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**Testimony before the Subcommittee on**  
**Antitrust, Competition Policy and Consumer Rights**  
**Senate Judiciary Committee**  
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Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, I am grateful for the opportunity to appear before you today. I am Misha Tseytlin, Solicitor General of the State of Wisconsin. Before beginning in this position, I worked for the Attorney General of West Virginia. In that prior post, one of my tasks was helping to draft an amicus brief before the United States Supreme Court—on behalf of 23 sovereign States—in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015).<sup>1</sup> In that brief, the States explained that a ruling holding that the dental board was subject to federal antitrust liability would be contrary to the text and history of the Sherman Act. The States further warned that such a decision would have deeply disruptive impacts, unsettling broadly used state structures without benefiting consumers.

Unfortunately, on February 25, 2015, the United States Supreme Court ruled against the dental board. While the States were gratified that their concerns found voice in Justice Alito’s powerful dissent, they now face a new reality. Although it is too early to draw any definitive conclusions, the negative impacts that the States warned about in their amicus brief are beginning to accumulate.

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<sup>1</sup> See Brief of *Amici Curiae* State of West Virginia and 22 Other States in Support of Petitioner, 2014 WL 2536518 (May 24, 2014) (**Attachment 1**).

I submit this testimony to provide background on the *North Carolina State Board of Dental Examiners* ruling and to explain what has been going on in the States in the eleven months since the Supreme Court issued its decision. At the end of the testimony, I offer some thoughts on what the States and Congress can do to mitigate this decision’s negative impacts on state sovereignty, while protecting consumers.

In preparing this testimony, I consulted with state officials working for States around the country, who have been grappling with the difficulties posed by the *North Carolina State Board of Dental Examiners* decision. I am grateful for the help those public servants have offered me. To the extent this testimony expresses any opinions regarding the Supreme Court’s decision, or the desirability of the steps the States or Congress could take in response to that decision, those views are my own and not necessarily those of the State of Wisconsin, Attorney General of Wisconsin, or any of the state officials with whom I consulted.

## **I. Section 1 Of The Sherman Act And The State Action Doctrine**

Section 1 of the Sherman Act—enacted in 1890—prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce *among the several States*, or with foreign nations.” 15 U.S.C. § 1 (emphasis added). At the time that Congress adopted this provision, it had a narrow conception as to what constituted commerce “among” the States. Specifically, Congress believed that it “lacked any power to regulate activity occurring completely within a state.” Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. Cal. L. Rev.

1293, 1295 (1988); *see, e.g., Kidd v. Pearson*, 128 U.S. 1, 17–18, (1888). In short, when Congress enacted the Sherman Act, it did not believe it was subjecting state regulatory boards—which govern the practice of professions *within* a State—to federal antitrust liability. *See N.C. St. Bd. of Dental Exam’rs*, 135 S. Ct. at 1118-19 (Alito, J., dissenting).

A problem for state sovereignty arose after the Supreme Court in the 1930s expanded the meaning of commerce “among” the States for purposes of the Commerce Clause of the United States Constitution. As the Court later explained, “[w]hen Congress passed the Sherman Act in 1890, it took a very narrow view of its power under the Commerce Clause. Subsequent decisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.” *Hosp. Bldg. Co. v. Tr. of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976) (citation omitted). If the courts were to apply this statutory expansion to state regulation of professions, then that would arguably render unlawful much such regulation, given that these state rules—often by definition—act as “restraint[s]” on the operation of markets. This would subject state actors to the harsh possibility of federal antitrust liability—including private antitrust lawsuits (15 U.S.C. § 15), enforcement actions brought by the Federal Trade Commission (“FTC”) (15 U.S.C. § 45(a)(1)), and even federal criminal penalties (15 U.S.C. § 1)—for regulating their intrastate markets.

To resolve this intolerable possibility, the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), developed what has become known as the State Action

Doctrine. In *Parker*, the Supreme Court recognized that “nothing in the language of the Sherman Act or in its history suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” *Id.* at 350–51. Since States are “sovereign[s]” within a “dual system of government,” the Sherman Act should not be read to “nullify a state’s control over its officers and agents” or undermine “the state . . . in [its] execution of a governmental policy.” *Id.* at 351–52. “For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.” *See N.C. St. Bd. of Dental Exam’rs*, 135 S. Ct. at 1119 (Alito, J., dissenting).

Since *Parker*, the Supreme Court has developed three tiers for analysis of the State Action Doctrine. In the top tier, actions by the State’s legislature, executive, and judiciary are absolutely immune from Sherman Act liability, without further scrutiny. *See Hoover v. Ronwin*, 466 U.S. 558, 574, 579–80 (1984). In the second tier, municipalities are immune so long as they act pursuant to “clearly articulated and affirmatively expressed state policy to displace competition.” *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013). In the third tier, private parties acting on behalf of the State must meet both “clear articulation” and active supervision requirements in order to be immune, as described below. *See infra* pg. 6.

