STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

PAUL GESSING and CARE NET OF ALBUQUERQUE, 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 ROCKY MOUNTAIN PLANNED PARENTHOOD, INC., d/b/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.,
Defendants.

D-202-CV-2023-00316

OPINION and ORDER
On City Defendants' Motion to Dismiss and
Defendant PPRM's Motion for Joinder and to Dismiss

Defendants Stephanie Yara and Carol M. Pierce (City Defendants) filed a motion to dismiss pursuant to Rule 1-012(B)(6) NMRA on Plaintiffs Paul Gessing's and Care Net of Albuquerque, Inc.'s Complaint. The Court denies the motion.

Defendant Rocky Mountain Planned Parenthood, Inc., d/b/a Planned Parenthood of the Rocky Mountains, Inc. (Defendant PPRM) filed a motion to join the City's Defendants' motion to dismiss as well as its own motion to dismiss the Complaint for lack of standing. The Court grants the motion with regard to Plaintiff Care Net. The motion is denied as to Plaintiff Gessing.

Facts and Background

This matter concerns actions of the City of Albuquerque and ultimately an agreement between its Department of Family and Community Services (the Department) and Defendant

PPRM following adoption of an amendment to reallocate funding. Plaintiffs seek a declaratory judgment that the City's grant to Defendant PPRM violates the New Mexico Constitution's Anti-Donation Clause. They attach a copy of the agreement as Exhibit B to the Complaint.

Plaintiff Gessing is a City homeowner. Complaint, ¶¶ 7; 30. He pays property taxes as well as gross receipts taxes with frequent purchases in Albuquerque. *Id.* Plaintiff Care Net is a pregnancy resource center located in Albuquerque. *Id.* ¶ 31. It provides pregnancy-related medical services, including free pregnancy testing, sexually transmitted infection testing, parenting and pregnancy counseling and classes, many of the same services covered by the agreement with Planned Parenthood; "[b]ut because the agreement was a council-directed sponsorship rather than an open request for proposals (RFP), Care Net had no opportunity to apply for the funds." *Id.*

Defendant Yara is director of finance and administration for the City, responsible for overseeing all aspects of the City's finances. Complaint, ¶ 9. Defendant Pierce is director of the Department, responsible for overseeing the City's grant to Defendant PPRM. *Id.* ¶ 10. Defendant PPRM is a non-profit organization and regional affiliate of the national Planned Parenthood Federation of America. *Id.* ¶ 10.

On May 16, 2022, the City Council, with regard to its 2023 budget, approved "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,'" through the Department. Complaint, ¶¶ 18-20. Plaintiffs observe that the City's Council's action followed the May 2, 2022, leak of the draft majority opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and allege that the action served as a "'sponsorship'" to Planned Parenthood as a sign of solidarity with the pro-choice side. *Id.* ¶ 2.

On May 17, a day after the vote, City Council member Tammy Fiebelkorn issued a press

release, stating: "'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.'" Complaint, ¶ 21. She further expressed:

> 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.

Id. ¶ 19; Ex. A.

The Department executed the agreement on August 5, 2022, with Defendant PPRM, effective July 1, 2022, through June 30, 2023. *Id.* ¶ 23; Ex. B. The relevant terms of the agreement are set out below.

At a subsequent City Council meeting on August 15, a motion was made to withdraw the funding for Planned Parenthood and reallocate it to a local homeless shelter. Complaint, ¶ 26. 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 ha[d] 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.

Id. The motion to withdraw the funds was amended to give $250,000 to Planned Parenthood, and to give $100,000 grants to the shelter and another nonprofit group; the amended version passed. *Id.* ¶ 28.

Discussion

Standard of Review

Under Rule 1-012(B)(6), the Court may dismiss a complaint only when it appears that Plaintiffs cannot recover or be entitled to relief under any state of facts provable under the claim. *Cf. Valdez v. State*, 2002-NMSC-028, ¶ 4, 132 N.M. 667, 54 P.3d 71. All well-pleaded factual allegations in the complaint are accepted as true and all doubts are resolved in favor of sufficiency of the complaint. *Id.*

City Defendants' Motion to Dismiss

"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 . . . ." N.M Const. Art. IX, § 14. "Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons." Art. IX, § 14(A).

