



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**April 20, 2023**

**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.**

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

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## INTRODUCTION

The Board of County Commissioners for Lea County (“LEA COUNTY” or “Respondent”) files this 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 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<sup>1</sup>, defenses, objections and arguments as asserted in that Response are incorporated by reference as if fully restated 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 – particularly the continuation of any Stay against Respondent-- whereas there is no

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<sup>1</sup> 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 below.

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. Question Presented<sup>2</sup> 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?”

**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<sup>3</sup> 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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<sup>2</sup> The question is stated as specified in this Court’s Order of March 31, 2023.

<sup>3</sup>*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*, 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.<sup>4</sup>

## DISCUSSION

### C. 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 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 30-5-1, 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*.<sup>5</sup>

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<sup>4</sup> As per HB 7 text, and *see* New Mexico Legislature online legislative calendar found at <https://nmlegis.gov>.

<sup>5</sup> *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242 (2022).

- **Nov. 7, 2022** - City of Hobbs enacts<sup>6</sup> 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<sup>7</sup> 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).
- **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.*<sup>8</sup>, including a broad construction<sup>9</sup> of the Comstock Act to prohibit shipping of abortion-inducing drugs,

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<sup>6</sup> Dates of local ordinance enactments listed are per allegations in Attorney General’s Emergency Petition.

<sup>7</sup> Office of Legal Counsel, *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.”)

<sup>8</sup> *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).

<sup>9</sup> *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).

- 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<sup>10</sup> 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.<sup>11</sup>
- **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 regulation and the Comstock Act regarding abortifacient drugs. Another recent federal case, *State of Washington, et al. v. United States Food & Drug Administration, et al.*<sup>12</sup> 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 the *Alliance* court decision and, but for an express geographic limitation in the *State of Washington* order, would have left the FDA with directly conflicting rulings as between the Ninth and the Fifth circuits.<sup>13</sup>

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<sup>10</sup> *Alliance for Hippocratic Medicine v. Food & Drug Administration, et al.*, \_\_\_ F.4th \_\_\_, 2023 WL 2913725, (5<sup>th</sup> 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.”)

<sup>11</sup> *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 7<sup>th</sup> order of the District Court for the Northern District of Texas, case no. 2:22-cv-223, setting deadline for responses as April 18<sup>th</sup>)

<sup>12</sup> *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 14 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.

<sup>13</sup> *Id.* at. \_\_\_ (Limiting the effect of its order to the Plaintiff jurisdictions and noting the conflict with the *Alliance* opinion issued the same week in Texas.)



**D. There is no legal consensus on two key issues central to the instant 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 31<sup>st</sup> 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.<sup>14</sup> 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 directly conflicting court opinions 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 triggered fresh cases of acute conflict within the federal judiciary, compounded by an explicit clash with the Executive Branch.<sup>15</sup> 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 regulating prescription drugs. Also, as to this matter, how do the pending FDA cases

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<sup>14</sup> See reference at footnote 9, above.

<sup>15</sup> See, e.g., references to the OLC opinion as cited at note 9, and *Alliance* case orders or opinions as cited at notes 8-11, and *State of Washington v. FDA* at note 12, above.

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 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 effect of the most recent cases on FDA regulation of remote use of mifepristone and related drugs raises 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*, we believe 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, rather than seeking this Court's premature intervention as a court of first resort.

**E. 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 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 16.* 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<sup>16</sup>.

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 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

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<sup>16</sup> *Alliance for Hippocratic Medicine v. Food & Drug Administration, et al.*, \_\_ F.Supp.\_\_, 2023 WL 2825871(N.D. Texas, April 7, 2023) (emphasis supplied).

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<sup>17</sup>.

Generally, where state law conflicts with federal law the Supremacy Clause would support preemption of the state law scheme or action<sup>18</sup>. If HB 7 is construed to conflict with any post-*Dobbs* rule on FDA regulatory schemes or the effect of the Comstock Act in the post-*Dobbs* era, it could very well be preempted based on a typical conflict analysis<sup>19</sup>.

**F. 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. Also, the lack of authoritative federal court rulings means that this matter is not yet ripe to be adjudicated here.**

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* decision and therefore no basis for mandamus existed at the time of filing. Even

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<sup>17</sup> *See Oneok, Inc. v. Lear Jet, Inc.* \_\_\_ U.S. \_\_\_, 135 S.Ct. 1591, 19 L.Ed. 511 (2015).

<sup>18</sup> *See, Smith v. United States*, 431 U.S. 291 (1977).

<sup>19</sup> *Id.*

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<sup>20</sup> 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.<sup>21</sup> 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.

Although this Court clearly has original jurisdiction of properly predicated mandamus actions based on its Constitutional authority under art. 6, Section 3, that

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<sup>20</sup> *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.

<sup>21</sup> HB 7 Sec. 4 specifically provides an enforcement provision directing any civil action be brought in district court.

authority itself is premised on the fundamental idea that government officials must have an explicit and undisputed legal duty which requires action.<sup>22</sup> 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.

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.<sup>23</sup> For these reasons as well, the Petition should be dismissed, which will leave the parties the option to pursue other relief, if and when appropriate, at the trial court level.<sup>24</sup>

## 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.

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<sup>22</sup> 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).

<sup>23</sup> 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).

<sup>24</sup> See, e.g., NMSA 1978, 44-6-1.

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 other appropriate proceeding.

RESPECTFULLY SUBMITTED BY

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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 April 20, 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