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 REPLY BRIEF

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

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INTRODUCTION

Aside from a few ill-informed procedural arguments that attempt to minimize this Court's mandamus power, the Cities' and Counties' answer briefs essentially offer the following two propositions in support of their ordinances: (1) the ordinances are not preempted by state law because they merely adopt federal law **[Cities Ans. Br. at 11; Roosevelt County Ans. Br. at 17, 21]**; and (2) there is no clear state constitutional right to reproductive choice that can form the basis for mandamus **[Cities Ans. Br. at 13-16; Roosevelt County Ans. Br. at 12-17]**. The first argument ignores the ordinances' expansion of federal law under any interpretation of the Comstock Act. More critically, it overlooks the lack of any authority for local governments to enforce federal criminal law or to legislate in a manner that conflicts with state law. The second argument is equally unavailing. The New Mexico Constitution prohibits the Cities and Counties from enacting ordinances disfavoring and restricting reproductive healthcare, including under well-established authority interpreting the Equal Rights Amendment.

I. This Court's Power of Mandamus Extends to the Enactment of Local Ordinances that Violate the New Mexico Constitution.

This Court may issue a writ of mandamus to, among other things, "'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).

The Cities argue that the Court's prohibitory mandamus powers are limited to preventing "unconstitutional official *action*" and "cannot be used to formally revoke a statute or ordinance." **[Cities Ans. Br. at 1-2]** But the Cities' authority for this proposition rests principally on the more limited power of mandamus exercised by federal courts. This Court has recognized that, under the New Mexico Constitution, "mandamus [is] 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 Clark*, 1995-NMSC-048, ¶ 20 (endorsing the use of prohibitory mandamus to assess the constitutionality of legislation); *Montoya v. Blackhurst*, 1972-NMSC-058, ¶ 4, 84 N.M. 91 (similar). In *Baca v. New Mexico Department of Public Safety*, the Court recognized that a petition for writ of mandamus was a proper vehicle to assess the "validity of the Concealed Handgun Carry Act," which "raise[d] a constitutional question of fundamental importance to the people of New Mexico." 2002-NMSC-017, ¶ 4, 132 N.M. 282. Likewise, in *Thompson v. Legislative Audit Commission*, the Court

"dispose[d] of respondents' contention that mandamus is not a proper remedy by which the petitioner can attack the constitutionality of the statute involved." 1968-NMSC-184, ¶ 3, 79 N.M. 693. Recognizing that "this [C]ourt has not insisted upon such a technical approach where there is involved a question of great public import," *id.*, the Court reviewed the challenged statute by mandamus and, after finding the law unconstitutional, declared the entire statute a nullity. *Id.* ¶ 17.

Contrary to Respondents' argument **[Lea County Ans. Br. at 13; Cities Ans. Br. at 13; Roosevelt County Ans. Br. at 4-8]**, the Court also may issue a writ of mandamus to nullify an invalid or unconstitutional law even when the underlying constitutional or legal question has not previously been considered by this Court. *See Cnty. of Bernalillo v. N.M. Pub. Reg. Comm'n* (*In re Adjustments to Franchise Fees*), 2000-NMSC-035, ¶ 6, 129 N.M. 787 ("[W]e exercise our power of original jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental constitutional question of great public importance."); *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154 (stating that the Court exercises its mandamus jurisdiction in cases of great public importance "as a matter of controlling necessity, because the conduct at issue affects, in a fundamental way, the sovereignty of the state, its franchises or prerogatives, or the liberty of its people" (internal quotation marks and citation omitted)). Indeed, "[t]his Court has never insisted upon a technical approach to the application of

mandamus where there is involved a question of great public import and where other remedies might be inadequate to address that question." *Clark*, 1995-NMSC-048, ¶ 18 (alterations, internal quotation marks, and citation omitted); *accord, e.g.*, *Unite N.M. v. Oliver*, 2019-NMSC-009, ¶ 2, 438 N.M. 343; *State ex rel. League of Women Voters of N.M. v. Advisory Comm. to N.M. Compilation Comm'n*, 2017-NMSC-025, ¶ 10, 401 P.3d 734.

