



**PREPARED STATEMENT OF  
THE FEDERAL TRADE COMMISSION  
ON  
COMPETITION AND OCCUPATIONAL LICENSURE  
BEFORE THE  
JUDICIARY COMMITTEE  
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST  
LAW  
UNITED STATES HOUSE OF REPRESENTATIVES  
WASHINGTON, D.C.  
SEPTEMBER 12, 2017**

## **I. Introduction**

Chairman Marino, Ranking Member Cicilline, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Maureen K. Ohlhausen, Acting Chairman of the Federal Trade Commission (“FTC” or “Commission”), and I am pleased to join you to discuss competition perspectives on occupational licensing. This has long been an area of significant interest for the Commission and, as demonstrated by H.R. 3446 – the “Restoring Board Immunity Act of 2017” (“RBI Act”) – it is of interest to Congress as well.<sup>1</sup>

The FTC recognizes that occupational licensing can offer important benefits. Licensing can protect consumers from actual health and safety risks and support other valuable public policy goals. But that does not mean *all* licensing is warranted, or that restrictions on an occupation always yield more benefits than harms. Licensing restrictions may impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits. Such regulations may lead to higher prices, lower quality, and reduced consumer access to services and goods. In the long term, these unnecessary restrictions can cause lasting damage to competition and the competitive process. They tend to render markets less responsive to consumer demand, and they dampen incentives for innovation in products, services, and business models. These restrictions also create barriers to entry and mobility for workers seeking to meet consumer demand for services. In the end, excessive occupational licensing means consumers lose the benefits of competition, workers are denied full economic opportunity, and our whole economy suffers.

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<sup>1</sup> This written statement presents the views of the Federal Trade Commission. Oral testimony and responses to questions reflect my views and do not necessarily reflect the views of the Commission or any individual Commissioner.

This testimony describes the FTC’s approach to evaluating the potential competitive effects of occupational licensing and related regulations, and how we use a combination of research, education, advocacy, and enforcement tools to promote competition among service providers. Typically, we have examined particular restrictions that may unduly limit competition in specific licensed occupations. Furthermore, when appropriate, the Commission has taken enforcement action to stop regulatory boards from exceeding their authority to suppress or eliminate competition. The Commission and its staff have not tended to focus on whether, as a general matter, certain occupations, trades, and professions should or should not be licensed or otherwise regulated.<sup>2</sup> Recently, however, I convened the FTC Economic Liberty Task Force,<sup>3</sup> which has begun to examine a range of broader licensing issues.

Occupational regulation can be especially problematic when regulatory authority is delegated to a board controlled by active market participants – members who work in, and may derive much or all of their income from, the very occupation they regulate. There may be good reasons to include board members with this type of expertise. However, when financially-interested members control or dominate a board, there is a risk that the board’s decisions will serve the private economic interests of its members, not the policies of the state or the well-being of its citizens. As the Supreme Court has observed, acknowledging the risk of self-dealing does not require an assumption that board members will act in bad faith. Rather, self-dealing arises

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<sup>2</sup> Some Commission and staff advocacy comments have questioned whether, for a certain service or occupation, licensure is a necessary or justified form of regulation. *See, e.g.*, FTC Staff Comment to the Hon. O.H. Harris Concerning Texas S.B. 454 to License Interior Designers (1989), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-hon.o.h.harris-concerning-texas-s.b.454-license-interior-designers/v890045.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.o.h.harris-concerning-texas-s.b.454-license-interior-designers/v890045.pdf). In addition, in the past, Commission staff have studied the general conditions under which licensure or some other form of occupational regulation may or may not be warranted. *See generally, e.g.*, CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FED. TRADE COMM’N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990), [http://www.ramblemuse.com/articles/cox\\_foster.pdf](http://www.ramblemuse.com/articles/cox_foster.pdf).

<sup>3</sup> Fed. Trade Comm’n, Economic Liberty, <https://www.ftc.gov/policy/advocacy/economic-liberty>.

from inherent biases associated with “singularly strong private interests,” and “an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.”<sup>4</sup>

The FTC and its staff address these concerns primarily in two ways. First, as part of the FTC’s competition advocacy program, we often respond to calls for public comment and invitations from legislators and regulators, who ask FTC staff to identify and analyze specific restrictions that may harm competition without offering countervailing consumer benefits. Typically, we urge policymakers to integrate competition concerns into their decision-making process. Specifically, we ask that they consider whether: (1) any licensing regulations are likely to have a significant adverse effect on competition; (2) those restrictions are targeted to address actual risks of consumer harm; and (3) the restrictions are narrowly tailored to minimize burdens on competition, or whether less restrictive alternatives are available.<sup>5</sup>

Second, the Commission has used its enforcement authority to challenge anticompetitive conduct by regulatory boards whose members are active market participants. These enforcement actions have included challenges to agreements among competitors that restrain truthful and non-deceptive advertising, price competition, and contracting or other commercial practices. We have also challenged direct efforts to prohibit competition from new rivals where there is no legitimate justification for doing so. The Commission can only bring these actions when the challenged conduct harms competition and consumers, violates the federal antitrust laws, and falls outside of the scope of protected “state action.” Under the state action doctrine, which was first articulated by the Supreme Court in 1943, principles of federalism limit the application of the federal

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<sup>4</sup> *N.C. State Bd. Dental Examiners v. FTC*, 135 S. Ct. 1101, 1114 (2015).

