November 17th, 2020

The Lubbock City Council has been considering an ordinance that would outlaw abortion within city limits. The city asked the law firm of Olson & Olson to evaluate this proposed ordinance, and Olson & Olson recently advised the city that the ordinance would violate state law.

As licensed attorneys in Texas, we have reviewed the proposed ordinance along with the analysis from Olson & Olson's that appeared in the city's press release. We conclude that the ordinance is entirely lawful and that Olson & Olson's legal attacks on the ordinance are baseless. The city of Lubbock is fully within its rights to regulate or outlaw abortions that occur within city limits, and the city council should reject the biased and misinformed advice from Olson & Olson.

Olson & Olson first claims that the proposed ordinance "if enacted, would be void because it is contrary to Texas Law." That is false; there is no Texas law that prevents municipalities from regulating or prohibiting abortion, and the analysis posted on the city's website does not identify or cite any such Texas law.

More importantly, the law of Texas already outlaws abortion, as noted in the proposed ordinance. The Texas legislature has never repealed its pre–*Roe v. Wade* statutes that criminalize all abortions unless the mother's life is in danger, and those statutes are still codified at articles 4512.1 through 4512.6 of the Revised Civil Statutes. So abortion remains a criminal offense under state law, even though district attorneys have halted the prosecution of abortion providers in response to *Roe v. Wade*. *Roe* does not (and cannot) change the fact that the law of Texas continues to define abortion as a crime. *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, even though the government may no longer constitutionally enforce it.").

Second, Olson & Olson claims that "The Texas Constitution prohibits a city from passing an ordinance 'inconsistent with the laws of the State.' Tex. Const. art. XI, § 5. Ordinances that conflict with State laws are void."

That is a misquotation of the state constitution. The relevant provision prohibits municipalities from enacting ordinances "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." The "general laws enacted by the Legislature of this State" include the pre-*Roe* statutes outlawing abortion, which have never been repealed, and which Olson & Olson refuses to acknowledge. *See* West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974).

Third, Olson & Olson claims that "The Proposed Ordinance conflicts with State law because it creates offenses for some actions that are permitted or licensed by the State. This is prohibited by the Texas Constitution." There is nothing in the state constitution that prevents a municipality from outlawing or regulating an activity that is subject to state licensing. The state's licensing requirements impose a separate and independent prohibition on abortions performed by entities that have not obtained a license from the state. That does not purport to preempt local ordinances that regulate or outlaw abortion.

Fourth, Olson & Olson claims that "The Proposed Ordinance conflicts with State law because the State regulates abortions, including who may perform them, where they may be performed, and when they may be performed, and the Proposed Ordinance imposes additional regulations inconsistent with those State regulations." There is nothing in state law that prevents municipalities from imposing additional regulations on abortion beyond those that the state legislature has enacted, and the analysis on the city's website fails to identify any such law.

Finally, Mayor Pope and several city council members have been asserting that the proposed ordinance violates the federal Constitution, but they are mistaken. Abortion is not a constitutional right, and there is no language anywhere in the Constitution that even remotely suggests that anti-abortion laws are unconstitutional. Although the Supreme Court invented a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the Court's holding merely prevents states or localities from *enforcing* abortion bans until *Roe* is overruled. It does not prevent states or localities from *enacting* abortion bans, so long as the city's *enforcement* of its ban is delayed until the Supreme Court overrules *Roe*. The proposed ordinance is consistent with *Roe* because it specifically prohibits the city or its officials from enforcing the ordinance until they obtain a declaratory judgment from a court that the enforcement of the ordinance will comport with Supreme Court precedent. Instead, the ordinance allows the abortion ban to be enforced only through private citizen suits, and enforcement mechanisms of that sort will not expose the city to any liability. *See Okpalobi v. Foster*, 244 F.3d 405, 426–29 (5th Cir. 2001) (en banc).

If city council members decide to reject the proposed ordinance, they should do so only if they believe that the city of Lubbock will be better served by having Planned Parenthood performing abortions within the city limits. They should not reject the proposed ordinance on the belief that its enactment would somehow violate city law or the U.S. Constitution, and they should not use Olson & Olson's flawed and unsupported analysis as an excuse to oppose the ordinance.

Sincerely,

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