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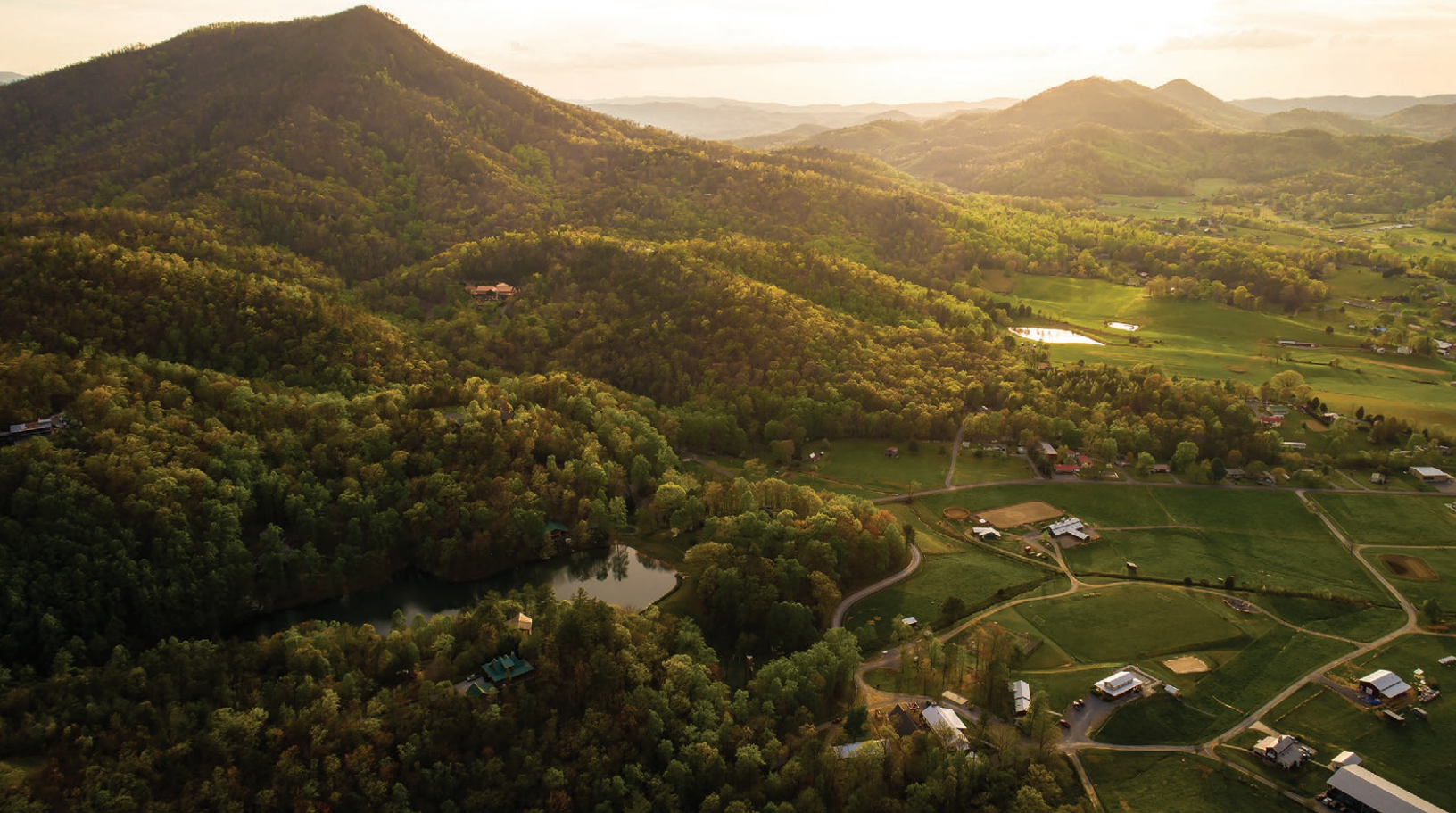
Permission to Care:

How Tennessee'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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> **"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."**
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> - 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).

Americans for Prosperity Foundation ("AFPF") finds that in the last two decades, state bureaucrats have denied $1.5 billion in new investment in one of Tennessee's most vital industries: health care. Specifically, Tennessee's certificate of need ("CON") law empowers these bureaucrats, rather than patients' needs, to decide what health care services are offered—leading to worse health outcomes for patients in the Volunteer State.

