IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39742

STATE OF NEW MEXICO, ex rel. RAUL TORREZ, New Mexico Attorney General,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS FOR LEA COUNTY, BOARD OF COUNTY COMMISSIONERS FOR ROOSEVELT COUNTY, CITY OF CLOVIS, and CITY OF HOBBS,

Respondents.

ANSWER BRIEF OF THE BOARD OF COUNTY COMMISSIONERS FOR LEA COUNTY PURSUANT TO THIS COURT'S ORDER OF MARCH 31, 2023

ORAL ARGUMENT REQUESTED

Original Proceeding under Rule 12-504 NMRA on Petition for Writ of Mandamus

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INTRODUCTION

The Board of County Commissioners for Lea County ("LEA COUNTY" or "Respondent") files this, its Answer Brief pursuant to this honorable Court's Order of March 31, 2023, and in conformance with Rule 12-318 NMRA, and would respectfully show as follows:

A. Preliminary Objections & Reservations.

1. This Answer Brief is filed subject to and without waiving any aspect of LEA COUNTY's Response to Petitioner's Emergency Petition for Writ of Mandamus and Request for Stay. *See* LEA COUNTY Response filed on February 7, 2023 with the papers of this cause. All factual and legal averments[1], defenses, objections and arguments as asserted in that Response are incorporated by reference as if fully re-stated herein.

2. LEA COUNTY also asserts its objection to further proceedings in this matter for lack of ripeness and in the absence of any current legal or constitutional basis for the issuance of any writ by this Court or other relief sought in Petitioner's request, particularly as to any mandamus or other extraordinary relief for the reasons stated below and in LEA COUNTY's prior Response.

3. LEA COUNTY also objects to any further proceedings in this matter –

[1] This reassertion of prior averments is not intended to disregard developments since filing of the County's prior Response, i.e., the enactment of House Bill 7 on March 16, 2023, which is addressed in detail herein.

particularly the continuation of any Stay against Respondent--whereas there is no basis for "emergency" action by this Court in view of the fact that the Legislature enacted its House Bill 7 without any "emergency" provisions and without expediting its effective date, which does not accrue until June 16, 2023.

B. Rebuttals to Petitioner's Brief

Petitioner's Brief-in-Chief attempts to summarize the provisions of the various local ordinances but fails to acknowledge important differences among those local ordinances. For instance, the statement on page 4 that the "Lea and Roosevelt County ordinances define an "abortion clinic" in exceeding broad terms…" is inaccurate because the Lea County ordinance does not contain the phrase "abortion clinic" and makes no attempt to define it. *See County of Lea Ordinance No. 99 at Exhibit 3 to Emergency Petition for Writ of Mandamus and Request for Stay filed on January 30, 2023 herein.* Petitioner also inaccurately suggests the Lea County Ordinance is among those that "purport to regulate abortion clinics and impose a medical licensing regime." *See* Brief in Chief, p. 8. Lea County's ordinance does neither. *See* County of Lea Ordinance No. 99. Contrary to Petitioner's argument, Lea County's enactment of its ordinance did not "constitute…unlawful and unconstitutional official action" and therefore cannot support the issuance of a "prohibitory writ of mandamus." *See* Brief in Chief, p. 8.

Petitioner again fails to distinguish Lea County's ordinance from other Respondent's enactments when it argues that "Respondents" exceeded constitutional

authority "in enacting the ordinances because the ordinances attempt to regulate and restrict professional medical services and licenses" governed by state law. *Id.* at p.10. There are no such terms to be found Lea County Ordinance No. 99. Petitioner makes a similarly inapplicable argument as to Lea County when it states that the "ordinances impose a burdensome set of licensing requirements for abortion clinics not applicable to other forms of medical care." *See* Brief in Chief, p. 29. No such licensing requirements appear in Ordinance 99. Petitioner repeats the same error in alleging that the "ordinances" constitute a "severe restriction on abortion clinics" because they provide discretion to deny a license upon a certain finding. *Id.*, p. 30. Lea County's ordinance contains no such provisions that would address medical services or medical licenses. *See* County of Lea Ordinance No. 99.

