

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

DIPENDRA TIWARI, KISHOR SAPKOTA,
and GRACE HOME CARE, INC,

Plaintiffs,

vs.

ADAM MEIER, in his official capacity as
Secretary of the Kentucky Cabinet for Health
and Family Services; KENTUCKY CABINET
OF HEALTH AND FAMILY SERVICES;
STEVEN D. DAVIS, in his official capacity as
Inspector General of Kentucky; and OFFICE
OF THE INSPECTOR GENERAL, DIVISION
OF CERTIFICATE OF NEED,

Defendants.

Civil Action No. 3:19-CV-884-JRW

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a constitutional challenge to Kentucky's certificate-of-need program, which arbitrarily prevents Plaintiffs and other entrepreneurs from offering safe, cost-efficient, specialized home health services. Specifically, Plaintiffs Dipendra Tiwari and Kishor Sapkota formed Plaintiff Grace Home Care, Inc. to offer badly needed home health services to the sizable Nepali-speaking community in Jefferson County. But Plaintiffs are unable to provide simple, safe home health services to their community because of Kentucky's "certificate-of-need" laws.

2. The Kentucky Cabinet of Health and Family Services administers the certificate-of-need program. Before opening or expanding into a new county, home health agencies, like

Grace Home Care, must apply for and receive a certificate of need in every county where they would like to operate.

3. Applying for a certificate of need is a difficult and expensive process, during which existing competitors protest and argue there is no “need” for a new home health agency.

4. Because—and only because—of the barrier posed by the certificate-of-need requirement, Plaintiffs are unable to open a home health agency to offer cost-effective, specialized home health services in Jefferson County or elsewhere in Kentucky.

5. The true purpose of Kentucky’s certificate-of-need laws is to protect existing health care businesses from competition. But it’s not the government’s job to pick winners and losers in the marketplace.

6. The certificate-of-need requirement violates the rights of Plaintiffs and others like them, who simply want to provide safe and effective home health services, as guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

7. And by imposing certificate-of-need requirements on some health care services but not other similarly situated services, Defendants violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

JURISDICTION AND VENUE

8. Plaintiffs bring this civil-rights lawsuit under 42 U.S.C. § 1983 for violations of rights, privileges, or immunities secured by the Fourteenth Amendment to the United States Constitution and under the Declaratory Judgments Act, 28 U.S.C. § 2201. Plaintiffs seek declaratory and injunctive relief against the enforcement of Kentucky’s certificate-of-need requirements, KRS §§ 216B.010 *et seq.*; their implementing rules and regulations, Kentucky Administrative Code title 900, chapter 6; and Defendants’ policies and practices in enforcing those provisions that violate Plaintiffs’ constitutional rights, both facially and as applied.

9. This Court has jurisdiction over Plaintiffs' constitutional claims under 28 U.S.C. § 1331 (federal question jurisdiction).

10. Venue is appropriate in this Court under 28 U.S.C. § 1391(b) and Local Rule 3.2(e) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in Jefferson County, Kentucky, where all Plaintiffs are domiciled and where Plaintiff Grace Home Care is registered. Jefferson County is located in the Western District of Kentucky. 28 U.S.C. § 97(b).

THE PARTIES

I. PLAINTIFFS

11. Plaintiff Dipendra Tiwari is a certified public accountant with his own accounting practice. Dipendra is an officer of Plaintiff Grace Home Care.

12. Dipendra is a United States permanent resident and a resident of Jefferson County, Kentucky.

13. Plaintiff Kishor Sapkota was a journalist in Nepal and currently works as a home health aide. Kishor is the President of Plaintiff Grace Home Care.

14. Kishor is a United States citizen and a resident of Jefferson County, Kentucky.

15. Plaintiff Grace Home Care, Inc. is a corporation organized under the laws of Kentucky with a sole intended purpose of operating a home health agency in Jefferson County. Its registered office is located at 7721 Wood Duck Way, Louisville, in Jefferson County, Kentucky. Grace Home Care's current board members are Plaintiffs Dipendra Tiwari and Kishor Sapkota.

