**Health care start-ups are trying to open. An old law stands in their way.**

**Critics say certificate-of-need laws are anticompetitive, but some health care associations say they are vital to a system not governed by the usual tenets of a free-market economy.**

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By [Shannon Najmabadi](https://www.washingtonpost.com/people/shannon-najmabadi/)

In 2017, M’Moupientila“Marc” N’dasought state approval to drive older and disabled Nebraskans to doctor’s appointments. Given what he was seeing among clients of his home health business — who often complained about unreliable rides — the need seemed obvious.

But would-be competitors [protested](https://washingtonpost.com/documents/a9c9bf84-a3f2-470b-abbd-e46e7f9234fa.pdf?itid=lk_inline_manual_4), backed by laws that give them sway over new entrants to the market. Thoughstate regulators determined N’da was qualified to run a medical transport operation, they denied his application because he hadn’t demonstrated it would be “harmless”to the businesses that had come before him.

N’da responded with a [lawsuit](https://ij.org/wp-content/uploads/2020/04/MMoupientila-NDa-et-al.-v.-Mike-Hybl-et-al._Complaint.pdf) accusing the state of denying him due process. The case is now [before](https://supremecourt.nebraska.gov/courts/supreme-court/supreme-court-call/nda-v-hybl) the Nebraska Supreme Court.

N’da ispart of a wave of litigants pressing to dismantle regulations that plaintiff lawyers say have fomentedhealth care “cartels” in more than 30 states — limiting, for example, the number of methadone clinics in West Virginia, youth mental health beds in Arkansas and MRI centers in North Carolina.

These certificate-of-need (CON) laws require certain health care and transportation businesses to demonstrate community need for their services before they can operate. The prerequisite is meant to contain costs and prevent oversaturation of the market, but it often comes with a catch: Would-be competitors can challenge applicants whose services could cut into their sales.

“It creates these little fiefdoms,” said William Aronin, a lawyer with the Institute for Justice, the libertarian law firm representing N’da. “No one benefits but the incumbents.”

M’Moupientila “Marc” N’da has argued that Nebraska’s government denied him due process because it would not approve his application for a medical transport business. (Institute for Justice)

Health care officials saythe rules create a crucial buffer in a system not governed by the usual tenets of a free-market economy. Hospitals must care for emergency room patients regardless of their ability to pay. The government sets payment rates for patients on public insurance programs. Commercially insured patients and specialty services help subsidize those losses.

If an ambulatory surgical center set up shop next to a rural hospital, “it can cherry-pick the patients that it wants,” said David Dirr, a lawyer who has represented the Kentucky Hospital Association.

Many health care facilities already can’t hire enough workers; without CON laws, proponents say, resources could be spread too thin to fully support any one hospital.About 1 in 5 nursing jobs [are vacant](https://online.fliphtml5.com/qard/xpzb/) in West Virginia.

“I get a kick when I hear some people say, ‘Well, if you get rid of CONin West Virginia, you’re going to have all these additional hospital beds,’” said Jim Kaufman, president and chief executive of the state’s hospital association.

“We can’t staff all the beds that we’re licensed for today.”

**Why not ‘something better’?**

The federal government in the 1970s [pushed states](https://www.congress.gov/bill/93rd-congress/senate-bill/2994/text) to adopt certificate-of-need laws to give health care planners more control over how resources were allocated. But officials in seven consecutive presidential administrations starting with Ronald Reagan’s presidency have [criticized](https://americansforprosperityfoundation.org/wp-content/uploads/2024/04/AFPF-CON-AdminQuotes.pdf) certificate regulations as anticompetitive or too easily manipulated by businesses interested in protecting their own bottom lines.

Congress did away with CON mandates by 1987, and more than a dozen states have eliminated their certificate requirements since then. But most state governments have kept them, with hospital groups and businesses that already have certificates urging lawmakers to maintain the status quo.

Amy Summers, a former emergency room nurse and House majority leader in West Virginia, said sherepeatedly tried to roll back the state’s CON law before leaving office this month. “The lobby is just too strong to get it done,” she said.