"'The Anti-Donation Clause . . . prohibits the use of state or local governmental funds to benefit private organizations.'" *City of Raton v. Ark. River Power Auth.*, 600 F. Supp.2d 1130, 1147 (D.N.M. 2008) (quoted authority omitted) (omission in original). "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 re. Mechem v. Hannah*, 1957-NMSC-065, ¶ 38, 63 N.M. 110, 314 P.2d 714 (quoted authority omitted). The Clause prohibits "gifts or donations disguised as business transactions." *City of Raton*, 600 F. Supp.2d at 1161.

Our Supreme Court has "defined donation, for purposes of Article IX, Section 14, as 'a gift, an allocation or appropriation of something of value, without consideration.'" *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 50, 458 P.3d 406 (quoted authority omitted) (concluding that a

textbook loan was not a donation within the meaning of Article IX, Section 14). It explained that the Anti-Donation Clause "permits 'incidental aid or resultant benefit to a private corporation or other named recipients' unless the aid or benefit 'by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect." *Id.* (quoted authority omitted). The Supreme Court recounted that it found violations of the Clause where there was "an outright gift of public money to a private individual or entity," including "'an outright gift' of public funds to ranchers and farmers to purchase livestock feed in times of drought," as well as "the appropriation of bond money to finance auditoriums for use by private corporations because the aid was 'direct and substantial.'" *Id.* (quoted authorities omitted).

Plaintiffs argue that the City Council violated the Anti-Donation Clause by voting for a council-directed sponsorship for Planned Parenthood, not as a purchase of services, but as a political statement in reaction to a leak of the *Dobbs* majority opinion. They contend that the City, subsequently, attempted to conceal the prohibited donation through the services agreement.

The City Defendants argue that Plaintiffs cite no authority to support their position that Councilwoman Fiebelkorn's public statements concerning the Budgetary Amendment are determinative of whether the agreement violates the Anti-Donation Clause. They assert that her support of Defendant PPRM does not equate to the City Council's approval, as a legislative body, of the funding as a gift. Rather, they contend that the terms of the agreement must be evaluated.

In response, Plaintiffs argue that Fiebelkorn's statements are highly illustrative of the City Counsel's intent, asserting that it shows the legislative history and intent to make a donation. They rely on several cases for support.

In two of Plaintiffs' relied-upon cases, the Court agrees with the City Defendants that they do not support Plaintiffs' position. In one case, the Supreme Court explained that a court may take

into consideration contemporaneous documents, which discussed whether recodification would have a fiscal impact, "presented to and presumably considered by the legislature during the course of enactment of a statute," "in attempting to glean legislative intent." *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 35, 117 N.M. 346, 871 P.2d 1352. However, the Court "expressly restrict[ed] consideration of this type of extrinsic evidence to cases in which the statutory meaning is unclear." *Id.* ¶ 36. A second case cited by Plaintiffs also considered legislative history as expressed during the floor debate on a related federal statute; again, the matter concerned statutory interpretation. *Cf. State of N.M. ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, ¶¶ 4, 26, 145 N.M. 563, 203 P.3d 94.

Plaintiffs also rely on *Moses*, 2019-NMSC-003, ¶ 50, which the City Defendants do not appear to address in either their motion or reply. The Court observes that Plaintiffs cited this authority in their Complaint, at 3, 8-9. Concerning the Anti-Donation Clause, our Supreme Court, as noted above, explains that the Clause disallows "aid or benefit" to a private corporation or other named recipients which, "'by reason of *its nature and the circumstances surrounding it*, take on character as a donation in substance and effect.'" *Id.* (emphasis added) (quoting *Vill. of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶¶ 34, 37, 62 N.M. 18, 303 P.2d 920) (per curiam) (concluding that municipal legislation authorizing issuance of revenue bonds to acquire industrial sites did not violate Article IX, Section 14). The Court concludes that the reference to consideration of the nature and circumstances surrounding the legislative body's decision, set out in *Hosdreg*, 1956-NMSC-111, ¶ 37, and quoted with approval in *Moses*, 2019-NMSC-003, ¶ 50, allows this Court to evaluate the public statements made by Fiebelkorn while the City Council was considering redirecting the funds to Defendant PPRM.

