IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)

AUSTIN LIFECARE, INC. Plaintiff, v. CITY OF AUSTIN, *a municipal corporation;* LEE LEFFINGWELL, *in his official capacity as the Mayor of Austin*; CHRIS RILEY, MIKE MARTINEZ, KATHIE TOVO, LAURA MORRISON, BILL SPELMAN, and SHERYL COLE, *in their official capacities as members of the Austin City Council*; and MARC OTT, *in his official capacity as City Manager of the City of Austin,* Defendants.	§	CIVIL NO. 1:11-CA-00875-LY (Consolidated with CIVIL NO. A-II-CA-876-LY)

AMENDED VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Pursuant to Federal Rules of Civil Procedure 15(a)(1)(B), Plaintiff AUSTIN LIFECARE, Inc. (hereafter "LifeCare"), by and through its undersigned attorneys, hereby amends its complaint (Document 1) against the above-captioned Defendants: the CITY OF AUSTIN (hereafter the "City"), LEE LEFFINGWELL, in his official capacity as the Mayor of Austin, each above-captioned member of the City Council of Austin (hereafter the "City Council") and MARC OTT, the City Manager of Austin, in their official capacities, respectively, as follows:

I. INTRODUCTION

1. This is a civil rights action commenced under applicable federal and state laws challenging on its face, and as it applies to LifeCare, the constitutionality and lawfulness of Chapter 10-10 of Title 10 of the Austin City Code, as enacted January 26, 2012 (effective

February 6, 2012) by the Austin Council and signed by the Mayor of Austin (Ordinance No. 20120126-45, hereafter the "Ordinance")[1]. A true and correct copy of the Ordinance is attached hereto as EXHIBIT F. The Ordinance challenged in the amended complaint is the immediate replacement for a similarly unconstitutional ordinance (Chapter 10-9 of Tile 10 of the Austin City Code, hereafter the "Repealed Ordinance"), as enacted April 8, 2010 by the Austin Council and signed by the Mayor of Austin (Ordinance No. 20100408-027, hereafter the "Repealed Ordinance") and repealed by the Austin Council on January 26, 2012 (Ordinance No.20120126-17), upon recommendation of their Law Department "to avoid further litigation costs." The Repealed Ordinance was the law challenged in Plaintiff's original complaint. A true and correct copy of the Repealed Ordinance is attached hereto as EXHIBIT A.

2. By this amended Complaint, LifeCare seeks a declaratory judgment of its rights under federal and Texas law, nominal monetary compensation, a reasonable attorney's fee and costs, and injunctive relief in the form of temporary, preliminary and permanent injunctions, barring Defendants, and all those in active concert with them, through the enforcement of this Ordinance, from continuing under penalty of monetary sanction to abridge LifeCare's rights to freedoms of speech, assembly and association, religion, and the equal protection of the laws, guaranteed to it by the First or Fourteenth Amendments to the United States Constitution and the laws of the United States, as well as the Constitution and laws of the State of Texas.

3. The Ordinance unconstitutionally compels LifeCare under penalty of monetary sanction to post signage "affixed to the entrance of the center" disclaiming to all of its existing or

[1] As discussed in more detail below, the Ordinance that Defendants' counsel says was enacted on January 26, 2012 is not the Ordinance that was proposed before the January 26, 2012 City Council meeting. A different ordinance was proposed and attached to Agenda item 45 of the meeting. This ordinance (hereafter "the Proposed Replacement Ordinance") is attached as part of EXHIBIT G. In these pleadings, subject to Plaintiff's objection to its improper enactment, "the Ordinance" refers to EXHIBIT F and "the Repealed Ordiance" refers to EXHIBIT A.

potential clients, whether LifeCare "provides medical services", has "a licensed health care provider or practitioner directly supervising all medical services" and "is licensed or regulated by a state or federal regulatory entity to provide medical services." The First Amendment forbids the government from requiring private citizens to engage in government-dictated speech, regardless of its truth or falsity. "[F]reedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it . . . . To this end, [t]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. National Fed'n. of the Blind of N.C., Inc.*, 487 U.S. 781, 791-790 (1988). "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citation omitted). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating press, speech and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945). Accordingly, government efforts to force speakers to convey government messages are subject to strict scrutiny, and are only permissible when the evidence before the government at the time of the challenged law's enactment demonstrates with the requisite specificity that the government's interest is "compelling," narrowly tailored, and uses "the least restrictive means." To justify a compelling government interest, the Supreme

Court has recently emphasized the government must "identify an 'actual problem' in need of solving and justify the restriction of free speech as "actually *necessary* to the solution." *Brown v. Entm't Merch.. Ass'n.*, 31 S. Ct. 2729, 2738 (2011) (citing *United States v. Playboy Entm't. Groups, Inc*. 529 U.S. 803, 822–23 (2000) and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)). No such compelling evidence is present in this case, nor is this Ordinance narrowly tailored to do anything but impose the government's preferred speech on LifeCare's free speech with which the Defendants disagree.

4. The Ordinance impermissibly violates LifeCare's constitutional rights under the First Amendment because the Ordinance singles out speech regarding one, and only one, subject—pregnancy—for special restrictions and financial penalties. The Ordinance is therefore clearly content-based, and, unconstitutional, because its application is entirely governed by whether or not the speaker discusses a single regulated topic. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995). While content-neutral speech restrictions can be permissible in certain circumstances, the Supreme Court has repeatedly stated that *content-based* restrictions of speech like those imposed by the Ordinance are *presumptively* unconstitutional. *R.A.V.*, 505 U.S. at 382.

5. The Ordinance also engages in unconstitutional discrimination based upon the pro-life *viewpoint* of LifeCare's free speech. The Supreme Court has repeatedly ruled that viewpoint discrimination violates the First Amendment, stating: "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Supreme Court recently made it clear that the government cannot enact a speech regulation that, by

legislative design or "practical operation," "burdens disfavored speech by disfavored speakers," and "is directed at certain content and is aimed at particular speakers," even, or rather especially, when the government deems that speech to be "frequently one-sided" and "incomplete and biased." *Sorrell v. IMS Pharmaceuticals*, 131 S. Ct. 2653, 2661–65 (2011) (quoting *R.A.V.*, 505 U.S. at 391). The text, history, operation, and publicly alleged justification for the Ordinance, the text of the Proposed Replacement Ordinance as well as the text, history and justifications for the Repealed Ordinance confirm that Defendants are unconstitutionally targeting speakers, like LifeCare, with a particular pro-life *viewpoint* with which Defendants disagree. The now Repealed Ordinance and the Proposed Replacement Ordinance, by their own express terms, apply only to *pro-life* pregnancy centers, and thereby target for speech regulation only one side of a contentious public, political debate based upon the *viewpoint* of LifeCare's speech. The Ordinance is viewpoint-discriminatory because by "design" and "practical operation" it does not apply to all discussions relating to pregnancy, nor does it apply to all discussions of pregnancy by speakers without medical licenses. Rather, it is gerrymandered to apply only to those discussions of pregnancy by a particular group of speakers who, like LifeCare, engage in discussions about pregnancy (what the Ordinance calls "options counseling") but who do not, like abortion facilities, have (or need to have) doctors present "full-time". As discussed in more detail below, the Ordinance also uses irrational language by requiring that LifeCare declare that it is not a facility "licensed by a state or federal regulatory entity to provide" sonograms and pregnancy diagnosis, because while all such services provided by LifeCare are supervised by doctors who are *individually* licensed, *no "facility" license exists anywhere* to perform such services, either from the federal or Texas governments, so it is not possible for LifeCare to obtain a facility license for such activities. This disclosure is the equivalent of forcing LifeCare to

declare that "this facility has not obtained unicorns from the state or federal government to provide its services." The Ordinance's irrational requirement is, instead, designed to cover only centers like LifeCare who do not provide abortions while not covering organizations who perform abortions because in Texas a *facility* license is required to perform abortions. TEX. HEALTH & SAFETY CODE § 245.003. By using a speaker's position on abortion to determine whether or not to regulate that speaker's speech, the law is impermissibly viewpoint-based. "In the ordinary case," the Court has said, "it is all but dispositive to conclude that a law is content-based and, in practice viewpoint discriminatory." *Id.* (citing *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid."). Even in the context of "commercial speech," which is not present here, the Court in *Sorrell* upheld an injunction against a state law in a case analogous to this one involving both a "content" and "viewpoint based" speech regulation where the government's "interest in burdening the speech . . . turns on nothing more than a difference of opinion" with speech and speakers disfavored by the government, and the government was not contending that the speaker's entire business was itself "false or misleading" or that the law itself was narrowly drawn to *only* "prevent false or misleading speech." *Id.*

6. The Ordinance also imposes an unconstitutional burden on LifeCare's freedoms of association and assembly. The First Amendment, applicable to Defendants through the Fourteenth Amendment, provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . " U.S. CONST., amend. I & XIV. Article 1, Section 27 of the TEXAS CONSTITUTION likewise provides that its "citizens shall have the right, in a peaceable manner, to assemble together for their common good." The Ordinance violates these rights insofar as it burdens LifeCare's staff, in a peaceful manner, from freely meeting with anyone coming on to their premises to discuss pregnancy options unless and until LifeCare

complies with the Ordinance.

