American University Journal of Gender, Social Policy & the Law

Volume 32 | Issue 2 Article 1

2024

Municipal Abortion Bans: When Local Control Clashes with State Power

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MUNICIPAL ABORTION BANS: WHEN LOCAL CONTROL CLASHES WITH STATE POWER

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"I believe cities make decisions all the time based on the health and welfare of their residents. If an abortion facility moved into Abilene, TX, it's not Austin, TX's problem. It's not Washington D.C.'s problem. It's Abilene's problem." Mark Lee Dickson, Right to Life of East Texas[1]

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1. VICE News, *Meet the Man Trying to Ban Abortion in America, One Town at a Time*, YOUTUBE (Jan. 22, 2022), https://www.youtube.com/watch?v=X6mtlT34VfE.

INTRODUCTION

When the Supreme Court overturned decades of precedent on abortion policy in its 2022 *Dobbs* ruling,[2] anti-abortion activists saw multiple opportunities to solidify and expand their gains. Many activists focused on state level issues.[3] Meanwhile, several policy entrepreneurs considered local efforts, perhaps taking a cue from previous efforts to pass municipal ordinances on policies involving same-sex marriage,[4] gun control,[5] and, most notably, Big Tobacco.[6]

In the 1990s and 2000s, tobacco control advocates tried various approaches to limit the advertising, sale, and use of tobacco products.[7] Municipalities sought to address a variety of subjects, including youth access to tobacco products, freestanding displays of tobacco products, the location of tobacco vending machines, billboard advertising, minimum cigarette pack

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2. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

3. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (providing the status of abortion bans in each state).

4. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147 (2005).

5. *See* Joseph Blocher, *Cities, Preemption, and the Statutory Second Amendment,* 89 U. CHI. L. REV. 557, 568-69 (2022) (discussing some effects of the "second wave of preemption" of local gun control ordinances).

6. *See* Leslie Zellers & Ian McLaughlin, *State and Local Policy as a Tool to Complement and Supplement the FDA Law*, 2 HASTINGS SCI. & TECH. L.J. 117, 117-19 (2010) (discussing advantages of local tobacco control).

7. *See* INSTITUTE OF MEDICINE, SECONDHAND SMOKE EXPOSURE AND CARDIOVASCULAR EFFECTS: MAKING SENSE OF THE EVIDENCE 113 (2010); Michelle Griffin et al., *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000-2010*, 60 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY AND MORTALITY WKLY. REP. 1124 (Aug. 26, 2011), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm (finding that states substantially reduced their preemption of local ordinances restricting smoking over the decade).

sizes, licensing tobacco product retailers, and restricting the locations and circumstances in which people may use tobacco products.[8] These attempts were met with mixed results, but they all allowed advocates to learn which strategies were effective and could survive legal challenges in different states.

Tobacco control advocates have largely won the battle to prohibit smoking indoors in a majority of U.S. states.[9] Other groups have sought similar successes at the municipal level, often where state-level change proved politically impossible.[10] Now, anti-abortion advocates are using the tobacco control advocates' strategies to try to block abortion access at the local level.[11] Anti-abortion advocates claim that *Dobbs v. Jackson Women's Health,* which overturned the federal constitutional right to abortion, not only allows states to prohibit abortion but also "opened up the door for localities to regulate abortion."[12] While many extant anti-abortion ordinances passed prior to June 2022 in states that have outlawed abortion, many present efforts, post-*Dobbs*, are focused on states where abortion is legal.

For example, one organization encourages individuals to seek passage of anti-abortion ordinances in their municipalities. The organization's website claims that it tailors anti-abortion ordinances for each city it works with and provides the city with a letter from an attorney offering legal support "if any litigation comes as a result of the passing of that particular ordinance."[13]

Anti-abortion activists are using different strategies in different states. Some focus on restricting zoning for abortion clinics.[14] Others address the

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8. *See generally* John A Francis, Erin M Abramsohn, & Hye-Youn Park, *Policy-Driven Tobacco Control*, 19 TOBACCO CONTROL i16 (2010) (discussing tobacco control policies at the state and local level).

9. *See STATE System Smokefree Indoor Air Factsheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/statesystem/factsheets/sfia/SmokeFreeIndoorAir.html.

10. *See, e.g.*, Udi Ofer, *Proliferation of Local Anti-Immigration Ordinances in the United States*, ACLU OF N.Y. (May 12, 2007), https://www.nyclu.org/en/publications/proliferation-local-anti-immigrant-ordinances-united-states (discussing instances where municipalities adopted anti-immigrant ordinances in California and other states where such policies would not likely be enacted at the state level).

11. *See, e.g.*, *Home*, SANCTUARY CITIES FOR THE UNBORN, https://sanctuarycitiesfortheunborn.org/ [hereinafter SANCTUARY CITIES].

12. Sylvie McNamara, *An Abortion Battle in Southwest Virginia Could Have Big Implications*, WASHINGTONIAN (Nov. 7, 2022), https://www.washingtonian.com/2022/11/07/an-abortion-battle-in-southwest-virginia-could-have-big-implications/.

13. SANCTUARY CITIES, *supra* note 11.

14. *See, e.g.*, McNamara, *supra* note 12 *(*stating that Bristol, Virginia, considered

licensure of abortion providers.[15] Some purport to create a cause of action for private individuals to sue neighbors and others in their municipality who get an abortion.[16] Still, others seek to enforce the federal Comstock Act, alleging that it prohibits the mailing of abortifacients and preempts state abortion law to the contrary.[17]

This multi-pronged strategy may be deliberate. Municipalities have limited legal authority to regulate issues within their boundaries.[18] The authority varies from state to state and often also varies within states based on the type or size of a municipality.[19] Especially after the elimination of federal constitutional protection for abortion, it is not yet known which, if any, of these strategies might be successful. By testing various strategies in different legal forms in municipalities in other states, the activists may be able to see which strategies will be sustainable and which they might be able to expand if needed. By acting in different jurisdictions, they may achieve different legal outcomes, even when all other relevant conditions are nearly identical. Finally, they may cultivate the fervor of their base and foment policy change at the state and federal levels by seeking to implement restrictions at the local level, regardless of the ultimate success of the ordinances.

This Article evaluates the likely success of each of these strategies in two states in which they are currently being tried: Nebraska and New Mexico. Both states currently permit abortion, but each regulates it differently at the state level. While some advocates for specific causes and some scholars of municipal governance argue that municipal authority should be interpreted expansively vis á vis state authority under certain circumstances, I argue that municipalities ought not to be permitted to regulate abortion more strictly than state law. Part I will provide an overview of relevant municipal law, emphasizing the power of different kinds of municipalities to regulate issues

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adopting a zoning ordinance prohibiting abortions on the strength of a state Supreme Court opinion that found a municipality validly adopted an ordinance regarding land use and waste disposal).

15. *See*, *e.g.*, EUNICE, N.M., CODE §19.030 (2023).

16. *See*, *e.g.*, HOBBS, N.M., CODE § 5.52 (2022).

17. *See id.* The Comstock Act, first enacted in 1873, criminalizes the sending of materials and drugs intended for procuring an abortion, among other "obscene" things, through mail, common carriers, or the internet. 18 U.S.C. §§ 1461, 1462.

18. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2:8 (3d ed. 2023).

19. *Id.*

addressed in the abortion ordinances this article will consider.[20] Part II will examine several different types of ordinances some municipalities have adopted in the wake of the *Dobbs* decision and their likely legality in the settings in which they were passed.[21] Part III will draw several conclusions about the legal ability of municipalities to adopt ordinances that alter the availability of abortion within their jurisdictions or the prosecution of its provision in comparison with relevant state law.[22]

PART I: AN OUTLINE OF MUNICIPAL REGULATORY POWER

Municipalities are political subdivisions of the state.[23] The state creates villages, towns, cities, and counties, regulates them, and provides them with the source of their own power to regulate their affairs.[24] As such, the law traditionally treats them as subordinate to the state.[25] One treatise characterizes this subordinate status as conclusive.[26] Accordingly, the state has absolute authority to grant, restrict, and remove powers from municipalities.[27] The Supreme Court has stated "the state is supreme" with respect to this authority and "its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.'"[28] A state's prospective grant of authority can be as expansive as its own power.[29]

States have opted to provide their municipalities with differing degrees of

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

23. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2:8 (3d ed. 2023).

24. *See* OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW § 6.3 (4th ed. 2015).

25. *See id.* at § 5.1 ("As the doctrine of inherent home rule . . . has been almost universally rejected, municipalities in the United States are subject to the complete control of the states in which they are located except as such control is limited by constitutional provisions.").

26. MCQUILLIN, *supra* note 23, at § 3.2.

27. *Id.* at § 1:23.

28. City of Trenton v. New Jersey, 262 U.S. 182, 186-87 (1923) (quoting Hunter v. Pittsburgh, 207 U.S. 161, 178, 179 (1907)).

29. *See* MCQUILLIN, *supra* note 23, at § 3:2 ("[T]he institution of subdivisions of a state and the accompanying distribution of state power is an exercise of political power and raises no judicial issue so long as the agencies to which such state power is delegated do not exceed their authority") (internal citation omitted).

power.[30] Most commonly, municipalities are created either under general laws of the state, authorizing their incorporation and specifying their powers, or under the state's home rule provisions, usually found in its constitution.[31] Municipalities created under the first method may variously be termed "Dillon's rule" or "non-home-rule" municipalities, and those created under the second method are "home rule" municipalities.[32]

Non-home-rule municipalities only have the specific powers that the state grants them by statute rather than having power directly delegated to them by their state's constitution (or by the legislature via constitutional dictate).[33] States typically permit non-home-rule municipalities to regulate traditionally "municipal" issues within their boundaries, including zoning, garbage collection, local street maintenance, and others.[34] This grant of power is not general; rather, it is specific, and courts have traditionally interpreted statutory ambiguity in favor of restraint on municipal authority.[35] Alabama, Delaware, Indiana, Kentucky, Mississippi, Nevada, North Carolina, Vermont, and Virginia are non-home-rule municipality states.[36]

All other states provide some form of home rule for either all or a subset of their municipalities.[37] Home rule comes in two primary varieties, though

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30. *See*, *e.g.*, *id.*

31. *See id.* at § 2:7. A handful of states provide general home rule authority not through constitutional amendment but rather by statute. *See*, *e.g.*, ME. STAT. tit. 23 § 3001 (2023) ("Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter"); Bd. of Educ. v. Naugatuck, 843 A.2d 603, 611-12 (Conn. 2004). Additionally, in some cases, municipalities may be created by a special act of the state legislature, but many states prohibit this in their constitutions. *See* MCQUILLIN, *supra* note 23, at § 3:36.

32. *See* Nat'l League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329, 1133-36 (2022); *see also* MCQUILLIN, *supra* note 23, at § 4:11.

33. *See* Nat'l League of Cities, *supra* note 32, at 1135-36.

