

# Kentucky's Certificate of Need Program: Lessons from Research

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Distinguished committee members:

My name is James Bailey. As a health economist, I have spent much of the last decade studying Certificate of Need (CON) laws, and I appreciate the opportunity to share my findings with you. Please note that I am writing only on my own behalf, and do not intend to represent the views of my employer.

CON laws require health providers to obtain the permission of a state board before opening, expanding, or offering a new type of service. Most states passed their CON law in response to a 1974 federal mandate<sup>1</sup>, though 15 states have repealed their laws since the federal requirement was dropped in the 1980's. Kentucky's Certificate of Need program aims to prevent "the proliferation of health care facilities, health services and major medical equipment that increase the cost of quality health care in the commonwealth."<sup>2</sup> Academic research on CON, however, shows that if anything CON has led to higher costs, and both research and common sense suggest that preventing the proliferation of health care facilities and services reduces access to care.

## **CON Decreases Access to Care and Increases Health Care Costs**

With Dr. Christopher Conover of Duke University, I conducted a [systematic review](#) of the academic literature on CON laws<sup>3</sup>. Surveying the articles that provided original empirical

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<sup>1</sup> The National Health Planning and Resource Development Act of 1974. See Conover and Bailey (2020) for a more detailed history: <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-020-05563-1>

<sup>2</sup> From: <https://www.chfs.ky.gov/agencies/os/oig/dcn/Pages/cn.aspx>

<sup>3</sup> Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). <https://doi.org/10.1186/s12913-020-05563-1>

estimates, we found that most research found that CON led to higher spending and worse access to care.

The most straightforward and direct effect of CON is that these laws make it more expensive, time-consuming, and difficult to open or expand a health care facility and to acquire health care equipment. The academic literature confirms that this generally results in fewer facilities and less equipment in CON states. CON is associated with:

13 percent fewer hospital beds<sup>4</sup>

26 percent fewer hospitals offering MRI scans and CT scans<sup>5</sup>

30 percent fewer hospitals per capita<sup>6</sup>

14 percent fewer ambulatory surgery centers<sup>7</sup>

49 percent fewer neonatal intensive care beds<sup>8</sup>

My own research on how CON affects health care spending found that it leads to 3.1% higher spending overall<sup>9</sup> and 13.1% higher spending by patients in less-than-good health<sup>10</sup>. This higher spending seems to be driven by higher prices more than higher utilization. In fact, health care prices are on average 13.8% higher in CON states<sup>11</sup>.

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<sup>4</sup> Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper <https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf>

<sup>5</sup> Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper <https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf>

<sup>6</sup> Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper <https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory> (an older article finds a 48 percent decrease- see Eichmann TL, Santerre RE. Do hospital chief executive officers extract rents from Certificate of Need laws?. *Journal of health care finance*. 2011;37(4):1-4.)

<sup>7</sup> Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper <https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory>

<sup>8</sup> Lorch SA, Maheshwari P, Even-Shoshan O. The impact of certificate of need programs on neonatal intensive care units. *Journal of Perinatology*. 2012 Jan;32(1):39-44.

<sup>9</sup> Bailey J. Can health spending be reined in through supply restraints? An evaluation of certificate-of-need laws. *Journal of Public Health*. 2019 Dec 1;27(6):755-60.

