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Oklahoma House Bill 2250: A Constitutional Analysis

This memorandum analyzes Oklahoma House Bill 2250. The legislation would violate numerous fundamental rights protected by the United States Constitution and set a dangerous precedent that threatens other charitable organizations and individuals both within and outside the State of Oklahoma.

Background

On March 1, 2016, the Oklahoma House of Representatives passed [House Bill 2250](#), which would create a new section 554.1 within the Oklahoma Solicitation of Charitable Contributions Act. The bill, which now is before the State Senate, proposes to enact the following language:

A. No animal rights charitable organization, professional fundraiser for an animal rights charitable organization or professional solicitor employed or retained by a professional fundraiser for an animal rights charitable organization shall engage in the solicitation of contributions from any person in this state intended to be used on program services or functional expenses outside of this state or for political purposes inside or outside this state.

B. As used in this section:

1. "Animal rights charitable organization" means any individual, organization, group, association, partnership, corporation, limited liability company, trust or other entity soliciting contributions in this state, other than a natural person, that is described in Section 501(c) of Title 26 of the United States Code, that is organized and operated primarily to benefit animal rights and shall not include an organization that is operated primarily to benefit or further the welfare of companion animals; and

2. "Contribution" shall have the same meaning as provided by paragraph 3 of Section 552.2 of Title 18 of the Oklahoma Statutes.

By placing the new section within the Oklahoma Solicitation of Charitable Contributions Act, the bill would impose sanctions in the form of civil penalties (including fines of up to \$10,000 per violation) and criminal penalties (deemed a felony offense, punishable by fines of up to \$10,000 and imprisonment of up to five years in custody of the Oklahoma Department of Corrections). Okla. Stat. tit. 18, § 552.14(a) (2014).

This analysis does not concern itself with the circumstances leading to the bill's introduction, which as reported by various media sources relate to an ongoing dispute between Oklahoma's Attorney General and a particular animal rights organization, as well as an upcoming ballot proposition on the right to farm. The former is the subject of a pending lawsuit between those two parties, and the latter is an issue for the voters of Oklahoma to decide. Rather, this analysis focuses on the language of the proposed legislation and the damaging effect it could have on charitable nonprofits and those they serve in communities across America, including in Oklahoma.

Overview of Fundamental Principles

The threats that HB 2250 pose against nonprofit advocacy, speech, and fundraising rights have attracted national media attention, including *The Chronicle of Philanthropy* ("[Okla. House OKs Bill to Restrict Humane Society Fundraising](#)") and *The NonProfit Times* ("[Fundraising, Speech Issues Targeted in 3 State Legislatures](#)"). It is essential that all concerned understand what is at stake if the State of Oklahoma enacts HB 2250.

A straightforward reading of the bill's language reveals that HB 2250 would make it illegal for anyone associated with an "animal rights charitable organization" to engage in the solicitation of any contributions from anyone in Oklahoma (whether that person is a resident or a visitor) with the intent of spending the donations either on (i) "program services or functional expenses" *outside* of Oklahoma's borders, or (ii) "for political purposes inside or outside" of Oklahoma. As explained in more detail in the full analysis below, here are some examples of why HB 2250 is unconstitutional and fatally flawed.

- By explicitly banning fundraising, which the U.S. Supreme Court repeatedly has held is protected speech intertwined with advocacy, HB 2250 infringes the First Amendment;
- HB 2250 overtly seeks to limit "political" speech, in direct violation of the First Amendment;
- By attempting to impose restrictions on fundraising across state borders, HB 2250 breaches the Commerce Clause of the U.S. Constitution, discriminating against groups located outside of Oklahoma and residents of Oklahoma who want to support the work of regional, national, and international animal rights organizations;
- By using multiple ambiguous terms that would force Oklahomans and people elsewhere to guess whether their actions might break the law, HB 2250 is fundamentally unfair, vague, and overbroad in violation of the Due Process Clauses in the Fifth and Fourteenth Amendments to the U.S. Constitution;
- Although HB 2250 purports to target one animal rights nonprofit organization, it actually could cover more than 20,000 charitable nonprofits across the country that deal with animals, exposing them to potential civil and criminal penalties, putting at risk tens of thousands of volunteer board members, paid staff, fundraising consultants, and other volunteers when they exercise rights guaranteed by the U.S. Constitution;
- HB 2250 effectively invites retaliatory bills from other states preventing Oklahoma residents from expressing their views and interests outside Oklahoma's borders; and
- HB 2250 would create a dangerous precedent – this time it's animal rights, but next time it could be children's rights, consumer rights, civil rights, gun rights, property rights, religious rights, seniors' rights, veterans' rights, or more.

