IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Caitlin Hainley and Des Moines Midwife Collective respectfully move for summary judgment pursuant to Fed R. Civ. P. 56. As more fully explained in the accompanying Memorandum and Statement of Undisputed Facts, there is no genuine issue as to any material facts and Plaintiffs are entitled to judgment as a matter of law.

DATED August 5, 2024.

Respectfully submitted,

/s/ Glenn E. Roper

GLENN E. ROPER*
Colorado Bar No. 38723
PACIFIC LEGAL FOUNDATION
1745 Shea Center Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
geroper@pacificlegal.org

WILSON C. FREEMAN*
Arizona Bar No. 036953
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

ALAN R. OSTERGREN
President and Chief Counsel
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, Iowa 50309
Telephone: (515) 207-0134
alan.ostergren@kirkwoodinstitute.org

Telephone: (916) 419-7111
wfreeman@pacificlegal.org

*Pro Hac Vice

Counsel for Plaintiffs Des Moines Midwife Collective and Caitlin Hainley,

CERTIFICATE OF SERVICE

The forgoing document has been filed with the Court's ECF system on August 5, 2024, and notice of service has been provided to the following:

DAVID M. RANSCHT
Assistant Attorney General
JENNIFER KLEIN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building
1305 East Walnut St., Second Fl.
Des Moines, Iowa 50319
David.Ranscht@ag.iowa.gov
Jennifer.Klein@ag.iowa.gov

Counsel for Defendants Iowa Health Facilities Council, Harold Miller, Aaron DeJong, Kelly Blackford, and Brenda Perrin

/s/ Glenn E. Roper
GLENN E. ROPER

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INTRODUCTION

Caitlin Hainley is an experienced and certified midwife who has spent her career caring for expectant mothers before, during, and after they give birth, as well as for their newborn babies. Her business, the Des Moines Midwife Collective (DMC), provides affordable care to Iowa women who prefer to give birth outside a hospital setting, typically at home. Her personal and professional goal is to enhance the equality, accessibility, and affordability of childbirth and recovery.

Ms. Hainley and DMC want to expand their practice by setting up a freestanding birth center where women with low-risk pregnancies can give birth in a customized and comfortable setting outside of a home or a hospital. Ms. Hainley's plans for the center have included developing a business plan and financial projection, scouting and evaluating potential locations, and working to secure necessary equipment and capital. But Iowa's Certificate of Need (CON) law stands in her way. It requires new healthcare facilities to get permission from a government agency, the Iowa Health Facilities Council, before beginning operations. But this is no ordinary permit. The decision to grant or deny a CON is not based on a business's qualifications, safety, or profitability, but on whether Council members think a new facility is "needed." Competitors—in this case, hospitals that already provide obstetric services—can oppose the application simply by asserting that a new birth center is not "needed" because they can satisfy existing demand. Unsurprisingly, the last time a CON was requested for a birth center, the Council denied it based on rote opposition from surrounding hospitals.

As applied to Plaintiffs' plan for a birth center, Iowa's CON law violates their federal and state constitutional rights. As to due process, the law cannot satisfy even the deferential rational basis test because there is no rational connection between the law's asserted purposes and its operation. Iowa's CON law has no rational connection to lowering childbirth costs, increasing

access to care, or improving the quality of care. Instead, it is simple economic protectionism geared toward protecting incumbents against competition. The law also violates equal protection in two ways: first, by requiring freestanding birth centers to obtain a CON while other out-of-hospital birth service providers are exempt from the CON requirement; and second, by allowing existing facilities to spend up to $1.5 million per year expanding their services without needing a CON. In contrast, Plaintiffs must obtain a CON before they can spend even $1 on a birth center. There are no genuine disputes of fact, Plaintiffs are entitled to judgment as a matter of law, and the Court should grant their motion for summary judgment.

STATEMENT OF FACTS

I. Plaintiffs Caitlin Hainley and Des Moines Midwife Collective

Caitlin Hainley is a registered nurse and lactation consultant in Des Moines who has attended childbirths and provided postpartum care for many years. SUF ¶ 1.[1] She holds master's and doctorate degrees in nursing. *Id.* ¶ 2. She is also a licensed advanced registered nurse practitioner and an International Board-Certified Lactation Consultant. *Id.* ¶ 3. Altogether, Ms. Hainley has almost two decades of obstetric care experience.

Ms. Hainley owns Des Moines Midwife Collective, an LLC registered in Iowa.[2] *Id.* ¶ 4. She started DMC to ensure that Iowans of all income levels had a safe option to give birth outside a hospital setting. DMC provides affordable reproductive and wellness care and operates a small lactation, prenatal, and women's health clinic in Des Moines. *Id.* ¶¶ 4–5. Its staff members attend births either at clients' homes or at other locations arranged by the expectant parents, including

[1] "SUF" refers to Plaintiffs' Statement of Undisputed Facts, filed along with their motion for summary judgment.

[2] Ms. Hainley founded DMC with Emily Zambrano-Andrews, a former plaintiff who recently transferred her interest to Ms. Hainley and was voluntarily dismissed. *See* SUF ¶ 4; Doc. 41.

hotel rooms, short-term rentals, or friends' houses. *Id.* ¶ 5. DMC is the only homebirth service in Iowa that accepts insurance, including Medicaid, which allows for significantly more affordable services. *Id.* ¶ 7. DMC has seen a significant increase in demand for its experienced midwives to attend births—growing to over 100 attended births in 2023. *Id.* ¶ 6.

Ms. Hainley wishes to expand DMC's services by opening a freestanding birth center[3] in the Des Moines area. *Id.* ¶ 8. Iowa currently has no freestanding birth centers, even though they are increasingly popular for reasons such as lower costs, more relational care, a home-like atmosphere, and compatibility with personal or religious values. *Id.* ¶ 10. Defendants agree that Ms. Hainley is both willing and able to provide childbirth services in a birth center. *Id.* ¶ 9. She has developed a business plan and five-year financial projection, secured a realty team and architectural firm to assist with scouting and evaluating potential locations, and worked to secure necessary equipment and capital. *Id.* ¶ 11.

But despite the many benefits of freestanding birth centers, Ms. Hainley's plans are subject to a significant hurdle—to open a birth center, she first needs permission from the Iowa Health Facilities Council in the form of a CON. *Id.* ¶¶ 13–14. Because that requirement impermissibly infringes Plaintiffs' constitutional rights, they brought this challenge to the CON requirement.

II. Iowa's Certificate of Need Law

Iowa law requires all new healthcare facilities to apply for and receive a CON before they can begin offering services. *Id.*; *see also generally* Iowa Code §§ 10A.711–721. With respect to birth centers, the CON requirement applies to any "premises holding itself out as a birthing center and regularly operated as a business offering birthing services." SUF ¶ 16. That includes

[3] A birth center is a healthcare facility primarily intended for planned deliveries "following a normal, uncomplicated, low-risk pregnancy." Iowa Code § 10A.711(3).

Ms. Hainley's proposed birth center. *Id.* ¶ 34. In contrast, the Council would not require someone to obtain a CON if she allowed friends to give birth in her home and even advertised that they could do so. *Id.* ¶ 17. Nor would it require a CON for a midwife to book a hotel room for a woman to give birth. *Id.* ¶ 18. In deciding whether a given situation requires a CON, the Council considers factors like advertising, materials and equipment, a permanent location, the cost of the facility, whether there is an agreement with a hospital for help in emergency situations, and the overall degree of formalization. *Id.* ¶ 19.[4] Iowa has never analyzed the effect of its CON law on birth centers, although Defendants admit that the CON process causes fewer birth centers to open. *Id.* ¶¶ 35–36. And the Council has not granted a CON for a birth center in at least ten years. *Id.* ¶ 39.

Iowa's CON process is onerous, time-consuming, costly, and adversarial. *Id.* ¶ 37. A prospective facility must first submit a letter of intent to the Iowa Department of Inspections, Appeals, and Licensing outlining the project. *Id.* ¶ 20. After 30 days, it may then file a CON application, using forms created by the Department. *Id*. The applicant must pay an application fee of three-tenths of one percent (0.3%) of the anticipated project cost, up to a maximum of $21,000. *Id.* ¶ 24. Payment of the fee does not guarantee approval and is not refunded if the application is denied. This fee structure is not only a barrier to entry for prospective providers, but also a sunk cost for any that navigate the CON process.[5]

[4] At deposition, the Council was unable to say without "more research" whether an Airbnb designated for birthing services or "a room in a location that designates itself as being for birthing services" would require a CON. SUF ¶ 19. The "research" would be done using Google to search for "news articles or research articles" defining the term "birth center." *Id.*

[5] A study of Iowa CON applications from 2016 to 2020 found that the Council denied over $250 million in investment in Iowa healthcare and that applicants paid, on average, over $15,000 in fees, not including the cost of legal representation or outside consultants. *See* Kevin Schmidt & Thomas Kimbrell, *Americans for Prosperity Foundation, Permission to Care: How Certificate of Need Laws Harm Patients and Stifle Health Care Innovation* 5 (Oct. 2021),

After the Department receives a CON application, it schedules a hearing and notifies all "affected parties" of the application, which primarily means individuals or organizations that provide a similar service (i.e., competitors). *Id.* ¶¶ 21–22. These parties are granted a significant role in the CON process, including being able to oppose the application and testify in opposition at the hearing. *Id.* ¶ 26; *see also* Iowa Code § 10A.716(2), (4). About 75% of CON applications face opposition letters from competitors. SUF ¶ 23. It is up to each Council member to determine how they will use information from objectors. *Id.* ¶ 27.

The decision on whether to grant or deny a CON is left to the five-member Health Facilities Council. *Id.* ¶ 14. The Council evaluates CON applications against eighteen non-exhaustive criteria. *Id.* ¶ 28. Among these criteria are things like "need of the population served," "availability of alternative, less costly, or more effective methods of providing the proposed … services," and "appropriate and nondiscriminatory utilization of existing and available health care providers." Iowa Code § 10A.714(1). Council members are not required to apply any particular weight to any of the eighteen factors; it is left up to each member to decide their significance. SUF ¶ 29.

In addition to considering the eighteen factors, the Council will only grant a CON if it finds that applicants have proven that each of the following requirements are satisfied:

> a. Less costly, more efficient, or more appropriate alternatives to the proposed institutional health service are not available and the development of such alternatives is not practicable;
> b. Any existing facilities providing institutional health services similar to those proposed are being used in an appropriate and efficient manner;
> c. In the case of new construction, alternatives including but not limited to modernization or sharing arrangements have been considered and have been implemented to the maximum extent practicable;

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https://americansforprosperity.org/wp-content/uploads/2023/11/Permission-to-Care-AFPF-CON-report-Oct-2021.pdf.

> d. Patients will experience serious problems in obtaining care of the type which will be furnished by the proposed new institutional health service or changed institutional health service, in the absence of that proposed new service.

Id. ¶¶ 30–31. Satisfying these four requirements to the Council's satisfaction demands that a birth center applicant possess a virtually unattainable level of intimate knowledge of the competitive landscape for its proposed services. That is especially true in the face of adverse testimony, since a competitor can negate an application by testifying that the competitor is a "more efficient" or "more appropriate" provider, that its facility is already providing the proposed services "in an appropriate and efficient manner," or that patients will not "experience serious problems in obtaining care" in the absence of the proposed institution. *Id.* Each of these is a sufficient basis for the Council to deny an application. And competitors' ability to block a new birth center from coming to market does not end even if the Council finds all the above criteria are met and grants the application. A competitor may request a rehearing, and if it "remains dissatisfied after the request for rehearing," it may appeal the CON through the state court system. *Id.* ¶ 33; Iowa Code § 10A.720.

There is also an important exception to Iowa's CON law for existing facilities. Iowa allows existing institutional health facilities—such as hospitals providing obstetrical services—to expend up to $1.5 million in each twelve-month period for expansion and modernization without needing to apply for a CON. SUF ¶ 41. But this exemption does not apply to someone who wishes to enter a market with a new birth center—for those individuals, the first dollar expended on the project requires a CON. *Id.* The Council testified that it does not do anything to monitor this capital expenditure exception and does not have reporting requirements related to the $1.5 million limit. *Id.* ¶¶ 42–43. It would be very difficult to ensure existing facilities do not circumvent the CON requirement by spending more than $1.5 million, and the Council does not attempt to do so. *Id.* ¶ 44. But even assuming existing facilities stay within the $1.5 million limit, there is nothing to

prevent them from repeatedly making capital expenditures just under the $1.5 million threshold each calendar year and thereby avoiding the CON requirement entirely. *Id.* ¶ 45.

III. Promise Birth Center's 2014 CON Application

Competitors' power in Iowa's CON scheme is evident from the most recent applicant who attempted to open a birth center. In 2014, Promise Birth Center (PBC) submitted a CON application for a nonprofit "nurse-midwifery operated birth center." *Id.* ¶ 48. The proposed center would care for women in a "medically underserved [part] of the region without regard to ability to pay." *Id.* Nearly all the region's population "is rural and low-income, and a substantial percentage is Hispanic," a population that culturally tends to "use midwives" and "seek out female providers who will respect the natural birth process." *Id.* ¶ 49. PBC evidenced market demand for its services by noting that only about two-thirds of the region's approximately 1,200 annual births occurred in a hospital. *Id.* ¶ 51. PBC also submitted "100 letters of support" from clients, physicians, nurse practitioners, and certified nurse-midwives. *Id.* ¶ 52. It showed that it was financially stable and provided cost comparisons showing its birth services would cost $8,500 versus local hospital charges of $10,482. *Id.* ¶ 53.

All six area hospitals that provided labor and delivery services opposed PBC's application. *Id.* ¶ 54. They submitted a joint opposition letter asserting that existing hospitals had ample capacity for birth services in the area and that "approval of the project would result in the duplication of these services." *Id.* The hospitals further asserted that approval "would result in fewer births in the area hospitals and thus have a negative impact on recruitment and retention of family practice physicians." *Id.* Despite the overwhelming evidence of market demand and feasibility, the Council denied PBC's application in the face of the hospitals' opposition, concluding that the four mandatory factors were not satisfied. *Id.* ¶ 55.

PBC appealed to an Iowa state district court, which affirmed the denial. *Id.* ¶ 56. The court concluded that because Iowa's CON law "does not give a formula for how the factors are to be considered," any consideration of the statutory factors by the Council was enough to conclude that the CON denial "was not unreasonable, arbitrary, or capricious." *Id*. Even though PBC projected that its services would cost 20% less than the hospitals', the court nonetheless found that the Council's determination that "more efficient or more *appropriate* alternatives existed" was sufficient to deny the application. *Id.* ¶ 57 (emphasis added). PBC did not appeal the decision, so Iowa's appellate courts have not reviewed the district court's ruling.

IV. Dr. Bailey's expert analysis of need-review laws

Plaintiffs' expert economist, Dr. James Bailey, has a doctorate in economics and is an Associate Professor of Economics at Providence College. *Id.* ¶¶ 58–60. He has extensive experience studying and publishing on economics issues, especially health economics and certificates of need. *Id.* ¶ 61. He submitted an expert report in this case concluding that the scholarly literature shows that need-review laws like those challenged here "do not fulfill their frequently stated aims" and instead (1) reduce access to services, (2) increase costs and prices, and (3) lead to lower service quality. *Id.* ¶¶ 62–64. Defendants did not produce any rebuttal expert testimony.

Based on his review of the relevant economic literature, some of which he authored, Dr. Bailey found that laws requiring proof of "need" before a business can operate tend to reduce access to services. *Id.* ¶ 65. This is hardly surprising—need laws are designed to limit entry into an industry. *Id.* ¶¶ 68–69. This effect is especially pronounced in the healthcare industry, as studies have shown that need-review laws like Iowa's lead to fewer hospital beds, ambulatory surgery centers, and neonatal intensive care beds per capita, especially in rural areas. *Id.* ¶ 65. Need-review laws also negatively affect service quality, including leading to higher mortality rates in some

areas. *Id.* ¶ 66. Finally, need review leads to increased costs and spending in the medical industry. *Id.* ¶ 67. That is consistent with basic economic theory; restricting the supply of services leads to increased costs and reduced access. *Id.* ¶ 68. Thus, as to birth centers, Iowa's CON requirement "does not serve consumers or the general economic interest" and leads to higher prices and fewer, lower quality services. *Id.* ¶ 69. Put simply, Dr. Bailey could "find no valid economic argument for a state to require a CON for birth centers" and "do[es] not see any rational basis for Iowa's CON law" in this context. *Id.* ¶¶ 73–74.

PROCEDURAL HISTORY

Plaintiffs brought this case in Polk County District Court, asserting claims under Article I, Sections 1, 6, and 9, of the Iowa Constitution and the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution. *See* Amended Petition ¶¶ 47–71. The named Defendants are the Iowa Health Facilities Council and its individual members in their official capacities.[6] Defendants removed the case to federal court, Doc. 1, then filed a motion to dismiss. Doc. 3. This Court largely denied the motion to dismiss, except as to Plaintiffs' Privileges or Immunities claim, which the Court dismissed. Doc. 44.[7]

LEGAL STANDARD

The Court should grant summary judgment where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "[T]he mere existence of some alleged factual dispute between the parties" is not enough to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "Instead, the

[6] Under the Federal Rules, members who joined the Council since the lawsuit was filed are "automatically substituted" as Defendants. Fed. R. Civ. P. 25(d). The current Council members are Kelly Blackford, Jeremy Kidd, Aaron DeJong, Arnold Delbridge, and Masami Knox. SUF ¶ 15.

[7] Plaintiffs reserve the right to appeal the dismissal of that claim.

dispute must be outcome determinative under prevailing law." *Mosley v. City of Northwoods*, 415 F.3d 908, 911 (8th Cir. 2005) (cleaned up). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (internal citations omitted). It can only establish a genuine dispute by introducing evidence that is more than "'merely colorable' or 'not significantly probative.'" *Scott v. Milosevic*, 372 F. Supp. 3d 758, 761 (N.D. Iowa 2019) (quoting *Anderson*, 477 U.S. at 249–50). "Evidence, not contentions, avoids summary judgment." *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 578 (8th Cir. 2006) (citation omitted).

ARGUMENT

I. Iowa's CON Scheme Violates the Fourteenth Amendment's Due Process Clause

A. Legal Standard

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Clause provides not only procedural protections, but also substantively protects "individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Norris v. Engles*, 494 F.3d 634, 637 (8th Cir. 2007) (quotation omitted).

A substantive due process challenge based on a non-fundamental right[8] succeeds when a challenged statute fails "rational basis" scrutiny; i.e., when it lacks a rational connection to a legitimate governmental purpose. Under this standard, a statute is presumed constitutional, and the burden is on the challenger to demonstrate that there is no rational basis for the legislative decision. *See Birchansky v. Clabaugh*, 955 F.3d 751, 757 (8th Cir. 2020). The rational basis test is not a

[8] In its motion to dismiss ruling, the Court concluded there is no fundamental right to earn a living, enter a common occupation, or choose the place and manner of giving birth. (Doc. 44 at 7 n.2, 10). Plaintiffs reserve the right to appeal these rulings.

rubber stamp of government action. *Merrifield v. Lockyer*, 547 F.3d 978, 988–92 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 227–29 (6th Cir. 2002). Although deferential, the test "is not toothless." *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City*, 742 F.3d 807, 810 (8th Cir. 2013) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

A plaintiff can rebut the presumption of constitutionality with evidence demonstrating that the legislation lacks any rational connection to a legitimate government interest. *See, e.g.*, *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149 (E.D. La. 2011), *aff'd*, 712 F.3d 215, 223 (5th Cir. 2013) (plaintiffs may "negate a seemingly plausible basis for the law by adducing evidence of irrationality"). If the evidence shows that the law is not rationally tailored to its ends or that the law only furthers illegitimate ends, then the legislature did not act rationally, and the law violates due process. *See, e.g.*, *St. Joseph Abbey*, 835 F. Supp. 2d at 156; *Craigmiles v. Giles,* 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd* 312 F.3d at 224; *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 271 (1932).

In *New State Ice*, an established ice manufacturer sought to enjoin an individual from selling ice because he lacked a license, which he could only obtain via proof of "necessity." 285 U.S. at 271–72. Like in Iowa, necessity was determined based on whether existing ice manufacturers could meet the "public needs." *Id.* The Supreme Court held that the need regulation was a mere pretext—"a private corporation … [sought] to prevent a competitor from entering the business." *Id.* at 278. Because the Court did not "see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production," it held the law unconstitutional under the Fourteenth Amendment as "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business." *Id.* at 278−80.

In *Bruner*, the plaintiff successfully challenged a Kentucky law that, like Iowa's, required prospective businesses (in that case, moving companies) to prove that their services were needed and subjected them to protests by incumbent movers. 997 F. Supp. 2d at 699. Kentucky claimed that the need law and protest procedure were necessary to prevent "excess entry" into the moving industry, which could lead to unprofitable moving companies cutting costs and endangering public health and safety. *Id.* at 700. But the court found that, in practice, need review did not actually consider whether an applicant would have these harmful effects. Instead, the process functioned to protect incumbent businesses from competition. *Id.* at 701. Assertions regarding public health and safety were a mere pretext—as the law was applied, "an existing moving company c[ould] essentially 'veto' competitors from entering the moving business for any reason at all, completely unrelated to safety or societal costs." *Id.* Because the scheme in *Bruner* served only to protect incumbent companies from competition, it failed rational basis review. *Id.* at 701.

In *St. Joseph Abbey*, the Fifth Circuit similarly held that a law prohibiting anyone other than a licensed funeral director from selling caskets failed rational basis review. 712 F.3d at 223−27. The state's argument that the law protected consumers was undermined by the fact that it did not require casket retailers to be licensed or to employ trained funeral directors—all the law did was give the funeral industry control over casket sales. *Id.* at 224. There was also no evidence that the law promoted health and safety, given that the state "does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets." *Id.* at 226. As the court concluded, "the great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." *Id.*

B. Application

As in *New State Ice*, *Bruner*, and *St. Joseph Abbey*, Iowa's CON law fails rational basis scrutiny as applied to birth centers because the unrebutted facts show the law lacks a rational relationship to any legitimate governmental end.

1. Iowa's CON law is irrational economic protectionism

Protecting incumbent hospitals from competition from birth centers is not, by itself, a legitimate end. *See, e.g.*, *St. Joseph Abbey*, 712 F.3d at 222 ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose …."); *Craigmiles*, 312 F.3d at 224 ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."); *Bruner*, 997 F. Supp. 2d at 700. And where the government offers pretextual arguments for a protectionist regulation, "[n]o sophisticated economic analysis is required" to hold that it fails rational basis review. *Bruner*, 997 F. Supp. 2d at 701 (quoting *Craigmiles*, 312 F.3d at 229).

Here, as applied to birth centers, Iowa's CON law is transparent economic protectionism. Indeed, competitors are allowed to *veto* new businesses simply because of their naked belief they can perform the services "appropriately" (i.e. they don't want the competition). It is not focused on promoting public health or safety in any meaningful way. Instead, it furthers the anticompetitive propping up of incumbent hospitals at the expense of birth center entrepreneurs like Ms. Hainley.

This incumbency protectionist purpose is perfectly demonstrated by the 2014 denial of an application by PBC—the latest birth center to seek a CON. *See* SUF ¶¶ 48–57. It demonstrates the insurmountable barrier an aspiring birth center faces when incumbents involve themselves in the CON scheme. Potential competitors are notified of and allowed to testify against each new CON application. *Id.* ¶¶ 21–22, 26. As shown by PBC's experience, incumbent competitors' testimony was dispositive for the Council. *Id.* ¶¶ 54–55. There are no set rules for how members of the

Council must evaluate the statutory factors, allowing them to arbitrarily exclude proposed new businesses in favor of incumbents. *Id.* ¶ 29. Incumbents can also torpedo an application simply by providing testimony that they are "more efficient" or "more appropriate," that their facilities already provide the proposed services, or that patients will not "experience serious problems in obtaining care" if the CON application is denied. *Id.* ¶¶ 30–31, 54–55. Incumbents are then permitted multiple avenues of appeal in the event of a decision favoring the applicant. *Id.* ¶ 33.

This level of competitor entrenchment amounts to naked economic protectionism, which has repeatedly been found to fail rational basis scrutiny. *See St. Joseph Abbey*, 712 F.3d at 222–23; *Merrifield*, 547 F.3d at 991 n.15 ("[M]ere economic protectionism for the sake of economic protectionism is irrational …."); *Craigmiles*, 312 F.3d at 224. There is little daylight between the law at issue here and the Kentucky law struck down in *Bruner*. And, as in *Bruner*, Iowa's law as applied to birth centers allows incumbent companies to "essentially 'veto' competitors from entering the [birth center] business for any reason at all, completely unrelated to safety or societal costs." 997 F. Supp. 2d at 700. It is therefore unconstitutional.

2. None of Defendants' proposed interests are related to Iowa's CON law

Although the anti-competitive nature of the CON law is apparent on its face, Defendants propose various other rationales. None of them are sufficiently supported to survive rational basis review in this context. Defendants primarily contend that Iowa's CON law is related to three interests: "controlling health care costs," "[e]nsuring access to health care and aiding underserved consumers by ensuring necessary hospital services are available," and "[e]nsuring quality health care services." App. 51, Defs.' Interrog. Resp. No. 4; *see also* Doc. 3-1 at 12 (Defendants' motion to dismiss). In discovery, Defendants suggested the law may also be related to four other purposes: "[r]especting administrative resources," "[r]ecognizing existing facilities' investments and experience," "[i]ncentivizing existing facilities' investment and capital expenditures," and

"[i]ncentivizing performance of a suite of health care services in hospitals or hospital-affiliated facilities." App. 51–52, Defs.' Interrog. Resp. No. 4.[9]

Applied to birth centers, these interests are not rationally related to Iowa's CON scheme. As described below, inhibiting the establishment of birth centers does not lower costs, ensure access, improve service quality, or promote Defendants' other asserted interests. Instead, it results in lower-quality services and higher prices, which are especially harmful to the state's most vulnerable populations.

Controlling costs. First, Defendants have no evidence that Iowa's CON law controls health care costs as applied to birth centers. On its face, it is unrelated to costs, and any claim that it helps control costs is contradicted by basic economics, decades of research, the federal government, and expert testimony. It is foundational in economics that limiting the supply of services raises costs. *See* SUF ¶ 68. Restricting competition for birth services through a CON will increase, rather than reduce, costs. And Defendants have provided no evidence to contradict that basic truth of economics. PBC's 2014 CON application showed that prospective Iowa birth centers can provide services for patients at a significantly reduced cost compared to hospitals, such that excluding birth centers *raises* costs for patients. *Id.* ¶ 53.

There is also "an extensive line of scholarly research that 'casts considerable doubt on the proposition that [CON] programs lead to reduced healthcare expenditures or that their repeal leads to a surge in unnecessary services in the market.'" *Tiwari v. Friedlander*, No. 3:19-CV-884-JRW-

[9] Defendants also refer to the CON law's preamble, but the goals discussed there are duplicative of Defendants' other claimed interests. *See* App. 50, Defs.' Interrog. Resp. No. 4 (citing 1977 Iowa Acts, ch. 75, preamble (stating a goal of ensuring health services are developed "in a manner which is orderly, economical and consistent with a goal of providing the necessary and adequate institutional health services to all of the people of this state while avoiding unnecessary duplication in institutional health services and preventing or controlling increases in the cost of delivering the services")).

CHL, 2020 WL 4745772, at *8 (W.D. Ky. Aug. 14, 2020) (quoting Emily Whalen Parento, *Certificate of Need in the Post-Affordable Care Act Era*, 105 Ky. L. J. 201, 228 (2017)). Congress itself repealed the federal CON mandate in 1986 after concluding that the evidence showed that CON programs resulted in *increased* health care costs. *Id.* And the Department of Justice and the Federal Trade Commission have actively come out against the continuance of CON programs. In 2004, these agencies issued a report citing "considerable evidence that CON [laws] can actually increase prices by fostering anticompetitive barriers to entry" and concluding that "[o]ther means of cost control appear to be more effective and pose less significant competitive concerns."[10] The agencies have repeatedly reaffirmed their opposition to CON programs in 2007, 2008, and 2015.[11]

Even if further evidence were needed on this point, scholarly research on need review conclusively demonstrates that a CON system is not a rational means of reducing costs, and Defendants have produced no evidence to the contrary. Plaintiffs' expert Dr. James Bailey, an economics professor at Providence College with a specialization in health economics and econometrics, has extensively reviewed academic studies on certificate of need laws. SUF ¶¶ 58–63. His unrebutted findings show that Iowa's CON scheme raises prices—not to mention results in inferior healthcare services. *Id.* ¶¶ 64–69. As he notes, a "large majority of the academic literature on CON laws finds that they do not advance their stated goals of lowering costs, promoting access, or improving quality of life." App. 8, Dr. Bailey Decl. ¶ 8. "Instead, most studies found that they increased spending …." *Id.* Thus, as Dr. Bailey testified in his deposition, there is simply no "economic justification for certificate of need laws to restrict the opening of birth

[10] U.S. Dep't of Justice & Federal Trade Comm'n, *Improving Health Care: A Dose of Competition* 22 (July 2004), https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf.

[11] *See* Parento, *supra*, at 215–18.

centers." App. 105, Bailey Depo. at 16:16–21. Defendants have not produced a rebuttal expert or otherwise contradicted this testimony.

Ensuring access and aiding underserved communities. Second, there is no evidence that protecting hospitals from competition from birth centers helps ensure access or aids underserved communities. To the contrary, Dr. Bailey's analysis of literature on CON laws like Iowa's concluded that they "do not advance their stated goal[] of … promoting access." SUF ¶ 64. In *Birchansky*, the pivotal state interest used to uphold Iowa's CON scheme against a challenge was that it would promote full-service hospital viability. 955 F.3d at 757–58. The court recognized that the outpatient surgeries at issue in that case were profitable areas of practice for hospitals. *Id.* The profits from surgeries were so crucial to hospital viability that the plaintiff doctor "testified that he was able to keep rural hospitals financially afloat by performing outpatient surgeries for them." *Id.* at 757. Therefore, the court held that protecting hospitals from competition for outpatient surgeries was rationally related to maintaining the hospitals' financial viability. *Id.* By contrast, there is no evidence that birth services are so profitable that they subsidize other hospital services and, consequently, require protection from competition to maintain financial viability.

