

1 LICENSE TO COMPETE: OCCUPATIONAL LICENSING
2 AND THE STATE ACTION DOCTRINE

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4 TUESDAY, FEBRUARY 2, 2016

5 United States Senate,
6 Subcommittee on Antitrust, Competition Policy, and
7 Consumer Rights,
8 Committee on the Judiciary,
9 Washington, D.C.

10 The Subcommittee met, pursuant to notice, at 2:04 p.m.,
11 in room SD-226, Dirksen Senate Office Building, Hon. Mike
12 Lee, Chairman of the Subcommittee, presiding.

13 Present: Senators Lee, Cornyn, Klobuchar, and Franken.

14 OPENING STATEMENT OF HON. MIKE LEE, A U.S. SENATOR

15 FROM THE STATE OF UTAH

16 Chairman Lee. Welcome to this hearing of the
17 Subcommittee on Antitrust, Competition Policy, and Consumer
18 Rights. Before I start, I want to thank the Ranking Member,
19 Senator Klobuchar, and her staff for their assistance in
20 preparing for this hearing, as well as the Chairman of the
21 full Committee, Senator Grassley, for his support.

22 A few housekeeping matters that we need to address
23 before we begin. After I and then Senator Klobuchar give
24 some opening remarks about the hearing, we will hear from
25 our two panels of witnesses who I will introduce shortly,

1 and then we will have 5-minute question rounds. But there
2 has been a development. There has been a series of eight
3 votes that have been scheduled for 2:30, so as a result, I
4 am going to need to suspend the hearing starting about 20
5 minutes after the hour. Senator Klobuchar and I and any
6 other members who attend will need to go to the floor for
7 that series of eight votes. We will come back as soon as
8 that is finished, and at that point we will resume the
9 hearing, hearing from our witnesses and then we will have
10 questions. I apologize for the inconvenience. That is the
11 reality around here. We do have votes from time to time,
12 and our timing today worked out this way.

13 Our hearing today is titled "License to Compete:
14 Occupational Licensing and the State Action Doctrine."
15 While it is often the business of this Subcommittee to
16 facilitate public discussion of significant pending mergers,
17 we also have the duty to provide an ongoing review of the
18 overall state of competition in the American marketplace in
19 order to inform and educate legislators, law enforcement
20 officials, and the public. We are here today for such a
21 purpose.

22 We will be focusing on the competition policy and
23 enforcement implications of occupational licensing and the
24 Supreme Court's decision in North Carolina State Board of
25 Dental Examiners v. Federal Trade Commission. But the

1 underlying topic of discussion this afternoon is the
2 importance of economic liberty to a free and competitive
3 marketplace. As more and more professions become subject to
4 burdensome licensure requirements, this issue has come to
5 involve a basic freedom: the freedom to work and to provide
6 for one's family.

7 So what is occupational licensing? Though we will hear
8 more on this subject from the expert witnesses who have
9 joined us today, broadly speaking, occupational licensing
10 refers to laws and regulations that impose training and
11 other requirements for members of certain designated
12 professions. While these regulatory regimes in many cases
13 serve to ensure the health and safety of consumers, in a
14 growing number of cases they have been expanded far beyond
15 that purpose in ways that may actually harm competition.
16 This happens when regulations, instead of being limited to
17 safety concerns, protect incumbents by imposing inordinate
18 costs on would-be market entrants, would-be market
19 participants, leaving consumers with higher prices, fewer
20 choices, and less innovation.

21 These licensing regimes also impose steep economic
22 costs, often with little rational basis to support them.
23 For example, a report by the Institute for Justice notes
24 that the average cosmetologist spends 372 days in training,
25 the average EMT only 33. Meanwhile, these standards vary

1 widely by State, calling into question whether they are even
2 necessary at all. For example, the same IJ report observes
3 that while ten States require 4 months or more of training
4 for manicurists, Alaska demands only about 3 days and Iowa
5 about 9 days.

6 Finally, the burdens of occupational licensing
7 disproportionately fall on certain communities, such as
8 military spouses and persons seeking to reenter society with
9 a criminal record.

10 One year ago this month, the Supreme Court affirmed the
11 Fourth Circuit and sided with the Federal Trade Commission
12 in an antitrust enforcement action against the North
13 Carolina State Board of Dental Examiners, holding that the
14 board's efforts to restrict the practice of teeth whitening
15 to licensed dentists were not protected by the State action
16 doctrine. While the actions of States are ordinarily immune
17 from scrutiny under the Federal antitrust laws, the North
18 Carolina Board did not qualify for the immunity because it
19 was controlled by practicing members of the profession it
20 regulated, and it was not subject to active participation or
21 supervision by the State.

22 This ruling opened up one possible avenue for
23 addressing the growing threat to competition posed by
24 Government regulators. It is my hope that today's hearing
25 will shed further light on this unfortunate trend. The role

1 of Government, whether Federal, State, or local, is to
2 facilitate economic flourishing by promoting free and open
3 competition throughout our society and not by picking
4 winners and losers or protecting wealthy and well-connected
5 incumbents in any industry.

6 Sadly, occupational licensing is too often one more
7 form of the crony capitalism that is borne whenever big
8 government gets in bed with big business. Undoubtedly, the
9 role of Federal antitrust enforces in addressing this
10 problem may be limited, but our discussion this afternoon
11 will provide deeper insight into the competition policy
12 concerns at play and give lawmakers and the public an
13 opportunity to explore additional ways to protect consumers
14 from overbearing regulation and ensure that entrepreneurship
15 and economic freedom remain a part of the American dream.

16 Senator Klobuchar will now give her opening statement,
17 and then we will move on from there.

18 OPENING STATEMENT OF SENATOR KLOBUCHAR

19 Senator Klobuchar. Thank you very much, Mr. Chairman.
20 Thank you to our two witnesses today. And thank you for
21 coming up with this idea for this hearing. I think it is
22 really important, and it is an example of potentially some
23 bipartisan work that needs to be done with support from
24 Democrats and Republicans for looking into this very
25 important issue.

1 The goal here is pretty obvious: Licensing is
2 important when it protects the health and welfare of
3 consumers or the safety of professionals. We know we need
4 that. But restrictions should not limit the opportunities
5 of workers, of small businesses, of millennials, of spouses,
6 of armed service members, you name it. And looking and
7 researching this, I had not heard much about it in our
8 State. I know one of our witnesses on the second panel is a
9 professor from our State. I realized that was because we
10 are one of the States that is on the low end of having these
11 licensing boards. And so I always like to tout our State,
12 so maybe we need to look into what is going on here and try
13 to make sure that this works.

14 I do note our State has the lowest unemployment rate of
15 any metropolitan area in the country and one of the lowest
16 in the country period, and maybe that has to do with the
17 fact that it is a little easier to get into some of these
18 occupations and businesses. So I think it is worth looking
19 at.

20 A recent study, Mr. Furman, by the President's Council
21 of Economic Advisers reports that in the 1950s roughly one
22 in 20 employees needed a license for their job. Over the
23 last 6 years, States have subjected an increasing number of
24 professions to occupational licensing requirements. By
25 2008, over one in four employees needed a license. Because

1 licensing is more prevalent than ever, examining its impact
2 on the economy and competition is appropriate.

3 On the benefit side for highly technical fields like
4 architecture or services critical to wellness, like
5 medicine, licensing ensures a basic level of competence,
6 provides information about quality, and protects consumers.
7 Just as licensing can improve competition and protect
8 consumers, it can also have the opposite effect.

9 Research suggests that unnecessary licensing
10 restrictions can increase both prices and income inequality.
11 There are head-scratching examples of requiring licensure
12 without an obvious reason, and my colleague has been able to
13 find a good number of them. Someone like Mr. Main, whom we
14 will hear from, a witness on our second panel, should not
15 have to pay fees and pass a multiple choice test to become a
16 tour guide. Similarly, although hair braiders neither cut
17 hair nor use chemicals, many States require them to obtain a
18 cosmetology license.

19 Licensing requirements differ from State to State.
20 Because interstate reciprocity is rare, these differences
21 limit people's ability to move. Instead, our economy, as
22 you know, this new gig economy, needs to accommodate
23 flexibility. Millennials face a rapidly changing job
24 market. Spouses of armed service members are constantly on
25 the move: 35 percent of military spouses in the labor force

1 work in professions that require State licenses or
2 certifications. They are ten times more likely to have
3 moved across State lines in the last year than their
4 civilian counterparts.

5 There is a reason why the Progressive Policy Institute,
6 the National Employment Law Project, and the Institute for
7 Justice have raised concerns about the overreach of
8 occupational licensing in certain fields. We need solutions
9 that open up professions without harming consumers. Doing
10 so will create opportunities for workers at the beginning of
11 their careers or someone who wants to start a new career.

12 The Council of Economic Advisers report provides a
13 thoughtful analysis of these issues and rejects a one-size-
14 fits-all solution. The report provides guidance on best
15 practices to improve licensing regimes. Licensing
16 requirements should address legitimate public health and
17 safety concerns for both the consumers and employees.
18 Periodic review of the licenses is necessary. Licensing
19 reciprocity among States helps professionals follow the
20 demand for their services. With Senator Thune, I introduced
21 the Sports Medicine Licensure Clarity Act to harmonize
22 liability standards for doctors providing care outside of
23 their State.

24 The Supreme Court decision in North Carolina State
25 Board of Dentistry v. FTC, the FTC expanded the role of the

1 antitrust law to address these problems, but it still is
2 limited scope. First, the licensing restriction must be an
3 unreasonable restraint on trade. Second, a licensing board
4 controlled by market participants must have established the
5 restriction. And, third, the State must have actively
6 supervised the licensing Board's decision.

7 But if a State legislature establishes a restriction
8 through a statute, the restriction is immune from antitrust
9 review. Similarly, municipal regulations will rarely
10 violate the antitrust laws. Many of the regulations being
11 criticized are State laws or municipal ordinances beyond the
12 reach of the antitrust laws.

13 As I began, the goal here is straightforward: We want
14 professionals to offer services to the full extent of their
15 competency while protecting consumers in the marketplace.
16 The more challenging question is how we get there. Neither
17 a one-size-fits-all solution nor a complicated patchwork of
18 regulations will work. I look forward to hearing about the
19 problems but also the solutions, because as we know,
20 complaining is not a strategy.

21 Thank you very much.

22 Chairman Lee. Thank you, Senator Klobuchar.

23 Okay. I am now going to introduce our witnesses before
24 we have to adjourn for votes.

25 Dr. Jason Furman was confirmed by the Senate on August

1 1, 2013, as the 28th Chairman of the Council of Economic
2 Advisers. In this role, he serves as President Obama's
3 Chief Economist and a member of the Cabinet. Dr. Furman has
4 also served in the Obama administration as Principal Deputy
5 Director of the National Economic Council and Assistant to
6 the President. He previously worked at the Council of
7 Economic Advisers and National Economic Council during the
8 Clinton administration and at the World Bank. Dr. Furman
9 has been a senior fellow at the Brookings Institution and
10 the Center on Budget and Policy Priorities and also has
11 served in visiting positions at various universities,
12 including NYU's Wagner Graduate School of Public Policy. In
13 addition to numerous articles in scholarly journals and
14 periodicals, Dr. Furman is the editor of two books on
15 economic policy. Dr. Furman holds a Ph.D. in Economics from
16 Harvard University.

