



Friend,

For the last several years, the Cardinal Institute has educated West Virginians on the disastrous set of policies known as certificate-of-need (CON) laws. For reasons outlined in this edition of *Liberi*, CON laws are outdated, disruptive, and, ultimately, a Soviet-esque regulatory system of central planning. These policies place bureaucracy at the center of our state's healthcare system, stifling innovation, promoting consolidation, limiting access, and distorting the market in intolerable ways.

In this edition of *Liberi*, you will find the economic, legal, and moral cases to be made against CON. I hope that you will come away with an understanding of why these laws have outlived their intended purpose and should be thrown into the dustbin of history.

Moving forward, you should expect the next edition of *Liberi* to arrive in your mailbox in February as we establish a regular quarterly cadence for the magazine. We have some terrific interviews lined up with some of the most effective advocates for liberty in the country, and I think you will enjoy the wisdom bestowed therein.

Here's to a prosperous, free 2025 for all Mountaineers.

For West Virginia

A handwritten signature in blue ink that reads 'Garrett Ballengee'.

Garrett Ballengee
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LIBERI

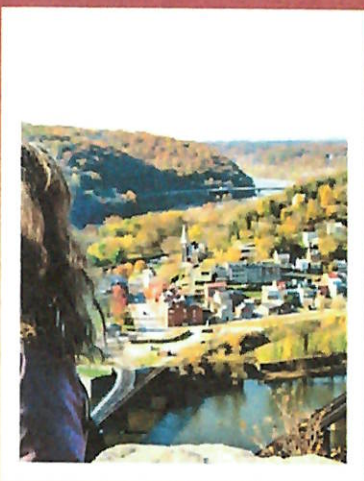
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A WILD AND WONDERFUL WELCOME

We are proud to release the second volume of the Cardinal Institute's *Liberi* magazine. As you may recall, our inaugural issue discussed the importance of getting West Virginians back into the workforce, contributing to their respective communities, and experiencing the dignity of "earned success." From private citizens like Charlotte and Kenny Webb helping the formerly incarcerated find work to wide-ranging public policy reforms in our criminal justice and welfare systems, a comprehensive approach is required to solve our state's chronic labor woes. We received a lot of positive feedback on our first volume. Thank you to everyone who offered thoughts and suggestions on ways to improve *Liberi*.

For *Liberi*'s second volume, the much-debated issue of "Certificate of Need" (CON) laws will take center stage. If you are familiar with the Cardinal Institute's work over the last several years, you will know where our organization stands: CON laws are a particularly malicious form of central planning as they sit at the center of our state's healthcare system. Replacing the wisdom of the market with bureaucracy and favoritism, CON laws are as distortive as any public policy in West Virginia.

Proponents of CON laws, primarily large hospital systems and hospital trade associations, argue against basic economic principles of supply and demand. They suggest that "overinvestment" in the healthcare field would lead to an increase in prices — that is, an increase in the supply of healthcare services would lead to an increase in prices. In this edition of *Liberi*, we will cover the economics, history, and path to repeal.

As we highlight the deep-seated interests and decades-long sclerosis in our healthcare system, we draw parallels with recent transformative reforms in our state's education, tax, and legal systems. While there are significant obstacles, including entrenched interests, we believe that bold reforms are the key to progress.

As a slight preview, in the third volume of *Liberi*, we will cover the exciting advance of freedom in West Virginia; however, it will be different from how you



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might expect. Most of you will be familiar with the advances of freedom-based policies in our legislature over the last several years. Still, exciting things are happening in some of our institutions, especially our universities. Yes, that's right, even in our universities. We will profile some of these exciting programs and changemakers. Liberty is indeed on the march in West Virginia, and it's not just in our statehouse.

Thank you for your ongoing support and engagement. As we address the complexities of Certificate of Need laws, we invite you to share your experiences and opinions on how these regulations have affected you or your community. Together, we can promote a more informed and active dialogue that will influence the future of public policy in West Virginia.

Ever grateful,

GARRETT BALLENGEE

President & CEO

THE BASICS OF CERTIFICATE OF NEED



By: Amanda Kieffer, Vice President of Communications & Strategy

What Are Certificate of Need Laws?

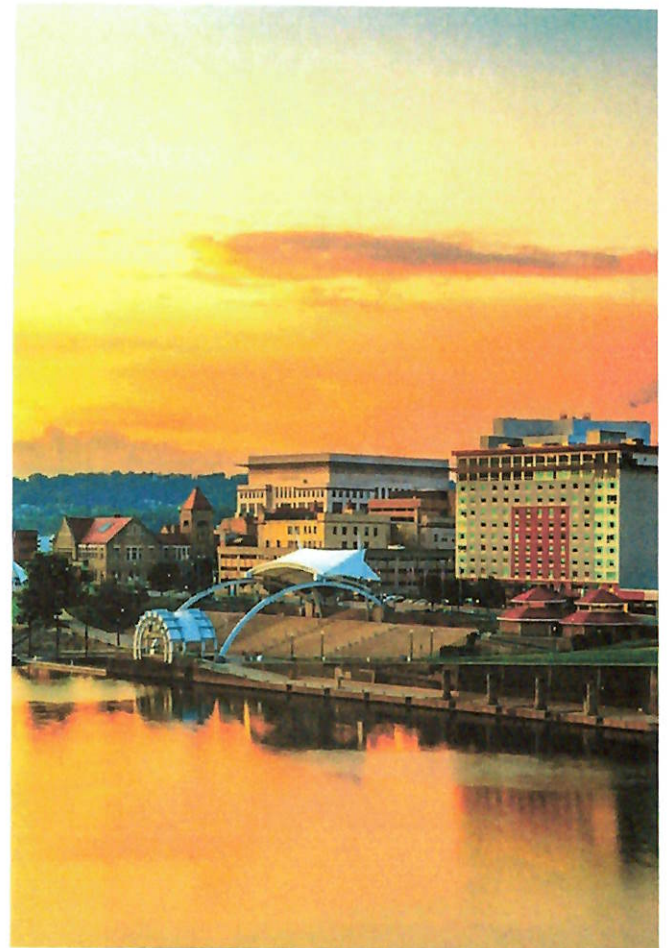
If you've been following the Cardinal Institute's work for more than a few minutes, then you've probably heard the term Certificate of Need laws, a.k.a. CON laws, come up at some point. If you're like most people, you might not know what that means. It's not exactly a term taught in school, and it isn't often spoken about outside of dedicated politico circles. I had never heard of them before I started working with the Cardinal Institute — it didn't take long to discover just how horrendous they are.

In short, Certificate of Need laws restrict the supply of a given service in a particular area. They can be found in various industries — including the moving industry. However, when most people discuss these laws, they talk about the CON laws regulating the healthcare industry.

Under these Certificate of Need laws, states set up regulatory boards with the authority to restrict healthcare services and technologies. These boards govern the creation of new hospitals, the addition of new hospital beds, the purchase of MRI machines, the opening of nursing homes and addiction treatment centers, and the offering of all kinds of new healthcare services. Anyone who wants to offer a service governed by CON laws must prove a "need" for those new services or healthcare technologies. (Because who wants an overabundance of hospitals, am I right?)

The criteria used to approve these certificates

vary significantly between states. As if the idea of having to prove to a government regulatory board that there is a "need" in the market for more health care wasn't bad enough, the distinction that makes these laws particularly egregious is the "competitors' veto."



