

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2025-IA-00266-SCT & NO. 2025-IA-00502-SCT**

**MISSISSIPPI STATE DEPARTMENT OF
HEALTH; OCEANS BEHAVIORAL HOSPITAL
OF JACKSON, LLC; AND ST. DOMINIC-
JACKSON MEMORIAL HOSPITAL**

APPELLANTS

vs.

**JACKSON HMA, LLC D/B/A MERIT HEALTH
CENTRAL**

APPELLEE

APPEAL FROM HINDS COUNTY CHANCERY COURT,

**FIRST JUDICIAL DISTRICT
CIVIL ACTION NO. 25CH1:24-CV-00314**

**BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT
OF APPELLANTS OCEANS BEHAVIORAL HOSPITAL OF JACKSON,
LLC AND MISSISSIPPI STATE DEPARTMENT OF HEALTH**

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INTRODUCTION

The Certificate of Need (“CON”) system often imposes significant inefficiencies on the market for health care services by empowering existing businesses to effectively veto their own competition. That’s why such laws have often been called “competitor’s veto” laws. *See, e.g., Bruner v. Zawacki*, 997 F. Supp. 2d 691, 697 (E.D. Ky. 2014): existing providers can exploit them to veto their own competition, blocking new health care facilities from opening while cloaking their self-interested motives in the language of public benefit. This, however has deleterious consequences for the public, who suffer from the disruption of competition, with the resulting scarcity of services and increased prices. *See, e.g., Mark Flatten, CON Job: Certificate of Need Laws Used to Delay, Deny Expansion of Mental Health Options*, Goldwater Inst. (Sept. 25, 2018).² That makes it imperative to avoid interpreting the CON statutes in a way that empowers existing clinics to prevent their own competition, as is being attempted here.

That, however, is not hard to do, because Mississippi’s CON statute, unlike those of many states, does *not* contemplate the Department basing decisions on the economic consequences that an existing clinic would experience from the opening of a new clinic. Instead, the statute plainly intends for the Department to base its decisions on health and safety factors such as competence and the availability of services to the indigent.

In other words, protecting existing firms is not within the “zone of interests” contemplated by the statute—and that means, as courts in Connecticut and Missouri have held in cases like this one, that Merit lacks standing. *High Watch Recovery Ctr., Inc. v. Dep’t of Pub. Health*, 339 A.3d 619 (Conn. 2025); *State ex rel. Christian Health Care of Springfield, Inc. v. Missouri Dep’t of Health and Senior Servs.*, 229 S.W.3d 270

² <https://www.goldwaterinstitute.org/wp-content/uploads/2023/06/CON-9-2018.pdf>.

(Mo. App. 2007). To allow Merit standing to prevent competition against itself would be to permit anticompetitive exploitation of that process in a manner that will only harm patients needing care.

ARGUMENT

I. CON laws restrict opportunities for new and innovative medical services, thus imposing significant burdens on competition, which harms patients.

CON laws are often called “competitor’s veto” laws, because they allow existing businesses to forbid new competitors from entering the market to provide services to the public. These laws exist in many industries—everything from taxicabs and limousines to medical clinics and psychological treatment centers. They were originally devised in the early twentieth century to regulate railroads, and were gradually applied to automobile-based businesses such as buses, when they came into existence. *See* Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 *Geo. Mason U. Civ. Rts. L.J.* 159, 165–66 (2014). The theory at the time was that competition was economically inefficient, because businesses waste resources on “unnecessary” advertising, whereas central planning could scientifically plan the use of resources to ensure that “public needs” were adequately served.

