



## Protecting the Presumption of Freedom

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The damage of the global coronavirus pandemic extends beyond the health and lives of people; it also shows up in the shuttering of stores, restaurants, salons, theaters, ballparks, and breweries ordered by many state governors. Americans are left sitting at home, waiting for a way out of the crisis. Economists are warning that coronavirus lockdowns could result in nearly one out of every three Americans losing their jobs.<sup>1</sup> The resulting havoc has stopped a once-surging economy in its tracks.

Americans have recovered from disasters before, and the key to recovery is entrepreneurship.<sup>2</sup> As America begins the process of reopening, officials at all levels of government will be looking for ways to get Americans back to work. Helping businesses and reviving employment does not require government growth; it requires respect for the freedom of individuals to create, innovate, and build. And that requires government restraint. It requires recognition of the fact that individuals should be free to earn an honest living, unobstructed by government unless their activities cause harm to others. Unfortunately, existing laws and regulations, many of which have been temporarily lifted in order to help people address the problems caused by the pandemic, contradict these principles and create obstructions to the economic opportunity necessary to revive the American economy.

This brief outlines three state-level model legislative reforms that can unleash the power of American entrepreneurship and encourage innovation: the Right to Earn a Living Act, which requires governments to prove some real risk to the public before it can restrict entrepreneurs' freedom; the Permit Freedom Act, which protects permit seekers from ambiguous and abusive processes; and the Home-Based Business Fairness Act, which prevents government from outlawing a business simply because it operates out of someone's home.

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Many Americans are willing and able to work now, and others want to return to work as soon as it is safe. These reforms can help ensure that government does not become a barrier to their success.

## **COSTLY PERMISSION BEFORE INNOVATION**

From food carts selling hot dogs to small storefronts selling household goods to tech-savvy innovators striking out on their own, Americans have long treasured the freedom to start their own businesses to provide for themselves, their families, and their communities.

Economic freedom boosts people's standard of living and is one of the most effective tools in bringing people out of poverty.<sup>3</sup> Economic freedom is essential to human flourishing because it allows people to create wealth by pursuing their passions. As Mercatus Center at George Mason University scholar Adam Thierer puts it, "If you are not free to innovate, you are not free to pursue happiness."<sup>4</sup>

While modern technology makes entrepreneurship easier than ever, red tape routinely makes it hard to get started. From occupational licensing laws to complex building codes, government regulations often thwart entrepreneurship by requiring a bureaucratic stamp of approval before a person may open a business, even if that business poses no threat to public health or safety.

Sixty years ago, only 1 in 20 jobs required some form of government permission. Today, more than a quarter of American workers are subject to occupational licensing.<sup>5</sup> And while fewer than 30 occupations are licensed in all 50 states today (mostly in the medical, dental, or mental health professions), more than half of all state-licensed occupations are only licensed in at least one state, which is strong evidence that these requirements do not actually protect public safety. These occupations include graphic designer, audio engineer, braille instructor, and travel agent.<sup>6</sup> In these cases, licensing laws require years of expensive training and burdensome licensing tests not to protect public safety, but to prevent economic competition in ways that benefit those fortunate enough to already have licenses.

Licensing is often of little value to consumers. They typically add little or nothing to the protections already provided by general laws against fraudulent or dangerous practices. Indeed, most recent studies show that licensure has little impact on quality (and that impact is often negative), tends to raise prices, and has a disparate impact on minority populations.<sup>7</sup> Competition, not licensing, is what ensures that businesses improve quality and lower prices.

Even worse is that fact that licensing and permitting requirements are often phrased in vague language (such as laws that allow officials to grant a license for "good cause"). Applicants are often given no specific timeframe specifying when their applications will be granted or denied, and those wrongly denied permits must often appeal such decisions through administrative agency

hearings that do not follow the rules of evidence and procedure that courts of law must obey. Any applicant who does try to push back against excessive restrictions on free enterprise must bear the cost. Some entrepreneurs have recently met with success in persuading legislatures to eliminate particularly egregious licensing requirements or have won lawsuits challenging the constitutionality of especially arbitrary licensing laws. But doing so typically takes years and costs thousands of dollars.

When the immediate threat of large-scale infection has subsided and America begins to move on to recovery, state policymakers must adopt legal reforms that give Americans the freedom they need to rebuild.

### **PRESUMPTION OF ECONOMIC LIBERTY**

Of all the rights Americans cherish, the freedom to earn a living receives the least protection under the law.

Under existing legal precedent, courts examine challenges to government restrictions on individual liberty using different standards of review. If the restriction applies to freedom of speech—for example, by imposing a licensing requirement for expression—a court uses what lawyers call “strict scrutiny.” Virtually no law survives this stringent test, which requires the government to show a compelling reason for the restriction and prove that it is “narrowly tailored,” meaning the law must do only what the legislature intended, and nothing more.<sup>8</sup>

By contrast, in cases involving economic freedom, courts apply the far more lenient “rational basis” test—a standard so deferential to the regulators that the individual challenging the law must prove that it’s positively irrational (that is, must prove a negative). Under this test, judges can even invent their own imaginary reasons to uphold the challenged law. That makes it almost impossible for the challengers to win.

