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Occupational Licensing: Regulation and Competition

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Testimony of

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Good afternoon Chairman Marino, Ranking Member Cicilline, and Members of the Committee. I am pleased to have this opportunity to speak with you about the rise of occupational licensing and its impact on American workers, consumers, and entrepreneurs.

I am an attorney at the Institute for Justice, a public-interest law firm that combats occupational licensing across the country through litigation, research, grassroots activism, and legislative advocacy.

For decades, the Institute for Justice has been at the forefront of the fight against occupational licensing. We have represented scores of entrepreneurs who have had their right to earn a living curtailed by arbitrary and unnecessary licensing restrictions—from Louisiana florists[1] to tour guides in Philadelphia[2] and teeth whiteners in Connecticut.[3] We have successfully challenged occupational licensing laws as violations of the First and Fourteenth Amendments,[4] as well as parallel protections afforded by State Constitutions.[5] Along the way, we have seen time and again the significant harms that are caused by occupational licensing.

Occupational licensing is, increasingly, one of the most prevalent regulatory barriers in the American workplace. Whereas in the 1950s only one in twenty U.S.

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[1] Institute for Justice, Louisiana Florists, http://bit.ly/1PzITLM.

[2] Institute for Justice, Philadelphia Tour Guides, http://bit.ly/1lPojPZ.

[3] Institute for Justice, Connecticut Teeth Whitening, http://bit.ly/1K90mOY.

[4] *See, e.g., Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

[5] *See, e.g.,Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W. 3d 69 (Tex. 2015); *see also id.* at 92 (Willett, J., concurring).

workers needed a license from the government to pursue their chosen occupation, today that figure stands at almost one in four.[6]

Increasingly, occupational licensing has attracted criticism from a bipartisan mix of sources, both within and outside government. The Federal Trade Commission recently stated that "[u]nnecessary licensing restrictions erect significant barriers and impose costs that cause real harm to American workers, employers, consumers, and our economy as a whole, with no measurable benefits to consumers or society."[7] And the White House, under the administration of President Barack Obama, issued a report concluding that licensing laws "raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across state lines."[8] Outside government, groups as diverse as the Brookings Institution,[9] Heritage Foundation,[10] and Reason Foundation[11] have issued publications critical of occupational licensing.

Occupational licensing has spread because it serves the interests of economic insiders—excluding competition from the market and allowing industry incumbents to charge higher prices. But occupational licensing limits opportunities for workers,

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[6] Morris M. Kleiner and Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, British J. of Indus. Relations (Dec. 2010), at 677-78.

[7] FTC, Economic Liberty: Opening Doors to Opportunity, http://bit.ly/2gHJ67x (last visited Sept. 6, 2017).

[8] Department of the Tresasury, Council of Economic Advisers, and Department of Labor, *Occupational Licensing: A Framework for Policymakers* (July 2015), at 3.

[9] Morris M. Kleiner, The Hamilton Project, *Reforming Occupational Licensing Boards* (Mar. 2015), *available at* http://brook.gs/2f8CAH9.

[10] James Sherk, The Heritage Foundation, *Creating Opportunity in the Workplace* (Dec. 2014), *available at* http://herit.ag/1ZASnRN.

[11] Adam B. Summers, Reason Foundation, *Occupational Licensing: Ranking the States and Exploring Alternatives* (Aug. 2007), *available at* http://bit.ly/1PufxyO.

frustrates entrepreneurs seeking to introduce innovative new business models, and raises prices paid by consumers. Occupational licensing also infringes workers' constitutional rights, including the right to earn a living, the right to freedom of speech, and the right to travel. Advocates of licensing claim that it is necessary to protect health and safety, but these claims generally do not withstand examination. Numerous less-restrictive alternatives are available to protect health and safety without limiting access to the marketplace. Most occupational licensing occurs at the state level and is enforced by boards composed of industry insiders, who use their position to limit competition.