That economic theory is now obsolete. During the twentieth century, economists discovered that competition is actually a “discovery process” necessary for finding out what the consuming public “needs” in the first place—something centralized bureaucracies are literally incapable of determining absent competition. *See generally* Don Lavoie, *National Economic Planning: What Is Left?* (1985). But not only is the

“scientific” management that early CON laws contemplated *impossible*, it also has deleterious secondary consequences. Specifically, as Judge Posner put it, CON laws “perpetuate monopoly” because a would-be business must first persuade a government agency to allow it to operate, which

will require a formal submission, substantial legal and related expenses, and a delay often of years—all before the firm may commence operations. The costs and delay are alone enough to discourage many a prospective entrant. Much more is involved than running a procedural gauntlet, however, for ultimate success is by no means certain. The favor with which regulatory agencies look upon entry varies with the agency and the period, but the predominant inclination has been negative.

Richard Posner, *Natural Monopoly and Its Regulation*, 21 Stan. L. Rev. 548, 612 (1969).

Consequently, CON laws “greatly [limit] the growth of competition in the regulated industries.” *Id.* Naturally, restricting competition raises prices and reduces the availability and quality of services.

Consider the Kentucky CON law for moving companies at issue in *Bruner, supra*. That law was far more vaguely written than the statute here, and consequently more subject to abuse by businesses seeking to prevent their own competition. Timothy Sandefur, *State “Competitor’s Veto” Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 Harv. J.L. & Pub. Pol’y 1009, 1032–35 (2015). Would-be moving companies had to apply, whereupon all existing moving companies were notified and given the opportunity to object, including to object based solely on their self-interested desire to prevent competition. *Id.* Once an objection was filed, the applicant was required to prove to a state agency that a new moving company would be “convenient” now or in the future. The agency employed no objective standards in making that determination. *Id.* at 1034.

Evidence at trial showed that during the preceding five years, *every* applicant had suffered one or more objections, for a total of 114 objections, *none* of which cited concerns with public safety, but all of which objected based on a desire to prevent competition. *Id.* at 1036. All objections were filed by existing businesses—none was ever filed by a consumer. *Id.* Virtually every applicant who suffered an objection gave up and abandoned his or her application, given the difficulty of surviving the hearing process, *id.* at 1037, but of those that did try to prove a “public convenience,” all were denied—none due to public safety concerns, but solely for anticompetitive reasons. In other words, rather than promoting the public interest, the CON law became a tool for blocking newcomers from the market—thus depriving consumers of needed services and raising prices.

With this record in mind, the District Court declared the Kentucky statute unconstitutional. “To the extent that the protest and hearing procedure prevents excess entry into the moving business,” it said, “it does so solely by protecting existing moving companies—regardless of their quality of service—against potential competition.” 997 F. Supp. 2d at 700.

Bruner is an extreme example, but it illustrates the basic pattern also seen in the health care market when subjected to CON-style regulation. A recent study found that CON laws are associated with 10 percent higher variable costs in general hospitals, that per capita expenditures are 20.6 percent higher in states with CON laws, and that patients in states with CON laws have access to between 30 percent and 48 percent fewer hospitals. Matthew Mitchell, *Certificate of Need Laws in Health Care: Past,*

Present, and Future, 61 *Inquiry* 1, 6 (2024).³ According to a joint report by the Department of Justice and the FTC, these laws “create barriers to entry and expansion, limit consumer choice, and stifle innovation,” because “incumbent firms seeking to thwart or delay entry by new competitors may use CON laws to achieve that end.” Joint Statement of the FTC and Antitrust Division of the U.S. Department of Justice, October 26, 2015⁴ at 2. And although these laws supposedly reduce health care costs, “the evidence to date does not suggest that CON laws have generally succeeded in controlling costs or improving quality.” *Id.* Indeed, empirical research has not only found no evidence that CON laws reduce costs or improve quality, but has shown that they “may actually increase costs.” Patrick Rivers, et al., *The Effects of Certificate of Need Regulation on Hospital Costs*, 36 *J. Health Care Fin.* 1, 11 (2010).⁵ And although CON laws are often defended on the grounds that they ensure sufficient services in smaller communities, research shows that they don’t actually do this. In fact, states with CON laws have 30 percent fewer rural hospitals and 20 percent fewer psychiatric care facilities than comparable states without such laws. Jaimie Cavanaugh & Matthew Mitchell, *Certificate of Need Reform: Answering the Fears*, Pacific Legal Found. (Aug. 2025)⁶ at 4-5.

