ALASKA STATE LEGISLATURE
SENATE LABOR AND COMMERCE STANDING COMMITTEE
April 21, 2021
1:30 p.m.

MEMBERS PRESENT

Senator Mia Costello, Chair
Senator Joshua Revak, Vice Chair
Senator Peter Micciche
Senator Gary Stevens
Senator Elvi Gray-Jackson

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 26
"An Act repealing the certificate of need program for health care facilities; making conforming amendments; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 26
SHORT TITLE: REPEAL CERTIFICATE OF NEED PROGRAM
SPONSOR(s): SENATOR(s) WILSON

01/22/21	(S)	PREFILE RELEASED 1/8/21
01/22/21	(S)	READ THE FIRST TIME - REFERRALS
01/22/21	(S)	HSS, L&C
03/25/21	(S)	HSS AT 1:30 PM BUTROVICH 205
03/25/21	(S)	Heard & Held
03/25/21	(S)	MINUTE(HSS)
04/07/21	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)
04/07/21	(S)	Scheduled but Not Heard
04/08/21	(S)	HSS AT 1:30 PM BUTROVICH 205
04/08/21	(S)	Moved SB 26 Out of Committee
04/08/21	(S)	MINUTE(HSS)
04/09/21	(S)	HSS RPT 1DP 3NR
04/09/21	(S)	DP: HUGHES

04/09/21	(S)	NR: BEGICH, REINBOLD, COSTELLO
04/21/21	(S)	L&C AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

SENATOR DAVID WILSON
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of SB 26.

GARY ZEPP, Staff
Senator David Wilson
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT:

DR. MATTHEW MITCHELL, Economist and Senior Research Fellow
Mercatus Center
George Mason University
Fairfax, VA

POSITION STATEMENT: Testified on SB 26 by invitation.

DR. DARCY BRYAN, Practicing Physician; Senior Affiliated Scholar
Mercatus Center
George Mason University
Fairfax, VA
POSITION STATEMENT: Testified by invitation on SB 26.

DR. JEFFREY SINGER, Senior Fellow in Health Policy Studies
Cato Institute
Washington, DC
POSITION STATEMENT: Testified by invitation on SB 26.

DAVID BALAT, Director
Right on Healthcare Initiative
Texas Public Policy Foundation
Austin, Texas
POSITION STATEMENT: Testified in support of SB 26.

ED MARTIN, representing self
Sterling, Alaska
POSITION STATEMENT: Testified in support of SB 26.

PATRICK SHIER, Alaska Membership Representative
Pacific Health Coalition
Wasilla, Alaska

POSITION STATEMENT: Testified in support of SB 26

WENDY SCHRAG, Fresenius Kidney Care
Juneau, Alaska
POSITION STATEMENT: Testified in opposition to SB 26.

BETHANY MARCUM, Alaska Policy Forum
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SB 26.

DR. ALICIA PLEMMONS, representing self
Edwardsville, Illinois
POSITION STATEMENT: Testified in support of SB 26.

YVONNE ITO, representing self
Glenallen, Alaska
POSITION STATEMENT: Testified in support of SB 26.

SARAH HETEMI, representing self
Anchorage, Alaska
POSITION STATEMENT: Testified in support of Sb 26.

JARED KOSIN, President and CEO
Alaska State Hospital and Nursing Home Association (ASHNA)
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to SB 26.

KAREN PERDUE, Volunteer Foundation Trustee
Foundation Health Partners (FHP)
Greater Fairbanks Community Hospital Foundation
Fairbanks, Alaska
POSITION STATEMENT: Testified in opposition to SB 26.

RYAN MCKEE, State Director
Americans for Prosperity-Alaska (AFP-AK)
Wasilla, Alaska
POSITION STATEMENT: Testified in support of SB 26.

ACTION NARRATIVE

1:30:09 PM
CHAIR MIA COSTELLO called the Senate Labor and Commerce Standing Committee meeting to order at 1:30 p.m. Present at the call to order were Senators Gray-Jackson, Micciche, Stevens, Revak, and Chair Costello.

SB 26-REPEAL CERTIFICATE OF NEED PROGRAM

1:30:56 PM
CHAIR COSTELLO announced the consideration of SENATE BILL NO. 26 "An Act repealing the certificate of need program for health care facilities; making conforming amendments; and providing for an effective date."

1:31:33 PM
SENATOR DAVID WILSON, Alaska State Legislature, Juneau, Alaska, sponsor of SB 26, stated that the healthcare services in Alaska are the most expensive in the world, but that does not mean that it has the elite healthcare services one would expect with the highest costs. He thanked the individuals who were willing to testify on the bill and acknowledged that some people may be reluctant to come forward because of the larger players involved in this issue. This is the fifth year he has introduced legislation to repeal certificate of need (CON) and his office has heard from many who fear losing hospital privileges or worry that it would hurt their relationship with providers that have CON.

SENATOR WILSON stated that Senate Bill 26 repeals Alaska's certificate of need (CON) program but delays implementation for three years to ease the transition. His office has examined the historical and current arguments for continuing CON but the evidence heavily favors elimination. Alaska's CON program does not provide the economic justification to deprive consumers of the benefits of a more open market. He said healthcare will always be heavily regulated and it should be to ensure that doctors are properly trained and licensed.

