IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

State of New Mexico ex rel. Raúl Torrez, New Mexico Attorney General, Petitioner, v. **Board of County Commissioners for Lea County; Board of County Commissioners for Roosevelt County; City of Clovis; City Of Hobbs,** Respondents.	No. S-1-SC-39742 Original Proceeding under Rule 12-504 NMRA on Petition for Writ of Mandamus

ANSWER BRIEF OF CITY OF HOBBS AND CITY OF CLOVIS (ORAL ARGUMENT REQUESTED)

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The Attorney General's petition for writ of mandamus contains numerous fatal and insurmountable problems. We will address each of them in turn.

I. A Writ Of Mandamus May Issue Only Compel The Performance Of An Act Or Restrain An Unlawful Action, Not To "Strike Down" An Ordinance Or Declare It "Void"

The first problem is that a writ of mandamus may issue "to compel the *performance of an act* which the law specially enjoins as a duty resulting from an office, trust or station." New Mexico Stat. § 44-2-4 (2019) (emphasis added). Yet one will search the petition in vain for any request to "compel" the cities or counties to "perform" an act. The Attorney General wants this Court to issue "a writ of mandamus striking down these ordinances and prohibiting the local governments from engaging in unconstitutional action." Pet. at 1. But a writ of mandamus cannot be used to formally revoke a statute or ordinance,[1] and the Attorney General never explains the "unconstitutional action" that he is asking this Court to restrain. Writs of mandamus exist to compel the *performance* of an *act* or to *prohibit* unconstitutional official *action*,[2] not to render opinions on the constitutionality of local ordinances that the Attorney General dislikes.

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1. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1221 (2010) ("Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental action. Government actors violate the Constitution.").
2. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23, 487 P.3d 815, 825 (N.M. 2021) ("Mandamus . . . may be used 'in a prohibitory manner to prohibit unconstitutional official action.'" (citation omitted)); *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 4, 573 P.2d 213, 215–16 (N.M. 1977) (allowing mandamus to issue in response to a request for "negative relief").

The Attorney General never alleges that the cities and counties are currently enforcing the ordinances against anyone, as there are no abortion providers located in any of these jurisdictions. None of the respondents have denied or withheld licenses, and Lea County has not enforced or threatened to enforce its $300 fines against anyone—because (so far) everyone in those municipalities is complying with the law. So what exactly *is* the "action" to be compelled or restrained by a writ of mandamus?

The Attorney General appears to be living in a parallel universe where the judiciary acts as a Council of Revision rather than a court—and is somehow empowered to act directly on legislation by formally revoking it or declaring it "void" in an act akin to an executive veto. But a "writ of mandamus striking down these ordinances"[3] is an oxymoron. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) ("'[C]ourts have no authority to strike down statutory text'" (citation omitted)). The Attorney General appears to be channeling Justice Sotomayor's demonstrably false claim in *Whole Woman's Health v. Jackson* that courts can somehow "enjoin" laws themselves, rather than the individuals or entities charged with enforcing those laws. *Compare* 141 S. Ct. at 2498–99 (Sotomayor, J., dissenting); *with id.* at 2495 (majority opinion) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." (citing *California* v. *Texas*, 141 S. Ct. 2104, 2115–16 (2021)); *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute.").

3. Pet. at 1.

II. The Court Must Determine The Meaning 18 U.S.C. §§ 1461–1462 Before Considering The Attorney General's Attacks On The Ordinances

The Attorney General assumes that the ordinances restrict abortion access in violation of HB 7, but that is true *only* if this Court rejects the Biden Administration's interpretation of 18 U.S.C. §§ 1461–1462. None of the ordinances ban abortion. They merely require compliance with the abortion-related provisions of 18 U.S.C. §§ 1461–1462, which (on their face) prohibit the shipment and receipt of abortion-related materials.[4] Yet the Biden Administration recently adopted a narrowing construction of 18 U.S.C. §§ 1461–1462, declaring that the statutes apply only when the sender intends for the recipient to use the abortion paraphernalia in violation of state or federal law. *See Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions*, 46 Op. O.L.C. ___ (Dec. 23, 2022), *available at* bit.ly/3MiNV7F (last visited on May 10, 2023). If the OLC opinion is correct, then the ordinances do nothing to restrict abortion access because abortion remains legal