Petitioner's allegations against Lea County are inaccurate and it would be inappropriate for this Court to grant the relief requested by Petitioner against Lea County in this case.

C. Question Presented[2] and Short Answers:

QUESTION: "What effect, if any, does House Bill 7, the Reproductive and Gender-Affirming Health Care Freedom Act, which was signed into law on March 16, 2023 have on this matter?"

[2] The question is stated as specified in this Court's Order of March 31, 2023.

SHORT ANSWERS:

1) Given that HB 7 does not become effective law until June 16, 2023, it currently has no binding effect on this matter or on the local ordinances being challenged by Petitioner. Specifically, there is still no clear duty[3] necessary to support Petitioner's mandamus request in the absence of any other legal or constitutional basis to enjoin action by Respondent.

2) Looking beyond June 16th, it is still impossible to know (within reasonable probability) the precise effect of HB 7 on ordinances tied to federal law until federal courts rule conclusively on two inter-related issues:

   a. emerging conflicts between federal judicial circuits on the regulatory status of abortifacient drugs in already pending cases against the federal Food & Drug Administration; and

   b. the meaning and application of the federal Comstock Act in a post-*Dobbs* environment.

Therefore, without those decisions the question of potential federal preemption as to HB 7 cannot yet be determined.

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[3]*Compare, In the Matter of Adjustments to Franchise Fees Required By the Electric Utility Industry Restructuring Act of 1999 v. New Mexico Public Regulation Commission,* 2000-NMSC-035, 6, 129 N.M. 787, 791, 14 P.3d 525, 529 (citing *Lovato v City of Albuquerque*, 1987-NMSC-086,106 N.M. 287, 289, 742 P.2d 499, 501(1987); *and see* arguments and authorities referenced by prior Response of Lea County.

3) Although HB 7 is not yet binding, the circumstances of its enactment support the conclusion that granting Petitioner's "emergency" relief by this Court was and is improper. This can be inferred because HB 7 as enacted has no "emergency provision" language and the Legislature did not otherwise expedite the bill's effective date beyond the standard 90-day lag for general legislative enactments.[4]

DISCUSSION

D. Procedural Background

The factual chronology in this matter is unusual, if not unique, because House Bill 7 (HB 7) was not enacted until well after the Attorney General filed the state's Emergency Petition in this case that challenges local ordinances – all of which were enacted before the pendency or enactment of HB 7. In fact, that statute did not come into existence until after the filing of LEA COUNTY's Response and all other responses in this matter. It is also important to note that the newly enacted HB 7 (now known as the "Reproductive and Gender-Affirming Health Care Freedom Act") does not become effective law until June 16, 2023. *See, generally, Chronology of Key Events, below.*

The legally relevant events occurred in the following sequence:

Chronology of Key Events

- **Feb. 26, 2021** -State of New Mexico repeals NMSA Sections 30-5-

[4] As per HB 7 text and *see* New Mexico Legislature online legislative calendar found at https://nmlegis.gov.

1, et seq. (prior restrictions on abortion in place since 1969) without enacting any affirmative law regarding abortion rights.

- **June 24, 2022** - The United States Supreme Court ("SCOTUS") overturns *Roe v. Wade,* in the case of *Dobbs v. Jackson Women's Health Organization.*[5]
- **Nov. 7, 2022 -** City of Hobbs enacts[6] Ordinance no. 1147.
- **Dec. 8, 2022-** LEA COUNTY adopts Ordinance no. 99, which addresses the use of mail or common carriers to send or receive certain items proscribed by 28 U.S.C. Sections 1461 & 1462 (the "Comstock Act.")
- **Dec. 23, 2022 -** In light of the *Dobbs* decision, the United States Dept. of Justice, Office of Legal Counsel ("OLC") authors an advisory opinion[7] to the U.S. Postal Service that narrowly construes the Comstock Act so as to allow mailing of certain drugs, including mifepristone, known to induce abortions.
- **Jan. 5, 2023 -** City of Clovis enacts Ordinance no. 2184-2022.
- **Jan. 10, 2023 -** Roosevelt County adopts Ordinance no. 2023-01.
- **Jan. 23, 2023 -** The Attorney General for the State of New Mexico files "Emergency Petition for Writ of Mandamus & Request for Stay" as to local ordinances**.**
- **Feb. 7, 2023 -** Roosevelt County files Response to AG's Emergency Petition.
- **Feb. 7, 2023 -** LEA COUNTY files its Response to AG's Emergency Petition.
- **Feb. 14, 2023** - Family Action Movement, *et al.* file proposed Amici Brief opposing Emergency Petition.
- **Feb. 20, 2023** - Cities of Hobbs & Clovis file joint Response to AG's Petition.
- **March 16, 2023 -** HB7 enacted (prohibiting local enforcement efforts re abortion).