SENATOR WILSON highlighted that the intent in federally mandating CON in 1974 was to cut down on inflation-driven healthcare costs. At the time, reimbursement services were on a cost-plus basis, which provided strong incentive for providers to expand their healthcare facilities. When the reimbursement system shifted to fee for service, the federal government determined the CON program did not effectively restrain healthcare costs and mandated its repeal in 1987. Since then, many states have either repealed their CON programs altogether or modified them to cover just one or two services. He deferred further introduction of SB 26 to his staff, Gary Zepp.

1:36:09 PM
GARY ZEPP, Staff, Senator David Wilson, Alaska State Legislature, Juneau, Alaska, stated that SB 26 seeks to repeal

Alaska's certificate of need program and directs the Department of Health and Social Services (DHSS) to develop regulations once the bill is enacted. The bill delays implementation for three years to allow time for businesses and banks to recoup their investments in healthcare facilities and services. The passage of SB 26 will not change the oversight of licensing and accreditation. Additionally, an entity that has existing CON activity at the time of repeal would remain subject to CON conditions. SB 26 has an effective date of July 1, 2024.

MR. ZEPP said SB 26 will not magically fix all of Alaska's healthcare challenges but it is a large piece of the puzzle. The reasons to repeal CON include price and quality, allowing new entrants, encouraging innovation and technology, removing barriers, allowing healthcare competition, slowing medical tourism to keep healthcare dollars in the Alaska economy, increasing employment opportunities in healthcare by allowing a free market, and providing additional options for healthcare providers.

He said the current CON provides exemptions for just some providers and allows healthcare venders to manipulate and circumvent the process, but opening Alaska for all businesses would allow opportunities for fair and open competition and a level playing field.

1:38:38 PM
MR. ZEPP began his PowerPoint presentation giving thanks to the valued healthcare providers in Alaska's communities. He said SB 26 seeks to repeal Alaska's CON program laws but it does not intend to disrespect or minimize how important healthcare providers are to Alaskans. He gave particular thanks for their work during the COVID-19 pandemic.

MR. ZEPP related his intention to focus on just a few slides in the presentation to allow time for the invited testimony. These national experts include healthcare economists, national researchers, and healthcare providers who have the data and experience in healthcare to support the repeal of the Alaska certificate of need. After more than 40 years of study, the research shows that states that do not have a CON program have better quality of care, improved healthcare outcomes, increased access to healthcare providers, and better access to new technologies compared to states that still have a CON program.

MR. ZEPP highlighted that the states that have repealed their CON laws entirely, represent over 40 percent of the population

or about 131 million Americans. These states have functioning healthcare markets and research shows that the cost of CON exceeds the benefits, particularly for consumers.

1:40:15 PM
MR. ZEPP displayed the map on slide 4 and noted that the topic of CON laws in Florida and Georgia came up during a hearing in the previous committee. He clarified that those states have partially repealed their CON programs. He turned to slide 5 and explained that it is a summary of the legislative history of Alaska's CON program. [The first law was enacted in 1976 and the last was in 2004.]

He paraphrased excerpts of slide 7 about why to repeal Alaska's CON. The slide read as follows:

> The Federal Trade Commission, the Dept. of Justice, the Mercatus Center, and many other researchers have studied this issue for over 4 decades and some have even testified here in our legislature supporting the repeal of the CON.
>
> Here are a few points (data & research derived from the various studies) as to why we should repeal CON:
>
> • CON programs limit the introduction and expansion of medical services & equipment, rehabilitation centers, nursing home beds, and medical imaging technologies;

1:41:27 PM
> • **Rural hospital closures**: The data and research shows that the closures are related to Low Patient Volume, Challenging Payer Mix (Medicare & Medicaid patients, which pay less), Geographic Isolation (located far away from population centers), and Workforce shortages. None of this has to do with whether you have a CON or not;
> • **High-quality health care**: Data and research indicates that deaths from treatable complications following surgeries and mortality from heart failure, pneumonia and heart attacks are significantly higher in CON states than non-CON states; and,
> • **Charity care**: Studies have shown, there is not evidence that charity care is higher in CON states than non-CON states.
> • **Racial Disparities**: According to research, racial disparities seems to increase in CON states.

1:41:48 PM
MR. ZEPP mentioned the Emergency Medical Treatment and Active Labor Act (EMTALA, otherwise known as charity or indigent care. He said there is no evidence that charity care is higher in CON states versus non-CON states. According to the American College of Emergency Room Physicians, emergency care in the U.S. is just 2 percent of all medical costs. He pointed out that the CON concept from the 1970s is to charge private insurers 2-3 times the amount for services versus uninsured patients so hospitals can offset that uncompensated care. In addition, the Department of Health and Social Services (DHSS) allocates the federal Disproportionate Share Hospital (DSH) Payments to hospitals throughout the state to help with uncompensated care. The state distributed $17.6 million in FY2017, $25 million in FY2019, and $20.8 million in FY2020.

He said proponents also talk about the increased Medicare and Medicaid costs if CON is repealed, but there is no evidence to support that claim. He pointed out that the healthcare markets for the 131 million Americans living in states that repealed CON function just fine.

1:43:25 PM
SENATOR WILSON pointed out that Alaska has one of the most profitable healthcare margins in the world. Average profitability is about 6.9 percent whereas a hospital in Anchorage has a 20 percent profit margin and his hospital in MatSu has a profit margin of over 24 percent. He said the committee will hear anecdotal data but he can attest that SB 26 is one of the most researched and heavy in empirical data of any bill in the legislature today. Volumes speak to the importance of repealing CON, he said.