The Restoring Board Immunity Act of 2017, H.R. 3446 and S. 1649, responds to these concerns by creating a framework for states to reform burdensome and unnecessary occupational licensing laws. The bill would confer limited antitrust immunity on state licensing boards, but only if states adopt both a policy of using less-restrictive alternatives to occupational licensing and procedures to ensure compliance with that policy. At the same time, the bill is sensitive to federalism concerns, as it gives states a choice between two procedural mechanisms to secure immunity, while also leaving states the choice to pursue immunity by other means (such as changing the composition of their boards) or to not pursue immunity at all. The bill thus provides benefits to states that adopt a program of occupational licensing reform—benefitting workers, consumers, and entrepreneurs—while not mandating that states take any of these steps. The Institute for Justice is pleased to support this important and worthwhile piece of legislation.

Industry Insiders Seek Out Licensing

Industry insiders frequently lobby legislators and regulators to impose new licensing barriers.[12] Existing market participants like licensing because it makes it more difficult for new competition to enter the market. Shielded from normal market pressures, industry insiders can charge consumers higher prices without concern that they will be undercut by lower-cost competitors.[13]

This dynamic is accelerated, in many cases, by laws that confer licensing authority on professional boards composed of the very industry insiders who benefit from licensing laws.[14] Unsurprisingly, when industry insiders are given authority to interpret and enforce licensing laws, they generally apply those laws to exclude competition and benefit their own bottom lines.

Recent history is replete with instances of industry groups seeking to impose unnecessary licensing burdens to advance their own self-interest. To highlight a few examples:

- Interior Design: The American Society for Interior Design and other industry lobbying groups have conducted a decades-long, nationwide campaign to impose

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[12] Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing* (Jan. 2015), *available at* http://bit.ly/1n0TDMm.

[13] Kleiner and Krueger, *supra* note 6, at 681 (finding that licensing is associated with an approximately 15 percent increase in hourly earnings).

[14] Brief of *Amici Curiae* Scholars of Public Choice Economics in Support of Respondent, *North Carolina State Board of Dental Examiners v. FTC*, No. 13-534 (U.S. 2014).

licensing on interior designers.[15] Three states and the District of Columbia have bent to this pressure and imposed licensing restrictions on interior designers, while numerous other states have imposed titling laws restricting which individuals can refer to themselves as "interior designers."[16] Advocates of imposing licensure on would-be interior designers maintain that licensing is needed to protect consumer safety, but impartial studies by state regulators have repeatedly found no viable health and safety justification for these laws.[17] And, indeed, it is difficult to imagine any conceivable danger from a misplaced throw pillow or unsightly shade of paint.

- Tax Preparers: With the support of large tax preparation firms, the IRS moved in 2011 to impose a new licensing scheme for tax preparers, which it estimated would sweep in 600,000 to 700,000 tax preparers who were previously unregulated at the federal level.[18] A Senior Vice President at H&R Block told reporters the company supported the regulation, as it would mean H&R Block "won't be competing against people who aren't regulated and don't have the same

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[15] Dick M. Carpenter II, Ph.D., Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* (Nov. 2007), at 9-10, *available at* http://iam.ij.org/2xUFJ56.

[16] *Id.* at 7.The State of Alabama also sought to license the practice interior design, but the state courts struck down that law as unconstitutional. *Id.*

[17] *Id.* at 12. An analysis of complaint data for interior designers in 13 states, conducted by the Institute for Justice, likewise found that the vast majority of complaints submitted to regulators concerned unlicensed practice—rather than a legitimate threat to health or safety. *Id.* at 14.

[18] Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011).

standards as we do."[19] In other words, by driving out competition, the rule would allow firms like H&R Block to raise their prices.[20] So, it is perhaps unsurprising that the IRS official who oversaw the drafting of these regulations was none other than a former CEO of H&R Block.[21] The IRS sought to impose these new licensing burdens despite the fact that tax preparers are already subject to civil and criminal statutes imposing stringent penalties for misconduct, and despite a very low prevalence of misconduct by tax preparers.[22] Fortunately, in a case brought by the Institute for Justice, a federal court found the IRS lacked authority to impose licensing.[23] Since then, however, some in Congress have sought to impose licensing through legislation—again with the support of large tax preparers.[24]

- Teeth Whitening: As teeth whitening services have become increasingly popular and lucrative, dentists across the country have lobbied state legislators and

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[19] Editorial, *H&R Blockheads*, Wall Street Journal, Jan. 7, 2010, *available at* http://on.wsj.com/1PwhESI.

