

ORDINANCE NO. 2022-O-159

AN ORDINANCE OUTLAWING ABORTION, DECLARING ATHENS 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 OF ATHENS, TEXAS THAT:

A. FINDINGS

The City of Athens finds that:

- (1) Curtis Boyd, a notorious illegal abortionist during the 1960s and early 1970s, performed abortions in Athens, Texas, when abortion was a criminal offense in Texas and in most of the United States;
- (2) The City Council is appalled that these violent and criminal acts occurred within city boundaries;
- (3) Curtis Boyd openly boasts about the illegal abortions that he performed in Athens, Texas, see <https://bit.ly/37YMUNr>;
- (4) The City Council of Athens, Texas, is determined to ensure that these murderous acts never again occur within city boundaries;
- (5) 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 defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”
- (6) Human life begins at conception.
- (7) Abortion is a murderous act of violence that purposefully and knowingly terminates an unborn human life.
- (8) Unborn human beings are entitled to the full and equal protection of the laws that prohibit violence against other human beings.
- (9) The State of Texas has never repealed its pre-*Roe v. Wade* statutes that outlaw and criminalize abortion unless the mother’s life is in danger.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.”).
- (10) 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 *See* Senate Bill 8, 87th Leg., § 2 (2021) (“The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion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.”).

(11) 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).

(12) 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.

(13) 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)).

(14) The Supreme Court’s pronouncements in *Roe v. Wade* and subsequent cases may temporarily 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 defined as a criminal act under Texas law.

(15) 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).

(16) 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.

(17) The Texas abortion laws are severable in each of their discrete applications, and they are severable as applied to each individual person, group of persons, or circumstances. *See* Tex. Gov’t Code § 311.036(c) (“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.

(18) The City of Athens finds it necessary to supplement the existing state-law prohibitions on abortion 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.

(19) The law of Texas explicitly 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* Tex. Gov't Code § 311.036(b) (“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.”).

(20) To protect the health and welfare of all residents within the City of Athens, 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 Athens, 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, articles 4512.1 – 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 article 4512.2 of the Revised Civil Statutes and

section 7.02 of the Texas Penal Code, unless the abortion is procured or attempted by medical advice for the purpose of saving the life of the mother.

(6) The City of Athens urges the district attorney of Henderson 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 of Athens urges all of its citizens to regard those who perform or assist elective abortion in Texas 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

Chapter 14 of the Athens Code of Ordinances is amended by adding Article 14.26 to read as follows:

ARTICLE 14.26 ABORTION

Sec. 14.26.001. Definitions

(a) For the purposes of this chapter, 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 completely 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.

Sec. 14.26.002. Abortion Prohibited

(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 Athens, Texas.

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

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

(i) Neither the City of Athens, 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 Subsection (h) 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 Subsection (h) 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 Subsection (h) lacks third-party standing to assert the rights of women seeking abortions in court.

(j) The penalty provided in Subsection (h) may not be imposed or threatened against any individual or entity if a previous decision of the Supreme Court of the United States established that the conduct of that individual or entity was constitutionally protected at the time it occurred.

(k) The non-imposition of the penalties described in Subsection (h) 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 14.26.006, 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.

(l) Mistake of law shall not be a defense to the penalty established in Subsection (h).

Sec. 14.26.003. Abortion Coverage Prohibited in Employer-Provided Health Insurance or Benefits

(a) It shall be unlawful for any employer in the city of Athens, Texas, and for any person acting on that employer's behalf, to offer, provide, or arrange for coverage of abortion in any health-insurance policy or plan, flexible spending account, health savings account, or any other benefit provided to its employees, except for abortions performed 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.

(b) 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.

(c) Any official of the city of Athens, Texas, who becomes aware that an employer is aiding or abetting abortions by providing coverage of abortions in an employee-benefits package shall report that employer to the district attorney of Henderson County, and to all other district attorneys with jurisdiction over that employer, for criminal prosecution under article 4512.2 of the Revised Civil Statutes and section 7.02 of the Texas Penal Code.