MR. ZEPP highlighted that the Federal Trade Commission, the Department of Justice, the Mercatus Center and others have testified in this committee to support the repeal of CON.

1:44:44 PM
MR. ZEPP paraphrased the text on Slide 8 that read as follows:

> Why would Alaska's health care providers not want to open Alaska to a free market? Here are some data examples to think about:

- Alaska ranks the highest in the nation at $11,064 per capita in 2014; (Medicaid & Medicare data was last released

in June 2017, which covers 1991-2014. The next release is scheduled for 2022);

- The total Anchorage consumer price index was up 77% from 1991- through 2017, but the medical care part of the index was up 210% - Nearly three times faster than the prices in the overall CPI;

    - Hospital margin averages in Alaska run at 15.6%, Anchorage margins average 20.6%, that's 5% higher than San Francisco, which is the next highest in the country;

    - Hospital Margins can be as much as 223 % higher than the lower 48 states; and,

    - Medicare Fee Schedule for Diagnostic Radiology (imaging) in Alaska increased from 491% in 2014 to 533% in 2016 (percentage above the average reimbursement rate).

MR. ZEPP reported that 25 jurisdictions suspended or loosened CON requirements during the COVID-19 pandemic. This increased hospital bed capacity and freed necessary equipment. He pointed out that CON regulations were suspended from March 31, 2020 to February 15, 2021. These laws and regulations are touted as necessary for health and safety but their suspension for more than 10 months seemed to work just fine. It begs the question of why are CON laws needed.

1:46:11 PM
MR. ZEPP stated,

> We believe in a free market economy where Alaskans decide which products and services will succeed and which ones will fail. We believe in private sector businesses and local control of resources and property. We believe that Alaskan consumers should have the choice on selecting a healthcare provider. This creates competition and assures that businesses have to compete for your hard-earned dollars.

He asked the committee to consider the increased opportunities if fewer Alaskans had to seek medical care out of state because of the high cost of healthcare in the state. He pointed out that the Alaska economy is losing those dollars. For businesses, repealing CON will reduce the highest line item on their balance

sheet, healthcare. He said over 40 percent of businesses in America are self-insured because third-party insurance costs too much. He emphasized that CON has distorted the healthcare market, which does not benefit Alaskans or healthcare workers. He asked the committee to support SB 26 and repeal government control of healthcare options in Alaska.

1:47:53 PM
CHAIR COSTELLO advised that she would take committee questions before the invited testimony. She mentioned the legislation to retroactively continue the disaster declaration and continue it to December 31, 2021. She said she understood that hospitals want to continue operating under the disaster declaration status but Mr. Zepp indicated that the CON laws and regulations were waived in 2020. She asked the sponsor if that was correct.

SENATOR WILSON confirmed that the CON laws and regulations were waived for 11 months.

CHAIR COSTELLO summarized that if the disaster declaration is extended, CON would essentially be repealed, but if the disaster declaration ended on February 15, 2021 and SB 26 were to pass, there would be three years to transition to no certificate of need. She asked the sponsor if he agreed.

SENATOR WILSON answered yes, but if the disaster declaration bill that is currently in the Senate Rules Committee were to pass, either the commissioner or governor would need to waive the CON regulations again.

CHAIR COSTELLO asked if waiving the CON regulations for 11 months had any negative effects.

SENATOR WILSON said he was aware of just one application during that timeframe and it went through the regular process. His research found that businesses that had the opportunity to come to Alaska during that 11 month period did not come when the CON regulations were waived.

CHAIR COSTELLO referenced his statement that the federal government mandated states repeal their CON laws and asked if that was done through legislation, resolution, or some other format.

1:51:27 PM

SENATOR WILSON said CON was mandated in 1974 in the [National Health Planning and Resources Development Act] and then repealed in 1987.

SENATOR GRAY-JACKSON summarized that the federal government mandated that all states have CON programs before 1987.

SENATOR WILSON agreed.

SENATOR GRAY-JACKSON asked if it was a state's decision whether or not to continue their CON program.

SENATOR WILSON answered yes.

MR. ZEPP added that when the CON law was enacted, the federal government tied federal funding to states to the passage of CON laws. This resulted in every state but Louisiana passing a certificate of need law.

SENATOR GRAY-JACKSON summarized that states that wanted to receive federal funds had to pass a CON law.

MR. ZEPP replied that is correct.

SENATOR GRAY-JACKSON asked for a one sentence explanation of how a CON program contributes to higher health care costs.

MR. ZEPP suggested that she imagine what the price of groceries would be if the government mandated that the greater Juneau area could have just one grocery store. The principle is that limiting supply causes costs to rise.

SENATOR GRAY-JACKSON commented that it's supply and demand.

1:53:31 PM
SENATOR MICCICHE said he appreciates the bill and discussion but he believes there should be some discussion about the reason for a certificate of need program. He posited that CON was particularly important in Alaska when it passed initially because it encouraged construction of a facility and ensured there were not too many competing interests. He cited the example of the hospital in his community evaluating whether or not to expand. He said this may have been more important when Alaska was much younger, but he would like to hear about the history, purpose, and value of CON as initially envisioned.

