

April 6, 2023

Mr. Steve Durbin
Sands Anderson
sdurbin@sandsanderson.com

Re: Grayson County: “Ordinance Requiring Compliance
With Federal Abortion Laws”

Dear Mr. Durbin:

We direct this letter to you in your role as County Attorney for Grayson County, Virginia. We understand that the Grayson County Board of Supervisors is considering the attached ordinance that was drafted for and advanced by Mark Lee Dickson, an anti-abortion activist from Texas. The proposed ordinance would make it a Class 1 misdemeanor to send or receive, through the mails or common carrier, any item or material that is designed, adapted, or intended to be used to perform an abortion, or to aid or abet anyone else in such conduct. This proposed ordinance is clearly invalid under Virginia law and the U.S. Constitution, will result in costly litigation, and will deter healthcare providers from serving the residents of Grayson County. Therefore, we recommend that the Board decline to act on this proposal and reject the ordinance.

As you know, Virginia employs the Dillon Rule to dictate what authority localities have to adopt ordinances and regulations. The Dillon Rule provides that localities have only the authority that is explicitly granted to them by state law. *See, e.g., Bragg Hill Corp. v. City of Fredericksburg*, 297 Va. 566, 578, 831 S.E.2d 483, 489 (2019); *Lawless v. Cnty. of Chesterfield*, 21 Va. App. 495 (1995). Further, localities may not enact ordinances that conflict with state or federal law. *See* Va. Code Ann. §§ 1-248; 15.2-1200.

While the General Assembly has delegated regulatory authority over various matters to counties, *see generally* Title 15.2 of the Code of Virginia, none of those matters include the regulation of abortion specifically, healthcare generally, or the use of the mails. Further, it is not within the authority of local governments to enforce federal law. Therefore, enacting an ordinance that not only regulates but criminalizes these activities would exceed a locality’s authority and would be void *ab initio*.

In addition, abortion remains legal in Virginia. The provision of abortion services specifically, and the practices of medicine, nursing, and pharmacy generally, are heavily regulated by statute and administrative rules, including through the use of criminal sanctions. The attempt to impose additional criminal penalties on the provision of important aspects of healthcare through a local ordinance would be invalid because it conflicts with this comprehensive statutory and regulatory scheme.



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Similarly, the ordinance would conflict with federal law because it criminalizes activity that is not, and has never been held to be, illegal under the federal statutes it cites. On December 23, 2022, the U.S. Department of Justice Office of Legal Counsel released an opinion addressing the effect of 18 U.S.C. § 1461 on the mailing of mifepristone and misoprostol— medication used, among numerous medical applications, as part of the medication abortion regimen. The Department unequivocally concluded that “section 1461 does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol where the sender lacks the intent that the recipient of the drugs will use them unlawfully.” 46 Op. O.L.C. __ (Dec. 23, 2022) at 1. This conclusion is based on over a century of judicial, congressional, and administrative understanding and practice that the reach of Section 1461 is “narrower than a literal reading might suggest.” *Id.* at 5. The DOJ has made it abundantly clear that these medications can be sent to patients through the mail just as safely as other prescription medications, and that the provisions of the Comstock Act do not apply to providers, patients, or helpers receiving and providing lawful care in Virginia.

Finally, this ordinance would be unconstitutionally overbroad and void for vagueness because it criminalizes such a wide array of conduct in such broad terms that it does not give “sufficiently precise and definite ... fair warning” of what conduct is criminal. *Norton v. Board of Supervisors of Fairfax County*, 299 Va. 749 (2021). An ordinance that criminalizes mailing any “thing” that may be “adapted” to produce an abortion cannot pass constitutional muster. In addition to its constitutional deficiencies, such an ordinance would undoubtedly have a significant deterrent effect on the provision of healthcare generally within Grayson County. States and localities that have enacted abortion bans have seen doctors and other healthcare providers leave those jurisdictions, and have had trouble recruiting new providers, resulting in fears of staffing shortages. Abortion and other reproductive care are essential components of healthcare, and no government should step into healthcare decisions that are best left to patients and their providers.

Because this ordinance would be invalid and serves no benefit to the residents of Grayson County, we recommend that the Board reject this proposal in its entirety.

Sincerely,

A handwritten signature in black ink, appearing to read "Eden B. Heilman".

Eden Heilman
Legal Director

Cc: Stephen Boyer, Grayson County Administrator