

## Appendix A-1

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Appendix 1a

Filed May 03, 2022

**UNITED STATES DISTRICT COURT EASTERN  
DISTRICT OF KENTUCKY CENTRAL  
DIVISION FRANKFORT**

Civil No. 3:19-cv-00066-GFVT-EBA

PHILLIP TRUESELL, *et al.*,

Plaintiffs,

v.

SECRETARY ERIC FRIEDLANDER., *et al.*,

Defendants.

**MEMORANDUM OPINION & ORDER**

\*\*\* \*\*\* \*\*\* \*\*\*

This matter is before the Court on the Defendants' Motions to Dismiss the Plaintiffs' Second Amended Complaint. [R. 78; R. 79.] For the reasons that follow, the Motions to Dismiss will be GRANTED IN PART and DENIED IN PART.

**I**

Plaintiff Phillip Truesdell is the owner of

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Plaintiff Legacy Medical Transport, LLC,<sup>1</sup> which is a “ground ambulance business” located in Ohio approximately one mile from the Kentucky border. [R. 63 at 2.] Legacy has operated in Ohio since 2017, and the company owns seven ambulances that make between 1,500 and 2,000 trips annually. *Id.* at 12. Given Legacy’s close proximity to Kentucky, the company wishes to provide Class I<sup>2</sup> non-emergency ground medical transport from Kentucky to Ohio and to make intrastate trips within Kentucky. *Id.* at 2.

However, Kentucky law requires Legacy to obtain a Certificate of Need before it can transport a Kentucky resident from a Kentucky facility to a facility located outside the state or make intrastate trips within Kentucky. [*Id.*; *see also* R. 78-1 at 13.]

In 2018, Legacy applied to the Cabinet for Health and Family Services for a Certificate to operate a Class I ambulance service in Kentucky. [R. 63 at 12.] Certificate-holding ambulance companies protested Legacy’s application, which necessitated a hearing.<sup>3</sup>

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<sup>1</sup> Because Mr. Truesdell is the sole owner of Legacy Medical Transport, LLC, Plaintiffs collectively will be referred to as Legacy.

<sup>2</sup> A Class I ground ambulance provider is a company that provides “basic life support or advanced life support services to all patients for emergencies or scheduled ambulance transportation which his medically necessary.” KRS § 311A.030.

<sup>3</sup> After a business applies for a Certificate of Need, any “affected person,” often a competitor, can protest the business’s application and request a hearing. KRS §§ 216B.040; 216B.085. At the hearing, the business must demonstrate that its services are needed. KRS § 216B.040; 900 KAR 6:090 § 3.

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*Id.* At the hearing, certificate-holding companies asked questions “related to whether allowing [Legacy] to operate in Kentucky would ‘harm’ the existing businesses,” specifically inquiring about “whether [Legacy] knew how many customers or how much money they would take away from the existing businesses.” *Id.* at 12–13. Ultimately, the Cabinet denied Legacy’s Certificate of Need application, at least in part, “because the Cabinet determined they could not prove there was a ‘need’ for a new business.” *Id.* at 13.

On September 24, 2019, Legacy filed the Complaint in this matter, arguing that Kentucky’s Certificate of Need regulations violated the dormant Commerce Clause, Due Process Clause, Equal Protection Clause, and the Privileges or Immunities Clause of the Fourteenth Amendment. [R. 1 at 11–14.] Legacy is not challenging its application denial or seeking money damages. [R. 63 at 3, 13.] Instead, Legacy is seeking prospective declaratory and injunctive relief. *Id.* at 13, 19–20. On October 29, 2019, the Defendants filed their first Motion to Dismiss. [R. 16.] In response, Legacy amended its Complaint on November 19, which mooted Defendants’ Motion to Dismiss. [R. 17; *see also* R. 57 at 18.] Defendants filed their second Motion to Dismiss on January 17, 2020. [R. 33.] On February 5, the Court granted Patient Transport Services, Inc.’s Motion to Intervene, and Patient Transport Services filed a Motion to Dismiss the same day. [R. 34; R. 36.]

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On August 5, 2020, the Court denied the Defendants' Motions to Dismiss as to the dormant Commerce Clause claim and granted the motion as to Legacy's Due Process, Equal Protection, and Privileges and Immunities claims. [R. 57 at 18.] On September 30, 2020, Legacy filed a Motion to Amend the First Amended Complaint, which the Court granted on August 24, 2021. [R. 62; R. 74.] On September 7, 2021, Defendants filed the Motions to Dismiss presently before the Court. [R. 78; R. 79.]

## II

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a plaintiff's complaint. In reviewing a Rule 12(b)(6) motion, the Court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all inferences in favor of the plaintiff." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (citation omitted). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000)). The Supreme Court explained that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Courier v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009).

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### A

Defendants seek dismissal of Legacy’s Due Process Clause claim. [R. 78-1 at 4; R. 79-1 at 5.] The Complaint alleges that the Plaintiffs’ liberty interest in pursuing their chosen occupation is offended by the statutory scheme because the Certificate of Need protest procedure and need requirement act as a “Competitor’s Veto.” [R. 63 at 16.] Furthermore, the Complaint alleges that the protest procedure and need requirement constitute nothing more than economic protectionism and create “shortages, jeopardize public health and safety, and increase costs.” *Id.*

The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. The Fourteenth Amendment “prohibits the government from imposing impermissible substantive restrictions on individual liberty,” for example, a liberty interest to engage in a chosen occupation. *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 661 (E.D. Tenn. 2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1994), *aff’d*, 312 F.3d 220 (6th Cir. 2002); *see also Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (recognizing that “the liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable government regulation”). “Generally speaking, freedom to choose and pursue a career, to engage in

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any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State.” *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Such legislation “violates the Due Process Clause where it imposes burdens without any rational basis for doing so.” *Sheffield v. City of Fort Thomas, Ky.*, 620 F.3d 596, 613 (6th Cir. 2010) (quoting *United States v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring) (internal quotation marks omitted)). Thus, legislation regulating a profession or trade carries “a presumption of legislative validity, and the burden is on [the challenger] to show that there is no rational connection between the enactment and a legitimate government interest.” *Am. Exp. Travel Related Servs. Co., Inc. v. Ky.*, 641 F.3d 685, 689 (6th Cir. 2011) (quoting *Sheffield*, 620 F.3d at 613) (alteration in original).

