TCCRI
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FREE ENTERPRISE & STATE REGULATION TASK FORCE

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I. Introduction

The 2019-20 TCCRI Task Force on Free Enterprise and State Regulation held a series of meetings throughout 2020 to discuss a variety of issues facing the state of Texas. As with all areas of public policy at this time, the COVID-19 pandemic plays heavily into the policy discussions taking place heading into the 87th Legislative Session.

One of the biggest areas in which policy changes could have a positive impact on all Texans is the area of occupational licensing. As this report lays out, numerous licensing laws and regulations have been waived or suspended during the pandemic. These waivers and suspensions have made it easier for Texans to continue to work and go about their business, and they have done so without documented negative consequences. As a result, TCCRI recommends making all waivers and suspensions of occupational licensing provisions permanent. Other occupational licensing recommendations relate to Sunset review of the Texas Department of Licensing and Regulation, implementing true reciprocity for out-of-state licensees coming to Texas, and adopting TCCRI's model legislation, the Occupational Licensing Consumer Choice Act.

Once again, a strong theme for this Task Force is local government overreach. The report discusses several policies relating to that theme, such as clarifying the state's constitutional prohibition on a state income tax to expressly prohibit local governments from adopting such a tax, and state preemption on matters such as burdensome regulations on food delivery services and short-term rental properties. The report also makes recommendations on inefficient issuance of unemployment benefits, data privacy, and food labeling laws.

As a final discussion, TCCRI's Free Enterprise and State Regulation Task Force revisits a policy debate from 2019, the abolition of the Texas State Board of Plumbing Examiners, which was set to expire because it was not statutorily reauthorized, but was extended until May 2021 by Governor Abbott. TCCRI argues that the plumbing board should be abolished, as planned and as recommended by the Sunset Commission.

II. Occupational Licensing

There is little doubt that occupational licensing—i.e., requiring the government's permission in order to pursue a specific occupation or trade—creates negative effects and distortions in the marketplace. Occupational licensing programs are estimated to reduce the rate of job growth by 20 percent and cost the country between $35 billion and $42 billion per year in decreased competition, higher prices for consumers, reduced job growth, and discouragement of innovation and investment.[i] Evidence suggests that licensed occupations that grew in employment by 10% from 1990 to 2000 would have grown by 12% without the license requirement in place.[ii] Research from the National Bureau of Economic Research estimates that state-specific licensing examination requirements may reduce interstate mobility by as much as 36%.[iii] A recent report shows that the growth in occupational licensing can decrease economic mobility, as evidenced by the fact that 31 new licenses created in each state over a 20-year period (1993-2012) correlated with a 6.7 percent decline in absolute mobility over that same period.[iv]

In addition to the negative economic effects of occupational licensing, existing research strongly suggests that licensing does little to protect consumers beyond protection that occurs within competitive labor markets. At least 19 studies have assessed the effect that occupational licensing has on quality. Twelve of those studies categorized the effects as neutral, mixed, or unclear.[v] A report issued by the Obama Administration summarizes this argument quite well:

> If licensing were able to limit the practice of an occupation to high-quality practitioners, then it would be expected to improve quality and public health and safety. A wide range of studies have examined whether this happens. With the caveats that the literature focuses on specific examples and that quality is difficult to measure, most research does not find that licensing improves quality or public health and safety.[vi]

Given the considerable negative effects, the justifications—or lack thereof—for occupational licensing should be given greater scrutiny. More than 500 professional activities require a state-issued license in Texas.[vii] Though a good number of those 500 are sublicenses within the same profession (e.g., there are different tiers of plumber licenses and cosmetology licenses), that number is still considerable.

An estimated 1,100 occupations require licensure in at least one state, but fewer than 60 of those occupations require licensure in *every* state, which suggests that the vast number of licensing laws are unnecessary.[viii] Few people could explain why interior designers require a license in three states (and the District of Colombia), but not the other 47, except maybe the interior design lobby in Nevada, Florida, and Louisiana.[ix]

A. Emergency suspensions

In the last several years, a significant number of state licensing laws and regulations have been suspended by the Governor using authority found under Section 418.016 of the Government Code:

> The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.[x]

Governor Abbott has used this authority extensively in both the aftermath of Hurricane Harvey and during the COVID-19 pandemic, with hundreds of statutes and rules still in suspension. Many of these relate to occupational licensing. Waivers include suspension of just about every registration, renewal, and continuing education requirement for health professionals, suspension of all necessary statutes and rules prohibiting out-of-state licensed health care professionals from practicing in Texas, and suspension of a host of licensing requirements for professions like plumbers, peace officers, psychologists, private security personnel, continuing education requirements of all licenses under the Texas Department of Licensing and Regulation's (TDLR's) purview within the affected counties, and many others.

