York lending of books to all school children, here the obvious sectarian purpose of the challenged sections is not only to make available to some Jewish people meat killed by a throat-cut (which plaintiffs are not arguing about), but also to make available to them meat from animals which have been handled for slaughter (i.e., shackled and hoisted) while they are alive and fully conscious.

This is the core of the problem, and the hidden, unstated reason why the Section 1906 exception was tacked on to the Act: A small, but very vociferous, minority of Jewish people believe that Hebrew Law prohibits cutting the throat of an animal which can not feel pain. (Encyclopedia Judaica, vol.6, p.28; vol.14, pps.1338,1341). In other words, it is said by some that under Jewish law, the animal is supposed to be alive and kicking when its throat is cut, as indeed it is now because of

Section 1906's exception to the "render insensible" requirement of Section 1902(a).

For evidence that this sectarian, not secular, legislative purpose was the reason for Section 1906's exception and Section 1905's creation of a watchman, one need look no further than the language of Section 1906 itself:

Notwithstanding any other provision of this chapter, in order to protect freedom of religion ... the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter.
(emphasis added).

Thus, the question here is brought into sharp focus. Is this Congressional attempt allegedly to protect religion, a violation of the First Amendment's proscription against any law "respecting" an establishment of religion? Or, more to the point on these motions, do plaintiffs raise at least an arguable issue as to a violation of the Establishment Clause as a result of this avowed government interest in religious "protection"?

Lest there be any question that the challenged sections were introduced in order to alleviate the concerns of certain vociferous Jewish groups, reference need only be made to the Hearings on the Act.

- The original humane slaughter bill introduced by Senator Hubert

Humphrey exempted from the Act persons "authorized by an ordained rabbi of the Jewish religious faith to serve as a schector." (S.1636, Sec. 2(c); See Hearings before a Subcommittee on Agriculture and Forestry, U.S. Senate, 84th Cong., 2d Session, May 9 and 10, 1956, p.3-4).

• A Senate amendment to the bill provided for the appointment of an Advisory and Research Committee on Humane Slaughter of Livestock and Poultry, to be composed of 10 members, one of whom was to be "a person familiar with the requirements of the Jewish religious faith with respect to slaughter." Listed as a "humane" method of slaughtering, in additon to a "render insensible before bleeding or slaughtering" requirement, was slaughtering "in accordance with the practices and requirements of the Jewish religious faith." (103 Cong. Rec. 13904, July 23, 1956).

• Eight bills were introduced in the House of Representatives, all of which contained specific prohibitions against shackling and hoisting of conscious animals. (See Hearings before the Subcommittee on Livestock and Feed Grains of the Committee on Agriculture, 85th Cong., 1st Sess., April 2 and 12, 1957). Hearings on the bills led to the drafting of H.R.8308. In 1958, amendments to H.R.8308 were offered, one of which was a provision that slaughtering in accordance with the ritual requirements of the Jewish faith was humane. In addition, "a new section" was to be added to the bill, to wit: "nothing in this act shall be construed to prohibit, abridge, or ... hinder the religious freedom of any person or group to slaughter and prepare for the slaughter of livestock in conformity with the practices and requirements of his

religion." This religious exemption provision was taken directly from a letter to one of the bill's sponsors, written by attorney Leo Pfeffer; the letter begins: "Dear Congressman Poage: I am writing this letter on behalf of the Rabbinical Assembly of America and the United Synagogue of America." (See 104 Cong.Rec. 1654-5 (February 4, 1958) (emphasis added)).

There are other numerous examples of how considerations of the Jewish religious faith were inextricably intertwined with the challenged sections of the Humane Slaughter Act --- the Hearings are replete with them. Moreover, merely to read the list of "interested" Jewish groups represented before Congress during the Hearings is to illustrate the point:

Research Institute of Religious Jewry; Rabbinical Assembly of the United Synagogue; Union of Orthodox Rabbis of the United States and Canada; the American Section of Argudas Israel World Organizations; Agudath Israel of America; American Jewish Congress; Association of Grand Rabbis; Central Conference of American Rabbis; Jewish Labor Committee; Jewish War Veterans of the U.S.A.; Mizrachi and Hapoel Hamizrachi of America; National Council of Young Israel; New York Board of Rabbis; Poale Agudath Israel of America; Rabbinical Alliance of America; Rabbinical Assembly of America; Rabbinical

Board of Greater New York; Rabbinical Council of America; Synagogue Council of America; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; United Synagogue of America; and the National Community Relations Advisory Council. The latter organization is a coordinating agency for some national Jewish organizations, as well as for 36 regional, state and local Jewish community councils throughout the country. (Hearings before the Subcommittee on Livestock and Feed Grains of the Committee on Agriculture, House of Representatives, 85th Congress, 1st Session, April 2 and 12, 1957, pp. 34-35).

Thus, there can be no question but that the Section 1906 exception to the "render insensible" requirement of Section 1902 was of paramount interest to, and strongly desired by, a vociferous and well-organized Jewish community.

"Principal or Primary Effect."

The question under Lemon's second test is whether the legislation's principal or primary effect is either to advance or to inhibit religion. Since at the moment, we are concerned with the Establishment Clause, we need focus only on advancement.

As stated above, there is only one primary effect of the Section

1906 exemption: meat handled in a manner desired by certain members of the Jewish faith becomes available when otherwise it would not, because of the "rendered insensible" requirement of Section 1902(a). No other purpose, principal or primary or anything else, has ever been suggested, nor indeed could it be. A "special interest" caused the challenged sections (especially 1906) to be included in the Act, for the express (and only) purpose of legislatively protecting the dietary preferences of its members.

As one Congressman pointed out:

... I assumed that the sole purpose of the bill /later, the Humane Slaughter Act/ was to prevent cruelty to animals about to be made into food and those who sponsored the bill knew what they were doing ... But, I wonder if this is just to protect animals. /The bill/ says "before being shackled, hoisted, thrown, cast, or cut" the animals are to be rendered insensible. I cannot, for the life of me ... see why our Jewish friends are exempt from this bill. One's religious practices, if the method and procedure of slaughter are just as painful as those used by others, is no reason for an exception if the sole purpose is to prevent pain in slaughter. (See 104 Congressional Record 1659, Statement of Representative Hoffman, February 4, 1958).

Again, for purposes of these motions, do plaintiffs assert at least an arguable claim to a violation of the Establishment Clause? We think it is clear that they do.

"Excessive entanglement."

Lemon's third test --- "an excessive government entanglement with religion" --- was derived from Walz, supra. Once again, for purposes

of these motions, it is unnecessary to prove conclusively that there is an excessive entanglement --- it must be shown only that there is a bona-fide, arguable issue as to entanglement. Here are some of the categories of entanglement which the challenged sections necessitate:

• Slaughtering by throat-cut is humane if "in accordance with the ritual requirements of the Jewish faith ..." (1902(b)).

1. Who decides what are the "ritual requirements of the Jewish faith?" Under Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143(1952), Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 80 S.Ct. 1037(1960), and Presbyterian Church v. Mary Eliz. Blue Hull Memorial Presbyterian Church, 393 U.S. 440(1969), no court can decide matters of religious dogma or doctrine. Yet, apparently even Jewish authorities seem to disagree not only about whether ritual slaughter is required, but also about what ritual slaughter actually is.

For years British law has been hazy on a definition for butchers of the word kosher, which denotes the Jewish method of slaughtering animals permitted to be eaten and the preparation process for eating. The religious law's requirements were laid down first in the Torah, or Five Books of Moses, and later interpreted in the Talmud. * * * "We ask 10 people and get 10 different opinions," said Jack Brenner, the secretary of the London Board of Shechita. [ritual slaughter]

"We're moving toward a definition but, believe me, it's not easy." (N.Y. Times, March 23, 1971)
(emphasis added)

We have no desire to protect methods of handling or preparation of animals which may be inhumane. At the same time, we see no need for restricting or banning present methods for handling which may not be inhumane. ... To be more specific, while we hold no brief for ... such forms of shackling and hoisting which may be inhumane, it was never the intention of the undersigned organization to imply that shackling and hoisting per se are inhumane, and, therefore subject to being prohibited in all their forms ..."

(104 Cong. Rec. 15397, July 29, 1958, letter by the then Executive Director of the American Jewish Congress, the then Acting Executive Director of the Rabbinical Assembly of America, the then Executive Vice President of the Central Conference of American Rabbis, the then Vice President of the Union of American Hebrew Congregations, and the then Executive Director of the United Synagogue of America.

2. Who settles a dispute about ritual slaughter? No court can.

3. Who gets reimbursed, and who decides who gets reimbursed, for bookkeeping and general supervisory work in connection with the "ritual requirements" provision?

4. Saturdays, for Orthodox Jewish people, are a prescribed day of rest and therefore no ritual slaughtering for the kosher trade is permitted. In addition, when a Jewish "no slaughtering" day or days precedes or follows a three-day weekend, no ritual slaughtering is permitted for 4 or 5 days. Is the government to administer, directly or indirectly, these Jewish religious requirements regarding non-slaughtering days?

• Under Section 1903 the government may purchase meat only if it is slaughtered "humanely," which includes animals killed by Jewish ritual slaughter.

1. Are the packers to provide the government with rabbinical certifications?

2. Is the government to station rabbis with every packer from whom it purchases meat?

3. What rabbis are to be used, --- Orthodox, Reform, Conservative, etc.?

... As we have heard, there is disagreement among members of the Jewish faith as to what the system of kosher slaughtering should be, and how it should be described in words and figures. (104 Cong. Rec.

4. All contractors selling meat to the government must file a statement of eligibility which states that all livestock products sold to the government comply with the requirements of the Act. (government memorandum, page 7). What proportion of the statements of eligibility are applicable to the ritual slaughter procedure, and how much more detailed and time-consuming must such statements be?

5. The Orthodox Jewish faith requires that all meat which is not sold within 72 hours after slaughter must be given a special washing (Beguissing) by a representative of the Jewish faith. Is the government to provide the representatives and/or supervise or pay for his "washing" activities?

6. The government concedes that ritually slaughtered meat was specifically purchased for Jewish schools in New York (government memorandum, page 16, footnote 2). How much time and money was spent by the government in administering this special purchase? In seeing to it that the meat purchased on behalf of the Jewish schools was in fact ritually slaughtered? In communications with the Jewish authorities? In separate bookkeeping? In meat segregation procedures?

7. The Code of Federal Regulations (Sec. 390.1 et seq.) provides for inspectors of the Meat and Poultry Inspection Program of the Animal and Plant Health Inspection Service of the Department of Agriculture, to insure compliance with the Humane Slaughter Act, such as

to see that all equipment meets certain specified requirements and to see that the animals are handled in a manner appropriate to the letter and spirit of the Act. What proportion of inspectors are assigned, and at what cost, to oversee compliance with the Act where ritual slaughtering is the procedure being used? How many different kinds of inspectors are needed? The government concedes that at least 65 plants and four million animals annually are involved in Jewish ritual slaughter. (government affidavit of C.H. Pals, paragraphs 2 and 3). Federal funds are obviously expended on these plants. Special personnel who are specifically acquainted with and knowledgeable about ritual slaughter are probably needed.

8. The Department of Agriculture is directed, under the Act, (7 U.S.C. 1904) to establish suitable means of identifying the carcasses of livestock which is inspected and passed, to see that said carcasses have been slaughtered in accordance with the policy declared in the Act. (See Code of Federal Regulations, Sec.391.1) Since the policy includes ritual slaughter, what proportion of the carcasses to be identified were ritually slaughtered? How many inspectors, and at what cost, have to be assigned to identify the carcasses of ritually slaughtered livestock? What part of the Department's sampling program is attributable to the sampling of ritually slaughtered meat? What about the various permits for movement of animals which are attributable to ritually slaughtered meat? Or the net weight compliance procedure? Or the special training that inspectors of ritually slaughtered meat may have to undergo? Are

they to be taught by rabbis who will be paid by the government?

The Secretary's Advisory Committee shall include "a person familiar with the requirements of religious faiths with respect to slaughter." The government's exhibits show that this person, not coincidentally, is a rabbi.

1. Which of the several Jewish sects is he to represent?
2. Who decides disputes?
3. The rabbi is paid expenses out of the public treasury.

4. The rabbi member of the Advisory Committee, since the Committee's inception, has been Rabbi Joseph Soloveitchik, who has been paid the sum of \$210.05 for "expenditures." (government memorandum, page 16, footnote 1) A breakdown of these expenditures can be found in Exhibit "A" attached to the affidavit of Assistant U.S. Attorney, Stephen J. Glassman. Rabbi Soloveitchik's airfare, trainfare, and taxifare are being paid by the government so that the Rabbi may apply his knowledge of Jewish ritual slaughter requirements when he consults with the United States government. Detailed schedules of expenses and vouchers in connection with Rabbi Soloveitchik's travels must be kept and administered by the government. The government, for example, must record and keep on file the time the Rabbi departs from his home, the amount of a taxi to an airport, the departure and arrival times of the Rabbi's various flights, various per diem expenses --- all at government expense --- and all for the purpose of administering the ritual slaughter exceptions to the Act.

• Section 1906, in the name of freedom of religion, protects only "ritual slaughter."

1. Who decides, and how are disputes resolved?

2. If ritual slaughter is to be protected, how much government surveillance is to be required, by whom, and of whom?

As to the crucial question of "surveillance," it needs to be observed that Lemon seemed virtually to equate it with "entanglement." Here, it is nearly self-evident that the challenged, religiously-based sections, in attempting to put the government's muscle on the side of members of a certain group, necessitate virtually constant government monitoring in order that the desired end be accomplished.

Once again --- this time as to "excessive entanglement" --- the question must be asked: have plaintiffs raised at least an arguable claim, sufficient to cause denial of the government's motion and convening of a three-judge court? We think that they have.

In short, if Walz, supra, acknowledged that "a direct money subsidy would be a relationship pregnant with involvement and ... could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards," if Lemon, supra, found an "excessive entanglement" in a teacher salary supplement plan and a reimbursement scheme, then surely, at the very least, the Federal Humane Slaughter Act's approval of, concern with, use of, and reliance upon, Jewish ritual slaughter, and the Act's religiously-based exception

to a humane requirement of general application, necessitates the convening of a three-judge court to decide the substantive constitutional issues present here.

"Foreclosure"

In view of the foregoing, it should not be necessary to belabor the point that the constitutional questions raised here by plaintiffs have not been foreclosed by prior decisions of the Supreme Court of the United States. No section of the Federal Humane Slaughter Act has ever been tested in court, on constitutional grounds or on any other. Moreover, no Supreme Court case on the Establishment Clause has ever dealt with the singling out of one particular religion for government help, as sections of the Federal Humane Slaughter Act single out the Jewish religion here.

As a matter of fact, if there is any issue here of foreclosure at all, it can be argued (as it will be by plaintiffs before the three-judge court) that certain Free Exercise Clause decisions of the Supreme Court compel the conclusion that the Section 1906 exception is patently unconstitutional.

In this connection, a brief summary of what is involved here may be useful. To cure horrible abuses which existed for years in the handling for slaughter and actual slaughter of livestock animals (Holzer affirmation, paragraph 5), in 1958 the Federal Humane Slaughter Act was enacted. In general, it required that before anything was done to the animals, they first had to be rendered insensible to pain by a single

blow. Then, but only then, they could be handled, shackled, hoisted, etc., and eventually killed --- killed even by a throat-cut, which was deemed to be a humane method of slaughter. Quite obviously, the Act was a manifestation by the people of this country, and by their Congress, that the medieval barbarity which had so long attended livestock slaughter in America was unacceptable any longer; that given the necessity for killing livestock animals for food, at least the unfortunate creatures would not feel any pain. The Act, although passed under the Commerce Clause power of the Constitution, was also in the nature of a police power enactment. It was aimed at general health-safety-morals-welfare issues, as the Act's preamble language makes quite clear. Then, in response to religious pressure, Section 1906 was proposed as an amendment. Certain Jewish organizations wanted not only that livestock animals could be killed by a throat-cut (which was done), but they also wanted a total exception from the "rendered insensible" requirements of Section 1902(b). Their reason was because some of them claimed that Jewish law required a soon-to-be-slaughtered animal to be fully conscious during the entire process. [The law requires simply that animals be rendered unconscious before being butchered. This innocent sounding requirement, however, is tantamount to outlawing of shehitah, since stunning by any method renders a creature unfit for Jewish slaughtering." (104 Cong. Rec. 15391, July 29, 1958, Statement of Senator Jacob Javits) (See Also "Animals into Meat: A Report on the Pre-Slaughter Handling of Livestock," Argus Archives, March 1971, Vol. 2, No. 1, p. 12).] Presumably, Senator Javits and some of his constituents held this view even though the "shehitah"

process involved included shackling, hoisting, tissue bleeding, tearing of hide and flesh, bruising, breakage and dislocation of bones, skull fracturing, eye-gouging, nose-ripping, horn-shattering, etc. This too, was done.

So, in Free Exercise terms, the question focuses easily: can one's real or alleged religious practices be allowed, no matter how repugnant, destructive and contrary to the letter and spirit of federal law? Even assuming that which is by no means conceded or true --- that Jewish law prohibits throat-cutting an animal which has first been rendered insensible to pain by a single blow --- the Supreme Court often has in analogous situations prohibited a religious practice, drawing in constitutional terms an important difference between the freedom to believe, which is absolute, and the freedom to act, which is not.

Despite a Mormon man's religious duty to enter into polygamous marriages, on pain of hell if he failed to do so, the Supreme Court upheld a federal law for the territory of Utah, making polygamy a crime. (Reynolds v. U.S., 98 U.S. 145(1878)).

Despite a Jehovah's Witness' religious duty to proselytize and sell the Order's magazines, the Court upheld a Massachusetts labor law conviction on an adult witness who had her teen-age niece out in the early evening selling magazines on a street corner, although the girl was there voluntarily. (Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438(1944)). There was, the Court held, a "compelling state interest" in protecting the welfare of children, even against a clear

religious obligation, and a harmless one at that.

In other words, Reynolds, Prince, and other cases, stand for the proposition, long recognized and applied by the Court, that while the Free Exercise Clause guarantees one the absolute right to believe religiously as he chooses, it does not guarantee one the right to act religiously as he chooses --- especially if there is a compelling state interest against that action. Thus, even if it were argued that the dietary law of some Jewish persons required the brutalization of helpless animals, that Free Exercise protected such conduct, it would not necessarily follow that the Free Exercise Clause would permit it. Moreover, to the extent that it is argued, to the extent that special interest groups contend that they have a constitutional right to dietary preferences even in contravention to the letter and spirit of a federal statute, to the extent they claim that their religious practices in this regard are entitled to more consideration than the sense of the Congress of the United States will allow, to that extent they serve only to prove the existence of a substantial, obviously meritorious, not foreclosed, constitutional question of the first magnitude. And to that extent, they prove the necessity for the government's motion here to be denied and the plaintiffs' cross-motion granted. How could it not be an important constitutional question for a federal statute to provide, in effect, that it is constitutional for meat packers to be exempted from a humane slaughter requirement, because of, and in the name of, what the Bible or the Talmud supposedly tells Jewish people about how their meat should be handled and killed? To ask the question is to answer it.

Lastly, a few words should be said about plaintiffs' contention

that their Free Exercise Clause rights are being violated because of the challenged sections of the Act, especially the reimbursement provision of Section 1905. The government has conceded that a rabbi is on the Secretary's Advisory Committee, and that public monies have been paid to him.

Plaintiffs are therefore being taxed to pay Rabbi Joseph Soloveitchik for his airplane, railroad, taxi and miscellaneous expenses, amounting thus far to at least \$210.05 (government memorandum, page 9). The Act provides for someone like Rabbi Soloveitchik to be on the Advisory Committee solely because he is familiar with the requirements of a specific religious faith ---- the Jewish faith. The Department is obliged to expend time and money ---- taxpayer money ---- to keep proper records in connection with the Rabbi's travels, to maintain expense schedules, to reimburse the Rabbi, to verify whatever travel activity the Rabbi engages in and puts in vouchers for.

Obviously, it matters not how much public money goes to the Rabbi. What is important is that any public money goes in support of religious persons, for religious reasons, in the name of real or supposed religious requirements. Citation of cases is hardly necessary for the proposition that the government can not hand over public money to a rabbi, in return for his advice as to what is kosher under a federal statute. The Court has condemned governmental efforts to aid financially all religions, so how clear must it be when the government, as here, contributes financial aid to one religion, for a purpose which aids only that religion? To the extent plaintiffs pay federal taxes, they help

to pay the rabbi's expenses, and for the kosher processed-and-killed meat which the government spends millions of dollars on each year.

The government purchases meat under the National School Lunch Act (42 U.S.C. 1751 et seq.) and the Child Nutrition Act (42 U.S.C. 1777 and 7 U.S.C. 612c as implemented by 15 U.S.C. 713c). Moreover, according to the Department of Agriculture, during periods of low livestock prices, the Department has removed surplus meat from normal channels, to provide market assistance to livestock producers. Products thus purchased have been donated to schools pursuant to the school-lunch program and also to "charitable institutions, needy families, and other eligible outlets. In 1953, ... 217 million pounds of beef at a cost of \$85.7 million [were purchased] ... [D]uring the fall of 1956, 100 million pounds of livestock products ... were purchased at a cost of \$32.9 million." (See Senate Report No. 1724, June 1958, Statement of True D. Morse, Acting Secretary of the Department of Agriculture, p.3934)

The government has meat procurement programs for the U.S. Army, Navy, Air Force, Marine Corps. (104 Cong. Rec. 1667, February 4, 1958) (The Department of Defense admitted in 1958, that it procured an estimated 2% of the national production of livestock) Many federally inspected slaughtering plants engage in at least some Jewish ritual slaughtering. (The government admits to 65; see government affidavit of C.H. Pals, Staff Officer, Meat Group, Animal and Plant Health Inspection Service, U.S. Dept. of Agriculture, p.1). The government also concedes that about 3½ million animals annually are ritually slaughtered. (see Pals affidavit, supra, p. 2). Thus, the substantial meat purchases by the

government pursuant to its various meat procurement programs entail a great deal of tax money spent on meat that is ritually slaughtered ---- on cattle, calves, goats and sheep. Just what percentage of the 3½ million ritually slaughtered animals are purchased for government procurement programs is not clear, since the government claims to make no distinction, in its purchases, between ritually and non-ritually slaughtered meat. (See government affidavit of John C. Pierce, Director, Livestock Division of the Agricultural Marketing Service of the U.S. Department of Agriculture, pp. 3 and 6)

What is clear, however, is that using the government's own figures of 3½ million ritually slaughtered animals annually, and estimating that, at rock bottom, each animal yields at least 5 pounds of meat and each pound is worth at least one dollar, then the government has, under its jurisdiction, close to \$20 million dollars annually worth of ritually slaughtered meat.

Thus, to the extent some of their tax money is used for religious purposes not their own, and which they oppose, plaintiffs' Free Exercise rights are being violated. See Everson v. Board of Ed., 330 U.S. 1, 67 S.Ct. 504(1947); McCullum v. Board of Ed., 333 U.S. 203(1948); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261(1962); Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560(1963); Walz, supra; Lemon, supra.

In view of the foregoing discussion, especially with respect to plaintiffs' Establishment Clause contentions and Lemon's three tests,

there can be no doubt that plaintiffs have presented a substantial constitutional question, one which necessitates the convening of a three-judge court, and denial of the government's motion to dismiss. Only one question remains: are plaintiffs --- or any one of them --- the appropriate persons to raise the constitutional issues presented here?

POINT II
PLAINTIFFS ---- OR AT LEAST ONE
OF THEM ---- HAVE "STANDING
TO SUE."

In Point I of its memorandum (pps. 14-20) in support of the motion to dismiss, the government contends that each and every one of the 9 individual and 3 organization plaintiffs lack the requisite "standing to sue," relying for the most part on Flast v. Cohen, 392 U.S. 83. The government's misplaced reliance on Flast was apparently caused by its misconception as to on what basis plaintiffs asserted standing. According to the government,

... the principal basis on which plaintiffs
claim standing is that of a taxpayer suit

In effect, the government has attempted to create a straw-man (taxpayer standing), and then to blow it down with Flast. The fact is, however, that plaintiffs assert standing on grounds in addition to their status as federal taxpayers; moreover, as will be seen, under Flast even if they asserted only federal taxpayer standing, it would be sufficient in the context of this case.

Plaintiff Jones, suing for herself and as next friend, is a non-meat-eating Catholic, deeply committed to the principle of separation of church and state, whose professional life has been devoted to animal welfare work. (paragraph 1 of the complaint; see also exhibit "C", annexed to the Holzer affirmation).

Plaintiff Steinberg, an agnostic and one deeply committed to the principle of humane treatment of animals, on ethical grounds is unable to eat the meat of animals which have in any way been injured in the slaughtering process. Yet, according to the government's own exhibits (annexed to its motion to dismiss), because a substantial number of meat packers do avail themselves of Section 1906's exception, and thus shackle and hoist live, fully conscious animals before the actual slaughter, at diverse times Mr. Steinberg has unwittingly purchased and eaten meat in violation of his ethical principles. (paragraph 8 of the complaint; see also exhibit "D", annexed to the Holzer affirmation).

Plaintiff Weiss, a meat-eater, a Roman Catholic and one who is deeply committed to the principles of church-state separation and the humane treatment of animals, is in much the same position as Mr. Steinberg. (paragraph 9 of the complaint; see also exhibit "E", annexed to the Holzer affirmation).

Plaintiff Landek, an atheist, refrains entirely from eating meat because of her commitment to the principle of humane treatment of animals, because of her conviction that the shackling and hoisting (pursuant to Section 1906's religious exception) of live, fully conscious animals does in

fact injure them (see paragraphs 11, 13 and 14 of the Holzer affirmation), because it is virtually impossible to ascertain at the consumer level what meat has been slaughtered in accordance with Section 1906's religious exception. (paragraph 7 of the complaint; see also exhibit "F", annexed to the Holzer affirmation).

Two other individual taxpayers also have deep commitments to the principle of humane treatment for animals. (See paragraphs 5 and 6 of the complaint).

Against this background of what interests each plaintiff is asserting here, and before discussing how and why each of them have standing, it would be useful to review some current aspects of the law of standing.

Although Justice Frankfurter once characterized the doctrine of standing as a "complicated specialty of federal jurisdiction" (U.S. ex rel. Chapman v. FPC, 345 U.S. 153, 156(1953)), and although for many years "the Supreme Court's law of standing [was] cluttered, confused, and contradictory" (3 K. Davis, Administrative Law Treatise §22.18 (Supp. 1965)), in a series of seven cases over the past five years the Supreme Court has unmistakably discarded many of the old standing concepts and liberally enlarged the class of those who will be deemed to possess standing to sue. Hence, the balance of this memorandum will principally be concerned with: Hardin v. Kentucky Util. Co., 390 U.S. 1(1968); Flast v. Cohen, 392 U.S. 83(1968); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150(1970); Barlow v. Collins, 397 U.S. 159(1970); Arnold Tours, Inc. v. Camp, 400 U.S. 45(1970); Investment Co.

Institute v.

Camp, 401 U.S. 617(1971); and Sierra Club v. Morton, 405 U.S. 727(1972).

One of the problems of analysis of standing doctrine has been the [erroneous] grouping under one heading of too many different situations. In order to understand the functions of the doctrine, it is necessary at the outset to distinguish the different contexts in which an issue of standing is said to arise --- for example, whether it involves a plaintiff seeking a judicial remedy or review with respect to some government action or enactment, a defendant in a proceeding brought by the government, or a party in private litigation. The important considerations in cases in these several categories overlap to a degree but are far from identical, and it is essential to keep them distinct. (Scott, Standing in Supreme Court --- A Functional Analysis, 86 Harvard Law Review 645(1973)).

Professor Scott's caveat is well taken. Much of the confusion in standing cases, and in attempts to understand and apply the doctrine, has been caused by imprecise delineation of the type of case involved.

Historically, the largest group of standing cases, and the one about which all of the current controversy has been concerned, have been the cases involving the standing of plaintiffs to obtain judicial review against the government.

