

**PREPARED STATEMENT OF  
THE FEDERAL TRADE COMMISSION**

**Before the  
United States Senate Committee on the Judiciary  
Subcommittee on Antitrust, Competition Policy and Consumer Rights  
“License to Compete: Occupational Licensing and the State Action Doctrine”  
February 2, 2016**

Chairman Lee, Ranking Member Klobuchar, and Members of the Committee, thank you for the opportunity to appear before you today. I am Commissioner Maureen K. Ohlhausen, and I am pleased to join you to discuss competition perspectives on the licensing and regulation of occupations, trades, and professions.<sup>1</sup>

The Commission and its staff recognize that occupational licensing can offer many important benefits. It can protect consumers from health and safety risks and support other valuable public policy goals. However, not all licensure is warranted. More importantly, in our experience, not every restriction imposed on an occupation may yield benefits that sufficiently justify the harms it can do to competition. We have seen many examples of restrictions that likely impede competition and hamper entry into professional and other services markets, and yet offer few, if any, significant consumer benefits. In these situations, occupational regulation may do more harm than good, leaving consumers with higher-priced, lower-quality, and less convenient services. Over the long term, unnecessary occupational regulation can cause lasting damage to competition and the competitive process by rendering markets less responsive to consumer demand; by dampening incentives for innovation in products, services, and business models; and by creating barriers to entry or repositioning by providers seeking to offer their services to consumers.

The Commission has not studied and has not taken a position on whether, as a general matter, some occupations, trades, and professions are subject to unnecessary licensure.<sup>2</sup> That has not been the focus of its attention in this area. Instead, the Commission has focused on commenting on particular regulations that may unduly restrict competition in specific fields. Furthermore, the Commission has taken enforcement action when appropriate to stop regulatory boards from exceeding their authority to eliminate competition.

From a competition standpoint, occupational regulation can be especially worrisome when regulatory authority is delegated to a board composed of members of the occupation it regulates. The risk is that the board will make regulatory decisions that serve the private economic interests of its members and not the policies of the state. These private interests may lead to the adoption and application of occupational restrictions that discourage new entrants, deter competition among licensees and from providers in related fields, and suppress innovative products or services that could challenge the status quo.

The Commission and its staff address these concerns primarily in two ways. First, as part of our competition advocacy program, where appropriate and feasible, we respond to calls for public comment and invitations from legislators and regulators to identify and analyze specific occupational restrictions that may harm competition without offering countervailing consumer

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

<sup>2</sup> In the past, Commission staff have studied the general conditions under which licensure or some other form of occupational regulation may or may not be warranted. *See generally, e.g.,* CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990), [http://www.rambleuse.com/articles/cox\\_foster.pdf](http://www.rambleuse.com/articles/cox_foster.pdf).

benefits. Typically, we urge policy makers to integrate competition concerns into their decision-making process—specifically, that they consider whether the restrictions are: (1) targeted to address specific risks of harm to consumers; (2) likely to have a significant and adverse effect on competition; and (3) narrowly tailored to minimize harm to competition, meaning less restrictive alternatives are not available or feasible.<sup>3</sup>

Second, the Commission has employed its enforcement authority to challenge anticompetitive conduct by regulatory boards composed of private actors. These enforcement actions have included challenges to agreements among competitors that restrain truthful and non-deceptive advertising, price competition, and contracting or other commercial practices. The Commission has also challenged direct efforts to prohibit competition from new rivals where there is not a legitimate justification for doing so. The Commission can bring these actions when the challenged conduct falls outside of the scope of protected “state action.”

