

1 § 10801. Thus, Congress vested protection and advocacy systems with “the authority
2 to . . . pursue administrative, legal, and other appropriate remedies to ensure the
3 protection of individuals with mental illness who are receiving care or treatment in
4 the State[.]” § 10805(a)(1)(B).

5 {30} In addition to individuals, we have held that an association (also referred to as
6 an organization) may have standing.

7 [A]n association has standing to bring suit on behalf of its members
8 when: (a) its members would otherwise have standing to sue in their
9 own right; (b) the interests it seeks to protect are germane to the
10 organization’s purpose; and (c) neither the claim asserted nor the relief
11 requested requires the participation of individual members in the
12 lawsuit.

13 *Forest Guardians*, 2001-NMCA-028, ¶ 21. In *ACLU II*, our Supreme Court
14 continued the *Forest Guardians* test. See *ACLU II*, 2008-NMSC-____, ¶ 30.

15 {31} Also in *ACLU II*, the Supreme Court reiterated the factors applied in *NARAL*.
16 *ACLU II*, 2008-NMSC-____, ¶ 31. In evaluating organizational standing, our Supreme

17 Court in *NARAL* focused on

18 the following three criteria in determining the right of litigants to bring
19 actions on behalf of third parties:

20 The litigant must have suffered an injury in fact, thus giving him or her
21 a sufficiently concrete interest in the outcome of the issue in dispute; the
22 litigant must have a close relation to the third party; and there must exist

1 some hindrance to the third party's ability to protect his or her own
2 interests.

3 1999-NMSC-005, ¶ 13 (internal quotation marks and citation omitted). In *NARAL*,
4 the plaintiffs were individual doctors who provided abortions to Medicaid-eligible
5 women, an organization that provided abortions to Medicaid-eligible women, and an
6 organization that provided counseling and referrals regarding abortions to Medicaid-
7 eligible women. *Id.* ¶ 11. The plaintiffs sued the secretary of the New Mexico
8 Human Services Department and others on behalf of Medicaid-eligible women who
9 sought and were denied State funding for medically necessary abortions. *Id.* ¶¶ 1, 11.
10 The Court held that the individual plaintiffs who provided abortions had standing to
11 sue because they had “both a direct financial interest in obtaining state funding to
12 reimburse them for the cost of these services, and a close relation to the Medicaid-
13 eligible women whose rights they seek to assert in court[.]” *Id.* ¶ 14 (citations
14 omitted). As for the organization, the Court held that it had a right to sue because it
15 had standing to sue on behalf of its members who were Medicaid-eligible women and
16 because “privacy concerns and time constraints impose a significant hindrance on the
17 ability of Medicaid-eligible women to protect their own interest.” *Id.*

1 {32} The special nature of protection and advocacy systems has been considered by
2 various courts in determining whether the systems have standing in order to advance
3 the claims of their members, or, as sometimes called, constituents. In particular, all
4 parties in the present case rely on the case of *Doe v. Stincer*, 175 F.3d 879 (11th Cir.
5 1999), which addressed whether an advocacy group had standing to sue Florida's
6 attorney general, a hospital, and various doctors for an alleged violation of the
7 Americans with Disabilities Act. In *Stincer*, the court applied the first two factors of
8 the test this Court enunciated in *Forest Guardians*. Those factors are that, first, it is
9 required that the association allege that at least one of its members is suffering from
10 an injury or a threatened injury sufficient to establish standing for that member had
11 the member brought the suit. Second, the interests sought to be protected by the
12 association must be germane to the association's purpose. *Stincer*, 175 F.3d at 882.
13 The court likened the protection and advocacy system involved to the statutorily
14 created Apple Advertising Commission considered by the United States Supreme
15 Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333
16 (1977). *Stincer*, 175 F.3d at 885 (citing *Hunt*, 432 U.S. at 344). While the Apple
17 Advertising Commission was not a membership organization, it was created to serve
18 a specialized segment of the community, and those community members possessed

1 “all the indicia of membership in an organization,” including electing the
2 Commission members and serving on the Commission. *Id.* (internal quotation marks
3 and citation omitted).

4 {33} Following the same line of reasoning as that in *Hunt* and relating to the Apple
5 Advertising Commission, *Stincer* held that the protection and advocacy system could
6 sue on behalf of its constituents if it met the requirements for organizational standing.
7 *Stincer*, 175 F.3d at 886. Just as in *Hunt*, the protection and advocacy system was
8 statutorily created to advocate on behalf of a specialized segment of the population.
9 *Stincer*, 175 F.3d at 886. Further, by statute, sixty percent of the advisory council
10 membership and the chair of the council of a protection and advocacy system must
11 be “individuals who have received or are receiving mental health services or who are
12 family members of such individuals.” *Id.* (quoting § 10805(a)(6)(B), (C)).

13 {34} In line with the reasoning of *Stincer*, we see no bar, nor does the City argue
14 one, to allowing standing even though P&A is an organization with constituents
15 rather than members. In the same vein, and considering the second prong of the
16 *Forest Guardians* test for organizational standing first, it is clear that the interests
17 sought to be protected by P&A in this case are germane to the organization’s purpose:
18 “to ensure that the rights of individuals with mental illness are protected” and to

1 “pursue administrative, legal, and other appropriate remedies to ensure the protection
2 of individuals with mental illness who are receiving care or treatment in the State[.]”

3 §§ 10801(b)(1), 10805(a)(1)(B). Thus, P&A has satisfied the second prong of the
4 *Forest Guardians* test to establish organizational standing.

