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# Unleashing Opportunity in Healthcare

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## Introduction

Healthcare is not only vital for people's basic well-being, it's the way that many people earn a living. But a thicket of anti-competitive laws stands in the way of both better healthcare services and economic opportunity. From those simply wishing to earn a living selling hearing aids[1] to those seeking to disrupt entire industries through the use of new technology that benefits consumers,[2] Americans are being thwarted by unjust, unnecessary, and unconstitutional laws.

This Article surveys some of the biggest hurdles to both innovation and economic opportunity, articulates legal theories for challenging those hurdles, and recaps recent or ongoing lawsuits challenging them. While it also outlines policy proposals to fix these problems, it should be noted that the solutions are not hard. Government should simply repeal or relax laws that stifle healthcare opportunity with scant evidence of any public benefit.

This Article proceeds in three parts. First, it explores the problems caused by Certificate of Need ("CON") laws. Second, it outlines the problems with occupational licensure in healthcare. Third and finally, it explains how CON laws, licensure, and other laws work together to restrict access to maternal healthcare.

## I. Certificate of Need Laws

Imagine if the government had told Peloton that it couldn't sell its exercise bikes unless it first somehow proved to a panel of bureaucrats that the company was "needed." That would've been a difficult thing for Peloton to do. Before COVID-19, many people were accustomed to exercising outside of their home—at the gym, or in studios. The company may not have been able to prove with any degree of certainty that tens of thousands of households would invest in large and expensive at-home exercise equipment. And yet, over the past several years, Peloton has become a household name with over six million users worldwide: It's even expanded into treadmills and rowing machines.[3] Had the company been

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[1] *Florida's Outdated Licensing Robs Hearing, Livelihoods*, PAC. LEGAL FOUND., https://perma.cc/EL2W-NH8Z.

[2] *Making a Spectacle Out of Economic Protectionism*, INST. FOR JUST. (Nov. 17, 2016), https://perma.cc/L466-RDQK.

[3] *Q2 FY2025 Shareholder Letter*, PELOTON (Feb. 26, 2025), https://perma.cc/T8KX-E4HD; *see* Julie Verhage & Mark Gurman, *Peloton to Sell Cheaper Treadmill and Rowing Machine in 2020*, YAHOO! FIN. (Nov. 13, 2019), https://perma.cc/MF2Z-4BEC.

forced to prove to the government's satisfaction that it would be successful, it likely wouldn't have been able to start up at all.[4]

But CON laws require just that: They demand that businesses in the healthcare field persuade the government that their service is needed before opening their doors.[5] In some states, hospitals must secure a CON even before adding new hospital beds.[6] Present in over 30 states,[7] CON laws usually require thousands of dollars, representation by an attorney, submitting to burdensome discovery, attending a trial-like hearing, and several months (if not years) to surmount.[8] For many, they stand as a complete barrier to entry in the healthcare field.

The problem is two-fold. First, it is difficult for entrepreneurs to prove that their business is needed in advance—particularly new or innovative businesses that will disrupt the market. In America, we generally let would-be business owners experiment and invest their own time and money to find out for themselves whether that would-be business is needed. CON laws, on the other hand, force people to prove something that may not be provable—turning the idea of the American Dream on its head.

The second problem is that in many cases, government officials defer to the existing businesses' determination about whether there is a need for the applicant—establishing a "Competitor's Veto" over new competition. Predictably, incumbents are reluctant to allow in new competition.[9] And even where bureaucrats do not rotely defer, they may apply outdated formulas or think about "need" in a one-dimensional way.[10] Even if there are enough providers from a numerical standpoint to serve the community, for example, consumers might still benefit from something new or different.

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[4] *See* Tiwari v. Friedlander (*Tiwari I*), No. 3:19-CV-884, 2020 WL 4745772, at *1 (W.D. Ky. Aug. 14, 2020) ("[I]magine if a Certificate of Need system had said:

- no need for Stanford (1891) because of Santa Clara (1851); . . .
- no need for Disneyland (1955) because of Knott's Berry Farm (1941);
- no need for Barbie (1959) because of Raggedy Ann (1915); . . .
- no need for iPhones (2007) because of Blackberries (1999) . . . ." (footnote omitted)).

[5] *See id.* (discussing Kentucky's CON law).

[6] *See, e.g.*, MINN. STAT. ANN. § 144.551 (West, Westlaw through Mar. 18, 2025, from the 2025 Reg. Sess.) (prohibiting the increase of "bed capacity of a hospital").

[7] *Certificate of Need State Laws*, NAT'L CONF. OF STATE LEGS. (Feb. 26, 2024), https://perma.cc/N9C8-VYWT.

[8] *See* Matthew D. Mitchell, *Certificate-of-Need Laws in Healthcare: A Comprehensive Review of the Literature*, 92 S. ECON. J. 6, 8 (2025); Eric Boehm, *How Virginia's Hospital Licensing Laws Led to an Infant's Death*, REASON (Jan. 25, 2017, 9:30 AM), https://perma.cc/DJ77-RUB2.

[9] Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL'Y 1009, 1010, 1025 (2015).

[10] *See, e.g.*, *infra* notes 88–91 and accompanying text.

A story out of New York City is illustrative. There, an all-female group of EMTs sought to buy an ambulance to serve the Hasidic community in Brooklyn.[11] But bureaucrats initially denied them permission after finding that the all-male EMT service rendered the female group's service unnecessary.[12] Apparently, the cultural preference of many women in that community for securing intimate medical services from women rather than men was irrelevant to the CON law's needs analysis.[13]

CON laws date back to the late 19th century when they were originally applied to railroads.[14] The idea was that if competition was not limited, there would be a duplication of unnecessary railroads, leading the two competing railroads to engage in "dog eat dog" competition that would leave both companies financially insolvent.[15] Nowadays, however, it's nearly universally recognized that competition leads to more efficient outcomes and that artificially restricting it leads to lower supply, higher prices, and poorer quality services.[16] And from a common sense perspective, it's difficult to understand how limiting supply would somehow ultimately increase it.

CON laws made their way to the medical field in the 1960s, when states began requiring them as a prerequisite to purchasing medical equipment or opening new facilities.[17] In 1974, Congress passed the National Health Planning and Resources Development Act, which tied federal funds to states passing a CON law program.[18] At the time, Congress reimbursed Medicare and Medicaid providers based on how much they actually spent.[19] One theory was that if providers buy a lot of expensive equipment, they will overcharge patients to recoup their costs.[20] Congress, therefore, believed that by controlling the supply of facilities and

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11 Anastasia Boden & Mollie Williams, *Government's Ambulance Chasers*, WALL ST. J. (Apr. 29, 2020, 6:13 PM), https://perma.cc/3FV7-6V84.

12 Emma Goldberg, *They Told Her Women Couldn't Join the Ambulance Corps. So She Started Her Own.*, N.Y. TIMES (June 23, 2023), https://perma.cc/3HTH-JB22.

13 *See* Boden & Williams, *supra* note 11.

14 Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 386 (2012).

15 *See id.* at 390–91.

16 *See* Mitchell, *supra* note 8, at 18.

17 *See* Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 ANTITRUST MAG., Fall 2015, at 50, 50–51.

18 National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, sec. 3, §§ 1523, 1525, 88 Stat. 2225, 2246, 2249 (1975), *repealed by* Drug Exports Amendments Act of 1986, Pub. L. No. 99-660 § 701, 100 Stat. 3743, 3799 (1986).

19 *See* Stephen M. Weiner, *"Reasonable Cost" Reimbursement for Inpatient Hospital Services Under Medicare and Medicaid: The Emergence of Public Control*, 3 AM. J.L. & MED. 1, 7 (1977).

20 *See* Ohlhausen, *supra* note 17, at 50–51.

equipment, CON laws would reduce how much providers spent on that equipment, which would lower overall healthcare costs.[21]

The federal inducement worked. By 1980, every state other than Louisiana had enacted a CON law.[22] But since then, Congress has switched to a fee-for-service model, undermining the original (already problematic) theory underlying CON laws.[23] What's more, even under a retrospective payment approach, CON laws tended to have negligible effects on reducing costs, and today the bulk of the academic research suggests that CON laws don't just fail to decrease costs—they increase healthcare spending.[24] This outcome is predicted by standard economic theory and it's why the government sets rates for natural monopolies like utilities.[25]

Recognizing that CON laws were an abject policy failure, Congress repealed its federal incentives in 1986.[26] Some states repealed their CON laws immediately, but CON laws remain on the books in nearly two-thirds of states because, unsurprisingly, incumbents have fought to keep them there.[27] Yet, agencies of every federal administration since Reagan have recommended that states repeal their CON laws.[28]

CON laws thwart myriad healthcare services, from online vision tests,[29] to less-invasive colonoscopies,[30] to ambulance services,[31] to mental health facilities,[32] to addiction treatment centers,[33] to NICUs,[34] to

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21 *See id.* at 51.

22 *Id.*

23 *Id.*

24 *See* Mitchell, *supra* note 8, at 13.

25 *See id.*

26 *See* Tiwari v. Friedlander (*Tiwari I*), No. 3:19-CV-884, 2020 WL 4745772, at *4 (W.D. Ky. Aug. 14, 2020).

27 *Id.*; *see* Gary Winslett, *Repeal Certificate-of-Need Laws in Health Care*, MEDIUM (June 13, 2024), https://perma.cc/7749-Z6PS.

28 Sofia Hamilton & Thomas Kimbrell, *Certificate of Need Laws Con Rural Patients Out of Health Care*, STATNEWS (June 14, 2024), https://perma.cc/NXG6-MFUR.

29 Matt Powers, *Online Vision Test Company Appeals Case to South Carolina Supreme Court*, INST. FOR JUST. (Aug. 19, 2024), https://perma.cc/UM6J-BJYA.

30 Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535, 541 (4th Cir. 2013).

31 Anastasia Boden, *Kentucky's Ambulance Cartel Is Afraid of Phillip Truesdell*, WALL ST. J. (Oct. 4, 2019, 5:47 PM), https://perma.cc/4ZSY-GEPK.

32 *Harmful Certificate of Need Laws Keep Mental Health Patients from Getting Care*, GOLDWATER INST. (Sept. 25, 2018), https://perma.cc/6CUL-4T8C.

33 Nigel Jaquiss, *After Nearly Five Years, a Pennsylvania Company Gives Up Plans to Open a New Rehab Hospital in Oregon*, WILLAMETTE WK. (July 12, 2023, 6:16 AM), https://perma.cc/G7FN-9E97.

34 Boehm, *supra* note 8.

specialized brain injury rehab,[35] to innovative cancer treatments.[36] And of course, they thwart people seeking to earn an honest living in the medical field. Plaintiffs in lawsuits challenging CON laws have included a social worker who set out to care for special needs families in New Orleans,[37] two home health entrepreneurs who sought to serve the Nepali community in Kentucky,[38] and an African refugee who sought to provide non-emergency medical transportation to the elderly and disabled in Nebraska.[39] Regardless of their original motivations, CON laws now deprive consumers of these services and these would-be entrepreneurs of their livelihood for purely anti-competitive reasons.

### A. *Legal Theories for Challenging CON Laws*

CON laws present a host of constitutional problems and have therefore been challenged under several legal theories, including the Due Process, Privileges or Immunities, and Equal Protection Clauses of the Fourteenth Amendment; analogous state provisions; and the Interstate Commerce Clause.[40]

#### 1. The Fourteenth Amendment

The Fourteenth Amendment was one of several Reconstruction Amendments passed in the wake of the Civil War.[41] Given the text, the context, and the many legislative debates surrounding their passage, the purpose of these Amendments was clear: ensure that the states would not repeat the horrific discrimination that had preceded the war by establishing a constitutional right to equal treatment, incorporating the

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35 Nigel Jaquiss, *Oregon Provides Hardly Any Rehab Beds for Patients with Brain Injuries. Powerful Interests Want to Keep It That Way.*, WILLAMETTE WK. (Jan. 18, 2023, 5:30 AM), https://perma.cc/8B2F-7GXZ.

36 Matthew Glans, *Research & Commentary: Michigan's Certificate of Need Laws Undermine Cancer Treatments*, HEARTLAND INST. (Oct. 1, 2019), https://perma.cc/ZFV9-3QKJ; *cf.* Eric Boehm, *Michigan Lawmakers Overturn a Bad Regulation Restricting Access to Cancer Treatments*, REASON (Nov. 18, 2019, 2:45 PM), https://perma.cc/CY4U-A56Y.

37 *See* Newell-Davis v. Phillips (*Newell-Davis IV*), No. 22-30166, 2023 WL 1880000, at *1 (5th Cir. Feb. 10, 2023) (per curiam).

38 *See* Tiwari v. Friedlander (*Tiwari III*), 26 F.4th 355, 358 (6th Cir. 2022).

39 *See Nebraska CON*, INST. FOR JUST., https://perma.cc/8TJ3-U78H.

40 *See, e.g.*, Tiwari v. Friedlander (*Tiwari I*), No. 3:19-CV-884, 2020 WL 4745772, at *5, *5 nn.62–63 (W.D. Ky. Aug. 14, 2020).

41 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2159 (2023); Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate Over Privileges or Immunities*, 14 TEX. REV. L. & POL. 15, 21 (2009).

