lenge the latter. Without the exemption provided by the State Statute, the City Council would not have been able to set the handgun licensing fee at the current $340 rate; instead, it would have been confined to the $10 maximum fee governing the rest of the State."

Regarding the arguments that the fee was constitutionally impermissible under the standards that governed the imposition of fees on the exercise of constitutionally protected activities, the court found the guiding principle was expressed by the U. S. Supreme Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941): that while the Government could not tax the exercise of constitutionally protected activities, it could impose a fee designed to defray the administrative costs of regulating the protected activity. In *Cox*, a statute requiring marchers to obtain licenses and prepay fees with a permissible range from a "nominal amount" to $300 a day to parade on public streets was permissible because the fee was "not a revenue tax, but one to meet the expense incident to the administration of the act and ... the maintenance of public order in the matter licensed." Similarly, the Supreme Court, in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), had rejected the notion that a fee had to be both nominal *and* designed to defray administrative expenses to be permissible. Here, there was no showing that the $340 handgun licensing fee qualified as a fee that was impermissible because it was so exorbitant as to deter the exercise of the protected activity. "There is no evidence that the fee has deterred or is likely to deter any individual from exercising his or her Second Amendment rights; indeed, all of the plaintiffs have paid the fee and have not pointed to any particular hardship they faced in doing so ... Moreover, there is no genuine dispute that the $340 fee is less than the administrative costs of the licensing scheme. The User Cost Analysis performed by the OMB in 2003 indicates that the average cost to the City at that time for each handgun license application was $343.49, more than the $340 fee at issue." The plaintiffs' motion for summary judgment with respect to this claim was denied.

The court also denied the plaintiffs' claim that the fee violated the Equal Protection Clause because it imposed an unequal burden on the Second Amendment rights of New York City residents as compared with other citizens of New York State. In that respect, the court found that the State Statute withstood rational basis scrutiny. The discretion the State Statute conferred upon the City to set its own licensing fees was cabined by New York law, which required that the amount of a license or permit fee not exceed "a sum reasonably necessary to cover the costs of issuance, inspection and enforcement" and not be "exacted for revenue purposes or to offset the cost of general governmental functions..." *Kwong v. Bloomberg*, No. 11 Civ. 2356 (JGK), 2012 U.S. Dist. LEXIS 41218 (S.D. N.Y. March 26, 2012).

First Amendment

Prevention of "Kosher Fraud"

New York's Kosher Law Protection Act of 2004 ("the Kosher Act," codified as N.Y. Agric. & Mkts. Law §§ 201-a through 201-d) imposed inspection and labeling requirements on food marketed as kosher. In enacting the law, the Legislature stated that "a significant number of consumers within the state [sought] to purchase food products that are kosher, and that many of those consumers [did] so for reasons unrelated to religious observance," and that it was "essential that consumers be provided [with] clear and accurate information about the food they [were] purchasing, and that this goal [be] furthered by requiring vendors of food and food products represented as kosher to make available to consumers the basis for that representation."

The plaintiffs — a delicatessen-butcher shop that specialized in kosher foods and its officers— challenged the constitutionality of the Kosher Act, alleging that the law discriminated against non-Orthodox Jews and impermissibly gave the State a supervisory role over what was properly "kosher." Specifically, the plaintiffs claimed that the labeling requirements of the Act violated the Establishment Clause of the First Amendment because there was no *halachic* (Jewish Law) requirement that, to be considered kosher, all food had to bear a label stating it was kosher, and that certain non-Orthodox Jews wished to market and purchase particular kosher foods without a kosher label or designation. The plaintiffs contended that, by adopting a labeling requirement, the challenged law discriminated against such non-Orthodox Jews and some kosher food purveyors; and that the inspection provision that granted the Department of Agriculture the authority to inspect all food establishments for compliance with the Act directly or indirectly involved an analysis of the acceptability or reliability of the "kosher nature" of the food that was sold. In addition, the plaintiffs claimed that the law violated the Free Exercise Clause because it constituted an impermissible regulation of a religious practice—whether a product was "kosher"—and was not the least restrictive means of preventing fraud. Finally, the plaintiffs argued that the language of the law was unconstitutionally vague.

The district court granted the defendants' motion to dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(6), finding that the Kosher Act did not violate the Free Exercise and Establishment Clauses of the First Amendment and was not void for vagueness. The State Legislature passed the Kosher Act for a valid secular purpose: the need to protect consumers from fraud in the kosher food market, and the law was "purely a labeling and disclosure law" that neither endorsed a particular religious viewpoint nor created an impermissible entanglement with religion. Under the law, the State did not have the authority to determine if a product was kosher under religious law, and the law imposed only an incidental burden on producers and retail vendors (that of labeling and disclosing information regarding the qualifications of their kosher certifier). As such, the State needed only to have a rational basis for its enforcement of the Kosher Act, a test the district court deemed the Kosher Act met. Last, the Kosher Act was not unconstitutionally vague.

On appeal, the U. S. Court of Appeals for the Second Circuit affirmed. "Jewish consumers reportedly now make up less than thirty percent of the consumers of kosher food." The legislative history of the law was clear —the labeling law had the "secular purpose of protecting against fraud by informing a consumer" that a particular seller believed a product was kosher, and the buyer had the option of examining the standard-form kosher certification form completed by that seller. (This

included a listing for the "Name of Individual or Organization Certifying Food as Kosher.") However, the Act did not adopt a definition, interpretation, or standard for the term "kosher," and the plaintiffs did not allege that the Act had been implemented in a discriminatory manner. An objective observer acquainted with the text, legislative history, and implementation of the statute would conclude that the purpose of the statute was secular.

