

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

PAUL GESSING and CARE NET OF
ALBUQUERQUE, INC.,

Plaintiffs,

v.

Case No.: D-202-CV-2023-00316

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.

PPRM'S MOTION TO DISMISS COMPLAINT & JOINDER
(LACK OF STANDING & CHAMPERTY)

Plaintiffs lack standing and their relationship to one another, as well as their representation by the Liberty Justice Center, violates New Mexico's prohibition of champerty. Defendant Rocky Mountain Planned Parenthood, Inc., d/b/a Planned Parenthood of the Rocky Mountains, Inc. ("PPRM"), therefore moves to dismiss the Complaint. In addition, pursuant to Rules 1-008(F) and 1-010(C), NMRA, PPRM joins the City Defendants' March 28, 2023 Motion to Dismiss and incorporates the statements in that Motion by reference.

BACKGROUND

On August 5, 2022, PPRM entered into an agreement with the City of Albuquerque (the "Agreement") to provide specific healthcare services to low income residents, educate a certain number of patients, and produce reports that include demographic data for the services rendered

under the Agreement. *See* Complaint Exhibit B. Plaintiffs' Complaint alleges that the Agreement violates the anti-donation clause set forth in Article IX, Section 14 of the New Mexico Constitution, and seeks a Declaratory Judgment as such. *See* Complaint pg. 8-14. Plaintiffs further request that the Court enjoin the City Defendants from transferring funds under the Agreement and return any appropriated funds to the City. *See* Complaint pg. 13.

The Court may dismiss the Complaint because Plaintiffs lack standing and their interest in this matter violates New Mexico's prohibition of champerty. Neither Paul Gessing nor Care Net have sufficiently demonstrated standing, and could not do so. Plaintiffs have not suffered an injury in fact caused by the execution of the Agreement, and a favorable decision from this Court will not be unlikely to redress their alleged injury. Moreover, Plaintiffs' coordinated attack with the Liberty Justice Center on the Agreement amounts to champerty and is consequently barred.

STANDARD OF REVIEW

A motion to dismiss tests the legal sufficiency of a complaint. *Healthsource, Inc. v. X-Ray Assocs. of N.M.*, 2005-NMCA-097, ¶ 16, 138 N.M. 70, 116 P.3d 861. When ruling on a motion to dismiss for lack of standing, the Court accepts "as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *N.M. Gamefowl Ass'n, Inc. v. State ex. rel King*, 2009-NMCA-088, ¶ 12, 146 N.M. 758, 215 P.3d 67. While the Court must accept all well pled allegations in the Complaint, it is not required to do so for conclusions of law or unwarranted factual deductions. *Tarin's, Inc. v. Tinley*, 2000-NMCA-048, ¶ 11, 129 N.M. 185, 3 P.3d 680.

ARGUMENT

I. Plaintiffs Lack Standing.

If the Court declines to grant the City Defendants' Motion to Dismiss, the Court may dismiss for lack of standing. The Complaint asserts that Paul Gessing owns a home in

Albuquerque, pays property taxes on his home and pays gross receipts taxes when he makes purchases in the City. *See* Complaint ¶ 7. The Complaint further states that Mr. Gessing “resides in and works in Bernalillo County.” *Id.* Concerning the second Plaintiff, the Complaint explains that Care Net “is a 501(c)(3) nonprofit social services agency that serves pregnant women” and has its “primary place of business in Bernalillo County.” *See* Complaint ¶ 8. None of these allegations is sufficient to confer standing.

Standing is a prerequisite for a cause of action and “must be established at the time the complaint is filed.” *Deutsche Bank Nat. Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶ 8, 335 P.3d 217. To demonstrate standing, Plaintiffs must establish that there is “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368 (internal quotation marks and citation omitted). An injury in fact requires “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’ ” *Id.* ¶ 24. (internal quotation marks and citation omitted). Plaintiffs must have suffered an injury in a “personal and individual way.” *ACLU of N.M. v. City of Albuquerque*, 2007-NMCA-092, ¶ 7, 142 N.M. 259, 164 P.3d 958. Because each plaintiff must establish standing independent from one another, we first address Mr. Gessing’s lack of standing and then turn to Care Net.

