



INSTITUTE FOR JUSTICE

April 30, 2020

VIA EMAIL AND UPS

Honorable David Y. Ige
Governor of Hawaii
Executive Chambers
State Capital
Honolulu, HI 96813
info@ehawaii.gov

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

Dear Governor Ige:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you expand your Executive Order No. 20-02 and Executive Order No. 20-04. Specifically, we ask that you suspend certificate of need (CON) laws that apply to **hospital beds,¹ hospice care centers,² and ambulatory surgical centers.³**

My colleagues and I acknowledge and applaud you for expanding access to telehealth care, permitting pharmacists to fill prescriptions remotely, and loosening health care licensing to allow for more providers.⁴ As the COVID-19 pandemic has shown, Hawaiians need access to more care, not less. That is why your Executive Orders should be expanded to waive CON requirements for hospital beds, hospice care centers, and ambulatory surgical centers. Such action would be commonsense and compassionate, but also the bold leadership that Hawaii's 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 CON laws impose on access to health care.⁶ Not only do these laws fail to protect public health, 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 amounts to more than bad policy and 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, Hawaii has taken quick action to increase access to healthcare. For example, Hawaii has increased access to telehealth services by waiving the in-person consultation requirement, allowing telehealth care to be provided through standard telephone contact, and allowing licensed out-of-state physicians to practice in-state telehealth.¹¹ Hawaii has also suspended laws prohibiting pharmacists from filling, compounding, or receiving prescriptions remotely, as long as those pharmacists are currently and actively licensed.¹² Additionally, Hawaii increased access to health care providers by loosening licensing requirements for nurses, occupational therapists, physical therapists, respiratory therapists, radiation therapists, and speech pathologists.¹³ These measures are extremely welcomed and demonstrate your ability to act quickly and decisively in response to the emergency in Hawaii.

But there is more that can be done to serve patients and support healthcare workers. Patients desperately need access to beds in hospitals and long-term care facilities, yet under current state law, hospitals that want to increase capacity by adding beds are required to go through the months-long CON process before they can respond to this vital need.¹⁴ The same is true for other critical services like home health agencies.¹⁵ And as stay-at-home restrictions start being lifted, there will be high demand for ambulatory surgical centers as well.¹⁶

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.¹⁷

Similar, quick action could save many lives. **We thus respectfully urge you to expand Executive Order No. 20-02 and Executive Order No. 20-04 to waive CON requirements for hospital beds, hospice care centers, and ambulatory surgical centers.** 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 on this issue. I can be reached at jwrench@ij.org or (703) 682-9320.

Respectfully,



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¹ Haw. Code R. § 11-186-7(a).

² Haw. Code R. § 11-186-5(4)(H).

³ Haw. Code R. § 11-186-5(3)(B).

⁴ Governor’s Exec. Order No. 20-02; Governor’s Exec. Order No. 20-04.

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/040723healthcarerpt.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 Governor’s Exec. Order No. 20-02(1)(n) (waiving the in-person consultation requirement and allowing out-of-state medical professionals to provide telehealth services in Hawaii); Governor’s Exec. Order No. 20-04(1)(f) (waiving a regulation that excluded standard telephone contact from the scope of lawful telehealth practice).

¹² Governor’s Exec. Order No. 20-04(1)(m).

¹³ Governor’s Exec. Order No. 20-04(1)(i)-(q).

¹⁴ Haw. Code R. § 11-186-7(a). A temporary increase of beds is exempt from the certificate of need requirement only if the increase lasts less than ninety days. Haw. Code R. § 11-186-7(b).

¹⁵ Home health agencies are included in the definition of “health care facilities” subject to Hawaii’s certificate of need laws. Haw. Code R. § 11-186-5(3)(G).

¹⁶ Outpatient clinics, which includes ambulatory centers, are included in the definition of “health care facilities” subject to Hawaii’s certificate of need laws. Haw. Code R. § 11-186-5(3)(B).

¹⁷ 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>.