Here, the parties agree that Kentucky’s Certificate of Need laws and regulations are subject to rational basis review. [R. 63 at 17; R. 78-1 at 4; R. 79-1 at 5.] Rational basis is “highly deferential,” and statutes fail under this standard of review “only in rare or exceptional circumstances.” *Doe v. Mich. Dep’t of State Police*, 490 F.3d 491, 501 (6th Cir. 2007). In cases of this sort, “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” *Am.*

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*Exp. Travel Related Servs.*, 641 F.3d at 689 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)). “[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993). In fact, the Supreme Court has explained that under the rational basis standard of review, the reasoning supporting the state’s legislative action is “constitutionally irrelevant.” *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). The Court will uphold the statute or regulation “if there is any reasonably conceivable state of facts that could provide a rational basis.” *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

In August 2020, this Court held that Legacy’s Amended Complaint failed to state a plausible substantive due process claim. [R. 57 at 13.] Taking a cue from the Fourth Circuit in *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013), this Court “decline[d] to delve into the specific rational bases that support the public hearing provision and need criterion,” finding that disagreement as to Kentucky’s Certificate of Need process was a matter more appropriately suited for resolution by the legislature. *Id.* at 14. Legacy was given the opportunity to amend its Amended Complaint, however, after the Court found that Legacy’s proposed amendment was not futile, meaning it “could withstand a Rule 12(b)(6) motion to dismiss.” [R. 75 at 4 (citing *Rose v. Hartford*

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*Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).] The Court reached this conclusion because the Second Amended Complaint contained significantly more information about the Certificate of Need program's fail to meet its own goals. [See, e.g., R. 63 at 8–11.]

KRS § 216B.010 provides that the Purpose of the Certificate of Need program is to “improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.” However, the Second Amended Complaint alleges that the program does not satisfy the rational- basis test because it “fails to achieve any of its goals.” [R. 63 at 9.] This claim is supported by the following allegations:

- Kentucky's Certificate of Need program has “resulted in a shortage of ambulance providers and higher wait times than states without such a program” and has resulted in the deaths of Kentucky residents;<sup>4</sup>

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<sup>4</sup> In a footnote, Legacy avers that one Certificate of Need application was granted to a Class I ambulatory service because the applicant “presented evidence that ambulance wait times likely contributed to a Kentucky resident's death.” [R. 63 at 8 n.6.] No other facts in the Second Amended Complaint support Legacy's allegation that Kentucky residents have died waiting for an ambulance.

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- Kentucky has 25% fewer providers than its neighboring states;
- Certificate of Need laws drive up medical costs by “artificially limiting the supply of medical providers;”
- States with Certificates of Need have higher mortality rates and a lower quality of care than non-Certificate of Need states;
- In response to Covid-19, “states that suspended or modified their [Certificate of Need] laws saved lives compared to states that did not;”
- Certificate of Need programs are not justifiable in the context of ground ambulance transportation; and
- The Certificate of Need program operates as an economic protectionist regime.

*Id.* at 8–10. Furthermore, Legacy alleges in the Second Amended Complaint that although Congress required states to implement Certificate of Need programs to receive certain federal funding in the 1970s, Congress repealed the Certificate of Need requirement in 1986 because the Certificate of Need programs were failing to achieve their stated goals. *Id.* at 10–11. In 2004, the Federal Trade Commission and Department of Justice issued a joint report condemning Certificate of Need programs and asking states to consider scrapping their Certificate of Need programs altogether. *Id.* at 11. Based on these additional allegations, the Court granted Legacy’s

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### Motion to Amend its Amended Complaint.<sup>5</sup>

However, during the pendency of this matter, the Sixth Circuit provided clarity on the Constitutionality of Kentucky's Certificate of Need program in a similar case originating in the Western District of Kentucky. *Tiwari v. Friedlander*, 26 F.4th 355 (6th Cir. 2022).<sup>6</sup> In *Tiwari*, Dipendra Tiwari and Kishor Sapkota submitted an application to establish a home healthcare company called Grace Home Care "that would focus on serving Nepali-speaking individuals in the Louisville area." *Id.* at 358. The application, submitted in March 2018, was ultimately denied.<sup>7</sup> *Id.* at 359. Grace Home Care

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<sup>5</sup> The Court's decision to permit Legacy to amend its Complaint is bolstered by the fact that Judge Justin Walker in the Western District of Kentucky denied motions to dismiss plaintiff's equal protection and due process claims in a case based on similar facts to those alleged in Legacy's Second Amended Complaint. *Tiwari v. Friedlander*, 2020 WL 4745772 (W.D. Ky. Aug. 14, 2020).

<sup>6</sup> As the Defendants point out, the exact Certificate of Need program (KRS Chapter 216B) at issue in *Tiwari* is at issue in this case. [R. 83 at 7.] The only difference is that *Tiwari* involved the Certificate of Need program's application to home healthcare companies and this case involves the Certificate of Need program's application to ground ambulance companies. [R. 84 at 6.]

<sup>7</sup> The plaintiffs in *Tiwari* do not focus on the process of their Certificate of Need denial, focusing instead on "the substance of Kentucky's certificate-of-need law"

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filed suit in federal court alleging that the Certificate of Need law, as applied to home healthcare companies, violated the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment. *Id.* The defendants filed 12(b)(6) motions to dismiss, which were denied “in a thoughtful and thorough opinion” as to the Due Process and Equal Protection Clauses and granted as to the Privileges or Immunities Clause. *Id.* at 360. In denying the motions to dismiss, the district court homed in on research and data indicating that Certificate of Need laws increase costs, limit access to home health care, and decrease the quality of care, in addition to “protect[ing] the pockets of rent-seeking incumbents at the expense of entrepreneurs who want to innovate and patients who want better home health care.” *Tiwari*, 2020 WL 4745772, at \*8–11, 14.

At the summary judgment stage, the district court granted summary judgment, finding that “the State’s justifications for the law rationally supported it.” *Tiwari*, 26 F.4th at 360 (citing *Tiwari*, 2021 WL

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and claiming that the law “violates the liberty guarantee of the Due Process Clause.” *Tiwari*, 26 F.4th at 360. Similarly, in this case, Legacy does not “challenge the license requirement, or any other health or safety regulations that pertain to medical transport.” [R. 63 at 5.] Instead, Legacy argues only that the protest procedure and need requirement “deprive them of the liberty of pursuing their chosen trade without serving any legitimate governmental interest.” *Id.* at 14.

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1407953, at \*13). The Sixth Circuit affirmed, addressing the Certificate of Need law’s interaction with the Due Process and Equal Protection Clauses in detail. The Court held that “rational-basis review epitomizes a light judicial touch.” *Id.* at 362. The Sixth Circuit analyzed several laws and programs that failed rational-basis review, finding that all of them “involved situations in which the law failed to serve a legitimate end or the law in application did not have a rational connection to its purpose.” *Id.* at 362–63. As for Kentucky’s Certificate of Need law, the Court held that it passed the rational-basis test “perhaps with a low grade but with a pass all the same.” *Id.* at 363. In fact, the Court found that “[n]o court to our knowledge has invalidated a healthcare certificate-of-need law under the rational-basis requirements of the Fourteenth Amendment.” *Id.* at 364. The Sixth Circuit found that a rational connection existed between the State’s legitimate goal of furthering healthcare in Kentucky and its “avowed means” of “increasing cost efficiency, improving quality of care, and improving the healthcare infrastructure in place.” *Id.* at 363–64.