4. The petition for mandamus falsely asserts that the Hobbs and Clovis ordinances "declare it to be unlawful to use the mail, an express service, a common carrier, or an interactive computer service for the delivery of any item designed or advertised to produce an abortion." Pet. at 3. Each of the four ordinances makes clear that this conduct is unlawful *only* to the extent that it *also* violates 18 U.S.C. §§ 1461–1462. *See* Hobbs Municipal Code § 5.52.070(A) ("It shall be unlawful for any person . . . *to violate 18 U.S.C. § 1461 by* . . ." (emphasis added)); Clovis City Code § 9.90.060(A) (same); Roosevelt County Ordinance No. 2023-01 § 2(A) (same); *id.* at § 9(A) (same); Lea County Ordinance No. 99 § 6.1 ("It is prohibited for any person *to violate 18 U.S.C. § 1461 by* . . ." (emphasis added)); Hobbs Municipal Code § 5.52.070(B) ("It shall be unlawful for any person . . . to *violate 18 U.S.C. § 1462 by* . . ." (emphasis added)); Clovis City Code § 9.90.060(B) (same); Roosevelt County Ordinance No. 2023-01 § 2(B) (same); *id.* at § 9(B) (same); Lea County Ordinance No. 99 § 6.2 ("It is prohibited for any person *to violate 18 U.S.C. § 1462 by* . . ." (emphasis added)).

in New Mexico and in the respondent cities and counties. No abortion provider in New Mexico could violate the ordinances (or 18 U.S.C. §§ 1461–1462) unless it acted with the intent of violating some *other* state's abortion laws—an exceedingly far-fetched scenario.

The ordinances cannot violate HB 7 or the New Mexico Constitution unless the OLC opinion is wrong and 18 U.S.C. §§ 1461–1462 mean what they say. *See id.* at 5 (admitting that OLC's interpretation is "narrower than a literal reading might suggest."). If (and only if) this Court rejects the OLC opinion and interprets 18 U.S.C. §§ 1461–1462 in accordance with the enacted text, then the ordinances (and federal law) would restrict abortion access in the respondent cities. Yet that scenario is entirely contingent on this Court's *rejecting* the interpretation of 18 U.S.C. §§ 1461–1462 in the OLC opinion.

The Attorney General insists that there is no need for this Court to resolve the meaning of 18 U.S.C. §§ 1461–1462, because he claims that the mere imposition of a *licensing* regime violates state law even if the ordinances impose no substantive restrictions on abortion access. *See* Pet. Br. in Chief at 16–21. The Attorney General claims that *any* type of licensing regime for abortion clinics is preempted by the Medical Practice Act, the Medical Malpractice Act, and HB 7. *See id.* None of these statutes even remotely suggest that local governments are forbidden to license abortion clinics, and they do not "clearly and indisputably" preempt local ordinances of that sort. *See infra*, at 16–17.

We are quite certain that the Attorney General heartily agrees with the Biden Administration's narrowing construction of 18 U.S.C. §§ 1461–1462 and would want

this Court to reject a textualist construction of the statutes in favor of the Biden Administration's views. But if the Attorney General (and this Court) agree with the OLC opinion, then the Attorney General's constitutional claims and HB 7 attacks become moot, as the ordinances would do nothing to limit abortion access in New Mexico. If, by contrast, the Attorney General wants this Court to reject the OLC opinion and interpret 18 U.S.C. §§ 1461–1462 in accordance with the statutory text, then he cannot simultaneously insist that New Mexicans have a supposed state-law "right" to act in violation of a supreme federal statute. There is no state-law right to act in defiance of a federal criminal statute, and any state-law right to abortion must be exercised within the confines of the federal criminal prohibitions established in 18 U.S.C. §§ 1461 and 1462 and the federal partial-birth abortion ban.[5]

More importantly, the state-law right in HB 7 protects only the right "to access or provide reproductive health care . . . *within the medical standard of care.*" HB 7, § 3(B). That necessarily excludes conduct outlawed and criminalized by federal law, such as partial-birth abortion and violations of 18 U.S.C. §§ 1461 and 1462. Criminal acts fall outside "the medical standard of care" by definition, and HB 7, by its terms, protects only abortion-related conduct that complies with extant federal law. HB 7 therefore leaves local jurisdictions free to enact prohibitions on partial-birth abortion and conduct that violates 18 U.S.C. §§ 1461 and 1462, because none of these criminal acts fall within "the medical standard of care."

