

ORDINANCE 2023 - ____

**TOWN OF MANHATTAN, MONTANA:
ORDINANCE REQUIRING COMPLIANCE
WITH FEDERAL ABORTION LAWS; DECLARING MANHATTAN A
SANCTUARY FOR THE UNBORN**

WHEREAS, federal law imposes felony criminal liability on every person who ships or receives abortion pills or abortion-related paraphernalia in interstate or foreign commerce, *see* 18 U.S.C. §§ 1461–62, and all such acts are predicate offenses under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), *see* 18 U.S.C. § 1961.

WHEREAS, the Constitution and laws of Montana do not and cannot secure a right, privilege or immunity to act in violation of federal criminal statutes such as 18 U.S.C. §§ 1461–62, or to engage in criminal or racketeering conduct as defined by federal law.

WHEREAS, The Town Council is bound by oath to support and defend the Constitution of the United States, and the statutory provisions codified at 18 U.S.C. §§ 1461–62 are the “supreme Law of the Land” under Article VI of the Constitution and must be obeyed and respected by every person within the Town of Manhattan and by every judge in the state of Montana. See U.S. Const. art. VI (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

WHEREAS, The Supreme Court of the United States in *Poelker v. Doe* (432 U.S. 519, 1977) opined “the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth” instead of abortion.

NOW, THEREFORE, BE IT ORDAINED by the Town Council of Manhattan, that the Town of Manhattan, Montana be declared a Sanctuary for the Unborn and that Section 1. The Manhattan Code of Ordinances is amended by adding Title 13 to read as follows:

CHAPTER 13

ABORTION

13-1-1: DEFINITIONS:

As used in this chapter:

- A. "Abortion" means the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of a woman, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of an unborn child. The term does not include:
1. In vitro fertilization or fertility treatments of any type;
 2. The use, prescription, administration, procuring, or selling of Plan B, morning-after pills, intrauterine devices, or any other type of contraception or emergency contraception; or
 3. An act performed with the purpose to:
 - a. Save the life or preserve the health of the unborn child;
 - b. Remove a dead unborn child caused by spontaneous abortion; or
 - c. Remove an ectopic pregnancy, the implantation of a fertilized egg or embryo outside of the uterus.
- B. "Abortion clinic" means any building or facility, other than a hospital, where an abortion of any type is performed, or where abortion-inducing drugs are dispensed, distributed, or ingested.
- C. "Affiliate" means a person or entity who enters into with another person or entity a legal relationship created or governed by at least one written instrument, including a certificate of formation, a franchise agreement, standards of affiliation, bylaws, or a license, that demonstrates:
1. Common ownership, management, or control between the parties to the relationship;
 2. A franchise granted by the person or entity to the affiliate; or
 3. The granting or extension of a license or other agreement authorizing the affiliate to use the other person's or entity's brand name, trademark, service mark, or other registered identification mark.
- D. "Hospital" means an institution that is:
1. Primarily engaged in providing, by or under the supervision of physicians, inpatient diagnostic and therapeutic services or rehabilitation services; and
 2. Duly licensed for this purpose under the laws of Montana.

E. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

F. "Woman" and "women" include any person whose biological sex is female, including any person with XX chromosomes and any person with a uterus, regardless of any gender identity that the person attempts to assert or claim.

13-1-2: COMPLIANCE WITH FEDERAL ABORTION LAWS REQUIRED:

A. It shall be unlawful for any person to violate 18 U.S.C. § 1461 by using the mails for the mailing, carriage in the mails, or delivery of:

1. Any article or thing designed, adapted, or intended for producing abortion;
or
2. Any article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion;

B. It shall be unlawful for any person to violate 18 U.S.C. § 1462 by:

1. Using any express company or other common carrier or interactive computer service for carriage in interstate or foreign commerce of any drug, medicine, article, or thing designed, adapted, or intended for producing abortion;
2. Knowingly taking or receiving, from such express company or other common carrier or interactive computer service, any matter or thing described in subsection (B)(1).

C. It shall be unlawful for any person to engage in conduct that aids or abets the violations of 18 U.S.C. § 1461 or 18 U.S.C. § 1462 described in subsection (A).

D. Notwithstanding any other law, the requirements of this section shall be enforced exclusively through the private civil actions described in section 13-1-3. No direct or indirect enforcement of this section may be taken or threatened by the Town of Manhattan or any of its employees or agents against any person or entity, by any means whatsoever, and no violation of this section may be used to justify or trigger the enforcement of any other law or any type of adverse consequence under any other law, except as provided in section 13-1-3. This section does not preclude or limit the enforcement of any other law or regulation against conduct that is independently prohibited

by such other law or regulation, and that would remain prohibited by such other law or regulation in the absence of this section.