34. *See generally* OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW § 6.5 (4th ed. 2015).

35. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 50 (2001); *see also* Marble Technologies, Inc., v. City of Hampton, 690 S.E.2d 84, 88 (Va. 2010) ("[I]f there is a reasonable doubt whether legislative power exists [for a municipality to adopt an ordinance], the doubt must be resolved against the local governing body").

36. Nat'l League of Cities, *supra* note 32, at 1336.

37. *Id.*

specific instantiations differ from state to state.[38] The first is termed "imperio" home rule.[39] Under this form, municipalities have both "the ability to enact legislation without specific state permission" regarding usually traditionally "municipal" affairs[40] and "the ability to prevent state invasions of local autonomy."[41] The other is termed "legislative" home rule.[42] Here, states grant municipalities "the full range of state legislative authority" but provide for preemption of local authority where state general law expressly overrides or conflicts with local law.[43]

In broad terms, both forms of home rule allow municipalities to govern their affairs in the absence of specific legislative authority within certain limits. Legislative home rule "vastly expanded" municipal latitude in policy development.[44] Using legislative home rule, municipalities have variously sought to "fence out those who threaten their homogenous lifestyles or those who threaten to consume more in services than they pay in taxes"[45] to make "local determinations of marriage eligibility" on the ground that "local citizens have a greater interest in who among them should be able to access the benefits of marriage than do citizens who live outside the jurisdiction,"[46] and to regulate drone and other unmanned aerial systems use in part to

38. *Id.* at 1334-35.

39. *Id.* at 1334.

40. These affairs typically include zoning, local taxation, plating and use of public streets, nomination and election of local officials, control of local public nuisances, etc. *See generally* REYNOLDS, *supra* note 34, at §§ 6.3-6.6.

41. FRUG, *supra* note 35, at 51; *see also* Nat'l League of Cities, *supra* note 32, at 1334. Professor Diller observed, "[w]hen a city acted within the sphere of 'local' concern, its actions were protected from state interference. That is, even if the state legislature wanted to preempt a city ordinance that regulated a matter of 'local' concern, it was prohibited from doing so, particularly if the state's home rule system was enshrined in the state's constitution. As a result, many early home-rule regimes established essentially separate—and exclusive—sovereigns, whose areas of authority did not overlap, thereby creating little potential for preemption." Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1124-25 (2007).

42. Nat'l League of Cities, *supra* note 32, at 1335 (describing "legislative home rule" as "legislative not in the sense that the source of authority is statutory (it is usually constitutional), but in the sense that the state legislature retains nearly plenary power to modify home rule, subject to other constitutional constraints such as generality mandates, bans on special legislation, and procedural requirements.").

43. *See id.* at 1335.

44. Diller, *supra* note 39, at 1126.

45. Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1183 (1996).

46. Schragger, *supra* note 4, at 154.

protect residents' reasonable expectation of privacy.[47] At the same time, this expansion increased the overlap between spheres of state versus local authority.[48] Courts have typically found that municipal ordinances must yield to state enactments in two broad circumstances: where a state has enacted a law of general application that is expressly or implicitly intended to preempt local regulation, and where state and municipal regulation conflicts on a matter that does not primarily involve a traditionally municipal concern.[49] These broad contours leave much to interpretation.

PART II: ACTIONS AT THE LOCAL LEVEL TO RESTRICT OR EXPAND ABORTION ACCESS: NEBRASKA AND NEW MEXICO

A. Nebraska

One of the states with the most municipalities that have passed an ordinance purporting to restrict abortions within its borders is Nebraska. The Nebraska legislature, while not generally in favor of abortion rights, has presently only restricted abortion access after eleven weeks of gestation.[50] Before the twelfth week of gestation, Nebraska residents may access abortion services in the state, subject to additional restrictions.[51] Notwithstanding the legislature's grant of abortion rights to its residents, several municipalities have passed ordinances purporting to ban nearly all surgical and medical abortions within local limits.[52]

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47. Jennifer A. Brobst, *Enhanced Civil Rights in Home Rule Jurisdictions: Newly Emerging UAS/Drone Use Ordinances*, 122 W. VA. L. REV. 100, 125-26 (2020).

48. *See* Diller, *supra* note 39, at 1126.

49. *See* Nat'l League of Cities, *supra* note 32, at 1344-45. A handful of states require a higher standard. These states, Alaska, Illinois, and New Mexico, among them, presumptively uphold local ordinances unless "there was an explicit preemption statement or if compliance with both laws would be impossible." Note, *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200, 1209-10 (2023) [hereinafter *To Save a City*].

50. L.B. 574, 108th Leg., 1st Reg. Sess. (Neb. 2023).

51. *See, e.g.*, NEB. STAT. ANN. § 38-2021 (restricting providers from performing an abortion where the provider will not be available for at least 48 hours of post-operative care and has not made alternative provisions for such care); *see also* NEB. STAT. ANN. § 28-327 (imposing specific informed consent requirements).

52. Natalia Alamdari, *Abortion Ban Fails in Small Nebraska Town, Others Pass, Some Narrowly*, NEB. PUB. MEDIA (Nov. 15, 2022), https://nebraskapublicmedia.org/en/news/news-articles/abortion-ban-fails-in-small-nebraska-town-others-pass-some-narrowly/.

1. Home Rule and Non-Home-Rule Municipal Powers in Nebraska

Nebraska adheres to legislative home rule principles for its largest cities and a more limited home rule for all but its smallest municipalities.[53] Early in Nebraska's history, the state went even further than this: in an old case, long since overruled, a divided Nebraska Supreme Court held that self-rule, a right held by "the people," is most fundamentally expressed in municipal government and, what is more, pre-dates the adoption of the state constitution.[54] The court held that the state legislature had no power to restrict individuals' right to choose how they are governed at the municipal level.[55] However, the Nebraska Supreme Court reversed itself soon thereafter, holding that "there can be no such thing as an inherent right of local self–government."[56] No subsequent enactment or case has appreciably constrained this legislative power.[57]

The Nebraska legislature has ultimate authority to both grant and limit powers to the municipalities of the state. Nebraska law permits municipalities with more than 5,000 people to adopt a home rule charter of their choosing.[58] Municipalities with over 100,000 people opting for home rule may do so by a majority vote of qualified electors.[59] Both municipalities in Nebraska meeting this description, Lincoln and Omaha, have chosen this path.[60] Nebraska home rule municipalities may legislate freely on matters

53. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. L. REV. 1337, app. at 1406 (2009).

54. State v. Moores, 76 N.W. 175, 175 (Neb. 1898).

55. *Id.* at 188.

56. Redell v. Moores, 88 N.W. 243, 247 (Neb. 1901).

57. *See*, *e.g.*, Lang v. Sanitary Dist., 71 N.W.2d 608, 609 (1957) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them."); Kansas-Nebraska Nat. Gas Co. v. Wiles, 212 N.W.2d 633, 636 (Neb. 1973) ("It is to be observed that municipal corporations are legislative creations, and that the Legislature, within constitutional limitations, prescribes their boundaries, power, and the qualifications for office of their governing officers. . . .").

58. NEB. CONST. art. XI-2 (governing by Chapter 16 of the Nebraska statutes).

59. NEB. CONST. art. XI-5 ("The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of the qualified electors of such city voting upon the question, and when so adopted may thereafter be changed or amended as provided in Section 4 of this article, subject to the Constitution and laws of the state.").

60. Omaha did so in 1922, and Lincoln in 1917. See Mollner v. City of Omaha, 98 N.W.2d 33, 35 (Neb. 1959); Eppley Hotels Co. v. City of Lincoln, 276 N.W. 196, 198 (Neb. 1937).

strictly of municipal concern, though state law preempts municipal regulation of issues of state concern.[61]

In contrast, Nebraska's smallest municipalities—those with fewer than 5,000 residents—are non-home-rule municipalities that lack constitutional authority to adopt a home-rule charter.[62] Their powers to regulate are strictly fixed by the state legislature.[63] These can be either second-class cities or villages.[64] The legislature expressly and specifically delimits the power of these municipalities.[65] Most cases in Nebraska addressing the authority of a non-home-rule city or village to regulate an issue under its police powers concern only issues that are clearly matters of municipal concern, such as zoning, garbage collection, public nuisances, and street paving.[66] This is not surprising. Nebraska state law provides that non-home-rule municipalities may regulate only matters that the legislature expressly granted to them, i.e., those that are "fairly implied in or incident to the powers expressly granted" and those "indispensable" to the declared purposes of the municipality.[67]

In addition to those powers expressly granted by the state legislature,[68]

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61. State ex rel. Hunter v. Araho, 289 N.W 545, 551 (1940).

62. Only municipalities with a population of 5,000 or greater may adopt a home rule charter. See NEB. CONST. art. XI 2.

63. *See* NEB. REV. STAT. ANN. § 17-501 (West 2017).

64. *See* NEB. REV. STAT. ANN. §§ 17-101, 17-201.

65. *See* NEB. REV. STAT. ANN. § 17-501.

66. *See*, *e.g.*, Meints v. Diller, No. A-20-597, 2021 WL 2201288, at *5 (Neb. Ct. App. June 1, 2021) (holding, *inter alia*, that a municipality has the power to order the removal of a dangerous building which constitutes a nuisance); Brady v. Melcher, 502 N.W.2d 458, 462 (Neb. 1993) (holding that a village did not act outside its statutory authority in passing an ordinance declaring "Any vehicle allowed to remain on property in violation of this Section shall constitute a nuisance."); Verdon v. Bowman, 97 N.W. 229, 230 (Neb. 1903) (holding an ordinance to prevent the spread of contagious disease a constitutional exercise of the village's police powers); Salsbury v. City of Lincoln, 220 N.W. 827, 828 (Neb. 1928) (noting that "improving the streets, alleys, and highways within the corporate limits of a municipality is one strictly of municipal concern.").

67. Lang v. Sanitary Dist. of Norfolk, 71 N.W.2d 608, 613 (Neb. 1955) (quoting Christensen v. City of Fremont, 63 N.W. 364, 366 (Neb. 1895)); *see also* Catherland Reclamation Dist. v. Lower Platte N. Nat. Res. Dist., 433 N.W.2d 161, 165 (Neb. 1988) (a "political subdivision…. has only that power delegated to it by the Legislature. A grant of power to a political subdivision is strictly construed."); Japp v. Papio-Missouri River Nat. Res. Dist., 733 N.W.2d 551, 555-56 (Neb. 2007).