5 {35} The aspect of organizational standing contested by the City is whether P&A
6 has met the first prong of the *Forest Guardians* test, that is, alleging that one of its
7 constituents would otherwise have standing to sue in his or her own right. The City
8 cites *Stincer* and two other cases for the proposition that protection and advocacy
9 groups have been denied standing if they have failed to show that their constituents
10 have standing. *Stincer*, 175 F.3d at 887-88; *see also Tenn. Prot. & Advocacy, Inc. v.*
11 *Bd. of Educ.*, 24 F. Supp. 2d 808, 816 (M.D. Tenn. 1998) (holding that the protection
12 and advocacy group did not establish that it had standing to sue where it failed to
13 name specific individuals who had suffered concrete harm); *Pa. Prot. & Advocacy,*
14 *Inc. v. Houston*, 136 F. Supp. 2d 353, 365-67 (E.D. Pa. 2001) (denying standing to
15 the protection and advocacy system because it had failed to “identify a specific
16 constituent who is being harmed by the [d]efendant’s actions”).

17 {36} The cases upon which the City relies are distinguishable. In *Stincer*, the court
18 held that the protection and advocacy system failed to allege facts showing that one

1 of its constituents had standing to sue. *Stincer*, 175 F.3d at 886-87. There, in order
2 to establish standing, the system alleged that it had received complaints from
3 individuals that they had been denied access to their medical records in violation of
4 federal law. *Id.* at 887. However, the system failed to allege facts showing that those
5 individuals were constituents of the system. *Id.* Here, however, P&A does not rely
6 on unnamed individuals for standing and it is clear from the complaint that the named
7 individual Plaintiffs are constituents of P&A because of the allegations that each
8 suffers from mental illness. Thus, we are not persuaded by the City's reliance on
9 *Stincer*.

10 {37} In the other two cases upon which the City relies, either there had been named
11 individual plaintiffs, but those individuals' claims had become moot because the
12 individuals received the remedy requested (in *Houston*), or no individuals were ever
13 identified or named as plaintiffs (*Tennessee Protection & Advocacy, Inc.*). *Houston*,
14 136 F. Supp. 2d at 358; *Tenn. Prot. & Advocacy, Inc.*, 24 F. Supp. 2d at 812. Thus,
15 the only plaintiff remaining at the time of the opinions in those cases was the
16 protection and advocacy system. Here, however, there are four Does identified and
17 named as individual Plaintiffs, each having standing under *ACLU* and each of whom
18 is, by statutory definition, a constituent of P&A. *See* § 10801(b). As such, we find

1 this case distinguishable from *Tennessee Protection and Advocacy* and from *Houston*.
2 We conclude that P&A has met the first prong of the *Forest Guardians* test for
3 organizational standing.

4 {38} Finally, as to the third *Forest Guardians* prong, 2001-NMCA-028, ¶ 21, that
5 “neither the claim asserted nor the relief requested requires the participation of
6 individual members in the lawsuit,” the United States Supreme Court retreated from
7 requiring that an organization establish that prong in *United Food & Commercial*
8 *Workers Union Local 751 v. Grown Group, Inc. (United Food)*, 517 U.S. 544, 556-57
9 (1996). However, in both *ACLU II* and *Forest Guardians* the Courts set out the third
10 prong, without mentioning the fact that the United States Supreme Court no longer
11 appears to rely on this requirement. *ACLU II*, 2008-NMSC-___, ¶ 30; *Forest*
12 *Guardians*, 2001-NMCA-028, ¶ 21. We tend to agree with *United Food*, but we
13 nevertheless will apply this factor because our cases have included it as part of the
14 test. *ACLU II* discussed it. As the Court determined in *Hunt*, we conclude that the
15 third prong for organizational standing is satisfied in the present case because neither
16 the claim asserted nor the relief requested “requires individualized proof.” 432 U.S.
17 at 344. There is no need for individualized proof because the district court granted
18 the injunction on the basis of an issue of law—preemption—which does not require

1 an examination of facts specific to an individual. Thus, we hold that P&A has
2 sufficiently established organizational standing under the *Forest Guardians* test.

3 {39} Additionally, we believe that P&A has demonstrated the existence of the
4 factors applied by our Supreme Court in *NARAL*. See *NARAL*, 1999-NMSC-005,
5 ¶ 13. *NARAL* discussed three factors, the first being that the litigant, in this case
6 P&A, must have suffered an injury in fact giving it “a sufficiently concrete interest
7 in the outcome of the issue in dispute.” *Id.* (internal quotation marks and citation
8 omitted). P&A points out that under the Ordinance the court shall appoint counsel
9 to indigent subjects and that the court “shall give preference to nonprofit
10 organizations offering representation to mentally ill . . . persons.” Albuquerque,
11 N.M., Ordinance C/S O-06-21, § 6(B). P&A asserts that it is a nonprofit corporation
12 charged with the duty of protecting and advocating for the rights of citizens with
13 mental illness. See §§ 10801(b)(2), 10805(a)(1). P&A, however, rather than stating
14 that it will represent persons who are the subjects of Ordinance petitions, states that
15 due to limited funding it cannot guarantee it will provide services to individuals
16 referred to it under the Ordinance. Nonetheless, under the Ordinance it appears that
17 P&A will be appointed to represent indigent persons who are the subjects of
18 Ordinance petitions. Upon appointment, P&A presumably will proceed to represent

1 a subject or protest the court-ordered appointment, thereby affecting P&A's financial
2 interests by having to incur legal fees. *See NARAL*, 1999-NMSC-005, ¶ 12 (stating
3 that the requirement of an injury "is met even when the extent of the alleged injury
4 is slight"). Therefore, P&A has a financial interest in the proceedings to the same
5 extent as the plaintiffs in *NARAL*. *See id.* ¶ 14 (concluding that "providers of abortion
6 services to Medicaid-eligible women . . . have . . . a direct financial interest in
7 obtaining state funding to reimburse them for the cost of these services").

