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COURT OF APPEALS

STATE OF NEW YORK

THE ALLIANCE TO END CHICKENS AS
KAPOROS,

Appellant,

-against-

No. 126

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

20 Eagle Street
Albany, New York
October 17, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 126, Alliance to End
3 Chickens as Kaporos v. New York City Police Department.

4 MS. MARINO: Good morning, Your Honors.

5 CHIEF JUDGE DIFIORE: Good morning. Good
6 afternoon.

7 MS. MARINO: Good afternoon. I'm sorry. I'm a
8 little nervous. I've never been in this court before and
9 someone told me that the room was intimidating, and it's
10 true. It's true. I'm very happy to be here. I'm Nora
11 Constance Marino for the appellants and the petitioners
12 herein. Your Honor, this case is about the - - -

13 CHIEF JUDGE DIFIORE: Ms. Marino, before you
14 start - - -

15 MS. MARINO: Yes, ma'am.

16 CHIEF JUDGE DIFIORE: - - - would you like to
17 reserve any rebuttal time?

18 MS. MARINO: Yes, please. Thank you. Three
19 minutes.

20 CHIEF JUDGE DIFIORE: Three minutes?

21 MS. MARINO: Yes, please.

22 CHIEF JUDGE DIFIORE: Fine.

23 MS. MARINO: Okay. This case is about the
24 executive branch of government ignoring a clear and
25 unambiguous mandate - - -



1 JUDGE GARCIA: Counsel - - - counsel, I'm sorry.
2 On - - - you can see from the Appellate Division's majority
3 citations that courts are generally hesitant to wade in on
4 a mandamus on enforcement investigative issues for a number
5 of reasons. And I think one of the primary reasons seems
6 to me is what would you have the court do here? What would
7 your relief be?

8 MS. MARINO: The relief would be a writ of
9 judicial mandamus telling the NYPD that they must enforce
10 the animal cruelty statute and the New York City Department
11 of Health - - -

12 JUDGE GARCIA: What would enforce mean though?
13 So what would - - -

14 MS. MARINO: An order.

15 JUDGE GARCIA: - - - enforce mean in terms of
16 that order? Because if we're going to issue a writ or an
17 order there would have to be a way that where we issue it
18 to could see how they would comply with it. So in any case
19 in an - - - in an enforcement context, if we're mandamus
20 enforcement what does that mean? Does it mean they have to
21 respond to a report? Does it mean they have to make an
22 arrest? Does it mean they have to pull resources off of a
23 different type of crime and put them onto these crimes
24 reinforcement?

25 MS. MARINO: Your Honor, I'm - - - I'm glad you



1 brought that up. First of all, this court issued that writ
2 in Klostermann in 1987. You issued that writ in - - -
3 regarding a case involving the health and hygiene laws
4 where two psychiatric patients were released and they were
5 - - - they ended up being homeless and there is a law in
6 the Mental Hygiene Law that requires the state to take care
7 of them and follow up. And they sued. It went up to this
8 court, and this court said to the state, yes, this is a
9 mandatory law. It includes the words must or shall. It's
10 a mandatory law. And the - - - the state actually even put
11 in opposition in that case, including affidavits, saying we
12 would love to help them but we don't have the money. And
13 even with that affidavit this Court of Appeals still said
14 that's not an excuse.

15 JUDGE GARCIA: If we issue the order that you're
16 asking for for enforcement and there is a call reporting a
17 alleged violation of one of the statutes that you reference
18 when then is the response that needs to happen under our
19 order?

20 MS. MARINO: The NYPD and the City of New York
21 are going to have to honor your order and do what the
22 statute says which is to issue summonses or effect arrests
23 and bring before a magistrate. That's the animal cruelty
24 statute. The Department of Health statutes, which are
25 mandatory through the New York City Charter specifically



1 says that the Department of Health and the City of New
2 York, NYPD, is to - - - shall enforce the health code.

3 JUDGE STEIN: Is it - - - is it relevant
4 notwithstanding that language as to whether the duty to
5 arrest under a particular statute is ministerial or
6 discretionary? I know - - - I know you may disagree as to
7 which it is, but does it matter which it is?

