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OCCUPATIONAL LICENSING: REGULATION AND COMPETITION

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 12, 2017

Serial No. 115–23

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
29–777 WASHINGTON : 2018

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OCCUPATIONAL LICENSING: REGULATION AND COMPETITION

TUESDAY, SEPTEMBER 12, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 3:07 p.m., in Room 2141, Rayburn House Office Building, Hon. Darrell E. Issa presiding.

Present: Representatives Goodlatte, Issa, Collins, Ratcliffe, Gaetz, Handel, Cicilline, Johnson, Swalwell, Jayapal, and Schneider.

Staff Present: Ryan Dattilo, Counsel; Andrea Woodard, Clerk; and Slade Bond, Minority Counsel.

Mr. ISSA. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time.

We welcome today today's hearing on, "Occupational Licensing: Regulation and Competition." And I now recognize myself for a short opening statement.

Occupational licensing has exploded in this country over the last few decades without any apparent connection to the correlation—or correlation to public health or safety. In a 2015 report, the Obama White House pointed out that more than one-fourth of Americans are required to obtain some form of occupational licensing. While many States' occupational licensing requirements would tend to promote consumer health and safety, others serve as barriers to competition and to entry and are constructed by incumbent industry interests, inevitably rising prices and reducing consumer choice in a marketplace.

The research done on occupations newly subject to license reveals, that licensees often raise prices and reduce employment without any corresponding increase in productivity or service quality. A 2011 study estimated that some restrictions have resulted in 2.85 million fewer jobs in regulated industries and have cost as much as $203 billion.

Perhaps these figures would be less troubling if effects of occupational licensing were confined to occupations typically subject to the licensing process, such as public health or public safety. But these

net costs come from new licenses levied on occupations such as interior designers, shampooers, florists, home entertainment installers, funeral home attendants, and one of my favorite, casket manufacturers. Often, these quasi-government regulatory regimes have the effect of not only—of not promoting public safety but shifting innovation and reducing competition.

One serious impact of occupational licensing is decrease in geographic mobility. And what I mean by that, as an example, in my district, there are 47,000 marines, almost half are married. Those marines travel and are redeployed every 18 to 36 months. Their spouses must move to another area, and most of them work. If they are schoolteachers, they may be subject to a multi-State compact. If they are hair braiders or other professions, some of which we will discuss today, it is unlikely that there is any reciprocal relationship between Virginia, North Carolina, and California.

This patchwork of overly burdensome occupational licensing laws means that, when you arrive in a new location, even after formal education, a licensing process, and years on the job, you will likely have to begin that same process over again. This certainly causes people to be unable to be reemployed even when they would be, by any reasonable definition, fully qualified for the position.

That is not to say that we do not want to support and continue a long tradition of licensing through medical boards and the like, doctors, lawyers, nurses, real estate professionals, and, of course, people in the construction industry required to be responsible, such as general contractors.

Before the August recess, I introduced legislation that would serve as a means to crack down on boards engaged in anticompetitive behavior while creating—and I want to stress this—creating a specific safe haven for certain environmental—and certain the environment for boards that serve in the public interest. The Supreme Court decision in North Carolina Dental case left open to interpretation what steps a State must take to ensure that the board—the boards satisfy the sanctions, that the boards it has sanctioned are not found liable for violation of antitrust.

Today, the term active supervised is not defined in law but defined in a single court case, a course case that in many ways comes more than half a century after States explicitly were allowed to create these boards and to rely on these boards as antitrust exceptions. The speed with which court cases can resolve problems are not fast enough and certainly create a burden for States that do not want to have to legislate every part of regulation.

The Restoring Board Immunity Act would offer States a certainty in exchange for the adoption of an oversight mechanism to ensure boards are operating in the public interest and not stifling competition.

We have an excellent panel today. We have a really excellent panel today, and I would like to thank you for being here. When somebody puts together a panel, you often hope to get the kinds of different views and different capability, and, of course, different enforcement requirements that we have today.

So I am delighted now to recognize the Ranking Member for his opening statement and get to our board.

Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman, for calling today's important hearing. And welcome to the panel. I look forward to hearing your testimony.

Creating economic opportunity for working Americans must be a national priority. It is essential that we invest in a stronger America that delivers good-paying jobs through apprenticeship programs, on-the-job training, and education, and a system of competition that helps workers and small businesses. That is why House and Senate Democrats have proposed A Better Deal, a bold economic agenda that will give workers new opportunities to get ahead.

Right now, nearly a third of American jobs require a State license. This includes many jobs that have little impact on public health or consumer safety. And as the Obama administration reported last year, this threatens to, "raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines."

Excessive licensing keeps jobs out of reach for too many working families who cannot afford large, upfront costs just to qualify for employment. For example, to work as a security guard, a job that typically pays less than $30,000, a Michigan resident must have 3 years of education and training. Other States require less than 2 weeks of training for the same job. What is worse, because these standards differ by State, military families are disproportionately affected because they are 10 times more likely to relocate across State lines.

In response to this growing problem, the Obama administration issued a series of best practices for States to reduce licensing barriers to employment and mobility, along with a call to action for Governors to streamline requirements for service members, veterans, and spouses.

Today's hearing is an important opportunity to consider whether we can do more. More than 70 years ago, the Supreme Court held, in Parker v. Brown, that the antitrust laws do not apply to a State's sovereign action. But recently, the Court held in North Carolina Dental that this exemption does not apply to State boards controlled by private parties or active market participants. As the Court noted, these boards have a structural risk of confusing their own interests with the State's policy goals.

In these circumstances, States must actively supervise the anticompetitive conduct of these agencies to receive antitrust immunity. This requirement is essential to ensuring that State boards are serving the public interest.

I look forward to hearing whether Congress should have a role in clarifying this standard.

And, with that, I thank the Chairman for calling today's hearing. And again, with our esteemed panel of witnesses, thank you for your participation today. And I yield back the balance of my time.

Mr. ISSA. I thank the gentleman.

We now recognize the Chairman of the full Committee, Mr. Goodlatte of Virginia, for his opening remarks.

Chairman GOODLATTE. Thank you, Mr. Chairman.

The United States has been and continues to be a champion of free and open markets. An open market place cultivates competi-

tion among service providers and is the very foundation of maintaining lower prices, higher quality products and services, and superior innovation.

The antitrust laws established in this country serve a valuable role in promoting competition, and the Judiciary Committee routinely exercises oversight authority to ensure that these laws are applied in a manner that is transparent, fair, predictable, and reasonably stable over time.

All occupational licensing restrains competition to a certain extent by restricting who can provide certain services. While occupational licensing can serve the important function of maintaining quality and safety in key vocations, poorly executed licensing schemes can be detrimental. In some instances, control of regulatory boards by incumbent interests can transform the boards into market gatekeepers, limiting entry into regulated industries and benefiting the established practitioners that control the boards. Often, boards' licensing requirements are not proportional to the regulated occupation's impact on public health, making it difficult for newcomers to enter well-paying industries, harming consumers through higher prices and generally disrupting otherwise competitive marketplaces.

The Federal Trade Commission and Acting Chairman Ohlhausen have made significant strides to fight back the tide of anticompetitive occupational licensing. It was an FTC enforcement action that led to the Supreme Court's recent decision in North Carolina Dental, which casts doubt on whether boards fall under the State action doctrine, a judicial rule granting antitrust immunity to State-level regulations restricting competition. The FTC has also issued guidance regarding when a State exerts sufficient active supervision over a regulatory board controlled by market participants such that it can invoke State action antitrust immunity. And the Commission recently launched an Economic Liberty Task Force to address regulatory hurdles to job growth, including occupational licensing.

States around the country have also made inroads to limit the undesirable aspects of occupational licensing. Occupational licensing requirements are an often unnecessary burden on low-income Americans and military families struggling to earn a living. During the most recent legislative session in Arizona, State Representative Jeff Weninger sponsored a bill that allows individuals with household incomes below 200 percent of the Federal poverty line to obtain an occupational license without paying the accompanying fee. A similar bill passed in Florida this year.

Finally, Congressman Issa recently introduced the Restoring Board Immunity Act to address two major problems related to occupational licensing boards. One, the cost associated with onerous and arbitrary occupational licensing and, two, the potential that the threat of monetary damages under Federal antitrust law may chill the willingness of worthy individuals to serve as board members and officers.

Today's hearing will help inform the committee regarding the recent proliferation in occupational licensing, the impact of the Supreme Court's decision in North Carolina Dental, and potential legislation to address concerns in this important area. I look forward

to hearing the witnesses' views on these issues and how the FTC, Congress, and the States can work together to address the anti-competitive impacts arising from significant growth in occupational licensing.

Today's testimony will help the Committee gain a better understanding of the seriousness of these issues and how they might be addressed. And I am pleased to welcome all of the witnesses here today, and especially Commissioner Ohlhausen, who has done great service on the FTC. I want to thank you all for your participation. I look forward to your testimony.

Thank you, Mr. Chairman.

Mr. ISSA. Thank you, Mr. Chairman.

We now recognize the Ranking Member for unanimous consent.

Mr. CICILLINE. Yes. I ask unanimous consent that the opening statement of the Ranking Member, Mr. Conyers, be introduced into the record.

Mr. Issa. Without objection, so ordered.

Statement submitted by the Honorable John Conyers, Jr., Michigan, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-MState-C000714-20170912.pdf*

Mr. ISSA. And without objection, other members' opening statements will be made a part of the record.

It is now my pleasure to introduce our panel of distinguished witnesses. And I would ask all the witnesses to please rise to take the oath. And raise your right hands.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Please be seated. Let the record reflect that all witnesses answered in the affirmative.

It is now my pleasure to introduce, as the Chairman just did, the distinguished Acting Chairwoman of the Federal Trade Commission, Ms. Maureen Ohlhausen, who has done great work for a long time. And this is not her first trip here, but we appreciate your return. Mr. Robert Johnson, attorney for the Institute for Justice. Ms. Sarah O. Allen, senior assistant attorney general, the Office of the Attorney General for the Commonwealth of Virginia. Welcome. Ms. Rebecca Allensworth, professor of law at Vanderbilt School.

For those who have not been here before, you will notice the red, yellow, and green lights. We often muse that it is exactly like what you see when you are driving down the road. Green means go. Yellow means go like heck. And red, of course, means you are stuck, you are going to have to stop. So I won't cut anyone off mid-sentence, but let's make sure that we stick to that last thought being the last one, and then we will allow you to embellish during Q and A.

TESTIMONY OF MAUREEN K. OHLHAUSEN, ACTING CHAIRMAN, FEDERAL TRADE COMMISSION; ROBERT E. JOHNSON, ESQ., ATTORNEY, INSTITUTE FOR JUSTICE; SARAH O. ALLEN, ESQ., SENIOR ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA; AND REBECCA H. ALLENSWORTH, ESQ., PROFESSOR OF LAW, VANDERBILT LAW SCHOOL

TESTIMONY OF MAUREEN K. OHLHAUSEN

Ms. OHLHAUSEN. Chairman Issa, Ranking Member Cicilline, Chairman Goodlatte, and members of the Subcommittee, thank you for the opportunity to appear before you today. I am Maureen Ohlhausen, the Acting Chairman of the Federal Trade Commission, and I am pleased to join you to discuss competition perspectives on occupational licensing. This has long been a significant area of interest for the Commission. And as demonstrated by H.R. 3446, the Restoring Board Immunity (RBI) Act of 2017, it is of interest to Congress as well.

Competition is the cornerstone of America's economy. When sellers compete, consumers benefit from lower prices, higher quality products and services, and greater innovation. In furtherance of that national policy the FTC act grants the Commission broad enforcement authority regarding both competition and consumer protection matters in most sectors of the economy.

The FTC has a long history with occupational licensing and State boards from both a policy and an enforcement perspective. The Commission and its staff have submitted hundreds of comments and amicus curiae briefs to State and self-regulatory entities on issues related to the intersection of antitrust and competition law and policy and occupational licensing.

In these comments, we provide a helpful analytical framework for State legislatures when considering occupational licensing. In particular, we advise policy makers to consider five key factors. First, implement licensing only when legitimate health and safety issues or other public policy purposes justify doing so. Second, adopt licensing that will not have adverse effects on competition and consumers. Third, only consider licensing that will yield other countervailing consumer benefits, outweighing the costs of foregone competition. Fourth, narrowly tailor regulations to minimize the loss to competition. And, fifth, always ask if there are less restrictive alternatives.

Elements of the proposed RBI Act are consistent with this framework and share similar procompetitive goals. By following this guidance, lawmakers can better avoid adopting rules that interfere unnecessarily with an otherwise competitive marketplace.

Although the FTC typically relies on competition advocacy to discourage potentially anticompetitive occupational licensing and regulations, the Commission sometimes invokes its enforcement authority to challenge anticompetitive conduct by regulatory boards when it falls outside protected State action. For example, 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 nondental providers of teeth whitening services. And the case went to the Supreme Court, which explained

that States must ensure that any anticompetitive actions undertaken at its direction by private actors pursuant to State law are, in fact, approved by the State as part of its policy to displace competition.

In light of the Commission's longstanding interest in mitigating the anticompetitive effects of occupational licensing and our ongoing work in this area, the Commission supports the overall goals of the RBI legislation. At the same time, we note a substantial body of case law regarding the State action doctrine has already struck a careful balance between the antitrust laws and State sovereignty. Careful thought must be given to the details and potential unintended consequences of any initiatives that would alter this balance.

