INSTITUTE FOR JUSTICE

March 27, 2025

House Health and Human Services Committee
State of Rhode Island General Assembly
82 Smith Street, House Lounge
Providence, Rhode Island 02903

Re: Letter in support of HB 5355

Dear Chair Donovan, Vice Chairs Giraldo and Potter and Members of the Committee:

Thank you for the opportunity to submit this letter in support of the certificate of need (CON) reform proposed by HB 5355. My name is Alasdair Whitney, and I am Legislative Counsel at the Institute for Justice (IJ). IJ is a nonprofit public interest law firm that works to protect civil liberties, including economic liberty. For years, we have researched and advocated for CON reform through litigation and legislation.

IJ strongly encourages the Committee to support HB 5355, which would repeal the state's burdensome CON laws. As the Committee is aware, CON laws prevent new medical services from opening unless the state deems them "necessary." It is difficult to imagine applying such a law to industries like electronics or restaurants and expecting improvement—yet that is precisely the underlying concept.

Rhode Island adopted its "determination of need," otherwise known as CON, regime in 1968 and it was the second state in the country to implement these laws. The federal government passed its own CON law in 1974, and in the years that immediately followed, nearly every state in the country had a variation of the law on the books.

At that time, healthcare providers were reimbursed by government payors using a "cost-plus" system, which covered their actual expenses rather than the negotiated rates used today. Congress believed that these reimbursements incentivized hospitals to open and expand without risk at the government's expense. CON laws were therefore introduced to limit the number of hospitals and hospital beds in an effort to control spending. By design, these laws do not expand access to care—they restrict it. Blocking access was their intended purpose.

Healthcare reimbursements have changed significantly. Today, hospitals and providers are typically paid on a "fee-for-service" basis rather than being reimbursed for their actual costs. This means that providers receive payments based on government-set rates. The old reimbursement system that once incentivized rapid healthcare facility expansion no longer exists. Even before these changes were implemented, Congress, in a remarkable about-face, repealed the federal CON law in 1986. In short, the original justification for these laws no longer exists.

In the wake of that federal repeal, every presidential administration has criticized CON laws as barriers to accessible, affordable, and quality healthcare services for tens of millions of

Americans.[1] Several federal agencies like the Department of Justice, the Federal Trade Commission, and the U.S. Department of Health and Human Services continue to urge states to repeal CON laws. For example, the U.S. Department of Justice and Federal Trade Commission have reported that "CON programs are generally not successful in containing health care costs" and present "anti-competitive risks" that "entrench[] oligopolists and erode[] consumer welfare."[2] A diverse array of a dozen states, including California, New Hampshire, Pennsylvania, and Texas, have heeded the federal government's advice and eliminated their CON laws entirely.[3]

The overwhelming weight of academic research has affirmed the policy decisions to jettison CON laws. One of IJ's reports analyzed over 128 separate academic papers containing 423 unique tests that address the stated goals of CON laws: access, quality, and costs.[4] Of the 389 tests that calculate an identifiable, conclusive outcome in those areas, 345 of those tests show that CON laws are associated with either an insignificant or bad outcome. In other words, nine out of every 10 tests with a conclusive, identifiable result show that CON laws neither materially improve nor benefit patient access, quality of care, or costs.

The facts are that patients in states with CON laws must wait longer and drive farther for healthcare. After controlling for relevant factors, states with CON laws have fewer hospitals, fewer hospital beds, fewer psychiatric care facilities, fewer dialysis clinics, and fewer medical imaging devices.[5] Indeed, decades of purposely limiting the supply of healthcare has led to emergencies today. During the pandemic, states with CON laws were 27% more likely to run out of hospital beds during COVID surges.[6]

This Committee should follow the research and put Rhode Island on a path to joining the dozen states that have completely eliminated these harmful laws. HB 5355 would do just that. And it would not, as opponents of repeal have suggested, lead to the closure of safety-net hospitals or discourage charity care. For one, research shows that jurisdictions without CON laws have more healthcare facilities overall, suggesting that "cherry-picking" is not forcing facilities that take underinsured or uninsured patients to close when newer facilities target well-insured patients for profitable services.[7] In fact, "safety-net" hospitals, *i.e.*, hospitals that treat a significant number of underinsured or uninsured patients and/or provide charity care, have *higher* aggregate profit margins in non-CON states than in CON states.[8] Relatedly, there is no evidence that hospitals are better equipped to subsidize care for underinsured or uninsured

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[1] *See* Hamilton, S. & Kimbrell, T., *Certificate of Need Laws Con Rural Patients Out of Health Care*, Stat (June 14, 2024), *available at* https://www.statnews.com/2024/06/14/certificate-of-need-laws-restrict-access-rural-health-care/.

[2] Federal Trade Comm'n & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition: A Report by the Federal Trade Commission and the Department of Justice*, (July 2004), *available at* https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice.

[3] *See* Cavanaugh, J., et al., *Conning the Competition: A Nationwide Survey of Certificate of Need Laws*, Inst. for Justice (Aug. 2020), *available at* https://ij.org/report/conning-the-competition/.

[4] *See* Cavanaugh, J. & Mitchell, M., *Striving for Better Care: A Review of Kentucky's Certificate of Need Laws*, Inst. for Justice (Aug. 2023), *available at* https://ij.org/report/striving-for-better-care/.

[5] *See id.*

[6] *Id.*

[7] *See* Stratmann, T. & Koopman, C., *Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals*, Mercatus Ctr. (Feb. 2016).

[8] *See* Dobson, A., et al., *An Evaluation of Illinois' Certificate of Need Program*, The Lewin Group (Feb. 15, 2007), *available at* https://cgfa.ilga.gov/Upload/LewinGroupEvalCertOfNeed.pdf.

patients by exclusively capturing the share of high-profit services offered to well-insured patients.[9] This makes sense because CON laws are designed to stifle the proliferation of additional healthcare providers, tightening the supply of critical services and resulting in higher prices.[10]

CON reform is badly needed in Rhode Island. IJ urges the Committee to support this bill. Supporting this reform will serve the best interests of the state's residents and those who seek healthcare services here. Thank you for your time and thoughtful consideration of this issue.

Sincerely,

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[9] *See* Stratmann, T., & Russ, J., *Do Certificate-of-Need Laws Increase Indigent Care?*, Mercatus Ctr. 3 (July 2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211637.
[10] *See id.*