

IN THE STATE OF NEW MEXICO
COUNTY OF BERNADILLO

PAUL GESSING AND CARENET OF
ALBUQUERQUE, INC. AND PROJECT
DEFENDING LIFE, INC.

Plaintiffs,

v.

STEPHANIE YARA, *in her official capacity
as director of finance and
administration for the City of
Albuquerque*; CAROL M. PIERCE, *in her
official capacity as director of family
and community services of the City of
Albuquerque*; and *Planned Parenthood
of the Rocky Mountains, Inc.*

Defendants.

Case No.

Complaint

1. Taxpayer funds are not a piggy bank for politicians to raid for their own pet projects and political preferences. The New Mexico Constitution's anti-donation clause is a bulwark against politicians treating taxpayer funds as their own. The anti-donation clause mandates that New Mexico and its political subdivisions may only give public funds to private entities, including nonprofit organizations, under narrow circumstances wherein the nonprofit organization enters into a genuine contract for concrete services, complete with specific performance metrics.

2. On May 2, 2022, an unknown person leaked the draft of Justice Samuel Alito's majority opinion for the U.S. Supreme Court in *Dobbs v. Jackson*

Women's Health Organization. At its next regularly scheduled meeting on May 17, the Albuquerque City Council voted to give \$250,000 in taxpayer funds as a “sponsorship” to Planned Parenthood as a sign of solidarity with the pro-choice side.

3. On August 5, 2022, the City entered into a “social services agreement” with Planned Parenthood of the Rocky Mountains. The agreement has minimal performance expectations, no specific metrics, and no meaningful accountability. It funds staff positions rather than specific services.

4. On August 15, 2022, the City Council voted down an effort to reallocate the Planned Parenthood funds. Instead, the Council voted to retain the Planned Parenthood sponsorship.

5. Plaintiffs are Albuquerque taxpayers and organizations that serve pregnant women that may have applied had the funds been available on a competitive basis. They challenge this unconstitutional use of taxpayer funds.

PARTIES

6. Plaintiff Paul Gessing is a property owner and registered voter in the City of Albuquerque. He pays property taxes to the City. He frequently purchases goods subject to the gross receipts tax.

7. Defendant Stephanie Yara is director of finance and administration for the City of Albuquerque and is sued in her official capacity. As such, she is responsible for overseeing all aspects of the city's finances, including its issuance of checks to grantees.

8. Defendant Carol M. Pierce is director of the Department of Family and Community Services for the City of Albuquerque. She is sued in her official capacity. As director, she is responsible for overseeing the City's grant to Planned Parenthood of the Rocky Mountains. Her deputy director signed the City's agreement with Planned Parenthood on her behalf.

9. Planned Parenthood of the Rocky Mountains, Inc., is a non-profit organization that is the regional affiliate of the national Planned Parenthood Federation of America. It has clinics and services in several Mountain West states, including New Mexico.

JURISDICTION AND VENUE

10. This case seeks a declaratory judgment under N.M. Stat. Ann. § 44-6-4 because Plaintiffs' rights are affected by a municipal ordinance. *See Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 3.

11. Venue is appropriate under N.M. Stat. Ann. § 38-3-1 (2018) because the Plaintiffs all reside or operate in Bernadillo County and the Municipal Defendants all work in their official capacity in Bernadillo County, and Planned Parenthood of the Rocky Mountains has a facility in Bernadillo County.

FACTUAL ALLEGATIONS

12. The anti-donation clause, article IX, Section 14 of the New Mexico Constitution, provides, in pertinent part: “Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation. . . .”

13. The City of Albuquerque is a municipality subject to this provision of the New Mexico Constitution.

14. At its meeting on May 16, 2022, the Albuquerque City Council voted on various provisions related to the City’s budget for fiscal year 2023.

