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

AUSTIN LIFECARE, INC., ROMAN CATHOLIC DIOCESE OF AUSTIN, CATHOLIC CHARITIES OF CENTRAL TEXAS, AUSTIN PREGNANCY RESOURCES CENTER, AND SOUTH AUSTIN PREGNANCY RESOURCE CENTER, PLAINTIFFS,	§	
V.	§	CIVIL NO. A-11-CA-875-LY
CITY OF AUSTIN, DEFENDANT.	§	

FINAL JUDGMENT
AND PERMANENT INJUNCTION

BE IT REMEMBERED that on April 9, 2012, the court called the above styled and numbered cause for bench trial, the parties announced they were ready, the trial proceeded, and concluded on April 10, 2012. On this date, by separate Findings of Fact and Conclusions of Law, the court has determined that Austin, Texas City Code chapter 10-10 is void for vagueness and the City of Austin should be enjoined from enforcing the provision. The court thus renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58:

IT IS ORDERED and the court **HEREBY DECLARES** Austin City Code Chapter 10-10 void for vagueness.

IT IS FURTHER ORDERED that the City of Austin is hereby **ENJOINED** from enforcing Austin City Code Chapter 10-10.

IT IS FURTHER ORDERED that Plaintiffs Austin LifeCare Inc., Roman Catholic Diocese of Austin, Catholic Charities of Central Texas, Austin Pregnancy Resources Center, and South Austin Pregnancy Resource Center recover their costs of court from Defendant the City of Austin.

Any claim for attorney's fees incurred in this action will be determined post judgment and pursuant to Rule CV-7(j), of the Local Rules of the United States District Court for the Western District of Texas.

IT IS FINALLY ORDERED that the case is hereby **CLOSED**.

SIGNED this 23rd day of June, 2014.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

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

AUSTIN LIFECARE, INC., ROMAN CATHOLIC DIOCESE OF AUSTIN, CATHOLIC CHARITIES OF CENTRAL TEXAS, AUSTIN PREGNANCY RESOURCES CENTER, AND SOUTH AUSTIN PREGNANCY RESOURCE CENTER, PLAINTIFFS,	§	
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CITY OF AUSTIN, DEFENDANT.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BE IT REMEMBERED that on April 9, 2012, the court called the above styled and numbered cause for a bench trial, which concluded on April 10, 2012.[1] Plaintiffs Austin LifeCare Inc. ("LifeCare"), Roman Catholic Diocese of Austin, Catholic Charities of Central Texas, Austin Pregnancy Resources Center ("Austin PRC"), and South Austin Pregnancy Resource Center ("South Austin PRC") and Defendant the City of Austin ("City") appeared through their representatives and by counsel. Plaintiffs challenge the constitutionality of the City's Code Chapter 10-10 that creates a criminal offense and imposes a monetary penalty for failure to comply with the chapter's

[1] The court consolidated two actions with similar contentions into this cause on November 14, 2011 (Clerk's Document No. 29). The live pleadings in this action are Austin LifeCare Inc.'s Amended Verified Complaint For Declaratory, Injunctive and Other Relief filed January 31, 2012 (Clerk's Document No. 30); the Verified First Amended Complaint of Roman Catholic Diocese of Austin, Catholic Charities of Central Texas, Austin Pregnancy Resources Center, and South Austin Pregnancy Resource Center filed February 2, 2012 (Clerk's Document No. 33); and the City's answers to each filed February 17, 2012 (Clerk's Document Nos. 42 & 43).

requirement that a sign containing certain information be posted at unlicensed pregnancy service centers. Austin, Tex. City Code ch. 10-10 (2012) ("Chapter 10-10").[2] Plaintiffs allege that Chapter 10-10 facially and as applied violates their free-speech, free-exercise-of-religion, equal-protection, and due-process rights under the First and Fourteenth Amendments to the United States Constitution.[3] Plaintiffs seek an order declaring Chapter 10-10 unconstitutional and enjoining the City from enforcing the provision. Having carefully considered the evidence presented at trial, the parties' stipulations[4] and briefing,[5] the applicable law, and the arguments of counsel, the court holds

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[2] The City passed Chapter 10-10 to achieve the same goals as an ordinance passed by the City in 2010 and since repealed, which applied to similar facilities. Austin, Tex., City Code ch. 10-9 (2010) (Ordinance No. 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"). Chapter 10-9 was repealed by the City, effective February 6, 2012. *See* Austin, Tex., Ordinance 20120126-017 (Jan. 26, 2012).