[20] Joe Kristan, *Tax Roundup, 12/24/2012: The Coming Preparer Crash*, Tax Update Blog, Dec. 24, 2012, http://bit.ly/1JN855A (predicting that the "population of authorized return preparers will crash" and that prices will rise due to "increas[ed] demand for the big national tax preparation franchises").

[21] Timothy P. Carney, *H&R Block, TurboTax and Obama's IRS Lose in Effort to Regulate Small Tax Preparers Out of Business*, Washington Examiner, Feb. 11, 2013, *available at* http://washex.am/23yLi3N.

[22] Institute for Justice, IRS Tax Preparers, http://bit.ly/2jcKOCK. Although an estimated 900,000 to 1.2 million paid preparers prepare approximately 87 million tax returns annually, the IRS only recommended prosecution in 162 cases in 2001 and 2002 combined. *Id.*

[23] *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

[24] Melissa Quinn, *Bill Regulating Tax Preparers Faces Criticism for Impacts to Small Businesses, Consumers*, Daily Signal, Dec. 29, 2015, *available at* http://dailysign.al/1ZpWB9q.

regulators to exclude non-dentist teeth whiteners.[25] Teeth whitening is safe; indeed, consumers can purchase teeth whitening products to apply to their own teeth in their own homes. A study of complaint data pertaining to teeth whiteners found that only four health-and-safety complaints were filed across 17 states over a five-year period, and all of those complaints concerned common reversible side-effects.[26] Over the same period, dentists and dental associations filed numerous complaints about increased competition from unlicensed teeth whiteners.[27] In response to such pressure, numerous states have acted to limit the practice of teeth whitening to licensed dentists.[28] In many cases, these restrictions have been imposed by boards composed primarily of practicing dentists who stand to benefit from the regulations—an arrangement that the U.S. Supreme Court concluded gave rise to potential liability under federal antitrust law.[29]

These are hardly isolated incidents. Other examples of nakedly protectionist licensing laws—drawn from cases litigated by the Institute for Justice—include attempts by veterinary boards to monopolize equine dentistry[30] and animal massage;[31] attempts by cosmetology boards to monopolize hair braiding,[32] eyebrow

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[25] Angela C. Erickson, Institute for Justice, *White Out: How Dental Industry Insiders Thwart Competition From Teeth-Whitening Entrepreneurs* (Apr. 2013), *available at* http://bit.ly/1SmOjjF.

[26] *Id.* at 24.

[27] *Id.*

[28] *Id.* at 14-15, 18.

[29] *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

[30] Institute for Justice, Texas Equine Dentistry, http://bit.ly/1SSwvMB.

[31] Institute for Justice, Arizona Animal Massage, http://bit.ly/205dqcb.

[32] Institute for Justice, Iowa Hair Braiding, http://bit.ly/1n6IA4T.

threading,[33] and makeup artistry; [34] and attempts by funeral director boards to monopolize the sale of caskets.[35]

Even where occupations are licensed in all fifty states, concerns with anticompetitive regulation frequently arise. For instance, while every state licenses the medical profession, states differ in the extent to which they allow licensed nurse practitioners to compete with doctors. The FTC has observed that restrictions on nurse practitioners often serve to shield doctors from competition—for instance, by mandating that nurse practitioners be "supervised" by doctors who provide little added benefit to the consumer but nonetheless charge a fee for their supervision.[36] This kind of regulation drives up the price of healthcare, "which can be detrimental to health care consumers and have broader public health consequences."[37] No occupation is immune from the risk that licensing will be used to drive up prices, rather than to address legitimate public health and safety concerns.

Licensing Imposes Significant Costs

While licensing benefits industry insiders, it imposes costs on just about everyone else. Workers, consumers, and entrepreneurs all suffer significant harms as a result of occupational licensing laws.

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[33] Institute for Justice, Arizona Eyebrow Threading, http://bit.ly/1n6IACa.