In reply, the City Defendants cite *United States Brewers Ass'n, Inc. v. Dir. of the N.M.*

Dep't of Alcoholic Beverage Control, 1983-NMSC-059, ¶ 9, 100 N.M. 216, 668 P.2d 1093. First, the Court observes that the case did not concern the Anti-Donation Clause. *Id.* ¶ 2 (setting out the issues on appeal). Rather, the plaintiffs presented an argument that certain amendatory language was concealed from the Legislature, the administration and those affected by the law in violation of mandatory notice requirements of Article 4, Sections 16 and 18 of the New Mexico Constitution, relying on affidavits from the chairmen of legislative committees claiming that they did not know the effect of particular bills. *Id.* ¶¶ 5-8. Our Supreme Court agreed with the proposition that it "is not bound, and need not consider [testimony of individual legislators made at the time of the bill's passage]. Testimony of individual legislators or others as to happenings in the Legislature is incompetent, since that body speaks solely through its concerted action as shown by its vote." *Id.* ¶ 9 (quoted authority and italics omitted). The Court further explained, somewhat contrarily:

> [I]n determining legislative intent it is proper to look to the legislative history of an act or contemporaneous statements of legislators while the legislation was in the process of enactment. Statements of legislators, *after* the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure.

Id. (emphasis in original). "In New Mexico, legislative intent must be determined primarily by the *legislation itself*." *Id.* ¶ 10 (emphasis in original).

The Court concludes that these expressions are not inapposite to *Moses*. The Court primarily examines the legislation at issue, as Plaintiffs argued during the hearing on this matter, not simply whether there was at least some consideration set out in the agreement, as the City Defendants contend. In order to determine whether there has been the giving of aid or benefit, where, by reason of its nature and the circumstances surrounding it, take on character as a donation in substance and effect in violation of the Anti-Donation Clause, the Court also considers the events highlighted in the Complaint, including leak of the draft opinion in *Dobbs* and the resulting

statements of City Council member Fiebelkorn, contemporaneous to the City Council's action. *Cf. Moses,* 2019-NMSC-003, ¶ 50.

The City Defendants characterize the City Council's action as approving funding of Defendant PPRM healthcare services. *See, e.g.,* Motion, at 1; 5-6. With regard to the City Council's action, in their Complaint, Plaintiffs allege that, on May 16, 2022, at its regularly scheduled meeting two weeks after the draft of the *Dobbs* majority opinion was leaked, the 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." Complaint, ¶ 2. They allege that, "[o]n 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.'" *Id.* at 19. They allege that, on August 15, 2022, the City Council voted down an effort to reallocate the Planned Parenthood funds," voting instead "to retain the Planned Parenthood sponsorship." *Id.* at 4. The City's final approved budget simply listed, under "Family & Community Services," $250,000 for "Planned Parenthood NM." As Plaintiffs argue, neither Amendment 13 nor the final adopted budget references healthcare services, supporting at least a reasonable inference that the City Council was acting in accordance with Fiebelkorn's statements.

Turning to the contract, the City executed an agreement with Defendant PPRM on August 5, 2022, months after its May 16 adoption of Amendment 13. The City Defendants argue that the agreement has deliverables and means for assessing performance as well as accountability, demonstrating that there was no donation. On the other hand, Plaintiffs argue that the agreement lacks basic performance metrics, providing taxpayers no guarantee of adequate consideration.