<sup>5</sup> *License to Compete: Occupational Licensing and the State Action Doctrine*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Pol’y and Consumer Rights, 114<sup>th</sup> Cong., 2 (Feb. 2, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/912743/160202occupationallicensing.pdf](https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupationallicensing.pdf).

antitrust laws when restraints on competition are imposed or approved by the states themselves.<sup>6</sup> A state acting as a sovereign may impose occupational licensing or other regulations that displace competition in favor of other goals and values. But as the Supreme Court has cautioned, “The national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially . . . [private anticompetitive conduct].”<sup>7</sup> As one of two federal agencies charged with enforcing U.S. antitrust laws, the Commission is committed to ensuring that the state action doctrine remains true to its foundations.

The discussion below will cover several aspects of the Commission’s occupational licensing work.

- First, it provides a brief overview of the FTC’s interest and experience in competition issues related to occupational licensing and competitor-controlled regulatory boards;
- Second, it outlines general competition concerns in this area, touching on some of the issues implicated by H.R. 3446; and
- Third, it provides additional details of the FTC’s work relating to the potential competitive harm of excessive regulation of the occupations, including FTC research, competition advocacy, and law enforcement.

## **II. Interest and Experience of the FTC**

Competition is at the core of America’s economy and vigorous competition among sellers in an open marketplace can provide consumers the benefits of lower prices, higher quality products and services, and greater innovation. To advance that national policy, the FTC Act

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<sup>6</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>7</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

grants the Commission broad enforcement authority with regard to both competition and consumer protection matters in most sectors of the economy.<sup>8</sup> In addition, Section 6 of the FTC Act provides, among other things, a general authority to investigate and report on market developments “in the public interest,” as well as authority to make recommendations based on those investigations.<sup>9</sup> This distinct charge supports the FTC’s research, education, and competition advocacy efforts.

To fulfill these statutory mandates, the Commission seeks to identify private, public, and quasi-public restrictions that may unreasonably impede competition. In the context of occupational licensing, the Commission and its staff have for over thirty years conducted various economic and policy studies,<sup>10</sup> as well as focused inquiries into regulations applying to particular occupations and their practitioners, such as nurses,<sup>11</sup> eye doctors and vendors of optical goods,<sup>12</sup> lawyers and other providers of legal services,<sup>13</sup> dental hygienists,<sup>14</sup> and the real estate brokers,<sup>15</sup>

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<sup>8</sup> The FTC’s authority reaches “[u]nfair methods of competition” and “unfair or deceptive acts or practices” that are “in or affecting commerce.” 15 U.S.C. § 45(a)(1) (2013). With some exceptions, the FTC’s authority ranges broadly over “commerce” without restriction to particular segments of the economy. *Id.* at § 45(a)(2).

<sup>9</sup> 15 U.S.C. § 46 (2006).

<sup>10</sup> *See, e.g.,* COX & FOSTER, *supra* note 2, at 4-12.

<sup>11</sup> DANIEL J. GILMAN & TARA ISA KOSLOV, FED. TRADE COMM’N STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, (2014), <http://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>.

<sup>12</sup> FED. TRADE COMM’N, COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (2005), <http://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf>; RONALD S. BOND ET AL., FED. TRADE COMM’N, STAFF REPORT ON THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980), <http://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf>.

<sup>13</sup> JACOBS ET AL., CLEVELAND REGIONAL OFFICE & BUREAU OF ECONOMICS, FED. TRADE COMM’N, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

<sup>14</sup> J. NELLIE LIANG & JONATHAN OGUR, RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS, FED. TRADE COMM’N, BUREAU OF ECON. STAFF REPORT (1987).

among others.<sup>16</sup> More recently, the Economic Liberty Task Force held a July 2017 public roundtable to explore issues relating to streamlining occupational license portability across state lines.<sup>17</sup> Based on this research, the larger body of economic literature, and its own investigations, the Commission has addressed potentially anticompetitive restrictions on certain occupations through competition advocacy, enforcement tools, and various forms of education and outreach.

### **III. Competition Issues Raised by Licensing and Other Occupational Regulations**

Licensing laws and regulations establish conditions for entry into an occupation and define the occupation’s metes and bounds or “scope of practice.”<sup>18</sup> Licensing has become an increasingly dominant form of occupational regulation, with studies suggesting that 25-30% of the U.S. workforce is employed in occupations that require a license.<sup>19</sup> Licensing is generally the most stringent form of occupational regulation.<sup>20</sup> Unlicensed practice, or the provision of services outside one’s scope of practice, may be prohibited by statute or regulation and may be subject to civil or criminal penalties.<sup>21</sup>

For some occupations, licensing laws and regulations may be an appropriate policy response to consumer protection or safety concerns. Licensing can help to prevent consumer

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<sup>15</sup> FED. TRADE COMM’N & U.S. DEP’T JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007), <http://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>.

