IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioner,

v. No. S-1-SC-39742

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

Respondents.

PROPOSED *AMICI CURIAE* NEW MEXICO FAMILY ACTION MOVEMENT, RIGHT TO LIFE COMMITTEE OF NEW MEXICO, AND NEW MEXICO ALLIANCE FOR LIFE SUPPORTING RESPONDENTS

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**Application for admission pro hac vice prepared and will be filed imminently*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

New Mexico Cases

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici are three pro-life advocacy organizations based in New Mexico: New Mexico Family Action Movement, Right to Life Committee of New Mexico, and New Mexico Alliance for Life. New Mexico Family Action Movement is a nonprofit organization that aims to "educate and activate voters, as well as work hand in hand with legislators in promoting policy that protects life, families, and freedoms in New Mexico"; the organization is among 40 other state groups in alliance with the national Family Policy Alliance organization.[2] Members of New Mexico Family Action Movement believe "that life is a precious gift from God and that it should be protected from fertilization to natural end of life."[3] New Mexico Family Action Movement "engages in a variety of issues at the grassroots level, the legislative process, and everything in between."[4]

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[1] As explained in their motion for leave to file an amici curiae brief, counsel for amici notified the parties of their intention to file this brief under NMRA, Rule 12-320.

[2] N.M. Fam. Action Movement, http://bit.ly/3YxO1vF.

[3] N.M. Fam. Action Movement, Life, http://bit.ly/3E48kZy.

[4] N.M. Fam. Action Movement, The Goal is Set!, http://bit.ly/40SBft7.

Right to Life Committee of New Mexico is "an educational, civil rights, not-for-profit, non-partisan, pro-life organization" that is an "affiliate of the National Right to Life Committee."[5] The organization aims to "educate the public and build pro-life support throughout New Mexico in order to protect all innocent human life from fertilization to natural death."[6] Right to Life Committee of New Mexico was founded in 1970 to minimize the harms from *Roe v. Wade*. Its "education and political efforts are dedicated to the proposition that all human life is precious and must be protected."[7]

New Mexico Alliance for Life is a nonprofit "nonpartisan organization focused on changing state and local laws by empowering women with better and informed choices when facing unplanned or difficult pregnancies."[8] The organization is also dedicated to "advocating for better protections for women and unborn children from an unsafe abortion industry." *Id.* New Mexico Alliance for Life works to build "a Culture of Life across New Mexico."[9]

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[5] N.M. Right to Life, http://bit.ly/3YxO1vF.
[6] N.M. Right to Life, What's Happening, https://www.rtlnm.org/.
[7] *Supra* n.5
[8] N.M. All. for Life, Mission, http://bit.ly/3Ilyrxy.
[9] N.M. All. for Life, https://bit.ly/3Ilyrxy.

Amici New Mexico pro-life organizations dedicate their time and resources to advocating for protecting unborn human life and naturally have a substantial interest in this lawsuit, which could cause great harm to unborn life by recognizing a constitutional right to abortion in New Mexico.

Moreover, New Mexico Family Action Movement, Right to Life Committee of New Mexico, and New Mexico Alliance for Life are well-acquainted with the history of abortion-related legislation in New Mexico and the surrounding constitutional issues. They are qualified to apprise the Court why the New Mexico Constitution does not encompass a right to abortion and why a mandamus action is an improper vehicle for this Court to recognize a new constitutional right in what would amount to an advisory opinion.

New Mexico Family Action Movement, Right to Life Committee of New Mexico, and New Mexico Alliance for Life respectfully urge this Court to refrain from recognizing a new constitutional right to abortion in this mandamus action.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Attorney General's Petition for Writ of Mandamus (the Petition) asks this Court to find a new constitutional right to abortion–one of the most consequential and divisive issues of our time–without the benefit of any court's prior review or even full briefing. This attempt to bypass ordinary litigation procedures and use the exceptional remedy of mandamus to create a new right rather than enforce an old one fails. First, the Petition fails to satisfy the basic requirement for a mandamus action: establishing that a right is clearly protected under current law. Second, the Attorney General admits that a district court action is available—an adequate remedy that makes mandamus inappropriate under the *Sandel* factors.