7. The Ordinance also violates LifeCare's rights to religious free exercise under the First Amendment, Article 1, Section 6 of the TEXAS CONSTITUTION, and the TEXAS RELIGIOUS FREEDOM RESTORATION ACT because it impermissibly targets LifeCare merely because Defendants apparently disagree with LifeCare's religiously-motivated speech. Defendant's enactment of the Ordinance cannot survive the applicable "strict scrutiny" because no compelling government interest of the "highest order" is protected by the Ordinance nor is any such interest advanced by "the least restrictive means." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

8. Finally, Defendants utterly lack case-specific evidence applicable to LifeCare that shows either a "compelling interest" behind the Ordinance or that demonstrates that forcing LifeCare to speak constitutes the least restrictive means to achieve such an interest. The Constitutions and laws of the United States and Texas prohibit Defendants from singling out one side in an important public debate related to pregnancy by requiring LifeCare, and not others with opposing views, to post the government's message, particularly when that mandated message is nonsensical and misleading, unfairly discriminates between speakers based upon the content and viewpoint of LifeCare's message, violates LifeCare's right to the equal protection of the laws and substantially interferes with and burdens LifeCare's ability to freely exercise constitutionally protected rights of free speech, association and the free exercise of religion.

II. JURISDICTION AND VENUE

9. The Court has original subject matter jurisdiction over the federal law claims for relief alleged herein (Claims One through Six and Twelve) pursuant to 28 U.S.C. § 1331 as this case arises under the Constitution and laws of the United States and presents a federal question,

and pursuant to 28 § 1343(a)(4), in that plaintiff seeks to secure equitable, monetary and other relief under an Act of Congress, specifically 42 U.S.C § 1983, which provides a cause of action for violation of LifeCare's federal civil rights by persons, like Defendants, acting under color of state law. The Court has supplemental jurisdiction over the state law claims alleged herein (Claims Seven through Eleven) pursuant to 28 U.S.C. § 1367 because these claims are so related to the federal law claims alleged in the action that they form part of the same case or controversy under Article III of the United States Constitution. The Court has jurisdiction over the request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57. The Court is authorized to issue the requested temporary, preliminary and permanent injunctive relief pursuant to Fed. R. Civ. P. 65, and Local Court Rule 65, and to award Plaintiff "a reasonable attorney's fee and costs" pursuant to 42 U.S.C. § 1988, and damages pursuant to 42 U.S.C. § 1983.

10. Venue is proper in the Western District of Texas, Austin Division, pursuant to 28 U.S.C. § 1391(b). Defendants are present in the Western District of Texas, and all of the events giving rise to these claims occurred in this District, including the passage of the Ordinance and application of the Ordinance to LifeCare.

11. This Court has authority to declare the rights and legal relations of the parties and to order further relief, pursuant to 28 U.S.C. §§ 2201–02, because this is a case of actual controversy within this Court's jurisdiction wherein LifeCare is suffering actual and irreparable injury to its constitutional rights as a direct consequence of the Ordinance..

12. Defendants are subject to this Court's personal jurisdiction due to their presence and activities within the Western District of Texas, Austin Division.

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III. PARTIES

A. Plaintiff

13. Plaintiff LifeCare is a charitable, not-for-profit corporation duly incorporated under the laws of Texas, exempt from federal taxation by Section 501(c)(3) of the Internal Revenue Code, with its principal place of business at 1215 West Anderson Lane, Austin, Texas, where it provides pregnancy-related counseling and other services without charge to its clients under the supervision of its chief executive officer and executive director, Pamela Cobern, who is competent, knowledgeable and duly authorized by LifeCare to verify this Amended Complaint.

14. Since 1984, LifeCare has been serving the Austin community and each of its clients confidentially and free of charge.

15. LifeCare, through its options counseling and otherwise, is dedicated to providing truthful, compassionate and trustworthy service to the Austin community, and each of its clients, by promoting positive solutions to the challenges surrounding unplanned pregnancies through prevention, intervention, and restoration. LifeCare seeks to protect the physical, emotional and spiritual lives of women and their unborn children, by providing services to pregnant women including education about pregnancy, about abortion procedures, and about adoption and parenting as well as providing limited ultrasound medical services under the direction and supervision of a licensed physician, childbirth and parenting classes, mentors and material assistance (clothing, baby items, etc.). While no "state or federal regulatory entity" exists from which LifeCare could obtain a "license" for it to perform its limited ultrasound and pregnancy testing services, all such services are provided by or under the direction and supervision of a licensed health care provider. Pursuant to the Texas Alternative to Abortion Services Program (TAASP), as administered by Texas Health and Human Services Commission (THHSC) through

its contract with the Texas Pregnancy Care Network (TPCN) for program and administrative services using Temporary Assistance for Needy Families (TANF) federal funding to promote childbirth rather than abortion, LifeCare's facilities, programs and corporate administration is annually inspected and evaluated by a TPCN inspector as a condition of receiving reimbursement for its qualifying expenditures promoting childbirth through its counseling services, rather than abortion. As evidenced by its Certificate of Waiver attached hereto as EXHIBIT J and incorporated herein by this reference, LifeCare operates a laboratory currently certified by U.S. Department of Health and Human Services' Center for Medicare & Medicaid (HHS) pursuant to Section 353 of the Public Health Services Act (42 U.S.C. 263a) as revised by the Clinical Laboratory Improvement Amendments (CLIA) to examine bodily fluids of its clients to determine the results of a pregnancy test procedure that has been approved as a "waived" test by HHS. All pregnancy test results that LifeCare issues pursuant thereto are done under the direction and supervision of a licensed physician. Help is available from LifeCare 24-hours-a-day through a confidential help line. LifeCare offers support for the spiritual, emotional, and psychological effects that can occur after an abortion experience or past sexual abuse, including a Bible study and support group led by peer counselors trained to guide and support men and women through the unique healing from an abortion experience, and educational conferences for men, women, counselors, clergy, and families.

16. LifeCare is a pro-life, Christian, faith-based non-profit organization that is supported by and partners with faith-inspired individuals and churches from several Christian denominations.

17. All of LifeCare's speech and services, including its counseling, pregnancy testing and limited ultrasound services are carried out in furtherance of its religious and moral views in

support of the sacred dignity of human life (and therefore against its destruction in abortion) and in order to glorify God through Jesus Christ.

18. Based upon its moral conscience and its religiously-motivated belief in the sanctity of human life and dignity from conception until natural death, as well as upon LifeCare's understanding of the physical, spiritual, psychological and emotional risks of induced abortion, LifeCare does not provide or refer for abortion or abortifacients, but is committed to offering accurate information about abortion procedures and risks.

19. LifeCare does provide information on abstinence, which is a recognized form of birth control. LifeCare does not provide or specifically refer for any other forms of birth control, including to providers of FDA-approved birth control drugs and medical devices. LifeCare does not recommend, provide, or refer single women for contraceptives. LifeCare does advise "married women seeking contraceptive information to seek counsel, along with their husbands, from their pastor and/or physician."

B. Defendants

20. Defendant City Council of Austin (the "City Council") is a municipal corporation located in this federal district, and operates with all the powers granted to cities by the statutes and Constitution of the State of Texas, according to Section 3 of Article 1 of the City's charter.

21. Defendant City of Austin (the "City") is a municipality existing under the laws of Texas, and may be served, pursuant to Tex. Civ. Prac. & Rem. Code §17.024, by serving its City Secretary at 301 West Second Street, Third Floor, Austin, Texas, 78701.

22. Defendant Lee Leffingwell is Mayor of Austin and is responsible for the execution of all city ordinances and general supervision of all municipal officers and agencies under Texas Local Government Code § 22.042(a). Mayor Lee Leffingwell, who voted to enact

the now Repealed Ordinance but was not present on January 26, 2012 to vote for or against the repeal of the Repealed Ordinance and the enactment of the Ordinance, is sued in his official capacity.

23. The defendant City Council Members Chris Riley, Mike Martinez, Kathie Tovo, Laura Morrison, Bill Spelman, and Sheryl Cole and City Manager Marc Ott are made parties to this lawsuit solely in their official capacities as proper parties to the claims asserted herein and/or as officers to whom authority was given to ensure compliance with and enforcement of the Ordinance.

