



Permission to Care:

Certificate of Need Laws Have Stopped Over a
Billion Dollars of Health Care Investment in Kentucky



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.

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Kentucky's certificate of need (CON) law requires the state government to pre-approve the establishment or expansion of health care facilities, services, or equipment. These certificates are government-mandated permission slips that individual health care providers, physician groups, hospitals, and health systems must obtain before they are allowed to care for patients. CON laws empower government bureaucrats to decide what health care services are offered, instead of that decision being driven by patients' needs and market demands.

Kentucky legislators passed the CON law in 1972, believing that they could control rising health care costs by preventing providers from offering redundant services in the same proximate area. However, decades of research have shown that CON laws fail to control costs or ensure access to health care.¹

Despite every presidential administration since 1987 calling for their repeal, 35 states and the District of Columbia still have CON laws on their books.² But a growing number are reforming and repealing their programs. It's time for the Bluegrass State to make some changes!

Americans for Prosperity Foundation's analysis of CON applications submitted since 1975 finds the Kentucky Cabinet for Health and Family Services (CHFS) lost the state **\$1 billion** in proposed health care investment. This is due to CON applicants either being denied by the CON board or withdrawing their application.

The U.S. Court of Appeals for the Sixth Circuit recently **ruled part of Kentucky's CON law unconstitutional**.³ Legacy Medical Transport is a family-owned ambulance service based in the border town of Aberdeen, Ohio. The CHFS denied Legacy's CON application after existing ambulance providers objected, despite interest in Legacy's services from Kentucky-based hospitals and nursing homes.

\$1 BILLION
health care investment
lost due to CON

\$216
amount Kentuckians would
save per year in health care
spending without CON

49
Number of additional
hospitals Kentucky would
have without CON

46
Kentucky ranks at the
bottom of the country
when comparing the
number of CON-regulated
services across states

1. Matthew Mitchell, "Certificate-of-Need laws in healthcare: A comprehensive review of the literature," Southern Economic Journal, May 2024, <https://onlinelibrary.wiley.com/doi/abs/10.1002/soej.12698>.

2. "What do the last seven presidential administrations have in common?," Americans for Prosperity Foundation, April 2024, <https://americansforprosperityfoundation.org/wp-content/uploads/2024/04/AFPF-CON-AdminQuotes.pdf>.

3. *Truesdell v. Friedlander*, 80 F.4th 762 (6th Cir. 2023).

However, in February 2024, the Sixth Circuit Court ruled that regulators could not stop Legacy from transporting patients in Kentucky to medical facilities in Ohio. CON laws are more concerned with who gets to transport patients to the hospital than they are with how quickly patients receive treatment.

Perhaps the most egregious example of the negative effects of CON laws is Kentucky's restrictions on freestanding birthing centers. Freestanding birthing centers are health facilities independent of hospitals that cater to low-risk pregnancies. Nationwide, more and more women are choosing to give birth in these facilities because they offer patients greater control over their own birthing experiences.

Giving birth in Kentucky is a perilous endeavor, with the state having a maternal mortality rate almost 50% higher than the national average.⁴ Birthing women are relegated to home births or traditional hospitals as there are no freestanding birthing centers in the state. Clearly, the current health care options available to Kentucky's mothers are not adequate. Yet, the state's CON law severely limits women's choices for perinatal care by requiring freestanding birthing centers to obtain a CON.

To do so, freestanding birthing centers must get approval from nearby hospitals (i.e., their competition) in the form of a signed hospital transfer agreement. No freestanding birthing center has ever been able to clear this hurdle to provide care for mothers and their infants. Despite the abysmal health outcomes within the state, lawmakers have remained unconvinced to increase women's choices. Legislation to exempt freestanding birthing centers from the CON process failed as recently as 2024.⁵

The CON regime's prohibitive effects are not limited to ambulance providers and birthing centers. Kentucky requires CONs for 32 types of

“Were we Kentucky legislators ourselves, we would be inclined to think that certificate-of-need laws should be the exception, not the rule, and perhaps have outlived their own needs.”

– U.S. Sixth Circuit Court of Appeals, *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022)

health care services and facilities, covering a vast range of medical services from complex open heart surgery to simply adding more beds to a hospital.⁶ Kentucky has more CON requirements for health care services than 45 states.⁷

The CON system heavily favors large health care providers that are already established in the market. These incumbent providers have a so-called “competitor's veto” that allows them to challenge others' CON applications and tie up the applicants in costly litigation until they inevitably withdraw from the process or their application is denied. Objections from competitors decrease the chance of a CON application being approved by nearly half and double the time until a final decision is made.⁸ These are bets that many health care providers and entrepreneurs cannot afford to make.