Analysis

HB 2250 Is Fatally Flawed Because It Violates Multiple Provisions of the Constitution.

The very first provision of the Oklahoma Constitution (Section I-1) expressly affirms that "the Constitution of the United States is the supreme law of the land." Likewise, under the Oklahoma Constitution (Section XV-1), every legislator has taken a solemn oath to "support, obey, and defend the Constitution of the United States and the Constitution of the State of Oklahoma." Here, HB 2250 violates multiple pillars of the U.S. Constitution, including: the First Amendment, the Commerce Clause, and Due Process Clauses.

1. HB 2250 Violates the First Amendment by Infringing Fundraising Rights, Which Are Intertwined with Protected Speech and Advocacy Rights.

Through a famous trilogy of cases, the United States Supreme Court has warned states that charitable solicitations constitute speech protected by the First Amendment of the U.S. Constitution. See *Schaumburg v. Citizens for a Better Environment*, [444 U.S. 620](#) (1980) (“soliciting funds involves interests protected by the First Amendment’s guarantee of freedom of speech”), *Secretary of State of Md. v. Joseph H. Munson Co.*, [467 U.S. 947](#) (1984) (“charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment”), and *Riley v. National Federation of Blind of N. C., Inc.*, [487 U.S. 781](#) (1988) (“Our prior cases teach that the solicitation of charitable contributions is protected speech”).

In *Schaumburg*, the Court found:

Prior authorities, therefore, clearly establish that *charitable appeals for funds ... involve a variety of speech interests – communications of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment*. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality *that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.* (Emphasis added.)

In *Munson*, the Court again held a restriction on fundraising to be unconstitutionally overbroad in violation of the First and Fourteenth Amendments. The Court observed, “Whether the charity is prevented from engaging in First Amendment activity by the lack of solicitation permit or by the knowledge that its fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same.” And in *Riley*, the Court reiterated that where “the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself.”

Here, HB 2250 effectively imposes a gag order on any and all animal rights organizations attempting to fundraise in Oklahoma by restricting their rights of free speech and advocacy. Restrictions on those rights must be narrowly construed. If the bill is enacted, Oklahoma would be banning those groups from fundraising and educating the public about animal rights, including advocating for public policy positions. Such bans are not compatible with the U.S. Constitution and thus void.

2. HB 2250 Violates the First Amendment by Overtly Trampling on Political Speech Rights.

There can be no doubt that the bill attempts to violate protected advocacy rights because it bans using funds for any “political purposes inside or outside this state.” Indeed, the bill’s lead sponsor openly admits that “he included the ban on using animal-rights contributions for ‘political purposes’ because of State Question 777, the ‘right to farm’ issue that will appear on the general election ballot in November.” See “Legislation Requires Animal-Rights Contributions Raised in Oklahoma, Be Spent in Oklahoma” ([Oklahoma Farm Report](#), Radio Oklahoma Network; Feb. 10, 2016). Moreover,

he expressed concern that others with a contrary view might be heard: “Outside political interests will be coming into Oklahoma and spending many, many dollars fighting” against the Right to Farm ballot issue. *Id.* Yet the “very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.” *Riley*, citing *Thomas v. Collins*, 423 U.S. 516,545 (1945). In such situations, “the government ... may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities.”

The Constitution is no less applicable to the free speech protections of “animal” rights nonprofits as it is for nonprofits advocating for “children’s” rights, “civil” rights, “consumer” rights,” “gun” rights, “property” rights, “religious” rights, “seniors’” rights, or “veterans’” rights. Speech protections transcend the political and emotional issues of the day. The First Amendment encourages robust discussions of issues of public importance so citizens can remain informed and make up their own minds; it protects against legislation like HB 2250 that stifles free speech.

Although this analysis purposefully avoids addressing the underlying merits of the Right to Farm ballot proposition, it cannot sidestep the reality that HB 2250 would ban fundraising by any animal rights organization to support the expression of its opinions for or against *any* policy-related matters in Oklahoma, including but not limited to the upcoming Right to Farm ballot measure. HB 2250 would effectively make it illegal for animal rights organizations to pay newspapers or radio or television stations to run ads about ballot measures if they would be spending funds raised via solicitations “for political purposes.” Likewise, the bill would trample on the First Amendment’s freedom of the press because paid staff of animal rights groups could not spend time writing press releases or responding to media requests for comments out of fear that they might be prosecuted—thus muzzling them, preventing them from being legitimate news sources for journalists.

