



INSTITUTE FOR JUSTICE

April 29, 2020

VIA EMAIL AND UPS

Honorable Steve Sisolak
Governor of Nevada
Capitol Building
101 N. Carson St.
Carson City, NV 89701
governor@govmail.state.nv.us

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

To Governor Sisolak:

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 Directive 011. Specifically, please expand Directive 011 to **waive Nevada’s certificate-of-need (“CON”) requirements for rural health facilities.**

My colleagues and I applaud you for waiving licensing requirements for skilled medical professionals during the pandemic. As the COVID-19 pandemic has shown, Nevadans need access to more care, not less, which is why we request that you waive CON requirements. Such action would be commonsense and compassionate, but also the bold leadership that Nevada 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.¹ 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 healthcare.² 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.³ Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.⁴ Instead, they serve as barriers to entry.⁵ 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.⁶

During this time of crisis, you have shown that your office is uniquely positioned to address today’s concerns. Under your leadership, Nevada has taken quick action to increase access to healthcare. For example, as mentioned above, Directive 011 waived licensing

requirements for doctors, nurse practitioners, emergency medical technicians, paramedics, and even medical and nursing students.⁷ In your statement regarding Directive 011, you said that it was meant to “quickly bring additional health care workers into our hospitals where we so desperately need them right now . . . without all the red tape that usually slows down these processes.”⁸ These measures are extremely welcome and demonstrate your ability to act quickly and decisively.

But there is more that can be done to serve patients and support healthcare workers throughout the entire state. Current state law wrongly distinguishes between patients in rural areas and those in urban areas. Rural health facilities that want to increase capacity with an expansion that costs more than \$2,000,000 are required to go through the months-long CON process before they can respond to this vital need.⁹ Yet urban health facilities face no similar constraints. And as stay-at-home restrictions start being lifted, there will be high demand for health facilities such as 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 practical solution. 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.¹⁰

Similar, quick action could save lives. **We thus respectfully urge you to waive Nevada’s CON requirements for rural health facilities.** 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. I look forward to working with you further on this issue and can be reached at cgbrothers@ij.org or (703) 682-9320.

Respectfully,



Caroline Grace Brothers
Constitutional Law Fellow
Institute for Justice

cc: Michelle White, Chief of Staff to Governor Sisolak, michellewhite@gov.nv.gov
Richard Whitley, Director, Nevada Department of Health and Human Services,
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¹ 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).

² 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).

³ 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>.

⁴ 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).

⁵ 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”).

⁶ 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 certificate-of-need law unconstitutional).

⁷ Nev. Governor Directive, *Directive 011* (Apr. 1, 2020), https://nvhealthresponse.nv.gov/wp-content/uploads/2020/04/2020-04-01_Declaration-of-Emergency-Directive-011-re-Health-Care-Providers.pdf.

⁸ Nev. Health Response, *Governor Sisolak activates national guard, signs directive to bring relief to healthcare professionals* at 3–4 (Apr. 1, 2020), https://nvhealthresponse.nv.gov/wp-content/uploads/2020/04/4.1-Press-Release-Governor-Announcements_FINAL.pdf.

⁹ Nev. Rev. Stat. § 439A.100; Nev. Admin. Code § 439A.226.

¹⁰ 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>.