Third, the Attorney General's action suffers another fatal flaw, that of requesting an improper advisory opinion because there is no real controversy. Regardless of this Court's determination as to what the federal Comstock laws mean, any ruling on whether the New Mexico Constitution protects a right to abortion is unnecessary. On one hand, if the federal Comstock laws apply only where there is an intent to violate state law, the ordinances would be meaningless because New Mexico

law allows abortion. But on the other hand, if the federal Comstock laws prohibit the mailing of abortifacients more broadly and this Court holds that local counties and cities can enforce federal law that conflicts with state law, then it matters not whether New Mexico protects abortion through its statutes or Constitution. The Supremacy Clause would prevail in either instance, and no justiciable controversy exists. For these reasons, this Court should reject the Attorney General's invitation to use the drastic remedy of mandamus to issue an improper advisory opinion.

The Court should not reach the constitutional question; but in any event, the New Mexico Constitution does not contain a right to abortion. Far from protecting an affirmative *right* to abortion, New Mexico *criminalized* the act when *each* of the cited constitutional provisions were drafted and adopted. Just as this Court concluded when evaluating an asserted right to assisted suicide—another deeply controversial and personal life-ending medical procedure—the New Mexico Constitution does not contain a right to abortion because such a guarantee is not stated in the text, is inconsistent with the history of New Mexico laws, and violates several well-established state interests.

The Court should summarily deny the Emergency Petition.

ARGUMENT

I. The Attorney General's constitutional arguments are not properly before this Court.

A. Mandamus does not lie where the right at issue is not clear.

This Court has time and again explained that "'[m]andamus is a drastic remedy to be invoked only in extraordinary circumstances.'" *State ex rel. Riddle v. Oliver*, 2021-NMSC-018, ¶ 23, 487 P.3d 815, 825 [published after Vol. 150 of the *New Mexico Reports*] (quoting *State ex. rel. Richardson v. Fifth Jud. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566). Further, because mandamus is a "potent" judicial weapon, 52 Am.Jur.2d *Mandamus* § 3, it is carefully circumscribed. Such an action ordinarily lies "only to force a clear legal right," not to create one. *Oliver*, 2021-NMSC-018, ¶ 23; *see also State ex rel. McElroy v. Vesely*, 1935-NMSC-096, ¶ 4, 40 N.M. 19, 52 P.2d 1090, 1091; *Carson Reclamation Dist. v. Vigil*, 1926-NMSC-019, 31 N.M. 402, 246 P. 907. But not a single case from any New Mexico court has ever recognized a "clear legal right" to abortion in the New Mexico Constitution.

Mandamus is also improper where an adequate remedy at law otherwise exists. *Oliver*, 2021-NMSC-018, ¶ 23; *Quality Auto. Ctr., LLC v. Arrieta*, 2013-NMSC-041, ¶ 19, 309 P.3d 80, 84 [published after Vol. 150 of the *New Mexico Reports*] (same); *see also* NMSA 1978, § 44-2-5 (1884) (stating that a writ of mandamus "shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law").

Notwithstanding the great weight of this Court's authority that counsels caution regarding mandamus, the Attorney General seeks to invoke this extraordinary and drastic remedy to recognize a new constitutional right. This effort falls far short.

The Attorney General focuses myopically on the tripartite *Sandel* test, but the Petition not only fails to satisfy the last of those three factors but omits entirely the "critical" and "threshold issue" that must be decided in every mandamus case: whether a clear legal right to the requested relief exists. *Oliver*, 2021-NMSC-018, ¶ 26. Further, "the party seeking relief by mandamus bears the burden to establish all the elements necessary to obtain mandamus," including "establishing the clear legal right to the relief." 52 Am.Jur.2d *Mandamus* § 2.

"It is a well-established doctrine in the law relating to mandamus that only clear legal rights are subject to enforcement by the writ." *Schreiber v. Baca*, 1954-NMSC-110, ¶ 14, 58 N.M. 766, 770, 276 P.2d 902, 905 (citing *Vigil*, 1926-NMSC-019; *State ex rel. Walker v. Hinkle*, 1933-NMSC-032, 37 N.M. 444, 24 P.2d 286). As this Court explained in *Oliver*, "[t]he 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." *Oliver*, 2021-NMSC-018, ¶ 34 (citing Chester James Antieau, *The Practice of Extraordinary Remedies* § 2.01 (Oceana Publications Inc. 1987)) (emphasis added); 52 Am.Jur.2d *Mandamus* § 1 (purpose of mandamus is to "enforce, rather than establish, a claim or right"). Practically speaking, this means that mandamus "confers no new authority." *Regents of Agric. Coll. v. Vaughn*, 1904-NMSC-023, ¶ 13, 12 N.M. 333, 78 P. 51, 53 (quoting *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493 (1989)). Thus, for nearly a century this Court has adhered to the rule that "[o]nly a clear legal right can be … enforced" by a mandamus action. *Vigil*, 1926-NMSC-019, ¶ 3 (citing High's Extraordinary Legal Remedies,

"Mandamus," § 10). This fundamental requirement "flows from the nature of the writ." *Oliver*, 2021-NMSC-018, ¶ 34.