West Virginia Del. Amy Summers (R) at the state capitol in January 2024. (Chris Jackson/AP)

In 2024, Kentucky lawmakers [considered](https://kentuckylantern.com/2024/03/21/kentucky-lawmakers-strike-down-bill-seeking-certificate-of-need-reform/) scaling back the state’s CON law after residents in several northern counties [complained](https://apps.legislature.ky.gov/CommitteeDocuments/380/28318/12%2014%202023%203.%20Written%20Public%20Input%20-%20Certificate%20of%20Need%20Task%20Force.pdf) they had only one hospital system from which to choose, prompting them to drive to Ohio if they didn’t like the care there. That [bill](https://apps.legislature.ky.gov/record/24RS/hb204.html) didn’t pass.

In Oregon’s House of Representatives, a bill introduced in February was [supported](https://olis.oregonlegislature.gov/liz/2024R1/Measures/Testimony/HB4139) by someresidents and doctors, who said a lack of mental health and rehabilitation beds forced patients to seek treatment out of state.

Laura Core, a resident of Portland, Oregon, stayed in one of those in-state rehabilitation beds after she sustained severe brain and spinal cord injuries in a 2022 car crash. She said some of the therapies she received, such as spending time in a garden and making cookies, were ineffective.

“Why do we not have something better?” she said in an interview. “It’s because of the law that is preventing that from happening.”

The Oregon [bill](https://olis.oregonlegislature.gov/liz/2024R1/Measures/Overview/HB4139) never made it out of committee.

Industry groups in Oregon and Kentucky have said certificate laws play an important [oversight role](https://olis.oregonlegislature.gov/liz/2024R1/Downloads/PublicTestimonyDocument/111520) and that their facilities [outperform](https://www.kyha.com/wp-content/uploads/2023/10/CONStudySummaryReport2019.pdf) those in non-CON states.

Other states have seen legal challenges on constitutional grounds;cases are pending in Mississippi, North Carolina and Nebraska.

Among them is a [lawsuit](https://www.courtlistener.com/docket/18726726/parties/slaughter-v-dobbs/) filed byCharles Slaughter, a physical therapist who tried to open a home-health business in Mississippi in 2020. But the state has a moratorium on new certificates for such enterprises; it hasn’t issued one for more than fourdecades. The number of Mississippi home health patients quadrupled from [1981](https://washingtonpost.com/documents/aa893c11-d600-434d-b6ee-4cedaaebf825.pdf?itid=lk_inline_manual_36) to [2020](https://msdh.ms.gov/page/resources/19385.pdf), the most recent year for which state data is available. Meanwhile, the number of home health agencies dropped by two-thirds during that time, according to state documents.

Slaughter’s only option would be to buy a certificate of needfrom another company, he said. But the cost is prohibitive: The last time he considered that route two decades ago, it would have cost over $1 million, he said. Application fees for a certificate of need in Mississippi can reach $25,000.

Slaughter’s attorney, Aaron Rice, likened the certificates to taxi medallions that now prevent small businesses from operating in certain markets. “There’s literally only one Mississippi-family-owned home health agency left in the state,” he said. A decision by a Mississippi district court is pending.

A Mississippi health department spokesperson said the agency can’t comment on pending litigation. A spokesperson for the Mississippi Association for Home Care said its facilities perform better than peers in states without CON laws, according to federal standards.

In 2020, North Carolina ophthalmologist Jay Singleton [sued](https://ij.org/wp-content/uploads/2020/04/Summons-Complaint.pdf) the state after discovering he couldn’t apply for a certificate to perform cataract surgeries at his New Bern clinic because the state had already decided there was [no need](https://info.ncdhhs.gov/dhsr/ncsmfp/2020/2020smfp.pdf). Since 2007 or earlier, regulators haven’t seen a need for new surgical centers within a roughly 1,800-square-mile area that includes the city of 32,000, according to state documents.

“I couldn’t even get in the door to apply,” Singleton said.

Jay Singleton owns an ophthalmology practice in New Bern, North Carolina. (Institute for Justice)

**Question of need**

When Nebraska began [requiring](https://washingtonpost.com/documents/e8df97e0-f06c-452c-b876-8ab7755c0b46.pdf?itid=lk_inline_manual_48) medical transport companies to secure certificates in 2002, state and local health officials [opposed](https://washingtonpost.com/documents/330001b9-8340-416b-b4bf-d39a99eb47ca.pdf?itid=lk_inline_manual_48) to the idea said it would limit the market to big companies “who can afford the lawyers to fight for them.”

The concern proved prescient, said Crystal Rhoades, who served on the state’s Public Service Commission from 2015 to 2023. While she was in office, Nebraska’s medical transport industry was dominated by a handful of companies that frequently contested applications, according to Rhoades and exhibits attached to N’da’s lawsuit.

