



CITY OF EDINBURG - CITY COUNCIL

Meeting Date: July 20, 2021

Ordinances

Agenda Item No:

Consider an Ordinance Amending the Code of Ordinances of the City of Edinburg to Outlaw Abortion and Declare Edinburg a Sanctuary for the Unborn.

1. Agenda Item:

Consider an Ordinance Amending the Code of Ordinances of the City of Edinburg to Outlaw Abortion and Declare Edinburg a Sanctuary for the Unborn.

2. **Description/Scope:** The proposed ordinance would amend the City's Code of Ordinances to:

Sec. 130.05. Abortion

- make it 'unlawful for any person to procure or perform an abortion' in the City of Edinburg
- make it 'unlawful to any person to knowingly aid or abet an abortion that occurs in the city of Edinburg,' including
 - 'providing transportation to or from an abortion provider,'
 - 'giving instructions over the telephone, internet or [other communication]' regarding abortion,
 - 'providing money with the knowledge it will be used to pay for an abortion'
 - 'providing or arranging for insurance coverage' for an abortion
 - 'providing 'abortion doula' services' (abortion doula services are providing emotional, informational, and physical support to people receiving abortions)
 - 'coercing or pressuring a pregnant mother to have an abortion against her will'
- make it 'unlawful for any person to possess or distribute abortion-inducing drugs' in the City of Edinburg
- provide the penalty for violations as 'the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health'
- restrict enforcement of this City ordinance by any City officers or employees, the District Attorney, or State or local government entity until the United States Supreme Court permits States and cities to punish persons who violate abortion prohibitions, a court declares the penalties of this Ordinance to no impose an 'undue burden' on women seeking abortions, or a court rules that a violator of this Ordinance does not have standing to assert the rights of women seeking abortions.

Sec. 130.06. Abortions Performed in Violation of Texas Law

- incorporate Texas abortion laws

Sec. 130.07 Private Right of Action

- allow any person in the state to file a lawsuit against a person that violates this Ordinance
- allow a person who files suit to obtain an injunction of violations of this Ordinance
- allow a person who files suit to recover at least \$10,000 for each violation of this Ordinance
- allow a person who files suit to recover attorney's fees and costs
- providing that 'there is no statute of limitations for' lawsuits brought under this Ordinance
- providing that lawsuits must be filed in state court and not in municipal court
- allows persons to file lawsuits even if the Supreme Court has not overruled caselaw

3. **Estimated Timeline:** The ordinance would be effective when passed. City enforcement would be restricted pending the United States Supreme Court reversing caselaw. Private lawsuits could be filed after the ordinance is effective.

4. **Budget**

Fund/Division/Source: N/A

5. Procurement/Selection Process:

N/A

- 6. Staff's Recommendation:** Staff recommends disapproval of item as presented. An ordinance of this scope should include a comprehensive public engagement process as well as an extensive analysis to the potential negative legal, economic, and community impacts.
- 7. Justification:** This item was placed on the agenda as requested by City Council Member, David White. The ordinance attached was provided to city council and staff via a local advocacy group on this topic.

ATTACHMENTS:

Attachment A - Ordinance

APPROVED:	_____
NOT APPROVED:	_____
TABLED:	_____
NO ACTION:	_____

ORDINANCE OUTLAWING ABORTION, DECLARING EDINBURG A SANCTUARY FOR THE UNBORN, MAKING VARIOUS PROVISIONS AND FINDINGS, PROVIDING FOR SEVERABILITY, AND ESTABLISHING AN EFFECTIVE DATE

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

A. FINDINGS

The City Council finds that:

- (1) Human life begins at conception.
- (2) Abortion is a murderous act of violence that purposefully and knowingly terminates an unborn human life.
- (3) Unborn human beings are entitled to the full and equal protection of the laws that prohibit violence against other human beings.
- (4) 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. *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.”).
- (5) The Texas Legislature has reaffirmed the continued existence and validity of the State's pre-*Roe v. Wade* criminal abortion statutes. *See* Senate Bill 8, 87th Leg., § 2 (2021) (“The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.”).
- (6) 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); Senate Bill 8, 87th Leg., § 2 (2021).
- (7) The law of Texas also imposes felony criminal liability on anyone who “furnishes the means for procuring an abortion knowing the purpose intended,” *see* West's Texas Civil Statutes, article 4512.2 (1974), as well as anyone who aids or abets an abortion performed in violation of Texas law, *see* Tex. Penal Code section 7.02.
- (8) 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)).