Accordingly, mandamus is an appropriate tool where a government official refuses to comply with a mandatory, unambiguous, statutory duty. But mandamus does not lie where, as here, "there is room for difference as to the true construction of constitutional language." *Pirtle v. Legis. Council Comm. of N.M. Legislature*, 2021-NMSC-026, ¶ 51, 492 P.3d 586, 602 [published after Vol. 150 of the *New Mexico Reports*] (cleaned up) (citing 52 Am.Jur.2d *Mandamus* § 52 (2011)). Here, the Attorney General has not even attempted to meet the "threshold" inquiry under *Sandel*. Rather, the Petition candidly admits that the supposed constitutional right to an abortion has *not* been "clearly and undisputedly" recognized under any of its proffered constitutional bases. *Id*.

1. The Equal Rights Amendment. The Attorney General concedes that "this Court has not directly addressed whether the Equal Rights Amendment secures a right to … abortion." **[Pet. 11]**. The Attorney General gestures towards *N.M. Right to Choose/NARAL v.*

Johnson, 1999-NMSC-005, ¶ 36, 126 N.M. 788, 975 P.2d 841, 853, but concedes that case does not decide the issue. **[Pet. 11-13]**.

2. *The Privacy and Due Process Clauses.* Similarly, the Attorney General admits this Court has never found a constitutional right to abortion according to a privacy or due process rationale. **[Pet. 14]** (this Court "has not determined whether the New Mexico Constitution's due process guarantees include a right to terminate a pregnancy"). The Petition argues instead that the language of the Constitution "*supports* such an interpretation." **[Pet. 14]** (emphasis added). But supportive constitutional language is not equivalent to a "clear legal right to the relief" requested. 52 Am.Jur.2d *Mandamus* § 2. The Attorney General then points to the *dissent* in *Dobbs* and to decisions from *other* states, positing that this Court "*should* conclude that the New Mexico Constitution protects a woman's right to choose whether to continue a pregnancy." **[Pet. 15-16]** (emphasis added). Requesting a declaration of a right is the exact opposite of asking that a clear, existing legal right to enforced.

3. *Inherent Rights Clause.* As a last-ditch effort to create a constitutional right, the Attorney General looks to the Inherent Rights

Clause. **[Pet. 16]**. But as the Petition recognizes, the Clause is not a fount of fundamental rights but rather reinforces the protections granted by other constitutional provisions and is itself subject to reasonable regulation. *Id.* There is no case from any New Mexico court concluding that the Inherent Rights Clause protects the right to abortion. *Id.* (admitting that such a holding would have been "unnecessary" to the decision in the Attorney General's best case: *N.M. Right to Choose*, 1999-NMSC-005. Indeed, the Petition once again looks outside this state to decisions from sister courts (with, of course, entirely different constitutions and legal histories) and urges this Court to do something new: "the Court *should* conclude in this case that the ordinances violate the Inherent Rights Clause, either on its own or in combination with other constitutional provisions." **[Pet. 17]** (emphasis added). This Court should reject the Petition's invitation to improperly "establish legal rights and duties" under its mandamus power. *Oliver*, 2021-NMSC-018, ¶ 34 (citing Antieau § 2.01).

B. Mandamus does not lie where other adequate remedies at law exist.

The tripartite *Sandel* test also requires the Attorney General to establish that resolution "cannot be obtained through other channels

such as a direct appeal." *Oliver*, 2021-NMSC-018, ¶ 24; see also *Lovato v. City of Albuquerque*, 1987-NMSC-086, ¶ 6, 106 N.M. 287, 742 P.2d 499 (noting the mandamus requirement or "no other plain, speedy[,] and adequate remedy in the ordinary course of law"). To put it simply, mandamus is no substitute for an appeal.

Yet the Attorney General forthrightly admits that this matter might first have been brought in the district court. **[Pet. 5]**. This Court should take the Attorney General at his word and reject the invitation to consider admittedly novel constitutional claims without the benefit of the views of the Governor or the State Legislature, and without any record, the full panoply of briefing, or any lower court decision.