Anyone who wants to offer a service governed by CON laws must prove a "need" for those new services or healthcare technologies.

Incumbent providers who hold certificates can testify against the new provider to show there is no need for additional competition in the healthcare market. Often, when a competitor testifies against a new CON applicant, the CON request is denied. Furthermore, these oversight boards typically don't even have to give an applicant a reason why they were denied a Certificate of Need. So, in addition to the arduous process, there is little transparency for those involved or those seeking to hold regulatory boards accountable.

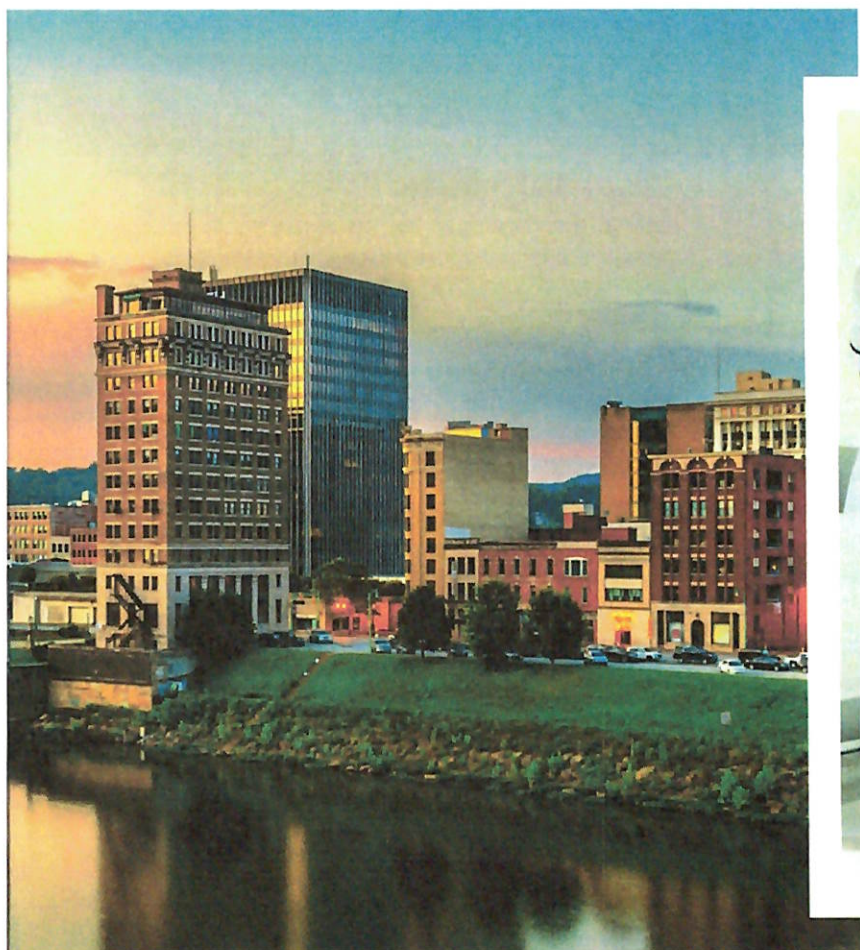
Some History of Certificate of Need Laws

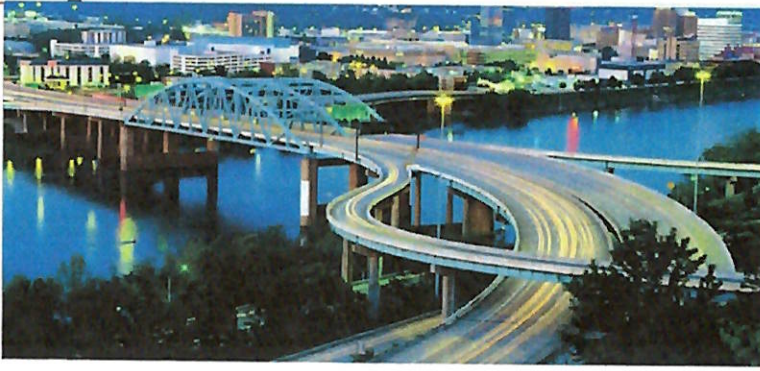
Where did these abominations come from? Well, I'm glad you asked. Certificate of Need laws were invented in the 1960s to regulate health care. Proponents claimed these laws would reduce costs and promote equal access to health care. Who could object to lower costs and equal access to care? So, of course, bureaucrats wanted to do anything in their power to make this dream a reality. And who better else to start this trend than the Empire State?

New York was the first state to endorse CON programs in 1964. Less than a decade later, in 1972, Section 1122, part of the Social Security Act of 1935, encouraged a similar program to review large capital expenditures in the states. This new section of the SSA meant that the federal government could withhold Medicare and Medicaid funding for capital expenditures that weren't pre-approved by central planning agencies.

In 1974, Congress took things a step further and passed the National Health Planning and Resources Development Act, which regulated expenses totaling more than \$100,000, bed additions, and service expansions for hospitals and nursing homes. By 1975, 46 states had opted into some form of a review program. By 1980, 49 states had created their own Certificate of Need processes to comply with the Act and receive federal funds. The Development Act dispensed nearly \$150 million annually for health planning.

However, after years of trying this experiment in Soviet-style central planning, government officials realized that CON laws weren't achieving their purported aims. In 1987, a bipartisan federal government repealed CON.





This is an exceedingly rare example of the federal government realizing something doesn't work and getting rid of it. This federal repeal caused many states to eliminate or modify their review programs. In 2016, the Federal Trade Commission and the Department of Justice even co-authored a report that stated, "[I]t is apparent that CON laws can prevent the efficient functioning of health care markets."

Unfortunately, 35 states and DC still have CON programs of some kind. West Virginia is one of them.

What Are the Effects of Certificate of Need Laws?

In general, Certificate of Need laws restrict the supply of healthcare services offered in a given area. This raises costs and lowers the quantity and quality of care that individuals receive.

Matt Mitchell, Senior Research Fellow and Certificate of Need Research Coordinator at the Knee Regulatory Research Center at West Virginia University, recently published a paper in the *Southern Economic Journal* comprehensively reviewing the academic literature on CON regulations. Here, he surveys 114 peer-reviewed studies of Certificate of Need laws that include 413 empirical tests. Of the 389 tests with relatively obvious implications, 205, or 53%, associate CON with a "bad" outcome. These bad outcomes include higher spending, diminished access, lower quality, less competition, or diminished care for underserved populations. 140 tests, or 36%, find neutral or insignificant outcomes from CON regulations. Only 44 tests, 11%, associate CON with a "good" outcome such as lower spending or higher quality.

The most studied aspect of CON is how these laws affect patient access to care. 97% of studies that examine this topic show that CON laws decrease individuals' access to health care and exacerbate racial disparities in access to care.

A Kaiser Family Foundation study found that states with CON laws have 11% higher costs in health care than states without these policies.

A Kaiser Family Foundation study found that states with CON laws have 11% higher costs in health care than states without these policies. Additionally, researchers with the Mercatus Center at George Mason University found a 5.5% higher mortality rate, 30% fewer hospitals per 100,000 residents, fewer hospital beds (131 fewer per 100,000), fewer MRI machines, and less access to CT scans in states with CON laws.