In the Second Amended Complaint, Legacy alleges that Kentucky’s Certificate of Need program has failed to lower costs or improve the level of care, operates as a protectionist regime, and has been disavowed in numerous studies and even by the federal government. [R. 63 at 8– 10.] However, each of the new allegations contained in Legacy’s Second Amended Complaint was addressed in detail in *Tiwari*, which binds this Court. Furthermore, this case involves the precise Certificate of Need program

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as the one at issue in *Tiwari* and is just as applicable to the ambulance company context as the healthcare company context,<sup>8</sup> particularly given the allegations raised by Legacy in this case.

Legacy argues that the Certificate of Need program has failed to lower costs or improve the level of care. However, “[t]he problem for [Legacy] is that this is not the inquiry. The Constitution does not prohibit legislatures from enacting stupid laws.” *Tiwari*, 26 F.4th at 365 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008)). Furthermore, the Due Process Clause does not contain a cost-benefit component. *Id.* Ultimately, the weighing of costs and benefits “in the face of competing costs is eminently a legislative task, not a judicial one.” *Id.* at 366. To the extent Legacy argues that Kentucky has fewer ambulances than surrounding states and that some states have modified or suspended their Certificate of Need programs because of the Covid-19 pandemic, these post hoc considerations are irrelevant because the rational-basis inquiry focuses on whether the enacting legislators had a plausible reason for passing the law. *Heller*, 509 U.S. at 324.

Although Legacy points to studies and evidence that Certificate of Need laws increase healthcare

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<sup>8</sup> Home health agencies, like the one at issue in *Tiwari*, and ambulance providers are both included within the 216B.015 definition of “health facility” for the Certificate of Need program.

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costs and lower the quality of care, the Court in *Tiwari* found that “the possibility of changed circumstances doesn’t change...the modest nature of the rational-basis inquiry.” *Id.* at 367. For example, lawmakers could rationally have thought that the Certificate of Need law would create cost efficiency for providers, which would then “benefit the public down the road.” *Id.* Defendants also argue that the Certificate of Need program “furthers the governmental interest of curbing unnecessary healthcare services.” [R. 79-1 at 10.] As for Legacy’s arguments that Kentucky’s Certificate of Need program has ultimately resulted in ambulance shortages, higher wait times, and is not justifiable, Defendants state that it was rational for the General Assembly to view the Certificate of Need program as a way to “reduce the likelihood that costly ambulances, equipment, and facilities would be underused, and thus the cost-efficiency of EMS services would be improved.” [R. 78-1 at 5.] The Court finds that the arguments proffered by the Defendants constitute rational bases on which the lawmakers could reasonably have relied upon in enacting the Certificate of Need program.

Finally, it is true that a law serving exclusively protectionist ends will fail rational-basis review. *See Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002). However, to the extent Legacy argues that the Certificate of Need law is a protectionist regime that “favors incumbents over new entrants,” the Sixth Circuit found that “[p]rotectionist though this law may be in some of its effects, that is not the only effect it has or the only goal it serves.” *Id.* at 368.

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Ultimately, the Sixth Circuit denied Legacy's precise argument in *Tiwari*, concluding that Kentucky has demonstrated that its Certificate of Need regulations "advance a legitimate cause." 26 F.4th at 368. Therefore, the Court will grant the Defendants' Motions to Dismiss as to Legacy's due process claim.

## B

Defendants also seek dismissal of Legacy's equal protection claim. [R. 78-1 at 4; R. 79-1 at 5.] The Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The purpose of the Fourteenth Amendment is "to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sadie v. City of Cleveland*, 718 F.3d 596, 602 (6th Cir. 2013) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)). "The basis of any equal protection claim is that the state has treated similarly-situated individuals differently." *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F. 2d 1031, 1036 (6th Cir. 1992).

Here, Legacy argues that the Certificate of Need requirement "draws an arbitrary and irrational distinction" between ground ambulance companies who are permitted to provide transportation in the Commonwealth and those who cannot. [R. 63 at 17.] Legacy argues that the company is as qualified to

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operate in Kentucky as any ground ambulance originating in Kentucky that possesses a Certificate of Need and that the “protest procedure and ‘need’ requirement bear no rational relationship to protecting public health or safety.” *Id.* Legacy argues the protest procedure and need requirement are protectionist. *Id.*

The Court previously granted dismissal of Legacy’s equal protection claim but permitted Legacy to amend its Amended Complaint. [R. 57 at 17; R. 75 at 7.] The Second Amended Complaint did not add any allegations to Legacy’s specific Equal Protection claim, relying instead on the same additional allegations about the Certificate of Need program’s shortcomings discussed *supra*. For many of the same reasons discussed in the due process context, the Certificate of Need program provisions survive rational basis scrutiny. *See Tiwari*, 26 F.4th at 368. “So long as the Commonwealth has not drawn categories ‘along suspect lines,’ its classifications will survive scrutiny ‘if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.’” *Id.* (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012)).

Here, the Kentucky General Assembly has articulated that the Certificate of Need program was enacted to advance the provision of safe, efficient, and quality health care. KRS § 216B.010. Defendants add that the Certificate of Need program “furthers the governmental interest of curbing unnecessary healthcare services.” [R. 79-1 at 10.]

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Furthermore, Defendants state that the General Assembly rationally viewed the Certificate of Need program as a way to “reduce the likelihood that costly ambulances, equipment, and facilities would be underused, and thus the cost-efficiency of EMS services would be improved.” [R. 78-1 at 5.] As discussed *supra*, studies questioning the efficacy of Certificate of Need programs after their enactment are not relevant to the rational basis inquiry. Ultimately, while Legacy may have drawn a different line than the one drawn by the General Assembly, “that consideration is one for the legislature, not the judiciary to make.” *Tiwari*, 26 F.4th at 370 (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). Accordingly, the Court will grant the Defendants’ Motions to Dismiss as to Legacy’s equal protection claim.<sup>9</sup>

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<sup>9</sup> The Court acknowledges that a district court in Mississippi recently concluded, based on a review of the Complaint, that the state’s Certificate of Need laws and moratoria did not rationally relate to any legitimate state interests. *Slaughter v. Dobbs*, --- F. Supp. 3d---, 2022 WL 135424, at \*5–6 (S.D. Miss. Jan. 13, 2022). However, Mississippi’s Certificate of Need law was quite different from Kentucky’s. In fact, “Mississippi’s restriction, it deserves note, ventured beyond Kentucky’s, banning *all* new entry into the market for the last several decades regardless of any ‘need’ for the services.” *Tiwari*, 26 F.4th at 369.

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### C

Defendants next seek dismissal of Legacy's dormant Commerce Clause claim. [R. 78-1 at 12; R. 79-1 at 10.] The Commerce Clause of the United States Constitution endows Congress with the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian tribes[.]" Art. I, § 8, cl. 3. Inherent in this grant of power to Congress is a limitation placed upon the states. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010) (quoting *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984)). "This self-executing limitation is often referred to as the 'negative' or 'dormant' aspect to the Commerce Clause." *E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 539–40 (6th Cir. 1997) (citing *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995)). The dormant Commerce Clause prohibits states from enacting statutes or regulations aimed at economic protectionism that are "designed to benefit in-state economic actors by burdening out-of-state actors." *Id.* at 540. The standard for evaluating alleged violations of the dormant Commerce Clause is two-tiered. *Id.* "The first step involves determining whether the statute directly burdens interstate commerce or discriminates against out-of-state interests." *Id.* If the challenged law is not discriminatory the court must still proceed to the

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second step and find the law is valid “unless the burdens on interstate commerce are ‘clearly excessive in relation to the putative local benefits.’” *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *see also Tennessee Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 449 (6th Cir. 2009).