The Recitals in the agreement, in contrast to the Amendment and final adopted budget, states that the City "has determined that it will provide basic social services to ensure that its

residents are afforded access to basic services required to maintain a reasonable quality of life," and that Defendant PPRM "represents that it has the expertise and resources necessary to render such social services." Complaint, Ex. B, at 1.

Both parties discuss the Outputs described under the Scope of Services section. Output 1 requires Defendant PPRM to "offer healthcare services to New Mexican residents," "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." PPRM "will report on the number of clients served and the number of each service provided" "and will track patient demographics to monitor social determinants of health." As Plaintiffs observe, there is no particular, much less minimum, number of clients or volume of services required.

The City Defendants assert that if PPRM provided services to only a single patient, as Plaintiffs argue is possible, PPRM would not be able to obtain reimbursement for $250,000 in services, pointing to page 2 of the agreement, Section 4(A), Compensation and Method of Payment, which provides that the "Maximum Compensation" "[f]or performing the Services specified in Section 2 of this Agreement" is $250,000. Section 2 of the Agreement, at page 1, "Scope of Services," states that PPRM "shall perform the services set out in Exhibit A ("Services"). The City Defendants also reference page 2 of the Agreement, Section B(1) and (2), which provides, respectively, that "[t]he City agrees to pay such sum to [PPRM] on a cost reimbursement basis" and that "[a]ll requisitions for payment" "must be supported by documentation of Services." However, as described in the preceding paragraph, Output 1 describes certain services to be "offered," but has no minimum number of clients or volume of services required, even if RRMP is required to report on the number of clients and services.

Further, as Plaintiffs note, the City Defendants' interpretation is belied by Appendices 2 and 4, which show, respectively, that the $250,000 is allocated to "Salaries & Wages" and "Payroll Taxes and Employee Benefits" for two registered nurses, three Health Center Assistants, and one Advanced Practice Nurse. They point out that there is no provision in the Agreement for "consumable supplies," such as pregnancy or STI tests, which would require "cost reimbursement" or "requisitions for payment." Rather, the Agreement indicates that all of the $250,000 is dedicated to salaries for staff, as the City Defendants concede.

Output 2 of Exhibit A, Section B, states that PPRM "will expand health equity by promoting equitable access to services and care," and Outcome 2 directs PPRM to "track progress in expanding health equity, by disaggregating data to assess for any difference in patient access, experience, or clinical outcomes across demographic groups." The City Defendants argue that the data PPRM is required to report under Output 2 is for actual patients who receive services under the Agreement, observing that Output 1 provides that PPRM will "track patient demographics." Plaintiffs contend that PPRM must produce some sort of report, which could be simply reporting the demographic data it already collects. The City Defendants, in reply, again emphasize that payment is to be made on a cost reimbursement basis for actual services, but this does not address the fact that the contract allocates the entire funding amount to salaries.

Section B, Output 3 of Exhibit A requires PPRM to "provide patient education to 8,000 participants regarding health choices on sexuality and parenting," and to "report numbers served, monitor strategies, outputs, and outcomes." Plaintiffs argue that this Output has no specifics or details, whether such information can be provided on PPRM's website, speaking at school assemblies, or providing individual counseling, and directs no specific curriculum. The City Defendants argue that PPRM could not satisfy Output 3 by tracking visits to a website by members

of the public, pointing to the word "patient" before "education," and contending that the Output requires PPRM to provide the education to patients receiving services under the Agreement. As Plaintiffs argue in response, the Output does not state this; rather, "patient education," which concerns the type of "education," must be provided to "8,000 participants," with "participants" undefined.

"The Anti-Donation Clause . . . preclude[s] [public entities] from making gifts or donations disguised as business transactions." *City of Raton*, 600 F. Supp.2d at 1161. The Court agrees with Plaintiffs that they have raised genuine concerns as to whether the agreement reflects "true consideration–money exchanged for a real product." *Id.* (explaining that an agreement should not be evaluated as "a good or bad deal under the Anti-Donation Clause, but merely check[ed] for adequate consideration").

