ATTORNEY-CLIENT PRIVILEGED MEMORANDUM

From: Olson & Olson LLP

To: Chad Weaver, City Attorney, City of Lubbock, Texas

Re: Proposed Ordinance Outlawing Abortion

This memorandum addresses the proposed ordinance outlawing abortion (the "Proposed Ordinance"). As explained below, it is our opinion that the Proposed Ordinance is void because it conflicts with, and therefore is preempted by, State law.

I. Background: Pre-1974 Texas statutes creating criminal offenses related to abortion.

The Texas Penal Code of 1925 addressed abortion in articles 1191 through 1194 and 1196.[1] Prior to 1974, the State law provided:

> Art. 1191. **Abortion**. – If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
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> Art. 1192. **Furnishing the means.** – Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1] Article 1195 was changed to article 4512.5 of the Revised Civil Statutes in 1973, and is sometimes listed with the abortion statutes. Technically, that article does not apply to abortion because it only applies to "a child in a state of being born." *See* A.G. Op. JH-0369 (1974) (Articles 1191, 1192, 1193, 1194 and 1196 are unconstitutional and no longer in effect; 1195 applies only to situations in which the victim is in the process of being born).

> Art. 1193. **Attempt at abortion.** – If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
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> Art. 1194. **Murder in producing abortion.** – If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.
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> ….
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> Art. 1196. **By medical advice**. – Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Act of February 6, 1925, 39th Leg., R.S. (1925 Texas Penal Code available electronically from Texas State Law Library, http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/).

In 1973, the Legislature re-codified the Penal Code. The new Penal Code did not repeal the articles relating to abortion. The legislation specifically stated that articles not repealed by that act were "transfer[red]" to the civil statutes "without reenactment and without altering the meaning or effect of the unrepealed articles." Act of May 28, 1973, 63rd Leg., R.S., ch. 399, § 5, Tex. Gen. Laws 883, 995. The act included a disposition table that specified articles 1191 through 1196 were transferred to the Revised Civil Statutes, articles 4512.1 to 4512.6. Articles 4512.1 through 4512.4 and 4512.6 will be referred to as the Abortion Statutes in this memorandum. Although the Legislature has not expressly repealed the Abortion Statutes, the text of these statutes is not provided on the Texas Legislature Online website (https://capitol.texas.gov/). Westlaw, an online legal research tool which

maintains a list of Texas Statutes, contains a notation that the Abortion Statutes are unconstitutional without the text of the statutes. As Attorney General Hill noted in 1974 immediately after *Roe v. Wade*, 410 U.S. 113 (1973) and its related cases, the State of Texas had no laws regulating abortion. A.G. Op. JH-0369 (1974).

II. The Proposed Ordinance's criminal provisions.

In the findings section, the Proposed Ordinance sets out the legal basis for the Proposed Ordinance. The two key premises, both faulty, underlying the Proposed Ordinance are that:

1) "[t]he State of Texas has never repealed its pre-*Roe v. Wade* statutes that outlaw and criminalize abortion …", *see* Proposed Ordinance, § A(1), (3); and

2) "[t]he Supreme Court's judgment in *Roe v. Wade* did not cancel or formally revoke the Texas statutes that outlaw and criminalize abortion …." *See* Proposed Ordinance, § A(4), (5).

In essence, the Proposed Ordinance draws a distinction between whether a State law has been formally repealed by the Texas Legislature, and whether the law can be enforced due to a court having found it unconstitutional. The assumption that the unrepealed statutes are still applicable and valid, but only unenforceable, is contrary to State law.

A. Validity of the pre-1974 criminal statutes concerning abortion.

The Abortion Statutes are not valid law and therefore do not support the Proposed Ordinance as set forth in the Findings sections of the Proposed Ordinance. The Texas Court of Criminal Appeals holds that a statute declared unconstitutional is of no force or effect.

> We have recognized that "an unconstitutional statute is void from its inception" and that "'when a statute is adjudged to be unconstitutional, it is as if it had never been'" and that such "an unconstitutional statute is stillborn[.]" *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988) (citing and quoting *Ex parte Bockhorn*, 62 Tex. Crim. 651, 138 S.W. 706, 707 (1911)). We have also said "that an unconstitutional statute in the criminal area is to be considered no statute at all." *Reyes*, 753 S.W.2d at 383 (citing *Hiett v. United States*, 415 F.2d 664, 666 (5th Cir. 1969), *cert. denied* 397 U.S. 936, 90 S. Ct. 941, 25 L. Ed.2d 117 (1970)).

