

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Norman Alan Davenport, M.D., on behalf of himself and others similarly situated; **Robert G. Anderson, M.D.**; **Mark A. Daniels, M.D.**,

Plaintiffs,

v.

City of Fort Worth; Betsy Price, in her official capacity as Mayor of the City of Fort Worth; **Southwest Fort Worth Abortion Services Center; Whole Woman's Health of Fort Worth**,

Defendants.

Case No. 4:20-cv-00379

COMPLAINT—CLASS ACTION

The COVID-19 pandemic has led to a worldwide shortage of personal protective equipment, such as masks, gloves, gowns, and face shields. This is threatening the lives of doctors and nurses on the front lines of the COVID-19 pandemic, who are already being instructed to re-use the masks and gowns that protect them and their colleagues from the highly contagious virus. It is also putting the entire American health-care system at risk of collapse. If hospitals run out of personal protective equipment and medical professionals begin falling sick and dying, then the nation will become incapable of treating those who acquire the COVID-19 virus, which will drastically increase the number of infections and lead to a loss of life of catastrophic proportions.

In response to this threatened calamity, the City of Fort Worth has issued a stay-at-home order that prohibits all elective medical, surgical, and dental procedures

within city limits. *See* Exhibit 1 (“All elective medical, surgical, and dental procedures are prohibited anywhere in City of Fort Worth.”). The order also postpones all “surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death as determined by the patient’s physician.” *See* Exhibit 1. The purposes of this order are to enforce social distancing and conserve personal protective equipment (PPE) for life-saving and medically necessary health care during this time of worldwide shortage.

But the City of Fort Worth is not enforcing its stay-at-home order against abortion providers—even though the vast majority of abortions are elective procedures, and even though abortions consume personal protective equipment that is needed by medical professionals on the front lines of COVID-19. And elective abortion is not “immediately medically necessary to correct a serious medical condition,” nor is it necessary to “preserve the life of a patient.” On the contrary, abortion—unlike the other prohibited elective procedures such as dentistry, orthodontics, oral surgery, dermatology, and plastic surgery—results in the intentional destruction of human life. *See Harris v. McRae*, 448 U.S. 297, 325 (1980) (“Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.”).

Yet the city of Fort Worth has shut down lawful elective procedures such as dentistry, orthodontics, oral surgery, dermatology, and plastic surgery while allowing elective abortions to continue unimpeded—even though the text of the city’s order prohibits elective abortions on the same terms as it prohibits other elective procedures. And each of the city’s abortion clinics is open for business as usual, apparently on the belief that city officials will look the other way or “interpret” the stay-at-home order in a manner that preserves abortion on demand. But neither the Constitution

nor the law of Texas allows city officials to give special dispensations to abortion providers at a time when other elective surgeries have been suspended. Nor does the Constitution permit city officials to allocate scarce PPE in a manner that prioritizes non-life-saving and non-medically necessary abortion procedures over life-saving and medically essential healthcare.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit arbitrary government conduct, and they require all government classifications to have a rational basis. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’” (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (Equal Protection Clause requires that “classification[s] bear a rational relationship to an independent and legitimate legislative end”). It is both rational and non-arbitrary for a city to suspend elective and non-essential surgeries and procedures during a pandemic to enforce social distancing and conserve scarce personal protective equipment for life-saving and medically necessary health care.

But there is no rational and non-arbitrary basis for exempting elective abortions from a general prohibition on elective surgeries and procedures in the midst of a deadly pandemic. Abortions consume PPE and undermine social distancing, just as other elective surgeries and procedures do. And elective abortions do not save anyone’s life—on the contrary, abortions intentionally kill human life—so they cannot rationally be equated in importance with the life-saving and medically necessary treatment provided by COVID-19 first responders and other practitioners of essential health care. The plaintiffs seek a declaratory judgment that the Constitution requires the city of Fort Worth’s stay-at-home order to prohibit abortion on the same terms that it prohibits other elective surgeries and procedures, and they seek an immediate injunction against the continued performance of elective abortions in Fort Worth.

JURISDICTION AND VENUE

1. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367.

2. Venue is proper because a substantial part of the events giving rise to the claims occurred in this judicial district. *See* 28 U.S.C. § 1391(b)(2).

PARTIES

3. Plaintiff Norman Alan Davenport, M.D., resides in Tarrant County, Texas.

4. Plaintiff Robert G. Anderson, M.D., resides in Tarrant County, Texas.

5. Plaintiff Mark A. Daniels, M.D., resides in Tarrant County, Texas.

6. Defendant City of Fort Worth is a legal government entity as defined in Texas Government Code § 554.001. It may be served with citation by serving Mayor Betsy Price through the City of Fort Worth, Texas, located at 200 Texas Street, Fort Worth, Texas 76102.

7. Defendant Betsy Price is the mayor of the City of Fort Worth. She may be served at her office at City Hall, 200 Texas Street, Fort Worth, Texas 76102. Mayor Price is sued in her official capacity as Mayor of the Fort Worth.

8. Defendant Southwest Fort Worth Abortion Services Center is an abortion provider affiliated with Planned Parenthood. It may be served at 6464 John Ryan Drive, Suite A, Fort Worth, Texas 76132.

9. Defendant Whole Woman's Health of Fort Worth is an abortion provider. It may be served at 3256 Lackland Road, Fort Worth, Texas 76116.

ALLEGATIONS RELATED TO ARTICLE III STANDING

10. Plaintiff Norman Alan Davenport, M.D., has standing because he is using and needs personal protective equipment (PPE) to provide essential and medically necessary health care during the COVID-19 pandemic. He sues on behalf of a class of all medical professionals who are currently using or need PPE to provide essential and medically necessary health care.

11. The defendants' diversion of PPE toward elective and medically unnecessary abortion procedures is endangering the lives and safety of Dr. Davenport and his fellow class members by aggravating the worldwide shortage of PPE.

12. Dr. Davenport serves as an internist in Fort Worth, where he has practiced for 40 years. Dr. Davenport is currently seeing many of his patients by videoconference in an effort to preserve PPE and maintain social distancing. But patients with non-febrile medical issues still require office visits, which require Dr. Davenport and his colleagues to use PPE.

13. Dr. Davenport's practice group includes over 150 physicians, including specialists such as surgeons and obstetricians/gynecologists as well as primary-care physicians. Each of these physicians needs PPE for essential and medically necessary health care.

14. Plaintiffs Robert G. Anderson, M.D., and Mark A. Daniels, M.D., are board-certified plastic surgeons who practice in Fort Worth. Dr. Anderson and Dr. Daniels have standing to seek declaratory and injunctive relief against the mayor's stay-at-home order because their practices have been almost completely shuttered by the mayor's order, which allows them to perform only melanoma surgeries and nothing else, while elective abortions are being allowed to continue unabated. This discriminatory treatment inflicts injury in fact.

15. Dr. Anderson and Dr. Daniels also have standing to sue because they are using and continue to need PPE for emergency and live-saving surgeries that remain permissible under the mayor's stay-at-home order. The defendants, however, are depleting this PPE by diverting it toward elective and non-medically necessary abortion procedures, thereby jeopardizing the lives and safety of medical professionals who need PPE for essential and medically necessary health care.

Claim No. 1—The Defendants Are Violating 42 U.S.C. § 1983 By Failing To Enforce The City’s Ban On Elective Surgeries Against Abortion Providers

16. The Due Process Clause of the Fourteenth Amendment prohibits arbitrary government conduct. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’” (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974))).