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5. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, 117 Stat. 1201, codified at 18 U.S.C. § 1531.

The scope of the ordinances (and the scope of HB 7) depends on the meaning of 18 U.S.C. §§ 1461–1462, and this Court must determine what those federal statutes mean before considering the Attorney General's constitutional and statutory objections to the ordinances.

III. The Petition Does Not Qualify For Original Mandamus Jurisdiction

The Court may not assert original jurisdiction over mandamus petitions unless three requirements are met. A petitioner must present:

> a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.

State v. Oliver, 2020-NMSC-002, ¶ 7, 456 P.3d 1065, 1069 (N.M. 2019). The Attorney General's petition comes nowhere close to satisfying this test.

A. The Petition Does Not Present An Issue Concerning "The Non-Discretionary Duty Of A Government Official"

The most glaring problem is that Attorney General has failed to present an "issue concerning the non-discretionary duty of a government official." *Oliver*, 456 P.3d at 1069. No "government official" has been identified the petition, and no "non-discretionary duty" of a supposed government official has been described. The only "issue" presented concerns the constitutionality of the ordinances in the abstract, which is not a basis on which this Court may exercise original mandamus jurisdiction.

The Attorney General also does not allege that any of the respondent cities or counties are taking action to enforce their ordinances by denying or withholding licenses or imposing fines, because no abortion providers are operating (or attempting

to operate) in any of these four jurisdictions. So there are no "acts" for this Court to compel or restrain with a writ of mandamus.

Finally, the Attorney General does not even allege that 18 U.S.C. §§ 1461–1462 (and the ordinances that incorporate these statutes) restrict abortion access in New Mexico, given the OLC opinion that construes 18 U.S.C. §§ 1461–1462 narrowly. Nothing in the petition can implicate a "non-discretionary duty of a government official" unless the Attorney General rejects the OLC opinion and insists that 18 U.S.C. §§ 1461–1462 categorically prohibit the shipment and receipt of abortion paraphernalia. The Attorney General makes no such claim in his brief.

B. The Petition Does Not Implicate "Fundamental Constitutional Questions Of Great Public Importance"

The Attorney General has also failed to show that his petition "implicates fundamental constitutional questions of great public importance." *Oliver*, 456 P.3d at 1069. There is nothing in the New Mexico Constitution or HB 7 that creates a right for people to ship or receive abortion pills or abortion-related paraphernalia in violation of federal law, and the Attorney General cites no opinion or ruling of this Court that recognizes such as right. And a writ of mandamus cannot be used to recognize or enforce rights and duties that were not previously established in law. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 34, 487 P.3d 815, 827 (N.M. 2021) ("The purpose of the writ of mandamus is to enforce performance of a public duty after it has been otherwise established, and not to establish legal rights and duties." (citation and internal quotation marks omitted)).

But there is an even larger problem for the Attorney General: It is *impossible* for his petition to implicate "fundamental constitutional questions of great public importance" because the ordinances either: (1) Do nothing to restrict abortion access (if the OLC interpretation of 18 U.S.C. §§ 1461–1462 is correct); or (2) Do nothing but repeat the requirements of a federal statute, which would preempt any supposed state-law right to ship or receive abortion-related materials. Either way, the ordinances cannot implicate "fundamental constitutional questions of great public importance" because they simply parrot the requirements of a federal statute that must prevail over any countervailing provision in state law. So the constitutional questions raised in the Attorney General's petition are neither "fundamental," nor are they "of great public importance."