Principles of federalism limit the application of the federal antitrust laws when restraints on competition are imposed by a state. A state acting as a sovereign may impose occupational licensing or other restrictions that displace competition in favor of other goals and values that are important to its citizens. The so-called state action doctrine was first articulated by the Supreme Court in 1943 and is rooted in the understanding that Congress, in passing the Sherman Act, did not intend to impinge upon the sovereign regulatory power of the states.<sup>4</sup> However, as explained below, that does not mean that all state regulators are exempt from antitrust scrutiny. The Court has cautioned that “[t]he national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially . . . [private anticompetitive conduct].”<sup>5</sup>

As one of two federal agencies charged with enforcing U.S. antitrust laws, the Commission is committed to ensuring that the state action doctrine remains true to its doctrinal foundations. As discussed below, the Commission has played an active role in the development of this doctrine, including early litigation against a tobacco board of trade<sup>6</sup> and a trade association for common carriers,<sup>7</sup> and continuing with cases in the 1990s that included an important ruling from the Supreme Court in the area of collective rate-making.<sup>8</sup> Then in 2003, Commission staff issued a report that outlined concerns about certain over-broad judicial interpretations of the state action doctrine, especially in the area of governmental entities composed of market participants.<sup>9</sup> Through enforcement actions challenging the conduct of state licensing boards, the Commission has helped

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<sup>3</sup> For an overview of the Commission’s advocacy efforts in the area of occupational licensing and regulation, *see Barriers to Entrepreneurship: Examining the Anti-Trust Implications of Occupational Licensing: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 14 (2014) (statement of Fed. Trade Comm’n on Competition and the Potential Costs and Benefits of Professional Licensure), <https://www.ftc.gov/public-statements/2014/07/prepared-statement-federal-trade-commission-competition-potential-costs>.

<sup>4</sup> *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>5</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

<sup>6</sup> *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502 (4th Cir. 1959).

<sup>7</sup> *Mass. Furniture & Piano Movers Ass’n, Inc. v. FTC*, 773 F.2d 391 (1st Cir. 1985).

<sup>8</sup> *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

<sup>9</sup> FTC Office of Policy Planning, *Report of the State Action Task Force* (2003), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf).

to define the contours of the state action doctrine for actions taken by state boards consisting of private actors, culminating in last year's decision by the Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*.<sup>10</sup>

This testimony focuses on the Commission's competition enforcement work relating to regulatory boards and will highlight a few recent competition advocacy efforts related to state licensing requirements.

## I. The State Action Doctrine

As noted above, the Supreme Court first articulated the state action doctrine in *Parker v. Brown*, concluding that the federal antitrust laws do not reach anticompetitive conduct engaged in by a state acting in its sovereign capacity.<sup>11</sup> For example, a state's legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives."<sup>12</sup> Actions of a state supreme court have been held to be sovereign state acts when the court wields the state's regulatory power over the practice of law.<sup>13</sup>

Under some circumstances, other actors besides the state itself may be able to use the state action doctrine as a shield for their anticompetitive conduct. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Supreme Court held that the conduct of a private actor is shielded by the state action doctrine only if it is (1) taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and (2) actively supervised by the state.<sup>14</sup>

As developed by the Supreme Court in a series of decisions, certain substate governmental entities, such as municipalities and other local political subdivisions, are protected from antitrust challenge if their conduct meets the first prong of the *Midcal* test. In other words, those substate entities can invoke the state action doctrine if they are acting pursuant to a "state policy to displace competition with regulation or monopoly public service."<sup>15</sup> Unlike private parties, these entities do not require active supervision by the state, the Court held, because they are publicly accountable and presumed to act in the public interest, and because clear articulation of the state's policy by its legislature is supposed to ensure that those entities do not put purely parochial public interests ahead of broader state goals.<sup>16</sup>

In *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court clarified that general grants of power to act from a state legislature are not sufficient under the first prong of *Midcal*. Rather, a substate governmental entity must show that it has been delegated authority "to act or to

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<sup>10</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

<sup>11</sup> *Parker*, 317 U.S. at 351–52.

<sup>12</sup> *N.C. Dental*, 135 S. Ct. at 1109.

<sup>13</sup> *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

<sup>14</sup> *Midcal Aluminum*, 445 U.S. at 105.

<sup>15</sup> *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion).