1. Policy Recommendation: Make All Temporary Disaster-Related Licensing Suspensions and Waivers Permanent

The ongoing disaster declarations make clear what occupational licensing policy experts have been saying for years: *these laws are not necessary, and Texas would be better off without them.* If Texas is willing to simply extend the licenses of medical professionals by 120 days, then the terms for regular licensure should be at least that long. If continuing education or training can be conducted online in an emergency, then it can be conducted online at all times. If an out-of-state practitioner is recognized to practice in Texas during our greatest time of need during a disaster, then that person should be recognized to practice in Texas at any time.

B. Reciprocity and universal recognition

One of the best ways to break down barriers to work is to grant licensure in Texas to individuals licensed in other states. Texas has made inroads in reciprocity in recent legislative sessions with bills like Senate Bill 1200 (Campbell, 86R), which grants a three-year license in Texas for spouses of members of the military who are licensed in other states that have licensing requirements that are substantially equivalent to licensing requirements in Texas.[xi]

TDLR purports to have broad reciprocity policies with other states, but that is not necessarily the case. There are two main provisions in statute that provide TDLR with the authority to make licensing less burdensome:

First, under Section 51.4041(a) of the Occupations Code, TDLR "may adopt alternative means of determining or verifying a person's eligibility for a license issued by the department, including evaluating the person's education, training, experience, and military service." In using such alternative means, TDLR may consider things like licensure in other states and criminal history.

Second, under Section 51.4041(b), the state "may waive any prerequisite for obtaining a license if the applicant currently holds a similar license issued by another jurisdiction that: (1) has requirements for the license that are substantially equivalent to those of this state[.]"

It is the use of the "substantial equivalence" standard that prevents Texas from having true reciprocity with other states. According to TDLR, the department determines substantial equivalence on a case-by-case basis. In the most heavily licensed fields of cosmetology and barbering, TDLR has recognized a limited number of licenses and states from which to grant reciprocity. Between different professions, sub-licenses within those professions, and different states and territories, reciprocity licensure in Texas is a patchwork quilt.

1. Policy Recommendation: Adopt a True Reciprocity Licensing Policy Using the "Scope of Practice" Standard

True reciprocity recognizes that if another jurisdiction has authorized a person for licensure, then Texas should too. A prerequisite for such a policy is the belief that standards and eligibility for licensed professionals are more subjective than the requirements of one's own state. Given that licensed industries tend to support the protection from competition that state licensure provides, legislators should expect opposition from those groups if another jurisdiction's requirements are less burdensome than one's own. Nevertheless, true universal reciprocity would be an incredibly beneficial policy for Texas, its workers, its consumers, and the state's economy.

Section 51.4041 of the Occupations Code should be revised with a standard for reciprocity that is more automatic and does a better job of recognizing qualified individuals coming to Texas. Model Legislation from the Institute for Justice would provide a strong substitute. The Universal Recognition of Occupational Licenses Act would require the issuance of a license to any applicant who meets the following conditions:

1) The person holds a valid occupational license or government certification in another state in a lawful occupation with a similar scope of practice, as determined by the board in this state;
2) The person has held the occupational license or government certification in the other state for at least one year;

3) The board in the other state required the person to pass an examination, or to meet education, training, or experience standards;
4) The board in the other state holds the person in good standing;
5) The person does not have a disqualifying criminal record as determined by the board in this state under state law;
6) No board in another state revoked the person's occupational license or government certification because of negligence or intentional misconduct related to the person's work in the occupation;
7) The person did not surrender an occupational license or government certification because of negligence or intentional misconduct related to the person's work in the occupation in another state;
8) The person does not have a complaint, allegation or investigation pending before a board in another state which relates to unprofessional conduct or an alleged crime. If the person has a complaint, allegation or investigation pending, the board in this state shall not issue or deny an occupational license or government certification to the person until the complaint, allegation or investigation is resolved or the person otherwise meets the criteria for an occupational license or government certification in this state to the satisfaction of the board in this state; and
9) The person pays all applicable fees in this state.

The model bill contains several other provisions, including a clarification that if the other state issues a government certification, but not a license, then that is satisfactory for requiring this state to issue the license. Should a legislator wish to go further, there are additional provisions in the model bill that would recognize work experience and private certification as qualifications for a license in this state. The full text can be read here.

C. Policy Recommendation: Pass TCCRI's Occupational Licensing Consumer Choice Act

The Occupational Licensing Consumer Choice Act ("The Act") is model legislation drafted by TCCRI. The Act "provides consumers with the right to choose a worker who best serves their needs irrespective of whether that person holds an occupational license." If a person works in an otherwise legal profession that requires a license, The Act provides that a license is not required so long as the person discloses the fact that they are not licensed by the state to prospective customers. The Act provides requirements for a written disclosure, and production of such a disclosure in any enforcement action for not having a license shall be dismissed.

Where other model licensing bills focus on litigation and methods for striking licensing laws down, The Act takes a different approach. It is self-executing in that it provides a clear framework for working without a license. It focuses on consumer information and consumer choice. The Act's benefits are myriad:

- It does not repeal any licenses, but makes them no longer mandatory.
- It allows licenses to remain a market signal of qualification, but empowers consumers and other market participants (insurers, for example) to choose for themselves how important the license is.
- It creates more market competition. This is good for workers, consumers, and the larger economy.
- It empowers industry groups, trade organizations, and similar private associations to self-regulate without the participation of government.

