IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39742

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, and CITY OF HOBBS,

Respondents.

PETITIONER'S BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

Medical licensing and the availability of medical services, including access to reproductive health care, are matters of statewide concern for which there is a clear legislative intent to preempt local legislation. The Legislature's recent enactment of House Bill 7 reinforces this principle of state preemption of attempts by local governments to regulate abortion clinics and reproductive health care. Moreover, local governments have no power to enact ordinances that violate the New Mexico Constitution. They may not infringe the protections afforded by Article II's Bill of Rights, including the Equal Rights Amendment's prohibition of sex- and pregnancy-based discrimination or the State Constitution's right to reproductive freedom.

The Counties of Lea and Roosevelt and the Cities of Clovis and Hobbs enacted ordinances purporting to regulate abortion clinics and restrict access to reproductive health care. These ordinances are invalid as enactments that are beyond the scope of local legislative authority and in conflict with state law, including the New Mexico Constitution's Bill of Rights. This Court has the constitutional power of original jurisdiction to issue a writ of mandamus and strike down the ordinances.

The State brings this petition for writ of mandamus wholly under state law. The local governments, however, seek to bait this Court into deciding this matter

on the basis of federal law. Undoubtedly, this is an effort to pursue further review in the United States Supreme Court, which is the stated desire of these local governments and their out-of-state counsel in crafting the ordinances. Federal law, however, is simply irrelevant to the petition. The ultimate question in this case concerns the legislative power of local governments and their authority to enact ordinances that conflict with the New Mexico Constitution and state statutes. This is strictly a matter of state law because counties and cities are political subdivisions of the State and possess only such authority as the State permits. Counties and cities derive no independent authority from federal law. The State respectfully asks this Court to issue the writ, invalidate the ordinances, and expressly declare that the Court's holding rests solely on an adequate and independent state law ground.

SUMMARY OF PROCEEDINGS

Factual and Procedural Background

A. The Ordinances

After the United States Supreme Court overturned *Roe v. Wade*, 410 U.S. 113 (1973), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), several New Mexico political subdivisions, including the Cities of Hobbs and Clovis and Lea and Roosevelt Counties, passed ordinances purporting to regulate abortion and abortion clinics. These laws are all entitled as ordinances requiring abortion providers to comply with federal law.

On November 7, 2022, the City of Hobbs enacted Ordinance No. 1147. On January 5, 2023, the City of Clovis enacted Ordinance No. 2184-2022. These ordinances have almost identical wording. Through introductory language, the Hobbs and Clovis ordinances cite two nineteenth-century federal laws, 18 U.S.C. §§ 1461 and 1462, part of what is commonly called the Comstock Act, which impose felony liability for shipping or receiving abortion pills or abortion-related paraphernalia through interstate commerce. The ordinances state that New Mexico's Constitution "does not and cannot secure a right, privilege or immunity to act in violation of" the Comstock Act; the members of the city commissions are bound by oath to support and defend federal law; and every person within the respective municipal boundaries must obey the Cities' understanding of the Comstock Act. The Cities encourage the United States Attorney to prosecute violations of the Comstock Act and "victims of abortion providers" to sue for racketeering.

The ordinances impose a licensing requirement on abortion clinics that requires a statement of compliance with the Cities' understanding of the Comstock Act. The ordinances allow the Cities to deny a license upon a finding that abortions cannot be performed without violating the Comstock Act. They further declare it to be unlawful to violate the Comstock Act by using 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. Aiding or abetting these acts is also declared to be unlawful.

On December 8, 2022, Lea County adopted Ordinance No. 99. On January 10, 2023, Roosevelt County adopted Ordinance 2023-01. Like the Hobbs and Clovis ordinances, the Counties' ordinances rely on the Comstock Act and purport to enforce the federal provisions.

Lea County's ordinance does not create a licensing requirement but makes a declaration of unlawful conduct similar to the Cities' ordinances discussed above. Lea County, however, added a $300 penalty for each violation.

Roosevelt County's ordinance creates a licensing requirement similar to the Cities' ordinances but goes further in creating a private cause of action against abortion clinics. Any person, other than the State, its political subdivisions, or their agents, may bring a civil action against any person or entity who violates or intends to violate the prohibitions of the Comstock Act as it is understood by the County. A plaintiff who prevails in such a civil action is entitled to "injunctive relief sufficient to prevent the defendant from violating" the law and statutory damages of not less than $100,000 for each violation.

The Lea and Roosevelt County ordinances define an "abortion clinic" in exceedingly broad terms, encompassing "any building or facility, other than a hospital, where an abortion of any type is performed, or where abortion-inducing

drugs are dispensed, distributed, or ingested." This definition seemingly includes even people's homes in which an abortion-inducing drug could be ingested.

B. The Comstock Act

In 1873, Congress enacted the Comstock Act "for the suppression of trade in and circulation of obscene literature and articles of immoral use." Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873). The Act was advanced by "a prominent anti-vice crusader who believed that anything touching upon sex was . . . obscene." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 70 n.19 (1983) (omission in original) (internal quotation marks and citation omitted). One part of the Act established a blanket prohibition against mailing advertisements for contraceptives, which Congress later restricted to unsolicited advertisements and which, even as modified, was held in *Bolger* to have violated the First Amendment as applied. *Id.* at 70 n.19, 75.

One of the sections cited by the ordinances declares the following to be "nonmailable":

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and–
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner

> calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and
>
> Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and
>
> Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing–

18 U.S.C. § 1461. The other provision of the Comstock Act cited in the ordinances establishes a similar prohibition for interstate commerce using express companies and common carriers. 18 U.S.C. § 1462. These statutes establish criminal penalties of imprisonment up to five years and a fine. They do not create any private remedies.

