

FIXING SHELTER ANIMAL OVERPOPULATION: USING PET FOOD REGISTRATION FEES TO FUND STATEWIDE, LOW-COST SPAY/NEUTER PROGRAMS

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ABSTRACT

At the outset of 2024, animal shelters and rescue facilities throughout the United States reported the most crowded conditions in decades, citing numbers that would be even higher if they only had more space. The crisis is the result of a precipitous drop in adoptions after a boom during the pandemic, coupled with persistent economic concerns and the rising costs of inflation, including in the cost of veterinary care. Tragically, over six million dogs and cats enter shelters every year awaiting forever homes, though too few find them, as nearly two million of these adoptable animals are euthanized each year. These numbers do not account for homeless, non-sheltered animals, which include uncontrolled populations of feral cats and wild dogs in many states.

This Article addresses the tragic and seemingly intractable problem of companion animal overpopulation by focusing on a realistic and attainable solution: increased access to free or low-cost spay and neuter surgeries for cats and dogs. States previously have tried numerous options for raising funds devoted to low-cost spay/neuter programs, with little to no success. More recently, five states have passed virtually identical legislation increasing pet food registration fees – already mandatory for selling pet food in every state but Alaska – precisely for this purpose. In addition to imposing a surcharge on the registration fees with which pet food manufacturers already must comply, the legislation establishes a fund within the state’s department of agriculture estimated to generate approximately one million dollars a year, with those funds going exclusively toward establishing a grant program for municipal shelters and other rescue organizations to offer free or low-cost spay/neuter surgeries to the many communities especially in need.

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While the grant programs in early adopting states, such as Maryland, have been wildly successful in reducing shelter euthanasia rates, the program in New Mexico is the subject of ongoing litigation challenging its constitutionality under the Equal Protection Clause and Commerce Clause of the United States Constitution. As well, newly proposed federal legislation concerning the labeling and marketing of pet food products presents a preemption plot-twist, as pet food manufacturers have demonstrated ambivalence about the increased fee legislation and current patchwork of state laws on point in this arena. This Article addresses each of these constitutional challenges and concludes not only that increased state pet food registration fees pass constitutional muster under the Equal Protection Clause, Commerce Clause, and Supremacy Clause, but that this proposed funding mechanism for increased access to free or low-cost spay/neuter services has significant promise and long-term viability. Moreover, this funding method will save taxpayers millions of dollars in sheltering and euthanasia costs and, even if the increased fee is passed on to pet food consumers, will increase the cost of pet food by merely one dollar per pet per month. Finally, the sheer number of animal lives saved alone is enough to advocate for replicating the success of pet food fee-funded spay/neuter programs in every state.

INTRODUCTION

At the outset of 2024, animal shelters and rescue facilities throughout the United States reported the most crowded conditions in decades, citing numbers that would be even higher if they only had more space.¹ The crisis is the result of a precipitous drop in adoptions after a boom during the COVID pandemic, coupled with persistent economic concerns and the rising costs of veterinary care.² Nearly seventy percent of American households report having at least one cat or dog, and most consider them family.³ Yet, tragically, over six million dogs and cats enter shelters every year awaiting forever homes, though too few find them, as nearly two million of these

¹ See Jacob Bogage, *As the Pandemic Adoption Boom Cools, Pet Shelters Overflow*, WASH. POST, https://www.washingtonpost.com/business/2023/12/25/dog-cat-animal-shelter-adoption/?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsl etter&wpisrc=nl_headlines.

² *Id.* (“The cost of veterinary services jumped 9 percent from November 2022 to November 2023, according to the Bureau of Labor Statistics. Pet food costs rose 5.6 percent in the same period.”)

³ *See id.*

adoptable animals are euthanized each year.⁴ In 2021 and 2022, the number of dogs and cats euthanized in the U.S. actually *increased* for the first time in the five years prior.⁵ These numbers do not account for homeless, non-sheltered animals, which include uncontrolled populations of feral cats and wild dogs in many states. In addition to the emotional toll that these circumstances have on shelter employees, rescue organizations, and animal advocates, the enormous financial burden of dealing with this crisis is borne largely by taxpayers.

This Article addresses the tragic and seemingly intractable problem of companion animal overpopulation by focusing on a realistic and attainable solution: increased access to free or low-cost spay and neuter surgeries for cats and dogs. State and local governments previously have tried numerous options for funding widespread spay/neuter programs, from tax checkoffs to specialty license plates, and some even have attempted mandatory spay/neuter laws. But these measures have met with little success, especially in states with large geographic areas, considerable rural expanses, and lower populations. More recently, five states have established funding mechanisms by increasing an already-existing fee charged to pet food manufacturers for registering instate sales of pet food and treats. Specifically, Maryland, Maine, West Virginia, New Mexico, and Delaware have — by legislation — established a fund within each state’s Department of Agriculture estimated to generate over one million dollars a year, with deposits going exclusively toward establishing a grant program for municipal shelters and other rescue organizations to offer free or low-cost spay/neuter surgeries to communities especially in need. Administratively, the idea is brilliant because it uses agency infrastructure already in place.

While the spay/neuter grant programs in adopting states have been wildly successful in reducing shelter euthanasia rates by significant percentages, the program in New Mexico is the subject of ongoing litigation challenging its constitutionality under both the Commerce Clause and Equal Protection Clause of the U.S. Constitution. That lawsuit is led by the same entity — the Pet Food Institute, the trade association whose members comprise the majority of U.S. pet food and treat manufacturers — that, ironically, actively supported extension of the exact same legislation in Maryland.

⁴ *See id.*

⁵ *See* Courtney Norris & Dorothy Hastings, *Animal Shelters Struggle as Many Pets Adopted During the Pandemic Are Returned*, PBS NEWS HOUR (Feb. 20, 2023 6:20 PM EDT), <https://www.pbs.org/newshour/show/animal-shelters-struggle-as-many-pets-adopted-during-pandemic-are-returned> (last visited June 4, 2024).

Part I of this Article describes the growing problem of “companion animal” overpopulation in this country and the only viable solution: increased access to free or low-cost spay/neuter services. Part II describes the successful state legislative efforts to increase funding for low-cost spay/neuter by implementing a spay/neuter “surcharge” on top of the nominal registration fees already required for pet food manufacturers to sell their products in almost every state. Part III focuses on New Mexico, where companion animal overpopulation has reached record levels, and where its version of such legislation is currently the subject of litigation challenging its constitutionality. Part IV explains why the New Mexico legislation does not violate either the Equal Protection Clause or Commerce Clause and therefore is constitutional. Part IV also examines whether recently (2024) proposed federal legislation intending to bring pet food regulation under the auspices of the federal Food and Drug Administration would preempt the specific state legislation advocated by this Article, concluding that it would not.

I. COMPANION ANIMAL OVERPOPULATION

Animal shelters across the United States started 2024 with the worst overcrowding they have seen in years, a crisis attributed to ongoing economic concerns such as inflation in the cost of pet food, the rising costs of veterinary care, as well as a cooldown in the adoption boom during the pandemic.⁶ Currently, 250,000 more adoptable cats and dogs reside in shelters than just over a year ago, a figure that might be even higher if shelters had the capacity to take more animals.⁷ Additionally, animals are sitting in shelters for longer periods of time. The Humane Rescue Alliance in Washington, D.C., reports that while intake of cats and dogs has increased four percent, adoptions are down ten percent.⁸

While owning a pet might be more expensive than it was three years ago, the economy is not the only relevant factor. Two-thirds of American households provide a home for a cat or dog, yet the reality is that population growth of both types of “companion animals” have outpaced adoptions by a long shot. According to research conducted by animal advocacy groups as well as veterinary organizations, “owners skipped three million spay or neuter

⁶ See, e.g., Bogage, *supra* note 1.

⁷ See *id.*; see also Norris & Hastings, *supra* note 5 (“America’s animal shelters are in crisis. Many are at capacity and understaffed, with adoptions lagging. In fact, animals are sitting in shelters for longer than they have in four years.”)

⁸ See Norris & Hastings, *supra* note 5.

surgeries in 2020 and 2021.”⁹ In concrete terms, one unaltered female dog and her offspring can produce 67,000 puppies in just six years. A single, unspayed female cat and her offspring can produce roughly 370,000 kittens in about the same amount of time.¹⁰ Thus, in addition to competing with breeders, shelters — and the animal advocates that support them in countless ways — are competing with themselves.

A. *The Scope of the Problem*

First, a note on terminology. This Article concerns “pet food” registration fees; however, the preferred terminology for the end-users of such products is “companion animal.” “Companion animals are those animals who share our homes and our lives.”¹¹ The term “companion animal” represents an intentional, rhetorical shift from the term “pet,” which implies ownership.¹² “Despite its prevalence, ‘pet’ is surely a derogatory term with respect to both the animals concerned and their human caregivers.”¹³ Indeed, most people living with one or more such creatures — primarily, but not

⁹ *Id.* See also Austin Cannon, *Millions of Pets Weren’t Spayed or Neutered During the Pandemic and That’s a Big Problem*, SHELTER ANIMALS COUNT: THE NATIONAL DATABASE (Sept. 13, 2022), <https://www.shelteranimalscount.org/millions-of-pets-werent-spayed-and-neutered-during-the-pandemic-and-thats-a-big-problem/> (last visited July 11, 2024).

¹⁰ See *Animals are Not Ours: Spay and Neuter*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), <https://www.peta.org/issues/animal-companion-issues/overpopulation/spay-neuter/> (“Sterilized animals live longer, happier lives. Spaying eliminates the stress and discomfort that females endure during heat periods, eliminates the risk of uterine cancer, and greatly reduces the risk of mammary cancer. Neutering makes males far less likely to roam or fight, prevents testicular cancer, and reduces the risk of prostate cancer. Altered animals are less likely to contract deadly, contagious diseases, such as feline AIDS and feline leukemia, that are spread through bodily fluids.”); see also *id.* (reporting that one pair of unspayed/unneutered cats and their offspring can produce 420,000 cats in seven years).

¹¹ *Companion Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/focus_area/companion-animals/ (last visited Mar. 1, 2023). Although service (or therapy) animals might immediately jump to mind, such animals fall into distinct categories based on their specific training and level of protection under federal and state law.

¹² *The Journal of Animal Ethics*, which issued its first publication in 2011, addressed in a cover note from the editors the derogatory nature of the term “pet” and specifically called for authors to use the preferred term: “companion animal.” See Terms of Discourse, J. ANIMAL ETHICS (2011) 1: vii-ix, <https://www-jstor-org.libproxy.unm.edu/stable/10.5406/janimalethics.1.1.vii?seq=2>.

¹³ See *id.*; see also Andrea Laurent-Simpson, *Just Like Family: How Companion Animals Joined the Household*, N.Y.U. PRESS (2021).

limited to, cats and dogs — would agree that they are irreplaceable members of the family.

An estimated 68% of American households include at least one companion animal,¹⁴ which calculates to nearly 85 million homes. The American Pet Products Association estimated for 2018 that in the United States, \$72.1 billion will be spent on animal companion-related expenditures this year (up from \$69.5 billion in 2017). These expenses include necessities such as food, supplies, over-the-counter medicine, and veterinary care.¹⁵ Essential expenditures such as these are no match, however, for the amount spent on decidedly non-essential items for animal companions and, more so, for the behaviors that people report about their interactions with them. *The New York Times* reports that 70 percent of animal parents say they sometimes sleep with their furry companions, 65 percent buy Christmas gifts for them, 23 percent cook special meals for them, and 40 percent of married women with one or more animal companions say they get more emotional support from them than from their spouses.¹⁶ A recent survey of just 2,000 cat and dog parents revealed that between one quarter to one third have at least one social media account devoted to their companion animal(s), and those surveyed admitted to having more followers for their animal accounts than for their individual accounts, with an average of just under one thousand followers for each account.¹⁷

At the same time, however, there are more cats and dogs in shelters than ever before. Nationwide, well over six million (6,000,000) cats and dogs — approximately three million of each — enter shelters across the country every year.¹⁸ Tragically, nearly one-third of those animals, almost a million, typically healthy, adoptable cats and dogs, are euthanized each year due to shelter overcrowding.¹⁹

¹⁴ See Bogage, *supra* note 1.

¹⁵ *The Human-Animal Bond Throughout Time*, MICH. STATE UNIV. COLL. OF VETERINARY MED., <https://cvm.msu.edu/news/perspectives-magazine/perspectives-fall-2018/the-human-animal-bond-throughout-time> (Dec. 7, 2018).

¹⁶ See *id.*

¹⁷ See, e.g., *One in Four Pet Owners are Transforming Their Furry Babies Into Social Media Stars*, DOGINGTON POST, <https://www.dogingtonpost.com/one-in-four-pet-owners-are-transforming-their-furry-babies-into-social-media-stars/> (Apr. 26, 2022).

¹⁸ See *Pet Statistics*, AM. SOC'Y. FOR THE PREVENTION OF CRUELTY TO ANIMALS (ASPCA), <https://www.aspc.org/helping-people-pets/shelter-intake-and-surrender/pet-statistics> (last visited Mar. 3, 2023).

¹⁹ See, e.g., *Why Spay and Neuter Is So Important*, MD. DEP'T. OF AGRIC., https://mda.maryland.gov/spay_neuter_program/Pages/Why-Spay-and-Neuter-Is-So-Important.aspx (last visited Mar. 30, 2023).

The origins of the companion animal overpopulation issue are numerous, with most reasons traceable to the post World War II era. Of course, humans have been breeding dogs to suit their purposes for thousands of years, but it was only after considerable industrialization that rural populations moved to cities, and increased incomes gave rise to new housing in suburban areas, which in turn provided more opportunities for families to adopt pets.²⁰ Concurrent developments in both veterinary medicine and pet food extended the life expectancy of dogs and cats, which also increased their reproductive capacity.²¹ Commercial breeders as well as private “backyard breeders” exacerbated (and continue to exacerbate) what was previously a less “intentional” over-reproductive problem by flooding the market with purebred puppies.²² In addition, millions of people either cannot afford to spay/neuter their pet(s) or affirmatively choose not to do so, largely based on misinformation. Combined with the millions of others who purchase or adopt a dog or cat — only later to decide that he or she is inconvenient, unaffordable, or unwelcome for any number of other reasons — the crisis is spiraling out of control and unlikely to be remedied anytime soon.²³

Failing to address this problem not only has dire consequences for companion animals, but also for communities faced with animal overpopulation and its numerous concomitant issues. Millions of tax dollars

²⁰ See, e.g., Stephen Zawistowski, et al., *Population Dynamics, Overpopulation, and the Welfare of Companion Animals: New Insights on Old and New Data*, 1 J. APPLIED ANIMAL WELFARE SCI. 193, 194 (1998).