Moreover, Iowa's rural and low-income communities are medically underserved as to childbirth, and more services would be available for these communities but for the CON scheme and its competitor's veto. This is especially true for the state's large Hispanic community, which has a culture of using midwives and women's care providers instead of hospitals for their maternity needs. *See* SUF ¶ 49. These services are inaccessible to many Iowans. Indeed, Ms. Hainley explained in her deposition the dire situation faced by Iowa's expectant mothers who want maternity services:

> [E]specially here in Iowa with 40 birthing units having closed down over the past 20 years, we have maternity care [deserts], so a lot of people would like our care.

> And to access that type of care is very difficult for them to come into Des Moines and on the fly find a hotel room or an Airbnb and be comfortable birthing in that space. So [a birth center] really fits our mission and it fits the needs of Iowans, and studies show that it's the best type of care you can get and we don't have it.

App. 113, *Hainley Depo.* at 29:12–21.

PBC's application and Ms. Hainley's testimony are uncontradicted by any evidence from Defendants and are supported by a 2023 March of Dimes study concluding that one in three counties in Iowa are in a "maternity care desert." March of Dimes, *Where You Live Matters: Maternity Care in Iowa* 1 (2023), https://www.marchofdimes.org/peristats/assets/s3/reports/mcd/Maternity-Care-Report-Iowa.pdf. In 2021, 4,176 babies were born in these "maternity care desert" counties. *Id.* The report also found that 14% of women in the state had no birth hospital within 30 minutes, compared to 9.7% nationally. *Id.* Nearly a quarter of all babies are born in the state's rural counties, where less than 10% of maternity care providers practice. *Id.* In the face of these needs, Iowa's CON restriction irrationally reduces the opening of birth centers that could help meet the need. Rather than ensuring access and helping underserved communities, the uncontradicted evidence in this case shows that Iowa's CON scheme reduces access and harms those communities.

Ensuring quality. Third, there is no evidence that the CON scheme helps hospitals provide superior birth services compared to birth centers. Studies show that limiting the supply of services decreases quality. *See Tiwari*, 2020 WL 4745772, at *10 ("[E]vidence suggests that stringent [CON] programs decrease the quality of care in many settings."). It is also axiomatic that competition among service providers delivers improved outcomes for consumers. As the Federal Trade Commission and Department of Justice have written, "like any barrier to entry," need-review laws "interfere with the entry of firms that could otherwise provide higher-quality services

than those offered by incumbents."[12] This interference "may tend to depress consumer choice between different types of treatment options or settings, and it may reduce the pressure on incumbents to improve their own offerings."[13] Likewise, Dr. Bailey's analysis of the literature on CON laws concluded that a "large majority of the academic literature on CON laws finds that they do not advance their stated goals of … improving quality of life." App. 8, Dr. Bailey Decl. ¶ 8. "Instead, most studies found that they … decreased the quality of available services." *Id.* Rather than ensuring quality, Iowa's CON law can be expected to *reduce* the quality of birth services.

Other interests. Nor is there any evidence that the CON law furthers Defendants' other purported interests in "[r]especting administrative resources," "[r]ecognizing existing facilities' investments and experience," "[i]ncentivizing existing facilities' investment and capital expenditures," and "[i]ncentivizing performance of a suite of health care services in hospitals or hospital-affiliated facilities." App. 51–52, Defs.' Interrog. Resp. No. 4. These interests are largely just economic protectionism in sheep's clothing. "Recognizing" and "incentivizing" an incumbent's investments is just another way of saying that existing hospitals should receive preferential treatment for no other reason than that they are existing companies. That is irrational. As in *Craigmiles*, "[n]o sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations." 312 F.3d at 229. There is no basis for believing that hospitals who received CON approval for birth services in the past provide better service than those who are seeking approval now.

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[12] U.S. Dep't of Justice & Federal Trade Comm'n, *Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform* 5 (Sept. 15, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-written-testimony-illinois-task-force-health-planning-reform-concerning/v080018illconlaws.pdf.

[13] *Id.*; *see also Improving Health Care*, *supra*, at 304–05.

As for a purported interest in "respecting administrative resources," Defendants do not elaborate or explain what this would mean. Defendants have not provided any evidence that there are administrative savings from the CON program; to the contrary, the undisputed evidence is that it requires extensive administrative resources to run the program. App. 87–88, 30(b)(6) Depo. at 19:10–24:21 (discussing administrative process and costs of the CON program).

In sum, there is no dispute of any material fact because Defendants have produced no evidence to support their argument or contradict Plaintiffs' evidence. The Department cannot create a dispute of fact through "mere speculation, conjecture, or fantasy." *Zayed v. Associated Bank, N.A.,* 913 F.3d 709, 714 (8th Cir. 2019). All of the evidence tends to show that as applied to birth centers, Iowa's CON requirement lacks a rational relationship to any legitimate state interest.

II. Iowa's CON Scheme Violates the Fourteenth Amendment's Equal Protection Clause

A. Legal Standard

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person … the equal protection of the laws," U.S. Const. amend. XIV, § 1, "which is essentially a direction that all persons similarly situated should be treated alike." *Stevenson v. Blytheville School Dist. #5*, 800 F.3d 955, 970 (8th Cir. 2015) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). As with a due process claim, an equal protection claim based on a non-fundamental right succeeds if the evidence shows that the state's classification is irrational or lacks a connection to a purported governmental objective. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); *City of Cleburne*, 473 U.S. at 446 ("The State may not

rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). For a classification to survive rational basis review under an equal protection challenge, "there [must be] a plausible policy reason for the classification … and the relationship of the classification to its goal [must not be] so attenuated as to render the distinction arbitrary or irrational." *Birchansky v. Clabaugh*, 421 F. Supp. 3d 658, 674 (S.D. Iowa 2018) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

In *Merrifield*, the Ninth Circuit struck down a licensure law for pest controllers under the Equal Protection Clause. 547 F.3d at 988. The plaintiff alleged that the challenged law discriminated "between non-pesticide pest controllers of vertebrate animals such as 'bats, raccoons, skunks, and squirrels,' and non-pesticide pest controllers of 'mice, rats, or pigeons.'" *Id.* Only the former were exempt from licensure, which the plaintiff argued was irrational. *Id.* at 988−89. The court agreed and held that the exemption had no purpose other than illegitimate protectionism. *Id.* at 990−91. It did "not logically follow ... that removing the licensing requirement … would pose a lesser risk to public welfare." *Id.* at 991. The court also noted that the licensing scheme "specifically singles out pest controllers," which, "in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review." *Id.* The court therefore concluded that the law was improperly "designed to favor economically certain constituents at the expense of others similarly situated." *Id.*

B. Application

Whereas due process asks whether the CON requirement deprives Plaintiffs of liberty without good reason, equal protection asks whether it treats Plaintiffs differently than others similarly situated without good reason. *City of Cleburne*, 473 U.S. at 439; *see also Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006); *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). Because the undisputed facts here show that Iowa's CON law, as applied to birth centers,

treats similarly situated groups differently without a rational relationship to any legitimate governmental end, it deprives Plaintiffs of equal protection.

Iowa's CON scheme violates Plaintiffs' equal protection rights in two ways. First, it treats birth centers unequally as compared to other out-of-hospital birth service providers, such as home birth providers. SUF ¶¶ 16–19. As the Council testified, Iowa also does not require a CON for a woman to advertise and allow her friends to give birth in her home, or for a midwife to book a hotel room for a woman to give birth there.[14] *Id.* ¶¶ 17–18. These entities all provide the same service with similar healthcare providers, equipment, treatment, and chance of exigency. Yet birth centers are subject to the CON requirement, while other out-of-hospital birth service providers are not. There is no plausible policy reason to differentiate between the two.

This unequal treatment of birth centers as compared to other out-of-hospital birth service providers contradicts Defendants' stated quality and access rationales. A freestanding birth center permits women with low-risk pregnancies to give birth in a customized, comfortable, and controlled environment with experienced midwives. They are licensed spaces dedicated to obstetric services that demand high sanitary standards and staff expertise. But Iowa's expectant mothers do not currently have access to birth centers. *Id.* ¶ 10. Instead, women who do not want to give birth in a hospital must receive such services in homes or one-off locations converted for the occasion, for which no CON is required. The result is that both expectant mothers and service providers have less control over safety, sanitation, and access to expertise. Defendants provide no justification for this differential treatment, and its differentiating factors for whether to require a

[14] The Council was unable to say without more research—specifically, using Google to look for "news articles or research articles" defining the term "birth center"—whether an Airbnb or other room designated for birthing services would require a CON. SUF ¶ 19. This "regulation by search engine" highlights the arbitrariness of Iowa's scheme.

CON in a given situation (e.g., whether equipment is kept on site, how they advertise, whether there is a permanent location, and the overall degree of formalization, *id.* ¶ 19) do not provide a rational basis for the distinction between birth centers and other out-of-hospital birth service providers. Considering the rationales put forward by Defendants for the law, this unequal treatment is irrational.

Second, the CON law creates a separate irrational classification between proposed birth centers and established or incumbent maternity care providers or mobile health services that want to expand. *See* SUF ¶ 41. While the first category is subject to the CON process (and the competitor's veto), the latter two categories can incrementally expand their services by spending up to $1.5 million annually in new capital expenditures or acquisitions—without having to prove a need for such expansion. *Id.* There is no reason for this distinction other than protecting established healthcare service providers against new competition. Expansion by existing providers has the same effects as establishing a new birth center. Thus, allowing one to proceed without a CON but not the other is not related to ensuring access, keeping costs low, or improving quality; it is a handout to a favored group. *See Craigmiles*, 312 F.3d at 224 (economic protectionism is not a legitimate governmental end). That is particularly evident because the Council does not require any reporting as to the $1.5 million limit or do anything to monitor this exception for existing providers. SUF ¶¶ 42–44. Even assuming existing providers fully comply with the $1.5 million limit in the absence of any monitoring, there is nothing to prevent them from repeatedly making expenditures just below the $1.5 million threshold each calendar year and thereby avoiding the CON requirement entirely. In contrast, a new proposed birth center is subject to the CON requirement based on the *first dollar* they spend. *Id.* ¶ 41, 45. Such a protectionist scheme is unconstitutional.

III. Iowa's CON Scheme Violates the Iowa Constitution

Iowa's appellate courts have frequently held that state constitutional provisions provide greater protection than their federal counterparts. *See State v. Brown*, 930 N.W.2d 840, 856–57 (Iowa 2019) (McDonald, J., concurring) ("[T]his court has treated the Iowa Constitution as a one-way ratchet to provide only greater rights and remedies than a parallel provision of the United States Constitution." (citing *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000) (en banc), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001)). That is fitting, as the Iowa Constitution contains language that differs from anything found in the U.S. Constitution.[15]

However, Plaintiffs recognize that Iowa courts have in recent years interpreted the provisions at issue here similar to clauses in the Fourteenth Amendment, applying rational basis review. *See City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015) (calling the interpretation of the Inalienable Rights Clause "virtually identical to the rational-basis due process test or equal protection tests under the Federal Constitution").[16] Even assuming that Article I, sections 1, 6, and 9, of the Iowa Constitution are interpreted under a rational basis test, however, Iowa's CON scheme fails for the same reasons as under the federal Constitution.

CONCLUSION

The Court should grant summary judgment in Plaintiffs' favor.

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[15] *See* Iowa Const. art. I, § 1 (the Inalienable Rights Clause) ("All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); *Id.* art. I, § 6 ("All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.").

[16] *See also Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 81 (Iowa 2022) ("[C]hallenges under the inalienable rights clause to regulatory statutes must be adjudicated under the highly deferential rational basis test."); *Planned Parenthood of the Heartland, Inc. v. Reynolds,* 962 N.W.2d 37, 47 (Iowa 2021) ("In most cases, we apply the very deferential rational basis test" to equal protection challenges) (quotation omitted).

DATED August 5, 2024.

Respectfully submitted,

/s/ Glenn E. Roper

ALAN R. OSTERGREN
President and Chief Counsel
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, Iowa 50309
Telephone: (515) 207-0134
alan.ostergren@kirkwoodinstitute.org

GLENN E. ROPER*
Colorado Bar No. 38723
PACIFIC LEGAL FOUNDATION
1745 Shea Center Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
geroper@pacificlegal.org

WILSON C. FREEMAN*
Arizona Bar No. 036953
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
wfreeman@pacificlegal.org

*Pro Hac Vice

Counsel for Plaintiffs Des Moines Midwife Collective and Caitlin Hainley

CERTIFICATE OF SERVICE

The forgoing document has been filed with the court's ECF system on August 5, 2024, and notice of service has been provided to the following:

DAVID M. RANSCHT
Assistant Attorney General
JENNIFER KLEIN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building
1305 East Walnut St., Second Fl.
Des Moines, Iowa 50319
David.Ranscht@ag.iowa.gov
Jennifer.Klein@ag.iowa.gov

Counsel for Defendants Iowa Health Facilities Council, Harold Miller, Aaron DeJong, Kelly Blackford, and Brenda Perrin

/s/ Wilson C. Freeman
WILSON C. FREEMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, and CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA **STATEMENT OF UNDISPUTED FACTS**

A. Plaintiffs Caitlin Hainley and Des Moines Midwife Collective (DMC)

1. Plaintiff Caitlin Hainley is a licensed advanced registered nurse practitioner and a licensed registered nurse in the State of Iowa. App. 1, Hainley Decl. ¶ 2.

2. Ms. Hainley received an associate's degree in nursing in 2014, a master's degree in nursing with an emphasis in midwifery in 2016, and a doctorate of nursing practice in 2017. App. 1, Hainley Decl. ¶ 3.

3. Ms. Hainley is a certified nurse-midwife, an advanced registered nurse practitioner, a registered nurse, and an International Board Certified Lactation Consultant. She has been working as a certified nurse midwife since 2017. App. 1, Hainley Decl. ¶¶ 3–4; *see also* Amended Pet. ¶ 15; Answer ¶ 15.

4. Ms. Hainley is the owner of Des Moines Midwife Collective (DMC), a limited liability company registered in Iowa that provides a variety of primary care services for women. She started DMC with Emily Zambrano-Andrews, who subsequently transferred her interest to Ms. Hainley. DMC's services include wellness services, contraceptive services, prenatal care, lactation services, and maternity care for home births. App. 2, Hainley Decl. ¶¶ 5, 7.

5. DMC operates a small lactation, prenatal, and women's health clinic with a lab in Des Moines. Its staff attends births either at clients' homes or at other locations arranged by the expectant parents, including hotel rooms, short-term rentals, or friends' houses. App. 2, Hainley Decl. ¶¶ 8–9; *see also* Amended Pet. ¶ 18; Answer ¶ 18.

6. DMC's business has grown in recent years, and its staff went from attending zero births in 2021 to attending approximately 100 births in 2023. In 2024, DMC has

been at record capacity for births and other services and will have almost 3,000 total clinic appointments by the end of the year. App. 2, Hainley Decl. ¶ 10.

7. DMC seeks to make its services as accessible as possible and its patients pay for its services through Medicaid or most major medical insurance providers. App. 2, Hainley Decl. ¶ 11.

B. Plaintiffs' Plan for a Birth Center

8. Ms. Hainley and DMC wish to open a freestanding birth center for low-risk births. The birth center would accept medical insurance and would be the first of its kind in Iowa. App. 3, Hainley Decl. ¶ 12.

9. Ms. Hainley is both willing and able to provide childbirth services in a freestanding birth center. Amended Pet. ¶ 3; Answer ¶ 3.

10. Although freestanding birth centers are legal in Iowa, there are currently none operating in the state. Amended Pet. ¶¶ 2, 44; Answer ¶¶ 2, 44.

11. Ms. Hainley has taken numerous steps to prepare for opening a birth center. Those steps include developing a business plan with a business advisor for the birth center; working with local and national business growth and leadership programs; developing a five-year financial projection plan, including projected revenue and expenditures; securing a realty team and architectural firm to assist with scouting and evaluating potential locations for the birth center; working to secure necessary equipment; attending educational webinars, workshops, and conferences through the American Association of Birth Centers; and working to secure needed capital through a variety of avenues including working with a local lender for financing. App. 3, Hainley Decl. ¶ 14.

12. She has been awarded a grant through the Des Moines Pitch Contest to help finance the birth center project. She has also submitted and is awaiting the determination of multiple other grant opportunities to assist with financing the birth center project, including those available through SCORE, the John Pappajohn Entrepreneurial Center, and Love Local. App. 3, Hainley Decl. ¶ 15.

C. Iowa's Certificate of Need (CON) Requirement

13. Despite the many benefits of freestanding birth centers, Iowa requires a sponsor planning to develop "a new … or changed institutional health service," including birth centers, to apply for a certificate of need (CON), which must be approved by Defendant Iowa Health Facilities Council. Amended Pet. ¶ 34; Answer ¶ 34.

14. Defendant Iowa Health Facilities Council ("Council") is an instrumentality of the State of Iowa responsible for reviewing and approving or denying CON applications. Iowa Code § 10A.712(e); *see also* Answer ¶ 7.

15. The current members of the Council are Kelly Blackford, Jeremy Kidd, Aaron DeJong, Arnold Delbridge, and Masami Knox. Iowa Talent Bank, *Health Facilities Council*, https://talentbank.iowa.gov/board-detail/bf67ead8-4cd7-4a0c-bb49-145c1c8a7d77 (last visited Aug. 1, 2024).[1]

16. In the case of birth centers, the Council considers the phrase "facility or institution" in the Iowa Code only to refer to premises holding itself out as a birth center and regularly operated as a business offering birth services rather than premises that happen to be utilized on a one-off, irregular, or individual-patient basis for home birth services. App. 55, Roper Decl. Ex. 1 (hereafter Defs.' Interrog. Resp.) No. 11.

17. The Council would not require a CON if a woman allowed her friends to give birth in her home and advertised that they could do so. App. 91, Roper Decl. Ex. 4 (hereafter Defs.' 30(b)(6) Depo.) at 44:7–12.[2]

18. The Council would not require a CON for a midwife to book a hotel room for a woman to give birth there. App. 91, *id.* at 44:13–19.

19. The Council's 30(b)(6) representative was unable to say without more research whether an Airbnb designated for birthing services or "a room in a location that designates itself as being for birthing services" would require a CON. App. 91, *Id.* at 44:20–25. The research would involve using Google to search for "news articles or research articles" defining the term "birth center." App. 91–92, *id.* at 45:11–46:1, 48:8–21. The Council would also consider things like advertising, materials and equipment, a permanent location, the cost of the facility, whether it had agreements with hospitals for help in emergency situations, and the overall degree of formalization. App. 92, *id.* at 46:2–47:10.

20. When a sponsor proposes a new institutional health service, it must submit a letter of intent to the Department outlining the project. Iowa Code § 10A.715(1). After 30 days, the sponsor may file a CON application outlining information about the project, its need, and its financial feasibility. *Id.* § 10A.716(1)–(2).

21. When a CON application is submitted, the Iowa Department of Inspections, Appeals, and Licensing notifies all affected persons—including competitors—of the application in writing and will notify any other affected persons through the certificate of need website. Amended Pet. ¶ 36; Answer ¶ 36.

[1] Because they are only sued in their official capacities, the current members are substituted pursuant to Fed. R. Civ. P. 25(d). This Court can take judicial notice of the identities of the current Council members. *See* Fed. R. Evid. 201.

[2] Defendants' 30(b)(6) representative, Rebecca Swift, has been Iowa's Certificate of Need Program manager for the Department of Inspections, Appeals, and Licensing since December 2015. App. 86, Defs.' 30(b)(6) Depo. at 8:23–9:4.

22. "Affected persons" are primarily individuals or organizations that provide a similar service. App. 93, Defs.' 30(b)(6) Depo. at 50:23–51:4.

23. Approximately 75% of CON applications face letters of opposition. App. 102, Roper Decl. Ex. 5 (hereafter Swift Depo.) at 27:22–28:1.

24. A CON application requires payment of an application fee equivalent to three-tenths of one percent of the anticipated cost of the project. The minimum fee is $600 and the maximum fee is $21,000 under Iowa Code 10A.713(1). *See also* Answer ¶ 35.

25. Ms. Hainley estimates that her CON application fee will be approximately $20,000, close to the maximum fee allowed. Hainley Decl. ¶ 17.

26. As part of the CON review process, the Council holds a public hearing where any affected persons can present testimony about the project. Iowa Code § 10A.716(3)–(4); Amended Pet. ¶ 36; Answer ¶ 36.

27. It is up to each member of the Council to determine how they will use information from an affected person. App. 94, Defs.' 30(b)(6) Depo. at 65:6–21.

28. The Council evaluates applications against a series of 18 criteria, including financial and economic feasibility standards. Iowa Code § 10A.714(1)(a)–(r); *see also* Amended Pet. ¶ 37; Answer ¶ 37.

29. There are no defined weights given to the eighteen criteria used to evaluate CON applications. Instead, each member of the Council makes their own determination as to how to weigh the criteria. App. 94, Defs.' 30(b)(6) Depo. at 62:17–21.

30. The Council must make a written finding that each of four mandatory criteria has been met before granting a CON:

    a. Less costly, more efficient, or more appropriate alternatives to the proposed institutional health service are not available and the development of such alternatives is not practicable;

    b. Any existing facilities providing institutional health services similar to those proposed are being used in an appropriate and efficient manner;

    c. In the case of new construction, alternatives including but not limited to modernization or sharing arrangements have been considered and have been implemented to the maximum extent practicable;

    d. Patients will experience serious problems in obtaining care of the type which will be furnished by the proposed new institutional

> health service or changed institutional health service, in the absence of that proposed new service.

Iowa Code § 10A.714(2); *see also* Amended Pet. ¶ 40; Answer ¶ 40.

31. The Council can only grant an application if the applicant provides information affirmatively showing these four are met. App. 95, Defs.' 30(b)(6) Depo. at 70:3–11.

32. At the end of the formal review process, the Council issues a written decision approving or denying the application. Amended Pet. ¶ 36; Answer ¶ 36.

33. Dissatisfied parties can then request a rehearing or appeal the decision, launching a lengthy legal process. Amended Pet. ¶ 36; Answer ¶ 36.

34. Because of Iowa's requirement, to open a freestanding birth center, Ms. Hainley and DMC are required to apply for a CON. Answer ¶ 29. In contrast, no CON is required for home birth services. Answer ¶ 28.

35. Iowa has never analyzed the CON law's effect on birth centers. App. 96, Defs.' 30(b)(6) Depo. at 99:1–3.

36. The CON process inhibits or causes fewer birth center openings. App. 100–01, Swift Depo. at 21:22–22:3.

37. Birth centers generally consider the CON process to be onerous because it's expensive, it takes a lot of time, they don't want to pay the fee, and it is a long process. App. 107, *id.* at 23:10–20.

38. Hospitals submitting letters of opposition to CON applications are always represented by counsel. App. 102, *id.* at 28:20–23.

39. The Council has not granted a CON for a freestanding birth center in at least ten years. No freestanding birth centers are currently operating in Iowa. Amended Pet. ¶ 44; Answer ¶ 44.

40. Even though Ms. Hainley believes that her birth clinic would meet the qualifications to be granted a CON under the application's statutory requirements, past determinations by the Council to deny CONs to freestanding birth centers, plus the words and actions of local hospital lobbyists at subcommittee meetings have convinced her that if DMC submitted a CON application, it would be heavily contested and denied, resulting in a loss of the fee money. Hainley Decl. ¶ 18.

D. The $1.5 Million Exception

41. Iowa's CON law allows current institutional health facilities, in this case hospitals providing obstetrical services, to expend up to $1.5 million in a twelve-month period for expansion and modernization without triggering the need to obtain a new

CON. However, this exemption does not apply to someone who wishes to enter a market to provide a service. For those individuals, like Plaintiffs, the first dollar expended on the project requires a CON. Amended Pet. ¶ 43; Answer ¶ 43.

42. The Council does not have reporting requirements for the $1.5 million limit. App. 90, Defs.' 30(b)(6) Depo. at 31:18–20.

43. The Council does not do anything to monitor the CON application's capital expenditure limit of $1.5 million. App. 90, *id.* at 31:14–32:18.

44. It would be very hard to monitor the CON application's capital expenditure limit of $1.5 million to ensure existing facilities did not circumvent the CON requirement. *Id.*

45. The Council does not prevent existing facilities from repeatedly making capital expenditures just under the $1.5 million threshold each calendar year to avoid the CON requirement. App. 90, *id.* at 32:19–33:11.

46. About half of the CON applications are for projects of less than $1 million. App. 101–02, Swift Depo. at 25:24–26:3.

47. Only about 25% of projects under $1 million are represented by counsel. App. 102, *id.* at 26:13–27:4.

E. Promise Birth Center's Application

48. In 2014, the Council decided an application for Promise Birth Center ("PBC"). PBC sought to be "a [nonprofit] nurse-midwifery operated birth center" that cared for women in a "medically underserved [part] of the region without regard to ability to pay." App. 59, Roper Decl. Ex. 2 (hereafter PBC Decision) ¶¶ 4–5.

49. In ruling on PBC's application, the Council recognized that "[n]early all of this [region's] population is rural and low-income, and a substantial percentage is Hispanic" and that according to PBC, "[c]ulturally, … these women use midwives and women care providers for their maternity needs and tend to seek out female providers who will respect the natural birth process." App. 59, *id.* ¶ 6.

50. The Council also recognized that "[m]any of the applicant's clients do not wish to have a home birth, live outside the safe transfer zone [to get to a hospital] (about 30 minutes) or have homes that are not suitable for a home birth." App. 59, *id.* ¶ 9.

51. PBC produced evidence of market demand for its services by noting that only 750–800 out of the region's approximately 1,200 annual births occurred in a hospital. App. 60, *id.* ¶ 12.

52. The PBC application included "100 letters of support" from clients, physicians, nurse practitioners, and certified nurse-midwives. App. 62, *id.* ¶ 30.

53. PBC also stated it was "financially stable with both positive cash flow and increasing net assets." App. 62, *id.* ¶ 29. The parent company had already employed the necessary personnel to operate the new facility. App. 61, *id.* ¶ 23. It also provided patient cost comparisons showing its standard birth service would cost $8,500 versus local hospital charges of $10,482. App. 61, *id.* ¶ 21.

54. All six of the area's hospitals that provided labor and delivery services submitted a letter of opposition to granting PBC's CON application. App. 62, *id.* ¶ 32. The opposition letter stated that the existing hospitals had ample capacity for these services and that "approval of the project would result in the duplication of these services." *Id.* The hospitals asserted that "approval of the project would result in fewer births in the area hospitals and thus have a negative impact on recruitment and retention of family practice physicians." *Id.*

55. The Council denied PBC's CON application, concluding that none of the four mandatory factors were satisfied. App. 63, *id.* at CONCLUSIONS OF LAW ¶¶ 1–2. Specifically, it concluded: "less costly, more efficient or more appropriate alternatives to the proposed health service are available," "a more efficient and appropriate alternative to the proposed health service currently exists through utilization of existing hospitals in the area," and "existing facilities providing health services similar to those proposed are currently being used in an appropriate and efficient manner but would be negatively impacted by this project." App. 63, *id.*

56. PBC appealed the Council's decision in state court, which affirmed the denial of the CON application. Roper Decl. Ex. 3. The court noted that the CON law "does not give a formula for how the factors are to be considered," but concluded the Council's conclusions based on these factors "was not unreasonable, arbitrary, or capricious." App. 79, *id.* at 14.

57. When PBC pointed out that its services would cost approximately 20% less than the hospital's services, the court responded that the Council "did not specifically make the finding that the Hospitals are more or less expensive. Rather, [the Council] found that: 'less costly, more efficient *or* more appropriate alternatives to the proposed health service are available' (emphasis added). In other words, [the Council] found the Hospitals had one or more of these three qualities." App. 72, *id.* at 7. The Council's determination that *any* of these three qualities was sufficient to deny the application. *See id.*

F. Plaintiffs' Expert Dr. James Bailey

58. Dr. James Bailey is an Associate Professor of Economics at Providence College. App. 6, Bailey Decl. ¶ 2.

59. Dr. Bailey is also a Visting Scholar in the Consumer Finance Institute at the Federal Reserve Bank of Philadelphia, a Senior Affiliated Scholar at the Mercatus Center at George Mason, and a Senior Research Affiliate at the Knee Center at West Virginia University. *Id.*

60. He holds an undergraduate, master's, and Ph.D. in economics with a specialization in health economics and econometrics. App. 7, *Id.* ¶ 3.

61. He has extensive experience studying and publishing on economics issues, especially health economics. App. 7, *Id.* ¶ 5.

62. Dr. Bailey was retained by Plaintiffs' counsel to serve as an expert in this case and was tasked with conducting a literature review on the likely effects of Iowa's CON requirement for new institutional health services. App. 7, *Id.* ¶ 4.

63. Dr. Bailey conducted his literature review by weighing academic studies against one another, considering the studies' relevance and quality of analysis, as well as the number of studies that have reached the same conclusion. App. 106–07, Roper Decl. Ex. 6 (hereafter Bailey Depo.) at 20:25–21:21.

64. Dr. Bailey concluded that the evidence shows that CON laws "do not fulfill their frequently stated aims" and "do not advance their stated goals of lowering costs, promoting access, or improving quality of life." Instead, most studies find "that they increased spending and decreased the quality of available services." App. 8, Bailey Decl. ¶ 8.

65. His analysis showed that states with need-review laws in healthcare reduce access to services versus states without need-review laws. Comparative studies have shown these laws lead to fewer hospital beds, ambulatory surgery centers, and neonatal intensive care beds per capita. App. 8, *id.* ¶ 9.

