To help States combat abuse of occupational licensing laws by economic incumbents, to promote competition, to encourage innovation, to protect consumers, and to facilitate the restoration of antitrust immunity to State occupational boards, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 27, 2017

Mr. Lee (for himself, Mr. Cruz, and Mr. Sasse) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To help States combat abuse of occupational licensing laws by economic incumbents, to promote competition, to encourage innovation, to protect consumers, and to facilitate the restoration of antitrust immunity to State occupational boards, and for other purposes.

1 Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Restoring Board Im-
5 munity Act of 2017” or the “RBI Act”.

6 SEC. 2. STATEMENT OF FINDINGS AND PURPOSE.

7 Congress finds the following:
(1) The prevalence of occupational licensing has increased dramatically in recent decades, in part because private interests have sought licensing in order to limit competition.

(2) Occupational licensing often limits opportunities for workers, frustrates entrepreneurs seeking to introduce new business models, and raises prices paid by consumers.

(3) Licensing should be imposed only to combat real, substantial threats to public health, safety, or welfare and only where other less restrictive regulatory alternatives are insufficient to protect consumers and serve the public interest.

(4) Regulators should consider a range of less restrictive alternatives before enacting an occupational licensing regime, which may include inspections, bonding or insurance requirements, registration, and voluntary certification.

(5) Voluntary certification provides a particularly significant alternative to licensure, as it allows market participants to signal to consumers the attainment of personal qualifications without limiting entry into the marketplace.

(6) The failure of State governments to adopt less restrictive alternatives to licensing, and less bur-
densome requirements in those areas where licensing is deemed necessary, has resulted in significant costs to consumers and the broader economy.

(7) The United States Supreme Court responded to these concerns in North Carolina Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015), holding that self-interested licensing boards may be subject to liability under the antitrust laws, but that decision has also created significant uncertainty for the States and their licensing boards.

(8) Some States have responded to the decision in North Carolina Board of Dental Examiners by establishing a layer of bureaucratic oversight that merely monitors board actions for consistency with State licensing laws. This response is a missed opportunity for reform, as it does not address the specific competition concern raised in North Carolina Board of Dental Examiners or the underlying problems with over-reliance on occupational licensure as a regulatory approach and with overly broad enforcement of licensing laws as a means to regulate commercial activities outside an occupation’s scope of practice.

(9) Legislation is necessary to clarify the requirements of active supervision, both to offer States
a clear and certain mechanism to immunize their oc-
occupational boards and to make clear that mere bu-
reaucratic oversight to ensure consistency with State 
licensing laws does not suffice to confer immunity.

(10) This Act is intended to offer States a 
choice between two alternative routes to achieve im-
munity for their occupational licensing boards—ei-
ther establishing a mechanism for meaningful active 
supervision of licensing boards by State officials or 
establishing a mechanism for meaningful judicial re-
view of board actions in the State courts.

SEC. 3. DEFINITIONS.

In this Act:

(1) CERTIFICATION.—The term “certification” 
means a voluntary program under which—

(A) a private organization (in the case of 
private certification) or the government of a 
State (in the case of government certification) 
authorizes an individual who meets certain per-
sonal qualifications to use “certified” as a des-
ignated title with respect to the performance of 
a lawful occupation; and 

(B) a non-certified individual may perform 
the lawful occupation for compensation but may 
not use the title “certified”.

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(2) GOOD FAITH.—The term “good faith”, with respect to performance—

(A) means diligent performance that is directed towards achieving the policies set forth in this Act;

(B) does not include performance that is—

(i) designed to subvert or evade the policies set forth in this Act; or

(ii) carried out in a manner that has the systematic effect of subverting or evading the policies set forth in this Act; and

(C) refers to an objective, rather than subjective, standard.

(3) LAWFUL OCCUPATION.—The term “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 individual selling the goods or services is subject to occupational licensing laws.

(4) LEAST RESTRICTIVE REGULATION.—The term “least restrictive regulation” means, from least to most restrictive:

(A) One or more of the following, each of which shall be considered equally restrictive:

(i) Market competition.
(ii) Industry or consumer-related ratings and reviews.

(iii) Private certification.

(iv) A specific private civil cause of action to remedy consumer harm.

(v) A deceptive trade practice act.

(vi) A regulation of the process of providing the specific goods or services to consumers.

(vii) Inspections.

(viii) Bonding or insurance.

(ix) Registration.

