Responses of Misha Tseytlin
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Subcommittee on Antitrust, Competition Policy and Consumer Rights
Senate Judiciary Committee
Hearing: "License to Compete: Occupational Licensing and the State Action Doctrine"
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Answers To Follow-Up Questions for the Record

1. How do we prevent the FTC from improperly inserting itself into decisions by state actors? Can we rely on courts adequately to police the agency? Is there something Congress should be doing? Is this something Congress should be worried about?

North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S. Ct. 1101 (2015), is a statutory decision, based upon the Supreme Court's interpretation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Under the FTC Act, 15 U.S.C. § 45, the FTC has the authority to enforce Section 1 of the Sherman Act, including the Supreme Court's new, narrowed understanding of the State Action Antitrust Immunity doctrine. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999) ("The FTC Act's prohibition of unfair competition and deceptive acts or practices [ ] overlaps the scope of § 1 of the Sherman Act [ ] aimed at prohibiting restraint of trade."). This means that the FTC can now take advantage of the leeway afforded by the *North Carolina State Board of Dental Examiners* decision to dictate to States how they should organize and staff their own regulatory boards. For example, the recently-issued FTC Staff Guidance carries with it the implicit threat of FTC enforcement actions if States do not acquiesce to the FTC's view of the Sherman Act, including declining to remove active professionals from boards and/or refusing to set up additional bureaucratic

structures to satisfy the active supervision requirement. *See 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.

Given the breadth and uncertainty inherent in the *North Carolina State Board of Dental Examiners* decision, Congress and the States cannot assume that the courts will reign in the agency's invasion into the States' sovereign rights in this area. *See generally* 135 S. Ct. at 1117–23 (Alito, J., dissenting).

Congress should be especially concerned about these threats to States' sovereignty and should seriously consider corrective action. It is worth re-emphasizing that the *North Carolina State Board of Dental Examiners* decision is based upon a *statutory interpretation* by the Supreme Court, which means that any action that the FTC takes to dictate to States how they must organize and staff their regulatory boards is done in Congress's name. Accordingly, only Congress can fix this problem. As I explained in my testimony, the simplest way to cure this problem is to eliminate by statute the judicially-created active supervision requirement, such that a state board that acts consistent with state law would not be subject to the FTC's regulatory oversight. *License to Compete: Occupational Licensing and the State Action Doctrine: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm.*, 114th Cong. (Feb. 2, 2016) (testimony of Misha Tseytlin, Solicitor General of Wisconsin, at 12–14). Such legislation would forward both federalism and the purposes of the

Sherman Act, for reasons including those that widely respected federal judge Frank H. Easterbrook has articulated. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 30 (1983).

2. What do you believe are the proper contours of the state action antitrust immunity doctrine? Does the Supreme Court have it about right, or is the doctrine too broad or too narrow?

The guiding principles in this area, as with all statutory interpretation, should be the statutory text and congressional intent, as expressed by that text. *See generally N.C. St. Bd. of Dental Exam'rs*, 135 S. Ct. at 1117–24 (Alito, J., dissenting). As Justice Alito explained in his powerful dissent in the *North Carolina State Board of Dental Examiners* decision, when Congress enacted the Sherman Act in 1890, it did not impose *any* limitations on how States could structure their regulatory boards, whether in terms of the boards' composition or their supervisory structures. *Id*. at 1118–19 (Alito, J., dissenting); *see also* Brief of *Amici Curiae* State of West Virginia and 22 Other States in Support of Petitioner, N.C. St. Bd. of Dental Exam'rs v. FTC (2014) (No. 13-534), 2014 WL 2536518. Accordingly, I believe that the proper understanding of State Action Antitrust Immunity would mandate that the federal courts and the FTC take the State at its word when the State determines that regulatory boards are part of the State, meaning that actions by such state boards are properly understood as protected by State Action Antitrust Immunity. The Supreme Court's decision in *North Carolina State Board of Dental Examiners* departed from that principle, and in doing so, too narrowly interpreted State Action Antitrust Immunity.