The Department of Justice's Office of Legal Counsel has concluded that the Comstock Act does not "prohibit the mailing of certain drugs that can be used to perform abortions where the sender lacks the intent that the recipient of the drugs will use them unlawfully." *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), at 1, 5, 20, https://www.justice.gov/olc/opinion/file/1560596/download (observing that this interpretation is consistent with that of the Judiciary, Congress, and the U.S. Postal Service). The local governments disagree with this interpretation of the Comstock Act, but as set out more fully below, the meaning and scope of the Comstock Act are irrelevant to the resolution of this matter.

ARGUMENT

I. Mandamus is Proper.

A. Writs of Prohibitory Mandamus Challenge Unlawful or Unconstitutional Official Action.

This Court may issue a writ of mandamus to "prohibit unlawful or unconstitutional official action." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (quoting *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562). "In considering whether to issue a prohibitory mandamus, [this Court] do[es] not assess the wisdom of the public official's act; [it] determine[s] whether that act goes beyond the bounds established by the New Mexico Constitution." *Adobe Whitewater Club of N.M. v. State Game Comm'n*, 2022-NMSC-020, ¶ 9, 519 P.3d 46 (internal quotation marks and citation omitted). This Court has specifically "recognized mandamus as a proper proceeding in which to question the constitutionality of legislative enactments." *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 6, 86 N.M. 359; *see also*

Montoya v. Blackhurst, 1972-NMSC-058, ¶ 4, 84 N.M. 91 ("[T]his [C]ourt has held that, in the proper case, mandamus may be used to question the constitutionality of a state statute."); *Clark*, 1995-NMSC-048, ¶ 20 (endorsing the use of the prohibitory mandamus to assess the constitutionality of legislation); *Thompson v. Legislative Audit Comm'n*, 1968-NMSC-184, ¶ 3, 79 N.M. 693 ("dispos[ing] of [the] respondents' contention that mandamus is not a proper remedy by which the petitioner can attack the constitutionality of the statute involved").

In the present case, the Cities and Counties enacted ordinances that contravene state law and extend beyond the bounds of New Mexico's Constitution and laws. Specifically, the ordinances purport to regulate abortion clinics and impose a medical licensing regime. In doing so, the ordinances limit the availability of medical services including, in particular, reproductive health care. As such, the ordinances exceed the authority granted to local legislative bodies and infringe upon New Mexicans' rights under the Constitution's Equal Protection Amendment and Due Process and Inherent Rights Clauses. Thus, the Cities and Counties' enactment of the ordinances constituted unlawful and unconstitutional official action. This warrants the issuance of a prohibitory writ of mandamus. *See Sandel*, 1999-NMSC-019, ¶ 11; *Clark*, 1995-NMSC-048, ¶ 19; *Sego*, 1974-NMSC-059, ¶ 6; *see also State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶

18, 125 N.M. 343 ("[T]he authority to prohibit unlawful official conduct is implicit in the nature of mandamus.").

B. This Court has Original Jurisdiction to Issue Writs of Prohibitory Mandamus.

The New Mexico Constitution vests this Court with original jurisdiction over mandamus actions against state officers, boards, or commissions. It further grants this Court the power to issue writs of mandamus "necessary or proper for the complete exercise of its jurisdiction." N.M. Const. art. VI, § 3. This Court's exercise of original jurisdiction is governed by a three-part test that asks whether

> the petitioner presents 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.

Sandel, 1999-NMSC-019, ¶ 11; *State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7, 456 P.3d 1065 (same). "Although relief by mandamus is most often applied to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law, the writ may also be used in appropriate circumstances in a prohibitory manner to prohibit unconstitutional official action." *Sugg*, 2020-NMSC-002, ¶ 7 (internal quotation marks and citations omitted); *see also Cnty. of Bernalillo v. N.M. Pub. Reg. Comm'n* (*In re Adjustments to Franchise Fees*), 2000-NMSC-035, ¶ 6, 129 N.M. 787 (indicating that this Court exercises its

"power of original jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental constitutional question of great public importance"). As discussed above, this case asks whether the Cities and Counties' enactment of the ordinances exceeded their authority and constituted unlawful and unconstitutional official action. This is a purely legal issue of great public importance suitable for mandamus.

First, this case implicates fundamental constitutional questions of great public importance. The ordinances infringe New Mexicans' rights protected by multiple provisions of the New Mexico Constitution's Bill of Rights, including the Equal Rights Amendment, the Due Process Clause, and the Inherent Rights Clause. This Court already has recognized the regulation of abortion and its review under the Equal Rights Amendment as a significant question of law and issue of great public importance. *N.M. Right to Choose/NARAL v. Johnson*, 1995-NMSC-005, ¶¶ 2, 22, 126 N.M. 788. Moreover, Respondents exceeded their constitutional authority in enacting the ordinances because the ordinances attempt to regulate and restrict professional and medical services and licenses that are governed by state law. Roosevelt County's ordinance also creates a private right of action for the supposed violation of a federal law. Additionally, when "the conduct at issue affects, in a fundamental way, the sovereignty of the state, its franchises or prerogatives, or the liberty of its people," such conduct is a matter of great public

importance, implicating this Court's mandamus jurisdiction "as a matter of controlling necessity." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154 (internal quotation marks and citation omitted)); *see also Baca v. State Dep't of Pub. Safety*, 2002-NMSC-017, ¶ 4, 132 N.M. 282 (considering the petitioner's request for writ of mandamus "on the basis of the importance of the questions raised in the petition"—specifically, whether the Concealed Handgun Carry Act was valid, which this Court stated raised "a constitutional question of fundamental importance to the people of New Mexico").

The second part of the Court's original jurisdiction test is met because there are no material factual disputes in this case. *See Sugg*, 2020-NMSC-002, ¶ 7. There is no dispute about the existence or content of the Ordinances. The core issue raised in this case is purely legal: whether local governments possess the power to enact ordinances that conflict with the New Mexico Constitution and state laws.

