



United States of America  
**Federal Trade Commission**

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**Institute for Justice  
National Economic Liberty Forum  
From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty  
Remarks of Commissioner Maureen Ohlhausen<sup>1</sup>  
April 28, 2016**

Thank you, Clark, for that kind introduction. I am excited to be part of this year's National Economic Liberty Forum. As you all know, IJ has been a powerful force for economic liberty, and this past year has been a banner year for the organization. I especially applaud IJ's recent victory in the Nevada legislature eliminating restrictive hair braiding licenses<sup>2</sup> and wish you success in the new lawsuit in Little Rock defending the rights of a taxi entrepreneur. And let me compliment your "License to Work" report on the burdens of occupational licensing.<sup>3</sup> This fact-based study, presented in a user-friendly format, is exactly what we need to move the needle in DC and around the U.S. In February, I testified before Congress at a hearing on occupational licensing and the state action doctrine. I know IJ's testimony at the same hearing made a compelling case for occupational licensing reform. So I am excited to participate in this event, and to swap ideas about how to further advance the economic liberty.

I have fought for economic liberty for much of my career. But, of course, the fight long predates me, and everyone in this room. Even the Code of Hammurabi, written 3700 years ago,

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<sup>1</sup> The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

<sup>2</sup> Press Release, Institute for Justice, Free to Braid: Nebraska Untangles Burdensome Braiding Licensing Requirements (Mar. 10, 2016), <http://ij.org/press-release/free-to-braid-nebraska-untangles-burdensome-braiding-licensing-requirement/>.

<sup>3</sup> DICK M. CARPENTER II, PH. D., LISA KNEPPER, *ET AL.*, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (May 2012) [IJ Report], <http://ij.org/report/license-to-work>.

included occupational restrictions for physicians, barbers, veterinarians, shipbuilders, and housebuilders, among others.<sup>4</sup> In the modern era, there has been tremendous growth in such occupational licensing over the past several decades, as IJ’s recent report attests.<sup>5</sup> Especially after Professor Kleiner’s presentation, I don’t need to list the stats to this crowd, but I will note that these restrictions cost the economy hundreds of billions of dollars annually. And in all probability, they disproportionately harm the lower income residents of our country.<sup>6</sup> As one of the amicus briefs in the FTC’s *North Carolina Dental* case said, “The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.”<sup>7</sup> (I’ll talk more about *NC Dental* shortly.)

Licensing, of course, has its place. It can ensure minimally acceptable health and safety requirements. But in many cases, occupational licensing serves as a state-sponsored and -enforced prohibition on competition. This reduces market competition and allows incumbents to collect higher profits than they would in the absence of the licensing. I am particularly concerned that occupational licensing regimes create artificial barriers to entry for entrepreneurs seeking to take their first step on the economic ladder. This is particularly true for occupations that draw individuals who are just beginning a professional career. Licensing requirements, which often include certain educational components, can exclude lower-income workers, who may not be able to pay for additional education. Competition and competitive markets, supplemented by sound antitrust enforcement, where necessary—not excessive licensing—will

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<sup>4</sup> *The Code of Hammurabi* (about 1754 BC), [http://avalon.law.yale.edu/subject\\_menus/hammenu.asp](http://avalon.law.yale.edu/subject_menus/hammenu.asp).

<sup>5</sup> IJ Report, *supra*, note 2.

<sup>6</sup> See Morris M. Kleiner, The Hamilton Project, Reforming Occupational Licensing Boards (Mar. 2015), <http://brook.gs/1ZARuJ2>.

<sup>7</sup> Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 21, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014).

promote entrepreneurship in this country and provide the most opportunity for the least advantaged in our economy to prosper.

For the past 15 years I have played a central role in the FTC's fight to expand economic liberty and I'd like to share some of that history. After a quick background on the FTC's general work in this area, I'll talk about our recent efforts in the area of state action doctrine and our ongoing efforts regarding the sharing economy. Either one of these topics has enough content for several speeches, but my purpose here today is to introduce the topics and what the FTC has done, with the hope that during Q&A you will offer feedback and thoughts.

