



INSTITUTE FOR JUSTICE

**Testimony of Jaimie Cavanaugh
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Thank you for the opportunity to submit this testimony. As you may know, the problems with certificate of need (CON) laws abound. They are a remnant of a failed federal program and serve no purpose today. The State of Alaska, this Committee, and the sponsors of this legislation are to be commended for taking action to end this harmful practice.

My name is Jaimie Cavanaugh. I am an attorney at the Institute for Justice, a nonprofit public interest law firm. One of the main areas in which IJ litigates is the economic liberty—or the right to earn an honest living. For decades, IJ has litigated and supported legislation to end CON laws. CON laws often stand in the way of entrepreneurs who want to provide new services to their communities.

Last summer I had the opportunity to write a [report](#)¹ comparing the CON laws across the country. The results showed an incoherent doctrine. For instance, many CON proponents argue that CONs are necessary to keep hospitals in rural areas, but Alabama, Florida, Kentucky, Oregon, and Washington exempt rural areas from their CON programs. That's because competition leads to more care, not less. CONs were also originally imagined to apply to facilities with large capital investments. Today, CONs apply to everything from imaging scanners to simply adding burn care or neonatal intensive care services at hospitals. There is no reason to limit these services because there is no risk of overutilization. No one will be in a neonatal intensive care unit by mistake. In fact, it is a place everyone wants to avoid.

My report also found that 25 out of 39 CON jurisdictions were forced to quickly suspend or loosen CON requirements to allow healthcare providers the flexibility to respond to the pandemic. If CON laws provide all the benefits proponents claim, one would assume we would need more of them during the pandemic, not fewer.

Although the statistics and empirical evidence all paint a clear picture of why CON laws are harmful, I would like to share two personal stories about IJ clients who can't earn a living the way they would like because of CON laws. And it is not just the clients who suffer. Their communities suffer too from the lack of access to tailored and affordable care.

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Louisville, Kentucky. Dipendra Tiwari wants to provide home health care to refugees around Louisville in a language they understand. But the state won't let him because it says that service isn't needed. How can that be? The answer is a government permission slip called a CON.

Nearly 100,000 Nepali speakers have been welcomed to the United States after ethnic tensions forced them out of their homes in the Himalayan country of Bhutan. Thousands of these refugees resettled in Louisville. And, just like anyone else, they need health care as they age. This situation gave Dipendra, a native Nepali speaker, an idea for a valuable service: a home health care agency catering to the refugee population, offering service in their own language. So, last year, Dipendra formed Grace Home Care and paid a \$1,000 fee to submit his plan to the state.

That's when things went wrong. A \$2 billion health care conglomerate—Dipendra's future competitor—stormed in to argue that there was no need for another home health agency. Based on some back-of-the-envelope estimates, and ignoring the need for Nepali-language care that Dipendra was trying to address, Kentucky agreed. It refused to issue a certificate of need and rejected Dipendra's application.

And that's exactly how certificates of need are supposed to work. Originating in a long-debunked effort to control costs, in practice, all they do is prevent new businesses from competing with established ones. They are why in Kentucky's 120 counties new home health agencies are allowed in only six. They are why Louisville itself has only nine home health agencies for 26,000 patients.

And, to be clear, CON laws have nothing to do with ensuring health or safety (which are covered by other laws). Rather, the whole point of current CON laws is to benefit established providers by stifling competition.

But giant health care conglomerates don't need the government to protect their business. And entrepreneurs shouldn't lose their shot just because someone else happened to get there first.

New Bern, North Carolina. Dr. Singleton's mission is to provide the best possible care for his patients at a price they can afford. He provides comprehensive eye care—everything from routine checkups to treatment for infections or disorders to surgery. He can do most of this at his own facility, Singleton Vision Center. However, he is legally required to perform surgeries, like cataract surgery or corrective surgery, at the local hospital, CarolinaEast, which charges thousands of dollars more in facility fees.

Dr. Singleton believes this system is needlessly inconvenient and expensive for his patients. For instance, he can perform a cataract surgery at his office for under \$1,800 total (facility and surgery fee included), while CarolinaEast charges almost \$6,000 for its facility fee alone. Dr. Singleton would like to perform all of his surgeries at his office and save his patients

thousands of dollars. Performing outpatient eye surgeries at Dr. Singleton's facility is also just as safe as performing them at a hospital. The only thing standing in Dr. Singleton's way is a CON.

At the moment, Dr. Singleton cannot even begin the process of applying for a CON. Under North Carolina's CON law, providers may only apply for a CON to offer new services or buy new equipment for which there is a predetermined "need" in their area for the coming year. Those determinations are made by the North Carolina Department of Health and Human Services in conjunction with the North Carolina State Health Coordinating Council using an overly simplified formula. There hasn't been a "need" for any kind of new surgery center in Dr. Singleton's community for at least a decade, so there is no option for him to even begin the process of applying for a CON.

These examples demonstrate just how much power CON laws give incumbent CON holders. They also demonstrate how CON laws cause most healthcare companies and entrepreneurs to give up before even applying for a CON. This leads to less innovation, leaving patients with fewer options.

As it stands, the current system allows the big healthcare conglomerates to stomp out newcomers. But instead of stacking the deck against newcomers, Alaska should welcome new providers and innovative services. This will likely decrease costs and give patients more options. And Alaska has the option to do just that—by supporting SB 26. Thank you again for the opportunity to testify.

¹ <https://ij.org/wp-content/uploads/2020/08/Conning-the-Competition-WEB-08.11.2020.pdf>