Because Kentucky’s Certificate of Need laws indisputably treat in-state and out-of-state applicants the same, Legacy alleges the second type of claim, which is that Kentucky’s Certificate of Need laws put an “undue burden” on interstate commerce. [R. 63 at 15–16.] Even laws that are applied evenhandedly and impose only an incidental burden on interstate commerce are unconstitutional if the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008) (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)). The putative benefits of a challenged law are evaluated under the rational basis test, though “speculative” benefits will not pass muster. *Medigen of Ky., Inc. v. Pub. Serv. Comm’n*, 985 F.2d 164, 167 (4th Cir. 1993). The *Pike* test requires close examination because courts must assess a statute’s burdens, particularly when the burdens fall primarily on out-of-state interests. *Yamaha Motor Corp. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005). The test is therefore deferential but not toothless. *See Davis*, 553 U.S. at 339.

In their Second Amended Complaint, Legacy alleges that Kentucky’s Certificate of Need program substantially burdens the interstate market for

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ground ambulance services. [R. 63 at 15.] Plaintiffs specifically state that “Kentucky’s Certificate requirement prevents out-of-state ground ambulance providers like Plaintiffs from offering trips in Kentucky without undertaking the costly, burdensome, and unconstitutional process of applying for and receiving a Certificate.” *Id.*

The Court previously found that Legacy’s Amended Complaint “present[ed] issues of fact that cannot be properly resolved on a motion to dismiss,” and denied the Defendants’ Motions to Dismiss as to the dormant Commerce Clause claim. [R. 57 at 11.] Legacy’s Second Amended Complaint is identical as to the dormant Commerce Clause claim, and Defendants’ arguments in their latest Motions to Dismiss are in large part copy and paste versions of arguments that the Court previously rejected. [Compare R. 33-1 at 10–15 with R. 79-1 at 10–14; and R. 36 at 12 with R. 78-1 at 13.] Defendants have failed to raise new issues that would prompt the Court to revisit its previous ruling at this stage in the litigation. Furthermore, “[t]he fact-intensive character of” the *Pike* balancing test “counsels against a premature dismissal.” [R. 57 at 11 (citing *Colon Health Ctrs. of Am.*, 733 F.3d at 546).] Therefore, the Court will permit Legacy’s dormant Commerce Clause claim to proceed.

## D

Finally, Kentucky’s Certificate of Need laws do not violate the Privileges or Immunities Clause. As the Court previously stated, the Supreme Court’s

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*Slaughter-House Cases*, 83 U.S. 36 (1873), foreclose Legacy's Privileges or Immunities claim. [R. 57 at 18; *see also* *Tiwari*, 26 F.4th at 370.] Therefore, the Court will grant the Defendants' Motions to Dismiss as to the Privileges or Immunities Clause claim.

### III

Accordingly, and the Court being sufficiently advised, it is hereby **ORDERED** that the Defendants' Motions to Dismiss [R. 78; R. 79] are **GRANTED** as to the Due Process, Equal Protection, and Privileges or Immunities claims and **DENIED** as to the dormant Commerce Clause claim.

This the 2d day of May, 2022.

*/s/ Gregory F. Van Tatenhove*  
Gregory F. Van Tatenhove  
United States District Judge

## Appendix 22a

### **216B.015 Definitions for chapter.**

Except as otherwise provided, for purposes of this chapter, the following definitions shall apply:

- (1) “Abortion facility” means any place in which an abortion is performed;
- (2) “Administrative regulation” means a regulation adopted and promulgated pursuant to the procedures in KRS Chapter 13A;
- (3) “Affected persons” means the applicant; any person residing within the geographic area served or to be served by the applicant; any person who regularly uses health facilities within that geographic area; health facilities located in the health service area in which the project is proposed to be located which provide services similar to the services of the facility under review; health facilities which, prior to receipt by the agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future; and the cabinet and third-party payors who reimburse health facilities for services in the health service area in which the project is proposed to be located;
- (4) (a) “Ambulatory surgical center” means a health facility:
  1. Licensed pursuant to administrative regulations promulgated by the cabinet;
  2. That provides outpatient surgical

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services, excluding oral or dental procedures; and

3. Seeking recognition and reimbursement as an ambulatory surgical center from any federal, state, or third-party insurer from which payment is sought.

(b) An ambulatory surgical center does not include the private offices of physicians where in-office outpatient surgical procedures are performed as long as the physician office does not seek licensure, certification, reimbursement, or recognition as an ambulatory surgical center from a federal, state, or third-party insurer.

(c) Nothing in this subsection shall preclude a physician from negotiating enhanced payment for outpatient surgical procedures performed in the physician's private office so long as the physician does not seek recognition or reimbursement of his or her office as an ambulatory surgical center without first obtaining a certificate of need or license required under KRS 216B.020 and 216B.061;

(5) "Applicant" means any physician's office requesting a major medical equipment expenditure exceeding the capital expenditure minimum, or any person, health facility, or health service requesting a certificate of need

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or license;

- (6) “Cabinet” means the Cabinet for Health and Family Services;
- (7) “Capital expenditure” means an expenditure made by or on behalf of a health facility which:
  - (a) Under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance or is not for investment purposes only; or
  - (b) Is made to obtain by lease or comparable arrangement any facility or part thereof or any equipment for a facility or part thereof;
- (8) “Capital expenditure minimum” means the annually adjusted amount set by the cabinet. In determining whether an expenditure exceeds the expenditure minimum, the cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the improvement, expansion, or replacement of any plant or any equipment with respect to which the expenditure is made shall be included. Donations of equipment or facilities to a health facility which if acquired directly by the facility would be subject to review under this chapter shall be considered a capital expenditure, and a transfer of the equipment or facilities for less than fair market value shall be considered a capital expenditure if a transfer of the equipment or facilities at fair market value would be subject

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to review;

- (9) “Certificate of need” means an authorization by the cabinet to acquire, to establish, to offer, to substantially change the bed capacity, or to substantially change a health service as covered by this chapter;
- (10) “Certified surgical assistant” means a certified surgical assistant or certified first assistant who is certified by the National Surgical Assistant Association on the Certification of Surgical Assistants, the Liaison Council on Certification of Surgical Technologists, or the American Board of Surgical Assistants. The certified surgical assistant is an unlicensed health-care provider who is directly accountable to a physician licensed under KRS Chapter 311 or, in the absence of a physician, to a registered nurse licensed under KRS Chapter 314;
- (11) “Continuing care retirement community” means a community that provides, on the same campus, a continuum of residential living options and support services to persons sixty (60) years of age or older under a written agreement. The residential living options shall include independent living units, nursing home beds, and either assisted living units or personal care beds;
- (12) “Formal review process” means the ninety (90) day certificate-of-need review conducted by the cabinet;