³https://pmc.ncbi.nlm.nih.gov/articles/PMC11088301/pdf/10.1177_00469580241251937.pdf.

⁴https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-virginia-certificate-public-need-work-group/151026ftc-dojstmtva_copn-1.pdf.

⁵ https://mhcc.maryland.gov/mhcc/pages/home/workgroups/documents/CON_modernization_workgroup/Articles/Article%2010.pdf.

⁶<https://pacifical.org/wp-content/uploads/2025/08/SR-1161-Mitchell-and-Cavanaugh-Research-in-Brief-Certificate-of-Need-Reform-v2.pdf>.

This led former FTC chairman Olhausen to call CON laws a “failed experiment.” *Certificate of Need Laws: A Prescription for Higher Costs*, Antitrust (Fall 2015) at 52.⁷ She isn’t alone. The American Medical Association has pronounced CON laws “a failed public policy.” *Certificate of Need: Evidence for Repeal* 3 (AMA Advocacy Resource Center, 2015).⁸ It cites the lack of evidence that such laws improve health care quality, and the fact that they “are anticompetitive” and are “susceptible to abuse” by existing entities that try to exploit these laws to prevent new competition rather than to improve health outcomes. *Id.* at 2.

The problem is particularly bad in states like Iowa, where the CON law expressly requires the state to “consider” anticompetitive factors when deciding whether to issue a CON. *See, e.g.*, Iowa Stat. §§ 10A.714(1)(j), (o); 10A.714(2)(b), (c). These statutory provisions basically instruct officials to deny an application whenever existing facilities claim a new competitor would have an “impact” on them, *id.* § 10A.714(1)(o), or assert that their own facilities aren’t being used “to the maximum extent practicable,” *id.* § 10A.714(2)(c)—which of course is basically always. The result is a conscience-shocking shortage of psychological care facilities in Iowa. Investigator Mark Flatten cites an example in *CON Job, supra*. In 2015, a Tennessee-based company called SBH sought to open a mental health facility in eastern Iowa, to take care of patients in severe need. *Id.* at 4. The area was drastically underserved—but two other firms ran facilities nearby, and objected to SBH’s application for a CON, because they were already working on improving their own facilities. Their opposition stalled SBH’s application for two years,

⁷https://www.ftc.gov/system/files/documents/public_statements/896453/1512fall15-ohlhausenc.pdf.

⁸https://www.akleg.gov/basis/get_documents.asp?session=33&docid=957.

and required three hearings and personal intervention by the governor, before it was allowed to open. In the interim, Iowans were forced to do without.

“Doing without” is no minor thing. As Flatten notes, the Iowa controversy led to an investigation in which witnesses testified that patients were often “forced to sit untreated in hospital emergency rooms for hours, days, and sometimes more than a week because there were no psychiatric hospital beds available.... Sheriffs described having their deputies crisscrossing the state, routinely driving four and five hours or more, to deliver inmates in psychological crises to far-flung mental health facilities.” *Supra* at 3. Patients were sometimes taken to hospitals with inadequate facilities, where they were handcuffed to gurneys for hours. *Id.* at 1.

II. Merit’s claims do not fall within the statute’s “zone of interests,” and it therefore lacks standing.

This Court has made clear that standing turns on “aggrievement.” *See, e.g., Belhaven Improvement Ass’n v. City of Jackson*, 507 So.2d 41, 45–47 (Miss. 1987). Aggrievement is determined by the “zone of interests” established in the statute. But the “zone of interests” in this statute don’t include protecting Merit from competition. To give it standing would be to insert anti-competitive elements into that statute, contrary to sound public policy.

A. Mississippi’s CON law, unlike those of other States, does not contemplate authorizing the Department to deny a CON based on the consequences of competition.