C. The Petition Cannot Be "Answered On The Basis Of Virtually Undisputed Facts"

Recall that a writ of mandamus may issue only "to compel the *performance of an act* which the law specially enjoins as a duty resulting from an office, trust or station." New Mexico Stat. § 44-2-4 (2019) (emphasis added). Yet there is nothing in the Attorney General's petition that describes any "act" of the respondents that he wants this Court to compel or restrain. Nor does the Attorney General's petition explain how any such "act" relates to a "duty resulting from an office, trust of station." *Id.*

The cities of Clovis and Hobbs maintain that they are not engaged in any "act" that could implicate the New Mexico Constitution, because there are no abortion providers operating in their cities and no abortion providers seeking to enter those jurisdictions. So the cities have no opportunity to enforce the licensing requirements

of their ordinances—and there is no prospect that they will have any opportunity to engage in an "act" of enforcement unless and until an abortion clinic tries to open in Clovis and Hobbs. The mere existence of an ordinance is not an "act" that can be compelled or enjoined by a court. *See* notes 1–2 and accompanying text, *supra*.

The Attorney General apparently thinks that the cities are performing (or about to perform) an unconstitutional act, because he is asking for mandamus that would "prohibit" the cities "from engaging in unconstitutional official action"—although he never bothers to tell the Court *what* those supposedly unconstitutional actions are. But the cities deny that they are engaged in *any* acts of enforcement because there are no abortion clinics in Clovis or Hobbs and no one who intends to open a clinic in either of those cities. If the Attorney General is contending otherwise, then his petition cannot be resolved "on the basis of virtually undisputed facts."

D. The Issues Do Not "Call For An Expeditious Resolution"

There is nothing in the petition that calls for an "expeditious resolution." *Oliver*, 456 P.3d at 1069. None of the four ordinances are doing anything to restrict abortion access because no abortion providers are operating in any of those four jurisdictions—and no providers have sought to offer abortions in any of the respondent cities or counties. The Attorney General cannot identify *anyone*—real or hypothetical—who is being hindered in obtaining an abortion on account of the ordinances, or who is suffering a violation of their supposed constitutional rights. And if there were any person who was being adversely affected by these ordinances, that person could sue on their own behalf. There is no need for immediate relief when there is no evidence or reason to believe that the ordinances are affecting abortion access on the ground.

The Attorney General's claim that the four ordinances "effectively ban abortions in those cities and counties" is false. *See* note 4 and accompanying text. The ordinances merely require compliance with the *federal* abortion restrictions codified in 18 U.S.C. §§ 1461–1462. If the OLC interpretation of 18 U.S.C. §§ 1461–1462 is correct, then the ordinances do not restrict abortion access in the slightest. *See* Section I, *supra*. And if the OLC opinion is wrong and 18 U.S.C. §§ 1461–1462 mean what they say, then abortion is effectively banned throughout the United States as a matter of federal law. *See id.* The ordinances themselves add nothing beyond what federal law independently requires—and if this Court rejects the OLC opinion and interprets 18 U.S.C. §§ 1461–1462 to ban *all* shipment and receipt of abortion pills, then it is federal law, and not the redundant ordinances, that is eliminating abortion access not only in New Mexico but throughout the entire nation. So there is no need for an "expeditious resolution," unless the Attorney General wants this Court to adopt a textual construction of 18 U.S.C. §§ 1461–1462 and hold that federal law effectively bans abortion nationwide.

E. The Attorney General Does Not Explain How His Requested Resolution Cannot Be Obtained "Through Other Channels"

The final jurisdictional problem is that the Attorney General has failed to explain how his requested resolution "cannot be obtained through other channels such as a direct appeal." *Oliver*, 456 P.3d at 1069. The most obvious alternate "channel" by which relief could be sought is by suing the respondents in state district court and

seeking an immediate preliminary injunction. Indeed, HB 7 explicitly gives the Attorney General a right of action to sue municipalities that infringe the state-law right to abortion established in HB 7:

> The attorney general or a district attorney may institute a civil action in district court if the attorney general or district attorney has reasonable cause to believe that a violation has occurred or to prevent a violation of the Reproductive and Gender-Affirming Health Care Freedom Act from occurring.").

HB 7, § 4(A). The Attorney General never explains why HB 7's cause of action is inadequate, and it is inconceivable that the Attorney General would be unable to pursue the relief that he is seeking in this Court by suing the municipalities under HB 7. That alone requires this Court to decline original jurisdiction and deny the requested relief.

