

**Testimony Before the House
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law**

**Hearing on “Occupational Licensing:
Regulation and Competition”**

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

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Prepared Testimony before the
United States House Judiciary Committee
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Chairman Marino, Ranking Member Cicilline, and Members of the Subcommittee: thank you for the opportunity to appear here today to testify about the importance of occupational licensing to the States and their ability to protect the health, safety, and welfare of their citizens.

I must first start with an important disclaimer: although I work in the Virginia Attorney General’s Office and regularly consult with my antitrust colleagues in other state Attorneys General offices through the National Association of Attorneys General, the opinions I express today are mine alone and do not necessarily reflect the views of the Virginia Attorney General’s Office, General Mark Herring, or any other person affiliated with NAAG.

The ability of individuals in our country to work in meaningful and financially sustainable occupations is a fundamental economic issue for all States. Just as important to States, however, is the ability to protect their citizens from fraudulent or unsafe practices by unqualified practitioners of vital consumer services, such as medical, engineering, or legal services. Our system of federalism largely vests in the States the decisions about how best to protect their citizens in these areas and how best to structure their individual state governments. I believe that discussions about reducing the number of licensed occupations, the desirability of periodic sunset reviews for boards, or the ability of states to monitor professionals through less restrictive means, such as certification or registration, are important. As an alumnus of the Federal Trade Commission, I also strongly believe in the FTC’s competition advocacy mission.

The assistant attorneys general who are defending state boards being sued in antitrust since the *FTC v. North Carolina State Board of Dentistry* (“*NC Dental*”) decision are mostly antitrust enforcers who often work closely with other state attorneys general offices, the FTC and the Antitrust Division of the Department of Justice to vigorously enforce our state and federal antitrust laws and believe strongly in the benefits of open competition. However, at the end of the day, I and many of my state antitrust colleagues believe that it should be left up to individual States to determine how best to structure their governments and economies in order to best protect their citizens.

I. State Action Immunity for State Government Entities

Many state laws and regulatory systems restrict the free and open competition of certain markets, such as licensing regimes for certain professions, limitations on which entities can sell automobiles to the public, certificate of need programs administered by state departments of health, or below-cost sales prohibitions for gasoline retailers. Rather than subject the State to potential antitrust liability for simply regulating its intrastate economy, the Supreme Court developed the doctrine of state action immunity in *Parker v. Brown*.¹ As the Court noted, “nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”² *Parker* recognized that within “a dual system of government,” States are “sovereign[s]” and “an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”³ The Court recently affirmed the “residual sovereignty of the States” by noting that “States retain broad autonomy in structuring their governments and pursuing

¹ 317 U.S. 341 (1943).

² *Id.* at 350-51

³ *Id.* at 351.

legislative objectives.”⁴ The balance of sovereignty between the federal and state governments “is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”⁵

Under *Parker*, the act of passing a statute by a State’s legislature is the action of the State itself, and therefore, is *ipso facto* immune from antitrust liability without any further analysis.⁶ When the sovereign itself takes action, “the danger of *unauthorized* restraint of trade does not arise.”⁷ Sub-sovereign state actors—such as traditional state agencies, state boards composed of active market participants, municipalities, and private actors pursuing a state statutory scheme—are subject to different levels of oversight by the State before receiving immunity in order to ensure that any “anticompetitive conduct of the State’s representative was contemplated by the State.”⁸ Municipalities⁹ and traditional state agencies¹⁰ only need to follow a “clearly articulated and affirmatively expressed state policy” to displace free market competition with regulation in order to be immune from antitrust liability.¹¹ Private actors pursuing a state statutory scheme must satisfy a second requirement of *Midcal* in order to use the state action defense—they must be “actively supervised” by the State itself in order to ensure that “only the

⁴ *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2623 (2013).

⁵ *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (internal quotation marks omitted).

⁶ *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984).

⁷ *Id.* at 569 (emphasis added).

⁸ *Id.* at 568.

⁹ *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 414 (1978) (a state’s political subdivisions are entitled to state action immunity only when “the State authorized or directed a given municipality to act as it did”).

