IN THE 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* PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.

Defendants.

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

PLAINTIFFS' RESPONSE TO PLANNED PARENTHOOD OF THE ROCKEY MOUNTAINS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs, Paul Gessing and Care Net Of Albuquerque, Inc. ("Care Net"), submit this response in opposition to Planned Parenthood of the Rocky Mountains' ("PPRM") Motion to Dismiss. This Court should deny the motion because Plaintiffs have standing to challenge the City of Albuquerque's ("the City") donation to PPRM, and the doctrine of champerty does not apply to the facts of this litigation.

Gessing has standing because, as a taxpaying resident of the City, he has a right to assert his interest as a taxpayer in preventing the municipal misuse of public funds to support political causes. Care Net has standing because the sweetheart deal between the City and an ideological organization it favors for political reasons deprived Care Net of the right to an open and nondiscriminatory process for public funding of healthcare service providers.

Champerty simply does not apply to this sort of pro bono public-interest litigation: the doctrine is a ban on litigation profiteering by third parties, not on pro bono representation of clients seeking equitable relief against the *ultra vires* actions of municipal officials. Indeed, if this litigation violates the ban on champerty, so does every other case filed by a nonprofit public-interest law firm challenging government action. But the good news is that's not actually what champerty is, and the United States Supreme Court has long held that the doctrine of champerty cannot be applied to public-interest litigation, which is protected by the First Amendment.

FACTUAL BACKGROUND

Plaintiffs have detailed the factual background of the case in their response to the City's separate Motion to Dismiss. They incorporate those facts by reference and here detail only those facts relevant to PPRM's arguments in particular.

After learning that his taxpayer dollars were being used for a donation to Planned Parenthood, Paul Gessing sought legal counsel. Paul is a homeowner in the City. Compl. at ¶ 27. He pays property taxes and also pays gross receipts taxes when he frequently makes purchases in the City. *Id.* Because he brings this case in his personal capacity as a taxpayer, the Complaint does not plead specific facts regarding his employment, but since PPRM has raised the issue, *see* PPRM MTD at 4, 8-9, it is true that Gessing is the President of the Rio Grande Foundation, a Albuquerque nonprofit whose mission "is to increase liberty and prosperity for all of New Mexico by informing citizens of the importance of individual freedom, limited government, and

economic opportunity."[1] The Rio Grande Foundation is not a party to this case and has no role as an organization in this litigation, but as PPRM notes Rio Grande Foundation has made some public statements in support of Gessing's involvement. *See, e.g.*, PPRM MTD at 8. Gessing has no financial interest in this litigation, except his interest as a taxpayer as asserted in the Complaint.

Care Net is a pregnancy resource center in the City. Compl. at ¶ 28. It provides pregnancy-related medical services, including free pregnancy testing, free sexually transmitted infection (STI) testing, and free parenting and pregnancy counseling and classes. *Id.* Many of its services overlap with those Planned Parenthood offers, but because the donation was a council-directed sponsorship rather than an open request for proposals, Care Net had no opportunity to apply for the funds. Care Net has no financial interest in the outcome of this case, except for its interest in being allowed to apply for funding on an equal basis with other organizations that provide similar services.

Counsel did not plead facts about themselves, but since PPRM has raised the issue of champerty, Counsel will provide some background: Plaintiffs are represented in this action by the Liberty Justice Center ("LJC"), a national nonprofit public-interest law firm headquartered in Chicago, Illinois, that litigates cases around the country to protect economic liberty, private property rights, free speech, and other fundamental rights.[2] In this regard, LJC is similar to many other public-interest legal organizations of various ideological stripes, such as the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, Institute for Justice, Pacific Legal Foundation, Lambda Legal, Campaign Legal Center, Natural Resources Defense Council, Public Citizen, Foundation for Individual Rights and Expression, Alliance Defending Freedom, and the Center for Reproductive Rights. Like all public-interest law firms, LJC is funded by donations from private citizens and foundations who believe in the organization's mission. LJC provides representation at no cost to its clients, and neither LJC nor any of its attorneys, staff, or donors have any financial interest in the outcome of this litigation, or any litigation it undertakes, except that LJC may seek an award of attorney's fees in circumstances where the law permits such awards to prevailing parties.

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[1] Rio Grande Foundation, *About*, https://riograndefoundation.org/about/.

[2] *See* Liberty Justice Center, *About*, https://libertyjusticecenter.org/about/.

STANDARD OF REVIEW

The issue on review for a rule 1-012(B)(6) dismissal is "whether the facts as stated in a complaint state a claim for relief." *Blea v. City of Espanola*, 1994-NMCA-008, 117 N.M. 217, *218 (Ct. App. 1994). "In ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted," this court assumes "as true all facts which are well pled, and the complaint must be construed in a light most favorable to the party opposing the motion and with all doubts resolved in favor of the sufficiency of the complaint." *Shea v. H.S. Pickrell Co.*, 1987-NMCA-149, 106 N.M. 683, *865 (Ct. App. 1987). "The purpose of a motion to dismiss for failure to state a claim for relief is to test the legal sufficiency of the claim, not the facts that support it." *Trujillo v. Berry*, 1987-NMCA-072, 106 N.M. 86, *87 (Ct. App. 1987). The mere "possibility of recovery based on a state of facts provable under the claim bars dismissal." *Id.* at *88.