IV. FACTUAL ALLEGATIONS

A. The Legislative History of the Ordinance and Repealed Ordinance

24. On or about April 8, 2010, after no more than a 30 minute hearing wherein its rules were waived and discussion was limited by the presiding officer to "15 minutes per side," and no evidence of any unlawfully deceptive or misleading conduct by LifeCare was presented, the Austin City Council on a 7-0 vote passed the now repealed Ordinance 20100408-027, "An Ordinance Amending the City Code to Add Chapter 10-9 to Require Signs in Certain Pregnancy Counseling Facilities; Creating an Offense and Imposing a Penalty," (the "Repealed Ordinance") to create special speech rules for "Limited Service Pregnancy Centers." Council Member defendant William Spelman sponsored the now Repealed Ordinance. Council Member defendant Laura Morrison and Mayor *Pro Tem* defendant Mike Martinez co-sponsored the Repealed Ordinance. Then City Attorney David Allan Smith approved the Repealed Ordinance. City Clerk Sherley A. Gentry attested to and Mayor Pro Tem Martinez signed the Repealed Ordinance into law on behalf of Mayor Lee Leffingwell. The Repealed Ordinance took effect on or about April 19, 2010 and was repealed on January 26, 2012.

25. A Complaint was filed herein against the now Repealed Ordinance on or about October 6, 2011 and a Motion for Preliminary Injunction was filed on or about October 12, 2011. After hiring outside council, the City of Austin came to the realization that the now Repealed Ordinance had serious constitutional problems and that defending it could cost the City of Austin a great deal of money in litigation costs and attorneys' fees. On November 11, 2012, a stay (Document 29) was granted by this Court until the next status conference (February 3) so that a decision could be made by Defendants regarding the now Repealed Ordinance.

26. At its meeting on January 26, 2012, the Austin City Council, made up of Mayor Pro-Tem Sheryl Cole, Laura Morrison, Kathie Tovo, Chris Riley, Mike Martinez, and Bill Spelman passed two agenda items on votes of 6-0 in response to this litigation: Agenda Item 17 "Approve an Ordinance repealing Chapter 10-9 of the City Code, relating to notices at limited service pregnancy centers." which repealed the Repealed Ordinance and Agenda Item 45 "Approve an ordinance amending the City Code to add Chapter 10-10, relating to limited service pregnancy centers." sponsored by Bill Spelman and co-sponsored by Mike Martinez. At some point, upon information and belief, Defendants took the position that Agenda Item 45 created the Ordinance now being challenged in this Amended Complaint. As was also true at the April 8, 2010 City Council meeting, no evidence of any unlawfully deceptive or misleading conduct by LifeCare was presented to the City Council at its January 26, 2012 meeting.

27. The action of the City Council at that January 26 meeting are unclear, since at the time of the meeting, it was the Proposed Replacement Ordinance, not the Ordinance, that was supplied by the City of Austin, attached to Agenda Item 45, and apparently voted upon and enacted at the January 26, 2012 meeting. Plaintiff's counsel, the public as a whole, and possibly the Council itself by virtue of the materials attached to Agenda Item 45, were only aware of the

"Proposed Replacement Ordinance" attached as part of EXHIBIT G. It was this Proposed Replacement Ordinance that Plaintiff's counsel and other members of the community were alerted to in advance, appeared to testify against, and was included in Agenda Item 45. The Ordinance currently enacted and on the books and now being challenged in this action (EXHIBIT F) was not made available to any plaintiff's counsel until January 28, 2012 and was not known by LifeCare's counsel until January 29, 2012. Counsel for Defendants, however, maintains that the Ordinance rather than the Proposed Replacement Ordinance is the item enacted into law because "the version of the Ordinance that the council voted on was available through the City Clerk during the council meeting."

28. As set forth in EXHIBIT F, the Ordinance defines an "Unlicensed Pregnancy Service Center" as "an organization or facility that:

(i) as its primary purpose, provides pregnancy related services, including pregnancy testing or options counseling; and
(ii) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full time practice on site. §10-10-1.

"Medical Service" includes, without limitation, diagnosing pregnancy or performing a sonogram." § 10-10-1(2).

29. The Ordinance requires the "owner or operator of an unlicensed pregnancy service center," like LifeCare, to "prominently display a black and white sign, in English and in Spanish, affixed to the entrance of the center so that the sign is conspicuously visible to a person entering the center, that accurately discloses the following information:

(i) whether the center provides medical services;
(ii) if the center provides medical services, whether all medical services are provided under direction and supervision of a licensed health care provider; and
(iii) if the center provides medical services, whether the center is licensed by a state or federal regulatory entity to provide those services.." §10-10-2(A).

"Each sign must be at least eight and one-half inches by eleven inches and the text must be in a font size of at least 36 point." § 10-10-2(B).

30. A violation of the Ordinance "shall be punished by a fine of not less than $250 for the first offense, not less than $350 for a second offense, and not less than $450 for a third or succeeding offense." § 10-10-3(B). A violation of the Ordinance does not require a culpable mental state. § 10-10-3(C).

31. As indicated in the "Additional Backup Material" for the passage of the now Repealed Ordinance (*see* online RECORD OF APRIL 8, 2010 AUSTIN CITY COUNCIL MEETING at http://www.ci.austin.tx.us/cityclerk/edims/2010/20100408-reg.htm#027/ including pertinent excerpts from the relevant Agenda Item #27 pertaining to the adoption of the Ordinance attached hereto as EXHIBIT B), the only evidence apparently relied upon by Defendants in enacting the now the Repealed Ordinance was a 2009 Annual Report by the abortion-proponent NARAL Pro-Choice Texas Foundation, entitled "*Taxpayer Financed Crisis Pregnancy Centers in Texas: A Hidden Threat to Women's Health"* (the "NARAL Report", attached hereto as EXHIBIT C) and a July 2006 "Minority Staff Report" prepared for pro-abortion Representative Henry A. Waxman by the Special Investigations Division of the United States House of Representatives Committee on Government Reform (the "Waxman Report", attached hereto as EXHIBIT D), both of which exhibit hostility towards pro-life pregnancy centers and religious viewpoints against abortion. These reports contain no evidence specifically pertaining to LifeCare, much less any "evidence" of any kind demonstrating any unlawful or deceptive misconduct by LifeCare, nor is 'evidence' of any such kind found in this material or any other testimony submitted in support of the Ordinance.

32. The patently-biased NARAL Report faults pregnancy centers for having "the express purpose of persuading pregnant teenagers and women seeking services for unexpected pregnancies to opt for motherhood and adoption" and accuses them of having "the express purpose of interfering with pregnant teenagers and women who are seeking comprehensive women's healthcare." III.b.i., IV.a. The NARAL Report calls pregnancy centers "biased" and "anti-choice," and states that their "primary purpose . . . is to advance an ideological, political, and religious agenda." Appendices I. It accuses pregnancy centers of having a "controversial history" and a "religious, anti-choice mission" such as "shar[ing] God's gift of eternal life through Jesus Christ with women in crisis pregnancies . . . by ministering to the physical, emotional, and spiritual needs of women . . . ." Id.

33. The equally-biased Waxman Report criticizes pregnancy centers because they "are virtually always pro-life organizations whose goal is to persuade teenagers and women with unplanned pregnancies to choose motherhood or adoption" and refers to one center's religious mission in a demeaning manner. Waxman Report 1. It concludes by accusing pregnancy centers of engaging in "tactic[s] [that] may be effective in frightening pregnant teenagers and women and discouraging abortion." Waxman Report 14.

34. As indicated in the "Supporting Materials" for the passage of the Ordinance (*see* online AUSTIN CITY COUNCIL AGENDA at https://austin.siretechnologies.com/sirepub/mtgviewer.aspx?meetid=186&doctype=agenda including pertinent excerpts from the relevant Agenda Items #17 and #45 pertaining to the adoption of the publicly proposed Ordinance, attached hereto as EXHIBIT G, the only additional evidence provided was another biased report from NARAL and various audits of pro-life

pregnancy resource centers (hereafter "PRCs"), none of which show any evidence of fraud or misinformation on the part of Austin LifeCare or other Austin PRCs.

35. The March 2011 NARAL report titled "The Texas 'Alternatives to Abortion' Program: Bad Health Policy, Bad Fiscal Policy" makes no mention of Austin LifeCare. Its focus is on state spending which has no relevance to the Ordinance. Its brief mention of alleged misinformation admits that what NARAL believes to be misinformation is actually information that Texas law requires be disclosed to women by abortion providers.

