PROPOSED FUNDRAISING BILLS IN OKLAHOMA AND MISSOURI WOULD UNCONSTITUTIONALLY TARGET ANIMAL RIGHTS CHARITIES

Daina Bray, Samantha Hasey & Candace Hensley[†]

CONTENTS

INTRODUCTION

Two proposed state bills out of Oklahoma and Missouri would prohibit an "animal rights charitable organization" from soliciting contributions in-state intended for either out-of-state use or "political purposes."[1] Oklahoma House Bill 2250 and Missouri House Bill 2604, if passed, would run afoul of the U.S. Constitution and more than thirty years of U.S. Supreme Court rulings on the rights of charitable organizations to fundraise as a form of expression. The legal issues raised by these two bills include some of the Constitution's most important protections: the First Amendment's protection of the freedom of speech and the Equal Protection Clause of the Fourteenth Amendment. They are also problematic under the due process

† Daina Bray is the General Counsel of the International Fund for Animal Welfare. Samantha Hasey is a JD candidate (2018) at the University of Virginia School of Law and Candace Hensley is a JD candidate (2018) at Harvard Law School. The views expressed are the authors' own in their personal capacities and may not reflect the views of the institutions with which they are affiliated.

1. H.R. 2250, 55th Leg., 2d Sess. (Okla. 2016); H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

guarantees of the Fifth and Fourteenth Amendments, and the bills' prohibition on out-of-state spending would inhibit interstate commerce in violation of Congress's enumerated powers in the Commerce Clause.

Given that one of the Oklahoma bill's sponsors has himself reportedly made comments to the press expressing doubt as to the bill's constitutionality,[2] it is hoped by the authors and doubtless by the many other individuals and organizations who have criticized the bills that the bills will not proceed further in the legislative process but rather will be left to collect dust in the state legislative committees where they were last discussed. Nonetheless, it is worthwhile to examine the bills and the factual context out of which they arose because of the important constitutional rights that they implicate and the potential chilling effect of this sort of legislation on the ability of nonprofits to advocate for their causes. While today it is "animal rights" groups under attack—by way of the bills discussed herein and other legislation such as so-called "ag-gag" bills,[3] which suffer from some of the same constitutional deficiencies—it is not difficult to imagine scenarios in which other nonprofit groups with a viewpoint unwelcome to a legislature, or to powerful private interests, could be similarly targeted.

I. TEXT & STATUS OF THE BILLS[4]

Oklahoma Bill 2250 (the "Oklahoma Bill") would add the following language to the Oklahoma Solicitation of Charitable Contributions Act[5]:

> A. No animal rights charitable organization, professional fundraiser for an animal rights charitable organization or professional solicitor employed or retained by a professional fundraiser for an animal rights charitable organization shall engage in the solicitation of contributions from any person in this state intended to be used on program services or functional expenses outside of this state or for political purposes inside or outside this state.
>
> B. As used in this section:
>
> 1. "Animal rights charitable organization" means any individual, organization, group, association, partnership, corporation, limited

2. *See generally* Hoberock, *infra* note 20 (reporting on state representative's comments that the bill is "probably" unconstitutional).

3. "Ag-gag" laws, discussed in more detail below, criminalize whistleblowing on factory farms. *See infra* notes 78–79.

4. The Oklahoma Bill and the Missouri Bill are referred to together throughout this article as the "Bills."

5. OKLA. STAT. tit. 18, §§ 552.1a, .3, .4, .6–.9, .13, .14a, .16, .19–.22 (2011 & Supp. 2015).

> liability company, trust or other entity soliciting contributions in this state, other than a natural person, that is described in Section 501(c) of Title 26 of the United States Code, that is organized and operated primarily to benefit animal rights and shall not include an organization that is operated primarily to benefit or further the welfare of companion animals . . . .[6]

The text of Missouri House Bill 2604 (the "Missouri Bill") is essentially identical except that it does not include the exception for organizations "operated primarily to benefit . . . companion animals."[7] Thus, in short, the Bills would prohibit individuals and groups "organized and operated primarily to benefit animal rights," as well as professional fundraisers working on their behalf, from raising funds in-state for either out-of-state activities or "political purposes" anywhere.[8]

The Oklahoma Bill was introduced into the Oklahoma House of Representatives on January 5, 2016 and passed the House by a vote of 56 to 26 on March 1, 2016.[9] The Bill was then sent to the Senate, which conducted a first and second reading.[10] It was referred to the Senate Judiciary Committee on March 10, 2016, and has not further progressed from there.[11]

Less than two months after the introduction of the Oklahoma Bill in the Oklahoma House, the Missouri Bill was introduced into the Missouri House of Representatives on February 22, 2016.[12] The House of Representatives read the Missouri Bill twice,[13] then referred it to the Agriculture Policy Committee without the House having voted on it.[14] The Committee held a public hearing on the Missouri Bill on April 26,

---

6. Okla. H.R. 2250.

7. H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (stating that the Missouri Bill would be inserted into the Missouri Charitable Organizations and Solicitations Law, MO. REV. STAT. §§ 407.450–478 (2000)).

8. Okla. H.R. 2250; Mo. H.R. 2604.

9. *Bill Information for HB 2250: Versions*, OKLA. ST. LEGISLATURE, http://oklegislature.gov/BillInfo.aspx?Bill=HB2250 (follow "Versions" hyperlink) (last visited Sept. 25, 2016); *see also Bill Information for HB 2250: Votes*, OKLA. ST. LEGISLATURE, http://oklegislature.gov/BillInfo.aspx?Bill=HB2250 (follow "Votes" hyperlink) (last visited Sept. 25, 2016) (illustrating that an original effort to insert an emergency clause to make the Oklahoma Bill effective immediately was defeated).

10. *Bill Information for HB 2250: History*, OKLA. ST. LEGISLATURE, http://oklegislature.gov/BillInfo.aspx?Bill=HB2250 (follow "History" hyperlink) (last visited Sept. 25, 2016).

11. *See id.*

12. H. JOURNAL, 98th Gen. Assemb., 2d Sess. 809 (Mo. 2016).

13. *Id.* at 818.

14. *Id.* at 2135.