8 {40} The other factors considered in *NARAL* are also present here: "a close relation
9 to the third party; and . . . some hindrance to the third party's ability to protect his or
10 her own interests." *Id.* ¶ 13 (internal quotation marks and citation omitted). Again,
11 the statutory purpose of P&A is to protect and advocate the rights of individuals with
12 mental illness, *see* §§ 10801(b)(2), 10805(a)(1), therefore establishing a close
13 relationship between P&A and an individual with mental illness subject to a petition
14 under the Ordinance. As to the hindrance of the third party's ability to protect his or
15 her interests, protection and advocacy systems were created based on the belief that
16 "individuals with mental illness are vulnerable to abuse and serious injury,"
17 § 10801(a)(1), with "abuse" defined to include "the use of bodily or chemical
18 restraints on [an] individual with mental illness which is not in compliance with

1 Federal and State laws and regulations.” § 10802(1)(D) (footnote omitted). Without
2 addressing whether the use of medications as treatment under the Ordinance is similar
3 to the use of “chemical restraints” on an individual, we believe that the same
4 vulnerability which Congress sought to remedy constitutes a hindrance to the ability
5 of individuals with mental illness to protect their own interests when subject to a
6 petition under the Ordinance. *See* § 10801(a)(1).

7 {41} Thus, we believe that under the standards applied in *ACLU II* and *Forest*
8 *Guardian*, as well as under the factors of *NARAL*, P&A has standing to assert the
9 rights of mentally ill individuals who are under a credible threat of being subject to
10 a petition for assisted outpatient treatment under the Ordinance. Having concluded
11 that all Plaintiffs have standing in this case, we now turn to the merits of the
12 preemption claim.

13 **IV. Preemption**

14 {42} The district court determined that the Ordinance is preempted by both the Code
15 and the Act. The district court concluded that the Ordinance is in direct conflict with
16 the Code and the Act. Further, the court concluded that the Code and the Act together
17 create a comprehensive scheme governing individuals with mental illness which
18 preempts the field by implication. The City contends that the district court erred

1 because the Ordinance and the Code can be harmonized and argues that the district
2 court incorrectly applied the law of preemption to the City as a home-rule
3 municipality.

4 {43} Whether a municipal ordinance enacted by a home-rule municipality is
5 preempted by state law requires us to construe together a constitutional amendment,
6 the statutes, and an ordinance, which involves a question of law reviewed de novo.
7 *NMFE*, 2006-NMCA-007, ¶ 11. We construe constitutional amendments and statutes
8 by first looking to the text of the amendment or statute and then turning to other
9 indicators of the intent of the framers of the amendment or the Legislature if
10 construing a statute. *Id.* The same rules of construction which apply to statutes apply
11 to ordinances. *City of Rio Rancho v. Logan*, 2008-NMCA-011, ¶ 7, 143 N.M. 281,
12 175 P.3d 949.

13 {44} The general rule is that a municipality must look to the Legislature for an
14 express or implied grant of authority in order to act. *State ex rel. Haynes v. Bonem*,
15 114 N.M. 627, 630, 845 P.2d 150, 153 (1992). However, a home-rule municipality,
16 such as Albuquerque, is not subject to this general rule. *Id.* at 630-31, 845 P.2d at
17 153-54; see *Apodaca v. Wilson*, 86 N.M. 516, 519-20, 525 P.2d 876, 879-80 (1974)
18 (stating that the City of Albuquerque is a home-rule municipality), *modification on*

1 *other grounds recognized by Haynes*, 114 N.M. at 634, 845 P.2d at 157 Instead,
2 home-rule municipalities are governed by Article X, Section 6 of the New Mexico
3 Constitution, which states:

4 D. A municipality which adopts a charter may exercise all
5 legislative powers and perform all functions not expressly denied by
6 general law or charter. This grant of powers shall not include the power
7 to enact private or civil laws governing civil relationships except as
8 incident to the exercise of an independent municipal power, nor shall it
9 include the power to provide for a penalty greater than the penalty
10 provided for a petty misdemeanor. . . .

11 E. The purpose of this section is to provide for maximum local
12 self-government. A liberal construction shall be given to the powers of
13 municipalities.

14 “[T]he express purpose and liberal construction clauses make clear that the home rule
15 amendment is intended to provide chartered municipalities with the utmost ability to
16 take policymaking initiative.” *NMFE*, 2006-NMCA-007, ¶ 16.

17 {45} At issue in the present case is the Article X, Section 6(D) limitation on home-
18 rule authority where a general law of the State expressly denies the municipality
19 authority to act. N.M. Const. art. X, § 6(D); *see NMFE*, 2006-NMCA-007, ¶ 17.
20 There are additional limits expressed in Article X, Section 6(D); however, we need
21 only address the general law limitation for the purpose of this case. N.M. Const. art.

1 X, § 6(D); see *NMFE*, 2006-NMCA-007, ¶ 17 (outlining the limitations expressed in
2 Article X, Section 6(D)).

3 {46} We determine if a statute is a general law which expressly denies the
4 municipality authority to act by using a two-step process. *Smith v. City of Santa Fe*,
5 2006-NMCA-048, ¶ 9, 139 N.M. 410, 133 P.3d 866, *aff'd*, 2007-NMSC-055, 142
6 N.M. 786, 171 P.3d 300. “In the first step, a court asks whether a state law is a
7 general law, that is, a law that applies generally throughout the state, relates to a
8 matter of statewide concern, and impacts inhabitants across the entire state.” *Id.*
9 (internal quotation marks and citation omitted).