²¹ See *id.*

²² See, e.g., Joshua Frank, *An Interactive Model of Human and Companion Animal Dynamics: The Ecology and Economics of Dog Overpopulation and the Human Costs of Addressing the Problem*, 32 HUM. ECOLOGY 107, 108 (Feb. 2004).

²³ The crisis, moreover, is not simply a national one, but a global one. See *Animal Overpopulation Crisis*, WORLD ANIMAL FOUND., <https://worldanimalfoundation.org/advocate/companion-animals/params/post/1275970/animal-overpopulation-crisis> (last visited Mar. 15, 2023):

Animal overpopulation has definitely become a global crisis. There are simply not enough homes for the number of abandoned animals. As cats and dogs are domesticated animals, they cannot survive in the wild or on the streets. They depend largely on humans for food, shelter, and protection. The animals involved that are without loving homes are either forced to enter shelters or left on roadsides. A large number of pets are given up by their pet parents for being too old or too sick or because they could simply not afford to keep them. The reasons also include allergies, moving out, or incompatibility with a family member or other pets. Another reason for overflow is that people associate pets with the status symbol and prefer buying a true breed[.]

are spent each year on both animal sheltering and the cost of euthanasia. In fact, some estimates are that taxpayers spend approximately *two billion dollars* annually for shelters to trap, house, euthanize and dispose of homeless animals.²⁴ Moreover, state and national statistics largely address animals that have found their way to shelters and thus do not account for issues more common in stray communities, such as the transmission of rabies and other viruses, or animal control calls responding to reports of aggressive behavior.²⁵ Intact dogs are responsible for more bite incidents. As well, animal control agencies spend more on intact dogs and cats because they are more likely to roam.²⁶

In New Mexico, the animal overpopulation problem is even more acute than in other states and has gotten significantly worse in the wake of the COVID-19 pandemic for a variety of reasons. Even in a typical year, upwards of 70,000 homeless cats and dogs are euthanized in New Mexico shelters, and the state is spending tax dollars to do so.²⁷ According to Animal Protection New Mexico (APNM), a leading voice on this issue:

Cat and dog overpopulation is at a crisis level in New Mexico. Uncontrolled breeding of cats and dogs, including those who are stray, abandoned and homeless or those with homes, has created this costly and tragic epidemic. The number of dogs, cats, kittens and puppies received annually by New Mexico's public and private shelters is estimated at more than 135,000; of those, nearly half are euthanized each year because there are not enough homes for them all. The health, safety and general welfare of the animals and residents of New Mexico will be better served by having affordable spay/neuter services widely available in New Mexico.²⁸

²⁴ See *Pet-overpopulation*, PAW WORKS, <https://pawworks.org/pet-overpopulation> (last visited June 24, 2024).

²⁵ See Helga Schimkat, *Creating a Fund to Aid Low-Income Households in Sterilizing, Vaccinating and Spaying or Neutering their Companion Animals*, N.M. ANIMAL SHELTERING BD. & REGUL. & LICENSING DEP'T, at 6-7 (Jan. 24, 2012) [hereinafter "NM Feasibility Study"] [<https://perma.cc/X64V-6T8H>].

²⁶ See *id.*

²⁷ *Pet Food Fee Could Fund Spay/Neuter Clinics in New Mexico*, PUBLIC NEWS SERVICE, <https://publicnewsservice.org/2018-02-08/consumer-issues/pet-food-fee-could-fund-spay-neuter-clinics-in-new-mexico/a61336-1> (last visited Mar. 16, 2023).

²⁸ *Companion Animal Overpopulation: The Importance of Spay/Neuter Services in New Mexico*, ANIMAL PROTECTION NEW MEXICO, <https://apnm.org/what-we-do/building->

B. *The Only Solution*

There is widespread agreement among veterinarians, animal shelters, and non-profit advocacy organizations nationwide that “[t]he single most important thing that we can do to save cats and dogs from all the suffering and death that their overpopulation causes is to spay and neuter them.”²⁹ Indeed, American Humane recommends that all cats and dogs adopted from public or private animal care and control facilities should be required to be spayed or neutered,³⁰ and least thirty-two states do in fact require sterilization to adopt an animal from a pound, shelter, or rescue organization.³¹

Spay or neuter surgeries are common, low-risk procedures typically performed in a veterinary office or clinic. The typical spay – the surgery for female dogs or cats – involves removing the ovaries, fallopian tubes, and

foundations-to-keep-animals-safe/new-mexico-spay-neuter-resources-directory/companion-animal-overpopulation/ (last visited Mar. 1, 2023). The problem is exacerbated in New Mexico because, for the third year in a row, the state has ranked last in terms of animal protection laws. *See Third Year in a Row: New Mexico Ranked Worst State for Animal Protection Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/third-year-in-a-row-new-mexico-ranked-worst-state-for-animal-protection-laws/> (last visited Mar. 1, 2023). That said, Animal Protection New Mexico and other organizations are working hard to change the status quo.

²⁹ *See, e.g., Breaking News on SB57 and the Fight to Bring Spay/Neuter Funding to New Mexico*, ANIMAL PROTECTION NEW MEXICO, <https://apvnm.org/breaking-news-on-sb-57-and-the-fight-to-bring-spay-neuter-funding-to-new-mexico/> (last visited Mar. 30, 2023). (“Spaying and neutering are routine, affordable surgeries that can prevent thousands of animals from being born, only to suffer and struggle to survive on the streets, be abused by cruel or neglectful people, or be euthanized in animal shelters for lack of a loving home”). *See also* Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L. J. 247, 312 (2008) (emphasis added) (stating owners who fail to spay/neuter “are the greatest single cause of the companion animal tragedy”); *see also Ending Pet Homelessness*, HUMANE SOC’Y, <https://www.humanesociety.org/all-our-fights/ending-pet-homelessness> (last visited Mar. 27, 2023).

³⁰ *See Position Statement on Animal Population Control*, AMERICAN HUMANE, <https://www.americanhumane.org/position-statement/animal-population-control/> (“American Humane supports the passage of laws and regulations mandating that all cats and dogs adopted from public or private animal care and control facilities be sterilized. It is less certain that community-wide mandatory spay/neuter laws are effective in addressing pet overpopulation. More information needs to be gathered on the benefit of prior legislative initiatives to determine long-term benefits.”) (last visited Mar. 16, 2023).

³¹ *Mandatory Spay/Neuter Laws*, AMERICAN VETERINARY MEDICAL ASS’N (June 2019), <https://www.avma.org/advocacy/state-local-issues/mandatory-spayneuter-laws>.

uterus (although there is also an option to leave the uterus intact).³² As long as the ovaries are removed, the animal cannot reproduce, and behaviors related to the breeding instinct are eliminated. In the typical neuter surgery for male pets, the testicles are removed, which similarly eliminates the ability to reproduce as well as reducing male breeding behaviors.³³ There are several less common, less extensive methods of surgical sterilization that keep hormones intact but still result in inhibiting reproduction, and efforts are ongoing to develop methods that would do the same without the need for surgery or anesthesia.³⁴ While both spaying and neutering are major surgical procedures, they are common and low-risk, especially when performed relatively early in the life of a companion animal.³⁵

The benefits of spay/neuter extend well beyond simply being an animal population control mechanism. Behavioral problems such as spraying, marking, mounting, yowling, and aggression, are typically minimized following a spay or neuter surgery.³⁶ Some common cancers and other diseases are significantly less prevalent in spayed/neutered animals, and neutered male animals (especially dogs) are less likely to roam — up to four miles from home — in search of female dogs in heat, which behavior tends to increase their chances of ending up in shelters.³⁷

Of course, mandatory spay/neuter laws for companion animals are not without controversy. A number of states have attempted to pass such laws for all companion animals but have been unable to do so for a variety of reasons, including extreme political pressure by breeders and organizations such as the American Kennel Club that vehemently oppose mandatory sterilization laws, maintaining that “responsible” breeders are not the problem.³⁸ In lieu of statewide legislation, a few city and local governments have been able to adopt mandatory spay/neuter ordinances. For example, in 2008, Los Angeles County passed one of the nation’s most stringent

³² See *Spaying and Neutering*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/resources-tools/pet-owners/petcare/spaying-and-neutering> (last visited June 19, 2024).

³³ See *id.*

³⁴ See *id.* Nonsurgical options are not available at this time for companion animals in the U.S., but research is underway involving such options involving sterilants, anti-fertility vaccines, or hormone implants.

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*; see also *Rio Grande Kennel Club v. City of Albuquerque*, 144 N.M. 636 (Ct. App. 2008) (addressing constitutionality of city ordinance requiring, among other things, mandatory spay/neuter).

spay/neuter laws, which requires most dogs and cats to be spayed or neutered by the time they are four months old.³⁹ However, as any version of mandatory spay/neuter laws is unlikely to take hold in most jurisdictions, the answer comes back around to the proven benefits of wider availability to low-cost, voluntary spay/neuter services.

The question becomes how increased access to low-cost spay/neuter services can be sustainably funded at the state level to make it more available and affordable for all companion animals. An emphasis on low-income households (and so too populations of homeless individuals with companion animals) is critical. Spay/neuter expert Peter Marsh, founder of Solutions to Overpopulation of Pets and author of *Getting to Zero: A Roadmap to Ending Animal Shelter Overpopulation in the United States*, has long emphasized that providing financial assistance for the spay/neuter of cats and dogs living in lower-income households is key.⁴⁰

A popular and long-standing public funding mechanism in many states is to use funds gained from the sale of specialty license plates.⁴¹ In New Mexico, for example, one can purchase a “spay/neuter” license plate, with \$25 of the \$37 paid for each one going to spay/neuter programs in the purchaser’s county.⁴² Typically, however, this option fails to generate

³⁹ See *id.* The Los Angeles law contains several important exceptions, such as animals that have competed in shows or sporting competitions, guide dogs, police dogs, and dogs belonging to professional breeders.

⁴⁰ See Peter Marsh, *Getting to Zero: A Roadmap to Ending Animal Shelter Overpopulation in the United States* (Town & Country Reprographics, Inc. 2012).

⁴¹ Solutions to Overpopulation of Pets is a group that spearheaded the establishment of publicly funded companion animal spay/neuter programs in New Hampshire. See SHELTER OVERPOPULATION, http://www.shelteroverpopulation.org/Getting_To_Zero.htm (last visited June 12, 2024). During the first six years after he established such programs in New Hampshire, shelter euthanasia rates dropped by a dramatic 75 percent. The state was so successful that it ended up able to *import* cats and dogs from surrounding states to New Hampshire shelters for adoption.

⁴¹ See, e.g., Phyllis Coleman, et al., *It’s Raining Cats and Dogs . . . Government Lawyers Take Note: Differential Licensing Laws Generate Revenue, Reduce Costs, Protect Citizens, and Save Lives*, 40 STET. LAW REV. 393, 394 and 404-406 (2011) (recommending that municipalities in Florida and elsewhere enact ordinances that provide for substantially higher license plate fees for unsterilized cats and dogs as a critical step in eliminating overpopulation).

⁴² See *New Mexico Spay/Neuter License Plate*, ANIMAL PROTECTION NEW MEXICO, <https://apnm.org/what-we-do/building-foundations-to-keep-animals-safe/shelter-savvy/nm-spayneuter-programs-and-animal-resources/new-mexico-spayneuter-license-plate/> (last visited March 23, 2023) [<https://perma.cc/CR5F-VJQY>]. In 2009, NM Senate Bill 185 increased the percentage of the purchase price for such specialty license plates going to local programs and streamlined the money’s distribution process. See *id.*

significant funds. Moreover, it is not specifically directed toward making spay/neuter services available to lower-income residents or toward establishing a coordinated, statewide program that ensures widespread geographic coverage or education about the importance of spay/neuter. In 2014, for example, the New Mexico Animal Sheltering Board oversaw the dissemination of just under \$26,000 from license plate fees to spay/neuter programs in twenty counties across the state.⁴³ In 2015, the Governor approved an additional \$70,000 toward this end, with a focus on the most vulnerable counties, those whose public shelters suffered the highest intake and greatest euthanasia rates, and in 2016, an additional \$12,000 in license plate funds were distributed to four more communities.⁴⁴ Finally, in 2018, the Board approved just under \$90,000 in funding to twenty-one programs in nine counties.⁴⁵ These are solid amounts for specialty license plate sales, but they pale in comparison to the amount of funds raised in one-calendar year by the pet food fee mechanism that this Article recommends. In New Mexico alone, more than ten times the license plate maximum of \$90,000 was raised in the 2022 calendar year by virtue of legislation requiring pet food manufacturers to pay a higher fee to register their products in the state.⁴⁶

The gist of such legislation, discussed in more detail in Parts II and III below, has been to increase the registration or licensing fee that most pet food manufacturers already pay to sell their products in a particular state, thus also taking advantage of the administrative agency infrastructure already in existence to manage and disseminate such funds to appropriate organizations and providers. This fee mechanism has been in place for the last ten years in Maryland and met with extraordinary success there, substantially reducing the number of animals in shelters and, importantly, overall euthanasia rates.⁴⁷ West Virginia and Maine likewise have for many years also had in place versions of similar legislation increasing registration fees on pet food manufacturers to fund free or low-cost spay/neuter programs. Though these two states' programs have slightly smaller scope and arguably have targeted more discrete, state-specific issues, their measures of success have been well-

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See Breaking News on SB57, supra* note 29.

⁴⁷ In fact, the Pet Food Institute, which originally opposed the legislation in Maryland and is currently litigating the constitutionality of the fee mechanism in New Mexico, affirmatively supported extension of it in Maryland by way of a letter to the Maryland Senate when the legislation was up for renewal. *See* Letter from Pet Food Institute to Md. Sen. in Supp. S.B. 206 Extension (Jan. 14, 2022) [hereinafter "PFI Letter"], https://mgaleg.maryland.gov/cmte_testimony/2022/ehe/1f0Oq92scX_W6OSyyc9hs84eUIs-w7pqGp.pdf [<https://perma.cc/MB6H-4L6S>].

recognized. Delaware passed increased pet food registration fee legislation in 2021, with funding first available in 2023.⁴⁸ Finally, New Mexico – the only Western state in the mix and the one most unlike the others culturally and geographically – passed a version of the legislation in late 2020. However, the spay/neuter program in that state has faced a series of implementation challenges and is the subject of ongoing litigation.