The full text of TCCRI's model bill may be read here.

D. Sunset recommendations for the Texas Department of Licensing and Regulation

TDLR recently underwent review by the Texas Sunset Commission, which describes its own sunset process as "the regular assessment of the continuing need for a state agency or program to exist." Sunset starts with a basic question: "Do the agency's functions continue to be needed?"[xii] In addition to that primary question, the sunset review process reveals a number of recommendations and areas where the agency can improve its functions and efficiencies. Those are revealed in the Sunset Staff Report.

1. Policy Recommendation: Abolish All Licenses Identified by Sunset Staff as Not Necessary to Protect the Public

Published in the summer of 2020, the Sunset Staff Report on TDLR identifies seven key issues in the Department, each with its own set of recommendations. They key "issue" at TDLR that TCCRI is interested in is Issue 2, which identifies 15 occupational licenses under TDLR's purview that are "not necessary to protect the public. The Sunset staff explains that "these licenses do not meet the Sunset Act's criteria for regulatory need given limited enforcement activity, duplication of existing controls, minimal public exposure, or numerous exemptions that undermine regulation."[xiii] Indeed, "Sunset staff found **these regulatory programs and licenses are no longer needed and could safety be eliminated**."[xiv] The programs and licenses targeted for elimination include the following:

- Polygraph Examiners
- Auctioneers
- Licensed Breeders
- Professional Employer Organizations
- Weather Modification
- Responsible Pet Owner
- Journeyman Lineman License
- Journeyman Industrial Electrician License

- Matchmaker, Event Coordinators, and Second Licenses in the Combative Sports Program

TCCRI fully and enthusiastically supports the elimination of every program and license identified by Sunset staff as unnecessary. Additional recommendations by Sunset staff that TCCRI supports include:

- Combining and simplifying regulation of barbering and cosmetology
- Eliminating the instructor and wig-related licenses
- Streamlining and simplifying the driver training programs

2. Policy Recommendation: Eliminate the Journeyman Industrial Electrician License, but Clarify the State Law which Applies to Those Individuals

It is sometimes the case that policy recommendations touch on issues that are more complex than they appear to be on the surface. The Sunset staff recommendation to abolish and eliminate the "Journeyman Industrial Electrician License" is such a case. The recommendation to eliminate the license states that the license is "voluntary" and is such in practice because Section 1305.003 of the Occupations Code exempts the type of work performed by such licensees. However, Section 1305.003(a), which lists the exemptions from application of the statutory chapter on electricians, is not entirely clear on this point as it applies to the work conducted by industrial electricians. As it currently applies to work conducted at chemical plants, refineries, and similar facilities, individuals who are solely employed by those facilities are exempt from the statutory requirements of the electrician code, which makes intuitive sense because such facilities require a high level of expertise and specialization to work on the type of equipment and machinery that they own and operate. The statute does not, however, clearly exempt a person who is under contract to conduct such work. The individuals who contract for such work are the kind of individuals who obtain the voluntary "Journeyman Industrial Electrician License."

The legislature should clarify Section 1305.003(a)(14)(B) of the Occupations Code at the same time that it eliminates the Journeyman Industrial Electrician License so that there is no confusion about who these facilities may hire. TCCRI strongly supports eliminating occupational licenses as a general matter, but the legislature must in doing so take care not to create a new issue in the process.

III. Local Overreach

The principle of federalism is well established between state governments and the federal government. While the federal government has broad powers granted to it by the states, those powers are specifically defined and granted to it in the United States Constitution. Article 1, Section 8 of the U.S. Constitution lists Congress's enumerated powers, such as, for example, regulating commerce "among the several states," and granting the powers "to declare war" and "to raise and support armies." The Tenth Amendment to the U.S. Constitution makes clear that "powers not "delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Not as well understood, but certainly no less important, is the relationship between the state government and the political subdivisions located within its borders. Just as states granted consent to the federal government, the State of Texas consented to the establishment of local governments and defined their purposes and the scope of their powers.

At an increasing rate, local governments in Texas are passing laws and ordinances that exceed the scope of their intended authority. Policies like the Denton hydraulic fracturing ordinance, ridesharing regulations in Austin and elsewhere, plastic bag bans, requirements on construction materials used for private property, and paid sick leave mandates all negatively impact the Texas economy and the liberty of its citizens. Often couched in arguments of "local control," these policies represent considerable overreach on the part of local governments and the State has a legitimate and compelling interest in stepping in to remedy these issues.

A. Government exists to protect liberty, not to "control"

Article 1, Section 19 of the Texas Constitution provides the following: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

The most relevant part Section 19 in the context of overreaching local governments is "liberty." The Texas constitution protects liberty, even over the policy preferences of local governments or their constituents. When local governments pass laws and ordinances restricting liberty in burdensome ways that is disconnected from any rational need for the regulation, the state has a legitimate role to play in protecting the people from such encroachments.