The City Defendants argue that the agreement falls within the sick and indigent exception to the Anti-Donation Clause, quoted above. They contend that Outputs 1 and 2 are clearly tied to prevention of various sicknesses, and acknowledge that the agreement pays for the salary and benefits of PPRM nurses and case managers who are providing healthcare services for the funding. They argue that the funding is not a donation to cover operating expenses.

In response, Plaintiffs argue that a sham donation fails the Clause, and that only a purposeful choice as to "provision for the care and maintenance of sick and indigent persons" fits within Article IX, § 14(A). They contend that Outputs 2 and 3 provide for a demographic report and sex/parenting education, not direct care for sick and indigent patients, so much of the agreement does not fit within the exception in any case.

The Court agrees with Plaintiffs. As discussed above, even Output 1 of the agreement requires merely that services be "offered," and the agreement expressly provides that all of the

funding is for salary and benefits for personnel, akin to operating expenses, despite the references in the agreement to reimbursement. There is at least a reasonable inference that the funding provides a subsidy to a private concern which may not lead to new or additional services beyond those already offered by PPRM.

The Court, on a motion to dismiss, tests the legal sufficiency of Plaintiffs' Complaint, assuming the veracity of all properly pleaded allegations and resolving all doubts in favor of sufficiency of the Complaint. The Court concludes, based on the nature and the circumstances surrounding the appropriation discussed above, as well as the alleged deficiencies in the Agreement, that the City Defendants have not demonstrated that Plaintiffs' Complaint should be dismissed.[1]

Defendant PPRM's Motion to Dismiss

Defendant PPRM filed a motion to dismiss Plaintiffs' Complaint for lack of standing. It further argues that Plaintiffs' relationship to one another, as well as their representation by the Liberty Justice Center, violates New Mexico's prohibition of champerty.

"'The requirements for standing derive from constitutional provisions, enacted statutes and rules, and prudential considerations.'" *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368, 24 P.3d 368 (quoted authority omitted). Generally, in order to demonstrate standing, a plaintiff must show the existence of an injury in fact, a causal relationship between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable decision.

[1] The Court acknowledges the City Defendants' notice of filing supplemental authority, 2022 Op. Ethics Comm'n No. 2022-0 (08/05/2022), which opined that the City's FY 2023 budgetary amendment reallocating the funds to PPRM did not violate either the Anti-Donation Clause or the Procurement Code. However, based upon the request made and the apparent absence of the Agreement, as the opinion was issued the same day the contract was executed, the opinion did not address the Agreement or the factual circumstances surrounding the amendment and is thus of little value to the Court's determination on the Defendants' motion.

Cf. id. "[T]he interest sought to be protected must be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (quoted authorities and quotation marks omitted).

As Plaintiff Gessing argues, his standing to sue the City is recognized in New Mexico. "The right of a taxpayer to sue to enjoin threatened devastavit of municipal funds or property is well established in this state." *Ward v. City of Roswell*, 1929-NMSC-074, ¶ 6, 34 N.M. 326. In that case, the taxpayer sued to enjoin the furnishing of free water to Roswell city officials from its municipally owned plant by motion or resolution passed by the city council. *Id.* ¶ 1. Our Supreme Court rejected the argument that the taxpayer did not appear to be threatened with substantial or irreparable injury, observing that the taxpayer's right to sue "would disappear if it must yield" to such an objection. *Id.* ¶ 6. Taxpayers need not "show greater or more irreparable injury than the public loss in which he [or she] shares." *Id.* The Supreme Court, in support of the taxpayer's right to sue, *id.*, cited *Asplund v. Hannett*, 1926-NMSC-040, 31 N.M. 641, 249 P. 1074. Both Plaintiffs and Defendant PPRM also rely on *Asplund*.