(x) Government certification.

(B) Specialty occupational license for medical reimbursement.

(C) Occupational license.

(5) LESS RESTRICTIVE ALTERNATIVES TO OCCUPATIONAL LICENSING.—The term “less restrictive alternatives to occupational licensing”—

(A) means regulations that achieve the public health or safety goals asserted by the government to justify licensing while imposing a less onerous restriction on entry into the marketplace; and
(B) includes the alternative forms of regulation described in paragraph (4)(A).

(6) Member, officer, or employee.—The term "member, officer, or employee", with respect to an occupational licensing board, means an individual appointed by a State to the board.

(7) Occupational license.—The term "occupational license" means a nontransferable authorization under law for an individual to perform a lawful occupation for compensation based on meeting personal qualifications established by the State government.

(8) Occupational licensing board.—The term "occupational licensing board" or "board" means an entity established under State law—

(A) the express purpose of which is to regulate the personal qualifications required to engage in or practice a particular lawful occupation;

(B) that has authority conferred by State law to interpret or enforce the occupational licensing laws of the State; and

(C) not less than 2⁄3 of the members of which are appointed by an elected official of the State.
(9) OCCUPATIONAL LICENSING LAW.—The term “occupational licensing law”—

(A) means a State statute that allows an individual to work in a lawful occupation and use an occupational title; and

(B) does not include a business license, facility license, building permit, or zoning and land use regulation, except to the extent that the law regulates an individual’s personal qualifications to engage in or practice a lawful occupation.

(10) OCCUPATIONAL REGULATION.—The term “occupational regulation”—

(A) means a statute, rule, practice, policy, or other law that substantially burdens an individual’s ability to work in a lawful occupation;

(B) includes a regulation requiring registration, certification, or an occupational license; and

(C) does not include a business license, facility license, building permit, or zoning and land use regulation except to the extent that such a requirement or restriction substantially burdens an individual’s ability to work in a lawful occupation.
(11) PERSONAL QUALIFICATIONS.—The term “personal qualifications” means criteria related to an individual’s personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education.

(12) REGISTRATION.—The term “registration” means a requirement that an individual give notice to the government of a State that may include—

(A) the individual’s name and address;

(B) the individual’s agent for service of process;

(C) the location of the activity to be performed; and

(D) a description of the service the individual provides.

(13) SPECIALTY OCCUPATIONAL LICENSE FOR MEDICAL REIMBURSEMENT.—The term “specialty occupational license for medical reimbursement” means a nontransferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the non-exclusive pro-
vision of medical services based on meeting personal qualifications established by the State legislature.

(14) STATE.—The term “State” means—

(A) each of the several States; and

(B) the District of Columbia.

SEC. 4. ANTITRUST IMMUNITY.

(a) IN GENERAL.—Subject to subsection (b), the Sherman Act (15 U.S.C. 1 et seq.) shall not apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of the board acting in the official capacity of that member, officer, or employee, if—

(1) the requirements under section 5 of this Act are satisfied; or

(2) the requirements under section 6 of this Act are satisfied.

(b) REQUIREMENT OF GOOD FAITH.—The immunity provided under subsection (a) shall not apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of the board acting in the official capacity of that member, officer, or employee, unless the State acts in good faith to perform the applicable requirements under section 5 or 6.

(c) EXISTING ENTITIES OR PROCEDURES.—The fact that a State governmental entity or procedure was estab-
lished before the date of enactment of this Act shall not prevent an occupational licensing board of the State, or a member, officer, or employee of that board, from qualifying for immunity under subsection (a) if the State governmental entity or procedure satisfies the applicable requirements under section 5 or 6.

(d) SAVINGS CLAUSE.—The immunity provided under subsection (a) shall not apply to an action unrelated to regulating the personal qualifications required to engage in or practice a lawful occupation, such as rules of an occupational licensing board governing minimum prices or residency requirements.

SEC. 5. ACTIVE SUPERVISION.

(a) IN GENERAL.—The immunity under section 4(a) shall apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of that board acting in the official capacity of that member, officer, or employee, if—

(1) the actions of the occupational licensing board or member, officer, or employee are authorized by a non-frivolous interpretation of the occupational licensing laws of the State;

(2) the State adopts a policy of using less restrictive alternatives to occupational licensing to address real, substantial threats to public health, safe-
ty, or welfare, in accordance with subsection (b) of this section; and

(3) the State enacts legislation providing for active supervision of the actions of an occupational licensing board and any member, officer, or employee of such a board, in accordance with subsection (c) of this section.

