PERMIT FREEDOM

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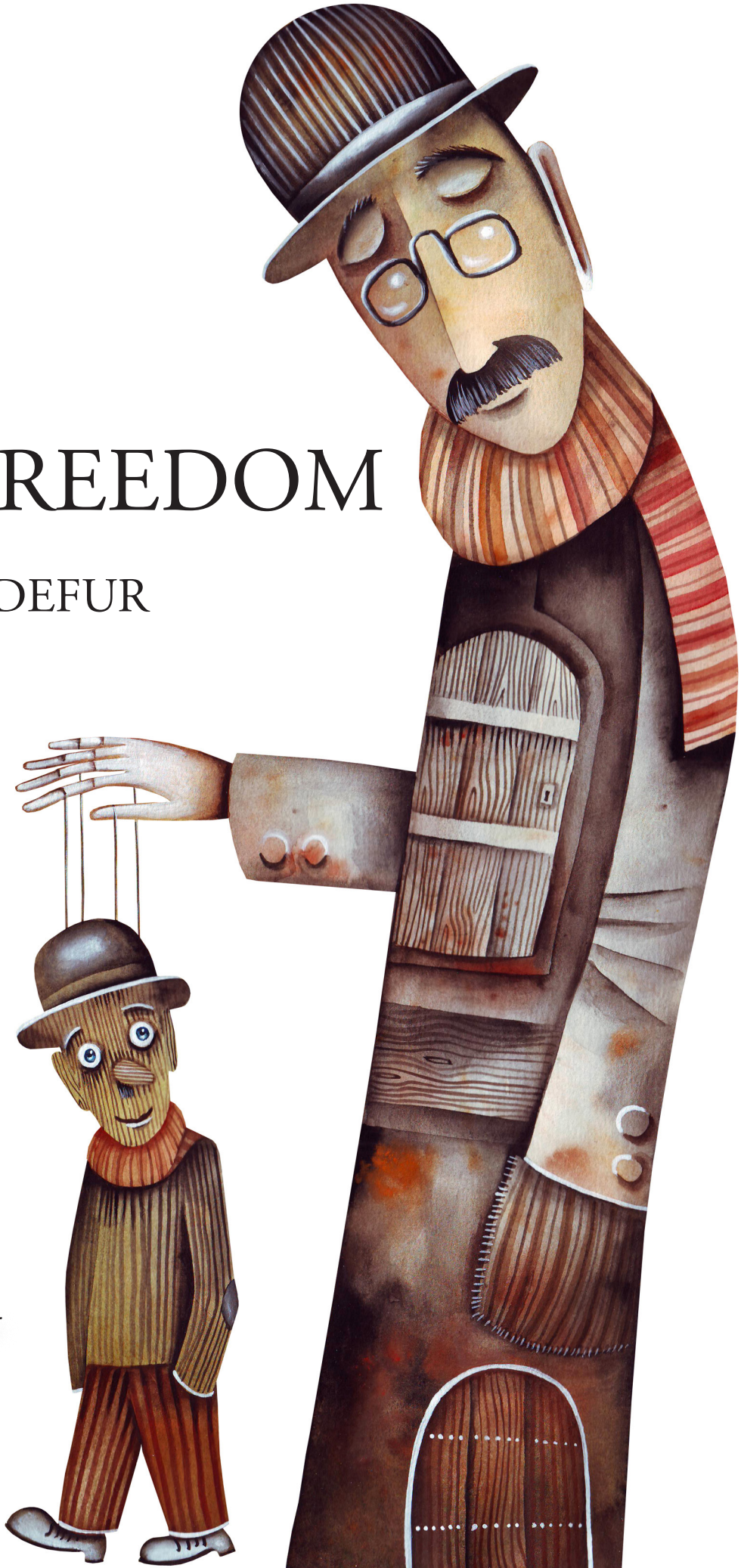


EXECUTIVE SUMMARY

Being free means not having to ask permission. Having rights means being able to choose—to decide and to act—without needing approval from some authority figure first.

