

TOWN OF EDGEWOOD, NEW MEXICO - ORDINANCE 2023 - 002

**AN ORDINANCE REQUIRING ABORTION PROVIDERS IN THE TOWN OF
EDGEWOOD, NEW MEXICO TO COMPLY WITH FEDERAL LAW**

BE IT ORDAINED by the governing body, that is, the Town Commission of the Town of Edgewood, New Mexico:

SECTION ONE: FINDINGS AND DECLARATIONS

The Town Commission finds that:

- A. Federal law imposes felony criminal liability on every person who ships or receives abortion pills or abortion-related paraphernalia through the mail, an express service, a common carrier, or an interactive computer service, see 18 U.S.C. §§ 1461-62, and all such acts are predicate offenses under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), see 18 U.S.C. § 1961.
- B. The State Constitution of New Mexico does not and cannot secure a right, privilege or immunity to act in violation of federal statutes such as 18 U.S.C. §§ 1461-62, or to engage in criminal and racketeering conduct as defined by federal law.
- C. The members of the Town Commission are bound by oath to support and defend the Constitution of the United States, and the statutory provisions codified at 18 U.S.C. §§ 1461-62 are the "supreme Law of the Land" under Article VI of the Constitution and must be obeyed and respected by every person within the Town of Edgewood and by every judge in the State of New Mexico. See U.S. Const. art. VI ("[T]he Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").
- D. The New Mexico legislature recently enacted House Bill 7, which purports to confer a state-law right to "access or provide reproductive health care....within the medical standard of care" and empowers the Attorney General to sue local jurisdictions that infringe this newly created state-law right.
- E. But the federal-law restrictions on the shipment or receipt of abortion pills and abortion-related paraphernalia in 18 U.S.C. §§ 1461 and 1462 are the "supreme Law of the Land" under Article VI of the Constitution and trump any state-law right to abortion that might be conferred by HB 7 or the New Mexico Constitution. There is no state-law right to act in defiance of a federal criminal statute, and any state-law right to abortion must be exercised within

the confines of the federal criminal prohibitions established in 18 U.S.C. §§ 1461 and 1462 and the federal partial-birth abortion ban.

- F. In addition, the state-law right in HB 7 "to access or provide reproductive health care within the medical standard of care" excludes conduct outlawed and criminalized by federal law, such as partial-birth abortion and violations of 18 U.S.C. §§ 1461 and 1462. Criminal acts fall outside "the medical standard of care" by definition, and HB 7, by its terms, protects only abortion-related conduct that complies with extant federal law.
- G. HB 7 therefore leaves local jurisdictions such as Edgewood free to enact prohibitions on partial-birth abortion and conduct that violates 18 U.S.C. §§ 1461 and 1462, because none of these criminal acts fall within "the medical standard of care."
- H. We call upon the United States Attorneys for the District of New Mexico, both present and future, to investigate and prosecute abortion providers and abortion-pill distribution networks under 18 U.S.C. §§ 1461-62 and the Racketeer Influenced and Corrupt Organizations Act (RICO).
- I. We call upon victims of abortion providers and abortion-pill networks to sue these racketeering enterprises under civil RICO.

SECTION TWO: PURPOSE AND INTENT

The purpose of this ordinance is to ensure compliance with federal abortion laws, including 18 U.S.C. §§ 1461-62, within the Town of Edgewood, New Mexico.

SECTION THREE: DEFINITIONS

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section unless in context it appears that a different meaning is intended:

"Abortion" means the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of an individual, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of an unborn child. The term does not include:

1. In vitro fertilization or fertility treatments of any type;
2. The use, prescription, administration, procuring, or selling of Plan 8, morning after pills, intrauterine devices, or any other type of contraception or emergency contraception; or
3. An act performed with the purpose to:

- a. Save the life or preserve the health of the unborn child;
- b. Remove a dead unborn child caused by spontaneous abortion; or
- c. Remove an ectopic pregnancy, the implantation of a fertilized egg or embryo outside of the uterus.

"Abortion clinic" means 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.

"Hospital" means an institution that is:

1. Primarily engaged in providing, by or under the supervision of physicians, inpatient diagnostic and therapeutic services or rehabilitation services; and
2. Duly licensed for this purpose under the laws of New Mexico.

"Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

"Medical emergency" means 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.

"Woman" and "women" include any person whose biological sex is female, including any person with XX chromosomes and any person with a uterus, regardless of any gender identity that the person may attempt to assert or claim.

