

HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE  
SUBCOMMITTEE ON HIGHER EDUCATION  
AND WORKFORCE DEVELOPMENT

Occupational Licensing:  
Reducing Barriers to Economic Mobility and Growth

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Testimony of

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Good afternoon Chairman Guthrie, Ranking Member Davis, 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 a senior attorney at the Institute for Justice, a public-interest law firm that has for decades led the battle for economic liberty—the right to earn an honest living without unnecessary government interference.<sup>1</sup> As part of this work, the Institute combats occupational licensing across the country through litigation, research, grassroots activism, and legislative advocacy. 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<sup>2</sup> to Arkansas dentists<sup>3</sup> to Chicago tax preparers.<sup>4</sup> We have successfully challenged occupational licensing laws as violations of the First and Fourteenth Amendments,<sup>5</sup> as well as parallel protections afforded by State Constitutions.<sup>6</sup> Along the way, we have seen time and again the significant harms that are caused by occupational licensing.

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<sup>1</sup> The Institute’s attorneys and experts have previously been called upon to testify in Congressional hearings addressing the dangers of occupational licensing; portions of my testimony today are drawn from testimony and evidence submitted in these earlier hearings.

<sup>2</sup> Institute for Justice, Louisiana Florists, <http://bit.ly/1PzITLM>.

<sup>3</sup> Institute for Justice, Arkansas Dentists, <http://bit.ly/2JGIq3V>.

<sup>4</sup> Institute for Justice, IRS Tax Preparers, <http://bit.ly/2jcKOCK>.

<sup>5</sup> *See, e.g., Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

<sup>6</sup> *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).

Occupational licensing is, increasingly, one of the most prevalent regulatory barriers in the American workplace. Whereas less than 5 percent of the workforce was required to obtain a license from their state government in the 1950s, today that figure stands over 20 percent—and even higher if federal, city, and county licensing is included.<sup>7</sup>

The problems caused by this explosion of occupational licensing are obvious and have increasingly been the subject of bipartisan condemnation. Under the administration of President Obama, the White House 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.”<sup>8</sup> And the administration of President Trump has spoken out with equal force, with U.S. Secretary of Labor Alex Acosta arguing last year that “the cost and complexity of licensing creates an economic barrier for Americans seeking a job, especially for those with fewer financial resources.”<sup>9</sup>

Criticism of occupational licensing has also come from bipartisan sources outside the government. Groups as diverse as the Brookings Institution,<sup>10</sup> Heritage

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<sup>7</sup> Morris M. Kleiner and Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, *British Journal of Industrial Relations* (Dec. 2010), at 678. Kleiner and Krueger found that 29 percent of the population reported being required to obtain some manner of license to do their job. *Id.* at 677.

<sup>8</sup> Department of the Treasury, Council of Economic Advisers, and Department of Labor, *Occupational Licensing: A Framework for Policymakers* (July 2015), at 3.

<sup>9</sup> Department of Labor, News Release, *U.S. Secretary of Labor Acosta Addresses Occupational Licensing Reform* (July 21, 2017), <http://bit.ly/2lcQHh8>.

<sup>10</sup> Morris M. Kleiner, The Hamilton Project, *Reforming Occupational Licensing Boards* (Mar. 2015), available at <http://brook.gs/1ZARuJ2>.

Foundation,<sup>11</sup> and Reason Foundation<sup>12</sup> have issued publications critical of occupational licensing.

If leaders left, right, and center agree that occupational licensing presents a serious problem, why has the practice continued to grow? The answer is simple: 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, 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. In short, as I detail below, licensing is all too often unnecessary, counterproductive, and unconstitutional.

### **Industry Insiders Seek Out Licensing**

Contrary to the traditional conception of government-business relations—where government actors seek to impose regulation and business leaders try to avoid regulation—industry insiders frequently actively lobby legislators and

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<sup>11</sup> James Sherk, The Heritage Foundation, *Creating Opportunity in the Workplace* (Dec. 2014), available at <http://herit.ag/1ZASnRN>.