66. Studies also show that need-review laws negatively affect service quality in healthcare, including leading to higher mortality rates in some areas. App. 8–9, *id.* ¶ 11.

67. Need-review laws likely increase, rather than decrease, healthcare costs, and most studies indicate CON laws are associated with "higher per-unit costs and higher overall spending on healthcare services." App. 9, *id.* ¶ 13.

68. The studies' findings of adverse effects associated with CON laws are "unsurprising" and consistent with basic economic theory on restricting the supply of services, which "lead[s] to increased costs and reduced access …." App. 9, *id.* ¶ 12.

69. Dr. Bailey concluded that Iowa's CON requirement is a "barrier[] to entry" that "does not serve consumers or the general economic interest" and instead "generally result[s] in higher prices and … fewer, lower-quality services … available." App. 9, *id.* ¶ 14.

70. As Dr. Bailey testified, "[t]he process of attempting to win [a CON] can be long and costly, and in the end, applicants may be rejected and forced to abandon their plans." App. 108, Bailey Depo. at 30:22–31:2.

71. The number of birth center CON applications does not entirely reflect the number of people interested in starting birth centers in Iowa. App. 109, *id.* at 46:11–16.

72. Instead, "it's possible that people would be interested in starting a center but not apply partly because … they could be quite interested, but that the [CON] process could deter them from applying, that it would be raising the risk and expense of starting the business. And some people might be at that margin where that added risk and expense would be enough to deter them." App. 109, *id.* at 46:16–47:3.

73. Dr. Bailey concluded that he could "find no valid economic argument for a state to require a CON for birth centers" and that "both economic theory and extensive empirical evidence suggest that [need-review in the healthcare industry] brings economic costs" instead of a net economic benefit. App. 10, Bailey Decl. ¶¶ 15–16.

74. Dr. Bailey concluded that he "do[es] not see any rational basis for Iowa's CON law." App. 10, *id.* ¶ 16.

DATED August 5, 2024.

Respectfully submitted,

/s/ Glenn E. Roper

GLENN E. ROPER*
Colorado Bar No. 38723
PACIFIC LEGAL FOUNDATION
1745 Shea Center Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
geroper@pacificlegal.org

WILSON C. FREEMAN*
Arizona Bar No. 036953
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
wfreeman@pacificlegal.org

*Pro Hac Vice

ALAN R. OSTERGREN
President and Chief Counsel
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, Iowa 50309
Telephone: (515) 207-0134
alan.ostergren@kirkwoodinstitute.org

Counsel for Plaintiffs Des Moines Midwife Collective and Caitlin Hainley,

CERTIFICATE OF SERVICE

The forgoing document has been filed with the Court's ECF system on August 5, 2024, and notice of service has been provided to the following:

DAVID M. RANSCHT
Assistant Attorney General
JENNIFER KLEIN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building
1305 East Walnut St., Second Fl.
Des Moines, Iowa 50319
David.Ranscht@ag.iowa.gov
Jennifer.Klein@ag.iowa.gov

Counsel for Defendants Iowa Health Facilities Council, Harold Miller, Aaron DeJong, Kelly Blackford, and Brenda Perrin

/s/ Glenn E. Roper
GLENN E. ROPER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, and CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA **APPENDIX IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA

DECLARATION OF CAITLIN HAINLEY

I, Caitlin Hainley, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration.

2. I am a licensed advanced registered nurse practitioner and licensed registered nurse in the State of Iowa. I have worked in perinatal care for almost two decades.

3. My formal educational history includes a bachelor's degree in English in 2005, an associate's degree in nursing in 2014, a Master's of Science in Nursing with an emphasis in midwifery in 2016, and a doctorate in nursing practice in 2017.

4. I am a certified nurse-midwife. I am also an International Board-Certified Lactation Consultant through the International Board of Lactation Consultation Examiners (IBLCE).

5. I am the sole owner of Des Moines Midwife Collective (DMC), which is a limited liability company registered in Iowa. I started DMC in 2021 with Emily Zambrano-Andrews, who has since transferred her interest to me.

6. DMC and I are the Plaintiffs in this lawsuit.

7. DMC's mission is to provide affordable and accessible reproductive and wellness care while partnering with families to create safe, physiological, empowering experiences in birth, parenthood, and self-care.

8. DMC's staff is comprised of midwives with experience in gynecology, prenatal care, birth assistance, postpartum care, lactation, and more.

9. DMC operates a small clinic with CLIA lab certification at 3500 2nd Avenue, Suite 1, in Des Moines. The clinic provides primary care services for women, including contraceptive services, prenatal care, lactation consulting, and maternity care for births planned in a home setting. DMC also provides newborn care for the first 28 days after birth, as well as partner STI diagnosis and treatment.

10. Over the past few years, DMC has seen a significant increase in demand for its services, especially for midwives to attend community births. DMC's midwives went from attending zero births in 2021 to attending 49 births in 2022 to attending 101 births in 2023. In 2024, DMC has been at record capacity for births, as well as newborn, lactation, women's wellness, and contraceptive/gynecologic care. DMC will have almost 3000 total clinic appointments by the end of the year.

11. DMC seeks to make its services as accessible as possible by accepting Medicaid and most major medical insurance providers.

12. DMC and I wish to open a freestanding birth center for low-risk births in the Des Moines area. There are currently no freestanding birth centers in Iowa and there have never been any freestanding birth centers in this State in-network with Medicaid or any other health insurance providers.

13. My planned birth center would continue to be in-network with Medicaid and most major health insurance providers and would be the first of its kind in Iowa.

14. I have taken numerous steps to prepare for opening a birth center. Those steps include developing a business plan with a business advisor for the birth center; working with local and national business growth and leadership programs; developing a five-year financial projection plan, including projected revenue and expenditures; securing a realty team and architectural firm to assist with scouting and evaluating potential locations for the birth center; working to secure necessary equipment; attending educational webinars, workshops, and conferences through the American Association of Birth Centers; and working to secure needed capital through a variety of avenues including working with a local lender for financing.

15. I have been awarded a grant through the Des Moines Pitch Contest to help finance the birth center project. I have also submitted and am awaiting the determination of multiple other grant opportunities to assist with financing the birth center project, including those available through SCORE, the John Pappajohn Entrepreneurial Center, and Love Local.

16. As part of my preparations for opening a birth center, I have researched Iowa's certificate of need ("CON") process. I understand that to open the planned birth center, I will first need to obtain a CON from the Iowa Health Facilities Council.

17. I estimate that the CON application fee for the birth center would be approximately $20,000, which I understand to be close to the maximum fee allowed under the law.

18. Although I believe that our proposed birth center would meet the statutory requirements for a CON, past determinations by the Iowa Health Facilities Council to deny CONs to freestanding birth centers, plus the words and actions of local hospital lobbyists at subcommittee meetings concerning freestanding birth centers, have convinced me that if DMC submitted a CON application, it would be heavily contested and denied, resulting in a loss of the fee money.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: August 2nd 2024

Caitlin Hainley

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA

DECLARATION OF DR. JAMES BAILEY

I, Dr. James Bailey, declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration.

2. I am an Associate Professor of Economics at Providence College in Providence, Rhode Island, where I have worked for the past seven years. Before that, I was an Assistant Professor of Economics at Creighton University and a Visiting Instructor of Economics at the University of West Florida. In addition to serving as a professor, I am a Visiting Scholar in the Consumer Finance Institute at the Federal Reserve Bank of Philadelphia, a Senior Affiliated Scholar at the Mercatus Center at George Mason

University, and a Senior Research Affiliate at the Knee Center at West Virginia University.

3. I earned a Master's degree in Economics in 2011 and a Ph.D. in Economics in 2014, both from Temple University. I earned my undergraduate degree in Economics from the University of Tulsa in 2009.

4. Plaintiffs' counsel retained me to serve as an expert in this case. I was tasked with conducting a literature review on the likely effect of Iowa's Certificate of Need ("CON") requirement for new institutional health services. Under the CON requirement, the Iowa Health Facilities Council ("Council") must conduct a need review to determine whether to allow a prospective healthcare service provider to provide a new service.

5. I have extensive experience studying and publishing on issues of economics, especially health economics, labor economics, entrepreneurship, and government regulation. I have published numerous peer-reviewed studies on economic issues, including articles analyzing Certificate of Need laws and their effects on pricing and services.

6. The report I produced in this case is attached to this declaration as Exhibit A. My curriculum vitae is included as an appendix to the report.

7. As discussed in my report, need-review laws have been studied extensively, particularly in the healthcare industry. In my report, I analyzed and summarized numerous peer-reviewed studies, some of which I personally

conducted, examining the effects of need-review laws on spending, access to services, and quality of services in the healthcare industry.

8. The evidence across sectors is quite consistent—need-review laws do not fulfill their frequently stated aims. A large majority of the academic literature on CON laws finds that they do not advance their stated goals of lowering costs, promoting access, or improving quality of life. Instead, most studies found that they increased spending and decreased the quality of available services.

9. Need-review laws also reduce, rather than increase, access to services. The studies I reviewed found that need-review laws in healthcare reduce access to services as compared to states without need-review laws. For example, states with CON laws have (per capita) 13% fewer hospital beds, 14% fewer ambulatory surgery centers, and 49% fewer neonatal intensive care beds. These reductions in available facilities hinder access to care, particularly in rural areas with limited healthcare services.

10. While some claim that need-review laws enable incumbents to provide higher-quality services by allowing them to improve their skills with reduced competition, the empirical evidence suggests that they do not improve quality and may reduce it.

11. The evidence shows that need-review laws harm the quality of some services. The studies I reviewed found that need-review laws negatively affect service quality in health care, leading to higher mortality rates in

some areas. For example, one article found CON regulations led to an increase in heart attack deaths by 6-10% within just a few years after the policy was enacted. *See* Kevin Chiu, *The impact of certificate of need laws on heart attack mortality: Evidence from county borders*, Journal of Health Economics, Volume 79, 2021. https://www.sciencedirect.com/science/article/abs/pii/S016762962100103X.

12. This empirical evidence is unsurprising, as it is consistent with basic economic theory. Economic theory predicts that a supply restriction will shift the supply curve left, reducing market competition. This, in turn, will lead to increased costs and reduced access to services. The literature I have reviewed also finds this to be true in the healthcare industry.

13. Need-review laws are likely to increase healthcare spending rather than decrease it. This conclusion is supported by empirical evidence, which finds states with CON laws experience higher overall per capita health spending. The majority of studies indicate that these laws are associated with higher per-unit costs and higher overall spending on healthcare services.

14. Both economic theory and the empirical evidence in the studies that I reviewed suggest that Iowa's CON requirement for healthcare service providers does not serve consumers or the general economic interest. By reducing competition, barriers to entry such as Iowa's CON requirement generally result in higher prices and mean that fewer, lower-quality services are available.

15. I can find no valid economic argument for a state to require a CON for birth centers. Such requirements serve as barriers to entry that harm would-be entrants, consumers, and overall economic efficiency. Empirical analysis of similar barriers to entry in the healthcare industry shows that such laws have either no significant effects or have or undermined their stated goals while harming overall economic efficiency.

16. I have not seen significant evidence to support the claim that applying need-review in the healthcare industry brings net economic benefits. Instead, both economic theory and extensive empirical evidence suggest that it brings economic costs. I do not see any rational basis for Iowa's CON law.

17. Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 7/29/24

Dr. James Bailey

DECLARATION OF PLAINTIFF'S EXPERT DR. JAMES BAILEY

EXHIBIT A

CERTIFICATE OF NEED REGULATION: AN EXPERT REPORT

Certificate of Need Regulation: An Expert Report

Prepared for the Iowa District Court for Polk County

James Bailey, Ph.D.

January 28th, 2024

Table of Contents

1. Introduction and Summary of Argument

My name is James Bailey. I am an Associate Professor of Economics at Providence College. I have been asked by attorneys representing Des Moines Midwife Collective to summarize the economics of Iowa's Certificate of Need law.

a. Statement of Opinion

Iowa requires birth centers to obtain a Certificate of Need to be allowed to operate. Obtaining the Certificate means convincing regulators that the service is economically necessary, not only that the operator can meet quality standards. While this specific law has not been the direct object of academic study, similar Certificate of Need laws restricting the entry of other types of health care providers have been studied extensively, and I have published several peer-reviewed articles on them. Both economic theory and empirical evidence from similar regulations suggest that Iowa's Certificate of Need requirement for birth centers does not serve patients or the general economic interest. By reducing competition, barriers to entry such as Iowa's Certificate of Need requirement generally mean that higher prices are charged and fewer, lower-quality services are available.

In the next section of this report I introduce Certificate of Need regulation and explain the economics of its effects. In section 3 I review the extensive evidence on the effects of Certificate of Need laws in other parts of health care. In section 4 I show what the evidence implies for the specific case of birth centers in Iowa. In section 5 I summarize and conclude.

b. Qualifications of the Witness and Financial Compensation

I hold a Ph.D. in economics and am an Associate Professor of Economics at Providence College. I am the author of over two dozen peer-reviewed academic articles, most of which evaluate the

effects of regulation. Eight of my eight peer-reviewed articles evaluate Certificate of Need laws. I include a detailed CV in an appendix to this report. This is the second time I have offered my opinion as an expert witness in a court case; the first was in *Noland v Montana*. I have no personal or financial stake in this matter other than the compensation I am receiving as an expert witness. My compensation as an expert witness is $1500 for this written report plus $200 per hour spent being deposed, testifying, or directly preparing for deposition or trial.

2. Economics of Certificate of Need

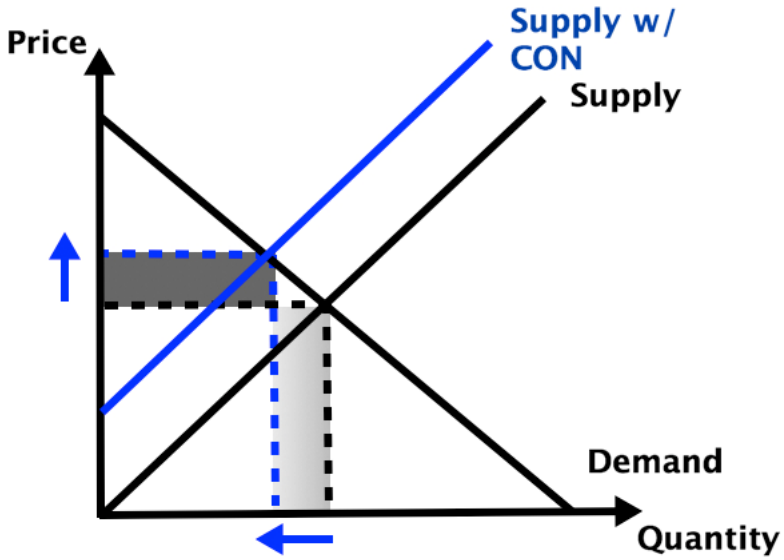
A. What is Certificate of Need

i. Iowa requires anyone who aims to open certain types of health care facilities, including birthing centers, to obtain a Certificate of Need prior to opening. To obtain a Certificate of Need, it is not enough to demonstrate that an applicant is able to do the job safely and competently. Instead, they must convince a majority of the Iowa Health Facilities Council, which is empowered to reject them simply because they believe there is no "need" for a new facility. The process of attempting to win this permission can be long and costly, and in the end applicants may be rejected and forced to abandon their plans. The state statutes and rules that establish this requirement appear to be primarily concerned with reducing health care costs, and secondarily with promoting access to care. In this report I show why Certificate of Need requirements for medical care do not achieve these stated goals and may work against them.

ii. In economic terms, Iowa's Certificate of Need requirements serve as a restriction on the supply of medical care. It means there are fewer health care facilities and lower capacity than there would be in a free market.

Basic economic theory is quite clear on the typical effect of supply restrictions: they lead to higher prices, a lower quantity of services provided, and lower benefits to consumers.[1] I illustrate this in Figure 1 below.

iii. Figure 1: Certificate of Need Requirement Lowers the Supply of Medical Care, Leading to a Lower Quantity of Care at Higher Prices



[1] I develop this argument more fully in two peer-reviewed articles: Bailey (2018) and Bailey and Hamami (2023). These articles show further that even if Certificate of Need laws did reduce spending, they would likely do so in ways that harmed consumers and reduced overall welfare in the targeted markets, by reducing the amount of valuable health care patients are able to use.

B. Markets as Allocation Mechanisms

a. Markets Provide Information and Incentives:

iv. Most industries in the United States have no equivalent to Iowa's requirement for new businesses or facilities to obtain a Certificate of Need. Would-be entrepreneurs, not a state board, are the ones to decide if their business is needed. States may sometimes require a test to establish that the new provider will be able to safely and competently perform their tasks, but tend not to bar new providers purely on the grounds that they are not needed.

v. Economics suggests that states are correct to avoid such restrictions. The market process provides its own superior method of determining whether new providers are needed. Potential entrepreneurs conduct their own assessment of market conditions to decide whether to risk their own time and money to start a business. They can consider current prices in the market, current costs for their needed supplies, their own abilities to provide service, and assess the extent of unmet demand among consumers. The market offers all manner of information about customer needs and the potential viability of new businesses.

vi. While a state board could consider similar information, their incentives to correctly identify the net economic benefits of a specific new entrant are weaker. A would-be entrepreneur is prepared to put their own money on the line. If there really is enough demand to support a new entrant, the entrepreneur stands to make money; if they turn out to be incorrect and their business fails, they are the one to lose money. In contrast, members of the Iowa Health Facilities Council do not appear to have similar

financial incentives to correctly assess demand. In the question of whether a specific health facility is a good idea, the would-be entrepreneur simply has a lot more on the line than other decision-makers do. If economists know anything, we know that people respond to incentives.[2] Those who are most informed about a question will generally be those with the strongest incentive to be correctly informed. In the case of a new business, that is the potential entrepreneur. This is why the free market system that prevails in most industries in most states provides superior outcomes to a system where new entrants must obtain the permission of a state board.

b. Benefits of Competition

vii. Allowing for competition tends to benefit consumers and overall economic performance, not only the new entrant themselves. New providers in a market win customers by offering services at higher quality, higher availability, or lower prices than existing providers. Introductory microeconomics textbooks emphasize that "perfectly competitive" markets tend to maximize overall benefits to all participants in a market. In contrast, markets with "barriers to entry" (including, but not limited to, government regulations limiting entry) tend to provide fewer services and charge higher prices, leading to worse overall economic outcomes.[3]

c. Exceptions Exist But Don't Apply In This Case

viii. Introductory economics textbooks do recognize that there are exceptions to the general rule that perfectly competitive markets provide the best

[2] See https://www.econlib.org/library/Topics/College/incentives.html
[3] See for instance chapters 12-15 of *Microeconomics* by Michael Parkin.

outcomes. There is a whole catalog of "market failures" or "market imperfections", each with their own set of suggested remedies. Markets with externalities might call for taxes, subsidies, or redefined property rights.[4] Markets with public goods might call for government subsidies or direct provision.[5] Markets with imperfect information might call for quality regulation.[6]

ix. However, government regulation to limit new entrants to a market is almost never suggested by economists as a solution to any market imperfection. Much more often we suggest the opposite: that market failures have led to "imperfect competition" and so some government remedy is needed to *increase* the number of competitors in the market and to strengthen competition. For instance, economists often argue that mergers between firms should be prevented, or that existing monopoly firms should be broken up, in order to increase competition to benefit consumers and overall economic efficiency. Such arguments are now frequently embodied in US antitrust law. Federal agencies like the Federal Trade Commission and the Economics Division of the US Department of Justice often bring suit to prevent mergers on the grounds that they would reduce competition.[7] State antitrust agencies often similarly

[4] See any typical introductory microeconomics textbook, for instance Chapter 17 of *Microeconomics* by Michael Parkin.
[5] See any typical introductory microeconomics textbook, for instance Chapter 16 of *Microeconomics* by Michael Parkin.
[6] See any typical introductory microeconomics textbook, for instance Chapter 20 of *Microeconomics* by Michael Parkin.
[7] See https://www.ftc.gov/enforcement/merger-review and https://www.justice.gov/atr/merger-enforcement

prevent mergers to promote competition.[8] The Federal Trade Commission and US Department of Justice have specifically supported the repeal of Certificate of Need laws.[9] In a joint statement, they note that "after considerable experience, it is now apparent that CON laws can prevent the efficient functioning of health care markets", that "CON laws create barriers to entry and expansion, limit consumer choice, and stifle innovation", and that "the evidence to date does not suggest that CON laws have generally succeeded in controlling costs or improving quality. For these reasons, explained more fully below, the Agencies historically have suggested that states consider repeal or retrenchment of their CON laws."[10]

3. Empirical Evidence on Certificate of Need

a. Types of Empirical Evidence on Certificate of Need

i. Certificate of Need laws are requirements that would-be providers obtain permission from a state board before opening or expanding certain types of medical facilities or purchasing certain types of medical equipment. Certificate of Need requirements are currently in effect in some 35 states.[11] While the exact services regulated by them vary greatly from state to state, it is common for states to require a Certificate of Need

[8] See for instance "State Attorneys General Jolt Antitrust Enforcement" https://www.cadwalader.com/resources/clients-friends-memos/state-attorneys-general-jolt-antitrust-enforcement--cadwalader-expands-ag-practice

[9] https://www.ftc.gov/legal-library/browse/advocacy-filings/joint-statement-federal-trade-commission-antitrust-division-us-department-justice-regarding

[10] All quotes from page 1 of: https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj-sclaw.pdf

[11] https://www.mercatus.org/research/data-visualizations/40-years-certificate-need-laws-across-america

before adding acute care hospital beds, opening a nursing home, or purchasing a magnetic resonance imaging machine.

ii. Empirical research on Certificate of Need tends to either evaluate the effect of states' programs as a whole, or to evaluate the effect of regulating one specific type of service, such as nursing homes or radiation therapy. My review of the academic literature shows that there do not appear to be any empirical articles estimating the effects of Certificate of Need requirements for birth centers in particular. Lacking the most direct possible form of evidence on this issue, I turn to the most relevant existing evidence, which is the literature on the effects of Certificate of Need laws in general. I review this literature below, and then discuss its implications for birth centers in the next section.

b. Extensive Literature Shows Certificate of Need Undermines Its Own Goals

i. Stated Goals of Certificate of Need

1. The National Health Planning Act of 1974 gave two justifications for pushing states to adopt Certificate of Need laws: that they would reduce health care spending and promote access to care.[12] Later advocates would add the argument that Certificate of Need laws would improve quality. Following Federal pressure, all states had passed Certificate of Need programs by the mid-1980's. Then the Federal government removed its requirements and began encouraging states to repeal Certificate of Need.[13] The fact that CON has been passed, repealed, and reformed often in different

[12] See *National Health Planning and Resource Development Act of 1974* (P.L. 93–641)
[13] Pub. L. 99-660, § 701, 100 Stat. 3799 1986

states has allowed researchers to measure the effects of CON by seeing how outcomes changed in response to these legal changes.

2. Over one hundred articles have now been published that use data to evaluate the effects of Certificate of Need laws. While there is a variety of findings among these articles, the overall thrust of the literature has been that Certificate of Need laws are at best ineffective at achieving their stated goals, and at worst actively undermine them. In a 2020 article *BMC Health Services Research* I coauthored with Christopher Conover of Duke University, we performed the only published systematic review and cost effectiveness analysis of Certificate of Need laws. Our abstract concludes:
    a. "The literature has not yet reached a definitive conclusion on how CON laws affect health expenditures, outcomes, or access to care. While more and higher quality research is needed to reach confident conclusions, our cost-effectiveness analysis based on the existing literature shows that the expected costs of CON exceed its benefits."[14]

ii. Certificate of Need Laws Do Not Reduce Spending

1. Our published systematic review cited above only summed up the 90 relevant articles published through 2010. Since then, many more articles have been published and the literature has become,

[14] Source: Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). https://doi.org/10.1186/s12913-020-05563-1

if anything, more negative on Certificate of Need laws. In this and the following sections I aim to sum up some of the newest published findings on the effects of Certificate of Need laws.

2. In a 2018 article, I use supply and demand theory to show why Certificate of Need laws are likely to increase spending on health care rather than decrease it.[15] In a recent article coauthored with Tom Hamami of Providence College, we show that more mathematically sophisticated theoretical models reach the same conclusion.[16] We also analyze data on health spending from the restricted Medical Expenditure Panel Survey and find that Certificate of Need laws are associated with 3% higher overall per capita health spending. In an article published in the *Journal of Public Health* in 2019 I analyzed data from a different source, the National Health Expenditure Accounts, and once again found that Certificate of Need laws are associated with 3% higher spending.[17] In a 2016 theoretical article that reviewed the literature on how Certificate of Need laws affect spending, Matthew Mitchell stated the following:
    a. "I review the basic economic theory of a supply restriction like CON, then summarize four decades of empirical research on the effect of CON on healthcare spending.

[15] Bailey, James. 2018. "Does "Excess Supply" Drive Excessive Health Spending? The Case of Certificate-of-Need Laws." *The Journal of Private Enterprise*, 33(4): 91-109.
[16] Bailey, J. & Hamami, T. (2023) Competition and health-care spending: Theory and application to Certificate of Need laws. *Contemporary Economic Policy*, 41(1), 128– 145. Available from: https://doi.org/10.1111/coep.12584
[17] Bailey, J. Can health spending be reined in through supply restraints? An evaluation of certificate-of-need laws. *J Public Health (Berl.)* **27**, 755–760 (2019).

There is no evidence that CON regulations limit healthcare price inflation and little evidence that they reduce healthcare spending. In fact, the balance of evidence suggests that CON laws are associated with higher per-unit costs and higher total healthcare spending."[18]

3. In a more recent 2022 review of the broad literature on Certificate of Need covering 93 peer-reviewed articles, Mitchell found that:
    a. "CON laws were initially intended to rein in healthcare spending, and many people continue to support the regulations out of a belief that they reduce costs. There is little evidence that they do…. Of **40** tests designed to assess the effect of CON on costs, just **two** find that the regulation is associated with reduced costs. **Ten** times as many tests—**21** studies—find that CON is associated with higher spending or lower efficiency. While **17** studies reach mixed, insignificant, or inclusive results."[19]

iii. Certificate of Need Laws Harm Access to Care

1. The core idea of Certificate of Need laws is to make it more difficult for would-be providers to open or expand health care facilities. The process necessarily entails adding extra steps, time, and expenses to the process of opening new health care facilities, and can result in proposed facilities not being allowed to open at

[18] Mitchell, Matthew D., Do Certificate-of-Need Laws Limit Spending? (September 29, 2016). Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2016, Available at SSRN: https://ssrn.com/abstract=2871325 or http://dx.doi.org/10.2139/ssrn.2871325

[19] See page 8 of Mitchell (2022), found at: https://palmettopromise.org/wp-content/uploads/2022/04/2022_Response-to-SC-LAC-report-PRINTED.pdf

all. This process would seem almost by definition to reduce the number of health care facilities available, making it puzzling that advocates ever argued that Certificate of Need would improve access to health care. Their roundabout argument is that while Certificate of Need would lead to fewer new facilities, it would protect older facilities, and that some of these older facilities would be more likely to serve uninsured or low-income patients. This is logically possible, but to find out whether Certificate of Need does this in practice requires empirical evidence, and the evidence suggests that if anything Certificate of Need worsens access to care.

2. Most directly, evidence suggests that Certificate of Need laws making it more difficult to build or expand medical facilities lead to fewer medical facilities. CON is associated with:
    a. 13 percent fewer hospital beds[20]
    b. 26 percent fewer hospitals offering MRI scans and CT scans[21]
    c. 30 percent fewer hospitals per capita[22] [23]
    d. 20 percent fewer psychiatric hospitals per capita[24]

[20] Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf
[21] Ibid.
[22] Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory
[23] An older article finds a 48 percent decrease in hospitals per capita- see Eichmann TL, Santerre RE. Do hospital chief executive officers extract rents from Certificate of Need laws?. Journal of health care finance. 2011;37(4):1-4.
[24] Bailey J, Lewin E. Certificate of Need and Inpatient Psychiatric Services. J Ment Health Policy Econ. 2021 Dec 1;24(4):117-124. PMID: 34907901. https://pubmed.ncbi.nlm.nih.gov/34907901/

e. 14 percent fewer ambulatory surgery centers[25]

f. 49 percent fewer neonatal intensive care beds[26]

g. 42 percent fewer substance abuse treatment centers[27].

3. Having fewer providers around can harm access to care. Certificate of Need is associated with 14 percent longer wait times in the emergency department[28] and greater shortages of intensive care beds during the pandemic[29]. Certificate of Need can make providers less likely to accept insurance[30] like Medicare.[31] In contrast, states that repealed Certificate of Need were found to have shorter travel times for care[32] and smaller racial disparities in care[33].

4. Certificate of Need laws seem to reduce access to care in rural areas specifically. Stratmann and Koopman note:

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[25] Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory

[26] Lorch SA, Maheshwari P, Even-Shoshan O. The impact of certificate of need programs on neonatal intensive care units. Journal of Perinatology. 2012 Jan;32(1):39-44.

[27] Noh S, Brown CH. Factors Associated with the Number of Substance Abuse Nonprofits in the US States: Focusing on Medicaid Expansion, Certificate of Need, and Ownership. Nonprofit Policy Forum 2018 Jun 7 (Vol. 9, No. 2).

[28] Myers MS, Sheehan KM. The Impact of Certificate of Need Laws on Emergency Department Wait Times. Journal of Private Enterprise. 2020 Mar 1;35(1).

[29] Mitchell, Matthew D., Thomas Stratmann, and James Bailey. Raising the Bar: ICU Beds and Certificates of Need. Mercatus Center Policy Brief. https://www.mercatus.org/research/policy-briefs/raising-bar-icu-beds-and-certificates-need

[30] Bailey, J., Lu, T. & Vogt, P. Certificate-of-need laws and substance use treatment. *Subst Abuse Treat Prev Policy* **17**, 38 (2022). https://doi.org/10.1186/s13011-022-00469-z

[31] Bailey J, Lewin E. Certificate of Need and Inpatient Psychiatric Services. J Ment Health Policy Econ. 2021 Dec 1;24(4):117-124. PMID: 34907901. https://pubmed.ncbi.nlm.nih.gov/34907901/

[32] Kolstad JT. Essays on information, competition and quality in health care provider markets [PhD [dissertation]]. Cambridge, MA: Harvard University; 2009.