Because occupational licensing and regulation affects an increasingly broad swath of our economy, I formed the FTC's Economic Liberty Task Force. One purpose of the task force is to study the economic effects of occupational licensing on competition. Toward that end, the FTC's Economic Liberty Task Force hosted a roundtable discussion in July and will host a second roundtable discussion on November 7. These programs involve leading economic and policy experts discussing the current state of economic learning, about the costs and benefits of licensing and its effects on workers, consumers, competition, and the overall economy.

So thank you for your time today, and I look forward to your questions.

Hon. Ohlhausen's written statement is available at the Committee or on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-Wstate-OlhausenM-20170912.pdf*

Mr. ISSA. Thank you.

Mr. Johnson.

TESTIMONY OF ROBERT E. JOHNSON, ESQ.

Mr. JOHNSON. Good afternoon, Chairman Issa, Ranking Member Cicilline, and members of the Subcommittee. My name is Robert Johnson, and I am an attorney at the Institute for Justice, a national public interest law firm that for decades has been at the forefront of the fight against occupational licensing. We have represented scores of entrepreneurs subject to arbitrary and unnecessary licensing restrictions, from Louisiana florists to tour guides in Philadelphia and teeth whiteners in Connecticut.

Occupational licensing is growing at an alarming pace. Whereas in the 1950s only one in 20 U.S. workers required an occupational license, today, that figure stands at almost one in four. Occupational licensing has spread because it helps economic incumbents. Licensing limits opportunities for workers, frustrates entrepreneurs seeking to introduce innovative new business models, and it also raises the prices paid by consumers. Licensing is particularly troublesome for workers at the first rungs of the economic ladder.

Importantly, even when licensing protects against real dangers, it can still be abused. Take medical licensing. While some States allow nurse practitioners to meet rising demand for medical services, in other States, doctors have used licensing laws to strictly

limit the practice of nurse practitioners, resulting in more profits for doctors but higher medical costs for everybody else.

Now, most licensing occurs at the State and local level. But there is still an appropriate role here for Congress, and that is because licensing restrictions are often imposed by boards made of up of industry insiders. And when industry insiders use licensing laws to exclude competition, they can be liable under the Federal antitrust laws.

In a 2015 decision, FTC v. North Carolina Board of Dental Examiners, the Supreme Court addressed this antitrust question and held that boards can be liable when they violate the antitrust laws. At the same time, the Court made clear that States can insulate boards from liability so long as they impose what the Court termed active supervision. And that, in turn, raised the question of just what active supervision entails. And, right now, nobody really knows.

But several States have responded to that decision by enacting what you might call rubber-stamp supervision. And these States charge licensing—or charge bureaucrats with supervising the actions of licensing boards, but they don't charge those bureaucrats with any actual mandate to promote competition. And this kind of rubber-stamp supervision is bad for everybody. It is a bad bet for the States, because the Supreme Court, after recently deciding the North Carolina Dental decision, is unlikely to hold that a rubber-stamp supervisor actually satisfies the antitrust laws. And it is certainly bad for those affected by occupational licensing as it will not result in real reform. Result is likely to be years of litigation as the courts hammer out a definition of active supervision.

The Restoring Board Immunity Act seeks to clear up this uncertainty, while also promoting reform. The Act immunizes State licensing boards, but it only does so if States adopt a meaningful version of active supervision. So to secure immunity under the bill, States must do two things. First, they must adopt a policy of using licensing only when truly necessary. And, second, they must adopt a procedure to ensure that boards follow that policy. And, notably, the bill gives States a choice between two procedural enforcement mechanisms: one administrative and one judicial. And this approach is consistent with principles of federalism. Since the antitrust laws are a creature of Congress, it is appropriate for Congress to clarify how they apply. And, at the same time, the bill does not actually require that States do anything at all. Instead, the bill simply rewards States that adopt beneficial reforms.

In short, the bill promotes licensing reform, benefiting consumers, workers, and entrepreneurs, while also respecting the role of the States. The Institute for Justice is pleased to support this bill.

Thank you for the opportunity to testify.

Mr. Johnson's written statement is available at the Committee or on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-Wstate-JohnsonR-20170912.pdf*

Mr. ISSA. Thank you.

Ms. Allen.

TESTIMONY OF SARAH O. ALLEN, ESQ.

Ms. ALLEN. Chairman Goodlatte, Chairman Issa, Ranking Member Cicilline, and members of the Subcommittee, thank you again for inviting me to speak with you today about this very important topic to the States.

Before I start, I must reiterate the disclaimer I made in my written testimony that my remarks today are my opinions alone and do not necessarily reflect those of the Virginia Attorney General's Office, General Mark Herring, or any of the other antitrust colleagues I have that are affiliated with the National Association of Attorneys General.

Even though these are my opinions alone, my remarks are informed by my 26 years as an antitrust enforcer, both on the Federal level as an alumnus of the FTC and on the State level at the Virginia Attorney General's Office. I do believe in strong antitrust enforcement and open competition. But part of my job at the AG's office is also to defend and advise State agencies and boards on antitrust issues. And in the last 3 years, most of that advice has been on issues concerning State action immunity.

One of the things that struck me when reading through the testimony of my fellow panelists and others who are critical of State boards is how widespread and profound the misunderstanding is of what State boards actually do. They are not cartels. They are not State-authorized conspiracies to exclude new entrants and raise prices in the market. They are arms of State government that are formed by sovereign State legislatures to perform oversight over people that the legislatures have chosen to include in their licensing regimes, not the board.

The legislatures have chosen to license certain occupations and restrict competition in those markets to protect something they value more than open competition, which is the health, safety, and welfare of their citizens.

The large majority of decisions made by State boards have little to no competitive impact. Instead, they are mainly concerned with issues, such as the proper standards of care for their profession, holding licensees to minimum ethics standards, protecting consumers from deceptive advertising or fraudulent billing practices, or cases involving licensees' mental or physical fitness to practice.

Practitioners who are active and current in their professions are often the best people to judge these issues. It would be difficult for States to develop this kind of expertise in-house with bureaucrats.

Even without active supervision, State boards must follow clearly articulated State policy. Private trade associations, to which State boards are often unfairly compared, are under no such restrictions.

In addition, more boards in many States do not have jurisdiction over nonlicensees. So it is not possible for them to do what the dentistry board in North Carolina did, which is to overreach their statutory authority to try to shut down new forms of lower cost or more innovative competition.

And many functions boards perform, such as determining if a particular applicant is qualified to receive a license, are ministerial and do not involve any discretion on the part of the board or the individual board members. Either the applicant meets the criteria for a license or she doesn't.

The licensing regime itself may restrict competition, but that decision was made by the legislature, not by the board or the individual board members. And that highlights the biggest problem with the Restoring Board Immunity Act, in my opinion. It targets the wrong actor. The State legislature is the entity that is creating boards and requiring them to be overseen by active market participants. The boards and the individual board members are taking actions, for the most part, that they are statutorily obligated to take.

If Congress wants State legislatures to engage in regulatory reforms to reduce the number of professions they license or to regulate them in less restrictive ways, then the boards are not the proper entities to defend the competitively restrictive decisions they did not make. And they certainly should not be on the hook for potential treble damage liability for these decisions. These cases should be for declaratory or injunctive relief only, and the board and its members should be immunized from damages liability.

In the aftermath of the NC Dental decision requiring active supervision for antitrust immunity and the flurry of antitrust cases filed against boards and board members since the decision, it is getting difficult for States to find qualified people to serve on these boards. The potential for being sued for treble damages and the inability of many States to indemnify them for constitutional reasons has caused some board members to resign and many more practitioners to refuse to serve.

And I am running out of time, but I wanted to wrap up by saying that the board would require huge revisions to States' legal codes and create an unfunded Federal mandate to establish an umbrella State agency for active supervision. The Act would also cause an arguable separation of powers problem by having an active supervisor in the executive branch or a State judge in the judicial branch overseeing the legislative branch.

So at the end of the day, I think the Act is really unworkable for States to implement, and so they will not be engaging in the regulatory reform that Congress would like to encourage them to do. And I thank you for inviting me to speak here today.

Ms. Allen's written statement is available at the Committee or on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-Wstate-AllenS-20170912.pdf*

Mr. ISSA. Thank you.

Professor.

TESTIMONY OF REBECCA H. ALLENSWORTH, ESQ.

Ms. ALLENSWORTH. Thank you, Chairman Issa, Ranking Member Cicilline, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, for the opportunity to testify today.

The case against excessive occupational licensing has been made for decades by libertarians who see it as an infringement on individual liberty—we have someone here on the panel today that would fit that description—by progressives who see licensing as yet another way to privilege high-status groups while leaving immigrants, racial minorities, and ex-offenders out of the labor market. And, of course, by conservatives who see licensing as just more gov-

ernmental red tape keeping markets from operating freely and fairly.

Yet in the half century since licensing first came under fire, it has only proliferated. Nearly a third of Americans need a State license to work, and the licensed professions have swelled to include hair braiders, casket sellers, and floral designers.

How can it be that excessive occupational licensing has survived, even thrived, in this environment of bipartisan support for reform? The answer is the regulatory institution targeted by this bill that we are discussing today, the State-level occupational licensing board.

Almost a third of our workforce is regulated by a constellation of over 1,700 State boards, each so small and so politically irrelevant as to be invisible. My research has shown that nearly all of them, over 85 percent, are required by statute to be dominated by currently licensed working professionals. That is right, these boards are formed by law as cartels.

So here you will see where my perspective differs sharply from Ms. Allen's. And I will pause to say, what is a cartel? A cartel is a group of competitors who get together, set the terms of entry into their profession or the things that they sell, determine what the kinds of competition will be allowed, what other kinds of competition won't be allowed. And that perfectly describes a State occupational licensing board. It is basically totally nongovernmental.

In 2015, the Supreme Court finally recognized these boards for what they are: not arms of the States, but combinations of competitors. Until North Carolina Dental, it was widely believed that boards enjoyed a legal loophole that allowed them to operate 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 lawsuits. It is this legal development that provides new hope for meaningful reform.

The introduction of this bill represents a promising effort in that direction. It offers States a carrot, a new way to immunize their licensing boards from the Sherman Act, if they adopt a policy of creating only efficient licensing laws and then either create an office of supervision of occupational boards or create a cause of action allowing individuals to sue to invalidate any licensing laws that do not conform to that policy of efficiency. Of course, States also have the option of doing nothing and rolling the dice with the court's existing State action doctrine.

The bill's greatest strength is the first option: the active supervision option that encourages States to supervise their boards, restoring transparency and accountability to licensing regulation. In other words, this would make licensing regulation governmental again, taking the cartel—taking away the power of the boards to act as a cartel and putting it in the hands of State government.

I advocated for a similar reform in an article I wrote last year, and I generally support this portion of the bill, except to the extent that it may give too little regulatory freedom to States by mandating that States use a least restrictive alternative test for all of their licensing regulation. The bill does well to require that licensing rules address only real threats to public health and safety, but

it goes too far by making States show that they had no other regulatory alternative.

I am less enthusiastic about the second option in the bill, the one that gives States immunity if they create a substantive right to efficient occupational regulation and a cause of action to enforce it. This section also has the least restrictive alternative analysis problem, and it has the additional flaw of relying on courts to balance regulatory alternatives and to do so in a case-by-case manner.

This issue is too important and too complex to be resolved by State courts on an ad hoc basis. And the result is likely to be one of two undesirable outcomes: either broad deference to the boards or wholesale deregulation of the professions. A better approach, in my opinion, would be to streamline the bill to its first option, to offer immunity to licensing boards that are supervised according to the bill's terms.

Thanks again for this opportunity to speak to you about this bill, and I look forward to your questions.

Ms. Allensworth's written statement is available at the Committee or on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-Wstate-AllensworthR-20170912.pdf*

Mr. ISSA. I do too, I do find it interesting that a former clerk for Anthony Kennedy and a former, I guess, researcher for Elizabeth Warren when she was at Harvard are on each side of you, Ms. Allen. I know you are in good company and feel that your left and your right is properly covered.

I am going to try and focus on Virginia for just a moment. Virginia is one of the States that had hair braiding regulated. And the legislature was lobbied in Virginia by the hair salon industry to make sure that if you want to be a hair braider, you had to be a hair salon. So although I hear what you say, the State of Virginia, for a period of time, based on a board/inside—and you called it—these were government entities—took the advice and elevated simple hair braiding to a cartel, essentially, of a much higher level. You had to have a facility, you had to have the right chair, you had to have the right water, and you had to have everything to braid hair.

Now, during Governor McDonnell's period of time, it was gotten rid of because it showed no public—I forget the exact language—evidence of public harm to get rid of it.

I heard what you said, but I am going to ask you a simple question. By my standard, simple. You mentioned and somewhat derided trade associations. But trade associations are fully covered by the antitrust laws. They live in terror that two of their board members will say the wrong thing in a meeting. Having been the Chairman of a major trade association, trust me, I have seen it, that you are overly concerned. And yet you would purport that it is burdensome in Virginia, in return for this immunity, to have active supervision, and yet you called them an arm of government.

Are they an arm of government, in your opinion, as you said in your opening statement?

Ms. ALLEN. Yes.

Mr. ISSA. If they are an arm of government, in Virginia, don't you require that people not have an economic conflict of interest in

their everyday voting? In other words, aren't you covered by not making decisions where you have an economic benefit of that decision? Isn't that true?

