



INSTITUTE FOR JUSTICE

May 8, 2020

VIA EMAIL AND USPS

Honorable Mike Parson
Governor of Missouri
P.O. Box 720
Jefferson City, MO 65102

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

To Governor Parson:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you **waive Certificate-of-Need (“CON”) requirements for nursing homes to add beds and health services.**¹

As the COVID-19 pandemic has shown, Missourians need access to more care, not less. Your taking this action is not only commonsense and compassionate, but also the bold leadership that Missouri 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.² 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.³ 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.⁴ Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.⁵ Instead, they serve as barriers to entry.⁶ The problems with CON laws amount to more than bad policy. Courts from the Supreme Court down have condemned economic protectionism of this nature.⁷

During this time of crisis, you have shown that your office is uniquely positioned to address today’s concerns. You have already authorized the Missouri Department of Health and Senior Services (“DHSS”) to temporarily waive any law or regulation as needed “to respond to the COVID-19 health threat.”⁸ In response, DHSS has already waived many rules, including regulations that prevent nursing homes from serving more patients than their licenses currently allow.⁹ These measures are extremely welcome and demonstrate your ability to act quickly.

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But there is more that can be done. Patients desperately need access to nursing home services. Yet, under the Missouri Certificate of Need Law,¹⁰ nursing homes that want to increase capacity by adding or converting beds are required to go through the months-long CON process before they can respond to this vital need.¹¹ The same is true if nursing homes add almost any new health services.¹² As DHSS has recognized, nursing homes need more flexibility right now to care for their patients in response to a pandemic. Missouri's CON laws stand in the way of such life-saving flexibility.

These entities are simply unable to meet these regulatory burdens right now. They should not 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. And in the aftermath of the pandemic, after emergency waivers expire, nursing homes will still need the flexibility to care for more residents without going through the burdensome CON process.

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.¹³

You have the authority to remove these unnecessary barriers to nursing home care during an emergency.¹⁴ The waivers DHSS issued for nursing homes are in effect until May 15, 2020.¹⁵ When those waivers are renewed, **we urge you to further waive nursing homes' CON requirements for adding beds and health services.** Doing so will give nursing homes the flexibility that they need to best serve their patients. We also hope that you and the legislature make this change permanent.

IJ stands ready to assist you in tailoring a solution that will serve all Missourians. We have a highly experienced team that would be honored to help your office implement this change. We look forward to working with you further on this issue. Thank you.

Respectfully,



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¹ See below notes 10–12.

² 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).

³ 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).

⁴ 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>.

⁵ 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).

⁶ 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”).

⁷ 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 CON law unconstitutional).

⁸ Mo. Exec. Order 20-04 (March 18, 2020), <https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2020/20-04.pdf>; see also Mo. Exec. Order 20-10 (May 4, 2020), <https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2020/20-10.pdf> (extending Order 20-04 until June 15, 2020).

⁹ See Mo. DHSS, *Residential Care Facility II Requirements*, (Apr. 17, 2020) <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/waiver-residential-care-facility-reqs-4.pdf>; Mo. DHSS, *Residential Care Facilities*, (Apr. 16, 2020) <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/waiver-residential-care-facilities-2.pdf>; Mo. DHSS, *Intermediate Care and Skilled Nursing Facilities* (Apr. 15, 2020), <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/waiver-inter-care-skilled-nursing-facilities-3.pdf>.

¹⁰ Sections 197.300 to 197.366, RsMo.

¹¹ See section 197.315 (CON requirement for “new institutional health services”); sections 197.305(9)(e), (9)(g) and 197.366(1) (adding beds and reallocating beds in facilities “licensed under chapter 198” are new institutional health services); chapter 198 (nursing homes), RsMo.

¹² See section 197.305(9)(f), RsMo.

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>.

¹⁴ See section 44.100, RsMo.

¹⁵ See waivers cited above in note 9.