¹⁰ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (active supervision not likely required for state agencies). In *Turner v. Virginia Department of Medical Assistance Services*, defendant state Medicaid agency’s motion to dismiss was granted on state action immunity grounds when the court determined that terminating plaintiff dentist from the adult Medicaid dental services program administered by the agency was within its “clearly articulated” grant of authority from the Virginia legislature. 230 F. Supp. 3d 498, 507 (W.D. Va. 2017).

¹¹ See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies” will be immune.¹² Recently, the Court determined that state boards composed of active market participants were more like private individuals pursuing state regulatory regimes than to state agencies and municipalities, so they also must be actively supervised by disinterested state officials in order to enjoy state action immunity.¹³

Even when warning about the potential danger of self-dealing by state boards, the Court in *NC Dental* nonetheless continued to affirm the authority of States to “impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives.”¹⁴ Federal antitrust law “would impose an impermissible burden on the States’ power to regulate” their economies if it “promot[ed] competition at the expense of other values a State may deem fundamental” by requiring “every duly enacted state law or policy . . . to conform to the mandates of the Sherman Act.”¹⁵ It is clear that the Court did not intend or require the federal government to pre-empt or dismantle States’ abilities to displace competition by adopting licensing schemes for certain occupations or to establish boards with active market participants to oversee these licensees in order for these boards to receive state action immunity—it merely required these boards to be actively supervised by the State to ensure any restrictions on competition were consistent with the State’s intent.

II. Active Supervision Considerations For State Boards After *NC Dental*

Under current case law, the only questions that determine whether a state board composed of active market participants will receive state action immunity is whether the board meets the two

¹² *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

¹³ *NC Dental*, 135 S.Ct. 1101 (2015).

¹⁴ *Id.* at 1109.

¹⁵ *Id.*

requirements of *Midcal*: 1) Was the board following a clearly articulated and affirmatively expressed state policy to displace competition? and 2) Was the board actively supervised by a disinterested state official to ensure that the board's actions were consistent with that policy? The *NC Dental* holding does not require the active supervisor to inquire into whether the board used the least restrictive alternative, such as certification, registration, or bonding requirements, to displace competition. The Court also did not authorize a state court reviewing a board's challenged restraint to disregard the state legislature's intent to displace competition when determining the legitimacy of the board's actions. Indeed, such an interpretation of *NC Dental* would exhibit an unprecedented disregard for a State's authority under the Constitution to structure its own government and economy and to promote other fundamental values the State determines to be more important than competition in certain circumstances. Interpreting *NC Dental* to negate a State's sovereignty in this manner is contrary to the States' ability to restrain competition as part of their licensing regimes for certain occupations that the Court in *NC Dental* itself explicitly upheld.¹⁶

In order to obviate the need for active supervision, States could decide to get rid of all of their state boards with active market participants and switch the oversight of those licensed occupations to traditional state agencies with full-time, salaried employees. The agencies then would only need to follow clearly articulated state policy to receive antitrust immunity. This approach has many disadvantages, however, the most obvious being that it would add millions of dollars to a State's budget in salaries and benefits since most market-participant board members are unpaid. It also would not necessarily change a State's philosophy about how many

¹⁶ *NC Dental*, 135 S.Ct. at 1109.

occupations should be licensed, while making it more difficult to maintain an antitrust challenge against the agency if the State is not required to prove active supervision in order to be immune.

Such a move would further disadvantage a State by removing the market expertise from the board that active practitioners in that market bring. A very large majority of the work of occupational regulatory boards does not restrict competition in any way, and active market participants are the best people to evaluate alleged standard of care violations by licensees. Other typical board actions with no competitive impact involve decisions about alleged ethics or behavioral standards violations, such as medical licensees who operate while intoxicated or fiduciary licensees who dip into their escrow funds, billing and advertising fraud cases, and mental fitness to practice cases. In addition, many States do not give their boards jurisdiction over non-licensees, so an overreach by a board to attempt to shut down new, non-licensed forms of competition that may be more innovative or lower-cost than the licensed incumbents, such as the North Carolina Dentistry Board's cease-and-desist actions against non-dentist teeth whiteners in *NC Dental*, is not possible in these States. These boards are more likely to get into antitrust trouble for applying the statutory scope of practice applicable to its licensees too narrowly than for attempting to extend their jurisdiction over new threats of competition.

Because so many of a board's decisions do not impact competition, it is not always financially sensible to incur the costs of restructuring the decision-making process of the board to add active supervision for the relatively few decisions for which active supervision is necessary in order to be immune from antitrust liability. The FTC Staff, in its Guidance on Active Supervision after the *NC Dental* decision,¹⁷ stated a preference for state regulatory boards to be

¹⁷ FTC Staff, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (2015), *available at*

subject to the requirements of federal antitrust laws, rather than adding active supervision in order to be immune for any competitive restraints they impose.¹⁸ The Guidance also explicitly states that a lack of active supervision “does *not* mean that the conduct of the regulatory board necessarily violates the federal antitrust laws.”¹⁹

Finally, although the licensing regime itself may restrict competition, most individual licensing decisions are ministerial and involve no discretion on the part of board members because the applicant for licensure only has to meet objective criteria. In such a case, it seems patently unfair for a board or its individual board members to be subject to potential treble damage liability for a licensing decision that the State made and that the board and its members were statutorily obligated to follow.

III. The Restoring Board Immunity Act of 2017

On July 27, 2017, Representative Issa introduced H. R. 3446 and Senators Lee, Cruz, and Sasse introduced S. 1649, both of which are called the “Restoring Board Immunity Act of 2017” or the “RBI Act.”²⁰ The Bills are identical and claim to “help States combat abuse of occupational licensing laws by economic incumbents”²¹ while dangling the carrot of obtaining immunity for a State’s occupational licensing boards if the State engages in the extensive overhaul of its licensing structure and procedures that the RBI Act (“the Act”) would require for such immunity. As detailed below, the Bill in its present form is unworkable for most States to

https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

¹⁸ *Id.* at 2-3

¹⁹ *Id.* at 6 (emphasis supplied).

²⁰ Restoring Board Immunity Act of 2017, H.R. 3446, 115th Cong. (2017); Restoring Board Immunity Act of 2017, S. 1649, 115th Cong. (2017). For ease of discussion, I will refer to the House version of the bill throughout the rest of my testimony.

²¹ H.R. 3446, Purpose Statement.

implement and would therefore leave those States without the immunity the Act claims to promote.

I would like to highlight some of the major difficulties that I believe the States will encounter in trying to follow the procedures mandated by the Act in order to get immunity. These problems are in no particular order and are not meant to be an exhaustive list of concerns with the Act.

First, the overriding question posed by the Act is whether its provisions provide the only path to state action immunity for licensing boards. Currently, six states have passed statutes adding active supervision by a state official to decisions of competitive significance for at least some of their licensing boards. Other states are relying on Executive Orders and Attorney General Opinions to provide the legal framework for active supervision. It appears that these statutes and other legal authority may be invalidated by the Act because they do not predicate their grant of immunity on meeting the rest of the requirements for immunity in the Act. It is also questionable as to whether Congress can override the Supreme Court's decision in *NC Dental* by requiring such intrusive changes to a State's legislative structure for its boards and the statutory review process for board decisions.

The Act criticizes States, such as Maryland, Tennessee, and Ohio, that already have passed active supervision legislation by claiming those States only "establish[ed] a layer of bureaucratic oversight that merely monitors board actions for consistency with State licensing laws."²² The very purpose of the active supervision requirement for immunity, however, is to determine if the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual

²² H.R. 3446, § 2(8)

interests.”²³ There is no authority in the Sherman Act or precedent in antitrust jurisprudence for an active supervisor in the State’s executive branch or a judge in the State’s judicial branch to substitute his own judgment about what the state legislature’s licensing regime should be.

On its face, the Act appears to invalidate any actions a State has already taken to implement active supervision over its boards. Section 4(a) states that immunity under the Sherman Act will only apply to state boards that meet the requirements set forth in Section 5 or 6, both of which contain several requirements that go well beyond the criteria established in *NC Dental* for adequate active supervision.²⁴ One of these requirements, in Section 5(b)(2), seems to deny state action immunity to any board that has not used the least restrictive alternative to occupational licensing in order to protect the health, safety, or welfare of its consumers. The use of the least restrictive alternative to displace competition is not required by any antitrust case law, invites second-guessing by the other branches of state government over the legislature’s prerogative, and highlights the futility of the Act’s requirements directed at state boards and board members, who do not make these licensing decisions and are statutorily obligated to follow them.

The purpose of an active supervisor or state judge reviewing a board’s actions to ensure it did not exceed its discretion interpreting a statutory licensing scheme in a manner that impermissibly restrains competition is very different from that of a supervisor or judge evaluating the law itself to determine if it serves a legitimate public interest. *Parker* and its progeny envision only the first type of review and provide a path to immunity for state boards under that framework.

²³ *NC Dental*, 135 S. Ct. at 1116 (quoting *Patrick* at 100-101). See also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992) (“Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State’s own.”)

²⁴ *NC Dental*, 135 S. Ct. at 1116-17.

For the second type of review, State legislatures are presumed to have considered the possible anticompetitive effects of their statutes and to have passed them anyway in furtherance of other policy goals.²⁵ A challenge to a board's actions premised on the underlying statutory authority's basis in an identified and legitimate public interest targets the wrong state actor, especially because the board and its individual board members cannot choose whether to follow the legislature's mandates. If the Act allows active supervisors and judges to consider and independently determine whether the board's actions are pursuant to an identified and legitimate public interest, the very least that should be done to protect the board and its individual board members from potential treble damages liability for decisions over which they have no control is to bar antitrust damages actions against them. This is similar to the Local Government Antitrust Act, which prohibits antitrust damages suits against local governments, school districts, or other local government units established by State law, any local government official or employee acting in an official capacity, and any private individual for actions taken at the direction of a local government or its officials or employees.²⁶ Private individuals already have begun expressing hesitation to serve on state boards because of the treble damages risk, and many state constitutions inhibit the ability of States to indemnify board members from treble damage liability.

There are several other difficult hurdles for States if they tried to implement the requirements of the Act, including the unfunded federal mandate to create an Office of Supervision of Occupational Boards in Section 5(c)(2) or Section 6(b)'s requirement to amend huge portions of

²⁵ See, e.g., *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013) (“Thus, we have concluded that a state policy to displace federal antitrust law was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.”).

²⁶ Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

their state codes to identify the important government interest for each statutory restriction for every licensed occupation, as well as all of the Administrative Procedure Act references for judicial review of relevant board decisions. In addition, it can be unwise for the same people who consult in the development of board policy to be the active supervisor of board action taken pursuant to that policy, as directed in Section 5(c)(2)(B)(ii).

It is also unclear which decisions by boards with potential competitive impacts will be immunized by the Act. Under current state action immunity case law, all decisions made by a state board that are actively supervised are immune from antitrust liability. In Section 4(d)'s Savings Clause, the Act appears to limit immunity only to board licensure decisions for individual applicants, which, as noted previously, are often ministerial and involve no discretion on the part of board members. The Act specifically seems to prohibit boards from conditioning licensure on any type of residency requirement, which makes continuing supervision of a licensee difficult if the board cannot get jurisdiction over the individual.

As I stated previously, the Act's current requirements attempt to dangle the carrot of state action immunity in order to force States to engage in wholesale regulatory overhaul of their existing licensing regimes. While there may be merit to such a re-examination, the Act creates too much of a burden on States to implement successfully. Instead of achieving its stated purpose of resolving uncertainty for licensing boards after *NC Dental*, reinstating state sovereignty that may have been eliminated by the decision, and restoring antitrust immunity to States, the Act creates more uncertainty for States and represents an unprecedented indifference to sovereign decisions by States about how best to protect the health, safety, and welfare of its citizens.

IV. Conclusion

Thank you for inviting me to testify before this Subcommittee today. I appreciate the interest you have taken in this vital economic interest of the States and in hearing what someone in state government has to say about the difficulties faced by States in adhering to the new standards created by *NC Dental*. I look forward to answering any questions you may have for me.