



Friday, August 12, 2022

Albuquerque City Councilors:

My name is Daniel Suhr, and I am managing attorney at the Liberty Justice Center, a national, non-profit, public-interest law firm whose mission includes protecting the structural limits on government that ensure our rights and liberties.

I write on behalf of Albuquerque taxpayers who believe that the City Council of Albuquerque violated the Anti-Donation Clause of the New Mexico Constitution when, on May 16, 2022, it appropriated \$250,000 of public money to a sponsorship of Planned Parenthood of New Mexico.

The City Council must act to ensure that these taxpayer dollars are not provided to Planned Parenthood, or if they already have been, must seek their return. If the City Council fails to remedy this unconstitutional appropriation, LJC will file suit to enforce the New Mexico Constitution on behalf of our clients and every taxpayer in Albuquerque who does not want their tax dollars to be used to advance the political pet projects of a few city councilors.

Article IX, Section 14 of the New Mexico Constitution, the Anti-Donation Clause, prohibits municipalities from making any donation to a private entity, unless the donation falls within one of several enumerated exceptions. N.M. Const. art. IX, § 14. Because Albuquerque is a municipality and Planned Parenthood of New Mexico is a private entity, the relevant legal questions in this case are (1) whether the sponsorship of Planned Parenthood is a donation under the Anti-Donation Clause, and if so, (2) whether any of the enumerated exceptions apply.

## **The sponsorship of Planned Parenthood is a donation under the Anti-Donation Clause.**

The New Mexico Supreme Court has defined “donation” for purposes of the Anti-Donation Clause as “a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation.” *Moses v. Roszkowski*, 458 P.3d 406, 421 (N.M. 2018) (internal quotation marks omitted) (quoting *Vill. of Deming v. Hosdreg Co.*, 303 P.2d 920, 926–27 (per curiam) (N.M. 1956)).

The City Council’s appropriation of \$250,000 to Planned Parenthood in the wake of the leak of the *Dobbs* decision is a political stunt, a gift, and an appropriation of something of value, not a bona fide contract for services. The City Council clearly has not required any consideration in exchange for its sponsorship of Planned Parenthood. It is a gift to Planned Parenthood, no strings attached. New Mexico court precedents and opinions of the attorney general’s office show that the sponsorship of Planned Parenthood is a donation. *See, e.g., State ex rel. Mechem v. Hannah*, 314 P.2d 714, 721 (N.M. 1957) (finding appropriation of state money to ranchers for which there was no consideration violated the Anti-Donation Clause); *Nat’l Union of Hosp. & Healthcare Employees v. Bd. Of Regents*, 245 P.3d 51, 63 (N.M. Ct. App. 2010), *cert. denied*, 243 P.3d 1146 (N.M. 2010) (finding ratification bonus for union negotiators was not in exchange for work and so violated the Anti-Donation Clause); N.M. Att’y Gen. Op. No. 4368 (Aug. 19, 1943) (advising that donation to chamber of commerce from city would likely violate the Anti-Donation Clause).

An advisory opinion on this sponsorship issued by the State Ethics Commission fails to overcome these obstacles.<sup>1</sup> Section I(B) of the advisory opinion begins its argument with a paragraph of obfuscation. It says that a municipal budget amendment *might* not be sufficient to constitute a donation and that, because the explanation of the amendment is not in the budget itself, the unrestricted appropriation *might* not be binding on the mayor. That the mayor *might* exercise *potential* legal authority to *attempt* to fix the Council’s mistake does not

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<sup>1</sup> 2022 Op. Ethics Comm'n No. 2022-07, <https://nmonesource.com/nmos/secap/en/item/18594/index.do>.

remove those defects from the sponsorship here and now. Nor does it erase the obvious legislative intention to provide a pure gift, which must shape how any future mayoral action is viewed.

**The sponsorship is not a provision for the care or maintenance of sick or indigent persons.**

The Anti-Donation Clause allows municipalities to provide “for the care and maintenance of sick and indigent persons,” without violating the Anti-Donation Clause. N.M. Const. art. IX, § 14(A). This clause has been interpreted to apply to provisions of aid to either sick *or* indigent persons. N.M. Att’y Gen. Op. No. 58-135 (June 23, 1958).

