



October 31, 2017

Acting Chairman Maureen K. Ohlhausen

Economic Liberty Taskforce
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Re: Comments of the Institute for Justice on Occupational Licensing

The Institute for Justice (“IJ”) welcomes the opportunity to submit comments for the Federal Trade Commission’s (“FTC”) forthcoming Roundtable on Occupational Licensing, organized by the FTC’s Economic Liberty Task Force. The Institute for Justice is the national law firm for liberty, advocating before state and federal courts and regulatory bodies in defense of private property rights, educational choice, free speech, and economic liberty.

For a growing segment of Americans, gainful employment requires convincing someone other than a prospective employer or potential customer of their value. It requires convincing the government. An “occupational license” is just that—government permission to work in a particular field. To earn the license, the aspiring worker must clear various hurdles: earn a certain amount or type of education, complete specialized training, pass an exam, attain a certain grade level, pay fees, and more.

For decades, IJ has been at the forefront of the fight against unjustified occupational licensing. IJ has represented scores of entrepreneurs who have had their right to earn a living curtailed by arbitrary and unnecessary licensing

restrictions—from Louisiana florists¹ to tour guides in Philadelphia² 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 Moreover, IJ has produced leading research on occupational licensing, discussed below.

IJ appreciates the FTC’s attention to this important issue, and submits these comments in response to the FTC’s request for comments on the state of empirical research on the extent, growth, stringency, costs of, and alternatives to occupational licensing. Unless otherwise indicated, all cited materials are incorporated by reference as part of IJ’s comments.

Evidence on the Extent, Growth, and Stringency of Occupational Licensing

FTC: “*What is the state of empirical knowledge about the extent, growth, and stringency of state licensing requirements? To what extent are such requirements uniform or varied across the states? To what extent do they vary by occupation?*”

Occupational licensing is, increasingly, one of the most prevalent regulatory barriers in the American workplace. Whereas in the 1950s, only one in 20 U.S. workers needed the government’s permission to pursue their chosen occupation, today that figure stands at around one in four.⁶ A number of diverse groups have produced research on the extent, growth, and stringency of occupational licensing,

¹ Institute for Justice, Louisiana Florists, *available at* <http://bit.ly/1PzITLM>.

² Institute for Justice, Philadelphia Tour Guides, *available at* <http://bit.ly/11PojPZ>.

³ Institute for Justice, Connecticut Teeth Whitening, *available at* <http://bit.ly/1K90mOY>.

⁴ See, e.g., *Craigsmiles 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).

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

including the Brookings Institution,⁷ Heritage Foundation,⁸ the Pacific Research Institute,⁹ Wisconsin Institute of Law and Liberty,¹⁰ and Reason Foundation¹¹ have issued publications critical of occupational licensing. IJ incorporates each of these reports into its comments by reference. Research to date—on occupations as diverse as school teachers, interior designers, mortgage brokers, dentists, physicians and others—provides little evidence that government licenses protect public health and safety or improve the quality of products or services.¹²

⁷ Kleiner, Morris M., *The Hamilton Project, Reforming Occupational Licensing Boards* (Mar. 2015), available at <http://brook.gs/2f8CAH9>.

⁸ Sherk, James, The Heritage Foundation, *Creating Opportunity in the Workplace* (Dec. 2014), available at <http://herit.ag/1ZASnRN>.

⁹ McQuillan, L. J., Maloney, M. T., Daniels, E., & Eastwood, B. M. (2008). *U.S. economic freedom index: 2008 report*. San Francisco: Pacific Research Institute (PRI). PRI collected licensure data for a small sample of occupations across all 50 states and combined that with other indicators to create its U.S. Economic Freedom Index.⁶ Fifteen of the occupations in the PRI index are non-health care related and cover a broad range of the socio-economic spectrum—barbers, architects and real estate agents, for example. Another 42 of the occupations come from the health care sector and range from physicians to drug counselors.

¹⁰ Wisconsin Institute for Law and Liberty, *Land of the Free? 50 state survey on how professional licensing laws lead to fewer jobs* (October 2017), available at <http://bit.ly/2zfeeHo>.

¹¹ Summers, Adam B., Reason Foundation, *Occupational Licensing: Ranking the States and Exploring Alternatives* (Aug. 2007), available at <http://bit.ly/1PufxyO>. The report found that states require licenses for 92 occupations, on average. According to this report, California leads the nation, licensing 177 job categories, almost double the national average.

