



United States of America
Federal Trade Commission

Advancing Economic Liberty

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I. Introduction

Thank you, Henry, for the introduction. I am very pleased to be joining you this morning at the Antonin Scalia Law School, my alma mater, to open the Law Review's 20th Annual Antitrust Symposium.¹ Although this is my first time addressing you as Acting Chairman of the FTC, I will focus on a topic that has defined much of my legal career: economic liberty.

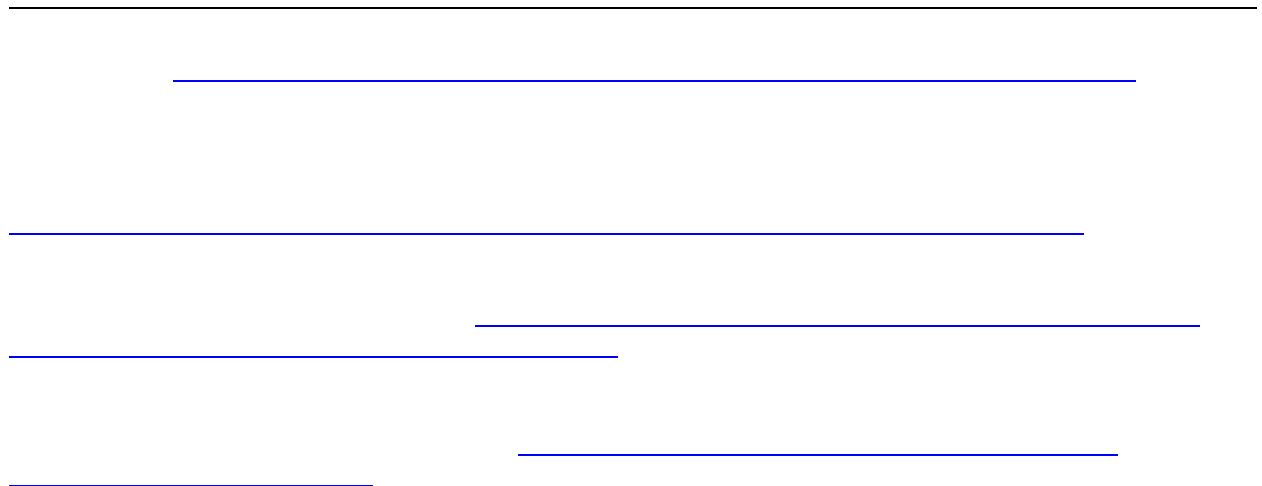
Margaret Thatcher observed, "There can be no liberty unless there is economic liberty." Like her, I believe in the power of competition and free-markets to spur innovation, new business models, economic opportunity and growth. The competitive process not only drives our economy, it provides greater access, choice, quality, and other benefits for consumers. And the freedom to work at a job of our choosing is fundamental to the American way of life.

My belief in the power and benefits of free markets has motivated my ongoing fight for economic liberty. I am proud of my role in the work started by Tim Muris in 2001 to limit antitrust immunity for anticompetitive private actions under the color of state authority.² That

drivers. But beyond those and a handful of other professions, state licensing of occupations varies significantly.¹³ Moreover, the particular licensing requirements, such as the number of months of training required, varies greatly among states regulating the same occupation.¹⁴ This uneven licensing of the same occupation and different requirements to obtain the same license across states strongly suggest that many occupational licenses do not advance public health, safety, or other legitimate goals.

The proliferation of unnecessary and overbroad occupational licensing regimes not only burdens consumers and the economy, it hurts many average Americans who want to enter these occupations.¹⁵ A 2011 study using standard economic models estimated that restrictions from occupational licensing resulted in up to 2.85 million fewer jobs with an annual cost to consumers of \$203 billion.¹⁶

I am particularly concerned that occupational licensing disproportionately affects those seeking to move up the lower and middle rungs of the economic ladder, as well as military



creating new business models. Furthermore, because military families often must move frequently, occupational licensing is a significant barrier for a trailing spouse seeking to practice his or her profession in a new state that may have additional or different licensing requirements. Occupational licensing also can be a barrier for veterans seeking to return to civilian employment. Reforms that promote reciprocity among states and credit work experience in place of additional educational requirements are among the changes that would help remove barriers to entry and competition, particularly for military families and veterans.

If such regulations are not necessary to protect consumers, why do they exist? Often, such regulation reflects regulatory capture, replacement, or overreach. Indeed, as in the *North Carolina Dental* case, it is often not the state itself acting but self-interested active market incumbents imposing occupational licensing requirements to prevent competition. Public choice theory recognizes that industry capture of regulators for private economic gain is most likely when incumbent providers can obtain a concentrated benefit while dispersing the competitive harm among many consumers.¹⁷ Such unproductive rent-seeking behavior limits competition in the market. And it often protects higher pricing by incumbents than would exist in a competitive market.

III. An FTC Economic Liberty Task Force

This “Brother May I” problem is precisely what I would like to work with interested parties including the states, to prevent and where possible reverse. Often, state and local legislators are only hearing one side of the story from the party who will receive the concentrated benefit. They often do not hear about the substantial, albeit diffuse costs such regulation will

¹⁷ See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35 (1998).

impose on the very constituents they wish to protect. I think it is important that state and local legislators hear both sides of the story.

To be clear, I believe in federalism and the important principles that it embodies. If politically accountable state actors have a clearly articulated policy and make the decision to displace competition in favor of state regulation, we must and should respect that decision. Their constituents will hold them accountable.

Often, however, such regulation reflects not the expressed will of the people through the political process, but rather regulatory capture by a narrow group of interests. It often lacks accountability to the state's voters and imposes high cost on the state's consumers. This is especially true when a state delegates regulatory authority to a

has issued hundreds of comments and amicus briefs to states, state boards, and self-regulatory entities addressing professional licensure across a wide-range of industries.¹⁹ State legislators and boards often ask the FTC for input on changes to existing occupational regulations. In its submissions, for example, the Commission has identified the benefits of expanding the use of telehealth for the provision of certain services, maintaining the same standard of care but expanding access to needed services, often to underserved and remotely located populations.²⁰ The FTC also has advocated for expanded roles for advanced practice registered nurses, APRNs, and for physician assistants to increase access, choice, and even quality through enhanced competition while still meeting public health and safety goals.²¹

As an early step, the Task Force will create a special area of the FTC website focused on economic liberty. This portal will highlight the FTC’s excellent work on competition advocacy and occupational licensing. It will also gather the many existing resources the FTC into a central repository for other stakeholders.

¹⁹ For an overview of the Commission’s advocacy efforts in the area of occupational licensing and regulation, *see* Prepared Statement of Fed. Trade Comm’n on Competition and the Potential Costs and Benefits of Professional, *Barriers to Entrepreneurship: Examining the Anti-Trust Implications of Occupational Licensing*, before the H. Comm. on Small Bus., 113th Cong. 14 (2014), <https://www.ftc.gov/public-statements/2014/07/prepared-statement-federal-trade-commission-competition-potential-costs>.

²⁰ *See, e.g.*, FTC Staff Comment to the Delaware Board of Occupational Therapy Practice (Aug. 3, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-staff-comment-delaware-occupational-therapy-board-proposal> (regarding its proposed telehealth regulation) *L6methe are II IfT*, 0

The Task Force will also seek input from an array of parties. Fortunately, many people want to expand economic opportunity, including many state leaders. Thus, the Task Force will seek to partner with stakeholders, including state elected leaders and other officials, to eliminate and narrow overbroad occupational licensing restrictions that are not narrowly tailored to satisfy legitimate health and safety goals.

This is a time of change and many Americans are demanding less regulation and more economic opportunity. I am pleased to say that governors and state legislators in many states are already identifying problematic occupational licensing and prioritizing the roll back of occupational regulations. Accordingly, I hope to create a new level of partnership with Governors, state Attorneys General, state legislative leaders, and other state and local officials, to integrate competition considerations into their decision-making process.

I have good reason for optimism in developing these partnerships. For example, during the 2012-2013 legislative sessions, Iowa Governor Terry Branstad vetoed a proposal to license four additional counseling occupations in the health care sector, favoring voluntary certification.²² He continues to include reform of occupational licensing as part of his agenda.²³ At that same time, then Governor Mike Pence vetoed licensing in Indiana of diabetes educators, anesthesiologist assistants, and dieticians.²⁴ And initiatives by governors appear to be increasing. Earlier this year, the governor of Nebraska launched an occupational licensing reform

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initiative.²⁵ The governors in Arizona, Missouri, and Wisconsin also are each seeking to remove occupational licensing restrictions that limit job opportunities and hamstring those seeking to start small businesses.²⁶

I am hopeful that we can help inform the review of new and existing regulations and encourage states to incorporate competition considerations in their assessments. This includes examining, among other things: the extent to which a regulation could affect, or already has affected, competition; whether there is concrete evidence a regulation is necessary to achieve a legitimate public policy goal; whether the regulation is narrowly tailored and reasonably limited to achieve the identified goal; and whether less restrictive alternatives might be available that would satisfy the goal while preserving to the greatest extent possible the benefits of increased competition.

By focusing the FTC's expertise, stakeholders' knowledge, and the FTC's advocacy efforts in partnership with state actors, I believe we can bring more competition into markets, help those seeking to enter and compete, and enhance consumer choice and access, innovation and quality.

Of course, in some instances enforcement may be an appropriate tool, consistent with the Supreme Court's ruling in *North Carolina Dental* and other state action cases.²⁷

control many state boards that impose licensing restrictions. Thus, the question revolves around whether the state is actively supervising the board actions that displace competition. When warranted, the FTC will bring enforcement actions in appropriate cases. But advocacy and partnership will be the primary work of the FTC's Economic Liberty Task Force.

IV. Conclusion

Economic liberty affects American workers and consumers in their everyday lives. As the country struggles to revive economic opportunity for all, we have a unique opportunity to challenge unnecessary occupational licensing. Together with the many entities who have done good work in this area and with state and local partners, we can make progress on removing long-standing barriers to competition, and thereby expand economic liberty. I look forward to overseeing the Task Force's work on this important goal. Thank you.