Ms. ALLEN. I am not sure about what it would—how it applies to me. But I think that the situation here is that the many, many decisions that the board makes——

Mr. ISSA. If you were in an antitrust case and you owned stock in the company, would you be allowed to prosecute that case or would you recuse yourself?

Ms. ALLEN. I would recuse myself.

Mr. ISSA. Okay. So we have established the conflicts of interest by government officials are critical. Additionally, your legislature, even though it is a part-time legislature, they find themselves recusing themselves if they have major interest in a specific entity that would be affected directly by a bill. True?

Ms. ALLEN. I assume so, yes.

Mr. ISSA. Okay. And yet these boards have no such objection. So the one point I want to make, using your testimony, is you want them to be public entities. But you don't currently, nor do virtually any States, require that they essentially recuse themselves from self-dealing. So if you have got people who can self deal, such as hair salons that can rake in braiding, or even dentists who can bring in additional revenue from tooth whitening, and you don't have them live up to the same ethical standards, isn't that where we are stepping in and where this legislation, which Professor Allensworth is not thrilled with, she wants some changes, but that is why we have a requirement here, is there is an inherent conflict because they are acting as government entities, but they are not bound by the normal ethics that the FTC commissioner would be bound by in her government role.

Ms. ALLEN. Well, to the contrary, Chairman Issa, I believe that the standards of ethics for many of these boards are very stringent. I know that the State bar has very stringent ethics rules and so does the Board of Medicine and so——

Mr. ISSA. Let's go through that.

Mr. Johnson, I will go to you. And I would like to get to all of you quickly. Do you see that they are allowed to rule in areas that specifically limit competition or raise potential revenues that come to their industries?

Mr. JOHNSON. Absolutely. That is what they exist to do.

Mr. ISSA. Okay. Professor Allensworth, do you agree?

Ms. ALLENSWORTH. They are regulating entry—they regulate entry and they are regulating the terms of competition. So that is always going to be a conflict of interest for currently licensed working board members.

Mr. ISSA. Okay. And Ms. Ohlhausen—Chairman, your past work of the FTC is specifically for that reason, isn't it, that overreach by people who have an economic benefit and do so without a demonstrated need for what they are asking for?

Ms. OHLHAUSEN. Yes, absolutely.

Mr. ISSA. So when we look—and I know Ms. Allen said that these things don't apply to the North Carolina Dental case, but hair salons in Virginia that wanted to make sure that braiding had to

come into their establishments, isn't it really a first cousin, if not a direct sibling, of the North Carolina Dental case?

Ms. OHLHAUSEN. Yes, I think it is. And the Supreme Court has recognized the risk of board members confusing their own interests with the State's policy goals.

Mr. ISSA. Okay. I want to be respectful of the clock, so I will now go to the Ranking Member, Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman. Thank you again to our witnesses.

I would like to begin with you, Acting Chairman Ohlhausen. In the same way that excessive licensing hurts workers, entrepreneurs, limit market mobility and innovation, so too do non-compete agreements. According to a report by The New York Times, these clauses have become pervasive, unreasonably broad in duration and scope, and cover one in five Americans, from hairdressers to engineers. Leading economist Alan Krueger has described the prevalence of non-competes as an act to prevent the forces of competition to rig the labor market against workers. And the Treasury Department, likewise, reported last year that non-competes diminish workers' earnings, mobility, and economic opportunity.

Through its competition enforcement, the Federal Trade Commission can be a leader against these structural impediments to open labor markets, just as it can be against occupational licensing. And so I would like to ask you what resources has the Commission dedicated to policing unreasonable non-compete clauses in employment contracts? And are you concerned that non-compete clauses are being unfairly used by businesses to unreasonably restrain trade in violation of the antitrust laws?

Ms. OHLHAUSEN. So last year, the FTC and the Department of Justice put out guidelines for HR professionals. And one of the things that it cautioned against in there is HR professionals getting together and coming up collectively with terms that they are going to impose on employees and their businesses, that that could raise a competition concern, and be an antitrust violation.

I think, also, as we look at all barriers to additional economic liberty, we can certainly look at the problem that may be raised by some, extensive or inappropriate noncompete agreements.

Mr. CICILLINE. I am also very concerned that the consolidation is a threat to the economic opportunity to working Americans. Many leading economists agree that the concentration of labor markets gives corporations the ability to hoard profits at the expense of workers. And yesterday, you remarked that antitrust is not suited to address economic problems such as income or inequality. But isn't enforcement and promoting competition critical to avoiding the harms of consolidation such as depressed wages, reduced opportunity, and workplace inequality?

Ms. OHLHAUSEN. So I am very much in favor of enforcing the antitrust laws and merger guidelines against undue levels of concentration that could cause impacts on consumer welfare. And preserving a competitive market also can preserve some of these other values that you are talking about.

Mr. CICILLINE. Thank you.

I would like now to turn to Professor Allensworth and ask you, what effect would this legislation have on the State action doctrine, in your judgment?

Ms. ALLENSWORTH. So I think that there is a bit of an ambiguity in the way that the bill is currently drafted. I read it as attempting to create another option for immunity for boards, in addition to the State action doctrine that exists. But there is something especially in the preamble that seems to suggest that maybe this is an attempt to define active supervision once and for all.

So the first reading, the one that I think is dominant and the one that I prefer, is the idea that occupational licensing is a special problem. And here we have a special solution for it. There is uncertainty in NC Dental following—there is uncertainty after NC Dental about what supervision is and about the State action doctrine. And so you can sort of bypass that by going to the options laid out in this bill for your occupational licensing boards.

I think that that is a more natural reading of the bill the way it is written because State action doctrine applies to all kinds of State regulation: liquor commissions, municipalities, regulated utilities. And this bill really says nothing about how States need to supervise—those entities are subject to the same two-prong test under State action doctrine involving supervision. It says nothing about that. And so it would be odd to read this bill as defining supervision for all areas of State action doctrine.

But I do think that it may be worth clarifying, if that is the intent of the drafters, that that is what this bill does. So, in other words, I think it would leave State action doctrine as it is.

Mr. CICILLINE. And your recommendation is that those first—the first part of the legislation act provides those two prongs is sufficient, it is the second part that raises concerns?

Ms. ALLENSWORTH. My hesitation about the judicial review option?

Mr. CICILLINE. Yeah.

Ms. ALLENSWORTH. Yeah. That is the one that I think, if States opt for that, I think we may not see the kind of reform that the bill is aimed at.

Now, the other question is, is it better than the status quo? So the status quo is the antitrust liability for boards. That is case-by-case judicial resolution of these problems too. So what I am talking about is writing on a blank slate. I like the idea of giving this option that will really encourage supervision. I think that is the better way to go.

As to whether or not this bill with its two options, including the one that I think is a little bit weaker, is better or worse than what we have, it is a closer call for me.

Mr. CICILLINE. Thank you.

Mr. ISSA. Would the gentleman yield for a second?

Mr. CICILLINE. Of course.

Mr. ISSA. I am intrigued by this. One follow-up question to Mr. CICILLINE's.

So, summarizing, it doesn't go far enough because it leaves a little too much in the way of loopholes. You would like it to be tougher on what it takes to qualify for immunity. Is that a fair statement?

Ms. ALLENSWORTH. I think it is possible to characterize the lawsuit option as a loophole because I worry that courts would under enforce the kinds of objectives that are laid out in the bill. So, yes, I think a way to make it tougher is actually sort of addition by subtraction, is to get rid of that second lawsuit option. Because I think the real problem with licensing is who does it. Right now, it is boards that I see as cartels. Who do I want to do it? The State. I want the State to take governmental responsibility for the regulation they create.

Mr. ISSA. Thank you.

Mr. CICILLINE. So just reclaim my time.

So that I understand your testimony, so your recommendation, your testimony, is if the bill had those two components that made it clear, that the State was going to engage in the supervision, that by itself is preferable to the bill with the second piece with respect to judicial review?

Ms. ALLENSWORTH. That is right.

Mr. CICILLINE. Thank you. I yield back.

Mr. ISSA. Thank you.

We now go to the Chairman of the full Committee, the gentleman from Virginia, Mr. GOODLATTE.

Chairman GOODLATTE. Thank you, Mr. Chairman.

Commissioner Ohlhausen, I would like to get your thoughts on that, but I will just make it a wider question. And that is, how would this bill impact your efforts with respect to occupational licensing both from advocacy and enforcement perspectives? And do you agree with Professor Allensworth's suggestion that we remove that provision related to the options?

Ms. OHLHAUSEN. I think the bill would give us additional opportunities for advocacy. As States decided whether to adopt these provisions and to go through this process that the bill provides, it would give the FTC an opportunity to weigh in on whether we thought where they were drawing the lines was good for consumers.

Regarding our enforcement, I think it depends on whether the bill is an additional option for States or whether it defines the field of what is active supervision. With that being said, I think to have the States think more closely about what this occupational licensing is doing and whether it is good for consumers or is it more restrictive than necessary, I would hope would reduce the incidents of States adopting, or boards adopting, harmful legislation.

As for the issue of parts on part two of the bill, I don't actually have an opinion on that. I certainly, appreciate setting out a process for—a clear process for the States to follow. I do agree that having a case-by-case of different judges deciding may give a less clear and consistent answer.

Chairman GOODLATTE. Very good. Thank you.

Ms. Allen, you note in your testimony that the RBI Act—by the way, Mr. Chairman, I like the baseball analogy in your title of your thing, because baseball itself has an antitrust exemption.

But the RBI Act places a significant burden on States to comply. How do the requirements under the Restoring Board Immunity Act differ from the inherent requirements under North Carolina Dental or the FTC guidance?

Ms. ALLEN. In several ways, actually. The active supervisor currently under North Carolina Dental case law merely has to be a disinterested State official who looks at what the board did in a substantive way, not just a procedural way, and determines whether or not the action that the board took is in keeping with the enabling statute that the board is operating under. There is no requirement of using the least restrictive alternative, there is no requirement that it has to be efficient, and there is no requirement for regulatory reform.

If you go the judicial route, review route, the burden shifts quite substantially from the plaintiff to prove that there was an antitrust violation to the board to defend a decision that they didn't make. The legislature is the one that restricted competition. The board was following what the legislature instructed them to do. So I think it quite substantially puts a burden on the States that is different and more than what they have to do now to comply with NC Dental.

Chairman GOODLATTE. And, Mr. Johnson, would a Federal legislative solution be necessary or helpful to address this issue?

Mr. JOHNSON. Yes, I think it would be. We are in a situation right now where there is a great deal of uncertainty as to what active supervision means. And I think that certainly Ms. Allen has suggested that the bar posed by active supervision requirement is quite low and that the States can meet it quite easily. On the other hand, that requirement may turn out to be much higher, and I think it probably will turn out to be much higher. But that uncertainty is going to create costs, it is going to give rise to litigation. And however it is decided ultimately by the courts may be a good result or a bad result.

What we have here is an opportunity to eliminate the need for those costs, to eliminate the need for that litigation, and to assure off the bat that what is achieved is a good result and a result that actually advances the cause of occupational licensing reform. And that is what the bill tries to do.

Chairman GOODLATTE. You like this bill. Do you think this bill should go further? Do you envision other bills that you would like better? What is your overall take on what needs to be done to address this creeping regulatory effect of State licensing which obviously has grown? And I, quite frankly, think the need for it hasn't been justified by the amount of growth we have seen.

Mr. JOHNSON. Well, this is obviously an area where there are sensitive federalism concerns. This is an area of regulation that historically has been one that is overseen by the States. This bill, I think, is sensitive to those concerns because it proceeds from the sort of foundation of the antitrust laws, which I think are sort of recognized roles for the Federal Government.

Could Congress go further and explore other types of approaches to occupational licensing? I think it certainly could, and it would be an interesting conversation to have. But the federalism issues that would then start to arise would be interesting and substantial and would require a lot of attention.

Chairman GOODLATTE. So you would be happy with this for now?

Mr. JOHNSON. Absolutely as a first step.

Chairman GOODLATTE. Thank you, Mr. Chairman.

Mr. ISSA. Thank you, Mr. Chairman.

We now go to the gentleman from, more or less, Oakland, California, Mr. Swalwell.

Mr. SWALWELL. Thank you, Mr. ISSA.

And I just want to, before we begin, wish well my colleague, Hank Johnson, and others who were in Irma's path, their constituents, as well as Mrs. Handel, that we are for them and will do anything in a united way in Congress to help them.

So, with that, I wanted to ask Ms. Allen, with respect to indemnification, it is my understanding that in some States you are not allowed to indemnify board members for damage liability associated with antitrust actions in which board members are specifically named as the antitrust defendant. But my fear is that this would be a perversion of the antitrust laws if counsel for an individual seeking a license or an individual subject to a disciplinary proceeding could contact an individual board member in such States and then threaten them with treble damages liability under the North Carolina Dental case if they did not refrain from acting against that client's interests.

Should there be a more straight way to remove this threat of individual damage liability? And, I guess, I am speaking specifically to the RBI Act and what your thoughts are on that. And I guess, just thinking—I went to law school, passed the bar exam, appreciate the great work that the California Bar Association does. And these are volunteers, the board members, at least in the law, usually don't get paid, and you just want to protect against them from being personally liable unless you can show that they are acting maliciously. So I would be interested in your thoughts on that.

Ms. ALLEN. Absolutely. There has been a flurry of lawsuits that have been filed against boards since the North Carolina Dental decision. And the majority of those lawsuits have also sued the individual board members for treble damage liability under the antitrust laws. And many States—some States are able to indemnify board members. Many States are not. They are constitutionally prohibited from indemnifying them over a certain amount of money, and it is been a problem.