<sup>12</sup> Adam B. Summers, Reason Foundation, *Occupational Licensing: Ranking the States and Exploring Alternatives* (Aug. 2007), available at <http://bit.ly/1PufxyO>.

regulators to impose new licensing barriers.<sup>13</sup> They do so because licensing creates barriers to entry that can make it more difficult for new competitors to enter the market. Shielded from new competition, existing businesses can then raise prices or reduce quality without being undercut or outperformed by new entrepreneurs.<sup>14</sup>

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 licensing on interior designers.<sup>15</sup> Five states bent to this pressure and imposed licensing restrictions on interior designers, while numerous other states imposed titling laws restricting which individuals can refer to themselves as “interior designers.”<sup>16</sup> Advocates of imposing licensure on would-be interior designers maintain that licensing is necessary to protect consumer safety, but impartial studies by state regulators have repeatedly found no viable health and safety

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<sup>13</sup> Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing* (Jan. 2015), available at <http://bit.ly/1n0TDMm>.

<sup>14</sup> Kleiner and Krueger, *supra* note 7, at 681 (finding that licensing is associated with an approximately 15 percent increase in hourly earnings).

<sup>15</sup> 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://bit.ly/1nof8aB>.

<sup>16</sup> *Id.* at 7.

justification for these laws.<sup>17</sup> 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.<sup>18</sup> 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 standards as we do.”<sup>19</sup> In other words, by driving out competition, the rule would allow firms like H&R Block to raise their prices.<sup>20</sup> 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.<sup>21</sup> 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

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<sup>17</sup> *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.

<sup>18</sup> Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011).

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

<sup>20</sup> 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”).

<sup>21</sup> 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>.

prevalence of misconduct by tax preparers.<sup>22</sup> Fortunately, in a case brought by the Institute for Justice, a federal court found the IRS lacked authority to impose licensing.<sup>23</sup> Large tax preparers have, however, responded to this courtroom defeat by lobbying Congress to impose similar licensure requirements directly.<sup>24</sup>

- Teeth Whitening: As teeth whitening services have become increasingly popular and lucrative, dentists across the country have lobbied state legislators and regulators to exclude non-dentist teeth whiteners.<sup>25</sup> Teeth whitening is safe; indeed, consumers can purchase teeth whitening products to apply to their own teeth in their own homes. A recent 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.<sup>26</sup> Over the same period, dentists and dental associations filed numerous complaints about increased competition from unlicensed teeth whiteners.<sup>27</sup> In response to such pressure, numerous states have acted to limit the practice of teeth

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<sup>22</sup> Institute for Justice, IRS Tax Preparers, <http://ij.org/case/irs-tax-preparers/>. 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.*

<sup>23</sup> *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

<sup>24</sup> 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>.

<sup>25</sup> 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>.

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *Id.*

whitening to licensed dentists.<sup>28</sup> 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.<sup>29</sup>

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<sup>30</sup> and animal massage;<sup>31</sup> attempts by cosmetology boards to monopolize hair braiding,<sup>32</sup> eyebrow threading,<sup>33</sup> and makeup artistry;<sup>34</sup> and attempts by funeral-director boards to monopolize the sale of caskets.<sup>35</sup>

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 their scope-of-practice restrictions—for example, in the extent to which they allow nurse practitioners to engage in activities that would compete with doctors, or even the extent to which they allow doctors to compete with one another. The FTC has observed that restrictions on nurse practitioners often serve to shield doctors from competition—for instance, by

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<sup>28</sup> *Id.* at 14-15, 18.

<sup>29</sup> *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

<sup>30</sup> Institute for Justice, Texas Equine Dentistry, <http://bit.ly/1SSwvMB>.

<sup>31</sup> Institute for Justice, Arizona Animal Massage, <http://bit.ly/205dqcb>.

<sup>32</sup> Institute for Justice, Iowa Hair Braiding, <http://bit.ly/1n6IA4T>.

<sup>33</sup> Institute for Justice, Arizona Eyebrow Threading, <http://bit.ly/1n6IACa>.

<sup>34</sup> Institute for Justice, Nevada Makeup, <http://bit.ly/1SmSrQC>.

