

SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS

License to Compete:
Occupational Licensing and the State Action Doctrine

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Testimony of Robert Everett Johnson

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

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

For decades, the Institute for Justice has been at the forefront of the fight against occupational licensing. We have represented scores of entrepreneurs who have had their right to earn a living curtailed by arbitrary and unnecessary licensing restrictions—from Louisiana 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 Along the way, we have seen time and again the significant harms that are caused by occupational licensing.

Occupational licensing is, increasingly, one of the most prevalent regulatory barriers in the American workplace. Whereas less than 5 percent of the workforce was required to obtain a license from their state government in the 1950s, today

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

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

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

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

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

that figure stands around 20 percent—and even higher if federal, city, and county licensing is included.⁶ Occupational licensing affects greater numbers of workers than either union membership or minimum wage laws.⁷

Increasingly, occupational licensing has attracted criticism from a bipartisan mix of sources, both within and outside government. Earlier this year, 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.”⁸ The Federal Trade Commission also has identified “many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits.”⁹ Outside government, groups as diverse as the Brookings Institution,¹⁰ Heritage Foundation,¹¹ and Reason Foundation¹² have issued publications critical of occupational licensing.

⁶ 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.

⁷ Morris M. Kleiner, *Occupational Licensing*, *Journal of Economic Perspectives* (Fall 2000), at 190.

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

⁹ Prepared Statement of the FTC on Competition and the Potential Costs and Benefits of Professional Licensure Before the Committee on Small Business, U.S. House (July 16, 2014).

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

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

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

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

Industry insiders frequently lobby legislators and regulators to impose new licensing barriers.¹³ Existing market participants like licensing because it makes it more difficult for new competition to enter the market. Shielded from normal market pressures, industry insiders can charge consumers higher prices without concern that they will be undercut by lower-cost competitors.¹⁴

This dynamic is accelerated, in many cases, by laws that confer licensing authority on professional boards composed of the very industry insiders who benefit

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

¹⁴ Kleiner and Krueger, *supra* note 6, at 681 (finding that licensing is associated with an approximately 15 percent increase in hourly earnings).

from licensing laws.¹⁵ 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.¹⁶ Five states 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.”¹⁷ 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 justification for these laws.¹⁸ And, indeed, it is difficult to imagine any conceivable danger from a misplaced throw pillow or unsightly shade of paint.

¹⁵ 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).

¹⁶ 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>.

¹⁷ *Id.* at 7.

¹⁸ *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

- 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.¹⁹ 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.”²⁰ In other words, by driving out competition, the rule would allow firms like H&R Block to raise their prices.²¹ 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.²² 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.²³ Fortunately, in a case brought by the

complaints submitted to regulators concerned unlicensed practice—rather than a legitimate threat to health or safety. *Id.* at 14.

¹⁹ Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286 (June 3, 2011).

²⁰ Editorial, *H&R Blockheads*, Wall Street Journal, Jan. 7, 2010, available at <http://on.wsj.com/1PwhESI>

²¹ 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”).

²² 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>.

²³ 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

Institute for Justice, a federal court found the IRS lacked authority to impose licensing.²⁴ Now, however, some in Congress are seeking to impose licensing through legislation—again with the support of large tax preparers.²⁵

- 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.²⁶ 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.²⁷ Over the same period, dentists and dental associations filed numerous complaints about increased competition from unlicensed teeth whiteners.²⁸ In response to such pressure, numerous states have acted to limit the practice of teeth whitening to licensed dentists.²⁹ In many cases, these restrictions have been imposed by boards composed primarily of practicing dentists who stand to benefit

87 million tax returns annually, the IRS only recommended prosecution in 162 cases in 2001 and 2002 combined. *Id.*

²⁴ *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

²⁵ 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>.

²⁶ 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>.

²⁷ *Id.* at 24.

