

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

PLANNED PARENTHOOD OF GREATER TEXAS)	
SURGICAL HEALTH SERVICES, on behalf of)	
itself, its staff, physicians and patients; and G. SEALY)	
MASSINGILL, M.D., on behalf of himself and his)	Case No. <u>5:21-cv-114</u>
patients,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF LUBBOCK, TEXAS,)	
)	
Defendant.)	

COMPLAINT

Plaintiffs Planned Parenthood of Greater Texas Surgical Health Services (“PPGTSHS”) and Dr. G. Sealy Massingill, by and through their attorneys, hereby allege the following:

INTRODUCTION

1. The Constitution of the United States guarantees the right to have an abortion. But as of June 1, 2021, the City of Lubbock will prohibit and prevent the exercise of that right through the passage of its Ordinance Outlawing Abortion Within the City of Lubbock, Declaring Lubbock a Sanctuary City for the Unborn, Making Various Provisions and Findings, Providing for Severability, Repealing Conflicting Ordinances, and Establishing an Effective Date (“Ordinance,” attached as Ex.). Plaintiffs bring this action to enjoin the City from maintaining in force, enforcing, or giving legal effect to the Ordinance and to declare the Ordinance invalid

under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Texas law.

2. The Ordinance bans abortions in the City of Lubbock. It imposes substantial liability on anyone who procures, performs, aids, or abets an abortion in Lubbock, be it a doctor, nurse, relative, friend, or stranger. It invites any Texas citizen to obtain an injunction against anyone who plans to procure, perform, aid, or abet an abortion. It permits these lawsuits at any time, and bars providers from citing the patient's consent as a defense.

3. The Ordinance will prevent Plaintiffs from providing abortions in Lubbock and will seriously impede access to abortion. Consequently, the Ordinance plainly violates the constitutional right to abortion.

4. The Ordinance also violates Texas law. As a municipality, the City of Lubbock has no power to create civil liability between private parties. Moreover, the Ordinance is preempted because the Texas Penal Code already covers the same conduct, and because the Ordinance's imposition of criminal and civil liability is inconsistent with the Texas Penal Code and the Texas wrongful death statute.

5. Plaintiffs bring this lawsuit to safeguard their patients' constitutional right to abortion, to prevent the harm that the Ordinance will cause their patients' health and well-being, and to preserve their own ability to fulfill their mission to provide comprehensive reproductive health care.

JURISDICTION AND VENUE

6. Plaintiffs assert their federal constitutional claim under 42 U.S.C. § 1983. The Court has subject matter jurisdiction over that claim under 28 U.S.C. § 1331 and § 1343(a)(3) and (a)(4).

7. The Court has supplemental jurisdiction over Plaintiffs' state-law claims under 28 U.S.C. § 1367(a).

8. Plaintiffs' request for declaratory and injunctive relief is authorized by 28 U.S.C. § 2201 and § 2202, Federal Rules of Civil Procedure 57 and 65, Texas Civil Practice & Remedies Code § 37.003 & .004(a) and § 65.011, and the Court's general legal and equitable powers.

9. Plaintiffs' request for attorney's fees and costs is authorized by 42 U.S.C. § 1988(b), Federal Rule of Civil Procedure 54(d), and Texas Civil Practice & Remedies Code § 37.009.

10. Venue is proper under 28 U.S.C. § 1391(b) because the City of Lubbock is in this district and because a substantial part of the events or omissions giving rise to the claims occurred in this district.

PARTIES

11. Plaintiff PPGTSHS is a non-profit corporation organized under the laws of the State of Texas and a subsidiary of Planned Parenthood of Greater Texas ("PPGT"). PPGT, through its predecessor organizations and through another subsidiary, has provided a broad range of high-quality reproductive health care to patients in Texas since 1935. PPGT and its subsidiaries provide medical services at a health center in Lubbock, Texas, which PPGT opened in October 2020, including birth control, annual gynecological examinations, cervical pap smears, diagnosis and treatment of vaginal infections, testing and treatment for certain sexually transmitted infections, HIV testing, and pregnancy testing. In April 2021, PPGTSHS began providing abortions at the Lubbock health center. PPGTSHS and its medical staff are threatened

with civil liability if they perform, aid, or abet abortions at the Lubbock health center.