Sec. 14.26.004. Abortions Performed Outside Athens, Texas

(a) It is the policy of Athens, Texas to protect its unborn residents from individuals and organizations that aid or abet the killing of unborn children, and to protect the unborn from those who seek to kill or otherwise harm them, to the maximum extent permissible under state and federal law.

(b) Except as provided by Subsections (c), (d), (e), and (f), it shall be unlawful for any person to knowingly aid or abet an abortion performed on a resident of Athens, Texas, or to attempt to aid or abet such an abortion, regardless of where the abortion is or will be performed. The prohibition in this subsection includes, but is not limited to:

- (1) Offering or 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) Offering or providing money with the knowledge that it will be used to pay for, offset, or reimburse the costs of an abortion or the costs associated with procuring an abortion;
- (4) Providing or arranging for insurance coverage of an abortion;
- (5) Offering or providing "abortion doula" services;
- (6) Providing referrals to an abortion provider;
- (7) Coercing or pressuring a pregnant mother to have an abortion; and
- (8) Engaging in any of the conduct that would make one an accomplice to abortion under section 7.02 of the Texas Penal Code.

(c) This section 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) This section may not be construed to prohibit conduct that Athens, Texas, is forbidden to prohibit or regulate under state or federal law.

(e) It shall be an affirmative defense if the unlawful acts described in Subsection (b) were taken 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.

(f) Under no circumstance may the woman upon whom the abortion was performed, or the pregnant woman who seeks to abort her unborn child, be subject to prosecution or penalty under this section.

(g) 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.

(h) Neither the City of Athens, 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 Subsection (g) 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 Subsection (g) 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 Subsection (g) lacks third-party standing to assert the rights of women seeking abortions in court.

(i) The penalty provided in Subsection (g) may not be imposed or threatened against any individual or entity if a previous decision of the Supreme Court of the United States established that the conduct of that individual or entity was constitutionally protected at the time it occurred.

(j) The non-imposition of the penalties described in Subsection (g) 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 14.26.006. 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.

(k) Mistake of law shall not be a defense to the penalty established in Subsection (g).

(l) Any official of the city of Athens, Texas, who becomes aware that an individual or organization is aiding or abetting abortions performed in Texas by engaging in the conduct described in subsection (b) shall report that individual or organization to the district attorney of Henderson County, or to the district attorneys with jurisdiction over that individual or organization, for criminal prosecution under article 4512.2 of the Revised Civil Statutes and section 7.02 of the Texas Penal Code.

Sec. 14.26.005. Abortions Performed in Violation of Texas Law

(a) It is the policy of the city of Athens 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 subsections (d), (e), (f), and (g), 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 subsections (d), (e), (f), and (g), 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) Offering or 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) Offering or providing money with the knowledge that it will be used to pay for, offset, or reimburse the costs of an abortion or the costs associated with procuring an abortion;
- (4) Providing or arranging for insurance coverage of an abortion;
- (5) Offering or providing “abortion doula” services;
- (6) Providing referrals to an abortion provider;
- (7) Coercing or pressuring a pregnant mother to have an abortion; and

(8) Engaging in conduct that makes one an accomplice to abortion under section 7.02 of the Texas Penal Code.

(d) 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.

(e) This section may not be construed to prohibit conduct that Athens, Texas, is forbidden to prohibit or regulate under state or federal law.

(f) It shall be an affirmative defense if the unlawful acts described in Subsection (b) were taken 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.

(g) Under no circumstance may the woman upon whom the abortion was performed, or the pregnant woman who seeks to abort her unborn child, be subject to prosecution or penalty under this section.

(h) 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.

(i) Neither the City of Athens, 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 Subsection (h) 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 Subsection (h) 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 Subsection (h) lacks third-party standing to assert the rights of women seeking abortions in court.

(j) The penalty provided in Subsection (h) may not be imposed or threatened against any individual or entity if a previous decision of the Supreme Court of the United States

established that the conduct of that individual or entity was constitutionally protected at the time it occurred.

(k) The non-imposition of the penalties described in Subsection (h) 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 14.26.006. 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.