While this Court does not employ mandamus in "an overly formalistic way," *Oliver*, 2021-NMSC-018, ¶¶ 25-26, the request here to "establish" new constitutional rights on one of the most debated and divisive issues of our day outside the normal legal process fails the most basic requirements of mandamus—that mandamus must only enforce and not establish new rights, and that there be no other adequate remedy at law. For those reasons alone, the Court should deny the Attorney General's Petition.

C. The Attorney General seeks an improper advisory opinion.

The question as to whether the New Mexico Constitution protects a right to abortion "must await the proper case or controversy." *Pirtle*, 2021-NMSC-026, ¶ 65. Yet the Attorney General asks this Court to render an improper advisory opinion, providing another independent ground for denying the Petition.

"It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 21, 124 N.M. 640, 646, 954 P.2d 72, 78 (quoting *Schlieter v. Carlos*, 1989-NMSC-037 ¶ 13, 108 N.M. 507, 510, 775 P.2d 709, 712) (cleaned up). In practice, this means that this Court "avoid[s] rendering advisory opinions." *El Paso Elec. Co.*, 1998 -NMSC-006, ¶ 18; *Application of Timberon Water Co., Inc.*, 1992-NMSC-047, ¶ 33, 114 N.M. 154, 162, 836 P.2d 73, 81 ("We do not give advisory opinions.").

In *Ramirez v. State*, for example, the State invoked sovereign immunity as to a particular cause of action. 2016-NMSC-016, ¶ 11, 372 P.3d 497, 501 [published after Vol. 150 of the *New Mexico Reports*]. This

Court explained that if sovereign immunity attached to the claim, any ruling regarding it would be advisory and thus improper. *Id.*

Here, the Attorney General's claim that this Court should create a new constitutional right to abortion—without considering any interest New Mexico may have in protecting unborn life, something this Court has recognized as compelling at some point, *N.M. Right to Choose*, 1999-NMSC-005—is not properly before this Court because *any* conclusion on the constitutional claim would be advisory. *Schlieter*, 1989-NMSC-037 ¶ 4 (citations omitted).

There is no scenario in which the issue of a constitutional right to abortion is before this Court. If the federal Comstock laws prohibit the mailing of abortifacients *and* New Mexico law permits localities to enforce federal law, then whether New Mexico protects abortion vis-a-vis statutory or constitutional law makes no difference–federal law would nonetheless prohibit the *mailing* and abortion instrumentalities. Any ruling from this Court regarding a constitutional right to abortion would be wholly advisory.

If, on the other hand, the federal Comstock laws operate only to prohibit the intentional mailing of abortifacients in violation of

applicable state law, then the ordinances have zero effect. Because New Mexico allows abortions, there is no state abortion prohibition that would trigger the requisite intentional violation. Here, too, this Court's substitution of its own judgment for that of the people on a divisive and consequential issue, would be advisory.

The question as to whether the New Mexico Constitution protects a right to abortion is not ripe for adjudication. However convenient or even desirable that a legal question be answered, the courts are "not justified in violating fundamental principles of judicial procedure" by "rendering an improper advisory opinion." *Pirtle*, 2021-NMSC-026, ¶ 65, (quoting *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007)). They are not, to quote Judge Cardozo, "knights errant, scanning the horizon for issues in distress that call out for rescue or remedy." *Id*.

II. The New Mexico Constitution does not contain a right to abortion.

The Petition argues that this Court should invalidate city and county ordinances on the basis of an *assumed* right to abortion in the New Mexico Constitution. But this State's Constitution does not expressly provide for such a right, and this Court has never found a right to abortion. Far from recognizing an affirmative right to obtain an

abortion, this State *criminalized* abortion when *each* of the relevant constitutional provisions were adopted. Indeed, the New Mexico Constitution expressly and repeatedly guarantees the right to life, not the right to end unborn life. N.M. Const. art. II, §§ 4, 18.

This Court's "central purpose in interpreting the constitution is to reflect the drafters' intent." *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 9, 370 P.3d 797, 799 [published after Vol. 150 of the *New Mexico Reports*] (quoting *State v. Lynch,* 2003-NMSC-020, ¶ 24, 134 N.M. 139, 74 P.3d 73) (cleaned up). "Principles of statutory construction apply equally to constitutional construction." *Id.* (quoting *State v. Boyse,* 2013-NMSC-024, ¶ 8, 303 P.3d 830 [published after Vol. 150 of the *New Mexico Reports*]) (cleaned up).

