



INSTITUTE FOR JUSTICE

May 6, 2020

**VIA EMAIL AND UPS**

The Honorable Ralph S. Northam  
Governor of Virginia  
1000 Bank Street; 3rd Floor  
Richmond, VA 23218-3673  
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*Re: Expanding Certificate-of-Need waivers during COVID-19 pandemic.*

Dear Governor Northam:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request **you expand Executive Order 52 to suspend Virginia’s certificate-of-need (CON) requirements for any increase in beds or operating capacity, as well as for new health services, like imaging or ambulatory surgeries.**

In Executive Order 52, you rightly recognize a “need to increase bed capacity in general hospitals and nursing homes within the Commonwealth.”<sup>1</sup> As the COVID-19 pandemic has shown, Virginians need access to more care, not less. Suspending CON requirements is commonsense and compassionate. It also demonstrates the bold leadership that Virginians admire and deserve during this unprecedented emergency.

For nearly 30 years, 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 has a particular commitment to removing barriers to opportunities in Virginia, as we moved our headquarters to Arlington in 2006 and most of our colleagues reside here. 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 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 on down have condemned economic protectionism of this nature.<sup>7</sup>

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During this crisis, you have shown that your office is uniquely positioned to address today's concerns. You already have taken quick and decisive action to increase access to healthcare. For example, you expanded the use of telehealth and authorized out-of-state licensed medical professionals, experienced nurse practitioners without a practice agreement, as well as residents, interns, and certain senior students to help meet the demand for increased health services.<sup>8</sup> These measures are welcome and demonstrate the Commonwealth's ability to act quickly.

But there is more that can be done. In addition to hospital and nursing home beds, patients will also need access to beds at other facilities and need specialized medical services. Yet, under current state law, which is unusually broad, all healthcare facilities that want to add beds are required to go through the months-long CON process before they can respond to this vital need. The same is true for adding operating rooms or new health services to an existing medical facility. As stay-at-home restrictions start being lifted, there will be high demand imaging services like CT scanning, outpatient surgeries, and other specialty services.

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. 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>9</sup>

Similarly, you have the authority to take action that could save many lives. **We thus urge you to suspend CON requirements for all increases in beds or operating capacity and for new health services like imaging or ambulatory surgery 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 tailoring a solution to serve the citizens of Virginia. We have a highly experienced team that would be honored to help your office implement this change. We look forward to working with you and can be reached at (703) 682-9320.

Respectfully,



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cc: Dr. M. Norman Oliver, State Health Commissioner, norm.oliver@vdh.virginia.gov  
The Honorable Mark Herring, Attorney General, mailoag@oag.state.va.us  
Clark Mercer, Chief of Staff to Governor Northam, clark.mercer@governor.virginia.gov

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<sup>1</sup> [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-(COVID-19).pdf).

<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 Amended No. 57 (April 23, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-57-AMENDED---Licensing-of-Health-Care-Professionals-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-57-AMENDED---Licensing-of-Health-Care-Professionals-in-Response-to-Novel-Coronavirus-(COVID-19).pdf).

<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>.