The Knee Center at West Virginia University recently hosted a conference dedicated to new research into Certificate of Need laws. Researchers presented findings that CON laws reduce wages for healthcare workers by 1.4% and that physicians in CON states earn 5% less than physicians in states without CON laws. So, it appears that those increased healthcare costs experienced by patients aren't going to pay the actual healthcare workers. On top of all that, researchers also found preliminary evidence that campaign contributions influence the CON approval process.

I'll leave you to imagine what that extra money is paying for. (My guess would be higher administration costs and lobbying to keep CONs in place.) *See the definition of Rent Seeking.

In summary, people often think CON laws are a healthcare regulation that deals with health-related concerns, meaning that medical care providers should inform decisions about CON. But CON laws are an example of centralized planning and entrenched special interests. You don't need a medical degree to see that CON laws are one big con. They don't help your average person receive better care or even help actual healthcare providers earn a better living. They simply help big medical conglomerates, politicians, and others who ride their coattails.

Are Any States Repealing These Laws?

Recently, there has been growing awareness of the problems associated with Certificate of Need laws. States like New Hampshire, Montana, Florida, and South Carolina have all taken action to eliminate CON laws.



According to the National Conference of State Legislatures, in 2016, New Hampshire was the most recent state to repeal its CON program completely. In 2019, Florida repealed all CON laws except those for long-term care facilities. In 2021, Montana revised their CON program to only include oversight of long-term care facilities and swing beds. Most recently, in 2023, South Carolina removed all CONs except:

- Those that relate to nursing homes,
- The construction or other establishment of a hospital, and
- A change in the existing bed complement of a hospital through the addition of one or more beds or a change in the classification of licensure of one or more beds.

Where Do CON Laws Stand in West Virginia?

In 2023, West Virginia exempted hospitals performing hospital services and birthing centers from CON oversight. This is a step in the right direction, but it's still not far enough. This year, during the 2024 West Virginia Legislative Session,

legislators passed a bill out of the House Health and Human Resources Committee to repeal all Certificate of Need laws in West Virginia except for the nursing home CON. This is the furthest a full or nearly total repeal bill has made it in the West Virginia Legislature.

According to polling conducted by the Zoldak Agency and commissioned by the Cardinal Institute in 2022, 58% of likely voters reported being concerned about their ability to access health care in the future. 60% said they would support a bill to repeal Certificate of Need laws.

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As we look forward to election season, we can only hope that a change in elected and appointed officials will bring with it a renewed sense of urgency to remove the shackles of CON laws from health care in the Mountain State and unleash much-needed competition and innovation.

For example, Berkeley County's population has increased by 19% over the past ten years, and the eastern panhandle's population is expected to continue growing by 1.0% annually. We must help health care keep pace with this growth and allow providers to meet the existing needs of West Virginians in all regions of the state.

We can't build a West Virginia Miracle that doesn't include access to quality health care for all Mountaineers. CON laws are standing in the way. It's time to remove these unnecessary barriers. Our future depends on it.

Where can
I get more
information?



ECON 101:

Certificate of Need

By: Jessi Troyan, Director of Policy & Research



In the complex landscape of healthcare regulation in the United States, Certificate of Need (CON) laws stand out not only for their impact but also for their obscurity. In West Virginia, healthcare providers cannot offer the full extent of desired services, residents cannot easily access the services they need, and healthcare costs remain stubbornly high.

While the regulation is not exclusive to health care, let's focus our attention here on it. In short, CON regulations are regulatory barriers requiring healthcare providers to receive authorization or permission from the West Virginia Health Care Authority to expand their offerings across 22 services.

These Include:

1. Radiation therapy
2. Computed tomography
3. Positron emission tomography
4. Cardiac surgery
5. Fixed magnetic resonance imaging
6. Comprehensive medical rehabilitation
7. Establishing an ambulatory care center
8. Establishing an ambulatory surgical center
9. Diagnostic imaging
10. Cardiac catheterization services
11. Constructing, developing, acquiring, or establishing kidney disease treatment centers, including freestanding hemodialysis units
12. Megavoltage radiation therapy

13. Surgical services
14. Establishing operating rooms
15. Adding acute care beds
16. Intellectual developmental disabilities services
17. Organ and tissue transplants
18. Establishing an intermediate care facility for individuals with intellectual disabilities
19. Inpatient services
20. Hospice services
21. Establishing a home health agency
22. Personal care services

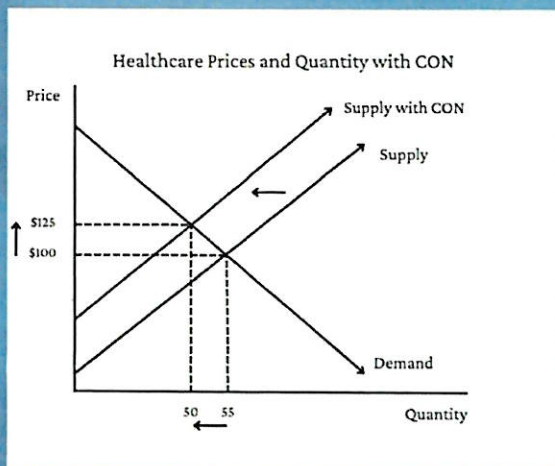
The Economic Impact of CON

While providers go through the arduous process of filling out the application and submitting it to the West Virginia Health Care Authority to expand their service offerings, there's no guarantee they'll be granted permission. Moreover, knowing the steep hurdles that providers must overcome before they ever have the chance to break ground likely means that there are prospective expansions the public never learns about. It's one thing for providers to bet on themselves within the market they aim to serve. It's another for them to shoulder a steep bureaucratic gamble before they ever get to offer their services to the public.

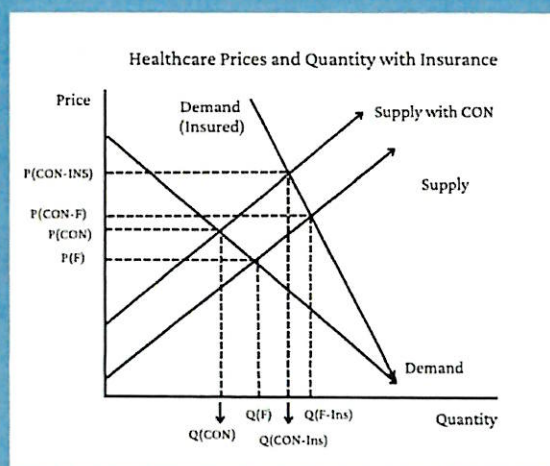
In purely economic terms, CON is a restriction in supply.

The effects of these regulations are best demonstrated in a classic supply and demand diagram.

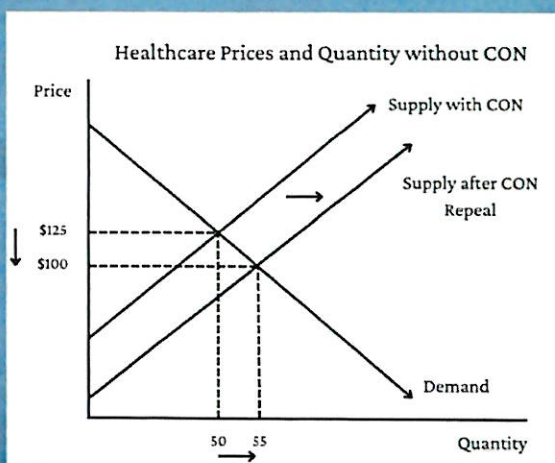




The diagram illustrates how the prices of healthcare services rise, and the quantity offered in the marketplace dwindles under a CON regime. In the case of West Virginia, we might be better situated to consider the reverse. Since so many services are already restricted by CON, the diagram illustrates how more healthcare providers would be available to Mountaineers and services offered at lower costs if lawmakers eliminated these restrictions.



