Cause No. _____

Texas Values; **David Walls**; **Alan Higginbotham**; **Jerri Lynn Ward**, Plaintiffs, v. **City of Austin**; **Spencer Cronk**, in his official capacity as City Manager of the City of Austin, Defendants	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS ____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION AND APPLICATION FOR TEMPORARY INJUNCTION

The City of Austin recently passed a budget that provides $250,000 in taxpayer money to organizations that provide travel, lodging, and other forms of aid to women seeking to abort their pregnancies. This budgetary provision violates article XI, section 5 of the Texas Constitution, which prohibits home-rule cities from enacting ordinances that "contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5. Specifically, the provision in the city's budget is "inconsistent with" articles 4512.1 and 4512.2 of the Revised Civil Statutes, as well as section 7.02 of the Texas Penal Code, which outlaw conduct that aids and abets abortion unless the mother's life is in danger. All of these statutes continue to exist as "general laws enacted by the Legislature of this State" because they have never been repealed in response to *Roe v. Wade*, 410 U.S. 113 (1973). And the city of Austin is forbidden to enact any ordinance "inconsistent with" those laws until the legislature sees fit to repeal them.

The city's decision to give taxpayer money to abortion-assistance organizations also violates the gift clause of the Texas Constitution. *See* Tex. Const. art. III, § 52(a). It should be promptly enjoined.

DISCOVERY CONTROL PLAN

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

PARTIES

2. Plaintiff Texas Values is a non-profit corporation that is headquartered in Travis County and pays taxes to the city of Austin.

3. Plaintiff David Walls resides in Travis County and pays taxes to the city of Austin.

4. Plaintiff Alan Higginbotham resides in Travis County and pays taxes to the city of Austin.

5. Plaintiff Jerri Lynn Ward resides in Travis County and pays taxes to the city of Austin.

6. 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.

7. Defendant Spencer Cronk is the city manager of the City of Austin. He may be served at his office at City Hall, 301 West 2nd Street, 3rd Floor, Austin, Texas, 78701. He is sued in his official capacity as City Manager of the City of Austin.

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 plaintiffs seek relief that can be granted by courts of law or equity.

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

10. The Court has jurisdiction over the plaintiffs' request for declaratory relief against defendants Spencer Cronk and the City of Austin because the Declaratory Judgment Act waives governmental immunity in lawsuits challenging the validity of an ordinance. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Education Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex. 1994).

11. Each of the plaintiffs 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, 556 (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 NO. 1: THE CITY'S BUDGETARY PROVISION VIOLATES ARTICLE XI, SECTION 5 OF THE TEXAS CONSTITUTION

14. In 2019, 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 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 $250,000 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* Tex. Gov't Code §§ 2272.001(2)–(3).

16. The city's expenditures, however, violate article XI, section 5 of the Texas Constitution, which prohibits home-rule cities from enacting ordinances that "contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5.

17. Specifically, the provision in the city's budget is "inconsistent with" article 4512.2 of the Revised Civil Statutes, which imposes criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974) (attached as Exhibit 1).

18. The Texas legislature has not repealed 4512.2 in response to *Roe v. Wade*, 410 U.S. 113 (1973), and this statute continues to exist as one of the "general laws enacted by the Legislature of this State."

19. The city's proposed expenditure is also "inconsistent with" section 7.02 of the Texas Penal Code, because it encourages, directs, aids, or attempts 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* West's Texas Civil

Statutes, article 4512.1 (1974) ("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."); West's Texas Civil Statutes, article 4512.6 (1974) ("Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.") (attached as Exhibit 1).

20. Neither *Roe v. Wade* nor any subsequent decision of the Supreme Court "struck down" or formally revoked article 4512.1, article 4512.2, 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.").

21. 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 produced an "implied repeal" of article 4512.1 and article 4512.2, 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 4512.1 and 4512.2 have somehow been implicitly repealed by post–*Roe v. Wade* enactments, and the state supreme court's conclusion on this issue will bind the state and federal judiciaries. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

22. In addition, every discrete application of article 4512.2 and the accomplice-liability statutes in the Texas Penal Code is severable from each other. *See* Tex. 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.

23. The courts must therefore continue to enforce article 4512.2 and section 7.02 of the Texas Penal Code unless their enforcement in a 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).

24. An injunction that bars the defendants 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.").

25. Because the city's budgetary provision is "inconsistent with" article 4512.2 of the Revised Civil Statutes and section 7.02 of the Texas Penal Code, it should be declared invalid under the Uniform Declaratory Judgment Act.

26. And because the city officials are violating article 4512.2 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, their expenditures of taxpayer money are *ultra vires* and must be enjoined.

CLAIM NO. 2: THE CITY'S EXPENDITURES VIOLATE THE GIFT CLAUSE

27. The city's expenditures also violate the state constitution's gift clause, which is codified at article III, section 52(a) of the Texas Constitution.

28. The gift clause provides, in relevant part:

> Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. However, this section does not prohibit the use of public funds or credit for the payment of premiums on nonassessable property and casualty, life, health, or accident insurance policies and annuity contracts issued by a mutual insurance company authorized to do business in this State.

Tex. Const. art. III, § 52(a); *see also Bullock v. Calvert*, 480 S.W.2d 367, 369 (Tex. 1972) ("[U]nder Art. 3, §§ 51 and 52 of the Constitution there may be no grant of public money for private individuals or associations.").

29. The state supreme court has interpreted the gift clause to allow transfers of public funds to private entities so long as the payment: "(1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return." *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission*, 74 S.W.3d 377, 383 (Tex. 2002). Neither of these requirements is satisfied.