B. Local governments derive their powers from the state

Article 1, Section 2 of the Texas Constitution provides, in part, the following: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit."

As Section 2 states, the State's authority is derived from the people, for the people's benefit. Through the Texas Constitution, the people have granted counties (Article 9) and municipalities (Article 11) the right to exist. They are creatures of state government, and state government reserves the right to define their legitimate functions. For instance, Article II, Section 13 states that "the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law." Should local governments impose burdensome laws and ordinances on the people, local control is a secondary concern. Furthermore, the notion that local control is some sort of conservative panacea is a falsehood.

C. It is appropriate and legitimate for the state to regulate economic activity to further the goals of free-flowing commerce and free enterprise.

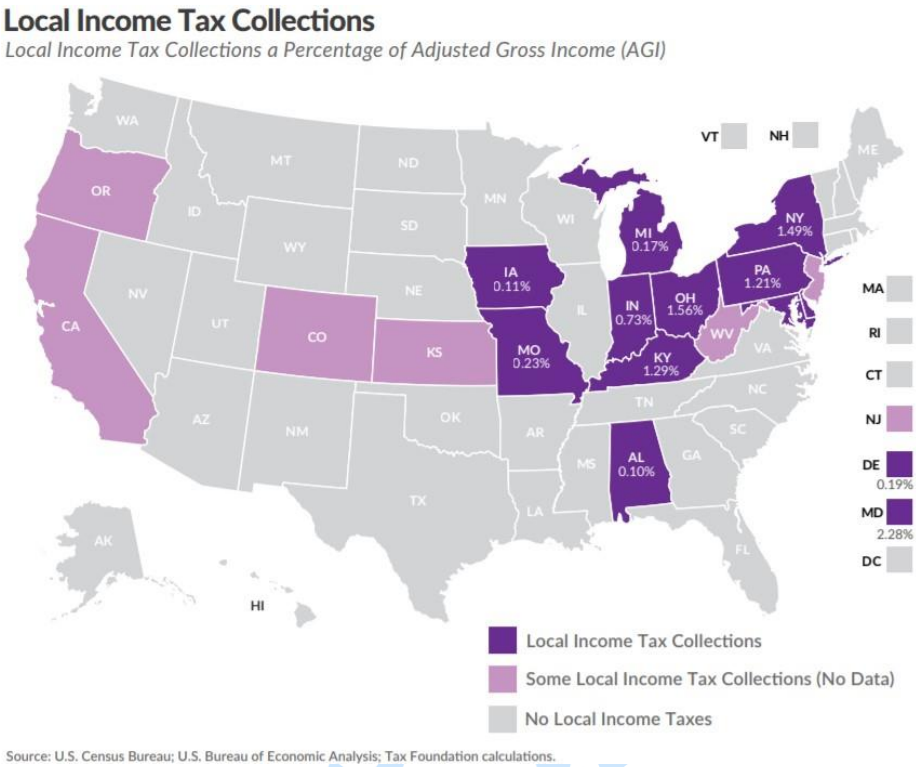
The federal government may regulate interstate commerce to prevent states from burdening each other with anticompetitive taxes and regulations aimed at benefitting themselves at the expense of the rest of the union. Similarly, it is appropriate for state governments to regulate *intra*state commerce for the purposes of promoting uniform market-friendly regulations. Where local governments enact burdensome, unnecessary laws and ordinances, State government should step in on the people's behalf.

D. Policy Recommendation: Constitutionally Prohibit the Enactment of a City-Level Income Tax

In 2019, the Texas Legislature passed, and voters approved, a constitutional amendment that strengthened an existing limitation on the creation of a state-level income tax. That amendment (HJR 38, Leach | et al.) replaced a narrow allowance for an income tax with a permanent ban that in order to repeal would require another constitutional amendment. Doing so would be a difficult task, as 74% of voters voted in favor of the permanent ban.[xv] However, the specific language of the Texas Constitution now states that "[t]he legislature may not impose a tax on the net incomes of individuals," which leaves the door open to the *local* imposition of an individual income tax.[xvi]

Local income taxes are increasingly common. In 1932, Philadelphia became the first city to adopt a local income tax.[xvii] Now, there are 4,964 jurisdictions across 17 states that impose an income tax at the local level.[xviii] For example, every county in Indiana and Maryland imposes a local income tax.[xix] In Ohio, nearly 750 municipalities and school districts impose an income tax.[xx] In fact, municipalities are the vast majority of jurisdictions with local income taxes, and include such high-profile examples as New York

City, Newark, Philadelphia, San Francisco, and Denver. The Tax Foundation provides the following graphic[xxi] to illustrate:



While Texas does not appear on the Tax Foundation's list, it is not entirely clear that local governments are prohibited from creating a local income tax. Under Article 11, Sections 4 and 5 of the Texas Constitution, cities may impose taxes "authorized by law," but are restricted in taxing more than 1.5% (cities with fewer than 5,000 population) or 2.5% (cities with more than 5,000 population) in one year the taxable property in the city.[xxii] Counties, detailed in Article 9, have similar limits on the amount of taxation, based on taxable property value, but no discernable restriction on the *type* of tax that may be imposed.

