



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.

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Respectfully submitted,

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