Bill of Rights and other protections for civil rights against the states, and giving the federal government vast new power to protect these rights.[42]

Though the immediate purpose was to empower newly freed black Americans, the Amendments were written broadly so as to widely eliminate any deprivations of liberty or equal treatment.[43] Thus, equal protection cases are often brought by individuals seeking to end many forms of arbitrary and unequal treatment, whether it relates to racial discrimination or other kinds of government favoritism.[44] Similarly, the Due Process and Privileges or Immunities Clauses protect against all arbitrary deprivations of liberty, even if the right to self-defense, free speech, and to keep the fruits of one's labor were top of mind at the time.[45]

CON laws directly conflict with the Fourteenth Amendment. Their primary effect is granting incumbent businesses a privilege that is denied to new entrants to the market—thus depriving people of their ability to earn a living.[46] Lawsuits challenging CON laws have therefore frequently relied on the Fourteenth Amendment or analogous provisions found in state constitutions.[47]

Unfortunately, courts have watered down the Fourteenth Amendment's protections. The Supreme Court effectively wrote the Privileges or Immunities Clause out of the Constitution in its decision in the *Slaughter-House Cases*.[48] That decision, which ruled that the clause only protects rights inherent to federal citizenship (like the right to access federal seaports) is widely recognized as wrong.[49] Advocates have brought, and should continue to bring, Privileges or Immunities cases with the hopes of restoring the clause to its original meaning, but until the

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[42] *See Students for Fair Admissions*, 143 S. Ct. at 2182 & n.2 (Thomas, J., concurring); Robert J. Kaczorowski, *Searching for the Intent of the Framers of Fourteenth Amendment*, 5 CONN. L. REV. 368, 368 (1972–73); U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[43] *See Students for Fair Admissions*, 143 S. Ct. at 2182 (Thomas, J., concurring).

[44] Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 379–81 (2003).

[45] Neily Ill & McNamara, *supra* note 41, at 17.

[46] *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 234–35 (2003).

[47] *See* discussion *infra* Section I.B.

[48] 83 U.S. (16 Wall.) 36, 76–80 (1872).

[49] *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 22 (2021); ILAN WURMAN, THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 138–39 (2020); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 4 (2015); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 313, 317 (2007); Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 342 (2005); Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 69 (2009); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1243, 1300 n.255 (2010).

Supreme Court revisits the issue, lower courts are bound by that erroneous decision.[50]

The protections in the Due Process Clause, too, have been greatly diminished. In *United States v. Carolene Products Co.*,[51] the Supreme Court established the foundation for three tiers of judicial scrutiny (strict, intermediate, and rational basis) which a judge will choose from depending on which right you argue has been violated.[52] Thus, some liberties enjoy higher judicial protection than others. Economic rights, like the right to contract, earn a living, or to use your property, are subject to the lowest form of judicial review—rational basis scrutiny.[53] Under that standard, plaintiffs are effectively tasked with proving a negative (i.e., that there was no conceivable rational reason for the law).[54] Judges will uphold laws so long as they can conjure *any* reason why the legislature *might* have thought the law would be a good idea, even if the government's attorney didn't present that reason in litigation.[55]

In practice, this is a very difficult standard to surmount and therefore very few cases asserting economic rights have succeeded.[56] In fact, an appellate court recently upheld a CON law that deprived a social worker in New Orleans from providing respite care for families with special needs children even though the state's only asserted purpose was administrative convenience.[57]

Worse, some state courts have interpreted due process and equal protection counterparts in state constitutions as requiring the same level of scrutiny as the Fourteenth Amendment.[58] Fortunately, state courts are increasingly recognizing that the Fourteenth Amendment is merely a

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50 Neily Ill & McNamara, *supra* note 41, at 41–42, 44.

51 304 U.S. 144 (1938).

52 *Id.* at 152–54, 152 n.4.

53 Douglas G. Smith, *A Return to First Principles?* Saenz v. Roe *and the Privileges or Immunities Clause*, 2000 UTAH L. REV. 305, 342–43 (2001).

54 *See id.* at 343–44.

55 Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016).

56 *Id.*

57 *See* Newell-Davis v. Phillips (*Newell-Davis IV*), No. 22-30166, 2023 WL 1880000, at *1, *4 (5th Cir. Feb. 10, 2023).

58 *See, e.g.*, Valley Nat'l Bank of Phx. v. Glover, 159 P.2d 292, 299 (Ariz. 1945) ("The equal protection clauses of the 14th Amendment and the [Arizona C]onstitution have for all practical purposes the same effect."); State v. McManus, 447 N.W.2d 654, 660 (Wis. 1989) ("This court has held the due process and equal protection clauses of the Wisconsin Constitution are the substantial equivalents of their respective clauses in the federal constitution."); *see also* Daniel Polonsky, *Equal Protection Through State Constitutional Amendment*, 56 HARV. C.R.-C.L. L. REV. 413, 428 n.73 (2021).

floor that states can exceed, and in fact, a state constitution's unique text and history often warrant a different interpretation.[59]

2. Interstate Commerce Clause

The Interstate Commerce Clause grants Congress the exclusive power to regulate commerce between states.[60] The Supreme Court has interpreted the clause as not only empowering Congress but also limiting states from discriminating against or unduly burdening interstate commerce—a doctrine known as the Dormant Commerce Clause.[61]

In this interconnected world, CON laws frequently burden or discriminate against commerce between states. For example, telehealth providers, ambulance companies, and practitioners who live in border towns often engage in interstate commerce.[62] Not surprisingly, CON laws not only create cartels, but cartels that are especially discriminatory against out-of-state competition.[63] Their tendency to gang up against out-of-staters and to thwart medical services across state lines therefore has Commerce Clause implications.

Indeed, in *Buck v. Kuyckendall*,[64] the Supreme Court invalidated a CON law under the Dormant Commerce Clause.[65] As was typical of the era, that law applied to the transportation industry and required a Certificate for interstate trips made by common carriers.[66] The Court reasoned that the law did not merely burden interstate commerce, it directly obstructed interstate commerce and prohibited competition for interstate services.[67] The law's "primary purpose [was] not regulation with a view to safety or to conservation of the highways, but the prohibition of

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59 *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16–17 (2018); ANTHONY B. SANDERS, BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS 141–44 (2023); *see also* Raffensperger v. Jackson, 888 S.E.2d 483, 489–90 (Ga. 2023); Ladd v. Real Est. Comm'n, No. 321 M.D. 2017, 2022 WL 19332047, at *14, *16–17 (Pa. Commw. Ct. Oct. 31, 2022); Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 86 (Tex. 2015).

60 U.S. CONST. art. I, § 8, cl. 3.

61 *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S.Ct. 1142, 1145 (2023), *see also* Anthony L. Moffa & Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Arugment Against Dormant Commerce Clause Scrutiny of Goods and Movement Policies*, 21 N.Y.U. ENV'T L.J. 344, 345–47 (2014) (explaining the complicated history of the Dormant Commerce Clause).

62 *See, e.g.*, Truesdell v. Friedlander (*Truesdell III*), 80 F.4th 762, 764–65 (6th Cir. 2023).

63 *See, e.g.*, Walgreen Co. v. Rullan, 405 F.3d 50, 55–56 (1st Cir. 2005) ("[E]xisting pharmacies not only w[ere] excused from the certificate requirement but also ha[ve] been permitted to wield substantial influence in the enforcement of the certificate requirement against proposed new pharmacies.").

64 267 U.S. 307 (1925).

65 *Id.* at 316.

66 *Id.* at 313.

67 *Id.* at 315–16.

competition."[68] And it did not determine a "manner of use" of the highways, but rather "the persons by whom the highways may be used."[69] In 2023, the Sixth Circuit Court of Appeals relied on this decision to invalidate a Kentucky law that required a CON to make non-emergency ambulance trips across state lines.[70] Thus, CON laws may be unconstitutional to the extent they completely and directly obstruct commerce between states.

Plaintiffs challenging CON laws across many industries have invoked the Commerce Clause, from motorcycle dealerships,[71] to transporters of infectious waste,[72] to ambulance businesses,[73] to people who want to use modern equipment to provide potentially life-saving and cancer-spotting colonoscopies.[74] This is sometimes seen as a more likely path to success than the Fourteenth Amendment, given that laws that discriminate against interstate commerce are generally per se unconstitutional. Even facially neutral laws that merely burden interstate commerce are subject to the *Pike* balancing test, which acts as a higher level of scrutiny than rational basis review.[75] Like it has with so many provisions of the Constitution, however, the Court has recently retreated from the *Pike* balancing test and suggested it requires evidence of discrimination, making it less certain whether that remains a viable path.[76]

### *B. Recent CON Cases*

#### 1. Kentucky CON Law Prevents Nepali-Speakers from Providing Home Health Services to Refugees

Dipendra Tiwari and Kishor Sapkota are members of the sizeable Nepali-speaking community in the Louisville, Kentucky area.[77] Many members of this community were forcibly expelled from Bhutan and spent 10–20 years living in poor conditions in refugee camps before being resettled to the U.S.[78] Dipendra and Kishor recognized that elderly members of their community were unable to access culturally appropriate

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68 *Id.* at 315.

69 *Id.*

70 Truesdell v. Friedlander (*Truesdell III*), 80 F.4th 762, 765, 767 (6th Cir. 2023).

71 Yamaha Motor Corp., U.S.A., v. Jim's Motorcycle, Inc., 401 F.3d 560, 563 (4th Cir. 2005).

72 Medigen of Ky., Inc. v. Pub. Serv. Comm'n of W. Va., 985 F.2d 164, 165 (4th Cir. 1993).

73 *Truesdell III*, 80 F.4th at 764.

74 *See* Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535, 541–42 (4th Cir. 2013).

75 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

76 *See, e.g.*, Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1158–59 (2023).

77 Tiwari v. Friedlander (*Tiwari II*), No. 3:19-CV-00884, 2021 WL 1407953, at *1 (W.D. Ky. Apr. 14, 2021).

78 *Bhutanese Refugees in Nepal*, U.S. DEP'T OF STATE, https://perma.cc/KRJ9-AJ85.

care in a language they could understand.[79] As a result, many of their friends and neighbors stayed home to care for their elderly family members.[80]

Dipendra and Kishor wanted to help by opening a home health agency. They named their agency Grace Home Care because of Dipendra's belief that "[e]verything . . . exists because of grace."[81] They hoped to specialize in language-appropriate and culturally-appropriate care for the Nepali-speaking community.[82]

As they started planning, they were shocked to learn about Kentucky's CON requirement.[83] Still, they knew many people who weren't able to access care and thought it would be easy to demonstrate need.[84]

In their application, Grace estimated it would serve fewer than 50 patients in its first year.[85] As soon as Grace filed its application, Baptist Health, a multibillion-dollar healthcare system, objected to their application and requested a hearing before the Kentucky Cabinet for Health and Family Services (the "Cabinet").[86] Dipendra and Kishor were unable to find an attorney to represent them at the hearing because all the attorneys they called had conflicts of interest given past representation of existing healthcare providers.[87] The Cabinet denied Grace's application in 2019.[88]

The Cabinet manages the State Health Plan ("SHP"), which proscribes the circumstances under which it may grant a CON application.[89] For home health services, the SHP sets out a black and white formula to predict future need county by county.[90] Under the terms of the SHP, an applicant must use the formula to show that a county has at least 250 patients who need home health services before the Cabinet will grant a

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79 *See Tiwari II*, 2021 WL 1407953, at *1.

80 On personal knowledge of the Authors, who represented the plaintiffs.

81 Declaration of Plaintiff Dipendra Tiwari in Support of Plaintiffs' Motion for Summary Judgment ¶ 18, *Tiwari II*, No. 3:19-cv-00884, 2021 WL 1407953.

82 *Id.* ¶ 16.

83 *See id.* ¶¶ 21–23.

84 *See id.*

85 Plaintiffs' Motion for Summary Judgment Exhibit 8, at 8, *Tiwari II*, No. 3:19-cv-00884, 2021 WL 1407953.

86 *See* Declaration of Plaintiff Dipendra Tiwari in Support of Plaintiffs' Motion for Summary Judgment ¶ 23, *Tiwari II*, No. 3:19-cv-00884, 2021 WL 1407953.

87 *Id.* ¶ 24.

88 *See* Amended Complaint for Declaratory and Injunctive Relief ¶ 120, *Tiwari II*, No. 3:19-cv-00884, 2021 WL 1407953.

89 *See Tiwari II*, 2021 WL 1407953, at *4.

90 *See id.*

CON application.[91] Existing providers, however, can get a CON to expand their operations if the need formula shows a need for only 125 patients.[92]

Grace sued, challenging the Commonwealth's CON requirements for home health services under the Federal Equal Protection and Due Process Clauses of the Fourteenth Amendment.[93] Grace also raised a claim under the Privileges or Immunities Clause of the Fourteenth Amendment.[94] The Kentucky Hospital Association ("KHA") intervened to defend CON laws.[95]

At the district court, Grace survived motions to dismiss from the Cabinet and KHA, but lost at the summary judgment stage.[96] In their motions for summary judgment, the Cabinet and KHA argued that CON laws must be upheld because they are rationally related to the legislature's goals of "promot[ing] cost-efficient, accessible, and quality healthcare services."[97] Grace submitted a sizable record showing that the balance of the academic research finds that CON laws do not lower costs, increase access, or increase healthcare quality.[98]

The Cabinet and KHA argued that the court should ignore Grace's record because under rational basis review "the only issue is whether there is a conceivable rational relationship between the law and its purpose, not if the law is reasonable in practice or supported by evidence."[99] In their view, facts didn't matter as long as they could allege any plausible reason justification for Kentucky's CON law.[100]

The court rejected that argument.[101] It would not simply ignore Grace's evidence; however, it took a limited view of the record, finding much of the evidence "irrelevant to whether there is any reasonably conceivable state of facts that could provide a rational basis for it."[102] Thus, the only issue was whether or not the challenged CON laws were rationally related to the legislature's goals of lowering cost, increasing access, and increasing quality of healthcare.[103]

The court upheld the CON law, ruling that it was reasonable for the legislature to believe that CON laws could promote cost efficiency,

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91 *Id.*

92 *Id.*

93 *Id.* at *2.

94 *Id.*

95 *See Tiwari II*, 2021 WL 1407953, at *2.