¹² Erickson, Angela C., Institute for Justice (2016), *Putting Licensing to the Test: How Licenses for Tour Guides Fail Consumers—and Guides*, available at <http://bit.ly/2A0cXRv>; Erickson, Angela C., Institute for Justice (2016), *Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape*, available at <http://bit.ly/2iMPpve>; Carpenter, D. M. (2012), *Testing the utility of licensing: Evidence from a field experiment on occupational regulation*. *Journal of Applied Business and Economics*, 13(2), 28–41, available at <http://bit.ly/2lsZ3El>; Angrist, J. D., & Guryan, J. (2008). *Does teacher testing raise teacher quality? Evidence from state certification requirements*. *Economics of Education Review*, 27, 483–503; Buddin, R., & Zamarro, G. (2008). *Teacher qualifications and student achievement in urban elementary schools*. *Journal of Urban Economics*, 66, 103–115; Carpenter, D. M. (2008). *Regulation through titling laws: A case study of occupational regulation*. *Regulation and Governance*, 2(3), 340-359; Carpenter, D. M. (2007), Institute for Justice (2007), *Designing Cartels: How Industry Insiders Cut Out Competition*, available at <http://bit.ly/2gXoZXq>; Carroll, S. L., & Gaston, R. J. (1981). *Occupational restrictions and the quality of service received: Some evidence*. *Southern Economic Journal*, 47(4), 959-976; Kleiner, M. M., & Kudrle, R. T. (2000). *Does regulation affect economic outcomes: The case of dentistry*. *Journal of Law and Economics*, 43(2), 547-582; Kleiner, M. M., & Petree, D. L. (1988). *Unionizing and licensing of public school teachers: Impact on wages and educational output*. In R. B. Freeman & C. Ichniowski (Eds.), *When public sector workers unionize* (pp. 305-319). Chicago: University of Chicago Press; Kleiner, M. M., & Todd, R. M. (2007). *Mortgage broker regulations that matter: Analyzing earnings, employment, and outcomes for consumers*. Cambridge, MA: National Bureau of Economic Research; Paul, C. (1984). *Physician licensure legislation and the quality of medical care*. *Atlantic Economic*

The Institute for Justice has produced the most comprehensive national study to date on the burdens of occupational licensing for low- and moderate-income occupations. This 2012 report, *License to Work*, documents the license requirements for 102 occupations nationwide.¹³ The report demonstrates that licensure burdens often vary considerably across states, calling into question the need for severe burdens. For instance, while 10 states require four months or more of training for manicurists, Alaska demands only about three days and Iowa about nine days. Moreover, the difficulty of entering an occupation often does not line up with the public health or safety risk it poses. For example, 66 occupations have greater average licensure burdens than emergency medical technicians. The average cosmetologist spends 372 days in training; the average EMT only 33. The *License to Work* report is attached as Exhibit A of the Appendix to IJ's comments. An updated and expanded version of *License to Work* will be published in November 2017; IJ will submit this report to the FTC upon publication.

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.

Industry insiders frequently lobby legislators and regulators to impose new licensing barriers.¹⁴ Existing market participants like licensing because it makes it more difficult for new competition to enter the market. Shielded from normal

Journal, 12(4), 18-30; Skarbek, D. (2008). *Occupational licensing and asymmetric information: Post-hurricane evidence from Florida*. *Cato Journal*, 28(1), 73-82.

¹³ 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>. A new and updated edition of this report is forthcoming in November 2017.

¹⁴ Larkin, Paul J., *Public Choice Theory and Occupational Licensing* (Jan. 2015), available at <http://bit.ly/1n0TDMm>.

market pressures, industry insiders can charge consumers higher prices without concern that they will be undercut by lower-cost competitors.¹⁵

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.¹⁶ 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 licensing on interior designers.¹⁷ 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.”¹⁸ 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.¹⁹ And, indeed, it is difficult to imagine any conceivable danger from a misplaced throw pillow or unsightly shade of paint.

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

¹⁶ 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).

¹⁷ Carpenter, D. M., Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* (Nov. 2007), at 9-10, *available at* <http://iam.ij.org/2xUFJ56>.

¹⁸ *Id.* at 7. The State of Alabama also sought to license the practice of interior design, but the state courts struck down that law as unconstitutional. *Id.*

¹⁹ *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.

- 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.²⁰ 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.”²¹ By driving out competition, the rule would allow firms like H&R Block to raise their prices.²² The IRS official who oversaw the drafting of these regulations was none other than a former CEO of H&R Block.²³ 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.²⁴ Fortunately, in a case brought by the Institute for Justice, a federal court found the IRS lacked authority to impose licensing.²⁵ Since then, however, some in Congress have sought to impose licensing through legislation—again with the support of large tax preparers.²⁶
- Teeth Whitening: As teeth whitening services have become increasingly popular and lucrative, dentists across the country have lobbied state

²⁰ Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011).