[34] Institute for Justice, Nevada Makeup, http://bit.ly/1SmSrQC.

[35] Institute for Justice, Oklahoma Caskets, http://bit.ly/1n1bK4R.

[36] *See* FTC, Competition and the Regulation of Advanced Practice Nurses at 14-16, 29-31 (Mar. 2014), *available at* http://bit.ly/2wMOz78.

[37] *Id.* at 14; *see also* Benjamin J. McMichael, *Beyond Physicians: The Effect of Licensing and Liability Laws on the Supply of Nurse Practitioners and Physician Assistants* (2017) (Mercatus Working Paper), *available at* http://bit.ly/2gOAYT7.

- Workers: Most obviously, licensing erects barriers to entry for individuals seeking to enter the workforce. According to economist Morris Kleiner, licensing results in a loss to the economy of **2.85 million jobs**.[38] These barriers are most harmful for individuals on the first rungs of the income ladder—including, disproportionately, members of racial and ethnic minorities—as those individuals can often least afford to pay the costs of time and money required to obtain a license.[39] Notably, these barriers vary considerably across state lines, suggesting that they are not truly necessary to protect the public. A study of 102 lower-income occupations found that only 15 were licensed in 40 states are more, while occupations that required months of training in one state might require only a few days of training in another.[40] In other words, individuals are being denied the right to earn an honest living not because they pose an actual danger to the public, but rather because they happen to live in the wrong state.

- Consumers: Licensing raises costs by eliminating competition, and the brunt of those higher costs are paid by consumers. Economist Morris Kleiner has estimated the cost of licensing to consumers, in the form of higher prices, at **$203 billion per year**.[41] Higher costs can also harm some consumers by causing them to forego necessary purchases altogether. For instance, one study found that areas

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[38] Kleiner, *supra* note 9, at 6.

[39] Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior (Sept. 1983).

[40] Dick M. Carpenter, *et al.*, Institute for Justice, *License to Work: A National Study of Burdens from Occupational Licensing* (May 2012), at 4-5, *available at* http://bit.ly/235ekrB.

[41] Kleiner, *supra* note 9, at 6.

with strict licensing requirements for electricians have higher electrocution rates, presumably because consumers are more likely to resort to dangerous "do it yourself" electrical work.[42] The Federal Trade Commission also has warned that "licensing of opticians and optical establishments may actually increase the incidence of health problems associated with contact lens use" because increased costs "may induce more individuals to over-wear their replacement lenses."[43]

- Entrepreneurs: Finally, licensing often frustrates the ability of entrepreneurs to bring innovative new business models to the market. For instance, in the medical field, licensing laws threaten to block attempts to provide medical advice via telephone and video chat—an innovation that could increase availability of medical care while simultaneously lowering prices.[44] In the legal field, meanwhile, licensing laws threaten to block services that help consumers create their own standard legal documents over the internet—an innovation that could likewise address a chronic shortage of legal services while also lowering prices.[45]

The foregoing are hardly the only costs associated with licensing. Licensing can also decrease the quality of goods and services, as market participants compete on quality as well as cost and may decrease quality in the absence of competition.[46] Licensing can give rise to entirely unregulated black markets, as high costs drive

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[42] Sidney L. Carroll and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, Law and Human Behavior (1983).

[43] Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004), at 21-22, *available at* http://1.usa.gov/1Tx9YVV.

[44] *Teladoc, Inc. v. Texas Medical Board*, 453 S.W.3d 606 (Tx. Ct. App. 2014).

[45] *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261 (Ark. 2013).

[46] Summers, *supra* note 11, at 11.

consumers from the legal market.[47] Licensing poses barriers to the reintegration of former prisoners into the workplace, as a criminal conviction may make it difficult or impossible to obtain an occupational license.[48] And licensing decreases mobility, as licenses are not portable across state lines—an issue that has posed particular concerns for military spouses who have difficulty acquiring a new license every time they are required to move to a new state.[49]

Licensing Infringes On Fundamental Constitutional Rights

Licensing laws are not just bad policy; they also are often unconstitutional. Licensing laws run afoul of a variety of constitutional protections, including the right earn a living, the right to freedom of speech, and the right to travel.