96 *Id.* at *2, *13.

97 *Id.* at *7–10.

98 *See id.* at *6; Plaintiffs' Motion for Summary Judgment at 15–20, *Tiwari II*, No. 3:19-cv-00884, 2021 WL 1407953.

99 *Tiwari II*, 2021 WL 1407953, at *6.

100 *See id.*

101 *See id.*

102 *See id.* at *7.

103 *See id.*

increased access, and increased quality of healthcare.[104] Likewise, the court ruled that even though the CON laws treated established home health agencies differently than new entrants, Grace failed to show that the difference in treatment was irrational.[105]

On appeal, Chief Judge Jeffrey Sutton, writing for a unanimous panel of the U.S. Court of Appeals for the Sixth Circuit affirmed, providing that Kentucky's CON laws pass rational basis review "perhaps with a low grade but with a pass all the same."[106] According to the court, although CON laws may have protectionist effects, they were not enacted with the sole purpose of creating healthcare monopolies.[107] In an attempt to further justify its conclusion the court reiterated that "[n]o court to our knowledge has invalidated a healthcare certificate-of-need law under the rational-basis requirements of the Fourteenth Amendment."[108]

The court, however, remained openly skeptical of the utility of CON laws, finding that "the judgement that [CON laws are] a failed experiment has the ring of truth to it. Were we Kentucky legislators ourselves, we would be inclined to think that [CON] laws should be the exception, not the rule, and perhaps have outlived their own needs."[109]

Indeed, in the court's view, this was an issue of public policy that should be raised in the legislature, not the courts:

> The defect with certificate-of-need laws is rarely that there is *no* rational benefit to them in a heavily regulated industry like healthcare. The real problem, and the most potent explanation for criticizing them, is that the costs of these laws—needless barriers to entry, protectionism for incumbents, the improbability of lowering prices by decreasing supply—*outweigh* their modest regulatory benefits. Yet it is precisely such weighing of costs and benefits that is so beyond judicial capacity.[110]

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104 *See id.* at *7–10.

105 *See Tiwari II*, 2021 WL 1407953, at *11, *13.

106 Tiwari v. Friedlander (*Tiwari III*), 26 F.4th 355, 363 (6th Cir. 2022).

107 *See id.* at 368.

108 *See id.* at 364

109 *Id.* at 365. Chief Justice Sutton is not the only judge to call on legislators to rethink CON laws. *See, e.g.*, Cartersville Med. Ctr., LLC v. Floyd Healthcare Mgmt., 880 S.E.2d 267, 274 (Ga. Ct. App. 2022) (Dillard, J., concurring) ("I strongly encourage the General Assembly to revisit and carefully reexamine the efficacy and constitutionality of [Georgia's CON Act] .... In my view, Georgia's CON Act 'unconstitutionally discriminate[s] between healthcare providers and infringe[s] their rights to earn a living under [the Federal Constitution and Georgia's State Constitution].' It's long past time for Georgia to implement a statutory regime that strikes the proper balance between appropriately regulating health care for the safety of the public and encouraging innovative, market-based competition in this industry. 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 health care provider's bottom line, then that system is fundamentally broken and needs to be reimagined." (first and second alteration in original) (footnotes omitted)).

110 *Tiwari III*, 26 F.4th at 365–66.

And if Grace was not before the wrong branch of government, then it was in the wrong court because any "recalibration of the rational-basis test and any effort to create consistency across individual rights is for the U.S. Supreme Court, not our court, to make."[111]

Grace sought review at the U.S. Supreme Court, but in 2022, the Court denied Grace's petition for writ of certiorari.[112] To date, Grace has not been able to provide home health services to the Nepali-speaking community.[113]

### 2. Louisiana CON Law Prevents Social Worker from Offering Respite Care Services to Special Needs Children

Ursula Newell-Davis is a social worker who wanted to offer respite care services in the New Orleans area to families with special needs children.[114] Respite workers offer parents, family members, and other caregivers short term relief from caregiving.[115] Ursula saw firsthand that when parents in her community lacked access to care, they were forced to leave their children unsupervised, which often led to them getting into trouble.[116] Thus, she knew her community needed respite services.[117]

To open a respite care business, Ursula needed to apply for a certificate of need—called Facility Need Review ("FNR") in Louisiana.[118] The FNR application process involves proving need to the Louisiana Department of Health ("LDH").[119]

Ursula collected statements from local leaders and state officials attesting to the fact that New Orleans needed more respite services.[120] She also provided evidence that respite care can lead to better behavioral outcomes for children and less stress for their family members.[121]

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111 *See id.* at 369.

112 *See* Tiwari v. Friedlander (*Tiwari IV*), 143 S. Ct. 444 (2022).

113 On personal knowledge of the Authors, who represented the plaintiff; *see also* Marianne Proctor & Jaimie Cavanaugh, *Certificate of Need Laws Create Medical Monopolies and Hurt Kentucky's Most Vulnerable.*, COURIER J. (Jan. 16, 2024, 6:45 AM), https://perma.cc/9E2M-2HJW.

114 *New Orleans Social Worker Challenges Louisiana Law That Stopped Her from Helping Special Needs Children and Their Families*, PAC. LEGAL FOUND. [hereinafter *Ursula PLF Article*], https://perma.cc/4YRV-R6XW.

115 LA. ADMIN. CODE tit. 48, pt. I, § 5003 (Westlaw through La. Register Vol. 51, No. 2, Feb. 20, 2025) (defining "Respite Care" as "an intermittent service designed to provide temporary relief to unpaid, informal caregivers of the elderly and/or persons with disabilities").

116 *See Ursula PLF Article*, *supra* note 114.

117 *Id.*

118 *Id.*

119 Petition for a Writ of Certiorari at 2–3, Newell-Davis v. Phillips, 144 S. Ct. 98 (2023).

120 *Id.* at 7.

121 *Id.*

To submit her application, Ursula had to be open and ready for business, meaning she spent thousands of dollars leasing and renovating office space, furnishing her office, and hooking up phone lines.[122]

Despite the clear need for services, in 2020, LDH denied Ursula's FNR application.[123] LDH never considered whether Ursula was qualified to offer these services.[124] Instead, the denial was based on LDH's belief that no new services were needed in New Orleans.[125]

In response, Ursula sued in the U.S. District Court for the Eastern District of Louisiana, bringing state and federal due process and equal protection claims.[126] Ursula alleged that the FNR regulations violated her right to earn a living as protected by the Fourteenth Amendment.[127] LDH argued the court must apply rational basis review and under that lenient standard, the court should uphold the FNR regulations.[128] The district court agreed.[129] On cross-motions for summary judgment, it ruled that Newell-Davis failed to meet her "heavy burden to 'negative every conceivable basis' which might support FNR."[130]

The district court ruled that FNR regulations further the legitimate government purpose of "enhancing consumer welfare" by forcing respite care providers to: (1) show a geographic need for a service and (2) meet strict facility licensure requirements.[131] LDH argued that ensuring licensure standards was "resource intensive and costly."[132] Therefore, denying Ursula's FNR application allowed LDH to spend more time on the surveys from the providers that passed FNR.[133] Moreover, the court ruled that FNR regulations pass rational basis review because it is "at least debatable" whether FNR regulations protect consumer welfare.[134]

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122 On personal knowledge of the Authors, who represented the plaintiff.

123 Petition for a Writ of Certiorari at 7, Newell-Davis v. Phillips, 144 S. Ct. 98 (2023).

124 *See id.*

125 *See* Newell-Davis v. Phillips (*Newell-Davis III*), 55 F.4th 477, 480 (5th Cir. 2022).

126 Newell-Davis v. Phillips (*Newell-Davis I*), 551 F. Supp. 3d 648, 652 (E.D. La. 2021). Ursula also brought a claim under the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 652. This argument was dismissed because it is foreclosed by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). *See Newell-Davis I*, 551 F. Supp. 3d at 659–60, 662.

127 *Newell-Davis I*, 551 F. Supp. 3d at 660.

128 Newell-Davis v. Phillips (*Newell-Davis II*), 592 F. Supp. 3d 532, 536 (E.D. La. 2022).

129 *See id.* at 550.

130 *Id.* at 548 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

131 *See id.* at 546, 548.

132 *Id.* at 546 (quoting Rec. Doc. 73-4 at 6).

133 *See id.* at 542.

134 *Newell-Davis II*, 592 F. Supp. 3d at 548 (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 674 (1981)).

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed.[135] LDH again argued that limiting the number of healthcare providers through FNR regulations would make it easier to manage those providers.[136] In the court's words, "an inundation of new applications could prevent LDH from effectively supervising existing healthcare providers."[137]

The court accepted this argument, but rejected Ursula's argument that accepting LDH's administrative ease argument would give the government cover to decrease the number of regulated parties in any industry in the name of consumer welfare.[138] The court explained that its ruling did not automatically extend beyond the "already highly-regulated market for healthcare services" and the government must still show a "real" link between a regulation and its purported benefits.[139]

Ursula also argued that the FNR regulations violated Louisiana's Equal Protection Clause because they "impermissibly burden[] disabled persons" by limiting additional respite care businesses.[140] The court rejected this argument finding that although Louisiana's Equal Protection Clause is different than the Federal Equal Protection Clause, Louisiana courts have declined to look at a law's impact and instead focus on whether the law discriminates on its face.[141] Because the FNR regulations applied to respite care providers without controlling which providers the disabled community could use, the court affirmed the denial of Ursula's state equal protection claim.[142] The court also clarified that disabled persons are not entitled to a heightened standard of review.[143]

Ursula sought review at the U.S. Supreme Court, but in 2023, the Court denied Ursula's petition for writ of certiorari.[144] To date, Ursula has not been able to open a respite care business.[145]

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135 Newell-Davis v. Phillips (*Newell-Davis IV*), No. 22-30166, 2023 WL 1880000, at *6 (5th Cir. Feb. 10, 2023).

136 *See id.* at *4.

137 *Id.*

138 *See id.*

139 *Id.*

140 *Id.* at *5.

141 *Newell-Davis IV*, 2023 WL 1880000, at *5.

142 *Id.*

143 *Id.* at *6 (reiterating that "disabled persons are not a quasi-suspect class" because "the Supreme Court expressly rejected this court's determination that statutes burdening disabled persons demand heightened scrutiny").

144 Newell-Davis v. Phillips, 144 S. Ct. 98 (2023).

145 On personal knowledge of the Authors, who represented the plaintiff.

In both cases, entrepreneurs were unable to use their unique life experiences to improve their communities. CON laws protected incumbent providers and even protected the workload of the Louisiana Department of Health. Worse, the entire CON process was unconcerned with what was best for the patients in their state, and the rational-basis test shielded these laws from meaningful review.

### 3. Non-Emergency Medical Transportation CON Ruled Unconstitutional Under the Dormant Commerce Clause in Kentucky

Legacy Medical Transport ("Legacy"), a small family-owned business based in Aberdeen, Ohio, provides non-emergency transportation services in several Ohio counties that border Kentucky.[146] Its founder, Phillip Truesdell, founded Legacy in 2017 when his family was facing job losses after a local power plant shut down.[147]

Ohio has no CON laws for medical transportation.[148] Patients often use Legacy's services to get to medical appointments or for transfers between hospitals.[149] Sometimes, Legacy's patients needed transportation from Ohio to facilities across the border in Kentucky.[150] Legacy could legally transport patients from Ohio to Kentucky, but Kentucky's CON laws prevented Legacy from transporting that same patient from Kentucky back to Ohio.[151]

So, Legacy applied for a CON.[152] Legacy knew there was a need for its services because it had declined about 300 requests for service annually.[153] Its Kentucky competitors opposed the application, and the Cabinet denied Legacy's application.[154] Despite Legacy's firsthand knowledge that its services were needed, the Cabinet found that Legacy did not show that the patients who requested its services were unable to find alternate means of transportation.[155]

Legacy sued in federal court raising claims under the Equal Protection Clause, Due Process Clause, Privileges or Immunities Clause, and the

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146 *Family Defeats Crony "Competitor's Veto" Law*, PAC. LEGAL FOUND., https://perma.cc/4K58-MUM7.

147 *Id.*

148 *See generally* OHIO REV. CODE § 3702.511 (2023) (dictating that Ohio's CON laws are applicable to long-term care facilities).

149 *Family Defeats Crony "Competitor's Veto" Law*, *supra* note 146.

150 *Id.*

151 *Id.*

152 *Id.*

153 Truesdell v. Friedlander (*Truesdell III*), 80 F.4th 762, 767 (6th Cir. 2023).

154 *Id.*

155 *Id.*

Dormant Commerce Clause.[156] The court granted competitor Patient Transport Services, Inc.'s motion to intervene.[157] The district court dismissed all of Legacy's claims except the claim under the Dormant Commerce Clause.[158] After discovery, the court granted the Cabinet's motion for summary judgment, ruling that Kentucky's CON laws did not violate the Dormant Commerce Clause.[159]

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed, striking Kentucky's CON law for non-emergency medical transport as applied to out-of-state providers.[160] The appellate court ruled that the law was not unconstitutional as it applied to intrastate transportation providers.[161] However, as applied to out-of-state providers, the court ruled that "Kentucky lacks the power 'to prevent competition deemed undesirable.'"[162] The court reiterated that Kentucky was allowed to "impose all manner of 'safety' regulations on interstate carriers," but it was barred from regulating interstate competition, especially when the Cabinet admitted that Legacy could safely transport patients from Kentucky to Ohio.[163]

The Cabinet filed a petition for writ of certiorari and Legacy filed a cross-petition, but the U.S. Supreme Court denied both petitions.[164]

4. State Court CON Challenges

In addition to federal challenges, plaintiffs have challenged CON laws under the unique provisions found in state constitutions. These challenges can be useful when litigants want to avoid the federal rational basis test. State courts, however, can still be hesitant to definitively rule that the rights protected by their state constitution are different than those protected by the U.S. Constitution or are entitled to a different level of scrutiny.[165]

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156 *Id.*

157 Truesdell v. Friedlander (*Truesdell I*), No. 3:19-cv-00066, 2022 WL 1394545, at *1 (E.D. Ky. May 3, 2022).

158 *Id.* at *7.

