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Federal Trade Commission

Death By A Thousand Haircuts: Economic Liberty and Occupational Licensure Reform

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I. Introduction

Many thanks to Alden for that introduction and to the Heritage Foundation for inviting me to speak today. My topic today is one of my favorites: the growing problem of unnecessary occupational licensure and what are we doing about it. I will summarize the well-understood effects of licensure on competition. I'll explain the modern spread of unnecessary licensure and how it harms consumers, eliminates jobs, and slows the economy. And, of course, I'll talk about how we at the FTC are addressing these problems through my Economic Liberty Task Force, which is actively advancing occupational licensing reform in cooperation with state and local governments.²

II. Occupational Licensing Limits Competition

First, how does occupational licensing affect competition? This is an important question because the competitive process drives our economy. For all manner of goods and services,

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

² *Economic Liberty*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/advocacy/economic-liberty>.

competition tends to benefit consumers by lowering prices, expanding access, improving quality, and driving innovation. So it is worth defending competition from various threats. Often in antitrust we focus on how private conduct threatens competition. But excessive public restraints and over-regulation can threaten competition, too, and often in ways that are far reaching and hard to remove.

Economists have long asked how occupational licenses affect competition, and we have some strong answers. Centuries ago, Adam Smith observed that undue occupational restraints limited competition and were likely to shrink supply and misallocate labor.³ Modern theoretical and empirical work demonstrates that Smith's concerns were well founded. Milton Friedman and Simon Kuznets did pioneering work in the 1930s and '40s, analyzing income premiums associated with professional practice, including "differences that reflect persistent hindrances to the free choice of occupation."⁴ Today we would describe these as barriers to entry. George Stigler⁵ and Sam Peltzman⁶ provided key theoretical frameworks on the economics of regulation, with particular applications to licensure. Economists such as Morris Kleiner, Keith Leffler, Lawrence Shepard, Steve Salop, Deborah Hass-Wilson, Alan Krueger, Dick Carpenter, and others have empirically demonstrated the negative effects of licensure.⁷ Public choice scholars such as James Buchanan and Mancur Olson explained the incentives legislators and regulators

³ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 136-165 (Modern Library 2000) (1776).

⁴ MILTON FRIEDMAN & SIMON KUZNETS, INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE vii (1954).

⁵ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13-20 (1971).

⁶ Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

⁷ For overviews of the literature, see generally, e.g., MORRIS M. KLEINER, REFORMING OCCUPATIONAL LICENSING POLICIES, BROOKINGS, HAMILTON PROJECT DISCUSSION PAPER (2015), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf; U.S. DEP'T TREASURY, COUNCIL OF ECONOMIC ADVISORS & DEP'T LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS (2015) [hereinafter OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS].

might have to adopt economically harmful limits on economic liberty such as unnecessary occupational licenses.⁸ Finally, the FTC and its staff have contributed to this work for more than 30 years through economic and policy studies of specific regulations in professions such as nursing,⁹ optometrists and vendors of optical goods,¹⁰ legal services,¹¹ dental hygienists,¹² and the real estate brokerage industry,¹³ among others.¹⁴

⁸ James M. Buchanan, *Public Choice: Politics without Romance*, 3 POLICY 19 (2003); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

⁹ DANIEL J. GILMAN & TARA ISA KOSLOV, FED. TRADE COMM'N, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014), <http://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>.

¹⁰ FED. TRADE COMM'N, COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (2005), <http://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf>; RONALD S. BOND ET AL, FED. TRADE COMM'N, STAFF REPORT ON THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980), <http://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf>.

¹¹ WILLIAM JACOBS ET AL., FED. TRADE COMM'N, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

¹² J. NELLIE LIANG & JONATHAN OGUR, FED. TRADE COMM'N, RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS (1987).

¹³ FED. TRADE COMM'N & U.S. DEP'T JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007), <http://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>.

¹⁴ CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990) (considering occupational regulation generally, as well as certain occupations).