10 While a general law supersedes a municipal charter or ordinance
11 in conflict therewith, it should be borne in mind that the subject matter
12 of the general legislative enactment must pertain to those things of
13 general concern to the people of the state. A law general in form cannot,
14 under the Constitution, deprive cities of the right to legislate on purely
15 local affairs germane to the purposes for which the city was
16 incorporated.

17 *Apodaca*, 86 N.M. at 522, 525 P.2d at 882 (internal quotation marks and citation
18 omitted).

19 {47} In the second step, we ask whether state law expressly denies the City’s power
20 to enact the Ordinance in question. See *Smith*, 2006-NMCA-048, ¶ 10. However, we

1 do not just look at whether the State has negated the City's power verbatim. *Haynes*,
2 114 N.M. at 634, 845 P.2d at 157. Rather,

3 [t]his involves an inquiry into whether the [statute] evinces any intent to
4 negate [the] municipal [legislative] power [at issue], whether there is a
5 clear intent to preempt that governmental area from municipal
6 policymaking, or whether municipal authority to act would be so
7 inconsistent with the [statute] that the [statute] is the equivalent of an
8 express denial.

9 *NMFE*, 2006-NMCA-007, ¶ 19.

10 {48} Though *NMFE* sets out the inquiries listed as three separate inquiries, the
11 purpose of all three is to determine legislative intent. *Id.*; *Smith*, 2006-NMCA-048,
12 ¶ 10. To that end, the most basic inquiry used to determine whether the statute
13 evinces an intent to negate the municipality from enacting a particular ordinance is
14 whether the ordinance is inconsistent with state law. *See Casuse v. City of Gallup*,
15 106 N.M. 571, 573, 746 P.2d 1103, 1105 (1987). Thus, while “an ordinance may
16 duplicate or complement statutory regulations,” if the ordinance is inconsistent with
17 a general State statute then the State statute controls. *State ex rel. Coffin v. McCall*,
18 58 N.M. 534, 538, 273 P.2d 642, 644 (1954) (internal quotation marks omitted); *see*
19 *Bd. of Comm'rs of Rio Arriba County v. Greacen*, 2000-NMSC-016, ¶ 15, 129 N.M.
20 177, 3 P.3d 672 (stating that where there is a conflict between an ordinance and state
21 law, the law of the sovereign controls); *Casuse*, 106 N.M. at 573, 746 P.2d at 1105

1 (same); *Gould v. Santa Fe County*, 2001-NMCA-107, ¶ 18, 131 N.M. 405, 37 P.3d
2 122 (same), *overruled on other grounds by Rio Grande Chapter of Sierra Club v.*
3 *N.M. Mining Comm’n*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806. “The analysis
4 to apply is whether the stricter requirements of the ordinance conflict with state law,
5 and whether the ordinance permits an act the general law prohibits, or prohibits an act
6 the general law permits.” *Gould*, 2001-NMCA-107, ¶ 18 (internal quotation marks
7 and citation omitted); *accord Greacen*, 2000-NMSC-016, ¶ 15.

8 {49} As an initial matter, we note that the City argues that the district court erred in
9 applying the conflict analysis exemplified in *Casuse*, 106 N.M. at 573, 746 P.2d at
10 1105, claiming that this Court turned away from such an analysis in *Smith* and *NMFE*.
11 In *Casuse*, our Supreme Court rejected the municipality’s argument that it was free
12 to “disregard an express law of the Legislature unless the law specifically states ‘and
13 no municipality may do otherwise.’” *Id.* Instead, the Court concluded that “when two
14 statutes . . . conflict, the law of the sovereign controls.” *Id.* The City misreads *Smith*
15 and *NMFE*. In *Smith*, this Court favorably cited the *Casuse* Court’s application of the
16 conflict rule. *See Smith*, 2006-NMCA-048, ¶ 17 (“[W]hen two statutes that are
17 governmental or regulatory in nature conflict, the law of the sovereign controls.”
18 (quoting *Casuse*, 106 N.M. at 573, 746 P.2d at 1105)). In *NMFE*, we cited *Casuse*

1 and, moreover, we devoted an entire section of the opinion to a conflict analysis and
2 cited more recent cases which rely on the same conflict analysis set forth in *Casuse*.
3 *NMFE*, 2006-NMCA-007, ¶¶ 19, 39-44 (“The analysis to apply is whether the stricter
4 requirements of the ordinance conflict with state law, and whether the ordinance
5 permits an act the general law prohibits, or prohibits an act the general law permits.”
6 (internal quotation marks omitted) (quoting *Gould*, 2001-NMCA-107, ¶ 18)).
7 Furthermore, even if we agreed with the City, we point out that *Casuse* is a case
8 decided by our Supreme Court, and we are without the authority to decline to follow
9 the reasoning therein. *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009,
10 ¶ 20, 135 N.M. 375, 89 P.3d 47 (stating that the Court of Appeals is bound by
11 Supreme Court precedent).

12 {50} We now turn to the application of the aforementioned law to the statutes and
13 the Ordinance at hand.

14 **A. The Code Preempts the Ordinance**

15 {51} We must decide whether the Code preempts the Ordinance. In order to do so,
16 we first look at the language of the Code and the Ordinance.

17 {52} The Code provides that:

18 No psychotropic medication, psychosurgery, convulsive therapy,
19 experimental treatment or behavior modification program involving

1 aversive stimuli or substantial deprivations shall be administered to any
2 client without proper consent. If the client is capable of understanding
3 the proposed nature of treatment and its consequences and is capable of
4 informed consent, his consent shall be obtained before the treatment is
5 performed.