Third, the resolution sought by Petitioner cannot be obtained expeditiously through other channels, such as a direct appeal. *See id.* The Ordinances are in effect in the four local jurisdictions, and they severely restrict access to reproductive health care in those cities and counties. The local governments named in this action and others have continued and will continue to pass laws that attempt to regulate and prohibit abortion. Such laws chill and inhibit the exercise of New Mexicans' constitutional rights and medical professionals' lawful provision of health services

by creating barriers to the operation of abortion clinics and by inducing a fear of liability. *See Jaramillo v. Jaramillo*, 1991-NMSC-101, ¶ 19, 113 N.M. 57 ("[A] legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."). Indeed, when and how a clinic or provider will attempt to provide necessary health care services to a patient in a way that directly violates one of the ordinances is uncertain. Waiting for such an event both fails to address the harmful chilling and inhibiting effects of the ordinances and fails to provide an expeditious resolution to the unlawful restraints on reproductive health care. Immediate relief is necessary to prevent harm from the ordinances.

Moreover, even though a direct appeal can, in certain circumstances, provide an expeditious resolution to an issue, and even if a matter might have been brought first in the district court, this Court may nonetheless invoke its original jurisdiction over a petition for an extraordinary writ. *Taylor*, 1998-NMSC-015, ¶ 15 (stating that "[t]he Court may invoke original jurisdiction even when a matter might have been brought first in the district court"). Thus, although the Court "generally defer[s] to the district court so that we may have the benefit of a complete record and so the issues may be more clearly defined[,] . . . when issues of sufficient public importance are presented which involve a legal and not a factual determination, we will not hesitate to accept the responsibility of rendering a just

and speedy disposition." *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 5, 91 N.M. 279.

Mandamus is the best vehicle for reviewing the urgent and profound issues presented by the challenged ordinances. Indeed, where, as here, the questions raised by a petition for mandamus do not require factual development and have statewide importance, mandamus is preferable to a district court action because it allows the expedited and definitive resolution of the issues at stake. *See Sandel*, 1999-NMSC-019, ¶ 11. Nor, contrary to Respondents' suggestion, does this case involve, let alone require the resolution of, a question of federal law concerning the interpretation of the Comstock Act. Because the ordinances exceed the local governments' authority under state law, this Court should exercise its original jurisdiction and issue a writ of prohibitory mandamus.

II. State Law Preempts the Local Ordinances.

Counties and municipalities are not sovereign governments; they are subdivisions of the State. *See State v. Rodriguez*, 2005-NMSC-019, ¶ 10, 138 N.M. 21 ("[P]olitical subdivisions such as municipalities are subordinate instrumentalities acting under the sovereignty of the state rather than independent sovereigns."); *Gibbany v. Ford*, 1924-NMSC-038, ¶ 7, 29 N.M. 621 ("In order to be political subdivisions, they must be formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to

whom the electors residing therein are, to some extent, granted power to locally self-govern themselves."). Their power to act is granted, and delimited, by state law. Counties have "only such powers as are expressly granted to [them] by the Legislature, together with those necessarily implied to implement those express powers." *El Dorado at Santa Fe v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1976-NMSC-029, ¶ 6, 89 N.M. 313. The Legislature has conferred police powers to counties. *Brazos Land, Inc. v. Bd. of Cnty. Comm'rs*, 1993-NMCA-013, ¶ 27, 115 N.M. 168 (discussing NMSA 1978, § 4-37-1 (1975)).

Even home-rule municipalities, which have the broadest authority of local jurisdictions and "may exercise all legislative powers and perform all functions not expressly denied by general law or charter," N.M. Const. art. X, § 6(D), are bound by state law. Unlike counties, a home-rule municipality does not have "to look to the legislature for a grant of power to act." *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 15, 138 N.M. 785 (internal quotation marks and citation omitted). Nonetheless, a home-rule municipality cannot enact an ordinance that conflicts with state law. *See* N.M. Const. art. X, § 6(D). This same limitation applies to counties, as well. Section 4-37-1 (denying counties "those powers that are inconsistent with statutory or constitutional limitations placed on counties").

State laws of general application preempt local laws on the same subject, including ordinances enacted by a home-rule municipality, when the Legislature

"expressly denies . . . [local] authority to legislate similar matters." *Casuse v. City of Gallup*, 1987-NMSC-112, ¶ 3, 106 N.M. 571. Preemption thus has two requirements: (1) the Legislature must have enacted a general law; and (2) state law must expressly deny local power to act. *Espinoza v. City of Albuquerque*, 2019-NMCA-014, ¶ 14, 435 P.3d 1270. "[I]f an ordinance is inconsistent with a general State statute then the State statute controls." *Prot. & Advoc. Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 48, 145 N.M. 156.

A general law is one that "applies generally throughout the state, relates to a matter of statewide concern, and impacts inhabitants across the entire state." *Smith v. City of Santa Fe*, 2006-NMCA-048, ¶ 9, 139 N.M. 410. General laws do not relate to "a particular locality." *Casuse*, 1987-NMSC-112, ¶ 3. General laws will be deemed to expressly deny local authority to act when the Legislature "clearly intends to preempt a governmental area." *Id.* ¶ 6. This legislative intent may be manifested in one of the three following ways: "whether the [statute] evinces any intent to negate such municipal power, whether there is a clear intent to preempt that governmental area from municipal policymaking, or whether municipal authority to act would be so inconsistent with the [statute] that the [state law] is the equivalent of an express denial." *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 19; *see ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶¶ 10-19, 128 N.M. 315 (concluding that state law preempted an Albuquerque curfew ordinance in part

because "the Delinquency Act comprehensively addresses behavior by children which could be described as criminal if not for the offender's age"); *Espinoza*, 2019-NMCA-014, ¶¶ 24, 26 (concluding that the state Forfeiture Act preempted Albuquerque's civil forfeiture ordinance because they were "functionally at odds with one another" and state law "comprehensively addresses asset forfeiture"); *Prot. & Advoc. Sys.*, 2008- NMCA-149, ¶¶ 70-71 (concluding that state law governing mental health decision-making preempted an Albuquerque outpatient treatment ordinance because the latter conflicted with the former and state law "create[d] a scheme so comprehensively regulating the area of treating individuals with mental illness" to preempt local regulation on the subject).

