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Feb. 27, 2018

**To:** House Committee on Small Business, Subcommittee on Economic Growth, Tax, and Capital Access

**From:** C. Jarrett Dieterle, Director of Commercial Freedom and Senior Fellow, R Street Institute

**Re:** Written testimony for hearing on “Occupational Hazards: How Excessive Licensing Hurts Small Business”

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I thank the subcommittee for inviting me to testify on occupational licensing. As the committee may know, I direct the R Street Institute’s work on commercial freedom policy, including our study of occupational licensing.

Occupational licensing has become one of the major labor policy issues facing today’s workforce. One out of every four Americans needs a license simply to pursue their occupation.<sup>1</sup> This is why several scholars recently described occupational licensing as “one of the nation’s principal forms of economic regulation.”<sup>2</sup>

According to the Institute for Justice, the average license requires almost a year of educational training, passing an exam, and the payment of \$267 in fees.<sup>3</sup> The human cost of excessive licensing is easy to overlook, but in fact, it is significant. After her husband’s death, Sandy Meadows, a woman from Louisiana who never before had to provide for herself, began doing so by arranging flowers—the primary skill she knew. Louisiana stopped her by denying her a floristry license because she could not pass a complicated practical exam which was judged by incumbent florists in the state. According to her attorney, she ultimately died alone and in

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<sup>1</sup> Dick M. Carpenter, et al., “License to Work,” Institute for Justice, 2<sup>nd</sup> Edition, November 2017, p. 6, [http://ij.org/wp-content/themes/ijorg/images/ltw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](http://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf).

<sup>2</sup> D. Berliner, et. al., “Occupational Licensing Run Wild,” released by the Regulatory Transparency Project of the Federalist Society, November 7, 2017, p. 6, <https://regproject.org/wp-content/uploads/RTP-State-Local-Working-Group-PaperOccupational-Licensing.pdf>.

<sup>3</sup> Dick M. Carpenter, et al., at p. 6.

poverty because the Louisiana Horticulture Commission refused to allow her to practice a harmless profession.<sup>4</sup>

Sadly, Sandy Meadows' case is only one example of how occupational licensure acts as a formidable barrier to entry for low- and middle-income Americans seeking to enter new professions. It is these populations that are least able to afford the high entrance costs or dedicate the time to partake in the intense educational requirements that so many licensing regimes mandate.

The result is a government-imposed barrier that arbitrarily limits Americans' ability to work and climb the income ladder to more prosperity. As Brink Lindsey and Steven Teles have pointed out, licensing can be a type of opportunity hoarding that exacerbates income inequality by hurting lower-income workers seeking to join occupations while simultaneously benefitting wealthy incumbent practitioners or businesses in fields like medicine, law, and more.<sup>5</sup> Excessive licensing also hurts small businesses and entrepreneurs that are seeking to find qualified candidates to hire or trying to expand into new markets.

Even worse, occupational licensing restricts geographic mobility, since states often have competing and at-odds licensing regimes, even within the same profession. For example, my colleague Shoshana Weissmann and I have written about how divergent state licensing regimes hurt a woman named Heather Kokesch Del Castillo, who started a health coach business in California but was shut down by state regulators when her family moved to Florida.<sup>6</sup> Although Heather's original state of California did not require a license to offer dietary advice, Florida demanded that Heather become a licensed dietician. Heather was ultimately forced to close her business.

Occupational licensing regimes are usually administered by state licensing boards, which set the requirements for licensing within industries and grant final approve to those seeking licenses. Many times, these boards are stocked with incumbent members of the occupation, who have direct financial incentives to block would-be entrants into the market. This type of economic rent seeking serves to entrench vested interests at the expense of up-and-coming, aspiring workers seeking to improve their lives.<sup>7</sup>

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<sup>4</sup> Clark M. Neily, "Just Say 'No' to Government," *American Spectator*, Oct 23, 2013, [https://spectator.org/56825\\_just-say-no-government/](https://spectator.org/56825_just-say-no-government/).