The legislature should clarify and strengthen the provision recently modified by HJR 38. The amendment requires little more than the addition of local governments in those prohibited from creating or imposing an income tax. A proposal is as follows:

> *Sec. 24-a. INDIVIDUAL INCOME TAX PROHIBITED. The legislature may not impose, or authorize a political subdivision to impose, a tax on the net incomes of individuals, including an individual's share of partnership and unincorporated association income.*

This amendment would protect future Texans from local governments seeking additional revenue from Texans already overburdened by state and local taxation.

E. Food delivery services

The COVID-19 pandemic has hit the dining and restaurant industry hard. According to the National Restaurant Association, approximately 100,000 restaurants have closed due to the pandemic, leaving nearly 3 million employees out of work.[xxiii] National restaurant sales in 2020 were down an estimated $240 billion.[xxiv] One of the few saving graces for the restaurant industry has been the availability of food delivery services, such as DoorDash, GrubHub, and Favor. Food delivery- once the near-exclusive province of pizza and Chinese food restaurants- is now ubiquitous.

And what follows newly successful businesses but government regulation. For food delivery services, local governments across the county have determined that it is necessary to regulate the commission fee paid by restaurants to delivery services. Although these efforts began before the pandemic, COVID-19 has been used to argue that delivery services unfairly profit from the pandemic and, therefore, the fees they charge restaurants to deliver food should be capped. These efforts have been made across the county in places like Baltimore,[xxv] Cleveland,[xxvi] Denver,[xxvii] New York,[xxviii] and Los Angeles,[xxix] to name only a few of the numerous examples.

1. Policy Recommendation: Prohibit Local Regulation of Food Delivery Service Fees and Commissions

Local efforts in price fixing distort an already complex marketplace. The first pizza delivery on record took place in 1889.[xxx] Putting together the resources to deliver food is an action that any restaurant may take. Of course, delivering food has its own costs associated with taking orders, fueling vehicles, and hiring the necessary staff to carry out the deliveries. That is why food delivery services have become so popular. They take care of all of those requirements and make things simple by offering to deliver food from restaurants to customers at a price. Whether that price is too high or too low is something to be negotiated between restaurants and delivery services. It should not be imposed by the government.

Efforts by government to protect restaurants by imposing commission caps do so at a cost. The delivery services are businesses too. When government tells them, for example, that they may charge only 60% of what they currently charge, then that eats into their margins. That could lead to fewer drivers, a smaller footprint, and a diminished ability to deliver food, which circles back to harm the restaurants that the government intended to protect in the first place. Texas should consider a state-level law to prevent local governments from distorting this marketplace.

2. Policy Recommendation: Oppose State-Level Efforts to Cap Food Delivery Commission Fees

On the opposite end of the governmental body spectrum, there is an effort to create a *state*-level law to cap commission fees. House Bill 598 (Sherman, Sr., 87R) is one such effort. HB 598 would prohibit third party food delivery services from charging restaurants a fee of more than 15 percent (with exceptions) of the total bill for delivery. Such efforts presume to understand the marketplace better than the participants involved and should be opposed.

F. State preemption on short-term rental properties

Through services like HomeAway and Airbnb, homeowners can rent out their houses, apartments, and condominiums to visitors for short periods of time at nightly or weekly rates. These short-term rental (STR) properties are popular on a worldwide scale. Airbnb, for instance, offers more than 2 million properties for rent across more than 34,000 cities in nearly 200 countries.[xxxi] That includes properties ranging from small apartments to castles (over 1,400 castles are available to rent through Airbnb).[xxxii] More than 60 million people have used Airbnb to find a place to stay while traveling.[xxxiii]

At their most basic level, STRs involve a decision by property owners to lease out their own real property. This is a transaction that has taken place for thousands of years. That new technology facilitates it with greater ease today is no cause for alarm. And yet, local governments have imposed restrictive measures on property owners leasing their own property as STRs.

Regulation of STRs in Texas is a mix of good and bad. In 2016, *R-Street*, a Washington D.C.-based public policy think-tank, released an analysis of STR regulation in the largest 59 cities in the United States based a number of factors such as existing regulations, the extent to which they restrict STRs, what obligations the city imposes on STRs, and how burdensome the regulations are.[xxxiv] Based on the points awarded or deducted in those categories from a baseline score of 90, each city was assigned a letter grade. Seven Texas cities were included in the study. The results are as follows:

City	Framework	Restrictions	Taxation	Licensing	Enforcement	Total	Grade
Austin	+10	-25	0	-7	-5	63	D
Dallas	0	0	0	0	0	90	A-
El Paso	0	0	0	0	0	90	A-
Ft. Worth	0	-30	0	-2	0	58	F
Galveston	+10	0	-2	0	-1	97	A+
Houston	0	-20	0	0	-5	65	D
San Antonio	0	0	0	0	0	90	A-

1. Policy Recommendation: State-Level Preemption of Short-Term Rentals

Given the broad range of regulatory approaches taken by cities with respect to STRs, the Texas Legislature has considered a statewide regulatory structure that would preempt the cities with a market-friendly approach that respects the private property rights of homeowners. Senate Bill 451 (85R, Hancock) and House Bill 2551 (85R, Parker) would have prohibited municipalities from expressly or effectively prohibiting the use of private property as a short-term rental, or from regulating short-term rental marketplaces. SB 451 would not have affected private entities, including property owners' associations. Interestingly enough, however, the Texas Supreme Court ruled in May 2018 that a homeowners' association that restricted home use to "residential purposes" did not prohibit home use as a short-term rental.[xxxv] Renewed efforts to provide state-level relief in the 86th Legislative Session (HB 3773, Button | SB 1888, Fallon) failed to gain traction.

