



INSTITUTE FOR JUSTICE

April 30, 2020

VIA EMAIL AND UPS

Honorable J. B. Pritzker
Governor of Illinois
Office of the Governor
207 Statehouse
Springfield, IL 62706
governor@state.il.us

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

Dear Governor Pritzker:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you expand Executive Order No. 2020-09 (Mar. 19, 2020). Specifically, we ask that you **suspend certificate of need (CON) requirements for newly proposed health care facilities for the duration of the COVID-19 pandemic.**¹

We acknowledge and applaud you for expanding access to telehealth services.² As the COVID-19 pandemic has shown, Illinoisans need access to more care, not less. That is why your Executive Order No. 2020-09 should be expanded to suspend certificate of need requirements for newly proposed health care facilities for the duration of the COVID-19 pandemic. Such action would be commonsense and compassionate, but also the bold leadership that Illinois 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.³ For example, we recently requested that you allow Illinoisans to seek care available through telehealth service providers licensed in other states.⁴ IJ also drafts legislation and advises legislatures throughout the country on licensing and other regulatory matters.

Additionally, our Clinic on Entrepreneurship at the University of Chicago brings together law students and entrepreneurs to advocate for small businesses on the Southside.⁵ IJ's mission is to support and protect the right of all Americans to provide for themselves, including caring 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 amount 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, Illinois has taken quick action to increase access to healthcare. For example, Illinois Executive Order No. 2020-09 required insurance companies to cover services provided via telehealth and prohibited issuers from imposing unnecessary review requirements on telehealth providers.¹¹ Additionally, the Illinois Health Facilities and Services Review Board called attention to a rule allowing health care facilities to add additional beds during an emergency, as long as health care facilities provide notice within thirty days.¹² Recently, you helped to transform Chicago's McCormick Place by making beds available for coronavirus patients.¹³ These measures are extremely welcomed and demonstrate your ability to act quickly and decisively in response to the emergency in Illinois.

But there is more that can be done to serve patients and support healthcare workers. Although existing health facilities are able to expand capacity during the COVID-19 pandemic, newly proposed health care facilities must still obtain a certificate of need before providing care.¹⁴ Despite vital need, new hospitals cannot operate without going through the months-long CON process.¹⁵ The same is true for facilities offering other critical services, like ambulatory surgery and long-term care.¹⁶

New health care facilities are simply unable to meet these regulatory burdens right now, nor should they be forced to obtain a certificate of need before providing vital services. 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. 2020-09 to suspend CON requirements for newly proposed health care facilities for the duration of the COVID-19 pandemic.** Doing so will give prospective 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. We look forward to working with you further on this issue and can be reached at jwrench@ij.org or (703) 682-9320.

Respectfully,



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¹ 77 Ill. Adm. Code § 1130.310(a)(3). These requirements extend to services like ambulatory surgery and long-term care. 77 Ill. Adm. Code § 1130.215(a), (c).

² Ill. Exec. Order No. 2020-09 § 2 (Mar. 19, 2020) (requiring insurance companies to cover the cost of telehealth services); *see also* Ill. Exec. Order No. 2020-09 § 3 (Mar. 19, 2020) (prohibiting health care issuers from imposing “unnecessary, duplicative, or unwarranted” review requirements on providers of telehealth services).

³ *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).

⁴ *Letter Re: State Restrictions on the Use of Telehealth Services During COVID-19 Pandemic*, INSTITUTE FOR JUSTICE (Apr. 22, 2020), <https://ij.org/wp-content/uploads/2020/04/IL-Telehealth.pdf>.

⁵ IJ Clinic on Entrepreneurship, <https://www.ij.org/ij-clinic-on-entrepreneurship/>.

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); *Craigmiles 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 Ill. Exec. Order No. 2020-09 §§ 2, 3 (Mar. 19, 2020).

¹² ILLINOIS HEALTH FACILITIES & SERVICES REVIEW BOARD, *Response to the COVID-19 Pandemic – Updated* (Apr. 20, 2020), <https://www2.illinois.gov/sites/hfsrb/Announcements/Pages/Covid-19-Announcement.aspx>; see also 77 Ill. Adm. Code § 1130.240(f)(4)(A).

¹³ Gregory Pratt, *Transformed from Convention Center to Medical Center, Chicago's McCormick Place Now Has 1,750 Beds Ready for Coronavirus Patients*, CHICAGO TRIBUNE (Apr. 10, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-mccormick-place-lightfoot-20200410-2bg3dhkkdbfe3b2caesl2share-story.html>.

¹⁴ 77 Ill. Adm. Code § 1130.310(a)(3).

¹⁵ The review period for CON applications in Illinois is between 30 and 120 days. 77 Ill. Adm. Code § 1130.610(b).

¹⁶ 77 Ill. Adm. Code § 1130.215(a), (c).

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>.