



INSTITUTE FOR JUSTICE

April 29, 2020

VIA UPS

Hon. Mike DeWine
Governor of Ohio
77 South High Street, 30th Floor
Columbus, OH 43215

VIA UPS and email

Dr. Amy Acton
Director of the Ohio Department of Health
246 North High Street
Columbus, OH 43215
DirectorAmyActon@odh.ohio.gov

Re: Certificate of Need waivers during COVID-19 pandemic

To Governor DeWine and Director Acton:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you **suspend Ohio’s certificate of need (CON) requirement for increasing and reallocating long-term care beds.**¹

As the COVID-19 pandemic has shown, Ohioans need access to more care, not less. Such action would be commonsense and compassionate, but also the bold leadership that Ohio 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 the 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 taken quick and decisive action to increase access to healthcare. For example, you already have recognized the need for increased access to telemedicine.⁸ These measures are extremely welcome and demonstrate your leadership and the state's ability to act quickly.

But there is more that can be done to serve patients and support healthcare workers. Older and sicker patients desperately need access to long-term care yet, under current state law, long-term care providers generally cannot add new beds.⁹ And providers that want to redistribute existing beds are required to go through the months-long CON process before they can respond to this vital need.¹⁰


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 dangerous 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.¹¹

Similarly, you have the authority to take action that could save lives. **We thus respectfully urge you to suspend the CON requirement for increasing and reallocating long-term care beds.** 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. My colleagues and I look forward to working with you further on this issue. You may reach me at andrew.ward@ij.org or (703) 682-9320.

Respectfully,



Andrew Ward
Attorney
Institute for Justice

cc: Laurel Dawson, Chief of Staff to the Governor (laurel.dawson@governor.ohio.gov)

¹ Ohio Rev. Code § 3702.511(A).

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); *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 & 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 See Ohio Dep't of Medicaid, *COVID: ODM Emergency Telehealth*, <https://medicaid.ohio.gov/COVID/ODM-Emergency-Telehealth>.

⁹ Ohio Rev. Code § 3702.511(A)(4); Ohio Dep't of Health, *CON Frequently Asked Questions* (Jan. 21, 2014) (referring to the “moratorium on new long term care beds”), <https://odh.ohio.gov/wps/portal/gov/odh/know-our-programs/certificate-of-need/resources/confrequentlyaskedquestions>.

¹⁰ Ohio Rev. Code § 3702.511(A)(5).

¹¹ 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>.