## II. The Supreme Court's Decision In *North Carolina State Board of Dental Examiners*

In *North Carolina State Board of Dental Examiners*, the Supreme Court adopted a far-reaching limitation on the State Action Doctrine. The North Carolina Dental Board—a garden-variety state-regulatory board—had sent out cease-and-desist letters to individuals conducting teeth whitening, alleging that those individuals were violating the state prohibition against practicing dentistry without a license. The FTC found that sending these cease-and-desist letters violated Section 1 of the Sherman Act, and that the board was not protected by the State Action Doctrine. See *In re N.C. St. Bd. of Dental Exam'rs*, 2011-2 Trade Cases P 77705, 152 F.T.C. 640, 2011 WL 11798463 (Dec. 2, 2011).

In an opinion for six Justices written by Justice Kennedy, the Court affirmed the FTC's conclusion that the state dental board would be treated like a private party acting on behalf of the State, for purposes of federal antitrust liability. The Court based its decision upon the fact that, because a majority of the board members are active dentists, a “controlling number of decisionmakers are active market participants in the occupation the board regulates.” *N.C. St. Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.

The Court held that whenever a state board is controlled by active market participants, the Board can only obtain State Action Doctrine immunity if (1) the board acts pursuant to a State's articulation of “a clear policy to allow the anticompetitive conduct”; and (2) “the State provides active supervision of [the] anticompetitive conduct.” *Id.* at 1111 (quotation omitted). The fact that a

regulatory board is “designated by the States as [an] agency” does not change the analysis because “State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing [that the active] supervision requirement was created to address.” *Id.* at 1113–14. This was an extremely consequential, far-reaching holding because, as the States had explained in their amicus brief, many regulatory boards throughout the country are composed of active professionals. *See Brief of Amici Curiae State of West Virginia and 22 Other States*, at 8–14.

The Court also provided some general parameters as to what it would take for a board to satisfy these elements. First, the “clear articulation” prong is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” *N.C. St. Bd. of Dental Exam’rs*, 135 S. Ct. at 1112 (citing *Phoebe Putney*, 133 S. Ct. at 1010–13). Second, active supervision is satisfied where “state officials [that are themselves not active professionals] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *N.C. St. Bd. of Dental Exam’rs*, 135 S. Ct. at 1112 (citation omitted). “Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide realistic assurance that a nonsovereign actor’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Id.* at 1116 (citation omitted). “The

supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the mere potential for state supervision is not an adequate substitute for a decision by the State.” *Id.* at 1117 (citation omitted).

In a powerful dissent, Justice Alito—writing for himself and two other Justices—argued that the history and text of the Sherman Act make plain that state regulatory boards fall outside of the Act’s reach. *Id.* at 1118–19 (Alito, J., dissenting). The dissent further explained that the majority’s decision would cause “practical problems and is likely to have far-reaching effects on the States’ regulation of professions.” *Id.* at 1122. “As a result of today’s decision, States may find it necessary to change the composition of medical, dental, and other boards, *but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts.*” *Id.* at 1122–23 (emphasis added). Justice Alito then laid out the numerous ambiguities the States will face in attempting to protect their state agencies and personnel from antitrust liability: “What is a ‘controlling number’? . . . [D]oes the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? . . . Who is an ‘active market participant’? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?” *Id.* at 1123.

### III. **Lawsuits That Have Been Filed In Light Of *North Carolina State Board of Dental Examiners***

The *North Carolina State Board of Dental Examiners* decision makes it easier for antitrust plaintiffs to sue regulatory boards created by the sovereign States, and thus will encourage more such lawsuits. Below, I provide several examples of federal lawsuits that have already been brought under that decision. Given that the Supreme Court issued that decision just eleven months ago, there is a serious concern that these early-filed lawsuits are just the tip of the oncoming iceberg. Notably, even though some of the cases below have been unsuccessful to date, the cost of defending against such lawsuits can be substantial.

- *Teladoc, Inc. v. Texas Medical Board*, No. 15-cv-343 (W.D. Tx. April 29, 2015): Sherman Act lawsuit filed by providers of telephonic medical services against the Texas Medical Board. The district court granted a preliminary injunction against the Board, Dkt. 44 (May 29, 2015), and denied the Board's motion to dismiss, Dkt. 80 (Dec. 14, 2015). The case is on an interlocutory appeal before the Court of Appeals for the Fifth Circuit. *See* No. 16-50017 (5th Cir. 2016).
- *Strategic Pharmaceutical Solutions, Inc. v. Nevada State Board of Pharmacy*, No. 16-cv-171 (D. Nev. Jan. 26, 2016). Sherman Act lawsuit filed by pet-medication distributors against the Nevada State Board of Pharmacy. This case is pending in the district court.
- *Express Lien, Inc. v. Cleveland Metropolitan Bar Association*, No. 15-cv-2519 (E.D. La. July 19, 2015): Sherman Act lawsuit filed by a construction-lien

software company against the Cleveland Metropolitan Bar Association. The case is pending before the district court.