17. The Equal Protection Clause of the Fourteenth Amendment requires all government classifications to have a rational basis. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (Equal Protection Clause requires that “classification[s] bear a rational relationship to an independent and legitimate legislative end”).

18. The Due Process and Equal Protection Clauses allow the city of Fort Worth to suspend elective and non-essential surgeries and procedures during a pandemic to enforce social distancing and conserve personal protective equipment for life-saving and medically necessary treatments.

19. But there is no rational and non-arbitrary reason for the city to refuse to enforce its ban on elective surgeries against elective abortions.

20. Elective abortions consume PPE and undermine social distancing, just as other elective surgeries and procedures do.

21. More importantly, elective abortions—which are not medically necessary to preserve the patient’s life or health—do not save anyone’s life. On the contrary, elective abortions intentionally kill human life, so they cannot rationally be equated in importance with the life-saving medical care administered by COVID-19 first responders and other practitioners of essential health care.

22. The defendants are therefore violating Dr. Davenport’s, Dr. Anderson’s, and Dr. Daniels’s rights under the Due Process Clause and 42 U.S.C. § 1983, by engaging in unconstitutionally arbitrary conduct under color of state law, by diverting scarce

PPE toward elective and medically unnecessary abortion procedures at the expense of doctors and medical professionals who need PPE for essential and medically necessary health care.

23. The defendants are also violating Dr. Anderson and Dr. Daniels's rights under the Equal Protection Clause and 42 U.S.C. § 1983, by prohibiting them from performing elective surgeries and procedures during the pandemic while allowing elective abortions to continue unabated.

24. The defendant abortion clinics are acting under color of state law and violating 42 U.S.C. § 1983 because they are receiving special dispensations from city officials to perform elective abortions, at a time when other elective surgeries and procedures have been suspended. *See, e.g., Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922 (1982) (holding private parties subject to liability under 42 U.S.C. § 1983 when acting pursuant to an unconstitutional state law).

25. The Court should enter a declaratory judgment that the Constitution requires the city of Fort Worth's stay-at-home order to prohibit abortion on the same terms that it prohibits other elective surgeries and procedures.

26. The Court should also enter an injunction that compels the city and its officials to enforce the city of Fort Worth's stay-at-home order against surgical and drug-induced abortions, unless those abortions are medically necessary for the purpose of saving the life or health¹ of the mother.

1. An abortion is medically necessary to save a woman's "health" if it is needed to prevent the risk of death or a substantial and irreversible physical impairment of a major bodily function. *See* Texas Health & Safety Code § 171.046(b). It is not enough to show that an abortion will prevent alleviate health conditions inherent in pregnancy, such as weight gain, high blood pressure, or the risk of post-partum depression.

Claim No. 2—The City And Its Officials Are Violating Article XI, § 5 Of The Texas Constitution By Failing To Enforce The City’s Ban On Elective Surgeries Against Abortion Providers

27. The city and its officials are also violating Article XI, § 5 of the Texas Constitution by allowing elective abortions to continue while prohibiting other elective surgeries within city limits. The plaintiffs bring this claim under the supplemental jurisdiction. *See* 28 U.S.C. § 1367.

A. The Law Of Texas Continues To Prohibit Abortion Unless The Mother’s Life Is In Danger

28. The State of Texas has never repealed its statutes that criminalize abortion.

29. Before *Roe v. Wade*, 410 U.S. 113 (1973), these statutes were codified at articles 1191–1196 of the Texas Penal Code. Article 1191 outlawed all types of abortion and imposed criminal penalties on those who perform them:

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years if it be done without her consent, the punishment shall be doubled. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

2A Texas Penal Code article 1191, at 429 (1961) (attached as Exhibit 2).

30. The only exception to this prohibition appeared in article 1196 of the Texas Penal Code, which provided that “[n]othing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” 2A Texas Penal Code art. 1196, at 436 (1961) (attached as Exhibit 2).

31. After the Supreme Court announced its ruling in *Roe v. Wade*, 410 U.S. 113 (1973), the Texas legislature did not repeal its statutes that outlaw abortion. Instead, the legislature recodified and transferred those laws to articles 4512.1 through 4512.6 of the Revised Civil Statutes. *See* Exhibit 3.

32. These statutes continue to exist as the law of Texas, and abortion remains a criminal offense under Texas law. *Roe v. Wade* and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), mean only that the federal judiciary is currently unwilling to enforce those statutes in cases where their enforcement will impose an “undue burden” on abortion patients. That does not “legalize” abortion under Texas law; it simply means that abortion providers can flout Texas law without facing punishment for as long as pro-abortion justices retain a majority on the Supreme Court.

33. Neither *Roe v. Wade* nor any subsequent decision of the Supreme Court “struck down” or formally revoked articles 1191–1196 of the Texas Penal Code, or any other statute that criminalizes abortion. The federal courts do not wield a writ of erasure over statutes that they declare unconstitutional, and these statutes continue to exist as laws until they are repealed by the legislature that enacted them. *See Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) (“[N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* ‘struck down’ any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it. Thus, the Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.”); *Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) (“The federal courts have no authority to erase a duly enacted law from the statute books, [but can only] decline to enforce a statute in a particular case or controversy.” (citation omitted)).

34. The defendant abortion providers are therefore acting in violation of Texas law—despite the fact that they are not being prosecuted—and they are racking up criminal penalties that can be imposed as soon as the Supreme Court overrules *Roe v. Wade*.

B. The Law Of Texas Continues To Prohibit Abortions Performed Outside Ambulatory Surgical Centers Or By Doctors Who Lack Hospital Admitting Privileges

35. Texas has never repealed its statutes that require abortions to be performed in ambulatory surgical centers, or that require abortion practitioners to hold hospital admitting privileges. *See* Tex. Health and Safety Code § 245.010(a) (ambulatory surgical centers); Tex. Health and Safety Code § 171.0031 (admitting privileges).

36. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), did not “strike down” or formally revoke these statutes. *Hellerstedt* merely prevents Texas officials from punishing abortion providers for violating these state laws until the Supreme Court overrules that decision. *Hellerstedt*, like *Roe v. Wade*, did nothing to change or alter the law of Texas. It simply announced a previous Supreme Court’s unwillingness to enforce the statute, which will last only for as long as pro-abortion justices hold a majority on the Supreme Court.

37. The defendant abortion providers are therefore acting in violation of Texas law to the extent they are performing abortions outside ambulatory surgical centers or allowing abortions to be performed by doctors who lack admitting privileges at a nearby hospital.

C. The Mayor And The City Are Violating Article XI, Section 5 Of The Texas Constitution By Failing To Enforce The City's Stay-At-Home Order Against Abortion Providers

38. Article XI, section 5 of the Texas Constitution provides that:

[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Tex. Const. article XI, § 5.

39. Articles 4512.1 through 4512.6 of the Revised Civil Statutes continue to exist as “general laws enacted by the Legislature of this State.” The state constitution

therefore forbids city officials to enact or enforce any order “inconsistent” with those laws.

40. Sections 171.0031 and 245.010(a) of the Texas Health and Safety Code also continue to exist as “general laws enacted by the Legislature of this State.” The state constitution therefore forbids city officials to enact or enforce any order “inconsistent” with those laws.

41. A stay-at-home order that allows an illegal medical procedure (abortion) to continue while prohibiting lawful procedures such as dentistry, orthodontics, oral surgery, dermatology, and plastic surgery during the COVID-19 pandemic is inconsistent with the state statutes that criminalize abortion, all of which continue to exist as “general laws enacted by the Legislature of this State.”

