



INSTITUTE FOR JUSTICE

May 13, 2020

**VIA EMAIL AND UPS**

The Honorable Andrew M. Cuomo  
Governor of New York State  
633 3rd Avenue; 38th Floor  
New York, NY 10017  
gov.cuomo@chamber.state.ny.us

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

Dear Governor Cuomo:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request **you expand Executive Order No. 202.10 to waive New York’s certificate-of-need (CON) requirements for long-term care, home health agencies, and equipment.**

New York has been hardest hit by the pandemic and you have rightly recognized the importance of removing regulatory barriers to deal with the high number of cases. Under Executive Order No. 202.10, you waived the CON requirement for hospitals making changes to their physical facilities such as temporarily increasing their bed capacities.<sup>1</sup> As the COVID-19 pandemic has shown, New Yorkers need access to more care, not less. Waiving CON requirements is commonsense and compassionate. It also demonstrates the bold leadership that New Yorkers admire and deserve during this unprecedented emergency.

For nearly 30 years, IJ has worked to reduce and remove burdensome, unnecessary, and in this case, dangerous, licensing requirements, including in the healthcare field.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.<sup>5</sup> Instead, they serve as barriers to entry.<sup>6</sup> The problems with CON laws amount to more than bad policy. Courts from the Supreme Court down have condemned economic protectionism of this nature.<sup>7</sup>

During this crisis, you have shown that your office is uniquely positioned to address today's concerns. You already have taken quick and decisive action to increase access to healthcare. For example, you have authorized physicians, physicians' assistants, nurses, and nurse practitioners licensed anywhere in the country to practice in New York without getting a state license.<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 long-term care and home health services. Yet, under current state law, providers that want to offer these services are required to go through the months-long CON process before they can respond to this vital need. The same is true if healthcare facilities need to add new equipment. As stay-at-home restrictions start being lifted, the demand for healthcare services will only get higher.

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.<sup>9</sup>

Similarly, you have the authority to take action that could save many lives. **We thus urge you to waive CON requirements for long-term care, home health agencies, and equipment.** 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 tailoring a solution to serve the citizens of New York. We have a highly experienced team that would be honored to help your office implement this change. My colleagues and I look forward to working with you and can be reached at dsheth@ij.org or 703-682-9320.

Respectfully,



Darpana Sheth  
Senior Attorney  
Institute for Justice

cc: Jill DesRosiers, Chief of Staff, Jill.DesRosiers@exec.ny.gov  
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<sup>1</sup> Executive Order No. 202.10, March 23, 2020, <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; Executive Order No. 202.28, May 7, 2020, <https://www.governor.ny.gov/news/no-20228-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>2</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>3</sup> 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).

<sup>4</sup> 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>.

<sup>5</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 CON laws).

<sup>6</sup> 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”).

<sup>7</sup> 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).

<sup>8</sup> Executive Order No. 202.27, May 7, 2020, <https://www.governor.ny.gov/news/no-20227-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>; see also Executive Order No. 202.5, March 18, 2020, <https://www.governor.ny.gov/news/no-2025-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>9</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>.