3. HB 2250 Violates the Commerce Clause by Discriminating Against Out-of-State Nonprofits.

By declaring that “No animal rights charitable organization ... shall engage in the solicitation of contributions from any person in this state intended to be used on program services or functional expenses outside of this state,” HB 2250 attempts to close Oklahoma’s borders by preventing out-of-state animal rights groups from fundraising within Oklahoma. On its very face, HB 2250 violates the Commerce Clause (Art. I, § 8) of the U.S. Constitution by discriminating against out-of-state entities in favor of in-state economic interests, thus subjecting it to a “virtually *per se* rule of invalidity.” See *City of Philadelphia v. New Jersey*, [437 U.S. 617](#) (1978), in which the Supreme Court found that the state’s interest in keeping toxic waste outside its borders was insufficient to save a New Jersey law from being struck down as unconstitutional. If toxic waste could not be kept out beyond a state’s borders, how can a state have a greater interest in keeping out fundraising solicitations that are intertwined with speech? In *Philadelphia*, the Supreme Court found, “All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset.” The Constitution makes no distinction between economic activities of for-profit and nonprofit corporations.

The barrier that HB 2250 tries to build around the State would effectively ban Oklahomans from being contacted with information seeking voluntary contributions to animal rights organizations outside the state’s borders, because such contributions might be used for “political purposes” or for

“program services or functional expenses.” Trying to pass laws erecting arbitrary blockades at jurisdictional borders, whether to protect insiders or discriminate against outsiders, is unconstitutional.

4. HB 2250 Is Unconstitutionally Vague and Ambiguous, Violating Due Process.

The U.S. Supreme Court held 90 years ago that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. General Construction Co.*, [269 U.S. 385](#), 391 (1926) (striking down as unconstitutional an Oklahoma statute concerning the payment of workers for being too vague). Here, language in HB 2250 is so vague and ambiguous that it forces individuals inside and outside of Oklahoma to guess how the State will interpret their actions. When individuals have to guess whether their actions may or may not trigger a loss of their freedom or property, a law is vague and overly broad in violation of the Due Process protections of the Fifth and Fourteenth Amendments to the U.S. Constitution.

a. “Animal Rights Charitable Organization”

The initial vagueness problem with HB 2250 is how anyone can possibly determine whether the bill would apply to them. They will not find the answer in the bill’s so-called definition of “animal rights charitable organization,” which fails to provide meaningful guidance as to which organizations are covered and which are not. The bill, in subsection B (1), defines an “animal rights charitable organization” as any “entity soliciting contributions in this state ... that is described in Section 501(c) of Title 26 of the United States Code, that is organized and operated primarily to benefit animal rights and shall not include an organization that is operated primarily to benefit or further the welfare of companion animals.” The use of the word “charitable” in the term generally limits the definition to 501(c)(3) public charities. Further, the only provision in all of Section 501(c) of Title 26 of the United States Code referring specifically to “animals” appears in Section 501(c)(3), concerning nonprofits “organized and operated exclusively for ... the prevention of cruelty to ... animals.” This category obviously includes a far wider range of organizations than just the “targeted” organization by sweeping in entities such as the American Society for Prevention of Cruelty to Animals (ASPCA).

Media reports indicate that the bill’s lead sponsor, Rep. Brian Renegar, “told the [House] committee that his bill focuses on animal ‘rights’ organizations rather than animal ‘welfare’ organizations so as not to interfere with legitimate activities of PetSmart Charities and the Petco Foundation, which donate customer contributions to local animal shelters, as well as activities of the American Society for the Prevention of Cruelty to Animals.” See “Proposed bill bans animal rights organizations from spending Oklahoma donations outside the state” ([News Channel 4](#); February 11, 2016); see also “Legislation Requires Animal-Rights Contributions Raised in Oklahoma, Be Spent in Oklahoma” ([Oklahoma Farm Report](#), Radio Oklahoma Network; Feb. 10, 2016). However, the bill’s language fails to provide such a distinction between “animal rights” and “animal welfare” organizations.

This confusion about which organizations are covered and which are not is confirmed by how the Oklahoma media have described the bill’s reach. Journalists covering this bill – presumably people “of common intelligence” that the U.S. Supreme Court used as the standard – have failed to see any meaningful distinction as they have referred to HB 2250 as applying to “animal groups” and animal “rescue groups” and “animal-rights organizations that help pets.” See, e.g., “Proposed bill could limit

fundraising for **animal groups** in Oklahoma” ([Fox 23 News](#); January 11, 2016) (“A new bill could limit **animal groups** from posting commercials in Oklahoma” and would prohibit any animal rights and **rescue groups** from fundraising inside the Sooner State”); “Proposed bill bans animal rights organizations from spending Oklahoma donations outside the state” ([News Channel 4](#); February 11, 2016) (“A bill that was unanimously approved by a legislative panel would make sure that any donations Oklahomans make toward **animal-rights organizations will help pets** in the Sooner State”) (emphasis added).