SECTION FOUR: COMPLIANCE WITH FEDERAL ABORTION LAWS REQUIRED

- A. It shall be unlawful for any person to violate 18 U.S.C. § 1461 by using the mails for the mailing, carriage in the mails, or delivery of:
 1. Any article or thing designed, adapted, or intended for producing abortion; or
 2. Any article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion;
- B. It shall be unlawful for any person to violate 18 U.S.C. § 1462 by:
 1. Using any express company or other common carrier or interactive computer service for carriage in interstate or foreign commerce of any drug, medicine, article, or thing designed, adapted, or intended for producing abortion;
 2. Knowingly taking or receiving, from such express company or other common carrier or interactive computer service, any matter or thing described in subsection (B)(1).

- C. It shall be unlawful for any person to engage in conduct that aids or abets the violations of 18 U.S.C. § 1461 or 18 U.S.C. § 1462 described in sub-section (A).
- D. It shall be unlawful for any person to perform or assist a partial-birth abortion in violation of 18 U.S.C. § 1531.
- E. Notwithstanding any other law, the requirements of this section shall be enforced exclusively through the private civil actions described in section 5. No direct or indirect enforcement of this section may be taken or threatened by the Town of Edgewood, New Mexico or any of its employees or agents against any person or entity, by any means whatsoever, and no violation of this section may be used to justify or trigger the enforcement of any other law or any type of adverse consequence under any other law, except as provided in section 5. This section does not preclude or limit the enforcement of any other law or regulation against conduct that is independently prohibited by such other law or regulation, and that would remain prohibited by such other law or regulation in the absence of this section.

SECTION FIVE: PRIVATE RIGHT OF ACTION

- A. Any person, other than the state, its political subdivisions, including the Town of Edgewood, New Mexico, and any officer or employee or agent of a state or local governmental entity in this state, has standing to bring and may bring a civil action against any person or entity that:
 - 1. Violates any provision of section 4(A), section 4(B), section 4(C), or section 4(D); or
 - 2. Intends to violate any provision of section 4(A), section 4(B), section 4(C), or section 4(D).
- B. If a claimant prevails in an action brought under this section, the court shall award:
 - 1. Injunctive relief sufficient to prevent the defendant from violating section 4;
 - 2. Nominal and compensatory damages if the plaintiff has suffered injury or harm from the defendant's conduct, including but not limited to loss of consortium and emotional distress;
 - 3. Statutory damages in an amount of not less than \$10,000 for each violation of section 4(A), section 4(B), section 4(C), or section 4(D); and
 - 4. Costs and reasonable attorney's fees.
- C. Notwithstanding Subsection (B), a court may not award relief under Sub-section (B)(3) or (B)(4) in response to a violation of Subsection (A)(1) if the defendant demonstrates that a court has already ordered the defendant to pay the full amount of statutory damages under Subsection (B)(3) in another action for that

particular violation of section 4.

- D. Notwithstanding any other law, a person may bring an action under this section not later than the sixth anniversary of the date the cause of action accrues.
- E. Notwithstanding any other law, the following are not a defense to an action brought under this section:
1. Ignorance or mistake of law;
 2. A defendant's belief that the requirements or provisions of this chapter are unconstitutional or were unconstitutional;
 3. A defendant's reliance on any court decision that has been vacated, reversed, or overruled on appeal or by a subsequent court, even if that court decision had not been vacated, reversed, or overruled when the cause of action accrued;
 4. A defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
 5. A defendant's reliance on any federal or state statute, agency rule or action, or treaty that has been repealed, superseded, or declared invalid or unconstitutional, even if that federal or state statute, agency rule or action, or treaty had not been repealed, superseded, or declared invalid or unconstitutional when the cause of action accrued;
 6. Non-mutual issue preclusion or non-mutual claim preclusion;
 7. The consent of the plaintiff or the unborn child's mother to the abortion;
 8. Contributory or comparative negligence;
 9. Assumption of risk;
 10. Any claim that the enforcement of this chapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by section 6.
- F. This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Article II, section 17 of the New Mexico Constitution.
- G. Notwithstanding any other law, neither the Town of Edgewood, New Mexico, nor any of its officers, employees, or agents, may:
1. Act in concert or participation with anyone who brings suit under this section;
 2. Establish or attempt to establish any type of agency or fiduciary relationship with a person who brings suit under this section;

3. Make any attempt to control or influence a person's decision to bring suit under this section or that person's conduct of the litigation; or
4. Intervene in any action brought under this section.

This subsection does not prohibit a person or entity described by this subsection from filing an amicus curiae brief in the action, so long as that person or entity does not act in concert or participation with the plaintiff or plaintiffs who sue under this section or violate any provision of Subsection (G)(1)-(4).

H. Notwithstanding any other law, a court may not award costs or attorneys' fees to a litigant who is sued under this section.

