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

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INTRODUCTION

The State of New Mexico, through its Attorney General, submits this reply to address two limited issues raised in the Response to the Petition for Writ of Mandamus filed by the Cities of Clovis and Hobbs. First, the State's Petition is wholly resolved by New Mexico law and does not, in the least, depend on an interpretation of federal law. Indeed, the writ should issue to the Cities and Counties regardless of the scope of the federal law cited in the Response. And second, mandamus is not only a proper vehicle for declaring the ordinances to be unconstitutional under the New Mexico Constitution—it is the best vehicle by which to do so.

New Mexico law is clear: local governments may not exceed the authority granted to them under state law. Political subdivisions of the state cannot act in a manner that conflicts with the New Mexico Constitution or state law. This Court, moreover, has the power to issue a writ of mandamus to prevent a local government from violating state law. None of this depends on federal law. Respondents cite the federal Comstock Act, but a local government's authority to legislate depends on state, not federal, law; nor does federal law limit this Court's power to prevent a local government from legislating in a manner that violates the New Mexico Constitution. And when, as here, a local government legislates in excess of its authority, a writ of mandamus is proper. This Court has in fact

repeatedly employed writs of prohibitory mandamus to review the constitutionality and validity of legislation.

Respondents' Insistence That This Court Must Interpret Federal Law Ignores the Exclusively State-Law Basis of Their Unconstitutional Official Action.

The New Mexico Constitution prohibits local governments from enacting ordinances that conflict with state law. N.M. Const. art. X, § 6(D); *see also Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen*, 2000-NMSC-016, ¶ 15, 129 N.M. 177 (stating that a county cannot "adopt local ordinances that are inconsistent with th[e laws] of the State"). Through the Medical Practice Act, the Legislature created "laws and rules controlling the granting and use of the privilege to practice medicine" in New Mexico and designated the Medical Board as the entity with the authority "to implement and enforce the laws and rules" governing the practice of medicine. The Legislature also 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). Combined, these Acts establish a statewide, uniform system of qualifications and standards for the practice of medicine while also protecting New Mexicans' access to healthcare 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 (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 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. The Hobbs, Clovis, and Roosevelt County ordinances purport to establish a licensing requirement for the operation of an abortion clinic. These local governments' attempt to regulate the practice of medicine threatens New Mexicans' access to healthcare on a locality-by-locality basis and thus "implicates serious concerns about non-uniformity in the law." *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 29, 138 N.M. 785. Medical licensing under state law does not merely set a floor like the Minimum Wage Act, but instead establishes a single statewide scheme designed to promote a healthcare system that is professional, competent, and accessible across the state. The New Mexico Constitution's protection of the right to abortion underscores the statewide importance of access to healthcare generally and abortion services specifically and the limitations on the exercise of local government power to restrict that access.

This Court can therefore issue the writ of mandamus based strictly on state law. The Cities' suggestion that the federal Comstock Act can confer on them excess authority beyond that permitted by state law **[Resp. at 4-6]** contravenes the

basic principle that local governments only possess those powers afforded to them by the State's Constitution and laws. *See El Dorado at Santa Fe., Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1976-NMSC-029, ¶ 6, 89 N.M. 313 ("A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers."); *Morningstar Water Users Ass'n v. Farmington Mun. Sch. Dist. No. 5*, 1995-NMSC-052, ¶ 37, 120 N.M. 307 (stating that a municipality "is an auxiliary of the state government"). This Court, in *State ex rel. Clark v. Johnson*, rejected the Governor's similar argument that federal law provided him authority beyond that conferred by state law. The Court found these arguments "inconsistent with core principles of federalism" and concluded that the "Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it." 1995-NMSC-048, ¶ 44, 120 N.M. 562. Thus, the Comstock Act, regardless of its scope and the circumstances under which the Act

would prohibit the mailing of abortion-related products,[1] cannot expand local governments' state powers.

Moreover, it is simply untrue that these ordinances do no more than require compliance with federal law. **[*See* Resp. at 14]** There is no federal law that authorizes local governments to create licensing requirements for abortion clinics. Nor can the local governments identify any source of authority that empowers them to enforce federal law through monetary fines that do not exist in the federal law itself. The local governments sought to use their limited authority under state law to regulate abortion clinics and abortion services. In doing so, they engaged in unconstitutional official action.

Mandamus is a Proper Vehicle to Review the Validity of the Local Governments' Ordinances

This Court has the authority to evaluate, via a petition for writ of mandamus, whether Respondents have exceeded their constitutional and statutory authority in enacting the challenged ordinances. The Supreme Court may issue a writ of mandamus to, among other things, "'prohibit unlawful or unconstitutional official

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[1] The Court does not need to address whether the Comstock Act applies to lawful abortion procedures in New Mexico in order to decide both that the local governments exceeded their legislative authority and that they did so in a manner that invaded a state constitutional right. The State would thus only note as an aside that Respondents' overly expansive, and entirely unsupported, view of federal preemption **[*See* Resp. at 5-6]** would not simply allow for the federal regulation of interstate mailing under the Commerce Clause but would go so far as to invalidate the state constitutional protection of the right to abortion recognized by the high courts of many other states.

action.'" *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272 (quoting *Clark*, 1995-NMSC-048, ¶ 19). "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." **[Resp. at 1]** But the Cities' authority for this proposition rests principally on federal courts' more cabined concept of their judicial review power **[*see* Resp. at 3-4]**, which is contrary to this Court's precedent. This Court has "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). For example, 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.

The Court's use of mandamus to review the constitutionality of laws further illustrates that, contrary to Respondents' argument **[Resp. at 8, 13-15]**, 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 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. Mandamus is therefore an appropriate means to prohibit the unlawful and unconstitutional official action committed by Respondents by 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 an action in district court [**Resp. at 19-20]**—overlooks that mandamus is the best vehicle for reviewing the urgent and profound issues presented by the challenged ordinances. To begin, Respondents recognize that there is not yet any enforcement action that someone could

challenge in the district court. **[Resp. 3, 9-10]** More fundamentally, this Court's exercise of mandamus jurisdiction does not require that an action be impossible in the district court. *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."). And 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.

This action is not about any one individual—it is about the invalid and unconstitutional ordinances that Respondents enacted that effectively outlaw abortion and abortion clinics in their cities and counties, chill New Mexicans' exercise of their constitutional rights, infringe upon the rights and lawful provision of health services by medical professionals, and induce 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, 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"). These are matters of great public

importance to be decided expeditiously by this Court in the exercise of its original jurisdiction.

CONCLUSION

For the foregoing reasons and those asserted in the petition, 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,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Petitioner's Reply* was filed through File and Serve with automatic service to all parties on March 6, 2023:

_/s/ James Grayson___________
Chief Deputy Attorney General