(9) 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.

(10) 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).

(11) 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.

(12) The Texas abortion laws are severable in each of their discrete applications, and they are severable as to each individual person, group of persons, or circumstances. *See* Tex. Gov’t Code § 311.032(c); *see also* Senate Bill 8, 87th Leg., § 5 (adding new section 311.036(c) to the Texas Government Code); *id.* (“Every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. If any statute that regulates or prohibits abortion is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States

Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.”). These laws therefore remain enforceable against any individual or entity that aids or abets an abortion performed in Texas, so long as the prosecution of the particular individual or entity that aids or abets the abortion will not impose an “undue burden” on abortion patients;

(13) The City Council of Edinburg finds it necessary to supplement the 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.

(14) The law of Texas allows municipalities and political subdivisions to outlaw and prohibit abortion, and to establish penalties and remedies against those who perform or enable unlawful abortions. *See* Senate Bill 8, 87th Leg., § 5 (adding new section 311.036(b) to the Texas Government Code); *see also id.* (“A statute may not be construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute.”).

(15) To protect the health and welfare of all residents within the City of Edinburg, including the unborn, the City Council finds it necessary to outlaw abortion under city law, to outlaw acts that aid or abet abortions, and to establish penalties and remedies as provided in this ordinance. *See* Tex. Local Gov't Code §§ 54.001(b)(1); 54.004.

B. DECLARATIONS

(1) We declare Edinburg, 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 unless the mother's life is in danger.

(3) Abortion-inducing drugs are declared to be contraband, and we declare the possession of abortion-inducing drugs within city limits to be an unlawful act.

(4) Abortions performed anywhere in the state of Texas are criminal acts under Texas law, unless the abortion is procured or attempted by medical advice for the purpose of saving the life of the mother. *See* West's Texas Civil Statutes, article 4512.1 – article 4512.6 (1974); *see also* Senate Bill 8, 87th Leg., § 2.

(5) Any person who “furnishes the means for procuring an abortion knowing the purpose intended,” or who otherwise aids or abets an abortion performed in Texas, is a criminal and a felon subject to prosecution and imprisonment under section 7.02 of the Texas Penal Code and article 4512.2 of the Revised Civil Statutes, unless the abortion is procured or attempted by medical advice for the purpose of saving the life of the mother.

(6) The City Council urges the district attorney of Hidalgo County to investigate and prosecute any individual or organization that “furnishes the means for procuring” an elective abortion, or that otherwise aids or abets such abortions, including:

(a) employers and insurers who arrange for coverage of abortions in Texas;

(b) individuals and organizations that knowingly provide transportation to or from a Texas abortion provider;

(c) individuals and organizations that knowingly pay for another person’s abortion in Texas, including abortion funds and abortion-assistance organizations;

(d) individuals who knowingly donate money to abortion funds and abortion-assistance organizations that aid or abet abortions performed in Texas;

(e) individuals and organizations that offer or provide “abortion doula” services in Texas.

(7) The City Council urges all residents of Edinburg to regard those who perform or assist elective abortion as criminals, consistent with the abortion laws of Texas, and to report these criminal activities to the relevant district attorneys for investigation and criminal prosecution.

C. AMENDMENTS TO CITY CODE

The Edinburg Code of Ordinances is amended by adding sections 130.05, 130.06, 130.07, and 130.08 to read as follows:

Sec. 130.05. Abortion.

(A) 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 Edinburg, Texas.

