



INSTITUTE FOR JUSTICE

April 29, 2020

VIA EMAIL AND UPS

Honorable Gina M. Raimondo
Governor of Rhode Island
Office of the Governor
82 Smith Street
Providence, RI 02903
governor@governor.ri.gov

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

Dear Governor Raimondo:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you expand Executive Order 20-21. Specifically, we ask that you suspend Certificate-of-Need (CON) laws that apply **to home health agencies, facilities providing inpatient hospice care, and ambulatory surgical centers.**¹

The Institute for Justice applauds you for suspending certificate of need (CON) requirements for hospital and nursing facilities. As the COVID-19 pandemic has shown, Rhode Islanders need access to more care, not less. That is why your Executive Order 20-21 should be expanded to suspend CON requirements that apply to home health agencies, facilities providing inpatient hospice care, and ambulatory surgical centers. Such action would be commonsense and compassionate, but also reflective of the bold leadership that Rhode Island 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 in various fields, including the healthcare industry.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, 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 and 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. Under your leadership, Rhode Island has taken quick action to

increase access to healthcare. For example, on March 18, you signed Executive Order 20-06 which expanded access to telemedicine services.⁸ Then, on April 10, you issued Executive Order 20-21, suspending a number of restrictions limiting the capacity of Rhode Island hospitals and nursing facilities, including “certificate of need statutes and rules.” These measures are extremely welcome and demonstrate your ability to act quickly and decisively in response to the emergency in Rhode Island.

But there is more that can be done to serve patients and support healthcare workers. Patients desperately need access to hospice care and home health care, yet these providers still must go through the expensive and time consuming CON process before they can respond to this vital need.⁹ Soon, as stay-at-home restrictions are lifted, there will be high demand for 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. Many 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 many lives. **We thus respectfully urge you to expand Executive Order 20-21 to suspend CON requirements that apply to home health agencies, facilities providing inpatient hospice care, and ambulatory surgical centers.** 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. We look forward to working with you further on this issue and can be reached at 703-682-9320.

Respectfully,



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¹ See R.I. Gen. Laws § 23-15-2(4) (defining “health-care facility” to include facilities providing inpatient hospice care, home-health providers, and ambulatory surgery centers).

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 Executive Order 20-06 (extended through Executive Order 20-28).

⁹ See R.I. Gen. Laws §§ 23-15-4(a) (addressing when a CON is required), 4(f) (setting forth the CON application review process), 2(4) (defining “health-care facility” to include facilities providing inpatient hospice care, home-health providers, and ambulatory surgery centers).

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>.