2016, which was the last action taken.[15]

Under existing penalties in the Oklahoma Solicitation of Charitable Contributions Act, violations of the Oklahoma Bill could result in civil penalties including fines of up to ten thousand dollars per violation and felony criminal penalties including fines of up to ten thousand dollars per violation and imprisonment of up to five years.[16] Similar heavy civil penalties and criminal penalties would be in place for violations of the Missouri Bill.[17]

II. FACTUAL CONTEXT SURROUNDING INTRODUCTION OF THE BILLS

Lawmakers who have sponsored the Bills in both states have made public remarks describing their intents in promoting the Bills. In statements to the Oklahoma House Agriculture and Rural Development Committee ("House Committee") prior to the House vote, Representative Brian Renegar and Representative Scott Biggs, both cosponsors of the Oklahoma Bill, each said that the Bill was motivated by a desire to encourage Oklahoma residents to donate to local animal welfare groups who would spend the money in-state, rather than to large national animal rights organizations.[18] Representative Biggs cited in

15. *Activity History for HB 2604*, MO. HOUSE REPRESENTATIVES., http://www.house.mo.gov/BillActions.aspx?bill=HB2604&year=2016&code=R (last visited Sept. 25, 2016).

16. OKLA. STAT. tit. 18, § 552.14(a) (2012).

17. MO. REV. STAT. § 407.095 (2000) (classifying violation of an order by the state attorney general as being a Class D felony); *id.* § 407.110 (providing for a civil penalty of up to five thousand dollars per violation for violating an injunction or restitution order); MO. REV. STAT. § 558.011(4) (Supp. 2013) (providing for a criminal penalty of imprisonment of up to four years); MO. REV. STAT. § 560.011(1) (2000) (providing for fines of up to five thousand dollars).

18. In a hearing on the Oklahoma Bill before the House Agriculture and Rural Development Committee, Representative Brian Renegar stated the following:

> You know, the bottom line is this: . . . Whenever we have a disaster . . . they have these pictures of these poor, neglected animals, and they get these people that sit at home and they say, I can pay nine dollars a month to help these animals, but then they take their money outside the state . . . . And I want to tell you something: these outside animal rights organizations have no connection to our county and city and different humane societies here in the state . . . . I am a big supporter of my local animal or humane society. . . . One of the intended consequences of this bill besides the obvious language, is that we need to direct people's attention more toward our local shelters and humane societies.

Hearing on H.R. 2250 Before the House Agriculture and Rural Development Committee, 55th Leg., 2d Sess. at 9:07–9:14, OKLA. ST. LEGISLATURE (Feb. 10, 2016) (transcribed by authors), http://www.okhouse.gov/Video/Default.aspx (follow "Calendar-Year" hyperlink; then follow "10" hyperlink under "February 2016"; then follow "Agriculture and Rural Development" hyperlink) [hereinafter, Hearing on House Bill 2250]. State Representative Brian Renegar also reportedly stated in a press interview, "One of the intended consequences of this bill, I want people to donate to local humane groups. They're the ones

particular his concerns about the spending of funds outside of Oklahoma raised by the Humane Society of the United States (HSUS) from Oklahoma residents after the Moore tornado of 2013.[19] HSUS has responded to these allegations, including in litigation.[20]

Representative Renegar also described to the House Committee the reasons behind the changes that had been made to the Oklahoma Bill since its introduction the month before, namely, (1) changing the definition of a covered "animal rights charitable organization" from a group "organized and operated primarily to *benefit animal welfare or to prevent cruelty to animals*" to a group "organized and operated primarily to *benefit animal rights*" and (2) adding the prohibition on fundraising "for political purposes inside or outside the state."[21] As to the first, Representative Renegar explained that his intention was to exclude from the Bill organizations such as PetSmart and Petco, which donated to local animal shelters.[22]

As to the addition of the prohibition on fundraising "for political purposes inside or outside the state," Representative Renegar told the House Committee that the addition was motivated by the then upcoming November 2016 ballot initiative by which Oklahomans would vote on State Question 777,[23] the so-called "Right to Farm" constitutional amendment:

> And the reason why I did this, is you need to look no further than what's going to happen this year. . . . All the people of the State of

---

that are the boots on the ground and do the most good for these animals." Mark Hrywna, *Fundraising, Speech Issues Targeted in 3 State Legislatures*, NONPROFIT TIMES (Mar. 1, 2016), http://www.thenonprofittimes.com/news-articles/fundraising-speech-issues-targeted-in-3-state-legislatures/. *See also Legislation Requires Animal-Rights Contributions Raised in Oklahoma, Be Spent in Oklahoma*, OKLA. FARM REP. (Feb. 10, 2016, 4:31 PM), http://oklahomafarmreport.com/wire/news/2016/02/00956_Legislation AnimalRightsContributions021016_163106.php#.V35k92cUXKI.

19. Hearing on House Bill 2250, *supra* note 18, at 9:11; *see also* OKLA. FARM REP., *supra* note 18.

20. Barbara Hoberock, *Humane Society of the U.S. Takes Oklahoma, Attorney General to Task over Right to Farm*, TULSA WORLD (Mar. 21, 2016, 12:00 AM), http://www.tulsa world.com/news/government/humane-society-of-the-u-s-takes-oklahoma-attorney-general/ article_c0fcd4d7-360e-56aa-a2d6-11b7699cc646.html; Randy Krehbiel, *State House Approves Anti-Abortion School Curriculum Bill*, TULSA WORLD (Mar. 2, 2016, 12:01 AM), http://www.tulsaworld.com/news/government/state-house-approves-anti-abortion-school-curriculum-bill/article_4e8cbcfb-cc8b-52fc-bd1b-90a9e85a8353.html.

21. Hearing on House Bill 2250, *supra* note 18, at 9:08; *see also Bill Information for HB 2250: History*, *supra* note 10.

22. Hearing on House Bill 2250, *supra* note 18, at 9:07–9:08; Hrywna, *supra* note 18; OKLA. FARM REP., *supra* note 18.

23. H.J. Res. 1012, 55th Leg., 1st Sess. (Okla. 2015), https://www.sos.ok.gov/ documents/questions/777.pdf?8,8.

> Oklahoma are going to be voting on the state question on Right to Farm. And if you don't think there is going to be some political outside interests coming in here, and they're animal rights groups, and they are going to be campaigning and they're going to be spending many many dollars in the State of Oklahoma fighting this Right to Farm bill. And so for that reason it is very imperative that we put inside as well as outside the state, and that [the Oklahoma Bill] also bans taking this money for political purposes.[24]

In a February 29, 2016 interview with the *NonProfit Times* about the Oklahoma Bill, Representative Renegar reportedly further explained, "I feel very strongly that I do not want some out-of-state animal rights group to tell me how to practice veterinary medicine. Furthermore, I don't want them to tell my cattlemen how to handle and raise cattle."[25]

Representative Charlie Davis, who introduced the Missouri Bill, echoed some of the stated intentions of the Oklahoma Bill's sponsors when he reportedly said in a press interview that he was motivated by his constituents' concerns about money raised in Missouri being spent out of state: "Money raised in Missouri should stay in the state, or the vast majority of it."[26]