To demonstrate how the confusion created by the bill’s vague and overbroad language will harm tens of thousands of organizations, consider that the Internal Revenue Service and National Center for Charitable Statistics use the [National Taxonomy of Exempt Entities](#) (NTEE) to classify nonprofit organizations, including a wide variety of animal-related nonprofits. The NTEE contains 18 categories of “Animal-Related” nonprofits, including several susceptible to being considered related to “animal rights” and “fundraising” for animal rights, such as: D01 (Alliances & Advocacy), D03 (Professional Societies & Associations), D05 (Research Institutes & Public Policy Analysis), D12 (Fundraising & Fund Distribution), D19 (Support), D20 (Animal Protection & Welfare), D30 (Wildlife Preservation & Protection), D31 (Protection of Endangered Species), D32 (Bird Sanctuaries), D34 (Wildlife Sanctuaries), D40 (Veterinary Services), D50 (Zoos & Aquariums), D61 (Animal Training), and D99 (Animal-Related).

A search of these various categories of “Animal-Related” nonprofits on GuideStar on Saturday March 5, 2016, yielded the names of more than 20,000 nonprofit organizations registered with the Internal Revenue Service. Thus, while the Oklahoma media universally report that the sponsors of HB 2250 “targeted” one particular organization (Humane Society of the United States), the bill’s unfocused aim will create considerable collateral damage.

Indeed, the language of HB 2250 could sweep in many thousands of “animal rights charitable organizations” that are “organized and operated primarily to benefit animal rights,” including the following small sampling of a huge number of entities:

- National Fish and Wildlife Foundation, established by Congress, that is organized and operated to benefit animal rights by protecting our nation’s native wildlife species (based in Washington, DC);
- World Wildlife Fund, which is organized and operated to benefit animal rights by, among other ways, advocacy and reducing poaching (based in Washington, DC);
- Jane Goodall Institute for Wildlife Research Education & Conservation, which is organized and operated to benefit animal rights by improving treatment of great apes through research and advocacy (based in Virginia);
- International Primate Protection League, which is organized and operated to benefit animal rights through its mission of protecting nonhuman primates (based in South Carolina);
- Friends of Animals, which is organized and operated to benefit animal rights by “freeing animals from cruelty and institutionalized exploitation around the world” (based in Connecticut);
- Keepers of the Wild, which is organized and operated to benefit animal rights by protecting abused, neglected, abandoned, and retired captive animals (based in Arizona);

- Big Cat Rescue, which is organized and operated to benefit animal rights by being “a leading advocate in ending the abuse of captive big cats and saving wild cats from extinction” (based in Florida);
- International Fund for Animal Welfare, which is organized and operated to benefit animal rights by reducing commercial exploitation of animals and prevent cruelty to animals, especially seals and whales (based in Maine);
- Lions, Tigers & Bears, which is organized and operated to benefit animal rights by “providing a safe haven for unwanted and abused exotic animals” (based in California); and
- American Society for the Prevention of Cruelty to Animals, which is organized and operated to benefit animal rights by, among other ways, “rescuing animals from harm and advancing the prevention, investigation and prosecution of animal cruelty via direct case involvement, consulting and training for other professionals, as well as advocacy for animal friendly legislation” (based in New York).

Admittedly, legislators sponsoring the bill could choose to argue that they did not mean to sweep in some of those organizations. But the bill’s language controls, and it provides very little guidance to future state employees who will be called upon later to enforce the law. Different employees could go in different directions in applying the law to wide range of charitable nonprofits that deal with one or more aspects of animal rights or the rights of animals. That is no comfort to the thousands of entities that look at the bill’s language as written and feel muzzled by the threat that Oklahoma might attempt to enforce it against them if they engage in their protected rights to fundraise, thereby subjecting them to five years of imprisonment and a \$10,000 fine. This fuzziness of language is not mere speculation, but documented reality, as shown by Oklahoma journalists covering this specific bill who have described it as applying to “animal welfare” organizations, animal “rescue groups,” and “animal-rights organizations [that] help pets.”

b. “Political Purposes”

But that is not the only ambiguous term that renders HB 2250 void for vagueness. The bill also outlaws using solicited funds for “political purposes.” As all Americans know, “political” speech is as exalted and protected by our society and courts as the expression of religious beliefs. HB 2250 unmistakably seeks to prohibit the solicitation of funds that are to be used for “political” purposes without defining what the word means in this context.