36. Not only do the audits fail to show any malfeasance on the part of LifeCare, but the only mention of LifeCare is a supportive, positive comment which only evidence serves as against the Ordinance, not for it. Specifically, the May 19, 2011 TPCN "Site Monitoring Report" published by the State of Texas' ALTERNATIVE TO ABORTION SERVICE PROGRAM states: "Austin LifeCare is a valuable and much needed resource for pregnant and/or parenting women in the Austin area."

37. At the January 26, 2012 meeting, several council members including sponsor Bill Spelman, Kathie Tovo, and Chris Riley referenced their fears of alleged misinformation being given to women and their desire for the provision of accurate women's health information as the basis for the Ordinance. But none of them named LifeCare or any Austin PRC as misinforming clients in anyway. No actual examples were given of Austin PRCs giving false information or telling untruths regarding what services they provide or what their qualifications are. There is no evidence of any kind in the administrative record before the City Council that LifeCare has given false medical information or told any untruth regarding what services they provide or what their qualifications are. There was no explanation by any of the Defendants as to why the City had not opted to use existing anti-fraud or consumer protection laws on the books or to use their own

independent municipal resources to promote the government's message instead of imposing it on Plaintiffs by the Ordinance.

38. The discriminatory purpose behind both the Repealed Ordinance and the Ordinance is made clear by the immediate replacement of the former with the latter. The current Ordinance compels an adjusted message but achieves the same purpose: targeting pro-life PRCs and compelling them to speak a government message which implies that their pro-life speech is somehow defective or disfavored in comparison to the speech of abortion providers.

39. The Ordinance and its predecessor were not only based on NARAL reports, they were developed by NARAL. This is documented in statements City officials made in NARAL's own YouTube video "Exposing Crisis Pregnancy Centers One City at a Time," uploaded by the account NARALProChoiceNY, and available at http://www.youtube.com/watch?v=Tpya05pQGAQ. The video explains how Austin's ordinance and other similar ordinances around the country are part of NARAL's Urban Initiative, started at a summit in 2008 in New York City and continued at a summit in Denver in 2009. After the Denver summit, NARAL's political director and an Austin NARAL "contact" decided to push legislation in Austin. This Austin contact is identified as Heidi Gerbracht, policy director for Councilmember Bill Spellman. She appears in the video and says that, "the conversation at the Denver Urban Initiative was fundamental to us getting our crisis pregnancy ordinance started and then passed." She admits that upon returning from the Denver initiative she "immediately started working on an ordinance for Austin." Thus Defendants admit that this ordinance is the creation of NARAL and pro-abortion activists, and of the Defendants' viewpoint-driven cooperation with the same. There is absolutely no evidence that, when developing the Ordinance or the now Repealed Ordinance, any attempt was made to seek information or input from any

sources other than pro-abortion groups who are already opposed to the work of pro-life pregnancy centers. There is also no evidence that any attempt was made to investigate the situation in Austin's pro-life pregnancy centers or seek the input of LIfecare.

40. During the April 8, 2010 City Council meeting, testimony was presented on behalf of LifeCare that it provides accurate, state approved information on abortion and are otherwise always truthful with clients about the services they offer, but the Ordinance's disclaimer would substantially burden LifeCare's right to speak with their clients about their situations and also about the options available to them.

41. During the April 8, 2010 City Council meeting, those testifying against the now Repealed Ordinance inquired whether any specific evidence exists as to the Repealed Ordinance's necessity. No evidence was presented during the meeting indicating that LifeCare, or any of the other pregnancy centers in Austin, has been untruthful or misleading about the services they offer.

42. During the April 8, 2010 City Council meeting, two attorneys testified against the Ordinance and questioned its constitutional legality. They stated that the now Repealed Ordinance would place a substantial burden on religious ministries and that it mandates compelled speech in violation of the United Stated and Texas Constitutions. One attorney testified that a similar ordinance was being challenged in federal district court in Maryland.

43. Despite the above-described unrebutted testimony and the lack of any evidence justifying its enactment, the City Council unanimously passed the now Repealed Ordinance. A video of the City Council's proceedings leading to the City's enactment of the 2010 Ordinance can be found at the City's website at http://www.ci.austin.tx.us/cityclerk/edims/2010/20100408-reg.htm.

44. During the January 26, 2012 City Council meeting, three attorneys representing LifeCare as well as an attorney representing the other plaintiffs in this consolidated action testified against the Proposed Replacement Ordinance (Exhibit G) explaining that it was no more and possibly less constitutional than the now Repealed Ordinance. Referencing the recent judgments in federal court as well as their January 25, 2012 letter to the City Council's outside legal counsel citing those judgments, a true and correct copy of which is found as EXHIBIT E to this Amended Complaint, each attorney explained that the signage requirement in the Proposed Replacement Ordinance, without any showing of a compelling government interest narrowly implemented using the least restrictive means, still imposes an unconstitutional burden on speech and would be held to be unconstitutional. Each attorney also explained that the attorney's fees are growing, and urged the City Council to make both the constitutional and prudent decision not to enact the Ordinance. A video of the City Council's proceedings leading to the City's enactment of the Ordinance can be found at the City's website at http://austintx.swagit.com/play/01262012-501/#11. A transcript of the proceedings is attached to this Amended Verified Complaint as EXHIBIT H. At no time were Lifecare's attorneys or any other member of the public testifying against the Proposed Replacement Ordinance given a copy of the Ordinance (Exhibit F) or advised that the defendant City Council was not voting on the Proposed Replacement Ordinance (Exhibit G) or that a copy of the Ordinance they were voting was available "was available through the City Clerk during the council meeting."

45. Along with his testimony, Stephen Casey, an attorney representing Austin LifeCare, submitted into evidence several documents regarding Austin LifeCare's policies which show the baselessness of the biased claims regarding any alleged misinformation or attempts by

PRCs to disguise who they are or what services they do or do not provide. These documents are attached to this complaint as EXHIBIT I.

46. During the January 26, 2012 City Council meeting, the Ordinance's sponsor, defendant William Spelman, admitted that "crisis pregnancy centers" were the target of this Ordinance though he did not name any of the Austin PRCs or cite an example why they should be targeted other than referencing the back up material which similarly doesn't provide any real evidence of any Austin PRCs, including Plaintiff, providing any misinformation to anyone. (Jan. 26, 2012 Austin City Council Close Caption Log hereafter "Transcript" or "Transc." pg. 117, ln 17-19) Outside legal counsel for defendants, Sara Clark, was also questioned by defendant Spelman. She stated that the Ordinance was constitutional but did not justify from any established legal precedent how the admitted constitutional defects of the Repealed Ordinance were not also found in the Proposed Replacement Ordinance (Exhibit G) properly before the City Council or the Ordinance (Exhibit F), a copy of which only she had at that time but had not made publicly available. Defendant Spelman also asked her if a PRC that "provided medical services but only did so under the direction and supervision of a licensed health care practitioner" would be covered by the Ordinance. (Transc. pg.112, ln. 24-45). Ms. Clark stated, "No sir, the Ordinance would not apply to them." (Transc. pg.112, ln. 27).

47. Contrary to what Ms. Clark erroneously advised defendant Spelman on the record of the City Council's deliberations regarding the proposed Ordinance (Exhibit G) just prior to enacting what they are now claming to be the Ordinance (Exhibit F), a plain reading of the Ordinance shows that it does apply to any "organization or facility that…does not have a health care provider that is licensed by a state or federal regulatory entity *maintaining a full time practice* on site." (emphasis added). Thus, even if a center has a licensed health care provider or

practitioner supervising all medical services that it offers, the Ordinance will apply to that center unless that licensed healthcare practitioner also maintains a full time practice on site. The Ordinance does not define what is meant by the phrases "full time practice on site" or "licensed or regulated" or "regulatory entity." Thus, even though as explained in paragraph 15 above, LifeCare provides its limited ultrasound services and pregnancy testing services under the direction and supervision of a licensed health care provider, is regulated by HHS, and is monitored by THHSC, it is still apparently covered by this unduly broad Ordinance and must apparently post the Ordinance's mandated disclosures, including that it is not "licensed by a state or federal regulatory entity to provide those services," even though no such license exists so LifeCare could not possibly obtain one.

48. The confusion created by Ms. Clark's testimony is enhanced by the fact that it appears as though Ms. Clark was reading from both the Proposed Replacement Ordinance (Exhibit G) and then later from a piece of paper that may be a draft of the Ordinance (Exhibit F) as she advises the Council on the constitutionality of whatever ordinance was being considered by the City Council. In the video of her testimony she can be seen referencing the exact word "outside" in her analysis in regards to the Ordinance and where the signs must be located. But this word is not in the Ordinance and was not in the Repealed Ordinance. It is, however, in the Proposed Replacement Ordinance. She later used the phrases "unlicensed pregnancy service center" and "maintaining a full time practice on site" which are only found in the Ordinance. Transc. At pg. 113 ln. 1-4.[2]

[2] The words "full time" do not make it into the closed caption record but can be heard in the video of the council meeting. The closed caption record is not an official transcript but is the best record available.