<sup>5</sup> See generally Brink Lindsey and Steve M. Teles, *The Captured Economy*, Oxford University Press, 2017.

<sup>6</sup> Weissmann and Dieterle, "Why Do You Need a College Degree to Give Diet Advice?," *Wall Street Journal*, Jan. 31, 2018, <https://www.wsj.com/articles/why-do-you-need-a-college-degree-to-give-diet-advice-1517439964>.

<sup>7</sup> Edward Rodrigue and Richard V. Reeves, "Four ways occupational licensing damages social mobility," Brookings Institution, Feb. 24, 2016, <https://www.brookings.edu/blog/social-mobility-memos/2016/02/24/four-ways-occupational-licensing-damages-social-mobility/>.

While occupational licensing laws are frequently enacted in the name of health and safety, they can only rarely be justified on those grounds. For instance, various states require a license to practice professions such as hair braiding, shampooing, fortune-telling, and floristry, none of which seem likely to endanger public safety.<sup>8</sup>

As a recent paper for the *Federalist Society* noted, the broad variance in licensing laws and standards across the 50 states undercuts the claim that licensure is necessary to protect the health and safety of consumers in many fields.<sup>9</sup> Furthermore, the discrepancy in the rigor of the requirements between professions similarly undermines health and safety justifications. For example, while cosmetologists are required to complete an average of 386 days of training to obtain a license, the average for Emergency Medical Technicians is a mere 34 days.<sup>10</sup> The empirical research available has also notably failed to demonstrate a clear connection between more stringent licensing requirements and better safety outcomes—although it *has* suggested that more licensing leads to higher prices for consumers.<sup>11</sup>

It is important to note that in fields in which health and safety concerns are legitimate, licensing still may not be the best mechanism for addressing such concerns. There are numerous less-onerous alternatives to occupational licensing that can adequately protect the health and safety of consumers. For example, options like inspections or insurance and bonding can often ensure high quality and safe products and services in a more narrowly-tailored way.<sup>12</sup> Accordingly, licensure should ideally only be used where: (1) there is a quantifiable and demonstrable risk to public health and safety inherent in the occupation; (2) there is little chance a non-licensed individual could competently practice in the occupation; and (3) there are no less-burdensome alternatives available for mitigating the safety risks.

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<sup>8</sup> See generally Dick M. Carpenter, et al., “License to Work”; Angela C. Erickson, “Barriers to Braiding,” Institute for Justice, July 2016, [http://ij.org/wp-content/uploads/2016/07/Barriers\\_To\\_Braiding-2.pdf](http://ij.org/wp-content/uploads/2016/07/Barriers_To_Braiding-2.pdf); Ramesh Ponnuru, “Is Your Fortune Teller Licensed?,” *Bloomberg*, Mar. 31, 2014, <https://www.bloomberg.com/view/articles/2014-03-28/is-your-fortune-teller-licensed>; John-Michael Seibler, “Licensing Laws Have Long Been a Drain on the Economy. But Florida Could Soon See Reform,” Heritage Foundation, Jan. 19, 2018, <https://www.heritage.org/government-regulation/commentary/licensing-laws-have-long-been-drain-the-economy-florida-could-soon>.

<sup>9</sup> D. Berliner, et. al., “Occupational Licensing Run Wild”, p. 11.

<sup>10</sup> Dick M. Carpenter, et al., “License to Work,” p. 25.

<sup>11</sup> A 2015 White House report conducted a literature review of the available empirical research on licensure’s effect on quality and safety, concluding that while there was “compelling evidence that licensing raises prices for consumers,” most research “does not find that licensing improves quality or public health and safety.” See Department of the Treasury, Council of Economic Advisers, and Department of Labor, “Occupational Licensing: A Framework for Policymakers,” July 2015, p. 13, 58-61, [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

<sup>12</sup> Weissmann and Dieterle, “Why Do You Need a College Degree to Give Diet Advice?,” *Wall Street Journal*. For additional alternatives to licensure, see D. Berliner, et. al., “Occupational Licensing Run Wild”, p. 46-47.

