



INSTITUTE FOR JUSTICE

April 24, 2020

**VIA Email and UPS**

Honorable Jay Inslee  
Office of the Governor  
Post Office Box 40002  
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jay.inslee@gov.wa.gov

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

To Governor Inslee:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request that your office expand Proclamation 20-38, through which you rightly waived certificate-of-need (CON) requirements for long-term care facility beds and nursing home beds. As the COVID-19 pandemic has shown, Washingtonians need access to more care, not less. That is why **Proclamation 20-38 should be expanded to include hospital beds, home health agencies, hospice care centers, and ambulatory surgical centers.** Such action would be commonsense and compassionate, but also the bold leadership that Washington 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.<sup>1</sup> IJ also drafts model 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. Not only do these laws fail to protect public health and safety,<sup>2</sup> they restrict the number of healthcare providers, drive up consumer costs, and decrease quality of services.<sup>3</sup> Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.<sup>4</sup> Instead, these laws merely insulate powerful incumbents from competition.<sup>5</sup> This is more than just bad policy—multiple federal courts have held that laws that exist solely to protect one group from competition are unconstitutional.<sup>6</sup>

During this time of crisis, you have shown that your office is uniquely positioned to address today's concerns. Under your leadership, Washington has taken quick action to increase access to healthcare. For example, you signed HB 1552, which vastly increases the number of healthcare workers available to respond to the pandemic in Washington.<sup>7</sup> Then you temporarily waived compliance with over one hundred burdensome licensing requirements for those workers,

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calling them “barriers to continued and uninterrupted healthcare practice.”<sup>8</sup> These measures are extremely welcome and demonstrate the state’s ability to act quickly.

But there is more that can be done to serve patients and support healthcare workers. Patients desperately need access to hospital beds yet, under current state law, hospitals that want to increase capacity by adding beds must still first go through the months-long CON process before they can respond to that vital need.<sup>9</sup> The same is true for other critical services like home health agencies and hospice care centers. Soon, as stay-at-home restrictions are lifted, there will be high demand for ambulatory surgical centers as well.

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 simple 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.<sup>10</sup>

Similar quick action could save many lives. **IJ thus respectfully recommends that you expand Proclamation 20-38 to allow hospitals, home health agencies, and hospice care centers to increase capacity without a CON. We also recommend that you allow ambulatory surgical centers to open without a CON.** Doing so will give healthcare providers the flexibility needed to best serve their patients during this time of uncertainty. 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 this great state. We have a highly experienced team that would be honored to help your office implement this change. If I can be of assistance, I can be reached at [wmauer@ij.org](mailto:wmauer@ij.org).

Respectfully,



William Maurer  
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<sup>1</sup> 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).

<sup>2</sup> See *N'Da v. Hybl*, No. CI-20-1227 (Dist. Ct. Lancaster Cty., 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).

<sup>3</sup> See e.g., Fed. Trade Comm'n & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition* (July 2004); <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerprt.pdf>; 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* (Dec. 2018), <https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf>.

<sup>4</sup> E.g., Mercatus Ctr., *Healthcare Favoritism*, <https://www.mercatus.org/tags/healthcare-favoritism> (collecting research, articles, policy papers, and more about the problems with certificate-of-need laws).

<sup>5</sup> See *Yakima Valley Mem'l 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"); see, also *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

<sup>6</sup> See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merryfield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (holding a certificate-of-need law unconstitutional).

<sup>7</sup> See <https://app.leg.wa.gov/billsummary?BillNumber=1162&Initiative=false&Year=2019>.

<sup>8</sup> State of Wash. Office of the Governor, Proclamation 20-32 (Mar. 26, 2020).

<sup>9</sup> See generally Wash. Admin. Code § 246-310-020(c); Wash. Dep't of Health, General Timeline for Certificate of Need Application, <https://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/ReviewProcess>.

<sup>10</sup> 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>.