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INTRODUCTION

The case against excessive professional licensing has been made, time and time again, for decades. It has been made by economists, consumer groups and labor activists. It has been made by libertarians, progressives, and conservatives; politicians, academics, and even professionals themselves. Some critiques focus on individual liberty, others on economic efficiency, and still others on racial and socioeconomic justice. Yet during this time of loud and bipartisan criticism, professional licensing has only proliferated. In the half-century since professional licensing first came under fire, the number of occupations licensed in at least one state has dramatically increased, and the percentage of the American workforce under licensing's grip has swelled to nearly thirty percent.

How can such wasteful regulation survive—even thrive—in the face of wide-spread opposition? The answer, like so many root causes of big problems, turns out to be rather small. The institutional structure of occupational licensing—specifically, the state-level licensing board—is to blame for the proliferation of a regulatory structure that costs consumers billions every year and prevents millions of workers from practicing their trade. We have, unwittingly, handed over control of almost a third of the American workforce to nearly two thousand self-serving, self-regulating boards. Each board is so tiny and covers such a small portion of the American workforce as to be almost invisible on the national stage. But together they form the most powerful labor institution in our country's history, eclipsing unions in their heyday.

These developments have not gone unnoticed by the Supreme Court and, as this hearing illustrates, by Congress. In just the last two years, the legal and regulatory landscape of occupational licensing has changed significantly. Until 2015, it was widely believed that licensing boards enjoyed a legal loophole that allowed them to operate as self-regulatory organizations without oversight from the states and without federal accountability for their anticompetitive practices. But in 2015, the Supreme Court decided that boards must bow to either state control or federal antitrust policy.[1] It is this legal development that provides new hope for meaningful reform. The introduction of this Bill represents a promising—although, in its current form, flawed—effort in that direction.

This testimony will proceed in four parts. In Part I, I will describe the legal and regulatory context that has given rise to this Bill, including a primer on how the professions are currently regulated in America, and a discussion of the legal implications of the Supreme Court's 2015 opinion in *North Carolina Dental*. In Part II, I will briefly explain the substance and effect of the Bill we are discussing today. Next, in Part III, I will address what I see as the Bill's greatest strength: the "Active Supervision" option that improves accountability and transparency in state occupational licensing by encouraging states to create umbrella agencies to review licensing board decisions. Finally, in Part IV I will discuss what I see as a major weakness of the Bill: the "Good Faith" clause that allows a state's boards to enjoy immunity even if that state falls short of the standards set out in the text.

This testimony is drawn largely from two articles I have written since the Court's 2015 opinion: *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. (forthcoming 2017) and *The New Antitrust Federalism*, 102 VA. L. REV. 1387 (2016).

[1] *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

I. STATE LICENSING BOARDS AND ANTITRUST STATE ACTION IMMUNITY

The professions are regulated by almost two thousand state licensing boards, together creating the most important labor institution in the country that controls whether and how almost a third of Americans work.[2] In 2016, I conducted a fifty-state survey, identifying all 1,790 state occupational licensing boards operating in American and describing their statutory composition.[3] The results of this comprehensive survey should be disturbing to those under the impression that occupational regulation is governmental, which is to say that it is in any measure public or public regarding. The dirty secret behind occupational licensing boards is that very little of what they do resembles governmental activity.

My research revealed that 1,515, or 85 percent, of state licensing boards are required by state statute to be comprised of a majority of currently licensed professionals, active in the very profession the board regulates. This overwhelming degree of self-regulation would be bad enough, but further research into the actual practices of these boards—from rules that non-professional board members cannot vote, to chronic vacancies and absences of non-professional board members, to violations of their organic statutes—shows that professional dominance on boards exceeds even this large percentage: it is nearly universal. Thin or nonexistent supervision from the states means that the licensed sector of the American workforce is almost entirely self-regulating. Such self-regulation may allow for expertise in decision making, but it comes at a very high price in the form of professional self-dealing.[4]

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[2] See Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S198 (2013) (estimating that, as of 2008, 29 percent of U.S. workers were licensed and noting that licensing is a growing phenomenon in the U.S. economy).

[3] Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. (forthcoming 2017).

[4] *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1104–10 (2014) (discussing a range of examples of self-dealing occupational regulation created by mostly professionally-dominated boards).

These facts about state licensing boards have triggered a legal crisis in the wake of the Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. FTC*. In that case, the Court held that "a state board on which a controlling number of decision makers are active market participants in the occupation the board regulates" must be actively supervised by the state or else face antitrust lawsuits brought by private parties and government enforcers. Because few states even arguably supervise their boards, and because, as my research reveals, almost every board is controlled by "active market participants," states are confronting a serious threat to their coffers and to the way they regulate millions of workers.

