



## **Statement of Principles for Restrictions on Enforcement of Conduct Codes and Eligibility Requirements**

The Professional Certification Coalition supports the objective of reducing unnecessary barriers to entry into professions. This laudable objective must be carefully balanced, however, against the need to ensure public safety, health, and welfare through legitimate state regulation of licensed professions. In addition, legislation must recognize and respect the fundamental right of non-governmental certification organizations to establish and enforce their own eligibility and conduct rights.

Most state legislation seeking to expand pathways into occupations focuses on licensed professions. **These bills aim to restrict the authority of licensing boards to consider certain criminal conviction history or take disciplinary action or deny a license based on such convictions, or on other conduct that is not directly connected to the tasks performed by a licensed professional.** With respect to criminal conviction history, **the PCC has urged careful crafting of such legislation in order to maintain important profession-specific protections for the public** and has issued a [Statement of Principles on Ex-Offender Reentry Bills](#). Recently, legislation has also sought to restrict licensing agencies from denying a license based on conduct that may reduce trust in the profession, as in the case of health professionals spreading COVID-19 misinformation or disinformation or providing prescriptions for medication that has been shown to be ineffective for the prescribed purpose.

These kinds of restrictions are a major concern for certification organizations in licensed professions because they transfer the burden of enforcement of conduct codes from the licensing board to the certification organization. Even when certifications are wholly voluntary and not required for licensure, certification organizations may be affected, as they often assess the professional standing of licensed candidates without performing criminal background checks.

**Other proposed and enacted legislation would restrict private certification organizations from denying credentials on the basis of certain criminal conviction history or based on speech or conduct that is contrary to the established values of the certification organization and the profession.** For example, recent legislation would prohibit making it a condition of certification, licensing, credentialing, passing an examination, or membership in an association to require adherence to certain diversity, equity, and inclusion (DEI) principles. Although ultimately unsuccessful thus far, some legislative attempts have also sought to block private certification organizations from denying or revoking certification based on social media statements made by individuals seeking or holding the organization's credentials. **The PCC opposes these legislative initiatives.**

Private certification organizations have a long and legally protected tradition of self-regulation. As the U.S. Supreme Court has recognized, certification organizations have a First Amendment "freedom not to associate" by denying eligibility to or revoking certification or

membership from certificants who violate the organization's conduct rules or values.<sup>1</sup> That fundamental right can only be curtailed by a compelling governmental interest, such as to prevent invidious discrimination on the basis of race or gender. Forcing a private organization to accept or endorse an individual whose statements or conduct are contrary to the organization's values tramples the protected expression of the organization. Most legislation restricting certification organizations from denying certification on the basis of criminal conviction history arises from concern that denial of those credentials may reduce the employment or licensure prospects of ex-offenders. However, the state's interest in opening the doors of economic opportunity to those with criminal records does not outweigh the constitutional rights of certification organizations.

Other efforts to legislate the decisions of private certification organizations are more ideologically motivated. These bills seek to prevent adverse credentialing consequences for individuals who violate the professional norms adopted by the certification organization. Many of these bills seek to protect the "free speech" of certificants by blocking private organizations from enforcing conduct rules that bar certificants from publicly spreading misinformation or disinformation about matters that the certification organization regards as part of the core competencies in the profession (e.g., for health care professions, broadcasting discredited COVID-19 or vaccination theories in speeches or on social media). This approach could also restrict certification organizations from adopting standards relating to spreading of debunked conspiracy theories without evidence or addressing certificants' vocal support for white supremacist views or anti-LGBTQ policies, where advocating those views is contrary to the inclusion and antidiscrimination policies adopted by the organization. Although most of these bills take aim at conduct codes that reflect more progressive positions, the constitutional principle applies regardless of whether a private certification organization adopts standards that reflect conservative or more liberal values. Similarly, the position publicly espoused by the individual may be unconnected to any political ideology but at direct odds with the mission of or standards set by the organization, such that allowing the individual to hold the organization's credential, in light of the individual's speech or conduct, could be seen as compelling the organization to endorse views the organization rejects.

For private certification organizations, public speech on many kinds of issues may be irrelevant to the purpose and significance of the credential the organization issues and therefore fall outside the organization's purview. Depending on the content of the individual's public statements and the nature of the certification, however, certification organizations may take the position that certain speech or conduct is damaging to the profession and contrary to the values of the organization. Some legislation characterizes this intrusion into the decisions of private certification organization as a way to protect individuals' "free speech" rights. The First Amendment, however, applies only to governmental restrictions ("Congress shall make no law..."), not to the decisions of non-governmental organizations to consider or take action based on the speech of individuals. With legislation of this nature, it is the certification organizations that have a First Amendment right to express their values without governmental laws restricting that expression. These decisions should be left to each certification organization to make, without interference from state legislatures.

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<sup>1</sup> See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).