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**IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO**

STATE OF NEW MEXICO
ex. Rel. RAUL 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. S-1-SC-39742
Original Proceeding under Rule 12-504 NMRA on Petition for Writ of Mandamus

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ANSWER BRIEF OF BOARD OF COUNTY COMMISSIONERS FOR ROOSEVELT COUNTY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Exercising its constitutionally granted authority to legislate to protect the health, safety, and general welfare of its citizens, Roosevelt County,[1] along with other New Mexico localities, enacted ordinances[2] adopting longstanding provisions of federal law criminalizing shipment of abortion instrumentalities by mail or common carrier. *See* 18 U.S.C. §§ 1461 & 1462. Roosevelt County's Ordinance specifically makes it "unlawful for any person to violate 18 U.S.C. § 1461, . . . unlawful for any person to violate 18 U.S.C. § 1462, . . . [and] unlawful for any person to engage in conduct that aid or abets the[se] violations." Ordinance 2023-01, Section 2(A)–(C). The Ordinance makes clear that it "shall be enforced exclusively through . . . private civil actions" and that no "direct or indirect enforcement of this section may be taken or threatened by Roosevelt County." *Id.* at Section 2(D).

The Attorney General asks the Court to use the extraordinary remedy of mandamus not only to strike down Roosevelt County's ordinance, but to find—for the very first time—a right to abortion in the New Mexico Constitution. This is an improper request. Mandamus is only proper when a "clear legal right" to relief exists. *State ex rel. Riddle*

[1] Undersigned counsel for Alliance Defending Freedom, now representing Roosevelt County, previously filed an amicus brief in which they truthfully stated that (at that time) they did not represent any party.
[2] *See* COUNTY OF ROOSEVELT, N.M., Ordinance 2023-01 (2023) (the Roosevelt County Ordinance).

v. Oliver, 2021-NMSC-018, ¶ 23, 487 P.3d 815, 825 [published after Vol. 150 of the New Mexico Reports]. Moreover, mandamus is an improper vehicle to find a new constitutional right. Controlling authority dictates that when "there is room for difference as to the true construction of constitutional language" mandamus action is inappropriate. *Pirtle v. Legis. Council Comm. of N.M. Legislature*, 2021-NMSC-026, ¶ 51, 492 P.3d 586, 602 [published after Vol. 150 of the New Mexico Reports] (cleaned up) (rejecting mandamus relief because of the existence of textual ambiguity).

This Court has consistently followed the *Pirtle* rule and twice declined to create a right to same-sex marriage through mandamus action. *Griego v. Oliver*, 2014-NMSC-003, ¶ 10, 316 P.3d 865, 872 [published after Vol. 150 of the New Mexico Reports]. The Attorney General's theory that New Mexico's Constitution supports a right to abortion has never been accepted by any New Mexico court. His use of scattershot legal arguments and reliance upon other courts' interpretation of other constitutions is not enough to establish a right to abortion at any time, much less on a mandamus action. *Pirtle* controls and demands that this Court dismiss this case.

The Attorney General's accusations against the ordinance also fail on the merits. By assuming what he seeks to prove, the Attorney General accuses Roosevelt County of violating the purported right to abortion. But the ordinance is constitutional: it does not violate any

provision of the New Mexico Constitution or exceed Roosevelt County's authority.

With no basis in the New Mexico Constitution for the purported right, the Attorney General also argues that the ordinance is preempted by various state laws, including the newly enacted, H.B. 7, an aggressive, overbroad, and unconstitutional act that itself is preempted by federal law. The Attorney General's argument is self-defeating: if the local ordinance requiring obedience to federal law directly conflicts with H.B. 7, then H.B. 7 itself directly conflicts with and is preempted by the adopted federal law. The argument results in absurdity: H.B. 7 makes it illegal to require obedience to federal law. H.B. 7 therefore cannot stand, and certainly cannot preempt Roosevelt County's Ordinance 2023-01, being itself preempted.

For the reasons stated below and in its previously filed Brief in Response to the Emergency Petition for Mandamus, Roosevelt County respectfully asks this Court to dismiss this mandamus action as improper or in the alternative, to uphold Roosevelt County's ordinance.

