

A LOCAL APPROACH TO A NATIONAL PROBLEM: LOCAL
ORDINANCES AS A MEANS OF CURBING PUPPY MILL
PRODUCTION AND PET OVERPOPULATION

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I. INTRODUCTION

“Puppy mill” has become a catchphrase synonymous with abuse and deplorable living conditions, conjuring to mind images of dogs crammed in wire mesh cages, matted with feces, and suffering from numerous untreated health problems.¹ Despite recent public attention to the issue and animal activists struggling to push for stricter regulation of commercial dog dealers, the federal agency in charge of the industry has failed to curb the rampant abuse through the inadequate regulations that are currently in force.² While the puppy mill industry churns out millions of puppies a year, millions of puppies and adult dogs are euthanized in shelters across the country after being let loose on the streets or abandoned to the system by their owners.³

A growing number of local governments are trying to dampen the market for puppy mill dogs through the enactment of local ordinances that ban or severely limit the retail sale of cats and dogs.⁴ By cutting off the ability of retail pet stores to sell their live products, these ordinances aim to curtail the demand for puppy mill dogs, thereby decreasing the supply and resulting in consumers turning to more humane places to get a new companion such as

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¹ Adam J. Fumarola, Note, *With Best Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage It, and the Positive Prospects of Animal Rights*, 6 BUFF. ENVTL. L.J. 253, 260–61 (1999).

² See discussion *infra* Part III.

³ *The Crisis of Pet Overpopulation*, ANIMAL CARE SERVS., CITY OF LONG BEACH, http://www.longbeach.gov/acs/pet_overpopulation/ (last visited Dec. 24, 2011).

⁴ See discussion *infra* Part VII.

shelters, rescue groups, or small-scale breeders.⁵

This paper will analyze the issues surrounding the potential for local ordinances to have an impact on puppy mills and pet overpopulation. Starting from the premise that local initiatives play a crucial role in changing public and governmental perception of the social and moral issues involved in the abusive puppy mill industry, this article argues that local ordinances that entirely prohibit the sale of dogs in pet stores—as compared to ordinances that regulate pricing of dogs sold by pet stores—should be utilized by more municipalities as a means of tightening market pressure on commercial dog dealers in the face of ineffective federal regulation.

II. BACKGROUND INFORMATION

Although “puppy mill” does not have a standard definition, the term generally refers to high volume breeding operations populated by poorly treated dogs that are bred at every opportunity, caged their entire life, and that receive minimal health care.⁶ As in most businesses, profit maximization is the paramount concern of these enterprises.

As of 2011, it is estimated that there are over seventy-eight million dogs owned in the United States, only twenty-one percent of which were adopted from animal shelters.⁷ Over \$2.13 billion were spent in the U.S. market in 2010 on live animal sales.⁸ Despite the substantial amount of money involved in the sale of companion animals, approximately six to eight million dogs and cats enter shelters across the country each year; three to four million of those animals are euthanized in the shelter system.⁹ Live animal sales only comprised 4.4 percent of the amount total spent in the pet industry in 2010.¹⁰ The Humane Society of the United States estimates that in 2009 approximately one-third of the nine thousand pet stores across the country sold puppy mill born puppies and that between two and four million puppies produced by puppy mills are sold each year.¹¹ Meanwhile, it is estimated that half of

⁵ See discussion *infra* Part VII.

⁶ Fumarola, *supra* note 1, at 254, 260–61.

⁷ *U.S. Pet Ownership Statistics*, THE HUMANE SOC'Y OF THE U.S. (Aug. 12, 2011), http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html.

⁸ *Industry Statistics & Trends: Pet Ownership*, AM. PET PRODS. ASS'N, http://www.americanpetproducts.org/press_industrytrends.asp (last visited Jan. 4, 2012).

⁹ *The Crisis of Pet Overpopulation*, *supra* note 3.

¹⁰ See *Industry Statistics & Trends: Pet Ownership*, *supra* note 8.

¹¹ *Pet Stores in 35 States Pledge to Protect Puppies*, THE HUMANE SOC'Y OF THE U.S (Dec. 22, 2009), http://www.humanesociety.org/news/press_releases/2009/12/pet_stores_sign_

the dogs and seven out of ten cats that enter the shelter system are euthanized due to a lack of homes.¹²

While great strides have been made in animal advocacy and humane treatment in the last few decades, the problem of puppy mill exploitation and its connection to pet overpopulation has continued to vex local governments and animal advocacy groups. A new approach is necessary in the face of the failure of the current legal regime.

III. FEDERAL REGULATION OF COMMERCIAL DEALERS

The federal regulatory scheme that currently governs puppy mills is ineffective to ensure adequately humane treatment for dogs, making local action necessary. The federal government regulates commercial breeding operations under the Animal Welfare Act (“AWA”).¹³ State governments (to a varying degree)—through anti-cruelty laws, health regulations, and lemon laws¹⁴—and local governments—often through zoning ordinances¹⁵—may impose additional and more restrictive regulations on puppy mills.¹⁶

In 1966 and through subsequent amendments, Congress drew upon its enumerated commerce clause power¹⁷ to regulate “the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using [animals] for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.”¹⁸ The AWA was not an attempt at a federal anti-cruelty statute, but rather targeted regulation for very specific and nationally important animal activities.¹⁹ The United States Department of Agriculture (“USDA”) is tasked with enforcing the AWA. More specifically, the regulations and enforcement measures pertaining to the AWA are handled by the Animal and Plant Health

puppy_friendly_pledge_122209.html.

¹² *The Crisis of Pet Overpopulation*, *supra* note 3.

¹³ Animal Welfare Act (AWA), 7 U.S.C. § 2133 (2011).

¹⁴ *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 122045–122220 (West 2011).

¹⁵ *See, e.g.*, ALBANY, N.Y., CODE § 375-103 (2008), available at <http://www.ecode360.com/7688013#7688073>.

¹⁶ This paper generally will not discuss state efforts to combat puppy mills and overpopulation because each state takes a different approach.

¹⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁸ 7 U.S.C. § 2131.

¹⁹ *See id.* (“[A]nimals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof . . .”).

Inspection Service (“APHIS”) within the USDA.²⁰ While the purposes listed in the Congressional Statement of Policy imply an expansive reach for the Animal Welfare Act,²¹ the legislation is riddled with exceptions and loopholes that severely reduce the effectiveness of the AWA in actually implementing care standards for various animals and industries.²²

Pursuant to the AWA, commercial dog dealers must apply for licenses from the USDA, comply with all applicable regulations from the agency, and undergo regular inspections to ensure compliance.²³ Dealers are defined as:

any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog . . . for . . . use as a pet . . . except that this term does not include—(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer;

²⁰ *The Animal Welfare Act: A Legislative and Regulatory History*, U.S. DEP’T OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERV., http://www.aphis.usda.gov/animal_welfare/downloads/awa_leg_history.pdf (last modified Apr. 26, 2010).

²¹ 7 U.S.C. § 2131 (“[T]o prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.”)

²² For example, the AWA definition of animal includes “any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used . . . for research, testing, experimentation, or exhibition purposes, or as a pet,” and Congress specifically excluded from the Act, and therefore the required care standards, “(1) birds, rats . . . and mice . . . bred for use in research, (2) horses not used for research purposes, and (3) other farm animals” intended for use in the food production system. 7 U.S.C. § 2132(g). A loophole in the statute allows commercial dealers that sell over the internet or directly to the public to avoid the need for a federal license. *Puppy Scams & Cons: Buyers Beware: Debunking Puppy Scams*, THE AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/fight-animal-cruelty/puppy-mills/puppy-scams-cons.aspx> (last visited Jan. 4, 2012). The APSCA reports that approximately eighty-nine percent of breeders selling their puppies over the internet are not federally licensed; the consumer has no way of knowing how the animals are cared for or treated behind the façade of the fancy website with cute pictures of puppies. *Id.* While it may have made sense to exempt breeders selling directly to the public from inspection when the AWA was passed, the legislature likely thought that the public would have access to and be viewing the facilities and conditions in which the dogs were bred. *Id.* With the widespread use of the internet, this is not the case and a survey by the APSCA reports that as many Americans are purchasing their dogs via Internet websites as those who are buying from pet stores. *Id.* Though not the subject of this paper, this is merely another example of how federal legislation regarding the treatment of animals needs to be updated to conform to modern humane standards, perhaps by requiring all dealers that have over a specific number of dogs and sell directly to the public to hold a federal license.

