

Oral and Written Testimony before the Senate Commerce Committee re: SB10

January 27, 2021

Chairman and Honorable Committee Members,

The Kansas State Board of Healing Arts (“Board”) submits this testimony to assist legislators in evaluating SB10. The Board licenses and regulates more than 32,000 Kansas healthcare providers in 16 different healthcare professions. I am Tucker Poling, Executive Director of the Board. The Board opposes this bill because:

- It would – in practice – **prevent the Board from performing its statutory duties of public protection** described below because it would essentially eliminate the ability to feasibly maintain public health and safety rules for the practice of any profession or occupation in Kansas.
- If the legislature sees fit to modify the scope of regulations permitted for any statute, the more efficient and appropriate method to implement your legislative intent would be to address the existing statutory authority for regulations. **It would be inconsistent to create new and overlapping standards for the scope of regulations rather than addressing the existing statutory enabling clauses.** Further, many of these statutory clauses *mandate* that boards promulgate specific regulations – it would be wasteful and inefficient to mandate these regulations but then set them up to be the subject of a time consuming and costly litigation process and repealed unless they meet a “strict scrutiny” standard of judicial review.
- **Manageable judicial review of regulations already exists** under the Kansas Judicial Review Act (“KJRA”), allowing any regulation to be overruled if it is found to be unreasonable. See KSA 77-602(b)(1); 77-602(i) 77-611(c); 77-613(a); 77-621(c)(8); 77-622(b).
- Our research indicates that, although this model bill¹ has been offered in many states, **the only state that has adopted the substantial equivalent of this bill is Tennessee – and the healthcare professions were exempted** from that bill (Tennessee bill attached). If the legislature moves forward with this bill, the Board suggests it exempt the healthcare professions to protect public safety.

However, the Board would support efforts to achieve more focused, efficient, practical, and updated professional regulations. Below, the Board describes (I) concerns with the bill and

¹ This bill appears to be model legislation (American Legislative Exchange Council (“ALEC”))¹ first drafted by ALEC in 2013. ([Right to Earn a Living Act - American Legislative Exchange Council \(alec.org\)](http://alec.org))

then (II) respectfully suggests consideration of alternative approaches to achieving the goal of more focused, efficient, practical, and updated professional regulations.

The mission of the Board is public protection, based on the statutory recognition that has been **part of the bedrock of Kansas law for more than 60 years** “that the practice of the healing arts is a privilege . . . and is not a natural right of individuals” and that “provisions covering the granting of that privilege and its subsequent use, control and regulation” be directed toward “the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of the healing arts and from unprofessional conduct by persons licensed to practice . . .” See K.S.A. 65-2801, et seq.

I. Concerns.

Among the most problematic aspects of this bill are:

- SB10 creates a **new fundamental civil right** under Kansas law that contradicts the most basic legal premises on which the practice of the healing arts in Kansas have been founded (quoted above).
 - Creates new grounds for **civil litigation** against regulatory agencies anytime a rule or regulation affects any individual’s pursuit of any profession notwithstanding whether they are well qualified to practice that profession and notwithstanding whether their professional conduct conforms to rules promoting health and safety.
 - Creation of a new fundamental civil right in Kansas may also expand the potential scope of civil **liability exposure for private employers**, and new avenues of civil rights litigation to attack anything that affects an individual’s “fundamental right” to pursue any profession they choose notwithstanding the quality of their qualifications and professional conduct in the workplace.
- Section (d)(2) of section 3 appears to implement the equivalent of the “**strict scrutiny**” **legal standard** to maintain any regulation of a profession.
 - This legal standard is very difficult to meet.
 - This would likely result in very few regulations surviving any court action under subparagraph (d) of section (3).
 - Further, the agency (and/or state general fund) would be forced to **pay the fees of plaintiffs’ attorneys** who are likely to file as many lawsuits as possible under this law.
- Extensive **new and costly administrative requirements** on regulatory agencies. These increased costs are ultimately shouldered by Kansas residents.
 - The agency has a minimum of 200 regulations related to the 16 professions we license and regulate.

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- Each will have to be reviewed and analyzed in detail prior to July 1, 2022.
 - Agency must determine if the regulation meets the stringent new requirements of Section 2 subsections (a), Section 3 subsection (d)(2), and Section 1 subsection (b)(4).
 - Then, for each regulation, each year, describe “with specificity” the conclusions as to each regulation.
- It would be inconsistent to create **new and overlapping standards for the scope of regulations rather than addressing the existing statutory enabling clauses**. Further, many of these statutory clauses *mandate* that boards promulgate specific regulations – it would be wasteful and inefficient to mandate these regulations but then set them up to be the subject of a time consuming and costly litigation process and repealed unless they meet a “strict scrutiny” standard of judicial review.
- **Manageable judicial review of regulations already exists** under the Kansas Judicial Review Act (“KJRA”), allowing any regulation to be overruled if it is found to be unreasonable. See KSA 77-602(b)(1); 77-602(i) 77-611(c); 77-613(a); 77-621(c)(8); 77-622(b).