8 MS. MARINO: I - - - I believe it absolutely
9 matters. These are - - -

10 JUDGE STEIN: Okay. So if it - - - if - - -

11 MS. MARINO: - - - mandatory statutes.

12 JUDGE STEIN: No, no, no. What I'm asking - - -

13 MS. MARINO: Maybe I'm not following your
14 question, Your Honor.

15 JUDGE STEIN: What I'm asking you is is that if a
16 statute says shall, okay, but there's still some discretion
17 within the wording of the statute itself - - - here, for
18 example, one the statutes uses the word justifiable - - -

19 MS. MARINO: Of course.

20 JUDGE STEIN: And again, I understand that you
21 don't think that that is for the police to make that
22 determination.

23 MS. MARINO: Yes, ma'am.

24 JUDGE STEIN: But I'm just using it as if we were
25 to disagree with you would that make any difference?



1 MS. MARINO: The - - - the term justifiable?

2 JUDGE STEIN: Yes, if we - - - I don't want to
3 get into that in - - - in answering this question. My
4 question is is that if there was an element of discretion
5 in the words of the statute that we agreed was - - - was -
6 - - indicated - - - says shall but - - - but defined it in
7 such a way that there was some discretion - - - so you have
8 sort of competing - - - I guess what I'm suggesting is
9 there's sort of competing messages there.

10 MS. MARINO: Is that your interpretation of the
11 animal cruelty statute?

12 JUDGE STEIN: I'm just asking you what you - - -
13 what - - - that is - - - that's certainly an interpretation
14 that's being argued here.

15 MS. MARINO: Correct. Yes, ma'am.

16 JUDGE STEIN: I'm not saying that it's mine.

17 MS. MARINO: Okay.

18 JUDGE STEIN: But it is one, and - - - and
19 without answering whether it is or is not discretionary, my
20 question is is if it were discretionary would that make a
21 difference?

22 MS. MARINO: Well, I think no. I think when you
23 have - - - when the legislature comes down with a statute
24 or a law or a rule and says that the law enforcement
25 agency, the executive branch must do this, that's



1 unambiguous. That is clear.

2 JUDGE STEIN: Does it apply if I intentionally
3 step on a spider?

4 MS. MARINO: No, because there's - - - there's
5 exceptions in the animal cruelty statute, and that wouldn't
6 be a crime because there would be no intent. If you
7 accidentally stepped on a spider.

8 JUDGE STEIN: No, I said intentionally.

9 MS. MARINO: Right. Well, there's exceptions in
10 the - - - in the animal cruelty statute, Section 355(a)
11 which sets forth pests, animals that are threats to human
12 safety or health.

13 JUDGE STEIN: What if there's a question about
14 whether this particular spider was a threat to - - - to my
15 safety or not? What if I'm - - - I'm very, very allergic
16 to spider bites, it could kill me? So - - -

17 MS. MARINO: Well, then I guess if somebody
18 called the police they could ask that a summons be issued
19 to you for doing that. I - - - I don't know.

20 JUDGE STEIN: So the police would be required to
21 issue a summons or arrest me in that instance? That's - -
22 - that's what I'm asking you.

23 MS. MARINO: Your Honor, that's - - - a
24 hypothetical I haven't considered. That - - - that's not
25 what the facts are in this case.



1 JUDGE STEIN: But if we make a rule here that
2 supports your argument it will apply to other situations so
3 we have to be cognizant of that. So - - - so I guess what
4 is the - - - what is the rule then? How do - - - how do we
5 tell the police when there is discretion and there - - - or
6 there is not discretion in - - - in the enforcement of a
7 law that says shall?

8 MS. MARINO: Well, in Klostermann the court just
9 said that in the order. I don't think the court followed
10 up or, you know, checked in. I - - - I think that the
11 court issued - - -

12 JUDGE WILSON: Can I get at - - - can I get at
13 what I think Judge Stein is asking at a - - - at a much
14 more convoluted way which may not help anybody here. When
15 - - - when you started this action it was not started as a
16 mandamus, correct? It was starting a plenary action for an
17 injunction and Supreme Court converted it to a mandamus?

18 MS. MARINO: No, it was started as an action for
19 an injunction and an - - - and an order to show cause to
20 compel the police which - - - which was mandamus.

21 JUDGE WILSON: Well, but it was converted to a
22 mandamus by the Supreme, no?

23 MS. MARINO: It was converted to an Article 78.

24 JUDGE WILSON: An Article 78, right. So my - - -
25 correct me if I'm wrong, I understood that before the



1 conversion happened that what you were anticipating was
2 there was going to be an order to show cause for a
3 temporary restraining order of sorts and then you would
4 have the development of a fuller record. So far so good or
5 no?