ARGUMENT

I. Mandamus action is not proper because no clear legal right to the requested relief exists and other adequate remedies exist at law.

A. There is no clear legal right to abortion in the New Mexico Constitution, and under this Court's decision in *Pirtle*, that controls the outcome here.

The "threshold" question for mandamus action is whether a "clear legal right" to the requested relief exists; when no clear right exists, mandamus is not proper. *Riddle*, 2021-NMSC-018, ¶ 23. Mandamus "is a drastic remedy to be invoked only in extraordinary circumstances," and it lies "only to force a clear legal right," not to create a new one. *Id.* (quoting *State ex. rel. Richardson v. Fifth Jud. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566). *See also Schreiber v. Baca*, 1954-NMSC-110, ¶ 14, 58 N.M. 766, 770, 276 P.2d 902, 905 (cleaned up) (holding that "[i]t is a well-established doctrine in the law relating to mandamus that only clear legal rights are subject to enforcement by the writ"). The party seeking mandamus relief "bears the burden to establish all the elements necessary to obtain mandamus," including "establishing the clear legal right to the relief." 52 Am.Jur.2d *Mandamus* § 2.

The Attorney General has not met his burden to establish a "clear legal right" to relief. Abortion is not expressly or impliedly mentioned anywhere in the New Mexico Constitution. To support his theory, the Attorney General ignores this Court's established principles of

constitutional construction, relies upon other jurisdictions' interpretations of other constitutions, and makes general assertions about the New Mexico Constitution containing more extensive protections than the U.S. Constitution. None of these devices are sufficient to establish an unqualified right to abortion or overcome the plain fact that abortion is never mentioned in the New Mexico Constitution. *See* Section II.

Despite failing to establish the threshold requirement of a clear legal right to relief, the Attorney General skips to the Court's *Sandel* test[3] and insists that mandamus relief is proper. The Attorney General argues that the ordinance is unconstitutional because it "infringe[s] upon New Mexicans' rights under the Constitution's Equal Protection Amendment and Due Process and Inherent Rights Clauses." **[BIC 8].** Rather than demonstrating a clear legal right in these provisions, the Attorney General instead discusses how he thinks these provisions *could*—but never have been found to—support a right to abortion. He admits that New Mexico courts have never recognized a clear legal right to abortion in the New Mexico Constitution, but he nevertheless asks

[3] *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 277, 980 P.2d 55, 60 (holding that mandamus may be appropriate when the case "(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[.]").

the Court to "*find* . . . [such a right] . . . in the New Mexico Constitution." **[BIC 35]** (emphasis added), *see also* **[BIC 36].**

"The purpose of the writ of mandamus is to enforce performance of a public duty after it has been otherwise established . . . *not* to establish legal rights and duties." *Riddle*, 2021-NMSC-018, ¶ 34 (citations omitted) (emphasis added). Nor does mandamus lie, where "there is room for difference as to the true construction of constitutional language." *Pirtle*, 2021-NMSC-026, ¶ 51 (cleaned up) (citing 52 Am.Jur.2d Mandamus § 52 (2011)). Not only is there "room for difference" between the Attorney General's construction: his theory of constitutional construction has never been accepted by any New Mexico court.

This Court's decision in *Pirtle* is controlling of the outcome here. In that case, this Court denied a mandamus petition challenging the constitutionality of a directive banning "in-person attendance at a then-impending special legislative session" that had been called to address issues related to the COVID-19 pandemic. 2021-NMSC-026, ¶ 1. The petitioners had "invoke[d] Article IV, Section 12 of the New Mexico Constitution and general notions of due process as prohibiting the 'closing' of the special session and argue[d] that the Council's directive exceeded constitutional limits." *Id.*

In denying the mandamus petition, this Court made clear that the "outcome of [the] case [was] dictated in large measure by the narrow

contours of the writ of mandamus, which this Court has described as 'a drastic remedy to be invoked only in extraordinary circumstances' and then 'only to force a clear legal right against one having a clear legal duty to perform an act.'" *Id.* at ¶ 35. (quoting *Richardson*, 2007-NMSC-023, ¶ 9).

