

Summary of the “Restoring Board Immunity Act”: Occupational Licensing Reform in the States

The Problem

The Supreme Court’s recent decision in North Carolina State Board of Dental Examiners v. FTC has cast doubt regarding the antitrust liability of numerous state licensing boards. This uncertainty presents an opportunity to reform occupational regulation in the states.

- In *North Carolina State Board of Dental Examiners*,¹ the Supreme Court held that self-interested licensing boards may be subject to liability under the antitrust laws. The decision created significant uncertainty regarding the legality of numerous other state licensing boards’ regulation of occupational entry.
- Some states have responded by establishing a layer of bureaucratic oversight that merely monitors licensing board actions for consistency with state licensing laws. In any given case, this response may—or may not—satisfy the Supreme Court’s standard. In all cases, this response is a missed opportunity for reform, as establishing an additional layer of bureaucracy does not address the broader problems of over-reliance on licensure as an approach to occupational regulation. Nor does it address the problem of overly aggressive enforcement of licensing requirements.
- There is also legitimate concern that the decision eliminated a measure of state sovereignty. This concern was outlined by the dissenting opinion and has only been heightened due to uncertainty about the antitrust liability of licensing boards that has followed the decision.²

The Solution

Create a limited antitrust exemption for state licensing boards, conditioned on whether a state adopts occupational regulation reforms tracking one of two frameworks:

Framework # 1: Active Supervision and Periodic Review³

- Establish a State Office of Supervision of Occupational Boards, tasked with day-to-day board supervision of licensing authorities, including the duty to ensure that boards confine license enforcement to the sale of goods and services

¹ 135 S. Ct. 1101 (2015).

² 135 S. Ct. 1101, at 1125 (Alito, J., dissenting).

³ This framework is modeled on the provisions of the ALLOW Act, S.3158, introduced in 2016 by Senator Lee and cosponsor Senator Sasse, and referred to the Homeland Security and Governmental Affairs Committee.

expressly included in any statutory definition of an occupation's scope of practice.⁴

- Create a state mechanism for periodic review of existing occupational regulations every five years, sunrise review of proposed new occupational regulations under a “least restrictive alternative” standard of review, and for publication of annual reports detailing review findings, analysis, and non-binding recommendations to legislators and regulators.⁵
- Create a statutory affirmative defense that may be raised in actions to enforce occupation regulations. If a defendant establishes that the regulation in question “substantially burdens [his or her] ability to engage in a lawful occupation,” the burden of proof shifts to the state to establish that the regulation meets the requirements of intermediate scrutiny.⁶

Framework #2: Judicial Review

- Create a cause of action under state law that provides for judicial review of licensing laws under an intermediate scrutiny standard.⁷
- Create a statutory affirmative defense that places the burden of proof in license enforcement actions on the state to establish that the licensing law in question meets the requirements of intermediate scrutiny.⁸
- Award attorney fees and costs in successful challenges of licensing laws.⁹

This approach would address the concerns of both the majority and the dissent in *North Carolina State Board of Dental Examiners* by tying pro-competitive reforms to the restoration of state regulatory flexibility under federal antitrust law. By offering two paths—one that is process-oriented and one grounded in substantive rights—the bill appeals to a wider range of possible state-level partners committed to simultaneously addressing the legal uncertainty surrounding licensing boards and the need to lower barriers to work, enhance economic opportunity, and expand consumer choice.

⁴ Discussion draft, Sec. 5(c)(2).

⁵ Id., Sec. 5(c)(5).

⁶ Id., Sec. 5(c)(4).

⁷ Id., Sec. 6(b)(1)(C).

⁸ Id., Sec. 6(b)(1)(B).

⁹ Id., Sec. 6(b)(1)(D).