- *WSPTN Corp. v. Tennessee Department of Health*, No. 15-cv-840 (M.D. Tenn. July 30, 2015): Sherman Act lawsuit filed by hearing-aid retailers against the Tennessee Department of Health. The case has been stayed by request of all parties, pending settlement negotiations. Dkt. 67 (Oct. 30, 2015).
- *Access Med. Clinic, Inc. v. Mississippi Board of Medical Licensure*, No. 15-cv-307 (S.D. Miss. Apr. 24, 2015): Sherman Act lawsuit filed by owner of medical clinics against the Mississippi Board of Medical Licensure. This case was dismissed by stipulation without prejudice to refile. Dkt. 2 (Aug. 31, 2016).
- *Coesterums.com, Inc. v. Virginia Real Estate Appraisers Board*, No. 1:15-CV-980 (E.D. Va. Oct. 6, 2015): Sherman Act lawsuit filed by appraisal management company for unlawful orders against the Virginia Real Estate Appraisers. This case was voluntarily dismissed. Dkt. 15 (Oct. 6, 2015).
- *Rodgers v. Louisiana State Board of Nursing*, No. 15-cv-615 (M.D. La. Aug. 12, 2015): Sherman Act lawsuit filed by a student at Grambling State University against the Louisiana State Board of Nursing. The lawsuit was dismissed on sovereign immunity grounds, *see* dkt. 42 (Dec. 12, 2015), and is on appeal before the Court of Appeals for the Fifth Circuit, *see* No. 16-30023 (5th Cir. 2016).
- *Robb v. Connecticut Board of Veterinary Medicine*, No. 15-cv-906 (D. Conn. June 12, 2015): Sherman Act lawsuit filed by a veterinarian against the Connecticut

Board of Veterinary Medicine. The district court recently granted the Board's motion to dismiss, Dkt. 47 (Jan. 20, 2016), but further proceedings are probable.

- *Petrie v. Virginia Board of Medicine*, No. 13-cv-1486 (E.D. Va. Fed. 3, 2014): Sherman Act lawsuit filed by a chiropractor against the Virginia Board of Medicine. The district court granted summary judgment in the Board's favor. The case is on appeal before the Court of Appeals for the Fourth Circuit, and is scheduled for argument on March 22, 2016. *See* No. 15-1007 (4th Cir. 2015).<sup>2</sup>

#### **IV. Steps The States And Congress Can Take In Response To *North Carolina State Board of Dental Examiners***

Most State responses to the *North Carolina State Board of Dental Examiners* decision are still in their nascent phase. The Supreme Court issued its decision just eleven months ago, when many State legislatures were already deep into their work for that year's session.<sup>3</sup> Accordingly, many States in 2015 did not have the opportunity to consider fully how to grapple with this decision. Indeed, given the complexities that this decision poses for the States—as Justice Alito's dissent articulates—it may take years for many States to decide what steps they will take. In the meantime, plaintiffs will likely bring more lawsuits. While States can take proactive steps to limit the exposure of their regulatory boards, only clear guidance and protection from the U.S. Congress can fully alleviate this problematic situation.

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<sup>2</sup> While this lawsuit was filed before the Supreme Court issued its decision in *North Carolina State Board of Dental Examiners* decision, the Fourth Circuit's decision in that same case had already been issued and had reached the same holding the Supreme Court ultimately adopted. *See N.C. St. Bd. of Dental Examr's v. FTC*, 717 F.3d 359 (4th Cir. 2013).

<sup>3</sup> *See* National Conference of State Legislatures, *2015 Legislative Sessions Calendar*, <http://www.ncsl.org/documents/ncsl/sessioncalendar2015.pdf> (Dec. 21, 2015).

The most straightforward, short-term way that States can respond to the *North Carolina State Board of Dental Examiners* decision is by State attorneys general and other State attorneys providing sound legal guidance to State regulatory boards and legislatures. This advice-giving has already begun. For example, the States of California and Idaho have published detailed, formal Attorney General Opinions providing advice regarding how to respond to this decision to both regulatory boards and legislatures.<sup>4</sup> Many other States have offered less formal guidance. Advice has taken the form of internal memoranda, consultation, meetings and other intragovernmental communications. More such advice—in various forms—is likely to continue and increase in the coming years.