When America's founding fathers declared independence from Great Britain, they rejected the monarchical idea that freedom is a gift that kings give their subjects. Instead, the new nation was based on the idea that people are fundamentally free—that they have the right to pursue happiness as they see fit, so long as they respect the rights of other people to do the same. James Madison thought that principle was the founders' "most triumphant" achievement.[1]

Sadly, America is steadily turning back from a free society—where freedom is regarded as a basic right—into a Permission Society, where our freedoms are regarded as privileges that government gives us when it chooses. Whether it be starting a business, building a home, buying a gun, supporting a political candidate, or even to taking medicine,[2] our ability to make our own decisions is increasingly curtailed by permit requirements, licensing restrictions, and other rules that require us to get government permission before we may do what we think best with our lives.

Most of these laws exist at the state and local levels. For example, about one–third of Americans today must get some form of permission from the state to do their jobs.[3] Property owners are frequently forced to give up land, money, or other rights in exchange for building or development permits. In many states, people seeking to buy guns must prove there is "good cause" for them to own a firearm, while bureaucrats are allowed to define "good cause" however they wish. Laws that restrict political campaigns are often so complicated that even skilled lawyers don't know what is and isn't allowed, and must ask a government agency to pre-approve what their clients want to say. In some communities, local politicians have used the complexities of permit rules to nullify state laws—as in Mar-

icopa County, where officials have used permit delays to block implementation of a 2010 ballot initiative that legalized medical marijuana.[4] In many places, citizens must get permits to cut down trees,[5] to give tours,[6] or even to close failed businesses.[7] Some states go so far as to forbid new businesses from opening unless they first get permission *from their own competitors*.[8]

These different rules all have one thing in common: they essentially reverse the long-standing principle that people are presumptively free, and that their freedom may be taken away only if they harm others. In a Permission Society, the individual is not free without government say-so. That puts government in a powerful position to impose restrictions on citizens and to demand things from them in exchange for the freedom to act.

The Goldwater Institute has drafted legislation that gives citizens a powerful tool to fight back against this trend. **The Permit Freedom Act** protects citizens against abuse whenever government imposes any kind of permit requirement on citizens. While licensing laws and permits can be an effective way to protect public safety, the safeguards in the Permit Freedom Act ensure that citizens are given fair warning of what the law requires, that they have a real chance to defend themselves in court, and that bureaucratic agencies make decisions in a timely manner, so that citizens can know what is and is not allowed.

Along with rules that help guarantee that citizens get due process of law when they go through the permitting process, the Permit Freedom Act will help ensure that our freedoms are not treated as privileges that government officials can choose to give or to withhold as they wish.

THE PROBLEMS WITH THE PERMISSION SYSTEM

Requiring people to get permits before they engage in certain activities is often reasonable. If an activity is likely to cause serious accidents that can't be fixed afterwards, it makes sense to require people to prove beforehand that they know what they're doing. A good example is driver licenses: car accidents are common, and can be deadly. A person who dies in a car accident can't be brought back to life, so it makes sense to take preventative measures beforehand, rather than punishing people after accidents happen. And the rules for driver licenses are usually clear and objective—people only need to be basically competent at driving, and government doesn't show favoritism: anybody who satisfies the requirements can get a license.

But when licensing or permit requirements are applied outside of those contexts, they can wrongly deprive people of freedom, weaken our economy, and give government dangerous and unjust powers.

First, the permit system is based on the assumption that the government knows what should and should not be permitted. But that's often untrue. For instance, some licenses (called "Certificate of Need" or CON laws) make it illegal to start a new company until the owner persuades the government that it would serve a "present or future public convenience and necessity."[9] These terms have never been defined, meaning that bureaucrats are free to decide at will whether a new business is "convenient" or will be in the future. Of course, nobody can possibly know such a thing. Nobody, for instance, could have

proven in the 1980s that the United States "needed" a new chain of coffee shops—there were plenty already—but the decades that followed, Starbucks' success proved there was such a need. The only way to learn whether any new business will serve a "public need" is to try it and see if it succeeds. Government officials—who have no profit-based incentive to predict the economic future correctly—can't reliably foresee what businesses will prove successful. Economists call this **the "knowledge problem"**: no individual, business, or government agency, can possibly know all of the information necessary to make the "right" economic decisions, because there are simply too many factors.[10]

Permit requirements work best when they are simple, clear, and objective. If the question is whether a person has gone to medical school, or whether a house has been built out of the proper materials, the knowledge problem is minimized. But when permit requirements force people to predict the future, or include subjective criteria—such as "good cause" or "convenience"—or require bureaucrats to know information that cannot possibly be known, they run the risk of limiting freedom for no good reason.