- Right to Earn A Living: The right to earn a living by your chosen occupation has long been recognized as a fundamental liberty secured by the Constitution.[50] Yet licensing laws frequently place unnecessary and irrational restrictions on that fundamental freedom: So, for instance, the U.S. Court of Appeals for the Fifth Circuit found that Louisiana violated the Constitution when it prohibited a group of monks from selling caskets—even though a casket is literally nothing more than a

[47] *Id.* at 13.

[48] American Bar Association, National Inventory of the Collateral Consequences of Conviction, http://bit.ly/1CuyVLL.

[49] Karen Jowers, *Spouses Face Licensing Roadblocks in Variety of Fields*, Military Times, May 4, 2015, *available at* http://bit.ly/1SnNwzw.

[50] *See Corfield v. Coryell*, 6 F. Cas. 546 (CCED Pa. 1825) (Washington, J.); *see also Truax v. Raich*, 239 U.S. 33, 41-42 (1915).

box—because they were not licensed as funeral directors.[51] And three separate federal courts have found that states violated the Constitution by requiring African hair braiders to undergo thousands of hours of schooling (almost entirely unrelated to braiding) and obtain a cosmetology license to engage in the traditional practice of braiding hair.[52] These cases highlight the fact that, for many Americans, their chosen career is not only a vital source of income but also a central part of their identity. By constraining individuals' choice of occupation, licensing laws interfere with an important aspect of liberty protected by the Constitution.

- Freedom of Speech: As occupational licensing has grown to occupy larger fields of human endeavor, it also has come into conflict with the First Amendment. Many individuals use words to make a living, and the government runs afoul of the First Amendment when it uses licensing laws to dictate who can and cannot talk about a given subject. So, for instance, the United States Court of Appeals for the D.C. Circuit recently found that the D.C. government violated the First Amendment when it required a license to work as a tour guide.[53] And a federal court likewise found that the Kentucky psychologist-licensing board violated the First Amendment when it attempted to end the publication of a popular advice column on the ground

[51] *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *see also Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

[52] *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

[53] *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

that the column constituted "unlicensed practice of psychology."[54] Individuals do not lose their First Amendment rights when they engage in an occupation; yet, too often, licensing authorities act as if they were exempt from the First Amendment.

- Right to Travel: The Supreme Court has recognized that the "right to travel from one State to another is firmly embedded in our jurisprudence."[55] Licensing laws place significant burdens on this right to travel, as states frequently refuse to recognize licenses issued by other states. So, for instance, although the practice of medicine obviously does not differ from state to state, doctors are unable to carry their licenses across state lines.[56] Similar restrictions burden nearly all licensed professionals, and at the Institute for Justice we have challenged a number of licensing schemes designed to exclude competition from outside the state, including laws governing funeral directors[57] and interior designers.[58] Individuals should not have to choose between their professional livelihood and their right to travel.

Licensing Is Frequently Unnecessary

Advocates of occupational licensing frequently maintain that licensing is necessary to promote the public's health and safety. All too often, however, these claims are not borne out by empirical evidence. For instance, a 2001 report surveyed academic studies on the impact of occupational licensing on the quality of products

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[54] *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015).

[55] *Saenz v. Roe*, 526 U.S. 489 (1999).