68. Such municipalities "have power (1) to sue and be sued; (2) to contract or be contracted with; (3) to acquire and hold real and personal property within or without the limits of the city or village, for the use of the city or village, convey property, real or personal, and lease, lease with option to buy, or acquire by gift or devise real or personal

non-home-rule cities and villages in Nebraska have general authority under a catch-all provision to maintain "the peace, good government, and welfare of the city or village and its trade and commerce."[69] This provision functions "as an extension of power" otherwise expressly delegated to non-home-rule municipalities by the legislature.[70]

The extent of this legislative grant of power is unclear. On the one hand, villages may validly exercise police power, as the Nebraska Supreme Court noted, to "protect the public health through ordinances."[71] The Nebraska Supreme Court has broadly construed that power.[72] Additionally, in Nebraska, municipal ordinances enjoy a presumption of validity, placing the burden of proof on a challenger.[73] On the other hand, the state supreme court has held that "to be valid, such ordinances must operate within legislative limits."[74] For example, a municipality that imposed a garbage collection fee on a nonuser of the system when state law only allowed the imposition of a fee on users had exceeded its legislative powers.[75]

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property; and (4) to receive and safeguard donations in trust and may, by ordinance, supervise and regulate such property and the principal and income constituting the foundation or community trust property in conformity with the instrument or instruments creating such trust." NEB. REV. STAT. ANN. § 17-501 (West 2017). They have few express grants of power with respect to the regulation of health, other than several pertaining to disposal of waste and sewage. *See id.* §§ 17-573-17-575.

69. NEB. REV. STAT. ANN. § 17-505.

70. Weilage v. City of Crete, 194 N.W. 437, 439 (Neb. 1923) ("It thus appears to be the purpose of this subdivision [§ 17-505] to, in a measure at least, enlarge the powers of the city authorizing it to act in the manner there stated and upon subjects in addition to those specific things before stated. The subdivision, therefore, instead of being a limitation upon the power of the municipal authorities to act, is an extension of power.").

71. Village of Winside v. Jackson, 553 N.W.2d 476,480-81 (Neb. 1996); *see also* Village of Brady v. Melcher, 502 N.W.2d 458, 462 (Neb. 1993) ("In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people….") (citation omitted).

72. Clough v. N. Cent. Gas Co., 34 N.W.2d 862, 870 (Neb. 1948) ("In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised"); *see also* State *ex. rel.* Krittenbrink v. Withnell, 135 N.W. 376, 376-77 (Neb. 1912).

73. *See, e.g.*, *Village of Winside*, 553 N.W.2d at 477.

74. *Id.* at 481 (citation omitted); *see also* Village of Brady, 502 N.W.2d at 462 ("In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people . . .") (citation omitted).

75. *See* State v. Withnell, 135 N.W. 376, 378 (Neb. 1912) (internal citations

The Nebraska Supreme Court has rarely considered how far a village may go in regulating to "maintain[] the peace, good government, and welfare of the [municipality] and its trade or commerce."[76] In one of the only Nebraska cases to consider municipal restraints on individual liberties, the petitioner in *Ex parte Sapp* questioned the validity of an ordinance that prohibited setting up card tables with the purpose of playing cards in businesses or "place[s] of public resort," promulgated by a city of the second class.[77] The city argued it properly adopted the ordinance based on its authority under the catch-all provision above to maintain the peace, good government, and welfare of the municipality.[78] The Nebraska Supreme Court disagreed.[79] Second-class municipalities, it held, "cannot by ordinance limit the liberty of its citizens" unless they are expressly granted that power—something which the catch-all provision did not offer.[80] Even the state, the court speculated, did not have the power to restrain people from simple amusements like card games played for amusement and not for betting.[81]

2. Nebraska Second-Class Cities and Villages Act Unlawfully When They Attempt to Ban Abortion Under Current State Law

All of the Nebraska municipalities that have adopted anti-abortion ordinances are second-class cities or villages.[82] Each of these five

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omitted).

76. NEB. REV. STAT. § 17-207(11) (2022); § 17-505 (2019).

77. *See Ex parte* Sapp, 113 N.W. 261, 261 (1907).

78. *Id.* at 262.

79. *Id.*

80. *Id.* at 261.

81. *Id.* at 262.

82. Those municipalities are Arnold (pop. 592), Blue Hill (pop. 805), Hayes Center (pop. 224), Hershey (pop. 649), and Stapleton (pop. 267). U.S. Census Bureau, Profile: Arnold Village, NE, https://data.census.gov/profile?g=160XX00US3102095; U.S. Census Bureau, Profile: Blue Hill City, NE, https://data.census.gov/profile/Blue_Hill_city,_Nebraska?g=160XX00US3105560; U.S. Census Bureau, Profile: Hayes Center Village, NE, https://data.census.gov/profile/Hayes_Center_village,_Nebraska?g=160XX00US3121660; U.S. Census Bureau, Profile: Hershey Village, NE, https://data.census.gov/profile/Hershey_village,_Nebraska?g=160XX00US3122290; U.S. Census Bureau, Profile: Stapleton Village, NE, https://data.census.gov/profile/Stapleton_village,_Nebraska?g=160XX00US3146870. While the voters in the Village of Paxton approved the proposed ordinance for adoption, the Board of Trustees of the village has not yet adopted it, and counsel is reviewing the proposed ordinance. Conversation with Vesta Dack, Village Clerk for the Village of Paxton (August 9, 2023). The voters of the Village of Curtis did not approve their proposed

municipalities[83] used the same template for their respective ordinance.[84] They each list several "findings" by the city council, including not only that "[h]uman life begins at conception" but also that "[a]bortion is a murderous act of violence that purposefully and knowingly terminates an unborn human life," and "[a]bortion providers and their enablers should be regarded as murderers and treated and ostracized as such."[85] Each ordinance declares abortion to be "unlawful at all stages of pregnancy" and "abortion-inducing drugs" to be "contraband."[86] They amend the municipal code to make it "unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy" and "for any person to knowingly aid or abet an abortion" within the borders of the municipality.[87] A person accused of doing any of these things has an affirmative defense if, and only if, the abortion was performed to address a "life-threatening" condition.[88] The ordinance also makes it "unlawful for any person to possess or distribute abortion-inducing drugs" in the municipality.[89] "Abortion-inducing drugs" are defined as "mifepristone, misoprostol, and any drug or medication that is

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ordinance and the city council has not adopted it. *See* Alamdari, *supra* note 50.

83. The villages of Brady and Wallace also put measures to "becom[e] a Sanctuary City [for fetuses]" to a popular vote. Village of Wallace Board of Trustees, Minutes of Special Meeting (Aug. 23, 2022), https://villageofwallace-ne.com/PastBoard MeetingMinutes/22-08-23%20Minutes.pdf; *see* Alamdari, *supra* note 50. A sample ballot describing the measures states that the Brady ordinance would "outlaw abortion, abortion-inducing drugs, [and] Human Trafficking," and the Wallace measure would "outlaw abortion within the Village of Wallace." *Sample Ballot, General Election, Nov. 8, 2022*, CNTY. OF LINCOLN, NE, http://lincolncountyne.gov/wp-content/uploads /2022/10/LincolnNE-General-221108_Publication-Ballot.pdf (Feb. 14, 2024). Both measures passed. *See* Alamdari, *supra* note 50. However, I have been unable to verify that the village boards subsequently adopted and obtained a copy of the ordinance from the village clerks.

84. *See* Alamdari, *supra* note 50.

85. *See* BLUE HILL, NEB., ORDINANCE 721 § A; ARNOLD, NEB., ORDINANCE 472 § A, etc.

86. BLUE HILL, NEB., ORDINANCE 721, at § B.

87. *Id.* at § C. "Aiding and abetting" expressly includes providing "transportation;" "giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;" and "providing money" for any of the costs of procuring an abortion.

88. *Id.* (permitting abortions only in response to "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.").

89. *Id.*

used to terminate the life of an unborn child" and expressly excludes birth control devices and pills as well as emergency contraception.[90]

a. Inconsistent State Law Should Preempt the Abortion Ordinances

Non-home-rule municipalities in Nebraska likely lack the authority to regulate abortion under their legislative-granted powers. However, even if they did have the authority to regulate abortion, inconsistent state law would preempt the ordinances they adopted. The Nebraska Supreme Court held that "[w]here there is a direct conflict between a city ordinance and a state statute, the statute is the superior law."[91] Moreover, "an ordinance cannot prohibit what the Legislature had expressly licensed, authorized, or permitted."[92] Preemption may additionally be inferred where "a comprehensive scheme of legislation effectively keeps localities from legislating in that area."[93]

First and most notably, the state legislature comprehensively regulates abortion, both as a procedure in Chapter 28 of the Nebraska Statutes[94] and as a professional matter for physicians in Chapter 38 of the Nebraska Statutes.[95]

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90. *Id.* The broad definition that the ordinance gives to abortifacients includes not merely drugs such as mifepristone that are used almost exclusively for inducing abortions and facilitating miscarriages in progress, but also drugs like misoprostol, methotrexate and others that have common, non-abortion-related uses. Consequently, the ordinance may create problems for patients needing to access these drugs at pharmacies in town, even if the intended use does not involve abortion. *See, e.g.*, Alice Miranda Ollstein & Daniel Payne, *Patients Face Barriers to Routine Care as Doctors Warn of Ripple Effects from Broad Abortion Bans*, POLITICO (Sept. 28, 2022), https://www.politico.com/news/2022/09/28/abortion-bans-medication-pharmacy-prescriptions-00059228 (noting "[t]he chronic illness advocacy group Global Healthy Living Foundation said its members in Tennessee, Texas and other states with abortion restrictions have been refused prescriptions for methotrexate—a drug for patients with lupus and other illnesses that also can be used to induce an abortion in the case of an ectopic pregnancy—and they're lobbying those states' governors and local officials to intervene.").

91. Arrow Club, Inc. v. Neb. Liquor Control Comm'n, 131 N.W.2d 134, 139 (Neb. 1964) (holding ordinance preempted where ordinance prohibited the dispensing of liquor on Sunday by a bottle club, but state statute permitted it); *see also* State v. Loyd, 655 N.W.2d 703, 705-06 (Neb. 2003) ("a city may not pass legislation which conflicts, or is inconsistent, with state law. An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa.").

92. *Arrow Club*, 131 N.W.2d at 139.

93. Butler Cnty. Dairy, L.L.C. v. Butler, 827 N.W.2d 267, 288 (Neb. 2013).

94. *See* NEB. REV. STAT. §§ 28-325-28-347.06 (2010).

95. *See* NEB. REV. STAT. §§ 38-178, 38-179(7), 38-193, 38-196(2), 38-2021, & 38-

Nebraska presently allows abortion through the eleventh week of gestation.[96] Moreover, state law does not provide for municipalities to adopt stricter restrictions. A second-class municipality with limited powers, including every one of the Nebraska municipalities that adopted anti-abortion ordinances in the last two years, may, therefore, not prohibit abortion before twelve weeks of gestation.[97] Such an ordinance would be deemed in conflict with state law by prohibiting what the state expressly permits and thus would be unenforceable.[98]

Second, the state regulates medical professionals,[99] hospitals,[100] and clinics,[101] while the federal government regulates the approval, manufacture, and distribution of pharmaceuticals.[102] The state and federal governments, not municipalities, regulate payment for health care services.[103] Any regulation, licensure, or prohibition of medical procedures such as abortion, the medical professionals who provide such services, and the possession, sale, and distribution of FDA-approved pharmaceuticals such as mifepristone and misoprostol are comprehensively addressed at the state and federal levels. Moreover, neither the Nebraska Medical Practice Act nor the federal Food, Drug, and Cosmetics Act include any provision recognizing or acknowledging a role for municipal regulation of the same topics.[104]

3424 (2010).