(b) POLICY.—The State shall adopt a policy providing that—

(1) occupational licensing laws should be construed and applied to—

(A) protect public health, safety, and welfare; and

(B) increase economic opportunity, promote competition, and encourage innovation;

(2) regulators should displace competition through occupational licensing laws only if less restrictive alternatives to occupational licensing will not suffice to protect consumers from real, substantial threats to public health, safety, or welfare; and

(3) an occupational licensing law should be enforced against an individual only to the extent the individual sells goods or services that are included explicitly in the statute or regulation that defines the occupation’s scope of practice.
(c) **Active Supervision.**—

(1) **In General.**—The legislation enacted under subsection (a)(3) shall satisfy each of the requirements under this subsection.

(2) **Day-to-Day Supervision.**—

(A) **Establishment of Office of Supervision of Occupational Boards.**—The State shall establish an Office of Supervision of Occupational Boards (referred to in this subsection as the “Office”) to review the actions of occupational licensing boards to ensure compliance with the policy adopted under subsection (b).

(B) **Duties.**—The Office shall—

(i) review and explicitly approve or reject in writing any occupational regulation proposed by a board before the board may adopt or implement the occupational regulation;

(ii) play a substantial role in the development of a board’s rules and policies to ensure they benefit consumers and do not serve the private interests of providers of goods and services regulated by the board;
(iii) disapprove in writing the use of any board rule or policy relating to an occupational regulation and terminate any enforcement action, including any such action pending on the date of enactment of this Act, that is inconsistent with the policy adopted under subsection (b);

(iv) exercise control over each board by reviewing and affirmatively approving in writing only occupational regulations that are consistent with the policy adopted under subsection (b);

(v) use the analysis conducted under paragraph (5) and conduct reasonable investigations to gain additional information, including about less restrictive regulatory approaches, to promote compliance with subsection (b);

(vi)(I) be staffed by not less than 1 attorney; and

(II) prohibit attorneys working in the Office from providing general counsel to any board; and

(vii)(I) approve board actions explicitly in writing, rather than implicitly; and
(II) clearly establish that silence or inaction does not constitute approval.

(3) INTERNAL REVIEW.—

(A) COMPLAINT.—The State shall establish a mechanism under which a person who is a resident of or has a license to operate a business in the State may file a complaint with the Office about an occupational regulation of an occupational licensing board in the State that the person believes is inconsistent with the policy adopted under subsection (b).

(B) OFFICE RESPONSE.—Not later than 90 days after the date on which a person files a complaint under subparagraph (A), the Office shall—

(i) investigate the complaint;

(ii) identify remedies and instruct the board to take action, where appropriate; and

(iii) respond in writing to the complainant.

(C) REVIEW.—The State shall establish a mechanism for review of a determination made by the Office under subparagraph (B), under which a complainant may appeal the determina-
tion to the general division of the trial court of
the State if the challenged occupational regula-
tion would substantially burden the complain-
ant's ability to—

(i) engage in a lawful occupation; or
(ii) employ or contract other individ-
uals for the performance of a lawful occu-
pation; and

(4) Right to raise defense.—

(A) In general.—The State shall author-
ize an individual to assert as a defense, in any
administrative or judicial proceeding to enforce
an occupational regulation, that the regulation
does not comply with the policy adopted under
subsection (b).

(B) Procedures.—In a proceeding de-
described in subparagraph (A)—

(i) an individual who asserts a defense
under this paragraph has the initial bur-
den of proof that the occupational regula-
tion being enforced substantially burdens
the individual's ability to engage in a law-
ful occupation;

(ii) if an individual meets the burden
of proof under clause (i), the State shall be
required to demonstrate by clear and convincing evidence that the occupational regulation—

(I) advances an important government interest in protecting against real, substantial threats to public health, safety, or welfare; and

(II) is substantially related to achievement of the important government interest described in subclause (I), in light of the availability of less restrictive alternatives to occupational licensing; and

(iii) in reviewing an alleged violation of the policy adopted under subsection (b), an administrative agency or a court—

(I) shall make its own findings of fact and conclusions of law;

(II) may not rely on a legislative finding of fact presented in admissible form to the agency or court; and

(III) may not grant any presumption to a legislative determination—
(aa) of harm to public health, safety, or welfare; or

(bb) that the occupational regulation is substantially related to achievement of the important government interest described in clause (ii)(I).