[3] Additionally, Plaintiffs allege that Chapter 10-10 imposes an unconstitutional burden on Plaintiffs' freedoms of association, assembly, and speech and rights to religious free exercise under the Texas Constitution and the Texas Religious Freedom Restoration Act. Tex. Const. art. I, §§ 6, 8, 27; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001-.012 (West 2011).

[4] *See* Clerk's Document Nos. 46, 80, 98, and 118.

[5] The following briefing is before the court: Opening Trial Brief of the City of Austin filed March 29, 2012 (Clerk's Document No. 85); Plaintiffs Roman Catholic Diocese of Austin, Catholic Charities of Central Texas, Austin Pregnancy Resources Center, and South Austin Pregnancy Resource Center's Opening Trial Brief filed March 29, 2012 (Clerk's Document No. 88); Plaintiff Austin LifeCare's Opening Trial Brief filed March 30, 2012 (Clerk's Document No. 90); City of Austin's Response Brief filed April 2, 2012 (Clerk's Document No. 103); Plaintiffs Roman Catholic Diocese of Austin, Catholic Charities of Central Texas, Austin Pregnancy Resources Center, and South Austin Pregnancy Resource Center's Response to Defendant City of Austin's Opening Trial Brief filed April 2, 2012 (Clerk's Document No. 104); and Plaintiff Austin LifeCare's Corrected Response to Defendant's Trial Brief filed April 3, 2012 (Clerk's Document No. 108). The parties submitted post-trial briefing on May 1, 2012 (Clerk's Document Nos. 130 & 131). Additionally the parties submitted advisories to the court on June 27, 2012, July 13, 2012, and August 15, 2012, may 24, 2013, July 3, 2013, July 8, 2013, August 15, 2013, January 27, 2014, March 13, 2014, and March 17, 2014 (Clerk's Document Nos. 130-144).

that Chapter 10-10 is unconstitutionally vague and violates Plaintiffs' Fourteenth Amendment guarantee of due process. In so deciding, the court makes the following findings of fact and conclusions of law.[6]

Chapter 10-10

Chapter 10-10 reads as follows:

CHAPTER 10-10 UNLICENSED PREGNANCY SERVICE CENTERS.

§10-10-1 DEFINITIONS.

In this chapter:

(1) **UNLICENSED PREGNANCY SERVICE CENTER** or **CENTER** means an organization or facility that:

(a) as its primary purpose, provides pregnancy related services, including pregnancy testing and options counseling; and

(b) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining a full time practice on site.

(2) **MEDICAL SERVICE** includes, without limitation, diagnosing pregnancy or performing a sonogram.

(3) **OWNER OR OPERATOR** means a person who owns, operates, or manages an unlicensed pregnancy service center.

§ 10-10-2 NOTICE REQUIRED.

(A) The owner or operator of an unlicensed pregnancy service center shall 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:

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[6] All findings of fact contained herein that are more appropriately considered conclusions of law are so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact is so deemed.

(1) whether the center provides medical services.

(2) if the center provides medical services, whether all medical services are provided under direction and supervision of a licensed health care provider; and

(3) if the center provides medical services, whether the center is licensed by a state or federal regulatory entity to provide those services.

(B) 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.

§ 10-10-3 PENALTY.

(A) An owner or operator commits an offense if the owner or operator violates this chapter.

(B) An offense under this article 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.

(C) A culpable mental state is not required, and need not be proved, for an offense under this chapter.

PART 2. This ordinance takes effect on February 6, 2012.

Joint Stipulations of Fact and Evidence

The parties filed many stipulations, all of which the court has considered. To provide context, the court refers to some of the stipulations.