[33] Delia D, Cantor JC, Tiedemann A, Huang CS. Effects of regulation and competition on health care disparities: the case of cardiac angiography in New Jersey. J Health Polit Policy Law. 2009;34(1):63–91.

a. "We examine the effect of entry regulation on ambulatory surgical centers and community hospitals and find that there are both more rural hospitals and more rural ambulatory surgical centers per capita in states without a certificate-of-need program regulating the opening of an ambulatory surgical center. This finding indicates that certificate-of-need laws may not be protecting access to rural health care, but are instead correlated with decreases in rural access."

5. In Mitchell's 2022 review of the literature on Certificate of Need, he found that:
    a. "Among **45** tests, a large majority—**73** percent—find that CON is associated with diminished access to care. **Ten** studies—**22** percent— find mixed or inconclusive results. And **two** studies associate CON with greater access to care."[34]

iv. Certificate of Need Laws Do Not Improve Quality

1. Though not part of the initial argument for Certificate of Need laws, more recent advocates have argued that Certificate of Need laws could improve the quality of care. The argument is that when there are fewer providers, each one handles more patients, and this extra experience will make them better at their job.

[34] Page 9 of Mitchell (2022), found at: https://palmettopromise.org/wp-content/uploads/2022/04/2022_Response-to-SC-LAC-report-PRINTED.pdf

2. The empirical evidence for this claim is mixed, but overall Certificate of Need laws do not appear to improve quality. My own work, published in *Health Services Research,* found that states with Certificate of Need have 0.5% *higher* all-cause mortality than states without it, though that the difference was not statistically significant.[35] More recent work found that states that did not relax Certificate of Need requirements during Covid saw higher mortality.[36] One article measured the effect of CON on more specific types of mortality, finding higher mortality rates for patients admitted to the hospital with pneumonia, heart failure, and heart attacks.[37] An article in the *Journal of Health Economics* (the top journal in the field of health economics) found that "CON regulations led to an increase in heart attack deaths, by 6%-10%, three years after the policy was enacted."[38]
3. In Mitchell's 2022 review of the literature on Certificate of Need, he found that:
    a. "**Fourteen** studies find that the regulation is associated with lower quality care, **12** obtain mixed results, and **4**

[35] Bailey J. The effect of certificate of need laws on all-cause mortality. Health services research. 2018 Feb;53(1):49-62. http://onlinelibrary.wiley.com/doi/10.1111/1475-6773.12619/abstract
[36] Roy Choudhury, Agnitra, Sriparna Ghosh, and Alicia Plemmons. 2022. "Certificate of Need Laws and Health Care Use during the COVID-19 Pandemic" *Journal of Risk and Financial Management* 15, no. 2: 76. https://doi.org/10.3390/jrfm15020076
[37] 2.5% to 5% higher depending on specification. Stratmann T, Wille D. Certificate-of-need laws and hospital quality. Mercatus Center working paper https://www.mercatus.org/system/files/mercatus-stratmann-wille-con-hospital-quality-v1.pdf
[38] Chiu, Kevin. The impact of certificate of need laws on heart attack mortality: Evidence from county borders. *Journal of Health Economics,* Volume 79, 2021. https://www.sciencedirect.com/science/article/abs/pii/S016762962100103X

studies find that CON is associated with higher quality care."[39]

v. Summary of Empirical Evidence on Certificate of Need

1. A large majority of the academic literature on Certificate of Need laws finds that they do not advance their stated goals of lowering costs, promoting access, or improving quality. In the Defendants' Motion to Dismiss, they state "No doubt there are dozens of additional studies and volumes of testimony that could be placed on a scale to balance the benefits of CON programs against the costs"[40] However, as an expert on Certificate of Need I do doubt this. The most recent published review of the literature I know of is Mitchell (2022), which identifies a total of 8 tests showing positive effects of Certificate of Need on spending, access, or quality, compared to 68 tests showing negative effects and 39 showing mixed or insignificant effects. It is certainly possible that Mitchell (2022) missed some articles finding positive effects of Certificate of Need, but based on my own systematic review and knowledge of the literature I would be quite surprised to find there are "dozens" of positive studies, or that all the positive studies "could be placed on a scale to balance the benefits of CON programs against the costs."

[39] See page 10 of Mitchell (2022), found at: https://palmettopromise.org/wp-content/uploads/2022/04/2022_Response-to-SC-LAC-report-PRINTED.pdf

[40] Page 14 of motion to dismiss; they go on to cite two examples of peer-reviewed articles that estimate positive effects of Certificate of Need.

4. Evidence on Certificate of Need and Birth Centers

    a. Relevant Empirical Evidence

        i. I can find no peer-reviewed article that has directly estimated how Certificate of Need affects birth centers in particular, or labor and delivery in general. I highlight here the parts of the literature that come closest to Certificate of Need and birth centers in Iowa: three articles that evaluate Iowa's Certificate of Need program, but do not conduct original empirical research and do not focus on birth centers; one empirical article on a moderately related subject, Certificate of Need and Neonatal Intensive Care Units; and one article that touches on the exact subject of Certificate of Need and birth centers but does not conduct original empirical research on the subject.

        ii. Many empirical articles on Certificate of Need include Iowa as part of their datasets covering all states, but as far as I can determine there are just 3 articles that focus specifically on Certificate of Need in Iowa rather than other states. All are law review articles that do not conduct original empirical research. All recommend a repeal of Iowa's Certificate of Need laws. Favero (2021) "addresses how Iowa's CON statute contributes to a poor mental health infrastructure and the increased rate of incarceration of people suffering from mental illness." Heiman (2018) is titled "Shifting Purpose: Why Iowa's Certificate of Need Law Is a Form of Economic Protectionism for Certain Iowa Health Care Providers and Should Be Repealed." Bogart (2019) concludes that "Iowa should join the 14 pioneering states by repealing its own CON law, because its effects are inconsistent with the Iowa CON program's intended goals, and CON laws

are generally not cost-effective; they do not provide sufficient benefits to justify the cost to consumers. Iowa's CON law carries the purpose of 'ensur[ing] that the citizens . . . will receive necessary and adequate institutional health services in an economical manner.' Since these two goals are negatively impacted by Iowa's CON law, the Iowa Legislature should completely repeal the Iowa CON program. Any negative effects of a CON repeal on the health service market in Iowa can be addressed by other, less anti-competitive and administratively burdensome, means."[41]

iii. A 2012 article in the *Journal of Perinatology*[42] found that states without Certificate of Need regulation of Neonatal Intensive Care Units had significantly more units and beds, but no significant differences in overall infant mortality or low birthweights.

iv. In a 2021 law review article, Elizabeth Kukura lays out the many reasons why expectant mothers may prefer to give birth outside of a hospital, and discusses the regulatory environment for birth centers as follows:

1. "although freestanding birth centers (FBCs) represent a comfortable middle ground between hospital and home birth for some pregnant people, lack of licensure in certain states, onerous certificate of need requirements, and other unnecessary regulations mean that many pregnant people do not have access to an FBC. Often owned and operated by midwives, FBCs have a strong record of promoting healthy birth outcomes, including

[41] Pages 237-238. Footnotes omitted. See https://jcl.law.uiowa.edu/sites/jcl.law.uiowa.edu/files/2021-08/Bogart_Final_Web.pdf

[42] Lorch SA, Maheshwari P, Even-Shoshan O. The impact of certificate of need programs on neonatal intensive care units. Journal of Perinatology. 2012 Jan;32(1):39-44.

fewer births by cesarean surgery. There are approximately 384 freestanding birth centers currently operating across the United States. Forty-one states plus the District of Columbia offer some form of licensing for FBCs; of the remaining states, in all but one, birth centers remain unregulated and thus may operate without a license, but this precludes them from being eligible for most insurance coverage, including Medicaid"[43]

2. Kukura continues with regard to Certificate of Need specifically: "In addition, in states that require a Certificate of Need (CON)—a legal document required for the construction of new health care facilities, which involves an expensive and time-consuming process—pregnant people have less access to FBCs than in states without a CON law. The process of securing a CON is particularly burdensome for birth centers, which are small businesses or non-profits that are often run by midwives, because it involves significant upfront financial costs and extensive regulatory hurdles. In addition, hospitals have used the CON process to deter potential competition by derailing birth center proposals, despite the significant differences between what services each type of facility provides, thus injecting politics—and often anti-midwife bias— into a regulatory process that was designed to contain spiraling health care costs."[44]
3. Kukura concludes: "States should also repeal certificate of need requirements and other regulatory requirements that impede the

[43] See pages 312-313 of Kukura (2021); I omit footnotes from the quote
[44] See page 313 of Kukura (2021); I omit footnotes from the quote

creation of new FBCs without benefiting public health and safety or containing health care costs. Research shows that greater access to and integration of midwives into mainstream maternity care is associated with better health outcomes for birthing people and infants. As such, regulatory reform to promote midwifery, including midwife-led birth centers, is an important component of broader efforts to reduce maternal mortality in the United States."

b. How Birth Differs From Some Other Types of Health Care: Less Moral Hazard

i. A common concern in health policy is that spending on health care in the United States is too high.[45] One common argument for why health spending is too high is that it is highly subsidized.[46] Nearly 50% of health care spending in the United States comes from government programs such as Medicare and Medicaid.[47] Most of the rest comes from private insurance that insulates consumers from paying the full price of each medical treatment.[48] As a result, only about 10% of health care spending in the United States is paid for out-of-pocket, that is to say, paid for directly by the consumer in question rather than someone else like a government program or private insurer.[49]

[45] See for instance What Is The US Health Spending Problem? By David M. Cutler in *Health Affairs* 2018 37:3, 493-497

[46] See for instance this testimony by Brian Blase: http://waysandmeans.house.gov/wp-content/uploads/2023/03/Ways-and-Means-testimony-3.21-FINAL-Blase.pdf

[47] According to the Center for Medicare and Medicaid Services' National Health Expenditure Fact Sheet, "The largest shares of total health spending were sponsored by the federal government (34 percent)…. state and local governments accounted for 15 percent." See https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet

[48] Ibid.

[49] Ibid.

ii. Because consumers only directly pay for about 10% of the price of health care services, they tend to consume more than they would if they directly paid the full price as they would in a more typical market[50]. The fact that consumers use more of a good when insurance covers some of its cost is known as "moral hazard".[51] This can lead to excess consumption of the covered good and excess spending,[52] and many high-quality empirical studies find this to be the case in health care[53]. Government subsidies can similarly lead to overconsumption and overspending.[54]

iii. Certificate of Need laws were mostly passed in the first place following the introduction of Medicare and Medicaid in 1965.[55] State governments saw surging health care spending and began adopting Certificate of Need laws with the goal of slowing it. The National Health Planning Act of 1974 required states to implement Certificate of Need programs and threatened to withhold Medicare funds from states that did not implement them.[56] Following a Medicare reform in the early 1980's the

[50] See for instance Brook, Robert H., Emmett B. Keeler, Kathleen N. Lohr, Joseph P. Newhouse, John E. Ware, William H. Rogers, Allyson Ross Davies, Cathy D. Sherbourne, George A. Goldberg, Patricia Camp, Caren Kamberg, Arleen Leibowitz, Joan Keesey, and David Reboussin, The Health Insurance Experiment: A Classic RAND Study Speaks to the Current Health Care Reform Debate. Santa Monica, CA: RAND Corporation, 2006. https://www.rand.org/pubs/research_briefs/RB9174.html.

[51] Arrow, Kenneth J. "Uncertainty and the welfare economics of medical care." In *Uncertainty in economics*, pp. 345-375. Academic Press, 1978. https://assets.aeaweb.org/asset-server/files/9442.pdf

[52] Pauly, Mark V. "The Economics of Moral Hazard: Comment." *The American Economic Review* 58, no. 3 (1968): 531–37. http://www.jstor.org/stable/1813785.

[53] Ringel, Jeanne S., Susan D. Hosek, Ben A. Vollaard, and Sergej Mahnovski, The Elasticity of Demand for Health Care: A Review of the Literature and Its Application to the Military Health System. Santa Monica, CA: RAND Corporation, 2002. https://www.rand.org/pubs/monograph_reports/MR1355.html.

[54] See almost any introductory microeconomics textbook; for instance chapter 6 of Michael Parkin's "Microeconomics".

[55] Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). https://doi.org/10.1186/s12913-020-05563-1

[56] Ibid.

federal government no longer required states to implement Certificate of Need, and in fact began arguing that states should repeal Certificate of Need requirements as anticompetitive[57]. However, it is clear that the initial Federal push for Certificate of Need laws was driven by a concern that government insurance programs were leading to overspending.[58]

iv. While the concern about growing health care spending was valid and motivated the passage of Certificate of Need laws, it does not necessarily follow that Certificate of Need laws were a good solution. As we have seen above, Certificate of Need laws appear to increase spending rather than decrease it.[59] [60] [61] Further, even if Certificate of Need laws did reduce spending, they would likely do so in ways that harmed consumers and reduced overall welfare in the targeted markets.[62] [63]

v. Concerns about moral hazard seem especially misplaced in the case of childbirth. The concern with moral hazard is that patients will choose to get care they don't especially need and don't value highly simply because

[57] Ibid., see also any of the joint statements of the Federal Trade Commission and US Department of Justice arguing against Certificate of Need laws, for instance https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj-sclaw.pdf

[58] See *National Health Planning and Resource Development Act of 1974* (P.L. 93–641)

[59] Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). https://doi.org/10.1186/s12913-020-05563-1

[60] Mitchell, Matthew D., Do Certificate-of-Need Laws Limit Spending? (September 29, 2016). Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2016, Available at SSRN: https://ssrn.com/abstract=2871325 or http://dx.doi.org/10.2139/ssrn.2871325

[61] Bailey, J. Can health spending be reined in through supply restraints? An evaluation of certificate-of-need laws. *J Public Health (Berl.)* **27**, 755–760 (2019). https://doi.org/10.1007/s10389-018-0998-1

[62] Bailey, James / 2018. "Does "Excess Supply" Drive Excessive Health Spending? The Case of Certificate-of-Need Laws." *The Journal of Private Enterprise*, 33(4): 91-109.

[63] Bailey, J. & Hamami, T. (2023) Competition and health-care spending: Theory and application to Certificate of Need laws. *Contemporary Economic Policy*, 41(1), 128– 145. Available from: https://doi.org/10.1111/coep.12584

insurance covers its cost. For instance, a patient might get a scan or test that is not medically recommended[64] out of curiosity. One argument for Certificate of Need (as well as insurance co-pays) is to prevent patients from using un-necessary or marginally necessary care. In many parts of health care this overuse of care is at least a real problem (though the empirical evidence I discuss above suggests that Certificate of Need laws do not generally solve it). But it seems unlikely that there is a real problem of patients seeking out birth centers (or other medical assistance for childbirth) unnecessarily simply because they have insurance; medical assistance for childbirth is generally recommended and widely used.[65] I don't believe that Iowa intends to use Certificate of Need laws to push patients to do unassisted home births as a way of saving money, so concern over moral hazard is not relevant here. This is furthered evidenced by the fact that Iowa does not require a Certificate of Need for midwives to attend home births, but only to operate a birth center.

5. Summary and Conclusions

After considering a variety of potential rationales, I can find no valid economic argument for a state to require a Certificate of Need for birth centers. This type of entry barrier rarely improves market functioning, and birth centers do not have any of the characteristics of a type of market

[64] E.g. whole-body MRI without any medical indication: https://www.aafp.org/pubs/afp/collections/choosing-wisely/250.html

[65] The American Academy of Family Physicians states that "Unassisted childbirth should be strongly discouraged" and notes that "The World Health Organization advocates for the presence of a maternal and newborn health professional at all deliveries". They note that over 98% of US births occur in a hospital, and that most births planned to take place outside of a hospital are assisted by midwives, implying that well under 1% of US births are intentionally unassisted. See https://www.aafp.org/pubs/afp/issues/2021/0601/p672.html#afp20210601p672-b49

that could benefit from entry barriers. Instead in birth centers (as in most markets) entry barriers harm would-be entrants, consumers, and overall economic efficiency.

Turning from economic theory to empirical evidence, I can find no study that uses data to assess how Certificate of Need regulation has affected the market for birth centers, so there is no perfectly direct peer-review empirical evidence to support (or oppose) the law. Lacking such evidence, I turn to studies of similar barriers to entry in other parts of health care. Considering Certificate of Need laws in other types of health care, the evidence shows that such laws have either failed to achieve their stated goals or actually harmed their goals, while also harming overall economic efficiency.

6. Bibliography

a. Arrow, Kenneth J. "Uncertainty and the welfare economics of medical care." In *Uncertainty in economics*, pp. 345-375. Academic Press, 1978. https://assets.aeaweb.org/asset-server/files/9442.pdf
b. Bailey J. The effect of certificate of need laws on all-cause mortality. Health services research. 2018 Feb;53(1):49-62. http://onlinelibrary.wiley.com/doi/10.1111/1475-6773.12619/abstract
c. Bailey, James. 2018. "Does "Excess Supply" Drive Excessive Health Spending? The Case of Certificate-of-Need Laws." *The Journal of Private Enterprise*, 33(4): 91-109.
d. Bailey, J. Can health spending be reined in through supply restraints? An evaluation of certificate-of-need laws. *J Public Health (Berl.)* **27**, 755–760 (2019).
e. Bailey, J. & Hamami, T. (2023) Competition and health-care spending: Theory and application to Certificate of Need laws. *Contemporary Economic Policy*, 41(1), 128– 145. Available from: https://doi.org/10.1111/coep.12584
f. Bailey J, Lewin E. Certificate of Need and Inpatient Psychiatric Services. J Ment Health Policy Econ. 2021 Dec 1;24(4):117-124. PMID: 34907901. https://pubmed.ncbi.nlm.nih.gov/34907901/
g. Bailey, J., Lu, T. & Vogt, P. Certificate-of-need laws and substance use treatment. *Subst Abuse Treat Prev Policy* **17**, 38 (2022). https://doi.org/10.1186/s13011-022-00469-z
h. Boden, Anastasia. The 'competitor's veto' is killing entrepreneurship — but that may end this year. The Hill, 2019 https://thehill.com/opinion/judiciary/437082-the-competitors-veto-is-killing-entrepreneurship-but-that-may-end-this-year/

i. Bogart, Grace. "Iowans Need Change: The Case for Repeal of Iowa's Certificate of Need Law." *J. Corp. L.* 45 (2019): 221.
j. Brook, Robert H., Emmett B. Keeler, Kathleen N. Lohr, Joseph P. Newhouse, John E. Ware, William H. Rogers, Allyson Ross Davies, Cathy D. Sherbourne, George A. Goldberg, Patricia Camp, Caren Kamberg, Arleen Leibowitz, Joan Keesey, and David Reboussin, The Health Insurance Experiment: A Classic RAND Study Speaks to the Current Health Care Reform Debate. Santa Monica, CA: RAND Corporation, 2006. https://www.rand.org/pubs/research_briefs/RB9174.html.
k. Cadwalader. *State Attorneys General Jolt Antitrust Enforcement – Cadwalader Expands A.G. Practice.* July 23, 2019 https://www.cadwalader.com/resources/clients-friends-memos/state-attorneys-general-jolt-antitrust-enforcement--cadwalader-expands-ag-practice
l. Centers for Medicare & Medicaid Services. National Health Expenditure Fact Sheet 2021. Accessed 7/12/23 https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet
m. Chiu, Kevin. The impact of certificate of need laws on heart attack mortality: Evidence from county borders. *Journal of Health Economics,* Volume 79, 2021. https://www.sciencedirect.com/science/article/abs/pii/S016762962100103X
n. Choudhury, Agnitra Roy, Sriparna Ghosh, and Alicia Plemmons. 2022. "Certificate of Need Laws and Health Care Use during the COVID-19 Pandemic" *Journal of Risk and Financial Management* 15, no. 2: 76. https://doi.org/10.3390/jrfm15020076
o. Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). https://doi.org/10.1186/s12913-020-05563-1
p. Cutler, David M. What Is The US Health Spending Problem? *Health Affairs* 2018 37:3, 493-497
q. Delia D, Cantor JC, Tiedemann A, Huang CS. Effects of regulation and competition on health care disparities: the case of cardiac angiography in New Jersey. J Health Polit Policy Law. 2009;34(1):63–91.
r. Eichmann TL, Santerre RE. Do hospital chief executive officers extract rents from Certificate of Need laws?. Journal of health care finance. 2011;37(4):1-4.
s. Favero, Jared T. "Certificate for the Needy: How the Iowa CON Statute Harms the Mentally Ill." *Iowa L. Rev.* 107 (2021): 287.
t. Federal Trade Commission and US Department of Justice. Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250. January

11, 2016. https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj-sclaw.pdf

u. Getzen, Thomas E. and Michael S. Kobernick. Health Economics and Financing. 6th Edition, ISBN: 978-1-119-78857-7. 2022.

v. Heiman, Chad A. "Shifting Purpose: Why Iowa's Certificate of Need Law Is a Form of Economic Protectionism for Certain Iowa Health Care Providers and Should Be Repealed." *Iowa L. Rev.* 104 (2018): 385.

w. Kolstad JT. Essays on information, competition and quality in health care provider markets [PhD [dissertation]]. Cambridge, MA: Harvard University; 2009.

x. Kukura, Elizabeth. Seeking Safety While Giving Birth During the Pandemic. St. Louis University Journal of Health Law & Policy (2021), Available at SSRN: https://ssrn.com/abstract=3934645

y. Lang G, Farnell EA 4th, Quinlan JD. Out-of-Hospital Birth. Am Fam Physician. 2021 Jun 1;103(11): 672-679. https://www.aafp.org/pubs/afp/issues/2021/0601/p672.html

z. Lorch SA, Maheshwari P, Even-Shoshan O. The impact of certificate of need programs on neonatal intensive care units. Journal of Perinatology. 2012 Jan;32(1):39-44.

aa. Mitchell, Matthew D., Do Certificate-of-Need Laws Limit Spending? (September 29, 2016). Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2016, Available at SSRN: https://ssrn.com/abstract=2871325 or http://dx.doi.org/10.2139/ssrn.2871325

bb. Mitchell, Matthew D., and Christopher Koopman. 40 Years of Certificate of Need Laws Across America. https://www.mercatus.org/research/data-visualizations/40-years-certificate-need-laws-across-america

cc. Mitchell, Matthew D., Thomas Stratmann, and James Bailey. Raising the Bar: ICU Beds and Certificates of Need. Mercatus Center Policy Brief. https://www.mercatus.org/research/policy-briefs/raising-bar-icu-beds-and-certificates-need

dd. Myers MS, Sheehan KM. The Impact of Certificate of Need Laws on Emergency Department Wait Times. Journal of Private Enterprise. 2020 Mar 1;35(1).

ee. Noh S, Brown CH. Factors Associated with the Number of Substance Abuse Nonprofits in the US States: Focusing on Medicaid Expansion, Certificate of Need, and Ownership. Nonprofit Policy Forum 2018 Jun 7 (Vol. 9, No. 2).

ff. Parkin, Michael. Microeconomics. 14th edition, Pearson, 2022.

gg. Pauly, Mark V. "The Economics of Moral Hazard: Comment." *The American Economic Review* 58, no. 3 (1968): 531–37. http://www.jstor.org/stable/1813785.
hh. Ringel, Jeanne S., Susan D. Hosek, Ben A. Vollaard, and Sergej Mahnovski, The Elasticity of Demand for Health Care: A Review of the Literature and Its Application to the Military Health System. Santa Monica, CA: RAND Corporation, 2002. https://www.rand.org/pubs/monograph_reports/MR1355.html.
ii. Sandefur, Christina. Competitor's Veto: State Certificate of Need Laws Violate State Prohibitions on Monopolies. Released by the Regulatory Transparency Project of the Federalist Society, February 26, 2020. https://rtp.fedsoc.org/paper/competitors-veto-state-certificate-of-need-laws-violate-state-prohibitions-on-monopolies/
jj. Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory
kk. Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf
ll. Stratmann T, Wille D. Certificate-of-need laws and hospital quality. Mercatus Center working paper https://www.mercatus.org/system/files/mercatus-stratmann-wille-con-hospital-quality-v1.pdf

7. Appendix: Curriculum Vitae

James Bailey

Curriculum Vitae updated January 2024

Contact Information

1 Cunningham Sq
Accinno Hall 208D
Providence, RI 02918

James.Bailey@providence.edu
401-865-1642
http://www.james-bailey.net

Employment

Associate Professor of Economics, Providence College (2022-)
Assistant Professor of Economics, Providence College (2017-2022)
Assistant Professor of Economics, Creighton University (2014-2017)
Visiting Instructor of Economics, University of West Florida (2014)

Affiliations

Visiting Scholar, Consumer Finance Institute at Federal Reserve Bank of Philadelphia (2016-)
Senior Affiliated Scholar, Mercatus Center at George Mason University (2019-)
Contributing Scholar, Center for Growth and Opportunity at Utah State University (2021-)
Senior Research Affiliate, Knee Center at West Virginia University (2023-)

Education

Temple University, Philadelphia PA

PhD in Economics (2014)
MA in Economics (2011)

University of Tulsa, Tulsa OK
BS Economics *cum laude* (2009)

Research Interests

Primary: Health Economics, Labor Economics
Secondary: Entrepreneurship, Regulation

Publications

Comparing Hospital Costs & Length of Stay for Cancer Patients in New York State Comprehensive Cancer Centers vs. Non-Designated Academic Centers & Community Hospitals (with Ryan Fodero) *Health Services Research* 2023

College Major's Effect on Marriage and Children (with Hannah Farrell) *Springer Nature Social Sciences* 2023

Hospital Concentration and Healthcare Spending: Theory and Application to Certificate of Need Laws (with Tom Hamami) *Contemporary Economic Policy* 2023

State Health Insurance Benefit Mandates and Health Care Affordability *Journal of Risk and Financial Management* 2022

Certificate of Need Laws and Substance Use Treatment (with Thanh Lu and Patrick Vogt) *Substance Abuse Treatment, Prevention, and Policy* 2022

The Evolution of Job Lock in the U.S.: Evidence from the Affordable Care Act (with Gregory Colman and Dhaval Dave) *Journal of Risk and Financial Management* 2022

Certificate of Need and Psychiatric Services (with Eleanor Lewin), *Journal of Mental Health Policy and Economics* 2021

Broadband Speeds in Fibered Markets: An Empirical Analysis (with Michael Kotrous) *Journal of Information Policy* 2021

Continuous Job Lock: Employer Health Insurance Contributions and Job Tenure (with Michael Mathes) *Applied Economics Letters* 2021

Does premarital cohabitation increase the likelihood of future marital dissolution? (with Sarah Kerrigan) *SN Social Sciences* 2021

An Introduction to the Effect of Regulation on Employment and Wages, in *Regulation and Economic Opportunity: Blueprints for Reform*, Adam Hoffer and Todd Nesbit eds. 2021

"Larger Polities are More Regulated" (with Patrick McLaughlin and James Broughel) *Journal of Public Finance and Public Choice* 2021

"Certificate of Need Laws: A Cost-Effectiveness Analysis", (with Christopher Conover) *BMC Health Services Research* 2020

"Regulatory Review Time and Pharmaceutical R&D", (with Anna Chorniy, Abdulkadir Civan, and Michael Maloney) *Health Economics*, 2020

"Expert Product Reviews and Conflicts of Interest" (with Tom Hamami) *Managerial and Decision Economics* 2020

"Can Health Spending Be Reined In Through Supply Constraints? An Evaluation of Certificate of Need Laws" *Journal of Public Health*, 2019

"The Effect of the Affordable Care Act on Entrepreneurship" (with Dhaval Dave) *Eastern Economic Journal*, 2019

"Regressive effects of regulation on wages" (with Diana Thomas and Joe Anderson) *Public Choice*, 2019

"Does Excess Supply Drive Excessive Health Spending? The Case of Certificate-of-Need Laws" *Journal of Private Enterprise*, 2018

"The value of waivers from the affordable care act" (with Coleman Drake and John Wingender) *Applied Economics Letters*, 2018

"Regulating away competition: the effect of regulation on entrepreneurship and employment" (with Diana Thomas) *Journal of Regulatory Economics*, 2017

"Health Insurance and the Supply of Entrepreneurs: New Evidence from the Affordable Care Act" *Small Business Economics*, 2017

"Certificate of Need Laws and Health Care Prices?" (with Tom Hamami and Daniel McCorry) *Journal of Health Care Finance*, 2017

"The Political Roots of Health Insurance Benefit Mandates" (with Douglas Webber) *Journal of Economic Studies*, 2017

"Certificate of Need Laws and All-Cause Mortality" *Health Services Research*, 2016

"Health Insurance Benefit Mandates and the Firm-Size Distribution" (with Douglas Webber) *Journal of Risk and Insurance*, 2016

"The Effect of State Health Insurance Benefit Mandates on Premiums and Employee Contributions" (with Nathan Blascak), *Applied Economics Letters* 2016

"Did the Affordable Care Act's Dependent Coverage Mandate Increase Premiums?" (with Briggs Depew) *Journal of Health Economics,* 2015

"Employer-Provided Health Insurance and Job Mobility" (with Anna Chorniy) *Contemporary Economic Policy,* 2015

"Who Pays the High Health Costs of Older Workers? Evidence from Prostate Cancer Screening Mandates" *Applied Economics,* 2014

"The Effect of Health Insurance Benefit Mandates on Premiums," *Eastern Economic Journal,*