It remains the case that STRs represent an area in which local governments have overreached. STRs represent an area in which a sensible state-level framework should replace onerous local-level regulations and prohibitions.

G. The state of paid sick leave regulations and mandates

State preemption on paid sick leave ordinances was a recommendation of the TCCRI Task Force on Free Enterprise, Energy, and Infrastructure in 2019.[xxxvi] As explained in that report, most private employers already offer paid sick leave to their employees voluntarily because it is good policy for those private companies.[xxxvii] But good *private* policy is not necessarily good *public* policy. And sometimes it is unconstitutional.

In November 2018, Texas's 3rd Court of Appeals ruled that Austin's paid sick leave ordinance is unconstitutional by way of preemption through the state's minimum wage law.[xxxviii] The Texas Minimum Wage Act expressly prohibits municipalities from regulating the wages of employers. The court concluded that Austin's ordinance "increases the pay of those employees who use paid sick leave. Thus, under the plain language of the TMWA, the Ordinance establishes a wage."[xxxix] The Texas Supreme Court denied review of the case, firmly establishing the unconstitutionality of mandatory sick leave policies across the state.

1. Policy Recommendation: State-Level Preemption of Paid Sick Leave

Despite a final ruling from the Texas Supreme Court on the larger question of unconstitutional mandates, local governments in Texas cannot seem to help themselves. San Antonio, for example, plans to launch a new policy on paid sick leave. Unconfirmed at this time, the new policy would grant government benefits to businesses that conform with the city's proposed sick leave policies to the

detriment of those that do not. TCCRI plans to monitor such proposals and would recommend state policies to address them if and when doing so becomes necessary.

IV. State Affairs

A. Data privacy

In 2018, California passed the first ever state-level law regulating businesses that collect and process data online. This sweeping law— the California Consumer Privacy Act (CCPA) of 2018—has been the subject of much criticism. In a piece for *Fortune* called "California's New Data Privacy Law Could Begin a Regulatory Disaster," the groundwork is laid for what the CCPA imposes and what should be expected next:

> In 2017 alone, over 1.9 billion files were leaked through security breaches. After the California Consumer Privacy Act comes into force, organizations mishandling data could be fined up to $7,500 for each violation. The financial impact to businesses could be enormous—and that doesn't even take into account the soft costs associated with loss of customer and employee confidence and damage to brand reputation.
>
> Data privacy regulation in America is about to become seriously confusing. Since the [European Union's Data Privacy Law] came into effect [in 2018], only some states have expanded their data protection regulations to include breach notification requirements. And state laws governing data breaches vary significantly: Texas imposes civil fines of up to $50,000 per violation, while Georgia imposes no penalty at all.[xl]

Data privacy is a very real concern. One need only search their own recent memory to recall notable data breaches. If one were to search the internet, hits like the Top 10 Biggest Data Breaches in 2018 are ubiquitous. What to do about that issue, particularly with respect to public policy, is a difficult proposition. The law has always been one step behind when it comes to innovations in the digital and online innovations. To step too soon could have harmful unintended consequences in the online space, which currently offers a wealth of products and services, often in exchange for consumers' personal data.

Personal information is sometimes called the currency of the online age, and, as some experts note, we should spend it more wisely. Indeed, the best thing a person can do is be an informed consumer. Companies like Google, Apple, Microsoft, Facebook, and Amazon know intimate details of our lives, yet we allow them that knowledge because of the services they offer in exchange. These companies also have the incentive and the resources to be transparent with respect to our data. Google, for example, allows users to download all of their data and find out everything Google knows about them. In fact, Facebook, Amazon, Apple, and Microsoft all allows users to download their data and, in some cases, delete it. These companies have responded to market pressures by providing a level of transparency that their customers want. One commentator recently explained this behavior and how they respond to it:

> The amount of personal data and the kind of data Google takes — and Apple, and Microsoft and Facebook, and Amazon, and you get the picture here — makes how they handle it and the way they let you know the most important thing about them.
>
> Everything is based on a barter system. I trade my data for a service or product. I look at what data a company wants, how they collect it and what they will do with it once they have it. Then I look at what they are offering. This way, I can decide if the trade is worth it to me. Being able to say "OK Google what's my day like?" and getting a ton of pertinent information from my phone or a Google Home is worth letting a machine look at every word and number that I ever typed online, because I have a very clear and concise document that explains exactly how it's collected, stored, and used. I trust that my data will be kept safe, and if something ever did happen things would be handled in a way I can approve of. I'll grant my trust in advance, and give them the opportunity to use my life's data in exchange for a service I like.[xli]

The internet and the services that populate it are truly the last bastion of free enterprise, where market self-regulation has led to businesses responding strongly to market pressures by embracing transparency.