That kind of standing is what this case, and the government's motion, is all about.

However, before going further, another distinction must be made, one which is central to an understanding of standing doctrine. That distinction is between:

Judicial review of an act or decision of a government official or agency which Congress has expressly provided shall be subject to review in the courts by some prescribed proceeding ["statutory review"], and judicial review obtained by invoking some general jurisdiction grant or remedy not related to the specific governmental action or decision being challenged ["nonstatutory review"]. (Scott, supra, at 647; emphasis added)

Therefore, it can be said that the standing issue in this case involves a situation where plaintiffs seek to obtain judicial review against the government, of either a statutory review type, or a non-statutory review type, or perhaps both.

All of the seven cases mentioned above involve --- as does the instant one --- efforts by plaintiffs to obtain judicial review of government action. In addition --- and this, minimally, is the situation here --- all of the seven cases involve situations of nonstatutory review. In net effect, according to Professor Scott, the cases have greatly liberalized standing requirements in nonstatutory review cases, and blurred the distinction between such cases and those involving statutory review.

Before discussing the mainstream of these few cases, it would be well to dispose of one of them which is quite special --- the case which the government apparently believes is the only one which applies to the case at bar, and on which the government appears wholly to rely: Flast v. Cohen. As was stated above, not only do plaintiffs assert standing on grounds additional to that as taxpayers, but under Flast, even if they did assert only taxpayer standing, they would have sufficient standing to bring this action.

Flast deals with a narrow issue, but one which is present, in part, in the instant case: the standing of federal taxpayers to challenge federal spending programs on constitutional grounds. When the Court found standing in Flast, it announced a new rule: a federal taxpayer possesses standing to attack a federal spending program on the ground that it violates "specific constitutional limitations" on the exercise by Congress of its taxing and spending powers --- the Establishment Clause was held to be such a "specific constitutional limitation."

Therefore, since plaintiffs here sue at least in part as taxpayers, and under the Establishment Clause --- a "specific constitutional limitation" --- it is worthwhile to look at whether the taxing and spending power of Congress is involved in the Federal Humane Slaughter Act.

On this subject, the government insists on focusing on expenditures which are directly religiously connected, which it concedes, but which it simultaneously seeks to minimize as "an incidental expenditure

of tax funds in the administration of an essentially regulatory statute": \$210.05 to the Secretary's Advisory Committee member, Rabbi Soloveitchik; a "carload of kosher beef specifically purchased for Jewish schools" (government's memorandum, p.16). It is submitted that, with regard to the requirements for standing, Flast is not concerned with how much the government may spend on something, but rather whether it spends anything at all. (If the government really cares to focus on the dollar amount involved, we invite its attention to some other "amounts" which the Court has held sufficient: a \$5.00 fine, in McGowan v. Maryland, 81 S.Ct. 1101; a fraction of one vote, in Baker v. Carr, 82 S.Ct. 691; and having to leave the school room during a prayer, in Engel v. Vitale, 82 S.Ct. 1261).

Moreover, the government conveniently chooses to ignore the wider point --- that the government indeed spends untold millions of dollars in connection with its activities under the Federal Humane Slaughter Act, an Act shot through in wording and in implementation with multiple religious considerations: Jewish ritual slaughter, scientifically described in detail in the Act, is humane, and thus must be done in a certain way; and, presumably, kept tabs on, by spending federal money; all the meat bought by every single "agency or instrumentality of the United States," and paid for with federal money, must adhere to humane slaughter methods, one of which is said to be Jewish ritual slaughter; the Secretary is obliged to do research and designate slaughter methods and to provide "suitable means of indentifying the

carcasses of animals inspected and passed under the Meat Inspection Act that have been slaughtered in accordance with the public policy declared in this chapter;" and he must use federal people and spend federal money to do so; he must have an Advisory Committee, and meetings, etc.; paid for with federal money; according to the government's exhibits, there are hundreds of "Federally Inspected Plants Using Ritual Slaughter" which are inspected by federal personnel paid with federal money.

In short, an essential ingredient permeating every aspect of the Federal Humane Slaughter Act is the Jewish religious accommodation. Accordingly, everything done by the government in implementing that Act with federal personnel and federal funds is to some extent necessarily devoted to cognizance of, deference to, and implementation of the Jewish religious aspects of the Act. Therefore, sometimes directly and sometimes indirectly, the government spends vast sums of time and money in connection with activities intimately concerned with the dietary preferences of one specific religious group. As we said above, the important consideration under Flast is whether expenditures are made, not how much they are. However, if the government wishes to emphasize how much is spent, it is readily apparent that each year millions are spent under the Act --- and spent in contravention of the Establishment Clause.

Thus, to the extent plaintiffs assert standing as federal taxpayers, they satisfy the requirements of Flast v. Cohen.

In addition, plaintiffs assert other interests as well, any of which are sufficient to give them standing to sue here.

In Data Processing, supra, and its companion case, Barlow v. Collins, supra, the Court enunciated a two-part test by which standing is now to be determined:

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. (397 U.S. at 152; emphasis added).

The second question is ... whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. (397 U.S. at 153; emphasis added).

We shall discuss the second question ("zone of interests") first, as it is applied to the case at bar.

In Data Processing and Barlow (as well as in the two later cases of Arnold Tours and Investment Company Institute, both supra) the Court had no trouble finding that the plaintiffs were at least reasonably contemplated by the statutes involved as "persons" with interests to be protected. The Data Processing majority (by Justice Douglas), which set the tone for the other three cases, was willing to consult statutory

materials for evidence of virtually any intent to recognize plaintiffs' interests in some way. Justice Brennan (joined by Justice White) went even further: he would consult statutory materials only to seek evidence of an intent to exclude a prospective plaintiff from judicial review, thereby establishing a kind of rebuttable presumption in favor of standing.

Here there is no doubt that the Act sought to protect interests represented by the plaintiffs now before the court. The legislative history of the Humane Slaughter Act demonstrates this:

In a bill (S. 1636) introduced by Senator Humphrey on April 1, 1955, to require humane slaughter, (which ultimately led to the bill H.R. 8308, which became the Humane Slaughter Act), Humphrey provided for a four-man committee to "work out any problems connected with developing more humane practices," and one member of that committee was a humane organization (the American Humane Association) (See 102 Cong. Rec. 4188(1955)).

A year later, S.1636 was reported favorably out of committee; S.1636 provided for an Advisory Committee to consist of 10 members, 2 of whom were "representatives of national humane organizations." (See Senate Rep. No.2617, July 1956, p.1) The report stated, under the subtitle "Subcommittee Recommendations," that in several days of hearings on the bill, testimony was received "from numerous humane organizations." (Senate Re., supra, p.8)

In other hearings on S.1636, Senator Humphrey said: "I appreciate the cooperation of organized humane groups in permitting a year's interlude so that all interested groups would have time to know what was being proposed...." (See Hearings before a Subcommittee of the Committee on Agriculture and Forestry, U.S. Senate, 84th Cong., 2nd Sess., May 9 and 10, 1956, p.2) (emphasis added)

Testimony incorporated into the hearings on S.1636 included the statement that: "The National Humane Society, along with more than 600 other American humane societies, urges the Congress to act favorably ... on the pending legislation. (See Hearings before a Subcommittee of the Committee on Agriculture and Forestry, supra, p.88)(emphasis added). And a further statement from Senator Humphrey, sponsor of the Humane Slaughter Act: "May I ask that the witnesses ... who are representing the different [humane] associations, if they have any editorial comment or article comment, I would appreciate having them." (See Hearings, supra, p. 109)

In House Report on humane slaughter, it was stated that "the issue of Federal legislation met a ready response, once it was raised by the humane associations" (House Report No.706, 1957, p.2)

In House hearings, reference was made to the fact that various representatives "from the leading humane organizations of this country" were present to testify or submit statements in connection with the proposed Humane Slaughter Act. (See Hearings Before the Subcommittee on

Livestock and Feed Grains of the Committee on Agriculture, House of Reps., 85th Cong., 1st Sess., April 2 and 12, 1957, Statement of the Executive Director of the American Humane Ass'n., p.24)

The Congressional "Findings and Declaration of Policy" found in Section 1901 of the Act amply demonstrate that plaintiffs' interests here are within the zone: "The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering" Among the 9 plaintiffs here, 7 expressly allege a deep commitment to the principle of humane treatment of animals. Of these, 2 do not eat meat, on ethical grounds, because of the inhumane treatment of livestock animals; 2 others experience a dilemma regarding the eating of meat because the manner of handling and slaughter offends their ethical beliefs. Plaintiff Committee for Humane Slaughter is composed of persons "whose purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner." Plaintiff Society for Animal Rights, Inc., is a national humane society, with approximately 25,000 members, "devoted to the welfare of animals from all forms of cruelty and suffering," and which, along with its members, views the inhumane treatment of animals as offending and contravening "moral principles, sensibilities and asthetic values."

"The Congress finds that the use of humane methods in the slaughter of livestock ... produces other benefits for ... consumers" Among other of the plaintiffs, because of the Act, plaintiff Weiss has

unwittingly, as a consumer, been forced to and eat meat in violation of her ethical principles. Plaintiff Landek, as a consumer, cannot buy any meat at all.

Reference to Hearings on the Act indicate certain interests at stake, which the Act sought to protect, namely --- consumer-members of the public: " ... the use of inhumane methods of slaughter and handling of livestock ... is contrary to the public interest and causes needless suffering and has an adverse effect upon the public acceptance of livestock products." (Committee on Agriculture and Forestry, Senate Rep. No.1724, June 18, 1948, p.3933)

In addition to all of the foregoing, plaintiff Committee for a Wall of Separation of Church and State in America has a considerable interest in strict adherence to Establishment Clause and Free Exercise Clause values. Since Section 1906 of the Act expressly provides that "nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group" and that ritual slaughter and handling for ritual slaughter are exempted from the Act "in order to protect freedom of religion," surely plaintiff Committee for a Wall of Separation of Church and State in America, which is devoted to the same goal of religious freedom and separation, is within the zone of interest to be protected by the Act. And the same can be said for the individual plaintiffs who share those convictions. (See in this regard, as to organization parties, Aberdeen & Rockfish R. Co. v. Scrap, 93 S.Ct. 1(1972), where the Chief Justice did not find it necessary even to pause for an inquiry into the standing of "an unincorp-

orated association formed by five law students from the George Washington University/ National Law Center ... in September 1971 whose primary purpose is to enhance the quality of the human environment for its members, and for all citizens'" (93 S.Ct. at 2, fn.1)).

As to the first Data Processing test ("injury in fact"), the Court turned its attention to it in Sierra Club, supra. The facts, and holding, of Sierra Club are well known and need not be repeated here. Contrary to the government's inference that Sierra Club is of no use to the organization plaintiffs here, the case is indeed of great value to them, especially to the Society. The Sierra Club made only one procedural mistake: while it claimed to represent the public, it neglected to allege that its members were users of Mineral King who would significantly and adversely be affected by the construction of the proposed resort. That technical pleading defect is not present here. The court will note that here, according to this action's caption, plaintiff Society for Animal Rights, Inc. sues on behalf of itself and its members, members, per paragraph 13 of the complaint, "dedicated to the principle of the humane treatment of animals. The inhumane treatment of animals offends and contravenes the moral principles, sensibilities and aesthetic values of the members of the Society." (emphasis added).

Accordingly, the organization plaintiffs' claim to standing is supported by Sierra Club.

As to the injury in fact to the individual plaintiffs, enough has been said supra. Moreover, if Sierra Club stands for the proposi-

tion that an organization has standing when it invokes the interests of its members, it is a fortiori that those members have standing when, as here, the members themselves assert their own interests. Sierra Club's holding that non-economic harm to an individual constitutes injury in fact for standing purposes, in addition to all of the reasons given above to show such injury, makes it abundantly clear that plaintiffs here have standing to sue. Moreover, it can also be argued, although at this point it would seem unnecessary to do so, that plaintiffs here are entitled also to statutory review under Section 10 of the Administrative Procedure Act. Sierra Club can be read that way; Hardin, supra, may stand for that idea; and in both Data Processing and Barlow, the majority opinions referred in passing to the "person aggrieved" language of the APA's Section 10.

When all is said and done, the conclusion is irresistible that plaintiffs here have standing to sue. In one sense, perhaps the entire foregoing discussion could have been avoided by asking a single rhetorical question: if at least one of the 11 plaintiffs here does not have standing to sue, who could ever have standing to sue in such a case, where people are trying to stop the religiously-caused barbaric treatment of dumb animals, animals who cannot speak, let alone sue, for themselves? A callous, gratuitous remark by the government perhaps sums up more eloquently the standing issue here than all of the legal discussion above:

The relationship of animals to rights conferred

by the Free Exercise and Establishment Clauses
are, of course, so ludicrous as not to require
further comment. (Memorandum, p.20)

If a violation of the Religion Clauses of the First Amendment,
and thus a violation of the Constitution of the United States of America,
is causing dumb creatures to be brutalized, surely under modern concepts
of standing and civilized notions of right and wrong, at least one of
the 11 plaintiffs here has standing --- standing to speak for the
Constitution, and thus for the animals.

And if even one of the plaintiffs does, the government's motion
must be denied, plaintiffs cross-motion granted, and a three-judge
court convened to rule on the substantial constitutional question pre-
sented by this case and by these plaintiffs.

CONCLUSION

FOR THE REASONS GIVEN ABOVE,
THE GOVERNMENT'S MOTION TO
DISMISS MUST BE DENIED IN ITS
ENTIRETY, AND PLAINTIFFS' CROSS-
MOTION TO CONVENE A THREE-JUDGE
COURT MUST BE GRANTED.

Erika Holzer,
On the memorandum

July 13, 1973

Submitted, by

HENRY MARK HOLZER (P.C.)
Henry Mark Holzer,
of counsel



2
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civil 1 (DBB)

HELEN E. JONES as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States of America; HELEN E. JONES individually; the RABBI, DR. ELMER BERGER; MRS. RUTH BERGER; DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; VIDLETTA LANDEK; CHARLES STEINBERG; MARY LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; SOCIETY FOR ANIMAL RIGHTS, INC., on behalf of itself and its members; COMMITTEE FOR A WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICA;

Plaintiffs,

-against-

EARL S. BUTZ, as Secretary of Agriculture of the United States of America; et al.,

Defendants.

PLAINTIFFS' SUPPLEMENTARY MEMORANDUM OF LAW

1. In opposition to Defendants' motion:

- a. To dismiss for lack of jurisdiction and failure to state a claim, and, in the alternative,
- b. For summary judgment.

-and-

2. In support of plaintiffs' cross-motion to convene a three-judge court.

HENRY MARK HOLZER (P.C.)
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INTRODUCTION

This consolidated supplementary memorandum of law -- submitted by plaintiffs both in opposition to the government's motion to dismiss, and in support of plaintiffs' motion to convene a three-judge court -- is, by agreement of counsel, the fourth and last memorandum of law to be submitted on these two motions.

To clarify: (1) the government moved to dismiss, supported by its May 21, 1973 "Government's memorandum of law; (2) plaintiffs (a) opposed and (b) cross-moved for a three-judge court, supported by one "memorandum of law," dated July 13, 1973; (3) the government then submitted a September 24, 1973 "reply memorandum of law" in response to plaintiffs' memorandum and cross-motion herein, and in further support of the Government's motion to dismiss the action"; and now (4) plaintiff's have submitted this "supplementary memorandum" of September 28, 1973, actually in reply to that portion of the government's September 24 memorandum which opposes plaintiff's cross-motion for a three-judge court.

This last memorandum of law is intended merely, once again, to stress what this case is all about (in view of the government's apparent confusion), and also to highlight the deficiencies in the government's opposition to plaintiff's

cross-motion to convene a three-judge court. As to what this case is about, the affirmation of Professor Holzer states quite clearly that:

" 18. This case in no way challenges the power of any meat packer or any religious group to slaughter a livestock animal by means of a throat-cut. Nor does it challenge the Congressional finding that a throat-cut is a humane method of slaughter.

" 20. Once the [Federal Humane Slaughter] Act requires all meat packers subject to it to render livestock animals insensible to pain before the handling process begins, and thus before they are shackled and hoisted, Section 1906 of the Act then makes a religious exception. It is this religious exception to the 'render insensible' requirement of the Act's Section 1902 (a) which is the crux of this case, and which plaintiffs claim violates the constitutional proscriptions of the First Amendment." (See also the complaint (Exhibit "B" to plaintiff's cross-motion), particularly paragraph 33; see also the Introduction to plaintiffs' main memorandum of law on these motions).

Point I

By Vigorously Arguing The Merits Of Plaintiffs' Constitutional Claims The Government Has, In Effect, Conceded The Substantiality Of Those Claims.

In Point I of its main memorandum of law (pps. 1-29) plaintiffs have argued -- drawing on many of the religion cases cited by the government itself -- that Section 1906's religious exception to Section 1902 (a)'s "render insensible" requirement presents at least an arguable claim of unconstitutionality, thus requiring the convening of a three-judge court in accordance with 28 U.S.C. §2282.

This conclusion was reached by a discussion at length of the Supreme Court's tests of "secular legislative purpose," "principal or primary effect" and "excessive entanglement, and by then measuring by those tests Section 1906, which was added to the Act expressly "in order to protect freedom of religion." Throughout, plaintiffs have not contended -- as indeed they could not, at this stage of the case -- that they will prevail on an ultimate adjudication of the merits. As Professor Holzer stated in paragraph 38 of his moving affirmation on the cross-motion:

" At the present time only two motions are before the court, the government's motion to dismiss, and plaintiffs' cross-motion to convene a three-judge court. Neither one concerns the basic substantive question of whether the Act's religious exception section [1906] violates the Establishment or Free Exercise Clauses." (Emphasis added).

Yet, for reasons far from clear to plaintiffs, the government persists, at this stage of the action, in arguing the ultimate merits. For example, on pages 11-14 of its reply memorandum it puts forward its view of the various sections' meaning(s) and the intent of Congress and, worse, not content merely to rewrite the Act, the government continues to rewrite plaintiffs' complaint, still maintaining that what plaintiffs attack here is the Congressional finding that a throat-cut is a humane method of slaughter. Once again, plaintiffs do not

challenge the throat-cut, but rather the Section 1906 religious exception to the Section 1902 (a) "render insensible" requirement.

Even more pronounced argument by the government on the merits is found in its Point II (b) (pps. 14-16). We have its word, for example, that "[t]he statute, even without a Congressional finding of humaneness, would merely assure non-interference with a religious practice." But is not that exactly what a three-judge court is supposed to decide, on the merits? The government says, in effect, that the Free Exercise Clause requires the existence^{of} Section 1906 -- plaintiffs say, inter alia, that the Establishment Clause invalidates Section 1906. This is the merits. The mere fact of the polarization and heated discussion of the question, without more, proves its substantiality!

It should also be observed that the government has failed wholly to address itself to the Supreme Court's three tests -- secular legislative purpose, principal or primary effect, and excessive entanglement -- and to use those three tests (as plaintiffs have) in an evaluation of plaintiffs' claim that under them a substantial constitutional question is presented by Section 1906 exempting certain practices from the "render insensible" requirement of Section 1902 (a).

Moreover, if plaintiffs have suggested to the court certain possible "hypothetical" examples of "excessive entanglement," they have done no more than the Supreme Court did itself in Lemon and Tilton, where the Court expressed considerable concern over what could happen vis-a-vis the Establishment Clause, even though it might not have happened yet. Indeed, if a law were enacted, but not enforced, requiring all Protestants (or Atheists) to attend Catholic church services, surely no one ---not even the government -- could contend that the law did not violate the Religion Clauses of the 1st Amendment.

In its "foreclosure" discussion the government continues to argue the merits. Using Wisconsin v. Yoder, it suggests that Section 1906 presents no constitutional problem because "even a limited accommodation of religious needs written into statute does not constitute the sponsorship or active involvement in religion prohibited by the First Amendment." We respectfully submit that questions such as ~~whether~~^{whether} Section 1906 is a "limited accommodation," and whether, if it is, it can or does constitute "sponsorship or active involvement," etc. are all questions not to be decided by a single-judge on these motions, but rather by a three-judge court as required by 28 U.S.C. 2282. Further ammunition is provided to plaintiffs in the two government supplemental

affidavits, where Agriculture Department employees Berry and Pals inform us that, re whether meat is kosher, the United States government "relies on the representative of a rabbinical authority." (Berry, P.1).

As to the question of actual "foreclosure," the government has still not come up with any case which has settled the constitutional questions raised here. Indeed, from reading the few lines which the government has written in its reply memorandum regarding "foreclosure," one is left with the impression that "foreclosure" is not really an issue.

In short, in its reply memorandum the government has only underscored plaintiffs contention that, as we say in Point I of our main memorandum, "the complaint raises a substantial federal constitutional question, and a three-judge court must be convened."

Only one more point need be dealt with.

Point II

Plaintiffs--Or At Least One Of Them
--Have "Standing To Sue."

Introduction

Plaintiffs respectfully wish to urge that because stand-

ing so closely affects the merits, a decision on the standing question ought be made not by the single-judge, but rather by the three-judge court convened under 28 U. S.C. §2282. As a matter of fact, the case of Linda R.S., cited by the government and discussed below, is clear authority for that proposition. (See also 335 F. Supp. 804(N.D . Tex. 1971), where the three-judge court made the standing determination; see also Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), where the three-judge court decided standing, and 93 S.Ct.739 where the Supreme Court left that determination intact).

On the assumption, however, that the single-judge does deem himself possessed with the jurisdiction to decide the standing issue, we submit the following argument.

Apparently recognizing (apparently with the help of plaintiffs' main memorandum) its original misconception about the nature of this case, the government now has had more to say about plaintiffs' standing to sue.

Because the law of standing tends to become more confusing the more it is discussed, it would be well to cover its applicable aspects here in precisely delineated categories.

Taxpayer standing: Flast v. Cohen

In our main memorandum we contend that not only do plaintiffs "assert standing on grounds additional to that as taxpayers [see below], but under Flast, even if they did assert only taxpayer standing, they would have sufficient standing to bring this action." In essence, plaintiffs argue that the Flast=holding makes crucial not how much the government spends, but whether it spends for purposes which violate the Establishment Clause -- and, additionally, even if "how much" is determinative, the government indeed spends substantial sums in connection with the Federal Humane Slaughter Act. These arguments are developed fully in our main memorandum and will not be repeated here. In reply, the government devotes a page-and-a-half to the Flast issue, saying, in effect, that the expenditures to which plaintiffs refer are "hypothetical" and attempting to refute them by the Berry and Pals affidavits, which say that the federal government does not employ any rabbis. However, absolutely no response has been made by the government to what is suggested by its own exhibits, in their clear distinction between kosher and non-kosher slaughterhouses: that the entire meat program of the federal government -- which involves the expenditure of millions upon millions of taxpayer dollars -- takes daily cognizance of what meat is kosher and what is not. In other

words, religion is involved. Even if great sums of taxpayer dollars are not spent directly for religious purposes, we contend that Flast is satisfied if any is spent -- and surely some is spent, because the government has conceded that it is: \$210.05 to the rabbi; the "carload of kosher beef specifically purchased for Jewish schools;" and also on the administrative aspects of what Messrs. Berry and Pals have disclosed in their affidavits, i.e., the Agriculture Department's obtaining, processing, evaluating, and acting on the rabbis' certification that meat has been kosher slaughtered. Moreover, if a dispute arose as to whether meat had been kosher slaughtered, surely the Agriculture Department would have to decide who was correct, thereby causing government personnel to be involved and thus government money and time to be spent. It is submitted that this is all that Flast requires in order that federal taxpayers have standing to sue, for as the Court said in Flast: " ... the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (392 U.S. at 83, 88 S.Ct. at 1942). Surely here this is ~~that~~ "adversary context."

Data Processing, et al.

In our main memorandum plaintiffs have discussed in con-

siderable detail the standing principles recently enunciated by the Supreme Court in Data Processing, Barlow, and other cases. Enough has been said, particularly about injury to each of the plaintiffs here and how each of them is within the appropriate "zone of interest." Yet, in its reply memorandum the government chooses to say virtually nothing about the "injury" and "zone" tests, but instead introduces other cases (only two) which allegedly support its contention that every one of the 9 individual and 3 organization plaintiffs here lack standing. As will be seen, the government's two cases (Roe and Linda R.S.) in no way adversely affect plaintiffs' standing here.

In Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (Jan.1973) before the Court denied standing to the Does it observed that since Roe had already been granted standing (and thus there was someone who could challenge the statute), "the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes." Moreover, the Court viewed the character of the Does' position as "speculative" in that it rested on "possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possi-

bilities may not take place and all may not combine." Without repeating all that plaintiffs have said about how they are injured by Section 1906 and its consequences, suffice it to say that not one of them has alleged anything in futuro - - each and every one of them has alleged present injury, now. (See the complaint, their affidavits, and our main memorandum of law).

Linda R.S. v. Richard D. et al., 410 U.S. 614, 93 S.Ct. 1146 (March 1973) does the government no good at all. There, the Court noted "the unique context of a challenge to a criminal statute" (emphasis added), and that Linda R.S. had "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of [the Texas statute]. Thus, if appellant were granted the requested relief [to invalidate the Texas statute's application only to legitimate children], it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best be termed only speculative." (emphasis added). Manifestly, the interests asserted by plaintiffs here are not speculative. Moreover, Linda R.S. turned on considerations not present here, to wit., appellant trying to do something about the inaction of prosecuting authorities. As the Court itself said in Linda R.S.: "The Court's prior ~~decisions consistently hold that a citizen lacks standing to~~

contest the policies of the prosecuting authorities when he himself is neither prosecuted nor threatened with prosecution."

(emphasis added) And more: "...we hold that appellant has made an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws." Obviously, nothing like that is involved here, and Linda R.S. has nothing to do with the Federal Humane Slaughter Act.

Not only do these two cases not add anything to the government's position on standing, but a host of other Supreme Court cases unequivocally demonstrate that plaintiffs here certainly do possess standing.

The government has cited Baker v. Carr, seemingly with approval. Without here going into the facts, holding, or the spirit of Baker, plaintiffs are perfectly content to have their standing here measured by Baker, where the Court stated that that gist of standing was "concrete adverseness." (369 U.S. at 204, 82 S.Ct. 691).

In Doe v. Bolton, 93 S.Ct.739 (Jan.1973), re the Georgia abortion statute, standing was found in "Georgia-licensed doctors," who were not themselves pregnant, "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." The Court did

not reach the standing of nurses, clergymen, social workers and non-profit abortion-reform corporations because "the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of [the other plaintiffs]."

The instant case is not "a remote, imaginary conflict" (Douglas, dissenting in Laird v. Tatum, 92 S.Ct. 2318(1972), but rather an actual, viable, battle being waged by persons who are for separation of church and state and against cruelty to animals -- persons (and organizations) who are touched every day in their daily lives and activities by Section 1906 and its consequences. They are touched every bit as much, if not more, than the voters in Baker and the physicians in Doe, and thus each of them display a requisite personal interest. In addition to that immediate, personal interest, certain plaintiffs assert other interests as well.

Asserting the Rights of Others

The complaint herein alleges that Plaintiff Jones "is President of Society for Animal Rights, Inc., and is deeply committed to the principle of the humane treatment of animals, such being her lifetime professional work." (paragraph 1); also (paragraph 2) that "[s]ince the livestock animals now and hereafter awaiting slaughter in the United States are ~~real parties in interest in this action, and since they cannot~~

speak for themselves, Miss Jones, also sues here as next friend and guardian on their behalf." Lastly, it is alleged (paragraph 12) that Plaintiff Society for Animal Rights, Inc. is a not-for-profit corporation devoted to the welfare of animals and the protection of animals from all forms of cruelty and suffering, "and (paragraph 11) that plaintiff Committee for Humane Slaughter's purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner."

It is immediately obvious that here we have an individual plaintiff and two organization plaintiffs who, in addition to asserting their own rights, are also asserting the rights of others -- and that, in this case, those others are animals, not humans.

We respectfully submit that this notion finds support in precedent, as well as in reason.