North Carolina Dental prompted two responses: (1) a flurry of antitrust lawsuits against licensing boards, and (2) a panic among state officials seeking ways to immunize their boards from further suit. And it provided the opportunity for the federal legislation we are discussing here today. Understanding why states felt suddenly vulnerable—and how Congress can capitalize on that with legislation like that proposed in today's Bill—requires understanding the shield that *North Carolina Dental* removed: antitrust state action immunity.

Antitrust state action immunity was created by the Supreme Court in 1943, as an interpretation of the Sherman Act. Although the Sherman Act was passed in 1890, it was not until the New Deal era that any conflict between the statute and state regulation arose. Until the Court interpreted the Commerce Clause to give Congress sweeping regulatory authority, it was unthinkable that a federal statute such as the Sherman Act could apply to state regulation, which was, by definition, formally intrastate. But in 1942, the Court established the "affectation" doctrine in *Wickard v. Filburn*,[5] vastly expanding the reach of Congress's Commerce Clause power to include all commerce that had an effect (however small and indirect) on interstate trade.

[5] 317 U.S. 111, 124 (1942).

Overnight, the boundaries of the Sherman Act grew to reach state regulation that had even a small effect on interstate trade.

The following year, the Court decided *Parker v. Brown*,[6] creating immunity from the Sherman Act for state regulatory activity. It held that although the Sherman Act made no mention of states and state action *per se*, one could fairly read the Act as implying immunity for state laws and regulations. But even from its inception, state action immunity was not complete: the *Parker* Court held that states could not selectively repeal the Sherman Act by sanctioning private cartels and other antitrust violations. Thus, *Parker* gave rise to a question that would plague the Court for over seventy years in defining the contours of state action immunity and the balance between state and federal power to control competition: Where exactly is the line between state regulation and private cartel activity?

North Carolina Dental was the latest in this line of cases, and it held that for an entity dominated by "active market participants" (such as a licensing board) to enjoy immunity, it would need to be actively supervised by the state. In other words, the case explained that practitioner-dominated boards that are not supervised by the state are private—no different from a cartel in the eyes of federal antitrust law. In this opinion, the Supreme Court exposed 1,515 state boards to private antitrust law suits (and potentially made their board members personally liable for a plaintiff's treble damages) unless the boards could show that they were actively supervised by their states. And because the Court has been unclear about what constitutes adequate supervision, and anyway states have taken a hands-off approach with boards, states have been understandably panicked about antitrust liability for licensing boards.

[6] 317 U.S. 341 (1943).

II. WHAT THIS BILL DOES

This Bill offers states something they have been seeking since *North Carolina Dental* came down in 2015: blanket board immunity from Sherman Act suits. But it does so under only two conditions, each designed to improve the substance of occupational licensing and impose transparency and accountability in the regulatory process. The Bill, as I see it, amends the Sherman Act, creating immunity from the Act for licensing board activity in states that either supervise their boards closely and with attention to the costs and benefits of licensing, or that create a private cause of action allowing individuals to sue to invalidate overly burdensome licensing rules and regulations. Another way of understanding the Bill is as providing a clearer statutory definition of the "active supervision" demanded by the antitrust state action doctrine. At the moment, much of the uncertainty states face after *North Carolina Dental* comes from the Supreme Court's lack of guidance about what kind of supervision will suffice to establish immunity. The "Active Supervision" option in the Bill provides states with a clearer set of mandates than the Court has yet provided.

Although this Bill may appear to demand that states regulate in a particular fashion, it actually offers states a genuine choice between the status quo under *North Carolina Dental* and its attendant uncertainty, or blanket immunity conditioned on certain regulatory reforms. Not only do I see this Bill as avoiding any commandeering problems, I see it as having a rather light touch in terms of federal regulation of the states: it actually provides a way out of—rather than imposing—federal statutory liability.

III. STRENGTH: ACCOUNTABILITY AND TRANSPARENCY THROUGH MEANINGFUL SUPERVISION

The Bill's emphasis on regulatory process, especially prominent in its suggestion that states create umbrella agencies that review board regulatory activity, is the Bill's greatest strength. The Bill offers a carrot (immunity) where *North Carolina Dental* offered a stick (antitrust liability). But one may ask why carrots or sticks are necessary in the first place. It would seem that states would already have an incentive to regulate occupations only to the extent it serves public health and safety. By putting the reins of competition into the hands of those who stand to gain the most from anticompetitive restrictions, they only harm their own citizens who pay the higher bills for services and get shut out of the labor market in their preferred occupation. Once one understands the political economy of licensing, it becomes clear why states have yielded to this unreasonable system of regulation.