6 MS. MARINO: No, I - - - no, the order to show
7 cause, Your Honor, was for an injunction but also to compel
8 the NYPD to enforce the fifteen laws that are violated
9 during this event.

10 JUDGE WILSON: And were you anticipating - - -

11 MS. MARINO: And that essentially was - - -

12 JUDGE WILSON: Were you anticipating the
13 presentation of evidence by both sides or no?

14 MS. MARINO: At that point in the lower court?

15 JUDGE WILSON: Uh-huh (affirmative).

16 MS. MARINO: I wasn't anticipating my complaint
17 being stricken so - - - whatever - - - I was not
18 anticipating my complaint to be dismissed.

19 JUDGE WILSON: So you were planning to put on
20 evidence and planning to have the city put on evidence and
21 go from there?

22 MS. MARINO: Well, no. My original order to show
23 cause, I asked the - - - the court to issue an order
24 compelling the NYPD to enforce laws which - - - which was
25 in effect requesting a writ of mandamus.



1 JUDGE WILSON: And you - - -

2 MS. MARINO: I just didn't use those words.

3 JUDGE WILSON: And you don't have - - - you - - -
4 your argument is that the city has no discretion in how to
5 enforce the statute?

6 MS. MARINO: No, no, no. That - - -

7 JUDGE WILSON: I think that's what Judge Stein's
8 getting at.

9 MS. MARINO: I see. Okay. Thank you. I do see
10 what Judge Stein's getting at. No. The - - - mandamus
11 specifically says - - - and Klostermann - - - Klostermann
12 specifically said that you cannot dictate how enforcement
13 will go about. You - - - but you can dictate that
14 enforcement will occur. That was the main thing in
15 Klostermann.

16 JUDGE GARCIA: But you seem to be equating
17 enforcement with arrests and summonses, and to me
18 enforcement is broader than that. Enforcement can be I go,
19 I look at it, and I think I'm not going to do anything
20 here. I'm an enforcement officer. I mean enforcement
21 isn't only arrests and summons. Enforcement is I'm going
22 to go out and see.

23 MS. MARINO: But that's not what the statute
24 says. That's the difference here. The animal cruelty
25 statute is only of two statutes that I - - -



1 JUDGE GARCIA: No, but there - - - I think again
2 what Judge Stein and I think Judge Wilson are getting at is
3 within - - - and I think the Appellate Division did too - -
4 - within that statute are factors that go to the - - - an
5 assessment of what's going on. So in each case, even
6 though there is a must or a shall in there, there are
7 factors within the statute that suggests some type of
8 discretion or assessment in the enforcement process.

9 MS. MARINO: But does that equal a complete and
10 total abdication and abandonment because that's what's
11 happening?

12 JUDGE RIVERA: Well, if - - - if I can ask I
13 thought in part - - - and you'll correct me here - - - that
14 you were not only arguing that there is passivity in the
15 sense that they're just not - - -

16 MS. MARINO: I'm sorry?

17 JUDGE RIVERA: - - - that they're not doing
18 anything. But you were also arguing that they actually
19 facilitate - - -

20 MS. MARINO: Yes, they aid and abet. Yes.

21 JUDGE RIVERA: - - - the breaking of the law.

22 MS. MARINO: Yes, ma'am.

23 JUDGE RIVERA: Okay. So if that's also what
24 you're arguing what would then be the order from this
25 court? Because you see the problem that some members of



1 the bench are raising with respect to whether or not the
2 statute - - - embedded in the statute - - - you may see it
3 differently but there may be members of the court, there
4 may be a majority that says, no, there's discretion in this
5 statute. But I thought you were also making a different
6 claim which is not just you're not doing what the law
7 mandates, your argument, perhaps people disagree with you,
8 but you're actually facilitating breaking the law and
9 surely that you cannot do.