17 Maureen K. Ohlhausen was sworn in as a Commissioner of
18 the Federal Trade Commission on April 4, 2012. Prior to
19 joining the Commission, Ms. Ohlhausen was a partner at
20 Wilkinson Barker Knauer. She previously served at the
21 Commission for 11 years, most recently as Director of the
22 Office of Policy Planning from 2004 to 2008, where she led
23 the FTC's Internet Access Task Force. She was also Deputy
24 Director of that office. From 1998 to 2001, Ms. Ohlhausen
25 was an attorney adviser for former FTC Commissioner Orson

1 Swindle. She started working at the FTC General Counsel's
2 Office in 1997. Before coming to the FTC, Ms. Ohlhausen
3 spent 5 years at the U.S. Court of Appeals for the D.C.
4 Circuit, serving as a law clerk for Judge David Sentelle and
5 as a staff attorney. She also clerked for Judge Robert Yock
6 of the U.S. Court of Federal Claims from 1991 to 1992. Ms.
7 Ohlhausen graduated with distinction from George Mason
8 University School of Law in 1991 and graduated with honors
9 from the University of Virginia in 1984.

10 Okay. With that, we are going to suspend the hearing.
11 Again, I regret this interruption. I do not see any other
12 way around it. We will be back as soon as our votes are
13 completed. Thank you.

14 [Recess 2:18 p.m. to 3:32 p.m.]

15 Chairman Lee. Welcome back, everyone. They are
16 continuing to vote down there, so Senator Klobuchar and I
17 are going to stay here during increments of time that we are
18 able to, and hopefully we will piece it together that way.
19 But let us go ahead. Dr. Furman, you may begin.

1 STATEMENT OF THE HONORABLE JASON FURMAN, CHAIRMAN,
2 COUNCIL OF ECONOMIC ADVISERS, OFFICE OF THE
3 PRESIDENT OF THE UNITED STATES, WASHINGTON, D.C.

4 Mr. Furman. Thank you--and I appreciate your doing
5 that--Chairman Lee, Ranking Member Klobuchar, for the
6 opportunity to appear here today, and my testimony will
7 contain many of the same points and themes that both of you
8 had in your openings, and I think that is indicative of much
9 of the bipartisan agreement and promise of this area.

10 I am going to be drawing in particular on a recent
11 report prepared by the Council of Economic Advisers, the
12 Department of Treasury's Office of Economic Policy, and the
13 Department of Labor.

14 Occupational licensing has grown substantially over the
15 past several decades. The share of the U.S. workforce
16 covered by State licensing laws grew from less than 5
17 percent in the early 1950s to 25 percent by 2008. CEA
18 analysis shows that about two-thirds of this change stems
19 from an increase in the number of professions that require a
20 license.

21 Licensing practices also differ among States. States
22 vary in the licensed share of their workforce, ranging from
23 a low of 12 percent in South Carolina to 33 percent in Iowa.
24 States also vary dramatically in their requirements for
25 obtaining a license. For example, Michigan requires 3 years

1 of education and training to become a licensed security
2 guard, while most other States require only 11 days or less.

3 Occupational licensing has benefits and costs.
4 Licensing is usually justified on the grounds that it
5 improves quality and protects public safety. This argument
6 is strongest when low-quality practitioners can inflict
7 serious harm or when it is difficult for consumers to
8 evaluate provider quality. Few people, for example, would
9 feel comfortable traveling in a commercial plane flown by an
10 unlicensed pilot.

11 But when consumers choose a florist, a barber, or a
12 decorator, there is considerably less harm to the public on
13 the line, and it may be easier for consumers to evaluate
14 quality on their own.

15 Licensing can also have clear costs. While licensing
16 requirements can lead to higher wages for those able to
17 obtain a license, they can also reduce employment
18 opportunities and depress wages for excluded workers.

19 Licensing laws also lead to higher prices for goods and
20 services, in many cases for lower-income households, which
21 are not always justified by improved quality or public
22 safety. The wide variation in licensing requirements at the
23 State level also reduces worker mobility across State lines.

24 Finally, our licensing system places special burdens on
25 certain populations, such as military spouses, immigrants,

1 and those with criminal records.

2 The administration has developed three best practices
3 to ensure that licensing policies safeguard the well-being
4 of the public while reducing burdens for workers and
5 consumers.

6 First, licensing restrictions should be closely
7 targeted to protecting public safety and should not be
8 overly broad or burdensome. For example, policymakers
9 should refrain from categorically excluding individuals with
10 criminal records and instead should only exclude those
11 individuals whose convictions are recent and relevant and
12 pose a threat to public safety. We find that 21 States do
13 not have standards governing the relevance of conviction
14 records of people applying for occupational licenses for
15 most or all occupations.

16 Second, States should establish "sunrise" review
17 processes to facilitate a careful cost-benefit analysis of
18 when new licensing laws are proposed. According to Maine's
19 Department of Professional and Financial Regulation, an
20 example of a sunrise agency, only one occupation has
21 acquired licensed status in Maine in the last 15 years.

22 Third, States should expand reciprocity agreements to
23 increase workers' mobility across State lines.

24 While licensing reform takes place primarily at the
25 State level, the administration is committed to working with

1 Congress and with States to make progress on this issue.
2 Thanks in part to the leadership of Senators Klobuchar and
3 Blumenthal, the President signed into law the Veterans
4 Skills to Jobs Act in 2012, which requires Federal agencies
5 to recognize relevant military training when certifying
6 veterans for occupational licenses. In addition, building
7 on First Lady Michelle Obama and Dr. Jill Biden's call to
8 Governors in 2012, the administration has partnered with
9 States to streamline State occupational licensing for
10 service members, veterans, and their spouses.

11 Over the coming year, we will continue to conduct
12 outreach to help spur action at the State level. The fiscal
13 year 2016 budget signed by the President included \$7.5
14 million to support efforts by a consortium of States to
15 expand reciprocity for a range of occupational licenses.

16 Licensing reform is only a small part of the effort to
17 raise incomes, improve access to employment, and reduce
18 inequality. But when the challenge we are facing is so
19 large, we cannot afford to leave any stone unturned in
20 addressing it.

21 Thank you.

22 [The prepared statement of Mr. Furman follows:]

- 1 Chairman Lee. Thank you, Dr. Furman.
- 2 Commissioner Ohlhausen.

1 STATEMENT OF THE HONORABLE MAUREEN K. OHLHAUSEN,
2 COMMISSIONER, FEDERAL TRADE COMMISSION,
3 WASHINGTON, D.C.

4 Ms. Ohlhausen. Chairman Lee, Ranking Member Klobuchar,
5 I am pleased to join you to discuss competition perspectives
6 on the licensing of occupations. The Commission has
7 submitted written testimony. My oral testimony and
8 responses to questions, however, only reflect my own views
9 and not necessarily those of the Commission.

10 Occupational licensing can offer many important
11 benefits. It can protect consumers from health and safety
12 risks and support other valuable public policy goals. In
13 the ftc's experience, however, not every occupational
14 restriction yields benefits that outweigh the harms it can
15 do to competition. We have seen many examples of
16 restrictions that impede competition and hamper new entry
17 into markets but offer few consumer benefits. In these
18 situations, occupational regulation may do more harm than
19 good, leaving consumers with higher prices, lower quality,
20 and reduced choices. Over the long term, unwarranted
21 occupational regulation can cause lasting damage by making
22 markets less responsive to consumer demand; dampening
23 incentives for innovation; and creating barriers to entry
24 for providers.

25 At the Commission, we address these competitive

1 concerns primarily in two ways.

2 First, we use our competition advocacy program, which I
3 previously headed. Under that program, we respond to
4 requests from State officials to analyze specific
5 occupational restrictions. Typically, we urge policymakers
6 to consider whether the regulations are targeted to address
7 specific risks of harm to consumers, likely to have a
8 significant and adverse effect on competition, and are
9 narrowly tailored to minimize harm to competition, or
10 whether less restrictive alternatives are available.

11 Since the late 1970s, the FTC has submitted hundreds of
12 comments on competition issues relating to professionals.
13 These advocacy efforts have focused on restrictions on price
14 competition, entry by competitors, and truthful, non-
15 deceptive advertising.

16 In addition to competition advocacy, we have also
17 challenged anticompetitive conduct by regulatory boards,
18 including restrictions on price competition, truthful and
19 non-deceptive advertising, and competition from new rivals
20 without any legitimate justification.

21 From a competition standpoint, occupational regulation
22 is especially worrisome when the regulatory authority is
23 wielded by a board composed of members of the occupation it
24 regulates. The risk, of course, is that the board will make
25 regulatory decisions that serve its members' private

1 economic interest and not the policies of the State. The
2 Commission has taken enforcement action when appropriate to
3 stop regulatory boards from exceeding their authority to
4 hinder competition.

5 Principles of federalism, however, limit the
6 application of Federal antitrust law to allow a State acting
7 as a sovereign to impose restrictions that displace
8 competition in favor of other goals that are important to
9 its citizens. The so-called State action doctrine, first
10 articulated by the Supreme Court in 1943, is rooted in the
11 understanding that Congress, in passing the Sherman Act, did
12 not intend to impinge upon the sovereign regulatory powers
13 of the States. That does not mean, however, that all State-
14 affiliated regulators are immune from antitrust scrutiny.

15 The Commission has long played an active role in the
16 development of this doctrine and is committed to ensuring
17 that it remains true to its foundations. As one example, in
18 2003, Commission staff issued a report that outlined
19 concerns about overbroad judicial interpretations of the
20 doctrine, and I was proud to serve on the task force that
21 issued that report.

22 Through these efforts, the Commission has helped to
23 define the contours of the State action doctrine,
24 culminating in two recent decisions by the Supreme Court:
25 Phoebe Putney in 2013 and North Carolina Dental last year.

1 These Court decisions and the work that led to them
2 represent a long-term bipartisan effort by the Commission to
3 make the law more favorable to competition and ultimately
4 consumers.

5 States may regulate a particular occupation by setting
6 licensing standards for individuals and creating a board
7 that includes practicing members of the occupation being
8 regulated. Neither the Supreme Court nor the FTC has sought
9 to dictate how such boards must be constituted. In North
10 Carolina Dental, however, the Supreme Court ruled that a
11 licensing board with a controlling number of active market
12 participants must meet two tests to enjoy antitrust
13 immunity: their actions must be taken pursuant to a clearly
14 articulated and affirmatively expressed State policy to
15 displace competition, and the State must actively supervise
16 their conduct.

17 The Court did not specify exactly what would constitute
18 "active state supervision," explaining that the inquiry was
19 "flexible and context-dependent," but it need not "entail
20 day-to-day involvement in any agency's operation or
21 micromanagement of its every decision." Rather, the
22 touchstone is "whether the State's review mechanisms provide
23 `realistic assurance' that a non-sovereign actor's
24 anticompetitive conduct `promotes state policy, rather than
25 merely the party's individual interests.'"

1 In the wake of the Supreme Court's decision, FTC staff,
2 responding to requests from State officials, issued guidance
3 on how States can satisfy the "active supervision"
4 requirement for regulatory boards controlled by market
5 participants.

6 Deviation from this guidance does not necessarily mean,
7 however, that the State action defense is inapplicable or
8 that a violation of the antitrust laws has occurred.