Many CON laws are explicitly anti-competitive. Illinois, for example, has a CON law governing car dealerships, *see* 815 Ill. Comp. Stat. 710/4(e)(8), which provides that a new dealership may not open unless the government decides there’s “good cause,” *id.* § 710/12(c)—a determination based on whether the would-be new dealership will compete

against existing dealerships. *Gen. Motors Corp. v. State Motor Vehicle Rev. Bd.*, 862 N.E.2d 209, 220 (2007). As one judge put it, the statute is “nothing more than a protectionist measure favoring existing motor vehicle dealerships” from competition. *Id.* at 231 (Karmeier, J., dissenting).

Another example is Ohio’s CON law, which requires officials to “consider the impact of the [proposed] project on all other providers of similar services in the service area ... including the impact on their ... market share and financial status.” Ohio Admin. Code § 3701-12-20(E). Georgia’s CON law likewise requires officials to deny a CON to an applicant whose project is “predicted to be detrimental to existing hospitals within the planning area,” with “detrimental” defined as reducing the number of patients going to the existing hospital. Ga. Stat. § 31-6-42(b.1)(7). This, of course, means that if the new hospital would serve patients so well that they would overwhelmingly prefer the newcomer to the existing hospital, the newcomer shall be denied the CON for precisely that reason.

Mississippi’s CON law is different. It does *not* expressly contemplate protecting existing hospitals against competition. It makes no mention either of competition or of minimizing economic consequences for existing clinics. It requires only that an application be consistent with the state health plan, and that plan doesn’t seek to protect existing clinics from competition. *See* FY2022 Mississippi State Health Plan.⁹ Section 306.01 is instead focused on factors such as ensuring that applicants provide a “reasonable amount” of care for the indigent, or that mental health care facilities provide a comprehensive treatment program. The plan asserts that there are more hospital beds than needed, but does so out of a concern that “existing services providers

⁹<https://msdh.ms.gov/page/resources/16691.pdf>.

[might] maintain unwarranted surpluses to shield themselves from competition.” *Id.* § 500. In other words—to borrow a slogan common in antitrust law—Mississippi’s CON laws aim to “protect competition, *not* competitors.” *Marucci Sports, L.L.C. v. Nat’l Collegiate Athletic Ass’n*, 751 F.3d 368, 376 (5th Cir. 2014) (emphasis added).

Had the legislature intended the CON law as an anti-competition measure, it could easily have used language like that in the Illinois, Ohio, or Georgia laws. Yet it didn’t. *Cf. Mississippi Baptist Health Sys., Inc. v. Harkins*, 245 So.3d 370, 378 ¶ 29 (Miss. 2018) (when Legislature could have accomplished something in a statute and did not do so, that is evidence the statute doesn’t do that thing). Instead, the statute evinces an intention to empower the Department to evaluate the total statewide needs for health care in order to ensure that the indigent receive adequate services—not to protect the parochial interests of existing providers.

B. This Court should follow the Connecticut Supreme Court’s recent ruling in *High Watch Recovery Center* because giving standing to existing firms would be tantamount to making the statute expressly anti-competitive.

Consistent with the above, Mississippi’s CON statute simply does not cover changes of ownership (“CHOW”), which are governed exclusively by regulation. On the contrary, Section 41-7-191(1) is specific: it only applies (as relevant here) to “[t]he construction, development or other establishment of a *new* health care facility,” or to CHOWs in which a notice of intent is not filed within 30 days, none of which applies here. *Id.* § 41-7-191(1)(a), (h) (emphasis added). This transaction is therefore not covered by the CON requirement, and accordingly, none of the procedural provisions governing who may appeal or otherwise challenge the Department’s actions apply.