Roosevelt County relies heavily on this Court's recent opinion in *Pirtle v. Legislative Council Committee of N.M. Legislature*, 2021-NMSC-026, 492 P.3d 586. There, however, this Court did not decline to interpret a constitutional provision in the absence of a previously-established interpretation. Instead, the Court undertook a full constitutional analysis and concluded not only that the provision at issue was truly ambiguous but that the textual arguments were "tenuous and or undeveloped" and the extra-textual arguments were non-existent. *Id.* ¶¶ 56-57. This is a far cry from the State's reliance on this Court's established constitutional framework for local governmental authority and equal rights and the express prohibitions in House Bill 7. Indeed, this Court recognized in *Pirtle* that New Mexico courts have properly exercised their mandamus power "where the interpretation of an ambiguous statute or constitutional provision readily yields a peremptory obligation for the officer to act." *Id.* ¶ 63 (internal quotation marks and cited authority omitted). Mandamus is therefore an appropriate means to prohibit

the unlawful and unconstitutional official action committed by Respondents in enacting the ordinances. *See Clark*, 1995-NMSC-048, ¶¶ 18-19; *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.").

Finally, Respondents' argument that mandamus is not appropriate because other remedies are available—such as multiple actions in district court **[Cities Ans. Br. at 19-20; Roosevelt County Ans. Br. at 9-10]**—overlooks that a single mandamus petition is the best vehicle for reviewing the urgent and profound issues presented by the challenged ordinances. As far as the enforcement mechanism of House Bill 7 is concerned, the law is not yet in effect. More generally, however, the questions raised in this case do not require factual development, have statewide importance, and will ultimately require this Court's interpretation of the New Mexico Constitution regardless of where any single action is initially filed. For these reasons, original jurisdiction in this Court is more efficient, appropriate, and definitive than a series of potential lower court actions against every local government that passes an ordinance regulating abortion in different judicial districts. *See Sandel*, 1999-NMSC-019, ¶ 11. Moreover, this Court has not required that an action be impossible in the district court in order to exercise the Court's power of original mandamus jurisdiction. *See 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").

The State explained in its Brief in Chief that the enforcement of the unconstitutional ordinances at issue would largely depend on the local governments' whims with respect to their subjective understanding of federal law. For this reason, these ordinances threaten to effectively outlaw abortion and abortion clinics in four localities by chilling New Mexicans' exercise of their constitutional rights, infringing upon the rights and lawful provision of health services by medical professionals, and inducing a fear of liability and criminal culpability for actions that are otherwise lawful under New Mexico law. *See State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 5, 91 N.M. 279 (stating that, "when issues of sufficient public importance are presented which involve a legal and not a factual determination, [the Court] will not hesitate to accept the responsibility of rendering a just and speedy disposition"). These are matters of great public importance to be decided expeditiously by this Court in the exercise of its original jurisdiction.

II. Local Governments Have No Power to Enforce Federal Criminal Law and Cannot Exceed Their Authority under New Mexico Law.

In our federalist system, the United States Constitution delegates certain powers to the United States and prevents the States from exercising certain national powers; all other powers are reserved to the States and the people. U.S. Const.

amend. X. The Federal Government and the States are separate sovereigns. Our constitutional system, however, recognizes no independent power or sovereign status for local governments. These entities are subsumed within the States and derive their authority to act from state law. As political subdivisions of the State of New Mexico, the Cities' and Counties' *only* source of authority is state law. Furthermore, the Cities' and Counties' powers are constrained by New Mexico law, including the New Mexico Constitution's Bill of Rights and House Bill 7. These local governments are not federal institutions and have no independent power delegated to them by the Federal Government.

The part of the Comstock Act to which the ordinances refer is a federal criminal law, and its enforcement rests exclusively with the United States Attorney General and the United States Department of Justice. Regardless of the scope and meaning of this federal law, the local governments simply have no role in either interpreting or enforcing its provisions.

This governmental structure is not unique to laws relating to abortion; it applies universally. For example, the Legislature has authorized the use of cannabis under certain restrictions and subject to certain licensing. *See* NMSA 1978, §§ 26-2C-1 to -42 (2021). Although there is some room for some local control on this subject, the Legislature has precluded local governments from "completely prohibit[ing] the operation of a licensee" or "prohibit[ing] a person from producing

homegrown cannabis." NMSA 1978, § 26-2C-12(B) (2021). Given this express state preemption of local powers, a local government in New Mexico would violate state law, and by extension the New Mexico Constitution, by enacting a local ordinance prohibiting marijuana use in the locality even if the local government sought to justify its action by relying on federal drug laws that proscribe the possession of marijuana. *See* 21 U.S.C. § 844(a).

Federal preemption is a doctrine that addresses the relationship between the sovereign powers of the United States and the sovereign powers of the States under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. *State* preemption, however, does not deal with separate sovereigns and instead concerns only the scope of power delegated to local governments by the State. This proceeding concerns only the latter form of preemption. Local governments cannot enlarge their powers under state law, or avoid state preemption, by reference to federal law. Local governments have the power to act only when authorized by state law and only in the absence of a conflict with state law.

