IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO
ex rel. RAÚL TORREZ,
New Mexico Attorney General,

Petitioner,

v.

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

Respondents.

No. _____

EMERGENCY PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY

RAÚL TORREZ
ATTORNEY GENERAL

James W. Grayson
Chief Deputy Attorney General

Nicholas M. Sydow
Solicitor General

P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 490-4060
jgrayson@nmag.gov
nsydow@nmag.gov

INTRODUCTION

Fifty years after the United States Supreme Court's recognition of a constitutional right to decide whether to continue a pregnancy in *Roe v. Wade*, and months after the Court's reversal of that right in *Dobbs v. Jackson Women's Health*, local governments in New Mexico have passed ordinances seeking to effectively outlaw abortion. The State requests that the Court consider the fundamental constitutional questions of the utmost importance raised by these ordinances and recognize that women in New Mexico have a constitutional right to reproductive freedom and choice that includes a right to choose to terminate a pregnancy.

The New Mexico Constitution provides broader protection of individual rights than the Federal Constitution, and these ordinances violate the New Mexico Constitution's protection of equality, liberty, privacy, and inherent rights. The local governments' actions also exceed their authority to legislate on a matter of statewide importance for which the Legislature has preempted local regulation. The State respectfully asks that this Court issue a writ of mandamus striking down these ordinances and prohibiting the local governments from engaging in unconstitutional action.

FACTUAL BACKGROUND

New Mexico Law Regarding Abortion

1. For nearly fifty years, women in New Mexico had a federal constitutional right to reproductive freedom and choice under the United States Supreme Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

2. Last year, the United States Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

3. Despite the United States Supreme Court's ruling in *Dobbs*, abortion is not prohibited under New Mexico law.

4. In fact, before *Dobbs*, New Mexico repealed its antiquated prohibition of abortion, NMSA 1978, §§ 30-5-1 through -3, in 2021. Laws 2021, ch. 2, § 1.

City Ordinances

5. Following the Supreme Court's ruling in *Dobbs*, several political subdivisions, including the Cities of Hobbs and Clovis and Lea and Roosevelt Counties, have passed ordinances regulating abortion.

6. 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 and copies of them are attached as Exhibits 1 and 2.

7. The ordinances create a licensing requirement for abortion clinics. They further declare it to be unlawful to use the mail, an express service, a common carrier, or an interactive computer service for the delivery of any item designed or advertised to produce an abortion. Aiding or abetting these acts is also declared to be unlawful.

County Ordinances

8. On December 8, 2022, Lea County adopted Ordinance No. 99. On January 10, 2023, Roosevelt County adopted Ordinance 2023-01. Copies of the counties' ordinances are attached as Exhibits 3 and 4.

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

10. Roosevelt County's ordinance creates a licensing requirement similar to the City 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 in the ordinance.

11. 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.

12. The Hobbs 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.

JURISDICTION

This is a civil action in the form of a petition for writ of mandamus to prohibit the Cities of Hobbs and Clovis, and the Boards of County Commissioners of Roosevelt and Lea Counties from engaging in unconstitutional official action. The ordinances passed by these local governments infringe on the reproductive and equality rights of women in violation of the New Mexico Constitution. They also exceed the authority of local governments to act on matters of statewide concern.

This Court has original jurisdiction over mandamus actions against state officers, boards, or commissions and 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 may issue a writ of mandamus to "'prohibit unlawful or unconstitutional official action,'" and the Court exercises original jurisdiction on matters of great public importance "when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official." *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). *See generally State ex rel. Cardenas v. Swope*, 1954-NMSC-028, 58 N.M. 296 (exercising original mandamus jurisdiction to direct a court clerk to set a matter for jury trial); *State ex rel. Balderas v. Hicks*, No. S-1-SC-38279 (N.M. May 28, 2020) (unpublished and nonprecedential) (issuing a writ of mandamus in an original action against the mayor of Grants).

