

**Gregory B. Scheideman; William F. Runyon Jr.; David W. Kostohryz Jr.; John Kelley; Fort Worth Oral Surgery PA; Kelley Orthodontics; American Association of Pro-Life Obstetricians and Gynecologists,**

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

IN THE DISTRICT COURT

TARRANT COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION AND  
APPLICATION FOR TEMPORARY INJUNCTION**

In response to the COVID-19 pandemic, the City of Fort Worth has issued a stay-at-home order that prohibits all elective medical, surgical, and dental procedures within the city. *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 essential medical procedures during this time of worldwide shortage.

It is not clear whether this language allows abortions to continue during the COVID-19 pandemic. Many supporters of abortion rights, for example, think that abortion should never be characterized as an “elective” procedure. And a physician who performs a woman’s abortion might “determine” that an abortion is always “medically necessary to correct a serious medical condition”—either by characterizing the pregnancy itself as a “serious medical condition,” or by characterizing the effects of pregnancy (such morning sickness, weight gain, high blood pressure, and the risk of post-partum depression) in that manner. The city’s officials, however, have not clarified whether this stay-at-home order prohibits abortions or allows them to continue.

When Governor Greg Abbott issued a similarly worded executive order on March 21, 2020, the Attorney General of Texas quickly clarified that the order prohibits all surgical and medication abortions in the State of Texas unless necessary to preserve the life or health of the mother. *See* Executive Order GA-09 (attached as Exhibit 2); Press Release from Attorney General Ken Paxton (March 23, 2020) (attached Exhibit 3). Litigation ensued, and as of April 17, 2020, the state’s officials have been enjoined from enforcing Governor Abbott’s order against drug-induced abortions and abortions for women whose pregnancies will go past 20 weeks when the executive order expires. *See Planned Parenthood Center for Choice, et al. v. Abbott, et al.*, 1:20-cv-00323-LY (ECF No. 63) (attached as Exhibit 3).

But the city of Fort Worth has not yet announced whether its own stay-at-home order imposes an independent prohibition on abortions during the COVID-19 pandemic, even though its prohibition on elective surgeries tracks the language that appears in Governor Abbott’s order. And neither the city nor this Court is bound in any way by the injunction that the federal district court in Austin has issued against the state’s officials. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial

district, the same judicial district, or even upon the same judge in a different case.” (citation and internal quotation marks omitted)). The Fort Worth abortion clinics are acting as though the city’s stay-at-home order imposes no independent prohibition on their ability to perform abortions, and they have resumed the performance of drug-induced abortions in response to recent injunction against the enforcement of Governor Abbott’s order.

The plaintiffs therefore seek a declaratory judgment that the city of Fort Worth’s stay-at-home order must prohibit abortion on the same terms that it prohibits other elective surgeries and procedures. The plaintiffs also seek an injunction that declares the stay-at-home order invalid and blocks city officials from enforcing it unless and until the order is amended or clarified to specifically prohibit surgical and drug-induced abortions in Fort Worth, unless they are performed for the purpose of saving the life of the mother.

### **DISCOVERY CONTROL PLAN**

1. The plaintiffs intend to conduct discovery under Level 3 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

### **PARTIES**

2. Plaintiff Fort Worth Oral Surgery PA is a professional association located in Fort Worth, Texas.

3. Plaintiff Kelley Orthodontics is the DBA name of John M Kelley Jr DDS MS PA. It is located in Fort Worth, Texas.

4. Plaintiff Gregory B. Scheideman DDS is an oral surgeon who practices at Fort Worth Oral Surgery PA.

5. Plaintiff William F. Runyon Jr. DDS is an oral surgeon who practices at Fort Worth Oral Surgery PA.

6. Plaintiff David W. Kostohryz Jr. DDS MD is an oral surgeon who practices at Fort Worth Oral Surgery PA.

7. Plaintiff John Kelley DDS is an orthodontist who practices at Kelley Orthodontics.

8. Plaintiff American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is a membership organization of obstetricians and gynecologists. It has 140 members who practice in Texas.

