

# POLICY *report*

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## Six Reforms to Occupational Licensing Laws to Increase Jobs and Lower Costs

Byron Schlomach, Ph.D., Director of the Goldwater Institute's Center for Economic Prosperity

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### EXECUTIVE SUMMARY

Do you have a love of fabric, furniture, and a talent for decorating? In a few states, unless you have a license, it's tough luck if you want to start a decorating business. Most states actually have laws that limit the use of the title "interior designer."<sup>1</sup>

Every state licenses medical doctors, lawyers, nurses, and chiropractors—professions that most people would say should be licensed. Every state also licenses architects, surveyors, and cosmetologists—professions that some people might be less likely to agree should be licensed. The vast majority of states license other professions such as accountants, athletic trainers, insurance agents, massage therapists, and private detectives. Then there are states that license animal caretakers, craft artists, and even librarians.

Then there are the infamous African hair braiding cases. Across the country, cosmetology boards are shutting down businesses run by African immigrants where they braid people's hair into intricate patterns using no chemicals or dangerous products. They want these hair braiders to go to cosmetology school and become licensed, even though the vast majority of schools don't even teach the technique of African hair braiding.

More and more, licensing represents a growing barrier to entering all sorts of occupations. Economic research shows that licensing makes services more expensive and makes it more difficult—often unnecessarily so—for people to enter a new profession. In Arizona approximately 85 professions are licensed and licensing costs the state an estimated \$660 million in lost economic activity.

Reforming licensing could open career opportunities and reduce the costs of services without sacrificing consumer safety. This paper recommends six reforms:

1. Create a "sunrise" provision that requires advocates of new licensing proposals to prove their need before they are approved.
2. Require that all licensing laws are periodically reauthorized after a rigorous review process.
3. Require licensing boards to have a supermajority of members drawn from the general public rather than the profession itself.
4. Replace mandatory licensing with voluntary certification.
5. Enact legislation protecting the right to earn a living.
6. Expand the scope of practice for some professionals, allowing them to perform more services.

These reforms would boost job creation and economic activity, as new career opportunities became available in areas once difficult to enter because of costly and often unnecessary licensing requirements.

## Introduction

Occupational licensing is ubiquitous in the United States. Thirty-eight states license athletic trainers.<sup>2</sup> As just noted, a few states even license interior designers.<sup>3</sup> Thirty states now require geology licenses.<sup>4</sup> Barbers and cosmetologists are licensed in every state. An estimated 800 occupations were licensed in at least one state during 2003.<sup>5</sup>

Although the practice of a profession even as skilled as medicine was open to just about anyone in America throughout most of the 19th century, the granting of exclusive rights to practice a profession is not a modern development. The earliest and most persistent licensing has governed the practice of medicine. The Code of Hammurabi in ancient Babylon specified surgeons' fees and prescribed malpractice penalties. An early example of modern-style licensing appeared in Sicily in the 13th century and spread throughout Europe in the 14th century—and governed medicine.<sup>6</sup>

During the medieval period in Europe, something akin to licensing was common in cities and towns. Associations of craftsmen and other professions, called *guilds*, were formed for the mutual benefit of members. By the 14th century, it was very common for craft guilds' members to obtain the exclusive right to practice their profession within a geographic area, usually a city, that a specific guild dominated.<sup>7</sup> With the Industrial Revolution, it became obvious that this monopoly power was stifling communities' economies, and guild structures were gradually torn down.<sup>8</sup> Some people consider this last development to be a key historical shift. As the Nobel Prize winning economist Milton Friedman put it, "The overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western world."<sup>9</sup>

What became the United States was settled during a period when guilds had fallen out of favor and laissez-faire philosophy was on the rise. Consequently, even though some regulation of the practice of medicine occurred prior to the 19th century, the bulk of such restriction was repealed for a time, and almost anyone could practice medicine by 1850. This change distressed some people who considered themselves the only legitimate medical practitioners. They formed the American Medical Association in 1847; by 1900, every state had its own mandatory licensing law for the practice of medicine, although serious enforcement did not occur until 1911.<sup>10</sup>

Professional licensing has now become as American as baseball and apple pie.

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## Occupational Regulation

Other than outright prohibition, licensing is the most severe and restrictive form of occupational regulation. Individuals who hold a license can practice a profession within a scope defined by a licensing law, but no one else is allowed to provide the licensed service or product. Doing so can constitute a criminal act that is punishable by a prison sentence, a fine, or both. In Arizona, practicing a licensed profession without a license carries various sanctions, depending on the profession. Practicing medicine without a license is a class 5 felony and can carry a prison sentence as high as two years and tens of thousands of dollars in fines.<sup>11</sup> Cutting hair without a license is a class 1 misdemeanor, the highest criminal sanction behind a felony, and can carry a prison sentence of six months and fines in the thousands.<sup>12</sup>

A milder form of occupational regulation is *certification*. In general, certification indicates that a person practicing a profession has achieved a certain level of verified education or expertise in that field. Certification does not preclude others from practicing the profession. Certification is often conferred on individuals practicing a specialty within a broader, sometimes licensed, profession. Medical doctors are frequently certified in specialties, but medical doctors not certified in urology, for example, are not prevented from performing urological procedures.

The mildest form of occupational regulation is *registration*. In this case, an individual merely has to declare the fact of his practicing a profession to the government, while giving his name, profession, and contact information and then paying a small fee. Sometimes, the main reason for registration is for the logistics of tax collection. The sales tax, for example, requires that retail sellers collect the tax for the government, and the government must know from whom it, in turn, will collect tax. In other instances, registration is for informational purposes to make the enforcement of other laws easier to carry out. Door-to-door salesmen, for example, often have to register. Food truck operators have to meet a myriad of health regulations but are rarely licensed or certified. Registration allows relevant agencies to carry out regulatory duties without imposing the same burdens as licensing or certification.

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## Negative Economic Effects of Licensing

The most important negative economic effect of licensing is that it restricts the number of individuals available to provide a service. Every other negative economic

effect either results from or is exacerbated by this restriction of *supply*. The effects of licensing are so intimately intertwined that they are difficult to separate and discuss singly. To some degree, economists have attempted to quantify those effects, but the main goal of this section is to demonstrate the significant negative effects of licensing.

### **Increased Costs to Enter Licensed Occupations**

By definition, licensing requirements are intentionally restrictive. The least restrictive requirement involves a check into a potential licensee's background and often an oath to follow a code of ethics. Of course, few people object to winnowing known criminals out of many industries or to requiring that licensees follow a code of ethics.

Next, a potential licensee must have a certain level of education. College educations are often required, but medical doctors must have more than a baccalaureate degree. Barbers are usually required to have only a high school degree. Some licenses require an apprenticeship or something akin to it. Cosmetology in Arizona, for example, requires 1,450 hours of experience at a cosmetology school, which the student pays for, unlike typical apprenticeships, where apprentices earn at least a meager income.<sup>13</sup> Medical doctors have internships and residency requirements, which are essentially apprenticeships.

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Along with educational requirements, a highly restrictive licensing requirement is the written exam. An individual can successfully complete extensive educational requirements, maintain a clean personal record, and fulfill apprenticeship requirements but fail the written exam. Under the guidance of a licensed plumber, an individual might be able to plumb an entire house to code, while passing every inspection with flying colors, but if that individual fails the written licensing exam, no license will be granted. Where exams are concerned, demonstrated practical ability does not matter; the important thing is the ability to pass an exam.

Exams can be costly too. A physician's exam can cost more than \$1,000.<sup>14</sup> Average fees across the nation for an athletic trainer are \$443, along with 1,460 days of education and experience. For a cosmetologist, it's \$142 and 372 days. For a fire alarm installer, it's \$230 and 486 days.<sup>15</sup> The bottom line is that licensing requirements have the economic effect of discouraging people from entering an occupation in which they might succeed if their success hinged only on the satisfaction of customers. African hair braiders, for example, are often shut down for lack of a cosmetology license, but the costs of going to cosmetology school and obtaining a license are prohibitive—especially considering most cosmetology programs don't even teach African hair braiding.<sup>16</sup>

### **Increased Cost of Doing Business**

Since licensing limits supply, it increases prices of services provided by licensed professions compared to what prices would be without licensing. Put another way,

the incomes of those who hold a license are higher than they would be if their occupation were not licensed. A study authored by economists David Harrington and Jaret Treber and sponsored by the Institute for Justice shows that interior designers in states that regulate the profession earn about \$1,600 more per year than do interior designers in states that do not regulate. Regulated interior design firms also earn considerably higher profits than unregulated interior design firms.<sup>17</sup>

In his book, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, labor economist and licensing expert Morris Kleiner shows that four of six economic studies indicate licensing increases the incomes of practitioners in the licensed occupations. The other two studies measured no effect, but the bulk of the evidence indicates that licensing increases costs for everyone who use licensees' services. Kleiner separately describes how state licensing boards and the American Dental Association (ADA) limited the number of new dentists entering the profession in the 1990s. Expensive ADA recommendations caused large dental schools to close. Consequently, the number of dentists relative to the population fell and dentists' incomes rose from being about the same or slightly lower than physicians' in 1990 to being higher by 2000.<sup>18</sup>

Still more evidence from Kleiner includes a separate econometric analysis of many licensed and unlicensed occupations that controls for individual characteristics such as age, sex, and gender. It indicates that licensed professions enjoy a 10 percent earnings premium. A comparison of unlicensed occupations requiring similar skills to those of licensed professions found that substantial premiums are earned by licensees. For example, physicians earn 40 percent more than people who have similar educations but who enter the biological and life sciences professions.<sup>19</sup> When the practice of medicine became universally licensed in the late 19th century, doctors used their cartel power to restrict their numbers. From 1910 to 1940, the number of medical schools in the United States was cut in half. The number of physicians per 100,000 members of the population also fell from 157 to 130 between 1900 and 1938.<sup>20</sup> Such a significant supply reduction must increase the price.