Smith v. State, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015). In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held that the Abortion Statutes, articles 1191–1194 and 1196 of the former Texas Penal Code, were unconstitutional. *Roe v. Wade*, 410 U.S. at 164, 166. Therefore, according to the Texas Court of Criminal Appeals these statutes are void and treated as if they "had never been."

Although the Abortion Statutes were never repealed by the Texas Legislature, because they were found unconstitutional and void, they do not support the Proposed Ordinance. In particular, Findings (2) and (3) of the Proposed Ordinance assert that the pre-1974 Abortion Statutes are still valid. Because the Court of Criminal Appeals has held that an unconstitutional law is not a valid law, Findings (2) and (3) of the Proposed Ordinance, as well as other similar findings in the Proposed Ordinance, are incorrect. *See also* A.G. Op. JH-0369 (1974) (stating that, after *Roe v. Wade*, there were "no effective statutes of the State of Texas against abortion ….").

Similarly the Proposed Ordinance, in Findings (4) and (5), sets forth the legal contention that a court cannot "erase" a statute by finding it unconstitutional. Proposed Ordinance, Finding (4)–(5) (citing *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21

(Tex. 2017)). This again is not an accurate statement of the law. First, as noted above, the Texas Court of Criminal Appeals holds to the contrary. Second, in *Pidgeon v. Turner*, the Supreme Court of Texas did not announce a blanket rule. Rather, it was specifically addressing the United States Supreme Court opinion in *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). No Texas law was at issue in *Obergefell*, thus the Texas Supreme Court was correct when it stated that the Supreme Court did not "strike down" any Texas law.[2] In contrast, in *Roe v. Wade* (and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), below) the United States Supreme Court was specifically addressing Texas statutes and held that they were unconstitutional. Therefore, the statement in *Pidgeon v. Turner* could not be applied in a case where the United States Supreme Court did specifically hold Texas laws unconstitutional, as it did in *Roe v. Wade* and *Whole Woman's Health v. Hellerstedt*.

Finding (6) of the Proposed Ordinance is also contrary to Texas law. Finding (6) declares that the current Penal Code's definition of the crime of murder that

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[2] The other case cited in Finding (4), *Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019), cert. granted sub nom. *California v. Tex.*, 140 S. Ct. 1262, 206 L. Ed. 2d 253 (2020) and cert. granted sub nom. *Tex. v. California*, 140 S. Ct. 1262, 206 L. Ed. 2d 253 (2020), does not state a rule of law as set out in Finding (4). The Fifth Circuit did not hold that "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." *Tex. v. United States*, 945 F.3d at 396. Rather, the court parenthetically quoted a law review article and then specifically noted, "***If that is true***, then courts are speaking loosely when they state that they are 'invalidating' or 'striking down' a law."). *Id.* at 396 n.41 (emphasis added).

excludes "lawful medical procedures" does not apply because the Abortion Statutes necessarily mean that abortion is not a "lawful medical procedure." Because those statutes were declared unconstitutional, they are void as though they "had never been." *See Smith*, 463 S.W.3d at 895. Therefore, they do not prevent abortion from being a lawful medical procedure.

Further, Section 19.06(2) of the current Texas Penal Code specifically states that Chapter 19 of the Penal Code does not apply to conduct causing the death of an unborn child if the conduct was "a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure." Tex. Pen. Code Ann. § 19.06(2). In other words, the statute specifically addresses a medical abortion. Section 19.06 was added to the Penal Code along with a definition change to expand the term "individual" to cover "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." Tex. Pen. Code Ann. § 1.07(26) (added by Acts 2003, 78th Leg., ch. 822, § 2.02, eff. Sept. 1, 2003). The legislative history for those changes states, "Under current Texas law, a person cannot be prosecuted for criminal homicide, assault, or intoxication manslaughter of an unborn child, nor can a person be sued in a civil action for the wrongful death of an unborn child." Texas Bill Analysis, S.B. 319, 6/17/2003 Texas Senate Research Center 78th Leg. 2003 R.S. Therefore, the Legislature specifically addressed abortions, which would be unnecessary if the Abortion Statutes were still valid.

Finding (7) of the Proposed Ordinance is based upon a similar faulty premise to that underlying Finding (6). Finding (7) posits that Texas Health and Safety Code Sections 171.0031 and 245.010 are still valid or effective, but they cannot be enforced. However, in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), the United States Supreme Court specifically held these two statutes to be unconstitutional. Because these are civil statutes and not criminal statutes, the rule in *Smith* may not apply directly to those statutes. However, because the Proposed Ordinance uses these civil statutes as the basis to make otherwise lawful conduct a criminal offense, in our opinion a court would likely apply the Court of Criminal Appeals' precedent to find that the civil statutes are void just as if they never existed.