To determine the intent of the drafters of our Constitution, "we first turn to the plain meaning of the words at issue, often using the dictionary for guidance." *Id.* "Under the plain meaning rule, we apply the ordinary meaning of the chosen language unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction." *Id.* (internal quotation omitted).

So framed, the question for this Court is simple: "[w]hat did the Constitution makers mean?" *State ex rel. Ulrick v. Sanchez*, 1926-NMSC-060, ¶ 66, 32 N.M. 265, 255 P. 1077, 1091. Because the New Mexico Constitution does not include a right to abortion, and because the State criminalized abortion when the relevant constitutional provisions were adopted, this Court should deny the Petition.

A. New Mexico protects the right to life and criminalized abortion when each of the relevant constitutional provisions were adopted.

The right to life is fundamental; without it, one cannot have or exercise any other right. Accordingly, the New Mexico Bill of Rights repeatedly guarantees the right to life. *See* N.M. Const. art. II, § 4 (protecting "rights of enjoying and defending life"); § 18 (ensuring that "[n]o person shall be deprived of life . . . without due process of law").

The Attorney General suggests that a right to abortion has been hidden and is just waiting to be found in several constitutional provisions: (1) the Search and Seizure Clause adopted in 1911, Art. II, § 10; (2) the Due Process and Equal Protection Clauses also adopted in 1911, Art. II, § 18; or (3) the Inherent Rights Clause adopted in 1911, Art. II, § 4. But none of these contain any language granting a right to

abortion, and the State criminalized abortion when each of these provisions were adopted, showing that the people of New Mexico did not understand any of these provisions to create a right to abortion at the time of enactment.

New Mexico protected unborn life from the beginning. New Mexico became a U.S. Territory in 1853 and already prohibited abortion unless necessary to save the mother's life. 1853-54 N.M. Laws, act 28, ch. 3 §§ 10-11 (repealed 1907). In 1907, New Mexico enacted a new abortion law, retaining the prohibition with modified felony classification. N.M. Code §§ 1463, 1464 (1907) (impliedly repealed 1919).

New Mexico was admitted to the Union in 1912. Soon thereafter, in 1919—less than a decade after the 1911 ratification of the New Mexico constitutional provisions on which the Attorney General relies—New Mexico enacted a new law that criminalized abortion in all cases unless necessary to save the mother's life. NMSA 1919, §§ 40-3-1, -3 (repealed 1963). In 1963, New Mexico again rewrote its law protecting life, retaining the 1919 law's prohibition on abortion but changing the felony classification. NMSA 1963, §§ 40A-5-1, -3 (repealed 1969). In 1969, New Mexico enacted another abortion law, retaining the general

prohibition except in cases of "justified medical termination," which included saving the life of the mother, as well as rape, incest, and grave physical or mental defects of the child. NMSA 1969, §§ 30-5-1 to -3 (1969), repealed by S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021). The 1969 law also required parental consent for minors to obtain an abortion and limited performance of abortions to licensed physicians. *Id.*

It is nonsensical to say that any provision of the 1911 New Mexico Constitution created a right to abortion when, both before and after that document's ratification, the people criminalized abortion. This statutory law and history is "dispositive" in confirming that the legislature considered unborn children "persons" protected by law. *See Salazar v. St. Vincent Hosp.*, 1980-NMCA-051 ¶ 16, 95 N.M. 150, 153, 619 P.2d 826, 829-30, *writ quashed sub nom. Harrold v. Salazar*, 94 N.M. 806, 617 P.2d 1321, and *writ quashed*, 617 P.2d 1321 (N.M. 1980) (recognizing that "[f]rom 1854 until 1919, New Mexico's public policy, stated in legislation, was that a viable fetus was protected by criminal laws declaring a violation to be murder" under laws against "lives and persons").

B. The Equal Rights Amendment does not contain a right to abortion.

Since its adoption in 1911, Article II, Section 18 of the New Mexico Constitution has guaranteed that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." In 1972, the people of New Mexico amended the provision to add that "[e]quality of rights under law shall not be denied on account of the sex of any person." *Id.* (the "Equal Rights Amendment").

As the Attorney General readily concedes, this Court has never interpreted the Equal Rights Amendment to include a right to abortion. **[Pet. 11].** And for good reason. This Court interprets the Equal Rights Amendment on the basis of "the text and history of our state constitution . . . ." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 36. And neither the text nor the history of the Equal Rights Amendment can support manufacturing a right to abortion.