10 MS. MARINO: Absolutely.

11 JUDGE RIVERA: So stop doing that.

12 MS. MARINO: Yes. The NYPD is showing up at this
13 event. They are providing police cars, manpower - - -
14 you've all obviously read my papers, so I - - - I don't
15 mean to repeat - - - lumber, generators for this religious
16 event that is not permitted. They don't even apply for a
17 permit. There is establishment clause violations here.
18 Why is this one set getting special treatment? Why - - -
19 why do I need a permit for a block party in Queens County
20 but meanwhile 60,000 animals are being slaughtered in the
21 street just like all bets are off? I mean what - - -
22 there's something wrong here, Your Honors. I understand
23 these are complex issues. I understand you have to come up
24 with an order that - - - that makes sense and is just but
25 something has to be done. This cannot continue to spiral



1 out of control which is what is happening here.

2 CHIEF JUDGE DIFIORE: Thank you, Ms. Marino.
3 Counsel.

4 MS. DRUKER: Your Honors, may it please the
5 court, Elina Druker on behalf of the City. The remedy that
6 the petitioner is seeking isn't available both because it's
7 not available in the law enforcement context and because
8 none of the statutes - - -

9 JUDGE RIVERA: Let's say we agreed with you on -
10 - - on that point about the enforcement. I - - - I know
11 you're going to be able to get back to that and go more
12 expansively. I just don't want to lose - - -

13 MS. DRUKER: Yes.

14 JUDGE RIVERA: - - - the moment on the second
15 point where she says well, it's not just that you're - - -
16 you're exercising - - - or law enforcement is exercising
17 its discretion not to do something but they're actually
18 doing something that facilitates, furthers, the breaking of
19 the law. It - - - would we be able to issue an order
20 responding to that? Let's just assume for one moment it's
21 true, just - - - just assume for that.

22 MS. DRUKER: Putting aside that I'm not sure
23 there's a concept of aiding and abetting within the
24 constricts of Article 78, I think the greater problem is
25 that the police have an obligation to maintain public order



1 all across the city for unpermitted protests that break up
2 that - - - that come spontaneously.

3 JUDGE RIVERA: But isn't that about the merits?
4 She's saying why are they dismissing my complaint? Why
5 can't I even get to the merits of that?

6 MS. DRUKER: I mean I think that isn't the
7 merits, Your Honor. I think that's a question of whether
8 there's ever a remedy available here, and I think the point
9 is the remedy is not available because the - - - as to this
10 aiding and abetting theory the police have a general
11 obligation to maintain peace. The petitioner's own papers
12 establish that there's a lot of tension between protestors.
13 There's - - - there's a large gathering of people.

14 JUDGE RIVERA: But wouldn't that go to whether or
15 not you're - - - using your phrase you're actually aiding
16 and abetting which is the merits of whether or not you're
17 doing what she claims which is you're facilitating breaking
18 of the law without some other societal and law enforcement
19 purpose?

20 MS. DRUKER: I think that all of the allegations
21 in the complaint are very clearly law enforcement
22 discretionary decisions. Providing lights in a potentially
23 tense situation where a large number of people gather,
24 whether it's for a spontaneous Black Lives Matter protests
25 we've had, whether it's for this type of practice, the fact



1 that something is unpermitted doesn't mean that the police
2 aid and abet by making sure that mayhem doesn't ensue.

3 That's - - -

4 JUDGE WILSON: Am - - - am I reading Walsh
5 incorrectly to say that the relief requested - - - or
6 relief like the request - - - requested here is available
7 but just not through mandamus? And there's an older case
8 from the Court of Appeals called Pumpyanky - - -

9 MS. DRUKER: Yes.

10 JUDGE WILSON: - - - that sort of suggests the
11 same thing?

12 MS. DRUKER: I think - - - if I understand
13 correctly I think that the line of cases that talk about
14 the availability of mandamus, they're all responding, first
15 of all, animated by the sort of acute separation of powers
16 concerns.

17 JUDGE WILSON: I mean both those cases say
18 mandamus is not the appropriate route.

19 MS. DRUKER: Exactly. What they say is that
20 mandamus isn't the appropriate remedy, and I think that
21 what Klostermann picks up on is the - - - is another thread
22 within that which is that when there's a full abdication of
23 a regulatory scheme, an administrative scheme, a full
24 abdication which isn't a enforcement decision not to
25 enforce the law on a particular circumstance but when the

1 executive passes a very detailed - - - I'm sorry. When the
2 legislative branch passes a very detailed scheme and the
3 executive just doesn't take up arms, and then what the
4 courts have been able to do is say only you must act. We
5 can't tell you how. We can't tell you whether or not to -
6 - - you know, the mechanics of how it will be done. But
7 the decision - - -