Relevant here, the Court rejected Article IV, Section 12 as a basis for mandamus relief because the existence of a "textual ambiguity" in that provision was "fatal" to the petitioners' "textually-based claim for mandamus relief." *Id.* at ¶ 51. The provision's use of the term "public" did not "plainly or unequivocally signal the framers' intention to require in-person attendance" at legislative proceedings. *Id.* at ¶ 54. And that was enough to foreclose mandamus relief: "At bottom, the uncertainty engendered by the drafters' unelaborated use of the term 'public' in Article IV, Section 12 is hardly the stuff of mandamus, which calls for clear-cut grounds, not tenuous or undeveloped argument." *Id.* at ¶ 56. Absent a "clear or explicit constitutional mandate," mandamus relief is improper. *Id.* The "directive prohibiting in-person attendance . . . was not shown to violate a clear and indisputable legal duty." *Id.* at ¶ 67. And so the Court denied the petition for mandamus relief. *Id.*

Pirtle compels the same result in this case. For the reasons explained below, there is no "clear and indisputable" right to abortion in New Mexico's Constitution, the challenged ordinance does not clearly and indisputably violate the Equal Rights Amendment, nor does it

exceed Roosevelt County's authority. *See infra*, Part II. Nothing in New Mexico's Constitution "plainly or unequivocally signal[s] the framers' intention to require" transportation of abortion instrumentalities through the mail or common carrier. *Pirtle*, 2021-NMSC-026, ¶ 54. The Attorney General's novel constitutional theories are "hardly the stuff of mandamus, which calls for clear-cut grounds, not tenuous or undeveloped argument." *Id.* at ¶ 56. "[M]andamus generally will not lie to compel or prohibit an act where, as here, the duty to act is not plainly prescribed but is to be gathered by a doubtful inference from a statute or constitutional provision." *Id.* at ¶ 63 (cleaned up).

Finally, the Attorney General also argues that the County "exceeded [its] constitutional authority" by attempting to regulate "medical services and licenses . . . governed by state law." **[BIC 10]**. Roosevelt County's ordinance does not regulate any medical procedure, including abortion, in any way. It merely calls for compliance with federal law. The ordinance is well within the County's authority to regulate for health, welfare, and safety. NMSA 1978, § 4-37-1 (1975) (noting counties are granted the "powers necessary and proper to provide for the safety, preserve the health, [and] promote the prosperity . . . of any county or its inhabitants"). And the ordinance does not attempt to regulate the abortion procedure or state licensing law. It merely requires those within the county jurisdiction to comply with existing federal law for the inhabitants' health and safety. Because the

Attorney General has not met his burden to show a clear and indisputable violation of a legal right, granting mandamus relief would be improper.

B. Other adequate remedies exist at law.

Where an adequate remedy at law otherwise exists, as is the case here, mandamus is improper for that additional reason. *Riddle,* 2021-NMSC-018, ¶ 23*; see also* NMSA 1978, § 44-2-5 (1884) (stating that a writ of mandamus "shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law"). The party seeking mandamus action has the burden to show that "there is no other plain, speedy and adequate remedy in the ordinary course of law," meaning that resolution of the issue "cannot be obtained through other channels *such as a direct appeal*." *Riddle*, 2021-NMSC-018, ¶ 23–24 (citing *Sandel*, 1999-NMSC-019, ¶ 11) (emphasis added).

This matter could and should have been brought in the district court. The Attorney General essentially concedes this and admits that "a direct appeal can . . . provide an expeditious resolution to an issue." **[BIC 12].** Despite this, he insists that "immediate relief is necessary," and that this case is "of sufficient public importance" to justify the Court's use of mandamus jurisdiction. **[BIC 12–13].**

As a general rule, this Court "defer[s] to the district court so that [it] may have the benefit of a complete record and so the issues may be more clearly defined." *Bird v. Apodaca*, 1977-NMSC-110, ¶ 5, 91 N.M.

