



## DISABILITY AND COMMUNICATION ACCESS BOARD

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1010 Richards Street, Room 118 • Honolulu, Hawaii 96813  
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March 21, 2024

### TESTIMONY TO THE HOUSE COMMITTEE ON HUMAN SERVICES

House Concurrent Resolution 101/House Resolution 82 – Requesting a Study of the Necessity for Hawaii's Certificate of Need Program under Chapter 323D, Hawaii Revised Statutes

The Disability and Communication Access Board (DCAB) supports House Concurrent Resolution 101/House Resolution 82 – Requesting a Study of the Necessity for Hawaii's Certificate of Need Program under Chapter 323D, Hawaii Revised Statutes.

The requirements to obtain a Certificate of Need is a barrier for the construction, expansion, or major capital expenditures by health care facilities and services.

Thank you for considering our position.

Respectfully submitted,

KIRBY L. SHAW  
Executive Director

Charlotte A. Carter-Yamauchi  
Director

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First Assistant

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LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol, Room 446  
415 S. Beretania Street  
Honolulu, Hawaii 96813

Written Comments

## HCR101/HR82

### REQUESTING A STUDY OF THE NECESSITY FOR HAWAII'S CERTIFICATE OF NEED PROGRAM UNDER CHAPTER 323D, HAWAII REVISED STATUTES

Charlotte A. Carter-Yamauchi, Director  
Legislative Reference Bureau

Presented to the House Committee on Human Services

Thursday, March 21, 2024, 9:30 a.m.  
Conference Room 329 & Via Videoconference

Chair Marten and Members of the Committee:

Good morning Chair Marten and members of the Committee, my name is Charlotte Carter-Yamauchi, and I am the Director of the Legislative Reference Bureau (Bureau). Thank you for providing the opportunity to submit written **comments** on H.C.R. No. 101/H.R. No. 82, Requesting a Study of the Necessity for Hawaii's Certificate of Need Program under Chapter 323D, Hawaii Revised Statutes.

The purpose of these measures is to request the Legislative Reference Bureau to conduct a study of the necessity for Hawaii's Certificate of Need program under Chapter 323D, Hawaii Revised Statutes, to examine:

- (1) The role of the Certificate of Need program in Hawaii;
- (2) Whether certain facilities, types of facilities, or services should be exempt from the Certificate of Need program;
- (3) Whether modifications made to the Certificate of Need program in other states may be beneficial to implement in Hawaii;

- (4) What the average cost of a Certificate of Need application in Hawaii is and whether Certificate of Need requirements have discouraged healthcare providers from constructing or expanding facilities in the State;
- (5) Whether the "competitor's veto"—that is, the ability of marketplace competitors to testify against the granting of a Certificate of Need—should be eliminated;
- (6) Whether reform of the Certificate of Need could help reduce strain on healthcare facilities and improve the number of available beds in a future healthcare emergency, similar to that experienced during the COVID-19 pandemic; and
- (7) Whether reducing or eliminating Certificate of Need requirements may improve health care access on neighbor islands and for vulnerable populations.

The measures also request the Bureau to submit a report of its findings and recommendations regarding the Certificate of Need program, including appropriate recommendations to eliminate or modify the existing Certificate of Need program and any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2026.

The Bureau takes no position on the merits of the measures but has serious concerns about its ability to complete the study as requested and submits the following comments for your consideration.

With regard to the study required of the Bureau, we note that the Bureau has no specific knowledge or expertise regarding healthcare, hospitals, or the Certificate of Need program. The Bureau would therefore be unable to provide the Legislature a definitive report on whether any particular services or facilities should be exempt from the Certificate of Need program, whether modifications made to the Certificate of Need program in other states may be beneficial to implement in Hawaii, whether Certificate of Need requirements have discouraged healthcare providers from constructing or expanding facilities in the State, whether the "competitor's veto" should be eliminated, whether reform of the Certificate of Need program could help reduce strain on healthcare facilities and improve the number of available beds in a future healthcare emergency, or whether reducing or eliminating Certificate of Need requirements may improve health care access on neighbor islands and for vulnerable populations. Accordingly, the Department of Health, the State Health Planning and Development Agency, the Statewide Health Coordinating Council, the Subarea Health Planning Councils, and the Review Panel, which all have responsibilities and experience with respect to the Certificate of Need program, would need to provide necessary information for the purposes of the study, and the Bureau would likely need to contract the services of an entity that specializes in analyzing such information. To this point, we note that the Bureau's current budget does not contain any funding for contracted services.