96. *See* L.B. 574, 108th Leg., 1st Reg. Sess. (Neb. 2023) (providing, in Section 4 of the slip law, that "(1) Except as provided in subsection (3) of this section, a physician, before performing or inducing an abortion, shall first: (a) Determine, using standard medical practice, the gestational age of the preborn child; and (b) Record in the pregnant woman's medical record: (i) The method used to determine the gestational age of the preborn child; and (ii) The date, time, and results of such determination. (2) Except as provided in subsection (3) of this section, it shall be unlawful for any physician to perform or induce an abortion: (a) Before fulfilling the requirements of subsection (1) of this section; or (b) If the probable gestational age of the preborn child has been determined to be twelve or more weeks.").

97. *C.f.* State v. Loyd, 655 N.W.2d 703, 706 (Neb. 2003) ("An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa.").

98. *Id.* (holding that, "[w]hen an ordinance is inconsistent with statutory law, it is unenforceable.").

99. *See* NEB. REV. STAT. §§ 38-2002-38-2045 (2023).

100. *See* 175 NEB. ADMIN. CODE §§ 9-001-9-009 (2023).

101. *See* 175 NEB. ADMIN. CODE §§ 7-001-9-008 (2007).

102. *See* Fed. Food, Drug, and Cosms. Act, 21 U.S.C. §§ 301-399i.

103. *See* 210 NEB. ADMIN. CODE §§ 22-001-009; 42 C.F.R. §§ 424.1-424-575.

104. *See, e.g.*, Butler Cnty. Dairy, L.L.C. v. Butler, 827 N.W.2d 267, 287-88 (Neb. 2013) (holding that, while a court may infer field preemption from a "comprehensive

b. Preemption Aside, Second-Class Municipalities Have Dubious Authority to Regulate Abortion

Even in the absence of preemption, it is unlikely that the Nebraska municipal anti-abortion ordinances would survive a legal challenge because they exceed municipal regulatory authority. The ordinances do indicate some concern for legal norms. All expressly state, for example, that they apply only within the municipality's physical boundaries.[105] They ostensibly do not prohibit the free speech of their inhabitants, and at least one ordinance (Blue Hill) states it does not prohibit anyone from referring a patient for an abortion outside the municipal bounds.[106] But there is nothing "normal" or legally permissible about the remainder. Second-class municipalities in Nebraska have no authority to regulate outside the confines of topics permitted to them by the state legislature.[107] The legislature does not provide any express authority to second-class cities and villages to regulate health care of any kind, including abortion.

The municipalities may cite their police powers as a basis for the ordinances. However, to the extent they may regulate matters such as "public morals," "disorderly conduct," or "licensing," second-class cities and villages have only strictly delimited powers.[108] While their police chief, if any, has the power to address violations of state criminal law and municipal ordinances,[109] secondary municipalities have only the power to fine individuals for infractions and to imprison them for ordinance violations only as a means of enforcing payment of the fine.[110] One does not find non-

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scheme" of state legislation, such an inference may not be made where state law acknowledges a county or municipal regulatory role regarding the subject).

105. ARNOLD, NEB., ORDINANCE 472 § A; BLUE HILL, NEB. ORDINANCE 721 § A; HAYES CENTER, NEB. ORDINANCE 2021-253 § A; HERSHEY, NEB. ORDINANCE 82222 § A; STAPLETON, NEB. ORDINANCE 236 § A.

106. ARNOLD, NEB., ORDINANCE 472 § D(6); BLUE HILL, NEB. ORDINANCE 3-131(F); HAYES CENTER, NEB. ORDINANCE 2021-253 § D(6); HERSHEY, NEB. ORDINANCE 82222 § D(6); STAPLETON, NEB. ORDINANCE 236 § D(6).

107. *See supra*, notes 80-82 and associated text.

108. *See, e.g.*, NEB. REV. STAT. § 17-120 (2019) (allowing secondary municipalities to prohibit prostitution, gambling, "public indecencies," and lotteries, among others); NEB. REV. STAT. § 17-132 (2022) (allowing secondary municipalities to license plates of amusement); NEB. REV. STAT. § 17-129 (2014) (allowing secondary municipalities to prohibit "intoxication, fighting, quarreling, dog fights, cock fights, and all disorderly conduct.").

109. *See* NEB. REV. STAT. § 17-213 (2014).

110. *See* NEB. REV. STAT. § 17-505 (2019); Bailey v. State, 47 N.W. 208, 209 (Neb. 1890) ("there is no law which empowers a village to enforce its ordinances by both fine

home-rule municipalities with ordinances prohibiting serious crimes such as murder; it would not make sense for them to do so, given the limited punitive powers of a non-home-rule municipality in Nebraska.[111]

Additionally, the prohibition of major crimes such as murder—which the municipalities adopting these ordinances consider abortion to be—is not among the powers that the Nebraska legislature delegates to secondary municipalities and villages.[112] Home rule municipalities may regulate a matter of primary state concern only where the ordinance does not impermissibly conflict with state law and is not otherwise preempted by it.[113] However, second-class cities and villages, which have no home rule authority and whose powers are strictly delegated by the legislature, have no such authority.

Could one nevertheless make a viable argument that the state legislature provided Nebraska second-class cities and villages with the ability to regulate abortion through a general grant of police power to address matters of municipal concern? The answer is likely no.

Notwithstanding the seemingly rigid and narrow delegation of authority to Nebraska non-home-rule municipalities, it is not always clear whether an issue is one of municipal or state concern. Rather, Nebraska courts, like many other courts, consider the issue on a case-by-case basis.[114] Seeking to delimit the boundaries of police power is a fool's errand, according to some commentators.[115] As the U.S. Supreme Court once observed, "[a]n attempt

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and imprisonment, nor by imprisonment alone, except as a means of enforcing the payment of the fine imposed by the court for a violation of the ordinance.").

111. *See, e.g.*, Malone v. City of Omaha, 883 N.W.2d 320, 328-29 (Neb. 2016). Municipalities may include criminal provisions in their codes of ordinances, but they are usually reserved for tort crimes such as battery and, in the case of non-home-rule municipalities, may be punished by a fine not to exceed $500. NEB. REV. STAT. § 17-505.

112. *See id.*

113. *See, e.g.*, *Malone*, 883 N.W.2d at 328-29 ("In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people and as to when and how such police power should be exercised"); *see also Malone*, 883 N.W.2d at 331 ("municipal laws are inferior to state law, because "a municipal corporation derives all of its powers from the state and . . . has only such powers as the Legislature has seen fit to grant to it,' " concluding from this fact that " 'in the case of a direct conflict between a statute and a city ordinance, the statute is the superior law.'") (internal citation omitted).

114. *See, e.g.*, Jacobberger v. Terry, 320 N.W.2d 903, 906 (Neb. 1982).

115. *See, e.g.*, Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47

to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts."[116]

The Nebraska municipalities that adopted anti-abortion ordinances exceeded their authority to regulate under their police powers. While cities of the second class with populations of more than 800 and less than 5,000 have the authority to regulate moral issues, that power is limited by statute to "restrain[ing], prohibit[ing], and suppress[ing] houses of prostitution, gambling, and gambling houses, and other disorderly houses and practices, and all kinds of public indecencies, and all lotteries or fraudulent devices and practices to obtain money or property."[117] Abortion can be considered neither public indecency nor public nuisance, both of which are among matters a second-class city can regulate[118] and the latter, which a village can regulate.[119] Rather, the medical procedure is a private, individual matter that rarely comes to public attention.

Abortion does concern a person's welfare. Certainly, it at least concerns the welfare of the person seeking the abortion.[120] As such, it may facially fall within a second-class city or village's authority to "maintain [] the peace, good government, and welfare of the city or village and its trade or commerce."[121] However, abortion bears little resemblance to common

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URB. LAW. 625, 663 (2015) ("The police power will continue to evolve to reflect the needs of a democratic society. We can strive to better understand the police power, but since we cannot accurately foresee the future: '[a]n attempt to define [the] reach [of the police power] or trace its outer limits is fruitless. . . .'") (internal citation omitted).

116. Berman v. Parker, 348 U.S. 26, 32 (1954).

117. NEB. REV. STAT. § 17-120 (2019).

118. NEB. REV. STAT. § 17-120 (2019); NEB. REV. STAT. § 17-555 (2012).

119. NEB. REV. STAT. § 17-555 (2012).

120. Whether the embryo or fetus's welfare may be of concern is another question. Nebraska does not possess a fetal personhood law. It allows a person to recover in tort under its wrongful death statute for the death of a product of conception in utero at any stage of gestation. NEB. REV. STAT. § 30-809 (2023). Otherwise, Nebraska law does not possess a general definition of "person." *See, e.g.*, State v. Covey, 859 N.W.2d 558, 562-63 (Neb. 2015) (finding no definition of "person" in the criminal statute in question and thus obtaining the definition of "person" from the Concise Oxford American Dictionary). There appears to be no reason to assume that a product of conception in utero should be a "person."

121. NEB. REV. STAT. § 17-207(11) (2022); § 17-505 (2019). Second-class cities and villages are defined by the size of their population. NEB. REV. STAT. §§ 17-201, 17-101 (2023). It would stand to reason that when they are regulating for the welfare of the city or village, they are doing so for the city's or village's inhabitants. Only one Nebraska case appears to address the question of who qualifies as an inhabitant. It held, *inter alia*, that adults and minors who make their home in a municipality are inhabitants of the

subjects of municipal control. Abortion is not about noise abatement, zoning, or pothole repair. It instead fundamentally concerns the health and life course of people who can become pregnant and their fetuses.

The ability of pregnant people to control the direction of their own lives plays a crucial role here. The anti-abortion ordinances are unsurprisingly silent on this matter, as they seek to prioritize the ostensible rights of fetuses over the people pregnant with them. However, the liberty of pregnant people to determine their life course, including whether they carry and give birth to a child, is relevant. Indeed, Nebraska takes the liberty of its inhabitants seriously. The first sentence of the first article of the Nebraska Constitution provides that "[a]ll persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, [and] the pursuit of happiness. . . and such rights shall not be denied or infringed by the state or any subdivision thereof."[122] The very purpose of government is to secure these liberties.[123] Allowing the government, whether state or local, to prioritize fetal life would necessarily eclipse the protected rights of pregnant people.[124]

In *Ex parte Sapp*, the Nebraska Supreme Court held that "[a] city of the second class cannot by ordinance limit the liberty of its citizens unless the power to do so is given in its charter."[125] In that case, the "liberty" of the denizens of Wymore, Nebraska—to play cards for the purpose of amusement rather than gambling—was at issue.[126] A restriction on the types of amusements in which a resident may indulge is only a slight intrusion on a person's liberty. Nevertheless, the Nebraska Supreme Court held this intrusion to be outside the bounds of the municipality's power.