### **FTC's Fight for Economic Liberty**

The FTC has a long history of fighting to free markets from competition-limiting state regulatory burdens. The Commission has devoted significant resources over the past forty years opposing state laws and regulations—including many in the occupational licensing area—that, in our view, unnecessarily restrict competition. As we explained in 2014 in testimony before the House of Representatives Committee on Small Business:

We have seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits. In these situations, regulations may lead to higher prices, lower quality services and products, and less convenience for consumers. In the long term, they can cause lasting damage to competition and the competitive process by rendering markets less responsive to consumer demand and by dampening incentives for innovation in products, services, and business models.<sup>8</sup>

I made similar points in my testimony in February.<sup>9</sup> The Commission has used two very different tools in opposing such regulations. The first tool at our disposal is law enforcement.

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<sup>8</sup> Prepared Statement of the Fed. Trade Comm'n, Competition and the Potential Costs and Benefits of Professional Licensure, before the U.S. House of Representatives Committee on Small Business, at 1 (July 16, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf).

<sup>9</sup> See Prepared Statement of the Fed. Trade Comm'n, License to Compete: Occupational Licensing and the State Action Doctrine, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the

We bring cases to address anticompetitive practices, including practices by state appointed boards that harm competition. However, the antitrust state action doctrine limits the practices we can challenge. That doctrine immunizes from antitrust liability certain state actions, even those with anticompetitive effects. Beginning in 2001 with Chairman Tim Muris’s State Action Task Force, the FTC sought to clarify and re-affirm the original purposes of the state action doctrine to better protect competition and consumers.<sup>10</sup> I was privileged to be a part of this effort.

The Task Force recommended clarifying that the law ensures immunity only if the state itself, and not private interests, restricts competition. It also sought to require states to clearly articulate any plan to displace competition and to actively supervise private parties carrying out that plan.<sup>11</sup> The Commissions’ successes in the courts since the 2003 report, culminating in the recent *North Carolina Dental* victory, show that the agency has progressed significantly toward these goals.<sup>12</sup>

The FTC’s second tool is competition advocacy, whereby we provide our views in letters or amicus briefs on the likely competitive effects of specific laws or regulations. In such advocacy, the Commission seeks to convince policymakers to minimize any adverse effects on competition that may result from regulations.

Since the 1970s, the Commission has issued hundreds of comments and amicus briefs to state and self-regulatory entities addressing professional licensure and other restrictions across a wide range of industries. During the early to mid-2000s, the Commission also engaged in competition advocacy to move the courts toward an interpretation of the state action doctrine that

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Committee on the Judiciary (Feb. 2, 2016), <https://www.ftc.gov/public-statements/2016/02/prepared-statement-federal-trade-commission-license-compete-occupational>.

<sup>10</sup> See FED. TRADE COMM’N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 50-58 (Sept. 2003), <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *In re Ky. Household Goods Carriers Ass’n*, 139 F.T.C. 404 (2005), *aff’d*, 199 Fed. Appx. 410 (6<sup>th</sup> Cir. 2006); *In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 257-58 (2004), *aff’d*, 455 F.3d 436 (4<sup>th</sup> Cir. 2006); *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003 (2013).

was more hospitable to competition and consumer welfare. We filed amicus briefs in several private suits where state action issues arose.<sup>13</sup> In 2005, I testified—in my capacity as the FTC’s Policy Director—on the proper scope of the state action doctrine before the Antitrust Modernization Commission.<sup>14</sup> Our advocacy before the courts, the Antitrust Modernization Commission, and elsewhere was grounded in, and very much aided by, the State Action Task Force Report and its underlying research.

