



INSTITUTE FOR JUSTICE

April 30, 2020

VIA EMAIL AND UPS

Honorable John Bel Edwards
Governor of Louisiana
Office of the Governor
P.O. Box 94004
Baton Rouge, LA 70804
jbe@la.gov

Re: Waiving facility need review requirements during COVID-19 pandemic.

Dear Governor Edwards:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you expand Proclamation No. JBE 2020-38 (Mar. 31, 2020) and Proclamation No. JBE 2020-41 (Apr. 2, 2020). Specifically, we ask that you **suspend Louisiana’s Facility Need Review (FNR) requirements for the duration of the COVID-19 pandemic**. These requirements prohibit the establishment or expansion of facilities providing home-based care or hospice care without first undergoing the FNR process.¹ On April 28, the Louisiana Department of Health Standards suspended review of all initial FNR applications, meaning that there is currently no way for providers to establish or expand home-based care or hospice services.²

My colleagues and I acknowledge and applaud you for suspending laws, rules, and regulations prohibiting out-of-state medical professionals from providing care in Louisiana and broadening access to telehealth services.³ As the COVID-19 pandemic has shown, Louisianans need access to more care, not less. That is why your proclamations should be expanded to include a suspension of Louisiana’s FNR requirements for the duration of the COVID-19 pandemic. Such action would be commonsense and compassionate, but also the bold leadership that Louisiana 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.⁴ 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.⁵ 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.⁶ Indeed, the evidence is near universal that CON laws fail to further any

legitimate government purpose.⁷ Instead, they serve as barriers to entry.⁸ The problems with CON laws amounts to more than bad policy: Courts from the Supreme Court down have condemned economic protectionism of this nature. One example is IJ's representation of the brothers of Saint Joseph Abbey in Covington, whose rights to sell wooden caskets without a funeral director license were upheld by U.S. Court of Appeals for the Fifth Circuit in 2013.⁹

During this time of crisis, you have shown that your office is uniquely positioned to address today's concerns. Under your leadership, Louisiana has taken quick action to increase access to healthcare. For example, your office suspended laws, rules, and regulations prohibiting certain out-of-state medical professionals, including nurses and physicians, from providing care in Louisiana, as long as those professionals possess a license in good standing in another state and hospitals verify their credentials.¹⁰ Additionally, your office issued guidance for expanding access to telehealth services and encouraged licensing boards to adopt emergency rules necessary to provide Louisianans with access to those services.¹¹ These measures are extremely welcomed and demonstrate your ability to act quickly and decisively in response to the emergency in Louisiana.

But there is more that can be done to serve patients and support healthcare workers. Patients desperately need access to home-based care yet, under current state law, prospective providers cannot establish a facility or expand capacity for home-based care without first undergoing the months-long facility need review process.¹² The same is true for other critical services like hospice care.¹³ On April 28, 2020, the Louisiana Department of Health unfortunately reissued a suspension of FNR application review, instead of loosening the requirements.¹⁴ Your order should include instructions to the Department to reverse this decision and to relax requirements.

Both prospective care providers and current facilities 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.¹⁵

Similar, quick action could save many lives. **My colleagues and I thus respectfully urge you to expand Proclamations JBE 2020-38 (Mar. 31, 2020) and JBE 2020-41 (Apr. 2, 2020) to include a suspension of Louisiana's FNR requirements for the duration of the COVID-19 pandemic.** 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 La. Admin. Code. tit. 48, § I-12503(C)(2); *see also* La. Admin. Code. tit. 48, § I-12503(C)(4).

² LA. DEP'T OF HEALTH STANDARDS, MEMORANDUM ON SUSPENSION OF REVIEW OF FNR APPLICATIONS (Apr. 28, 2020), *available at* http://ldh.la.gov/assets/medicaid/hss/docs/Coronavirus_2019/COVID_19_Suspension_of_FNR_04282020.pdf.

³ Governor's Proclamation No. JBE 2020-38 § 2(D), (F), (K)–(O) (Mar. 31, 2020) (removing restrictions on out-of-state medical professionals); Governor's Proclamation No. JBE 2020-41 § 9(C) (Apr. 2, 2020) (adopting guidelines to expand access to telehealth services).

⁴ *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).

⁵ *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).

⁶ *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>.

⁷ 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).

⁸ 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”).

⁹ 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).

¹⁰ Governor’s Proclamation No. JBE 2020-38 § 2(D), (F), (K)–(O) (Mar. 31, 2020).

¹¹ Governor’s Proclamation No. JBE 2020-41 § 9(C)(1)–(4) (Apr. 2, 2020).

¹² La. Admin. Code. tit. 48, § I-12503(C)(2).

¹³ La. Admin. Code. tit. 48, § I-12503(C)(4).

¹⁴ LA. DEP’T OF HEALTH STANDARDS, MEMORANDUM ON SUSPENSION OF REVIEW OF FNR APPLICATIONS (Apr. 28, 2020), *available at* http://ldh.la.gov/assets/medicaid/hss/docs/Coronavirus_2019/COVID_19_Suspension_of_FNR_04282020.pdf.

¹⁵ 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>.