9. 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.

10. 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.

11. 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.

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

### **JURISDICTION AND VENUE**

13. The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court exclusive of interest. The plaintiffs seek relief that can be granted by courts of law or equity.

14. The Court has jurisdiction over the plaintiffs' request for declaratory relief against defendants Betsy Price and the city of Fort Worth because the Declaratory

Judgment Act waives governmental immunity when the plaintiffs are challenging the validity of an ordinance or order. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

15. The Court has jurisdiction over the plaintiff's request for injunctive relief against defendant Betsy Price because the mayor is acting *ultra vires* by shutting down lawful elective surgeries and procedures—such as dentistry, oral surgery, and orthodontics—while allowing abortions to continue in violation of Texas law. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009).

16. Plaintiffs Fort Worth Oral Surgery PA, and Dr. Scheideman, Dr. Runyon, and Dr. Kostohryz have standing to seek declaratory and injunctive relief because their business has been almost completely shuttered by the mayor's stay-at-home order, which allows them to perform only emergency surgeries and nothing else.

17. Plaintiff Kelley Orthodontics, along with Dr. Kelley, has standing to seek declaratory and injunctive relief because its business has been shut down by the mayor's stay-at-home order.

18. Plaintiff American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) has associational standing to seek declaratory and injunctive relief against the city's refusal to enforce its stay-at-home order against abortion providers. AAPLOG has members who are using scarce personal protective equipment (PPE) to treat COVID-19 patients or provide other essential health care, and their lives, health, and safety are endangered by the defendant abortion clinics' diversion of PPE toward elective and unlawful abortion procedures. These members of AAPLOG would have standing had they sued as individuals. The interests that AAPLOG seeks to protect in this litigation are germane to its purpose, and there is no need for the individual members to participate in this lawsuit. *See Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 447 (Tex. 1993).

19. The Court has personal jurisdiction over each of the defendants.

20. Venue is proper because a substantial portion of the events giving rise to the claims occurred in Tarrant County, Texas. *See* Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.003, 15.005, 15.035.

### STATEMENT OF THE CLAIM

#### I. THE LAW OF TEXAS CONTINUES TO PROHIBIT ABORTION UNLESS THE MOTHER'S LIFE IS IN DANGER

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

22. 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 4).

23. 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 4).

24. 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 5.

25. 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. But 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.

26. 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)).

27. 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*.

## II. 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

28. 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.

29. 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.

30. An order that allows an illegal medical procedure (abortion) to continue while prohibiting lawful procedures such as dentistry, oral surgery, and orthodontics 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.”

31. The stay-at-home order therefore 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.

### CAUSES OF ACTION

32. The plaintiffs bring their claims for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

33. Defendants Southwest Fort Worth Abortion Services Center and Whole Woman’s Health of Fort Worth should be joined as parties needed for just adjudication under Rule 39 of the Texas Rules of Civil Procedure.

34. The plaintiffs are seeking relief entirely under state law and are not asserting claims that arise under federal law or any federal cause of action.



## GROUNDS FOR TEMPORARY INJUNCTION

35. To obtain a temporary injunction, an applicant must plead and prove: “(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Ford Motor Co.*, 284 S.W.3d 198, 205 (Tex. 2002).

36. The Uniform Declaratory Judgment Act and *Heinrich* each provide the plaintiffs with a cause of action to seek declaratory and injunctive relief against the mayor and the city over their issuance and enforcement of the stay-at-home order.

37. The plaintiffs have a probable right to relief because the city’s failure to enforce its stay-at-home order against abortion providers violates Article XI, section 5 of the Texas Constitution.

38. The members of AAPLOG will suffer probable, imminent, and irreparable injury absent a temporary injunction because the defendant abortion clinics and their patients are selfishly consuming personal protective equipment on elective and unlawful abortions, at a time when every piece of PPE must be conserved, to the maximum possible extent, for workers on the front lines of the COVID-19 pandemic and others who are provide life-saving or essential medical treatments.