²¹ Editorial, *H&R Blockheads*, Wall Street Journal, Jan. 7, 2010, available at <http://on.wsj.com/1PwhESI>.

²² 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”).

²³ 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>.

²⁴ 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.*

²⁵ *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

²⁶ 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>.

legislators and regulators to exclude non-dentist teeth whiteners.²⁷ 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.²⁸ Over the same period, dentists and dental associations filed numerous complaints about increased competition from unlicensed teeth whiteners.²⁹ In response to such pressure, numerous states have acted to limit the practice of teeth whitening to licensed dentists.³⁰ 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.³¹

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 dentistry³² and animal massage;³³ attempts by cosmetology boards to monopolize hair braiding,³⁴ eyebrow threading,³⁵ and makeup artistry;³⁶ and attempts by funeral director boards to monopolize the sale of caskets.³⁷

Even where occupations are licensed in all fifty states, concerns with anticompetitive regulation frequently arise. For instance, while every state licenses

²⁷ 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>.

²⁸ *Id.* at 24.

²⁹ *Id.*

³⁰ *Id.* at 14-15, 18.

³¹ *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

³² Institute for Justice, Texas Equine Dentistry, available at <http://bit.ly/1SSwvMB>.

³³ Institute for Justice, Arizona Animal Massage, available at <http://bit.ly/205dqcb>.

³⁴ Institute for Justice, Iowa Hair Braiding, available at <http://bit.ly/1n6IA4T>.

³⁵ Institute for Justice, Arizona Eyebrow Threading, available at <http://bit.ly/1n6IACa>.

³⁶ Institute for Justice, Nevada Makeup, available at <http://bit.ly/1SmSrQC>.

³⁷ Institute for Justice, Oklahoma Caskets, available at <http://bit.ly/1n1bK4R>.

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.³⁸ This kind of regulation drives up the price of healthcare, “which can be detrimental to health care consumers and have broader public health consequences.”³⁹ 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.

Evidence on the Costs of Occupational Licensing

FTC: *What is the state of empirical evidence on the costs and benefits of occupational licensing? What is known about the typical, average, or aggregate effects of licensing restrictions on consumers, workers, competition, and the economy?*

While licensing benefits industry insiders, a great body of work indicates that occupational licenses increase consumer costs⁴⁰ and reduce opportunities for workers,⁴¹ particularly minorities, those with less education and older workers who

³⁸ See FTC, Competition and the Regulation of Advanced Practice Nurses at 14-16, 29-31 (Mar. 2014), available at <http://bit.ly/2wMOz78>.

³⁹ *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>.

⁴⁰ Chevalier, J. A., & Morton, F. M. S. (2008). *State casket sales restrictions: A pointless undertaking?* *Journal of Law and Economics*, 51, 1-23; Harrington, D. E., & Krynski, K. J. (2002), *The effect of state funeral regulations on cremation rates: Testing for demand inducement in funeral markets.* *Journal of Law & Economics*, 45, 199-223; Kleiner and Kudrle, 2000.

⁴¹ Adams, A. F., Jackson, J. D., & Ekelund, R. B. (2002). *Occupational licensing of a credence good: The regulation of midwifery.* *Southern Economic Journal*, 69(3), 659-675; Carpenter, C. G., & Stephenson, E. F. (2006). *The 150-hour rule as a barrier to entering public accountancy.* *Journal of Labor Research*, 27(1), 115-126; Federman, M. N., Harrington, D. E., & Krynski, K. J. (2006). *The impact of state licensing regulations on low-skilled immigrants: The case of Vietnamese manicurists.* *American Economic Review*, 96(2), 237-241; Jackson, R. E. (2006). *Post-graduate educational requirements and entry into the CPA profession.* *Journal of Labor Research*, 27(1), 101-114; Jacob, J., & Murray, D. (2006). Supply-side effects of the 150-hour educational requirement to CPA licensure. *Journal of Regulatory Economics*, 30(2), 159-178; Kleiner and Todd, 2007.

may want to switch careers.⁴²

Indeed, occupational licensing has attracted criticism from a bipartisan mix of sources, both within and outside government. As this Agency recently found, “[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.”⁴³ 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.”⁴⁴ 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.⁴⁵ A recent study by the Wisconsin Institute for Law and Liberty, which evaluated ten occupational licenses across 50 states, estimated that employment in the U.S. for those ten occupations would increase by 4.5% if licensing regulations were reduced.⁴⁶ 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.⁴⁷ For example, states that demanded more training hours had fewer licensed or registered braiders

⁴² Angrist and Guryan, 2008; Dorsey, S. (1983). *Occupational licensing and minorities*. Law and Human Behavior, 7(2-3), 171-181; Federman, et al., 2006; Harrington, D. E., & Treber, J. (2009). *Designed to exclude*. Arlington, VA: Institute for Justice; Kleiner, M. M., & Krueger, A. B. (2008). *The prevalence and effects of occupational licensing*. Cambridge, MA: National Bureau of Economic Research.