IV. The Ordinances Cannot Violate The New Mexico Constitution Because They Simply Require Compliance With 18 U.S.C. §§ 1461–1462, Which Is The "Supreme Law Of The Land" Under Article VI Of The Constitution

The Attorney General claims that the ordinances violate rights supposedly secured by the New Mexico Constitution. *See* Pet. at 9–18. But the problem for the Attorney General is that these ordinances do nothing more than require compliance with *existing federal law*; they do not ban abortion or impose regulatory burdens that go beyond what is already required by 18 U.S.C. §§ 1461–1462. Each of the four ordinances makes clear that a person cannot violate the ordinance *unless* it is violating its federal-law obligations under 18 U.S.C. §§ 1461–1462. *See* Hobbs Municipal Code § 5.52.070(A) ("It shall be unlawful for any person . . . *to violate 18 U.S.C. § 1461 by* . . ." (emphasis added)); Clovis City Code § 9.90.060(A) (same); Roosevelt County

Ordinance No. 2023-01 § 2(A) (same); *id.* at § 9(A) (same); Lea County Ordinance No. 99 § 6.1 ("It is prohibited for any person *to violate 18 U.S.C. § 1461 by . . .*" (emphasis added)); Hobbs Municipal Code § 5.52.070(B) ("It shall be unlawful for any person . . . to *violate 18 U.S.C. § 1462 by . . .*" (emphasis added)); Clovis City Code § 9.90.060(B) (same); Roosevelt County Ordinance No. 2023-01 § 2(B) (same); *id.* at § 9(B) (same); Lea County Ordinance No. 99 § 6.2 ("It is prohibited for any person *to violate 18 U.S.C. § 1462 by . . .*" (emphasis added)). The titles of the ordinances and their statements of purpose make this clear as well.

So the meaning of the ordinances depends entirely on the meaning of 18 U.S.C. §§ 1461–1462. But the Attorney General is pinioned on the horns of a dilemma. He can either: (a) Endorse the OLC interpretation of 18 U.S.C. §§ 1461–1462, which would render the ordinances toothless because abortion is legal in New Mexico (and in each of the respondent cities and counties); or (b) Reject the OLC opinion and endorse a textualist interpretation of 18 U.S.C. §§ 1461–1462, which will impose a federal nationwide ban on the shipment and receipt of abortion-related materials. Either way, mandamus relief is impermissible because either: (a) the ordinances do nothing to limit abortion access; or (b) 18 U.S.C. §§ 1461–1462 imposes a nationwide federal ban on the shipment and receipt of abortion paraphernalia, which preempts any supposed state-law right to act in violation of these federal statutes.

The Attorney General is bound by oath to support and defend article VI of the Constitution, which marks federal statutes as "the supreme Law of the Land" and requires any conflicting state constitutional provision to give way. Mandamus should

be denied because a court cannot recognize or enforce a state-law "right" to act in violation of supreme federal law.

V. Mandamus May Be Used Only To Enforce Legal Rights That Have Already Been Established

There is yet another fatal and insurmountable problem with the Attorney General's petition: A writ of mandamus may be used only to enforce legal rights that have already been established, not to enforce or establish rights or duties that have not previously been recognized. *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 34, 487 P.3d 815, 827 ("'The purpose of the writ of mandamus is to enforce performance of a public duty *after it has been otherwise established, and not to establish legal rights and duties*.'" (citation and internal quotation marks omitted)). There is no decision of this Court holding that New Mexicans have a state-law right to ship or receive abortion pills or abortion-related paraphernalia in violation of a federal criminal statute. The ordinances do not ban abortion; they merely require compliance with 18 U.S.C. §§ 1461–1462.[6] And there is no decision of this Court that even remotely suggests that New Mexico law protects the conduct outlawed by 18 U.S.C. §§ 1461–1462.

The Attorney General even *admits* that this Court has not previously recognized a right to abortion under the state constitution. *See* Pet. at 11 ("This Court has not directly addressed whether the Equal Rights Amendment secures a right to reproductive freedom and choice that includes the right to abortion."); *id.* at 16 ("In N.M.

6. The Attorney General claims that the ordinances "operate as *de facto* bans on abortion," Pet. at 10, but he cannot take that stance without rejecting the OLC opinion and conceding that 18 U.S.C. §§ 1461–1462 bans the shipment and receipt of abortion pills nationwide as a matter of federal criminal law.

