

Permission to Care: Outdated Certificate of Need Law Costing Georgians Hundreds of Millions of Dollars in Health Care

Over the last 12 years, state bureaucrats have denied hundreds of millions of dollars in new investment in one of Georgia's most vital industries: health care. Specifically, Georgia's certificate of need ("CON") laws and regulations empower these bureaucrats, rather than patient demand, to decide whether new health care services are needed. The CON laws require health care providers to obtain approval from the Department of Community Health ("DCH") and overcome competitor challenges before acquiring, replacing, or adding 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 the states establish CON laws to receive federal health care funds. Congress lifted the mandate in 1987 after CON laws proved ineffective at controlling costs.

At least a dozen states have since repealed their CON laws. However, Georgia's CON program persists to protect incumbent care providers from competition by limiting the supply of health care in the state at the patients' expense. American for Prosperity's ("AFP") analysis of CON applications submitted since 2010 finds the Georgia Department of Community Health ("DCH") denied approximately \$700 million in proposed health care investment.

Georgia's CON program pits providers against each other to fight for government favor, diverting resources away from patient care. Competing providers oppose others' CON applications and even litigate DCH's decisions. According to DCH's latest [tracking report](#), dated January 3, 2023, rival providers are contesting a dozen CON approvals, delaying approximately \$269 million in already-approved health care investment.

The true cost of Georgia's CON law is unknown but certainly greater than the \$1 billion that has been denied or appealed over the last 12 years. CON artificially restricts the supply of health care to protect politically proficient providers from competition. Prohibitive application costs and the threat of competitor opposition preclude many providers from ever applying to offer services they otherwise would. So much lost health care means higher prices and less access for Georgians.

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FACT-CHECKING PROPONENTS OF GEORGIA'S CERTIFICATE OF NEED LAW



Georgia Alliance for Community Hospitals: “Certificate of need is a critical program that puts your care first.”

False. According to AFP’s review of Georgia’s CON system, Department of Community Health (“DCH”) denied approximately \$700 million in new health care investment since 2010. Further, even approved CON applications can get stuck in litigation, diverting money from and delaying the development of new health care provisions. Currently, CON applications for \$312 million in new health care investment are held up in the appeals process.

Georgia Alliance for Community Hospitals: “CON laws strike a balance between improving access to care and striving to ensure that communities have the critical services they need, such as trauma care and intensive care for premature infants.”

False. CON is the barrier that prohibits communities from developing critical services.

Because of CON, Bartow County is the largest county in Georgia without a level II NICU. The DCH denied a request to add four Level II NICU beds in March 2020. Currently, infants and parents must transfer outside of county if they need these vital services. The DCH Commissioner overruled the agency’s decision and approved the CON, but competing providers appealed. The case is currently before the Supreme Court of Georgia. In the Georgia Court of Appeals’ [opinion](#), Presiding Judge Stephen Louis A. Dillard wrote:

One thing is for certain: Georgians don’t benefit from a system that props up health care monopolies. And if the CON Act results in mothers and their babies being separated shortly after birth for no reason other than to preserve a healthcare provider’s bottom line, then that system is fundamentally broken and needs to be reimagined.

Department of Community Health (DCH): “The Certificate of Need (CON) program is intended to achieve three goals: (1) to measure and define need, (2) to control costs, and (3) to guarantee access to healthcare services.”

Georgia’s CON program fails on all three goals.

1. The CON law restricts access to health care options that would be available to Georgians but for CON. The

Mercatus Center at George Mason University estimates that, without CON, [Georgia would have](#) 74 additional hospitals, 27 of which would serve rural areas.

2. Georgia, like many other states, clings to the erroneous rationale the federal government abandoned more than 30 years ago: CON laws keep down health care costs and ensure access to care. But recent scholarship conducted by the Mercatus Center shows states with CON laws are associated with [higher health care costs](#), [lower quality care](#), and [less access](#) to health care. And according to a 2018 [joint study](#) from the U.S. Department of Health and Human Services, U.S. Department of the Treasury, and U.S. Department of Labor:

The evidence to date, however, suggests that CON laws are frequently costly barriers to entry for healthcare providers rather than successful tools for controlling costs or improving healthcare quality. Based on that evidence and their enforcement experience, the two federal antitrust agencies—the FTC and the Antitrust Division of the Justice Department—have long suggested that states should repeal or retrench their CON laws.

3. No [scholarly research](#) indicates that CON laws protect rural hospitals, and the few studies that examine the issue conclude CON is associated with fewer rural hospitals and medical facilities, not more.

States Continue to Repeal or Reform Their Outdated CON Laws

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

- Tennessee exempted several services from CON in a [reform bill](#) signed in 2021.
- 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.
- A bill to repeal CON in South Carolina [passed the State Senate](#) 35-6 in January 2022 but eventually died in the State House. The repeal bill will be [considered again](#) in 2023.