The obvious counter to this argument is that bad actors do exist, and that there are breaches and bad occurrences that take place even amongst the good actors, but that will be true even if a large top-down regulatory structure to data privacy is imposed on the internet marketplace. It is also why Texas passed the Identity Theft Enforcement and Protection Act, which requires companies to inform customers when there is a data breach. Failure to do so can result in stiff penalties.

State-level legislation doesn't touch on the larger, global internet marketplace. Such legislation touches on the marketplace in the state in which it is passed, which is all that it is allowed to do. California's law was the first in what is sure to be a national patchwork quilt of regulations in a global marketplace. Even a national approach to data privacy—which this analysis is *not* arguing for—would likely have serious unintentional consequences, but at least it would have the legitimacy of Congress's power to regulate interstate commerce behind it.

Laws like the CCPA not only force private businesses to fundamentally change their practices with respect to the services they offer to freely-participating customers, they may even force them to decide whether or not offering those services is worth it at all.

1. Policy Recommendation: Do Not pass a CCPA-style bill in Texas

Data privacy need not be a comprehensive, top-down, one-size-fits-all package. There may come a time when passage of a CCPA-style bill in Texas is a necessity, but a number of thresholds should be reached

first. Not the least of these thresholds is a clear market failure on the part of private businesses to take data privacy seriously. If that becomes clear, Congress is the rightful authority to regulate interstate commerce. Texas has a great reputation for taking a sensible approach to regulation. To pass a CCPA-style bill in Texas at this time would be to depart from that prudent course.

B. Free speech in food labeling

Filed in the 86th Legislative Session, HB 3799, also called the Texas Meat and Imitation Food Act, would have prohibited the labeling of certain food products that do not contain meat from using meat-related terms (i.e., "meat," "beef," "chicken," "pork,") in the food's name or description. Any food item that does not contain one of these products, but has the word on its label would have been considered misbranded and, under the filed bill, would have amounted to false or misleading advertising. The bill established a process by which any food suspected of being mislabeled, misbranded, or adulterated would be embargoed and tested by the Department of State Health Services (DSHS); it also would have allowed DSHS or the OAG, on DSHS' behalf, to seek an injunction for a temporary restraining order against someone found to be violating, or threatening to violate, the Act. A past, present, or future violation would have created an immediate threat to public health and safety. HB 3799 was heard in the House Public Health Committee, but did not pass out of committee.

Supporters of these types of labeling laws often hail them as transparency acts to better educate consumers. However, in this instance, the proposed law is an attempt to use the governmental regulatory apparatus as a tool to disadvantage one competitor over another- a role that government should always decry. While true transparency is a positive, the requirements of HB 3799 went beyond that and would have prevented an entire industry from using words like "meat," "beef," and "chicken," to describe their products at all, or even to clearly label them as "faux meats," or boast that they have a "meaty" or "chicken" flavor.

In addition to requiring foods that are currently on supermarket shelves from being "embargoed," the bill would also have discouraged food industry innovations that are already in the works. For instance, the USDA and FDA announced in 2018 that they would be overseeing the production of lab-grown meat so it could be safely brought to the consumer market in the near future.[xlii] This "cultured meat" is produced in a lab from the stem cells of animals, but under this bill, likely could not be marketed with the word "meat." And, since funding for artificial meat has "skyrocketed" over the past few years, it is likely that more and more innovations like this one will be hitting the market.[xliii]

1. Policy Recommendation: Protect Commercial Speech in Food Labeling

Texas consumers are savvy and can be trusted to distinguish the difference between a "real" and "faux" meat product. HB 3799 would have discouraged retailers from placing any "faux meat" or plant-based meat products in Texas stores, placing both our retailers and consumers at a distinct disadvantage.

HB 316, a similar bill to HB 3799, has already been filed in the 87th Legislative Session and is similarly objectionable.

V. Alcoholic Beverage Sales and Regulation

Texas's laws and regulations pertaining to alcoholic beverages are both confusing and cumbersome. The Texas Alcoholic Beverage Code was drafted during the aftermath of Prohibition, a unique period of U.S. history ruled by sentiments very different than those that prevail today. Many of the restrictions on alcohol sales thought necessary at the time have since outlived their usefulness. For instance, times and locations of sales for alcohol differ depending on whether the alcohol is sold for on-premise or off-premise consumption, at a grocery store or a liquor store, whether food is served with the alcohol, or whether the alcohol type is beer, wine, or spirits. Those are but a few examples. There is a great opportunity for Texas to promote free market principles by lifting a number of these conflicting, anticompetitive alcohol regulations.