Many State legislatures and governors will also likely respond to the *North Carolina State Board of Dental Examiners* decision by making structural changes. The State of Oklahoma has been an early leader in this regard. On July 17, 2015, Oklahoma Governor Mary Fallin issued an executive order to “all state boards who have a majority of members who are participants of markets that are directly or indirectly controlled by the board” to submit “all non-rulemaking actions” to the Office of the Attorney General of Oklahoma.<sup>5</sup> Oklahoma’s Attorney General, Scott Pruitt, has devoted substantial resources to carrying out these responsibilities. As of last week, Attorney General Pruitt had issued 248 opinions—responding to 372

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<sup>4</sup> See Attorney General Kamala Harris, 98 Ops. Cal. Atty. Gen. 12, 2015 WL 5927487 (Sept. 10, 2015) (**Attachment 2**); Attorney General Lawrence G. Wasden, Op. Id. Att’y Gen., No. 16-01, 2016 WL 301598 (January 13, 2016) (**Attachment 3**).

<sup>5</sup> Okla. Gov. Mary Fallin, Exec. Order 2015-33 (July 17, 2015) (**Attachment 4**).

requests from 20 agencies—on proposed non-rulemaking actions pursuant to Governor Fallin’s executive order.<sup>6</sup> In addition, Connecticut adopted legislation in response to the *North Carolina State Board of Dental Examiners* decision, requiring that its Department of Public Health review and approve all decisions made by regulatory boards under the Department’s auspices.<sup>7</sup>

Similar actions by legislatures and governors will likely continue and increase in the coming years. These structural changes may consist of, among other things, changing the composition of state regulatory boards, eliminating certain boards, and altering state supervisor structures in the hopes of satisfying the active supervision test.<sup>8</sup> While some of these changes may or may not have salutary benefits for consumers, depending on how they are structured, it is important to note that such alterations in the way the States structure their internal operations are very far afield from the interests that the Sherman Act was designed to protect. *See N.C. St. Bd. of Dental Exam’rs*, 135 S. Ct. at 1118-19 (Alito, J., dissenting).

Ultimately, however, only action by the U.S. Congress can alleviate fully the problems that the *North Carolina State Board of Dental Examiners* decision has created for the sovereign States. While there are many positive steps that Congress

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<sup>6</sup> Okla. Office of Att’y Gen., *Recent Opinions*, <https://www.oag.ok.gov/oagweb.nsf/viewopinions.html> (last visited Jan. 27, 2016); *see, e.g.*, E. Scott Pruitt, Op. Okla. Att’y Gen., No. 2015-12A (Sept. 23, 2015); E. Scott Pruitt, Op. Okla. Att’y Gen., No. 2015-180A (Dec. 9, 2015).

<sup>7</sup> *See* S.B. 1502, 2015 Conn. Leg., June Sp. Sess., Pub. Act 15-5 (eff. July 1, 2015).

<sup>8</sup> *See generally* 98 Ops. Cal. Atty. Gen. at 9–14; Op. Id. Att’y Gen., No. 16-01 at 10–12.

can take, one option should be considered: eliminating by statute the judicially created “active supervision” requirement from federal antitrust law. Given that the State Action Doctrine is intended to ensure that the anticompetitive policy is genuinely the policy of the State, and not of private parties, the mandate that the State itself “clearly articulated” the policy at issue fully achieves this aim. It undermines the States’ sovereign dignity—including their right to “prescribe the qualifications of their own officers”—for them to be forced to structure their decision making processes to avoid federal antitrust liability, as the active supervision prong requires. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation omitted). And active supervision often fails to balance these serious harms to state sovereignty with any benefits to consumers; indeed, it may well be counterproductive in this regard. As widely respected federal judge Frank H. Easterbrook explained, the “active supervision” requirement encourages States to adopt duplicative regulatory structures, which in some cases may be “conducive to competition among cartelists for rents.”<sup>9</sup> At a minimum, each State should have the sovereign right to choose for itself the type and level of supervision for its own State boards.

Given that the Supreme Court’s decision in *North Carolina State Board of Dental Examiners* has so unsettled the States’ expectations in this area, Congress should consider corrective action of the type described above or other measures to provide the States with more guidance. Federal legislation clearly delineating state

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<sup>9</sup> Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 30 (1983).

liability—if any—under federal antitrust laws could better strike the balance between the twin paramount interests of federalism and consumer protection than does the uncertain, litigation-saturated status quo.<sup>10</sup>

## V. Conclusion

Thank you for giving me the opportunity to testify before this Subcommittee today. I appreciate the interest you have taken in this extremely important area for the States. I look forward to answering any questions that you might have.

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<sup>10</sup> The FTC has published staff guidance on the *North Carolina State Board of Dental Examiners* decision, but such guidance does not provide the States with sufficient. Staff, FTC Bureau of Competition, *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf). The guidance would not be binding in litigation and would most likely be subject only to minimum deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). In any event, the guidance takes a narrow view of State Action Doctrine immunity, in several respects, inconsistent with States' sovereign dignity.