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Empirical economic analysis is clear. Licensing increases the price of doing business with a licensed profession. Aggregate earnings in that profession might not rise, because such an increase depends on how profound the reduction in consumers' purchases is compared to the rise in price.<sup>21</sup> However, for individual licensed practitioners, income is higher than it would otherwise be. Lawyers have a median hourly rate of compensation more than three times higher than occupations in general, and doctors are at a level almost five times higher.<sup>22</sup> In response to higher prices, either consumers learn to do without those services or they do with less, thereby reducing their purchases of services from the licensed profession.

### Decreased Output and Deadweight Loss

Tied to an increase in price is an accompanying decrease in the amount of a service that consumers purchase. This finding is a result of the Law of Demand (i.e., people buy less at a higher price for a good or service compared to what they buy at a lower price for the same good or service). Consequently, some transactions are lost that would otherwise add value in the economy. The net value of those lost transactions is what economists call *deadweight loss*. Because the transactions that would otherwise occur absent the artificial structure of licensing do not take place, their net benefit or value is not transferred to anyone; it is simply lost. This type of cost is very damaging. Although resources such as labor and other inputs can be transferred and used elsewhere in the unlicensed economy, lost value-added from forgone trade in the licensed economy cannot be recovered in any way.

Exactly how many haircuts, legal and medical appointments, building designs, decorated interiors, and other goods and services are lost as a result of licensing cannot be calculated with a high degree of precision. However, economists have been able to devise proxy measures that give us some notion of the dollar value of lost output. Kleiner estimates that about 20 percent of the nation's workforce is licensed, driving up costs to consumers by between 2.0 and 2.4 percent. That figure represents a shift of dollars from consumers to licensed professionals, brought about artificially through licensing, of between \$116 billion and \$139 billion. Kleiner estimates that this shift, in turn, leads to a deadweight loss of between \$34.8 billion and \$41.7 billion per year in 2000 dollars.<sup>23</sup>

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What makes up an approximate \$35 billion deadweight loss? Is this estimate just theoretical economist-speak, or does the figure reflect something real? In some cases, consumers who would pay a lower price drop out of the market altogether and simply do without. For example, relatively high prices and reduced availability of cosmetology services will cause some consumers to rely on home treatments. Others will go to a salon less often. Although many people might consider the value to the economy of such services to be relatively trivial, there is a still a cost when such economic activity is lost.

African hair braiders, who apply no chemicals to hair and who simply manipulate the hair into intricate braids and patterns, have been prevented from practicing their art by cosmetology licensing boards. Though a cosmetology license would require training in techniques and materials inapplicable to such African hairstyles, government officials have insisted that African hairstylists have the inapplicable training. Not only would those who wish to have their hair styled that way lose the service as a result of licensing, but also those who practice the craft (who are often low-income) lose the opportunity to sell their services.<sup>24</sup>

In some cases, licensing keeps services from even being offered. Cindy Vong,

a nail salon entrepreneur, serves as an example. She was forced to stop offering a service common in Asia, Europe, and parts of the United States. With a \$50,000 investment, she offered rough skin and callous removal by the small, toothless Garra Rufa fish. The Arizona Board of Cosmetology, however, determined that a fish pedicure violates the rules because fish cannot be sterilized. Being sticklers for safety, the board requires that *all* pedicure tools be sterilized. Of course, the main reason for sterilization is that human pedicurists occasionally go a little deeper into a subject's skin than they should. The fish like only the dead stuff and do not eat live skin. For now, no one in Arizona can get a precision fish pedicure; if you don't want an imprecise human one, well, there's no pedicure for you.<sup>25</sup> The Goldwater Institute is representing Vong in a legal challenge to the board's decision to shut her down.

Cosmetology is just one example. Modest medical treatments are likely forgone because some medically trained personnel may have the skills and knowledge—but not the requisite license—to administer aid. Simple wills are not complicated and individuals prepare their own wills all the time, but a self-taught expert in will preparation cannot legally sell his services unless he's been to law school and taken a licensing exam. As a result, some people die without a will, and their property ends up in a long and costly probate process. Someone with a penchant and talent for selecting plants and moving dirt around can't design landscapes because of licensing. Consequently, many people do without a designed landscape simply because of expense. Sometimes people wire a structure themselves and do the job incorrectly to avoid the expense of a licensed electrician, thus creating a true safety hazard. The examples go on and on. Deadweight loss is real.

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### **Decreased Mobility and Lost Opportunity**

*Mobility* in the context of this paper has two aspects. One type is *geographic labor mobility*, which is the readiness and ability of labor to move, especially from one state to another, in search of opportunity. The other type is *income mobility*, which is the movement of earners up or down the various income levels in the United States.

Licensing interferes with both types of mobility. Although many states have reciprocity agreements, which allow individuals licensed in one state to practice the same profession in another state, those agreements are limited. Reciprocity between two states in one profession does not automatically extend to any other profession. Also, to the extent that this type of mobility occurs within the United States, it does not extend to other countries. Medical doctors trained in other countries cannot practice in the United States by simply showing their credentials from their native land. Minimally, such individuals must pass licensing exams in the state where they wish to practice. Even when exams are passed, though, residency requirements often prevent foreign-trained doctors from ever practicing in the United States.<sup>26</sup>

Reduced geographic mobility—whereby individuals who have already demonstrated competence in an occupation in one state face artificial licensing obstacles that prevent them from practicing in another state—increases costs of using licensed practitioners in high-demand states. If high-growth states such as Arizona and Texas also have licensing with little reciprocity, licensed professionals will tend to see relatively higher salaries than would otherwise occur. Economic studies have shown this tendency to be the case.<sup>27</sup> The lack of mobility on the part of those in licensed professions across states results in a less-than-optimal distribution of licensed skills across the country.

Licensing blocks even temporary mobility. Take the case of Remote Area Medical, an international medical organization that sets up free temporary clinics in remote areas that have poor medical access. Medical volunteers staff the facilities, and the organization has begun to offer its services in the United States.<sup>28</sup> There is one problem, though. Licensing makes it difficult—and in some cases nearly impossible—to staff the temporary clinics because of the logistics, inconvenience, and time that licensing agencies impose for someone to temporarily practice in a state. Licensing laws effectively insist that volunteers come from the state where a temporary facility is set up, but sometimes there just are not enough home-state volunteers.<sup>29</sup>

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Economic theory suggests not only that licensing will restrict the supply of individuals practicing a licensed occupation, but also that licensing increases the supply of individuals practicing nonlicensed occupations. For example, someone might want a career as an independent construction contractor, but licensing requirements will force that person to seek a nonlicensed occupation such as a carpenter, an occupation that is universally not licensed. Licensing decreases the supply of individuals practicing a licensed profession, thereby pushing up earnings for them. It simultaneously increases the supply of individuals in nonlicensed occupations, thereby pushing down their earnings. Thus, licensing increases the disparity between the earnings of licensed occupations (that might already earn a premium even if they were not licensed) and unlicensed occupations. Kleiner notes, “Barriers to entry into these regulated and high-income occupations, regardless of whether they are licensed, may provide an additional explanation for the growth of income inequality in the United States.”<sup>30</sup>

An Institute for Justice study looked at 102 specific low-income professions and found that 44 of them are licensed in more than half the states. Across 29 states, on average, obtaining a license as a mason contractor costs \$287 in fees, 491 days of education and experience, and one exam. Becoming a midwife requires \$619 in fees, 700 days of education and experience, and an exam.<sup>31</sup> The days of education and experience are probably the more onerous requirements because they often preclude one from earning income. Licensure is an opportunity killer for those with low incomes, especially when professions are licensed that can be

learned on the job and consumers can protect themselves simply by obtaining references.

According to a study by the Canadian government, 80 to 90 percent of work performed by general dentists could be performed by high school graduates with less than two years of postsecondary school training.<sup>32</sup> This finding indicates that licensing requirements prevent otherwise qualified individuals from entering professions that could lead to greater earnings. To reiterate, licensing blocks some people's opportunities to earn higher incomes.