PPGTSHS brings this lawsuit on behalf of itself, its physicians, its staff, and its patients.

12. Plaintiff G. Sealy Massingill, M.D., is PPGT's Chief Medical Officer and one of the physicians serving patients at the Lubbock health center. In that capacity, he provides patients with abortions and related health care. Consequently, Dr. Massingill, along with all other physicians and medical staff who participate in the provision of abortions at the Lubbock health center, are threatened with liability under the Ordinance. Dr. Massingill brings this lawsuit on behalf of himself and his patients.

13. Defendant, the City of Lubbock, is a city located in Lubbock County, Texas.

ALLEGATIONS

A. Abortion in Lubbock

14. Lubbock is a medically underserved area with high rates of low-income and uninsured residents. Access to comprehensive reproductive health care, including abortion, has been especially difficult in Lubbock since 2013, when a health center operated in Lubbock by a separate Planned Parenthood entity was forced to close following the State's imposition of a series of state funding cuts and abortion restrictions, which were later held unconstitutional. The closure left people in the Lubbock area more than 300 miles from the nearest abortion provider. Some to the north or west of Lubbock were even more isolated from abortion providers in Texas.

15. To fill this gap, PPGT decided to open a health center in Lubbock to provide needed health care services. The Lubbock health center's mission is to provide affordable and accessible comprehensive reproductive, family-planning, and other health care services, especially to patients from underserved communities. This includes screening for breast and cervical cancer, testing and treatment for various infections, access to contraception and

vaccines, and annual wellness checks. Comprehensive reproductive health care also includes access to abortion, and so the health center was constructed to provide abortions.

16. The Lubbock health center is the only licensed abortion provider within 300 miles of the City of Lubbock.

17. Legal abortion is one of the safest medical procedures in the United States. To date, the Lubbock center has offered only medication abortion, but it is equipped to offer procedural abortion and intends to begin performing such services soon. The Lubbock health center's staff for serving abortion patients includes not only doctors, but also nurses and medical assistants.

B. The Ordinance

18. In September 2020, in response to PPGT's announcement that it would open a health center in Lubbock, an "initiating committee" of Lubbock residents, led by Charles Perry, a state legislator, initiated a petition for the City to either adopt a proposed "sanctuary city" ordinance or hold a referendum on the proposed ordinance.

19. The City solicited a legal opinion from an outside law firm, Olson & Olson LLC, on the legality of the proposed ordinance. Olson & Olson advised the City: "The Proposed Ordinance is inconsistent with the United States and Texas Constitutions" and "with the present law of the State of Texas." In particular, Olson & Olson concluded that the proposed ordinance would violate the constitutional right to abortion under *Roe v. Wade*, 410 U.S. 113 (1973), and other binding Supreme Court decisions. And Olson & Olson concluded that the proposed ordinance was inconsistent with and therefore preempted by the Texas Penal Code and the Texas wrongful death statute.

20. At a meeting in November 2020, the City Council unanimously rejected the proposed Ordinance. At that meeting, the mayor and all other city councilmembers explained that the proposed Ordinance was constitutionally invalid under *Roe* and that it was inconsistent with, and therefore void under, state law.

21. Pursuant to the City's charter, upon the initiating committee's request, the proposed ordinance was referred to the City's voters. The initiative passed on May 1, 2021. The Ordinance will become effective on June 1, 2021.

22. The Ordinance states that its aim is "to outlaw abortion under city law and to establish penalties and remedies" in order "[t]o protect the health and welfare of all residents within the City." Ordinance § A(9). Accordingly, the Ordinance provides: "Abortion at all times and at all stages of pregnancy is declared to be an act of murder." Ordinance § C(2). Further, the Ordinance declares it "unlawful for any person" to "procure or perform an abortion of any type and at any stage of pregnancy in the City," Ordinance § D(1), or to "knowingly aid or abet an abortion that occurs in the City," Ordinance § D(2). The Ordinance specifies that aiding and abetting include "[k]nowingly providing transportation to or from an abortion provider," "[g]iving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion," and "[p]roviding money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion." *Id.* The Ordinance provides for public enforcement and two mechanisms for private enforcement.