The true cost of Kentucky's CON law is unknown, but it is certainly greater than the \$1 billion in

4. “Maternal deaths and mortality rates,” Centers for Disease Control and Prevention, <https://www.cdc.gov/nchs/maternal-mortality/mmr-2018-2022-state-data.pdf>.

5. House Bill 199, Kentucky General Assembly, <https://apps.legislature.ky.gov/record/24rs/hb199.html>.

6. Jaimie Cavanaugh and Matthew D. Mitchell, “Striving for Better Care: A Review of Kentucky's Certificate of Need Laws,” Institute for Justice, August 2023, <https://ij.org/report/striving-for-better-care/con-laws-in-kentucky/>.

7. “States Ranked by Number of CON-Regulated Services, 2020,” Mercatus Center at George Mason University, November 2020, <https://www.mercatus.org/media/72541>.

8. *Supra* note 6.

health care investment that has been denied or withdrawn since the law’s inception. Miles of red tape and the threat of opposition prevent many more providers from applying to offer services they otherwise would. In the absence of a CON program, researchers estimate that Kentucky would have 49 more hospitals, for a total of 166 compared to their current 117. Patients would also be expected to save \$216 in total health care spending each year if without CON laws.⁹

In 2023, the General Assembly formed a legislative task force to study reforming the CON program. After six months, the task force issued a disappointing one-sentence recommendation in December for “further study.”¹⁰ But, the studies have been done. A large and growing body of research shows CON does not work.¹¹

At the onset of the COVID-19 pandemic, the governor declared a state of emergency. The Cabinet for Health and Human Services subsequently directed providers to follow emergency procedures that allowed them to add or alter beds and services to respond to the pandemic without first obtaining a CON.¹² According to Americans for Prosperity Foundation’s analysis, 87 emergency applications were approved during the health crisis that allowed for, among other things, the addition of more than 700 acute care beds.

The pandemic CON exemption acts as a tacit admission from the state government that the CON process does, in fact, prohibit providers from adequately responding in a timely manner to the needs of patients. But CON laws always restrict the supply of health care, not just during pandemics, and hinder preparedness for the next public health emergency. One working paper even found higher mortality rates from COVID-19 in states with CON laws compared to those without them.¹³

While Kentucky continues to stifle health care innovation, neighboring states invite it:

- Ohio and Indiana only maintain CON requirements for nursing homes.
- South Carolina repealed CON requirements for virtually all facilities and services except nursing homes in 2023.
- Georgia exempted outpatient birthing centers, hospital perinatal services in rural counties, and psychiatric and substance abuse inpatient programs from CON, among other revisions in 2024.
- 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.
- Tennessee passed reform bills exempting many services from CON in 2021 and again in 2024.

The Cabinet for Health and Family Services states the CON process “prevents the proliferation of health care facilities, health services and major medical equipment that increase the cost of quality health care in the commonwealth.”¹⁴ However, Americans for Prosperity Foundation’s research shows that CON laws have restricted health care investments that would benefit Kentuckians by increasing access to services and lowering costs in the long term. A “proliferation” of health care would be great for patients in the Bluegrass State. The CON system does not serve patients or communities – the archaic law serves politically proficient businesses that seek to protect their finances and keep control over their local markets.

9. Matthew D. Mitchell, et al., “Certificate-of-Need Laws: Kentucky,” Mercatus Center at George Mason University, November 11, 2020, <https://www.mercatus.org/media/72411>.

10. Sen. Donald Douglas and Rep. Russell Webber, Memorandum re Findings and Recommendations of the Certificate of Need Task Force, Kentucky Legislative Research Commission, December 14, 2023, <https://apps.legislature.ky.gov/CommitteeDocuments/361/28589/01%2010%2024%2023.%20Final%20CON%20Task%20Force%20Findings%20Recommendations%202023%20Memo.pdf>.

11. *Supra* note 1.

12. Jaimie Cavanaugh, et al., “Conning the Competition: A Nationwide Survey of Certificate of Need Laws,” Institute for Justice, August 2020, <https://ij.org/report/conning-the-competition/state-profile/kentucky/>.

13. “Certificate of Need,” Kentucky Cabinet for Health and Family Services, <https://www.chfs.ky.gov/agencies/os/oig/dcn/Pages/cn.aspx>.

14. Sriparna Ghosh et al., Certificate-of-Need Laws and Healthcare Utilization During COVID-19 Pandemic (working paper, July 29, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3663547.

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

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

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

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

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

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

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

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 Labeledz Concerning Nebraska L.B. 429, 439, and 745 to Liberalize or Repeal Certificate of Need Regulation



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