49. The Ordinance does not apply to all speakers or organizations that primarily provide counseling or information about pregnancy services or pregnancy options.

50. Without the words "full time" in § 10-10-1(1)(b) the Ordinance would not apply to LifeCare.

51. As applied, the Ordinance in practical effect requires only pro-life centers that refuse to provide or refer for abortion and "Comprehensive Birth Control Services" to engage in government-drafted "disclaimers."

52. The Ordinance does not reach speakers on a wide variety of life-and-death healthcare issues on which people have varying viewpoints, such as vaccines, addictions, and cancer treatments. It reaches only speakers primarily dealing with one topic —pregnancy.

53. Even within the context of pregnancy, the Ordinance does not reach the vast majority of sources pregnant women are likely to consult, such as books, websites, friends, family members, teachers, guidance counselors, or religious leaders—all of whom may have their own biases, opinions, information, and misinformation about pregnancy and abortion. Likewise, the Ordinance imposes its burdens on non-medical pro-life centers wishing to discuss pregnancy in options counseling, while allowing abortion centers to engage in unlimited pregnancy counseling by workers who are not individually licensed medical providers, without posting any sign at the entrance, as long as they have a doctor maintaining a full time office elsewhere in the facility, even if he is never even slightly involved in the options counseling.

54. There is no requirement of a finding that an "unlicensed pregnancy service center" has committed any wrongdoing whatsoever to be regulated by the Ordinance.

55. Defendants had no evidence of any wrongdoing by LifeCare (or, for that matter, any other PRC within the City of Austin) at the time the Ordinance was enacted.

B. LifeCare

56. Since 1984 LifeCare has operated in Austin in general conformance with what the Ordinance now defines as an "unlicensed pregnancy service center."

57. LifeCare provides no medical services, except limited ultrasound and pregnancy testing services either directly provided by a licensed physician on site or under the direct supervision of a licensed health care provider on site. However, LifeCare does not have a licensed health care provider that maintains "a full-time practice on site" because a full-time on site practice is not necessary to provide or otherwise directly supervise the above-described services LifeCare does provide.

58. LifeCare as an entity is not licensed or certified by the Texas or federal governments to provide limited ultrasound services and pregnancy diagnosis because no such licensing exists, except, as explained in paragraph 15 above, Austin LifeCare is monitored for compliance with the TASSP by the THHSC and is authorized by HHS to provide and disclose the results of a pregnancy tests under the supervision of a licensed health care provider.

59. The counseling, information and services provided and/or facilitated by LifeCare are highly dependent on the development of personal relationships with the women it serves. Forcing LifeCare to precede these sensitive conversations with government-mandated disclaimers, including the disclaimer mandated in the Ordinance that misleadingly and irrationally declares that LifeCare does not have a facility license that governments do not even offer, interferes with and may even preclude all together LifeCare's discussions with these women and its right to freely speak to and associate with these women in the manner, the timing, the context, and the emphasis it deems necessary to convey its message.

60. LifeCare does not sell any products or services and does not charge any person it serves for its counseling, information, or services.

61. LifeCare does not engage in or propose any commercial transactions.

62. LifeCare's providing of counseling, information and services is not solely related to any economic motive benefiting LifeCare.

63. On its face, the Ordinance compels non-commercial speakers, like LifeCare, to face this dilemma: under threat of monetary sanction for failure to do so, either deliver the government's unconstitutionally compelled messages or incur the expense of having a "licensed health care provider" that maintains "a full-time practice on site."

64. The Ordinance explicitly regulates non-commercial speech that is fully protected by the Constitution.

65. LifeCare wishes to engage in its non-commercial communications and related services about pregnancy without being forced to post the Ordinance's mandated disclaimers.

66. By requiring disclaimers, the Ordinance compels LifeCare to speak in violation of its rights to free speech and association under the United States and Texas Constitutions.

67. The existence of the Ordinance imposes a prior restraint and unconstitutional "chill" on LifeCare's speech.

68. Although LifeCare uses fully licensed health care providers for its limited ultrasound services and pregnancy testing services, and has all of the individual licenses required for those services, under the Ordinance LifeCare will be forced to state that its facility is unlicensed by federal and state governments, implying that its services are lacking in needed regulation or licenses when no such license is even possible.

69. To avoid being covered by the Ordinance, LifeCare would either have to cease engaging in its primary purpose to speak about pregnancy, or hire an unneeded full time medical professional to "maintain a full time practice on site" when there is no rational, much less compelling reason for doing so.

70. By requiring a disclaimer that LifeCare as a facility is not licensed or regulated by a state or federal regulatory entity to provide limited ultrasound services and pregnancy diagnosis, the Ordinance compels LifeCare to deliver the implied message that their speech is defective and disfavored toward speech from centers with medical licenses.

71. LifeCare's opposition to abortion arises in central part from its sincerely-held religious and moral beliefs.

72. LifeCare's charitable outreach to and personal moral discussion with pregnant women in need are matters of religious exercise and are based in part on LifeCare's sincerely-held religious beliefs.

73. By depriving LifeCare of its right to speak about pregnancy on its own terms and in its own way, and by subjecting LifeCare to regulations and potential fines solely because of a desire to do so, the Ordinance places a substantial burden on LifeCare's moral conscience, religious free exercise and sincerely-held religious beliefs in violation of the Free Exercise Clause of the First Amendment to the United States Constitution, Article 1, Section 6 of the Texas Constitution, and the Texas Religious Freedom Restoration Act.

74. The existence of the Ordinance imposes a chill on Plaintiff's free exercise of religion.

75. Fearing the penalties threatened by the Repealed Ordinance if it did not succumb to the Repealed Ordinance's compelled speech, LifeCare had reluctantly complied with the

Repealed Ordinance from its date of enforcement until November 10, 2011, when the Court stayed this action and the City of Austin agreed that the Repealed Ordinance would not be enforced while the City of Austin considered its options. Upon being informed that City of Austin agreed that the Repealed Ordinance would not be enforced, LifeCare immediately took down the Repealed Ordinance's disclaimers, and has not posted any government-mandated disclaimers from the Repealed Ordinance or from the Ordinance. LifeCare desires to be relieved of the unconstitutional infringements of its rights under federal and Texas law that are imposed upon it by mandate of the Ordinance when it becomes effective on February 6, 2012. Counsel for LifeCare asked counsel for the City of Austin whether it would agree not to enforce the new Ordinance while this case is pending or at least until this Court considers LifeCare's amended motion for preliminary injunction, but she refused to so agree saying: "We do not have authority to agree that the City will not enforce the Ordinance once it is effective."

76. Before filing suit against the 2010 Ordinance, two letters were sent to the City Attorney of Austin to explain LifeCare's opposition to this Ordinance and detailing its unconstitutionality. On April 22, 2011, in the wake of two federal district court decisions, further described in paragraphs 81 and 82 below, finding unconstitutional and enjoining two similar laws enacted by Montgomery County and the City of Baltimore, respectively, LifeCare's legal counsel hand-delivered a letter, a true and correct copy of which is attached and incorporated herein as EXHIBIT E, to Defendant City of Austin's City Attorney, Karen Kennard, requesting Defendant's "position as to whether upon complaint or otherwise the City Attorney intends to ever enforce the Ordinance in light of its patent unconstitutionality." On September 16, 2011, in the wake of yet another federal district court decision, further described in paragraph 83 below, finding unconstitutional and enjoining a similar law enacted by New York City

Council, LifeCare's legal counsel again hand-delivered a letter to Defendant City of Austin's City Attorney, Karen Kennard, again requesting Defendant's "position as to whether upon complaint or otherwise the City Attorney intends to ever enforce the Ordinance in light of its patent unconstitutionality." The City Attorney never responded to either of these letters. On January 25, 2012, LifeCare's legal counsel hand-delivered a third letter to the City Attorney explaining to her and the City's outside legal counsel why the Proposed Replacement Ordinance was as or more unconstitutional than the now Repealed Ordinance. True and correct copies of each of these letters are attached and incorporated herein as EXHIBIT E. The concerns and legal analysis expressed in these letters apply to the current Ordinance (Exhibit F) as much as they did to the Proposed Ordinance (Exhibit G) and the now Repealed Ordinance (Exhibit A) for the reasons set forth in this Amended Complaint.

77. The Ordinance, its enforcement, and all actions alleged herein have occurred and will occur under color of state law.