(B) It shall be unlawful for any person to knowingly aid or abet an abortion that occurs in the city of Edinburg, Texas. This section does not prohibit referring a patient to have an abortion which takes place outside the city

limits of Edinburg, Texas. The prohibition in this section includes, but is not limited to, the following acts:

- (1) Knowingly providing transportation to or from an abortion provider;
- (2) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;
- (3) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;
- (4) Providing or arranging for insurance coverage of an abortion;
- (5) Providing “abortion doula” services; and
- (6) Coercing or pressuring a pregnant mother to have an abortion against her will.

(C) It shall be an affirmative defense to the unlawful acts described in Subsections (A) and (B) 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.

(D) It shall be unlawful for any person to possess or distribute abortion-inducing drugs in the city of Edinburg, Texas.

(E) No provision of this section may be construed to prohibit any action which occurs outside of the jurisdiction of the city of Edinburg, Texas.

(F) No provision of this section 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, or by Article 1, Section 8 of the Texas Constitution.

(G) Under no circumstance may the mother of the unborn child that has been aborted, or the pregnant woman who seeks to abort her unborn child, be subject to prosecution or penalty under this section.

(H) For purposes of this section, the following definitions shall apply:

- (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, and it does not include Plan B, morning-after pills, or emergency contraception. 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) “Unborn child” means a natural person from the moment of conception who has not yet left the womb.

(3) “Abortion-inducing drugs” includes mifepristone, misoprostol, and any drug or medication that is used to terminate the life of an unborn child. The term does not include birth-control devices or oral contraceptives, and it does not include Plan B, morning-after pills, or emergency contraception. The term also does not include drugs or medications that are possessed or distributed for a purpose that does not include the termination of a pregnancy.

(I) 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, the provisions and applications of this section shall be severable as follows:

(1) It is the intent of the city council that every provision, subsection, sentence, clause, phrase, or word in this section, and every application of the provisions in this section, are severable from each other. If any application of any provision in this section 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 section 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 section 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 applications 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 section's application do not present an undue burden. The city council further declares that it would have enacted this section, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this section, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this section were to be declared unconstitutional or to represent an undue burden.

(2) If any court declares or finds a provision in this section facially unconstitutional, when there are discrete applications of that provision that can be enforced against a person, group of persons, or circumstances without violating the Constitution, then those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the city council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the Constitution.

(3) If any provision of this section 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 Subsections (I)(1) and (I)(2).

(4) No court may decline to enforce the severability requirements in Subsections (I)(1), (I)(2), and (I)(3) 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 locality or government 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 an executive official not to enforce a duly enacted statute or ordinance in a limited and defined set of circumstances.

(5) If any federal or state court ignores or declines to enforce the requirements of Subsections (I)(1), (I)(2), (I)(3), or (I)(4), or holds a

provision of this section invalid or unconstitutional on its face after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), (I)(3) and (I)(4), for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of this section that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of this section 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 section 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 this section is overruled, vacated, or reversed.

(6) The Mayor must issue the saving construction described in Subsection (I)(5) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this section after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), (I)(3), and (I)(4). If the Mayor fails to issue the saving construction required by Subsections (I)(5) 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 Subsections (I)(1), (I)(2), (I)(3), and (I)(4), 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 Subsection (I)(5).

(J) Whoever violates this section 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.

(K) Neither the City of Edinburg, 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 130.05(J) unless and until:

(1) 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

(2) 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 this section will not impose an “undue burden” on women seeking abortions; or

(3) 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 this section lacks third-party standing to assert the rights of women seeking abortions in court.

Provided, that the penalty provided in Section 130.05(J) 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.

(L) The non-imposition of the penalties described in Section 130.05(J) does not in any way legalize the conduct that has been outlawed by this section, and it does not in any way limit or affect the availability of the private-enforcement remedies established in Section 130.07, or the criminal penalties for abortion set forth in article 4512.1 of the Revised Civil Statutes and sections 1.07 and 19.02(b) of the Texas Penal Code. 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.

