



INSTITUTE FOR JUSTICE

April 29, 2020

**VIA EMAIL AND UPS**

Honorable Bill Lee  
Office of the Governor  
State Capitol, 1st Floor  
600 Dr. Martin L. King, Jr. Blvd.  
Nashville, TN 37243  
bill.lee@tn.gov

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

Dear Governor Lee:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request that you expand your Executive Order No. 15. Specifically, **we ask that you suspend CON requirements that apply to home health agencies, nursing homes, residential hospices, and ambulatory surgical centers.**<sup>1</sup>

The Institute for Justice applauds you for suspending Tennessee’s certificate-of-need (CON) requirements for hospitals that want to temporarily increase the number of licensed beds at their facilities or establish hospital and diagnostic services elsewhere. As the COVID-19 pandemic has shown, Tennessee residents need access to more care, not less. That is why Executive Order No. 15 should be expanded to suspend CON requirements that apply to home health agencies, nursing homes, residential hospices, and ambulatory surgical centers. Such action would be commonsense and compassionate, but also reflective of your bold leadership that Tennessee 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.<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.

You also may recognize IJ for our work in educational choice. The Institute for Justice represents parents who wish to participate in Tennessee’s ESA Pilot Program and have intervened in the two lawsuits challenging the program. IJ is coordinating with the Attorney General in our legal defense of this vital program.

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 time of crisis, you have shown that your office is uniquely positioned to address today's concerns. Under your leadership, Tennessee has taken quick action to increase access to healthcare. For example, on March 19, you signed Executive Order No. 15, which, among other actions, waives certain licensing requirements for healthcare workers, allows pharmacists to complete computer-based processing of prescriptions remotely, and suspends CON requirements for hospitals to temporarily increase their bed capacity and establish additional hospital and diagnostic services.<sup>8</sup> These measures are extremely welcome and demonstrate Tennessee'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 home health care, nursing home care, and hospice care, yet these providers still must go through the expensive and time consuming CON process.<sup>9</sup> 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.<sup>10</sup>

Similar, quick action could save many lives. **We thus respectfully urge you to expand Executive Order No. 15 to suspend CON requirements that apply to home health agencies, nursing homes, residential hospices, 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 tailored solutions that will serve the citizens of your great state. We have a highly experienced team that would be honored to help your office implement these changes. We look forward to working with you further on this issue and can be reached at the email and telephone numbers below.

Respectfully,



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<sup>1</sup> See Tenn. Code § 68-11-1602(7) (defining “health care institution” to include nursing homes, home care organizations, residential hospice, and ambulatory surgical treatment centers).

<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/040723healthcarerpt.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. 15 (Mar. 19, 2020) (as amended in Executive Order No. 28 (Apr. 17, 2020)).

<sup>9</sup> See Tenn. Code § 68-11-1607(a) (addressing when a CON is required), 1607(c) (setting forth the CON application process).

<sup>10</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>.