The Supreme Court has long recognized the standing of one party to assert the rights of someone else. In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct.1678(1965) the Executive Director of the Planned Parenthood League and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using

contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship. In Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031(1953) a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-caucasian purchasers. Nearly two decades later, the Court was to characterize the Barrows relationship as "between one who acted to protect the rights of a minority and the minority itself." (Eisenstadt v. Baird, 405 U.S. 438, 445, 92 S.Ct. 1029, 1034(1972)). And in Eisenstadt itself, the Court held that "the relationship between Baird and those whose rights he seeks to assert is . . . that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." Noting that "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests," the Court held that Baird had standing. There are many such cases. (See, eg., NAACP v. ALABAMA, 357 U.S. 449, 78 S.Ct. 1163(1958)). Narrowing the issue even further, the Court has often found standing to assert third-party rights in 1st Amendment cases, even when the relationship has been more tenuous. (See, eg., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736(1940) and

U.S. v. Raines, 362 U.S. 17, 80 S.Ct. 519(1960)). Narrowing even further, within the 1st Amendment itself, in religion cases the assertion of third-party rights is not unheard of. For example, in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438(1944), a custodian, in violation of state child labor laws, furnished a young girl with religious magazines to distribute on the street in accordance with the dictates of their religion. The Supreme Court implicitly held that the custodian had standing to assert the child's alleged religious rights which were threatened which, in the context of that litigation, the child had no effective way of asserting herself.

It thus being accepted doctrine that one generally has standing to represent so-called "third-party" interests in addition to one's own interests, and particularly in 1st Amendment Religion Clause cases, the next connection that must be made is that such third-party interests may be that of animals.

There is more than one way the connection may be made.

If the rights of unborn "human beings" can be asserted by actual litigants (see the abortion decisions, supra, Roe, Linda R.S., etc.), and if "unborn children have been recognized as acquiring rights or interests by way of inheritance

or other devolution of property, and have been represented by guardians ad litem [citations omitted]" (93 S.Ct. at 731) it is not a large step for the president of a humane society, the Society itself, and a Committee for Humane Slaughter to assert the rights of millions of animals that are now alive.

If, as the Court observed in Data Processing, one's "standing" interest may reflect "aesthetic, conservational, and recreational values" (citing Senic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2 Cir.1965), where, at root, the welfare of fish were sought to be protected) -- if in Citizens to Preserve Overton Park, Inc., et al. v. Volpe, 401 U.S. 402, 91 S.Ct. 814(1971), the Supreme Court could take completely for granted the standing of "private citizens as well as local and national conservation organizations" who sought to stop a federally funded highway from ruining a park -- if, in Data Processing, the Supreme Court recognized that "[a] person or a family may have a spiritual stake in [non-economic] First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause" -- if the spirit of Sierra Club is really that someone must be heard to speak against the alleged despoiling of Mineral King --if a host of recent district and circuit court cases have found standing to challenge harm to environmental interests and in-

animate objects (270 F.Supp. 650, 425 F.2d 97, 207 F.2d 391, 428 F.2d 1093, 284 F.Supp. 809) -- if in all such cases standing existed because plaintiffs were obviously asserting a public purpose and because they were serious, professional activists for their particular causes, then here the standing of Jones, the Society, and the Committee, to sue on behalf of the millions of livestock animals being slaughtered annually in the United States, also exists.

In the concluding remarks of our main memorandum of law (p.43) we have asked this question: "If at least one of the 11 plaintiffs here does not have standing to sue, who could ever have standing to sue in such a case, where people [and three organizations of people] are trying to stop the religiously-caused barbaric treatment of dumb animals, animals who cannot speak, let alone sue, for themselves?"

With all due respect, it is no answer for the government casually to toss-off the observation that "[t]he case merely presents an interest in search of a plaintiff with standing, rather than an actual case and controversy." For the plaintiffs here are real people, outraged yes, but also personally aggrieved by what they perceive to be an Establishment Clause violation resulting in medieval barbarism being inflicted on millions of defenseless animals. Not

only is the standing issue which is actually presented here of great importance, but the implication of the government's position is of enormous magnitude as well. Carried to its logical conclusion, the government's position means that Congress could pass a law -- no matter how egregious, how illegal, how immoral, how unconstitutional -- and that in principle a situation could exist where no one would have standing to challenge it. It hardly needs to be observed that not ever in the history of this Republic has any such law existed on any level of government, local, state, or federal. Indeed, it is the genius of our system that no statute is ever insulated from judicial scrutiny, that no legislature is ever above the law.

Risking overstatement, we quote the closing words from our main memorandum of law:

" If a violation of the Religion Clauses of the First Amendment, and thus a violation of the Constitution of the United States of America, is causing dumb creatures to be brutalized, surely under modern concepts of standing and civilized notions of right and wrong, at least one of the 11 plaintiffs here has standing -- standing to speak for the Constitution and thus for the animals.

" And if even one of the plaintiffs does, the government's motion must be denied, plaintiffs' cross-motion granted, and a three-judge court convened to rule on the substantial constitutional question presented by this case and by these plaintiffs."

CONCLUSION

Because At Least One Plaintiff Possesses Standing To Sue, And Because A Substantial Constitutional Question Under The Religion Clause Of The First Amendment Has Been Presented, The Government's Motion To Dismiss Must Be Denied In Its Entirety And Plaintiffs' Motion To Convene A Three-Judge Court Must Be Granted.

Submitted by,

HENRY MARK HOLZER (P.C.)
Henry Mark Holzer, of counsel

Erika Holzer,
on the memorandum.

October 2, 1973.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

3

HELEN E. JONES as next friend and
guardian for all livestock animals
now and hereafter awaiting slaughter
in the United States; HELEN E. JONES
individually; DOROTHEA S. BUICK;
DOROTHY M. HOLAHAN; VIOLETTA LANDEK;
CHARLES STEINBERG; MARY LEAH WEISS;
COMMITTEE FOR HUMANE SLAUGHTER;
SOCIETY FOR ANIMAL RIGHTS, INC.,
on behalf of itself and its members;
COMMITTEE FOR A WALL OF SEPARATION
BETWEEN CHURCH AND STATE IN AMERICA;

Plaintiffs,

-against-

EARL S. BUTZ, as Secretary of Agri-
culture of the United States of
America; et al.;

Defendants.

73 CIVIL 1

(HJF)

(DBB)

(ELP)

PLAINTIFFS' MEMORANDUM OF LAW

1. In opposition to defendants' motion;

-and-

2. In support of plaintiffs' cross-motion
for summary judgment.

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UNITED STATES DISTRICT COURT
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PLAINTIFFS' MEMORANDUM OF LAW

1. In opposition to defendants' motion;

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INTRODUCTION

The facts of this case and the theory upon which it is
brought are set forth at length in the complaint, in plaintiffs'
motion below to convene a three-judge court, and in the affirma-

tion of Henry Mark Holzer on the instant motion and cross-motion.
In essence,

18. This case in no way challenges the power of any slaughterer or any religious group to slaughter a livestock animal by means of a throat-cut. Nor does it challenge the Congressional finding that a throat-cut is a humane method of slaughter.

19. Plaintiffs' constitutional challenge in this case is directed to other aspects of the Act, aspects which involve the government in the alleged dietary preferences of a particular religious group.

20. After the Act in section 1902(a) requires all slaughterers subject to it to render livestock animals insensible to pain before the handling process, and thus before they are shackled and hoisted, Section 1906 of the Act then makes a religious exemption. It is this religious exemption to the "render insensible" requirement of section 1902(a) which is the crux of this case, and which plaintiffs claim violates the Religion Clauses of the First Amendment.
(Holzer affirmation, p.10)

Upon plaintiffs' earlier cross-motion to convene a three-judge court, Hon. Dudley B. Bonsal concluded that "[f]rom the papers submitted, the constitutional issues presented do not appear to be unsubstantial."

Accordingly, he requested the Chief Judge of the Court of Appeals for the Second Circuit to convene a three-judge court. Judge Bonsal reserved for that court's consideration the government's motion to dismiss the complaint on the ground that all plaintiffs allegedly lacked standing to sue.

Therefore, there are two questions to be decided here: (1) are either of the First Amendment's Religion Clauses violated by the challenged sections of the Act, and, if so, (2) does at least one of the plaintiffs have standing to sue?

POINT I

At Least One Of The Nine Plaintiffs Has A Sufficient "Personal Stake" In The Outcome Of This Controversy To Assure "Concrete Adverseness" And Thus At Least One Possesses Standing To Sue.

The Law Of Standing Today

The decisions of the Supreme Court of the United States clearly identify the essence of the doctrine of standing to sue, and provide abundant examples of when one possesses standing and when one does not.

The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703 7 L.Ed. 2d 663 (1962). (Flast v. Cohen, 392, U.S. 83, 99, 88 S.Ct. 1942, 1952 (1968)).

Looking back on the decade since its decision in Baker

v. Carr, less than a year ago the Court reiterated that:

Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing [footnote omitted], federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction [footnote and citations omitted]. (Linda R.S., et al. v. Richard D. and Texas, et al., U.S. , 93 S.Ct.1146, 1148 -9 (1973)).

Every standing decision of the Court since Baker v. Carr (and most prior to it which contained a standing issue^[1]) has been bottomed on and may be explained by, this personal stake/threatened-or-actual-injury requirement.

In Baker residents of five Tennessee counties sued for themselves, for all qualified voters of their respective counties, and on behalf of all Tennessee voters similarly disadvantaged by a state statute apportioning the members of the General Assembly

¹See, for example, Pierce v. Society of Sisters, 267 U.S. 510, 45 S.Ct. 571, Barrows v. Jackson, 346 U.S. 249, 73 U.S. S.Ct. 1031, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, Abington v. Schempp, 347 U.S. 203, 83 S.Ct. 1560 (1963); See also McCullum v. Board of Education, 333 U.S. 203 (1948), Engel v. Vitale, 370 U.S. 421 (1962).

among the state's ninety-five counties. Even though only a fraction of a vote per plaintiff was at stake, and even though ultimately they might not be entitled to any relief, plaintiffs had standing because they were asserting "a legally cognizable injury," a "plain, direct and adequate interest in maintaining the effectiveness of their votes." (369 U.S. at 208, 82 S.Ct. at 705). The Court's final words on standing were drawn from that Body's earliest days:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60. (369 U.S. at 208, 82 S.Ct. at 705).

Next came *Hardin v. Kentucky Utilities Company*, 390 U.S. 1, 88 S.Ct. 651 (1968), an administrative action case, which involved the question of whether Congress had prohibited the TVA from competing with Kentucky Utilities Company in the sale of electricity. The standing question arose because of the claim that Kentucky Utilities lacked standing to challenge the legality of the TVA's activities. The Court found standing because section 15d of the TVA Act, in effect, had as one of its primary purposes the protection of private utilities from TVA competition. In other words, since the Act, in effect, defined those parties who would be injured by TVA competition, the Court held that that Congressional definition of injury was sufficient to

confer federal standing. It should be noted that although standing in Kentucky Utilities was bottomed on section 15d of the Act, the touchstone of that section's concern was the private utilities' injury, an injury which had been virtually, albeit implicitly, codified by the statute. As the Court said: "Since respondent is thus in the class which §15d is designed to protect [from injury], it has standing under familiar judicial principles...and no explicit statutory provision is necessary to confer standing." (390 U.S. at 7, 88 S.Ct. at 655).

Kentucky Utilities was followed several months later by Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968), a case erroneously understood by many to have "liberalized" the law of standing. Flast did no such thing; it is merely a consistent application of the Baker v. Carr principle of personal stake/threatened-or-actual-injury.

After stating and restating the Baker requirement (392 U.S. at 99, 101, 88 S.Ct. 1952, 1953) Chief Justice Warren observed for the Court that: "A taxpayer may or may not have the requisite personal stake in the outcome, depending on the circumstances of the particular case." (392 U.S. at 101, 88 S.Ct. at 1953). In other words, the Baker requirement applies to plaintiffs asserting a personal stake in the outcome, or threatened-or-actual-injury, qua taxpayers, just as it applies to plaintiffs asserting a stake or injury qua anything else, eg., voters (Baker), protected competitors (Kentucky Utilities), etc.

The question for the Court then was whether the Flast plaintiffs, solely qua federal taxpayers, met the Baker requirement:

Thus, our point of reference in this case is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal spending program. Whether such individuals have standing to maintain that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements. (392 U.S. at 102, 88 S.Ct. 1953, emphasis added).

The Court, of course went on to hold that as taxpayers the Flast plaintiffs had a sufficient personal stake-threatened-injury.^[2] Perhaps the best summary of why there was injury is found in the statement of Justice Stewart, albeit in a concurring opinion: "Because [the Establishment Clause] plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for the support of a religious institution." (392 U.S. at 114, 88 S.Ct. at 1960).

² At footnote 124 of his article "Standing in the Supreme Court--A Functional Analysis (86 Harvard Law Review 645 (1973)), Professor Kenneth E. Scott observes that: "In Flast the plaintiffs' stake as taxpayers in the outcome of the action was too embarrassingly small for the Court even to describe it, while their stake in terms of political principles firmly held was the real basis for the Court's feeling of confidence that the plaintiffs had sufficient interest." (86 Harv. L. Rev. at 676).

Just as Flast did not really say anything new, but was rather merely another application of the Baker principle, so too were Association of Data Processing Service Organizations, Inc., et al. v. Camp, et al., 397 U.S. 150, 90 S.Ct. 827 (1970) and Barlow, et al. v. Collins, et al., 397 U.S. 159, 90 S.Ct. 832 (1970).

Unlike Flast, Data Processing was a competitor's suit, but the touchstone of standing was still injury, which the Court easily found. Additionally, because administrative action was involved, the "person aggrieved" language of the Administrative Procedure Act (5 U.S.C. §702) was involved in the inquiry as to whether Petitioners were injured. For the Court, Justice Douglas observed that the interest of one suing

... at times, may reflect "aesthetic, conservational, and recreational" as well as economic values. Senic Hudson Preservation Conference v. FPC, 2 Cir., 354 F.2d 608, 616; Office of Communication of United Church of Christ, 123 U.S. App. D.C. 328, 334-340, 359 F.2d 994, 1000-1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844. We mention these non-economic values to emphasize that standing may

stem from them as well as from the economic injury on which petitioners rely here. (397 U.S. at 154, 90 S.Ct. 827).

Barlow involved the standing of tenant farmers to challenge administrative regulations promulgated by the Secretary of Agriculture. The 5th Circuit had denied standing "not only because [the farmers] alleged no invasion of a legally protected interest but also because petitioners have not shown us, nor have we found, any provision of the Food and Agriculture Act of 1965 which expressly or impliedly gives [petitioners] standing to challenge this administrative regulation" (397 U.S. at 163-164, 90 S.Ct. 836). However, the Supreme Court found "no doubt that in the context of this litigation the tenant farmers ... have the personal stake and interest that impart the concrete adverseness required by Article III." (397 U.S. at 164, 90 S.Ct. at 836).^[3] Thus, the Baker test was again applied, and the plaintiffs found to possess a sufficient personal stake/threatened-or-actual-injury to give them standing.^[4]

Sierra Club, v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972) also presented the standing issue in the context of a challenge to administrative action. Thus, the Court's task

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Since an administrative statute was involved, the Court also had to decide whether the farmers were within the zone of interests protected by the Act. They were.

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Also in 1970, this Circuit held that a serviceman does have standing if he is under orders to fight in the combat to which he objects. (Berk v. Laird, 429 F.2d 302, 306 (1970)).

(not present in the instant case) was to ascertain who was an injured party under APA §10 with regard to the assertion of non-economic interests that were widely shared.^[5] This was necessary, because to gain standing the Sierra Club "relie[d] upon §10 of the Administrative Procedure Act...." (____ U.S. at ____, 92 S.Ct. at 1365), and "[w]here...Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." (____ U.S. at ____, 92 S.Ct. at 1365).

However, even though in the instant case plaintiffs do not rely on the APA for standing, as the Club did, the Sierra case is instructive here. For there the Court again restated that the Baker principle of injury is the one which governs in all situations where there is no statute which actually or arguably confers standing:

Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether

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The Court observed that the "palpable economic injuries" presented in Data Processing and Barlow "have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review [citing cases]" (____ U.S. at ____, 92 S.Ct. at 1365).

the party has alleged such a "personal stake in the outcome of the controversy," Baker v. Carr ... as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." Flast v. Cohen (___ U.S. at ___, 92 S.Ct. at 1364).

The next cases before the Court which presented standing questions involved not challenges to administrative action, as in Hardin, Data Processing, Barlow, and Sierra Club, but attacks on state anti-abortion statutes.

In Roe, et.al. v. Wade, ___ U.S. ___, 93 S.Ct. 705 (1973), the Court easily found the Baker requirement met, for obvious reasons, by a pregnant woman.

On the same day, in Doe v. Bolton, ___ U.S. ___, 93 S.Ct. 739 (1973), the Court found the Baker requirement met not only by a pregnant woman, but also

... that the physicians-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The

physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment. (____ U.S. at ____, 93 S.Ct. at 745)

Although in the next case, Linda R.S., et al. v. Richard D. and Texas, et al., ____ U.S. ____, 93 S.Ct. 1146 (1973), under the facts Appellant was held not to have standing, the Court again stated the controlling principle:

The threshold question which must be answered is whether "the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr (____ U.S. at ____, 93 S.Ct. 1146).

The Plaintiffs Here

There are six individual and three organization plaintiffs here. In all--sometimes by themselves, and sometimes in combination--they present at least seven entirely separate and distinct interests, any one of which, it is alleged, suffices to satisfy the Supreme Court's requirement under Baker, and

its predecessors and its progeny, for standing to challenge an unconstitutional statute.

There are those who have given up eating livestock meat entirely: Landek, because she cannot ascertain at the consumer level whether the meat she might purchase came from a ritually slaughtered animal who was shackled and hoisted while conscious; Jones, who on ethical grounds is opposed to eating meat.

There are those--Steinberg, Weiss, and Buick--who are faced with the dilemma of wanting to eat meat but having to risk violating their ethical, moral and/or religious beliefs because they are unable to ascertain at the consumer level the meat's source, including Holahan who will probably cease eating meat if this action is unsuccessful.

There are those who are non-Jews--Steinberg, Weiss, Buick, and Holahan--who because of the problem of identification of the meats' source at the consumer level, may unknowingly obtain meat from animals which have been ritually slaughtered and shackled and hoisted while fully conscious.

There are those who are federal taxpayers: Landek, Jones, Steinberg, Weiss, Buick, and Holahan.

There is Society for Animal Rights, Inc., a not-for-profit, tax exempt organization (contributions to which are tax deductible), devoted to the welfare of animals and the protection of animals from all forms of cruelty and suffering, chartered in the District of Columbia whose corporate purpose is: To promote

protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause; to seek to prevent nationwide causes of cruelty to and suffering in animals; to publish, provide, offer, and make available periodicals, magazines, bulletins, folders, booklets and leaflets dealing with the individual aspects of animal welfare; to conduct mass humane education of the public through radio, television and the press; to foster mercy, compassion and respect for animals; to cooperate wherever possible with other animal welfare organizations in both the national and local fields. The Society actively litigates on behalf of animal welfare issues, and it sues here on its own behalf and that of its approximately 25,000 members, 3,500 to 4,000 of whom reside in this District, most of whom overwhelmingly support this action and its goals.

There is the Committee For Humane Slaughter, an ad hoc unincorporated association of persons--including all of the individual plaintiffs here--who reside in this District, whose purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner (paragraph 11 of the complaint).

There is the Committee for a Wall of Separation of Church and State in America, ad hoc an unincorporated association of persons--including all of the individual plaintiffs here--who

reside in the Southern District of New York, whose purpose is to assure that the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States are strictly adhered to at all times (paragraph 14 of the complaint).

Plaintiffs Stake

The consequences of the religious exemption found in Section 1906 of the Act is that each year millions of livestock animals are brutalized by being shackled and hoisted while fully conscious. The government concedes that some 65 slaughterhouses which it inspects annually kill approximately 3,500,000 animals after they have been shackled and hoisted while fully conscious. (See the Pals affidavit, annexed to the government's motion papers).

Where does the meat go each year, from these 3,500,000 carcasses? It, along with all meat non-ritually (section 1902(a)) slaughtered, goes to two sources. To the government, which overall purchases millions of dollars worth of livestock meat annually (see, for example, the government's Pierce affidavit), and (2) the rest goes into the non-government private market, which of course buy tens of millions of pounds of livestock meat each year.

The government does not deny, as indeed it could not, that it cannot tell whether or not the meat it purchases has

come from animals which have been shackled and hoisted, per section 1906's exemption from the render insensible requirement of section 1902(a). Indeed, the government's Pierce, Berry, and Pals affidavits make it quite clear that the government has knowledge (and then only by hearsay) of only how the animals are actually killed, and absolutely no knowledge at all of how they are handled--i.e., of whether or not they are shackled and hoisted fully conscious before they are killed.

Therefore, both the government and the consumer are getting some meat from fully conscious shackled and hoisted animals, and no one knows, or can know--except in a kosher butcher shop--if any given piece of meat has or has not come from that source.

Surely plaintiff Landek has a personal stake in the outcome of this challenge to section 1906 of the Act, since her ethical and moral beliefs bar her from eating the meat of all livestock animals which have been shackled and hoisted while fully conscious pursuant to the religious exemption created by section 1906.

No less a personal stake is possessed by plaintiffs Steinberg, Weiss, and Buick who are faced with the dilemma of either ceasing to eat all such livestock meat (which they wish and/or need to eat), or eating such meat in violation of their ethical, moral, and/or religious beliefs--and by Holahan who

asserts that she will probably resolve her dilemma, if this action is unsuccessful, by ceasing to eat all such livestock meat.

As to those of the aforementioned plaintiffs who are severely prejudiced by being unable to distinguish between ritually and non-ritually slaughtered meat, it should be noted that, in the Senate Hearings on the Act, supra, the then General Counsel of the Department of Agriculture observed as follows: that the religious "handling" exemption (which later became section 1906) was applicable to livestock products destined for use by members of the [Jewish] religious faith, but that there existed a serious question as to whether the exemption could extend to products intended for others. In other words, the General Counsel anticipated the very predicament the aforementioned plaintiffs find themselves in--the problem of being unable to distinguish between products from animals which were fully conscious when shackled and hoisted, and products from animals which were not. Nor can there be any question that every slaughterer "sells some of the product of his cattle slaughtering to the gentile trade although it is killed kosher, because it is cheaper to do so." (See Exhibit "1" annexed to the Jones affidavit, the latter being annexed as Exhibit "C" to the Holzer affirmation; see also 104 Congressional Record 1656, Statement by Representative W.R. Poage, Feb. 4, 1958).

The personal stake of Steinberg, Weiss, Buick, and Holahan is also obvious not only because they cannot tell at the

consumer level the source of the meat they are getting, but also because as non-Jews it offends their ethical, moral, and/or religious beliefs perhaps to consume meat that has been slaughtered in accordance with the dictates of another religion. (See McGowan v. Maryland, 366 U.S. 420 (1961)). Moreover, if the unsuccessful intervenors below, allegedly representing approximately 5,000,000 American Jews, were correct in their assertion that section 1906 of the Act was enacted for their benefit, such would be further evidence that non-Jews have cause to complain about that section and other sections of the Act.

As federal taxpayers, the personal stake of all six individual plaintiffs is as real here as was the interest of the individual plaintiffs in Flast. We have stated above that Flast was merely a consistent application of Baker's "personal stake" requirement in the context of a taxpayer challenge under the spending power to an alleged Establishment Clause violation.

On this subject, the government reads Flast too literally, and insists on focusing on expenditures which are directly religiously connected, which it concedes, but which it simultaneously seeks to minimize as an incidental expenditure of tax funds in the administration of an essentially regulatory statute, to wit: \$210.05 to the Secretary's Advisory Committee member, Rabbi Soloveitchik; a "carload of kosher beef specifically purchased for Jewish schools." It is submitted that with regard to the requirements for standing, Flast is not concerned with how

much the government may spend on something, arguably in violation of the Establishment Clause, but rather whether it spends anything at all. (See Doremus v. Board of Education, 342 U.S. 429 (1957)).

Moreover, the government conveniently chooses to ignore the wider point--that the government indeed spends untold millions of dollars in connection with its activities under the Federal Humane Slaughter Act, an Act shot through in wording and in implementation with multiple religious considerations: Jewish ritual slaughter scientifically described in detail in the Act, must be done in a certain way; all the meat bought by every single "agency or instrumentality of the United States," and paid for with federal money, must adhere to humane slaughter methods; the Secretary is obliged to do research and designate slaughter methods and to provide "suitable means of identifying the carcasses of animals inspected and passed under the Meat Inspection Act that have been slaughtered in accordance with the public policy declared in this chapter;" and he must use federal people and spend federal money to do so; he must have an Advisory Committee, and meetings, etc.; paid for with federal money; and according to the government's exhibits, there are over a thousand federally inspected plants using humane slaughter, which, in part include ritual slaughter, and which are inspected by federal personnel paid with federal money.

In short, an essential ingredient permeating every aspect of the Federal Humane Slaughter Act is the Jewish religious

accommodation. Accordingly, everything done by the government in implementing that Act with federal personnel and federal funds, in general, apart from ritual slaughter in particular, is to some extent necessarily devoted to cognizance of, deference to, and implementation of the Jewish religious aspects of the Act. Therefore, sometimes directly and sometimes indirectly, the government spends vast sums of time and money in connection with activities intimately concerned with the dietary preferences of specific religious group.

Indeed, the government in one branch or another must have the largest meat bill in the country, when one considers its purchases for military personnel and other government employee feeding programs. Among other things, the Department of Agriculture itself "procures meat under the National School Lunch Act ...Child Nutrition Act ..." and admits having on one occasion purchased 38,500 pounds of "ritually slaughtered" (i.e., shackled and hoisted while fully conscious) meat "for distribution to Jewish schools in New York City." (Pierce affidavit).

In short, the United States of America in general, and the Department of Agriculture in particular, annually spend millions of dollars purchasing livestock meat, some of it (although no one knows what specific pieces of meat) is produced under the religious exemption of section 1906, and some of the tax money of Landek, Jones, Steinberg, Weiss, Holahan and Buick (no matter how little, cf Flast) helps pay for it. Under Baker via Flast, all six have a personal stake in the outcome of this

case and thus possess standing to sue.

Society for Animal Rights, Inc. also has the requisite personal stake. Suffering by millions of livestock animals annually will be ended if it is correct that section 1906--which makes that suffering possible--is held unconstitutional and enforcement of that section enjoined. The test for standing by organization plaintiffs is no different than for individuals. Indeed, in Data Processing the lead plaintiff was an association, and in many other cases organizations have had standing. (See, for example, NAACP v. Alabama, supra, Investment Company Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091 (1971). Suing here on its own behalf, and on the behalf of its 25,000 members approximately 3,500 to 4,000 of whom reside in this District, the Society seeks to promote its chartered corporate purpose of promoting the welfare of animals, and to vindicate its members' abhorrence of the barbaric practice of shackling and hoisting fully conscious animals before slaughter. As indicated by the individual plaintiffs here, many of the Society's members either must refrain from eating livestock meat or violate their ethical, moral, and/or religious beliefs to do so.

The only line of reasoning which the government urges against standing here, other than its misreading of Flast, is concerned with standing in the Administrative Procedure Act cases, Data Processing, Barlow, and Sierra Club. The instant case, unlike those three, does not involve a challenge to ad-

ministrative action. Also, those three cases apply the Baker principle, but in a context where a statute may grant standing or augment the chance of finding it. Therefore, although ordinarily we would not deem it necessary specifically to discuss Data Processing, Barlow, and Sierra Club here, we accept the government's invitation to do so.

In Data Processing, Barlow, the Court enunciated a two-part test by which standing is now to be determined where a challenge to administrative action is involved:

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. (397 U.S. at 152; emphasis added).

The second question is...whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. (397 U.S. at 153; emphasis added).

We shall discuss the second question ("zone of interests") first, as it is applied to the case at bar.