A related problem is the fact that permit requirements **hinder innovation and experimentation**. As economist Adam Theirer notes, nobody could have proven ahead of time that such web-based businesses as Amazon.com, Uber, or eBay would succeed. Yet thanks to rules that in the 1990s blocked government from interfering with Internet commerce, entrepreneurs had the freedom to try. Some, like Pets.com, failed. But others succeeded, revolutionizing our way of life. "These innovations were able to flourish because our default position for the digital economy was 'innovation allowed' or permissionless innovation," writes Thierer. "No one had to ask anyone for the right to develop these new technologies and platforms."[11]

Permit requirements force people to ask for the right to try new ideas. But even if an inventor or entrepreneur manages to prove a proposal's merit—which can be prohibitively difficult—the delay alone can often destroy a budding business idea. Thierer gives the example of Free World Dialup, a company which in the 2000s tried to start a simple Inter-

net-based video-call service similar to Skype. It took a year and a half for federal officials to decide that it didn't need a permit under federal telecommunications regulations—but by that time, foreign-based Skype went ahead with its business plan, dooming Free World Dialup to failure.[12]

Worse still is the cost imposed when the system stifles new ideas before they're born. If people want to try something innovative, and the process for getting approval is expensive and time consuming, they might be deterred from trying things that could better our lives. It's hard to measure this cost because when new ideas are stifled or abandoned before reaching the market, they never come into existence to begin with. These costs are therefore unseen. But while these costs may be invisible, they are real. They take the form of *what might have been* if only people had been allowed to try.

One thing that worsens the knowledge problem and the hindering of innovation is **vague permit criteria**. Vague rules are a serious threat to freedom, because if people don't know what is and isn't legal, they run the risk of being trapped or surprised later. If a law prohibited, say, "bad things" without defining that term, it would be impossible to know what would and wouldn't be punished—and government officials could prosecute whomever they chose for whatever they wanted. Consequently, citizens would hesitate to act—or even to exercise other rights—for fear of crossing some invisible line and incurring punishment.

Compounding these problems is the phenomenon economists call **"rent seeking,"** better known as lobbying. When a government permit is necessary to run a business, that permit can be worth a lot of money—and it then becomes worthwhile for people to spend time and money to get that permit or to keep it away from their rivals. When an entrepreneur applies for a CON, for instance, existing companies that don't want new competition will typically exercise their power to block the government from issuing the license to a potential competitor. Meanwhile, consumers—who would benefit from competition—often don't even know such laws exist. This means bureaucrats may fall under the influence of

politically powerful companies that use the system to benefit themselves by barring competitors and raising prices.

Another downside to permit requirements is the fact that when the government is in a position to grant or withhold permission to use property or exercise other rights, it is also in a position to **demand something in exchange**. Local governments frequently demand that property owners give up land, cash, or other rights in return for building permits.[13] Officials in one California city even forced a family to give up their constitutionally protected right to vote in exchange for a permit to build a second story on their home.[14]

Most fundamentally, the Permission Society **undermines the principle of equality**. When freedoms are seen as privileges that the government gives the citizen, that means the citizen stands beneath the government—and must beg for the right to act. That's the opposite of how freedom is supposed to work. Rights aren't permissions, because rights already belong to us—we don't ask the government for them, and the government can't impose conditions on them. But when bureaucrats treat rights as privileges, they empower themselves and reduce citizens to a subservient position that is unhealthy for freedom.

CONSTITUTIONAL PROTECTIONS IGNORED

The most infamous permit system in our legal history is known as "prior restraint." Abolished more than 350 years ago, the prior restraint required British subjects to get a government permit before publishing a book or expressing their political or religious opinions. When the U.S. Constitution was written, one of the first rules its authors made clear was that Americans could not be subjected to any prior restraint requirement.[15]

That total prohibition on prior restraints was later watered down by U.S. Supreme Court rulings. Yet the court made clear that even when prior restraints are allowed, the government still must provide certain procedural safeguards to protect citizens from abuse.[16] The court listed several basic requirements, three of which are particularly

important:

- ★ **The standards for whether a permit will be granted or denied must be clear**[17]—vague standards that enable government officials to enforce the rule subjectively are unconstitutional;
- ★ The law must provide **a clear deadline for when the permit will be granted or denied**[18]— officials must not be allowed to delay a permit application indefinitely;
- ★ The applicant must have **an opportunity for independent judicial review**—a day in court to challenge the government if a permit is wrongfully denied.[19]

These guidelines were originally applied to restrictions on free speech, but the Supreme Court has also made clear that *any* law that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon . . . a permit or license" must provide such procedural safeguards, or the law will qualify as "an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."[20] In other words, *all* permit requirements must abide by these three standards.