159 Truesdell v. Friedlander (*Truesdell II*), 626 F. Supp. 3d 957, 970, 972 (E.D. Ky. 2022).

160 Truesdell v. Friedlander (*Truesdell III*), 80 F.4th 762, 782 (6th Cir. 2023).

161 *Id.*

162 *Id.* at 778 (quoting Bradley v. Pub. Util. Comm'n of Ohio, 289 U.S. 92, 95 (1933)).

163 *Id.* (quoting Buck v. Kuykendall, 267 U.S. 307, 316 (1925)).

164 Friedlander v. Truesdell, 144 S. Ct. 1344 (2024); Truesdell v. Friedlander (*Truesdell IV*), 144 S. Ct. 1346 (2024).

165 *But see* Raffensperger v. Jackson, 888 S.E.2d 483, 492, 497 (Ga. 2023) (explaining that Georgia's Due Process Clause protects the right to earn a living and rejecting the federal rational basis test in ruling an occupational licensure law for lactation consultants unconstitutional).

a. *Nebraska CON Law Prohibits Home Health Agency from Providing Medical Transportation*

Marc N'Da, an entrepreneur and political refugee from Togo, founded a home health company to provide quality care for neighbors and friends.[166] In addition to providing in-home care, Marc's home health agency, Dignity, helps patients run errands.[167]

Nebraska does not have a CON law for home health agencies, but it does have one for "non-emergency medical transportation" providers (called "certificate of public convenience and necessity" there).[168] Seeing that existing transportation companies provided poor service, and seeing that it could take his patients up to three days to schedule a simple ride to the pharmacy, Marc made a plan to help.[169]

He purchased a wheelchair-accessible van, made plans to hire drivers, and filed his CON application with the Nebraska Public Service Commission ("NPSC").[170] After reviewing his application, the NPSC found Marc was well-qualified to provide non-emergency medical transportation.[171] But that was not the end of the inquiry. Marc also needed permission from existing competitors to offer these services.[172]

Naturally, existing providers did not want more competition, and they used their power to veto Marc's application.[173] As Marc explains, his service is allowed to drive patients to Wal-Mart to get groceries, but not to pick up their prescriptions.[174] But Marc did not give up on providing medical transportation easily—he spent two years trying to convince the Nebraska legislature to fix the problem.[175] After his attempts failed, Marc sued.[176]

The lawsuit raised three claims under the Nebraska Constitution.[177] First, Marc alleged the challenged law was unconstitutional under the special legislation provision, which prohibits government from enacting laws that pick winners and losers in the market.[178] Specifically, as applied

166 *Nebraska CON*, *supra* note 39.

167 *Id.*

168 *Id.*

169 *Id.*

170 *See id.*

171 *See id.*

172 *Nebraska CON*, *supra* note 39.

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*; *see* Complaint for Declaratory and Injunctive Relief at 2, N'Da v. Hybl, No. Cl 20-1227 (Dist. Ct. Lancaster Cnty., Neb. Apr. 22, 2020), 2020 WL 14043027 [hereinafter *N'Da Complaint*].

177 *N'Da Complaint*, *supra* note 176, at 20–24.

178 *See id.* at 20–21; *see also* NEB. CONST. art. III, § 18.

to non-emergency medical transportation, the CON law confers a special privilege on Marc's competitors by allowing them to veto new competition.[179] Second, the lawsuit included a state due process clause claim because the CON law unconstitutionally interferes with Marc's right to earn a living.[180] Third, the lawsuit alleged that the CON law violates the Nebraska Constitution's prohibition on granting special privileges or immunities.[181] Like the first claim, this claim challenged the authority of incumbent providers to veto new entrants' CON applications.[182]

A critical component of Marc's lawsuit was his argument that Nebraska applied the "real and substantial" test when reviewing laws that interfere with the ability to earn a living.[183] The "real and substantial" test is not found in federal jurisprudence and is less deferential to the government than rational basis review.[184]

The district court rejected Marc's claims, ruling that the Nebraska Supreme Court has ruled that the state constitution's Due Process and Equal Protection Clauses are "coextensive to those of the Federal Constitution," finding "no current support in Nebraska law" for the application of heightened scrutiny.[185] Thus, the court applied the federal rational basis test in deciding Marc's claims.[186] Unsurprisingly, the court proceeded to uphold the CON law because there existed "some rational speculation connecting [Nebraska's CON law] to a legitimate state end . . . ."[187]

Marc appealed this case to the Nebraska Supreme Court, which upheld the CON law, in part because "the statute can be applied in a manner that focuses on the public interest and does not 'inherently implicate unacceptable protectionist concerns.'"[188] To date, Marc has not been able to provide medical transport to his clients.[189]

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179 *N'Da Complaint*, *supra* note 176, at 20–21.

180 *See id.* at 22–23; *see also* NEB. CONST. art. I, § 3.

181 *N'Da Complaint*, *supra* note 176, at 24; *see also* NEB. CONST. art. I, § 16.

182 *See N'Da Complaint*, *supra* note 176, at 24–25.

183 *See* N'Da v. Golden, No. C120-1227, at 11 (Dist. Ct. Neb. Oct. 23, 2023).

184 *See id.* at 13–14.

185 *Id.* at 14–16 (the first quotation is quoting *In re* Int. of Jordan B., 913 N.W.2d 477, 483–84 (Neb. 2018)); Keller v. City of Fremont, 790 N.W.2d 711, 791 (Neb. 2010)); *see also id*. at 20 (calling the Federal Due Process Clause "coterminous with Nebraska's").

186 N'Da v. Golden, No. C120-1227, at 14–15.

187 *Id.* at 19.

188 *N'Da v. Hybl*, STATE CT. REP. (Apr. 4, 2025), https://perma.cc/54TY-FM8S.

189 *See* Shannon Najmabadi, *Health Care Start-Ups Are Trying to Open. An Old Law Stands in Their Way*, WASH. POST (Jan. 2, 2025), https://perma.cc/5HCV-2D3L.

### b. *North Carolina CON Laws Prohibit Ophthalmologist from Using Existing Surgical Suite*

Jay Singleton is an ophthalmologist in New Bern, North Carolina.[190] Dr. Singleton has a surgical suite where he could operate on his patients.[191] But the suite sits unused because Dr. Singleton needs a CON to operate in his own office.[192] Because he cannot get a CON, Dr. Singleton is forced to operate at the local hospital, which costs his patients thousands of dollars more and forces them to wait longer for needed surgeries.[193]

Because CON laws do not protect patient health and safety, Dr. Singleton challenged North Carolina's CON laws in state court.[194] Like Kentucky, North Carolina relies on a plan that predetermines whether new healthcare services are "needed" throughout the state.[195] And Dr. Singelton's plan did not show a need for surgery centers in his region, so applying for a CON would have been futile.[196]

Dr. Singleton's lawsuit alleged that the CON laws are unconstitutional under the North Carolina Monopolies Clause, Exclusive Emoluments Clause, and Law of the Land Clause.[197] Interestingly, North Carolina is the only state that has ruled its CON law scheme unconstitutional.[198] In 1973, the North Carolina Supreme Court ruled that the CON laws violated the Due Process, Monopolies, and Exclusive Emoluments Clauses of the North Carolina Constitution.[199] The legislature, however, reenacted its CON law regime in 1978.[200]

The district court dismissed Dr. Singleton's case for failure to state a claim.[201] The court of appeals affirmed, ruling: (1) Dr. Singleton should have exhausted his administrative remedies before filing suit; and (2)

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190 Complaint for Declaratory Judgment and Injunctive Relief at 1, Singleton v. N.C. Dep't of Health & Hum. Servs., No. 20 CVS 05150, 2021 WL 7186714 (N.C. Super. Ct. June 9, 2021).

191 *Id.*

192 *See id.* at 1–2.

193 *See id.* at 1, 6, 21.

194 *Id.* at 1–3, 25.

195 *See North Carolina Ophthalmologist Challenges Outdated Certificate of Need ("CON") Law*, INST. FOR JUST., https://perma.cc/63XT-49XV.

196 *See id.*

197 Singleton v. N.C. Dep't of Health & Hum. Servs., 906 S.E.2d 806, 807 (N.C. 2024).

198 Bruce Allain, *North Carolina Supreme Court Addresses Certificate of Need Challenge*, SOURCE ON HEALTHCARE PRICE & COMPETITION (Nov. 14, 2024), https://perma.cc/NW9M-N6AH; *see, e.g.*, *In re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 733, 736 (N.C. 1973).

199 *In re* Aston Park Hosp., Inc., 193 S.E.2d at 732, 735–36.

200 Allain, *supra* note 199; *see* North Carolina Health Planning and Resource Development Act of 1978, ch. 1182, 1977 N.C. Sess. Laws.

201 Singleton v. N.C. Dep't of Health & Hum. Servs., No. 20 CVS 05150, 2021 WL 7186714, at *1 (N.C. Super. Ct. June 9, 2021), *vacated and remanded*, 906 S.E.2d 806 (N.C. 2024).

regarding the due process claim, which can be brought without first exhausting administrative remedies, even when taking all allegations in the complaint as true, Dr. Singleton failed to state a claim upon which relief could be granted.[202]

The North Carolina Supreme Court reversed, ruling that Dr. Singleton's claims, both as-applied and facial, should not have been dismissed.[203] Indeed, the court held that if Dr. Singleton is able to prove the allegations in his complaint, it "could render the [CON] law unconstitutional in all its applications."[204] The court signaled that if Dr. Singleton can prove that CON laws are harmful and do not protect human health or safety, the proper remedy may be to strike North Carolina's CON law scheme for a second time.[205]

The case has been remanded to the trial court and remains pending.[206] To date, Dr. Singleton has not been able to use his surgical suite.[207]

### C. *Policy Proposals*

Although the problems with CON laws are overwhelming, legislatures have many tools to end or reduce their harmful consequences.[208] And from 2021–2023, at least 21 states have updated their CON laws.[209]

#### 1. Fully Repeal CON Laws

States like California, Texas, Pennsylvania, Colorado, and New Hampshire have repealed their healthcare CON laws.[210] In 2023, South Carolina repealed all healthcare CON laws except for nursing homes.[211]

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202 Singleton v. N.C. Dep't of Health & Hum. Servs., 874 S.E.2d 669, 674–75, 678 (N.C. Ct. App. 2022), *vacated and remanded*, 906 S.E.2d 806 (N.C. 2024).

203 *See* Singleton v. N.C. Dep't of Health & Hum. Servs., 906 S.E.2d 806, 808 (N.C. 2024).

204 *Id.*

205 *See id.*

206 *Id.*; *Singleton v. North Carolina Department of Health and Human Services*, STATE CT. REP. (Oct. 18, 2024), https://perma.cc/T5UV-6UZ6.

207 *See* Andrew Wimer, *North Carolina Supreme Court Revives Doctor's Suit Against Anti-Competitive Medical Monopoly Law*, INST. FOR JUST. (Oct. 18, 2024), https://perma.cc/ZV5H-C86D.

208 *See* Matthew D. Mitchell, *Certificate of Need Laws in Health Care: Past, Present, and Future*, INQUIRY: J. HEALTH CARE ORG., PROVISION & FIN., Jan.–Dec. 2024, at 7–8 (2024).

209 Michael Brady, *States Curb CON Laws to Boost Bed Capacity*, HEALTHCARE DIVE (Jan. 3, 2025), https://perma.cc/H29K-QWMS.

210 *See Certificate of Need Laws—Bad for America's Health*, PAC. LEGAL FOUND., https://perma.cc/N7CN-8LP4 (displaying a map of CON laws by state and their restrictiveness).

211 State Health Facility Licensure Act, No. 20, § 6, 2023 S.C. Acts 63, 70–71.

Montana made a similar change in 2021 and Oklahoma followed suit in 2024.[212]

2. Partially Repeal CON Laws

Other states have repealed CON laws for select facilities or services. States like Connecticut, Georgia, North Carolina, Tennessee, and West Virginia have repealed CON laws for select services such as birth centers, imaging equipment or facilities, rural hospitals, mental health services and facilities, and alcohol and substance abuse rehab facilities.[213] If full CON repeal isn't politically plausible, states should begin repealing select CON laws.

One strategy may be to eliminate CON laws for services used by vulnerable populations (mental health and substance use rehab) or low-cost alternatives to care (surgery centers, home health, or hospice care). Another strategy is to target services that are unlikely to be over-prescribed like organ transplants, burn care, or neonatal intensive care services.

3. Raise the Capital Thresholds that Trigger a CON

Some states maintain capital expenditure thresholds for CON laws.[214] In those states, a provider does not need a CON unless they spend over a certain amount on a facility or service.[215] One way to help providers respond to their patients' needs is by making those thresholds much higher (e.g., raising a facility threshold from $3.5 million to $15 million).

In 2025, Washington, D.C., and Vermont raised their capital thresholds. Washington, D.C., increased its thresholds from $6 million to $15 million for new facilities, and from $3.5 million to $5 million for equipment.[216] Likewise, Vermont increased its thresholds from $1.5 million

212 *See* Act of May 12, 2021, Ch. 477, §§ 1, 2, 4, 2021 Mont. Laws 1775, 1776, 1780–83 (amending its CON laws to apply to "long-term care facilities" rather than "heath care facilities"); Act of May 6, 2024, No. 2330, Ch. 275, 2024 Okla. Sess. Law Serv. (West).