In Data Processing and Barlow (as well as in Arnold Tours v. Camp, 400 U.S. 45, 91 S.Ct. 158 and in Investment Company Institute, supra) the Court had no trouble finding that the plaintiffs were at least reasonably contemplated by the statutes

involved as "persons with interests to be protected. The Data Processing majority (by Justice Douglas) which set the tone for the other three cases, was willing to consult statutory materials for evidence of virtually any intent to recognize plaintiffs' interests in some way. Justice Brennan (joined by Justice White) went even further: he would consult statutory materials only to seek evidence of an intent to exclude a prospective plaintiff from judicial review, thereby establishing a kind of rebuttable presumption in favor of standing.

Here, there is no doubt that the Federal Humane Slaughter Act sought to protect interests represented by some of the plaintiffs now before the court. The legislative history of the Humane Slaughter Act shows the following:

In a bill (S. 1736) introduced by Senator Humphrey on April 1, 1955, to require humane slaughter, (which ultimately led to the bill H.R. 8308, which became the Humane Slaughter Act), Humphrey provided for a four-man committee to "work out any problems connected with developing more humane practices," and one member of that committee was a humane organization (the American Humane Association) (See 102 Cong. Rec. 4188 (1955)).

A year later, S.1636 was reported favorably out of committee; S.1636 provided for an Advisory Committee to consist of 10 members, 2 of whom were "representatives of national humane organizations." (See Senate Rep. No.2617, July 1956, p.1) The report stated, under the subtitle "Subcommittee Recommen-

dations," that in several days of hearings on the bill, testimony was received "from numerous humane organizations." (Senate Re., supra, p.8)

In other hearings on S.1636, Senator Humphrey said: "I appreciate the cooperation of organized humane groups in permitting a year's interlude so that all interested groups would have time to know what was being proposed...." (See Hearings before a Subcommittee of the Committee on Agriculture and Forestry, U.S. Senate, 84th Cong., 2nd Sess., May 9 and 10, 1956, p.2) (emphasis added)

Testimony incorporated into the hearings on S.1636 included the statement that: "The National Humane Society, along with more than 600 other American humane societies, urges the Congress to act favorably ... on the pending legislation. (See Hearings before a Subcommittee of the Committee on Agriculture and Forestry, supra, p.88) (emphasis added) And a further statement from Senator Humphrey, sponsor of the Humane Slaughter Act: "May I ask that the witnesses ... who are representing the different [humane] associations, if they have any editorial comment or article comment, I would appreciate having them." (See Hearings, supra, p.109)

In the House Report on humane slaughter, it was stated that "the issue of Federal legislation met a ready response, once it was raised by the humane associations" (House Report No.706, 1957, p.2)

In the House Hearings, reference was made to the fact that various representatives "from the leading humane organizations of this country" were present to testify or submit statements in connection with the proposed Humane Slaughter Act.

(See hearings before the Subcommittee on Livestock and Feed Grains of the Committee on Agriculture, House of Reps., 85th Cong., 1st Sess., April 2 and 12, 1957, Statement of the Executive Director of the American Humane Ass'n., p.24)

The Congressional "Findings and Declaration of Policy" found in section 1901 of the Act amply demonstrate that plaintiffs' interests here are within the zone. "The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering" Among the 9 plaintiffs here, the 6 individuals expressly allege a deep commitment to the principle of humane treatment of animals. Of these, 2 do not eat meat, on ethical and moral grounds, because of the inhumane treatment of livestock animals; 4 others experience a dilemma regarding the eating of meat because the manner of handling and slaughter offends their ethical, moral, and/or religious beliefs. Plaintiff Committee for Humane Slaughter is composed of persons "whose purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered in a humane manner." Plaintiff Society for Animal Rights, Inc., is a national humane society, with approximately 25,000 members,

"devoted to the welfare of animals from all forms of cruelty and suffering," and which, along with its members, views the inhumane treatment of animals as offending and contravening "moral principles, sensibilities and asthetic values."

"The Congress finds that the use of humane methods in the slaughter of livestock... produces other benefits for ... consumers...." Yet because of section 1906 of the Act, plaintiffs Weiss, Buick, Holahan, and Steinberg, have unwittingly, as consumers, been forced to and do eat meat in violation of their ethical, moral, and/or religious principles. Plaintiff Landek, as a consumer, cannot buy any livestock meat at all.

Reference to Hearings on the Act indicate certain interests at stake, which the Act sought to protect, namely-- consumer-members of the public: "...the use of inhumane methods of slaughter and handling of livestock...is contrary to the public interest and causes needless suffering and has an adverse effect upon the public acceptance of livestock products." (Committee on Agriculture and Forestry, Senate Rep. No.1724, June 18, 1948, p.3933)

In addition to all of the foregoing, plaintiff Committee for a Wall of Separation of Church and State in America has a considerable interest in strict adherence to Establishment Clause and Free Exercise Clause values. Since section 1906 of the Act expressly provides that "nothing in this [Act] shall

be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group" and that ritual slaughter and handling for ritual slaughter are exempted from the Act "in order to protect freedom of religion," surely plaintiff Committee for a Wall of Separation of Church and State in America, which is devoted to the same goal of religious freedom and separation, is within the zone of interest to be protected by the Act. And the same can be said for all 6 of the individual plaintiffs, who share those convictions. (See in this regard, as to organization parties, Aberdeen & Rockfish R. Co. v. Scrap, U.S. , 93 S.Ct. 1 (1972), where the Chief Justice did not find it necessary even to pause for an inquiry into the standing of "an unincorporated association formed by five law students from the [George Washington University] National Law Center ... in September 1971 whose 'primary purpose is to enhance the quality of the human environment for its members, and for all citizens'" (U.S. , 93 S.Ct. at 2, fn.1) See also the later SCRAP case where the Court held that there was standing under the APA. (U.S. v. Students Challenging Regulatory Agency Procedures, U.S. , 93 S.Ct. 2405 (1973)). If standing under APA §10 can allow the 5 air-breathing students of SCRAP to sue, surely plaintiffs here have the requisite standing to challenge legislative action.

As to the first Data Processing test ("injury in fact"), the Court turned its attention to it in Sierra Club, supra. The facts and holding of Sierra Club are well known and need

not be repeated here. Contrary to the government's conclusion that Sierra Club is of no use to the organization plaintiffs here, the case actually is of great value to them, especially to the Society. The Sierra Club made only one procedural mistake: while it claimed to represent the public, it neglected to allege that its members were users of Mineral King who would significantly and adversely be affected by the construction of the proposed resort. That technical pleading defect is not present here. The Court will note that here, according to this action's caption, plaintiff Society for Animal Rights, Inc. sues on behalf of itself and its members, members, per paragraph 13 of the complaint, "dedicated to the principle of the humane treatment of animals. The inhumane treatment of animals offends and contravenes the moral principles, sensibilities and aesthetic values of the members of the Society." (emphasis added) Accordingly, the Society's and the Humane Committee's claim to standing is supported by Sierra Club.

As to the "injury in fact" to the individual plaintiffs, enough has been said supra. Moreover, if Sierra Club stands for the proposition that an organization has standing when it invokes the interests of its members, it is a fortiori that those members have standing when, as here, the members themselves assert their own interest. Sierra Club's holding that non-economic harm to an individual constitutes injury in fact for standing purposes, in addition to all of the reasons given above to show such injury, makes it abundantly clear

that plaintiffs here have standing to sue.

The government has made passing reference to the abortion cases, which have been discussed above. A few more words about them are relevant here.

In Roe v. Wade, before the Court denied standing to the Does it observed that since Roe had already been granted standing (and thus there was someone who could challenge the statute), "the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes." Moreover, the Court viewed the character of the Does' position as "speculative" in that it rested on "possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine." Without repeating all that plaintiffs have said above about how they are injured by section 1906 and its consequences, suffice it to say that not one of them has alleged anything in futuro--each and every one of them has alleged present injury, now.

In Doe v. Bolton, concerning the Georgia abortion statute, standing was found in "Georgia-licensed doctors," who were not themselves pregnant, "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution for violation of the State's abortion statutes." The Court did not reach the standing of nurses,

clergymen, social workers and non-profit abortion-reform corporations because "the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of [the other plaintiffs]."

Linda R.S. v. Richard D. et al. does the government no good at all. There, the Court noted "the unique context of a challenge to a criminal statute" (emphasis added), and that Linda R.S. had "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of [the Texas statute]. Thus, if appellant were granted the requested relief [to invalidate the Texas statute's application only to legitimate children], it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best be termed only speculative." (emphasis added) Manifestly, the interests asserted by plaintiffs here are not speculative. Moreover, Linda R.S. turned on considerations not present here, to wit., appellant trying to do something about the inaction of prosecuting authorities. As the Court itself said in Linda R.S.: "The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authorities when he himself is neither prosecuted nor threatened with prosecution." (emphasis added) And more: "...we hold that appellant has made an in-

sufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State's criminal laws." Obviously, nothing like that is involved here, and Linda R.S. has nothing to do with the Federal Humane Slaughter Act.

The instant case is not "a remote, imaginary conflict" (Douglas, dissenting in Laird v. Tatum, U.S. , 92 S.Ct. 2318 (1972)), but rather an actual, viable, battle being waged by persons and organizations who are for separation of church and state and against cruelty to animals--persons (and organizations) who are touched in their daily lives and activities by section 1906 and its consequences. They are touched every bit as much, if not more, than the voters in Baker and the physicians in Doe, and thus each of them displays a requisite personal stake. In addition to that immediate, personal interest, certain plaintiffs assert other interests as well.

The complaint alleges that Plaintiff Jones "is President of Society for Animal Rights, Inc., and is deeply committed to the principle of the humane treatment of animals, such being her lifetime professional work." (paragraph 1); also (paragraph 2) that "[s]ince the livestock animals now and hereafter awaiting slaughter in the United States are real parties in interest in this action, and since they cannot speak for themselves, Miss Jones, also sues here as next friend and guardian on their behalf." Lastly, it is alleged (paragraph 12) that Plaintiff Society for Animal Rights, Inc. is a not-

for-profit corporation devoted to the welfare of animals and the protection of animals from all forms of cruelty and suffering, "and (paragraph 11) that plaintiff Committee for Humane Slaughter's purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner."

It is immediately obvious that here we have an individual plaintiff and two organization plaintiffs who, in addition to asserting their own rights, are also asserting the rights of others--and that, in this case, those others are animals, not humans.

We respectfully submit that this notion of jus tertii finds support in precedent, as well as in reason.

The Supreme Court has long recognized the standing of one party to assert the rights of someone else. In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965) the Executive Director of the Planned Parenthood League and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship. In Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (1953) a seller of land was entitled to defend against an action for damages for breach of a racially restrict-

ive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-caucasian purchasers. Nearly two decades later, the Court was to characterize the Barrows relationship as "between one who acted to protect the rights of a minority and the minority itself." (Eisenstadt v. Baird, 405 U.S. 438, 445, 92 S.Ct. 1029, 1034 (1972)). And in Eisenstadt itself, the Court held that "the relationship between Baird and those whose rights he seeks to assert is ... that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." Noting that "more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests," the Court held that Baird had standing. There are many such cases. (See, eg., NAACP v. Alabama, supra; Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400 (1969)).

Narrowing the issue even further, the Court has often found standing to assert third-party rights in First Amendment cases, even when the relationship has been more tenuous. (See, eg., Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736 (1940) and U.S. v. Raines, 362 U.S. 17, 80 S.Ct. 519 (1960)).

Narrowing even further, within the First Amendment area itself, in religion cases the assertion of third-party rights is not unheard of. For example, in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944), a custodian, in vio-

lation of state child labor laws, furnished a young girl with religious magazines to distribute on the street in accordance with the dictates of their religion. The Supreme Court implicitly held that the custodian had standing to assert the child's alleged religious rights which were threatened which, in the context of that litigation, the child had no effective way of asserting herself.

It thus being accepted doctrine that in certain circumstances one does have standing to represent so-called "third-party" interests, in addition to one's own interests, and particularly in First Amendment Religion Clause cases, the next connection that must be made is that such third-party interests may be that of animals.

There is more than one way the connection may be made.

If the rights of unborn "human beings" can be asserted by the Court (see the abortion decisions, supra), and if "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem [citations omitted]" (93 S.Ct. at 731) it is not too long a step for the president of a humane society, the Society itself, and a Committee for Humane Slaughter to assert the rights of millions of animals that are now alive.

If, as the Court observed in Data Processing, one's

standing interest may reflect "aesthetic, conservational, and recreational values" (citing Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2 Cir.1965), where, at root, the welfare of fish were sought to be protected)--if in Citizens to Preserve Overton Park, Inc., et al. v. Volpe, 401 U.S. 402, 91 S.Ct. 814 (1971), the Supreme Court could take completely for granted the standing of "private citizens as well as local and national conservation organizations" who sought to stop a federally funded highway from ruining a park--if, in Data Processing, the Supreme Court recognized that "[a] person or a family may have a spiritual stake in [non-economic] First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause"--if the spirit of Sierra Club is really that someone must be heard to speak against the alleged despoiling of Mineral King --if a host of recent district and circuit court cases have found standing to challenge harm to environmental interests and inanimate objects--if in all such cases standing existed because plaintiffs were obviously asserting a public purpose and because they were serious, professional activists for their particular causes, then here the standing of Jones, the Society, and the Committee, to sue on behalf of the millions of live-stock animals being slaughtered annually in the United States, also exists. The plaintiffs here are 6 real people, 2 Committees, and a humane Society of some 25,000 members, all of whom are personally aggrieved by what they perceive to be an

Establishment Clause violation resulting in medieval barbarism being inflicted on millions of defenseless animals. Not only is the standing issue which is actually presented here of great importance, but the implication of the government's position is of enormous magnitude as well. Carried to its logical conclusion, the government's position means that Congress or a state legislature could pass a law--no matter how egregious, how illegal, how immoral, how unconstitutional--and that in principle a situation could exist where no one would have standing to challenge it. It hardly needs to be observed that not ever in the history of this Republic has any such law existed on any level of government, local, state, or federal. Indeed, it is the genius of our system that no statute is ever insulated from judicial scrutiny, that no legislature is ever above the law. As a matter of fact, there are strong implications in SCRAP (II) that it would be quite undesirable if there was legislative or administrative action that no one could challenge.

When all is said and done, the conclusion is irresistible that plaintiffs here have standing to sue. In one sense, perhaps the entire foregoing discussion could have been avoided by asking a single rhetorical question: if at least one of the 9 plaintiffs here does not have standing to sue, who could ever have standing to sue in such a case, where people are trying to stop the religiously-caused barbaric treatment of dumb animals, animals who cannot speak, let alone sue, for

themselves? A callous, gratuitous remark by the government, made below and repeated here, perhaps sums up the standing issue here more eloquently than all of the legal discussion above:

The relationship of animals to rights conferred by the Free Exercise and Establishment Clauses are, of course, so ludicrous as not to require further comment.

(Memorandum, p. 20a).

If a violation of the Religion Clauses of the First Amendment, and thus a violation of the Constitution of the United States of America, is causing dumb creatures to be brutalized, surely under modern concepts of standing and civilized notions of right and wrong, at least one of the 9 plaintiffs here has standing--standing to speak for the Constitution, and thus for the animals.

And if even one of the plaintiffs does, the government's motion to dismiss must be denied.

POINT II

Because Section 1906 Of The Act Lacks "A Secular Legislative Purpose And A Primary Effect That Neither Advances Nor Inhibits Religion" (Abington v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963)), That Section Is Unconstitutional Under At Least The Establishment Clause Of The First Amendment.

Introduction

The legislative history of the Federal Humane Slaughter Act^[6] as well as all of its provisions (except, of course, section 1906) conclusively shows that the statute was conceived and enacted in order to eliminate the pre-slaughter suffering of live-stock animals--a goal manifestly within the power of Congress.

One important way for Congress to eliminate that suffering was to bar the pre-slaughter handling (i.e., shackling and hoisting) of animals which were fully conscious. Accordingly, the core of the Act is found in section 1902(a):

in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals [must be] 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

⁶ The Act, containing six sections, is Public Law 85-765, 85th Congress, H.R. 8308, approved August 27, 1958; a copy is annexed hereto as Appendix "A." References are to 7 U.S.C. §§ 1901-1906.

The legislative history of the Act discloses that section 1906 was tacked on as an amendment by Senator Case. (104 Cong. Rec., 15414-5, July 29, 1958.)

Section 1906 of the Act--the so-called Case Amendment--provides that:

Nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this Act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act. For the purposes of this section, the term "ritual slaughter" means slaughter in accordance with section 2(b).

Thus, avowedly to protect the alleged religious freedom of a small number of Jews--who insisted on having animals not only killed by a throat-cut, but also shackled and hoisted while fully conscious--the Case amendment created the following situation: although the Act was aimed at allowing the handling and slaughter of animals only if they had first been instantly rendered insensible to pain, the amendment exempted from the render insensible requirement all animals which would die later by a throat cut.

In Schempp, supra, the Supreme Court held that bible reading in public schools violated the Establishment Clause. Schempp left little doubt about how to identify an Establishment

Clause violation:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (374 U.S. at 222, 83 S.Ct. 1571, emphasis added).

A "Secular Legislative Purpose"

Manifestly, section 1906 of the Act does not evidence the government's interest in protecting the general public, in a usual "police power" sense. Section 1906 has nothing whatever to do with the public health, welfare, safety or morals. Indeed, even the most vigorous supporters of the sections have never made such a claim. Nor has any argument ever been made, nor could it be, that the sections evince a governmental interest in fostering charitable giving, as in Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409 (1970), or any other comparable public purpose. Unlike in Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947), where the Court approved of New Jersey providing bus transportation to all school children, and Board of Education v. Allen, 392, U.S. 236, 88 S.Ct. 1923 (1968), where the Court approved of New York lending books to all school children, here the obvious non-secular sectarian

purpose of the challenged section is not only to make available to some Jewish people meat killed by a throat-cut (which plaintiffs are not challenging , but also to make available to them meat from animals which have been handled for slaughter (i.e., shackled and hoisted) while they are alive and fully conscious.

This is the core of the problem, and the hidden, unstated reason why the section 1906 exception was tacked on to the Act:
a small, but very vociferous, minority of Jewish people believe that Hebrew law prohibits cutting the throat of an animal which can not feel pain. (Encyclopedia Judaica, vol. 6, p.28; vol.14, pps. 1338, 1341) They were able to get their religious views enacted into law. In other words, it is said by some that under Jewish law, the animals is supposed to be fully/^{conscious}and kicking when its throat is cut--as indeed it is now, because of section 1906's exemption to the render insensible requirement of section 1902(a).

For evidence that this sectarian, not secular, legislative purpose was the reason for section 1906's exemption (and section 1905's creation of a watchman), one need look no further than the language of section 1906 itself:

Notwithstanding any other provision of this chapter, in order to protect freedom of religion ... the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. (emphasis added.)

Thus, the question here is brought into sharp focus.

Is this alleged Congressional attempt to protect religion a violation of the First Amendment's proscription against any law "respecting" an establishment of religion?

Lest there be any question that section 1906 was introduced in order to alleviate the concerns of certain vociferous Jewish groups, the following should be noted:

- The original humane slaughter bill introduced by Senator Hubert Humphrey exempted from the Act persons "authorized by an ordained rabbi of the Jewish religious faith to serve as a shechter." (S.1636, Sec.2(c); See Hearings before a Subcommittee on Agriculture and Forestry, U.S. Senate, 84th Cong., 2d Session, May 9 and 10, 1956, p.3-4).

- A Senate amendment to the bill provided for the appointment of an Advisory and Research Committee on Humane Slaughter of Livestock and Poultry, to be composed of 10 members, one of whom was to be "a person familiar with the requirements of the Jewish religious faith with respect to slaughter." Listed as a "humane" method of slaughtering, in addition to a "render insensible before bleeding or slaughtering" requirement, was slaughtering in "accordance with the practices and requirements of the Jewish religious faith." (103 Cong.Rec. 13904, July 23, 1956).

- Eight bills were introduced in the House of Representatives, all of which contained specific prohibitions against shackling and hoisting of conscious animals. (See Hearings before the Subcommittee on Livestock and Feed Grains of the Committee on Agriculture, 85th Cong.1st Sess., April 2 and 12, 1957).

Hearings on the bills led to the drafting of H.R. 8308. In 1958, amendments to H.R. 8308 were offered, one of which was a provision that slaughtering in accordance with the ritual requirements of the Jewish faith was humane. In addition, "a new section" was to be added to the bill, to wit: "Nothing in this Act shall be construed to prohibit, abridge, or ... hinder the religious freedom of any person or group to slaughter and prepare for the slaughter of livestock in conformity with the practices and requirements of his religion." This religious exemption provision was taken directly from a letter to one of the bill's sponsors, written by attorney Leo Pfeffer; the letter begins: "Dear Congressman Poage: I am writing this letter on behalf of the Rabbinical Assembly of America and the United Synagogue of America." (See 104 Cong. Rec. 1654-5 (February 4, 1958) (emphasis added)).

As the court knows, the same Leo Pfeffer has unsuccessfully attempted to intervene in this case, on behalf of a variety of Jewish organizations. In both his motion to intervene, and at oral argument on that motion, Dr. Pfeffer again has proved that section 1906 was introduced and enacted for strictly sectarian purposes. We are told in his affidavit, and in those of his associates, that there are hundreds of thousands of Jews "for whose benefit the challenged provision was enacted." Moreover, "[t]he organizational applicants were all represented and testified at the hearings held before the appropriate Congressional committees prior to the enactment of the challenged statute, and the particular and unique interest in the statute and its provisions was fully recog-

nized by the Congressional committees." (Pfeffer affidavit, paragraph 4; more of the same appears in the minutes of oral argument on the motion to intervene, December 10, 1973, see Exhibit "B" annexed to the Holzer affirmation herein).

There are numerous other examples of how the wishes of some members of the Jewish religious faith were inextricably intertwined with the challenged sections of the Humane Slaughter Act--the Hearings are replete with them. Moreover, merely to read the list of "interested" Jewish groups represented before Congress during the Hearings is to illustrate the point: Research Institute of Religious Jewry; Rabbinical Assembly of the United Synagogue; Union of Orthodox Rabbis of the United States and Canada; the American Section of Argudas Israel World Organizations; Agudath Israel of America; American Jewish Congress; Association of Grand Rabbis; Central Conference of American Rabbis; Jewish Labor Committee; Jewish War Veterans of the U.S.A.; Mizrachi and Hapeol Hamizrachi of America; National Council of Young Israel; New York Board of Rabbis; Poale Agudath Israel of America; Rabbinical Alliance of America; Rabbinical Assembly of America; Rabbinical Board of Greater New York; Rabbinical Council of America; Synagogue Council of America; Union of American Hebrew Congregations; Union of Orthodox Jewish Congregations of America; United Synagogue of America; and the National Community Relations Advisory Council. The latter organization is a coordinating agency for various national Jewish organizations, as well as for 36 regional, state and local Jewish community councils throughout the country.

(Hearings before the Subcommittee

on Livestock and Feed Grains of the Committee on Agriculture, House of Representatives, 85th Congress, 1st Session, April 2 and 12, 1957, pp.34-35).

Thus, there is no question but that the section 1906 exemption to the "render insensible" requirement of section 1902(a) was of paramount interest to, and strongly desired by, a vociferous and well-organized Jewish community, and thus the legislative purpose was by no means secular--it was as sectarian as could possibly be. This alone renders section 1906 unconstitutional.

"Principal or Primary Effect."

The question under Schempp's second test is whether the legislation's principal or primary effect is either to advance or to inhibit religion. Since, at the moment, we are concerned only with the Establishment Clause, we need focus only on advancement.

As stated above, there is only one primary effect of the section 1906 exemption: meat handled in a manner desired by certain members of the Jewish faith becomes readily available, when otherwise such meat would be perhaps more difficult and/or more expensive to obtain because of the render insensible requirement of section 1902(a). No other purpose--principal, primary, or anything else--has ever been suggested, nor indeed could it be. A special interest lobby caused the challenged sections (especially 1906) to be included in the Act, for the express (and only) purpose of legislatively protecting the dietary preferences of its members.

As one Congressman pointed out:

...I assumed that the sole purpose of the bill [later, the Humane Slaughter Act] was to prevent cruelty to animals about to be made into food and those who sponsored the bill knew what they were doing ... But I wonder if this is just to protect animals. [The bill] says "before being shackled, hoisted, thrown, cast or cut" the animals are to be rendered insensible. I cannot, for the life of me ... see why our Jewish friends are exempt from this bill. One's religious practices, if the method and procedure of slaughter are just as painful as those used by others, is no reason for an exemption if the sole purpose is to prevent pain in slaughter. (See 104 Congressional Record 1659, Statement of Representative Hoffman, February 4, 1958).

Under Schempp, it is enough to render section 1906 unconstitutional that its purpose, far from being secular, was and is blatantly sectarian. However, additionally we find a primary effect which unconstitutionally advances the dietary preferences of a specific religious group.

Plaintiffs readily admit that no case in the Supreme Court is directly dispositive of the issue presented here. We do contend, however, that Schempp's secular legislative purpose--primary effect test is the litmus paper against which section 1906

must be analyzed, and we further contend that such analysis necessarily compels the conclusion that the section violates the Establishment Clause.

As to plaintiffs' Free Exercise claims, the government has conceded that a rabbi is on the Secretary's Advisory Committee, and that public monies have been paid to him.

Plaintiffs are therefore being taxed to pay Rabbi Joseph Soloveitchik for his airplane, railroad, taxi and miscellaneous expenses, amounting thus far to at least \$210.05. The Act provides for someone like Rabbi Soloveitchik to be on the Advisory Committee solely because he is familiar with the requirements of a specific religious faith--the Jewish faith. The Department is obliged to expend time and money--taxpayer money--to keep proper records in connection with the Rabbi's travels, to maintain expense schedules, to reimburse the Rabbi, and perhaps to verify whatever travel activity the Rabbi engages in and puts in vouchers for.

Obviously, it matters not how much public money goes to the Rabbi. What is important is that any public money goes in support of religious persons, for religious reasons, in the name of real or supposed religious requirements. Citation of cases is hardly necessary for the proposition that the government can not hand over public money to a rabbi, in return for his advice as to what is kosher under a federal statute. The Supreme Court has condemned governmental efforts to aid financially all religions, so how clear must it be when the government, as here, contributes financial aid to one religion, for a purpose which aids only that religion? To the extent plaintiffs pay federal taxes, they help to

pay the rabbi's expenses, and for the kosher processed-and-killed meat which the government spends millions of dollars on each year.

The government purchases meat under the National School Lunch Act (42 U.S.C. 1751 et seq.) and the Child Nutrition Act (42 U.S.C. 1777 and 7 U.S.C. 612c as implemented by 15 U.S.C. 713c). Moreover, according to the Department of Agriculture itself, during periods of low livestock prices the Department has removed surplus meat from normal channels, to provide market assistance to livestock producers. Products thus purchased have been donated to schools pursuant to the school-lunch program and also to "charitable institutions, needy families, and other eligible outlets. In 1953, ... 217 million pounds of beef at a cost of \$85.7 million [were purchased] ... [d]uring the fall of 1956, 100 million pounds of livestock products ... were purchased at a cost of \$32.9 million." (See Senate Report No. 1724, June 1958, Statement of True D. Morse, Acting Secretary of the Department of Agriculture, p. 3934.)

The government has meat procurement programs for the U.S. Army, Navy, Air Force, Marine Corps. (104 Cong.Rec. 1667, February 4, 1958) (The Department of Defense admitted in 1958, that it procured an estimated 2% of the national production of livestock.) Many federally inspected slaughtering plants engage in at least some Jewish ritual slaughter. (The government admits to 65; see government affidavit of C. H. Pals, Staff Officer, Meat Group, Animal and Plant Health Inspection Service, U.S. Dept. of Agriculture, p. 1). The government also concedes that about 3 1/2 million animals annually are ritually slaughtered. (See Pals affidavit, supra, p.2). Thus, the substantial meat purchases by the government

pursuant to its various meat procurement programs entail a great deal of tax money spent on meat that is ritually slaughtered--on cattle, calves, goats and sheep. Just what percentage of the 3 1/2 million ritually slaughtered animals are purchased for government procurement programs is not clear, since the government claims to make no distinction, in its purchases, between ritually and non-ritually slaughtered meat. (See government affidavit of John C. Pierce, Director, Livestock Division of the Agricultural Marketing Service of the U.S. Department of Agriculture).