III. Unnecessary Occupational Licensing Harms Workers, Consumers, and the Economy

The practical takeaway from this body of work is clear: although occupational licensing can have benefits, it often serves the interests of incumbents rather than the public. As such, unnecessary occupational licensing harms workers, consumers, and the economy as a whole.

For some occupations, licensure may be an appropriate policy response to specific consumer protection or safety concerns. It can help mitigate the effects of certain potential market failures – for example, when there are persistent information asymmetries between professionals and consumers, particularly in highly technical fields or when consumers cannot easily observe service quality.¹⁵ For example, in certain health care occupations, consumers could face serious risks if treated by unqualified individuals, yet find it difficult (or impossible) to assess quality of care at the time of delivery. In such circumstances, a license requirement might help improve public health and safety.

However, much of the growth in licensing requirements has occurred in occupations where the consumer risks are low or entirely speculative. A good example is cosmetology. Although some licensing may be justified, some states require a year or more of education and significant fees for cosmetology.¹⁶ One state requires 615 hours of education in “cosmetology theory.”¹⁷ A bad haircut or makeup application is markedly obvious to a consumer and to all of her friends. Bad haircuts or makeup applications quickly have consequences for the

¹⁵ *Id.* at 4-12. In addition, conflicts of interest may arise when professionals serve as both diagnosticians and treatment providers. *Id.* at 11.

¹⁶ OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, *supra* note 7, at 46.

¹⁷ IOWA ADMIN. CODE r. 645-61.14(157) (2017).

cosmetologist. The consumer risk is low and fleeting, but the excessive licensure requirement is not – it creates a large burden on those seeking to enter the workforce and limits competition.

Interior designers, milk samplers, and many other vocations and professions have no clear rationale for licensure at all, and the scope of the problem far exceeds these limited examples. Creative regulators have identified about 1,100 occupations on which to impose licensure requirements in at least one state, and the requirements for those licenses vary widely.¹⁸ Yet only about 60 occupations are licensed in all 50 states, meaning that for many of the eleven hundred occupations, at least one state has found other mechanisms sufficient to protect consumers.¹⁹

Even for professions where health and safety concerns or market failures may warrant some action, restrictions are often much broader than necessary to solve the problem. Other, less stringent alternatives both public and private can help consumers identify quality and value without creating high entry barriers.²⁰

Unfortunately, in the past decades, regulators have too often defaulted to strict licensure. Indeed, occupational licensing has grown dramatically. In the 1950s, less than 5% of U.S. jobs needed a license;²¹ today, that number is between 25 and 30%.²²

Such licenses often require expensive, extensive education, years of on-the-job training, difficult examinations, and significant fees. These burdensome requirements can close the door

¹⁸ OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, *supra* note 7, at 5.

¹⁹ *Id.* at 4.

²⁰ See COX & FOSTER, *supra* note 14, at 43-51 (regarding alternatives to licensing).

²¹ See KLEINER, *supra* note 7, at 5.

²² See *id.*; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT J. INDUS. REL. 2 (2010).

on job opportunities for people who are ready to work. They can prevent workers from marketing their skills to employers and consumers. And such requirements can reduce entrepreneurship and business innovation, insulating current service providers and legacy business models from new forms of competition.

One aspect of occupational licensing that harms many Americans, particularly those in military service and their families, is lack of the license portability. Workers who move across state lines typically need a new license and often face complex paperwork, expensive fees, and long delays. Because licensing requirements often vary by state, a new license might require additional coursework, training, or supervised experience, even for someone who has been licensed and working in the field for many years. Military families often face this problem because they move often and service-members' spouses often work in licensed occupations.

Taking a wider view, licensure disproportionately affects those seeking to move up the lower and middle rungs of the economic ladder. These regulations can prevent people from developing and using their vocational skills to find employment, start a small business, or create a new business model.