42. The city’s stay-at-home order is also “inconsistent” with the “general laws enacted by the Legislature of this State” because it is allowing abortion clinics to continue performing abortions in violation of sections 171.0031 and 245.010(a) of the Texas Health and Safety Code.

43. The Court should therefore declare that the stay-at-home order violates Article XI, section 5 of the Texas Constitution, unless it is amended or clarified to prohibit abortion in Fort Worth unless the mother’s life is endangered by the pregnancy.

Claim No. 3—Abortion Is Not A Constitutional Right

44. One of the reasons abortion providers think they should get special allowances to use PPE during a deadly pandemic is that past opinions from the Supreme Court have said that abortion is constitutional right. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). This has created an entitlement mentality among the nation’s abortion providers, who have convinced themselves that nothing can be allowed to take priority over the convenience of abortion patients and the profit margins of abortion providers. It does

not matter that our nation is in the midst of a horrific pandemic that has already killed 48,000 Americans and threatens to kill hundreds of thousands more. It does not matter that medical professionals on the front lines of COVID-19 are facing shortages of PPE and could die if PPE is diverted to elective and medically unnecessary procedures such as abortion. It does not matter how many lives would be saved if the PPE that they are consuming on elective abortions were redirected to COVID-19 efforts or other life-saving medical care. The right to abortion is absolute—to the point that it allows abortion providers to endanger the public safety by flouting social-distancing guidelines and consuming scarce personal protective equipment that is needed to prevent others from falling sick and dying during a catastrophic global pandemic.

45. Abortion providers might be justified in holding these views if abortion actually were a constitutional right. But abortion is not a constitutional right. There is nothing in the language of the Constitution that even remotely suggests that women have a constitutional right to abort their fetuses. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) (“*Roe v. Wade* . . . is *not* constitutional law and gives almost no sense of an obligation to try to be.” (emphasis in original)); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159. Nor is there any historical pedigree to support the notion of an implied constitutional right to abortion, as abortion was criminalized for an entire century before *Roe* was decided.

46. The Constitution makes no allowance for the Supreme Court to invent or impose constitutional “rights” that have no grounding in constitutional text or historical practice. *Roe v. Wade* and the Supreme Court’s subsequent abortion edits violate the Tenth Amendment and the Republican Form of Government Clause by subordinating state laws to the policy preferences of unelected judges. The members of

the *Roe* majority may have believed very strongly that abortion should be freely available in all 50 states as a matter of policy, but that is not a basis on which a court may enjoin the enforcement of a duly enacted statute.

47. The Supreme Court's membership has changed since its last abortion pronouncement. Justice Kennedy, who joined the five-justice majority opinion in *Hellerstedt*, has been replaced by Justice Kavanaugh. Justice Scalia, who died before *Hellerstedt* was decided, has been replaced by Justice Gorsuch. So it is far from clear that *Roe v. Wade* retains majority support on the current Supreme Court. It is time for the lower courts to force reconsideration of *Roe* in the Supreme Court by announcing that they will follow the Constitution rather than a lawless and widely criticized judicial opinion that is unlikely to have majority support among the sitting justices. See *Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (“[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”).

48. The plaintiffs therefore seek a declaratory judgment that: (a) There is no constitutional right to have an abortion; and (b) The previous Supreme Court's abortion jurisprudence violates the Tenth Amendment and the Republican Form of Government Clause by subordinating state law to the policy preferences of unelected judges.

49. If the Court believes that it is duty-bound to adhere to *Roe* notwithstanding its lawlessness and the recent change of membership on the Supreme Court, then the plaintiffs respectfully wish to preserve this claim for appeal and for an eventual certiorari petition.

CLASS-ACTION ALLEGATIONS

50. Dr. Davenport brings this class action under Rule 23(b)(2) of the federal rules of civil procedure.

51. The class comprises all medical professionals in the United States who need personal protective equipment (PPE) to provide life-saving or medically necessary health care during the COVID-19 pandemic.

52. The number of persons in the class and subclass makes joinder of the individual class members impractical.

53. There are questions of law common to the class, including: (1) Whether the City of Fort Worth is violating the Due Process Clause and Equal Protection Clause by refusing to enforce its ban on elective surgeries against abortion providers; and (2) Whether the City of Fort Worth's stay-at-home order violates Article XI, § 5 of the Texas Constitution by allowing elective abortions to continue unimpeded.

54. Dr. Davenport's claims are typical of other members of the class. Each class member needs PPE to provide life-saving or medically necessary health care during the COVID-19 pandemic, which the defendants are diverting toward non-life-saving and non-medically necessary abortion procedures.

55. Dr. Davenport adequately represents the interests of the class, and he has no interests antagonistic to the class.

56. A class action is appropriate under Rule 23(b)(2) because the defendants are acting on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

DEMAND FOR RELIEF

57. The plaintiffs respectfully request that the court:
- a. certify the class described in paragraph 51;

- b. declare that the defendants are violating 42 U.S.C. § 1983 by allowing elective abortions to continue while suspending other elective surgeries and procedures in response to the COVID-19 pandemic;
- c. declare that the city of Fort Worth's stay-at-home order violates Article XI, § 5 of the Texas Constitution by allowing elective abortions to continue while prohibiting other elective surgeries within city limits;
- d. declare that the law of Texas continues to define abortion as a felony criminal offense, despite the Supreme Court's past unwillingness to enforce the State's criminal abortion statutes when deciding cases or controversies under Article III of the Constitution;
- e. declare that the law of Texas continues to prohibit abortions that are performed outside ambulatory surgical centers, as well as abortions that are performed by doctors who lack hospital admitting privileges, despite the Supreme Court's past unwillingness to enforce these statutes in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016);
- f. declare that the defendant abortion clinics may be punished for their past and current violations of these still-extant Texas abortion statutes if and when the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), or *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016);
- g. declare that abortion is not a constitutional right;
- h. issue a temporary restraining order, preliminary injunction, and permanent injunction that compels the city and the mayor to prohibit elective abortion under the same terms that other elective surgeries and procedures have been suspended under the city's stay-at-home order;
- i. issue a temporary restraining order, preliminary injunction, and permanent injunction that prevents the defendant abortion clinics from performing abortions, unless those abortions are medically necessary for the purpose of saving the life or health of the mother as defined in section 171.046(b) of the Texas Health & Safety Code;
- j. award the plaintiffs nominal damages and compensatory damages;
- k. award costs and attorneys' fees under 42 U.S.C. § 1988;
- l. award all other relief that the Court deems just, proper, or equitable.

Respectfully submitted.