279, 282, 573 P.2d 213, 216. *Cf. Griego*, 2014-NMSC-003, ¶ 10 (permitting a case involving a never-before-recognized constitutional right to same-sex marriage to go to the district court first and noting it had "denied two separate verified petitions for writs of mandamus" before accepting the writ of superintending control).[4]

The Attorney General asks this Court to bypass the normal legal process to make an extraordinary ruling finding a new right to abortion in the New Mexico Constitution. This request for extraordinary mandamus action is inappropriate, and if this case is to be heard at all, it would benefit from "a complete record" and "clearly defined" issues. *Bird*, 1977-NMSC-110, ¶ 5.

C. The Attorney General seeks an improper advisory opinion.

Mandamus is exceptionally inappropriate here because the Attorney General asks the Court to use it to issue an improper advisory opinion. This Court "avoid[s] rendering advisory opinions." *City of Las*

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[4] While this Court has in some cases issued mandamus writs when other remedies could have been pursued, those cases are rare exceptions to the rule. *See State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 15–17, 125 N.M. 343, 348, 961 P.2d 768, 773 (exercising mandamus jurisdiction because the Governor's actions implicated serious separation of powers issues that necessitated early resolution); *State ex rel. Bird*, 1977-NMSC-110, ¶ 6 (exercising mandamus jurisdiction because ordinary district court proceedings would be inadequate for state engineer being unlawfully transferred by the Governor).

Cruces v. El Paso Elec. Co., 1998-NMSC-006, ¶ 18, 124 N.M. 640, 645, 954 P.2d 72, 77 (quoting *Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 510, 775 P.2d 709, 712) (cleaned up). And "[i]t is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so." *El Paso Elec. Co.*, 1998-NMSC-006, ¶ 21.

Whether a constitutional right to abortion exists in the New Mexico Constitution is not properly before the Court. The ordinance at issue does not regulate abortion procedures or abortion facilities; it adopts *federal* law regulating the shipment of abortion instrumentalities. There is no world where the ordinance implicates an alleged state constitutional right to abortion, unless that right were construed to be a right to unregulated abortion on demand uninhibited by federal law. Any opinion on this issue would thus be advisory and would mean "violating fundamental principles of judicial procedure." *Pirtle*, 2021-NMSC-026, ¶ 65 (quoting *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007)).

II. The Ordinance does not clearly violate the New Mexico Constitution or exceed the local governments' authority.

A. The New Mexico Constitution does not clearly and indisputably protect a right to abortion.

No right to abortion has ever been found in the New Mexico Constitution. The Attorney General acknowledges this and instead asks

the Court to "*find* a right to choose whether to continue a pregnancy in the New Mexico Constitution." **[BIC 35]** (emphasis added). He details an unusual roadmap for the Court to locate the right, offering plenty of alternative routes in case the first, second, third, or fourth paths he proposes do not reach the desired destination. According to the Attorney General's directions, the right may be found in the Due Process Clause, the Search and Seizure Clause, the Inherent Rights Clause on its own, *or* in the Inherent Rights Clause in conjunction with the Equal Rights Amendment and the Due Process Clause. **[BIC 33–37]**. Anywhere the Court is willing to perceive a brand-new right will do. On the basis of this newfound right, he then asks the Court to annul the ordinance. Putting the improper posture of the request aside, the Attorney General's scattershot constitutional arguments fail on the merits.

The New Mexico Constitution does not contain a right to abortion, much less one that is "clear and indisputable." *Pirtle*, 2021-NMSC-026, ¶ 67. When interpreting the Constitution, this Court's "central purpose . . . is to reflect the drafters' intent." *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 9, 370 P.3d 797, 799 [published after Vol. 150 of the New Mexico Reports] (cleaned up). To determine the drafters' intent, the Court "turn[s] to the plain meaning of the words at issue." *Id.* "Under the plain meaning rule," the Court applies "the ordinary meaning of the chosen language unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice,

absurdity or contradiction." *Id*. This Court also reviews the history of the provisions at issue to inform its analysis. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 31, 126 N.M. 788, 975 P.2d 841, 852.