Perhaps a better example of how licensing blocks opportunity has to do with urban transportation. One alternative to urban mass transit is the jitney. *Jitney* is an old slang term for the nickel coin, and the term transferred to small, private buses that people began to operate in the early days of the automobile and for which the most common price was five cents. Jitneys are effectively banned in most American cities in favor of public transit and licensed taxi services.<sup>33</sup> Yet there is a demand for them. Jitneys provide potential upward mobility for the individuals with modest means who operate them. They also provide a flexible and inexpensive mode of transportation so other people of modest means can discover opportunities they might otherwise be unable to reach. Partly because of the insistence on licensing transportation services and the unwillingness to license jitneys, such opportunities for upward income mobility are lost.<sup>34</sup>

### **Decreased Innovation**

Innovation occurs fitfully and uncertainly. Some people think that if they merely declare or mandate that a new technology should develop, then it will happen.<sup>35</sup> In the real world, innovation can result from accidents, eureka moments, dogged hard work, or a combination of any of those; sometimes expected innovations never quite materialize. What is certain is that more minds working to solve a problem or to improve a process are better than fewer minds. By allowing fewer individuals into an occupation, licensing diminishes the potential for innovation.

For example, in the case of Cindy Vong's fish pedicures, an alternative, innovative method for exfoliating feet was blocked. In the jitney example, if multiple jitney companies were competing, there is every reason to believe innovative new ways to dispatch and route drivers would emerge, especially with the increasing use of GPS (global positioning system) technologies. Anyone who currently uses an airport van service can witness such technology put to relatively limited use. Instead, we are stuck with fixed-route bus and taxi services, both 19th-century products.

Innovation results partly from unique insights, where different pieces of knowledge inform other pieces. Yet licensing often blocks cross-pollination of

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knowledge and skills. For example, massage therapists in Texas tried to defend against chiropractors, who claimed an exclusive right to do spinal manipulations under licensing law. Chiropractic, as a profession, has faced similar struggles.<sup>36</sup> Podiatry is yet another area where traditional medicine has proved an impediment.<sup>37</sup> By government's limiting a service to only a particular profession with a uniform educational background, potential innovation is lost for lack of new insights that occur from people having different kinds of knowledge.

One type of relatively uncelebrated innovation involves developing new ways to bring buyers and sellers together. In so doing, an entrepreneur adds value and profits by extracting a small portion of that added value when buyers and sellers are matched. One example in Arizona is that of cancer survivor and former hospice nurse's assistant Lauren Boice. Her business, Angels on Earth Home Beauty, connects licensed cosmetologists with homebound elderly, sick, and terminally ill patients who need in-home services. Although Lauren is strictly a coordinator and doesn't provide any cosmetology services herself, the Arizona Board of Cosmetology insists that Boice go to the expense of opening an actual physical salon.<sup>38</sup> Under some licensing laws, ownership of a business that is involved with a licensed profession can occur only if the owner is licensed. Boice's business is an example of an innovation that benefits both buyer and seller but that a licensing board is intent on squashing. Note also that the benefits both the sick and elderly would enjoy will simply be lost if this licensing board prevails—another example of a deadweight loss.

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Even advocates of occupational licensing must admit the innovative benefits of keeping occupations open rather than insulating them with licensing. The former president of the National Society of Professional Engineers, Neil Norman, said as much in a 2005 white paper:

*In many cases, break-through products are interdisciplinary and could not be tied to engineering disciplines alone. These are strong arguments supported by the superior achievement of U.S. industry in so many fields. How then can we convince industry that their best interests are served by supporting the licensing of engineers in responsible charge and encouraging the licensing of all engineers?*<sup>29</sup>

Although Norman goes on to defend licensing, his grudging admission speaks volumes.

### **Licensing That Begets Licensing**

Perhaps one reason so many health care professions are licensed is that medicine has always been at the forefront of such licensing. After medical doctors were licensed, they effectively became medical service gatekeepers. Anyone providing alternative forms of health care risked being prosecuted for practicing

medicine without a license. Chiropractors and podiatrists serve as two prominent examples. Although neither profession was rendered extinct, both struggled with medicine and both are now separately licensed, effectively giving their practitioners permission to practice while protecting them from prosecution.

There have been struggles between nurses and doctors as well. Today, nurse practitioners can prescribe and provide many services once reserved to physicians, but getting licensing approval wasn't easy.<sup>40</sup> Dental hygienists are now licensed to provide services that dentists had tried to reserve to themselves—dental services that some employees had been doing for a long time. In both cases, dentists and physicians still exercise control through the requirement that dental hygienists and nurse practitioners must have some supervision from dentists and physicians.

When one profession is licensed, related professions seek licensing to carve out protection. This snowballing effect exacerbates the negative economic effects of licensing. It also adds to the idea that a profession must be governmentally credentialed to be legitimate.

### **Arguments in Defense of Licensing**

Economists are generally skeptical of arguments defending occupational licensing. Such defenses are typically advocated by members of the profession and not by the general public.<sup>41</sup> Nevertheless, economists recognize potential positive effects from licensing, especially when it provides buyers more information about specific goods and services.

#### **Public Safety**

The first argument that advocates make for licensing an occupation is that licensing protects the public from harm. A scary scenario (whereby someone could have avoided harm had a service provider been more competent or attentive) can be constructed for virtually any occupation. Scary stories, what-ifs, might, and maybes hardly constitute a basis for sound public policy. Nevertheless, they are the foundation on which most licensing laws rest.

The International Interior Design Association's advocacy webpage begins, "Interior Design laws help establish and maintain professional standards that protect the health, safety, and welfare of the general public."<sup>42</sup> No explanation or examples, other than the assertion noted that links interior design to public health and safety, can be found on the website. The Reason Foundation, which is opposed to licensing, produced a video specifically about interior designers' efforts to get licensed. The best a licensing advocate from Texas could muster was a general statement about the danger of people slipping on a floor, with no specific examples.<sup>43</sup>

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To be sure, there are occupations whose practitioners perform work that is not as easily evaluated or apparent as that of an interior designer. Practicing various forms of medicine, for example, requires knowledge regarding diagnosis, drug interactions, drug purpose, drug strength, human anatomy, infection complications, and surgical procedures, among a host of other issues. Individuals in the general public cannot easily evaluate a medical doctor's claimed credentials on their own. Someone who claims to be a medical doctor or other health care professional without proper training can certainly harm individuals seeking treatment. Improperly trained engineers can design defective bridges. Veterinarians without training can cause harm to animals along with human distress as a result of improper care.

Licensing enjoys widespread acceptance with respect to health-related occupations, legal occupations, some insurance-related occupations, plumbers, and even barbers. Challenges to this status quo generally evince quizzical reactions and protests that without licensing we would all be at the mercy of charlatans. The general belief is that we enjoy significantly greater quality of service as a result of licensing than we would experience otherwise.

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Evidence of a significant qualitative differential between licensed practitioners of an occupation and those who are unlicensed is largely absent. Quality is notoriously difficult to judge and measure, given its inherent nature of being in the eye of the beholder. However, attempts have been made to objectively determine whether licensing increases overall qualitative outcomes.

Of nine studies that Morris Kleiner highlighted in his book on licensing, two indicate a qualitative improvement from licensing. One study looked specifically at dentists and focused only on dentists' practices without considering overall experience of the public, including those who might have decided to forgo dental treatment because of high prices. Authors of a second study evaluated dentists along with other occupations and concluded that while licensing increases the quality of practitioners, consumers have less access to quality services because licensing increases prices and limits the availability of practitioners. A third study that indicated qualitative improvement looked only at circumvention of minimum licensing requirements for contractors and concluded that circumvention reduces quality. Those two studies, which confirmed the notion that licensing increases quality, were incomplete. Of the remaining six studies that Kleiner examined, one indicated that the benefits of qualitative improvement accrued only to those who specifically valued quality over price. The other studies indicated no qualitative benefit from licensing. The bulk of the latter studies looked at the teaching profession.<sup>44</sup>

Kleiner points to evidence from professional liability insurance rates. If licensing truly increases quality and produces better overall outcomes for consumers, it stands to reason that professional liability insurance rates would

be lower for those licensed in a profession than for those not licensed in the same profession. Kleiner directly investigates malpractice insurance premiums paid by clinical psychologists, practical and vocational nurses, and occupational therapists. He also cites a study by graduate student Scott Cordes, who looked at insurance rates for marriage and family therapists, pastoral counselors, and professional counselors. All of the professions, except clinical psychologists, are licensed in some states and not in others. In both investigations, the existence of licensing regulations made no difference in insurance rates. In the case of clinical psychologists, malpractice insurance explicitly insured only those with a master's degree and a license or those with a PhD. As Kleiner notes, "This was the only case where there was evidence that the insurance industry valued a licensed professional relative to an unlicensed one in the data that [were] examined for this analysis."<sup>45</sup>

A study that looked at physicians who emigrated from Russia to Israel found that licensing actually reduced quality when compared to what it could have been. Physicians from other countries have to be re-licensed in Israel, not unlike what is required in the United States. The study's authors found that the costs associated with re-licensure were onerous enough that Russian physicians with high ability tended not to seek licensure because they could do very well in other professions that did not have entry barriers. Consequently, the overall quality of medical practice in Israel was lower than what it could have been even though licensure resulted in higher earnings for physicians than otherwise.<sup>46</sup>

There is evidence that licensing advocates know that they overstate the importance of public safety. Such evidence is contained in the very licensing legislation that they often pursue. It is very common for a law that newly licenses an occupation to include a grandfather provision. *Grandfathering* refers to the practice of automatically licensing individuals already practicing a profession even if they (a) do not have the educational background and (b) have not passed the licensing exam prescribed in the new licensing law.<sup>47</sup> If licensing is necessary because dangerous and unhealthy practices are followed in the absence of licensure, then public safety cannot be the primary motive for that law when the previously unlicensed are automatically licensed.