A. **Mr. Gessing lacks standing as a taxpayer and fails to assert that the great public importance doctrine applies.**

Mr. Gessing fails to explain how he satisfies the standing requirements, but implies he does so through taxes paid. To demonstrate taxpayer standing and seek an injunction, Mr. Gessing must allege a direct injury. *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 10, 144 N.M. 471, 188 P.3d 1222. He fails to do so. Nowhere does Mr. Gessing explain how the Agreement

directly injures him in a personal or individual way. It is difficult to see how Mr. Gessing would even make such an argument. The Agreement neither prevents Mr. Gessing from doing something nor requires him to act. As Mr. Gessing has explained on his blog for the Rio Grande Foundation, he finds the Agreement to be “problematic” and therefore claims to be injured by it. *See* “Rio Grande Foundation hits KOAT TV to discuss City Council grant to Planned Parenthood” attached hereto as Exhibit 1.¹ Dislike is simply insufficient to serve the basis for an injury in fact. New Mexico law also requires Mr. Gessing to demonstrate that the Agreement affects him differently “than any other taxpayer of the state” and the Agreement will either increase or decrease his taxes, or those of another taxpayer. *Asplund v. Hannett*, 1926-NMSC-040, ¶ 7, 31 N.M. 641, 249 P. 1074.

Because Mr. Gessing lacks the first standing requirement, the Court need not reach the other two elements of standing. *Forest Guardians*, 2001-NMCA-028, ¶ 16. However, if the Court decides to conduct a full standing analysis, it may determine that Mr. Gessing fails to meet the other two standing requirements. As stated above, there must be a causal connection between the injury and the challenged conduct. *Id.* ¶ 16. Said another way—“the injury has to be fairly traceable to the challenged action of the defendant.” *Id.* ¶ 25 (alterations, internal quotation marks and citation omitted). Mr. Gessing fails to assert how the Agreement has a causal connection to his alleged injury, or has any effect to him as a taxpayer. In *Eastham v. Public Employees Retirement Account Association Board*, the New Mexico Supreme Court considered whether potential retirees had standing to challenge a policy of the Public Employee Retirement Account. 1976-NMSC-046, ¶ 25, 89 N.M. 399, 553 P.2d 679. The Court explained that plaintiffs lacked standing because “the required nexus” was not met and plaintiffs could not allege by an amendment of complaint the “personal stake” required for standing. *Id.* ¶ 25. Mr. Gessing likewise fails to establish his personal

¹The Court may take judicial notice of the Foundation’s website: “Rio Grande Foundation” <https://riograndefoundation.org/> (last visited April 18, 2023). *See* Rule 11-201(B)(2) NMRA.

stake in the matter, and is unlikely to be able to demonstrate the standing requirements by amending the Complaint.

Similarly, Mr. Gessing does not demonstrate that his alleged injury would be redressed by a favorable decision from this Court. *See id.* ¶ 25 (explaining “it must be likely, as opposed to merely speculative, that the injury will be redressed by the favorable decision.”) (internal quotation marks and citation omitted). Even if the Court determined that the Agreement violates the anti-donation clause and granted Plaintiffs’ request for an injunction, it is speculative that relief would redress Mr. Gessing’s speculative injury as a taxpayer.

The Court may grant discretionary standing to parties seeking enforce the New Mexico Constitution in cases that present issues of “great public importance.” *See State ex rel., Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277 (explaining that the court may grant standing under the “great public importance doctrine” where a claim involves “clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution”). For instance, in *Baca v. New Mexico Department of Public Safety*, the New Mexico Supreme Court explained that the validity of the Concealed Handgun Carry Act raised a constitutional question of great public importance and elected to confer standing on that basis. 2002-NMSC-017, ¶ 4, 132 N.M. 282, 47 P.3d 441. The *Baca* Court clarified that “even though a private party may not have standing to invoke the power of [the c]ourt to resolve constitutional questions and enforce constitutional compliance, [the court], in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.” *Id.* ¶ 3.

But, this Court may and should decline to apply discretionary standing. In *State ex rel., Coll*, for example, the Court declined the plaintiffs’ request to grant discretionary standing under

the doctrine of great public importance. 1999-NMSC-036, ¶ 21. The Court explained that “the fact that a case involves a duty that state officials owe to the general public as a whole is not sufficient to show that the case involves an issue of great public importance.” *Id.* ¶ 22. Our courts have expressed greater hesitancy to apply the doctrine where plaintiffs fail to raise it in their complaint. *See e.g. Eastham*, 1976-NMSC-046, ¶ 20. Mr. Gessing fails to argue that the Court should employ its discretionary standing under the “great public importance doctrine.” Even if he did assert that the doctrine is applicable, the Court should decline to grant discretionary standing here. Plaintiffs’ claims do not present “clear threats to the essential nature of state government guaranteed to New Mexico citizens under the Constitution.” *Coll*, 1999-NMSC-036, ¶ 21. Rather Plaintiffs claim to be injured by an Agreement between a municipality and a private entity for the provision of medical services that serve sick and indigent members of the local community. Such a matter is not a clear threat to the nature of state government.