15. On a 6 to 3 vote, the Council adopted Floor Amendment 13, which reduced \$500,000 from affordable housing and redirected half of those funds, or \$250,000, to a “council-directed sponsorship for Planned Parenthood.”ⁱ

16. The City’s final 2023 adopted budget includes \$250,000 for “Planned Parenthood NM” under the Department of Family & Community Services.ⁱⁱ

17. The day after the vote, Councilwoman Tammy Fiebelkorn put out a press release regarding Amendment 13. In that release, she is quoted as saying, “While extremists attack choice nationwide and the Supreme Court seems poised to take away women’s rights and control of their own bodies, we affirmed our respect and support for women’s reproductive freedoms. I’m proud to have sponsored this amendment to provide vital support for Planned Parenthood.”

18. The release quotes her further as saying, “Anti-women extremists have used aggression and intimidation towards Planned Parenthood clinics, staff, and patients resulting in increased costs, delays in treatment, and additional counseling and education needs. These funds support our local Planned Parenthood clinic to ensure that all Albuquerque women have access to family planning, abortion, and other reproductive health services.”ⁱⁱⁱ The release is attached and incorporated by reference as Exhibit A.

19. Subsequently, an agreement was entered into between the City’s Department of Family and Community Services and Planned Parenthood of the Rocky Mountains, Inc. A complete copy of that agreement is attached as Exhibit B to this complaint and is entirely incorporated by reference. The agreement is for services rendered from July 1, 2022 to June 30, 2023. But the agreement was not formally signed until August 5, 2022.

20. Under the terms of the agreement, the \$250,000 is paid out in partial payments spaced out over the two years of the agreement.

21. Planned Parenthood of the Rocky Mountains, Inc., is a nonprofit provider of abortions and other health services in Colorado, New Mexico, Southern Nevada, and Wyoming. It has four locations in New Mexico, including two in the City of Albuquerque.

22. At a subsequent Council meeting on Monday, August 15, a motion was made to withdraw the funding for Planned Parenthood and reallocate it to Barrett House, a local homeless shelter. Councilwoman Fiebelkorn defended the appropriation, telling one colleague, “Let me just start by saying that I am very sad that it was only \$250,000. I would love to give Planned Parenthood way, way more money. They do amazing services for our community. I have been there when I was in college. They are the only reason that I had STD testing, contraception, breast cancer screenings. It is insane to say that \$250,000 for this great organization won’t be spent in a really good manner. The reason it came about is because I am pro-choice. I am a supporter of Planned Parenthood. Period. And I was happy, proud to sponsor this budget amendment.”

23. Later in the discussion, Councilwoman Fiebelkorn said, “A gentleman asked earlier, what do we want to be known for? And let me just say, I want to be known as a Planned Parenthood supporter. I want to be known as a New Mexican where we still value women, respect women and give them control over their own bodies. That is what I want to be known for.”^{iv}

24. The motion to withdraw the \$250,000 from Planned Parenthood and reallocate it to Barrett House was amended to give \$250,000 to Planned Parenthood, and to give \$100,000 grants to Barrett House and another nonprofit group, Prosperity Works. This amended version passed.

25. On its website, Planned Parenthood of the Rocky Mountains thanks the Councilors who passed this earmark, saying, “The City of Albuquerque recently finalized next year’s budget and five champions stood up for access to the full spectrum of reproductive health care, including abortion care, by appropriating \$250,000 for Planned Parenthood in New Mexico!” It urges website visitors to “[s]end a message to those champions today to say thank you for ensuring that patients across our city will be able to access the full spectrum of reproductive health care, including abortion care.” The suggested message to the City Councilors reads, “Thank you for standing with Albuquerque families by appropriating \$250,000 to Planned Parenthood for reproductive health care services in our city’s budget. With access to abortion care at stake across the country, it is critical that we all stand up and make sure that people are able to access the health care they need in NM. You did just that by voting to support this critical funding for our city’s patients.”

