

Subject: [EXTERNAL] Abortion Ordinance - Attorney Client Communication

From: Jared Morris

Date: 10/7/2022, 11:32 AM

To: CommissionUpdate@cityofclovis.org

Good Morning,

Attached please find two (2) alternative draft abortion ordinances provided to the Mayor on Wednesday Mark Lee Dickson. Also attached is a letter from Johnathan F. Mitchell, the attorney primarily responsible for drafting the ordinances.

I wanted to make a few points to put the comments from last night in context. To begin, the legality of the ordinances is definitely in question. The implication that the ordinances are guaranteed to survive in the short and long term is incorrect. When I spoke to Mr. Mitchell, he himself acknowledged this fact.

The first type of ordinance they proposed creates a private right of action, in other words, the City doesn't enforce the ordinance, the citizens do. The second ordinance (this is "the" ordinance referenced last night) creates a way for the City to refuse business licenses to abortion clinics. Both ordinances rely on a current federal statute that essentially prohibits abortion. They draw their authority on the City's ability to recognize and enforce that statute.

The Mayor and I attended a meeting with Mr. Dickson, Mr. Mitchell and representatives from the City of Hobbs a couple of weeks ago. In that meeting, they proposed the private right of action ordinance (this is the ordinance they travel with and propose to other cities). The Hobbs City Attorney pointed out that the New Mexico constitution prohibits private right of action ordinances. At some point later (and with help from Hobbs), they came up with the business license ordinance that they are asking us to adopt.

The full legal analysis is extremely complicated. Please feel free to contact me directly and I will give you my best explanation. In short, I think the business license ordinance is the most defensible and most practical; however, there is a financial risk in enacting that ordinance that is difficult, if not impossible, to quantify. While it is said that Mr. Mitchell will represent the City for free, and while I believe I would receive plenty of legal support from Hobbs and others, the City will still have to pay any judgment against us. This judgment could include attorney fees and costs if we lose, or even punitive or other damages. This is important because I have reached out to our insurance carrier and confirmed that they will not provide any coverage in the event we are sued.

I feel pretty confident that the ordinance will not survive in the long term but that doesn't mean it couldn't take years to overturn. A very brief overview of my legal analysis so far is as follows:

On one hand, there is currently no state law that regulates abortion or preempts the City from enacting an ordinance that regulates abortion (or allows us to use federal law to restrict business licenses). Therefore, until the legislature takes action, home rule cities are not prohibited from exercising their police/zoning powers, even out right prohibiting abortion. As an aside, most people assume the legislature will take action on the issue eventually.

On the other hand, the Supreme Court Opinion in Dobbs clearly states that there is no Constitutional right to an abortion, and that the federal government should not interfere with the States right to regulate abortion. Thus, the federal statutes upon which the ordinances rely are illegal (as they would essentially make abortion illegal everywhere).

Again, please feel free to call me anytime to discuss this matter. I would like to end by mentioning that, shortly after a recent City Commission Meeting in Hobbs which was similarly attended, Hobbs received an IPRA request from the ACLU for all emails, texts and correspondence relating to their proposed abortion ordinance.

Have a great weekend.

Jared

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- [Attachments/Clovis Sanctuary Cities Ordinance \(conventional public enforcement\).pdf](#)
- [Attachments/Letter from JFM to Clovis \(9.22.2022\).pdf](#)

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