Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing: "License to Compete: Occupational Licensing and the State Action Doctrine"
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Response of Robert Everett Johnson, Attorney, Institute for Justice
To Written Questions from Senator Orrin G. Hatch

Question: What is the right way to evaluate the efficacy of licensing schemes? When are such schemes necessary? When are they plainly not? How should we go about determining whether a particular licensing scheme is appropriate or is instead merely protectionist?

Response: When considering whether regulation is necessary, the default starting assumption should always be that government intervention is *not* required. Instead, we should assume that ordinary market forces will operate to protect consumers, and we should leave the choice between competing service providers up to consumers in the market. Those who agitate for the creation of a license (which is almost always industry representatives rather than consumers) should bear the burden of proving it is needed.

In evaluating the need for licensing, we also should demand that the need for regulation be proven with actual evidence. Far too often, licensing schemes are imposed on the basis of little more than assertion and anecdote. Industry representatives seeking to impose regulation cite speculative and far-flung dangers to public health and safety, although in truth ordinary market forces are working just fine to protect the public.

Where industry representatives are able to show a demonstrable threat to public health and safety, regulation may be necessary. However, even here significant caution is required, as those concerns may potentially be addressed by means of less restrictive alternatives that protect the public without restricting access to the market. Because licensing operates as a complete barrier to competition, licensing should be imposed only as a last resort where other forms of regulation fall short.

Among other things, policy makers should ask whether the need for regulation can be resolved through the following less restrictive alternatives:

- Deceptive trade practice acts and other targeted consumer protections.
- Inspections.
- Bonding or insurance requirements.
- Registration (requiring service providers to register with the government without limiting who can become registered).
- Certification (allowing service providers to take a test to become "certified" by the government but not making certification a condition of entry into the market).

In running through this menu, policymakers should engage in a process that (a) identifies the problem before the solution, (b) quantifies the risks, (c) seeks solutions that get as close to the problem as possible, (d) focuses on the outcome (with a specific focus on prioritizing public safety), (e) uses regulation only when necessary, (f) keeps it simple, (g) checks for unintended consequences, and (h) reviews and responds to change. In so doing, the goal should be to produce regulations that are proportionate to risk, consistent, targeted, and transparent.

As an example, consider the case of manicurists—an occupation well-suited for individuals on the first rungs of the economic ladder. In many states, manicurists must spend hundreds of hours in education and training and complete examinations, the content of which often have little to do with public health and safety. To the extent that there is *any* health and safety justification for such regulation, its primary concern is to protect the public from the spread of fungus or infectious disease. But the restrictions that are imposed are clearly disproportionate to those ends. A less restrictive system of inspections would be far more targeted to the safety risks that ostensibly justify licensure.

In addition to running through this menu of less restrictive alternatives, policymakers also should ask if the same occupation is subject to licensure in other jurisdictions. If other jurisdictions do not license an occupation—even if those jurisdictions fall short of a majority—that should indicate that there is at least a good possibility that licensure is unnecessary. Policymakers may look to the experience of jurisdictions that do not impose licensure to see if there is any real substance to asserted health and safety justifications advanced by proponents of licensing.

Question: In your view, what are the circumstances that tend to lead to particularly egregious or problematic licensing schemes? Are certain types of professions particularly susceptible to abuse on this front? Do the problems arise mainly in the decision to license in the first place, or in the imposition of unnecessary, costly licensure requirements later on?

Response: Presently, the greatest amount of licensing growth tends to be in the service sector. This is significant, as the service sector is becoming an ever-larger share of the economy—meaning that the growth of the service sector only accelerates the rise of occupational licensing and its negative effects on consumers and the economy.

New occupational licensing regimes often arise in circumstances where there already exists a particularly active professional association. An association concentrates the interests of those who are already active in the market, and it provides a framework for those market participants to lobby for the imposition of licensure (while frequently asking lawmakers to "grandfather" existing market participants). Meanwhile, consumers and others who are harmed by licensing have no such institutional advocate, so their voice frequently goes unheard by the legislature. This dynamic creates a one-way pressure for legislatures to impose licensing. We have seen

precisely this dynamic at work as the American Society for Interior Designers (ASID) has mounted a nationwide campaign to impose licensure for interior design.

Another circumstance that encourages the imposition of particularly egregious licensing regimes is the existence of an industry-dominated licensing board. Once licensing has been imposed for an occupation, licensing often is overseen by a board composed of industry insiders who stand to benefit from expanding the definition of the licensed profession to monopolize ever greater areas of goods and services. For instance, dental boards composed of practicing dentists have sought to define teeth whitening as the practice of dentistry; veterinary boards composed of practicing veterinarians have sought to define equine dentistry as the practice of veterinary medicine; and cosmetology boards composed of practicing cosmetologists have sought to define hair-braiding as the practice of cosmetology.

These concerns can arise with any occupation. For instance, although most would agree that doctors should be subject to some form of regulation, abuse can occur even in that context. Doctors—through their professional associations and licensing boards—frequently seek to expand the definition of medical practice to include work that might otherwise be performed by other (less highly-compensated) licensed professionals. Efforts by doctors to unnecessarily limit the scope of practice for nurses, technicians, and other medical professionals undoubtedly have contributed to the rising cost of medical care.

As the foregoing suggests, these problems arise with both the creation and the maintenance of licensing schemes. Industry representatives frequently seek to impose licensing on their own industry in order to exclude new competition. Then, once licensing has been imposed, we often see a process of "license creep" whereby industry representatives seek to expand the scope of their government-granted monopoly to cover an ever-wider array of goods and services—thus allowing for even greater monopoly rents.