13-1-3: PRIVATE RIGHT OF ACTION:

A. Any person, other than the state, its political subdivisions, including the Town of Manhattan, and any officer or employee or agent of a state or local governmental entity in this state, has standing to bring and may bring a civil action against any person or entity that:

1. Violates any provision of section 13-1-2(A), section 13-1-2(B), or section 13-1-2(C); or

2. Intends to violate any provision of section 13-1-2(A), section 13-1-2(B), or section 13-1-2(C).

B. If a claimant prevails in an action brought under this section, the court shall award:

1. Injunctive relief sufficient to prevent the defendant from violating section 13-1-2;

2. Nominal and compensatory damages if the plaintiff has suffered injury or harm from the defendant's conduct, including but not limited to loss of consortium and emotional distress;

3. Statutory damages in an amount of not less than \$100,000 for each violation of section 13-1-2(A), section 13-1-2(B), or section 13-1-2(C); and

4. Costs and reasonable attorney's fees.

C. Notwithstanding Subsection (B), a court may not award relief under Subsection (B)(3) or (B)(4) in response to a violation of Subsection (A)(1) if the defendant demonstrates that a court has already ordered the defendant to pay the full amount of statutory damages under Subsection (B)(3) in another action for that particular violation of section 2.

D. Notwithstanding any other law, a person may bring an action under this section not later than the sixth anniversary of the date the cause of action accrues.

E. Notwithstanding any other law, the following are not a defense to an action brought under this section:

1. Ignorance or mistake of law;

2. A defendant's belief that the requirements or provisions of this chapter are unconstitutional or were unconstitutional;

3. A defendant's reliance on any court decision that has been vacated, reversed, or overruled on appeal or by a subsequent court, even if that court decision had not been vacated, reversed, or overruled when the cause of action accrued;
4. A defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
5. A defendant's reliance on any federal or state statute, agency rule or action, or treaty that has been repealed, superseded, or declared invalid or unconstitutional, even if that federal or state statute, agency rule or action, or treaty had not been repealed, superseded, or declared invalid or unconstitutional when the cause of action accrued;
6. Non-mutual issue preclusion or non-mutual claim preclusion;
7. The consent of the plaintiff or the unborn child's mother to the abortion;
8. Contributory or comparative negligence;
9. Assumption of risk;
10. Any claim that the enforcement of this chapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by section 13-1-3.

F. This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Article II, section 7 of the Montana Constitution.

G. Notwithstanding any other law, neither the Town of Manhattan, nor any of its officers, employees, or agents, may:

1. Act in concert or participation with anyone who brings suit under this section;
2. Establish or attempt to establish any type of agency or fiduciary relationship with a person who brings suit under this section;
3. Make any attempt to control or influence a person's decision to bring suit under this section or that person's conduct of the litigation; or
4. Intervene in any action brought under this section.

This subsection does not prohibit a person or entity described by this subsection from filing an amicus curiae brief in the action, so long as that

person or entity does not act in concert or participation with the plaintiff or plaintiffs who sue under this section or violate any provision of Subsection (G)(1)–(4).

H. Notwithstanding any other law, a court may not award costs or attorneys' fees to a litigant who is sued under this section.

I. Notwithstanding any other law, a civil action under this section may not be brought:

1. Against the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this chapter, or against a pregnant woman who intends or seeks to abort her unborn child in violation of this chapter;
2. Against any person or entity that performs, aids or abets, or attempts or intends to perform or aid or abet an abortion at the behest of federal agencies, contractors, or employees that are carrying out duties under federal law, if a prohibition on that abortion would violate the doctrines of preemption or intergovernmental immunity;
3. Against any common carrier that transports a pregnant woman to an abortion provider, if the common carrier is unaware that the woman intends to abort her unborn child; or
4. By any person who impregnated a woman seeking an abortion through an act of rape, sexual assault, or incest, or by anyone who acts in concert or participation with such a person.

13-1-4: AFFIRMATIVE DEFENSES:

A. A defendant against whom an action is brought under section 13-1-3 may assert an affirmative defense to liability under this section if:

1. The imposition of civil liability on the defendant will violate rights, privileges, or immunities secured by the Constitution or laws of the United States or by the Constitution or laws of the state of Montana, that belong to the defendant personally; or
2. The defendant
 - a. Has standing to assert the rights, privileges, or immunities of a third party under the tests for third-party standing established by the Supreme Court of the United States or the Supreme Court of Montana;
and

- b. Demonstrates that the imposition of civil liability on the defendant will violate rights, privileges, or immunities secured by the Constitution or laws of the United States, or by the Constitution or laws of the state of Montana, that belong to that third party.
- B. The defendant shall bear the burden of proving the affirmative defense in Subsection (A) by a preponderance of the evidence.
- C. Nothing in this section or chapter shall limit or preclude a defendant from asserting the unconstitutionality of any provision or application of this ordinance as a defense to liability under section 13-1-3, or from asserting any other defense that might be available under any other source of law.