What is clear, however, is that using the government's own figures of 3 1/2 million ritually slaughtered animals annually, and estimating that, at rock bottom, each animal yields at least 5 pounds of meat and each pound is worth at least one dollar, then the government has, under its jurisdiction, close to \$20,000,000 dollars worth of ritually slaughtered meat annually.

Thus, to the extent some of their tax money is used for religious purposes not their own, and which they oppose, plaintiffs' Free Exercise rights are being violated. In addition, two plaintiffs--Weiss and Buick--are offended in their religious beliefs by purchasing meat which may have been, and probably was, slaughtered in accordance with the ritual laws of the Jewish religion. (See Everson v. Board of Ed. 330 U.S. 1, 67 S.Ct. 504 (1947); McCollum v. Board of Ed., 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962); Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963).

Both as to plaintiffs' Establishment Clause and Free

Exercise Clause contentions, there is nothing in the government's case to warrant a contrary conclusion.

The Government's Case

Basically, the government's entire case comes down to two propositions, the first of which the government discusses at some length, and the second of which it only touches on lightly (but which various amici will doubtless argue here and in the Supreme Court): (i) for there to be an Establishment Clause violation, there must be "excessive entanglement," and (ii) if section 1906 did not exist, the freedom of religion of Dr. Pfeffer's clients would be adversely affected.

As to the first, it is apparent that the government relies heavily on Walz v. Tax Commission, supra, from which is derived the so-called "excessive entanglement" test. In the context of the case at bar, there is an easy answer to the government's use of Walz. It was recently expressed by Professor Gianella, who observed that in Walz the Chief Justice intended to "confine the entanglement test to cases involving state subsidies of religious institutions, particularly church-related schools," [7] a situation obviously not involved in the case at bar. In this connection it should be noted that in the three religion cases [8] decided by the Court after Walz, the only one not to rely on "entanglement" (Gillette and Negre) was the only one which did not

⁷ Gianella, "Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement," 1971 The Supreme Court Review 147, 172.

⁸ Gillette v. U.S. and Negre v. Larsen, et al., 401 U.S. 437, 91 S.Ct. 828 (1970), Tilton et al. v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971), Lemon et al. v. Kurtzman et al. and Earley et al. v. DiCenso et al. and Robinson et al. v. DiCenso et al., 403 U.S. 602, 91 S.Ct. 2105 (1971).

involve governmental financial subsidies. On the other hand, Tilton and Lemon did involve such subsidies, and each case turned on the extent of "entanglement" present.

Next to be dealt with is the argument that absent section 1906 there would be a free exercise problem for some Jewish people who desire meat obtained by cutting the throat of an animal that is fully conscious, even if it means shackling and hoisting the animal while fully conscious. Before it can be disposed of, this argument must be understood fully. It goes like this: (1) the Jewish religion requires Jews to eat meat, (2) it requires that livestock be slaughtered not only by a properly executed throat cut, but that the animal be fully conscious when its throat is being cut, (3) the Act without section 1906 would require slaughterers to render the animals insensible before slaughter, (4) Jews could not eat such meat, and (5) therefore, their right to practice their religion would be violated by the presence of, and the slaughterers' obligation to adhere to, the render insensible requirement of section 1902 (a) and by the absence of the present exemption of section 1906. There are a great many fallacies in this contention--any one of which is sufficient to refute it:

1. There is nothing in Jewish law which requires Jews to eat meat, or which requires that an animal about to be slaughtered by a throat-cut be able to feel pain:

For years British law has been hazy on a definition for butchers of the word kosher, which denotes the Jewish method of slaughtering animals permitted to

be eaten and the preparation process for eating. The religious law's requirements were laid down first in the Torah, or Five Books of Moses, and later interpreted in the Talmud. * * * "We ask 10 people and get 10 different opinions," said Jack Brenner, the secretary of the London Board of Shechita. [ritual slaughter]. "We're moving toward a definition but, believe me, it's not easy." (The New York Times, March 23, 1971, emphasis added).

* * *

... As we have heard, there is disagreement among members of the Jewish faith as to what the system of kosher slaughtering should be, and how it should be described in words and figures. (104 Cong.Rec. 15408, Statement of Senator O'Mahoney).

As a matter of fact, if an animal is injured during slaughter--as obviously a shackled and hoisted livestock animal is--apparently under Jewish law the entire animal is considered "unclean" and thus inedible. Doubtless this is why the Jewish State of Israel refuses to import meat from America which has been shackled and hoisted, while fully conscious, before slaughter. (See Appendix "B" hereto).

Moreover, even if it were arguably true that Jews were required to eat meat and that Jewish law required an animal to be fully conscious when slaughtered, neither this court nor any other could resolve the dispute. Under Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143(1952), Kreshik v. St. Nicholas Cathedral,

363 U.S. 190, 80 S.Ct. 1037 (1960), and Presbyterian Church v. Mary Eliz. Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), no court can decide matters of religious dogma or doctrine.

2. Even if the Jewish religion did require both the eating of meat and that the animals be fully conscious before slaughter, no Jew who observed both requirements would be cut off from such meat because of the Act, and thus no one's freedom of religion would be violated. In other words, if the Act existed without section 1906, those persons who wished meat slaughtered by a throat cut, while the animal was fully conscious, could still get such meat. For one thing, the ASPCA has developed a pen which allows the throat-cutting of large livestock animals without having to shackle and hoist them. (See Appendix "C" hereto). For another, such persons could import the meat they wished. Thirdly, they could either purchase intra-state the meat they needed, or purchase it inter-state from those slaughterers who are not under the Act, since the Act reaches only large slaughterers who do business with the government and perhaps also those who do business in interstate commerce. Lastly, such persons could organize their own slaughtering anywhere, and easily stay out from under the Act's reach. Under any of these approaches, the meat might be somewhat more expensive, but it would be there.

Plaintiffs contend that either of the above two points are sufficient to resolve any free exercise argument which our opponents could make. But we will go even further.

3. Even assuming arguendo that the Jewish religion

required eating meat, and that the animals had to be fully conscious before slaughter, and that there was no other place on earth where such meat could be obtained, plaintiffs contend that the Act without section 1906 would be constitutional and present no free exercise problem.

In this connection, a brief summary of what is involved here may be useful. To cure horrible abuses which existed for years in the handling for slaughter, and in the actual slaughter, of livestock animals (Holzer affirmation), in 1958 the Federal Humane Slaughter Act was enacted. In general, it required that before anything was done to the animals, they first had to be rendered insensible to pain by a single blow. Then, but only then, they could be handled, shackled, hoisted, etc., and eventually killed--killed even by a throat-cut, which was deemed to be a humane method of slaughter. Quite obviously, the Act was a manifestation by the people of this country, and by their Congress, that the medieval barbarity which had so long attended livestock slaughter in America was unacceptable any longer; that given the necessity for killing livestock animals for food, at least the unfortunate creatures would not feel any pain. The Act, although passed under the Commerce Clause power of the Constitution, was also in the nature of a police power enactment. It was aimed at general health-safety-morals-welfare issues, as the Act's preamble language makes quite clear. Then, in response to religious pressure, from a specific religious group, section 1906 was proposed and enacted as an amendment. Certain Jewish organizations wanted not only that livestock animals could be killed by a throat-cut, but they also wanted a total exception

from the "rendered insensible" requirements of section 1902(a). Their reason was because some of them claimed that Jewish law required a soon-to-be-slaughtered animal to be fully conscious during the entire process, even though the process involved included shackling, hoisting, tissue bleeding, tearing of hide and flesh, bruising, breakage and dislocation of bones, skull fracturing, eye-gouging, nose-ripping, horn-shattering, etc.

So, in Free Exercise terms, the question is: can one's real or alleged religious practices be allowed, no matter how repugnant, barbaric, destructive, and contrary to the letter and spirit of federal law? Even assuming that which is by no means conceded or true--that Jewish law both requires meat eating and prohibits throat-cutting an animal which has first been rendered insensible to pain by a single blow--the Supreme Court often has in analogous situations prohibited a religious practice, drawing an important difference in constitutional terms between the freedom to believe, which is absolute, and the freedom to act, which is not. (Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903 (1940)).

Despite a Mormon man's religious duty to enter into polygamous marriages, on pain of hell if he failed to do so, the Supreme Court upheld a federal law for the territory of Utah, making polygamy a crime. (Reynolds v. U.S., 98 U.S. 145(1878)).

Despite a Jehovah's Witness' religious duty to proselytize and sell the Order's magazines, the Court upheld a Massachusetts labor law conviction of an adult Witness who had her teen-age niece

out in the early evening selling magazines on a street corner, although the girl was there voluntarily. (Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438(1944)). There was, the Court held, a valid state interest in protecting the welfare of children, even against a clear religious obligation, and a harmless one at that.

In Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct.1144(1961) orthodox Jews complained about "Blue Laws" which required them to close their stores on Sundays. They contended that because their religion "forced" them also to close on Saturdays, enforcement of the "Blue Laws" violated their free exercise rights in that if they closed on Saturday as their beliefs required, they would suffer severe economic loss (which they could not make up on Sunday), and if they kept open on Saturday to avoid the economic loss, they would violate their beliefs.

In holding that no violation existed of Appellant's free exercise rights, the Court wrote with words which could have been addressed to the case at bar:

... if the State [here, Congress] regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's [federal government's] secular goals, the statute is valid despite its indirect burden on religious observance unless the State [Congress] may accomplish its purpose by means which do not impose such a burden.. (366 U.S. at 607, 81 S.Ct. at 1148).

In other words, Reynolds, Prince, and Braunfeld, stand for the proposition, long recognized and applied by the Court, that while the Free Exercise Clause guarantees one the absolute right to believe religiously as he chooses, it does not guarantee one the right to act religiously as he chooses (Cantwell v. Connecticut, supra). That being so, no sound argument can be made here to the effect that some persons of the Jewish faith possess the right to have slaughterers exempted, via section 1906, from the render insensible requirement of section 1902(a). On the contrary, section 1906 is a flagrant violation at least of the Establishment Clause of the First Amendment, and perhaps from the Free Exercise Clause as well, as to the six individual plaintiffs here or some of them. Indeed, research has not disclosed any other federal statute which even comes close to the naked, specific, religious exemption found here in section 1906 of the Federal Humane Slaughter Act.

CONCLUSION

Because At Least One Of The Nine Plaintiffs Has Standing To Sue,
Because The Religious Exemption Of Section 1906 Of The Act Violates
At Least The Establishment Clause Of The First Amendment, And Be-
cause The Existence Of The Act Absent Section 1906 Would Not Violate
Anyone's Free Exercise Rights, Such Section Should Be Declared
Unconstitutional And Its Enforcment And All Other Action Thereunder
Enjoined..

Submitted by,

Henry Mark Holzer (P.C.)

- Henry Mark Holzer, of counsel
Attorney for Plaintiffs

Erika Holzer,
On the Brief.

Public Law 85-765
85th Congress, H. R. 8308
August 27, 1958

AN ACT

To establish the use of humane methods of slaughter of livestock as a policy of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce. It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.

Humane methods of slaughter.

SEC. 2. No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(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.

SEC. 3. The public policy declared herein shall be taken into consideration by all agencies of the Federal Government in connection with all procurement and price support programs and operations and after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants or in any plants of any slaughterer or processor with which it is affiliated slaughters or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture (hereinafter referred to as the Secretary) pursuant to section 4 hereof: *Provided*, That during the period of any national emergency declared by the President or the Congress, the limitations on procurement required by this section may be modified by the President to the extent determined by him to be necessary to meet essential procurement needs during such emergency. For the purposes of this section a slaughterer or processor shall be deemed to be affiliated with another slaughterer or processor if it controls, is controlled by, or is under common control with, such other slaughterer or processor. After June 30, 1960, each supplier from which any livestock products are procured by any agency of the Federal Government shall be required by such agency to make such statement of eligibility under this section to supply such livestock products as, if false, will subject the maker thereof to prosecution, title 18, United States Code, section 287.

Procurement, etc., by U. S. after June 30, 1960.

72 Stat. 862.
72 Stat. 853.

62 Stat. 698.

Appendix "A"

SEC. 4. In furtherance of the policy expressed herein the Secretary is authorized and directed—

(a) to conduct, assist, and foster research, investigation, and experimentation to develop and determine methods of slaughter and the handling of livestock in connection with slaughter which are practicable with reference to the speed and scope of slaughtering operations and humane with reference to other existing methods and then current scientific knowledge;

(b) on or before March 1, 1959, and at such times thereafter as he deems advisable, to designate methods of slaughter and of handling in connection with slaughter which, with respect to each species of livestock, conform to the policy stated herein. If he deems it more effective, the Secretary may make any such designation by designating methods which are not in conformity with such policy. Designations by the Secretary subsequent to March 1, 1959, shall become effective for purposes of section 3 hereof 180 days after their publication in the Federal Register;

34 Stat. 1260.

(c) to provide suitable means of identifying the carcasses of animals inspected and passed under the Meat Inspection Act (21 U. S. C. 71 and the following) that have been slaughtered in accordance with the public policy declared herein. Handling in connection with such slaughtering which necessarily accompanies the method of slaughter described in subsection (b) of this section shall be deemed to comply with the public policy specified by this section.

Advisory Com-
mittee.

SEC. 5. To assist in implementing the provisions of section 4, the Secretary is authorized to establish an advisory committee. The functions of the Advisory Committee shall be to consult with the Secretary and other appropriate officials of the Department of Agriculture and to make recommendations relative to (a) the research authorized in section 4; (b) obtaining the cooperation of the public, producers, farm organizations, industry groups, humane associations, and Federal and State agencies in the furtherance of such research and the adoption of improved methods; and (c) the designations required by section 4. The Committee shall be composed of twelve members, of whom one shall be an officer or employee of the Department of Agriculture designated by the Secretary (who shall serve as Chairman); two shall be representatives of national organizations of slaughterers; one shall be a representative of the trade-union movement engaged in packinghouse work; one shall be a representative of the general public; two shall be representatives of livestock growers; one shall be a representative of the poultry industry; two shall be representatives of national organizations of the humane movement; one shall be a representative of a national professional veterinary organization; and one shall be a person familiar with the requirements of religious faiths with respect to slaughter. The Department of Agriculture shall assist the Committee with such research personnel and facilities as the Department can make available. Committee members other than the Chairman shall not be deemed to be employees of the United States and are not entitled to compensation but the Secretary is authorized to allow their travel expenses and subsistence expenses in connection with their attendance at regular or special meetings of the Committee. The Committee shall meet at least once each year and at the call of the Secretary and shall from time to time submit to the Secretary such reports and recommendations with respect to new or improved methods as it believes should be taken into consideration by him in making the designations required by section 4 and the Secretary shall make all such reports available to the public.

72 Stat. 853.

72 Stat. 864.

72 Stat. 864.

SEC. 6. Nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this Act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act. For the purposes of this section the term "ritual slaughter" means slaughter in accordance with section 2 (b).

Religious
freedom.

"Ritual
slaughter"

Approved August 27, 1958.

Appendix "A"

A-2

מדינת ישראל

STATE OF ISRAEL

Department of Public Services

Ministry for Religious Affairs

Tel-Aviv-Jaffa

משרד הדתות

א"ח Eyar 5723 3/23
23 April 1963

The National Catholic Society for Animal Welfare
~~723 Fifteenth Street N.W.~~ 1346 Connecticut Ave.
Washington 5, D.C.
U. S. A.

Dear Sirs,

The Embassy of Israel in Washington D.C.,
contacted us about the information you seek, as to the
method of restraint or handling, by which meat animals
are brought into position for the ritual "Shechita".

We are sorry, that after our letter of March 14,
the matter missed our attention, till the reminder from
the Embassy.

As to the information we gathered from the
Tel-Aviv area, which is the main center for the supply of
meat, here, - the casting or lowering of the animal is done
by experienced men, who take all precautions to minimize,
the possibility of causing harm or pain, to the animal.

The ritual "Shechita" is carried out while the
animal is lying on the floor, or mat and held into
position by assistants of the "Shochet". The American
method of hoisting the animal up, is not accepted here.

The present abattoir is small and therefore no
special casting device can be put into use, however in
the new abattoir it is planned to install a "Weinberg
Casting" pen, which is used in England for all Kosher
"Shechita".

Yours sincerely,

Dov Cohen

Rabbi Dov Cohen

Director of Public Services

Copy: Embassy of Israel, Washington D.C.

Appendix "B"

A-3

DC/NF

ASPCA

Founded in 1866



THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS ■ 441 EAST 92nd STREET, NEW YORK, N.Y. 10028 ■ 876-7700

Arthur R. Williams
Public Relations Director

January 12, 1972

Henry Mark Holzer, Esq.
540 Madison Avenue
New York, N. Y. 10022

Dear Mr. Holzer:

As we discussed this afternoon, I am enclosing folders describing the ASPCA holding pen for large beef animals.

Unfortunately the material is several years old, but most of it pertains. I would like to point out one change in the progress of developing a pen for small animals. Thus far no suitable prototype has been developed, and research is still continuing.

A pen costs about \$10,000 plus installation charges.

Sincerely,

A handwritten signature in cursive script that reads "Arthur R. Williams".

Arthur R. Williams
Public Relations Director

ARW.r
Encls

Appendix "C"

A-4

The ASPCA holding pen for large beef animals is in use by the following packing plants.

Cross Bros.	Philadelphia, Pa.
Consolidated Dressed Beef	Philadelphia, Pa.
2 installations	
Allen Packing Co.	Elizabeth, N. J.
Midtown Veal & Mutton	Newark, N. J.
Linden Packing Co.	Newark, N. J.
S. Schweid	Patterson, N. J.
Raskin Packing Co.	Sioux City, Iowa
Gold-Pak	Vernon, California
Mid States Packers Inc.	Sioux City, Iowa
United Fryer Stillman	Denver, Colorado
2 installations	

Appendix "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN E. JONES etc., et al.,

Plaintiffs,

-against-

EARL S. BUTZ etc., et al.,

Defendants.

73 Civil 1
(HJF)
(DBB)
(ELP)

PLAINTIFFS' REPLY MEMORANDUM OF LAW

1. In support of plaintiffs' cross-motion for summary judgment;
- and-
2. In opposition to the amici curiae - proposed intervenors.

HENRY MARK HOLZER (P.C.)
Attorney for Plaintiffs
c/o Society for Animal Rights, Inc.
400 East 51st Street
New York, N. Y., 10022
(212) PL-2-8690

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HELEN E. JONES etc., et al.,

Plaintiffs,

-against-

EARL S. BUTZ etc., et al.,

Defendants.

:
:
:
:
:
:
:

73 Civil 1
(HJF)
(DBB)
(ELP)

PLAINTIFFS' REPLY MEMORANDUM OF LAW

1. In support of plaintiffs' cross-motion for summary judgment;
 - and-
 2. In opposition to the amici curiae - proposed intervenors.
-

INTRODUCTION

After plaintiffs' papers were served and filed in opposition to the government's motion and in support of the plaintiffs' cross-motion, plaintiffs received a brief and affidavits from the government in opposition to the cross-motion. Plaintiffs also received, on behalf of large numbers of amici curiae-proposed intervenors, a 39 page brief/appendix from Leo Pfeffer, Esq. and a 100 page brief/appendix from Nathan Lewin, Esq. This memorandum of law is submitted in reply.

In the briefs of the government and the amici-proposed intervenors, only a few issues emerge which must be commented upon--one in particular, because it has just been raised for the first time.

THE SECTION 1902(b) ISSUE

Although we have repeatedly emphasized that "[b]asically, plaintiffs' fire is aimed at §1906 of the Act" (Holzer affirmation, p. 2), in his amici brief Mr. Pfeffer does not even once mention section 1906 but instead inexplicably characterizes our substantive case as only a "challenge to the constitutionality of 7 U.S.C. Sec. 1902(b)." (Pfeffer brief, p.2). We wish to state again, hopefully for the last time, that this case does not involve the question of whether a throat-cut is or is not a humane method of killing. This case involves the question of whether the federal "render insensible before killing law" can constitutionally be emasculated by exempting--mostly via section 1906, but also by the spirit of sections 1902(b) and one section of 1905--the alleged dietary preference of one religious group. Mr. Pfeffer's brief has the tail wagging the dog. Although section 1902(b) does reflect the religious exemption which permeates the Act, it is section 1906 which creates the exemption, and it is section 1906 which the government and the amici-proposed intervenors must confront.

SEVERABILITY

Although conceding "that the absence of such a [severabil-

ity] clause does not necessarily mean that the invalidity of part of a statute defeats the entire enactment" (p.35), Mr. Lewin asserts that if the religious exemption falls, then the entire statute should fall with it. This assertion--akin to the theory of the jilted suitor who kills because "if I can't have her, no one will"--apparently rests on the double inference that Senator Humphrey would want it that way, and so would each and every other Congressman who voted for the Federal Humane Slaughter Act. Not only is such assertion presumptuous to a fault, not only does it rest on mere speculation, and not only is it utterly devoid of any evidentiary support, but it ignores the possibility (if possibilities are what we are dealing in) that some of those who voted against the Act with the religious exemption in might have voted for it with the exemption out. In short, who knows? Surely an Act of Congress can not be obliterated on the basis of such an unanswerable question.

FREE EXERCISE OF RELIGION

Eating meat

In our main memorandum we argue that the absence of the Act's religious exemption would not give rise to any free exercise problem. (Pps.52-3). The reasons are (1) that "[t]here is nothing in Jewish law which requires Jews to eat meat," and (2) even if there is, nothing in Jewish law "requires that an animal about to be slaughtered by a throat-cut be able to feel pain." It is well settled that if a practice contended for in the name of free exercise of religion is not actually a religious requirement, no free exercise issue exists. (Eg.: United States v. Kuch, 288 F.Supp. 439 (D.C.D.C.

1968, Gesell, J.); Leary v. United States, 383 F.2d 851 (5 Cir.1967), rehearing denied, 392 F.2d 220(1968), reversed on other grounds, 395 U.S. 6 (1969); Butler v. Kavanagh, 64 F.Supp. 741 (E.D. Mich.1945); cf. People v. Woody, 40 Cal. Repr. 69, 394 P.2d 813 (1964)).

The government and the amici-proposed intervenors have failed to come up with anything to demonstrate a religious duty to eat meat, or, if there is such a duty, that the animal must be shackled and hoisted while fully conscious. Indeed, much of what the amici-proposed intervenors have submitted necessitates the opposite conclusion. For example, we are referred by the Lewin brief to the teachings of Maimonides (p.6, 11A), who, when referring to the eating "of the flesh of a domestic animal," spoke not of those who must so eat, but rather of those "whosoever wishes to eat" (emphasis added).

As to shackling and hoisting fully conscious animals, the Lewin brief (p.19-20) cites the testimony of a Mr. Greenwald, "Counsel for the American Federation of Retail Kosher Butchers." But he tells us that:

Our faith requires that the animal be turned with its shoulder to the ground.

And Maimonides tells us that Leviticus 17:13 requires not sensibility to pain, not shackling and hoisting fully conscious animals, but only that "he shall pour out the blood thereof." (Lewin brief, p.12A).

As a matter of fact, the papers of the amici-proposed in-

tervenors are replete with references to Jewish law which apparently teaches that the purpose of the throat-cut is to avoid pain, because Jewish law will not tolerate an injury to an animal when it is killed. That being so, it would appear that shackling and hoisting fully conscious animals would be against Jewish law.

However, as we say in our main memorandum, even if it were arguably true that Jews were required to eat meat and that Jewish law required an animal to be fully conscious when slaughtered, neither this court nor any other could resolve the dispute. (Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Presbyterian Church v. Mary Eliz. Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)).

But we go further, and make the point (main memorandum, p.54) that even if concededly there was a duty to eat meat, and a non-insensible requirement, such meat would be available even if the Act's religious exemption was wiped out. No one has yet answered this point. *

Making exemptions

And we go still further: there is no free exercise problem if there are persons who must have such meat, if there is nowhere else on earth to obtain it, and if there is no exemption in the Act. Only Mr. Lewin's brief addresses itself to this point.

*On the standing issue, the government states that plaintiffs could get the meat they want if they used "a bit of ingenuity." The same can be said of those who desire to have meat from shackled and hoisted fully conscious animals.

Although the Lewin brief does not actually come out and say so, it appears that the amici-proposed intervenors' entire free exercise case rests on Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). But neither case is applicable here, where we confront an Act of Congress, conceived and enacted as an exercise of the delegated powers of the Federal Government, which includes within it a religious exemption. Neither Verner nor Yoder, involved an attack on a statutory religious exemption, as here. Indeed, the Court in those cases required that an exemption be made, something quite different than the issue presented here. Indeed, if that is what the government and/or the amici-proposed intervenors are asking this court--as indeed they are, if the challenged section(s) go down--then it is they who have no standing to seek such an alleged free exercise exemption in the context of someone else's lawsuit. Moreover, the nature of the exemptions in Verner and Yoder are by no stretch of the imagination even remotely comparable to the magnitude of the exemption which is contended for here.

Lastly, it should be noted that although, as Mr. Lewin says (p.33), there was a statutory exemption in the National Prohibition Act (41 Stat. 308) for the use of Jewish sacramental wine, when a rabbi and others challenged on free exercise grounds the amount of wine allowed to them, the court held that the plaintiffs' religious worship rights had not been violated. In other words, even though sacramental wine was religiously required in excess of the allotment, there was no free exercise violation in prohibiting such ex-

cess amount to the worshipers. (Shapiro v. Lyle, 30 F.2d 971 (D.C. Wash. 1929)).

THE SECTION 1904(c) ISSUE

The government (apparently as the beneficiary of Mr. Lewin's research) and Mr. Lewin now contend that the last line of section 1904(c) is in the wrong place in the Act, and that if it is put in section 1902 the religious exemption of section 1906, and the other challenged sections, are somehow rendered less of a religious exemption. In our judgment, this assertion is disposed of quite easily. For one thing, there is no proof that "the Legislative Clerk [because of confusion] apparently added it [the last sentence of section 1904 (c)] to Section [190]4" (Lewin brief, p.27). For another, contrary to Mr. Lewin's assertion, it cannot be said that the sentence "makes no sense" where it is. Moreover, we respectfully suggest that this Court cannot undertake to rectify the alleged errors of allegedly confused Legislative Clerks, by moving sentences around in federal statutes. And most important: even if Mr. Lewin is correct about the sentence belonging somewhere in section 1902, nothing would be different, for it would not change one iota of the religious exemption from the Act's overall render insensible requirement--an exemption spearheaded not by section 1902(b), or by the last sentence of section 1904(c), but by section 1906.

STANDING

The government's memorandum and its Glassman and Welbourn

affidavits strengthen plaintiffs' claim to standing, because they prove that in military meat procurement the government does not know whether the meat has been ritually slaughtered or not--indeed, we are told not only that they do not know, but that they can not know, because of "reasons of logistical impracticability and....undesirability..." Thus, if the Department of Defense cannot find out from the Department of Agriculture what meat has been slaughtered in which way, surely these plaintiffs cannot find out from the latter, from Swift, Armour, et al., or from anyone else.

THE NAZIS

Ordinarily we would move to strike from the Lewin brief all references to the Nazi laws forbidding Jewish ritual slaughter, and especially the grotesque reproduction and translation appearing at 6A and 7A, because they are in no conceivable way relevant to any legal issue in this case. However, we are not so moving because they illustrate more eloquently than we could just how-and why--rampant fear and uncontrolled emotionalism rammed through the challenged religious exemption when the Act was proposed and passed in the late 1950s. Suffice it to say that America in the 1950s, and even in the 1970s, bears no resemblance to Hitler's Germany of 1933--and that the plaintiffs here bear no resemblance to the Nazis. Perhaps the amici-proposed intervenors missed what we said on page 38 of our main memorandum:

If a violation of the Religion Clauses of the First Amendment, and thus a violation of the Constitution of

the United States of America, is causing dumb creatures to be brutalized, surely under modern concepts of standing and civilized notions of right and wrong, at least one of the 9 plaintiffs here has standing--standing to speak for the Constitution, and thus for the animals.