SENATOR WILSON said he would not go into the history, but he would point out that hospitals do not make money from their emergency departments because they are required to treat EMTALA or indigent care patients. They rely on their other surgery or ambulatory services to offset those losses and they fear losing those profit margins to competing facilities. He also pointed out the loopholes in CON that allow ambulatory surgery centers under a dollar threshold that are privately owned through physician funding or the exempt Indian Health Service (IHS). To Senator Micciche's example about the benefit of CON to a hospital in his community looking at expanding, he highlighted that today a hospital in Anchorage could spend $2 million to fight that CON effort because they may want to expand into that community. He said that is not how the open market should work here in Alaska.

1:58:35 PM
MR. ZEPP added that healthcare providers will say they do not like CON if they cannot open facilities, but they do like it when it blocks new facilities and protects the incumbents. He said it should be like any other industry where the economics drive the free market.

CHAIR COSTELLO turned to invited testimony. She introduced Dr. Matthew Mitchell from the Mercatus Center and asked him to describe the Center and who provides its backing.

2:00:01 PM
DR. MATTHEW MITCHELL, Economist and Senior Research Fellow, Mercatus Center, George Mason University, Fairfax, VA, stated that the Center is a nonprofit research center that is funded primarily by donations from individuals and foundations and about one percent from corporations. The research and funding arms of the Center are separated by design so he does not have many details about the funding. This allows the researchers to select their own topics and come to their own conclusions.

He said the federal government at one time encouraged states to adopt CON laws through federal matching funds. The effort started in 1974 with the National Health Planning and Resources Development Act, but when evidence showed that CON laws were failing to achieve their goals, a bipartisan Congress repealed the federal mandate. Since then about 15 states have repealed their CON programs and several others partially repealed the law. Currently, about 40 percent of Americans live in a diversity of states that have no certificate of need for healthcare. Health economists for several decades have tracked

outcomes in these non-CON states and compared them to CON states like Alaska. Controlling for observable and nonobservable factors, the research concluded that CON laws do not achieve their stated goals. In fact, they seem to make matters worse. In states that have repealed their CON laws, patients enjoy greater access to care, higher quality of care, and lower cost care.

2:02:57 PM
DR. MITCHELL described the data on access as overwhelming. In non-CON states, controlling for other factors, there are more hospitals per capita, more surgery centers per capita, more rural hospitals, more rural ambulatory surgery centers per capita, and more hospital beds, even during the pandemic. They found that states that had repealed their CON laws a while ago were in a better position to handle the pandemic than those states that temporarily suspended their CON laws. Non-CON states have more dialysis clinics, patients do not have to travel as far to obtain care, and there are smaller disparities in the provision of care to communities of color.

On average and controlling for other factors, he said patients tend to receive higher quality of care in non-CON states. For example, one study found that nursing home patients were less likely to be physically restrained and more likely to benefit from higher staffing ratios. Another study found that patients in non-CON states experienced lower mortality rates after heart attacks, heart failure, and pneumonia. Readmission after heart attacks and heart failures were lower and patients were less likely to die from post-surgery complications. Yet another study found that all-cause mortality is about 5 percent lower in non-CON states. He highlighted that payers also spend less per procedure and per patient in non-CON states.

DR. MITCHELL stated that the best option in terms of access, quality, and cost seems to be to eliminate the CON program altogether. Short of full repeal, he suggested Alaska consider reforms that other states have adopted. For example, the state might eliminate CONS that restrict access to services used by vulnerable populations such as psychiatric services, less used services such as renal failure and radiation therapy, or to low cost modes of care such as ambulatory surgery centers.

2:05:32 PM
He mentioned the options to ease the administrative burden of CON laws. For example, Alaska might reduce fees in the application process or require incumbents to pay the cost of the application if they are unsuccessful in challenging an entrant's

application. He said it is the incumbent's role to block a new entrant's CON application and in part is why CON laws are so suspect for economists and antitrust authorities in the U.S. Department of Justice and the Federal Trade Commission. For decades, those agencies have taken the position that CON laws are anti-competitive and harmful to consumers.

2:06:21 PM
DR. MITCHELL suggested that the CON criteria could also be changed. For example, a CON application should not be rejected to prevent duplicative services because that essentially guarantees a monopoly of the local market. Finally, policy makers could consider options that would increase the transparency of the CON program and make legislative oversight easier. For example, the board could be required to regularly disclose its CON approval rates and the share of applications opposed by competitors. Or the board could be required to ask applicants to estimate their costs to apply for a CON and then regularly report the numbers to the public.

2:06:58 PM
DR. MITCHELL emphasized that the bulk of evidence conducted over several decades by medical economists suggest that the best option in terms of access, quality, and cost would be full repeal. This is based on the experience of the 40 percent who work, live, and seek care in states that do not require a certificate of need for healthcare.

SENATOR STEVENS asked him to talk about states that have fully repealed their CON laws and those that adopted a partial or stepped approach to repeal.

DR MITCHELL replied the most common stepped approach to appeal is to eliminate specific CONs. For example, West Virginia, Florida, Indiana, and Ohio retained a few versions of CON for things like nursing homes. Another popular approach is to do a full repeal over a specific time. Indiana did that through a stepped approach over five years. Another possibility would be to direct the CON board to approve an increasing number of CON applications each year. He said he was not aware of a state that had done that but it would seem to be a way to remove some hesitancy about a full repeal.

CHAIR COSTELLO invited Dr. Bryan to provide her testimony.

2:09:51 PM

DR. DARCY BRYAN, Practicing Physician; Senior Affiliated Scholar, Mercatus Center George Mason University, Fairfax, VA, stated agreement with the previous testimony that a diversity of states have repealed their CON laws since 1987. She said the main purpose of certificate of need has nothing to do with quality or diversity of choice for patients or healthcare providers. Rather, it is about a committee determining whether a healthcare service is economically valuable.