213 *See* Act of June 26, 2023, Pub. Act No. 23-147, § 8, 2023 Conn. Laws (birth centers); Act of Apr. 19, 2024, No. 384, §§ 3, 7, 2024 Ga. Legis. Serv. 10 (West) (imaging equipment and facilities); Act of Mar. 27, 2023, Sess. L. 2023-7, pt. III, 2023 N.C. Laws (licensed home care agencies); Act of May 21, 2024, Ch. 985, § 1, 2024 Tenn. Laws (licensed acute care hospitals); Act of Mar. 10, 2023, Ch. 255, 2023 W. Va. Acts 1953, 1966, 1967 (birthing centers and diagnostic imaging).

214 Mitchell, *supra* note 208, at 3.

215 *Id.*

216 Certificate of Need Improvement Amendment Act of 2025, D.C. Act 26-44, 2025 D.C. Laws 26-7.

to $10 million for facilities, from $1 million to $5 million for equipment, and from $500,000 to $3 million for health care services or technology.[217]

4. End the Competitor's Veto

Most states allow direct competitors to intervene and object to CON applications from their competitors.[218] In some instances, new entrants cannot open unless their competitors agree.[219] This has nothing to do with whether patients need access to more healthcare. Six states with CON laws have already ended the competitor's veto and do not allow competitors to do more than file a written comment in response to a CON application: Indiana, Louisiana, Michigan, Nebraska, New Jersey, and New York.[220]

5. Update the CON Application Process and Regulations

Applying for a CON is time-consuming and costly and many entrepreneurs lack the resources to apply for a CON with no guarantee they will ever be allowed to operate.[221] Streamlining the process and lowering application fees may encourage more providers to apply.

Many states rely on a State Health Plan which prescribes how an agency must assess "need."[222] For example, many of these plans contain basic formulas that determine when more of a service is needed.[223] These formulas rely on past population projections and thus fail to accurately account for future population growth or changing needs.[224] State legislatures should eliminate these formulas and allow applicants to show any relevant evidence of need.

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217 Act of May 13, 2025, Pub. Act No. 25-15, 2025 Ver. Laws.

218 *See generally* Jaimie Cavanaugh, Caroline Grace Brothers, Adam Griffin, Richard Hoover, Melissa LoPresti & John Wrench, *Conning the Competition: A Nationwide Survey of Certificate of Need Laws* (Aug. 2020), https://perma.cc/A85F-WMF6 (performing a nationwide survey on state CON laws and determining that competitors may intervene in most jurisdictions).

219 CHRISTINA SANDEFUR, COMPETITOR'S VETO: STATE CERTIFICATE OF NEED LAWS VIOLATE STATE PROHIBITIONS ON MONOPOLIES 3 (2020).

220 *See Cavanaugh* et al., *supra* note 218, at 61, 75, 89, 117, 123, 129.

221 *See id.* at 4.

222 *See generally, e.g.*, *2023 Update to State Health Plan*, KY. CABINET FOR HEALTH & FAM. SERVS. (Mar. 2024), https://perma.cc/AB2A-PU32.

223 *E.g.*, *id.* at 1, 8.

224 *See id.* at 8.

In some states, incumbents apply for CONs with no intention of ever using them.[225] They simply want to ensure no one else can get a CON.[226]

At the very least, states should increase transparency around the CON application process. Some states make applications and all related documents easily available online.[227] Other states post this information but in non-user-friendly ways.[228] Still other states hide this information.[229] Potential applicants and the public deserve to know which entities are applying for and ultimately getting CON approval.

## II. Occupational Licensure

It has perhaps become banal in the policy world to observe that occupational licensure has run amok. Its critics span the Obama Administration,[230] the Hoover Institution,[231] the Cato Institute,[232] Brookings,[233] and the American Enterprise Institute.[234] Nearly a third of Americans need a government-issued license before getting a job, and securing one is time-consuming and expensive.[235] A recent lawsuit in Florida challenged an onerous licensing scheme that required hearing aid sellers to use outdated forms of fitting technology, even though new, self-

225 *See* Tiwari v. Friedlander (*Tiwari I*), No. 3:19-CV-884, 2020 WL 4745772, at *11 (W.D. Ky. Aug. 14, 2020).

226 *See id.* (suggesting binding precedent indicates CONs were "nothing more than an attempt to prevent economic competition").

227 *See, e.g.*, *Current Healthcare Reviews*, ME. DEP'T HEALTH & HUM. SERVS., https://perma.cc/JUR5-QC5S; *Division of Certificate of Need Online*, KY. CABINET FOR HEALTH & FAMILY SERVS., https://perma.cc/7TJG-4AXB.

228 *See, e.g.*, *HealthPlanning*, GA. DEP'T OF CMTY. WEBLINK REPOSITORY, https://perma.cc/NW82-YFR6 (acting as a massive directory of CON data with no user guidance).

229 *See, e.g.*, *How to Obtain a Certificate of Need*, D.C. HEALTH, https://perma.cc/43LJ-5ZMY (the application is not visible without creating a State Health Planning and Development ("SHPDA") account).

230 *See* Press Release, The White House, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses That Are Limiting Worker Mobility and Reducing Wages (June 17, 2016), https://perma.cc/PCE6-8KEL.

231 *See* David R. Henderson, *Occupational Licensing Is a Bad Idea*, HOOVER INST. (Apr. 2, 2019), https://perma.cc/8HRJ-ET6T.

232 *See* Jeffrey Miron & Jacob Winter, *Another Negative of Occupational Licenses*, CATO INST. BLOG (Apr. 15, 2024, 10:29 AM), https://perma.cc/BQW8-8S58.

233 Ryan Nunn, *Eliminating the Anti-Competitive Effects of Occupational Licensing*, BROOKINGS (Jan. 17, 2019), https://perma.cc/LZ7S-Z9U7.

234 James Pethokoukis, *The Terrible Economic Burden of Occupational Licensing*, AM. ENTER. INST. (Apr. 21, 2014), https://perma.cc/79QJ-2D9B.

235 Brad Hershbein, David Boddy & Melissa S. Kearney, *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, BROOKINGS (Jan. 27, 2015), https://perma.cc/8FU7-927Y.

fitting hearing aids can be adjusted using your phone.[236] The plaintiff in that case left the state rather than continue adhering to a scheme he felt was a disservice to his customers and thwarted newer technology that would encourage those who need it to secure hearing help.[237]

Even if you manage to get a license in one state, you sometimes must duplicate that effort if you move or travel to another state.[238] Licensure requirements have thwarted the rise of telehealth, even though many fields (teledentistry, triage, monitoring chronic conditions, and therapy) can be safely and easily completed from the comfort of both the practitioner's and patient's home.[239]

And yet studies show that licensure has little to no effect on outcomes for the consumer; it simply drives up prices and keeps people out of a job.[240] It shouldn't be difficult for qualified people to enter a profession. States have ample alternatives to licensure—including private certification, registration, or bonding—that can ensure people are qualified for their job.[241]

Not only has licensure expanded to new occupations (even dog walkers require a license in some localities),[242] it has also expanded *within* occupations—a phenomenon called "licensure creep."[243] Regulatory bodies, which are frequently dominated by people employed in the

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236 *Florida's Outdated Licensing Robs Hearing, Livelihoods, supra* note 1; *Legislative Update – Licensure Issues*, FLA. ACAD. AUDIOLOGY (May 2, 2018), https://perma.cc/25RR-WYK3.

237 On personal knowledge of the Authors, who represented the plaintiff.

238 Press Release, Fed. Trade Comm'n, FTC Staff Report Examines Ways to Improve Occupational License Portability Across State Lines (Sept. 24, 2018), https://perma.cc/GUQ2-M2BG.

239 *See* Fazal Khan, *From Pixels to Prescriptions: The Case for National Telehealth Licensing & AI Enhanced Care*, 57 IND. L. REV. 581, 583–84 (2024).

240 Patrick McLaughlin, Matthew D. Mitchell & Anne Philpot, *The Effects of Occupational Licensure on Competition, Consumers, and the Workforce*, MERCATUS CTR., GEO. MASON UNIV. (Nov. 3, 2017), https://perma.cc/HWH7-FLRV; Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, BROOKINGS (Mar. 15, 2018), https://perma.cc/P5DD-VGL4.

241 LISA KNEPPER, DARWYYN DEYO, KYLE SWEETLAND, JASON TIEZZI & ALEC MENA, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 50–51 (3d ed. 2022).

242 *See* Chris Edwards, *Occupational Licensing*, *in* EMPOWERING THE NEW AMERICAN WORKER: MARKET-BASED SOLUTIONS FOR TODAY'S WORKFORCE 58, 63 (Scott Lincicome ed., 2022) (providing some examples of new industries that require licensure); *How to Obtain a Commercial Dog Walker Permit*, S.F. ANIMAL CARE & CONTROL, https://perma.cc/DAG8-U35U ("Commercial dog walkers in San Francisco walking four or more dogs, limited to eight dogs total, are required to carry a valid annually renewed commercial dog walking permit . . . . [Previously unregistered applicants] must complete 20 hours of classroom training or an apprenticeship program of at least 40 hours of practical experience . . . .").

243 *See* Joshua Polk & Anastasia Boden, *Antitrust Policy Should Target Government Monopolies*, FOUND. ECON. EDUC. (Jan. 27, 2021), https://perma.cc/7N3Y-3DE3; *cf.* DANA BERLINER, DANIEL GREENBERG, PAUL J. LARKIN, JR., CLARK NEILY, RYAN NUNN, JONATHAN RICHES & LUKE A. WAKE, OCCUPATIONAL LICENSING RUN WILD 3, 16–17 (2017), https://perma.cc/9LU3-HG8J (discussing "licensing creep").

regulated industry, sometimes seek to regulate services that are ancillary to the profession.[244] Teeth whitening provides a good example. North Carolina's dental board recently attempted to monopolize teeth whitening by requiring a certified dentist's license to perform the simple and non-threatening act.[245]

Similarly, "scope of practice" laws sometimes prevent licensees from practicing within the full scope of their expertise, akin to forcing you to hire an attorney for services that could be performed by a paralegal.[246] During the COVID-19 pandemic, scope of practice laws prevented qualified healthcare workers from meeting quickly changing needs.[247] For example, strict scope of practice laws in Wisconsin require a physician to supervise each physician assistant ("PA") and do not allow a physician to oversee more than four PAs at a time.[248] This prevented one PA, Dianna Malkowski, from moving to telemedicine at a time when many people were reluctant to leave their homes or visit a crowded doctor's office, since telemedicine companies had less capacity to hire PAs.[249]

### A. *Legal Theories*

#### 1. Fourteenth Amendment or State Analogues

Much like CON laws, occupational licensure laws keep people out of the profession for anti-competitive reasons without any resulting benefit to the public.[250] They therefore present serious Fourteenth Amendment concerns.[251] But because claims against government economic regulations are subject to rational basis scrutiny, they are extraordinarily difficult to

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244 *See* Polk & Boden, *supra* note 243.

245 *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 500–01 (2015) ("Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers . . . . These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina."); *see also* Joshua Polk, Stephen Slivinski & Caleb Trotter, *Guardians or Gatekeepers? Industry Capture of Dental Boards 10 Years After* NC Dental, PAC. LEGAL FOUND. (Feb. 2025), https://perma.cc/2VGT-ECS7.

246 *See Scope-of-Practice Laws*, MERCATUS CTR., GEO. MASON UNIV. (Mar. 22, 2017), https://perma.cc/24KR-BGE8.

247 *See* Shirley Svorny & Michael F. Cannon, *Health Care Workforce Reform: COVID-19 Spotlights Need for Changes to Clinician Licensing*, CATO INST. (Aug. 4, 2020), https://perma.cc/TR7J-X2FR.

248 *See* ANASTASIA P. BODEN & CHRISTINA SANDEFUR, COVID-ERA HEALTHCARE SOLUTIONS FOR THE POST-COVID WORLD 7 (Apr. 18, 2022), https://perma.cc/4GRX-2GAX.

249 *Id.*

250 *See* BERLINER ET AL., *supra* note 243, at 3, 18, 27, 36.

251 *See* Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111, 1122–23 (2019) (discussing recent successful challenges of occupational licensing laws under the Fourteenth Amendment).

win.[252] Thus, advocates may consider pursuing state constitutional claims or other causes of action alongside due process, privileges or immunities, and equal protection claims under the Fourteenth Amendment.

2. Antitrust

Occupational licensure equates to a government-created monopoly.[253] While anti-competitive acts are generally subject to antitrust challenge under the Sherman Act or other federal antitrust laws, state actors are generally immune under so-called *Parker* immunity.[254] This immunity insulates the people with the most monopoly power—the government—from liability, even when government power is co-opted by interested parties.[255]

In *North Carolina Board of Dental Examiners v. FTC*,[256] the Supreme Court offered a way that plaintiffs can pierce that immunity when challenging actions taken by boards that are dominated by people practicing the trade.[257] When dentists in North Carolina observed a burgeoning tooth whitening industry that threatened to compete with licensees, they cajoled the state dental board into issuing cease-and desist orders against non-dentists.[258] By employing a novel interpretation of the licensing laws, the Board argued that tooth whitening constituted unauthorized dental work.[259] As Justice Kennedy noted in the Supreme Court opinion, the board members had a strong incentive to ice out competition.[260] Non-dentists offered lower rates compared to dentists' lucrative fees, and six of the Board's eight members were licensed dentists and one was a dental hygienist.[261] Just one member was a consumer.[262]

The Federal Trade Commission ("FTC") charged the Board with violating federal antitrust law and the Board claimed immunity under

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252 *See id.* at 1120, 1122 ("Victories under the rational basis test are few.").