II. PET FOOD REGISTRATION FEES AS A FUNDING SOURCE

The pet food registration fee mechanism at play in the five states adopting this fundraising model works similarly, though the actual low-cost spay/neuter programs in place in each state have different parameters and requirements.⁴⁹ That is exactly what one would expect given the different geographies, populations, and specific concerns of the states at issue. Part II.A briefly describes the pet food registration fee mechanism, and II.B covers the legislation in place in Maryland, West Virginia, Maine, and Delaware. Maryland’s low-cost spay/neuter program deserves the most attention because it has met with exceptional success since its legislation was passed by the Maryland General Assembly in 2013 and renewed for ten more years thereafter. The spay/neuter programs in West Virginia, Maine, and Delaware are also addressed in turn below. The New Mexico program, however, is the subject of Part III because, despite having passed its version of the pet food registration fee legislation in 2020 – and having collected increased fees on schedule since 2022 – its program has faced numerous delays in implementation, including having become the subject of litigation challenging the legislation’s constitutionality.

A. Pet Food Registration Fees

Currently, every state except Alaska charges animal feed manufacturers (including pet food and feed for livestock) a fee for selling food in the state.⁵⁰ A state agency – typically the Department of Agriculture

⁴⁸ H.B. 263, 151st Gen. Assemb. (Del. 2021). *See also Update: Delaware Spay/Neuter Funding Bill Passed!*, FAITHFUL FRIENDS ANIMAL SOC’Y, (June 22, 2021), <https://faithfulfriends.us/advocacy-alert-new-delaware-spay-neuter-funding-bill/>; Daniel Larlham, Jr., *New Pet Food Fees Won’t Start to Bring in Money Until 2023*, DELAWARE LIVE (Jan. 24, 2022), <https://delawarelive.com/new-pet-food-fees-wont-start-to-bring-money-until-2023/>.

⁴⁹ For example, individuals may apply directly for grants in New Mexico; however, in Maryland and West Virginia grants are available only for shelters, nonprofits, and other rescue organizations.

⁵⁰ *See* Schimkat, Helga, *A Guide to Enacting State Legislation for Sustainable*

– is charged with overseeing the safety and quality of food intended for consumption by companion animals and livestock, similar to the role that the Food and Drug Administration plays with respect to food and medicine intended for humans. The funds are typically collected per each “label,” which is every distinct formula of pet food (or treats).⁵¹ The premise of the pet food fee legislation is to add a specific surcharge to this registration fee that would be earmarked and then distributed by a state agency via a coordinated, statewide grant program designed to increase access to low-cost spay/neuter services.

Even in states that have not adopted such a surcharge, there is already an agency in charge of collecting registration fees. Moreover, as discussed above in Part I.B, most states already have in place a fund for state spay/neuter services, typically collected from specialty license plate sales, tax checkoffs, and animal abuse fines. Accordingly, in addition to the possibility of generating a more sufficient, secure, and reliable stream of revenue, increasing pet food registration fees for spay/neuter purposes has the benefit of at least two administrative agencies that might oversee distribution – the one already collecting the registration fees and the one already overseeing spay/neuter efforts. Often, these are the same entity. United Spay Alliance’s *Guide to Enacting State Legislation for Sustainable Spay/Neuter Funding* reports that an incremental increase in pet food registration fees stands to generate approximately one million dollars per year per state (which has been exactly true in the states following this model) specifically for spay/neuter program funding.⁵²

A. Maryland, West Virginia, Maine, and Delaware

Maryland’s “Spay and Neuter Grants Program” was initially conceived of in a white paper written by Maryland Votes for Animals.⁵³ That report was followed by a comprehensive study conducted by the state appointed Spay and Neuter Task Force, which was comprised of representatives from animal shelters, animal control agencies, spay and neuter organizations, the Maryland Veterinary Medical Association, and the

Spay/Neuter Funding, at 3, <https://summerlee.org/wp-content/uploads/Revised-United-Spay-Alliance-Spay-Neuter-Funding-Guide-04-12-2021-1.pdf>. A few states impose a fee based on tonnage instead of per label, but the idea is the same. *Id.*

⁵¹ *See id.*

⁵² *See id.* at 3-4.

⁵³ Program Background, MD DEP’T OF AGRIC., https://mda.maryland.gov/spay_neuter_program/Pages/Program%20Background.aspx (last visited Apr. 12, 2023).

Maryland Department of Agriculture.⁵⁴ Results of that report unfortunately mirrored the statistics noted above in Part I: approximately fifty percent of cats and more than thirty-three percent of dogs who found themselves in shelters were being euthanized.⁵⁵ The report underscored an “urgent need” for a statewide spay/neuter program, targeted to low-income pet owners, and touted the benefits of doing so: “The intake, housing, and euthanasia of these animals is costing Maryland taxpayers millions of dollars, and a statewide spay/neuter program has huge potential to benefit animals in facilities across the state, Maryland taxpayers, and low-income pet owners.”⁵⁶

The fee mechanism is simple and straightforward: “Any person who registers a commercial feed . . . that is prepared and distributed for consumption by a cat or dog shall . . . [p]ay to the Department [of Agriculture] for use in the spay/neuter fund [a fee] for each registered brand or product[.]”⁵⁷ That fee increased on a sliding scale after the legislation was passed, from \$50 to \$75 and finally to \$100 for each registered brand starting in September 2015.⁵⁸ The vast increase in spay/neuter services made available by these funds targets dogs and cats as well as colonies of feral, or “community” (unowned), cats. Grant funding is not provided directly to individuals but, rather, to local governments and nonprofit animal welfare organizations, who in their applications for funding attest to certain data, for example: how many surgeries they plan to perform, to what end users, and according to what schedule of availability.⁵⁹ Certain capital expenditures may also be covered by a grant, such as if an organization seeks to increase capacity by opening a new clinic or enhancing a mobile spay/neuter unit — or even simply by adding surgical equipment or recovery space.⁶⁰ An excellent website run out of the Maryland Department of Agriculture provides easily accessed information for both grant applicants as well as for end users

⁵⁴ TASK FORCE ON THE ESTABLISHMENT OF A STATEWIDE SPAY/NEUTER FUND, FINAL REPORT, at 1-2 (2012), [https://mda.maryland.gov/about_mda/Documents/SNAB/Task%20Force%20Final%20Report%20\(2012\).pdf](https://mda.maryland.gov/about_mda/Documents/SNAB/Task%20Force%20Final%20Report%20(2012).pdf).

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ Spay/Neuter Fund Reg., codified at COMAR 15.01.10.10, <https://dsd.maryland.gov/regulations/Pages/15.01.10.10.aspx>

⁵⁸ *Id.* The Maryland Department of Agriculture appointed a “Spay and Neuter Advisory Board” to assist in the formation of regulations and guidelines for grants and funding recommendations, which were solidified in 2014.

⁵⁹ *See* Grant Applications, MD DEP’T OF AGRIC., https://mda.maryland.gov/spay_neuter_program/Pages/grant-applications.aspx.

⁶⁰ *See id.*

of free spay/neuter services.⁶¹ Importantly by way of outreach, the website also contains detailed information for pet owners, organized by county, regarding clinics and other organizations providing free or low-cost spay/neuter services.⁶²

Maryland's program has met with success along several metrics. Animal shelters operated by local governments and other rescue organizations receiving state funds must submit quarterly reports providing information about their efforts' effectiveness. That data is used to determine overall program effectiveness as well as to identify specific areas in need for additional grant funds.⁶³ Just three years into the program, the Maryland Department of Agriculture reported that euthanasia of shelter animals had decreased substantially, and total shelter intake was also down statewide.⁶⁴ Indeed, because of Maryland's efforts over the ten years since the spay/neuter program has been in place, shelter euthanasia rates are down almost fifteen percent per year, which compounds to higher percentages over time.⁶⁵

Other than the fact that pet food registration fees fund each of their programs, the adopting states differ on how their programs are constructed and administered. That is not out of keeping with what one would expect given that the states in question are so differently situated. As noted above, geographic differences alone easily can dictate different needs and thus responses to animal overpopulation. As well, the states that have adopted pet food registration fee legislation have had different concerns requiring intervention. One aspect of Maryland's program, for example, involved specific attention to bully breeds in Baltimore, whereas Maine focused on feral, or "community" cats. Similarly, West Virginia noted specific concerns

⁶¹ The Grant Applications page is easy to find when searched and provides a comprehensive overview of the grant program, including a "one-stop" application portal containing all of the relevant applications documents in fillable, electronic form. *See id.*

⁶² *Spay and Neuter Services for Owned Pets*, MD DEP'T OF AGRIC., MARYLAND.GOV, https://mda.maryland.gov/spay_neuter_program/Pages/Free-Spay-and-Neuter-Services.aspx (last visited June 19, 2024).

⁶³ *See* Layne Litsinger, *Statewide Spay and Neuter Program Shows Promising Signs*, S. MD NEWS, https://www.somdnews.com/recorder/news/local/statewide-spay-and-neuter-program-shows-promising-signs/article_d0fbc37a-aa71-53cb-abaf-0be252eecd.html (May 30, 2018). For example, Somerset County, one of the poorest in Maryland, does not have its own shelter or clinic; without the statewide program, counties such as Somerset would not be able to address overpopulation. *See id.*

⁶⁴ *See id.*

⁶⁵ *See 2023 Animal Shelter Statistics, Spay and Neuter Program*, MD DEP'T OF AGRIC., MARYLAND.GOV, https://mda.maryland.gov/spay_neuter_program/Reports/2023%20Annual%20Shelter%20Statistics.pdf (last visited July 17, 2024).

with feral cats and, relatedly, controlling outbreaks of rabies.⁶⁶

Given the vehemence with which the same entity is challenging analogous legislation in New Mexico (see Part III, below) the Pet Food Institute (7) somewhat remarkably submitted a letter supporting the extension of the pet food registration fee funded spay/neuter program in Maryland:

PFI recognizes and agrees in principle with the intended goals of Maryland's Spay and Neuter Program, with a core focus on low-income communities and populations, and commends Maryland for the great success of the program at its current funding level. It is significant that Maryland can approve the majority of grant proposals and support a decrease in both shelter intakes and animals euthanized, while still maintaining carryover in program funding year-to-year. We appreciate and support the effort to extend this program for the next decade and are in favor of the committee advancing SB 206 [the MD reauthorization bill] with no amendments.⁶⁷

PFI supported the extension of the Maryland program specifically at a maximum of the current \$100 per product registration fee:

Given the Department's opinion that the program is already appropriately funded, we respectfully request the committee to reject any proposals that would increase taxes, which would have tangible impacts on pet food manufacturers and pet parents. Instead, additional funding mechanisms should be explored and sought rather than solely placing the full burden on pet food makers.⁶⁸

Like Maryland's program, the West Virginia Spay/Neuter Assistance Program (WVSNP) is also run primarily out of the state's Department of Agriculture.⁶⁹ The framework for the program was established more than a decade ago in 2013, but the program was unfunded until the pet food fee legislation passed in 2017. In other words, West Virginia identified a rather

⁶⁶ *See id.*

⁶⁷ *See* PFI Letter, *supra* note 47.

⁶⁸ *See id.*

⁶⁹ *See* WV Spay and Neuter Assistance Program, WV DEPT. OF AGRIC. <https://agriculture.wv.gov/divisions/animal-health/west-virginia-spay-and-neuter-assistance-program/> (last visited July 11, 2024).

desperate need and created a program for increased, low-cost spay/neuter availability before it knew how that program would be financed.⁷⁰ Ready to launch from day one, WVSNP has been awarding grants since 2018, and that will continue through 2027 based (primarily) on the money generated by the pet food fee legislation. Like Maryland, West Virginia does not provide grant funds directly to individuals. Rather, grants are made available only to county and municipal shelters and to nonprofit rescue organizations incorporated in West Virginia.

According to statistics gathered by the Federation of Humane Organizations of West Virginia, just under 518,000 West Virginia households (or seventy percent) have at least one companion animal.⁷¹ An approximate total of 1.1 million cats and dogs reside in households; however, an estimated additional 180,000 feral, or “community,” cats also reside in the state, and “98% of [them] are not altered.”⁷² As a result, WVSNP has tended to focus on the state’s feral cat and dog populations, as well as on the risk of rabies and other diseases borne by feral or stray animals. The special needs of rural and low-population areas are likewise a critical issue. The goal of the West Virginia program is to “lower the long-term societal costs associated with high stray and feral populations by increasing spay and neuter rates.”⁷³

WVSNP is the legislative result of citizens wanting a publicly funded statewide approach to overpopulation of stray cats and dogs in West Virginia. West Virginia’s feral cat and dog populations pose health and safety problems for humans and pets, impact wildlife, spread disease, and burden communities. Mitigating these problems is expensive, whether handled through county and municipal animal control, volunteer shelters and foster care, or euthanasia. Despite everyone’s best efforts, these resources are regularly overburdened.⁷⁴

⁷⁰ See Erin Cleavenger, *Mug-Z-Moo to the Rescue – Animal Welfare Struggle for Funding*, DOMINION POST, <https://www.dominionpost.com/2023/07/22/mug-z-moo-to-the-rescue-animal-welfare-groups-ongoing-struggle-for-funding/>. (“The framework of WVSNP was established in 2013, but the program was unfunded until House Bill 2552 was passed by the West Virginia Legislature and signed into law by Governor Jim Justice in 2017.”).

⁷¹ See *id.*

⁷² See *id.*

⁷³ See WV Spay and Neuter Assistance Program, WV DEPT. OF AGRIC., <https://agriculture.wv.gov/divisions/animal-health/west-virginia-spay-and-neuter-assistance-program/> (last visited July 11, 2024).

⁷⁴ See *id.*

Since its official launch, WVSNP has provided spay or neuter vouchers for over 11,000 dogs, more than 26,000 owned cats and 12,000 community cats. The total requests for vouchers have exceeded the available funds every year.⁷⁵ In part based on the success of WVSNP despite having more need than available funds, in September 2022, a nonprofit organization contributed \$4 million dollars to the state-run spay/neuter program, to be distributed over a three-year period.⁷⁶ This foundation is providing \$150,000 per year to each of the six low-cost, high-volume spay/neuter clinics in the state “to improve proficiencies, increase surgeries and generally help all 55 counties [in West Virginia].”⁷⁷ The remaining money will be deposited directly into the WVSNP fund each year, bringing the total amount available to approximately \$900,000 each year.⁷⁸

WVSNP’s creators have been thrilled with this development because, from the outset of the push for increased pet food fee legislation, they imagined that the established fund would require private donations to be sustainable. According to a 2023 news article, pet food in West Virginia is a nearly \$200 million-dollar a year business, “*and most pet food companies do not mind the fee.*”⁷⁹ One small pet treat business in Morgantown, WV, in business for thirty years articulate the point well. The fact that it costs her more to sell each treat does not bother her: “I have to pay in every state where my product is [The increased fee] is one of the best things that ever happened in West Virginia. . . . [I]t’s not a big amount of money when you think about your return on your product.”⁸⁰ The West Virginia pet food fee legislation expires in 2027, but with the extension in Maryland as the gold-star standard, WVSNP administrators and participants hope to follow the same path:

Let’s face it, unwanted animals lead to increased animal cruelty, disease, wasted tax dollars and heartbreak for shelter workers If you spend a few years not spaying and neutering, people let their cats run and some are not altered.