<sup>35</sup> Institute for Justice, Oklahoma Caskets, <http://bit.ly/1n1bK4R>.



mandating that nurse practitioners be “supervised” by doctors who provide little added benefit to the consumer but take a share of the nurse practitioner’s wages.<sup>36</sup> Similarly, some states have adopted laws or rules forbidding dental specialists (those who have specialized board certifications that qualify them to hold themselves out as, for example, orthodontists or endodontists) from performing general dental services.<sup>37</sup> Still other states limit licensed doctors’ ability to incorporate new technologies into their practice, as is the case in South Carolina, which (despite a general state law permitting telemedicine) specifically forbids ophthalmologists from using online technologies to write corrective-lens prescriptions.<sup>38</sup> Restrictions like these undeniably help protect established practitioners from competition, but (as discussed further below) they do so at significant costs to patients and others, with often no evidence that they protect against any true threat to the public health or safety.

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

<sup>37</sup> See, e.g., *Kiser v. Kamdar*, 831 F.3d 784 (6th Cir. 2016) (striking down such a requirement as unconstitutional).

<sup>38</sup> Institute for Justice, South Carolina Eyeglasses, <http://bit.ly/2yiS3QY>.

## 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.

- 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**.<sup>39</sup> 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.<sup>40</sup> 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 23 were licensed in 40 states or more, while occupations that required months of training in one state might require only a few days of training in another.<sup>41</sup> 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.

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<sup>39</sup> Kleiner, *supra* note 10, at 6.

<sup>40</sup> Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior (Sept. 1983).

<sup>41</sup> Dick M. Carpenter, *et al.*, Institute for Justice, *License to Work: A National Study of Burdens from Occupational Licensing* (2d ed. November 2017), at 104, available at <http://bit.ly/2JXCmmM>.

- 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**.<sup>42</sup> Higher costs can also harm some consumers by causing them to forgo necessary purchases altogether. For instance, one study found that areas with strict licensing requirements for electricians have higher electrocution rates, presumably because consumers faced with higher prices are more likely to resort to dangerous “do it yourself” electrical work.<sup>43</sup> 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.”<sup>44</sup>

- 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.<sup>45</sup> In the legal field, meanwhile, licensing laws threaten to block services that help consumers create their own standard legal

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<sup>42</sup> Kleiner, *supra* note 10, at 6.

<sup>43</sup> Sidney L. Carroll and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, Law and Human Behavior (1983).

<sup>44</sup> Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004), at 21-22, available at <http://1.usa.gov/1Tx9YVV>.

<sup>45</sup> *Teladoc, Inc. v. Texas Medical Board*, 453 S.W.3d 606 (Tx. Ct. App. 2014).

documents over the internet—an innovation that could likewise address a chronic shortage of legal services while also lowering prices.<sup>46</sup>

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.<sup>47</sup> Licensing can give rise to entirely unregulated black markets, as high costs drive consumers from the legal market.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

### **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.

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<sup>46</sup> *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261 (Ark. 2013).

<sup>47</sup> Summers, *supra* note 12, at 11.

<sup>48</sup> *Id.* at 13.

<sup>49</sup> American Bar Association, National Inventory of the Collateral Consequences of Conviction, <http://bit.ly/1CuyVLL>.

<sup>50</sup> Karen Jowers, *Spouses Face Licensing Roadblocks in Variety of Fields*, *Military Times*, May 4, 2015, available at <http://bit.ly/1SnNwzw>. See also *infra* at 19–20.

- Right to Earn A Living: The right to earn a living in your chosen occupation has long been recognized as among the rights secured by the Constitution.<sup>51</sup> 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 box—because they were not licensed as funeral directors.<sup>52</sup> 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.<sup>53</sup> 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

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<sup>51</sup> 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).

<sup>52</sup> *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); see also *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

<sup>53</sup> *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).

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.<sup>54</sup> 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 that the column constituted “unlicensed practice of psychology.”<sup>55</sup> Individuals do not lose their First Amendment rights when they engage in an occupation; yet, all too often, licensing authorities act as if they were immune from any First Amendment constraint.

- Right to Travel: The Supreme Court has recognized that the “right to travel from one State to another is firmly embedded in our jurisprudence.”<sup>56</sup> 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.<sup>57</sup> 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

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<sup>54</sup> *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

<sup>55</sup> *Rosemond v. Markham*, \_\_ F. Supp. 3d \_\_, 2015 WL 5769091 (E.D. Ky. Sept. 30, 2015).

<sup>56</sup> *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>57</sup> Brittany La Couture, American Action Forum, *The Traveling Doctor: Medical Licensure Across State Lines* (June 2015), available at <http://bit.ly/1Tb6l7k>.

laws governing funeral directors<sup>58</sup> and interior designers.<sup>59</sup> Individuals should not have to choose between their professional livelihood and the exercise of their right to travel between the states.