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* *pro hac vice* applications
forthcoming

Dated: April 23, 2020

*Counsel for Plaintiffs
and the Proposed Class*

**SIXTH AMENDED DECLARATION OF PUBLIC HEALTH EMERGENCY
CITY OF FORT WORTH, TEXAS
STAY AT HOME, WORK SAFE MEASURES**

WHEREAS, in December 2019 a novel coronavirus, now designated COVID-19, was detected in Wuhan City, Hubei Province, China, with symptoms including fever, cough, and shortness of breath and with outcomes ranging from mild to severe illness and in some cases, death;

WHEREAS, on January 30, 2020, the World Health Organization Director General declared the outbreak of COVID-19 as a Public Health Emergency of International Concern (PHEIC), advising countries to prepare for the containment, detection, isolation and case management, contact tracing and prevention of onward spread of the disease;

WHEREAS, on March 5, 2020, the World Health Organization Director General urged aggressive preparedness and activation of emergency plans to aggressively change the trajectory of this epidemic;

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a worldwide pandemic;

WHEREAS, the Centers for Disease Control and Prevention is closely monitoring the growing number of cases that have spread into the United States and the identification of “community spread” cases of COVID-19 in the United States signals that transmission of the virus is occurring;

WHEREAS, COVID-19 spreads between people who are in close contact with one another through respiratory droplets produced when an infected person coughs or sneezes;

WHEREAS, the continued worldwide spread of COVID-19 presents an imminent threat of widespread illness, which requires emergency action;

WHEREAS, County Judge Glen Whitley issued a Declaration of Disaster Due to Public Health Emergency for City of Fort Worth for COVID-19 on March 13, 2020;

WHEREAS, Governor Greg Abbott issued a State of Disaster for all Texas counties for COVID-19 on March 13, 2020;

WHEREAS, President Donald Trump declared a State of National Emergency for the United States of America on March 13, 2020;

WHEREAS, pursuant to the Texas Disaster Act of 1975, the mayor is designated as the emergency management director of the City of Fort Worth, and may exercise the powers granted to the governor on an appropriate local scale;

WHEREAS, a declaration of local disaster and public health emergency includes the ability to reduce the possibility of exposure to disease, control the risk, promote health, compel persons to undergo additional health measures that prevent or control the spread of disease, including isolation, surveillance, quarantine, or placement of persons under public health observation, including the provision of temporary housing or emergency shelters for persons misplaced or evacuated and request assistance from the governor of state resources;

WHEREAS, by this Declaration of Local Disaster and Public Health Emergency, I declare all rules and regulations that may inhibit or prevent prompt response to this threat suspended for the duration of the incident;

WHEREAS, pursuant to the authority granted to the Mayor under the Texas Disaster Act of 1975, I authorize the use of all available resources of state government and political subdivisions to assist in the City's response to this situation;

WHEREAS, I, Betsy Price, the Mayor of the City of Fort Worth have determined that extraordinary and immediate measures must be taken to respond quickly, prevent and alleviate the suffering of people exposed to and those infected with the virus, as well as those that could potentially be infected or impacted by COVID-19;

WHEREAS, Governor Abbott issued Executive Order GA 08 and Commissioner John W. Hellerstedt, M.D. issued a Declaration of Public Health Disaster in the State of Texas on March 19, 2020 to implement statewide measures to address the spread of COVID-19, and Governor Abbott issued Executive Order GA 14 superseding GA 08 on March 31, 2020; and

WHEREAS, County Judge Glen Whitley issued a Second Amended Declaration of Disaster Due to Public Health Emergency for Tarrant County for COVID-19 on March 21, 2020 and an Executive Order on April 3, 2020;

WHEREAS, I issued a Declaration of Public Health Emergency on March 13, 2020, an Amended Declaration of Public Health Emergency on March 16, 2020, a Second Amended Declaration of Public Health Emergency on March 18, 2020, a Third Amended Declaration of Public Health Emergency on March 19, 2020, a Fourth Amended Declaration of Public Health Emergency on March 21, 2020, and a Fifth Amended Declaration of Public Health Emergency on March 24, 2020, to implement additional measures to ensure the protection of the general public in the City of Fort Worth; and

WHEREAS, to remain consistent with the declaration of the Texas Department of State Health Services and the executive orders issued by Governor Greg Abbott and to harmonize to the extent possible, the executive orders of Governor Greg Abbott, the Tarrant County Judge and the mandates contained in the declarations of the Mayors of the Cities of Fort Worth, Arlington and other cities, I now issue this Sixth Amended Declaration of Public Health Emergency.

NOW THEREFORE BE IT PROCLAIMED BY THE MAYOR OF THE CITY OF FORT WORTH, TEXAS:

1. That a state of disaster and public health emergency is hereby declared for the City of Fort Worth, pursuant to §418.108(a) of the Texas Government Code.
 2. That the state of disaster and public health emergency shall continue for a period of not more than seven days of the date hereof, unless the same is continued by the City Council of the City of Fort Worth, Texas, pursuant to §418.108(b) of the Texas Government Code.
 3. That this declaration of a local state of disaster and public health emergency shall be given prompt and general publicity and shall be filed promptly with the City Secretary, pursuant to §418.108(c) of the Texas Government Code.
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4. That the City's Emergency Operations Plan is activated and implemented, pursuant to §418.108(d) of the Texas Government Code.
5. That this declaration authorizes the City to commandeer or use any private property, temporarily acquire, by lease or other means, sites required for temporary housing units or emergency shelters for evacuees, subject to compensation requirements, pursuant to §418.020(c) of the Texas Government Code.
6. That this declaration authorizes the City to take any actions necessary to promote health and suppress disease, including quarantine, establishing quarantine stations, emergency hospitals, and other hospitals, regulating ingress and egress from the City, and fining those who do not comply with the City's rules, pursuant to §122.006 of the Health and Safety Code.
7. That this Declaration authorizes the City to order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the mayor if necessary for the preservation of life or other disaster mitigation, response, or recovery, and to control the movement of persons and the occupancy of premises, pursuant to §418.108(f), (g) of the Texas Government Code.
8. All persons currently residing within the City of Fort Worth shall stay at home, except as allowed by this Declaration. All persons may leave their residences only for Essential Travel, Essential Services, and Essential Activities, to work in or access Essential Businesses, Government Service, or Essential Critical Infrastructure, or to perform Minimum Basic Operations, as defined below.

To the extent individuals are using shared or outdoor spaces, they must maintain Social Distancing and minimize in-person contact with people who are not in the same household.

Nothing in this Declaration is intended to restrict "essential services" as such term is defined in Governor Abbott's Executive Order GA-14 (Order GA-14), nor is it intended to allow gatherings prohibited by Order GA-14. To the extent that the Texas Division of Emergency Management approves additions to "essential services", those additions will be treated as an Essential Business in the City of Fort Worth. Nothing herein is intended to impose restrictions inconsistent with Order GA-14 or any other order issued by the Governor currently in effect relating to COVID-19 (a COVID Order). To the extent that this Executive Order conflicts with a COVID Order, the provisions in a COVID Order prevail. All questions relating to what is an essential service or business shall be directed to the Texas Division of Emergency Management via email at EssentialServices@tdem.texas.gov. Information is also available at www.tdem.texasa.gov/essentialservices.

9. All businesses operating in City of Fort Worth, except Essential Businesses as defined herein, shall not allow members of the public to occupy business premises. Non-essential businesses may continue Minimum Basic Operations, as outlined below, so long as the businesses strictly adhere to the following: (1) minimize in-person contact with people who are not in the same household; (2) maintain Social Distancing; (3) utilize remote teleworking to the greatest extent possible; and (4) minimize the number of employees needed to operate at a basic level.

