



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Petitioner,

v.

No. S-1-SC-39742

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

Respondents.

**BOARD OF COUNTY COMMISSIONERS FOR
ROOSEVELT COUNTY'S RESPONSE TO PETITIONER'S
EMERGENCY PETITION FOR WRIT OF MANDAMUS
AND REQUEST FOR STAY**

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ORAL ARGUMENT REQUESTED

COMES NOW, Respondent the Board of County Commissioners for the County of Roosevelt (hereinafter Roosevelt County), by and through its counsel, NM Local Government Law, LLC (Michael I. Garcia and Randy M. Autio) and states as its Response to Petitioner's Emergency Petition for Writ of Mandamus and Request for Stay as follows:

I. INTRODUCTION

A. Preemption.

The central legal issue in this case is preemption. But the question is not simply whether New Mexico law preempts the Roosevelt County Board of County Commissioners (Roosevelt County) from enacting an ordinance that calls for enforcement of federal law; the question is also whether federal law preempts the State from granting permission for what federal law expressly forbids. Roosevelt County's Ordinance 2023-01 itself does not address the procedure of abortion or regulate how it may be performed in any way. Thus, by its terms, the Ordinance does not purport to regulate the medical aspect of the procedure, which the Attorney General argues is preempted. Rather the Ordinance addresses specifically the shipment of abortion instrumentalities by mail or by common carrier as prohibited by 18 U.S.C. § 1461 and § 1462(c), which are currently in effect.

B. Constitution.

Concerning the question of whether there is a right to abortion under the New Mexico Constitution, Roosevelt County notes that there is no express provision of such a right either in that document or in State statutes. Nor has the New Mexico Supreme Court found a right to abortion in the State's Constitution. Accordingly, the Attorney General's Emergency Petition for Writ of Mandamus and Request for Stay (the Petition) has begged the question, assuming what it is trying to prove, by arguing that Roosevelt County's Ordinance 2023-1 violates a hitherto unstated right to abortion in New Mexico. As the Attorney General notes, however, there are express provisions defending and protecting life in both the Inherent Rights and Due Process clauses of the New Mexico Constitution. These express provisions bear on whether there is an unstated right to abortion.

C. Original Jurisdiction.

Regarding the Attorney General's position that this matter is one that implicates fundamental constitutional questions of great public importance; that it presents a purely legal issue capable of resolution on virtually undisputed facts; and calls for expeditious resolution, *Petition*, p. 4-5, Roosevelt County agrees. State ex rel. Sugg v. Oliver, 2020-NMSC-002, ¶ 7 456 P.3d 1065. A murkier question, however, is whether the enactment of an ordinance can be considered non-discretionary. Legislation is among the most discretionary of actions, especially as the question

concerns the content of legislation. Furthermore, this is a matter possibly resolved by other means, as the Legislature appears to be contemplating with HB 7 regarding abortions and sex change.

https://nmlegis.gov/sessions/23%20Regular/bills/house/HB0007_PDF. Roosevelt County does not contest the Court's original jurisdiction; but it does observe that the Legislature may have some role in answering the question, as do the people of New Mexico in ratifying or rejecting constitutional amendments. N.M. Const., art. XIX, § 1.

II. THE LAWS AT ISSUE:

A brief outline of the laws at issue here may be helpful to begin. Roosevelt County Ordinance 2023-01 at Section 9 makes it unlawful for any person or licensed abortion clinic within its boundaries to violate 18 U.S.C. § 1461:

- A. ...by using the mails for the mailing, carriage in the mails, or delivery of:
 - 1. Any article or thing designed, adapted, or intended for producing abortion, or
 - 2. Any article, instrument, substance, drug, medicine or thing, which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion.

Section 9 also makes it unlawful for any person or licensed abortion clinic within its boundaries to violate 18 U.S.C. § 1462...:

- B. ...by:

1. Using any express company or other common carrier or interactive computer service for carriage in interstate or foreign commerce of any drug, medicine, article or thing designed, adapted, or intended for producing abortion; or
2. Knowingly taking or receiving from such express company or other common carrier or interactive computer service any matter or thing described in subsection (B)(1).

Section 9(C) makes it unlawful for any person or licensed abortion clinic within its boundaries, or “any employee or agent of an abortion clinic licensed by Roosevelt County to engage in conduct that aides or abets the violation of 18 U.S.C § 1461 or §1462.” Accessible at <https://www.rooseveltcountry.com/wp-content/uploads/2023/01/2023-01SCFTU-Ordinance.pdf>.