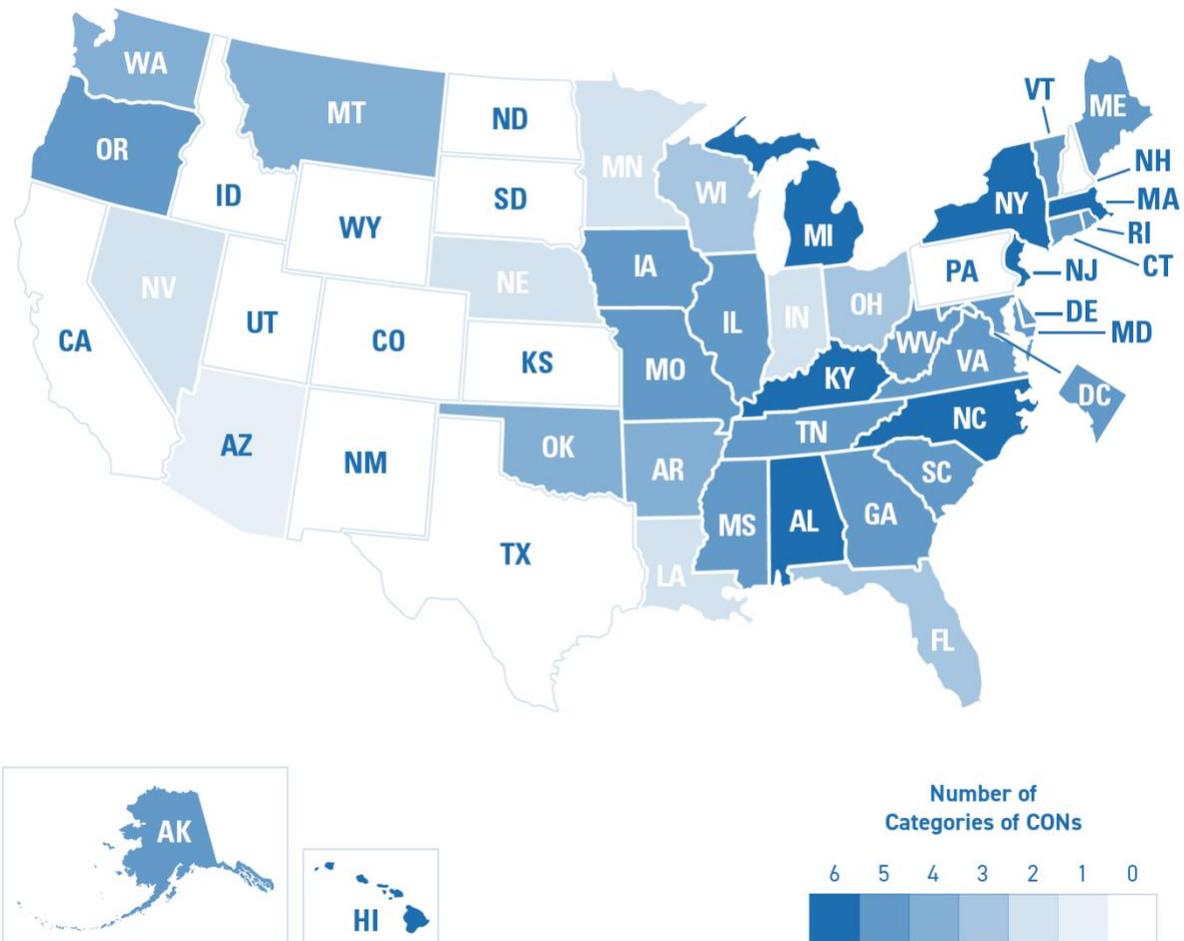
<sup>10</sup> Bailey J, Hamami T. Competition and Health-Care Spending: Theory and Application to Certificate of Need Laws. Federal Reserve Bank of Philadelphia working paper 19-38 <https://www.philadelphiafed.org/the-economy/competition-and-health-care-spending-theory-and-application-to-certificate-of-need-laws>

<sup>11</sup> Bailey J, Hamami T, McCorry D. Certificate of need laws and health care prices. *Journal of Health Care Finance*. 2016 Jul 17;43(4).

## Kentucky's CON Program

By one recent measure, Kentucky currently operates one of the most restrictive CON programs in the country. The Institute for Justice measured the number of different types of health facilities, equipment, and services regulated by CON laws in every state, noting that Kentucky is one of only 7 states to regulate all 6 out a possible 6 broad categories.

### States That Regulate Healthcare Access in the Most Categories



Source: Institute for Justice, "Conning the competition"

Reform is possible. New Hampshire repealed its entire CON program in 2016; we have also seen near-complete repeal in Florida in 2019, Montana in 2021, and South Carolina in 2023. COVID and concern about full hospitals led many states<sup>12</sup>, including Kentucky, to temporarily waive CON requirements, and save lives as a result.<sup>13</sup>

## **Conclusion**

Evidence from the academic literature suggests that Kentucky should consider reforming its unusually broad CON program in order to allow for more health facilities, better access to care, and lower costs for health care.

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<sup>12</sup>[https://www.ftc.gov/system/files/documents/public\\_statements/1579079/summer\\_2020\\_wilson\\_deregulating\\_health\\_care\\_in\\_a\\_pandemic- and\\_beyond.pdf](https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic-_and_beyond.pdf)

<sup>13</sup> Choudhury, Agnitra Roy, Sriparna Ghosh, and Alicia Plemmons. 2022. "Certificate of Need Laws and Health Care Use during the COVID-19 Pandemic" *Journal of Risk and Financial Management* 15, no. 2: 76. <https://doi.org/10.3390/jrfm15020076>