B. Care Net lacks standing.

Plaintiff Care Net similarly lacks standing. The Complaint alleges that Plaintiff Care Net is a “pregnancy resource center in the City of Albuquerque” that “provides “pregnancy-related medical services, including free pregnancy testing, free sexually transmitted infection (STI) testing, and free parenting and pregnancy counseling and classes.” Complaint ¶ 31. Care Net alleges it “provides many of the same services covered by the [A]greement” and was denied an opportunity to apply for the funds. *Id.* These allegations do not demonstrate standing.

Care Net’s alleged injury—that it was unable to apply for funding through the City of Albuquerque—is not suffered by Care Net in a personal and individual way. The City of Albuquerque entered into an Agreement with PPRM under which PPRM agreed to provide health services, many of which Care Net does not provide. The New Mexico Department of Health

provides a comprehensive list of HIV and STD testing and treatment programs in the State.² Although that list includes PPRM, it does not include Care Net. *See id.* While Care Net may provide some of the same services as PPRM, it does not provide all of the services covered by the Agreement. Even if Care Net does provide some free STI testing, its own website explains that it only provides testing for a limited number of STI/STDs.³ Because Care Net does not provide all of the services compensable under the Agreement, Care Net was not denied an opportunity to submit a bid. Rather the City entered into an Agreement with PPRM, an entity that administers the services desired, which Care Net does not provide.

Care Net similarly fails to satisfy the other standing requirements. As Care Net did not suffer a direct injury due to Defendants' conduct in entering into the Agreement, Care Net is unable to satisfy the causal connection required. *See Forest Guardians*, 2001-NMCA-028, ¶ 25 (“the injury has to be fairly traceable to the challenged action of the defendant”). Even if the Court determines that Care Net has suffered an injury that is fairly traceable to Defendants' conduct, a favorable decision is unlikely to redress Care Net's speculative injury, because Care Net would not gain the contract. Care Net is not identified as an STI/ STD provider by the State and does not provide all of the services covered by the Agreement. Therefore, a favorable award is unlikely to redress Care Net's alleged injury. Even if Care Net amended its Complaint, it will not be able to satisfy the standing requirements. *See Eastham*, 1976-NMSC-046, ¶ 25. Accordingly, the Court may dismiss the Complaint for lack of standing.

²See “New Mexico Department of Health HIV, Hepatitis, STD Online Resource Guide,” <https://nmhivguide.org/> (last visited April 18, 2023). *See* Rule 11-201(B)(2).

³See Care Net Services “STI Testing,” <https://carenetaq.com/services/sti-testing/>, (last visited April 18, 2023) (providing information on many STI/STDs, but explaining that Care Net Pregnancy Center's locations offer free STI/STD testing for Chlamydia and Gonorrhea only). *See* Rule 11-201(B)(2).

III. Plaintiffs' interest in the litigation is improper and amounts to champerty.

The Court may alternatively dismiss the Complaint because Plaintiffs' interest in the litigation amounts to champerty, a practice barred in New Mexico for decades. Rule 1-017(A) NMRA requires that "[e]very action shall be prosecuted in the name of the real party in interest." The test for determining the real party in interest is "whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit." *Edwards v. Mesch*, 1988-NMSC-085, ¶ 6, 107 N.M. 704, 763 P.2d 1169 (internal quotation marks and citation omitted). New Mexico has barred champerty since territory times. *See Gurule v. Duran*, 1915-NMSC-043, ¶ 8, 20 N.M. 348, 149 P. 302, 302 ("It was a principle of the common law that a right of action could not be transferred by him who had the right to another."). New Mexico defines champerty 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." *Rienhardt v. Kelly*, 1996-NMCA-050, ¶ 17, 121 N.M. 694, 917 P.2d 963 (quoting *Black's Law Dictionary* 231 (6th ed. 1990)).