23. As to public enforcement, the Ordinance subjects "any person, corporation, or entity who commits an unlawful act" under the Ordinance—procuring, providing, aiding or abetting an abortion—"to the maximum penalty permitted under Texas law for the violation of a

municipal ordinance governing public health.” Ordinance § E(1). However, the Ordinance states that no such penalty may be “impose[d] or threaten[ed] ... unless and until” one of three events occurs: (a) the Supreme Court “overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)”; (b) a “state or federal court ... rules that the imposition or threatened imposition” of such penalty “will not impose an ‘undue burden’ on women seeking abortions”; or (c) “state or federal court ... rules that the person, corporation, or entity that committed the unlawful act ... lacks third-party standing to assert the rights of women seeking abortions in court.” Ordinance § E(2).

24. As to private enforcement, first, the Ordinance provides that “[a]ny person, corporation, or entity that commits an unlawful act” under the Ordinance “shall be liable in tort to the unborn child’s mother, father, grandparents, siblings and half-siblings.” Ordinance § F(1). “[E]ach” such “relative” is entitled to recover “[c]ompensatory damages, including damages for emotional distress,” “[p]unitive damages,” and “[c]osts and attorneys’ fees.” *Id.* “There is no statute of limitations for this private right of action,” and “[t]he consent of the unborn child’s mother to the abortion shall not be a defense to liability, even if the unborn child’s mother sues under this provision.” *Id.*

25. Second, the Ordinance provides that “[a]ny private citizen of Texas ... may bring an action to enforce this ordinance against a person or entity that has committed an unlawful act” under the Ordinance “or that commits or plans to commit [such] an unlawful act.” Ordinance § F(2). The Ordinance directs that such a private plaintiff “be awarded ... [i]njunctive relief” if the “unlawful act” has not already been committed, “[s]tatutory damages of not less than” \$2,000, and “[c]osts and attorneys’ fees” if either injunctive relief or statutory damages are

awarded. Ordinance § F(2). Again, there is no statute of limitations and the patient's consent to the abortion is not a defense. *Id.*

26. The Ordinance declares that “[t]he non-imposition of the penalties” through public enforcement “does not in any way limit or [a]ffect the availability of the private-enforcement remedies.” Ordinance § E(4). And the Ordinance provides an “affirmative defense” to both public and private enforcement actions “if the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.” Ordinance § D(3).

C. The Ordinance's Effects

27. The Ordinance's obvious purpose is to prevent Plaintiffs from providing abortions in Lubbock, depriving anyone in the Lubbock area who wants an abortion of access to a safe and legal abortion. And that will be its effect.

28. Because the Ordinance declares procuring, performing, aiding, or abetting abortion “unlawful” and “murder,” imposes substantial liability on anyone who procures, performs, aids, or abets an abortion in Lubbock, and allows injunctions against anyone planning to so act, no doctor, nurse, or other staff at the Lubbock center will participate in the center's abortion services. The legal and financial risk to the health center and to its personnel personally is too great. Even if they were to successfully defend against a civil suit, the litigation costs from the barrage of civil lawsuits encouraged by the Ordinance would be crushing. Indeed, the Ordinance has already forced Plaintiffs to cancel abortion-related appointments to avoid potential liability.

29. Therefore, the Ordinance leaves Plaintiffs no choice but to cease all abortion services in Lubbock. That will undermine Plaintiffs' mission of providing affordable, comprehensive reproductive health care (especially to patients from underserved communities).

30. More fundamentally and more troubling, Plaintiffs' inability to perform abortions in Lubbock will prevent and unduly burden their patients' exercise of the constitutional right to abortion. Without access to abortion at the Lubbock center, anyone in the Lubbock area who wants an abortion will be able to obtain one only by traveling extraordinary distances—a daunting and, for many, prohibitive obstacle, especially for people with lower incomes.

31. People who want an abortion generally seek one as soon as possible, but many face logistical challenges that can delay access to care. For example, a pregnant person needs to deliberate and decide whether to seek an abortion, schedule appointments, gather the financial resources to pay for the abortion and related costs, arrange transportation to and from a health center, take time off work (often unpaid), and possibly obtain substitute care for a child or other family member during the abortion and recovery. There is a narrow window of time to accomplish these tasks; people usually do not learn they are pregnant until at least four weeks after their last menstrual period, and often much later, and Texas law prohibits nearly all abortions beginning at twenty-two weeks of gestation.

