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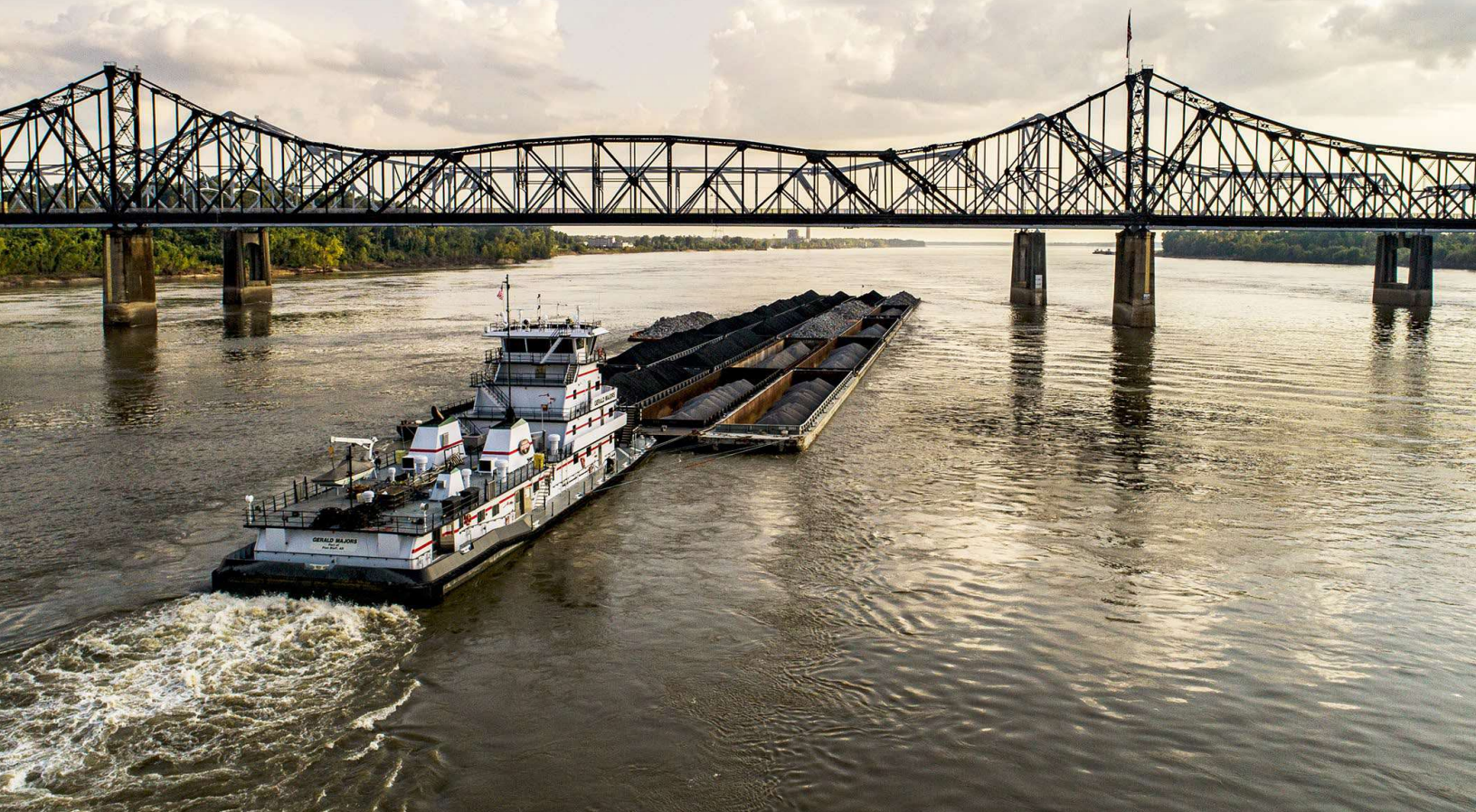
Permission to Care:

How Mississippi's Certificate of Need Law Harms Patients and Stifles Health Care Innovation



About Americans for Prosperity Foundation

Americans for Prosperity Foundation is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.

About The Authors

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April 2024

At the height of the COVID-19 pandemic, as medical facilities were being flooded with patients, many people across the country sought alternative ways to access health care, such as telehealth and at-home care. However, an arcane law, known as certificate of need ("CON"), prevented patients and health care professionals in Mississippi from doing so.