If the amici-proposed intervenors are concerned about totalitarianism, we suggest that they forgo seeking to have their dietary preferences enacted into positive law, for when the state becomes involved with religion, as it surely is here, somewhere down the road may be just what the amici-proposed intervenors fear most. If they were wise, they would join as plaintiffs.

If the Lewin brief's conclusion is so concerned with "the bona fides and the deeply held conscientious convictions of a segment of American citizenry which follows traditions that espoused humanity to animals long before the rest of the civilized world even conceived of such a possibility," we suggest that one way to be humane to animals is to cease shackling and hoisting them while they are fully conscious. Action always speaks louder than words.

Submitted by,

HENRY MARK HOLZER (P.C.)
Attorney for Plaintiffs

Henry Mark Holzer,
of counsel

Erika Holzer,
on the brief

IN THE

work copy

Supreme Court of the United States

October Term, 1973

(5)

No.

HELEN E. JONES, as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States; HELEN E. JONES individually; DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; VIOLETTA LANDEK; CHARLES STEINBERG; MARY LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; SOCIETY FOR ANIMAL RIGHTS, INC., on behalf of itself and its members; COMMITTEE FOR A WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICA,

Appellants,

against

EARL S. BUTZ, as Secretary of Agriculture of the United States of America; GEORGE GRANGE, as Acting Administrator of Consumer and Market Services, United States Department of Agriculture; "JOHN DOE" being a fictitious name referring to the member of the Secretary's Advisory Committee under 7 U.S.C. §1905 who is "familiar with the requirements of religious faiths with respect to slaughter",

Appellees,

and

JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *et al.*,

Intervenors-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

JURISDICTIONAL STATEMENT

HENRY MARK HOLZER
Counsel for Appellants
250 Joralemon Street
Brooklyn, New York 11201
(212) MA 5-2200

June, 1974

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IN THE
Supreme Court of the United States
October Term, 1973

No.

HELEN E. JONES, *et al.*,
Appellants,
against
EARL S. BUTZ, *et al.*,
Appellees,
and

JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF
AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND
PUBLIC AFFAIRS, *et al.*,
Intervenors-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of a three-judge United States District Court for the Southern District of New York entered on April 19, 1974, and from that court's judgment dated and filed on May 10, 1974 (1) granting Appellees' motion for summary judgment and dismissing the complaint with prejudice, and (2) denying Appellants' cross-motion for summary judgment. Appellants submit

this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the three-judge United States District Court for the Southern District of New York is not yet reported. Said opinion is annexed hereto as Appendix A; the court's judgment is annexed hereto as Appendix B.

Jurisdiction

This suit was brought under 5 U.S.C. §§702, 703 and 28 U.S.C. §§1331, 1343, 1361, 2201, 2202. Primarily, it seeks to enjoin as unconstitutional the enforcement of section 6 of the Humane Slaughter Act (Act of August 27, 1958, Pub. L. No. 85-765, 72 Stat. 562 (1959), 7 U.S.C. §§1901-1906 (1970)).¹

The opinion of the three-judge district court was entered on April 19, 1974.² The court's judgment was dated and filed on May 10, 1974. Notice of appeal to this Court was filed in the United States District Court for the Southern District of New York on May 17, 1974.

The jurisdiction of the Supreme Court to review in this case by direct appeal is conferred by 28 U.S.C. §1253.³

1. To the extent the district court has held that one sentence of section 4(c) actually belongs elsewhere in the Act, this suit seeks also to enjoin that sentence's enforcement. (See footnote 3 to the three-judge court's opinion, Appendix A, 4a). Section 2(b) and a portion of section 5 are also implicated in this case.

2. Reference is made here to the three-judge court's *opinion* because it stated that "It is so ordered." (See Appendix A, 21a).

3. See also 28 U.S.C. §§2282, 2101(b).

Constitutional Provision Involved

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”

Statute Involved

Challenged here as being unconstitutional under the Religion Clauses of the First Amendment are certain sections of the Humane Slaughter Act (Act of August 27, 1958, Pub. L. No. 85-765, 72 Stat. 562 (1959), 7 U.S.C. §§1901-1906 (1970)). The Act is annexed hereto as Appendix C.

Judgment and Notice of Appeal

The judgment of the three-judge court is annexed hereto as Appendix B. No rehearing was sought or had. The notice of appeal is annexed hereto as Appendix D.

Question Presented

Section 2(a) of the Humane Slaughter Act provides that “in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are [to be] 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. . . .”

At the urging of various Jewish organizations (11a), an exemption to section 2(a)’s “render insensible” requirement was made by the inclusion in the Act of an additional

section, section 6, which provides in pertinent part that: "Notwithstanding any other provision of this Act, in order to protect freedom of religion . . . the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act."

Does this religious exemption, found (primarily) in section 6 of the Act, violate the First Amendment's Establishment Clause or its Free Exercise Clause, or both?

Statement of the Case

This action challenges the religious exemption found principally in section 6 of the Federal Humane Slaughter Act, the result of such religious exemption, among other things, being to negate the main purpose of the Act as found in section 2(a) thereof.

Prior to the enactment of the Federal Humane Slaughter Act it was virtually a universal practice of livestock slaughterers not only to kill the animals while they were fully conscious, but also to position them physically for the kill while they were fully conscious. An integral part of that positioning procedure—commonly called "handling"—consisted of "shackling and hoisting" the animal: from a point high above the slaughterhouse floor a chain was hung from a winch device, the chain's bottom end was tied around one of the animal's legs, the winch was started, and the animal abruptly yanked into the air upside down, to begin its trip to the other end of the building, where death awaited. During this entire procedure, the animal was alive and fully conscious. (See Hearings Before A Subcommittee of

the Committee on Agriculture and Forestry, U.S. Senate, 84th Congress, 2d Session, May 9 and 18, 1956, and Hearings Before the Subcommittee on Livestock and Feed Grains of the Committee on Agriculture, House of Representatives, 85th Congress, 1st Session, April 2 and 12, 1957, statements of Fred Myers).

For years, various humane societies unsuccessfully sought legislation which would accomplish two different, but related, ends: (1) abolition of the shackling and hoisting of conscious animals, and (2) requiring that the actual killing of livestock animals be done in a humane manner.⁴

Accordingly, when the Act was passed in 1958 its first section "declared . . . the policy of the United States that the slaughtering of livestock *and the handling of livestock in connection with slaughter* shall be carried out only by humane methods" (Emphasis added). Thus, the main purpose of the Act is found in section 2(a):

in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals [must be] . . . 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* . . . (emphasis added).

However, at the urging of organized Jewish groups who apparently insisted, among other things, that the animals

4. When Senator Humphrey first introduced humane slaughter legislation in 1955, he stated that: "European Nations all immobilize and make insensible to pain all animals and poultry *before slaughter* The practices of our slaughterhouses of *shackling animals and hanging them up by one leg before the knife is used to kill them* . . . represents unfortunate cruelty to which the slaughter industry often seems callously insensible." (102 Cong. Rec. 4188, April 1, 1955, emphasis added, see also Hearings, *supra*).

remain fully conscious during the entire handling procedure and while they were being slaughtered (see 104 Cong. Rec. 1654-5, 1659, February 4, 1958 and 104 Cong. Rec. 15414-5, July 29, 1958), the so-called Case Amendment was added as section 6 of the Act:

Nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this Act, *in order to protect freedom of religion*, ritual slaughter and *the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act*. For the purposes of this section the term "ritual slaughter" means slaughter in accordance with section 2(b). (emphasis added)

In other words, if at the end of the slaughter line the animal was to have its throat cut pursuant to section 2(b) of the Act, section 6 exempted that animal *ab initio* from the "render insensible" requirement of section 2(a); because of the amendment contained in section 6, an animal which was to be killed by a throat-cut could be "handled," i.e. shackled and hoisted, while fully conscious.

Because they are aggrieved⁵ by the section 6 exemption, and because they consider the exemption to be religious in nature and to provide "separate treatment and special protection to the dietary preferences of a particular religious group,"⁶ Appellants commenced this action for in-

5. The three-judge court held that Appellants have standing to sue. Their "personal stake in the outcome" (*Baker v. Carr*, 369 U.S. 186 (1962)) is set forth in detail in the affidavits annexed to their cross-motion below for summary judgment.

6. Paragraph 33 of the complaint (39a). The pleading is annexed hereto as Appendix E.

junctive and declaratory relief. (It has been stressed throughout this litigation, and perhaps it is useful to stress it again here, especially in view of some of the language in the opinion of the three-judge court, that Appellants have never challenged the Congressional finding that a throat-cut is a humane method of slaughter (section 2(b)), nor the power of any slaughterer or any religious group to slaughter a livestock animal by means of a throat-cut).

The single-judge district court granted Appellants' motion to convene a three-judge court.⁷

The three-judge court held that the section 6 exemption did not violate either the Establishment or the Free Exercise Clause of the First Amendment.⁸ "The accommodations of religious practices by granting exemptions from statutory obligations have been upheld in the Sunday closing cases and in the conscientious objector cases." (17a); "Insofar as [Appellants'] attack is based on the Free Exercise Clause . . . the answer to it is that they have failed to demonstrate any coercive effect of the statute with respect to their religious practices." (20a).⁹

7. Judge Bonsal's decision is annexed hereto as Appendix F.

8. Nor did the court find that the Establishment Clause or the Free Exercise Clause were violated by section 2(b), by the last sentence of section 4(c), or by the portion of section 5 referring to the "person familiar with the requirements of religious faiths with respect to slaughter."

9. It should be noted that although Appellants are aggrieved principally by the section 6 religious exemption (and, if applicable, by the last sentence of section 4(c)), to the extent that section 2(b) and a portion of section 5 (referring to the "person familiar with the requirements of religious faiths with respect to slaughter") constitute religious acknowledgments in the Act, those sections are also implicated in Appellants' challenge. See footnote 11, *infra*.

The Question Is Substantial

The issue involved

It is possible to understand why the question presented is substantial only if first it is understood what Appellants are claiming. Unfortunately, thus far in this litigation neither the government, the amici-intervenors, nor even the three-judge court have appeared to understand fully the precise nature of Appellants' constitutional claim.¹⁰

Throughout this litigation Appellants have never contended that the Humane Slaughter Act is unconstitutional, and they do not now contend that it is. What they have contended below, and what they contend now, is that the religious exemption to the "render insensible" requirement of section 2(a), found in section 6 (and perhaps in the last sentence of section 4(c)), violates the Religion Clauses of the First Amendment.¹¹ Indeed, it was this contention

10. For example, the lengthy amicus brief submitted below by Leo Pfeffer, Esq. never once mentioned section 6, but instead inexplicably characterized Appellants' case as only a "challenge to the constitutionality of 7 U.S.C. Sec. 1902(b)." More surprising is Judge Palmieri's opening paragraph in his opinion for the three-judge court: "This action involves a challenge, under the Free Exercise and Establishment Clauses of the First Amendment, to the Humane Slaughter Act (the Act), 7 U.S.C. §1901 et seq. (1970), and in particular to the provisions relating to ritual slaughter as defined in the Act and which plaintiffs suggest involve the Government in the dietary preferences of a particular religious group." (2a).

11. Appellants' references to the throat-cut provisions of section 2(b) and to the provision of section 5 relating to the "person familiar with the requirements of religious faiths with respect to slaughter" have been meant, from the beginning, to highlight the efforts of organized Jewish groups to influence the drafting of the Act and to carve out, and enforce, a religious exemption to a federal statute which fundamentally provides (in section 2(a)) that before anything

which was made to the single district judge, and which caused him to begin his opinion, granting Appellants motion to convene a three-judge court, by stating that:

This action was commenced . . . to enjoin the federal government from purchasing livestock handled or slaughtered pursuant to the "religious exception" contained in the Humane Methods of Livestock Slaughter Act *Plaintiffs contend that the religious exception* [of section 6 (and perhaps section 4(c))] *unconstitutionally violates the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.* (emphasis added)

It was, and is, section 6's constitutionality vis-a-vis the Religion Clauses that is at issue here, nothing more nor less.¹²

This Court has not before had occasion to rule on the constitutionality of this Act's self-contained religious exemption; indeed, there are those who contend that this Court has never squarely ruled on the constitutionality of a self-contained religious exemption in a statute which otherwise is of general application.

is done to a livestock animal who has arrived at the slaughterhouse the animal must first be "rendered insensible to pain." As we said repeatedly below: this case in no way challenges the power of any slaughterer, or any religious group, to slaughter a livestock animal by means of a throat-cut. Nor does it challenge the Congressional finding that a throat-cut is a humane method of slaughter.

12. With all due respect, most of Judge Palmieri's opinion for the three-judge court seems to misconceive what it is that Appellants contend. Accordingly, we ask that their contentions be judged from their complaint (and, if need be, from their motion papers below), rather than by Judge Palmieri's characterization of what those contentions are. Frankly, it would appear that, in large measure, a straw man was created and then easily blown down.

Yet, according to the government itself, 3,500,000 livestock animals are slaughtered annually under this Act's religious exemption, and the government purchases a substantial portion of such meat, not only for such obvious purposes as military needs, but for such less conspicuous programs as "the National School Lunch Act, 42 U.S.C. §§1751 *et seq.*, the Child Nutrition Act of 1966, 42 U.S.C. §§1771-86, and under 7 U.S.C. §612c as implemented by 15 U.S.C. §713c" (footnote 6 to the three-judge court's opinion, 9a).¹³ As a matter of fact, the government admitted below that in 1971 the Department of Agriculture specifically purchased a carload of ritually slaughtered kosher beef "for distribution to Jewish schools in New York City."

Moreover, like some of the Appellants, there are millions of people in the United States who, for religious, moral, aesthetic, and other comparable reasons, cannot or will not eat the meat of livestock animals which have been shackled and hoisted while fully conscious pursuant to section 6's religious exemption, but who are unable to ascertain at the consumer level whether or not the meat which they purchase has been handled in that manner. If the exemption is held unconstitutional, with the result that all livestock covered by the Act will be rendered insensible before being shackled and hoisted, these consumers can continue to eat meat. If the exemption is held constitutional, many of

13. Indeed, on June 19, 1974, *The New York Times* reported on page 1 that "The White House announced today a stepped-up program of meat purchases for school lunches in an effort to aid the depressed hog and cattle industry Mr. Nixon approved a plan for purchases of up to \$100-million in beef and pork this summer by the Department of Agriculture." It was also announced that "the Agriculture Department had bought about 105 million pounds of beef and pork this fiscal year, which ends June 30."

them, like some of the Appellants, will have to cease eating meat.

In short, the federal statute presented here contains an express self-contained religious exception, an exception which, as to itself, and as a representative of a phenomenon of religious exceptions in statutes, this Court has not heretofore dealt with. Millions of animals are slaughtered each year pursuant to the religious exception; the government spends substantial sums of money purchasing such meat; and consumers, many of whom have deep convictions about the issue, cannot know at the retail level how the animal whose meat they purchase was handled and slaughtered. We contend that for these reasons, and for those which follow, the issue presented here is substantial.

Establishment

The three-judge court's rationale for holding against Appellants' Establishment Clause contention was expressed thusly:

The accommodations of religious practices by granting exemptions from statutory obligations have been upheld in the Sunday closing cases and in the conscientious objector cases. [There follows mention of *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Arlan's Department Store v. Kentucky*, 317 U.S. 218 (1962), *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961), *Selective Draft Law Cases*, 245 U.S. 366 (1918), *Welsh v. United States*, 398 U.S. 333 (1970).] (17a)

* * *

The lesson to be drawn from these Sunday closing and conscientious objector cases is this: that if Congress acted here out of deference to the religious tenets

of many Orthodox Jews it did so constitutionally and in substantially the same way as it accommodated the Sabbatarians and conscientious objectors by the exceptions in the applicable statutes. (18a)

As to the threefold Establishment test, although the three-judge court did recognize that in the challenged sections of the Act "a wholesale exemption was provided for ritual slaughter and accompanying preparation of livestock to accommodate a religious practice" (19a), the court nevertheless found: (1) a secular legislative purpose to those sections, (2) that they neither advanced nor inhibited religion, and (3) that they did not foster excessive government entanglement with religion.

However, despite the language and the holding of the three-judge court, we contend that neither the Sunday closing cases nor the conscientious objector cases are dispositive of the self-contained statutory religious exemption issue presented here. As we have observed above, we contend that no case in this Court has ever disposed of the type of self-contained statutory religious exemption presented here. We contend further that what the three-judge court itself recognized as a "wholesale exemption . . . to accommodate a religious practice" cannot pass muster under this Court's threefold Establishment test, recently reiterated in *Committee For Public Education And Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) and applied by virtually every court in America, federal and state, at one time or another in the past few years.

As to the Sunday closing law cases, we differ sharply with the three-judge court. In none of those cases was there

before the Court a self-contained religious exemption to a statute of otherwise general application. The Court was not called upon to decide, nor did it decide, that point. Indeed, in *Braunfeld*, in his reference to a state statute which might "cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observed a day of rest other than Sunday," Chief Justice Warren strongly implied that such an approach might well exceed constitutional limitations. (366 U.S. at 608-609). Justice Frankfurter's separate opinion, joined in by Justice Harlan, expressed the same concern. (366 U.S. at 516-517, 520). Thus, the quartet of Sunday closing cases are not dispositive of the issue presented here.

We also differ sharply with the three-judge court's conclusion that this Court's *per curiam* dismissal in *Arlan's Department Store*, for want of a substantial federal question, is dispositive of the self-contained statutory religious exemption issue presented by section 6 of the Humane Slaughter Act. It is plain that, apart from the many features which distinguish *Arlan's* from the instant case, even if the *Arlan's* dismissal means that this Court has constitutionally, albeit tacitly, approved a Sabbatarian exemption from a Sunday closing law (which is not conceded), it does not follow *ipso facto* that all self-contained religious exemptions to statutes of otherwise general application are thereby constitutionally acceptable. Indeed, there is abundant evidence that the *Arlan's* dismissal did not forever lay to rest all questions of religious exemptions to otherwise generally applicable statutes (see e.g., *Gillette v. United States and Negre v. Larsen*, 401 U.S. 437 (1971)).

It is noteworthy that in support of its conclusion, that the religious exemption found in section 6 of the Act did not violate the Establishment Clause, the three-judge court also relied only on draft cases, and within that area only on two, the *Selective Draft Law Cases* and *Welsh*. If anything, rather than being dispositive of the self-contained statutory religious exemption presented here, these two cases demonstrate that the issue remains wide open. As to the *Selective Draft Law Cases*, we adopt the statement of Justice Harlan's concurring opinion in *Welsh*:

The Government enlists the *Selective Draft Law Cases* . . . as precedent for upholding the constitutionality of the religious conscientious objector provision. That case involved the power of Congress to raise armies by conscription and only incidentally the conscientious objector exemption. The language emphasized by the Government to the effect that the exemption for religious objectors and ministers constituted neither an establishment nor interference with free exercise of religion can only be considered an afterthought since *the case did not involve any individuals who claimed to be nonreligious conscientious objectors*. This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration of the question in a case that squarely presents the issue. (398 U.S. at 359). (emphasis added).

The three-judge court's use of *Welsh* is based on language conceded by the court to be drawn from Justice White's dissent, wherein he speculated on why Congress exempted conscientious objectors. And, more to the point, the *Welsh* majority expressly eschewed "passing upon the constitutional arguments that have been raised" (398 U.S.

at 335); instead the majority merely construed section 6(j) of the Universal Military Training and Service Act.

Unfortunately, *Gillette and Negre, supra*, presented “no claim that exempting conscientious objectors to war amounts to an overreaching of secular purposes and an undue involvement of government in affairs of religion” (401 U.S. 450).¹⁴ Thus, the only Establishment Clause issue was whether “§6(j) impermissibly discriminates among types of religious belief and affiliation” (401 U.S. at 449). Because there were “neutral, secular reasons to justify the line that Congress has drawn” between non-selective and selective objectors, this Court found no Establishment Clause violation.

As to the requirement of secular purpose, and as to the other two Establishment Clause tests (*Nyquist, supra*), the three-judge court below did little more than merely announce that:

It is clear that the sections of the Act here under attack do not violate these tests. Read in the context of the entire statute, they have a secular purpose; their principal or primary effect is to provide for humane slaughter; and they do not foster excessive government entanglement with religion. (19a)

In view of the fact that all the challenged sections were placed in the Act at the express request of organized Jewish

14. The Court also noted that “§6(j) does not single out any religious organization or religious creed for special treatment” (401 U.S. at 451). Appellants here claim that section 6 (and part of section 4(c) does just that.

groups;¹⁵ in view of the fact that this was conceded by the amici-intervenors in their motions to intervene and in their briefs below; and in view of the fact that elsewhere in his opinion for the three-judge court Judge Palmieri stated that “the intervenors appeared before Congressional committees at the time the Act was under consideration by Congress . . .” (7a), and that “the legislative history indicates that opinion among Jewish organizations regarding the inclusion of section 2(b), 4(c) and 6 of the Act was divided” (11a),¹⁶ it is apparent that the Court’s tests for Establishment Clause violations, most recently reiterated in *Nyquist, supra*, especially the “secular legislative purpose” test, means something quite different in the Southern District of New York than it means elsewhere.

Although the three-judge court did not rely on *Walz v. Tax Commission*, 397 U.S. 664 (1970), the case deserves mention here. At a quick glance, the case’s holding might appear dispositive of the self-contained statutory religious exemption involved here. But it is not dispositive. For one thing, *Walz* did not involve, as this case does, a self-contained statutory religious exemption to an otherwise generally applicable statute—there, *all* religions were tax

15. See, for example, the Hearings and Congressional Record, *supra*. Most interesting is the fact that section 6 was taken directly from a letter to one of the bill’s sponsors. Written by Leo Pfeffer, Esq., the letter begins: “Dear Congressman Poage: I am writing this letter on behalf of the Rabbinical Assembly of America and the United Synagogue of America.” (See 104 Cong. Rec. 1654-5 (Feb. 4, 1958)).

16. Footnote 7 of the three-judge court’s opinion, following this quotation, states as follows: “Certain members of the orthodox Jewish community were alarmed with respect to the implications of the proposed legislation both regard to the possible restriction of pre-slaughter handling and to the possibility of anti-Semitic propaganda which had accompanied similar legislation in other countries.”

exempt, unlike here, where *one* religion is the beneficiary of the exemption; there, the exemption was found in an entirely separate statute, the sole purpose of which was to specify the various categories of entities which were tax exempt, unlike here where the Act is generally applicable and meant to reach all livestock animals and where the religious exemption is built right into that same Act. For another thing, the majority opinion in *Walz* appears to rest on the proposition that the tax exemption passes each of the three Establishment Clause tests: secular legislative purpose, primary effect which neither advances nor inhibits religion, and no excessive entanglement. If, when all is said and done, those are the tests which are to measure the constitutionality or unconstitutionality of self-contained statutory religious exemptions, then we submit that they ought to be applied to the sections of the Act under attack in this case.

Free Exercise

The three judge court's rationale for holding against Appellants' Free Exercise contention was that "they have failed to demonstrate any coercive effect of the *statute* with respect to their religious practices" (20a, emphasis added). With all due respect, Appellants have never claimed that the *Act* violates their Free Exercise rights, but rather that the existence and consequences of the Act's religious *exemption* violates their right to Free Exercise of religion.

Using the government's own figures of 3,500,000 livestock animals slaughtered annually pursuant to the Act's religious exemption, and estimating that at a bare minimum

each animal yields only 5 pounds of meat, and calculating the value of that meat at the now long-past price of only \$1.00 per pound, it appears that nearly \$20,000,000 worth of such "exemption" meat is under the government's jurisdiction each year. Some of it is purchased by the government,¹⁷ which uses the tax dollars not only of the Appellants but also of many other Americans who, like Appellant Buick, are offended in their religious beliefs by involuntarily supporting the purchase and consumption of meat handled and slaughtered in accordance with the dietary preferences of religionists of the Jewish faith. This point is dramatically evident when one considers that, according to the government itself, tax money was used to purchase a carload of kosher beef for Jewish school children in New York City. Presumably, if the religious exemption did not exist in the Act, public tax funds would not have been paid for kosher beef for Jewish children.

Although Appellants' Free Exercise point may be of less impact than the Establishment problem caused by the Act's religious exemption, the fact is that this Court has not heretofore had occasion to measure such an exemption by the proscription of the First Amendment's Free Exercise Clause.

Conclusion

In concluding one of our briefs below, in response to an implied charge of anti-semitism we stated that: "If the amici-proposed intervenors are concerned about totalitarianism, we suggest that they forego seeking to have their

17. See footnote 13, *supra*, which indicates that the actual figure may be many times \$20,000,000.

dietary preferences enacted into positive law, for when the state becomes involved in religion, as it surely is here, somewhere down the road may be just what the amici-proposed intervenors fear most. If they were wise, they would join as plaintiffs.”

In the final analysis, what is important about this case is the fact that, perhaps for the first time, the Congress of the United States, when enacting a much-needed humane slaughter statute of general application, bowed to the pressure of one religious group and at its behest simultaneously enacted into law a self-contained statutory religious exemption which embodied the dietary preferences of that religious group. Thus, while this religious exemption, in this Act, is of substantial importance in this case, the implications are far wider. At bottom, the question is whether Congress can be allowed, when it legislates, to make special arrangements, via religious exemptions, for specific religious groups.

We believe that the question presented by this appeal is substantial, and of great public importance.

Respectfully submitted,

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Appendix A

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before FRIENDLY, Circuit Judge, and PALMIERI and
BONSAL, District Judges.

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PALMIERI, District Judge

This action involves a challenge, under the Free Exercise and Establishment Clauses of the First Amendment,¹ to the Humane Slaughter Act (the Act), 7 U.S.C. §1901 *et seq.* (1970),² and in particular to the provisions relating to ritual slaughter as defined in the Act and which plaintiffs suggest involve the Government in the dietary preferences of a particular religious group.

The plaintiffs consist of a group of six individuals and three organizations hereinafter described. They seek injunctive relief as well as a declaration that the questioned statutory provisions are violative of the Constitution. Plaintiffs' application for the convening of a three-judge court, 28 U.S.C. §§2282, 2284, was granted by Judge Bonsal on October 25, 1973. The three-judge court was convened and a hearing held on February 11, 1974.

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

2. Act of August 27, 1958, Pub. L. No. 85-765, 72 Stat. 862 (1959).

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Jurisdiction is alleged under 5 U.S.C. §§702 and 703 and 28 U.S.C. §§1331, 1343, 1361, 2201, and 2202. The complaint alleges that the amount in controversy exceeds \$10,000.

The parties have made cross-motions for summary judgment. Rules 12(c) and 56, Fed. R. Civ. P. Additionally, the defendants have moved for an order dismissing the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P.

The Statutory Provisions Involved

Section 1 of the Act (7 U.S.C. §1901) declares it to be the policy of the United States "that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." And section 3 provides:

"The public policy declared in this chapter shall be taken into consideration by all agencies of the Federal Government in connection with all procurement and price support programs and operations and after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants or in any plants of any slaughterer or processor with which it is affiliated slaughters or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture. . . ." 7 U.S.C. §1903.

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The plaintiffs' challenge to the Act is directed to sections 2(b), 5, and 6 (7 U.S.C. §§1902(b), 1905, and 1906). Section 2 provides:

“§1902. Humane methods

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(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.”

Section 4(c) provides:

“Handling in connection with such slaughtering which necessarily accompanies the method of slaughter described in subsection (b) of this section shall be deemed to comply with the public policy specified by this section.”³

3. Although this sentence appears in §1904(c) it is manifest that it was placed there by mistake since it makes reference to the method set out in §1902(b).