<sup>16</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47 (1985).

regulate anticompetitively.”<sup>17</sup> A state policy meets the first prong when the displacement of competition is “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature,” such that “the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its state policy goals.”<sup>18</sup> In *Phoebe Putney*, the Court ruled that although Georgia law authorized counties and municipalities to create hospital authorities with general corporate powers to acquire hospitals, the law did not clearly and affirmatively authorize acquisitions that would substantially lessen competition in violation of the Clayton Act.<sup>19</sup>

As recounted in *North Carolina Dental*, states may regulate a particular occupation or profession by setting standards for licensing individuals to practice that occupation or profession and creating a board to administer those licensing standards. States often require that licensing boards include practicing members of the occupation or profession being regulated, and neither the Supreme Court nor the FTC has sought to dictate how such boards must be constituted. The Court has, however, opined on the question how such boards must be accountable when they are controlled by market participants. In *North Carolina Dental*, the Supreme Court ruled that a licensing board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy both prongs of the *Midcal* test: their actions must be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and their conduct must be actively supervised by the State.<sup>20</sup> The active supervision requirement ensures that any anticompetitive acts undertaken by private actors are in fact approved by the State as part of its regulatory policy. The mere possibility of supervision is not enough; state officials must have and exercise the power to review the anticompetitive acts of the private parties and to reject or modify those that conflict with state policy.<sup>21</sup>

## **II. FTC Enforcement Involving Conduct of Licensing Boards Composed of Market Participants**

The FTC has brought a number of enforcement actions challenging anticompetitive conduct by state licensing boards acting outside the protection of the state action doctrine. Early cases focused on restrictions on advertising.<sup>22</sup> For example, the FTC issued an administrative complaint charging the Massachusetts Board of Registration in Optometry with unfair methods of competition for banning truthful advertising by optometrists, including ads that offered discounts or publicized the provider’s affiliation with an optical store. The Massachusetts Board was (and is) a state agency that regulates the practice of optometry in Massachusetts; its enabling statute explicitly barred the Board from placing limits on truthful, nondeceptive advertising. In its ruling,

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<sup>17</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. —, 133 S. Ct. 1003, 1012 (2013).

<sup>18</sup> *Id.* at 1013.

<sup>19</sup> *Id.* at 1017.

<sup>20</sup> *N.C. Dental*, 135 S. Ct. at 1114.

<sup>21</sup> *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988).

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

the Commission pointed to similar cases condemning unreasonable advertising restrictions promulgated by trade associations, and noted that the actions of licensing boards also have the force of law: optometrists who violate the Board's commands may lose their professional license, and thereby their livelihood.<sup>23</sup> The Commission held that the Board's advertising restraints were not shielded by the state action doctrine; indeed state law clearly articulated a policy favoring, not displacing, competition through truthful advertising. The Commission also ruled that the Board's restrictions on truthful advertising had no plausible procompetitive justification and thus were unreasonable restraints of trade.

The Commission has also challenged board rules that impose unreasonable restrictions on new models for delivering the services of licensed professionals operating in the state. For instance, in 2003, the Commission issued an administrative complaint against the South Carolina Board of Dentistry, charging that the Board had illegally restricted the ability of dental hygienists to provide basic preventive dental services in schools.<sup>24</sup> To address concerns that many schoolchildren, particularly those in low-income families, were not receiving any preventive dental care, the South Carolina legislature had eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive care in schools. But according to the FTC's complaint, the Board—seven of whose nine members were dentists—re-imposed the dentist examination requirement, which was clearly inconsistent with the policy established by the legislature. The complaint alleged that the Board's action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and that its harmful effects on competition and consumers could not be justified.

The Board moved to dismiss the complaint on the grounds that its actions were exempt from the antitrust laws under the state action doctrine. The Commission denied the Board's motion. As a state agency, the Board was not automatically entitled to protections afforded to the State of South Carolina as a sovereign. Furthermore, its challenged conduct was not pursuant to any clearly articulated policy of the legislature to displace the type of competition at issue. Indeed, the conduct contravened the legislature's action to eliminate the examination requirement.<sup>25</sup> The Board ultimately entered into a consent agreement settling the charges.<sup>26</sup>

More recently, in 2010, the Commission charged that the North Carolina State Board of Dental Examiners violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists.<sup>27</sup> The Board is a state agency established under North Carolina law and charged with administering and enforcing a

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<sup>23</sup> Decision and Order, Mass. Bd. of Registration in Optometry, 110 F.T.C. 529, 605 (1988).