To begin, the plain language of the Equal Rights Amendment nowhere mentions abortion. Instead, it contemplates a remedy of "equality" in situations where "rights under law" are enjoyed by some but "denied" to others "on account of" their sex. N.M. Const. art II, § 18.

But a right to abortion has never been enjoyed by men but denied to women on account of their sex. And manufacturing a right to abortion for women would not result in equality between men and women with respect to the relevant rights under law. So the plain language of the Equal Rights Amendment provides no grounding or support for a right to abortion.

The history surrounding the Equal Rights Amendment affirms this point. As noted above, New Mexico criminalized abortion both before and after this Amendment's original ratification in 1911. And when the people of New Mexico added the amendment in 1972, the State criminalized elective abortion in a law that those same people's elected representatives enacted in 1969, only three years before. *See* NMSA 1969, §§ 30-5-1 to -3, repealed by S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021). Because the people of New Mexico had recently, continuously, and categorically affirmed that elective abortion was a crime, it is inconceivable that the same electorate intended to allow abortion—much less create an affirmative *right* to abortion—by adding "sex" to the Equal Rights Amendment.

Failing to find any support in the text or history of the Equal Rights Amendment, the Attorney General asks this Court to imply a right to abortion by extending its decision in *N.M. Right to Choose*. **[Pet. 10-13]**. But the Attorney General misreads *N.M. Right to Choose*.

There, this Court addressed New Mexico Human Services Department rules that prohibited the use of government funds to pay for some women's procedures deemed medically necessary (namely, abortions), but did not prohibit use of government funds to pay for men's procedures deemed medically necessary. *See N.M. Right to Choose*, 1999-NMSC-005, ¶ 27. This Court held that the Department's rule violated the Equal Rights Amendment because it did "not apply the same standard of medical necessity to both men and women," thus "treating men and women differently with respect to their eligibility for medical assistance" in cases of medical necessity. *Id.* ¶¶ 2, 27.

Under *N.M. Right to Choose*, an Equal Rights Amendment violation occurs only when the challenged law includes "gender-based classifications," men and women are similarly situated with respect to the law's classification, and that rights under the law are denied to some on the basis of sex. *See id.* ¶¶ 36, 38-40. Indeed, the "inquiry must

begin" by identifying a classification based on sex, and then the government must respond by showing that "such classifications" are constitutional. *Id.* ¶¶ 36, 38-40. This Court's rationale in *N.M. Right to Choose* cannot support a right to abortion for three reasons.

First, the challenged ordinances do not include gender-based classifications. Laws do not violate the Equal Rights Amendment when they are "gender neutral on their face" and "[e]ither males or females could be arrested and convicted under either statute." *See State v. Sandoval*, 1982-NMCA-091, ¶¶ 5-6, 98 N.M. 417, 419, 649 P.2d 485, 487. Indeed, "if a statute treats all persons alike, regardless of sex, it does not violate the provisions of N.M. Const. art. II, s 18." *Id.* ¶ 6 (quoting *Schaab v. Schaab*, 1974-NMSC-072, 87 N.M. 220, 531 P.2d 954).

To be sure, courts may infer a gender-based classification from a classification based on physical characteristics in some circumstances. *See N.M. Right to Choose*, 1999-NMSC-005, ¶¶ 36, 38-40. Even then, laws with classifications based on physical characteristics do not necessarily violate the Equal Rights Amendment. *See City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶ 13, 135 N.M. 578, 581, 92

P.3d 24, 27 (upholding city ordinance prohibiting public nudity and distinguishing between males and females on the basis of unique physical characteristics attributable to each). But here, the challenged ordinances do not include classifications based on sex *or* physical characteristics. Indeed, the ordinances do not even address the procedure of abortion or regulate how it may be performed in any way. Rather, the ordinances generally require compliance with longstanding federal statutes regulating mail and shipping. The absence of any gender-based classification is fatal to the Petition.

Second, men and women are not similarly situated with respect to an alleged right to abortion. Under the unique facts in *N.M. Right to Choose*, this Court held that men and women were similarly situated with respect to a right under law—receiving government funds for procedures deemed medically necessary—and that their equal entitlement remained true even though some particular procedures happen to be unique to one sex or the other. *N.M. Right to Choose*, 1999-NMSC-005, ¶¶ 36, 38-40 But here, the ordinances here do not invoke any right or classification equally applicable to both men and women. Rather, the Attorney General advocates for a unique right to abortion

for women alone. That difference renders *N.M. Right to Choose* inapposite.