II. Potential alternative approaches.

The Board supports efforts to make professional regulations more focused, efficient, practical, and updated, but this bill would not safely and effectively support that goal. A few alternative options that the Board suggests could be considered are:

- **Revising existing regulatory enabling clauses in statutes** to narrow the scope of regulations and reduce or eliminate mandates to promulgate regulations. All authority for regulations comes from the legislature in statutes. You already have the power to narrow the scope of regulations in a targeted manner by addressing the issue at the statutory roots.
- **Making the process for reducing or deleting regulations more efficient.**
 - The regulation promulgations process has become increasingly burdensome in recent years.
 - Currently the process of either deleting or reducing regulations is just as burdensome as the process of creating new regulations.
 - The Board would support efforts to reduce bureaucratic steps in the process of deleting or reducing regulations, such as eliminating the need to submit economic impact statements and obtain approval by three other state agencies before such a

deletion or revision can even be considered by the Joint Committee on Rules and Regulations or considered for final approval by the regulatory agency.

- Reducing duplicative processes in the regulation promulgation process.
 - For example, the required hearing before the Joint Committee on Rules and Regulations could be combined with the public hearing required by the statutes into a single, more effective and more visible hearing with advance public notice. This could reduce duplicative process and improve transparency of the process for both legislators and the public.
- **Creating a collaborative process** to consider the issue of how to make professional regulations more efficient, focused, practical, and updated.
 - The Board notes that last month the [results of a four-year review of state occupational licensing, with a focus on efforts to expand licensure access and portability](#), were released.² This report was the culmination of the work of a consortium including the National Conference of State Legislatures, the Council of State Governments, and the National Governors Association for Best Practices. These partner organizations worked with teams from 11 states to help them address their goals around licensing access and portability. Among the key “Lessons Learned” findings in this report were:
 - The value of focusing on targeted professions and the challenges of attempting broad stroke reforms that do not appropriately account for industry/profession-specific variation.³ **We note that it does not appear healthcare professions were generally found to be among the appropriate professions to target.**⁴
 - A broader, more diverse set of stakeholders – including regulatory agencies – when considering strategies and tactics to effectively reduce unnecessary occupational/professional barriers tends to achieve more effective results.⁵

Thank you for considering this testimony. I welcome any comments, questions, or further dialogue with members of the committee. Please feel free to contact me on my cell (785-760-0686) at any time or via email at tucker.poling@ks.gov .

Sincerely,



Tucker L. Poling
Executive Director

² https://www.ncsl.org/Portals/1/Documents/Labor/NCSL_DOL_Report_05_web_REVISED.pdf

³ See pages 12, 18, 64.

⁴ See pages 12, 18, 64.

⁵ See page 57.



State of Tennessee

PUBLIC CHAPTER NO. 1053

SENATE BILL NO. 2469

By Green, Johnson, Roberts, Bell, Gresham, Stevens, Beavers, Bowling, Crowe, Dickerson, Niceley, Norris

Substituted for: House Bill No. 2201

By Daniel, Reedy, Sanderson, Zachary, Jerry Sexton, Terry, Hazlewood, Holt, Hardaway, Lynn

AN ACT to amend Tennessee Code Annotated, Title 4; Title 7; Title 38; Title 62; Title 63 and Title 67, relative to businesses, professions, and occupations.

WHEREAS, the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right; and

WHEREAS, the freedom to earn an honest living traditionally has provided the surest means for economic mobility; and

WHEREAS, in recent years, many regulations of entry into businesses and professions have exceeded legitimate public purposes and have had the effect of arbitrarily limiting entry and reducing competition; and

WHEREAS, the burden of excessive regulation is borne most heavily by individuals outside the economic mainstream, for whom opportunities for economic advancement are curtailed; and

WHEREAS, it is in the public interest to ensure the right of all individuals to pursue legitimate entrepreneurial and professional opportunities to the limits of their talent and ambition; to provide the means for the vindication of this right; and to ensure that regulations of entry into businesses, professions, and occupations are demonstrably necessary and narrowly tailored to legitimate health, safety, and welfare objectives; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "Right to Earn a Living Act".

SECTION 2. Tennessee Code Annotated, Title 4, Chapter 5, is amended by adding the following language as a new part:

4-5-501. As used in this part:

(1) "Entry regulation" means:

(A) Any rule promulgated by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any rule prescribing qualifications or requirements for a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; or

(B) Any policy or practice of a licensing authority that is established, adopted, or implemented by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any policy or practice relating to the qualifications or requirements of a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; and

(2) "Licensing authority" means any state regulatory board, commission, council, or committee in the executive branch of state government established by

Exempts healings arts professions (title 63), which in Tenn includes nursing, pharmacy, dentistry. Also exempts hospitals and EMT services (title 68, chapters 11 and 140).