While playing cards and getting an abortion are substantially distinct activities, both involve a person's liberty. Card-playing for amusement is a harmless pastime, and the court was unable to imagine why a municipality

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municipality, while those who attend school or work there but reside elsewhere are not inhabitants. *See* State ex rel. Einstein v. Northrup, 113 N.W. 540, 541 (Neb. 1907).

122. NEB. CONST. art. 1, § 1.

123. *Id.*

124. *See, e.g.*, Laura Hermer, *Intentional Parenthood, Contingent Fetal Personhood, and the Right to Reproductive Self-Determination*, 57 U. MICH. J. L. REFORM 259 (2024).

125. *Ex parte* Sapp, 113 N.W. 261, 261 (Neb. 1907).

126. *Id.* The court also observed that the language of the ordinance was ambiguous by making it unlawful to "keep any card table in or adjacent to any place of business or place of public resort, or to permit card playing in any place of business." The unreasonably wide sweep of the ordinance was an additional factor in the court's decision that the city of Wymore had acted ultra vires in adopting it.

might seek to prohibit it. Abortion, on the other hand, is not technically harmless. It intentionally terminates the life of a fetus. Even if it only removed the fetus from the uterus with the utmost care, abortion would result in the fetus's death, as a fetus has no ability to survive outside the womb, independent of medical support, until approximately 36 weeks of gestation.[127]

But pregnant people do not abort their pregnancies out of murderous impulses. Rather, they do so because they do not want, for any number of reasons, to bring a child into the world. Under U.S. law, no one may be forced against their will to use their bodies to support the life of another person.[128] According to the Supreme Court, individual self-determination is paramount.[129] For example, no law will force the parent of a child who needs a blood transfusion or kidney donation to provide the needed tissue if they are a match and yet refuse to do so. If the child dies because of the refusal, the parent cannot be prosecuted for their refusal to provide their tissue to their child. Given this context, it is not only a breach of a person's protected liberty interests but also an inequitable anomaly to force unwillingly pregnant people to continue to use their bodies to support an unwanted fetus. This breach does not only involve nine months of pregnancy; rather, it implicates irrevocable change to a pregnant person's existence. If a second-class city may not restrain the liberty of residents to play cards for private amusement, it seems unlikely that it would have the authority to force its residents into unwanted maternity, a condition with serious, lifelong

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127. Jason Gardosi, *Normal Fetal Growth*, *in* DEWHURST'S TEXTBOOK OF OBSTETRICS & GYNECOLOGY 28 (D. Keith Edmonds, ed., 7th ed. 2007).

128. *See, e.g.*, Bonner v. Moran, 126 F.2d 121, 123 (D.C. Cir. 1941) (where a physician performed an operation on a 15 year-old boy for the benefit of his cousin without first obtaining the boy's parents' consent, the D.C. Circuit held the trial court had erred in refusing to instruct the jury that the consent of the parents was necessary); *In re* A.C., 573 A.2d 1235, 1243-44 (D.C. 1990) ("Courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health."); Curran v. Bosze, 566 N.E.2d 1319, 1326 (Ill. 1990) ("The doctrine of substituted judgment requires clear and convincing proof of the incompetent person's intent before a court may authorize a surrogate to substitute his or her judgment for that of the incompetent. Any lesser standard would 'undermin[e] the foundation of self-determination and inviolability of the person upon which the right to refuse medical treatment stands.'" (citing *In re* Estate of Longeway, 549 N.E.2d 292 (Ill. 1989)).

129. *See, e.g.*, Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

responsibilities and consequences.[130] Current Nebraska law does not permit second-class municipalities and villages to adopt ordinances that would force such a result. Consequently, if they are legally challenged, the presiding court should strike them down.

B. New Mexico

Municipalities in New Mexico, encompassing home-rule cities, non-home-rule municipalities, and counties, have taken a different approach to restricting abortion than those in Nebraska. Rather than prohibiting abortion altogether, the six New Mexico municipalities that have adopted anti-abortion ordinances at the time of this writing focus their restrictions only on abortifacients and implements used in performing surgical abortions. The ordinances claim that federal law prohibits these items from being sent through the mail, and they require municipal residents to adhere to the ordinances' interpretation of the law.[131]

At the same time, New Mexico law permits pregnant people to obtain an abortion.[132] There are no gestational limits on when an abortion may occur.[133] Moreover, HB 7, the state's Reproductive and Gender-Affirming Health Care Freedom Act ("the Health Care Freedom Act"), expressly prohibits a "public body or an entity or individual acting on behalf of or within the scope of the authority of a public body" from taking several acts, including "deny[ing], restrict[ing] or interfer[ing] with a person's ability to

130. For further discussion of this issue, *see* Hermer, *supra* note 124.

131. *See* EUNICE, N.M., CODE § 19.070 (2023); CLOVIS, N.M., CODE § 9.90.060 (2022); LEA CNTY., N.M., ORDINANCE No. 99, § 6 (2022); HOBBS, N.M., CODE § 5.52.070 (2022); ROOSEVELT CNTY., N.M., ORDINANCE No. 2023-01 § 2 (2023); EDGEWOOD, N.M., CODE 2023-002 § 4 (2023).

132. In 2021, the New Mexico legislature repealed then-existing criminal prohibitions against abortion. See Susan Dunlap, 2021 Top Stories #1: NM Repeals Abortion Ban, N.M. Pol. Rep. (Dec. 31, 2021), https://nmpoliticalreport.com/2021/12/31/2021-top-stories-1-nm-repeals-abortion-ban/. However, New Mexico has not enacted any express protection for abortion rights. The state supreme court has not squarely addressed whether the state constitution protects abortion.

133. There is, however, a prohibition against performing an intact dilation and extraction. N.M. STAT. ANN. § 30-5A-3 (West 2023) ("No person shall perform a partial-birth abortion except a physician who has determined that in his opinion the partial-birth abortion is necessary to save the life of a pregnant female or prevent great bodily harm to a pregnant female: A. because her life is endangered or she is at risk of great bodily harm due to a physical disorder, illness or injury, including a condition caused by or arising from the pregnancy; and B. no other medical procedure would suffice for the purpose of saving her life or preventing great bodily harm to her.").

access or provide reproductive health care or gender-affirming health care within the medical standard of care."[134]

Consequently, the state has sued these municipalities, alleging that both state medical licensing law and state constitutional rights preempt their abortion ordinances.[135] The City of Eunice has countersued, seeking a declaratory judgment that federal law—in this instance, the Comstock Act—constrains the state's protection of abortion rights.[136] The parties argued their claims to the state supreme court in December 2023.[137] This section will independently examine these claims.

1. Home Rule and Non-Home-Rule Municipal Powers in New Mexico

New Mexico, like Nebraska, gives some municipalities legislative home rule powers and only statutory authority to others.[138] Unlike Nebraska, even the smallest municipalities, excluding counties, may adopt a home rule charter if they wish. If they do so, they may "exercise all legislative powers and perform all functions not expressly denied by general law or charter."[139] As the New Mexico Supreme Court stated in *State ex rel. Haynes v. Bonem*, "the purpose of our home rule amendment is to delegate to municipalities autonomy in matters concerning their local community, as opposed to matters of statewide concern or interest."[140] The New Mexico Court of Appeals observed that this power was intended to "devolve onto home rule municipalities remarkably broad powers" and "the utmost ability to take policymaking initiative" concerning local issues.[141] Matters "affect[ing] all of the inhabitants of the state," on the other hand, are considered issues of

134. N.M. STAT. ANN. § 24-34-3 (West 2023).

135. *See* Brief for Petitioner, State *ex rel.* Torrez v. Bd. of Cnty. Comm'r for Lea, No. S-1-SC-39742 (N.M. Apr. 2023).

136. *See* Complaint, City of Eunice v. Torrez, D-506-CV-2023-00407 (Apr. 17, 2023).

137. *See* Order, Torrez v. Cities and Counties, No. S-1-SC-39742 (Aug. 29, 2023); New Mexico Supreme Court, *Oral Argument: State v. Board of County Commissioners for Lea County, S-1-SC-39742*, YOUTUBE (Dec. 13, 2023), https://www.youtube.com/watch?v=fRidW04pi8E.

138. Baker & Rodriguez, *supra* note 51, at 1407-08.

139. N.M. CONST. art. X, § 6 (amended 1970).

140. State *ex rel.* Haynes v. Bonem, 845 P.2d 150, 157 (N.M. 1992).

141. New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1158 (N.M. Ct. App. 2005).

state concern.[142] In those cases, the state retains superior control.[143] Of the New Mexico municipalities that have adopted abortion ordinances, Hobbs and Clovis have home rule charters.[144]

Not all New Mexico municipalities take advantage of home rule powers. Those that do not adopt a home rule charter possess only those powers that the state legislature grants to them.[145] Counties also fall into this category.[146] The city of Eunice, the town of Edgewood, and the counties of Lea and Roosevelt, each of which adopted an abortion ordinance, are non-home-rule municipalities.[147]

Non-home-rule municipalities may only regulate matters permitted by the state legislature. In New Mexico, municipalities have standard powers, including "protect[ing] generally the property of its municipality and its inhabitants" and "preserv[ing] peace and order within the municipality."[148] Relevant to several of the ordinances under consideration here, they may

142. *See Haynes*, 845 P.2d at 156 (quoting Apodaca v. Wilson, 525 P.2d at 876, 882 (N.M. 1974)).

143. *See id.*

144. *Home Rule Municipalities*, N.M. LEGIS., https://www.nmlegis.gov/publications/handbook/home_rule_municipalities.pdf (last visited Nov. 8, 2023).

145. *See* Kane v. City of Albuquerque, 358 P.3d 249, 264 (N.M. 2015) (quoting *Haynes*, 845 P.2d at 154).

146. *See, e.g.*, *County Government Overview: New Mexico*, NAT'L ASSOC. OF CNTYS., https://www.naco.org/sites/default/files/event_attachments/DRAFT_NewMexico_012022.pdf (last visited Nov. 8, 2023) (excluding Los Alamos County, "which is a city-county consolidated government," which has home rule powers).

147. *Municipalities by Type of Government*, N.M. MUNICIPAL LEAGUE, https://nmml.org/DocumentCenter/View/250/2016-Municipalities-by-Type-of-Government-PDF?bidId= (last visited Nov. 8, 2023). Counties may regulate the unincorporated areas within their borders. *See* N.M. STAT. ANN § 4-37-2 (West 2023) ("County ordinances are effective within the boundaries of the county, including privately owned land or land owned by the United States. However, [county] ordinances are not effective within the limits of any incorporated municipality.").

