

BENEFITS TO PATIENTS AND PROVIDERS IN ALASKA WITH THE REMOVAL OF CON LAWS

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Chair Costello, Vice Chair Holland, and members of the committee:

My name is Darcy Bryan, and I am a practicing obstetrician gynecologist surgeon and senior affiliated scholar with the Mercatus Center at George Mason University. My research encompasses the positive impact that innovative healthcare models and technology can have on healthcare access, quality, and affordability. I have practiced in the state of California as an obstetrician gynecologist for most of my professional life and have recently moved to Florida, where I am actively engaged in women's healthcare.

By 1990, 12 states had repealed their certificate-of-need (CON) laws, which they were easily able to do because the federal government withdrew its CON mandate in 1986.¹ Since 1990, a growing number of states have repealed, modified, or limited the effects their CON programs. It is with pleasure that I take the opportunity to testify regarding SB 26 and its proposed repeal of the CON program in Alaska. Today, I offer three takeaways:

- CON laws are anticompetitive and sustain regional monopolies in healthcare facilities and services.
- CON laws adversely affect physicians' ability to advocate for healthcare quality and affordability on behalf of their patients.
- CON laws hinder a states' ability to prepare for unforeseen healthcare disasters and emergencies, such as the COVID 19 pandemic, by limiting their ability to build a network of lifesaving services.

CON LAWS ARE ANTICOMPETITIVE

The Antitrust Division of the US Department of Justice has taken a close look at the impact of CON laws on the healthcare market and has found that these laws place a substantial cost on healthcare consumers by limiting choice, cost containment, and innovation through the creation of barriers to

1. "CON-Certificate of Need State Laws," National Conference of State Legislatures, December 1, 2019, <https://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.

entry and expansion into the healthcare marketplace.² Within a CON-law state, businesses wishing to build a new healthcare facility or offer a new healthcare service within a particular community must first pay for costly studies proving that the community needs the service, even though they have no guarantee of success in doing so.³ Meanwhile, established competitors in the marketplace naturally argue against expansion and innovation with the bias that the threat of lost market share would predict. Most researchers agree that monopolies are bad for consumers. This is no less true for healthcare. My colleague Matthew Mitchell has shown through his extensive research that CON laws increase cost and limit access to adequate healthcare.⁴ I may only add that I have seen with my own eyes how competition improves quality of care.

CON LAWS LIMIT PHYSICIANS' ABILITY TO ADVOCATE FOR QUALITY

As a doctor, I have benefited greatly by working in states where CON laws have been eliminated or pared back. Without exception, I have been able to maintain practice privileges at multiple hospitals, a flexibility that allows me to bring my patients to a healthcare facility that I think would serve my patients best in terms of quality, diversity of services, and cost. Unfortunately, doctors who work in states with CON regulations have limited choice and quality.⁵ The situation in CON-law states only worsens as more physicians' practices are purchased by hospitals and as more doctors become hospital employees. The acquisition of physicians' practices by hospitals increased by 128 percent from 2012 to 2018.⁶

Mutual quality assurance is an important component of a healthy and beneficial relationship between hospitals and medical staff. Specifically, physicians advocate for adequate nursing staff, procedural equipment, and quality metrics within the hospital, taking their patients to another facility if the hospital administration resists positive change. In turn, the hospital ensures that those doctors with practice privileges are adequately trained and have good outcome metrics. But communities with a single hospital or care facility disempower doctors and thus damage the relationship between hospitals and medical staff. Where else can doctors take their patients? This problem is even worse when physicians are employees of a hospital; then there is no alternative employer to work for should disagreements over hospital quality and service arise.

CON LAWS HINDER PREPARATION FOR HEALTHCARE DISASTERS

The COVID-19 pandemic revealed the fragility of the healthcare supply chain, with shortages of personal protective equipment, ventilators, and ICU beds the most prominent examples of deficiencies that hit the news. In response, 24 states with CON laws on the books suspended some portion of their CON laws or enabled emergency provisions in 2020.⁷ However, such emergency provisions were too little too late. Vital infrastructure cannot be built in a day.

2. Competition in Healthcare and Certificates of Need, Hearing before a Joint Session of the Health and Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia, 149th Gen. Assemb. (2007) (statement of Mark J. Botti, Chief, Litigation I Section, US Department of Justice, Antitrust Division).

3. Matthew D. Mitchell, "State Certificate-of-Need Laws: What Do the Data Show?," *Managed Healthcare Executive* 29, no. 9 (2019): 20–21.

4. "Matthew D. Mitchell," Mercatus Center at George Mason University, accessed April 12, 2021, <https://www.mercatus.org/scholars/matthew-d-mitchell>.

5. Thomas Stratmann and David Wille, "Certificate-of-Need Laws and Hospital Quality" (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2016).

6. Jacqueline LaPointe, "Hospital Acquisitions of Physician Practices Rose 128% since 2012," *RevCycleIntelligence*, February 21, 2019.

7. Angela C. Erickson, "States Are Suspending Certificate of Need Laws in the Wake of COVID-19 but the Damage Might Already Be Done," Pacific Legal Foundation, January 11, 2021.

The time to build is before the disaster occurs; as a matter of good governance, healthcare providers and policymakers should anticipate crises and put in place mitigation measures. Scarcity in healthcare supply is a well-understood side effect of CON laws that could have been anticipated and mitigated. In light of the COVID-19 crisis, this effect can no longer be discounted as minor or easily fixed.⁸

In conclusion, CON laws are an impediment to doctors striving to provide the highest-quality care for their patients at affordable prices. Researchers have long known that they play an anticompetitive role in the healthcare market, and the COVID-19 pandemic has exacerbated the problem and made evident the need for reform. SB 26 takes steps to change the status quo and ensure that doctors can adequately care for patients.

8. Eric Boehm, "America Doesn't Have Enough Hospital Beds to Fight the Coronavirus. Protectionist Health Care Regulations Are One Reason Why," *Reason*, March 13, 2020.