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[5]*Dobbs v. Jackson Women's Health Organization,* ___U.S.___,142 S. Ct. 2228, 2242, 213 L.Ed.2d 545 (2022).

[6] Dates of local ordinance enactments listed are per allegations in Attorney General's Emergency Petition.

[7] Office of Legal Counsel (U.S. Dept. of Justice), *Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions* (Dec. 23, 2022) (stating the Comstock Act does not "prohibit the conveyance of articles intended for…producing an abortion where the sender lacks the intent that those items should be used unlawfully.")

- **March 31, 2023** - This Court issues Order Granting Stay and orders briefing regarding the effect of HB7.
- **April 7, 2023 -** Federal District Court in Amarillo, TX Issues order and findings in the case of *Alliance for Hippocratic Medicine v. Food & Drug Administration, et al.*[8], including a broad construction[9] of the Comstock Act to prohibit shipping of abortion-inducing drugs, including mifepristone, conflicting with the earlier OLC opinion.
- **April 12, 2023 -** On appeal by the defendants to the United States Fifth Circuit, a three-judge panel issues temporary order[10] partially upholding the Amarillo district court order in *Alliance*, but also issues a partial stay of that court's order, pending substantive review and oral argument.
- **April 14, 2023 -** SCOTUS (Justice Alito) issues temporary stay of district court order in *Alliance*, pending further substantive review.[11]
- **April 19, 2023** – SCOTUS continues temporary stays of underlying orders in *Alliance* cases.[12]
- **April 21, 2023** –SCOTUS opinion granting continued stay of orders

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[8] *Alliance for Hippocratic Medicine v. Food & Drug* Administration, *et al.*, ___ F.Supp.____, 2023 WL 2825871 (N.D. Texas, April 7, 2023) (Order staying FDA approval of mifepristone, subject to 7-day delay for defendants to seek appellate relief).

[9] *Id.* ("In any case, the Comstock Act plainly forecloses mail-order abortion in the present, and Defendants cannot immunize the illegality of their actions by pointing to a small window in the past where those actions might have been legal.")(emphasis supplied).

[10] *Alliance for Hippocratic Medicine v. Food & Drug* Administration, *et al.*, ____F.4th____, 2023 WL 2913725 (5th Cir., April 12, 2023) (Granting motion for stay in part, while noting FDA and Danco defendants "have not shown that plaintiffs are unlikely to succeed on the merits of their timely challenges."

[11] *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine* Administration, *et al.*, ___U.S.____, 2023 WL 2942264 (April 14, 2023)(Order imposing administrative stay on April 7th order of the District Court for the Northern District of Texas, case no. 2:22-cv-223, setting deadline for responses as April 18th); See, also, *Food and Drug Administration v. Alliance for Hippocratic Medicine*, ___U.S.____, 2023 WL 2942266 (April 14, 2023).

[12] *See, Food and Drug Administration v. Alliance for Hippocratic Medicine*, ___U.S.____, 2023 WL 2996931(April 19, 2023) (Mem.); and *Danco Laboratories, LLC v Alliance for Hippocratic Medicine*, ___U.S.____, 2023 WL 2996932(April 19, 2023) (Mem.) (temporary orders continuing stays at trial court and Fifth Circuit).

below, pending disposition of ongoing Fifth Circuit appeal, and of any "petition for writ of certiorari if timely sought."[13]

- **June 16, 2023-** Effective date for House Bill 7 (per online legislative calendar found at https://nmlegis.gov).