32. Having to travel hundreds of miles to an abortion provider and hundreds of miles back, likely with an overnight stay, exacerbates these challenges. Anyone seeking an abortion will likely need to gather more money to cover higher travel costs (not just for gas but potentially also for overnight lodging and more meals), might lose more income from taking more time off work, and will have a harder time obtaining substitute family care. For some, these heightened challenges will be impossible to overcome; for others, they will appreciably delay their access to

an abortion. These challenges are especially serious for people with lower incomes, who are already medically underserved and constitute a substantial portion of Plaintiffs' patients.

33. Delay in accessing abortion poses significant health risks because, although abortion is very safe, the health risk associated with an abortion increases with gestational age. Delay also increases medical costs because the cost of an abortion procedure increases as gestational age increases. Someone seeking an abortion can fall into a vicious cycle of delaying while gathering funds only to find that procedures later in pregnancy are more expensive than anticipated, requiring further delay. In the worst-case scenario, the person may be so delayed by the challenges of having to travel hundreds of miles that the time to have an abortion expires.

34. Studies have confirmed that “greater distances to abortion facilities are associated with increased burden [on the person seeking an abortion], including higher associated out-of-pocket costs, greater difficulty getting to the clinic, negative mental health outcomes, higher likelihood of emergency room-based follow-up care, delayed care, and decreased use of abortion services.” Indeed, after the State of Texas adopted a set of draconian abortion restrictions in 2013 that—before they were struck down by the Supreme Court—forced many abortion providers to close (including the one in Lubbock), the number of abortions performed in Texas abruptly fell substantially, and the more those closures increased the distance to the nearest abortion provider, the greater was the decline. For example, where those closures increased the distance to the nearest abortion facility by 100 miles or more—as they did for Lubbock—the number of abortions declined by 50.3%.

35. Consequently, the Ordinance will put many pregnant people in the Lubbock area to a difficult choice: carry the pregnancy to term (which may be harmful emotionally and poses significant medical risks) or pursue illegal or potentially unsafe abortion methods. That is not

the choice protected by the U.S. Constitution. *See, e.g., Roe*, 410 U.S. at 153 (describing “[s]pecific and direct harm” to women from forced childbirth).

CLAIMS

COUNT ONE

Due Process Clause

36. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees the right to abortion before viability. Binding precedent of the Supreme Court and the Fifth Circuit establishes that laws banning pre-viability abortion are categorically unconstitutional. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (maj. op.); *Jackson Women’s Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

37. Because the Ordinance bans pre-viability abortions, it is a per se violation of Plaintiffs’ patients’ constitutional right to choose abortion.

38. Additionally, binding Supreme Court and Fifth Circuit precedent establishes that an abortion regulation imposes a constitutionally impermissible “undue burden” if its purpose or effect is to place a substantial obstacle in the path of obtaining an abortion. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Jackson Women’s Health*, 945 F.3d at 275-276.

39. The Ordinance imposes a constitutionally impermissible undue burden because its purpose and effect are to place a substantial obstacle in the path of obtaining abortions: preventing abortion providers from providing abortions in Lubbock, leaving pregnant people in the Lubbock area hundreds of miles from the nearest abortion provider.

40. Plaintiffs and their staff face serious legal liability under the Ordinance should they participate in the provision of an abortion—or even plan to. The constant threat of such

liability will impair Plaintiffs' and their staff's ability to provide abortions in Lubbock. Plaintiffs will have no choice but to cease providing abortions in Lubbock.

41. The elimination of abortion providers in Lubbock is an extreme obstacle to abortion. Providers in other locations are not an adequate substitute. The nearest abortion provider to Lubbock is more than 300 miles away. As explained above, the logistical and financial challenges of traveling such a great distance for an abortion are significant. For some, these obstacles will delay access to an abortion, potentially forcing them to obtain a later abortion, which carries greater health risks, without adequate justification. For others, these obstacles will entirely foreclose access, forcing them to carry an unwanted pregnancy to term.

COUNT TWO

State Law – Ultra Vires

42. Texas law grants municipalities the power to adopt ordinances and to enforce their ordinances themselves, *see* Tex. Loc. Gov't Code § 51.001, §§ 51.071-51.079, § 54.001, but it does not grant municipalities the power to create civil liability between private parties. Only State law, through the common law or a statute, may do that.