Representative Renegar, sponsor of the Oklahoma Bill, and Representative Davis, sponsor of the Missouri Bill, have reportedly expressed some doubt or a lack of opinion as to whether the Bills are constitutional. A local newspaper summarized Representative Renegar's comments as follows: "Renegar said the [Oklahoma Bill] 'probably is' unconstitutional, but that hasn't stopped lawmakers in the past from passing bills. In addition, he really didn't expect the measure to go anywhere . . . ."[27] For his part, Representative Davis reportedly told the *NonProfit Times* in a phone interview, "I base my opinion not on whether it's constitutional; if it's deemed unconstitutional, we can backtrack and not do it . . . . It's up to judges to determine

24. Hearing on House Bill 2250, *supra* note 18, at 9:08–9:09; *see also* KSWO Staff, *Animal-Rights Contribution Spending Bill Passes Committee*, KSWO 7 NEWS (Feb. 10, 2016, 3:57 PM), http://www.kswo.com/story/31189920/animal-rights-contribution-spending-bill-passes -committee; OKLA. FARM REP., *supra* note 18. HSUS has been an outspoken opponent of State Question 777. *See, e.g.*, Press Release, Okla. Right to Farm, Oklahoma Farmers and Ranchers Emphasize Strong Support for Right to Farm Amendment (Nov. 17, 2015), http://Oklahomarighttofarm.com/Oklahoma_Farmers_And_Ranchers_ Emphasize_Strong_ Support_for_Right_to_Farm.pdf.

25. Hrywna, *supra* note 18.

26. *Id.*

27. Hoberock, *supra* note 20.

constitutionality."[28]

Unsurprisingly, both pending Bills were promptly criticized from many quarters for being inconsistent with fundamental constitutional rights, including in a thorough constitutional analysis of the Oklahoma Bill issued by the National Council of Nonprofits.[29] The Council expressed concern about the "damaging effect [the Oklahoma Bill] could have on charitable nonprofits and those they serve in communities across America," highlighting the danger this type of bill poses to all charitable organizations: "[It] would create a dangerous precedent—this time it's animal rights, but next time it could be children's rights, consumer rights, civil rights, gun rights, property rights, religious rights, seniors' rights, veterans' rights, or more."[30]

Oklahoma Senator Brian Crain, who is Vice Chair of the Judiciary Committee to which the Oklahoma Bill was referred, has publicly expressed doubts about the constitutionality of the Bill: "I don't know that we, simply because we don't agree with the political goals of a nonprofit entity, should we be prohibiting them from doing what is otherwise lawful."[31] The Editorial Board of *Tulsa World*, a Tulsa-based daily newspaper, published this criticism of the Oklahoma Bill:

> It stems from a disputed series of events involving [HSUS] following the 2013 Moore tornado, but what happened then isn't important. What's important is what the Legislature is trying to do, which is just plain wrong.
>
> If it's not clear why it's wrong, take out the phrase "animal rights charitable organization" in the bill's language and insert some cause you support. Imagine if the Legislature tried to ban the National Rifle Association or the Democratic Party from raising money for political purposes. Imagine if the state tried to ban the American Cancer Society or the American Red Cross from raising money in Oklahoma for programs in other states.
>
> It's ridiculous. It's wrong. It's un-American.
>
> Voicing political opinions, even unpopular opinions, is a

28. Hrywna, *supra* note 18.

29. *See* Memorandum from Tim Delaney, Nat'l Council of Nonprofits, Oklahoma House Bill 2250: A Constitutional Analysis (Mar. 14, 2016), https://www.councilofnonprofits.org/sites/default/files/documents/OK%20-%20HB%202250%20-%20constitutional%20an alysis%20(March%2014).pdf.

30. *Id.*

31. Hoberock, *supra* note 20; *see also* Hrywna, *supra* note 18 (quoting Errol Copilevitz, a founder of the Kansas City, Missouri law firm Copilevitz & Canter that advises nonprofit clients, as describing the Missouri Bill as "[s]illiness" and "clearly content-based regulation of speech").

> constitutional right, and raising money is part of that right. There's no legitimate reason why the state should prevent any charity from raising money to spend anywhere.
>
> HB 2250 is bad legislation, and we hope it never sees the light of day in the state Senate.[32]

This article builds from these prior critiques, endeavoring to set out a complete analysis of the potential constitutional deficiencies of the Bills.

III. CONSTITUTIONAL ANALYSIS

A. Freedom of Speech

If passed in their current form, the Bills would violate the First Amendment by infringing animal rights charities' (1) right to fundraise (which is a form of highly protected speech) and their (2) right to engage in political speech (also highly protected), while not being narrowly tailored to achieve a compelling government interest.

1. Charitable Fundraising as Protected Speech

The Bills would prevent an "animal rights charitable organization" (and professional fundraisers that it hires) from engaging in in-state fundraising if the proceeds were intended to be used for out-of-state "program services or functional expenses" or "for political purposes" anywhere.[33] This prohibition runs afoul of strong Supreme Court precedent establishing that charitable solicitations are protected speech under the First Amendment.[34]

More than thirty years ago, the Supreme Court declared that charitable fundraising "involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes"—that fall within the most protected sphere of the First Amendment.[35] In *Village of Schaumburg v. Citizens for a Better Environment*, the Court affirmed that a municipal ordinance prohibiting solicitation by organizations that did not use at least seventy percent of donations for "charitable purposes" was an

---

32. World's Editorial Writers, *Tulsa World Editorial: UnAmerican Bill Targets Animal Rights Groups*, TULSA WORLD (Mar. 10, 2016, 12:00 AM), http://www.tulsaworld.com/opinion/editorials/tulsa-world-editorial-unamerican-bill-targets-animal-rights-groups/article_a4e4941d-c744-52c7-b941-c5169d80b1b2.html.

33. H.R. 2250, 55th Leg., 2d Sess. (Okla. 2016); H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

34. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622 (1980).