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.

State ex rel. Sugg v. Oliver, 2020-NMSC-002, ¶ 7, 456 P.3d 1065 (quoted authority omitted). The Court may invoke its original jurisdiction over a petition for an extraordinary writ even when the matter might have been brought first in the district court. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15, 125 N.M. 343.

Here, the first part of the test is established because these political subdivisions took action of general concern that involves a matter of great public importance and impacts fundamental constitutional rights. The fundamental constitutional issues are two-fold.

First, the ordinances unduly restrict the state constitutional right to abortion protected under multiple provisions in the Bill of Rights, including Sections 4, 10, and 18 of Article II. 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." *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277 (internal quotation marks and citation omitted). This Court has already recognized the regulation of abortion and its review under the Equal Rights Amendment to Article II, Section 18 as a significant question of law and an issue of public importance. *N.M. Right to Choose/NARAL v. Johnson*, 1995-NMSC-005, ¶¶ 2, 22, 126 N.M. 788, 975 P. 2d 841. The issues raised in this petition are also ones of public and governmental prominence, with attention in the State's current legislative session.

Second, the ordinances present a question of the constitutional authority of local governments, that is, whether these local governments have the authority to restrict the performance of professional health services that are governed by state licenses and state regulations and whether Roosevelt County, specifically, has the authority to create a private right of action for the violation of the ordinance. New Mexicans' access to health care is a matter of critical importance; a person's access to health care must be uniform across the state and cannot depend on a patchwork of

local regulations targeting specific health services that are disfavored by the local government.

This case also satisfies the second part of the test for exercising original jurisdiction because the Petition "can be answered on the basis of virtually undisputed facts." *State ex rel. Sugg*, 2020-NMSC-002, ¶ 7. The State's challenge of the facial validity of the ordinances can be assessed by reviewing the ordinances themselves without resort to external facts.

Finally, the third part of the test for exercising original jurisdiction is met because the dispute in this case "calls for an expeditious resolution that cannot be obtained through other channels." *Id.* ¶ 7. The ordinances are presently in effect in the four local jurisdictions, and they effectively ban abortions in those cities and counties. Further, the local governments named in this action and others will continue to pass laws that attempt to regulate and prohibit abortion in the wake of *Dobbs*. These laws chill and inhibit the exercise of New Mexicans' constitutional rights and the lawful provision of health services by medical professionals 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."). Immediate relief is necessary to prevent harm from these ordinances. For these

reasons, this Court should issue a stay, exercise original jurisdiction, and strike down the unconstitutional ordinances at the earliest opportunity.

PARTIES

1) Petitioner Attorney General Raúl Torrez is the chief law enforcement officer of the State of New Mexico and is authorized to act on behalf of New Mexicans when, in his estimation, doing so serves the public good. NMSA 1978, § 8-5-2(A), (B), (J) (1975). *See generally State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8.

2) Respondents are local governments that are political subdivisions of the State of New Mexico.

ARGUMENT

1. The Local Governments' Actions Cause Immediate Harm and Warrant Issuance of an Extraordinary Writ

The State asks this Court to prohibit the Cities' and Counties' unconstitutional official action. The Court's power to issue writs of mandamus encompasses orders prohibiting public officials from taking unlawful official actions. *Adobe Whitewater Club of N.M. v. State Game Comm'n*, 2022-NMSC-020, ¶ 9, 519 P.3d 46. Accordingly, "[t]his Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Clark*, 1995-NMSC-048, ¶ 19; *see State ex rel. Edwards v. City of Clovis*, 1980-NMSC-039, ¶ 12, 94 N.M. 136 ("Once petitioner showed that there was a valid

ordinance in existence and that it was being violated, the duty cast upon the City became ministerial and subject to enforcement by mandamus."). The local governments' attempt to regulate – and effectively outlaw – abortion warrants the immediate issuance of a writ of mandamus.