<sup>24</sup> Complaint, S.C. State Bd. of Dentistry, Dkt. No. 9311 (F.T.C. Sept. 12, 2003), <https://www.ftc.gov/sites/default/files/documents/cases/2003/09/socodontistcomp.pdf>.

<sup>25</sup> Opinion of the Commission, S.C. State Bd. of Dentistry, Dkt. No. 9311, (F.T.C. July 30, 2004) (denying motion to dismiss on state action grounds), <https://www.ftc.gov/sites/default/files/documents/cases/2004/07/040728commissionopinion.pdf>.

<sup>26</sup> Decision and Order, S.C. State Bd. of Dentistry, Dkt. 9311 (F.T.C. Sept. 6, 2007), [https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070911decision\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/cases/2007/09/070911decision_0.pdf).

<sup>27</sup> Complaint, N.C. State Bd. of Dental Exam'rs, Dkt. No. 9343 (F.T.C. June 17, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf>.

licensing system for dentists. A majority of the members of the Board were themselves practicing dentists. As such, they had a private financial incentive to limit competition from non-dentist providers of teeth whitening services. When non-licensed teeth whitening practitioners began offering teeth whitening services at lower prices than dentists, the Board acted to protect the interests of dentists. After concluding that teeth whitening constitutes the practice of dentistry, the Board informed the non-licensed practitioners that they were practicing dentistry without a license and ordered them to cease and desist from providing those services. The Board also issued letters to various third parties, such as mall operators, warning them that the non-licensed practitioners' teeth whitening services constituted the unlawful practice of dentistry.

The Board argued that, because it is a state agency, the state action doctrine exempts it from liability under the federal antitrust laws. The Commission rejected the Board's argument, as did the Fourth Circuit, and the Supreme Court. In a February 2015 decision, the Supreme Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."<sup>28</sup> As the Court explained,

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. . . . Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.<sup>29</sup>

After *North Carolina Dental*, licensing boards may continue to regulate professionals in their respective states and be exempt from antitrust laws, so long as they act pursuant to a clearly articulated state policy and, if they are controlled by market participants, under active supervision by the state. The Court did not specify exactly what would constitute "active state supervision," explaining that that inquiry was "flexible and context-dependent." Further, it need not "entail day-to-day involvement in any agency's operation or micromanagement of its every decision." Rather, the touchstone is "whether the State's review mechanisms provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'"<sup>30</sup>

In the wake of the Supreme Court's decision, state officials requested advice from the FTC regarding antitrust compliance for state boards responsible for regulating occupations. In October

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<sup>28</sup> *N.C. Dental*, 135 S. Ct. at 1114.

<sup>29</sup> *Id.* at 1112.

<sup>30</sup> *Id.* at 1116 (quoting *Patrick*, 486 U.S. at 100–01).

2015, FTC staff issued guidance on how states can satisfy the “active supervision” requirement of the state action doctrine with respect to regulatory boards controlled by market participants.<sup>31</sup> Although this guidance does not have the force of law, it may help state officials determine the appropriate level of oversight needed for a regulatory board controlled by market participants to benefit from state action immunity.

The staff guidance emphasizes that antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. A one-size-fits-all approach to active supervision is neither possible nor warranted. Moreover, deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

### **III. Antitrust Analysis of Restraints Imposed by Regulatory Boards Not Protected by the State Action Doctrine**

Where the state action defense is not available, conduct taken by regulatory boards that are controlled by competing market participants is subject to traditional antitrust principles. With respect to joint conduct among competitors, a violation of Section 1 of the Sherman Act requires proof of two elements: (1) a contract, combination, or conspiracy; (2) that imposes an unreasonable restraint of trade. Unless the restraint is per se illegal, the Commission applies the antitrust “rule of reason,” assessing whether a restraint is unreasonable by examining both the procompetitive benefits and the anticompetitive effects of the agreement. In general, “reasonable” restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured. For instance, a regulatory board may prohibit members of the occupation from engaging in fraudulent business practices or false or deceptive advertising without raising antitrust concerns.