A. State Medical Licensing Provisions Preempt Local Requirements for Medical Licensing.

Access to competent health care is a matter of statewide concern. Accordingly, the Legislature enacted the Medical Practice Act "to protect the public from the improper, unprofessional, incompetent and unlawful practice of medicine" by providing "laws and rules controlling the granting and use of the privilege to practice medicine." NMSA 1978, § 61-6-1 (2021). The Legislature further created the medical board "to issue licenses to qualified health care practitioners, including physicians." *Id.* By protecting access to health care and minimum qualifications for providing medical care, the Medical Practice Act is unquestionably a general law. The Legislature intended to establish uniform

qualifications and requirements for the practice of medicine in order to protect New Mexicans as a whole on a statewide basis.

The Legislature separately enacted the Medical Malpractice Act, a comprehensive statutory scheme dealing with private actions for a physician's breach of the standard of care. NMSA 1978, §§ 41-5-1 to -29 (1976, as amended through 2021). In addition, the Legislature has established licensure requirements for nurses, nurse practitioners, and clinical nurse specialists as administered by the board of nursing, NMSA 1978, §§ 61-3-13 (2001), -23.2 (2022), -23.4 (2022); physician assistants as administered by the medical board, NMSA 1978, § 61-6C-3 (2022); and pharmacists as administered by the board of pharmacy, NMSA 1978, § 61-11-9 (1997). The Legislature further created the department of public health and requires licensure by the department for all health facilities. NMSA 1978, §§ 24-1-3, -5 (2017).

Combined, these statutes establish a statewide, uniform system of qualifications and standards for the practice of medicine and the operation of health facilities. This interest, however, is balanced against protecting New Mexicans' access to health care through limitations on liability that ensure "the availability of practicing physicians." *Lester ex rel. Mavrogenis v. Hall*, 1998-NMSC-047, ¶ 11, 126 N.M. 404; *see also Baker v. Hedstrom*, 2013-NMSC-043, ¶ 20, 309 P.3d 1047

(explaining that the Legislature created the Medical Malpractice Act in part "to ensure that patients would have adequate access to health care services").

Because this legislative scheme encompasses all aspects of the health care system and balances the need for minimum qualifications with broad access to health care, it leaves no room for local licensing requirements directed at specific medical procedures. Thus, although there is no direct expression of an intent to limit municipal authority, any local governmental regulation of the medical profession is preempted because it would disrupt the careful balance established by the Legislature. These Acts therefore establish a legislative intent to preempt the area of medical licensing and liability from municipal policymaking.

The ordinances at issue in the present action do not merely impose general regulations applicable to all or many entities, such as a general business license or a zoning provision applicable to the business community as a whole. Instead, the Hobbs, Clovis, and Roosevelt County ordinances require a license to practice medicine and, more specifically, a license to practice a specific medical procedure. The ordinances further give the local government the discretion to deny a license—that is, to prohibit abortions and the operation of abortion clinics—if the local government finds, on its own, that the medical procedure cannot be performed without violating federal law. The Lea County ordinance establishes a penalty not otherwise existing in federal or state law, thereby expanding

physicians' liability for the practice of medicine. The practical effect of all of these ordinances is to prevent physicians from performing abortions within the boundaries of the local governments.

These are matters of statewide concern. The ordinances affect New Mexicans' access to health care and unlawfully create a patchwork of regulation for a single medical procedure. Just as a local government could not require a special license for attorneys to pursue particular claims or categories of damages contrary to this Court's constitutional and statutory power to regulate the legal profession, local governments cannot take it upon themselves to regulate the practice of medicine or any subpart of the practice of medicine. By attempting to regulate medical licensing and medical liability, the ordinances invade an area of law that the Legislature intended to be within the exclusive province of the state. *See Prot. & Advoc. Sys.*, 2008-NMCA-149, ¶ 58 (concluding that a municipal ordinance was preempted because it "allows an act which [the Mental Health and Developmental Disabilities Code] forbids"); *Robin v. Inc. Vill. of Hempstead*, 285 N.E.2d 285, 287 (N.Y. 1972) (finding preemption for an ordinance requiring that abortions be performed in hospitals and observing that "there are no 'special conditions' concerning the performance of abortions" in a locality such that it would be the proper subject of local health regulations).

B. House Bill 7 Reinforces the Legislature's Intent to Preempt Local Authority on the Specific Issue of Reproductive Health Care.

The Legislature passed the Reproductive and Gender-Affirming Health Care Freedom Act, House Bill 7, on March 10, 2023, and the Governor thereafter signed it into law. House Bill 7 becomes effective on June 16, 2023. *See* N.M. Const. art. IV, § 23.