Mississippi's CON law leaves patients, veterans, and Mississippians in underserved or rural communities with less access to critical health care while also locking out the providers who wish to serve them. The law requires health care providers to obtain approval from the state before adding or expanding health care facilities, services, or equipment.

Fifty years ago, lawmakers believed they could control rising health care costs by preventing providers from offering redundant services in the same proximate area. In 1974, Congress mandated states establish CON laws to receive federal health care funds. Congress lifted the mandate in 1987 after CON laws proved ineffective at controlling costs. Every presidential administration from Reagan to Biden has urged states to get rid of their CON laws, but only a dozen states have fully repealed them.

The Institute for Justice counts 80 CON requirements regulating health care in Mississippi, making its CON program one of the most expansive in the nation.[1] Mississippi also maintains several moratoria prohibiting the development of certain facilities and services, such as new skilled nursing facilities and home health agencies.

The Mississippi Justice Institute ("MJI") is currently challenging the constitutionality of Mississippi's CON law. MJI filed a lawsuit on behalf of a physical therapist who was barred from starting a home health business by the moratorium. The U.S. District Court Judge notes the case "involves artificial limitations on at-home health care during the height of a global pandemic."[2] He writes, "This moratorium, or some version of it, has remained in place for 40 years. Four decades! And, since this moratorium was imposed, the number of home health patients has increased by at least 194 percent. Now, one can only enter the market if a current operator is willing to sell their CON."[3] MJI argues that CON harms Mississippians and props up health care monopolies by needlessly shielding them from competition.

"The advocates of CON programs (typically, the representatives of large hospital systems) often characterize CON repeal as risky, dangerous, or unknown. These concerns are unfounded. Over 100 million Americans—nearly a third of the population—live in states without CON laws in health care. Four-in-ten Americans live in states with limited CON regimes that only apply to one or two services such as ambulance services or nursing homes."

– Matthew D. Mitchell, Senior Research Fellow & Certificate of Need Research Coordinator at The Knee Regulatory Research Center at West Virginia University

The Mississippi Department of Health ("MSDH") states, "The CON process is designed to increase accessibility and quality of health services while avoiding unnecessary costs."[4] However, a large and growing body of research indicates CON laws fail to promote health care quality, access, or cost-effectiveness.[5] Compared to states without CON laws, states with CON are associated with higher health care spending, fewer medical facilities, and inferior patient outcomes.[6] The Mercatus Center estimates that without CON, Mississippi would have 49 additional hospitals, 32 of which would serve rural areas.[7]

Rather than "avoiding unnecessary costs," CON creates them. Maintaining an expansive CON program means paying for an expensive bureaucratic apparatus to administer the program. It also means higher spending on health care. Under Mississippi's CON regime, the Magnolia State spends 21% of its GDP on health care, about five percentage points higher than the national average.[8] A study published earlier this year finds that Mississippians could expect to spend $400 less per person per

[1] Inst. for Justice, CONNING the Competition: A Nationwide Survey of Certificate of Need Laws at 97 (Aug. 2020), *available at* https://ij.org/wp-content/uploads/2020/08/Conning-the-Competition-Report-JUNE-2023-WEB.pdf.
[2] *Slaughter v. Dobbs*, No. 3:2020cv00789 - Document 32 (S.D. Miss. 2022), *available at* https://storage.courtlistener.com/recap/gov.uscourts.mssd.110235/gov.uscourts.mssd.110235.32.0.pdf.
[3] *Id.*
[4] Mississippi State Department of Health, Certificates of Need, https://msdh.ms.gov/page/30,0,84.html (last accessed Apr. 10, 2024).
[5] *See, e.g.*, Matthew D. Mitchell, Mississippi's Certificate of Need Laws: Options for Reform, Mississippi Center for Public Policy (January 2024), *available at* https://mspolicy.org/wp-content/uploads/2024/01/CON-paper-FINAL.pdf; Jaimie Cavanaugh & Matthew D. Mitchell, Striving for Better Care: A Review of Kentucky's Certificate of Need Laws, Institute For Justice (August 2023), *available at* https://ij.org/wp-content/uploads/2023/08/Kentucky-CON-Report-Aug.-2023.pdf.
[6] *Id.*
[7] Matthew D. Mitchell at al., Certificate-of-Need Laws: Mississippi State Profile, Mercatus Center at George Mason University (Mar. 23, 2021), *available at* https://www.mercatus.org/media/73971/.
[8] James B. Bailey, Certificate of Need and Health Care Spending in Mississippi (January 29, 2024), *available at* https://dx.doi.org/10.2139/ssrn.4709595.