⁷⁵ *See id.*

⁷⁶ *See* Cleavenger, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ *See id.*; *see also* WV Spay and Neuter Assistance Program, WV DEPT. OF AGRIC. <https://agriculture.wv.gov/divisions/animal-health/west-virginia-spay-and-neuter-assistance-program/> (last visited July 11, 2024).

⁷⁹ *See* Cleavenger, *supra* note 71 (quoting Theresa Bruner, President of the Federation of Humane Organizations of WV): “We thought it was perfect because [pet food manufacturers] are benefitting from all the animals, and no taxpayer money would be used.”).

⁸⁰ *Id.*

If you let them out, they are going to breed. . . . And most people let their cats in and out.⁸¹

The bottom line for proponents of WVSNP and programs like it is sustainability. Companion animal overpopulation is not something a community can necessarily “solve;” rather, “it is something that you get under control.”⁸² “The goal of WVSNP is to lower the long-term societal costs associated with high stray and feral populations by increasing spay and neuter rates. Sterilization is a proven method to reduce these populations and associated costs over time. While not the whole answer, WVSNP is part of the answer to this problem in West Virginia. No step in the right direction is too small.”⁸³

The pet-food-fee-funded, spay/neuter program run out of Maine’s Department of Agriculture, Conservation, and Forestry differs significantly from those discussed above in that it targets *individuals* who are seeking free or low-cost spay/neuter services directly rather than organizations seeking to increase access to such services. Maine’s “Help Fix ME” Program solicits applications from qualified individuals who cannot otherwise afford to spay or neuter their companion animals.⁸⁴ The problem in Maine remains about the access to veterinary services, which are not as robustly available as they are in more urban areas. As a consequence, Maine has often limited the reach of its spay/neuter program to “large mix breed dogs” – no designer breeds! – and its waitlist for services in a calendar year is often full before the summer.⁸⁵

Finally, Delaware is the most recent state to join the coalition of those with mandatory pet food registration fee increases, passing its version in late 2021.⁸⁶ Like the legislation in other states, the Delaware law proposes to increase the registration fee on pet food manufacturers from the current \$23 per label to \$100, phased in over three years. The Delaware DOA estimates generating \$650,500 by the third full year of the new program, most of which will support low-cost spay/neuter programs as well as rabies vaccinations.

⁸¹ *Id.* (quoting Theresa Bruner).

⁸² *Id.*

⁸³ See WV Spay and Neuter Assistance Program: History of WVSNP, WV DEPT. OF AGRIC., <https://agriculture.wv.gov/divisions/animal-health/west-virginia-spay-and-neuter-assistance-program/> (last visited July 11, 2024).

⁸⁴ See Animal Welfare: Spay/Neuter Programs, Me. Dept. of Agric., Conserv., & Forestry, MAINE.GOV., https://www.maine.gov/dacf/ahw/animal_welfare/help-fix-me-program.shtml (last visited July 11, 2024).

⁸⁵ *See id.*

⁸⁶ H.B. 263, 151st Gen. Assemb. (Del. 2021), <https://legis.delaware.gov/BillDetail/79027> (last visited July 11, 2024).

Additional funding will be directed specifically toward free-roaming cats statewide, to “reduce animal suffering, protect the public from disease, reduce nuisance complains, and help Good Samaritan cat colony caretakers working with shelters.”⁸⁷

What all of these states’ pet food registration fee-funded spay/neuter programs have in common is a dedicated effort to defray the significant taxpayer costs of animal sheltering and euthanasia by piggybacking on an already-existing agency administrative scheme and developing a statewide program that has the structure and funding to contribute to a feasible *solution* to the companion animal overpopulation crisis plaguing so many regions of the country.

III. THE NEW MEXICO PROBLEM

While shelters and other animal welfare organizations in New Mexico have been attempting to solve the problem of overpopulation for more than two decades, none has achieved success. A 2012 Feasibility Study conducted by the Animal Sheltering Committee and Regulation and Licensing Department highlighted two significant obstacles: the lack of a statewide perspective, and the fact that “shelters and animal control agencies are so overwhelmed with the number of animals they take in that they are constantly operating in triage mode and cannot take the time to engage in long range planning.”⁸⁸ In terms of taxpayer burden, data from the study, conducted more than ten years ago, estimated the state spends an estimated \$225 per sheltered animal, or \$13 per person, of public funding annually.⁸⁹

Following several years of intense lobbying for a legislative solution, in 2020, animal rights advocates successfully banded together to convince the New Mexico legislature to use pet food registration fees to fund low-cost spay/neuter services across the state. Touting the success of Maryland’s program in support of the New Mexico legislation, APNM summarized the potential for such a program as follows:

⁸⁷ *Id.*

⁸⁸ NM Feasibility Study, *supra* note 25, at 3.

⁸⁹ Though more than a decade old, this data is the most recently available. Moreover, it does not include the cost of transporting animals to other states, such as Colorado, where the enforcement of strict spay/neuter laws have controlled the population enough for shelters in, *e.g.*, Denver and Boulder, to accept cats and dogs from bordering states. Assuming a rescue organization already owns a viable transport vehicle, which costs in the \$45,000 range, it would spend between \$25 and \$90 per animal in transportation costs depending on gas, mileage, and other staffing costs. *Id.*

After five years of spay/neuter funding cycles, after passing a new law just like Senate Bill 57, the state of Maryland reported a 22% increase in adoptions and other “live release” of dogs and cats in their animal shelters... but their intake numbers stayed the same? That’s because the well-funded spay/neuter program was so successful, that Maryland shelters were able to transport animals in from other states and find them adoptive homes in-state. This awe-inspiring scenario could someday be a reality in New Mexico, too!⁹⁰

Proponents of the legislative solution still commonly referred to as Senate Bill 57 (SB57) have argued that the animal overpopulation issue in New Mexico is even more acute than in Maryland, West Virginia, and Maine. This may be true for several reasons. First, New Mexico has far greater expanses of land than these other states. By geographic area, Maine, West Virginia, and Maryland rank 39th, 41st, and 42nd in that order; Delaware ranks 49th. New Mexico lies on the opposite end of the spectrum as the fifth largest state in the country in terms of geographic area. With a population of only a little over two million, however, much of that land is rural. Geography unquestionably has a considerable impact on accessibility of veterinary services, which, in turn, has a serious and substantial effect on the availability of spay/neuter services for “owned” pets, let alone the numbed of “unowned,” “wild” cats and dogs that populate these areas. Indeed, much has been written in the past several years about the veterinary shortage nationwide, including the mental distress veterinarians suffer as a result of pet owners not able to afford appropriate care for their animals,⁹¹ but that is all the more reason to support statewide legislative efforts to alleviate the problem.⁹²

With only three sizable cities, veterinary services can be even more difficult to come by in New Mexico, with some communities having no good options for such care.⁹³ According to the 2012 feasibility study that undergirds the New Mexico legislation, nine of New Mexico’s 33 counties do

⁹⁰ *Watch Our Webinar Presentation on Spay/Neuter and Senate Bill 57*, ANIMAL PROTECTION NEW MEXICO, <https://apvnm.org/watch-our-webinar-presentation-on-spay-neuter-and-senate-bill-57/> (Aug. 25, 2020).

⁹¹ Sarah Zhang, *The Great Veterinary Shortage*, THE ATLANTIC, <https://www.theatlantic.com/health/archive/2022/07/not-enough-veterinarians-animals/661497/> (July 6, 2022).

⁹² That said, with more American households acquiring pets during the pandemic and fewer people entering the veterinary profession, “the current mess is not about to be fixed anytime soon.” *See id.*

⁹³ *Pets Without Vets*, SANTA FE REPORTER, <https://www.sfreporter.com/news/2021/07/07/pets-without-vets/> (July 7, 2021).

not have any spay/neuter programs, and another fourteen countries have only one.⁹⁴ The programs that do exist are severely limited in terms of capacity. For example, many indigenous communities in New Mexico — including but not limited to the large tract of land in the northwest corner of the state that constitutes the Navajo Nation — are forced to rely on mobile veterinary units or “pop-up clinics” organized on indigenous lands to address the severity of the animal overpopulation problem in these communities.⁹⁵ Opponents of the spay/neuter legislation have argued that it will “disproportionately punish smaller businesses and less wealthy pet owners that are less able to absorb the cost.”⁹⁶ Sponsors of the legislation, however, have documented that the cost of pet food would increase only about \$1.50 per pet-owning household, per month.⁹⁷ As previously noted, the costs associated with housing and caring for a companion animal are not an insignificant factor in the shelter crisis in the first instance. That said, whether and how much of the cost of an increase in registration fees contributes to the overall problem is slight, if anything, and the upside benefits are well worth any of the legislation’s alleged downsides.

A. NM Senate Bill 57

In 2020, the New Mexico Legislature passed SB57, the “New Mexico Commercial Feed Act,” which amended the Animal Sheltering Act⁹⁸ and was signed into law by Governor Michelle Lujan Grisham immediately thereafter. Effective July 1, 2020, and entitled the “Spay and Neuter Program Fee,” the 2020 amendment to the Animal Sheltering Act establishes a sub-account for low-cost spay/neuter within the Animal Care and Facility Fund. The spay/neuter program is funded each year by a fee collected from pet food manufacturers registered with the Department of Agriculture (DOA). Indeed, all “commercial feed,” including but not limited to dog and cat pet food, but

⁹⁴ NM Feasibility Study, *supra* note 25, at 8.

⁹⁵ See Keiko Ohnuma, *New Initiative Sets Up MASH Unit to Spay/Neuter Dogs on Laguna Pueblo*, ALBUQUERQUE JOURNAL, <https://www.abqjournal.com/765326/re-zdog-management.html> (April 29, 2016) (“Native communities know there’s a problem with strays and overpopulation, said Diana Webster of the Native America Humane Society, who surveyed tribal nations when she founded her organization in 2014. Yet most lack basic resources to start addressing the issue – not just money and expertise, but animal control departments and veterinarians.”).

⁹⁶ Robert Nott, *Lawmakers Eye Pet Food Fee to Fund Spay/Neuter Efforts*, SANTA FE NEW MEXICAN (Jan. 2, 2018), https://www.santafenewmexican.com/news/local_news/lawmakers-eye-pet-food-fee-to-fund-spay-neuter-efforts/article_dc4bfe3-6375-51e5-a26f-802bc904038f.html

⁹⁷ See *id.*; see also NM Feasibility Study, *supra* note 25, at 23-24 (noting a \$1.00 increase per pet per month).

⁹⁸ See N.M.S.A § 61-14-7.1B and § 76-19A-1.

excluding customer-formula feed, must be registered with the DOA before it can be distributed in New Mexico.⁹⁹ The text of the critical part of the legislation reads as follows:

- A. Except as provided in Subsection B of this section, in addition to the commercial feed registration fee required pursuant to Section 76-19A-10 NMSA 1978, the department shall collect an annual fee on each pet food registered with the department as follows:
 - (1) beginning January 1, 2021, fifty dollars (\$50.00);
 - (2) beginning January 1, 2022, seventy-five dollars (\$75.00); and
 - (3) on and after January 1, 2023, one hundred dollars (\$100).

- B. The provisions of Subsection A of this section do not apply in cases of:
 - (1) prescription diet pet food prescribed by a veterinarian; or
 - (2) pet food manufactured by a person who demonstrates to the board, in a manner prescribed by the board, that the person's tax-year annual gross revenue from the distribution of pet food is no more than three million dollars (\$3,000,000).¹⁰⁰

The first three years of the fee schedule was implemented at \$50 per pet food label the first year (2021), raised to \$75 the second year (2022), and finalized at the full fee rate of \$100 per label in 2023.¹⁰¹ The fee is included with the Annual Renewal Application to the DOA unless the manufacturer is exempt. Importantly, the legislation contains exclusions for the fees for veterinarian-prescribed diet pet food and for “pet food manufactured by a person who demonstrates to the board, in a manner prescribed by the board, that the person's tax-year annual gross revenue from the distribution of pet

⁹⁹ See N.M.S.A. § 76-19A-2(F) & (P); and § 76-19A-10(A)

¹⁰⁰ N.M.S.A. § 76-19A-1.

¹⁰¹ The “fee collected” is distributed as follows: 96% is deposited with the state treasurer for “the statewide spay and neuter sub-account of the animal care and facility fund,” and 4% is distributed to the Department of Agriculture to administer the Commercial Feed Act. N.M.S.A. § 76-19A-10.1(C).

food in general is no more than three million dollars (\$3,000,000).”¹⁰² The legislation requires the NMBVM to provide a yearly report to the legislature on how the funds have been distributed.¹⁰³

In addition, the amendment gives the Animal Sheltering Committee (ASC)¹⁰⁴ the added responsibility of making recommendations to the NMBVM for the parameters of a statewide spay/neuter program serving low-income households, where low income is defined as no more than 200% of the federal poverty level.¹⁰⁵ The ASC was reconstituted in late 2022, at which time the NMBVM issued the mandate for it to comprehensively overhaul the spay/neuter grant application process previously in place to disseminate license plate funds. That came as a result of the Governor releasing close to one million dollars in funds raised via the pet food fee mechanism for this purpose.¹⁰⁶ The ASC revamped its application process in 2023 and received over fifty applications from hopeful grantees totaling well over one million dollars in requests. Disbursements from the Animal Care and Facility Fund are made based on information provided to the Animal Sheltering Committee during the application process. Three types of organizations may apply for funds, which are fronted to these organizations for their proposed spay/neuter clinics or other qualifying projects: (1) nonprofit organizations with 501(c)(3) status and in good standing; (2) animal shelters; and (3) euthanasia agencies. Applicants came from a wide range of organizations in categories (1) and (2), including non-profit organizations targeting severely underserved locations, Native American lands, homeless persons, and other populations or areas with well-defined, desperate needs. A substantial percentage of the state’s

¹⁰² See N.M.S.A. § 76-19A-10.1(B)(1) & (2).