⁴³ FTC, *Economic Liberty: Opening Doors to Opportunity*, <http://bit.ly/2gHJ67x> (last visited Sept. 6, 2017)

⁴⁴ Department of the Treasury, Council of Economic Advisers, and Department of Labor, *Occupational Licensing: A Framework for Policymakers* (July 2015), at 3.

⁴⁵ Kleiner, *supra* note 9, at 6.

⁴⁶ *Supra* at 11

⁴⁷ Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior (Sept. 1983).

relative to their black populations than states with fewer requirements, according to data from 12 states and D.C. Most of these differences were statistically significant. In 2012, Mississippi, which requires zero hours of training, had over 1,200 registered braiders. Neighboring Louisiana, which requires 500 hours, had only 32 licensed braiders-despite its larger black population.⁴⁸

Notably, these barriers vary considerably across state lines, suggesting that they are not truly necessary to protect the public. The Institute for Justice’s “License to Work” study of 102 lower-income occupations found that only 15 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.⁴⁹ 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.⁵⁰ Higher costs can also harm some consumers by causing them to forego necessary purchases altogether. For instance, one study found that areas 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.⁵¹ The Federal Trade Commission also has warned that “licensing of opticians and optical establishments may actually increase the incidence of health problems

⁴⁸ Angela C. Erickson, Institute for Justice (2016), *Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape*, available at <http://bit.ly/2iMPpve>.

⁴⁹ 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>.

⁵⁰ Kleiner, *supra* note 9, at 6.

⁵¹ Sidney L. Carroll and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, Law and Human Behavior (1983).

associated with contact lens use” because increased costs “may induce more individuals to over-wear their replacement lenses.”⁵²

- 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.⁵³ 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.⁵⁴

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.⁵⁵ Licensing can give rise to entirely unregulated black markets, as high costs drive consumers from the legal market.⁵⁶ 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.⁵⁷ 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.⁵⁸

⁵² Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004), at 21-22, available at <http://1.usa.gov/1Tx9YVVV>.

⁵³ *Teladoc, Inc. v. Texas Medical Board*, 453 S.W.3d 606 (Tx. Ct. App. 2014).

⁵⁴ *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261 (Ark. 2013).

⁵⁵ Summers, *supra* note 11, at 11.

⁵⁶ *Id.* at 13.

⁵⁷ American Bar Association, National Inventory of the Collateral Consequences of Conviction, <http://bit.ly/1CuyVLL>.

⁵⁸ Karen Jowers, *Spouses Face Licensing Roadblocks in Variety of Fields*, Military Times, May 4, 2015, available at <http://bit.ly/1SnNwzw>.

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 to 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.⁵⁹ 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.⁶⁰ 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.⁶¹ 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

⁵⁹ 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).

⁶⁰ *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); see also *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

⁶¹ *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).

D.C. government violated the First Amendment when it required a license to work as a tour guide.⁶² 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.”⁶³ 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.”⁶⁴ 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.⁶⁵ 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,⁶⁶ interior designers,⁶⁷ and diet coaches.⁶⁸ Individuals should not have to choose between their professional livelihood and their right to travel.

⁶² *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

⁶³ *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015).

⁶⁴ *Saenz v. Roe*, 526 U.S. 489 (1999).

⁶⁵ Brittany La Couture, American Action Forum, *The Traveling Doctor: Medical Licensure Across State Lines* (June 2015), available at <http://bit.ly/1Tb6l7k>.

⁶⁶ Institute for Justice, Maryland Funeral Homes, available at <http://bit.ly/1JYzjFX>.

⁶⁷ Institute for Justice, Florida Interior Design, available at <http://bit.ly/1RTILia>.

⁶⁸ Institute for Justice, Florida Diet Coaching, available at <http://ij.org/case/florida-diet-coaching/>

Alternatives to Occupational Licensing

FTC: “What are the alternatives to occupational licensing? Are there other forms of government regulation – such as certification, registration, or mandatory bonding – that might serve some of the consumer protection goals of licensing? What types of private initiatives or market-based solutions might be adequate substitutes for licensing? What is known about the comparative advantages and disadvantages of such alternatives, either generally, for certain types of occupations, or for individual occupations?”