year on health care if CON is repealed.[9] The study also finds a significant reduction in annual Medicaid and Medicare spending in other states after CON repeal.[10]

Mississippi's CON regime empowers bureaucrats, rather than patients' needs, to decide what health care services are offered. MSDH publishes its determinations for needed health care services in the State Health Plan. However, MSDH recently released a report analyzing the State Health Plan that finds that the data and formulas MSDH uses to calculate need are "outdated and unreliable" and "does not account enough for performance or quality."[11]

The report also finds "a maldistribution of services and facilities in Mississippi" and that "[p]eople who live in the delta and other rural areas are experiencing a significant lack of access to facilities and services. Most CON applications have been concentrated in a few areas of the state, including Hinds County."[12] It's no surprise then that only 6% of the key informants MSDHA interviewed in 2023 said the state's CON program should be kept as is.[13]

A recent MSDH survey finds that fewer CON applications are filed in Mississippi than in peer states.[14] Respondents indicated that the high costs of hiring lawyers to prepare the applications and defend them from opposition make health care providers unlikely to submit applications they expect may not be approved.[15]

Mississippi's CON program pits providers against each other to fight for government favor, diverting resources from patient care. Rather than appeal to patients, providers must petition the government's central planners for permission to care. Competing providers commonly oppose each other's CON applications and even litigate decisions to approve or deny a project in court. These disputes can take years to resolve and cost hundreds of thousands of dollars, delaying deployment of new health care provisions.

This "competitor's veto,"[16] combined with other bureaucratic hurdles, has a chilling effect on health care investment. Restrictive need calculations, high application costs, and the threat of opposition deter providers from applying to offer services they otherwise would.

"We feel that the issues created by Certificate of Need are a hindrance to veterans getting care…In 2018 Congress passed the VA Mission Act, that then led to the creation of the Veterans Community Care Program, which allows veterans to seek care in the community under certain eligibility and access standards. This program allows veterans who are receiving care through the Veterans Administration to be sent into the Community, which has proven popular with veterans… But, the current lack of accessible options for veterans in Mississippi is denying them this life saving option."

- Jimmie T. Smith, Coalitions Director, Concerned Veterans for America"

Ultimately, CON precludes a latent supply of health care that could increase access to and lower costs of care for patients in Mississippi. The MSDH report recommends considering CON exemptions for services "where Mississippi is significantly behind national benchmarks," including psychiatric care and substance use disorder facilities and maternal and infant care services.[17] **The implication is clear: exempting facilities and services from CON restrictions will expand access to them.**

[9] *Id.*
[10] *Id.*
[11] Miss. State Dept. of Health, A New Vision for the Mississippi State Health Plan at 9 (Jan. 2024), *available at* https://magnoliatribune.com/wp-content/uploads/2024/03/MDOH-CON-Executive-Summary-to-DOH-01.02.24.pdf.
[12] *Id.* at 18.
[13] *Id.* at 2.
[14] *Id.*
[15] *Id.*
[16] *See* Anastasia Boden & Angela C. Erikson, Competitor's Veto: A Roadblock to New Businesses, Pacific Legal Foundation (2021), *available at* https://pacificlegal.org/wp-content/uploads/2021/01/con-law-report.pdf.
[17] *Supra* note 11.

The CON program is also unnecessary. The health care industry is highly regulated. Understandably, medical professionals must meet rigorous educational, licensing, and quality-of-care standards. Mississippi's CON scheme acts as an unnecessary additional barrier for health care providers to treat patients in the Magnolia State. Licensed medical professionals in good standing who can provide high-quality care should be able to do so without having to convince the government—and competing providers—that their services are "needed."