II. DEFENDANTS

16. Each natural Defendant is sued in his official capacity.

17. Defendant Adam Meier is the Secretary of the Kentucky Cabinet for Health and

Family Services. In his official capacity, Defendant Meier has ultimate responsibility for implementing and enforcing the challenged certificate-of-need requirements. Defendant Meier further has ultimate control over Defendant Kentucky Cabinet for Health and Family Service. Defendant Meier's office is located at 275 East Main Street, Frankfort, Kentucky.

18. Defendant Kentucky Cabinet for Health and Family Services administers the statutes that establish Kentucky's certificate-of-need laws. KRS §§ 216B.010 *et seq.* The Cabinet also promulgates rules, regulations, policies, and procedures to carry out the challenged certificate-of-need laws. *Id.* The Cabinet is located at 275 East Main Street, Frankfort, Kentucky.

19. Defendant Steven D. Davis is the Inspector General of the Commonwealth of Kentucky and has ultimate responsibility for and control over the Office of the Inspector General Division of Certificate of Need. In his official capacity, Defendant Davis has authority to approve, deny, or revoke certificates of need and adopt and enforce rules to carry out the certificate-of-need laws. KRS § 216B.040. Defendant Davis's office is located at 275 East Main Street, 5E-A, Frankfort, Kentucky.

20. The Office of Inspector General is the regulatory and licensing agency for all health services, including home health, in Kentucky. Defendant Office of Inspector General, Division of Certificate of Need, administers the challenged statutes and regulations and carries out all administrative duties in enforcing the challenged certificate-of-need requirements. The Defendant Office of Inspector General, Division of Certificate of Need, is located at 275 East Main Street, 5E-A, Frankfort, Kentucky.

STATEMENT OF FACTS

I. PLAINTIFFS WANT TO OFFER HIGH QUALITY HOME HEALTH SERVICES TO THE NEPALI COMMUNITY, BUT CANNOT DO SO BECAUSE OF KENTUCKY'S CERTIFICATE-OF-NEED PROGRAM.

21. Home health agencies offer personalized services to patients who need ongoing

care and want to receive it in the privacy and comfort of their homes. Home health agencies may offer a range of non-medical and medical services to their clients. Some agencies focus on basic care by transporting clients to medical appointments or helping clients with personal care and basic household tasks, while others employ nurses and therapists to administer medication or offer in-home physical therapy. *See* KRS § 216.935; 902 KAR 20:081.

22. Starting a home health agency does not require a large capital investment.

23. Home health care is used most by the elderly population.

24. There is unmet need for home health services throughout Kentucky.

25. Home health care is less expensive than other care options, such as institutional care at nursing homes or hospitals.

26. Home health care is vital for many patients who need extended or long-term care.

27. Home health care is the first choice for many patients who need care, but prefer to remain in the comfort and privacy of their homes.

28. Patients that use home health services often have better outcomes, including lower rates of re-institutionalizations.

29. The majority of states have no certificate-of-need requirements for home health care agencies.

30. Plaintiffs Dipendra Tiwari and Kishor Sapkota are native Nepali speakers and immigrants from Nepal. They want to open a home health agency in Jefferson County or elsewhere in Kentucky.

31. Kentucky—and Jefferson County in particular—has a Nepali-speaking community that numbers in the thousands. This community is made up of both immigrants from Nepal and refugees expelled from Bhutan. The refugees from Bhutan were forced into refugee

camps in Nepal before eventually being allowed to resettle in the United States. In fact, since the 2000s, about 92,000 Nepali-speaking refugees have been forced to relocate to the United States.

32. Nepali-speaking people in Jefferson County and elsewhere in Kentucky have difficulty finding Nepali-speaking home health aides and medical services. This problem will only worsen as the Nepali-speaking community ages and requires additional care. Furthermore, the limited translator services available to the Nepali-speaking community are often useless because many Nepali-speakers do not know the formal Nepalese that is spoken by the translators.