26. Paul Gessing is a homeowner in the City of Albuquerque. He pays property taxes on his home. He also pays gross receipts taxes when he makes purchases in the City, as he frequently does.

27. CareNet is a pregnancy resource center in the City of Albuquerque. It provides pregnancy-related medical services, including free pregnancy testing, free sexually transmitted infection (STI) testing, and free parenting and pregnancy counseling and classes. In other words, it provides many of the same services covered by the agreement with Planned Parenthood. But because the agreement was a council-directed sponsorship rather than an open request for proposals (RPF), CareNet had no opportunity to apply for the funds.

28. Project Defending Life is a Catholic umbrella ministry in New Mexico that sponsors a pregnancy resource center in the City of Albuquerque. It provides pregnancy-related medical services, including free pregnancy testing, free sexually transmitted infection (STI) testing, and free parenting and pregnancy counseling and classes. In other words, it provides many of the same services covered by the agreement with Planned Parenthood. But because the agreement was a council-directed sponsorship rather than an open request for proposals (RPF), Project Defending Life had no opportunity to apply for the funds.

COUNT I

Defendants' sponsorship of Planned Parenthood of the Rocky Mountains violates the anti-donation clause.

29. The allegations contained in all preceding paragraphs are incorporated herein by reference.

30. The anti-donation clause provides, "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid

of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad; provided: (A) nothing in this section shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.” N.M. Const. art. IX, § 14.

31. This Court’s job is not to pass on the worthiness of the recipients of the funds: “The constitution makes no distinction as between ‘donations’, whether they be for a good cause or a questionable one. It prohibits them all.” *State ex rel. Mechem v. Hannah*, 63 N.M. 110, 120 (1957) (quoting *State ex rel. Sena v. Trujillo*, 46 N.M. 361, 369 (1942)).

32. Many attempts have been made in the past to give public funds to private charities—the courts and Attorney General have uniformly held that they violate the anti-donation clause. 1990 N.M. AG LEXIS 10, *3-4 (collecting examples).

33. Even if the City has an agreement in place with Planned Parenthood, this does not mean that it is no longer a donation.

34. First, whether something is a gift or donation must be seen “by reason of its nature and the circumstances surrounding it” such that it “take[s] on character as a donation in substance and effect.” *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50 (quoting *Vill. Of Deming v. Hosdreg Co.*, 62 N.M. 18, 28 (1956)).

35. Or, as the Attorney General has opined, “the anti-donation clause should be construed by reference to the ills it was intended to correct.” 1985 N.M.

AG LEXIS 36, *4. That purpose is “to preclude [public entities] from making gifts or donations disguised as business transactions.” *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (interpreting state law).

36. Here, the circumstances surrounding the agreement make clear that the motivation and purpose is to give a gift to Planned Parenthood. The substance of the matter indicates quite clearly this is a gift, not a contract for specified services. Councilwoman Fiebelkorn’s press release following the Council vote make clear this was a political statement aimed at anti-abortion groups and their potential success in the *Dobbs* case based on the leak, not on an identified need for medical services for indigent persons in Albuquerque. And as one does after receiving a gift, Planned Parenthood has a website dedicated to saying “thank you.”

37. Put differently, the expenditures in this case commit one of the ills the anti-donation clause was intended to prevent: it is an earmark by a public official, who is directing public funds to her private charitable goals.

38. Second, an agreement for services cannot be a sham. A violation of the anti-donation clause occurs when a public body gives public funds to a private entity “with no exchange of adequate consideration.” 2019 N.M. AG LEXIS 11, *13-14. See *City of Raton*, 600 F. Supp. 2d at 1161. Numerous opinions of the Attorney General insist on the equivalency in value between the sums given and the services received. 2002 N.M. AG LEXIS 2, *10; 2019 N.M. AG LEXIS 9, *4 (quoting N.M. Att’y Gen. Advisory Letter to Honorable Mary Kay Papen, New Mexico State Senate (Mar. 30, 2011)).