30. To determine whether the city's payment of public funds to abortion-assistance organizations serves "legitimate public purpose," a court must find that the city

has: "(1) ensure[d] that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain[ed] public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure[d] that the political subdivision receives a return benefit." *Id.* at 384. The proposed expenditures fail this test. The "predominant purpose" of these expenditures is to benefit private parties: the abortion-assistance organizations and the women who abort their fetuses.

31. The grant of money to these abortion-assistance organizations also fail to provide a "clear public benefit in return." *Id.* at 383. There is no "clear public benefit" from providing taxpayer subsidies to organizations that help women abort their pregnancies.

32. Because the city's budgetary provision is "inconsistent with" article III, section 52(a) of the Texas Constitution, it should be declared invalid under the Uniform Declaratory Judgment Act.

33. And because the city's officials are violating article III, section 52(a) of the Texas Constitution by providing taxpayer money to abortion-assistance organizations, their expenditures of taxpayer money are *ultra vires* and must be enjoined.

CAUSES OF ACTION

34. The plaintiffs bring their claims for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

35. The plaintiffs do not contend that the Texas Penal Code or the abortion statutes on which they rely establish a private right of action or give them standing to sue anyone who violates those laws. *See Spurlock v. Johnson*, 94 S.W.3d 655 (Tex. App.—San Antonio 2002, no pet.) ("[T]he Texas Penal Code does not create private

causes of action"). The plaintiffs' standing comes from *Bland Independent Sch. Dist. v. Blue*, 34 S.W.3d 547, 556 (Tex. 2000), which gives taxpayers "standing to sue in equity to enjoin the illegal expenditure of public funds," and their causes of action come from the UDJA, which gives private citizens a cause of action to sue municipalities that enact invalid or unconstitutional ordinances, and *Heinrich*, which gives private citizens a cause of action to sue public officials who act *ultra vires* by violating state law. The city's budgetary provisions are invalid—and the actions of its officials are *ultra vires* and unlawful—*because* they are "inconsistent with" a state-law criminal prohibition, but that does not immunize an allegedly unlawful expenditure of taxpayer funds from judicial review.

GROUNDS FOR TEMPORARY INJUNCTION

36. To obtain a temporary injunction, an applicant must plead and prove: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 284 S.W.3d 198, 205 (Tex. 2002).

37. The Uniform Declaratory Judgment Act and *Heinrich* each provide the plaintiffs with a cause of action to seek declaratory and injunctive relief against the city for its invalid budgetary enactment and against the city's officials for their *ultra vires* acts.

38. The plaintiffs have a probable right to relief because the city's efforts to give taxpayer money to abortion-assistance organization are inconsistent with the state's abortion statutes and the state constitution's gift clause.

39. The plaintiffs and the taxpayers of Austin will suffer probable, imminent, and irreparable injury because the state supreme court has not yet recognized or resolved a taxpayer's standing to claw back money that a public entity has already spent. *See Pidgeon v. Turner*, 538 S.W.3d 73, 84–85 (Tex. 2017) (declining to resolve whether

taxpayers have standing to pursue a "claw back" of illegally spent public funds, while acknowledging that the arguments were "interesting and important").

DEMAND FOR JUDGMENT

The plaintiffs demand the following relief:

a. a declaration that the provisions in the city's budget that allocate taxpayer money to abortion-assistance organizations are invalid because they are "inconsistent with . . . the general laws enacted by the Legislature of this State" under article XI, section 5 of the state constitution;

b. a declaration that the provisions in the city's budget that allocate taxpayer money to abortion-assistance organizations are invalid because they violate the state constitution's gift clause;

c. a temporary and permanent injunction that prohibits the defendants from giving taxpayer money to abortion-assistance organizations;

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

e. an award of nominal and compensatory damages;

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

D. Bryan Hughes
Texas Bar No. 00793995
Law Office of D. Bryan Hughes
110 North College Avenue, Suite 207
Tyler, Texas 75702-7221
(903) 581-1776 (phone)
bryan@hughesfirm.com

Jonathan F. Mitchell
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

(additional counsel listed on following page)

H. Dustin Fillmore III
Texas Bar No. 06996010
Charles W. Fillmore
Texas Bar No. 00785861
The Fillmore Law Firm, LLP
1200 Summit Avenue, Suite 860
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Thomas Brejcha*
Illinois Bar No. 0288446
Martin Whittaker*
Texas Bar No. 24095097
Thomas More Society
309 W. Washington Street, Suite 1250
Chicago, Illinois 60606
(312) 782-1680 (phone)
(312) 782-1887 (fax)
info@thomasmoresociety.org

Erick G. Kaardal*
Minnesota Bar No. 0229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
(612) 341-1074 (phone)
(612) 341-1076 (fax)
kaardal@mklaw.com

* pro hac vice applications forthcoming

Dated: August 27, 2020

Counsel for Plaintiffs

Exhibit 1

West's Texas Statutes and Codes

Volume 4 SUPERSEDED

REVISED CIVIL STATUTES

Articles 2461 to 5561

ST. PAUL, MINN.
WEST PUBLISHING CO.

deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas [1] and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

[1] See, now, article 4504a.

Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

CHAPTER SIX ½. ABORTION

Article
4512.1 Abortion.
4512.2 Furnishing the Means.
4512.3 Attempt at Abortion.
4512.4 Murder in Producing Abortion.
4512.5 Destroying Unborn Child.
4512.6 By Medical Advice.

Art. 4512.1 Abortion

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.

[1925 P.C.]

Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]