New Mexico has a long history of protecting unborn life and criminalizing abortion.[5] It is clear the drafters did not intend the Constitution to convey a right to abortion. The provisions purportedly supporting a right to abortion were adopted in 1911. N.M. Const. art. II, §§ 4, 10, 18. But at that time and for more than a century prior to that, New Mexico protected unborn life and criminalized abortion. *See also Salazar v. St. Vincent Hosp.*, 1980-NMCA-051, ¶ 16, 95 N.M. 150, 153, 619 P.2d 826, 829–30, *writ quashed sub nom. Harrold v. Salazar,* 94 N.M. 806, 617 P.2d 1321, *and writ quashed*, 617 P.2d 1321 (N.M. 1980)

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[5] Since its territorial days, New Mexico prohibited abortion unless necessary to save the mother's life; and after being admitted to the Union in 1912, New Mexico continued to protect unborn life and criminalize abortion to some extent until 2021. *See* 1853–54 N.M. Laws, act 28, ch. 3 §§ 10–11 (repealed in 1907) (prohibiting abortion in all cases except to save the life of the mother); N.M. CODE §§ 1463, 1464 (1907) (impliedly repealed in 1919) (retaining the prohibition with modified felony classification); NMSA 1919, §§ 40-3-1, -3 (repealed in 1963) (prohibiting abortion); NMSA 1963, §§ 40A-5-1, -3 (repealed in 1969) (retaining the 1919 law's prohibition on abortion but changing the felony classification); NMSA 1969, §§ 30-5-1–3 (1969), repealed by S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021) (retaining the prohibition of abortion except in cases of "justified medical termination," which included saving the life of the mother, as well as rape, incest, and grave physical or mental defects of the child).

(recognizing that "[f]rom 1854 until 1919, New Mexico's public policy, stated in legislation, was that a viable fetus was protected by criminal laws declaring a violation to be murder" under offenses against "lives and persons").

Moreover, the plain meaning of the New Mexico Constitution does not reveal any right to abortion. None of the referenced provisions mention abortion. N.M. Const. art. II, § 4, 10, 18. Nor can they be read to imply a right to abortion. The Attorney General relies on general assertions that the New Mexico Constitution conveys broader constitutional protections than the U.S. Constitution, **[BIC 24, 32, 36]**, and references "other jurisdictions" that have interpreted *other* state constitutions to contain a right to abortion. **[BIC 34, 36].** But neither of these arguments is enough to establish a new right to abortion under the New Mexico Constitution. And these arguments contradict many of the recognized interpretation and construction rules this Court has long followed. *See State v. Gomez*, 1997-NMSC-006, ¶ 20, 122 N.M. 777, 783, 932 P.2d 1, 7 (noting that New Mexico is committed to independent constitutional interpretation and interstitial analysis); *Morris v. Brandenburg*, 2016-NMSC-027, ¶¶ 18, 51, 376 P.3d 836, 844–55 [published after Vol. 150 of the New Mexico Reports] (holding that "the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental . . . constitutional right" and that "New Mexico's due process guarantees are analogous to the due process

guarantees provided under the United States Constitution”). *Cf. Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (holding that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause”).

Moreover, if the broader protection of the New Mexico Constitution grants any additional rights, it should be read to broadly protect rights that are *expressly* recognized, meaning that the express right to life should be read to protect all life, including the born and the unborn. *See* N.M. Const. art. II, § 4 (protecting “rights of enjoying and defending life”); § 18 (ensuring that “[n]o person shall be deprived of life . . . without due process of law”).

B. The ordinance does not clearly and indisputably violate the Equal Rights Amendment.

The ordinance does not run afoul of the Equal Protection Amendment; it merely requires compliance with a non-discriminatory federal mailing law. A law does not violate the Equal Protection Amendment if it is “gender neutral on [its] face” and “treats all persons alike, regardless of sex.” *State v. Sandoval*, 1982-NMCA-091, ¶¶ 5–6, 98 N.M. 417, 419, 649 P.2d 485, 487. The ordinance satisfies these requirements: it makes no sex-based classifications; and men and women are not treated any differently for shipment of abortion instrumentalities.