35. *Id.* at 632.

unconstitutional limitation on charities' freedom of speech.[36] The Court noted that some charities' primary purpose is not to provide direct services or funding; instead, they achieve their missions by disseminating information and advocating positions on certain issues.[37] Such organizations may necessarily exceed a twenty-five percent limitation by hiring professional fundraisers, for example, while still serving as legitimate charities promoting worthwhile causes.[38] In *Secretary of the State of Maryland v. Joseph H. Munson Company, Inc.*, the Court established that an even more flexible percentage limitation is unlikely to be constitutional.[39]

In addition to solicitation by charitable organizations, the Court has also placed solicitation by professional fundraisers within the realm of highly protected speech. *Riley v. National Federation of the Blind* affirmed the unconstitutionality of a state law that had imposed multiple restrictions on professional fundraisers and their agreements with charities.[40] As in *Schaumburg* and *Munson*, the Court found that the government's legitimate goal (of ensuring that the largest possible portion of donations went to the charitable cause) did not outweigh the burden on fundraisers' freedom of speech, noting as to professional fundraisers in particular that "[i]t is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."[41]

The Bills go even further than the laws struck down in *Schaumburg*, *Munson*, and *Riley*. Rather than imposing a percentage limitation on a charity's use of funds or dictating the nature of its agreements with professional fundraisers, the Bills' propose to prohibit entire categories of fundraising, namely fundraising for out-of-state or "political purposes."[42] This would impose prior restraint on what organizations say while engaging in the act of soliciting, by limiting the causes for which they may fundraise.[43]

---

36. *Id.* at 622.

37. *Id.* at 635.

38. *Id.* at 636–37.

39. 467 U.S. 947, 950 (1984).

40. 487 U.S. 781, 784 (1988).

41. *Id.* at 789–90, 801 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964)).

42. *See* H.R. 2250, 55th Leg., 2d Sess. (Okla. 2016); *see also* H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

43. *Riley*, 487 U.S. at 801 n.13.

2. Political Speech

Moreover, the Bills explicitly prohibit an "animal rights charitable organization" (and professional fundraisers that it hires) from engaging in in-state fundraising if the proceeds are intended to be used "for political purposes," both inside and outside of the state.[44] This explicit ban on fundraising in support of political speech is inconsistent with the Supreme Court's robust protection of political speech.[45]

The Court has established a "rough hierarchy" of types of speech, with political speech enjoying the most protection, commercial speech having fewer protections, and speech involving profanity and fighting words being the least protected of all.[46] Political speech is thus central to the guarantees of the First Amendment, and any attempts to burden it are subject to strict scrutiny.[47]

The First Amendment also disfavors content-based regulations that prohibit speech by certain groups or viewpoints and not others.[48] The Bills facially discriminate based on content because they only target speech of "animal rights charitable organization[s]," while leaving charities working on other issues free to fundraise without limitation.[49] For example, in *Animal Legal Defense Fund v. Otter*, discussed in more detail below in Section III.B, the Court found that an Idaho "ag-gag" law "facially discriminate[d] based on content because it only target[ed] speech concerning the 'conduct of an agricultural production facility's operations' while leaving unburdened other types of speech at agricultural production facilities."[50]

In addition to the naked limitation on fundraising for "political purposes," and the fact that the Bills facially discriminate based on content, the factual context out of which the Oklahoma Bill arose indicates that a motivation of one of the Bill's sponsors for its proposal was to limit the ability of animal rights groups to engage in political speech against State Question 777, the upcoming ballot question on the so-called "Right to Farm" constitutional amendment.[51] As found in

44. *See* Okla. H.R. 2250; Mo. H.R. 2604.

45. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010).

46. R.A.V. v. City of St. Paul, 505 U.S. 377, 422–23 (1992).

47. *Citizens United*, 558 U.S. at 340.

48. *Id.* (first citing United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); and then citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

49. *See* Okla. H.R. 2250; Mo. H.R. 2604.

50. 118 F. Supp. 3d 1195, 1205 (D. Idaho 2015), *appeal docketed*, No. 15-35960 (9th Cir. Dec. 14, 2015).

51. Hearing on House Bill 2250, *supra* note 18, at 9:08–9:09; Memorandum from Tim Delaney, *supra* note 29, at 3.

Otter, a "law can be content based if the underlying purpose of the law is to suppress particular ideas."[52] In that case, the court referenced a number of contemporaneous statements made by the legislators who had supported the "ag-gag" law at issue, observing that "a review of [the law's] legislative history leads to the inevitable conclusion that the law's primary purpose is to protect agricultural facility owners by, in effect, suppressing speech critical of animal-agriculture practices."[53]

As observed by the National Council of Nonprofits:

> [The Oklahoma Bill] effectively imposes a gag order on any and all animal rights organizations attempting to fundraise in Oklahoma by restricting their rights of free speech and advocacy. . . . If the bill is enacted, Oklahoma would be banning those groups from fundraising and educating the public about animal rights, including advocating for public policy positions. Such bans are not compatible with the U.S. Constitution and thus void.[54]

The Supreme Court has said that "[i]t is perhaps our most important constitutional task to ensure freedom of political speech,"[55] and that "[s]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"[56] Attempts to "disfavor certain subjects or viewpoints"—such as the Bills' attempt to disfavor animal rights activism by limiting fundraising rights—run afoul of the First Amendment.[57]

3. Compelling Interest & Narrowly Tailored

States may regulate protected speech as long as they have a compelling reason for doing so and the regulation is narrowly drawn.[58] As the Supreme Court has explained, "[t]his is an exacting test. It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must

---

52. *Otter*, 118 F. Supp. 3d at 1206 (citing Berger v. City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009)).

53. *Id.*

54. Memorandum from Tim Delaney, *supra* note 29, at 3.

55. Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 503 (2007); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010).

56. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)).

57. *Citizens United*, 558 U.S. at 340.

58. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 680 (1994) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (first citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); and then citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 786 (1978)).

restrict as little speech as possible . . . ."[59]

The prevention of fraud and "efforts to enable donors to make informed choices" are established legitimate government interests.[60] However, regulations imposing overly broad and far-reaching restraints on charitable fundraising are unconstitutional.[61] In *Schaumburg*, the Court found no "substantial relationship" between the government's asserted interest in protecting against fraud and the law's requirement that a certain percentage of funds be spent on charitable purposes.[62] In *Riley v. National Federation of the Blind*, the Court found that the creation of a presumption of fraud based on percentages was the sort of overly broad, prophylactic regulation struck down in *Schaumburg* and *Munson*.[63] Instead, the legitimate goal of protecting citizens from fraud in charitable solicitation can be served by more narrowly tailored means, including by enforcing existing measures that prohibit fraud and require reporting about charitable finances and professional fundraising engagements.[64] While a state may argue that a broad and preemptive restriction on fundraising by certain groups is a more efficient means of preventing fraud, "the First Amendment does not permit the State to sacrifice speech for efficiency."[65] Moreover, in this particular context, the state's interest in limiting this speech should not override the public's interest in the humane treatment of animals.[66]

Should the Bills pass, Supreme Court decisions—and in particular the trilogy of charitable fundraising cases discussed above (*Schaumburg*, *Munson*, and *Riley*)—provide a clear road map for challenging them as direct and overly broad restrictions on First Amendment rights.

---

59. *Turner Broad. Sys., Inc.*, 512 U.S. at 680.