In conclusion, the Proposed Ordinance is based upon a faulty premise that the prior unconstitutional Abortion Statutes of the State of Texas are valid even though they are unenforceable.

B. The Proposed Ordinance is preempted (voided) by Texas law.

Regardless of whether the pre-1974 Abortion Statutes are valid, the Proposed Ordinance is void because it is preempted by Texas Law. A home-rule city has broad powers, but no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5. A city ordinance that conflicts with a State statute is unenforceable and void to the extent of such conflict.

Assuming, for the sake of argument, that the Abortion Statutes retained some validity, or that the Supreme Court overrules *Roe v. Wade* in the future, then the

Proposed Ordinance would be preempted, or void, under Texas law. In the current Texas Penal Code, the legislature has expressly limited the ability of a city, including the City of Lubbock, to enact ordinances concerning criminal conduct. Section 1.08 of the Penal Code, entitled "Preemption," provides:

> No 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.

Tex. Pen. Code Ann. § 1.08. "In accordance with this provision, a city cannot enact an ordinance proscribing the same conduct as is proscribed by the Penal Code." *City of Richardson v. Responsible Dog Owners of Tex.,* 794 S.W.2d 17, 17 (Tex. 1990). "[T]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted." *Id.* at 19. If there is no conflict between a State law and a city ordinance, the ordinance is not void. *Id.*

Whether the Proposed Ordinance is preempted (voided) by State law involves two issues: (1) does the Proposed Ordinance proscribe the "same conduct" as the State's penal laws and (2) does the Proposed Ordinance conflict with State law.

1. Do the Proposed Ordinance and State law involve the same conduct?

The Proposed Ordinance defines abortion as murder, relying on the pre-1974 Abortion Statutes and the current Penal Code provisions to do so. It is clear that the current Penal Code already specifically addresses murder, defining the scope of prohibited conduct, providing exceptions (e.g., Section 19.06(2) covering "lawful medical procedures"), and providing affirmative defenses. If the Abortion Statutes

are valid—and therefore except an abortion from the scope of a "lawful medical procedure" as suggested in Findings (2), (3), and (6) of the Proposed Ordinance—then the same conduct criminalized by the Proposed Ordinance is covered by the Penal Code offense of murder. Therefore, the Proposed Ordinance Section D(1) would be preempted because it would conflict with State law (an issue addressed below).

The current Texas Penal Code also defines when a person can be criminally responsible for "aiding" the commission of criminal conduct. *See* Tex. Penal Code Ann. §§ 7.01–.02. Therefore, Section D(2) making "aiding or abetting an abortion" a criminal act of the Proposed Ordinance would be preempted as well.

The Proposed Ordinance covers the same conduct as the Abortion Statutes, generally. Section B(1) defining abortion and Section D(1) making abortion unlawful are substantially similar to article 4512.1. Article 4512.6 provided an exception to the criminal conduct if it was performed pursuant to medical advice to save the life of the mother. Section (D)(3) of the Proposed Ordinance covers similar situations, although worded differently and although it classifies the life-saving conduct as an affirmative defense rather than excluding it from the scope of the crime. Similarly, both the Abortion Statutes and the Proposed Ordinance criminalize conduct that facilitates an abortion. *Compare* art. 4512.2 *with* Proposed Ordinance Section D(2). Because the same conduct is covered, the pre-1974 Abortion Statutes, if valid, would preempt and void the Proposed Ordinance.

2. Does the Proposed Ordinance conflict with State law?

A home-rule city has broad powers, but no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5. A city ordinance that conflicts with a State statute is unenforceable to the extent of such conflict. *Dall. Merchant's & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993); *see also City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) ("Clearly, an ordinance which conflicts or is inconsistent with state legislation is impermissible."). If a reasonable construction can give effect to both the State law and the ordinance, the ordinance is not preempted by the statute. *Dallas Merchant's*, 852 S.W.2d at 491. But when a more narrow statute imposes a lesser range of punishment than a broader statute, then there is an irreconcilable conflict. *See Azeez v. State*, 248 S.W.3d 182, 193 (Tex. Crim. App. 2008); *Mills v. State*, 722 S.W.2d 411, 414 (Tex. Crim. App. 1986).

