Restoring THE RIGHT TO EARN A LIVING

A Common-Sense Solution to Occupational Licensing Job Barriers

The Problem

Of all the rights Americans cherish, the freedom to earn a living receives the least protection under the law. At the same time, regulators often stifle entrepreneurship by requiring a government stamp of approval before individuals may work in a wide range of lawful occupations.

Politicians of all stripes talk of the need to "create more jobs." Indeed, job creation and fostering an environment for entrepreneurship is often a touchstone for policymakers at all levels. Yet it is often government restrictions put in place by those same policymakers – in the form of occupational licenses – that makes the ability to get a job difficult for everyday Americans.

This is especially true in Louisiana. Louisiana has some of the most onerous and unusual licensing requirements in the country. The state also ties for first in licensing the most lower-income professions in the country.[1]

An occupational license is a government permission slip to work in one's chosen field. Occupational licenses have been required for some professions, such as doctors and lawyers, for many decades. The historical justification for requiring government permission before engaging in such occupations is that government regulators can protect the public from harm or fraud by requiring that certain standards be met prior to engaging in dangerous or risky professions. Increasing, however, there has been a growing trend toward prohibiting people from working or starting a business without first asking permission from government—even if they aren't posing any health or safety threat to the public.

In the 1950s, only five percent of jobs required an occupational license. Today, roughly one in four jobs require government permission.[2] While fewer than 30 occupations are licensed in all 50 states (most of which are in the medical, dental, and mental health professions), over half of all state-licensed occupations are licensed in only one state—occupations including graphic designers, audio engineers, braille instructors, and travel agents.[3]

In addition to licensing more occupations than any other state, Louisiana also licenses professions that are rarely licensed elsewhere. For example, in Louisiana, tree trimmers[4] require an occupational license, as do interior designers, a license that only three other states require.[5] Louisiana is also the only state in the country to require that florists receive government permission before arranging flowers.[6] The costs of these licenses are high in several professions. For example, in order to receive a license as an alarm installer, licensees must demonstrate more than five years of education and work experience, pass four exams, and pay $1,400 in fees.[7]

Often, licenses serve as barriers to entry into a profession, shielding incumbent industries that have become powerful special interest groups from would-be competition. For example, so-called certificate-of-need laws require new entrants into a market to demonstrate that the existing companies cannot meet demand before the government will allow them to compete. But no one can determine whether the public needs a new business. In reality, these laws are designed to bar competition against established businesses,

1. Dick Carpenter and Lisa Knepper, License to Work: A National Study of Burdens from Occupational Licensing, 2nd Ed., Nov. 2017, at 21.

2. Carpenter et al., note 1, at 6.
3. Mark Flatten, Protection Racket: Occupational Licensing Laws and the Right to Earn a Living, Dec. 2017, https://goldwaterinstitute.org/article/protection-racket-occupational-licensing-laws-and/.
4. La. Stat. Ann. § 3:3808.
5. Id. at § 37:3177.
6. Id. at § 3:3808.
7. Carpenter et al., note 1, at 80.

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regardless of their quality or skill. States have adopted certificate-of-need schemes to cover a variety of industries, including taxicabs, where companies must obtain government permission, sometimes called a medallion, before they can serve customers.

The problem is compounded when state regulatory boards – comprised not of elected lawmakers, but of unelected, unaccountable bureaucrats – impose onerous and often irrational licensing requirements through rules and regulations. Decades of bad court decisions have rendered these regulations nearly immune from legal challenge. As a result, government regulators can decide when and where people can work with little consequence or accountability for those decisions.

Unfortunately, entrepreneurs, business owners, and others looking to earn an honest living face an uphill battle when trying to protect their rights in court. When laws or regulations restrict people's freedom of speech or religious freedom, courts examine a challenge to that government requirement under what is called "strict scrutiny." In other words, the court will require the government prove that the restriction is narrowly tailored to accomplish a compelling government interest. Under this standard of review, a regulation that undermines a constitutional right is susceptible to being struck down.