²³ 7 U.S.C. §§ 2133, 2134.

or (ii) any person who does not sell, or negotiate the purchase or sale of any . . . dog . . . and who derives no more than \$500 gross income from the sale of other animals during any calendar year.²⁴

This exemption for retail pet stores is also built into the licensing provision which does not require any retail pet store or person who “derives less than a substantial portion of his income . . . from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility” to obtain a dealer license.²⁵

APHIS has defined a retail pet store as any outlet that offers for sale at retail, but not wholesale, animals exclusively listed in the APHIS regulation, which includes dogs, cats, and various small animals.²⁶ Establishments that deal in dogs for hunting, security, or breeding purposes; exhibit wild or exotic pets; sell animals for research; sell animals wholesale; or exhibit pets in a room separate from the retail store are not covered by the retail pet store exclusion.²⁷ APHIS’s definition of retail pet store has been challenged as overly inclusive and contrary to congressional intent because the agency has construed the statute and its own regulations as providing a blanket exemption, through the retail pet store exclusion, to individuals who breed and sell dogs within their home directly to consumers.²⁸ The U.S. Court of Appeals for the District of Columbia upheld APHIS’s interpretation of retail pet store as consistent with the AWA, in part because it allowed the agency to focus its resources on wholesalers which the agency argued were at a higher risk of violating animal welfare standards.²⁹

APHIS regulations establish minimum care requirements that commercial dealers are required to meet in order to maintain their federal license.³⁰ These regulations specify standards for housing and sheltering of the animals,³¹ feeding,³² providing water,³³

²⁴ *Id.* § 2132(f).

²⁵ *Id.* § 2133.

²⁶ 9 C.F.R. § 1.1 (2011).

²⁷ *Id.*

²⁸ *Doris Day Animal League v. Veneman*, 315 F.3d 297, 299 (D.C. Cir. 2003).

²⁹ *Id.* at 301.

³⁰ 9 C.F.R. § 2.3.

³¹ *Id.* §§ 3.1–3.6.

³² *Id.* § 3.9.

³³ *Id.* § 3.10.

exercising,³⁴ adequate veterinary care,³⁵ and sanitation.³⁶ For example, each dealer is required to have a formal arrangement employing an attending veterinarian.³⁷ This arrangement is supposed to “include a written program of veterinary care and regularly scheduled visits to the premises of the dealer.”³⁸ Regulations require “[t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care” and also require “[d]aily observation of all animals to assess their health and well-being . . . so that timely and accurate information on problems of animal health, behavior, and well-being” can be communicated to the veterinarian.³⁹

The regulations provide very minimal standards of care for the dogs kept by commercial dealers; the largest problem, however, is that even these nominal standards are barely enforced and dogs are often subjected to a much lower standard of care.⁴⁰ Dealers are subject to inspections prior to licensing to ensure compliance with the AWA and regulations; once a license is obtained, dealers are inspected without prior notice at least twice a year.⁴¹ Violations found during these inspections can result in suspended or revoked licenses, monetary penalties, or criminal penalties.⁴² In the face of growing public opposition to puppy mills, the Office of the Inspector General conducted an audit of APHIS’s inspections of problematic dog dealers and published the resulting report in May of 2010.⁴³ The report evaluated whether the Animal Care Unit effectively enforced provisions of the AWA against dealers that had a history of violations within the previous three years.⁴⁴

The report concludes that between the fiscal years of 2006 and

³⁴ *Id.* § 3.8. These regulations suggest, but do not require, that dogs be provided with human contact, “[d]ealers, exhibitors, and research facilities . . . should consider providing positive physical contact with humans that encourages exercise through play or other similar activities.” *Id.* § 3.8(c)(2).

³⁵ *Id.* § 2.40.

³⁶ *Id.* § 3.11.

³⁷ *Id.* § 2.40.

³⁸ *Id.*

³⁹ *Id.* § 2.40(b)(1–3).

⁴⁰ U.S. DEP’T OF AGRIC.: OFFICE OF INSPECTOR GEN., ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS: AUDIT REPORT 33002-4-SF 1–2 (May 2010), available at <http://www.usda.gov/oig/webdocs/33002-4-SF.pdf>.

⁴¹ *Id.* at 4.

⁴² Animal Welfare Act (AWA), 7 U.S.C. § 2149 (2011).

⁴³ U.S. DEP’T OF AGRIC.: OFFICE OF INSPECTOR GEN., *supra* note 40, at 1.

⁴⁴ *Id.*

2008, the Animal Care Unit was ineffective in enforcing compliance by dealers with the AWA and corresponding regulations.⁴⁵ The report points to an overreliance on education and cooperation as a means of achieving compliance, which has resulted in “the agency cho[osing] to take little or no enforcement actions against violators . . . [and] taking this position against serious or repeat violators weakened the agency’s ability to protect the animals.”⁴⁶ While inspectors must recommend that enforcement action be taken against repeat violators, a repeat violator is defined as a dealer that consecutively violates the same subsection of the regulations; in addition, one of the enforcement actions that inspectors may recommend is no action.⁴⁷ This means that so long as dealers do not violate the same exact care provision in consecutive inspections, and rather violate different provisions each time, the dealer can avoid being labeled a repeat offender and inspectors will not have to recommend enforcement action against them.⁴⁸ As evidenced by the report’s conclusions, finding that no action was recommended in fifty-two percent of the cases reviewed with repeat violations,⁴⁹ even being labeled a repeat violator does not ensure the agency will take a harder stance against the dealer.

The auditors visited sixty-eight commercial dealers to evaluate APHIS’s inspections and enforcement of the AWA and its regulations.⁵⁰ The detailed examples provided in the report, accompanied by gruesome and tragic images, depict the truth of puppy mills and the complete failure of the current legal system to adequately protect their occupants.⁵¹ For example, upon inspection of a breeding facility in Oklahoma, a severely injured dog was found and the report discusses the results:

[O]ne of the direct violations involved a dog that had been bitten by another dog. The first dog was left untreated for at least 7 days, which resulted in the flesh around the wound rotting away to the bone. . . . Based on the results of the investigation, AC recommended a stipulation. However, as of early June 2009—11 months after our visit—the violator had not yet been fined. . . . In this case, AC did not notify the

⁴⁵ *Id.* at 8.

⁴⁶ *Id.*

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.* at 10–24.

state of Oklahoma (which has first-offense felony laws for animal cruelty) of the inhumane treatment the dog received.⁵²

Unfortunately, this is only one of numerous examples in the report of the deplorable and illegal conditions at licensed puppy mills.⁵³ Others include dead dogs and starving dogs that resorted to cannibalism,⁵⁴ dogs that were entirely covered in ticks,⁵⁵ kennels overrun with feces and urine,⁵⁶ and food infested with cockroaches.⁵⁷ At the facility in which the starving dogs were found, the AC inspector did not remove the surviving dogs, and as a result twenty-two more dogs died.⁵⁸ Arguably, this result was required as AC inspectors must provide the violator a chance to correct the violations before they may confiscate any animals; there are no emergency provisions that provide authority for confiscation even in the most extreme of cases.⁵⁹ This is a severe regulatory oversight that results in needless suffering and pain for the occupants of puppy mills.

The report notes that over the last few decades, Congress has increased the maximum penalties that may be levied against violators of the AWA.⁶⁰ But these increases have not corresponded to an increase in penalties actually charged as “average penalties actually assessed by APHIS [have] represented less than 10 percent of the maximum.”⁶¹ Previous audits have found that because APHIS usually significantly reduces the monetary penalties against dealers, it is easier for dealers to pay the fine rather than ensure the animals are properly cared for, and instead dealers merely regard the penalties as a normal cost of business.⁶²

As the reports of government inspections demonstrate, the purpose of the AWA “to insure that animals intended . . . for use as

⁵² *Id.* at 11 (footnote omitted).