9 State regulation of occupations can serve important
10 public policy goals and protect consumers from harm. But as
11 illustrated by the Commission's experience, some regulations
12 may make consumers worse off, impeding competition without
13 offering meaningful protection from legitimate health and
14 safety risks.

15 Thank you.

16 [The prepared statement of Ms. Ohlhausen follows:]

1 Chairman Lee. Thanks to both of you for your
2 testimony. I will start with the questioning, and then we
3 will go back and forth in sort of a rapid-fire fashion given
4 the odd timing that we have got. "Rapid-succession" format
5 rather than "fire."

6 [Laughter.]

7 Chairman Lee. Dr. Furman, regarding persons with a
8 criminal record seeking to reenter society, do you see
9 occupational licensing reform as something that perhaps
10 ought to accompany something of a companion piece of
11 legislation that maybe we ought to consider in connection
12 with criminal justice reform?

13 Mr. Furman. Thank you for that question, Senator. I
14 do not have a particular recommendation for you in terms of
15 what you do or do not include in that recommendation. What
16 we have been doing with this effort is reaching out to
17 States because many of these licensing restrictions are at
18 the State level and encouraging them to look at ways to make
19 changes in their laws as well as the administration
20 providing technical assistance in their efforts to do so.

21 Chairman Lee. But you do certainly see that there are
22 some communities that are disproportionately affected, and
23 one of those communities would include people with criminal
24 records?

25 Mr. Furman. Absolutely, and that is worth, you know,

1 understanding what the Federal Government could do about
2 that as well.

3 Chairman Lee. Senator Klobuchar?

4 Senator Klobuchar. Thank you.

5 One of the solutions you talked about, Chairman Furman,
6 is having sunrise and sunset provisions for these
7 occupational licenses. My State is one of ten that has
8 them. You know, it is one minor provision that could make a
9 difference. Could you explain why you think it is helpful?

10 Mr. Furman. Yes, and it relates to any time you let a
11 group make rules for itself, it will tend to make those
12 rules in ways that benefit itself, often at the expense of
13 others. So by creating another institution that is not the
14 same as the group that would benefit from its regulations,
15 they can apply cost-benefit and ask the question of are the
16 benefits for the public in terms of, for example, safety
17 truly important enough that they outweigh the costs in terms
18 of higher price or--

19 Senator Klobuchar. You could have an issue that comes
20 up that people do feel strongly in a State, we better
21 license because of some safety thing, then you look back at
22 it and think differently in 5 years or something.

23 Mr. Furman. Yes. So the most important thing is that
24 it is not the group that benefits from the decision making
25 the decision, and these commissions are a way to avoid doing

1 that.

2 Senator Klobuchar. Okay.

3 Chairman Lee. All right. Here is what I going to
4 propose. Senator Klobuchar and I have to go vote again. We
5 are two of the fastest people in the Senate--in fact, they
6 have clocked us. We are the two fastest. She is faster
7 than I am.

8 Senator Klobuchar. Only on a bicycle, but okay, yes.

9 Chairman Lee. We are going to go vote. We will be
10 right back. I want to give you the option of leaving if you
11 need to leave. If you do not, we would love to be able to
12 come back and ask you some additional questions before we
13 have our next panel. Are you okay with that? Okay. Thank
14 you.

15 [Recess 3:45 p.m. to 4:09 p.m.]

16 Chairman Lee. We are back. Senator Klobuchar will be
17 back momentarily.

18 Commissioner Ohlhausen, the FTC won a big victory at
19 the Supreme Court in connection with the N.C. Dental case.
20 What has the FTC done since then, since that ruling came
21 out, to continue policing licensing boards that might
22 similarly run afoul of our antitrust laws? Tell me what has
23 happened since then.

24 Ms. Ohlhausen. Sure. Senator, we have done two
25 primary things. The first thing is we gave guidance to the

1 States on what active supervision should look like and who
2 needs to be actively supervised. So if the States take a
3 deeper look at what their boards are doing and the
4 licensing, that could be helpful in this regard.

5 Secondly, we have gotten complaints from a variety of
6 entities about what some of the State boards are doing, and
7 we follow up on those to see if there is possibly a
8 competitive issue.

9 Chairman Lee. How pervasive do you think the problem
10 is? Is this a tip-of-the-iceberg sort of a thing or is that
11 hard to say? Maybe that is hard to assess.

12 Ms. Ohlhausen. It is a little bit hard to assess.
13 Obviously, there are a lot of--as Dr. Furman has observed,
14 State licensing has really expanded exponentially in the
15 past few decades, so there are a lot of State boards.
16 Whether they are engaging in anticompetitive conduct is a
17 more difficult inquiry.

18 Chairman Lee. Senator Klobuchar?

19 Senator Klobuchar. Yes, I guess, both of you, just why
20 do you think this is happening that there are more boards?
21 If you did not answer that with Senator Lee. Why do you
22 think this is happening?

23 Mr. Furman. I will speculate first, and then you can
24 either speculate or give an answer.

25 Senator Klobuchar. Pure speculation.

1 Mr. Furman. And it relates to the same question you
2 asked before, which is basically grounded in rent-seeking,
3 that if you let a group of people exclude other people, they
4 will make decisions, and it will just accrete and grow over
5 time.

6 Senator Klobuchar. I get it. Okay.

7 Ms. Ohlhausen. And I would agree with that.

8 Senator Klobuchar. Okay. I am going to go to one more
9 policy thing. Can you talk about, Chairman Furman, how you
10 think these licensing requirements from an economist's
11 standpoint can increase income inequality, which is already
12 a problem?

13 Mr. Furman. Yes. So we reviewed a range of studies.
14 For example, we looked at 11 studies, the impact on price in
15 different sectors, and 9 out of the 11 it turned out to
16 raise those prices, and those price increases were often for
17 lower-income households. Also, you observe a big wage
18 differential between people in licensed occupations and
19 outside of them, and so it can reduce wages for people in
20 two respects: one, if they cannot get a license; and, two,
21 then there are more people excluded competing with each
22 other, driving those wages down. And then the third is
23 mobility. You are much less likely to move across State
24 lines to a better job, and mobility is one of the things
25 that has helped create opportunity and convergence in the

1 United States, and inhibiting that can increase inequality.

2 Senator Klobuchar. And just last in this series, are
3 certain types of licensing requirements likely to have
4 greater impact on the opportunity, do you think, or certain
5 occupations?

6 Mr. Furman. It is the combination of the requirement
7 but also the cost of getting it. I mean, if you have to
8 give up a year of your life and a lot of money to get a
9 license, that is an opportunity--

10 Senator Klobuchar. And so maybe if you are doctor or
11 someone that is making--which, of course, you are going to
12 get a license for, but your salary is such, it is a
13 different situation.

14 Mr. Furman. Right. And the opportunity the person
15 has--

16 Senator Klobuchar. And, you know, if you were to
17 suggest to a State, well, which occupations, whether it is
18 hair braiders or whatever it is, just shouldn't you be doing
19 this for, is there any suggestion you have from an economic
20 standpoint of how you would put the divide?

21 Mr. Furman. Our recommendation is to use cost-benefit
22 analysis and, in particular, to look how consequential is
23 the lack of quality and how observable is it. So if your
24 florist does a bad job, not only is it not going to kill
25 you, but you will be able to see that and the next time have

1 a different florist. You know, maybe that remedy does not
2 work in the case of a surgeon or an airplane pilot.

3 Senator Klobuchar. Except for maybe weddings. No, I
4 am kidding. It was a little occupational licensing joke
5 that you missed about weddings.

6 [Laughter.]

7 Senator Klobuchar. Okay. I will turn it over to you.

8 Chairman Lee. In my hometown of Alpine, Utah, we joke
9 about little else other than occupational licensing. It is
10 all the rage there.

11 Commissioner, what guidance, if any, can you give to
12 States about how they can avoid taking steps that could harm
13 competition? Are there any bright lines that they could
14 follow?

15 Ms. Ohlhausen. Well, first of all, I think a
16 fundamental question is whether this occupation requires
17 licensing to begin with. And I think it would be a good
18 idea for States to think more deeply about that. And then
19 if they decide that it does, when they have clearly
20 articulated an intention to displace competition, and then
21 turned over to a board of active market participants the
22 task of implementing that, that they think about does the
23 State board require active supervision, who is on the board,
24 what may their interests be; and then, secondly, how the
25 State board is carrying that out and how the review is being

1 done. So does the reviewer have the information--for the
2 State to actively supervise, does the supervisor have the
3 information at hand to properly evaluate the actions of the
4 Board, and do they have a written decision? Have they taken
5 in comments from interested parties? A lot of process kinds
6 of issues to make sure that all the relevant factors have
7 been considered.

8 Chairman Lee. The more they fit the pattern of N.C.
9 Dental, the more they are going to run into some kind of
10 risk of running afoul of the antitrust laws.

11 Ms. Ohlhausen. Exactly. Exactly.

12 Senator Klobuchar. Commissioner Ohlhausen, it has been
13 close to a year since that Supreme Court case that we talked
14 about, the North Carolina case. Is the FTC actively
15 pursuing investigations involving State licensing boards?
16 Or can you say?

17 Ms. Ohlhausen. I cannot really say whether we are
18 pursuing any particular ones, but it is certainly an area,
19 as I mentioned, we have gotten a lot of inquiries about, and
20 we are following up.

21 Senator Klobuchar. What criteria do you think would be
22 used to decide whether or not the FTC looks at a case?

23 Ms. Ohlhausen. First of all, I think there has to be
24 the likelihood of substantial anticompetitive activity that
25 results in serious consumer harm. So that would be an

1 appropriate use. So often in areas particularly involving
2 health care, those are the kinds of topics where there could
3 be substantial harm to consumers.

4 Senator Klobuchar. I would like to note that the
5 Chairman beat me here, and he walked, and I was on the tram.
6 And so he has added more steps to his Fitbit.

7 Chairman Lee. It was not just that. In my defense, I
8 did not take the train because the train left just before I
9 got there, and I cannot stand waiting.

10 Senator Klobuchar. All right. He did try to friend me
11 on the Fitbit, I just want the record to reflect.

12 [Laughter.]

13 Chairman Lee. She turned it down.

14 Senator Klobuchar. No. I did not know it existed.

15 I am done. Thank you.

16 Chairman Lee. Thanks to both of you. I really
17 appreciate you coming here. We are going to bring up our
18 next panel now, but thank you for your patience and for your
19 testimony.

20 Senator Klobuchar. And it was really interesting, I
21 think, and we should be doing more in this area, and I think
22 people are not quite aware what is going on. I am also
23 interested, which I can get from you afterward on the
24 record, just sort of State-by-State comparisons and what you
25 have on that. Maybe you have it in your report, but what is

1 working, what is not, so we can have maybe even a model idea
2 of, okay, yeah, some things should be licensed, and here is
3 an example of what is working in some States.

4 Thank you.

5 Ms. Ohlhausen. Thank you.

6 Chairman Lee. Thank you.

1 Chairman Lee. Okay. Thank you very much for your
2 patience. Thank you for joining us. We have got only one
3 grouping of two votes left, and so we are going to have to
4 step out one more time, but it will be only one time.

5 In order to save time, though, we are going to dispense
6 with the introductions, and, Mr. Tseytlin, we will start
7 with you and then we will go down the list from there. You
8 have each got 5 minutes. Thank you.