## The Status Quo

In recent years, there has been growing bipartisan recognition of the problems posed by excessive occupational licensing requirements. Both the Obama and Trump administrations have highlighted the issue and put resources into studying and addressing it. Similarly, both Democratic and Republican governors from across the nation have focused on the deleterious effects of licensing.

Despite this bipartisan attention, broad scale reform efforts have been somewhat slow to materialize. To be sure, numerous states have enacted licensure reform in recent years. For example, in Arizona, Governor Doug Ducey has pursued licensing reforms along with the state legislature,<sup>13</sup> and both Florida and Oklahoma recently engaged in reform efforts.<sup>14</sup>

Nonetheless, there has yet to develop a broad, systematic repeal of licensing laws across the country. The Bureau of Labor Statistics found that, as of 2014, only eight occupations that were previously licensed had been delicensed at the state level in the prior 40 years.<sup>15</sup> This number has grown in recent years, but it nevertheless underscores the frustration many reformers have felt with the lack of progress toward more widespread licensing reform victories.

This is where the federal government can play a key role as a policy leader. Up to this point, policymakers have predominantly framed occupational licensing as a state issue. While it is true that the bulk of licensing takes place at the sub-national level, the federal government is far from powerless to help.

What's more, the federal government need not overstep its constitutional boundaries to get involved. In fact, Congress and the executive branch have myriad tools at their disposal that can help break the licensing stalemate while still respecting important principles of state authority and federalism.

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<sup>13</sup> “Governor Doug Ducey Enacts Regulatory Reforms To Protect Job Creators & Small Businesses,” News Release, Office of the Governor, May 19, 2016, <https://azgovernor.gov/governor/news/2016/05/governor-doug-ducey-enacts-regulatory-reforms-protect-job-creators-small>.

<sup>14</sup> Eric Boehm, “Florida Lawmakers Are Fast-Tracking Licensing Reforms,” *Reason*, Jan. 16, 2018, <http://reason.com/blog/2018/01/16/florida-house-passes-licensing-reforms>; Rhett Morgan, “Occupational Licensing Task Force recommendations include criminal justice reform,” *Tulsa World*, Jan. 10, 2018, [http://www.tulsaworld.com/business/employment/occupational-licensing-task-force-recommendations-include-criminal-justice-reform/article\\_187d7afb-8d97-565d-a2df-746481d310fb.html](http://www.tulsaworld.com/business/employment/occupational-licensing-task-force-recommendations-include-criminal-justice-reform/article_187d7afb-8d97-565d-a2df-746481d310fb.html).

<sup>15</sup> Robert J. Thornton and Edward J. Timmons, “The de-licensing of occupations in the United States,” Bureau of Labor Statistics, *Monthly Labor Review*, May 2015, <https://www.bls.gov/opub/mlr/2015/article/pdf/the-de-licensing-of-occupations-in-the-united-states.pdf>.

## The Federal Government's Role

The federal government has numerous available options to make an impact in occupational licensing reform. Importantly, all these options avoid raw preemption of state law and recognize the importance of the federal government staying within its constitutionally-designated lane. I will focus on three predominant ones here.