States acquiesce to this self-dealing, because professionals, in contrast to consumers, are well-organized and motivated, and so have political power to encourage a hands-off attitude from the state.[7] States face relatively little electoral discipline for this choice because the boards are too numerous and small, and the activities of any single board are too obscure to raise public outrage. States engage in a cost-benefit analysis, where the political cost of displeased consumers is smaller than the benefit of the enthusiastic support of organized professions. Finally, self-regulation with antitrust immunity is cheap. To the extent the organized occupations demand rents, and states face incentives to supply them, suspending antitrust liability can be an efficient way to deal those rents. It allows a licensed profession to write its own check with minimal effort or involvement of the state bureaucracy. And self-regulation can even be remunerative for the

[7] See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 44–46 (2006) (discussing the political economy of professional licensing).

state; in the case of professional licensing, anticompetitive regulation can line the state coffers with revenue from licensing fees.

Forcing a state to take more political credit and blame for the anticompetitive regulation it sanctions or tolerates has the potential to mitigate the risks of self-regulation, and that is something that this Bill encourages. In theory, if voters represent the diffuse interests of consumers in lower prices, better products and services, and more innovation, then exposing regulation to electoral discipline may improve the competitive environment of state-regulated occupations. The Bill's "Active Supervision" option achieves this effect by encouraging states—through a single umbrella agency operating in the public eye—to take responsibility for licensing regulation. It may seem naïve to argue that exposing anticompetitive self-dealing to the sunshine of state politics will actually affect regulatory outcomes, and indeed, it is likely not a perfect solution. Yet there is anecdotal evidence—from the *NC Dental* case itself—that forcing states to take credit and blame may result in less anticompetitive regulation than would occur in the current regime of immune, unsupervised industry self-regulation.[8]

And the Bill goes further than merely asking states to take responsibility for their occupational licensing schemes—it conditions immunity on states rejecting rules that have no basis in public health and safety. Thus the Bill has the potential to improve both the substance and the process of occupational regulation by encouraging states to ask the tough questions: is

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[8] The North Carolina dental board had the option of making a rule about non-dentist teeth whitening, which could have been even more effective than the cease-and-desist letters in terms of either stopping dangerous teeth-whitening or suppressing competition. But making such a rule, under North Carolina law, would have required review by the state's Rules Review Commission, which would have resulted in more transparent state involvement in the anticompetitive regulation. The dental board chose the less effective, but more opaque, route to suppressing non-dentist teeth whitening probably because they believed the state, through the Rules Review Commission, would have blocked their efforts to, in their own words, "do battle" with the teeth whiteners. That the state seemed willing to allow the dentists themselves to do what it was likely unwilling to do in a transparent, accountable manner suggests that credit-blame accountability can help counter the perverse incentives that prompt states to pass the regulatory buck.

this regulation tailored to address a real public threat? Or is this licensing restriction designed to protect incumbent professionals from competition?

Some states already have umbrella agencies in place that at least approximate the "Active Supervision" option contemplated by the Bill. These agencies could serve as models going forward. For example, Colorado houses many of its executive agencies, including its occupational licensing boards, under the Department of Regulatory Agencies (DORA). The Department reviews some of its sub-boards' rules and decisions for their conformity with legislative intent and cost-benefit analysis before implementation. Economists have applauded this procedure as leading to less rent-dealing and more efficient regulation. Similarly, Arizona uses a Regulatory Review Council located in the governor's office to review regulatory activity using cost-benefit analysis.[9] These agencies could be adapted to fit the requirements laid out in the Bill's "Active Supervision" option, and could serve as models for states looking to create the supervisory agencies described in the Bill.

IV. Weakness: The Good Faith Clause Creates a Significant Loophole

Despite the Bill's promise, it has a weakness that precludes my support of it in its current form. This weakness, however, could easily be eliminated through revision, thus is it easy for me to imagine supporting a revised version of the Bill.

The Bill lets states and boards evade antitrust liability too easily by giving blanket immunity to all licensing boards and board members if "the State acts in good faith to perform the applicable requirements" for either the "Active Supervision" option or the "Judicial Review" option. "Good faith" is defined as "diligent performance that is directed towards achieving the

[9] See Ariz. Rev. Stat. Ann. § 41-1052 (2013).

policies set forth in this Act." This language would suggest that immunity would obtain even if a State merely attempts, in good faith, to create the umbrella agency contemplated by the "Active Supervision" option, or to pass the legislation contemplated in the "Judicial Review" option.

It is easy to imagine that these attempts could fall short—for political or financial reasons—and result in an umbrella agency with less power and transparency than that described in the Bill, or a cause of action with less teeth than set forth in the "Judicial Review" option. A good faith effort at creating the agency or the cause of action could even result in no agency or cause of action at all, and as written the Bill would provide immunity for all state licensing boards as long as the state made a good faith effort at reform. Thus the "good faith" term jeopardizes the Bill's aims, to ensure that occupational regulation "be imposed only to combat real, substantial threats to public health, safety, or welfare," and to "serve the public interest." It potentially creates a loophole leading back to the status quo of unsupervised self-regulation.