253 *See* MORRIS M. KLEINER & EVGENY S. VOROTNIKOV, AT WHAT CO$T?: STATE AND NATIONAL ESTIMATES OF THE ECONOMIC COSTS OF OCCUPATIONAL LICENSING 8 (Nov. 2018), https://perma.cc/Y7TA-52CS.

254 *See* Parker v. Brown, 317 U.S. 341, 351–52 (1943).

255 *See id.* at 346.

256 574 U.S. 494 (2015).

257 *See id.* at 503–04.

258 *See id.* at 500–01.

259 *Id.* at 501 (describing how the Board interpreted "the practice of dentistry" to encompass teeth whitening).

260 *See id.* at 500; *see also id.* at 516 (Alito, J., dissenting) ("[The Board] is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists.").

261 *Id.* at 499–500 (majority opinion).

262 *N.C. Bd. of Dental Exam'rs*, 574 U.S. at 500.

*Parker*.[263] The Supreme Court ruled that boards forfeit that immunity if they are (1) dominated by market participants and (2) not actively supervised by the state.[264] While there are still open questions regarding what constitutes "active supervision" and just how much teeth this exception will have, it offers a promising route to holding government actors accountable when they mix private and public interests.[265]

## B. *Recent Cases*

### 1. State Constitution Helps Lactation Consultant to Defeat Irrational Licensing Scheme

A recent case out of Georgia demonstrates how pursuing state constitutional claims may provide a backstop when courts fail to fully enforce the United States Constitution. Mary Jackson became a lactation consultant after her own experience as a mother brought home just how little information was available to new moms who sought to breastfeed.[266] Though Mary worked for years educating mothers, doctors, nurses, and medical students about breastfeeding, in 2016 Georgia imposed a license requirement on the trade.[267] There was no evidence unlicensed lactation care had ever harmed anyone in the nation, let alone in Georgia.[268] And only three other states bother licensing lactation consultants.[269]

Securing a license was no easy feat. Consultants would have to get certified by the International Board of Lactation Consultant Examiners, which required about two years of college courses and over 300 hours of supervised clinical work.[270] But lactation consultants with many different types of training already worked across the state.[271] They worked in hospitals, pediatricians' offices, and private practice.[272] If the licensure law had taken effects, nearly 1,000 women would have had to quit their jobs

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263 *See id.* at 501.

264 *See id.* at 510.

265 *See id.* at 507.

266 *Breastfeeding Battle: IJ Defeats Georgia's License for Lactation Consultants*, INST. FOR JUST., https://perma.cc/KV6T-9HZ8.

267 *See id.*

268 *Id.*

269 *Id.*

270 *Id.*

271 Andrew Wimer, *Hundreds of Women Will Keep Working for New Mothers After Court Victory*, FORBES (Mar. 15, 2022), https://perma.cc/C87V-P5TH.

272 *See id.*

and go back to school to qualify for a license.[273] This includes Mary, who had been working in the field for decades.[274]

After Mary brought a lawsuit, the Supreme Court of Georgia invalidated the licensing requirement under the due process clause of the state constitution.[275] The court explicitly rejected applying tests adopted by the Supreme Court that apply to the Fourteenth Amendment Due Process Clause and instead applied a more rigorous standard.[276] That test does not allow the government to merely assert that some restriction on the trade will improve the quality of the profession; instead, it requires the government to show that the nature of the trade is such that affirmative harm would result in absence of the law.[277] Moreover, it does not allow the government to rely on speculation about harms that might occur in the face of substantial evidence to the contrary.[278] This is in direct contrast to various cases decided under the rational basis test.[279]

### 2. Antitrust Lawsuit Leads to Liberalization of Telehealth

Antitrust has also proven a viable tool for fighting anti-competitive conduct that deprives healthcare entrepreneurs of economic opportunity. In 2015, the telehealth company Teladoc brought an antitrust lawsuit against the Texas state medical board based on a regulation it adopted requiring physicians to see patients in person before treating them remotely.[280]

Section 1 of the Sherman Act is concerned with concerted acts that unreasonably restrain trade.[281] "Thus, to establish a violation of Section 1 of the Sherman Act, 'plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market.'"[282] The Texas board didn't bother to assert immunity or

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273 *See id.*

274 *See id.*

275 Raffensperger v. Jackson, 888 S.E.2d 483, 487 (Ga. 2023); J. Justin Wilson, *Georgia Supreme Court Rules Lactation Licensing Law Unconstitutional*, INST. FOR JUST. (May 31, 2023), https://perma.cc/4JDY-K2PQ.

276 *Raffensperger*, 888 S.E.2d at 491–92, 492 n.11.

277 *See id.* at 492.

278 *See id.* at 496–97.

279 *Compare id.* at 491–92, *with* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

280 Teladoc, Inc. v. Tex. Med. Bd., 112 F. Supp. 3d 529, 533–34 (W.D. Tex. 2015).

281 *See id.* at 536 (citing 15 U.S.C. § 1).

282 *See id.* (quoting Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327 (5th Cir. 2015)).

even to deny a conspiracy.[283] Instead it argued that its restriction did not have the required anti-competitive effect.[284]

A Texas district court granted Teladoc a preliminary injunction after finding that the Board's rule would create "increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services."[285] In addition to presenting data about how restrictions on telehealth affected consumers, Teladoc presented evidence that the practice increased economic opportunity for physicians.[286] For example, one physician testified that turning to telehealth allowed him to practice medicine in his semi-retirement.[287] Another testified that without telehealth, he would be forced to treat fewer patients, thus reducing his income.[288] The district court found that there was no benefit to offset these negative effects.[289]

The Board later tried to dismiss the case on the theory that it was immune from antitrust liability because, while it was dominated by market participants, its decisions were subject to judicial review or, ultimately, legislative repeal.[290] The district court rejected that argument, and though the Board initially appealed, the court later concluded that the immunity issue was not subject to interlocutory appeal.[291] At that point, the legislature removed the requirement for a face-to-face meeting prior to treatment by telehealth, making Texas the last state in the nation to liberalize the practice.[292]

### 3. Lawsuit Leads to Repeal of Anti-Competitive Dental Board Rule

In 2021, the Texas legislature also liberalized teledentistry following a lawsuit brought by TeleDentists and Celeste Mohr: a startup teledentistry platform and one of its affiliated dentists.[293] For Celeste, teledentistry was a means to practice from home while also fulfilling her role as a mother

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283 *Id.* at 535–36.

284 *Id.* at 536.

285 *Id.* at 537, 544.

286 *Teladoc, Inc.*, 112 F. Supp. at 537.

287 *Id.*

288 *See id.*

289 *See id.* at 537–38.

290 Teladoc, Inc. v. Tex. Med. Bd., No. 1-15-CV-343, 2015 WL 8773509, at *1, *7 (W.D. Tex. Dec. 14, 2015).

291 *Id.* at *10; Teladoc, Inc. v. Tex. Med. Bd., No. 1:15-CV-343, 2016 WL 4362208, at *1, *4–5 (W.D. Tex. Aug. 15, 2016).

292 Act of May 27, 2017, Ch. 205, 2017 Tex. Gen. Laws 379.

293 *Defending the Right to Practice Teledentistry from State-Sponsored Protectionism*, PAC. LEGAL FOUND. [hereinafter *Defending Teledentistry*], https://perma.cc/996F-CK4Y; *Texas Legalizes Teledentistry Following Lawsuit*, PAC. LEGAL FOUND. (June 18, 2021), https://perma.cc/M38K-JXBL.

to two autistic sons.[294] Both Celeste and TeleDentists had practiced in Texas for years performing video consultations regarding toothaches and swollen gums, whether to go to the emergency room, prescribing medication, or offering tips for better oral hygiene.[295] If they believed an in-person exam was needed, they referred the patient to a brick-and-mortar office.[296] One beneficial result was saving people from unnecessary trips to the ER, which are overwhelmingly caused by dental problems.[297] But in 2020, at the onset of a global pandemic, the Board banned teledentistry.[298]

According to the Board, it was acting on an earlier rule that required dentists to document the findings of any visual or tactile exams, which they read as mandating a tactile exam.[299] The plaintiffs, however, argued that they were acting based on a desire to shield traditional brick-and-mortar dentists from new competition.[300]

They brought claims under the state and federal constitutions and, shortly after, the Texas legislature passed legislation ending the effective ban on teledentistry.[301]

### C. *Policy Proposals to Scale Back Licensure Restrictions*

States should consider removing licensing requirements that limit the ability of people to pursue healthcare as a profession. The Institute for Justice has offered an inverted pyramid that shows less restrictive alternatives to licensure.[302] These measures are successful in healthcare just like all other fields.[303]

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294 *Defending Teledentistry*, *supra* note 293.

295 *Id.*

296 *Id.*

297 *Id.*; Benjamin C. Sun et al., *Emergency Department Visits for Nontraumatic Dental Problems: A Mixed-Methods Study*, 105 AM. J. PUB. HEALTH 947, 947 (2015) (finding "[t]here are about 2 million annual emergency department (ED) visits in the United States for nontraumatic dental problems" and that "[m]ost EDs are not equipped to provide definitive dental care").

298 Polk et al., *supra* note 245.

299 *Id.*

300 *See id.*

301 Plaintiffs' Original Petition for Declaratory Judgment and Application for Injunctive Relief at 4, The TeleDentists, LLC v. Tex. State Bd. of Dental Exam'rs, No. D-1-GN-21-000684 (Tex. 126th Dist. Ct. Feb. 11, 2021); s*ee Defending Teledentistry*, *supra* note 293.

302 John K. Ross, *The Inverted Pyramid: 10 Less Restrictive Alternatives to Occupational Licensing*, INST. FOR JUST. (Nov. 2017), https://perma.cc/ELN3-J4PM.

303 *See* Randall G. Holcombe, *Does Licensing of Health Care Professionals Improve Health Care?*, 93 J. MED. LICENSURE & DISCIPLINE, no. 3, 2007, at 17–18 ("[M]arket mechanisms—such as specialty board certification and hospital practicing privileges—already provide a better indicator of quality than government licensing.").

If states choose to keep licensing on the books, they should at least recognize licenses from other states and allow medical professionals to practice at the top of their expertise. Arizona, for example, was the first state in the country to pass a law recognizing out-of-state occupational licenses, including those for physicians, behavioral health professionals, and pharmacists.[304]

Arizona also passed a law making it easier for people in all professions to challenge overburdensome licensing laws.[305] Its Right to Earn a Living Act requires that laws restricting occupational freedom be demonstrably necessary to protecting the public, and allows those affected to sue in state court under a heightened standard of scrutiny.[306] Pacific Legal Foundation has a model policy that recognizes the right to earn a living as a fundamental right and establishes a higher level of scrutiny in state court.[307]

States are also increasingly ensuring that healthcare professionals can practice within their full competency. For example, thirty states and territories allow nurse practitioners ("NPs") to act as primary care providers, meaning they can perform routine tasks such as make diagnoses, order and interpret tests, create and supervise treatment plans, and prescribe medications without physician supervision.[308]

Last, states should liberalize telemedicine. There is no reason to mandate an in-person visit unless the provider, in his or her medical judgment, thinks one is needed.[309] And Medicaid and Medicare should not discriminate in reimbursement based on whether the treatment is in-person or remote.[310]

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304 In Defense of Liberty Blog, *Arizona Is Now the First State to Recognize Occupational Licenses from Other States*, GOLDWATER INST. (Apr. 10, 2019), https://perma.cc/6W4Y-L7YG; Ryan Randazzo & Mitchell Atencio, *Here's What You Need to Know About Arizona's New Law for Out-of-State Work Licenses*, ARIZ. REPUBLIC (Apr. 22, 2019, 4:37 PM), https://perma.cc/2JXV-4Q6P; *see* Act of Apr. 10, 2019, Ch. 55, 2019 Ariz. Sess. Laws 255, 255–56.

305 *See* Right to Earn a Living Act, Ch. 138, 2017 Ariz. Sess. Laws 844, 844–45 (2017).

306 *Id.* § 5. Louisiana also enacted a "right to earn a living act" in 2022. *See* Press Release, Pelican Institute, STATEMENT: Louisiana Legislature Passes the Right to Earn a Living Act (June 5, 2022), https://perma.cc/6P69-AR2L.

307 *See Entrepreneurial Freedom Restoration Act—Model Policy*, PAC. LEGAL FOUND., https://perma.cc/5ZB2-MAMQ.

308 *See* Ann Feeney, *Nurse Practitioner Practice Authority: A State-by-State Guide*, NURSE J. (May 23, 2024), https://perma.cc/UR2R-23FZ.

309 *See generally* Jackie Gerhart, Alex Piff, Kersten Bartelt & Eric Barkley, *Telehealth Visits Unlikely to Require In-Person Follow-Up Within 90 Days*, EPIC RSCH. (Dec. 13, 2022), https://perma.cc/8A77-2EVQ ("These findings suggest that, for many specialties, telehealth visits are typically an efficient use of resources and are unlikely to require in-person follow-up care.").

310 For state lawmakers who agree, Pacific Legal Foundation has created a model state law to address telehealth rate discrimination. *See The Telemedicine Freedom Act*, PAC. LEGAL FOUND., https://perma.cc/XX4U-CB8M.