In *Asplund*, 1926-NMSC-040, ¶ 16, our Supreme Court explained that "we consider the taxpayer's right, as against municipal authorities, settled in this jurisdiction," recounting that "[i]t was expressly declared in *Laughlin v. Bd. of Cnty Comm'rs of Santa Fe Cnty*, 1885-NMSC-025, ¶ 3, 3 N.M. 420, 5 P. 817 (relying on an 1879 case from the United States Supreme Court, and concluding that "no suggestion can be properly entertained in the courts of this territory against the rights of an individual tax-payer to obtain relief by a direct suit in [the taxpayer's] own name against a threatened *devastavit* of public funds in which he [or she] has a tax-payer's interest"). The Court further observed that "[s]ince then the right does not seem to have been questioned," and proceeded to cite three additional cases in which such suits had been maintained. 1926-

NMSC-040, ¶ 16. The Supreme Court, "[g]ranting the foregoing doctrine," addressed whether a taxpayer's right extended, or should be extended "so far as to maintain injunction against officers of the state." *Id.* ¶ 17. It acknowledged that more jurisdictions supported such a right as to enjoin waste or unlawful expenditure of state funds, *id.* ¶ 18, but explained that a "distinction between a state government and municipal corporations" has been recognized, as a "'county is a quasi corporation" while "the state is a sovereignty," *id.* ¶ 19, and applying the right with regard to the state could result in "frequent and disastrous interference with the machinery of government," *id.* ¶ 20. *Cf.* Charter of the City of Albuquerque, Art. I (incorporation and powers of "[t]he municipal corporation now existing and known as the City of Albuquerque"). Following an exhaustive survey of New Mexico cases and those from other jurisdictions, acknowledging the separation of powers doctrine, and returning to the "dual nature of municipal corporations as agencies of sovereignty and as business corporations," the Court explained that there was no "such dual nature of the state," *Asplund*, 1926-NMSC-040, ¶ 51, and concluded that there was no "legal or logical principle to support a taxpayer's suit to enjoin the expenditure of *state* funds" and thus the taxpayer had "no such right in this state." *id.* ¶ 52 (emphasis added).

Based on this authority, the Court concludes that Plaintiff Gessing has standing as a taxpayer to bring claims against the City. *Cf., e.g., Ward*, 1929-NMSC-074, ¶ 6; *Cathay v. City of Hobbs*, 1973-NMSC-042, ¶ 10, 85 N.M. 1, 508 P.2d 1298 ("When there is no reason for the City to spend its money, then taxpayers certainly have the right to seek an injunction against the expenditure."); *Asplund*, 1926-NMSC-040, ¶ 16. In reply and during the hearing on this matter, Defendant PPRM counters Plaintiff Gessing's authority by pivoting to the merits, arguing that the City had good cause to spend the money, based on a valid agreement. This places the cart before the horse; whether there was a valid agreement or a violation of the Anti-Donation Clause has yet

to be determined.

Plaintiff Care Net argues that it has standing as an organization that was denied an equal opportunity to apply for the funding. Pointing to its allegations in the Complaint that it provides pregnancy-related medical services, including free pregnancy testing, free STI testing, and counseling, Plaintiff Care Net contends that additional funding would allow any needed expansion of services. It asserts that it need not prove that it would win an open and nondiscriminatory bidding process under a properly issued request for proposals, relying on an analogy to a City grant to only Christian churches, or one to a particular political party. Standing was not an issue in either case relied upon by Plaintiff Care Net. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 454 (2017) (concluding that a state department grant for entities to purchase particular playground surfacing material with a policy of categorically disqualifying religious organizations violated the right of an applicant plaintiff under the Free Exercise Clause of the First Amendment); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10th Cir. 1992) (addressing employment discrimination).