2:10:50 PM
DR. BRYAN advised that her testimony would mostly be from the perspective of a practicing physician who works with hospitals and surgery centers. She said there is strong evidence that states without CON have 30 percent more hospitals per capita, 14 percent more ambulatory surgery centers, and more hospice and dialysis centers. There is also good evidence that quality improves through competition and diversity of options for patients.

DR BRYAN said she has practiced in states that either significantly reduced or eliminated their CON laws entirely so she can testify that she has had the ability to direct her patients to the surgery center or hospital that she thought would provide the best level of care for their surgery or condition. She has held multiple hospital privileges, which provided flexibility in her decision-making and enabled her to have a significant voice in medical staff meetings. She said healthcare administrators are primarily business men and women whose job is to advocate for the success of the institution for which they work. Physicians are granted permission to work in their facility and in turn the facilities reach out to physicians hoping that they will bring their patient population to the facility for healthcare and referrals. In turn, providers wish to practice in a facility that will provide quality and patient satisfaction. This reflects well on them professionally and their ability to make certain their patients are well cared for.

DR. BRYAN offered her perspective that practicing in a region with a monopoly generally leads to an administration that is resistant to change in investing in terms of quality and care. She said you can imagine if you're the only surgery center and a provider wants you to buy a particular piece of expensive operative equipment that is shown to have better outcomes surgically but is less "cost effective" than a cheaper piece of equipment. The surgery center can refuse and the provider has nowhere else to go. She said she has seen doctors advocate for

new equipment purchases with the ability to say they would not operate in a surgery center or hospital that was not amenable or responsive to what the doctor recommended. She offered her perspective that advocacy is an empowerment for physicians and much more effective in a competitive environment in terms of purchasing new equipment to improve operating room nurse staffing ratios and quality metrics.

2:14:24 PM
DR. BRYAN highlighted that the relatively new phenomena of hospitals purchasing physician practices increased 128 percent from 2012 to 2018. This makes it unlikely that a physician in a community that has just one hospital would challenge the hospital's quality metrics, staffing, or equipment purchases. Leaving town is a more likely option. She offered her belief that it disempowers healthcare providers to have just one hospital or surgery center in a community.

DR. BRYAN said her last point is that the COVID-19 pandemic was completely predictable but nobody did predict it in terms of setting up adequate ICUs or hospital beds. It is clear that the US lacks flexibility in healthcare supply to respond to a disaster. She believes more pandemics should be expected and healthcare providers should have more freedom at the community level to make decisions about what they need in terms of ICU beds, ventilators, hospital beds. Having to run these decisions through an administrative bureaucracy before moving forward hinders a quick and flexible response to patient care. She said she is essentially saying that CON laws are an impediment to physicians striving to provide the highest quality of care for their patients at affordable prices. CON laws also lead to an inability and lack of flexibility to respond to impending healthcare disasters.

2:16:56 PM
CHAIR COSTELLO noted that she mentioned that healthcare quality improves without certificate of need laws and asked how she measures quality.

DR. BRYAN replied the metrics are the morbidity and mortality rates. For example, preventative post-operative deaths. Statistically, surgery has a recognized mortality rate and you can compare those rates across hospitals to see how one patient population performs post-operatively in a certain hospital versus another. In the field of obstetrics, she has seen high cesarean section rates versus other hospitals that have lower

rates of operative deliveries, blood loss, loss of life through pre-eclampsia, or other preventable problems.

SENATOR STEVENS asked if it is possible to compare morbidity in CON hospitals versus non-CON hospitals during the COVID-19 pandemic.

DR. BRYAN said she knows of studies that show that states with CON laws have statistically higher mortality rates. She deferred further comment to Dr. Mitchell.

2:19:06 PM
DR. MITCHELL reported that three healthcare economists conducted a study called the "Certificate of Need Laws and Healthcare Utilization during the COVID-19 Pandemic." They found that during the pandemic, there were higher rates of septicemia, diabetes, chronic lower respiratory disease, influenza, pneumonia, and Alzheimer's disease in CON states versus non-CON states. The states with CON laws also had higher COVID-19 deaths during the pandemic.

CHAIR COSTELLO asked him to send the study or point to where the committee could find it.

SENATOR MICCICHE expressed interest in seeing the data that Dr. Mitchell and Dr. Bryan referenced and restated his original question. Why was there CON originally?

CHAIR COSTELLO invited Dr. Singer to testify and to explain what the Cato Institute is and how it receives its funding.

2:21:48 PM
DR. JEFFREY SINGER, Senior Fellow in Health Policy Studies, Cato Institute, Washington, DC, stated that the Institute is a nonpartisan public policy research institute that receives no government funding. The majority of its funding comes from individual donors. He added that he is also a general surgeon in private practice in Phoenix, Arizona.

2:22:21 PM
DR. SINGER said he appreciates the opportunity to offer his perspective on certificate of need laws. Responding to an earlier question, he related that in the early 1970s, Connecticut and New York experimented with CON laws with the idea that reducing healthcare facilities would help reduce overall healthcare costs. In 1974, the federal government passed a law to incentivize states to adopt CON laws by providing

funding. It has been more than three decades since Congress repealed incentive, but CON laws still exist to varying degrees in 38 states.

