



INSTITUTE FOR JUSTICE

April 30, 2020

VIA EMAIL AND UPS

The Honorable John Carney
Governor of the State of Delaware

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Re: Expanding Certificate of Need waivers during COVID-19 pandemic.

To Governor Carney:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request you modify your Declaration of a State of Emergency. Specifically, IJ asks that you **suspend the Certificate-of-Public-Review requirements in Title 16 to allow health-care facilities to:**

- (1) expand bed capacity,¹**
- (2) acquire major medical equipment,²**
- (3) make expenditures to expand health-care services without a cap,³ and**
- (4) to allow new health-care facilities to build and open.⁴**

As the COVID-19 pandemic has shown, Delawareans need access to more care, not less. That is why such action is commonsense and compassionate, but also the bold leadership that Delaware residents admire and deserve during this unprecedented emergency.

For nearly three decades, IJ has worked to reduce and remove burdensome, unnecessary, and in this case, dangerous, licensing requirements, including in the healthcare field.⁵ IJ also drafts legislation and advises legislatures throughout the country on licensing and other regulatory matters. IJ's mission is to support and protect the right of all Americans to provide for themselves and care for their health free from unreasonable interference.

In recent years, IJ has become particularly concerned about the burdens that state Certificate of Need (CON) laws impose on access to health care.⁶ (Delaware uses the term “Certificate of Public Review” where other states use the term “Certificate of Need.”) Not only do these laws fail to protect public health and safety, they restrict the number of available healthcare providers, drive up consumer costs, and decrease quality of services.⁷ Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.⁸ Instead, they serve as barriers to entry.⁹ The problems with CON laws amount to more than bad

policy. Courts from the Supreme Court down have condemned economic protectionism of this nature.¹⁰

During this time of crisis, you have shown that your office is uniquely positioned to address today's concerns. Under your leadership, Delaware has taken quick action to increase access to healthcare. For example, pursuant to your Emergency Declaration, the Department of Health and Social Services with the Delaware Emergency Management Agency issued a Joint Order reducing barriers for medical providers including allowing out-of-state licensed medical practitioners to practice in Delaware.¹¹ These measures are extremely welcome and demonstrate the state's ability to act quickly and decisively.

But there is more that can be done to serve patients and support healthcare workers. Patients desperately need access to hospital beds and healthcare services, yet, under current state law, healthcare facilities that want to increase capacity by adding beds, acquiring new medical equipment, expanding their existing facilities, or establishing new health-care facilities are required to go through the months-long Certificate-of-Public Review process before they can respond to this vital need.

These entities are simply unable to meet these regulatory burdens right now, nor should they be forced to divert their limited resources away from patient care. During a pandemic, these irrational and significant administrative burdens cross the line from counterproductive red tape to potentially deadly barriers to necessary care.

Thankfully, this problem has a practical solution. In fact, many states, including Virginia, New Jersey, and Oklahoma, have already waived their CON laws as applicable to hospital beds. Other states like Connecticut, Georgia, and South Carolina have gone further and eliminated all CON laws for projects necessary to respond to the pandemic. And at least a dozen states fully repealed their CON laws even before the pandemic began.¹²

Similarly, you have the authority to take quick action that could save many lives. **We thus urge you to modify your Declaration of a State of Emergency and suspend the Certificate-of-Public-Review requirements to allow health-care providers to (1) expand their bed capacity, (2) acquire major medical equipment, (3) make expenditures for their existing health-care facilities, and (4) establish new health-care facilities.**

Doing so will give healthcare providers the flexibility needed to best serve their patients. We also hope that you will choose to make this change and others you have recently implemented permanent.

IJ stands ready to assist you in crafting a tailored solution that will serve the citizens of your great state. We have a highly experienced team that would be honored to help your office implement this change. My colleagues and I look forward to working with you further. I can be reached at agriffin@ij.org or 336-202-0082.

Respectfully,



Adam Griffin
Constitutional Law Fellow
Institute for Justice

cc: Dr. Kara Odom Walker, Secretary, the Department of Health and Social Services,
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Karyl Thomas Rattay, Director, the Delaware Division of Public Health,
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¹ 16 Del. C. § 9304(a)(3).

² 16 Del. C. § 9304(a)(4).

³ 16 Del. C. § 9304(a)(2).

⁴ 16 Del. C. § 9304(a)(1).

⁵ See, e.g., *Garrett v. Tex. State Bd. of Pharmacy*, Cause No. D-1-GN-19-003686 (Travis Cty., 98th Jud. Dist., filed June 27, 2019); *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, Civ. Action No. 2016-CP-40-06276 (Richland Cty., 5th Jud. Cir., filed Oct. 20, 2016).

⁶ See, e.g., *N'Da v. Hybl*, No. CI-20-1227 (Dist. Ct. Lancaster Cty. Neb., filed Apr. 23, 2020); *Singleton v. N.C. Dep't of Health & Human Servs.*, No. 20 CVS 5150 (Cty. of Wake, Sup. Ct. filed Apr. 23, 2020); *Am. Compl. Tiwari v. Friedlander*, No. 3:19-cv-00884-JRA (W.D. Ky, filed Dec. 2, 2019); *Birchansky v. Clabaugh*, No. 18-3403, 2020 WL 1861975 (8th Cir. Apr. 14, 2020); *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

⁷ See, e.g., U.S. Dep't of Health and Human Servs., U.S. Dep't of the Treasury, & U.S. Dep't of Labor, *Reforming America's Healthcare System Through Choice and Competition*, 50–59 (Dec. 2018), <https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf> (recommending repeal or significant reduction of CON laws); Fed. Trade Comm'n & Dep't of Justice, *Improving Health Care: A Dose of Competition*, ch. 8 at 1–6 (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723/healthcarerpt.pdf>.

⁸ E.g., Mercatus Ctr., *Healthcare Favoritism*, <https://www.mercatus.org/tags/healthcare-favoritism> (collecting research, articles, policy papers, and more about the problems with CON laws).

⁹ See *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 929 (9th Cir. 2011) (recognizing that certificates of need are a “barrier to market entry”).

¹⁰ See, e.g., *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882–83 (1985); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227–28 (5th Cir. 2013); *Craigsmiles v. Giles*, 312 F.3d 220, 228–29 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700–01 (E.D. Ky. 2014) (holding a certificate-of-need law unconstitutional).

¹¹ Joint Order of the Department of Health and Social Services and the Delaware Emergency Management Agency (March 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/DEMA-and-DPH-Order-3.23.20.pdf>.

¹² See Nat'l Conference of State Legislatures, *CON – Certificate of Need State Laws* (Dec. 1, 2019), <https://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.