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TESTIMONY OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF A RIGHT TO EARN A LIVING ACT

Chairman Stafsholt, Vice-Chairman Sortwell, and Members of the Study Committee on Occupational Licenses:

My name is Anthony LoCoco and I am an attorney at the Wisconsin Institute for Law & Liberty. My testimony will focus on the significant benefits to be gained from passing a Right to Earn a Living Act in Wisconsin. This testimony is in three parts: first, I will discuss the problem that a Right to Earn a Living Act is meant to solve; second, I will explain how the Act solves that problem; and third, I will briefly summarize potential components of the Act.

The Problem. First, the problem. As the members of this Committee well know, there are many occupational regulations on the books in Wisconsin and while some of them are important and justified, others may be arbitrary, overly oppressive, or otherwise unfair. Of course, it is not feasible to expect the Legislature to identify and take action on all unjustified occupational regulations enforced by the executive branch in advance. Sometimes Wisconsin workers will have to go to court to seek relief.

Therein lies the problem. Unlike in areas such as free speech, religious liberty, or the right to keep and bear arms, the federal and state constitutions impose very limited restraints on the ability of our state government to regulate workers and businesses. Most of the time, courts are going to apply what lawyers call "rational basis review" when assessing the lawfulness of occupational regulations. It is difficult to overstate how low of a bar this is. To pass rational basis review, an occupational regulation need only have a "rational relationship" to any "legitimate government interest."[1] And it need not even be an interest that the agency was actually pursuing—any interest a lawyer or court can think up after the fact will do.[2] Essentially, then, only a "patently arbitrary" regulation will flunk rational basis review.[3] Virtually any law will meet this test. This leaves untouchable many laws that should not be on the books even if they are not technically arbitrary in the true sense of that word.

Let me give an example. In 2016, my firm sued the State of Wisconsin and the Wisconsin Funeral Directors Examining Board on behalf of a cemetery and one of its owners.[4] We challenged a law that barred Wisconsinites from owning or operating both cemeteries and funeral homes

[1] *See, e.g.*, *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶36, 366 Wis. 2d 1, 878 N.W.2d 109.
[2] *Id.*
[3] *Id.*
[4] *Porter v. State*, 2018 WI 79, ¶2, 382 Wis. 2d 697, 913 N.W.2d 842.

simultaneously.[5] The legislative history of this bizarre law, which was preventing our clients from pursuing a lawful occupation, indicated that the law was requested, sponsored, and drafted by the Wisconsin Funeral Directors and Embalmers Association.[6] In other words, there was good evidence that this anti-combination law was a simple attempt by funeral directors to limit competition from cemetery owners. But the Court upheld the law because rational basis review applied and the Court was not willing to say that the law was irrational.

That case shows how difficult it is for Wisconsinites to obtain judicial relief when fighting unjust economic laws. Wisconsin workers do not have the tools they need to challenge occupational regulations on the merits in court when state agencies go too far. That is where the Right to Earn a Living Act comes in.

The Solution. In simple terms, the Right to Earn a Living Act would raise the standard of review that courts apply when assessing the lawfulness of occupational regulations from rational basis to something modestly more demanding. It would not raise it so high as to require agencies to pass the types of tests we use in areas like free speech or religious liberty—known as strict scrutiny—but instead would impose an intermediate level of review. This would demand a little more care of our agencies when they draft occupational restrictions while still providing them the breathing room that is appropriate in the sphere of economic regulation.

There are various formulations of an appropriate standard available. But as an example I will quote from model legislation proposed by the Goldwater Institute, a think tank based in Arizona that has done a lot of work in this area and which successfully obtained enactment of a Right to Earn a Living Act in that state. Goldwater's model legislation applies the following standard to specified occupational regulations: "All entry regulations with respect to businesses and professions shall be limited to those demonstrably necessary and carefully tailored to fulfill legitimate public health, safety, or welfare objectives."[7]

The Legislature could certainly tinker with this language to reach the level of judicial review it finds appropriate. For example, instead of "legitimate" public health, safety, or welfare objectives, the Legislature could require "important" objectives, a higher standard. Or instead of mandating "careful tailoring" by the agency, the Legislature could lower the standard to requiring something like a "substantial" relationship between a law and the agency's goals. But the point is that rational basis review, which is no obstacle at all, would no longer apply in the area of occupational regulation. Occupational regulations that do not pursue important enough objectives, or that are not sufficiently proven to achieve those objectives, are unlawful and can be struck down in court.

Potential Components of the Act. Before concluding I would like to briefly discuss some other aspects of Goldwater's Right to Earn a Living Act because the Act does more than simply heighten the standard of review of occupational regulations; it contains a handful of other sections that may be of interest to this Committee.

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[5] *Id.*
[6] *Id.* at ¶55 (R.G. Bradley & Kelly, JJ., dissenting).
[7] Clint Bolick, Right to Earn a Living Act, Goldwater Institute (2016), *available at* https://www.goldwaterinstitute.org/wp-content/uploads/2016/01/Right-to-Earn-a-living-1.pdf.

First, the law requires agencies to conduct comprehensive reviews of occupational regulations, articulate how each regulation meets the standard set in the Act, repeal or modify those regulations that do not meet the Act's standard, and then report back to the Legislature within a set timeframe.

Second, the Act provides workers with the ability to petition an agency to repeal or modify specified regulations and, if that occurs, requires the agency in question to either repeal or modify the regulation or state why it complies with the Act's standard within 90 days.

Third, if administrative proceedings fail, the Act provides workers with a cause of action that awards attorney's fees and costs if the worker prevails.

Finally, the Act contains a preemption provision to prevent local municipalities from regulating occupations in a way inconsistent with state-level regulations.

Taken together, these provisions would go a long way toward creating a more favorable environment for Wisconsin workers by ensuring that when our agencies restrict the ability of Wisconsinites to pursue a lawful occupation, they have good reasons for doing so.

Thank you for your time. I would be happy to answer any questions you may have regarding my testimony.