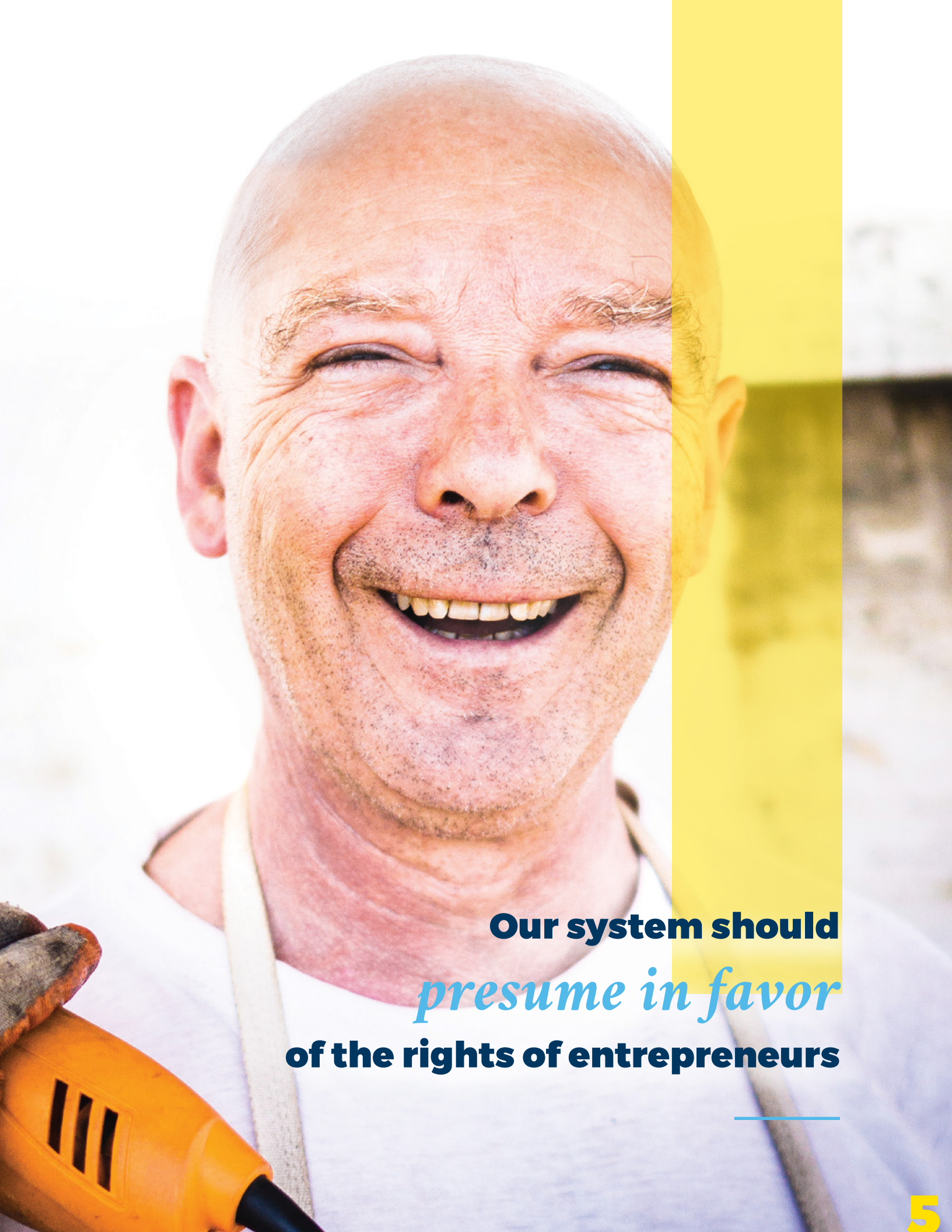
The opposite is true for laws or regulations that restrict economic freedom and the right to earn a living. Courts examine these restrictions under a much more lenient "rational basis" test, under which a court will presume the law is constitutional and require the victim of the regulation to disprove every imaginable justification for the law. Under this relaxed standard of review, regulations will be upheld in all but the most exceptional circumstances. In fact, the standard is so deferential to the regulators that if the government is unable to offer reasons to support the regulation, courts in many parts of the country are obligated to come up with reasons for the government.

That's not how the Land of Opportunity should work. Our system should presume in favor of the rights of entrepreneurs and require regulators to at least provide some good reason when it undermines a person's freedom to get a job.

The Solution

Fortunately, there is a solution. The Right to Earn a Living Act, developed by the Goldwater Institute and recently enacted in Arizona,[8] corrects this accountability problem and restores the right to

8. Ariz. Rev. Stat. Ann. § 41-1093, et seq.



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earn a living to its status as a protected right. The Act can serve as a model for Louisiana lawmakers looking to provide greater freedom in the area of occupational licensing.

The Right to Earn a Living Act rights the wrongs of the current legal landscape by putting the burden of proof back where it belongs – on the regulators who restrict economic freedom, instead of the job-seeker. Whenever bureaucrats restrict people's right to use their skills to provide for themselves and their families, the Act requires government to show that there is a true public need for that restriction. If the government cannot prove that the regulation is necessary to serve the public, people are presumed free to pursue the occupation of their choice.