Unfortunately, although courts have sometimes struck down specific permit requirements for violating these rules, they have done so inconsistently, and sometimes not at all.

The criteria for getting permits are often vaguely phrased. Consider, for example, the city of Mesa's rules governing residential building permits. To get a permit, a house must have "adequate design features to create visual variety and interest"[21] and must "create a distinctive and appealing community."[22] No doubt everyone would like an "appealing community," but such terms are subjective, aesthetic judgment calls—not the kind of clear guidelines the law should provide.[23] In 2008, when Ryan and Teresa Coleman asked the city of Mesa for a permit to open a commercial tattoo parlor, the city said no. Despite the fact that their application satisfied all required safety standards, the city council decided, by a 3-2 vote, that a tattoo parlor was not "appropriate" for the location.[24] What qualifies as

"appropriate" is anyone's guess.

The Colemans sued, and the Arizona Supreme Court ruled in their favor. By denying them a permit, the court said, the city intruded on their right to free speech. But other kinds of businesses that don't qualify as speech—hardware stores, restaurants, or gift shops—don't enjoy that same legal protection, so the city's vague zoning rules remain in place for them.[25]

Sometimes courts just ignore the vagueness problem, or even openly defy constitutional standards. In a 1971 case, for instance, California justices ruled that that state's "courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies."[26] But the purpose of the law is to *limit* the "broad discretionary power" of government officials.

Even in areas other than zoning, the standards for getting permits or licenses are often subjective. For instance, Louisiana requires florists to be licensed, and to get a license, applicants must take a test where they are graded on their understanding of such artistic notions as the "harmony" and "effect" of flower arrangements.[27] Gun permits are also frequently phrased in vague terms. Massachusetts, for instance, only allows "a suitable person" to get a gun license, even though courts have struggled unsuccessfully to define "suitable."[28] A federal court recently upheld a California law that bars people from carrying firearms unless they show "good cause"—even though "good cause" is not defined.[29] Under such broad language, government officials can decide arbitrarily whether to grant or deny a permit.

And despite the rule that permit requirements must include specific deadlines saying when the applicant will get an answer, the reality is that agencies can take an indefinite amount of time to decide whether or not to grant permits. Even when a law does specify a reasonable time limit, the permitting process frequently involves numerous postponements and exceptions. The website of the city of Litchfield, Arizona, for example, frankly admits that "timelines may vary due to volume and suspensions for delays caused by the need for

public hearings, state or federal licenses."[30] These hearings often result in applicants being asked to revise their applications and to come to another hearing—a process that can go on and on.

Courts have allowed this, on the theory that as long as the applicant gets another hearing, and another, and still another, his due process rights are still protected. "This ensures that due process becomes a blanket to suffocate, not a route to speedy and prompt review in the courts," writes Professor Richard Epstein. "So long as there is hope within the administrative system, the courts remain closed to those who must have a permit in order to proceed with their business."[31] But for people who need a permit to build or to run a business, or to defend themselves with a firearm, such delays amount to a prohibition—worse, in fact, since an applicant is usually not allowed to ask a court to intervene as long as these delays continue. Even when agencies refuse to issue *any* permits, property owners and others often have no legal recourse.[32]

