April 30, 2020

VIA UPS
Honorable Jim Justice
Governor, West Virginia
1900 Kanawha Street
Charleston, WV 25305


To Governor Justice:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you waive certain certificate-of-need (CON) laws. Specifically, please immediately:

1. suspend the CON requirements for adding ventilators at hospitals,
2. suspend the CON requirements preventing home health agencies from opening and expanding, and
3. suspend the moratorium on adding intermediate care beds or skilled nursing beds to existing facilities.

You have done a more than admirable job containing the spread of the virus in an extraordinarily difficult situation, but West Virginians continue to need access to more care, not less. In fact, this issue predates the pandemic. Thus, taking the requested action would be commonsense and compassionate and in line with the other swift and decisive actions you have already taken in response to the pandemic.

In recent years, IJ has become particularly concerned about the burdens that state CON laws impose on access to healthcare. 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. Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose. Instead, they serve as barriers to entry. The problems with CON laws amount to more than bad policy. Courts from the Supreme Court down have condemned economic protectionism of this nature.

You quickly suspended certain medical licensing requirements and other provisions restricting the use of telehealth services. These actions have vastly expanded the number of
providers and types of services available to patients throughout the Mountain State. These measures are extremely welcome. They reflect the bold leadership that West Virginians admire and deserve during this unprecedented emergency. But there is more to be done.

As of today, West Virginia maintains a moratorium prohibiting facilities from adding intermediate care beds or skilled nursing beds. Additionally, home health agencies that would like to open or expand are forced to endure the expensive, months-long CON process before they can start caring for patients.\textsuperscript{12} 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, states like Connecticut, Georgia, and South Carolina have 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.\textsuperscript{13}

Similarly, you have the authority to take action that could save many lives. \textbf{We thus urge you to suspend the:}

\begin{itemize}
\item[(1)] CON law preventing hospitals from adding ventilators;
\item[(2)] CON laws preventing home health agencies from opening or expanding; and
\item[(3)] moratorium on adding intermediate care beds or skilled nursing beds to existing facilities.
\end{itemize}

We also hope that you and the legislature will choose to make this change and many 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. We look forward to working with you and can be reached at the numbers and email addresses below.

Respectfully,

\begin{tabular}{ll}
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cc: Mike Hall, Chief of Staff to Governor Justice, mike.hall@wv.gov; Patrick Morrisey, West Virginia Attorney General, patrick.morrisey@wvago.gov; Barbara Skeen, Interim Executive Director West Virginia Health Care Authority, barbara.l.skeen@wv.gov;
Representative Amy Summer, House of Delegates Majority Leader, amy.summers@wvhouse.gov; Representative Roger Hanshaw, House of Delegates Speaker, roger.hanshaw@wv.house.gov

8 E.g., Mercatus Ctr., Healthcare Favoritism, https://www.mercatus.org/tags/healthcare-favoritism (collecting research, 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 CONs are a “barrier to market entry”).