<sup>16</sup> COX & FOSTER, *supra* note 2, (considering occupational regulation generally, as well as certain particular occupations).

<sup>17</sup> Fed. Trade Comm’n, Streamlining Licensing Across State Lines, Initiatives to Enhance Occupational License Portability, <https://www.ftc.gov/news-events/events-calendar/2017/07/streamlining-licensing-across-state-lines-initiatives-enhance>.

<sup>18</sup> U.S. DEP’T TREASURY, COUNCIL OF ECONOMIC ADVISORS & DEP’T LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, n. 6 and accompanying text (2015).

<sup>19</sup> *See id.*; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT J. INDUS. REL. 2 (2010).

<sup>20</sup> *See* COX & FOSTER, *supra* note 2, at ch. V (regarding alternatives to licensing).

<sup>21</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13 (1971).

fraud and mitigate the effects of certain types of market failure – for example, those associated with persistent information asymmetries between professionals and consumers.<sup>22</sup> Licensing regulations may serve an especially important function in health care, where consumers might face serious risks if they were treated by unqualified individuals, and patients might find it difficult (if not impossible) to assess quality of care at the time of delivery.

At the same time, licensing inherently constrains competition, albeit to varying degrees.<sup>23</sup> When a law or regulation establishes required entry conditions for an occupation, only individuals who satisfy those conditions are legally permitted to provide the services associated with that occupation, which tends to reduce the number of market participants. This reduction in supply, and the resulting loss of competition, can lead to higher prices, reduced non-price competition on terms such as convenience or quality, or other distortions in services or labor markets.<sup>24</sup> Licensing is estimated to result in 10-15% higher wages for licensed workers relative to unlicensed workers, after adjusting for differences in education, training, and experience,<sup>25</sup> and numerous studies have shown that licensing leads to higher prices for consumers.<sup>26</sup> In addition, although licensing may be designed to provide consumers with minimum quality

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<sup>22</sup> For example, consumers may not have reliable access to, or sufficient ability to understand, relevant information relating to the quality of the services they are consuming or the risks they may face and conflicts of interest may arise when professionals serve as both diagnosticians and treatment providers. *See, e.g., COX & FOSTER, supra* note 2, at 4-12.

<sup>23</sup> *See Stigler, supra* note 21, at 13-17.

<sup>24</sup> Regarding licensure generally, see Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 192 (2000) (“The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered.”); *see also COX & FOSTER, supra* note 2, at 21-36.

<sup>25</sup> Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 British J. Industrial Relations 676 (2010); *see also* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LABOR ECON. S-173, S-191 (2013); COX & FOSTER, *supra* note 2, at 28-31 (reviewing studies of effects of licensing on the prices of dental, legal, and optometric services).

<sup>26</sup> U.S. DEP’T TREASURY, COUNCIL OF ECONOMIC ADVISORS & DEP’T LABOR, *supra* note 18, at 14.

assurances, licensing provisions do not always increase service quality.<sup>27</sup> Licensing costs and burdens may also discourage innovation and entrepreneurship. In some cases, these regulatory barriers to entry may severely impede the flow of labor or services to where they are most in demand, potentially reducing consumer access to valued services.<sup>28</sup> Based on standard economic models, one 2011 study estimates that license-related restrictions have resulted in as many as 2.85 million fewer jobs nationwide, with an annual cost to consumers of up to \$203 billion.<sup>29</sup>

As noted above, the FTC and its staff have not tended to focus on the broader question of whether individual occupations should be subject to licensure as a form of regulation; and we have not closely studied or determined whether the U.S. economy is characterized by excessive occupational licensing. We have begun, however, to extend some of our prior inquiries into the potential costs and benefits of licensure and other occupational regulations<sup>30</sup> and to consider the kinds of evidence that could illuminate broader questions about the economic impact of licensing. For example, we announced yesterday that the Economic Liberty Task Force will hold a public roundtable on November 7, 2017, to examine recent and ongoing empirical research into the effects of occupational licensure on competition, consumers, and the workforce.<sup>31</sup> But the FTC has never attempted to design regulatory institutions or tell various jurisdictions and

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<sup>27</sup> See, e.g., Morris M. Kleiner & Robert T. Kurdle, *Does Regulation Affect Economic Outcomes: The Case of Dentistry*, 43 J. LAW & ECON. 547, 570 (2000) (“Overall, our results show that licensing does not improve dental health outcomes as measured by our sample of dental recruits. Moreover, treatment quality does not appear to improve significantly on the basis of the reduced cost of malpractice insurance or a lower complaint rate against dentists, where regulation is more stringent.”); see also COX & FOSTER, *supra* note 2, at 21-29.

<sup>28</sup> For example, FTC staff comments on nursing regulations have focused on primary care provider shortages and the abilities of advanced practice nurses and others to meet the needs of underserved populations. See generally POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, *supra* note 11, at 2, 20-26.

<sup>29</sup> Morris M. Kleiner, Alan B. Krueger & Alex Mas, *A Proposal to Encourage States to Rationalize Occupational Licensing Practices: A Proposal to the Brookings Institution Hamilton Project*, Apr. 2, 2011.