### *1. Passing federal legislation*

Congress presently has several ready-to-go bills that, if passed, would materially reform occupational licensing burdens. Perhaps the most promising is the Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW Act), which was introduced by Reps. Brat and Meadows in the 114<sup>th</sup> Congress and draws upon congressional control of federal enclaves and property.<sup>16</sup>

Specifically, the ALLOW Act would utilize Congress' constitutional authority over the District of Columbia to establish a template for occupational licensing reform, which other states could then draw upon to enact their own reforms. Under this model, licensing in D.C. would only be permitted "where less restrictive regulation will not suffice to protect consumers from present, significant, and substantiated harms that threaten public health, safety, or welfare."<sup>17</sup>

It would also recognize a "freedom to engage in an occupation," which would bar the government from requiring a license for a profession unless the government could demonstrate an "important government interest" in protecting risks to public health and safety caused by that profession. It would also require it to prove that a licensing mandate was "substantially related" to those concerns.<sup>18</sup> Critically, the law would allow D.C. residents to use the fact that a licensing requirement failed to meet these standards as an affirmative defense in any enforcement action brought against them for lacking a license.<sup>19</sup>

The ALLOW Act would also tackle another growing problem in the occupational licensing arena: military spouse licensure. Because of the transient nature of life in the armed services, military spouses are often forced to move across state lines when their spouse is transferred to a new base. This creates significant challenges for these spouses because states have wildly divergent licensing laws and requirements, and licenses from one state are oftentimes not recognized by another state.

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<sup>16</sup> ALLOW Act, S.3158, 114th Congress (2015-2016), <https://www.congress.gov/bill/114th-congress/senate-bill/3158>.

<sup>17</sup> Id. § 204(2).

<sup>18</sup> Id. § 207(b).

<sup>19</sup> Id. § 208.

The problem is significant:

Military spouses were 10 times as likely to have moved to a new state in the past year than the average American, according to a combined 2012 study by the Treasury and Defense departments. Surveys suggest that anywhere from 35% to 50% of military spouses work in professions that require licensure, and nearly 75% of them would need to be relicensed upon transferring to a new state. Perhaps as a result, the unemployment rate for military spouses is 16%, while the national unemployment rate is only 4.1%.<sup>20</sup>

The Department of Defense's State Liaison Office has collaborated with states in recent years to increase military spouse license portability,<sup>21</sup> and states like Florida have passed legislation that allows for out-of-state military spouses to transfer their licenses at no cost.<sup>22</sup> But more should be done.

The ALLOW Act helps alleviate this problem by permitting military spouses who move across state lines and work at a federal military installation to no longer have to obtain a new license in their new state.<sup>23</sup> Scholars such as Paul Larkin have argued that this could be expanded to apply to all federally-owned land.<sup>24</sup>

Congress can and should pass legislation like the ALLOW Act and place it on the President's desk.<sup>25</sup> Doing so would fix discrete policy issues that the federal government is well-positioned to impact, as well as create a reform model in D.C. upon which other states could draw.

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<sup>20</sup> Weissmann and Dieterle, *Wall Street Journal*, Jan. 31, 2018; see U.S. Dept. of Treasury and U.S. Dept. of Defense, "Supporting Our Military Families: Best Practices for Streamlining Occupational Licensing Across States," Feb. 2012,

[http://archive.defense.gov/home/pdf/Occupational\\_Licensing\\_and\\_Military\\_Spouses\\_Report\\_vFINAL.PDF](http://archive.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF);

Brice Stone and Rosalinda Maury, "Military Spouse Employment Report," Issue Lab, Feb. 1, 2014,

<https://www.issuelab.org/resource/military-spouse-employment-report.html>.

<sup>21</sup> Amy Bushatz, "Push to Ease Licensing for Military Spouses Remains Patchwork by State," *Military.com*, July 5, 2016, <https://www.military.com/daily-news/2016/07/05/push-ease-licensing-military-spouses-remains-patchwork-state.html>.

<sup>22</sup> Florida House Bill 625, <https://www.flsenate.gov/Session/Bill/2017/615/>.

<sup>23</sup> ALLOW Act, § 101.

<sup>24</sup> Paul J. Larkin Jr., "A Positive Step Toward Occupational Licensing Reform: The ALLOW Act," Heritage Foundation, Legal Memorandum No. 212, July 21, 2017, p. 6, [https://www.heritage.org/sites/default/files/2017-07/LM-212\\_0.pdf](https://www.heritage.org/sites/default/files/2017-07/LM-212_0.pdf).