In Florida, the Chairman and a couple of other members of the podiatry board have resigned because of this. Many other people in their professions are refusing to serve because of this problem. And boards can't add active supervision to themselves. They have to wait till the legislature does it for them. So the problem does exist.

And I think that one possible solution is to add an analog to the Local Government Antitrust Act that immunized municipalities from antitrust damage liability because of several big judgments that bankrupted some cities and towns.

Mr. SWALWELL. Do you fear that if they were not indemnified from treble damages, that the costs would be passed along either to the practitioners or—I mean, because I don't know who would serve without some sort of protection, and that would require an insurance policy. And someone would have to pay for it.

Ms. ALLEN. Right. I mean, the Commonwealth of Virginia has a risk management plan that requires us to defend them, and it does immunize them to a certain amount. But antitrust treble damage

liability can quite easily go over the amount of the risk management plan.

Mr. SWALWELL. Now, Chairman Ohlhausen.

Darrell Issa and I are the founders and co-chairs of the Sharing Economy Caucus. And I was interested in your testimony about how smartphones have allowed the development of new ways for consumers to use transportation services. Particularly, Uber and Lyft are the most widespread platforms. You note that some jurisdictions have pursued regulatory approaches that would impede the development of new services, often without putting forth evidence of a legitimate consumer protection justification.

Could you share some examples of the services targeted and the approaches that you have seen used?

Ms. OHLHAUSEN. So the FTC has filed competition advocacy comments on some of these concerns. So we filed comments on the Colorado Public Utilities Commission, District of Columbia Taxicab Commission, the City Council of Anchorage, and the City Council of Chicago on allowing these kinds of new forms of sharing services to exist for consumers. With that being said, we certainly are also alert to whether there any consumer protection issues that regulation should address. But opening it up to competition, certainly, we are in favor of.

Mr. SWALWELL. Sure. So are we.

Mr. ISSA. If the gentleman would yield?

Mr. SWALWELL. I would yield.

Mr. ISSA. I liked your line of questioning. I would only share a question with you. If I heard correctly, according to Ms. Allen, many States have decided to protect their boards exactly as they do every employee, millions of employees that work for States. When they make a decision to have someone do something on behalf of the government and then decide not to treat them like employees for the purpose, wouldn't you say that was a decision that each State makes?

Mr. SWALWELL. Sure. And to reclaim my time. I certainly respect that. And I think what you are looking for is probably when people go outside the scope of employment, if that is the relationship that they have. If you go outside the scope of employment, then you are not covered as a State employee, and then you probably won't be covered on one of these boards. But fair point.

Mr. ISSA. I thank the gentleman. It is a good line of questioning.

With that, I believe the next in line is the gentlelady from the air-and-water-torn State of Georgia, Mrs. Handel.

Mrs. HANDEL. Thank you very much, Mr. Chairman.

And thank you to my colleague from California for your good wishes for everything in Georgia. We still have quite a number of people without power, including our own Congressman Collins here, so——

Mr. COLLINS. I come with my own power.

Mrs. HANDEL. He does come with his own power. Believe me, I know.

Thank you very much to the witnesses for being here.

I am a former secretary of state, and as such, in that role, I oversaw some 40 licensing boards. So this is, even though I am new, this is a very interesting piece of legislation for me.

So one thing I would like to get at is, for Chairman Ohlhausen, as you sent out the guidance on the active supervision, what was the response to that, and sort of, has there been any action taken? Specifically, what have you heard from secretaries of state that may have these licensing boards up under them?

Ms. OHLHAUSEN. So we had a very productive dialogue with the State AGs and other officials about trying to give them the guidance that they were seeking post-North Carolina Dental.

So the response has been positive on it. And as for what the States have done, we are actually conducting a survey right now to look at what every State who has taken an action, which States have taken an action, and what they have done in response to the North Carolina Dental case.

Mrs. HANDEL. Do you know if secretaries of state have been rolled into that, or has it just been the attorneys general?

Ms. OHLHAUSEN. So different States do it differently. Some AGs, some State legislators——

Mrs. HANDEL. Okay. Great. I know, for myself, I took a very active role in what was happening with the licensing boards, and I will say there are some boards that are really, really good. And they come at it with the right perspective for what they are trying to do. And it is true that the boards, they can only do what they are legislatively directed and instructed to do.

With that said, some did very much—your point—wander into what I would call attempts to barrier to entry. And I always took that very, very seriously.

So, Professor Allensworth, what more do you think needs to be done in this piece of legislation to make sure that we have as open and free market possible out there?

Ms. ALLENSWORTH. Well, I think the first goal of the legislation is to increase clarity for States. I think that is really, really important. Once States know the lay of the land, as made clear by this statute, then they will be able to balance the competitive costs of regulations themselves.

I do think that licensing has gone too far. I think that there are lots of occupations that we license that shouldn't be licensed at all, and I also think that occupations we do license, like medicine, get regulated in a way that is inefficient. And I think that all goes back down to who is doing that regulation.

I like this bill because it addresses what I think the real problem is, which is that regulatory infrastructure, if we fix that, and then we fix the ultimate problem.

So what more does the bill need? I think I will go back to the comments that I said before. I think it would be stronger if it didn't have the option of lawsuits because, to me, that is not restoring governmental regulation here in place of the cartel. It is putting the cartel—vulnerable to a different kind of lawsuit and different courts, State courts rather than Federal courts. To me, it is sort of a step sideways whereas the first option, what I would call the administrative option, the active supervision option, actually puts the regulation back in the hands of the State. And that will result in, somewhat—it is never going to be perfect. You are going to have capture. You are going to have regulatory inefficiencies, but it is going to make it better, in my opinion.

Mrs. HANDLE. Great. Thank you very much.

To be sure, it is regulation run amuck with some of the licensing, but then there are those boards, to your point, that are very much needed to strike that right balance.

So thank you very much. And I yield back, Mr. Chairman.

Mr. ISSA. I thank the gentlelady.

We now go to the gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chairman.

And I really want to thank you and our Ranking Member Cicilline for what I think is a very important hearing. And I think it has been very reassuring to hear all of the views across the board, which is what I have heard from my constituents in reaching out about this bill, but also in my time in the State senate, where I served on the healthcare Committee. We dealt a lot with these licensing issues. And I think, from the labor and social services side, the importance of licensing, particularly in the health professional—health arena and around quality of care and standardization of professions, but also then, on the other side, the studies that clearly show that too much licensing actually presents enormous barriers.

And certainly with the population that I have worked very closely with, immigrant refugee population, we have really had to balance a lot of these cultural competency issues. So I hope we continue to have those discussions and the right balance there, and I appreciate the various perspectives that you have brought.

Now, Ms. Allensworth, I wanted to ask you about Ms. Allen's testimony. Ms. Allen argues that our constitutional system vests plenary authority on States to protect their citizens from fraudulent or unsafe practices by unqualified practitioners of vital consumer services, such as medical, engineering, or legal services.

Are you concerned at all that Federal reforms in this area might actually disrupt the role of the States in ensuring the safety of their citizens?

Ms. ALLENSWORTH. To me, it is quite the opposite. It is putting it back in the hands of the States.

The States have decided for various reasons to, in my opinion, abdicate their responsibility to regulate in this area. So, while it is true that States have the ability and the responsibility to regulate in the public interest, they also cannot, according to our antitrust laws, merely hand over regulation to self-interested regulators and walk away.

So that is what this—that is what the North Carolina Dental case is about, and that is what this bill is about.

So I don't think it is an area where the Federal Government is being too heavy-handed. I think this is totally appropriate.

So Chairman Goodlatte said something about how maybe this was more effort than it was really worth. And I just wanted to say I think Federal interest in this is really appropriate. So we are talking about almost a third of American workers. That is how many people were covered by unions in the maximum level of unionization going back decades.

I don't think that we would be debating about whether or not the Federal Government has a role in regulating how unions operate.

I think it is a totally appropriate thing, and it covers—I mean, today, unions cover many, many fewer than these boards cover.

Ms. JAYAPAL. Well, I mean, that is interesting perspective, and it leads to the next question I was going to ask you, which is, in light of the North Carolina Dental case, I mean, does it in any way minimize the role for the Federal Government, because one could argue that you do have that case, you do have regulation that has been set forth, essentially deriving from that case?

Do you feel that the Federal Government really—why do you feel that the Federal Government has such a strong role to play here?

Ms. ALLENSWORTH. So the Federal Government back in 1890 created the Sherman Act. And so they are very involved in regulating competition, going back 120 years ago. In 1942–1943, I believe it was, they came up with this doctrine of immunity. And now, to me, this is another piece of legislation in that line that—1943 was not a piece of legislation. That was——

Ms. JAYAPAL. Yeah.

Ms. ALLENSWORTH [continuing]. To be sure, an interpretation of the Sherman Act. But I don't think it is displacing the Court's opinion. I think it is rather taking an opportunity to come back and say: This is what we mean, at least as far as it concerns occupational licensing, this sort of specific problem that has cropped up.

Ms. JAYAPAL. Thank you. That makes sense.

Mr. Johnson, Ms. Allen argues in her written testimony that States are best suited to determine how to best structure their governments and economics in order to protect their citizens. How do you respond to that concern?

Mr. JOHNSON. Well, I think the concern and the reason that the antitrust law has come into play here is that these decisions about what to regulate and how are not being made by the States. They are being made by boards that are charged by the States with regulating their own industries. And that brings up huge problems where the members of these industries are acting as gatekeepers to competition for their own industry.

Certainly the State legislature lays out a licensing law where they say, for instance, that dentists have to be licensed. But then the question becomes, well, does the practice of dentistry include teeth whitening? And the people who get to decide that, under the current system, are dentists.

And, of course, in State after State after State, they say: Well, teeth whitening is dentistry, i.e., there is no health or safety justification for excluding unlicensed teeth whiteners. And the only reason is to ensure that dentists can make greater profits.

So, absolutely, yes, this is an area where there is a role for the States and for the Federal Government. But the problem right now is that this is an area where regulation has been given to——

Ms. JAYAPAL. Thank you.

Mr. JOHNSON. Sorry.

Ms. JAYAPAL. Thank you. I appreciate that.

And, again, I am glad we are having this hearing.

I yield back.

Mrs. HANDEL [presiding]. Thank you very much.

Let me next recognize the gentleman from Georgia.

Mr. COLLINS. Thank you, Madam Chair. I appreciate it.

This is an interesting hearing. I think it is one that, as you first look at it, I think this Committee, this Subcommittee in particular, has a lot more issues of jurisdiction, especially, Ms. Ohlhausen, from what we have talked about before, in not just this arena. I think this is a good opening to talk about it, but there is a lot more from hearings that we could have on truly national issues that I think that I would like to see moving forward here.

I just have some interesting comments. Because being on the State legislator level, having—the former secretary of state, this is interesting because you talked about active supervision. If we define it in this—and the bill I think takes a stab at that, but several things that have come out sort of this rubber-stamp authorization, if they do it, and also this fact of the sort of the antithesis here is the dental and the teeth whitening, hair braiding.

In Georgia, you can be a hair braider if you have 2 hours of community—or CLE or business practices, industry trends. I mean, what does that mean? Reading a magazine? I mean, and what is the health—why would a State do that? And even my own State of Georgia does this. But it is interesting.

Where I want to concentrate for a second is, the majority of these State boards are required by State statute to be comprised of a majority of currently licensed professionals active in the very profession they were regulated in. So most States are doing it this way. It brings to a question; it is opened up. This is free for all. To determine active supervision, we have a secretary of state in some instances, but in the State of Georgia, on the very website, it says: We do not have any input into the decisions made by these boards.

They are appointed in Georgia by the Governor. Many of the States have a similar aspect, which puts them under the realm of executive branch. Attorneys general are the ones, as you well know, as I, are the ones that take the cases and have to defend. This is an interesting—I know, in Georgia, they would.

But my question is this: If we roll this back to active supervision, and we sort of hit at this at many different levels, my question is: I don't believe we need an office of anything in most government, State, local, Federal, in particular. We need a better understanding of what that means. Does that mean the secretary of state should, in these offices, if they are under them, actually give administrative support, that they are the active supervision, or should there be a change in State law? And then if that is true—and I am making a long question because I want to hear your answers—how can Congress or a State legislature be considered active supervision when most have no idea what goes on, or if they do, it is only from an outcry?

So, Ms. Ohlhausen, if you will start, and just sort of everybody from there jump in.

Ms. Allen, I know you have got a position on that but——

Ms. OHLHAUSEN. Thank you. You put your finger on some very important factors. And in the FTC's guidance to the States about what constitutes active supervision, we say the supervisor has to obtain the information necessary for a proper evaluation.

We brought a case a number of years ago where there was someone who just got a price list and shoved it in a drawer. They never looked at it. Have they looked at the substantive merits of the ac-

tion? Did they have a written decision, and do they have the ability to overturn what the board has done?

So, but it is up to the State to decide where that authority should lie, whether it is with the attorney general or whether it is a board, the only thing we say is the supervisor cannot be a market participant, him or herself.

Mr. COLLINS. Just a quick yes/no. So, in your answer that is out there, I have heard basically you say a State legislature could not provide active supervision.

Ms. OHLHAUSEN. I think it would be very difficult for a State legislature——

Mr. COLLINS. Okay. Although they could make rules and laws——

Ms. OHLHAUSEN. Right.