78. The Ordinance and its threat of enforcement irreparably harms LifeCare by infringing upon LifeCare's First and Fourteenth Amendment rights to freedom of speech, freedom of association, free exercise of religion, equal protection, and due process as well as LifeCare's similar rights under the Texas Constitution and the Texas Religious Freedom Restoration Act.

79. Without temporary, preliminary and permanent injunctive and declaratory relief, the Ordinance will continue to impose irreparable harm on the constitutional rights of LifeCare as described herein.

80. LifeCare has no adequate remedy at law, is likely to prevail on the merits of its claims in this action, and submits that enjoining the enforcement of the Ordinance best serves the public interest.

C. Other Related Federal Court Decisions

81. In *O'Brien v. Mayor and City Council of Baltimore*, 768 F. Supp. 2d 804 (D. Md. 2011), the United States District Court for the District of Maryland ruled that an ordinance compelling PRCs to post a sign was subject to strict scrutiny as an action of compelled speech and amounted to unlawful viewpoint discrimination in violation of the First Amendment of the United States Constitution, and on January 31, 2011, the court permanently enjoined the enforcement of this ordinance.

82. In *Centro Tepeyac v. Montgomery County*, No. DKC 10-1259, 1 WL 915348 (D. Md. Mar. 15, 2011), the United States District Court for the District of Maryland preliminarily enjoined the enforcement of part of a similar ordinance compelling pregnancy resource centers to post a sign in their waiting rooms. The court held that the entire disclosure was subject to strict scrutiny as an action of compelled speech, and ruled that plaintiff, a pregnancy resource center, was likely to succeed on its claim that part of the sign amounted to unlawful compelled speech in violation of the First Amendment.

83. In *Evergreen Ass'n v. City of New York* (11-Civ-2055) and *Pregnancy Care Center of New York v. City of New York* (11-Civ-2342), 2011 WL 2748728 (S.D.N.Y. July 13, 2011), strict scrutiny was applied to another similar ordinance due to its compulsion of speech, and it was enjoined in its entirety, this one enacted by the New York City Council requiring similar disclosures regarding PRCs and their services.

84. All three courts found that the laws regulating pro-life pregnancy centers are not regulations of commercial or professional speech and that strict scrutiny applies to the compelled speech ordinances.

V. CLAIMS FOR RELIEF

CLAIM ONE: VIOLATION OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION (COMPELLED GOVERNMENT SPEECH AND COMPELLED FALSE SPEECH) AGAINST ALL DEFENDANTS

85. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

86. The First Amendment to the UNITED STATES CONSTITUTION provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

87. The First Amendment is applicable to state and local governments by incorporation in the Fourteenth Amendment.

88. The Ordinance unconstitutionally restricts LifeCare's rights of free speech, which includes the right to refrain from speaking and the right to refuse to speak a government-dictated message.

89. The Ordinance unconstitutionally forces LifeCare, on pain of government penalty, to engage in government disclaimers that LifeCare would not otherwise post and must do so in a way that they are "affixed to the entrance of the center so that the sign is conspicuously visible to a person entering."

90. The Ordinance requires LifeCare to post a misleading and irrational message regarding the qualifications of its staff and volunteers. While LifeCare does provide limited ultrasounds and pregnancy diagnoses directed and supervised by licensed medical professionals, it will be forced to suggest that these services are defective by posting that the center itself is not

"licensed or regulated by a state or federal regulatory entity to provide" limited ultrasounds and pregnancy diagnoses, even though there is no process in state or federal law by which a facility can obtain a license to provide these services.

91. The Ordinance mandates the timing, context, size, emphasis, content and location of the Centers' speech regarding the services they provide.

92. By requiring the sign to be "at the entrance", the Ordinance creates a heavy burden on LifeCare's speech. The City has ensured that its message will preempt the conversation before LifeCare has a chance to speak for itself regarding its services and qualifications, and that such preemption will necessarily be negative and discouraging since it is not possible for LifeCare or anyone else to obtain a facility license for those services.

93. Because the Ordinance compels speech, it is subject to strict scrutiny and cannot be upheld unless at the time of its enactment the Ordinance advanced a compelling governmental interest in a narrowly tailored way and by the least restrictive means.

94. The Ordinance does not promote any legitimate, much less compelling, governmental interest, and Defendants lack any evidence sufficient to demonstrate such an interest despite having two city council meetings in which to provide any such evidence.

95. The Ordinance is not tailored at all, much less narrowly tailored, to further any sufficient governmental interest, and it does not do so by the least restrictive means. Defendants have ample alternative channels to achieve any alleged interest without the Ordinance's burdens on Plaintiff's speech.

96. Therefore, the Ordinance and Defendants' enactment and enforcement thereof unconstitutionally infringe on LifeCare's rights, thereby entitling LifeCare, pursuant to 42 U.S.C. § 1983, to the relief requested below.

CLAIM TWO: VIOLATION OF FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION (CONTENT- AND VIEWPOINT- BASED DISCRIMINATION) AGAINST ALL DEFENDANTS

97. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

98. The Ordinance unconstitutionally discriminates against LifeCare's speech on the basis of its content because the Ordinance only regulates entities, like LifeCare, that speak about the topic of pregnancy.

99. The Ordinance is expressly content-based—if LifeCare wished to discuss any subject on Earth other than pregnancy, the Ordinance would not apply. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. at 382.

100. The Ordinance also unconstitutionally restricts LifeCare's speech on the basis of the viewpoint of Plaintiff's speech. Both versions previously considered only apply their restrictions on speakers with a viewpoint that does not provide or refer for abortion and comprehensive birth control services, but not on entities that are willing to provide or refer for such activities. The Ordinance has the practical effect of only covering these same speakers.

101. All services, information and material assistance that LifeCare offers are inextricably intertwined with and offered in furtherance of their viewpoint of non-judgmental support for abortion-alternatives and opposition to abortion.

102. The Ordinance was designed to apply to the same centers as the Repealed Ordinance, those who do not provide or refer for abortion, but not to abortion centers. This can be seen in the earlier Ordinances as well as the statements made by sponsor Bill Spelman and the other council members.

103. The words "maintaining a full time practice on site" are the mechanism with which the council maintained the Ordinance's viewpoint discrimination. Without this phrase, the Ordinance would not apply to LifeCare. There is no reason given or easily understood as to why it is important that a physician, nurse, or any other medical professional who works or volunteers at a PRC must maintain a full time practice on site. If the medical professional supervises all medical procedures, it should not matter how many hours or days are spent doing this. The insertion of a wholly unnecessary and irrational clause which has the effect of including the same speakers who were facially targeted by the Repealed Ordinance and Proposed Replacement Ordinance is evidence of the intended viewpoint discrimination in the Ordinance.

104. The Supreme Court has made it clear that such viewpoint discrimination violates the First Amendment: "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

105. The speech compelled by the Ordinance imposes a contrary viewpoint and a pall over LifeCare's discussions with pregnant women, by suggesting in the timing, context, emphasis and location of the mandated disclosures that their pregnancy related speech is suspect because the center is not licensed to perform certain procedures even though it is impossible for any facility to obtain a license to do so.

106. The Ordinance only mentions two "medical services": "diagnosing pregnancy or performing a sonogram," which specifies the only two medical services provided by many pro-life PRCs.

107. Because the Ordinance infringes LifeCare's speech on the basis of its content and LifeCare's viewpoint, it is subject to strict scrutiny.

108. The Ordinance does not promote any legitimate, much less compelling, governmental interest, and Defendants lacked any evidence sufficient to demonstrate such an interest.

109. The Ordinance is not tailored at all, much less narrowly tailored, to further any sufficient governmental interest, it does not do so by the least restrictive means, and Defendants have ample alternative channels to achieve any alleged interest without the Ordinance's content- and viewpoint-based burdens on Plaintiff's speech.

110. Therefore the Ordinance and Defendants' enactment and enforcement thereof unconstitutionally infringe on LifeCare's rights, thereby entitling LifeCare, pursuant to 42 U.S.C. § 1983, to the relief requested below.

CLAIM THREE: VIOLATION OF FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION (FREEDOM OF ASSEMBLY & ASSOCIATION) AGAINST ALL DEFENDANTS

111. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

112. The First Amendment to the UNITED STATES CONSTITUTION provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people to peacefully assemble."

113. The Ordinance imposes an unconstitutional burden on LifeCare's freedoms of association and assembly, insofar as it prohibits LifeCare's staff from freely meeting with pregnant women for the purpose of providing its counseling and information unless and until LifeCare complies with the Ordinance.

114. Defendants have no legitimate or compelling governmental interest in furtherance of the Ordinance's burden of LifeCare's free association and assembly.