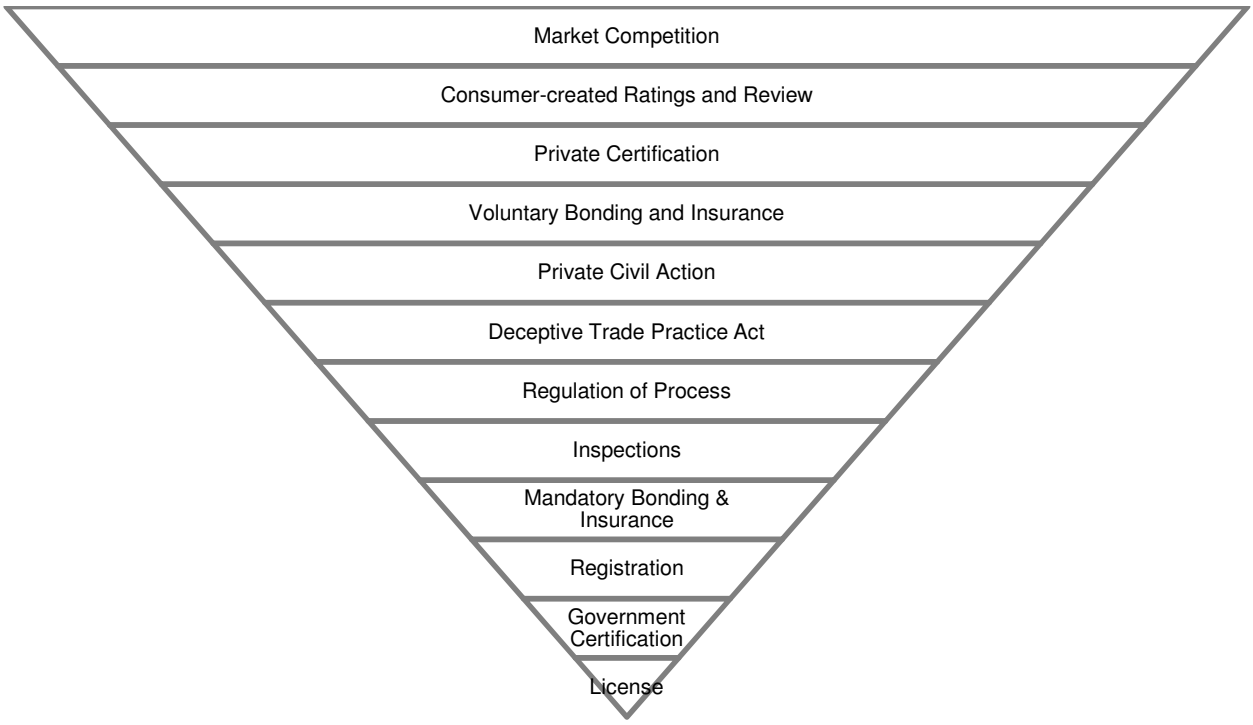
[56] Brittany La Couture, American Action Forum, *The Traveling Doctor: Medical Licensure Across State Lines* (June 2015), *available at* http://bit.ly/1Tb6l7k.

[57] Institute for Justice, Maryland Funeral Homes, http://bit.ly/1JYzjFX.

[58] Institute for Justice, Florida Interior Design, http://bit.ly/1RTlLia.

and services for a variety of occupations and found that only two out of fifteen studies found any positive impact from licensing; five found a negative impact on health and safety, one found a mixed impact, and seven found no impact at all.[59] Moreover, to the extent that advocates of licensing point to real health-and-safety concerns, those concerns can almost always be addressed through less-restrictive alternatives to licensing laws.[60]

Available alternatives to licensing may be visualized as an inverted pyramid of regulatory options, where the forms of regulation at the top of the pyramid are the least restrictive and should be employed in the largest number of cases:



[59] Canada Office of Fair Traiding, *Competition in Professions* 22 (Mar. 2001), *available at* http://bit.ly/1mYLwzR.

[60] *See* Robert Everett Johnson, Institute for Justice, *Boards Behaving Badly* at 5 (Mar. 2015), *available at* http://iam.ij.org/2f9yNJL.

In many cases, market competition alone—paired with private tort litigation as a backstop—provides sufficient protection for health and safety. But where those protections prove inadequate, regulators may consider a variety of alternatives prior to licensure. Market participants may be subjected to targeted consumer-protection laws, inspections, and bonding or insurance requirements. And, where it is important for government to identify the individuals participating in a market, market participants may be required to register to do business.

Perhaps one of the most important, and often overlooked, alternatives to occupational licensing is voluntary certification. Under a voluntary certification regime, market participants can choose to undergo testing to obtain a certificate that they meet a certain level of quality; individuals who do not choose to undergo testing cannot refer to themselves as "certified" but may nonetheless continue to participate in the market. Certification responds to the concern—often expressed by advocates of licensing—that consumers may lack information necessary to identify individuals qualified to provide certain goods or services. Certification responds to this concern by conveying information about market participants' qualifications; indeed, certification may in some cases offer *superior* knowledge when compared to licensing, as a variety of certification providers may compete in the marketplace. Importantly, however, certification does not exclude anyone from the marketplace and leaves the ultimate choice of service provider with the consumer, rather than the government.

