February 12, 2016

Hon. Pedro Nava
Chairman
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

Dear Chairman Nava:

I write to thank you for the opportunity to testify before the Little Hoover Commission last week, and to applaud you for undertaking such an important – and too often unexamined – study of professional licensing schemes. I was very impressed by the presentations, and in particular the commissioners’ thoughtful questions at the hearing.

Because the two public comments at the end of the hearing specifically addressed my testimony, I respectfully submit the following responses, which I hope will provide some further clarity to the Commission:

1. *North Carolina State Board of Dental Examiners v. FTC* is Critical to this Study and to the State: As you will recall, the California Nurses Association (CNA) representative characterized my summary of the *North Carolina* holding as “severe,” and urged you to disregard my recommendations for implementing truly active state supervision over licensee-dominated regulatory boards in California. This position – which I imagine is not unique among trade associations – is not only dangerous in terms of major exposure to the state, but also reflects a fundamental misunderstanding of the antitrust laws.

   CNAs admonition that “the fact that boards no longer have immunity does not mean that there has been, or is any more likely to be, an antitrust violation” is blatantly inaccurate.

   Briefly, federal antitrust law prohibits “combinations” (including agreements among competitors) that unreasonably “restrain trade.” Some federal antitrust violations are deemed so destructive to competition that they are deemed “per se violations” — meaning that if the offense is proven to have occurred, no defense or argument regarding the reasonableness of the violation is permitted. Price-fixing (an expansive violation prohibiting any agreement among competitors that affects the price of products or services or restricts supply so as to artificially raise prices) is a per se antitrust violation, as is a “group boycott” (a group agreement to exclude a competitor).

   As you heard at the hearing, almost every occupational licensing board under the umbrella of the Department of Consumer Affairs (DCA) is controlled by licensees of that board who agree to take actions that “restrain trade.” The most common restraint of trade exercised by every DCA board is to create and enforce entry standards for licensure.1 These entry conditions necessarily limit supply. DCA board members revoke licenses, specify how licensees are to practice, and control supply

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1 Of course, CPIL supports such requirements where they are connected to their intended rationale (e.g., the assurance of competence of practitioners, particularly where involving possible irreparable harm — as with a surgeon or others upon whom the public must rely).
by limiting entry into the profession or market. These acts — if committed by a cartel or any private grouping of competitors — would be per se antitrust violations under federal law.

In a series of decisions starting with Parker v. Brown,2 the U.S. Supreme Court ruled that federal antitrust laws do not apply to a state when it acts anticompetitively, provided that two conditions are met: (1) the anticompetitive action must be clearly authorized and affirmatively expressed in state law or policy; and (2) the anticompetitive action must be actively supervised by the state itself. If it met that two-pronged test, a state board alleged to have acted anticompetitively could claim so-called “state action immunity.” In North Carolina, however, the Court held that a board controlled by “active market participants” in the profession regulated by that board may not claim “state action immunity” to charges of anticompetitive conduct. “State action immunity” is imperative. Thus, this holding appears to leave states with two options: (1) discontinue their historical practice of stacking state regulatory boards with a controlling number of licensees who thus control their own regulation, and/or (2) create a legitimate “active state supervision” mechanism that is authorized to review, veto, and modify acts of state boards that are controlled by “active market participants.”

Currently, no structural changes have been made in California to address the North Carolina decision. Thus, boards such as the Board of Registered Nursing, dominated by licensees, may no longer claim state action immunity. And they are restraining trade every day. CNA’s statement that we “should not confl ate lack of immunity with the commission of antitrust violations” is therefore simply wrong.3

CPIL’s position on this case is not unique and is fully supported by the FTC staff guidance on implementation of the case, as well as the FTC’s testimony before Congress earlier this month. Other states are beginning to move ahead of California in understanding this new reality. In July, Oklahoma’s governor issued an executive order upon the recommendation of Oklahoma’s Attorney General, to comply with the North Carolina decision. Last month, the Idaho Attorney General issued an opinion consistent with CPIL’s analysis of this case, and other states are looking closely and analyzing implementation options as well. Moreover, several antitrust lawsuits against boards across the country are now proceeding. Most recently, a District Court judge in Texas upheld a complaint filed by doctors who practice telemedicine (“teledocs”) against the licensee-dominated Texas Medical Board, rejecting the Board’s claim of state action immunity in light of the North Carolina decision. This threat is real—yielding significant exposure to the state in the form of treble damages. I urge the Commission to reject the thinly-veiled pleas of the trade associations and recommend real action to implement this decision in California.

2. Professional Associations are Desperately Clinging to Licensure and their Control of State Regulatory Boards. As was abundantly clear from the testimony before you, including the testimony from the legislative staff, professional associations are very influential at the Capitol. In fact, the public comments from the licensee perspective perfectly underscore this point!4 They are desperate to maintain their control and influence over these boards. But as Justice Kennedy reiterated, “[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”5

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2 317 U.S. 341 (1943).
3 CPIL is working separately with the Attorney General to clarify some of the points from the AG opinion that the trade associations appear to be relying upon in making these statements.
4 The joint presentation to the Commission by Michael Scheele (a landscape architect, and representative of the American Society of Landscape Architects professional association), and Doug McCauley (the Executive Director of the California Architects Board, under which the Landscape Architects Technical Committee (LATC) operates) speaks volumes. Notably, the five member LATC is made up entirely of landscape architects.
The Landscape Architects Technical Committee representatives’ comments substantially underline the contentions made by your first two presenters. Their comments were entirely focused on the importance of what they do – how much they matter, and how their skill is important. Tellingly, they did not focus upon the consequences of supply limitation on the availability of those services, or on their price. Not a word. This orientation is the very reason why outside perspectives must make the supply limitation decisions. And that fact exists, notwithstanding the political power achieved by those now organized to an unprecedented level around their immediate group profit stake in public policy.

And while the comments regarding the potentially irreparable harm that can flow from landscape architects’ lack of competence (e.g. irrigation, playground landscapes, or park design) has some merit in certain settings, those contracting for that work are rarely average citizens but those with their own expertise and capacity to screen prospective landscape architects. Indeed, the only cited example involving a typical consumer was the construction of a swimming pool that could “slide down into the neighbor’s yard.” But that example forgets that the Contractors’ State License Board already regulates the swimming pool contractors who actually install the pools.

Again, I truly appreciate the Commission’s efforts to study this important topic, and I do hope these clarifications are helpful.

Sincerely,

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