Humans are fallible, and there will always be many examples of individuals—licensed and unlicensed—who harm others with practices that run counter to common sense or generally accepted training. The overblown promise of licensing advocates, however, is that such harm will be nearly eliminated by imposing high standards on practitioners of occupations. This conclusion is patently false, and there is no better example of the falsehood than to look at medical practice, one occupational category where licensing requirements are rarely questioned.

Cleanliness is a basic standard in medicine. One of the simplest yet most important practices for infection prevention, especially hospital-acquired

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infections, is for medical professionals to wash their hands.<sup>48</sup> Nevertheless, it is common for licensed professionals, who are educated in very expensive and exclusive schools, to neglect this most basic of practices.<sup>49</sup> The omission can have tragic outcomes.<sup>50</sup> In fact, if proper attention is paid to cleanliness, it is possible to close cuts with stitches and to perform surgery without giving the patient the ubiquitously prescribed course of antibiotics and without the patient incurring an infection.<sup>51</sup>

### **Viable Markets and Protection against Fraud**

A famous paper written by economist George Akerlof, “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism,” speculates that markets can break down if consumers have insufficient information to determine whether they are truly getting what they believe they are paying for.<sup>52</sup> In one scenario, the used car market could include some very good, well-cared-for cars along with cars that were badly flawed dating back to the factory. The good and the bad would be indistinguishable from the outside, but the good used cars would be valued as if they were bad because buyers face a high probability of buying a bad car that a seller claims is good. Buyers would eventually assume every used car is a bad car or would assign a high probability to that outcome, so buyers would not be willing to pay more for *any* used car than they would pay for a bad one. Sellers with truly good cars wouldn’t sell at bad car prices. Thus, the only used cars in the market would be bad cars. Few people would be willing to buy under such circumstances. Conceivably, therefore, the used car market could cease to exist.

*The only economic justification for licensing is related to the public safety and quality issue.*

Obviously, used car markets are almost as old as the automobile itself. Even when “lemon” cars were a more common problem, there was a used car market. Although that market has never ceased to exist, it is, nevertheless, true that if a potential buyer knew as much about a used car as did its original owners, both could be better off. This problem arises from what economists call *information asymmetry* (i.e., some know more than others). Buyers would be less likely to overpay if they knew whether an owner had been conscientious or not, and conscientious owners would receive more for their vehicles. Real world exchanges that have not occurred could perhaps have occurred if there were greater information and if both parties were accordingly assured they would do well in the transaction.

The only economic justification for licensing is related to the public safety and quality issue. Licensing might lower the cost for consumers’ obtaining information about service providers and might reduce the likelihood of consumers being defrauded. An occupational license is supposed to automatically indicate to consumers that a licensed practitioner is highly qualified. With licensing, however, consumers cannot evaluate and undervalue the highly qualified practitioners by comparing them to low-qualified ones because the latter are not allowed into the market. Consumers do benefit on the whole by not having to deal with the costs of

searching out and researching practitioners. Moreover, high-quality practitioners benefit by not dealing with the costs of (a) differentiating themselves from others or (b) persuading consumers of their truthfulness. Ideally, with licensing, charlatans and the unqualified are crowded out of the market, not high-quality providers.

Once again, however, the real world intrudes. Consumers react to price as well as to quality. Some people might do without a service entirely rather than pay the higher price that licensed practitioners command, which is not a market breakdown but perhaps a close cousin. For example, midwives offer their expertise for a lower price than do medical doctors. Effectively making midwifery illegal through licensing laws would likely cause some women to attempt childbirth without anyone attending. Thus, licensing can increase overall risk for consumers rather than reduce the risk. Although we should be concerned about fraud, we should also be concerned about the availability and affordability of services. In nine states, midwifery is illegal: Alabama, Illinois, Indiana, Iowa, Kentucky, Maryland, North Carolina, Pennsylvania, and South Dakota.<sup>53</sup> Only two of those states, Iowa and Kentucky, have a lower infant mortality rate than the national average.<sup>54</sup> A study from the National Center for Health Statistics and Centers for Disease Control and Prevention shows that certified midwives have better infant mortality outcomes than do physicians.<sup>55</sup>

In Florida after hurricanes Francis and Katrina, licensing requirements for roofers were relaxed. On the one hand, demand for roofers skyrocketed because of all the storm damage, so it was important for supply to rise from a purely economic perspective. On the other hand, with building owners especially desperate to protect their property, the information asymmetry problem was at its worst. The expectation, if licensing were justified by information asymmetry, would be that shoddy workmanship on roofs would explode. In fact, although complaints about roofers did go up, complaints identified as having probable cause rose far less than did the amount of work done. Florida's roofing experience flatly contradicts the asymmetry justification for licensing.<sup>56</sup>

In his book, *Rule of Experts*, S. David Young describes in detail a study on construction contractor quality. Circumvention of quality standards in the contractor licensing regime involved special test-preparation schools that helped applicants pass the licensing exam but provided no other training. Arguably, this practice reduced quality compared to what it would have been otherwise. However, the test-preparation schools operated entirely within the licensing regime, and their students qualified under the licensing law. Young also points out that consumers themselves share the blame for the drop in quality because they automatically assumed that a license ensures quality. Naturally, one wonders how many other situations in other professions and other states see the same result: that of licensing effectively granting credibility to incompetents.<sup>57</sup>

*Consumers react to price as well as to quality. Some people might do without a service entirely rather than pay the higher price that licensed practitioners command. Thus, licensing can increase overall risk for consumers rather than reduce the risk.*

Complaints that licensed professions fail in their mission to police members of their own profession are common. Given the nature of medical practice, it is not altogether unexpected that complaints are frequent and that many complaints lack foundation because patients do not understand the situation surrounding their case. Cases such as that of eight-year-old Richard Leonard, who died at the hands of a known incompetent anesthesiologist in 1995, can be used to overstate the problem.<sup>58</sup> However, the reticence of physicians to police their own became such a problem in the United Kingdom that doctors lost the right to police themselves.<sup>59</sup>

Consider, too, the paper by Akerlof, the title of which is often shortened to “The Market for ‘Lemons’” with its allusion to lemon cars.<sup>60</sup> Although the paper brought up an interesting and important point, it was incomplete. Most economists use it to illustrate an example of market failure (e.g., markets left to their own devices break down as a result of a lack of common and complete information). In fact, information asymmetry is a market opportunity that entrepreneurs react to and seek so they can fill the valuable informational void. There is no other way to explain consumer and trade publications such as *AutoWeek*, *Consumer Reports*, and *PC Magazine*, which are just a few of many publications about an untold number of specific industries and products. With respect to automobiles, manufacturers’ used-car certification programs and information services such as Carfax have also leapt to fill the void.

*In the absence of licensing, markets react to information asymmetry by seeking to fill a valuable void and to sell information for which consumers are willing to pay, information that is often absent with respect to licensed occupations.*

Either of two lessons can be learned from the evidence presented here. One is that even more control and regulation of occupations should be instituted, thereby closing loopholes and increasing information through more government intrusion. The other is to admit that—despite the best of intentions—human fallibility, limited information, and poor incentives will always play a role in how licensing operates. In the absence of licensing, markets react to information asymmetry by seeking to fill a valuable void and to sell information for which consumers are willing to pay, information that is often absent with respect to licensed occupations. Perhaps it would be better to find market-friendly alternatives that do less to impact consumers negatively.

### **Licensing in Arizona**

State-licensed professionals in Arizona have average yearly earnings of \$67,643. Professions not licensed by the state have average yearly earnings of \$39,265.<sup>61</sup> In other words, individuals working in licensed professions earn 72 percent more than do individuals working in nonlicensed professions in Arizona. To be sure, this crude comparison does not account for the relative productivity of occupations, characteristics of the occupations, and amount of skill and education generally expected to prevail in various occupations. It is, nonetheless, a useful first step in determining the economic effects of license regulation.

As mentioned earlier, about 10 percent of Arizona's workforce is licensed by the state. This percentage is an understatement of overall licensing, given that local government licenses were not included in this paper's counts. Using 2000 census data, Kleiner estimates that about 12.3 percent of Arizona's workers are licensed. Kleiner also estimates that almost 20 percent of United States workers are licensed, considerably higher than Arizona's percentage. By this measure, only seven states' workforces are less licensed than Arizona's.<sup>62</sup> Another way to quantify licensing across states is to compare the number of professions that are licensed. America's Career Info Net is a source for this information.<sup>63</sup> Arizona's ranking is relatively low. As reflected in appendix A, Arizona licenses only 85 professions and is ranked ninth lowest.<sup>64</sup>

Arizona's state-licensed workforce commanded about \$18.2 billion of the state's total compensation in 2010.<sup>65</sup> If one applies Kleiner's estimate that licensed occupations see a 10 to 12 percent wage premium, then licensing drove up costs to Arizona's consumers by between \$1.8 billion and \$2.2 billion in 2010. Applying Kleiner's methodology implies a deadweight loss to Arizona's economy of between \$540 million and \$660 million in 2010.<sup>66</sup>

A ranking based on the overall number of licensed professions—or even a rough estimate of licensing's deadweight cost to the state's economy—does not tell the full story about the effects of licensing in Arizona.<sup>67</sup> Despite Arizona's relatively modest level of occupational licensing, a 1997 book on the subject lists Arizona as the only state to license flight instructors, fumigators, ginseng nurserymen, horse traders, and plant breeders.<sup>68</sup> Most states now license pest control chemical applicators; fortunately, Arizona no longer licenses most pest control professions, such as people who trap small animals. The fact that Arizona has licensed such professions in the past, however, should be enough to give pause to the idea that Arizona is relatively well behaved when it comes to licensing.