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 2014 report surveyed the impact of occupational licensing on the quality of products and services for a variety of occupations and found that in nearly every study analyzed, “the prices of goods or services supplied by the profession increase as a direct result of regulation of the providing profession, sometimes by as much as 100 percent”⁶⁹; a similar 2001 report found that only two out of fifteen studies surveyed 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.⁷⁰ 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.⁷¹

⁶⁹ McLaughlin, P. A., Ellig, J., & Shamoun, D. Y. (2014). *Regulatory reform in Florida: An opportunity for greater competitiveness and economic efficiency* (Working Paper No. 14-09). Arlington, VA: Mercatus Center, George Mason University, available at <http://bit.ly/2A2AbH1>.

⁷⁰ Canada Office of Fair Trading, *Competition in Professions* 22 (Mar. 2001), available at <http://bit.ly/1mYLwzR>.

⁷¹ Hemphill, Thomas A. & Carpenter, D. M., *Occupations: A Hierarchy of Regulatory Options, Regulation* (Fall 2016), available at <http://bit.ly/2A1qf0f>; Robert Everett Johnson, Institute for Justice, *Boards Behaving Badly* at 5 (Mar. 2015), available at <http://iam.ij.org/2f9yNJL>; Carpenter, D. M., & McGrath, L. (2014). *The balance between public protection and the right to earn a living*. RESOURCEBRIEF, a publication of the Lexington, KY Council on Licensure, Enforcement and Regulation, available at <http://bit.ly/2z5ixEf>.

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.

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.⁷² Under the current Administration, this Agency 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.⁷³ 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.⁷⁴

Conclusion

Existing empirical research already sufficiently demonstrates the widespread harm caused by unjustified occupational licensing. Nonetheless, the FTC should exercise its authority under Section 6 of the FTC Act, 15 U.S.C. Sec. 46, to conduct

⁷² Council of Economic Advisers, *supra* note 44, at 43-45.

⁷³ Federal Trade Commission, *Letter to Nebraska Senator Suzanne Geist* at 7-8 (Mar. 15, 2017), available at <http://bit.ly/2jbq5yP>.

⁷⁴ There is broad consensus on this approach. See, e.g. Little Hoover Commission, *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers* (Oct. 2016), available at <http://bit.ly/2A2Racc>; Kleiner, Morris M., *The Hamilton Project, Reforming Occupational Licensing Boards* (Mar. 2015), available at <http://brook.gs/2f8CAH9>; National Conference of State Legislatures, et al. *The State of Occupational Licensing: Research, State Policies and Trends* (Oct. 2017) available at <http://bit.ly/2zjFjZQ>.

additional economic studies on the scope, growth, and costs of occupational licensing. Specifically, the FTC should investigate:

- How does licensing enforcement by state licensing boards compare to market discipline and other alternatives to licensure?
- What percent of complaints to licensing boards focus on a practitioner's quality of service? How does that compare to the percent of complaints about whether a practitioner is properly licensed?
- What percent of enforcement actions are focused on a practitioner's licensing status? How does that compare to the percent of enforcement actions focused on a practitioner's quality of service?
- How common are license revocations? What triggers revocations?
- Is there a link between licensing and entrepreneurship and/or innovation? Does licensing help or hinder the spread of innovative technologies and business practices?
- How do alternatives to licensing operate in unlicensed fields or in states where a field is unlicensed? What lessons can be drawn for licensing policy?

Consistent with its Section 6 authority, the FTC should timely release to the public the information it has already collected, and collects in the future, on occupational licensing.

Respectfully submitted,

Dana Berliner
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Attorney

Appendix—Enclosed Exhibits

The following exhibits are attached as part of the comments of the Institute for Justice:

- A. Carpenter, D. M., *et al.*, Institute for Justice, *License to Work: A National Study of Burdens from Occupational Licensing* (May 2012), available at <http://bit.ly/235ekrB>.
- B. Hemphill, Thomas A. & Carpenter, D. M., *Occupations: A Hierarchy of Regulatory Options*, Regulation (Fall 2016), available at <http://bit.ly/2A1qf0f>
- C. Angela C. Erickson, Institute for Justice, *Putting Licensing to the Test: How Licenses for Tour Guides Fail Consumers—and Guides* (Oct. 2016), available at <http://bit.ly/2A0cXRv>
- D. Angela C. Erickson, Institute for Justice, *Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape* (July 2016), available at <http://bit.ly/2iMPpve>
- E. Carpenter, D. M., *Testing the utility of licensing: Evidence from a field experiment on occupational regulation*, Journal of Applied Business and Economics, 13(2) (2012), available at <http://bit.ly/2lsZ3E1>
- F. 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>