Instead of shifting entire burden of review of regs to agencies, creates a system of shared responsibility with legislative review committee.

statute or rule that issues any license, certificate, registration, certification, permit, or other similar document for the purpose of entry into, or regulation of, any occupational or professional group. "Licensing authority" does not include any state regulatory board, commission, council, or committee that regulates a person under title 63 or title 68, chapter 11 or 140.

4-5-502.

(a)(1) No later than December 31, 2016, each licensing authority shall submit a copy of all existing or pending entry regulations pertaining to the licensing authority and an aggregate list of such entry regulations to the chairs of the government operations committees of the senate and house of representatives. The committees shall conduct a study of such entry regulations and may, at the committees' discretion, conduct a hearing regarding the entry regulations submitted by any licensing authority. The committees shall issue a joint report regarding the committees' findings and recommendations to the general assembly no later than January 1, 2018.

(2) After January 1, 2018, each licensing authority shall, prior to the next occurring hearing regarding the licensing authority held pursuant to § 4-29-104, submit to the chairs of the government operations committees of the senate and house of representatives a copy of any entry regulation promulgated by or relating to the licensing authority after the date of the submission pursuant to subdivision (a)(1). The appropriate subcommittees of the government operations committees shall consider the licensing authority's submission as part of the governmental entity review process and shall take any action relative to subsections (b)-(d) as a joint evaluation committee. Prior to each subsequent hearing held pursuant to § 4-29-104, the licensing authority shall submit any entry regulation promulgated or adopted after the submission for the previous hearing.

(3) In addition to the process established in subdivisions (a)(1) and (2), the chairs of the government operations committees of the senate and house of representatives may request that a licensing authority present specific entry regulations for the committees' review pursuant to this section at any meeting of the committees.

(4) Notwithstanding this subsection (a), the governor or the commissioner of any department created pursuant to title 4, chapter 3, relative to a licensing authority attached to the commissioner's department, may request the chairs of the government operations committees of the senate and house of representatives to review, at the committees' discretion, specific entry regulations pursuant to this section.

(b) During a review of entry regulations pursuant to this section, the government operations committees shall consider whether:

- (1) The entry regulations are required by state or federal law;
- (2) The entry regulations are necessary to protect the public health, safety, or welfare;
- (3) The purpose or effect of the entry regulations is to unnecessarily inhibit competition or arbitrarily deny entry into a business, trade, profession, or occupation;
- (4) The intended purpose of the entry regulations could be accomplished by less restrictive or burdensome means; and
- (5) The entry regulations are outside of the scope of the licensing authority's statutory authority to promulgate or adopt entry regulations.

(c) The government operations committees may express the committees' disapproval of an entry regulation promulgated or adopted by the licensing authority by voting to request that the licensing authority amend or repeal the entry regulation promulgated or adopted by the licensing authority if the committees determine during a review that the entry regulation:

- (1) Is not required by state or federal law; and

(2)(A) Is unnecessary to protect the public health, safety, or welfare;

(B) Is for the purpose or has the effect of unnecessarily inhibiting competition;

(C) Arbitrarily denies entry into a business, trade, profession, or occupation;

(D) With respect to its intended purpose, could be accomplished by less restrictive or burdensome means, including, but not limited to, certification, registration, bonding or insurance, inspections, or an action under the Tennessee Consumer Protection Act of 1977, compiled in title 47, chapter 18, part 1; or

(E) Is outside of the scope of the licensing authority's statutory authority to promulgate or adopt entry regulations.

(d)(1) Notice of the disapproval of an entry regulation promulgated or adopted by a licensing authority shall be posted by the secretary of state, to the administrative register on the secretary of state's web site, as soon as possible after the committee meeting in which such action was taken.

(2) If a licensing authority fails to initiate compliance with any recommendation of the government operations committees issued pursuant to subsection (c) within ninety (90) days of the issuance of the recommendation, or fails to comply with the request within a reasonable period of time, the committees may vote to request the general assembly to suspend any or all of such licensing authority's rulemaking authority for any reasonable period of time or with respect to any particular subject matter, by legislative enactment.

(e) Except as provided in subdivision (a)(2), for the purposes of reviewing any entry regulation of a licensing authority and making final recommendations under this section, the government operations committees may meet jointly or separately and, at the discretion of the chair of either committee, may form subcommittees for such purposes.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.


Sets up process for legislative publication of disapproval that would likely be effective in itself in undermining disapproved regulation.

Also adds teeth of recommendation to suspend agency's reg/ rulemaking authority.

This process is more manageable than expensive strict scrutiny civil litigation judicial review process set up model bill

SENATE BILL NO. 2469

PASSED: April 20, 2016



RON RAMSEY
SPEAKER OF THE SENATE



BETH HARWELL, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 20th day of April 2016



BILL HASLAM, GOVERNOR