39. There must be *adequate* consideration so the anti-donation clause is not circumvented by a nominal exchange that is in reality a gift. *City of Raton*, 600 F. Supp. 2d at 1161 (“to preclude them from making gifts or donations disguised as business transactions”); 2019 N.M. AG LEXIS 12, *6; 2011 N.M. AG LEXIS 15, *16; 2009 N.M. AG LEXIS 17, *5 (reaffirming 1990 N.M. AG LEXIS 10, *4-5).

40. In order to ensure adequate consideration, any contract for services must be specific. It must set specific performance targets, measurement metrics, and accountability measures to ensure it is an authentic contract for services and not a sham cover for a gift. 1989 N.M. AG LEXIS 6, *4. *See* 1966 N.M. AG LEXIS 145, *3; N.M. Att’y Gen. Advisory Letter to Shawn Lerch, Miners’ Colfax Medical Center (June 22, 2015), *2. There must be, in other words, “a real product” being purchased at the end of the day. *City of Raton*, 600 F. Supp. 2d at 1161.

41. The Planned Parenthood agreement does not guarantee “adequate consideration” for the subsidy. The agreement identifies three “outputs.” First, “offer healthcare services to New Mexican residents. Services are limited to wellness visits, breast exams, telehealth visits, health center visits and any follow-up or treatment as needed, cancer screening and prevention services, provision of birth control and testing for sexually transmitted infections. The Contractor will report on the number of clients served and the number of each service provided from the list above...” Ex. A, p. 16. In other words, Planned Parenthood could provide one wellness visit, report it, and fulfill its obligation.

42. The second output is to “expand health equity by promoting equitable access to services and care.” Planned Parenthood is to do this by “disaggregating data to assess for any difference in patient access, experience, or clinical outcomes across demographic groups, including age, race, ethnicity, income level, region of residence, etc.” Ex. A, pp. 16-17. In other words, Planned Parenthood must produce some sort of report, which could be as simple as reporting the demographic data it already collects.

43. The third output is to “provide patient education to 8,000 participants regarding healthy choices on sexuality and parenting. The agency will report numbers served; monitor strategies, outputs, and outcomes.” The output has no specifics or details—whether it covers providing information on Planned Parenthood’s website, speaking at school assemblies, or providing individual counseling. It also has no specifics on the curriculum or materials that will be used in this education.

44. A single patient visit, a report of already collected data, and 8,000 visitors to an existing website is not adequate consideration for \$250,000 of public funds. Appendix A to the agreement does not provide the specific performance targets, measurement metrics, and accountability steps necessary to show the contract is not a cover for an illegal gift.

45. The “sick and indigent persons” exception to the anti-donation clause does not apply here. First, two of the three outcomes specified in the agreement do not directly care for the sick and indigent: they require a demographic report and

education on sex and parenting. Neither of these things is direct care for individual sick and indigent patients.

46. Second, “[T]his exception does not justify payments which directly benefit physicians and only incidentally benefit the poor and sick.” 1989 N.M. AG LEXIS 6, *2 n.1. The exception allows for the direct reimbursement of direct care for the sick and indigent, but does not allow for general subsidies of operations. *Id.* (citing 1955-56 Op. Att’y Gen. No. 6426). *See* 2011 N.M. AG LEXIS 15, *15-16 (“the sick and indigent exception does not permit the state or a local government to make donations to a private or nonprofit organization that are used for the organization’s operating expenses”). *See also* 1956 N.M. AG LEXIS 81, *4-5 (interpreting implementing statute).

47. Appendix A of the agreement does not provide for direct reimbursement of direct care for the sick and indigent. Instead, it provides for a wide range of undefined potential services. It states that all \$250,000 will go to cover staff salaries and benefits, namely three nurses and three health center assistants. It may be that these nurses and health center assistants care for sick and indigent individuals, but the New Mexico Attorney General’s opinions make clear that the funds must be used to care for specific individual patients, not as general funds for operations.