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- (13) "Health facility" means any institution, place, building, agency, or portion thereof, public or private, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care and includes alcohol abuse, drug abuse, and mental health services. This shall include but shall not be limited to health facilities and health services commonly referred to as hospitals, psychiatric hospitals, physical rehabilitation hospitals, chemical dependency programs, nursing facilities, nursing homes, personal care homes, intermediate care facilities, assisted living communities, family care homes, outpatient clinics, ambulatory care facilities, ambulatory surgical centers, emergency care centers and services, ambulance providers, hospices, community mental health centers, home health agencies, kidney disease treatment centers and freestanding hemodialysis units, and others providing similarly organized services regardless of nomenclature;
- (14) "Health services" means clinically related services provided within the Commonwealth to two (2) or more persons, including but not limited to diagnostic, treatment, or rehabilitative services, and includes alcohol, drug abuse, and mental health services;
- (15) "Independent living" means the provision of living units and supportive services, including but not limited to laundry, housekeeping,

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maintenance, activity direction, security, dining options, and transportation;

- (16) "Intraoperative surgical care" includes the practice of surgical assisting in which the certified surgical assistant or physician assistant is working under the direction of the operating physician as a first or second assist, and which may include the following procedures:
  - (a) Positioning the patient;
  - (b) Preparing and draping the patient for the operative procedure;
  - (c) Observing the operative site during the operative procedure;
  - (d) Providing the best possible exposure of the anatomy incident to the operative procedure;
  - (e) Assisting in closure of incisions and wound dressings; and
  - (f) Performing any task, within the role of an unlicensed assistive person, or if the assistant is a physician assistant, performing any task within the role of a physician assistant, as required by the operating physician incident to the particular procedure being performed;
- (17) "Major medical equipment" means equipment which is used for the provision of medical and other health services and which costs in excess of the medical equipment expenditure

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minimum. In determining whether medical equipment has a value in excess of the medical equipment expenditure minimum, the value of studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the acquisition of the equipment shall be included;

- (18) "Nonsubstantive review" means an expedited review conducted by the cabinet of an application for a certificate of need as authorized under KRS 216B.095;
- (19) "Nonclinically related expenditures" means expenditures for:
  - (a) Repairs, renovations, alterations, and improvements to the physical plant of a health facility which do not result in a substantial change in beds, a substantial change in a health service, or the addition of major medical equipment, and do not constitute the replacement or relocation of a health facility; or
  - (b) Projects which do not involve the provision of direct clinical patient care, including but not limited to the following:
    - 1. Parking facilities;
    - 2. Telecommunications or telephone systems;
    - 3. Management information systems;
    - 4. Ventilation systems;
    - 5. Heating or air conditioning, or both;

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6. Energy conservation; or
7. Administrative offices;

(20) "Party to the proceedings" means the applicant for a certificate of need and any affected person who appears at a hearing on the matter under consideration and enters an appearance of record;

(21) "Perioperative nursing" means a practice of nursing in which the nurse provides preoperative, intraoperative, and postoperative nursing care to surgical patients;

(22) "Person" means an individual, a trust or estate, a partnership, a corporation, an association, a group, state, or political subdivision or instrumentality including a municipal corporation of a state;

(23) "Physician assistant" means the same as the definition provided in KRS 311.550;

(24) "Record" means, as applicable in a particular proceeding:

- (a) The application and any information provided by the applicant at the request of the cabinet;
- (b) Any information provided by a holder of a certificate of need or license in response to a notice of revocation of a certificate of need or license;
- (c) Any memoranda or documents prepared by or for the cabinet regarding the matter under review which were

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introduced at any hearing;

- (d) Any staff reports or recommendations prepared by or for the cabinet;
- (e) Any recommendation or decision of the cabinet;
- (f) Any testimony or documentary evidence adduced at a hearing;
- (g) The findings of fact and opinions of the cabinet or the findings of fact and recommendation of the hearing officer; and
- (h) Any other items required by administrative regulations promulgated by the cabinet;

(25) “Registered nurse first assistant” means one who:

- (a) Holds a current active registered nurse licensure;
- (b) Is certified in perioperative nursing; and
- (c) Has successfully completed and holds a degree or certificate from a recognized program, which shall consist of:
  1. The Association of Operating Room Nurses, Inc., Core Curriculum for the registered nurse first assistant; and
  2. One (1) year of postbasic nursing study, which shall include at least

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forty-five (45) hours of didactic instruction and one hundred twenty (120) hours of clinical internship or its equivalent of two (2) college semesters.

A registered nurse who was certified prior to 1995 by the Certification Board of Perioperative Nursing shall not be required to fulfill the requirements of paragraph (c) of this subsection;

- (26) "Secretary" means the secretary of the Cabinet for Health and Family Services;
- (27) "Sexual assault examination facility" means a licensed health facility, emergency medical facility, primary care center, or a children's advocacy center or rape crisis center that is regulated by the Cabinet for Health and Family Services, and that provides sexual assault examinations under KRS 216B.400;
- (28) "State health plan" means the document prepared triennially, updated annually, and approved by the Governor;
- (29) "Substantial change in a health service" means:
  - (a) The addition of a health service for which there are review criteria and standards in the state health plan; or
  - (b) The addition of a health service subject to licensure under this chapter;
- (30) "Substantial change in bed capacity" means the addition or reduction of beds by

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licensure classification within a health facility;

- (31) “Substantial change in a project” means a change made to a pending or approved project which results in:
  - (a) A substantial change in a health service, except a reduction or termination of a health service;
  - (b) A substantial change in bed capacity, except for reductions;
  - (c) A change of location; or
  - (d) An increase in costs greater than the allowable amount as prescribed by regulation;
- (32) “To acquire” means to obtain from another by purchase, transfer, lease, or other comparable arrangement of the controlling interest of a capital asset or capital stock, or voting rights of a corporation. An acquisition shall be deemed to occur when more than fifty percent (50%) of an existing capital asset or capital stock or voting rights of a corporation is purchased, transferred, leased, or acquired by comparable arrangement by one (1) person from another person;
- (33) “To batch” means to review in the same review cycle and, if applicable, give comparative consideration to all filed applications pertaining to similar types of services, facilities, or equipment affecting the same

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health service area;

- (34) “To establish” means to construct, develop, or initiate a health facility;
- (35) “To obligate” means to enter any enforceable contract for the construction, acquisition, lease, or financing of a capital asset. A contract shall be considered enforceable when all contingencies and conditions in the contract have been met. An option to purchase or lease which is not binding shall not be considered an enforceable contract; and
- (36) “To offer” means, when used in connection with health services, to hold a health facility out as capable of providing, or as having the means of providing, specified health services.