<sup>30</sup> See COX & FOSTER, *supra* note 2.

<sup>31</sup> FTC Press Release, “FTC Announces Second Economic Liberty Public Roundtable,” Sept. 11, 2017, <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-announces-second-economic-liberty-public-roundtable>.

licensing authorities how best to administer their licensing laws. Rather, we have recognized that specific licensure regulations can have good, bad, or mixed competitive effects, depending on the circumstances. Therefore, we typically focus on case-by-case competition analysis of particular restrictions, and we have urged legislators and regulators to do the same.

#### **IV. FTC Advocacy Efforts**

A central goal of the FTC's competition advocacy program is to encourage federal, state, and local policymakers, as well as private, self-regulatory authorities, to integrate competition concerns into their decision-making process. By doing so, we hope they can avoid standards likely to interfere unnecessarily with the proper functioning of a competitive marketplace.<sup>32</sup> Even well intentioned laws and regulations may impose undue burdens on competition, in ways that ultimately harm consumers. Moreover, public restraints on competition may sometimes prove particularly harmful and durable, but may not always be actionable under the federal antitrust laws. Competition advocacy – in the form of comments, testimony, workshops, reports, and amicus briefs – encourages federal and state policy makers to consider how existing and proposed regulations are likely to affect competition and consumers, as well as other important policy goals.

##### **A. Framework for Analysis**

To address these concerns while preserving the potential benefits of occupational licensing, the Commission and its staff have developed a framework that we recommend to

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<sup>32</sup> For a general discussion of the FTC's "policy research and development" mission and the role of the advocacy program, see, e.g., WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 92-109; 121-24 (2009), <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>. See also James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005); Maureen K. Ohlhausen, *Identifying Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMPETITION POL'Y INT'L 151, 156-7 (2006) (competition advocacy "beyond enforcement" of the antitrust laws), <https://www.competitionpolicyinternational.com/file/view/6289>; Tara Isa Koslov, *Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Success*, 8 CPI ANTITRUST CHRON. 1 (2012), <https://www.competitionpolicyinternational.com/file/view/6732>.

policymakers evaluating licensing regulations. We note that various elements of the proposed RBI Act are consistent with this framework and share similar procompetitive goals. Specifically, the FTC's framework encourages policymakers to ask the following questions:

- Are there significant and non-speculative consumer health and safety issues, or other legitimate public policy purposes, that warrant licensing?
- Are any of the specific conditions or restrictions imposed under licensing likely to have a significant adverse effect on competition and consumers?
- If so, do the specific restrictions address the concerns at issue and protect against demonstrable harms or risks? For example, are there good grounds for claims that they reduce the risk of consumer harm from poor-quality services? Will the regulation yield other demonstrated or likely consumer benefits?
- Are the regulations narrowly tailored to serve the state's policy priorities without unduly restricting competition?<sup>33</sup>
- Are less restrictive alternatives available that would still serve legitimate public policy goals, but would be less harmful to competition?<sup>34</sup>

When consumer benefits are slight or highly speculative, a licensing regime may be generally undesirable. Similarly, policymakers may wish to avoid specific requirements that impede competition with no offsetting benefits. Further inquiry is important even when regulations serve well-founded consumer protection concerns; it is important to balance

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<sup>33</sup> For a more complete exposition of this framework, see POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, *supra* note 11, at 16-17.

<sup>34</sup> Other mechanisms may help consumers identify quality and value, without necessarily creating the same entry barriers as licensing. These approaches may include both private initiatives (e.g., consumer reviews and ratings, voluntary private certification or accreditation) as well as public ones (e.g., government registration or certification).

consumer benefits and costs, and alternative protections can sometimes accomplish as much or more, while doing less harm.

## **B. Specific Advocacy Efforts**

Since the late 1970s, the Commission and its staff have submitted hundreds of comments<sup>35</sup> and amicus curiae briefs<sup>36</sup> to state and self-regulatory entities on competition policy and antitrust law issues relating to occupations such as real estate brokers,<sup>37</sup> electricians,<sup>38</sup> accountants,<sup>39</sup> lawyers,<sup>40</sup> dentists<sup>41</sup> and dental hygienists,<sup>42</sup> nurses,<sup>43</sup> eye doctors and opticians,<sup>44</sup>

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<sup>35</sup> Many of these advocacy comments can be found at <http://www.ftc.gov/policy/advocacy/advocacy-filings>.

<sup>36</sup> See, e.g., Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, 190 N.J. 250 (N.J. 2007), <http://www.ftc.gov/policy/advocacy/amicus-briefs/2007/05/re-petition-review-committee-attorney-advertising-opinion-39>. For access to the FTC's other recent amicus briefs, see <http://www.ftc.gov/policy/advocacy/amicus-briefs>.

<sup>37</sup> FTC and Department of Justice Comment to Governor Jennifer M. Granholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Service Requirements on Real Estate Brokers (2007), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-and-department-justice-comment-governor-jennifer-m.grahholm-concerning-michigan-h.b.4416-impose-certain-minimum-service-requirements-real-estate-brokers/v050021.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-governor-jennifer-m.grahholm-concerning-michigan-h.b.4416-impose-certain-minimum-service-requirements-real-estate-brokers/v050021.pdf).