Here, the Proposed Ordinance is narrower than the current Texas Penal Code. The Penal Code offense of murder covers, in part, any conduct of a person if that person "intentionally or knowingly causes the death of an individual." Tex. Pen. Code Ann. § 19.02(b)(1). As stated above, an "individual" includes "an unborn child at every stage of gestation from fertilization until birth." Tex. Pen. Code Ann. § 1.07(26). The Proposed Ordinance's definition of murder covers conduct that constitutes an "abortion" as defined by the Ordinance, i.e., an act to cause the death of an unborn child of a woman known to be pregnant. Proposed Ordinance Section B(1), C(2); *see*

also Finding (8) (referring to "state law prohibitions on abortion-murder"). Therefore, the actions outlawed by the Proposed Ordinance are more narrowly defined but are already proscribed by the broader State law.

The Proposed Ordinance imposes a maximum penalty of $2,000. Proposed Ordinance Section E(1); Tex. Loc. Gov't Code Ann. § 54.001(b)(1). The broader Penal Code offense is punishable, generally, as a first degree felony. Tex. Pen. Code Ann. § 19.02(c). A first degree felony is punishable by imprisonment for "any term of not more than 99 years or less than 5 years" and "a fine not to exceed $10,000." Tex. Pen. Code Ann. § 12.32(a)-(b). Because the Proposed Ordinance—the narrower provision—carries a lesser range of punishment than the broader State law provision, there is an irreconcilable conflict. *See Azeez*, 248 S.W.3d at 193.

The Proposed Ordinance criminal conduct provisions cover the same conduct that State law covers and conflict with it. Therefore, the Proposed Ordinance would be preempted by State law to the extent it imposes criminal liability.

III. The Proposed Ordinance's private enforcement provisions are preempted.

Section F of the Proposed Ordinance purports to allow private enforcement of the Ordinance by creating a private cause of action for damages and a "citizen-suit enforcement action."

A. Private cause of action.

1. The private cause of action is preempted by State law.

Section F(1) of the Proposed Ordinance states that any person who commits an unlawful act as defined by the Proposed Ordinance (i.e., abortion or aiding and abetting an abortion) is liable in tort to an unborn child's "mother, father, grandparents, siblings and half siblings." The liability is for compensatory damages, punitive damages, and costs and attorneys' fees. The Proposed Ordinance also states that there is no statute of limitations for this private action and that the mother's consent is not a defense. The Proposed Ordinance does provide a defense based on federal constitutional law, but only if the person sued has standing to assert the rights of women concerning abortions. *See* Proposed Ordinance, Section F(4).

Just as a city ordinance that creates a penal offense is subject to preemption, a civil city ordinance that conflicts with State law is also invalid. *Dall. Merchant's*, 852 S.W.2d at 491; *City of Brookside Vill.*, 633 S.W.2d at 796. The Legislature's enacting a statute addressing a particular area does not necessarily preempt a city ordinance in the same area. *Dallas Merchant's*, 852 S.W.2d at 491. A home-rule city's ordinance and a State statute "will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *Id.* A city ordinance "in harmony with the general scope and purpose of the State enactment, is acceptable." *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016).

The Proposed Ordinance is in irreconcilable conflict with State laws. In Texas, there is no common-law right for a decedent's heirs or family members to sue for their

losses from decedent's death. Rather, that right is entirely statutory. *See Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 403 (Tex. 1993). The Wrongful Death statute specifically applies to the death of an unborn child.

> (3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.
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> (4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

Tex. Civ. Prac. & Rem. Code Ann. § 71.001. The Wrongful Death statute allows a cause of action only for "[t]he surviving spouse, children, and parents of the deceased." Tex. Civ. Prac. & Rem. Code Ann. § 71.004. The Proposed Ordinance creates a cause for persons excluded by the Wrongful Death statute.[3]

The Proposed Ordinance also conflicts with State law governing limitations. The legislature has set the limitations for an "injury resulting in death" at two years from the death of the injured person. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(b). The Proposed Ordinance specifically states that "[t]here is no statute of limitations" for the private cause of action. This provision and Section 16.003(b) cannot both be given effect.

The Proposed Ordinance prohibits any person from performing abortions, including licensed medical professionals. State law regulates abortions and abortion

[3] If this were the only conflict, a court could potentially determine that the Proposed Ordinance was only invalid to the extent it conflicted with the Wrongful Death statute, i.e., only that portion that broadens the class of persons that can bring a private cause of action for the death of an unborn child.

facilities.[4] State law regulates who may perform abortions; where it may be performed; at what stage of the pregnancy it may be performed; and the methods by which it is performed. *See, e.g.*, Tex. Health & Safety Code Ann. §§ 171.003, 171.004, 171.004, 171.044, 171.045. Abortion facilities are also regulated. They are required to have a separate license (with certain exceptions) and are subject to inspection. Tex. Health & Safety Code Ann. §§ 245.003, 245.006. There are criminal and civil penalties for violations. Tex. Health & Safety Code Ann. §§ 245.014–.015.