Section 501(c)(3) of the Internal Revenue Code already imposes an absolute ban prohibiting all charitable nonprofits from participating in, or intervening in, any political campaign on behalf of or in opposition to any candidate for elective public office (although federal law does authorize them to participate in advocacy for or against ballot measures). If partisan electioneering is the concern of the bill’s sponsors, then the legislation’s gag rule is redundant and unnecessary. But if the bill means something else, then it is unclear what HB 2250 intends “political” to mean. Does it attempt to illegally limit protected rights to participate in ballot measures? Or illegally restrict protected rights to testify or take positions on proposed legislation at the local, state, or federal levels?

c. “Functional Expenses”

Equally troubling is application of the ban on raising funds to be used “on program services or functional expenses” outside of Oklahoma. The term “program services” is fairly common, but there is no known “functional expense” for nonprofits. The phrase “functional expenses” is common – but only as part of a longer term. The Financial Accounting Standards Board issued [Financial Accounting Standard 117](#) (“Financial Statements of Not-for-Profit Organizations”) in 1993 when it first required nonprofits to produce their financial statements in ways that comply with generally accepted accounting principles. But it uses the phrase of “functional expense” *as part of a longer term* – “functional expense reporting” – and a *much larger concept*: how nonprofits must report ALL of their expenses. The phrase relates to a process for reporting expenses through required statements, and not a special category of expenses. So with the bill referring to “program services or functional expenses” in the same line, people of “common intelligence must necessarily guess at its meaning” in violation of the U.S. Constitution.

Practical Implications

For multiple reasons, nonprofit organizations of all types across the country are concerned about this bill that threatens their fundraising, advocacy, speech, and other rights. Naturally, the first concern is for their own organizations and how HB 2250 could impact their operations. For thousands of organizations, it means the added cost of hiring attorneys to determine endless questions for items as simple – and complex – as the following topics. Does the bill’s vague term of “animal rights” reach their activities? Must they try to bifurcate all of their messages between those going into Oklahoma and those that don’t (or to even stop communicating with their colleagues and fellow Americans in Oklahoma)? What types of photographs and language can they use – or must they avoid – in their newsletters and websites (e.g., can they use anything depicting or referring to animals if the material might enter Oklahoma’s borders)? Do they need to completely change the historical norm of automatically reaching out to past contributors to make sure that nothing electronic or on paper ever crosses Oklahoma’s state lines again? Is there liability if an Oklahoman voluntarily signs up to receive the animal rights organization’s electronic newsletter that requests donations, using the person’s “gmail” or “aol” or other email account that provides no notice that the person resides in Oklahoma?

These and many other issues must be resolved not only by the more than 20,000 known charitable organizations that work on aspects of “animal rights,” but also all of their current and potential fundraising professionals. With the vast majority of nonprofits having annual income of less than \$1 million, most could not afford such legal advice and might be inclined to find ways to cut off any and all work and communications whatsoever with people in Oklahoma to try to avoid potential problems.

Nonprofits also are concerned about the dangerous precedent that HB 2250 could set for other state legislatures to try to enact similar legislation to deny their state’s residents information of different viewpoints about policy issues. Almost identical legislation has been introduced in Missouri, where [Missouri House Bill 2604](#) would prohibit any “animal rights charitable organization” from engaging “in the solicitation of contributions from any person in this state intended to be used on program services or functional expenses outside of this state or for political purposes inside or outside this state.” How many other walls and barriers will be built around states, either as copy-cat or retaliation bills? Where will it end? This time the effort to deny constitutional protections targets

“animal rights” (whatever that means), but perhaps the next time something else is targeted – maybe children’s rights, or civil rights, or consumer rights, or gun rights, or property rights, or religious rights, or seniors’ rights, or veterans’ rights – if this law passes.

Conclusion

That HB 2250 is unconstitutional is not in doubt. It violates the U.S. Constitution, the Oklahoma Constitution by reference, and the oath of office of every member of the Oklahoma Legislature who has sworn to support, obey, and defend the Constitution. What is in doubt is whether the Oklahoma Senate will follow the House in passing this unconstitutional bill, or pull the bill from further consideration.

The **National Council of Nonprofits** is a trusted resource and advocate for America’s charitable nonprofits. Through our powerful network of State Associations and 25,000-plus organizational members – the nation’s largest network of nonprofits – we serve as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. We identify emerging trends, share proven practices, and promote solutions that benefit charitable nonprofits and the communities they serve. Our work specifically includes “promoting, supporting, and protecting nonprofit advocacy and lobbying.”

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