Minimum Basic Operations allows the minimum necessary activities to:

- a. Maintain the value of the business's inventory or equipment, process payroll and employee benefits, maintain the premises and the security of the premises, equipment or inventory, including the care and maintenance of livestock or animals;
 - b. IT or other operations that facilitate employees working from home; and
 - c. Facilitate online or call-in sales; and/or perform in-store repair services.
10. It is ordered that a restaurant with or without drive-in or drive-through services; drive-in restaurant; drive-through restaurant; or microbrewery, micro-distillery, or winery may only provide take out, delivery, curbside pickup or drive-in or drive-through services as allowed by law. Social Distancing is required.
11. All public or private gatherings of any number of people occurring outside a single household or living unit are prohibited, except as otherwise provided herein. Nothing in this Declaration prohibits the gathering of members of a household or living unit.
12. All elective medical, surgical, and dental procedures are prohibited anywhere in City of Fort Worth. All licensed health care professionals shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death as determined by the patient's physician. Provided, however, that this prohibition shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.¹
13. If someone in a household has tested positive for COVID-19, the household is ordered to isolate at home. Members of the household cannot go to work, school, or any other community function until cleared by a medical professional but may seek medical services as needed from medical personnel and facilities.
14. Nursing homes, retirement, and long-term care facilities are to prohibit non-essential visitors from accessing their facilities unless to provide critical assistance or for end-of-life visitation.
15. Individuals experiencing homelessness are strongly urged to obtain shelter and maintain Social Distancing when feasible. If a homeless person is sheltered and exhibits symptoms or is diagnosed, the shelter's isolation center shall be deemed the residence of the homeless person solely for the purpose of complying with the requirements of this Declaration. Medical personnel shall make the decision whether any other shelter residents shall be required to isolate based on potential exposure. Available shelters, to the maximum extent practicable, must use COVID-19 risk mitigation practices in their operations.
16. Definitions:
- a. Social Distancing means maintaining at least 6 feet distance from other individuals, frequently washing hands with soap and water for at least 20 seconds, using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not the hands), regularly disinfecting high touch surfaces, and not shaking hands.

¹ Texas Medical Board, 22 TAC § 187.57 (c) (1), (2).

- b. Minimum Basic Operations include the following, provided the businesses strictly adhere to the following: (1) minimize in-person contact with people who are not in the same household; (2) maintain Social Distancing; (3) utilize remote teleworking to the greatest extent possible; and (4) minimize the number of employees needed to operate at a basic level.

Minimum Basic Operations allows the minimum necessary activities to:

- Maintain the value of the business's inventory or equipment, process payroll and employee benefits, maintain the premises and the security of the premises, equipment or inventory, including the care and maintenance of livestock or animals;
 - IT or other operations that facilitate employees working from home; and
 - Facilitate online or call-in sales; and/or perform in-store repair services.
- c. Essential Activities includes any of the following:
- i. To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members (for example, obtaining medical supplies or medication, visiting a health care professional, or obtaining supplies need to work from home).
 - ii. To obtain necessary services or supplies for themselves and their family or household members, or to deliver those services or supplies to others (for example, food, pet and livestock supplies, and any other household consumer products, and products necessary to maintain the safety, sanitation, and essential operation of residences). It is strongly recommended that households, to the greatest extent possible, send only one person to businesses for the purpose of picking up food or other essential items.
 - iii. To engage in outdoor activity, provided the individuals comply with Social Distancing (for example, walking, biking, hiking, golfing, or running).
 - iv. To perform work providing essential products and services at an Essential Business or to otherwise carry out activities specifically permitted in this Declaration.
 - v. To care for a family member or pet in another household.
- d. Essential Businesses:
- i. Essential Health Care Services. Healthcare operations, including hospitals, clinics, doctors, dentists, pharmacies, pharmaceutical and biotechnology companies, other healthcare facilities, healthcare suppliers, home healthcare services providers, mental health providers, substance abuse providers, blood banks, medical research, or any related and/or ancillary healthcare services, veterinary care provided to animals. Home-based care for seniors, adults, or children. Residential facilities and shelters for seniors, adults, and children. Healthcare operations do not include fitness and exercise gyms and similar facilities. Healthcare operations do not include elective medical, surgical, and dental procedures as established in accordance with this Declaration.
 - ii. Essential Government Functions. All services provided by local, state and federal governments needed to ensure the continuing operation of the government agencies to provide for the health, safety and welfare of the public. All Essential Government Functions shall be performed in compliance with Social Distancing, to the extent possible.
 - iii. Essential Critical Infrastructure. Pursuant to Governor Abbott's Executive Order GA-14, everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, or as may be amended.

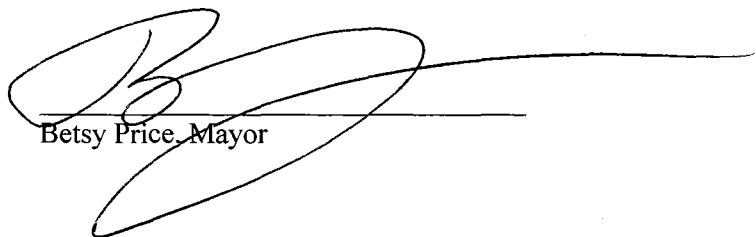
- iv. Essential Retail. Food service providers, including grocery stores, warehouse stores, bodegas, gas stations, convenience stores, and farmers' markets and other retail stores that sell food products and household staples, pet and feed stores. Businesses not open to the public that ship or deliver groceries, food, goods or services directly to residences. Liquor stores and restaurants and other facilities that prepare and serve food, but only for delivery, take out, drive-in, drive-through, curb side pickup, or carry out. Schools and other entities that typically provide free services to students or members of the public on a pick-up and take-away basis only. The restriction of delivery or carry out does not apply to cafes and restaurants located within hospital and medical facilities. Laundromats, dry cleaners, and laundry service providers. Businesses that provide for the delivery of, or preparation of vehicles. Businesses that supply products needed for people to work from home, including businesses providing mail and shipping and post office box. Businesses that supply products necessary for essential repairs and maintenance of a home or business. Hotel, motels, and shared rental units, except that all bars, cafes, or restaurants in hotels, motels, and shared rental units are closed except for pick-up and room service.
- v. Providers of Basic Necessities to Economically Disadvantaged Populations. Social services and charitable organizations that provide food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise vulnerable individuals.
- vi. Essential Services Necessary to Maintain Essential Operations of Residences or Other Essential Businesses. Trash and recycling collection, processing and disposal, mail and shipping services, building cleaning and maintenance, auto repair, warehouse/distribution and fulfillment, and storage for essential businesses. Plumbers, pool services, yard maintenance and landscapers, security services, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operations of residences, Essential Activities, and Essential Businesses. Professional services, such as legal or accounting services, when necessary to assist in compliance with legally mandated activities.
- vii. News Media. Newspapers, television, radio, and other media services.
- viii. Financial Institutions. Banks and related financial institutions, consumer lenders, alternative financial services companies, sales and finance lenders, credit unions, appraisers, and title companies. As much business as possible shall be conducted with web-based technology to limit in-person contact.
- ix. Real Estate Transactions: Services related to current real estate transactions. As much business as possible shall be conducted with web-based technology to limit in-person contact.
- x. Childcare Services. Childcare facilities providing services that enable employees who perform Essential Activities or work for an Essential Business to work as permitted.
- xi. Animal Shelters, Zoos, and Other Businesses that Maintain Live Animals. Businesses that maintain and care for live animals are not permitted to allow any visitors or patrons but may continue to operate to the extent necessary to provide the necessary care for the animals. Nothing in this section shall prohibit a non-employee from entering the premises to perform a health care services or another Essential Business service.