¹⁰³ See *id.*

¹⁰⁴ In 2018, the Animal Sheltering Board officially became the Animal Sheltering Committee, which operates under the direction of the New Mexico State Board of Veterinary Medicine. See N.M.S.A. §77-1B-3(D). The five-member Animal Sheltering Committee predates the 2020 amendment. The NMBVM is in charge of appointing the members, specifically: (1) one euthanasia agency employee with training and education in euthanasia; (2) one veterinarian who has provided paid or unpaid services to an animal shelter; (3) one representative from a nonprofit animal advocacy group; (4) one member of the public; and (5) a manager or director of a New Mexico facility that provides shelter to animals on a regular basis; provided that the manager or director selected is trained in animal shelter standards. No more than two committee members shall be appointed from any one county within the state, and each member serves a four-year term. See *id.* In the interest of full disclosure: the Author serves on the ASC as a member of the public from Santa Fe County.

¹⁰⁵ N.M.S.A. § 61-14-7.1(B).

¹⁰⁶ See *Breaking News on SB57*, *supra* note 29. At the end of 2022, there were over \$900,000 in funds waiting to be distributed. In 2023 and 2024, fees were still being collected, however, given that there is no injunction in place.

municipal shelters applied for the grant maximum of \$50,000, and numerous shelters and organizations sought disbursements for capital expenditures, which are capped at \$5,000.

Organizations applying for disbursements from the Animal Care and Facility Fund are required to provide a wide range of information in their applications, for example: the names and licenses of the veterinarians or clinics slated to provide the medical services and allowable vaccinations; the targeted end users of the services, *i.e.*, companion animal “owners,” who are required by affidavit to certify that they have a household income that does not exceed 200% of the current federal poverty level; and comprehensive budgets describing the scope, details, and cost specifics of their proposed clinics or projects. Applications were ranked based on several factors, including budgetary detail, experience with high-volume spay/neuter surgeries, and potential impact of the proposed project, including scope as well as service to the needs of rural or otherwise underserved communities. The ASC’s aim in reviewing applications was to spread the available funds as widely as possible.¹⁰⁷

Because New Mexico’s program allows individuals to apply to the Animal Care and Facility Fund directly, the ASC also created an application process for them, receiving about a dozen. These applications required different information in part because the process works differently with individuals. Whereas nonprofit organizations and animal shelters are provided funds in advance of their projects — by necessity given the razor-thin margins that these organizations operate within — individuals demonstrating eligibility are provided with a letter that promises a veterinarian of their choice (or, more likely, their accessibility) a previously agreed-upon, ASC-determined fee for performing the surgery or surgeries requested by the individual applicant. In the case of individual applicants, the reimbursement is provided directly to the veterinarian once services are performed.

Although the funds associated with these applicants and proposed projects were slated for dissemination by the end of 2023, the process has faced a series of administrative delays and is still a work-in-progress as of mid-2024. Moreover, the PFI-led litigation discussed below threatens not

¹⁰⁷ The West Virginia Spay Neuter Advisory Committee reportedly uses a similar application ranking system so that all eligible applicants receive some funding even though many will not receive the full requested amount. *See* Cleavinger, *supra* note 72. Despite both NM and WV having reached the \$100 ceiling for registration fees per pet food label, both states receive applications with grant proposals that far exceed the funds available.

only to dismantle the legislation, but because an Amended Complaint seeks restitution of funds in addition to a declaratory judgment that SB57 is unconstitutional, the process may be shut down entirely. Unfortunately, the mere *possibility* of having to repay fees already collected may result in a *de facto* stay of the program in New Mexico even though no stay has been ordered.

B. *The Litigation*

The promise of the New Mexico spay/neuter legislation has been significantly threatened by litigation challenging its constitutionality. In December 2020, shortly after the New Mexico legislation was enacted, the Pet Food Institute filed a lawsuit in New Mexico state court, seeking a declaratory judgment that the fee assessment is unconstitutional under both state and federal law.¹⁰⁸ Established in 1958, the Pet Food Institute (PFI) is a trade association whose members account for the majority of pet food manufactured in the United States, including, for example, Blue Buffalo and Freshpet.¹⁰⁹ As noted above, the same group affirmatively *supported* the extension of analogous legislation in Maryland.¹¹⁰ Nevertheless, the organization, in tandem with the other plaintiffs,¹¹¹ continues to litigate the constitutionality of almost the exact same program in New Mexico.

Immediately after the lawsuit was filed, Defendants Governor Michelle Lujan Grisham, the State of New Mexico, the Attorney General, and the Secretary of Agriculture removed the case from state to federal court on the theory that the actions in the Complaint include alleged violations of the United States Constitution, specifically the Commerce Clause and the Equal Protection Clause.¹¹² Thereafter Defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted. After the case was pending in federal court for almost two years — a timeframe coinciding with

¹⁰⁸ The initial complaint has been amended twice; the most-recent version is First Amended Complaint for Declaratory Judgment and Injunctive Relief, *Pet Food Inst. v. Grisham*, No. D-101-CV-2020-02766 (1st Jud. Dist. Ct., Santa Fe Cnty., Feb. 15, 2023) [hereinafter “3d Compl.”]. Because there are two “Amended Complaints” (seeking different forms of relief), this Article refers to the most recent, active version as “3d Compl.”

¹⁰⁹ Pet Food Institute, <https://www.petfoodinstitute.org/7/about-pfi/producer-members/> (last visited March 3, 2023).

¹¹⁰ See PFI Letter, *supra* note 47.

¹¹¹ The other plaintiffs in the case are the New Mexico Chamber of Commerce, the New Mexico Farm & Livestock Bureau, the Pet Industry Joint Advisory Council, and the Rio Grande Kennel Club. Many of these entities are repeat plaintiffs in analogous litigation.

¹¹² See *Pet Food Inst v. Grisham*, 640 F. Supp. 3d 1093 (D.N.M. 2022).

the height of the COVID-19 pandemic — the United States District Court for the District of New Mexico, in two related opinions, remanded the case to state court for lack of federal subject matter jurisdiction. Specifically, in September 2022, the District Court raised *sua sponte* the question of federal subject matter jurisdiction, citing the (federal) Tax Injunction Act (TIA) as a statutory vehicle depriving the court of jurisdiction.¹¹³ The TIA essentially states that federal district courts shall not interfere in the assessment or collection of a state tax, where there is a sufficient (plain, speedy, and efficient) remedy under state law.¹¹⁴ In November 2022, the District Court remanded the case to state court for lack of jurisdiction; it also denied attorney’s fees to the plaintiffs.¹¹⁵

In remanding the case, the District Court reasoned that the pet registration fee at issue constitutes a “tax” under state law within the meaning of the TIA and, as such, should be adjudicated in state court.¹¹⁶ What the New Mexico legislature labels as a fee is not dispositive.¹¹⁷ The only remaining question under the TIA was whether the plaintiffs have access to a “plain, speedy and efficient remedy” in state court, which neither side denied.¹¹⁸ The court found that New Mexico meets these minimal criteria in that taxpayers are able to raise constitutional objections to the tax.¹¹⁹ In fact, the New Mexico legislation provides numerous avenues for challenging the fee (or tax) in state court. In every situation where the DOA believes a manufacturer has

¹¹³ See *Pet Food Inst. v. Grisham*, 2022 WL 4482727 (Sept. 27, 2022).

¹¹⁴ See 28 U.S.C. § 1341. The TIA prevents a federal court from entering a declaratory judgment holding a state tax law unconstitutional. *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). Congress passed the TIA “to restrict ‘the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.’” *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937)). The TIA applies in cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes, which would have the effect of reducing the flow of state tax revenue. See *id.* at 106-07.

¹¹⁵ See *Pet Food Inst. v. Grisham*, 640 F. Supp. 3d. 1093 (D.N.M. 2022).

¹¹⁶ Compare *Hill*, 478 F.3d at 1245-46 (primary purpose of Oklahoma’s specialty license plate scheme was revenue-raising, and thus a tax, where majority of funds were to be disbursed for various public purposes); with *Marcus*, 170 F.3d at 1307, 1311-12 (assessment charged to disabled persons seeking placard and identification card for parking accommodations was regulatory fee, where statute expressly tied funds collected to administration of motor vehicle registration laws).

¹¹⁷ See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), which the District of New Mexico distinguished on the ground that it was not a Tax Injunction Act case.

¹¹⁸ See *Hill*, 478 F.3d at 1253.

¹¹⁹ See *id.*

not complied with the Commercial Feed Act, no action may be taken without a hearing in state district court.¹²⁰

In February 2024, oral arguments were heard in state court on the motion to dismiss, which Defendants refiled after the case was remanded. The court dismissed only one of plaintiffs' claims — that the statute codifying SB57 is "void for vagueness" — but denied defendants' motion to dismiss the other alleged state and federal violations,¹²¹ propelling the case forward into discovery. The analysis below focuses on plaintiffs' two federal constitutional claims and additionally addresses the issue of whether newly proposed federal legislation presents a cognizable preemption challenge.¹²²

IV. CONSTITUTIONALITY

Neither the Pet Food Institute (PFI) nor any of its co-plaintiffs brought legal challenges to the constitutionality of the legislative fee mechanism in any of the states that previously adopted it. As a result, the only insight into its arguments opposing the increase in registration fees comes from the New Mexico litigation. Parts III.A and B discuss the two primary constitutional arguments and conclude that the New Mexico legislation is legitimate under both the Equal Protection Clause and Commerce Clause of the U.S. Constitution. Part III.C takes up newly introduced federal legislation that threatens to preempt not only the New Mexico legislation, but each of the state laws undergirding the successful spay/neuter programs discussed above.

¹²⁰ See N.M.S.A. § 76-19A-13(C)-(D) (no commercial feed may be condemned until after a hearing in the district court); § 76-19A-14(A)-(B) (any entity adversely affected by any "act, order or ruling made pursuant to the provisions of the New Mexico Commercial Feed Act may appeal the decision[.]). Section 39-3-1.1 sets forth procedures for a person aggrieved by a final decision by an agency to appeal the decision to district court, which may set aside the decision for numerous reasons, including that the agency did not act in accordance with law, and a party. A party may further appeal to the court of appeals. *Id.* § 39-3-1.1(C)-(E).

¹²¹ Order Granting in Part and Denying in Part Defendants' Motion and Memorandum in Support of Motion to Dismiss, PFI v. Lujan Grisham, No. D-101-CV-202002766 (Dec. 3, 2023). On July 17, 2024, the court granted a motion by Animal Protection New Mexico / Animal Protection Voters and Espanola Humane to intervene in the litigation. *See id.* (July 17, 2024).

¹²² The remaining state court claims allege: (1) a violation of the Anti-Donation Clause of the New Mexico Constitution, N.M. CONST., art. IX § 14; and (2) the lack of a rational relationship between the increased pet food registration fee and services provided by the payor under N.M. Mining Ass'n v N.M. Mining Comm'n, 122 N.M. 332, 338 (Sup. Ct. 1996). The second of these claims is mostly likely disposed of via the same analysis as the Commerce Clause allegations discussed below.

A. Equal Protection Clause

One of the plaintiffs' central arguments in the New Mexico litigation is that the pet food fee legislation violates the Equal Protection Clause of the United States Constitution as well as the Equal Protection Clause of the New Mexico Constitution. As explained below, the plaintiffs' arguments are based on faulty premises and do not provide sound rationales for invalidating the legislation on equal protection grounds.

The Equal Protection Clause of the Fourteenth Amendment provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹²³ It is "essentially a direction that all persons similarly situated should be treated alike."¹²⁴ However, the guarantee of equal protection coexists with the reality that most legislation creates classifications, and most classifications are not prohibited.

The threshold question in any equal protection challenge is whether the alleged offending legislation creates a class of similarly situated individuals who are treated dissimilarly.¹²⁵ In determining what level of scrutiny applies to an equal protection claim, courts thus consider the basis for the distinction between classes of persons.¹²⁶ "If the challenged government action implicates a fundamental right, or classifies individuals using a suspect classification, such as race or national origin, a court will review that challenged action applying strict scrutiny."¹²⁷ However, if the challenged government action does not implicate a fundamental right or protected class, rational basis review is appropriate.¹²⁸ Under the rational basis standard, plaintiffs' claim will fail "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification."¹²⁹

1. Suspect Class

¹²³ See U.S. CONST., amend. XIV.

¹²⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

¹²⁵ See *id.*; see also *Madrid v. St. Joseph's Hosp.*, 122 N.M. 524, 535 (1996).

¹²⁶ See generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹²⁷ *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008).

¹²⁸ See *Carney v. Okla. Dept. of Public Safety*, 875 F.3d 1347, 1353 (10th Cir. 2017).

¹²⁹ *Id.* (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

The “Spay and Neuter Program Fee” (the increased pet food registration fee imposed by SB 57) on its face is worded neutrally with respect to who must comply: all manufacturers of pet food or treats intending to sell their products in New Mexico. There are two exceptions to the imposition of the increased fee: (1) prescription diet pet food prescribed by a veterinarian; or (2) pet food manufactured by a [manufacturer] who demonstrates . . . that [its] tax-year annual gross revenue from the distribution of pet food is no more than three million dollars (\$3,000,000).¹³⁰

The plaintiffs in the New Mexico litigation allege differential treatment of pet food manufacturers under SB 57 based on (2), above – the exemption in the statute for manufacturers doing less than three million dollars of business.¹³¹ This “small business” exemption is not contained in the legislation enacted in the other four states and could be a plausible justification for the isolated litigation in New Mexico. That said, the plaintiffs are seeking a declaration that the entire fee mechanism is unconstitutional, not just this exception. The plaintiffs’ primary contentions with respect to this small business exception are that it is under-inclusive in its attempt to protect small manufacturers and arbitrary in the tiered system it creates. These arguments are based on three examples proffered in the First Amended Complaint for Declaratory and Injunctive Relief:

- (1) A New Mexico-based manufacturer with an annual tax-year gross revenue of \$2.9 million distributing entirely within the state would qualify for the exception, whereas a Colorado-based manufacturer with an annual gross revenue of one penny over \$3 million would not, even if the Colorado-based manufacturer only grossed \$500,000 from sales in New Mexico.¹³²
- (2) A New Mexico-based manufacturer with \$10 million in total pet food sales but less than \$3 million in New Mexico sales may qualify for the exception but a New Mexico-based or Colorado-based manufacturer with one penny over \$3 million in sales in New Mexico would not.¹³³

¹³⁰ N.M.S.A. § 76-19A-1(B).