## III. Birth Freedom

Sometimes, a combination of laws stifle healthcare opportunities and individual liberty. Since the nation's founding, women have had the right to choose where to give birth and with whom present.[311] But CON laws, other similar restrictions on birth centers, and occupational licensing restrictions make it difficult for mothers in most states to exercise their right to birth freedom.[312] These laws also curb providers' ability to work to the full scope of their training.[313]

It is well known that the U.S. suffers from poor outcomes for mothers and babies. In fact, "[t]he United States has the highest maternal mortality rate among high-income countries" and that rate has been increasing since 2000, while the rates in other high-income countries continue to decrease.[314] Government at every level recognizes the problem and is trying to improve outcomes for moms and babies.[315] Yet, some of the factors contributing to bad outcomes may be exacerbated by the lack of choice in facilities and providers.[316]

Midwives offer safe, high-quality, patient-centric care. Research confirms that midwifery-care leads to better outcomes for women and babies.[317] This includes fewer unnecessary interventions, lower rates of stillbirth and preterm births, and a lower risk of post-partum

311 *See generally A Brief History of Midwifery in America*, CTR. FOR WOMEN'S HEALTH, OR. HEALTH & SCI. UNIV. (discussing the history the widespread practice of midwifery in colonial and early United States), https://perma.cc/WGY3-VEQD.

312 *See Access to Maternity Providers: Midwives and Birth Centers*, MACPAC (May 2023), https://perma.cc/2WA2-J98Q.

313 *See id.*

314 Leah Frattellone, Comment, *Decreasing the United States' Maternal Morality Rate: Using Policies of Other High-Income Countries as a Model*, 36 PACE INT'L L. REV. 149, 151 (2024).

315 *See generally, e.g., The Surgeon General's Call to Action to Improve Maternal Health*, U.S. DEP'T HEALTH & HUM. SERVS. (Dec. 2020), https://perma.cc/NV2F-9DYQ (the federal government); *Task Force on Maternal Mental Health*, OFF. ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS. (the federal government); *Arkansas Maternal Mortality Review Committee*, ARK. DEP'T OF HEALTH, https://perma.cc/5RH8-FKJX (Arkansas); *Maternal Health Task Force*, COLO. DEP'T OF PUB. HEALTH & ENV'T, https://perma.cc/X694-UYYB (Colorado); *Taskforce on Maternal Mortality and Disparate Racial Outcomes*, N.Y. DEP'T OF HEALTH, https://perma.cc/EL6T-SCZW (New York); *Oklahoma Maternal Health Task Force*, OKLA. STATE DEP'T OF HEALTH, https://perma.cc/W6TN-BL4B (Oklahoma); *Maternal Health Task Force*, TENN. DEP'T OF HEALTH, https://perma.cc/9XXV-JQNR (Tennessee); *Maternal and Infant Health Task Force*, ANNE ARUNDEL CNTY. DEP'T OF HEALTH, https://perma.cc/E5Y9-ZQQZ (Anne Arundel County, Maryland).

316 *See Nowhere to Go: Maternity Care Deserts Across the US: 2024 Report*, MARCH OF DIMES (2024), https://perma.cc/T538-HNTJ.

317 Frattellone, *supra* note 314, at 171.

depression.[318] Even women who used a birth center for prenatal care but delivered in a hospital reaped these benefits.[319]

Preventing midwives and other skilled providers from practicing to the full scope of their training is also illogical as the U.S. is also facing a growing provider shortage.[320] By 2030, the U.S. Department of Health and Human Services estimates the shortage of obstetricians and gynecologists will grow to more than 5,100.[321] And the skepticism of midwifery and birth centers is a relatively new phenomenon.[322] Although demand for midwifery care and birth centers has been steadily increasing in the U.S., many laws make it nearly impossible for providers to meet this demand.[323]

### A. *The Legal Impediments to Birth Freedom*

#### 1. Birth Centers

First, around a dozen states use CON laws to restrict birth centers from opening.[324] As discussed above, nearly all CON laws give incumbent providers veto power over new CON applications.[325] Even states without CON laws sometimes impose requirements that birth centers obtain a signed transfer agreement with a nearby hospital.[326] While it is reasonable

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318 *Id.*

319 Jill Alliman, Kate Bauer & Trinisha Williams, *Freestanding Birth Centers: An Evidence-Based Option for Birth*, J. PERINATAL EDUC., Winter 2022, at 11.

320 Alejandra O'Connell-Domenech, *The United States Is Experiencing a Growing OB-GYN Shortage. Here's Why.*, THE HILL (Apr. 14, 2024), https://perma.cc/6AY5-GVYQ.

321 NAT'L CTR. FOR HEALTH WORKFORCE ANALYSIS, U.S. DEP'T OF HEALTH AND HUM. SERVS., PROJECTIONS OF SUPPLY AND DEMAND FOR WOMEN'S HEALTH SERVICE PROVIDERS: 2018–2030, at 10 (Mar. 2021), https://perma.cc/C48N-YADE.

322 *See* Stacey A. Tovino, *American Midwifery Litigation and State Legislative Preferences for Physician-Controlled Childbirth*, 11 CARDOZO WOMEN'S L.J. 61, 67 (2004); *see also id.* at 67–68 ("The transition to physician-attended hospital deliveries in the twentieth century first began with middle- and upper-class women and their obstetricians who believed in new theories regarding germ transmission that theoretically made home birth difficult to manage. . . . By the second wave of the women's movement in the 1960's, American physicians had established a near-monopoly on childbirth . . . .").

323 P. Mimi Niles & Laurie C. Zephyrin, *How Expanding the Role of Midwives in U.S. Health Care Could Help Address the Maternal Health Crisis*, COMMONWEALTH FUND (May 5, 2023), https://perma.cc/DK4H-A6K6.

324 *See Birth Center Regulation & Access in the United States*, AM. ASS'N OF BIRTH CTRS. (Oct. 2024), https://perma.cc/2XS7-27VY.

325 *See supra* notes 9, 219–21 and accompanying text.

326 For example, Pennsylvania has no CON laws, *see Certificate of Need State Laws*, *supra* note 7, but it does have a written transfer agreement requirement for birth centers, *see* 28 PA. CODE § 501.44(a) (Westlaw through Pa. Bull., Vol. 55, No. 9, dated Mar. 1, 2025) ("The birth center shall have a written transfer agreement with physicians who have admitting privileges to a hospital obstetric/newborn service for the mother and infant when complications or emergencies arise.").

to ask birth centers to create a transfer *plan*—a plan for how a patient will be transferred in the event of an emergency—it is unreasonable to allow hospitals to veto new birth centers by refusing to sign transfer agreements.[327]

In any event, federal law requires hospitals to stabilize anyone who presents at an emergency department, so hospitals should not be allowed to use transfer agreement requirements to skirt their legal duty to treat patients at the emergency department.[328]

Second, facility licensure standards can prevent birth centers from opening. Even where a signed transfer agreement with a hospital is not required, strict requirements for where birth centers may open forces birth centers to locate in urban areas close to hospitals.[329] Thus, although maternity deserts exist in many states, birth centers are often not allowed to open in the locations with the highest needs.[330] Facility licensure laws can also impose irrelevant but expensive requirements. For instance, some states license birth centers the same as hospitals or surgery centers, which imposes numerous costly facility requirements and makes it practically impossible for birth centers to open.[331]

### 2. Occupational Licensure

As discussed above, occupational licensure laws often limit or prohibit skilled health workers from working to the full scope of their

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327 Many state legislators are starting to agree. *See, e.g.*, UTAH CODE ANN. § 26B-2-228 (LexisNexis, LEXIS through the 2024 4th Spec. Sess.) (stating that the state "may not require a birthing center . . . to . . . maintain a written transfer agreement" but must "require a birthing center to have a written plan for the transfer of a patient to a hospital"); H.B. 1576, 137th Gen. Assemb., Reg. Sess. (Miss. 2025) (proposing to require a transfer plan instead of a transfer agreement); S.B. 322, 135th Gen. Assemb., Reg. Sess. (Ohio 2024) ("No freestanding birth center shall be required to establish a written transfer agreement with a hospital."); *see also* GA. CODE ANN. § 31-6-47(31.1)(C) (LEXIS through Act 3 of the 2025 Reg. Sess.) ("[H]ospitals shall not unreasonably deny a transfer agreement . . . with the birthing center . . . .").

328 *See* 42 U.S.C. § 1395dd(b)(1).

329 Take Georgia, for example, which requires that birth centers must be "within a reasonable distance" from a "hospital with at least Level lll perinatal services," GA. CODE ANN. § 31-6-47(33.1)(C) (LEXIS through Act 3 of the 2025 Reg. Sess.), despite the fact that most of such hospitals are concentrated in the Atlanta metropolitan area, *see NICU Directory*, NEONATOLOGY SOLS., https://perma.cc/E3MA-DT6E. Many states simply impose a blanket restriction that birth centers be within 30 minutes of a hospital. *See* OKLA. ADMIN. CODE § 310:616-3-1(d)(7) (1992); ALA. CODE r. 420-5-13-.01(2)(r) (2023); N.M. CODE R. § 8.370.17.9(D)(1) (LexisNexis, 2024).

330 *See generally Nowhere to Go: Maternity Care Deserts Across the US*, *supra* note 316 (discussing the lack of perinatal care availability in rural America).

331 *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 39, *Oasis Fam. Birthing Ctr., LLC v. Ala. Dep't of Pub. Health*, No. 03-CV-2023-901109.00 (Ala. Cir. Ct. filed Aug. 8, 2023) (lawsuit challenging the Alabama Department of Public Health's policy of licensing birth centers as hospitals).

training.[332] This occurs most commonly with midwives, but can also apply to other practitioners such as doulas and lactation consultants.[333] And laws that favor physicians over other providers persist despite the evidence that midwifery care leads to the same or better outcomes.[334]

The two most common types of midwives are certified nurse midwives ("CNMs") and certified professional midwives ("CPMs").[335] CNMs must get a license in all 50 states, though their scopes of practice vary widely.[336] CPMs can practice in 37 states and the District of Columbia.[337] And 37 states require licensure for direct entry (or lay) midwives.[338] Of the states that do not license direct entry midwives, seven of them prohibit direct entry midwives from working altogether by requiring higher-level nurses' licenses.[339]

But even with licensure, midwives can be prevented from practicing their occupation. For example, some states prohibit licensed midwives from attending home births or otherwise limit who can choose a home birth.[340] In other states, midwives are banned from independent practice and forced to enter collaborating agreements with physicians.[341] In theory, requiring midwives to work with physicians does not sound unreasonable. In practice, however, these agreements can severely limit a midwife's

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332 *See supra* notes 312–13 and accompanying text.

333 *See Access to Maternity Providers*, *supra* note 312; Amy Chen & Alexis Robles-Fradet, *Challenges Reported by California Doula Pilot Programs*, NAT'L HEALTH L. PROGRAM 15 (Mar. 2, 2022), https://perma.cc/6KMH-9P7F (doulas); Jeffrey A. Singer & Sofia Hamilton, *Licensing Would Reduce Access to Lactation Support Services*, CATO INST. (Dec. 10, 2024), https://perma.cc/7V9P-GKGV (lactation consultants).

334 Joan L. Combellick et al., *Midwifery Care During Labor and Birth in the United States*, 228 AM. J. OBSTETRICS & GYNECOLOGY S983, S986 (2023).

335 E. Brie Thumm, Cathy L. Emeis, Carol Snapp, Lydia Doublestein, Rebecca Rees, Jennifer Vanderlaan & Tanya Tanner, *American Midwifery Certification Board Certification Demographic and Employment Data, 2016 to 2020: The Certified Nurse-Midwife and Certified Midwife Workforce*, 68 J. MIDWIFERY & WOMEN'S HEALTH 563, 564 (2023).

336 *See How Does the Role of Nurse-Midwives Change from State to State?*, GEO. UNIV. SCH. OF NURSING (Feb. 5, 2019), https://perma.cc/Z3KM-QKZ7.

337 *See Legal Recognition of CPMs*, NAT'L ASS'N CERT'D PRO. MIDWIVES (Oct. 11, 2024), https://perma.cc/RRE3-GPUW.

338 *See* LISA KNEPPER ET AL., *supra* note 241, at 20.

339 *Id.* at 225.

340 *See, e.g.*, NEB. REV. STAT. § 38-613(3)(b) (2007) ("[A] certified nurse midwife shall not attend a home delivery . . . ."); DEL. CODE ANN. tit. 24, § 1799JJ (2025) (defining when midwives are and are not allowed to provide home birth delivery services); *see also* Natalie Krebs, *As Home Births Rise in Popularity, Some Midwives Operate in a Legal Gray Area*, NPR (Apr. 5, 2022, 5:01 AM), https://perma.cc/98HR-63UY.

341 *See, e.g.*, WIS. ADMIN. CODE DSPS § N4.06(2) (2024) ("A nurse-midwife shall collaborate with a physician . . . pursuant to a written agreement . . . ."); *see also CNM Independent Practice Map*, NAT'L COUNCIL OF STATE BDS. OF NURSING (Sept. 7, 2022), https://perma.cc/EX3N-84Y9.

scope of practice, which can lead to bad outcomes for patients.[342] They also force midwives to pay exorbitant fees to their direct competition for the right to earning a living.[343]

Other times preferences for physicians are more covert. In Alabama, for instance, state law requires infants to be screened for certain genetic diseases.[344] Medical providers are supposed to administer the tests within 24–48 hours of birth, but the Alabama Department of Public Health has stopped allowing midwives to buy the screening tests, which can make it difficult or impossible for anyone delivering outside of a hospital to access these tests.[345] One CNM in Alabama even reported having to contract with a lab in Mississippi to offer this service to her patients.[346]

## B. *Legal Challenges*

### 1. CON Laws Interfere with Georgia Birth Center

Georgia entrepreneur, Katie Chubb, wants to open a birth center in Augusta with her husband.[347] There is very high demand for her services.[348] In fact, Katie was inspired to open a birth center after she and her husband were forced to drive for 2.5 hours while she was in labor to get to the nearest birth center.[349] After submitting her CON application, the Georgia Department of Community Health found that there was a need for a birth center in Augusta, and that the birth center would offer high quality services, but denied Katie's CON application because the local hospitals refused to sign a transfer agreement with her.[350]

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342 *See* Sara Markowitz, E. Kathleen Adams, Mary Jane Lewitt & Anne L. Dunlop, *Competitive Effects of Scope of Practice Restrictions: Public Health or Public Harm?*, 55 J. HEALTH ECON. 201, 216 (2017) (finding that states that allow autonomous midwifery practice had lower odds of labor induction, C-section delivery, and low birth weight than states with scope of practice laws).