33. Many Nepali-speaking people would prefer home health services from other Nepali speakers.

34. In fact, a patient must be able to communicate with his or her home health aide and medical providers. The inability of a patient to communicate with a home health aide presents health and safety risks.

35. Individuals in Jefferson County or elsewhere in Kentucky who need home health services may forego those services because they cannot locate Nepali-speaking home health aides. Alternatively, these individuals are forced to rely on constant care from their family members, who in turn are forced to stop working outside the home.

36. Dipendra and Kishor are personally aware of Nepali-speaking individuals who cannot get adequate home health services from Nepali-speakers and who would have better health outcomes and would be less of a burden to their families if Grace Home Care was able to operate.

37. Because of the unmet demand for Nepali-speaking home health services, in 2017, Dipendra and Kishor formed Plaintiff Grace Home Care in furtherance of their dream of opening

a home health agency that would serve the Nepali-speaking community in Kentucky. Grace Home Care would, of course, also serve non-Nepali speaking patients.

38. Due solely to the certificate-of-need requirements, Plaintiffs are unable to open and operate a home health agency in Jefferson County or elsewhere in Kentucky.

II. THE FEDERAL GOVERNMENT HAS ACKNOWLEDGED THE FAILURE OF CERTIFICATE-OF-NEED PROGRAMS.

39. In the mid-1960s, state and local governments first established certificate-of-need programs to allocate federal funding for the creation of hospitals. Specifically, the government established certificate-of-need laws in a misguided attempt to ensure the financial viability of hospitals paid for by tax dollars.

40. The first certificate-of-need programs were based on the premise that restricting the supply of health care would somehow lead to greater control over health care costs. Specifically, early certificate-of-need programs involved governments dividing health care services by geographic regions and then constraining the supply of hospital beds in an attempt to control health care costs.

41. But constraining the supply of hospital beds and dividing the market for health care services only insulated existing hospitals from new competition.

42. Hospitals were the first to recognize that they would benefit financially from certificate-of-need laws and their inherent restriction on competition.

43. In 1968, the American Hospital Association began a nationwide lobbying campaign to create certificate-of-need programs. This campaign included drafting model legislation.

44. By 1975, 27 states had enacted certificate-of-need programs as a result of the American Hospital Association's lobbying efforts.

45. Congress then noticed the American Hospital Association's lobbying efforts. At the time, Medicare and Medicaid reimbursements were based on a hospital's actual expenditures. This system allowed hospitals receiving federal funding to recoup expenditures even when they were inefficient. Thus, Congress believed it could hold hospitals accountable for costs by requiring new medical facilities to demonstrate that they were needed in a community.

46. Congress passed the National Health Planning and Resources Development Act of 1974 ("NHPDA"), which required states to adopt certificate-of-need programs in order to receive federal health care subsidies.

47. NHPDA also guaranteed federal funding for administration of state certificate-of-need programs that met federal guidelines.

48. As a result of NHPDA, every state except Louisiana had implemented a certificate-of-need program by 1980.

49. But the experiment with certificate-of-need programs was short lived. In 1984, Congress restricted the Medicare and Medicaid reimbursement system to the current fee-for-service model. Under this model, hospitals receive a fixed amount for each patient regardless of the hospital's actual expenditures.

50. In 1986, Congress repealed NHPDA, eliminating the federal requirement and funding for state certificate-of-need programs, for three reasons. First, restricting the Medicare and Medicaid reimbursement system to a fee-for-service model eliminated the original rationale for encouraging states to adopt certificate-of-need programs. Second, Congress found there was no evidence that certificate-of-need programs advanced their goal of lowering health care costs or even slowing the growth of health care costs. In fact, the evidence showed that certificate-of-need programs resulted in increased health care costs. Third, Congress determined that

certificate-of-need programs produced detrimental effects as local officials took myopic or parochial views of what medical services a community “needed.”

51. At least twice since 1986, the federal government has reaffirmed its conclusion that certificate-of-need programs raise costs and harm patients.