Regardless of whether an individual has health insurance, the supply restriction imposed by CON regulations has the same general effect. The persistence of CON laws in West Virginia constrains the healthcare market, affecting both the availability and affordability of services. Phasing out these laws could lead to a more dynamic healthcare sector that offers more choices and better prices for residents.



While this captures the mechanics of most goods or services, we should bear in mind that how people consume healthcare services is affected by whether they have health insurance or not. If an individual has health insurance, they generally do not pay the full cost of whatever service they receive whenever they go to an appointment. Instead, they pay a portion while insurance covers the rest.

A supply and demand diagram can likewise show the dynamics and effects of CON regulations for individuals with and without insurance.



THE VOICES OF CERTIFICATE OF NEED



By: Monica Moses, Former Policy Fellow

An Introduction to West Virginia's Healthcare System with CON

Certificate of Need (CON) laws have long hindered the healthcare marketplace for West Virginians, exacerbating the existing challenges within quality and access. Despite the state's pressing healthcare needs, CON places burdensome requirements and processes on providers, services, and by proxy, the patients they serve. This regulatory framework not only impedes the expansion of healthcare services but also leaves many patients without access or alternative options to essential care.

West Virginia grapples with a growing demand for specialized

services and a demand for home health among an aging population amidst a dwindling workforce. Earlier this year, Forbes Advisor ranked each state's "healthiness" based on 21 different metrics (spanning disease risk factors and prevalence, substance abuse, lifestyle habits, and health outlook). West Virginia was ranked last, titled the least healthy state in the U.S.

How exactly West Virginia's

healthcare labor force will best serve the entire population's needs in a timely and efficient manner is a pressing issue. In addition, West Virginia has unique geographic factors that create additional strain on delivering care to the Mountain State that, when combined with a restrictive bureaucratic process, leaves fewer incentives and more challenges for providers to meet the needs of the Appalachian population. This leaves existing practitioners overburdened with patients, and more importantly: patients with a lack of options for quality care.

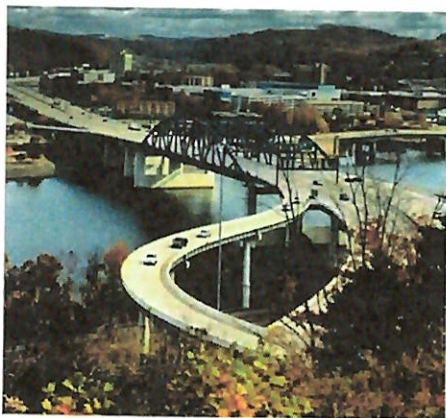
This urgent call to remove CON to reduce excessive



healthcare strain is echoed not only by practitioners and healthcare entrepreneurs seeking to streamline the process, but also the patients being underserved and left without options for care much in part due to CON's restrictive regulations.

The CON Process

For new or existing operations and services looking to open or to be added, exceeding \$100 million, providers must go through an extensive legal application (the CON process) through the West Virginia Health Care Authority to ensure the necessity, quality, and provision of this medical supply. The rigorous process of CON can take months and cost the provider up to hundreds of thousands of dollars. Moreover, it often leads to one-sided legal battles against other direct industry competitors as well as the West Virginia Health Care Authority. This is a major barrier to entry for new, and even existing providers, and often keeps new participants from wanting to supply medical services in the state of West Virginia. Furthermore, CON is a synthetic regulation that is failing at its intention for cost-savings and inhibiting the medical market for new suppliers to entering the medical market



One study published by the think tank Americans for Prosperity found at least 20 applications for new services and operations proposed in West Virginia had been withdrawn from the CON process after rivals filed for opposition in the court throughout the study period of 2017-2020. New entrants into the healthcare market understand this competitor opposition extends the CON process, can majorly increase legal fees through requests for discovery and inquiry, and mostly, delay final application decisions for years before being able to bring medical equipment and services to market. These twenty additional facilities and services that could have been provided to the state of West Virginia totaled an estimated \$43.7 million in healthcare investment. These hurdles to expanding or establishing health care are significant and costly, dissuading many new entrepreneurs and suppliers from wanting to establish any type of improvements to the existing healthcare market for patients.

Rather than prioritizing patient quality and safety, the need methodology for CON appears to focus, or rather has the unintended consequence of inhibiting market competition. Studies have shown there is little-to-no evidence on increased quality, safety, and cost-savings.

The need methodology for the Certificate of Need for different categories of healthcare applications is not specific to the type of service or operation being introduced, nor does it tailor its application to the field of health care. This is concerning as one of the goals is quality assurance, yet medical technologies and services vary so wildly from one another. Additionally, this selective process grants existing healthcare systems and suppliers a concentrated market share, restricting options for patients and hampering the delivery of expanded services. This is not a system that puts the needs of patients first.

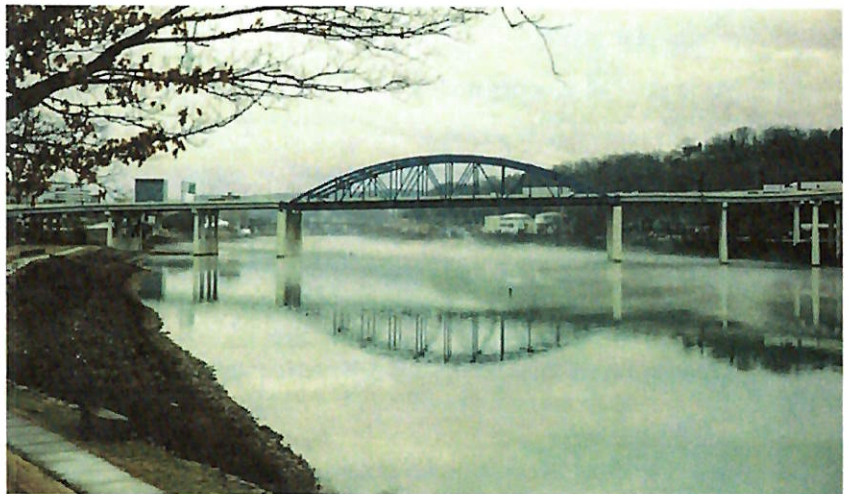
The urgent need for reform is evident, as echoed by those directly impacted by CON regulations. Their experiences voice the desperation for change, and how removing these anti-competitive measures could be the start of fostering a more inclusive and accessible healthcare marketplace in West Virginia.

Home Health Agency in CON

CON primarily impacts the servicers looking to create a "new" supply of health care in an area. Talking with a native of West Virginia, as well as owner of an in-home health agency servicing patients across West Virginia and Appalachia, we discussed the challenges CON presented him and his personal caregiving agency.