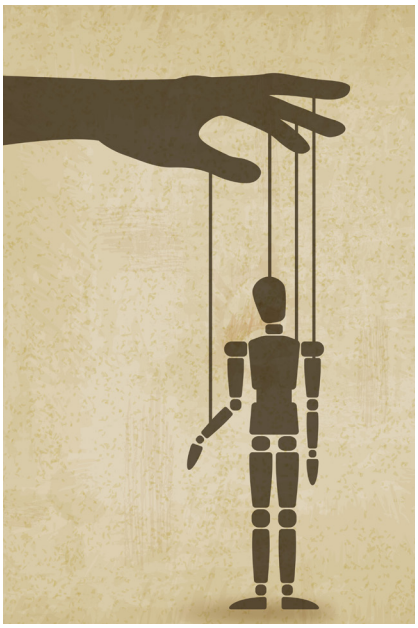
Finally, the rule that applicants are entitled to judicial review has been eroded by laws that allow bureaucratic agencies to hold "informal" hearings in which the ordinary rules of evidence don't apply.[33] Worse, the laws also limit the authority of judges to review an agency's decision on appeal.[34] Because courts are required to defer to decisions by bureaucratic agencies,[35] someone who is brought before an agency for a hearing often has no right to object when evidence that is normally inadmissible, such as hearsay, is used.[36] Later, when the person appeals to an actual court, he is often barred from disputing that evidence or introducing new facts. Indeed, courts will typically uphold an agency's determination, even if the evidence that the agency based its decision on is contradicted by other evidence.[37] This means people can lose their rights through a process that violates the basic rules of our legal system. As a result, the promise that each citizen has a right to a day in court "has become largely symbolic rather than effectual in contemporary licensing cases."[38]

HARMS

Businesswoman Debra Nutall started a successful hair-braiding business in Memphis, Tennessee, in the early 1990s. She had learned the traditional craft from her mother, and her business was so successful that within a few years, she was training low-income workers in hair-braiding. But in 1995, the state Board of Cosmetology began threatening her with prosecution for running her business without a cosmetology license. She waged a 15-year fight for her business, working with state and federal lawmakers until she finally gave up and moved across the border to Mississippi, where no license is required. "I started a business and now it's nothing," she said. "It leaves you no hope."[39]

When it comes to CONs, the rule can be even harsher. Most licensing laws are intended to test a person's skills or honesty, but CON laws exist solely to protect existing businesses against competition. And although these laws were originally written over a century ago to regulate railroads, they apply today to a wide variety of industries—everything from taxicabs and moving companies to liquor stores, car dealerships, and even hospitals.

Here is how these laws work: when someone applies for a certificate, the government gives all existing companies in the industry a chance to object, and when an objection is filed, the applicant must prove to the government that there is a "public need" for the new company, or that the new firm would serve a "future public convenience." No court has ever defined these terms, meaning that bureaucrats can deny the application even if the applicant is fully qualified, experienced, safe, and honest, simply because existing companies don't want competition.



Licensing laws are thought to cost the nation's economy as much as 2.8 million jobs annually,[40] enough that the

Obama administration issued a report in 2015 urging states to find different ways to regulate the economy.[41] Because most of the jobs lost to these permit requirements never come into existence to begin with, it's impossible to know exactly how many businesses would have started, how many jobs might have been created, and how many goods and services could exist today if they had not been stifled by licensing restrictions.

Permit requirements also create opportunities for bureaucratic delay, meaning government can use them to prevent businesses or construction, or other activities—thus imposing severe costs on people—without actually denying them outright. In 2002, the Arizona Snowbowl applied for federal approval to expand its operations, and to use recycled water to make artificial snow on ski slopes. Years of litigation ensued when environmentalists and Indian tribes tried to block the project, until at last courts ruled in favor of the Snowbowl's owners in 2009. Yet even after the Snowbowl won the lawsuit, the U.S. Department of Agriculture refused to issue the required snowmaking permit for another year. (The Snowbowl was finally allowed to proceed as planned in 2010.[42])

In Benson, Arizona, a planned development called Villages at Vigneto, which would bring 28,000 homes, schools, medical facilities, and more than 16,000 jobs to Benson and Cochise Counties,[43] was halted in the summer of 2016 when federal officials suspended permits for 8,200 acres of the development.[44] Local officials approved the project, eager to see the economic boost it could bring, and the U.S. Army Corps of Engineers deemed the project environmentally sound. But at the behest of another federal agency, the Corps suspended the permit, and the project is now stalled.[45]

These delays harm taxpayers as well as the government. In 2012, an Arizona court ordered the city of Kingman to pay a company nearly $500,000 in damages for delaying construction on a railroad underpass for so long that building costs skyrocketed.[46] In a 2007 case, a Washington state court upheld a $10 million verdict against a city that stalled a building permit application for three years because local officials didn't want an apartment building in the area.[47] The government sometimes even imposes burdensome licensing

requirements on itself. The U.S. Department of Interior forces federal Border Patrol agents to get permits to go onto federal lands, and in a 2010 survey, more than half of the agents reported long delays in getting permits.[48]

REFORM

Permit rules can sometimes be a a good way to protect public safety. But they are a risky tool. They can stifle innovation, empower lobbyists at the expense of taxpayers, and provide opportunities government abuse and exploitation. That's why the three basic procedural safeguards—*clear criteria*, *explicit deadlines*, and a genuine right to *judicial review*—are so important. These requirements already have the blessing of the nation's highest court. But they're often ignored in practice. State law can give them real meaning and protect the rights of citizens—while still allowing reasonable regulation.