52. A 1988 Staff Report of the Bureau of Economics in the Federal Trade Commission concluded that certificate-of-need programs harm consumers and raise health care costs by: (1) barring new health care providers and (2) encouraging hospitals to avoid using more-efficient (but certificate-of-need-restricted) services and equipment in favor of less-efficient (but certificate-of-need-exempt) services and equipment.

53. Then, in 2004, the Federal Trade Commission and United States Department of Justice issued a joint report reaffirming the 1988 study. Based on hearing testimony, a workshop, and independent research, the federal agencies concluded that:

States with Certificate of Need [“CON”] programs should reconsider whether these programs best serve their citizens’ health care needs. The [agencies] believe that, on balance, CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent’s market [T]he vast majority of single-specialty hospitals—a new form of competition that may benefit consumers—have opened in states that do not have CON programs. Indeed, there is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry. Other means of cost control appear to be more effective and pose less significant competitive concerns.

54. Since 1986, there has been no federal authorization for certificate-of-need programs.

55. Despite the end of the federal authorization of certificate-of-need programs, lobbying efforts by hospitals and health care providers have kept many certificate-of-need requirements in place in the majority of states, including Kentucky.

56. At least twelve states have eliminated their certificate-of-need programs altogether. There is no evidence of any negative effects in those states.

57. And any potential justification for certificate-of-need programs generally simply cannot be applied in the home health context.

III. A STUDY COMMISSIONED BY KENTUCKY HAS RECOMMENDED ENDING KENTUCKY'S CERTIFICATE-OF-NEED PROGRAM FOR HOME HEALTH AGENCIES.

58. In 2013, Kentucky commissioned Deloitte to prepare a report regarding health care capacity across the Commonwealth. In response, Deloitte published the Health Care Facility Capacity Report ("Capacity Report").

59. The Capacity Report projected that demand for home health services would increase 14% through 2017.

60. Based on the needs of the aging and disabled population in Kentucky, the Capacity Report recommends "discontinuing the [certificate-of-need] program for Home Health Agencies."

61. In response to the Capacity Report, the Kentucky Hospital Association published a report with the aim of discouraging Kentucky from ending the certificate-of-need program for home health agencies.

62. The only reason Kentucky did not follow the recommendation of the Capacity Report and discontinue the certificate-of-need program for home health agencies is because hospitals and existing home health agencies lobbied to keep the certificate-of-need program intact.

63. Attempts by state lawmakers to reduce the burdens imposed by Kentucky's certificate-of-need program are always or almost always blocked by existing certificate holders who do not want increased competition.

IV. KENTUCKY’S BURDENSOME CERTIFICATE-OF-NEED REQUIREMENTS PREVENT ENTREPRENEURS FROM OFFERING SPECIALIZED, COST-EFFECTIVE HOME HEALTH SERVICES.

64. The stated purpose of Kentucky’s certificate-of-need program is to promote medical safety and efficiency:

The General Assembly finds that the licensure of health facilities and health services is a means to insure that the citizens of this Commonwealth will have safe, adequate, and efficient medical care; that the proliferation of unnecessary health-care facilities, health services, and major medical equipment results in costly duplication and underuse of such facilities, services, and equipment; and that such proliferation increases the cost of quality health care within the Commonwealth. Therefore, it is the purpose of this chapter to fully authorize and empower the Cabinet for Health and Family Services to perform any certificate-of-need function and other statutory functions necessary to improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.

KRS § 216B.010.

65. Kentucky’s certificate-of-need program fails to increase access to health care facilities, increase the quality of health care services, or otherwise decrease health care costs.

66. The actual purpose of Kentucky’s certificate-of-need program is to offer health care providers a government-backed shield from competition.

67. Anyone who operates a health care facility, including a home health agency, without a certificate of need may be fined up to one percent of the capital expenditure involved, or at least \$500 for each violation. KRS § 216B.990.

A. The Certificate-of-Need Review Criteria Irrationally Prevents Plaintiffs From Opening A Home Health Agency.

68. The crux of the challenged regulatory scheme broadly prohibits anyone from establishing, expanding to a new county, or making key changes to a “health facility” without first obtaining a certificate of need. KRS § 216B.061; *see also* KRS § 216B.020; 900 KAR chapter 6.