Likewise, the measures' request for recommendations to eliminate or modify the existing Certificate of Need program is outside of the Bureau's scope of expertise and would be best undertaken by either another agency or a contracted entity with specific expertise in the subject matter and the requisite professional services to perform an analysis to determine what, if any, changes to the program would be appropriate.

If, however, the scope of the requested study is narrowed to focus solely on:

- (1) Surveying modifications made to the Certificate of Need programs in other states; and
- (2) Comparing Hawaii's existing Certificate of Need law with similar laws of other states,

then the Bureau believes that such a study could be manageable, provided that the Bureau's interim workload is not adversely impacted by too many other studies or additional responsibilities, such as conducting, writing, or finalizing other reports, drafting legislation, or both, for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for the opportunity to submit written comments.



**Thursday, March 21, 2024 at 9:30 am**  
**Conference Room 329**

**House Committee on Human Services**

To: Chair Lisa Marten  
Vice Chair Terez Amato

From: Paige Heckathorn Choy  
AVP, Government Affairs  
Healthcare Association of Hawaii

**Re: Submitting comments**  
**HCR 101/HR 82, Requesting a study of the necessity for Hawaii's certificate of need program under Chapter 323D, Hawaii Revised Statutes**

The Healthcare Association of Hawaii (HAH), established in 1939, serves as the leading voice of healthcare on behalf of 170 member organizations who represent almost every aspect of the health care continuum in Hawaii. Members include acute care hospitals, skilled nursing facilities, home health agencies, hospices, assisted living facilities and durable medical equipment suppliers. In addition to providing access to appropriate, affordable, high-quality care to all of Hawaii's residents, our members contribute significantly to Hawaii's economy by employing over 30,000 people statewide.

We are submitting **comments** on this measure, which would request that the Legislative Reference Bureau complete a study on the necessity of the certificate of need (CON) program in Hawaii. The resolution specifically mentions testimony provided by our organization on a measure previously heard this legislative session in opposition to any repeal of the certificate of need law. Our position still stands that the CON program is an important consumer protection tool that is not administratively burdensome. Our members must also engage in the CON program if they choose to expand services. Their feedback has been that it is an efficient, fair process that adequately allows all viewpoints to be heard. Any efforts to degrade this important tool, or remove community voices from the process, would be harmful to patients in the state.

The major issue that limits access to care is our workforce shortage. The limitations on services during the COVID-19 pandemic, or in rural areas, are not driven by the certificate of need program—it is driven by low reimbursements rates, and a lack of healthcare workers in the state. Our members have invested heavily in building the healthcare workforce pipeline, and we do have measures such as HB 1827 asking for the state to invest in the training and retention of these critical workers. We believe that it would be most appropriate for the legislature to focus on these enduring workforce shortages and continue to support solutions that would appropriately address them.

We would be open to future discussions about whether some services should be exempted from CON program—however, we do not believe that this study is an appropriate vehicle to do so. Thank you for the opportunity to comments on this measure.

Phone: (808) 521-8961 | Fax: (808) 599-2879 | [HAH.org](http://HAH.org) | 707 Richards Street, PH2 - Honolulu, HI 96813

Affiliated with the American Hospital Association, American Health Care Association, National Association for Home Care and Hospice, American Association for Homecare and Council of State Home Care Associations

March 21, 2024, 9:30 a.m.  
Hawaii State Capitol  
Conference Room 329 and Videoconference

**To: House Committee on Human Services**

**Rep. Lisa Marten, Chair**

**Rep. Terez Amato, Vice-Chair**

**From: Grassroot Institute of Hawaii**

**Ted Kefalas, Director of Strategic Campaigns**

TESTIMONY IN SUPPORT OF HCR101/HR82 — REQUESTING A STUDY OF THE NECESSITY FOR HAWAII'S CERTIFICATE OF NEED PROGRAM UNDER CHAPTER 323D, HAWAII REVISED STATUTES.