This analytical framework—looking to alternatives to licensure—enjoys broad support across the ideological spectrum. When the Obama White House issued a report on occupational licensing, it suggested a similar approach, urging legislators to consider the availability of certification, registration, bonding, and other forms of regulation short of licensure.[61] Under the current Administration, meanwhile, the FTC has urged state legislators to consider "less-restrictive alternatives to the current licensing system that still address [any] legitimate policy objectives," including a system of voluntary certification.[62] Too often, legislators respond to *any* health and safety concern by imposing licensure. Instead, licensure should be imposed only when less-restrictive alternatives will not suffice.

The Restoring Board Immunity Act

The Restoring Board Immunity Act of 2017 ("RBI Act"), H.R. 3446 and S. 1649, provides a framework for the states to address the rise of occupational licensing. The bill does not mandate any particular action by the states, but it does provide incentives for the states to adopt beneficial reforms.

The bill responds to the Supreme Court's 2015 decision in *North Carolina Board of Dental Examiners v. FTC*, which held that state licensing boards composed of industry insiders could potentially be liable for restraining competition under federal antitrust laws.[63] Critically, that decision *already* provides states with a route to immunize their licensing boards, as it makes clear that boards are immune

[61] Council of Economic Advisers, *supra* note 8, at 43-45.

[62] Federal Trade Commission, Letter to Nebraska Senator Suzanne Geist at 7-8 (Mar. 15, 2017), *available at* http://bit.ly/2jbq5yP.

[63] 135 S. Ct. 1101 (2015).

from antitrust liability if they are "actively supervised" by the states. What exactly such active supervision entails, however, is currently undefined, though the FTC has offered non-binding guidance on the question.[64] The bill alleviates the current uncertainty about what exactly states must do to avoid liability under the antitrust laws, providing states with a clear and certain route to immunize their boards. At the same time, the bill ensures that immunity will be paired with meaningful reform to eliminate unnecessary licensing restrictions. These reforms have both a substantive and a procedural dimension.

Substantively, in order to secure immunity, states would be required to adopt a policy of using less-restrictive alternatives to occupational licensing where those alternatives will suffice to protect health and safety. The term "less restrictive alternatives" is defined in Section 3 of the bill to essentially track the inverted pyramid of regulatory alternatives laid out in this testimony—an analytical framework that, as noted above, enjoys broad ideological support. This substantive requirement is a critical aspect of the bill, as it provides an incentive for states to ask whether licensing is truly necessary.

Procedurally, the bill gives teeth to its substantive reforms by conditioning immunity on states enacting a mechanism to ensure compliance with this policy. Here, states would have a choice between two alternatives. The first alternative, laid out in Section 5 of the bill, would charge state officials with reviewing new and

[64] FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 2015), *available at* http://bit.ly/1LcSdpQ. The guidance is clear that it is non-binding, and that "[d]eviation from this guidance does not necessarily mean that the state action defense is inapplicable." *Id.* at 3.

existing licensing laws. The second alternative, laid out in Section 6 of the bill, would instead charge state courts with reviewing licensing laws. Regardless of which alternative a state decides to select, the bill makes clear that this review must strive to ensure that occupational licensing laws are in fact justified by legitimate health and safety concerns—considering, as part of that analysis, the availability of less-restrictive alternatives to licensing.

This bill is consistent with principles of federalism, as it enhances the regulatory flexibility of the states. Under current antitrust doctrine, while states can achieve immunity by providing for "active supervision" of their licensing boards, that supervision must be bureaucratic in nature and generally cannot take the form of state-court judicial review.[65] The bill gives states added flexibility by providing a route to achieve immunity via state-court judicial review. In many cases, states may find that judicial review provides an economical alternative to establishment of a new layer of bureaucratic supervision. At the same time, the bill does not actually require that states do anything at all; states can decline the offer of immunity, or states can reduce their antitrust liability in other ways—for instance, by changing the composition of their boards so that they are not dominated by industry insiders. The bill does not impose any one-size-fits-all solution on any state.