69. The statutory definition of “health facility” expressly includes home health agencies. KRS § 216B.015(13).

70. Notwithstanding the expansive definition of “health facility,” many facilities, such as primary care offices, assisted-living residences, and group homes are exempted from the certificate-of-need program. KRS § 216B.020(1).

71. Certificate-of-need applications are reviewed against the following six separate criteria: (a) Consistency with the state health plan; (b) need; (c) accessibility; (d) interrelationships and linkages; (e) costs and economic feasibility; and (f) quality of services. KRS § 216B.040(2)(a)(2).

72. The state health plan is a document created by Defendants and updated every two years.

73. The state health plan contains determinations of “need” for various types of health care services.

74. To determine the need for home health services in a particular county, Defendants estimate how many people will use home health services there, then they subtract the number of patients who actually received home health services (averaged over the last two years). The difference between the estimated number of users and the patients who received care is the “need.” Defendants use this crude formula to calculate the need for home health services in each of Kentucky’s 120 counties.

75. If the need in a county is 250 people or more, new home health agencies may be allowed.

76. If the need in any county is fewer than 250 people, new home health agencies are not allowed.

77. Under the current state health plan, the need for home health services exceeds 250 people in only six counties.

78. But the need requirement is applied unequally depending on who the applicant is.

79. Existing home health agencies can expand in any county with a need estimated at 125 people or more.

80. Hospitals can establish home health agencies in the county where they are located if there is a need of only 50 people.

81. If Plaintiffs were an existing home health agency, they would be eligible for a certificate of need in counties with a need determination of 125.

82. If Plaintiffs were a hospital, they would be eligible for a certificate of need in counties with a need determination of only 50.

83. Upon information and belief, if the need in a county increases to 50 or 125, existing hospitals or home health agencies (respectively) expand and prevent the “need” for home health services (as calculated by the state health plan) from ever reaching 250 in Jefferson County (and in most counties in Kentucky).

84. Although the most recent state health plan calculated a need of negative 929 patients in Jefferson County, Plaintiffs are personally aware of patients in Jefferson County who do not have access to adequate home health services. The wellbeing of these patients and their families depend on access to Nepali-speaking home health care. But these individuals are unable to use Plaintiffs’ home health services because of the certificate-of-need requirement. Thus, the state health plan does not determine the actual “need” for home health services in Kentucky.

85. Even if a county has a demonstrated “need” for home health care (under the terms of the state health plan), Defendants can still deny a certificate-of-need application based on the

other broad criteria.

86. Defendants have denied certificate-of-need applications that were consistent with the state health plan based on their review of the other review criteria.

87. On information and belief, Defendants wrongly relate all six review criteria to need for new services.

88. Defendants have complete discretion in applying the certificate-of-need review criteria.

89. On information and belief, regardless of the facts presented in a certificate-of-need application, Defendants can always find a reason to deny a certificate-of-need application if they want to.

90. On information and belief, Defendants apply the certificate-of-need program in an anticompetitive manner.

91. On information and belief, Defendants possess no evidence that preventing home health agencies from opening increases access to safe, quality, affordable home health services in Jefferson County or elsewhere in Kentucky, or achieves any other legitimate government interest.

92. Preventing Plaintiffs from operating a home health agency in Jefferson County or elsewhere in Kentucky protects incumbent home health providers from competition—which is the true purpose of the certificate-of-need requirement.

93. The application of the certificate-of-need program harms both entrepreneurs and patients.

94. The state health plan and review criteria discourage many entrepreneurs from applying for certificates of need at all.

B. The Certificate-of-Need Application and Hearing Process Benefit Existing Providers While Keeping New Home Health Agencies Out Of Business.

95. The certificate-of-need application process is both time consuming and expensive.

96. The fee associated with a certificate-of-need application varies between \$1,000 and \$25,000 depending on the estimated capital expenditure associated with the proposed health facility. 900 KAR 6:020. And this only accounts for the fee paid to Defendants to have a certificate-of-need application reviewed. This fee does not include any expenditures of time and money necessary to complete the application.