Mr. COLLINS [continuing]. Could change any decision by a board.

Ms. OHLHAUSEN. Right.

Mr. COLLINS. Ms. Allen.

That is interesting because that brings back—that is a whole different line of questioning, Ms. Allen.

Ms. ALLEN. I agree with that answer. I don't think the State legislature can be the active supervisor.

But I think, in Virginia and many other States, all the health profession boards are under a department of health profession. All the other nonhealth boards are under a department of professional occupational regulation.

The directors of those umbrella agencies are State employees, and they could very easily be the active supervisor for the boards that are under their umbrella agency.

Mr. COLLINS. Would they have a veto opinion on those votes?

Ms. ALLEN. Yes, absolutely. To be active supervision, you have to be able to approve, deny, or modify a board decision. And they would have to be—the legislature would have to pass a statute to enable them to do it, but they should be able to do those things.

Mr. COLLINS. That could throw a kink in the cartel world.

Mr. Johnson.

Mr. JOHNSON. I think it is important to understand the act here gives flexibility to the States to decide where to put the office of supervision. And then the board—or the act refers to an office, and they give the impression that there is a particular structure for that in mind. But the bill really is functional. And it requires that some part of the State bureaucracy be charged with supervision, not that it be in anywhere in particular in the State.

Mr. COLLINS. Ms. Allensworth, a very quick comment.

Ms. ALLENSWORTH. So I see your question, Mr. Collins, as basically asking, are they going to do their job? Is this supervisor going to help at all? And I don't have an answer to that, right?

How well does this government work? You know better than I do, not perfectly all the time.

Mr. COLLINS. Well, we could all look at that one.

Well, but I think here is the point here, and I want to finish up with this, and I think—I appreciate—the comments have been good here. This actually goes back to a really—from the new sharing economy to things we don't know about yet.

The concern is, is when it comes to the State legislatures or to Congress, each of these groups are a voting constituency. So, when it comes to that that is the active supervision part.

And, look, I think there needs to be some licensing. I don't think we need as many as we probably have, but there are definitely some that need to be there.

This question—I appreciate Representative Issa bringing this up and talking about this from his bill perspective, but I think one of the things that we need to do here is, what are we doing to actively participate in the marketplace, not restrict the marketplace, and find ways that I would like to talk even further in bigger arenas on this antitrust issue as we go forward. But I think this goes back to say I am very—I see the need for this discussion of this legislation, but also it goes back to—Ms. Allen, your last comment—State legislators need to take an active role in what they are doing, instead of just giving carte blanche to a lot of these things, which is, unfortunately, happens, due to many multitude of reasons.

With that, Mr. Chairman, I yield back.

Mr. ISSA [presiding]. Thank you.

I would like to hear from Mr. Cicilline. The gentleman is recognized.

Mr. CICILLINE. I would just ask unanimous consent that a statement entitled "Occupational Licensing: Regulation and Competition," from a variety of regulatory boards be made part of the record.

Mr. ISSA. Without objection, so ordered.

This material is available at the Committee or on the Committee Repository at: *http://docs.house.gov/meetings/JU/JU05/20170912/106382/HHRG-115-JU05-20170912-SD003.pdf*

Let me do a couple quick closing questions.

Chairman Ohlhausen, you have seen a lot of government, and you worked with all kinds of agencies—EPA, OSHA, et cetera. Just for purposes of comparing the Federal Government with the State of Virginia, the Commonwealth of Virginia: Although the Federal Government has all kinds of boards and commissions, for the most part, aren't they advisory, in other words, they lack the ability to create regulations?

Ms. OHLHAUSEN. I think that that varies. So, but I agree that there are a lot of advisory boards that play a role——

Mr. ISSA. And so——

Ms. OHLHAUSEN [continuing]. In the U.S. Government.

Mr. ISSA [continuing]. In the executive branch of the Federal Government—just for purposes of making the record clear, and I am using you as my fellow Federal officer here for a moment—when you go on a board or commission, even when it is advisory, there is a whole slew of ethics protections, recusals; you have to file almost every one of these positions; even unpaid has to file a full financial reporting so that the public has the ability to see if there is a conflict of interest, right?

Ms. OHLHAUSEN. Yes.

Mr. ISSA. And yet they do not—and we pay money to move them. Even if they are not being paid, we supervise them. And yet they don't get to create regulations. For the most part, the regulations that are created, that Ms. Allen is saying are burdensome, are cre-

ated by the Federal taxpayer through their employees? Isn't that correct, from your experience?

Ms. OHLHAUSEN. Yes. So the regulations are created through the appointed or elected official.

Mr. ISSA. So, when States decide, instead of having an advisory board that ultimately the executive branch then, through an agency it creates or its legislature creates, creates rulemaking, what they are really doing is using, for the most part, a volunteer, unpaid group to lower their economic costs but not, quite frankly, not that they couldn't have those boards and commissions, including the State bar. Those could all be advisory with a separate agency of government employees who would have no conflicts of interest, who would have all the normal requirements actually creating the regulations. There is nothing inherently outside of what States could do if they were willing to pay the tab. Is that right?

Ms. OHLHAUSEN. That is right. I think it is up to the States to choose.

Mr. ISSA. Okay.

And so, Professor Allensworth, sort of going to that, because you have studied both the Federal and the State, is there something wrong in my thinking that, because Ms. Allen has very carefully articulated that, although these are government people—and I have made clear I think in our conversation—that they are not held by the same set of rules that government people are because they, obviously, have an economic interest in the decisions they make—isn't it really a question of any time you use these outside groups you are lowering your burden as a State where the Federal Government, for the most part, does not lower its burden? It has an equivalent group of people, advisers from industries, but it doesn't allow them to legislate. It uses federally tax paid employees—the FCC, the SEC and so on—to actually regulate and then holds them to a very different standard. Is that a fair representation? Because I want to set the stage for why we are thinking that this legislation may be appropriate, and the Court's decision, looking at these conflicts in the North Carolina case, was appropriate.

Ms. ALLENSWORTH. So I think that is absolutely right. And so a private association, industry association doesn't enjoy immunity. They are subject to the Sherman Act. And they can have an opinion. They can involve themselves in a rulemaking. We know that they do. And sometimes they can be very influential on what the Federal Government does.

But that doesn't mean that they ought not to be answerable for the anticompetitive things that they do when they are not merely lobbying. And so, if we thought of these boards as lobbying and taking a position, that then the State listened to, considered, weighed, and, in their wisdom, accepted or rejected, that would be a very different circumstance from what we have now.

Mr. ISSA. Let me ask you a follow-up question, Professor.

This part of the bill that I participate in that you seem to have concerns about, let me ask you as a question in the alternative, if we struck that altogether and there were no private right of action and the States had to have active supervision and then we discovered that they didn't have active supervision or somebody wanted to contest whether they have active supervision, you would pre-

sume that either the Federal Trade Commission or some other entity would sue just as they did in the North Carolina Dental case, right?

Ms. ALLENSWORTH. Right. So I think your question is saying I am not crazy about the legal option, but doesn't it all boil down to legal option; doesn't it all boil down to courts making individual decisions in these cases? And I think that that is a fair point.

Any time you have an issue where somebody has failed to comply with the statute, that gets worked out, whether or not they have or haven't typically gets worked out in a court of law.

I just think that doing it in the first instance through the courts may be a less efficient way to get the kind of results this bill is looking for.

Mr. ISSA. And I am going to include Ms. Allen, because I have been talking around you for a moment, but final question for you and then others: If I were to tell you that my wish is that no State would choose the second option, that every State would look and say, "We've given you a definition of active supervision, and we really wish you would choose it, but under the concept of federalism, if you do not do it, rather than automatically say, 'Well, we will wait for a challenge from perhaps the FTC because you didn't do active supervision,' we are going to have this other option," is there something inherently wrong with that, presuming that we really do want everyone to have active supervision, but we know that, out of 50 States, there just might be somebody who doesn't get around to it?

Ms. ALLENSWORTH. So I don't think there is anything inherently wrong with it, and that has to do with what we have under the status quo. What we have under the status quo is ambiguous vulnerability of these boards to Federal antitrust lawsuits.

And so I see the second option as being maybe as good as that. And that is something that I was happy to see happen in 2015. So I am not against that. I just think this other one is superior.

So your hope that everyone takes the superior one I think is good. I also think they are more likely to take it. The States are not going to want to hand over control of their boards to their judiciary. They are probably going to want to keep it within the executive round.

Mr. ISSA. Nobody is going to want to be on a board that is in that situation, particularly if they are in a State that doesn't fully indemnify them.

Ms. ALLENSWORTH. Well, that is also true.

Mr. ISSA. Ms. Allen, your final comments.

Ms. ALLEN. I think most States actually want active supervision following North Carolina Dental.

I think the problem is that, even under the current case law, many States haven't been able to get their legislatures to pass a bill.

I think this bill respectfully creates even more hurdles for a State to meet than they do under current case law. And so I think States are just going to take the option of doing the cost-benefit analysis and chancing it in court.

Mr. ISSA. Well, Mr. Johnson, that leaves it up to you. What do you think about first option, second option, and so on?

Mr. JOHNSON. Well, so I do want to speak briefly in favor of the second option. I think that there are merits to the first option. I also think there are merits to the second. And Professor Allensworth alluded very briefly to the concept of regulatory capture, which is just that, when you have bureaucrats whose job is to regulate a particular agency, it often happens that those bureaucrats end up being aligned with the industry that they regulate. And we see that constantly.

So the plus to an option that puts the responsibility for supervision in the courts is that courts are far less subject to regulatory capture because judges are generalists. They regulate everybody. They don't regulate a particular industry.

So, as a litigator, my perspective is that you often get better results out of the courts than you do out of the legislative or—not the legislative, than you do the administrative process.

I think that perhaps there are different views on that, but I think one of the——

Mr. ISSA. The conservative arguing for the plaintiffs' bar.

Mr. JOHNSON. Yeah, one of the benefits of the bill though is it ultimately leaves that choice up to the States. So perhaps some States choose the administrative option; some States choose the judicial option. Well, let's see. Maybe some of them will have better results than the others, and then we will actually know which is the better way to do it.

Mr. ISSA. Thank you. I might note that, in a book I wrote some time ago, I noted that the father and son team that came aboard the Deepwater Horizon one morning and gave it a clean bill of health had breakfast with some of their cousins and then left before that ill-fated rig blew up were probably part of a captive entity known as the Minerals Management Service.

So it happens. There is no question at all. And you are right. At least for British Petroleum, it was the private right of action that caused them to take steps so that it will never happen again, hopefully.

Chairman, you are the one government person. You filled out all those financial reporting things. You have lived up to all those onerous things, and you have done it on a limited salary, so you get to close.

Ms. OHLHAUSEN. Thank you so much. And what I would say is that I think that, to the extent the bill is giving States an option that will improve their oversight of these boards, I think it is a very positive development.

Mr. ISSA. Mr. Cicilline, any final remarks?

The gentleman is recognized.

Mr. CICILLINE. Thank you. I just want to follow up on Chairman Issa's question.

With respect to the second part of the bill, the judicial review part, I mean, if in fact the bill had the first requirement, the active supervision, and a procedure to be sure that it is being followed, States would either be required to do that or their board—I mean, that is in order to earn immunity. So, if they didn't do it, they would expose their board members to litigation and treble damages, and presumably that would be enough of an incentive. If you

think that the regulatory role of this board is important, you want to actually be able to staff the board with individuals.

So I do wonder whether the judicial component will invite more uncertainty. And to Professor Allensworth's point, maybe it will be no worse than the current situation in terms of ambiguity. But having a clear requirement in the legislation that says, "You must provide supervision in this way and a system to ensure it is happening in order to get the immunity, and if you don't, you don't get the immunity," it is sort of very clear. And isn't that a better system than inviting a whole judicial review subject to all kinds of hopes, dreams, and advocacy? Both you, sir, and Professor Allensworth.

Mr. JOHNSON. I think, from the perspective of the antitrust laws, either option provides clarity. From the perspective of the antitrust laws, if the State has satisfied the requirements of section 5 or the requirements of section 6, either way, the State is entitled to immunity under the antitrust laws, and that is kind of case closed.

The sort of uncertainty is, well, if you go with the bureaucratic administrative option, will it work? If you go with the judicial option, will that work? And that is sort of the devil is in the details. It depends on how the States implement it.

But my prediction would be that the States that go with the judicial option will actually see better results. Perhaps Professor Allensworth's prediction is the opposite.

I think that is an interesting experiment. I would rather see that experiment run than to not give the States the option to choose.

Ms. ALLENSWORTH. I agree, especially with the last couple things that Mr. Johnson said. We do have different priors on this as to which works better, but I also think it is an interesting experiment and maybe would like to see it run.

I would like to add one more comment about the judicial review option. And here is where my objection to that kind of dovetails with my objection to the least restrictive alternative analysis.

So that itself is very uncertain. The least restrictive alternative sounds great. Can we do the same thing with less injury to competition? But it is almost never true that the alternative does the exact same thing as the first thing. And so this least restrictive alternative analysis is a bit unwieldy, and it is difficult for courts to do, especially on an ad hoc kind of basis.

Mr. CICILLINE. Thank you. I yield back.

Mr. ISSA. Thank you. To be continued.

What I heard today was you would all like legislation; perhaps some less. But I think, even for Ms. Allen, I didn't hear that the status quo is delightful in the current environment.