The burden of proving that government restrictions on free enterprise are excessive should not be placed on those who want to earn an honest living; instead regulators should bear the burden of justifying their restrictions. In other words, the law is designed to give job license applicants the presumption that the business they want to start or profession they want to pursue is legal.

The Right to Earn a Living Act accomplishes two goals. First, any regulation that limits participation in a job or profession must be necessary to address a public health, safety, or welfare concern. [9] This limits the government's power to regulate to traditional police powers, such as the protection of public health or safety. By contrast, economic protectionism – favoring incumbent license holders over others – is not a legitimate government interest.

This part of the legislation would protect hard-working Louisianans like Sandy Meadows. Sandy was a high school dropout who moved to Baton Rouge to start a new life after the death of her husband. Meadows found meaningful work and made a respectable living as a floral clerk at a grocery store, eventually rising to the floral department supervisor. But Louisiana law requires that floral arrangers have a license from the state. After the Louisiana Horticulture Commission inspected Meadows's store and found she was unlicensed, she lost her job. She ended up unemployed and on the verge of homelessness, dying before a legal case that challenged Louisiana's arcane and protectionist florist laws could be appealed.[10]

The State of Louisiana justified its restrictions on florists, claiming that if florists were not licensed, customers could be exposed to infected dirt, or prick their fingers on exposed sticks. Based on the current standard of deferential judicial review, even these absurd health and safety justifications were upheld. It would not be so under the Right to Earn a Living Act, which requires a rational health and safety justification that is not put in place, like Louisiana's florist licensing requirements, to protect incumbent industries.

The second piece of the Act pertains to enforcement. If an existing regulation violates the Right to Earn a Living Act, anyone can petition the agency or local government to repeal or modify the restriction. If the agency decides not to change or repeal the regulation, the individual who requested the review may challenge the regulation in court. Courts must rule in favor of the challenger (and invalidate the regulation) if:

9. Id. at 41-1093(1).

10. Mark Flatten, "Protection Rcket: Occupational Licensing Laws and the Right to Earn a Living," The Goldwater Institute, at 6.

...the Right to Earn a Living Act requires a rational health and safety justification *to protect* incumbent industries.

(1) the challenged regulation burdens entry into or participation in an occupation or particular profession; and (2) the regulation is not demonstrated to be necessary to specifically fulfill a public health, safety, or welfare concern. "Necessary" and "specifically" refer to whether the means fit the ends. Is the rule related to a specific profession, or is it unrelated to the products or services provided? If the court determines that the regulation is not designed to advance a legitimate health, safety, or welfare concern, the regulation will be invalidated.

The law would help entrepreneurs like Lauren Boice, a former hospice nurse's assistant and cancer survivor from Arizona, who, after serving her homebound patients and winning her own battle with cancer, opened a business called Angels on Earth Home Beauty. When she discovered that there were no businesses in Arizona that provided salon services to homebound people, Lauren devised a service to connect the elderly or terminally ill with independent, licensed cosmetologists who could perform haircuts, manicures, or massages for them right in their homes.[11] Even though Lauren did not cut anyone's hair or do anyone's makeup – her business merely provided a means of communication between homebound customers and licensed cosmetologists – the Arizona Board of Cosmetology told Lauren that she needed to obtain a salon license and open a physical salon to operate her business.[12] While the Board might have an interest in clean and safe salons, this regulation made no sense because Lauren did not operate a salon – she merely dispatched licensed cosmetologists. Lauren received appointment requests and then contacted independent cosmetologists with the appointment time and location—nothing more. As such, her business was purely an information assembly and dissemination service. In other words, the regulatory means did not fit the end of purported public health and safety in clean salons.

In 2011, Lauren filed a lawsuit challenging the Board's

11. Angels on Earth Home Beauty, LLC, "About the Founder," http://www.angelsonearthhomebeauty.com/about.html.
12. Boice v. Aune, CV2011-021811 (Maricopa Cty Super. Ct. Apr. 30, 2012) Amend. Compl. ¶¶ 24-7, https://goldwater-media.s3.amazonaws.com/cms_page_media/2016/10/18/3Complaint.pdf.

Lauren *spent years in court* just to arrive at the commonsense conclusion that a cosmetology board does not have the power to regulate a phone dispatch business.

authority to impose a licensing requirement on her.[13] After a year and a half of litigation, the Board backed down and agreed to cease regulating Angels on Earth and other services that simply connected cosmetologists to patients confined to their homes or care facilities. Sadly, Lauren spent years battling the cosmetology board, in and out of court, just to arrive at the commonsense conclusion that a cosmetology board does not have the power to regulate a phone dispatch business. That's because Arizona had not yet enacted the Right to Earn a Living Act, so the deck was stacked against Lauren from the moment she challenged the Board.