<sup>25</sup> There are other legislative options at the federal level that also warrant consideration, including the New Hope and Opportunity through the Power of Employment Act (New Hope Act), H.R.2155, 115th Congress (2017-2018) and the Restoring Board Immunity Act H.R.3446, 115th Congress (2017-2018). For more information on the Restoring Board Immunity Act, see: Written Testimony of C. Jarrett Dieterle and Shoshana Weissmann, U.S. House Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, "Occupational

## 2. *Reforming Licensure in Government Agencies and Contracting*

The significant size of the federal workforce provides another opportunity for federal action in the licensing realm. The executive branch employs over 2 million civilian workers.<sup>26</sup> Estimates suggest there are an additional 7.5 million individuals working as federal contractors.<sup>27</sup> Adding these together, this amounts to over 5% of the nation's 160 million person workforce.

The federal government possesses direct or indirect control over the job requirements for these positions, which uniquely situates it to determine what licensing, if any, such jobs require. The Department of Veterans Affairs recently demonstrated the potential for reform in this area.

After a notice-and-comment process, the VA granted "full practice authority" to registered nurses, allowing them to engage in primary care activities outside the direct supervision of doctors in the VA system.<sup>28</sup> This change, known as "scope of practice" reform, frees nurses to practice to the full extent of their degree, rather than being arbitrarily limited as to the services they can provide. Previously, only licensed medical doctors had been permitted to undertake many primary care activities within the VA system.<sup>29</sup> As such, scope-of-practice reform operates as a type of occupational licensing reform by clearing away these arbitrary barriers.

Congress or the President should direct the Government Accountability Office (or another appropriate agency) to conduct a review of all licensing requirements across federal agencies and contracts and identify ones that are irrational or unnecessary. Then, as the VA demonstrated, these requirements can be cleared away or eliminated.

Given the size and importance of the federal workforce, the federal government has a real opportunity to clear away excessive licensing burdens for a significant number of Americans.

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Licensing: Regulation and Competition," Sept. 12, 2017, <https://www.rstreet.org/wp-content/uploads/2017/09/Restoring-Board-Immunity-Written-Statement-FINAL.pdf>.

<sup>26</sup> Office of Personnel Management, Historical Federal Workforce Tables: Executive Branch Civilian Employment Since 1940, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/>.

<sup>27</sup> John J. DiIulio, Jr., "10 questions and answers about America's 'Big Government,'" Brookings Institution, Feb. 13, 2017, <https://www.brookings.edu/blog/fixgov/2017/02/13/ten-questions-and-answers-about-americas-big-government/>.

<sup>28</sup> Federal Register, Vol. 81, No. 240, 90198, (Dec. 14, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-14/pdf/2016-29950.pdf>.

<sup>29</sup> C. Jarrett Dieterle, "How The VA Could Become A Policy Leader In Occupational Licensing Reform," *Forbes*, Nov. 9, 2016, <https://www.forbes.com/sites/realspin/2016/11/09/how-the-va-could-become-a-policy-leader-in-occupational-licensing-reform/#31aab9351c29>.

### 3. *Expanding the FTC's Occupational Licensing Work*

The Federal Trade Commission has done significant—but perhaps underappreciated—work in the occupational licensing arena. Congress could empower the agency to expand its efforts.

In 2010, the FTC brought an enforcement action against the North Carolina Board of Dental Examiners for actively seeking to exclude non-dentists from providing teeth-whitening services. The board in question was stocked with incumbent dentists who had an economic interest in limiting competition for the services they provided, including teeth whitening. The case ultimately escalated to the Supreme Court, which ruled that the board violated federal antitrust law because it was not actively supervised by the North Carolina government and was comprised mostly of self-interested economic actors.<sup>30</sup>

As noted, state licensing boards are often packed with industry insiders that have a direct economic incentive to prevent further market entrants into their profession. The boards erect formidable barriers to entry that prevent would-be professionals from entering the market. While quasi-government entities like licensing boards have traditionally been exempt from antitrust scrutiny under the so-called “state action doctrine,” the Supreme Court’s decision in the North Carolina dental board case appears to have ushered in a sea change in the law.