6 § 43-1-15(A).

7 {53} The Code defines “client” to include “any patient who is requesting or
8 receiving mental health services . . . or who is present in a mental health . . . facility
9 for the purpose of receiving such services.” § 43-1-3(B). In some places, the Code
10 specifically refers to “resident clients,” *see, e.g.*, § 43-1-6 (“Personal rights of
11 residential clients.”); § 43-1-7 (“Right to treatment.”), whereas in others, the Code
12 refers to a broader range of clients, as the Code does in Section 43-1-15(A).

13 {54} The Code has two exceptions to the informed consent requirement of Section
14 43-1-15(A). Under Section 43-1-15(B), a provider may petition the court for the
15 appointment of a treatment guardian to make a substitute decision for the client if the
16 provider believes that the client is incapable of informed consent. The court will only
17 appoint a treatment guardian after significant procedural protections are employed.
18 *Id.* The guardian must consider the client’s wishes, best interest, and whether the
19 treatment is the least drastic means for accomplishing the objective. *Id.* The guardian
20 may then “apply to the court for an enforcement order” which allows for the

1 administration of treatment without consent. *Id.* Significantly, this exception
2 specifically addresses the procedure to be followed for outpatient clients: “If a client,
3 who is not a resident of a medical facility and for whom a treatment guardian has
4 been appointed, refuses to comply with the decision of the treatment guardian, the
5 treatment guardian may apply to the court for an enforcement order.” *Id.* This makes
6 it clear that Section 43-1-15 governs outpatients as well as residential patients.

7 {55} The second exception to the rule that no psychotropic medication may be
8 administered without consent allows a physician to administer medication without
9 consent on an emergency basis if he or she “believes that the administration of
10 psychotropic medication is necessary to protect the client from serious harm,” while
11 the provisions of Section 43-1-15(B) are being satisfied. § 43-1-15(F).

12 {56} As for the Ordinance, Section 8(B) authorizes a court to “order the [s]ubject to
13 self-administer psychotropic drugs or accept the administration of such drugs by an
14 authorized professional as part of an assisted outpatient treatment program.” The
15 Ordinance further allows for blood tests or urinalysis to determine whether the subject
16 is taking the court-ordered medication, therapy, counseling, supervision of living
17 arrangements, and more. Albuquerque, N.M., Ordinance C/S O-06-21, § 8(B). The
18 Ordinance does not require that an individual lack capacity in order to be subject to

1 the Ordinance. *See id.* § 4 (listing the criteria to be subject to a petition and order).
2 Further, the Ordinance states that “[t]he determination by a court that a [s]ubject is
3 in need of assisted outpatient treatment shall not be construed as or deemed to be a
4 determination that the subject is incapacitated.” *Id.* § 8(E). Thus, a person with
5 capacity can be subject to a petition and order for outpatient treatment under the
6 Ordinance.

7 {57} Having set out the pertinent provisions of the Ordinance, we now apply the law
8 of preemption in order to determine whether Article X, Section 6 of the New Mexico
9 Constitution authorizes the City to allow a court to order an individual to accept
10 treatment without his or her consent. We must first consider whether the Code is a
11 “general law.” *Smith*, 2006-NMCA-048, ¶ 9. As in *NMFE*, we have no difficulty
12 concluding that the statute is a general law because it concerns individuals with
13 mental illness who are located throughout the State and thus the statute addresses
14 issues of statewide, rather than local, concern. *See NMFE*, 2006-NMCA-007, ¶ 18
15 (determining that the Minimum Wage Act is a general law because it is of concern
16 to workers across the State).

17 {58} Next, we turn to an analysis of whether the Code expressly denies the City’s
18 authority to act. *See Smith*, 2006-NMCA-048, ¶ 10. The district court concluded that

1 the Ordinance conflicts with Section 43-1-15 of the Code. Because we read the
2 Ordinance to allow an act that Section 43-1-15(A) prohibits, we agree. *See Gould,*
3 2001-NMCA-107, ¶ 18. First, Section 43-1-15(A) states that “[n]o psychotropic
4 medication . . . shall be administered to any client without proper consent.” If the
5 client is incapable of giving an informed consent, then a treatment guardian must be
6 appointed before any treatment can be administered without consent, regardless of
7 whether or not the client is a residential client. § 43-1-15(A), (B). On the other hand,
8 Section 8(B) of the Ordinance allows a court to order an individual to take medication
9 or accept the administration of medication, even where the individual has the capacity
10 and refuses to consent as defined in Section 43-1-15(A), thereby directly
11 contravening the dictates of Section 43-1-15(A). *See also* Albuquerque, N.M.,
12 Ordinance C/A O-06-21, § 4 (outlining the criteria for an order under the Ordinance);
13 *id.* § 8(E) (“The determination by a court that a [s]ubject is in need of assisted
14 outpatient treatment shall not be construed as or deemed to be a determination that
15 the subject is incapacitated.”). Additionally, the Ordinance does not require the
16 appointment of a treatment guardian if an individual does lack the capacity to
17 consent. Thus, Section 8(B) of the Ordinance allows an act which Section 43-1-
18 15(A) forbids and is therefore preempted.

1 {59} The City argues that the Code and the Ordinance can be harmonized as follows:

2 “The . . . Code allows forced administration of medication on a subject only in the
3 absence of capacity of the subject, while [the Ordinance] would allow the court to
4 issue an order requiring the subject to comply with a treatment plan even if the
5 subject has the mental capacity to make decisions.” We are unable to discern how the
6 City’s reading of the Ordinance and the Code establishes that the two are in harmony.