These federal statutes have never been repealed or struck down.

The first federal statute deals with instrumentalities (a term Roosevelt County uses throughout the brief for short reference to the items prohibited) of abortion sent in the mail. In relevant part it provides:

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose;...

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined under this title or imprisoned not more than five years, or both, for the first such offense,

and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1461. In sum, it provides for criminal penalties for sending abortion instrumentalities through the mail.

The second federal statute provides for delivering the same instrumentalities with common carriers:

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934), for carriage in interstate or foreign commerce--

...

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful--

Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1462. This statute provides criminal penalties for its violation by using a common carrier to deliver abortion instrumentalities.

Finally, Roosevelt County has resolved that “human life, including fetal life, must always be protected and that society must protect those who cannot protect themselves; ...”. Roosevelt County Resolution 2021-08 In Support of Life, <https://www.rooseveltcounty.com/wp-content/uploads/2021/01/2021-08SupportofLife.pdf>. This Resolution informs and animates Roosevelt County’s position on these questions.

III. DISCUSSION.

A. Roosevelt County’s Ordinance 2023-01 addresses the use of mail and common carriers to deliver instrumentalities of abortion, but does not purport to regulate the procedure of abortion, and is therefore not preempted by the Medical Practice Act, NMSA 1978, § 61-6-1, et seq. (2021).

By its terms, Ordinance 2023-01 at Section 9 makes it unlawful for any person or licensed abortion clinic within its boundaries to violate 18 U.S.C. § 1461:

- C. ...by using the mails for the mailing, carriage in the mails, or delivery of:
3. Any article or thing designed, adapted, or intended for producing abortion, or
 4. Any article, instrument, substance, drug, medicine or thing, which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion.

Section 9 also makes it unlawful for any person or licensed abortion clinic within its boundaries to violate 18 U.S.C. § 1462.

D. ...by:

3. Using any express company or other common carrier or interactive computer service for carriage in interstate or foreign commerce of

- any drug, medicine, article or thing designed, adapted, or intended for producing abortion; or
4. Knowingly taking or receiving from such express company or other common carrier or interactive computer service any matter or thing described in subsection (B)(1).

Section 9(C) makes it unlawful for any person or licensed abortion clinic within its boundaries, or “any employee or agent of an abortion clinic licensed by Roosevelt County to engage in conduct that aides or abets the violation of 18 U.S.C. § 1461 or §1462.” Ordinance 2023-01, Section 9.

Nowhere in its language does it attempt to address any medical aspect of the procedure of abortion. In simple terms, Ordinance 2023-01 says nothing about the lawfulness of abortion, or whether or how the procedure would be carried out. It merely directs compliance with federal law. In fact, Section 9 actually contemplates a “licensed” clinic, implying that such a license would be possible.

Assuming for argument that New Mexico State law has preempted the practice of medicine in every aspect, it has not yet done so expressly. See NMSA 1978, § 61-6-1, et seq. But even it had preempted the field, and specifically the practice and procedure of abortion, that would not preempt the delivery of instrumentalities of abortion by mail or common carrier contrary to federal law. Nothing in State law has specifically addressed these federal statutes. In any event, State law cannot disregard them, and much less preempt them.

Again, Roosevelt County has made no direct regulation of the practice of abortion whatsoever. It has only required those within its boundaries to observe federal law regarding the delivery of abortion instrumentalities.

B. New Mexico law allows local governments to regulate civil relationships reasonably incident to a public purpose within its delegated powers, absent serious concerns about non-uniformity.

New Mexico Counties are without doubt empowered to regulate for the health, welfare, and safety:

All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

NMSA 1978, § 4-37-1; see also, e.g., § 3-21-1 (cities and counties may zone for health, safety, morals and general welfare.). Moreover, county commissioners take an oath to support the Constitution New Mexico and the Constitution of the United States, which includes Article VI and its Supremacy Clause. See NMSA 1978, § 3-10-2(A). Roosevelt County will address the Supremacy Clause further, *infra*.

But for the present discussion, local governments have lawfully regulated civil relationships among private third parties. One example is the minimum wage, where Santa Fe, Bernalillo County, Albuquerque, and Las Cruces have enacted minimum

wages and created private rights of action. See New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785; Bernalillo County Code of Ordinances, § 2-218 et seq.

Bernalillo County authorizes a private right of action in a court of competent jurisdiction to enforce its minimum wage. Bernalillo County's ordinance authorizes coordinating implementation and enforcement of its minimum wage, and as damages, the wage owed plus interest, plus double the lost wage, and any other appropriate legal or equitable remedy. Id. at § 2-222.