Courts only "infrequently" grant motions to dismiss for failure to state a claim. *Las Luminarias v. Isengard*, 1978-NMCA-117, 92 N.M. 297, *300 (Ct. App. 1978). Moreover, "[o]nly when there is a total failure to allege some matter which is essential to the relief sought should such a motion be granted." *Id.*

ARGUMENT

A. Plaintiffs have standing to challenge the City's illegal donation.

1. Gessing has standing as a taxpayer to challenge the violation of the Anti-Donation Clause.

"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, 327, 281 P. 28, 28 (citing *Asplund v. Hannett*, 31 N.M. 641, 249 P. 1074, 58 A. L. R. 573). "Nor need the taxpayer, in such suits, show greater or more irreparable injury than the public loss in which he shares." *Id.* Yet PPRM claims that "Gessing [must] demonstrate that the Agreement affects him differently 'than any other taxpayer of the state'"—in other words, PPRM basically claims there is no taxpayer standing in New Mexico, and cites *Asplund* as support. PPRM MTD at 4 (quoting *Asplund,* ¶ 7).

But PPRM misses an important nuance in *Asplund*: Its holding is specific to the expenditure of *state*, rather than *municipal* funds. *Asplund* held that there was no right against the state, but also that "a taxpayer may, in the absence of enabling statute, have injunction to prevent devastavit

of municipal funds . . . we consider the taxpayer's right, as against municipal authorities, settled in this jurisdiction." *Id.* at ¶¶ 15-16 (citing *Laughlin v. County Commissioners*, 3 N.M. 420, 5 P. 817; *Crampton v. Zabriskie*, 101 U.S. 601, 25 L. Ed. 1070; *Catron v. County Commissioners*, 5 N.M. 203, 21 P. 60, *Page v. Gallup*, 26 N.M. 239, 191 P. 460). "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." *Cathey v. The City of Hobbs*, 1973-NMSC-042, ¶ 10, 85 N.M. 1, 4, 508 P.2d 1298, 1301 (citing *Laughlin v. County Comm'rs*, 3 N.M. 420, 5 P. 817 (1885)); *see also Shipley v. Smith*, 1940-NMSC-074, ¶ 14, 45 N.M. 23, 28, 107 P.2d 1050, 1053 ("Private citizens as well as taxpayers or proper public officials may maintain mandamus to enforce the performance of a public duty.") (citing *State ex rel. Black & Gilmore v. Wilson*, 158 Mo. App. 105, 120, 121, 139 S.W. 705, 709).

Contrary to PPRM's argument, PPRM MTD at 3, *ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 1, 144 N.M. 471, 473, 188 P.3d 1222, 1224, does not say otherwise. Rather, that passage in *ACLU of N.M.*on which PPRM relies simply cites *Asplund* for the general point that "as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate" the traditional elements of standing, and quotes *Asplund*'s rejection of taxpayer standing against *the state*. Nowhere does *ACLU of N.M.* question *Asplund*'s distinction between municipal and state funds.

Moreover, *ACLU of N.M* makes clear that standing doctrine in New Mexico is not jurisdictional, but a matter of policy, such that PPRM admits that this court would have discretion to reach the merits even if it believed Gessing lacks the formal elements of standing. PPRM MTD at 5-6. Enforcement of the Anti-Donation Clause is precisely such a circumstance. The Clause's role as an important constitutional check on the wasting of public funds would be thwarted if everyday citizens could not challenge sweetheart deals provided to private actors. In other words, the clause exists to allow exactly the sort of challenges to the misuse of municipal funds that *Asplund* approves.

This Court should therefore find that Gessing has standing to challenge the illegal transfer of public funds to Planned Parenthood.

2. *Care Net has standing as an organization that was denied an equal opportunity to apply for funding.*

PPRM's core argument as to Care Net is that "[b]ecause Care Net does not provide all of the services compensable under the Agreement, Care Net was not denied an opportunity to submit a bid." PPRM MTD at 7. But Care Net does in fact provide such services: the facts as alleged are that Care Net "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." Compl. ¶ 31. And in any case Care Net's current offerings would not be dispositive because additional money, such as the funds at issue in this case, would allow any necessary expansion of such services.

The (ostensible) services agreement between the City and PPRM has three "Outputs": (1) "offer[ing] healthcare services to New Mexican residents"; (2) "promoting equitable access to services and care"; and (3) "providing patient education to 8,000 participants regarding healthy choices on sexuality and parenting." Care Net already provides healthcare services to New Mexico residents as required by Output 1, already provides pregnancy counseling classes and other educational services consistent with Output 3, and is in just as good a position as PPRM to report the data on whom they serve as contemplated by Output 2.

