



# Economic Liberty and Occupational Freedom Act

## A Bill

To clarify and strengthen the application of the federal antitrust laws to state regulatory boards dominated by active market participants, to provide a private cause of action for individuals denied professional licenses, to promote economic liberty and occupational freedom, and for other purposes.

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the “Economic Liberty and Occupational Freedom Act”.

### **SEC. 2. FINDINGS.**

Congress finds the following:

- (1) State occupational licensing requirements have expanded dramatically over the past several decades, with approximately one in four American workers now requiring a government-issued license to work in their chosen occupation.
- (2) Many state licensing boards are dominated by active market participants who have direct financial interests in limiting competition and restricting entry into their professions.
- (3) Excessive and anticompetitive licensing requirements impose substantial costs on consumers through higher prices and reduced access to services, while creating unnecessary barriers to employment and entrepreneurship.
- (4) The Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015), confirmed that state licensing boards dominated by active market participants are subject to federal antitrust scrutiny unless actively supervised by the State.
- (5) Inconsistent state licensing requirements impede interstate commerce, restrict labor mobility, and prevent qualified professionals from serving consumers across State lines.
- (6) Citizens aggrieved by anticompetitive conduct of state licensing boards currently lack adequate remedies under federal law to vindicate their rights and recover damages.
- (7) Clarification of the federal antitrust laws as applied to state licensing boards, together with a private right of action, will promote economic liberty, enhance consumer

welfare, and ensure that licensing requirements are justified by legitimate public health and safety concerns.

### **SEC. 3. DEFINITIONS.**

In this Act:

(a) **ACTIVE MARKET PARTICIPANT.**—The term “active market participant” means any member of a state licensing board who—

- (1) Holds a license issued by such board.
- (2) Has financial interest, including any direct or indirect financial interest, in limiting entry into or competition within the regulated profession; or
- (3) Is nominated, appointed, or otherwise selected by a professional trade association or other private entity representing licensees.

(b) **STATE LICENSING BOARD.**—The term “state licensing board” means any board, commission, council, or other entity established by State law that has the authority to—

- (1) Grant, deny, suspend, or revoke occupational or professional licenses.
- (2) Establish qualifications or standards for entry into an occupation or profession; or
- (3) Enforce rules or regulations governing professional conduct.

(c) **FEDERAL ANTITRUST LAWS.**—The term “federal antitrust laws” has the meaning given that term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), and includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition.

(d) **LICENSING REQUIREMENT.**—The term “licensing requirement” means any law, rule, regulation, policy, practice, or other requirement that conditions the lawful practice of an occupation or profession upon obtaining a license, certification, registration, permit, or other credential from a State or state licensing board.

### **SEC. 4. ANTITRUST LIABILITY OF STATE LICENSING BOARDS.**

(a) **APPLICATION OF FEDERAL ANTITRUST LAWS.**—A state licensing board, a majority of whose members are active market participants, shall be subject to the federal antitrust laws to the same extent as a private trade association, unless the board's conduct is actively supervised by the State in accordance with subsection (b). A state licensing board is also subject to federal antitrust laws if the majority of board members establishing a quorum for voting purposes for any given vote are active market participants.

(b) **ACTIVE SUPERVISION REQUIREMENTS.**—For purposes of subsection (a), conduct of a state licensing board shall be considered actively supervised by the State only if—

- (1) The State has established a non-market participant supervisory body with authority to review and approve or reject the board's licensing decisions and rules.

- (2) Such supervisory body engages in substantive review of the board's conduct to determine whether it furthers the State's policy to displace competition.
- (3) Such supervisory body has the power to veto or modify particular decisions of the board; and
- (4) Such supervisory body actually exercises its supervisory authority.

#### **SEC. 5. PER SE ANTITRUST VIOLATIONS—BOARD COMPOSITION.**

It shall be a per se violation of the Sherman Act (15 U.S.C. 1–7) for any rule, policy, or enforcement action of a state licensing board to restrain trade or limit entry into a profession if—

- (1) A majority of the members of the board are active market participants; and
- (2) The board's members—
  - (A) Are selected in whole or in part by a single private entity; or
  - (B) Are chosen by a public official and the public official is legally required to select from a list of nominees submitted or limited by a single private entity.