148. N.M. STAT. ANN. § 3-18-1 (West 2023). New Mexican municipalities may "sue or be sued; enter into contracts or leases; acquire and hold property, both real and personal; have a common seal which may be altered at pleasure; exercise such other privileges that are incident to corporations of like character or degree that are not inconsistent with the laws of New Mexico; protect generally the property of its municipality and its inhabitants; preserve peace and order within the municipality; and establish rates for services provided by municipal utilities and revenue-producing projects, including amounts which the governing body determines to be reasonable and consistent with amounts received by private enterprise in the operation of similar facilities."

license businesses and impose a licensure fee upon them if the municipality determines that licensure would "promot[e] the general health and welfare of the municipality."[149]

2. State Law Preempts the Municipalities' Ordinances or Otherwise Prohibits Their Valid Adoption

The ordinances adopted by these municipalities differ from those adopted by the Nebraska municipalities in that they do not seek to ban abortion directly; rather, the New Mexico ordinances seek to restrict abortion by ostensibly enforcing compliance with the federal Comstock Act under the municipalities' direction.[150] They accomplish this by (1) requiring individuals and entities seeking to operate an abortion clinic within municipal borders to agree to adhere to the municipality's interpretation of the Comstock Act as a condition of municipal licensure,[151] (2) prohibiting any person from violating the municipality's interpretation of the Comstock Act[152] or both.[153] The penalty for violating the ordinance varies, depending on the municipality. It ranges from licensure denial or removal if the applicant or licensee fails to adhere to the city's interpretation of the Comstock Act in Eunice[154] to providing a private right of action against anyone who violates primary ordinance provisions to any individual not affiliated with the state or county with damages including statutory ones of "no less than $100,000 for each violation," as well as "costs and reasonable attorney's fees" in Roosevelt County.[155]

149. *See* N.M. STAT. ANN. § 3-38-1 (West 2023).

150. *See* EUNICE, N.M., CODE § 19.070 (2023); CLOVIS, N.M., CODE § 9.90.060 (2022); LEA CNTY., N.M., ORDINANCE No. 99, § 6 (2022); HOBBS, N.M., CODE § 5.52.070 (2022); ROOSEVELT CNTY., N.M., ORDINANCE No. 2023-01 § 2 (2023); EDGEWOOD, N.M., CODE 2023-002 § 4 (2023).

151. EUNICE, N.M., CODE §§ 19.030-19.070 (2023); CLOVIS, N.M., CODE §§ 9.90.020-9.90.060 (2022); HOBBS, N.M., CODE §§ 5.52.030-070 (2022).

152. EDGEWOOD, N.M., CODE § 4 (2023); LEA CNTY., N.M., ORDINANCE No. 99, § 6 (2022).

153. ROOSEVELT CNTY., N.M, ORDINANCE No. 2023-01 §§ 2, 5-7 (2023).

154. EUNICE, N.M., CODE §§ 19.030-19.060 (2023); see also CLOVIS, N.M., CODE §§ 9.90.040-9.90.060 (2022); LEA CNTY., N.M., ORDINANCE No. 99, § 7 (2022); HOBBS, N.M., CODE § 5.52.060 (2022) (each citing similar provisions in their ordinances, although the penalty for violating the Lea County licensing provision is a $300 fine).

155. ROOSEVELT CNTY., N.M, ORDINANCE No. 2023-01 § 3 (2023); *see also* Austin Fisher, *Edgewood Anti-Abortion Ordinance Likely to Face Challenge at NM Supreme Court, Scholar Says,* SOURCE N.M. (Nov. 2, 2023, 12:23 PM), https://sourcenm.com/2023/04/17/edgewood-anti-abortion-ordinance-likely-to-face-

a. State Law Preempts the Ordinances

All six New Mexico municipalities possess general authority to adopt business licensing ordinances. The home rule municipalities, Hobbs and Clovis, may more broadly adopt ordinances affecting any matter of local concern.[156] Business licensure is a standard matter of municipal concern.[157] Businesses typically pay a fee to the city for a license. The locality uses that payment, in turn, to defray the municipality's regulatory costs.[158] If we assume that abortion providers may be licensed like any other purveyor of goods and services—an assumption that may not be correct, as will be discussed further below—then the ordinances adopted by Hobbs and Clovis would be unexceptional.

The remaining municipalities are all non-home-rule. New Mexico law expressly permits non-home-rule municipalities to license businesses.[159] At first glance, it might appear that most entities providing abortion services would be considered businesses. The legislature defines "business" as "any person, occupation, profession, trade, pursuit, corporation, institution, establishment, utility, article, commodity or device engaged in making a profit, but does not include an employee."[160] The salient is the pursuit of profit. While the definition would likely include many physicians and other healthcare providers working for themselves or in a for-profit group practice, it would likely exclude not-for-profit clinics, hospitals, and other establishments that do not yield revenue. Currently, most, if not all, of the clinics providing abortions in New Mexico are 501(c)(3) not-for-profit entities.[161] If those clinics sought to expand to Edgewood or Eunice, they

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challenge-at-nm-supreme-court-scholar-says/ (stating the town of Edgewood's ordinance would contain a similar penalty up to $10,000).

156. *See* N.M. CONST. art. X, § 6.

157. *See, e.g.*, City of Lovington v. Hall, 359 P.2d 769, 770 (N.M. 1961) (holding that in the context of a non-home-rule municipality, "[t]here can be no question that the municipality has power, under the [licensing] statute, to regulate and to charge a license fee which does not exceed the probable expense of issuing the license and of regulating the business.").

158. *Id.* at 772 ("It is well established that where a municipality is authorized to regulate and to require those regulated to obtain a license, the municipality may charge a reasonable fee to cover the labor and expense of issuing it, and for the services of those required to perform some duty in connection with the regulation or conduct of the business, and for other expenses directly or incidentally imposed by the ordinance requiring the license or by some other ordinance of the municipality.").

159. N.M. STAT. ANN. § 3-38-1 (West 2023).

160. N.M. STAT. ANN. §3-1-2(B) (West 2019).

161. *Abortion in New Mexico,* ABORTION FINDER, https://www.abortionfinder.org

would exist outside of the purview of the related ordinance.

These ordinances, as well as those in home rule Clovis and Hobbs, may face additional problems. Each ordinance purports to regulate "abortion clinics."[162] The language used by the City of Eunice, a non-home-rule municipality, to define the term "abortion clinic" is identical to the language used in the other ordinances. Eunice's ordinance states that an "abortion clinic" is "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."[163] At first glance, this definition appears to regulate a location: buildings or facilities where certain procedures are performed or treatments provided. It arguably could even apply to a home in which a person takes abortion pills to terminate a pregnancy. But there is nothing special about the location itself that is being regulated. The ordinance does not purport to regulate features of the physical plant, whether in terms of size, occupancy, or cleanliness. The subject of regulation is not the location but rather the person or practitioner performing the service.

The language the ordinance uses makes it unlawful for "any person or licensed abortion clinic" in the municipality to either use the mail, an express company, common carrier, or interactive computer service to send or deliver "[a]ny article or thing designed, adapted, or intended for producing abortion" or "[a]ny article, instrument, substance or drug, medicine or thing which is advertised or described in a manner calculated to lead another to use or apply it producing abortion."[164] The prohibited conduct is not merely stipulated to abortion clinics. Instead, it prohibits practitioners and others from obtaining any abortifacients or implements needed to perform an abortion. Prohibiting the conduct of any person falls outside of the scope of licensing a business or facility.

State law preempts Eunice's ordinance, which pertains to health care

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/abortion-guides-by-state/abortion-in-new-mexico/providers (Nov. 8, 2023) (providing that New Mexico currently has 10 institutional abortion providers, all of which are 501(c)(3) not-for-profits: Southwestern Women's Options; Alamo Women's Clinic; Whole Woman's Health; Las Cruces Women's Health Organization; Full Circle Health Center; UNM Center for Reproductive Health; and Planned Parenthood (multiple New Mexico locations)).

162. CLOVIS, N.M., CODE §§ 9.90.040-9.90.060 (2022); HOBBS, N.M., CODE § 5.52 (2022).

163. EUNICE, N.M., CODE § 19.070 (2023); *see also* HOBBS, N.M., CODE § 5.52.020 (2022); EDGEWOOD, N.M., CODE § 3 (2023). *But see* CLOVIS, N.M., CODE § 9.90.010 (2022) (failing to define "abortion clinic").

164. EUNICE, N.M., CODE § 19.070 (2023) (listing an aiding and abetting provision).

practitioners, pregnant people seeking an abortion,[165] and those who might assist someone with obtaining an abortion. Preemption occurs in two different ways in this case. First, the ordinance's regulation of health care providers falls under the state's purview. Second, the ordinance likely violates the state's Equal Rights Amendment.

On the first issue, New Mexico, like all other states, regulates the practice of medicine, as well as most other healthcare professions. The state regulates both health facilities[166] and licensure and regulation of health care practitioners, including physicians.[167] A physician granted a license to practice medicine in the state may provide medical or surgical services without restriction by the state.[168] A state may suspend or restrict a physician's license only for good cause.[169] With only one exception, no New Mexico law restricts healthcare providers from offering abortion services.[170] Other than the single prohibition against most intact dilation and extractions,[171] a prohibition against naturopaths performing surgical

165. *See* CLOVIS, N.M., CODE, tit. IX, § 9 (2022); HOBBS N.M., CODE § 5 (2022); EUNICE, N.M., CODE § 19 (2023) (showing none of the three municipalities that purport to license abortion clinics provide any exception for pregnant people seeking an abortion).

166. *See* N.M. STAT. ANN. § 24-1-5 (West 2017); N.M. STAT. ANN. § 24-1-2(F) (West 2022) (defining "health facility" as "a public hospital, profit or nonprofit private hospital, general or special hospital, outpatient facility, crisis triage center, freestanding birth center, adult daycare facility, nursing home, intermediate care facility, assisted living facility, boarding home not under the control of an institution of higher learning, child care facility, shelter care home, diagnostic and treatment center, rehabilitation center, infirmary, community mental health center that serves both children and adults or adults only, residential treatment center that serves persons up to twenty-one years of age, community mental health center that serves only persons up to twenty-one years of age and day treatment center that serves persons up to twenty-one years of age or a health service organization operating as a freestanding hospice or a home health agency").

167. *See* N.M. STAT. ANN. § 61-6-1(C) (West 2021) (designating the state medical board to discipline incompetent or unprofessional physicians).

168. *See* N.M. ADMIN. CODE § 16.10.2.8(B) (2023) (delineating categories of licenses, providing "Medical: An unrestricted license to practice medicine and surgery"); *see also* N.M. STAT. ANN. § 61-6-11 (West 2021) (providing requirements for licensure).

169. *See* N.M. STAT. ANN. § 61-6-15.1(A) (West 2008) (providing the circumstances under which the board may "summarily suspend or restrict a license. . . without a hearing").