8 JUDGE STEIN: What does that mean in this
9 context?

10 MS. DRUKER: It has no application in this
11 context. What Klostermann - - -

12 JUDGE RIVERA: Your position is she has no remedy
13 for - - - for whatever it is they're complaining about
14 because this is all about law enforcement discretion? They
15 have no remedy at - - - recourse in the courts. They may
16 have some political remedy - - -

17 MS. DRUKER: In the court.

18 JUDGE RIVERA: - - - obviously.

19 MS. DRUKER: Exactly. No, the remedy - - - I
20 mean separations of powers concerns are so acute. At - - -
21 at their apex in the law enforcement context, if someone
22 doesn't like the discretionary decisions that their
23 executive branch takes it's our system of government, a
24 bedrock principle, they can vote them out.

25 JUDGE WILSON: Well, so if - - - so if the police



1 department decided it was never going to prosecute anti-
2 Semitic graffiti in New York City, there's no recourse in
3 the courts?

4 MS. DRUKER: I think there would be no recourse
5 in the courts, putting aside that the police have to act
6 within the confines of law. So there are potentially
7 recourses. With that example, I - - - I would think
8 there'd be human rights law violations, potentially
9 constitutional claims about equal protection.

10 JUDGE FAHEY: Well, it's the same here as the
11 animal cruelty violations. It's the same concept.

12 MS. DRUKER: Well, I think the difference is that
13 the human rights - - - the city human rights law potential
14 would protect - - -

15 JUDGE FAHEY: No, isn't - - - isn't this really
16 what politically acceptable and possible? Isn't that what
17 you're talking about in these decisions? Not political in
18 the big P, but in the small p, in the allegation of power
19 and who makes the decisions here. And what you're saying
20 to us is that the court can't make this decision.

21 MS. DRUKER: Not - - -

22 JUDGE FAHEY: That - - - that the administrators
23 and - - - and the police department have to make this
24 decision or their superiors.

25 MS. DRUKER: Perhaps. Yeah, not in - - - not at



1 the behest of a private citizen. The decision - - - I mean
2 in this context what we - - - what the order from - - -

3 JUDGE FAHEY: But there are laws that do - - - do
4 require mandatory arrests by police officers, for instance,
5 domestic violence laws.

6 MS. DRUKER: I think the domestic violence law is
7 a much tougher question.

8 JUDGE FAHEY: It is. It - - - I agree with you,
9 and it's also the law is more carefully crafted to require
10 that the police act as opposed to this law, but
11 nonetheless, it does exist. And it - - - and in point of
12 fact there are laws that do do that, so your argument only
13 goes so far.

14 MS. DRUKER: I think for the example of the
15 domestic violence law as is clear, the legislature intended
16 to cabin the discretion of the police officer on the scene
17 that says not only the police must arrest but also shall
18 not attempt to reconcile, and there's legislative history
19 behind that - - -

20 JUDGE FAHEY: It seems more like what you're
21 saying is is that the exercise of discretion is - - - is -
22 - - it's a political executive administrative function, not
23 a judicial function.

24 MS. DRUKER: I think that, yes, as a - - - as a
25 sort of broad - - - that is - - - that boils down to it,



1 Your Honor. The decision about how to wield this giant law
2 enforcement apparatus, all the different resourced
3 allocation issues, potential other threats, other things
4 that are - - - that go into the picture are - - - they
5 require the kind of perspective the executive branch has,
6 not a limited record that the court has, at the behest of a
7 private citizen to enforce one law, to reshuffle the decks
8 and reset the priorities of the - - -

9 JUDGE RIVERA: But again, as I understand your
10 argument - - - because her position is it's not about those
11 things. It's not about deploying resources. It's not
12 about those things. It's about something else so she wants
13 an opportunity to show something else, and she wants - - -
14 because there really - - - in their argument there is no
15 reason not to enforce these laws. And if it's justifiable
16 that's for the judiciary to figure out, not - - - not the
17 police, but as I understood your argument is she cannot
18 even go to the court with that argument. She has no
19 judicial recourse even if she tries to characterize this
20 argument in the way she does. Her recourse is political
21 and that's it?