So, recognizing that I have three who like the legislation, at least partially, and one who would like legislation but perhaps not this legislation, I look forward to getting Mr. Cicilline onto this bill with such modifications as may be necessary to get his buy-in.

And, with that, we stand adjourned.

[Whereupon, at 4:37 p.m., the Subcommittee was adjourned.]

INSTITUTE FOR JUSTICE

October 31, 2017

The Honorable Bob Goodlatte
Chairman, House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte:

Thank you for your letter of September 29, 2017, sending questions for the record following the hearing of the Committee on the Judiciary's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on "Occupational Licensing: Regulation and Competition." My response to your questions follows below.

1. It has been argued that as a result of North Carolina Dental and the threat of treble antitrust damages, market participants will be reluctant to serve on occupational licensing boards. Is this a problem States could address through indemnification of board members or other means?

Answer: While States may choose to address board members' concerns through indemnification, the Restoring Board Immunity ("RBI") Act provides a superior solution.

States have good reason not to indemnify board members against antitrust liability, as indemnification would amount to a blank check to violate the antitrust laws. As I set out in my prior written testimony, there are numerous well-documented examples of licensing boards using their authority to drive competition from the market. To give just a few examples, dentists have used their licensing authority to monopolize the practice of teeth whitening; veterinarians have used their licensing authority to monopolize the practice of equine dentistry; and cosmetologists have used their licensing authority to monopolize the practice of hair braiding. This kind of activity raises prices for consumers, while making it harder for people to find jobs. A State that indemnified board members would essentially subsidize that bad behavior.

The RBI Act provides a superior solution. The RBI Act provides board members with assurance that they will not face ruinous liability because they choose to serve on a licensing board. At the same time, however, it conditions that immunity on the adoption of procedures designed to ensure that licensing boards do not abuse their authority to impose restrictions that limit competition without actually benefitting the public. In other words, whereas

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indemnification gives boards a blank check for bad behavior, the RBI Act strives to ensure that boards do not engage in bad behavior in the first place. The RBI Act thus strikes an appropriate balance, addressing the concerns of the boards while also protecting the public from abuse.

2. Ms. Allensworth noted in her testimony that aspects of the Restoring Board Immunity Act, including the "good faith" standard, are too lenient and could be abused by States to gain undeserved immunity. Do you agree with her assessment?

Answer: I do not share Ms. Allensworth's concern, as I respectfully disagree with her interpretation of the RBI Act's "good faith" provision. Section 4(b) imposes a "requirement of good faith," under which "[t]he immunity provided under subsection (a) shall not apply to any action of an occupational licensing board . . . unless the State acts in good faith." This good faith provision anticipates that States might pass legislation adopting the RBI Act's procedures, but might then fail to take concrete action to actually implement those procedures. In such a case, the State would not have acted in good faith and would not enjoy immunity. So interpreted, the good faith provision imposes an *additional* requirement that States must satisfy to secure immunity.

Ms. Allensworth instead reads the good faith provision as a "loophole," and under her interpretation a State could secure immunity if it acted in "good faith" but did not actually satisfy the Act's other requirements. However, the good faith provision does not say that immunity shall apply in every case in which a State acts in good faith; instead, it says that immunity shall *not* apply "unless" the State acts in good faith. Indeed, properly interpreted, the good faith provision guards against precisely the kind of game-playing that Ms. Allensworth suggests is a concern, as it bars immunity in any case in which the States fails to provide a functioning oversight regime for its licensing boards.

If the subcommittee agrees with Ms. Allensworth, the "good faith" provision could be strengthened to bolster the reading I suggest above, and I would be happy to review any language that might be drafted.

3. A section of the Restoring Board Immunity Act requires States to establish a new private right of action, allowing individuals to sue to enjoin enforcement of licensing requirements if the requirements do not meet certain criteria. Should we be concerned about the potential for frivolous litigation, and the subsequent burden on the judiciary, that might result from this new right of action?

Answer: No, that should not be a concern. The RBI Act does not actually require that *any* State adopt a private right of action. Instead, the RBI Act gives States a choice: States can choose to secure immunity by creating a mechanism for bureaucratic oversight of state licensing boards, or States can instead choose to secure immunity by creating a private right of action to challenge

the actions of state licensing boards in state court. (Notably, that right of action would allow for injunctive relief but not damages.) If States choose to create a private right of action, they will do so only because the state legislature determines that a right of action is a better approach for that particular State, and the resulting litigation will proceed only in state court.

Some States may have good reasons to prefer a private right of action to bureaucratic oversight. Bureaucratic oversight is not without its own costs; among other things, it may require hiring new employees. A state legislature could reasonably conclude that a private right of action would be more cost-effective. A state legislature might also conclude that a private right of action is a more effective way to prevent abuse by licensing boards—and thus a more effective way to promote competition, entrepreneurship, and the creation of new jobs—because state courts are less likely to be "captured" by the licensed occupations. The RBI Act does not impose any costs at all when it gives States the option to make that choice.

4. I understand the goal of the Restoring Board Immunity Act is to give states optionality. In your opinion, how would the legislation interact with the existing state action doctrine and the standard set forth in North Carolina Dental?

Answer: The RBI Act states in its first section that it is intended to "clarify the requirements of active supervision, both to offer States a clear and certain mechanism to immunize their occupational boards and to make clear that mere bureaucratic oversight to ensure consistency with State licensing laws does not suffice to confer immunity." This language makes clear that the RBI Act is intended to override existing state action doctrine in the limited context of claims against state licensing boards.

This interpretation is confirmed by Section 5(c) of the Act, which provides a definition of "active supervision." After all, "active supervision" is a term of art used by the Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1116-17 (2015). In that case, the Supreme Court held that, "[i]f a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked." *Id.* at 1117. When the RBI Act defines "active supervision," it plainly intends to define the degree of active supervision required to invoke that immunity.

In addition to being the best interpretation of the RBI Act, this also makes good sense as a matter of policy. The RBI Act is essentially a legislative compromise: It gives state licensing boards the antitrust immunity that they seek, but it does so on the condition that States enact reforms to prevent anticompetitive conduct by the boards. That legislative compromise would be undermined if States could pursue an alternative path towards immunity under the vague and undefined requirements of *Parker* immunity doctrine.

Thank you again for the opportunity to testify on these issues.

Sincerely,

Robert Everett Johnson
Attorney
Institute for Justice

Additional Written Responses to the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on September 12, 2017
"Occupational Licensing:
Regulation and Competition"

Sarah Oxenham Allen
Senior Assistant Attorney General and Unit Manager,
Antitrust Unit
Office of the Virginia Attorney General

November 3, 2017

Additional Written Responses before the
United States House Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on September 12, 2017
"Occupational Licensing: Regulation and Competition"

Sarah Oxenham Allen, Senior Assistant Attorney General and Unit Manager,
Antitrust Unit, Office of the Virginia Attorney General

November 3, 2017

Chairman Goodlatte, thank you for your letter of September 29, 2017, providing me with additional questions from members of the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law following the hearing on September 12, 2017 on "Occupational Licensing: Regulation and Competition." I was honored to provide written and oral testimony to the Subcommittee on this important topic, and I thank you for the opportunity to provide additional thoughts and clarifications of my previous testimony.

I must first begin again with an important disclaimer: the answers to these questions reflect my own opinions and are not necessarily the views of the Virginia Attorney General's Office, General Mark Herring, or any of my antitrust colleagues with whom I work through the National Association of Attorneys General ("NAAG").

1. **Has North Carolina Dental discouraged professionals from serving on licensing boards in Virginia? If so, what is Virginia doing to address these concerns?**

As part of my position as Chair of the State Action Working Group of the NAAG Multistate Antitrust Taskforce, I have heard from my counterparts in several states various levels of concern by board members in their states about the potential for individual antitrust treble damage liability against them following the United States Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) (hereinafter, "*NC Dental*"). Although I am unaware of any case in which antitrust damages have been imposed on

an individual board member since *NC Dental* was decided, at least two-thirds of the dozens of antitrust cases that have been brought against state licensing boards following that decision have also named as defendants board members in their official and individual capacities and requested damages from them. In addition, all of these cases have been brought against traditional boards that are regulated in most or all states, such as the boards of medicine,[1] dentistry,[2] veterinary medicine,[3] hearing aid examiners,[4] auctioneers,[5] and the state bar.[6] The boards of controversial occupations that many believe should not have licensing regimes, such as interior designers and hair braiders, have not been involved in any post-*NC Dental* antitrust litigation of which I am aware.

Events in Florida this year perfectly illustrate the hesitation to serve on boards by individuals who are worried about potentially being liable for treble damages because of their actions while on these boards. The members of the Florida Board of Podiatric Medicine wrote letters to the Governor and the Chair wrote an open letter to the podiatry profession stating their intention to resign if individual board members could not be indemnified by the State of Florida for antitrust damages claims.[7] Although the Florida legislature then considered a bill to indemnify current

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[1] *Petrie v. Va. Bd. of Med., et al.*, 648 F. App'x. 352 (4th Cir. 2016); *Allibone v. Tex. Med. Bd., et al.*, Case No. A-17-CA-00064-SS, 2017 WL 4768224 (W.D. Tex., Oct. 20, 2017).
[2] Complaint, *Julien, et al., v. Ga. Bd. of Dentistry, et al.*, No. 1:17-cv-04045 (N.D. Ga. Oct. 12, 2017).
[3] *Robb v. Conn. Bd. of Veterinary Med., et al.*, 157 F. Supp. 3d 130 (D. Ct. 2016).
[4] Complaint, *WSPTN Corp., d/b/a Beltone Hearing Aid Ctr., et al., v. Tenn. Dep't of Health, et al.*, 2015 WL 4593719 (M.D. Tenn., July 7, 2015).
[5] *Bauer v. Pa. State Bd. of Auctioneer Exam'rs., et al.*, 188 F. Supp. 3d 510 (W.D. Pa. 2016).
[6] Complaint, *LegalZoom.com, Inc. v. N.C. State Bar, et al.*, Case No. 1:15-cv-00439 (M.D.N.C., June 3, 2015).
[7] *See, e.g.*, Letter to the Honorable Rick Scott, Governor of Florida, from Dr. Chet Evans, Chair, and Drs. Block, Strickland, Sindone, Koppel, and Morris, and Mr. Pearce, Board Members, Florida Board of Podiatric Medicine, Dec. 6, 2016 (attached as Exhibit A); *Podiatric Medical Board Volunteers Nationwide NOT Immune to Lawsuit: An Open Letter to the Podiatric*

and past active market participant board members, the bill ultimately failed.[8] The Chair and another board member then resigned.[9] Although nothing so dramatic has happened yet in other states, I have heard that some states are encountering difficulty finding qualified professionals willing to serve on boards following the *NC Dental* decision.

Even if ultimately found not liable, individual board members are still likely to be subjected during litigation to depositions and document productions from their businesses, including personal income information. In an antitrust case against the Virginia Board of Medicine, the defendant doctors were eventually vindicated, but not until after each one was deposed and had to produce personal information about their finances and practices. In addition, the Board of Medicine spent hundreds of thousands of dollars defending itself and them.[10]

In addition, many states have constitutional prohibitions against indemnification. In Virginia, indemnification arrangements are considered debts that are limited by Article 10 of the Virginia Constitution and require that the "full faith and credit of the Commonwealth" be pledged for payment through an identified statute and/or fund. It is also likely that even with statutory authority to indemnify board members, the Commonwealth's obligation would be capped by the current limits of the Division of Risk Management's plan for public liability.[11]

Profession," Podiatry Management Online, by Chet Evans, MS, DPM, Jan. 20, 2017, *available at* http://podiatrym.com/search3.cfm?id=98854.

[8] *See* www.flsenate.gov/Session/Bill/2017/00582.

[9] *See* http://floridaspodiatricmedicine.gov/meetings/minutes/2017/02-february/020317-minutes.pdf.

[10] Summary judgment in favor of the Board of Medicine, five of its board members, and its Executive Director was affirmed by the Fourth Circuit in *Petrie v. Va. Bd. of Med., et al.*, 648 F. App'x. 352 (4th Cir. 2016).

[11] *See* Va. Code Ann. § 2.2-1837.

Antitrust damages are automatically trebled,[12] which could easily surpass the current risk management cap.

The easiest way to ensure the best practitioners are willing to serve their professions on state regulatory boards, as well as to weed out vexatious antitrust lawsuits where aggrieved licensees are merely seeking cash payouts, is for Congress to pass a statute immunizing individual board members from damages liability. This would be analogous to the Local Government Antitrust Act,[13] which prohibits antitrust damages actions against local governments, school districts, and individuals acting in an official capacity on their behalf. As discussed more fully below, this is especially important within the context of the Restoring Board Immunity Act,[14] which appears to require a board and its members to defend not just their own actions, but those of the state legislature as well, by proving that the board's actions were pursuant to an identified and legitimate public interest in the statute that the board must follow.

2. Has the FTC's "active supervision" guidance been adequately clear, from your perspective, for States like Virginia? How have Virginia and similar States responded to this guidance?

The Federal Trade Commission staff issued guidance to the States following the *NC Dental* decision, seeking to clarify several questions left unanswered by the Court in its opinion.[15] The

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[12] 15 U.S.C. § 15(a).