170. *See* N.M. STAT. ANN. § 30-5A-3 (West 2023) (prohibiting providers from performing intact dilations and extractions under most circumstances).

171. *See id*. (referencing intact dilations and extractions as "partial-birth abortions").

abortions,[172] and a requirement that facilities record abortion statistics and provide them to the state,[173] there are no special laws regulating abortion at the state level.

Given the regulation at the state level, New Mexico law preempts municipal ordinances that purport to license abortion practitioners. New Mexico law preempts municipal regulation where the law is a general law and where it "expressly denies municipalities the authority to legislate similar matters."[174] A general law applies throughout the state, relates to a matter of statewide concern, and impacts inhabitants across the entire state.[175] The state legislature is not required to expressly deny municipalities authority to regulate in its language.[176] Rather, legislative intent can be implicit in the comprehensiveness of the relevant state law.[177] The issue is whether state law regulating health care practitioners is a general law that excludes municipal regulation on the same subject.

The state's medical licensure law should be considered a general law. Regulation of medical and other health care practitioners is a matter of statewide concern, not a local matter. The New Mexico Legislature enacted the Medical Practice Act "[i]n the interest of the public health, safety, and welfare and to protect the public from the improper, unprofessional, incompetent and unlawful practice of medicine."[178] The Medical Practice Act is intended to "provide laws and rules controlling the granting and use of the privilege to practice medicine and to establish a medical board to implement and enforce the laws and rules."[179] The Act impacts inhabitants throughout the state rather than only those in one or a handful of municipalities or regions.[180]

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172. *See* N.M. STAT. ANN. § 61-12G-8(G) (West 2019).

173. *See* N.M. STAT. ANN. § 24-14-18 (West 2008) (stating that names and addresses of abortion patients shall not be included in statistic reports).

174. *See* Espinoza v. City of Albuquerque, 435 P.3d 1270, 1275 (N.M. 2018) (quoting Casuse v. City of Gallup, 746 P.2d 1103, 1104 (1987) (explaining general laws affect the community at large).

175. *Id.* (quoting Smith v. City of Santa Fe, 133 P.3d 866, 869 (N.M. 2006)).

176. *See Casuse*, 746 P.2d at 1105 (ruling that laws clearly intending to preempt a governmental area are sufficient without expressly stating that municipalities cannot operate to the contrary).

177. *See, e.g.*, *Espinoza,* 435 P.3d at 1279 (concluding that comprehensive provisions can "exhaustively address" a governmental area).

178. N.M. STAT. ANN. § 61-6-1(B) (West 2021).

179. *Id.*

180. *Cf.* State *ex rel.* Haynes v. Bonem, 845 P.2d 150, 156 (N.M. 1992) (stating,

State law expressly prohibits public bodies, including municipalities,[181] from "deny[ing], restrict[ing] or interfer[ing] with a person's ability to access or provide reproductive health care or gender-affirming health care within the medical standard of care."[182] It additionally prohibits municipalities from "impos[ing] or continu[ing] in effect any law, ordinance, policy or regulation that violates or conflicts with the provisions of the Reproductive and Gender-Affirming Health Care Freedom Act."[183] A municipality that attempts to restrict providers from sending or receiving tools, implements, and drugs through the mail, common carriers, and internet providers violates this express legislative provision. Surgical implements and supplies or abortifacients are required to perform any abortion. Thus, the ordinance's restriction violates the Health Care Freedom Act as enacted.

Even notwithstanding the Health Care Freedom Act, state law implicitly prohibits municipalities from regulating health care providers in the way the ordinances attempt. In *In re Generic Investigation into Cable Television Services in the State of New Mexico*, the state supreme court considered whether new state regulation of cable television services would conflict with already-existing municipal regulation.[184] The court held that the legislature's grant of authority to a state commission to regulate cable television preempted municipal regulation, even though the legislature did not expressly address the issue.[185]

Similarly, the New Mexico Legislature empowered the state medical board to oversee the licensure, re-licensure, and de-licensure of physicians, physician assistants, and other health care providers authorized to practice in the state.[186] The state boards of nursing and pharmacists enjoy a similar grant

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regarding whether a law is a general law, that "the test, or at least a test, is the effect of a legislative enactment—whether it affects all, most, or many of the inhabitants of the state and is therefore of statewide concern, or whether it affects only the inhabitants of the municipality and is therefore of only local concern.").

181. *See* N.M. STAT. ANN. § 24-34-2(B) (West 2023) ("'[P]ublic body' means a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education.").

182. N.M. STAT. ANN. § 24-34-3(B) (West 2023).

183. N.M. STAT. ANN. § 24-34-3(D) (2021).

184. *See* Las Cruces TV Cable v. N.M. State Corp. Comm'n, 707 P.2d 1155, 1160-61 (N.M. 1985) (noting that municipalities may exercise legislative powers not expressly denied by general law or charter).

185. *Id.* at 1161.

186. N.M. STAT. ANN. §§ 61-6-1, 61-6-5 (2021).

of authority.[187] While the legislature does not expressly state that municipalities may not regulate health care practitioners, its own comprehensive and coordinated system of laws, in conjunction with its grant of regulatory authority to health care provider boards, suggests that it intended to preempt municipal regulation.

There are additional state law grounds for preemption with respect to obtaining implements and pharmaceuticals needed for an abortion. The New Mexico Constitution provides, in relevant part, that no person shall be denied equal protection of the laws.[188] The people of New Mexico voted to augment that provision with an Equal Rights Amendment in 1972.[189] The clause provides, "[e]quality of rights under law shall not be denied on account of the sex of any person."[190] While neither the state constitution itself nor any case yet decided in the state expressly secures the right to reproductive freedom, including the right to an abortion, it is likely that such a right is implied under the constitution and laws of the state.

Two factors weigh heavily in this determination. First, under New Mexico's amended Equal Protection Clause, "[sex-based] classifications are presumptively unconstitutional."[191] The government has the burden to rebut this presumption.[192] This is true even with respect to conditions that affect only one sex due to physical differences between the two, such as pregnancy.[193] Second, the state court uses strict scrutiny to evaluate gender-based legal distinctions.[194] Where gender-based legal distinctions operate to the disadvantage of one gender, and where the state's interests are not both compelling and narrowly tailored to achieve their purpose, the law cannot stand.[195] In *N.M. Right to Choose v. Johnson*, the state failed to meet this

187. N.M. STAT. ANN. §§ 61-3-2, 61-3-10 (2021); N.M. STAT. ANN. §§ 61-11-1.1, 61-11-6 (2021).

188. N.M. CONST. art. II, § 18 (amended 1970).

189. N.M. Right to Choose v. Johnson, 975 P.2d 841, 853 (N.M. 1998).

190. N.M. CONST. art. II, § 18.

191. *N.M. Right to Choose*, 975 P.2d at 853.

192. *Id*.

193. *Id*. at 854-55 (observing that "we cannot ignore the fact that "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." Further, history teaches that lawmakers often have attempted to justify gender-based discrimination on the grounds that it is "benign" or "protective" of women") (citations omitted).

194. *See id*. at 856 (noting the State must show a compelling justification to survive the heightened scrutiny applied to gender-based classifications).

195. *Id*. at 855.

standard where plaintiffs challenged state law prohibiting Medicaid payments for most abortions at any stage of pregnancy.[196] The court observed that "since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them" and that "lawmakers often have attempted to justify gender-based discrimination on the grounds that it is 'benign' or 'protective' of women."[197] "Romantic paternalism" cannot provide a defensible basis for laws that discriminate based on gender.[198]

b. New Mexico Municipalities May Not Authorize a Private Right of Action

Finally, the state constitution prohibits the City of Edgewood and the Counties of Lea and Roosevelt from providing a private right of action to any municipal resident other than those involved in local government. Article 10, § 6(D) of the New Mexico Constitution prohibits even home rule municipalities from "enact[ing] private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power."[199] These three municipalities, all of which are non-home-rule, are limited solely to the powers expressly granted to them by the legislature. The legislature nowhere grants them the power to create private causes of action for matters of any kind, let alone ones that they have, as articulated above, no authority to regulate. Thus, the municipalities' attempts to enforce their abortion ordinances by providing individuals with a private right of action against those who violate them are invalid.

c. The City of Eunice Misinterprets the Federal Comstock Act

The City of Eunice argues in its petition for a declaratory judgment that

196. *See id*. at 856 ("Rule 766 undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.").

197. *Id*. at 854-55.

198. *Id*. at 855. In *N.M. Right to Choose*, the New Mexico Supreme Court relied on then-existing federal law for the proposition that the state's interest in unborn life cannot trump that of the pregnant person's life or health. *Id*. at 857 ("Under federal law, the State's interest in the potential life of the unborn is never compelling enough to outweigh the interest in the life and health of the mother"). No New Mexico law expressly provides a right to an abortion, and the state supreme court has not held that the state constitution protects this right. Attorney General Raúl Torrez has asked the state supreme court to find a right to an abortion in the New Mexico Constitution in *Torrez v. Cities and Counties*. However, at oral argument, the court provided no indication it would likely address this issue in deciding the case. New Mexico Supreme Court, *supra* note 135.

199. N.M. CONST. art. X, § 6(D) (amended 1970).

its ordinance is lawful.[200] It seeks to permit the city to enforce existing federal law.[201] It also seeks a declaratory judgment that the Health Care Freedom Act excludes conduct that violates federal law.[202] It contends that while New Mexico law may permit abortions to be performed and may purport to prohibit municipalities from adopting conflicting ordinances, that permission does not supersede conflicting federal law.[203] According to the City of Eunice, the Comstock Act, as enacted in 18 U.S.C. §§ 1461 and 1462, stands in full force as written and hence prohibits "abortion-related materials" from being sent through the mail, via common carriers, or via the internet.[204] The current Biden administration, however, "refuses to interpret or enforce these statutes as written."[205]

The Biden administration is not alone. For many decades, no federal administration has interpreted or enforced these statutes, at least concerning materials that are either expressly, or are presumed to be, lawful and where they are used. As early as 1881, one federal district court remarked in *dicta* that matter taken from medical and surgical books "would be proper enough for the general use of members and students of the profession," even though it might be deemed obscene for the public.[206] The Second Circuit in *Youngs Rubber Corp. v. C.I. Lee & Co*. provided in *dicta* that such an interpretation of the Comstock Act

> would prevent mailing to or by a physician of any drug or mechanical device 'adapted' for contraceptive or abortifacient uses, although the physician desired to use or to prescribe it for proper medical purposes. The intention to prevent the proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress.[207]

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200. *See* Complaint at 2, City of Eunice v. Torrez, No. D-506-CV-2023-00407 (N.M. Cnty. of Lea 5th Jud. Dist. Apr. 17, 2023) (arguing that there is no state-law right to defy federal criminal statutes pertaining to abortion).

201. *See id*. (asserting state-law right to abortion must be exercised within confines of federal criminal prohibitions in 18 U.S.C. §§ 1461 and 1462).