60. Ill. *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 623 (2003).

61. *Schaumburg*, 444 U.S. at 639.

62. *Id.* at 638.

63. 487 U.S. 781, 789 (1988).

64. *Id.* at 795 (citing Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 967 1984)); *see also Madigan*, 538 U.S. at 623–24 (quoting *Riley*, 487 U.S. at 800).

65. *Riley*, 487 U.S. at 795 (first citing *Schaumburg*, 444 U.S. at 639; and then citing Schneider v. New Jersey, 308 U.S. 147, 164 (1939)).

66. *See, e.g.*, Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1207 (D. Idaho 2015) ("The journalistic and whistleblower speech [the "ag-gag" law aims to suppress is not a compelling interest.] . . . Given the public's interest in the safety of the food supply, worker safety, and the humane treatment of animals, it would contravene strong First Amendment values to say the State has a compelling interest in affording these heavily regulated facilities extra protection from public scrutiny.").

B. Equal Protection

Depending on the evidence before a court in the event of a constitutional challenge, the Bills could also be found to violate the Fourteenth Amendment's guarantee of "equal protection of the laws."[67] A "legislative classification"—such as the Bills' application only to "animal rights" groups—will only be sustained if it "is rationally related to a legitimate governmental interest."[68] The Court has placed limits on what may be considered a "legitimate" governmental interest so as to permit classification.[69] In *United States Department of Agriculture v. Moreno*, an amendment to the Food Stamp Act excluded households containing individuals who were unrelated to other members of the household.[70] The government asserted that this was meant to reduce fraud within the program—a legitimate interest.[71] However, the Court found two problems with this stated goal.[72] First, there were already provisions in place within the Act to prevent fraud, and the Court thus questioned why the amendment was necessary to accomplish the same end.[73] Second, the amendment's legislative history appeared to indicate that it was actually intended to exclude "hippies and hippie communes" from using the food stamp program.[74] The Court found this alternative purpose (of barring a particular social group) was unacceptable because it was based on prejudice and discrimination, explaining that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[75]

Perhaps the best illustration of the path a court could follow to find that the Bills would violate the Equal Protection Clause is the District Court of Idaho's decision in *Animal Legal Defense Fund v. Otter*, a recent example of a bill being struck down at least in part because of evidence of animus toward animal rights groups.[76] In *Otter* (which is currently on appeal to the Ninth Circuit), the court invalidated Idaho's

67. *Id.* at 1209 (citing Plyer v. Doe, 457 U.S. 202, 216 (1982)).

68. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

69. *Id.* at 533 (first citing Jefferson v. Hackney, 406 U.S. 535, 546 (1972); then citing Richardson v. Belcher, 404 U.S. 78, 81 (1971); then citing Dandridge v. Williams, 397 U.S. 471, 485 (1970); and then citing McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

70. *Id.* at 529.

71. *Id.* at 535.

72. *Id.* at 534–35.

73. *Moreno*, 413 U.S. at 536.

74. *Id.* at 534.

75. *Id.* (emphasis added).

76. 118 F. Supp. 3d. 1195, 1212 (D. Idaho 2015).

so-called "ag-gag" law.[77] Ag-gag laws, on the books in seven states,[78] criminalize whistleblowing on factory farms.[79] Modern ag-gag laws operate in several ways. Most ban individuals from recording the operation of a farm facility without the owner's permission, including via video, photo, or audio,[80] and also criminalize seeking employment at a facility under "false pretenses," i.e., without stating one's pro-animal group affiliations and undercover investigation intentions.[81] Recently, ag-gag laws have transformed to include "quick reporting" requirements, requiring that undercover investigators turn over footage of animal abuse to authorities almost immediately after it is taken, thereby potentially hampering efforts to document a pattern of abuse in order to build a full legal case.[82]

---

77. *Id.*

78. The seven states with ag-gag laws currently on the books are Iowa, Kansas, Missouri, Montana, North Carolina, North Dakota, and Utah. IOWA CODE § 717A.3A (2015); KAN. STAT. ANN. § 47-1827 (Supp. 2015); MO. REV. STAT. § 578.013 (Supp. 2013); MONT. CODE ANN. § 81-30-103 (2015); N.C. GEN. STAT. § 99A-2 (2015); N.D. CENT. CODE § 12.1-21.1-02 (2012); UTAH CODE ANN. § 76-6-112 (LexisNexis 2012). Lawsuits challenging North Carolina's and Utah's ag-gag laws are currently pending in federal court. Dan Flynn, *Activists Challenge NC's New 'Ag-Gag' Law in Federal Court*, FOOD SAFETY NEWS (Jan. 14, 2016), http://www.foodsafetynews.com/2016/01/north-carolinas-new-ag-gag-law-challenged-in-federal-court/#.V50WsWdTHIU; *see also Taking Ag-Gag to Court*, ANIMAL LEGAL DEF. FUND, http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/ (last visited Sept. 25, 2016).

79. *See, e.g.*, Bill Moyers, *WATCH: 'Ag Gag' Laws Silence Factory Farm Whistleblowers*, THE HUFFINGTON POST: THE BLOG (July 11, 2013, 2:44 PM), http://www.huffingtonpost.com/bill-moyers/watch-ag-gag-laws-silence_b_3580074.html; Jeff Zalesin, *An Overview of "Ag-Gag" Laws*, REP. COMMITTEE FOR FREEDOM OF PRESS, http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2013/overview-ag-gag-laws (last visited Sept. 25, 2016).

80. The following five states have ag-gag laws which ban recording of a facility's operations without the owner's permission: Kansas, Montana, North Carolina, North Dakota, and Utah. KAN. STAT. ANN. § 47-1827 (Supp. 2015); MONT. CODE ANN. § 81-30-103 (2015); N.C. GEN. STAT. § 99A-2 (2015); N.D. CENT. CODE § 12.1-21.1-02 (2012); UTAH CODE ANN. § 76-6-112 (LexisNexis 2012); *see also* Ted Genoways, *Gagged by Big Ag*, MOTHER JONES (June 17, 2013, 6:20 AM), http://www.motherjones.com/environment/2013/06/ag-gag-laws-mowmar-farms.

81. Iowa, North Carolina, and Utah have ag-gag laws which ban seeking employment at a facility under false pretenses. IOWA CODE § 717A.3A (2015); N.C. GEN. STAT. § 99A-2 (2015); UTAH CODE ANN. § 76-6-112 (LexisNexis 2012); *see also* Genoways, *supra* note 80.