At the same time, licensing can drive up prices and reduce supply, which also harms lower and middle class individuals. For example, in 2000, the South Carolina legislature was concerned that many schoolchildren in low-income areas received too little dental care due to a scarcity of providers. Thus, they relaxed restrictions on the provision of basic dental care – “screenings and cleanings” to increase access.²³ In response, the South Carolina Board of Dentistry enacted an emergency regulation that effectively reestablished the requirement that a

²³ S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 439 (4th Cir. 2006).

dentist examine a patient before a hygienist could provide services.²⁴ The FTC brought an action alleging anticompetitive conduct on the part of the Board. The Board asserted a “state action immunity” defense but ultimately lost that argument in court – the Board action clearly subverted the legislature’s intent to expand access – and the case settled.²⁵

The South Carolina case is a good example of how a self-interested regulatory board might impose occupational restrictions demanding a high level of care without demonstrating any countervailing health or safety justification for prohibiting a lower level of care. Such overly restrictive regulations create for some consumers the untenable choice between gold-plated Cadillac care they cannot afford and no care at all.

I’ve laid out many granular problems with unnecessary licensing restrictions, whether applied to your barber or your dental hygienist. While the burden of each individual regulation might be relatively small, in the aggregate they form a substantial drag on American workers, consumers, and the economy – a sort of death-by-a-thousand-haircuts. Using standard economic techniques, one 2011 study estimates that license-related restrictions have resulted in as many as 2.85 million fewer jobs nationwide, with an annual cost to consumers of up to \$203 billion.²⁶

IV. The Economic Liberty Task Force and Expanding Economic Liberty

We’ve talked about the problem. Let’s talk potential solutions. In February of this year, as my first major initiative as Acting Chairman, I formed the Economic Liberty Task Force to help shine a spotlight on the harms of unnecessary or overbroad occupational licensing and to

²⁴ *Id.*

²⁵ *Id.* at 438-9.

²⁶ MORRIS M. KLEINER, ALAN B. KRUEGER & ALEX MAS, A PROPOSAL TO ENCOURAGE STATES TO RATIONALIZE OCCUPATIONAL LICENSING PRACTICES: A PROPOSAL TO THE BROOKINGS INSTITUTION HAMILTON PROJECT 3 (2011), <https://www.hhh.umn.edu/file/9441/download>.

partner with state leaders and other stakeholders to try to remove and reform these regulations. The task force has done a lot in the last five months. We've created a centralized resource, ftc.gov/econliberty, for licensing reform efforts. We've drawn significant media attention to the problem and its harmful effects on middle- and low-income Americans and military families. And we've received a terrific response from the coalition of the willing – legislators and governors and other citizens who want to bring jobs and talent to their states and cities. Furthermore, the task force has held dozens of meetings with outside parties to learn about the extent of the problem and potential solutions.

I am particularly pleased that tomorrow the FTC's Economic Liberty Task Force will host a roundtable focused on one of the specific problems I outlined earlier: the lack of license portability. The roundtable will examine ways to reduce or eliminate the costs that state-based regulations impose on licensed workers when they move and seek to offer their services across state lines.²⁷ We will discuss, among other topics various models that have emerged to enhance license portability and diminish the costs of multistate licensing.

The task force is also planning a second roundtable – to be held in the fall – to consider and highlight new empirical research on occupational licensure. These roundtables are an important part of the task force's ongoing efforts.

V. State Reform Efforts

Another important part of the task force's work is facilitating state-level reform efforts. Competition law respects the important federalism structure of our government. State officials generally may structure local markets to promote policy goals other than competition, including

²⁷ *Streamlining Licensing Across State Lines, Initiatives to Enhance Occupational License Portability*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/events-calendar/2017/07/streamlining-licensing-across-state-lines-initiatives-enhance>.

by licensing occupations. But if a state chooses to displace competition, it needs to do so directly. As the Supreme Court confirmed in *NC Dental*, a state cannot delegate oversight and gatekeeping authority to financially interested market participants unless it clearly articulates that delegation of authority and, then, actively supervises its exercise.²⁸