	2013
	"Who Pays for Obesity? Evidence from Health Insurance Benefit Mandates," *Economics Letters,* 2013
Working Papers	"Missouri's Medicaid Contraction and Consumer Financial Outcomes" (Federal Reserve Bank of Philadelphia working paper 20-42, with Nathan Blascak and Slava Mikhed) *Revise and Resubmit*
Works In Progress	"Health Insurance, Consumption, and Borrowing: Evidence from the Affordable Care Act's Dependent Coverage Mandate" (with Nathan Blascak and Slava Mikhed) "Employer-Provided Health Insurance and Wages: Where is the Compensating Differential?" (with Anna Chorniy) *Revise and Resubmit* Certificate of Need, Health Care Spending, and Health Insurance Premiums Certificate of Need and the Labor Market Certificate of Need and Self Employment
Courses Taught	Health Economics (Undergraduate and MBA) Applied Economic Research Economics Senior Capstone Labor Economics Introduction to the Culture of Collegiate Life History of Economic Theory Microeconomic Principles Macroeconomic Principles
Awards and Fellowships	Emergent Ventures Intellectual Development Grant (as part of EconomistWritingEveryDay.com), 2021 Eckstein Prize, Best Paper in Eastern Economic Journal 2019-2020 Kauffman Dissertation Fellowship, 2013 Humane Studies Fellowship, 2011 - 2014 National Merit Scholarship, University of Tulsa, 2005 - 2009
External Funding	Center for Open Science- Funding to replicate research claims as part of the SCORE project, 2020-2022 Institute for Humane Studies- Hayek Fund Travel Grants 2012, 2013, 2023 Institute for Humane Studies- Course Buyout Grant 2024

Selected Presentations

2024: American Economic Association
2023: American Economic Association, West Virginia University, Certificate of Need Law Research Conference, MPS Bretton Woods, Southern Economic Association
2022: American Economic Association, Public Choice Society, Capitol Leaders Nevada, Southern Economic Association, Sacramento State Fall Ethics Symposium
2021: John Locke Foundation, Eastern Economic Association, Association for Private Enterprise Education, American Society of Health Economists, Southern Economic Association, The Future of Healthcare in Rhode Island
2020: American Economic Association, Oklahoma State ISFE, Truman State University, Kauffman

Entrepreneurship Issue Forum, Southern Economic Association
2019: American Economic Association, Public Choice Society, Southern Economic Association
2018: American Economic Association, Eastern Economic Association, Truman State University, American Society of Health Economists, Southern Economic Association

2017: American Economic Association, Florida House of Representatives (Health Innovation Subcommittee), Providence College, University of the Sciences, Public Choice Society, Rice University, International Health Economics Association, University of Louisville, Kauffman Foundation Entrepreneurship Scholars, Southern Economic Association
2016: Bentley University, Public Choice Society, Association for Private Enterprise Education, American Society of Health Economists, Association for Public Policy Analysis and Management, Southern Economic Association
2015: West Virginia University, Eastern Economic Association, Association for Private Enterprise Education, University of New Orleans, Public Choice Society, Kauffman Midwest Research Workshop, Methodist University, Southern Economic Association
2014: American Economic Association, Creighton University, Wayne State University, Public Choice Society, Society of Labor Economists, American Society of Health Economists, Kauffman Emerging Scholars Conference, Southern Economic Association
2013: Eastern Economic Association, Association for Private Enterprise Education, Western Economic Association, University of Alabama at Birmingham, Samford University, University of Tulsa, International Atlantic Economic Society, Louisiana State University, Southern Economic Association
2012: Southern Economic Association
2011: Northeast Business and Economic Association
2009: American Association for the Advancement of Science, Dallas Fed Economics Scholars Program

Service
Providence College Faculty Working Group, School of Nursing and Health Sciences 2022
Providence College Sponsored Programs and Research Advisory Committee, 2020-
Providence College Economics Hiring Committee, 2018-19 and 2021-22

Professional Experience

Topic Board, Journal of Risk and Financial Management 2021-

Editorial Board, BMC Health Services Research 2021-2023
Dissertation Committee (Outside Reader)- Thanh Lu, PhD (Temple University 2020)
Institute for Humane Studies Adjunct Program Officer 2015-2019
Duke Center for the History of Political Economy Summer Institute 2011-2

Referee: *Applied Economics (12), Contemporary Economic Policy (7), Journal of Public Eco- nomics (4), Journal of Policy Analysis and Management (4) , Health Services Research (3), Southern Economic Journal (3), Journal of Health Economics (2), American Journal of Health Economics (2), Eastern Economic Journal (2), Inquiry (2), Health Economics (2), Economics and Human Biology (2), Social Science and Medicine, Economics Scholars Program, Risk Management and Healthcare Policy, International Journal of Health Economics and Management, Health Affairs, Journal of Economic Studies, Journal of Entrepreneurship and Public Policy, Journal of Human Resources, Business Forum, Feminist Economics, Forum for Health Eco- nomics and Policy, Journal of Adolescent Health, Journal of Business Venturing, Small Business Economics, Oxford University Press, Public Finance Review, International Review of Finance, African Development Review, Journal of*

Business Venturing Insights, Journal of Economics and Management Strategy, Journal of Regional Analysis & Policy, Public Choice, Frontiers in Public Health, Econ Journal Watch, Journal of Labor Research

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN. Defendants.	Case No. 4:23-CV-00067-SMR-HCA

DECLARATION OF GLENN E. ROPER

I, Glenn E. Roper, hereby declare as follows:

1. I am over the age of 18, of sound mind, and otherwise competent to sign this declaration.

2. I am an attorney representing Plaintiffs in the above-captioned case. I am personally familiar with the facts and circumstances of this case referenced herein. I submit this declaration in support of Plaintiffs' motion for summary judgment.

3. Attached hereto as Exhibit 1 is a true and correct copy of Defendants' Responses to Plaintiffs' First Set of Interrogatories.

4. Attached hereto as Exhibit 2 is a true and correct copy of the Iowa Health Facilities Council's ("Council") 2014 decision on Promise Birth Center's ("PBC") application for a Certificate of Need ("CON").

5. Attached hereto as Exhibit 3 is a true and correct copy of the Iowa District Court for Polk County's judicial ruling on PBC's appeal of the Council's decision on its application for a CON.

6. Attached hereto as Exhibit 4 is a true and correct copy of excerpts from the 30(b)(6) deposition of the Council, with Rebecca Swift serving as designated witness.

7. Attached hereto as Exhibit 5 is a true and correct copy of excerpts from the deposition of Rebecca Swift, serving in her personal capacity as a witness.

8. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the deposition of Dr. James Bailey, Plaintiffs' expert witness.

9. Attached hereto as Exhibit 7 is a true and correct copy of excerpts from the deposition of Plaintiff Caitlin Hainley.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 8/2/2024

Glenn E. Roper

DECLARATION OF GLENN ROPER

EXHIBIT 1

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, and EMILY ZAMBRANO-ANDREWS, Plaintiffs, v. IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN, Defendants.	Case No. 4:23-CV-00067-SMR-HCA **DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

Defendants Iowa Health Facilities Council, Harold Miller, Aaron DeJong, Kelly Blackford, and Brenda Perrin (collectively "the Council") hereby submit their response to Plaintiffs' First Set of Interrogatories.

The Council objects to all "instructions" and "definitions" contained within Plaintiffs' discovery requests to the extent they are overly broad and seek to impose definitions or burdens not required by the rules of civil procedure. The Council will respond in accordance with the Federal Rules of Civil Procedure and will give the terms contained in Plaintiffs' requests their commonly understood, ordinary definitions.

BRENNA BIRD
Attorney General of Iowa

/s/ David M. Ranscht
DAVID M. RANSCHT
JENNIFER KLEIN

Assistant Attorneys General
Iowa Department of Justice
1305 East Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Phone: 515-281-7175
Email : David.Ranscht@ag.iowa.gov
Email : Jennifer.Klein@ag.iowa.gov
ATTORNEYS FOR DEFENDANTS

Interrogatories

Interrogatory No. 1:

Identify all individuals consulted in the preparation of answers to these Interrogatories, including indicating the interrogatory or interrogatories for which they were consulted.

ANSWER: The Council objects on the basis of attorney–client privilege and attorney work product. Subject to and without waiving those objections, answers to each interrogatory were prepared with the assistance of counsel. In addition, Rebecca Swift, the CON program manager within the Iowa Department of Inspections, Appeals, and Licensing (DIAL) assisted with answers to interrogatories #4 through #12. As requested in Plaintiffs' Definition No. 9, DIAL's address is 6200 Park Ave., Suite 100, Des Moines, IA 50321. Ms. Swift may be contacted through counsel.

Interrogatory No. 2:

Identify every person who has, or is likely to have, any knowledge or facts that Defendants may use to support their defenses in this matter and describe the subjects and substance of their knowledge or facts.

ANSWER: Rebecca Swift, CON program manager. Ms. Swift has been the program manager for the CON program since December 2015 and thus has substantial experience and knowledge regarding CON applications and Council decisions.

Interrogatory No. 3:

Identify all documents referred to or examined in the preparation of responses to these Interrogatories.

ANSWER: The Council objects on the basis of attorney–client privilege and attorney work product. Subject to and without waiving those objections, see documents provided in Defendants' Initial Disclosures (Bates pages STATE 0001–0062) and in Defendants' Response to Plaintiffs' Request for Production of Documents (Bates pages STATE 0063–0504).

Interrogatory No. 4:

Identify all government interests Defendants contend are advanced by the Certificate of Need requirements for birthing centers.

ANSWER: When enacting the CON requirement in 1977, the Iowa Legislature expressly identified several interests: ensuring new institutional health facilities provide adequate services and coverage statewide, avoiding duplication of relevant services and avoiding service "deserts," and preventing skyrocketing costs for delivering the services. *See* 1977 Iowa Acts ch. 75, preamble.

The governmental interests asserted in the *Birchansky* lawsuit decided by the United States Court of Appeals for the Eighth Circuit in 2020 included:

1. The interests set forth in the preamble to the 1977 legislation establishing the CON framework.

2. Controlling health care costs and preventing duplication.

3. Ensuring access to health care and aiding underserved consumers by ensuring necessary hospital services are available. CON programs assure that new health facilities are not able to cherry-pick only certain types of the most profitable services, and provide only those services in isolation, separate from comprehensive nonprofit hospitals. Nonprofit hospitals need such services to subsidize critical yet unprofitable services like emergency rooms, trauma services, and mental health care—services that rarely are offered by standalone outpatient facilities. In short, maintaining a CON program and framework serves a clear governmental interest in ensuring Iowa hospitals maintain viability.

4. Ensuring quality health care services. A CON program improves quality by discouraging the development of underutilized facilities and ensuring that practitioners who utilize sophisticated medical equipment have ample volume to generate necessary experience and expertise.

5. Respecting administrative resources.

6. Recognizing existing facilities' investments and experience. By allowing existing facilities to develop certain health services up to a statutory amount but preventing new facilities from doing so, the legislature could have been

acknowledging that existing institutional health facilities have already navigated both applicable licensure frameworks *and* the CON law. Existing licensed facilities have thus demonstrated compliance with volumes of federal and state laws ensuring safe physical structures and equipment, competent staff, and patient safety. Relatedly, existing facilities can offer additional services without again incurring licensure or other startup and infrastructure costs that new facilities must incur.

7. Incentivizing existing facilities' investment and capital expenditures.

8. Incentivizing performance of a suite of health care services in hospitals or hospital-affiliated facilities. Doing so both promotes full-service hospital viability and access to all important health care services, and furthers patient safety by ensuring that if any complications arise in providing one specific health care service, other necessary services (such as emergency room backup or any other comprehensive health care) are nearby and available without undue delay.

These eight interests, as particularized in the *Birchansky* matter, also persist today. But of course, the Court is not limited to "the legislature's stated purpose as long as the law could rationally further *some* legitimate government purpose." *Birchansky v. Clabaugh*, 955 F.3d 751, 756 (8th Cir. 2020) (emphasis added). And other legitimate interests supporting the CON requirement include promoting quality services, protecting infrastructural investment, and promoting facility viability and stability. *See id.*

Interrogatory No. 5:

> Identify all factual evidence, including, but not limited to, legislative evidence, scientific studies, interviews, or testimony, that supports Defendants' assertion that the government interests identified in response to Interrogatory No. 4 are actually advanced by the Certificate of Need requirement for birthing centers.

ANSWER: The Council objects to this interrogatory because it is a contention interrogatory seeking an outline of the Council's ultimate position regarding its defenses. As such, the Council is entitled to complete or nearly complete discovery before responding. *See, e.g.*, *Zubrod v. Hoch*, No. C15-2065, 2016 WL 1752770, at *6 (N.D. Iowa May 2, 2016) ("[C]ontention interrogatories can be overly broad and unduly burdensome on their face if they seek 'all facts' supporting a claim or defense, such that the answering party is required to provide a narrative account of its case." (cleaned up)); *Vishay Dale Elecs., Inc. v. Cyntec Co.*, No. 8:07CV191, 2008 WL 4868772, at *5–6 (D. Neb. Nov. 6, 2008); *see also* Fed. R. Civ. P. 33(a)(2). This response may be supplemented after discovery closes.

The Council further objects to this interrogatory because the CON requirement, "like other health and welfare laws," is not subject to a constitutional test that measures whether it "actually advances" a legitimate government interest. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022). Rather, the statute "must be sustained if there is a rational basis on which the legislature *could have thought* that it would serve legitimate state interests." *Id.* (emphasis added); *see also Tiwari v. Friedlander*, 26 F.4th 355, 369 (6th Cir. 2022) ("[T]he question is not whether a law is in fact rational. It's whether a legislator could plausibly think so."). As the Eighth Circuit has explained, courts "apply rational basis review to the CON

regime" set forth in Iowa law. *Birchansky v. Clabaugh*, 955 F.3d 751, 756 (8th Cir. 2020). And under rational basis review, the "relation to a state interest need only be conceivable, and supporting empirical evidence is unnecessary." *Id.*

Nevertheless, the cases, legislative findings, articles, and studies cited in the Motion to Dismiss and related briefing filed in this case support the contention that Iowa's certificate of need statute rationally furthers legitimate governmental interests.

Interrogatory No. 6:

> If Defendants contend that the CON requirement promotes full-service hospital viability, identify all factual evidence that supports that contention.

ANSWER: The Council objects on the same basis as stated in the answer to No. 5.

Interrogatory No. 7:

> If Defendants contend that the CON requirement controls health care costs, identify all factual evidence that supports that contention.

ANSWER: The Council objects on the same basis as stated in the answer to No. 5.

Interrogatory No. 8:

> If Defendants contend that the CON requirement ensures access to health care, identify all factual evidence that supports that contention.

ANSWER: The Council objects on the same basis as stated in the answer to No. 5.

Interrogatory No. 9:

If Defendants contend that the CON requirement ensures quality health care services, identify all factual evidence that supports that contention.

ANSWER: The Council objects on the same basis as stated in the answer to No. 5.

Interrogatory No. 10:

Identify any internal standards, guidance, policy manuals, reports, research, or similar documents that the state relies upon or would rely upon in evaluating CON applications for birthing centers.

ANSWER: See documents provided as Bates pages STATE 0063-0097 in Defendants' Response to Plaintiffs' Request for Production of Documents (Bates pages STATE 0063–0504).

Interrogatory No. 11:

Describe how Defendants determine the scope of facilities or institutions covered by Iowa Code §§ 135 et seq., including how Defendants distinguish between homes or rented facilities which may be lawfully used for home birthing services and facilities which require a CON.

ANSWER: The facilities covered by the CON requirement are those defined as "institutional health facilities" in Iowa Code section 10A.711(13). In the case of birthing centers, the Council considers the phrase "facility or institution" in the Iowa Code only to refer to premises holding itself out as a birthing center and regularly operated as a business offering birthing services rather than premises that happen to be utilized on a one-off, irregular, or individual-patient basis for home birthing services.

Interrogatory No. 12:

Describe how the Council determines or would determine affected persons for purposes of a birthing center CON application.

ANSWER: The Council determines affected persons for purposes of a birthing center CON application by applying the legislative definition of "affected persons" in Iowa Code section 10A.711(1) and the definition of "appropriate geographic service area" in Iowa Administrative Code rule 641—202.1.

DECLARATION OF GLENN ROPER

EXHIBIT 2

IOWA HEALTH FACILITIES COUNCIL'S DECISION ON PROMISE BIRTH CENTER'S APPLICATION

IOWA DEPARTMENT OF PUBLIC HEALTH
STATE HEALTH FACILITIES COUNCIL

IN THE MATTER OF THE APPLICATION OF	)	
	)	
PROMISE BIRTHCENTER	)	**DECISION**
	)	
SIOUX CENTER, IOWA	)	

This matter came before the State Health Facilities Council for hearing on Monday, April 14, 2014.

The application proposes the establishment of a birth center at an estimated cost of $249,485.

Promise Birth Center applied through the Iowa Department of Public Health for a Certificate of Need.

The record includes the application prepared by the project sponsor and written analysis prepared by Iowa Department of Public Health staff and all the testimony and exhibits presented at the hearing. Barb Nervig of the Iowa Department of Public Health summarized the project in relation to review criteria. Doug Fulton of Brick Gentry Law; Nancy Dykstra, Director of Promise Community Health Center; Belinda Lassen, CNM; Cynthia Flynn, CNM; Ted Boesen, Iowa Primary Care Association; Caleb Widman of Lawton; Brittany Hamm and Pam Hulstein were present representing the applicant. The following signed in as representing the applicant, but did not speak: Molly Dekorne, Katie Schuller, Amy Kleinhesselink and Sarah Bradbury. The applicant made a presentation and answered questions.

Affected parties appearing at the hearing in opposition to the proposal were Alissa Smith of Dorsey & Whitney representing Sioux Center Hospital; Dr. Lorianna Anderson, family practice physician; Dr. Jian-zhe Cao, surgeon; Marilyn Vermeer, RN, Sioux Center Health; Kayleen R. Lee, CEO of Sioux Center Health; Marty Guthmiller, Orange City Hospital and Glenn Zevenbergen of Hegg Memorial in Rock Valley.

The Council, after hearing the above-mentioned testimony and after reading the record, voted 4-1 to Deny a Certificate of Need. As a basis for their decision the Council, considering all the criteria set forth pursuant to Iowa Code Section 135.64 (1 and 2) (2013) made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Promise Community Health Center (PCHC) opened in 2008; from 2009-2012 it was recognized as a FQHC look-alike and in June 2012 it received New Access point funding from HRSA. Receiving FQHC designation was the culmination of more than 10 years of community-based efforts to bring a community health center to Sioux county. PCHC is a comprehensive health home that provides primary medical and dental services. Behavioral health services are provided on-site through referral relationships.

2. Promise CHC currently provides prenatal and post-natal care, including home visits, to approximately 70 women per year with two employed Certified Nurse-Midwives (CNMs) and a Nurse-Practitioner with a specialty in Women's Health.

3. The applicant proposes the establishment of a birth center, with two birthing rooms, in Sioux Center. Currently, the only operating birth centers in Iowa are located in rural Corydon, Wayne County and in Des Moines, Polk County. Iowa does not require licensure of birth centers.

4. Promise Birth Center (PBC) will be a nurse-midwifery operated birth center that provides birth services for Promise Community Health Center clients. It will fulfill the request of the clients to have access to midwifery-led birth care, which is currently only available in the home.

5. The applicant states that women who come to the clinic use PCHC as their health home. The facility is for essentially healthy, ambulatory women carrying healthy babies. Promise Community Health Center (PCHC) was started in order to care for the medically underserved of the region without regard to ability to pay.

6. Nearly all of this population is rural and low-income, and a substantial percentage is Hispanic. Culturally, according to the applicant, these women use midwives and women care providers for their maternity needs, and tend to seek out female providers who will respect the natural birth process.

7. In addition, PCHC offers extra services, such as outreach, transportation, interpreting, on-site insurance enrollment, and navigation services to ensure that its clients receive quality health care.

8. At present, low-risk clients (except home birth clients) are transferred to the care of local family physicians when they reach 36 weeks of gestation. The applicant states that although the clients return to PCHC after the birth of their baby, they are disappointed that PCHC is not seeing them through to the end of their pregnancies.

9. Many of the applicant's clients do not wish to have a home birth, live outside the safe transfer zone (about 30 minutes) or have homes that are not suitable for a home birth. The applicant further states that the number of women the midwives can accommodate in a home setting is limited.

10. The applicant states that the women have asked that PCHC provide them with a facility where they can continue their care with their midwives through the whole maternity cycle, including the birth. In particular, the Latino Coalition and the Center for Assistance, Service and Advocacy (CASA) want PCHC to add a freestanding birth center.

11. The following statistics are listed by place of residence of the mother.

Counties within the service area	*2010 Live Births*	*2011 Live Births*	*2012 Live Births*
Sioux	527	497	510
Lyon	174	173	169
Plymouth	265	284	293
O'Brien	176	146	153
Osceola	59	62	80
TOTAL	1,201	1,162	1,205

12. There are six hospitals with labor and delivery services within the geographical area, three of which are in Sioux County. The applicant points out that of the approximately 1,200 births to residents of the five counties, only 750-800 give birth in hospitals located within those five counties.

13. The applicant states that hospital birth services throughout the five-county area are provided by family practice physicians and surgeries (i.e. C-sections) are performed by general surgeons. The closest obstetricians are located in Sioux City (45 miles away) or in Sioux Falls, South Dakota (55 miles away).

14. The applicant states that one CNM provides very limited home birth services in the Sioux City area and Sioux Falls has the closest hospital-based CNMs.

15. The applicant considers their service area to include Sioux, Lyon, Plymouth, O'Brien and Osceola counties. These are the same counties that Promise Community Health Center has been serving for the last five years. There is currently no operational freestanding birth center in this geographic service area as an alternative to hospital or home birth.

16. The applicant states the proposed facility is conveniently located in the heart of downtown Sioux Center, just one block off of Highway 75. It is only one block from EMS-ambulance services and four blocks from a critical access hospital. The health center and the proposed birth center strive to assist clients with transportation needs with a can donation program, which provides a fund for a regional transportation voucher, if needed.

17. The proposed project represents an alternative to hospital and home births. This application is in response to the applicant's clients' request.

18. The applicant has a goal to apply for accreditation by the Commission for the Accreditation of Birth Centers. Promise Birth Center (PBC) also intends to seek the Baby-Friendly designation, as the birth center will follow the ten steps required for accreditation as a Baby Friendly facility. The applicant states there are currently no designated Baby Friendly facilities in the state of Iowa.

19. The applicant projects the following number of births at the birth center:

Counties within the service area	*2014 Births*	*2015 Births*	*2016 Births*
Sioux	21	28	32
Lyon	7	10	11
Plymouth	12	16	18
O'Brien	7	9	10
Osceola	3	3	4
TOTAL	**50**	**66**	**75**

20. There are six hospitals with labor and delivery services that are located within the geographical area. The applicant provided the number of 2013 births at each of the hospitals based on newspaper reports and hospital personnel. The total number of births was 747.

21. The applicant states their fees to be $4,500 for global maternity professional services, $1,500 for newborn care and $2,500 for the mother's facility service fee for a total of $8,500. As a comparison, local charges for vaginal delivery with a one-day (or less) stay and no epidural medications or complications average: $5,000 for the global maternity professional fee for the nearest hospital midwifery practice, $3,612 for the mother's hospital charge, and $1,870 for the baby's hospital charge for a total of $10,482.

22. The applicant anticipates 6% of patient revenue from private pay, 24% from Medicaid, 30% from Wellmark and 24% from other insurance. The remaining 16% would be from Heath Resources and Service Administration (HRSA), providing support for visits by Federally Qualified Health Center (FQHC) clients who are uninsured or who have special needs.

23. The applicant indicates that necessary personnel are already employed by PCHC. The applicant states that the two CNMs currently employed by PCHC have a variety of experiences in all practice settings.

24. The applicant states that a licensed RN will be on the premises at all times when a labor client is in the facility and a CNM will be present at all times when the woman is in active labor and until the mother and newborn are stabilized following delivery at the facility.

25. Promise uses a pool of 5-6 RNs who have extensive labor and delivery, post-partum, and newborn care experience.

26. The applicant does not have a formal transfer agreement with any local hospital.

27. The build out for the birth center includes a total of 2,313 square feet and will include two birth rooms with attached baths; a family room/library/kitchen; a CNM/RN work area/call room; a family bathroom and laundry and storage areas. The costs of the project are all related to the build out.

28. The applicant indicates the source of funds for the proposal will be cash on hand ($39,485), gifts and contributions ($55,000) and borrowing ($155,000). The applicant has done

extensive research and has begun the pre-application process for obtaining funding through the USDA Rural Development's Community Facilities Program.

29. PCHC states they are financially stable with both positive cash flow and increasing net assets. They feel they are well-positioned to service the much-needed expansion of its facility.

30. There were 100 letters of support received for this proposal; several of these are from clients. Medical professionals, including physicians, nurse practitioners and CNMs also wrote in support. The supportive letters assert the birth center would offer a safe, natural alternative to a hospital birth for women who desire to have their birth attended by a CNM in a non-hospital setting.

31. There were 72 letters of opposition received; three of these from state legislators and several from local elected officials and residents who oppose the project primarily because of its potential impact on existing hospitals in the area. The Iowa Hospital Association submitted a letter of opposition citing the negative impact of this proposal on existing hospitals and the ability of those facilities to continue to offer a full range of health services to patients in the community, including charity care and emergency care. IHA also asserts that approval of the project would lead to declining OB patient volumes at the hospitals, which would hamper the hospitals' ability to recruit and retain family practice physicians.

32. Each of the six hospitals that provide labor and delivery services in the area submitted a letter of opposition and three appeared in opposition to the project at hearing. The existing hospitals oppose the project for several reasons, including the fact that ample capacity exists for labor and delivery cases at the existing hospitals and approval of the project would result in the duplication of these services. The family physicians practicing in these hospitals offer a family-centered approach to birthing in which there is no continuous fetal monitoring and laboring women are encouraged to labor naturally and without medical intervention unless necessary. The hospitals also provide services such as Spanish-speaking staff and care to low income patients. Additionally, the hospitals assert the approval of the project would result in fewer births in the area hospitals and thus have a negative impact on recruitment and retention of family practice physicians. The loss of family physicians in this area could have wide-ranging negative impacts as these physicians provide emergency room coverage and other health services, in addition to the obstetrical care.

CONCLUSIONS OF LAW

In determining whether to issue a certificate of need, the Council considers the eighteen criteria listed in Iowa Code § 135.64(1)(a)-(r). In addition, the legislature has provided that the Council may grant a certificate of need only if it finds the following four factors exist:

a. Less costly, more efficient or more appropriate alternatives to the proposed institutional health service are not available and the development of such alternatives is not practicable;

b. Any existing facilities providing institutional health services similar to those proposed are being used in an appropriate and efficient manner;

c. In the case of new construction, alternatives including but not limited to modernization or sharing arrangements have been considered and have been implemented to the maximum extent practicable;

d. Patients will experience serious problems in obtaining care of the type which will be furnished by the proposed new institutional health service or changed institutional health service, in the absence of that proposed new service.

1. The Council concludes that less costly, more efficient or more appropriate alternatives to the proposed health service are available. The Council concludes that a more efficient and appropriate alternative to the proposed health service currently exists through utilization of existing hospitals in the area, which have ample capacity for obstetrical patients. Iowa Code Sections 135.64(1) and 135.64(2)a.

2. The Council concludes that existing facilities providing health services similar to those proposed are currently being used in an appropriate and efficient manner but would be negatively impacted by this project. The Council finds that three of the four hospitals in Sioux County offer deliveries with 20 family physicians in the area able to do deliveries. The Council concludes that the proposed birth center would draw cases from those hospitals, adversely affecting the OB volume at those facilities and negatively impacting their ability to recruit family physicians. The Council is persuaded that the approval of this project could have a significant and detrimental long term impact on the community by reducing the numbers of family physicians available to care for all the residents of these communities and the full array of their health care needs. Iowa Code Sections 135.64(1) and 135.64(2)b.

3. The Council concludes that the proposed project involves facility build out costs of $249,485. Iowa Code Sections 135.64(1) and 135.4(2)c.

4. The Council concludes that patients will not experience serious problems in obtaining care of the type which would be furnished by the proposed health service, in the absence of that proposed service. The Council finds that in Sioux County there are three hospitals that provide birthing services. These hospitals are currently serving the patient population proposed to be served by the applicant, including offering services to women regardless of income, offering culturally sensitive services, and offering female providers who respect the natural birthing process. The Council concludes that patients in this community will not experience serious difficulties obtaining birthing services of this nature in absence of the proposed birth center. as these birthing services are readily available in the area. Iowa Code Sections 135.64(1) and 135.64(2)d.

The facts, considered in light of the criteria contained in Iowa Code Section 135.64 (1 and 2) (2013), led the Council to find that a Certificate of Need should be denied.

The decision of the Council may be appealed pursuant to Iowa Code Section 135.70 (2013).