For this reason, Roosevelt County's argument that House Bill 7 is preempted by federal law **[Roosevelt County Ans. Br. at 21-24]** has no more place in this proceeding than the local governments' plea to this Court to interpret the Comstock Act. Federal law, regardless of the interpretation of the Comstock Act, does not preempt New Mexico's decision about how much authority to delegate to local

governments and what constraints to place on such delegated authority. Respondents' arguments that New Mexico cannot create "a state-law right to ship or receive abortion-related paraphernalia in violation of a federal criminal statute" **[Cities Ans. Br. at 13; *see also* Roosevelt County Ans. Br. at 8; Cities Ans. Br. at 16]** miss the point. The State does not argue that New Mexico's laws do any such thing; nor does the State need to make such an argument in order to show the ordinances' unconstitutionality. New Mexico law prevents local governments from enacting ordinances that conflict with state law. The New Mexico Bill of Rights and House Bill 7 restrain local governments from passing laws or taking actions that discriminate on the basis of sex, interfere with bodily integrity, or interfere with access to reproductive healthcare. Thus, regardless of how the Comstock Act is interpreted, New Mexico law restricts local governments' ability to regulate abortion and reproductive healthcare.

These state law limitations on local government powers are not preempted by the Comstock Act under either a field preemption or conflict preemption theory. **[Roosevelt County Ans. Br. at 21-22]** Nothing in the New Mexico Constitution's limitation on local governmental authority, the New Mexico Constitution's Bill of Rights, or House Bill 7 precludes the Federal Government from interpreting and enforcing the Comstock Act as the United States Department of Justice sees fit.

On the question of *state* preemption, however, there can be little debate that the ordinances conflict with state law. The ordinances purport to regulate the medical profession by requiring licenses, or imposing fines, for the performance of a particular type of medical procedure or the operation of a particular type of medical facility in a manner that conflicts with medical licensing at the state level. Further, these ordinances do not apply to any other business or any other type of medical facility so as to fall within local zoning authority, and the regulation of this single medical procedure is not incident to a power delegated to the local governments by the Legislature so as to satisfy the independent powers doctrine. The ordinances are invalid because they conflict with state law and exceed local governmental authority.

III. The Ordinances Violate New Mexico's Bill of Rights.

Respondents focus most of their briefing on issues other than the validity of the ordinances under New Mexico's Bill of Rights; their arguments on this subject are both paltry and unavailing. Initially, as discussed in more detail above, mandamus can be employed to resolve unsettled constitutional questions. And here, the Equal Rights Amendment's strict scrutiny of laws that single out abortion and other pregnancy-related healthcare for regulation is well established. The ordinances are not gender-neutral, as Respondents maintain, but instead fall within the category of legislation providing for the disfavored treatment of

pregnancy-related healthcare that employs "'women's biology and ability to bear children . . . as a basis for discrimination against them.'" *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 41, 975 P.2d 841, 126 N.M. 788 (quoting *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986)). Further, Respondents' minimal criticisms of the State's arguments under the Due Process and Inherent Rights Clauses are unsupported or rest on federal law that differs from New Mexico's constitutional protections.

To begin, Respondents' argument that the constitutional rights raised in the Petition are not clearly established is no obstacle to mandamus. **[*See* Roosevelt County Ans. Br. at 11-15]** As detailed above, the Court may issue a writ of mandamus to nullify an invalid or unconstitutional law, even when the underlying constitutional or legal question has not previously been considered by this Court. *See supra* p. 3-5. Moreover, the strict scrutiny applicable to regulations that disfavor reproductive healthcare, including abortion, is well established by the Court's holding in *N.M. Right to Choose*. **[*See* BIC at 29-32.]**

New Mexico's historical laws prohibiting or restricting abortion do not undermine the constitutional rights raised in the State's Petition. **[Roosevelt County Ans. Br. at 13-14.]** New Mexico, including through its adoption of the Equal Rights Amendment, has changed its laws to "reflect an evolving concept of gender equality in this state." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 31.

Recognizing the discriminatory nature of the State's older laws, "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." *Id.* ¶ 36. **[*See also* BIC at 24-28]** The New Mexico Bill of Rights does not provide a static set of protections but has been amended and interpreted over time to remedy the past harms of gender discrimination in the State's laws.