Tennessee also enacted a version of the Right to Earn a Living Act.[14] That law directs all state agencies to review existing occupational regulations to determine whether they in fact advance a legislate health, safety, or welfare objective, and then to report those findings to the legislature.[15] Although the law does not include a cause of action, or an enforcement mechanism for people who have been harmed by occupational licenses, it is a step in the right direction and based on the same premise as Arizona's more robust law: the government must justify its restrictions on economic freedom and only impose occupational regulations that actually protect the public.

The problem of occupational regulation is a problem of accountability. Because regulators know it is unlikely that their regulations will be challenged, or that challenges will be unsuccessful, they are free to regulate at will, no matter how burdensome or irrational the rule may be. The Right to Earn a Living Act holds those decision-makers accountable and therefore results in better, more informed and less burdensome regulatory decisions.

13. Boice v. Aune, CV2011-021811 (Maricopa Cty Super. Ct. Dec. 13, 2011).
14. Tenn. Code Ann. § 4-5-501.
15. Id. at § 4-5-502.

Because of the Right to Earn a Living Act, Annette was able to *pursue a career* without ever having to see the inside of a courtroom.

Within months of its passage, the Right to Earn a Living Act was already helping job seekers in Arizona. After Annette Stanley, a behavioral health counselor in the state of Kansas, moved to Arizona in 2014, she sought a license to practice in her new state. But because Stanley had owned her own practice, the state of Arizona would not recognize hours accumulated for her Kansas license. Although the Arizona licensing board recognized that she was fully qualified, this arbitrary requirement prevented her from receiving her license.

Relying on the Right to Earn a Living Act, Annette Stanley asked the Board to review the regulations that prevented her from working in the field of her choice even though she was fully qualified. Rather than face the possibility of a lawsuit where the Board would have to justify its restrictions, the Board resolved to modified its own rules, eliminating the prohibition of having an "ownership interest" in a firm where a licensee received supervision and agreeing to allow out-of-state hours in this category to county for in-state purposes. Annette was able to pursue a career in her new home state without ever having to see the inside of a courtroom.[16]

An Opportunity

There have been recent calls in Louisiana, including by Governor John Bel Edwards,

16. Goldwater Institute, Arizona Board of Behavioral Health Examiners moves to make it easier for behavioral health counselors to practice, https://goldwaterinstitute.org/article/arizona-board-of-behavioral-health-examiners-moves-to-make-it-easier-for-behavioral-health-counselors-to-practice/.

to review and reform many occupational licenses. Governor Edwards specifically questioned by Louisiana is the only state in the union to license florists.[17]

Governor Edwards is correct to be skeptical. In a state with slow job growth and low wages, thousands of others like Sandy Meadows have been blocked from meaningful work because the state imposes licensing requirements – often at the behest of incumbent industries and trade associations – that have no relation to the public health and safety.

While efforts to repeal individual licenses should be supported, that is often politically difficult and must be done in piecemeal fashion. On the other hand, the Right to Earn a Living Act provides a holistic solution to the occupational licensing accountability problem.

As a result, in addition to efforts, including efforts by Governor Edwards to review and repeal discrete occupational licensing, policymakers should also take up and pass its own Right to Earn a Living law.

Conclusion

A hallmark of American freedom is the right to pursue one's chosen profession and provide for oneself and one's family. This is as true today – where new technologies make entrepreneurship easier than ever – as it was at our country's founding.

Based on a nationwide survey of occupational licensure,[18] Louisiana is the 43rd most burdensome state in the country for occupational licenses, licensing more lower-income professions than any other state, requiring high costs and burdens for several professions that are not even licensed in other states, and licensing some professions that are licensed in few other places or nowhere else.

Of course, government should protect the public against unqualified or dishonest businesses, and the Right to Earn a Living Act does not stop government from doing so. But regulators shouldn't be free to impose arbitrary restrictions on hard-working entrepreneurs and job-seekers without good reason.

The Right to Earn a Living Act restores the proper balance between freedom and legitimate government regulation, ensuring that economic opportunity for all is not merely a promise, but a reality.

Jon Riches is the Director of National Litigation at the Goldwater Institute

17. Elizabeth Crisp, "In La. Florists Need a License. Governor Questions Why," Houmatoday.com, Jan. 16, 2018, available at http://www.houmatoday.com/news/20180116/in-la-florists-need-license-governor-questions-why.
18. Carpenter et al, note 1, at 80.

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