Dated this 27th day of June 2014

William J. Thatcher

William Thatcher, Chairperson
State Health Facilities Council
Iowa Department of Public Health

cc: State Health Facilities Council
Iowa Department of Inspections and Appeals:
Health Facilities Division

DECLARATION OF GLENN ROPER

EXHIBIT 3

JUDICIAL RULING ON PROMISE BIRTH CENTER'S APPEAL

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THE IOWA DISTRICT COURT FOR POLK COUNTY

PROMISE COMMUNITY HEALTH CENTER, Petitioner, vs. **IOWA DEPARTMENT OF PUBLIC HEALTH, STATE HEALTH FACILITIES COUNCIL,** Respondent, **SIOUX CENTER HEALTH; HEGG MEMORIAL HOSPITAL d/b/a HEGG MEMORIAL HEALTH CENTER; and ORANGE CITY MUNICIPAL HOSPITAL d/b/a ORANGE CITY AREA HEALTH SYSTEM,** Intervenors.	**Case No. CVCV048112** **RULING ON PETITIONER'S PETITION FOR JUDICIAL REVIEW**

The Court held oral argument on this Petition for Judicial Review on November 14, 2014. Attorney Douglas Fulton appeared for Petitioner Promise Community Health Center (hereafter "Petitioner"). Assistant Attorney General Heather Adams appeared for Respondent Iowa Department of Public Health, State Health Facilities Council (hereafter "Respondent"). Attorney William J. Miller appeared for Intervenors Sioux Center Health, Hegg Memorial Hospital d/b/a Hegg Memorial Health Center, and Orange City Municipal Hospital d/b/a Orange City Area Health System (hereafter collectively "Intervenors"). The Court has now had an opportunity to review the petition, briefs, certified record, as well as the Court file and enters the following:

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RULING

Procedural Background

The above-captioned matter came on for hearing before Respondent agency on April 14, 2014. On June 27, 2014, Respondent entered the Decision denying Petitioner's request for a Certificate of Need (hereafter "CON"). Petitioner filed its Petition for Judicial Review on July 24, 2014. On appeal, Petitioner argues (1) that Respondent agency acted unreasonably, arbitrarily, or capriciously; misinterpreted statutes; and failed to follow statutory requirements for evaluation of the application by Petitioner for a birth center; and (2) the Respondent agency denied Petitioner a fair and impartial hearing on its application. A hearing on the Petition was held by this Court on November 14, 2014.

Findings of Fact

When Petitioner submitted its application for a CON, Petitioner provided prenatal and post-natal care including home visits, to approximately 70 women per year with two certified nurse-midwives and a nurse-practitioner with a specialty in women's health. (Ex. 3 at 3.[1]) Petitioner in its application requesting a CON proposed the establishment of a birth center, with two birthing rooms, in Sioux Center, Iowa. (Ex. 3 at 5.[2]) The plans for the proposed birth center included nurse-midwifery care throughout the entire maternity cycle, including the birth process, amongst other services. (Ex. 3 at 11.[3]).

The counties which are within Petitioner's service area (hereafter "Area") are Sioux, Lyon, Plymouth O'Brien and Osceola. (Ex. 3 at 7.[4]) There are six hospitals with labor and

[1] The parties' record is consecutively paginated, and the parties cited to this pagination. The Court's record does not have this pagination. The parties have provided to the Court the consecutive paginated record. Therefore, the Court will cite to the pagination specific to each exhibit in text and cite to the pagination of the full trial record in footnotes. Tr. at 8.
[2] Tr. at 10.
[3] Tr. at 16.
[4] Tr. at 12.

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delivery services within the Area (hereafter "the Hospitals"). (Ex. 3 at 8.[5]) There is currently no operational freestanding birth center in the Area. (Ex. 3 at 8.[6])

Legal Standards

Chapter 17A provides "the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19. Since a CON hearing is consider an agency action, the hearing is reviewed under this chapter. *Greenwood Manor v. Iowa Dept. of Pub. Health, State Health Facilities Council*, 641 N.W.2d 823, 831 (Iowa 2002).

Petitioner challenges Respondent's denial of a CON as unreasonable, arbitrary, or capricious. Iowa Code § 17A.19(10)(n). The Supreme Court has defined the term "unreasonable" as "action in the face of evidence as to which there is no room for difference of opinion among reasonable minds, or not based on substantial evidence." *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994). The Court has construed the term "arbitrary" and "capricious" in the context of a CON review to mean that the decision was made "without regard to the law or facts." *Greenwood Manor*, 641 N.W.2d at 831 (quoting *Bernau v. Iowa Dept. of Transp.*, 580 N.W.2d 757, 764 (Iowa 1998). "[P]aragraphs 17A.19(10)(h)-(m) provide specific examples of agency action that any reviewing court should overturn as unreasonable, arbitrary, capricious, or an abuse of discretion." *Zieckler v. Ampride*, 743 N.W.2d 530, 532-533 (Iowa 2007) (internal quotations omitted.)

Petitioner also challenges Respondent's interpretation of statutes. The amount of deference given to an agency's interpretation of law depends on whether the power to interpret the law is vested in the agency's authority. If the ability to interpret a law is clearly vested by a

[5]Tr. at 13.
[6]Tr. at 13.

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provision of law in the discretion of an agency, the court "shall reverse, modify, or grant other appropriate relief from agency action...if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is...[b]ased upon an irrational, illogical or wholly unjustifiable interpretation." Iowa Code § 17A.19(10)(l) Conversely, if the power to interpret a particular law is not clearly vested by a provision of law in the discretion of the agency, the Court may reverse modify or grant other appropriate relief from agency action if the interpretation is erroneous. Iowa Code § 17A.19(10)(c).

Analysis

I. Whether Respondent Acted Unreasonably, Capriciously, or Arbitrarily; Misinterpreted Statutes; or Failed to Follow Statutory Requirements for Evaluation of the Application by Promise Community Health Center for a Birth Center

Iowa law requires new institutional health services to receive a CON from Respondent before offering services. Iowa Code § 135.63(1). Institutional health services "means any health service furnished in or through institutional health facilities." Iowa Code § 135.61(15). A birth center is an institutional health facility. Iowa Code 135.61(14)(f). A birthing center means "a facility or institution, which is not an ambulatory surgical center or a hospital or in a hospital, in which births are planned to occur following a normal, uncomplicated, low-risk pregnancy." Iowa Code § 135.61(2). Iowa Code section 135.64(1) provides eighteen (18) criteria Respondent shall consider in reviewing a CON application.

In addition to considering these factors, Iowa Code section 135.64(2) states that Respondent must make four findings in writing before issuing a CON for a new institutional health services. *Greenwood Manor*, 641 N.W.2d at 833. These four factors are:

> a. Less costly, more efficient, or more appropriate alternatives to the proposed institutional health service are not available and the development of such alternatives is not practicable;

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> b. Any existing facilities providing institutional health services similar to those proposed are being used in an appropriate and efficient manner;
> c. In the case of new construction, alternatives including but not limited to modernization or sharing arrangements have been considered and have been implemented to the maximum extent practicable;
> d. Patients will experience serious problems in obtaining care of the type which will be furnished by the proposed new institutional health service or changed institutional health service, in the absence of that proposed new service.

Iowa Code § 135.64(2)(a)-(d).

Respondent made four separate conclusions of law in the Decision by applying the factors in Iowa Code section 135.64(1)-(2) to the facts. Petitioner challenges these findings by contending that they are unreasonable, arbitrary, or capricious or a result of a misinterpretation of law. From these conclusions, Respondent found it proper to deny Petitioner's request for a CON. Petitioner challenges this ultimate denial by contending that Respondent did not follow the statutory procedure set out in Iowa Code section 135.64 in making this denial. The Court will address these challenges by analyzing the first, second, and fourth conclusions to determine whether the conclusions were unreasonable, arbitrary, or capricious or based on a misinterpretation of law. The third finding is not relevant to this judicial review and will not be addressed under these standards. After this review, the Court will determine whether Respondent followed all the required procedures outlined in Iowa Code section 135.64 in making its ultimate decision to deny the request for a CON.

This review is complicated by Respondent's failure to cite the specific paragraphs of Iowa Code section 135.64(1) that Respondent applied to arrive at the conclusions of law. However, the Court is able to work backwards to determine the paragraphs applied and review the conclusions of law under the proper standards of review. This backwards analysis is unnecessary for the application of the factors in Iowa Code section 135.64(2) as Respondent cited to the specific paragraphs applied.

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Respondent's first conclusion was:

> The Council concludes that less costly, more efficient or more appropriate alternatives to the proposed health services are available. The Council concludes that a more efficient and appropriate alternative to the proposed health service currently exists through utilization of existing hospitals in the area, which have ample capacity for obstetrical patients.

Working backwards, it is apparent to the Court that Respondent was applying the factor outlined in paragraph (j) of Iowa Code section 135.64(1) to the facts to come to this conclusion. Paragraph (j) states:

> The appropriate and nondiscriminatory utilization of existing and available health care providers. Where both allopathic and osteopathic institutional health services exist, each application shall be considered in light of the availability and utilization of both allopathic and osteopathic facilities and services in order to protect the freedom of choice of consumers and health care providers.

Respondent also said it applied Iowa Code section 135.64(2)(a) in coming to this conclusion.

Petitioner first makes a legal interpretation argument by contending that Respondent does not have legal authority to find that two different institutional health services are the same. The Court is confused by this argument as the closet Respondent came to stating that the services were the same was stating that the Hospitals' services and the proposed birthing center's planned services were alternatives or similar. Therefore, the Court will construe this argument as an argument that Respondent, without legal authority, made a finding that the birthing services provided by the Hospitals and the proposed birthing center's services were similar or alternatives to each other.

In this conclusion, Respondent found alternatives to the proposed health services were available. The Court finds that Iowa Code section 135.64(2)(b) gives Respondent authority to determine whether the Hospitals' services were alternatives to the proposed birthing center's services. The Court realizes that hospitals and birthing centers are statutorily two distinct

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institutional health facilities as set out in Iowa Code section 135.61; however, this does not preclude a finding that different types of institutional health facilities offer alternative institutional health services under Iowa Code section 135.64. Therefore, even if the Court assumes the less deferential standard set out in Iowa Code section 17A.19(10)(c) is the appropriate standard to review Respondent's legal interpretation of the interaction between sections 61 and 64 of Iowa Code chapter 135, the Court upholds this finding.

Petitioner also distinguishes the services factually by contending the facts do not lend themselves to a legal conclusion that the services are alternatives. This challenge is a challenge to Respondent's application of law to facts. There is evidence in the record that shows that the services are alternatives, including an exhibit submitted with Petitioner's application for a CON. This exhibited stated: "Birth centers have demonstrated that they are a viable alternative...to costly hospital acute care for more than 35 years." (Ex. 3B at 2.[7]) Therefore, the Court finds that it was not unreasonable, arbitrary, or capricious to find this conclusion after Respondent applied Iowa Code section 165.43(1)-(2) to the facts.

Petitioner further argues that Respondent failed to realize that the cost of a birth in the proposed birth center is estimated to be approximately 20% less than the cost of a delivery at one of the Hospitals. The Court finds that this evidence does not disrupt the conclusion. Respondent did not specifically make the finding that the Hospitals are more or less expensive. Rather, Respondent found that: "less costly, more efficient *or* more appropriate alternatives to the proposed health service are available." (emphasis added.) In other words, Respondent found the Hospitals had one or more of these three qualities. The next sentence in Respondent's conclusion states, "[t]he Council concludes that a more efficient and appropriate alternative to the proposed

[7] Tr. at 35.

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health service currently exists," shows that Respondent found more efficient and appropriate alternatives existed.

In Petitioner's Brief In Support Of Its Appeal Of Agency Action, Petitioner makes an argument that does not specifically address this conclusion but is appropriate to discuss with this conclusion because it states that the birthing services at the Hospitals are more appropriate than the proposed birthing center's services and the argument involves the safety of the proposed birthing center's services. The argument is premised on comments Respondent agency members made before voting, which Petitioner argues made it clear that Respondent would not entertain an application for a birth center because they felt that births outside of a hospital were not safe. Petitioner said this belief was against the legislative intent of Iowa Code section 135.61 as the inclusion of a birth center in the definition of an institutional health facility shows that the Iowa legislature thinks birth centers are safe and appropriate and the definition of a birth center shows that the Iowa legislature believes births outside of hospitals are safe and appropriate.

The Court finds that Petitioner misinterpreted Respondent's comments at the hearing. The comments prior to the vote denying the application showed that Respondent agency members did not believe the proposed birthing center was safe, not that all birthing centers were not safe. (Ex. 13 at 183.[8]) Additionally, while the Court agrees with Respondent that the inclusion of a birthing center in the definition of institutional health facility and the definition of a birthing center show that the Iowa legislature thought freestanding birthing centers can be safe and appropriate, it does not show that the Iowa legislature thought a freestanding birthing center was always appropriate and safe regardless of the circumstances. The decision regarding whether the proposed birthing center is appropriate is a decision that Respondent within its expertise must make. *Greenwood Manor*, 641 N.W.2d at 839 ("We ordinarily defer to the expertise and

[8] Tr. At 626.

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experience of the agency, particularly in areas where the legislature has delegated considerable discretion to the agency.").

Lastly, Petitioner argues Iowa Code section 135.64(1)(j) promotes the freedom of choice in health care decisions. The Court finds that this language in paragraph (j) is only triggered when both allopathic and osteopathic institutional health services are available. Second, the Court finds that while choice is one consideration, it is not the only consideration

Respondent's second legal conclusion was:

> The Council concludes that existing facilities providing health services similar to those proposed are currently being used in an appropriate and efficient manner but would be negatively impacted by this project. The Council finds that three of the four hospitals in Sioux County offer deliveries with 20 family physicians in the area able to do deliveries. The Council concludes that the proposed birth center would draw cases from those hospitals, adversely affecting the OB volume at those facilities and negatively impacting their ability to recruit family physicians. The Council is persuaded that the approval of this project could have a significant and detrimental long term impact on the community by reducing the numbers of family physicians available to care for all the residents of these communities and the full array of their health care needs.

Working backwards, it is apparent to the Court that Respondent was applying paragraph (g) of Iowa Code section 135.64(1) to the facts to come to this conclusion. Paragraph (g) states the "relationship of the proposed institutional health services to the existing health care system of the area in which those services are proposed to be provided" is a factor that shall be considered in determining whether a CON shall be issued. Respondent also said it applied Iowa Code section 135.64(2)(b) in coming to this conclusion.

Petitioner's arguments against this conclusion are unconvincing. First, Petitioner argues no evidence was submitted that the Hospitals would be negatively affected. The Court disagrees. Dr. LoriAnne Andersen, a family medicine physician in the Sioux Center Medical Clinic and Hospital, testified that the pool of candidates that practice family medicine and chose to enter

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rural medicine is low. (Ex. 13 at 75.[9]) She also testified that the Area's recruiting pool would be further hampered by the birthing center. (Ex. 13 at 77.[10]) Additionally, she testified physicians might leave the Area because of the reduced number of patients. (Ex. 13 at 76.[11])

Second, Petitioner questions the finding that the 75 births that the birthing center planned to deliver each year could have a negative impact on the number of family physicians in the Area. The Court finds that it is not unreasonable, arbitrary, or capricious to find that any reduction in business to the family physicians could hurt the ability to recruit or retain additional physicians, as Kayleen Leen, the CEO of Sioux Center Health, testified that the family physicians were already struggling to have the obstetrics volume needed to maintain their competency. (Ex. 13 at 118.[12]) Therefore, the Court finds that there was evidence before Respondent that this would heighten the difficulty of retaining and recruiting family physicians as family physicians that wanted to provide birthing services would not come to the Area or leave the Area.

Third, Petitioner argues that the finding that the services the proposed birthing center planned to provide were similar to the services the Hospitals provide is incorrect. Petitioner argues that there is no statutory authority to find that the services are the same. Again, this will be construed as an argument that Respondent does not have the legal authority to interpret that two institutional health services are similar. The Court finds this argument unconvincing as Iowa Code section 135.64(1)-(2) clearly gives such authority. Furthermore, the statutory distinction between a hospital and a birthing center, as set out in Iowa Code section 135.61, does not preclude a finding of similarity for the same reason the statutory distinction does not preclude a

[9] Tr. at 518.
[10] Tr. at 520.
[11] Tr. at 519.
[12] Tr. at 561.

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finding that hospital birthing services are alternatives to the proposed birthing center's services. Again, even if the Court assumes the less deferential standard set out in Iowa Code section 17A.19(10)(c) is the appropriate standard to review Respondent's legal interpretation of the interaction between sections 61 and 64 of Iowa Code chapter 135, the Court upholds this finding.

Petitioner's fourth argument involves highlighting all the factual differences the services the Hospitals provide and the services the proposed birthing center planned to offer, specifically that the Hospitals do not have nurse-midwives services or a free standing birth center, to show that the legal conclusion is wrong. This is a challenge to the application of the law to the facts. The Court finds that when the correct interpretations of Iowa Code sections 135.64(1)(g) and (2)(b) are applied to the facts it is not unreasonable, arbitrary, or capricious for Respondent to find the services are similar as both services are baby delivering services. The Court recognizes Petitioner highlighted differences, but Respondent said the services were similar, not identical.

Fifth, Petitioner argues that the proposed birthing center and the Hospitals provide different services, and therefore, will not be competing. In support of this contention Petitioner emphasize that 400 to 500 mothers in the Area seek services outside the Area already. The Court finds this argument unconvincing because even if different services are provided both institutions compete for the same clients/patients, and a birthing center could draw clients away from the Hospitals. Additionally, regardless of the amount of people seeking services outside the Area or the reasons why they are seeking care outside the Area, it is not unreasonable to find that the proposed birthing center would affect the Hospitals as it is not unreasonable to find that some of the clients/patients from the Hospital would utilize the birthing center if it was built. In other words, Petitioner cannot show that only women who do not currently utilize the Hospitals would utilize the birthing center.

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Sixth, Petitioner argues that even if the services were to compete, competition has been cited positively in the past. In *Greenwood Manor*, 641 N.W.2d at 840, the Supreme Court of Iowa said: "When considering the benefits of competition in the context of Coralville Manor's application, the Council was considering how competition would improve the quality and cost of health care to Johnson County's citizens. Thus, the Council properly considered competition in its evaluation of the application." The Court finds this argument unconvincing. Merely because competition improved the quality of health care in one situation, does not mean that the Court must find that competition will improve the quality of care in the case *sub judice*. The Court finds that Respondent gave acceptable rationale for its finding that additional birthing services will decrease the quality of care in Sioux County.

Respondent's fourth finding was:

> The Council concludes that patients will not experience serious problems in obtaining care of the type which would be furnished by the proposed health service, in the absence of that proposed service. The Council finds that in Sioux County there are three hospitals that provide birthing services. These hospitals are currently serving the patient population proposed to be served by the applicant, including offering services to women regardless of income, offering culturally sensitive services, and offering female providers who respect the natural birthing process. The Council concludes that patients in this community will not experience serious difficulties obtaining birthing services of this nature in absence of the proposed birth center as these birthing services are readily available in the area.

Working backwards, it is apparent to the Court that Respondent was applying paragraph (d) of Iowa Code section 135.64(1) to the facts to come to this conclusion. Paragraph (d) states the "distance, convenience, cost of transportation, and accessibility to health services for persons who live outside metropolitan areas" is a factor that shall be considered in determining whether a CON shall be issued. Respondent also said it applied Iowa Code section 135.64(2)(d) in coming to this conclusion.

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Petitioner's arguments against this conclusion mirror the arguments against the other two conclusions as Petitioner makes an interpretation argument that Respondent did not have the authority to find that the Hospitals provide "care of the type" the proposed birthing center planned to provide. Petitioner also challenges that the facts do not support a finding that the Hospitals provide "care of the type" the proposed birthing center planned to provide. This is a challenge to the application of law to fact and will be reviewed under an unreasonable, arbitrary, or capricious standard of review.

The Court will address the legal interpretation argument first. The Iowa Court of Appeals showed that the phrase "type of care" in Iowa Code section 135.64(2)(d) means similar health services. *On With Life, Inc. v. State Health Facilities Council*, 532 N.W.2d 496, 498 (Iowa Ct. App. 1995). As earlier addressed, Respondent has the authority to find that the services are similar.

In support of Petitioner's challenge to the application of law to fact, Petitioner cites to the letters of the mothers who wished to utilize midwives for the birth of their babies but had no services available to them. The Court finds that while the facts in Petitioner's argument may be true, it is not unreasonable, arbitrary, or capricious to find that patients will not experience serious problems in obtaining similar services as the Hospitals provide birthing services.

Furthermore, in this conclusion Respondent gave additional rationale for finding that the services were similar. Respondent stated that the Hospitals and proposed birthing center serve or planned to serve women regardless of income, offer or planned to offer culturally sensitive services, and offer or planned to offer female providers who respect the natural birthing process. Petitioner does not dispute these similarities, and the Court finds that it is additional evidence to support that the services are similar.

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After making these conclusions, Respondent found: "The facts considered in light of the criteria contained in Iowa Code Section [sic] 135.64 (1 and 2) (2013), led the Council to find that a Certificate of Need should be denied." Petitioner challenges this ultimate conclusion. Petitioner argues that Respondent did not consider all 18 factors which must be considered under Iowa Code section 135.64(1). Petitioner also challenges that many of the factors which were not specifically addressed in the ruling favor Petitioner.

The Court finds these arguments unconvincing. Respondent said it considered all the mandatory factors. Also, Iowa Code section 135.64(1) does not give a formula for how the factors are to be considered just that they shall be considered. The Court finds the statute was followed properly as Respondent stated it considered the factors, made conclusions based on these factors, and denied the CON based on these conclusions. The result was not unreasonable, arbitrary, or capricious or the result of a misinterpretation of law.

II. Whether the Agency Denied Petitioner a Fair and Impartial Hearing on its Application

"Iowa has...adopted a presumption of objectivity in decision making among administrative adjudicators." *Lee v. Pocahontas Area Community School Dist. Bd. Of Directors*, No. 05-1150, 2006 WL 2059069, at *3 (Iowa Ct. App. 2006).

Petitioner claims Respondent's chairperson, William Thatcher, was biased because he interrupted Fulton and told Petitioner to stop its presentation. (Ex. 13 at 44[13], 177.[14]) Thatcher interrupting Petitioner's counsel once is hardly evidence of bias to overcome the presumption. Similarly, the conversation where Petitioner claims Thatcher told Petitioner to stop its presentation is not evidence of bias. The conversation occurred between Thatcher, Fulton, and

[13] Tr. at 487.
[14] Tr. at 620.

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Cynthia Flynn, a certified nurse midwife who consulted Promise Birth Center in the CON application process, as follows:

> Chairperson Thatcher: Okay. I think we've heard enough.
> Ms. Flynn: Yeah.
> Mr. Fulton: Let me just summarize.
> Ms. Flynn: Well, we've got to do this one about collaboration.
> Chairperson Thatcher: Ma'am, it's 6 o'clock. We've heard everything we can from you. We're going to make a decision, and we're going to go to the rest of the agenda.
> Mr. Fulton: So she's not allowed to make the point?
> Chairperson Thatcher: We've been listening for quite a while.
> Ms. Flynn: I can't rebut what they said?
> Chairperson Thatcher: Well. Make your point in about three minutes.
> Ms. Flynn: All right
> Mr. Fulton: Less than that.

(Ex. 13 at 177-178.[15]) The Court finds that this is not evidence of bias as it appears that Flynn and Fulton both initially agreed that enough evidence was presented. When Flynn changed her mind, Thatcher agreed to give her three more minutes. Neither Flynn nor Fulton protested this allotment of time, but Fulton appears to have thought it was too generous and suggested "les than that." Additionally, after Flynn utilized this time, Fulton attempted to give a "quick summary" but a speaker for Petitioner, Pam Hulstein, asked to give another statement and gave her statement, all without interruption from Thatcher. (Ex. 13 at 178.[16]) The record shows that Thatcher was willing to hear more evidence than Fulton thought was necessary to give. This also appears to have been over concern for time constraints and not bias against Petitioner.

According to Petitioner, the other council members showed a bias against birth centers as they made comments involving safety. Petitioner does not cite the council members' comments about safety in the course of making the bias argument, but did cite comments and testimony regarding safety earlier in the brief. In these comments, the council members made comments

[15] Tr. at 620-621.
[16] Tr. at 621.

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regarding the planned procedures for emergencies. (Ex. 13 at 165,[17] 172.[18]) These safety concerns are not evidence of improper bias. Rather these comments are evidence that Respondent was performing its job properly and determining the appropriateness of the birthing center.

Conclusion

Based upon the Court's complete review of this appeal, the Court finds that the Respondent properly applied the law and fulfilled its statutory obligation. There are no bases to reverse the Respondent's Decision.

ORDER

IT IS ORDERED that Petitioner's Petition for Judicial Review is **DENIED** and Petitioner's Petition for Judicial Review is **DISMISSED**.

Costs of this administrative appeal are assessed to the Petitioner.

Copies to:

Douglas Fulton
ATTORNEY FOR PETITIONER

Heather Adams
Assistant Attorney General
ATTORNEY FOR RESPONDENT

William J. Miller
ATTORNEY FOR INTERVENORS

[17] Tr. at 608.
[18] Tr. at 615.

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State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV048112	PROMISE COMMUNITY HEALTH CENTER VS IOWA DEPARTMENT

So Ordered

Richard G. Blane II, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2015-01-21 15:08:53 page 17 of 17

DECLARATION OF GLENN ROPER

EXHIBIT 4

TRANSCRIPT EXCERPTS FROM THE DEPOSITION OF DEFENDANT'S 30(B)(6) WITNESS REBECCA SWIFT

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE
AND CAITLIN HAINLEY,

Plaintiffs,

v. Case No.: 4:23-CV-00067-SMR-HCA

IOWA HEALTH FACILITIES COUNCIL,
HAROLD MILLER, AARON DEJONG,
KELLY BLACKFORD, and BRENDA PERRIN,

Defendants.

REMOTE STREAMING DEPOSITION OF

REBECCA SWIFT 30(b)(6)

TAKEN ON

MONDAY, JUNE 3, 2024

10:03 A.M.

6200 PARK AVENUE, SUITE 100

DES MOINES, IOWA 50321

REMOTE APPEARANCES

Appearing on behalf of the Plaintiffs:
WILSON FREEMAN, ESQUIRE
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 419-7111
wfreeman@pacificlegal.org

-and-

GLENN E. ROPER, ESQUIRE
Pacific Legal Foundation
1745 Shea Center Drive, Suite 400
Highlands Ranch, CO 80129
(916) 419-7111
geroper@pacificlegalfoundation.org

REMOTE APPEARANCES CONTINUED

Appearing on behalf of the Defendants:
DAVID M. RANSCHT, ESQUIRE
JENNIFER KLEIN, ESQUIRE
Iowa Attorney General's Office
1305 East Walnut Street, Second Floor
Des Moines, Iowa 50319
(515) 281-7175
david.ranscht@ag.iowa.org
jennifer.klein@ag.iowa.org

ALSO PRESENT:
Tom Hazelhurst, Zoom Technician

EXAMINATION INDEX

EXHIBIT INDEX

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REMOTE STREAMING DEPOSITION OF
REBECCA SWIFT 30(b)(6)
TAKEN ON
MONDAY, JUNE 3, 2024
10:03 A.M.

THE REPORTER: We are on the record at 10:03 a.m. Will Ms. Rebecca Swift please raise your right hand. Do you affirm under penalty of perjury that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

THE DEPONENT: Yes.

THE REPORTER: Thank you.

Will each attorney please state their name and whom they represent.

MR. FREEMAN: My name is Wilson Freeman, attorney for plaintiff, Des Moines Midwife Collective.

MR. ROPER: Glenn Roper, also an attorney for plaintiffs.

MR. RANSCHT: David Ranscht, for the Health Facilities Council and its individual defendant members.

MS. KLEIN: Jenny Klein, also for the defendants.

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THE REPORTER: Thank you. You may proceed.

REBECCA SWIFT, having been first duly affirmed to tell the truth, was examined, and testified as follows:

EXAMINATION

BY MR. FREEMAN:

Q. Good morning, Ms. Swift. My name is Wilson Freeman. I'm an attorney for the plaintiffs. Can you please state your name and address for the record?

A. My personal address or my work address?

Q. Let's get your personal address.

A. Okay. My name is Rebecca Swift. My address is 4116 Plainview Drive, Des Moines, Iowa 50311.

Q. So Ms. Swift, have you been deposed before?

A. Yes.

Q. How many times have you been deposed?

A. Once.

Q. Okay. When was that deposition?

A. I think it was in 2018.

Q. Do you remember -- can you tell us what it was about?

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A. It was Birchansky versus the Health Facilities Council, and it related to the constitutionality of the Certificate of Need Program in the case of an eye surgery center.

Q. Okay. Thank you. So you understand in this case, you're here -- you're providing sworn testimony under oath then?

A. Yes.

Q. You know, if you don't hear or understand one of my questions, you understand you can feel free to ask me to restate or rephrase it?

A. Yes.

Q. You know, your counsel, they might object from time to time. If they do, that's just for the record. You should still answer the question unless, for some reason, they direct you not to. You understand that?

A. Yes.

Q. Now, is there anything, that you're aware of, that would affect your ability to answer my questions truthfully and accurately today?

A. No.

Q. Okay. So first, what is your position?

A. I manage the Certificate of Need Program for the Department of Inspections, Appeals, and

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Licensing.

Q. How long have you held that position?

A. I joined that position, or I took that position in December of 2015.

Q. Can you summarize your employment history before you started in 2015 at your current role?

A. Sure. I was with the Department of Public Health from 2012 to 2015 doing various roles there. Prior to that, I was with the Iowa Office of Drug Control Policy. I was there for 15 years. Prior to that, I worked for a substance abuse prevention organization for a year and a half. And then prior to that, I was with another substance abuse prevention agency for 10 years.

Q. So you -- so ever since that -- so ever since 2015 then, your sole job has been managing the Certificate of Need Program for the State of Iowa for the Department of Health?

A. I also, for a while for the Department of Health, also managed a volunteer healthcare provider program, but that was a very small portion of my position. For the majority, I was with the Certificate of Need Program.

Q. Okay. Can you just quickly summarize your educational history for us?

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A. The governor hadn't appointed enough people to have a quorum which was, at that time, was four out of five.

Q. And now, you do have five people on the council?

A. Correct.

Q. Okay. How do -- tell me about how council members make decisions on applications for Certificate of Need.

A. Well, once we receive an application, those applications are sent to them via email.

Q. Mm-hmm.

A. And they read those. They also are provided all of the other materials that would come in related to an application. So they would read affected party letters, and those could be letters from individuals or organizations that either support or oppose the application. They would read --

One of the things I do is, I read the application and then if I feel like there are -- if there's information missing or that there would be additional information that the council could benefit from, I write staff questions that are provided to the applicant for response. So the

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applicant would have -- or excuse me, not the applicant.