Respondents' argument that the ordinances do not violate the Equal Rights Amendment because the ordinances are gender-neutral cannot be squared with this Court's opinion in *N.M. Right to Choose*. **[Roosevelt County Ans. Br. at 15-16; Cities Ans. Br. at 15]** Roosevelt County points to *State v. Sandoval*, 1982-NMCA-091, ¶¶ 5-6, 98 N.M. 417, for the general proposition that a "law does not violate the Equal [Rights][1] Amendment if it is 'gender neutral on its face' and 'treats all persons alike, regardless of sex.'" **[Roosevelt County Ans. Br. at 15 (brackets omitted)]** This general statement by the Court of Appeals in a case predating *N.M. Right to Choose* does not contradict the more specific holding by this Court that pregnancy-based discrimination, and in particular the disfavored treatment of reproductive healthcare, is presumptively unconstitutional.

[1] Roosevelt County inadvertently calls the ERA the "Equal Protection Amendment."

Laws that do not expressly distinguish between men and women in their terms but make pregnancy-based distinctions may still be subject to strict scrutiny under the Equal Rights Amendment. Indeed, the Medicaid regulations that were the subject of *N.M. Right to Choose* did not distinguish between men and women in their terms but defined medical necessity for abortions in a narrow manner distinct from other medical care. *See N.M. Right to Choose*, 1999-NMSC-005, ¶ 7; 8.325.7.12 NMAC (2003).[2] In *N.M. Right to Choose*, this Court explained that "classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment." 1999-NMSC-005, ¶ 43. **[*See also* BIC at 30-31 (describing in more detail why pregnancy-based discrimination is sex discrimination for ERA purposes)]** Respondents' argument would exempt from judicial scrutiny laws that disfavor reproductive healthcare so long as the law does not explicitly mention men or women. Presumably, even a wholesale prohibition by local governments on obstetric care would not be subject to the Equal Rights Amendment under Respondents' theory because both men and women would be barred from providing care for pregnant patients. **[*See* Cities Ans. Br. at 15**

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2 https://www.hsd.state.nm.us/wp-content/uploads/FileLinks/db23120443324198f49d260c6129473/8.325.7.pdf

(contending that ordinances do not "classify on account of sex or impose different rules on men and women")]

Roosevelt County's argument that "men and women are not similarly situated with respect to an alleged right to abortion," and thus the regulation of abortion cannot trigger heightened scrutiny, is contrary to this Court's interpretation of the Equal Rights Amendment in *N.M. Right to Choose*. **[Roosevelt County Ans. Br. at 17]** The Court explained that "[i]t would be error . . . to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 39. Expressly rejecting the same argument made by Roosevelt County, the Court reasoned as follows:

> In this context, "'similarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." . . . To determine whether men and women are similarly situated with respect to a classification, "we must look beyond the classification to the purpose of the law." Further, to determine whether a classification based on a physical characteristic unique to one sex results in the denial of "equality of rights under law" within the meaning of New Mexico's Equal Rights Amendment, we must ascertain whether the classification "operates to the disadvantage of persons so classified."

Id. ¶¶ 39-40 (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 345-46 (1949)); *see* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 Univ. Cin. L. Rev. 1, 37 (1975). Therefore, it is no

defense of the ordinances to say that women and men are not similarly situated when it comes to pregnancy and abortion. Singling out abortion for disadvantageous regulation compels strict scrutiny.

Respondents' fleeting objections to the State's arguments based on the Due Process and Inherent Rights Clause are no more successful. Roosevelt County contends that the New Mexico Constitution's Due Process Clause is interpreted similarly to the federal Due Process Clause. **[Roosevelt County Ans. Br. at 14-15]** As discussed in the Brief in Chief, however, there are compelling grounds–under either an interstitial or primacy approach–for recognizing a right of reproductive choice under New Mexico's Due Process Clause. **[*See* BIC at 33-35]** As the Court recognized in *Morris v. Brandenburg*, the Inherent Rights Clause "may also ultimately be a source of greater due process protections than those provided under federal law." 2016-NMSC-027, ¶ 51, 376 P.3d 836. Together, the New Mexico Bill of Rights' protections in the Equal Rights Amendment, Due Process Clause, and Inherent Rights Clause prohibit local governments from disfavoring reproductive healthcare, including abortion.

CONCLUSION

For the foregoing reasons and those asserted in the Petition and Brief in Chief, 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 Reply Brief* was filed through File and Serve with automatic service to all parties on May 22, 2023:

/s/ James Grayson
Chief Deputy Attorney General