Tennessee's CON 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 that states establish CON laws to receive federal health care funds. Congress lifted the mandate in 1987 after CON laws proved ineffective at controlling costs. More than a dozen states have since repealed their CON laws.

Tennessee law mandates that "the establishment and modification of healthcare institutions, facilities, and services must be accomplished in a manner that promotes access to necessary, high quality, and cost-effective services for the health care of the people of this state."[1] However, a large and growing body of research indicates CON laws fail to promote health care quality, access, or cost-effectiveness.[2]

"A large and growing body of research indicates CON laws fail to promote health care quality, access, or cost-effectiveness."

In fact, CON programs appear to do the opposite. Compared to states without CON laws, states with CON are associated with higher health care spending, fewer medical facilities, and inferior patient outcomes.[3] The Mercatus Center estimates that without CON, Tennessee would have 63 additional hospitals, 25 of which would serve rural areas.[4]

However, Tennessee's CON program persists to protect incumbent care providers from competition by limiting the supply of health care at the patients' expense. AFPF's analysis of CON decisions issued since 2000 finds the state denied nearly $1.5 billion in proposed health care investment.

$1.5 BILLION

health care investment denied since April 2000

Moreover, Tennessee'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 sometimes take years to resolve and cost hundreds of thousands of dollars, delaying deployment of new health care provisions.

For example, HealthSouth applied for a CON in December 2010 to build a 40-bed inpatient rehabilitation hospital in Franklin to treat patients recovering from debilitating injuries and illnesses such as stroke, brain and spinal cord injuries, and amputations. HealthSouth was granted the CON in March 2011; however, a competitor petitioned for judicial review of the decision in the Chancery Court for Davidson County. After losing, the competitor appealed the ruling to the Tennessee Court of Appeals, which affirmed HealthSouth's CON in August 2014.[5] The CON dispute delayed construction of the hospital for four years,[6] needlessly leaving patients without critical care provisions.

Often called a "competitor's veto,"[7] combined with other bureaucratic hurdles, the CON process has a chilling effect on health care investment. The threat of cost-prohibitive court battles deters providers from applying to offer services they otherwise would. A Beacon Center of Tennessee study finds

[1] Tenn. Code § 68-11-1611.
[2] *See, e.g.*, 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.
[3] *Id.*
[4] Matthew D. Mitchell et al, Certificate-of-Need Laws: Tennessee State Profile, Mercatus Center at George mason University (Mar. 23, 2021), *available at* https://www.mercatus.org/media/73956/download?attachment.
[5] *Middle TN Rehab. Hosp., LLC v. Health Servs. & Dev. Agency*, No. M2013-02180-COA-R3CV, 2014 WL 4181074 (Tenn. Ct. App. Aug. 22, 2014).
[6] HealthSouth Corporation, *HealthSouth To Build Hospital In Franklin, Tennessee*, PR Newswire (Oct. 23, 2014), https://www.prnewswire.com/news-releases/healthsouth-to-build-hospital-in-franklin-tennessee-896083269.html.
[7] See Anastasia Boden & Angela C. Erikson, Competitor's Veto: A Roadblock to New Business, Pacific Legal Foundation (2021), *available at* https://pacificlegal.org/wp-content/uploads/2021/01/con-law-report.pdf.

that the number of CON applications has fallen by more than 70 percent over the last 20 years.[8]

The COVID-19 pandemic highlighted CON's shortcomings as a public health policy. Early in the public health emergency, Governor Bill Lee recognized the CON program would prevent health care providers from ramping up services to respond adequately to the crisis. Like many other states with CON laws, the governor issued an order on March 19, 2020, suspending CON laws and regulations to allow hospitals to add beds and services as needed without having to obtain a CON.[9]

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 in states with CON laws compared to those without them.[10]

In 2021, the Tennessee General Assembly reformed the CON law to make it less restrictive. The reforms removed the CON requirement for mental health hospitals, psychiatric services, and some hospice and home health agencies. The 2021 revisions also allow health facilities to relocate or replace medical equipment without obtaining a CON.

