

# LEGAL MEMORANDUM

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## Eliminating State Occupational Licensing Barriers to the Enlistment and Retention of Servicemembers: The Portable Certification of Spouses Act of 2019

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### Abstract

*To maintain a skilled voluntary fighting force, the armed forces must be able both to encourage people to enlist and to retain already serving personnel. State occupational licensing requirements impose a considerable obstacle to those goals. More than one-third of military spouses work in licensed fields, and servicemembers are transferred an average of nine times during their careers. Because states do not always treat licenses granted elsewhere as valid within their borders, spouses of servicemembers must repeat their past education and training at considerable cost. The relicensing burden affects military preparedness by discouraging soldiers and sailors from entering or remaining in the military. The Portable Certification of Spouses Act of 2019 would take a step toward lightening that burden.*

### Introduction

Protecting the safety of the nation demands not only that we have sufficient hardware and software to project force and communicate securely with our forces, but also a large, well-trained cadre of warriors ready to perform whenever called upon to do so. No one ever became rich wearing the nation's uniform, however, and servicemembers face economic challenges greater than those faced by most civilians. Most spouses of soldiers, sailors, and airmen must work to make ends meet, or want to do so to pursue their own careers. Yet even in today's booming economy, finding work can be difficult for a large number of military spouses because of obstacles that states place in the way of their employment.

Those state-law barriers are occupational licensing requirements. Congress has the opportunity, however, to alleviate the economic

### KEY POINTS

- To maintain a skilled voluntary fighting force, the armed forces must be able both to encourage people to enlist and to retain already serving personnel.
- State occupational licensing requirements, however, impose a considerable obstacle to those goals.
- Because states do not always treat licenses granted elsewhere as valid within their borders, spouses of servicemembers must repeat their past education and training at considerable cost.
- By discouraging soldiers, sailors, and airmen from entering or remaining in the military, the relicensing burden negatively affects military preparedness.
- The Portable Certification of Spouses Act of 2019 would take a salutary step toward lightening that burden by eliminating a state disincentive to attracting or maintaining well-trained armed forces.

This paper, in its entirety, can be found at <http://report.heritage.org/lm246>

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problems that state licensing laws impose on members of the military, their families, and the armed forces. The nation would be well served with those barriers out of the way.

### **The Harms Imposed by Occupational Licensing Requirements**

Occupational licensing rules have existed in America since colonial days, but they have become a serious problem in America only during the past 60 years.<sup>1</sup> Until the 1950s, only 5 percent of workers were licensed, and most of them were employed in professional fields like medicine, the law, and accounting, where licensing makes eminent sense. Since then, however, that number has leapt to more than 1,100 occupations encompassing roughly 30–35 percent of the workforce, particularly in service industries.<sup>2</sup> Today, states require licenses for a host of positions—such as ballroom dance instructors, barbers, cosmetologists, florists, interior designers, taxi drivers, travel guides, home entertainment installers, photographers, and turtle farmers—that involve no remote risk to public safety, health, and welfare.<sup>3</sup>

Why, then, have we seen this boom in occupational licensing? Not because hiring an unlicensed interior designer puts the public at risk of death or grave bodily injury, and not because licensing is the only way to ensure that photographers have the credentials necessary to perform satisfactorily. No, occupational licensing schemes become law because they create legalized cartels.<sup>4</sup> Cosmetologists, for example, would like to band together to limit competition from new entrants into their field who might offer their services at a lower price, but the federal antitrust laws prohibit such combinations to restrain trade.

Accordingly, to eliminate rivalry, competitors persuade the state legislatures to do their dirty work for them by adopting a licensing requirement (that grandfathers them in, of course). The result is a reduction in the supply of a particular service, which thereby increases the price that licensed parties can charge without producing any corresponding increase in the safety or quality of the service provided.<sup>5</sup> It's good work if you can get it.

Aggravating the harms caused by licenses is the frequent reluctance or unwillingness of states to recognize licenses granted in other states. The effect is to force already licensed parties to start their licensing process anew and incur considerable expense in

the process.<sup>6</sup> That is a particular burden for military spouses. “Thirty-five percent of military spouses work in licensed fields, and they are ten times more likely than civilians to relocate interstate.”<sup>7</sup> Any policy that lightens that burden would be a boon to the armed forces.

