



INSTITUTE FOR JUSTICE

April 15, 2020

**Via Email and UPS**

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President Kathy Shipp  
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*Re: Texas' restrictions on nurse practitioners during COVID-19*

To Governor Abbott, Mr. Rodriguez, and President Shipp:

The Institute for Justice has learned that Texas is barring advanced practice registered nurses (also known as nurse practitioners) from working in hospitals to assist with the COVID-19 pandemic, unless they are supervised by a physician. This supervision requirement is effectively banning many nurse practitioners from offering their services to overburdened hospitals, even as volunteers. Not only is this requirement hurting the State's emergency efforts, but it is also completely unnecessary and likely unconstitutional. We thus request that you lift this requirement as soon as possible.

The Institute for Justice (IJ) is a national nonprofit organization that has worked to remove and reduce licensing restrictions for 30 years, including in medical professions. For example, IJ has sued several states regarding their unduly burdensome regulations for certificates of need, telemedicine, and medicine dispensing. In addition, IJ drafts model legislation and advises state legislatures on licensing matters nationwide.

We understand that you have approved several measures to ease barriers to licensure of health professionals during the pandemic, including measures relating to

emergency licenses, license reinstatement, and prescribing medications for certain controlled substances via telemedicine. These measures are extremely welcome and speak highly of the State's ability to act quickly during a crisis.

However, there is still more to be done—especially when it comes to nurse practitioners. Under state law and regulations, nurse practitioners can only practice under the supervision of a physician, including in an emergency. *See, e.g.*, 22 Tex. Admin. Code §§ 172.21, 221.13, 222.5; Tex. Occ. Code § 301.152. This supervisory restriction is preventing many nurse practitioners from volunteering to help with COVID-19 patients in all areas of the state, especially rural and underserved regions. Some physicians are unable to supervise nurse practitioners because of limitations in their medical malpractice insurance, while others cannot take on additional supervisory responsibilities during this chaotic time. Removing the red tape and allowing nurse practitioners to volunteer during this crisis will grant patients direct access to all of the services nurse practitioners are educated and trained to provide.

The supervision requirement is also unnecessary. Texas has one of the strictest regulatory regimes for nurse practitioners in the country.<sup>1</sup> The majority of states do not require career-long supervision for nurse practitioners, and 14 states and the District of Columbia do not require supervision at all.<sup>2</sup> In addition, multiple studies, including an extensive 2018 report from the Brookings Institute, have found that physicians' supervision of nurse practitioners does not increase quality or safety but just restricts competition, raises prices, and reduces patient access to care.<sup>3</sup> During the COVID-19 pandemic, it may also cost lives.

Indeed, the evidence suggests that the only reason for the supervision provision is to protect doctors from competition. Not only is such protectionism irrelevant during the pandemic, but several federal courts have held that licensing laws that exist to protect others from competition are unconstitutional. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994).

Several other states have already loosened or lifted supervision requirements on nurse practitioners during the pandemic, including Kentucky, Louisiana, Michigan, New Jersey, New York, and Wisconsin. Multiple other states have lifted other restrictions on nurse practitioners as well.

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<sup>1</sup> *E.g.*, American Association of Nurse Practitioners, State Practice Environment, <https://www.aanp.org/advocacy/state/state-practice-environment>.

<sup>2</sup> *E.g.*, Becker's Hospital Review, 28 states with full practice authority for NPs (Dec. 28, 2019), <https://www.beckershospitalreview.com/hospital-physician-relationships/28-states-with-full-practice-authority-for-nps.html>.

<sup>3</sup> *E.g.*, E. Kathleen Adams & Sara Markowitz, *Improving efficiency in the health-care system: Removing anticompetitive barriers for advanced practice registered nurses and physician assistants* (June 2018), <https://www.brookings.edu/research/improving-efficiency-in-the-health-care-system-removing-anticompetitive-barriers-for-advanced-practice-registered-nurses-and-physician-assistants/>; Institute for Justice, *The Costs of Occupational Licensing* (Nov. 2018), <https://ij.org/report/at-what-cost/costs-of-occupational-licensing/>.

We thus respectfully recommend that you lift the supervisory requirement for nurse practitioners during the pandemic, which would allow them to help overburdened hospitals and needy patients. We also hope that your state will choose to remove these restrictions permanently. If you have any questions, we can be reached at [esmith@ij.org](mailto:esmith@ij.org) and [kmorton@ij.org](mailto:kmorton@ij.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Erica Smith", written over a thin yellow vertical line.

Erica Smith  
Senior Attorney  
Institute for Justice

A handwritten signature in black ink, appearing to read "Kendall Morton", written on a light gray background.

Kendall Morton  
Special Projects Manager  
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