82. For example, Missouri has a quick-reporting ag-gag law in place, requiring undercover investigators to turn over recorded animal abuse to law enforcement within twenty-four hours, while additionally banning any editing, splicing, or manipulating of the recording. MO. REV. STAT. § 578.013. The Animal Enterprise Terrorism Act ("AETA") is another law that explicitly targets individuals and organizations working on behalf of animals. Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2012). The AETA created the crime of "animal enterprise terrorism" for damaging or interfering with "animal enterprises," which is defined to include a broad range of businesses that use or sell animals and animal products. *Id.* § 43(d)(1). The AETA's constitutionality was unsuccessfully

As noted above, the Equal Protection Clause will only be in play where there is a legislative classification. A law may create classifications by (1) discriminating on its face, (2) being applied in a discriminatory manner, or (3) being enacted with the purpose of discriminating.[83] In *Otter*, the court found that the Idaho ag-gag law discriminated both on its face (by subjecting agricultural whistleblowers to different treatment than other whistleblowers) and through its purpose (by being enacted because of prejudice against animal groups).[84]

That the Bills discriminate on their face cannot be in doubt: the Bills apply only to groups organized and operated primarily to benefit animal rights (but not, in the case of the Oklahoma Bill, including organizations working primarily on companion animal welfare).[85] There are no comparable restrictions put on other types of charities, just as there was no comparable punishment for other types of whistleblowers under the Idaho statute in *Otter*.[86]

As to whether the Bills discriminate through their purpose (an independent basis on which a court may find that a legislative classification exists), the analysis would depend on the factual evidence put before a court in the event of a constitutional challenge.[87] A bill's "legislative or administrative history may be highly relevant [to determining a bill's true purpose], especially where there are contemporary statements by members of the decision making body."[88]

In *Otter*, as to whether the Idaho ag-gag law was rationally related to a legitimate government interest, the court started by questioning the state's assertion that the law was motivated by a desire to protect the property of agricultural facility owners.[89] As in *Moreno*, the *Otter* court observed that existing laws already addressed the issues that the new

---

challenged in District Court in Massachusetts in *Blum v. Holder*. 930 F. Supp. 2d 326, 328 (D. Mass. 2013). The court dismissed the lawsuit for lack of standing, finding that the savings clause in the Act carving out protected speech made the chilling of free speech too speculative in that instance. *Id.* at 337. The dismissal was upheld on appeal in Blum v. Holder, 744 F.3d 790, 803 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 477, 477 (2014).

83. *See, e.g.*, Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1210 (D. Idaho 2015).

84. *Id.*

85. H.R. 2250, 55th Leg., 2d Sess. (Okla. 2016); H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

86. *Otter*, 118 F. Supp. 3d at 1210.

87. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

88. *Id.* at 268.

89. *Otter*, 118 F. Supp. 3d at 1210.

law was arguably meant to address, which "cast[ ] considerable doubt upon the proposition that [the law] could have rationally been intended to prevent those very same abuses."[90]

In the case of the Bills, if the governments of Oklahoma and Missouri were to argue in the event of an eventual constitutional challenge that the Bills were rationally related to the legitimate interest of preventing fraud in charitable solicitation[91] (which seems possible in light of the comments by legislative supporters of the Oklahoma Bill that the Bill was motivated by concerns about HSUS's fundraising practices[92]), that argument would suffer from the same deficiency as Idaho's argument in *Otter*: the Bills are unnecessary in light of existing laws.[93] As with the regulations struck down in *Schaumburg*, *Munson*, and *Riley*, there are already existing laws in both Oklahoma and Missouri that serve the same purpose of preventing fraud in charitable solicitation.[94]

In *Otter*, the court also noted that the state had failed to show why agricultural facilities needed greater protection than other businesses, observing that "[p]rotecting the private interests of a powerful industry, which produces the public's food supply, against public scrutiny is not a

---

90. *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 536-37 (1973)) (explaining that existing laws against trespass, conversion, and fraud already addressed the "ag-gag" law's contended legitimate purpose of guarding against trespass, conversion, and fraud).

91. *See* Ill. *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 623 (2003) ("Our decisions have repeatedly recognized the legitimacy of government efforts to enable donors to make informed choices about their charitable contributions.").

92. Hearing on House Bill 2250, *supra* note 18, at 9:11; *see also* OKLA. FARM REP., *supra* note 18.

93. *Otter*, 118 F. Supp. 3d at 1202.

94. Both Oklahoma and Missouri have existing laws that regulate charitable fundraising. OKLA. STAT. tit. 18, §§ 552.1a, .3, .4, .6–.9, .13, .14a, .16, .19–.22 (2011 & Supp. 2015); MO. REV. STAT. §§ 407.450–.478 (2000). Moreover, charitable fundraising is subject to specific registration and reporting requirements, both by the Internal Revenue Service (IRS) as well as by the states themselves. States typically require a nonprofit that solicits funds in-state to register with a state agency before conducting any solicitations, and usually also require filing of periodic financial reports. To solicit in Oklahoma, for example, a nonprofit must comply with the Oklahoma Solicitation of Charitable Contributions Act and submit new documentation each year, including a copy of the organization's IRS Form 990, detailing the organization's revenues, expenses, assets, and liabilities. OKLA. SEC'Y OF STATE, FORM 101A-01/13, CHARITABLE ORGANIZATION REGISTRATION IN OKLAHOMA: INFORMATION & INSTRUCTIONS (2013), https://www.sos.ok.gov/forms/FM0101.pdf. In Missouri, nonprofit organizations undergo a similar registration process. MO. ATTORNEY GEN., CHARITABLE ORGANIZATION: INITIAL REGISTRATION STATEMENT (2016), https://www.ago.mo.gov/docs/default-source/forms/charityinitial.pdf; MO. ATT'Y GEN., CHARITABLE ORGANIZATION: ANNUAL REPORT FORM (2016), https://ago.mo.gov/docs/default-source/forms/charityannual report.pdf.

legitimate government interest."[95] Here, Oklahoma and Missouri would have to show why "animal rights charitable organizations" should be subjected to restrictions not placed on charities working on other causes.