22 MS. DRUKER: That is right, Your Honor. The
23 problem would be if the Department of Health had to
24 reshuffle its deck every time an individual said I see this
25 as the most important problem facing New York City, 8.5



1 million people. We have a multitude of threats that are
2 faced both to the - - - to the police department, to the
3 Department of Health, and they set their priorities based
4 on their expertise. And they have both the institutional
5 competence and the constitutional authority to make those
6 decisions.

7 JUDGE RIVERA: So she stands in the same - - -
8 she stands in the same place I take it from your argument
9 as if she was representing a community that says police
10 never come to our community because of the racial makeup of
11 everyone who lives here?

12 MS. DRUKER: That, Your Honor, would be an equal
13 protection claim and one that this court could entertain.
14 It's a very different - - - there is no - - -

15 JUDGE RIVERA: But - - - but my point is she'd
16 get past the complaint stage because she's got to be able
17 to show that. You're now getting to the merits. That was
18 not my question.

19 MS. DRUKER: I think the point is that the remedy
20 of mandamus to compel wouldn't be available, but there
21 would be other recourse in the courts which is what I
22 thought - - - I thought your question was is whether or not
23 potentially there's the recourse in the courts for people
24 who are dissatisfied. And it depends on the circumstances
25 but not in this case. None of the Agricultural and Markets



1 Law, none - - - none of the health codes they've
2 identified, the city charter, nothing is ministerial so
3 nothing compels a specific action. If it did then the
4 police would have no discretion - - -

5 JUDGE RIVERA: So if she argued - - - let me ask
6 you this then. If she argued that the exercise of this
7 discretion is one that - - - that shows - - - and she wants
8 the opportunity to show that. It's up to you to - - - to
9 show otherwise, but she wants the opportunity to show that
10 it's not about deployment of resources, it's about favoring
11 a particular class in a way that perhaps raises some of
12 these other constitutional questions or not. It depends
13 what she claims.

14 MS. DRUKER: Well - - -

15 JUDGE RIVERA: Would she then be able to go to
16 court with that kind of an argument?

17 MS. DRUKER: First of all, that's not her claim.
18 But - - -

19 JUDGE RIVERA: Understood.

20 MS. DRUKER: - - - putting that aside, I believe
21 the mandamus to compel would still not be the available
22 remedy in that circumstance. The limitation of the
23 available remedy of mandamus to compel is about whether or
24 not it's a ministerial function or a ministerial mandatory
25 function which means that the police officer on the scene



1 has no discretion whatsoever. That means in this case that
 2 the police would arrive and they would have no discretion.
 3 They would have to arrest 60,000 people, a religious
 4 minority, on the eve of their holiday. They - - - they
 5 would have no discretion. And if they are acting in an
 6 abuse of their discretion in some other manner that's a
 7 different point. That's not within the confines of the
 8 mandamus to compel remedy. The court - - - this court's
 9 law has - - - jurisprudence goes back pretty much forever
 10 saying that the remedy is extraordinary and it's available
 11 in extremely rare circumstances, and this is not that
 12 circumstance. If Your Honors have no further questions - -
 13 -

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MS. DRUKER: Thank you.

16 CHIEF JUDGE DIFIORE: Counsel.

17 MS. MARINO: Obviously, I - - - I beg to differ
 18 with my colleague. This - - -

19 JUDGE RIVERA: But to be clear you're not making
 20 any of these other arguments that she seems to say there's
 21 - - - well, there's - - - there's some carveouts, there's
 22 some places, civil rights, equal protection, you're not
 23 making those arguments just to be clear?

24 MS. MARINO: Well, I'm not sure - - -

25 JUDGE RIVERA: And your complaint doesn't make



1 those arguments. Your complaints are just the - - - the -
2 - -

3 MS. MARINO: But these are mandatory statutes - -
4 -

5 JUDGE RIVERA: Yes.

6 MS. MARINO: - - - that require enforcement.

7 JUDGE RIVERA: And the - - - and law enforcement
8 is not acting on those statutes.

9 MS. MARINO: Yes.

10 JUDGE RIVERA: And it has nothing to do with who
11 would be targeted by enforcement which is the nature of the
12 line of questions she was getting.