Aloha Chair Marten, Vice-Chair Amato and Committee Members,

The Grassroot Institute of Hawaii would like to **comment in support** of [HCR101](#) and [HR82](#), which requests that the Legislative Reference Bureau conduct a study of Hawaii certificate-of-need program.

The study would include the impact and cost of the CON program; whether it discourages providers from constructing or expanding facilities in the state; whether to eliminate the “competitor’s veto”; whether some facilities should be exempt from CON; whether Hawaii should consider adopting CON reforms from other states; and whether reducing or eliminating CON requirements could improve care on neighbor islands and for vulnerable populations.

Reforming Hawaii’s certificate-of-need program would be an important step forward in increasing healthcare affordability and accessibility in Hawaii. Recent studies suggest that CON laws have the counterproductive effect of limiting healthcare quality and access, especially for rural areas and vulnerable populations.

For example, consider that:

>> States with certificate-of-need laws have fewer hospitals, substance treatment facilities, psychiatric hospitals, ambulatory surgical centers, dialysis clinics, nursing home beds, open heart surgery programs and hospice care facilities.<sup>1</sup>

>> CON regulations tend to lead to fewer hospital beds, decreased access to medical imaging technology and longer wait times.<sup>2</sup>

>> CON regulations are linked to fewer rural hospitals and alternatives. Residents of CON states have to travel farther for care and are more likely to leave their states for care.<sup>3</sup>

Defenders of CON laws claim that they are needed to constrain high healthcare costs and guarantee access to higher-quality care. However, that is not supported by the research, which demonstrates that such laws are associated with higher per-person healthcare costs and higher death rates from treatable complications following surgery.<sup>4</sup>

According to a 2020 [study](#) from the Mercatus Center, Hawaii has the highest number of certificate-of-need restrictions in the country.<sup>5</sup> The result of those restrictions is to make healthcare more expensive, limit access to care and lower the overall quality of care.

By comparing costs and outcomes in states with restrictive certificate-of-need laws to those without, the Mercatus Center determined that CON laws increase annual per capita healthcare spending in Hawaii by \$219 and reduce the number of healthcare facilities in the state by about 14%.<sup>6</sup>

The Center also estimates that without certificate-of-need laws, deaths from post-surgery complications would decrease by about 5% and the proportion of patients who would rate their hospital highly (at least 9 out of 10) would increase by 4.7%.<sup>7</sup>

By imposing limitations on the construction of healthcare facilities, certificates of need have the effect of limiting treatment options for Hawaii residents. The lack of alternatives and options has an effect on everything from care for the homeless to mental health.

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<sup>1</sup> Mitchell, Matthew D. [“West Virginia’s Certificate of Need Program: Lessons from Research,”](#) Mercatus Center at George Mason University, Sept. 22, 2021.

<sup>2</sup> [Ibid.](#)

<sup>3</sup> [Ibid.](#)

<sup>4</sup> [Ibid.](#)

<sup>5</sup> [“Hawaii Certificate-of-Need Programs 2020,”](#) Mercatus Center, March 22, 2021.

<sup>6</sup> “Certificate of Need Laws: Hawaii State Profile,” Mercatus Center, November 2020. Available at <https://www.mercatus.org/publication/hawaii-and-certificate-need-programs-2020>.

<sup>7</sup> [Ibid.](#)

Since 2006, Hawaii officials have denied<sup>8</sup> more than two dozen certificate-of-need petitions, representing over \$200 million in private healthcare investment. Those included three medical facilities that would have added 206 beds, increasing the current hospital capacity by 8%.

The thinking behind certificate-of-need laws has long since been abandoned, and CON reform has been a growing trend in healthcare policy. More than a dozen states have fully repealed their CON programs, and even more have been rolling them back.

By initiating a comprehensive study on the impact of Hawaii's CON laws, this resolution could help identify a path forward for reasonable CON reform in our state.

