



INSTITUTE FOR JUSTICE

May 1, 2020

**VIA UPS and email**

Dr. Andrew Pollak, Chairman (andrew.pollack@maryland.gov)  
Ben Steffen, Executive Director (ben.steffen@maryland.gov)  
Maryland Health Care Commission  
4160 Patterson Avenue  
Baltimore, MD 21215

*Re: Expanding emergency certificates of need during COVID-19 pandemic.*

To Chairman Pollak and Director Steffen:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest law firm—to respectfully request that you **expand your guidance about emergency certificates of need (CONs) to include home health agencies.**<sup>1</sup>

As the COVID-19 pandemic has shown, Marylanders need access to more care, not less. The requested action would be commonsense and compassionate, but also the bold leadership that Maryland 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.<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.

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 the 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 the Commission is uniquely positioned to address today's concerns. You have already taken quick and decisive action to increase access to healthcare by issuing emergency CONs for hospitals and nursing homes seeking to add beds. These measures are extremely welcome and demonstrate Maryland's ability to act quickly.

But there is more that can be done to serve patients and support healthcare workers. Patients—especially vulnerable and elderly patients who need to stay isolated—desperately need

alternatives to overwhelmed medical facilities. Home health care is one such alternative. Yet under current state law, home health agencies generally need to go through the months-long CON process to provide service in new areas.<sup>8</sup>

As you have already recognized for hospitals and nursing homes, providers are simply unable to meet these regulatory burdens right now, and they should not be forced to divert their limited resources away from patient care. During a pandemic, home health agencies need guidance so that they know Maryland stands ready to issue emergency CONs to them as well.

Other states have gone even further. 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>9</sup>

Similarly, you have the authority to take action that could save lives. **We thus urge you to issue guidance on emergency CONs for home health agencies.** Doing so will give healthcare providers the flexibility needed to best serve 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 and can be reached at (703) 682-9320 and [andrew.ward@ij.org](mailto:andrew.ward@ij.org).

Respectfully,



Andrew Ward  
Attorney

cc: Matthew Clark, Chief of Staff to the Governor ([Matthew.Clark@maryland.gov](mailto:Matthew.Clark@maryland.gov))

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<sup>1</sup> See Md. Health Care Comm'n, Revised MHCC Regulatory Guidance 001 (Apr. 13, 2020); Md. Health Care Comm'n, Guidance Regarding Emergency CONs for Comprehensive Care Facilities (Nursing Homes) (Apr. 3, 2020).

<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); *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 & 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); *Craigsmiles 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> Md. Code Regs. 10.24.01.02(A)(4)(e)(ii).

<sup>9</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>.