Faced with this reality, PPRM argues that Care Net doesn't provide *every* service to the exact same extent as PPRM. PPRM MTD at 6-7. This is true, because Care Net is smaller than Planned Parenthood and therefore resource constrained. Take PPRM's main example: that Care Net's website currently mentions only free STI testing for Chlamydia and Gonorrhea. PPRM MTD at 7, n.3. But the premise of the agreement between the City and PPRM is that the City will *pay* for the testing done by PPRM. If Care Net were to receive a grant, it would have the funding to fulfill whatever STI testing, or other services, the grant required.

Yet all this is academic because there was no Request for Proposals with a list of the sorts of services required to receive this money. Instead, the City simply gave PPRM the money and made up some possible things PPRM could spend it on after the fact. It's therefore impossible to say what minimum level of service provision or expertise Care Net would need to demonstrate in order

to qualify for the money because no such minimum level was ever articulated by the City, because it does not actually care about the services provided, because this is not, in fact, a bona fide contract for services—rather, this is a political handout to an ideologically favored organization, as Councilwoman Fiebelkorn explained in her own words. *See* Compl. ¶¶ 21-22.

Nor is Care Net required to prove that it would win an open and nondiscriminatory bidding process under a properly issued Request for Proposals. The denial of such an open and nondiscriminatory process itself is an injury. If the City of Albuquerque issued grants only to Christian churches, mosques and synagogues could rightfully object to that religious discrimination, whether or not any particular mosque or synagogue could prove that it would have won a competitive bid. *See generally Trinity Lutheran Church of Columbia, Inc. v. Comer* 137 S. Ct. 2012 (2017). The same would be true of a grant offered only to Republicans, or only to members of the Communist Party of America: the viewpoint discrimination in the *process itself* is actionable. Take as another analogy the Title VII context: "Employment discrimination law does not require that a plaintiff formally apply for the job in question." *Whalen v. Unit Rig, Inc*., 974 F.2d 1248, 1251 (10th Cir. 1992). All that is required is that "the plaintiff be in the group of people who might reasonably be interested in the particular job." *Id.*

The Court should therefore find that Care Net has standing to challenge the illegal donation to PPRM.

B. Public-interest litigation does not violate the prohibition on champerty.

Plaintiffs concede they are a bit flummoxed that PPRM has chosen to argue that public-interest litigation violates the ancient prohibition on champerty, given the vital importance of public-interest litigation to the abortion-rights movement of which it's a part. If the Liberty Justice Center and its clients are guilty of champerty, so are the ACLU, the Center for Reproductive Rights, and hundreds of other legal nonprofits operating around the country. The good news is they are not because this argument is frivolous.

Per PPRM's own motion, champerty is 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)). The term "proceeds" is important to that definition: champerty is the financial support of litigation by a third party *as an investment*, the return on

which would be a cut of the money damages at the end of the case. In other words, it's a ban on third-party litigation *profiteering*.

This Court can be confident there is no agreement between Plaintiffs, their counsel, or any third party, to divide the spoils of this litigation, because there will be no spoils: Plaintiffs' Complaint pleads only declaratory and injunctive relief. Compl. ¶¶ A-F. There is no damages claim, nor any claim of personal ownership by Plaintiffs over the funds at issue. If Plaintiffs win this case, PPRM will return funds to the City—none of it will go to Plaintiffs. Plaintiffs pled an award of attorney's fees under N.M. Stat. Ann. § 44-6-11, but that is a discretionary award, explicitly authorized by statute, that this Court may approve or deny, and in any case would simply recoup some of the expenses Plaintiffs' non-profit pro bono counsel have incurred litigating this case—again, standard practice in civil rights litigation. If this case is successful, Gessing will not receive a dime; instead he will simply get the vindication that his tax dollars are not being wasted on political stunts. Care Net may receive the right to apply for a grant through an independent bidding process—assuming the City carries one out once they're foreclosed from cutting a sweetheart deal with PPRM—but that simply affords them the right to bid on equal terms with any other service provider in the area.

And if it were true that New Mexico's prohibition on champerty banned public-interest litigation, such a legal rule would itself be invalid under the First Amendment, which protects the right of private citizens and private lawyers to challenge illegal government action—such that the Supreme Court squarely held 60 years ago that common law champerty had to give way to the First Amendment right of citizens to use the legal system to redress their grievances. *NAACP v. Button*, 371 U.S. 415 (1963) (rejecting "the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty"); *see also id.* at 439 ("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.").

CONCLUSION

For the foregoing reasons, this Court should deny PPRM's Motion to Dismiss.

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CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was electronically filed and served through the Court's E-file and E-service system on the following parties on the 3rd day of May, 2023.

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