

CRIMINAL JUSTICE REFORM THROUGH ADMINISTRATIVE STREAMLINING: A WIN-WIN FOR COLORADANS

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Chair Roberts, Vice Chair Sullivan, and members of the committee:

Thank you for the opportunity to submit this testimony on Colorado House Bill 22-1098,¹ which concerns the elimination of barriers to obtaining permission to practice an occupation in light of an individual's criminal record. My name is James Broughel, and I am a senior research fellow at the Mercatus Center at George Mason University and an adjunct professor of law at the Antonin Scalia Law School. I specialize in regulatory procedures, cost-benefit analysis, and the impact of regulations on economic growth. In my research for the Mercatus Center, I conduct careful and independent nonpartisan analysis, employing contemporary economic scholarship to assess regulations and their effects on economic opportunity and societal well-being.

My testimony today centers on the intersection of criminal justice reform and regulatory reform. I have three points to make:

1. Many regulations have regressive, disparate effects on disadvantaged individuals, thereby limiting upward mobility in society. Regulatory reform is a path to enhanced social justice.
2. A number of states are combining occupational licensing reforms with criminal justice reforms in light of growing awareness that licensing regulations often make it hard for those with criminal records to obtain work. Such restrictions can be justified in some cases, but in other cases, requirements act as barriers to competition and yield little public benefit to consumers or society at large.
3. At a time when divisions run deep in this country, reducing administrative burdens to advance criminal justice reform is an area where there is some rare bipartisanship. The legislation being considered by this committee today has elements that members of both major political parties have supported.

1. H.B. 22-1098, 73rd Gen. Assemb., 2022 Reg. Sess. (Co. 2022).

THE POLITICS OF PUNISHMENT

Clemency has historically been considered a virtue and promoted throughout the ages. However, teaching a lesson to those who have committed serious crimes is also important. Thus, a balance must be struck. Too much or too little leniency is a problem.²

Moreover, clemency is often bad politics. There is a strong political incentive to create excessive regulation. For example, if a dangerous drug gets through the FDA review process, the FDA is blamed for any harms that result. But the holdup of a safe drug by the FDA review process almost never creates the same degree of scandal, even though withholding a safe drug can easily result in just as much harm. The result of such harm is what some economists have called an “invisible graveyard.”³ The FDA has a strong incentive to be risk averse in its decisions. Risk averse regulation is likely prudent from the agency’s own perspective but too stringent to be socially optimal.⁴

In the same way, politicians can err on the side of being too tough on crime, given that they may be blamed for any rise in crime but not blamed for lives that are upended owing to an overly harsh criminal justice system. One recent study estimates that 5,199 crimes are spelled out in the US Code, up about 36 percent from 25 years earlier.⁵ Those concerned with reforming the criminal justice system should be concerned about the rising number of restrictions, violation of which can label a person a criminal for life.

Regulations can be necessary in many cases to protect public health, safety, and the environment, as well as to prevent people with a track record of committing crimes from reoffending. But too many regulations can act as a barrier to those with criminal records who want to enter a new profession or line of business to turn their life around.

One recent study that I coauthored finds a consensus in the academic literature that anticompetitive regulations that restrict entry into product and labor markets are harmful to economic growth.⁶ Regulations can also be regressive, both for consumers and workers. Regulations raise prices of goods and services,⁷ which often constitute a larger share of a low-income person’s budget than of a high-income person’s. Occupational licensing regulations create hoops to jump through that are often hardest for those with less education, those with nonnative English speaking ability, and those who tend to move frequently, such as military spouses.⁸ Regulations can also disproportionately affect small businesses more than large businesses, given that large businesses are often more able to absorb the fixed costs of complying with regulations than are small businesses.⁹ The result is that regulations can exacerbate existing inequalities in society.

2. Consider, for example, the famous case of Julius Caesar granting clemency to some of his archrivals upon reaching power. Although this was initially praised by some as a savvy political move, among Caesar’s assassins were some whom Caesar had pardoned earlier. See Barry Strauss, *The Death of Caesar: The Story of History’s Most Famous Assassination* (New York: Simon & Schuster, 2015).

3. Alex Tabarrok, “Is the FDA Too Conservative or Too Aggressive?,” *Marginal Revolution*, August 26, 2015.

4. Sam Peltzman, “An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments,” *Journal of Political Economy* 81, no. 5 (1973): 1049–91.

5. “America’s Ever-Expanding Criminal Code,” *Wall Street Journal*, January 21, 2022.

6. James Broughel and Robert W. Hahn, “The Impact of Economic Regulation on Growth: Survey and Synthesis,” *Regulation and Governance*, published ahead of print (December 28, 2020), <https://doi.org/10.1111/rego.12376>.

7. Dustin Chambers, Courtney A. Collins, and Alan Krause, “How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation,” *Public Choice* 180 (2019): 57–90.