In this case, City Councilor Tammy Fiebelkorn described the risk to legal protections of abortion given the then-potential reversal of *Roe v. Wade* and the need for the provision of “reproductive health services” that would result.<sup>2</sup> This language shows that the City Council’s purpose in providing the sponsorship was not to provide healthcare for sick or indigent women but rather to promote the pro-abortion agenda of some City Councilors.

Even if the intention of the donation had been to help the sick or indigent, it would still fail. There is no public-purpose exception to the Anti-Donation Clause. *State ex rel. Mechem v. Hannah*, 314 P.2d 714, 721 (N.M. 1957); *Harrington v. Attenberry*, 153 P. 1041, 1042 (N.M. 1915); *State ex rel Sena v. Trujillo*, 129 P.2d 329, 333 (N.M. 1942) (“The constitution makes no distinction as between ‘donations’, whether they be for a good cause or a questionable one. It prohibits them all.”). Thus, even if the donation to Planned Parenthood could serve some useful public purpose, that would not make it constitutional.

The State Ethics Commission’s advisory opinion argues that if the sponsorship were implemented such that it provided for the care and maintenance of sick or indigent persons, it would satisfy the requirements of the exception. This is not so. Incidental or indirect

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<sup>2</sup> City of Albuquerque, City Council Funds Planned Parenthood of New Mexico (May 17, 2022) <https://www.cabq.gov/council/find-your-councilor/district-7/news/city-council-funds-planned-parenthood-of-new-mexico>.

benefit for some sick or indigent residents of Albuquerque would not satisfy the Sick and Indigent Persons exception. In *Hannah*, the New Mexico Supreme Court found that a program that gave money to farmers was unconstitutional, despite the significant economic loss farmers could experience without the aid, because the farmers were not indigents. 314 P.2d at 718. This case and several attorney general opinions have made clear that, unless a donation is directed to the sick or indigent specifically, it is not covered by the exception. See N.M. Att’y Gen. Op. No. 99-01 n.3 (Jan. 29, 1999) (“If a school voucher program were limited to indigent students, this provision might exempt the program from coverage under Article IX, Section 14.”); N.M. Att’y Gen. Op. No. 61-84 (Sept. 11, 1961) (stating county payment scheme to ambulance operator intended to cover the bills of indigent ambulance users but which had no system to ensure that the funds were only provided to indigent users was likely unconstitutional); N.M. Att’y Gen. Op. No. 89-22, n.1 (Aug. 7, 1989) (“[The sick and indigent persons] exception does not justify payments which directly benefit physicians and only incidentally benefit the poor and sick.”).

In this case, there is no structure attached to the sponsorship of Planned Parenthood to ensure that the funds are only used to serve sick or indigent women. Planned Parenthood is not required to restrict the use of the money to services for indigent or sick clients. It could use the money for any purpose. Planned Parenthood could spend the money on marketing, lobbying, fundraising, capital improvements or building maintenance, or a host of other activities that are not specific to sick or indigent patients. Additionally, many of the persons Planned Parenthood provides services to may not be “sick” or “indigent” (for instance, when a non-poor person seeks family planning services or products, they are not “sick” or “indigent”). Thus, both the purpose and implementation of the sponsorship demonstrate that the sponsorship was not appropriated for the care and maintenance of sick or indigent persons and thus is not covered by the exception to the Anti-Donation Clause.

**If already sent to Planned Parenthood, the City Council has the power to, and must, pursue the return of the money.**

Public funds illegally distributed can and must be reimbursed to the government. *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.”). Later cases confirm this interpretation. *See Chronis v. State ex rel. Rodriguez*, 670 P.2d 953, 959 (1983) (citing *Axtell*, 393 P.2d 451.) The City Council thus has the authority and the responsibility to ensure the return of the money if it has already been transferred to Planned Parenthood of New Mexico.

The Albuquerque City Council must immediately take whatever action necessary to prevent the \$250,000 sponsorship from being paid to Planned Parenthood or to seek its return if it has already been delivered. Any other outcome would be illegal and will lead to litigation.

Very truly yours,

A handwritten signature in blue ink that reads "Daniel R. Suhr". The signature is fluid and cursive, with the first name being the most prominent.

Daniel R. Suhr

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