**Effective:** July 14, 2022

**History:** Amended 2022 Ky. Acts ch. 20, sec. 39, effective July 14, 2022. – Amended 2018 Ky. Acts ch. 143, sec. 9, effective July 14, 2018. -- Amended 2012 Ky. Acts ch. 103, sec. 1, effective July 12, 2012; and ch. 146, sec. 106, effective July 12, 2012. -- Amended 2005 Ky. Acts ch. 99, sec. 60, effective June 20, 2005. -- Amended 2001 Ky. Acts ch. 36, sec. 1, effective June 21, 2001. -- Amended 2000 Ky. Acts ch. 96, sec. 1, effective July 14, 2000; ch. 142, sec. 5, effective July 14, 2000; ch. 264, sec. 1, effective July 14, 2000; and ch. 538, sec. 1, effective July 14, 2000. – Amended 1998 Ky. Acts ch. 426, sec. 449, effective July 15, 1998; and ch. 582, sec. 1, effective July 15, 1998. -- Amended 1996 Ky.

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Acts ch. 233, sec. 8, effective July 15, 1996; and ch. 371, sec. 37, effective July 15, 1996. -- Amended 1994 Ky. Acts ch. 512, Part 7, sec. 23, effective July 15, 1994. -- Amended 1990 Ky. Acts ch. 235, sec. 6, effective July 13, 1990; and ch. 499, sec. 1, effective July 13, 1990. -- Amended 1988 Ky. Acts ch. 210, sec. 5, effective July 15, 1988. -- Amended 1982 Ky. Acts ch. 347, sec. 2, effective July 15, 1982. -- Created 1980 Ky. Acts ch. 135, sec. 2, effective July 15, 1980.

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### **216B.020 Certificate of need – Exemptions – Categories of care not exempted – Requirements for issuance of certificate of need.**

- (1) The provisions of this chapter that relate to the issuance of a certificate of need shall not apply to abortion facilities as defined in KRS 216B.015; any hospital which does not charge its patients for hospital services and does not seek or accept Medicare, Medicaid, or other financial support from the federal government or any state government; assisted living residences; family care homes; state veterans' nursing homes; services provided on a contractual basis in a rural primary-care hospital as provided under KRS 216.380; community mental health centers for services as defined in KRS Chapter 210; primary care centers; rural health clinics; private duty nursing services operating as health care services agencies as defined in KRS 216.718; group homes; licensed residential crisis stabilization units; licensed free-standing residential substance use disorder treatment programs with sixteen (16) or fewer beds, but not including Levels I and II psychiatric residential treatment facilities or licensed psychiatric inpatient beds; outpatient behavioral health treatment, but not including partial hospitalization programs; end stage renal disease dialysis facilities, freestanding or hospital based; swing beds; special clinics, including but not limited to wellness, weight

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loss, family planning, disability determination, speech and hearing, counseling, pulmonary care, and other clinics which only provide diagnostic services with equipment not exceeding the major medical equipment cost threshold and for which there are no review criteria in the state health plan; nonclinically related expenditures; nursing home beds that shall be exclusively limited to on-campus residents of a certified continuing care retirement community; home health services provided by a continuing care retirement community to its on-campus residents; the relocation of hospital administrative or outpatient services into medical office buildings which are on or contiguous to the premises of the hospital; the relocation of acute care beds which occur among acute care hospitals under common ownership and which are located in the same area development district so long as there is no substantial change in services and the relocation does not result in the establishment of a new service at the receiving hospital for which a certificate of need is required; the redistribution of beds by licensure classification within an acute care hospital so long as the redistribution does not increase the total licensed bed capacity of the hospital; residential hospice facilities established by licensed hospice programs; the following health services provided on site in an existing health facility when the cost is less than six hundred thousand dollars (\$600,000)

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and the services are in place by December 30, 1991: psychiatric care where chemical dependency services are provided, level one (1) and level two (2) of neonatal care, cardiac catheterization, and open heart surgery where cardiac catheterization services are in place as of July 15, 1990; or ambulance services operating in accordance with subsection (6), (7), or (8) of this section. These listed facilities or services shall be subject to licensure, when applicable.

- (2) Nothing in this chapter shall be construed to authorize the licensure, supervision, regulation, or control in any manner of:
  - (a) Private offices and clinics of physicians, dentists, and other practitioners of the healing arts, except any physician's office that meets the criteria set forth in KRS 216B.015(5) or that meets the definition of an ambulatory surgical center as set out in KRS 216B.015;
  - (b) Office buildings built by or on behalf of a health facility for the exclusive use of physicians, dentists, and other practitioners of the healing arts; unless the physician's office meets the criteria set forth in KRS 216B.015(5), or unless the physician's office is also an abortion facility as defined in KRS 216B.015, except no capital expenditure or expenses relating to any such building shall be chargeable to or reimbursable as a cost for

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providing inpatient services offered by a health facility;

- (c) Outpatient health facilities or health services that:
  1. Do not provide services or hold patients in the facility after midnight; and
  2. Are exempt from certificate of need and licensure under subsection (3) of this section;
- (d) Dispensaries and first-aid stations located within business or industrial establishments maintained solely for the use of employees, if the facility does not contain inpatient or resident beds for patients or employees who generally remain in the facility for more than twenty-four (24) hours;
- (e) Establishments, such as motels, hotels, and boarding houses, which provide domiciliary and auxiliary commercial services, but do not provide any health related services and boarding houses which are operated by persons contracting with the United States Department of Veterans Affairs for boarding services;
- (f) The remedial care or treatment of residents or patients in any home or institution conducted only for those who rely solely upon treatment by prayer or spiritual means in accordance with the

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creed or tenets of any recognized church or religious denomination and recognized by that church or denomination; and

- (g) On-duty police and fire department personnel assisting in emergency situations by providing first aid or transportation when regular emergency units licensed to provide first aid or transportation are unable to arrive at the scene of an emergency situation within a reasonable time.
- (3) The following outpatient categories of care shall be exempt from certificate of need and licensure on July 14, 2018:
  - (a) Primary care centers;
  - (b) Special health clinics, unless the clinic provides pain management services and is located off the campus of the hospital that has majority ownership interest;
  - (c) Specialized medical technology services, unless providing a State Health Plan service;
  - (d) Retail-based health clinics and ambulatory care clinics that provide nonemergency, noninvasive treatment of patients;
  - (e) Ambulatory care clinics treating minor illnesses and injuries;
  - (f) Mobile health services, unless providing a service in the State Health Plan;

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- (g) Rehabilitation agencies;
- (h) Rural health clinics; and
- (i) Off-campus, hospital-acquired physician practices.

(4) The exemptions established by subsections (2) and (3) of this section shall not apply to the following categories of care:

- (a) An ambulatory surgical center as defined by KRS 216B.015(4);
- (b) A health facility or health service that provides one (1) of the following types of services:
  1. Cardiac catheterization;
  2. Megavoltage radiation therapy;
  3. Adult day health care;
  4. Behavioral health services;
  5. Chronic renal dialysis;
  6. Birthing services; or
  7. Emergency services above the level of treatment for minor illnesses or injuries;
- (c) A pain management facility as defined by KRS 218A.175(1);
- (d) An abortion facility that requires licensure pursuant to KRS 216B.0431; or
- (e) A health facility or health service that requests an expenditure that exceeds the

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major medical expenditure minimum.