### **Protecting the Spouses of Servicemembers from Those Harms**

Recently, a bipartisan group of Senators and Representatives—Senators Tom Cotton (R-AR), Jeanne Shaheen (D-NH), and Martha McSally (R-AZ) and Representatives Jim Banks (R-IN) and Susan Davis (D-CA)—decided to take a small step toward eliminating the barriers that those cartels impose on the spouses of servicemembers.<sup>8</sup> They introduced identical companion legislation in the Senate and House of Representatives, the Portable Certification of Spouses Act of 2019 (or PCS Act),<sup>9</sup> that would nudge the states in the direction of lifting those artificial restraints on competition.

The PCS Act would work in two ways:

- **Section 1** deals with the registration of a business. It would deem a spouse to be a resident of a state from which he or she moved to accompany a military spouse. Section 1 would also enable a spouse to use the same state residence as his or her servicemember wife or husband, regardless of the date of their marriage.
- **Section 2** deals with occupational licenses. It authorizes the Secretary of Defense, for five years, to enter into a cooperative agreement with the Council of State Governments that would assist the funding of interstate compacts that avoid the burden of a spouse needing to become relicensed in connection with “a permanent change of duty station” of servicemembers to another state.

The bill would serve an important need for servicemembers, their spouses, and their families. There is no federal law establishing uniform licensing requirements for various professions; the states handle that responsibility. One-third of military spouses work in a field subject to a state licensing requirement, and they are often forced to obtain a new one whenever a servicemember is transferred interstate. Military families also move often, usually at least nine times in an average career.

There is an enormous variety both in the licensing requirements that different states impose and in their willingness to accept a different state's certification. Recertifying under a new state's laws can cost a military spouse hundreds of hours of needless education and training, along with thousands of dollars in education expenses and fees, just to practice in a field for which he or she is already qualified in a different state.

The prospect of needing to requalify from scratch can deter servicemembers from "reupping" whenever there is a risk that they will be transferred elsewhere within the United States. Because that risk *always* exists, soldiers and sailors can be forced to leave the military at the end of their tours simply because they cannot afford to live on military pay. That prospect could also deter civilians from entering the military in the first place. Because America has an all-volunteer army, we cannot afford to let the states impede our military preparedness by imposing onerous licensing requirements.

### **Congress's Powers to Protect the Armed Forces from Those Harms**

Congress has the constitutional authority to displace state laws creating anticompetitive guilds adopted under the guise of protecting the public welfare. Article I of the Constitution authorizes Congress to create and maintain an army and a navy,<sup>10</sup> and the Necessary and Proper Clause<sup>11</sup> empowers Congress to take reasonable steps to prevent the states from interfering with our national defense.<sup>12</sup> If Congress found that state occupational licensing rules burdened the ability to travel in interstate commerce, Congress could invoke its authority under the Commerce Clause of Article I as another basis to prevent the states from interfering with military preparedness.<sup>13</sup> Finally, Congress has the power to remove state roadblocks to the constitutional right to interstate migration,<sup>14</sup> a right protected by the Privileges or Immunities Clause of the Fourteenth Amendment,<sup>15</sup> by exercising its power under Section 5 of that amendment, the Enforcement Clause.<sup>16</sup>

The PCS Act, however, would not erase all state occupational licensing requirements, even for military spouses. It is a modest measure designed, to borrow a phrase from Professors Richard Thaler and Cass Sunstein, simply to "nudge" the states in the right direction.<sup>17</sup> For that reason, it is by no means clear that Congress must approve any agreement among the states to allow military spouses to transfer their licenses, because such agreements would not "enhance state power to the detriment of federal supremacy."<sup>18</sup> Given the legitimacy and strength of the government's interests and the absence of any affirmative burden that the act would impose on the states, one would think (or at least hope) that it would be difficult to oppose the policies underlying the bill.

### **Conclusion**

It is a mistake to assume that the only way to maintain our military's strength is to purchase new aircraft, submarines, and tanks. Encouraging people to enter military service and retaining already trained personnel are critical to our ability to deter aggression and overcome whatever we cannot scare off. The Portable Certification of Spouses Act of 2019 is a modest attempt to defend the nation by eliminating a disincentive that the states place in the way of attracting or maintaining well-trained armed forces. Congress has the authority to go much farther and force the states to open their markets to military spouses holding a license in a different state, and such a measure would be a valuable step toward the dismantling of state-created cartels. This act might take only a small step toward that goal, but it certainly is a step in the right direction.