### **Licensing Is Frequently Unnecessary Compared With Alternatives**

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 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.<sup>60</sup>

Researchers have also taken advantage of changes in law to study whether licensing requirements achieve their stated ends in terms of quality of service. For example, in 2014, the D.C. Circuit Court of Appeals struck down a Washington, D.C., regulation requiring those working as paid tour guides to pass a special examination in order to obtain a tour-guide license.<sup>61</sup> If this sort of mandatory testing affected tour-guide quality, the influx of untested guides caused by the court ruling should have resulted in a noticeable decline in consumer satisfaction. But no such thing happened—to the contrary, a statistical analysis of thousands of reviews

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<sup>58</sup> Institute for Justice, Maryland Funeral Homes, <http://bit.ly/1JYzjFX>.

<sup>59</sup> Institute for Justice, Florida Interior Design, <http://bit.ly/1RTlLia>.

<sup>60</sup> Canada Office of Fair Trading, *Competition in Professions 22* (Mar. 2001), available at <http://bit.ly/1mYLwzR>.

<sup>61</sup> *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

on the website TripAdvisor revealed that the removal of licensure made no difference at all in reported consumer satisfaction with their tour guides.<sup>62</sup>

These reasons to doubt the efficacy of licensing, it is important to note, apply even as to occupations where the risks to public health or safety are obvious. Take, for example, dentistry: Dentists are licensed in all 50 states, but with different levels of stringency. When economist Morris Kleiner analyzed the dental records of incoming Air Force personnel, however, he found that more stringent dental licensing in their home states produced no discernible effect on dental-health outcomes but did produce a measurable increase in the price of dental services.<sup>63</sup>

Moreover, observing different practices among the several states shows a surprising inconsistency in their approach to licensing—not only in *whether* a license is required to perform a particular occupation but in *how burdensome* those requirements are as measured by required education, examination, or fees.<sup>64</sup> If there were discernible public benefits generated by these stricter practices, one would expect them to be easily observed. But, as noted above, that is not the case: States with higher burdens generally do not have safer consumers to show for it.

It is clear, then, that the appropriate question for regulators is not simply whether an occupation should be licensed, but *how*. Specifically, regulators should

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<sup>62</sup> Angela C. Erickson, *Putting Licensing to the Test: How Licenses for Tour Guides Fail Consumers—And Guides*, at 1 (Institute for Justice 2016) available at <https://bit.ly/2LYKFMq>.

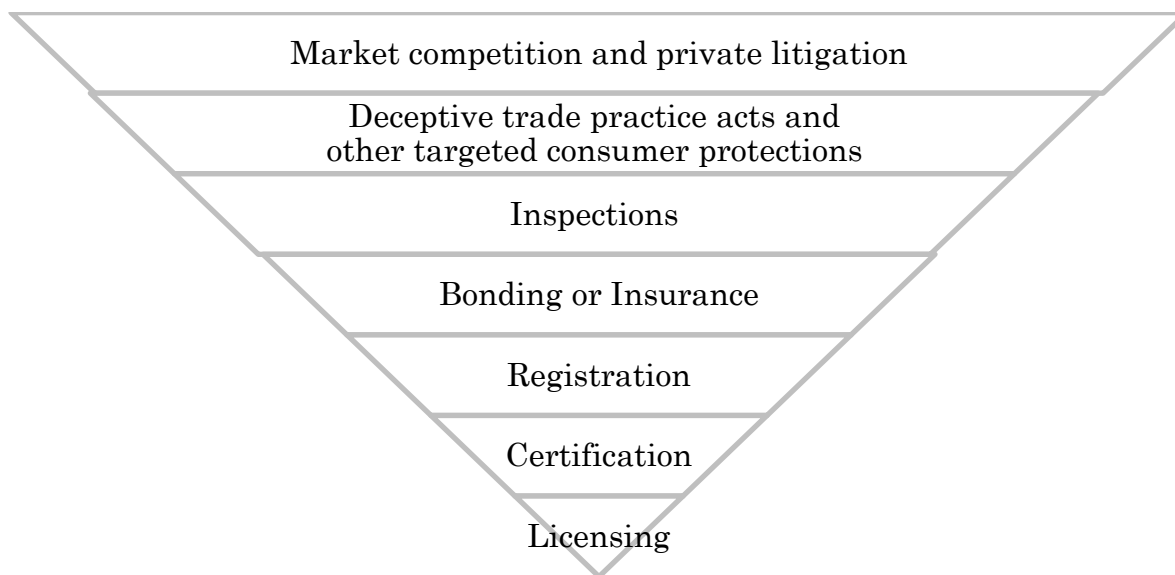
<sup>63</sup> Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Improve Outputs and Increase Prices? The Case of Dentistry* (NBER Working Paper Series 1999), available at <http://bit.ly/2lfhIkd>.