115. The Ordinance's burden on LifeCare's free association and assembly is not sufficiently or narrowly tailored in the least restrictive manner to serve such an interest.

116. LifeCare is unconstitutionally burdened and chilled in its free association and assembly by the enactment of the Ordinance and its threat of monetary sanctions, and will continue to be so burdened and chilled without declaratory and injunctive relief insofar as LifeCare is being irreparable injured and has an inadequate remedy at law.

117. Therefore the Ordinance and Defendants' enactment and enforcement thereof unconstitutionally infringe on LifeCare's rights, thereby entitling LifeCare, pursuant to 42 U.S.C. § 1983, to the relief requested below.

CLAIM FOUR: VIOLATION OF FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION (FREEDOM OF EXERCISE OF RELIGION) AGAINST ALL DEFENDANTS

118. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

119. The First Amendment to the UNITED STATES CONSTITUTION provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

120. The Ordinance compels LifeCare to violate its sincerely-held religious beliefs against providing or referring for abortion and comprehensive birth control services.

121. The Ordinance is not neutral and generally applicable, and it intentionally imposes a substantial burden on LifeCare's ability to serve women pursuant to its sincerely-held religious beliefs.

122. By their reliance while enacting the Ordinance upon only reports showing hostility toward LifeCare's sincerely held religious beliefs opposing abortion and certain forms

of birth control, Defendants have indicated of the Ordinance's purpose of substantially burdening the free exercise and expression of such religious viewpoints.

123. The Ordinance unconstitutionally imposes a substantial burden on LifeCare's sincerely-held religious beliefs, in that it deprives LifeCare of its right to the free exercise of religion and exposes it to special regulation and fines as a result of its sincerely-held religious beliefs.

124. The Ordinance imposes an unconstitutional burden on LifeCare's free exercise of religion and, without declaratory and injunctive relief, will continue to do so thereby causing LifeCare ongoing irreparable injury for which there is no adequate remedy at law.

125. The Ordinance violates LifeCare's right to free exercise of religion. It is subject to strict scrutiny.

126. The Ordinance does not promote any legitimate, much less compelling, governmental interest, and Defendants lacked any evidence sufficient to demonstrate such an interest.

127. The Ordinance is not tailored at all, much less narrowly tailored, to further any sufficient governmental interest, it does not do so by the least restrictive means, and Defendants have ample alternative channels to achieve any alleged interest without the Ordinance's content- and viewpoint-based burdens on Plaintiff's speech.

128. Accordingly, the Ordinance violates LifeCare's religious freedoms protected by the First Amendment of the United States Constitution thereby entitling LifeCare, pursuant to 42 U.S.C. § 1983, to the relief requested below.

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CLAIM FIVE: VIOLATION OF FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION (EQUAL PROTECTION)
AGAINST ALL DEFENDANTS

129. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

130. Section 1 of the Fourteenth Amendment to the UNITED STATES CONSTITUTION provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

131. The Ordinance regulates the speech and interactions of LifeCare by virtue of LifeCare's refusal to refer for or provide abortions and certain forms of birth control.

132. The Ordinance subjects LifeCare—but not other, similarly situated entities such as abortion performing or referral facilities that provide information and counseling about pregnancy—to severe financial penalties, interference with free speech, and compelled speech.

133. The Ordinance imposes a penalty on LifeCare—but not other, similarly situated entities such as abortion performing or referral facilities that provide information and counseling about pregnancy—in the form of reduced speech rights and exposure to regulation and fines for Plaintiff's refusal to provide or refer for abortions.

134. If LifeCare simply agreed to refer for abortions and additional methods of birth control, the restrictions of the Repealed Ordinance and Proposed Replacement Ordinance would have been inapplicable.

135. Without the inclusion of the unexplained and wholly irrational phrase "maintain a full time practice" the Ordinance would not apply to LifeCare and other similarly situated speakers.

136. As such, the Ordinance violates LifeCare's Fourteenth Amendment guarantees of equal protection based on LifeCare's exercise of the fundamental rights of free speech and free exercise of religion, and based upon the suspect classification between speakers of a different viewpoint. It is therefore subject to strict scrutiny.

137. The Defendant passed the Ordinance based on animus toward pregnancy centers that advocate alternatives to abortion. Ordinances based on animus fail even rational basis review, much less strict scrutiny review. Subjecting pregnancy centers that advocate abortion alternatives, and not those that advocate in favor of abortion, to compelled disclosures and criminal sanctions fails rational basis review and violates equal protection guarantees.

138. The Ordinance cannot satisfy any level of review, since it does not advance any ration much less compelling government interest, it does not do so in a way tailored at all, much less narrowly tailored, to such an interest, and it does not do so in the least restrictive means available.

139. Accordingly, the Ordinance violates LifeCare's equal protection rights protected by the Fourteenth Amendment of the United States Constitution thereby entitling LifeCare pursuant to 42 U.S.C. § 1983 to the relief requested below.

CLAIM SIX: VIOLATION OF FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION (VAGUENESS) AGAINST ALL DEFENDANTS

140. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

141. The Fourteenth Amendment of the United States Constitution right to due process protects against the government's imposition of penalties such as fines based on vague terms that do not give regulated entities adequate notice of whether or how the law applies and what entities can do to comply.

142. The Ordinance defines "Unlicensed Pregnancy Services Centers" in part as "an organization or facility that… does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full time practice on site."

143. The Ordinance requires a sign that must state in part, "if the center provides medical services" and "whether the center is licensed by a state or federal regulatory entity to provide those services."

144. The Ordinance is vague because it does not define the following words or phrases "maintaining a full time practice on site," "regulatory entity" and "licensed."

145. Plaintiff Austin LifeCare appears to fit the definition described in the Ordinance in paragraph 28 above and the description given by Mr. Spelman during his questioning of Ms. Clark as described in paragraph 46 above. Licensed medical professionals work and volunteer for LifeCare. LifeCare is authorized by the Clinical Laboratory Improvement Amendments (CLIA) to provide and diagnose pregnancy tests, but LifeCare, as "an organization or facility" does not have a specific organization or facility license to provide medical services generally or have a license or any kind of specific regulatory authorization to provide ultrasounds or any medical services other than pregnancy tests. It is unclear if the CLIA qualifies HHS as a "regulatory entity" described by the Ordinance.

146. It is unclear what a medical professional working for LifeCare must do to maintain a full time practice on site at LifeCare. There is no explanation as to how much time or

other standards this requires. There is similarly no explanation or guide to know if a medical professional may maintain a practice at several sites.

147. Austin LifeCare participates in the Texas Alternative to Abortion Services Program. In order to receive funding from this program, Austin LifeCare must maintain certain standards that are regulated by the Texas Alternative to Abortion Services Program. This program does not specifically license Austin LifeCare's medical services, but it is unclear if Texas Health and Human Services Commission (THHSC) though its contract with the Texas Pregnancy Care Network (TPCN) qualifies as a state "regulatory entity."

148. The Ordinance does not define or give examples of an organization that is or is not "licensed or regulated by a state or federal regulatory entity to provide [medical] services."

149. The Ordinance also does not explain what is required when a center provides one or more medical services for which neither a state or federal regulatory license is available or otherwise required for an "organization or facility" to provide such services by or under the direction and supervision of a licensed health care provider.

150. As referenced above, Councilmember Spelman and Sara Clark both stated that the Ordinance would not apply to PRCs who have licensed professionals supervising all medical procedures without addressing the multitude of vague terms and requirements in the Ordinance. As these are not the individuals tasked with enforcement of the law, a simple statement that it does not apply provides no reliable assurance to LifeCare what the Ordinance requires of it.

151. The vagueness caused by a lack of definitions and explanation and the statements by sponsor of the Ordinance, Bill Spelman and attorney representing the City, Sara Clark affect LifeCare on two levels. *First*, it is unclear if the Ordinance applies to LifeCare. *Second*, it is unclear what content is required on a sign if the Ordinance does apply.

152. During the January 26, 2012 City Council meeting where the Ordinance was passed, both Sara Clark, outside council for defendants and Defendant Bill Spelman stated that centers which used licensed medical professionals would not be covered by the Ordinance.

153. Statements from an attorney representing the City of Austin and from the sponsor of the Ordinance conflict with a plain reading of the Ordinance. Plaintiff Austin LifeCare and other similarly situated PRCs have no way to be certain if the Ordinance applies to them or not and do not know whether or not they are compelled to burden their own speech with the government's message.

154. As such, the Ordinance violates LifeCare's Fourteenth Amendment guarantees of due process because the Ordinance is unconstitutionally vague.