Right to Choose, the Court refrained from deciding whether Article II, Section 4 protects a right to choose to terminate a pregnancy"). He is instead asking this Court to extend existing precedent to recognize a state constitutional right that has not previously been established. *See id.* at 10–18. That is impermissible in a mandamus proceeding.

The Attorney General likewise admits that "there is no direct expression of an intent to limit municipal authority" in the Medical Practice Act or the Medical Malpractice Act. *See* Pet. Br. in Chief at 18. That concession gives the game away, as mandamus cannot be used to create or recognize new legal rights and duties that have not been previously recognized. And the Attorney General cites no authority whatsoever to support his claim that Medical Practice Act and the Medical Malpractice Act preempt local licensing regimes and foreclose municipalities from enacting them.

VI. Mandamus Cannot Issue Because The Attorney General Has Failed To Show That His Entitlement To Relief Is "Clear" And "Indisputable"

This Court has held many times that mandamus may issue only to enforce rights and duties that are "clear" and "indisputable." *See State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23, 487 P.3d 815, 825 (N.M. 2021) ("[M]andamus . . . will lie only to force a clear legal right against one having a clear legal duty to perform an act" (emphasis added) (citation and internal quotation marks omitted)); *State ex rel. Coll v. Johnson*, 1999-NMSC-036, 128 N.M. 154, 158, 990 P.2d 1277, 1281 (N.M. 1999) ("[A] writ of mandamus is available only to one who has a *clear legal right* to the performance sought; it is available only in limited circumstances to achieve limited purposes." (emphasis added) (citation and internal quotation marks omitted)); *Mobile*

America, Inc. v. Sandoval County Comm'n, 1974-NMSC-007, ¶ 5, 85 N.M. 794, 795, 518 P.2d 774, 775 (N.M. 1974) ("[M]andamus lies to compel the performance of a statutory duty only where it is clear and undisputable.").[7] The Attorney General does not even acknowledge this requirement or assert that the supposed rights and legal duties are "clear" and "indisputable."

The arguments in the Attorney General's petition fall far short of the "clear" and "indisputable" showing needed for mandamus relief. His argument based on the Equal Rights Amendment cannot get off the ground because the ordinances do not ban abortion; they merely require compliance with 18 U.S.C. §§ 1461–1462. Men and women are equally prohibited from shipping or receiving abortion pills or abortion-related paraphernalia in violation of 18 U.S.C. §§ 1461–1462, and men and women are equally prohibited from violating 18 U.S.C. §§ 1461–1462 in an attempt to kill their unborn children. That is true both as a matter of federal law and as a matter of local law. None of these laws classify on account of sex or impose different rules on men and women.

The Attorney General's "due process" and "privacy" arguments are even more tenuous, as is his reliance on the "inherent rights" clause of Article II, section 4.

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7. *See also Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 218–19 (1930) ("Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed, but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." (footnote omitted)).

State-law privacy rights do not include a right to violate federal criminal statutes, and there is no such thing as a "natural, inherent, and inalienable right" to engage in conduct that federal law has outlawed and criminalized. Any attempt to interpret the New Mexico Constitution in that manner would be preempted by 18 U.S.C. §§ 1461–1462. The Attorney General also attempts to derive these supposed state-law rights from vague and amorphous language in previous court opinions, such as the court-described rights of "personal bodily privacy" and "personal dignity." *But see generally* Steven Pinker, *The Stupidity of Dignity*, The New Republic (May 27, 2008), available at http://bit.ly/3XHKF7Z (explaining how "dignity" is "a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it."). That is far from a "clear" and "indisputable" showing of a state constitutional right.

Finally, there is nothing in the Medical Practice Act or the Medical Malpractice Act that purports to prevent local jurisdictions from licensing or regulating the practice of medicine, and the Attorney General cannot point to any language in these statutes that could possibly preempt these ordinances. Lea County's ordinance doesn't even require licensing of abortion providers; it simply imposes a $300 fine on every "person" who violates the abortion-related provisions of 18 U.S.C. §§ 1461–1462. How the Medical Practice Act or Medical Malpractice Act could preempt an ordinance of that sort remains a mystery.