Recently, in the face of mounting evidence against CON, multiple states have made changes to deregulate or eliminate CON programs:

- South Carolina repealed CON for all services and facilities except for nursing homes and home health agencies in 2023.
- Georgia passed a bill in 2024 that loosens CON restrictions on hospitals' ability to add or relocate services and exempts other non-hospital services and facilities, including birthing centers, from CON.
- Montana reformed its CON law in 2021 to only cover long-term care facilities.
- Florida eliminated CON requirements for numerous services in 2019.
- New Hampshire legislation from 2012 phased out the state's CON program in 2016.

Mississippi's CON program is costly and unnecessary; however, it persists to protect politically proficient parties from competition by limiting the supply of health care at the patients' expense. Prohibitive application costs, miles of red tape, and the threat of competitor opposition preclude many providers from offering services they otherwise would. The result of so much lost health care investment is that Mississippians pay higher prices for less access and lower quality health care.

"CON laws have failed to produce cost savings, higher quality healthcare, or greater access to care, whether in underserved communities or in underserved areas...the evidence suggests CON laws are ineffective. There is no compelling evidence suggesting that CON laws improve quality or access, inefficiently or otherwise. . . Evidence also fails to support the claim that CON programs would increase access to care for the indigent, or in medically underserved areas."

- Reforming America's Healthcare System Through Choice and Competition. A joint report by the U.S. Department of Health and Human Services, U.S. Department of the Treasury, and U.S. Department of Labor (December 3, 2018)

CASE STUDY: How CON Causes Needless Delays for Critical Care

In May 2016, MedCentris applied for a certificate of need ("CON") to treat and prevent amputations by providing digital subtraction angiography (DSA) in Warren County. In August 2016, the Mississippi State Department of Health determined that the project served the community's needs and recommended approval.

Mississippi is a top five state in the nation for diabetes rate, with about 1 in 7 Mississippians afflicted by the disease. More than 1,000 Mississippians died from diabetes or complications from the disease in 2016. Diabetes can reduce blood flow to limbs and, if not treated, can require amputation.

However, despite the obvious need for increased access to critical care, Mississippi's CON law empowered an existing health care provider, Merit Health River Region ("River Region"), to mire the project in six years of administrative proceedings and litigation. The delays imposed by this broken CON process harm Mississippians, Medcentris's brief argues:

> *This case revolves around [MedCentris's] proposal to provide needed care to a gravely underserved population in order to attack this epidemic and decrease these staggering numbers. [The] proposal is designed to salvage limbs and lives through the use of endovascular interventions, among other services. Denial of [the] requested CON will do nothing but result in further harm to Mississippians.*

A deposition of the River Region CEO revealed that his hospital did not have a CON for the services MedCentris sought to provide, and he did not know whether they even had the proper equipment to do so.

This case is not exceptional in states with CON laws that allow competitors to intervene. Mississippi's CON program pits providers against each other to fight for government favor. Rather than appeal to patients, providers must petition the government's central planners for permission to care. First and foremost, providers want to provide care to patients in need. When they compete, it should be for patients through the quality of their care—not for government permission.

2016

May 2016 — MedCentris applies for a CON to provide digital subtraction angiography ("DSA") services in Vicksburg.

August 2016 — Mississippi State Department of Health ("MSDH") recommends approval of the project.

2017

August 2017 — River Region opposed the CON, and MSDH held a hearing. The hearing officer recommended approval of MedCentris's CON application.

September 2017 — State Health Officer granted MedCentris a CON, but River Region appealed to the chancery court.

2018

January 2018 — Chancery court vacated the CON and remanded the case for further clarification.

February 2018 — State Health Officer files order again approving the CON.

July 2018 — Chancery court denies motions to strike and case is sent to Mississippi Supreme Court after 120 days.

2019

April 2019 — MedCentris Wound Healing Institute opens new clinic in Vicksburg but is unable to offer DSA services.

2020

March 2020 — Mississippi Supreme Court rules that River Region lacked standing and remands back to the chancery court.

2023

March 2023 — MedCentris and River Region continue to battle over attorneys' fees.

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CASE STUDY: How CON is Abused to Try to Prevent Needed Care

In 2016, patients in Oxford and Lafayette County were limited to one provider, Baptist Memorial Hospital-North Mississippi (Baptist), for diagnostic imaging provided by an MRI machine. MRIs are vital to catching diseases like cancer, for which early detection can be the difference between life and death. But with only one provider and demand rising, patient wait times for non-emergent MRIs were growing increasingly longer. Baptist responded by increasing hours, operating on weekends, and adding a mobile MRI unit, but still could not keep up with demand.