The flurry of federal rulings referenced above cover both FDA regulations and the Comstock Act regarding abortifacient drugs. Another recent federal case, *State of Washington, et al. v. United States Food & Drug Administration, et al.*[14] has also addressed the status of FDA regulation of mifepristone and related drugs but without considering the Comstock Act. That court's ruling on the FDA regulatory status of mifepristone is clearly contrary to decision of the district court in the *Alliance* case and, but for an express geographic limitation in the *State of Washington* order, would have left the FDA with directly conflicting rulings as between district courts in the Ninth and the Fifth circuits.[15]

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[13] *Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, ___ U.S. ____, 2023 WL 3033177 (Apr. 21, 2023).

[14] *See State of Washington, et al. v. United States Food and Drug Administration, et al*, ___ F. Supp. ____, 2023 WL 2941567 Case no. 1:23:-cv-03026-TOR (E.D. Washington, April 13, 2023)(enjoining the FDA from "altering the status or rights of the parties under the operative Mifepristone REMS Program until a determination on the merits."). Here 17 Plaintiff states (including New Mexico) plus the District of Columbia succeeded in obtaining partial injunctive relief within the Plaintiff states. Interestingly, unlike the Amarillo federal district court, the Eastern District of Washington makes no mention of the Comstock Act or the recent OLC opinion construing Comstock.

[15] *Id.* at. ___ (Limiting the effect of its order to jurisdictions of the 18 Plaintiffs at bar and noting the conflict with the *Alliance* opinion issued the same week in Texas.)

E. There is no legal consensus on two issues central to this case:

1) federal regulation of remote use and delivery of abortifacient drugs; or
2) post-*Dobbs* meaning and application of the Comstock Act.

Discordant federal court holdings, injunctions, temporary orders, and pending appeals have arisen since this Court's March 31st order. This eruption of divergent lines of cases across different federal circuits is also overlaid against the earlier OLC opinion that was directly attacked in the *Alliance* trial court order.[16] The net result is a complete lack of clarity, much less certainty, regarding the correct interpretation and application of the Comstock Act – particularly in the context of unresolved conflicts now under review in the federal courts on the FDA's regulatory duties in regard to remote use of mifepristone or related abortifacient drugs.

Although the regulatory issues span more than two decades of legal disputes, the *Dobbs* opinion has recently triggered fresh cases of acute conflict within the federal judiciary, compounded by an explicit clash with the Executive Branch.[17] All of which means this case is precariously balanced on fundamentally unresolved questions, of federal law, i.e., how will SCOTUS or the federal circuit courts resolve the tension between a *Dobbs* ruling that returns abortion regulation to the states while the federal government retains its longstanding preemptive presence

[16] See reference at footnote 9, above.
[17] *See, e.g.*, references to the OLC opinion as cited at notes 7 & 9, and *Alliance* case orders or opinions as cited at notes 8-13, and *State of Washington v. FDA* at notes 14-15, above.

regulating prescription drugs. Also, as to this matter, how do the pending FDA cases ultimately affect a federal statute that, despite its age and controversial history, has remained on the books over parts of three centuries and survived through contrasting eras of court-made law on abortion?

Given the prospective prohibitions of HB 7 and its purported effect on the several ordinances of Respondents – all of which invoke terms of the Comstock Act in some regard—it is now apparent that a proper understanding and future application of HB 7 demands a clear, dispositive ruling on the meaning of the Comstock Act as applied to drugs with abortifacient uses. Just as obviously, no such dispositive ruling has yet emerged from the currently percolating federal cases and, thus, there is presently no clear guidance as to the post-*Dobbs* application of the Comstock Act.

Moreover, the most recent cases on FDA regulation of remote use of mifepristone and related drugs raise fundamental questions about the legal status and regulation of such drugs well beyond the effect of the Comstock Act.

