

Institute for Justice

Iowa Certificate of Need

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For more than 20 years, Dr. Lee Birchansky has tried to offer his patients the option of having their cataract and other outpatient eye surgeries in a center right next to his office in Cedar Rapids. But the state of Iowa has stymied his efforts to open his own surgery center, forcing him to perform these surgeries at his competitors' facilities.

How does this scheme work? Iowa makes it a crime for doctors to open up a new location and offer services without obtaining special permission known as a "certificate of need." Permission is not easy to come by: Dr. Birchansky must persuade state officials that his outpatient surgery center is "needed" in the proposed location through a cumbersome process that resembles full-blown litigation and that allows existing businesses (his competitors) to oppose his application. This process amounts to nothing more than certificates of monopoly.

Iowa's requirement has absolutely nothing to do with public health or safety. Separate state and federal laws govern who is allowed to practice medicine and what kind of medical procedures are permitted. Iowa's CON program only regulates whether someone is allowed to open a new facility; it is explicitly designed to make sure new facilities are not allowed to take customers away from established healthcare facilities. It ensures that more money flows into the pockets of established businesses and prevents someone like Dr. Birchansky from expanding Iowans' choices for medical care.

Patients and doctors—not state officials—are in the best position to decide what healthcare services are needed. That is why Dr. Birchansky, his patient Michael Jensen and another Iowa medical provider—Korver Ear Nose and Throat LLC—have joined forces with the Institute for Justice to challenge Iowa's protectionist CON program. The U.S. Constitution protects the right to earn an honest living free from unreasonable government interference, and it protects a patient's right to seek routine, safe and effective medical treatment from a qualified doctor. The Iowa CON program infringes on those rights, and that is why a federal court should strike it down.

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Photos



What Is a Certificate of Need?

A certificate of need (CON) is better understood as a government permission slip to compete. They are used in various industries to stifle competition by allowing existing businesses to decide which new businesses can open near them. For instance, food

trucks vendors have been forced to obtain written permission from brick-and-mortar restaurants in order to operate within 300 feet of them.[1] But these laws are especially harmful when required for medical facilities.

The earliest medical CON requirements applied only to large publicly-funded facilities like hospitals and nursing homes on the theory that they would help keep costs down. After New York enacted the first medical certificate-of-need law in 1964,[2] the American Hospital Association began a national campaign to pass CON programs in other states because these requirements financially benefited existing hospitals by insulating them from competition.[3]

By 1974, the federal government joined in, offering states financial incentives to adopt CON programs.[4] The lure of federal funding led every state but Louisiana to adopt CON requirements. Over time, the federal government concluded that CON requirements utterly failed to control costs or provide any other benefits. Moreover, they were no longer necessary in light of changes to the way Medicare and Medicaid reimbursed healthcare providers. Accordingly, Congress repealed its funding in 1986.[5] Since then, 16 states have eliminated their CON programs.[6]

The remaining states vary in the breadth of services requiring a certificate of need, with Iowa's law requiring a CON for 17 different kinds of services.[7]

Iowa's Certificate-of-Need Requirement Does Not Apply Evenhandedly, Is Burdensome and Does Not Further Any Health or Safety Purpose.

As Dr. Birchansky knows all too well, Iowa requires a certificate of need to open an outpatient surgery center, with one big loophole: Existing facilities do not require a certificate of need if the cost of the proposed center would not exceed \$1.5 million.[8] Over the last 20 years, Mercy Medical Center, the local hospital, has opposed Dr. Birchansky's applications on the grounds that there was no need for a new outpatient surgery center because Mercy's beds were half full. But Mercy is using the loophole[9] to open its own outpatient facility just four miles from Dr. Birchansky's office at Hiawatha Medical Park, a three-story, 80,000-square-foot medical building that will also house an eye clinic.[10] It is easy to see how established businesses turn Iowa's certificate-of need requirement into a certificate of monopoly.

Iowa's CON requirement is also burdensome. The application process begins with filing a letter of intent with the Iowa Department of Public Health, completing an extensive application form, and paying a fee of up to \$21,000.[11] The Department must promptly

notify in writing all “affected persons,” including would-be competitors, who can testify at the mandatory public hearing. [12]

Ultimate authority to approve or deny the application lies with a division of the Department, called the Iowa Health Facilities Council, but that determination frequently hinges on whether established businesses have disputed the “need” for the proposed facility. Moreover, the Council must consider 18 non-exhaustive factors in determining whether an applicant receives a certificate[13]—but, since no one factor is controlling, this amounts to almost complete discretion over whether an application is granted or denied.