- xii. Construction. Construction under a valid permit issued by a governmental entity.
- xiii. Funeral Services. Funeral homes, crematoriums and cemeteries may operate.
- xiv. Worship Services. The community of Fort Worth is currently at substantial community spread. Guidelines from the CDC currently state that when a community is experiencing substantial community transmission of COVID-19, “cancel or postpone community and faith-based gatherings of any size.” Religious services held outdoors whereby individuals remain in their vehicles are allowed if Social Distancing is practiced.
For more information, houses of worship should consult CDC guidance: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html>.” For updates about the level of community spread, see CoronaVirus.TarrantCounty.com.
- xv. Moving Services and Supply. Businesses that provide residential and/or commercial moving services and necessary moving supplies.
- e. Essential Travel. For the purposes of this Declaration, Essential Travel includes travel for any of the following purposes.
 - i. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, and Essential Businesses Essential Critical Infrastructure, Minimum Basic Operation;
 - ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons;
 - iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services;
 - iv. Travel to return to a place of residence from outside the jurisdiction;
 - v. Travel required by law enforcement or court order;
 - vi. Travel by church staff or clergy for the purpose of production of remote delivery of religious services and other ministries requiring travel;
 - vii. Travel related to attending a funeral service; or
 - viii. Travel required for non-residents to return to their place of residence outside the City. Individuals are strongly encouraged to verify that their transportation out of the City remains available and functional prior to commencing such travel.
- f. Essential Services. Essential Services means services, by whomsoever rendered, and whether rendered to the government or to any other person, the interruption of which would endanger life, health or personal safety of the whole or part of the population.

17. In accordance with Attorney General Opinion KP-0296, nothing in this declaration shall be construed to prohibit or regulate the transfer, possession, or ownership of firearms, or commerce in firearms.
18. That this declaration hereby authorizes the use of all lawfully available enforcement tools, including applicable county and State of Texas criminal penalties.
19. That this Declaration incorporates the attached table, Disaster Restrictions, as if set forth verbatim herein.
20. The sections, paragraphs, sentences, clauses and phrases of this Declaration are severable and if any phrase, clause, sentence, paragraph or section of this Declaration should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences paragraphs and sections that can be given effect without the invalid provision, and to this end, the provisions of this Declaration are severable.

21. This Declaration shall take effect at 1pm on April 7, 2020, and shall remain in effect until April 30, 2020, unless terminated or modified by a subsequent Order.

ORDERED this the 7th day of April 2020.



A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a horizontal line extending to the right.

Betsy Price, Mayor

**Disaster Restrictions
Declaration Issued April 7, 2020**

Locations / Activities	Restrictions
Persons residing in City of Fort Worth	<ul style="list-style-type: none"> • Stay at place of residence • Practice Social Distancing • Leave residence only for Essential Activities, or to work at Essential Businesses, Essential Travel, Essential Governmental Services, Essential Critical Infrastructure, or to perform Minimum Basic Operations • Comply with Guidelines from the President and the CDC
All businesses except Essential Businesses	No public occupancy permitted Minimum Basic Operations allowed Social Distancing required Minimum number of employees Minimize in-person contact
Public or Private Gatherings occurring outside a single household or living unit	Prohibited, with limited exceptions as set forth herein
Food Establishments Including those at schools, hotels, motels Excluding those at hospitals	In-house dining/shopping – no public occupancy Drive-in, drive-through, take out, and delivery is permitted. Social Distancing is required
Worship Services	If substantial community spread, all in-person gatherings of any size are cancelled or postponed. GA-14 requires compliance with the Guidelines from the President and CDC
Elective medical, surgical, and dental procedures	Prohibited, with limited exceptions as set forth herein
Nursing homes, retirement, and long-term care facilities	Prohibit non-essential visitors unless to provide critical assistance or for end-of-life visitation

<p><u>Essential Travel, summary:</u> Allowed to carry out activities specifically permitted in this Declaration.</p> <ul style="list-style-type: none"> i. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, and Essential Businesses Essential Critical Infrastructure, Minimum Basic Operation; ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons; iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services; iv. Travel to return to a place of residence from outside the jurisdiction; v. Travel required by law enforcement or court order; vi. Travel by church staff or clergy for the purpose of production of remote delivery of religious services and other ministries requiring travel; vii. Travel related to attending a funeral service; or viii. Travel required for non-residents to return to their place of residence outside the City. Individuals are strongly encouraged to verify that their transportation out of the City remains available and functional prior to commencing such travel. 	<p>Individuals may leave home to perform Essential Activities</p> <p>Must practice Social Distancing</p>
<p><u>Essential Businesses, summary:</u> hospitals clinics doctors dentists pharmacies pharmaceutical and biotechnology companies, other healthcare facilities healthcare suppliers mental health providers substance abuse service providers blood banks medical research laboratory services home-based and residential-based care for seniors, adults, or children</p>	<p>Allowed to remain open</p> <p>Social Distancing required</p> <p>Essential Businesses providing essential infrastructure should implement screening precautions to protect employees and all activity shall be performed in compliance with Social Distancing and compliance with the Guidelines from the President and the CDC.</p>

veterinary care

all services to provide for the health, safety and welfare of the public

food service providers

food cultivation- farming, fishing, livestock delivery and shipping not open to the public

essential critical infrastructure

laundromats, dry cleaners, laundry service

gas stations

auto-supply & repair, bicycle repair

hardware stores

businesses that supply products needed for people to work from home

social services, charitable organizations

trash and recycling collection, processing and disposal

mail and shipping services

building cleaning, maintenance

security services

warehouse/distribution and fulfillment

storage for essential businesses

funeral homes, crematoriums, cemeteries

plumbers

electricians

pool service, yard maintenance, landscaping

exterminators

legal or accounting

news media

financial institutions

real estate transactions

childcare services

businesses that maintain live animals

construction

moving services and supply

Essential Critical Infrastructure, summary:

Work necessary to the operations and maintenance of the list by the U.S.

Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, as may be amended

<p><u>Minimum Basic Operations:</u></p> <ul style="list-style-type: none"> - operations necessary to maintain security, upkeep, and maintenance of premises, equipment or inventory, including but not limited to the care and maintenance of livestock or animals; - IT or other operations that facilitate employees working from home; - Teleworking is required, if possible - Facilitate online or call-in sales or in-store repair services; - in-person contact of any kind between people who are not in the same household must be minimized. 	<p>Operations allowed for non-essential businesses</p> <p>Social Distancing required</p> <p>Number of employees are kept to a minimum</p> <p>Minimize in-person contact with people who are not in the same household</p>
<p><u>Essential Services:</u></p> <p>-Business operations the interruption of which would endanger life, health or personal safety of the whole or part of the population.</p>	<p>Allowed to remain open</p> <p>Business operations providing Essential Services should implement screening precautions to protect employees and all activity shall be performed in compliance with Social Distancing and in compliance with the Guidelines of the President and CDC.</p>

VERNON'S ANNOTATED
PENAL CODE
OF THE
STATE OF TEXAS

Volume 2A
Penal Code
Articles 979 - 1268

TRADE AND COMMERCE
OFFENSES AGAINST THE PERSON

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY

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2A Tex. Penal St.

CHAPTER NINE

ABORTION

Art.

- 1191. Abortion.
- 1192. Furnishing the means.
- 1193. Attempt at abortion.
- 1194. Murder in producing abortion.
- 1195. Destroying unborn child.
- 1196. By medical advice.

Article 1191. [1071] [641] [536] Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. Acts 1907, p. 55.

Cross References

Refusal to license physicians, see Vernon's Ann.Civ.St. art. 4505.
Suspended sentence, see Vernon's Ann.C.C.P. art. 776.