13-1-5: SEVERABILITY:

- A. Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the Supreme Court of the United States held that an explicit statement of legislative intent is controlling, it is the intent of the Town Council that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter to every person, group of persons, or circumstances, are severable from each other.
- B. If any application of any provision in this chapter to any person, group of persons, or circumstances is found by any court to be invalid, preempted, or unconstitutional, for any reason whatsoever, then the remaining applications of that provision to all other persons and circumstances shall be severed and preserved, and shall remain in effect. All constitutionally valid applications of the provisions in this chapter shall be severed from any applications that a court finds to be invalid, preempted, or unconstitutional, because it is the Town Council's intent and priority that every single valid application of every provision in this chapter be allowed to stand alone.
- C. The Town Council further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of the provisions of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter were to be declared invalid, preempted, or unconstitutional.
- D. If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and

remain in force, consistent with the severability requirements of Subsections (A), (B), and (C).

E. No court may decline to enforce the severability requirements of Subsections (A), (B), (C), and (D) on the ground that severance would “rewrite” the ordinance or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state or local official from enforcing a statute or ordinance is never rewriting the underlying law or engaging in legislative or lawmaking activity, as the statute or ordinance continues to contain the same words as before the court’s decision. A judicial injunction or declaration of unconstitutionality:

1. Is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Montana Constitution or United States Constitution;
2. Is not a formal amendment of the language in a statute or ordinance; and
3. No more rewrites a statute or ordinance than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

F. If any court, including any state or federal court, disregards any of the severability requirements in Subsections (A), (B), (C), (D), or (E), and declares or finds any provision of this chapter facially invalid, preempted, or unconstitutional, when there are discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating federal or state law or the federal or state constitutions, then that provision shall be interpreted, as a matter of town law, as if the Town Council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision’s application will not violate federal or state law or the federal or state constitutions, and every court shall adopt this saving construction of that provision until the court ruling that pronounced the provision facially invalid, preempted, or unconstitutional is vacated or overruled.

Section 2. Title 7, Chapter 6 of the Manhattan Code of Ordinances is amended by adding sections 7-6-4 and 7-6-5 to read as follows:

7-6-5: SEVERABILITY:

A. Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the

Supreme Court of the United States held that an explicit statement of legislative intent is controlling, it is the intent of the Town Council that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter to every person, group of persons, or circumstances, are severable from each other.

- B. If any application of any provision in this chapter to any person, group of persons, or circumstances is found by any court to be invalid, preempted, or unconstitutional, for any reason whatsoever, then the remaining applications of that provision to all other persons and circumstances shall be severed and preserved, and shall remain in effect. All constitutionally valid applications of the provisions in this chapter shall be severed from any applications that a court finds to be invalid, preempted, or unconstitutional, because it is the Town Council's intent and priority that every single valid application of every provision in this chapter be allowed to stand alone.
- C. The Town Council further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of the provisions of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter were to be declared invalid, preempted, or unconstitutional.
- D. If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force, consistent with the severability requirements of Subsections (A), (B), and (C).
- E. No court may decline to enforce the severability requirements of Subsections (A), (B), (C), and (D) on the ground that severance would "rewrite" the ordinance or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state or local official from enforcing a statute or ordinance is never rewriting the underlying law or engaging in legislative or lawmaking activity, as the statute or ordinance continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:
1. Is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Montana Constitution or United States Constitution;

2. Is not a formal amendment of the language in a statute or ordinance;
and
3. No more rewrites a statute or ordinance than a decision by the
executive not to enforce a duly enacted statute in a limited and defined
set of circumstances.

F. If any court, including any state or federal court, disregards any of the severability requirements in Subsections (A), (B), (C), (D), or (E), and declares or finds any provision of this chapter facially invalid, preempted, or unconstitutional, when there are discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating federal or state law or the federal or state constitutions, then that provision shall be interpreted, as a matter of town law, as if the Town Council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate federal or state law or the federal or state constitutions, and every court shall adopt this saving construction of that provision until the court ruling that pronounced the provision facially invalid, preempted, or unconstitutional is vacated or overruled.

EFFECTIVE DATE

This ordinance shall go into effect 30 days after the second and final adoption of the ordinance by the Town Council of Manhattan, Montana.