Cause No. D-1-GN-19-005930

Don Zimmerman, Plaintiff, v. **City of Austin**; **Steve Adler**, in his official capacity as Mayor of the City of Austin; **Lilith Fund for Reproductive Equity**; **The Bridge Collective ATX**; **Fund Texas Choice**, Defendants	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 98TH ___ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY INJUNCTION

The City of Austin recently passed a budget that provides $150,000 in taxpayer money to organizations that provide travel, lodging, and other forms of aid to women seeking to abort their pregnancies. This expenditure of taxpayer money violates the state's abortion laws and should be promptly enjoined.

DISCOVERY CONTROL PLAN

1. The plaintiff intends to conduct discovery under Level 3 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

PARTIES

2. Plaintiff Don Zimmerman resides in Travis County and pays taxes to the city of Austin.

3. Defendant City of Austin is a legal government entity as defined in Texas Government Code § 554.001. It may be served with citation by serving Mayor Steve Adler through the City of Austin, Texas, located at 301 West 2nd Street, 2nd Floor, Austin, Texas, 78701.

4. Defendant Steve Adler is the mayor of the City of Austin. He resides in Travis County, Texas. He may be served at his office at City Hall, 301 West 2nd Street, 2nd Floor, Austin, Texas, 78701. He is sued in his official capacity as Mayor of the City of Austin.

5. Defendant Lilith Fund for Reproductive Equity is an organization that aids and abets abortion. It may be served with civil process by serving Emily M. Bivona, 2727 Allen Parkway, Suite 1700, Houston, Texas, 77019-2125.

6. Defendant The Bridge Collective ATX is an organization that aids and abets abortion. It may be served with civil process by serving Heather Frederick, 407 East 45 Street, Austin, Texas, 78751.

7. Defendant Fund Texas Choice is an organization that aids and abets abortion. It may be served with civil process by serving Lenzi Sheible, 3903 South Congress Avenue, #41823, Austin, Texas, 78704.

JURISDICTION AND VENUE

8. The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court exclusive of interest. The plaintiff seeks relief that can be granted by courts of law or equity.

9. The Court has jurisdiction over the plaintiff's request for injunctive relief against defendant Steve Adler because the mayor is acting *ultra vires* by providing taxpayer money to abortion-assistance organizations, in violation of the state law. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009).

10. The Court has jurisdiction over the plaintiff's request for declaratory relief against defendants Steve Adler and the City of Austin because the Declaratory Judgment Act waives governmental immunity. *See* Tex. Civ. Prac. & Rem. Code

§§ 37.004, 37.006; *Texas Lottery Com'n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Tex. Educ. Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex. 1994).

11. Plaintiff Don Zimmerman has taxpayer standing to seek declaratory and injunctive relief against these unlawful expenditures of public funds. *See Bland Independent Sch. Dist. v. Blue*, 34 S.W.3d 547 (Tex. 2000) ("[A] taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury.").

12. The Court has personal jurisdiction over each of the defendants.

13. Venue is proper because a substantial portion of the events giving rise to the claims occurred in Travis County, Texas. *See* Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.003, 15.005, 15.035.

CLAIM FOR RELIEF

14. Earlier this year, the Texas legislature enacted Senate Bill 22, which prohibits governmental entities, including the city of Austin, from providing taxpayer money or resources to abortion providers or their affiliates. The only exception is for "basic public services, including fire and police protection and utilities" that are provided to the general public. The provisions of Senate Bill 22 are codified at 10 Tex. Gov't Code §§ 2272.001–.005.

15. In an attempt to circumvent the statutory prohibitions in Senate Bill 22, the Austin city council recently enacted a budget that provides $150,000 in taxpayer money to organizations that aid and abet abortions by providing logistical support—such as travel and lodging—to women who want to abort their pregnancies. Organizations of this sort are not covered by the prohibitions in Senate Bill 22, because they do not fall within the statutory definition of "abortion provider" or "affiliate." *See* 10 Tex. Gov't Code §§ 2272.001(2)–(3).

16. The city's expenditures, however, violate another Texas statute that imposes criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." 2A Texas Penal Code article 1192, at 433 (1961).

17. The Texas legislature has not repealed article 1192 in response to *Roe v. Wade*, 410 U.S. 113 (1973), and this statute continues to exist as the law of Texas.

18. The city's expenditures also violate section 7.02 of the Texas Penal Code, because they encourage, direct, aid, or attempt to aid the commission of a criminal offense. The Texas statute criminalizing abortion has not been repealed in response to *Roe v. Wade*, 410 U.S. 113 (1973), and it outlaws all abortions except those needed to save the life of the mother. *See* 2A Texas Penal Code article 1191, at 429 (1961) ("If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."); 2A Texas Penal Code art. 1196, at 436 (1961) ("Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.").