This West Virginia local started his caregiving journey as a young student at the West Virginia University College of Law. He took weekends to travel from West Virginia to Florida to provide care for his ailing grandfather. He recognized the needs required to provide care, and that this full-time job was larger than just him. Other family members and skilled personnel delivering dependable, high-quality, and trustworthy in-home caregiving were needed too. Suppliers of home care had also been a major player within this system.

His father had also been a major inspiration for his journey to in-home care services. Watching his father provide family health and geriatric care since he was young, he learned the lesson that dignity and quality personnel for health care are not only essential but should be a right for patients.



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The call was clear that quality in-home support was an essential service for families and loved ones to allow individuals to remain at home, comfortably, and with the dignity and nurture they deserve. Following this mantra, he and two other longtime friends started down the path to providing home care. They opened their first office in 2013, located in Barboursville, WV, and the second office two years later in Charleston, WV. Now a nationwide agency located in 19 states with over 50 offices serving over 6,000 patients, this owner said there was so much learning to be had along the way.

Some of the most important lessons included how to understand and best meet the needs of patients, how to invest in your employees and support their needs to provide the best caregivers, and how to expand these services while maintaining effective management. His passion and commitment to this endeavor shine through in the thorough and responsible management, the humane not sterile, nature through which they guide their business, and the noble intentions of their agency.

Despite being a very highly reviewed and successful agency within the home health community, we discussed how CON has erected barriers along the way. Specifically, in West Virginia, their most recent challenge was gaining the ability to serve in-home personal care services for Medicaid patients and getting the CON approval to do so. This bureaucratic process was delayed several months because of requests for additional documentation coming from outside, competitor, firms, which cost over \$100,000 in fees for legal and consulting partners to help navigate the CON process. This left many of their patients without the necessary in-home support they so desperately needed. The agency has a waiting list of new patients they would have loved to serve

if it weren't for the bureaucratic hold up because of CON. Luckily, this story comes with a happy ending. As of this year, the CON process was finally approved after a long battle, and the agency can now begin to serve in-home personal care services to Medicaid patients (a new population they were unable to serve previously through their agency) in 51 counties for West Virginia and an additional 65 patients throughout the state.

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Through hard work, determination, and much learning and commitment to their cause, this advocate for quality caregiving in West Virginia and beyond has experienced the additional burdens of CON but hasn't let that stop him. The positive commentary from his patients (from personal accounts I've personally recorded and from online reviews), as well as his ability to grow his agency over the years, has been a true testament to the marketplace feedback working as an efficient mechanism. CON faces much criticism over being an inefficient way to harbor control of suppliers in healthcare markets, and this man's story is one great example of shining a light on just this.



A Patient's Access to Care through CON

This story is a story of resilience, determination, and hopefulness despite always being told otherwise throughout her life.

A current patient of the previously mentioned home health agency, constrained by the limits of her caregiving hours through bureaucratic red tape, "Cindy" has been denied full time at-home care for personal care services. She only receives a limited number of hours a day with an at-home aid to assist her in daily tasks, in which the remaining hours of the day she is without help. This is, in part, due to the lack of the agency's successful receipt of a Certificate of Need in her county allowing for the additional services for her. She does not have the ability to get in and out of bed without aid and cannot feed or clean herself without additional help. Cindy's diagnosis, since birth, has left her completely immobile. Cindy has cerebral palsy, and without the assistance of another person and her assistive tools, she is unable to function in her daily life.

Without the personal care CON approval, the home health agency was unable to serve her in the additional ways she so desperately needed. Because of this, she found little help elsewhere, forcing her sister to devote almost all her time to dedicated caregiving. These needs are not only constrained to the client but also take a toll on the entire family. Cindy and her sister have an incredibly strong bond unlike any other through this time together, but the role of caregiving takes a massive toll on anyone needing to fill this gap in assistance. CON has an impact that cuts so deeply into patients' and families' lives that may not be fully understood when creating these policies that leave patients without the assistance and support they need.

Cindy, although immobilized and in a difficult season of her life, was in high spirits when we met. She had an attitude that was ready to take on anything. She may have been one of the most inspiring people I've ever met.

A little about Cindy: after being told she would not live past the age of one, she continued on to graduate 10th in her high school class, teach her grandmother to read and count, teach Sunday school to kids with disabilities, and make changes in her community by contacting the town's mayor



to get sidewalks reconstructed for wheelchair accessibility. This kickstarted her three-time run for city council, winning the vote for at-large council once, where she became a voice for those who were previously unheard. She is "a fighter who will fight for anybody," as she said it, but it's about time we fought for her rights to care.

"I never let my disability get the better of me," she said. She and her sister have so many stories and laughs together and have developed a beautiful relationship, despite needing to be her main source of caregiving. Cindy reminisced that she met the love of her life and had a lovely six years of marriage. Unfortunately, he passed in 2023, but he leaves her with beautiful memories and a step-granddaughter that she boasts about non-stop. She has lived a very fulfilling and meaningful life, despite the many barriers that she's had to overcome.



She tells me, she isn't done yet! When it comes to the limitations imposed by CON, as a client of the agency applying for personal care services, she was ineligible to receive these services. She expressed her desire to fight for more rights for the disabled population through policy and accommodations. The experience with caregiving only eight hours a day, no weekends and no holidays, her and her sister agree is just not enough help for what she truly needs. Cindy had even served on a board for aged and disabled waivers, another form of caregiving legislation, while active in her town's council. She was an advocate at a time when cutting the waiver's hours had been a consideration and fought successfully for not limiting these waivers.

Cindy, who receives support through the aged and disabled waiver, could benefit significantly from additional care. If the Certificate of Need (CON) is approved, she would gain access to personal care services that, combined with her current waiver, would provide her with 12 hours of daily assistance—an increase from the 8 hours she currently receives. Cindy and her sister aren't asking for the world, just for a little more support through CON.

Cindy and her sister aren't asking for the world, just for a little more support through CON.

As a testament to her caregiving agency, they discussed the above and beyond efforts the organization goes to help their workers "make it to work," even in the worst of weather, and to help make sure their clients are receiving their care daily. The foundation of a strong caregiving company and the well-intentioned owner are clear and evident to the client through their clients' own words.

One of the most intelligent and strong-willed people I've met, this client's life-long goal is to become the mayor of Huntington, to improve the lives of others, and bring a voice to the voiceless. Although CON may be a barrier to her receiving care, her spirits haven't been let down. She keeps fighting on, making jokes, and holding on to the hope that there will more care, bigger change,