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## Endnotes

1. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 212-13 (2016).
2. See, e.g., THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 17 (2015) [hereafter WHITE HOUSE OL FRAMEWORK].
3. See Kevin Dayaratna, Paul J. Larkin, Jr. & John O'Shea, *Reforming American Medical Licensure*, 42 HARV. J. L. & PUB. POL'Y 253, 254-56 (2019).
4. See Larkin, *supra* note 1, at 235-37 ("Occupational licensing requirements have been criticized on several grounds. The most common has been that they hijack state power for the benefit of a few. They limit the number of service providers, thereby allowing the members of a given trade to avoid competition and raise prices, without supplying the corresponding service quality improvement promised to consumers.... The effect of licensing is to create a cartel that supplies its members with economic rents on an ongoing basis because entry restrictions operate like a 'hidden subsidy' to licensees.... Licensing requirements give licensees a 'premium' of four to thirty-five percent above the competitive price.") (internal citations omitted).
5. See, e.g., WHITE HOUSE OL FRAMEWORK, *supra* note 2, at 12-13; Larkin, *supra* note 1, at 222-25 (discussing the alleged safety-promoting and information-providing justifications for occupational licensing).
6. See Larkin, *supra* note 1, at 239-40 ("States do not regularly recognize a license issued in the state of origin, forcing an individual to begin anew the oftentimes lengthy and costly education and training process, to abandon a profitable occupation, or to practice it illegally.").
7. *Id.* at 240; see, e.g., WHITE HOUSE OL FRAMEWORK, *supra* note 2, at 10; NELSON LIM ET AL., RAND NAT'L DEF. RES. INST., "WORKING AROUND THE MILITARY" REVISITED: SPOUSE EMPLOYMENT IN THE 2000 CENSUS DATA 3 (2007); EXECUTIVE OFFICE OF THE PRESIDENT, THE FAST TRACK TO CIVILIAN EMPLOYMENT: STREAMLINING CREDENTIALING AND LICENSING FOR SERVICE MEMBERS, VETERANS, AND THEIR SPOUSES (2013); U.S. DEP'TS OF THE TREASURY AND DEFENSE, SUPPORTING OUR MILITARY FAMILIES: BEST PRACTICES FOR STREAMLINING OCCUPATIONAL LICENSING ACROSS STATE LINES (2012); U.S. Dep't of Defense, Issue 2: *Removing Licensure Impediments for Transitioning Military Spouses*, USA4MilitaryFamilies.dod.mil, [http://www.usa4militaryfamilies.dod.mil/MOS/f?p=USA4:ISSUE:0::::P2\\_ISSUE:2](http://www.usa4militaryfamilies.dod.mil/MOS/f?p=USA4:ISSUE:0::::P2_ISSUE:2) [<http://perma.cc/9WCE-3QET>]. Some states grant temporary licenses or expedite the licensing process. STREAMLINING CREDENTIALING, *supra*, at 3-4. Those efforts, however, do not fully solve the problem. Larkin, *supra* note 1, at 240 n.147.
8. See Press Release, Cotton, *Shaheen Introduce the Portable Certification of Spouses (PCS) Act of 2019*, Off. of Senator Tom Cotton (May 9, 2019), [https://www.cotton.senate.gov/?p=press\\_release&id=1120](https://www.cotton.senate.gov/?p=press_release&id=1120).
9. The text of the bill can be found at <https://www.cotton.senate.gov/files/documents/Cotton-Shaheen%20PCS%20Legislation.pdf>.
10. U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have Power...[t]o raise and support Armies...."); *id.* cl. 13 ("The Congress shall have Power...[t]o provide and maintain a Navy....").
11. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power...[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers....").
12. U.S. CONST. pmbl. ("WE THE PEOPLE of the United States, in Order to...provide for the common defense...do ordain and establish this Constitution of the United States of America.").
13. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power...[t]o regulate Commerce...among the several States....").
14. See *Saenz v. Roe*, 526 U.S. 489, 502-03 (1999).
15. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....").
16. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); see *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.") (footnote omitted).
17. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).
18. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460 (1978). The Compact Clause, U.S. Const. art. I, § 10, cl. 3, provides that "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State...." The Supreme Court of the United States has not read that clause literally. Under the Court's ruling in *U.S. Steel Corp. v. Multistate Tax Comm'n*, the states must submit to Congress for its approval only those interstate compacts that threaten federal power. The compacts contemplated by the PCS Act would not appear to do so.