Iowa has no objection to doctors offering any of these services. It just wants them to do so by working for an already-established Iowa business instead of owning their own practice. Iowa has separate laws governing who is licensed to practice medicine. And both federal and state laws already regulate what medical treatments doctors may use. In other words, Iowa’s CON requirement only applies when someone wants to offer a service that would otherwise be perfectly legal under state law. Consequently, the certificate-of-need requirement has nothing to do with protecting the public health or safety. As former Iowa Governor Terry Branstad told *The Gazette* last year, “[t]he established health care provider uses this as a way to keep out competition.”[14]

The Plaintiffs

The three plaintiffs in IJ’s constitutional challenge to Iowa’s CON requirement illustrate the real costs the law has for doctors and patients all across the state.

Recognized as one of the top ophthalmologists in the country, Dr. Lee Birchansky seeks to offer the kind of medical innovation Iowans need. After learning “no-stitch” cataract surgery in 1991 directly from the pioneer of the procedure, Dr. Birchansky introduced this technique to Eastern Iowa and has performed over 30,000 no-stitch cataract surgeries.

In that time, Dr. Birchansky has been denied a certificate of need to open his own surgery center four times. At each and every step, the two area hospitals that control 100 percent of the existing operating facilities—Mercy Medical Center and St. Luke’s—have opposed his efforts, even intervening in the actions to squash his attempts to compete with them. Dr. Birchansky’s compelling struggle uniquely illustrates the

inherent cost of this protectionist regime. Were it not for the CON requirement, Dr. Birchansky could begin performing cataract surgeries in his center within one to three weeks.

Plaintiff Michael Jensen has been a patient of Dr. Birchansky's since 2001. He would like Dr. Birchansky to perform his next needed eye surgery at the outpatient center next to Dr. Birchansky's office because it is a safe, less costly, convenient, and familiar environment. Unfortunately Iowa's CON law is denying him that choice.

Finally, Plaintiff Korver Ear Nose and Throat LLC owns a recently constructed medical facility in Orange City, Iowa. It would like to convert the lower level of this facility into an outpatient surgery center to perform tonsillectomies, sinus surgeries, and other outpatient ENT surgeries. But it does not want to incur the enormous time, expense, and uncertainty of going through the certificate of need process, only to be denied because of its competitor's opposition.

The Legal Argument

Iowa's CON requirement is not just bad policy—it is unconstitutional in three different but equally important ways.

First, Iowa's certificate-of-need requirement for outpatient surgery centers is not applied evenhandedly. Both the U.S. and Iowa Constitution guarantee equal protection and uniform operation of the laws.^[15] States are forbidden from imposing regulatory burdens unequally. Under Iowa's CON scheme, existing health facilities can expand without a certificate of need as long as the cost does not exceed \$1.5 million per year.^[16] This kind of arbitrary loophole denies Dr. Birchansky and others equal and uniform application of the law.

Second, Iowa's CON requirement for outpatient surgery centers violates the right to earn an honest living guaranteed by the U.S. and Iowa Constitutions. Iowa courts have recognized that the primary purpose of Iowa's certificate-of-need statute is to ensure that Iowans will receive necessary and adequate institutional health services in an economical manner.^[17] However, there is no rational relationship between these goals and requiring a certificate of need. Rather, the certificate-of-need requirement serves only to protect existing facilities and hospitals from competition, which is not a legitimate government interest.

And history makes clear that CON programs like Iowa's are nothing but protectionism run amok. Indeed, a 2004 joint report from the Justice Department and the Federal Trade Commission found no reliable evidence that CON laws achieve any public benefits—a situation the report found troubling in light of the clear evidence that the laws grant anticompetitive benefits to protected business interests.[18] Another study found that there is no evidence that CON regulations limit healthcare price inflation and little evidence that they reduce healthcare spending—and that the evidence suggests CON laws lead to higher healthcare costs.[19] There is even evidence that CON regulations lead to lower-quality care or, at best, have little to no effect on quality.[20] Especially at a time when healthcare costs continue to soar, Iowa patients deserve better.[21]

Third, Americans have a fundamental right to seek routine, safe and effective medical procedures from licensed professionals. Iowa's certificate-of-need requirement forces Dr. Birchansky's patients and others to pay more to receive lower quality care and risk higher rates of infections to undergo the same procedure at a hospital.

Simply put, the government cannot impose burdens like this on healthcare entrepreneurs and patients for no good reason. Patients and doctors—not state officials—are in the best position to decide which healthcare services are “needed,” and the Constitution gives them the right to do exactly that.

The Litigation Team

The Plaintiffs are represented by IJ Senior Attorney Darpana Sheth and Attorney Joshua House. Glen Downey of Downey & Mundy Law Offices, PLLC serves as local counsel.

About the Institute for Justice

The Institute for Justice is a public interest law firm that brings challenges nationwide in support of fundamental individual liberties, including economic liberty and medical self-determination.

The Institute for Justice is based in Arlington, Virginia. IJ has offices in Arizona, Florida, Minnesota, Texas, and Washington, as well as a Clinic on Entrepreneurship at the University of Chicago Law School.

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