19. Neither *Roe v. Wade* nor any subsequent decision of the Supreme Court "struck down" or formally revoked article 1191, article 1192, or any other Texas statute that criminalizes abortion. The federal courts do not wield a writ of erasure over the statutes that they declare unconstitutional, and these statutes continue to exist as laws until they are repealed by the legislature that enacted them. A Supreme Court ruling that declares a statute unconstitutional means only that the statute may not be enforced in a manner that contradicts the Supreme Court's interpretation of the Constitution. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017)

("[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim."); *see also* Hart and Wechsler's The Federal Courts and The Federal System 181 (Richard H. Fallon, Jr., et al. eds., 7th ed. 2015) ("[A] federal court has no authority to excise a law from a state's statute book."); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759, 767 (1979) ("No matter what language is used in a judicial opinion, a federal court cannot repeal a duly enacted statute of any legislative authority.").

20. Although the Fifth Circuit opined in *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004), that subsequent abortion regulations enacted by the Texas legislature have produce an "implied repeal" of article 1191 and article 1192, the Fifth Circuit's ruling is not binding on the state judiciary and may not be followed unless a state court, in its independent judgment, finds the reasoning in *McCorvey* persuasive. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997). *McCorvey*'s reasoning is not persuasive and contradicts numerous U.S. Supreme Court pronouncements that strongly disfavor implied repeals. *See, e.g.*, *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 381 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an 'irreconcilable conflict' between the two federal statutes at issue."). There is no "irreconcilable conflict" between the Texas statutes outlawing all abortions except those needed to save the mother's life and the post–*Roe v. Wade* abortion regulations that the State of Texas has enacted, and *McCorvey*'s conclusion to the contrary is indefensible. In all events, it is for the Supreme Court of Texas, not

the Fifth Circuit, to decide whether articles 1191 and 1192 have somehow been implicitly repealed by post–*Roe v. Wade* enactments, and the state supreme court's conclusion on this issue will bind all state and federal courts. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

21. In addition, every discrete application of article 1192 and the accomplice-liability statutes in the Texas Penal Code is severable from each other. *See* Texas Gov't Code § 311.032(c) ("In a statute that does not contain a provision for severability or nonseverability, if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable."); *see also Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) ("Severability is of course a matter of state law."); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013) ("Severability is a state law issue that binds federal courts."). So any applications of these aiding-and-abetting statutes that violate the Supreme Court's abortion edicts are severable from the applications that do not, and the constitutional applications of these statutes remain fully enforceable.

22. The courts must therefore enforce article 1192 and section 7.02 of the Texas Penal Code unless their enforcement against the defendants in this particular case would violate the Supreme Court's abortion edicts by imposing an "undue burden" on women seeking abortions. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

23. An injunction that bars the mayor and the city from providing taxpayer money to abortion-assistance organizations will not impose an "undue burden" on any woman who wants to abort her pregnancy. It has long been established that women seeking to abort their pregnancies have no constitutional right to taxpayer

assistance, and that the withholding of taxpayer subsidies does not constitute an "undue burden." *See Harris v. McRae*, 448 U.S. 297 (1980); *see also Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 826 (10th Cir. 2014) ("There is a qualitative difference between prohibiting an activity and refusing to subsidize it. The Supreme Court, for instance, has drawn that line in rejecting state laws prohibiting certain abortions but not laws refusing to provide funds for the practice.").

24. Because the mayor and the city are violating article 1192 and section 7.02 of the Texas Penal Code by providing taxpayer money to abortion-assistance organizations, and because an injunction that prohibits these expenditures will not impose an "undue burden" on women seeking to abort, the mayor and the city's expenditures of taxpayer money are *ultra vires* and must be enjoined.

25. The Lilith Fund for Reproductive Equity, The Bridge Collective ATX, and Fund Texas Choice are abortion-assistance organizations that are expected to apply for or receive some or all of these unlawful city expenditures. They should therefore be joined as parties needed for just adjudication under Rule 39 of the Texas Rules of Civil Procedure, and they should be enjoined from applying for or accepting taxpayer funds from the city of Austin.

26. Mr. Zimmerman brings his claims for relief under the Uniform Declaratory Judgment Act. He also brings suit under *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009), which authorizes *ultra vires* claims against city officials who act in defiance of state law.

DEMAND FOR JUDGMENT

Mr. Zimmerman demands the following relief:

a. a declaration that the mayor and the city are violating state law by providing taxpayer money to abortion-assistance organizations;

b. a temporary and permanent injunction that prohibits the mayor and the city from providing taxpayer money to abortion-assistance organizations;

c. a temporary and permanent injunction prohibiting The Lilith Fund for Reproductive Equity, The Bridge Collective ATX, and Fund Texas Choice from applying for or accepting taxpayer funds from the city of Austin;

d. a temporary and permanent injunction requiring The Lilith Fund for Reproductive Equity, The Bridge Collective ATX, and Fund Texas Choice to repay all taxpayer funds that they receive from the city of Austin in violation of state law;

e. a temporary and permanent injunction requiring the mayor and the city to claw back all public funds provided to abortion-assistance organizations under its recently enacted budget;

f. an award of costs and attorneys' fees;

g. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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