Further, in *Otter* the court observed that a "review of the legislative history does nothing to help the State's cause,"[96] concluding as follows based on the factual context in that case:

> The overwhelming evidence gleaned from the legislative history indicates that [the Idaho ag-gag law] was intended to silence animal welfare activists, or other whistleblowers, who seek to publish speech critical of the agricultural production industry. Many legislators made their intent crystal clear by comparing animal rights activists to terrorists, persecutors, vigilantes, blackmailers, and invading marauders who swarm into foreign territory and destroy crops to starve foes into submission. Other legislators accused animal rights groups of being extreme activists who contrive issues solely to bring in donations or to purposely defame agricultural facilities.[97]

Per *Moreno*, animus is never a legitimate governmental interest under the Equal Protection Clause: "[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest if equal protection of the laws is to mean anything."[98]

Whether a court would find that the legislative history of the Bills showed animus toward powerful national animal rights groups would depend on the court's evaluation of the evidence before it in the event of a constitutional challenge. While the Bills have not yet been through the full legislative process, some of the publicly available statements of some of the legislative supporters and sponsors of the Oklahoma Bill could be found to be relevant to a court's evaluation of this issue.[99] For example, one sponsor of the Oklahoma Bill told the House that he had added the "political purposes" section of the Oklahoma Bill to stop "'[o]utside political interests [that would] be coming into Oklahoma and spending many, many dollars fighting this' proposed [Right to Farm] constitutional amendment."[100] A court could take this statement as evidence that a purpose of the Oklahoma Bill was to silence animal

95. *Otter*, 118 F. Supp. 3d at 1210.

96. *Id.*

97. *Id.*

98. *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (explaining that politically unpopular groups are protected under the equal protection of law, and Congress's desire to harm such groups is not a legitimate governmental interest).

99. *Id.*

100. *See* OKLA. FARM REP., *supra* note 18.

rights groups from outside Oklahoma and to prevent them from engaging in political speech about the state's agricultural practices, which is not a legitimate government interest that would justify the Bill's imposition of a classification. In *Otter*, the court concluded its equal protection analysis as follows:

> Because ALDF has shown that the enactment of [the Idaho ag-gag law] was animated by an improper animus toward animal welfare groups and other undercover investigators in the agricultural industry, and the law furthers no other legitimate or rational purpose, the Court finds that the law violates the Equal Protection Clause.[101]

The *Otter* court also found that the Idaho ag-gag law violated the Equal Protection Clause on a separate and independent basis. The law was subject to (and did not survive) strict scrutiny because it unjustifiably discriminated on the basis of the fundamental right of free speech:

> [T]he central problem with [the Idaho ag-gag law] is that it distinguishes between different types of speech, or conduct facilitating speech, based on content . . . .
>
> "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a public forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[102]

For the reasons set out above, the Bills also run afoul of the First Amendment and, therefore, should be found to be impermissible under the Equal Protection Clause on this basis as well.

C. Due Process

If enacted into law, the Bills would also have a due process problem because of their vague and overly broad language.[103] The Supreme Court has stated that due process includes the right to be "informed" as to what laws proscribe, so that no one is left to "speculate as to the meaning of penal statutes."[104] A law will be struck down if

---

101. *Otter*, 118 F. Supp. 3d at 1211.

102. *Id.* (third alteration in original) (quoting Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 96 (1972)) (explaining that, under the Equal Protection Clause and First Amendment, the government cannot, with respect to granting the use of public forums, favor those with whom it finds acceptable).

103. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty or property without "due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

104. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

"men of common intelligence must necessarily guess at its meaning."[105] Moreover, as the Supreme Court has observed on multiple occasions, the vagueness test is much stricter when a law threatens constitutionally protected rights, including—as in the case of the Bills—the freedom of speech.[106]

The Bills' most prominent vagueness problem is their poor definitions of which groups fall within their scope. In *Hynes v. Mayor of Oradell*, a municipal ordinance requiring advance notice prior to canvassing or soliciting was successfully challenged under the Due Process Clause.[107] The Supreme Court ruled that the ordinance was impermissibly vague in its language by not sufficiently specifying what groups fell within its purview.[108]

The Bills suffer from the same infirmity, as it is not clear which organizations the state would treat as "animal rights charitable organizations." The Bills define "animal rights charitable organization" as a 501(c)(3) organization "organized and operated primarily to benefit animal rights."[109] In the case of the Oklahoma Bill (but not the Missouri Bill), organizations "operated primarily to benefit or further the welfare of companion animals" are excluded.[110]

Within the animal protection community, there can be a deep divide between "animal rights" (whose proponents may support abolition of the use of animals for any purpose and that animals should be given legal rights similar to humans) and "animal welfare" (whose proponents may argue for incremental improvements in treatment of animals and for working within the existing legal system that treats animals as property).[111] Indeed, many 501(c)(3) organizations that operate to benefit what they consider to be "animal welfare" (rather than animal rights) may justifiably be confused as to whether the Bills would

105. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

106. Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976).

107. 425 U.S. at 620.

108. *Id.* at 621.

109. While the Bills are not explicit in stating that they would apply only to 501(c)(3) public charities, that conclusion seems clear from the inclusion of the word "charitable" in the definition of covered groups. Moreover, as observed by the National Council of Nonprofits, the only provision in Section 501(c) of Title 26 of the United States Code that refers to "animals" is in Section 501(c)(3) (referring to nonprofits "organized and operated exclusively . . . for the prevention of cruelty to . . . animals"). Memorandum from Tim Delaney, *supra* note 29, at 5.

110. H.R. 2250, 55th Leg., 2d Sess. (Okla. 2016); H.R. 2604, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

111. Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 48–52 (2012).

apply to them at all. Oklahoma's exception for organizations devoted to companion animals is likely to cause further confusion for groups that may be properly classed as working for both animal rights and companion animals.[112] As pointed out by the National Council of Nonprofits, press descriptions of which groups would be covered by the Bills have illustrated the potential for confusion, including reports stating that the Bills would apply to "animal groups," animal "rescue groups" and "animal-rights organizations that help pets."[113] Moreover, "men of common intelligence" would have difficulty agreeing as to whether or not a particular organization is "organized and operated *primarily* to benefit animal rights," or "operated *primarily* to benefit or further the welfare of companion animals."[114] As observed by the National Council of Nonprofits, the vagueness of the Bills' definitions mean that any "animal-related" charity could potentially be swept within their ambit, which is a very large group of charities: more than twenty thousand.[115]

The definition of covered groups is not the only part of the Bills that is marred by vagueness. The meaning of "functional expenses" is not immediately clear, nor is the meaning of "political purposes."[116] As to the latter, the IRS specifically separates "political activities" (such as campaigning on behalf of a certain candidate) and "lobbying" (influencing legislation) into two separate categories for 501(c)(3) organizations.[117] Each is subject to different regulations, with a total ban on the former and the latter permitted but regulated.[118] The Bills purport to completely prohibit fundraising for "political purposes," but nonprofits are left to surmise for themselves what this includes.[119] As observed by the National Council of Nonprofits as to the Oklahoma Bill:

> [The] language in HB 2250 is so vague and ambiguous that it forces individuals inside and outside of Oklahoma to guess how the State will interpret their actions. When individuals have to guess whether

112. *Id.* at 52.

