



April 14, 2021

Senator Mia Costello  
Alaska State Capitol  
Juneau, Alaska 99801-4711

Dear Senator Costello and members of the Senate Labor and Commerce Committee:

My name is Jeffrey A. Singer. I am a Senior Fellow in Health Policy Studies at the Cato Institute. I am also a medical doctor specializing in general surgery and have been practicing that specialty in Phoenix, Arizona for over 35 years. I would like to thank you for giving me the opportunity to testify before the Senate Labor and Commerce Committee regarding SB 26, which seeks to repeal health care Certificate of Need requirements. I appreciate this opportunity to provide my perspective, as a health care practitioner and policy analyst, to assist this committee in its assessment of existing policies.

More than three decades since repeal of the 1974 federal law that incentivized states to establish "Certificate of Need" (CON) requirements before new health care facilities can develop—or existing ones can add beds or equipment—CON requirements still exist to varying degrees in 38 states. A classic example of central planning, CON commissions are heavily influenced by incumbent health care providers. Attempts to reform or repeal them are often met by fierce resistance from the incumbents who try to make the case that they only have the interests of the general public in mind. CON laws render state health care systems sclerotic and unable to rapidly adjust their infrastructure to meet the changing demands of public health emergencies. Many governors suspended CON laws during the public health emergency. The CON laws in those states and in the states where they were not suspended should be formally repealed by state legislators.<sup>1</sup>

Despite the ineffective nature of these laws, states still have a variety of CON laws on the books today. The various states differ in the type and number of restricted facilities and expenditures. For example, Ohio restricts only long-term care services while Kentucky restricts more than 24 different types of health care facilities.<sup>2</sup> The state in which I reside and practice medicine, Arizona, repealed all of CON laws except for ambulance services in 1990. This action was supported by the Arizona Hospital Association. By 1990, California, Colorado, Idaho, Kansas, Minnesota, New Mexico, South Dakota, Texas, Utah, Wisconsin and Wyoming repealed all of the CON laws.<sup>3</sup>

The certificate granting process effectively gives monopoly privileges to existing hospitals and facilities. When a new provider petitions for a certificate, established providers are usually invited to testify against their would-be competitors.<sup>4</sup> This means that some health care practices can openly challenge the right to exist of any practice that might hurt their bottom line. Indeed, hospital administrators openly admit that protection against competition thanks to CON laws has become an integral part of their business model.

Hospital administrators argue against repeal of CON laws claiming these laws allow them to generate enough revenue to provide 24-hour emergency services and uncompensated

care. Physicians and other health care practitioners also provide uncompensated care and other services. Yet state professional organizations don't argue for creating a certificate of need requirement before allowing additional doctors, nurses, psychologists, physical therapists, etc. to set up practices in a state. And they would be publicly derided if they did so.

New health care practitioners entering the state may provide competition to incumbents. This has not stunted the growth of the health care professions. Instead, it has benefitted health care consumers by increasing choice and access.

According to one health care journal, "hospitals tend to view CON restrictions favorably when they serve to exclude [competing] facilities from entering a market, but may take steps to circumvent the CON application process where their own expansion is concerned."<sup>5</sup>

One of the original purposes of CON laws was to encourage hospital substitutes. Yet ironically, 28 states now have restrictions on ambulatory care services, a common hospital substitute, that competes with traditional hospitals.<sup>6</sup>

Long-term care and hospice care can be offered either in nursing homes or through home health care services. Many states that have repealed some CON laws retain them with respect to nursing homes. Comparisons between states with some CON laws and those with no CON laws show hospice expenditures in states with CON laws are dominated by nursing homes rather than alternatives like home health care.<sup>7</sup>

Another argument in favor of maintaining CON laws that incumbents usually make is that CON laws reduce health care expenditures. This claim runs counter to economic theory, which predicts a supply restriction will increase prices. While some may argue that the increase in prices will reduce health care consumption, the third-party payer system insulates consumers from the impact of price increases, thus having little impact on utilization. With health care consumers largely insulated from price effects, reduction in health care expenditures can only be achieved by reducing availability and access to health care. In a George Mason University Mercatus Center working paper, a review of 20 academic studies found CON laws largely failed to achieve their goal of reducing health care costs, and concluded the overwhelming evidence is that CON laws are associated with higher per-unit costs and higher expenditures.<sup>8</sup>

We have seen and continue to see that countries embracing central planning fall victim to what economists call "the knowledge problem." It is impossible to predict how many ICU beds, general beds, or other health care facilities and services will be needed to serve a growing and dynamic population. Markets are the most accurate and efficient way of allocating goods and services.

With the advent of the COVID-19 pandemic, many states realized their CON laws left them unprepared for a sudden surge in demand for critical care and other health care services and straightjacketed by bureaucratic red tape. Therefore, 20 states, including Alaska, suspended their CON laws and 4 other states issued emergency certificates of need (thus bypassing the usually months-long certificate application process).<sup>9</sup> This was a tacit

admission that Certificate of Need laws are an impediment to the rapid response of the health care system to changes in society.

Lawmakers should heed the lessons provided by the public health crisis and act now to repeal CON laws and rid their health care systems of discredited central planning reminiscent of a bygone era.

Respectfully,

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<sup>1</sup> <https://www.cato.org/blog/certificate-need-laws-will-impede-preparedness-expected-surge-covid-19-cases>

<sup>2</sup> Jack Pistor, 'States Modernizing Certificate of Need Laws,' National Conference of State Legislatures Vol. 27, No. 41 (Dec. 2019), <https://www.ncsl.org/research/health/states-modernizing-certificate-of-need-laws.aspx>; National Conference of State Legislatures, (2019), 'CON State List 2019', [https://www.ncsl.org/documents/health/CON\\_State\\_List\\_2019.pdf#page=41](https://www.ncsl.org/documents/health/CON_State_List_2019.pdf#page=41)

<sup>3</sup> <https://medium.com/concentrated-benefits/how-state-certificate-of-need-con-laws-impact-access-to-health-care-b8d3ec84242f>

<sup>4</sup> <https://www.bizjournals.com/charlotte/blog/health-care/2015/01/carolinas-healthcare-asks-court-to-block-fort-mill.html>

<sup>5</sup> [http://www.healthcapital.com/hcc/newsletter/11\\_12/CON2.pdf](http://www.healthcapital.com/hcc/newsletter/11_12/CON2.pdf)

<sup>6</sup> <https://www.mercatus.org/publications/corporate-welfare/certificate-need-laws>

<sup>7</sup> Momotazur Rahman, Omar Galarraga, Jacqueline S. Zinn, David C. Grabowski & Vincent Mor, 'The Impact of Certificate-of-Need Laws on Nursing Home and Home Health Care Expenditures', *Journal of Medical Care Research and Review* (July 2015), <https://journals.sagepub.com/doi/abs/10.1177/1077558715597161>

<sup>8</sup> <https://www.mercatus.org/system/files/mercatus-mitchell-con-healthcare-spending-v1a.pdf>

<sup>9</sup> <https://pacificlegal.org/certificate-of-need-laws-covid-19/>