<sup>38</sup> FTC Staff Comment to the Hon. Glen Repp Concerning Texas H.B. 252 to Establish a System to Voluntarily License Electricians and Electrical Contractors (1989), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-hon.glen-repp-concerning-texas-h.b.252-establish-system-voluntarily-license-electricians-and-electrical-contractors/v890034.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.glen-repp-concerning-texas-h.b.252-establish-system-voluntarily-license-electricians-and-electrical-contractors/v890034.pdf).

<sup>39</sup> FTC Staff Comment to the Honorable Jean Silver Concerning Washington Administrative Code 4-25-710 to Require Additional Academic Credits for Certified Public Accountants (CPAs) (1996), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-jean-silver-concerning-washington-administrative-code-4-25-710-require/v960006.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-jean-silver-concerning-washington-administrative-code-4-25-710-require/v960006.pdf).

<sup>40</sup> FTC Staff Letter to the Supreme Court of Tennessee, Concerning Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (2013), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-letter-supreme-court-tennessee-concerning-proposed-amendments-tennessee-rules-professional/130125tennesseadvertisingletter.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-supreme-court-tennessee-concerning-proposed-amendments-tennessee-rules-professional/130125tennesseadvertisingletter.pdf).

<sup>41</sup> FTC Staff Letter to NC Representative Stephen LaRoque Concerning NC House Bill 698 and the Regulation of Dental Service Organizations and the Business Organization of Dental Practices (2012), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-letter-nc-representative-stephen-laroque-concerning-nc-house-bill-698-and-regulation/1205ncdental.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-nc-representative-stephen-laroque-concerning-nc-house-bill-698-and-regulation/1205ncdental.pdf).

<sup>42</sup> FTC Staff Comment Before the Maine Board of Dental Examiners Concerning Proposed Rules to Allow Independent Practice Dental Hygienists to Take X-Rays in Underserved Areas (2011), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-maine-board-dental-examiners-concerning-proposed-rules-allow-independent-practice/111125mainedental.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-maine-board-dental-examiners-concerning-proposed-rules-allow-independent-practice/111125mainedental.pdf).

and veterinarians.<sup>45</sup> These advocacy efforts have focused on various restrictions on price competition, contracts or commercial practices, entry by competitors or potential competitors, and truthful and non-misleading advertising.

For example, a series of FTC staff competition advocacy comments have addressed various physician supervision requirements that some states impose on advanced practice registered nurses (APRNs).<sup>46</sup> FTC staff has not questioned state interests in establishing licensing requirements for APRNs or other health professionals in the interest of patient safety. Rather, staff has questioned the competitive effects of additional restrictions on APRN licenses, such as mandatory supervision arrangements with individual physicians, which are sometimes cast as “collaborative practice agreement” requirements. Physician supervision requirements may raise competition concerns because they give one group of health care professionals the ability to restrict access to the market by another, potentially competing or collaborating group of health care professionals. Based on substantial evidence and experience, expert bodies have concluded that APRNs are safe and effective as independent providers of many health care services within

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<sup>43</sup> FTC Staff Comment to the Dep’t of Veterans Affairs: Proposed Rule Regarding Advanced Practice Registered Nurses (2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013\\_staff\\_comment\\_department\\_of\\_veterans\\_affairs.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf).

<sup>44</sup> FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses (Jan. 2011), <http://www.ftc.gov/os/2011/01/1101ncopticiansletter.pdf>; Letter from Maureen K. Ohlhausen *et al.* to Arkansas State Representative Doug Matayo (Oct. 4, 2004), <http://www.ftc.gov/os/2004/10/041008matayocomment.pdf>. *Cf.* FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), <http://www.ftc.gov/be.v020007.htm>.

<sup>45</sup> FTC Staff Comment Before the Virginia Board of Veterinary Medicine Concerning Regulations to Remove Restrictions on Advertising and Non-Veterinarian Relationships (1996), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-virginia-board-veterinary-medicine-concerning-regulations-remove-restrictions/p864641.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-virginia-board-veterinary-medicine-concerning-regulations-remove-restrictions/p864641.pdf).

<sup>46</sup> Many of the individual advocacy comments regarding nursing restrictions, along with the research and analyses underlying those comments, are described in detail in POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, *supra* note 11.

the scope of their training, licensure, certification, and practice.<sup>47</sup> Therefore, we have suggested that fixed, mandatory physician supervision requirements may be excessive or unjustified.