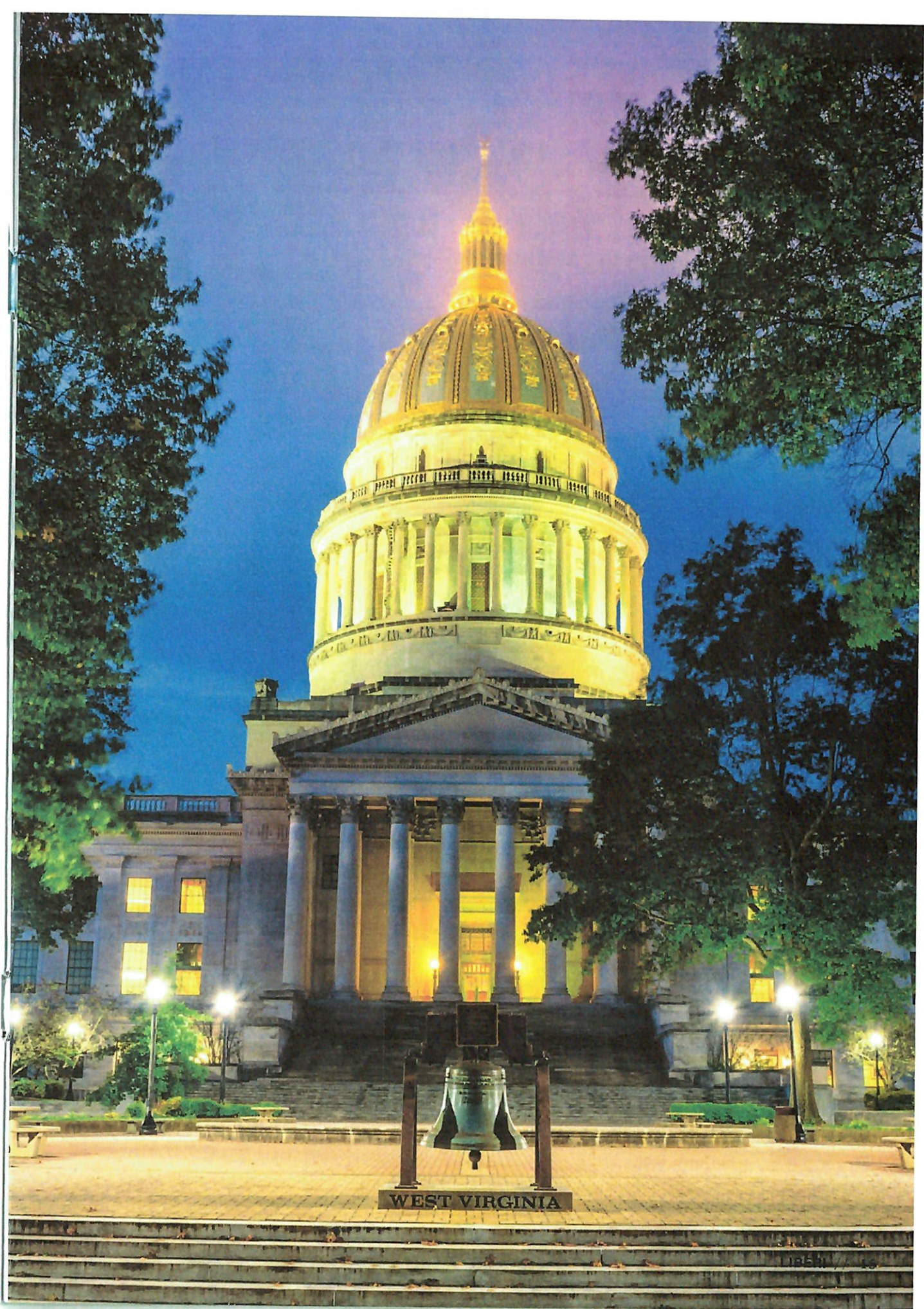
and a better tomorrow for populations that are marginalized through policies that have unintended consequences such as CON.



CONCLUSION

For the number of agencies and fields that are desperately working toward a CON approval, or wanting to expand or establish their own services, I hope this story brings some light to your fight, and reminds you of your purpose for which you bring light, dignity, and service to your patients. To patients being underserved as a function of CON restricting options to care within your region, I hope bureaucrats may reconsider this process and bring solutions to providing more accessibility to home health care and other sectors of health services.

And I hope advocates such as this owner, this client, and those reading this may continue to fight on the behalf of the marginalized populations getting the short end of the stick. CON regulations have held back healthcare services long enough in West Virginia throughout the entirety of the healthcare ecosystem, as West Virginia has one of the most expansive Certificate of Need policies for almost all healthcare services and types. We will continue to tell your stories and fight your fight until CON is a relic of the past.



"STEPHANIE'S LAW"

WAS A GOOD START.

NOW, WEST VIRGINIA SHOULD
ABOLISH ALL CON LAWS.

By: Anastasia Boden

Senior Attorney, Equality & Opportunity, Pacific Legal
Foundation

There could be no doubt that Arty Vogt's moving business was needed in West Virginia; it had one hundred years' worth of proof. The original owners of Lloyd's Transfer and Storage had started the business nearly a century earlier with just a horse and buggy. Now, the company was a full-fledged moving operation located in Berryville, Virginia, and it even made trips for people across the border in West Virginia, too. Based on his own belief that there was a continued market in both Virginia and West Virginia for moving services, Arty saved up his money and purchased the company with his wife.

Arty didn't know that as a new owner, he'd have to apply to transfer the company's Certificate of Public Convenience and Necessity (CPCN) to himself. Once the Commission found out he hadn't done so, it demanded that he apply for a new one, which required him to prove to the Commission's satisfaction that his business was "needed." So, Arty set out to prove what he thought was obvious.

After over a year of administrative hearings, sleepless nights, and \$10,000 in attorney fees, the Public Service Commission disagreed and denied his application for a Certificate.

After over a year of administrative hearings, sleepless nights, and \$10,000 in attorney fees, the Public Service Commission disagreed and denied his application for a Certificate. Shortly after that, Arty's wife Stephanie died of cancer. Arty thought the fight for his business was over. But his battle in the courts was yet to begin.



The Origins Of Certificate Of Need Laws

Certificate of Need or CON laws — sometimes called Certificate of Public Convenience and Necessity laws — are often discussed in health care, but they originally started as a means of regulating transportation services. In the late 19th century, proponents of CON laws believed that limiting competition would encourage railroad investments, incentivize companies to serve out-of-the-way customers, and avoid so-called "dog-eat-dog competition." Under the latter theory, it was believed that unrestrained competition would cause businesses to undercut each other until it was no longer feasible to profit, and all companies would soon go under, leaving too few firms in the market.

Economics has come a long way in the last 130+ years. It's now almost universally recognized that competition leads to efficient outcomes and that suppressing normal competitive pressures results in shortages and lower-quality services. Thus, the economic rationales for CON laws have long been debunked. However, incumbents have a powerful incentive to keep monopolies on the books. So CON laws have persisted, even as it has become apparent that they fail to meet their goals.

In fact, CON laws have spread. When the same governmental entities that regulated railroads went on to regulate new forms of transportation (like taxis, shuttles, and moving companies), they began applying CONs to those industries. And in the 1970s, states also began applying CON laws to medical services.

The result is that entrepreneurs in transportation, health care, and even education are often forced to prove to state bureaucrats that they're "needed" before they can start up. In practice, state agencies defer to the testimony of incumbent businesses, who invariably say there's no market for anybody new. Evidence obtained during Arty's lawsuit, for example, showed that no applicant for a Certificate that had faced an objection by an existing business had been able to secure a CON in the past ten years. For this reason, CON laws are sometimes referred to as the "Competitor's Veto."