Certainly, the differing minimum wages in New Mexico's 33 counties are not uniform across the State. Nevertheless, the Court of Appeals found such a structure to be lawful and constitutional. See New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, 138 N.M. 785. And nevertheless, businesses covered under ordinances such as Bernalillo County's are compelled to pay the minimum wages set in those localities, with government employees actually involved in the implementation and enforcement. In contrast regarding Ordinance 2023-01, Roosevelt County employees and other State and local agents may *not* initiate an action themselves to enforce Ordinance 2023-01. Id. at Section 3.

Bernalillo County also requires mandatory paid time off for certain employees within its jurisdiction and creates both private and county enforcement through an administrative process and courts of competent jurisdiction, with both damages and

civil penalties to include backpay at time and a half, rescission of discipline, reinstatement, attorney fees, and fines. Bernalillo County Code of Ordinances, § 14-703. This is a non-trivial level of involvement of the local government in the relationship of third-party employers and employees.

The City of Las Cruces creates a right of action in district court for damages, and attorney fees for violation of its minimum wage as a public nuisance. See Las Cruces Code of Ordinances, § 14-64. Albuquerque may enforce its minimum wage both with civil damages and criminal prosecution. Albuquerque City Code, § 13-12-5.

Accordingly, private actions for third parties created by local governments are not per se unconstitutional. In fact, they have been upheld by New Mexico courts, and appear to be proliferating. And where a county is regulating incident to a public purpose, New Mexico law clearly allows it. In the case of Roosevelt County's ordinance, the public purpose is clear: individuals and businesses in Roosevelt County must comply with federal law regarding delivery of abortion instrumentalities. Complying with federal law is generally consistent with health, safety, welfare, good order, and morals.

But the converse proposition should be startling: is New Mexico free to ignore federal law? Though few absolutes exist in law, the answer should nearly always be, no.

Concerns about uniformity here are minimal. Employers who have operations around the State, and who must comply with various minimum wage laws, even with the obvious burdens of doing so, demonstrate that whatever the burden would be for them, it could not justify flouting federal statutes across the State as would be the case here.

In sum, there is nothing inherently unconstitutional about Roosevelt County creating a third party right of action to enforce existing federal law in view of Santa Fe, Albuquerque, Bernalillo County, and Las Cruces creating their own for violations of minimum wages and paid-time-off ordinances. If those political subdivisions of the State of New Mexico can regulate the rights of third party relationships, Roosevelt County should be able to regulate them by requiring compliance with federal law, which the State of New Mexico is also bound by.

- C. Preemption applies more clearly to New Mexico's relationship with federal law than the Attorney General's suggestion of establishing abortion as an unwritten constitutional right barring Roosevelt Counties right to legislate.

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be 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.

U.S. Const., art. VI, cl. 2. In the present case 18 U.S.C. § 1461 and § 1462 are without dispute “Laws of the United States...made in Pursuance” of the Constitution. They are still in effect. They have never been repealed or struck down.

The first statute deals with instrumentalities sent in the mail. In relevant part it provides:

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose;...

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined under this title or imprisoned not more than five years, or both, for the first such offense, and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1461. In sum, it provides for criminal penalties for sending abortion instrumentalities through the mail.

The second statute provides for the same with common carriers:

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...

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful--

Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.

18 U.S.C. § 1462. Again, this statute provides criminal penalties for its violation by using a common carrier to deliver abortion instrumentalities.

In the present case, there is no express constitutional or statutory right to abortion in New Mexico. The Attorney General's Petition, however, assumes what it seeks to prove: that there is a constitutional right to abortion in New Mexico. Without such a right, whether constitutional or statutory, no conflict preemption exists. At least at present.

In State v. Herrera, 2014-NMCA-003, ¶ 9, 315 P.3d 311, the Court of Appeals noted that the question whether state law has been preempted by federal legislation depends upon whether Congress intended such a result. To answer the question, courts look to whether Congress has expressly preempted state law and, in the absence of express preemption, to whether such a purpose can be implied from the

structure and the purpose of the federal legislation in question. Field preemption, which is a form of implied federal preemption of state law, occurs when federal law so occupies the field that courts are prevented from asserting jurisdiction. Id. at. ¶ 9.

The federal statutes operating here prohibit delivery of abortion instruments by mail and common carrier. They do not expressly preempt state action. But the prohibition on interstate and international delivery of abortion instrumentalities is legislation operating in a field ordinarily restricted to the federal government—regulating interstate and international commerce—and therefore impliedly preempts state action to the contrary.