In some situations, we have engaged in competition advocacy where no plausible public benefit is even offered on behalf of licensing restrictions. For example, in 2011, the Commission filed an amicus brief in *St. Joseph Abbey v. Castille*,<sup>48</sup> clarifying the meaning and intent of the Commission’s “Funeral Rule.”<sup>49</sup> The plaintiffs, monks at St. Joseph Abbey who had built and sold simple wooden caskets consistent with their religious values, had challenged Louisiana statutes that required persons engaged solely in the manufacture and sale of caskets within the state to fulfill all licensing requirements applicable to funeral directors and establishments. Those requirements included, for example, a layout parlor for 30 people, a display room for six caskets, an arrangement room, the employment of a full-time, state-licensed funeral director, and, even though the Abbey did not handle or intend to handle human remains, installation of “embalming facilities for the sanitation, disinfection, and preparation of a human body.”<sup>50</sup> The U.S. Court of Appeals for the Fifth Circuit found that “no rational relationship exists between public health and

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<sup>47</sup> See, e.g., INST. OF MED., NAT’L ACAD. OF SCIENCES, THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH, 98-99 (2011); NAT’L GOVERNORS ASS’N, THE ROLE OF NURSE PRACTITIONERS IN MEETING INCREASING DEMAND FOR PRIMARY CARE, 7-8 (2012), <http://www.nga.org/files/live/sites/NGA/files/pdf/1212NursePractitionersPaper.pdf> (study funded by U.S. Dep’t Health & Human Servs., reviewing literature pertinent to NP safety and concluding “None of the studies in the NGA’s literature review raise concerns about the quality of care offered by NPs. Most studies showed that NP-provided care is comparable to physician-provided care on several process and outcome measures.”).

<sup>48</sup> Brief for the Federal Trade Commission as Amicus Curiae Supporting Neither Party, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), cert. denied, 134 S. Ct. 423 (2013) (“FTC Brief Amicus Curiae, *St. Joseph Abbey v. Castille*”).

<sup>49</sup> 47 Fed. Reg. 42260 (1982).

<sup>50</sup> See FTC Brief Amicus Curiae, *St. Joseph Abbey v. Castille* at 12, quoting La. Rev. Stat. Ann. § 37:842(D)(3).

safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realities of Louisiana's regulation of caskets and burials.”<sup>51</sup>

As noted earlier, the response of regulated industries to new and disruptive forms of competition is another area of concern. In some cases, regulators have acted to protect incumbent service providers currently subject to regulation. For example, in the taxi and related transportation business, innovative smartphone applications have provided consumers with new ways to arrange for transportation and, in some cases, have enabled new transportation services. Although some jurisdictions have adapted to these innovations, others have pursued regulatory approaches that would impede the development of new services, often without putting forth evidence of a legitimate consumer protection justification. We have urged these jurisdictions to consider carefully the adverse consequences of limiting competition, and to question the basis for restrictions advocated by incumbent industry participants.<sup>52</sup>

## **V. FTC Enforcement Efforts**

Although the FTC typically relies on competition advocacy to discourage potentially anticompetitive occupational licensing laws and regulations, the Commission sometimes invokes its enforcement authority to challenge anticompetitive conduct by regulatory boards that falls outside of the scope of protected state action.<sup>53</sup> These enforcement actions have included

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<sup>51</sup> *St. Joseph Abbey v. Castille*, 712 F.3d at 226 (affirming the district court decision that the challenged regulations, and their enforcement by the state board, were unconstitutional).

<sup>52</sup> See, e.g., FTC Staff Comment to the Honorable Brendan Reilly Concerning Chicago Proposed Ordinance O2014-1367 Regarding Transportation Network Providers (2014), [http://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf](http://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf). Regarding new methods of retail sales of automobiles, see, e.g., FTC Staff Comment Before the Missouri House of Representatives Regarding House Bill 1124, Which Would Expand the Current Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles (2014), <http://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/05/ftc-staff-comment-missouri-house-representatives-0>.

<sup>53</sup> The Supreme Court has recently admonished that reliance on the state action doctrine is “disfavored.” *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 133 Page 15 of 22

challenges to agreements among competitors that restrained advertising and solicitation, price competition, and contract or commercial practices, as well as direct efforts to prohibit competition from new rivals, without any cognizable justification.<sup>54</sup>

For example, in 2003, the Commission sued the South Carolina Board of Dentistry, charging that the Board had illegally restricted the ability of dental hygienists to provide basic preventive dental services in schools.<sup>55</sup> To address concerns that many schoolchildren, particularly those in low-income families, were not receiving any preventive dental care, the state legislature had eliminated a statutory requirement that a dentist examine each child before a hygienist could perform basic preventive care in schools. The Board then re-imposed the dentist examination requirement as an “emergency regulation.” Our complaint alleged that the Board’s action unreasonably restrained competition in the provision of preventive dental care services, depriving thousands of economically disadvantaged schoolchildren of needed dental care, and

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S. Ct. 1003, 1010 (2013), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)) (“[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’”); *Phoebe Putney Health Sys.*, 133 S. Ct. at 1016 (“federalism and state sovereignty are poorly served by a rule of construction that would allow ‘essential national policies’ embodied in the antitrust laws to be displaced by state delegations of authority ‘intended to achieve more limited ends.’”). Prior Commission testimony provides additional details on the history and scope of the state action exemption. *See License to Compete*, *supra* note 5; *see also* FED. TRADE COMM’N OFF. POL’Y PLAN., REPORT OF THE STATE ACTION TASK FORCE (2003), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf).

<sup>54</sup> The Commission also has advocated against attempts to exempt certain licensed health care professions from antitrust scrutiny for the purpose of permitting blatantly anticompetitive conduct. *See* FTC Staff Comment Before the Connecticut General Assembly Labor and Employees Committee Regarding Connecticut House Bill 6431 Concerning Joint Negotiations by Competing Physicians in Cooperative Health Care Arrangements, 3 (2013), [http://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf](http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf).