The Goldwater Institute's Permit Freedom Act provides that whenever the government requires any kind of license or permit, the criteria for granting or denying that permit shall be clear and unambiguous. Also, it guarantees that applications for permits will be decided within a specified time—either one month, or another specific period established by the legislature. The Act then requires that hearings held by administrative agencies must comply with the rules of evidence and procedure that already protect individual rights in court. And it provides that if a court later reviews an agency's decision, it will apply its own independent judgment instead of rubber-stamping the bureaucrats' decision.

The Permit Freedom Act is basic, commonsense reform that protects citizens and taxpayers. While it enables government to enforce rules that promote public safety, it gives real meaning to the "procedural safeguards" that are so essential to preventing government abuse and ensuring the protection of individual rights.

Appendix: Proposed Legislation

Section 1: Permit conditions

Notwithstanding any other law, in any case in which a license or permit is required prior to a person engaging in any constitutionally protected activity, the criteria for the granting or denial of that license or permit shall be specified in clear and unambiguous language, and the applicant shall be entitled to a review and determination of that permit or license application within 30 days or such other time as the legislature shall by law prescribe. The determination of what constitutes clear and unambiguous language shall be a judicial question, without deference to the legislature or the agency.

Section 2: Agency hearings

A. Unless knowingly and voluntarily waived by the parties, all agency hearings must comply with the rules of procedure and rules of evidence required in judicial proceedings. Notice may be taken of judicially cognizable facts, and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data, and parties shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence.

B. The parties to a contested case or appealable agency action have the right to be represented by counsel or to proceed without counsel, to submit evidence, and to cross-examine witnesses.

C. A party may file a motion with the director of the agency to disqualify an administrative law judge from conducting a hearing for bias, prejudice, personal interest, or lack of technical expertise necessary for a hearing. The administrative law judge may issue subpoenas to compel the attendance of witnesses and the production of documents. The subpoenas shall be served and, on

application to the superior court, enforced in the manner provided by law for the service and enforcement of subpoenas in civil matters. The administrative law judge may administer oaths and affirmations to witnesses.

D. All hearings shall be recorded. The administrative law judge shall secure either a court reporter or an electronic means of producing a clear and accurate record of the proceeding at the agency's expense.

E. On application of a party or the agency and for use as evidence, the administrative law judge may permit a deposition to be taken, in the manner and on the terms designated by the administrative law judge, of a witness who cannot be subpoenaed or who is unable to attend the hearing. Subpoenas for the production of documents may be ordered by the administrative law judge if the party seeking the discovery demonstrates that the party has reasonable need of the materials being sought. All provisions of law compelling a person under subpoena to testify are applicable.

F. Disposition may be made by stipulation, agreed settlement, consent order, or default. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. A final administrative decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

G. The burden of proof in agency hearings shall be preponderance of evidence. Notwithstanding any other law, at a hearing on an agency's denial of a license or permit or a denial of an application or request for modification of a license or permit, the agency has the burden of persuasion. At a hearing on an agency action to suspend, revoke, terminate, or modify on its own initiative material conditions of a license or permit, the agency has the burden of persuasion. At a hearing on an agency's imposition of fees or penalties or any agency compliance order, the agency has the burden of persuasion.

Section 2: Review of agency action

In any action to review a final administrative decision, the parties shall be entitled to a speedy and public determination by a court of law. If requested by a party to an action within 30 days after filing a notice of appeal or petition for review, the court shall hold an evidentiary hearing, including testimony and argument, to the extent necessary to make the determination. Notwithstanding any other law, for review of final administrative decisions, the court shall decide de novo all relevant questions of law, including the interpretation of constitutional, statutory, and regulatory provisions, unless the parties stipulate otherwise. On demand of any party, if the determination of facts may be made by a jury. Relevant and admissible exhibits and testimony that were not received during the administrative hearing shall be admitted so long as compliant with the rules of evidence, and objections that a party failed to make to evidence offered at the administrative hearing shall be considered, unless either of the following is true:

1. The exhibit, testimony, or objection was withheld for purposes of delay, harassment, or other improper purpose.

2. Allowing admission of the exhibit or testimony or consideration of the objection would cause substantial prejudice to another party.