Plaintiff Care Net does not argue that it is relieved of the requirement to "meet the traditional requirements for standing" set out above. *Forest Guardians*, 2001-NMCA-028, ¶ 15. "Actual or threatened injury alone is not enough to maintain a particular cause of action." *Forest Guardians*, 2001-NMCA-028, ¶ 19. Rather, Care Net "must also show that the injury alleged is within the one of interests to be protected by a constitutional provision or statute." *Id.* Not receiving an opportunity to apply for the funding is not one of the interests protected by the Anti-Donation Clause. The Court concludes that Plaintiff Care Net has failed to show that it is "within the zone of interests to be protected by the constitutional provision[] at issue in this case." *Id.* ¶ 18; *compare id.* ¶ 19 (concluding that conservation groups lack standing to bring a facial challenge

because they are clearly not within the zone of interests to be protected by particular constitutional provisions), *with ACLU v. City of Albuquerque*, 1999-NMSC-044, ¶ 9, 128 N.M. 315, 992 P.2d 866 (holding that plaintiff parents and children had standing to challenge the constitutionality of a juvenile curfew ordinance although none had been arrested under it based on the curtailment of previously legitimate activities and the city's intention to apprehend those in violation). The Court thus concludes that Defendant PPRM's motion should be granted as to Plaintiff Care Net.

Finally, Defendant PPRM argues that Plaintiffs' interest in the litigation amounts to champerty, relying on Rule 1-017(A) NMRA ("Every action shall be prosecuted in the name of the real party in interest."). "Champerty is defined as 'a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds.'" *Reinhardt v. Kelly*, 1996-NMCA-050, ¶ 17, 121 N.M. 694, 917 P.2d 963 (quoted authority omitted). Our Court of Appeals, *id.*, further cited an earlier case which described champerty as "the practice of purchasing a lawsuit." *Bank of Santa Fe v. Petty*, 1993-NMCA-155, ¶ 5, 116 N.M. 761, 867 P.2d 431 (concluding that there was no indication that the party purchased the bank solely for the purpose of bringing the lawsuit). As the Court has concluded that Plaintiff Care Net lacks standing, this issue is addressed only as to Plaintiff Gessing.

Defendant PPRM argues that Plaintiff's interest in this litigation constitutes champerty, as Plaintiff Gessing is an author and president of a conservative think tank, the Rio Grande Foundation, writing extensively about Planned Parenthood and promoting the filing of this suit on the Foundation's website, factual allegations outside of the Complaint. Defendant contends that Gessing has no real interest in this matter and that the Court should not allow his coordination with Plaintiff Care Net. As set out above, Plaintiff Gessing has standing as a taxpayer, not based on any affiliation with Care Net.

Defendant PPRM further argues that both Plaintiffs are represented by the Liberty Justice Center, a Chicago-based non-profit organization that represents taxpayers throughout the country who challenge various alleged abuses to their constitutional rights. It asserts that this group is not a New Mexico organization and has no New Mexico licensed attorneys.

The Court rejects this argument. As Plaintiffs argue, there are no judgment proceeds at issue, as Plaintiffs' Complaint pleads only declaratory and injunctive relief, not damages. While they do request statutory attorney's fees, Plaintiff Gessing will not receive any money, even if successful. Most significantly, champerty with regard to public-interest litigation would raise other constitutional considerations. *Cf. NAACP v. Button*, 371 U.S. 415, 439 (1963) ("However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. . . . "[T]he exercise [of suits against government] as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious."). While Defendant PPRM argues in reply that attorney fees could constitute proceeds, it offers no authority from New Mexico or elsewhere that has dismissed a complaint for violation of a prohibition against champerty based on a possible award of attorney fees. *Cf. In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). It similarly provides no authority for the proposition that any positive media attention or other such theoretical benefits raised in its briefs and during argument would constitute proceeds. *Cf. id.*

Conclusion

The City Defendants' motion to dismiss is **DENIED.** Defendant PPRM's motion to dismiss is **GRANTED** as to Plaintiff Care Net, but **DENIED** as to Plaintiff Gessing.

IT IS SO ORDERED.

The Honorable Denise Barela Shepherd
District Court Judge

A copy of the foregoing was e-filed on this
1 day of November, 2023.

By: */s/ Amy Ballou*
Amy Ballou
Trial Court Administrative Assistant

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