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Section 5 of the Act provides for the establishment of an advisory committee to assist in implementing the Act's provisions, with one of the members of the advisory committee being a "person familiar with the requirements of religious faiths with respect to slaughter." 7 U.S.C. §1905. Section 6 provides:

"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 provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term 'ritual slaughter' means slaughter in accordance with 1902(b) of this title." 7 U.S.C. §1906.

The Parties

The plaintiffs are six individuals and three organizations having in common a professed commitment to "the principle of humane treatment of animals" and to "the principle of the separation of church and state." The complaint alleges that each of the individual plaintiffs is a taxpayer, that two of the individual plaintiffs abstain from eating any meat or meat products because of the alleged inhumane treatment of animals prior to slaughter, and that the other individual plaintiffs are consumers of meat who have at times unwittingly eaten meat that allegedly was slaughtered according to the "religious exception" contained in sections 2(b) and 6 of the Act. Two of the organization plaintiffs are unincorporated associations whose

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members reside in the Southern District of New York; and one is a not-for-profit corporation organized under the laws of New York with its principal offices in New York City.

Defendants are the Secretary of Agriculture, the Acting Administrator of Consumer and Market Services of the Department of Agriculture, and "John Doe," who has since been identified as Rabbi Joseph Soloveitchik, the member of the advisory committee authorized under section 5 who is familiar with the requirements of religious faiths with respect to slaughter.

Intervention has been permitted pursuant to Rule 24, Fed. R. Civ. P., to seven individuals and five organizations speaking for a large number of the estimated 6 million Jews in the United States and representative of the "entire spectrum of Jewish organizational life." The intervenors contend that if the Act is held unconstitutional, they and their members will be deprived of their right to eat ritually slaughtered meat.

The intervenors have an undoubted interest in the legislation under consideration here inasmuch as it affects the production of kosher⁴ meat, which is slaughtered according to the ritual method described in section 2(b). This in-

4. Although the plaintiffs have apparently avoided use of the term "Kosher" and have used the expression "ritually prepared meat" in describing their alleged grievances, the defendants and the intervenors have occasionally used the term "Kosher." It has not been made clear that the two are not interchangeable. Kosher is the Jewish term for any food or vessels for food made ritually fit for use. Ritually slaughtered meat is not necessarily Kosher meat. Not all animals slaughtered in accordance with the ritual requirements of the Jewish faith are Kosher. See 13 Encyclopedia Britannica, *Verbo* "Kosher," at 493 (1959 ed.).

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terest is different and distinct from the interest of the federal officials who have been named as defendants in this action and whose responsibility it is to administer the provisions of the Act. In addition, we are persuaded that intervention here will not delay the disposition of the action and will not cause any perceptible prejudice to any existing party. Moreover, the intervenors appeared before Congressional committees at the time the Act was under consideration by Congress and were therefore in a unique position to inform the Court regarding factual matters raised by this action. *See Bass v. Richardson*, 338 F. Supp. 478, 492 (S.D.N.Y. 1971).

Standing to Sue

The question of standing, vigorously contested in the briefs and upon the argument, presents no serious obstacle to a consideration of the merits. Defendants argue that plaintiffs cannot show that they have suffered any injury in fact by reason of the so-called religious exception of the Act and that therefore they lack standing to maintain this action. Plaintiffs, on the other hand, contend that they, or that at least one of them, have sustained the requisite injury either as taxpayers, in that the Act governs procurement of meat and meat products by the federal government; as consumers of meat who, as a practical matter, are unable to distinguish between meat produced according to subsection (a) and that produced according to subsection (b) of section 2 of the Act, and who therefore are "forced to eat ritually prepared meat"; or as citizens whose moral, religious, and aesthetic beliefs are offended because they are unable to refrain from eating ritually prepared meat. Plaintiffs contend that these alleged injuries are sufficient

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to confer standing to challenge the constitutionality of the Act.

The Supreme Court has recently made it clear that the plaintiffs' asserted injury may reflect "aesthetic, conservation, and recreational as well as economic values." *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). The fact that the interests claimed to have been injured are shared by many rather than few does not make them less deserving of legal protection through the judicial process. To have standing it is only necessary that the plaintiffs be among the class of persons injured.⁵ Thus, in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973), the Court held that an unincorporated association of law students in the Washington, D.C. metropolitan area had standing to challenge Interstate Commerce Commission orders pertaining to railroad tariff increases on the grounds that the agency action might be shown to have a detrimental impact on the environment and natural resources in the Washington metropolitan area, which the plaintiffs claimed to use for camping, hiking, fishing, and sightseeing. Justice Stewart writing for the Court quoted Professor Davis (*Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968)):

"The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." 412 U.S. at 689 n. 14.

5. The injury need not be large; it may be a fraction of a vote as in *Baker v. Carr*, 369 U.S. 186 (1962), a five dollar fine and costs, as in *McGowan v. Maryland*, 366 U.S. 420 (1961), or a \$1.50 poll tax as in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Cf. *O'Shea v. Littleton*, 94 S. Ct. 669 (1974).

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That the plaintiffs' commitment to the principles of humane treatment of animals and to the separation of church and state is deeply held and sincere is not doubted. The intervenors profess to be no less committed to the same principles, and indeed their religious beliefs have a long historical association with the humane treatment of animals. The sole question here is whether the plaintiffs have suffered the requisite injury or have a personal stake in the outcome of this controversy so that the Court can be assured that the issues will be framed 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 as to make it capable of judicial resolution. *See Flast v. Cohen*, 392 U.S. 83, 106 (1968).

This is not a generalized dispute in which plaintiffs seek to air "generalized grievances about the conduct of government," *id.*; plaintiffs have raised a specific attack on a particularized legislative enactment, alleging that it is in violation of specific constitutional provisions in the First Amendment. The Act in question establishes as the policy of the United States that animals are to be treated humanely prior to and during the slaughtering process, and in addition provides that the Act's provisions with respect to what methods of slaughter are humane shall govern the procurement of all meat and meat products by the federal government through the expenditure of federal moneys. In addition to the moneys spent by the federal government for procurement,⁶ there are some moneys spent to pay the

6. The United States Department of Agriculture, for example, procures meat under the National School Lunch Act, 42 U.S.C. §§1751 *et seq.*, the Child Nutrition Act of 1966, 42 U.S.C. §§1771-86, and under 7 U.S.C. §612c as implemented by 15 U.S.C. §713c.

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travel and subsistence expenses of the members of the advisory committee authorized under section 5 of the Act and to administer the other provisions of the Act. Plaintiffs' allegations of injury in their role as federal taxpayers are therefore sufficient to meet the criteria of *Flast v. Cohen, supra*.

But apart from their status as taxpayers, plaintiffs' allegations of injury as consumers and citizens are sufficient to confer standing here. Plaintiffs allege that the Act contains a religious exception making it impossible as a practical matter to be certain of purchasing meat from animals slaughtered by a process that they consider humane and consistent with the policy of the United States as declared in section 1 of the Act. Plaintiffs contend that this uncertainty causes injury to their moral principles and aesthetic sensibilities. These allegations are substantially comparable to the allegations of environmental injury in *United States v. S.C.R.A.P., supra*, where the Court sustained the standing of plaintiffs. Although the Act in its operative provisions regulates directly only government procurement, we are willing to accept, *cf. United States v. S.C.R.A.P., supra* at 688-90, that governmental refusal to purchase the meat of animals slaughtered by the ritual method would so influence production in the great packing houses as to save plaintiffs from the uncertainty of which they complain; indeed, the general structure of the Act rather suggests that Congress believed government procurement policy could have that kind of impact on methods of slaughter and handling in general.

*Appendix A**The Meaning of the Statutory Provisions*

Two aspects of the legislative history deserve special mention: first, that in passing these provisions Congress was fully informed with respect to the method of slaughter according to the Jewish ritual method, as well as the handling of livestock prior to such slaughter; and secondly, that the legislative history indicates that opinion among Jewish organizations regarding the inclusion of sections 2(b), 4(c) and 6 of the Act was divided.⁷

The declaration of humaneness becomes a focal point of inquiry in the case. The plaintiffs do not challenge the right of any slaughterer or religious group to slaughter livestock by means of a throat cut administered skillfully with a sharp knife—the Jewish ritual slaughtering method known as *shehitah*. Nor do the plaintiffs challenge the Congressional finding that the throat cut method is a humane method of slaughter. The crux of their complaint rests upon the proposition that in failing to require that the animal be rendered insensible to pain before the handling process, and thus before it is shackled and hoisted, the provisions permitting ritual slaughter are offensive to and inconsistent with the humane purposes of the Act and have a special religious purpose in contravention of the First Amendment. In effect, therefore, the plaintiffs contend that the provisions of the Act (sections 2(b) and 6) constitute an exemption from the application of subdivision

7. Certain members of the orthodox Jewish community were alarmed with respect to the implications of the proposed legislation both with regard to the possible restriction of pre-slaughter handling and to the possibility of anti-Semitic propaganda which had accompanied similar legislation in other countries.

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(a), an act of cruelty to the animal so slaughtered, and a violation of the Religion Clauses of the First Amendment.

Congress characterizes as humane, in section 2 of the Act, either of two methods of “slaughtering and handling.” The two methods are set forth in disjunctive paragraphs. The first, subdivision (a), relates to the method by which the animal is “rendered insensible to pain” by some form of stunning—mechanical, electrical or chemical—before being shackled and hoisted. The second, subdivision (b), provides for an alternative method—slaughter “in accordance with the ritual requirements of the Jewish faith or any other religious faith” without making any express reference to the shackling or hoisting or any pre-slaughter handling procedure. It was conceded, however, upon the argument by counsel for the intervenors, that in practice, because of Department of Agriculture regulations, the Jewish slaughter method often involves the animal’s being shackled and hoisted before the animal suffers loss of consciousness.⁸ It is precisely this to which the plaintiffs object. They contend that such prior hoisting and shackling is inhumane. The plaintiffs’ argument can be paraphrased

8. Upon the argument counsel for the intervenors made the following uncontradicted statement:

“In Israel, and indeed, in the old traditional Jewish method, the animal would be laying down on its side, and the throat would be cut on the floor.

“That is not permitted under Department of Agriculture regulations for sanitary reasons. You can’t put an animal down in a Department of Agriculture inspected plant on the ground.

“The consequence is that the way the animal is positioned for slaughter in many slaughter houses that use the Jewish ritual method is that it is what is called shackled and hoisted. It is picked up by its legs, and it is turned upside down so that the throat cut can be administered.”

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in substantially the following manner: section 2(a) specifically provides that the animal must be rendered insensible before being shackled and hoisted. The general declaration of policy by Congress contained in section 1 is that only humane methods of slaughter should be carried out. Yet section 2(b) appears to be opposed to the declaration of policy and to be inconsistent with 2(a) because the animal suffers no loss of consciousness during the preliminary shackling and hoisting procedure under the ritual method. Yet this method as well as the method described in 2(a) are both "found to be humane" by the express provisions of the introductory paragraph of section 2; and perhaps by the misplaced provision in section 4(c) as well. Plaintiffs assert that such legislative inconsistency can be explained only as so clear a piece of deference to the tenets of one religious group as to violate the First Amendment.

The intervenors have made a persuasive showing that Congress was fully and competently advised with respect to Jewish ritual practices. It developed at the argument that the shackling and hoisting were not part of the Jewish ritual; but that under Jewish ritual practice it was essential that the animal be conscious at the time of the administration of the throat cut. This appears to be the reason why ritually slaughtered animals are sometimes shackled and hoisted before being killed—a practice prohibited in the Act with respect to other animals. Accepting, *arguendo*, that this constitutes an inconsistency in the statute, the question remains as to whether that inconsistency in any way violates the plaintiffs' rights under the Establishment Clause or the Free Exercise Clause of the First Amendment.

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Since Congress has determined that the Jewish ritual method is humane under the Act, the plaintiffs' arguments reduce themselves to whether they are really alleging an injury to themselves or an injury to the livestock **to be** slaughtered in the future, not by way of the throat cut which they concede is humane but because of the pre-slaughter handling which they suggest is not. In this connection section 4(c), the misplaced provision of the statute, expressly referred to section 2(b), setting forth the ritual method of slaughter, and stated that handling necessarily connected with such method "shall be deemed to comply with the public policy specified" by the statute. The draftsmen apparently attempted, perhaps inartistically, to avoid the appearance of inconsistency. But if there is inconsistency in the statute the plaintiffs have not persuaded us that they have suffered a deprivation of rights under the First Amendment.

We note at the outset of the analysis that we do not read subdivision (b) to be an exception to subdivision (a) of section 2. Phrased as it is in the disjunctive, the statute makes neither (a) nor (b) an exception to the other. The described methods are alternative methods; neither is dependent upon the other for the ascertainment of its meaning, and each one is supported by legislative history as a justifiable legislative determination that the stated method of slaughter is indeed humane.

*Appendix A**The Establishment Clause*

Despite this, plaintiffs assert that subsection (b), in permitting slaughterers to slaughter in accordance with the ritual method and, by implication, to handle livestock by whatever means is appropriate prior to such slaughter, had a religious purpose—the protection of a religious belief—and therefore violated the Establishment Clause.

Congress considered ample and persuasive evidence to the effect that the Jewish ritual method of slaughter, and the handling preparatory to such slaughter,⁹ was a humane method. It formulated a general policy after evaluating the abundant evidence before it.¹⁰ Congress did not create a religious preference, nor did it create an exception to any general rule. The intervenors have made a persuasive showing that Jewish ritual slaughter, as a fundamental

9. See *Humane Slaughtering of Livestock*, Hearings Before the Senate Committee on Agriculture and Forestry on S.1213, S.1497, and H.R. 8308, 85th Cong., 2d Sess. (1958). See also 104 Cong. Rec. 15368-415 (1958).

10. See *Humane Slaughtering of Livestock and Poultry*, Hearings Before a Subcommittee of the Senate Committee on Agriculture and Forestry on S.1636, 84th Cong., 2d Sess. (1956), which summarizes the testimonials and reports of a number of physiologists and others from the scientific community with respect to the humaneness of the Jewish ritual method of slaughter. Senator Hubert H. Humphrey, chairman of the Subcommittee and one of the principal proponents of the legislation, said on the floor of the Senate during debate that “because the subject matter of kosher slaughter came before the committee, we asked for scientific information relating to the matter. A substantial body of evidence was presented, which is in the files of the Committee on Agriculture and Forestry, and was included by reference in our report. . . . Not only is such a procedure accepted as a humane method of slaughter, but it is so established by scientific research.” 104 Cong. Rec. 15391 (1958). See also *Humane Slaughter*, Hearings Before the Subcommittee on Livestock and Feed Grains of the House Committee on Agriculture, 85th Cong., 1st Sess. (1957).

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aspect of Jewish religious practice, was historically related to considerations of humaneness in times when such concerns were practically non-existent.

Since we regard the questioned statute as a Congressional declaration of policy, it necessarily follows that the proper forum for the plaintiffs is the Congress and not the courts. *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970). The court cannot be asked to choose among methods of slaughter or pre-slaughter handling of livestock and to decide which is humane and which is not. We do not sit as a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), quoted with approval in *Ferguson v. Skrupa*, *supra* at 731.

The Constitutional clause against establishment of religion by law "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). Thus the Congressional finding of humaneness in section 2 of the Act was an appropriate legislative function; and its coincidence with a ritual procedure under Jewish religious law does not undercut its validity or propriety.

Even assuming, *arguendo*, that Congress permitted the throat-cutting method of slaughter out of deference to the religious beliefs of many orthodox Jews, and chose out of similar deference not to restrain the prior handling of livestock attendant upon such ritual slaughter, Congress did

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not thereby violate the First Amendment. The accommodations of religious practices by granting exemptions from statutory obligations have been upheld in the Sunday closing cases and in the conscientious objector cases. In *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961), Chief Justice Warren, writing for himself and three other justices, made the following statement though rejecting a free exercise claim by Sabbatarians in the absence of statutory exemption:

“A number of States provide such an exemption, and this may well be the wiser solution to the problem.”
(Footnote omitted).

A year later the *per curiam* opinion of the Supreme Court in *Arlan's Department Store v. Kentucky*, 371 U.S. 218 (1962), disposed of this issue. In that case an appeal from a judgment of the Kentucky Court of Appeals, 357 S.W.2d 708 (1962), upholding a Sunday closing law that included a blanket exemption for Sabbatarians was dismissed for want of a substantial federal question. The Kentucky court had relied partly on the *Braunfeld* language quoted above and partly on the fact that the Supreme Court had upheld the Massachusetts closing law in *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961), without discussing its rather more limited exemptions for Sabbatarians.

Additionally, the Supreme Court has found no conflict between the conscientious objector exemptions of the military draft laws and the Religion Clauses of the First Amendment, *Selective Draft Law Cases*, 245 U.S. 366, 389-

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90 (1918). Chief Justice White there stated in effect that the soundness of the proposition that no such conflict existed was such that no more was required than its statement.¹¹ As Mr. Justice White said in *Welsh v. United States*, 398 U.S. 333 (1970), “[l]egislative exemptions for those with religious convictions against war date from colonial days.” *Id.* at 370. Although writing in dissent, on another issue in the case, he added that the conscientious objector exemption from the draft may have been granted “because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress to deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect.” *Id.* at 369-70.

The lesson to be drawn from these Sunday closing and conscientious objector cases is this: that if Congress acted here out of deference to the religious tenets of many orthodox Jews it did so constitutionally and in substantially the same way as it accommodated the Sabbatarians and conscientious objectors by the exemptions in the applicable statutes.

The plaintiffs have placed much emphasis upon the holding of the Supreme Court in *Abington School District v. Schempp*, 374 U.S. 203 (1963), which held Bible reading in the public schools required by state action to be a violation of the Establishment Clause. We do not regard this

11. “And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act . . . because we think its unsoundness is too apparent to require us to do more.” 245 U.S. at 389-90.

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holding as inconsistent with our views. The requirement in *Abington* that there be a secular legislative purpose¹² is met here by the manifest Congressional intent to establish humane standards for the slaughter of livestock. That one of the provisions of the Act defining humaneness coincided with the method for Jewish ritual slaughter, and even that a wholesale exemption was provided for ritual slaughter and accompanying preparation of livestock to accommodate a religious practice quite apart from the finding of humaneness, neither advanced nor inhibited religion within the intendment of the holding in *Abington*.

In its later decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the Supreme Court set forth the three tests to be applied in determining whether a law violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * * finally, the statute must not foster 'an excessive government entanglement with religion.'" (Citations omitted.) It is clear that the sections of the Act here under attack do not violate these tests. Read in the context of the entire statute, they have a secular purpose; their principal or primary effect is to provide for humane slaughter; and they do not foster excessive government entanglement with religion.

12. The Supreme Court there stated:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

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We do not find it necessary to discuss the holdings of the Supreme Court under the Establishment Clause which are concerned with an excessive entanglement of government with religion¹³ because there is no entanglement here. The governmental functions involved have no connection with any religious practices. The only government expenditure attributable to allegations in the complaint is the sum of \$210.05 paid to Rabbi Joseph Soloveitchik for travel and subsistence expenses as a member of the advisory committee authorized under section 5. These expenses were paid for the period January 28, 1959 to July 15, 1963. We attribute no significance to this expenditure because it is both *de minimis* and stale.

The Free Exercise Clause

Insofar as plaintiffs' attack is based on the Free Exercise Clause rather than the Establishment Clause, the answer to it is that they have failed to demonstrate any coercive effect of the statute with respect to their religious practices. The plaintiffs suggest that they are being forced "knowingly or unknowingly" to eat ritually slaughtered meat, while in some cases they have been forced to cease eating meat. Apart from other failings in the claim, they do not allege any impingement upon the practice of any

13. The government brief cites the following cases in support of the proposition that in order to establish a meritorious constitutional claim under the Establishment Clause the plaintiffs must demonstrate an excessive entanglement of Government with religion. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Gillette v. United States*, 401 U.S. 437 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Zorach v. Clauson*, 343 U.S. 306 (1952).

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religion of their own. The plaintiffs' assertion of ethical principles against eating meat resulting from ritual slaughter is not sufficient. In the absence of a showing of coercive effect on religious practice, a meritorious claim under the Free Exercise Clause has not been made out. *Board of Education v. Allen*, 392 U.S. 236, 248-49 (1968); *Abington School District v. Schempp*, *supra* at 222-23; *Zorach v. Clauson*, 343 U.S. 306, 311 (1952). By making it possible for those who wish to eat ritually acceptable meat to slaughter the animal in accordance with the tenets of their faith, Congress neither established the tenets of that faith nor interfered with the exercise of any other.

Defendants' motion for summary judgment is granted, dismissing the complaint with prejudice.

Plaintiffs' motion for summary judgment is denied.

It is so ordered.

/s/ Henry J. Friendly

Henry J. Friendly
U.S.C.J.

/s/ Edmund L. Palmieri

Edmund L. Palmieri
U.S.D.J.

/s/ Dudley B. Bonsal

Dudley B. Bonsal
U.S.D.J.

Dated: New York, N.Y.

April 19, 1974

Appendix B**Judgment of the United States District Court
for the Southern District of New York****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

The defendants in the above entitled action having moved the Court to dismiss or in the alternative for summary judgment pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the plaintiffs having cross-moved for an order to convene a three-judge Court hearing, and the said motion having been granted, and the Statutory Court consisting of the Honorables Henry J. Friendly, C.J.; Edmund L. Palmieri, D.J. and Dudley B. Bonsal, D.J., having been convened, and the Court on April 19, 1974, having handed down its opinion granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants Earl S. Butz, as Secretary of Agriculture of the United States of America; George Grange, as Acting Administrator of Consumer and Market Services, United States Department of Agriculture; "John Doe" being a fictitious name referring to the member of the Secretary's Advisory Committee under 7 U.S.C. Sec. 1905 who is "Familiar with the requirements of religious faiths with respect to slaughter" have judgment against all plaintiffs, except as to Rabbi,

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Dr. Elmer Berger and Mrs. Ruth Berger, having been by an order of December 11, 1973, withdrawn as plaintiffs, the complaint is dismissed with prejudice.

Dated: New York, N.Y.
May 10, 1974

Raymond F. Burghardt
Clerk

Approved:

Edmund L. Palmieri
U.S.D.J.

Appendix C
Humane Slaughter Act

Public Law 85-765
85th Congress, H. R. 8308
August 27, 1958

AN ACT

To establish the use of humane methods of slaughter of livestock as a policy of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce. It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.

SEC. 2. No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

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(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.

SEC. 3. The public policy declared herein shall be taken into consideration by all agencies of the Federal Government in connection with all procurement and price support programs and operations and after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants on in any plants of any slaughterer or processor with which it is affiliated slaughters or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture (hereinafter referred to as the Secretary) pursuant to section 4 hereof: *Provided*, That during the period of any national emergency declared by the President or the Congress, the limitations on procurement required by this section may be modified by the President to the extent determined by him to be necessary to meet essential procurement needs during such emergency. For the purposes of

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this section a slaughterer or processor shall be deemed to be affiliated with another slaughterer or processor if it controls, is controlled by, or is under common control with, such other slaughterer or processor. After June 30, 1960, each supplier from which any livestock products are procured by any agency of the Federal Government shall be required by such agency to make such statement of eligibility under this section to supply such livestock products as, if false, will subject the maker thereof to prosecution, title 18, United States Code, section 287.

SEC. 4. In furtherance of the policy expressed herein the Secretary is authorized and directed—

(a) to conduct, assist, and foster research, investigation, and experimentation to develop and determine methods of slaughter and the handling of livestock in connection with slaughter which are practicable with reference to the speed and scope of slaughtering operations and humane with reference to other existing methods and then current scientific knowledge;

(b) on or before March 1, 1959, and at such times thereafter as he deems advisable, to designate methods of slaughter and of handling in connection with slaughter which, with respect to each species of livestock, conform to the policy stated herein. If he deems it more effective, the Secretary may make any such designation by designating methods which are not in conformity with such policy. Designations by the Secretary subsequent to March 1, 1959, shall become effective for purposes of section 3 hereof 180 days after their publication in the Federal Register;

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(c) to provide suitable means of identifying the carcasses of animals inspected and passed under the Meat Inspection Act (21 U. S. C. 71 and the following) that have been slaughtered in accordance with the public policy declared herein. Handling in connection with such slaughtering which necessarily accompanies the method of slaughter described in subsection (b) of this section shall be deemed to comply with the public policy specified by this section.

SEC. 5. To assist in implementing the provisions of section 4, the Secretary is authorized to establish an advisory committee. The functions of the Advisory Committee shall be to consult with the Secretary and other appropriate officials of the Department of Agriculture and to make recommendations relative to (a) the research authorized in section 4; (b) obtaining the cooperation of the public, producers, farm organizations, industry groups, humane associations, and Federal and State agencies in the furtherance of such research and the adoption of improved methods; and (c) the designations required by section 4. The Committee shall be composed of twelve members, of whom one shall be an officer or employee of the Department of Agriculture designated by the Secretary (who shall serve as Chairman); two shall be representatives of national organizations of slaughterers; one shall be a representative of the trade-union movement engaged in packinghouse work; one shall be a representative of the general public; two shall be representatives of livestock growers; one shall be a representative of the poultry industry; two shall be representatives of national organiza-

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tions of the humane movement; one shall be a representative of a national professional veterinary organization; and one shall be a person familiar with the requirements of religious faiths with respect to slaughter. The Department of Agriculture shall assist the Committee with such research personnel and facilities as the Department can make available. Committee members other than the Chairman shall not be deemed to be employees of the United States and are not entitled to compensation but the Secretary is authorized to allow their travel expenses and subsistence expenses in connection with their attendance at regular or special meetings of the Committee. The Committee shall meet at least once each year and at the call of the Secretary and shall from time to time submit to the Secretary such reports and recommendations with respect to new or improved methods as it believes should be taken into consideration by him in making the designations required by section 4 and the Secretary shall make all such reports available to the public.

SEC. 6. Nothing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this Act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act. For the purposes of this section the term "ritual slaughter" means slaughter in accordance with section 2 (b).

Approved August 27, 1958.

Appendix D

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that the Plaintiffs-Appellants above-named hereby appeal to the Supreme Court of the United States from the final order of the three-judge district court (Judges Friendly, Palmieri, Bonsal) entered in this action on April 19, 1974, and the judgment dated and filed on May 10, 1974, (1) granting Defendants-Appellees' motion for summary judgment and dismissing the complaint with prejudice, and (2) denying Plaintiffs-Appellants' cross-motion for summary judgment.

This appeal is taken pursuant to 28 U.S.C. §1253.

New York, N.Y., May 16, 1974

/s/ Henry Mark Holzer

HENRY MARK HOLZER
Counsel for Plaintiffs-Appellants
250 Joralemon Street
Brooklyn, New York 11201
(212) MA-5-2200

Appendix D

To:

1. Clerk of the above-named court.
2. Solicitor General, Department of Justice, Washington, D.C., 20530.
3. Paul J. Curran, Esq., United States Attorney
for the Southern District of New York,
United States Court House, Foley Square,
New York, N.Y., 10007.
4. Leo Pfeffer, Esq.
15 East 84th Street
New York, N.Y., 10028.
5. Nathan Lewin, Esq.
1320 19th Street, N.W.
Washington, D.C., 20036.
6. Sidney Kwestel, Esq.
425 Park Avenue
New York, N.Y.

Appendix E

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, for their complaint herein, hereby allege:

PARTIES

Plaintiffs

1. HELEN E. JONES is a resident of the City, County and State of New York in the Southern District of New York. She is a taxpayer of the United States of America. She is President of Society for Animal Rights, Inc., and is deeply committed to the principle of the humane treatment of animals, such being her lifetime professional work. Miss Jones is a Roman Catholic and, for the sake of the animals, abstains from eating meat. She is also deeply committed to the principle of separation of church and state.

2. Since the livestock animals now and hereafter awaiting slaughter in the United States are real parties in interest in this action, and since they cannot speak for themselves, Miss Jones also sues here as next friend and guardian on their behalf.

3. DR. ELMER BERGER is a resident of the City, County and State of New York in the Southern District of New

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York. Dr. Berger is a taxpayer of the United States of America. He is deeply committed to the principle of the humane treatment of animals and to the principle of separation of church and state. Dr. Berger is a rabbi, and a consumer of meat and meat products.