When Oxford Pre-Op & Imaging Center LLC ("OPIC") applied for a CON for an MRI later that year to meet demand, Baptist opposed it, claiming OPIC's CON application did not meet the community's needs, as defined by the State Health Plan. However, internal documents obtained during litigation reveal Baptist "believe[d] the community c[ould] support a third MRI" and worried this fact "leaves the door open for another investor group/system to enter the market." But, because the CON law allows competitor challenges, incumbent providers use it to try to prevent competition and corner the market. The results? Patients were unable to access a much-needed MRI machine for more than two and a half years.

The state's restrictive need calculations force providers to compete for limited opportunities to offer services. Consequently, competing providers commonly oppose each other's CON applications and even litigate decisions to approve or deny a project in court. These disputes can take years to resolve and cost hundreds of thousands of dollars, diverting resources from patient care and delaying deployment of new health care provisions.

2015

August 2015 — OPIC files a notice of intent to apply for a CON to offer MRI services.

2016

February 2016 — OPIC applies for a CON to offer MRI services.

May 2016 — Mississippi State Department of Health recommends approval of the project.

October 2016 — Public hearing held at competitor's request.

2017

April 2017 — State Health Officer granted OPIC a CON, but competitor appealed to the chancery court.

August 2017 — Chancery court affirms grant of a CON. Competitor appeals.

2018

October 2018 — Court of Appeals affirms a CON to OPIC.

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Fact Check: Certificate of Need Laws and Rural Health Care

"Repealing CON will decrease access to care in rural areas."

FALSE. A large and growing body of research shows that patients in states with CON laws have less access to health care than patients in states without CON, including those in rural areas.[1] The Mercatus Center finds that states with CON have 30% fewer rural hospitals and 13% fewer rural ambulatory surgical centers.[2]

States are beginning to acknowledge that CON laws harm rural areas and are moving to exempt them from CON requirements. Alabama, Indiana, Kentucky, Montana, Ohio, Oregon, Tennessee, and Washington have rural exemptions to their CON requirements.

"Repealing CON will allow some providers to offer only the most profitable services, hurting rural hospitals that offer a full suite of care."

FALSE. Politically proficient providers often appeal to lawmakers that they must be protected from competition to remain financially viable. They claim their market power will enable them to use revenue from more profitable services to offset the costs of less profitable ones and provide charity care.

However, hospitals are not doing so. According to the U.S. Department of Health and Humans Services, Federal Trade Commission, and the U.S. Department of Justice Antitrust Division, the empirical evidence contradicts these claims.[3] Similarly, the Mercatus Center finds no evidence of this type of cross-subsidization.[4]

Research also shows that safety-net hospitals in states without CON laws had higher margins than safety-net hospitals in states with CON.[5]

"The advocates of CON programs (typically, the representatives of large hospital systems) often characterize CON repeal as risky, dangerous, or unknown. These concerns are unfounded. Over 100 million Americans—nearly a third of the population—live in states without CON laws in health care. Four-in-ten Americans live in states with limited CON regimes that only apply to one or two services such as ambulance services or nursing homes."

– Matthew D. Mitchell, Senior Research Fellow & Certificate of Need Research Coordinator at The Knee Regulatory Research Center at West Virginia University.[6]

"States continue to repeal or reform their outdated CON laws."

TRUE. A dozen states have eliminated CON, and at least 18 more are currently reassessing their CON programs. In the face of mounting evidence against CON, multiple states, including states bordering Tennessee, have recently made changes to deregulate or eliminate CON programs:

- South Carolina repealed CON requirements for virtually all facilities and services except nursing homes in 2023.
- North Carolina reformed CON to exempt numerous services and ease the regulatory burden in 2023.
- West Virginia repealed CON requirements for birthing centers and all hospital services in 2023.
- Florida eliminated CON requirements for numerous services in 2019.
- Montana reformed its CON law in 2021 to cover only long-term care facilities.
- New Hampshire legislation from 2012 phased out the state's CON program in 2016.

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[1] Jamie Cavanaugh & Matthew D. Mitchell, Striving for Better Care: A Review of Kentucky's Certificate of Need Laws, Institute for Justice (August 2023), *available at* https://ij.org/wp-content/uploads/2023/08/Kentucky-CON-Report-Aug.-2023.pdf.