Section 3 of House Bill 7 prevents public bodies from (1) discriminating against a person for using or not using reproductive health care or gender-affirming health care services; (2) denying, restricting, or interfering with a person's access to or provision of reproductive health care or gender-affirming health care within the medical standard of care; (3) depriving, "through prosecution, punishment or otherwise, a person's ability to act or refrain from acting during the person's pregnancy based on the potential, actual or perceived effect on the pregnancy"; and (4) imposing or continuing in effect "any law, ordinance, policy or regulation that violates or conflicts with the . . . Act." The Legislature, in Section 2 of House Bill 7, broadly defined "public body" as including political subdivisions, among others. This section defines "reproductive health care" as including a number of medical services and specifically covers abortion. For any violation of the Act, Section 4 grants the Attorney General and the district attorneys enforcement authority through the filing of a civil action in the district court, and this section provides the district court with the authority to grant injunctive relief and impose a civil penalty

for any violation by a public body.[1] Section 5 of House Bill 7 also establishes a private right of action against public bodies for violating the Act.

It is difficult to imagine a clearer example of state field preemption of local ordinances. *Cf. Prot. & Advoc. Sys.*, 2008-NMCA-149, ¶ 71 (finding field preemption when the Legislature created "a scheme so comprehensively regulating the area" that it left no room for local regulation). House Bill 7 expressly limits local governmental authority over reproductive health care. In conflict with this provision, however, the ordinances seek to restrict access to reproductive health care by creating a licensing requirement and by punishing physicians and clinics that violate the ordinances. By virtue of this conflict, House Bill 7 preempts the ordinances.

C. The Roosevelt County Ordinance Is an Unconstitutional Private Law.

All local governments, including home rule municipalities, are constitutionally restricted from enacting "private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power." N.M. Const. art. X, § 6(D). Private laws consist "of the substantive law

[1] House Bill 7's creation of a civil enforcement mechanism in the district court does not lessen the need for a writ of mandamus for two reasons. First, House Bill 7 is not yet in effect and will not be in effect until June 16, 2023. The Attorney General and the district attorneys will not be able to use the Act's civil enforcement procedure until the effective date. Second, the Act does not restrict previously available remedies or this Court's power of original jurisdiction to issue writs of mandamus.

which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another." *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 23 (internal quotation marks and citation omitted).

Roosevelt County's ordinance violates this proscription. The ordinance purports to create a private right of action to sue an abortion clinic. It establishes "[s]tatutory damages in an amount of not less than $100,000 for each violation." Further highlighting the private nature of this cause of action, 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. Moreover, this ordinance does not limit the venue for such a claim to Roosevelt County and seeks to have a statewide reach. The Roosevelt County ordinance is an impermissible private law.

Moreover, the ordinance is not incident to the County's exercise of independent power. The independent powers doctrine applies only if "(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." *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 28. The County's ordinance fails on both counts. The County has no delegated authority over abortion clinics, abortions in general,

or even the practice of medicine. Medical licensing under state law does not merely set a floor like the Minimum Wage Act at issue in *New Mexicans for Free Enterprise* but, instead, establishes a single statewide scheme designed to promote a health care system that is professional, competent, and accessible across the state. Further, the ordinance greatly disrupts the uniformity of New Mexico law on abortion and creates a patchwork of available medical care on a county-by-county basis. Roosevelt County had no power to create a private right of action regulating the practice of medicine and acted unlawfully in doing so.

III. The Ordinances Exceed the Local Governments' Authority Because They Violate the New Mexico Constitution's Bill of Rights.

As local governments' authority is bound by state law, local governments may not enact ordinances that violate the State's Constitution. In addition to their preemption by state statutes, the Cities and Counties' ordinances are invalid because they infringe New Mexicans' rights under the New Mexico Constitution's Bill of Rights. The ordinances' singling out abortion for licensure and other regulation, in contrast to other medical procedures, violates the Equal Rights Amendment's protection against pregnancy-based discrimination. Furthermore, the ordinances infringe New Mexicans' rights to choose whether to continue a pregnancy guaranteed by the State Constitution's protection of due process and inherent rights.

A. Equal Rights

The Cities and Counties' threatened enforcement of the ordinances violates the Equal Rights Amendment of the New Mexico Constitution. By singling out and restricting New Mexicans' right to choose whether to continue a pregnancy, the ordinances violate the Equal Rights Amendment's guarantee that people will not be denied an equal provision of rights on the basis of their sex. The ordinances violate this guarantee by imposing incapacitating regulations on reproductive health care not applied to non-pregnancy-related care. The Equal Rights Amendment does not permit such pregnancy-based discrimination and the ordinances should be invalidated as unconstitutional under the New Mexico Constitution's Bill of Rights.

1. New Mexico's Equal Rights Amendment

The New Mexico Constitution's Bill of Rights provides more robust protections against sex-based discrimination than the United States Constitution. That is because New Mexico adopted an Equal Rights Amendment to its Bill of Rights that is lacking in its federal counterpart. Shortly before the Supreme Court decided *Roe*, "the people of New Mexico passed the Equal Rights Amendment by an overwhelming margin." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 29. As a result, while both the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution provide that no person shall

"be denied equal protection of the laws," only New Mexico affords explicit protection against sex-based discrimination.

Supplementing this equal protection guarantee, the Equal Rights Amendment added to New Mexico's Bill of Rights the statement that "[e]quality of rights under law shall not be denied on account of the sex of any person." N.M. Const. art. II, § 18. The Court has "construe[d] the intent of this amendment as providing something beyond that already afforded by the general language of the equal protection clause. *N.M. Right to Choose*, 1999-NMSC-005, ¶ 30; *cf. Dobbs*, 142 S. Ct. at 2245 (observing that, in contrast, under the federal Equal Protection Clause, "regulation of abortion is not a sex-based classification" subject to heightened scrutiny). Describing the Court's ruling in *New Mexico Right to Choose/NARAL v. Johnson*, Judge Linda Vanzi summarized that the "inevitable conclusion reached by the court was that the [Equal Rights Amendment (ERA)] was added to New Mexico's constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the U.S. Constitution." Linda M. Vanzi, *Freedom at Home Revisited: The New Mexico Equal Rights Amendment After* New Mexico Right to Choose/NARAL v. Johnson, 40 N.M. L. Rev. 215, 218 (2010). The Court has observed that the strict scrutiny it applies to sex-based classifications in excess of federal law is needed "to honor the intent of the citizens of New Mexico to expand the guarantees of our Equal Protection Clause" by our

adoption of an Equal Rights Amendment. *Griego v. Oliver*, 2014-NMSC-003, ¶ 45, 316 P.3d 865.