²⁸ *Id.*

²⁹ *Id.* at 14-15, 18.

from the regulations—an arrangement that the U.S. Supreme Court recently concluded gave rise to potential liability under federal antitrust law.³⁰

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 dentistry³¹ and animal massage;³² attempts by cosmetology boards to monopolize hair braiding,³³ eyebrow threading,³⁴ and makeup artistry;³⁵ and attempts by funeral director boards to monopolize the sale of caskets.³⁶

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**.³⁷ 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

³⁰ *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

³¹ Institute for Justice, Texas Equine Dentistry, <http://bit.ly/1SSwvMB>.

³² Institute for Justice, Arizona Animal Massage, <http://bit.ly/205dqcb>.

³³ Institute for Justice, Iowa Hair Braiding, <http://bit.ly/1n6IA4T>.

³⁴ Institute for Justice, Arizona Eyebrow Threading, <http://bit.ly/1n6IACa>.

³⁵ Institute for Justice, Nevada Makeup, <http://bit.ly/1SmSrQC>.

³⁶ Institute for Justice, Oklahoma Caskets, <http://bit.ly/1n1bK4R>.

³⁷ Kleiner, *supra* note 10, at 6.

can often least afford to pay the costs of time and money required to obtain a license.³⁸ Notably, these barriers vary considerably across state lines, suggesting that they are not truly necessary to protect the public. A study of 102 lower-income occupations found that only 15 were licensed in 40 states are more, while occupations that required months of training in one state might require only a few days of training in another.³⁹ 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**.⁴⁰ 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.⁴¹ The Federal Trade Commission also has warned that “licensing of opticians and optical establishments may actually increase the

³⁸ Stuart Dorsey, *Occupational Licensing and Minorities*, Law and Human Behavior (Sept. 1983).

³⁹ 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>.

⁴⁰ Kleiner, *supra* note 10, at 6.

⁴¹ Sidney L. Carroll and Robert J. Gaston, *Occupational Licensing and the Quality of Service*, Law and Human Behavior (1983).

incidence of health problems associated with contact lens use” because increased costs “may induce more individuals to over-wear their replacement lenses.”⁴²

- 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.⁴³ 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.⁴⁴

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.⁴⁵ Licensing can give rise to entirely unregulated black markets, as high costs drive consumers from the legal market.⁴⁶ 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.⁴⁷ And licensing decreases mobility,

⁴² Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (Mar. 2004), at 21-22, available at <http://1.usa.gov/1Tx9YVV>.

⁴³ *Teladoc, Inc. v. Texas Medical Board*, 453 S.W.3d 606 (Tx. Ct. App. 2014).

⁴⁴ *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261 (Ark. 2013).

⁴⁵ Summers, *supra* note 12, at 11.

⁴⁶ *Id.* at 13.

⁴⁷ American Bar Association, National Inventory of the Collateral Consequences of Conviction, <http://bit.ly/1CuyVLL>.

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.⁴⁸

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 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.⁴⁹ 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.⁵⁰ 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

⁴⁸ Karen Jowers, *Spouses Face Licensing Roadblocks in Variety of Fields*, *Military Times*, May 4, 2015, available at <http://bit.ly/1SnNwzw>.

⁴⁹ 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).

⁵⁰ *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); see also *Craig miles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

braiding hair.⁵¹ These cases highlight the fact that, for many Americans, their chosen career is not only a vital source of income but also a central part of their identity. By constraining individuals' choice of occupation, licensing laws interfere with an important aspect of liberty protected by the Constitution.

- Freedom of Speech: As occupational licensing has grown to occupy larger fields of human endeavor, it also has come into conflict with the First Amendment. Many individuals use words to make a living, and the government runs afoul of the First Amendment when it uses licensing laws to dictate who can and cannot talk about a given subject. So, for instance, the United States Court of Appeals for the D.C. Circuit recently found that the D.C. government violated the First Amendment when it required a license to work as a tour guide.⁵² 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.”⁵³ 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.