In all events, the Hobbs, Clovis, and Lea County ordinances are business-licensing ordinances, not a "medical licensing regime." Nothing in these ordinances regulates the securing of a medical license or authorizes its suspension or revocation. The Medical Practice Act "provide[s] laws and rules controlling the granting and use of

the privilege to practice medicine and to establish a medical board to implement and enforce laws and rules." N.M. Stat. § 61-6-1(B). Yet a doctor's license to practice medicine and his business license are not synonymous. The latter is governed by the New Mexico statutes on business licensing. *See* N.M. Stat. § 3-38-1 *et seq.* Indeed, the city of Hobbs already licenses medical facilities and requires its local hospital to hold a license from the city. *See* Exhibit 1 (hospital license). Does the Attorney General think *that* is preempted by state law?

The Attorney General is equally wrong to assert that the "purpose" of the ordinances is to "prevent physicians from being able to perform [abortions]." Pet. at 20. The purpose of the ordinances is to require compliance with federal law,[8] and if this Court construes 18 U.S.C. §§ 1461–1462 in accordance with the OLC opinion then the ordinances do nothing to restrict physicians or anyone else from performing abortions in New Mexico. *See* Section I, *supra*. There is also no possibility that these ordinances will create a "patchwork of regulation"[9] because they do nothing more than require compliance with rules that federal law already imposes on a nationwide basis. *See* 18 U.S.C. §§ 1461–1462. However this Court chooses to interpret 18 U.S.C. §§ 1461–1462, the residents of the respondent cities and counties will be under the same legal obligations as everyone else in the United States.

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8. *See* Hobbs Municipal Code § 5.52.010 ("The purpose of this section is to preserve the integrity of the local medical profession by ensuring compliance with applicable law."); Lea County Ordinance No. 99 § 2 ("The purpose and intent of this ordinance is to ensure compliance with federal abortion laws, including 18 U.S.C. §§ 1461–1462, within Lea County.").
9. Pet. at 20.

Finally, the Attorney General fails to explain how a writ of mandamus can restrain private litigants from suing non-compliant abortion providers under section 2 of the Roosevelt County ordinance. Roosevelt County does nothing to enforce this part of the ordinance; indeed, it is explicitly prohibited from doing so, as the Attorney General acknowledges. *See* Pet. at 21 (complaining that "the ordinance expressly prohibits the County and its officers, employees, and agents from participating in the filing of, or seeking to influence a decision to bring, any action under the ordinance."). But a writ of mandamus would be directed only at Roosevelt County, not the litigants who sue under the ordinance or the judges who hear those cases.

The private right of action in the Roosevelt County ordinance also falls comfortably within the County's exercise of independent power. *See New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶ 28, 138 N.M. 785, 797, 126 P.3d 1149, 1161 (N.M. 2005) ("Where a municipality has been given powers by the legislature to deal with the challenges it faces, those may be sufficiently independent municipal powers to allow regulation of a civil relationship as long as (1) the regulation of the civil relationship is reasonably 'incident to' a public purpose that is clearly within the delegated power, and (2) the law in question does not implicate serious concerns about non-uniformity in the law."). The private right of action is "incident to" the county's delegated powers to "provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of [the] county or its inhabitants." N.M. Stat. § 4-37-1 ("Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort

and convenience of any county or its inhabitants."). The Attorney General does not even acknowledge the existence of section 4-37-1 or explain why it is incapable of supporting the Roosevelt County ordinance. And the private right of action does not implicate any "concerns about non-uniformity in the law" because it does not extend beyond the requirements that 18 U.S.C. §§ 1461–1462 already impose nationwide as a matter of federal law. *See* note 9 and accompanying text, *supra*.

VII. Mandamus Cannot Issue Because The Attorney General Has Not Even Attempted To Explain How "Ordinary" Proceedings Would Be "Inadequate"

The last and most serious problem with the Attorney General's request is that mandamus cannot issue unless the petitioner shows that relief is unavailable in the "ordinary" course of law. *See* N.M. Stat. § 44-2-5 ("The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law."); *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23, 487 P.3d 815, 825 (N.M. 2021) ("[M]andamus . . . will lie only . . . where there is no other plain, speedy and adequate remedy in the ordinary course of law." (citations and internal quotation marks omitted)); *State ex rel. Coll v. Johnson*, 1999-NMSC-036, 128 N.M. 154, 158, 990 P.2d 1277, 1281 (N.M. 1999) ("Mandamus is a drastic remedy to be invoked only in extraordinary circumstances. The writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law." (citations and internal quotations marks omitted)); *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 6, 91 N.M. 279, 282, 573 P.2d 213, 216 (N.M. 1977) ("Mandamus will lie where ordinary proceedings would be inadequate.").