Third, the Equal Rights Amendment is inapplicable because women are not denied equality of rights under law with respect to abortion. In *N.M. Right to Choose*, the Court applied the Equal Rights Amendment to provide a remedy of equality when a particular right under law—the use of government funds for procedures deemed medically necessary—was granted to men but denied to women in some circumstances. Here, there is no such inequality. Men do not enjoy a right to abortion that is denied to women on account of their sex. Thus, *N.M. Right to Choose* is further distinguishable and cannot sustain a right to abortion.

The text and history of the Equal Rights Amendment make clear that its drafters—and the people who adopted it—did not understand the provision to include a right to abortion. *N.M. Right to Choose* does not compel a different result. This Court should deny the Petition.

C. The Search and Seizure Clause, Due Process Clause, and Equal Protection Clause do not contain a right to abortion.

In a kitchen-sink approach to implied constitutional rights, the Attorney General cites both the Search and Seizure Clause, N.M. Const. art. II, § 10, and the combined Due Process and Equal Protection Clauses, *id.* art. II, § 18, urging that a right to abortion is lurking in their subsidiary protections of privacy, liberty, or bodily autonomy. **[Pet. 13-16]**. Not so.

Start with the Search and Seizure Clause. To be sure, "Article II, Section 10 provides more protection against unreasonable searches and seizures than the Fourth Amendment," and applying this clause may involve an analysis of citizens' reasonable expectations of privacy. *State v. Leyva*, 2011-NMSC-009, ¶ 51, 149 N.M. 435, 451, 250 P.3d 861, 877. But Article II, Section 10 does not create and protect privacy rights in a vacuum; evaluating citizens' reasonable expectation of privacy only becomes relevant in relation to "unreasonable searches and seizures." N.M. Const. art. II, § 10; *see State v. Adame*, 2020-NMSC-015, ¶ 25, 476 P.3d 872, 879 [published after Vol. 150 of the *New Mexico Reports*] (finding no independent right to privacy in bank records obtained from

third parties). Indeed, the Attorney General only cites two cases regarding this provision, and both were limited to analyzing searches by law enforcement. **[Pet. 13]**; *State v. Crane*, 2014-NMSC-026, ¶ 3, 329 P.3d 689, 691 (search of garbage by police); *State v. Chacon*, 2018-NMCA-065, ¶ 2, 429 P.3d 347, 348 [published after Vol. 150 of the *New Mexico Reports*] (search of inmate by correctional officials). Because an unreasonable search or seizure is not alleged or even applicable here, the Court should reject the Attorney General's suggestion that Article II, Section 10 contains a freestanding right to abortion.

The appeal to Article II, Section 18 fares no better. The Attorney General starts by admitting that this Court has never found a right to abortion under the New Mexico Constitution's Due Process Clause. **[Pet.14]**. Further, because New Mexico's "due process guarantees are analogous" to federal constitutional due process guarantees, *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 18, 376 P.3d 836, 844 [published after Vol. 150 of the *New Mexico Reports*], under the interstitial approach, this Court must "first examine whether an asserted right is protected under an equivalent provision of the United States Constitution." *Id.* ¶ 19. If an asserted right is *not* protected under the federal constitution,

then the party requesting relief bears the burden of providing "reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent." *Id.* (quoting *ACLU of N.M. v. City of Albuquerque*, 2006-NMCA-078, ¶ 18, 139 N.M. 761, 137 P.3d 1215). Under this approach, the Court considers "whether flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics require a divergence from established federal precedent in determining whether the New Mexico Constitution protects the right." *Id.* ¶ 19 n.7 (internal quotation omitted).

The U.S. Supreme Court recently held that the federal Due Process Clause does not include a right to abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). Thus, the Attorney General bears the burden to show why New Mexico's Constitution should be interpreted differently. The Attorney General makes no such showing. Instead, in a single paragraph, the Petition baldly asserts that *Dobbs* should not control because (1) the State constitution is distinctive in its ability to provide broader rights than the federal constitution; and (2) "the analysis in *Dobbs* is flawed for the reasons outlined in the

dissenting opinion." **[Pet. 14]**. Both of these short and vague assertions fall far short of carrying the necessary burden.

First, the Attorney General's cryptic reference to broader rights is insufficient. When evaluating an asserted right to assisted suicide in *Morris v. Brandenburg*, this Court readily acknowledged that while the State Constitution can provide more protection than the federal constitution, no distinctive state characteristics justified such a departure from federal law. 2016-NMSC-027, ¶¶ 18-20. The Attorney General fails to explain why the case for abortion requires a different outcome. Because the burden rests on the Attorney General, this silence is fatal.