Congress can draw upon and expand this legal precedent by encouraging states with abusive licensing boards to take self-policing measures to restructure their boards. For example, Congress should consider passing the recently introduced Restoring Board Immunity Act, which provides states a safe harbor from federal antitrust exposure if they enact reforms that ensure active state supervision of licensing boards and robust judicial review standards for legal challenges to licensing laws.<sup>31</sup>

Beyond its direct enforcement authority, the FTC is also empowered with research and advocacy powers under federal law. Section 6 of the FTC Act authorizes the agency to “gather and compile information” and to “make public from time to time such portions of the information obtained by it . . . as are in the public interest.”<sup>32</sup> In fact, the FTC “has a long history of engaging in competition advocacy before federal regulators, state legislatures, [and] courts.”<sup>33</sup>

This advocacy can take different forms, but most prominently, under Acting Chairman Maureen Ohlhausen, the FTC has created its Economic Liberty Task Force. The task force has compiled

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<sup>30</sup> *N.C. Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

<sup>31</sup> See Restoring Board Immunity Act, S. 1649, <https://www.congress.gov/bill/115th-congress/senate-bill/1649>.

<sup>32</sup> 15 U.S.C. § 46(a), (f).

<sup>33</sup> Tara Isa Koslov, “Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes,” *CPI Antitrust Chronicle*, August 2012, p. 2, <https://www.competitionpolicyinternational.com/assets/Uploads/KoslovAug-121.pdf>.

extensive research and resources about the effects of occupational licensing and the potential policy solutions available. It has also hosted numerous roundtable events that bring together stakeholders from across the country to discuss occupational licensing. The FTC's advocacy efforts also include the filing of "advocacy comments" before state political entities that are considering new occupational licensing legislation or rules.<sup>34</sup>

Congress should consider increasing funding for the FTC's occupational licensing work in an effort to solidify it. While Congress traditionally just appropriates general funding to the agency, it could pass a specific line item appropriation and reporting requirement that specifically directs more money toward the agency's licensing efforts. Or Congress might simply direct the FTC to expend more of its existing budget on this work. Increasing funding of government agencies is never a popular argument, but unlike many government expenditures, the FTC's advocacy efforts provide a good return on investment.<sup>35</sup>

In sum, expanding FTC occupational licensing reform advocacy would allow the federal government to exert indirect influence on state-level licensing debates in a way that respects the boundaries of federalism.

## Conclusion

The issue of occupational licensing continues to attract widespread attention among policymakers and commentators. While many at the federal level have dismissed it as a "state issue," this incorrectly diminishes the federal government's unique ability to pursue licensing reform. The federal government has multiple levers available that could make a real difference.

Hopefully this testimony has highlighted some potential options for Congress and the subcommittee to consider, although surely there are additional opportunities, as well. I again would like to thank the subcommittee for inviting me to testify and would be happy to answer any questions, today or in the future.

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<sup>34</sup> Federal Trade Commission, Advocacy Filings, <https://www.ftc.gov/policy/advocacy/advocacy-filings>.

<sup>35</sup> As FTC staff have noted in the past, advocacy comments "can be researched and written by a few staff members within a relatively short time frame," which makes them a much less resource-intensive endeavor than "a fully investigated and litigated enforcement matter." Koslov, p. 4. Similarly, a 1989 American Bar Association Report stated that "the potential benefits" from an FTC advocacy program "exceed the Commission's entire budget." Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, *reprinted* in 58 Antitrust L.J. 43, 116 (1989).