202. *See id*. at 2-3 (arguing state-law right to access or provide reproductive healthcare excludes federally criminalized conduct such as partial-birth abortions).

203. *See id*. at 5 (noting that the city ordinance does not ban abortion but requires conformity with federal law).

204. *Id*. at 3.

205. *Id*. at 4.

206. *See* United States v. Chesman, 19 F. 497, 497-98 (E.D. Mo. 1881) (explaining that the medical matter was obscene without regard of who the matter was directed to).

207. Youngs Rubber Corp. v. C.I. Lee & Co., 45 F.2d 103, 108 (2d Cir. 1930); *see also* United States v. One Package, 86 F.2d 737, 739-40 (2d Cir. 1936) (stating that

Cases following *Youngs Rubber* cited this dictum with approval in their holdings. The Sixth Circuit, in *Davis v. United States*, cited the reasoning in *Youngs Rubber* that it was an error to refuse to permit the defendants to show their "good faith and absence of unlawful intent" in shipping condoms to druggists.[208] Another court reasoned similarly that because "[n]o federal statute forbids the manufacture or sale of contraceptives," and because the defendants were using the mail to send condoms intended for a lawful purpose, the defendants could not have violated the Comstock Act.[209]

Some courts might seek to use the Comstock Act to prohibit all items that might fall within its ambit, even if their purchase and use in a state is legal.

Congress did not likely intend "to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patient"); United States v. Nicholas, 97 F.2d 510, 512 (2d Cir. 1938) ("Contraceptive books and pamphlets are of the same class and those at bar were therefore lawful in the hands of those who would not abuse the information they contained"); Consumers Union of U.S., Inc. v. Walker, 145 F.2d 33, 35 (D.C. Cir. 1944) ("In short, while it is the duty of courts, whenever they can, to interpret statutes in such manner as to avoid doubt of constitutionality, there is, also, a duty to avoid absurdity or injustice. With these considerations in mind, we are inclined to follow the interpretation which has been adopted in other circuits, namely, that Congress did not intend to exclude from the mails properly prepared information intended for properly qualified people.") (footnotes omitted).

208. Davis v. United States, 62 F.2d 473, 475 (6th Cir. 1933). At that time, the Comstock Act included contraceptives among the items prohibited from the mail and common carriers.

209. United States v. H.L. Blake Co. Inc., 189 F. Supp. 930, 937 (W.D. Ark. 1960); *see also* United States v. 31 Photographs, 156 F. Supp. 350, 358-59 (S.D.N.Y. 1957) (stating in the context of obscene materials, "It is possible, instead of holding that the material is not obscene in the hands of the persons who will have access to it, to speak of a conditional privilege in favor of scientists and scholars, to import material which would be obscene in the hands of the average person. I find it unnecessary to choose between these theories. In the first place, under either theory the material may not be excluded in this case. Moreover, I believe that the two theories are but opposite sides of one coin. For it is the importer's scientific interest in the material which leads to the conditional privilege, and it is this same interest which requires the holding that the appeal of the material to the scientist is not to his prurient interest and that, therefore, the material is not obscene as to him"); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (in a case involving the application of 39 U.S.C. § 3001(e)(2), which "originated in 1873 as part of the Comstock Act," finding that the government has a "substantial" interest in "aiding parents'" efforts to discuss birth control with their children"); *see generally* Associated Students Univ. of Cal. Riverside v. United States, 368 F. Supp. 11, 24 (C.D. Cal. 1973) (holding that the mailing of informational materials regarding contraception is protected by the First Amendment and hence did not violate the Comstock Act).

A more logical and consistent interpretation, however, is one taken by federal circuit and district courts that have considered the issue: abortifacients and other materials used in performing an abortion may be sent through the mail, via common carriers, and the internet in cases where their use is legal.[210]

PART IV. CONCLUSION

The Nebraska and New Mexico municipalities considered in this Article lack the authority to adopt the abortion ordinances considered here. Even if they did have proper authority, either state law would preempt their effect or federal law would render the ordinance unenforceable.

One might wonder why the municipalities considered here did not simply challenge the state's ability to permit abortifacients and instruments used in producing an abortion under the Supremacy Clause. At least four federal circuits, including the Tenth, have held that municipalities have standing to challenge state law that they believe violates or is preempted by federal law despite their contingent status as state creations.[211] If a municipality such as Eunice wanted to challenge a state law that it believed violated or was preempted by the Comstock Act, it would technically be able to do so in the Tenth Circuit, provided it satisfied other standing requirements.[212] However, the mere ability to challenge a state regarding its adherence to federal law does not, in itself, give it the authority to pass an ordinance requiring adherence to a particular federal law within its boundaries, especially where

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210. *See*, *e.g.*, Smith v. United States, 431 U.S. 291, 300-01 (1977) (suggesting no portion of the Comstock Act, not even the portion restricting "obscene" materials, is taken at face value, but rather is guided by community notions of what qualifies as "obscene"); *see also* Miller v. California, 413 U.S. 15, 26 (1973) (indicating the test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve and that patent offensiveness is to be treated in the same way).

211. *See*, *e.g.*, Tweed-New Haven Airport Auth. v. Tong, 930 F.3d 65, 73 (2d Cir. 2019) ("If the Supremacy Clause means anything, it means that a state is not free to enforce within its boundaries laws preempted by federal law"); Ocean Cnty. Bd of Comm'rs v. N.J., 8 F.4th 176, 181 (3d Cir. 2021) (agreeing "with the reasoning of the Second Circuit and hold[ing] that a political subdivision may sue its creator state in federal court under the Supremacy Clause"); Rogers v. Brockette, 588 F.2d 1057, 1070 (5th Cir. 1979) (granting school district authority to challenge its state creator over whether federal law preempts a state provision); Branson Sch. Dist. v. Romer, 161 F.3d 619, 628 (10th Cir. 1998) (concluding that "a political subdivision has standing to bring a constitutional claim against its creating state when the substance of its claim relies on the Supremacy Clause and a putatively controlling federal law").

212. *See*, *e.g.*, Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329, 1370-78 (2020) (discussing the standing of cities to bring impact litigation cases).

it seeks to require people to adhere to the municipality's interpretation of that federal law. The municipality would need sanction from the state that created it, just as it does for any other sort of ordinance. The legislature would have to provide that authority by statute to non-home-rule municipalities. Home rule municipalities presumably already have such sanction, except to the extent that the state in which it is located preempts the issue.

The existence of an easier alternative for these municipalities to achieve their stated aim, especially one that could yield a statewide rather than municipally-focused result, suggests several possibilities. First, it is possible that the individuals involved in drafting were unaware of the possibility of launching a Supremacy Clause challenge, at least in the Tenth Circuit. Second, it is possible that the goals of one or more of the individuals behind Sanctuary Cities for the Unborn may be larger than simply encouraging municipalities like those in New Mexico to prohibit abortion within their borders. Perhaps they additionally seek to extend municipalities' scope of self-governance. Third—and most likely—the individuals involved are more interested in promoting their ideologies than in the legality of their ordinances. If anti-abortion activists are able to get their ideas into the mainstream, the notion that a tiny municipality might legitimately control major aspects of the lives and destinies of its residents may become normalized.

Municipalities commonly restrict rights that affect many residents, most notably involving property rights through zoning laws.[213] Such restrictions can have indirect negative effects on liberties—most notoriously on rights of association, with related enfeebling of social solidarity.[214] Restrictions on

213. *See*, *e.g.*, Mitchell v. City of Roswell, 111 P.2d 41, 44 (N.M. 1941) ("All property and property rights are held subject to the fair exercise of the police power (3 McQuillin, 2d Ed., § 939); and a reasonable regulation enacted for the benefit of the public health, convenience, safety or general welfare is not an unconstitutional taking of property in violation of the contract clause, the due process clause, or the equal protection clause of the Federal Constitution. . . A vested interest in property cannot be asserted against it upon the theory that the business was established before the statute or ordinance was passed. When the power is authorized and reasonably enforced, it matters not that the investment in property, as it is alleged here, was made prior to the passing of the ordinance, or that the value of the property was reduced materially by reason thereof; or that the property is not so useful or valuable for any other purpose. The private interests of the individual are subordinated to the superior interest of the public.") (citations omitted).

214. *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 257 (1977) (explaining that local authorities' refusal to change the tract from a single-family to a multi-family classification was racially discriminatory, but ultimately

property rights are different, however, from the right to establish one's own life course. While the first is financial, the second is existential. One could reasonably argue that municipalities with home rule powers should have the ability to expand this second, existential sort of right.[215] However, municipalities ought not to have the ability to restrict fundamental individual liberties, especially liberties associated with a historically marginalized sex. This is particularly the case when the general right—that to bodily autonomy—is otherwise subject in broad terms to constitutional and other legal protection.[216] Nowhere else does United States law require a person to use their own body to support the life of another person.[217]

Liberty will be expanded, not contracted, if municipal powers only govern matters of municipal concern and not broader, more fundamental issues such as the reproductive fate of residents who can become pregnant and their ability to determine their own life course. Questions regarding the

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upheld a zoning ordinance that prevented the construction of multi-unit dwellings for low-income tenants); *The Case Against Restrictive Land Use and Zoning*, N.Y.U. FURMAN CTR (Jan. 2022), https://furmancenter.org/files/publications/The_Case_ Against_Restrictive_ Land _ Use_and_Zoning_Final.pdf (explaining restrictive zoning has a deleterious effect on an individual's choice, such as the choice to reside in an apartment rather than a detached single-family home).

215. *See*, *e.g.*, *To Save a City*, *supra* note 47, at 1215 (arguing that local governments are creatures of the people, not state will).

216. *See*, *e.g.*, Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); Lawrence J. Nelson, Brian P. Buggy & Carol J. Weil, *Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'*, 37 HASTINGS L.J. 703, 755 (1986) ("If our society will not compel someone to undergo a bodily invasion such as organ or tissue transplantation for the benefit of another, how can society view pregnant women refusing treatment any differently? The basic values at stake are the same: the freedom to choose one's own destiny and to maintain one's bodily integrity"). *But see* Marjorie M. Schultz, *Abortion and Maternal-Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 88 (1992) (recognizing the absence of a duty to rescue in other contexts, but noting, "no other circumstance squarely parallels the situation of gestation").

217. *See supra* notes 128-29 and associated text; *see also* Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 L. & ETHICS OF HUMAN RTS. 189, 212-16 (2017) (finding in the few cases considering the issue that courts do not obligate one person to provide a portion of their body for the benefit of a third person).

ontological status of fetuses and the equal rights of women and others who can become pregnant are matters that supersede municipal concerns. Municipalities handle matters that uniquely affect their cities, towns, and villages. While they may be called upon to address matters involving civil rights specific to their locality, they still must consider relevant state and federal law in the process. It is difficult to imagine any circumstance in which a municipality might lawfully decide that it can subordinate the civil rights of a pregnant person.