LifeCare, Austin PRC, South Austin PRC, and The Gabriel Project, which operates under Catholic Charities of Central Texas,[7] each has as its primary purpose to provide pregnancy-related

[7] Catholic Charities is the social service arm of the Roman Catholic Diocese of Austin and operates pursuant to a service agreement with the Diocese.

services (collectively the "Establishments").[8] Based on their religious beliefs, these Establishments do not offer abortion services nor do they refer any client to any entity that does offer such services.

Plaintiffs are opposed to posting the sign required by Chapter 10-10. The parties agree that Chapter 10-10 compels speech by the Establishments and, by requiring the sign specified in Chapter 10-10, the City mandates the timing and content of the required speech. Chapter 10-10 applies to a facility that does not have a health-care provider on site and to a speaker who discusses the topic of pregnancy. Further, a center that has a health-care provider on site who supervises all medical services, as defined by Chapter 10-10, must also post the required sign if the health-care provider's practice at the facility is not full time. Chapter 10-10 includes no requirement of a finding that a center has committed any wrongdoing.

Neither LifeCare, Austin PRC, nor South Austin PRC has a health-care provider licensed by the state or federal regulatory entity that maintains a full time practice on site. The Gabriel Project does not have a health-care provider licensed by a state or federal regulatory entity who works at its site.

LifeCare provides sonograms and pregnancy diagnoses, supervised by a licensed physician. LifeCare operates a laboratory currently certified by United States Department of Health and Human Services' Center for Medicare and Medicaid to examine bodily fluids of its clients to determine the results of a pregnancy test procedure.

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[8] The parties' stipulations refer to LifeCare, Austin PRC, South Austin PRC, and The Gabriel Project collectively as "Centers". As the word "center" is a term defined by Chapter 10-10, to avoid any unintended implication the court refers to these entities collectively as "Establishments".

Austin PRC and South Austin PRC provide, *inter alia*, pregnancy tests, limited sonograms, parenting classes, mentoring and individual support, budgeting classes, nutrition classes, maternity clothes, and baby items.

The parties agree that displaying the sign required by Chapter 10-10 may deter potential clients of the Establishments who would otherwise hear the Establishments' religious and other messages. The Establishments are not licensed by any state or federal regulatory entity to provide medical services. There is no license a pregnancy center can obtain from a state or federal regulatory entity for providing only sonograms and pregnancy diagnoses.[9]

Analysis

Facial vagueness

Plaintiffs argue that Chapter 10-10 is facially vague and violates the Due Process Clause of the Fourteenth Amendment. Specifically, Plaintiffs contend the phrases "full time practice on site" and "medical service, includes without limitation" are vague as they fail to provide proper notice about what conduct may be penalized. The Plaintiffs argue that due to these vague phrases and the fact that these portions are inextricably intertwined with the remainder of Chapter 10-10, the entire

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[9] Similar municipal ordinances that apply to pregnancy service centers are being litigated. The status of three actions are as follows: *Evergreen Assoc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (provisions of ordinance were severable and preliminary injunction enjoining ordinance affirmed in part, vacated in part, and action remanded for further proceedings); *Greater Baltimore Ctr for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264 (4th Cir. 2013) (en banc) (two consolidated cases, one action affirmed district court ruling certain parties lacked standing, other action vacated district court's final judgment and summary judgment rendered in favor of Baltimore and action was reversed for further proceedings); *Centro Tepeyac v. Montgomery Cty.*, 2014 WL 923230 (D. Md. Mar. 7, 2014) (following remand from Fourth Circuit's ruling on appeal of preliminary injunction, cross motions for summary judgment, County's motion denied, Centro Tepeyac's motion granted, and County permanently enjoined from enforcing ordinance).

chapter is unconstitutional. The City responds that Plaintiffs have failed to establish that they have standing to urge the facial-vagueness challenge and, alternatively, that the vagueness claims fail on their merits or can be addressed with a limiting construction so as to avoid a finding of unconstitutionality.

Plaintiffs complain specifically that the following italicized portions of Chapter 10-10 render the entire chapter vague because it is unclear what actions may be penalized:

> **§ 10-10-1 Definitions.**
>
> (1) **UNLICENSED PREGNANCY SERVICE CENTER** or **CENTER** means an organization or facility that:
>
> (b) does not have a health care provider that is licensed by a state or federal regulatory entity maintaining *a full time practice on site.*
>
> and
>
> (2) ***MEDICAL SERVICE*** *includes, without limitation,* diagnosing pregnancy or performing a sonogram.