CLAIM SEVEN: VIOLATION OF ARTICLE 1, SECTION 8 OF THE TEXAS CONSTITUTION (FREEDOM OF SPEECH) AGAINST ALL DEFENDANTS

155. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

156. Section 8, Article 1 of the TEXAS CONSTITUTION states that, "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

157. For similar reasons described above that the Ordinance violates the guarantee of the right to free speech under the United States Constitution, the Ordinance also violates the guarantee to the liberty of speech in the Texas Constitution.

158. Therefore, LifeCare is entitled to the relief requested below.

CLAIM EIGHT: VIOLATION OF ARTICLE 1, SECTION 6 OF THE TEXAS CONSTITUTION (FREEDOM OF RELIGION) AGAINST ALL DEFENDANTS

159. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

160. Section 6 of Article 1 of the TEXAS CONSTITUTION provides that, "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent."

161. As detailed above, the services and speech that LifeCare engages in is a result of their sincerely-held religious beliefs. The burdens that the Ordinance places on those beliefs and speech infringe upon Plaintiff's right to worship according to its own dictates.

162. Furthermore, the speech compelled by the Ordinance effectively constitutes maintenance of ministry against LifeCare's consent.

163. For similar reasons described above that the Ordinance violates the guarantee of the right to the free exercise of religion under the United States Constitution, the Ordinance violates the guarantee to the liberty of worship in the Texas Constitution.

164. Therefore, LifeCare is entitled to the relief requested below

CLAIM NINE: VIOLATION OF THE TEXAS RELIGIOUS FREEDOM RESTORATION ACT (TEX. CIV. PRAC. & REM. CODE, §§ 110.001 ET SEQ.) AGAINST ALL DEFENDANTS

165. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

166. Section 110.003 of the TEXAS RELIGIOUS FREEDOM RESTORATION ACT (TRFRA) in pertinent part provides: "a government agency may not substantially burden a person's free exercise of religion, [unless] . . . the government agency demonstrates that the application of the

burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest."

167. LifeCare is a religious organization with a Statement of Faith to which all of LifeCare's Board members, staff and volunteers subscribe.

168. The Ordinance substantially burdens LifeCare's ability to freely exercise its sincerely-held religious beliefs as it prefers.

169. As described above, LifeCare's service and speech to the women of Austin encompass the exercise of sincerely-held religious beliefs.

170. LifeCare's refusal to provide or refer for abortion and certain methods of birth control are directly tied to its sincerely-held religious beliefs.

171. As described above, LifeCare is also motivated by sincere religious beliefs that it must reach women and families facing unplanned pregnancies with the gospel of Jesus Christ through their provision of pregnancy counseling and information and related services, and in the manner and form inconsistent with the Ordinance's compelled disclosures. LifeCare believes that the Bible and church doctrine are unequivocal that human life begins at conception; they further believe that abortion destroys innocent human life, degrades women, and destroys families.

172. The Ordinance substantially burdens LifeCare's free exercise of religion by undermining its staff and volunteers from reaching clients with their religious messages, and does so in violation of TRFRA for failing to be narrowly tailored to serve a compelling governmental interest by the least restrictive means.

173. Therefore, LifeCare is entitled to the relief requested below.

CLAIM TEN: VIOLATION OF ARTICLE. 1, SECTION 27 OF THE TEXAS CONSTITUTION (FREEDOM OF ASSEMBLY & ASSOCIATION) AGAINST ALL DEFENDANTS

174. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

175. Section 27 of Article 1 of the TEXAS CONSTITUTION in pertinent part provides that "The citizens shall have the right, in a peaceable manner, to assemble together for their common good . . ."

176. For the same reasons described above that the Ordinance violates the guarantee of the right to free association and assembly under the First Amendment of the United States Constitution, the Ordinance also violates LifeCare's guarantee to be able "assemble together for their common good" in the TEXAS CONSTITUTION.

177. Therefore, LifeCare is entitled to the relief requested below.

CLAIM ELEVEN: VIOLATION OF ARTICLE 1, SECTION 3 OF THE TEXAS CONSTITUTION (EQUAL RIGHTS) AGAINST ALL DEFENDANTS

178. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

179. Section 3 of Article 1 of the TEXAS CONSTITUTION states that, "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

180. For the same reasons described above that the Ordinance violates the guarantee of the equal protection of the laws under the Fourteenth Amendment of the United States Constitution, the Ordinance violates the guarantee of equal rights in the Texas Constitution.

181. Therefore, LifeCare is entitled to the relief requested below

CLAIM TWELVE: VIOLATION OF THE FOURTEENTH AMENDMENT'S PROTECTION AGAINST THE DEPRIVATION OF CONSTITUTIOANLLY PROTECTED RIGHTS WITHOUT PROCEDURUAL DUE PROCESS OF LAW

182. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

183. The Fourteenth Amendment of the United States Constitution right to due process protects against the government's deprivation of rights protected by the Constitution in the absence of minimum standards of procedural due process, including the right not to be subjected to criminal or monetary sanctions without any due notice of a law that is being proposed for enactment and an opportunity to be heard in opposition to its enactment.

184. For the same reasons described above that the Ordinance was enacted without any public notice of its proposed language in an apparent subterfuge of LifeCare's constitutional rights.

185. Therefore, LifeCare is entitled to the relief requested below

VI. DECLARATORY ACTION

186. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

187. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaration from the Court that the Ordinance violates federal and state law.

VII. EQUITABLE INJUNCTIVE RELIEF

188. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

189. For the reasons describe above, LifeCare is entitled to temporary or preliminary injunctive relief enjoining the Defendants' enforcement of the Ordinance against it because: (1) there is "a substantial likelihood" that LifeCare will enjoy "success on the merits", (2) LifeCare's loss of "First Amendment Freedoms . . . constitutes irreparable injury" if the injunction is not issued (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)), (3) the irreparable injury to LifeCare "if the injunction is denied outweighs any harm that will result if the injunction is granted," and (4) "the grant of such an injunction will not disserve the public interest." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

190. For the same reasons, described above, LifeCare is also entitled to permanent injunction enjoining Defendant City of Austin, its agents, employees, and all other persons acting in concert with Defendant City of Austin or any of its agents or employees from enforcing the Ordinance against LifeCare.

VIII. NOMINAL DAMAGES

191. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

192. Plaintiffs seek nominal damages for Defendants violation of the law as described above, including the costs of posting and taking down the sign required by the now Repealed Ordinance and the loss of revenues otherwise reimbursable from the TAASP for services that were never rendered to clients who otherwise would have received such services from LifeCare but for the Ordinance or the now Repealed Ordinance.

IX. COSTS & A REASONABLE ATTORNEY"S FEES

193. LifeCare incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

194. LifeCare, as the prevailing party, will seek an award of "costs and a reasonable attorney's fee" against Defendant pursuant but not limited to 42 U.S.C. § 1988 and Tex. Civ. Prac. & Rem. Code § 110.005(a)(4) for the services reasonably required to challenge the constitutionality of the Ordinance and the now Repealed Ordinance.

X. PRAYER FOR RELIEF

195. WHEREFORE, LifeCare respectfully requests an Order and Judgment from this Court:

(a) Declaring the Ordinance unconstitutional on its face and/or as-applied to LifeCare;

(b) Entering temporary, preliminary and permanent injunctions against enforcement of the Ordinance;

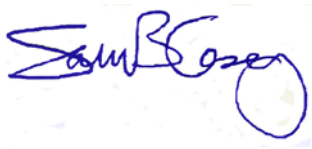
(c) Awarding LifeCare nominal damages for the existing violation of its rights under the Ordinance and now Repealed Ordinance;

(d) Awarding LifeCare its costs of the litigation, including a reasonable attorney's fees and expenses under 42 U.S.C. § 1988 and under the Texas Religious Freedom Restoration Act;

(e) Awarding any and all other relief the Court deems just and proper.

Dated this 30th Day of January, 2012

Respectfully submitted,



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VERIFICATION OF COMPLAINT

I, PAMELA COBERN, hereby declare that I am the chief executive officer and executive director of Austin LifeCare, the plaintiff in this action. I have read the foregoing VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF and hereby declare and verify under penalty of perjury that the factual allegations contained in the foregoing Complaint are known by me to be true and correct.

Executed in Austin, Texas, on January 31, 2011.

Pamela Cobern, *CEO & Executive Director*
Plaintiff AUSTIN LIFE CARE

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2012, using the CM/ECF system I electronically filed the foregoing Plaintiff Austin LifeCare's AMENDED VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF with the Clerk of the Court and duly served a copy of these documents on following legal counsel representing all the parties in this consolidated action.

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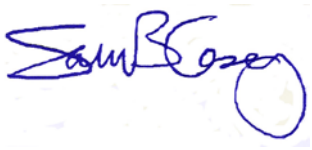

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