[13] Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

[14] Restoring Board Immunity Act of 2017, § 5(c)(4)(B)(iii) (does not allow the supervisor to rely on a legislative finding of fact or grant a presumption to a legislative determination (a) of harm to the public health, safety, or welfare or (b) that the restriction is substantially related to achieving the identified and legitimate public interest); *see also* § 6(b)(1)(E) (provides for independent judicial review of a state's occupational licensing laws within the context of a lawsuit by an individual against a board that "burdened" the individual through a decision made pursuant to those licensing laws).

[15] FTC Staff, FTC STAFF GUIDANCE ON ACTIVE SUPERVISION OF STATE REGULATORY BOARDS CONTROLLED BY MARKET PARTICIPANTS (2015), *available at* https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

FTC Guidance is helpful to state antitrust attorneys providing counsel to our boards about who is considered an "active market participant," what is a "controlling number" of active market participants on a board, who may properly be the disinterested state official who can serve as the "active supervisor," and situations that probably would not be considered adequate supervision to provide the board with immunity. It is less helpful on a daily basis for the actual board members and board counsel who are much less knowledgeable about antitrust issues and about the types of decisions they make that may impose competitive restraints.

Antitrust counsel in the various Attorneys General Offices have provided in-person training and legal advice memoranda to board counsel and board members to educate them on these issues. More importantly, a NAAG taskforce collaborated with the Center for State Enforcement of Antitrust and Consumer Protection Laws ("the State Center"), which commissioned a Primer directed to board counsel, board members, and active supervisors.[16] The Primer explains, in non-legal jargon, the history of state action antitrust immunity, the requirements for state entities to be immunized, the purpose of active supervision, and the types of decisions boards make—from ministerial and non-discretionary actions to those with a slight, medium, or high risk of antitrust impact. The Primer also gives examples, many of which have similar fact patterns to actual cases filed against boards since *NC Dental*, of board decisions at each risk level and explains why these decisions may restrain competition and how the board could use a less restrictive alternative. This has been an enormously important resource for States that are struggling to minimize their antitrust exposure in the absence of statutes adding active supervision to their decisions.

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[16] Abraham L. Wickelgren, RESPONDING TO THE NORTH CAROLINA DENTAL DECISION: A PRIMER FOR STATE REGULATORY BOARD COUNSEL AND BOARD SUPERVISORS (Jan. 20, 2017), *available at* www.statecenterinc.org/docs/Primer_January_2017.pdf.

3. You note in your testimony that the Restoring Board Immunity Act places a significant burden on States to comply. How do the requirements under the Restoring Board Immunity Act differ from the inherent requirements under North Carolina Dental or the FTC guidance?

Under current case law, the decisions of state boards will be immune if they can demonstrate compliance with two requirements: they must be following "clearly articulated and affirmatively expressed state policy" to displace free market competition with regulation[17] and they must be "actively supervised" by the State itself to ensure that "only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies"[18] will be immunized. All non-sovereign state actors, including traditional state agencies and municipalities, must comply with the first requirement to follow clearly articulated state policy when displacing competition in order to be immunized. The Supreme Court made clear in *NC Dental* that, unlike other state agencies, it considers active market participants who serve on state regulatory boards to be the same as private individuals and trade associations pursuing a state policy, and therefore, also subject to the second requirement of active supervision in order to be immune from antitrust liability.[19]

As explained in case law and the FTC Guidance, active supervision must consist of more than simply a negative option to override a board's decision[20] and more than merely ensuring "that some sort of reasonable procedure was afforded and that there was evidence from which it could be found" that the board acted reasonably.[21] For this reason, the FTC Guidance concludes that judicial review of a board's decision through a state's administrative procedure act appeals process does not satisfy *NC Dental's* requirement that the active supervisor "must review the

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[17] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).
[18] *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).
[19] *NC Dental*, 135 S. Ct. at 1113.
[20] *See, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 637-38 (1992).
[21] *Patrick*, 486 U.S. at 105 (internal citations omitted).

substance of the [board's] anticompetitive decision, not merely the procedures followed to produce it."[22]

Active supervision following *NC Dental*, however, does not require analysis of whether the board used the least restrictive or most efficient alternative to achieve the State's policy objectives. A supervisor also does not have to engage in an analysis of whether the procompetitive benefits of the challenged restriction outweigh its anticompetitive effects, like courts must when they consider competitive restrictions using a rule of reason analysis. The question "is not whether the challenged conduct is efficient, well-functioning, or wise,"[23] or "how well state regulation works, but whether the anticompetitive scheme is the State's own."[24] Under *NC Dental*, if an active supervisor is a disinterested state official and approves a board's actions because he determines they are in accord with the State's policy to restrict competition in favor of another public interest deemed more important by the State, then the inquiry ends and the board's actions are immunized from antitrust liability.

The Restoring Board Immunity Act ("RBI Act" or "the Act"),[25] on the other hand, would immunize far fewer decisions by state boards than current case law authorizes, would cost States more to comply with its requirements, and would give no deference to the principles of federalism that allow States to make their own decisions about how to structure their economies and safeguard their citizens' health, safety, and welfare. The Act also appears to amend the Sherman Act in such a way that compliance with its terms provides the only path by which States can assure immunity for their board's actions. This is problematic in two ways: it

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[22] FTC GUIDANCE at 13.
[23] *NC Dental*, 135 S. Ct. at 1111.
[24] *Ticor*, 504 U.S. at 635.
[25] Restoring Board Immunity Act of 2017, H.R. 3446, 115th Cong. (2017); Restoring Board Immunity Act of 2017, S. 1649, 115th Cong. (2017).

disregards the active supervision statutes that some states have already passed and creates a much higher bar for state boards to receive immunity, as entities of state government, than private individuals and trade associations would have to demonstrate under the current *Midcal* and *Ticor* standard of active supervision.

The following are several specific instances where the RBI Act's conditions for immunity would be much higher than current case law requires and would present open questions or problematic situations for states:

1) The Savings Clause in Section 4(d) of the Act appears to limit state action immunity only to some licensing decisions by boards. It is unclear if immunity under the Act is available to boards for scope of practice/unauthorized practice decisions, and it appears that immunity is explicitly not available for other potentially problematic board decisions, such as pricing regulations. Moreover, the licensing decisions the Act would immunize are often among the more ministerial and non-discretionary actions boards take, so immunity for these decisions is less necessary than for many other board actions for which immunity may no longer be available at all under the Act.

2) In Section 5(c), the Act creates an unfunded federal mandate to establish a new agency called the Office of Supervision of Occupational Boards, which would have day-to-day oversight of state licensing board decisions. It appears that this Office would provide the active supervision required by *NC Dental*, but its duties go far beyond merely reviewing board decisions. Among other things, the Office is directed to "play a substantial role" in creating board rules and policies. Many of a board's rules, however, are already set forth in the state's administrative procedure act. In addition, it is not always advisable to have the same entity that

helps create board policies then review whether decisions made pursuant to those policies comply with the state sovereign's expressed intention to restrict competition.

3) The Act purports to grant immunity to boards through two pathways—either active supervision by the Office of Supervision of Regulatory Boards in Section 5 or judicial review in Section 6. Under either path, however, the Act expressly gives no deference to the decisions by state sovereign legislatures to displace competition for other public interests they deem more important. The Act allows a supervisor in the executive branch of the State or a judge in the judicial branch to substitute her judgment for the sovereign legislature's about whether the interest being protected is an actual, legitimate risk to the public.[26] The Act also appears to authorize the supervisor or judge to disregard the sovereign if she deems that the legislature did not mandate the use of the least restrictive alternative to safeguard that public interest.[27] Beyond the almost breathtaking, and perhaps unconstitutional, breach of federalism the Act authorizes, is the unpalatability of the Act to the state legislatures that would need to implement it before its provisions would take effect in those States. I question whether many States would do so, preferring to take their chances in court over immunizing their boards by neutering their own legislative decisions.

4) Under either pathway to immunity, the Act creates a right of action for individuals allegedly "burdened" by the regulatory board's restrictions.[28] In both cases, the plaintiff must merely demonstrate that the board's actions "substantially burdened" his ability to engage in a lawful profession in order to establish a *prima facie* case which the board must then affirmatively defend. "Substantially burdened" is not a defined term in the Act and seems to be an easy

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[26] RBI Act, §§ 5(c)(4)(B)(iii), 6(b)(1)(E), and 6(b)(2).
[27] *Id.* at §§ 5(c)(4)(B)(ii) and 6(b)(1)(A)(ii).
[28] *Id.* at §§ 5(c)(4) and 6(b)(1)(C).

burden for the plaintiff to meet because any regulatory requirement encumbers the ones who must abide by its terms. Once the plaintiff satisfies this vague threshold, the board must then show by clear and convincing evidence[29] that its action advances an important government interest that has been identified in the statute the board is following and that its action is substantially related to achievement of that interest, in light of less restrictive alternatives it could have pursued. Thus, the Act effectively shifts the burden of proof from the plaintiff to establish that the board impermissibly restricted him to the board to prove that its restriction served a higher interest than competition, while at the same time forcing the board to demonstrate that it used the least restrictive alternative and allowing the board limited reliance on the decision of the sovereign legislature whose statute the board was mandated to follow.

5) In order for state legislatures to guard against active supervisors and judges under the Act substituting their judgment of how boards can best safeguard public interests for statutory decisions the legislatures already made, it appears each statute that restricts competition must expressly identify the important government interest served by its authorized displacement of competition and how the restriction is substantially related to that interest. In addition to the federalism issues problems caused by the Act, this provision sets up intrastate separation of powers issues. Even setting aside the federal and state constitutional problems, the Act is impractical to implement because it would require state legislatures to re-write huge swaths of their state codes in order to satisfy these provisions of the Act.

6) In addition to all of the above problems, Section 4(b) of the Act appears to add a "good

[29] "Clear and convincing evidence" is a higher evidentiary standard than the current "rationally related to a legitimate government interest" or "preponderance of the evidence" standard that boards must meet in administrative procedure act appeals of their decisions.

faith" requirement on the State to implement the Act's other suggested regulatory reforms in order to receive immunity, despite compliance with all other provisions of the Act. These regulatory reforms include considerations of less restrictive forms than licensure for regulating an occupation—such as registration, certification, or bonding requirements—and would require a state legislature to authorize sunset reviews of a certain number of licensing boards each year. While such regulatory review may be procompetitive, this provision is directed at state legislatures, and the lawsuits filed by individuals pursuant to the Act would be directed against the boards that are powerless to engage in these activities without statutory authorization. The boards would then be denied antitrust immunity, even if they were complying with all other provisions of the Act, because of a failure by their legislatures.

This is not an exhaustive list of problems the Act causes for state boards, but overall, the Act unfairly forces boards to defend themselves for anticompetitive decisions they may not have made. The regulatory reforms in which the Act forces the States to engage in order to receive antitrust immunity for their boards are extensive, expensive, and perhaps unconstitutional. This, therefore, may leave most boards without immunity because their legislatures will not implement the Act's provisions in their states. This will then force boards to engage in costly, full rule of reason defenses of their decisions in court and provide more uncertainty about the contours of state action immunity because they will be decided on a case-by-case, piecemeal basis through this type of litigation.

4. **You note in your testimony that the Restoring Board Immunity Act puts requirements on States, such as using "least restrictive alternatives" for regulation, which go beyond what is required in antitrust case law. Can you elaborate more on these concerns?**

As explained more fully in my answer 3 above, current antitrust case law expressly does not require States to use the "least restrictive alternative" when promulgating statutes that displace

competition in order to protect an important public interest. The Supreme Court in *NC Dental* arguably also does not impose that requirement on boards when taking actions pursuant to their governing statutes that authorize such displacements of competition. While I believe that boards should consider less restrictive ways in which to achieve their statutory goals, I do not believe that concepts of federalism allow Congress to place that requirement on state legislatures through the RBI Act. I also believe it would be unconstitutional on the state level for active supervisors or judges to invalidate statutes by sovereign legislatures because they determined the statutes did not meet that requirement of the RBI Act.

5. **I understand the goal of the Restoring Board Immunity Act is to give states optionality. How would the legislation interact with the existing state action doctrine and the standard set forth in North Carolina Dental?**

As explained above in my answer to question 3, the requirements of the RBI Act for a board to receive antitrust immunity are far higher than what current case law after *NC Dental* requires. Although the Act provides two pathways by which a board could gain immunity, neither path allows the supervisor or judge to give any deference to the statutes that the boards must follow. Both paths ask a state legislature to implement the Act's provisions that give no respect to its sovereign decisions on how to protect its citizens. I do not believe, therefore, that many states will elect to pursue either path to immunity.

I would also add that States already engage in some of the regulatory reforms that the Act is trying to incentivize outside of the entire antitrust/state action immunity framework. For instance, Colorado's Department of Regulatory Agencies reviews proposed rulemaking by the entities that oversee most of its regulated occupations and engages in routine sunrise and sunset reviews of different occupations. California also engages in regular sunset reviews of its regulatory agencies.

In addition, Virginia engaged in a wide-ranging regulatory review across the state in 2012, and the Commission on Government Reform and Restructuring suggested removing many unnecessary and obsolete regulations in all areas of state government. The very example of unnecessary licensure in Virginia that Chairman Issa cited in the Subcommittee's hearing—hair braiding—was an occupation that was de-regulated in 2012 because of this Commission's findings.[30] This regulatory review was done outside of an antitrust context and did not need the carrot of state action immunity dangled before the legislature in order for it to occur. I respectfully submit that the same is still true, and the unwarranted invasion of States' abilities to protect their own citizens posed by the provisions of the RBI Act is not the best approach to incentivize States to engage in the desired licensing review and reforms.