(5) Periodic Advisory Review.—

(A) In General.—The State shall establish a mechanism for periodic non-binding review of existing occupational regulations, and non-binding review of new proposed occupational regulations, to ensure that the occupational regulations comply with the policy adopted under subsection (b).

(B) Scope of Review.—The entity conducting the review under subparagraph (A)—

(i) shall publish an annual written report encompassing approximately 20 percent of the occupations subject to occupational regulations within the State, such that the entity will review all occupational regulations within the State during each 5-year period; and
(ii) shall publish a written report assessing any proposed occupational licensing law, or other proposed law that would expand the authority of an occupational licensing board to impose occupational regulations, before the proposed law is submitted to a vote by the State legislature.

(C) REQUIREMENTS FOR ANALYSIS.—In conducting the review required under subparagraph (A), the entity shall—

(i) determine whether the law or other regulation satisfies the policy adopted under subsection (b) of using the least restrictive regulation necessary to protect consumers from real, substantial threats to public health, safety, or welfare;

(ii) evaluate the effects of the law or other regulation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects;

(iii) compare the law or other regulation to whether and how other States regulate the applicable occupation; and
(iv) if the applicable occupation is subject to an occupational licensing law, evaluate—

(I) the feasibility of entering into reciprocity compacts with one or more other States to improve worker mobility and labor market flexibility; and

(II) the advisability of endorsing occupational licenses granted by other States to spouses of active service military members as if those occupational licenses were granted by the State conducting the review.

SEC. 6. JUDICIAL REVIEW.

(a) IN GENERAL.—The immunity under section 4(a) shall apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of that board acting in the official capacity of that member, officer, or employee, if—

(1) the actions of the occupational licensing board or member, officer, or employee are authorized by a non-frivolous interpretation of the occupational licensing laws of the State;

(2) the State adopts a policy of using less restrictive alternatives to occupational licensing to ad-
dress real, substantial threats to public health, safety, or welfare, in accordance with section 5(b); and

(3) the State enacts legislation providing for judicial review of occupational licensing laws, in accordance with subsection (b) of this section.

(b) JUDICIAL REVIEW LEGISLATION.—Legislation enacted by a State under subsection (a)(3)—

(1) shall—

(A) prohibit the State and any occupational licensing board from imposing an occupational licensing law unless the State—

(i) identifies an important government interest in protecting against real, substantial threats to public health, safety, or welfare; and

(ii) demonstrates that the occupational licensing law is substantially related to achievement of the important government interest described in clause (i), in light of the availability of less restrictive alternatives to occupational licensing;

(B) provide an affirmative defense against enforcement of any occupational licensing law of the State under which the State shall be re-
quired to demonstrate that the standard under subparagraph (A) has been met;

(C) establish a cause of action under which—

(i) a person may bring an action for injunctive relief against enforcement of an occupational licensing law of the State;

(ii) the plaintiff bears the initial burden to prove that the challenged occupational licensing law substantially burdens the plaintiff’s ability to engage in a lawful occupation; and

(iii) once the plaintiff makes the initial showing under clause (ii), the State is required to demonstrate that the standard under subparagraph (A) has been met;

(D) provide for an award of reasonable costs and attorney fees to a person who successfully challenges the application of an occupational licensing law of the State by—

(i) raising an affirmative defense under subparagraph (B); or

(ii) bringing an action under subparagraph (C); and
(E) provide for independent judicial review of the occupational licensing laws of the State to ensure that the standard set forth in subparagraph (A) has been met; and

(2) may not authorize a court to—

(A) uphold enforcement of an occupational licensing law of the State simply because the court believes the law is rationally related to a legitimate governmental purpose;

(B) rely on hypothetical risks to public safety, not substantiated by evidence in the record, to uphold enforcement of an occupational licensing law of the State;

(C) defer to factual or legal conclusions of another person or entity, rather than exercising independent review; or

(D) rely on a post hoc justification for the action of an occupational licensing board that was not put forward by the board at the time of the challenged action.

(c) Rule of Construction.—Nothing in subsection (b) shall be construed to require legislation enacted by a State under subsection (a)(3) to provide a right to
1 recover monetary damages, other than reasonable costs
2 and attorney fees as provided under subsection (b)(1)(D).