(l) Mistake of law shall not be a defense to the penalty established Subsection (h).

(m) Any official of the city of Athens, Texas, who becomes aware that an individual or organization is performing or aiding or abetting abortions in violation of any statute enacted by the Texas legislature, including articles 4512.1 and 4512.2 of the Revised Civil Statutes, as well as sections 171.0031(a)(1) and 245.010(a) of the Texas Health & Safety Code, shall report that individual or organization to the district attorney of Henderson County, or to the district attorneys with jurisdiction over that individual or organization, for criminal prosecution under articles 4512.1 and 4512.2 of the Revised Civil Statutes and section 7.02 of the Texas Penal Code.

Sec. 14.26.006. 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 sections 14.26.002, 14.26.003, 14.26.004, or 14.26.005.

(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 section 14.26.002, 14.26.003, 14.26.004, or 14.26.005 in the future;

(2) statutory damages in an amount of not less than \$10,000 for each violation of section 14.26.002, 14.26.003, 14.26.004, or 14.26.005 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 14.26.002, 14.26.003, 14.26.004, or 14.26.005.

(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 sections 14.26.002, 14.26.003, 14.26.004, or 14.26.005, 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 sections 14.26.002, 14.26.003, 14.26.004, or 14.26.005;
- (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 sections 14.26.002, 14.26.003, 14.26.004, or 14.26.005 or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by section 14.26.007.
- (f) An action under this section must be brought in state court and not in the local or municipal courts;
- (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 Athens, Texas, nor any state or local official may intervene in an action brought under this section. This subsection does not prohibit a person or entity 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.

Sec. 14.26.007. Civil Liability: Undue Burden Defense

- (a) A defendant against whom an action is brought under Section 14.26.006 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 or the Supreme Court of Texas 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 or state 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 14.26.006 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, or otherwise violate the rights of women seeking abortions under the United States Constitution.

(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).

(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 14.26.006, and a court may not award relief under Section 14.26.006 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.

Sec. 14.26.008. Severability

(a) 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 Supreme Court of the

United States held that an explicit statement of legislative intent is controlling, the provisions and applications of this chapter shall be severable as follows:

- (1) It is the intent of the city council that every section, provision, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other. If any application of any provision in this chapter 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 the provisions in this chapter 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 chapter 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 a provision limited to the persons, group of persons, or circumstances for which the provision's application do not present an undue burden. The city council further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this chapter were to be declared unconstitutional or to represent an undue burden.
- (2) If any court declares or finds a provision in this chapter 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 a matter of city law, 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 chapter 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 (a)(1) and (a)(2), and the provision shall be interpreted, as a matter of city law, as if the city council had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application do not present constitutional vagueness problems.
- (4) No court may decline to enforce the severability requirements in Subsections (a)(1), (a)(2), and (a)(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 (a)(1), (a)(2), (a)(3), or (a)(4), or holds a provision of this chapter invalid or unconstitutional on its face after failing to enforce the severability requirements of Subsections (a)(1), (a)(2), (a)(3) and (a)(4), for any reason whatsoever, then the Mayor shall hold delegated authority to issue a saving construction of this chapter that avoids the constitutional problems or other problems identified by the federal or state court, while enforcing the provisions of this chapter 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 chapter 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 chapter is overruled, vacated, or reversed.

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

D. EFFECTIVE DATE

This ordinance shall go into immediate effect upon (1) a majority vote to adopt the ordinance within the Athens, Texas City Council meeting or through (2) a citywide election by which the citizens of Athens, Texas adopt this proposed ordinance.

PASSED, APPROVED and ADOPTED this the **8th** day of **November 2022** by the electors of the City of Athens by a vote of 1,582 in favor and 1,160 opposed) at a Special City Election brought forward by a citizen-led initiative.

November 17, 2022, Special City Council Meeting – Resolution No. 2022-R-158 canvassing the returns and declaring the results of the Special City Election held November 8, 2022.

Toni Clay, Mayor

ATTEST:

Bonnie Hambrick, City Secretary