97. Upon submission, Defendants review applications for completeness. Once an application is deemed complete, Defendants are required to notify the public about the certificate-of-need application by publishing it in their Certificate of Need Newsletter. 900 KAR 6:065 § 4(7)(b); 900 KAR 6:060.

98. After publication in the Certificate of Need Newsletter, any “affected person” can request a public hearing to oppose the application. KRS 216B.085.

99. Affected persons are also allowed to file motions for summary judgment, requesting that a certificate-of-need application be denied.

100. The affected persons that oppose application are not the patients or users of the proposed health care facility. The parties that object to certificate-of-need applications are always (or almost always) existing health care providers and the applicant’s future direct competitors.

101. The process that allows affected persons to oppose certificate-of-need applications works as a competitor’s veto, preventing new businesses from opening.

102. In fact, many certificate-of-need applications are withdrawn or left to be denied after an affected person files an opposition to the application.

103. The applicant bears the heavy burden of proving by “substantial evidence” that their application satisfies the review criteria.

104. A contested application can be decided on a motion for summary judgment or after a public hearing.

105. A public hearing amounts to a full-blown trial, officiated by an administrative hearing office. The hearing typically lasts multiple days, and applicants and affected persons are required to be represented by attorneys at the hearing. The parties offer exhibits and live testimony for the hearing officer to consider.

106. Even applications that comply with the need calculations can be and are denied by Defendants on other grounds.

107. Upon information and belief, Defendants always or almost always deny contested home health certificate-of-need applications.

108. Upon information and belief, Defendants always consider whether granting a certificate of need would cause an existing home health agency to lose business.

109. The certificate-of-need application and review process, as created and carried out by Defendants, prevents entrepreneurs like Plaintiffs from offering cost-effective and specialized home health services, despite the fact that actual need for these services exists in Jefferson County and throughout Kentucky.

110. Because the current certificate-of-need application and review process benefit existing health care providers, established health care providers and their trade organizations often lobby to prevent Kentucky from modernizing or eliminating its certificate-of-need program.

V. PLAINTIFFS HAVE FIRST-HAND EXPERIENCE WITH HOW THE CERTIFICATE-OF-NEED PROGRAM OPERATES.

111. In March 2018, Plaintiffs filed a certificate-of-need application to open a home health agency to serve Nepali-speaking individuals in Jefferson County, Kentucky.

112. Plaintiff Dipendra Tiwari spent hundreds of hours researching and completing the certificate-of-need application.

113. Plaintiffs' application was publicly noticed in November 2018.

114. Baptist Healthcare Systems, a future competitor, opposed Plaintiffs' application and moved for summary judgment.

115. Plaintiffs' application was denied on January 11, 2019 because the state health plan in effect at the time projected a need of negative 929 home health patients in Jefferson County.

116. Of course, the state health plan does not account for the unique needs of the Nepali-speaking community.

117. Plaintiffs' experience with the certificate-of-need program is common. Between 2000 and mid-2018, Defendants received 225 certificate-of-need applications for home health agencies. Of those 225 applications, 131 applications were withdrawn, revoked, deferred, or deemed null. One application was submitted for a proposal that did not require a certificate of need. Of the remaining applications, 43 were denied by Defendants.

118. Nearly all of the denied home health applications were denied on the basis that a lack of "need" existed. Upon information and belief, all or almost all of the denied home health agency certificate-of-need applications were objected to by a direct competitor.

119. Fifty home health applications were approved between 2000 and late-2018. Upon information and belief, all or almost all of the applications that were approved were submitted by

existing home health agencies or existing health care facilities such as hospitals, not by new home health agencies.

120. Upon information and belief, it is impossible for a new health agency to open in most counties in Kentucky because existing home health agencies and hospitals prevent the need determination for home health services from ever reaching the 250-person threshold.