The Equal Rights Amendment was "the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 31. Notably, efforts to obtain equality for women had previously failed to incorporate protections in the Equal Protection Clause of the Fourteenth Amendment. *See* Sarah M. Stephens, *At the End of Our Article III Rope: Why We Still Need the Equal Rights Amendment*, 80 Brook. L. Rev. 397, 401-03 (2015) (describing Equal Rights Amendment as continuation of efforts to obtain equality for women including Seneca Falls convention in 1848 and failed efforts to have women included in Reconstruction Amendments). Based on a review of the State Constitution's text and the history of growing legal rights for women, the Court concluded that "the Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 36.

The Equal Rights Amendment applies strict scrutiny to sex-based classifications that disadvantage women. "[T]he Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based

classifications[]" that "must begin from the premise that such classifications are presumptively unconstitutional." *Id.*; *see City of Albuquerque v. Sachs*, 2004-NMCA-065, ¶ 13, 135 N.M. 578 ("When the classification is based on a unique physical characteristic, but the classification operates to the disadvantage of the persons so classified, a presumption exists that the New Mexico Equal Rights Amendment is violated."). Such scrutiny is more stringent than that provided under federal law. *See N.M. Right to Choose*, 1999-NMSC-005, ¶ 37. The Equal Rights Amendment requires that the government "provide a compelling justification for using [pregnancy-based] classifications to the disadvantage of the persons they classify." *Id.* ¶ 43; *Sachs*, 2004-NMCA-065, ¶ 13 ("The law will be deemed unconstitutional unless the [government] is able to show both a compelling justification for the classification and that the law accomplishes its purpose by the least restrictive means.").

The stringent review and presumptive unconstitutionality of sex-based classifications encompasses "classifications based on the unique ability of women to become pregnant and bear children." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 43. In concluding that pregnancy-based classifications are sex-based classifications subject to the Equal Rights Amendment, the Court stated that "we cannot ignore the fact that '[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them.'" *Id.* ¶ 41

(quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986)). Therefore, this Court concluded that "'discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medically necessary expenses are paid by the state for both men and women is sex oriented discrimination.'" *Id.* ¶ 47 (quoting *Doe*, 515 A.2d at 159) (alteration omitted); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985) (contending that sex equality provides a better basis for reproductive rights than due process); Paul Taylor & Philip G. Kiko, *The Lost Legislative History of the Equal Rights Amendment: Lessons from the Unpublished 1983 Markup by the House Judiciary Committee*, 7 U. Md. L.J. Race, Religion, Gender & Class 341, 346 & n.27 (2007) (noting that Congressional Research Service analysis of ERA stated that abortion regulations like the Hyde Amendment would be subject to strict scrutiny as pregnancy classifications). Therefore, laws that impose disadvantages or burdens on the basis of a person's ability to become pregnant are presumptively unconstitutional and must be the least restrictive means for achieving a compelling justification.

2. The Ordinances Cannot Survive Strict Scrutiny Under the Equal Rights Amendment.

The ordinances single out abortion for burdensome regulation and civil liability unlike any other medical care provided in the Cities and Counties. As a result, the ordinances are pregnancy-based classifications that presumptively

violate the Equal Rights Amendment. The Cities and Counties cannot meet their burden of establishing that the ordinances escape this presumption of unconstitutionality by showing that they are the least restrictive means of furthering a compelling interest.

First, subjecting abortion to disadvantageous, unique regulation is a sex-based classification within the Equal Rights Amendment's ambit. This conclusion is compelled by the Court's opinion in *New Mexico Right to Choose*. There, the Court considered a Human Services Department rule denying Medicaid funding for medically necessary abortions. Because "there [was] no comparable restriction on medically necessary services relating to physical characteristics or conditions unique to men," 1999-NMSC-005, ¶ 46, the Court concluded that the rule "undoubtedly single[d] out for less favorable treatment a gender-linked condition that is unique to women." *Id.*, ¶ 47.

The ordinances contain the same, presumptively unconstitutional singling out of abortion as in *New Mexico Right to Choose*. The ordinances impose a burdensome set of licensing requirements for abortion clinics not applicable to other forms of medical care. *See supra* at 4. Such regulations even apply to locations, such as people's homes, where abortion medication is taken. *See supra* at 4. Such "clinics" are not permitted to operate unless they first obtain a license and agree not to send or receive items that produce abortions (or aid and abet in such

action), making the operation of an abortion clinic very difficult. Indeed, the ordinances recognize this severe restriction on abortion clinics as they provide discretion to deny a license upon a finding that "the proposed activity cannot be accomplished" without violating the restrictions in the ordinance.

The ordinances also declare unlawful actions delivering, or aiding and abetting the delivery of, abortion-related medication or paraphernalia. *See supra* at 4. Such prohibitions are enforced by fines or private civil actions. *See supra* at 4. In particular, the Roosevelt County ordinance creates a cause of action that permits any person to obtain injunctive relief and monetary awards of $100,000 per violation against anyone sending or receiving items intended to produce an abortion. Even before anyone is sued under the ordinances, the threat of ruinous liability under the law operates to chill New Mexicans from exercising their right to choose whether to terminate a pregnancy and health care providers from providing lawful medical services. The Cities and Counties have passed no comparable ordinances regulating other forms of medical care. Because the ordinances only regulate pregnancy-related care, they are "classifications based on the unique ability of women to become pregnant and bear children" and require a "compelling justification." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 43.

