



INSTITUTE FOR JUSTICE

April 30, 2020

**VIA EMAIL AND UPS**

The Honorable Asa Hutchinson  
Governor of Arkansas  
State Capitol  
500 Woodlane Street-Room 250  
Little Rock, AR 72201  
info@governor.arkansas.gov

*Re: Suspending Permit-of-Approval requirements during COVID-19 pandemic.*

Dear Governor Hutchinson:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you expand Executive Order Nos. 20-06 and 20-16 to increase Arkansans’ access to healthcare.<sup>1</sup> **Specifically, IJ recommends you suspend the state’s Permit-of-Approval (POA) requirement for home healthcare services agencies and for long-term care facilities.**<sup>2</sup>

My colleagues and I acknowledge and applaud you for suspending regulations that hinder Arkansas’s ability to respond to the COVID-19 crisis. As the COVID-19 pandemic has shown, Arkansans need access to more care, not less. That is why your Executive Orders should be expanded to suspend Arkansas’s Permit-of-Approval (POA) requirement for home healthcare services agencies and for long-term care facilities. Such action would be commonsense and compassionate, but also the bold leadership that Arkansans 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.<sup>3</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 Certificate of Need (CON) laws impose on access to healthcare.<sup>4</sup> (Arkansas uses the term “Permit of Approval” where most other states use the term “Certificate of Need.”)

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>5</sup> Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.<sup>6</sup> Instead, they serve as barriers to entry.<sup>7</sup> 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.<sup>8</sup>

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, in accordance with Executive Orders 20-06 and 20-16, your Department of Health suspended surveys and inspections for home health agencies.<sup>9</sup> The Department also has clarified that hospitals may temporarily increase their number of beds.<sup>10</sup> 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. And it requires your action. Patients desperately need access to home health services and long-term care. Yet under state law, long-term care facilities that want to increase capacity by adding beds and services are often required to go through the months-long Permit-of-Approval process before they can respond to this vital need. The same is true for other critical services, like home healthcare services agencies, particularly in the provision of community services.<sup>11</sup>

Fortunately, you have already put your agencies in a position to act. Pursuant to Executive Orders 20-06 and 20-16 you directed the Department of Health, the Health Services Permit Commission, and the Health Services Permit Agency to suspend regulations that are hampering the state's ability to respond to COVID-19. The POA restriction on home healthcare services agencies and long-term care facilities "prevents, hinders, or delays the agency's ability to render maximum assistance to the citizens" of Arkansas by limiting the availability of healthcare services. Accordingly, these agencies should identify these POA regulations and post them to their websites for suspension.<sup>12</sup>

*Unfortunately, the agencies you directed to address this problem have not acted despite your giving them the authority to do so.* It is now in the best interest of Arkansans that you end this logjam and waive those requirements for at least the duration of the emergency in Arkansas.

Healthcare services agencies and long-term care facilities 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, including Virginia, New Jersey, and Oklahoma, have already waived their CON laws as applicable to hospital beds. Other states like Connecticut, Georgia, and South Carolina have gone further and 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>13</sup>

Similar, quick action could save many lives. **IJ thus respectfully urge you to take the initiative to suspend the POA requirement for home healthcare services agencies and for long-term care facilities.** 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. IJ has 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 contact me at [agriffin@ij.org](mailto:agriffin@ij.org) or 336-202-0082.

Respectfully,



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Constitutional Law Fellow  
Institute for Justice

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<sup>1</sup> See Executive Order 20-06 (Mar. 17, 2020), [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-06\\_.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-06_.pdf); Executive Order 20-16 (April 13, 2020), [https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-16\\_.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-16_.pdf).

<sup>2</sup> Ark. Stat. § 20-8-107(a); *see also id.* § 20-8-101(6)(A) (defining “health facility” to include long-term care facilities and home healthcare services agencies).

<sup>3</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>4</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>5</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>6</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>7</sup> *See Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 929 (9th Cir. 2011) (recognizing that certificates of need are a “barrier to market entry”).

<sup>8</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 certificate-of-need law unconstitutional).

<sup>9</sup> *See* Arkansas Dep't of Health, *Rules*, <https://www.healthy.arkansas.gov/rules-and-regulations> (last visited Apr. 27, 2020).

<sup>10</sup> *Id.*; *see also* Ark. Admin. Code R. 007.05.17-11(E)(1).

<sup>11</sup> *Id.* § 20-8-101(6)(A).

<sup>12</sup> Executive Order 20-16 (April 13, 2020),

[https://governor.arkansas.gov/images/uploads/executiveOrders/EO\\_20-16\\_.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-16_.pdf).

<sup>13</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>.