2:23:13 PM
DR. SINGER described CON laws as a classic example of central planning that is heavily influenced by incumbent healthcare providers. State healthcare systems are unable to adjust their infrastructure rapidly to meet the changing demands of public health emergencies. Despite being ineffective, states still have a variety of CON laws on the books. For example, Ohio restricts only long-term care services while Kentucky restricts more than 24 different types of healthcare facilities. Arizona, where he resides and practices medicine, repealed all its CON laws except for ambulance services in 1990. The Arizona Hospital Association supported that action and Arizona healthcare providers have not regretted the repeal.

2:24:10 PM
DR. SINGER said by 1990, California, Colorado, Idaho, Kansas, Minnesota, New Mexico, South Dakota, Texas, Utah, Wisconsin, and Wyoming all repealed there certificate of need laws. He agreed with previous testimony that these laws essentially give monopoly privileges to existing hospitals and facilities. Further, established providers are invited to give testimony when a new provider petitions for a certificate. This means some healthcare practices can openly challenge the right to exist of any practice that may hurt their bottom line. Indeed, hospital administrators openly admit that protection against competition due to CON laws has become an integral part of their business model. He said they argue that CON laws allow the hospital to generate enough revenue to provide 24-hour emergency services and uncompensated care, but physicians also provide 24-hour emergency services and uncompensated care yet state professional organizations do not argue in favor of creating a CON requirement before allowing more doctors, nurses, psychotherapists, physical therapists and others to set up practices in a state. And they would and should be publicly derided if they did so. New healthcare practitioners entering a state may provide competition to incumbent healthcare practitioners but this has not stunted the growth of the healthcare profession, he said. Instead, it has benefited healthcare consumers by increasing choice and access.

DR. SINGER said one of the original purposes of CON laws was to encourage hospital substitutes but 28 states now have restrictions on ambulatory care services, which are a common

hospital substitute that compete with traditional hospitals. Long-term care and hospice care can be offered either in nursing homes or through home healthcare services. Comparisons between states with CON laws and those with no CON laws shows that hospice expenditures in states with CON laws are dominated by more costly nursing homes rather than alternatives like home healthcare. Incumbents often claim CON laws reduce healthcare expenditures. But this claim runs counter to economic theory, which would predict that a supply restriction will increase prices. While some may argue that the increase in prices will reduce healthcare consumption, the third-party payer system insulates consumers from the impact of price increases thus having little impact on utilization. With healthcare consumers largely insulated from price affects, reductions in healthcare expenditures can only be achieved by reducing the availability to access to healthcare.

2:26:52 PM
DR. SINGER confirmed Dr. Mitchell's report that a Mercatus Center review of 20 academic studies found that CON laws largely failed to achieve the goal of reducing healthcare costs and concluded that the overwhelming evidence was that CON laws are associated with higher per unit costs and higher expenditures. He said governments that embrace central planning, fall victim to what economists call the "Knowledge Problem." It is impossible to predict how many healthcare facilities and services will be needed to serve a growing and dynamic population. Markets are the most accurate and efficient way of evaluating goods and services. With the advent of the COVID-19 pandemic, many states realized that their CON laws left them unprepared for a sudden surge in demand for critical care and other healthcare services and 20 states, including Alaska, suspended their CON laws. He said this was a tacit admission that CON laws impede the rapid response of the healthcare system to changes in society. He suggested that Alaska lawmakers heed the lessons the public health crises provided and act to repeal CON laws and rid the state's healthcare system of discredited central planning reminiscent of a bygone era.

CHAIR COSTELLO asked the testifiers to provide their testimony and materials in writing.

2:28:47 PM
CHAIR COSTELLO opened public testimony on SB 26.

DAVID BALAT, Director, Right on Healthcare Initiative, Texas Public Policy Foundation, Austin, Texas , stated that despite

CON's underlying assumption that excess capacity of healthcare facilities results in inflated healthcare prices, the findings on average are that this regulation does the exact opposite. He pointed out that it is next to impossible for a patient to see a list of prices for services a hospital offers even though a 2020 national study found that nine out of ten people believe all healthcare prices should be disclosed. Despite a federal law that requires hospitals to post their negotiated rates, the rate of compliance for hospitals in Alaska is 21 percent, which is among the lowest in the nation. The message clearly is that they do not want patients to know the prices they negotiated with insurers and that the negotiated rates directly attributed to the regulation that protects them from competition. He pointed out that Alaska and 24 other states suspended CON laws in the wake of the COVID-19 pandemic and emphasized that maintaining this restrictive law will continue to artificially limit the number of providers by requiring businesses to prove their services are needed. This is contrary to a market-based economy where the customer provides that feedback, not the existing competitors.

MR. BALAT concluded his comments highlighting that despite Alaska approving all recent CON applications, none of the terrible things the hospital association said would happen has happened. He asked the committee to look favorably on SB 26.

2:31:25 PM
ED MARTIN, representing self, Sterling, Alaska, testified in support of SB 26. He said quality and profit do not always go hand-in-hand, free enterprise and capitalism is what America is about, and healthcare costs will go down with more competition. He noted that the evidence shows that centralization and planning has been expensive. He did not believe the state should fear more free enterprise and that it was not necessary to go back to 1965 and figure out why healthcare costs have risen so dramatically. He concluded his testimony by suggesting the committee move on and get the business done.