ENDNOTES

[1] James Madison, "Charters," in Jack Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 502.

[2] Darcy Olsen, *The Right to Try* (New York: Harper, 2015).

[3] Brad Hershbein, et al., "Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices," Brookings.edu, January 27, 2015, https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/.

[4] After passage of Arizona's Prop. 203 legalized the medicinal use of marijuana in 2010, county officials who disagreed with that initiative responded by refusing either to grant or deny applications for permits to open marijuana dispensaries. Property owners sued, and a trial court declared that the county's "categorical refusal to examine whether Plaintiff's proposed site meets zoning requirements" was "unlawful," and the Arizona Court of Appeals agreed in December 2016. *White Mountain Health Center v. County of Maricopa*, CV 2012-053585 (Maricopa Co. Sup. Ct. December 3, 2012), *aff'd* 2016 WL 7368623 (Ct. App. December 20, 2016).

[5] Timothy Sandefur, *The Permission Society* (New York: Encounter Books, 2016), 195.

[6] See *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014); *Kagan v. New Orleans*, 753 F.3d 560 (5th Cir. 2014).

[7] See, e.g., Pinellas County Tax Collector, Going out of Business Information, http://www.taxcollect.com/other-services/going-out-of-business/. Some cities also require a permit to hold a going-out-of-business sale. "Dan Sorenson, Beware of Liquidation Sales," *Arizona Daily Star*, November 16, 2008. In 1984, the California Supreme Court upheld a local ordinance that prohibited rental property owners from going out of business. The state legislature was forced to pass a new law, the Ellis Act, to allow landlords to remove property from the market. But many local governments still require them to get permits or even to pay thousands of dollars in fees to do so. *Nash v. City of Santa Monica*, 37 Cal.3d 97 (1984).

[8] Sandefur, 104-33.

[9] See, e.g., Nev. Rev. Stat. § 706.151 et seq., W. Va. Code § 24A-2-5 et seq.

[10] Friedrich Hayek, "The Use of Knowledge in Society," *American Economic Review* 35, no. 4 (1945): 519-30; Leonard Read, I, Pencil (Irvington-on-Hud-

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son, NY: Foundation for Economic Education, 1958).

[11] Adam Theirer, *Permissionless Innovation* (Washington, D.C.: Mercatus Center, 2016), 14.

[12] Thierer, 110.

[13] Luke A. Wake and Jarod M. Bona, "Legislative Exactions After *Koontz v. St. Johns River Management District*," *Georgetown International Environmental Law Review* 27 (2015): 539-83.

[14] *Griswold v. City of Carlsbad*, 402 Fed.Appx. 310 (9th Cir. 2010).

[15] Michael I. Myerson, "The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and The Separation of Powers," *Indiana Law Review* 23 (2001): 295-342. During the first great crisis in free speech in the United States—the Sedition Act of 1798—the Act's supporters and opponents both agreed that prior restraints were prohibited by the First Amendment. They simply disagreed over whether the Act qualified as a prior restraint. (See James Madison, "Report on The Alien and Sedition Acts," in Rakove, 608-62.)

[16] *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–61 (1975); *Freedman v. Maryland*, 380 U.S. 51, 57-60 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70–71 (1963).

[17] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 531 (1952); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990).

[18] *Freedman,* 380 U.S. at 58-59; *FW/PBS*, 493 U.S. at 225-26.

[19] *Conrad,* 420 U.S. at 560.

[20] *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). *See also Conrad*, 420 U.S. at 560 (applying safeguard requirements outside context of motion picture licensing).

[21] Mesa Zoning Ordinance § 11-5-5(D)(4), http://www.mesaaz.gov/home/showdocument?id=12450.

[22] Mesa Zoning Ordinance § 11-71-6(A)(3), http://www.mesaaz.gov/home/showdocument?id=12520.