Conflict preemption is a form of implied federal preemption. It arises when there is an unavoidable conflict between the state law and the federal law, or when the state law is an obstacle to the full accomplishment of congressional objectives. Herrera, 2014-NMCA-003, ¶ 9. As the Attorney General notes, *Petition*, p. 20, preemption occurs when an ordinance allows an act which state law forbids. Protection & Advocacy Systems, 2008-NMCA-149, ¶ 58. The same is true where state law requires, or presumably allows, an act federal law forbids. See Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 U.S. 472, 486, 133 S.Ct. 2446, 2476 (2013). Roosevelt County respectfully notes, the federal statutes here are “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.” U.S. Const. Amend. VI, cl. 2. Thus, the federal statutes at issue here would preempt many state-granted protections for abortion.

D. The Inherent Rights, Due Process, Equal Protection and Equal Rights Clauses of the New Mexico Constitution do not provide for an express constitutional right of abortion and the Court should avoid the invitation to rationales the United States Supreme Court has discarded.

Much of the Attorney General’s argument attempts to find a right to abortion in the Inherent Rights, Equal Protection, Due Process, and Equal Rights clauses, with reference to privacy and the personal nature of the decision to abort a baby. Notably, even in four constitutional provisions mentioned, not one expressly provides for a right to abortion. Without going into great detail, these are the same kinds of arguments and rationales the United States Supreme Court discarded in Dobbs v. Jackson Women’s Health Org., 597 U.S._____, 45-56, 142 S.Ct. 2228, 2266-79 (2022), when it overturned Roe v. Wade, 410 U.S. 113 (1973). Constitutional rights seem to have a better chance of enduring if they are found in actual text.

As the discussion concerns the Inherent Rights Clause, N.M. Const. art. II, § 4, Roosevelt County notes that the provision, while it says nothing about abortion, expressly protects the inherent right to life, which itself is a necessary predicate to every other right. Roosevelt County believes that a consistent approach would recognize that the rights to life, liberty, property, and happiness, include being born

to exercise those rights. The same is true of the State guarantees of due process, without which the New Mexico Constitution forbids the State's taking of life. N.M. Const. art II, § 18. And the Equal Protection clause which guarantees all persons equal protection under the law. Id. Likewise, the Fourteenth Amendment to the United States Constitution, which guarantees equal protection to all persons born in the states, and forbids states from taking life without due process. U.S. Const. Amend. XIV. For its part, Roosevelt County has recognized all of these provisions in its Resolution 2021-08, which it resolved In Support of Life, declaring "that innocent human life, including fetal life, must always be protected...." Roosevelt County's position is that a state's prohibiting such protection to any form of human life would be to deny life without due process and equal protection.

Insofar as the discussion concerns equal rights based on sex, N.M. Const. art. II, § 18, it is unclear how that provision necessitates a right to abortion, since men and women are not similarly situated regarding the ability to conceive or have an abortion. And the privacy or personalness of a decision cannot by themselves confer rightness or constitutionality upon it.

Roosevelt County, through the actions of its Board of County Commissioners at issue in this case, has clearly expressed its position about abortion and the right to Life. Roosevelt County speaks for a considerable number of citizens of the State of New Mexico. Roosevelt County understands the gravity of the decision the Attorney

General asks this Court to decide on an emergency basis with an extremely short briefing schedule, and no real opportunity for public engagement or participation. The good citizens of the State of New Mexico, on both sides of this important and controversial issue, deserve a full and fair hearing on this matter. The Attorney General asked for a special summary process which does not suit the gravity of these issues. This matter may be more appropriately decided by a clear and unambiguous law from the legislature or through a Constitutional Amendment.

If the Court is inclined to construe the New Mexico Constitution as providing greater protection of rights than the federal counterpart as the Attorney General urges, and which it certainly may do, State v. Gomez, 1997-NMSC-006, 122 N.M. 777, then of all rights guaranteed in the New Mexico Constitution, the right to life should be read most broadly. No other right is possible without it.

CONCLUSION

For the foregoing reasons, Roosevelt County respectfully asks the Court to deny the Emergency Petition. While the case is pending, Roosevelt County does not oppose the stay requested by the Attorney General.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

As required by Rule 12-504(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word for Microsoft 365 version 2205, and that the body of the brief contains 4,375 words

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2023 I filed the foregoing pleading electronically through the court's Odyssey file and serve system. I FURTHER CERTIFY that a copy of the foregoing was also transmitted via electronic mail to the following:

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