A. Policy Recommendation: Make Alcohol-to-go a Permanent Policy

Like many industries, the alcoholic beverage industry has been dramatically affected by the COVID-19 pandemic. One of Governor Abbott's many waivers of state law to help businesses weather the economic hardships of the pandemic is a waiver that allows restaurants to deliver alcoholic beverages with food orders.[xliv] Senator Kelly Hancock and State Representative Charlie Geren have filed legislation in the 87th Legislative Session to make this waiver permanent. House Bill 1024 and Senate Bill 298 should be supported.

B. Policy Recommendation: Create Uniformity in Hours of Sale

Conflicting laws on hour of sale should be made uniform for a variety of reasons ranging from the promotion of economic growth, to alleviating anti-competitive effects, to potentially creating more revenue for the state. One proposal is to simply allow alcohol sales of all kinds from 7am until 1am across the board, with an option for a late-hours permit in those jurisdictions that allow it. This will eliminate the anti-competitive system we currently have where certain kinds of businesses may only sell certain kinds of alcohol at variously defined times. Such a reform would simplify the law, free the alcoholic beverage economy, benefit consumers, and make Texas a stronger free market leader.

C. Policy Recommendation: Allow Sunday Liquor Sales

Texas is one of only twelve remaining states that prohibits Sunday liquor sales for off-premise consumption.[xlv] Not only is this practice outdated, but it is anticompetitive in nature. Bars and restaurants are permitted to sell liquor on Sunday, which eliminates any kind of safety or moral argument against such sales. Indeed, purchasing a bottle of liquor and taking it home for consumption is arguably far safer than allowing a person to drink liquor on a bar or a restaurant and then driving home afterwards. Bills to remedy this anticompetitive law, such as Senate Bill 785 (86R, Johnson), are filed

every legislative session. House Bill 937 (Raymond) has been filed in the 87th Legislative Session, and would achieve this policy goal if passed.

VI. Regulation of the Plumbing Industry

Under the Texas Sunset Act, the Texas State Board of Plumbing Examiners was set to expire (i.e., "sunset") on September 1, 2019 unless the Legislature passed legislation, such as Senate Bill 621 (86R), to reauthorize and extend it.

The Sunset Commission describes its own process as "the regular assessment of the continuing need for a state agency or program to exist." Sunset starts with a basic question: "Do the agency's functions continue to be needed?"[xlvi]

The Sunset Commission's findings with respect to plumbing regulation are that the agency's functions do continue to be needed, but the agency itself does not. The Sunset Commission's Report explains:

> The Sunset review of the Texas State Board of Plumbing Examiners began by observing the agency's response to licensees and consumers trying to recover from Hurricane Harvey's $125 billion toll. The small agency struggled to allocate its already stretched staff and resources, and to navigate sometimes restrictive statutory requirements. However, Sunset staff found many problems existed long before the storm and were within the board's control to fix, but the board and agency leadership have a track record of neglecting known deficiencies. Ongoing problems and frustrations include backlogged exams, with more than 1,400 individuals waiting to take exams; poor customer service, with the agency only able to answer about 62 percent of its calls; and growing complaint caseloads and resolution times, with each investigator handling between 45 to 100 complaints and the average complaint resolution time doubling to almost six and a half months.
>
> Sunset staff also found a litany of constraints on plumbers that make entry into the trade and progression through a career difficult, some of which are statutorily created and others self-imposed or worsened by the agency. Further, the agency's enforcement processes fail to meet standard practices to ensure consistent, documented, and fair application of laws and rules to licensees, or transparency for the public.
>
> Board members and agency leadership have acknowledged some of these persistent problems, but have failed to appropriately address them, and broader problems, like the workforce shortage, have been exacerbated by board inattention and unwillingness to change the status quo.[xlvii]

Heading into the 86th Legislative Session, the Sunset Commission recommended moving regulation of plumbing from the plumbing board to the Texas Department of Licensing and Regulation. That was the

key recommendation of the Commission, and Senate Bill 621 was dedicated primarily to making that change throughout the code.

The Sunset Commission's report fell just short of describing the current plumbing board as entirely incompetent, which should have been enough to justify removing its regulatory authority. Plumbing, like most other professions, could be privately regulated within the marketplace. However, SB 621 did not pass. Nor did a safety net bill to merely extend the expiration date for the plumbing board. Governor Abbott issued an executive order reauthorizing the plumbing board and the plumbing code, using his emergency powers under the Hurricane Harvey disaster declaration.[xlviii] Under his proclamation, the board and the code are reauthorized "until disaster needs subside or the 87th legislature addresses the matter." Further, "[t]o facilitate the legislature's consideration of the issue, this suspension shall have the force and effect of law until May 31, 2021."[xlix]

A. Policy Recommendation: Dissolve the Plumbing Board as Planned

Thus, the continued existence of the plumbing board will be an issue for the 87th Legislature. The Legislature should follow the Sunset Commission's recommendation and dissolve the plumbing board as was planned two years ago. Nothing in the past two years has changed the fact that the plumbing industry is one of the most poorly regulated industries under state licensure.

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