(M) Mistake of law shall not be a defense to the penalty established Section 130.05(J).

Sec. 130.06. Abortions Performed in Violation of Texas Law.

(A) It is the policy of the city of Edinburg to ensure that the Texas abortion laws are enforced to the maximum possible extent consistent with the Constitution and existing Supreme Court doctrine.

(B) Except as provided by subsection (D), it shall be unlawful for any person to perform an abortion in violation of any statute enacted by the Texas legislature, including article 4512.1 of the Revised Civil Statutes, as well as sections 171.0031(a)(1) and 245.010(a) of the Texas Health & Safety Code.

(C) Except as provided by subsection (D), it shall be unlawful for any person to knowingly aid or abet an abortion performed in violation of any statute enacted by the Texas legislature, including article 4512.1 of the Revised Civil Statutes, as well as sections 171.0031(a)(1) and 245.010(a) of the Texas Health & Safety Code. The prohibition in this subsection includes, but is not limited to:

- (1) Knowingly providing transportation to or from an abortion provider;
- (2) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;
- (3) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;
- (4) Providing or arranging for insurance coverage of an abortion;
- (5) Providing “abortion doula” services;
- (6) Coercing a pregnant mother to have an abortion against her will; and
- (7) Engaging in conduct that makes one an accomplice to abortion under section 7.02 of the Texas Penal Code.

This subsection may not be construed to impose civil or criminal liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Article 1, Section 8 of the Texas Constitution.

(D) Until the Supreme Court of the United States overrules *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992), the prohibitions in subsections (B) and (C) may be enforced only against:

- (1) Persons who lack third-party standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the Supreme Court of the United States; or
- (2) Persons for whom prosecution and punishment will not impose an undue burden on women seeking abortions.

(E) A person who violates this section may assert an affirmative defense if:

(1) the person has standing to assert the third-party rights of a woman or group of women seeking an abortion under the tests for third-party standing established by the Supreme Court of the United States; and

(2) the person demonstrates that his prosecution or punishment will impose an undue burden on that woman or that group of women seeking an abortion. A defendant does not establish an “undue burden” under this subsection merely by demonstrating that the imposition of civil or criminal liability will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion;

(F) The affirmative defense under Subsection (E) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

(G) Nothing in this section shall in any way limit or preclude a defendant from asserting his or her own constitutional rights as a defense to civil or criminal liability, and a defendant is not liable under this section for any exercise of state or federal constitutional rights that belong to the defendant personally.

(H) Under no circumstance may the woman upon whom the unlawful abortion was performed, or the pregnant woman who seeks to abort her unborn child in violation of Texas law, be subject to prosecution or penalty under this section.

(I) 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, the provisions and applications of this section shall be severable as follows:

(1) It is the intent of the city council that every provision, subsection, sentence, clause, phrase, or word in this section, and every application of the provisions in this section, are severable from each other. If any application of any provision in this section 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 section 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 section 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 applications 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 section's application do not present an undue burden. The city council further declares that it would have enacted this section, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this section, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this section were to be declared unconstitutional or to represent an undue burden.

(2) If any court declares or finds a provision in this section facially unconstitutional, when there are discrete applications of that provision that can be enforced against a person, group of persons, or circumstances without violating the Constitution, then those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the city council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the Constitution.

(3) If any provision of this section 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 Subsections (I)(1) and (I)(2).

(4) No court may decline to enforce the severability requirements in Subsections (I)(1), (I)(2), and (I)(3) 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 locality or government 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 an executive official not to enforce a duly enacted statute or ordinance in a limited and defined set of circumstances.

(5) If any federal or state court ignores or declines to enforce the requirements of Subsections (I)(1), (I)(2), (I)(3), or (I)(4), or holds a provision of this section invalid or unconstitutional on its face after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), (I)(3), and (I)(4), for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of this section that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of this section 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 section 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 this section is overruled, vacated, or reversed.