In fact, Arizona is not well behaved, especially when regulating low-income professions. A recent study by the Institute for Justice ranks Arizona as the most broadly and onerously licensed state in the country for low-income professions. The state has the second highest percentage of licensed low-income occupations reviewed by the study. It has the fifth most onerous fee and training requirements. Combined, this finding makes Arizona one of the more inhospitable places for low-income individuals to find a niche and to begin a career.<sup>69</sup>

Moreover, licensing boards in Arizona have received low marks from the people they license. The Arizona chapter of the American Association of Physicians and Surgeons conducted an unscientific survey of 350 Arizona doctors who responded to the survey request (9,000 surveys were sent out). Among responders, 46 percent disagreed that the Arizona Medical Board (AMB) does a good job of protecting the public. Nearly three quarters, or 74 percent, doubted whether an AMB

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investigation would be fair. Moreover, 90 percent disagreed that AMB policies are friendly to innovation. All in all, the survey showed a great deal of dissatisfaction among physicians with how medical licensing is administered in Arizona.<sup>70</sup>

Licensing boards can become abusive. Some potential for abuse can be imagined by looking at the rules that various licensing boards have passed.<sup>71</sup>

- The Board of Examiners for Nursing Care Institution Administrators and Assisted Living Facility Managers requires an applicant to reveal “whether the applicant ever was pardoned from or had expunged the record of a felony conviction and, if so, the nature of the offense, jurisdiction, and date of pardon or expunging.”<sup>72</sup> This requirement would seem to run counter to the prohibition on self-incrimination. Moreover pardons and expunging of records are very often the result of acknowledged errors in convictions. The whole point of pardoning and expunging the record of an individual is to give that person a fresh start without prejudice.
- The Board of Occupational Therapy Examiners requires that “in a hearing conducted on a denial of a license, the applicant has the burden of proof.”<sup>73</sup> It would seem the burden of proof should be on the board, which is denying someone the right to make a living.
- The Board of Technical Registration requires applicants for registration to provide “citizenship or legal residence of the applicant.”<sup>74</sup> Regardless of one’s view on the issue of citizenship, past court decisions indicate that there is some question as to whether citizenship requirements are legal.<sup>75</sup> After all, it is possible to legally live and work in the United States without being a citizen.
- The Board of Barbers graciously exempts “domestic administration” of a haircut from requiring licensure. Domestic administration includes cutting one’s own hair and that of specifically listed close family members, but cutting the hair of a cousin runs afoul of the rule. In addition, barber school regulations are so detailed as to require the school to have “filing cabinets for school and student records” and to provide a nonrefundable kit to each student that includes “twelve combs and six brushes without defects.”<sup>76</sup>
- The Board of Respiratory Care Examiners requires an applicant to provide “a statement whether the applicant has ever been denied a professional license or certificate or the privilege of taking an examination by a governing licensing authority,” relevancy being at issue. In addition, the board requires an applicant to provide “evidence of the applicant’s U.S. citizenship, alien status, legal residency, or lawful presence in the U.S.”<sup>77</sup>

*Licensing boards can become abusive. Some potential for abuse can be imagined by looking at the rules that various licensing boards have passed.*

- The Board of Behavioral Health Examiners is extremely prescriptive in many respects. It requires that “an individual shall provide clinical supervision to a maximum of 15 supervisees at the same time.” This requirement is reminiscent of maximum class sizes in public schools, thus effectively pumping up demand in a profession significantly employed by government. In addition, rules are highly prescriptive regarding the educational curriculum of individuals planning to seek licensing for counseling and for marriage and family therapists. The rules include course titles and detailed course descriptions, something not seen in other rules.<sup>78</sup>
- The Board of Cosmetology requires a cosmetology instructor to be at least 23 years of age.<sup>79</sup> You can buy a handgun when you’re 21, but you can’t teach cosmetology.
- The Board of Dental Examiners can arbitrarily cycle between two methods to determine the minimum passing grade on licensing exams, presumably to manage the number of new licensees. (See earlier discussion regarding dentists.) Those rules are also very specific regarding proper phrases to be used by practitioners in any advertising they may do, something not seen in other rules.<sup>80</sup>
- The Board of Funeral Directors and Embalmers requires the registration of salespersons who prearrange funerals.<sup>81</sup>
- The Arizona Medical Board allows physicians to register in the state to practice temporarily or for free. In both cases, fees must be paid, and significant paperwork must be filed. The board specifies that those licenses can take 60 to 120 days to process.<sup>82</sup>
- Second only to the rules of the Pharmacy Board in length (see third bullet next), the Board of Nursing rules effectively require a certificate of need for a new nursing school to open in Arizona.<sup>83</sup> This rule can have the effect of limiting the number of potential new nurses. Few state boards directly regulate the availability of training in addition to regulating the profession itself, which likely contributed to the nursing shortage Arizona suffered just a few years ago.<sup>84</sup>
- In an application for an optical establishment license, the Board of Dispensing Opticians requires inclusion of “the hours the establishment will be open to the public for business.”<sup>85</sup> One wonders if dispensing opticians have a proclivity toward strange working hours and if the board would refuse an application on such a basis.
- The Board of Optometry requires applicants for licensure to pass a jurisprudence exam “that assesses knowledge of Arizona’s statutes and

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rules relating to optometry.”<sup>86</sup> Arizona’s statutes and rules governing optometry must be complex relative to other professions, most of which have no such requirement.

- Board of Pharmacy rules—at 80 pages—take up more pages, by far, than the rules of any other licensing board. The sale of nonprescription drugs requires a permit. The manufacture and wholesaling of drugs in Arizona require a permit from the Board of Pharmacy. The board requires that a community pharmacy have a minimum amount of workspace for a given number of workers, including that it must “provide an additional 60 square feet of floor area for each additional pharmacist.” A separate area for patient counseling is also required. If one wishes to remodel a pharmacy, in addition to any local permits, a permit must be obtained from the Board of Pharmacy, which must approve any plans. It also regulates the donation of prescription medications.<sup>87</sup>
- The State Real Estate Department requires an applicant for a license to submit, among other things, “a 10-year work history, stating each employer’s name and address, supervisor’s name and telephone number, position held, and dates of employment, specifying any periods of unemployment.”<sup>88</sup> One wonders if the department does the hiring for real estate firms or if the department just maintains all licensees’ résumés for them.

*Even in a state such as Arizona, where licensing is comparatively light, many rules seem needless. It is easy to see how licensing raises costs for such occupations and, as a result, raises prices for consumers.*

An extensive reading of licensing statutes was not conducted, but in the course of research, a few interesting provisions were uncovered in the statutes governing the licensing of contractors. Arizona Revised Statutes (ARS) Section 32-1153 denies an individual the right to sue for payment for services rendered if the individual is not a licensed contractor and if the work is governed by the licensing statute.<sup>89</sup> ARS 32-1158 actually prescribes the format of contractors’ contracts while ARS 32-1158.1 truly reaches into the trivial by regulating the contract and payment terms for swimming pool installations.<sup>90</sup>

Even in a state such as Arizona, where licensing is comparatively light, many rules seem needless. It is easy to see how licensing raises costs for such occupations and, as a result, raises prices for consumers. There is every reason to think the examples of questionable licensing rules are a fraction of what could be discovered.

## **Recommendations to Reform Licensing**

Few in the general public would think it necessary to license athletic trainers, geologists, interior decorators, or any number of other occupations that are currently licensed in the United States and that are seeking to expand the coverage of licensing. Several reforms can restore sanity to licensing and can help to minimize economic damage.

**Reform 1: Enact a rigorous sunrise requirement.**

In 2008, Senate Bill 1502 (see appendix B) was signed into Arizona law by then-governor Janet Napolitano. The law applies only to nonhealth professions and occupations. It requires that a proposed law to license a profession not previously licensed be evaluated according to several relatively rigorous criteria, including evidence that “an unregulated practice can clearly harm or endanger the public health, safety, or welfare” and “the public cannot be effectively protected by private certification or other alternatives.”<sup>91</sup>

In addition, four months before the legislative session in which the legislation is to be proposed, advocates for a new licensing law must submit a report that provides, among other items, “a definition of the problem and why regulation is necessary,” “the alternatives considered,” and “the expected costs of regulation.” Those criteria and the others mentioned show that Arizona lawmakers have a healthy level of skepticism toward licensing. Nevertheless, the law could be improved in some important respects.