¹³¹ 3d Compl. ¶¶ 110-120. Originally, Plaintiffs also challenged the statutory exception for veterinary prescribed pet food under both the Equal Protection Clause and Commerce Clause, but that basis for relief was omitted in the most recent version of the Complaint with respect to the Equal Protection Clause challenge. It does, however, still appear in their Commerce Clause challenge, though it is not a central point of contention. This point is discussed in detail in Part IV.B, below.

¹³² 3d Compl. ¶118.

¹³³ *Id.* ¶119.

- (3) A small manufacturer distributing 25 different labels of pet food (or treats) in New Mexico is exempt if its annual gross revenues do not exceed \$3 million, whereas a manufacturer distributing only one label, but doing more than \$3 million dollars of business, would not be exempt.

The only additional allegation that the plaintiffs raise under the equal protection clause of the New Mexico state constitution is that the state would apply a heightened standard of scrutiny for these differences in classifications.¹³⁴

None of Plaintiffs' allegations have merit. First, large, multinational pet food manufacturers certainly do not constitute a "suspect class," generally defined as a discrete group subjected to a history of purposeful, unequal treatment. Accordingly, a court should review the challenged state action under a "rational relationship" test, meaning that the lower level of scrutiny applies. Under that level of scrutiny, the differential classification – here, for low-volume manufacturers – will be deemed constitutional if there is any "reasonably conceivable set of facts" tying the classification to the state's legislative goals.¹³⁵

Second, there is no indication that courts would apply a different, heightened level of scrutiny per the plaintiffs' allegations that the New Mexico Constitution requires it. Even the case that plaintiffs cite in their Complaint in support of that proposition does not hold as such. Rather, *Rodriguez v. West End Dairy* clearly states that "[r]ational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class."¹³⁶ Moreover, in applying rational basis review to uphold a statute

¹³⁴ *Id.* ¶¶ 123-24 (citing *Rodriguez v. Brand West Dairy*, 378 P.3d 13, 25 (N.M. Sup Ct. 2016)).

¹³⁵ *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010); *see also* *New York Pet Welfare Ass'n, Inc. v. City of New York*, 143 F. Supp.3d 50, 66 (E.D.N.Y. 2015) (upholding laws aimed at reducing pet homelessness because the "relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational") (quoting *Nordlinger v. Hahn*, 505 U.S. 1 (1992)). In *New York Pet Welfare Ass'n*, an array of plaintiffs, from pet stores and pet owners to veterinarians and breeders, brought claims against the City of New York concerning ordinances that established a comprehensive regulatory framework requiring spay/neuter of dogs and cats before pet stores could release animals to purchasers. The motion to dismiss was granted because the court found a rational relationship to reducing cat and dog homelessness and euthanasia.

¹³⁶ *Rodriguez*, 378 P.3d at 24 (quoting *Breen*, 120 P.3d at 418).

excluding farm and ranch laborers from certain workers compensation benefits, *Rodriguez* specifically noted that for claims under the U.S. Constitution, “we still follow the federal rational basis test, which only requires a reviewing court to divine ‘the existence of a conceivable rational basis’ to uphold legislation against a constitutional challenge.”¹³⁷ Under that test, “those attacking the rationality of the legislative classification have the burden to negative [sic] every conceivable basis which might support it.”¹³⁸

There are myriad rational reasons why the New Mexico legislature would treat pet food manufacturers differently based on the volume of pet food sold. The goal of not economically overburdening small-volume manufacturers on its own easily justifies the exemption. Indeed, pet food companies doing less than three million dollars of business in annual gross sales face the majority of their competition from pet food manufacturers that are multistate if not multinational corporations. Importantly, this point also addresses plaintiffs’ specific examples described in (1) and (2) above. The small business exception in the New Mexico spay/neuter fee legislation makes no distinction based on where a manufacturer’s products are sold, nor based on where that manufacturer is located or incorporated. Rather, the exception turns simply on whether a manufacturer distributes over or under \$3 million dollars in pet food or treats. That, on its face, is a legitimate and quite common legislative tool. By setting the cap as low as \$3 million, the New Mexico legislature presumably intended to exempt truly “micro” or “craft” manufacturers, regardless of where they are located, incorporated, or primarily conduct business.

Notably, the Supreme Court has made plain that when no suspect (or quasi-suspect) class is being singled out by the government – as is true in this case – state legislation will be given enormous deference. That is true *even if* the means and the ends do not seem to be an especially good fit.¹³⁹ In other words, the bar is set quite high in terms of what plaintiffs mounting an equal protection challenge must show to overturn legislation not predicated on a suspect classification. In fact, there are only three singularly classic Supreme Court equal protection cases that have struck down legislation under the rational basis test. All three of these cases are a long way off from the reality

¹³⁷ *Rodriguez*, 378 P.3d at 25 (quoting *Kane v. City of Albuquerque*, 358 P.3d 249, 256 (N.M. Sup. Ct. 2015) (emphasis in original)).

¹³⁸ *Rodriguez*, 378 P.3d at 25 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (internal quotation marks and citations omitted in original)).

¹³⁹ *See New York City Transit v. Beazer*, 440 U.S. 568 (1979) (permitting law that was both over- and underinclusive under rational basis scrutiny); *Railway Exp. Agency v. New York*, 336 U.S. 106 (1949).

of SB 57 and the plaintiffs' issues with the small business exemption.

Addressing these cases in reverse chronological order, first is *Romer v. Evans*, where the Court found that a state constitutional amendment precluded all legislative, executive, or commercial actions designed to protect rights based on sexual orientation violated the Equal Protection Clause.¹⁴⁰ Next is *Cleburne v. Cleburne Living Center*, where the Court invalidated the requirement for a special use permit as it related to a group home for intellectually disabled persons.¹⁴¹ And, finally, in *U.S. Dep't of Agric. v. Moreno*, the Court struck down a classification intended to prevent so-called "hippies" from participating in the federal food stamps program.¹⁴² None of these cases involved a recognized suspect or quasi-suspect class. Thus, in all three cases, the Court applied rational basis review.

Importantly, all three cases involved laws that the Supreme Court determined seemed motivated by *prejudice against a class of persons*. It was prejudice against the LGBTQ+ community in *Romer*, against individuals with intellectual disabilities in *Cleburne*, and against "hippies" in *Moreno*. In contrast, even a "clumsy" classification – one that is arguably overbroad, underinclusive, or simply not as tailored as it could be – will pass constitutional muster where, as here, there is an identifiable, rational reason for one class of manufacturers (those multistate, multinational companies doing over \$3 million in sales annually) to be treated differently from another (those small, craft manufacturers targeting local buyers). That is not to say that the \$3 million dollar exemption as written is clumsy, overbroad, or underinclusive; it simply underscores how weak the plaintiffs' contentions are in the New Mexico litigation as far as their federal and state equal protection challenges are concerned.

2. Fundamental Rights

Disentangling the remainder of plaintiffs' Equal Protection Clause arguments suggests that plaintiffs' issues with the small business exemption also might also implicate a more substantive right – the right of contract. These contentions fail as well. Ever since *Williamson v. Lee Optical*¹⁴³ the Supreme Court has given breathtaking deference to the legislature with respect to the regulation of economic activities. *Williamson*, like the PFI litigation, concerned the right of contract – specifically, selling merchandise

¹⁴⁰ 517 U.S. 620 (1996).

¹⁴¹ 473 U.S. 432 (1985).

¹⁴² 413 U.S. 528 (1973).

¹⁴³ 348 U.S. 483 (1955).

to the general public. Whether eyeglasses or pet food, the right to sell one's wares is simply not a fundamental one. Recognizing that, the *Williamson* court deferred to the legislature under a rational basis standard.¹⁴⁴

The NM legislation imposes a surcharge, or increased product registration fee, for commercial actors in the pet food business to sell their products in New Mexico. That imposition is, at best, a relatively minor financial burden on the cost of doing business, especially for an industry that generates upwards of \$200 million in annual sales/revenue even in a state as small as West Virginia.¹⁴⁵ If the contention is that some market participants believe that the increased fee is overly burdensome, that – even if true – is not an Equal Protection Clause violation. Rather, where, as here, there is no fundamental right at stake, state legislatures are perfectly able to levy different categories of taxes or fees on commercial actors as long as those fees bear a rational relationship to legitimate state goals.

Plaintiffs' first two examples of alleged discrimination in their Complaint would be more sensible if the small business exception were keyed to a manufacturer doing less than \$3 million dollars of business *in New Mexico*. As drafted, the exception applies to manufacturers based anywhere, and the annual gross revenue likewise can be accrued anywhere. Plaintiffs' third example is also problematic in that it compares apples to oranges, meaning that it juxtaposes two categories of manufacturers that are in no way delineated in the legislation. If, instead, the plaintiffs mean to suggest that pet food manufacturers are being discriminated against because the legislation singles them out for an increased registration fee as opposed to imposing a fee on other product manufacturers, that argument is even weaker because the legislation specifically targets cat and dog food manufacturers for an increased fee intended to benefit dog and cat owners (or dogs and cats themselves) and specifically does not apply to manufacturers of other animal feed such as commercial agricultural feed. Moreover, the fact that a state administrative scheme already exists to collect, manage, and distribute that (increased) fee makes the legislature's choice to impose it on dog and cat food manufacturers entirely logical.

Exempting veterinary-prescribed food — the other substantive exemption in the legislation that plaintiffs omitted in the most recent version

¹⁴⁴ *Id.* at 490-91. *Williamson* serves as a conclusive repudiation of *Lochner v. N.Y.*, 198 U.S. 45 (1905).

¹⁴⁵ See, e.g., *Spay/Neuter More Cost Effective than Euthanasia!*, FED'N OF HUMANE ORGS. OF WV (July 17, 2024), <https://fohowv.org/funding-wvsnp-is-more-cost-effective-than-killing-dogs-and-cats/> (last visited July 18, 2024).

of the Complaint — from the increased registration fee similarly is both reasonable and rational for at least two reasons. First, prescription pet food is already more expensive than grocery store or pet store food. Second, the legislature would be entirely rational in concluding that if the increased registration fee is passed on to consumers, the additional charge for the registration of prescription food might negatively affect pet owners whose choices are already limited in the prescription pet food market.¹⁴⁶

Plaintiffs' reliance in their Complaint on two U.S. Supreme Court cases — *Metro. Life Ins. Co. v. W.G. Ward*¹⁴⁷ and *Walters v. City of St. Louis*¹⁴⁸ — to support their arguments about differential treatment also falls flat. *Metro Life* concerned a domestic preference tax statute in Alabama that on its face taxed out-of-state insurance companies at a higher rate than in-state companies. In finding an equal protection violation, the Supreme Court emphasized that Alabama's sole aim was to promote domestic industry, regardless of the cost to foreign corporations. According to the Court, that was exactly the sort of parochial discrimination that the Equal Protection Clause was designed to prevent.¹⁴⁹

Here, in contrast, the pet food fee registration mechanism on its face is agnostic with respect to where a pet food manufacturer is incorporated, principally conducts business, or even with respect to how much food or treats that manufacturer sells in New Mexico versus elsewhere. The small business exception applies to a manufacturer's annual gross revenue, wherever that revenue may be generated. By plaintiffs' own examples, a Colorado manufacturer might qualify for the exception while a New Mexico manufacturer might not. Similarly, *Walters* provides no support for plaintiffs' allegations because it simply states that different (taxation) classifications must be based on real, not feigned differences.¹⁵⁰ That is clearly the case here with an exception designed to protect businesses located in any state that produce so little product overall that they barely meet the definition of a

¹⁴⁶ To prove the complete lack of a rational relationship, which is plaintiffs' burden, plaintiffs would have to demonstrate that the classification difference is grossly under-inclusive with respect to a legislative purpose, such that the relationship is too attenuated to be rational. See *Rodriguez*, 378 P.3d at 26. Of course, grossly *over*-inclusive would also be a problem; however, that is not, nor could it be, a basis for plaintiffs' argument because the exception that they are challenging is a limiting one.

¹⁴⁷ 470 U.S. 869, 875 (1985).

¹⁴⁸ 347 U.S. 231, 237 (1954).

¹⁴⁹ *Metro Life*, 470 U.S. at 875.

¹⁵⁰ *Id.* This is perfectly consistent with the New Mexico Equal Protection Clause, N.M. CONST., art. II, § 18. See, e.g., *Breen v. Carlsbad Mun. Schs.*, 138 N.M. 331, 335 (Sup. Ct. 2005).

“commercial” feed provider in the first instance.

At bottom, plaintiffs’ equal protection arguments — whether based on the U.S. Constitution or the analogous provision of the New Mexico constitution — have no legitimate foothold in the law. They are not premised on a differential classification implicating a fundamental constitutional right or suspect class. The legislation simply imposes an increased fee on substantively related market participants, excluding those that are so small that they likely would not be able to continue doing business absent the exception. In one sense, the legislation treats similarly situated individuals exactly *similarly* in that it draws a line not based on any problematic categorization, just the “size” of the business as measured by annual tax year gross revenue.

Finally, plaintiffs’ arguments demonstrate considerable confusion between what is relevant under the Equal Protection Clause and (dormant) Commerce Clause. While a differential classification may *impact* — which is different from “burden” — commerce between or among the states (an allegation that plaintiffs have not yet proven), the appropriate inquiry under each clause is distinct. The focus of an equal protection challenge remains on the dissimilar treatment of individuals or entities, not on protecting commerce. Only Commerce Clause jurisprudence weighs a state interest (deemed legitimate) against the alleged burden the law in question places on interstate commerce. In the equal protection context, if the state’s purpose is legitimate, the state law stands as long as the burden it imposes is rationally related to that purpose.¹⁵¹

The plaintiffs’ logic is that, by necessity, those small manufacturers will be conducting business primarily if not exclusively in New Mexico, hence their misguided reference to interstate commerce in the paragraphs of their complaint that allege an equal protection violation (“protecting New Mexico businesses at the expense of interstate businesses is not a legitimate state purpose”).¹⁵² Nothing in the legislation suggests that the \$3 million dollar small business exception applies based on pet food sales in New Mexico. Rather, the small business exception applies regardless of where the revenue is generated. Whether the small business exception violates the Commerce Clause is a separate question, discussed at length below. To be

¹⁵¹ See *Western & Southern Life Ins. Co. v. Bd. of Equalization of CA*, 451 U.S. 648, 664 (1981) (if purpose is legitimate, equal protection challenge may not prevail so long as the question of rational relationship is “at least debatable” (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154, (1938)).