43. Insofar as the Ordinance permits a private person to sue for money damages or injunctive relief, it is ultra vires.

COUNT THREE

State Law – Preemption

44. The Ordinance is expressly and impliedly preempted by the Texas Penal Code and Texas's wrongful death statute.

45. Under Texas law, “[n]o governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty.”

Tex. Penal Code § 1.08. The Ordinance subjects those who participate in providing an abortion to criminal penalties, but the Texas Penal Code already covers abortion. *See* Tex. Penal Code §§ 1.07(a)(26), 19.02(b).

46. Additionally, under Texas law no ordinance may “contain any provision inconsistent with ... the general laws enacted by the Legislature of this State.” Tex. Const. art. XI. The Ordinance is inconsistent with Texas’s homicide and wrongful death statutes: whereas Texas has deliberately exempted from criminal and civil liability a death arising from a lawful medical or health care procedure or the lawful dispensation or administration of a drug, *see* Tex. Penal Code § 19.06; Tex. Civ. Prac. & Rem. Code §§ 71.002(a) & 71.003(c), the Ordinance imposes criminal and civil liability on such abortions. The Ordinance is also inconsistent with Texas’s health code, which permits abortion by licensed physicians, subject to extensive requirements. *See* Tex. Health & Safety Code ch. 171.

47. The Ordinance is also inconsistent with the State’s wrongful death statute in that the wrongful death statute defines a two-year limitations period and a narrow and exclusive class of plaintiffs, *see* Tex. Civ. Prac. & Rem. Code § 16.003(b), § 71.004(a), whereas the Ordinance eliminates the limitations period and greatly expand the class of plaintiffs.

RELIEF REQUESTED

Plaintiffs request that this Court:

- a. Declare the Ordinance invalid under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;
- b. Preliminarily and permanently enjoin the City and its officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or

participation with them from maintaining in force, enforcing, or giving legal effect to the Ordinance;

- c. Declare the Ordinance invalid under Texas law;
- d. Award to Plaintiffs their attorney's fees and costs; and
- e. Award such other and further relief as this Court shall deem just and reasonable.

Dated: May 17, 2021

Respectfully submitted,

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** Pro hac vice applications forthcoming*

EXHIBIT

ORDINANCE OUTLAWING ABORTION WITHIN THE CITY OF LUBBOCK, DECLARING LUBBOCK A SANCTUARY CITY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS, PROVIDING FOR SEVERABILITY, REPEALING CONFLICTING ORDINANCES, AND ESTABLISHING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LUBBOCK, TEXAS, THAT:

A. FINDINGS

The City Council of Lubbock finds that:

- (1) The State of Texas has never repealed its pre-Roe v. Wade statutes that outlaw and criminalize abortion unless the mother's life is in danger.
- (2) After the Supreme Court announced its judgment in Roe v. Wade, 410 U.S. 113 (1973), the Texas legislature recodified and transferred its criminal prohibitions on abortion laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. See West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974); see also Act of June 14, 1973, ch. 399, §§ 5–6, 1973 Tex. Acts 883, 995–96; see also *id.* 996a, 996e (including the Texas abortion laws in the table indicating the “Disposition of Unrepealed Articles of the Texas Penal Code of 1925 and Vernon’s Penal Code.”).
- (3) The law of Texas therefore continues to define abortion as a criminal offense except when necessary to save the life of the mother. See West's Texas Civil Statutes, article 4512.1 (1974).
- (4) The Supreme Court's judgment in Roe v. Wade did not cancel or formally revoke the Texas statutes that outlaw and criminalize abortion, and the judiciary has no power to erase a statute that it believes to be unconstitutional. See Pidgeon v. Turner, 538 S.W.3d 73, 88 n.21 (Tex. 2017) (“When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it”); Texas v. United States, 945 F.3d 355, 396 (5th Cir. 2019) (“The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy.” (citation and internal quotation marks omitted)).
- (5) The Supreme Court's pronouncements in Roe v. Wade and subsequent cases may limit the ability of State officials to impose penalties on those who violate the Texas abortion statutes, but they do not veto or erase the statutes themselves, which continue to exist as the law of Texas until they are repealed by the legislature that enacted them. The State's temporary inability to prosecute or punish those who

violate its abortion statutes on account of *Roe v. Wade* does not change the fact that abortion is still defined as a criminal act under Texas law.