First, because the law is purely statutory, future legislatures could circumvent it. Given its relatively short length, it could be included in the state’s constitution. Understandably, legislators in any state are hesitant to load up the state’s constitution with what might appear to be needless technical propositions. Minimally, the rules of each house in the legislature should reference the statute and should require a supermajority vote to circumvent it.

Second, an objective economic analysis by a third party should be required. The main issue likely to arise from such a requirement concerns who would get to pick the third party. Another issue regards who would pay for the analysis. Advocates for licensing should have to pay to prove their case. A committee consisting of House and Senate members and at least one representative of the executive branch could choose who does the analysis.

Finally, the law should apply to health occupations. A truly rigorous evaluation of health occupation licensing might very well show that alternatives to licensing in the health professions are viable. For some professions, licensing might not be necessary at all.

**Reform 2: Subject all licensing to periodic and rigorous sunset review.**

*Sunset provisions* are automatic repeals set in law that occur at a date certain. The purpose of sunset provisions is to require a periodic reappraisal of laws and regulations and to force the legislature to review the efficacy of laws it has enacted. The Arizona legislature has a habit of reenacting existing statutes without rigorously evaluating and reviewing the law. This approach must change, especially with respect to licensing.

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When a licensing law is subjected to rigorous review, the review should include an analysis that is very similar to the one suggested previously for the sunrise process. That is, existing licensing regimes should be reviewed as if they were entirely new proposals. With such a rigorous review, sunset intervals could be lengthened from the standard of every 10 years to perhaps every 20.

**Reform 3: Require a supermajority of the members of occupational licensing boards to be members of the general public and not to be members of the occupation to be licensed.**

Some years ago, the Pest Control Board's predecessor agency was involved in a controversy when it pursued charges against a teenager who was installing screens over small openings in the structures of homes in order to keep out rodents. The agency did not actually have the authority to regulate devices, having the authority only to regulate the application of dangerous chemicals. When the agency was reformed under the Napolitano administration, none of the board members were part of the industry they regulated. Consequently, the agency focused not on the profession but on public safety.<sup>92</sup>

*It is far more likely that a profession will be regulated for the public interest if the general public is involved. A profession regulated by its own members will tend to be regulated for the interest of the profession.*

There is no reason for boards of licensing agencies to be made up almost exclusively of individuals involved in practicing the profession. In fact, because of conflicts of interest, just the opposite should occur. It is far more likely that a profession will be regulated for the public interest if the general public is involved. A profession regulated by its own members will tend to be regulated for the interest of the profession.

In 2012, Arizona State Representative Tom Forese proposed House Bill 2244 to prohibit more than 25 percent of a licensing board's membership from consisting of individuals regulated by the board. See appendix C for the language of that bill.<sup>93</sup>

**Reform 4: Create an environment that encourages and legally enforces private certification.**

A number of private entities serve as quality gatekeepers, which is essentially the purpose that licensing advocates claim licensing serves. For example, Underwriters Laboratories (UL) is a nonprofit, independent, safety science company funded by private industry. It is rare to find an electrical appliance for sale for which a manufacturer has not first sought and received a UL certification, although there is no legal requirement to do so. Best known for its testing of electrical products, UL has, virtually from its beginning in 1894, also tested and certified other products.<sup>94</sup>

Since 1909, *Good Housekeeping* magazine has issued the Good Housekeeping Seal to products advertised in the magazine. The seal is a limited warranty by *Good Housekeeping* that products with the seal will perform as advertised or *Good*

*Housekeeping* will make good on a money-back guarantee. The seal is not an indication that independent testing and verification of a manufacturer's claims have been conducted, but it is, in effect, a promise to consumers that they will be protected from loss—and the promise is issued by a for-profit company.<sup>95</sup>

*Consumer Reports* is a periodic publication of the Consumers Union, which is an independent, nonprofit organization established in 1936. The organization accepts no outside advertising and does not accept free merchandise samples to be tested. The organization tests all kinds of products, then produces quality comparisons for consumers.<sup>96</sup>

Begun in the early 20th century, the Better Business Bureau (BBB) accredits businesses and charities as part of its mission to build marketplace trust. It receives complaints about businesses and works to resolve them. It accomplishes those functions with national and local chapters.<sup>97</sup>

With the advent of the Internet, even more information is available that rates products and professionals. College students can share their opinions of their professors at [ratemyprofessors.com](http://ratemyprofessors.com).<sup>98</sup> Angie's List is a website where consumers review professionals, especially doctors and contractors.<sup>99</sup>

Despite the long history of alternatives to monopolistic government seals of approval in the form of licensing, some discomfort remains when it comes to private certification, both on the part of consumers and even on the part of some professionals who might admit that licensing has problems. Part of the discomfort stems from the fact that private certification relies mostly on civil action. If someone perpetrates a fraud and uses the Good Housekeeping or UL seals without authorization, it is a civil matter rather than a criminal one. The offended organization would have to bring legal action against the perpetrator.

Another perceived problem with private certification is that people wonder if private organizations would have honest standards. Early in its history, *Good Housekeeping* was sued by the government over its seal, which included the words "tested and verified" when, in fact, *Good Housekeeping* did no testing. Eventually, the change to a money-back guarantee resulted. So, one possible remedy is that if untrue claims are made, the government does and should have the power to sue or prosecute for fraud. Conversely, if someone claims a certification falsely but if the certification requires no bona fide minimum standards other than paying a fee for someone to belong, the government can and should refuse to protect the certifying organization's rights.

An objection from a free enterprise perspective is that private certification, which is protected by the government through criminal fraud law, seems little different from licensing. However, certification does not preclude anyone from

*A number of private entities serve as quality gatekeepers, which is essentially the purpose that licensing advocates claim licensing serves. With the advent of the Internet, even more information is available that rates products and professionals.*

practicing a profession. It only precludes someone from claiming a certification. Not unlike companies that pursue the UL label, private professionals will have an incentive to band together and create professional standards outside of government as long as they know their efforts will be protected without necessarily going through the high costs of civil litigation. The potential is that there might be competing certifying organizations. This potential is already witnessed with the simultaneous existence of medical doctors, osteopaths, and podiatrists as licensed professions—all with hospital privileges. With certification, though, other types of health professionals with hospital privileges could more easily arise.

Private certification would gain greater acceptance—especially on the part of currently licensed practitioners—if fraudulent claims of certification were a crime instead of only a civil matter. To enjoy such legal protection, a certifying organization might have to meet certain criteria such as a bona fide set of professional quality—albeit loosely defined—criteria. At the same time, the existence of one private certification organization in a given profession would not preclude formation of a competing certification organization. For that matter, practitioners could, if they convince people to patronize them, offer their services in the same profession without benefit of any certification at all. This is the aim of the model bill in appendix D.

*Freedom is about more than the right to political speech, the right to bear arms, the right to worship, and the right to own oneself. It is also about the right to maximize one's talents and earning capacity without defrauding or otherwise harming others.*

#### **Reform 5: Enact right to earn a living legislation.**

Freedom is about more than the right to political speech, the right to bear arms, the right to worship, and the right to own oneself. It is also about the right to maximize one's talents and earning capacity without defrauding or otherwise harming others. At its most basic, liberty may be more economic than political. Work—what we do for a living—is often a fundamental part of who we are as individuals. Using government to block a person from entering certain professions is a fundamental denial of liberty.

At the same time, government is—in no small part—instituted to curb what some might consider freedoms. Government can step in and sanction restrictions on trespassing, thereby preserving property rights for property owners but limiting the ability of others to wander wherever they wish. Government-imposed sanctions for fraudulent behavior benefit us all by allowing markets to function better. Because markets perform well in an environment of trust, having government limit blatantly false speech that perpetrates fraud will help build that environment. The founding fathers did not fight the Revolution for the right to cheat others or to cry fire in a crowded theater.

Legislation dealing with the right to earn a living recognizes both of those issues. It would guarantee that individuals have such a right as long as doing so doesn't involve selling a good or service that is itself illegal because of fraud or some

other legal prohibition. At the same time, if the government can prove, rigorously, that imposing a substantial burden on someone who wants to earn a living in a particular profession protects against clear and present harm to the public health or safety, the government may reasonably regulate the profession. Most licensing laws would fail this test. For an example of this type of legislation, see appendix E.<sup>100</sup>

**Reform 6: Expand the scope of practice for paraprofessionals and other professions.**

Paralegals have experience in document preparation and often prepare wills and perform other legal services for licensed lawyers. They should be able to prepare simple wills and simple bankruptcy documents without fear of being prosecuted for practicing law without a license. Similarly, pharmacists should be allowed to prescribe common drugs for common, easily diagnosed maladies such as ear and sinus infections. Registered nurses, paramedics, and physician assistants are similarly qualified.

By increasing the supply of professionals who can render services that are currently restricted to only licensed individuals, the price of those services would fall. Health care and access to courts would be less expensive. Some might say that this change needlessly increases risks. However, risks are greatest when people cannot avail themselves of any expertise in areas such as law and medicine. Artificially inflated prices are more damaging than allowing individuals with expertise to sell services they are perfectly capable of providing.