The Attorney General, however, insists that the ordinance is not gender-neutral because it makes "pregnancy-based" classifications. **[BIC 28].** And he argues that "controlling authority [demonstrates] that laws disadvantaging pregnancy-related care are presumptively invalid under the Equal Rights Amendment." **[BIC 31].**

The Attorney General misreads not only the ordinance, but also the controlling authority: *New Mexico Right to Choose*. In that case, this Court analyzed a Human Services Department rule that prohibited the use of government funds for women's procedures deemed medically necessary (namely, abortions), but not for men's procedures deemed medically necessary. The Court held that the rule violated the Equal Rights Amendment because it did "not apply the same standard of medical necessity to both men and women," and thus "treat[ed] men and women differently with respect to their eligibility for medical assistance." *N.M. Right to Choose*, 1999-NMSC-005, ¶¶ 2, 27. That case does not support the Attorney General's much broader assertion that laws touching on pregnancy are presumptively invalid. **[BIC 31].** Instead, it merely confirms that a law violates the Equal Protection Amendment when (1) it makes a sex-based classification, (2) men and women are similarly situated with respect to the classification, and (3) the law denies rights on the basis of sex. *N.M. Right to Choose*, 1999-NMSC-005, ¶¶ 36, 38–40.

In this case, the ordinance does not make classifications or deny rights based on sex—they do not even regulate abortion. In any event, unlike in *New Mexico Right to Choose*, where men and women were similarly situated concerning the right to receive government funds for medically necessary procedures, men and women are not similarly situated with respect to an alleged right to abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (explaining that the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other," and that "the goal of preventing abortion" is not invidious discrimination) (cleaned up). That's because, as even Planned Parenthood has conceded in other cases, "[w]omen and men are not similarly situated in terms of the biological capacity to be pregnant." *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 743 (Iowa 2022) (quoting Planned Parenthood's brief and agreeing that "[w]omen undeniably are not" similarly situated to men with respect to laws regulating abortion).

Roosevelt County respectfully urges the Court to decline the invitation to take an issue of profound importance out of the hands of the people where the New Mexico Constitution leaves that issue.

C. The ordinance does not exceed Roosevelt County's authority.

Counties are empowered to regulate and enact ordinances for their inhabitants' health, safety, and welfare. NMSA 1978, § 4-37-1 (1975). "The board of county commissioners" is specifically empowered to enact "any ordinance to discharge these [health, welfare, and safety] powers not inconsistent with statutory or constitutional limitations." *Id.* The Attorney General himself acknowledges that "[t]he Legislature has conferred police powers to counties." **[BIC 14]** (citing *Brazos Land, Inc. v. Bd. of Cnty. Comm'rs*, 1993-NMCA-013, ¶ 27, 115 N.M. 168, 174, 848 P.2d 1095, 1101). Roosevelt County is thus empowered by law to enact ordinances, like Ordinance 2023-01, aimed at safeguarding the health and safety of its citizens.

From the outset, the Attorney General's claim that Roosevelt County's ordinance exceeds the County's authority because of state-law preemption is defeated. The County's ordinance does not conflict with state laws regulating abortion or state abortion-facility licensing. The ordinance does not regulate abortion procedures, providers, or facilities; it simply requires compliance with federal mailing law. And the state loses on any conflict with federal law. *See* Section III *infra*.

Nor does Roosevelt County's ordinance—which authorizes a private right of action—violate the New Mexico Constitution's prescription against private laws. **[BIC 21–23].** The New Mexico

Constitution makes clear that localities are 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) (emphasis added). A county may lawfully act incident to its independent powers 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. v. The City of Santa Fe*, 2006-NMCA-007, ¶ 28, 138 N.M. 785, 797, 126 P.3d 1149, 1161.

The Attorney General incorrectly claims that the ordinance acts outside of its delegated power and "disrupts the uniformity of New Mexico law on abortion." **[BIC 22–23].** The ordinance is well within Roosevelt County's independent power to legislate for health and safety, which the Attorney General does not dispute exists. The private-cause-of-action provision is reasonably incident to ensuring that this law is followed and to protecting the health and safety of the county inhabitants because it helps assure enforceability and incentivize compliance. It also does not implicate non-uniformity concerns: the federal law it mirrors applies uniformly across the State of New Mexico.

Moreover, many New Mexico localities have lawfully enacted similar ordinances that regulate private third-party relationships and create private rights of action. *See* BERNALILLO COUNTY, N.M. CODE art.