(Emphasis added.)

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *See Federal Commc'n Comm'n v. Fox Television Station, Inc.*, ____ U.S. ____, 132 S.Ct. , 2307, 2317 (2012) (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). A law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally*, 269 U.S. at 391.

The void-for-vagueness doctrine "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so that they may act accordingly; and second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S.Ct. at 2317 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972)); *Hill v. Colorado*, 530 U.S. 703, 732 (2000). The void-for-vagueness doctrine requires that laws "articulate a proscription 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' while providing enough objective metrics that it 'does not encourage arbitrary and discriminatory enforcement.'" *Texas Med. Providers Performing Abortion Svcs. v. Lakey*, 667 F.3d 570, 581 (5th Cir. 2012).[10] Further, any policy of forbearance in which the City might engage does not moot the issue of vagueness. *See Fox Television*, 132 S.Ct. at 2318 ("due process protection against vague regulations does not leave regulated parties at the mercy of noblesse oblige").

Courts must "proceed with caution and restraint" when considering a facial vagueness challenge to a law. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). "[A] court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). In evaluating such a challenge, "a federal court must, of course, consider any limiting

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[10] *Lakey* addressed a claim of vagueness with regard to whether the phrase "the physician who is to perform the abortion" is to make certain disclosures to a patient, is satisfied in a multi-physician practice when the physician "who intends to" perform the abortion makes the required disclosures. 667 F.3d at 581. The circuit court held it was reasonable to construe the provision grammatically as allowing compliance by the physician who "intends" or "is intended" to perform the abortion and, as construed, the provision was not vague. *Id.* The phrase at issue in *Lakey*, was determined to be sufficiently definite, because it was clear to an ordinary person what was required.

construction that a state court or enforcement agency has proffered." *Id.* at n. 5. In the absence of a limiting construction from a state court, federal courts should "presume any narrowing construction or practice to which the law is fairly susceptible." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11 (1988).[11]

Standing

Before addressing the Plaintiffs' facial-vagueness challenge, the court reviews the City's challenge, raised in its post-trial briefing, that Plaintiffs lack standing to bring such claim. To have standing to bring a claim, a plaintiff must demonstrate that it has been injured, that the defendant caused the injury, and that the requested relief will redress the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The City argues that Plaintiffs have failed to establish the harm requirement for a facial challenge to Chapter 10-10.

Facial challenges are generally disfavored because they "entail a departure from the norms of federal-court adjudication by calling for relaxation of familiar standing requirements to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)); *See also City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."). Controlling precedent, however, establishes that a chilling of speech because

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[11] The City notes this facial-challenge analysis was utilized in *Netherland v. Eubanks*, 302 Fed. Appx. 244, 2008 WL 4996611 (5th Cir. 2008) (unpublished opinion). The *Netherland* court held that the district court failed to consider any narrowing construction from Louisiana courts or, in the absence of state-court decisions, if the ordinance was "fairly susceptible" to a narrowing construction. *Id.* at *2. The court will first consider the issue of Plaintiffs' standing.

of the mere existence of an allegedly vague law can be sufficient injury to support standing. *See Carmouche*, 449 F.3d at 660.

The parties stipulate that the Establishments are subject to Chapter 10-10. Potential enforcement of Chapter 10-10 against each of the Establishments could be redressed by enjoining its enforcement. The court holds that the Plaintiffs have standing to raise their facial-vagueness challenge.

Full-time practice on site

At trial, the parties focused on what constitutes a full-time practice on site for purposes of Chapter 10-10. The City has no definition for "full time" nor does the City direct the court to any standard definition. City Councilmember William Spelman, the City's representative at trial, acknowledged that "full time" is not defined by Chapter 10-10 and testified that "full time is full time." Spelman stated that he "presume[s] somewhere there's a definition of full time" and continued that perhaps "full time" is defined in *Black's Law Dictionary*. However, *Blacks' Law Dictionary* does not include an entry for "full time." Spelman also stated that he thought working four-and-a-half days per week would satisfy Chapter 10-10 "with just about anybody who was being reasonable." Furthermore, when presented with the question of whether a pregnancy center that is only open 20 hours a week would be required to have a "full time" medical provider who works five days per week on site, Spelman responded that would be required; however, he continued, "That's a flaw in the ordinance. I see your point."

