CITY ORDINANCE NO. 1055

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

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LEVELLAND, TEXAS:

A. FINDINGS

The City Council of Levelland finds that:

(1) The Preamble of the Constitution of the United States states, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . ."

(2) The State of Texas has never repealed its pre–Roe v. Wade statutes that outlaw and criminalize abortion unless the mother's life is in danger.

(3) 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.").

(4) 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).

(5) 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)).

(6) 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.

(7) 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).

(8) 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.

(9) The City Council of Levelland 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.

(10) To protect the health and welfare of all residents within the City of Levelland, 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 Levelland, Texas.

C. DECLARATIONS

(1) We declare Levelland, 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).

(3) The Supreme Court erred in Roe v. Wade, 410 U.S. 113 (1973), when it said that pregnant women have a constitutional right to kill their unborn children through abortion, as there is no language anywhere in the Constitution that even remotely suggests that abortion is a constitutional right;

(4) Constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, *see* John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion.");

(5) Roe v. Wade, 410 U.S. 113 (1973), is a lawless and unconstitutional act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree;

(6) The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole

Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to abort a unborn child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are declared to be null and void in the City of Levelland.

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 Levelland, 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 Levelland, Texas. This section does not prohibit referring a patient to have an abortion which takes place outside of the city limits of Levelland, Texas. 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 Levelland.

(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.

(2) Neither the City of Levelland, 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:

(a) The individual seeking to impose the penalty described in Section E(1) has determined that the imposition or threatened imposition of this penalty upon the particular person, corporation, or entity who committed the unlawful act described in Section D will not impose an "undue burden" on women seeking abortions; or

(b) The person, corporation, or entity who committed the unlawful act described in Section D lacks standing to assert the third-party rights of women seeking abortions in court; or

(c) 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.

In determining whether the imposition or threatened imposition of the penalty described in Section E(1) will impose an "undue burden" on women seeking abortions, the individual seeking to impose the penalty described in Section E(1) shall consider the definition of the "undue burden" test as set forth in Chief Justice Roberts's controlling opinion for the Supreme Court in June Medical Services LLC v. Russo, 140 S. Ct. 2103, 2133–42 (2020) (Roberts, C.J., concurring in the judgment); any future majority opinion (or controlling opinion) from the Supreme Court or the U.S. Court of Appeals for the Fifth Circuit that defines the "undue burden" standard; the availability of abortion services in other jurisdictions; and the extent to which the punishment or threatened punishment of the particular person, corporation, or entity who committed the unlawful act described in Section D will prevent women from aborting their pregnancies.

The individual seeking to impose the penalty described in Section E(1) may seek legal counsel regarding the meaning of the "undue burden" standard, and may seek a declaratory judgment from a state or federal court before deciding whether to impose or threaten the penalties described in Section E(1).

(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 mother and/or father of the unborn child that was aborted. The person or entity that committed the unlawful act shall be liable to each surviving parent 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, including a belief that the requirements of this ordinance are unconstitutional or were unconstitutional. 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 may bring a civil enforcement suit against a person or entity that commits or plans to commit an unlawful act described in Section D, and shall be awarded:

(a) Injunctive relief;

(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; and

(c) Costs and attorneys' fees;

Provided, that no damages or liability for costs and attorneys' fees or any other judicial relief may be awarded or assessed against the mother of the unborn child that has been aborted. There is no statute of limitations for this private civil enforcement action. Mistake of law shall not be a defense to liability, including a belief that the requirements of this ordinance are unconstitutional or were unconstitutional. The consent of the unborn child's mother to the abortion shall not be a defense to liability. A court may not award relief under this Section F(2) in response to an unlawful act described in Section D if the defendant demonstrates that the defendant previously paid statutory damages in a previous action for that particular violation or offense.

(3) No private civil enforcement action described in Section F(2) may be brought by the City of Levelland, 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) Private enforcement described in Section F(1) and F(2) may be brought against any person, corporation, or entity that commits an unlawful act described in Section D upon the effective date of the ordinance, regardless of whether the Supreme Court has overruled Roe v. Wade, 410 U.S. 113 (1973), or Planned Parenthood v. Casey, 505 U.S. 833 (1992), and regardless of whether the current jurisprudence of the Supreme Court permits states and municipalities to punish those who violate abortion prohibitions.

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 Levelland, Texas City Council meeting.

Passed and approved on first reading this _____ day of _____, 2021.

Passed and approved on second reading this _____ day of _____, 2021.

_____
Barbra Pinner
Mayor

ATTEST:

_____
Andréa Corley
City Secretary