[2] Thomas Stratmann & Christopher Koopman, *Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals* (Mercatus Ctr. At George Mason Univ. Working Paper, 2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191476.

[3] Dep't of Health & Human Servs. *et al.*, Reforming America's Healthcare System Through Choice and Competition at 50 (2018), *available at* https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf.

[4] Thomas Stratmann & Jacob Russ, *Do Certificate-of-Need Laws Increase Indigent Care?*, (Mercatus Ctr. At George Mason Univ. Working Paper, 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211637.

[5] Al Dobson *et al.*, *An Evaluation of Illinois' Certificate of Need Program*, State of Illinois Commission on Government Forecasting and Accountability (2007), *available at* https://cgfa.ilga.gov/Upload/LewinGroupEvalCertOfNeed.pdf.

[6] Matthew D. Mitchell, Mississippi's Certificate of Need Laws: Options for Reform, Mississippi Center for Public Policy (January 2024), *available at* https://mspolicy.org/wp-content/uploads/2024/01/CON-paper-FINAL.pdf.

WHAT DO THE LAST SEVEN PRESIDENTIAL ADMINISTRATIONS HAVE IN COMMON? THEY ALL AGREE CERTIFICATE-OF-NEED (CON) LAWS ARE BAD FOR HEALTH CARE.

Biden Administration (2023)

"Empirical studies demonstrate certificate-of-need laws fall short of achieving better access to healthcare... CON laws do not ensure access to care in rural areas; rather, they act as a barrier to entry, leading to lower access to care and less innovation."

– Department of Justice Letter on the Proposed Repeal of Alaska's Certificate-of-Need Laws

Trump Administration (2018)

"CON laws have failed to produce cost savings, higher quality healthcare, or greater access to care, whether in underserved communities or in underserved areas...the evidence suggests CON laws are ineffective. There is no compelling evidence suggesting that CON laws improve quality or access, inefficiently or otherwise. . . Evidence also fails to support the claim that CON programs would increase access to care for the indigent, or in medically underserved areas."

– Reforming America's Healthcare System Through Choice and Competition. A joint report by the U.S. Department of Health and Human Services, U.S. Department of the Treasury, and U.S. Department of Labor

Obama Administration (2015)

"CON laws, when enacted, had the laudable goals of reducing health care costs and improving access to care. However, it is now apparent that CON laws can prevent the efficient functioning of health care markets in several ways that may undermine those goals. First, CON laws create barriers to entry and expansion, limit consumer choice, and stifle innovation. Second, incumbent firms seeking to thwart or delay entry by new competitors may use CON laws to achieve that end...Finally, the evidence to date does not suggest that CON laws have generally succeeded in controlling costs or improving quality."

– Joint Statement of the DOJ Antitrust Division and the FTC to the Virginia CON Work Group

Bush Administration (2004)

The Agencies believe that CON programs can pose serious competitive concerns that generally outweigh CON programs' purported economic benefits. Where CON programs are intended to control health care costs, there is considerable evidence that they can actually drive up prices by fostering anticompetitive barriers to entry... CON programs can retard entry of firms that could provide higher quality services than the incumbents...The Agencies believe that CON programs are generally not successful in containing health care costs and that they can pose anticompetitive risks...CON programs risk entrenching oligopolists and eroding consumer welfare.

– A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice

Clinton Administration (1997)

"Indeed, a large part of the Commission's antitrust law enforcement efforts in the health care field focuses on competitive problems that would not exist, or would be less severe, if there were no CON regulation...We believe that the continued existence of CON regulation would be contrary to the interests of health care consumers in Virginia."

– FTC Staff Comment to the Virginia Commission on Medical Facilities Concerning Certificate of Need Reform

H.W. Bush Administration (1989)

"[W]e believe that Nebraska's current CON regulatory process may, on balance, harm health care consumers. Ongoing improvements in health care financing are resolving the principal problems that prompted CON regulation. Moreover, the benefits of CON regulation, if any, are likely to be outweighed by its adverse effects on competition in health care. As a result, continuing CON regulation is likely to harm consumers by increasing the price and decreasing the quality of health services in Nebraska."

