



INSTITUTE FOR JUSTICE

April 30, 2020

VIA EMAIL AND UPS

Eric Holcomb
Governor of Indiana
Office of the Governor
200 W. Washington St. Room 206
Indianapolis, IN 46204
holcomb@gov.in.gov

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

Dear Governor Holcomb:

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 Executive Order 20-05.¹ Specifically, IJ asks that you instruct the State Department of Health to **fully waive CON requirements for nursing homes**.

The Institute for Justice applauds you for making the push to waive CON requirements. As the COVID-19 pandemic has shown, Hoosiers need access to more care, not less. That is why your office should order the waiving of this CON requirement. Such action is commonsense and compassionate, but also reflects the bold leadership that Indiana 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, Indiana has taken quick action to increase access to healthcare. For example, under Executive Order 20-12, Indiana expanded the availability of opioid prescriptions via telemedicine in some circumstances. Also, out-of-state

and retired health care providers, in addition to certain health care students close to the end of their formal education, may obtain temporary authorization to provide care under Executive Orders 20-05 and 20-13. 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. Nursing home patients are one of the most vulnerable groups to COVID-19 in Indiana. They desperately need access to nursing homes yet, current law requires, nursing homes that want the flexibility to increase capacity by adding or transferring beds are required to go through the months-long CON process before they can respond to this vital need.⁸ Although you granted Commissioner Box authority to waive the CON requirements in response to the pandemic, the Department of Health has not done so. Nursing homes are a critical component of the health care system. They will continue to be in high demand even after you lift the stay-at-home restrictions.

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. CON laws tie the hands of nursing home operators. Unfortunately, some operators may welcome such restraints for anticompetitive reasons. 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, already waived their CON laws related 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.⁹

Similar, quick action could save many lives. **IJ thus respectfully urges you to directly waive CON requirements for nursing homes.** Doing so will give providers the flexibility needed to best serve their patients in nursing homes across Indiana. 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. We can be reached at the email and telephone numbers below. Thank you.

Respectfully,



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¹ Executive Order 20-05, https://www.in.gov/gov/files/EO_20-05.pdf.

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 See Ind. Code § 16-29-7-13 (review period begins July 1 of that calendar year, and ends June 30 of the following calendar year); Ind. Code § 16-29-7-10 (prohibition on the addition, transferring, and conversion of nursing home beds unless granted a CON or allowed under Ind. Code § 16-28-2.5).

⁹ 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>.