**Conclusion**

Although licensing is usually defended on grounds of consumer protection, there is scant evidence that licensing substantially protects consumers from harm. In fact, evidence shows that licensed professionals are the main beneficiaries of licensing, not consumers. By limiting their own supply, those with the license command higher prices, and consumers suffer. Policymakers should consider reforms that will open the doors to more professionals and will reduce costs to consumers. With such reforms, economic liberty and the general public will win.

*Although licensing is usually defended on grounds of consumer protection, there is scant evidence that licensing substantially protects consumers from harm. Policymakers should consider reforms that will open the doors to more professionals and will reduce costs to consumers.*

## APPENDIX A

**Number of Licensed Job Categories by State**

Number of Licensed Job Categories	State	Number of Licensed Job Categories	State
32	Washington	129	Georgia
49	South Carolina	130	Oklahoma
55	Idaho	134	Vermont
58	Mississippi	137	Missouri
69	Texas	143	North Dakota
76	Virginia	147	South Dakota
79	West Virginia	149	Nevada
84	Indiana	149	New Jersey
85	Arizona	150	New Hampshire
85	Kansas	154	New York
85	Utah	154	North Carolina
87	Ohio	155	Rhode Island
88	Colorado	158	Nebraska
92	Wyoming	162	Minnesota
98	Maryland	164	New Mexico
103	Alabama	187	Kentucky
103	Delaware	190	Oregon
109	Montana	190	Tennessee
110	Hawaii	198	Wisconsin
110	Pennsylvania	221	Connecticut
113	Louisiana	228	Maine
117	Alaska	233	Michigan
117	Florida	252	Arkansas
124	Iowa	254	Illinois
127	Massachusetts	285	California

Source: CareerOneStop Licensed Occupations tool ([http://www.acinet.org/licensedoccupations/lois\\_keyword.asp?nodeid=16&by=keyword](http://www.acinet.org/licensedoccupations/lois_keyword.asp?nodeid=16&by=keyword)).

APPENDIX B

**Senate Bill 1502: A Sunrise Bill for Proposed Laws to License  
Nonhealth-Related Occupations**

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 32, Arizona Revised Statutes, is amended by adding chapter 43, to read:

CHAPTER 43

REGULATION OF NONHEALTH PROFESSIONS AND OCCUPATIONS

ARTICLE 1. GENERAL PROVISIONS

32-4301. Regulating nonhealth professions and occupations; criteria

A. A profession or occupation shall not be regulated except for the exclusive purpose of protecting the public interest. Except as provided in chapter 31 of this title, all proposed legislation to regulate a profession or occupation for the first time shall be reviewed according to the criteria prescribed in subsection B.

B. A profession or occupation shall be regulated by this state only if all of the following apply:

1. An unregulated practice can clearly harm or endanger the public health, safety or welfare.
2. The actual or anticipated public benefit of the regulation clearly exceeds the costs imposed on consumers, businesses and individuals.
3. The public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional ability.
4. The public cannot be effectively protected by private certification or other alternatives.

C. After evaluating the criteria prescribed in subsection B, the Legislative Committee of Reference shall examine data from multiple sources and look for evidence of actual harm to the public related to the industry being considered for regulation. The evidence may include industry association data, federal, state and local government data, business reports, complaints to the respective state law enforcement or consumer affairs divisions or the better business bureau and data from reciprocal agencies in other states with and without similar laws and rules.

D. If the Legislative Committee of Reference finds that it is necessary to regulate a profession or occupation not previously regulated by law, the regulation shall be in the least restrictive manner and shall not be imposed to protect a discrete interest group from economic competition.

E. The Legislative Committee of Reference may hold hearings to evaluate the criteria and examine the data and evidence prescribed in subsections B and C.

F. Notwithstanding any other law, an agency that issues new professional or occupational licenses, registrations or certificates shall not hinder the regulated industry through the delayed awarding of a license, registration or certificate.

32-4302. Applicant groups nonhealth professions and occupations; written report

Applicant groups shall submit a written report explaining the factors prescribed in section 32-4303 to the Joint Legislative Audit Committee established pursuant to section 41-1279. The report shall be submitted on or before September 1 prior to the start of the legislative session for which the legislation is proposed. The Joint Legislative Audit Committee shall assign the written report to the appropriate Legislative Committee of Reference. The Legislative Committee of Reference shall study the written report and deliver the report of its recommendations to the Joint Legislative Audit Committee, the speaker of the House of Representatives, the president of the Senate, the governor and, if appropriate, the regulatory entity on or before December 1 of the year in which the report is submitted. Legislative committees of reference may hold hearings as they deem necessary.

32-4303. Applicants for regulation; factors

Applicant groups for regulation shall explain each of the following factors to the extent requested by the legislative committees of reference:

1. A definition of the problem and why regulation is necessary.
2. The efforts made to address the problem.
3. The alternatives considered.
4. The benefit to the public if regulation is granted.
5. The extent to which regulation might harm the public.
6. The maintenance of standards, including:
  - (a) Whether effective quality assurance standards exist in the profession, such as legal requirements associated with specific programs that define or enforce standards or a code of ethics.
  - (b) How the proposed legislation will assure quality including:
    - (i) The extent to which a code of ethics, if any, will be adopted.
    - (ii) The grounds for suspension or revocation of registration, certification or licensure.

7. A description of the group proposed for regulation, including a list of associations, organizations and other groups representing the practitioners in this state, an estimate of the number of practitioners in each group and whether the groups represent different levels of practice.

8. The expected costs of regulation.

*Source:* Arizona State Legislature website ([http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/sb1502s.htm&Session\\_ID=86](http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/sb1502s.htm&Session_ID=86)).

APPENDIX C

**House Bill 2244: A Bill Limiting the Proportion of Licensing Board Members Who Are Members of the Licensed Profession**

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 32, Arizona Revised Statutes, is amended by adding chapter 45, to read:

CHAPTER 45  
MEMBERSHIPS OF BOARDS AND COMMISSIONS  
ARTICLE 1. GENERAL PROVISIONS

32-4501. Definitions

In this chapter, unless the context otherwise requires:

1. “Agency” means any organization that is authorized by this state to grant individuals an exclusive right to practice a profession or occupation that is regulated pursuant to this title.
2. “Board” means any body that oversees an agency.

32-4502. Board membership

A. Notwithstanding any other law, no more than twenty-five percent of the board members of a regulatory agency may be regulated in the profession or occupation overseen by that agency.

B. Notwithstanding any other law, qualifications of board members shall be determined at the discretion of the governor except that:

1. A board member shall be a resident of this state for at least three years before appointment.
2. A board member must agree that the member’s primary duties, in order of priority, are as follows:
  - (a) To protect the health and safety of the general public.
  - (b) To enforce regulatory laws in a manner least restrictive to individuals wishing to enter into the profession or occupation that is regulated by the agency.
  - (c) To administer the regulatory agency in a way that presents the least possible cost to members of the profession or occupation that is regulated by the agency.

3. An individual may be a member of more than one board.

Sec. 2. Terms of board members

A. Notwithstanding section 32-4502, Arizona Revised Statutes, as added by this act, a person who is serving as a member of a board, as defined in section 32-4501, Arizona Revised Statutes, as added by this act, on the effective date of this act is eligible to continue to serve until expiration of the current term of office.

B. As existing board members' terms expire, the governor shall appoint only individuals who are not licensed, registered or certified in the profession a board oversees until the board's membership complies with the requirement of section 32-4502, Arizona Revised Statutes, as added by this act.

Sec. 3. Conforming legislation

The legislative council staff shall prepare proposed legislation conforming the Arizona Revised Statutes to the provisions of this act for consideration in the fifty-first legislature, first regular session.

Source: [http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/2r/bills/hb2244p.htm&Session\\_ID=107](http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/2r/bills/hb2244p.htm&Session_ID=107)

APPENDIX D

**Private Certification Model Legislation**

No agency or subdivision of the state may interfere with an individual's practice of a profession if that individual is doing so in a manner consistent with a professional certification as defined in this section.

“Professional certification” is a nontransferable credential granted to an individual by a private certifying organization that indicates the individual is well qualified to practice a profession within a scope of professional practice as defined by the certifying organization.

“Private certifying organization” is any organization that

1. Is nongovernmental;
2. Allows any individual to apply for a certification credential regardless of gender, race, ethnicity, or religion;
3. Requires bona fide minimum qualifications and/or criteria that are directly related to the certified profession and that an individual must meet, beyond mere registration and/or payment of a fee, in order to gain certification;
4. Defines a scope of professional practice appropriate to each class of credential granted to individuals;
5. Makes credentialing requirements and scopes of professional practice information readily available to the public; and
6. Requires that certified individuals in good standing prominently display their credentialed status and make available credentialing requirements with the appropriate scope of professional practice to current and potential customers.

Any individual who falsely claims a professional certification as defined by this section is guilty of a felony punishable by a maximum of 1 year in the state penitentiary.

Any government official who intentionally interferes with an individual's practice of a profession consistent with the individual's professional certification under this section shall be guilty of a felony punishable by a maximum of 2 years in the state penitentiary.