The council would have the opportunity to read those questions and the responses to those questions. The council also receives any presentation materials that the applicant or affected parties would use during their hearing and during testimony. So those are the things that they would be provided to prepare for a meeting.

Q. So when the council receives an application for Certificate of Need, when does the -- what causes the council to have a hearing on that? When is the hearing -- is the hearing -- are these periodic hearings?

A. They're periodic hearings. We typically have hearings in -- during each calendar in either January or February, May, July, and October.

Q. Okay. January or February, May, July, and October, typically. And at those meetings, the council -- does the council decide at the meetings the decisions of the Certificate of Need?

A. Yes, they do.

Q. Okay. So does the -- tell me about the -- let me ask this question. When an incoming Certificate of Need application is received, what

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happens? Who handles them? Does that go to you or --

A. It comes -- yeah. It comes to me.

Q. Mm-hmm.

A. And then I review it, but then I also provide it to the council and anybody who asks for a copy. It's considered public record.

Q. Okay. What's involved in your handling of that application? What do you do, exactly?

A. What do I do?

Q. Mm-hmm.

A. I create a file for that application --

Q. Mm-hmm.

A. -- which would include like a cover sheet just to keep track of who the contact people are, and how much the project was costing, and when they anticipate it being completed, so I create the cover sheet. I send out the affected party letter, which would go to similar facilities or facilities offering similar services, and the county and contiguous counties. I send the application to the council and others that might request, as I said earlier. I read and review the application. I hope I'm answering your question properly.

Q. Oh, you are. You're doing a good job.

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A. Okay.

Q. Thank you.

A. Okay. I read and review the application. I write staff questions or ask for additional information, which are then sent to the applicant.

Q. Mm-hmm.

A. The applicant -- and we have deadlines for the time that everything's due, so the applicant would then have a deadline for when they had to return the responses to the questions.

Q. Mm-hmm.

A. They would receive -- the applicant would receive any affected parties that were submitted, that weren't submitted directly to them. So usually letters of opposition would come to me or letters to support might come to me, and not to them directly. So they receive all of that. Then the applicant has then the opportunity to provide kind of a final written submission and presentation materials, and all of that material would go to the council, as well. So I handle all of that.

Q. Wow. Thank you. Now, is this process different, at all, depending on the health service involved in the application?

A. No. They're all handled the same way.

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Q. So you mentioned that the Certificate of Need Program has been -- or rather your department -- are you the only individual who assists or, rather, are you the only individual who assists the council in their -- you know, in providing these summaries and these materials that you mentioned?
A. Yes. I'm the only staff.
Q. You're the only staff. And do you have anybody who works for you?
A. No.
Q. Okay. All right.
A. No.
Q. And so are there any other departments or organizations in Iowa involved in the Certificate of Need process?
A. Not directly, no.
Q. What about indirectly?
A. Attorneys that work with -- I work with the attorneys that work with the applicant, as well as sometimes the affected parties.
Q. You mentioned earlier that you have an AAG that you work with. Is that a dedicated person?
A. Yes.
Q. Okay. And that person's role is to -- you know, is that person's role to answer legal

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questions regarding the Certificate of Need Program?
A. Yes. I guess, I should've mentioned that. Yes. She answers questions that I have. She sits in on the meetings as legal counsel. She reviews the decisions that I write and the minutes.
Q. Mm-hmm.
A. But she doesn't handle day-to-day contact or the contact with the council on a regular basis.
Q. And what --
A. It's much more limited.
Q. What's her name?
A. Jenny Klein.
Q. Jenny Klein. Okay.
A. Yeah.
Q. Okay.
A. Ms. Klein.
Q. Okay. Do -- apart from the attorneys involved or the person involved in the application itself, are there any outside groups who work with you or the council on the Certificate of Need applications?
A. Not that work with me, no.
Q. So what about in any other capacity?
A. No.
Q. I guess --

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A. Oh, go ahead. I'm sorry.
Q. So I guess, you do receive letters and you may receive advocacy from persons opposed to an application, as well?
A. Persons opposed and persons in support, yes.
Q. As well as persons in support. Okay. And other than that, there's no sort of outside involvement or outside group involvement with a -- on applications or on an application, right?
A. Correct.
Q. Okay. Approximately -- to the best of your knowledge, what's the council's annual budget?
A. The annual budget is approximately $131,000.
Q. Okay.
A. And that covers my salary. A portion goes to the AAG for her support, or to the AAG's office, I should say, for their support. Supplies. There is no budget for the council, itself. They do not receive any payments or per diems or reimbursements.
Q. Okay. Being -- is being a council member a full-time job?
A. No.
Q. It doesn't sound like it. So council

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members receive no compensation, whatsoever, for their role?
A. That's correct.
Q. Why do council members agree to serve on the council?
A. I think that's kind of a loaded question. I don't really know --
Q. Okay.
A. -- other than they might have an interest in serving the public.
Q. Okay. So you mentioned that the council has four periodic meetings a year. The statute mentions a biannual organizational meeting. Are you familiar with that?
A. Yes.
Q. Is that separate from these four annual meetings?
A. No.
Q. So that would be -- which of the four meetings would that be?
A. That would be in the July meeting.
Q. And that's the only meeting that's statutorily required; is that correct?
A. Correct.
Q. And what happens at that meeting?

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A. That would be a meeting, for example, if we needed a vice chair, that the vice chair would be elected. We don't really do a lot of organizational business, but that would be the meeting where a vice chair would be elected, if we needed one. That's probably the primary thing that would happen at that meeting that makes it a little bit different than others.

Q. So let me ask questions about that.

A. Sorry.

Q. I think it was back to the organization of the council. You mentioned vice chair. Was there a chair of the council?

A. Yes.

Q. Who is the current chair?

A. Aaron DeJong is the current chair.

Q. What is -- what is his role?

A. His role is to -- basically, to run the meeting.

Q. Okay. And that's it, he just runs the meetings and gavels them in and gavels them out? Is there anything else he does?

A. He -- aside from the meetings, he would be my first contact if there were a problem or if we needed to schedule a separate meeting, I might get

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in touch with him about dates that he would be available before I'd let the -- before I'd put those dates out to the council for suggested dates for meeting, but he is -- his primary role is to be -- preside over the meetings.

Q. Okay. When you're -- you mentioned if you had a need for a vice chair. I mean when would there be a need for a vice chair?

A. If -- well, we always want to have a vice chair in case the chair person is not available or is sick or something happens that he, or perhaps she, is not available to attend a meeting or in the case that the vice -- that the chair has to recuse him or herself because of personal knowledge of the applicant.

Q. So when you were compiling the materials and the reports for the council, you just email it to them?

A. Yes. Email it to them, yes.

Q. Okay. So -- and you'll just email all of these materials -- I mean do you send it all in one package? Do you send it periodically?

A. I send it periodically, typically, as it's received.

Q. Mm-hmm. Okay. Do you receive questions

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from the council about these materials, from members of the council?

A. Not typically, no. Once in a while, they might ask a question, a clarifying question or if they're having trouble opening the documents, they might ask if they should click on the link, things like that.

Q. Sure. Do members of the council have any additional support, besides you --

A. No.

Q. -- to review the documents?

A. No.

Q. In terms of when they reach -- you know, when they're going through them, so the only person that they could really turn to for questions or, you know, thinking about what their obligations are, would be you, correct?

A. That's correct. And if I'm not able to answer the question, then I would reach out to Jenny --

Q. Mm-hmm.

A. -- Ms. Klein, and we would work on that question together, and then respond to the council.

Q. Okay. So the council, they don't ever hire consultants or attorneys to assist them

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reviewing these applications? It's just you and Jenny?

A. Me and Jenny, for the most part. Yes. There is a section in the code that says we can hire a consultant, but the council wouldn't do that. We would do that as a department.

Q. Okay. Has that ever happened?

A. No.

Q. Okay. Not as --

A. At least not -- right.

Q. Okay. Now, according to the code, the Certificate of Need requirement applies to new institutional health services; is that correct?

A. Correct. Or facilities.

Q. Or facilities. Okay. Now, the code states it doesn't apply to capital expenditure, lease donation, on behalf of an institutional health facility in excess of $1,500,000 within a 12-month period; is that --

A. I'm sorry. We have a lawnmower going by. Can you repeat the question?

Q. Sure thing.

A. It's kind of loud.

Q. No problem. I'm asking about the part of the code that states that new institutional health

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service does not include capital expenditure, lease donation, by or on behalf of an institutional health facility in excess of $1,500,000 in a 12-month period. Are you familiar with that section?

A. Yes, I am.

Q. Okay. So can you explain the rationale as behind setting the threshold of 1.5 million?

A. That was set by the legislature.

Q. Mm-hmm.

A. And they did that a number of years ago, and I don't know what their rationale was for setting it at $1.5 million.

Q. Has the threshold ever been discussed as a subject for legislative --

A. It has, but it has never passed the legislature.

Q. So --

A. Sorry about that. They decided to pick today to mow the lawn.

Q. It's all right. It's all right. As long as you can still hear me. If need be, I can shout into my computer and hopefully make it a little better.

A. Okay.

Q. What were the reasons behind the

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legislative efforts that changed the threshold?

A. I'm not sure I can speak to the intent of the legislature, but I do believe it was to increase the thresholds. I know that they have attempted to do that on several occasions, and it has never passed.

Q. How does the council monitor -- or if not the council -- maybe we'll come back to this in a moment. But how does the State of Iowa monitor and enforce compliance with that threshold? I think that's a bad question. Let me back up. Let me try again.

A. Okay.

Q. How does the council ensure -- let's say, you're a hospital and you want to make a capital expenditure of less than $1.5 million.

A. Mm-hmm.

Q. Are there any reporting requirements, that you're aware of?

A. No.

Q. So how does the council monitor and enforce compliance with the $1.5 million -- not the council, sorry. The State of Iowa itself since --

A. Well, if a hospital for -- I'll use your example of a hospital, if they wanted to build or

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add on or buy equipment that was over $1.5 million, they would be required to get a CON in order to build, add on, or make that purchase. If they didn't, there are sanctions in the code, and those would be enforced by the department.

Q. So if you're a hospital and you're making a capital expenditure of 1.2 million, how does the department attempt to verify that that expenditure is not actually 1.6 million?

A. I don't think that there's any monitoring of those that would come in under 1.5.

Q. So is there any way -- how can the council ensure that facilities don't circumvent the CON requirement by making these small -- first, let's say, by making expenditures around that threshold, how does -- is there any way the council can monitor those expenditures?

A. It would be very hard to do that.

Q. Okay. And what about making -- is there anything to prevent a facility from, say, making a $1.4 million expenditure in March of 2022, a $1.4 million expenditure in March of 2023, and a $1.4 million expenditure in March of 2024, thereby expanding their facilities?

A. There would be no --

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Q. No -- nothing in the Certificate of Need Program?

A. Correct.

Q. Correct. So there'd be nothing that would -- so we're talking about birthing services in this case. If you're a hospital with an obstetrics ward, there's nothing to prevent the hospital from spending $1.4 million to add more birthing services, as long as they do it once every 12 months; is that correct?

A. Correct.

Q. Okay. So let's -- you mentioned a moment ago, facility. How does the council determine, or how does Iowa determine, you know, what is an institutional health facility?

A. Institutional health facilities are actually written into code, and they're defined as -- there are several different types of institutional health facilities, so a nursing home or that type of a healthcare facility, which is typically a nursing home. It could be an intermediate care facility for the intellectually disabled or an intermediate care facility for persons with mental illness, ambulatory surgery centers, hospitals, birthing centers, community

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Q. So does the council or -- does the council have regard out of hospital births as safe?
A. None of the council members that are current, nor any that are listed in this lawsuit, have ever been privy to a birthing center application, so I don't know that they would have an opinion on that.
Q. Okay. But in the abstract, the council has approved birth centers in the past, correct?
A. In the past, yes.
Q. Okay. Is the council aware of any operational freestanding birth centers in the state?
A. I don't think they are. I'm not aware of any, at this point in time.
Q. Under the law, though, in Iowa, is it consistent with your understanding that a woman in Iowa can give birth in many different places, correct?
A. Correct.
Q. A woman can give birth in a hospital, correct?
A. Can you say that one more time a little louder?
Q. I'm sorry. My apologies. My microphone is over here. Can a woman give birth in a hospital in Iowa?
A. Oh, yes.
Q. Right. And a woman can give birth outside a hospital in a variety of locations, correct?
A. Correct. That's my understanding.
Q. No Certificate of Need is required if a woman gives birth in her home, correct?
A. Correct.
Q. That's because the home is -- is that because the home is not a facility under the law?
A. That's how I would define it, yes, that it's not a facility.
Q. Okay. So what would make a home or a location, outside a hospital, a facility, such that it requires a Certificate of Need under Iowa law?
A. If -- I would say, if the birthing center was holding themselves out as a birth center as a business, and if they provided that service where the woman would come to them in a facility, whether that be an office or another type of facility.
Q. So --
A. Oh, go ahead.
Q. No, that's fine. I'll ask. So with respect to a facility in the context of a birth center, it has to hold itself out as a place to give birth; is that right?
A. That's my understanding, yes.
Q. Does there have to be a commercial aspect to that holding itself out?
A. Can you define a little bit more what you mean by, "a commercial aspect"?
Q. Okay. If a woman allowed many of her friends to come give birth in her home and told many of their friends that they could come give birth in their home, would that make her home into a birthing center?
A. Not necessarily, no.
Q. Okay. What about a hotel, is a Certificate of Need required for a midwife to book a hotel room for a woman to give birth there?
A. No.
Q. And again, that's because a hotel doesn't hold itself out as a birth center?
A. Correct.
Q. Okay. Now, what about an Airbnb designated for birthing services, like a room in a location that designates itself as being for birthing services, would that be a facility needing a Certificate of Need?
A. I'd have to do more research on that.
Q. Well, what factors would you consider to determine whether that was a facility?
A. We would consider if they were -- I would say, if they're advertising themselves as a birth center and taking in clients that would come in to them specifically for the purpose of giving birth, that they would have the equipment and other materials that they needed to provide that birth -- those births in that facility, that that would be considered a birthing center.
Q. You mentioned a moment ago, you might want to do some research --
A. Mm-hmm.
Q. -- to answer those questions. What would you research?
A. I would probably -- I would -- first of all, I would get with Ms. Klein, and we would talk about it, and then probably look for articles that talked about whether or not a place where women came that was not, for example, an Airbnb or a hotel, whether or not those were considered birth centers, or if it was just a location where women gave birth.
Q. What do you mean by articles? I'm sorry.
A. If there were any news articles or research articles. Research articles, more than

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anything.
Q. So you mentioned advertising services, correct?
A. Yes.
Q. That they, essentially, would advertise their services.
A. Yes.
Q. Okay. And you mentioned the presence of materials and equipment, correct?
A. Correct.
Q. Can you think of anything else that would be a factor that you would have to consider to determine whether a location was a facility?
A. They would have to have -- there would be a permanent location, a permanent location with an address --
Q. Mm-hmm.
A. -- would be one factor that we would take into consideration. Certainly, the cost of that facility would be another consideration. The -- and I had mentioned the equipment and other materials necessary to provide a birth.
Q. Mm-hmm.
A. We would look at whether or not they had agreements with hospitals in cases of emergencies

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rather than just, you know, having it at an Airbnb and not having those types of formalized arrangements. So it would be a much more formalized facility --
Q. Mm-hmm.
A. -- versus something that was more impromptu.
Q. So the degree of formalization, correct, is what would --
A. Correct.
Q. Okay.
A. That's one thing we would look at, for sure.
Q. You mentioned -- I'm sorry. Just to back up, you mentioned research articles a moment ago that you would look at. Did you mean -- what sort of articles do you mean, academic articles?
A. Academic articles on birth centers, we would do some research into that, look at whether or not there are any.
Q. What would you be looking for, essentially?
A. Be looking for how birth centers are defined in the research.
Q. Okay.

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A. And there may not be any. I'm just saying that's one thing I would do.
Q. Yeah. I mean generally speaking, who writes these articles?
A. It could be midwives. It could be nurses. It could be others from the associations that deal with birthing centers.
Q. So if I wanted to find an article like this, where would I look?
A. I look on Google and -- or I Google -- I know that there's -- I've read that there are a couple of associations or academic associations that work with birth centers. I would look for them, and then look for what research they had.
Q. You know, what do you think you would Google on such a case?
A. I would Google birth centers, definition.
Q. Okay. And that would help you sort of define whether a particular location was a facility under --
A. It could potentially, yes.
Q. Okay. And when you're making these determinations -- I guess, in the context of -- as we talked about earlier, in the context of an informal determination, it would be you and Jenny

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looking at these materials, making a determination, and then issuing some sort of informal opinion, correct?
A. Correct.
Q. And then if you were to receive a certificate of reviewability asking about this, then it would have to go to the council for approval, correct?
A. Can you repeat that question? I didn't hear it.
Q. Sorry. If somebody were to have submitted a certificate of reviewability for a -- whatever it was called a moment ago -- then it would have to go to the council if you said it didn't need a CON at that point, right?
A. Yes. You're talking about a --
Q. Like a formal --
A. A determination of reviewability?
Q. A determination of reviewability, correct.
A. Yeah.
Q. If you were giving a formal opinion about reviewability, you -- they would have to -- then your determination that no CON was required, that goes to the council, correct?
A. Correct. Mm-hmm.

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Q. Otherwise, it's just an informal opinion or if you determine that a CON is required, then it's essentially you're making that determination, based on what we talked about a moment ago, correct?
A. Yes, correct.
Q. Okay.
MR. FREEMAN: Can we take a quick break? Maybe five minutes. Would that be all right?
THE DEPONENT: Five minutes? Sure. Thank you.
THE REPORTER: Absolutely. We are going off the break at 11 -- we're going off the record at 11:01 a.m.
(WHEREUPON, a recess was taken.)
THE REPORTER: We are back on the record at 11:10 a.m.
MR. FREEMAN: Thank you.
BY MR. FREEMAN:
Q. So earlier, Ms. Swift, you mentioned notification for applications being sent to affected persons, correct?
A. Correct.
Q. Okay. How -- who's an affected person with respect to an application?
A. It could be an individual or an

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organization that provides a similar service. That's primarily who an affected party is in kind of general. It could be another institutional health facility. It could be an interested individual. And, again, it could be those that might support or oppose. What I do is I send out -- it's basically a memo stating that this organization has applied -- submitted an application for Certificate of Need, and I provide the location of the project, the name of the contact person, and then the type of project and provide a date by which a potential affected party would have to submit a letter, either in opposition or support or neutral, and then those are put into the record.
Q. Okay. So you get an application for a Certificate of Need. You identify affected persons. How do you identify -- sorry. Go ahead.
A. No. You finish your question. I'm sorry.
Q. How do you identify who the affected persons are for a particular application?
A. Typically, it's -- I identify affected facilities, so I use the Department of Inspections and Appeals and Licensing Entities Book, which is a listing of a variety of different types of facilities and their locations and contact persons,

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and I use that, primarily.
If I get an email or phone call from an individual who's interested in the application, they might be considered an affected person, and I would send them the affected party letter or memo so that they have the opportunity to respond.
Q. So with respect to this licensing book that you mentioned a moment ago, is that something that's publicly available?
A. Yes.
Q. Okay.
A. It's on the Department of Inspections and Appeals and Licensing website. It's a little hard to find, but it's there.
Q. Okay. Okay. So you get an application, you consult this licensing book, and then in addition -- and then what are you looking for in that book?
A. I would look for similar types of facilities to the one that has applied. And I know birthing centers aren't licensed in Iowa, so I know that they're not in the list. So that would be an instance where I might learn of another birthing center through their interest in the project.
I would also send it to hospitals in the

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area, not necessarily knowing whether or not they offered birthing services, but I would send it to the hospitals in the area because many of them still do offer birth services and then they would have until -- for example, our next meeting is July 17th, and the affected party letters were due a couple weeks ago. They would have until -- or actually, I take that back. They were due on Friday. So they were -- so they had to have their affected party letters in by then in order to be put into the record.
An affected party can also speak at a hearing in support or opposition without necessarily having submitted a letter in advance.
Q. So what do affected parties need to do in order to speak at a hearing?
A. They just have to be there at the hearing, and then the chairperson will ask if there are any affected parties in support that are present who would like to speak, and whether or not there are any affected parties in opposition that would like to speak. After the applicant has done their testimony and the council has had the opportunity to ask questions of the applicant, then the chairperson will ask for affected parties in support.

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A. Not each of them. Some of them are kind of combined together.

Q. Okay. The application is -- okay. Do you prepare a report for the council, based on these criteria?

A. Yes, I do. I prepare a staff summary of the application, and I also prepare staff oral remarks that I make at the meeting, or at the hearing itself.

Q. Okay. In your staff summary, is each of these criteria separately discussed?

A. Most of them are. Not all of them.

Q. Are there certain ones that you always leave out?

A. Yes. There's a template that I use that was developed prior to my arrival, that I use.

Q. Okay. In your staff summary, you know, how do you weigh the criteria against each other?

A. There are no weights to the criteria. The council has to make the determination as individuals, how they would weight those. In my staff summary, I don't -- I always put the applicant stated, the applicant noted that, so I'm not saying -- so it's their words coming to the council versus mine. I don't make any kind of recommendations to

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the council on what the decision should be. I simply restate in a more concise manner the responses.

Q. So you -- neither in your staff summary nor in your staff oral report, do you recommend an outcome on the Certificate of Need?

A. No.

Q. Okay. And you don't -- do you ever -- apologies. The applicant's words, are they what is given precedence in your report to the council?

A. Yes.

Q. Is it a report on these criteria, which is given precedence?

A. Can you say that one more time?

Q. Yes. When you are summarizing these criteria, do you rely exclusively on what the applicant said?

A. Yes. There is a spot in the application for me to put information about affected party letters, as well.

Q. Okay. I'll come back to that. In the application, the applicant answers questions which relate to these criteria, correct?

A. Correct.

Q. What information can an applicant submit

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along with their application, besides answering these questions?

A. They can submit any kind of supporting documentation that they want to. Some of them put data and research articles. Some of them put in affected party letters in support. So really, they're not limited to just answering the questions. They can, you know, supplement their application in any way they want to.

You know, certainly I prefer not to get a hundred-page application because those are hard to wade through, but we have had some that are like that where there's a lot of additional information that's provided about the service or about the sponsor of the project, things like that.

Q. Do applicants ever provide like a -- let's say, a legal brief or a memorandum in support of their application, or anything like that?

A. Nothing like that. It's usually -- something in support would be maybe they would put in a letter from the mayor of the community, for example. But not a legal brief, no.

Q. So with respect to these criteria it's, generally speaking, the applicant -- the application stands for itself?

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A. Yes.

Q. Okay. And does the applicant submit -- can an applicant possibly submit studies or research relating to that?

A. Yes, they could.

Q. With respect to these factors, how is information from an affected person is considered?

A. Information from affected persons or parties is considered by the council. They -- you know, obviously, they make their own decisions as individuals, but they may look at the data that's provided and make a determination that while there's a dearth of this service in the area, based on what the parties in support are saying, so they may say that they support a project because of that.

You know, it's really up to each individual to determine how they're going to use that information. But they do have the option of hearing what the affected parties have to say, and it helps to really provide that community input into the need or no need for a new service.

Q. In the staff summary then, you -- do you follow a form in your staff summary that you use for every Certificate of Need?

A. Yeah. There's a template that I use.

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A. Can you define what you mean by the, "standard"?

Q. Well, so it says here that, "Council shall grant a Certificate of Need only if it finds in writing on the basis of data submitted to by the department." So I guess my question is, the council could -- the council can only grant this application if the applicant provides information which sort of affirmatively shows these four criteria, these four factors are met, correct?

A. Yes.

Q. So ultimately, the applicant has to prove -- I mean it's the applicant who has to prove that they're entitled to the Certificate of Need, correct?

A. They bear the burden of responsibility, yes.

Q. Okay. Because they're providing all the data. They're -- it's their application. You're just re-reporting what it is going to say, right?

A. Correct.

Q. So it's the applicant -- the application which has to show, essentially on its face, that it meets these four factors, correct?

A. Yes. But can I qualify that just a bit?

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Q. Please do.

A. They also have the opportunity to provide additional information when they respond to staff questions.

Q. Okay.

A. And they have the opportunity to provide additional information after they've had a chance to review affected party letters.

Q. Okay.

A. And they have the opportunity to provide additional information when they do their presentation materials, if they so choose to do that.

Q. Okay. Let's go through each of these. First, the staff questions.

A. Mm-hmm.

Q. What are staff questions?

A. Staff questions are, when I'm reading the application, if there is something that I feel is missing, if I think there's additional information that would benefit the council. For example, sometimes an applicant will leave something out like where their financing is coming from, for example. So I might say, you know, you've noted that you're going to have financing, but there's no letter of

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support from your financial facility. I might ask them for that. I might --

In the case of a Medicaid certified entity, I might ask them how many of the beds will be Medicaid certified, or if any of them will be. In the example of equipment, I might ask them, you know, if they have a specific model picked out so I just -- as I go through an application, I think what else -- what other information would the council benefit from, and is it information that's just blatantly missing.

Q. Right. So you make judgment calls as you go through the application, try to determine whether or not you think more information is needed based on, I would say, your judgment, right?

A. Yes.

Q. Okay. And then those -- we call those staff questions. Do you just send those in an email to the applicant?

A. Yes.

Q. Okay.

A. And then they respond to me via email.

Q. And then they respond. And then how you do incorporate these responses into -- do those -- sorry. Do those responses get incorporated into

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your staff report and your staff oral report?

A. Yes.

Q. Okay. Okay. Now, the second thing you mentioned was response to affected party letters. So how is that process for an applicant?

A. When the affected party letters come in, they are sent to the applicant for their review. And then there's a final written submission deadline, and it's after the affected party letters come in. And so they have a final opportunity in their final written submission to respond to -- obviously, particularly, they're going to respond to affected parties in opposition, but they do have an opportunity to respond. And those responses can -- will go into a staff summary, as well as into the oral report.

Q. How do you -- I mean how do you make the decision of how to incorporate all this information you're getting? Are you just -- you have your form, and you're just using your judgment to kind of pull out as best you can?

A. Yes.

Q. Okay. And so you'll get all of these staff responses -- you'll get all of these responses from the applicant, whether to your questions or to

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done until just recently when a study was -- or not a study, but recommendations have been asked for regarding the bed need formula for nursing facility beds, and so that's ongoing right now.

Q. Recommendations were asked for from who? Who ask for them?

A. Recommendations -- there was a recommendation -- not a recommendation. A requirement that a work group be pulled together with the Department of Health and Human Services style and providers to look at the long-term care bed need formula for nursing facilities and to make recommendations for change to the governor and legislature general assembly.

Q. I see.

A. And that's in December.

Q. Did that work group requirement come from statute or from a law?

A. It was session -- it would be session law.

Q. Okay.

A. I think.

Q. So apart from these two studies, have there been any other analysis conducted by the state?

A. Not that I'm aware of, no.

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Q. Okay. So the state never conducted an analysis specific to birth centers?

A. No, not that I'm aware of.

Q. Is the council -- or rather, you know, is your department conscious of legislative efforts to reform or modify Certificate of Need requirements?

A. We work with our legislative liaison every year to keep up on the legislation that would be related to Certificate of Need. Yes.

Q. Okay. And who's your legislative liaison?

A. Sara Throener and Sarah Vanderploeg.

Q. Okay. So what are your legislative -- tell me about your role in those legislative efforts.

A. My role would be to, if there were legislation and I was requested to, I would write kind of a legislative analysis and might do a fiscal note to attach to that. I didn't get any of those requests this last legislative session, however.

Q. Okay. Can you tell me what a fiscal note is?

A. A fiscal note just looks at the costs related to the program and to the changes that might be made.

Q. Okay. So when you do a fiscal note, I

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mean you're providing that as sort of the view of the department on the costs or the various changes that are being proposed to the legislature?

A. Oh, the fiscal notes I've done in the past, we would put in the amount that the program -- like the one hundred -- like we talked about earlier, the $131,000. That would be in there. It would talk about -- there's certain questions that you have to respond to, and I think one of them is the impact to the state of the legislation. It's been a while since I've looked at a fiscal note, so I apologize. I'm not as prepared to answer that question as some. I might have been right at the end of the legislative session.

Q. Okay. So with respect to, you know, legislative efforts, you know, you -- do you ever advise your legislative liaison, or does your legislative liaison ever advise -- let me back up. Do you advise your legislator on the impact of Certificate of Need?

A. Only if I'm requested to do so by our legislative liaison.

Q. Okay. What kind of form would that request be? 2

A. She would usually send an email, and

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that's what the legislative analysis is. It's a -- this is what would happen if -- this is the legislation, and the things that are in the legislation and how would that impact the state.

Q. Okay. And when you're doing a -- you know, this kind of impact analysis, how do you go about -- you know, how do you go about answering those questions?

A. Let me think for just a second. It's been a while since I've done one. Typically, the information is pretty straightforward. It's here's what the legislation is asking or saying, and then the impact would be if we had -- well, for example, when -- there was legislation a number of years ago to really pare down the Certificate of Need Program, and so we talked about the fact that that would impact the general fund if there weren't as many fees coming in, that it would potentially open the door for a plethora of freestanding services to come available like ambulatory surgery centers.

This was specific to hospitals. But ambulatory surgery centers might proliferate and take business away -- to kind of cherry-pick business away from the hospitals and take away some of their lucrative services that they need in order

DECLARATION OF GLENN ROPER

EXHIBIT 5

TRANSCRIPT EXCERPTS FROM THE DEPOSITION OF REBECCA SWIFT, IN HER PERSONAL CAPACITY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE
AND CAITLIN HAINLEY,

Plaintiffs,

v. Case No.: 4:23-CV-00067-SMR-HCA

IOWA HEALTH FACILITIES COUNCIL,
HAROLD MILLER, AARON DEJONG,
KELLY BLACKFORD, and BRENDA PERRIN,

Defendants.