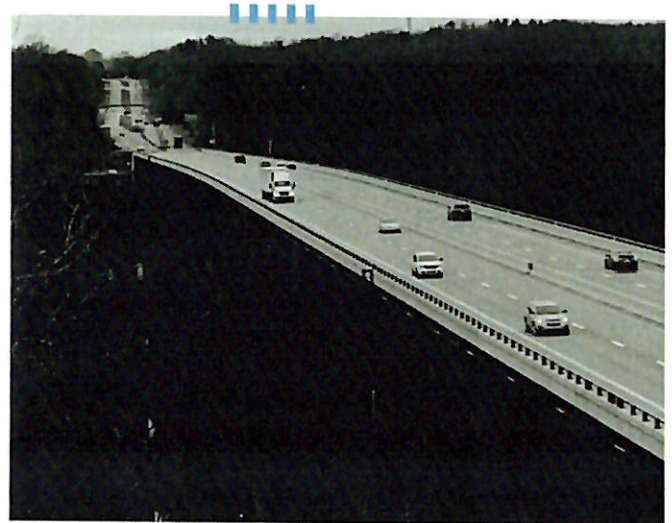
Arty's Fight

After Arty's application was protested and denied, he brought a lawsuit arguing that the law violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Interstate Commerce Clause. The theory was that the law granted incumbents a veto privilege and deprived Arty of his constitutional right to earn a living free of arbitrary government interference. He also argued that because his business was headquartered in Virginia, the law was an unconstitutional burden on interstate commerce.

When West Virginia repealed the law, his case was in its final stages. Though he had wanted a court ruling deeming the law unjust, Arty appreciated his victory in the legislature. In a video celebrating the repeal, he called the law "Stephanie's law" and said, through tears, that he felt like he had finished her fight.

Part of Arty's joy was recognizing that not every lawsuit has such a happy ending. Lawsuits challenging economic regulations are exceedingly difficult to win. Since the New Deal, when the justices upended constitutional law to make way for FDR's increasingly invasive economic regulations, courts have given short shrift to economic rights. While many constitutional rights, like the right to free speech or equal protection regardless of race, enjoy heightened judicial protection, economic rights (like the right to consent to a contract or to enter a profession) are subject to very little judicial oversight. Thus, the legislature essentially enjoys free rein to regulate occupational freedom, even if the right to earn a living is one of our most fundamental and longstanding rights.

There have, however, been some victories for economic liberty in the courts. In 2014,



Raleigh Bruner was the first person since the New Deal to win a lawsuit challenging a CON law for moving companies under the Fourteenth Amendment. However, judicial or legislative wins are harder to come by in the medical context, where the lobbyists are better funded and, given the high stakes, courts are even more wary of invalidating laws.

Perhaps one of the worst examples of courts turning a blind eye to manifest injustice and arbitrary deprivation of liberty is the case of Ursula Newell-Davis. A social worker, entrepreneur, and mother to a special needs child, Ursula had sought to start a business caring for children like her own in Louisiana. She was motivated not only by her

All photos in this article courtesy of Pacific Legal Foundation



desire to make sure children got high-quality care but also by her empathy for families and caregivers of special needs children. She knew how deeply caregivers need respite from the rigors of child-rearing and some time to themselves. And through her social work, she saw how badly care was lacking in New Orleans. After the state denied her on the theory that her services weren't "needed," she brought a lawsuit designed much like Arty's.

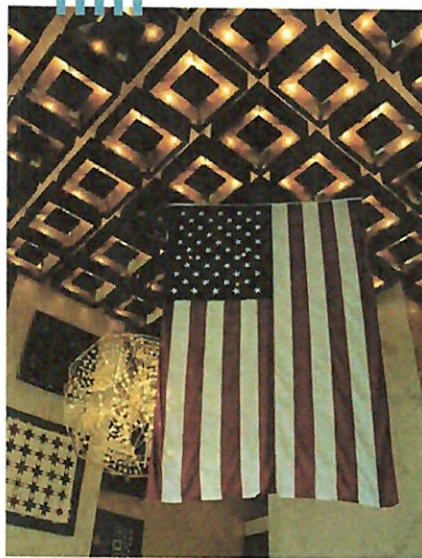
During the lawsuit, the state did not even argue that its law was related to improving health or safety. Instead, it argued that it limited the number of caregivers by 70% each year solely because it wanted to save its resources for other regulatory activities. In other words, the state didn't argue the law directly benefited the public. Instead, it argued that the law improved its own administrative ease, which, according to the state, "necessarily" benefits the public. Despite that, Ursula put forward a slew of evidence showing the Louisiana law harmed, not helped, its citizens, and the court upheld it. The court ruled that the government's circular argument that the state can deprive people of constitutional

rights for the purpose of offering fewer people their constitutional rights was acceptable — at least when it comes to economic regulations.

The Future of CON

Public opinion seems to be turning regardless of the fate of CON laws in courts. The pandemic made clear that CON laws hindered the healthcare industry's ability to respond quickly to crises. Many states, therefore, passed emergency legislation suspending CON laws to make sure that hospitals could adequately respond to fast-rising demand. But the same things that led states to suspend CON laws during a pandemic remain true now: supply and demand fluctuate, limiting supply leads to shortages and poorer quality services, and research shows that CON laws have no discernible

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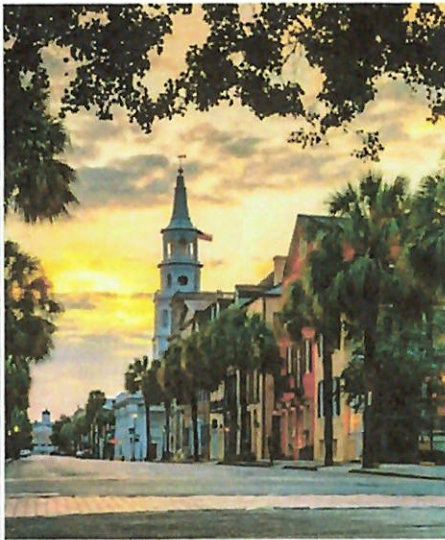


relationship to improving costs, access, or quality of care. And thus rather than reverting to the pre-pandemic regime, states should consider taking CON laws off the books for good.

In 2019, Arty Vogt passed away. His obituary, though short, is a testament to his bravery; it notes his efforts to rid West Virginia of its CON law for movers through Stephanie's law. It's time for West Virginia to eliminate all its CON requirements in every industry. Perhaps this time, the law will be called Arty's law, symbolizing West Virginia's commitment to hard work, small businesses, and free enterprise.







LEARNING FROM South Carolina

By: Candace Carroll, Director of Public Affairs,
Americans for Prosperity South Carolina

Background and Rationale:

Could you provide a brief overview of what the Certificate of Need program was and the main reasons behind its repeal in South Carolina?

The CON program in South Carolina was used for 18 medical services and providers (from mental health facilities to MRI machines). Whether new construction was coming in or a current provider was looking to upgrade their equipment, the minimal dollar amount that would trigger the need to go through the CON process was \$600k.

In the medical world, that's pocket change! This process was inhibiting growth in both access and affordability to care across the state, particularly in our rural areas, where the larger healthcare system providers (from counties over) could block new providers from coming in to serve patients.

Some of the most egregious examples here were new cancer treatment facilities being blocked, new mental health facilities being blocked, and the one that seemed to shake everyone to their core — NICU beds being tied up in legal battles between two hospitals in the same geographical area.

What non-legislative challenges (media, governor, public, hospital associations, etc.) did you face in the effort?