In total, the reforms included over 30 changes to the CON program.[11] Many of these changes are arbitrary. For example, health facilities can now add acute, rehabilitation, or long-term care beds without a CON if they already have beds in that category. But if the facility does not have beds in a category, they cannot add them without a CON. Additionally, providers in smaller counties must obtain a CON to develop MRI services. But providers in counties with a population above 175,000 can do so without a CON—unless they expect to perform more than five scans annually on patients 14 years old or younger, then a CON is required.

While better than nothing, the reforms did not go far enough. These piecemeal changes highlight the inefficiencies inherent to Tennessee's CON regime. The CON program is a labyrinth of red tape. While some of these reforms will allow patients and providers more health care access at the margins, Tennessee's CON regime still artificially limits the supply of health care to protect politically proficient providers from competition.

The health care industry is highly regulated. Understandably, medical professionals must meet rigorous educational, licensing, and quality of care standards. Tennessee's CON scheme acts as an unnecessary additional barrier for health care providers to treat patients in the Volunteer 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—their services are "needed."

"Tennessee's CON regime artificially limits the supply of health care to protect politically proficient providers from competition."

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.
- 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.

Tennessee's CON regime is costly and unnecessary. It has directly denied $1.5 billion in health care investment over the last 23 years—and deterred much more. 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 Tennesseans pay higher prices for less access and lower quality health care.

[8] Ron Shultis et al., Old Regulations, Bureaucracy, and Protectionism: How Government Reduces Access To Healthcare Through Certificate-of-Need Laws, Beacon Center of Tennessee (2022), *available at* https://www.beacontn.org/wp-content/uploads/2023/01/CON-Report-Final.pdf.
[9] Tenn. Exec. Order No. 15 (March 19, 2020).
[10] 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.
[11] Tennessee Health Services and Planning Act of 2021, SB 1281, 112th General Assembly, Reg. Sess. (Tenn. 2021).

CASE STUDY: How CON Causes Needless Delays for Critical Care

HealthSouth and Middle Tennessee Rehabilitation Hospital ("MTRH") applied for a certificate of need ("CON") in December 2010 to build a rehabilitation hospital in Williamson County. The hospital would treat patients with chronic and debilitating conditions such as brain and spinal cord injuries, stroke, heart and pulmonary problems, and amputations. HealthSouth was granted the CON in March 2011; however, MTRH contested the decision. Later that year, an administrative law judge upheld the Health Services and Development Agency ("HSDA") decision to approve HealthSouth's CON application and deny MTRH's application.

MTRH then petitioned for judicial review of the decision in the Chancery Court for Davidson County. MTRH's objections were not about patient care but were challenges to the CON process under the Uniform Administrative Procedures Act. After losing, MTRH appealed the chancery court's ruling to the Tennessee Court of Appeals, which affirmed HealthSouth's CON in August 2014. The CON dispute delayed the construction of the hospital for four years, needlessly leaving patients without critical care provisions.

This case is not exceptional in states with CON laws that allow competitors to intervene. Tennessee'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 high-quality care to patients in need. When they compete, it should be for patients through the quality of their care—not for government permission to do so.

However, 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 sometimes take years to resolve and cost hundreds of thousands of dollars, diverting resources from patient care and delaying deployment of new health care provisions.

2010

December 2010 — HealthSouth and MTRH each file a CON application to build an inpatient rehabilitation hospital in Williamson County.

2011

March 2011 — The State approved HealthSouth's application and denied MTRH's.

MTRH contested the decision.

November 2011 — An HSDA administrative law judge granted HealthSouth the CON.

2012

MTRH petitioned the chancery court for judicial review.

2013

August 2013 — The chancery court affirmed the agency's decision to grant HealthSouth the CON.

2014

MTRH appealed the ruling.

August 2014 — The Tennessee Court of Appeals affirmed the chancery court's order upholding the HSDA's decision to grant a CON to HealthSouth and deny MTRH's application.

December 2014

2015 — HealthSouth begins construction on a $23 million 40-bed inpatient rehabilitation hospital in Franklin.

December 2015

2016 — HealthSouth Rehabilitation Hospital of Franklin opens.

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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 who 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, and Washington have rural exemptions to their CON requirements.