### **Recent FTC Actions**

Turning to more recent developments, the past year has been a very interesting one for the Federal Trade Commission’s role in expanding economic liberty. On the state action front, we continue to see the ramifications of the FTC’s win in *North Carolina Dental v. FTC*. Back in 2010, the FTC filed an administrative complaint against the North Carolina Board of Dental Examiners<sup>15</sup> alleging that the Board—through its dentist-members—was “colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services” in North Carolina.<sup>16</sup> The Board had decided that whitening teeth constitutes the practice of dentistry and issued many letters to non-dentist teeth whitening providers, stating that they were illegally practicing dentistry and ordering them to stop.

The Commission alleged that the Board’s activities constituted an unlawful restraint of trade under the antitrust laws. The Commission further alleged that the Board’s action deprived

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<sup>13</sup> See, e.g., Brief for the United States & the Fed. Trade Comm’n as Amici Curiae Urging Reversal in Support of Appellant, Jackson, *Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc.*, No. 04-5387 (6th Cir. June 1, 2004); Brief of Fed. Trade Comm’n as Amicus Curiae Supporting Cross-Appellant and Urging Reversal, *Brentwood Acad. v. Tenn. Secondary School Athletic Ass’n*, Nos. 03-5245 & 03-5278 (6th Cir. Nov. 13, 2003).

<sup>14</sup> Prepared Statement of Maureen K. Ohlhausen, Dir., Office of Policy Planning, Fed. Trade Comm’n, before the Antitrust Modernization Comm’n on the State Action Doctrine (Sept. 29, 2005), <https://www.ftc.gov/public-statements/2005/09/ftc-staff-testimony-antitrust-modernization-commission-concerning-state>.

<sup>15</sup> *In re N.C. Bd. of Dental Exam’rs*, Dkt No. 9343, Complaint (June 17, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf>.

<sup>16</sup> *Id.* at 1. The Board consists of six licensed dentists, one licensed hygienist, and one “consumer member,” who is neither a dentist nor a hygienist. *Id.* ¶ 2.

consumers of the benefits of price competition and increased choice provided by non-dentist teeth whiteners.<sup>17</sup>

The Board argued that the state action doctrine protected its conduct from antitrust liability. The full Commission rejected this argument in a unanimous opinion.<sup>18</sup> The Board appealed this all the way to the Supreme Court.

And, as many of you know, in February of 2015 the Supreme Court affirmed the FTC decision. The Court held that the state must actively supervise any regulatory board when a controlling number of the board members actively participate in the regulated occupation. Absent such active supervision, state action immunity does not apply.<sup>19</sup>

Of the FTC's recent court victories, the Supreme Court's decision in North Carolina Dental may benefit competition and consumer welfare the most. Many state agencies throughout the country will need to examine and revise their practices. Studies suggest that in some states more than ninety percent of licensing boards are controlled by active participants.<sup>20</sup> Having active market participants on state regulatory boards can offer valuable and potentially unique expertise in making important regulatory decisions. But the Supreme Court was clear. While, under our federal system, states may meddle with the free market, when they do so they must be politically accountable for whatever market distortions they impose on consumers. I know many of the groups represented here today seek to hold such boards accountable, and I believe that the *NC Dental* decision will help those efforts and ultimately benefit consumers.

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<sup>17</sup> *Id.* ¶ 25.

<sup>18</sup> See *In re N.C. Bd. of Dental Exam'rs*, Dkt No. 9343, Opinion of the Commission (Dec. 7, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf>.

<sup>19</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

<sup>20</sup> See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103, 1157-64 (2014).

I also think *NC Dental* has significant implications for occupational licensing regimes more generally. I hope it will prompt the re-evaluation of the excessive state licensing regimes that have developed over the years. As the states take a step back to reconsider the composition and oversight of their regulatory boards, there will be opportunities for those in this room to advocate that states also take a very hard look at their occupational licensing regimes to see if they are on balance helping or harming their constituents.