2:33:21 PM
PATRICK SHIER, Alaska Membership Representative, Pacific Health Coalition, Wasilla, Alaska, stated that PHC assists a coalition of more than 50 self-funded health plans to find the best price and value in quality healthcare. By leveraging competitive principles, these member plans saved more than $500 million in 2019. He stated support for SB 26 and measures that enlist the power of free markets in the pursuit of better healthcare and pricing. He reminded the members of the 2019 PHC-sponsored Lunch

and Learn that featured the authors of the book "Overcharged: Why Americans Pay Too Much For Healthcare." The authors made a compelling case that distortions of market forces almost always result in negative outcomes. He cited the example of the federal measure prohibiting the reimportation of insulation in 1998. The effect was a tenfold increase in price. While government intervention is sometimes warranted, he said certificate of need has outlived its usefulness and created monopolistic barriers to entry in an industry that is critically valuable to Alaskans. He concluded that repealing CON is a necessary step in unraveling the many distortions in the healthcare industry and helping all stakeholders take a fresh look at proving high quality cost-effective healthcare delivery in Alaska. He urged passage of SB 26.

2:35:43 PM
WENDY SCHRAG, Fresenius Kidney Care, Juneau, Alaska, Testified in opposition to SB 26. She advised that FKC provides dialysis services to about 325 patients in 11 clinics in Alaska. They support CON laws, which have established a long history of stability for reputable dialysis providers and investments in their clinics and equipment. Responding to previous testimony that non-CON states have more dialysis clinics, she said she lives in a non-CON state and the two dialysis clinics near her house operate at 50 percent capacity and are open just three days a week. They are closed the rest of the week. She also noted that FKC had to close a new dialysis clinic in a nearby community when a third dialysis provider moved in. She explained that dialysis clinics remain solvent by balancing the current population of needs with the expected growth of needs. She highlighted that CON supports access to care in outlying areas but warned that rural clinics in Alaska could potentially close or not open in the first place without CON. The dialysis clinic in Juneau for example has just 19 dialysis patients but FKC knows it will maintain that patient base because of CON laws. The home dialysis training in Juneau had to close however because of low patient numbers. She noted that the Soldotna clinic is in the same situation. She warned that without CON laws, providers may be reluctant to enter outlying areas. She reiterated support for CON laws and opposition to SB 26.

2:38:39 PM
BETHANY MARCUM, Alaska Policy Forum, Anchorage, Alaska, stated that the Alaska legislature and 23 other states suspended requirements for some certificates of need during the COVID-19 pandemic. She described it as the government getting out of the way to allow the timely delivery of essential healthcare

services. She said this policy should be extended and the requirements for burdensome CONs should be repealed in Alaska. Requiring entrepreneurs to prove their services are needed instead of allowing the free market to work makes it difficult and expensive to open new healthcare facilities. She said that is hard to swallow in a state like Alaska where there are significant issues associated with healthcare access. Less access means fewer facilities and providers, which prevents people from getting the care they need and it drives up costs. She said CON requirements also stifle innovation and competition by establishing a system of central planning and cronyism. Patients are left with higher costs, lower quality care, and fewer options. Furthermore, allowing existing providers to give input on their potential competition is not in the best interest of consumers. Patients, providers, and the free market should instead determine what new medical facilities will open in an area. She said it is time for Alaska to join the 15 other states that have removed their CON requirements. There is support for this among Alaska voters. She concluded that Alaska has some of the most challenging access and most expensive healthcare in the country and it is up to the legislature to alleviate this situation.

2:40:50 PM

DR. ALICIA PLEMMONS, representing self, Edwardsville, Illinois, related that she is an assistant professor at Southern Illinois University Edwardsville and a research affiliate of the Knee Center for the Study of Occupational Regulation at Saint Francis University. She advised that she is the author of the study mentioned earlier about how CON laws affected mortality during the COVID-19 pandemic. She said she would not go into the background of CON laws but did want to remind the committee that CON laws affect all aspects of healthcare, down to the number of beds in an ICU. She noted that previous testimony did not include the point that in Alaska, purchases requiring approval through CON laws takes from 60 to 180 days and the fees range from $2,500 to nearly $75,000. Anytime during this process, competitive healthcare providers can intervene to have the application denied. In 2019, 35 states and the District of Columbia had versions of CON laws. During the COVID-19 pandemic, Alaska was one of the states that recognized the need to let healthcare purchase and move beds very quickly. She and her co-authors analyzed the legal changes using CDC mortality files and found that states such as Alaska that suspended CON laws that restricted hospital beds, saw a significant reduction in deaths from not only coronavirus but also from other diseases using similar medical equipment. This included septicemia, diabetes,

chronic lower respiratory disease, influenza, pneumonia, and advanced Alzheimer's disease. She said these legal changes saved about 26 lives per week from March to the end of June.

DR. PLEMMONS said her testimony has three points. First, CON laws affected purchasing during the pandemic and restricted healthcare facilities nationwide from responding to the demand. Second, Alaska saved lives by temporarily suspending CON laws. Third, repealing CON laws can avoid these emergencies in the future by allowing hospitals and healthcare providers to prepare for these emergencies before they happen. She highlighted that there has been extensive research on CON laws over the past decade and that dozens of data-driven, peer-reviewed studies in academic journals have consistently found that CON laws have fallen short of their goal to protect access to high quality care in rural and underserved communities by preventing competition that would otherwise keep quality high and prices low. She concluded that SB 26 offers an opportunity to do better and put the lives of Alaskans first in the fight for better healthcare.