Second, the Attorney General's passing reference to the dissenting opinion in *Dobbs* fails to carry his burden to show that the U.S. Supreme Court's analysis was flawed. The *Dobbs* decision rests on the complete absence of any historical support for abortion; indeed, the well-documented history shows that States, including New Mexico, had long chosen to criminalize abortion. *Dobbs*, 142 S. Ct. at 2240-99. And as catalogued above, the same history is true regarding New Mexico's Constitution.

Further, the Supreme Court's analysis in *Dobbs* was largely based on its prior due-process analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997), including its requirement that rights must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Dobbs*, 142 S. Ct. at 2242. As demonstrated above, a right to abortion is not deeply rooted in New Mexico's history and tradition because the State criminalized the act for most of its history. *See supra*, Section II.A. And this Court has specifically approved the federal analysis in *Glucksberg*, holding that New Mexico shares the federal interests in protecting vulnerable groups and protecting the integrity and ethics of the medical profession. *Morris*, 2016-NMSC-027, ¶¶ 32-34. Because *Dobbs* hews closely to *Glucksberg*'s analysis and interests—which this Court already approved in *Morris*—the Attorney General has failed to show why this Court is required to reverse course and disagree with the Supreme Court here.

Finally, given New Mexico's commitment to independent constitutional interpretation and interstitial analysis, *State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 777, 783, 932 P.2d 1, 7, the Attorney General's appeal to *other* jurisdictions' findings is neither helpful nor

persuasive. **[Pet. 14-15]**. To the extent this Court is willing to consider the decisions of other courts, it should start with the U.S. Supreme Court's meticulous and well-reasoned analysis concluding that nearly identical due-process language cannot support a right to abortion. *Dobbs*, 142 S. Ct. at 2242. Numerous state courts have reached the same conclusion. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740 (Iowa 2022) (holding that the due process clause of the Iowa Constitution does not create a right to abortion); *Planned Parenthood Great Nw. v. State*, No. 49615, 2023 WL 110626 (Idaho Jan. 5, 2023) (holding Idaho's constitution does not contain an explicit or implicit right to abortion); *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31, 45 (N.D.2014) (per curiam) (Vande Walle, J.) (upholding a pro-life law with at least two justices agreeing that the North Dakota Constitution did not create a right to abortion).

Because neither the Search and Seizure Clause nor the Due Process Clause support a right to abortion, this Court should deny the Emergency Petition.

D. The Inherent Rights Clause does not contain a right to abortion.

The Attorney General finally appeals to the Inherent Rights Clause, which provides that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." N.M. Const. art. II, § 4. But this provision provides no abortion guarantee.

To begin, the Attorney General concedes that the Inherent Rights Clause has never been interpreted to be an independent source of *any* fundamental or important right, much less a right to abortion. **[Pet. 16]**. And for good reason. The plain language of the Inherent Rights Clause nowhere mentions abortion. And New Mexico criminalized abortion when this provision was adopted and thereafter. *See supra*, Section II.A. To the contrary, the Inherent Rights Clause expressly guarantees life and safety, N.M. Const. art. II, § 4, and New Mexico Courts have suggested that unborn children were considered protected "persons" when this provision was adopted. *See St. Vincent Hosp.*, 1980-NMCA-051 ¶ 18 .

This Court's decision in *Morris* is again instructive. After finding that there was no right to assisted suicide under the Due Process Clause, the Court evaluated the asserted right under the Inherent Rights Clause. *Morris*, 2016-NMSC-027, ¶¶ 39-51. This Court emphasized that the Clause is *not* an independent "source for a fundamental or important constitutional right" and is always subject to "reasonable regulation." *Id.* ¶ 51. While the Clause may inform and expand upon existing due-process or equal-protection guarantees, it could not independently support a right to assisted suicide. *Id.*

So too here. Because there is no existing right to abortion under the Due Process or Equal Protection Clauses, *see supra*, Section II.B., the Inherent Rights Clause cannot independently ground a controversial and weighty right to abortion.

CONCLUSION

The amici respectfully request that this Court deny the Emergency Petition.

Respectfully submitted this 14th day of February, 2023.

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**Application for admission pro hac vice prepared and will be filed imminently*

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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 February, 14, 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/Joseph Gribble
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