It makes sense to treat CHOWs differently from the establishment of a new facility if the state’s primary concern is to ensure adequate provision of care for the indigent, as opposed to an anti-competition policy. If the latter were the statute’s purpose, then obviously any existing firm should be entitled to invoke statutory restrictions on competition. Such “competitive injury” standing is common in federal courts. *See, e.g., El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995). But if the statute exists to ensure that the needs of the indigent are served, rather than to protect market incumbents from competition, then such standing does not make sense. In fact, the opposite applies: **plaintiffs typically lack standing to challenge a benefit others receive that doesn’t directly affect them.** *See, e.g., Allen v. Wright*, 468 U.S. 737, 755 (1984).¹⁰

The recent Connecticut decision in *High Watch Recovery Ctr., supra*, is instructive. There, one clinic objected to the government granting a CON to operate a competing clinic. The court found that the objector lacked standing, because it wasn’t aggrieved by the decision. It applied a “zone of interests” test, and concluded that “allegations that a governmental action will result in competition harmful to the complainant’s business would not be sufficient to qualify the complainant as an aggrieved person.” 339 A.3d at 628, 625 (citation omitted). While there might be times when the state “encompass[es] market competitors within its zone of interests,” that was not true in this instance. *Id.* at 626. That was because the Connecticut CON law—like Mississippi’s—required the agency to consider public needs, the capacity of public

¹⁰Obviously federal standing rules don’t govern Mississippi courts, but Mississippi law still requires the plaintiff to prove a “*present, existent*” injury in the form of “a right to judicial enforcement of a legal duty,” as opposed to “[a]n inchoate or not fully developed right.” *Hotboxxx, LLC v. City of Gulfport*, 154 So.3d 21, 27 ¶ 21 (Miss. 2015).

facilities, the qualifications of the applicant—but did *not* require the agency to “protect[] market participants from competition.” *Id.* at 629.

For example, the Connecticut court pointed to a different CON law which required an agency to consider the “effect” on “existing motor transportation facilities” from the granting of a CON, *id.*, which plainly evinced a design to protect established firms from competition. Such language was absent from the *medical* CON statute, however, which showed that the statute did not include anti-competitive concerns within its zone of interests. Consequently, the objector lacked standing. The exact same applies here. Like Connecticut’s law, Mississippi’s CON statute contains no language evincing a concern to protect existing clinics against competition. Thus “[the] statutory zones of interests do not encompass market participants.” *Id.* at 630.¹¹

The plaintiff in *High Watch Recovery Ctr.* asserted—as Merit does here—a general interest in ensuring that the CON procedure was “free from procedural ‘irregularities.’” *Id.* at 630. But the court also found no standing under that theory. “[P]rocedural irregularities resulting in loss of opportunity to be heard,” it said, “do not establish classical aggrievement.” *Id.* at 632 (citation omitted).

Missouri’s Court of Appeals reached the same conclusion in *Christian Health Care of Springfield, supra*. There, too, an existing clinic challenged the grant of a CON to a new clinic, and the court found no standing. “[T]he “right” to be free from legitimate competition is not a right at all and is certainly not one protected by law,” the court observed. 229 S.W.3d at 277 (citation omitted). Applying the “zone of interest”

¹¹Contrast the Florida decision *Hospice of Palm Beach Cnty., Inc. v. State, Agency for Health Care Administration*, 876 So.2d 4 (Fla. Dist. Ct. App. 2004), where the court found that an existing clinic did have standing—because the statute was expressly anti-competitive. It provided that existing facilities could initiate a proceeding if they could show their business would be “substantially affected” by a new competitor. *Id.* at 7.

test, it found that the statute’s “clear goal” was “to protect residents of nursing homes,” and that there was “nothing” in the law “which indicates that economic competitors are in the zone of interest.” *Id.* at 278. Again, the same is true here.

The zone of interests in Mississippi’s CON statute is the protection of patients’ access to services. The statute notably does not expressly give existing firms standing to challenge the Department’s decision to grant permission to operate a new facility. Absent such express language, the Chancery Court inferred it from Section 41-7-173(a) (ii) and (iii), which define “affected person” to include “a person residing within the geographic area to be served by the applicant's proposal” and “a person who regularly uses health care facilities or HMOs located in the geographic area of the proposal which provide similar service to that which is proposed.” This language obviously focuses on patients, not clinics.

