# Certificate of Need Reform in Kentucky

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# Purpose of Certificate of Need (CON) Laws

CON laws were adopted to *decrease* government spending in healthcare and increase the quality of healthcare services.

- The experiment with CON laws failed.
- 90% of peer-reviewed tests show that CON laws are associated with a negative or neutral outcomes for users of healthcare.

**CON laws cannot increase access to care. That is the exact opposite of what they were designed to do.**

# CON Law Background

- In 1972, Kentucky adopted CON laws
- In 1974, Congress enacted a federal mandate encouraging states to adopt CON laws.

  Pub. L. No. 93-641, 88 Stat. 2225 (1974)
- In 1986, Congress repealed the CON law mandate finding CON laws had failed to offer any benefits to patients.

# The reason states adopted CON laws no longer exists

- CON laws are primarily supposed to decrease government spending on healthcare.
- When Congress mandated that states enact CON laws, the federal government reimbursed hospitals for their actual expenses (cost-plus reimbursement). Some people believe cost-plus reimbursement encouraged “unchecked hospital spending.”
- Congress decided limiting the supply of hospitals might decrease federal healthcare spending.
- When CON laws didn’t solve the problem, Congress changed to the fee-for-service reimbursement system still used today.

# Since 1986, every federal administration has called for states to repeal CON laws

- Every administration since the Reagan Administration has commented that CON laws increase costs and harm patients.
- No administration has found evidence that CON laws achieve their goals of decreasing cost or increasing quality.
- This is a bipartisan issue. Both republican and democrat administrations agree that states should repeal CON laws.

# The federal government supports repealing CON laws

- 1987 (Reagan Administration) – Federal Trade Commission testimony supporting CON repeal in Hawaii:
  - "There is no evidence that the CON regulatory process has served its intended purpose of controlling health care costs."
- 1989 (H.W. Bush Administration) – Federal Trade Commission testimony supporting CON repeal in Nebraska:
  - "CON regulation is likely to harm consumers by increasing the price and decreasing the quality of health services in Nebraska."

# The federal government supports repealing CON laws

- 1997 (Clinton Administration) – Federal Trade Commission comment to Virginia Commission on CON Reform:
  - "[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 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."

# The federal government supports repealing CON laws

- 2004 (Bush Administration) – Federal Trade Commission and Department of Justice Report:
  - Joint report found “considerable evidence” that CON laws increase costs and prevent providers that could offer higher quality services from entering the market.

# The federal government supports repealing CON laws

- 2015 (Obama Administration) – Department of Justice Antitrust Division and Federal Trade Commission Statement to Virginia CON work group:
  - "CON laws create barriers to entry and expansion, limit consumer choice, and stifle innovation. . . . [T]he evidence to date does not suggest that CON laws have generally succeeded in controlling costs or improving quality."

# The federal government supports repealing CON laws

- 2018 (Trump Administration) – U.S. Dep't of Health and Human Services, Dep't of the Treasury, and Dep't of Labor Healthcare Report:
  - "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."

https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf

# The federal government supports repealing CON laws

- 2023 (Biden Administration) – Dep't of Justice Testimony supporting CON repeal in Alaska:
  - "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."

# Research confirms CON laws are harmful

CON laws were adopted to *decrease* government spending in healthcare and increase the quality of healthcare services.

CON laws are a failed experiment.

- 90% of peer-reviewed tests show associate CON laws with negative or neutral outcomes for healthcare users.
- CON laws are 500% more likely to be associated with a negative or neutral result than a positive result.

# CON laws increase healthcare spending

- CON laws are associated with 10% higher variable costs in general acute hospitals.
- Hospital expenditures are 20.6% higher per capita in states with CON laws.
- Restrictive CON laws increase hospital expenditures per admission.
- Hospital charges in states without CON laws are 5.5% lower five years following repeal.

# CON laws increase government healthcare spending

- Medicare reimbursements for knee replacement surgery are 5% to 10% lower in states that have already repealed CON laws.
- CON laws are associated with higher per-capita Medicaid community-based care expenditures.
- CON laws are associated with higher Medicaid costs for home health services.
- Medicare spending per rural beneficiary is $295 higher in states with CON laws.

# CON laws decrease healthcare quality

States with CON laws have:

- Higher mortality rates for common conditions like pneumonia, diabetes, chronic lower respiratory disease, and influenza.
- Higher mortality rates for heart attack, heart failure, sepsis, Alzheimer's and covid-19.
- Higher readmissions rates following heart attack, heart failure, and pneumonia.
- Hospitals in states with CON laws were 27% more likely to run out of beds during pandemic surges.

# CON laws decrease access to healthcare

By design, CON laws limit the supply of healthcare services and facilities.

- Out of 170 academic tests specific to access, 90% find that CON laws have a negative or neutral effect on access.

States with CON laws have:

- 30–48% fewer hospitals
- 30% fewer rural hospitals; 13% fewer rural ambulatory surgical centers
- 20% fewer psychiatric care facilities
- Fewer dialysis clinics and reduced capacity at existing clinics.

# Common CON Law Myths

Proponents of CON laws argue:

- CON laws keep rural hospitals from closing.
- CON laws ensure that underserved communities can access care.
- Repealing CON laws will allow privately insured patients to seek care outside of hospitals, which will hurt hospital profits.
- Standard economic principles don’t apply to healthcare; healthcare isn’t a free market.

**Experience and research dispels these myths.**

# CON laws do not cause rural hospital closures

- There are more rural hospitals and more rural surgery centers per capita in states without CON laws.
- One study found that CON laws do not affect hospital volumes.
- The fallacy that repealing CON laws will force rural hospitals to close relies on the faulty assumption that everyone who needs care is already getting care. In reality, more patients are able to access care after CON laws are reformed.