1 STATEMENT OF MISHA TSEYTLIN, SOLICITOR GENERAL,
2 STATE OF WISCONSIN, MADISON, WISCONSIN

3 Mr. Tseytlin. Thank you so much. I am grateful for
4 the opportunity to appear before the Subcommittee today. I
5 am Misha Tseytlin, Solicitor General of the State of
6 Wisconsin. I am here to discuss the negative impacts of the
7 Supreme Court's North Carolina Dental Board decision upon
8 sovereign States.

9 In preparing this testimony, I consulted with State
10 officials around the country who have been grappling with
11 the difficulties posed by the North Carolina Dental Board
12 decision. I thank those public servants for their help.
13 The views I express today are my own and not necessarily
14 those of the State of Wisconsin, the Attorney General of
15 Wisconsin, or any of the State officials with whom I
16 consulted.

17 I would also like to note that nothing in my testimony
18 endorses the actions of any particular board or the notion
19 of broad occupational licensing in general. I am a very,
20 very strong believer in economic liberty and the free market
21 and think those essential individual rights and institutions
22 should be protected by all lawful means.

23 But my first principles also include enforcing
24 constitutional and textual limits on Federal power, a cause
25 that is particularly critical given the overreach that the

1 present administration has engaged in in so many areas.

2 Given those considerations, I would like those who
3 support both free markets and textual and constitutional
4 limits on Federal power to consider the following point:

5 The Sherman Act and the FTC are simply not
6 constitutionally or statutorily proper mechanisms for
7 limiting State regulatory boards and never were intended to
8 be.

9 From the point of view of State sovereignty, the FTC
10 telling States how to organize their regulatory boards is no
11 different in kind from the EPA telling us how to regulate
12 our power plants.

13 Section 1 of the Sherman Act--enacted in 1890--
14 prohibits "restraints of trade or commerce among the several
15 States, or with foreign nations." The Congress that enacted
16 the Sherman Act understood that a State board's regulation
17 of professions operating entirely within the State does not
18 restrain trade among States.

19 When the Supreme Court drastically expanded the meaning
20 of interstate commerce for purposes of the Commerce Clause
21 to the U.S. Constitution, including in infamous decisions
22 like Wickard, this created a threat that State agencies
23 would be swept into the Sherman Act as basically an
24 unfortunate historical accident.

25 The Court put this affront to State sovereignty to

1 rest, or seemed to, in 1943 in the Parker decision, holding
2 that States were immune from antitrust liability under the
3 Sherman Act.

4 In the Dental Board decision last year, the Supreme
5 Court, unfortunately, departed from that proper protection
6 of federalism and held that State regulatory boards that
7 were composed of a controlling number of active participants
8 in the regular market would be treated as private parties
9 and not as the State itself.

10 But perhaps the most troubling impact of this holding
11 is that such boards will be now subject to Federal antitrust
12 liability unless the States can show that full-time State
13 employees actively supervise the board. As Justice Alito
14 explained in a powerful dissent, joined by Justice Scalia
15 and Justice Thomas, this active supervision requirement is
16 big, difficult to comply with, and violates the original
17 intent of the Congress that enacted the Sherman Act.

18 In my written testimony, I outlined a series of
19 lawsuits that have already been brought against State
20 regulatory boards under the Dental Board decision. I also
21 explain some of the actions that States are beginning to
22 take to respond to this decision. I expect this activity
23 and these lawsuits to only increase.

24 It would be remarkable for the Congress that enacted
25 the Sherman Act to learn that its decision to prohibit

1 restraints of interstate and international trade would have
2 this sort of broad impact on the internal operations of
3 State governments. That is where help from this body can be
4 critical.

5 While there are many positive steps that Congress can
6 take both to protect consumers and to protect federalism,
7 one of the simplest would be to eliminate by statute the
8 judicially created active supervision requirement. This
9 requirement undermines the States' sovereign dignity by
10 forcing them to restructure their decisionmaking processes
11 to avoid Federal antitrust liability. An active supervision
12 fails to balance these harms to State sovereignty with any
13 benefit to consumers. Indeed, it may well be entirely
14 counterproductive in this regard.

15 As widely respect Federal Judge Frank Easterbrook
16 explained, the "active supervision" requirement encourages
17 States to adopt duplicative regulatory structures that are
18 often harmful to consumers and economic liberties.

19 Thank you for giving me the opportunity to testify
20 before the Subcommittee today. I look forward to answering
21 any questions you may have.

22 [The prepared statement of Mr. Tseytlin follows:]

1 Chairman Lee. Thank you, sir.

2 Professor Kleiner.

1 STATEMENT OF MORRIS M. KLEINER, PROFESSOR,
2 HUMPHREY SCHOOL OF PUBLIC AFFAIRS, UNIVERSITY OF
3 MINNESOTA, MINNEAPOLIS, MINNESOTA

4 Mr. Kleiner. Chairman and members of the Senate
5 Committee on the Judiciary Subcommittee on Antitrust,
6 Competition Policy and Consumer Rights, my name is Morris
7 Kleiner, and I testify before you today on my behalf and not
8 as a representative of the University of Minnesota or any
9 other organization with which I am affiliated.

10 Let me start with my conclusions because it establishes
11 a general, though not universal, case for certification over
12 licensure of occupations. Certification is usually better
13 than occupational licensing for three reasons:

14 First, certification has benefits over licensing for
15 workers. Certification does not necessarily fence out
16 workers by law or cause the type of problems in labor
17 markets that licensing does. Licensing may cause workers to
18 lose the opportunity to move into the middle class because
19 of the high barriers to entry. A reduction in licensing
20 requirements could reduce unemployment in the U.S.
21 Licensing further reduces the ability of workers to move
22 across State lines and engage in work that is most
23 beneficial to them and could contribute to economic growth.
24 Certification of practitioners does not have these negative
25 features.

1 Estimates developed by me and former Chair of the
2 Council of Economic Advisers Alan Krueger and Professor
3 Alexandre Mas, who was also at Princeton and former Chief
4 Economist at the Department of Labor and OMB showed the cost
5 of licensing nationally in terms of lost jobs to be about
6 0.5 to 1 percent in 2010.

7 Second, certification is better for consumers than
8 occupational licensing. Similar to licensing, certification
9 sends a signal to consumers about who has met the
10 Government's requirements to work in an occupation.
11 However, it does not reduce competition, and it does not
12 cause wages to increase in the same way that licensing does.
13 It gives consumers more choices for the kinds of services
14 they need. It gives consumers the right to choose the level
15 of quality they think is appropriate for them rather than
16 having members of the occupation through a licensing board
17 decide what is the level of skill that is necessary for
18 consumers. Also, all consumers do not demand the same level
19 of quality. If licensure improves quality simply by
20 restricting the entry into the profession, then some
21 consumers will be forced to pay for more quality than they
22 would want or need.

23 Third, certification is better for Government than
24 occupational licensing. It reduces the unnecessary and
25 often excessive lobbying by trade associations to convince

1 legislators to enact and Governors to implement licensing
2 regimes under the assumption of protecting the public.
3 Often lobbyists claim that licensing is needed to screen out
4 frauds and incompetents. There is little evidence to
5 support this claim. But licensing laws do offer lobbyists
6 and their trade associations a way to deliver less
7 competition and higher earnings.

8 There are important differences between licensing and
9 certification. Licensing restricts the practice of an
10 occupation. Certification restricts the use of the title
11 such as "certified financial analyst" or "certified interior
12 designer." Anyone can do financial analysis or interior
13 design, but only those who meet the Government's
14 requirements can call themselves "certified financial
15 analysts" or "certified interior designers." Unlike
16 licensing, certification provides consumers more options by
17 allowing individuals greater choice, with lesser influence
18 of guild-like protectors of the occupation.

19 The reality is that occupational licensing is likely to
20 reduce economic growth, contribute to unemployment, and
21 increase costs to consumers. The main groups that win under
22 licensing are those who are licensed through higher wages
23 and greater job opportunities and benefits for those
24 fortunate enough to become licensed. Certification has not
25 shown to have any of the problems of licensing such as

1 raising prices or restricting overall demand. It provides
2 consumers more choice at a lower price than occupational
3 licensing. I am, of course, delighted to answer questions
4 about occupational regulation and its consequences.

5 [The prepared statement of Mr. Kleiner follows:]

1 Chairman Lee. Thank you.

2 Okay. Senator Klobuchar and I are going to have to run
3 back and cast our last sequence of votes. These will be the
4 last ones. We will be back in a few minutes. If you are
5 okay to stay, we would appreciate that. Thank you.

6 Senator Klobuchar. Thank you.

7 [Recess 4:28 p.m. to 4:46 p.m.]

8 Chairman Lee. Thank you very much for your patience.
9 I understand, Mr. Tseytlin and Mr. Kleiner, you have got
10 flights to catch, and so I think in light of that, what we
11 ought to do is start with questions--Senator Klobuchar will
12 be back here in a moment, and we will go there. Hang on
13 just a second.

14 Senator Franken, I am told that you are running on a
15 short schedule. Do you want to begin?

16 Senator Franken. I am. I just wanted to ask a
17 question of Professor Kleiner. Is that okay? I can do
18 that? Okay, good. Thank you.

19 First of all, it is a pleasure to have you. It is good
20 to have someone from the University of Minnesota. And we
21 were talking before, and I just want to get this on the
22 record. Minnesota has dental therapists. It is kind of a
23 mid-level between a hygienist and a dentist, but they can do
24 things like extract teeth and fill cavities, and in this
25 country we first had dental therapists in Alaska as part of

1 a program in the Bureau of Indian Affairs or Indian Health
2 Services, and this is a designation of dental care or dental
3 professional that is in almost every other developed
4 country. In fact, they got their training in New Zealand.
5 And what it did was--there are just underserved populations
6 in dentistry, and I just wanted you to talk a little bit
7 about the benefit of having--where we have kids that are
8 underserved, why we have these professional organizations,
9 like the American Dental Association fighting against--tell
10 me the thing that you were saying about originally they
11 wanted--they fought hygienists from taking care of kids,
12 poor kids. Talk to me a little bit about this subject.

13 Mr. Kleiner. Well, thank you, Senator. The issue is
14 really battles between occupations when you have the
15 Government determining who can do the work as opposed to
16 consumers deciding who can do the work. A lot of times you
17 have fencing out of different occupations, and what
18 happened--and this was a case that the Federal Trade
19 Commission took on and was eventually settled--was that
20 hygienists were looking at kids who were getting free and
21 reduced lunches, kids in poverty, and the dental hygienists
22 wanted to look at them at various ages, generally around age
23 6 to 8. And the Dental Association in this case filed suit
24 that they were looking at these kids without a dentist's
25 supervision, and the Federal Trade Commission stepped in and

1 really got the Dental Association to agree to allow the
2 dental hygienists to be able to examine the kids' teeth.

3 But there are numerous other examples in terms of nurse
4 practitioners versus doctors, architects versus interior
5 designers. There are just lots of occupations where there
6 are battles that take place in the State legislature over
7 who gets to do the work. And a lot of times whoever has
8 greater political clout determines who gets to do the work.
9 And in the case of nurse practitioners versus doctors, a lot
10 of times they can do the work just as well in terms of, for
11 example, well-child visits and can save the Federal
12 Government lots of money under the Affordable Care Act.

13 So these are issues that have real significant economic
14 consequences, and it is an issue that the Federal Government
15 and State governments really ought to look into in a great
16 deal of detail.

17 Senator Franken. This is sort of the nub of this
18 hearing. Is it possible to establish a licensing regime
19 that takes account of the need for competition and public
20 health and safety while also facilitating increased access
21 to care, whether it be dental or other health care? How do
22 you strike this balance?

23 Mr. Kleiner. Well, I think a number of States,
24 including our State of Minnesota, which has sunrise and
25 sunset provisions, also the State of Colorado has an agency

1 called "DORA" where they look at these cases, they look at
2 these battles, and they look at new occupations that are
3 seeking to become licensed relative to certification in a
4 cost-benefit way to see what are the potential limits to
5 supply, who might provide these services, can individuals
6 who provide these services do an adequate job, especially at
7 the low end? You do not have to have--and this is an old
8 statement that when the American Medical Association said
9 that every doctor ought to be a Cadillac doctor, Professor
10 Friedman replied, "Well, you do not need a Cadillac.
11 Sometimes a Chevy is good enough." And in some cases, for
12 low-end medical services or other services that consumers
13 need, you do not need a Cadillac for every service that is
14 provided, and States and the Federal Government should
15 really look at this on a case-by-case basis, which a number
16 of States, including Minnesota and Colorado, have done.

17 Senator Franken. Thank you. In fact, if you are
18 driving your car to a high-crime area, you might want to
19 take the Chevy.

20 Chairman Lee. A moped is also sometimes in order.

21 Senator Franken. Well, that makes you more vulnerable.
22 This is what the Senate does. Thank you. I really wanted
23 to get that one done.

24 Let me ask another question as long--can I? Okay. Mr.
25 Johnson, thank you for being here as well, and thank you all

1 for your patience, and thank me for my patience.

2 I think it is clear that we have some unnecessary
3 occupational licensing and that can harm workers and
4 consumers in a number of ways. Can you explain why low-
5 income individuals and people of color, both as workers and
6 as consumers, may disproportionately be impacted by
7 occupational licensing laws?

8 Mr. Johnson. Sure. So I think there are a number of
9 aspects to that. One is that it is simply more difficult to
10 become licensed if you are somebody who is at the bottom or
11 first rungs of the income ladder. You do not have the time
12 necessarily to take classes to become--for instance, to
13 become a cosmetologist may take years of education in some
14 States, thousands of hours of education. If you are working
15 paycheck to paycheck trying to make a living for yourself,
16 how are you going to find that time? It also can be very
17 expensive to become licensed, to take those classes, to
18 afford the schooling. It is not free.

19 So these kinds of requirements impact people who are
20 just getting started, who are trying to make their way in
21 the world. So naturally that impacts people
22 disproportionately who both at the first rungs of the income
23 ladder and, by extension, communities that are
24 disproportionately less economically well off.

25 Senator Franken. So it can be a barrier for low-income

1 people and people who are just at that level where--and
2 sometimes there are licensure requirements that may not be
3 necessary and are just creating that barrier.

4 Mr. Johnson. Yes, absolutely. At the Institute for
5 Justice, we did a study of 102 low-income occupations.
6 These are occupations that are predominantly done by people
7 at the lower, first rungs of the economic income ladder, and
8 we found that of those occupations, only 15 were licensed in
9 40 States or more. So that means that all of the other 90-
10 some occupations were licensed in only a few States--you
11 know, a handful of the States. And what that tells you is
12 if you have an occupation that in one State is licensed but
13 in many other States is not, what that suggests is that it
14 does not really need to be licensed, or at the very least
15 that there is a very good chance that it does not need to be
16 license.

17 Senator Franken. Right. Thank you.

18 Thank you, Mr. Chairman.

19 Chairman Lee. Mr. Tseytlin, is it possible to believe
20 that the Supreme Court wrongly decided the FTC case against
21 North Carolina, the North Carolina Dental Board, while
22 opposing as a policy matter burdensome occupational
23 licensing regimes?

24 Mr. Tseytlin. Thank you, Senator. That is absolutely
25 possible. I would put myself in that camp. As I mentioned,

1 I am a strong believer in economic liberty. Back when I was
2 in law school, I interned for the Institute for Justice, and
3 I am quite proud of that. And I support a lot of the work
4 that they do, including on behalf of Mr. Main there, when it
5 is sued under the First Amendment, to protect economic
6 liberty. But just, you know, as I mentioned in my remarks,
7 the Federal antitrust laws were not designed to solve this
8 problem. This is a problem for the States and sometimes
9 when the First Amendment is implicated for the Federal
10 courts, but certainly not for the FTC or the antitrust laws.

11 Chairman Lee. Thank you.

12 Professor Kleiner, you spoke of certification as a
13 possible alternative to licensure. How might States
14 transition from licenses to certification? And will this
15 preserve the benefits to consumers?

16 Mr. Kleiner. Well, certainly, looking on a case-by-
17 case basis, there are occupations that--for example, the
18 State of Florida looked at interior designers, moving that
19 occupation in Florida from currently it is licensed in that
20 State to certification. Occupations like auctioneers have
21 moved from licensing to certification. And certainly there
22 are other occupations that States--like the State of
23 Michigan has moved a number of occupations from licensing to
24 certification. And this provides the stamp of approval that
25 someone has completed a certain level of education, but then

1 consumers can decide if they want to pay for that higher
2 quality or use that money elsewhere and get a lower-quality
3 interior designer or a lower-quality auctioneer.

4 Chairman Lee. I would like to extend a question to
5 both of you. What do you believe caused the significant
6 expansion of occupational licensing that we have seen in
7 recent decades?

8 Mr. Kleiner. In part, in terms of--I did a lot of the
9 work in terms of the growth of occupational licensing. In
10 the 1950s, part of the reason was the movement from
11 manufacturing to services, and I think you are seeing it in
12 a number of other countries as well. This is a way to
13 establish a web of rules which oftentimes unions were able
14 to provide in manufacturing, which licensing provides to
15 these occupations in terms of protections and setting up
16 various rules. In addition--so this is just a way to
17 protect the workers, in this case the licensed
18 practitioners, from the ravages of the marketplace.

19 Mr. Tseytlin. I am going to defer to the professor on
20 this one. This is a question that he studied. I am more on
21 the legal side, so I am just going to defer to the professor
22 on that one.

23 Chairman Lee. All right. And then, Professor Kleiner,
24 what has been the overall economic toll of excessive
25 professional licensing?

1 Mr. Kleiner. Well, I have estimated some of these
2 effects. It raises unemployment. There is also the
3 inefficiencies that are caused in terms of setting up rules
4 that only certain occupations can perform certain tasks or
5 certain jobs. That results in inefficiencies. Rather than
6 having individuals decide who is appropriate, you have
7 individuals in Government, often lobbied by the professional
8 associations, who determine who can do what.

9 Chairman Lee. In that respect, many poor and middle-
10 class Americans suffer because they are paying for it at
11 both ends. Many of them are paying for it in terms of
12 diminished earning capacity.

13 Mr. Kleiner. Right, and in terms of an issue that
14 Senator Klobuchar mentioned, earlier, in terms of income
15 inequality, typically individuals--and it was presented
16 earlier in testimony that the individuals who are licensed
17 tend to be higher income, so it is a bit of what I would
18 suggest might be a reverse Robin Hood, that individuals who
19 are not licensed are lower-income and they are paying more
20 to higher-income licensed practitioners.

21 Chairman Lee. Taking from the poor to give to the
22 rich. Thank you.

23 Senator Klobuchar?

24 Senator Klobuchar. Very good. Thank you. I had a
25 meeting out there, and I did want to mention that Professor

1 Kleiner is a professor at the Humphrey School in Minnesota,
2 and we thank him for that and his background from our State.
3 And I guess I would ask you, given that you have studied all
4 this--I was reading in one of the articles Minnesota only
5 has 11 of these boards and Iowa has 33. What is the
6 difference between these States as we look at what best
7 practices that some States have started developing these and
8 others have not?

9 Mr. Kleiner. Well, part of the reason is the industry
10 composition. So Iowa has lots of insurance companies, and
11 they tend to be much more licensed.

12 Senator Klobuchar. But yet we do the same kind of
13 insurance.

14 Mr. Kleiner. Right, but that is a much more important
15 industry in Iowa. So Nevada, having gambling, so there is a
16 lot more regulations and a lot more boards. So part of it
17 is just the industry composition, and certainly you have
18 different States where political establishments, different
19 groups have gotten together and organized and have tried to
20 get licensing for their occupation. So four States license
21 interior designers. We have a few States that license
22 upholsterers, locksmiths. So these are some of the
23 occupations that Mr. Johnson--

24 Senator Klobuchar. You know, is there a way, if you
25 are going to put up best practices--because, you know, I

1 agree with Dr. Furman's analysis here that there is just--it
2 is such a patchwork, there are too many of them. And is
3 there a way to put out best practices of things that have
4 tended to work or, you know, maybe what every single State
5 does license these and every single State--and then start
6 looking at the ones they do not all license. You can start
7 wondering if maybe some of these should not be licensed.

8 Mr. Kleiner. Right. I think that there are some
9 really good examples. I think the State of Colorado, which
10 has an organization called "DORA," which looks at each
11 occupation in a cost-benefit manner and decides which they
12 recommend to the State legislature whether an occupation
13 should be licensed. Or if an occupation can move from
14 licensing to certification where you have a certain level of
15 education and job training in order to become certified.
16 But, again, consumers can choose whether they want to
17 purchase the certified good or pay less and get an
18 uncertified service.

19 Senator Klobuchar. All right. Thank you very much.

20 Chairman Lee. Okay. Before we hear testimony from Mr.
21 Johnson and Mr. Main, before we let Mr. Kleiner and Mr.
22 Tseytlin go, I believe Senator Cornyn has got some
23 questions. We are going to turn to him, and then we will go
24 to the two of you. Thank you.

25 Senator Cornyn. Thank you, Mr. Chairman. And I want

1 to thank all the witnesses for being here to help us figure
2 this out.

3 There are a number of issues that I think are raised
4 that are of concern to me. One obviously is barriers to
5 entry in various occupations due to artificial requirements,
6 which make it impossible for people to qualify, get an
7 appropriate license, and earn a living. And I think that
8 that is an important topic, and there are some, frankly,
9 shocking examples of where State licensing boards have
10 basically tried to restrict people's access to the
11 appropriate license and then be able to get a job.

12 Mr. Tseytlin, the subject that concerns me most
13 immediately, though, has to do with the North Carolina State
14 Board of Dental Examiners issue and the State action
15 doctrine and whether or not self-regulation, lawyers and
16 doctors, for example, are barred--or, excuse me, there is
17 antitrust immunity because these are actions of the State.
18 Could you explain to us how we got here and how we could get
19 to the point where actually the Supreme Court says that you
20 have to have non-experts regulate lawyers or doctors when
21 they have no real background or training in those
22 professions?

23 Mr. Tseytlin. Thank you so much for that question,
24 Senator. As I mentioned in my written remarks, we kind of
25 got here as a matter of kind of unfortunate historical

1 accident. When the Sherman Act was enacted in 1890, the
2 Congress that enacted it did not believe that its
3 prohibition on restraints of interstate commerce had
4 anything to do with State regulations of their own
5 professions. It would not have even been in the mind of any
6 person who voted for the Sherman Act.

7 When the U.S. Supreme Court in the 1930s expanded the
8 notion of what the Commerce Clause meant, it also said that
9 we are going to assume that the Sherman Act is going to
10 expand at the same time and in the same way that the
11 evolving understanding of the Commerce Clause happened.

12 Now, what happens with that is once you expand the word
13 "commerce" to mean anything and then "restraint" to mean
14 what it means, anything a State does would be a violation of
15 this expanded notion of the Sherman Act because everything a
16 State does, you know, in regulating professions restrains
17 trade.

18 So what the Supreme Court did in the Parker decision in
19 1943 is they said, well, we cannot have that. So if a State
20 is acting, we are going to say that you are immune. And so
21 that seemed to be a pretty good compromise.

22 Now, unfortunately--and this is best exemplified by the
23 North Carolina Dental Board decision--the Supreme Court has
24 determined that they are not going to take the States at
25 their word. These boards that are at issue in the dental

1 case and are at issue in some of my testimony, they are
2 genuinely part of the State. We represent them in court.
3 They are our clients. And yet the Supreme Court has said
4 that, based on their competition and based on the level of
5 supervision that the States choose to do, for purposes of
6 Federal antitrust law only, they are going to be said to be
7 private actors, even though in every other way they are
8 clearly part of the State. And that is how we got to this
9 notion that in order for a State to organize itself how it
10 wants, it has to either change the composition of its
11 boards, have non-professionals, people who are not expert,
12 regulating or set up duplicative bureaucratic structures
13 with the sole purpose of avoiding antitrust liability, which
14 can be quite harsh, treble damages and the like.

15 So that is how we got here. It is kind of an
16 unfortunate historical accident that has then put the States
17 in a very tough position.

18 Senator Cornyn. Well, of course, as you know, there is
19 already litigation against States, including mine, the Texas
20 Medical Board, the Texas Department of Licensing and
21 Regulation, and while I think we all have sympathy to the
22 concept in general, it seems to me it has led to absurd
23 results when you talk about non-lawyers regulating lawyers,
24 non-doctors regulating doctors.

25 What do you think an appropriate response by Congress

1 would be? Since we wrote the antitrust laws, I guess we can
2 change them. But that is not an easy thing to do.

3 Mr. Tseytlin. That is right. I apologize for
4 interrupting. The main recommendation that I had presented
5 in my testimony is to get rid of the active supervision
6 requirement. That is the aspect of the Dental Board
7 decision that is most disruptive to the States' self-
8 government, because as a practical matter, active
9 professionals on regulatory boards are not going away. Even
10 States that kind of want to do it, just as a practical on-
11 the-ground matter, that is not going to happen. So this
12 active supervision requirement is really what is doing the
13 work, and that is the thing that is causing States
14 legislatures around the country to debate how do we change
15 our internal structures to not have this treble damages
16 liability under the Federal antitrust law.

17 For example, in the Teladocs case that is currently
18 being brought against Texas, if the same exact rule had been
19 made by career bureaucrats, there would have been no Federal
20 antitrust lawsuit, even if it had the exact same
21 anticompetitive effects, all the same effects, deleterious
22 effects on poor folks that have been discussed here. So
23 that seems to be kind of the wrong solution to a problem.

24 Senator Cornyn. Well, I know, Mr. Chairman, in Texas
25 the Texas Supreme Court that I served on appoints the

1 members of the Board of Law Examiners who actually conducts
2 the tests and sets the requirements for admission to the
3 bar. And the idea that this is somehow not State action is
4 just hard to understand. So maybe there is a way for us to
5 address this, but I appreciate the witnesses' testimony.
6 Thank you.

7 Chairman Lee. Thank you, Senator Cornyn.

8 We are going to go ahead and hear now from Mr. Johnson
9 and Mr. Main. Mr. Kleiner and Mr. Tseytlin, we thank you
10 for your testimony. If you want to stay, if you can stay,
11 we would welcome you staying. But if you have got planes to
12 catch, we understand.

13 Senator Klobuchar. And there is a blizzard in the
14 Midwest, so I know they are just eager to go back, both of
15 them.

16 Mr. Kleiner. Thank you very much.

17 Mr. Tseytlin. Thank you so much, Senator. I think we
18 will try to catch the flight.

19 Chairman Lee. Thank you. Your testimony has been very
20 helpful.

21 Mr. Johnson?

1 STATEMENT OF ROBERT E. JOHNSON, ELFIE GALLUN
2 FELLOW FOR FREEDOM AND THE CONSTITUTION, INSTITUTE
3 FOR JUSTICE, WASHINGTON, D.C.

4 Mr. Johnson. Good afternoon. Thank you for inviting
5 me to testify. My name of Robert Everett Johnson. I am
6 attorney at the Institute for Justice. IJ is a national
7 public interest law firm that for decades has been at the
8 forefront of the fight against occupational licensing. IJ
9 has represented dozens of entrepreneurs in fights against
10 arbitrary and unnecessary licensing laws, ranging from
11 florists in Louisiana to teeth whiteners in Connecticut and
12 tour guides right here in Washington, D.C.

13 In the course of these years, we have seen time and
14 again how industry insiders seek out occupational licensing
15 in order to shield themselves from competition. We have
16 seen the interior design lobby, the Association for Interior
17 Designers, mount a multi-State, years-long campaign to
18 impose lobbying on their own industry.

19 Independent State regulators have looked at the claims
20 of the interior design lobby and have determined repeatedly
21 that there are no health or safety concerns associated with
22 interior design that would justify licensing, as you might
23 expect. Yet, nonetheless, this campaign has been a moderate
24 success with several States imposing licensing on the
25 interior design industry and many more imposing titling

1 restrictions on who can call themselves an interior
2 designer.

3 We have also seen large tax preparation firms mount a
4 campaign to convince the IRS to impose licensing on tax
5 preparers. This licensing would benefit large firms like
6 H&R Block at the expense of mom-and-pop tax preparers who
7 simply cannot afford to comply with the cost of licensure.
8 The IRS actually promulgated such a rule in 2011 and,
9 perhaps unsurprisingly, the drafting of the rule was
10 overseen by none other than the former CEO of H&R Block.
11 That rule, fortunately, was overturned by the D.C. Circuit
12 in a case brought by IJ, but now H&R Block is lobbying
13 Congress to impose that same licensing rule through
14 legislation.

15 We have also seen dentists complain to their own
16 dentist licensing boards about unlicensed teeth whiteners
17 seeking to have those boards confer a monopoly on the
18 practice of teeth whitening, even though teeth whitening is
19 perfectly safe, you can buy the products over the counter,
20 and you can apply them in the safety of your own home.

21 So that is the problem. The question arises: What is
22 to be done? And, you know, I think North Carolina Dental
23 here is a very good start, and I would disagree with the
24 suggestion that there is something radical about the holding
25 of that case. It simply says that if you have the fox

1 guarding the henhouse, if you turn over the keys to the
2 regulatory machine to people who are members of the
3 regulated industry, then you have to have some sort of
4 supervision, or else those people will be treated as members
5 of the regulated industry for purposes of the antitrust
6 laws, which I think is a reasonable holding from the Supreme
7 Court.

8 So it is a start, but I think it is important to
9 realize it is not a panacea. The three examples that I just
10 mentioned--interior designers, tax preparers, and dentists--
11 of those three, only one would fall within the ambit of
12 North Carolina Dental; the other two fall outside it because
13 they either involve State legislatures, who are not subject
14 to antitrust law, or they involve the Federal Government,
15 which, again, is not subject to antitrust law.

16 So what then can be done to address those other aspects
17 of this problem? It is a complicated question. I cannot
18 get into, you know, an exhaustive survey of options now, but
19 I think two modest proposals bear thinking about.

20 One is judicial appointments. At the Institute for
21 Justice, we have been litigating these issues for years, and
22 there are developing circuit splits where you see some
23 judges are willing to take economic liberty seriously and
24 some are not. So, for instance, while the D.C. Circuit
25 upheld Bill Main's claim under the First Amendment in a case

1 involving tour guides, the Fifth Circuit came to the
2 opposite holding. So I think this court should look to
3 confirm judges who take economic liberty seriously.

4 The second is I think the Federal Government needs to--
5 you know, much of this is at the State level, but the
6 Federal Government nevertheless needs to look to clean its
7 own house. And you will hear from Bill Main in a second
8 about problems he ran into with tour guide licensing in the
9 National Park Service, and I think that is one example. But
10 it is not the only example of licenses that are imposed by
11 the Federal Government. So it certainly would be a
12 worthwhile thing for the Federal Government to look to see--
13 for Congress to look to see what licenses are imposed by the
14 Federal Government and what can be done about that.

15 Thank you again for the opportunity to testify.

16 [The prepared statement of Mr. Johnson follows:]

1 Chairman Lee. Thank you.

2 Mr. Main.

1 STATEMENT OF WILLIAM MAIN, CO-OWNER, SEGS IN THE
2 CITY, BALTIMORE, MARYLAND

3 Mr. Main. Good afternoon, Chairman Lee, and good
4 afternoon, Senator Cornyn. At the outset, please allow me
5 to thank you for the opportunity to come here and address
6 you.

7 I do not come here as an expert economist nor as a
8 learned attorney. I come here as one of the myriad of small
9 business entrepreneurs that has suffered at the hands of
10 occupational licensing.

11 In 2004, my good wife, Tonia, the young lady behind me
12 with the red coat on, and myself established a business
13 known as Segs in the City in the city of Annapolis,
14 Maryland, with a view to offering Segway tours around the
15 old historic city. Business blossomed, and we found the
16 need and the encouragement to expand our business to
17 Washington, D.C.; Baltimore, Maryland; and to the Civil War
18 battlefield at Gettysburg.

19 Not long after, coming to Washington, we found there
20 was such a thing as occupational licensing. Previously, in
21 Annapolis and, indeed, in Baltimore, there is no such thing.
22 But here in Washington, we found occupational licensing, and
23 this required an individual--not a business but an
24 individual--who sought to be a tour guide must be licensed
25 by the District of Columbia.

1 There were onerous conditions placed upon receiving
2 that license. First of all, one had to pay a fee--\$200.
3 One had to sit an examination of some 100 multiple choice
4 questions. One had to provide a criminal background check.
5 One had to be over the age of 18 years of age. One had to
6 be fluent in the language of English. And one also had to--
7 I mentioned the criminal record, yes.

8 So these were the onerous conditions placed upon a tour
9 guide. Now, tour guiding is not a lofty profession. It
10 does not match up to being a lawyer or a Senator or a
11 doctor. It is an employment opportunity for those who are
12 seeking part-time opportunity. It is an employment
13 opportunity for students who are on vacation looking for
14 vacation employment. It is an opportunity for graduate
15 students who have not yet found their chosen career. But
16 yet the city or the District of Columbia sought to license
17 these people, imposing these regulations on them.

18 Looking a little further, we also found that you had to
19 be a resident of the District of Columbia for at least 3
20 years before you would be given a license, and you had to be
21 a United States citizen.

22 Now, I guess you can hear from the accent you are
23 hearing here, I did not meet many of those requirements. At
24 the time I was not a citizen. I did not live in the
25 District of Columbia. I was over 18. I could have answered

1 the questions, possibly. But these impositions were placed
2 not upon me, because I was the business manager, I was not
3 doing the touring. These young kids I employed were doing
4 the touring.

5 The upshot of the license was that without a license
6 you were not allow to speak in the District of Columbia as a
7 tour guide. This brought on our case against the District
8 of Columbia, not for monopolistic trade practice but for, of
9 course, the infringement of our First Amendment right. And
10 the Supreme--not the Supreme Court, sorry, the Court of
11 Appeals here in the District upheld our case, struck down
12 the entire law applicable to tour guide licenses.

13 Our story is not over there. We go to Gettysburg. We
14 find that the Civil War battleground, of course, is under
15 the auspices of the National Park Service, and they, too,
16 have very onerous licensing provisions, far more onerous
17 than we found here in the District of Columbia. Not only
18 did you have to sit a 100-plus multiple choice question on
19 Civil War history, you also had to be over the age of 18.
20 You had to be able to speak English. You also had to wear
21 the National Park's guide uniform. You had to originate
22 your tours and finish your tours outside the park or start
23 them from their particular location. You had to register
24 yourself as a guide, and you were allocated your customers
25 based on requests to the National Park Service.

1 We tried practicing in the Civil War battlefield for a
2 year, and we were then approached by both licensed guides,
3 who are a monopoly guild in Gettysburg, and by the National
4 Park Police Service and were expressly told to desist from
5 operating these tours or you will be charged with some
6 criminal offense. We established that without a license you
7 are not permitted to speak about the Civil War in the Civil
8 War battlefield. So we had both Washington and we had
9 Gettysburg telling us you cannot speak unless we license you
10 to do so.

11 Now, this is overreaching, to say the least, in terms
12 of occupational licensing, overreaching to quite an extent.
13 However, we had one law struck down by the Court of Appeal
14 here in Washington, and now the District of Columbia has
15 revised its licensing laws. We still require a license, but
16 we only have to be over 18 now; we only have to attest that
17 we are not criminals; and we only have to speak English.
18 This law has been watered down to such an extent now that it
19 is meaningless. There is no need for a guide's occupational
20 license here in the District of Columbia because we do that.
21 We would not employ a person under 18. We would not employ
22 a guide that cannot speak English. And we would not employ
23 a guide who had any criminal record. So we do not have to
24 have the State regulate us. We are doing that by ourselves.

25 We have not yet tried our luck at Gettysburg. We look

1 to this Committee to assist us at Gettysburg, because there
2 should be no need for an occupational license there either,
3 because what this license is doing is protecting the guild
4 of guides. It is preventing us from speaking and earning
5 our living.

6 Now, the absurdity of both cases is that I can quite
7 legally practice as a guide without a license in Washington
8 and without a license in Gettysburg if I make a pre-recorded
9 message. I can do it all, as long as I have a message.
10 They do not care what I say on this message. I can come up
11 here onto Capitol Hill, point to the Capitol building, and
12 say, "There is the White House," and there is no breaking of
13 the law, there is no crime. But if I come up here and I
14 point at the Capitol and I say in real-time speaking, "There
15 is the Capitol," I have broken the law. That is an
16 absurdity.

17 Why should we have occupational licensing when dealing
18 with tour guides? One can possibly understand the need for
19 airline pilots to be licensed in one way or another, doctors
20 to be licensed in one way or another, even our good learned
21 friends to be licensed in one way or another, because they
22 do have an impact on the public. They do jeopardize safety
23 if they are not. They do create a problem if they give bad
24 advice or perform a bad operation. But what does a tour
25 guide do? A tour guide makes you laugh, I hope. A tour

1 guide makes you relax. A tour guide gives you an experience
2 of the city that you would not otherwise have.

3 Thank you.

4 [The prepared statement of Mr. Main follows:]

1 Chairman Lee. Thank you very much. I really
2 appreciate the testimony from both of you. And, Mr. Main,
3 thank you so much for sharing your personal story about
4 that. That really does help us put all of this in
5 perspective.

6 Let me ask you, Mr. Main, in the absence of these
7 professional licensing requirements that you have described,
8 would it be safe to say that you would be able to expand
9 your business, you would be able to hire more employees?

10 Mr. Main. Oh, yes, because we would go back to
11 Gettysburg. We could go into the national park. We could
12 go to--well, let me say one other thing. There are
13 relatively few cities in the Nation that have these
14 licensing laws. One goes to Philadelphia, you will find
15 them, New York has them, there is none in Los Angeles, there
16 is none in San Francisco, there is none in Denver, there is
17 none in--so there are lots of cities, jurisdictions that do
18 not have such licensing laws. For example, right here in
19 the National Mall, there is no licensing law by the National
20 Park for the touring around the monuments on the National
21 Mall. There is no license requirement here by Congress or
22 the Capitol Police for us to have a license to run around
23 the Capitol building. I am sure you have all seen us doing
24 that.

25 Chairman Lee. And yet pandemonium has not ensued.

1 Mr. Main. And pandemonium has not yet happened, no.
2 So, yes, business would expand. And if I may elaborate a
3 little further, we are one of the larger operators in the
4 country, but in any city where there is a Segway dealer,
5 they, too, do tours. And they may only have six Segways.
6 They may only have the business operator himself as the
7 guide. But if he is operating in a city that has a license
8 requirement, he needs to get a license.

9 Chairman Lee. And typically with tour guides, the
10 difference can be whether you speak or not.

11 Mr. Main. Yes.

12 Chairman Lee. If you just drive and you are mute,
13 then--

14 Mr. Main. If you are mute, you are not breaking the
15 law. If you have a prerecorded message, you are not
16 breaking the law. When you open your mouth, you are.

17 Chairman Lee. Yes. Well, I routinely give tours to my
18 constituents from Utah. I hope I am not breaking any laws
19 without knowing it. In a sense I am doing it for a living
20 because they pay me to represent them.

21 Mr. Main. Maybe you will be.

22 Chairman Lee. I better be careful with that.

23 Now, do you believe that there are other tour guide
24 businesses that are using the licensing process to keep out
25 competition from businesses like yours?

1 Mr. Main. Well, I think Gettysburg is a very good
2 example of that. The guides up there are regimented by the
3 National Park Service, and, indeed, on the occasions when we
4 were there, we were approached several times by guides to
5 say, "You know, you are not supposed to do this. We think
6 you should leave," and various intimidatory remarks to stop
7 us from doing what we were doing.

8 Here in Washington, we were approached also by--there
9 is a tour guide here in Washington. We were approached by
10 them, too, to say, "You guys should be licensed to do this."

11 Now, there is an economic side to their argument
12 because a tour guide, licensed tour guide here in
13 Washington, ones that, say, for example, get on a tour bus
14 when a tour bus arrives that pick up a professional guide
15 and take them around the city, they get on the order of \$40
16 an hour. Similarly, at Gettysburg, you request a guide, a
17 guide takes your car and is going to drive you around the
18 park, and they are going to charge you \$40 an hour.

19 Now, we do not charge anything like that for the
20 guide's services. We do charge for the Segway, but that is
21 another issue.

22 Chairman Lee. Sure, sure, and that is not the part
23 that is being licensed.

24 Mr. Main. That is right. The Segway does not have to
25 be licensed.

1 Chairman Lee. But as a result of this, those who do
2 choose to hire a tour guide when they go to Gettysburg pay
3 more than they would otherwise have to pay.

4 Mr. Main. Yes.

5 Chairman Lee. As a result of this.

6 Mr. Main. Yes, they would.

7 Chairman Lee. Because they are not free to negotiate--

8 Mr. Main. If there was free competition, then you
9 would get tour guides a lot cheaper than \$40 an hour.

10 Chairman Lee. Right, and so getting back to the
11 example that we used earlier, if everyone required to go to
12 a doctor could gain access only to a Cadillac-equivalent
13 doctor, then necessarily doctors are going to be harder to
14 come by and, therefore, more expensive. The same thing
15 would apply with respect to tour guides.

16 Mr. Main. That could well do, yes.

17 Chairman Lee. Only a botched tour guide visit is not
18 necessarily going to land you in the emergency room or with
19 a life-threatening condition.

20 Mr. Main. It is not. And there is no real need for
21 regulation of this business. Our biggest regulator is the
22 Internet. I guess you folks have not got onto Internet yet
23 or onto Trip Advisor. This is where you find out how good
24 you are. You get those comments on Trip Advisor. You
25 either live or you die. If you go on a vacation, everybody

1 now looks at Trip Advisor. "Oh, what is that hotel like?"

2 "What is that Segway tour like?" If you have not got five-
3 star ratings, you are going to be out of business in a very
4 short space of time. Be careful, Senators. Do not get
5 yourselves on Trip Advisor.

6 Chairman Lee. An important safety tip. Thank you.

7 Senator Klobuchar?

8 Senator Klobuchar. All right. Well, thank you very
9 much. I want to go on a tour with you, Mr. Main.

10 Mr. Main. By all means.

11 Senator Klobuchar. And, really, this has been very
12 enlightening, this hearing, in terms of the reports that
13 have been out there, and what I am trying to figure out, it
14 turns out our State actually does not have a lot of these.
15 It is interesting because the economy is really good in our
16 State. The unemployment rate is down to 3.8 percent. We
17 have like 11 of these boards. And then some of our
18 neighboring States have a lot of them. And just what do you
19 think it is--and our culture, actually, it has been kind of
20 a purple State, I guess, politically, but it tends to be a
21 little more Democratic right now. So I am trying to figure
22 out what is it about certain States that creates more of
23 these, and you have it from your own business. What is it?
24 Is it a political issue, or is it just a group gets more
25 entrenched and it really does not matter if it is Democrats

1 or Republicans in charge? What is going on here?

2 Mr. Main. Well, in the one case, if you are talking
3 national parks, of course, that is the Federal Government
4 that are making the rules.

5 Senator Klobuchar. Right. But it is not all that, but
6 exactly. But yet you have some Federal Government property
7 where you are allowed to do this.

8 Mr. Main. Well, yes, there is a dichotomy or--there
9 are certain--and sticking to national parks, there are lots
10 of parks where there is no requirement for a license, and
11 there are relatively few where there is a requirement.

12 Senator Klobuchar. So it is a park-by-park--I remember
13 going to Gettysburg, and we just used the guide in the car
14 with the audio thing. But we have liked to do that, but I
15 remember thinking it was expensive. So it is a park-by-park
16 thing with the National Parks.

17 Mr. Main. Well, I cannot speak fully about what the
18 National Park regulations are, but I know the National Mall,
19 there is no license. I believe there is none at Antietam.
20 I think as far as the military parks are concerned, it is
21 only Gettysburg.

22 I know, for example, we look at Arlington Cemetery, we
23 know we are not allowed to have our Segways there at all.
24 It is not a licensing issue there. It is a protection of
25 Government property--

1 Senator Klobuchar. Right.

2 Mr. Main. --which they are at liberty to do.

3 Senator Klobuchar. So you would have a reason that you
4 might vary from park to park.

5 Mr. Main. Yes.

6 Senator Klobuchar. Okay. Yes, I am just trying to--I
7 think one of the things that would be interesting is to look
8 at what just kind of State by State what everyone is
9 licensing, you know, kind of a general matter, and then what
10 are these oddities that certain States are--

11 Mr. Main. I think Gettysburg grew out of history,
12 because what happened after the Civil War, lots of citizens
13 wanted to go and have a look at where the greatest battle
14 took place. And a lot of charlatans got out there and said,
15 "Oh, well, we are a tour guide. I will show you."

16 Senator Klobuchar. Right, way, way back. Yes.

17 Mr. Main. And, therefore, gave the historical
18 precedent for the possibility in Gettysburg's case to impose
19 certain restrictions. I think the time for that is long
20 gone.

21 Senator Klobuchar. Right. Thank you.

22 Mr. Johnson, the Institute for Justice has litigated a
23 number of cases challenging the occupational licensing
24 requirements, and the cases are mostly focused on statutes
25 and based on constitutional grounds. Is that correct?

1 Mr. Johnson. The cases are entirely based on
2 constitutional grounds. We challenge licensing laws under
3 the 14th Amendment to the U.S. Constitution, the First
4 Amendment, and we also challenge licensing laws in State
5 courts under State constitutions. The challenges are both
6 to board actions and also to statutes. So a lot of the
7 cases that we run into really are licensing boards that are
8 trying to extend their jurisdiction. So, for instance,
9 teeth whitening is an instance of the dentistry board trying
10 to extend its jurisdiction to include teeth whitening. We
11 see veterinary boards trying to extend their jurisdiction to
12 include animal massage.

13 Senator Klobuchar. Oh, my. There is an occupation for
14 you if this does not work out--animal massage.

15 So have you been successful in these cases?

16 Mr. Johnson. Well, it is a mix, and I think that
17 really speaks to what I was saying about the importance of
18 judges in this, because what we see is that there are some
19 judges who are willing to engage with claims of economic
20 liberty and to ask seriously, you know, has the Government
21 put forth a good reason for seeking to impose this licensure
22 requirement? And then there are other judges who are not
23 willing to ask that. And so you see in the same
24 occupations, like the sale of caskets, one court will say
25 that, you know, a casket is literally just a box and that

1 excluding people from selling caskets, unless they are a
2 licensed funeral director, is just a transparent giveaway to
3 the funeral director lobby. Other courts will simply refuse
4 to draw that conclusion. We see that with tour guides as
5 well. There is a long history of some judges--there are
6 judges who just think that is not their job.

7 Senator Klobuchar. Okay. Two quick questions to
8 follow up. One, have you considered using antitrust laws at
9 all for these cases?

10 Mr. Johnson. You know, I think that the antitrust law
11 is an--this is an important development that we saw with the
12 North Carolina Dental case.

13 Senator Klobuchar. That was going to be my second
14 question, if that affects the ability to challenge--
15 plaintiffs to challenge the decisions.

16 Mr. Johnson. It does, and it is an important
17 development, and I do not want to denigrate it. But I think
18 that the decision is limited in its scope, and it has
19 important limits on it simply because it cannot be used to
20 challenge anything other than a board. And it is very
21 possible, in fact, likely, that within 5 or 10 years most
22 States will have figure out ways to adjust the structure of
23 their regulatory agencies so that they are no longer exposed
24 under the North Carolina Dental framework.

25 Senator Klobuchar. And antitrust law, have you--

1 Mr. Johnson. Yeah, I guess that is what I am getting
2 towards here, is that from our perspective, the antitrust
3 law is just not the right tool for us to attack this issue.
4 It is too easily evaded through changing the composition of
5 your board, through other measures that do not really get to
6 the root of the problem, which is why we focused on the
7 constitutional aspect of this.

8 Senator Klobuchar. Right. Okay. Thank you very much.

9 Chairman Lee. Senator Cornyn.

10 Senator Cornyn. So, Mr. Main, it sounds like you have
11 been subjected to a lot of abuse at the hand of the District
12 of Columbia Government, and I cannot imagine any rational
13 person would think that the sort of requirements that have
14 been imposed on your business make any kind of sense other
15 than from the standpoint of maintaining the monopoly.

16 But here is my bigger question, and maybe this is for
17 Mr. Johnson. I have a lot of respect for the Institute for
18 Justice, and you all do a lot of really wonderful work, and
19 typically I find myself very much aligned with what you are
20 trying to do. But I do have a problem trying to figure out
21 from a federalism standpoint. I cannot believe the
22 Institute for Justice or somebody who like me considers
23 themselves a believer in federalism would say that it is a
24 good solution to have the Federal Government regulate these
25 State boards by application of the Federal antitrust laws.

1 So I wonder if you could speak to that.

2 Mr. Johnson. So I want to be clear. IJ, we do not
3 litigate Federal antitrust cases for exactly the reasons
4 that I just suggested, and we are not the Institute for
5 Antitrust Law. So I am not here to necessarily defend the
6 application of Federal antitrust law in these cases. But I
7 do think, you know--two points. One is, you know, the
8 decision in North Carolina Dental, while it did expose
9 boards to new forms of liability, ultimately was not a
10 radical extension of existing antitrust law. It simply held
11 that when you give the fox the keys to the henhouse, to so
12 speak, and you allow private market participants to engage
13 in regulating their peers, they are subject to the antitrust
14 laws as private market participants, unless they are subject
15 to supervision by the Government. And, you know, I do not
16 know that IJ as an institution has a position on that one
17 way or the other. I simply meant to suggest that to me I do
18 not think that is a radical extension of the antitrust laws.

19 Senator Cornyn. Well, you can see how it would be hard
20 for the Governor of Texas, for example, to get people to
21 agree to serve on the medical board if they know they are
22 going to find themselves a defendant in an antitrust
23 lawsuit, not by the Institute for Justice but by someone
24 else. And I am wondering whether there is not some sort of
25 line that could be drawn, some rule of reason here, when it

1 comes to operations like tour guides, that it is hard for me
2 to imagine how even if you are a bad tour guide you really
3 can hurt people, like a bad lawyer could or a bad doctor
4 could literally cost you your life or your liberty. And it
5 is hard for me to imagine how a lay member on a board would
6 have the background and training to be able to do the sort
7 of self-policing or regulation. I get the concern that you
8 have, and I think it is a legitimate concern, but it seems
9 to me it goes too far to say that you have to get a layman
10 on a board to regulate lawyers or doctors when they are not
11 trained in the law and they are not trained in medicine.

12 So I am wondering, particularly from the standpoint of
13 protecting the public from harm, whether there is some line
14 there that we ought to draw where we make a judgment that,
15 well, where there really is a risk of harm to the public, to
16 their life and liberty, in those instances that a different
17 rule or some modification of that should apply.

18 Mr. Johnson. You know, I think the important thing to
19 say there is that the decision in North Carolina Dental does
20 not mean that doctors cannot be on medical boards. It
21 simply means that if you are going to have doctors on
22 medical boards, you have to have somebody watching the
23 watchmen.

24 Senator Cornyn. Who would that be? Would it be--well,
25 let us make this lawyers. Would you say the Texas Supreme

1 Court supervising the actions of the State Board of Law
2 Examiners, would that be an adequate protection?

3 Mr. Johnson. That, in fact, is how the State bars have
4 mostly evolved, that they are now supervised by State
5 Supreme Courts. Whether that would qualify as sufficiently
6 active supervision, I do not know.

7 You know, what we have proposed at the Institute for
8 Justice is that States should put the onus to supervise in
9 most States appropriately within the Attorney General's
10 office. We think that that is something that--the Attorney
11 General's office has had the experience--

12 Senator Cornyn. Within the State Attorney General's
13 offices?

14 Mr. Johnson. Yes.

15 Senator Cornyn. Okay.

16 Mr. Johnson. That they have the experience, the know-
17 how to do, it is in their--they have people who are capable
18 of doing it. And let me just emphasize here, we are not
19 talking about questions of medical practice, you know, What
20 should the standard of care be for medicine? Obviously,
21 that is something that non-doctors are going to have a very
22 difficult time weighing in on. But there are things that
23 even as a lay person, not a doctor, you can see there it
24 seems unreasonable. And I think a good example of that
25 actually is the Teladocs decision in Texas, one of the cases

1 that has been brought since the decision in North Carolina.
2 And the issue there is that you have companies that provide
3 medical advice by telephone, and the Texas State Board of
4 Medical Practice has said that that is illegal because you
5 cannot be providing medical care in Texas without first
6 examining someone in person.

7 But, in fact, there are lots of great studies out there
8 that have looked at this issue very thoroughly and have
9 found that there are all kinds of benefits from giving
10 medical care over the telephone. You have people who are in
11 remote locations who might otherwise not see a doctor. You
12 have people who just simply would not be able to afford to
13 go to a doctor, would not want to go to a doctor, who can
14 call somebody up, they can ask a question, and if it is
15 something that cannot be answered over the telephone, well,
16 then, they can be referred to see a doctor in person. But--

17 Senator Cornyn. Well, I may or may not agree that the
18 Texas Medical Board got that one right, but I have been
19 Attorney General in Texas, and I cannot imagine that--I can
20 sort of see saying, well, the Attorney General's office has
21 a responsibility to supervise the State bar generally or to
22 keep an eye on them to make sure they do not engage in
23 anticompetitive, arbitrary rulemaking that exclude people
24 from the profession. Maybe I might have something to say
25 about that. But when it comes to the practice of medicine,

1 I am not sure my being a lawyer or being Attorney General
2 would equip me to make those sorts of decisions--maybe in
3 some cases, but certainly not when it comes to medical
4 practice generally.

5 Let me just ask you, in conclusion, Mr. Johnson, as you
6 know, Justice Alito wrote a dissent in the North Carolina
7 Dental Board, and I have a little quote here that I want to
8 ask you whether you agree with him or disagree with him. He
9 said, "Staffing the State Board of Dental Examiners with
10 certified public accountants would certainly lessen the risk
11 of actions that place the well-being of dentists over those
12 of the public, but this would also compromise the State's
13 interest in sensibly regulating a technical profession in
14 which lay people have little expertise."

15 Do you agree with that statement? Or do you disagree?
16 And if you disagree with it, will you tell me why?

17 Mr. Johnson. I think it presents a false choice. I
18 think what people are saying is that obviously you need to
19 look to these professions for input about--for their
20 guidance on technical questions where only they have
21 expertise. But somebody who does not stand to benefit
22 economically from regulation has to be there as well in
23 order to make sure that regulation is not being imposed to
24 transparently benefit economic insiders. You know, in many
25 cases, that is the role of--it could be the role of the

1 Attorney General's office; it could be the role of judges.
2 But there are many cases where, if you look closely, you do
3 not have to be a doctor to see--like in the case of
4 telemedicine, that this is something that is being imposed
5 not because it protects patients but because it protects
6 patients--excuse me, but because it protects doctors and it
7 protects their bottom line. And, you know, are there cases
8 where it is simply not possible for a lay person to exercise
9 that kind of supervision? Yes. But there also are many
10 cases where it is possible to exercise that kind of
11 supervision, and currently we are not doing that to a great
12 extent, and we should be. I think that is what I would say,
13 and I think that is what the decision stands for.

14 Senator Cornyn. Thank you both.

15 Chairman Lee. I want to thank both of you. We saved
16 the best for last in many respects. You have been very
17 patient. You have also been really informative. Thank you
18 very much for being here. Mr. Main, thanks for sharing your
19 personal stories. Mr. Johnson, thank you for bringing your
20 expertise to this, which is much appreciated. And I notice
21 that you and Mr. Tseytlin have basically the same resume. I
22 had to be convinced by my staff that you are, in fact, two
23 distinct beings. But you both bring different perspectives
24 to this that have been very helpful.

25 Thank you very much. We will be adjourned.

1 Mr. Main. Thank you, Chairman Lee.

2 [Whereupon, at 5:46 p.m., the Subcommittee was

3 adjourned.]

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