The Proposed Ordinance conflicts with State laws. The Proposed Ordinance imposes liability for conduct that is lawful under State law, in effect regulating that which the State has already regulated.[5] And, as stated above, the private-cause-of-action remedy conflicts with the laws governing wrongful death actions. The Proposed Ordinance is not merely supplemental regulation that is "in harmony" with State law. Rather, there is an inherent conflict between the Proposed Ordinance and State law; both cannot be given effect. Because the Proposed Ordinance conflicts with State law, the Proposed Ordinance is invalid.[6] *See BCCA Appeal Group, Inc.*, 496 S.W.3d at 12; *Dallas Merchant's*, 852 S.W.2d at 491.

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[4] *See, generally*, Tex. Health and Safety Code, Chapters 171 ("Abortion") and 245 ("Abortion Facilities").

[5] *Cf. BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 15 (Tex. 2016) (relying on both article 11, section 5 and language in the Texas Clean Air Act to find that TCEQ's issuing of permit and Act's enforcement provisions preempted city's attempt to create its own air-quality enforcement scheme).

[6] The Proposed Ordinance contains other provisions that are contrary to State or federal law. For example, Sections G(4) and (5) of the Proposed Ordinance purport to delegate authority to the Mayor to modify the ordinance as needed to permit its

2. The private cause of action is unconstitutional.

Finally, the private cause of action, unlike other provisions of the Proposed Ordinance is not conditioned on a change to or an overturning of current law governing abortion from the United States Supreme Court. The Proposed Ordinance purports to create liability for constitutionally protected actions. In a similar situation, the United States Supreme Court held that deed restrictions and restrictive agreements limiting occupancy of residential neighborhoods to whites, and forbidding occupancy by people of color, did not themselves violate constitutional principles; they constituted private conduct, not any state action. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). However, when white property owners in the area covered by the restrictions sought an injunction in court to prevent black owners from occupying the properties, the Court found state action (i.e., the use of the state's judicial system) that denied rights protected by the United States Constitution. *Id.* at 20. The Courts cannot be used to enforce an unconstitutional scheme, and any attempt by a city to create such a scheme is unconstitutional. Creating a cause of action that would require a court to award compensatory and punitive damages against an abortion provider who lawfully provided abortion services to a woman, consistent with her

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enforcement by a court if a court finds one or more provisions of the Proposed Ordinance unlawful. In our opinion, the City Council does not have the authority to delegate the Mayor authority to rewrite an ordinance to save the ordinance from conflicting with State law.

constitutional rights, would constitute state action contrary to current constitutional principles.

B. The citizen-suit enforcement is preempted by State law.

The Proposed Ordinance provides that any private citizen of Texas may sue any person for violation of the ordinance for injunctive relief, civil penalties, and attorneys' fees. The creation of such a private enforcement action has not been litigated in the State of Texas. In other states, similar proposals have had mixed results. *Compare Sims v. Besaw's Café,* 165 Or. App. 180 (Or. Ct. of App. 2000) (upholding city ordinance creating private cause of action for discrimination against employees on basis of sexual orientation) *with Petro v. Palmer College of Chiropractic*, 945 N.W.2d 763 (Iowa 2020) (city ordinance cannot create private cause of action for age discrimination –jurisdiction of state courts a state affair); *see also* Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (May 2012); Note, *Suing for the City: Expanding Public Interest Group Enforcement of Municipal Ordinances*, 50 Colum. Hum. Rts. L. Rev. 220 (Winter 2019). Regardless of whether Texas courts would allow a city to create a private cause of action as an enforcement mechanism for a city ordinance, the Proposed Ordinance conflicts with Texas's criminal and civil laws as stated above. In our opinion, the Proposed Ordinance's private causes of action are preempted by State law.

CONCLUSION

The Proposed Ordinance is inconsistent with the United States and Texas Constitutions. Regardless of the continued validity of the laws cited in the Proposed Ordinance, both the criminal and civil provisions of the Proposed Ordinance are inconsistent with the present law of the State of Texas. The Proposed Ordinance cannot be interpreted in a way that harmonizes it with Texas law and it is, therefore, void.