KEN PAXTON
ATTORNEY GENERAL OF TEXAS

JUDD E. STONE
Solicitor General

(512) 936-2834
Judd.Stone@oag.texas.gov

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Via E-mail

The Honorable James Wesley Hendrix
United States District Court for the
Northern District of Texas
1205 Texas Ave., Room C-210
Lubbock, Texas 79401

Re: ***Planned Parenthood of Greater Texas Surgical Health Services, et al. v. City of Lubbock, Texas*, No. 5:21-CV-114**

Judge Hendrix:

Thank you for the invitation to express the Office of the Attorney General's views on the questions of Texas law presented by Planned Parenthood's second and third claims in this case. In our view, Planned Parenthood has not shown that Lubbock's ordinance is inconsistent with state law. To the extent that the Court finds state law to be ambiguous regarding the merits of Planned Parenthood's claims, the Court should abstain from exercising jurisdiction.

I. SB 8 clarifies that Lubbock's ordinance is not preempted.

As an initial matter, the Texas Legislature has clarified that state law does not prevent cities like Lubbock from imposing regulations like those that Planned Parenthood challenges. Recently enacted Senate Bill 8 ("SB 8") provides:

> 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.

ECF 42-1 at 16.

The thrust of Planned Parenthood's allegations is that Lubbock's ordinance is preempted because it is more "stringent" than state law. Consequently, SB 8 will control Planned Parenthood's claims following its effective date of September 1, 2021. Planned Parenthood has not identified a statute that "explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion"—let alone one that prohibits the type of regulations at issue here. *Id.* Planned Parenthood's claims therefore fail on the merits no later than September 1, 2021.

SB 8 is relevant even before its effective date. Under Texas law, when a later-enacted statute clarifies the meaning of earlier statutes, it is "highly persuasive," even if it does not technically control. *Calvert v. Marathon Oil Co.*, 389 S.W.2d 153, 158 (Tex. App.—Austin 1965, writ ref'd n.r.e.); *see also Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 n.4 (Tex. 1991).

This section of SB 8 does not alter state abortion regulations; instead, it guarantees local authority in a particular regard—the regulation of abortion—unless another state law "explicitly states" that a political subdivision is prohibited from regulating or prohibiting abortion in a specific way. ECF 42-1 at 16. Thus, even if it "is not [yet] controlling," SB 8 is "highly persuasive" evidence that pre-existing statutes should only be understood as preempting local regulation or prohibition of abortion to the extent they explicitly do so. *Calvert*, 389 S.W.2d at 158. Planned Parenthood's claim to the contrary is without merit.

II. Planned Parenthood cannot plead an ultra vires claim against Lubbock.

Count Two of Planned Parenthood's complaint—what it calls a "State Law—Ultra Vires" claim, ECF 1 ¶¶ 42-43—fails for at least three independent reasons.

First, the claim falters from the start because Planned Parenthood has sued a governmental entity (*i.e.*, the City of Lubbock). *Id.* ¶ 13. But "suits complaining of ultra vires actions may not be brought against a governmental unit, but must be brought against the allegedly responsible government actor in his official capacity." *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 76 (Tex. 2015); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

Second, Planned Parenthood argues that, as a general matter, "[t]he Texas Local Government Code permits municipalities to adopt ordinances, but nowhere

specifies a power to use ordinances to create civil liability between private parties." ECF 13 at 19–20. Here, Planned Parenthood has the standard backward.

Lubbock is a "home rule city." *See Wilson v. Andrews*, 10 S.W.3d 663, 666 (Tex. 1999) (footnote omitted). Home-rule cities may exercise legislative power generally, subject only to specific limitations imposed by the Legislature. *Republic Waste Services of Tex., Ltd. v. Tex. Disposal Sys., Inc.*, 848 F.3d 342, 344-45 (5th Cir. 2016).[1] Thus, Lubbock does not need to identify a state law authorizing the ordinance; rather, Planned Parenthood must identify a state law prohibiting the ordinance.