The Attorney General does not even acknowledge or address this requirement, and he does not explain why he cannot obtain a "plain, speedy and adequate remedy" by suing the respondent cities and counties under HB 7 and seeking a preliminary injunction. Recall that HB 7 gives the Attorney General an *explicit* cause of action to sue municipalities that restrict abortion access in violation of state law:

> The attorney general or a district attorney may institute a civil action in district court if the attorney general or district attorney has reasonable cause to believe that a violation has occurred or to prevent a violation of the Reproductive and Gender-Affirming Health Care Freedom Act from occurring.").

HB 7, § 4(A). The Attorney General does not even attempt to explain how his ability to sue the municipalities under HB 7 fails to qualify as a "plain, speedy and adequate remedy in the ordinary course of law."

Nor does the Attorney General explain why the supposed "victims" of these ordinances are incapable of vindicating their own rights by suing the respondents in state district court. It seems rather obvious that proceedings in "the ordinary course of law" are available not only to the Attorney General but also to any private citizen who is injured or adversely affected by the ordinances—and that the state district courts remain open to hear these claims and issue preliminary injunctions if warranted. Mandamus should be denied for that reason alone.[10]

* * *

10. For the same reason, the Attorney General cannot show that original jurisdiction is warranted, as explained in Section I.E, *supra*.

The ordinances do nothing more than incorporate the requirements of federal law. If this Court chooses to adopt OLC's interpretation of 18 U.S.C. §§ 1461–1462, then it should deny the petition for mandamus because the ordinances do nothing to limit abortion access in New Mexico. If this Court chooses to reject the OLC opinion and interpret 18 U.S.C. §§ 1461–1462 according to what they say, then abortion is effectively outlawed as a matter of federal law, and neither HB 7 nor the state constitution can confer a right to act in violation of a federal criminal statute.

CONCLUSION

The petition for writ of mandamus should be denied.

Respectfully submitted.

/s/ Michael J. Seibel

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Dated: May 10, 2023

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** Counsel for City of Hobbs only

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City of Clovis and City of Hobbs

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I certify that on May 10, 2023, I served this document through the electronic case manager upon:

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STATEMENT OF COMPLIANCE

This brief complies with the typeface and type-volume requirements of NMRA Rules 12-318(F)(2) and (F)(3). The brief was prepared in a proportionally spaced typeface in 14-point Equity font, the body of the brief does not exceed 35 pages, double-spaced, and the body of the brief contains 6,506 words, calculated using Microsoft Word for Mac, version 16.41.

/s/ Michael J. Seibel
MICHAEL J. SEIBEL
Counsel for Respondents
City of Clovis and City of Hobbs

Exhibit 1

CITY OF HOBBS

BUSINESS REGISTRATION
200 E. Broadway
Hobbs, NM 88240
(575) 397-9200
THIS LICENSE EXPIRES 12/31/2023

Business Registration
Original Copy

2023

Registration Number	**00020810**
Issue Date	01/31/2023
Expiration Date	12/31/2023
Category	PROFESSIONAL SERVICES
Type	HOSPITAL/NURSING HOME
State Tax ID	XXXXXXX 4001
Phone Number	575-492-5103

BUSINESS NAME & MAILING ADDRESS

COVENANT HEALTH HOBBS HOSPITAL & COVENAN
COVENANT HOSPITAL HOBBS
COVENANT HEALTH HOBBS HOSPITAL & COVENAN
4900 N LOVINGTON HWY
ATTN: ADMINISTRATION
HOBBS, NM 88240

OWNER NAME

COVENANT HOSPITAL HOBBS
5419 N LOVINGTON HWY
HOBBS, NM 88240

Physical Address 4900 N LOVINGTON HWY

Hobbs
NEW MEXICO

By: _____
City Clerk

Total Paid $25.00

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