2. The Ordinances Violate the Bill of Rights of the New Mexico Constitution.

By singling out and restricting New Mexicans' right to choose whether to continue a pregnancy, the ordinances violate the Bill of Rights of the New Mexico Constitution.[1] The ordinances create a direct restriction on and regulation of abortion in several ways. To begin, the ordinances directly regulate the operation of "abortion clinics" – a term defined in extremely broad terms. 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), effectively making the operation of an abortion clinic impossible. Indeed, the ordinances recognize this impossibility by reserving the discretion to deny a license upon a finding that "the proposed activity cannot be accomplished" without violating the restrictions in the ordinance. The Roosevelt County ordinance goes even further by creating a cause of

[1] The ordinances pose an emergency warranting immediate relief. In the event the Court issues a stay, however, the State would welcome an opportunity for a fuller discussion of the Bill of Rights through additional briefing given the great public importance of the issue and the limited time and word count available in preparing this Petition. *See* Rule 12-504(C)(3).

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. All told, the ordinances operate as *de facto* bans on abortion in violation of several provisions in the New Mexico Constitution's Bill of Rights.

a. Equal Rights Amendment

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. Like the Fourteenth Amendment, Article II, Section 18 provides that no person shall "be denied equal protection of the laws," but the Equal Rights Amendment added that "[e]quality of rights under law shall not be denied on account of the sex of any person." By adopting this language, the people of New Mexico intended to provide "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 federal Equal Protection Clause, "regulation of abortion is not a sex-based classification" subject to heightened scrutiny).

This Court has not directly addressed whether the Equal Rights Amendment secures a right to reproductive freedom and choice that includes the right to abortion. The Court has, however, addressed a related issue. In *N.M. Right to Choose*, the Human Services Department restricted Medicaid funding for medically necessary abortions. This Court determined that the Equal Rights Amendment "provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and the civil law traditions that preceded it," and this constitutional provision requires "a searching judicial inquiry" when evaluating laws that establish classifications based on gender. 1999-NMSC-005, ¶ 36. "This inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the [government's] burden to rebut this presumption." *Id.* The government must have a "compelling justification for treating men and women differently with respect to their medical needs." *Id.* ¶ 2.

In analyzing the constitutionality of the Medicaid funding restriction, this Court answered the Department's argument that the provision drew a distinction based on a physical condition not shared by men and women such that it did not discriminate on the basis of sex. *Id.* ¶ 38. This Court recognized that "not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination" but rejected the notion that such a distinction "is reasonable simply because it corresponds to some 'natural' grouping." *Id.* ¶¶ 38-39.

Consistent with a searching judicial inquiry, the Court evaluates whether men and women are similarly situated with respect to a particular classification by looking beyond the classification itself to "the purpose of the law." *Id.* ¶ 40 (quoted authority omitted). The historical use of women's unique biology and ability to bear children as a basis for governmental discrimination formed a central part of this Court's analysis. *See id.* ¶ 41. The Court also highlighted the health consequences of a pregnancy. *Id.* ¶ 42. Based on these factors, "classifications based on the unique ability of women to become pregnant and bear children" must be founded on "a compelling justification for using such classifications to the disadvantage of the persons they classify." *Id.* ¶ 43.

A searching judicial inquiry showed that the Medicaid funding restriction for abortions, even when medically necessary, "undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women." *Id.* ¶ 47. Because the government lacked "a compelling justification for treating men and women differently with respect to their medical needs," this Court determined that the rule violated the Equal Rights Amendment. *Id.* ¶ 54.

Under this Court's analysis in *N.M. Right to Choose*, the ordinances at issue in the present case cannot survive constitutional scrutiny. These ordinances create unreasonable burdens that are designed to have the effect of banning abortion in the localities. The provisions thus seek to limit women's access to lawful medical

services in a way that discriminates on the basis of sex under *N.M. Right to Choose*. Tellingly, the local governments refer to women who choose to receive medical care at abortion clinics as "victims" instead of patients.