Planned Parenthood next complains that "although the Code authorizes 'a municipality' to 'enforce each . . . ordinance . . . and . . . punish a violation' thereof, it nowhere authorizes municipalities to delegate enforcement to private parties through civil actions." ECF 13 at 20. That theory fails for the same reason. As explained above, Lubbock need not identify a provision of the code that "authorizes" its ordinance. *See also* Tex. Loc. Gov't Code § 51.072(b).

Third, at least two key premises of Planned Parenthood's argument are wrong. Citing *City of Corpus Christi v. Texas Driverless Co.*, 190 S.W.2d 484 (Tex. 1945), Planned Parenthood principally argues that "'only the [state] legislature is authorized to change the common law' to expand 'tort' liability." ECF 13 at 19; *see also* ECF 1 ¶ 42. But the opinion Planned Parenthood quotes merely described a litigant's argument. Indeed, the *Texas Driverless Co.* court expressly concluded that it "need not" decide the city's authority to expand tort liability beyond that provided at common law "since the questioned ordinance has not at all undertaken to enlarge the common law liability of the owners of rented automobiles." 190 S.W.2d at 485. At most, *Texas Driverless Co.* stands for the proposition that both sides in this case have respectable arguments to make about the scope of a city's authority to expand tort liability.

In any event, *Texas Driverless Co.* is somewhat beside the point. Lubbock's ordinance does not displace the common-law treatment of abortion. In the light of the state statutes governing abortion in Texas, Planned Parenthood does not argue that common-law rules apply today. And if the common law does not apply in this area, the ordinance by necessity does not displace it.

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[1] There are exceptions to this doctrine, but none are pertinent here.

Equally off-base is Planned Parenthood's argument that an authorization "to 'enforce'" cannot delegate the power to create a private cause of action. ECF 13 at 20. The most famous authorization "to enforce"—Congress's power "to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment, *see* U.S. Const. amend. XIV, § 5—authorized the very private cause of action on which Planned Parenthood relies for its federal claim: 42 U.S.C. § 1983. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); ECF 1 ¶ 6.

III. There is no inconsistency between state and local abortion laws.

Planned Parenthood's third claim also fails because it has not pointed to any state law with which Lubbock's ordinance is inconsistent. "Under article XI, section 5 of the Texas Constitution, home-rule cities have broad discretionary powers provided that no ordinance 'shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'" *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990). Texas courts therefore seek to reconcile allegedly conflicting state and local laws. *Id.* In Count Three, Planned Parenthood advances two preemption theories. *See* ECF 1 ¶¶ 44–47. Even without SB 8, both preemption theories would fail because Lubbock's ordinance is entirely consistent with state law.

First, Planned Parenthood points to Texas Penal Code section 1.08, which provides that "[n]o governmental subdivision or agency may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty." *See* ECF 13 at 21. Lubbock's ordinance does not make any conduct "subject to a criminal penalty." At the outset, the ordinance only provides for a financial penalty for its violation, ECF 1-1 at 4 (citing Tex. Loc. Gov't Code § 54.001(b)(1)). And it prohibits enforcement by any public actor. *Id.* at 4–5. Given that only public prosecutors may enforce criminal laws, this prohibition precludes the ordinance from subjecting any conduct to a criminal penalty.

Second, Planned Parenthood points to Texas's wrongful-death statute, which does not prohibit abortion. *See* ECF 13 at 21–22. But the omission of abortion from a particular state statute does not amount to precluding local regulation of abortion altogether. The Legislature could have easily prohibited local regulations on abortion; it did not. As Planned Parenthood does not claim that the wrongful-death statute field-preempts local abortion ordinances, the statute should not be construed

to prevent interstitial local regulations. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378–79 (1992) ("To ensure that the States would not undo federal deregulation with regulation of their own, the [Airline Deregulation Act] included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.").

In sum, "[a] reasonable construction of" both the state laws Planned Parenthood cites and Lubbock's ordinance "allows both to be given effect because they are not inconsistent." *Responsible Dog Owners of Tex.*, 794 S.W.2d at 19. It is easy to simultaneously comply with a state law that exempts abortions from its requirements and a local ordinance regulating abortions.[2] Because Planned Parenthood can follow Lubbock's ordinance while complying with state law, its third claim also fails.