<sup>55</sup> *In re South Carolina State Bd. of Dentistry*, Complaint (2003) (Dkt. No. 9311), <http://www.ftc.gov/os/2003/09/socodontistcomp.pdf>. *See also In re South Carolina State Bd. of Dentistry*, Opinion and Order of the Commission (2004) (Dkt. No. 9311), <http://www.ftc.gov/os/adjpro/d9311/04072Scommissionopinion.pdf>.

that its harmful effects on competition and consumers were unjustified. The Board ultimately entered into a consent agreement settling the charges.<sup>56</sup>

Similarly, in 2010, the Commission challenged the North Carolina Board of Dental Examiners for issuing a series of cease-and-desist letters that successfully expelled low-cost non-dentist providers of teeth-whitening services.<sup>57</sup> As discussed in the next section, the FTC's challenge led to the Supreme Court's much-discussed opinion on the application of the state action doctrine to state boards dominated by active market participants. It is also worth noting that lower courts addressed competition issues underlying the FTC's challenge to the board's conduct: the U.S. Court of Appeals for the Fourth Circuit affirmed, among other things, the FTC's conclusion that the Board's behavior was likely to cause significant competitive harm.<sup>58</sup>

Some of the Commission's most important enforcement actions challenging restrictions on the dissemination of truthful advertising of professional services have been in the health care area.<sup>59</sup> For example, some boards of optometry<sup>60</sup> and dentistry<sup>61</sup> have sought to suppress information that could be useful to consumers of their services.

When the FTC takes enforcement actions, it is mindful of state regulatory authority. The state action doctrine is highly protective of direct exercises of sovereign state authority; it provides considerable leeway to the states as to the delegation of that authority and, in particular, to the makeup and conduct of licensing boards. Intervention under the federal antitrust laws

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<sup>56</sup> *In re South Carolina State Bd. of Dentistry*, Decision and Order (2007) (Dkt. No. 93 II), <http://www.ftc.gov/os/adjpro/d93111070911decision.pdf>.

<sup>57</sup> *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1108-9.

<sup>58</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F. 3d 359, 374 (4th Cir. 2013) (FTC's finding "supported by substantial evidence.").

<sup>59</sup> For an example outside the health care area, see, e.g., *Rhode Island Bd. of Accountancy*, 107 F.T.C. 293 (1986) (consent order).

<sup>60</sup> See, e.g., *In the Matter of Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

<sup>61</sup> *Louisiana State Bd. of Dentistry*, 106 F.T.C. 65 (1985) (consent order).

requires conduct that is anticompetitive under the antitrust laws, demonstrably harmful to consumers, and in excess of any clearly delegated authority and/or unsupervised by the state. Notably, many of these FTC enforcement matters have been aided or reinforced by state legislatures or attorneys general.<sup>62</sup> For example, the Texas state legislature and governor, apparently sharing concerns that motivated an FTC investigation, recently overrode rules imposed by the Texas Medical Board that effectively prevented most telemedicine in the state.<sup>63</sup> As a result, the Commission closed its investigation of the Texas Medical Board's alleged anticompetitive conduct.<sup>64</sup> As the Commission said in its closing statement:

The Commission commends the State of Texas for directly exercising its sovereign authority to override the TMB's rules and to reform its regulatory authority for the benefit of Texas consumers. As the Commission first noted in a 2004 report, when properly used, telemedicine has considerable promise to broaden access, lower costs, and improve health quality. The Commission hopes that by expanding the availability of telemedicine and telehealth alternatives, the new law will lead to many benefits for Texans, including increased competition among providers, more innovation in the delivery of care, increased access to healthcare services, reduced travel costs, and greater convenience.<sup>65</sup>

## **VI. North Carolina Board of Dental Examiners and the Future of the State Action Doctrine**

As recounted in the Supreme Court's *North Carolina Board of Dental Examiners* decision, states may regulate a particular occupation or profession by setting standards for

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<sup>62</sup> See, e.g., text accompanying notes 55-56 (regarding *South Carolina State Bd. of Dentistry* and conflict between Board and S.C. legislature); Brief of Amici Curiae State of Illinois et al., in Support of Petitioner, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (No. 11-1160) (amici brief filed by 20 states in support of the FTC).

<sup>63</sup> See S.B. No. 1107, 85th Legislative Session, Sec. 2 (striking Tex. Occ. Code Ann. § 111.004(5) and Sec. 3 (Tex. Occ. Code Ann. §§ 111.005(a)(3), (b), 111.007, 111.007(b)).

<sup>64</sup> Statement of the Federal Trade Commission On the Commission Vote To Close the Investigation of the Texas Medical Board's Conduct (Jun. 21, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1225993/1510180\\_texas\\_medical\\_board\\_statement\\_of\\_the\\_commission\\_6-21-17.pdf](https://www.ftc.gov/system/files/documents/public_statements/1225993/1510180_texas_medical_board_statement_of_the_commission_6-21-17.pdf).