Thank you very much for the opportunity to respond to your thoughtful questions and to further expand on my previous comments about occupational reform and the RBI Act.

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[30] *See Hair Braiding De-Regulation FAQs*, Va. Dep't of Prof'l and Occupational Regulation, *available at* http://dpor.virginia.gov/BarberCosmo/Hair_Braiding_Deregulation. In 2004, the Virginia legislature amended its law to allow hair braiders to have a separate license and lessen the burden of having to hold a full cosmetology license. In 2012, the requirement for a license for hair braiders was removed entirely, and *pro rata* licensing fees were refunded.

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November 3, 2017

Bob Goodlatte
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Goodlatte,

Thank you for the opportunity to supplement the testimony I gave at the hearing on "Occupational Licensing: Regulation and Competition" before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Please find my answers to Chairman Marino's questions below.

1. You note in your testimony that some states, including Colorado, have already created umbrella agencies, like those called for in the Restoring Board Immunity Act. Should we continue to leave this to the States to address or would an extra incentive be helpful for needed?

A few states have umbrella agencies that in some ways resemble the Office of Supervision of Occupational Boards described in the Restoring Board Immunity Act (RBIA), but I know of no state with an agency that meets the bill's requirements. The differences between the existing agencies and the Office of Supervision described in the RBIA are not minor or merely technical, but cut to the heart of state accountability. Because so few states have accountable, disinterested agencies that review occupational licensing, and those that do use agencies that significantly fall short of the bill's requirements, I think the extra incentive is necessary and desirable. States with existing supervisory agencies should not be treated any differently under the bill, but should be incentivized to create the strong powers of review necessary to assure meaningful state involvement in occupational regulation.

The state that has the closest analog to the Office of Supervision described in the RBIA is Colorado, whose Department of Regulatory Agencies (DORA) has been praised by labor economist Morris Kleiner for encouraging sensible licensing rules and regulations.[1] DORA's Division of Professions and Occupations oversees about twenty-five licensing boards, pursuing a mission of consumer protection that balances public health and safety with consumer prices and

[1] MORRIS M. KLEINER, GUILD-RIDDEN LABOR MARKETS: THE CURIOUS CASE OF OCCUPATIONAL LICENSING 67 (Upjohn Institute for Employment Research 2015).

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availability of services.[2] The Division conducts cost-benefit analyses of board rules, and issues opinions about their efficacy and efficiency. The Division's participation in occupational regulation likely serves as an important—and rare, among the states—bulwark against the excesses that often attend professional self-regulation through boards dominated by licensees.

Although Colorado is a step ahead of most states, DORA's supervisory powers do not go far enough to ensure meaningful state involvement in occupational regulation, and do not go as far as the RBIA demands. DORA's Division of Professions and Occupations can subject board rules to cost-benefit analysis, but it may use its discretion to decline review.[3] And when it does review a rule or regulation, it lacks the authority to invalidate the rule even when it fails cost-benefit analysis.[4] Essentially, the Division's role is discretionary and advisory, in stark contrast to the RBIA's requirement that the Office of Supervision consider and approve of all occupational regulation before it takes effect.[5]

States like Colorado should be rewarded for their willingness to take a supervisory role over occupational regulation, even if that supervision is less than optimal. But special treatment for states like Colorado is not necessary, because as a practical matter they will have a head start in complying with the bill's requirements. They have the infrastructure, personnel, and expertise in place already to perform the kinds of analyses required by the administrative supervision route to immunity laid out in Section 5 of the RBIA.

2. I understand the goal of Restoring Board Immunity Act is to give states optionality. How would the legislation interact with the existing state action doctrine and the standard set forth in North Carolina Dental?

The relationship between the RBIA, as currently drafted, and the existing antitrust state action doctrine is ambiguous, and I think the bill should be clearer on this point. In 1943, the Supreme Court created "state action immunity" in *Parker v. Brown*,[6] holding that state regulatory activity could not be challenged under the Sherman Act. Since then, the Court has refined this doctrine in a series of cases that establish a two-prong test for what kinds of restrictions constitute state action and are thus immune. Most recently, the Court decided in *North Carolina Board of Dental Examiners v. FTC* [7] that occupational licensing boards dominated by competitors would need to meet both prongs of the test to enjoy immunity.

My understanding is that the RBIA is intended to give states another route to immunity, separate from the Court's state action doctrine and *North Carolina Dental*'s rule about competitor-dominated licensing boards. This interpretation would leave the Court's state action immunity jurisprudence in place for areas of state regulation not addressed in the RBIA and for licensing boards in states that do not elect to take bill's routes to immunity. But there is language in the current version of the RBIA that raises doubt about this interpretation and supports a

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[2] COLORADO DEPARTMENT OF REGULATORY AGENCIES, https://www.colorado.gov/pacific/dora/divs.
[3] COLO. REV. STAT. ANN. § 24-4-103(2.5)(a) (West 2017).
[4] *Id* at § 24-4-103(2.5)(b).
[5] Restoring Boards Immunity Act of 2017, H.R. 3446, 115th Cong. § 5(c)(2)(B)(i) (2017) ("RBIA").
[6] 317 U.S. 341, 350-52 (1943).
[7] 135 S. Ct. 1101 (2015)

different reading of the bill: that Section 5 legislatively defines—once and for all—the term "active supervision" as used in the Court's state action immunity cases. This ambiguity in the bill's text should be resolved before it moves forward.

The bill should be revised to make clear that it offers states a separate route to immunity for licensing boards unwilling to roll the dice with the Supreme Court's state action doctrine. Three features of the bill make any other reading problematic. First, the RBIA discusses only one kind of state regulation: occupational licensing. If the bill were intended to displace the Court's existing state action doctrine by defining "active supervision" once and for all, then it would have to create a standard for supervision that could be used in all the contexts in which the Court's state action immunity applies. Since its creation in 1943, state action immunity has been addressed by the Supreme Court in twenty different cases. Several of these cases address immunity for occupational licensing boards, but others address regulation created by motor vehicle boards, liquor commissions, municipalities, utilities, and state hospital authorities. The RBIA applies only to licensing boards, offering immunity for "any action of an occupational licensing board of a State" if the state follows the steps laid out in the bill.[8] And those steps—establishing an umbrella agency to review licensing rules or creating a cause of action to vindicate a right to efficient occupational regulation—are specific to licensing. The preamble emphasizes this narrow scope, saying that the bill is designed to "facilitate the restoration of antitrust immunity to State occupational boards."[9]

Second, if Section 5 of RBIA were read to legislatively define the Court's "active supervision" requirement, the bill would fit uneasily with the rest of the Court's state action doctrine. The Court's state action immunity test has two prongs—regulation must be both supervised *and* authorized by a state to enjoy immunity.[10] The RBIA says nothing about the authorization prong that requires immune regulation to be "clearly articulated and affirmatively expressed as state policy." If the RBIA is interpreted to rewrite the Court's state action doctrine, then does the "clear articulation" prong no longer apply? If so, what about entities such as municipalities that need only "clear articulation" to enjoy immunity under the Court's current test? Or does the bill divide authority over the two prongs between branches of government, leaving "clear articulation" up to the courts while defining "supervision" legislatively? This possibility is awkward and not mentioned in the bill.

Third, reading Section 5 of the RBIA as defining "active supervision" under state action doctrine makes the inclusion of Section 6 peculiar. Section 6 purports to offer states an alternative to supervision, allowing even unsupervised board activity to enjoy immunity in states that have created a cause of action to challenge inefficient occupational regulation. This judicial review procedure has no analog in the Court's state action doctrine, and it makes no sense as an alternative to a definition of a term of art within that doctrine. It could be read as an alternative to the state action doctrine altogether, but the bill does not mention this possibility and its organization—offering supervision and judicial review as parallel routes to immunity—suggests otherwise.

Reading the RBIA to supersede the Court's state action immunity doctrine would be so tortured as to be completely unworkable. Unfortunately, however, the bill's language does not foreclose this interpretive possibility. Most troubling is the statement that the RBIA is intended

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[8] RBIA, *supra* note 5, at § 2(10).
[9] *Id.* at pmbl.
[10] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

to "clarify the requirements of active supervision, both to offer States a clear and certain mechanism to immunize their occupational boards and to make clear that mere bureaucratic oversight to ensure consistency with State licensing laws does not suffice to confer immunity."[11] This statement suggests that the RBIA defines active supervision, displacing any judicial use of the term or concept. This reading is also suggested by bill's use of "Active Supervision"—a term of art from the Court's state action jurisprudence—to describe the procedures laid out in Section 5. It would be better to use a new term, perhaps "administrative supervision," to describe the route to immunity offered in Section 5.

If the Bill does not rewrite Supreme Court state action doctrine, then what does it do? It creates two new routes to immunity for an area of state regulation that is especially troubling to Congress, and particularly targeted by the Court's recent state action doctrine—occupational licensing. This is an appropriate target for Congress's attention, given the unique and documented problems that excessive occupational licensing has caused for the economy and labor force. Read as an *alternative to* state action doctrine, Sections 5 and 6 make sense. States may choose not to take either alternative and instead seek immunity for their boards under the state action doctrine, hoping that whatever supervisory structure they create passes muster in the eyes of the Court.

3. Your testimony indicates that the Restoring Board Immunity Act does not go far enough in combatting the anticompetitive conduct of occupational licensing boards. What improvements or changes do you think are necessary for the legislation or would otherwise be helpful?

The RBIA's greatest weakness is the second route to immunity it offers states—the option that states create a substantive right to efficient occupational licensing and a private right of action to enforce it. My research has been focused on finding the regulatory pathologies that give rise to excessive occupational licensing, and I have found that it is the fifteen hundred dominated boards—unaccountable and almost invisible—that are to blame for bad licensing rules.[12] The judicial review option would leave this unsupervised structure in place, while hoping to curb self-dealing through individual lawsuits for injunctive relief. The threat of these lawsuits would be insufficient incentive for states to change the form or the substance of licensing regulation. The judicial review option allows states to do what they have done for decades: push responsibility down to an unsupervised board and adopt a hands-off approach to occupational regulation.

Under the judicial review option, some licensing rules will be reviewed by an arm of the state—a state judge—but there is reason to believe that this review will be infrequent and perfunctory. For a judge to review any given rule, there will have to be an aggrieved individual who both knows that he or she is aggrieved and has the incentive to hire counsel and file suit. The RBIA contemplates injunctive relief only, meaning that the incentive to sue will not include money damages. Further, for those few rules that do appear before state courts, judges will have to make ad hoc determinations about occupational licensing policy, with little access to expertise or data about the rule's benefits to public safety and costs to competition. Judges under these circumstances will likely defer to the self-regulatory boards, frustrating the RBIA's attempts at

[11] RBIA, *supra* note 5, at § 2(9).

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

meaningful occupational licensing reform. To the extent that the RBIA offers judicial review as an alternative to the much more promising option of administrative supervision, it creates a loophole leading back to the status quo.

Another weakness of the bill is its requirement that states use a "least restrictive alternative"(LRA) standard for their licensing regulation. The RBIA imposes a "least restrictive alternative" standard on states for both the administrative supervision and judicial review options. It affords immunity to boards if a state "adopts a policy of using least restrictive alternatives to occupational licensing"[13] and either reviews board activity for conformity with that policy or creates a private cause of action to enforce that policy. The bill defines "least restrictive alternatives to occupational licensing" as "regulations that achieve the public health and safety goals asserted by the government to justify licensing while imposing a less onerous restriction on entry into the marketplace."[14] In theory, the LRA language creates an efficiency standard that asks if there is a way to achieve the same regulatory benefits at a lower cost to competition. But as legal scholars have documented, such a standard is notoriously difficult for courts to implement.[15]

An LRA standard is difficult to apply in an exacting way because the benefits of two regulatory alternatives are almost never identical, and so the standard requires an apples-to-oranges comparison. For example, consider a rule promulgated by a state nursing board that forbids nurses' aides, untrained in the practice, from giving injections. Someone challenging this rule in court may argue that requiring disclosure of the lack of training and providing patients with the option of receiving an injection from a trained nurse also protects consumers from health and safety risks associated with improperly administered injections, while allowing greater access to healthcare for consumers. But the two regulatory options protect consumers in different ways and to different degrees. It is unclear how a court should apply a "least restrictive alternative" analysis in this context.

The difficulty of applying the least restrictive alternative requirement presents two opposite risks. First, it could tie states' hands too tightly, leaving them little regulatory discretion and leading to the under-regulation of the professions. As much as I believe that most professions are currently over-regulated, I would not want to see the pendulum swing too far in the other direction. Second, and perhaps more likely, courts may find the standard too unwieldy and choose to give strong deference to states' regulatory choices. This possibility would result in little or no meaningful regulatory reform. A better approach would be to require states to conduct cost-benefit analyses of licensing rules, and to approve of rules only where the benefits outweigh the costs. This standard, used by Colorado's DORA, captures some of the benefits of the "least restrictive alternative" standard by holding states to a degree of rationality in occupational regulation, while avoiding some of the downsides of LRA analysis.

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[13] RBIA, *supra* note 5, at § 4(b).
[14] *Id.* at § 3(5).
[15] C. Scott Hemphill, *Less Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

In closing, I am generally supportive of federal legislation that confers antitrust immunity on licensing boards in states that have made themselves accountable and responsible for their occupational regulation. I would support a version of the RBIA that did not hold states to a "least restrictive alternative" test and that did not provide the judicial review option laid out in Section 6.

Sincerely yours,

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