Mr. Gessing and Care Net's interest in this litigation constitutes champerty. Mr. Gessing is an author and President of the conservative think tank the Rio Grande Foundation. He has written extensively about Planned Parenthood and promoted the filing of this lawsuit on the Rio Grande Foundation website. *See* Rio Grande Foundation "RGF and its president Paul Gessing file lawsuit against City of Albuquerque over Planned Parenthood 'Donation,'" <https://riograndefoundation.org/rgf-and-its-president-paul-gessing-file-lawsuit-against-city-of-albuquerque-over-planned-parenthood-donation/>, (last visited April 18, 2023) attached hereto as Exhibit 2. Mr. Gessing coordinated with Care Net, who claims it was allegedly injured because it was unable to apply for funds through the City. Mr. Gessing has no real interest in this matter and

the Court should deny Mr. Gessing's attempt to achieve standing by relying on Care Net's alleged injury.

Moreover, Mr. Gessing and Care Net are represented by the Liberty Justice Center, a Chicago based non-profit organization that represents taxpayers across the country who challenge various alleged abuses to their constitutional rights. The Liberty Justice Center is not a New Mexico based organization, has no New Mexico licensed attorneys, and to PPRM's knowledge has brought no other actions in the State. While a "pro hac vice" motion is supposedly forthcoming, the Liberty Justice Center has failed to so move by the date of this Motion to Dismiss.

The Liberty Justice Center has promoted this lawsuit and its representation of Mr. Gessing and Care Net on its website. *See* Liberty Justice Center, "Gessing v. Yara," <https://libertyjusticecenter.org/cases/gessing-v-yara/> (Jan. 18, 2023) attached hereto as Exhibit 3. In a blog post about this case, the Liberty Justice Center explains that "is has filed a lawsuit challenging the unconstitutional use of taxpayer funds on behalf of Paul Gessing" and Care Net. *Id.* Mr. Gessing similarly touts his legal representation by the Liberty Justice Center on the Rio Grande Foundation website, stating that the "Rio Grande Foundation and its President Paul Gessing have filed a lawsuit" challenging the Agreement "[t]hanks to legal help from the Liberty Justice Center." Exhibit 2. This arrangement is the definition of champerty. *See Reinhardt*, 1996-NMCA-050, ¶17, (defining champerty 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.").

Not only does Mr. Gessing boast about his free representation by the Liberty Justice Center, he does so through the Foundation's blog. The Rio Grande Foundation is not a party to this lawsuit and like Mr. Gessing and Care Net has no real interest in this matter. Their ability to bring this

lawsuit is made possible only by the “legal help” of the Liberty Justice Center. *See* Exhibit 2. Accordingly, the Liberty Justice Center’s representation of Mr. Gessing and Care Net violates New Mexico’s prohibition against champerty.

CONCLUSION

For the reasons enumerated above, Defendant PPRM respectfully requests that this Court dismiss all claims in the Compliant and for any further relief this Court deems appropriate.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: /s/ Chandler R. Farnworth
Brian K. Nichols (bkn@modrall.com)
Chandler R. Farnworth (cfarnworth@modrall.com)
P. O. Box 2168
Albuquerque, New Mexico 87103-2168
Telephone: 505-848-1852
Attorneys for Defendant PPRM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served to counsel of record via the court’s Odyssey File & Serve System as well as via e-mail this 18th day of April, 2023:

Matthew Lang
Law Offices of Timothy D. Ducar, PLC
orders@azlawyers.com
Attorneys for Plaintiffs

Daniel R. Suhr
Liberty Justice Center
dsuhr@libertyjusticecenter.org

Philomena Hausler, Robles, Rael & Anaya, P.C.
philomena@roblesrael.com
Attorneys for City Defendants

By: Chandler R. Farnworth
Chandler R. Farnworth
W4697283.DOCX

Rio Grande Foundation hits KOAT TV to discuss City Council grant to Planned Parenthood

Rio Grande Foundation president Paul Gessing recently [sat down with KOAT Channel 7 to discuss < https://www.koat.com/article/your-tax-dollars-have-entered-the-abortion-debate/40292667>](https://www.koat.com/article/your-tax-dollars-have-entered-the-abortion-debate/40292667) the recent “no-strings-attached” made by Albuquerque’s City Council to Planned Parenthood.” Whatever one’s views on abortion, it is hugely problematic that City Council has “donated” \$250,000 to an activist political organization that actively involves itself in political campaigns.