113. Memorandum from Tim Delaney, *supra* note 29, at 5.

114. *Id.* (emphasis added).

115. *Id.* at 6.

116. *Id.* at 7–8.

117. *Exemption Requirements—501(c)(3) Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations (last updated June 28, 2016).

118. *Political and Lobbying Activities*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/political-and-lobbying-activities (last updated June 10, 2016).

119. Memorandum from Tim Delaney, *supra* note 29, at 1.

> their actions may or may not trigger a loss of their freedom or property, a law is vague and overly broad in violation of the Due Process protections of the Fifth and Fourteenth Amendments . . . .[120]

A law may additionally be challenged under the Due Process Clause as overly broad if it "reaches a substantial amount of constitutionally protected conduct."[121] As discussed above, the Supreme Court has been unequivocal in its affirmation of First Amendment protection for charitable fundraising and political speech—both of which would be reached by the Bills.

D. Commerce Clause

The Bills would also violate the Commerce Clause by discriminating against out-of-state animal groups and by inhibiting interstate commerce without a legitimate local interest. The Constitution vests the United States Congress alone with the power to regulate commerce "among the several States."[122] Under the doctrine known as the "dormant" Commerce Clause, the Supreme Court has interpreted this power granted to Congress to imply a complementary limit on state power.[123] In *City of Philadelphia v. New Jersey*, in which a New Jersey law prohibited the importation of nearly all waste from outside the state, the Supreme Court established that the "crucial inquiry" in assessing a state's power under the dormant Commerce Clause is whether a law "regulates evenhandedly to effectuate a legitimate local public interest, and [whether] its effects on interstate commerce are only incidental."[124] If the asserted local interest is found to be indeed legitimate, then a court should look to the relative importance of the local interest and whether less burdensome means to serve it are available.[125] Sometimes a burden on interstate commerce may be unavoidable and justifiable.[126] States may legislate to protect public health and safety, for example, by prohibiting the importation of items that by their very movement risk contagion.[127] But pure economic protectionism by a state, such as a law

120. *Id.* at 5.

121. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

122. U.S. CONST. art. I, § 8, cl. 3.

123. City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.").

124. *Id.* at 624 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

125. *City of Philadelphia*, 437 U.S. at 624.

126. *Id.*

127. The Court has stated that such laws simply prevent trafficking in dangerous articles (whatever their origin may be) and thus do not discriminate against interstate commerce as

that "overtly blocks the flow of interstate commerce at a State's borders," is generally *per se* invalid.[128]

By prohibiting fundraising in-state for the purpose of out-of-state spending, the Bills explicitly discriminate against out-of-state charities and inhibit the flow of funds across state lines. As an "object of interstate trade," a charitable donation moving across state lines would be protected under the Court's analysis in *City of Philadelphia*.[129]

Thus, because the Bills would regulate interstate commerce, they will only be found to be constitutional if they serve a legitimate local purpose, the effect on interstate commerce is merely incidental, and less burdensome means are not available.[130] In this case, statements by the Bills' sponsors indicate that one of the primary purposes of the Bills is to favor local animal groups over nonlocal groups.[131] In Oklahoma, Representative Renegar told a House Committee, "[o]ne of the intended consequences of this bill . . . is that we need to direct people's attention more toward our local shelters and humane societies."[132] In Missouri, Representative Davis reportedly told a journalist that "[m]oney raised in Missouri should stay in the state, or the vast majority of it."[133] But this would seem to be the kind of economic protectionism prohibited by *City of Philadelphia*.[134] The Supreme Court has consistently invalidated laws that employ "illegitimate means of isolating the State from the national economy," even if a legitimate local goal is sought.[135] The prevention of fraud, another possible goal of the Bills and a legitimate one under the Court's precedents on charitable solicitation, could be achieved by ends less burdensome on interstate commerce than the total prohibitions proposed by these Bills.[136] While the efficacy of national versus local charities is arguable—and that judgment can and should be made by an individual donor in deciding to which groups to donate—the Bills' effort to legislate this decision would be an impermissible restriction on interstate commerce.

---

such. *Id.* at 628–29.

128. *Id.* at 624.

129. *Id.* at 622.

130. *City of Philadelphia*, 437 U.S. at 624.

131. Hearing on House Bill 2250, *supra* note 18, at 9:07–9:14.

132. *Id.* at 9:10–9:11.

133. Hrywna, *supra* note 18.

134. *See City of Philadelphia*, 437 U.S. at 624, 628.

135. *Id.* at 627 (first citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522–24 (1935); then citing Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10–12(1928); then citing Johnson v. Haydel, 278 U.S. 16, 17 (1928); then citing Toomer v. Witsell, 334 U.S. 385, 403–04 (1948); and then citing Edwards v. California, 314 U.S. 160, 173–74 (1941)).

136. *See id.* at 624.

CONCLUSION

If the Bills were ever to become law, litigation over their constitutionality would seem inevitable. The Supreme Court precedent outlined here, as well as recent ag-gag litigation, would provide a clear roadmap for such a challenge. If such a challenge was successful, the plaintiff could be awarded attorney's fees,[137] which would be an additional expense for tax payers over and above the resources already expended in promulgating the Bills.

If pursued, the Bills would set a dangerous precedent. Like the ag-gag laws, the Bills target animal advocates in particular. But advocates of other causes should likewise be concerned by the Bills' proposed limitation on nonprofit advocacy. As relevantly observed nearly twenty years ago, in light of the important role that nonprofits play in our society, legislators should take great care in regulating the nonprofit sector:

> [T]he nonprofit sector makes a significant, probably pivotal, contribution to the American form of representative democracy in at least three respects. First, the nonprofit sector teaches the skills of self-government. Second, it inculcates the habits of tolerance and civility. Finally, it mediates the space between the individual and the other two sectors of society, that is, the "public" or governmental sector and the "private" or "entrepreneurial" or "proprietary" sector. Thus, the nonprofit sector acts as a counterpoise against excessive displays of power emanating from the public or private sectors. Consequently, any legislative attempt to change the way the nonprofit sector is regulated should preserve its capacity to play these three political roles effectively.[138]

The Bills would hamper the ability of nonprofits to stand up to private sector and governmental interests that affect animals, which—even apart from the Bills' unconstitutionality—makes them bad policy.

---

137. *See* Animal Legal Def. Fund v. Otter, No. 14-cv-00104-BLW, 2016 U.S. Dist. LEXIS 66463, at *5 (D. Idaho May 18, 2016) (awarding attorneys' fees under 42 U.S.C. § 1988(b) for party prevailing on significant issue in litigation achieving some of benefit party sought in bringing suit).

138. Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. L. & PUB. POL'Y 555, 556 (1998).