On the other hand, state legislatures may choose to expand economic liberty and enact laws that promote free market competition. And states are increasingly making this choice. Building upon our competition advocacy program,²⁹ the task force is supporting such efforts to eliminate or reduce unnecessary licensing requirements that are not narrowly tailored to protect the public from legitimate, demonstrable health and safety risks.³⁰ The task force has highlighted efforts by Arizona Governor Doug Ducey to reform occupational licensing.³¹ We've recognized Michigan Governor Rick Snyder's Office of Regulatory Reinvention, which issued a report recommending abolishing or revising licensing for numerous occupations.³² And I have worked with elected leaders in Nebraska,³³ Wisconsin,³⁴ and elsewhere to support their important work on occupational licensing reforms.

²⁸ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112-14 (2015).

²⁹ *Selected Advocacy Related to Occupational Licensing*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/advocacy/economic-liberty/selected-advocacy-relating-occupational-licensing>.

³⁰ *State-Based Initiatives: Selected Examples*, FED. TRADE COMM'N, <https://www.ftc.gov/policy/advocacy/economic-liberty/state-based-initiatives>.

³¹ *Id.* In May 2016, Arizona Governor Doug Ducey enacted a package of regulatory reforms relating to occupational licensing. As explained in a press release, “[i]n signing these bills, Governor Ducey kept good on his promise to begin the elimination of burdensome licensure of scores of odd jobs – regulations that are often designed to kill competition or keep out the little guy . . .”

³² *Id.* In 2011, Michigan Governor Rick Snyder established the Office of Regulatory Reinvention. Its February 2012 report contained multiple recommendations for improving the state's licensing regulations, including the complete deregulation of 18 occupations, as well as the elimination of additional licensing provisions.”

³³ *FTC and State of Nebraska Co-Host Twitter Chat Today on Economic Liberty*, (Mar. 23, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-state-nebraska-co-host-twitter-chat-today-economic-liberty>.

³⁴ Maureen K. Ohlhausen & Scott Walker, *Thriving Without A License*, THE WASHINGTON TIMES (May 23, 2017), <http://www.washingtontimes.com/news/2017/may/23/government-permission-to-do-business-hamstrings-tr/>.

Texas provides another great example. Recently, the Texas state legislature and governor acted to promote a more competitive market for health care delivery. They overrode rules imposed by the Texas Medical Board that effectively prevented most telemedicine in the state.³⁵ The FTC had been investigating the Texas Medical Board’s alleged anticompetitive conduct, but in light of the legislation, closed the investigation.³⁶ In our closing statement, the Commission commended, “the State of Texas for directly exercising its sovereign authority to override the TMB’s rules and to reform its regulatory authority for the benefit of Texas consumers. As the Commission first noted in a 2004 report, when properly used, telemedicine has considerable promise to broaden access, lower costs, and improve health quality.”³⁷ This is a positive development for competition and access to health care in Texas.

The Economic Liberty Task Force will continue to assist in and advocate for occupational licensing reform at the state level.

³⁵ See 2017 Tex. Sess. Law Serv. Ch. 205 (West) (striking Tex. Occ. Code Ann. § 111.004(5) and Tex. Occ. Code Ann. §§ 111.005(a)(3), (b), 111.007, 111.007(b)).

³⁶ FED. TRADE COMM’N, STATEMENT OF THE FEDERAL TRADE COMMISSION ON THE COMMISSION VOTE TO CLOSE THE INVESTIGATION OF THE TEXAS MEDICAL BOARD’S CONDUCT (2017), https://www.ftc.gov/system/files/documents/public_statements/1225993/1510180_texas_medical_board_statement_of_the_commission_6-21-17.pdf.

³⁷ *Id.*

VI. Conclusion

In sum, unnecessary or over-broad occupational licensing requirements create harmful consequences for competition and consumers. The growth of occupational licensure requirements has been unchecked for too long. I am pleased to join with elected officials from state and federal government, as well as a growing group of stakeholders, to work to prevent or roll back unnecessary or overbroad licensing regimes, and thereby promote free and competitive markets.