However, where, for example, the regulatory board’s conduct consists of concerted action denying actual or would-be competitors access to the market, the board’s action may violate Section 1 of the Sherman Act, and thus constitute a violation of Section 5 of the FTC Act. Numerous cases bear out the commonsense proposition that professional and industry associations “often have economic interests to restrain competition” that threatens their members’ interests.<sup>32</sup> State boards controlled by private market participants present the risk those participants will “foster anticompetitive practices for the benefit of [their] members.”<sup>33</sup>

A brief review of the Commission’s antitrust analysis of the N. C. Dental Board’s actions to exclude non-dentist providers of teeth whitening services demonstrates how the antitrust laws apply to the actions of a regulatory board not shielded by the state action doctrine. First, the

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<sup>31</sup> FTC Staff, *Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (October 2015), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf).

<sup>32</sup> See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 465–66 (1986); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 356–57 (1982); *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 465 U.S. 556, 571–72 (1982); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692–93 (1978); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 463–65 (1941).

<sup>33</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

Commission considered whether the dentist-members of the Board acted by agreement (or in concert) to exclude non-dentists from providing teeth whitening services in North Carolina. The Commission concluded that these dentist-members had acted in concert.<sup>34</sup> Indeed, the record showed that on several occasions, dentist-members of the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services.

The Commission next evaluated the likely impact of the Board's actions upon consumers and competition. The record evidence showed that non-dentist providers of teeth whitening services charged significantly less than dentists but achieved comparable cosmetic results. The exclusion from the market of these low-cost providers would force consumers to switch to more expensive providers of teeth whitening or to forgo making a purchase altogether. Exclusion of non-dentist providers therefore likely resulted in higher prices and reduced supply.

Lastly, the Commission considered the justifications proffered by the Board. The Commission rejected the Board's claim that its actions promoted public health and safety. First, Supreme Court precedent imposes a strong presumption that colluding private competitors may not restrict consumer choice by imposing on the market their view of the type of service consumers should choose.<sup>35</sup> Moreover, there was no clinical or empirical evidence validating the Board's claim that non-dentist teeth whitening poses a significant risk to health or safety. To the contrary, there was a wealth of evidence that non-dentist teeth whitening is a safe cosmetic procedure.<sup>36</sup>

#### **IV. Specific Advocacy Efforts Related to Professional Licensure**

The FTC has also engaged in various advocacy efforts relating to licensing requirements for occupations and professions. Since the late 1970s, the Commission and its staff have submitted hundreds of comments and amicus curiae briefs to state and self-regulatory entities on competition policy and antitrust law issues relating to such professionals as real estate brokers, electricians, accountants, lawyers, dentists and dental hygienists, nurses, eye doctors and opticians, and veterinarians. These advocacy efforts have focused on various restrictions on price competition, commercial practices, entry by competitors or potential competitors, and truthful, nondeceptive advertising.

For example, a recent series of FTC staff competition advocacy comments have addressed various restrictions on advanced practice registered nurses, or APRNs.<sup>37</sup> FTC staff have not

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<sup>34</sup> Opinion of the Commission, N.C. State Bd. of Dental Exam'rs, Dkt. No. 9343 (F.T.C. Feb. 8, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinion.pdf>.

<sup>35</sup> *Indiana Federation of Dentists*, 476 U.S. at 462 ("The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.").

<sup>36</sup> Opinion of the Commission, N.C. State Bd. of Dental Exam'rs, Dkt. No. 9343 (F.T.C. Feb. 8, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinion.pdf>. The Fourth Circuit upheld the Commission's decision, as to both the inapplicability of the state action defense and as to the Board's liability under the antitrust laws. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359 (4th Cir. 2013).