REMOTE STREAMING DEPOSITION OF

REBECCA SWIFT

TAKEN ON

MONDAY, JUNE 3, 2024

1: 21 P.M.

6200 PARK AVENUE, SUITE 100

DES MOINES, IOWA 50321

REMOTE APPEARANCES

Appearing on behalf of the Plaintiffs:
WILSON FREEMAN, ESQUIRE
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 419-7111
wfreeman@pacificlegal.org

-and-

GLENN E. ROPER, ESQUIRE
Pacific Legal Foundation
1745 Shea Center Drive, Suite 400
Highlands Ranch, CO 80129
(916) 419-7111
geroper@pacificlegalfoundation.org

REMOTE APPEARANCES CONTINUED

Appearing on behalf of the Defendants:
DAVID M. RANSCHT, ESQUIRE
JENNIFER KLEIN, ESQUIRE
Iowa Attorney General's Office
1305 East Walnut Street, Second Floor
Des Moines, Iowa 50319
(515) 281-7175
david.ranscht@ag.iowa.org
jennifer.klein@ag.iowa.org

ALSO PRESENT:
Tom Hazelhurst, Zoom Technician

EXAMINATION INDEX

EXHIBIT INDEX

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A. Primarily, drew on the study bill itself --

Q. Mm-hmm.

A. -- and other information that I had about Certificate of Need that had been provided to me when I first started in the program so -- excuse me just a second. I need a drink of water.

Q. All right. That's fine.

A. I drew on some of the previous bill reviews that I had written and other materials that had been created to support the CON program.

Q. Okay. What materials, specifically, are you referring to?

A. I have a history of CON that I draw on. It talks about where CON came from and how it got started in Iowa.

Q. Mm-hmm.

A. From the preamble to the legislation that actually implemented the CON program, House File 354, I think, from 1977. I drew on that. Those would be the main things.

Q. Do you know if that material was produced to us in the course of discovery?

A. I don't know because I don't know that it was specifically asked for.

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Q. That's fine. I'm just asking if you knew. That's okay. So House File 354, you say --

A. Yeah.

Q. -- from 1977?

A. I believe, that's the right number.

Q. Okay.

A. From 1970 -- it was General Assembly 67 in 1977.

Q. This is from the preamble to the original legislation that put Certificate of Need in place?

A. Yes. That contains the preamble.

Q. Mm-hmm. And that document, is that sort of like a useful source for determining what the purpose is and the interests of Certificate of Need are?

A. Yes, I would say so.

Q. Okay. Is there anything else you would've drawn on to write this?

A. Those would've been the main things.

Q. Okay.

A. I would say, the main thing would've been previews bill reviews that I've done, especially related to the background.

Q. Right, of course. So I want to talk, specifically, about the impact section here, which is in the middle of my screen. So you can review it, just to refresh your memory about it.

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A. Okay.

Q. Okay. So here, you mention, "The lack of oversight could cause exponential growth in certain areas including birth centers. The growth in birth centers could pull lucrative obstetric services away from hospitals causing them to lose money, thus affecting their ability to provide the client services." By lack of oversight here, are you referring to the fact mentioned in the previous paragraph of this document, that the bill would eliminate birth centers from needing a CON?

A. Yes.

Q. Is that what that means?

A. Yes.

Q. Okay. Oversight in this context refers to the CON program itself?

A. Correct.

Q. Okay. Did you mean -- now, you write that this could cause exponential growth in birth centers. You know, what did you mean by that?

A. Well, what I meant by that is it could cause -- I'm trying to think of another word. Could cause a lot of growth in that area.

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Q. Okay. So did you review any studies or documents in order to reach the conclusion that this could cause growth in birth centers?

A. No, I did not.

Q. Okay. I mean is it your understanding that the Certificate of Need process prevents the opening of birth centers in the state?

A. It doesn't prevent the opening of birth centers. What it does is, it provides for some -- I like the word oversight, which I know is used in the document here, but it provides for someone looking at whether or not there's a need for the service in the area.

Q. I mean --

A. And that the birth center or the other -- another facility has the capability and financial resources to open and to actually sustain itself.

Q. It's true, though, that you wrote that if there was a lack of CON, there would be a growth in the number of birth centers, correct?

A. Yes.

Q. Okay. And that's because, in your view based on your experience with Certificate of Need, that the Certificate of Need process -- I don't want to say prevents, but I guess inhibits or causes less

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of opening of birth centers, correct?
A. I believe that's true because birth centers feel that it's an onerous process.
Q. Okay. What led you to the second part of this -- what led you to the conclusion that the growth in birth centers could affect hospitals' ability to provide other services -- other required services.
A. Well, let me read that again.
Q. Okay.
A. Well, birth -- or hospitals are required, I believe under EMTALA to provide emergency services, and one of those would be births, emergent births. And when an ambulatory surgery center or birth centers are proliferating, they're able to pull those services away from a hospital, which could affect the hospital's bottom line. And that could eventually impact the ability of the hospital to provide those services.
Q. And did you review any -- have you reviewed any studies in order to reach that conclusion?
A. It comes from, I think, the years that I've worked in CON and have gone through a lot of CON -- not necessarily for birth centers, but

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especially for ambulatory surgery centers, and the comments that hospitals would make about what would happen if ambulatory surgery centers were able to open without a CON.
Q. So you mostly -- I mean, again, your experience in CON, you know, is based on the comments and the letters that you receive and that you review in your course, correct?
A. Correct.
Q. Okay. You mentioned a moment ago that birth centers generally consider the process to apply for a CON to be onerous. What makes you say that?
A. It's basically based on things that I've heard from birth centers and from other smaller businesses that might have to go through a CON process. That it's expensive, that it takes a lot of time, and that they don't want to put -- do the layout of money to pay the fee, and that it is a long process.
Q. Right. Can you remember anyone specifically telling you that?
A. Not off the top of my head, no.
Q. Okay. Do you agree that that's an onerous process?

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A. I don't think it's an onerous process, no. I think it does take some time but with good planning, it can be a very helpful process, not only for the birth center because it forces them to look at the service that they're planning to provide, but also for the community when they have the opportunity to hear from the birth center about why their services are needed, and also to hear from affected parties that might support or oppose the project. Mr. Freeman, did you freeze? You look frozen.
THE REPORTER: He did.
BY MR. FREEMAN:
Q. Can you -- hold on a moment. Can you see me now?
A. Yes. And I can hear you.
Q. Okay.
MR. FREEMAN: Can we go off the record for a moment?
THE REPORTER: Yes, sir. We are going off record at 1:48 p.m.
(WHEREUPON, a recess was taken.)
THE REPORTER: We are back on the record at 1:57 p.m.
MR. FREEMAN: Okay. Thank you, Ms. Swift.

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BY MR. FREEMAN:
Q. We were talking about the difficulty, or not difficulty, that the CON process poses for birth centers. You had mentioned you don't think that it's onerous. Could you maybe -- could you restate that answer for me again, please?
A. Yeah. I said I don't think that it's an onerous process. I mean yes, it does take some time. You know, it could be a couple months. I don't think the application is so difficult that a birth center couldn't complete it without having to hire a team of attorneys. I don't think it's that expensive for most birth centers. I think when I reviewed the Promise Birth Center application and figured out their fee, it would've been roughly $749, so it's not terribly expensive. And so those are reasons why I don't think it's terribly onerous.
Q. Do most -- in your experience, do most -- are most Certificate of Need applicants represented by counsel?
A. The larger applications are, yes, in most cases. Some of the smaller applications, less expensive, smaller services, are not always.
Q. Okay. Can you, approximately, give me a number that you would consider to be a smaller

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application, in terms of the total cost of the project?

A. Probably under a million dollars.

Q. Anything under a million dollars. Do you see -- approximately, how many applications of that size do you see in a year?

A. In a year, it really depends on how many applications come in. This past year, I would say probably about 50 percent of ours were under that. I'd have to go and look, so don't -- that's not a --

Q. I'm just asking for an estimate.

A. Yeah.

Q. And in those 50 percent, roughly, of applications, how often were those applicants represented by counsel?

A. Probably about 25 percent at the time.

Q. So 3/4 of the time, you get -- so 3/4 of 50 percent or whatever, you know, you get an application from a party putting in an application for less than a million dollars, in terms of the expenditure?

A. Mm-hmm.

Q. They're not represented, correct?

A. Say that -- can you say the last part of that again?

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Q. They're not represented, correct?

A. Correct.

Q. They're not --

A. Correct, yeah.

Q. Okay. And are those -- let me ask it this way. You mentioned it takes time. You know, approximately how long does an average application take?

A. Well, it starts with a letter of intent, which is due no less than 30 days before the application.

Q. Mm-hmm.

A. The applications are usually due about six weeks before -- six to eight weeks before the meeting, so that I can do all the background and do the staff summary and give everybody time to get their materials in, their ancillary materials in. Then we have the meeting, and then there's the time to write the decision. Although, the date that the decision is made is when they can start their project.

Q. How many -- approximately how -- what proportion of applications are -- have faced letters of opposition?

A. I would say, probably 75 percent have

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maybe a small number of letters of opposition.

Q. Okay. And in terms of small projects, do they typically get letters of opposition?

A. Sometimes they do, yes. We've got letters of -- affected party letters are actually due today for a project -- or a hearing that we're having July 17th, I mentioned earlier. And we have one project that they're due in two hours and at this time, I have not received any letters of opposition for one of the projects.

Q. Mm-hmm. Right.

A. So --

Q. And you said there's about a quarter of the projects you don't get any letters, though?

A. Correct.

Q. Okay. So that's not crazy. Hospitals, generally speaking, they have representation, correct?

A. Correct.

Q. And when a hospital puts in a letter of opposition, they're going to be represented by counsel?

A. Correct.

Q. If a -- what proportion -- approximate again. What proportion of applications that you

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receive, do you see hospitals putting in an application?

A. It's really going to depend on the type of application that we get.

Q. Mm-hmm.

A. When there are other hospitals involved or the purchase of expensive equipment, oftentimes I do see some type of affected party letter from another hospital system. It could be a letter of support, or it could be a letter of opposition.

Q. I see. Okay. With respect to, you know, these sort of smaller projects, under a million dollars, I mean do you ever see hospitals coming into those cases in opposition?

A. Again, it depends on the type of project but, yeah, sometimes.

Q. Okay. So with respect to, you know, the process -- I guess, let me just ask a follow-up question about that. You know, are the -- what projects, I guess, would tend to get, or do tend to get opposition from hospitals?

A. I would say, probably the most common are ambulatory surgery centers and equipment purchases, or the initiation of services such as radiation therapy services, especially if it's a hospital

DECLARATION OF GLENN ROPER

EXHIBIT 6

TRANSCRIPT EXCERPTS FROM THE DEPOSITION OF DR. JAMES BAILEY,

PLAINTIFF'S EXPERT WITNESS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY and EMILY ZAMBRANO-ANDREWS,
Plaintiffs,
vs.
IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN,
Defendants.

) Case No. 4:23-CV-00667-SMR-HCA
) ZOOM DEPOSITION OF JAMES BAILEY

THE ZOOM DEPOSITION OF JAMES BAILEY, taken before Dina L. Dulaney, Registered Professional Reporter, Certified Shorthand Reporter, commencing at approximately 9 a.m., June 12, 2024.

APPEARANCES

Plaintiffs by:

GLENN ROPER
Attorney at Law
1745 Shea Center Drive
Suite 400
Highlands Ranch, Colorado 80129

Defendants by:

DAVID RANSCHT
JENNIFER KLEIN
Assistant Attorneys General
Hoover State Office Building
Des Moines, Iowa 50319

Reported by: Dina L. Dulaney, RPR, CSR

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(Exhibit A was referenced during this deposition.)

JAMES BAILEY,

of lawful age, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. RANSCHT:

Q. All right. Thank you, Dr. Bailey, for being here today and thank you for rolling with the schedule change on this as well.

Just a few kind of ground rules to talk through before we get started. If you don't understand a question that I ask, can we agree that you'll ask me to rephrase?

A. Yes.

Q. Thank you. And you also just did a great example of one of the other things I was going to say, which is that our court reporter will very much appreciate if you say "yes" and "no" rather than "uh-huh" or "huh-uh" or head shakes or nods. So if you can work to do that with me, I would greatly appreciate it, and I assume that Dina will as well.

A. That makes sense.

Q. Have you been deposed before?

A. Yes.

Q. Okay. So you -- you kind of know what's going to happen here then. I'm just here to ask questions and learn more about what you know, but I would like to start a little bit with your background.

Can you tell me about your personal educational background starting with perhaps an undergraduate degree?

A. Sure. So I studied economics as an undergraduate at the University of Tulsa, went on to graduate school for economics at Temple University where I got a master's and a PhD.

Q. Okay. What sparked your interest in economics?

A. Several things. Probably the first one was taking a class in economics in high school, AP Economics, and finding it surprisingly interesting and surprisingly easy, which seemed like a good combination.

Q. Sure. Did you end up taking the AP test after that class?

A. Yes.

Q. Did you transfer the credits into your undergrad?

A. Yes.

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demographics than Iowa does?
A. Yes.
Q. Could that, in your view, affect the certificate of need program?
MR. ROPER: Objection to form. Vague.
Q. (By Mr. Ranscht) Does the demographic makeup of a state inform whether a state might enact a certificate of need requirement for a birth center?
MR. ROPER: Objection to form. Calls for speculation. You can answer, if you understand the question, Dr. Bailey.
A. Yeah, I don't know of any research that directly answers that question.
Q. (By Mr. Ranscht) Okay. When preparing your report, did you review the Health Facilities Council -- pardon me, the Iowa Health Facilities Council decisions either granting or denying certificates of need for institutional health facilities generally?
A. I reviewed some documents on decisions by the Iowa Health Facilities Council. As I recall they had to do with birth centers.
Q. So you focused your review on decisions by the council specifically addressing birth

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centers?
A. I reviewed the documents that I was sent, which I believe came through discovery, and I believe the discovery request might have been focused on the birth centers, which would make sense. I tried to read everything I was sent, but I believe that was the focus of it.
Q. Okay. How many birth center decisions do you remember reading?
A. I don't recall very well. I believe it was about 15 documents, which may not have all been precisely birth centers.
Q. Okay. Would it be fair to say that you reviewed a handful of birth center decisions?
MR. ROPER: Objection to form.
Q. (By Mr. Ranscht) I'll rephrase. When you say 15 documents that may not have all been decisions, in your estimate how many of them were decisions?
A. Let's see, I'm trying to remember. I believe I read these about six months ago and didn't look back since. As I tried to recall how many had to do with birth centers, I would be fairly confident that it was at least two and quite confident that it would be less than

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30.
COURT REPORTER: David, I hate to interrupt.
(Recess was taken.)
Q. (By Mr. Ranscht) Dr. Bailey, I think we were talking about reading birth center decisions from the council.
Did you see a trend of the council, in the decisions you reviewed, either to grant or to deny certificates to the birth center applicants whose decisions you reviewed?
A. I don't recall one.
Q. Do you recall seeing a decision granting a certificate to a birth center?
A. I believe so.
Q. Did you see a decision denying a certificate to a birth center?
A. I believe so. It may not have been a final denial. I don't know if it was denied and appealed or -- or if they got some negative step along the way that was something other than a denial.
Q. Okay. Do you recall the time frame of that decision when the decision was issued?
A. Not precisely. I believe there were

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some cases in there from at least the last 30 years.
Q. Okay. So after reviewing the case materials, the statutes, the website, some decisions and academic literature -- well, I guess first question, did I omit anything from that question that you reviewed?
A. Those were certainly the main things. I'm trying to think if there was anything else.
Q. If there was, did you mention it in your report?
A. I believe everything in the report would be summarized fairly well by the categories you mentioned. Certainly it's mostly academic literature that I cite in the report.
Q. Okay. So what is your bottom-line opinion after reviewing all those materials and preparing your report?
A. That I don't see an economic justification for certificate of need laws to restrict the opening of birth centers.
Q. Is that the current economic justification?
MR. ROPER: Objection to the form.
Q. (By Mr. Ranscht) I'll rephrase.
A. It's --

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Q. Oh, go ahead, Dr. Bailey.
A. It's my current opinion, I guess, as I read the current state of the academic literature and the information I can find, I don't currently see a justification for it.
Q. Was there an economic justification for it within the past ten years?
A. Nothing comes to mind that would have changed in the last ten years in a relevant way. You know, I don't see any change that would be significant enough to -- to change my opinion.
Q. What would be a significant enough change to change your opinion?
MR. ROPER: Objection. Calls for speculation.
A. So --
Q. (By Mr. Ranscht) Okay. Go ahead.
A. So to try to answer this in a nonspeculative way but rather one that looks to the past. Certificate of need laws arguably made more sense prior to 1983 when Medicare operated in a very different manner.
Q. What happened in 1983 that changed Medicare's operation?

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A. They went from reimbursing on a cost plus basis to paying more of a flat fee, which dramatically reduced the incentive to inflate costs.
Although in the case of birth centers, I don't know if this change would be as relevant as it would have been in some of the more cost-inflating parts of health care.
Q. Are some health care facilities more cost-inflating, to use your word, than birth centers?
A. So it's often the case that for a specific type of treatment, there are several options available which could be substitutes for one another; where some are more expensive than the others and greater use of those options could increase total costs or spending.
Q. Total costs or spending by who?
A. By the payors; certainly potentially by Medicare.
Q. So a payor could be Medicare. Could it be an insurance company?
A. Yes. In general insurance companies can be payors; although they would not have been affected by this specific change that I

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mentioned.
Q. In general can individual patients also be payors?
A. Yes.
Q. So before this change in the early 1980s to Medicare, why did certificate of need programs make more sense?
MR. ROPER: Objection. Mischaracterizes the prior testimony.
Q. (By Mr. Ranscht) I'll go at this a different way. Oh, go ahead, Dr. Bailey.
A. I can give the federal government's perspective, all right, which may not necessarily be mine, but as of the 1970s, they expected these laws -- certificate of need laws to be able to reduce spending, and they say so in their 1974 law requiring states to pass them.
Then they make this change to Medicare in 1983. And by 1986, they have completely switched sides and are telling the states, "Not only are you no longer required to pass certificate of need laws, we would actually prefer that you repeal them."
Q. So that's the federal government's

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perspective, as you said. What is your perspective comparing pre-1983 to post-1983?
A. In my case I'm not convinced that the laws made sense even before 1983, but I would say they were more plausible.
Q. So a legislator before that time could have believed that the certificate of need program would reduce costs?
MR. ROPER: Objection. Calls for speculation.
A. I think they could believe all sorts of things. I think that's one of them.
Q. (By Mr. Ranscht) Would it be reasonable to believe that?
MR. ROPER: Objection to the extent it calls for a legal conclusion.
A. Yeah, I was just going to say depends what you mean by reasonable. It would not be crazy.
Q. (By Mr. Ranscht) Let's kind of zoom out to a broader view. Am I correctly stating your opinion to be that you do not see ongoing economic justification for Iowa's certificate of need requirement for birth centers?
A. Yes.
Q. Is that based on weighing academic

studies against one another?
A. Yes.
Q. How do you determine which studies to give weight to in the formulation of your opinion?
A. So I would consider their relevance in -- you know, are they studying a type of certificate of need that seems more related to birth centers or less related to birth centers since -- and then are they using methods that seem to me to be more or less convincing in terms of what type of data do they gather and how do they analyze it?
And then I would also consider the number of studies. So if you have studies with differing opinions, would they be roughly equal in number or are there a lot more that have one sort of finding then another sort of finding?
So I would say relevance, quality of data analysis and numbers would be the three main things that come to mind.
Q. And relevance means analyzing a birth center?
A. It means analyzing a law that is as similar to a law covering CON and birth centers

as possible. So that could mean -- you know, ideally it's studying exactly that sort of law. The next best would be studying other types of CON that would be addressed to types of health care or health facilities that seem relatively similar to birth centers.
If you didn't have anything like that, you would try to find some other sort of law that seems fairly similar to CON, like another sort of entry barrier; right? But you just -- you want to find things that are as similar to the law in question as you can.
Q. Is the certificate of convenience that you mentioned from your Montana opinion, is that one example of what you just called a barrier?
A. Yes.
Q. But a barrier that isn't health care related?
A. Correct, in that case.
Q. What type of data is important for you to see that a study gathers when it comes to analyzing a law regarding birth centers?
A. So I would like to see data on whatever outcomes are important, which could mean, you

know, what seems important to me or it could mean if there's some outcome that's relevant to its stated justification.
You know, so if a law, for instance, were aimed at reducing spending on health care, I would want to get data on spending health care to try to measure, you know, whether -- whether that's actually happening.
Q. So the word outcome that you're referencing refers to measuring the law against a purpose it is -- it meaning that law -- is at least ostensibly attempting to achieve a purpose it's attempting to fulfill?
MR. ROPER: Objection to the form. Vague. If you understand the question, Dr. Bailey, you can answer it.
A. So I would say that would be one type of outcome. You know, an outcome could be anything that the law affects that you're trying to measure. Specifically it would be the dependent variable in a regression that you would be analyzing where the law would be an independent variable.
Q. (By Mr. Ranscht) Okay. So what I was driving at is outcome could be that but could

it also refer to a patient outcome?
A. The outcome could be related to health or -- yes, generally we wouldn't be studying one specific patient, if that's what you mean, but we could be discussing what happens to the health outcomes of patients in general in states with one sort of law versus another sort of law.
Q. Yeah, that's what I'm asking about is whether it's important in you formulating an opinion to look at -- this is just one example but whether a group of patients requires emergency intervention, for example. Understanding that that is just one example, that could be an outcome that you are looking at; yes?
A. I'm not sure quite what you mean by requires emergency intervention.
Q. Okay. Well, let's talk more generally about care at a birth center then.
In your understanding is care at a birth center shared with care at a hospital maternity ward?
A. What do you mean by shared?
Q. Does a patient at a birth center also

familiar?
A. Yes.
Q. I want to start here on page 3, and I want to ask you about a sentence that I'm going to highlight. Can you view the highlight that I've made?
A. Yes.
Q. Can you read that sentence for me so I know we're talking about the same part?
A. "Instead, they must convince a majority of the Iowa Health Facilities Council, which is empowered to reject them simply because they believe there is no need for a new facility."
Q. Okay. And just so this is clear in the transcript later, does the word "they" here refer to applicants for a certificate of need?
A. The first "they."
Q. And the second "they" is the council?
A. Yes.
Q. So what in your view goes into need as used in this sentence?
A. So I would say I'm using it in the colloquial sense. It's possible that the Iowa statutes or administrative code set out, you know, a more precise legal definition that I

certainly don't recall.
Q. But there could be multiple factors that go into need?
A. Yes.
Q. Could one factor be analyzing operational capacity of existing facilities offering similar or adjacent health care services?
A. So not an expert on the specific law in Iowa, but I believe that some states have tests along those lines.
Q. So could it also -- could need also include the projected capacity of the applying facility?
A. So, again, not an expert on the specific law in Iowa, but I believe some states have tests along those lines.
Q. All right. I'm going to highlight what is the next sentence in Section 2A(i) of the report. Can you see my highlight?
A. Yes.
Q. Can you read that sentence so that I'm sure we are talking about the same words?
A. "The process of attempting to win this permission can be long and costly, and in the

end, applicants may be rejected and forced to abandon their plans."
Q. I may know what your answer will be, but how long is the process?
A. So I don't have, for instance, data on the average length of the process in Iowa, but again, just on my general knowledge of certificate of need law, it could certainly be months' long and can -- can sometimes be running into the years.
Q. Is that commensurate with the timeline for developing health care facilities more generally?
MR. ROPER: Objection to form.
Q. (By Mr. Ranscht) Let me ask a different question. Is a process that takes several months economically unjustified for a birth center?
MR. ROPER: Objection to form. Calls for speculation.
A. So I would say a process that takes several months is a real cost. Whether that process is economically justified would depend on the benefits that come from it.
So in some other setting where the

process were bringing large benefits, a long process could be justified, but in this case, where I don't really see the benefits, then it's hard to say that the costs would be -- would be justified.
Q. (By Mr. Ranscht) So "long," as used in this sentence, is -- has some overlap with costly as used in this sentence?
A. Yes, in that the delay of opening a facility would be part of the costs.
Q. And the costs also includes an application fee?
A. Yes.
Q. How costly is that fee, if you know?
A. I don't recall the specific fee for Iowa.
Q. In the second part of this sentence, "Applicants may be rejected and forced to abandon their plans," if an applicant is rejected, do you know whether they can reapply?
A. I believe one of the cases I reviewed involved someone who was rejected and reapplied. Although, again, I'm not an expert on the specific law in Iowa, so, you know, I don't want to say that that -- the ability to reapply definitely exists today.

MR. RANSCHT: Mr. Roper, I don't think I have anything more, so if you would like to have some redirect, the floor is yours.

MR. ROPER: Yeah, I do think I have a few questions for you, Dr. Bailey. And I'll try to make it brief, and I'll sort of go through chronologically and how the issues came up in the deposition to this point.

CROSS-EXAMINATION

BY MR. ROPER:

Q. You -- I believe you testified that you reviewed some decisions granting or denying certificates of need to birth centers in Iowa. Do you recall that testimony?

A. Yes.

Q. And I just want to give you a chance to tell us what -- what relevance did those have to the analysis that you did in your report?

A. So, you know, if you look at my report, I'm mostly citing academic literature. I don't discuss the history of the specific cases certainly much or possibly at all.

As I read them, mainly I was looking to find out just is there anything -- were there any unknown unknowns? Like, you know, is

there anything about the process that I just had no idea about that would come up there? And it was interesting to read about, but I don't think it had a major influence on my report.

Q. Fair to say that that was not a focus of your opinion?

A. Correct.

Q. Those specific decisions, I mean?

A. Correct.

Q. And with your economics expertise, would you expect that the number of birth center applications would entirely reflect the number of people who would be interested in starting birth centers in Iowa?

A. No. It's possible that people would be interested in starting a center but not apply partly because maybe they're not very interested but partly because the -- they could be quite interested, but that the process could deter them from applying, that it would be raising the risk and expense of starting the business. And some people might be at that margin where that added risk and expense would be enough to deter them.

Q. And when you say "the process," you're referring to the certificate of need process?

A. Yes.

Q. And so there could be individuals -- well, let me back up. So would you -- is it fair to characterize a certificate of need in Iowa as a barrier to entry?

A. Yes.

Q. And that could be a barrier to people even applying to start a birth center?

A. Yes. It's possible that the existence of that process would raise the cost enough that they would choose not to begin it.

Q. There was also some discussion in your testimony about a change in the law in about 1983. Do you recall that testimony?

A. Yes.

Q. What was the change that happened in or about 1983?

A. So Medicare changed the way that they reimbursed health care providers.

Q. And with your economic expertise, would you say that that had some effect on economic incentives in the health care industry?

A. Yes.

Q. And so any of those incentives that were present before 1983 were eliminated with that change in 1983? Maybe that's too vague a question. Let me strike that.

A. Yeah.

Q. What is your view of how the economic incentives changed after 1983?

A. Right. So the biggest part of the reform was the change from a cost plus reimbursement system to more of a fixed payment based on the specific diagnosis that the people are coming in with.

And so that big change in incentives is to remove the previous incentive for what would be called gold plating; where just, for example, if a provider were being paid -- reimbursed based on the cost of everything that they spend, plus say 5 percent, right, then the higher they can make their costs, the bigger that 5 percent reimbursement that they get to keep would be, so they have this incentive to gold plate and just do more things to raise the cost of providing care.

Whereas, after 1983, they're being paid with a flat fee. If they can find ways to

DECLARATION OF GLENN ROPER

EXHIBIT 7

TRANSCRIPT EXCERPTS FROM THE DEPOSITION OF

PLAINTIFF CAITLIN HAINLEY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DES MOINES MIDWIFE COLLECTIVE, CAITLIN HAINLEY, and EMILY ZAMBRANO-ANDREWS,

Plaintiffs,

vs.

IOWA HEALTH FACILITIES COUNCIL, HAROLD MILLER, AARON DEJONG, KELLY BLACKFORD, and BRENDA PERRIN,

Defendants.

COPY

CASE NO. 4:23-CV-00067-SMR-HCA

DEPOSITION OF CAITLIN HAINLEY,

taken via Zoom Video Conference by the Defendants before Keriann E. Hansen (Appearing via Zoom), Certified Shorthand Reporter of the State of Iowa, commencing at 1:10 p.m., Wednesday, June 5, 2024.

APPEARANCES:

For the Plaintiffs: WILSON FREEMAN, ESQ.
(Appearing via Zoom)
Pacific Legal Foundation
Phoenix, AZ

For the Defendants: JENNIFER KLEIN, ESQ.
DAVID RANSCHT, ESQ.
(Appearing via Zoom)
Iowa Attorney General's Office
Hoover State Office Building
1305 East Walnut Street
Des Moines, IA 50319

Witness: Caitlin Hainley
(Appearing via Zoom)

KERIANN E. HANSEN - CERTIFIED SHORTHAND REPORTER

I N D E X

SUSAN FRYE COURT REPORTING | 515-284-1972
300 Walnut Street, #36, Des Moines, IA 50309-2224

a birth center, it was inaccessible to the majority of people. And our mission specifically relates to equality, accessibility, and affordability.

Federal studies, including the Strong Start study, have also showed that birth centers provide the highest quality of care and best outcomes. In fact, the current federal initiative for transforming maternal healthcare grants provided to states puts a high emphasis on states that have birth centers available to their Medicaid population.

Also, especially here in Iowa with 40 birthing units having closed down over the past 20 years, we have maternity care desserts, so a lot of people would like our care. And to access that type of care is very difficult for them to come into Des Moines and on the fly find a hotel room or an Airbnb and be comfortable birthing in that space. So it really fits our mission and it fits the needs of Iowans, and studies show that it's the best type of care you can get and we don't have it.

Q You mentioned that moms do want this type of care and I think you spoke to it a little bit about some of the reasons, but can you just state, like, why moms want a birthing center?