The ordinances seek to deny women's access to reproductive health services and therefore establish a classification "based on the unique ability of women to become pregnant and bear children." *N.M. Right to Choose*, 1999-NMSC-005, ¶ 43. Because the local governments lack a compelling justification needed to overcome the presumption of unconstitutionality and to support the creation of a patchwork regulation of abortion in this State, the ordinances 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).

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 an interstitial constitutional analysis). 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 anachronistic 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.,*

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 the 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); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) (stating that the right of privacy under the Minnesota Constitution encompasses the right to decide whether to terminate a pregnancy); *Planned Parenthood v. State*, No, 2022-001062, 2023 WL 107972, at *8 (S.C. Jan. 5, 2023) (holding 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."); *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). Following these courts and New Mexico's well-established practice of interstitial constitutional analysis, the Court

should conclude that the New Mexico Constitution protects a woman's right to choose whether to continue a pregnancy.

c. Inherent Rights Clause

The Ordinance also violates the inherent rights protections in Article II, Section 4. This 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. The Court should conclude in this case 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 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) (internal quotation marks, citation and ellipsis omitted).

Whether independently of or together with the Equal Rights Amendment and the state constitutional protections of liberty and privacy, Article II, Section 4

protects a woman's right to reproductive freedom and choice and requires strict scrutiny of the ordinances.

The local governments' ordinances violate a number of constitutional rights guaranteed by the New Mexico Constitution, including equal rights, liberty, privacy, and inherent rights. Applying these constitutional rights in isolation or together, the ordinances cannot withstand strict scrutiny and violate the New Mexico Constitution because they simply are not supported by a compelling governmental interest.

3. The Ordinances Exceed the Local Governments' Constitutional Authority.

The legislative powers of cities and counties are limited by state law. Home rule municipalities "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6(D). Counties, on the other hand, 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 County Comm'rs of Santa Fe County*, 1976-NMSC-029, ¶ 6, 89 N.M. 313. Neither municipalities nor counties may enact ordinances that conflict with state law. N.M. Const. art. X, § 6(D); NMSA 1978, § 4-37-1 (1975).

a. State Law Preempts the Ordinances.

"An enactment by the Legislature preempts a municipal ordinance if it expressly denies municipalities the authority to legislate similar matters." *Espinoza v. City of Albuquerque*, 2019-NMCA-014, ¶ 14, 435 P.3d 1270 (quotation marks and quoted authority omitted). Preemption of a municipal ordinance – and therefore a county ordinance, as well – occurs when the Legislature (1) enacts a general law, meaning a law that affects the community as a whole on a matter of statewide concern, and (2) clearly intends the general law to be a restriction on municipal legislative powers. *See Espinoza*, 2019-NMCA-014, ¶¶ 15-18. "[I]f an ordinance is inconsistent with a general State statute then the State statute controls." *Protection & Advocacy Sys. v. City of Albuquerque*, 2008-NMCA-149, ¶ 48, 145 N.M. 156.

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 created the medical board "to issue licenses to qualified health care practitioners, including physicians." *Id.* The Act is unquestionably a general law, and the Legislature clearly 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 ordinances do not purport to require a business license or to enact a zoning provision. Instead, they require a license to practice medicine and, more specifically, a license to practice a specific medical procedure. Their purpose is to prevent physicians from being able to perform this medical procedure. But these are matters of statewide concern that the Legislature has delegated to the Medical Board. The ordinances affect New Mexicans' access to health care and unlawfully threaten to create a patchwork of regulation for a single, lawful 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. The ordinances conflict with the Act and are preempted. *See Protection & Advocacy 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. Village 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. Roosevelt County Enacted 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 law consists "of the substantive law 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. v. City of Santa Fe*, 2006-NMCA-007, ¶ 23, 138 N.M. 785 (quotation marks and quoted authority 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." (Emphasis added.) 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.