7 In sum, the City recognizes that the Ordinance allows a court to order a subject with
8 capacity to comply with a treatment plan, which can include taking medication, to
9 which he or she does not consent, and the Code prohibits the administration of
10 medication absent consent except where the individual lacks capacity. The Ordinance
11 and the Code are in conflict and cannot be harmonized because the Ordinance permits
12 the court-ordered treatment of an individual with the capacity to make an informed
13 consent, whereas Section 43-1-15(A) prohibits such an act. *See Gould*, 2001-NMCA-
14 107, ¶ 18. Under these circumstances, the Code preempts the Ordinance. *Id.*

15 {60} The City next argues that we should apply the reasoning of the New York
16 Court of Appeals in *In re K.L.*, 806 N.E.2d 480 (N.Y. 2004), in harmonizing the New
17 York statute upon which the Ordinance is modeled with prior cases in New York
18 holding that “a judicial finding of incapacity . . . is required before an involuntarily

1 committed patient may be forcibly medicated with psychotropic drugs against his or
2 her will.” *Id.* at 484. There, the court concluded that the assisted outpatient treatment
3 statute “does not permit forced medical treatment” because “a violation of the [court]
4 order, standing alone, ultimately carries no sanction.” *Id.* at 484, 485. The court
5 noted that the statute stated that the “[f]ailure to comply with an order of assisted
6 outpatient treatment shall not be grounds for . . . a finding of contempt of court.” *Id.*
7 at 485 (internal quotation marks and citation omitted). The court, therefore, reasoned
8 that “[t]he restriction on a patient’s freedom effected by a court order authorizing
9 assisted outpatient treatment is minimal, inasmuch as the coercive force of the order
10 lies solely in the compulsion generally felt by law-abiding citizens to comply with
11 court directives.” *Id.* Thus, the court, which was addressing the argument that the
12 statute violated due process, held that there was no due process violation because
13 ultimately there was no consequence to the failure to comply with a court order
14 requiring an individual to accept certain treatment. *Id.*

15 {61} Even, for the purpose of argument, were we to read the Ordinance to be
16 consistent with the New York statute as to the absence of a sanction, for two reasons
17 we conclude that the reasoning behind the New York court’s due process holding
18 cannot be applied in the context of the preemption analysis at issue in this case. First,

1 the New York court was faced with a state statute that addressed assisted outpatient
2 treatment, not an ordinance. *Id.* at 482. Consequently, the due process discussion in
3 *In re K.L.* is not particularly helpful to our consideration of the separate issue of
4 preemption, especially because the New York legislature had incorporated other,
5 related mental health statutes into its assisted outpatient treatment statute. *See, e.g.,*
6 N.Y. Mental Hygiene Law § 9.60 (1999) (incorporating references to other mental
7 health provisions). When considering preemption, we must, above all, follow our
8 Legislature’s intent, which, as we discussed earlier in this opinion, is clearly that no
9 person with capacity be treated without consent.

10 {62} Second, unlike the New York statute, the Ordinance does not state that the
11 failure to comply with a court order will not result in sanctions. *See State ex rel.*
12 *Apodaca v. Our Chapel of Memories of N.M., Inc.*, 74 N.M. 201, 204, 392 P.2d 347,
13 349 (1964) (discussing contempt and stating that “[t]he orderly process of law
14 demands that respect and compliance be given to orders issued by courts possessed
15 of jurisdiction of the persons and of the subject matter and one who defies the order
16 of a court having jurisdiction does so at his peril”). Further, regardless of whether
17 there are sanctions in the Ordinance for failure to comply with court-ordered
18 treatment, the coercive nature of a court order requiring treatment would clearly allow

1 an act contrary to the statute's mandate that an individual's consent be obtained as
2 long as the individual has capacity. Thus, we are not persuaded that the lack of
3 sanctions in the Ordinance allows us to hold that the Ordinance is consistent with the
4 Code and thus not preempted.

5 {63} Finally, we note that the City focuses on the underlying purpose of the
6 Ordinance, arguing that this purpose is complementary to that of the Code and thus
7 we should not conclude that the Code preempts the Ordinance. We recognize that
8 both the City and the Legislature, through the Ordinance and the Code, respectively,
9 have considered and in their own way have attempted to balance the interests of
10 individuals in making their own mental health care treatment decisions, against the
11 needs and desires of both the individual and the community for safety from violent
12 episodes by individuals with mental illness. *See* Albuquerque, N.M., Ordinance C/S
13 O-06-21, § 1 (stating that the purpose of the Ordinance is to address individuals with
14 mental illness "who are capable of living in the community with the help of family,
15 friends and mental health professionals, but who, without routine care and treatment,
16 may relapse and become violent, suicidal or require hospitalization"); *N.M. Dep't of*
17 *Health v. Compton*, 2001-NMSC-032, ¶ 12, 131 N.M. 204, 34 P.3d 593 (discussing,
18 at length, the Code's balance of an individual's "significant liberty interest in being

1 free from involuntary commitment” and the “compelling governmental interest of
2 exercising its *parens patriae* power to protect individuals from themselves and its
3 police power to protect society from dangerous individuals”). If there were not a
4 conflict between the Code and the Ordinance, we would look to the purposes behind
5 the Code and Ordinance in our analysis. *See Gould, 2001-NMCA-107, ¶ 18*
6 (summarizing the analysis as looking at both the purpose and effect of the statute and
7 the regulation). However, when, as here, there is a conflict between state law and an
8 ordinance, our focus is not on the consistency of the general intent and purpose
9 behind the laws. *See id.* (pointing out that if there is a conflict between an ordinance
10 and a statute, the statute controls and stating that an ordinance may be more
11 restrictive than a statute unless it conflicts with the statute). Because we have found
12 a conflict in this case, it would be improper for us to consider the City’s arguments
13 as to the goals of the Ordinance, regardless of whether we agree with the goals and
14 the balance of those goals against the rights of individuals with mental illness. The
15 beneficial purpose of the Ordinance cannot override a conflict in preemption
16 jurisprudence.