**Rural residents in states with CON laws travel farther, wait longer, and pay more for healthcare.**

# CON laws do not cause rural hospital closures

- Five states without CON laws for rural hospitals have had zero rural hospitals closures since 2005:
  - CO, ID, OR, UT, WY
  - Kentucky has had four rural hospital closures since 2005.
- Eight states make exceptions to their CON laws to allow providers to expand into rural areas:
  - AL, GA, IN, **KY**, MT, OH, OR, SC, TN, WA

# CON laws do not increase access to healthcare for underserved communities

- Uninsured patients are more likely to pay out-of-pocket in states with CON laws.
- One study found that safety-net hospitals in states without CON laws had higher margins than safety-net hospitals in states with CON laws.
- There is no evidence of cross subsidization or evidence that CON laws increase charity care.

# Hospitals do not rely on cost-shifting

Government research and independent peer-reviewed studies find no evidence that hospitals rely on cost-shifting.

If hospitals relied on cost-shifting, costs to commercially insured patients would *increase* when government insurance rates decrease.

Instead, empirical data shows that states with lower government reimbursement rates also have lower costs for commercially insured patients.

# Hospitals do not rely on cost-shifting

- The evidence also shows that the only time hospitals get away with shifting some costs to privately insured patients is when they're located in a geographic area without competition.
- CON laws increase healthcare consolidation, which hurts patients.

# Hospitals do not rely on cost-shifting

One Vermont healthcare regulator wrote:

"[W]hy does the myth of the cost shift persist? Because it serves the interests of some very powerful forces in health care. First, it provides monopolistic hospitals and other profit-maximizing providers with a way to shift blame onto the government for their price gouging . . . . And remarkably, many state governments not only accept this lie but help enable it."

Thom Walsh, "Don't Blame Medicare for Rising Medical Bills, Blame Monopolies," Washington Monthly (July/Aug. 2023). https://washingtonmonthly.com/2023/06/19/dont-blame-medicare-for-rising-medical-bills-blame-monopolies/

# The healthcare market responds to market forces

- Healthcare monopolies function like other monopolies.
- Hospitals in markets with fewer than four hospitals:
  - Charge 12% more; and
  - Assume less risk, *i.e.*, force insurers to bear more risk.
- Hospitals often lower costs in response to lower government reimbursement rates, which shows that hospitals/healthcare responds to market forces.

# The healthcare market responds to market forces

Data on hospital mergers from 2007–2011 shows:

- When mergers were geographically close (less than five miles apart), competition was reduced and hospitals increased prices by over 6%.
- When mergers were geographically distant, hospitals did not increase prices.

- CON laws increase healthcare consolidation and make it nearly impossible for new providers to open.
- Incumbents weaponize the CON application process to stifle competition.

# CON Laws Are Not Working in Kentucky

- Twice in 2023, Governor Beshear issued emergency regulations to address **dangerously low** levels of services:
  - March 2023 – Emergency regulations were needed "to ease the urgent mental health crisis by promoting greater access to psychiatric care[.]"
    - Yet, Cabinet denied a CON application in 2021 to convert 33 acute care beds to psychiatric beds.
  - May 2023 – Emergency regulations needed to allow ambulance providers to expand their service area "without waiting months to obtain a certificate of need."
    - Since 2011, the Cabinet has disapproved at least 11 ground ambulance CON applications.

# CON Laws Are Not Working in Kentucky

CON laws were enacted to lower costs, yet:

- 18% of adults in Kentucky have medical debt.
  - That's 5% higher than the national average of 13%.
- Another 12% of adults in Kentucky report avoiding care because of cost.
- Nearly 63% of Kentuckians have private health insurance.
  - But that doesn't mean they can afford care or have accessible services.
  - This is higher than the national average of 55%.

# Federal Courts Question CON Laws

- Sixth Circuit Court of Appeals struck down ambulance CON applied to out-of-state providers.
  - Questioned why the Kentucky legislature would continue to "inflict" the "human costs" of CON laws "on its own people." *Truesdell v. Friedlander*, 80 F.4th 762, (6th Cir. 2023)
- Sixth Circuit Court of Appeals also noted:
  - "[T]he judgment that [CON laws were] a failed experiment has a ring of truth to it. Were we Kentucky legislators ourselves, we would be inclied to think that certificate-of-need laws should be the exception, not the rule, and perhaps have outlived their own needs." *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022)

# Recent CON Law Reforms Around the Country

- 2019 Florida phased out nearly all CON laws
- 2022 Montana repealed CON laws for everything except nursing homes
- 2023 South Carolina repealed CON laws for everything except nursing homes
- 2024 Oklahoma repealed CON laws for everything except nursing homes

# Recent CON Law Reforms Around the Country

- 2023 North Carolina made significant reforms including repealing CON laws for: psychiatric care facilities, substance use rehab.
- 2023 Connecticut and West Virginia repealed birth center CON.
- 2024 Georgia repealed CON laws for birth centers, in patient psychiatric care, substance use rehab, hospitals in rural counties, maternal health services, and more.
- 2024 Tennessee repealed CON laws for hospitals in rural counties, freestanding emergency departments, burn units, NICU services, MRI/PET services in rural counties, and more.

# Potential Reforms in Kentucky

- Repeal CON for individual services like birth centers, obstetrics, psychiatric services, and rehab (CT, GA, NC, OK, WV)
- Repeal CON for ambulance services to address critical statewide shortage
- Update CON application procedure (NC, GA, TN)
  - Repeal the competitor's veto (stop competitors from blocking new providers)
    - Six states have CON laws but do not allow existing providers to intervene in the application procedure:
      - IN, LA, MI, NE, NJ, NY
  - Make granted CONs expire if they are not used

# Questions?

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