121. Plaintiffs do not challenge the denial of their past certificate-of-need application; they are challenging whether requiring a certificate of need to operate a home health agency is constitutional in the first place.

122. This lawsuit is a constitutional challenge to the operation of the certificate-of-need program as applied to home health care. As such, an Article III court, not an administrative body, has jurisdiction to decide the constitutionality of Kentucky's certificate-of-need program.

INJURY TO PLAINTIFFS

123. Kentucky's certificate-of-need program imposes a nearly insurmountable barrier to opening a new home health agency.

124. Plaintiffs Dipendra and Kishor founded Plaintiff Grace Home Care, Inc. with the express purpose of providing home health services in Jefferson County.

125. Plaintiffs are personally aware of individuals throughout Kentucky that need or would prefer home health services from Nepali speakers. Plaintiffs are unable to offer home health services to those patients, or any other patients in Jefferson County, because of Kentucky's certificate-of-need program.

126. Plaintiffs cannot offer cost-effective home health services in Jefferson County because (and only because) they cannot obtain a certificate-of-need. As a result, Plaintiffs are suffering real, ongoing economic injury.

127. Plaintiffs cannot receive a certificate of need, because the current certificate-of-

need program favors incumbent providers.

128. Going through the certificate-of-need application process would cost Plaintiffs thousands of dollars.

129. Plaintiffs' denied certificate-of-need application involved hundreds of hours of time lost and cost them thousands of dollars.

130. Plaintiffs do not want to spend additional time or money to comply with Kentucky's certificate-of-need requirement.

131. Plaintiffs will never be able to obtain a certificate of need in Jefferson County because existing home health agencies or hospitals will prevent the need from ever reaching 250 in those counties and in most counties throughout Kentucky.

132. Plaintiffs are prepared to and have the ability to open a home health agency in compliance with all other relevant requirements, such as those for safety and quality. *See* 902 KAR 20:081(3)(b); 902 KAR 20:008.

133. But for the existence of Kentucky's certificate-of-need requirement, Plaintiffs could legally open and operate Grace Home Care and begin providing home health services in Jefferson County.

134. Even if Grace Home Care ceased to exist, Dipendra and Kishor would continue to work towards opening a home health agency in Jefferson County or elsewhere in Kentucky, either together or independently.

135. Plaintiffs have no other adequate remedy at law.

CONSTITUTIONAL VIOLATIONS

Count I (Fourteenth Amendment to the United States Constitution) (Equal Protection Violation)

136. Plaintiffs reallege and incorporate by reference each and every allegation set forth

in paragraphs 1-135 above.

137. The Fourteenth Amendment to the U.S. Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

138. Kentucky’s certificate-of-need program irrationally treats new home health agencies differently from materially indistinguishable existing home health agencies.

139. There is no rational reason to treat home health agencies differently based on whether they already have a certificate of need (or based on who the home health agency’s owner is).

140. Kentucky’s certificate-of-need program irrationally discriminates between different kinds of health care providers. Many health care facilities, such as primary care offices, assisted-living residences, and group homes, do not require certificates of need.

141. There is no rational reason to subject Plaintiffs’ home health agency to a certificate-of-need requirement while exempting other similarly situated facilities.

142. Even if Kentucky’s certificate-of-need program achieved any of its purported purposes for some types of health care services (which it does not), the certificate-of-need program does not achieve any legitimate state purpose in the home health context.

143. No purported justification for certificates of need in other contexts, such as control of capital expenditures or cross-subsidization, exists in the home health context.

144. Artificially limiting the supply of home health services does not lower consumer costs, increase access to care, or increase the quality of care.

145. Artificially limiting the supply of home health services increases consumer costs, decreases access to care, and decreases the quality of care.

146. The application of the certificate-of-need program to services like those that

Plaintiffs would like to offer does not advance any conceivable legitimate state interest.

147. Ignoring the Capacity Report's recommendation of discontinuing the certificate-of-need program for home health agencies is irrational.

148. Ignoring the Federal Trade Commission and Department of Justice reports that conclude that certificate-of-need programs "pose serious anticompetitive risks" is irrational.