8. Matthew D. Mitchell and Liya Palagashvili, “Economic Freedom in the Period of Invisible Punishment: Occupational and Business Licensing Barriers That Restrict Access to Work for Those with Criminal Records” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, January 2022); Matthew D. Mitchell, “Occupational Licensing and the Poor and Disadvantaged” (Mercatus Policy Spotlight, Mercatus Center at George Mason University, Arlington, VA, September 2017).

9. James Bailey and Diana Thomas, “Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2015).

SOME RARE BIPARTISANSHIP

Occupational licensing regulations in particular are likely to have regressive and anticompetitive effects. A study from 2017 finds that 85 percent of state occupational licensing boards are required by law to have a majority of members be currently licensed professionals from the industry being regulated.¹⁰ Although it makes sense to have regulations written by people who understand the industry being regulated, this kind of industry control over regulation also invites what economists call “regulatory capture,” or the idea that “regulation is acquired by [an] industry and is designed and operated primarily for its benefit.”¹¹

There is considerable bipartisan consensus that occupational licensing regulations often limit opportunities for some of the most disadvantaged in society. In 2015, the Obama administration issued a seminal report on occupational licensing that helped jump-start many reforms at the state level.¹² Among the findings of the report are that

workers seeking a license face other procedural burdens, such as learning what the licensing requirements are and how to apply for a license, filling out the requisite paperwork, and waiting for their applications to be processed. These burdens are especially large for individuals with criminal records; it can take six months to a year for the relevant agency or board to review an applicant’s criminal history and make an initial determination about whether she qualifies for a license.¹³

Interestingly, both occupational licensing and criminal justice reform were priorities of the Trump administration, as evidenced by passage of the First Step Act and by a collaboration between the federal and state governments related to regulatory reform known as the Governors’ Initiative on Regulatory Innovation.¹⁴ That initiative aimed to “cut regulations and costs, advance occupational licensing reform, and better align state and federal regulations.”¹⁵

WHAT STATES ARE DOING

I won’t go into all the details about how occupational licensing affects those with criminal histories, given that my colleague Matthew Mitchell has many insights in his own testimony before this committee on that topic.¹⁶ However, I will stress that, across the nation, states are considering streamlining regulations as a way to make it easier for those with criminal backgrounds to reenter society safely and fairly.

One notable example comes from the state of Virginia. In 2018, Virginia passed a law establishing the Regulatory Reduction Pilot Program.¹⁷ The law passed through a narrowly Republican-controlled legislature with strong Democratic support and was signed into law by then-Governor Ralph Northam,

10. Rebecca Haw Allensworth, “Foxes at the Henhouse: Occupational Licensing Boards Up Close,” *California Law Review* 105, no. 6 (2017): 1567.

11. George J. Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21.

12. US Department of the Treasury, Council of Economic Advisers, and US Department of Labor, *Occupational Licensing: A Framework for Policymakers*, July 2015.

13. US Department of the Treasury, Council of Economic Advisers, and US Department of Labor, *Occupational Licensing*, 27.

14. First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

15. Office of the Governor of Idaho, “President Trump, Vice President Pence Meet with Governor Little on Regulatory Reform,” press release, December 16, 2019, <https://gov.idaho.gov/pressrelease/president-trump-vice-president-pence-meet-with-governor-little-on-regulatory-reform/>.

16. Matthew D. Mitchell, “Colorado’s Barriers to Work for Those with Criminal Records” (Testimony before the Colorado House Committee on Business Affairs and Labor, Mercatus Center at George Mason University, Arlington, VA, February 17, 2022).

17. H.B. 883, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

a Democrat. One reason the law had bipartisan support is that,¹⁸ like the bill before this committee, it combined occupational licensing reform with criminal justice issues.

The Virginia law required two state agencies, the Department of Professional and Occupational Regulation (DOPR) and the Department of Criminal Justice Services (DJCS), to conduct a review of their regulations and aim for substantial reductions in administrative burdens (25 percent each). The pilot program wrapped up in late 2021, with the DOPR and DJCS reporting a reduction in requirements of 27 percent and 14 percent,¹⁹ respectively. Reduced burdens came from providing additional pathways to licensure, reducing paperwork burdens, and consolidating chapters and requirements, as well as general streamlining improvements such as moving forms or processes online.²⁰ These are exactly the kinds of administrative burdens, which, on the margin, are likely to discourage individuals from pursuing work in a regulated profession.²¹ Moreover, relaxing these kinds of requirements may have trivial impacts on quality of services.²²

In addition to being notable for its effectiveness and bipartisanship, Virginia's reform has also inspired reforms in other states. The governor of New Mexico issued an executive order in late 2021 that paired occupational licensing with social justice issues.²³ The executive order requires the state Regulation and Licensing Department to review its rules and compile a report identifying rules that impose a burden on members of the public or result in a disparate impact on underserved populations. The order asks the department to identify rules that can be removed, amended, or streamlined without jeopardizing public health, safety, environmental protections, or other social interests. Importantly, the executive order also directs the department to implement rule and fee changes—where the department has the authority to do so—and to produce a report with recommendations for the legislature in areas where statutory changes are required to enact recommended changes.