<sup>37</sup> Many of the individual advocacy comments regarding nursing restrictions, along with the research and analyses underlying those comments, are described in detail in FTC Staff, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses* (2014), <https://www.ftc.gov/reports/policy-perspectives-competition-regulation-advanced-practice-nurses>. For a broader discussion of the advocacy program and competition perspectives on APRN, nurse

questioned state interests in establishing licensure requirements – including basic entry qualifications – for APRNs or other health professionals in the interest of patient safety. Rather, staff have questioned the competitive effects of certain additional restrictions on APRN licenses, such as mandatory supervision arrangements, which are sometimes cast as “collaborative practice agreement” requirements. Physician supervision requirements may raise competition concerns because they effectively give one group of health care professionals the ability to restrict access to the market by another, potentially competing group of health care professionals. Based on substantial evidence and experience, expert bodies such as the Institute of Medicine have concluded that APRNs are safe and effective as independent providers of many health care services within the scope of their training, licensure, certification, and current practice.<sup>38</sup> Therefore, staff have suggested that states carefully consider whether there is any health or safety justification for mandatory physician supervision of APRNs.

In some cases, the FTC has expressed the view that there is no plausible public benefit justifying licensure restrictions. For example, in 2011, the Commission filed an amicus brief in *St. Joseph Abbey v. Castille*,<sup>39</sup> clarifying the meaning and intent of the Commission’s “Funeral Rule.” The plaintiffs, monks at St. Joseph Abbey who built and sold simple wooden caskets consistent with their religious values, challenged Louisiana statutes that required persons engaged solely in the manufacture and sale of caskets within the State to fulfill all licensing requirements applicable to funeral directors and establishments. Those requirements included, for example, a layout parlor for 30 people, a display room for six caskets, an arrangement room, the employment of a full-time, state-licensed funeral director, and – even though the Abbey did not handle or intend to handle human remains – installation of “embalming facilities for the sanitation, disinfection, and preparation of a human body.” Agreeing with the FTC, the U.S. Court of Appeals for the Fifth Circuit found that “no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realities of Louisiana’s regulation of caskets and burials.”<sup>40</sup>

As noted earlier, another area of concern is how regulated industries respond to new and disruptive forms of competition. In some cases, regulators have adopted regulations that facilitate the entry of new competition, especially when it appears to respond to consumer demand and offer new or different services or products. In other cases, however, some regulators have responded by acting to protect those currently subject to regulation. This has been happening in the taxi and local transportation businesses, where innovative smartphone applications have provided consumers with new ways to arrange for transportation and workers with new employment opportunities. Although some jurisdictions have responded by revising or applying regulations in a way that

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anesthetist, and retail clinic regulations, see Daniel J. Gilman & Julie Fairman, *Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice*, 24 HEALTH MATRIX 143 (2014).

<sup>38</sup> See, e.g., INST. OF MED., NAT’L ACAD. OF SCIENCES, THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH 98-99 (2011). The Institute of Medicine—established in 1970 as the health arm of the National Academy of Sciences—provides expert advice to policy makers and the public.

<sup>39</sup> Brief for the Federal Trade Commission as Amicus Curiae Supporting Neither Party, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir.), cert. denied, 134 S. Ct. 423 (2013).

<sup>40</sup> *St. Joseph Abbey*, 712 F.3d at 226 (affirming the district court decision that the challenged regulations, and their enforcement by the state board, were unconstitutional).

supports the entry of these new sources of competition into the market, others have maintained existing regulations that disproportionately affect new entrants or sought to adopt new regulations that would impede the development of these new services seemingly without valid justification. The FTC has urged these jurisdictions to carefully consider the adverse consequences of limiting competition and examine the basis for any restrictions advocated by incumbent industry participants.<sup>41</sup>

## **V. Conclusion**

State regulation of occupations and professions can serve important public policy goals and, when used appropriately, protect consumers from harm. But, as illustrated by the Commission's history of advocacy and enforcement, some regulations may make consumers worse off, impeding competition without offering meaningful protection from legitimate health and safety risks. State legislatures should consider the impact of proposed regulations on competition and their proffered justification, particularly when they are likely to harm consumers. States also should take steps to actively supervise the conduct of regulatory boards that are controlled by individuals practicing the very occupation or profession being regulated.

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

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<sup>41</sup> *See, e.g.*, FTC Staff Comment to the Honorable Brendan Reilly Concerning Chicago Proposed Ordinance O2014-1367 Regarding Transportation Network Providers (Apr. 2014), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning>.