<sup>65</sup> *Id.* (citing FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 23 (2004)).

licensing individuals to practice that occupation or profession and creating a board to administer those licensing standards. States often require that licensing boards include practicing members of the occupation or profession being regulated, and neither the Supreme Court nor the FTC has sought to dictate how such boards must be constituted.

The Court has, however, opined on the political accountability of boards controlled by market participants. In *N.C. Dental*, the Supreme Court held that a licensing board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy both prongs of the test the Supreme Court articulated in *California Retail Liquor Dealers Association v. Midcal Aluminum*.<sup>66</sup> The Court held that board actions must be made pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and their conduct must be actively supervised by the state.<sup>67</sup> The active supervision requirement ensures that any anticompetitive acts undertaken by private actors are in fact approved by the state as part of its regulatory policy. The mere possibility of supervision is not enough; state officials must have and exercise the power to review the anticompetitive acts of the private parties and to reject or modify those that conflict with state policy.<sup>68</sup>

The FTC and its staff are well aware that, in the wake of the *N.C. Dental* decision, many stakeholders have been grappling with questions of state authority and the independence of state regulatory boards. Indeed, we understand that these questions have helped to motivate introduction of the RBI Act. On the one hand, some stakeholders have voiced concerns that post-

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<sup>66</sup> See *Midcal*, *supra* note 7.

<sup>67</sup> *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1113-4; *Midcal*, *supra* note 7, at 105-6.

<sup>22</sup> See, e.g., *Decision and Order, Va. Bd. of Funeral Directors & Embalmers*, 138 F.T.C. 645 (2004); *R.I. Bd. of Accountancy*, 107 F.T.C. 293 (1986). See also *United States v. Tex. State Bd. of Public Accountancy*, 464 F. Supp. 400, 402–03 (W.D. Tex. 1978) (a competitive bidding case), *aff'd as modified*, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 444 U.S. 925 (1979).

<sup>68</sup> *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988).

*N.C. Dental* antitrust lawsuits that might be filed against state regulatory boards and their members could undermine state authority and the practical functioning of such boards.

Relatedly, some have expressed concerns about the possible exposure of individual board members – including part-time and/or voluntary board members – to money damages from private antitrust litigation (a concern that would not apply to FTC enforcement).

But there are also concerns on the other side, especially if reaction to *N.C. Dental* were to lead to attempts to further insulate state boards from federal antitrust scrutiny. As noted above, states can exercise their sovereign authority or delegate that authority to lesser state actors or independent boards,<sup>69</sup> even if a board consists exclusively of self-interested private parties who may be engaged in conduct that otherwise would violate the antitrust laws. The state need only clearly articulate its delegation of authority to regulate in an anticompetitive manner, and then actively and adequately supervise the exercise of that delegated authority. Some are concerned, however, that responses to *N.C. Dental*'s clarification of when active supervision is needed might be cursory and *pro forma* or, in some cases, lead to the worst of both worlds. First, costly and burdensome oversight mechanisms intended to satisfy the active supervision requirement might impede commerce and the proper functioning of state licensing boards, without furthering competition or other state policy goals. Second, these approaches, if successful, would achieve the goal of insulating blatantly anticompetitive conduct by private actors.

Although the Commission believes that worries about undue antitrust enforcement are premature and unlikely to be borne out in future litigation, both sets of concerns about the long-term impact of *N.C. Dental* are understandable. The RBI Act seeks to balance these concerns,

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<sup>69</sup> State boards of occupational regulation are sometimes called “independent” boards, to the extent that they include members who are active market participants and others who work substantially outside state government, or to the extent the boards appear otherwise independent of a state’s executive branch of government.

providing additional assurance and stability to state policymakers, “independent” state boards, and board members, while guarding against occupational licensing initiatives that, either intentionally or unintentionally, might undermine “our national policy in favor of competition” and thereby harm consumer welfare.<sup>70</sup> In light of the Commission’s longstanding interest in mitigating the anticompetitive effects of excessive occupational licensing, the Commission supports the goals of the legislation. At the same time, we note that a substantial body of case law regarding the state action doctrine has already struck a careful balance between the antitrust laws and state sovereignty, and careful thought must be given to the details and potential unintended consequences of any initiatives that would alter this balance.

## **VII. Conclusion**

Occupational licensing can serve important goals and, when used appropriately, protect consumers from harm. But, as is illustrated by the Commission’s history of advocacy and enforcement, excessive occupational licensing can leave consumers and workers worse off, by impeding competition without offering meaningful protection from legitimate health and safety risks. Even when some form of licensing is warranted, specific regulations can have significant adverse effects on competition and consumers. Such regulations should be analyzed for their impact on competition and, when it seems likely that anticompetitive effects will outweigh any consumer benefits, the proponents of any restrictions should bear the burden of justifying why they are needed. We also urge states to be cautious when delegating authority to enforce potentially anticompetitive regulations to self-interested boards whose members represent the very occupation to be regulated.

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<sup>70</sup> See H.R. 3446, 115<sup>th</sup> Cong. § 2 (2017) (statement of findings and purpose).

Thank you for the opportunity to share the Commission's views and to discuss our efforts to promote competition and protect consumers.