[23] *R.S.T. Builders, Inc. v. Village of Bolingbrook*, 489 N.E.2d 1151 (Ill. App. 1986) (invalidating vague building codes); *Morristown Rd. Associates v. Mayor & Common Council & Planning Bd. of Borough of Bernardsville*, 163 N.J. Super. 58, 66-67 (Law. Div. 1978) (same); *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill.App.2d 218 (1968) (same); *City of West Palm Beach v. State*, 30 So.2d 491, 492

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(Fla. 1947) ("When regulations are to be imposed in order to promote health, welfare, safety and morals it is necessary that exactions be fixed in the ordinance with such certainty that they not be left to the whim or caprice of the administrative agency and the ordinance must have some relation to a lawful purpose.").

[24] *Coleman v. City of Mesa*, 230 Ariz. 352, 355, 284 P.3d 863, 866 (2012).

[25] See Daniel Mandelker, "Design Standards in Zoning Ordinances," May 23, 2012, Washington University in St. Louis Legal Studies Research Paper No. 12-05-06. Available at SSRN: https://ssrn.com/abstract=2065302.

[26] *People v. Gates*, 41 Cal.App.3d 590, 595 (1974), quoting Donald G. Hagman, et al., *California Zoning Practice* (Berkeley: California Continuing Education of the Bar, 1969), 148.

[27] L.S.A. § 3:3807. One website that offers assistance to people studying for the exam provides the following example test questions: "What effect does one strive to achieve in a round bouquet"? (Answer: a dome effect) and "Tones may be considered light or dark and may be used where what type of coloring is needed?" (Answer: subtle). http://www.studystack.com/flashcard-1679547.

[28] See, e.g., *Chief of Police of City of Worcester v. Holden*, 470 Mass. 845, 855–56 (2015). Brian MacQuarrie, "Want a Gun License in Massachusetts? Much Depends on Where You Live," Boston.com, March 11, 2013.

[29] *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016).

[30] City of Litchfield Park, Building Permit Questions And Concerns, http://www.litchfield-park.org/index.aspx?NID=487#.

[31] Richard A. Epstein, "The Permit Power Meets the Constitution," *Iowa Law Review*, 81 (1995): 415.

[32] Laura Hurmence McKaskle, "Land Use Moratoria and Temporary Takings Redefined After *Lake Tahoe*?" *Pepperdine Law Review* 30 (2003): 293-94.

[33] A.R.S. §§ 41-1092.07(F)(1); 12-911(B)

[34] A.R.S. § 12-910(B), (E).

[35] *Pima Cty. v. Pima Cty. Law Enf't Merit Sys. Council*, 211 Ariz. 224, 228 (2005); *Gaveck v. Arizona State Bd. of Podiatry Examiners*, 222 Ariz. 433, 436 (Ct. App. 2009).

[36] Different states have different rules for administra-

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tive agencies. Most state courts have ruled that hearsay is admissible in administrative hearings. Others have prohibited it, but courts so frequently disregard violations of the rules that one expert has written that "Courts sometimes state in a general way that hearsay evidence either is, or is not, admissible in an administrative proceeding. Such broad statements cannot be construed as meaning that the courts will apply such a rule always and in every instance." Ernest H. Schopler, "Hearsay Evidence in Proceedings before State Administrative Agencies," *American Law Reports* (Third Series), 36:12. Arizona courts are ambivalent. Despite the fact that the statute makes plain that evidentiary rules do not apply, Arizona courts have declared that agency decisions "should not be based upon unreliable hearsay." *Plowman v. Arizona State Liquor Bd.*, 152 Ariz. 331, 337 (Ct. App. 1986). Yet the *Plowman* court acknowledged that this was nonbinding dicta, and later courts have said that "otherwise inadmissible evidence such as hearsay may be considered" and "given probative weight," and "may even be the sole support of an administrative decision" so long as "circumstances establish that it is trustworthy." *Brown v. Arizona Dep't of Real Estate*, 181 Ariz. 320, 328 (Ct. App. 1995). The Arizona Supreme Court has never pronounced on the question. In any event, the statute provides that an agency's "failure to observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the superior court that the error or failure affected the rights of a party and resulted in injustice to him." A.R.S. § 12-911(B).

[37] *Gaveck,* 222 Ariz. at 436.

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[46] *Technology Construction, Inc. (TCI) v. City of Kingman*, 229 Ariz. 564 (2012).

[47] *Westmark Dev. Corp. v. City of Burien*, 140 Wash. App. 540 (2007).

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