In short, in the absence of an authoritative and binding interpretation by a federal court on FDA regulatory obligations and the Comstock Act after *Dobbs,* it is unlikely this honorable Court can reach an appropriate and final disposition of the issues raised by the Attorney General's office. This is especially so in the absence of the normal fact finding and sharpening of issues that would occur had the present matter been properly asserted in a state district court in a declaratory judgment

action, rather than the current premature invocation of this Court as a court of first resort.

F. Dispositive rulings on FDA regulations and the Comstock Act (post-*Dobbs*) are essential to final determination of the effect of HB 7 based on the open question of federal preemption, pursuant to the Supremacy Clause of the United States Constitution, art. VI.

Respondent LEA COUNTY believes that the unresolved federal issues in this area are on the verge of being addressed by the federal court system. *See, Alliance and State of Washington and related cases, as discussed above*. Moreover, since the Department of Justice has squarely joined the issue (as to the Comstock Act) in its December 23, 2022 opinion, it would appear that federal regulatory issues regarding the shipment of abortifacient drugs (as adjudicated in *Alliance* and *State of Washington* cases) as well as the Comstock Act are soon to be before SCOTUS or, at the very least, before the Fifth Circuit. *See,* footnotes 8 through 13. In regard to the Comstock Act, the district court in *Alliance* squarely challenges the OLC's interpretation, stating:

> In any case, the Comstock Act plainly forecloses mail-order abortion in the present, and … Defendants cannot immunize the illegality of their actions by pointing to a small window in the past where those actions might have been legal[18].

The inevitability of a preemption concern in this context is difficult to ignore, especially as all of the challenged local ordinances invoke or rely on the Comstock

[18] *Alliance for Hippocratic Medicine v. Food & Drug* Administration, *et al.*, __ F.Supp.__, 2023 WL 2825871(N.D. Texas, April 7, 2023) (emphasis supplied).

Act to some extent. Other Respondents have correctly pointed out any future ruling that the Comstock Act is effective to bar shipping and receiving drugs like mifepristone implicates the question of whether HB 7 would be preempted as being in conflict with federal law. Conflicts between state and federal laws are, of course, subject to the effect of the Supremacy Clause[19].

Generally, where state law conflicts with federal law the Supremacy Clause would support preemption of the state law scheme or action[20]. If HB 7 is construed by any federal court to conflict with FDA regulatory schemes or the effect of the Comstock Act in the post-*Dobbs* era, it is likely to be preempted based on a typical conflict analysis[21].

G. The flawed procedural posture of this matter dictates that it be dismissed, and the current Stay dissolved as there is no adequate legal basis for the underlying mandamus action.

The Attorney General commenced this "Emergency" action in this Court prior to the most recent legislative session. At that time, there was no HB 7 and the previous statutory scheme regulating abortion procedures had already been repealed in 2021 without any affirmative enactments regarding abortion rights. *See* Chronology of Key Events, and citations therein, above. As argued in the previous filings there is no historical legal basis for a duty here in the wake of the *Dobbs*

[19] *See Oneok, Inc. v. Lear Jet, Inc.* 575 U.S.373, 135 S.Ct. 1591, 19 L.Ed. 511 (2015).
[20] *See, Smith v. United States*, 431 U.S. 291 (1977).
[21] *Id.*

decision and therefore no basis for mandamus existed at the time of filing. Even now, by the Legislature's own terms, HB 7 does not become effective before June 16, 2023. *Id.*

Thus, even after passage of HB 7, the Emergency Petition has no legal basis for mandamus against LEA COUNTY, where there was no clear duty[22] on the Board of Commissioners based on any existing legal or constitutional obligation. *See,* LEA COUNTY's prior Response and filings of other respondents.

In the absence of a proper legal basis for mandamus, this Court lacks authority to maintain the present action and the Stay attendant to the action. If the Attorney General's action were predicated on HB 7 – which it is not— that law itself specifies the proper venue for actions to be a local district court.[23] Furthermore, the terms of passage for HB 7 belie the "emergency" basis for the Petition. HB 7 was passed without any emergency provision and the legislature did nothing to expedite its effective date, leaving it to accrue 90 days post-enactment. Thus, this Court should not infer any proper basis for an emergency Stay in light of the Legislature's own treatment of the bill in question.