Merit’s interest can be one of two things: it seeks either to block competition or to be shielded from anticipated economic consequences of Oceans operating. The former, as seen above, isn’t a judicially cognizable right under the statute, which isn’t concerned with blocking competition, and the idea of a legal “right” to be protected against competition would be bad public policy. *See Tallahatchie Valley Elec. Power Ass’n v. Mississippi Propane Gas Ass’n*, 812 So. 2d 912, 925–26 ¶¶ 42-45 (Miss. 2002) (no right to be free of competition).¹²

¹²Merit also asserts a Fourteenth Amendment injury as well. The Supreme Court long ago held that nobody has a Fourteenth Amendment right to be free from competition. *See Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 752-53 (1884). Consequently there’s no “procedural due process” right against competition. Its state-based procedural due process claim fares no better. Since Merit has no right to participate in proceedings exempt from the CON statute, it’s owed no due process when being “denied” such a purported right.

In *Tallahatchie Valley*, the plaintiff sued the Tennessee Valley Electric Power Association (“TVEPA”) for acquiring an interest in the DeSoto gas company, arguing that TVEPA was statutorily barred from acquiring anything other than electric companies. 812 So.2d at 916-20 ¶¶ 13-26. The court said it was—but also that the plaintiff lacked standing because the purported injury arising from TVEPA’s acquisition of DeSoto was that the plaintiff had “lost customers to DeSoto Gas,” and this was *not* a legally cognizable injury. *Id.* at 924-25 ¶¶ 40, 42. “There is,” said the court, “no statutory or contractual right to be free from competition.” *Id.* at 926 ¶ 45. The same is true here.

Merit’s second purported injury is also too attenuated. Paragraphs 23 *et seq.* assert that St. Dominic will be free to transfer emergency psychiatric patients to “other hospitals like Merit,” which presumably will increase Merit’s costs. *Id.* ¶ 26. This is not adequate for standing purposes. In *Simon v. East Ky. Welfare Rts. Org.*, 426 U.S. 26 (1976), plaintiffs challenged favorable tax treatment given to hospitals that the plaintiffs complained did not provide the full range of treatment to the indigent as required by law. Although the statute in question, like the statute here, gave “aggrieved” persons a right to sue, *id.* at 38, standing nevertheless requires that the plaintiff “stand to profit in some personal interest” from the outcome, and some of the plaintiffs had only an “abstract concern” with the goal of “promoting access of the poor to health services.” *Id.* at 39-40.

Other plaintiffs in *Simon* asserted a different injury: the denial of medical services. But the Court found that injury too attenuated to establish standing because the defendants were officials in charge of the tax treatment, not the hospitals denying service. *See id.* at 41. The connection between the favorable tax treatment and the denial

of services was “speculative” and therefore insufficient for standing. *Id.* at 42-43. The same is true here of Merit’s argument that it will have to provide care if Oceans doesn’t.

The bottom line is that (a) the economic impact on Merit doesn’t confer standing because that is outside the statutory zone of interests, and (b) Merit’s claims of economic harm flowing from Ocean’s operations are too attenuated to qualify as direct injury.

CONCLUSION

The Court should *reverse*.

THIS the 16th day of January 2026.

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CERTIFICATE OF SERVICE

I, Theodore Cooperstein, one of the attorneys for Amicus Curiae Goldwater Institute, do hereby certify that I electronically filed the above and foregoing ***Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Goldwater Institute in Support of Appellants Oceans Behavioral Hospital of Jackson, LLC and Mississippi State Department of Health*** using the Court's MEC system which sent notification of such filing to all counsel of record.

I also certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Goldwater Institute in Support of Appellants Oceans Behavioral Hospital of Jackson, LLC and Mississippi State Department of Health*** to the following:

Honorable Tametrice Hodges-Linzey
Hinds County Chancery Court
P.O. Box 686
Jackson, MS 39205-0686

THIS the 16th day of January 2026.

/s/ Theodore M. Cooperstein

Theodore M. Cooperstein