39. Plaintiffs Fort Worth Oral Surgery PA, Kelley Orthodontics, and Doctors Scheideman, Runyon, Kostohryz, and Kelley will suffer probable, imminent, and irreparable injury absent a temporary injunction because their businesses have been shut down on account of the city’s stay-at-home order, and they are suffering discriminatory treatment by having their lawful practices shuttered while illegal abortion providers are allowed to continue operating.

## DEMAND FOR JUDGMENT

The plaintiffs demand the following relief:

- a. a declaration that the law of Texas continues to outlaw abortion, except when the mother’s life is endangered by the pregnancy;

- b. a declaration that the city of Fort Worth’s stay-at-home order violates Article XI, section 5 of the Texas Constitution and is invalid, unless it is amended or clarified to prohibit abortion on the same terms that it prohibits lawful medical procedures such as dentistry, oral surgery, and orthodontics;
- c. a temporary and permanent injunction that prevents Mayor Price from enforcing the city of Fort Worth’s stay-at-home order unless and until it is amended or clarified to prohibit abortion, except when the mother’s life is endangered by the pregnancy;
- d. an award of nominal and compensatory damages;
- e. an award of costs and attorneys’ fees;
- f. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

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\* *pro hac vice* application  
forthcoming

Dated: April 17, 2020

*Counsel for Plaintiffs*

# Exhibit 1

**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](mailto:EssentialServices@tdem.texas.gov). Information is also available at [www.tdem.texasa.gov/essentialservices](http://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.<sup>1</sup>
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.

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<sup>1</sup> 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.



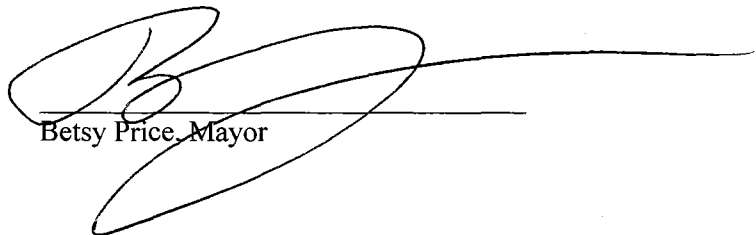
- iv. Essential Retail. Food service providers, including grocery stores, warehouse stores, bodegas, gas stations, convenience stores, and farmers' markets and other retail stores that sell food products and household staples, pet and feed stores. Businesses not open to the public that ship or deliver 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, curbside 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](http://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 7<sup>th</sup> day of April 2020.



A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is positioned above a horizontal line.

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"> <li>• Stay at place of residence</li> <li>• Practice Social Distancing</li> <li>• 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</li> <li>• Comply with Guidelines from the President and the CDC</li> </ul>
All businesses except Essential Businesses	<p>No public occupancy permitted            Minimum Basic Operations allowed            Social Distancing required            Minimum number of employees            Minimize in-person contact</p>
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	<p>In-house dining/shopping – no public occupancy            Drive-in, drive-through, take out, and delivery is permitted.            Social Distancing is required</p>
Worship Services	<p>If substantial community spread, all in-person gatherings of any size are cancelled or postponed.</p> <p>GA-14 requires compliance with the Guidelines from the President and CDC</p>
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"> <li>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;</li> <li>ii. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons;</li> <li>iii. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services;</li> <li>iv. Travel to return to a place of residence from outside the jurisdiction;</li> <li>v. Travel required by law enforcement or court order;</li> <li>vi. Travel by church staff or clergy for the purpose of production of remote delivery of religious services and other ministries requiring travel;</li> <li>vii. Travel related to attending a funeral service; or</li> <li>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.</li> </ul>	<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"><li>- 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;</li><li>- IT or other operations that facilitate employees working from home;</li><li>- Teleworking is required, if possible</li><li>- Facilitate online or call-in sales or in-store repair services;</li><li>- in-person contact of any kind between people who are not in the same household must be minimized.</li></ul>	<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>