4. MRS. RUTH BERGER is a resident of the City, County and State of New York in the Southern District of New York. Mrs. Berger is a taxpayer of the United States of America. She is deeply committed to the principle of humane treatment of animals and to the principle of separation of church and state. Mrs. Berger is of the Jewish faith, and a consumer of meat and meat products.

5. DOROTHEA S. BUICK is a resident of the City, County and State of New York in the Southern District of New York. Mrs. Buick is a taxpayer of the United States of America. She is deeply committed to the principle of humane treatment of animals. Mrs. Buick is an Episcopalian, and a consumer of meat and meat products. At diverse times, she has unwittingly eaten meat handled and slaughtered in accordance with the Religious exception provided for Jewish ritual slaughter in 7 U.S.C. §1902(b).

6. DOROTHY M. HOLAHAN is a resident of the City, County and State of New York, in the Southern District of New York. Mrs. Holahan is a taxpayer of the United States of America. She is deeply committed to the principle of humane treatment of animals. Mrs. Holahan is an Atheist, and deeply committed to the principle of separation

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of church and state. She is also a consumer of meat and meat products.

7. VIOLETTA LANDEK is a resident of the City, County and State of New York, in the Southern District of New York. Ms. Landek is a taxpayer of the United States of America. She is deeply committed to the principle of humane treatment for animals, and, for the sake of the animals, abstains from eating meat.

8. CHARLES STEINBERG is a resident of the City, County and State of New York, in the Southern District of New York. Mr. Steinberg is a taxpayer of the United States of America. Mr. Steinberg is deeply committed to the principle of humane treatment of animals, and is a consumer of meat and meat products, and a consumer of meat handled and slaughtered in accordance with the Religious exception provided for Jewish ritual slaughter in 7 U.S.C. §1902 (b).

9. MARY LEAH WEISS is a resident of the City, County and State of New York, in the Southern District of New York. Ms. Weiss is a taxpayer of the United States of America. She is deeply committed to the principle of humane treatment of animals. Ms. Weiss is a Roman Catholic, and a consumer of meat and meat products.

10. Plaintiffs JONES, BERGER, BERGER, BUICK, HOLAHAN, LANDEK, STEINBERG and WEISS have paid and pay in excess of \$10,000 in taxes to the United States of America.

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11. COMMITTEE FOR HUMANE SLAUGHTER is an unincorporated association of persons, all of whom reside in the Southern District of New York, whose purpose is to assure that all livestock animals slaughtered, and to be slaughtered, for their meat, in the United States of America, are handled prior to slaughter, and slaughtered, in a humane manner.

12. Plaintiff SOCIETY FOR ANIMAL RIGHTS, INC. is a corporation duly organized, and qualified to do business in the State of New York, having its principal offices in the City, County and State of New York, in the Southern District of New York. The Society is a not-for-profit corporation devoted to the welfare of animals and the protection of animals from all forms of cruelty and suffering.

13. Each and every one of the Society's members is dedicated to the principle of the humane treatment of animals. The inhumane treatment of animals offends and contravenes the moral principles, sensibilities and asthetic values of the members of the Society.

14. Committee for a Wall of Separation of Church and State in America is an unincorporated association of persons, all of whose members reside in the Southern District of New York, whose purpose is to assure that the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States are strictly adhered to at all times.

15. Plaintiffs as a group are persons and organizations who seek to prohibit the federal government from pur-

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chasing livestock handled or slaughtered pursuant to the Religious exception contained in the Humane Slaughter Act, because they believe that the exception unconstitutionally violates the Establishment and Free Exercise Clauses of the First Amendment. Some of the individual plaintiffs object to being forced to eat ritually produced meat, as a result of the government's procurement policies. Others object to being forced to cease eating meat as a consequence of the inhumane handling or slaughter which the statute unconstitutionally allows.

Defendants

16. EARL S. BUTZ ("BUTZ") is Secretary of Agriculture of the United States of America. BUTZ has taken an oath to uphold and enforce the Constitution of the United States.

17. Defendant GEORGE GRANGE ("GRANGE") is Acting Administrator of Consumer and Market Services of the United States Department of Agriculture. GRANGE has also taken an oath to uphold and enforce the Constitution of the United States.

18. "JOHN DOE" ("DOE"), the name being fictitious, is that member of the government's past or present Advisory Committee under 7 U.S.C. §1905 who is "familiar with the requirements of religious faiths with respect to slaughter."

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JURISDICTION

19. Jurisdiction is conferred on this Court by 5 U.S.C. §§702, 703; 28 U.S.C. §§1331, 1343, 1361, 2201, 3202; under other provisions of the U.S. Code; and because the amount in controversy exceeds \$10,000.

STATUTES AND RULES

20. In an attempt to implement the "policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods," Congress enacted Public Law 85-765, Title 7 U.S. Code, Sections 1901-1906, entitled "Humane Methods of Livestock Slaughter" (the "Humane Slaughter Act").

21. Subsection (a) of Section 1902 of the Humane Slaughter Act specifies that humane slaughter consists of livestock being "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. . . ."

22. However, notwithstanding Subsection (a), Subsection (b) of Section 1902 also authorizes:

" . . . 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 instantana-

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neous severance of the carotid arteries with a sharp instrument.”

23. Section 1903 of the Humane Slaughter Act provides that:

“... after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants or in any plants of any slaughterer or processor with which it is affiliated slaughter or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture . . .”

24. Section 1905 of the Humane Slaughter Act provides that “(t)o assist in implementing the provisions of (the Act) . . . the Secretary is authorized to establish an advisory committee . . . of twelve members, of whom one shall be . . . a person familiar with the requirements of religious faiths with respect to slaughter.” Further, under Section 1905, although committee members are not entitled to compensation, “the Secretary is authorized to allow their travel expenses and subsistence expenses.”

25. Section 1906 of the Humane Slaughter Act provides that “. . . ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term ‘ritual slaughter’ means slaughter in accordance with Section 1902 (b) of this title.”

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26. Butz is charged, *inter alia*, with overall administration and enforcement of the Humane Slaughter Act.

27. Upon information and belief, Butz has administered and enforced the Ritual slaughter provisions of the Humane Slaughter Act, using substantial tax funds of the United States to do so.

28. Upon information and belief, slaughterers and processors of livestock products, because of their desire to sell to the federal government and because of the provisions of 7 U.S.C. §1903, and because of the economics of a uniform method of handling and slaughter, have been and are now handling and slaughtering all, or substantially all, of their livestock in accordance with the ritual slaughter exception of 7 U.S.C. §1902 (b). Thus, the plaintiffs herein who are consumers of meat and meat products are forced, knowingly or unknowingly, to eat meat handled or slaughtered in accordance with the ritual exception to the Act. Some of the plaintiffs have been forced to cease eating meat because of the inhumane way in which it is handled or slaughtered as a result of the unconstitutional exception in §1902 (b).

29. Upon information and belief, Butz and/or his predecessors have established the Advisory Committee contemplated by §1985 of the Humane Slaughter Act, and Butz has appointed Doe as the member "familiar with the requirements of religious faiths with respect to slaughter," using substantial tax funds of the United States to do so.

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Upon information and belief, Doe is of the Jewish faith, and his familiarity is with the kosher dietary preferences with respect to handling and slaughter. Upon information and belief, Doe has received funds of the United States for his travel and subsistence expenses in connection with his duties as a member of the Committee.

30. Upon information and belief, Judaism is the only religion with a substantial following in the United States which has dietary preferences with respect to handling and slaughter of livestock and therefore the Religious exception in §1902 (b), and the committee post in §1905, were intended and are used for the sole and express benefit of the adherents of that Religious faith.

31. GRANGE is charged, *inter alia*, with supervision over the procurement of livestock products for the United States, which products, pursuant to Section 1903 of the Humane Slaughter Act, must have been handled and slaughtered in accordance with said Act.

32. Therefore, upon information and belief, the United States, through its agencies, has spent substantial sums of tax money of the United States for the procurement of livestock products which have been handled and slaughtered in accordance with the ritual slaughter exception of the Humane Slaughter Act. And, as a result of this procurement policy, some consumers have been forced to eat Kosher meat or no meat at all.

33. Sections 1902 (b) and 1906, and so much of Section 1905 as pertains to committee membership by a per-

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son familiar with the requirements of religious faiths with respect to slaughter, are unconstitutional as written and as applied, as aforesaid. Because they provide separate treatment and special protection to the dietary preferences of a particular religious group, and for other reasons as well, they violate the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States of America. Said Sections exceed specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power. Congressional action under the Constitution's taxing and spending clause, as found in the enactment and operation of the aforesaid sections, is in derogation of constitutional provisions which operate to restrict the exercise of the taxing and spending power, to wit: the First Amendment. Plaintiffs' tax money is being extracted from them and spent in violation of such specific constitutional protections against such abuses of legislative power.

34. Because Sections 1902 (b) and 1906 and Section 1905, as pertains to Committee membership by a person familiar with the requirements of religious faiths with respect to slaughter, are unconstitutional, agency action pursuant to these sections is *a fortiori* unconstitutional. Plaintiffs are aggrieved, in the various ways set forth herein, by this unconstitutional agency action.

35. Because defendants BUTZ and GRANGE have taken oaths to uphold and enforce the Constitution of the United States, and because the aforesaid sections violate the Constitution of the United States, defendants BUTZ and GRANGE,

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inter alia, owe the plaintiffs herein a clear duty to cease their compliance with the said sections, and instead to purchase meat only if the livestock has been handled and slaughtered in accordance with Section 1902 (a) of the Act.

RELIEF SOUGHT

WHEREFORE, pursuant to 5 U.S.C. §§702, 703; 28 U.S.C. §§1331, 1343, 1361, 2201 and 3202, Plaintiffs seek the following relief:

1. The convening of a three-judge constitutional court;
2. A permanent injunction from the constitutional court against the enforcement of §§1902 (b) and 1906, and so much of §1905 as aforesaid, of the Federal Humane Slaughter Act;
3. A declaration by the constitutional court that the aforesaid sections of the Humane Slaughter Act are unconstitutional, as written and as applied, and that the balance of the Act applies to everyone doing business in interstate commerce who is engaged in the handling and slaughter of livestock animals;
4. An order in the nature of mandamus compelling Butz to remove Doe from Butz' Advisory Committee;
5. A permanent injunction from the constitutional court against the purchase of ritually produced meat by the federal government which was han-

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- dled or slaughtered pursuant to the religious exceptions of §§1902 (b) and 1903;
6. An order in the nature of mandamus to compel GRANGE, henceforth to purchase only meat which was handled and slaughtered in accordance with 1902 (a);
 7. The costs and disbursements of this action;
 8. Such other and further relief as may be just.

By: _____

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New York City, January 2, 1973

Appendix F

Order of the Single District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HELEN E. JONES, et al.,

Plaintiffs,

v.

EARL S. BUTZ, et al.,

Defendants.

HENRY MARK HOLZER (P.C.)

c/o Society for Animal Rights, Inc.

400 East 51st St., New York, N.Y. 10022

Attorney for Plaintiffs

PAUL J. CURRAN,

United States Attorney for the

Southern District of New York

Attorney for Defendants

STEVEN J. GLASSMAN,

Assistant United States Attorney

Of Counsel

MEMORANDUM

BONSAL, D.J.

This action was commenced on January 2, 1973 by a group of nine individuals and three organizations seeking to enjoin the Federal Government from purchasing livestock handled or slaughtered pursuant to the "reli-

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gious exception" contained in the Humane Methods of Livestock Slaughter Act ("the Act") [7 U.S.C. §§1901 et seq., 72 Stat. 862-64 (1958)]. Plaintiffs contend that the religious exception unconstitutionally violates the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.

Section 1 of the Act declares it to be the policy of the United States "that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods." 7 U.S.C. §1901. Section 3 of the Act provides:

"The public policy declared in this chapter shall be taken into consideration by all agencies of the Federal Government in connection with all procurement and price support programs and operations and after June 30, 1960, no agency or instrumentality of the United States shall contract for or procure any livestock products produced or processed by any slaughterer or processor which in any of its plants or in any plants of any slaughterer or processor with which it is affiliated slaughters or handles in connection with slaughter livestock by any methods other than methods designated and approved by the Secretary of Agriculture." 7 U.S.C. §1903.¹

The plaintiffs' challenge is directed to three sections of the Act only: sections 2(b), 5, and 6 [7 U.S.C. §§1902(b), 1905, and 1906]. Section 6 provides:

1. According to the affidavit of John C. Pierce, dated April 25, 1973, the United States Department of Agriculture procures meat under the National School Lunch Act (42 U.S.C. §§1751 et seq.), the Child Nutrition Act of 1966 (42 U.S.C. §§1771-1786), and under 7 U.S.C. §612c as implemented by 15 U.S.C. §713c.

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“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 provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term ‘ritual slaughter’ means slaughter in accordance with 1902(b) of this title.” 7 U.S.C. §1906.

Section 5 of the Act provides for the establishment of an advisory committee to assist in implementing the Act’s provisions, with one of the members of the advisory committee being a “person familiar with the requirements of religious faiths with respect to slaughter.” 7 U.S.C. §1905.² And section 2 of the Act provides:

“Either of the following two methods of slaughtering and handling are hereby found to be humane:

(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 reli-

2. According to the affidavit of Mr. Steven J. Glassman, dated May 21, 1973, the advisory committee authorized under 7 U.S.C. §1905 has been established; the member of the committee familiar with the requirements of religious faiths with respect to slaughter is Rabbi Joseph Soloveitchik, whose travel and subsistence expenses in connection with his attendance at meetings of the committee have been paid by the federal government and total \$210.05, covering the period from January 28, 1959 to July 15, 1963.

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gious 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.” 7 U.S.C. §1902.

The complaint alleges that sections 2(b), 5, and 6 provide separate treatment and special protection to a particular religious group in the handling of animals prior to slaughter, in violation of the Establishment and Free Exercise Clauses of the First Amendment. Plaintiffs seek a declaratory judgment and a permanent injunction against the purchase by the federal government of ritually produced meat.³ Jurisdiction is alleged under 28 U.S.C. §§1331, 1343, 2201, and 2202.

Defendants have moved for an order dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment pursuant to Rules 12(c) and 56 of the Federal Rules of Civil Procedure. Plaintiffs oppose this motion and have cross moved for an order convening a three-judge court pursuant to 28 U.S.C. §§2282 and 2284.

From the papers submitted, the constitutional issues presented do not appear to be unsubstantial. *Ex parte Poresky*, 290 U.S. 30 (1933). Accordingly, the Court will request the Chief Judge of the Court of Appeals for the Second Circuit to convene a three-judge court. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713

3. According to the complaint, some of the individual plaintiffs object to being forced to eat ritually produced meat, as a result of the government's procurement policies. Others object to being forced to cease eating meat as a consequence of the inhumane handling or slaughter which the statute allegedly unconstitutionally allows.

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(1962); *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938); *cf. Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967). Defendants' motion to dismiss the complaint is reserved for consideration by the three-judge court.

It is so ordered.

Dated: New York, N.Y.
October 25, 1973.

DUDLEY B. BONSAI
U.S.D.J.

IN THE
Supreme Court of the United States

October Term, 1973

(6)
No. 73-1964

HELEN E. JONES, as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States; HELEN E. JONES individually; DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; VIOLETTA LANDEK; CHARLES STEINBERG; MARY LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; SOCIETY FOR ANIMAL RIGHTS, INC., on behalf of itself and its members; COMMITTEE FOR A WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICA,

Appellants,

against

EARL S. BUTZ, as Secretary of Agriculture of the United States of America; GEORGE GRANGE, as Acting Administrator of Consumer and Market Services, United States Department of Agriculture; "JOHN DOE" being a fictitious name referring to the member of the Secretary's Advisory Committee under 7 U.S.C. §1905 who is "familiar with the requirements of religious faiths with respect to slaughter",

Appellees,

and

JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *et al.*,

Intervenors-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

**APPELLANTS' REPLY BRIEF IN OPPOSITION
TO MOTIONS TO AFFIRM BY
INTERVENORS-APPELLEES**

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August, 1974

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IN THE
Supreme Court of the United States
October Term, 1973

No. 73-1964

HELEN E. JONES, *et al.*,
Appellants,
against

EARL S. BUTZ, *et al.*,
Appellees,
and

JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF
AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND
PUBLIC AFFAIRS, *et al.*,
Intervenors-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

**APPELLANTS' REPLY BRIEF IN OPPOSITION
TO MOTIONS TO AFFIRM BY
INTERVENORS-APPELLEES**

Introduction

This reply brief is submitted in opposition to the two motions to affirm which have been filed by counsel for the Intervenors-Appellees. We are informed that, although his time to file has expired, the Solicitor General intends to file a motion to affirm. If such a motion is filed, we may wish to submit a reply brief in opposition thereto.

Brief of National Jewish Commission etc., *et al.*

The Jurisdiction Statement¹ repeatedly attempts to make clear that the question presented here is whether the “religious exemption, found (primarily) in section 6 of the Act, violate[s] the First Amendment’s Establishment Clause or its Free Exercise Clause, or both.” However, despite this, the National Jewish Commission’s motion erroneously sets up the question as asking whether it is unconstitutional for provisions of the Act to:

Recognize the Jewish ritual method of slaughter as humane and provide that in order to protect freedom of religion all steps [i.e., shackling and hoisting conscious animals] preparatory to religious ritual slaughter are not subject to the law.

This formulation is erroneous because it combines what we *are* challenging (whether section 6 can constitutionally exempt from section 2(a)’s “render insensible” requirement those animals who will be ritually slaughtered), with what we are *not* challenging: whether Jewish ritual slaughter (throat cutting) is humane.

This half-right/half-wrong formulation then leads to the Commission arguing that the combination question is unsubstantial because, after all, Congress found “that Jewish ritual slaughter is humane *in toto*” (p. 4). As we have said before, the ritual slaughter question is a straw man, and it is not in this case. Apparently realizing that it is not, the Commission’s motion then passes to what it conceives to be another argument for unsubstantiality.

1. See, for example: page 7, and footnotes 9-12 and the accompanying text.

Suddenly acknowledging Appellants' real claim, that section 6's exemption to the "render insensible" requirement of section 2(a) is unconstitutional, the Commission contends that:

It is not unconstitutional for Congress to exempt from the reach of a general law the religiously mandated practices of a particular faith. Indeed, if those practices present no real or significant threat "to public safety, peace or order," Congress is obliged by the Free Exercise Clause * * * to provide such an exemption. [Citing *Sherbert v. Verner* and the dissent in *Welsh v. United States*] (p. 5).

Apart from the fact that it has not even been alleged, let alone proved, that shackling and hoisting conscious animals preparatory to a Jewish ritual throat-cut is a "religiously mandated practice," we submit that the quoted portion of the Commission's argument for unsubstantiality is in reality supportive of Appellants' contention that the motion is substantial. This is because, like the three-judge court below, the Commission argues not unsubstantiality (per Rule 16, 1(c)), but rather that its substantive position is the correct one on the merits. Even framing the issue as the Commission has, surely a substantial Establishment Clause question is presented as to whether Congress can make religious exemptions to general laws (for religiously mandated practices, or otherwise), and a substantial Free Exercise question is presented as to whether or under what circumstances Congress must make such exemptions. It appears to us that the Commission's adamant views on the substantive question of the section 6 exemption quite clearly reveal that the question is any-

thing but unsubstantial. Indeed, the motion itself admits that when the Act was before Congress:

concern was expressed by Congressmen and witnesses that religious rites might, in some fashion, be violated by enforcement of the law. In order to insure that this result would not occur, Congress wrote into the Act two other provisions [section 6] that firmly and conclusively shield the entire procedure of a Jewish ritual slaughter from any possible infringement by governmental authorities. (p. 3).

It seems to us that to admit this, is necessarily to concede that the question put before this Court by Appellants is substantial.

Brief of Joint Advisory Committee etc., *et al.*

In addition to raising a jurisdictional issue, which will be discussed below, the Committee's motion makes the same mistake as the Commission did.

Beginning in reverse order, we find that the Committee's third "question presented" asks: "Are the ritual slaughter provisions of the Act constitutional?" Enough has been said elsewhere concerning how this is not the question in this case. However, the Committee's answer to its question ("3. Constitutional Issue," pp. 6-7) is of passing interest in that, like the Commission's motion, the Committee's motion not only fails to present any arguments to why Appellants' question is unsubstantial, but instead the motion argues the merits of the ritual slaughter non-question. We contend that argument of the merits is a virtual concession that the question which Appellants present is substantial.

Next, the Committee asks: "Does the Appellants' challenge present a justiciable issue?" Here, under the rubric of "Justiciability" (pp. 4-6), the Committee makes an argument which, frankly, we have considerable difficulty grasping. The contention seems to be twofold: that Appellants' question is unsubstantial because: (1) (again) Jewish ritual slaughter is humane, and (2) somehow, we are asking the Court to legislate. However, whatever the meaning of this portion of the Committee's motion, one thing is very clear: there does not appear to be any reason given to support the Committee's contention that Appellants' question is unsubstantial.

Lastly, Mr. Pfeffer, on behalf of the Committee, asks: "Do the appellants have standing to challenge judicially the ritual slaughter provisions of the Act?" Here, several things need to be said. One (again) is that Appellants do not challenge the "ritual slaughter provisions of the Act," and that being so, nothing the Committee has said about standing is relevant. Second, and, we contend, dispositive by itself: based on a proper understanding of what this diverse group of 10 appellants are complaining about, and thus of how they are aggrieved, the three-judge court unanimously held that Appellants did possess standing. (See 7a-10a of the Jurisdictional Statement.)² Third, and most interesting legally, there is serious doubt that the Committee, not having appealed the District Court's holding that

2. See also the affidavits annexed to Appellants' cross-motion below for summary judgment. Appellants include consumers who are uncontradicted in their allegations that on the retail level they cannot know whether meat they buy comes from animals which have been shackled and hoisted while fully conscious, and therefore that such Appellants are offended morally, aesthetically, and/or religiously with the result that some already have stopped eating meat, and that some may have to stop, in certain cases because of religious scruples.

Appellants have standing, can raise that issue now. (*Strunk v. United States*, 412 U.S. 434 (1973); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973); *NLRB v. International Van Lines*, 409 U.S. 48 (1972)).

Conclusion

Because the single question presented (the constitutionality of the section 6 exemption) is not unsubstantial, the motions should be denied, probable jurisdiction should be noted, and the case should be set down for briefing and argument.

Respectfully submitted,

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(212) MA 5-2200

IN THE
Supreme Court of the United States
October Term, 1974

7

No. 73-1964

HELEN E. JONES, as next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States; HELEN E. JONES individually; DOROTHEA S. BUICK; DOROTHY M. HOLAHAN; VIOLETTA LANDEK; CHARLES STEINBERG; MARY LEAH WEISS; COMMITTEE FOR HUMANE SLAUGHTER; SOCIETY FOR ANIMAL RIGHTS, INC., on behalf of itself and its members; COMMITTEE FOR A WALL OF SEPARATION BETWEEN CHURCH AND STATE IN AMERICA,

Appellants,

against

EARL S. BUTZ, as Secretary of Agriculture of the United States of America; GEORGE GRANGE, as Acting Administrator of Consumer and Market Services, United States Department of Agriculture; "JOHN DOE" being a fictitious name referring to the member of the Secretary's Advisory Committee under 7 U.S.C. §1905 who is "familiar with the requirements of religious faiths with respect to slaughter",

Appellees,

and

JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, *et al.*,

Intervenors-Appellees.

**On Appeal from the United States District Court
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**APPELLANTS' REPLY BRIEF IN OPPOSITION TO
MOTION TO AFFIRM BY THE UNITED STATES**

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October, 1974

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IN THE
Supreme Court of the United States
October Term, 1974

No. 73-1964

HELEN E. JONES, *et al.*,
Appellants,
against
EARL S. BUTZ, *et al.*,
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JOINT ADVISORY COMMITTEE OF THE SYNAGOGUE COUNCIL OF
AMERICA, *et al.*; NATIONAL JEWISH COMMISSION ON LAW AND
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**On Appeal from the United States District Court
for the Southern District of New York**

**APPELLANTS' REPLY BRIEF IN OPPOSITION TO
MOTION TO AFFIRM BY THE UNITED STATES**

Introduction

This reply brief is submitted in opposition to the Solicitor General's motion to affirm received by Appellants'

counsel on Friday, October 4, 1974.¹ The brief is made necessary because, like the Intervenor-Appellees, the Solicitor General misconceives what this case is all about and thus in his motion addresses an issue which is not in this case and fails to address the issue which is presented.

Motion of the Solicitor General

In their reply brief, in opposition to the motions to affirm by the Intervenor-Appellees, Appellants said that:

The Jurisdictional Statement repeatedly attempts to make clear that the question presented here is whether the "religious exemption, found (primarily) in section 6 of the Act, violate[s] the First Amendment's Establishment Clause, or its Free Exercise Clause, or both." (at p. 2).

This statement was necessary because the Intervenor-Appellees have insisted on discussing an issue which is not in this case (whether a Jewish ritual throat cut is constitutional and/or humane), while steadfastly refusing to discuss the only substantive issue which Appellants present: whether section 6 can constitutionally exempt from section 2(a)'s "render insensible" requirement those animals who will be ritually slaughtered.

Regrettably, the Solicitor General is, at least in part, taking the same approach to this case as did the Intervenor-Appellees. He frames the question presented as:

Whether the ritual slaughter provisions of the Humane Slaughter Act are in violation of the Establish-

1. Appellants have already submitted a reply brief in opposition to the motions to affirm made by Intervenor-Appellees. In that brief we reserved the right to submit an additional reply brief if the Solicitor General made a motion to affirm.

ment of Religion and Free Exercise of Religion Clauses of the First Amendment. (at p. 2).

Our Jurisdictional Statement and previous reply brief make quite clear why this is not the issue here, and no further discussion of that is necessary.

It should be noted, however, that although the Solicitor General (erroneously) frames the question presented in terms of whether the Act's ritual slaughter provisions are constitutional, he apparently does recognize the importance to the case of section 6 because he characterizes it as "an expression of complete government neutrality. * * *" (at p. 5).

However, despite his glancing recognition that this case involves section 6, the Solicitor General's argument of no Establishment Clause violations (pp. 5-6) is confined to applying the *Lemon* tests not to section 6, but instead to the entire Humane Slaughter Act: "The *statute* at issue here satisfies these tests * * * *humane slaughter* is obviously secular in purpose. Moreover, that this *statute* neither unconstitutionally 'advances nor inhibits religion' nor 'fosters government entanglement with religion' is demonstrated conclusively" by *Wisconsin v. Yoder*. (Emphasis added.) As to Appellants' Free Exercise contention, the Solicitor General addresses not section 6, but the entire Act: "* * * appellants must show that the operation of the *statute* has a coercive effect upon them. * * *" (p. 6, emphasis added).

Appellants can offer no explanation of why the Solicitor General, like the Intervenor-Appellees, has chosen to move to affirm by arguing the unsubstantiality of a non-issue (humane slaughter) and by not arguing the section 6 issue

presented by this case and decided by the three-judge court in the following way:

the accommodations of religious practices by granting exemptions from statutory obligations have been upheld in the Sunday closing cases and in the conscientious objector cases. (J.S. App. A, 17a).

One thing is clear, however, and that is that none of the Appellees has advanced anything which suggests, let alone proves, the unsubstantiality of the actual question presented here concerning the constitutionality of section 6's self-contained statutory religious exemption.²

Conclusion

Because the single question presented (the constitutionality of the section 6 exemption) is not unsubstantial, the motion should be denied, probable jurisdiction noted, and the case should be set down for briefing and argument.

Respectfully submitted,

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2. As to the motion's view that Appellants lack standing to sue (p. 6, footnote 2), we remind the Court that the United States, like Intervenor-Appellees, failed to appeal the District Court's holding that Appellants have standing and therefore there is serious doubt that the issue can be raised now (*Strunk v. United States*, 412 U.S. 434 (1973); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973); *NLRB v. International Van Lines*, 409 U.S. 48 (1972)).