Addressing the entanglement and advancement prongs of the *Lemon v. Kurtzman* test, 403 U.S. 602, 612 (1971), the court found the Kosher Act did not foster an excessive government entanglement with religion. The Act did "not adopt an Orthodox standard of *kashrut*, nor [did] it regulate what foods [were] acceptably kosher or take a position on what it means for a product to be considered kosher." The arguments on the advancement factor failed for many of the same reasons as the arguments on excessive entanglement: the Kosher Act did not endorse a particular religious denomination or sect. The fact that applying a label to a food product to inform consumers that the product had been deemed kosher by the seller or producer "merely happen[ed] to coincide with Orthodox Jewish practice," and did not evidence a specific endorsement or impairment of any religious practice or viewpoint.

On the argument that the law violated the Free Exercise Clause of the First Amendment, the law at issue was one of general applicability and neutral on its face: it applied to any seller who offered products for sale marked as "kosher," regardless of the seller's religious beliefs or affiliation. There was nothing to support the finding that the object of the Act was to infringe upon or restrict practices because of a group's religious motivation. Because the Kosher Act was "neutral, generally applicable, minimally burdensome, and ha[d] a rational basis, no Free Exercise violation exist[ed]." *Commack Self-Service Kosher Meats, Inc. v. Hooker*, No. 11-3517, 2012 U.S. App. LEXIS 9538 (2d Cir. May 10, 2012).

Personnel and Employment

Sexual Harassment

"[T]his appeal requires us to answer two questions of first impression in this Court: first, whether there is a viable claim of retaliation under Title VII of the Civil Rights Act of 1964 ... for participating in an internal employer investigation prior to any proceeding before the Equal Employment Opportunity Commission ('EEOC'); and, second, whether an employer is liable under Title VII for sexual harassment committed by a senior executive who is a proxy or alter ego for the employer, despite the existence of a possible affirmative defense under the Supreme Court's decisions in *Faragher v. City of Boca Raton*, ...and *Burlington Industries, Inc. v. Ellerth*."

Martha Townsend was employed by Benjamin Enterprises, Inc. (BEI). She alleged that as an employee, she was sexually harassed by Hugh Benjamin. Hugh was a shareholder as well as the sole corporate Vice President of BEI, and the husband of BEI's President, Michelle Benjamin. Grey-Allen, the Human Resources Director, started an internal investigation of the allegations but was fired four days later by Michelle Benjamin before it was completed. Grey-Allen alleged that her termination was in retaliation for her participation in the internal investigation. Michelle Benjamin took over the investigation and hired an outside human resources organization that concluded that "nothing happened" between Hugh Benjamin and Townsend, and that it was a "he said versus she said" case. Grey-Allen and Townsend sued BEI, Michelle Benjamin, and Hugh Benjamin for violations of Title VII.

The district court granted summary judgment dismissing Grey-Allen's retaliation claims, finding that her participation in an internal employer investigation into Townsend's sexual harassment allegations, an investigation that was not connected to any formal charge with the EEOC, did not qualify as protected activity under the participation clause of Title VII's anti-retaliation provision. A jury returned a verdict in favor of Townsend against the defendants. The jury found that Hugh Benjamin had subjected Townsend to a hostile work environment. It also found that he was the alter ego of BEI and that his actions were, therefore, imputed to BEI. Grey-Allen appealed, and the defendants challenged the district court's order denying their post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. They contended that the district court erred in rejecting various arguments asserted by the defendants, including their argument that there was no "proxy" or "alter ego" exception to the *Faragher/Ellerth* affirmative defense.

The U. S. Court of Appeals for the Second Circuit affirmed. In order to gain protection under the participation clause of Title VII's anti-retaliation provision, the participation had to be in an investigation or proceeding covered by Title VII, and not in an internal employer investigation. "The language of the participation clause confines those proceedings in which participation is protected to those 'under this subchapter,' meaning subchapter VI of Chapter 21 of Title 42," adding that "[e]very Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause."

Addressing the defendants' "proxy" or "alter ego" argument (that the *Faragher/Ellerth* affirmative defense remains available even when the alleged harasser holds a sufficiently high position within the hierarchy of an organization to be considered the organization's proxy or alter ego), the court stated, succinctly, that "[t]his argument cannot be squared with a fair reading of *Faragher* and *Ellerth*." The *Faragher/Ellerth* affirmative defense was unavailable when the harassing supervisor was sufficiently senior to be the employer's proxy or alter ego. The EEOC's interpretation of Title VII, as set forth in its Enforcement Guidance (*EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*), was in accord with this analysis. *Townsend v. Benjamin Enterprises, Inc.*, No. 09-0197, 2012 U.S. App. LEXIS 9441 (2d Cir. May 09, 2012).

Planning and Zoning

Permit Revocation: Due Process, Ripeness

On July 13, 2009, Debra Bowlby appeared before the City of Aberdeen Planning and Zoning Board, seeking permission to operate a "Sno-Cone" business at an intersection of the city.

She had already purchased a small hut for this business, and made arrangements to

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