Notes of Decisions

Accomplices 4
Admissibility of evidence 12
Burden of proof, evidence 11
Civil actions 17
Consent 3
Constitutionality 1
Construction and application 2
Contents of indictment 6
Different counts, duplicity and election, indictment 7
Evidence 10-13
 In general 10
 Admissibility 12
 Presumptions and burden of proof 11
 Weight and sufficiency 13
Form and contents, indictment 6
Indictment 6-9
 Different counts, duplicity and election 7
 Form and contents 6
 Issue and proof 8
 Sufficiency 9
Instructions to jury 14
Issue and proof, indictment 8
New trial 16
Penalty 15
Presumptions and burden of proof, evidence 11
Principals and accomplices 4

Proof, indictment 8
Sufficiency of evidence 13
Sufficiency of indictment 9
Validity 1
Venue 5
Weight and sufficiency of evidence, 13

Library references

Abortion \S 1, 15.
C.J.S. Abortion $\S\S$ 1-12, 40.
Forms, indictments. Willson's Texas Criminal Forms, 6th Ed., $\S\S$ 1600, 1601.

1. Validity

This article is not unconstitutional as falling to sufficiently define or describe the offense. Jackson v. State (1909) 55 Cr.R. 79, 115 S.W. 262, 131 Am.St.Rep. 792.

2. Construction and application

A completed abortion should be prosecuted under this article only. If the attempt to commit abortion fails, accused should be prosecuted under both this and art. 1193. Willingham v. State (1894) 33 Cr.R. 98, 25 S.W. 424. And see Jackson v. State (1909)

Ch. 9

ABORTION

Art. 1192

ment was properly refused." *Link v. State* (1914) 73 Cr.R. 82, 164 S.W. 987.

A charge to acquit if the medicine either caused, or was calculated to cause, the death of the fetus, should not be given. *Id.*

It was not error to omit to define "assault," where the court stated in detail what the jury would be required to find before they could convict. *Id.*

In prosecution for producing abortion upon a pregnant woman and destroying life of fetus in womb of said woman, where isolated portion of court's charge included causing of premature birth within definition of abortion, but portion of charge applying law to facts made no mention of phrase relative to premature birth and emphasized that jury must find beyond reasonable doubt that fetus was destroyed in woman before conviction could be had, such charge was proper. *Jarquín v. State* (1950) 155 Cr.R. 140, 232 S.W.2d 736.

In abortion prosecution, jury should be instructed that, in order to constitute the crime of abortion, a live fetus must be destroyed in the womb, or a premature birth thereof must be caused. *Mayberry v. State* (1954) 160 Cr.R. 432, 271 S.W.2d 635.

Where there was no evidence in abortion prosecution suggesting that fetus was not alive at the time defendant allegedly performed the abortion, instruction that jury was required to find that the life of the fetus or embryo in the womb was destroyed by means of drug and medicine and instrument used, was sufficient to protect defendant in her rights before jury, and it was not error because trial court failed to instruct that it was necessary to find that at time of alleged abortion, the fetus was living and was expelled alive from the womb of the prosecuting witness as result of act of defendant. *Id.*

In prosecution for abortion, testimony of physician to effect that there was no

evidence of other than a normal pregnancy, together with known fact of nature that pregnancy, in the absence of an intervening cause would continue and progress, amounted to direct evidence that fetus of victim lived and progressed, and fact that victim had taken hot ginger did not amount to an intervening cause, and therefore trial court did not err, in refusing to charge on law of circumstantial evidence. *Parnell v. State* (1958) 166 Cr.R. 239, 312 S.W.2d 506.

15. Penalty

In prosecution for producing abortion upon pregnant woman and destroying life of fetus in womb of said woman, facts and circumstances shown to have surrounded act established that crime merited severest punishment allowed by law. *Jarquín v. State* (1950) 155 Cr.R. 140, 232 S.W.2d 736.

16. New trial

In abortion prosecution, new trial must be granted where jury received testimony of a juror that defendant probably had been carrying on abortions other than the offense involved and such not supported by the evidence. *Davis v. State* (Cr.App. 1959) 328 S.W.2d 316.

17. Civil actions

In action by patient against physician and another for personal injuries arising from alleged battery committed jointly by physician and such other person as result of an alleged abortion performed by force against patient's will, evidence sustained finding that physician did in fact perform such operation against patient's will. *Thaxton v. Reed* (Civ.App.1960) 339 S.W.2d 241, ref. n. r. e.

In action against defendant physician and another for alleged battery in the form of an operation performed by force against patient's will, evidence presented a jury question as to patient's consent. *Id.*

Art. 1192. [1072] [642] [537] Furnishing the means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Notes of Decisions

Accomplices 1
Indictment 2

Library references

Abortion ☞3.
C.J.S. Abortion § 14.
Form, indictment. Willson's Texas
Criminal Forms, 6th Ed., § 1602.

2A Tex.Penal St.—28

1. Accomplices

The woman's father testifying for the state, held to be an accomplice. *Watson v. State* (1880) 9 Cr.R. 237.

Where a defendant has furnished the means for procuring an abortion, knowing the purpose intended, and the abortion is in fact procured, he is an accomplice, but where the attempt fails, he may be prose-

Art. 1192. OFFENSES AGAINST THE PERSON

Tit. 15,

cuted as a principal for an attempt to procure an abortion, though he did not administer the medicine, and, was not present when it was taken. *Willingham v. State* (1894) 33 Cr.R. 98, 25 S.W. 424.

A person who furnishes to a pregnant woman drugs to produce an abortion is properly indicted under art. 641, with "administering" such drugs as a principal, not under section 642, providing that one furnishing means to procure an abortion "is an accomplice"; since the woman was not a principal, and he who furnished her the drugs could not therefore be an accomplice. *Moore v. State* (1897) 37 Cr.R. 552, 40 S.W. 287.

This article is not exclusive in defining accomplices, but article 70 applies, so that

one who advises, commands, or encourages another to commit the abortion, is guilty. *Fondren v. State* (1914) 74 Cr.R. 552, 169 S.W. 411.

2. Indictment

A count charging that defendant furnished to A., a pregnant woman, an instrument for the purpose, on A.'s part, of procuring an abortion of herself therewith, he knowing the purpose intended by said A., and said means being calculated to produce that result, and did, by means of such instrument so furnished, procure an abortion of A., was bad for duplicity. *Wandell v. State* (Cr.App.1894) 25 S.W. 27.

Art. 1193. [1073] [643] [538], Attempt at abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Notes of Decisions

Accomplices 4
 Constitutionality 1
 Construction and application, 2
 Evidence 6
 Indictment 5
 Means used 3
 Validity 1

4. Accomplices

Evidence showed that the father of the injured female was an accomplice. *Watson v. State* (1880) 9 Cr.R. 237.

Where the injured female testifies the court is not required to instruct on the law of accomplice. *Willingham v. State* (1894) 33 Cr.R. 98, 25 S.W. 424.

The injured female, though she consented to the attempt, is not an accomplice. *Hunter v. State* (1897) 38 Cr.R. 61, 41 S.W. 602.

Library references
 Abortion § 1, 17.
 C.J.S. Abortion §§ 10, 40.
 Form, indictment. *Willson's Texas Criminal Forms*, 6th Ed., § 1603.

5. Indictment

Where indictment charges attempt by use of drug or medicine it is not necessary to allege what drug or medicine was administered. *Watson v. State* (1880) 9 Cr.R. 237; *Cave v. State* (1894) 33 Cr.R. 335, 26 S.W. 503.

