



# KANSAS JUSTICE INSTITUTE

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## Testimony to the Health and Human Services Committee

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HB 2256: “AN ACT concerning advanced practice registered nurses; relating to the board of nursing; definition of practice; prescribing authority; licensure requirements; rules and regulations; amending K.S.A. 65-1130 and K.S.A. 2020 Supp. 40-3401, 65-1113 and 65-4101 and repealing the existing sections.”

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By: Samuel G. MacRoberts

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Chairwoman Landwehr Members of the Committee:

Kansas Justice Institute<sup>1</sup> supports the elimination of unreasonable occupational barriers. To that end, KJI requests this Committee carefully consider removing the “authorization for collaborative practice” and the “written [prescription drug] protocol as authorized by a responsible physician” requirements, as they are currently fashioned. These two requirements, in their current iteration, are unnecessary, unreasonable, outdated, and are not appropriately tailored to serve a legitimate public interest.

An Advanced Practice Registered Nurse (APRN) has the training, experience, and board-issued credentials to treat nursing patients safely and appropriately. Currently though, APRNs cannot fully practice commensurate with their APRN training unless they first convince a physician to sign an “authorization for collaborative practice” agreement. Physicians sometimes, if not usually, charge APRNs for these agreements. However, the collaborating physician is not required to be physically present during the patient’s examination, the APRN is not required to consult with the physician, and the agreement does not change based upon the particulars of the patient. In short, collaborative practice agreements do not make APRNs more capable of safely treating their nursing patients. But they do create an opportunity for physicians to extract fees from APRNs.

Instead of increasing patient outcomes, the requirement makes it significantly harder for some APRNs to treat those in rural and other under-served communities. APRNs who are otherwise qualified and licensed to treat patients cannot always find willing physicians to sign

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<sup>1</sup> KJI is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans.

a collaborative practice agreement, thus preventing some APRNs from fully practicing in certain communities.

A collaborative practice agreement does not guarantee effective communication, does not assure physician availability, wrongly implies APRNs need physician supervision over the practice of advanced nursing, can cause patient confusion because pre- and post- discharge paperwork sometimes contains the physician's name (even though the patient might not have ever met the named physician), and essentially permits economic competitors to dictate where, when, and how APRNs practice their calling. Further, there is no evidence the collaborative practice agreement requirement enhances patient outcomes.

In our view, requiring an APRN to sign a collaborative practice agreement, who is otherwise qualified and licensed to practice advanced nursing, could very well violate Kansas Constitution Bill of Rights Section 1, and other provisions not discussed here.<sup>2</sup> In our view, Section 1 *is* a natural rights clause, but is best understood to protect the right to earn an honest living, free from unreasonable government interference. When “[John] Locke observed that ‘every Man has a Property in his own Person,’ ”<sup>3</sup> he was instead referencing the right to earn an honest living. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 221 (2003). Perhaps more importantly, Kansas' natural rights clause was modeled after Thomas Jefferson's use of the phrase in the Declaration of Independence, and “it is evident that Jefferson's use of the phrase, ‘life, liberty, and the pursuit of happiness’ was meant to assert this right of livelihood.” *Id.* at 220.

The Kansas founders understood and appreciated the clause's true meaning at the time it was adopted.

Based upon the historical record, caselaw, and common-sense arguments, the right to earn an honest living is a fundamental right and a court should apply strict scrutiny to unreasonable occupational barriers. This right to earn an honest living existed at English common law as far back as the 1600s. *See, e.g., Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614) (Lord Coke declaring the common law protected the right of “any man to use any trade thereby to maintain himself and his family” in a case involving an upholsterer who opened his business before completing an apprenticeship.). But even if a court did not apply strict scrutiny, some requirements could very well fail under a more deferential standard. The Kansas Constitution forbids occupational barriers that are not appropriately tailored.

It is my impression that some have considered assigning regulation of APRNs to the Kansas Board of Healing Arts rather than the Kansas Board of Nursing. This too raises serious constitutional and legal concerns.

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<sup>2</sup> This analysis is not exhaustive.

<sup>3</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 640 (2019).

As the Federal Trade Commission wrote in its letter to The Honorable Daniel R. Hawkins in 2020, “[f]rom a competition standpoint, occupational regulation can be especially worrisome when regulatory authority is delegated to a board composed of members of the occupation it regulates. The risk is that the board will make regulatory decisions that serve the private economic interests of its members and not the policies of the state. These private interests may lead to the adoption and application of occupational restrictions that discourage new entrants, deter competition among licensees and from providers in related fields, and suppress innovative products or services that could challenge the status quo.” *Letter from Director Bilal Sayyed to Hon. Dan Hawkins*, page 10 (Jan. 9, 2020) (cleaned up). As the FTC’s letter made clear, similar concerns were raised in *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494 (2015).

In short, there are several solid reasons to permit Advanced Practice Registered Nurses to practice nursing to the fullest extent of their education and training; to abandon the current iteration of the “authorization for collaborative practice” and “written [prescription drug] protocol as authorized by a responsible physician” requirements; and keep APRNs under the Board of Nursing.

Thank you for your time and consideration.

Sincerely,

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