Any sweeping reform of occupation licensing practices will need to come from the states. Fortunately, and thanks in no small part to the hard work of many of you, such reform should garner support from across the political spectrum. Licensing reform should appeal to those who wish to expand economic opportunity for low- and middle-income workers and keep prices more affordable for low- and middle-income consumers. This appears to have been the impetus for the White House's recent report on occupational licensing.<sup>21</sup>

Licensing reform should also appeal to “those committed to expanding economic opportunities by promoting entrepreneurship, the creation of small businesses, and giving individuals the ability to pursue their vocational interests.”<sup>22</sup> The takeaway is that there should be broad political support for reform of state licensing regimes. Indeed, there was broad political support for the outcome in the North Carolina Dental case, as evidenced by the diverse parties filing amicus briefs in support of the FTC.<sup>23</sup> We should all do what we can to promote bipartisan action on these issues.

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<sup>21</sup> DEP'T OF THE TREASURY OFFICE OF ECON. POLICY, COUNCIL OF ECON. ADVISERS, & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 4 (July 2015), [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf)

<sup>22</sup> Melissa S. Kearney, 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 INSTITUTION UP-FRONT BLOG (Jan. 27, 2015 11:00 AM), <http://www.brookings.edu/blogs/up-front/posts/2015/01/26-time-to-examine-occupational-licensing-practices-kearney-hershbein-boddy>.

<sup>23</sup> See Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondent at 4, *N.C. State Bd. Of Dental Exam'rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (arguing that the FTC's position “is fully in accord with

## Sharing Economy

Before we turn to Q&A and discussion, let me quickly address one apparent growth industry for occupational licensing where the FTC has actively sought to educate legislators: the sharing economy.

The rise of the sharing economy is a terrific example of the transformative power of free markets. Entrepreneurs are using technology to develop new peer-to-peer business models, some of which may ultimately upend existing businesses while benefitting consumers. Positive disruption is an old story – the economist Joseph Schumpeter talked about the value of creative destruction in the early 1940s. Change has always been a part of free-market capitalism and it always will be.

Change can be hard, however. Even the most beneficial evolutions can dislocate those deeply invested in the older order. Yet the potential social value of disruptive innovation remains as true today as it was in Schumpeter’s time. We shouldn’t lose sight of the long term benefits of a flexible economy for individual consumers.

Indeed, over the long term the rise of the sharing economy may bring the greatest benefits to less affluent consumers. The effective ability to rent rather than buy expensive goods, or to partially defray the cost of ownership through facilitated sharing may be most valued by lower

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this Court’s state-action precedents, good public policy, and the weight of academic scholarship across the ideological spectrum”); Brief of Amici Curiae Pacific Legal Foundation and Cato Institute in Support of Respondent at 23, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (“Whatever one’s opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight.”); Brief of Amici Curiae Scholars of Public Choice Economics in Support of Respondent at 6-7, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (“When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends? One does not need a Ph.D. in economics – or even a particularly keen insight into human nature – to guess the answer to this question.”); Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 21, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014); *See also* Brief of Amici Curiae State of West Virginia and 21 Other States in Support of Petitioner at 11, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. May 30, 2014).

income consumers. These potential effects illustrate how disruptive innovation can often meaningfully change people's lives.

Despite increased opportunity for the less advantaged, there has been a consistent drumbeat for increased regulation of sharing economy platforms. These calls have generally come from companies with traditional business models and their sympathizers, who are threatened by competition from new models.

To be clear, I am not advocating or criticizing any particular business model. However, I am arguing that the government should not pick the winners and losers in the marketplace. Nor should incumbent companies pick their competitors via government actions. Far too often, we at the FTC encounter what I call "Brother May I?" scenarios, when a new competitor must essentially request permission from the incumbent firms to enter the market. Whether through effective control of state regulatory boards (as in *NC Dental*) or by obtaining protectionist legislation, incumbent firms can place themselves in a position to determine their competitors.<sup>24</sup>

Whether the state picks winners and losers itself or delegates that role to incumbents, consumers pay the price for actions that favor narrow special interests over the broader public good. Public choice theory predicts that such rent seeking exploitation of state licensing laws and regulations is most likely when incumbent providers receive a concentrated benefit while the competitive harm is dispersed across many consumers.<sup>25</sup> The sharing economy, pitting a number

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<sup>24</sup> See Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I? The Challenge of Competitor Control Over Market Entry*, 4 J. ANTITRUST ENFORCEMENT 111 (April 2016).