1. Validity

This article sufficiently defines the offense. *Jackson v. State* (1909) 55 Cr.R. 79, 115 S.W. 262, 131 Am.St.Rep. 792.

An indictment conforming strictly to the statute is sufficient. *Hunter v. State* (1917) 81 Cr.R. 471, 196 S.W. 820.

2. Construction and application

Where an attempt to produce abortion fails of its purpose, the accused should be prosecuted under both this and art. 1191. *Willingham v. State* (1894) 33 Cr.R. 98, 25 S.W. 424.

6. Evidence

The statute does not seem to be predicated on the means prescribed evidencing the intent of defendant, but on the means actually used. *Fretwell v. State* (1902) 43 Cr.R. 501, 67 S.W. 1021.

On trial for attempt to produce an abortion, the evidence showed that defendant had administered ergot; evidence of experts that ergot would under certain circumstances produce an abortion is sufficient to support a conviction. *Hunter v. State* (1897) 38 Cr.R. 61, 41 S.W. 602. And further as to evidence, see *Watson v. State* (1880) 9 Cr.R. 237.

3. Means used

The means used need not almost produce an abortion. *Hunter v. State* (1917) 81 Cr.R. 471, 196 S.W. 820.

The defendant was charged with administering cotton root tea for the purpose

Ch. 9 **ABORTION** **Art. 1195**

of producing an abortion. Expert witnesses for the state testified that, while the books said that an abortion was liable to follow the administration of cotton root tea, they knew nothing of it by personal observation, and thought that as administered to the prosecuting witness by defendant it would not produce an abortion.

Held that, the jury should have found for the defendant. *Williams v. State* (Cr.App. 1902) 19 S.W. 897.

Evidence was sufficient to sustain a conviction of attempted abortion. *Hunter v. State* (1917) 81 Cr.R. 471, 196 S.W. 820.

Art. 1194. [1074] [644] [539] Murder in producing abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Notes of Decisions

- Constitutionality 1
- Construction and application 2
- Evidence 4
- Instructions to jury 3
- Validity 1

Library references

Homicide §18(2).
C.J.S. Homicide § 21.

1. Validity

The statute sufficiently defines the offense. *Jackson v. State* (1909) 55 Cr.R. 79, 115 S.W. 262, 131 Am.St.Rep. 792.

2. Construction and application

A homicide committed by procuring or attempting to procure an abortion is not murder per se, the intent to kill must exist. *Ex parte Fatheree* (1895) 34 Cr.R. 594, 31 S.W. 403.

Abortion must be with malice aforethought to render death caused thereby murder. *Ex parte Vick* (1927) 106 Cr.R. 373, 292 S.W. 889.

3. Instructions to jury

Charge of court, see Notes of Decisions under *Vernon's Ann.C.C.P.* art. 658.

Where the state claimed that accused committed an abortion on decedent by a criminal operation, while he introduced proof that deceased had attempted to bring on an abortion by inserting a hatpin into her womb, and had also been violently struck by a dog and knocked from her

feet, sustaining a severe fall on the sidewalk, and had also fallen from a chair shortly before her miscarriage, either of which would have caused the same, the court erred in omitting to charge that, if the abortion and blood-poisoning were the result of punctures with a hatpin, they should acquit. *Jackson v. State* (1909) 55 Cr.R. 79, 115 S.W. 262, 131 Am.St.Rep. 792.

4. Evidence

Where defendant, charged with murder by abortion, allegedly hit deceased wife on side at least two days before miscarriage, admitting testimony of nonexpert, who waited on wife when child was born, that such blow caused miscarriage and wife's death held error. *Bowden v. State* (1936) 130 Cr.R. 465, 94 S.W.2d 734.

In prosecution for murder by abortion, evidence that victim was in home of accused on occasion of her death, that before she died accused had rubbed victim with alcohol, and that victim could not have walked a mile after fetus had been punctured in manner disclosed by testimony of physicians, did not exclude every other reasonable hypothesis except guilt of accused when viewed in light of fact that accused was a midwife and licensed nurse, that there was no definite testimony as to distance between homes of victim and accused, and that no sharp instrument of any character was found in home of accused, and hence reversal of conviction based on circumstantial evidence was required. *Smith v. State* (1939) 137 Cr.R. 644, 132 S.W.2d 868.

Art. 1195. [1075] [645] [540] Destroying unborn child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

Historical Note

Derivation. From *Vernon's Pen.Code* 1916 (*Pen.Code* 1911) art. 1075, unchanged except that instead of "or for not less

than five years," the former article concluded with "or any period not less than five years at the discretion of the jury."

Art. 1195. OFFENSES AGAINST THE PERSON

Tit. 15,

Notes of Decisions

Construction and application 1
Indictment 2

Library references

Homicide \Rightarrow 1.
C.J.S. Homicide \S 2.
Form, indictment. Willson's Texas
Criminal Forms, 6th Ed., \S 1604.

1. Construction and application

The child must be in a condition of being born alive and but for the act of the accused the child would have been born alive. This offense differs from infanticide, for

in the latter the child must be born alive in order that its death may be brought within the definition of that offense. Hardin v. State (1908) 52 Cr.R. 233, 106 S.W. 353.

2. Indictment

The manner in which the vitality is destroyed must be alleged with reasonable particularity; a mere allegation in the language of the statute will not suffice. The indictment need not negative that the act was done under the advice of a physician. State v. Rupe (1874) 41 T. 33.

Art. 1196. [1076] [646] [541] By medical advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Notes of Decisions

Library references

Abortion \Rightarrow 1, 2.
C.J.S. Abortion $\S\S$ 3, 13.
Form, indictment. Willson's Texas
Criminal Forms, 6th Ed., \S 1600.

1. Act of physician

Physician has right to produce abortion to save life of mother and child. Ex parte Vick (1927) 106 Cr.R. 373, 292 S.W. 889.

West's Texas Statutes and Codes

Volume 4 **SUPERSEDED**

REVISED CIVIL STATUTES

Articles 2461 to 5561

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Art. 4510a**TITLE 71**

624

deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas¹ and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

¹ See, now, article 4504a.

Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50), nor more than Five Hundred Dollars (\$500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

CHAPTER SIX ½. ABORTION**Article**

- 4512.1 Abortion.
- 4512.2 Furnishing the Means.
- 4512.3 Attempt at Abortion.
- 4512.4 Murder in Producing Abortion.
- 4512.5 Destroying Unborn Child.
- 4512.6 By Medical Advice.

Art. 4512.1 Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

[1925 P.C.]

Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Norman Alan Davenport, M.D., on behalf of himself and others similarly situated; Robert G. Anderson, M.D.; Mark A. Daniels, M.D.

(b) County of Residence of First Listed Plaintiff Tarrant (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Jonathan F. Mitchell, Mitchell Law PLLC 111 Congress Avenue, Suite 400, Austin, Texas 78701 (512) 686-3940

DEFENDANTS

City of Fort Worth; Betsy Price, in her official capacity as Mayor of the City of Fort Worth; Southwest Fort Worth Abortion Services Center; Whole Woman's Health of Fort Worth

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. § 2201, 42 U.S.C. § 1983

Brief description of cause: Constitutional challenge to Fort Worth's exemption of abortion from its ban on elective surgery

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE

April 23, 2020

SIGNATURE OF ATTORNEY OF RECORD

Jonathan F. Mitchell

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE