Written Testimony of Dick M. Carpenter II, PhD
Director of Strategic Research
Institute for Justice
Prepared for the Little Hoover Commission
Sacramento, California
February 4, 2016

Chairman Nava, Vice Chairman Kaye, and honorable members of the Little Hoover Commission, thank you for the opportunity to participate in your hearing on one of the most significant issues in labor economics today, occupational licensing.

My name is Dr. Dick Carpenter. I am a director of strategic research at the Institute for Justice.

The Institute for Justice, or IJ, is a nonprofit, public-interest law firm that represents individuals whose most basic rights are violated by government. In addition to fighting on behalf of our clients, our goal, through litigation, is to ensure that all Americans have the right to control their own destinies as free and responsible members of society.

Since 1991, IJ has come to the aid of individuals who want to do the simple things every American has the right to do—including own property, start and grow a business, speak freely about commerce or politics, and provide their children with a good education—but can't because they find excessive regulations in their way.

We are successful in winning 70 percent of our cases in the court of law, in the court of public opinion, or through legislative reforms. Through 2015, IJ has litigated almost 200 cases, including five before the U.S. Supreme Court. Of those five cases, IJ won four before the Supreme Court and the fifth (the *Kelo* eminent domain case) in the court of public opinion.

Our headquarters are in Arlington, Virginia, and our five state offices are located in Florida, Minnesota, Texas, Arizona, and Washington state. IJ's Clinic on Entrepreneurship is located at the University of Chicago Law School.

The strategic research team at IJ produces social science research to inform the courts of law and the court of public opinion about issues relevant to our cases. In so doing, we seek to help judges, legislators, and citizens understand the effects and implications of laws and policies that affect not just our clients but the many people our clients represent. Our research is unique because we ask questions others have not asked, challenge assumptions and ideas others have taken for granted, and pursue studies others either can't or won't do.

A quintessential example is our 2012 study *License to Work*[1] (also presented in the journal *Economic Affairs*[2]). In that report, we gathered and analyzed the occupational licensing requirements of 102 low- and moderate-income occupations in all 50 states and the District of Columbia. The multiple years it took us to gather the data and write the report confirmed precisely why no one had ever before undertaken such a study.

We had at least two purposes in limiting our sample to low- and moderate-income occupations. First, our typical clients are those who practice occupations squarely in this sector of the economy, and, as mentioned, our research is tied to our litigation. Second, prior research on licensing had focused on dentists, physicians, mortgage brokers, teachers, and the like, but too few studies had examined the types of occupations ideal for individuals just entering or re-entering the economy and also the types of occupations that have traditionally seen dynamic levels of entrepreneurship. These purposes, then, guided the creation of our random sample of low- to moderate-income occupations, all of which are recognized and defined by the U.S. Bureau of Labor Statistics.

The specific licensing requirements we studied included fees paid to the state, time lost to training and experience, number of exams, minimum grade level, and minimum age. With these data, we were able to score and rank each occupation and each state by how burdensome their licensing laws are.

On average, these 102 licenses force aspiring workers to spend nine months in education or training, pass one exam, and pay more than $200 in fees. One-third of the licenses take more than a year to earn. At least one exam is required for 79 of the occupations.

Among the occupations, the hardest to enter is interior designer, although it is licensed in only three states and the District of Columbia. To work as an interior designer, a person must, on average, complete six years of education and experience, pass a costly national exam, and pay hundreds of dollars in fees to the state.

When we take into account the burdens to enter a given occupation and the number of states that license it, the most widely and onerously licensed occupations are cosmetology trades, truck and bus drivers, and pest control applicators.

Often, the licensure requirements to enter an occupation appear to have little to do with public health and safety. Although I am sure industry representatives would object, the public health and safety implications of occupations like sign language interpreter and auctioneer—which is actually regulated in California—seem quite dubious. A favorite example thus far—although it did not make it into *License to Work* for various reasons—is music therapist. Three states license music therapists, and licensure has been considered in others. The bills to create these laws always start the same way: “To protect the public health and safety….” This is because the enabling legislation comes from model legislation provided by the American Music Therapy Association.

For its part, the California Legislature in 2015 enacted a titling act for music therapists,[3] which would have restricted the title of board certified music therapist only to those who completed designated requirements. But the titling act would not have been the end of lobbying by music therapists. Several years ago, I completed research on the evolution of licensure (published in the peer-reviewed journal *Regulation and Governance*[4]) and found that titling acts play a key role in the evolutionary process of creating full licensure. Fortunately for would-be

music therapists, the fate of California's legislation was a veto. Governor Brown's veto message[5] (cheekily) stated:

> To the Members of the California State Assembly:
>
> I am returning Assembly Bill 1279 without my signature.
>
> This bill establishes the "Music Therapy Act" and regulates when a person may use the title of "Board Certified Music Therapist."
>
> Generally, I have been very reluctant to add licensing or title statutes to the laws of California. This bill appears to be unnecessary as the Certification Board for Music Therapists, a private sector group, already has defined standards for board certification.
>
> Why have the state now add another violin to the orchestra?
>
> Sincerely,
>
> Edmund G. Brown Jr.

One way of thinking about the public safety implications of an occupation is to compare one occupation to another. Doing so can illuminate irrationalities in their respective licensing schemes. For example, it should not take 10 times the training to become a cosmetologist that it does to become an emergency medical technician, yet that is the case in most states. On average, cosmetologists are required to undergo 372 days of training, and EMTs just 33. In fact, 66 occupations face greater average licensing burdens than EMTs. In California, barbers and cosmetologists devote about one year to education or experience, and EMTs only one month. Comparisons like these lead one to question the public safety rationale underlying licensure of many occupations in our sample.

Turning to state comparisons, we ranked states based on the number of occupations they license and how burdensome those laws are. Although none of the states requires a license for all of the 102 occupations we studied, 13 license more than half of the occupations on our list. Louisiana licenses the most, at 70 lower-income occupations. At the other end of the spectrum is Wyoming, which licenses 24. The average number of occupations licensed across all states is 43. California licenses 62 of the occupations we studied.

But the number of occupations licensed is only part of the story. Also important is the question of how difficult it is to enter the occupations. By combining the various licensure requirements mentioned earlier—education and training, fees, exams, and so forth—into burden scores, we were also able to rank the states based on how burdensome their licensure requirements are. Hawaii tops the list as having the most burdensome average requirements. With the lightest requirements, Pennsylvania is at the bottom. California ranks seventh, meaning its requirements are among the most burdensome in the country.

Our scoring system also allowed us to combine the number of occupations licensed in a state with how burdensome the laws are. This enabled us to rank states based on both the number of occupations licensed and how burdensome the licensure requirements are. With many licenses and burdensome laws, Arizona tops the list, followed by California, Oregon, Nevada, Arkansas, Hawaii, Florida, and Louisiana. In those eight states, it takes, on average, a year and a half of training, one exam, and more than $300 to get a license. At the bottom of the list are Wyoming, Colorado, Indiana, South Dakota, Missouri, and Kansas. In those states, it takes, on average, 221 days of education and experience, two exams, and $141 to secure a license.

As mentioned, California ranks as the second most broadly and onerously licensed state. This is in large part due to the requirements associated with contractor occupations and the comparably large number of occupations regulated. On average, aspiring practitioners in the Golden State have to lose 549 days to education or experience, take one exam, and pay $300 in fees.

While it is always interesting to compare one state to another in a kind of competitive fashion, that there are such wide disparities between states and across occupations is one of the most striking findings in our report. It also calls into question the health and safety rationale for many of these licenses.

There are several types of disparities to note:

1. The vast majority of jobs we studied are unlicensed in at least one state, undermining the purported need for licensure. For example, interior designers are licensed in just three states and the District of Columbia, and florists in only one. If there were really an epidemic of dangerous floristry, we would expect to see more than just one state licensing it.
2. Licensing requirements for a given occupation often vary greatly from one state to another. For instance, aspiring auctioneers must complete about a year or more of training in five states—but only about nine days in Vermont and four days in Pennsylvania. Eleven states where auctioneers are regulated, including California, require no education or training whatsoever. It is implausible that auctioneers in other states really need so much more training.
3. Then there are the types of disparities I mentioned earlier—those that come about when comparing licensing requirements for occupations with more and less apparent relationships to public safety.

Comparisons and disparities like these illustrate how the difficulty of jumping licensing hurdles often has little to do with the safety risk of a particular job. It merely keeps some people out of an industry so that those with licenses face fewer competitors and can command higher prices. As the legislators on this Commission will likely recognize from their own experience sitting in committee meetings, consumers are rarely the ones advocating for licensing laws. More typically, it is industry insiders who do so.

One of the inevitable questions is, What are the effects of these licenses? Evidence suggests that the effects are profound and that licensure reform could be significant. For example, University of Minnesota economist Morris Kleiner, whom you will hear from as well, estimates that

licensure costs Minnesota—a state approximately one-sixth the size of California—more than $3 billion annually. If Minnesota were to reform its licenses, 15,000 new jobs could be created in the state. In addition, there is evidence to suggest that licensure makes states less competitive. First, occupational licenses do precisely what they are designed to do—keep people out. But they not only keep people out of occupations, they also keep people out of your state. Other research on the relationship between occupational licensure and migration indicates that licensure restricts people's ability to migrate from one state to another. This also restricts upward mobility, as moving from one state to another is often part of the climb up the economic and social ladder. The economic implications are predictable—a reduced tax base, less competition in licensed industries, and higher prices for consumers. This issue received particular attention in a 2015 White House report[6] on occupational licensing that highlighted many of these same effects.

Second, barriers like these make it harder for people—particularly minorities, those of lesser means, and those with less education—to find jobs and build new businesses that create jobs. This is something we found in a study of the interior design occupation.[7] Professors David Harrington and Jaret Treber compared states based on their regulatory requirements and discovered that in states where interior designers are regulated, fewer entrepreneurs are able to enter the market, and blacks, Hispanics, and those wishing to switch careers later in life are being disproportionately excluded from the field, thus impeding their upward mobility. Also as a consequence, consumers are paying higher prices for design services.

Third, competitiveness and innovation are closely linked, but there is evidence that licensure retards innovation. This is because licensure does not reward innovation; it rewards standardization and compliance. This, too, harms upward mobility, as it discourages entrepreneurs from distinguishing themselves from their competitors and thereby growing their businesses and enjoying the economic benefits of their innovation. Thus, to the extent that states are interested in facilitating competitiveness through innovation, there is evidence to indicate cutting licensure burdens could help.

In our report, we recommend using comparisons like those I mentioned earlier to identify licenses ripe for cutting or reforming. Policymakers interested in alleviating the occupational licensing burdens in their states should ask themselves the following questions:

1. What occupations are licensed in your state but in only a few or perhaps no others?
2. How do the licensure burdens or requirements in your state compare to those in other states?
3. How do the requirements of a particular occupation stack up against those of occupations with clear health and safety implications?
4. Is there actual evidence of the need for licensure in an occupation?

Overall, we recommend that the presumption be on the side of economic freedom. Before we limit the freedom of individuals to work in the occupation of their choice and cut off avenues for upward mobility, we should require that those who agitate for the creation or perpetuation of a license prove the need for that license.

It has been our observation that recommendations for the elimination or reform of licenses make some people uncomfortable because the resulting landscape looks to them like the "Wild West," as one licensure proponent described a world without barber licenses.[8] Thus it is important to bear in mind that there are alternatives to licensure that transcend the prevailing binary thinking—no licensure or full licensure—but still hold the capacity to realize the primary benefits.

In a 2014 report[9] for the Council on Licensure, Enforcement, and Regulation, my co-author and I described how states can choose from a menu of regulatory options to strike an efficacious balance between protection and freedom of practice—and to do so in the least restrictive way. This menu was also featured prominently in the aforementioned White House report on licensing.

The spectrum of regulations ranges from the least restrictive (market competition/no government regulation) to the most restrictive (occupational licensure). The entire spectrum is included below, listed from least to most restrictive.

> (a) Market competition/no government regulation. It is a foundational principle of free-market economics that markets generally work better than regulations not only to efficiently allocate resources but also, more specifically to this issue, to protect consumers.[10] Consumers today have access to copious amounts of information, the most basic of which is providers' reputations, that provides them with insight into the quality of providers' services, often making regulations superfluous. This is particularly so in the contemporary communications environment, where consumers have instant access to reviews, rankings, and reports about service providers. Through social media, advice blogs, and websites such as Angie's List and Yelp, consumers can easily find recommendations on effective service providers and tips on whom to avoid. Because of consumers' ready access to such information, market forces can often weed out incompetents and fraudsters more quickly and effectively than regulatory schemes.
>
> (b) Private civil action in court to remedy consumer harm. Should legislators not be satisfied that markets alone are sufficient to protect consumers, private rights of action can introduce a light but effective regulatory option. Allowing for litigation after injuries, even in small-claims courts, gives consumers a means to seek compensation and compel providers to adopt standards of quality to avoid loss of reputation and litigation. The cost to consumers of obtaining the remedy could be reduced by including a provision for consumers to collect court and attorneys' fees if their claims are successful.
>
> (c) Deceptive trade practice acts. If market forces and the threat of or actual litigation are sufficient, policymakers should stop at this level and not adopt any regulation. Only if there is an identifiable market failure should policymakers move to the next level of regulation. In such cases, they should look first to existing regulations on business processes—not individuals. These include deceptive trade practice acts that empower the attorney general to prosecute fraud.

(d) Inspections. The next level of regulation—inspections—is already used in some contexts but could be applied more broadly as a means of consumer protection without full licensure. For example, municipalities across America adopt inspection regimes to ensure the cleanliness of restaurants, which is deemed sufficient to protect consumers over a more restrictive option of licensing food preparers, waitstaff, and dishwashers. The same could be applied to other professions, such as barbers and cosmetologists, where the state may have a legitimate interest in cleanliness of instruments and facilities. Similarly, periodic random inspection could replace the licensing of various trades, such as electricians, carpenters, and other building contractors, where the application of skills is repeated and detectable to the experienced eye of an inspector.

(e) Bonding or insurance. Some occupations carry with them more risks than others. Although risks are often used to justify licensure, mandatory bonding or insurance—which essentially outsources management of risks to bonding and insurance companies—is another less invasive way to protect consumers and others. For example, the state interest in regulating a tree trimmer—an occupation regulated in California—is that the service provider can pay for the repair to a home or other structure in the event of damage. The trimming itself is a relatively safe profession that possesses few other threats to consumers such that extensive state-mandated training, experience, testing, or other licensure requirements are unnecessary. This means that the state interest in protecting consumers from potential harm associated with tree trimming and other similar occupational practices can be met through bonding and insurance requirements, while allowing for basically free exercise of occupational practice.

(f) Registration. The next most restrictive form of occupational regulation, registration, requires providers to notify the government of their name, address, and a description of their services but does not include personal qualifications. Registration is often used in combination with a private civil action because it often includes a requirement that the provider indicate where and how he takes process of services that initiate litigation. The simple requirement of registration with the state may also be sufficient in and of itself to deter potential fly-by-night providers who may enter a state after a natural disaster or similar circumstances.

(g) Voluntary certification. Certification is the type of occupational regulation that restricts the use of a title. Although the voluntary nature of this designation seems contrary to the definition of regulation, it is, in fact, regulated. This is because although anyone can work in an occupation under certification, only those who meet the state's qualifications can use a designated title, such as certified interior designer, certified financial planner, or certified mechanic. Use of a title is thus regulated. Certification sends a signal to potential customers and employers that practitioners meet the requirements of their certifying boards and organizations. Certification is less restrictive than occupational licensing and presents few costs in terms of increased unemployment and consumer prices. Certification also overcomes a frequently cited basis for regulation—asymmetrical information, when a service provider has more or better information than customers.[11] The concern is that this creates an imbalance of power that service providers can use to their advantage. A related concern is specialized knowledge,

when a field is so complex that consumers cannot know enough to recognize when they are receiving good versus poor service.[12] Both concerns are used to justify full licensure, but voluntary certification can fulfill much the same function as licensure—namely, signal sending[13]—without the costs. Certification provides information that levels the playing field with providers without setting up barriers to entry that limit opportunity and lead to higher prices. Note that certification does not have to be administered by the state. Professional associations and other third-party organizations—like that cited by Governor Brown in his aforementioned veto message—offer effective certification systems that achieve many of the same ends but without the structures and costs associated with a state agency.

(h) Occupational license. Finally, licensing is the most restrictive form of occupational regulation. The underlying law is often referred to as a "practice act" because it limits the practice of an occupation only to those who meet the personal qualifications established by the state and remain in good standing. Given the significant costs associated with licensing and the advantages of other types of regulation described here, legislators should view licensing proposals with great skepticism. Less restrictive types of regulation, if any regulation is truly needed at all, can most often protect consumers just as effectively as licensing without licensing's costs in terms of lost employment and higher consumer prices. To the extent that licensure is considered, the need for the creation of new licenses, or for the continuation of existing ones, should be established through careful study in which empirical evidence (not mere anecdote) is presented.

To apply 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, transparent, and agile.

To conclude, in 1787, James Madison wrote that the protection of property rights "is the first object of government."[14] To Madison, property rights went beyond real estate and personal belongings to cover "everything to which a man may attach a value and have a right," including "the free use of his faculties and free choice of the objects on which to employ them."[15] His inclusion of economic liberty and the right to earn an honest living under the protection of property rights was as unequivocal as his disdain for the cooptation of government by one group at the expense of others. He wrote:

> That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty is violated by arbitrary seizures of one class of citizens for the service of the rest ... where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.[16]

To cite the Father of the Constitution is not to call for the wholesale deregulation of all existing licenses or a complete moratorium on the creation of new ones. Such a position would likely be inconsistent with his view. Indeed, note that Madison condemned "*arbitrary* seizures of one class of citizens for the service of the rest" and "*arbitrary* restrictions, exemptions, and monopolies" (emphases added).

Instead, the menu I propose is a mechanism by which elected officials can fulfill Madison's call for a just government that protects public health and safety while executing the "first object of government," including the preservation of the freedom of practice. In pursuing this first object, lawmakers will concomitantly facilitate the upward mobility of their fellow citizens and the safety and security thereof.

Endnotes

[1] Carpenter, D. M., Knepper, L., Erickson, A. C., & Ross, J. K. (2012). *License to work: A national study of burdens from occupational licensing*. Arlington, VA: Institute for Justice. Retrieved from http://ij.org/report/license-to-work/.

[2] Carpenter, D. M., Knepper, L., Erickson, A. C., & Ross, J. K. (2015). Regulating work: Measuring the scope and burden of occupational licensure among low- and moderate-income occupations in the United States. *Economic Affairs, 1*(3), 3–20. Retrieved from http://onlinelibrary.wiley.com/doi/10.1111/ecaf.12107/full.

[3] http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1251-1300/ab_1279_bill_20150902_enrolled.pdf

[4] Carpenter, D. M. (2008). Regulation through titling laws: A case study of occupational regulation. *Regulation and Governance, 2*(3), 340–359. Retrieved from http://onlinelibrary.wiley.com/doi/10.1111/j.1748-5991.2008.00041.x/full.

[5] http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1251-1300/ab_1279_vt_20151011.html

[6] Department of the Treasury Office of Economic Policy, Council of Economic Advisors, & Department of Labor. (2015). *Occupational licensing: A framework for policymakers.* Washington, DC: White House. Retrieved from https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

[7] Harrington, D. E., & Treber, J. (2009). *Designed to exclude: How interior design insiders use government power to exclude minorities and burden consumers*. Arlington, VA: Institute for Justice. Retrieved from http://ij.org/report/designed-to-exclude-2/.

[8] "Michigan Barber School Director Darryl Green said he was 'in shock' legislation could wipe out the [barber] licensee requirements. 'It does have a lot to do with public health,' Green said. 'I'm not saying we are as important as doctors, but we are the closest you can get. We are turning this into the Wild, Wild West. It's not important? OK. I'd like to see them get a haircut in a barber shop five years from now. It will be like rolling the dice'" (Gantert, T. (2012). 1,200 hours to be a lawyer, but 2,000 to be a barber. *Michigan Capitol Confidential*. Retrieved from http://www.michigancapitolconfidential.com/16782).

[9] Carpenter, D. M., & McGrath, L. (2014). *The balance between public protection and the right to earn a living* [resource brief]. Lexington, KY: Council on Licensure, Enforcement and Regulation. Retrieved from http://ij.org/report/the-balance-between-public-protection-and-the-right-to-earn-a-living/.

[10] Friedman, M., & Friedman, R. D. (1980). *Free to choose: A personal statement.* New York: Harcourt Brace Jovanovich.

[11] Akerlof, G. A. (1970). The market for "lemons": Quality uncertainty and the market mechanism. *Quarterly Journal of Economics, 84*(3), 488–500.

[12] Brain, D. (1991). Practical knowledge and occupational control: The professionalization of architecture in the United States. *Sociological Forum, 6*(2), 239–268; Freidson, E. (2001). *Professionalism: The third logic*. Chicago, IL: University of Chicago Press.

[13] Spence, M. (1973). Job market signaling. *Quarterly Journal of Economics, 87*(3), 355–374.

[14] *The Federalist* No. 10

[15] Rakove, J. N. (Ed.). (1999). *James Madison: Writings 1772–1836.* New York: Library of America.

[16] Rakove, 1999.