(6) The Texas murder statute defines the crime of “murder” to include any act that “intentionally or knowingly causes the death” of “an unborn child at every stage of gestation from fertilization until birth.” See Texas Penal Code § 19.02; Texas Penal Code § 1.07. Although the statute exempts “lawful medical procedures” from the definition of murder, see Texas Penal Code § 19.06(2), an abortion is not a “lawful medical procedure” under Texas law unless the life of the mother is in danger, see West’s Texas Civil Statutes, article 4512.1 (1974).

(7) The law of Texas also prohibits abortions unless they are performed in a facility that meets the minimum standards for an ambulatory surgical center, and by a physician who holds admitting privilege at a nearby hospital. See Texas Health and Safety Code § 171.0031, 245.010(a). The Supreme Court’s ruling in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), did not alter or revoke these requirements of state law; it merely enjoined state officials from enforcing the penalties established in those statutes against the abortion providers who violate them. *Whole Woman’s Health v. Hellerstedt* does not change the fact that abortion is not a “lawful medical procedure” under Texas law unless it complies with sections 171.0031 and 245.010(a) of the Texas Health and Safety Code, and it does not change the fact that the Texas murder statute prohibits abortions that fail to comport with these still-existing requirements of Texas law.

(8) The City Council of Lubbock finds it necessary to supplement these existing state-law prohibitions on abortion-murder with its own prohibitions on abortion, and to empower city officials and private citizens to enforce these prohibitions to the maximum extent permitted by state law and the Constitution. See Tex. Local Gov’t Code §§ 54.001(b)(1); 54.004.

(9) To protect the health and welfare of all residents within the City of Lubbock, including the unborn, the City Council finds it necessary to outlaw abortion under city law and to establish penalties and remedies as provided in this ordinance. See Tex. Local Gov’t Code §§ 54.001(b)(1); 54.004.

B. DEFINITIONS

(1) “Abortion” means the act of using or prescribing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to cause the death of an unborn child of a woman known to be pregnant. The term does not include birth-control devices or oral contraceptives. An act is not an abortion if the act is done with the intent to:

(a) save the life or preserve the health of an unborn child;

(b) remove a dead, unborn child whose death was caused by accidental miscarriage; or

(c) remove an ectopic pregnancy.

(2) "Child" means a natural person from the moment of conception until 18 years of age.

(3) "Unborn child" means a natural person from the moment of conception who has not yet left the womb.

(4) "Abortionist" means any person, medically trained or otherwise, who causes the death of the child in the womb. The term does not apply to any pharmacist or pharmaceutical worker selling birth-control devices or oral contraceptives. The term includes, but is not limited to:

(a) Obstetricians/gynecologists and other medical professionals who perform abortions of any kind.

(b) Any other medical professional who performs abortions of any kind.

(c) Any personnel from Planned Parenthood or other pro-abortion organizations who perform abortions of any kind.

(d) Any remote personnel who instruct abortive women to perform self-abortions at home.

(5) "City" shall mean the city of Lubbock, Texas.

C. DECLARATIONS

(1) We declare Lubbock, Texas to be a Sanctuary City for the Unborn.

(2) Abortion at all times and at all stages of pregnancy is declared to be an act of murder, subject to the affirmative defenses described in Section D(3).

D. UNLAWFUL ACTS

(1) ABORTION — It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Lubbock, Texas.

(2) **AIDING OR ABETTING AN ABORTION** — It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the City of Lubbock, Texas. This section does not prohibit referring a patient to have an abortion which takes place outside of the city limits of Lubbock, TX. The prohibition in this section includes, but is not limited to, the following acts:

- (a) Knowingly providing transportation to or from an abortion provider;
- (b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;
- (c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;
- (d) Coercing a pregnant mother to have an abortion against her will.

(3) **AFFIRMATIVE DEFENSE** — It shall be an affirmative defense to the unlawful acts described in Sections D(1) and D(2) if the abortion was in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed. The defendant shall have the burden of proving this affirmative defense by a preponderance of the evidence.

(4) No provision of Section D may be construed to prohibit any action which occurs outside of the jurisdiction of the City of Lubbock.