¹⁵² 3d Compl. ¶ 115.

sure, however, that alleged differential treatment is not a basis for an equal protection challenge where, as here, there no fundamental right or suspect class is implicated and there is a rational relationship between the increased registration fee and a legitimate state interest in controlling animal populations. Highly deferential to state legislatures, a strong presumption of validity attaches to laws not implicating fundamental rights or suspect classifications and should be struck down only where the classification “rests on grounds wholly irrelevant to the achievement of the State’s objectives.”

B. Commerce Clause

Plaintiffs’ arguments under the Commerce Clause of the U.S. Constitution¹⁵³ are a bit muddled and overly complicated as presented. Putting aside their attempt to bootstrap their Commerce Clause argument into their Equal Protection argument (discussed above) plaintiffs’ Commerce Clause allegations rest on four “subclaims” (their words) that describe their specific points of contention regarding the \$3 million-dollar small business exception to the New Mexico legislation. Discussed in more detail toward the end of this section, these contentions do not adhere to a framework appropriate to a Commerce Clause analysis. Instead, the “test” that plaintiffs articulate throughout their subclaims amounts to no more than cherry-picking among various buzz phrases in Commerce Clause jurisprudence.

The common linchpin of plaintiffs’ various contentions is that the \$3 million-dollar small business exception — and, to a lesser extent, the veterinary-prescribed food exception — creates an unfair market advantage for New Mexico-based small-volume manufacturers and imposes a heavier burden on out-of-state pet food manufacturers.¹⁵⁴ First and foremost, plaintiffs presumably mean to invoke the “Dormant Commerce Clause” in their favor, though they do not label their claim as such. The Commerce Clause gives Congress (and only Congress) the power to regulate commerce with foreign nations, among the states, and with Native American tribes.¹⁵⁵ However, the Supreme Court has long recognized that this affirmative grant of power to Congress entails an implicit limitation on the states, restricting their ability to enact state laws that burden, or discriminate against, interstate commerce.¹⁵⁶ So, for example, a state may not tax a transaction that crosses state lines more heavily than if that transaction had occurred entirely within

¹⁵³ U.S. CONST, Art. I, sec. 8, cl. 3.

¹⁵⁴ *Id.*

¹⁵⁵ U.S. CONST, Art. I, sec. 8, cl. 3.

¹⁵⁶ *See, e.g., Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of State of Or.*, 511 U.S. 93, 98 (1994); *Dennis v. Higgins*, 498 U.S. 439, 447 (1991).

state borders.¹⁵⁷ Or, it cannot impose a tax providing a direct commercial advantage to local businesses.¹⁵⁸ This implicit restriction on the states is widely known as the Dormant Commerce Clause, which prohibits the individual states from discriminating against out-of-state businesses or business transactions on the basis of “some interstate element.”¹⁵⁹

Where, as in the New Mexico PFI litigation, the challenge is centered on state, versus federal government action, caselaw surrounding the Dormant Commerce Clause controls. The Tenth Circuit has recognized three ways in which a state statute might violate the Dormant Commerce Clause: (1) the statute is discriminatory on its face; (2) the statute imposes a burden on interstate commerce that is incommensurate with the upside benefits to the state; or (3) the statute has the practical effect of controlling commerce that occurs entirely outside the borders of the state in question.¹⁶⁰ Plaintiffs’ arguments do not address this framework head on; however, their various allegations at best implicate only the second of these three options.¹⁶¹ The first option is not relevant because, as noted above, the statutory exception at issue here is not discriminatory on its face. In addition, there is no sense in which that exception or anything else in the statute has the effect of controlling commerce entirely outside state borders.

With respect to the second option, the appropriate test for determining whether a state statute imposes a burden on interstate commerce that is incommensurate with the upside benefits to the state requires consideration of four factors: (1) the nature of the putative local benefits advanced by the statute; (2) the burden imposed on interstate commerce; (3) whether that burden is clearly excessive in relation to the local benefits; and (4) whether the local interests can be promoted with a lesser impact on interstate commerce.¹⁶² The party challenging the statute bears the burden of

¹⁵⁷ *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

¹⁵⁸ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

¹⁵⁹ *Boston Stock Exchange v. State Tax Comm’n*, 429 U.S. 318, 332 (1977).

¹⁶⁰ *KT&G Corp. v. Atty Gen. of State of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008) (citing *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970)). A state statute that does not directly regulate or discriminate against interstate commerce may still be invalid if the “burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142. “If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.*

¹⁶¹ See 3d Compl. ¶¶ 67-69.

¹⁶² See *Blue Circle Cement, Inc. v. Bd. Of Cnty. Commits of Cnty. of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (citing *Pike*, 397 U.S. at 142). See also *Nat’l Pork Prod.*

establishing a violation.¹⁶³

The local benefits of the increased pet food registration fee are clear. Money deposited into the Animal Care and Facility Fund is “appropriated by the legislature . . . to be used to help animal shelters and communities defray the cost of implementing the [NMBVM’s] initiatives conducted pursuant to the Animal Sheltering Act.”¹⁶⁴ Now more than ten years old, the Feasibility Study that undergirds the New Mexico legislation documented that, even if the cost of such increased fees is passed on to consumers at the retail level, the impact would be \$0.025 per pound of pet food purchased, or about \$1.00 per pet, per month.¹⁶⁵ The benefits of this funding system are equitable in that only pet owners are affected, and at the likely affordable cost of only an extra dollar per month even if the costs to manufacturers are passed on, as they likely would be. It is a reliable and steady stream of predictable revenue with a minimal additional administrative cost in that it piggybacks on an existing fee structure with an administrative infrastructure poised to incorporate and manage it.¹⁶⁶

In terms of the supposed burden on interstate commerce created by the small-business exception, plaintiffs allege that there were 137 pet food labels produced by New Mexico based manufacturers in the 2022 registration year and that “most” of these New Mexico based manufacturers are eligible for the \$3 million dollar small business exception.¹⁶⁷ Their assumption is that the small business exception “was enacted to protect New Mexico-based pet food manufacturers and drive the costs associated with the Spay & Neuter Program Fee to out-of-state manufacturers operating in interstate commerce.”¹⁶⁸

There is no evidence throughout the legislative history of SB 57 that the exception was so intended; nor is there data thus far collected on how many craft pet food manufacturers *not* based in New Mexico may be eligible for the same exception. Discovery in the litigation is in only the most nascent

Council v. Ross, 598 U.S. 356, ___, 143 S. Ct. 1142 (2023). There, the Court noted that a statute’s practical effects may reveal an unarticulated discriminatory purpose; however, the Court also noted that “In a functioning democracy, those sorts of policy choices—balancing competing, incommensurable goods—belong to the people and their elected representatives.” *Id.* at 1157-59, 1164-65.

¹⁶³ See *Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992).

¹⁶⁴ N.M.S.A. § 77-1B-4(C).

¹⁶⁵ See NM Feasibility Study, *supra* note 25, at 21-23.

¹⁶⁶ *Id.*

¹⁶⁷ 3d Compl. ¶¶ 83-86.

¹⁶⁸ *Id.* ¶ 87.

phase because the case has ping-ponged between state and federal court for several years, hampered as well by pandemic-related delays. As of July 2024, no scheduling order has been issued. Plaintiffs' arguments may require factual investigation that will play out during discovery. Even if their statistics are accurate, plaintiff's allegations still do not amount to a Commerce Clause violation unless the entire balance between benefit and burden is upset and other aspects of the appropriate test are also met. They are not.

The remaining inquiries concern whether the burden is excessive as compared to the local benefits and whether the local interests can be promoted with a lesser burden on interstate commerce. The local interests are frankly enormous. Currently, taxpayers are footing the bill for euthanizing animals unnecessarily, and companion animal overpopulation in New Mexico has reached record heights. At the same time, it is difficult to argue that the burden of the legislation on pet food manufacturers is excessive, whether measured by impact on pet food manufacturers or pet food consumers. As noted above, the approximate cost of the New Mexico legislation to pet food *consumers* is \$1.00 per pet, per month – if the entire increased cost of product registration is passed on to them.¹⁶⁹ The burden on pet food manufacturers is even slighter, by some estimates .001 percent or less of the cost of pet food sold, even in smaller states.¹⁷⁰

Finally, in terms of whether there is a better method for promoting local interests, one need only look to the comprehensive Maryland and New Mexico feasibility studies conducted in advance of each state's legislative efforts, as well as to the *Guide to Enacting State Legislation for Sustainable Spay/Neuter Funding* developed by the United Spay Alliance.¹⁷¹ In the latter, the author writes that “[a]dding a spay/neuter fee to pet food that is sold within the state and distributing the revenue collected to a dedicated spay/neuter

¹⁶⁹ See NM Feasibility study, *supra* note 25, at 23.

¹⁷⁰ See *Spay Neuter More Cost Effective*, *supra* note 145. Using data available from the U.S. Census Bureau, American Veterinary Medical Association, and the Pet Food Institute, the Federation of Humane Organizations of West Virginia estimated that pet food sales total approximately \$358 million per year in West Virginia alone. Under WV's version of the pet food fee legislation, manufacturers spend \$450,000 in registration fees, which calculates to .001% of sales. *Id.* Even where that that figure is double, such as in Maryland and New Mexico (SB 57 generates approximately \$900,000 to \$1 million per year in registration fees), so too is the number of households with pets. Based on this rough data, resulting percentage is still less than one percent of total sales.

¹⁷¹ See Schimkat, *supra* note 50, at 3. The study goes on to note that “every state except Alaska charges animal [food] manufacturers and/or distributors fees for selling [food] in the state.” *Id.*

fund” is the only realistically sustainable and secure method of garnering the funds necessary to combat the problem of shelter animal / companion animal overpopulation.¹⁷²

When Maryland legislators studied the companion animal overpopulation problem in that state, they concluded that cost is the most significant barrier for low-income pet owners to have their animals spayed or neutered, and that companion animal overpopulation in general places significant costs on local governments, taxpayers, and the staff of animal welfare facilities.¹⁷³ Importantly, in response to its mandate to recommend the most appropriate funding mechanism for a spay/neuter fund – and after having considered at least eight other options in place in other states – the task force determined that a surcharge on pet food was the only truly viable option.¹⁷⁴ Similarly, the New Mexico Feasibility Study considered various funding mechanisms in place in each state and concluded that only an increase in pet food registration fees made sense in terms of generating a reliable, steady revenue stream that would be equitable in impacting only pet owners (versus taxpayers more generally), and where there was already a regulatory structure in place on which it could piggyback administratively.¹⁷⁵

Plaintiffs’ articulated Commerce Clause “subclaims” may be tangentially related to alleged violations, but on the whole amount to an amalgam of references to language from cases that do not support their arguments. Summarized here from their most recently filed complaint, plaintiffs’ subclaims are as follows: the increased pet food registration fee (1) is not fairly apportioned; (2) discriminates against interstate commerce; (3) does not fairly relate to the services provided to the payor by the state; and (4) does not regulate even-handedly or have a legitimate local interest with a nexus to the payor.¹⁷⁶ Plaintiffs’ subclaim (2) above is the only legitimate option for plaintiffs to prevail against the defendant state actors in the New

¹⁷² *Id.* at 3.

¹⁷³ See Andrew D. Gray and T. Patrick Tracy, *Task Force on the Establishment of a Statewide Spay/Neuter Fund: Final Report*, MD Department of Legislative Services, at iii-iv (Dec. 2012), https://mda.maryland.gov/about_mda/Documents/SNAB/Task%20Force%20Final%20Report%20%282012%29.pdf (last visited June 24, 2024).

¹⁷⁴ *Id.* at 7.

¹⁷⁵ NM Feasibility Study, *supra* note 24, at 2, 23. One notable finding of the study regarding the long-term sustainability of specialty license plate revenues was that Texas has *ten times* the number of registered vehicles as New Mexico, and that even Texas’s spay/neuter fund derived from such sales has struggled to keep up with demand. *Id.* at 17.

¹⁷⁶ See 3d Compl. ¶ 68. Accordingly, if SB 57 is unconstitutional under the Commerce Clause, it can only be because it imposes a burden on interstate commerce that is incommensurate with the upside benefits to the state.

Mexico litigation. Importantly, however, it merely reiterates their larger challenge under the Dormant Commerce Clause analyzed previously in this section and fails for the same reasons.

At bottom, subclaim (2) seems to be a nonparallel “umbrella” claim, presumably with (1), (3), and (4) as its relevant subparts. These remaining three “subclaims” are premised on two cases: *South Dakota v. Wayfair, Inc.*,¹⁷⁷ and *Complete Auto Transit Inc., v. Brady*.¹⁷⁸ The first of these is an odd case for the plaintiffs to focus on because it does not inform the current circumstances in the slightest. Rather, *South Dakota v. Wayfair, Inc.*, was an important case for e-commerce businesses because it eliminated the “physical presence rule” previously applied to require only businesses with a local, physical presence to charge sales tax for internet transactions occurring within a state.¹⁷⁹ The Court recognized that “[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence [in prior cases]” and “the Court should not maintain a rule that ignores substantial virtual connections to the state.”¹⁸⁰ *Complete Auto Transit Inc. v. Brady* is no more helpful to the plaintiffs’ cause. Another state sales tax case, *Complete Auto* concerns interstate transit of motor vehicles by large scale carriers of vehicles assembled outside of the state for ultimate sales within the state. There, the Court squarely rejected a rule that a state tax on the “privilege of doing business” within a state is *per se* unconstitutional with respect to interstate commerce. It is curious at best what plaintiffs intend the court to glean from it given that, like the *Wayfair* case, it ultimately runs counter to their arguments.

Nothing about the New Mexico small business exception relates to this concern, as it measures the \$3 million exception based on total annual gross revenue, regardless of where a manufacturer is located or where that revenue is accrued. The sole metric for measuring eligibility for the exception is proof of annual gross tax-year revenue of less than \$3 million. A Colorado craft business could have a single store in Durango that does \$500,000 in in-store revenue and \$2.49 million in Internet sales to customers throughout the U.S. If it registers to distribute specialty pet treats in Santa Fe, it must pay the regular \$2 registration fee but would be exempt from the surcharge. A craft business situated in Santa Fe would face the same results on the same numbers, regardless of the place from which those amounts emanated. Moreover, once either business tipped the annual revenue scale over \$3

¹⁷⁷ 585 U.S. 162, 163-64 (2018).

¹⁷⁸ 430 U.S. 274, 279 (1977).

¹⁷⁹ 585 U.S. at 163.

¹⁸⁰ *Id.*

million, the exception would not apply. If, as plaintiffs also allege, multistate companies such as those that make up the Pet Food Institute are burdened more than those small businesses – regardless of corporate location or sales generation location – that otherwise might be priced out of the New Mexico market, the answer is simply “yes.” That is the point, and it is not unconstitutional.