“We always had the same issue,” the former regulator said. “The applicant would come in and say, ‘There’s a need, there’s an unmet need.’ And the existing carriers would say, ‘No, there isn’t, and we can handle it.’”

The Nebraska certificate at issue in N’da’s case is for medical transportation companies that want to drive patients in government programs such as Medicaid.

Half the applications submitted from 2015 to mid-2022 were contested by one of four companies, according to filings in N’da’s lawsuit. Of the 39 challenged, only one won approval as submitted; 16 advanced after making certain concessions, such as staying out of large cities or limiting the number of handicap-accessible vehicles in their fleet, the lawsuit documents said.

N’da said he was presented with a similar offer: Stay out of Lincoln, Omahaand Bellevue — the state’s three largest cities — and the established companies would drop their opposition. N’da described his reaction at a 2023 court hearing.

“‘What they’re offering me is unheard of,’” N’da recalled telling state regulators. “‘They don’t want competition.’”

N’da said he decided to start amedical transport business after hearing complaints from customers of his home health companies; they said existing options often ran lateordidn’t wait for clients whose appointments went longer than expected. The lack of reliability was particularly problematic for people with hard-to-reschedule or can’t-miss appointments, like for dialysis, N’da said in court testimony.

But N’da didn’t prove that there was sufficient need for his services or thathis company would be “harmless” to established players, regulators wrote in [denying](https://washingtonpost.com/documents/30c70a98-4a01-4707-ab45-b0d8bba2195f.pdf?itid=lk_inline_manual_59) his application.

“Imagine if I want to open a restaurant, but the existing restaurant(s) have to decide my fate,” N’da said duringthe 2023 hearing.

N’da’s case was heard by the Nebraska Supreme Court in December. A decision is pending.

Of the four companies that contested N’da’s application, one appears to no longer offer medical transport and could not be reached for comment. A representativefor two others — sister companies Camelot Transportation and Triumph Transportation — said their protestwas mainly about whether N’da’s small operation had the resources to serve the entire state,as he was proposing, and whether his service filled a need.

Camelot and Triumph do not oppose competition and haven’t protested many applications in recent years, said managing director and owner Alissa Kern.

But “we can’t all be carriers, or else none of us are going to survive,” she said.

Kirby Young, who until 2019 owned the fourth challenger to N’da, also views Nebraska’s certificate rules as anticompetitive. He bought a cab company in the early 2000s in an attempt to break into the market, he said. He later applied for medical transport certification.

His brother and sister hadworked for a cab company and told Young they couldn’t start their own.

“I said, ‘Why not? This is America. You can do whatever you want,’” Young recalled. “They said, ‘No, not in the state of Nebraska.’”

**Competition and cost**

Research is mixed on whether states’ certificate requirements make health care more expensive.

Because medical charges are often set by insurers or the government, hospitals typically don’t compete on price, said Steven Ullmann, director of the University of Miami’s Center for Health Management and Policy. Rather, they try to entice patients with upgraded facilities or cutting-edge services, such as new cancer treatments or robotic surgeries.

That can actually drive up costs, Ullmann said, because there’s an incentive to use new technologies in lieu of cheaper alternatives to justify their purchase — similar to running a CAT scan if an X-ray will do.

“It’s a result of overcapitalization and duplication” of expensive services, he said.

The cost and complexity of the application process itself — and the threat of an administrative fight with incumbents — are often enough to repel new or small businesses, say opponents of certificate requirements.

West Virginia state Del. Evan Worrell (R) said that even though the state granted a certificate of need to apersonal-care business he operates, he has spent more than $100,000 in an ongoing legal battle because rival senior centers raised objections that landed him in the state’s Intermediate Court of Appeals.

Worrellsaidhe filled out eight applications in 2023, each to work in a few counties. He had to print two sets of each 150-page application, put some in binders with tab separators, and drop them off at two government offices. More than 18 months later, he’s still waiting for a decision.

Gailyn Markham, a spokesperson for the West Virginia Department of Health, said that the state’s CON program is less restrictive than those in other states and that the regulatory agency “prides itself on its commitment to provide cost-effective health care.”

Even if the state ultimately approvesa large percentage of applications, the process deters potential participants, Worrell said.

“People don’t even apply,” he said.

Article available with photos at

<https://www.washingtonpost.com/business/2025/01/02/certificate-of-need-competition-health-care/>