# **Exhibit 2**

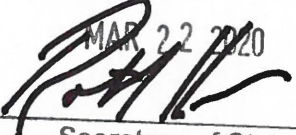




GOVERNOR GREG ABBOTT

March 22, 2020

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
4:30 PM O'CLOCK

MAR 22 2020  
  
Secretary of State

The Honorable Ruth R. Hughs  
Secretary of State  
State Capitol Room 1E.8  
Austin, Texas 78701

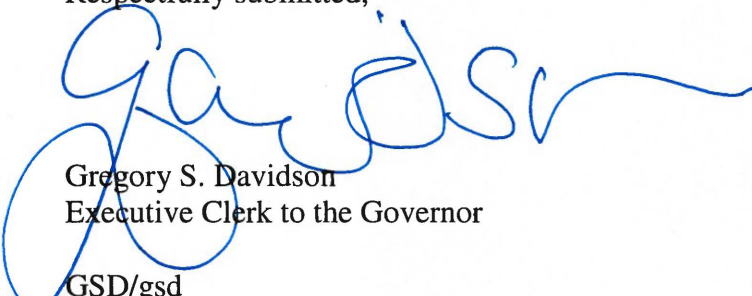
Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

Executive Order No. GA-09 relating to hospital capacity during the COVID-19 disaster.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,

  
Gregory S. Davidson  
Executive Clerk to the Governor

GSD/gsd

Attachment

# Executive Order

BY THE  
GOVERNOR OF THE STATE OF TEXAS

Executive Department  
Austin, Texas  
March 22, 2020

EXECUTIVE ORDER  
GA 09

*Relating to hospital capacity during the COVID-19 disaster.*

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WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, the Texas Department of State Health Services has determined that, as of March 19, 2020, COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, on March 19, 2020, I issued an executive order in accordance with the President's Coronavirus Guidelines for America, as promulgated by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC), and mandated certain obligations for Texans that are aimed at slowing the spread of COVID-19; and

WHEREAS, a shortage of hospital capacity or personal protective equipment would hinder efforts to cope with the COVID-19 disaster; and

WHEREAS, hospital capacity and personal protective equipment are being depleted by surgeries and procedures that are not medically necessary to correct a serious medical condition or to preserve the life of a patient, contrary to recommendations from the President's Coronavirus Task Force, the CDC, the U.S. Surgeon General, and the Centers for Medicare and Medicaid Services; and

WHEREAS, various hospital licensing requirements would stand in the way of implementing increased occupancy in the event of surge needs for hospital capacity due to COVID-19; and

WHEREAS, the "governor is responsible for meeting . . . the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and the legislature has given the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders . . . hav[ing] the force and effect of law;" and

WHEREAS, under Section 418.016(a), the "governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster;" and

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
4:39 PM O'CLOCK

MAR 22 2020

WHEREAS, under Section 418.173, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable by a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement.

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order that, beginning now and continuing until 11:59 p.m. on April 21, 2020, all licensed health care professionals and all licensed health care facilities 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.

At the request of the Texas Health and Human Services Commission, I hereby suspend the following provisions to the extent necessary to implement increased occupancy in the event of surge needs for hospital capacity due to COVID-19:

25 TAC Sec. 133.162(d)(4)(A)(iii)(I);  
25 TAC Sec. 133.163(f)(1)(A)(i)(II)–(III);  
25 TAC Sec. 133.163(f)(1)(B)(i)(III)–(IV);  
25 TAC Sec. 133.163(m)(1)(B)(ii);  
25 TAC Sec. 133.163(t)(1)(B)(iii)–(iv);  
25 TAC Sec. 133.163(t)(1)(C);  
25 TAC Sec. 133.163(t)(5)(B)–(C); and  
any other pertinent regulations or statutes, upon written approval of the Office of the Governor.