#### **SEC. 6. PRESUMPTION AGAINST LICENSING REQUIREMENTS.**

(a) PRESUMPTION.—Any licensing requirement imposed by a state licensing board that is subject to the federal antitrust laws pursuant to section 4 shall be presumed invalid unless the board demonstrates by clear and convincing evidence that the requirement is necessary to protect public health or safety and is the least restrictive means of achieving such protection.

(b) Factors.—In determining whether a licensing requirement satisfies the standard set forth in subsection (a), a court shall consider—

- (1) The specific harm to public health or safety that the requirement is intended to prevent.
- (2) Whether such harm is real and substantial, as opposed to speculative or remote.
- (3) Whether less restrictive alternatives could adequately protect against such harm; and
- (4) The economic burden imposed by the requirement on potential market entrants and consumers.

#### **SEC. 7. INTERSTATE LICENSE RECIPROCITY.**

(a) RECOGNITION OF LICENSES.—A State shall recognize as valid any occupational or professional license issued by another State if the holder of such license is in good standing and the licensing requirements of the issuing State are substantially equivalent to, or more stringent than, those of the recognizing State.

(b) PROHIBITION ON RESIDENCY REQUIREMENTS.—No State or state licensing board may deny a license, or condition licensure, on the basis of an applicant's residency in another State, or

business address, except where physical presence within the State is an essential and inherent element of the regulated occupation.

(c) INTERSTATE TELEHEALTH AND ONLINE SERVICES.—No State or state licensing board may prohibit or unreasonably restrict the provision of telehealth services, online education, or other interstate online services by a person who holds a valid license from another State to provide such services.

## **SEC. 8. PRIVATE ENFORCEMENT.**

(a) PRIVATE CAUSE OF ACTION.—Any individual or person aggrieved or economically harmed in their business or property, or whose rights, privileges, or immunities as secured by this Act or the Constitution are injured or threatened by a violation of this Act, including any rule, regulation, enforcement action, policy, or practice of a government entity, State, its political subdivisions, or any state licensing board that violates this Act or the federal antitrust laws (as clarified herein), may bring a civil action in an appropriate United States district court or State court of competent jurisdiction.

(b) RELIEF AVAILABLE.—A prevailing plaintiff under this section may obtain:

- (1) Declaratory and injunctive relief, including against state officials in their official capacities.
- (2) Compensatory damages, including lost income or opportunity.
- (3) In cases of violations of sections 4, 5, or 6 of this Act or the federal antitrust laws, treble damages in accordance with section 4 of the Clayton Act (15 U.S.C. 15).
- (4) Punitive damages where the defendant's conduct is shown to be malicious, willful, or in reckless disregard of the plaintiff's rights; and
- (5) Reasonable attorney's fees and costs.

(c) EX PARTE YOUNG DOCTRINE PRESERVED.—Nothing in this Act shall be construed to bar suits for prospective injunctive or declaratory relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), including actions against individual state officials acting in their official capacity to enforce an unconstitutional, unlawful, or anticompetitive rule or law.

(d) STATUTE OF LIMITATIONS.—An action under this section shall be commenced within four years after the cause of action accrues. For purposes of this subsection, a cause of action accrues when the plaintiff knows or reasonably should know of the injury giving rise to the claim.

(e) JURY TRIAL.—Any party to a civil action under this section may demand a trial by jury.

## **SEC. 9. FEDERAL ENFORCEMENT.**

(a) DEPARTMENT OF JUSTICE.—The Attorney General may bring a civil action in an appropriate United States district court to restrain any violation of this Act and to obtain such other relief as may be appropriate, including treble damages on behalf of the United States.

(b) FEDERAL TRADE COMMISSION.—The Federal Trade Commission shall have authority to enforce this Act under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and a violation of this Act shall be treated as an unfair method of competition.

#### **SEC. 10. PREEMPTION.**

(a) GENERAL PREEMPTION.—This Act shall supersede any State law, rule, or regulation to the extent that such law, rule, or regulation conflicts with the provisions of this Act or would permit conduct prohibited by this Act.

(b) SAVINGS CLAUSE.—Nothing in this Act shall be construed to preempt any State law that provides greater protection to consumers or greater economic liberty to individuals than is provided under this Act.

#### **SEC. 11. SEVERABILITY.**

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional or otherwise invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

#### **SEC. 12. EFFECTIVE DATE.**

This Act shall take effect 180 days after the date of enactment.