EXHIBIT 1

RGF and its president Paul Gessing file lawsuit against City of Albuquerque over Planned Parenthood "Donation"

Thanks to legal help from the Liberty Justice Center, a non-profit, public interest litigation center, the Rio Grande Foundation and its president Paul Gessing have filed a lawsuit against the City under New Mexico's "anti-donation clause" over the City's "donation" of \$250,000 of our tax dollars to Planned Parenthood. [You can read more about the case here. < https://libertyjusticecenter.org/cases/gessing-v-yara/>](https://libertyjusticecenter.org/cases/gessing-v-yara/)

EXHIBIT 2

“New Mexico’s constitution prevents politicians from using taxpayer funds like their own personal piggy banks,” says Daniel Suhr, managing attorney at the Liberty Justice Center. “Albuquerque’s grant to Planned Parenthood is pure politics, and the state constitution prevents that kind of abuse of taxpayer dollars.”

“Taxpayers should not be compelled to subsidize Planned Parenthood or any other private group,” said Gessing, who is president of the free-market Rio Grande Foundation. “The anti-donation clause of New Mexico’s constitution is a bulwark for taxpayers against politically motivated earmarks just like this one.”

Sadly, Albuquerque’s City Council seems to have ignored [New Mexico law which clearly states that < https://www.rodey.com/wp-content/uploads/2022/05/rodey_anti_donation_clause_history.pdf >](https://www.rodey.com/wp-content/uploads/2022/05/rodey_anti_donation_clause_history.pdf)

“Neither the state, nor any county, school district, or municipality ... 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 ...”

Errors of Enchantment < <https://errorsofenchantment.com/>>

Tipping Point New Mexico < <https://tippingpointnm.com/>>

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Up ↑

GESSING V. YARA

Shortly after a draft of the U.S. Supreme Court's decision overturning *Roe v. Wade* was leaked in 2022, the New Mexico City Council decided to show its opposition to the upcoming decision by giving Planned Parenthood a gift of \$250,000 of taxpayer money.

That gift was unconstitutional. Taxpayer funds are not a piggybank for politicians to use to support whatever pet projects and political schemes their hearts desire. And the New Mexico Constitution has an anti-donation clause to prevent politicians from using public funds as though they were their own. It requires that New Mexico only give funds to private entities (including nonprofits) under very specific and narrow circumstances, through agreements in which clear, detailed performance metrics are used to maintain accountability.

In press release touting Albuquerque's gift to Planned Parenthood, Councilwoman Tammy Fiebelkorn boasted: "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."

The Liberty Justice Center has filed a lawsuit challenging this unconstitutional use of taxpayer funds on behalf of Paul Gessing, a property owner and taxpayer in the City of Albuquerque; Care Net Pregnancy Center of Albuquerque; and Project Defending Life, a Catholic umbrella ministry that sponsors a pregnancy resource center in the City of Albuquerque. Neither of the nonprofits were given an opportunity to apply for the funds provided to Planned Parenthood because the agreement was a council-directed sponsorship—even though these institutes provide many services similar to those offered by Planned Parenthood, including pregnancy-related medical services (free pregnancy testing, free sexually transmitted infection (STI) testing, free parenting and pregnancy counseling and classes).

The lawsuit points out the hypocrisy in the City Council's decision to donate public funds to Planned Parenthood after it rejected other attempts to give to private charities because that would violate the anti-donation clause.

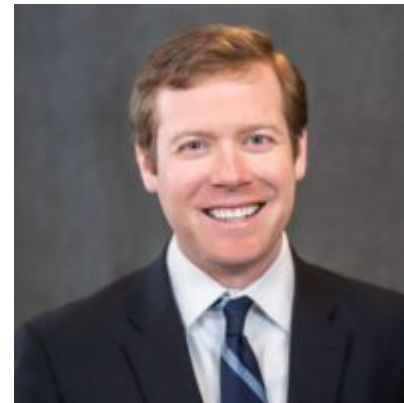
Background

Gessing v. Yara filed in the Second Judicial District Court, against Stephanie Yara, director of finance and administration for the City of Albuquerque, Carol M. Pierce, director of family and community services of the City of Albuquerque, and Planned Parenthood of the Rocky Mountains, Inc. on January 17, 2022.

Briefs

[Press Release 01/18/2023](#)

Lead Attorney



[Daniel Suhr](#)

Managing Attorney

To schedule an interview,
please contact
media@libertyjusticecenter.org

Media

[New LawsUIT:
Albuquerque
vote to give
taxpayer
funds to
Planned
Parenthood
violates New
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EXHIBIT 3