<sup>64</sup> See *License to Work*, *supra* note 41, at 104–06.



ask what actual threat to public health or safety they seek to address through regulation and then ask whether this threat can be meaningfully addressed through a less restrictive means than licensing laws.<sup>65</sup>

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:



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.

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<sup>65</sup> See Robert Everett Johnson, Institute for Justice, *Boards Behaving Badly* at 5 (Mar. 2015), available at <http://iam.ij.org/2f9yNJL>.

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.<sup>66</sup> 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

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<sup>66</sup> Council of Economic Advisers, *supra* note 8, at 43-45.

objectives,” including a system of voluntary certification.<sup>67</sup> 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 to address a real problem, and the burdens imposed by licensure should be minimized to those absolutely necessary.

### Paths Toward Reform

Most of the problems detailed above are, of course, problems of state or local regulation that require solutions at the state and local level. And, indeed, policy debates continue in the states, though those debates can be guided and improved by federal investigations and studies like those cited above.

But federal regulation does play a role in the scope of occupational licensing. This was made most clear, perhaps, by 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.<sup>68</sup> Some in Congress have, in the wake of that decision, proposed responding to that decision by providing a framework for the states to immunize their licensing boards from antitrust liability by adopting certain beneficial reforms.<sup>69</sup> The Institute for Justice has supported and continues to support such an approach.

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<sup>67</sup> Federal Trade Commission, Letter to Nebraska Senator Suzanne Geist at 7-8 (Mar. 15, 2017), *available at* <http://bit.ly/2jbq5yP>.

<sup>68</sup> 135 S. Ct. 1101 (2015).

<sup>69</sup> *See* The Restoring Board Immunity Act of 2017, H.R. 3446 and S. 1649.

More broadly, I suggest that the focus of any efforts at reform must begin with the idea of reducing the number of licensing requirements and minimizing the burdens of those requirements that remain, rather than starting with the goal of enabling already-licensed practitioners to move across state lines. Reducing licensing barriers will increase mobility, but measures designed solely to increase mobility will all too often leave damaging licensing requirements in place.

Take, for example, the case of Institute for Justice client Heather Kokesch Del Castillo, who operated a successful dietary-advice business from her home in California and who discovered upon moving to Florida (as a result of her husband's transfer to Eglin Air Force Base) that running this very same business made her a criminal because she was not a Florida-licensed dietician.<sup>70</sup>

It is tempting (and surely true) to say that a military spouse like Heather, who has successfully run her business in a different state that does not require licensure, should not be thrown out of business simply because of her husband's service to his country. But it is equally true that Heather's experience in California illustrates that the business she was engaged in—one that merely provided ordinary dietary advice like that dispensed by personal-trainers, health-food-store employees, and meddling relatives every single day—should not require a license in the first place (and, in many jurisdictions like California, it does not). A lifelong Floridian, then, should have exactly the same right to embark upon a diet-advice business that a recent transplant like Heather should. In other words, Heather's

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<sup>70</sup> See Institute for Justice, Florida Diet Coaching, <https://bit.ly/2JS9cLL>.

story does not just illustrate that occupational licensing harms military spouses; it illustrates that it is unnecessary for the State of Florida to license the underlying conduct in the first place. Finding ways to remove barriers like these is the fastest and surest path to improving conditions and opportunities for entrepreneurs—including military spouses like Heather.

### 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 before 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 employed as a last resort, but too often today licensing requirements are imposed without any real concern for whether they are justified. I appreciate the Subcommittee's interest in this vital topic, as this sort of attention is a necessary step to achieving lasting change and greater economic liberty for all Americans.

Thank you for the opportunity to testify.