Respondents' contention that the ordinances are not sex-based classifications because they apply to both men and women, Clovis & Hobbs' Brief Opp. Pet. at

15–16, overlooks this controlling authority that laws disadvantaging pregnancy-related care are presumptively invalid under the Equal Rights Amendment. As explained in an article analyzing the protections afforded under state Equal Rights Amendments,

> [t]he guarantee of equality at the heart of state ERAs is also clearly implicated by laws that single out abortion services for prohibition or restriction: "Because only women obtain abortions, the direct impact of abortion restrictions falls on a class composed only of women, while men are able to protect their health and exercise their pro-creative choices free of governmental interference."

Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 Rutgers L.J. 1201, 1249 (2005) (quoting Kathryn Colbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 Temp. L. Rev. 1151, 1167-68 (1993)); *see also Doe*, 515 A.2d at 159 ("[D]iscrimination against pregnancy by not funding abortion" unlike other medically necessary services "is sex oriented discrimination.").

The local governments lack a compelling justification needed to overcome the presumption of unconstitutionality and to support their burdensome regulation of abortion. Presumably, the Cities and Counties may argue that the ordinances are the least restrictive means of furthering the interest of enforcing their interpretation of the Comstock Laws. This argument, however, fails for several reasons. First, the Cities and Counties lack an interest in prohibiting activities that the Department of

Justice has opined do not violate the federal laws Respondents are purportedly seeking to enforce. Moreover, even if the Comstock Laws were applicable, contrary to the Federal Government's position, the Cities and Counties lack a compelling interest in duplicating federal laws. *See Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 13, 129 N.M. 177 (finding it "very difficult to comprehend" how an ordinance could further a county's interests "by merely duplicating . . . regulations").

Second, even if Respondents could have a compelling interest in enforcing federal laws the Federal Government has deemed inapplicable, the ordinances are not the least restrictive means of such enforcement. The ordinances regulate a suite of activity in an indirect effort to prohibit activities Respondents believe would violate the Comstock Act. Such indirect regulations—such as establishing civil liability or licensing abortion clinics—sweep in and chill abortion-related activity generally, reaching beyond any specific prohibitions contained in the Comstock Act. Therefore, the ordinances cannot survive strict scrutiny and violate the Equal Rights Amendment.

B. Due Process and Privacy

New Mexico recognizes robust constitutional rights to privacy and liberty beyond those protected under federal law. "New Mexico courts have long held that Article II, Section 10 provides greater protection of individual privacy than the

Fourth Amendment." *State v. Crane*, 2014-NMSC-026, ¶ 16, 329 P.3d 689. This includes the right to "personal bodily privacy" and "personal dignity." *State v. Chacon*, 2018-NMCA-065, ¶ 15, 429 P.3d 347. The right to privacy is also included in Article II, Section 18's guarantee that "[n]o person shall be deprived of . . . liberty . . . without due process of law." *See Griego*, 2014-NMSC-003, ¶ 55; *State v. Druktenis*, 2004-NMCA-032, ¶ 76, 135 N.M. 223 (discussing independence in certain types of decision-making).

> Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. It prevents the state from impinging on a person's liberties or rights of fundamental constitutional magnitude unless it proves that the law is necessary to promote a compelling or overriding interest.

State v. Rotherham, 1996-NMSC-048, ¶ 39, 122 N.M. 246 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

Here, the ordinances infringe New Mexicans' constitutional rights to privacy, liberty, and bodily autonomy. Although the Court has not decided whether the New Mexico Constitution's due process guarantees include a right to choose whether to terminate a pregnancy, the broad, protective language of the State's Constitution supports such an interpretation. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777 (identifying bases for undertaking interstitial constitutional

analysis).[2] The contrary conclusion reached by the United States Supreme Court in *Dobbs* should be rejected both because of the broader rights to equality, liberty, and privacy in the New Mexico Constitution that serve as distinctive state characteristics and because the analysis in *Dobbs* is flawed for the reasons outlined in the dissenting opinion. *Dobbs*, 142 S. Ct. at 2317–54 (Breyer, Sotomayor, & Kagan, JJ., dissenting). *Dobbs* rests on the interpretation of the Fourteenth Amendment's understanding in 1868, which is both narrower than New Mexico's Constitution and premised on an understanding of women as second-class citizens that cannot be reconciled with New Mexico's adoption of the Equal Rights Amendment. *Id.* at 2333 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

Other jurisdictions have interpreted their States' protections of privacy and liberty as encompassing the decision whether to terminate a pregnancy. *See, e.g.*, *Planned Parenthood v. State*, 882 S.E.2d 770, 782 (S.C. 2023) (observing that, despite *Dobbs*, "we are persuaded by the logic replete in the opinions that we have surveyed that few decisions in life are more private than the decision whether to terminate a pregnancy" and "[o]ur privacy right must be implicated by restrictions

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[2] Some commentators have recommended abandoning the interstitial approach altogether. *See* Linda M. Vanzi & Mark T. Baker, *Independent Analysis & Interpretation of the N.M. Constitution: If Not Now, When?*, 53 N.M. L. Rev. 1, 2 (2023) (suggesting that "there is an urgent need for the New Mexico Supreme Court to reconsider the *Gomez* framework and to develop a method for analyzing state constitutional issues that recognizes the independent legal significance of state constitutions in our system of dual sovereigns and also provides clarity and guidance to litigants and judges").

on that decision"); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 4 (Tenn. 2000) ("We specifically hold that a woman's right to terminate her pregnancy is a vital part of the right to privacy guaranteed by the Tennessee Constitution. We further hold that the right is inherent in the concept of ordered liberty embodied in our constitution and is therefore fundamental."), *overruled by amendment*, Tenn. Const., art. 1, § 36 (2014); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (right of privacy under Minnesota Constitution encompasses right to decide whether to terminate pregnancy); *Comm. to Defend Reprod. Rts. v. Myers*, 625 P.2d 779, 784 (Cal. 1981) (recognizing "fundamental constitutional right to choose whether or not to bear a child" based on natural rights and privacy provisions in the California Constitution that predates and is independent of Supreme Court's ruling in *Roe*); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 398–400 (Mass. 1981) (recognizing that due process right to choose to terminate pregnancy is broader under Massachusetts Constitution than under federal law). Following these courts and New Mexico's well-established practice of interstitial constitutional analysis, the Court should find a right to choose whether to continue a pregnancy in the New Mexico Constitution.