343 *See* Brendan Martin & Kyrani Reneau, *How Collaborative Practice Agreements Impede the Administration of Vital Women's Health* Services, 65 J. MIDWIFERY & WOMEN'S HEALTH 487, 488 (2020) (discussing how midwives must often pay fees to the physicians with whom they are mandated by law to collaborate, potentially detering market entry).

344 *See* ALA. CODE § 22-20-3(b) (2024). This screening exists in every state, though there are variations in how easy it is for parents to opt out and whether or how the blood can be used for anything other than genetic testing. *See* Sonia M. Suter, *Did You Give the Government Your Baby's DNA? Rethinking Consent in Newborn Screening*, 15 MINN. J.L. SCI. & TECH. 729, 730–31, 746–47 (2014).

345 *See* Alander Rocha, *Midwifery Grows in Alabama Amid Maternal Health Challenges*, ALA. REFLECTOR (Aug. 8, 2023, 7:01 AM), https://perma.cc/8NGM-4TW.

346 *Id.*

347 *Georgia Birth Center Director Fights Crony Protectionism to Help Expectant Mothers*, PAC. LEGAL FOUND. [hereinafter *Katie PLF Article*], https://perma.cc/XJ45-DVC4.

348 *See id.*

349 *Id.*

350 *Id.*

Katie filed a lawsuit in federal court alleging that Georgia's CON laws interfered with the right of women to give birth under the circumstances of their choosing as well as Katie's right to provide healthcare to her community and earn a living in the manner of her choosing.[351]

In 2024, while Katie's case was pending, the Georgia legislature amended its CON laws and removed the CON requirement for birth centers.[352] The new law still requires birth centers to have an agreement with a hospital that has a neonatal intensive care unit, or to have someone on staff with admitting privileges at an acute care hospital.[353] Although this change in legislation mooted Katie's case, she is still required to go through the facility licensure process.[354] The medical director of Katie's birth center has always had admitting privileges at a nearby hospital, which should satisfy the new licensure requirements.[355] At the time of publication, Katie was still going through the facility licensure process.[356]

2. Iowa CON Law Prevents Birth Center from Opening

Emily Zambrano-Andrews and Caitlin Healy founded the Des Moines Midwife Collective (the "Collective") after healthcare careers in Iowa's hospital systems.[357] They were both frustrated by the options available in their state and knew women wanted access to different types of maternal healthcare.[358] The Collective safely and legally offers home birth services, but Emily and Caitlin cannot open a freestanding birth center because of Iowa's CON laws.[359] Unsurprisingly, there are no birth centers in Iowa.[360]

In 2023, the Collective sued the Iowa Facilities Council, raising claims under the Iowa Constitution and U.S. Constitution.[361] They sued in state court, but defendants removed to federal court.[362] The Collective has alleged claims under the Iowa Constitution's Due Process, Equal

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351 *See* Complaint for Declaratory and Injunctive Relief ¶¶ 1, 30, 58, 64, 82, Chubb v. Noggle, No. 1:22-cv-03289, 2022 WL 3536326 (N.D. Ga. Aug. 16, 2022).

352 *See* Act of Apr. 19, 2024, No. 384, § 7(a)(31.1), 2024 Ga. Laws.

353 *Id.* § 7(a)(31.1)(C).

354 *See id.* § 7(a)(31.1).

355 *See id.* § 7(a)(31.1)(C); *Katie PLF Article*, *supra* note 347.

356 *Katie PLF Article*, *supra* note 347.

357 *Iowa Midwives Fight Back Against Cronyism to Help Expectant Mothers*, PAC. LEGAL FOUND., https://perma.cc/H6SF-DXK2.

358 *See id.*

359 *Id.*

360 *Id.*

361 *See* Petition at 10–14, Des Moines Midwife Collective v. Iowa Health Facilities Council, No. 05771 EQCE088449 (Iowa Dist. Ct. Jan. 12, 2023).

362 Des Moines Midwife Collective v. Iowa Health Facilities Council, 756 F. Supp. 3d 722, 726 (S.D. Iowa 2024), *vacated*, No. 24-3524, 2025 WL 1583977 (8th Cir. June 2, 2025).

Protection, and Inalienable Rights Clauses and violations of the Federal Due Process, Equal Protection, and Privileges and Immunities Clauses.[363]

On cross-motions for summary judgment, the district court upheld Iowa's CON laws.[364] The court first reviewed the federal claims, ruling that the CON law has a legitimate purpose of protecting hospitals from competition, especially in rural areas.[365] The court reasoned that "[l]osing patients to new birth centers could impact [the hospitals'] abilities to provide other necessary services and impede healthcare access for the public."[366]

Government and healthcare providers use this post hoc justification for CON laws time and again, despite the fact that the research dispels the myth that CON laws protect rural hospitals from closure.[367] In fact, rural areas benefitted most when states repealed CON laws for surgery centers and researchers found "no evidence that CON repeal is associated with hospital closures in rural areas."[368] But remember: Under a rational basis regime, facts indicating industry need and market circumstances are irrelevant. The court then held that review of state constitutional claims was coextensive with the federal rational basis test and denied the Collective's state claims on that basis.[369] The Collective has appealed that ruling.[370]

### 3. Nebraska Law Prohibits Certified Nurse Midwife from Attending Home Births

Heather Swanson is a CNM and NP.[371] She has dedicated her career to providing childbirth services, especially in underserved communities.[372] Nebraska is the only state that bans CNMs from home births, although midwives with less training and doulas face no such ban.[373] Worse, Nebraska's scope of practice laws require Heather to practice directly

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363 *See* Petition, *supra* note 361, at 10–14.

364 *Des Moines Midwife Collective*, 756 F. Supp. 3d at 734.

365 *Id.* at 727–32.

366 *Id.* at 731.

367 *See* Thomas Stratmann, Markus Bjoerkheim & Christopher Koopman, *The Causal Effect of Repealing Certificate-of-Need Laws for Ambulatory Surgical Centers: Does Access to Medical Services Increase?*, 2024 S. ECON. J. 1, 2 (2024).

368 *Id.* at 1.

369 *Des Moines Midwife Collective*, 756 F. Supp. 3d at 734.

370 *See* Appellants' Opening Brief at 14, 60, *Des Moines Midwife Collective v. Iowa Health Facilities Council*, 756 F. Supp. 3d 722 (S.D. Iowa 2024) (No. 24-3524).

371 *Nebraska Midwife Entrepreneur Fights Unjust Ban on Her Profession*, PAC. LEGAL FOUND. [hereinafter *Heather PLF Article*], https://perma.cc/4XVS-R6SU.

372 *Id.*

373 *Id.*

under a physician and only in hospitals, public health agencies, or physician-approved settings.[374] The physician-supervision requirement does not serve any health or safety interest, but it does serve physicians' economic interests.[375]

The ban forced Heather to leave Nebraska for several years to pursue her calling.[376] She worked in other states including Texas, where she ran a birth center, and South Dakota, where she still teaches in a nurse practitioner program.[377] Upon her return to Nebraska to care for her ailing mother, she is determined to open her own practice, Oneida Health, but Nebraska's laws prohibit her from doing so.[378]

In 2024, Heather sued alleging violations of the Federal Due Process, Equal Protection, and Privileges or Immunities Clauses.[379] At the motion to dismiss stage, the U.S. District Court for the District of Nebraska ruled for the government, dismissing Heather's claims and holding that the challenged restrictions on Heather's ability to follow her calling are rationally related to the legitimate purpose of "protecting the health and well-being of patients, including Nebraska mothers during childbirth and their babies."[380] Because the rational basis test is so deferential to government, the court reasoned that Heather was not even entitled to seek discovery and prove that the challenged regulations are not rationally related to a legitimate government interest.[381] Heather has appealed that ruling.[382]

### C. *Policy Proposals*

#### 1. Enshrine the Right to Choose and Direct Maternal Healthcare

Women have a longstanding right to direct their maternal healthcare.[383] Nevertheless, courts have not generally been protective of this right.[384] As such, states should enact language recognizing that childbirth is a natural process, not an illness and the state cannot interfere with a woman's right to choose where to give birth and with whom

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374 *Id.*

375 *Id.*

376 *See id.*

377 *Heather PLF Article*, *supra* note 371.

378 *Id.*

379 *See* Swanson v. Hilgers, No. 4:24CV3072, 2024 WL 4135939, at *1 (D. Neb. Sept. 9, 2024).

380 *Id.* at *6–7.

381 *See id.*

382 *See* Appellants' Opening Brief, Swanson v. Hilgers, No. 24-3027 (8th Cir. filed Nov. 12, 2024).

383 *See generally A Brief History of Midwifery in America*, *supra* note 311.

384 *See, e.g.*, Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 644–45 (3d Cir. 1995) (explaining that providing or receiving midwife services is not a fundamental right).

present. Importantly, the right to choose and direct one's maternal healthcare also includes the express right to decline any treatment or procedure.[385]

2. Reduce Occupational Licensure Restrictions for Midwives and Other Birth Workers

Midwifery has been part of the history and tradition of the United States since before the Founding.[386] Increasing access to midwifery care and other types of maternal healthcare furthers the public interest. States should resist overzealous licensure laws that limit a provider's scope of practice. Instead of defining what every occupation can do (as most licensure laws do),[387] states should enact laws that allow providers to work to the full extent of their training. They should also reject supervisory schemes as there is no evidence that supervisory requirements are necessary for health or safety.[388] Last, states should recognize out-of-state licenses to give providers greater flexibility and to increase access to healthcare providers in the near term.

3. Eliminate Barriers to Opening Birth Centers

Over the last few years, many states have repealed CON laws for birth centers.[389] States as different as Connecticut and West Virginia recognized that they need more options for maternal healthcare and allowing birth centers to open is one way to end maternity deserts.[390] States should also eliminate requirements that birth centers obtain transfer agreements with hospitals or emergency transportation services, or proximity requirements that prevent birth centers from opening in rural and underserved areas.

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385 *See* Vacco v. Quill, 521 U.S. 793, 800 (1997) (identifying an entitlement "to refuse unwanted lifesaving medical treatment").

386 *See* Kerry E. Reilley, *Midwifery in America: The Need for Uniform and Modernized State Law,* 20 SUFFOLK U. L. REV. 1117, 1118–21 (1986).

387 *See, e.g.*, IDAHO ADMIN. CODE r. 24.34.01.200 (2023).

388 *See Position Statement: Collaborative Agreement Between Certified NurseMidwives/Certified Midwives and Physicians or Other Health Care Providers*, AM. COLL. OF NURSE-MIDWIVES, https://perma.cc/GKU5-Y72J.

389 *See, e.g.*, Act of June 26, 2023, Pub. Act No. 23-147, § 8, 2023 Conn. Laws; Act of Apr. 19, 2024, No. 384, § 7, 2024 Ga. Laws; Act of Jan. 21, 2025, No. 252, § 2224c, 2025 Mich. Laws; State Health Facility Licensure Act, No. 20, §§ 3, 6, 2023 S.C. Acts 63, 65, 70–71; Act of Mar. 10, 2023, Ch. 255, 2023 W. Va. Acts 1953, 1965–67.

390 *See* Press Release, Conn. State Dep't of Pub. Health, *Governor Lamont Signs Legislation Licensing Free-Standing Birth Centers in an Effort to Increase Access to High-Quality Maternal Health Services* (July 24, 2023), https://perma.cc/5B9A-KJTX; Leah Willingham, *West Virginia House OKs Bill to Encourage More Birth Centers*, AP NEWS (Feb. 7, 2023, 3:21 PM), https://perma.cc/CAL6-N65P.

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These reforms can be enacted independently, but Pacific Legal Foundation has created a model policy called the Birth Freedom Act to encourage states to increase access to care for mothers and babies.[391]

## Conclusion

Restrictions on entrepreneurship and the restrictions on occupational freedom run rampant in healthcare. Instead of protecting public health and safety, these restrictive laws and policies protect incumbent providers from competition and prevent trained professionals from serving their communities. And contradictions abound. In some instances, the government uses CON laws to prevent facilities from locating too close together.[392] In other instances, the government says facilities like birth centers must be located close to existing hospitals.[393] Sometimes CON laws are used to limit the amount of money a facility can spend on opening,[394] but other times, providers like Ursula Newell-Davis are forced to lease office space even though her business would provide care in people's homes.[395]

If providers did not have to navigate this web of regulation, they would be able to use their skills to provide for themselves and improve their communities. Instead, healthcare entreprenuers are often forced out of the market, which leaves patients with few healthcare options. The solution, then, is simple. Government should not be in the business of picking winners and losers. Instead, government should repeal CON laws and rethink overly burdensome occupational licensing laws to unleash healthcare freedom.

Implementing these changes will require government to stand up to the entities that benefit from the status quo. Taking on the hospital associations or medical associations is no small task, but it is necessary to ensure healthcare facilities and services are responsive to local needs.

Finally, in considering whether to repeal or amend CON laws and occupational licensing restrictions, legislators should eliminate laws that lack a data-backed connection to protecting public health and safety. With government out of the way, individuals, families, and communities can thrive.

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391 *The Birth Freedom Act*, PAC. LEGAL FOUND., https://perma.cc/5MFN-ZM7H.

392 *See Certificate of Need State Laws*, *supra* note 7 (explaining that one of the primary objectives of CON laws is to avoid "unnecessary expansion or duplicative services within an area").

393 *See supra* Section III.A.1.

394 *See supra* Section I.C.3.

395 *See supra* Section I.B.2.