(5) No provision of Section D may be construed to prohibit any conduct protected by the First Amendment of the U.S. Constitution, as made applicable to state and local governments through the Supreme Court's interpretation of the Fourteenth Amendment.

E. PUBLIC ENFORCEMENT

(1) Except as provided in Section E(2) and E(3), any person, corporation, or entity who commits an unlawful act described in Section D shall be subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation shall constitute a separate offense. See Tex. Local Gov't Code §§ 54.001(b)(1);

(2) Neither the City of Lubbock, nor any of its officers or employees, nor any district or county attorney, nor any executive or administrative officer or employee of

any state or local governmental entity, may impose or threaten to impose the penalty described in Section E(1) unless and until:

(a) The Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and permits states and municipalities to punish anyone who violates an abortion prohibition, or

(b) A state or federal court enters a declaratory judgment or otherwise rules that the imposition or threatened imposition of this penalty upon the particular person, corporation, or entity that committed the unlawful act described in Section D will not impose an "undue burden" on women seeking abortions; or

(c) A state or federal court enters a declaratory judgment or otherwise rules that the person, corporation, or entity that committed the unlawful act described in Section D lacks third-party standing to assert the rights of women seeking abortions in court.

Provided, that the penalty provided in Section E(1) may not be imposed if a previous decision of the Supreme Court of the United States established that the prohibited conduct was constitutionally protected at the time it occurred.

(3) Under no circumstance may the penalty described in Section E(1) be imposed on the mother of the unborn child that has been aborted.

(4) The non-imposition of the penalties described in Section E(1) does not in any way legalize the conduct that has been outlawed in Section D, and it does not in any way limit or effect the availability of the private-enforcement remedies established in Section F. Abortion remains and is to be regarded as an illegal act under city law and a criminal act under state law, except when abortion is necessary to save the life of the mother. And abortion remains outlawed under both city and state law, despite the temporary and partial inability of city and state officials to punish those who violate the abortion laws on account of the Supreme Court's decisionmaking.

(5) Mistake of law shall not be a defense to the penalty established Section E(1).

F. PRIVATE ENFORCEMENT

(1) Any person, corporation, or entity that commits an unlawful act described in Section D(1) or D(2), other than the mother of the unborn child that has been aborted, shall be liable in tort to the unborn child's mother, father, grandparents, siblings and half-siblings. The person or entity that committed the unlawful act shall be liable to each surviving relative of the aborted unborn child for:

- (a) Compensatory damages, including damages for emotional distress;
- (b) Punitive damages; and
- (c) Costs and attorneys' fees.

There is no statute of limitations for this private right of action. Mistake of law shall not be a defense to liability. The consent of the unborn child's mother to the abortion shall not be a defense to liability, even if the unborn child's mother sues under this provision.

(2) Any private citizen of Texas, other than the individuals described in Section F(3), may bring an action to enforce this ordinance against a person or entity that has committed an unlawful act described in Section D, or that commits or plans to commit an unlawful act described in Section D, and shall be awarded:

- (a) Injunctive relief, if the court finds that the defendant is committing or plans to commit an unlawful act described in Section D;
- (b) Statutory damages of not less than two thousand dollars (\$2,000.00) for each violation, and not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, if court finds that the defendant has committed an unlawful act described in Section D for which he has not previously paid statutory damages or the penalty described in section (E)(1); and
- (c) Costs and attorneys' fees, if the court awards any of the injunctive relief or statutory damages described in sections (F)(2)(a) and (b).

Provided, that no citizen-suit enforcement action may be brought, and no injunction or statutory damages or liability for costs and attorneys' fees may be awarded or assessed, against the mother of the unborn child that has been or will be aborted.

There is no statute of limitations for this private right of action. Mistake of law shall not be a defense to liability. The consent of the unborn child's mother to the abortion shall not be a defense to liability.

(3) The citizen-suit enforcement action described in Section F(2) may not be brought by the City of Lubbock, by any of its officers or employees, by any district or county attorney, or by any executive or administrative officer or employee of any state or local governmental entity.

(4) The citizen-suit enforcement action described in Section F(1) and F(2) may be brought on or after the effective date of this ordinance. An individual or entity sued

under the citizen-suit enforcement action described in Section F(1) and F(2) may assert the Supreme Court's rulings in *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), or any other abortion-related pronouncement of the Supreme Court as a defense to liability if that individual or entity has third-party standing to assert the rights of women seeking abortions in court, and if the imposition of liability in that particular lawsuit would impose an "undue burden" on women seeking abortions.