C. Inherent Rights

The ordinances also violate the inherent rights protections in Article II, Section 4. The Inherent Rights Clause states 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." Although "the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation," the Court has explained that "Article II, Section 4 should inform our understanding of New Mexico's equal protection guarantee, and may also ultimately be a source of greater due process protections than those provided under federal law." *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 51, 376 P.3d 836 (citations omitted).

In *N.M. Right to Choose*, the Court refrained from deciding whether Article II, Section 4 protects a right to choose to terminate a pregnancy because it was not necessary in reaching the Court's decision. 1999-NMSC-005, ¶ 3. Here, the Court should conclude that the ordinances violate the guarantees of the Inherent Rights Clause, either on its own or in combination with other constitutional provisions.

Other states have relied on similar constitutional language to recognize an inalienable, natural right to bodily autonomy and the decision whether to continue a pregnancy. For example, the Kansas Supreme Court held that an "inalienable natural rights" guarantee "protects all Kansans' natural right of personal autonomy, which includes the right to control one's own body, to assert bodily integrity, and to

exercise self-determination. This right allows a woman to make her own decisions regarding her body, health, family formation, and family life-decisions that can include whether to continue a pregnancy." *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019). Likewise, the Ohio Court of Appeals concluded that in "light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection." *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993). The Supreme Court of New Jersey held that such a clause is "more expansive than that of the United States Constitution" and "incorporates within its terms the right of privacy and its concomitant rights, including a woman's right to make certain fundamental choices." *Planned Parenthood v. Farmer*, 762 A.2d 620, 631 (N.J. 2000) (omission, internal quotation marks, and citation omitted).

Whether independently of or together with the Equal Rights Amendment and due process, Article II, Section 4 protects a woman's right to reproductive freedom and choice and requires strict scrutiny of the ordinances. Because the local governments cannot establish a compelling justification to support their restrictions on abortion, the ordinances violate the Inherent Rights Clause. The ordinances' infringement on New Mexicans' rights in the State Constitution render the

ordinances unconstitutional and merit a writ of mandamus declaring the ordinances invalid and enjoining their enforcement.

IV. The Petition Rests Solely on State Law and Presents No Federal Question.

As noted at the outset, the State's arguments supporting this Court's issuance of the writ of mandamus are based exclusively on state law. The ordinances purport to implement the Comstock Act, but this assertion suffers from two fundamental flaws. First, local governments have no authority to enforce federal criminal law. Enforcement of federal criminal law lies with the United States Attorney General and the Department of Justice, and it rests with the Department of Justice to determine whether and under what circumstances to enforce the Comstock Act. The local governments are deeply mistaken in believing that a handful of local officials have the power to establish national policy or federal criminal law.

The second flaw in the local governments' assertion that their ordinances enforce federal law is that key provisions in the ordinances have no federal analog. Three of the ordinances establish a licensing requirement that does not exist in the Comstock Act, and one of those three also creates a new private right of action. The remaining ordinance creates a new monetary penalty. The ordinances thus do not simply implement the local governments' understanding of federal law.

For these reasons, federal law, and more specifically the meaning and scope of the Comstock Act, is irrelevant to the local governments' actions in excess of their power as political subdivisions under the New Mexico Constitution. Indeed, regardless of how the Comstock Act is interpreted, the ordinances exceed local governments' authority under state law. The Court should reject the local governments' transparent attempt to manufacture a federal question where none otherwise exists.

The United States Supreme Court has observed that it has no jurisdiction to review this Court's interpretation of state law. *See State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514 (1939). As a general rule, the Supreme Court has recognized the fundamental importance of state courts being "left free and unfettered . . . in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). As a result, the Supreme Court will decline to exercise jurisdiction when a "state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent [state] grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This "plain-statement rule" overcomes a presumption that a state court decision is based on federal law when the state court's reliance on federal or state law is ambiguous. *Florida v. Powell*, 559 U.S. 50, 57 (2010). Because this case depends solely on state law, the State asks this Court to include

in its decision a plain statement of reliance on adequate and independent state law grounds.

The Cities and Counties' purported purpose in enacting their ordinances is to enforce federal law. The Comstock Act, however, does not create a private cause of action. It is a federal criminal statute that is within the enforcement authority of the United States Department of Justice. Neither the State nor its political subdivisions have authority to enforce a federal criminal statute.

CONCLUSION

For the foregoing reasons and those asserted in the petition, the State respectfully requests this Court to declare the ordinances void and enjoin the local governments from any enforcement of the ordinances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Petitioner's Brief in Chief* was filed through File and Serve with automatic service to all parties on April 20, 2023:

/s/ James Grayson
Chief Deputy Attorney General

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

Pursuant to Rule 12-318(G) NMRA, I hereby certify that the foregoing brief was prepared using a proportionally-spaced type style or typeface, and the word count according to Google Docs automated count shows 9089 words out of a maximum of 11,000.

/s/ James Grayson
Chief Deputy Attorney General