– FTC Staff Comment to the Hon. Bernice Labedz Concerning Nebraska L.B. 429, 439, and 745 to Liberalize or Repeal Certificate of Need Regulation

Reagan Administration (1987)

"There is no evidence that the CON regulatory process has served its intended purpose of controlling health care costs. Indeed, CON regulation may well increase prices to consumers by restricting supply of hospital services below the level that would exist in a non-regulated competitive environment."

– FTC Staff Comment to Governor Mary George Concerning Hawaii S.B. 213 to Abolish the State Planning and Health Agency, Including its Administration of Certificates of Need

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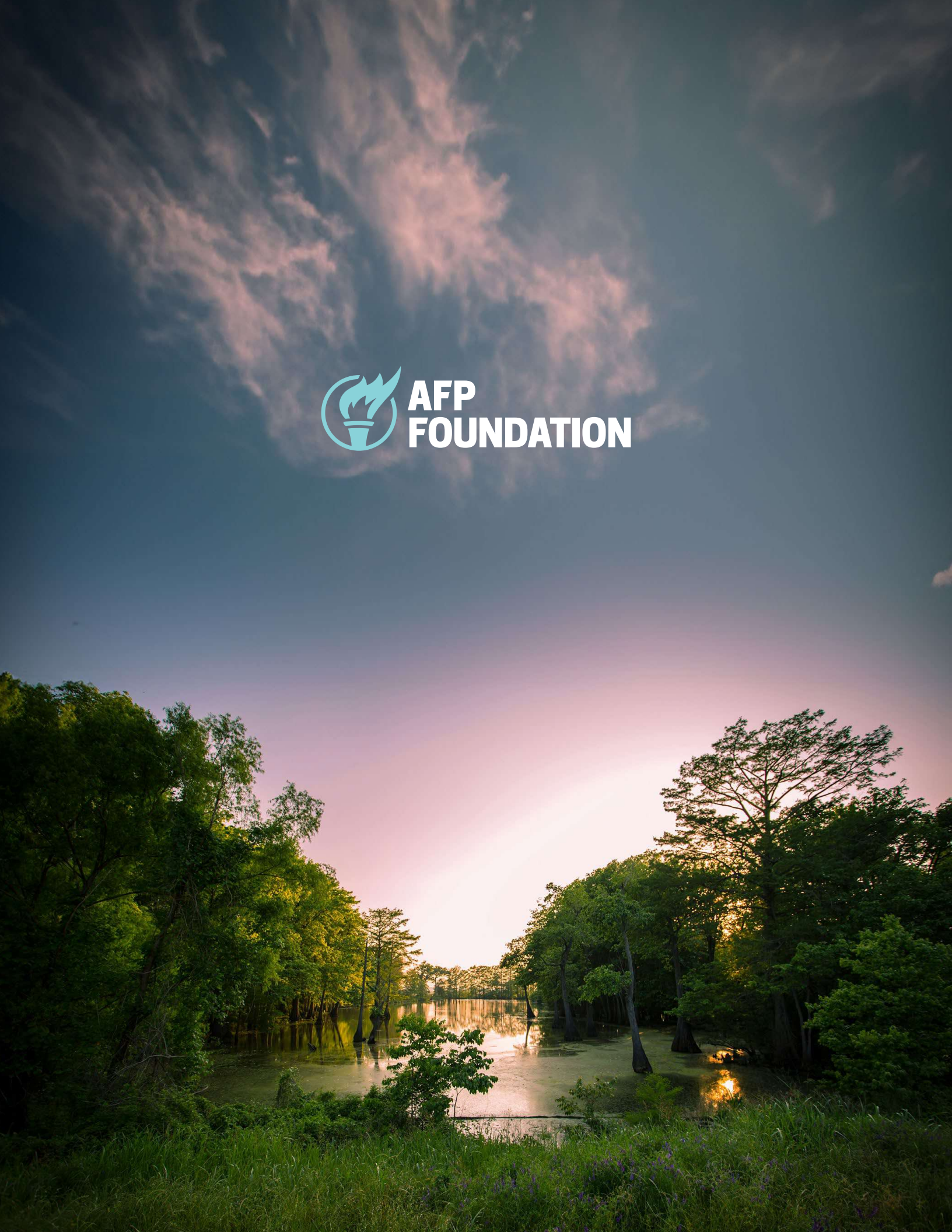
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