- (5) An existing facility licensed as an intermediate care or nursing home shall notify the cabinet of its intent to change to a nursing facility as defined in Public Law 100-203. A certificate of need shall not be required for conversion of an intermediate care or nursing home to the nursing facility licensure category.
- (6) Ambulance services owned and operated by a city government, which propose to provide services in coterminous cities outside of the ambulance service's designated geographic service area, shall not be required to obtain a certificate of need if the governing body of the city in which the ambulance services are to be provided enters into an agreement with the ambulance service to provide services in the city.
- (7) Ambulance services owned by a hospital shall not be required to obtain a certificate of need for the sole purpose of providing non-emergency and emergency transport services originating from its hospital.
- (8) (a) As used in this subsection, "emergency ambulance transport services" means the transportation of an individual that has an emergency medical condition with acute symptoms of sufficient severity that the absence of immediate medical attention could reasonably be expected to place the individual's health in serious

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jeopardy or result in the serious impairment or dysfunction of the individual's bodily organs.

- (b) A city or county government that has conducted a public hearing for the purposes of demonstrating that an imperative need exists in the city or county to provide emergency ambulance transport services within its jurisdictional boundaries shall not be required to obtain a certificate of need for the city or county to:
  1. Directly provide emergency ambulance transport services as defined in this subsection within the city's or county's jurisdictional boundaries; or
  2. Enter into a contract with a hospital or hospitals within its jurisdiction, or within an adjoining county if there are no hospitals located within the county, for the provision of emergency ambulance transport services as defined in this subsection within the city's or county's jurisdictional boundaries.
- (c) Any license obtained under KRS Chapter 311A by a city or county for the provision of ambulance services operating under a certificate of need exclusion pursuant to this subsection shall be held exclusively by the city or county government and

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shall not be transferrable to any other entity.

(d) Prior to obtaining the written agreement of a city, an ambulance service operating under a county government certificate of need exclusion pursuant to this subsection shall not provide emergency ambulance transport services within the boundaries of any city that:

1. Possesses a certificate of need to provide emergency ambulance services;
2. Has an agency or department thereof that holds a certificate of need to provide emergency ambulance services; or
3. Is providing emergency ambulance transport services within its jurisdictional boundaries pursuant to this subsection.

(9) (a) Except where a certificate of need is not required pursuant to subsection (6), (7), or (8) of this section, the cabinet shall grant nonsubstantive review for a certificate of need proposal to establish an ambulance service that is owned by a:

1. City government;
2. County government; or
3. Hospital, in accordance with paragraph (b) of this subsection.

(b) A notice shall be sent by the cabinet to all cities and counties that a certificate of

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need proposal to establish an ambulance service has been submitted by a hospital. The legislative bodies of the cities and counties affected by the hospital's certificate of need proposal shall provide a response to the cabinet within thirty (30) days of receiving the notice. The failure of a city or county legislative body to respond to the notice shall be deemed to be support for the proposal.

- (c) An ambulance service established under this subsection shall not be transferred to another entity that does not meet the requirements of paragraph (a) of this subsection without first obtaining a substantive certificate of need.
- (10) Notwithstanding any other provision of law, a continuing care retirement community's nursing home beds shall not be certified as Medicaid eligible unless a certificate of need has been issued authorizing applications for Medicaid certification. The provisions of subsection (5) of this section notwithstanding, a continuing care retirement community shall not change the level of care licensure status of its beds without first obtaining a certificate of need.
- (11) An ambulance service established under subsection (9) of this section shall not be transferred to an entity that does not qualify under subsection (9) of this section without

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first obtaining a substantive certificate of need.

- (12) (a) The provisions of subsections (7), (8), and (9) of this section shall expire on July 1, 2026.
- (b) All actions taken by cities, counties, and hospitals, exemptions from obtaining a certificate of need, and any certificate of need granted under subsections (7), (8), and (9) of this section prior to July 1, 2026, shall remain in effect on and after July 1, 2026.

**Effective:** July 14, 2022

**History:** Amended 2022 Ky. Acts ch. 110, sec. 13, effective July 14, 2022; and ch. 126, sec. 9, effective July 14, 2022. -- Amended 2018 Ky. Acts ch. 143, sec. 10, effective July 14, 2018. -- Amended 2017 Ky. Acts ch. 42, sec. 13, effective June 29, 2017. -- Amended 2015 Ky. Acts ch. 66, sec. 6, effective March 25, 2015. -- Amended 2012 Ky. Acts ch. 90, sec. 2, effective July 12, 2012; and ch. 103, sec. 2, effective July 12, 2012. -- Amended 2005 Ky. Acts ch. 102, sec. 1, effective June 20, 2005. -- Amended 2000 Ky. Acts ch. 264, sec. 2, effective July 14, 2000. -- Amended 1998 Ky. Acts ch. 582, sec. 2, effective July 15, 1998. -- Amended 1996 Ky. Acts ch. 299, sec. 1, effective July 15, 1996; ch. 351, sec. 2, effective July 15, 1996; and ch. 371,

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sec. 38, effective July 15, 1996. -- Amended 1994 Ky. Acts ch. 512, Part 7, sec. 24, effective July 15, 1994. -- Amended 1992 Ky. Acts ch. 61, sec. 4, effective March 16, 1992. -- Amended 1990 Ky. Acts ch. 235, sec. 7, effective July 13, 1990; and ch. 499, sec. 2, effective July 13, 1990. -- Amended 1988 Ky. Acts ch. 436, sec. 2, effective July 15, 1988. -- Amended 1986 Ky. Acts ch. 31, sec. 3, effective February 28, 1986. -- Amended 1984 Ky. Acts ch. 301, sec. 2, effective July 13, 1984. -- Amended 1982 Ky. Acts ch. 347, sec. 3, effective July 15, 1982. -- Created 1980 Ky. Acts ch. 135, sec. 3, effective July 15, 1980.

**Legislative Research Commission Note** (7/14/2022). This statute was amended by 2022 Ky. Acts chs. 110 and 126, which do not appear to be in conflict and have been codified together.

## Appendix 47a

### **216B.040 Functions of cabinet in administering chapter – Regulatory authority.**

- (1) The cabinet shall have four (4) separate and distinct functions in administering this chapter:
  - (a) To approve or deny certificates of need in accordance with the provisions of this chapter, except as to those applications which have been granted nonsubstantive review status by the cabinet;
  - (b) To issue and to revoke certificates of need;
  - (c) To provide a due process hearing and issue a final determination on all actions by the cabinet to deny, revoke, modify, or suspend licenses of health facilities and health services issued by the cabinet; and
  - (d) To enforce, through legal actions on its own motion, the provisions of this chapter and its orders and decisions issued pursuant to its functions.
- (2) The cabinet shall:
  - (a) Promulgate administrative regulations pursuant to the provisions of KRS Chapter 13A:
    1. To establish the certificate of need review procedures, including but not limited to, application procedures, notice provisions, procedures for review of completeness of applications, and timetables for review

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cycles.