IV. If the Court does not reject Planned Parenthood's claims on the merits, it should decline supplemental jurisdiction and abstain.

The Office of the Attorney General believes that state law is clear enough for this Court to reject Planned Parenthood's claims on the merits. But to the extent the Court finds state law ambiguous, it should abstain from resolving these state-law questions.

In this case, analyzing the validity of Lubbock's ordinance under state law requires consideration of an ordinance (Lubbock's) and a state law (SB 8), neither of which have been interpreted in Texas state courts. If the Court decides that Planned Parenthood's "claim raises a novel or complex issue of State law," it can decline supplemental jurisdiction. 28 U.S.C. § 1367(c)(1).

The potential complexity of Planned Parenthood's state-law claims would also support abstention for its federal-law claim. In *Railroad Commission of Texas v. Pullman Co.*, the plaintiffs "assailed [a state agency's] order as unauthorized by Texas law as well as violative of the Equal Protection, the Due Process and the

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[2] Preemption can also occur where a local law prohibits something that state law expressly authorizes. Even though it is technically possible to comply with both provisions, a state law expressly authorizing conduct preempts local laws that sharply curtail or prohibit it precisely because the state law expressly allows conduct that the local law does not. That situation is not implicated here.

Commerce Clauses of the Constitution." 312 U.S. 496, 498 (1941). The Court abstained for two reasons.

First, whether Texas law authorized the agency's order was "doubtful," *id.* at 499, and resolution of that doubtful matter belonged to the state courts, not federal courts. "[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast [of state law] rather than a determination." *Id.* "The last word on the meaning of [the Texas statute], and therefore the last word on the statutory authority of the [state agency] in this case, belongs" not to the federal courts "but to the supreme court of Texas." *Id.* at 499–500.

Second, resolution of the state-law issue could have obviated the need to resolve the federal constitutional question. "If there was no warrant in state law for the [state agency's] assumption of authority there is an end of the litigation; the constitutional issue does not arise." *Id.* at 501; *see also Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980).

Pullman abstention is appropriate here. Planned Parenthood claims that Lubbock's ordinance is "unauthorized by Texas law." *Pullman*, 312 U.S. at 498; *see* ECF 13 at 19 (arguing that "the City has no authority under Texas law to create civil liability between private parties"). "If there [is] no warrant in state law for" Lubbock's ordinance, "there is an end of the litigation; the constitutional issue does not arise." 312 U.S. at 501.

Planned Parenthood contends that *Pullman* abstention cannot be based on the fact that "the state law challenged in the federal case might be invalid under *state* law." ECF 45 at 2. But that contradicts *Pullman* itself. *See Pullman*, 312 U.S. at 498 (noting the state-law issue was whether a state agency's order was "unauthorized by Texas law").

Finally, Planned Parenthood relies on several cases in warning that abstaining here would extend *Pullman* beyond its limits. Planned Parenthood is mistaken. It is true that abstention may not be appropriate when the only state-law issue is the validity of a statute under a "broad" state constitutional provision, such as one guaranteeing equal protection or due process. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 598 (1976) (rejecting abstention where the state-law issue was that the challenged law "might conflict with the cited broad and sweeping [state] constitutional provisions" prohibiting discrimination and requiring

equal protection); *Chancery Clerk of Chickasaw Cty. v. Wallace*, 646 F.2d 151, 154 n.7 (5th Cir. 1981) (rejecting abstention based on "the possibility that a Mississippi court will find a conflict between the civil commitment scheme and the broad reach of the Mississippi constitution's due process clause"). But this case presents no such question, so *Pullman* abstention remains appropriate.

If my office can be of any further assistance, please do not hesitate to let me know. As always, my office would be happy to submit further briefing or present argument if the Court would find it useful.

Respectfully submitted.

/s/ Judd E. Stone II
JUDD E. STONE II
Solicitor General

cc: Counsel of Record (via e-mail)