⁵¹ *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).

⁵² *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

⁵³ *Rosemond v. Markham*, __ F. Supp. 3d __, 2015 WL 5769091 (E.D. Ky. Sept. 30, 2015).

- Right to Travel: The Supreme Court has recognized that the “right to travel from one State to another is firmly embedded in our jurisprudence.”⁵⁴ 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.⁵⁵ 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 directors⁵⁶ and interior designers.⁵⁷ 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

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

⁵⁴ *Saenz v. Roe*, 526 U.S. 489 (1999).

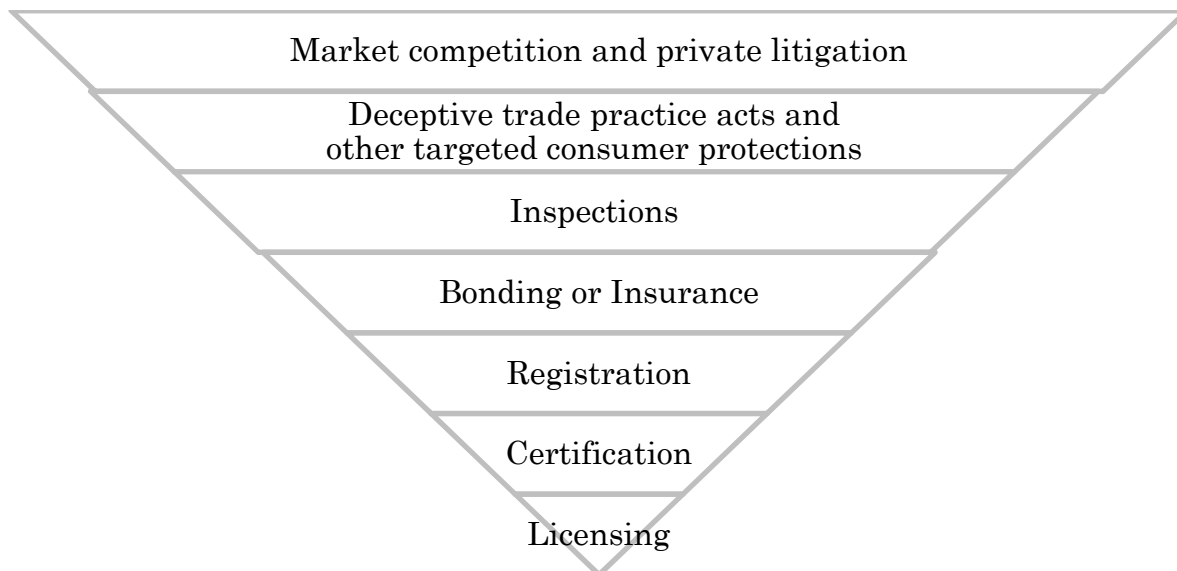
⁵⁵ Brittany La Couture, American Action Forum, *The Traveling Doctor: Medical Licensure Across State Lines* (June 2015), available at <http://bit.ly/1Tb6l7k>.

⁵⁶ Institute for Justice, Maryland Funeral Homes, <http://bit.ly/1JYzjFX>.

⁵⁷ Institute for Justice, Florida Interior Design, <http://bit.ly/1RTlLia>.

health and safety, one found a mixed impact, and seven found no impact at all.⁵⁸ Moreover, to the extent that advocates of licensing point to real health-and-safety concerns, those concerns can often be addressed through less restrictive alternatives to licensing laws.

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

⁵⁸ Canada Office of Fair Trading, *Competition in Professions* 22 (Mar. 2001), available at <http://bit.ly/1mYLwzR>.

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.

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 to licensure—including voluntary certification

regimes. Licensing should be employed as a last resort, where no other form of regulation will suffice, but too often today licensing requirements are imposed without any real concern for whether they are necessary or justified.

Thank you for the opportunity to testify.