Simply put, a county has no authority to create a private right of action or to specify "statutory damages" for a private right of action. *See New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 23 (concluding that an ordinance created a private law

"because it seeks to establish legal duties between private businesses and their private employees, and it establishes a new cause of action against private businesses that do not pay the wage") (quotation marks omitted); *see also* N.M. Att'y Gen. Op. 18-03 (2018) (similar); *cf. McCrory Corp. v. Fowler*, 570 A.2d 834, 839 (Md. 1990) ("'The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons . . . .'") (quoting 6 McQuillan, *Municipal Corporations* § 22.01 (3d ed. rev.)). 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 or abortions in general. Further, the ordinance greatly disrupts the uniformity of New Mexico law on abortion and threatens to create a patchwork of available medical care on a county-by-county basis. Roosevelt County had no power to enact the ordinance and acted unlawfully in doing so.

4. The State Requests that the Court Declare the Ordinances Void and Prohibit Their Enforcement.

Given these violations of New Mexico's Constitution and laws, the State respectfully requests that the Court issue a writ of mandamus declaring the ordinances null and void and their provisions unenforceable in New Mexico's courts. A writ of prohibitory mandamus is proper here for ordinances that violate New Mexicans' constitutional rights and exceed the local governments' legal powers. *See Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132, 257 P.3d 952.

The State further asks this Court to issue a stay while this Petition is pending. *See* Rule 12-504(D)(2)(a) (stay proper where "irreparable injury, loss, or damage will result to the petitioner before the respondent … can be heard in opposition"). Every day the ordinances are in effect, New Mexicans' exercise of constitutional rights will be infringed and chilled. Furthermore, the issuance of local laws seeking to regulate and prohibit abortion is spreading across New Mexico's cities and counties, leaving an uncertain legal landscape of what options are available to pregnant New Mexicans and their medical providers. Only this Court's ruling regarding the validity of these political subdivisions' actions can forestall this harm and afford clarity and uniformity to the legal options and access to health care available to all New Mexicans.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to issue a stay, declare the ordinances void, and prohibit the local governments from their unconstitutional actions.

Respectfully submitted,

RAÚL TORREZ
Attorney General of New Mexico

By: _____
James Grayson
Chief Deputy Attorney General

Nicholas M. Sydow
Solicitor General

Office of the New Mexico Attorney General
408 Galisteo St.
Santa Fe, NM 87501
(505) 490-4060
jgrayson@nmag.gov
nsydow@nmag.gov

STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Rule 12-504(H), I certify that this brief complies with the type-volume requirement of Rule of Appellate Procedure 12-504(G). It contains 5240 words in the body of the petition, according to a count by Microsoft Word 2016.

Chief Deputy Attorney General

VERIFICATION

I, James Grayson, attorney for Petitioner state under oath that I have read this *Emergency Verified Petition for Writ of Mandamus and Request for Stay*, and that the factual statements it contains are true and correct to the best of my knowledge, information, and belief.

Date: January 23, 2023

Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Emergency Verified Petition for Writ of Mandamus and Request for Stay* was personally served, served by email, and served by U.S. mail to Respondents on January 23, 2023, on the following persons and entities:

Jan Fletcher
City Clerk
City of Hobbs
200 E. Broadway St.
Hobbs, NM 88240
jfletcher@hobbsnm.org

Leighann Melancon
City Clerk
City of Clovis
321 N. Connelly
P.O. Box 760
Clovis, NM 88101
lamelancon@cityofclovis.org

Mandi Park
County Clerk
Roosevelt County
109 W. 1st St.
Lobby Box 4
Portales, NM 88130
mpark@rooseveltcounty.com

Keith Manes
County Clerk
Lea County
100 N. Main St., Suite 1C
Lovington, NM 88260
kmanes@leacounty.net

Chief Deputy Attorney General