C. Preemption

Enter into the fray House Bill 7380, the Pet Food Uniform Regulatory Reform Act of 2024, otherwise known as the PURR Act. Introduced on February 15, 2024, this legislation would revamp the current regulatory scheme applicable to commercial pet food, placing oversight of certain issues with the Food and Drug Administration for the first time. One interesting initial note is that the PURR Act uses the term “companion animal,” which it defines as a “domesticated canine or feline.”¹⁸¹ So, as is the case with the statutorily increased registration fee in play in the five states mentioned, the PURR Act applies only to commercial manufacturers of food for dogs and cats, not for any other animal, such as livestock. The essence of the change is to move the regulation of pet food *ingredients*, to the FDA. House Bill 7380 specifically refers to the purported benefits of creating a more “streamlined” regulatory process for approving pet food ingredients, as well as a need to replace the “patchwork” of state regulations with a more uniform regulatory framework.

The PURR Act was introduced in the United States House of Representatives by five members, the bipartisan group of: Jake LaTurner, Sponsor (R-KS) and initial co-sponsors Henry Cuellar (D-TX); Steve Womack (R-AR); Sharice Davids (D-KS); and Josh Harder (D-CA).¹⁸² Since it was introduced, nine additional representatives have joined as additional co-sponsors, though none from any of the states that have enacted the pet food registration fee model for funding statewide spay/neuter programs.¹⁸³ The Bill has been referred to the House Committee on Energy and Commerce, Subcommittee on Health. If passed in its current form, the PURR Act will result in the following “congressional findings:”

¹⁸¹ Pet Food Uniform Regulatory Reform Act of 2024, H.R. 7380, 118th Cong. (2024).

¹⁸² *Id.*

¹⁸³ Additional cosponsors are: Mark Amodei (R-NV), A. Drew Ferguson (R-GA), Donald Davis (D-NC), Blaine Luetkemeyer (R-MO), Adrian Smith (R-NE), David Valadao (R-CA), Derrick Van Orden (R-WI), Susan Wild (D-PA), and Brandon Williams (R-NY). See Pet Food Uniform Regulatory Reform Act of 2024, H.R. 7380, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/house-bill/7380/all-info>.

(1) The pet food industry is a growing sector in the United States. Pet food exports have increased by double digits over the last few years.

(2) United States pet food manufacturers contribute to the national economy by buying nearly \$7,000,000,000 worth of agricultural products from farmers, ranchers, and farm-product processors every year.

(3) Pet ownership has consistently grown in the United States, resulting in an increase in pet food sales and an accompanying increase in the interest by pet owners in how their companion animals' food is regulated and produced.

(4) Historically, pet food and livestock feed have been regulated under the same framework. However, as pet owners' relationships with their pets have changed, so too has their understanding of pets' nutritional needs and preferences. Pet food is specifically formulated to ensure complete nutrition for the long and healthy lives of companion animals. Owning a companion animal provides profound mental, social, and physical health benefits for pet owners such as reduced blood pressure and stress levels, and research indicates that companion animals can play a role in managing depression. Before the enactment of this Act, the regulatory framework that was originally created for livestock feed no longer met the needs of pets or their owners.

(5) Before the enactment of this Act, the regulatory framework governing pet food manufacture and sale, from ingredient approvals to labeling requirements, was multifaceted and wildly inconsistent. Regulatory regimes varied by State, were developed in part by a combination of nongovernmental entities and State government agencies, and were overseen by the Food and Drug Administration's Center for Veterinary Medicine.

(6) Creating a more streamlined Federal regulatory process for new pet food ingredients allows for expedited advances for nutrition, greater innovation, and more functionality in a more predictable regulatory environment.

(7) Replacing the patchwork of regulation of pet food with a uniform Federal regulatory framework improves marketplace certainty, allows for more consistent and predictable ingredient review and market introductions, and enhances companion animal nutrition.

(8) The nationwide availability of nutritious, safe, and affordable pet food is substantially improved through a unified comprehensive Federal system of oversight of the manufacture and sale of pet food.

(9) The manufacture of pet food and its marketing and sale is undertaken throughout the United States and its territories and is interstate commerce.¹⁸⁴

Several of these proposed congressional findings are consistent with those that companion animal advocacy groups and proponents of the pet food registration fee funding mechanism would recognize. The shift to “companion animal” is forward-thinking for this industry, and the notion that “owning a companion animal provides profound mental, social, and physical health benefits for pet owners such as reduced blood pressure and stress levels” noted in (4) above is laudably progressive. While the bill’s authors and sponsors may be correct that separating domestic pet food regulation from the regulation of livestock feed is a sensible reform measure, the proposed PURR Act does not attempt to address the problems associated with companion animal overpopulation in any respect. Proponents of the PURR Act are not wrong in their efforts to standardize, even re-regulate the regime governing acceptable pet food ingredients. But the PURR Act does not contemplate, or even mention, pet food registration fees as deployed to assist with spay/neuter funding. Rather, the legislation ignores the documented crisis that shelters in the United States are facing, even though the impetus of the Bill is completely bound up with dismal statistics on the fate of a growing number of shelter animals across the country. Presumably, Congress has decided to leave that issue to the states.

Not surprisingly, PFI strongly supports the PURR Act. It featured a story and several additional posts on its website about the proposed federal legislation immediately upon the bill’s introduction:¹⁸⁵

¹⁸⁴ *Id.* § 2.

¹⁸⁵ See *Pet Food Institute Announces Support for New Federal Regulation to Modernize Pet food Regulation*, PET FOOD INSTITUTE,

The Pet Food Institute (PFI), whose members produce the vast majority of dog and cat food and treats in the United States, announced its support for new federal legislation that would modernize and streamline how pet food is regulated. Under the proposed bill, H.R.7380, the U.S. Food and Drug Administration (FDA) would have regulatory authority over the labeling and ingredient review process for dog and cat food and treats, replacing the outdated and inconsistent state-by-state approach currently used for ingredient and label approval.¹⁸⁶

The articulated focus of their support with respect to labeling appropriately turns on content – or, pet food *ingredients*:

Dog and cat owners not only want to ensure the same high quality and safe pet foods they trust to nourish their beloved dogs and cats but expect the products to reflect the latest in nutritional science and ingredient innovation,” said PFI President and CEO Dana Brooks. “To continue delivering on that commitment, we are supporting federal legislation that would replace the current inefficient patchwork approach between states and the federal government with consistent national standards that are predictable, clearly defined, and encourage innovation and speed to market.”¹⁸⁷

The primary sponsor of the PURR Act, Representative LaTurner stated that “I am proud to introduce the bipartisan PURR Act to eliminate red tape and allow pet food makers to deliver the best nutritional outcomes for our dogs and cats.”¹⁸⁸ Similarly, co-sponsor Representative Cuellar noted that “The PURR Act includes necessary reforms to streamline and update pet food regulations in the United States. I am pleased to cosponsor this bipartisan

<https://www.petfoodinstitute.org/newsroom/pet-food-institute-announces-support-for-new-federal-legislation-to-modernize-pet-food-regulation/> (last visited June 19, 2024).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *New Federal PURR Act to Modernize Pet Food Regulation*, PET FOOD INSTITUTE, <https://www.petfoodindustry.com/safety-quality/pet-food-regulations/news/15664812/new-federal-purr-act-to-modernize-pet-food-regulations> (last visited June 19, 2024).

bill that will encourage innovation among pet food manufacturers while protecting the health and well-being of our pets.”¹⁸⁹

It appears, therefore, that the purpose of the PURR Act is to promulgate a modernized pet food regulatory framework streamlined under the FDA, to regulate the ingredients, labeling, and marketing of pet food, that is a worthy cause. The issue is whether this newly proposed federal legislation would dismantle the funding mechanism for increased low-cost spay/neuter services relying on increased pet food registration fees. The language in the Act as currently drafted does not preempt the increased registration fees. Of course, there are many links in this chain. The PURR Act is only now in a subcommittee, and its language may not be enacted as drafted. If it becomes law, the plaintiffs will have to raise a preemption challenge and, as discussed below, will have the burden of proof on this issue.

The Supremacy Clause of the U.S. Constitution provides that federal law “shall be the supreme law of the Land[,] any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁹⁰ State law is preempted under the Supremacy Clause in three circumstances. First, Congress can explicitly define the extent to which it intends to displace state law.¹⁹¹ Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended to dominate such that there is no room left for state laws on the same subject.¹⁹² Although courts may draw an inference of field preemption where it is supported by the regulatory scheme, “[w]here . . . the field which Congress is said to have preempted’ includes areas that have ‘been traditionally occupied by the States,’ congressional intent to supersede state laws must be ‘clear and manifest.’”¹⁹³ Finally, state law is preempted to the extent that it *actually* conflicts with federal law, or where it is impossible for a private party to comply with both federal and state requirements.¹⁹⁴

The PURR Act contains an express preemption provision providing that: “No State or a political subdivision of a State may directly or indirectly establish, maintain, implement, or enforce any requirement relating to the

¹⁸⁹ *Id.*

¹⁹⁰ U.S. CONST. art VI, cl. 2.

¹⁹¹ See *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

¹⁹² See *id.* The classic example of a scheme of federal regulation so pervasive that it leaves no room for the states to supplement it is the Employee Retirement Income Security Act of 1974 (ERISA).

¹⁹³ See *id.* at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹⁹⁴ See *English*, 496 U.S. at 79.

marketing or labeling of pet food.”¹⁹⁵ With this provision, Congress will have explicitly preempted state laws with respect to the *marketing* and *labeling* of pet food.¹⁹⁶ Nothing about fees that may be associated with selling pet food products is referenced in any regard, nor is standardization of those fees so much as hinted at in the proposed legislation.¹⁹⁷

Moreover, there is ample room for the state-imposed pet food registration fees at issue here to coexist in this new regulatory landscape. When read in the context of the entire Act – particularly the congressional findings enumerated at (5)-(8) above where “labeling” is mentioned – the intent of the federal legislation concerns only the *content* of the labels themselves. So, for example, a state law may not be able to alter the ingredients that must be disclosed or the nutrition information that must be included on a label, such as fat, calories, or added preservatives. Similarly, how a particular product is marketed and what a manufacturer can or cannot say on its packaging would fall within the contours of federal preemption. Such state law prohibitions would be consistent with the appointment of the FDA as the primary regulator and with the various references throughout the legislation to its primary purpose concerning pet food ingredients and companion animal nutrition.¹⁹⁸

Significantly, pet food manufacturers *also* could easily comply with the state pet food registration fee laws enacted and applicable in forty-nine states, including the increased charges or surcharges associated with the spay/neuter programs in New Mexico, Maryland, West Virginia, Maine, and Delaware. In fact, although the PURR Act and these state laws both concern pet food, there is no overlap otherwise in substance or purpose, and the state registration fees in no way “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”¹⁹⁹ under the proposed federal bill. Here, Congress’ purpose is to establish an exclusive federal scheme for regulating the *content* of pet food labeling as a substantive

¹⁹⁵ *Id.* § 425(b).

¹⁹⁶ *Thornton v. Tyson Foods*, 28 F.4th 1016, 1026-28 (10th Cir. 2022) is instructive on this point. There, the court confronted a federal law prohibiting states from imposing marketing, labeling, and ingredient requirements for meat food products. Labeling requirements in a statutory regime not unlike what the PURR Act recommends were construed as entirely substantive, about the content of the label (and alleged misbranding). *See also* *In re Santa Fe Natural Tobacco*, 288 F. Supp.3d 1087, 1156-58 (D.N.M. 2017).

¹⁹⁷ *Compare id.*

¹⁹⁸ *See, e.g., id.* at (6), (7) (8): “new pet food ingredients;” “expedited advances for nutrition;” “consistent and predictable ingredient review;” “companion animal nutrition;” “nutritious, safe, and affordable pet food.”

¹⁹⁹ *Emerson v. Kansas City So.* 503 F.3d 1126, 1132 (10th Cir. 2007).

matter. Neither SB 57 nor analogous legislation in other states addresses the content of pet food labeling, advertising, or marketing. Because there are no conflicting obligations under state and (proposed) federal law, any preemption arguments should fail.²⁰⁰

V. CONCLUSION

The problem of companion animal overpopulation is one of our own creation, and the widespread availability of free or low-cost spay/neuter services is by all accounts the linchpin of the solution. The promise of pet food registration fees to fund coordinated, statewide low-cost spay/neuter services is great, especially in states such as New Mexico, where companion animal overpopulation is particularly acute:

Dog and cat overpopulation is a serious statewide problem with heartbreaking and expensive consequences, and it is costing New Mexico families—hitting low-income and rural New Mexicans the hardest. Senate Bill 57 is a groundbreaking step forward, giving our state the best tools yet to aggressively curb pet overpopulation—including improving public health and safety, and dramatically reducing shelter animal euthanasia—by helping struggling rural and low-income New Mexico families afford and access vital spay/neuter services for their animals. What’s more, by sustainably funding low-cost spay/neuter services, New Mexico will also begin to decrease the tens of millions of taxpayer dollars that our county and city governments are forced to spend annually dealing with pet overpopulation. We enthusiastically applaud Governor Michelle Lujan Grisham for signing into law this life-saving, cost-saving solution to a critical issue that is not just

²⁰⁰ See, e.g., *Pueblo of Pojoaque v. New Mexico*, 214 F. Supp.3d 1028, 1107-1108 (D.N.M. 2016) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43). See also *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528-29 (1992) (“unlike state law obligations concerning the warning to render a product ‘reasonably safe,’ state-law proscriptions on intentional fraud rely on a single, uniform standard: falsity. Thus [the FCLAA’s express preemption clause] . . . does not encompass the more general duty not to make fraudulent statements.”).

about animal welfare, but about the wellbeing of entire communities.²⁰¹

Ironically, the cost to taxpayers in each state of euthanizing millions of perfectly adoptable animals each year is the same as the cost to pet food manufacturers of contributing increased registration fees to spay or neuter them.²⁰² As the funding mechanism promoted by this Article keeps associated costs entirely within the community of people that provide homes and food to companion animals, its enactment in every state should be a no-brainer.

* * *

²⁰¹ Animal Protection Voters Celebrates the Governor Signing Senate Bill 57, Affordable Spay/Neuter Legislation, ANIMAL PROTECTION VOTERS (Press Statement Mar. 6, 2020), <https://apvnm.org/animal-protection-voters-celebrates-the-governor-signing-senate-bill-57-affordable-spay-neuter-legislation/> (last visited July 11, 2024).

²⁰² See *Spay Neuter More Cost Effective*, *supra* note 145.