(6) The Mayor must issue the saving construction described in Subsection (I)(5) within 20 days after a judicial ruling that declares invalid or enjoins the enforcement of a provision of this section after failing to enforce the severability requirements of Subsections (I)(1), (I)(2), (I)(3), and (I)(4). If the Mayor fails to issue the saving construction required by Subsections (I)(5) 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 Subsections (I)(1), (I)(2), (I)(3), and (I)(4), 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 Subsection (I)(5).

(J) Whoever violates this section 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.

Sec. 130.07. Private Right of Action.

(A) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action in state court against any person who violates or intends to violate section 130.05 or section 130.06.

(B) If a claimant prevails in an action brought under this section, the court shall award:

- (1) injunctive relief sufficient to prevent the defendant from violating this section 130.05 or section 130.06 in the future;
- (2) statutory damages in an amount of not less than \$10,000 for each violation of section 130.05 or section 130.06 that the defendant committed; and
- (3) costs and attorney's fees.

(C) Notwithstanding Subsection (B), a court may not award relief under this section if the defendant demonstrates that the defendant previously paid statutory damages in a previous action for the particular conduct that violated section 130.05 or section 130.06.

(D) There is no statute of limitations for an action brought under this section.

(E) The following are not a defense to an action brought under this section:

- (1) ignorance or mistake of law;
- (2) a defendant's belief that the requirements of this section, or the requirements of section 130.05 or section 130.06, are unconstitutional or were unconstitutional;
- (3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates section 130.05 or section 130.06;
- (4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
- (5) nonmutual issue preclusion or nonmutual claim preclusion;
- (6) the consent of the unborn child's mother to the abortion; or
- (7) any claim that the enforcement of section 130.05 through 130.08 or the imposition of civil liability against the defendant will violate the

constitutional rights of third parties, except as provided by section 130.08.

(F) An action under this section must be brought in state court and not in the municipal courts of Edinburg;

(G) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Article 1, Section 8 of the Texas Constitution;

(H) Neither the city of Edinburg, nor any state or local official may intervene in an action brought under this section. This subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

(I) A civil action under this section may not be brought by any person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other unlawful act.

(J) Under no circumstance may a civil action under this section be brought against the mother of the unborn child that has been aborted, or the pregnant woman who seeks to abort her unborn child.

(K) The private civil-enforcement suits described in this section may be brought against any person, corporation, or entity that commits an unlawful act described in Section 130.05 and 130.06 on or after 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 limits the authority of states and municipalities to punish those who violate abortion prohibitions.

(L) The severability requirements that appear in section 130.05(I) and section 130.06(I) are fully applicable to this section as well.

Sec. 130.08. Civil Liability: Undue Burden Defense.

(A) A defendant against whom an action is brought under Section 130.07 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

(1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party

rights of women seeking an abortion in state court as a matter of federal constitutional law; or

- (2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.

(B) A defendant in an action brought under Section 130.07 may assert an affirmative defense to liability under this section if:

- (1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (A); and
- (2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

(C) A court may not find an undue burden under Subsection (B) unless the defendant introduces evidence proving that:

- (1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or
- (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

(D) A defendant may not establish an undue burden under this section by:

- (1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or
- (2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

(E) The affirmative defense under Subsection (B) is not available if the United States Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 130.07 occurred before the Supreme Court overruled either of those decisions.

(F) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 130.07, and a court may not award relief under Section

130.07 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

(G) The severability requirements that appear in section 130.05(I) and section 130.06(I) are fully applicable to this section as well.

D. EFFECTIVE DATE

This ordinance shall go into immediate effect upon a majority vote within the Edinburg, Texas City Commission meeting.

PASSED, ADOPTED, SIGNED and APPROVED,

Mayor of the City of Edinburg, Texas

City Secretary of the City of Edinburg, Texas

FURTHER ATTESTED BY “WE THE PEOPLE,” THE CITIZENS and WITNESSES TO THIS PROCLAMATION, THIS _____ DAY OF _____, THE YEAR OF OUR LORD _____.

WITNESS: _____

WITNESS: _____