1 **B. The Act Preempts the Ordinance**

2 {64} Additionally, Plaintiffs argue that the Act preempts the Ordinance. The district
3 court agreed.

4 {65} The Act allows an individual with capacity to give detailed instructions, in
5 written or oral form, regarding his or her preferences for treatment should he or she
6 become incapacitated. §§ 24-7B-4(A), -9(E). "Capacity" is defined as:

7 an individual's ability to understand and appreciate the nature and
8 consequences of proposed mental health treatment, including significant
9 benefits and risks and alternatives to the proposed mental health
10 treatment, and to make and communicate an informed mental health
11 treatment decision.

12 § 24-7B-3(C). According to the Act:

13 [A] health care provider or mental health treatment facility providing
14 care to a patient shall comply:

15 (1) before and after the patient is determined to lack
16 capacity, with an individual instruction of the patient made while the
17 patient had capacity;

18 (2) with a reasonable interpretation of the individual
19 instruction made by a person then authorized to make mental health
20 treatment decisions for the patient; and

21 (3) with a mental health treatment decision for the
22 patient that is not contrary to an individual instruction of the patient and
23 is made by a person then authorized to make mental health treatment
24 decisions for the patient, to the same extent as if the decision had been
25 made by the patient while having capacity.

1 § 24-7B-9(E). Exceptions to this requirement exist when:

2 (1) the treatment requested is infeasible or unavailable;

3 (2) the facility or provider is not licensed or authorized
4 to provide the treatment requested; or

5 (3) the treatment requested conflicts with other
6 applicable law.

7 § 24-7B-9(F). Additional exceptions exist when the treatment requested would
8 require “medically ineffective health care or health care contrary to generally
9 accepted health care standards.” § 24-7B-9(G).

10 {66} Under the Act, an advance directive for mental health treatment can include,
11 for example, instructions on which medications an individual does or does not
12 consent to take, how the medication can be administered, physicians by whom the
13 individual does or does not consent to be treated, preferred treatment instead of
14 hospitalization if feasible, instructions regarding the use of restraint and seclusion,
15 instructions regarding the use of electroconvulsive therapy, and the appointment of
16 an agent. *See* § 24-7B-7(E). Alternatively, an individual may execute a power of
17 attorney for mental health treatment “that may authorize the agent to make any mental
18 health treatment decision” for the individual should the individual become
19 incapacitated. § 24-7B-4(B), (C).

1 {67} The Ordinance, on the other hand, allows the court to order treatment to which
2 an individual does not consent if an individual meets the criteria in Section 4(A) of
3 the Ordinance, whether or not the individual lacks capacity. *See* Albuquerque, N.M.,
4 Ordinance C/S O-06-21, § 4(A); *id.* § 8(E) (distinguishing a determination that
5 outpatient assistance is appropriate from a determination that an individual is
6 incapacitated). The Ordinance allows the court to order an individual to self-
7 administer or accept the administration of treatment, including medication, by an
8 authorized professional. *Id.* § 8(B). With regard to advance health care directives,
9 the Ordinance requires the physician developing the treatment plan to “take into
10 account” any advance directives. *Id.* § 7(B). Additionally, “the court shall take into
11 account any advance directives or directions by the personal representative, agent,
12 surrogate, guardian or individual designated by the person in determining the written
13 treatment plan.” *Id.* § 4(B). Finally, “[n]othing in this Ordinance shall preclude a
14 person with an authorized representative from being subject to a petition for an order
15 authorizing assisted outpatient treatment.” *Id.* § 4(B).

16 {68} Applying the analysis set forth earlier in this opinion to determine whether the
17 Ordinance is preempted by the Act, we first look to see if the Act is a general law.
18 *Smith*, 2006-NMCA-048, ¶ 9. Again, we have no difficulty in concluding that the Act

1 is a general law applicable throughout the State because it concerns how all New
2 Mexicans with capacity can give instructions or execute a power of attorney in case
3 the individual should in the future lack capacity to make mental health decisions.
4 § 24-7B-4; *see NMFE*, 2006-NMCA-007, ¶ 18 (concluding that the State minimum
5 wage statute is a general law because it affects individuals throughout the State).

6 {69} Next, we look at whether the Act expressly denies the City power to enact the
7 Ordinance. *Smith*, 2006-NMCA-048, ¶ 10. Again, because we conclude that the
8 Ordinance allows an act that the Act forbids, we conclude that the Act preempts the
9 Ordinance. *Gould*, 2001-NMCA-107, ¶ 18.

10 {70} The Act requires health care providers to comply with an individual's health
11 care instructions, written or oral, made while the individual has capacity. § 24-7B-
12 9(E). The Act also requires a physician to comply with the treatment decisions made
13 by an individual's agent if the individual lacks capacity. *Id.* This provision of the
14 Act conflicts with and thereby preempts the Ordinance because the Ordinance allows
15 a physician to not comply with (1) the oral or written treatment decisions of an
16 individual with capacity, (2) the oral or written instructions given when an individual
17 had capacity even where the individual currently lacks capacity, or (3) the treatment
18 decisions made by an individual's appointed agent if the individual lacks capacity.