APPENDIX E

**Statutory Right to an Occupation: Model Legislation  
December 5, 2011**

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100.01	Purpose.
100.02	Definitions.
100.03	Right to engage in a lawful occupation.
100.04	Severability clause.
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100.06	Effective date.

**100.01 Purpose.** This chapter's purpose is to (a) ensure that a person may pursue a lawful occupation free from unnecessary regulations and (b) protect against the misuse of occupational regulations to reduce competition and to increase prices to consumers.

**100.02 Definitions.**

Subd. 1. **Scope.** For the purposes of this chapter, the words defined in this section have the following meanings.

Subd. 2. **Certification.** "Certification" is a voluntary program for which the legislature establishes the criteria to grant recognition to a person who (a) has met certain predetermined qualifications and (b) may use "certified" as a designated title. Noncertified persons may also perform the occupation for compensation, but the use of the title "certified" by a noncertified person is illegal. For this chapter, the term "certification" is not intended to be synonymous with "licensing" or "license."

Subd. 3. **Court.** "Court" means any court, administrative tribunal, or other government agency acting in a judicial or quasi-judicial capacity.

Subd. 4. **Government.** "Government" means the government of this state or any of its political subdivisions.

Subd. 5. **Lawful occupation.** "Lawful occupation" means a course of conduct, pursuit, or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the person selling them is subject to an occupational regulation.

Subd. 6. **Least restrictive occupational regulation.** "Least restrictive occupational regulation" means, from least to most restrictive, (a) a provision for private civil action to remedy consumer harm, (b) inspection, (c) bonding, (d) registration, (e) certification, or (f) licensing.

Subd.7. **Licensing.** “Licensing” is a nontransferable authorization to perform an occupation for compensation based on meeting predetermined qualifications established by the legislature such as (a) satisfactory completion of an approved education program and (b) acceptable performance on a qualifying examination or series of examinations. It is illegal for nonlicensed persons to perform the occupation for compensation. Licensing is the most restrictive form of occupational regulation.

Subd. 8. **Occupational regulation.** “Occupational regulation” means a statute, rule, practice, policy, or other government-prescribed requirement for a person to work in a lawful occupation.

Subd. 9. **Registration.** “Registration” means a requirement established by the legislature in which a person (a) submits notification to a state agency and (b) may use “registered” as a designated title. Notification may include the person’s name and address, the person’s agent for service of process, the location of the activity to be performed, and a description of the service that the person provides. Registration does not include education or experience requirements. Registration may include a requirement to maintain a bond. Nonregistered persons may not perform the occupation for compensation or use “registered” as a designated title. For this chapter, the term “registration” is not intended to be synonymous with “licensing” or “license.”

Subd. 10. **Substantial burden.** “Substantial burden” means a legal or other regulatory obstacle that imposes significant difficulty or cost on a person seeking to enter or continue in a lawful occupation. A substantial burden is a burden that is more than incidental.

### **100.03 Right to engage in a lawful occupation.**

Subd. 1. **Statutory right.** A person has a right to engage in a lawful occupation free from any substantial burden unless the government demonstrates that (a) it has a compelling interest in protecting against present and recognizable harm to the public health or safety and (b) the occupational regulation is the least restrictive means of furthering that compelling interest.

Subd. 2. **Defense and relief.** (a) A person may assert as a defense the right to engage in a lawful occupation in any judicial or administrative proceeding to enforce an occupational regulation that violates subdivision 1.

(b) A person may bring an action for declaratory judgment or injunctive or other equitable relief for a violation of subdivision 1.

(c) A person may assert as a defense or bring an action against the enforceability of an occupational regulation, pursuant to subsections (a) and (b), which is

(1) in law at the effective date of this chapter or

(2) enacted, adopted, or amended after the effective date of this chapter and does not include in state statute an explicit exemption from this chapter.

(d) A person who asserts a defense or brings an action under this section has the initial burden of proof that an occupational regulation substantially burdens the person's right to engage in a lawful occupation.

(e) If the person meets the burden of proof under paragraph (d), the government must demonstrate by clear and convincing evidence that the government has a compelling interest in protecting against present and recognizable harm to the public health or safety, and the occupational regulation is the least restrictive means for furthering that compelling interest.

Subd. 3. **Judicial determination.** A court shall liberally construe this chapter to protect the right established in subdivision 1. A court shall make its own findings of fact and conclusions of law. It shall not grant any presumption to legislative or administrative determinations that harm is caused to the public health or safety, or that the regulation is the least restrictive means of furthering a compelling governmental interest.

**100.04 Severability clause.**

**100.05 Repealer clause.**

**100.06 Effective date.**

Source: Institute for Justice [http://www.ij.org/images/pdf\\_folder/legislative/ijmodeleconlib.pdf](http://www.ij.org/images/pdf_folder/legislative/ijmodeleconlib.pdf).

## ENDNOTES

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- 2 See “State Regulatory Agencies,” Board of Certification, [http://www.bocatc.org/index.php?option=com\\_content&view=article&id=92&Itemid=144](http://www.bocatc.org/index.php?option=com_content&view=article&id=92&Itemid=144).
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- 7 See “History of Western Civilization,” Boise State University, <http://boisestate.edu/courses/westciv/medsoc/24.shtml>.
- 8 Young, *Rule of Experts*, 11.
- 9 Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), 137.
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Most people cleanse a wound by pouring a little saline over it. I perform a local anesthetic block first, as adequate cleansing by my definition is almost impossible without anesthesia. Then, vigorous scrubbing with soap and water.[sic] If there is not at least some bleeding stirred up, scrubbing has probably not been sufficient. Then put on gloves and sterile drape, inspect the wound for irregular and non-viable skin and subcutaneous tissue, debriding (cutting out tissue likely to be dead) if necessary, and finally suturing the laceration just tightly enough for the skin edges to touch. A snug pressure dressing is almost equally important as the suturing.”

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62 Adam Summers, in a Reason Foundation paper, describes the drawbacks of this Career Info Net. It does change over time, and there is a good deal of dependence on the states to provide data. Summers provides an accounting of licensed job categories in his 2007 paper that is very similar to that provided by Kleiner. (See footnote 61) For this paper, the Career Info Net list of licensed occupations across the country, by state, was loaded into a spreadsheet. For some states, certified professions are noted but not in others, so all certified positions were left in the list. The counts that resulted, listed in appendix A, are different from those of Summers and Kleiner. The disagreement between the count of licensed occupations done for this paper and the counts of Summers and Kleiner illustrate the difficulty of fully accounting for every licensed job and occupation. Laws change all the time and so does reporting.

63 Using May 2010 Occupational Employment and Wage Estimates from the federal Bureau of Labor Statistics and a list of licensed state professions compiled by the CareerOneStop website sponsored by the U.S. Department of Labor, the author compiled the number of individuals employed in licensed professions and compared it to all individuals employed in the state. See “May 2011 National Occupational Employment and Wage Estimates, United States,” Bureau of Labor Statistics, [http://bls.gov/oes/oes\\_dl.htm](http://bls.gov/oes/oes_dl.htm) and CareerOneStop, U.S. Department of Labor, [http://www.acinet.org/licensedoccupations/lois\\_agency.asp?stfips=04&nodeid=16&by=occ&onetcode=9999](http://www.acinet.org/licensedoccupations/lois_agency.asp?stfips=04&nodeid=16&by=occ&onetcode=9999).

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65 Goldwater Institute intern Megan Teague conducted a survey of 60 Arizona city and town websites, which showed that nearly all require a yearly business permit fee averaging \$50. Sometimes specific occupations were singled out for particularly high fees. El Mirage requires an extraordinary \$2,000 yearly fee from massage therapists. In contrast, Gilbert requires an initial fee of \$220 and a \$120 yearly renewal. Adult-oriented businesses often face especially high fees. In Mesa, only teenage dance halls and sexually oriented businesses are charged more than the \$325 permit fee charged to fortune tellers. Gilbert and Glendale both charge relatively high fees, in the range of \$1,000 per year, for alcohol-related businesses. Although business permitting is not quite the same as licensing, there is no denying that differentially high fees are charged to discourage some types of businesses compared to others. Licensing is far more onerous than even relatively high fees. There is no denying it has a similar intended effect: to limit entry by some into the market. Data on city and town permitting in Arizona can be obtained from the author by email: [bschlomach@goldwaterinstitute.org](mailto:bschlomach@goldwaterinstitute.org).

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71 Arizona Administrative Code, Title 4, Chapter 43, Section R4-43-201 G, [http://www.azsos.gov/public\\_services/Title\\_04/4-43.pdf](http://www.azsos.gov/public_services/Title_04/4-43.pdf), page 4.

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87 See Arizona State Legislature document at <http://azleg.gov/FormatDocument.asp?inDoc=/ars/32/01153.htm&Title=32&DocType=ARS>.

88 See Arizona State Legislature documents at <http://azleg.gov/FormatDocument.asp?inDoc=/ars/32/01158.htm&Title=32&DocType=ARS> and <http://azleg.gov/FormatDocument.asp?inDoc=/ars/32/01158-01.htm&Title=32&DocType=ARS>.

89 See Appendix B. The Arizona State Legislature document is available online at [http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/sb1502s.htm&Session\\_ID=86](http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/sb1502s.htm&Session_ID=86).

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