G. SEVERABILITY

(1) 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 United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the City Council that every provision, section, subsection, sentence, clause, phrase, or word in this ordinance, and every application of the provisions in this ordinance, are severable from each other. If any application of any provision in this ordinance to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, then the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this ordinance shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the City Council's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this ordinance to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the City Council had enacted an ordinance limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The City Council further declares that it would have passed this ordinance, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this ordinance, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this ordinance, were to be declared unconstitutional or to represent an undue burden.

(2) If any provision of this ordinance 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 declarations of the City Council's intent in Section G(1)

(3) No court may decline to enforce the severability requirements in Sections G(1) and G(2) 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

city official from enforcing a subset of an ordinance's applications is never "rewriting" an ordinance, as the ordinance continues to say exactly what it said before. A judicial injunction or declaration of unconstitutionality is nothing more than a non-enforcement edict that can always be vacated by later courts if they have a different understanding of what the Constitution requires; it is not a formal amendment of the language in a statute or ordinance. A judicial injunction or declaration of unconstitutionality no more "rewrites" an ordinance than a decision by the executive not to enforce a duly enacted ordinance in a limited and defined set of circumstances.

(4) If any federal or state court ignores or declines to enforce the requirements of Sections G(1), G(2), or G(3), or holds a provision of this ordinance invalid on its face after failing to enforce the severability requirements of Sections G(1) and G(2), for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of the ordinance that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of the ordinance to the maximum possible extent. The saving construction issued by the Mayor shall carry the same force of law as an ordinance; it shall represent the authoritative construction of this ordinance in both federal and state judicial proceedings; and it shall remain in effect until the court ruling that declares invalid or enjoins the enforcement of the original provision in the ordinance is overruled, vacated, or reversed.

(5) The Mayor must issue the saving construction described in Section G(4) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections G(1) and G(2). If the Mayor fails to issue the saving construction required by Section G(4) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this ordinance after failing to enforce the severability requirements of Sections G(1) or G(2), or if the Mayor's saving construction fails to enforce the provisions of the ordinance to the maximum possible extent permitted by the Constitution or other superseding legal requirements, as construed by the federal or state judiciaries, then any person may petition for a writ of mandamus requiring the Mayor to issue the saving construction described in Section G(4).

H. EFFECTIVE DATE

This ordinance shall go into immediate effect upon majority vote within the Lubbock, Texas City Council meeting.

PASSED, ADOPTED, SIGNED and APPROVED,

Mayor of the City of Lubbock, Texas

City Secretary of the City of Lubbock, Texas

FURTHER ATTESTED BY "WE THE PEOPLE", THE CITIZENS and WITNESSES
TO THIS PROCLAMATION, THIS 5th DAY OF November, THE YEAR OF
OUR LORD 2020.

WITNESS:

Dorothy Bayet

WITNESS:

Mark

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Planned Parenthood of Greater Texas Surgical Health Services and G. Sealy Massingill, M.D.

(b) County of Residence of First Listed Plaintiff Lubbock (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Law Offices of Robin Green; 1001 Main Street, Suite 204, Lubbock, Texas, 79401; (806) 749-3030

DEFENDANTS

City of Lubbock

County of Residence of First Listed Defendant Lubbock (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Fernando Bustos; 1001 Main Street, Suite 501, Lubbock, Texas, 79401; (806) 780-3976

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. 1983

Brief description of cause: Suit challenging validity of "Ordinance Outlawing Abortion Within the City of Lubbock"

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ preliminary injunction CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

May 17, 2021 s/ Robin M. Green

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Case 5:21-cv-00114-C Document 1-2 Filed 05/17/21 Page 2 of 2 PageID 27
INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related cases, if any. If a related case exists, whether pending or closed, insert the docket numbers and the corresponding judge names for such cases. A case is related to this filing if the case: 1) involves some or all of the same parties and is based on the same or similar claim; 2) involves the same property, transaction, or event; 3) involves substantially similar issues of law and fact; and/or 4) involves the same estate in a bankruptcy appeal.

Date and Attorney Signature. Date and sign the civil cover sheet.