That’s not how the land of opportunity should work. America’s system of government should presume the right to earn a living and require regulators to provide a genuinely persuasive justification for restricting that right. This requires shifting the burden of proof from the challenger to the regulator.

The model legislation the Right to Earn a Living Act does exactly this. This state-level reform requires the government to show that restrictions on a person’s economic freedom are necessary to fulfill an actual public health, safety, or welfare need and forbids the government from interfering with economic opportunity simply to prevent competition against existing firms.

Government is already required to prove a person’s guilt when it seeks to jail that person. It is already required to prove limits on the freedoms of speech or religion are justified by strong rea-

sons. So, too, should the government be required to prove that its restrictions on economic freedom are justified by genuinely public reasons.

### **FAIR PLAY RULES FOR PERMITS**

Licensing and permit requirements are supposed to protect public safety. In reality, they often hinder economic growth and productivity because of vagueness and long delays. Obscure or incomprehensible permit requirements give bureaucrats leverage to make excessive demands of applicants, and the lack of deadlines enables them to indefinitely postpone permit applications, knowing that applicants typically have no legal recourse until a final decision is made.

These problems are why state and federal governments have responded to the COVID-19 pandemic by waiving or revising countless regulations that require licenses and permits.<sup>9</sup> That's a wise course, and there's no reason that these suspensions should be temporary. Instead, lawmakers should act promptly to enact permanent, common-sense procedural reforms to protect the rights of people who apply for permits or licenses.

In fact, the US Supreme Court has already pointed the way. In the 1950s, it issued a series of decisions holding that, while the government can require people to get permits, it must provide three basic “procedural safeguards,” or rules of fair play, for anyone who requests a permit. Unfortunately, states have often disregarded these requirements.<sup>10</sup>

Many permit requirements include ambiguous and undefined terms, such as requiring that the applicant have “good character” or that the proposed building have an “appropriate” appearance—terms that are never defined and thus mean whatever the government says they mean. Permit requirements often include no deadline, leaving applicants largely at the mercy of bureaucratic agencies. And frequently, people who are denied permits may appeal only by going through administrative hearings, which lack the due process protections promised by state and federal constitutions.<sup>11</sup>

To address these concerns, the model Permit Freedom Act includes three procedural safeguards for anyone who asks permission of a state agency or local government:

1. Government must provide clear criteria for granting or denying permits (no vague standards like “good cause”).
2. Government must provide an explicit deadline for when it will make its decision.
3. If the permit is denied, the individual may appeal to court, where he or she may present evidence and the government bears the burden of justifying its denial of the permit.<sup>12</sup>

When the economy is not in crisis, policymakers can afford to turn a blind eye to slow, cumbersome, complicated bureaucracy. But now that productivity and rebuilding are so essential to America's

economic survival and to Americans' physical health, a rational and clear regulatory system is imperative. It is time to eradicate these vague, sluggish, and arbitrary licensing requirements.

## **PROTECTING THE RIGHT TO WORK FROM HOME**

Advances in technology have empowered entrepreneurs to start businesses from their homes and realize their dreams of self-employment. Now, as Americans grapple with the coronavirus healthcare crisis, the ability to earn a living from home is of even greater importance. More than ever, lawmakers should eliminate unnecessary restrictions on home-based businesses so people can continue providing needed services while social distancing.

Unfortunately, cities and counties still apply outdated zoning, licensing, and permitting regulations to home-based businesses, stifling flexibility and economic opportunity.<sup>13</sup> This often prohibits people from earning money by providing services from home, such as cutting hair, giving music lessons, tutoring schoolchildren, teaching yoga, running an online retail business, or doing people's taxes. Many cities prohibit home-based businesses from employing any off-site nonresidents. Some even make operating home-based businesses a *crime*, punishable by stiff fines and even jail time.<sup>14</sup>

Outlawing home-based businesses makes no sense in most cases. If it is legal to do one's *own* taxes at the kitchen table, there's no reason an accountant should be punished for doing someone else's taxes in her home office. If a mother can teach her daughter to play the violin in her living room, it's irrational for the government to penalize her for teaching someone else's daughter in the same living room for money.

The Home-Based Business Fairness Act is a model state law that modernizes outmoded approaches to regulating home-based businesses in common-sense ways. It allows cities to require that homes be used primarily as residences (so there is no risk of shopping centers cropping up in residential neighborhoods) and to bar excessive traffic or visual nuisances such as signs. But it otherwise protects people's right to work from home without obtaining costly, time-consuming home occupation permits, so long as they do not cause disruption to the residential area. If a person's work has no harmful effect on the community, government should not deny him or her the right to work from home.

In these uncertain times, government should do everything it can to make it easier for people to find and sustain work. It shouldn't turn honest, hardworking people into outlaws. Legislators can achieve this goal by protecting people's rights to safely and peacefully work from home without having to get government permission.<sup>15</sup>

## CONCLUSION

A hallmark of American freedom is the right to earn a living for oneself and one's family. With many businesses shuttering indefinitely because of the battle with COVID-19, government should find every possible way to clear the road for people looking to earn an honest living and serve their communities' needs, especially as the immediate threat to Americans' health abates. One of the first steps toward ensuring that Americans recover from this crisis is for policymakers to reform today's expensive, tedious, and often futile permitting processes and to empower people to pursue the American dream.

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## NOTES

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