Plaintiffs note that the Texas Workforce Commission, with regard to part-time or full-time status, provides in materials available to the public, "Texas and federal laws leave it up to an employer to define what constitutes full-time and part-time status within a company and to determine

the specific schedule of hours."[12] The Commission goes on to warn, "Having part-time/full-time definitions that are insufficiently specific can lead to a problem of interpretation." *Id.*

Also discussed at trial was the possibility that the National Labor Relations Board might have a definition of "full time." However, as noted by Plaintiffs, courts have found problems with leaving the term "full time" undefined. *See National Labor Relations Bd. v. Greensburg Coca-Cola Bottling Co.*, 40 F.3d 669, 671 (3d Cir. 1994) (company understood full-time employment to mean working 40 hours per week, union asserted full-time employees were "all regularly employed persons, regardless of the number of hours worked").

The City maintains that the phrase "full time" has withstood void-for-vagueness challenges in two federal-district-court actions. *See Estill v. Cool*, No. 2:08-CV-606; 2008 WL 4274065 at *6-7 (S.D. Ohio Sept. 11, 2008) (undefined phrase "full time" in regulation requiring prior "full-time" employment as condition for candidacy was not void for vagueness); *Kaufman v. Board of Trustees*, 522 F.Supp. 90, 94-97 (N.D. Ill. 1981) ("full time" is term of common usage today and when it is infused with its commonly understood meaning, challenged rule prohibiting concurrent "full-time" employment not unconstitutionally vague). Further, the City states that it "does not intend to prosecute unreasonable complaints alleging that a health care practitioner is not on site while the center is open for parenting classes but medical services are not being provided."

The court is unpersuaded by the City's argument. The court finds Chapter 10-10's requirement that a center is subject to the provisions of Chapter 10-10 if it does not have a health-care provider, who is licensed by a state or federal regulatory entity and maintains a full-time practice

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[12] Texas Workforce Commission, Especially For Texas Employer, Top Ten Tips, "Part-Time/Full-Time Status." http://www.twc.state.tx.us/news/efte/part_time_full_time.html (accessed January 25, 2013).

on site, is a vague requirement. The meaning of "full time" as used in Chapter 10-10 is not sufficiently definite such that an ordinary person can determine what is required. Further, lacking from Chapter 10-10 is the precision and guidance necessary to ensure that those enforcing the law on behalf of the City do not act in an arbitrary or discriminatory manner.

Medical service, includes without limitation

Plaintiffs also complain of Chapter 10-10's broad and unbounded definition of "medical service," which is a nonexclusive list of only two items–diagnosing pregnancy or performing a sonogram. Plaintiffs argue that this is insufficient for a person of ordinary intelligence to understand what constitutes a "medical service" for purposes of Chapter 10-10 and fails to provide the precision and guidance necessary for those enforcing Chapter 10-10.

With regard to this phrase, the court notes the vagueness discussion and reasoning in *Evergreen Association Inc. v. City of New York*, 740 F.3d 233, 243-44 (2d Cir. 2014). At issue in *Evergreen* was a municipal ordinance that required "pregnancy services centers" to make certain mandatory disclosures regarding their services. The local law defined a pregnancy services center "as any facility whose primary purpose is to provide services to pregnant women and, *inter alia*, has the 'appearance of a licensed medical facility.'" *Id.* at 243. The local law listed six specific nonexclusive factors for determining whether a facility has such an appearance. *Evergreen* held that the "listed factors, while nonexclusive, are objective criteria that cabin the definition of 'appearance.'" *Id.* at 244 (internal quotations and citations omitted). The appearance of a licensed medical facility, combined with the listed factors, was "enough to give notice to regulated facilities and curtail arbitrary enforcement." *Id.*

Although perfect clarity and precise guidance have never been required, Chapter 10-10's list of only two nonexclusive factors allows the City to classify a "medical service" based solely on unspecified criteria. The court concludes that Chapter 10-10's definition of "medical service" permits those who would be charged with enforcing its provisions to classify a service offered by a center as a "medical service" based on unspecified criteria. The court further concludes that Chapter 10-10 fails to impose sufficient restraints on the City's discretion in enforcing the provisions of Chapter 10-10 with regard to what is a "medical service."