III, div. 6, § 2-218 *et seq*. (2023) (enacting minimum-wage ordinance and creating private rights of action); BERNALILLO COUNTY, N.M. CODE art. XII, § 14-703 (enacting mandatory paid-time-off ordinance that creates both private and county enforcement); ALBUQUERQUE, N.M. CODE art. XII § 13-12-5 (enacting minimum-wage ordinance with civil damages and criminal prosecution); LAS CRUCES, N.M. CODE art. III, § 14-62. (enacting minimum-wage ordinance that creates a right of action in district court for damages); *New Mexicans for Free Enter.*, 2006-NMCA-007, ¶ 72. (finding Santa Fe's minimum-wage ordinance constitutional). In the effort to protect unlimited abortion, the Attorney General has taken selective aim at Roosevelt County's ordinance, but meanwhile ignored other ordinances which the Attorney General agrees with as a policy matter.

III. State laws, including H.B. 7, do not affect or preempt the ordinance because the ordinance adopts federal law.

A. State law does not preempt federal law.

The Attorney General insists that H.B. 7. preempts the ordinances and "reinforces the Legislature's intent to preempt local authority on the specific issue of reproductive health care." **[BIC 20]**. H.B. 7 prohibits "denying, restricting, or interfering with a person's access to or provision of reproductive health care." H.B. 7. According to the Attorney General, H.B. 7 thus preempts the ordinances because they "seek to restrict access to reproductive health care[.]" **[BIC 21]**.

It is true that, as a general matter, state law preempts local law. But that is not true here because (1) there is no conflict between state law and Roosevelt's ordinance, *see infra*, and (2) to the extent that there is any conflict, Roosevelt's ordinance tracks federal law, which would preempt any conflicting state law.

The Attorney general asserts two sources of alleged conflict: NMSA 1978, § 61-6-1, *et seq*. (2021) (governing medical provider and facility licensure) and H.B. 7 (broadly banning government actors from "restricting access to reproductive health care"), But Roosevelt County's ordinance does not touch on licensure at all—it merely directs all individuals and entities to comply with federal law on mailing and shipping. Ordinance 2023-01, Section 9. And if the Ordinance interacts with H.B. 7 at all, it is only in the same way that federal law does, such that federal law supersedes and resolves any conflict in favor of the Ordinance. U.S. Const. art. VI, cl. 2. (federal law is "the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

To the extent that H.B. 7 and other state laws mandate acting contrary to the federal prohibition against mailing abortion instrumentalities, they are preempted. The Attorney General does not dispute that preemption of state law occurs when "federal law so occupies the field that state courts are prevented from asserting

jurisdiction" or when there is "an unavoidable conflict between the state law and the federal law." *State v. Herrera*, 2014-NMCA-003, ¶ 9, 315 P.3d 311, 314 [published after Vol. 150 of the *New Mexico Reports*] (cleaned up). The Comstock Act clearly falls into these categories. The Act regulates interstate and international commerce, a field limited to the federal government; and H.B. 7's mandate that public bodies allow unhindered access to abortion—assuming that includes the intentional mailing of abortion instrumentalities—unavoidably conflicts with the Comstock Act. *See Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 486 (2013) (cleaned up) (holding that "[w]hen federal law forbids an action that state law requires, the state law is without effect").

The Attorney General's attempt to get around federal preemption by arguing a novel interpretation of the Comstock Act is unavailing. The Attorney General's claim about Comstock's interpretation ignores its text. And no court has ever struck down or suspended enforcement of the Comstock Act's prohibition on mailing chemical abortion drugs. In any event, this Court does not have the authority to rewrite federal law.

The Attorney General claims the ordinance mirroring federal law violates the New Mexico Constitution, while insisting that this case "rests solely on State law and presents no federal question." **[BIC 38].** (cleaned up). His basis for this claim is flimsy: he claims that the "provisions in the ordinance[] ha[s] no federal analog" and localities cannot enforce federal law. *Id.* But while Ordinance 2023-01 contains

legal provisions not in the Comstock Act, *see* Section II.C., this does not justify disregarding the federal matter, the basis for Roosevelt County's ordinance. And localities have inherent *municipal* authority to enforce *municipal* laws, regardless of whether those municipal laws happen to mirror federal law. It would be absurd for a locality to be unable to enforce its own laws simply because those laws are consistent with federal law.