This executive order shall remain in effect and in full force until 11:59 p.m. on April 21, 2020, unless it is modified, amended, rescinded, or superseded by me or by a succeeding governor.



Given under my hand this the 22nd day of  
March, 2020.

A handwritten signature in black ink that reads "Greg Abbott".

GREG ABBOTT  
Governor

ATTESTED BY:

A handwritten signature in black ink that reads "Ruth R. Hughs".

RUTH R. HUGHS  
Secretary of State

FILED IN THE OFFICE OF THE  
SECRETARY OF STATE  
4:39 PM O'CLOCK

MAR 22 2020

# Exhibit 3





[HOME](#) > [NEWS](#) > [NEWS RELEASES](#) >

HEALTH CARE PROFESSIONALS AND FACILITIES, INCLUDING ABORTION PROVIDERS, MUST IMMEDIATELY STOP ALL MEDICALLY UNNECESSARY SURGERIES AND PROCEDURES TO PRESERVE RESOURCES TO FIGHT COVID-19 PANDEMIC

March 23, 2020 | Press Release

# Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic

SHARE THIS: 155

Texas Attorney General Ken Paxton today warned all licensed health care professionals and all licensed health care facilities, including abortion providers, that, pursuant to Executive Order GA 09 issued by Gov. Greg Abbott, they must postpone all surgeries and procedures that are not immediately medically necessary.

On Saturday, Gov. Abbott issued an executive order that “all licensed health care professionals and all licensed health care facilities 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.” This prohibition applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.

The COVID-19 pandemic has increased demands for hospital beds and has created a shortage of personal protective equipment needed to protect health care professionals and stop transmission of the virus. Postponing surgeries and procedures that are not immediately medically necessary will ensure that hospital beds are available for those suffering from COVID-19 and that PPEs are available for health care professionals. Failure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to \$1,000 or 180 days of jail time.

“We must work together as Texans to stop the spread of COVID-19 and ensure that our health care professionals and facilities have all the resources they need to fight the virus at this time,” said Attorney General Paxton. “No one is exempt from the governor’s executive order on medically unnecessary surgeries and procedures, including abortion providers. Those who violate the governor’s order will be met with the full force of the law.”

For information on the spread or treatment of Coronavirus (COVID-19), please visit the [Texas Department of State Health Services](#) website.

Receive email updates from the OAG Press Office:

## Related News

### AG Paxton: Voting by Mail Because of Disability Must be Reserved For Texans Suffering from Actual Illness or Medical Problems

April 15, 2020 | Press Release

### AG Paxton Defends Governor Abbott’s Executive Order Prohibiting the Release of Dangerous Individuals from Dallas Jails

April 15, 2020 | Press Release

### AG Paxton: Voting by Mail Based on Disability Reserved for Texans With Actual Illness or Medical Problem Rendering Them Unable to Vote In-Person

April 15, 2020 | Press Release

### AG Paxton Applauds Court for Upholding Governor Abbott’s Executive Order Preventing the Release of Dangerous Individuals from Texas Jails

April 15, 2020 | Press Release

[See all News](#)



# Exhibit 4

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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## 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  
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    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)

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-

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

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

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.

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.

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.

3. Means used

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

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.

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.

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

6. Evidence

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.

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

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."

Notes of Decisions

Construction and application 1  
Indictment 2

Library references

Homicide § 1.  
C.J.S. Homicide § 2.  
Form, indictment. Willson's Texas  
Criminal Forms, 6th Ed., § 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 § 1, 2.  
C.J.S. Abortion §§ 3, 13.  
Form, indictment. Willson's Texas  
Criminal Forms, 6th Ed., § 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.

# Exhibit 5

# West's Texas Statutes and Codes

Volume 4 **SUPERSEDED**

**REVISED CIVIL STATUTES**

Articles 2461 to 5561

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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 Texas<sup>1</sup> 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.]

<sup>1</sup> 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.]