⁵³ *See id.* at 10–24.

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 12. “Although the inspector was concerned that the dogs [that were completely infested with ticks] might be anemic, she cited the ticks as an indirect violation” not affecting the dogs’ health and due to poor reporting APHIS is unsure whether or not this dog was ever treated. *Id.*

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 19.

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 14.

⁶⁰ *Id.* at 28.

⁶¹ *Id.* (footnote omitted).

⁶² *Id.* at 6–7.

pets are provided humane care and treatment”⁶³ is not being achieved. The inability of the federal government to appropriately address these problems through enforcement of current regulations and laws, or through the passage of new, stricter legislation (which would likely have the same poor enforcement), has left the door open for local communities, advocacy groups, and municipalities to take steps towards solving the problem on their own.

IV. ADVOCACY EFFORTS

The cruelty inherent in puppy mill operations has aroused the ire of various advocacy groups across the country.⁶⁴ The actions and supporters of these groups are important to the issue because it shows a growing social awareness of the moral and social problems inherent in the puppy mill trade.⁶⁵ Prominent advocacy groups such as the Humane Society of the United States (“HSUS”) and the Animal Legal Defense Fund (“ALDF”) run campaigns aimed at educating the public about the conditions of puppy mills in hopes that increased public awareness will discourage consumers from supporting the establishments by purchasing their next dog from a pet store.⁶⁶

The HSUS encourages all people to pledge that they will consider adoption first and will not purchase an animal, or pet supplies, from a retail store that sells puppies.⁶⁷ The HSUS has compiled listings of “puppy-friendly pet stores” that have pledged not to sell puppies in their stores to help consumers find local stores they should support if they do not want their money inadvertently benefitting puppy mills.⁶⁸ To date, over one thousand independent pet stores, across forty-two states, have committed to aiding and supporting adoption rather than the sale of puppies.⁶⁹

The HSUS has also created a puppy mill task force that

⁶³ Animal Welfare Act, 7 U.S.C. § 2131 (2011).

⁶⁴ See, e.g., *Puppy Mills Require Ongoing Legislative Attention*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/article.php?id=1551> (last updated Dec. 2010); *Stop Puppy Mills*, THE HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/issues/campaigns/stop_puppy_mills (last visited Jan. 4, 2012).

⁶⁵ *Puppy Mills Require Ongoing Legislative Attention*, *supra* note 64.

⁶⁶ *Id.*; *Stop Puppy Mills*, *supra* note 64.

⁶⁷ See *Puppy Friendly Pet Stores*, THE HUMANE SOC’Y OF THE U.S. (May 17, 2011), http://www.humanesociety.org/issues/puppy_mills/facts/puppy_friendly_pet_stores.html.

⁶⁸ *Id.*

⁶⁹ *Puppy Friendly Pet Stores Program Exceeds Milestone of 1,000 Members*, THE HUMANE SOC’Y OF THE U.S. (Jan. 11, 2011), http://www.humanesociety.org/news/press_releases/2011/01/_puppy_friendly_pet_pledge_1000_stores_111110.html.

cooperates with law enforcement and other agencies in investigating puppy mills, executing raids (through legal means), and providing general guidance to government agencies in the field.⁷⁰ This task force is aided by the creation of a national toll-free “puppy mill tipline,” through which concerned members of society may report potential abuses of care standards, cruelty cases, or unlicensed facilities.⁷¹ Organizations like the HSUS also provide support to government agencies and advocate for stricter regulation and standards to be established by the federal, state, and local governments.⁷²

Efforts to educate the public and provide an avenue for concerned citizens to become involved may help effectuate lasting change. But the problem with relying on advocacy to pressure puppy mills into changing their methods is that it fails to directly impact the market for the puppy mill product. While dispersed individuals choosing to make a moral decision not to support the business indirectly affects the demand for puppies, concerted government action sends a much clearer and more unmistakable message to the suppliers and the general public that puppy mills will not be tolerated.

V. WHY SHOULD LOCAL GOVERNMENTS CARE?

Overpopulation of dogs and cats places stress on local governments and raises health and public safety concerns among the general population. The HSUS reports that in 1972 shelters across the United States expended approximately \$800 million on caring for animals; in 2007 that number had escalated to approximately \$2.4 billion.⁷³ As of late December 2011, California taxpayers alone spent over \$245,177,000 housing and euthanizing stray cats and dogs.⁷⁴ Pet overpopulation that results in stray animals increases human exposure to dangerous public health

⁷⁰ *New Puppy Mill Task Force Scores First Victory for Dogs*, THE HUMANE SOC'Y OF THE U.S. (July 2, 2009), http://www.humanesociety.org/news/news/2009/07/puppy_mill_task_force_070209.html.

⁷¹ *Puppy Mill Tipline Fights Cruelty*, THE HUMANE SOC'Y OF THE U.S. (Dec. 3, 2009), http://www.humanesociety.org/issues/puppy_mills/qa/puppy_mill_tip_line.html.

⁷² *Legislation*, THE HUMANE SOC'Y OF THE U.S., <http://www.humanesociety.org/about/departments/legislation> (last visited Jan. 4, 2012).

⁷³ *Animal Sheltering Trends in the U.S.*, THE HUMANE SOC'Y OF THE U.S. (Mar. 11, 2009), http://www.humanesociety.org/animal_community/resources/timelines/animal_sheltering_trends.html.

⁷⁴ *Pet Overpopulation Crisis*, SOC. COMPASSION IN LEGISLATION, <http://socialcompassioninlegislation.org/scil-home.php> (last visited Jan. 4, 2012).

risks, such as rabies.⁷⁵ The public is footing the bill for problems that are exacerbated by overpopulation of cats and dogs including capturing stray animals, their subsequent care, and investigating cruelty against these animals.⁷⁶

In addition to burdens placed on all communities by overpopulation problems caused by puppy mills, those communities that actually have puppy mills within their jurisdiction are enormously burdened when those puppy mills fail. For example, in 2007 Carroll County, Virginia declared a local disaster when a puppy mill was raided for suspected violations.⁷⁷ County officials had to transport animals off the property, feed, house, clean, and socialize the animals, as well as arrange for medical care, foster homes, and permanent homes for the dogs that did not need to be euthanized.⁷⁸

Animal shelters are also victims of the current harsh economic climate with budget cuts forcing shelters to make tough decisions. For example, New York City Animal Care and Control recently changed their policy regarding lost pets and will no longer accept lost pet reports or search the shelter system for animals matching their descriptions.⁷⁹ The city shelters have experienced budget cuts of over \$1.5 million in the past two years.⁸⁰ With reduced funding, the stress of overpopulation of cats and dogs will be increasingly felt in local communities and will likely result in an increase in the number of animals euthanized without being given an adequate opportunity to be re-homed.⁸¹

⁷⁵ Jean McNeil & Elisabeth Constandy, *Addressing the Problem of Pet Overpopulation: The Experience of New Hanover County Animal Control Services*, 12 J. PUB. HEALTH MGMT. PRAC. 452, 452 (2006).

⁷⁶ *Animal Overpopulation: United States Facts & Figures*, OXFORD-LAFAYETTE HUMANE SOC'Y, http://www.oxfordpets.com/index.php?option=com_content&view=article&id=61&Itemid=63 (last visited Jan. 4, 2012).

⁷⁷ Alexis C. Fox, Comment, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L. 87, 89–90 (2008).

⁷⁸ *Id.* at 90.

⁷⁹ Lisa L. Colangelo, *Budget Cuts Force Animal Shelters to Stop Taking Lost Reports, Will No Longer Search for Lost Pets*, N.Y. DAILY NEWS, Nov. 11, 2010, http://articles.nydailynews.com/2010-11-11/local/27080790_1_animal-shelters-pet-owners-dogs-and-cats.

⁸⁰ *Id.*

⁸¹ Lindsay Barnett, *California Budget Cuts Could Mean Faster Euthanizing of Strays in Shelters*, L.A. TIMES, June 3, 2009, <http://latimesblogs.latimes.com/unleashed/2009/06/california-budget-cuts-could-mean-pets-are-put-to-sleep-faster-in-animal-shelters.html>.

VI. THE ROLE OF LOCAL GOVERNMENT

The supply of puppy mill dogs may be regulated from two different directions: the puppy mills themselves, an approach which the federal government has not been effective in enforcing, or through the distributors, the pet stores that act as middle-men between the wholesalers and the public.

Local governments have the authority to issue care and handling standards and to directly regulate puppy mills.⁸² Congress expressly stated in the AWA that the federal authority granted to the Secretary of Agriculture to issue standards to manage the humane care and treatment of animals by dealers does not preempt state and local authorities from promulgating their own additional standards.⁸³ Federal courts have upheld the ability of states to regulate domestic animals that are also regulated under the AWA, stating that this “is an exercise of the state’s traditional police power” and the “traditional authority is preserved and expressly authorized by the AWA.”⁸⁴ State and local action, where it is expressly established by Congress, is not subject to Commerce Clause preemption even where it interferes with interstate commerce.⁸⁵

Though the AWA authorizes local municipalities to regulate puppy mills directly, regulating puppy mills is a complex job, requiring an understanding of the problem and resources to maintain awareness of, and enforce regulations against, local facilities.⁸⁶ More importantly, this option is not open to those municipalities that do not have any puppy mills within their borders but still feel their effects, either financially or morally.⁸⁷

⁸² See Fumarola, *supra* note 1, at 265–66.

⁸³ Animal Welfare Act (AWA), 7 U.S.C. § 2143(a)(8) (2011).

⁸⁴ Zimmerman v. Wolff, 622 F. Supp. 2d 240, 245 (E.D. Pa. 2008).

⁸⁵ *Id.* (quoting White v. Mass. Council of Constr. Emp’rs, Inc., 460 U.S. 204, 213 (1983)); Kerr v. Kimmell, 740 F. Supp. 1525, 1528–29 (D. Kan. 1990).

⁸⁶ See Katherine C. Tushaus, *Don’t Buy the Doggy in the Window: Ending the Cycle that Perpetuates Commercial Breeding with Regulation of the Retail Pet Industry*, 14 DRAKE J. AGRIC. L. 501, 513–14 (2009) (discussing the problems arising even where states and municipalities have puppy mill legislation in place).

⁸⁷ See, e.g., Debbie Becker, *Las Vegas Bets on Life if an Animal is Adoptable, City Says Let It Live Ambitious Program Close To Reaching Zero-Kill Goal*, USA TODAY, June 23, 1998, at 1A (stating the cost to federal taxpayers for rounding up, sheltering, and killing and disposing of stray animals is estimated at two billion dollars each year); 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 STETSON L. REV. 393, 400–01 (2011) (discussing the moral burden on local governments after regularly euthanizing healthy dogs).

Several communities throughout the country have decided to take a different approach and instead have been targeting the pet stores that are the middle man between puppy mill puppies and the public.⁸⁸

The mere existence of the ordinances plays a significant role in the public perception of pet ownership and the move towards more humane raising of puppies. Puppies are often purchased from pet stores on impulse, without due consideration of the financial, time, and emotional commitments that accompany caring for a dependent animal.⁸⁹ By forcing people to work harder and make more effort to obtain a pet, either through locating a responsible small scale breeder (who will often later take back and re-home their dogs if necessary)⁹⁰ or through visiting their local animal shelter—where the consumer is faced with what will happen should they change their mind about their new companion—people are more apt to fully consider the consequences of adopting or purchasing a pet.⁹¹ This will likely result in stronger commitments to the adopted animal and reduce the likelihood that the companion animal will end up back in the shelter system. The local ordinances send a message to government officials at both the state and federal level that people care about this issue and want to see more done to curb the abuse prevalent in the puppy mill industry.

VII. ORDINANCES IN EFFECT

Several cities have enacted ordinances which regulate or prohibit the retail sale of dogs and cats to varying degrees. Two types of ordinances have emerged in recent years: ordinances that entirely prohibit the sale of dogs in retail pet stores, which are more prevalent, and ordinances that regulate the prices pet stores may

⁸⁸ Fumarola, *supra* note 1, at 278–81; *see also State Puppy Mill Laws*, THE HUMANE SOCIETY OF THE U.S., http://www.humanesociety.org/assets/pdfs/legislation/state_puppy_mill_laws.pdf (last updated May 2011) (listing the puppy mill laws of each state including states with laws against retail dog dealers).

⁸⁹ Fumarola, *supra* note 1, at 263; *Pet Overpopulation*, AM. HUMANE ASS'N, <http://www.americanhumane.org/animals/adoption-pet-care/issues-information/pet-overpopulation.html> (last visited Jan. 4, 2012).

⁹⁰ *Buying vs. Adopting*, AM. HUMANE ASS'N, <http://www.americanhumane.org/animals/adoption-pet-care/buying-vs-adopting.html> (last visited Jan. 4, 2012).

⁹¹ In addition to being face to face with what will happen should the adopters chose not to maintain their commitment to their new family member—their pet will end up back in the shelter often at risk of euthanasia—shelters and rescue groups often require adopters to sign paperwork which explicitly states a commitment to care for the animal, emphasizing the responsibility which the individual is taking on.

charge for the pets they offer for sale.

A. Prohibition Ordinances

On February 16, 2010, the City Council of West Hollywood, California unanimously approved an ordinance banning the sale, bartering, auctioning, or otherwise transferring of dogs or cats in pet stores within the city boundaries.⁹² Exemptions within the chapter provide that individuals or establishments may still sell animals that were bred and raised on the premises of the person or establishment (breeders).⁹³ Public animal shelters and privately operated nonprofit humane and rescue groups are also exempt from the prohibition, including those that are affiliated with pet stores.⁹⁴ The regulation allows pet stores to provide space and care for animals owned by public or private animal rescue agencies in order to facilitate adoption of those animals to the public.⁹⁵ At the time the ordinance was passed there were no pet stores within city limits selling cats or dogs.⁹⁶ The City of Hermosa Beach, also in California, passed an identical ordinance in March 2010.⁹⁷

Pet stores in Albuquerque, New Mexico may not sell any companion animals, which are defined as a dog or cat that is not a hybrid.⁹⁸ Under this ordinance, which also requires all pet store operators to obtain a pet store permit to operate within the city, holders of a pet store permit are disqualified from receiving litter permits, intact companion animal permits, or multiple companion

⁹² WEST HOLLYWOOD, CAL., MUN. CODE art. 4, ch. 9.50, § 9.50.020 (2010), available at http://qcode.us/codes/westhollywood/view.php?topic=9-4-9_50-9_50_020&frames=on; Kate Linthicum, *West Hollywood Bans Most Cat, Dog Sales at Pet Stores*, L.A. TIMES, Feb. 17, 2010, <http://articles.latimes.com/print/2010/feb/17/local/la-me-weho-pet-stores17-2010feb17>.

⁹³ WEST HOLLYWOOD, CAL., MUN. CODE art. 4, ch. 9.50 § 9.50.020(d)(1).

⁹⁴ *Id.* § 9.50.020(d)(2)–(4).

⁹⁵ *Id.* § 9.50.020(e).

⁹⁶ Kate Linthicum, *supra* note 93.

⁹⁷ See HERMOSA BEACH, CAL., MUN. CODE § 6.16.020 (2011), available at <http://www.hermosabch.org/index.aspx?page=384#020>; *Hermosa Beach Ban Takes Action to Curb Puppy Mill Abuses*, THE HUMANE SOC'Y OF THE U.S. (Mar. 24, 2010), http://www.humanesociety.org/news/press_releases/2010/03/hermosa_beach_dog_cat_sales_03_2410.html?

⁹⁸ ALBUQUERQUE, N.M., CODE OF ORDINANCES § 9-2-3-12 (2011), available at [http://www.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/cityofalbuquerqueenewmexicocodeofordinanc?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:albuquerque_nm_mc](http://www.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/cityofalbuquerqueenewmexicocodeofordinanc?f=templates$fn=default.htm$3.0$vid=amlegal:albuquerque_nm_mc). Hybrids are defined in the ordinance as animals “created by breeding Animals of different species. Dogs, wolves and coyotes are different species for purposes of this definition.” *Id.* at § 9-2-1-4, available at [http://www.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/cityofalbuquerqueenewmexicocodeofordinanc?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:albuquerque_nm_mc](http://www.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/cityofalbuquerqueenewmexicocodeofordinanc?f=templates$fn=default.htm$3.0$vid=amlegal:albuquerque_nm_mc).

animal permits.⁹⁹ These specifications prevent pet stores from circumventing the ordinance and continuing to run their pet stores, and breeding animals, as a separate facet of their business supposedly unaffiliated with the pet store.¹⁰⁰ Since the passage of this ordinance in 2006, Albuquerque has proclaimed the ordinance is a success, reporting that since its passage adoptions have increased by twenty-three percent and euthanasia of homeless animals has decreased by thirty-five percent.¹⁰¹

In December of 2010, the city council of Austin, Texas voted to amend the city code relating to commerce of live animals.¹⁰² The new amendments prohibit pet traders from engaging in the retail sale of cats or dogs in any place aside from where the animals were bred.¹⁰³ Ordinances such as this allow for reputable small scale breeders to remain in business. City animal shelters and registered nonprofit animal welfare organizations are excluded from this prohibition.¹⁰⁴

While the ban was still being debated by the Austin city council, the city's only pet store that sold puppies, Petland (part of the national franchise), closed.¹⁰⁵ The store attributed its shut down to "the proposed ordinance, negative media attention and the economic slump."¹⁰⁶ While loss of a local business has undesired economic impacts on a community, Petland's closure shows that mere speculation about such a ban can have a large impact. While the puppy supplier to this specific Petland franchise has not been established, it is known that Petland stores nationwide regularly procure their puppies from puppy mills.¹⁰⁷ The closing of a Petland

⁹⁹ *Id.* § 9-2-3-12(E).

¹⁰⁰ *See id.* §§ 9-2-1-4–9-2-3-12.

¹⁰¹ Rebecca Dube, *No Pups for Sale? Cities Ban Pet Shops*, MSNBC.COM (May 27, 2010), http://www.msnbc.msn.com/id/37359894/ns/health-pet_health/t/no-pups-sale-cities-ban-pet-shops/.

¹⁰² AUSTIN, TEX., ORDINANCE No. 20101216-024 (2010), available at <http://www.ci.austin.tx.us/edims/document.cfm?id=146902>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ John Egan, *Austin's Only Petland Store Closing Ahead of Anticipated City Ban on Retail Pet Sales*, EXAMINER.COM (July 15, 2010), <http://www.examiner.com/market-in-austin/austin-s-only-petland-store-closing-ahead-of-anticipated-city-ban-on-retail-pet-sales#ixzz1BiuvIP7E>.

¹⁰⁶ *Id.*

¹⁰⁷ *New Nationwide Investigation of Petland Reveals Continued Support of Puppy Mills*, THE HUMANE SOC'Y OF THE U.S. (June 29, 2009), http://www.humanesociety.org/news/press_releases/2009/06/new_petland_investigation_062909.html. HSUS has been investigating and protesting the Petland retail chain since 2008, accusing ninety-five percent of Petland's stores, the nation's largest chain of pet stores, of supporting puppy mills by obtaining their dogs from either brokers (that buy from the puppy

franchise because the community does not approve of the source of the puppies signals to the national corporation that their policy and business approach to the sale of dogs is becoming increasingly unacceptable to the general public.¹⁰⁸ Eventually, the impact will be felt by Petland and through them, the suppliers and the puppy mills will feel the financial effect of these ordinances.

South Lake Tahoe, California also enacted a prohibition on the retail sale of cats and dogs within city limits.¹⁰⁹ The findings section of the ordinance is very detailed, listing statistics of the number of animals estimated to be produced by puppy mills each year and the number of animals euthanized across the country annually.¹¹⁰ The ordinance states the city council's goal in enacting the prohibition,

it is the city council's belief that puppy mills and kitten factories continue to exist in part because of public demand and the sale of dogs and cats in pet stores. [] The city council finds that the retail sale of dogs and cats in pet stores in the city of South Lake Tahoe is inconsistent with the city's goal to be a community that cares about animal welfare . . . [and] believes that a ban on the retail sale of dogs and cats in pet stores will promote community awareness of animal welfare and, in turn, will foster a more humane environment in the city.¹¹¹

Pet stores that were selling dogs or cats prior to January 27, 2009 may continue to do so under the ordinance as a legally nonconforming use for two years after the effective date of the ordinance.¹¹² Breeders are exempt from the definition of pet store in this ordinance and, as such, individuals may still sell dogs that they bred and raised.¹¹³

mills) or directly from the mills themselves:

The HSUS traced shipments of more than 15,000 puppies from massive commercial puppy brokers to over 95 percent of Petland stores in the past few months. Some Petland stores were even still buying from puppy mills that The HSUS named and exposed as part of its initial 8-month Petland investigation last year. Two Petland stores were documented buying puppies from the facility of convicted puppy mill operator, Kathy Bauck in New York Mills, Minn. Bauck was convicted in March of three counts of animal torture and one count of animal cruelty.

Id.

¹⁰⁸ See Egan, *supra* note 106 (explaining the response from Petland stores nationally).

¹⁰⁹ SOUTH LAKE TAHOE, CAL., CITY CODE § 32-31.1(c) (2011), available at <http://www.codepublishing.com/ca/southlaketahoe/>.

¹¹⁰ See *id.* § 32-31.1(A)(6)–(10).

¹¹¹ *Id.* § 32-31.1(A)(12)–(14).

¹¹² *Id.* § 32-31.1(B), (D).

¹¹³ *Id.* § 32-31.1(B).

Absent from the South Lake Tahoe ordinance is any exemption that allows pet stores to facilitate adoption by providing space or care provided by local shelters or rescue groups.¹¹⁴ The prohibition specifically states that pet stores are also prohibited from adopting cats and dogs to the public.¹¹⁵ This is a less desirable form of the ordinance than those that allow pet stores to work closely with local shelters and animal groups in providing homes for the animals.¹¹⁶ Allowing pet stores to provide financial and physical support to rescue groups would benefit the groups themselves, the general public, and the animals in ease of access to the animals.¹¹⁷ Pet stores that work with rescue groups or shelters can also use that work for positive publicity in the community; hosting adoption drives can draw in customers to benefit all sides of the arrangement.

B. Price Regulation Ordinances: The El Paso Approach

A local ordinance passed in October of 2010 in El Paso, Texas, which amended Title 7 of the municipal code and took effect on January 1, 2011, restricts the ability of retail establishments to sell cats and dogs without enacting an outright prohibition.¹¹⁸ Between seventeen and eighteen thousand pets are euthanized in El Paso each year.¹¹⁹ The ordinance prohibits the sale or transfer of any cat or dog younger than eight weeks of age except for those taken to the Department of Public Health, an animal welfare organization, or transfers between such organizations.¹²⁰ The last provision of this section in the ordinance states that the ordinance in no way prohibits a retail pet establishment from allowing the use of its premises by an animal welfare organization for the purpose of

¹¹⁴ See *id.* § 32-31.1.

¹¹⁵ *Id.* § 32-31.1(C).

¹¹⁶ See, e.g., EL PASO, TEX., CODE OF ORDINANCES § 7.14.020 (J) (2011).

¹¹⁷ See *16,051 Pets Saved During the PetSmart Charities® National Adoption Weekend*, MARKETWATCH (Nov. 14, 2011), <http://www.marketwatch.com/story/16051-pets-saved-during-the-petsmart-charities-national-adoption-weekend-2011-11-14> (discussing a charity established by PetSmart stores with the goal of raising money for animal welfare and helping pets find homes).

¹¹⁸ EL PASO, TEX., CODE OF ORDINANCES § 7.14.020(A), (C), available at http://www.ci.el-paso.tx.us/muni_clerk/_documents/Ordinance%20017428.pdf#view=fitH.

¹¹⁹ Marty Schladen, *New El Paso City Ordinances Take Effect*, EL PASO TIMES, Jan. 3, 2011, http://www.elpasotimes.com/news/ci_16996283. Some estimates calculate that over nineteen thousand animals were euthanized last year by El Paso Animal Services. Darren Hunt, *Education, Enforcement Begin for New Pet Ordinance*, KVIA.COM (Jan. 3, 2011), <http://www.kvia.com/news/26357747/detail.html>.

¹²⁰ EL PASO, TEX., CODE OF ORDINANCES § 7.14.030.

transferring animals, so long as those transfers comply with the described fee schedule.¹²¹

The El Paso ordinance establishes specific prices that any person, retail establishment, or animal welfare organization which is selling or transferring a dog or cat under the age of one may charge.¹²² The city states that the fees mandated in the ordinance are for the purpose of allowing the seller to recover specific costs and expenses.¹²³ If the cost of the puppy to the purchaser will exceed fifty dollars, the transferor must provide documentation to the buyer of the animal verifying all expenses other than food.¹²⁴ The transferor may then charge the total amount of all verified expenses, including “the cost of food, and in the case of an animal welfare organization, [but not individuals or retail establishments] the cost of providing shelter.”¹²⁵ If the transferor is unable to provide this documentation, the ordinance directs that the maximum amount that may be charged is one hundred and fifty dollars for a spayed or neutered dog or cat and fifty dollars for an unaltered dog or cat.¹²⁶ Permitted breeders with litter permits and individuals with litter permits that do not advertise at all within the city for the sale of animals are exempt from these requirements.¹²⁷ Licensed breeders are those selling service dogs, law enforcement dogs, or purebred dogs registered with a national breeding agency.¹²⁸ The sale of cats and dogs over a year old is not regulated by the ordinance.¹²⁹

The El Paso ordinance is structurally substantially different than those passed by the other municipalities. That the sale of dogs over a year old is not subject to the fee schedule is likely a result of the fact that pet stores ordinarily only sell young puppies and likely based on an assumption that anyone selling older dogs is not obtaining such dogs from a puppy mill. As will be discussed below, the affect the ordinance will have on pet stores is probably the same

¹²¹ *Id.* § 7.14.020(J).

¹²² *Id.* § 7.14.020(B)–(E). However, the ordinance provides that retail establishments may, until March 31, 2011, sell a dog or cat younger than one year at the price advertised prior to December 31, 2010, so long as the establishment has documentation showing that the animal was in its possession prior to that date. *Id.* § 7.14.020(C).

¹²³ *Id.* § 7.14.020(E).

¹²⁴ *Id.* § 7.14.020(E)(1).

¹²⁵ *Id.*

¹²⁶ *Id.* § 7.14.020(E)(2).

¹²⁷ *Id.* § 7.14.020(E)(3)(b)–(c).

¹²⁸ Telephone Interview with Kenneth A. Krohn, Assistant City Attorney for El Paso, Tex. (Aug. 8, 2011).

¹²⁹ *See* EL PASO, TEX., CODE OF ORDINANCES § 7.14.020(C).

as an outright prohibition because pet stores will no longer find the puppy business profitable if they may only charge customers their own cost for the animals.¹³⁰

VIII. COMPARISON OF PROHIBITION ORDINANCES AND PRICE REGULATION ORDINANCES

The goals of each type of ordinance are applaudable. The El Paso ordinance makes more of an effort to find a middle ground between allowing the pet stores to continue their businesses and reducing pet overpopulation as well as the suffering of canines in puppy mills.¹³¹ Unlike most other localities that have passed ordinances regulating the sale of cats and dogs, El Paso was facing direct opposition to the ordinance from an active market participant when deciding what type of approach should be used to reduce the sale of live pets in pet stores.¹³² This fact required the city to make more political compromise than would otherwise be the case, and its decision to use the price regulation ordinance allowed them to take some measure more quickly than the city may have been able to pass a total ban ordinance.¹³³ However, despite the political compromise, this approach will likely not work to appease pet store opposition because the ordinance entirely eliminates profit from the sale of dogs and cats, likely having the same impact on pet stores financially as a total prohibition ordinance.¹³⁴ That pet stores are allowed to sell dogs over one year old without restriction will not counteract pet store resistance to the ordinance since puppies are much more marketable products.¹³⁵ Since the impact is substantially the same, the municipality might as well enact a straightforward prohibition ordinance that requires much less investigation and is more easily enforced; it will be more noticeable that a pet store is violating a local ordinance by selling dogs in a

¹³⁰ See discussion *infra* part VII.A.

¹³¹ See Tom Linney, *El Paso Votes to Regulate Pet Stores*, ANIMAL LEGAL DEF. FUND BLOG (Oct. 12, 2010), <http://www.aldf.org/article.php?id=1493> (explaining that the city could have gone further in its law).

¹³² Stephanie Feldstein, *Pittsburgh Pet Store Becomes Latest Convert to the Adoption Option*, CHANGE.ORG (Oct. 26, 2010), <http://news.change.org/stories/pittsburgh-pet-store-becomes-latest-convert-to-the-adoption-option> (comparing the willingness of Petland to work with the Humane Society in Pittsburgh with the backlash by Petland to El Paso's ordinance); Telephone Interview with Kenneth A. Krohn, *supra* note 129.

¹³³ Telephone Interview with Kenneth A. Krohn, *supra* note 129.

¹³⁴ See Marty Schladen, *Petland Sues, Says it Will Close Jan. 1*, EL PASO TIMES, Oct. 7, 2010, http://www.elpasotimes.com/news/ci_16272481.

¹³⁵ See *id.* (asserting that the El Paso ordinance "effectively" banned the sale of puppies).

town where it is prohibited whereas it will be harder to ensure that pet stores are providing the appropriate documentation and charging the proper prices for each individual sale.¹³⁶ In addition, problems may arise with the falsifying of documents or inflation of costs by the pet stores.

The ordinances that take a stronger, albeit simpler approach with prohibition of the sale of dogs, will likely encounter fewer problems with enforcement, implementation, and constitutional challenges. The El Paso ordinance is complex and potentially confusing to customers who are trying to ensure that the pet store is charging them the appropriate fee, merchants that have to keep detailed and extensive records for transactions on which they will generate no profit, and requires fairly comprehensive enforcement to ensure that the mandated prices are being charged.¹³⁷ The prohibition ordinances avoid these difficulties.

The El Paso ordinance implicates at least two constitutional clauses and was recently challenged in the United States District Court for the Western District of Texas by Six Kingdom Enterprises.¹³⁸ Six Kingdoms Enterprises operates Petland El Paso, the only pet store in El Paso selling puppies at the time the ordinance became effective.¹³⁹ The challenge resulted in a temporary restraining order (“TRO”), which expired at the end of January 2011, stalling enforcement of the El Paso ordinance.¹⁴⁰ The TRO was granted upon a finding that the plaintiff’s contracts and commerce clause arguments would “likely . . . succeed on the merits . . . [and plaintiff would] suffer irreparable harm in the absence of preliminary relief, [and] that the balance of equities tip[ped] in his favor, and that an injunction [was] in the public interest.”¹⁴¹ While the ordinance was also challenged on grounds of vagueness and ambiguity, that challenge failed due to the high standard in the Fifth Circuit; the ordinance must be virtually incomprehensible to be invalidated on those grounds.¹⁴² The

¹³⁶ As required by the El Paso Ordinance for puppies under the age of one. EL PASO, TEX., CODE OF ORDINANCE § 7.14.020(E)(1)–(2) (2011), available at http://www.ci.el-paso.tx.us/muni_clerk/_documents/Ordinance%20017428.pdf#view=fitH.

¹³⁷ *Id.* § 7.14.020(E)(1)–(2), (F).

¹³⁸ See *Six Kingdoms Enter., LLC v. City of El Paso*, No. EP-10-CV-485-KC, 2011 WL 65864, at *4, *7 (W.D. Tex. Jan. 10, 2011) (implicating the contracts clause and the commerce clause).

¹³⁹ *Id.* at *1, *2.

¹⁴⁰ *Id.* at *10.

¹⁴¹ *Id.* at *4 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010)).

¹⁴² *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *4 (citing *Ford Motor Corp. v. Texas*

following section will give brief overviews of the contracts clause and commerce clause complications associated with this type of ordinance before returning to the comparison of the two types of ordinances.

A. Contracts Clause Challenge

Under the Constitution, “[n]o State shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts.”¹⁴³ To determine whether a state or local law interferes with the obligation of contracts and to balance that impairment with the state’s interest in public welfare, the Supreme Court has established a three-part test.¹⁴⁴ The contracts clause is not interpreted strictly or literally, and does not obliterate the state’s authority to regulate pursuant to its police power.¹⁴⁵

The first inquiry in the contracts clause analysis is whether the state law substantially impairs the contractual relationship.¹⁴⁶ There are three distinct aspects to this part of the test: (a) whether “a contractual relationship” exists, (b) “whether a change in law [or regulation] impairs that contractual relationship,” and (c) whether any resulting “impairment is substantial.”¹⁴⁷ When deciding whether the impairment of contractual obligations is substantial, the court should inquire into the reasonable expectations of the parties regarding potential regulatory changes pertaining to the

Dep’t of Transp., 264 F.3d 493 (5th Cir. 2001)); Telephone Interview with Kenneth A. Krohn, *supra* note 129.

¹⁴³ U.S. CONST. art I, § 10, cl. 1.

¹⁴⁴ *Energy Reserves Grp. Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983).

¹⁴⁵ *Id.* at 241.

It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.

Manigault v. Springs, 199 U.S. 473, 480 (1905).

¹⁴⁶ *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 504 (5th Cir. 2001).

¹⁴⁷ *Six Kingdoms Enter.*, 2011 WL 65864, at *4 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

contract.¹⁴⁸ Relevant to ascertaining the expectations of the parties to the contract “is whether [and to what extent] the subject matter of the contracts” were regulated “at the time the contract was made.”¹⁴⁹ Courts also consider the specific terms of the contract that are impaired and for what duration the contract will be affected.¹⁵⁰

Petland argued that three contracts would be impaired if the ordinance was allowed to stand: (1) the store’s franchise agreement; (2) the store’s small business loan agreement; and (3) the store’s lease.¹⁵¹ The Petland franchise challenging the El Paso ordinance was opened in 2008 pursuant to a franchise agreement that requires the store to sell a specified number of puppies and other small animals.¹⁵² The contract prohibits the disclosure of confidential prices negotiated with Petland for the puppies that the store sells; therefore to remain in compliance with their franchise agreement, the plaintiff would only be able to sell puppies without providing documentation of expenses incurred to their customers.¹⁵³ The average price charged by plaintiff per puppy is between \$1000 and \$1200.¹⁵⁴

Under the ordinance, without documentation the plaintiff may only charge \$150 for altered puppies and fifty dollars for unaltered puppies.¹⁵⁵ The plaintiff asserts that this would require the store to absorb a loss for every sale because just the cost of transporting the puppies exceeds the prices allowed.¹⁵⁶ Alternatively, providing documentation of expenses, at which point plaintiff could charge customers its own cost on the puppies, would result in plaintiff breaching its confidentiality agreement with its franchisor.¹⁵⁷ Because the pet store could not comply with the ordinance without breaching its contract with its franchisor or without selling the puppies at significantly lower than cost, the court concluded that the ordinance substantially impaired plaintiff’s contractual

¹⁴⁸ *Six Kingdoms Enter.*, 2011 WL 65864, at *5 (quoting *Lipscomb*, 269 F.3d at 504).

¹⁴⁹ *Lipscomb*, 269 F.3d at 504 (citing *Energy Reserves Grp., Inc.*, 459 U.S. at 410).

¹⁵⁰ *Six Kingdoms Enter.*, 2011 WL 65864, at *4 (citing *Lipscomb*, 269 F.3d at 504).

¹⁵¹ *Six Kingdoms Enter.*, 2011 WL 65864, at *5; Telephone Interview with Kenneth A. Krohn, *supra* note 129.

¹⁵² *Six Kingdoms Enter.*, 2011 WL 65864, at *2.

¹⁵³ *Id.* at *3.

¹⁵⁴ *Id.*

¹⁵⁵ EL PASO, TEX., CODE OF ORDINANCES § 7.14.020(E)(2) (2011), available at http://www.ci.el-paso.tx.us/muni_clerk/_documents/Ordinance%20017428.pdf#view=fitH.

¹⁵⁶ *Six Kingdoms Enter., LLC*, 2011 L 65864, at *3.

¹⁵⁷ *Id.*

obligations because it could result in the loss of the franchise.¹⁵⁸ In addition, the parties objectively had no reasonable expectation that the sale of puppies would be regulated in this manner considering the lack of previous similar regulation by El Paso and other municipalities nationwide.¹⁵⁹

Once a court determines that there is a substantial impairment of contractual obligation, the next step is to evaluate the state's justification for the law; the state "must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."¹⁶⁰ If the court determines that the state is validly exercising its police power to promote or protect the general public welfare, the last consideration facing the court is whether the law is "reasonably necessary' to achieve th[at] purpose."¹⁶¹ While conducting this review the court generally should defer to the legislature's determination of the reasonability and necessity of the method and means chosen¹⁶² but the level of scrutiny the court uses corresponds to the degree of impairment.¹⁶³

Unlike the findings of the South Lake Tahoe ordinance, the El Paso City Council does not directly point to puppy mills as a driving force behind the ordinance.¹⁶⁴ The City Council states that:

[T]he purpose of this ordinance is to promote the health, safety and welfare of the public and the local pet population by reducing the number of unwanted dogs and cats in the City, which will also reduce the burden on the taxpayers who pay much of the cost to care for or euthanize many thousands of animals; and . . . the City finds that regulating the sale and transfer of dogs and cats, and including special provisions regarding the services of animal welfare

¹⁵⁸ *Id.* at *5.

¹⁵⁹ *Id.* at *6.

¹⁶⁰ *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983) (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977)).

¹⁶¹ *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *5 (citing *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 627 (5th Cir. 2010)). See also *Energy Reserves Grp., Inc.*, 459 U.S. at 412 ("Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions" (quoting *U.S. Trust Co. of N.Y.*, 431 U.S. at 22)).

¹⁶² *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *5 (citing *Energy Reserves Grp., Inc.*, 459 U.S. at 412–13); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987) ("[C]ourts should 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" (citing *Energy Reserves Grp., Inc.*, 459 U.S. at 413)).

¹⁶³ *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (citations omitted).

¹⁶⁴ See EL PASO, TEX., CODE OF ORDINANCES No. 017428 (2011), available at http://www.ci.el-paso.tx.us/muni_clerk/_documents/Ordinance%20017428.pdf#view=fitH.

organizations who work with dogs and cats . . . is an appropriate solution to help . . . reduce the euthanization rate, and to achieve the City's goals of achieving the "no kill" goal by restricting breeding practices¹⁶⁵

The city alludes to the problem of puppy mills by stating that the overpopulation of dogs and cats "is exacerbated by the reckless breeding of dogs and cats for the purpose of making a profit from the sale of these animals during the first year of their lives."¹⁶⁶

The Court found that the ordinance's first two purposes, to reduce euthanization of animals and to reduce the likelihood of stray animals becoming a public health risk, were classic police power functions but stated that the third purpose, providing special treatment to animal welfare organizations, was not a legitimate motivation.¹⁶⁷ The court further found that the price regulatory portion of the ordinance was not reasonably related to the two legitimate goals behind the city's actions because the city provided no evidence supporting the specific prices established by the ordinance or how charging those prices would effectuate a change in the stray animal population.¹⁶⁸ Based on these findings the court held that the pet store would likely succeed on a contracts clause challenge to the El Paso ordinance.¹⁶⁹

B. Dormant Commerce Clause Challenge

Article I of the Constitution gives Congress the power to regulate commerce "among the several [s]tates."¹⁷⁰ This clause has been interpreted by the courts as barring states from passing laws that unduly interfere or burden interstate commerce.¹⁷¹ In the first prong of the commerce clause test established by the Supreme Court, a statute or ordinance that directly regulates or discriminates against interstate commerce—by favoring in-state economic interests over out of state economic interests—will be declared per se unconstitutional,¹⁷² unless it can be shown under

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *6.