In 2021, Tennessee passed legislation that eliminated CON requirements for health care facilities and services in economically distressed counties that did not already have a hospital. However, CON remains a barrier to increased access to care for rural communities not covered by this exemption.

"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.

"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.

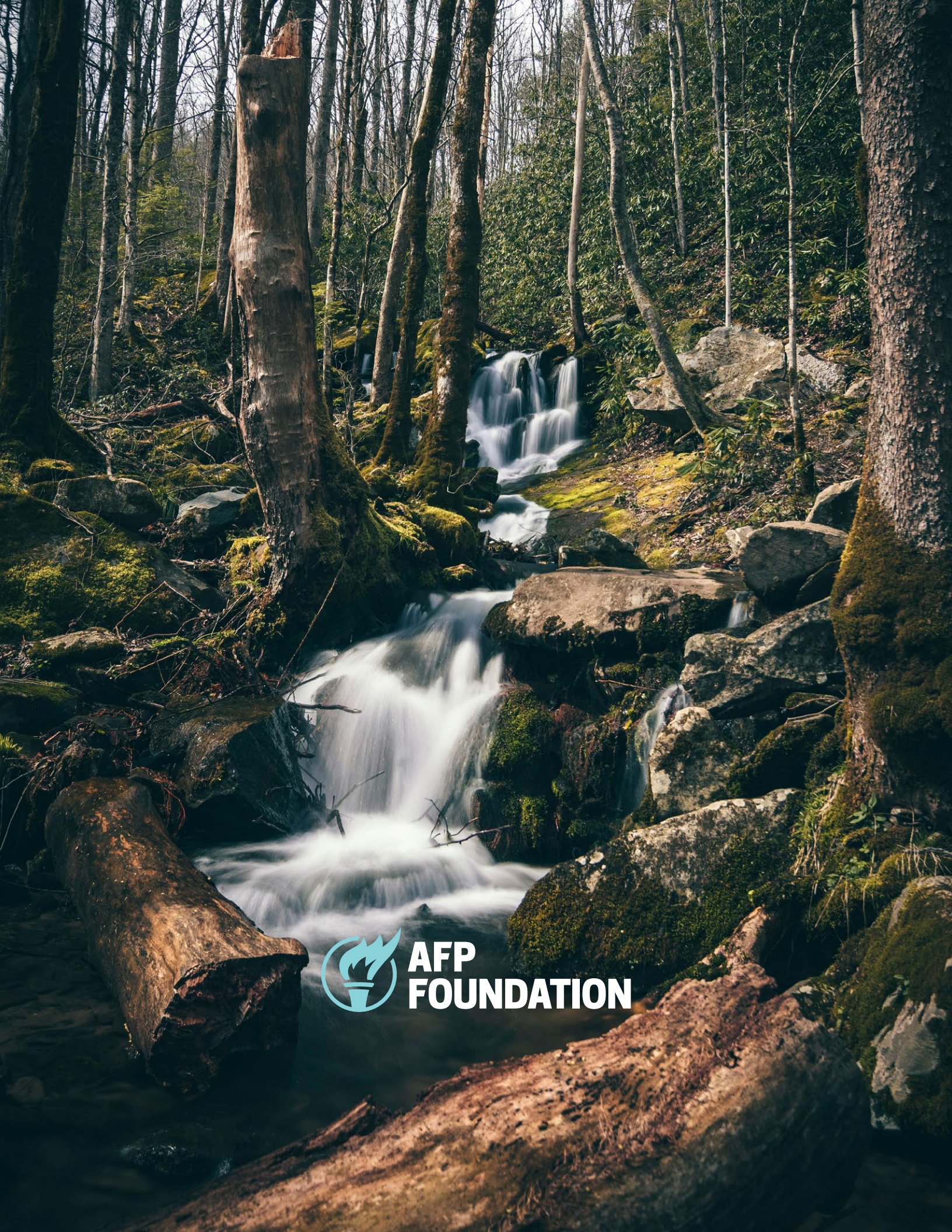
[1] Jamie Cavanaugh & Matthew D. Mitchell, Striving for Better Care: A Review of Kentucky's Certificate of Need Laws, Institute for Justice (August 2023), *available at* https://ij.org/wp-content/uploads/2023/08/Kentucky-CON-Report-Aug.-2023.pdf.

[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.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