



INSTITUTE FOR JUSTICE

May 6, 2020

VIA EMAIL AND UPS

Honorable Steve Bullock
Governor of Montana
State Capitol
1301 E. 6th Avenue
Helena, MT 59620
sbullock@mt.gov

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

To Governor Bullock:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request you **waive Certificate-of-Need (“CON”) requirements for home health services and long-term care.**¹

As the COVID-19 pandemic has shown, Montanans need access to more care, not less. Your taking this action is commonsense and compassionate. It is also the bold leadership that Montana 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.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 and safety, 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. 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. You have already taken quick and decisive action to increase access to healthcare. For example, your office issued directives to expand telemedicine⁸ and relax barriers to licensing for out-of-state and retired healthcare professionals.⁹ These measures are extremely welcome and demonstrate your 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 services and long-term care, yet under current state law, home health agencies and long-term care facilities must go through the months-long CON process just to add a few beds.¹⁰ The same is true for most health care facilities adding *any* new service with “annual operating and amortization expenses” over \$150,000, and for any hospital seeking to provide *any* home health services or long-term care.¹¹

These entities are simply unable to meet these regulatory burdens right now. They should not 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. 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.¹²

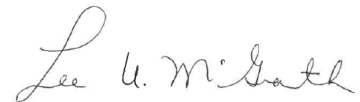
Similarly, you have the authority to remove unnecessary barriers to healthcare services.¹³ **We thus urge you to waive CON requirements for home health services and long-term care facilities.** Doing so will give healthcare providers the flexibility needed to best serve their patients. We also hope that you and the legislature make these change and other changes you recently implemented permanent.

IJ stands ready to assist you in tailoring a solution that will serve all Montanans. 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. Thank you.

Respectfully,



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¹ See Mont. Code Ann. § 50-5-301(1)(b), (c), (h).

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/040723/healthcarerpt.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 certificates of need 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 certificate-of-need law unconstitutional).

⁸ *Directive Implementing Executive Orders 2-2020 and 3-2020 and Providing for the Use, Delivery, and Reimbursement of Telemedicine and Telehealth Services* (Apr. 21, 2020), <https://covid19.mt.gov/Portals/223/Documents/4-21-20%20Telehealth%20.pdf?ver=2020-04-22-140845-733>.

⁹ *Directive Implementing Executive Orders 2-2020 and 3-2020 and Easing Licensing Requirements for Health Care Providers During the Emergency* (Apr. 21, 2020), <https://covid19.mt.gov/Portals/223/Documents/4-21-20%20Health%20Care%20Licensing.pdf?ver=2020-04-22-140815-253>.

¹⁰ See Mont. Code Ann. § 50-5-301(1)(b).

¹¹ *Id.* § 50-5-301(1)(c), (h).

¹² 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>.

¹³ See, e.g., Mont. Code Ann. § 10-3-104(2)(a).