The Attorney General invites the Court to discover a state constitutional right to abortion and declare that such a decision rests solely on state law, all the while ignoring that the core of Roosevelt County's ordinance and the other ordinances call for compliance with federal law. Federal law is the looming backdrop as well as the centerpiece of every ordinance in this case, and no turning of a blind eye to this fact can change a decision into one based purely on state law.

B. H.B. 7 is unconstitutional as the Attorney General attempts to apply it here.

H.B. 7 presents serious constitutional problems. In an aggressive attempt to annul Roosevelt County's ordinance (and effectively federal law)— and go much further—the New Mexico legislature hastily enacted an overbroad and vague statute. H.B. 7 states that "[a] public body . . . shall not deny, restrict or interfere with a person's ability to access or provide reproductive health care." But the meaning of "restrict" and "interfere" in this context is vague and could easily be

interpreted to have a broad range of meanings that tread on the constitutional rights of pro-life New Mexicans.

The statute as it stands (1) does not allow individuals a fair opportunity to determine whether their conduct is prohibited (2) permits impermissible delegation of legislative authority to prosecutors to determine whether conduct is criminal, and (3) impermissibly chills protected speech. *See State v. Pierce*, 1990-NMSC-049, ¶ 19, 110 N.M. 76, 81, 792 P.2d 408, 413 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)). For example, under H.B. 7, a public body's accommodation of religious or conscientious objectors, in whose consciences abortion results in death to an unborn baby, to abortion in pharmacies or hospitals could very well be considered "interference" with a woman's ability to receive an abortion. Granting permits to groups hosting pro-life rallies or marches or allowing billboards expressing a pro-life message could be deemed illegal under the act. Even allowing pro-life sidewalk advocacy outside of abortion facilities could arguably be prohibited under H.B. 7's sweeping language. Any such interpretation would violate fundamental constitutional freedoms like free speech, free association, and the free exercise of religion.[6]

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[6] Additional concerns about H.B. 7's unconstitutionality have been noted elsewhere but are not relevant here. *E.g.*, *Senate Republicans Condemn House Bill 7 Assault on Parental Rights and Conscience Protections*, Code RED (Mar. 1, 2023), https://bit.ly/3LUswA5.

If this Court entertains the Attorney General's suggestion of looking to H.B. 7 as potentially preemptive of the County's ordinance, it should do so fully cognizant of H.B. 7's constitutional defects.

CONCLUSION

Mandamus action is not proper in this case. No clear and indisputable legal right to the requested relief exists, and other adequate remedies exist at law. The challenged ordinance does not violate the New Mexico Constitution. And state laws, including the overbroad and unconstitutional H.B.7, do not preempt the ordinance. The only preemption that occurs is federal preemption of New Mexico law, to the extent that New Mexico state law contradicts federal prohibitions on mailing abortion instrumentalities.

Roosevelt County respectfully asks this Court to dismiss this mandamus action as improper, or in the alternative, to uphold the ordinance on the merits.

Respectfully submitted this 10th day of May, 2023.

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**Pro Hac Vice affidavit forthcoming*

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CERTIFICATE OF SERVICE

In accordance with the electronic filing manual, State of New Mexico Supreme Court, I hereby certify that service of this document was made on May 10, 2023, via the notice transmission facilities of the case management and electronic filing system of the Supreme Court to all counsel of record and/or email to counsel of record.

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STATEMENT OF COMPLIANCE

This brief complies with the typeface and type-volume requirements of NMRA Rules 12-318(F)(2) and (F)(3). The brief was prepared in a proportionally spaced typeface in 14-point Century Schoolbook font, the body of the brief does not exceed 35 pages, double-spaced,[7] and the body of the brief contains 5,804 words, calculated using Microsoft Word for Microsoft Office 365, version 2208.

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[7] This brief uses true double-spacing, which means that because the brief is set in 14-point font, the line spacing is set to Exactly 28 points.