At the same time, the bill will advance the cause of licensing reform. Under current antitrust doctrine, while states can achieve immunity through "active supervision" of their licensing boards, courts have focused on the procedural aspects

[65] *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (citing *Patrick v. Burget*, 486 U.S. 94, 103-05 (1988)).

of that supervision rather than its substantive objectives.[66] This focus on procedure over substance has led a number of states to respond to the *North Carolina Dental* decision by adopting what can be termed "rubber-stamp supervision," under which state bureaucrats formally review decisions of licensing boards but do not actually seek to advance any kind of pro-competitive policy. In Tennessee, for example, state officials review board decisions only to ensure they are consistent with state law; the officials do not ask whether the board's actions also make good policy.[67] Similar rubber-stamp regimes have been adopted in Georgia and Oklahoma.[68] Whether this kind of rubber-stamp supervision truly suffices to confer immunity under the antitrust laws is an open question that—absent action by Congress—will be decided in the courts.[69] It is currently clear, however, that this type of rubber-stamp supervision is on the rise in the states and will not produce any meaningful progress in the fight against unnecessary licensing laws.

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[66] *See* Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 Va. Law Rev. 1387, 1413-14 (2016) (describing this procedural approach).

[67] Tennessee Senate Bill No. 127 (adopted April 24, 2017), *available at* http://bit.ly/2xTGMSI.

[68] Georgia has adopted this type of regime by statute. Georgia Professional Regulation Reform Act (adopted April 27, 2016), *available at* http://bit.ly/2xhoTQV. Oklahoma, meanwhile, has adopted this type of regime by executive action, as the Governor has directed the Attorney General to review every action of the boards. This has resulted in numerous Attorney General Opinions but little meaningful reform. *See* Oklahoma Attorney General Opinions, http://bit.ly/2f8qdL0.

[69] Ultimately, courts will likely hold that rubber-stamp supervision *does not* confer immunity. Under *North Carolina Dental*, the point of "active supervision" is to ensure that some state government entity reviews the board's actions to make sure that they contribute to the public good rather than advancing the board's self-interest. If the supervising entity acts as a rubber stamp for the board, it is difficult to see how that goal will be achieved.

The bill provides a benefit for the states, insofar as it provides a clear and certain route to achieve immunity, but as a condition of this benefit it requires reform that is more meaningful than the rubber-stamp supervision we currently see being adopted in some states. To achieve immunity under the bill, states would have to follow the example of Mississippi, which recently enacted legislation adopting a policy requiring the use of less-restrictive alternatives to occupational licensing and established a body to supervise licensing boards for compliance with that policy.[70] In short, the bill conditions immunity on the pursuit of meaningful reform. And, at the same time, the bill provides added flexibility to the states by providing a menu of options from which the states can choose. In short, the bill promotes occupational licensing reform—benefitting consumers, workers, and entrepreneurs—while also respecting the role of the states in our federal system.

Conclusion

Occupational licensing serves the interests of industry insiders by excluding competition, but it harms nearly everyone else. Licensing results in higher prices for consumers, erects unnecessary barriers for people seeking a job, and frustrates innovation by entrepreneurs. Even where proponents of licensing identify legitimate health and safety concerns, those concerns frequently can be addressed through less-restrictive alternatives—including voluntary certification. Licensing should be

[70] Mississippi Occupational Board Compliance Act (adopted April 11, 2017), *available at* http://bit.ly/2kXk8W8. While Mississippi's reform follows the same general approach as the Restoring Board Immunity Act, the Act would provide even greater protection—for instance, by allowing individuals targeted under a licensing law to raise the existence of less-restrictive alternatives as a defense to the enforcement action.

employed as a last resort, but too often today licensing requirements are imposed without any real concern for whether they are justified. The Restoring Board Immunity Act represents an important step to address this growing problem, and for that reason the Institute for Justice is pleased to offer its support.

Thank you for the opportunity to testify.