



INSTITUTE FOR JUSTICE

April 30, 2020

VIA UPS

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

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

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

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.⁴ 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.

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 healthcare.⁶ 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.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. Courts from the Supreme Court down have condemned economic protectionism of this nature.¹⁰

You quickly suspended certain medical licensing requirements and other provisions restricting the use of telehealth services.¹¹ 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.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.¹³

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

- (1) CON law preventing hospitals from adding ventilators;**
- (2) CON laws preventing home health agencies from opening or expanding; and**
- (3) moratorium on adding intermediate care beds or skilled nursing beds to existing facilities.**

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,



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¹ W. Va. Code § 16-2D-8(a)(6).

² W. Va. Code § 16-2D-8(a)(11).

³ W. Va. Code § 16-2D-9(1).

⁴ See H.B. 4580 (2020) (broadly eliminating CON laws); H.B. 2007 (2019) (same); Steven Allen Adams, *Health care drama highlights Certificate of Need repeal*, THE PARKERSBURG NEWS AND SENTINEL (Jan. 2, 2020), <https://bit.ly/3f1yUUX>.

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/040723/healthcarerpt.pdf>.

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”).

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 CON law unconstitutional).

¹¹ Exec. Order No. 7-20 (Mar. 19, 2020).

¹² See W. Va. Health Care Auth., *Home Health Services* (Nov. 13, 1996) (explaining home health agency CON process), https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Home_Health_Services.pdf.

¹³ 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>.