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[22] See, *In the Matter of Adjustments to Franchise Fees Required By the Electric Utility Industry Restructuring Act of 1999 v. New Mexico Public Regulation Commission,* 2000-NMSC-035, ¶ 6, 129 N.M. 787, 791, 14 P.3d 525, 529 (citing *Lovato v City of Albuquerque*, 106 N.M. 287, 289, 742 P.2d 499, 501(1987)); *and see* arguments and authorities referenced by prior Response of Lea County.

[23] HB 7 Sec. 4 specifically provides an enforcement provision directing any civil action be brought in district court.

Although this Court may have original jurisdiction of a properly predicated mandamus action based on its Constitutional authority under art. 6, Section 3, that authority itself is premised on the fundamental idea that government officials must have an explicit and undisputed legal duty which requires action.[24] Given the chronology of legal developments leading up to HB 7, the circumstances of its passage and the absence of clear undisputed legal or constitutional standards during that period, mandamus is not supported and it is now evident there was and is no emergency basis to proceed in this Court. Pursuant to NMRA, Rule 12-504 C (2), and considering the intervening passage of HB 7, the Attorney General's petition should be denied or dismissed summarily as to LEA COUNTY.

H. This matter is not ripe for adjudication here due to the lack of authoritative federal court rulings that would be dispositive of the unresolved and intertwined federal questions.

Finally, given the unsettled condition of the inter-related federal law (see discussion above parts D & E.), and considering HB 7 has yet to come into effect, this matter is not ripe for action by this court.[25] For these reasons as well, the Petition

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[24] See, *In the Matter of Adjustments to Franchise Fees Required,*2000-NMSC-035, ¶6, 129 N.M. 787, 791, 14 P.3d 525, 529 (discussing the clear duty requirement and mandamus within the context of original jurisdiction).

[25] *See, e.g., New Energy Econ., Inc. v Shoobridge*, 2010-NMSC-049, ¶ 17, 149 N.M. 42, 47-48, 243 P.3d 746, 751-52 (analyzing "actual controversy requirements and finding lack of ripeness in a declaratory judgment action); and *Yount v. Millington*, 1993-NMCA-143, 117 N.M. 95, 103, 869 P.2d 283, 291 (no actual controversy in declaratory judgment action).

should be dismissed, which will leave the parties the option to pursue other relief, if and when appropriate, at the trial court level.[26]

CONCLUSION

The pending emergency stay issued by this Court is not well-founded in the absence of the clear duty requirement for any mandamus action and considering the lack of any emergency provision or expedited enactment date in regard to HB 7. Therefore, this matter should be dismissed promptly. Further, without an authoritative ruling from United States Supreme Court, or at least from the federal Tenth Circuit, regarding the meaning and application of the Comstock Act in the wake of the *Dobbs* opinion and in view of currently pending controversies involving preemptive federal regulation of abortifacient drugs, this Court should dismiss the present action until these potential disputes are ripe for determination via declaratory relief in an appropriate future proceeding.

RESPECTFULLY SUBMITTED BY

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[26] See, e.g., NMSA 1978, 44-6-1.

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CERTIFICATE OF SERVICE

In accordance with the electronic filing manual, State of New Mexico Supreme court, I hereby certify that service of this document was made on May 10, 2023, via the notice transmission facilities of the case management and electronic filing system of the Supreme Court to all counsel of record and/or email to counsel of record.

/s/ Jeffrey T. Lucky or Brian B. Brack

STATEMENT OF COMPLIANCE WITH RULE 12-318(G) NMRA

Pursuant to Rule 12-318(G) NMRA, I hereby certify that the body of the foregoing brief was prepared using a proportionally spaced type style or typeface, and the word count of the body of the answer brief according to MSWord automated count shows 3900 words out of a maximum of 11,000.

/s/ Jeffrey T. Lucky or Brian B. Brack