48. The funds are not allocated to purchase materials like sexually transmitted disease tests, or lab work to process such tests, or for the physical products necessary for birth control.

49. The “sick and indigent persons” exception also does not apply when a contract does not lead to new or additional services beyond those already offered in the community, but “instead provides a subsidy to a private concern” that happens to operate in the medical arena. 1970 N.M. AG LEXIS 26, *5-6.

50. The agreement does not require Planned Parenthood to provide new or additional services. It is entirely possible that Planned Parenthood will use the City’s funds to supplant private funds to offer the same services, freeing up the private funds for other uses.

51. The “sick and indigent persons” exception only applies when a contractor documents that public funds have actually served “sick and indigent persons” within the city’s responsibility. The contract should be specific, made on a reimbursement basis, and paid out with specific proof of service to named sick and indigent persons. 1961 N.M. AG LEXIS 82, *3-4.

52. The Planned Parenthood agreement states that the services must be for “New Mexican residents” but does not specify that they must be residents of Albuquerque.

53. The Planned Parenthood agreement, Exhibit B, p. 25, indicates that the first draw-down of funds will be completed on September 30, 2022, for \$62,500. The remainder will be paid out every three months in the same amount, ending on June 30, 2023.

54. Funds that are illegally appropriated in violation of the anti-donation clause must be returned by the recipients to the public fisc. *State ex rel. Callaway v.*

Axtell, 393 P.2d 451, 454 (N.M. 1964) (“Public monies are trust funds belonging to the people, and must be reimbursed by the recipient if they are paid out illegally by a public official, even though in good faith; and this is particularly true in a case such as that before us, involving a donation or gratuity.”); *Chronis v. State ex rel. Rodriguez*, 670 P.2d 953, 959 (1983). See John Martinez, *Getting Back the Public’s Money: The Anti-Favoritism Norm in American Property Law*, 58 Buffalo L. Rev. 619, 648 (2010) (anti-donation clauses “have historically been interpreted to confer both an individual right and a governmental obligation to seek recapture of public funds or assets transferred to private parties in violation of the anti-favoritism norm”).

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

- a. Declare that the City’s grant of \$250,000 funds to Planned Parenthood of the Rocky Mountains, Inc., is a gift or donation in violation of the anti-donation clause.
- b. Declare that the City’s agreement with Planned Parenthood of the Rocky Mountains, Inc., is null and void.
- c. Enjoin Defendants from transferring funds under this appropriation to Planned Parenthood of the Rocky Mountains, Inc.
- d. Order that any funds already given to Planned Parenthood of the Rocky Mountains, Inc., be returned to the City.

- e. Award Plaintiffs their costs and attorney's fees under N.M. Stat. Ann. § 44-6-11.
- f. Award Plaintiffs any other relief to which they may be entitled.

Dated: October XX, 2022

Respectfully submitted,

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SIGNATURE BLOCK

Counsel for Plaintiffs

ⁱ https://www.youtube.com/watch?v=NpHipNR_Q6w (Video of Albuquerque City Council Meeting - May 16, 2022), at 2:41:30 (introductory comments by Councilwoman Fiebelkorn).

ⁱⁱ The Fiscal Year 2023 approved budget for the City of Albuquerque, *available at* <https://www.cabq.gov/dfa/documents/fy23-approved-budget-numbered-w-hyperlinks-final.pdf>. The Planned Parenthood earmark is on page 36, line 5.

ⁱⁱⁱ The press release is available at <https://www.cabq.gov/council/find-your-councilor/district-7/news/city-council-funds-planned-parenthood-of-new-mexico>.

^{iv} <https://www.youtube.com/watch?v=6SiwJqSKOOQ> (Video of Albuquerque City Council Meeting – August 15, 2022), at 2:13:12.