CHAIR COSTELLO asked her to send her research to the committee.

2:44:23 PM
YVONNE ITO, representing self, Glenallen, Alaska, stated that she is a Doctor of Social Work at Crossroad Medical Center in Glenallen and she was speaking in support of SB 26. She pointed out that it is already difficult to obtain services in rural Alaska and the CON laws make it worse. She urged the committee to think about access to care and to do what is sensible and repeal CON laws.

SENATOR MICCICHE thanked her for her concise testimony and perspective.

CHAIR COSTELLO expressed particular appreciation to the Alaskans who were testifying.

2:46:16 PM
SARAH HETEMI, representing self, Anchorage, Alaska, stated that during the COVID-19 pandemic, Alaska was one of 20 states that suspended portions of their CON laws to allow providers to act quickly to respond to the pandemic. She questioned the reason for not allowing this same flexibility year around for various services. She said quality healthcare should matter regardless of the healthcare issue. She cited a Mercatus Center study mentioned earlier that that found that CON laws are associated

with fewer services, less access to services, and greater racial disparity in the provision of care. She concluded that she believes that repealing CON laws would help improve healthcare for all Alaskans, which is why she supports SB 26.

2:48:41 PM
JARED KOSIN, President and CEO, Alaska State Hospital and Nursing Home Association (ASHNA), Anchorage, Alaska, stated that ASHNA opposes SB 26. They agree that problems exist with the current CON program but a wholesale repeal is not the answer. He said it is impossible to respond to the assertions that have been made in just two minutes. He pointed out that CON regulations were waived during the pandemic, but ordinary capital projects received government review. He emphasized that no providers are asking to keep the hospital beds that were freed up to remain available on a permanent basis. Regarding the free market argument for repeal, he said healthcare really is not a free market. Hospitals are required to maintain an emergency department, they have a duty to treat all patients regardless of ability to pay, and they must be open 24 hours per day, 365 days per year. By contrast, ambulatory surgery centers do not have a duty to treat and their hours of operation are discretional. The point is that customers are choosing between two totally different products and only one is subject to a host of expensive requirements.

MR. KOSIN said ASHNA urges the committee to look at the regulatory framework of CON instead of full repeal.

CHAIR COSTELLO urged him and other testifiers to send written comments if they would like to respond more fully.

2:51:01 PM
KAREN PERDUE, Volunteer Foundation Trustee, Foundation Health Partners (FHP), Greater Fairbanks Community Hospital Foundation, Fairbanks, Alaska, urged the committee to slow down and listen to some broader perspectives on the issue of certificate of need. She said most states still have a CON program and Alaska needs one because it is so rural it does not have the volume to control costs. She cited the community of Fairbanks trying to support a hospital system with a population of 100,000. She highlighted that the robust surgery center in Fairbanks gained its status through the CON process. That shows that the CON process works, but the center has diminished surgeries at the hospital by about 30 percent and the concern is that other niche providers will take other specialized high-profit services from the hospital.

2:52:59 PM
MS. PERDUE questioned the reason for the indeterminant fiscal note and suggested it might be because the cost would be so very high. She related her understanding that it takes the cap off long term care. She explained that the state pays about 80 percent of skilled nursing costs through Medicaid and adding long term care beds automatically adds to that program. When she was DHSS commissioner and a long term care certificate of need was authorized, it automatically added several million dollars to the state budget. She acknowledged that there is a shortage of long term beds in Alaska but noted that a long term policy has been to try to have those services in the community. In response to the expert testimony about consequences of CON, she noted that the state has the least restrictive use of restraints in the country.

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MS. PERDUE refuted the material in the bill packet from the Mercatus Center that talks about the additional facilities Alaska would have without CON. She pointed out that rural hospitals are just hanging on and questioned where hospitals might be added. She said CON has done what it was intended to do in managing healthcare infrastructure. She suggested the committee ask the department what it would cost, including licensing and managing, to add eight new hospitals and up to 400 long term care beds.

MS. PERDUE said her final point is that this is a tough conversation to listen to when hospitals performed so well during the COVID-19 pandemic. She assured the committee that it would not have been possible to manage the pandemic in Fairbanks without a functioning and vital hospital system. She emphasized that Foundation Health Partners (FHP) provided the medical leadership and boots-on-the-ground. It is a large part of the public health infrastructure in the community and now is not the time to talk about weakening capacity. The conversation should instead be about how to strengthen the system. She urged the committee to hold SB 26 and do more research about the benefits of keeping CON.

CHAIR COSTELLO advised people who were unable to testify today to call on Friday or provide their comments in writing.

2:57:28 PM
RYAN MCKEE, State Director, Americans for Prosperity-Alaska (AFP-AK), Wasilla, Alaska, testified in support of SB 26. He

said the COVID-19 pandemic showed that preparation is necessary and that much of the state was not prepared and had to shut down. He said the effects of not being prepared were large and if repealing CON laws adds to preparedness that will have a positive affect throughout the state and not just in the healthcare sector. He also pointed out the potential for monopolies with CON laws. He said many Alaskans are forced to seek healthcare treatment outside the state where services are more affordable, but it should not be that way. Healthcare should be affordable for all Alaskans. He encouraged the committee to support SB 26.

CHAIR COSTELLO stated that she would hold SB 26 in committee with public testimony open.

2:59:54 PM
There being no further business to come before the committee, Chair Costello adjourned the Senate Labor and Commerce Standing Committee meeting at 2:59 p.m.