The New Mexico executive order was partly a response to a report published in November of 2021 about how to facilitate economic development in New Mexico.²⁴ The report recommends that the state Economic Development Department “work with state regulatory agencies to identify bottlenecks and inefficiencies in New Mexico’s permitting, licensing, and incentive approval processes and address these challenges through regulatory reform.”²⁵ Moreover, the report specifically highlights Virginia’s 2018 law, pointing to Virginia as a state that has been “more proactive in addressing obstacles to quick and easy business establishment and expansion.”²⁶ Virginia is also named one of the best states to do business in a 2018 CNBC report, with the 2018 pilot program law singled out as a reason for Virginia’s improvement in the rankings from previous years.²⁷ Virginia went on to take the top spot in the CNBC rankings in 2021.²⁸

18. On the law’s bipartisan support, see James Broughel, “A Reform That Offers Hope for Centrists,” *Washington Post*, March 14, 2018; James Broughel, “Licensing, Justice Reform Will Aid Virginia’s Poorest,” *Charlottesville Daily Progress*, March 25, 2018.

19. Virginia Secretary of Finance, “Report to the General Assembly” (report no. RD356, Reports to the General Assembly, Richmond, VA, August 15, 2021).

20. Virginia Secretary of Finance, “Report to the General Assembly,” 8, 10–11.

21. Pamela Herd and Donald P. Moynihan, *Administrative Burden: Policymaking by Other Means* (New York: Russell Sage Foundation, 2018).

22. On the effect of licensing regulations on quality, see Mitchell, “Colorado’s Barriers to Work.”

23. New Mexico Exec. Order No. 2021-060 (2021).

24. New Mexico Economic Development Department, *Empower & Collaborate: New Mexico’s Economic Path Forward*, October 2021.

25. New Mexico Economic Development Department, *Empower & Collaborate*, 232.

26. New Mexico Economic Development Department, 233.

27. Jeff Clabaugh, “Virginia Ranks 4th among CNBC’s Best States for Business,” *WTOP*, July 10, 2018.

28. Scott Cohn, “Virginia Is Back as America’s Top State for Business in 2021,” *CNBC*, July 13, 2021.

A similar reform to Virginia’s and New Mexico’s that has yet to be adopted but may be gaining support is legislation introduced in Pennsylvania known as the Fighting Chance Act.²⁹ The Fighting Chance Act is modeled after Virginia’s 2018 pilot program in that it is a regulatory streamlining bill that also targets the state’s occupational licensing and criminal justice regulators. The 2019–2020 version of the legislation had more than 25 cosponsors, representing both major political parties.³⁰ Although the legislation has yet to pass, it is another example of the growing consensus and momentum for reforms that address the intersection of administrative streamlining, occupational licensing reform, and criminal justice reform.

COLORADO’S OPPORTUNITY

Colorado has an opportunity to advance meaningful criminal justice reform by streamlining occupational licensing requirements for those with criminal records. The bill before this committee would expand upon licensing reforms passed in Colorado in 2018, which reduced some barriers to employment for those with criminal records.³¹ In addition to the examples in the previous section, several other states have passed some version of criminal justice–related occupational licensing reform legislation. In 2021 alone, a diverse array of states including Arizona,³² Georgia,³³ New Jersey,³⁴ New Mexico,³⁵ Ohio,³⁶ Tennessee,³⁷ Washington,³⁸ and the District of Columbia all passed legislation that further reduces occupational and professional licensure barriers for those with criminal records.³⁹

This is an exciting time for those who seek to bridge the partisan divide and pass meaningful legislation that will improve people’s lives. This committee has an opportunity to kill two birds with one stone. Pursuing criminal justice reforms and administrative streamlining are sensible undertakings in their own rights. Combining the two seems like a win-win.

Thank you and I am happy to answer any questions you may have.

29. Andrew Lewis and Malcolm Kenyatta, “Proposed Bill Would Help Give all Pennsylvanians a Fighting Chance,” *Patriot-News*, Penn Live, February 26, 2019.

30. H.B. 995, Gen. Assemb., 2019 Sess. (Penn. 2020).

31. H.B. 18-1418, 71st Gen. Assemb., 2018 Reg. Sess. (Colo. 2018).

32. H.B. 2787, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

33. S.B. 114, 2021 Gen. Assemb., 2021–2022 Reg. Sess. (Ga. 2021).

34. S.B. 942, 219th Leg., 2020–2021 Sess. (N.J. 2020).

35. S.B. 2, 55th Leg., 1st Special Sess. (N.M. 2021).

36. H.B. 263, 133rd Gen. Assemb., 2019–2020 Reg. Sess. (Ohio 2021).

37. S.B. 768, 112th Gen. Assemb., 2021–2022 Sess. (Tenn. 2021).

38. H.B. 1399, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

39. B23-0440, 23rd Council Period (D.C. 2021).