2. To establish criteria for issuance and denial of certificates of need which shall be limited to the following considerations:
  - a. Consistency with plans. Each proposal approved by the cabinet shall be consistent with the state health plan, and shall be subject to biennial budget authorizations and limitations, and with consideration given to the proposal's impact on health care costs in the Commonwealth. The state health plan shall contain a need assessment for long-term care beds, which shall be based on a statistically valid analysis of the present and future needs of the state as a whole and counties individually. The need assessment shall be applied uniformly to all areas of the state. The methodology shall be reviewed and updated on an annual basis. The long-term care bed need criteria in the state health plan or as set forth by the appropriate certificate of need authority shall give preference to conversion of personal care beds and acute care beds to nursing facility beds, so long as the state health plan or the appropriate certificate of need authority establishes a need in the affected counties and the proposed

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conversions are more cost- effective than new construction. The fact that the state health plan shall not address the specific type of proposal being reviewed shall not constitute grounds for disapproval of the proposal. Notwithstanding any other provision of law, the long-term care bed need criteria in the state health plan or as set forth by the appropriate certificate of need authority shall not consider, factor in, or include any continuing care retirement community's nursing home beds established under KRS 216B.015, 216B.020, 216B.330, and 216B.332;

- b. Need and accessibility. The proposal shall meet an identified need in a defined geographic area and be accessible to all residents of the area. A defined geographic area shall be defined as the area the proposal seeks to serve, including its demographics, and shall not be limited to geographical boundaries;
- c. Interrelationships and linkages. The proposal shall serve to accomplish appropriate and effective linkages with other services, facilities, and elements of the health care system in the region and state, accompanied by assurance of effort to achieve

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comprehensive care, proper utilization of services, and efficient functioning of the health care system;

- d. Costs, economic feasibility, and resources availability. The proposal, when measured against the cost of alternatives for meeting needs, shall be judged to be an effective and economical use of resources, not only of capital investment, but also ongoing requirements for health manpower and operational financing;
- e. Quality of services. The applicant shall be prepared to and capable of undertaking and carrying out the responsibilities involved in the proposal in a manner consistent with appropriate standards and requirements assuring the provision of quality health care services, as established by the cabinet;
- f. Hospital-based skilled nursing, intermediate care, and personal care beds shall be considered by the cabinet in determining the need for freestanding long-term care beds.

- (b) Conduct public hearings, as requested, in respect to certificate-of-need applications, revocations of certificates of need, and denials, suspensions, modifications, or revocations of licenses.

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(3) The cabinet may:

- (a) Issue other administrative regulations necessary for the proper administration of this chapter;
- (b) Administer oaths, issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings brought before or initiated by the cabinet, and the process shall extend to all parts of the Commonwealth. Service of process in all proceedings brought before or initiated by the cabinet may be made by certified mail, or in the same manner as other process in civil cases, as the cabinet directs;
- (c) Establish by promulgation of administrative regulation under KRS Chapter 13A reasonable application fees for certificates of need;
- (d) Establish a mechanism for issuing advisory opinions to prospective applicants for certificates of need regarding the requirements of a certificate of need; and
- (e) Establish a mechanism for biennial review of projects for compliance with the terms of the certificate of need.

**Effective:** July 14, 2018

**History:** Amended 2018 Ky. Acts ch. 143, sec. 12, effective July 14, 2018. – Amended 2000 Ky. Acts ch. 264, sec. 3, effective July 14, 2000. -- Amended 1996 Ky. Acts ch. 299, sec. 2, effective July 15, 1996; and ch. 371,

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sec. 40, effective July 15, 1996. -- Amended 1994 Ky. Acts ch. 512, Part 7, sec. 26, effective July 15, 1994. -- Amended 1990 Ky. Acts ch. 493, sec. 1, effective July 13, 1990; and ch. 499, sec. 3, effective July 13, 1990. -- Amended 1988 Ky. Acts ch. 210, sec. 9, effective July 15, 1988. -- Amended 1982 Ky. Acts ch. 347, sec. 6, effective July 15, 1982. - - Created 1980 Ky. Acts ch. 135, sec. 7, effective July 15, 1980.

## Appendix 53a

**216B.061 Actions requiring certificates of need  
– Prohibitions against dividing projects to  
evade expenditure minimums and against ex  
parte contacts – Ambulatory surgical centers.**

- (1) Unless otherwise provided in this chapter, no person shall do any of the following without first obtaining a certificate of need:
  - (a) Establish a health facility;
  - (b) Obligate a capital expenditure which exceeds the capital expenditure minimum;
  - (c) Make a substantial change in the bed capacity of a health facility;
  - (d) Make a substantial change in a health service;
  - (e) Make a substantial change in a project;
  - (f) Acquire major medical equipment;
  - (g) Alter a geographical area or alter a specific location which has been designated on a certificate of need or license;
  - (h) Transfer an approved certificate of need for the establishment of a new health facility or the replacement of a licensed facility.
- (2) No person shall separate portions of a single project into components in order to evade any expenditure minimum set forth in this chapter. For purposes of this chapter, the

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acquisition of one (1) or more items of functionally related diagnostic or therapeutic equipment shall be considered as one (1) project.

- (3) No person shall have ex parte contact with the final-decision-making authority engaged in certificate of need activities regarding a certificate-of-need application from the commencement of the review cycle to the final decision. If an ex parte contact occurs, it shall be promptly made a part of the record.
- (4) No person shall obligate a capital expenditure in excess of the amount authorized by an existing certificate of need unless the person has received an administrative escalation from the cabinet as prescribed by regulation.
- (5) No person shall proceed to obligate a capital expenditure under an approved certificate of need if there has been a substantial change in the project.
- (6) A certificate of need shall be issued for a specific location and, when applicable, for a designated geographical area.
- (7) No person shall establish an ambulatory surgical center as defined in KRS 216B.015 without obtaining a certificate of need. An ambulatory surgical center shall require a certificate of need and license, notwithstanding any exemption contained in KRS 216B.020.
- (8) Nothing in this chapter shall be interpreted to

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require any ambulatory surgical center licensed as of July 12, 2012, to obtain a certificate of need to continue operations and exercise all of the rights of a licensed health care facility, regardless of whether it obtained a certificate of need before being licensed.

**Effective:** July 12, 2012

**History:** Amended 2012 Ky. Acts ch. 103, sec. 3, effective July 12, 2012. – Amended 1996 Ky. Acts ch. 371, sec. 45, effective July 15, 1996. -- Amended 1994 Ky. Acts ch. 512, Part 7, sec. 31, effective July 15, 1994. -- Amended 990 Ky. Acts ch. 499, sec. 5, effective July 13, 1990. -- Amended 1988 Ky. Acts ch. 210, sec. 14, effective July 15, 1988. -- Created 1982 Ky. Acts ch. 347, sec. 11, effective July 15, 1982.