<sup>25</sup> See e.g., Steven Menashi & Douglas H Ginsburg, 'Rational Basis with Economic Bite' (2014) 8 NYU J.L. & LIBERTY 1055, 1087–88 (2014) ('By now, "[a]ll reasonably sophisticated persons know that a well-knit special interest group is likely to prevail over an amorphous "public" whose members are dispersed and, as individuals, are not in sharp conflict with the organized interest.' The occupational licensing laws recently invalidated under rational basis review are just this type of special-interest legislation.') (quoting Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 16(1976)); Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO MASON U.C.R.L.J. 159, 176 (2014) ("Public choice theory predicts that where the government can redistribute wealth or opportunities between private groups, those groups will invest their resources in obtaining favorable legislation that will benefit them or

of long-established business models against aggressive new entrants, appears particularly to be fertile ground for such mischief.

The evolution of markets should be driven by consumer demand, rather than artificial, regulatory preferences for one business model over another. Misguided government regulation can be the barrier to innovation that never falls, so regulators should tread carefully, particularly when considering hypothetical rather than demonstrated consumer harm.

The FTC has actively sought to educate state and local legislators about the potential harms of government picking winners and losers. For example, the FTC has repeatedly weighed in on proposals to regulate car sharing in Anchorage, Colorado, Chicago, and DC.<sup>26</sup> We have generally cautioned state and local governments not to impose legacy regulations on new business models simply because they happen to fall outside of existing regulatory schemes. Policymakers examining new peer-to-peer business models must ask anew whether there is a public policy justification for regulating such services at all. If there is no such rationale, policymakers should allow competition to proceed unfettered. Our experience tells us that consumers generally benefit from the competition that arises between traditional and new business models.

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handicap their rivals. Entry restrictions like occupational licenses or [certificate-of-need] laws are made-to-order examples.”).

<sup>26</sup> See, e.g., Federal Trade Commission Staff Letter to Anchorage Assembly Member Debbie Ossiander Concerning AO NO. 2013-36 (Apr. 19, 2013), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/04/ftc-staff-comment-anchorage-assembly-member-debbie>; Federal Trade Commission Staff Letter to Colorado Public Utilities Commission regarding Dkt No. 13R-0009TR (Mar. 6, 2013), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities>; Federal Trade Commission Staff Letter to Alderman Brendan Reilly, Chicago City Council regarding Proposed Ordinance O2014-1367 (Apr. 15, 2014), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning>; Federal Trade Commission Staff Letter to Jacques P. Lerner, General Counsel, District of Columbia Taxicab Commission regarding Second Proposed Rulemakings regarding Chapters 12, 14, and 16 of Title 31 (June 7, 2013), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab>.

In addition to our advocacy in this area, we also held a workshop in June of last year on the sharing economy to bring stakeholders together to talk about the issues. This event included discussions about market design and market structure, the novel trust mechanisms that are developing in sharing economy business models, and the interplay between competition, consumer protection, and regulation in this area.<sup>27</sup> We are still digging through the 2,000 plus comments we received and are evaluating next steps, but such workshops often result in reports.

### **Conclusion**

I hope in these brief remarks I've convinced you that I and many others at the FTC are your allies in the fight to expand economic liberty. And I hope you will continue to educate me about opportunities for the FTC to play a helpful role in ensuring that Americans can exercise their economic rights free of unnecessary and harmfully restrictive regulation, whether at the local, state, or federal level. I look forward to your questions and your ideas for how we can work together.

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<sup>27</sup> Fed. Trade Comm'n, "The 'Sharing' Economy: Issues Facing Platforms, Participants, and Regulators," <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.