149. Ignoring the fact that at least twelve states have gotten rid of their certificate-of-need programs entirely, without any negative health or safety consequences, is irrational.

150. Ignoring the fact that the majority of states do not require certificates of need for home health agencies and have not experienced any negative health or safety consequences is irrational.

151. The true purpose behind Kentucky's certificate-of-need program is to protect established health care facilities from economic competition.

152. Protecting existing health care facilities from economic competition is not a legitimate state interest.

153. Plaintiffs have been and continue to be harmed by Defendants' enforcement of Kentucky's certificate-of-need program.

Count II
(Fourteenth Amendment to the United States Constitution)
(Substantive Due Process Violation)

154. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-153 above.

155. The Fourteenth Amendment to the U.S. Constitution protects the right to earn an honest living in the occupation of one's choosing, subject only to reasonable government regulation.

156. Kentucky's certificate-of-need program violates Plaintiffs' right to earn a living because it does not advance any conceivable legitimate state interest.

157. The application of the certificate-of-need program to services like those that Plaintiffs would like to offer does not advance any conceivable legitimate state interest.

158. Ignoring the Capacity Report's recommendation of discontinuing the certificate-of-need program for home health agencies is irrational.

159. Ignoring the Federal Trade Commission and Department of Justice reports that conclude that certificate-of-need programs "pose serious anticompetitive risks" is irrational.

160. Ignoring the fact that at least twelve states have gotten rid of their certificate-of-need programs entirely, without any negative health or safety consequences, is irrational.

161. Ignoring the fact that the majority of states do not require certificates of need for home health agencies and have not experienced any negative health or safety consequences is irrational.

162. The true purpose behind Kentucky's certificate-of-need program is to protect established health care facilities from economic competition.

163. Economic protectionism is not a legitimate state interest.

164. Even if Kentucky's certificate-of-need program achieved any of its purported purposes for some types of health care services (which it does not), the certificate-of-need program does not achieve any legitimate state purpose in the home health context.

165. Kentucky's nakedly protectionist certificate-of-need program harms entrepreneurs, like Plaintiffs, and further deprives consumers of home health services of their right to choose their home health provider.

166. Plaintiffs have been and continue to be harmed by enforcement of Kentucky's

certificate-of-need requirement for home health agencies.

COUNT III
(Fourteenth Amendment to the United States Constitution)
(Privileges or Immunities Violation)

167. Plaintiffs reallege and incorporate by reference each and every allegation set forth in paragraphs 1-166 above.

168. The Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution provides “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

169. The Privileges or Immunities Clause was intended to guarantee citizens’ right to earn a living in the occupation of their choosing, free from unreasonable or unnecessary government regulations.

170. Kentucky’s prohibition against opening a home health agency without prior government approval, on its face and as applied, violates that right because it is arbitrary, unreasonable, and not related to the advancement of any legitimate government interest.

171. Plaintiffs recognize that this claim is contrary to the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). They are preserving the claim in light of the scholarly consensus that *Slaughter-House* was wrongly decided.

PRAYER FOR RELIEF

Plaintiffs thus respectfully request:

A. An entry of judgment declaring that Kentucky’s certificate-of-need requirement for home health agencies and its implementing rules and regulations are unconstitutional on their face and as applied because they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

B. An entry of judgment declaring that Kentucky's certificate-of-need requirement for home health agencies and its implementing rules and regulations are unconstitutional on their face and as applied because they violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;

C. An entry of judgement declaring that Kentucky's certificate-of-need requirement for home health agencies and its implementing rules and regulations are unconstitutional on their face and as applied because they violate the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution;

D. An entry of permanent injunction against Defendants prohibiting the enforcement of the challenged statutory provisions, administrative rules and regulations, and policies and practices;

E. An award of attorneys' fees, costs, and expenses under 42 U.S.C. § 1988; and

F. All other legal and equitable relief that this Court deems just and proper.

DATED this 3rd day of December 2019.

Respectfully Submitted,

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**Motion for admission pro hac vice to be filed*