Possible narrowing or limiting construction

Having determined that these portions of Chapter 10-10 are vague, the court considers whether the phrases are susceptible to a narrowing or limiting construction that would cure their vagueness. *See Lakey*, 667 F.3d at 581. The City proposes the following limited constructions and represents to the court that it intends to enforce Chapter 10-10 in a manner consistent with such construction.

The City suggests that "full time practice on site" be construed to mean that full time be considered only during times when medical services are being performed at a center. The City argues that because the intent of Chapter 10-10 is to avoid having women be confused when they receive medical services from lay people, this construction is sensible because the potential for harm will be ameliorated if medical services are only provided while a health-care practitioner is on site. The City represents that it does not intend to prosecute any center that has a licensed health-care practitioner on site while medical services are being provided.

The City also suggests that "medical services, including without limitation" be construed to include only services that may be provided in an obstetrical medical practice. The City argues that

because Chapter 10-10 only applies to pregnancy centers whose primary purpose is to provide pregnancy-related services, and because the only two specific services referred to in Chapter 10-10 are "diagnosing pregnancy" and "performing a sonogram," the phrase "medical service includes, without limitation" is fairly susceptible to the construction that such services include only other medical acts that might be performed in the context of an obstetrical medical practice.

The City directs the court to several Texas statutory provisions that include the phrase "medical services," arguing that this indicates the phrase has a commonly understood meaning. However, the City acknowledges, "[a]rguably, those statutes do not require any further definition because they refer, in general terms, to essentially all services provided by some variety of licensed health-care provider." The court agrees with the City's acknowledgment. Alternatively, the City suggests that for purposes of construing Chapter 10-10, medical services is fairly susceptible to a narrowing construction that would include any type of service that a doctor might do or delegate.[13]

The court finds the City's proposed limiting construction for medical services problematic. Because medical services would still lack a specified meaning, there would remain insufficient restraints on the City's discretion in enforcing the provisions of Chapter 10-10. Also, the court declines to accept the City's proposed limiting construction of full-time practice on site, because the phrase hinges on the City's proposed limiting construction of medical services, which the court declines to accept. The court concludes that these phrases are not susceptible to a narrowing

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[13] In Texas, a physician may delegate to a trained nonphysician the "medical acts" of performing injections, taking blood pressure, checking temperature, and other tasks that do not involve the exercise of professional judgment. See Delegation of Duties By a Physician to a Nonphysician at 3 (June 2010) (available at http://texmed.org/npp/). However, the physician remains responsible for those delegated medical acts and for ensuring that no misleading information is provided to the patient pertaining to the licensure or nonlicensure of the individual performing the act. *Id.* at 1.

construction. The court also concludes that even if the court were to accept the City's proposed narrowing construction, the City's assertion that it will use what in essence is prosecutorial discretion and good sense to not enforce the vague portions of Chapter 10-10, does not cure what are otherwise unconstitutionally vague provisions. *See Fox Television*, 132 S.Ct. at 2318.

Conclusion

The court concludes that the phrases at issue are facially vague and neither is fairly susceptible to a narrowing construction. The court further concludes that these vague portions are so intertwined with the other provisions of Chapter 10-10 that the entire chapter is rendered vague. Finally, the court concludes that Chapter 10-10 violates Plaintiffs' right to fair notice under the Due Process Clause of the Fourteenth Amendment. Because the court resolves this action on fair-notice grounds under the Due Process Clause, the court need not address the First Amendment implications of Chapter 10-10, if any. *See id.* at 2320.

Accordingly, the court will declare Austin City Code Chapter 10-10 void for vagueness and enjoin the City from enforcing Austin City Code Chapter 10-10.

SIGNED this 23rd day of June, 2014.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE