WRITTEN TESTIMONY OF

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BEFORE THE U.S. SENATE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMPETITION POLICY, ANTITRUST,

AND CONSUMER RIGHTS

FOR A HEARING ENTITLED

"DEREGULATION AND COMPETITION: REDUCING REGULATORY BURDENS TO UNLOCK INNOVATION AND SPUR NEW ENTRY"

JUNE 24, 2025

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I. INTRODUCTION AND EXECUTIVE SUMMARY

Chairman Lee, Ranking Member Booker, Members of the Subcommittee, thank you for the invitation to appear before you today.[1]

A. Witness Background

My name is Daniel Francis. I am a law professor at NYU, where I teach and write about competition and regulation. Most of my current academic work deals with antitrust law and the microeconomics of competition, including efforts to identify ways in which our antitrust laws can better protect consumers and workers from economic harms.[2]

I am also a former federal antitrust enforcer. From May 2018 to January 2021, during the first Trump Administration, I served in the antitrust arm of the FTC successively as Senior Counsel, Associate Director for Digital Markets, and Deputy Director. Before joining the FTC, I spent roughly ten years in the private practice of antitrust law. I hold a law degree from Trinity College, University of Cambridge; a Master of Laws degree from Harvard Law School; and a J.S.D. research doctorate from NYU School of Law. I have testified about competition and regulation on two previous occasions before this Subcommittee.[3]

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[1] I do not work for or represent any private clients, and I have not done so since leaving private practice to join the FTC in May 2018. My wife is an antitrust attorney in private practice. My research is funded only by NYU School of Law.

[2] *See*, *e.g.*, Daniel Francis, *Post-Profit Antitrust*, 135 Yale L.J. __ (forthcoming 2025–26) (proposing a new theoretical and doctrinal framework that allows plaintiffs to challenge and deter non-profit-maximizing antitrust violations); Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917 (2024) (proposing a new framework for the analysis of harmful conditional dealing as a form of monopolization); Daniel Francis, *Antitrust Without Competition*, 74 Duke L.J. 353 (2024) (proposing elimination of the opaque "harm to competition" formulation in antitrust discourse); Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J 779 (2022) (proposing a general theory of the monopolization offense); Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, 84 Antitrust L.J. 883 (2022) (proposing a balanced approach to platform antitrust after *AmEx*); Daniel Francis, *Revisiting the Merger Guidelines: Protecting an Enforcement Asset*, Comp. Pol'y Intl. (Nov. 2022) (examining the role of the merger guidelines as an enforcement tool).

[3] My previous written testimony is available on SSRN. *See* Daniel Francis, Testimony Before the U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on *Reining in Dominant Digital Platforms: Restoring Competition to Digital Markets* (March 2023) (link); Daniel Francis, Testimony Before the U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on *Breaking the News: Journalism, Competition, and the Effects of Market Power on a Free Press* (February 2022) (link); *see also* Daniel Francis, Submission to Senate Judiciary Committee re Journalism Competition and Preservation Act (June 2023) (link).

In addition to my work on antitrust, I have a long-standing research interest in the interaction between economic regulation and constitutional federalism. In addition to my law-review scholarship, the subject of my doctoral dissertation was the role of the Commerce Clause—and specifically its "dormant" or negative dimension—as a constraint on protectionist and discriminatory state and local regulation.[4] Thus the subject matter of today's hearing sits at the intersection of my two principal scholarly interests.

B. Executive Summary of Written Testimony

I strongly support the Subcommittee's focus on anticompetitive regulation. When the power of the state is harnessed to protect incumbents from competition, monopolies and oligopolies flourish—while consumers and workers suffer. All too often, the soothing rhetoric of public safety, commercial fairness, national security, and consumer protection conceals harmful protectionism that serves special interests at the expense of the broader population.

In this Testimony I offer three suggestions to the Subcommittee.

First, I propose a definition of the problem (Section II.A.). It is easy to misuse the rhetoric of "competitiveness" in ways that have nothing to do with the best interests of our citizens. **The Subcommittee should treat regulations as "anticompetitive" if they (1) cause overall economic harm to the set of *all* affected consumers and workers (2) by reducing the ability or incentive of businesses to supply valuable products and services.** In particular, the Subcommittee should distinguish carefully between the interests of the public as a whole and the interests of specific groups of businesses. Behind almost every anticompetitive regulation is a

[4] For my work on regulation and federalism, *see* Daniel Francis, *Perfecting the Union: The Dormant Commerce Clause and the Internal Market Law of the United States* (unpublished doctoral dissertation) (2020); Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 Denv. L. Rev. 255 (2017); Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 Ariz. St. L.J. 1023 (2017); *see also* Daniel Francis, *From Utopia to Apology: The European Union and the Challenge of Liberal Supranationalism*, 39 Cardozo L. Rev. 849 (2018) (analyzing federalism in the European Union).

special-interest fan club, often loudly claiming that the regulation serves the public. I also emphasize Congress's central constitutional role in opposing such measures when they threaten interstate commerce, even—perhaps especially—when they are created by states (Section II.B.).

Second, I describe a variety of common types of anticompetitive regulations that can often be observed throughout our economy (Section II.C.). I highlight that it is possible to cause overall harm by, among other things, creating or maintaining: (1) **bans and output restrictions**; (2) **entry barriers**; (3) **restrictions on beneficial practices**; (4) **deterrents to investment and innovation**; (5) **opportunities for private anticompetitive conduct**; and (6) **state-owned, subsidized, or supported competitors**.

Third, I identify specific regulations that raise serious competitive concerns and are strong candidates for Congressional intervention (Section III). I focus on regulations that interfere with interstate commerce and harm the national interest, and that have generally been subject to decades of mainstream bipartisan criticism. I also make concrete recommendations for reform.

In brief, I highlight the following regulations:

Certificate of Need laws (Section III.A.). "Certificate of Need" laws restrict entry or expansion in hospital and healthcare markets without government permission, inviting manipulation and abuse by incumbents and harming patients. The federal Congress pushed these laws on the states in the 1970s, reflecting contemporary policy concerns about the effects of a cost-plus reimbursement model on healthcare spending. Cost-plus reimbursement subsequently declined, the policy case for the law crumbled, and Congress repealed the federal mandate in the 1980s. But the CON laws across the country—supported by in-state special interests—largely survived. Today, they help incumbent monopolists and oligopolists keep out interstate competition

in our most important markets, harming patients and healthcare workers. **Congress should fix the problem that it helped create, by enacting federal incentives for state repeal of CON laws.**

Certificate of Public Advantage laws (Section III.B.). Certificate of Public Advantage laws, which confer immunity on harmful hospital mergers, have emerged to exploit a perceived design feature of the federal antitrust laws. Specifically, the Supreme Court has inferred (without much real evidence) that Congress intended to leave a gap in the federal antitrust system that allows state governments to bless private anticompetitive mergers and other harmful conduct—*for any reason or none, and to the complete exclusion of the federal enforcers and courts*—so long as they clearly articulate their intention to sacrifice competition and actively supervise the conduct. This has led, among other things, to a practice of granting "Certificates of Public Advantage" to bless obviously anticompetitive hospital mergers and acquisitions, often accompanied by troubling signs of pressure on state government. The resulting deals commonly create hospital monopolies, result in higher prices for care, and impair quality—and they leave the federal antitrust agencies and courts powerless to intervene. **Congress should clarify that the federal antitrust laws do not empower state governments to immunize harmful private mergers. At a minimum, mergers between private competitors (and arguably all private conduct) should always be subject to federal antitrust review.**

The Robinson-Patman Act (Section III.C.). The Robinson-Patman Act is a very clear example of special-interest legislation that harms consumers. As common sense and economic theory suggest, consumers do best overall in a free-discounting regime in which businesses are free to ask for lower prices and free to give them. The Robinson-Patman Act punishes and deters some kinds of differential pricing (in very broad terms: different prices for the sale of tangible commodities of like grade and quality), subject to a variety of intricate defenses, and it is not

limited to practices that provably harm consumer welfare. The result of such a rule is to deter sellers from granting a lower price (because they may have to give it to other buyers too, making the discount more expensive, or face the threat of litigation from unhappy buyers) and to deter buyers from asking for one (because a discount that will be shared with their own competitors is less valuable). Moreover, the core case of behavior in this vein that threatens consumers—where a power buyer obtains an MFN-style commitment that its rivals won't get competitive prices, harming consumers—is already caught by the Sherman Act and the FTC Act. The RPA has been manageable only thanks to a decades-long bipartisan enforcement moratorium (with the Justice Department estimating 1977 that the law inflicted billions of dollars of harm each year—in 1977 dollars!) and judicial skepticism of private suits. But commentators have, reasonably, pointed out that it is for Congress, not the agencies, to repeal bad laws, and the FTC has resumed enforcement.

Congress should immediately repeal the Robinson-Patman Act.

The Jones Act (Section III.D.). The Jones Act is to shipping what the Robinson-Patman Act is to pricing: an obviously anticompetitive law that serves special interests but harms consumers. (Alas: the Jones Act, unlike the RPA, is vigorously enforced.) In an apparent effort to protect U.S. shipbuilding, this statute limits the domestic waterborne shipment of goods to "Jones-Act-compliant" vessels, which are U.S.-built, flagged, and crewed. Unfortunately, that rule limits domestic shippers to a tiny, aging, and incredibly expensive set of ships: forcing U.S. businesses of all kinds, *and ultimately consumers*, to pay massively over the odds for transport. This in turn weakens our economy and gives a solid advantage to foreign suppliers—which can use the cheaper, newer, larger ships in the international trading fleet—in competition for the business of U.S. customers. In other words, as one commentator has put it, the Jones Act is "protectionism for foreigners." The law has not even created a strong domestic shipbuilding industry: large

commercial ships, to the extent that they are built here at all, are largely built at just two shipyards: one runs at a loss and the other depends on Navy contracts. The Congressional Research Service describes U.S. commercial shipbuilding as "globally uncompetitive" and point out that no-one buys these ships unless they are legally required to do so. The result: higher prices for American consumers; a competitive disadvantage for American businesses; and a desultory national shipbuilding business. **Congress should end the tax on U.S. businesses and consumers, and repeal or substantially liberalize the Jones Act.**

Licensing recognition (Section III.E.). Across the United States, occupational and professional licensing laws discriminate against out-of-state licenses and those moving or working across state lines, simply because the relevant license was issued by an out-of-state agency rather than an in-state one. Specifically, worker licensing regimes—which, as policy scholars point out, are routinely imposed on occupations that do not need such rules, and are often made subject to absurdly unreasonable obligations—often impose onerous requirements for recognizing an out-of-state license, or may simply decline to recognize them at all. The result (and apparent purpose) is to protect in-state incumbents from the competition that interstate commerce and interstate commercial movement would provide, and to restrict the access of countless workers to interstate commerce. This is a direct affront to a core constitutional value that is entrusted to the federal Congress. It harms American workers and their families (who are hindered in moving or working across state lines), American businesses (who are denied access to skilled labor), and American consumers (who pay more as a result). **Congress should legislate to protect the rights of workers to interstate recognition of worker licenses, for example: by creating a voluntary federal licensing recognition regime; by creating a federal licensing system; or by mandating interstate license recognition.**

Other regulations (Section III.F.). The foregoing are not the only regulations that raise serious competitive concerns on their face. In a short final section I very briefly spotlight three more concerns.

- **FDA "Orange Book."** I note concerns expressed by the FTC and academic experts that branded-drug manufacturers may be improperly listing patents in the FDA's "Orange Book" in order to deter competition from generic drug makers. I endorse a promising suggestion, made in recent work by two patent and innovation experts, to require some USPTO review of the validity and pertinence of listed patents, in order help to curb these anticompetitive abuses.
- **Baseball's antitrust exemption.** I note the illogical and indefensible special exemption for baseball (alone among all sports!) created out of whole cloth by the Supreme Court in the 1920s. This loophole is today a matter of open embarrassment to all—including the modern Court. I propose eliminating it.
- **Direct-sale restrictions.** I note the existence of direct sale restrictions—particularly but not exclusively in the automobile industry—that protect independent dealers from the risk that a manufacturer-owned or -operated outlet might offer customers a better deal. I note that these rules are facially anticonsumer, and I propose that Congress examine ways to liberalize them, ranging from direct preemption to incentives for repeal.

II. OVERVIEW: THE PROBLEM OF ANTICOMPETITIVE REGULATIONS

This Section provides a general overview of the problem of anticompetitive regulation, including a general definition and some common sub-types.

A. The Concept of "Anticompetitive Regulation"

Competition is among the most important engines of American prosperity. Consumers, workers, and citizens overwhelmingly benefit when businesses are permitted to compete with one another to satisfy our demand for valuable products and services. Rivalry encourages businesses to offer better terms in order to win profitable trading relationships (for example, by lowering their prices). And it encourages them to innovate—that is, to devise and create new and better products, and to develop cheaper and more efficient ways to meet demand—in ways that contribute to prosperity, the store of knowledge, and human flourishing.[5]

Conversely, practices that *limit* competition—by prohibiting, deterring, burdening, or taxing competitive entry, expansion, and output, or by facilitating collusive and exclusionary practices—cause harms.[6] As a general matter, such practices increase prices, reduce quality, and diminish the incentive to innovate.

The term "anticompetitive" can bear many meanings, but I will use it in this Testimony to mean "socially harmful overall by reason of a tendency to create or protect pricing power by limiting the ability or incentive of businesses to satisfy demand."[7] This is centrally because the term "anticompetitive," as it is used in competition-policy discourse and antitrust law alike, virtually always signifies that a particular practice is *harmful on balance* across the set of all affected persons (or a close proxy like "all consumers"[8]). For example, we would not usually use

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[5] *See generally* Daniel Francis & Christopher Jon Sprigman, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS (3d ed. 2025) 44–54 (providing a short introduction to the economics of competition).

[6] Francis & Sprigman, ANTITRUST, *supra* note 5, at 53 (discussing the harms of collusion and exclusion).

[7] This term is used in different ways by different writers, and for that reason I have opposed its unexplained use in technical antitrust discourse. *See* Francis, *Antitrust Without Competition*, *supra* note 2, at 358.

[8] There is some intricacy and complexity here, and room for plenty of reasonable disagreement about the details, but the framing in the text is good enough at a high level for most policy purposes. *See*, *e.g.*, Mark Meador, *Antitrust Policy for the Conservative (*remarks of May 1, 2025) 21 (supporting "an understanding of consumer welfare that actually focuses on consumers"); Francis & Sprigman, ANTITRUST, *supra* note 5, at 4–5 (discussing the nuances of, and various perspectives on, a "consumer welfare" standard).

the term "anticompetitive" to describe the introduction of a terrific and cheap new product, even if the result of introducing the product was that the supplier acquired a high market share and achieved a clear advantage over its competitors.[9] Similarly, we would not naturally use the term "anticompetitive" to describe a reasonable licensing requirement for brain surgery designed to ensure competence.[10] The reason in each case is that the overall economic impact of the relevant practice (*i.e.*, the new product and the licensing requirement) is *beneficial*, not harmful. Thus, even though they affect the workings of competition, they are not plausibly "anticompetitive."

The Subcommittee should be wary of efforts to deploy the "anticompetitive" label to attack regulatory and other practices that are beneficial overall. In particular, special-interest groups and particular businesses sometimes use the label "anticompetitive" to describe practices that are bad for them individually, just as tough competition itself often is. But being harmful (or beneficial) to individual business firms does not make something bad (or good) for "competition" in the relevant policy sense. Indeed, any recognizable process of competition *centrally* involves "harm" to unsuccessful rivals, in the form of lost profits and even exit from the market. (Consider, for example, the fate of Blockbuster Video stores. As unfortunate as that outcome was for Blockbuster—including its shareholders and employees—consumers would clearly have been harmed if Congress had attempted to keep Blockbuster in business or suppress its rivals.)

As the Subcommittee well knows, many anticompetitive practices involve "purely" private action.[11] Private collusion or exclusion—including cartels, monopolization, and harmful

[9] *See* Daniel Francis, *Antitrust Without Competition*, 74 Duke L.J. 353, 401 (2024); *see also*, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (stating that monopolization law does not punish "superior product, business acumen, or historic accident"); United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001) (en banc) (indicating that "developing an attractive product" could not be anticompetitive).

[10] *See*, *e.g.*, Henry E. Sigerist, *The History of Medical Licensure*, 104 J. Am. Med. Ass'n 1057, 1057 (1935) ("In no other profession is lack of knowledge so serious as in medicine.").

[11] The scare quotes acknowledge that virtually nothing in the market is *purely* private action: for example, rights of property and contract—defined and enforced by government action—often play a critical role in facially "private" conduct.

mergers—is often disciplined by the antitrust laws, including Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act as well as Section 5 of the FTC Act.[12]

But *government* action too can harmfully create or protect pricing power by restraining entry, expansion, and output. In principle, virtually any kind of government action can have this effect, including: federal and state legislation; executive action; administrative rules; enforcement practices; and even judicial decisions. (For convenience, these practices—which define and enforce obligations—will generally be described in this Testimony as "regulation."[13]) Some scholars have pointed out that, where the harms of private misconduct may be corrected or defeated by the operation of market forces (as, for example, when market entry breaks up a cartel or displaces a monopolist),[14] state action may be more resistant to market forces and, as such, its harms may be more durable.[15] This is often an important insight (although it is sometimes over-read to support an unduly relaxed "Chicago School" approach to harmful private conduct).

For years, competition-policy experts and antitrust enforcers of both parties have shared the goal of identifying, opposing, and eliminating such regulations. I strongly welcome the Subcommittee's support for that goal, and what appears to be a whole-of-government effort in this

[12] 15 U.S.C. §§ 1, 2, 18, 45.

[13] One sometimes hears the suggestion that "law enforcement" and "regulation" are separate and distinct in kind. That is not usually correct. Each refers to government action that affects private conduct in service of a policy objective of some kind. But the implicit point of the purported separation is usually to emphasize (correctly!) that some forms of regulation involve special features: more bureaucratic discretion, more detailed rules, a narrower domain of application (*e.g.*, a specific industrial sector), and/or a more specialized enforcer (*e.g.*, a specialized agency). But it's all "regulation," in the core sense of establishing and enforcing normative obligations. For example, even antitrust law—which is created by a strikingly brief set of federal statutory provisions, *see* 15 U.S.C. §§ 1, 2, 18—has given rise to an intricate and detailed system of obligations, applied in a fact-intensive and market-specific manner requiring extensive technical expertise, and leaving plenty of room for discretion by enforcers and judges. Of course, Congress's constitutional power to enact commercial legislation is explicitly framed as a power to "regulate Commerce." U.S. Const., Art. I § 8 cl. 3.

[14] As Steve Salop and Tom Krattenmaker (and others) have pointed out, entry by potential competitors may itself be *less* likely if a monopolist is in a position to exclude or preclude that entry. *See*, *e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209, 258 (1986).

[15] One of the most famous versions of this criticism applies to antitrust condemnation by courts: the point being that if a court wrongly tolerates a private practice, the market will *See*, *e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2 (1984) ("[J]udicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.").

direction. In a recent Executive Order, for example, President Trump declared that "[r]egulations that reduce competition, entrepreneurship, and innovation—as well as the benefits they create for American consumers—should be eliminated, and he announced the beginning of a "process for eliminating anti-competitive regulations to revitalize the American economy."[16] And issuing a new Request for Information targeted at the problem of anticompetitive regulations, Chairman Andrew Ferguson emphasized that "[r]egulations that reduce competition, entrepreneurship, and innovation can hamper the American economy."[17] Previous Administrations, too, including those of former Presidents Obama and Biden, have also emphasized the importance of fighting anticompetitive regulation, such as unreasonable occupational licensing, that harms American consumers and workers, and the antitrust agencies during their Administrations opposed multiple harmful practices that used state power to exclude competition, with the FTC often in the lead.[18]

B. The Role of Congress

As the constitutional guardian of interstate commerce, and as the nation's supreme legislature, Congress is in a unique position—both in constitutional theory and in the practice of federalism—to complement the work of the White House and the FTC by looking beyond federal administrative rules and considering federal *and state* measures of all kinds, including statutes, regulations, and practices.

One of Congress's most important functions in the constitutional order is to protect interstate commerce from state-level distortions, and particularly discrimination and

[16] President Donald J. Trump, Executive Order 14,267, *Reducing Anti-Competitive Regulatory Barriers* (Apr. 9, 2025).

[17] FTC, Press Release, *FTC Launches Public Inquiry into Anti-Competitive Regulations* (Apr. 14, 2025) (quoting FTC Chairman Andrew N. Ferguson).

[18] *See*, *e.g.*, President Joseph R. Biden, Executive Order 14,036, *Promoting Competition in the American Economy* (July 9, 2021); Department of the Treasury Office of Economic Policy, Council of Economic Advisers, & Department of Labor, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015); North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494 (2015) (Obama FTC challenging anticompetitive state action); FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) (Biden FTC expressing opposition to anticompetitive state action).

protectionism. Of course, the Commerce Clause of the U.S. Constitution explicitly assigns the power to regulate interstate and foreign commerce to Congress,[19] and the Supremacy Clause guarantees the paramountcy of federal law over state law.[20] Today, in the modern federal legislative state, we think of the Commerce Clause as primarily a basis for affirmative legislation. But in the early life of the republic, before the rise of an expansive federal government, the Commerce Clause was at least as important—and arguably more important—as a tool to *eliminate* and control state-level regulation that had a discriminatory and protectionist effect on interstate competition and markets. Indeed, state economic discrimination and protectionism were a primary spur to the Constitutional Convention.[21]

More specifically, control of such practices seems to have been the *primary* focus of discussion of the Commerce Clause—to the extent that there was such discussion—at the Convention. Alfred Abel's detailed survey of the debates reaches what may be a shocking conclusion to a modern reader: "There is . . . not a single occasion in the proceedings of the convention itself where the grant of power over commerce between the states was advanced as the basis for independent affirmative regulation by the federal government. Instead, it was uniformly

[19] U.S. Const., art. I, § 8, cl. 3.

[20] U.S. Const., art. VI, cl. 2.

[21] Many scholars have pointed this out. *See*, *e.g.*, Barry Friedman & Daniel Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1882 (2011); Norman R. Williams, *The Foundations of the American Common Market*, 84 Notre Dame L. Rev. 409, 423 (2008); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417, 485 (2008); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 23–25 (1999). The Court has also highlighted this history. *Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 515 (2019) ("[R]emoving state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods."); *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2090 (2018) ("The Commerce Clause reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.") (internal quotation marks, brackets, and citation omitted). *See also* James Madison, *Vices of the Political System of the United States*, in Jack N. Ravoke (ed.), JAMES MADISON: WRITINGS (1999) 71 (noting tendency of State laws to "beget retaliating regulations" that were "expensive & vexatious" as well as "destructive of the general harmony")

mentioned as a device for preventing obstructive or partial regulations by the states."[22] Likewise, Madison wrote in 1829 that "it is very certain that [the Commerce Clause] was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government[.]"[23]

Little wonder, then, that in the 1820s the Supreme Court concluded that the Commerce Clause prohibited certain kinds of interference with interstate commerce *of its own force*—that is, even absent specific Congressional action—giving rise to the "dormant Commerce Clause"

[22] Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 470–71 (1941) ("The first thing that strikes one's attention in seeking references directed to interstate commerce is their paucity. . . . In the convention, control over commerce between the states seems to have been mentioned only nine times. In three of these instances, reference was made to the potentialities of the clause as affording a means of protection against injury inflicted by hostile or harmful restrictions or regulations of sister states, without intimating what particular type of state commercial regulation was thus to be stricken down. One of these statements seems to suggest a distinction as to the effect of federal commercial action where citizens alone were concerned and where foreigners were involved, the former being treated as of a negative or restraining character while the latter apparently implied positive controlling action. The other six all refer in like manner to the anticipated operation of the grant in preventing discriminatory commercial regulations by states, but mention particular subjects of legislation as being affected. Twice the restraining effect of the grant is mentioned in connection with state export duties. Once it seems to have been involved in an interchange with regard to a state impost on imports. And it was mentioned once as to each of the subjects of tolls on the interior waterways, inspection fees, and compulsory entry and clearance.") (footnotes omitted); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1125 (1986): ("There is much evidence that the main point of [the Commerce Clause . . . was not to empower Congress, but rather to disable the states from regulating commerce among themselves.").

[23] Letter from James Madison to Joseph Cabell (Feb. 13, 1829), reprinted in Max Farrand (ed.), 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1884) 479.

doctrine.[24] Despite perennial grumblings of dissatisfaction with this doctrine, no majority of the Court has doubted the constitutional correctness of that conclusion since that time.[25]

Likewise, as a matter of practical politics, Congress is the only legislature in which the interests of the nation's consumers and workers, as a whole, are represented together and the evils of parochialism and protectionism can plausibly be tackled. It is widely understood that there are both economic and political reasons to expect and fear state-level legislation that serves the interests of influential in-state groups (particularly well-organized groups like industry and professional associations) while harming less organized, and often out-of-state, consumers. Standard theoretical treatments of Congress's role in the federal system emphasize the importance of its power to prevent and remedy parochial protectionism, interference with interstate commerce, and other state conduct that serves in-state interests but causes national harm.[26]

The point of all this is to emphasize that *Congress is at or near the very core of its assigned constitutional function and power when it protects interstate commerce from state interference*, as

[24] *Gibbons v. Ogden*, 22 U.S. 1, 209 (1824) (Marshall, C.J.) (noting "great force" in the argument that the assignment of the regulatory power to Congress necessarily precluded states from "disturb[ing] and derang[ing]" the zone of federal regulation, "by changing what the regulating power designs to leave untouched"); *id.* at 231–32 (Johnson, J., concurring) ("If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."); Brown v. Maryland, 25 U.S. 419, 448–49 (1827) ("We admit [the state's taxing] power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. . . . [Hypothetical uses of the state taxing power] are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given."); Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245, 252 (1829) ("We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."); *see also* Smith v. Turner (The Passenger Cases), 48 U.S. 283, 408 (1849) (McLean, J., announcing the judgment of the Court) ("That the [commerce] power is exclusive seems to be as fully established as any other power under the Constitution which has been controverted.").

[25] Individual Justices have certainly expressed disagreement. *See*, *e.g.*, Comptroller of Treasury of Maryland v. Wynne, 135 S.Ct. 1787, 1808, 1811 (2015) (Scalia, J., dissenting) (describing the "Imaginary Commerce Clause" as a "judicial fraud"). But the current Court has clearly affirmed the doctrine. National Pork Producers Council v. Ross, 598 U.S. 356 (2023).

[26] There is a rich literature on this issue, drawing on the economics of collective action and the political challenges of regulation with externalized effects. For a sample, *see generally*, *e.g.*, Aziz Z. Huq, *Does The Logic of Collective Action Explain Federalism Doctrine?* 66 Stan. L. Rev. 217, 230 (2014); Robert Cooter & Neil Siegel, *Collective Action Federalism: a General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115 (2010); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 428 (1982).

well as from improvident federal legislative and regulatory action. While recognizing the value of local regulatory choice, political autonomy, and state experimentation, the Subcommittee should not be afraid to act decisively to protect interstate commerce and to guarantee its benefits to American consumers, workers, and businesses.

C. Some Common Types of Anticompetitive Regulation

Anticompetitive regulations—that is, as explained above, regulations that are harmful overall by reason of a tendency to create or protect pricing power by limiting businesses' ability or incentive to satisfy demand—may take many different forms, but many of the most prominent examples fall into some straightforward categories. The following are not mutually exclusive and collectively exhaustive analytical categories—they are just illustrative types.

Is everything in the following categories necessarily bad?

No! Just because some anticompetitive regulations can be sorted into the following categories does *not* mean that everything in these categories is anticompetitive or otherwise economically harmful overall. For example: just because some anticompetitive regulations take the form of bans and taxes, it does not follow that all bans and taxes are anticompetitive! Some bans, for example, prevent activities that are harmful overall (like a ban on the sale of contract killing services), and some taxes help to improve overall economic welfare (like a tax that is calibrated to ensure that an actor internalizes harms that would otherwise be externalized to others, resulting in socially excessive levels of the relevant activity).

In addition, a bit more deeply: just because something is "anticompetitive" in the sense I am using here does not necessarily mean that it is wrongful all-things-considered *from all reasonable points of view*. A legislature might, for example, ban or limit the supply of a product or service as an expression of important community values, to protect rights, or to pursue other goals in political morality. Political theorists often emphasize the role of representative legislatures in making choices that implicate difficult questions of value.[27]

[27] The following discussion reflects my own sense of what counts as "good" and "bad" in the relevant sense. I am for all or virtually all purposes what a moral philosopher would call a subjective-preference welfarist: that is, I think what is socially good is a function of what is good for individual persons, and what is good for individual persons is whatever they subjectively prefer. This is a common normative framework used by many economists to approach and frame policy choices. Readers with very different visions of the good may have very different views about what is socially beneficial or harmful, and they may accordingly find the following discussion less persuasive.

Relatedly: what follows is an effort to summarize and explain the harms of anticompetitive regulations, not an effort to extoll their various possible virtues.

1. Bans and Output Restrictions

Some anticompetitive regulations inflict harm through simple and nondiscriminatory prohibitions, limits, or burdens on certain kinds of output. The core cases in this category are the ban, the nondiscriminatory quota, and the nondiscriminatory tariff or tax. For example, if a particular kind of product or service is banned outright, output is reduced to zero. Consumers that would value buying the product or service, and workers that would be paid to produce it, must all find inferior trading relationships instead, resulting in welfare harms.

In a similar way, nondiscriminatory quotas, tariffs, and taxes can restrict entry, expansion, or output without completely prohibiting them: the lower the quota or higher the tariff or tax, the more closely the effect approximates a ban. (One can think of a ban as a zero quota or an infinite tariff or tax.)

Examples of regulations that may be anticompetitive in this sense: bans on home-sharing or ride-sharing; prohibitions on self-driving cars that are not justified by safety (or other) risks.

2. Entry Barriers

Some regulations amount to prohibitions or restrictions on competitive entry or expansion: that is, they bite on those aiming to start competing or to expand their operations beyond existing scale.[28] These may cause overall harm by preventing or restricting certain types of competitors from doing so, such as: (a) out-of-state or foreign suppliers; (b) workers that have not received

[28] The definition of a barrier to entry is theoretically contested. *See*, *e.g.*, R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, *What Is a Barrier to Entry?* AEA Papers & Procs. 461 (May 2004); Richard Schmalensee, *Sunk Costs and Antitrust Barriers to Entry*, 94 Am. Econ. Rev. 471 (2004); Harold Demsetz, *Barriers to Entry*, 72 Am. Econ. Rev. 47 (1982); *see generally* George Stigler, THE ORGANIZATION OF INDUSTRY (1968); Joe S. Bain, BARRIERS TO NEW COMPETITION (1956). I borrow this note from Daniel Francis & Christopher Jon Sprigman, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS (3d ed. 2025) 50 n.149.

government permission or licenses; (c) businesses that are already active in other markets (such as "line of business" restrictions that prohibit competition from vertically integrated businesses); or even (d) consumers, where they are able and willing to perform some relevant service themselves.

Such rules are often, though not always, best understood and explained as special-interest protection for the privileged incumbents, who profit—*at the expense of consumers and society overall*—because the regulation protects them from the competition that entry and expansion would bring. Such "regulatory capture" is a common motif in regulatory theory and experience.[29] It is common in part because special-interest groups—with fewer members, more in common, closer connections, and higher individual stakes in the relevant policy—find it much easier to organize, lobby, and exert political pressure than do large, diffuse groups like consumers.[30]

Examples of regulations that may be anticompetitive in this sense: local, state, or national import bans, quotas, and tariffs; state "Certificate of Need" laws; unreasonably burdensome licensing statutes; "Buy American" regulations that favor domestic suppliers like the Jones Act; prohibitions on manufacturers selling directly to consumers at retail (*e.g.*, cars, alcohol); unreasonable prohibitions on "self-service" (*e.g.*, pumping gas).

3. Restrictions on Beneficial Practices

Some regulations prohibit or restrict desirable behavior by market participants. When they cause overall harm by limiting output in this way, they are anticompetitive. For a clear example, consider minimum-price laws that prevent suppliers from charging prices beneath a certain level.

[29] *See*, *e.g.*, Anthony I. Ogus, REGULATION: LEGAL FORM AND ECONOMIC THEORY (1994) Ch. 4; George J. Stigler, *The Theory of Economic Regulation*, 2 Bell. J. Econ & Mgmt. Sci. 3 (1971).

[30] *See generally* Mançur Olson, THE LOGIC OF COLLECTIVE ACTION (1965).

By raising consumer prices, such rules inflict harm. Likewise, rules may harm consumers by prohibiting the introduction of desirable new products or business models.[31]

Examples of regulations that may be anticompetitive in this sense: the Robinson-Patman Act (and state-law equivalents); minimum-price laws; prohibitions on certain forms of digital "self-preferencing" through new features or product integration under proposed legislation.

4. Deterrents to Investment and Innovation

Regulations may deter investment and innovation by imposing onerous obligations that reduce the rewards that would otherwise encourage businesses to engage in those activities. For example, a cap on the price of milk, or on the rent that can be charged for an apartment, will tend to make it less profitable for businesses to provide milk or apartments, and will encourage them to use the relevant productive resources in other ways, or simply to shift investment into other activities. This can lead to significant consumer harm.

Examples of regulations that may be anticompetitive in this sense: caps, controls, or freezes on prices, rents, royalties, and rates; undue taxation of particular activities or their fruits; obligations to deal with others (*e.g.*, forced-sharing, forced-licensing, and forced-service duties).

5. Opportunities for Private Anticompetitive Conduct

Regulations may, in a variety of ways, encourage private businesses to engage in harmful anticompetitive conduct. Regulations may immunize such behavior (*e.g.*, through an antitrust exemption or defense), or simply provide a practical opportunity to engage in it. They may also create systems and tools that allow private individuals to harness the power of government action to support collusion or exclusion.

[31] My concerns regarding the proposed American Innovation and Competition Online Act include concerns of this kind. *See*, *e.g.*, Daniel Francis, Testimony Before the U.S. Senate, Committee on the Judiciary, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Hearing on *Reining in Dominant Digital Platforms: Restoring Competition to Digital Markets* (March 2023) § II.C.

Examples of regulations that may be anticompetitive in this sense: federal legislative or judicially-created antitrust exemptions (*e.g.*, state action, baseball, export cartels); licensing and regulatory boards that are dominated or influenced by private market participants; no-review patent listings in the "Orange Book"; price and output control systems that result in supracompetitive prices and infracompetitive output.

6. State-Owned, Subsidized, or Supported Competitors

Although the creation of a state-owned "public option" or the provision of subsidies to private competitors may superficially appear (and may even be) beneficial, these practices can also result in significant harms. State-owned competitors, or specially favored suppliers, may enjoy a variety of advantages over rivals, including formal and informal subsidies and specially favorable regulatory treatment. State-owned enterprises also often behave in non-profit-maximizing ways, reflecting their distinctive incentives and missions, and may be willing to operate at margins that would be unsustainable for private competitors, or even negative. The resulting potentials for harm has been well chronicled by scholars.[32]

The result may be to deter others from competing—either vigorously or at all—against the favored enterprise, resulting in higher prices, lower quality, less investment, and less innovation than would otherwise result. Ultimately, the result may be a lazy state-owned (or state-supported) monopolist with few or no incentives to lower costs and prices, perhaps with a fringe of private rivalry, rather than a market that serves consumers best.

[32] *See generally*, *e.g.*, Daniel Francis, *Choices and Consequences: Internationalizing Competition Policy After TPP* in Benedict Kingsbury et al. (eds.), MEGAREGULATION CONTESTED: THE GLOBAL ECONOMIC ORDER AFTER TPP (Oxford 2020) 424–27 (discussing the risks that SOEs can present to competition and consumers, including because "state ownership and government sponsorship can break the link between price and cost on which the case for competition as an engine of consumer welfare depends"); David E.M. Sappington & J. Gregory Sidak, *Incentives for Anticompetitive Behavior by Public Enterprises*, 22 Rev. Indus. Org. 183, 184 (2003); John R. Lott, Jr., *Predation by Public Enterprises*, 43 J. Pub. Econ. 237, 237 (1990).

In addition, when regulators rather than markets set prices and output levels, and design products and services free from market constraints, the results may be far from the social optimum. The fact that the costs of the business may be borne by taxpayers through opaque funding mechanisms, rather than directly by customers or consumers, means that the full costs of such an intervention may be hard to detect or measure, and it may be hard to ensure political accountability for the resulting effects.

Examples of regulations that may be anticompetitive in this sense: state monopolies; "public option" competitors; businesses subsidized by foreign or domestic governments, especially when subsidies are discriminatory across competitors.

III. SPECIFIC REGULATIONS THAT RAISE COMPETITIVE CONCERNS

In this Section I identify some specific regulatory programs that, based on public information, merit close Congressional attention in the context of a whole-of-government effort to identify and eliminate anticompetitive regulations.

I offer the following discussion in my capacity as a generalist scholar of competition, regulatory theory, and antitrust; and as a former federal antitrust enforcer. I am *not* a subject-matter expert in a specific industrial sector—including healthcare, shipping, or the other industries implicated by the following discussion—nor am I an empirical researcher of costs and benefits. The following is based on my own research from publicly available materials, my experience as an enforcer, and my work on regulatory theory, law, and competition policy.

A. Certificate of Need Laws: The Harmful Legacy of a Federal Mandate

1. Competitive Concerns

Certificate of Need ("CON") laws are state statutes that prohibit healthcare providers from entering or expanding in certain markets until the state government affirmatively concludes that there is demand for the entry or expansion, and grants a regulatory license (*i.e.*, a "certificate of need") to that effect.[33] Such laws are in effect in at least 35 states,[34] and vary considerably.[35]

CON laws present obvious competitive concerns. Certificate-of-need laws create barriers to entry around some of our most important markets, "interfer[ing] with the entry of firms that could . . . provide higher-quality services than those offered by incumbents," and protecting incumbents against competition that would force them to serve patients better.[36] Like any other barrier to entry, CON laws spell harm for patients through the obvious prospect that they will "increase prices, limit consumer choice, and stifle innovation."[37] The antitrust agencies and others

[33] U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004) Ch. 8 at *301 ("State certificate of need (CON) programs generally prevent firms from entering certain areas of the health care market unless they can demonstrate to state authorities that there is an unmet need for their services. Upon making such a showing, prospective entrants receive from the state a CON allowing them to proceed.").

[34] *See* Nat'l Academy for State Health Policy, *50-State Scan of State Certificate-of-Need Programs* (Dec. 12, 2024), https://nashp.org/state-tracker/50-state-scan-of-state-certificate-of-need-programs/ (identifying 35 states); Matthew D. Mitchell, *Certificate-of-Need laws in healthcare: A comprehensive review of the literature*, S. Econ. J. 1, 3 (2024) ("Today, 39 states and the District of Columbia require a CON for at least one healthcare serviceor technology. In many of these states, however, the CON regime is quite limited. For example,Arizona, Minnesota, and New Mexico only require CONs for ambulance services. Indiana,Montana, Ohio (and soon, South Carolina) only require CONs for nursing homes. Hawaii,which requires a CON for 28 services and technologies, regulates more activities than any other state.").

[35] *See* Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *2 (2020) (noting that "there is wide variation in the scope and mechanics of CON review across states"); *see also*, *e.g.*, Ala. Code § 22-21-265(a) ("On or after July 30, 1979, no person to which this article applies shall acquire, construct, or operate a new institutional health service, as defined in this article, or furnish or offer, or purport to furnish a new institutional health service, as defined in this article, or make an arrangement or commitment for financing the offering of a new institutional health service, unless the person shall first obtain from the [State Health Planning and Development Agency] a certificate of need therefor."); Alaska Stat. § 18.07.031(a) ("Except as provided in (c) and (d) of this section, a person may not make an expenditure of $1,000,000 or more for any of the following unless authorized under the terms of a certificate of need issued by the department: (1) construction of a health care facility; (2) alteration of the bed capacity of a health care facility; or (3) addition of a category of health services provided by a health care facility.").

[36] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 5–6.

[37] Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1 (Mar. 27, 2019) 2.

have repeatedly and explicitly pointed out that they do indeed have this effect in practice.[38] A 2024 review of the empirical literature highlights the evidence linking CON laws with higher per-service costs, higher per-capita spending, diminished availability of service, and lower quality. [39]

Regardless of whether a CON is ultimately granted, the application process can itself often be a lengthy, burdensome, and expensive one, including because the relevant state authorities may be understaffed and underfunded.[40] As one study has noted:

> Smaller community hospitals reportedly often lack the financial resources to go through a protracted CON process. A Georgia respondent noted that large hospitals, which often have ample financial resources and political clout, have kept smaller hospitals out of a market by tying them up in CON litigation for years. Likewise, a Michigan respondent observed that "haves"—hospitals with significant market share and resources—use the CON process to prevent outsiders from entering the state entirely.[41]

As this suggests, a sharp concern is that incumbent healthcare providers—which prefer *not* to face competition from new entrants—are often well placed to weaponize CON systems in order to suppress competitive threats and protect monopoly power or cozy oligopolies. CON laws often allow incumbents to oppose new applications through hearings and appeals, significantly

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[38] *See*, *e.g.*, Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 1–2 ("The Agencies' experience and expertise has taught us that Certificate-of-Need laws impede the efficient performance of health care markets. By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers. They undercut consumer choice, stifle innovation and weaken markets' ability to contain health care costs."); U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), at *302 ("[T]here is considerable evidence that [CON laws] can actually drive up prices by fostering anticompetitive barriers to entry.").

[39] *See* Matthew D. Mitchell, *Certificate-of-Need laws in healthcare: A comprehensive review of the literature*, S. Econ. J. 1, 6–10 (2024) .

[40] U.S. Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004) Ch. 8 at *301 (attempting to prove need can be "expensive and time-consuming"). Unsurprisingly, CON laws can engender a cottage industry of service providers, with the usual consequences. Tracy Yee, Lucy B. Stark, Amelia M. Bond & Emily Carrier, *Health Care Certificate-of-Need Laws: Policy or Politics?* Nat'l Institute for Health Care Reform Research Brief No. 4 (May 2011) 5 ("In some states, where a small number of consultants and attorneys dominate the CON planning process, hospital respondents reported retaining particular consultants simply so they would be unavailable to a competitor.").

[41] Tracy Yee, Lucy B. Stark, Amelia M. Bond & Emily Carrier, *Health Care Certificate-of-Need Laws: Policy or Politics?* Nat'l Institute for Health Care Reform Research Brief No. 4 (May 2011) 4; *see also id.* ("[O]ne state hospital association respondent said member hospitals initially had mixed views about the benefits of CON but banded together to support the process *after realizing it was a valuable tool to block new physician-owned facilities.*") (emphasis added); *id.* at 5 ("Physician respondents [to the survey] frequently cited the CON process as the primary barrier to market entry, either from the state itself or because of opposition from other provider.").

increasing the burdens and difficulty of entry.[42] Just a few weeks ago, for example, the FTC highlighted these pathologies in a letter to the Governor of Rhode Island:

> Incumbent providers may exacerbate the potential competitive harm [of CON laws] by taking advantage of the CON process to protect their entrenched market position and revenues. . . . [A]n incumbent firm may file challenges or comments to a potential competitor's CON application to thwart or delay competition. . . . Misuse of the CON process by incumbents can also divert scarce resources away from health care innovation as potential entrants incur legal, consulting, and lobbying expenses responding to incumbents' challenges (and as incumbents incur expenses in mounting such challenges).[43]

The CON process is notoriously vulnerable to political pressure from incumbents to decline such applications. After all, incumbents frequently enjoy close connections with local governments, and are often important local employers. Multiple high-profile cases of naked corruption and bribery have been established.[44] But serious harms can arise without anything like such technicolor wrongdoing. One 2011 study noted that "[i]n five of the six states studied . . . the CON approval process can be highly subjective and tends to be influenced heavily by political

[42] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 6 (noting the opportunities for "incumbent providers . . . to cause substantial delays in the development of new health care services and facilities," the additional entry costs and deterrents in the form of "legal, consulting, and lobbying expenditures" required to navigate such procedures); U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004) 22 ("Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market."); Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1 (Mar. 27, 2019) 2 ("[I]ncumbent firms can use CON laws to thwart or delay otherwise beneficial market entry or expansion by new or existing competitors").

[43] Letter from Clarke Edwards, Acting Director, Office of Policy Planning, FTC, re: Proposed Reforms to Rhode Island's Certificate of Need Process, to Governor Dan McKee of Rhode Island (Apr. 16, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-letter-to-ri-gov-mckee-on-proposed-con-amendments.pdf.

[44] *See*, *e.g.*, *Ex-banker pleads guilty in Ill. hospital fraud*, SAN DIEGO UNION-TRIBUNE (Feb. 25, 2009) ("Naperville-based Edward Hospital had wanted to build a new hospital and medical building in Plainfield but required a certificate of need from the Illinois Health Facilities Planning Board before it could start construction. Levine testified at last year's fraud trial of political fixer Tony Rezko, a major Blagojevich fundraiser, that Rezko had stacked the planning board with individuals who would obediently vote as directed by Rezko and Levine."); U.S. Dept. of Justice, Press Release, *Former Alabama Governor Don Siegelman, Others Indicted In Racketeering, Bribery And Extortion Conspiracy* (Oct. 26, 2005) ("[T]he indictment alleges that then-HealthSouth Chief Executive Officer Richard M. Scrushy made two disguised payments totaling $500,000 to Siegelman in exchange for Siegelman's appointment of Scrushy to Alabama's Certificate of Need Review Board"); Paul Taylor, *U.S. Indicts Gov. Edwards*, WASH. POST (Mar. 1, 1985) ("Edwin W. Edwards, the colorful three-term Democratic governor of Louisiana, was indicted today on 50 counts of conspiracy, racketeering, mail fraud and wire fraud in connection with an alleged scheme to award valuable state certificates of need to private health-care corporations in which he had a concealed interest.").

relationships, such as a provider's clout, organizational size, or overall wealth and resources, rather than policy objectives, according to many respondents in the six states interviewed for the study."[45]

The bottom line is simple. *CON laws discourage entry*, and they often protect and entrench healthcare monopolies and oligopolies.[46] This is a competitive harm of a particularly harmful kind, given the critical importance to American families of access to healthcare, and the widely recognized crisis of healthcare costs in the United States.[47]

As if all this were not enough, certificate-of-need laws can create incentives and opportunities for competing hospitals to reach private anticompetitive agreements. Among other things, an incumbent hospital might threaten to oppose (or to continue to oppose) an entrant's application for a certificate of need *unless* the entrant agrees to pull its competitive punches in some way.[48] The federal antitrust agencies have identified multiple such cases, despite the difficulties of ferreting out such agreements. In one case, for example, the Justice Department concluded that an incumbent hospital in Charleston, West Virginia, had used the leverage created by the CON system—specifically, from its power to oppose the granting of the certificate—to extract a commitment that the entrant would not open a certain facility in a particularly desirable location. The hospital entered a consent decree with the Department to resolve the concerns.[49] In other cases in West Virginia and Vermont, the Department concluded that the certificate-of-need

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[45] Tracy Yee, Lucy B. Stark, Amelia M. Bond & Emily Carrier, *Health Care Certificate-of-Need Laws: Policy or Politics?* Nat'l Institute for Health Care Reform Research Brief No. 4 (May 2011) 2.

[46] *See*, *e.g.*, Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *4 (2020) ("CON programs risk entrenching oligopolists and eroding consumer welfare.").

[47] *See*, *e.g.*, Centers for Medicare & Medicaid Services, *National Health Expenditures 2023 Highlights*, https://www.cms.gov/files/document/highlights.pdf ("Health care spending in the US reached $4.9 trillion and increased 7.5 percent in 2023 . . . . Spending for hospital care services increased 10.4 percent in 2023 to reach $1.5 trillion. This rate of growth was the fastest since 1990[.]").

[48] Such a policy, even if unilaterally adopted, may violate Section 2 of the Sherman Act. *See* Daniel Francis, *Monopolizing by Conditioning*, 124 Colum. L. Rev. 1917 (2024).

[49] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 7.

process facilitated or protected "market allocation" agreements, in which healthcare providers agreed to divide territories or service categories between themselves to avoid head-to-head competition.[50]

Against all these harms—and the obvious reasons of common sense and theory to expect trouble—the evidence that CON laws actually furnish benefits is thin. Theoretical hopes that, for example, by increasing volume and repeat-play, CON laws may help to improve proficiency, or that they may help to lower costs overall, do not seem to have been borne out by a mixed literature.[51] A 2022 study "found no evidence that CON laws increase quality of care. Instead, we found evidence consistent with the hypothesis that limiting entry results in lower hospital quality. . . . For example, we found that mortality rates are statistically significantly higher at hospitals in CON states than in non-CON states. . . . We also found that hospitals in CON states average six more deaths per 1000 surgical discharges that result in complications."[52]A 2024 literature review concluded:

> [A]mong 433 tests [of the effects of CON laws] with an obvious normative implication, a slight majority (220) associate CON with a "bad" outcome. These bad outcomes include higher spending, less access, lower quality, diminished care for under-served populations, or less competition. The next-most-common result, found in 157 tests (36%) was a neutral or insignificant result. Finally, 54 tests (12%) associate CON with a"good" outcome such as less spending or higher quality. Tests associating CON with a bad outcome are four times more common than tests associating CON with a good outcome.[53]

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[50] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 7–8. The West Virginia case was resolved by consent decree, *id.*; the Vermont case was closed when the state enacted legislation that made a state-action defense more likely. U.S. Dep't of Justice, Press Release, *Department of Justice Statement on the Closing of the Vermont Home Health Investigation* (Nov. 23, 2005).

[51] *See* Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *2 (2020) ("The evidence regarding hospital CON's effect on health expenditures is generally mixed, although one could credibly conclude that the weight of this evidence is that CON has no impact on health costs overall."); Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust 50, 51 (Fall 2015) ("The majority of studies fail to establish any definitive link between CON laws and lower unit costs. Although a small number of studies identify some very modest benefits from CON laws, these studies suffer from significant methodological problems.").

[52] Thomas Stratmann, *The Effects of Certificate-of-Need Laws on the Quality of Hospital Medical Services*, 15 J. Risk Financial Mgmt. 272, at *26 (2022).

[53] Matthew D. Mitchell, *Certificate-of-Need laws in healthcare: A comprehensive review of the literature*, S. Econ. J. 1, 5 (2024).

Likewise, the FTC has said that "after considerable experience, it has become apparent that *CON laws do not provide the benefits they originally promised.*"[54] Both antitrust agencies have affirmed that "[e]mpirical studies indicate that CON programs generally fail to control costs and can actually lead to increased prices."[55]

Some CON defenders charge in general terms that CON laws, which often require a certified facility to provide some care for the indigent, are beneficial for this reason.[56] There is some support for the claim that, when CON systems impose such obligations, they can achieve the desired benefit, at least to some extent, though monitoring and enforcement are uneven in practice.[57] But even if a charitable-care mandate really is the best way to meet demand, the same benefit could be achieved by simply imposing the mandate, without also limiting entry.

All in all, the CON-law epidemic adds up to a serious national problem and an appropriate subject for Congressional action. Needless to say, CON laws present a significant obstruction to the workings of interstate commerce in healthcare: including entry and expansion by out-of-state and multistate providers and hospital systems, and the provision of care to patients across state lines. But—perhaps even more importantly—**the CON problem is in significant measure a product of *federal* Congressional legislation.** In the 1960s, the practice of awarding cost-plus

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[54] Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1 (Mar. 27, 2019) 2 (emphasis added).

[55] U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), at *304.

[56] American Health Planning Association, *Improving Health Care: A Dose of Competition: AHPA Response*, https://www.ahpanet.org/AHPAargfavorCON.pdf (claiming that CON laws "ensure a minimal commitment to serving the medically indigent"); *see also* Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *5 (2020) ("As of 1994, most CON programs required facilities to provide a "reasonable amount" of care to the poor [30]. The literature on the actual effects of CON regulation on access have been mixed. Nine studies found a positive effect of CON on access, two found no effect, and sixteen found a negative effect. . . . The greatest challenge in summarizing the literature on access to care is that almost every study defines "access" in a different way (amount of care overall, amount of uncompensated care, travel time to care, racial disparities in care, et cetera).").

[57] Tracy Yee, Lucy B. Stark, Amelia M. Bond & Emily Carrier, *Health Care Certificate-of-Need Laws: Policy or Politics?* Nat'l Institute for Health Care Reform Research Brief No. 4 (May 2011) 6 ("While there are CON regulatory standards related to hospitals' provision of charity care, enforcement is difficult. For example, while South Carolina requires hospitals to track and report their levels of charity care, there is no penalty for not meeting the standards.").

reimbursement created incentives for healthcare providers to overbuild and overspend.[58] Scholars and policymakers also appear to have been concerned that the creation of hospital beds tended to increase demand for them.[59] New York adopted the first CON statute in 1964 in an effort to limit spending.[60] And in the National Health Planning and Resources Development Act of 1974,[61] Congress explicitly legislated a national mandate for states to enact certificate-of-need laws as a precondition of access to federal funding.[62] The mandate led to virtually universal adoption of CON systems by the states, which had soon been adopted in 49 states.[63]

In the years that followed, the underlying policy case for CON laws has crumbled with the decline of cost-based reimbursement.[64] The federal mandate was repealed by Congress in 1986.[65] But, unfortunately, CON laws have survived across the country—as noted above, existing in some

[58] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 4 (noting "concern that, because patients are not usually price-sensitive, providers [were engaging] in a 'medical arms race' by unnecessarily expanding their services").

[59] Matthew D. Mitchell, *Certificate-of-Need laws in healthcare: A comprehensive review of the literature*, S. Econ. J. 1, 2 (2024).

[60] Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *2 (2020).

[61] 88 Stat. 2225, Pub. L. No. 93-641 (1974), codified at 42 U.S.C. § 300k *et seq.*

[62] 88 Stat. 2225, Pub. L. No. 93-641 (1974) § 1523(a)(4) (requiring that a relevant state agency "administer a State certificate of need program which applies to new institutional health services proposed to be offered or developed within the State and which is satisfactory to the Secretary. Such program shall provide for review and determination of need prior to the time such services, facilities, and organizations are offered or developed or substantial expenditures are undertaken in preparation for such offering or development, and provide that only those services, facilities, and organization found to be needed shall be offered or developed in the State.").

[63] *See* Tiwari v. Friedlander, 26 F.4th 355, 365 (6th Cir. 2022) ("Through the National Health Planning and Resources Development Act of 1974, Congress required States to enact such laws in return for federal healthcare funding. . . . Eight years later, as a result, every State in the country, save for Louisiana, had adopted a healthcare certificate-of-need program."); Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 4 (noting that "[m]any CON programs trace their origin" to the 1974 legislation).

[64] *See* Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust 50, 51 (Fall 2015) ("[T]he federal government establishes universal reimbursement rates for Medicare and Medicaid, and private insurers negotiate payments procedure by procedure rather than by provider cost. In this environment, providers have little incentive to make unnecessary capital improvements."); Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 4 ("The federal government, as well as private third-party payors, no longer reimburse on a cost-plus basis.").

[65] 100 Stat. 3799, Pub. L. 99-660, § 701 (1986) (repealing Title XV of the Public Health Service Act).

form in around two thirds of states—reflecting the well-known fact that it is easier to pass special-interest laws than to repeal them.[66]

But repeal is the right solution. For years, the Federal Trade Commission and Department of Justice have shared a long-term bipartisan goal of opposing CON laws and supporting their elimination.[67] More than twenty years ago, for example, the FTC and DOJ wrote:

> The Agencies believe that, on balance, CON programs are not successful in containing health care costs, and that they pose serious anticompetitive risks that usually outweigh their purported economic benefits. Market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market. . . . [T]he vast majority of single-specialty hospitals—a new form of competition that may benefit consumers—have opened in states that do not have CON programs. . . . [T]here is considerable evidence that CON programs can actually increase prices by fostering anticompetitive barriers to entry. Other means of cost control appear to be more effective and pose less significant competitive concerns.[68]

And in 2008 they jointly affirmed that:

> Numerous studies have examined the effects of CON laws on health care costs, and the best empirical evidence shows that "on balance . . . CON has no effect or actually increase both hospital spending per capita and total spending per capita." A [2007] study conducted by the Lewin Group for the state of Illinois confirms this finding, concluding that "the evidence on cost containment is weak," and that using "the CON process to reduce overall expenditures is unrealistic."[69]

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[66] A classic mechanism for this effect is that the law itself empowers and organizes the group that was able to lobby for its adoption in the first place. *See*, *e.g.*, Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J. L. & Pub. Pol'y 87, 98 (2010) ("[O]nce regulatory programs have given rise to communities of interest in their continuation, amending or repealing a regulatory statute may be more difficult than enacting it in the first place.").

[67] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 2 ("Together, we support the repeal of [CON] laws, as well as steps that reduce their scope.").

[68] U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004) 22. *See also*, *e.g.*, Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1 (Mar. 27, 2019) 2 ("CON laws can undermine some of the very policy goals they were originally intended to advance."); Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 1–2 ("The Agencies' experience and expertise has taught us that Certificate-of-Need laws impede the efficient performance of health care markets. By their very nature, CON laws create barriers to entry and expansion to the detriment of health care competition and consumers. They undercut consumer choice, stifle innovation and weaken markets' ability to contain health care costs.").

[69] Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008) 5. See also U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), at *301–02 ("The Agencies believe that CON programs can pose serious competitive concerns that generally outweigh CON programs' purported economic benefits.").

Many writers and policy scholars, too, have called for deep reform.[70] Former Acting FTC Chair Maureen K. Ohlhausen has noted that "state CON laws are restraints of trade."[71] A 2020 literature study found evidence that the costs of such laws exceed their benefits by an estimated $302 million dollars per year.[72] The International Center for Law & Economics—which has been known to express caution or skepticism about antitrust intervention—recent devoted several pages of public comments to bracing criticism of CON-style systems that make market entry contingent on government permission.[73] Even the U.S. Court of Appeals for the Sixth Circuit has gone out of its way to point out the case against CON systems:

> [T]he federal government—across different agencies and ideologically diverse administrations—continues to advocate against [CON] laws, noting their tendency to increase costs while decreasing access and quality of care. Even so, 35 States still have some form of certificate-of-need laws, and . . . 16 States still apply them to home healthcare companies. But the public defenders of such laws are a shrinking minority.
>
> While we cannot claim to have the expertise of the economists or other scholars critical of these laws or the knowledge of the federal and state legislators that have repealed them, we can say that the judgment that this was a failed experiment has the ring of truth to it. Were we Kentucky legislators ourselves, we would be inclined to think that certificate-of-need laws should be the exception, not the rule, and perhaps have outlived their own needs.[74]

2. Recommendation

Congress should consider federal legislative action to eliminate, preempt, or discourage state certificate-of-need laws, or to encourage their repeal. It was federal Congressional action in

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[70] Christopher J. Conover & James Bailey, *Certificate of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *2 (2020) ("[A]s a general proposition, state policy currently has been moving in the general direction of eliminating CON or softening its stringency since the 1980s.").

[71] Maureen K. Ohlhausen, *Certificate of Need Laws: A Prescription for Higher Costs*, 30 Antitrust 50 (Fall 2015)

[72] Christopher J. Conover & James Bailey, *Certificatze of Need Laws: A Systematic Review and Cost-Effectiveness Analysis*, 20 BMC Health Servs. Res. 748, at *2 (2020).

[73] Eric Fruits, Daniel Gilman, Ben Sperry, Kristian Stout & Mario Zuñiga, *Comments of the International Center for Law & Economics Re: Department of Justice Anticompetitive Regulations Task Force, Docket No. ATR2025-0001 [and] Federal Trade Commission Request for Public Comment Regarding Reducing Anti-Competitive Regulatory Barriers* (May 27, 2025).

[74] Tiwari v. Friedlander, 26 F.4th 355, 365 (6th Cir. 2022).

the 1970s that led to nationwide adoption of CON laws by the states, where—predictably and unhappily—they have become entrenched. Today, Congress has an opportunity to correct the policy problem that was created by a federal mandate in 1974 and has since congealed through the workings of special-interest politics.

Most obviously, Congress should consider using its role as an enormous funder of state healthcare by making at least some federal healthcare funding conditional on the elimination of CON laws. (In effect: if Congress is going to be paying for state healthcare, it might as well ensure that it is not subsidizing exclusionary practices that benefit incumbents and harm patients.)

I am aware of at least one previous legislative effort in this direction. In January 2019 and August 2020, in the 116th Congress, then-Congressman (now Senator) Jim Banks of Indiana introduced H.R. 506 and H.R. 8098 (the "Hospital Competition Act"), which would have made some grant money to States conditional on, among other things, a showing that "[t]he State does not have in effect any State certificate of need law that requires a health care provider to provide to a regulatory body a certification that the community needs the services provided by the health care provider."[75]

I support this approach, which uses the same funding-incentive mechanism that Congress originally used—50 years ago—to push CON laws to states in the first place. Having significantly inflamed the problem through affirmative incentives, Congress could now valuably use the same tool to put matters right and reopen the nation's hospital markets.

[75] H.R. 506 ("Hospital Competition Act of 2019"), 116th Cong. (2019–2020) § 2(c)(3)(B)(i); H.R. 8098 ("Hospital Competition Act of 2020"), 116th Cong. (2019–2020) § 2(c)(3)(B)(i).

B. Certificate of Public Advantage Laws: Did Congress Really Intend to Give States an Antitrust Veto?

1. Competitive Concerns

In general, mergers between rival hospitals that harm consumers by eliminating competition are illegal under federal antitrust law.[76] This foundational rule of law protects patients and payors from the price and quality harms of bad hospital mergers, which are widely recognized as a significant driver of increasing healthcare costs.[77]

But the Supreme Court has carved out an odd loophole in the antitrust laws—including the merger laws—that is neither grounded in the text of those statutes nor consistent with the normal operation of federal statutes. Specifically: the Court has held that a *state* government can confer complete immunity from federal antitrust law on *wholly private businesses*, so long as the state "clearly articulates" a choice to displace competition and if it "actively supervises" the relevant conduct.[78] This is known in antitrust parlance as the application of "state action immunity"—the principle that the antitrust laws do not restrain state-government action—to private conduct.[79] When it applies, it permits private businesses to engage in the most naked and harmful forms of antitrust wrongdoing, up to and including naked price-fixing and—crucially for present purposes—the consummation of harmful mergers and acquisitions.[80]

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[76] *See*, *e.g.*, ProMedica Health System, Inc. v. F.T.C., 749 F.3d 559 (6th Cir. 2014).

[77] *See*, *e.g.*, Zarek Brot, Zack Cooper, Stuart V. Crai, & Lev Klarnet, *Is There Too Little Antitrust Enforcement in the US Hospital Sector?* 6 Am. Econ. Rev.: Insights. 526 (2024); Cheryl L. Damberg, *Health Care Consolidation: The Changing Landscape of the U.S. Health Care System*, Testimony before the U.S. House of Representatives Committee on Ways and Means, Subcommittee on Health (May 17, 2023) ("Studies examining the effects of horizontal consolidation of hospitals show that consolidation leads to higher commercial prices. The literature largely shows no effect on or declines in quality of care, even though the stated goal of consolidation is to improve clinical outcome").

[78] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[79] Francis & Sprigman, ANTITRUST, *supra* note 5, at 532–36.

[80] *See*, *e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (authorizing what amounts to a raisin cartel); FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216 (2013) (implicitly confirming the applicability in principle of the state action defense to hospital mergers, although concluding that the preconditions for such immunity were not satisfied by the challenged transaction).

In effect, the doctrine allows states to hand out the antitrust equivalent of a license to kill to private parties under the antitrust laws, apparently based on the Court's understanding of Congress's intent.[81] Of course, it is one thing to conclude—from legislative silence![82]—that Congress did not intend to prohibit or punish the conduct of state sovereign institutions; it is quite another to conclude that Congress intended to empower the states themselves to hand out immunity shields to private parties for whatever reason a state government instrumentality might think good, without any federal supervision or recourse.

This is a somewhat anomalous principle in our federal system. States do not usually exercise a veto over federal statutes of general application; on the contrary, Article VI of the Constitution explicitly provides for the supremacy of federal law. Just imagine the consequences if the Court were to confer on the states the same ability to derogate—by clear articulation and active supervision—from federal statutes or rules relating to taxation, environmental regulation, defense, aviation, and so on. Indeed, the Court has explicitly affirmed that there is no "carveout" from the Commerce Clause for traditional government functions.[83] To be sure, the Court has recognized that a clear-statement rule can protect the "usual constitutional balance of federal and state powers," but the states have no "usual" power to grant private parties, carrying on commercial activities, immunity from federal commercial statutes of general application.[84]

And it is not just an anomalous principle; it is also a dangerous one. It is plainly a risky business to allow state governments to grant, without federal supervision, hall passes that excuse

[81] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103–04 (1980).

[82] Parker v. Brown, 317 U.S. 341, 351 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

[83] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976) (which had held that the Commerce Clause does not permit Congress to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions").

[84] *See* Bond v. United States, 572 U.S. 844, 858 (2014) (discussing the clear statement principle).

private parties from compliance with federal statutes of general application, and lock the federal agencies out of their enforcement functions. States may grant such passes for reasons of local politics; based on an incomplete (or parochial) assessment of the policy impacts; or in the name of idiosyncratic policy goals that are foreign to or even adverse to the federally ordained regulatory scheme. As a general matter, when Congress legislates—above all through "superstatutes" like the Sherman Act and Clayton Acts that operate as pillars of the interstate commerce system—the force of its command should not depend on the whims of lawmakers and officials in the several states.

The effects of this antitrust license-to-kill are nowhere clearer than in state Certificate of Public Advantage ("COPA") laws. These are state laws that empower state agencies to grant an antitrust free pass to hospital mergers and agreements that would otherwise be illegal, by "certifying" that the otherwise-illegal deal is in the public interest and often imposing regulatory obligations (*e.g.*, price controls).[85] When a hospital merger receives a COPA, the state-action doctrine kicks in, and the antitrust agencies are forbidden to review or challenge the deal.[86] A recent district court decision has held that such a merger need not even be notified to the agencies under the HSR Act, meaning that the agencies may not even have an opportunity to advocate to the state.[87]

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[85] *See*, *e.g.*, Tex. Health & Safety Code, Title 4, Subtitle F, Chapter 314A § 314A.003(b) ("It is the intent of the legislature that this chapter immunize from all federal and state antitrust laws the execution of merger agreements approved under this chapter and post-merger activities supervised under this chapter."). *See generally*, *e.g.*, Seungwhan Chun, Marco Duarte, Cici McNamara & Jason Lindo, *Evaluating Substitutes for Antitrust: The Case of COPA Laws* (working paper), at *7 ("When a COPA is approved, states typically impose a suite of regulatory conditions designed to simulate the competitive pressures that will be lost. These conditions vary but often include caps on price increases, limits on operating margins, and mandates to maintain or expand access to care. For example, the North Carolina COPA for Mission-St. Joseph's imposed caps on margins, cost growth, and physician employment, while the MaineHealth COPA required cost savings and physician recruitment. The Ballad Health COPA included an "Equalization Plan" to harmonize employee compensation and restrictions on layoffs. These conditions are intended to ensure that the merged entity delivers on its promises of maintaining access to care without exploiting its market power.").

[86] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 1 ("In states with COPA laws, officials allow hospitals to merge if they determine the likely benefits from a particular merger outweigh any disadvantages from reduced competition and increased consolidation. . . . COPAs purport to shield provider mergers and other types of collaborations from federal antitrust enforcement under the state action doctrine.").

[87] *See* Louisiana Children's Med. Ctr. v. Att'y Gen. of United States, No. CV 23-1305, 2023 WL 6293887, at *12 (E.D. La. Sept. 27, 2023) ("[T]he Court holds that the Hospitals' transaction is exempt from the federal antitrust laws and need not comply with

COPA statutes emerged beginning with Wisconsin in 1991,[88] and today more than a third of all states have COPA statutes.[89] Such laws are still emerging: Indiana, for example, passed a COPA law in 2021 and amended it in 2022.[90] (The Indiana Department of Health is currently considering an application for a COPA filed in February 2025.[91]) And COPA are being sought and granted with increasing frequency. Since 2016 alone, I am aware of provider mergers that have been immunized by a COPA in West Virginia (Cabell / St. Mary's), Tennessee and Virginia (Mountain States / Wellmont, forming Ballad Health), Texas (Hendrick / Shannon), and Louisiana (Louisiana Childrens' / Tulane Medical), as well as efforts to obtain them in New York (SUNY Upstate / Crouse, application withdrawn in the face of FTC opposition) and Indiana (Union Health / Terre Haute, currently pending). I have no reason at all to consider this an exhaustive list.

These laws harm consumers. The FTC has been crystal-clear: "Research demonstrates that COPAs have resulted in significant price increases and contributed to declines in quality of care."[92] And it is not hard to understand why. Transactions that aren't harmful don't violate the antitrust laws, so a COPA—which takes time and energy to obtain—is only worthwhile for providers planning mergers that they believe to be harmful and therefore illegal.[93] Unsurprisingly, "most

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Section 7A's requirements. The Court finds no reason to subject a merger exempt from Section 7 to a waiting period and filing requirements designed to allow the FTC to determine whether that merger may violate Section 7.")

[88] *See* Sean O'D. Bosack, *Antitrust Immunity for Health Care Providers in Wisconsin: The State Action Immunity Doctrine and Wisconsin's Health Care Cooperative Agreement Legislation*, 80 Marq. L. Rev. 245, 261 (1996).

[89] Seungwhan Chun, Marco Duarte, Cici McNamara & Jason Lindo, *Evaluating Substitutes for Antitrust: The Case of COPA Laws* (working paper), at *7 ("[A]s of 2024, 19 states have active COPA laws, with Indiana enacting its COPA law in 2021, making it the most recent state to do so."); Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 466 (2022) (giving the figure as 18 states).

[90] Ind. Code § 16-21-15.

[91] Union Hospital, Inc. & Terre Haute Regional Hospital, L.P., 2025 Application for Certificate of Public Advantage (Feb. 2025), https://www.in.gov/health/cshcr/files/COPA-2025-Application-Reduced.pdf.

[92] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 3.

[93] FTC, Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital, Public Version (Redacted) (Mar. 17, 2025) 6 ("COPA applications often involve a considerable cost and delay for merging hospitals. And, if approved, a COPA often imposes significant regulatory burdens on the merging hospitals and the state. Therefore, in many cases, a rational hospital would only pursue a COPA if necessary to immunize the merger from the antitrust laws."); see also FTC, *FTC Policy Perspectives on*

COPAs that have been approved so far [have] resulted in a single hospital monopoly."[94] For example, the COPA application pending in Indiana, described above, would result in a merged firm with "a combined share of 74% of all commercially insured inpatient hospital services provided to county residents."[95] (Such a market share is more than sufficient to support a finding of monopoly power under the antitrust laws.[96])

The harms from a COPA typically play out in two stages. In the *first* stage, the COPA is granted and the merger takes effect. The COPA typically imposes some controls on price and services in an effort to substitute for competition. But there are a series of problems with this effort. First, government price controls and service mandates are seldom good substitutes for market competition: there are usually simply too many variables for a regulator to plausibly define, monitor, and enforce "competitive" outcomes.[97] For example, even when price does not increase, quality of care or breadth of service may decline: thus, a price cap may simply displace the harms of monopoly or market power into an "unregulated dimension" like quality.[98]

Certificates of Public Advantage, Staff Policy Paper (Aug. 15, 2022) 11 (noting the "lengthy process" in Tennessee and Virginia).

[94] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 1.

[95] FTC, Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital, Public Version (Redacted) (Mar. 17, 2025) 1.

[96] Francis & Sprigman, ANTITRUST, *supra* note 5, at 328 (noting that "a market share of around 70% is often suggestive of monopoly").

[97] Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 468 (2022) ("[T]wo COPAs were poorly designed and allowed the merging hospitals to effectively evade regulation and increase prices while under COPA regulation.").

[98] Seungwhan Chun, Marco Duarte, Cici McNamara & Jason Lindo, *Evaluating Substitutes for Antitrust: The Case of COPA Laws* (working paper), at *3 ("We find that mergers consummated under COPA law result in price declines of 15.2% and increases in 30-day mortality rates of 1 p.p. over a baseline average of 11%. These mortality effects are significantly larger than those resulting from FTC-challenged mergers. The correlation between individual-level price and quality effects for hospitals that experience COPA mergers is negative, which is consistent with our prediction that post-merger price regulations exacerbate the exercise of newfound market power along unregulated dimensions of hospital behavior."); Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 482 (2022) ("When competition is reduced while prices are regulated, the regulated firms have fewer incentives to improve quality, and it is likely that quality will decline.").

Second, even if the rules are correctly framed on paper, in practice states encounter tremendous difficulties in monitoring and enforcing them.[99] Indeed, COPA administration can be very expensive and burdensome. (For example, a 2018 report on a COPA issued by Tennessee and Virginia noted that "accordingly to [Tennessee Department of Health] staff, Tennessee's costs to review the . . . COPA application were $2,995,545" and that "[a]n estimate of [the Virginia Department of Health's] annual costs of ongoing supervision of the . . . cooperative agreement was included in the governor's proposed 2018 budget, totaling $624,518 per year."[100])

These difficulties are exacerbated when the supervising agencies are understaffed and overworked—as they often are. The merged hospital, of course, has every incentive to exert political influence to *ensure* that the supervising agencies are understaffed,[101] and to seek and obtain amendments and modifications that relax the obligations of the COPA itself.[102]

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[99] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 4 ("COPAs can be extremely difficult to implement and monitor, requiring significant state resources over many years, sometimes decades. Regulatory fatigue, staff turnover, and changes in funding priorities at state agencies can lead to less vigorous supervision over time.").

[100] Erin C. Fuse Brown, *Hospital Mergers and Public Accountability: Tennessee and Virginia Employ a Certificate of Public Advantage, Milbank Memorial Fund Report* (September 2018) 29–30.

[101] This may sound like speculative scaremongering. It is not. FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11 ("Soon after the COPA was approved, the West Virginia legislature made significant changes to the [supervising] Authority, including eliminating the salaried board of directors (including those who approved the COPA), a 50% reduction in funding, and large staffing reductions (including those who evaluated the COPA). In addition, the Authority's autonomy was eliminated, and it was placed under the direction of the West Virginia Department of Health and Human Resources. The Authority is still responsible for continued oversight of the Cabell COPA, although with substantially fewer resources and a lack of independent authority.").

[102] *See*, *e.g.*, Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 481 (2022) (noting that the Palmetto COPA was renegotiated to "weaken[] many of its price regulations"; that "In 2007, Benefis successfully petitioned the Montana legislature to repeal the COPA . . . by citing the announced entry of a new 20-bed hospital and surgery center and its estimate of the compliance costs associated with the COPA ($250,000 per year). The political power of Benefis as the largest employer in Great Falls (with more employees than the next 10 private employers combined) and one of the largest private employers in the state may have contributed to its success in repealing the COPA"; and that "Mission Health successfully lobbied the North Carolina legislature to end its COPA regulation through the repeal of the statute that had allowed Mission to apply for COPA regulation. Mission was successful in arguing that COPA regulation was unnecessarily burdensome and no longer useful . . .. Immediately after the repeal, Mission's prices increased substantially. Likewise, the expiration of SMMC's COPA led to a large price increase at SMMC relative to prices at other Maine hospitals."); FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 4 ("[T]he hospitals subject to COPAs often lobby for repeal of COPA oversight or fewer COPA conditions, citing costs and difficulties of compliance. When this happens, the practical effect is that the merged healthcare system that was previously subject to state COPA oversight is then able to exercise increased market power (in most cases, monopoly power) unconstrained by either state regulation or antitrust enforcement against merger-related harms."); .Erin C. Fuse Brown, *To Oversee or Not to Oversee? Lessons from the Repeal of North Carolina's Certificate of Public Advantage Law, Milbank Memorial Fund Report* (September 2018) 32 ("[T]he COPA

Third, there is a deep problem in the background with the design of the system. What is the ultimate remedy if the hospital persistently violates the conditions? If the merged hospital fails to comply with its commitments—or if the merger proves obviously harmful in other ways—the state often has little recourse. It is proverbially difficult to "unscramble the eggs" and unwind an anticompetitive transaction, and often this just cannot be done. On multiple occasions the FTC has had to settle for an obviously-inadequate behavioral remedy for an illegal hospital merger because it has become impractical to restore competition among independent providers.[103]

In the *second* stage, the COPA is often repealed or its obligations reduced—with the relevant hospital, of course, very likely lobbying to bring this about—completing the transformation to an unregulated monopoly provider. Effects at this stage can be really shocking: the termination of the Mission Health COPA in North Carolina resulted in price increases of "at least 38%"[104]; the termination of the MaineHealth COPA in Maine resulted in price increases of around 50% at one hospital and 62% at another[105]; and there is evidence of significant quality concerns following the termination of COPAs in multiple cases.[106]

So why do states grant COPAs? Among other things, state agencies are often implored to grant a COPA on the basis that the relevant merger is likely to be beneficial for patients or the

party will have strong incentives to escape stringent regulatory oversight under the COPA, either through legislative repeal of the state's COPA law or by seeking exceptions, modifications, or regulatory evasion from the COPA conditions.").

[103] Statement of the Federal Trade Commission, In the Matter of Cabell Huntington Hospital, Inc., Docket No. 9366 (July 6, 2016) 3 ("Because healthcare provider mergers are difficult to unwind, there is no easy remedy if a cooperative agreement fails to deliver its promised benefits. In all likelihood, the benefits of competition will be lost, and patients, employers, and communities will suffer the consequences of higher-cost and lower-quality healthcare."). For a salutary lesson, *see* In the matter of Evanston Northwestern Healthcare Corp., 2007 WL 2286195 (F.T.C. Aug. 6, 2007) (noting the impracticability of post-consummation divesture in a hospital merger).

[104] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 3–4.

[105] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 10.

[106] Andrew R. Jones, *Conditions at Asheville's Mission Hospital pose 'immediate jeopardy to patients' health and safety,' state investigators report*, ASHEVILLE WATCHDOG (Jan. 23, 2024); Christopher Garmon & Laura Kmitch, *Hospital Mergers and Antitrust Immunity: The Acquisition of Palmyra Medical Center by Phoebe Putney Health*, 43 J. Comp. L. & Econ. 433, 436 (2018); Adam Friedman, *With Ballad Health under new scrutiny, Tennessee to hold yearly hearing on monopoly agreement*, TENNESSEE LOOKOUT (July 1, 2024).

community through the creation of cost savings and efficiencies. But, as current and former enforcers well know, such hopes commonly prove unfounded or unduly optimistic. Merging hospitals (and other merging parties) routinely make such arguments to the FTC during antitrust investigations. But "[e]xperience and evidence demonstrate . . . that many hospital mergers do not result in significant efficiencies, despite hospital projections that they will."[107]

Similarly, hospitals often argue (and no doubt believe) that a COPA for a facially anticompetitive merger is necessary to avoid the closure of at least one hospital. But here again, long FTC experience has shown these claims are routinely overblown. "When facing antitrust scrutiny," the FTC has explained, "merging hospitals often claim that sell-side hospitals would close without the merger, recognizing that the FTC takes such concerns seriously. But, *whenever these self-serving claims are actually tested, they are nearly always proven false.*"[108] This is a facet of a broader phenomenon well known to antitrust enforcers everywhere: merging firms are often quick to plead dire financial straits in an effort to consummate an anticompetitive merger, only to experience a "miraculous recovery" (or find a less anticompetitive buyer) if the deal is eventually blocked.[109] As the FTC has recently pointed out, "a review of FTC challenges to hospital mergers

[107] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022)4.

[108] Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Mar. 17, 2025) 4 (emphasis added); see also id. at 2 ('[T]here are credible reasons to doubt Union Health's suggestions that HCA Healthcare would close THRH if the COPA is denied. Notably, the Parties did not represent in their Original Application or in their Second Application that THRH would close if the COPA application is denied. When Union Health's CEO was pushed on this point at a 2021 legislative hearing on the COPA law, he predicted that THRH would not exit the market absent the merger, stating, 'I do not believe the other system would leave the community.'").

[109] Ian Conner, Director, FTC Bureau of Competition, *On "Failing" Firms—and Miraculous Recoveries*, FTC COMPETITION MATTERS BLOG (May 27, 2020) ("Over the past few years, the [FTC's Bureau of Competition] has faced a surprising number of failing-firm claims by merging parties. Even when the economy was booming, we heard many iterations of the same argument: The acquired firm is failing. The acquiring firm is failing. Both firms are failing (which presumably would justify the merger on the basis that if you tie two sinking rocks together, they're more likely to float). The entire industry is failing. But despite many claims and much time spent assessing the financial health of numerous firms, the Bureau rarely finds that the facts support a failing firm argument.").

from the past decade . . . reveals that *none* led to any hospitals shutting down or terminating services in local communities."[110]

Most importantly, *both* these arguments—the argument from overall benefit and the argument from a failing firm—are accepted and considered in standard merger review, and when supported by convincing evidence they can render the merger lawful.[111] As a result, there is no good reason to think that the relevant economic analysis can be better handled by an underfunded state authority than the nation's most experienced analyst of hospital mergers, the FTC.

Consumer benefits and the risk of hospital failure are likely not the only reasons COPAs are granted. Just as with CON laws, and for the same reasons, the state processes can be vulnerable to political pressure from incumbent hospitals and hospital systems.[112] A recent article in the Journal of Law and Economics neatly captures the problem:

> [L]ocal politicians advocating for COPAs are often influenced by the hospitals that wish to merge without the scrutiny of antitrust enforcement. For example, in 2019 Texas passed a COPA law to shield hospital mergers from federal antitrust enforcement and replace antitrust regulation with active supervision by the Texas Health and Human Services Commission (TXHHSC). However, the law applies to only eight counties, including the counties in which Abilene and San Angelo are located . . . . The law was written with the help of the lawyers and administrators of the hospitals in Abilene and San Angelo. The representative who coauthored the law stated, "The purpose of doing this at the state level was to circumvent and to bypass federal trade regulations, and antitrust regulations. I mean it was solely for that purpose, to avoid having to try to explain to someone in Washington, D.C., why it was important in Abilene, Texas, or San Angelo, Texas, or Nacogdoches, Texas—was really going to be beneficial for the consumer" . . . . The following

[110] Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Mar. 17, 2025) 5.

[111] Francis & Sprigman, ANTITRUST, *supra* note 5, at Ch VIII.

[112] *See*, *e.g.*, Alex Kacik & Tara Bannow, *Beyond the Byline: Texas COPA law may pave the way for more hospital M&A – Transcript*, MODERN HEALTHCARE (Oct. 9, 2020) ("Hospitals. I mean, they tend to be some of the biggest employers in their regions. I mean, especially in these cities in Texas, they're just really politically powerful. So if they want to do a deal that they think might get blocked by the feds, they might go to their state lawmakers who they might have relationships with already, you know, write them a check and be like, Hey bud, you know, can I get a COPA? And in this particular case, both the CEOs of Hendrick health system and Shannon medical center, the two providers that are buying hospitals from community health systems, they donated money to the little lawmaker who carried the bill. Both CEO's spoke in support of the bill at a hearing, a CHS representative. That's the company selling the hospitals and a pair of Texas hospital trade groups had both been scheduled to testify in support of the bill.")

> year, in two separate transactions, the only two hospitals in Abilene and the only two hospitals in San Angelo merged under the protection of the new Texas COPA law . . . . The mergers were approved by the TXHHSC despite strong objections from the [FTC] that the mergers presented "substantial risk of serious competitive and consumer harm in the form of higher healthcare costs, lower quality, reduced innovation, and reduced access to care."[113]

Small wonder, then, that scholars and advocates have clamored for years for a decisive solution to the COPA problem before the problem gets any further out of hand. The FTC has repeatedly pointed out that "COPAs . . . allow for hospital consolidation that is likely to harm patients and employees."[114] It recently stated that: "the weight of the empirical evidence indicates that in the long run, hospital mergers shielded with COPAs often lead to higher prices and reduced quality from unconstrained provider market power. Despite hospital claims that COPAs will result in lower costs and improved population health outcomes, we are not aware of any proven benefits of COPAs."[115]

Nor is this a "state problem." Just as with CON laws, the COPA system has a distinctively federal root, and not just because they routinely affect acquisitions by out-of-state and multistate hospital systems, and cause harms to patients and workers that travel across state lines.

Critically, the entire COPA phenomenon stems from a purported interpretation of *federal* law: the Supreme Court's conclusion that Congress intended that the Sherman Act and the Clayton Act be read to create a state immunizing power of just this kind. Indeed, COPA laws often exemplify the worst problems of a state-action immunity doctrine that applies

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[113] Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 466 (2022) (citations omitted).

[114] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 1. *See also* FTC, Federal Trade Commission Staff Submission to Indiana Health Department Regarding the Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Sept. 5, 2024) 5 ("The FTC has a long history of advocating against the use of COPAs through comments and testimony submitted to state legislators and other stakeholders due to concerns that COPAs may enable activity that would substantially reduce competition.").

[115] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 12 (internal quotation marks, brackets, and footnote citation omitted); *see also id.* at 4 ("We are not aware of any studies showing that these purported benefits are ever actually achieved.").

to private conduct (including even naked price-fixing, monopolization, and harmful mergers). In principle, the doctrine allows a state to shield *anything* from the federal antitrust laws—for bad reasons or none at all, and with no role for the federal enforcers or private plaintiffs to protect competition or consumers when the state policy is wrong.

COPAs are of particular concern today, given a national wave of hospital mergers and other forms of healthcare consolidation,[116] and widespread recognition that mergers of competing hospitals in markets with few suppliers contribute to a rising cost crisis.[117] Importantly, even when COPA conditions and supervision do manage to keep prices down, experts often express concerns—consistent with the teachings of economic theory and long experience—that patient harms may result through quality, service, and innovation effects.

To make the preceding discussion more concrete, the following chart identifies some transactions that the FTC has highlighted in its public policy output. In addition to traditional-form COPAs, it also includes an acquisition that was consummated as a result of the application, by a lower court, of state-action immunity to private conduct (the Phoebe Putney transaction):

[116] Christopher Garmon & Kishan Bhatt, *Certificates of Public Advantage and Hospital Mergers*, 65 J. L. & Econ. 465, 465 (2022) ("Over the past 10 years, the United States experienced an unprecedented wave of hospital mergers. The vast majority of urban areas in the United States now have hospital markets that are highly concentrated . . . . Coincident with this increase in concentration, the price of hospital services rapidly increased, outpacing other types of health care services . . . . Commercial inpatient hospital prices increased from 110 percent of Medicare rates at the beginning of the century to the current average of 247 percent of Medicare rate.")

[117] *See*, *e.g.*, Martin Gaynor, Kate Ho and Robert J. Town, *The Industrial Organization of Health-Care Markets*, 53 J. Econ. Lit. 235, 262 (2015) ("[M]ergers between rival hospitals are likely to raise the price of inpatient care and these effects are larger in concentrated markets.").

Year of State Approval	State(s)	Transaction	Notes
1995 (cooperation), 1998 (merger); repealed in 2015	NC	Memorial Mission & St. Joseph's ("the only two general acute care hospitals in Asheville, [NC]"[118])	"Mission Health increased its prices by at least 20% more than peer hospitals during the COPA period[.] . . . prices increased by another 38% after the COPA was repealed in 2015," thus "leaving no competitive or regulatory constraint on Mission Health's monopoly power in Asheville," and then "[i]n February 2019, Mission Health was acquired by the for-profit healthcare system HCA Healthcare."[119] In December 2023, news reports indicate, the NC DHHS identified "deficiencies in care that were so severe . . . that they posed immediate jeopardy to patients' health and safety. 'Immediate jeopardy' is the most serious deficiency possible for a hospital."[120] Since that time, quality appears to have improved.[121]
1996; repealed in 2007	MT	Columbus Hospital & Montana Deaconess ("the only two general acute care hospitals in Great Falls, [MT]"[122]), forming Benefis Health System	"Benefis's prices closely tracked the prices of peer hospitals in duopoly markets during the COPA period, but then increased by at least 20% following the repeal of the COPA" when "[i]n 2007, at [the system's] urging, the Montana state legislature passed a bill that effectively terminated the COPA agreement, despite the Montana Attorney General's objections. As a result, Benefis Health has been able to freely exercise its market power in Great Falls with no regulatory or antitrust oversight for merger-related harms since 2009[.]"[123]
1997; modified in 2003	SC	Baptist Healthcare System & Richland Memorial Hospital ("two general acute care hospitals in Columbia, [SC]"), forming Palmetto Health System	Unusually, Palmetto Health faced significant competition (*i.e.*, was not a merger to single-hospital monopoly); between 1992 to 2008 inpatient prices did not increase more than those of comparable hospitals.[124]

[118] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 8.

[119] *Id.* at 8.

[120] Andrew R. Jones, *Conditions at Asheville's Mission Hospital pose 'immediate jeopardy to patients' health and safety,' state investigators report*, ASHEVILLE WATCHDOG (Jan. 23, 2024).

[121] Karen Zatkulak, *Mission Health back in compliance with CMS standards, letter provided by hospital shows*, ABC13 NEWS (June 4, 2024).

[122] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 8–9.

[123] *Id.* at 8–9.

[124] *Id.* at 9–10.

2009	ME	MaineHealth & Southern Maine Medical Center (creating a "combined organization [with] a dominant share of patient discharges in the [relevant] service area" in Southern Maine[125])	"At MMC, prices increased by 38% during the COPA period, and by 62% following the expiration of the COPA (for an average of 50% during the entire post-merger period). Furthermore, SMMC's quality declined across most measures following the expiration of the COPA."[126] In addition, "SMMC's prices increased by almost 50% following the expiration of the COPA in 2015."[127] "During the COPA period, SMMC's prices increased by about 8% to 13% compared to peer hospitals, but this increase was not statistically significant."[128]
2011 (see notes)	GA	Phoebe Putney Health & Palmyra Medical Center (Albany, GA)	The FTC challenged this merger. The district court declined to issue a preliminary injunction on state-action immunity grounds; by the time the Supreme Court reversed that holding, the transaction had been consummated.[129] The Commission subsequently concluded that Georgia's state CON laws made a divestiture impossible, and grudgingly accepted minimal behavioral relief.[130] A 2017 study found a "large post-merger price spike possibly reflecting the elimination of the lower-priced Palmyra," which later moderated, and "a significant post-merger reduction in inpatient hospital quality . . . across many quality metrics."[131]
2016	WV	Cabell Huntington Hospital & St. Mary's Medical Center (Huntington, WV)[132]	FTC study in progress.[133] Note that the COPA supervising authority was gutted shortly after the COPA was issued: "Soon after the COPA was approved, the West Virginia legislature made significant changes to the Authority, including eliminating the salaried board of directors (including those who approved the COPA), a 50% reduction in funding, and large staffing reductions (including those who evaluated the COPA). In addition, the Authority's autonomy was eliminated, and it was placed under the direction of the West Virginia Department of Health and Human Resources. The Authority is still responsible for continued oversight

[125] *Id.* at 10.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216 (2013).

[130] Statement of the Federal Trade Commission in the Matter of Phoebe Putney Health System, Inc. et al. FTC Dkt. No. 9348 (Mar. 31, 2015).

[131] Christopher Garmon & Laura Kmitch, *Hospital Mergers and Antitrust Immunity: The Acquisition of Palmyra Medical Center by Phoebe Putney Health*, 43 J. Comp. L. & Econ. 433, 436 (2018).

[132] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11.

[133] FTC, Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019); FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11; FTC Congressional Budget Justification FY 2026, 26 (noting study).

			of the Cabell COPA, although with substantially fewer resources and a lack of independent authority."[134]
2018; modified in 2019, 2021, and 2022	TN & VA	Mountain States Health Alliance & Wellmont Health System ("competitors in the geographic region that straddles the border of southwestern Virginia and northeastern Tennessee"[135]), forming Ballad Health System	FTC study in progress.[136] FTC has noted that concerns have been expressed by the public, an independent physician group, and a health insurer.[137] A 2024 news report noted that "[i]n the six years since lawmakers bypassed anti-monopoly laws to allow the hospital system to exist, ER wait times for patients sick enough to be hospitalized have grown more than three times as long and now far exceed the criteria set by state officials, according to an investigation by KFF News into the dangers of hospital monopolies published over the past year. The investigation also found Ballad failed to meet 80% of the benchmarks designed to improve quality care and has yet to fulfill nearly $148 million in charity obligations agreed to as part of the COPA agreement with lawmakers."[138]
2020	TX	Hendrick Health System & Shannon Health System (San Angelo, TX)	The FTC's analysis during the COPA process "indicate[d] that two of the relevant facilities are each other's closest competitor[,] that the geographic service areas of Hendrick are highly concentrated," and that "the proposed Hendrick merger would have a substantial adverse impact on patients with respect to the price of healthcare services."[139]
2022	LA	Louisiana Children's Medical Center, Tulane Medical Center, Tulane Lakeside & Lakeview Regional Medical Center	Unknown.
2022–23 (application filed and withdrawn)	NY	SUNY Upstate Medical University & Crouse Health System (Syracuse area, NY)	The parties ultimately withdrew their application for a COPA.[140] The FTC had expressed opposition during the COPA review process.[141]

[134] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11.

[135] *Id.*

[136] FTC, Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019); FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11; FTC Congressional Budget Justification FY 2026, 26 (noting study).

[137] FTC, *FTC Policy Perspectives on Certificates of Public Advantage*, Staff Policy Paper (Aug. 15, 2022) 11–12.

[138] Adam Friedman, *With Ballad Health under new scrutiny, Tennessee to hold yearly hearing on monopoly agreement*, TENNESSEE LOOKOUT (July 1, 2024).

[139] FTC, Federal Trade Commission Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System (Sept. 11, 2020) 21.

[140] FTC, Press Release, Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger (Feb. 16, 2023).

[141] FTC, Federal Trade Commission Staff Submission to New York State Health Department Regarding the Certificate of Public Advantage Application of State University of New York Upstate Medical University and Crouse Health System, Inc. (Oct. 7, 2022)

2025	IN	Union Health & Terre Haute Regional Hospital (Terre Haute area, IN)	Currently pending.[142] The FTC has expressed opposition,[143] noting among other things that "FTC staff has obtained evidence that the proposed merger between Union Health and THRH will likely lead to higher prices and reduced quality of care in Indiana, as well as reduced access to healthcare services. It will also likely result in worse working conditions and lower wage growth for hospital employees."[144] The FTC also noted that "the Parties would have a combined share of nearly 74% of commercially insured inpatient hospital services."[145]

2. Recommendation

Congress should consider federal legislative action to eliminate, preempt, or invalidate COPA laws. Congress may also wish to reconsider the application of the state action doctrine to private conduct more generally.

At a minimum, Congress should consider using its role as a funder of state healthcare by making at least some federal healthcare funding conditional on the elimination of COPA laws. Just as with CON laws, the point here is an obvious one: if Congress is going to be paying for state healthcare, it might do well to ensure that it is not subsidizing obviously harmful mergers. Senator (then-Congressman) Jim Banks' 2020 bill in the 116th Congress (the Hospital Competition Act, mentioned in Section III.A.2. above) would have made some federal funding conditional on a showing that "[t]he State does not have in effect any Certificate of Public Advantage laws that

[142] Union Hospital, Inc. & Terre Haute Regional Hospital, L.P., 2025 Application for Certificate of Public Advantage (Feb. 2025), https://www.in.gov/health/cshcr/files/COPA-2025-Application-Reduced.pdf.

[143] FTC, Federal Trade Commission Staff Submission to Indiana Health Department Regarding the Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Sept. 5, 2024); FTC, Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Mar. 17, 2025).

[144] FTC, Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Mar. 17, 2025) 2.

[145] FTC, Federal Trade Commission Supplemental Staff Submission to Indiana Health Department Regarding 2025 Certificate of Public Advantage Application of Union Health and Terre Haute Regional Hospital (Mar. 17, 2025) 3.

clearly articulate the State's intent to displace competition in favor of regulation or that violate State or Federal antitrust laws."[146] I support that approach.

More broadly, Congress might also consider legislating to express its intention that, while the actions of sovereign state institutions and state emanations are not intended to be subject to antitrust scrutiny (if that is indeed Congress's will), the actions of *private* competitors should be subject to at least some federal antitrust control.

Specifically, Congress might consider withdrawing state-action immunity for private persons under Section 5 of the FTC Act, which would allow the FTC to enforce the antitrust laws against private conduct but would not open the possibility of litigation by other plaintiffs (*e.g.*, competitors, consumers, and State AGs). This might easily be done with the addition of a clause stating that it applies ". . . notwithstanding any the policy of any state, or agency or emanation thereof, to the contrary."

As a companion measure—and as a reform that would be obvious desirable in its own right—Congress should amend the FTC Act to eliminate the loophole, almost certainly not intended by Congress but never corrected, that currently exempts nonprofits from the reach of Section 5.[147]

Congress may also wish to consider eliminating state-action immunity for private conduct under federal merger law under Section 7 of the Clayton Act. This would effectively end the ability of states to bless anticompetitive mergers and by doing so shield them from federal antitrust law.

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[146] H.R. 8098 ("Hospital Competition Act of 2020"), 116th Cong. (2019–2020) § 2(c)(3)(B)(iv).

[147] *See* 89 Fed. Reg. 38,342, 38,357 (May 7, 2024) (noting "Commission precedent and judicial decisions" holding that the FTC lacks jurisdiction over nonprofits). I have argued elsewhere in forthcoming work that this exemption should be explicitly eliminated by a simple amendment to the FTC Act. See Daniel Francis, *Post-Profit Antitrust*, 135 Yale L.J. __ (forthcoming 2025–26), *76 ("This odd loophole causes a series of headaches in practice, including the inability of the FTC to examine the conduct of nonprofit hospitals under Section 5 despite its unmatched expertise in hospital competition.").

It would allow any proper plaintiff to challenge illegal mergers. This approach would preserve state-action immunity for other forms of private conduct, such as state-supervised price-fixing.

Most broadly of all, Congress may even wish to consider whether it would be appropriate to withdraw state-action immunity from private conduct more generally, including under Sections 1 and 2 of the Sherman Act, perhaps with prospective effect only to minimize the disruption and uncertainty of the change. This would be a broad change and it would be important to make sure that the effects of such a change were well explored and understood: hearings would be useful for this purpose. Among other things, this reform should likely be accompanied by legislation providing that participation in state-supervised regulation (*e.g.*, licensing boards) should be analyzed under the rule of reason—which requires evidence of competitive harm not justified by offsetting benefits—rather than subject to *per se* condemnation. This would align the legal analysis of such activity with participation in private standard setting, where Congress has legislated in exactly this way in the Standards Development Organization Act of 2004 (codified at 15 U.S.C. §§ 4301–06), which as far as I am aware has worked as intended.[148]

C. The Robinson-Patman Act: Corporate Welfare at Consumers' Expense

1. Competitive Concerns

In 1936—at the behest of grocery-industry lobbyists complaining about discounting to and by the emerging chain stores[149]—Congress passed the Robinson-Patman Act ("RPA"), amending

[148] *See* 15 U.S.C. § 4302 ("In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of- (1) any person in making or performing a contract to carry out a joint venture, or (2) a standards development organization while engaged in a standards development activity, shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets. For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it may be appropriate in the circumstances.").

[149] I do not think this unflattering characterization is seriously contested. A lawyer for the U.S. Wholesale Grocers' Association drafted the bill and "Congressman Patman relied heavily on [him] during committee consideration of the bill," in support of which he also testified, and "with the sole exception of the National Association of Retail Druggists, all business interests outside the food industries opposed the bill in both hearings." Corwin D. Edwards, THE PRICE DISCRIMINATION LAW: A REVIEW OF

the Clayton Act of 1914.[150] The Act contains a variety of prohibitions, but its central commandment is a prohibition on certain kinds of price discrimination, by a seller, among buyers of a particular commodity.[151]

In the broadest terms, the Supreme Court has interpreted the Act to prohibit—under certain circumstances, and subject to certain defenses and defensive doctrines—a seller from charging different prices to different sellers for the same commodity or tangible good.[152] (This is not the same as "price discrimination" in economics, which involves charging prices disproportionate to costs.[153]) To be sure, this is a simplification: the RPA is an arcane and intricate statute, and it does not prohibit *all* price differences between buyers. For example, it only applies to price differences in pricing for commodities of like grade and quality, and a defendant may avoid liability by establishing various defenses or defensive doctrines (like "cost justification," changing circumstances, "meeting competition," or the practical availability of the discount to the disfavored

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EXPERIENCE (1959) 22, 24; *see also* Herbert Hovenkamp, *Can the Robinson-Patman Act Be Salvaged?* PROMARKET (Oct. 13, 2022) ("Congress . . . listened almost exclusively to trade associations of independent retailers.).

[150] The RPA is codified at 15 U.S.C. §§ 13–13c.

[151] *See* 15 U.S.C. § 13(a) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them").

[152] There is a competitive-harm test under the RPA, but its meaning is contested and complex. Most importantly, the Supreme Court has held that in at least some cases it can be established, at least presumptively, by the existence of a significant price difference for a significant period. FTC v. Morton Salt Co., 334 U.S. 37 (1948); *see also* Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006) (reaffirming that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time"). This is an exceptional and unwelcome result from the perspective of the modern antitrust system, which generally distinguishes sharply between harm to *competitors* and harm to *competition*: the latter typically requiring overall harm to consumer welfare, an effect that may—but does not necessarily or even usually—result from harm to individual competitors.

[153] Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & Econ. S201, S203 (2014) ("Although the Robinson-Patman Act speaks of price discrimination, it actually challenges price differences. Actual price discrimination occurs when there are differing price-to-marginal-cost ratios across customers . . . , but this is not what constitutes price discrimination under the Robinson-Patman Act."); Jonathan B. Baker, *Competitive Price Discrimination: The Exercise of Market Power Without Anticompetitive Effects*, 70 Antitrust L.J. 643, 643 & n.1 (2003) (emphasizing the gap between "economic price discrimination" and RPA price discrimination); Edward H. Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 962 (1977) ("Lawyers often bewail the fact that administration of [the RPA] frequently fails to conform to an economist's notion of discrimination.").

buyer)—although in practice these can be difficult and expensive to establish, and can require expensive discovery.[154] In addition to the core prohibition, the Act also contains some additional *per se* prohibitions that do not include a harm-to-competition test of any kind.[155]

"Price discrimination" sounds, of course, like a bad thing, including because many other forms of "discrimination" in social and political life can be invidious and harmful. But banning or deterring price differentials as the RPA does can cause serious economic harms.

To see why this is true, in general terms, start by considering the case of a manufacturer that is asked by a retailer to reduce its prices in the ordinary course, or is considering doing so of its own accord. Suppose for now a free discounting regime in which no special rules apply.

Seeking and granting price reductions, of course, are central features of business life. Whether or not a supplier will ultimately grant a discount usually turns on countless relationship-specific details: the supplier's costs, its profit margins, the sales volume that the buyer represents, the buyer's level of effort and success in promoting the product, the nature and value of the overall relationship including their other points of interaction and negotiation, the parties' respective estimates of the alternatives that each of them has to a deal with one another, and everything else that might play into the expected marginal effect on the supplier's profits of saying yes or no to the buyer.

In the *vast* majority of cases, consumers win when suppliers choose to grant the request and reduce a price, and when a seller chooses to lower a price of its own volition. That's centrally because a reduction in the marginal cost of selling a product or service almost always means that a profit-maximizing business will then reduce its own downstream prices. Even a strict monopolist

[154] Cost justification is famously difficult to establish under the Act. *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18 (1990) (noting that the cost justification defense imposes a "requirement of exactitude" and that its use "has proven difficult, expensive, and often unsuccessful"), *quoting* 3 E. Kintner & J. Bauer, FEDERAL ANTITRUST LAW § 23.19, pp. 366–367 (1983).

[155] *See* 15 U.S.C. §§ 13(c), (d), (e).

(*i.e.*, a business with literally no competitors) will usually find it profitable to reduce its prices—and thus benefit consumers—when its own marginal costs decline.[156]

Importantly, this result holds even if the discount is only granted to the buyer that seeks it, and not to the buyer's competitors (which, very likely, are also constantly asking their own various suppliers for lower prices). The buyer that gets the special "discriminatory" discount will find it profit-maximizing to reduce its own prices, which will benefit its consumers—and which will likely attract more customers through the lower price. The buyer's competitors will, as a result, be incentivized to find ways to cut their own costs: perhaps by improving their internal operations or services; perhaps by asking for their own special discounts; perhaps by giving up some profit margin and running a leaner operation. They will, in other words, be encouraged to *compete*. And all this generally benefits consumers.

With this in mind, now we can see why a rule that bans or punishes price differences—even if only presumptively, incompletely, and subject to various defenses and defensive doctrines—causes a double harmful effect.

First, the nondiscrimination rule makes it *more expensive* for the seller to grant a discount: the seller knows that it will either have to give the discount to other buyers (the ones that might complain about price discrimination) or face the expensive and unwelcome prospect of defending against litigation from other unhappy customers. This is a straightforward deterrent of a procompetitive practice, and threatens clear harms: we just do not want to generally discourage sellers from lowering prices![157] (Tellingly, part of the *objective* of the Robinson-Patman Act was to challenge the practice of granting volume discounts(!), except where the discounter could

[156] *See generally* Francis & Sprigman, ANTITRUST, *supra* note 5, at 47–48 (discussing monopolist pricing).

[157] Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & Econ. S201, S203 (2014) ("To the extent that the Robinson-Patman Act inhibits such price differentials, more efficient firms will be denied a lower price, which in turn harms consumers.").

clearly establish that they did not go beyond an underlying cost differential.[158]) In addition to the pass-through consumer benefits, discriminatory discounts may help to break up collusive or oligopolistic pricing.[159]

Second, the buyer's own incentive to push for a lower price will be dampened and reduced by the knowledge that every dollar of discount it obtains will be shared with its own rivals! When a buying agent is made into an agent for his or her own direct competitors, his or her incentive to bargain hard for it is *obviously* reduced. Why work hard to lower your competitors' costs?

In sum: **a rule that punishes "discriminatory" discounts deters sellers from giving lower prices, and it deters buyers from asking for them, so it pushes consumer prices up.** That is a profound and obvious harm.

It is particularly important to see that the above results hold even if the law allows for defenses like "cost justification." For one thing, the cost-justification defense in particular is virtually impossible to prove to the satisfaction of a court, given the complexity of cost accounting and the rigors of the law.[160] For another, in practice a defense of this kind simply reduces the expected magnitude of the deterrent impact, without eliminating it—above all if the defense cannot protect the putative defendant from the threat of lengthy public litigation and discovery. It is often cold comfort for a seller to be told that, if it is indeed sued for granting a discount, then at least—after months of bad publicity, expensive attorneys' fees, and burdensome discovery—it will have

[158] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948) ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. . . [The purpose of the RPA's amendment to Section 2 of the Clayton Act] was to limit 'the use of quantity price differentials to the sphere of actual cost differences.").

[159] As Roger Blair and Christine DePasquale have pointed out, in oligopoly markets (in which output is commonly below competitive levels), "price discrimination may be a way of pursuing marginal sales" and "can undermine [an explicit or tacit] collusive price structure," leading to "lower prices and enhanced consumer welfare." Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & Econ. S201, S204 (2014).

[160] *See supra* note 154.

a reasonable shot at winning the ultimate claim. In a great many cases, the threat of burden will surely weigh against seller willingness to discount, deterring the grant of a lower price.

Having said all this, though: in some cases price discrimination may play a role in harmful behaviors. Perhaps the most important example is the case of a buyer with some market or monopoly power that obtains a commitment from an important supplier of inputs that the buyer will receive equally favorable, or *more* favorable, treatment than its own rivals (*e.g.*, "promise to charge me no more, or 5% less, than you give any competitor"). This commitment can prevent the trading partner from offering good deals to rivals that would sponsor competition, with the result that the buyer's own market power is augmented or protected, and consumers are harmed. But if such an agreement or policy (known in antitrust jurisprudence as an "MFN" or "MFN-plus") harmed consumers through contribution to market or monopoly power, it would likely violate Sections 1 and/or 2 of the Sherman Act.[161] *No RPA enforcement is necessary to tackle this problem.* (In fact, the RPA's core focus on seller liability, and demanding tests for buyer-inducement liability, makes it an inapt tool to tackle this problem.[162])

In addition, scholars have constructed an economic "waterbed effect" model in which a grant of a discount to a favored purchaser (which has acquired scale through multiple acquisitions) results in lower prices, deprives rivals of volume and share, reduces their bargaining power with suppliers as a result, drives up their costs, and harms their consumers.[163] But I am not aware of any evidence that this interesting theoretical model captures the effects of a significant minority of—let alone most—differential discounts in the real world, or that the benefits from avoiding this

[161] Daniel Francis & Christopher Jon Sprigman, ANTITRUST: PRINCIPLES, CASES, AND MATERIALS (3d ed. 2025) 317–23.

[162] Roger D. Blair & Jeffrey L. Harrison, MONOPSONY IN LAW AND ECONOMICS (2010) § 2.3.1 (noting that the RPA's emphasis on sellers "may be misguided").

[163] Roman Inderst & Tommaso M. Valletti, *Buyer Power and the "Waterbed Effect,"* 59 J. Indus. Econ. 1 (2011).

special effect would approach the obvious costs that a nondiscriminatory pricing rule would bring from discouraging discounts generally.[164] The waterbed model is just a theoretical illustration of the point that, under the right circumstances, some harm is conceivable—just, in fact, as it is from regular nondiscriminatory discounts.[165] The authors also emphasize that welfare effects predicted by the model are "markedly different" when the favored buyer has achieved its scale from an improvement in its own efficiency rather than horizontal acquisitions.[166]

More generally: I am not aware of any evidence that, on balance, consumers suffer under a free discounting regime (*i.e.*, when some customers are allowed to get lower prices even when not all do so). The weight of expert opinion, the teachings of basic theory, and the practice of our antitrust system all firmly suggest the contrary. Antitrust's strong reluctance to punish low prices is grounded in the fact that *most of the time* giving and getting low prices are good, not bad, for consumers—and that it is dangerous and unwise to discourage discounting. It is therefore very unsurprising that the 1977 DOJ Report on the Robinson-Patman Act estimated that the RPA caused losses of "$3 to $6 billion" a year: in 1977 dollars! (This appears to be something like $16–32 billion a year in today's money.[167])

Finally, even if we believed that discrimination by sellers was a serious competitive problem, the RPA would not be a remotely serious way to approach that problem. The Act overlaps only casually with the purported underlying concern. For example:

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[164] One of the co-authors of a prominent modern treatment of the waterbed model has acknowledged: "A waterbed effect is only one possibility." Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 Wis. L. Rev. 331, 353 (2008).

[165] For example, a nondiscriminatory above-cost discount might be set at the right level to discourage entry that would improve long-run welfare (so-called "limit pricing"). The dangers of condemning such prices are obvious, and courts do not do so.

[166] Roman Inderst & Tommaso M. Valletti, *Buyer Power and the "Waterbed Effect,"* 59 J. Indus. Econ. 1, 12 (2011); *see also id.* at 13 ("[W]hen size differences were due to growth by improved efficiency . . . discriminatory wholesale prices may have the potential to improve efficiency, provided that the difference between rivals is not too large.").

[167] https://www.bls.gov/data/inflation_calculator.htm.

- it applies only to discriminations in price, not discriminations in quality (so instead of giving X a better price than Y, a defendant can just give X a better quality for the same price);
- it punishes disfavoring a customer by selling at a higher price but does not punish refusing to sell to it at all (so instead of giving X a better price than Y, a defendant can just cut Y off altogether);
- it can be circumvented, if a seller is willing to incur the cost, by differentiating products (including by reference to grade or quality), and charging different prices for different versions (so instead of giving X a better price than Y, a defendant can just offer two grades of its product, and sell one grade to X on more favorable terms and another grade to Y on less favorable terms);
- it applies only to sales, not purchases (so it does not punish discrimination in purchasing prices regardless of its effects); and
- it applies only to sales of tangible commodities, not to intangibles, leases services, licenses, and so on (so it punishes discrimination in prices of sale for a machine but not in prices of the lease for the same machine).

In other words, the Act does not even measure up coherently to its own premise.

This is not a fringe view: it is the solid consensus of the mainstream, including among government enforcers. For decades, it was a point of consensus among federal antitrust enforcers of both parties that the Robinson-Patman Act was harmful on balance and that, as a result, enforcement of its provisions should not be a priority for overstretched antitrust enforcers. The

high point of federal government was the 1950s and 1960s, during which the FTC took the lead.[168] But economic and professional opinion turned decidedly against the Act in the 1970s. The FTC had begun "a policy of seemingly deliberate neglect" from 1969 onward.[169] In 1977, the Justice Department issued a strongly critical report, concluding that "Robinson-Patman is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole," and "[t]he greater the business community's compliance with Robinson-Patman . . . the greater the Act's deleterious impact upon competition."[170] And with that, "DOJ unilaterally stopped its Robinson-Patman enforcement."[171] The FTC has brought hardly any cases since the 1980s. (The RPA also has a criminal provision, which—mercifully—has not been enforced in decades.[172])

This reflects the settled views of generations of enforcers, Republicans and Democrats alike, that RPA enforcement would harm competition and consumers, not help them, and that it was effectively perverse to take resources away from antitrust enforcement and spend it on Robinson-Patman efforts that ran at cross-purposes.

Private enforcement has continued since the federal enforcers lost their enthusiasm for the RPA, although private suits have been discouraged by skeptical judicial approaches to a variety of procedural and substantive issues, including the nature of injury and the propriety of class-action litigation.[173]

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[168] *See* Richard A. Posner, THE ROBINSON-PATMAN ACT; FEDERAL REGULATION OF PRICE DIFFERENCES (1976) 30 (indicating that the FTC filed 1,395 RPA complaints through 1971), 32–33 (table indicating 1,326 such complaints between 1937 and 1974).

[169] Richard A. Posner, THE ROBINSON-PATMAN ACT; FEDERAL REGULATION OF PRICE DIFFERENCES (1976) 31.

[170] U.S. Dep't of Justice, U.S. DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 250 (1977).

[171] D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2075 (2015).

[172] *Id.* at 2075 & n.94.

[173] Brian Callaci, Daniel Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 Temple L. Rev. 185, 212 (2025) ("Private enforcement of the RPA is toothless at present. . . . The Supreme Court's revision of procedure may have made changes to substantive doctrine on the RPA moot."); Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 294 (December 2015) ("Of 200 reported cases with

This skepticism by government enforcers and federal judges aligns neatly with the weight of expert opinion, which holds that the RPA was improvidently enacted: a striking example of special-interest legislation that has been made tolerable only by federal-enforcer neglect and sustained judicial skepticism.

For example, the bipartisan Antitrust Modernization Commission ("AMC") stated that "the [RPA] has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would."[174] It added that "the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective."[175]

The AMC's report concluded that "[t]he time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. *The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.*"[176] The AMC also pointed out that antitrust improvement commissions had regularly pleaded for the RPA's elimination. "[The RPA's] repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977.

Robinson-Patman Act claims filed in federal court from 1996 to 2006, only three resulted in jury verdicts in favor of plaintiffs that were affirmed on appeal. One of those three ultimately was reversed by the Supreme Court."); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

[174] Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS (April 2007) 311.

[175] *Id.* at 311.

[176] *Id.* at 312 (emphasis added).

That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage."[177]

Professor Herbert Hovenkamp, the leading living scholar of U.S. antitrust, has recently emphasized that "[t]he RPA's enactment [in 1936] reveals a captured Congress," pointing out that "Congress never asked the FTC to testify at the RPA hearings, nor were the Department of Justice, consumer groups, or economists invited. It listened almost exclusively to trade associations of independent retailers. Representative Patman candidly acknowledged that Henry B. Teegarden, General Counsel of the Wholesale Grocer Association, actually drafted the bill."[178] He has written that "the RPA was the worst possible solution to the problem at hand: struggling Americans in 1936 did not really need 'protection' from low prices. Nor do they today."[179]

Professor Hovenkamp has described the RPA as "a socially-costly statute that produces no benefits to competition that could not be secured by means of litigation under the Sherman Act. At the same time, [it] imposes significant costs on manufacturers who depend on networks of independent dealers."[180]

Professor Roger Blair, a leading scholar of buyer power,[181] has in co-authored work called the RPA "ill-advised" "protectionism,"[182] and argued that "[i]ts continuing presence . . . imposes costs on the business community and consumers. . . . Even though the prospects for success today may be dim, antitrust suits impose financial costs on defendants and may lead to nuisance settlements. In addition, the Robinson-Patman Act may still impose harm to consumers even

[177] *Id.* at iii.

[178] Herbert Hovenkamp, *Can the Robinson-Patman Act Be Salvaged?* PROMARKET (Oct. 13, 2022).

[179] *Id.*

[180] Herbert Hovenkamp, *Written Testimony [before the Antitrust Modernization Commission] on the Robinson-Patman Act* (July 2, 2005) 1.

[181] *See*, *e.g.*, Roger D. Blair & Jeffrey L. Harrison, MONOPSONY IN LAW AND ECONOMICS (2010)

[182] Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & Econ. S201, S202 (2014)

though there is no public enforcement . . . because the business community may be less inclined to offer discounts that appear discriminatory. . . . This is unsettling because *the act has no redeeming virtues.*"[183] In conclusion: "The purpose of the act has always been to soften competition rather than encourage it."[184]

Professor Daniel Sokol, a prominent antitrust scholar, has concluded that "Robinson-Patman shifts the benefit of antitrust from consumers to less efficient competitors,"[185] and characterized the RPA as "a relic from an earlier protectionist era,"[186] and "protectionism . . . masked in the rhetoric of localism."[187]

And so on. I do not mean to suggest that the Act lacks defenders. But—while I am not well placed to present the best version of their views—those defenders generally make one of two arguments about why the RPA is or might be a wise and beneficial law, and I do not think the Subcommittee should find either persuasive.

The first is focused on *consumer harm*: namely, the observation that some forms of price discrimination, particularly if induced by a powerful buyer in the form of a commitment referencing the prices of rivals, can harm consumers under certain circumstances. Commissioner Mark Meador, for example, has thoughtfully emphasized that the likelihood of finding a harmful case of price discrimination will vary by industry, and that specific industries may present higher chances of finding a good case.[188] But such practices are already within reach of Sections 1 and 2 of the Sherman Act. (And to the extent that there are cases that somehow fall outside the reach of

[183] Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & Econ. S201, S213 (2014).

[184] *Id.* at S214.

[185] D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2066 (2015).

[186] *Id.* at 2098.

[187] *Id.* at 2070.

[188] Mark Meador, *Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers*, FEDSOC BLOG (July 9, 2024).

that statute, but involve consumer harm through the improper augmentation of market power, they are clearly within the reach of Section 5 of the FTC Act.) Moreover, if consumer welfare impact is the metric, it is not plausible that the consumer benefits from finding the occasional meritorious case outweigh the consumer harms from a deterrent on discounting.

The second is based on the interests of *small business as such*: often framed as an interest in fairness, equality of treatment, democracy, opportunity, or a decentralized economy. For example, Daniel Hanley emphasizes: a Congressional goal of "distributing power and opportunity within the United States political economy"[189]; the importance of democracy and independence[190]; fairness[191]; and equality of treatment or nondiscrimination.[192] Brian Callaci, Daniel Hanley, and Sandeep Vaheesan find in the history of the RPA a recognition that "a stronger price discrimination law could raise consumer prices but, as Congress did [in] many other laws, rejected the philosophy of low prices at any cost. Fair competition and fair treatment of businesses, fair wages to workers, and fair prices to producers took precedence over solely low prices to consumers and competition by any means."[193]

These are values with some obvious appeal. And I am certainly not opposed in principle to small or even inefficient businesses, fairness, or democracy. But the killing objection is that **the RPA puts the interests of business owners in direct opposition to the interests of consumers.** These arguments of fairness and opportunity are being offered to justify a measure that—at least on my reading of all theory, evidence, and experience—*surely harms consumers, and society*

[189] Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 Hofstra L. Rev. 313, 314 (2024).

[190] *Id.* at 321.

[191] *Id.* at 323, 329, 331.

[192] *Id.* at 324–25, 329.

[193] Brian Callaci, Daniel A. Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 Temple L. Rev. 185, 195 (2025).

overall, in order to pad the profit margins of business owners. I do not think Congress should take so much as a dollar from the pockets of working families in order to prop up any particular business model. And if the result of that approach is that much distribution and retail is carried out by large-scale business, because that is the cheapest and best way to put food and other goods in the hands of those who want it, I would embrace that outcome. Industrial-policy romance is no substitute at all for making food cheaper.

Despite my bleak assessment of the merits of the RPA, today a revival appears to be on the horizon. Toward the end of the Biden Administration, the FTC filed two cases: one in December 2024 against Southern Glazer's (an alcoholic beverage distributor), and another in January 2025 against PepsiCo (a soft drink manufacturer). The latter has been withdrawn, but the former is proceeding, on a complaint that makes no allegation of actual consumer harm.[194] All three sitting members of the FTC have indicated at least some willingness to enforce the Act.[195] Some lawmakers have explicitly asked that the FTC return to RPA enforcement.[196] As a result, today an RPA revival seems more likely than it has been for half a century.

Perhaps the most important argument in favor of such a "revival"—and a prominent theme among those who favor some RPA enforcement—is that, regardless of whether it is a *good* law, the RPA is law all the same, enacted by Congress and never repealed. Thus, FTC Chairman Andrew Ferguson has written: "The Executive Branch should not categorically and publicly refuse

[194] FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684, 2025 WL 1392166 (C.D. Cal. Apr. 17, 2025) (denying motion to dismiss). The complaint contains a boilerplate statement that "When Southern's unlawful conduct is remedied, large corporate chains will face increased competition, which will safeguard continued choice for American consumers." Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684, 2025 WL 1392166 (C.D. Cal. Apr. 17, 2025) ¶ 10.

[195] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 2110155 (Dec. 12, 2024); Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 2110155 (Dec. 12, 2024); Statement of Commissioner Mark R. Meador In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (May 22, 2025).

[196] Letter from lawmakers to FTC Chair Lina Khan (March 28, 2024), https://www.warren.senate.gov/imo/media/doc/2024.03.28%20Letter%20to%20FTC%20re%20Robinson%20Patman%20Act1.pdf.

to enforce laws that Congress has passed and the President has signed. The separation of powers forbids the suspension of the laws merely because of a policy disagreement with that law."[197] Likewise, FTC Commissioner Melissa Holyoak has written: "As a Federal Trade Commissioner, I take seriously that Congress enacted the Robinson-Patman Act. And as law enforcers, the Commission must faithfully execute the law."[198] And FTC Commissioner Mark Meador has written: "[T]he RPA is a validly enacted law that the Commission should enforce when the facts warrant it and there is clear consumer harm that enforcement will remedy."[199]

There is certainly something to be said for this view (although the view would appear to imply a revival of both civil and criminal enforcement, which is a maximally alarming prospect). Despite the necessity of prosecutorial discretion—and the reality that agencies and other enforcers must make choices every day about alternative dispositions of enforcement resources—it is surely for Congress, not the agencies, to decide whether a law was improvidently enacted.

2. Recommendation

Congress should repeal the Robinson-Patman Act and protect families against a threatened RPA revival that would increase their prices and deter discounting across the economy. 15 U.S.C. § 13–13c should be eliminated in its entirety.

Congress should *strongly* prefer repeal over half measures. Eliminating the RPA would acknowledge decades of bipartisan mainstream consensus, including the views of multiple bipartisan antitrust reform commissions and generations of antitrust enforcement leaders, that the

[197] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 2110155 (Dec. 12, 2024) 1.

[198] Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 2110155 (Dec. 12, 2024) ii.

[199] Statement of Commissioner Mark R. Meador In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (May 22, 2025).

RPA steals from the consumer and gives to the business owner. (The fact that, in doing so, it diverts antitrust agency resources away from real antitrust enforcement is a very bitter irony.)

As a very distant second-best, Congress should harmonize the Robinson-Patman Act with the rest of the Clayton Act by providing, in each subsection of the Act, that the relevant practice is unlawful if and only if "the effect may be substantially to lessen competition." The point of this change would be to reset the RPA to the same harm-to-competition standard—connoting overall consumer harm—that governs every other piece of the antitrust system. The proposed language is drawn from the merger statute, Section 7 of the Clayton Act, and appears also in the conduct prohibition in Section 3 of the Clayton Act.[200]

Implementing this change would be simple. It would involve inserting this language into parts of the Robinson-Patman Act that currently lack any harm to competition test (15 U.S.C. § 13(c), (d), (e)), and striking from 15 U.S.C. § 13(a) the additional language that has led the Court to adopt an anticonsumer standard under the Act. For clarity, the most important subsection of the RPA—that is, 15 U.S.C. § 13(a)—would then read:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition ~~or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them~~: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences

[200] Those provisions also include the language ". . . or to tend to create a monopoly." I favor omitting that language for at least two reasons. First, it has long been virtually ignored by courts and agencies: this means that in practice it has an uncertain meaning or none at all. *See*, *e.g.*, Daniel Francis, *The 2023 Merger Guidelines and the Arc of Antitrust History*, 39 J. Econ. Persp. 3, 3 n.1 (2025) (noting that "enforcers and courts have generally not focused on that language"). Second, if taken literally it would be anticonsumer. A practice or transaction might "tend to create a monopoly" by reducing prices or increasing quality so much that other rivals cease to be competitive. It would not be a good idea to condemn practices solely on the ground that they were so beneficial that others could not catch up.

> in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.
>
> 15 U.S.C. § 13(a) (strikethrough added).

D. The Jones Act: Taking from Consumers, Giving to Shippers

1. Competitive Concerns

One of the most notorious examples of protectionism in U.S. law is the Merchant Marine Act of 1920, as amended (the "Jones Act"). It requires that shipping for domestic trade can only be conducted in ships that were built in the United States, owned by U.S. citizens, and crewed by U.S. citizens (or, for up to 25% of the crew, by permanent residents).[201] Penalties for

[201] *See* 46 U.S.C. §§ 8103 (imposing strict citizenship requirement for some crew positions, and a citizenship or permanent residency requirement for unlicensed seamen subject, broadly speaking, to a 25% limitation on those who are not citizens); 12102(a) (obligation to obtain "a certificate of documentation with an endorsement for that trade under this chapter"), 12103(a)–(b) (certificate of documentation limited to U.S.-owned vessels and those "not documented under the laws of a foreign country"), 12112(a)–(b) (coastwise endorsement limited to U.S.-owned vessels); 12132 (prohibition on engaging in coastwise trade for vessels "sold foreign," "placed under foreign registry," or "rebuilt outside the United States"), 50101(a)(3) (noting policy objective that the U.S. merchant marine is "owned and operated as vessels of the United States by citizens of the United States"), 55102(b) ("[A] vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel-- (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement"); *see also* 46 U.S.C. §§ 12111 (permitting "trade with Guam, American Samoa, Wake, Midway, or Kingman Reef" to be conducted by vessels with a registry endorsement: *i.e.*, merely "U.S.-flagged"), 12103 (providing a limited exemption from the citizen-owner requirement for vessels owned by a trust but chartered by a U.S. citizen), 55101(b) (exempting from the coastwise laws American Samoa, the Northern Mariana Islands (subject to exceptions) and the

noncompliance can be severe.[202] The Act is subject to various exceptions and limiting interpretations.[203]

This is a crystal-clear example of a towering barrier to entry surrounding a critical market. It protects a market (*i.e.*, the market for domestic shipping services) that serves as a cost input to countless products and services on which working families rely across the United States. The Jones Act effectively forces any business wanting to move goods within the United States by sea to rely on a tiny, overpriced, aging, and shockingly expensive fleet of "Jones-Act-compliant" vessels. The Act even affects international trade, because vessels used in international trade that do not comply with this rule—which, given the zero commercial appeal of U.S.-built commercial ships, turns out to be *all* vessels used in international trade—cannot collect and deliver goods between multiple U.S. ports, resulting in inefficient shipping patterns and countless unnecessary internal journeys.[204]

The Jones Act is openly and obviously harmful to U.S. businesses and consumers. Basic economic theory teaches that excluding foreign vessels from domestic shipping will significantly increase prices, and by doing so increase the costs of products and services across the economy.

First, Jones-Act-compliant ships are strikingly few in number, mainly because the U.S. shipbuilding industry is minimal in size, useful output, and competitiveness. U.S.-built ships are

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Virgin Islands unless and until the President otherwise proclaims); OSG Prod. Tankers LLC v. United States, 82 Fed. Cl. 570, 572 n.2 (Ct. Fed. Cl.. 2008) ("The Jones Act states that the tankers must be owned and crewed by United States citizens and built in the United States.").

[202] *See*, *e.g.*, Daniel Michaeli, *Foreign Investment Restrictions in Coastwise Shipping: A Maritime Mess*, 89 N.Y.U. L. Rev. 1047, 1048 (2014) ("In February 2011, the U.S. Coast Guard levied a fine of close to six million dollars on Trico Marine for failing to prove—in the face of "repeated requests"—that it was 75% owned by American citizens, as required by law. Many in the shipping industry were shocked. The Coast Guard demanded shareholder information from Trico that few public corporations would be able to provide.").

[203] John Frittelli, *Shipping Under the Jones Act: Legislative and Regulatory Background*, CONGRESSIONAL RESEARCH SERVICE (Nov. 21, 2019), at *i ("Congress has enacted numerous exemptions or exceptions to the Jones Act. In some cases, Congress has enacted an exemption if there are no Jones Act-qualified carriers interested in serving a particular market (e.g., passenger travel to and from Puerto Rico). Congress has allowed waivers of the Jones Act for national defense reasons, which most often have been executed to speed fuel deliveries to a region after a natural disaster disrupted normal supply lines."); John Frittelli, *Shipping Under the Jones Act: Legislative and Regulatory Background*, CONGRESSIONAL RESEARCH SERVICE (Nov. 21, 2019).

[204] Sam Heavenrich, *The Neglected Port Preference Clause and the Jones Act*, 132 Yale L.J. 559, 563 (2022) (noting that "the Jones Act prohibits unloading goods at multiple U.S. ports").

smaller, more expensive, and take longer to build.[205] "The few U.S.-made large commercial ships now [almost entirely[206]] come from just two shipyards: one in Philadelphia and another in San Diego."[207] The Philadelphia shipyard "continues to operate at a loss"; the San Diego one "primarily relies on Navy shipbuilding for revenue."[208] *Statista* reported that in January 2023 the entire oceangoing Jones Act fleet included just 56 tankers and 23 container ships.[209]

By limiting buyers of shipping services to a compliant fleet, the Jones Act limits them to a pitifully small share of the available vessel pool. The gross tonnage of ships built in the United States in 2024 was 30,782: half that of Spain (64,327), less than a quarter of that of the Netherlands (142,935), and uncomfortably close to that of *Romania* (22,233), a nation not among the globe's great sea powers or industrial leaders.[210] A recent report pointed out that while the United States is the second-largest manufacturing country in the world (representing 17% of world manufacturing output), it is now the *nineteenth*-ranked shipbuilder, representing 0.04% of global commercial shipbuilding.[211] (In other words, a *tenfold* increase in U.S. shipbuilding output would still leave it at less than half of one percent.) The Wall St. Journal has noted that "Asian shipyards churn out hundreds of big boxships and oil tankers a year," while "[t]he U.S. is lucky if it can finish more than one each year."[212]

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[205] Inti Pacheco & Costas Paris, *In Shipbuilding, the U.S. Is Tiny and Rusty*, WALL ST. J. (Mar. 2, 2025) ("The U.S. shipyards aren't competitive with foreign rivals in terms of the size of ships they produce, how long they take to build or how much they cost.").

[206] Note that a Brownsville, TX, shipyard, manufactured 2 container ships in recent years. John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

[207] Inti Pacheco & Costas Paris, *In Shipbuilding, the U.S. Is Tiny and Rusty*, WALL ST. J. (Mar. 2, 2025).

[208] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

[209] Statista, U.S.-flag oceangoing privately owned merchant Jones Act fleet as of January 2023, by ship type (Dec. 8, 2023), https://www.statista.com/statistics/646259/us-flag-oceangoing-privately-owned-jones-act-fleet-by-type/.

[210] UNCTAD, *Ships built by country of building, annual (analytical)* (updated June 10, 2025), https://unctadstat.unctad.org/datacentre/dataviewer/US.ShipBuilding.

[211] Colin Grabow, *Protected US Shipbuilding Continues to Sink*, CATO AT LIBERTY (June 17, 2025).

[212] Inti Pacheco & Costas Paris, *In Shipbuilding, the U.S. Is Tiny and Rusty*, WALL ST. J. (Mar. 2, 2025).

Some numbers help to illustrate the problem. In 2023, a Congressional Research Service report noted that "China, Korea, and Japan build over 90% of the world's tonnage; the United States builds about 0.2%."[213] The report included a helpful chart:

Table 1. Year-End Orderbook for Large Oceangoing Ships
(number of ships under construction)

Shipbuilder	2022	2021	2020
China	1,794	1,708	1,216
South Korea	734	626	441
Japan	587	612	533
Europe	319	288	284
United States	5	3	4

Source: BRS Shipbrokers, *Annual Review*, https://brsshipbrokers.com/publications.

Source: John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023)

Indeed, *from 2010 and 2023*, all U.S. shipyards appear to have yielded 41 large commercial vessels in total (*i.e.*, less than 10% of what Korea produced in *one year* in 2020 alone), as the following CRS chart shows:

[213] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

Table 2. U.S. Shipyards Constructing Large Commercial Cargo Ships, 2010-2023

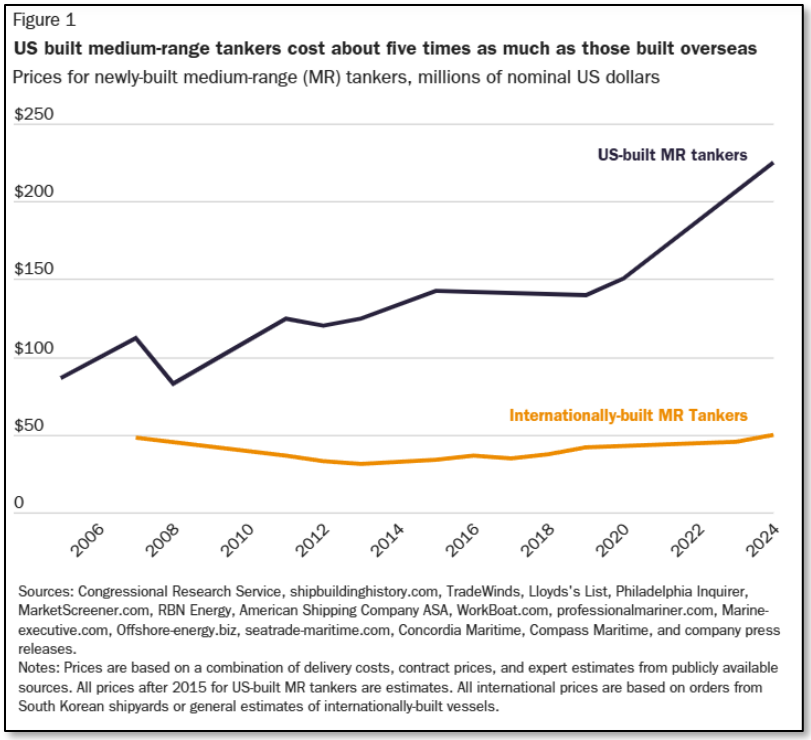
Shipyard	Location	Ships Built
Philly Shipyard	Philadelphia, PA	16 tankers 2 container ships
General Dynamics NASSCO	San Diego, CA	12 tankers 4 container ships
VT Halter Marine*	Pascagoula, MS	2 container ships 1 roll-on/roll-off
Keppel AmFELS	Brownsville, TX	2 container ships
BAE Systems	Mobile, AL**	1 tanker (2012)
Fincantieri Bay Shipbuilding	Sturgeon Bay, WI	1 dry bulk "laker"

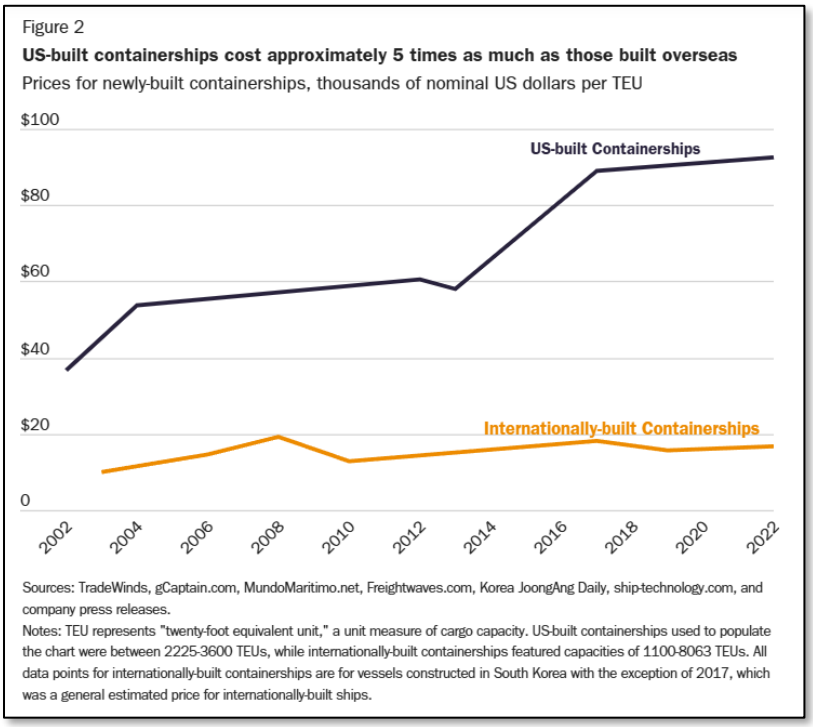
Source: U.S. Maritime Administration, Jones Act fleet listing.
Notes: *acquired by Bollinger Shipyards in 2022; **closed in 2018.

Source: John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023)

Second, U.S.-built ships are not only few in number; they are also staggeringly expensive. A recent Cato Institute report noted evidence that a U.S.-built product tanker costs $200–250 million, by contrast with foreign-built alternatives that cost "between $42 and $52 million."[214] That report also included helpful charts of the costs of U.S.-built and international-built new medium-range tankers and container ships, which show that the U.S. versions are about five times the cost of their international rivals:

[214] Colin Grabow, *Competitiveness of Protected US Shipyards Continues to Erode*, CATO AT LIBERTY (Jan. 15, 2025).





Source: Colin Grabow, *Competitiveness of Protected US Shipyards Continues to Erode,* CATO AT LIBERTY (Jan. 15, 2025), https://www.cato.org/blog/competitiveness-protected-us-shipyards-continues-erode.

Other reports underscore the vastly inflated costs of using Jones Act vessels. A recent news report noted that "Jones Act $/d rates have remained rangebound since the start of the year between $86,000/d and $91,000/d per Argus assessments, *an order of magnitude higher* than the $8,952/d averaged by internationally flagged [medium-range] tankers carrying refined products like diesel from the US Gulf coast to Pozos, Colombia in the same period."[215] A U.S. DOT Maritime Administration study in 2011 concluded that U.S.-flagged ships in *international* commerce involve a "total average cost . . . 2.7 times higher than the cost incurred by foreign-flag equivalents."[216] (The average cost in *domestic* commerce of using the Jones Act fleet will be surely significantly higher, because that fleet is subject to the cost-inflating U.S.-built requirement of the Jones Act and because prices for using that fleet reflect considerably less competitive pressure. On top of all that, the Maritime Administration estimates that the cost difference has since *increased*.[217])

In January, the Wall St. Journal noted that the Philadelphia shipyard has recently been working on an order from a U.S. shipper for three "small boxships" capable of holding around 3,600 20-foot shipping containers. Remarkably, "[t]he cost per ship [for these boxships was] about $333 million. A similar ship at a Chinese yard would cost around $55 million, according to shipowners."[218] That is a *sixfold price difference*! A foreign shipper, Maersk, placed an order with a South Korean shipbuilder for larger ships capable of holding around 16,000 20-foot containers (*i.e.*, 4–5 times larger than the Philadelphia ships), and "[t]he average price for these ships was

[215] Ross Griffith, *Jones Act rates unaffected by Trump ship talk*, ARGUS MEDIA (June 6, 2025).

[216] U.S. Dep't of Transportation Maritime Administration, COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS (Sept. 2011) 1

[217] John Frittelli, *Shipping Under the Jones Act: Legislative and Regulatory Background*, CONGRESSIONAL RESEARCH SERVICE (Nov. 21, 2019) 4 & n.25.

[218] Inti Pacheco & Costas Paris, *In Shipbuilding, the U.S. Is Tiny and Rusty*, WALL ST. J. (Mar. 2, 2025).

about $200 million."[219] In other words, to juxtapose these numbers: the U.S.-built small ships cost about $92,500 per unit shipping container capacity; the Chinese small ships around $15,300 (*i.e.*, less than 17% of the per-container cost of the U.S. ships); and the Korean larger ships around $12,500 (*i.e.*, less than 14% of the per-container cost of the U.S. ships). The Congressional Research Service has summed it up: "[T]he U.S. [commercial shipbuilding] industry remains globally uncompetitive."[220]

Unsurprisingly, no-one wants to buy these ships. And it turns out that no-one does buy them unless forced by law to do so. The Congressional Research Service points out that "[n]o overseas purchase of large U.S.-built ships has occurred in decades because U.S.-built ships can be four or more times the world price," including because of labor costs, exchange rates, and lack of competitive scale.[221] Even across the *U.S.-flagged* fleet used in international trading, "*[n]one* . . . is domestically built."[222]

And there is no reason to think any of this will change in the foreseeable future.[223] For one thing, the fall of the U.S. shipbuilding industry is a long-term world-historical trend, not a recent anomaly or a function of China's industrial rise. "The mantle of the world's leading shipbuilder passed from the United Kingdom to Japan in the 1950s, from Japan to South Korea around 2000,

[219] Inti Pacheco & Costas Paris, *In Shipbuilding, the U.S. Is Tiny and Rusty*, WALL ST. J. (Mar. 2, 2025).

[220] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

[221] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023). *See also* GAO, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POSSIBLE EFFECTS OF MODIFYING THE JONES ACT, Report GAO-13-260 (March 2013) ("Foreign shipyards can build vessels for less than U.S. shipyards for several reasons. For example, foreign shipyards—particularly large yards in China, Japan, and South Korea—enjoy considerable economies of scale because of long production runs of relatively standard vessel designs. Long production runs reduce labor costs per unit, as workers become more efficient because they repeat their job frequently due to the high volume of vessels being built, and support a strong industrial base of parts and material suppliers.").

[222] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023) (emphasis added).

[223] Joe Brady, *Don't hold your breath: OSG's Sam Norton weighs in on Jones Act tanker replacement*, TRADEWINDS NEWS (Nov. 14, 2024) ("A much-needed replacement of the US Jones Act tanker fleet is not likely any time soon, for a host of reasons, a leading executive told a finance conference on Thursday.").

and from South Korea to China in 2010. . . . The minuscule U.S. market share in shipbuilding long predates China's ascent."[224]

Third, the scarcity problem is not limited to the vessels: the U.S.-citizen sailors mandated by the Jones Act are themselves very scarce.[225] Compared to international alternatives, U.S. seamen are hard to find and expensive to employ.[226]

Fourth and finally, the consequence of these restrictions—including the obligation to use ships made in shipyards that produce very few ships in any given year—is that Jones Act ships are markedly older than their international counterparts.[227] There can be no doubt that this puts the

[224] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

[225] *See*, *e.g.*, Ann C. Phillips, Maritime Administrator, U.S. Dep't of Transp. Maritime Administration, *Assessing the Shortage of United States Mariners and Recruitment and Retention in the United States Coast Guard*, Statement before the Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, U.S. House of Representatives, Hearing On "Shortage of U.S. Mariners and Recruitment and Retention in the United States Coast Guard" ()May 11, 2023) ("A study prepared by the Maritime Workforce Working Group and released by MARAD in 2017 found that the U.S. did not have enough mariners with unlimited tonnage credentials to sustain a full activation of the RRF and our commercially operated vessels to meet sealift needs. Specifically, the 2017 analysis determined that, at that time, concurrent operations of the commercially operated U.S.-flagged fleet and sustained military sealift operations would require 13,607 U.S. mariners with unlimited credentials. In 2017, the estimated pool of actively sailing mariners was comprised of 11,768 sealift qualified mariners—documenting a deficit of 1,839 mariners. This optimistic scenario assumed that all qualified mariners would be both available and willing to sail as needed. During the six years since the 2017 study was released, globally standardized credentialing requirements have had an impact on the U.S. Merchant Marine. And of course, the maritime industry—like many other industries—has also been profoundly affected by the COVID-19 pandemic. Both of these developments have negatively impacted mariner retention."); Jacqueline Weaver, *Maritime officials fear 'catastrophic' outcome if mariner shortage worsens*, MAINE MONITOR (Nov. 30, 2024) (noting that a "number of factors, including the pandemic, have left the United States with a marked shortage of merchant mariners"); Ross Griffith, *Jones Act rates unaffected by Trump ship talk*, ARGUS MEDIA (June 6, 2025) (quoting a source: "The shortage of US mariners is, of course, another important issue as well that will have to be wrestled with.").

[226] U.S. Dep't of Transportation Maritime Administration, COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS (Sept. 2011) 5 ("Sixty-seven percent of carriers participating in the PwC survey revealed that the "Citizen Crew Requirement" negatively impacted their decision to register under the U.S. flag. As is true for most industries employing U.S. citizens, carriers suggested that the "Citizen Crew Requirement" results in higher manning requirements, higher wages, and higher benefits compared to foreign registries. Some carriers reported that payroll taxes for U.S. crews also contribute to their operating costs for U.S.-flag vessels. They further noted that in some other countries mariners do not have to pay income tax, which adds to cost differentials for U.S.-flag operators. Essentially, carriers noted that the standard of living in the U.S. and the social benefits provided to mariners contribute to U.S.-flag wages being significantly higher than foreign-flag wages. There are several other components that contribute to overall U.S.-flag crewing costs that may or may not be applicable to foreignflag vessels, such as mariner education or training and union fees.").

[227] *See* Colin Grabow, *Old Ships Still Abundant in the Jones Act Fleet*, CATO AT LIBERTY (Oct. 1, 2019) ("A ship's useful life is commonly estimated to be anywhere from 20 to 30 years, and some observers place that figure even lower. U.S. Maritime Administrator Mark H. Buzby has testified before Congress that 'in the commercial world it's rare to see a ship beyond about 15 or 20 years.' But ships long past their normal useful lifespan remain abundant within the Jones Act fleet. Just last week the Lihue, the world's second-oldest containership at 48 years of age, was placed back in service by carrier Matson after being laid up for 11 months. And that's not even the oldest Jones Act ship. The Chemical Pioneer, a vessel partially made from the charred hulk of a wrecked containership, was built in 1968. A general cargo ship, the Coastal Trader, was built in 1963. The evidence goes beyond anecdotes. According to the Maritime Administration's latest statistics, 30 of the 99 Jones Act ships in existence were built in 1994 or earlier. The Jones Act fleet's nine general cargo ships average 35 years of age while its two dry bulk ships average 38.

safety of sailors at risk, given that older vessels present distinctive safety concerns. In a notorious case that may have been inflected by the operation of the Jones Act, the sinking of the 40-year-old *El Faro* in 2015 during a hurricane resulted in 33 deaths.[228]

Effectively, then, the Jones Act is a voluntary commitment by the United States to live under oligopoly conditions: dramatically restricted output, much higher prices, and worse quality. This is a bizarre choice given a worldwide capacity glut in shipbuilding.[229]

And of course the result of more expensive *ships* is more expensive *shipping* for domestic trade: a cost tacked onto the prices of goods and services that will come out of the pockets of consumers (and indeed the margins of U.S. businesses across the economy).[230] This gives foreign competitors an obvious price advantage over U.S. businesses which have to use Jones Act shipping. One commentator has called the Act an "America Last" policy,[231] underscoring the advantage it gives to international competitors against their American rivals:

> The law is designed precisely to restrict the supply of domestic shipping so that American domestic ship operators and shipbuilders can charge more. Shipping rates on Jones Act routes are typically several times more expensive than rates in the competitive international market, especially in terms of cost per nautical mile traveled for a standard container. The Jones Act's proponents are fervent supporters

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Jones Act containerships may seem like spring chickens at 24 years of age, but their youth is very much a Jones Act-specific context; their international counterparts average a mere 12.").

[228] John Frittelli, *Shipping Under the Jones Act: Legislative and Regulatory Background*, CONGRESSIONAL RESEARCH SERVICE (Nov. 21, 2019) 1 & n.4 (noting that "the ship's age was a factor in the survivability of the vessel and crew").

[229] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023) ("Worldwide, overcapacity plagues the shipbuilding sector, though the number of active shipyards in 2022 was 301 compared with a peak of 699 in 2007. Current worldwide shipyard capacity is about 1,200-1,300 ships per year compared with about 2,000 ships per year between 2005 and 2010.").

[230] The Surface Transportation Board has some oversight power over rates to noncontiguous areas of the United States, but—emphasizing my complete lack of expertise in the operations of the Board—this seems to be minimal. Letter from GAO to lawmakers re: "Domestic Oceangoing Shipping: Information on the Surface Transportation Board's Regulatory Processes" (Aug. 16, 2022) 1 ("The Surface Transportation Board (STB), an independent federal agency, has the authority to determine the reasonableness of a rate for domestic oceangoing carriers that transport cargo between the mainland U.S. and noncontiguous U.S. states and territories."), 3 ("Since its establishment in 1996, STB has received three formal rate-reasonableness-related complaints against domestic oceangoing carriers. The last formal complaint was received in 1999. STB has not self-initiated an adjudication."), 4 ("As of August 2022, STB has had only one case in which it carried out its process and methodology for determining rate reasonableness within the context of domestic oceangoing transportation."). As noted throughout this Testimony, bureaucratic price-caps are—even when set and enforced—a poor substitute for competition.

[231] Mario Loyola, AMERICA LAST: THE GRIM REALITY OF THE JONES ACT, CEI Issue Analysis 2020 No. 5 (June 2020) 1 ("The law has not only failed to accomplish any of [its] objectives, it has systematically undermined each of them.").

> of "buy American" but the law favors imports over domestic commerce. It is protectionism for foreigners.[232]

Others have pointed out the same substitution effect,[233] recognizing that, "[a]s a Jones Act workaround, shippers import on foreign ships rather than source product domestically."[234]

The Jones Act windfall does not only accrue to foreign shippers and the foreign manufacturers that use them. Other (non-sea) forms of transportation, too, are given an artificial competitive advantage by the *de facto* tax on domestic shipping. But road and rail are not always an option, and the harms of the Jones Act are particularly acute for consumers and U.S. businesses in areas that cannot usually substitute in this way, including those in Puerto Rico, Alaska, and Hawaii.[235] As a federal district court has pointed out:

> As a matter of basic economics, the Jones Act's limitation on the supply of vessels available to serve and compete in the Puerto Rico shipping market necessarily causes prices in that market to be higher than they otherwise would be. . . . These artificially-inflated prices and their effect on the cost of goods in Puerto Rico are well known to anyone who lives here. Thus, a Puerto Rico corporation would never turn to a supplier on the mainland to buy local goods. Instead, if a Puerto Rico corporation wanted to buy a Puerto Rico product, the corporation would turn to a local supplier, instead of its home office or affiliate in the continental United States. After all, the mere cost of shipping the product off and then back to the island would likely consume all of the savings or efficiencies that might normally accrue to transacting with the out-of-state home office or related party.[236]

In other words, by every measure the Jones Act is an astonishingly anticompetitive and harmful statute. And to the extent that its purpose is to ensure a strong national shipbuilding

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[232] Mario Loyola, AMERICA LAST: THE GRIM REALITY OF THE JONES ACT, CEI Issue Analysis 2020 No. 5 (June 2020) 1.

[233] *See*, *e.g.*, GAO, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POSSIBLE EFFECTS OF MODIFYING THE JONES ACT, Report GAO-13-260 (March 2013) 29 ("Because of freight rate differentials or the lack of availability of Jones Act vessels for certain products, the Act may cause businesses in Puerto Rico to import goods from foreign locations when the same goods are readily available from U.S. providers.").

[234] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023).

[235] *See* Sam Heavenrich, *The Neglected Port Preference Clause and the Jones Act*, 132 Yale L.J. 559, 562–63 (2022) (Jones Act "is a major cause of the exorbitantly high cost of living in Hawaii, Alaska, and Puerto Rico"), 573 ("Economic analyses of the Jones Act have estimated its annual damage to the economies of Hawaii, Alaska, and Puerto Rico to be in the billions.").

[236] Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez, 174 F. Supp. 3d 585, 645 (D.P.R.) (citation and internal quotation marks omitted), *aff'd sub nom.* Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez, 834 F.3d 110 (1st Cir. 2016).

industry—albeit at the expense of American consumers—that purpose appears to have signally failed. By imposing a significant cost factor on an economy-wide input like shipping we are *weakening* our economy. And the unique treatment of shipping is puzzling: we do not impose such requirements on transporters by rail, road, air, or other equally important forms of infrastructure.[237] It seems worth noting that even the Defense Department relies significantly on Chinese-built ships.[238]

Finally: an intriguing article in the Yale Law Journal has suggested that, in light of the effect and purpose of the Jones Act in protecting some U.S. ports over others—notably the Seattle port dear to the heart of lawmaker Wesley Jones[239]—it invites constitutional obligations under the Port Preference Clause, which provides that: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another."[240]

2. Recommendation

Congress should repeal or substantially liberalize the Jones Act. It is an obviously harmful measure that harms American consumers and inexplicably discriminates against U.S. businesses.

I defer to experts in national security on whether the national interest favors the creation of a nationalized shipbuilder, or perhaps some kind of open direct subsidy to national shipbuilders drawn from general revenue. I am not well placed to approach that question. A careful study of

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[237] GAO, PUERTO RICO: CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POSSIBLE EFFECTS OF MODIFYING THE JONES ACT, Report GAO-13-260 (March 2013) 4.

[238] John Frittelli, *U.S. Commercial Shipbuilding in a Global Context*, CONGRESSIONAL RESEARCH SERVICE (Nov. 15, 2023) ("Chinese-built ships are prevalent in the world fleet, and the U.S. military relies on them. Three of the ten commercial oil tankers selected to ship fuel for DOD as part of the newly enacted Tanker Security Fleet are Chinese-built. As for dry cargo supplies for DOD, 7 of the 12 most recently built ships in the Maritime Security Fleet are Chinese-built.").

[239] Sam Heavenrich, *The Neglected Port Preference Clause and the Jones Act*, 132 Yale L.J. 559, 597–98 563 (2022) (furnishing evidence that "the primary architect of the Jones Act [the senior senator from Washington] wanted to enact legislation that benefitted Washington at the expense of Alaska and Hawaii").

[240] U.S. Const. art. I § 9, cl. 6.

the measures taken by other countries (virtually all of which are substantially more liberalized than the United States) would be instructive. But the costs of such a venture, whatever its ideal form, should not be multiplied and cloaked by making the nation's internal trade depend upon a few overpriced, small, rusting ships that make American products and business less competitive—and American consumers less prosperous—than they otherwise would be.

As a result, I support enacting the Open America's Waters Act, introduced by Subcommittee Chairman Mike Lee earlier this month.[241]

E. Licensing Recognition: Opening Interstate Commerce to Working Families

1. Competitive Concerns

Across the economy, American workers in a wide range of occupations and professions face a basic problem: their license to work stops at an interstate border.[242] This limits workers' ability to search or bargain for the right job and the right wage; makes it harder for businesses to recruit the labor they need; and means that consumers pay more as a result. This adds up to a distinctively national pathology of interstate commerce, and Congress is uniquely well placed to resolve it.

It is widely appreciated that state and local governments impose licensing requirements—that is, an obligation to secure government permission—as a precondition for entry into a wide range of professions, from the practice of law to landscape gardening. Such statutes "typically make government permission conditional upon the fulfillment of certain conditions or criteria, which . . . tend to include some of the following: (1) completion of specific education, training, or qualification requirements; (2) successful performance on one or more examinations; (3) some

[241] Sen. Mike Lee, Press Release, *Lee Introduces the Open America's Waters Act to Repeal Jones Act, Boost Coastal Trade* (June 12, 2025).

[242] Section III.E. borrows and quotes freely from Francis, *Perfecting the Union*, *supra* note 4.

level of practical experience or apprenticeship; (4) the maintenance of particular facilities or equipment; (5) the absence of criminal conviction; (6) personal criteria, including those relating to age and/or character; and/or (7) payment of an initial and/or regular fee."[243]

In recent years, lawmakers, policy scholars, and advocates have done much to emphasize that many licensing regimes impose unreasonably demanding requirements that go *far* beyond the fever dreams of reason.[244] At least three features of the licensing patchwork stick out. *First*, licensing requirements are often found shielding entry to occupations that do not even arguably need a government gatekeeper. For example, state and local governments have required government permission before allowing persons to engage in work as a beekeeper,[245] interior designer,[246] florist,[247] egg grader,[248] and—if you can believe it—fortune teller.[249]

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[243] Francis, *Perfecting the Union*, *supra* note 4, at 198.

[244] There is a thriving literature. *See*, *e.g.*, Clifford Winston (ed.), REFORMING OCCUPATIONAL LICENSING IN THE US: REDUCING SOCIAL COSTS AND INCREASING SOCIAL BENEFITS IN THE LEGAL, MEDICAL, AND FINANCIAL SERVICES PROFESSIONS (2024); Adam Thierer & Trace Mitchell, *Occupational Licensing Reform and the Right to Earn a Living: A Blueprint for Action*, MERCATUS CENTER POLICY BRIEF (Apr. 2020); Archbridge Institute, *Too Much License? A Closer Look at Occupational Licensing and Economic Mobility* (April 2018); John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. Rev. 844 (2017); Peter Q. Blair & Bobby W. Chung, *Occupational Licensing Reduces Racial and Gender Wage Gaps: Evidence from the Survey of Income and Program Participation*, Human Capital and Economic Opportunity Global Working Group Working Paper 2017-50 (May 2017); Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105(6) Cal. L. Rev. 1567 (2017); Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?*, Research Division Federal Reserve Bank of Minneapolis Staff Report 561 (Dec. 2017); Maureen Ohlhausen, *Prepared Statement of the FTC on Competition and Occupational Licensure before the Judiciary Committee Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, House of Representatives (Sept. 12, 2017); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub Pol'y 209 (2016); Thomas A. Hemphill & Dick M. Carpenter II, *Occupations: A Hierarchy of Regulatory Options*, 39 Regulation 20 (2016); Department of the Treasury Office of Economic Policy, Council of Economic Advisers, & Department of Labor, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014); Dane Stangler, OCCUPATIONAL LICENSING: HOW A NEW GUILD MENTALITY THWARTS INNOVATION, Progressive Policy Institute (March 2012); Dick M. Carpenter et al., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING, Institute for Justice (Nov. 2017); Daniel B. Klein, et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 Econ. J. Watch 210 (2012); Morris M. Kleiner & Alan B. Kreuger, *The Prevalence and Effects of Occupational Licensing*, 48(4) Brit. J. Indus. Rel. 676 (2010); Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. Cal. Interdisc. L.J. 565 (2010).

[245] N.D. Code Ann. § 4.1-16-02.

[246] N.M. Stat. Ann. § 61-24C-8.

[247] La. Stat. Ann. Title 3 § 3808(J)

[248] Mont. Code Ann. § 81-20-201.

[249] Moore-King v. Cty. of Chesterfield, Va., 708 F.3d 560, 563 (4th Cir. 2013) (describing the—truly extraordinary—licensing and other requirements in order to engage in "the occupation of occult sciences, including a fortune-teller, palmist, astrologist, numerologist, clairvoyant, craniologist, phrenologist, card reader, spiritual reader, tea leaf reader, prophet, psychic or advisor" in Chesterfield County, Virginia).

Second, access to a license is often made subject to absurdly burdensome conditions. Landscape gardening licenses have been made contingent on everything from reputation and moral-character tests to fingerprinting, to an examination with a 36% pass rate.[250] Neil Katsuyama has pointed out that California has required "1500 hours of training and practice to become a barber and 1600 hours to become a cosmetologist" but just "1090 hours of training to become a paramedic."[251] (Happily, California has since lowered the barber and cosmetology training requirement, though it still stands at 1,000 hours.[252] But other states have not followed suit: North Dakota, for example, requires no less than 1,500 hours of training for a barber's license.[253]) Nevada requires applicants for an interior design license to have two years of experience in interior design, a relevant accredited or equivalent degree or program, plus an examination.[254] And so on.

And, *third*, licensing systems are often backed up by draconian penalties. These may even involve criminal sanctions. In Florida, for example, practicing interior design in commercial settings without a license is punishable by imprisonment of up to one year, while unlicensed naturopathy (including "purifying . . . human tissues" by, among other things, "dietetics," "hygiene," and "sanitation") is punishable by up to *five years'* imprisonment.[255] Violating the North Dakota beekeeper licensing statute is a class A criminal misdemeanor—punishable by up to

[250] Caleb R. Trotter, *Constitutional Landscaping: An Analysis of Occupational Regulations of Landscape Contractors in the United States*, 58 S. Tex. L. Rev. 367, 375, 386 (2018).

[251] Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics to Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. Cal. Interdisc. L.J. 565, 569–70 (2010).

[252] Cal. Bus. & Prof. Code § 7362.5

[253] N.D. Code Ann. § 43-04-24.

[254] NRS 623.192.

[255] Fla. Stat. §§ 462.17, 481.223(2), 775.082(3)(e), 775.082(4)(a); *see* Daniel Francis, *Perfecting the Union: The Dormant Commerce Clause and the Internal Market Law of the United States* (Sept. 2019) 208.

360 days' imprisonment and up to $3,000 criminal fine or both[256]—and may result in a civil penalty of up to $5,000 per violation.[257] And so on.

The harms of unreasonable licensing systems are real and serious. But a separate acute harm of occupational licensing—and one of particular interest to Congress—arises when states decline to recognize licensed professionals at the interstate border, as they often do. Specifically: most state licensing systems treat licenses issued in a sister state less favorably, and often *much* less favorably, than licenses issued in-state. (In doing so, they raise at least sharp concerns under the dormant Commerce Clause, which prohibits commercial discrimination against out-of-state interests—including reciprocity requirements, which are common in licensing statutes—and well as unduly burdensome restrictions of interstate commerce.[258])

Many commentators have pointed out that interstate recognition of licenses in the United States is shockingly limited.[259] For example: the rules governing the practice of law in Delaware make no provision for recognition of out-of-state qualifications at all, requiring examination and a five-month clerkship in Delaware in all cases.[260] The West Virginia foresters' licensing statute provides for discretionary recognition of an out-of-state license only when the out-of-state license "meets requirements that are substantially equivalent" to those in-state, the applicant is of "good

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[256] N.D. Code Ann. § 12.1-32-01.

[257] N.D. Code Ann. § 4.1-16-17.

[258] I will make this case in full in a forthcoming article; an earlier version of it was set out in *Perfecting the Union*.

[259] *See*, *e.g.*, Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?*, Research Division Federal Reserve Bank of Minneapolis Staff Report 561 (Dec. 2017) 1 (noting that "often the cost of attaining licensure in another state can be significant, even for those already licensed in another state"); Comments of Maureen Ohlhausen, FTC Economic Liberty Task Force, *Streamlining Licensing Across State Lines: Initiatives to Enhance Occupational License Portability Roundtable Discussion* (July 27, 2017) 6 ("Now applicants licensed in one state may need more education or different types of training to obtain a new license, even though they provided the services safely and effectively for many years. Even when the underlying standards to obtain a license in a particular profession are similar across the country, the process of getting a license in another state can be slow and burdensome and costly."); Department of the Treasury Office of Economic Policy, Council of Economic Advisers, & Department of Labor, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015) 13 ("[L]icensed individuals seeking to move to another State often discover that they must meet new qualifications (such as education, experience, training, testing, etc.) if they want to continue working in their occupation. The resulting costs in both time and money can discourage people from moving or lead them to exit their occupation".).

[260] *See* Rules of the Supreme Court of the State of Delaware, Rule 52.

moral character" and *not* a West Virginia resident, and has "completed such other action as is required by the [West Virginia licensing] board."[261] In a 50-state analysis I conducted in 2019 (examining licensing statutes for attorneys, barbers, landscape gardeners, athletic and personal trainers, and plumbers), I concluded that, at that time:

> Of the 250 licensing systems [examined], 49 license systems (20%) apply blanket refusals to recognize out of state licenses for some or all applicants; 67 license systems (27%) require or reward reciprocal recognition by the state of origin [i.e., State A's recognition of State B's license depends at least to some extent on whether State B recognizes State A]; and 137 license systems (55%) make recognition a matter of discretion. *Only four systems (2%) have full mandatory recognition of out-of-state licenses.*[262]

Since I conducted that research in 2019, things have improved at least to some extent. In particular, several states—around 20 at the time of writing[263]—have enacted "universal licensing recognition" statutes that confer some rights of recognition on those holding occupational and professional licenses. These are a significant step forward and a cause for genuine celebration. So too are the occupation-specific licensing compacts, covering specific professions, into which some states have entered.[264]

But even "universal recognition" statutes often do not result in equal treatment or genuine recognition, despite the name. These statutes often impose additional requirements: seniority requirements (*i.e.*, out-of-state licensure for X years as a prerequisite for recognition)[265]; in-state residency requirements in the recognizing state[266]; exclusions of, or freedom to exclude, those who

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[261] W. Va. Stat. § 30-19-11.

[262] Francis, *Perfecting the Union*, *supra* note 4, at 228.

[263] Institute for Justice, *State Reforms for Universal License Recognition*, https://ij.org/legislative-advocacy/states-reforms-for-universal-recognition-of-occupational-licensing/ ("Today, 20 states have enacted universal license recognition.").

[264] *See* Nat'l Center for Interstate Compacts, INTERSTATE LICENSURE COMPACTS AND UNIVERSAL LICENSURE RECOGNITION LAWS: FACT SHEET (2022).

[265] *See*, *e.g.*, Va. Admin. Code § 135-20-65(B) (requiring three years of licensure in the state of origin).

[266] *See*, *e.g.*, Kan. Stat. Ann. Art. 34 § 48-3406 (limiting non-military recognition to "an individual who has established or intends to establish residency in this state"); Okla Stat. § 59-4150.1(B) ("A person moving to and residing in Oklahoma may make application for licensing or certification pursuant to the Universal Licensing Recognition Act . . . .").

have been convicted of crimes (even non-violent crimes)[267]; requirements of substantial equivalence to in-state standards of education, examination, and experience[268]; preconditions of reciprocity[269]; and carveouts that entirely exempt many professions.[270]

Why would states want to wall off their own labor markets? Unhappily, a major driver of the exclusionary practice is the reality that the relevant rules are often designed, adopted, and enforced by state licensing boards that are heavily composed of active market participants—who of course have every incentive to limit and restrict competition from out-of-state workers. The Justice Department and Federal Trade Commission have noted that: "State licensing boards are disproportionately composed of licensed providers . . . . Many state licensing boards have taken steps . . . that significantly reduce certain forms of competition."[271] Rebecca Allensworth quantified this dominance a few years ago:

> My research reveals that of the 1,790 total boards [in the United States at the time of the study], *1,515, or 85 percent, are required by statute to be comprised of a majority of currently licensed professionals, active in the very profession the board regulates.* This overwhelming degree of self-regulation would be bad enough, but further research into the actual practices of these boards-from rules that nonprofessional board members cannot vote, to chronic vacancies and absences of nonprofessional board members, to violations of their organic statutes shows that professional dominance on boards exceeds even this large percentage: it is nearly universal. *Thin or nonexistent supervision from the states means that the licensed sector of the American workforce is almost entirely self-regulating.* Such self-

[267] For example, the Virginia statute allows the state regulatory board to decline a license if it concludes that a person is "unfit or unsuited" based on information including a conviction record; the statute does not limit the relevant crimes to those of violence or dishonesty—although it does prohibit a refusal based *solely* on a criminal conviction unless it directly relates to the relevant occupation or profession. Va. Code § 54.1-204.

[268] *See*, *e.g.*, Okla Stat. § 59-4150.1(B)(1), (4).

[269] *See*, *e.g.*, Okla Stat. § 59-4150.1(B)(1) expressly disapplies the universal-recognition provisions if a statutory reciprocity rule applies.

[270] *See*, *e.g.*, Va. Code § 54.1-205(F) (exempting "professional services"); Va. Code § 2.2-4301 (defining "professional services" to include: "work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering" as well as "the services of an economist procured by the State Corporation Commission").

[271] U.S Dept. of Justice & FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004) 22

> regulation may allow for expertise in decision making, but it comes at a very high price in the form of professional self-dealing.[272]

Worse still, as noted above (in § III.B above), the Supreme Court's state-action immunity doctrine allows market participants, even on regulatory boards that they dominate, to enjoy *complete immunity from the antitrust laws*—including for nakedly harmful collusion and exclusion—so long as the state "clearly articulates" a policy to choose something other than open competition and "actively supervises" its implementation—a concept defined only in general terms by the Supreme Court and which is observed in practice to an uncertain extent.[273]

In practice, all this adds up to a recipe for trouble, and successive Administrations have recognized as much. Fighting oppressive licensing statutes—in order to open up opportunities for workers who want to move (or have the option of moving), businesses that want to hire, and consumers that want the benefit of competitive labor markets—has been a longstanding bipartisan policy goal, with the Executive Branch often pushing for change.

President Trump has declared by Executive Order that "it is the policy of the United States Government to support occupational regulation reform throughout the Nation," and noted that "[b]y requiring workers to acquire new licenses when they move to a new jurisdiction, occupational regulations reduce worker mobility, disproportionately harm low-income Americans, and are particularly burdensome to military spouses who must relocate to support the service members committed to keeping our country safe."[274] He affirmed the policy that "State, territorial, and tribal governments should review existing occupational regulations, including associated

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[272] Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 Cal. L. Rev. 1567, 1570 (2017) (emphasis added).

[273] North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494, 507 (2015) (requiring "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy") (quoting Patrick v. Burget, 486 U.S. 94, 101 (1988)).

[274] President Donald J. Trump, *Executive Order on Increasing Economic and Geographic Mobility* (Dec. 14, 2020).

scope-of-practice provisions, to ensure that their requirements are the least restrictive to competition sufficient to protect consumers from significant and demonstrable harm."[275]

Under the first Trump Administration—in a project inaugurated by Acting FTC Chair Maureen Ohlhausen—the FTC formed an Economic Liberty Task Force to explore ways to fight unreasonable licensing.[276] The effort culminated in the publication of a policy document that identified various paths to licensing portability, with an emphasis on interstate compacts (which have been successful in areas like nursing and physical therapy) and model laws and rules, as well as considerations in the harmonization of underlying standards for certification and licensure.[277]

And the effort has been a bipartisan one. Former President Biden noted by Executive Order that certain "overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States."[278] He encouraged the FTC Chair to consider action to fight "unfair occupational licensing restrictions."[279] And former President Obama's Administration issued a lengthy and thoughtful flagship multi-agency report on occupational licensing that underscored, among other concerns, that licensing requirements "create[] barriers to workers moving across State lines and inefficiencies for businesses and the economy as a whole."[280]

But there is only so much that the Executive Branch can do to address the problem: interstate commerce is primarily in the care of Congress, not the President. And after so many years of bipartisan policy enthusiasm, today—with a surge of interest in, and political support for, the reform of anticompetitive regulations—the time is ripe for Congress to lead the way.

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[275] President Donald J. Trump, Executive Order 13,966, *Increasing Economic and Geographic Mobility* (Dec. 14, 2020).

[276] *See*, *e.g.*, FTC, Press Release, *FTC Launches New Website Dedicated to Economic Liberty* (Mar. 16, 2017).

[277] FTC, *Policy Perspectives: Options to Enhance Occupational License Portability* (Sept. 2018).

[278] President Joseph R. Biden, Executive Order 14,036, *Promoting Competition in the American Economy* (July 9, 2021).

[279] *Id.*

[280] Department of the Treasury Office of Economic Policy, Council of Economic Advisers, & Department of Labor, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (July 2015).

2. Recommendation

Congress should act to guarantee the benefits of interstate commerce for workers, businesses, and consumers by supporting interstate license recognition. (I note, but do not explore here, arguments that state-level licensing restrictions might themselves raise constitutional objections, in particular under the dormant Commerce Clause.)

There are many forms such an effort might take, and a full analysis of the options and their possible forms would take more time for reflection, and space for description, than this Testimony allows. Some possibilities—in very broad outline, from mildest to most robust—include:

- **Option 1: Incentives to recognize.** At the mildest end of the spectrum, Congress could make some federal funding conditional on the adoption of recognition statutes, beginning in one or two professions and then gradually expanding.
- **Option 2: A voluntary federal licensing recognition statute.** Congress could prescribe a voluntary "opt-in" system of mutual licensing recognition, perhaps beginning with one or two occupations on a pilot basis. Administered by an appropriate federal agency (*e.g.*, Department of Labor or the Federal Trade Commission), states that accede to the system (by notifying the agency of their intent to be bound by the program[281]) would receive a federal certification for their own occupational and professional licenses within the scope of the system, and would agree to recognize the validity of similarly certified licenses issued by other participating states. This system would not require the federal government to formulate or enforce any licensing obligations: instead, the federal government

[281] A simple notification can be enough for this purpose. *See*, *e.g.*, 46 U.S.C. § 30303(a) ("A State may become a participating State under this chapter by notifying the Secretary of Transportation of its intention to be bound by section 30304 of this title.").

would merely serve as a focal point and facilitator for participating states to help them voluntarily lower barriers to interstate movement. As more states and more occupations were included in the program, the value of joining it would increase. (A slight variation would introduce occupation-specific minimum federal standards for license recognition under the scheme, to the extent this were thought necessary to protect against race-to-the-bottom concerns.)

- **Option 3: A voluntary federal licensing program.** Congress could provide for the federal licensing of certain professions. An appropriate federal agency (*e.g.*, Department of Labor or the Federal Trade Commission) would determine the reasonable requirements for such federal licenses, which individual persons could choose to obtain. The federal license would permit the practice of the relevant profession on a national basis. A federal bar license would be a particularly interesting possibility, given that many attorneys practice exclusively federal law and do not practice state law or in state courts, the significant barriers that often attend interstate movement, and the routine exemption of law from the universal recognition programs described above.
- **Option 4: A mandatory federal licensing recognition statute.** Congress could affirmatively legislate to create a national license recognition obligation, perhaps beginning with one or two specific occupations as a pilot program. There are many ways in which one might design such a program. One version might provide that no person shall be denied the right to practice an occupation or profession on the ground that that person lacks an in-state license, where the person holds a license from another state that was issued on grounds that are substantially equivalent to,

or strictly more onerous than, the conditions of obtaining an in-state license. (This would effectively provide that every state occupational license created a federal right to engage in interstate commerce in all states with equivalent, or less onerous, requirements for licensing.) Another version might impose a similar obligation without the substantial equivalence requirement, to ensure full license portability. A third version might set minimum federal standards for a state license to qualify in this way, to address concerns about competence in relevant markets.

Needless to say, there are many important complexities and sensitivities here, particularly for more robust forms of intervention. But the same is true of many federal legislative projects. Congress has the opportunity to help tackle a longstanding policy problem that directly hinders and restrains interstate commerce, and which has been a priority for successive Administrations of both parties. The case for bold action is strong.

F. Other Regulations

In this very short final section, I briefly highlight some regulations and regulatory practices that facially present similar concerns to the measures discussed above, but which I have not yet examined closely. Of course, I would be happy to take a closer look if it would assist the Subcommittee.

1. No-Review Orange Book Patent Listings for Pharmaceuticals

Under the complex scheme for federal pharmaceutical regulation, the manufacturer of a new branded drug that has been approved by the FDA for safety and effectiveness is required to inform the FDA of patents that claim the drug's active pharmaceutical ingredient, formulation or composition, and any novel use.[282] These claimed patents are listed in a public document known

[282] 21 U.S.C. §§ 355(b)(1)(A)(viii) (requiring notification in an application to the FDA of "the patent number and expiration date of each patent for which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner of the

for historical reasons as the Orange Book.[283] Listing a patent sends a signal to would-be generic competitors. A would-be generic entrant must, for each patent that claims the relevant drug or a relevant use for it, certify that the relevant patent has expired, is invalid, or will not be infringed.[284] This certification, in turn, empowers the branded drug maker to sue in infringement, which in turn generally triggers an automatic 30-month stay of the approval of the generic drug's application.[285]

In principle, the Orange Book is a sensible policy tool, as it is obviously helpful to provide public notice of relevant patent protections. But the system is vulnerable to abuse. The FTC has noted that "certain manufacturers have submitted patents for listing in the Orange Book that claim neither the reference listed drug nor a method of using it"—despite the statutory instruction that "[p]atent information that is not the type of patent information required . . . shall not be submitted"[286]—and that by deceptively deterring generic entry "the result may be to increase the cost of and reduce access to prescription drugs."[287] Specifically:

> Improper Orange Book patent listings may disincentivize investments in developing a competing product and increase the risk of delayed generic and follow-on product entry, reducing patient access to more affordable prescription drugs and increasing costs to the healthcare system. Given the enormous profit margins of many branded drugs, even small delays in generic competition can

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patent engaged in the manufacture, use, or sale of the drug, and that—(I) claims the drug for which the applicant submitted the application and is a drug substance (active ingredient) patent or a drug product (formulation or composition) patent; or (II) claims a method of using such drug for which approval is sought or has been granted in the application"), 355(c)(2) ("Not later than 30 days after the date of approval of [a relevant] application . . . the holder of the approved application shall file with the Secretary the patent number and the expiration date of any patent described in subsection (b)(1)(A)(viii), except that a patent that is identified as claiming a method of using such drug shall be filed only if the patent claims a method of use approved in the application"); 21 C.F.R. § 314.53(b)(1) (stating in relevant part: "[A relevant] applicant . . . must submit to its [New Drug Application] the required information, on the required FDA declaration form, set forth in paragraph (c) of this section for each patent that claims the drug or a method of using the drug that is the subject of the [New Drug Application] or amendment or supplement to it and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner of the patent engaged in the manufacture, use, or sale of the drug product. For purposes of this part, such patents consist of drug substance (active ingredient) patents, drug product (formulation and composition) patents, and method-of-use patents.")

[283] FDA, *Approved Drug Products with Therapeutic Equivalence Evaluations*, https://www.fda.gov/drugs/drug-approvals-and-databases/approved-drug-products-therapeutic-equivalence-evaluations-orange-book.

[284] 21 U.S.C. § 355(j)(2)(A)(vii).

[285] 21 U.S.C. § 355(j)(5)(B)(iii).

[286] 21 U.S.C. § 355(c)(2).

[287] FTC, *Federal Trade Commission Statement Concerning Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book* (Sept. 14, 2023) 1.

> generate substantial additional profits for brand companies at the expense of patients.[288]

Under both the Trump Administration and the Biden Administration, the FTC has undertaken whack-a-mole enforcement efforts aimed at individual listings. Most recently, in May 2025, the FTC renewed challenges to "dozens" of patent listings, following previous efforts in November 2023 and April 2024.[289]

In recent work, Scott Hemphill and Bhaven Sampat have suggested one avenue for a potential fix: some review of the validity of the patent by the USPTO when they are listed in the Orange Book. Hemphill and Sampat make the case in the following terms:

> [S]elective review of pharmaceutical patents does seem feasible. In the 2023 edition of the Orange Book, there are only 5,633 unexpired pharmaceutical patents overall, of which only 645 were newly added since 2022.
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> To ensure validity of these listings, the Patent Office could provide an intensive second layer of review to pharmaceutical patents at the time of Orange Book listing . . . . For drug makers, one benefit of this approach is that it could effectively "gold plate" high- quality patents against further litigation . . . , limiting the "prospecting" type challenges that worry some observers . . . .[290]

This is a promising suggestion. Some review for validity and pertinence could plausibly help to reduce the incentives for branded manufacturers to provide excessive or improper listings—and as a result to promote competition in the nation's pharmaceutical markets.

2. Baseball's (Inexplicable) Antitrust Immunity

Of all the exemptions and immunities from the antitrust laws, perhaps the least defensible is the exemption for professional baseball. Created by the Supreme Court (and Justice Holmes in

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[288] *Id.* at 4.

[289] FTC, Press Release, *FTC Renews Challenge of More Than 200 Improper Patent Listings* (May 21, 2025); FTC, Press Release, *FTC Expands Patent Listing Challenges, Targeting More Than 300 Junk Listings for Diabetes, Weight Loss, Asthma and COPD Drugs* (Apr. 30, 2024); FTC, Press Release, *FTC Challenges More Than 100 Patents as Improperly Listed in the FDA's Orange Book* (Nov. 7, 2023).

[290] C. Scott Hemphill & Bhaven N. Sampat, *Patents, Innovation, and Competition in Pharmaceuticals: The Hatch-Waxman Act After 40 Years*, 39 J. Econ. Persps. 27, 44 (2025).

particular) in 1922,[291] it has absolutely no basis in statutory text or Congressional intent—and has mercifully never extended to any other sport.[292] Nevertheless, the judicial invention has evaded Congressional correction for so long that the Court has actually blamed Congress for it:

> We continue to be loath, 50 years after *Federal Baseball* . . . to overturn [it] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.[293]

Courts still apply the exemption today.[294] Congress should put an end to this remarkable somersault ("positive inaction"!) and extend to baseball the same protections that the antitrust laws give to other sports and, indeed, the rest of the economy. Congress should eliminate the baseball exemption.

3. Direct-Sale Restrictions

In a small number of industries, state laws prohibit manufacturers from selling their own products at retail. Such regulations are prominent, for example, in markets for automobiles and for alcohol. In general, such laws should be treated with suspicion: they are often designed to serve the interest of dealers and retailers, rather than consumers, and they deprive consumers of the benefits that direct sale can bring. For illustration, I will focus here on direct-sales restrictions in automobile markets.

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[291] Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs, 259 U.S. 200 (1922).

[292] NCAA v. Alston, 594 U.S. 69, 95 (2021) ("[T] his Court has refused to extend *Federal Baseball*'s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as 'unrealistic' and 'inconsistent' and 'aberration[al].'").

[293] Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

[294] *See*, *e.g.*, Cangrejeros de Santurce Baseball Club, LLC v. Liga de Beisbol Profesional de Puerto Rico, Inc., 680 F. Supp. 3d 107, 117 (D.P.R. 2023) (dismissing alleged boycott claims and noting that "[t]he baseball exemption bars any federal antitrust claims issued from the complaint"); Wyckoff v. Off. of the Comm'r of Baseball, 211 F. Supp. 3d 615, 627 (S.D.N.Y. 2016) (emphasizing the broad reach of the baseball exemption and applying it); Right Field Rooftops, LLC v. Chicago Baseball Holdings, LLC, 87 F. Supp. 3d 874, 885 (N.D. Ill. 2015) (dismissing claims of exclusionary conduct that allegedly eliminated a competing option for watching a live game, and stating that "the baseball exemption applies here and therefore the Rooftops' antitrust claims must fail").

In automobile markets, many states have enacted laws that prevent manufacturers from selling at retail, or significantly restrict their ability to do so. The purpose of these laws is to *protect dealers from competition* from manufacturer-owned outlets, pumping up their profits at consumers' expense. A few years ago, the FTC's Directors of the Office of Policy Planning, the Bureau of Competition *and* the Bureau of Economics wrote together to express their opposition to such laws: "A fundamental principle of competition is that consumers—not regulation—should determine what they buy and how they buy it. Consumers may benefit from the ability to buy cars directly from manufacturers—whether they are shopping for luxury cars or economy vehicles. The same competition principles should apply in either case."[295]

As Professor Daniel Crane notes in a forthcoming book, "there is not a whiff of consumer protection sentiment in these statutes. They were all about protecting *dealers* in franchise relationships from the exigencies of superior manufacturer bargaining power."[296] And as Crane further points out, consumer experience with car dealerships all too often bears the hallmark of insufficient competition:

> According to a 2024 KPA Dealership Trust Survey, conducted by The Harris Poll, consumer views on car dealers were overwhelmingly negative, with 76% of the respondents saying they did not trust dealerships to be honest about pricing, 86% concerned about hidden fees, and 84% reporting that price transparency is lacking at most car dealerships. . . . According to the Consumer Federation of America and Better Business Bureau, consumers complain about car dealerships more than any other business in the United States, a remarkable feat given consumer antipathy to other loathed businesses like cable companies and debt collectors.[297]

Whatever the case for these laws in the early and mid 20th century, today—with significantly greater competition among manufacturers from around the world, considerable

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[295] Marina Lao, Debbie Feinstein & Francine Lafontaine, *Direct-to-consumer auto sales: It's not just about Tesla*, FTC COMPETITION MATTERS BLOG (May 11, 2015).

[296] Daniel Crane, DIRECT HIT: HOW TESLA WENT STRAIGHT TO CONSUMERS AND SMASHED THE CAR DEALERS' MONOPOLY (forthcoming 2025) (draft on file with author).

[297] *Id.*

consolidation among car dealerships, and consumer access to information and services vastly expanded by the internet[298]—the case for denying manufacturers the option of selling direct, if they think it better, cheaper, or more effective, is miserably weak. Dealer protection laws serve the special interests of the dealers themselves: padding their profits at the expense of consumers.

The resulting harm may be considerable. 40 years ago, economists at the FTC examined the effects of state laws that *limit* the ability of manufacturers to open retail outlets near existing dealers (*i.e.*, less than a full restriction), in an effort to test the theoretical proposition that such laws would increase price and reduce output.[299] The report concluded that the laws "raised car prices by a significant amount," reduced the relevant sales volumes by about 4.5% compared to what they would have been in the absence of such laws, and supported an inference that the total costs to consumers of the then-current laws "would be about $3.2 billion per year in 1985 prices."[300] (This seems to be about $9.6 billion in 2025 prices.[301]) As a result, the study explained, "*the pay-off from opposing the passage of the laws and from repealing them where they already exist seems to be even greater than we had previously thought.*"[302]

Two decades later, a Justice Department report was equally clear: "[C]ar customers would benefit from elimination of state bans on auto manufacturers' making direct sales to consumers."[303] It underscored that the existing dealer-based system is rife with unnecessary costs: "the current auto industry make-to-stock sales model takes a lot of money, much of it tied up in inventories and

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[298] Gerald R. Bodisch, Economist, U.S. Dep't of Justice, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, EAG Competition Advocacy Paper (May 2009) 2–3.

[299] Robert P. Rogers, FTC Bureau of Economics, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS, Bureau of Economics Staff Report (January 1986).

[300] *Id.* at 8–11.

[301] https://www.bls.gov/data/inflation_calculator.htm.

[302] Robert P. Rogers, FTC Bureau of Economics, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS, Bureau of Economics Staff Report (January 1986)

[303] Gerald R. Bodisch, U.S. Dep't of Justice, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers*, EAG Competition Advocacy Paper (May 2009) 11.

devoted to discounting to clear lots of less popular vehicles, to try to sell cars that can come up short of what customers would really prefer."[304] And it emphasized that possible dealer concerns about genuinely harmful conduct by manufacturers—opportunistic holdup and free-riding on dealer investment—can be solved by contract, just as they are across the rest of the economy.[305]

In recent years, some progress has been made, particularly with respect to direct sale of electric vehicles, but this has been limited. Tracking the state legislative patchwork, a 50-state survey conducted by the Consumer Choice Center in 2021 highlighted that "Electric vehicle companies like Tesla have been completely banned from selling their vehicles directly to consumers in 17 states and have sales limitations in an additional 12 states, all due to dealer franchise laws."[306]

Direct sale restrictions in the automotive industry may be popular with dealers, but they plainly disserve consumers and the economy. There is no reason to make consumers pay a tax to prop up a business model favored by influential incumbents. Congress should open the channels of interstate commerce to manufacturers that want to sell directly to consumers, and allow working families across the country to benefit. At a minimum, it seems valuable to consider creating federal incentives to repeal such laws. Direct preemption might be a quicker and cleaner path to the same end, given that automobile distribution and sale is overwhelmingly an interstate matter. When consumers undertake the burdens and pay the costs of buying a car—a major commitment for any family—Congress should ensure that they enjoy the full benefit of competitive interstate markets.

[304] *Id.* at 4.

[305] *Id.* at 6–7.

[306] David Clement, Elizabeth Hicks, Joshua Ippolitov & Brandon Bouchard, *2021 United States Electric Vehicle Accessibility Index* (2021) 4.