I. Notwithstanding any other law, a civil action under this section may not be brought:

1. Against the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this chapter, or against a pregnant woman who intends or seeks to abort her unborn child in violation of this chapter;
2. Against any person or entity that performs, aids or abets, or attempts or intends to perform or aid or abet an abortion at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity;
3. Against any hospital, or against any employees, agents, or contractors of a hospital, for engaging in conduct necessary to ensure that a licensed physician is prepared to perform an abortion in response to a medical emergency;
4. Against any common carrier that transports a pregnant woman to an abortion provider, if the common carrier is unaware that the woman intends to abort her unborn child; or
5. By any person who impregnated a woman seeking an abortion through an act of rape, sexual assault, or incest, or by anyone who acts in concert or participation with such a person.

SECTION SIX: AFFIRMATIVE DEFENSES

A. A defendant against whom an action is brought under section 5 may assert an affirmative defense to liability under this section if:

1. The imposition of civil liability on the defendant will violate rights, privileges, or immunities secured by the Constitution or laws of the United States or by the Constitution or laws of the State of New Mexico, that belong to the defendant personally; or

2. The defendant:
 - a. Has standing to assert the rights, privileges, or immunities of a third party under the tests for third-party standing established by the Supreme Court of the United States or the Supreme Court of New Mexico; and
 - b. Demonstrates that the imposition of civil liability on the defendant will violate rights, privileges, or immunities secured by the Constitution or laws of the United States, or by the Constitution or laws of the State of New Mexico, that belong to that third party.
- B. The defendant shall bear the burden of proving the affirmative defense in Subsection (A) by a preponderance of the evidence.
- C. Notwithstanding Subsection (A) or any other law, this section shall not provide an affirmative defense to liability for conduct that violates the federal criminal laws of the United States, including 18 U.S.C. §§ 1461-1462, and no purported state-law right, privilege, or immunity to act in violation of 18 U.S.C. §§ 1461-1462 or any other federal criminal law may provide a defense to liability under this section.
- D. Notwithstanding any other law, nothing in this section or chapter shall limit or preclude a defendant from asserting the unconstitutionality of any provision or application of this ordinance as a defense to liability under section 5, or from asserting any other defense that might be available under any other source of law.

SECTION SEVEN: SEVERABILITY

- A. Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the Supreme Court of the United States held that an explicit statement of legislative intent is controlling, it is the intent of the Town Commission that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter to every person, group of persons, or circumstances, are severable from each other.
- B. If any application of any provision in this chapter to any person, group of persons, or circumstances is found by any court to be invalid, pre-empted, or unconstitutional, for any reason whatsoever, then the remaining applications of that provision to all other persons and circumstances shall be severed and preserved, and shall remain in effect. All constitutionally valid applications of the provisions in this chapter shall be severed from any applications that a court finds to be invalid, preempted, or unconstitutional, because it is the Town Commission's intent and priority that every single valid application of every provision in this chapter be allowed to stand alone.

- C. The Town Commission further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of the provisions of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter were to be declared invalid, preempted, or unconstitutional.
- D. If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the severability requirements of subsections (A), (B), and (C).
- E. No court may decline to enforce the severability requirements of Subsections (A), (B), (C), and (D) on the ground that severance would "rewrite" the ordinance or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state or local official from enforcing a statute or ordinance is never rewriting the underlying law or engaging in legislative or lawmaking activity, as the statute or ordinance continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:
1. Is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the New Mexico Constitution or United States Constitution;
 2. Is not a formal amendment of the language in a statute or ordinance; and
 3. No more rewrites a statute or ordinance than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.
- F. If any court, including any state or federal court, disregards any of the severability requirements in Subsections (A), (B), (C), (D), or (E), and declares or finds any provision of this chapter facially invalid, pre-empted, or unconstitutional, when there are discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating federal or state law or the federal or state constitutions, then that provision shall be interpreted, as a matter of local law, as if the municipality had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate federal or state law or the federal or state constitutions, and every court shall adopt this saving construction of that provision until the court ruling that pronounced the provision facially invalid, preempted, or unconstitutional is vacated or overruled.

SECTION EIGHT: EFFECTIVE DATE

This ordinance, after adoption, shall go into effect five days after it has been published by the Town of Edgewood Town Commission and may be amended as authorized by ordinance or statute.

PASSED, ADOPTED, AND APPROVED this 26th day of April 2023.

Audrey J. Jaramillo
Audrey J. Jaramillo, Mayor, CMO

ATTEST:

Nina R. McCracken
Nina R. McCracken, Town Clerk