¹⁶⁸ *Id.* at *7.

¹⁶⁹ *Id.*

¹⁷⁰ U.S. CONST. art. I, § 8, cl. 3.

¹⁷¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit* 362 U.S. 440, 443 (1960)).

¹⁷² *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986) (citations omitted).

“rigorous scrutiny” that there are no other available means to advance a legitimate local interest.¹⁷³ If the local government action regulates “even-handedly” and only indirectly affects interstate commerce, the state must put forth a legitimate local interest and the court will balance the local interest against the infringement on interstate commerce; the court will uphold the local ordinance unless the burdens to interstate commerce are “clearly excessive in relation to the putative local benefits.”¹⁷⁴ If a local government can establish a legitimate local purpose, “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.”¹⁷⁵

The Federal District Court found that the El Paso pet store ordinance directly discriminated against interstate commerce through its establishment of a fee schedule.¹⁷⁶ Plaintiff successfully argued that because the maximum allowable prices were too low to enable a pet store to transport puppies from suppliers beyond the immediate vicinity without taking a substantial loss, the ordinance protected the local industry of puppy suppliers at the expense of those in other states.¹⁷⁷ While the ordinance was serving a legitimate local purpose, the court was skeptical of the relationship between El Paso’s stated purpose and their means of achieving it through price setting, finding no evidence that any of the animals contributing to the city’s pet overpopulation problem had been purchased from the Petland store.¹⁷⁸ The Texas court found that the plaintiff was “likely to succeed on the merits” and that the ordinance would fail under the rigorous scrutiny of interstate commerce jurisprudence.¹⁷⁹

The City of El Paso and Petland El Paso settled the case subsequent to the issuance of the TRO.¹⁸⁰ The city agreed to extend the effective date to January 1, 2013 for the store specifically to

¹⁷³ *C & A Carbone, Inc. v. Town of Clarkston* 511 U.S. 383, 392 (1994) (citing *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986)).

¹⁷⁴ *Pike*, 397 U.S. at 142.

¹⁷⁵ *Id.*

¹⁷⁶ *Six Kingdoms Enter., LLC v. City of El Paso*, No. EP-10-CV-485-KC, 2011 WL 65864 at *8 (W.D. Tex. Jan. 10, 2011) (citing *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951)).

¹⁷⁷ *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *8 (citing *Dean Milk Co.*, 340 U.S. at 356).

¹⁷⁸ *Six Kingdoms Enter., LLC*, 2011 WL 65864, at *7.

¹⁷⁹ *Id.* at *8 (citations omitted).

¹⁸⁰ Telephone Interview with Kenneth A. Krohn, *supra* note 129.

allow them additional time to recoup their costs.¹⁸¹ After January 1, 2013, the ordinance will take effect against Petland El Paso and any live pet sales will have to conform to the ordinance's requirements.¹⁸²

IX. BACK TO THE COMPARISON

Both ordinances may run into trouble with the contracts clause, but there is a way around this problem. Since the contracts clause only applies to pre-existing contractual obligations,¹⁸³ one potential way to save the ordinances in the face of a challenge would be to expressly include in the ordinance a provision that stalls enforcement against any retail pet stores currently under contracts mandating confidential prices or establishing a required number of puppy sales (or in the case of contract with suppliers, number of purchases), and to apply the ordinance once the contract term ends.¹⁸⁴ This would accomplish two things; first, it would prevent the opening of new retail establishments that sell puppies within the city limits; And second, once the pre-existing contract expires, the ordinance will become applicable to that pet store. This would accomplish the end goal of the ordinance—establishing a pet sale free city—while providing enough notice and time for pet stores to sell puppies already in their possession, comply with contractual obligations, and prepare new potential sources of income for their business.¹⁸⁵ Providing an exception for pet stores with pre-existing contractual obligations to continue the sale of puppies for however long those contract terms are is a better alternative than risking the repeal or invalidation of the ordinances altogether.

Though both types of ordinances can be written to accommodate the contracts clause in the manner described above, the El Paso price-regulating ordinance runs into further difficulties because municipalities will have to provide evidence of how the specific prices set by its ordinance are reasonably related to effectuating a change in stray populations.¹⁸⁶ This would require municipalities to do studies on what prices impact the market in such a way that consumers are less likely to abandon animals bought from puppy

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Munday v. Wis. Trust Co.*, 252 U.S. 499, 503 (1920) (citing *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U.S. 632, 639 (1912)).

¹⁸⁴ *See Six Kingdoms Enter., LLC*, 2011 WL 65864, at *6.

¹⁸⁵ *See id.* at *1, *3, *6.

¹⁸⁶ *See id.* at *7.

stores. In contrast, ordinances that simply reduce the supply by prohibiting the sale of puppies in pet stores will have an easier time arguing that the reduction in impulse purchases of pets, and the additional effort required to locate and adopt a dog from an animal shelter or rescue group, is rationally related to reducing stray populations and euthanasia.¹⁸⁷

The dormant commerce clause challenges associated with the El Paso ordinance, which effectively prevents out of state suppliers from competing in the El Paso market, are another difficulty associated with price regulatory ordinances. The total prohibition type ordinances however, regulate “even-handedly” across both local and out of state interests and have a much stronger chance of passing constitutional muster.

X. CONCLUSION

Federal regulation of puppy mills is ineffective in guaranteeing humane care of dogs bred by and born in puppy mills. Municipalities throughout the country may take action on this issue by enacting local ordinances that prohibit the sale of dogs in retail pet stores and limit the market for puppy mill dogs, thereby decreasing the ability of puppy mill dealers to sell their products. Although these ordinances do not directly regulate or correct the conditions in which many dogs suffer in puppy mills, the ordinances provide a means for communities to express their views of the puppy mill trade and make sure that they are not participating and exacerbating the exploitation. These ordinances influence public perception of the issue and play a role in a paradigm shift towards society’s valuing humane breeding practices over profit made at the animal’s expense.

The prohibition ordinances found in the various municipalities discussed above are the better approach (as compared to price regulation schemes) for communities considering this type of legislation, and provide a way for local communities to help end the abuses inherent in the puppy mill industry. In summary, the prohibition ordinances are easier for consumers and pet merchants to understand, easier to enforce, and present fewer constitutional challenges than price regulation ordinances. Over the next few years local municipalities across the country should look to these ordinances as a means of safeguarding the morals, ethics, and

¹⁸⁷ See *id.* at *1, *7.

finances of their communities.

Whether or not either type of ordinance can succeed in reducing the population of unwanted dogs remains to be seen. Shelters in the cities that have passed these ordinances should focus on data collection, which will hopefully show a decrease in euthanization and an increase in adoption numbers. Adequate reporting of the effects of these ordinances is crucial for several reasons. If the ordinances have a demonstrated beneficial impact, other municipalities are more likely to consider using them. Concrete evidence of the financial and public health benefits to local municipalities will make these ordinances attractive to those that are less interested in the ethical and moral issues associated with pet stores and puppy mills. In addition, if municipalities can prove a correlation between a prohibition on the retail sales of dogs and increased adoption, decreased euthanization, and a reduction in the prevalence of stray dogs, it will strengthen the argument that this type of regulation is a legitimate exercise of police power through a reasonable and necessary means, and challenges to the validity of such ordinances will be a tougher sell to the courts.