Two challenges immediately come to mind:

The public has no idea what a Certificate of Need is. They know that they adamantly want the government out of their healthcare decisions and that they want more affordability and accessibility, but the term "Certificate of Need" is a foreign concept to most folks. Our team engaged in a significant campaign over the two years of our engagement to break down the jargon barrier. Once we explained what it was in layman's terms to people, they immediately agreed that it needed to be repealed.

The hospital association was, of course, a barrier at the very beginning of our engagement. They were mentioning the same rhetoric that they have in other states (and frankly for the past 15 years here) that medical services in areas would start to close if CON was repealed — insinuating that it was the only thing keeping some of their facilities open.

Thankfully, our elected officials began to see through that argument, particularly when we could factually point that multiple hospitals had closed with CON in place. I even had one elected official in a very rural district ask me "the hospitals say that medical providers in my district will close, if we repeal CON. But I don't have any medical providers in my district — so how can they close, if there's nothing there?" This "scare tactic" narrative, thankfully, wasn't convincing to our elected officials as members of both parties in both Chambers were willing to poke holes in the hospital association's arguments.

"The hospitals say that medical providers in my district will close, if we repeal CON. But I don't have any medical providers in my district — so how can they close, if there's nothing there?"

Impact and Outcomes:

Since the repeal, what immediate impacts have you observed on the healthcare system in South Carolina?

Within 36 hours of the repeal bill passing, I heard lawmakers saying they had received calls from healthcare providers looking to invest in their communities.

Within 36 hours of the repeal bill passing, I heard lawmakers saying they had received calls from healthcare providers looking to invest in their communities. This was huge!

We've even seen hospital CEOs publicly discuss how repealing CON allows them to be more nimble in their growth, particularly when upgrading their equipment.

Here's an example of the news articles we've seen popping up across the state:



Comparison with Other States:

Are there any lessons or models from South Carolina's experience that could be relevant to other states considering similar reforms?

Bring all the stakeholders to the table! Think tanks, grassroots organizations, medical associations, insurance (our BCBS was a big player in repeal with under the dome conversations), hospitals, etc. We found the greatest success when we were all willing to come together and discuss where we could compromise.

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For example, we knew that our House chamber wasn't going to go for immediate repeal for new hospital construction but that they would go for a 3-year sunset — so we all worked together to draft amendment language to that effect, which is ultimately what passed in South Carolina: immediate repeal on CON for everything; except a 3-year sunset on new hospital construction. There were a few exceptions here (such as if a hospital was going to be built in one of our counties that doesn't currently have a hospital).



Be willing to talk to members of BOTH parties — don't assume that just because a member is a Republican or Democrat that they are adamantly supportive or opposed! We found some of our greatest allies in Democrat members who had rural districts and were members of the Legislative Black Caucus — as these were a lot of the districts that either didn't currently have services/providers in their areas and/or their hospital had previously closed under the current CON system. I had several members of both parties say that they were in support of repeal simply because we were willing to talk to them versus just assuming they were against us.

Policy Implications:

What policy implications does South Carolina's CON repeal have for states like West Virginia considering similar moves?

South Carolina's CON repeal was the most transformative across the country in the past 15 years, opening up opportunities for states to lean into repeal conversations.

The "how-to" guide is available in South Carolina if states like WV are ready to make changes.

Future Outlook:

What are the next steps for South Carolina's healthcare system post-CON repeal?

Though highly transformative, the CON repeal is just the beginning of healthcare reform in South Carolina! Already in this legislative session, we're seeing bills that include but aren't limited to:

- » Telehealth Expansion
- » Scope of Practice Expansion
- » Medical Billing Transparency

Advice for Policymakers:

Based on South Carolina's experience, what advice would you give to policymakers contemplating a similar repeal in West Virginia?

Go for it! It's worth taking on the hospital association to provide greater access and affordability to patients across your state! AFP and Cardinal are two great organizations, along with many others, that can give you coverage in your districts for doing the right thing for patients in your state.

Also, call your counterparts in South Carolina! We were able to pass CON repeal with a unanimous vote in both Chambers, so definitely call any friends you have in the legislature and talk with them stripes to stripes about how and why they decided to do so.



WE ARE IN THIS TOGETHER.

I don't think any of us sees Washington, DC as the standard of efficiency or effectiveness. Now imagine a policy so bad that even the federal government recognized it as such and abandoned it . . . 37 years ago.

Certificate of Need is so bad at meeting its intended purpose that even an entity where bad policy lingers on for centuries realized the error of its ways and got rid of it shortly after it was implemented.

So why does this terrible policy linger on in West Virginia?

For the same reason that CON fails to begin with, protectionism. It erodes the free market and consumer choice to the benefit of legacy regimes. Providing a service in a field without competitors only benefits the provider.

West Virginians are the ones that suffer the detriment of CON laws. That's evident in the Mountain State's abysmal ranking in quality of healthcare despite some of the highest spending.

Consumers and workers (everyday West Virginians) are the ones that lose. Folks that use West Virginia's healthcare services face higher costs, fewer options, poorer quality of service longer wait times, and further distances to travel (sometimes even having to leave the state). Our health suffers for it.

West Virginia's healthcare workers lose when competitors are kept out of the market. There's less competition for their services. That, or they're recruited away to another state, drawing away West Virginia's most talented professionals.

It is long overdue that we stop asking everyday West Virginians to sacrifice their economic freedom, worker freedom, and quality of health care to benefit the few. Attaining the West Virginia Miracle depends on it. Without Cardinal supporters like you, this issue would be nonexistent in Charleston, buried by special interests as it had been for prior decades. Together, we can fix this policy blunder and cut the red tape hindering access to quality health care for our community.

Thank you!

Kyle Hanlin
Director of Development



*Liberi is a product of the
Cardinal Institute for West
Virginia Policy.*

MISSION

Founded in 2014, the Cardinal Institute for West Virginia Policy, Inc. is a 501c(3) non-profit dedicated to researching, developing, and communicating effective free market public policies for West Virginia.

VISION

The Cardinal Institute envisions an economic turnaround that will transform West Virginia into a beacon of prosperity and hope. For this miracle to occur, it must be built on four pillars: economic freedom, education freedom, worker freedom, and a culture of freedom encapsulated in the state's motto and founding ethos, *Montani Semper Liberi* — Mountaineers Are Always Free.



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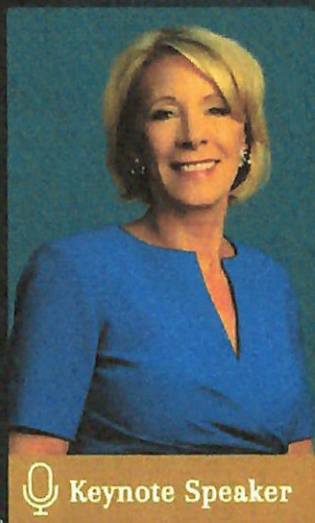
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11th Secretary of Education

Betsy DeVos is a leader, an innovator, a disruptor, and a champion for freedom. She is the nation's leading advocate for education freedom for students of all ages, having served as the 11th U.S. Secretary of Education from 2017-2021.

For more than three decades, she has been tireless in her pursuit of public policy reforms that get government out of the way and allow all students the freedom, flexibility, resources, and support they need to choose where, when, and how they learn. Her advocacy has helped create new educational choices for K-12 students in more than 25 states and the District of Columbia and expanded post-high school education options for students and adult learners alike.



Keynote Speaker