1 See Albuquerque, N.M., Ordinance C/S O-06-21, §§ 4(B), 7(B), 8(B). The clear
2 import of the Act is to require compliance with an individual's treatment decisions
3 made while that individual has capacity. See § 24-7B-9(E). While the Ordinance
4 requires the court to "take into account" advance directives when issuing an order for
5 assisted outpatient treatment, it would nonetheless allow treatment contrary to that
6 specified in advance directives because the Ordinance allows the court to order
7 treatment to which an individual does not consent. Thus, the Ordinance allows a
8 deviation from the requirement of Section 24-7B-9(E) that a physician honor the
9 treatment decisions of an individual given while the individual has capacity, and
10 therefore it allows an act that the Act forbids. Based on this conflict, the Act
11 preempts the Ordinance.

12 **C. The Code and the Act Create a Comprehensive**
13 **Scheme Preempting the Ordinance**

14 {71} Additionally, we agree with the district court that the Code and the Act create
15 a scheme so comprehensively regulating the area of treating individuals with mental
16 illness, with or without the consent of those individuals, that the two state laws
17 together preempt the City from enacting a separate ordinance regulating individuals
18 with mental illness. See *ACLUI*, 1999-NMSC-044, ¶ 13. Through the Code and the
19 Act the Legislature has evinced an intent to respect the treatment decisions of

1 individuals made while they have capacity, and if the individual lacks capacity, then
2 to provide the specific protections of both the Code and the Act before treating an
3 individual with mental illness. It is the exceptional circumstance under which
4 treatment can be required without consent. *See* §§ 43-1-15, 24-7B-9(E). The Code
5 details procedural protections which must be granted before an individual can be
6 ordered by a court to accept treatment to which he or she does not consent, including
7 a finding of incapacity as well as the appointment of a treatment guardian. § 43-1-
8 15(B). The Act goes into great detail to explain the extent to which an individual can
9 give advance instructions for his or her treatment in the event that the individual
10 subsequently becomes incapacitated and requires treatment providers to abide by
11 those instructions. §§ 24-7B-4, -7, -9. The Code and the Act, therefore, are written
12 expansively to cover all of the circumstances in which an individual can be required
13 to take treatment to which the individual does not consent. To allow each
14 municipality to create different schemes governing when and how individuals who
15 do not consent to treatment can be required to accept treatment would frustrate the
16 purpose of the Legislature in creating the detailed scheme in the Code and the Act.
17 *See ACLU I*, 1999-NMSC-044, ¶¶ 13, 15 (determining that it would frustrate the
18 intent of the Legislature to protect children to allow a municipality to criminalize

1 behavior not criminalized by the comprehensive scheme created by the Children's
2 Code). Thus, we hold that the Code and the Act together create a comprehensive
3 scheme governing the circumstances by which an individual with mental illness can
4 be required to accept treatment and together preempt the City in this case from
5 enacting the Ordinance.

6 **D. Severability**

7 {72} P&A argues that other parts of the Ordinance are also preempted. We do not
8 find it necessary to review these arguments, however, because the effect of our
9 conclusion that Section 8(B) is preempted is that the entire Ordinance is effectively
10 preempted. This is so even though the Ordinance contains the following severability
11 clause:

12 If any section, paragraph, sentence, clause, word or phrase of this
13 [O]rdinance is for any reason held to be invalid or unenforceable by any
14 court of competent jurisdiction, such decision shall not affect the
15 validity of the remaining provisions of this [O]rdinance. The Council
16 hereby declares that it would have passed this [O]rdinance and each
17 section, paragraph, sentence, clause, word or phrase thereof irrespective
18 of any provision being declared unconstitutional or otherwise invalid.

19 Albuquerque, N.M., Ordinance C/S O-06-21, § 14.

20 {73} “[A] severability clause raises a presumption that the legislating body would
21 have enacted the rest of the ordinance without the void section.” *Chapman v. Luna*,


1 101 N.M. 59, 65, 678 P.2d 687, 693 (1984). While, as in *Chapman*, the severability
2 clause in this case is “emphatic in its statement that the ordinance[] would have been
3 enacted even if the invalid provision[] were not included,” *id.*, here the invalidation
4 of the relief available in the Ordinance in effect guts the entire Ordinance. The rest
5 of the provisions of the Ordinance simply state the purpose of the Ordinance, define
6 relevant terms, lay out the criteria for an order allowing treatment without consent,
7 establish the procedure for such an order, and establish the parameters of such an
8 order. *See generally* Albuquerque, N.M., Ordinance C/S O-06-21. These provisions
9 serve no purpose once the provision allowing treatment without consent is
10 invalidated.

11 {74} Because our holding is that a court cannot order that an individual accept
12 treatment without consent as allowed in Section 8(B) of the Ordinance, the purpose
13 of the rest of the sections of the Ordinance cannot be fulfilled. In effect, invalidating
14 the relief allowed by the Ordinance in Section 8(B) invalidates the entire Ordinance.
15 The City does not argue otherwise. We hold that the entire Ordinance is preempted.


1 **CONCLUSION**

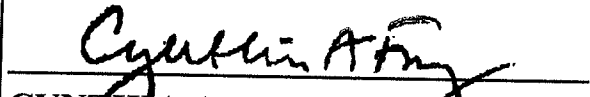
2 {75} We conclude that Plaintiffs have standing to challenge the Ordinance. Further,
3 the Ordinance is preempted by both the Code and the Act. We affirm the district
4 court's permanent injunction against enforcing the Ordinance.

5 {76} **IT IS SO ORDERED.**

6 
7 _____
JONATHAN B. SUTIN, Chief Judge

8 **WE CONCUR:**

9 
10 _____
LYNN PICKARD, Judge

11 
12 _____
CYNTHIA A. FRY, Judge