13 MS. MARINO: Well, but - - - but enforcement is
14 supposed to be neutral. This is actually the flip side of
15 the coin from targeting. This is targeting a religious
16 sect and let - - - and favor it, favoring them. This is -
17 - - this is a violation of the establishment clause. Like
18 I said before I need a permit to throw a block party. I
19 need all of these permits. Why is this particular - - -

20 JUDGE RIVERA: But did you make those kinds of
21 arguments?

22 MS. MARINO: In my papers, yes, ma'am. Yes,
23 ma'am. They're in my papers. And with respect to, you
24 know, this resources argument by the city, this - - - this
25 is a farce. Saying resource allocation, the resources are



1 there. There's police everywhere during this event
2 facilitating the event, assisting with the event, aiding
3 and abetting the event.

4 JUDGE GARCIA: So if they remove - - - if they
5 remove the police that would also answer your complaint?

6 MS. MARINO: No, because the crimes are still
7 being committed.

8 JUDGE GARCIA: So - - -

9 MS. MARINO: The crimes are being committed, and
10 the public health is being put at risk here. And that's -
11 - - I know I don't have much time, but I just - - - this -
12 - - this event is growing exponentially every year. When
13 is it going to stop? Where is it going to stop? It - - -
14 it started out - - - in one my plaintiff's affidavits they
15 think, you know, 5- or 10,000 chickens were used. It was
16 50- in 2015. It's up to 60- or 70- now. It's spreading
17 into areas of Manhattan, in Queens. When is this going to
18 stop? Is - - - it will be - - - will it be half-a-million
19 chickens? A million? Does someone have to get sick?

20 CHIEF JUDGE DIFIORE: Counsel, if we agree with
21 your argument and the police make arrests on the scene,
22 does - - - does the prosecuting agency have to go forward
23 with the prosecution of the case?

24 MS. MARINO: The statute says - - - are you
25 talking about the animal cruelty statute? The animal



1 cruelty statute says that a police officer or constable
2 must effect - - - must summons or arrest and bring before a
3 court or magistrate. That's what the statute says.

4 CHIEF JUDGE DIFIORE: And then who would
5 prosecute that case?

6 MS. MARINO: The district attorney's office.

7 CHIEF JUDGE DIFIORE: And do they have any
8 discretion as to whether or not to go forward or not? Do
9 they - - - must they - - - they prosecute that case?

10 MS. MARINO: Your Honor, I don't know what the
11 rules are with district attorney's office. I've never been
12 a district attorney or I - - - I don't have an answer to
13 that, Your Honor. I'm just - - - we have - - -

14 JUDGE STEIN: And so who - - - who would be
15 arrested? Would - - - would it be the people in charge?
16 Would it be the rabbis? Would it be the participants?
17 Would it be the children that are taking part in this? I
18 mean would - - - would all of them - - - would each and
19 every one of them have to be arrested?

20 MS. MARINO: It would be the people effecting and
21 - - - and causing the animal cruelty and the health code
22 violations. So it would be the butchers who are slitting
23 the throats and letting blood drip into the streets and
24 into the sewers and allowing feces to get attached to
25 people's shoes and people are tracking this into their

1 homes. Your Honors, if you haven't read my plaintiffs'
 2 affidavits I beg you to read each and every one of them.
 3 It is a horror show out their front doors every year.
 4 Where is their right to live in a - - - in a nuisance-free
 5 environment and have their community protected?

6 JUDGE RIVERA: The question - - - the question is
 7 whether or not mandamus is the appropriate vehicle - - -

8 MS. MARINO: Your Honor - - -

9 JUDGE RIVERA: - - - to - - - to address those
 10 concerns. You've heard her arguments. At the end of the
 11 day her position is that's a political calculation and
 12 that's how you have to address it. It's for us to decide
 13 whether or not she's right, you're right, but what's your
 14 response to that?

15 MS. MARINO: Your Honor, if there was ever a case
 16 for mandamus this is the case, and the notion of my clients
 17 going to political resources to get some relief here, they
 18 have. No one in office wants to touch this. It - - - it's
 19 a huge group of people. That constitutes a voting bloc,
 20 Your Honors. I - - - I don't know how else to - - - to
 21 word this.

22 CHIEF JUDGE DIFIORE: Thank you. Ms. Marino,
 23 your light's on. Thank you very much.

24 MS. MARINO: Thank you, Your Honors.

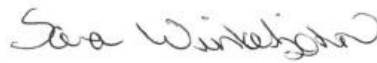
25 (Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of The Alliance to End Chickens as Kaporos v. New York City Police Department, No. 126 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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