Thank you for the opportunity to testify.

Ted Kefalas  
Director of Strategic Campaigns  
Grassroot Institute of Hawaii

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<sup>8</sup> ["Certificate of Need Applications and Decisions,"](#) Hawaii State Department of Health.





## PACIFIC LEGAL FOUNDATION

Defending Liberty and Justice for All.

March 20, 2024

### Statement to Connecticut Public Health Committee regarding Certificate of Need Study

To Chair Marten, Vice-Chair Amato, and Members of the Public Health Committee:

My name is Jaimie Cavanaugh and I'm Legal Policy Counsel with Pacific Legal Foundation. Pacific Legal Foundation is a national, public interest law firm that works to advance equity, opportunity, and protect private property rights.

Over the past few years, I have become a certificate of need (CON) policy expert. In 2020, I was the lead author of a survey of CON laws around the country<sup>1</sup> and in 2023, I published a review of every academic-quality study of CON<sup>2</sup> with co-author and Ph.D economist, Matthew D. Mitchell. We found that 89% of tests associated with CON show that CON laws lead to a negative or neutral result. *See Striving for Better Care* at pp. 18–41 (PDF attached). The results overwhelmingly showed that CON laws fail to decrease costs, increase access to care, or increase quality of care.

As you may know, 40% of the population of the nation live in a state with zero or one CON law and the legislative trend is for states to repeal these harmful laws. In fact, the following states have reformed and repealed their CON laws over the past several years:

- In 2016, New Hampshire repealed its CON program in its entirety.
- In 2019, Florida repealed CON for everything except nursing homes, hospice, and rehab facilities.
- In 2021, Montana repealed all CON laws, except nursing homes.
- In 2021, Tennessee made reforms including repealing CON for mental health services, making it easier for closed facilities to re-open, and updated the application process.
- In 2023, South Carolina repealed CON for everything except nursing homes.
- In 2023, North Carolina made significant reforms and repealed CON for things like psychiatric care facilities, rehab facilities, MRI equipment in counties above a certain size, and increased the dollar thresholds that trigger a CON requirement.
- In 2023, West Virginia repealed CON for birth centers and now allows hospitals to expand services without a CON.
- In 2023, Connecticut repealed CON for birth centers.
- In 2023, Georgia passed a resolution to create CON Modernization Committees.

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<sup>1</sup> *Conning the Competition* (Aug. 2020), available at <https://ij.org/report/conning-the-competition/>

<sup>2</sup> *Striving for Better Care* (Aug. 2023), available at <https://ij.org/report/striving-for-better-care/>

- The Senate CON Modernization Committee recommended that the Georgia General Assembly fully repeal CON.
- In 2023, Kentucky also convened a legislation CON Study Task Force.
- In 2024, Washington extended an exemption for CON on psych beds/facilities through 2028.

HCR 101 and HR 82 include the following statement from the State Health Planning and Development Agency: “Empirical studies have shown both substantial economic and service quality benefit from CON regulation and related planning.”

While there may be limited evidence that CON provides positive benefits, I reviewed every academic quality study available as of May 2023. That review showed that the overwhelming majority of the empirical tests of CON laws are associated with a negative or neutral result. It is 500% more likely that a test of CON laws will yield a negative or neutral result than a positive result.<sup>3</sup>

The federal government also understands that CON laws harm patients. In 1986, Congress repealed a federal law that threatened to withhold healthcare funding to any state that did not enact a CON law. At that time, Congress recognized that CON laws were not sensitive to community needs and failed to otherwise control costs. Since that time, agencies of the federal government under both Republican and Democrat administrations, have uniformly called for states to repeal CON laws. These agencies include the Federal Trade Commission, the Antitrust Division of the U.S. Department of Justice, Department of Health and Human Services, Department of the Treasury, and the Department of Labor.

As an expert on this topic, I would be happy to contribute to any study of CON in Hawaii. Please let me know if you have any further questions.

Sincerely,



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Pacific Legal Foundation  
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248-895-1555

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<sup>3</sup> See *Striving for Better Care*, *supra* n.2.